Breaking BI: Using the False Claims Act to End the Intensive Supervision Appearance Program

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This Note offers a novel approach to bringing suit against the executor of the Department of Homeland Security's (DHS) Intensive Supervision Appearance Program (ISAP), Behavioral Interventions, Incorporated (BI). BI is contracted by DHS to run ISAP, the government's only alternative to detention for newly arrived immigrants. ISAP involves shackling newly arrived immigrants with GPS devices and conducting around-the-clock surveillance with the SmartLINK phone application. Though presented as a "reasonable" alternative to physical detention, the program seriously harms immigrants by causing physical and mental damage, violating their privacy, over-surveilling the population, and weaponizing the collected data against the wider immigrant community.

Previous litigation efforts have failed to successfully challenge ISAP. This Note provides a novel roadmap for bringing action against the company responsible through the False Claims Act (FCA) by alleging that BI has broken its contract with the U.S. government. Analyzing prior litigation against BI can reveal potential contractual breaches, creating a path for FCA plaintiffs to prevail where constitutional claims have failed. This Note exposes distinct areas where a false claim is likely to be found: product deficiency claims around faulty GPS devices, questionable data collection and retention practices, and failure to provide contractually obligated case management services. Successful claims would result in remedies of up to billions of dollars that would incapacitate BI and jeopardize the continued existence of ISAP. Successful FCA litigation, when paired with growing social and political pressures against ISAP, could end the program.

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INTRODUCTION

"I'm happy for my freedom, but I don't feel free. I want to be free, free."[1]

Immigrants who risk their lives[2] coming to the United States to seek refuge are often immediately locked away in detention centers.[3] Shortly after, they are forced from a physical prison to a digital one—they are assigned to intensive surveillance programs while they await their day in court, in a severely backlogged immigration system.[4] This obtrusive surveillance regime is presented as freedom: one can be released from physical detention in exchange for being digitally monitored. In reality, it imposes severe restrictions and exacts myriad harms on those subject to it, making it a poor substitute for the prisons it is meant to replace.

The purpose of immigrant detention, as defined by the Department of Homeland Security (DHS), is to "ensure [immigrants'] presence for immigration proceedings" and to "facilitate removals" from the United States.[5] DHS detains immigrants who are statutorily subject to "mandatory detention" because they have committed or been accused of committing certain crimes,[6] been ordered removed, or engaged in terrorist activity.[7] Additionally, immigrants who are placed in removal proceedings may be subject to detention based on DHS' discretion.[8] Physical detention subjects immigrants to horrific conditions causing significant harm and distress through improper uses of

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1. *See* TOSCA GIUSTINI ET AL., IMMIGRATION CYBER PRISONS: ENDING THE USE OF ELECTRONIC ANKLE SHACKLES 21 (2021) (quoting an anonymous survey participant).

2. *See* Priscilla Alvarez, *A Record Number of Migrants Have Died Crossing the US-Mexico Border*, CNN (Sept. 7, 2022, 3:53 PM), https://www.cnn.com/2022/09/07/politics/us-mexico-border-crossing-deaths/index.html [https://perma.cc/C5YF-6C8Y].

3. *See Detain*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/detain [https://perma.cc/NV9A-HWQ5] (Mar. 27, 2025).

4. *U.S. Immigration Courts See a Significant and Growing Backlog*, U.S. GOV'T ACCOUNTABILITY OFF. (Oct. 19, 2023), https://www.gao.gov/blog/u.s.-immigration-courts-see-significant-and-growing-backlog [https://perma.cc/2W9V-GVZ5] (finding that over 2 million cases were pending in U.S. immigration courts as of October 2023).

5. *Detain*, *supra* note 3.

6. Prior to 2025, such crimes included only "crimes involving moral turpitude," aggravated felonies, or drug offenses. *See* 8 U.S.C. §§ 1182 (a)(2), 1227 (a)(2)(A)(ii)–(iii). In January 2025, the Trump administration expanded the list of mandatory detention-eligible crimes to include burglary, theft, larceny, and shoplifting. *See* Laken Riley Act, Pub. L. No. 119-1, 139 Stat. 3, 3 (2025). Importantly, the Trump administration also expanded mandatory detention to include noncitizens who have only been charged with the delineated crimes, as opposed to those who have been convicted. *See id.*

7. *See* 8 U.S.C. §§ 1226(c)(1)(D), 1182(a)(3)(B)(i).

8. *See* 8 U.S.C. § 1226(a).

force, staff misconduct, and unsafe and unsanitary conditions, inter alia.[9] Advocacy against the inhumane practice of detention—coupled with the DHS' interest in ensuring that immigrants are accounted for and meeting the obligations associated with their claims for relief—resulted in DHS' development of Alternatives to Detention (ATDs).[10] These programs, however, do not solve the issues of detention that they were purported to remedy in their inception. Though they provide some benefit over incarceration, they introduce various new harms against the immigrant community.[11]

The most oppressive of these programs is the Intensive Supervision Appearance Program (ISAP). Though scholars have long advocated for the abolition of unjust physical detention of immigrants,[12] few have worked towards ending the inhumane practices of ISAP. This Note aims to fill this gap and introduce an avenue toward dismantling ISAP by targeting the company that has been paid hundreds of millions of dollars to surveil and oppress the immigrant community: Behavioral Interventions, Inc. (BI). In Part I, this Note outlines the development of ISAP, BI's monopoly over the program, and the harm BI's implementation has caused. Part II examines the state of litigation that has been brought against BI and notes how it has been unsuccessful in jeopardizing ISAP's existence. Part III charts the course for how plaintiffs could bring actions under the False Claims Act (FCA). It identifies three specific areas where a contractual breach might be found: BI's

9. *See* Tom Dreisbach, *Government's Own Experts Found 'Barbaric' and 'Negligent' Conditions in ICE Detention*, NPR (Aug. 16, 2023, 5:01 AM), https://www.npr.org/2023/08/16/1190767610/ice-detention-immigration-government-inspectors-barbaric-negligent-conditions [https://perma.cc/R427-5EQZ] (noting that experts hired by the Department of Homeland Security's Office for Civil Rights and Liberties examined over two dozen Immigration and Customs Enforcement [ICE] detention facilities and found negligent care, unsafe and filthy conditions, racist abuse, and other offenses sometimes contributed to the death of detainees).

10. The ATD Program was created by DHS in 2004 to ensure compliance with release conditions and provide case management. *See Alternatives to Detention*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/features/atd [https://perma.cc/9TRQ-R5KH] (Feb. 27, 2025).

11. ISAP affects those who might normally have been subject to detention and expands the ambit of those subject to DHS' surveillance to those on the non-detained docket as well. *See infra* Part I. It also affects the immigrant community more generally by vilifying those individuals by contributing to narratives of them being more "detainable." *See infra* text accompanying note 48.

12. *See, e.g.*, Ariana Headrick, *An End to Inhumane Detention: Washington Must Ban Private Detention Centers and Strengthen Protections for Detained Immigrants*, 19 SEATTLE J. SOC. JUST. 505 (2021); Maureen A. Sweeney et al., *Detention as Deterrent: Denying Justice to Immigrants and Asylum Seekers*, 36 GEO. IMMIGR. L.J. 291 (2021).

physical products, its data practices, and specific services rendered. This proposed litigation, if successful, would result in BI owing litigants and the government billions of dollars in remedies—enough to stifle BI from running the program.

I. THE INTENSIVE SUPERVISION APPEARANCE PROGRAM (ISAP)

Part I tracks the development of ISAP from its inception in 2004 to the present day. In outlining the program's expansion in both scope and technological capability, this Part also highlights the harms that ISAP has perpetrated against those individuals subject to it, including both physical and psychological pain. Finally, Part I concludes by discussing the private corporation that is responsible for managing the program: BI.

ISAP, implemented in 2004, is a subprogram of the Immigration and Custom Enforcement's (ICE) ATD programming.[13] ISAP is a public-private partnership between DHS and BI that leverages technologies like smartphones and ankle GPS shackles, as well as non-technological surveillance methods like in-person check-ins, to track immigrants' movements throughout their communities, and set off alarms if the digital detainees deviate from their preapproved schedules.[14] ISAP's goal is to use modern technologies and case management practices to closely monitor a small segment of individuals on the non-detained case docket[15] and ensure individuals on the docket comply with release conditions.[16] Local ICE officers determine the type of monitoring appropriate for each participant on a case-by-case basis, deciding among technologically-based surveillance—such as GPS tracking devices, telephonic check-ins, and the smartphone

13. *See* U.S. DEP'T OF HOMELAND SEC., INTENSIVE SUPERVISION APPEARANCE PROGRAM: FISCAL YEAR 2020 REPORT TO CONGRESS 3 (2022).

14. *See* Stephanie J. Silverman, Down that Wrong Road: US Immigration Detention Electronic Monitoring 'Alternatives' as Net-Widening 1 (Sept. 14, 2021) (unpublished manuscript) (on file with the *Columbia Journal of Law & Social Problems*).

15. *See* Sandra Sanchez, *Explainer: How Immigrants End up on ICE's Non-Detained Docket*, BORDERREPORT (Oct. 1, 2024, 6:58 PM), https://www.borderreport.com/immigration/explainer-how-immigrants-end-up-on-ices-non-detained-docket/ [https://perma.cc/LN8X-GFFQ] ("ICE's non-detained docket is a list of every person the United States believes is a removable non-citizen who is physically present in the United States and who is not currently held in ICE detention.").

16. *See* U.S. DEP'T OF HOMELAND SEC., *supra* note 13, at 3.

application, SmartLINK[17]—or non-electronic monitoring, including office check-ins and home visits.[18] In making this determination, ICE officers consider an individual's "criminal and immigration history, supervision history, family and/or community ties, status as a caregiver or provider, and other humanitarian or medical considerations."[19] ICE officers have discretion to increase or decrease the level of supervision depending on an individual's level of compliance.[20]

Now in its fourth iteration (ISAP IV),[21] the Department of Homeland Security has astronomically expanded ISAP, raising the number of participants from 200 at the start of the program in 2004 to 320,000 in 2022.[22] BI, a subsidiary of the GEO Group[23] responsible for managing a significant portion of the private detention centers in the country, has managed this program since its inception.[24] Today, ISAP IV relies almost exclusively on electronic monitoring through GPS tracking via ankle monitors, voice recognition, the use of the SmartLINK app, and facial recognition.[25] The SmartLINK application is currently ICE's surveillance tool of choice, with enrollment skyrocketing from just 5,706 enrollees in September of 2019 to over 250,000 in November 2022.[26]

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17. SmartLINK "enables participant monitoring via smart device using biometric facial comparison technology to establish identity" and uses GPS technology to "monitor participant compliance at the time of a login or scheduled check-in." *See Alternatives to Detention*, *supra* note 10.

18. *See* U.S. DEP'T OF HOMELAND SEC., *supra* note 13, at 3.

19. *Id.*

20. *See id.*

21. In 2008 ICE combined its early ATD programs with ISAP to form ISAP II, which became the foundation of nearly all official ATD programming in the United States. *See* AM. IMMIGR. COUNCIL, ALTERNATIVES TO IMMIGRATION DETENTION: AN OVERVIEW 2 (2023). By its third iteration (ISAP III), it was the only ATD program in operation by ICE with an expanded scope with availability for participants nationwide. *See* AUDREY SINGER, CONG. RSCH. SERV., R45804, IMMIGRATION: ALTERNATIVES TO DETENTION (ATD) PROGRAMS 7 (2019).

22. *See* AM. IMMIGR. COUNCIL, *supra* note 21, at 2.

23. *See* Aarti Shahani, *What is GEO Group?*, NPR (March 25, 2011, 1:24 PM), https://www.npr.org/2011/03/25/134852256/what-is-geo-group [https://perma.cc/G9ZF-5K8U].

24. *See* Press Release, The Geo Group Inc., The GEO Group Announces Five-Year Contract with U.S. Immigration and Customs Enforcement for Intensive Supervision and Appearance Program (ISAP) (March 24, 2020), https://investors.geogroup.com/news-releases/news-release-details/geo-group-announces-five-year-contract-us-immigration-and [https://perma.cc/NTC8-S3CF].

25. *See* AM. IMMIGR. COUNCIL, *supra* note 21, at 3.

26. *See* JESS ZHANG ET AL., VERA INST. OF JUST., PEOPLE ON ELECTRONIC MONITORING 26 (2024); *see also* Sarah Sherman-Stokes, *Immigration Detention Abolition and the*

A. THE HARMS ISAP PERPETRATES AGAINST THE IMMIGRANT COMMUNITY

ICE broadcasts ISAP as a reasonable alternative to detention, but the realities of hyper-surveillance stand in stark contrast to this projection. A survey conducted by the Cardozo School of Law Greenberg Immigration Justice Clinic found that 90% of its respondents experienced some form of physical harm from their ankle monitors, ranging from discomfort to life-threatening symptoms, with 58% of participants reporting "severe" or "very severe" physical impact.[27] Advocates for ISAP leverage the atrocities of incarceration to create a comparatively positive public perception of the practices it endorses.[28] Some of the purported benefits of these ATD programs are cost-effectiveness,[29] easier access to legal counsel,[30] and higher rates of compliance with immigration obligations.[31] Ankle monitors and other surveillance tactics provide some undeniable improvement from physical detention, but any actual benefit ATDs provide must be weighed against the harms associated with them.[32] As one victim of ISAP puts it: "Even though I was released, I still feel caged in a cyber prison."[33]

Though presented as an *alternative* to detention, the use of ATDs is actually an unwarranted *expansion* of ICE's surveillance

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Violence of Digital Cages, 95 U. COLO. L. REV. 219, 237 (2024) ("Between June 2019 and April 2022, the number of people on SmartLINK . . . increased from 12% to 76%. In some ICE offices, enrollment in SmartLINK has exploded by increases of almost 1000%.") (internal citation omitted).

27. *See* GIUSTINI ET AL., *supra* note 1, at 12.

28. *See* Julie Pittman, Note, *Released into Shackles: The Rise of Immigrant E-Carceration*, 108 CAL. L. REV. 587, 587 (2020).

29. On its own website, ICE claims that the "daily cost per ATD participant is less than $4.20 per day—a stark contrast from the cost of detention, which is around $152 per day." *Alternatives to Detention*, *supra* note 10; *see also* DAVID SECOR ET AL., NAT'L IMMIGRANT JUST. CTR., A BETTER WAY: COMMUNITY-BASED PROGRAMMING AS AN ALTERNATIVE TO IMMIGRANT INCARCERATION 11 (2019) (finding that participation in ICE ATD programming cost $4.43 per day compared to detention costs that range from $129 for an adult and $295 for a child).

30. *See Alternatives to Detention*, *supra* note 10.

31. USCIS reported an absconder rate of only 22.9% overall for its ATD programming, meaning there was a 77% compliance rate in 2018. *See* U.S. IMMIGR. & CUSTOMS ENF'T, CONGRESSIONAL BUDGET JUSTIFICATION: FISCAL YEAR 2020, O&S 154 (2020).

32. *See* GIUSTINI ET AL., *supra* note 1, at 4 ("As the harms of electronic ankle shackling demonstrate, ISAP is by no means an acceptable reform to the existing detention apparatus; rather it is another form of confinement that must be dismantled alongside physical detention.").

33. *Id.* at 21 (quoting an anonymous survey participant).

coverage, in that ankle monitors and surveillance measures are used on thousands of people who would not have been detained in the first place.[34] ISAP's surveillance is intended for those immigrants who are part of the non-detained docket—a group of immigrants who are not detained or subject to supervision.[35] Thus, the practice allows ICE to extend its own reach on an unprecedented scale. A call for the true abolition of immigrant detention must therefore include the end of inhumane practices of surveillance under ISAP. As put by Professor Sarah Sherman-Stokes: "Digital cages, masquerading as a more palatable version of enforcement and surveillance, create devastating harms that are hidden in plain sight, while duping us into thinking of these measures as more humane."[36]

Many immigrants subject to GPS shackling devices report physical pain and harms including aches, excessive heat, numbness, inflammation, and cuts, scabbing, scars, blistering,[37] and even electrical shocks.[38] The shackles' health consequences are not limited to injury by the device itself; the extreme stress individuals under surveillance live with manifests in physical maladies.[39]

Immigrants subject to ISAP also suffer myriad psychological harms. In addition to physical pain, 88% of the survey's respondents reported a negative impact on their mental health and 73% expressed that the ankle monitors resulted in a "severe" or "very severe" impact on their mental health.[40] The reported mental health detriments included anxiety due to the stigma associated with wearing their shackles in public, feelings of being surveilled, and a fear of being placed in detention.[41] Because electronically shackled immigrants are geographically constrained and stigmatized for their visible monitoring devices, they face

34. *See* HUM. RTS. WATCH, DISMANTLING DETENTION: INTERNATIONAL ALTERNATIVES TO DETAINING IMMIGRANTS 8 (2021); *see also* Kyle Barron & Cinthya Santos Briones, *No Alternative: Ankle Monitors Expand the Reach of Immigration Detention*, N. AM. CONG. ON LATIN AM. (Jan. 6, 2015), https://nacla.org/news/2015/01/06/no-alternative-ankle-monitors-expand-reach-immigration-detention [https://perma.cc/573F-9TQL].

35. *See Alternatives to Detention*, *supra* note 10.

36. Sherman-Stokes, *supra* note 26, at 220.

37. *See* AM. IMMIGR. COUNCIL, *supra* note 21, at 3; Pittman, *supra* note 28, at 601–02.

38. *See* GIUSTINI ET AL., *supra* note 1, at 13.

39. *See id.* at 14.

40. *Id.* at 14. The severity of mental health varied across participants. *Id.* 12% of people reported that the ankle monitoring devices caused them to have suicidal thoughts. *Id.*

41. *See id.* at 15.

social isolation that only exacerbates their already traumatic experience.[42] Those under intense government surveillance also face retraumatization, especially those who have fled persecution by their governments in their home countries, as they have essentially traded one overly surveillant government for another.[43]

ISAP's general surveillance practices also engender an array of harms on its subjects. The SmartLINK app causes "deep anxiety about ICE's access to personal lives and a constant sense of being watched, particularly for communities of color who are overwhelmingly subject to ISAP and targeted by all forms of law enforcement more broadly."[44] Check-ins, conducted both over the phone and in person, are time-consuming surveillance mechanisms that cause emotional distress, anxiety, fear of retaliation, and make it extraordinarily difficult for participants to maintain steady employment.[45] These surveillance methods encroach on an immigrant's autonomy by limiting a person's basic movement, instilling fear through constant monitoring, and chilling the ability to speak freely and advocate for themselves and their communities.[46]

ATDs of all forms are thus harmful in ways that "are invisible to those with power and those not subjected to their constant surveillance and monitoring."[47] ICE's inhumane surveillance practices executed through the guise of lenient, reasonable alternatives not only exact inextricable physical and psychological harms on the immigrant community but perpetuate stigma against it as a community that is dangerous and more deserving of detention.[48] The damage to individual immigrants and general harm to the immigrant community cannot be overlooked by advocates opposed to the immigrant-carceral system.

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42. *See id.* at 17. 97% of participants reported that shackles led to some form of isolation through not wanting to be around others, others not wanting to be around the respondent, difficulty forming new relationships, not feeling like a part of their community, and negatively impacting their relationship with their family. *Id.*

43. *See* AM. IMMIGR. COUNCIL, *supra* note 21, at 3–4.

44. ALY PANJWANI & HANNAH LUCAL, TRACKED AND TRAPPED: EXPERIENCES FROM ICE DIGITAL PRISONS 8 (2022).

45. *See id.*

46. *See id.*

47. *See* Sherman-Stokes, *supra* note 26, at 262.

48. *See* Silverman, *supra* note 14, at 9 ("SmartLINK and grilletes [ankle monitors] draw on the social construction of migrants and parolees as already-dangerous and detainable."); *see also* Sherman-Stokes, *supra* note 26, at 264 ("ATD presumes the need for an immigration carceral system that incorporates technology to surveil and monitor large numbers of noncitizens.").

B. THE PROFIT-DRIVEN CORPORATION RESPONSIBLE FOR IMMIGRANT SURVEILLANCE

ISAP's problems have been perpetrated by a public-private partnership between ICE and one private company since the program's inception: BI.[49] BI has provided case management and supervision services for ISAP since the program began in 2004.[50] This relationship has survived various iterations of ISAP, expanding its scope through advancements in surveillance technology and drastically increasing the number of immigrants subject to the program. But in 2011, GEO group bought out BI[51] and various other competitors in the physical detention space, which gave GEO control over the ATDs and the physical prisons used for immigrant detention.[52] Those who do not comply with the terms of BI-controlled, and GEO-owned, ATD programs are detained in physical prisons, also owned by GEO.[53] GEO's alarming monopoly on detention and supervision was seemingly no issue for DHS, which gave BI additional control over all its ATD programming. Prior to 2009, DHS utilized three different programs: ISAP, Enhanced Supervision Reporting[54] (ESR), and Electronic Monitoring.[55] ICE called ISAP the "most restrictive and costly of the three strategies" and soon absorbed the ESR and

49. Though other corporations work with DHS in other areas of immigration enforcement, ISAP is run solely by BI. *See* Connie Cheng, *From Walls to Shackles: The Big Business of Electronically Monitoring Immigrants*, THE [F]LAW, (Aug. 15, 2022), https://theflaw.org/articles/from-walls-to-shackles-the-big-business-of-electronically-monitoring-immigrants/ [https://perma.cc/BN8Q-VNAK].

50. *See Immigration Services*, BI INC., https://bi.com/immigration-services/ [https://perma.cc/5GAH-PJPB] (last visited Apr. 22, 2025).

51. *See* Alyssa Ray, Note, *The Business of Immigration: Tracking Prison Privatization's Influence on Immigration Policy*, 33 GEO. IMMIGR. L.J. 115, 125 (2018).

52. *See id.* ("As GEO Group is profiting from the expansion of both 'alternative to detention' and detention itself—and there have been sharp increases in profit for both—it is difficult to consider ISAP as an alternative to detention at all, and rather just detention with an expanded radius.").

53. *See id.*

54. ESR was run by the private corporation Group 4 Securicor. *See* RUTGERS SCH. OF L., NEWARK IMMIGRANT RTS. CLINIC, FREED BUT NOT FREE: A REPORT EXAMINING THE CURRENT USE OF ALTERNATIVES TO IMMIGRATION DETENTION 8 (2012). ESR used the same monitoring methods as ISAP including telephonic reporting, radio frequency tracking, GPS tracking, and unannounced home visits. *See* U.S. IMMIGR. & CUSTOMS ENF'T, ALTERNATIVES TO DETENTION FOR ICE DETAINEES (2009).

55. *See* DORA SCHRIRO, U.S. IMMIGR. & CUSTOMS ENF'T, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 20 (2009).

Electronic Monitoring into one supervision program implemented nationwide.[56]

ICE then implemented ISAP III by a new contract in 2014[57] and rapidly began increasing its scale.[58] The contract removed limitations on the geographic scope of the program, making it possible for BI to begin supervising ISAP III participants in over 100 different locations, covering all 50 states.[59] Now, in its fourth iteration, ISAP IV has increased enrollment from 1,300 people in 2005 to nearly 340,000 enrollees in November 2022.[60] ISAP's budget has been drastically augmented from $28 million in 2006 to $475 million in 2021.[61] The five-year contract awarded for ISAP IV in March 2020 was valued at $2.2 billion,[62] and stipulated that BI would be expected to "serve" between 90,000 and 100,000 participants every day.[63] A welcome (but unsuccessful)[64] addition to the most recent contract with BI provides for "extended case

56. *Id.* DHS determined that BI's contract proposal (at a cost of $372,814,177) to consolidate the three ATD programs into one, ISAP II, was technically superior to and lower-priced than other offers and "represented the 'best value' to the government." G4S Gov't Servs., B-401694, 2009 WL 4577028, at 3 (Comp. Gen. Nov. 4, 2009). At that time, one of BI's main competitors for the contract protested the awarding of the contract to BI on the grounds that ICE improperly held discussions with only BI, explicitly disfavored any case management system that was not the proprietary one executed by BI under ISAP I, and that BI's price prediction evaluation was seriously flawed. *Id.* at 4 n.5. Despite these protests, the Government Accountability Office (GAO) maintained the validity of BI's contract, thus enabling BI to continue its monopoly over ISAP and functionally all ATD programming in the country. *Id.* at 11.

57. *See Federal Contract Opportunities: Intensive Supervision Appearance Program (ISAP III)*, GOVTRIBE (June 30, 2014), https://govtribe.com/opportunity/federal-contract-opportunity/intensive-supervision-appearance-program-isap-iii-hscecr14r00001 [https://perma.cc/B6KU-26FY].

58. Between 2015 and June 2019, there was a 283% increase in enrollees growing from 26,625 in 2015 to over 100,000 in mid 2019. *See* SINGER, *supra* note 21, at 7.

59. *See id.* at 7 n.47.

60. *See* ZHANG ET AL., *supra* note 26, at 25; *see also Detention Management*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/detain/detention-management [https://perma.cc/VE6F-HXVQ] (Apr. 16, 2025).

61. *See* Tonya Riley, *How a Private Company Helps ICE Track Migrants' Every Move*, CYBERSCOOP (Sept. 26, 2023), https://cyberscoop.com/ice-bi-smartlink/ [https://perma.cc/W3T6-YBBF]. The $28 million figure, adjusting for inflation, would have been $37 million in 2021. *See Inflation Calculator*, U.S. INFLATION CALCULATOR, https://www.usinflationcalculator.com/ [https://perma.cc/4T72-PXCC] (last visited Apr. 25, 2025).

62. *See Intensive Supervision Appearance Program (ISAP IV)*, FED. COMPASS, https://www.federalcompass.com/award-contract-report/70CDCR20D00000011 [https://perma.cc/DS34-MXA8] (last visited Apr. 25, 2025).

63. *See* Press Release, The Geo Group, *supra* note 24.

64. *See infra* Part III.B.3. ISAP's absorption of the Family Case Management Program involved adding case management practices to ISAP, however BI has failed to actually live up to its duty to provide case management to ISAP participants. *See id.*

management services" in which BI must employ "case managers" to assist noncitizens in their navigation of the complex immigration processes by connecting them with local service providers.[65] This has proven a poor substitute for the successful Family Case Management Program (FCMP) terminated in 2017, as BI has under-implemented these new case management provisions, leaving immigrants without the support needed to successfully navigate their case.[66] For example, an American Immigration Council investigation revealed that some case managers were responsible for over 300 cases.[67] This, among other areas of contract performance, might indicate larger problems that could be addressed through FCA litigation.

II. THE STATE OF LITIGATION AGAINST BI: PERSONAL INJURY, LACK OF DATA TRANSPARENCY, AND CONSTITUTIONAL VIOLATIONS

The inhumanity of a program like ISAP, and the immense wealth of the major corporation behind it, makes BI a natural target for litigants aiming to end the program or, at least, provide affected individuals with some recourse. Immigrants and immigrant rights organizations have primarily focused on three types of suits to further their interests: due process to improve their procedural protection, personal injury to remediate their injuries, and data privacy to protect personal freedoms. All three approaches, however, have faced major roadblocks.

A. CONSTITUTIONAL CLAIMS

Attempts to dismantle ISAP on constitutional grounds have been unsuccessful. *Nguyen v. B.I. Inc.* was one of the first major constitutional cases to receive close attention in federal courts and has often been cited in subsequent constitutional claims against ISAP.[68] Plaintiff Son Nguyen, a noncitizen released from detention

65. *See* AM. IMMIGR. COUNCIL, BEYOND A BORDER SOLUTION: HOW TO BUILD A HUMANITARIAN PROTECTION SYSTEM THAT WON'T BREAK 24 (2023).

66. *See* Part III.B.3.

67. *See id.* ("[I]nvestigations into the case management services provided by BI Inc. under the ISAP IV contract have revealed overwhelmed case managers handling over 300 cases per person, lack of individualized attention, and a system which provides case management in name alone.").

68. *See* 435 F. Supp. 2d 1109 (D. Or. 2006); *see* cases cited *infra* note 77.

and enrolled in ISAP, argued that ISAP regulations were so restrictive as to constitute "detention"—and that the government's authority to restrict noncitizens who are subject to removal orders is limited to imposing only those conditions necessary to ensure their availability, should removal become possible.[69] The district court concluded that placement in ISAP was not detention because it was a form of supervision that "uses no physical restraints or surveillance," and even assuming it were detention, ISAP placement was "certainly less restrictive on participants than living in a federal detention center."[70] Under this reasoning, ICE was well within its authority under Section 1231(a)(3)(d) of the Immigration and Nationality Act (INA) to "reasonably restrict the conduct and activities of final-order aliens."[71] The judge also held that ISAP requirements did not violate substantive or procedural due process. Since "the liberty interest at issue in ISAP is not fundamental as applied to final-order aliens,"[72] the government need only survive rational basis review—which it did seemingly without issue.[73]

On procedural grounds, the court also found that petitioners had ample opportunity to be heard *before* being enrolled in ISAP and that, during the enrollment stage, they did not have the right to be heard on whether they qualified for intense supervision under ISAP.[74] Both petitioners in *Nguyen* were entered into ISAP after pleading guilty to serious crimes that violated their immigration orders of supervision, making it "well within the statutory authority of ICE" to place them into ISAP.[75] This, to the

69. *See* Nguyen, 435 F. Supp. 2d at 1114.

70. *Id.*

71. *Id.*

72. *Id.* A "final-order alien" is a noncitizen who has been issued a final order of removal by an immigration judge. *See* 8 C.F.R. § 1241.1 (2025).

73. *See Nguyen*, 435 F. Supp. 2d at 1114–15 ("[R]educing the number of absconding aliens and protecting the community from aliens with criminal propensities are two legitimate governmental interests furthered by the ISAP program."); *see* Iruene v. Weber, 2012 WL 5945079 at *2 (N.D. Tex. Aug. 1, 2012) (holding that because the court had not found a noncitizen's liberty interest to be fundamental, ISAP was only subject to rational basis review).

74. *See* Nguyen v. B.I., Inc., 435 F. Supp 2d 1109, 1115–16 (D. Or. 2009).

75. *Id.* The court also noted, relevant to the procedural due process analysis, that an ICE supervisor must approve a violation report, as was done in this case, prior to transfer into ISAP. *See id.* at 1116. Another relevant point to this court was that neither petitioner "availed himself of the ISAP grievance process." *Id.* None of these factors is dispositive in a procedural due process analysis. Therefore, there remains an open question as to whether enrollment in ISAP violates procedural due process for an immigrant who does not have a

court, nullified any right an immigrant might have to procedural due process.[76] Therefore, because of its rigid ruling upholding the constitutionality of ISAP, *Nguyen* can be seen as an early, yet unsuccessful, attempt to disrupt ISAP on constitutional grounds. Numerous district courts have adopted *Nguyen*'s reasoning.[77] Advocates have attempted to salvage constitutional litigation against ISAP, mostly through the avenues of substantive and procedural due process claims,[78] but they have run into obstacles. Constitutional substantive due process claims require the court to determine whether a liberty right is fundamental to a noncitizen, and then, if and only if the right is found to be fundamental, apply a strict scrutiny analysis to the government's interests.[79] If the liberty interest is deemed not fundamental to noncitizens, then the government practice through ISAP need only survive rational basis review.[80]

Even when courts are amenable to immigrants' rights claims, the results have not placed ISAP in jeopardy of termination. Advocates have made some progress in arguing for immigrants' rights in detention, but this has been limited to instances of

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qualifying criminal conviction and who uses the ISAP grievance process. This runs into the same issue of ICE's statutory authority to decide who is placed under supervision. *See id.*

76. It is worth noting that *Nguyen*'s ISAP is markedly different from the current ISAP IV. Therefore, the *Nguyen* court's understanding that "ISAP does not use physical restraint or direct surveillance" is outdated. *Id.* at 1113. Though a troubling precedent that is indicative of broader deference to immigration agencies, *Nguyen* is less relevant to challenges to ISAP IV.

77. *See* Ahmed v. Tate, 2020 WL 3402856, at *5 (S.D. Tex. June 19, 2020) (holding that the conditions of Ahmed's release under ISAP did not equate to detention); Iruene, 2012 WL 5945079, at *3 (holding that the few courts that have considered the issue have uniformly found that the ISAP, including the requirement that participants wear ankle bracelets, does not violate migrants' due process rights because it is rationally related to the governmental purposes of monitoring aliens under final removal orders and protecting the community); López López v. Charles, 2020 WL 419598, at *4 (D. Mass. Jan. 26, 2020) (holding that a GPS tracking device placed on a migrant who has been ordered removed does not state a claim for a violation of due process); Zavala v. Prendes, 2010 WL 4454055, at *2 (N.D. Tex. Oct. 5, 2010) ("[R]equiring petitioner to wear an ankle monitor is a reasonable restriction that assures that petitioner can be accounted for and does not abscond pending removal." (citing *Nguyen*, 435 F. Supp. 2d at 1114–15)); Diawara v. Sec'y of Dep't of Homeland Sec., 2010 WL 4225562, at *2 (D. Md. Oct. 25, 2010) (finding that ISAP requirements including ankle bracelets "did not violate alien's liberty interests").

78. *See generally* Sara DeStefano, Note, *Unshackling the Due Process Rights of Asylum-Seekers*, 105 VA. L. REV. 1667 (2019).

79. *See Nguyen*, 435 F. Supp. 2d at 1114–15 (stating that "[t]he liberty interest at issue in ISAP is not fundamental as applied to final-order aliens. . . . Because the right at stake is not fundamental, the government's action is subject only to rational basis review" (citing Demore v. Kim, 538 U.S. 510, 521, 528 (2003))).

80. *See* DeStefano, *supra* note 78, at 1689.

prolonged detention and has not been extended to encompass digital incarceration. For example, the Supreme Court's decision in *Zadvydas v. Davis*,[81] which found that due process protection applies to noncitizens in immigration detention, was heralded as a major victory for noncitizens' rights.[82] Nonetheless, *Zadvydas* has had no effect on the constitutionality of surveillance practices under ISAP. Courts would need to recognize that GPS-monitoring is an infringement on noncitizens' liberty interest,[83] but, so far, courts have refused to find that ankle bracelets' limitation of noncitizens' movements amounts to the same level of infringement as physical detention.[84] Moreover, at the narrow tailoring step of the strict scrutiny analysis, the court would have to find that ISAP's requirement of individualized determinations of the types of conditions a participant will be subjected to is not an "individualized and meaningful determination[ ] of flight risk or dangerousness" as required by *Zadvydas*.[85] Given that ISAP has only been subjected to rational basis review and the Court's reluctance to rule for noncitizens on matters of fundamental

81. 533 U.S. 678 (2001).

82. *See ACLU History: Due Process: Freedom from Unconstitutional Detention*, ACLU (Sept. 1, 2010), https://www.aclu.org/documents/aclu-history-due-process-freedom-unconstitutional-detention [https://perma.cc/U7HA-ZM8F] ("The Court's Zadvydas ruling was especially significant because it reaffirmed that non-citizens have a core fundamental, constitutionally-protected interest in freedom from physical detention and that the government's justification for immigration detention must pass exacting constitutional scrutiny. As a result, thousands of indefinitely detained immigrants were entitled to release.").

83. *See* DeStefano, *supra* note 78, at 1696.

84. *See* Nguyen v. B.I. Inc., 435 F. Supp. 2d 1109, 1114 (D. Or. 2006) ("I conclude that placement in ISAP is not detention. It is a form of supervision that uses no physical restraints or surveillance, both of which are typical characteristics of detention. Even if ISAP were considered detention, it is certainly less restrictive on participants than living in a federal detention center."); *see also* Mermikwu v. Gonzales, 2007 WL 530228 at *2 (N.D. Tex. Feb. 21, 2007) (finding that ISAP does not constitute physical detention (citing *Nguyen*, 435 F. Supp. 2d at 1114))). Given the trend of moving away from ankle monitors and to smartphone applications, to apply to ISAP more broadly, the court would need to find that *any* limitation on a noncitizen's movement is an infringement on a fundamental liberty interest. *See* Nguyen, 435 F. Supp. 2d at 1115 (stating that "[t]he liberty interest at issue in ISAP is not fundamental as applied to final-order aliens" (citing Demore v. Kim, 538 U.S. 510, 521, 528 (2003))).

85. *See* DeStefano, *supra* note 78, at 1697. Courts have been reluctant to challenge the quality of the individualized determinations made by ICE under ISAP when it comes to habeas petitions and the right of procedural due process. *See Nguyen*, 435 F. Supp. 2d at 1114.

liberty interests, constitutional grounds are not the most feasible avenue for attempts to dismantle ISAP.[86]

B. PERSONAL INJURY CLAIMS

Given the difficulties litigants have encountered when combating ISAP's practices, advocates seeking individualized relief for their clients have turned to more targeted types of litigation. Individual claimants under the supervision of BI have sued in both the criminal supervision[87] and immigration supervision contexts via personal injury tort claims.[88] Many of these claims center the use of ankle monitoring, as their products cause physical pain and discomfort for many users.[89] Given potential difficulties with accessing legal assistance[90] and fear of engaging with the legal system,[91] the number of actual injuries[92]

86. Constitutional efforts deserve thoughtful consideration and meaningful litigative attention; however, this Note suggests that constitutional grounds are less likely to reach the desired result given these problems and introduces a new strategy toward the same objective.

87. *See* Complaint and Demand for Trial by Jury, Augustine v. B.I., Inc., No. 3:16-cv-30057 (D. Mass. Mar 30, 2016), ECF No. 1-1. Petitioner alleged that use of faulty "B.I. Sobrietor" (an alcohol detection device) led to him sustaining damages and being falsely imprisoned. *Id.* This case was settled by B.I. in 2016. *See* Settlement Order of Dismissal, Augustine v. B.I. Incorporated et al., No. 3:16-cv-30057 (D. Mass. June 6, 2016), ECF No. 13.

88. *See* Valenta v. B.I., Inc., 2021 WL 3081902 (W.D. Pa. Apr. 1, 2021) (recommending dismissal where plaintiff asserted a product liability claim stating that BI is liable for manufacturing and selling an ankle monitor in a defective and unreasonably dangerous condition that caused him harm).

89. *See id.*

90. *See* Nadia Almasalkhi, *Immigrants Lack Access to Legal Representation*, BERKELEY INTERDISC. MIGRATION INITIATIVE & HAAS INST. FOR A FAIR & INCLUSIVE SOC'Y (2019), https://bimi.berkeley.edu/sites/default/files/bimi_policy_brief_almasalkhi_immigrants_lack_access_to_legal_representation.pdf [https://perma.cc/44DN-W6ZC].

91. ACLU, FREEZING OUT JUSTICE: HOW IMMIGRATION ARRESTS AT COURTHOUSES ARE UNDERMINING THE JUDICIAL SYSTEM 1 (2018) (noting how the presence of ICE officers and increased immigration arrests create fear in immigrant communities, stopping many from coming to court or calling police); *see also* David Becerra et al., *Policing Immigrants: Fear of Deportations and Perceptions of Law Enforcement and Justice*, 17 J. SOC. WORK 715, 723 (2017) (finding that study participants who expressed a greater fear of deportation were significantly less willing to report being a victim of a crime to police).

92. A *Guardian* investigation found that BI's ankle monitors can overheat, have shocked people, and at times are put on too tightly by ICE. *See* Johana Bhuiyan, *Poor Tech, Opaque Rules, Exhausted Staff: Inside the Private Company Surveilling US Immigrants*, GUARDIAN (Mar. 2022), https://www.theguardian.com/us-news/2022/mar/07/us-immigration-surveillance-ice-bi-isap [https://perma.cc/HU5C-EXC8]; *see also* GIUSTINI ET AL., *supra* note 1, at 13 (finding that a majority of survey participants experienced some degree of physical health symptoms from BI's ankle monitors).

likely exceeds the numbers of litigants able to bring claims. Though the individual claims themselves have not amassed enough pressure on BI to jeopardize the existence of ISAP, this might be an area worthy of exploration for class action tort claims.[93]

C. DATA PRIVACY CLAIMS

Both local and national immigrants' rights organizations have fought the parties responsible for ISAP through Freedom of Information Act (FOIA) litigation to uncover valuable data that has been taken from the immigrant community and shielded by BI.[94] These efforts have failed.[95] Many organizations have sued in response to documents demonstrating that ICE and BI have conflicting reports about how often the application tracks the location data of its users.[96] In 2020, various advocacy groups filed FOIA requests to ICE seeking records related to the use of BI's SmartLINK app, specifically records regarding "the collection of data from the SmartLINK application; the retention, sharing, and use of such data; and, the nature of monitoring through the application."[97] BI, however, neither timely nor adequately

93. *See* Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 39, 42 (1983) (observing how mass litigation has resulted in substantial punitive damages for manufacturers of asbestos, IUDs, and other mass-marketed products with design errors, resulting in the destruction of various businesses).

94. A clinic at Stanford Law School made FOIA requests about ATDs on behalf of various Bay Area nonprofits. *See* FOIA Request from Stanford Immigrants' Rights Clinic to the U.S. Department of Homeland Security and U.S. Immigration and Customs Enforcement (Jan. 31, 2020), https://law.stanford.edu/wp-content/uploads/2020/11/ATD-FOIA-Request.pdf [https://perma.cc/N2NU-7LTU]. Another clinic at Berkeley Law also submitted FOIA requests and subsequent litigation when responses were not had in a timely manner. *See Community Justice Exchange et al v. U.S. Immigration and Customs Enforcement et al*, U.C. BERKELEY L., https://www.law.berkeley.edu/case-project/alternative-detention-programs-foia/ [https://perma.cc/XU9T-APER] (Feb. 16, 2024).

95. FOIA litigation is especially important given that the majority of ATD enrollees across the country are now using SmartLINK. *See* David Mamone, *ICE Gets Sued for Privacy Concerns Over Immigrant Tracking*, GOV'T TECH. (Apr. 20, 2022), https://www.govtech.com/public-safety/ice-gets-sued-for-privacy-concerns-over-immigrant-tracking [https://perma.cc/K7GV-HDUW] (stating that in April 2022 "nearly 75% of non-citizens enrolled in the ATD program across the country [were] using SmartLINK").

96. *See* Jasmine Aguilera, *U.S. Officials Deploy Technology to Track More Than 200,000 Immigrants, Triggering a New Privacy Lawsuit*, TIME (Apr. 18, 2022), https://time.com/6167467/immigrant-tracking-ice-technology-data/ [https://perma.cc/3M7F-A3VQ].

97. Complaint at 1–2, Cmty. Just. Exch. v. U.S. Immigr. & Customs Enf't, No. 3:22-02328 (N.D. Cal. Apr 14, 2022), ECF No. 1.

responded to these FOIA requests, prompting further litigation.[98] By 2023, thanks to these lawsuits, ICE has produced some documentation, but has still hidden crucial information about their data practices.[99] However promising this data might prove to be for future litigation concerning the invasions of privacy rights of immigrants, its production has taken months longer than the average FOIA response[100] due to consistent legal challenges and delay tactics by both the government and BI.[101]

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Due process,[102] personal injury,[103] and data privacy claims[104] are currently at the heart of litigation against the government and BI. These are important avenues of suit that advocates should continue to pursue. Though this Note addresses some of the potential weaknesses of these claims, more pressure from various sources bringing a diverse array of claims will only underscore the gravity of ISAP's harms to the immigrant community. Perhaps a clever litigant will succeed in a class action comprised of many personal injury claimants. Or data privacy might become a fruitful area from which to attack ISAP given their dubious data practices that have yet to be fully exposed.[105] Though important claims on their own merits, this Note focuses on FCA claims because of the indisputable impact money damages can have on both the government and BI. Given the courts' insistence on upholding the constitutionality of ISAP and the fact that individual successes on personal injury claims will not disrupt the program on the whole,

98. *See* U.C. BERKELEY L., *supra* note 94.

99. *See* JUST FUTURES L. ET AL., FACT SHEET ON ICE FOIA LAWSUIT: ICE DOCUMENTS REVEAL ALARMING SCALE OF SURVEILLANCE IN ISAP PROGRAM 2 (2023).

100. *See FOIA Processing*, U.S. DEP'T OF HOMELAND SEC., https://www.dhs.gov/foia-processing [https://perma.cc/4PV2-XL89] (Sept. 1, 2022) ("In general, the FOIA requires an agency to respond to requests within 20 business days after the office that maintains the responsive records receives the request.").

101. *See* Complaint at 2, Int'l Refugee Assistance Project, Inc. v. U.S. Citizenship & Immigr. Servs., No. 1:23-02931 (S.D.N.Y. Apr. 7, 2023) (alleging that USCIS deprioritizes FOIA requests from advocacy organizations like IRAP).

102. *See* Ahmed v. Tate, 2020 WL 3402856, at *5 (S.D. Tex. June 19, 2020) (holding that noncitizens subject to ISAP have no fundamental liberty interest and that ISAP's conditions are reasonable and rationally related to legitimate government purpose, passing constitutional scrutiny); *see also* López López v. Charles, 2020 WL 419598, at *4 (D. Mass. Jan. 26, 2020) (holding that a GPS monitor placed on noncitizen who had been ordered removed does not state a claim for a violation of due process).

103. *See* Petition, Smith v. B.I. Inc., No. 2:23-cv-02200 (D. Kan. May 3, 2023), ECF No. 1.

104. *See* JUST FUTURES L. ET AL., *supra* note 99, at 2.

105. *See id.*

this Note proposes a new path forward that could force BI to pay billions of dollars back to the government and foreclose its ability to continue running ISAP. This approach uses inferences drawn from current litigation that indicate broader problems within BI's practices that could lead to successful litigation under the FCA.[106] An FCA claim would attack the root of ISAP, BI, by exposing contractual breaches by a government contractor that courts cannot ignore. Litigation through the FCA would also put billions of dollars into play, forcing the Department of Justice (DOJ) to join the action or support the claim to recoup a significant sum. FCA suits, despite not resting on morally-vindicating claims that bolster the rights of the immigrant community, could still result in the desired outcome of these other paths of litigation—the abolition of ISAP.

This Note's analysis of the current state of litigation against ISAP and its managers reveals various trends about some common and successful claims that may result in a potential avenue for FCA litigation against BI—a novel form of action against the company.[107] Further, it suggests the types of claims currently being brought against BI are likely also instances where a false claim is most readily identifiable. This Note is not intended to discourage the continued exploration of these claims, but rather suggests a new avenue to bring concurrent FCA litigation.[108]

III. USING THE FCA TO BRING BETTER ACTION AGAINST BI AND END ISAP

Litigants may be more successful if they frame BI's practices as breaches of its contract with ICE under the FCA, rather than bringing claims for individualized harm, as most litigation to date has done. Government reports have indicated that ICE does not fully assess the contractor against the standards for performance established in the contract.[109] This lack of oversight not only

106. *See infra* Part III.B.

107. *See infra* Part III.B.

108. Litigation to end ISAP should not put all its eggs in one basket and should instead continue to apply pressure from various angles in order to expose the gravity of the issue and expose the many ways in which the program is unjust.

109. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-104529, ALTERNATIVES TO DETENTION: ICE NEEDS TO BETTER ASSESS PROGRAM PERFORMANCE AND IMPROVE CONTRACTOR OVERSIGHT 48 (2022) (stating that "[w]hile ICE conducts some contract oversight activities, ICE does not fully assess the contractor against the standards for performance established in the contract.").

suggests that BI could be contravening the rights of immigrants, but also suggests that the government takes no notice of potential substandard contract performance. Although not proven, the lack of oversight may also open the door for BI to knowingly make false claims about its contract performance, in order to receive hundreds of millions of dollars from the federal government. FCA claims are likely to lead to more success than humanitarian claims against BI because of the government's emphasis on cost-cutting over humanity.[110]

This Part proceeds by first providing an overview of the FCA, and identifies three areas of contract performance where false claims might be found: supply production; data collection and storage; case management practices. Next, it explains how a litigant might be able to satisfy the scienter and materiality requirements of the FCA. Finally, the section concludes by discussing the potential damages that BI would be required to pay and identifying barriers to successful litigation.

A. UNDERSTANDING THE FCA

Congress enacted the FCA in 1863 in response to defense contractor fraud during the American Civil War.[111] The FCA was passed to target the many instances of fraud perpetrated by contractors in the midst of wartime, where suppliers were providing substandard goods and services to the troops.[112] The FCA empowers the Attorney General to pursue perpetrators of fraud against the United States and private citizens to file suit on behalf of the government against parties who had defrauded the government through *qui tam* suits.[113] The FCA makes any person

110. Some might argue that if an FCA claim successfully eliminates BI's ISAP, another corporation will simply take its place. However, BI's long-held monopoly over ISAP indicates taking over the contract would not be so easy. Since it has retained exclusive control over the program, beating away various competitors over the years, no other company is adequately equipped to continue the program as it is currently run. CoreCivic, Inc., B-418620, 2020 WL 4346850 (Comp. Gen. July 8, 2020).

111. *See* 31 U.S.C. §§ 3729–3733; *See The False Claims Act*, U.S. DOJ: CIV. DIV., https://www.justice.gov/civil/false-claims-act [https://perma.cc/WRZ4-UUDB] (Jan. 15, 2025).

112. *See* Larry D. Lahman, *Bad Mules: A Primer on the Federal False Claims Act*, 76 OKLA. BAR J. 901, 901 (2005) ("During the Civil War, unscrupulous early day defense contractors sold the Union Army decrepit horses and mules in ill health, faulty rifles and ammunition, and rancid rations.").

113. *See The False Claims Act*, *supra* note 111; *see also* 31 U.S.C. § 3730. A "qui tam" suit is one in which an individual brings an action against a person or company on the

who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" from the government liable for damages.[114] Its provisions also cover other knowingly fraudulent claims (or conspiracies) such as delivering less than all of the money or property owed to the government,[115] making or using a false statement material to a false claim,[116] and buying or receiving a debt or public property from a government official not authorized to make the sale.[117] Further, the FCA can be an effective remedy for contractor fraud because it requires the defrauder to pay triple the amount of damages it caused the government to spend.[118] Successful *qui tam* relators generally recover between 15% and 30% of the awards to the government.[119]

To state a claim under the FCA, plaintiffs must allege: "(1) a false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that is presented to the government" in negotiations or in the actual agreed upon terms.[120] *Qui tam* actions brought by private citizens face further regulatory hurdles. A private actor, referred to as the relator, must also file their complaint under seal[121] and provide the federal government with a copy along with "substantially all material evidence and information."[122] Once the complaint is filed along with the requisite evidence, it remains under seal for 60 days before being served on the defendant giving the government (and

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government's behalf. *See Qui Tam Action,* LEGAL INFO. INST., CORNELL L. SCH., https://www.law.cornell.edu/wex/qui_tam_action [https://perma.cc/A9C6-BD99] (June 2022).

114. 31 U.S.C. § 3729 (a)(1)(A).

115. *See id.* § 3729(a)(1)(D).

116. *See id.* § 3729(a)(1)(B).

117. *See id.* § 3729(a)(1)(F).

118. *See id.* § 3729(a)(1).

119. *See* Press Release, U.S. Dep't of Just., False Claims Act Settlements and Judgments Exceed $2.9B in Fiscal Year 2024 (Jan. 15, 2025), https://www.justice.gov/archives/opa/pr/false-claims-act-settlements-and-judgments-exceed-29b-fiscal-year-2024 [https://perma.cc/CQS3-NT3R].

120. United States *ex rel.* Steury v. Cardinal Health, Inc., 625 F.3d 262, 267 (5th Cir. 2010) (citing United States *ex rel.* Longhi v. United States, 575 F.3d 458, 467 (5th Cir. 2009)).

121. Documents filed in federal court are normally available to the public. However a litigant can file something "under seal" to limit access to only certain parties—typically the litigating parties, their counsel, and experts. *See Filing Documents Under Seal in Federal Court*, THOMSON REUTERS: PRACTICAL L. LITIG. (on file with the *Columbia Journal of Law & Social Problems*), https://us.practicallaw.thomsonreuters.com/5-562-9328.

122. *See* Andrew Nassar, Note, *Modern Public Discourse: Reading "News Media" in the False Claims Act*, 123 COLUM. L. REV. 805, 805 (2023) (quoting 31 U.S.C. § 3730(b)(2)).

only the government)[123] a chance to intervene.[124] If the government, through the DOJ, declines to take action in that period, it may request an extension to keep the complaint under seal for good cause,[125] or, alternatively, the government can petition to intervene at a later point.[126]

Without government intervention, the action may only be dismissed if the court *and* the Attorney General give written consent to the dismissal and explain their reasoning.[127] If at any time the government intervenes, however, it may dismiss or settle the action over the objections of the relator who initiated the suit.[128] Though driven by government interest, *qui tam* actions can be attractive to potential relators and whistleblowers alike, who are assured a percentage of the treble damages awarded.[129] When the government proceeds with the action, the relator's award is based on their contribution to the prosecution.[130] Section 3730(d)(1) even provides for whistleblowers who initiate a suit but do not contribute substantially to the litigation to receive up to 15% of the awarded damages.[131] The FCA therefore provides relators and whistleblowers an opportunity to right the wrongs perpetrated by fraudulent actors and be compensated for it.[132]

But an FCA action is more than just a request for monetary compensation or a publicity stunt. Relators can use information provided by whistleblowers to initiate productive action in hopes

123. *See* 31 U.S.C. § 3730(b)(5).
124. *See id.* § 3730(b)(2).
125. *See id.* § 3730(b)(3).
126. *See id.* § 3730(c)(3).
127. *See id.* § 3730(b)(1).
128. *See id.* § 3730(c)(2)(A)–(B).
129. *See id.* § 3730(d). Though if the action is initiated and followed through until the end as a *qui tam* action without intervention, the relator is entitled to a larger portion of the awarded amount (between 25-30%). *Id.* If the government takes the case through, the initiator will receive 15-25% of the award depending on the extent of their contribution to the prosecution. *Id.*
130. *See id.*
131. *See id.* This number drops slightly when the action is based on disclosures of specific information (other than from the relator) relating to allegations in other hearings, reports, audits, investigations, or news media. *Id.*
132. *See* Press Release, U.S. Dep't of Just., *supra* note 119 ("Of the $2.9 billion in settlements and judgments reported by the government in fiscal year 2024, over $2.4 billion arose from lawsuits that were filed under the qui tam provisions of the False Claims Act and pursued by either the government or whistleblowers. During the same period, the relator shares for the individuals who exposed fraud and false claims by filing qui tam actions exceeded $400 million.").

of substantive change to problematic practices.[133] *Qui tam* action under the FCA can be a means of justice through private law for aggrieved individuals.[134] Uniquely, this type of litigation seeks to change social values by "elevat[ing] the value of protecting the larger community over the value of loyalty to those close at hand."[135] Thus, would-be whistleblowers ought to see the FCA as an attractive avenue of change that could result in significant monetary gain and lasting social change.

FCA litigation can be an effective means of dismantling ISAP, if only indirectly, because the immigrant-detention complex is composed of thousands of actors who may be witness to fraudulent claims being made to the government. The sheer financial impact of successful litigation could wreak havoc on BI and create an opportunity to apply pointed political pressure to bring an end to this oppressive form of surveillance and detention. Based on an analysis of the current trends of litigation against GEO and its subsidiaries, regarding its hardware, software, and the execution of its contractual responsibilities, a claim against them under the FCA is cognizable.

The following sections identify areas where a potential plaintiff can uncover FCA claim, how a plaintiff might prove the claim's materiality, and the approximate damages BI may have to pay the government (or a claimant) given a successful claim.

B. IDENTIFYING THE FALSE CLAIM

An FCA complainant must present a false claim made by the alleged government defrauder. False claims can include actions like mislabeling vaccines[136] or failing to disclose regulatory violations.[137] Case law clarifies that courts should evaluate contractors' representations under common-law fraud definitions.[138] These cases also note that false or fraudulent claims

133. *See* Stephen F. Hayes, *Enforcing Civil Rights Obligations Through the False Claims Act*, 1 COLUM. J. RACE & L. 29, 29 (2011).

134. *See* Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 54 (2002).

135. *Id.*

136. *See* United States *ex rel.* Krahling v. Merck & Co., 44 F. Supp. 3d 581 (E.D. Pa. 2014).

137. *See* United States v. Majestic Blue Fisheries, LLC, 196 F. Supp. 3d 436 (D. Del. 2016).

138. *See* United States *ex rel.* Schutte v. SuperValu Inc., 598 U.S. 739, 739 (2023) (holding that "[t]he FCA sets out a three-part definition of the term 'knowingly' that largely

include more than just claims that contain express falsehood; actions may also be taken for misrepresentations by omission.[139] For plaintiffs looking for a false claim, the current contract for ISAP IV could be a fruitful starting point. By looking at the contractual provisions, a relator can more readily see where breaches indicative of false claim liability might have occurred.[140]

This critical parsing of the contract itself, however, is not necessarily a requirement of making a successful FCA claim.[141] Though potentially a strong indication that the requisite scienter is met, a relator could identify a false claim through other means. Specifically, this Note contends that a potential plaintiff can find a false claim using inferences drawn from close analysis of the current litigation trends against BI in addition to publicly available information about BI's contractual duties. Highly publicized potential contractual breaches might seem like easy-picking for a potential relator; however, a court has leave to dismiss a case "if substantially the same allegations or transactions as alleged in the action or claim were *publicly disclosed*."[142] Therefore, inferential claim-making is preferable since it avoids this pitfall. This public disclosure prohibition excludes claimants from basing their claim on information available to the public through: hearings in federal court in which the government or its agent is a party; congressional, Government Accountability Office (GAO), or other federal reports or investigations; and the news media.[143] These limitations apply to an FCA complaint unless the action is brought by the Attorney

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tracks the traditional common-law scienter requirement for claims of fraud" and that the text of the FCA tracks the common law).

139. *See id.*; *see also* Universal Health Servs., Inc. v. United States, 579 U.S. 176, 187–88 (2016) (holding that "half-truths—representations that state the truth only so far as it goes, while omitting critical qualifying information—can be actionable misrepresentations.").

140. Thanks to FOIA litigation by Stanford Law School, the contract between BI and DHS has been uncovered along with thousands of other documents related to ATD use. *See Production 11: Documents Released by the Department of Homeland Security on June 30, 2021 (Pages 5715-5913)*, SLS IMMIGRANTS' RTS. CLINIC, https://law.stanford.edu/immigrants-rights-clinic/alternatives-to-detention-foia-documents-produced/ [https://perma.cc/L5M9-K2YJ] (the current ISAP IV contract) [hereinafter *ISAP IV Contract*].

141. *See Universal Health Servs., Inc.*, 579 U.S. at 190 (holding that the FCA does not limit liability only to instances where the defendant failed to disclose the violation of contractual provisions the government expressly designated a condition of payment).

142. 31 U.S.C. § 3730 (e)(4)(A) (emphasis added).

143. *See id.*

General[144] or the person bringing the action is the *original source* of that information.[145] This provision thus empowers a hopeful claimant against BI to draw their false claim from information revealed in current litigation efforts against BI or to themselves be a whistleblower who has attempted to draw attention to BI's harmful (and allegedly contractually violative) practices.[146]

A claimant attempting to expose BI's violations from the outside—who is not herself under the employ of the GEO group, BI, or ICE (and thus not privy to the relevant misrepresentations in contract negotiations)—can still make a viable claim based on analysis of the current litigation against BI and the GEO.[147] A claim can be factually or legally false to qualify as false for purposes of the FCA.[148] Under the FCA, a claim is factually false if the contractor invoices for services that were not rendered[149] or can be legally false if "the contractor withheld information about its noncompliance with material contractual requirements."[150]

144. Given the anti-immigrant proclivities of the Trump administration, Attorney General Pam Bondi is unlikely to bring a claim that could terminate the U.S.'s own ATD programming. *See supra* text accompanying note 6; *see also* Weill-Greenberg, *infra* note 244 and accompanying text; OBSER, *infra* note 256 and accompanying text. The Biden administration was similarly unlikely to bring an FCA complaint. *See* HUMAN RTS. FIRST, BIDEN ADMINISTRATION ASYLUM BAN (2023) https://humanrightsfirst.org/library/biden-administration-asylum-ban-widely-opposed-misstep-violates-law-and-fuels-wrongful-deportation-of-refugees/ [https://perma.cc/C8FC-6VBJ] ("The Biden administration's asylum ban violates U.S. law and international treaty obligations. It is a new iteration of similar bans promulgated by the Trump administration that were repeatedly struck down by federal courts because they violated central features of U.S. refugee law. Organizations have challenged the Biden asylum ban in federal court for also violating U.S. refugee law.").

145. *See* 31 U.S.C. § 3730(e)(4)(A)(iii). The original source language indicates an individual who voluntarily disclosed to the government the information on which the claim is based or who has knowledge that is independent of, and materially adds to, the publicly disclosed allegations and who has voluntarily provided this information to the government before filing under the FCA. *See id*. This section then opens the door to a whistleblower to commence an action.

146. The GAO reports cited in this Note thus far cite to numerous conversations with employees of the various companies and governmental agencies involved in ISAP IV. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 109, at 3. One of those employees could qualify under the whistleblower provisions of the FCA and bring a claim that is based directly on information they already provided to GAO. Otherwise, the GAO reports may only be used as supportive evidence without the original source of the information bringing the claim themselves.

147. This Note does not conduct a sufficient investigation or analysis to clearly formulate this false claim but merely identifies potential avenues from which to draw a claim for an FCA complaint.

148. *See* United States *ex rel.* Conner v. Salina Reg'l Health Ctr., Inc., 543 F.3d 1211, 1217 (10th Cir. 2008).

149. *See* United States *ex rel.* Hockett v. Columbia/HCA Healthcare Corp., 498 F. Supp. 2d 25, 64 (D.D.C. 2007).

150. United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1269 (D.C. Cir. 2010).

Litigation brought against BI in the past implicates both types of falsity. The avenues of current litigation that most strongly implicate a potential FCA complaint are personal injury claims indicating substandard equipment,[151] and FOIA litigation exposing general misrepresentations of data practices.[152] In addition there are potential claims to be had that would allege that BI failed to provide certain services to ISAP enrollees.[153] These areas all indicate potential noncompliance with different contractual duties to predicate an FCA suit.

1. *Public Injury Claims Reveal Potential Product Deficiencies*

In the past two decades, numerous participants in BI's surveillance programs (both under ISAP and criminal sentence alternative programs) have brought personal injury claims against BI and its use of ankle bracelets based on purported hardware overheating, allegedly negligent placement and maintenance of the bracelets, and other general injuries brought about by defective ankle monitors.[154] In addition to injuries, there are other indicators that BI equipment is not up to the standard promised, given that some investigations have found many ankle monitors suffer from multiple restarts, run out of battery or completely fail to hold a battery charge, and erroneously display blinking lights for over 24 hours.[155] Nonetheless, BI is contractually obligated to provide GPS transmitters that are "adjustable to fit an ankle of any size," "comfortable and durable enough to withstand the strains of everyday wear, which may consist of working, recreational activities, resting, sleeping,"[156] and operated at

151. If the false claim pursued is based on product defects, there are further hurdles that must be surpassed to create FCA liability. A defective product-based claim traditionally occurs when the government pays for something that the company knows is defective, but a claim can also arise when the contractor fails to meet certain "ancillary" requirements concerning the quality/specifications of a product or service. *See* LORI L. PINES ET AL., WEIL, GOTSHAL, & MANGES, UNDERSTANDING THE FALSE CLAIMS ACT 2 (2015). A claim against BI would likely fall under the former, traditional category of product misrepresentation given the wide latitude given to BI to run ISAP as it sees fit and the lack of product specifications in the contract.

152. *See supra* note 99.

153. *See infra* Part III.B.3.

154. *See* Valenta v. BI Inc., 2021 WL 3081902 (W.D. Pa. Apr. 1, 2021); *see also* Wright v. United States, 2017 WL 3142041 (E.D.N.Y. July 24, 2017).

155. *See* Bhuiyan, *supra* note 92.

156. *See ISAP IV Contract*, *supra* note 146, at 47.

"99.999% reliability" annually.[157] Thus, software malfunctions could indicate another fault in BI's program management that might have preceded any misrepresentation about the efficacy of their system in order to secure the contract in the first place.[158] Because BI is contractually obligated to "meet or exceed these same characteristics,"[159] a breach of this promise, along with evidence of BI's misrepresentations about product quality, could be a viable basis for a FCA claim. Moreover, the significant harms to the immigrant community associated with these malfunctions distinguish them from other claims regarding more generic product deficiencies handled by past courts—potentially making them less likely to be disregarded.[160]

2. *Dubious Data Reporting May Not Satisfy Government Privacy Requirements*

Outside of personal physical injury, litigants have most commonly brought suit against ICE regarding BI's practices related to ISAP's data collection and usage. BI has been reluctant to provide information on how it uses immigrants' data to the U.S. government, as evident in its responses—or lack thereof—to immigrants' rights organizations' FOIA requests.[161] In recent years, litigants have begun to pull back the curtain on BI's obscure data practices through litigation that revealed numerous red flags.[162]

For instance, the Samuelson Law, Technology & Public Policy Clinic at the UC Berkeley School of Law has made several key findings about BI's surveillance over the immigrant community.[163]

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157. *Id.*

158. *Id.* at 48.

159. *Id.* at 47.

160. *See* United States *ex rel.* Roby v. Boeing Co., 302 F.3d 637, 640 (6th Cir. 2002) (detailing how a relator brought a claim against a government contractor for allegedly selling faulty helicopter parts).

161. *See ICE Continues to Ignore FOIA Request for Reports on Enforcement Activities and Removals*, IMMIGRANT LEGAL RES. CTR. (Nov. 30, 2021), https://www.ilrc.org/ice-continues-ignore-foia-request-reports-enforcement-activities-and-removals [https://perma.cc/92H4-K9MP].

162. *See supra* notes 94–95 and accompanying text.

163. *See* JUST FUTURES L. ET AL., *supra* note 99, at 3; *see also* Johana Bhuiyan, *Documents Show Immigration Agency ICE and BI Inc Gather More Information on Those in ISAP Program and Store it for Longer*, GUARDIAN (Sept. 26, 2023), https://www.theguardian.com/us-news/2023/sep/26/revealed-ice-bi-inc-migrants-more-data-collection [https://perma.cc/DQ34-P5ZN].

It found that ICE and BI extract and maintain a broad array of data about immigrants subject to ISAP monitoring, including personal identification data, such as address, email, phone number, birth date, visa information, and social security number; biometric and health data such as facial scans, voice prints, and physical descriptions; geolocation data; immigration court records; and community surveillance data about a subject's community ties and neighborhood.[164] This massive over-surveillance is ripe for privacy litigation and may be a good target for FCA contractual breach claims. Although the government's contract provides ICE with "unlimited rights to use, dispose of, or disclose" all ISAP data and metadata,[165] there are contractual limitations to how BI can collect and store data.[166] Data collection issues, therefore, are prime for false claim identification, since responses to FOIA requests revealed that BI has contradicted ICE statements that the former limits its location and phone data surveillance.[167]

Plaintiffs could premise FCA suits on claims that BI misrepresents the amount of data it collects. Records received through the Samuelson Clinic's FOIA litigation state that the SmartLINK app tracks location data during a login, biometric enrollment, check-in, or start of a video call.[168] DHS, however, has stated that location data is *only* collected during enrollment and check-ins.[169] ICE further contradicts this statement by maintaining that data can only be accessed when the application is "open," suggesting that data collection can happen even when the application is running in the background.[170] These findings highlight the invasive surveillance practices of BI and may be a starting point for finding discrepancies between ICE's stated procedures and BI's actual execution of the surveillance, collection, and use of the data. A discrepancy between stated procedure and practice could be the basis of a false claim about the way BI collects, stores, or reports its data, if contrary to what is explicitly required in the contract. Still, a litigant would need to decipher

164. *See* JUST FUTURES L. ET AL., *supra* note 99, at 3. This information is collected through both electronic surveillance mechanisms as well as recorded by officers conducting home visits. *See id.* at 2.
165. *Id.* at 3.
166. *See supra* note 6.
167. *See id.*
168. *See id.* at 5.
169. *See* JUST FUTURES L. ET AL., *supra* note 99, at 5.
170. *See id.*

where ICE's decision-making ends and where BI's begins.[171] Successful FCA claims would further require that the problematic practices in place are not already being sanctioned by ICE.[172] Regardless, data collection practices could make for a viable FCA claim.

Dubious data practices might be indicative of a larger problem: unsecure data management and information storage. Information gleaned from FOIA litigation might provide insight here, as well. According to its contract, ICE itself has control over the data collected.[173] This contract, however, does not give BI the power to store sensitive data in any manner it wants, nor does it give BI the ability to disseminate the data to outside parties without government approval.[174] BI even has limitations on how it is allowed to use its own collected ISAP data for internal testing.[175] Yet, somehow, non-affiliated organizations have allegedly gained access to what appears to be GEO data and promulgated this sensitive information in their own reports.[176] This type of breach of sensitive data, whether deliberate or due to lack of proper security measures, might viably serve as a foundation for an FCA claim. For instance, after SmartLINK data appeared in a Heritage Foundation[177] report on the "border crisis," one researcher

171. If the problematic practices by BI are so intertwined with ICE's decision-making that they are functionally operating as one, then finding a practice to be against the contract would be unlikely since the agency could be seen as tacitly consenting to the practice given its involvement. *See* cases cited *infra* note 202.

172. *See* United States v. Southland Mgmt. Corp., 326 F.3d 669, 682 (5th Cir. 2003) (holding that where the government is aware of the falsity but is willing to pay anyway, the claim cannot be said to have knowingly presented a false claim).

173. *See* JUST FUTURES L. ET AL., *supra* note 99, at 3.

174. *Id.*

175. *See id.* at 6.

176. *See* Pablo De La Rosa, *Conservative Group Targets Migrant Cell Phone Data at NGOs, Raising Privacy Concerns*, TEX. PUB. RADIO (Jan. 6, 2023), https://www.tpr.org/border-immigration/2023-01-06/conservative-group-targets-migrant-cell-phone-data-at-ngos-raising-privacy-concerns [https://perma.cc/TK3B-4NKL] (reporting by an investigative researcher at the Electronic Frontier Foundation who sounded the alarm after data from ATD tracking devices appeared in a conservative foundation's published report).

177. The Heritage Foundation presents itself as fulfilling a mission promoting public policies "based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense." *About Heritage*, HERITAGE FOUND., https://www.heritage.org/about-heritage/mission [https://perma.cc/UCE7-AHAX] (last visited Apr. 30, 2025). The organization has been criticized for its ultra-conservative viewpoints and involvement in the creation of the controversial Project 2025. *See* Franco Ordoñez, *The Conservative Think Tank Behind the Controversial Project 2025 Faces Trump's Ire*, NPR (July 20, 2024), https://www.npr.org/2024/07/20/nx-s1-5044495/the-conservative-think-tank-behind-the-controversial-project-2025-faces-trumps-ire [https://perma.cc/VB8Q-Q6PC]; *see also* Nancy Maclean, *The Heritage Foundation's Racist*

expressed his concerns about how the Heritage Foundation obtained this data and noted that if GEO was "at all involved in the way that the Heritage Foundation obtained this information, then that's particularly disgusting because the entire report very clearly has an agenda."[178] Though GEO denied involvement in the leak of information, this breach of data is very concerning.[179] Whether GEO was involved in providing information about its ATD programming without the government's consent, leaked the information, or had the information stolen by hacking or some other means, any of these scenarios indicates a larger problem with proper data management and usage. This might violate BI's contract with ICE and could be the basis of an FCA claim, especially if BI had made misleading assurances about its data storage practices during negotiations.

3. *Failure to Provide Case Management Services Violates Contractual Requirements*

Another potential avenue for a false claim is BI's failure to provide "case management services" per its newest ISAP IV contract.[180] Given that DHS added case management provisions to the ISAP IV contract after other successful community-based ATD programs were terminated, a litigant could show that BI made false representations about its actual execution of the program in order to continue its monopoly over ISAP. The contract makes explicit the requirement, and importance, of providing newly arrived immigrants enrolled in ISAP with robust case management services.[181]

Origins and What That History Tells Us: *How Project 2025 Will Destroy Public Education and Multi-Racial Democracy*, WASH. SPECTATOR (Apr. 30, 2024), https://washingtonspectator.org/heritage-foundations-racist-origins/ [https://perma.cc/QWU4-L785] (describing Heritage as the top agenda-setting organization on the right that began with anti-integrationist lobbying and has now authored the "authoritarian" Project 2025).

178. *See* De La Rosa, *supra* note 176.

179. *See id.* ("A GEO Group spokesperson said in a statement that, 'GEO has no knowledge of The Heritage Foundation's methodology or how it obtained the information for its report. What we do know is that it did not come from GEO or any of its subsidiaries.'").

180. *See ISAP IV Contract*, *supra* note 140, at 47.

181. *See id.* at 58.

In 2022, the GAO found evidence that the ATD contractor may have failed to provide legal orientation presentations[182] as per its contractual obligations.[183] In its most recent contract, ICE added provisions stating that all participants enrolled in any ATD programming must get access to the legal orientation presentation.[184] According to the officials, however, ATD sites did not generally offer the presentations during the COVID-19 pandemic, and it took months for the subcontractor to offer them virtually.[185] In February 2021, almost a year after the start of its contract, BI began providing recorded presentations on televisions in waiting rooms and through emailing a link to participants.[186] Despite these cursory steps, which in no way are equal to a live presentation because virtual participation cannot be guaranteed,[187] "ICE does not have reasonable assurance that the contractor is providing them as required by the contract because ICE does not monitor the contractor's provision of them."[188] Although BI hired "case managers" to provide ISAP enrollees with mental health, community support, and other services, its actual role is effectively akin to probation officers.[189] BI's perfunctory staffing and programming decisions could, with additional evidence, form the basis of a claim that they had no actual intention of running the integrated support program meant to

182. The Legal Orientation Program requires representatives from nonprofit immigration legal services organizations to provide comprehensive explanations about immigration court procedures along with other helpful legal information to adult individuals in DHS custody. *See Legal Orientation Program*, U.S. DEP'T OF JUST., EXEC. OFF. FOR IMMIGR. REV., https://www.justice.gov/eoir/legal-orientation-program [https://perma.cc/YQ7C-83UF] (Feb. 3, 2025). This program is normally administered in person at detention facilities. *Id.*

183. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 109, at 54.

184. Specifically, the contract requires BI to schedule a presentation for a participant upon enrollment to be delivered by a private attorney. *See id.* at 55.

185. *See id.*

186. *See id.*

187. ICE officials have also noted that some ATD participants do not have "requisite technology or technology literacy to participate in virtual presentations." *Id.* at 56. Meanwhile, "about 17[%] of participants who . . . enrolled in ATD after August 1, 2020 and assigned to contractor sites for at least 30 days from March through October 2021 attended or viewed a virtual presentation." *Id.* at 56.

188. *Id.* at 55.

189. *See* Bhuiyan, *supra* note 92 (highlighting an interview with a BI case manager who stated how they are often overworked with hundreds of cases each with little to no time to offer immigrants the support they were promised by the program).

replace the successful pilot FCMP program and, instead, made false claims to continue their contract with ICE.[190]

A preliminary analysis of the claims that have been brought against BI in recent years exposes various avenues for an FCA cause of action. For such a claim to succeed, plaintiffs must also show that BI knew, or had reason to know, of the falsity of its claims. This might be proved through basing arguments on ICE's weak contractual oversight and BI's recklessness in their own auditing that might have materialized in various false claims being used to advance BI's financial interest in their monopoly over ATD programming.

C. EXPOSING BI'S REQUISITE SCIENTER

A successful FCA claim must prove that the alleged defrauder *knew* they presented false claims to the government. This knowledge requirement, or scienter, under the FCA is: (1) "actual knowledge of the [false] information"; (2) deliberately acting "in ignorance of the truth or falsity of the information; or" (3) acting "in reckless disregard of the truth or falsity of the information."[191] No proof of specific intent to defraud is required.[192] Scienter is intended to restrict punishment to defendants that knowingly lie, that ignore "red flags" that information may be inaccurate, or that deliberately choose to remain ignorant, and to exclude from punishment those who made only "honest mistakes or incorrect claims through mere negligence."[193] The FCA's definition of "knowingly," therefore, enables the government to "effectively prosecute those persons who have actual knowledge, but also those who play the ostrich."[194] To fulfill the scienter requirement, a

190. Given the success and rapid termination of the FCMP and the new contractual terms meant to provide case management services to immigrants under ISAP IV, it is a more than reasonable inference that ICE intended the most recent iteration of ISAP to include case management as a central piece of its comprehensive ATD program. *See* AM. IMMIGR. COUNCIL, *supra* note 65, at 24 (noting that the FCMP was "short-lived").

191. *See* 31 U.S.C. § 3729(b)(1).

192. *See* U.S. Dep't of Transp. *ex rel.* Arnold v. CMC Eng'g, Inc., 947 F. Supp. 2d 537, 543 (W.D. Pa. 2013), *aff'd*, 567 F. App'x 166 (3d Cir. 2014).

193. *Id.* at 543 (quoting United States *ex rel.* Hefner v. Hackensack Univ. Med. Ctr., 495 F.3d 103, 109 (3d Cir. 2007)).

194. *Id.* at 544 (quoting H.R. REP. NO. 660-99, at 20–21 (1986)); *see also Ostrich*, MERRIAM-WEBSTER ONLINE, https://www.merriam-webster.com/dictionary/ostrich#dictionary-entry-1 [https://perma.cc/36MG-EZRN] (last visited May 13, 2025) (defining ostrich as "[from the belief that the ostrich when pursued hides its head in the

plaintiff would need to show that BI actively knew of its falsehoods and misrepresented them for contractual, financial gain, which is no easy feat. Such a claim would likely require the type of proof a whistleblower from inside BI would be able to provide.[195]

Without a whistleblower, a plaintiff may find more success under a "deliberate ignorance or reckless disregard" theory of scienter. To prove deliberate ignorance or reckless disregard, a plaintiff can look toward GAO reports about government oversight—or lack thereof—over ISAP. For instance, plaintiffs can incorporate GAO reports, which have made clear calls for ICE to increase contractor oversight, stating that "ICE does not fully assess the contractor against the standards for performance established in the contract, nor follow-up and document whether the contractor resolves issues it identifies."[196] Although ATD headquarters and field offices conduct some of their own audit-focused activities, as does BI, ICE does not fully assess the contractor against the standards for performance established in the contract.[197] Furthermore, ICE does not work to resolve issues that *are* found in the auditing of the case files.[198] GAO's analysis of the weekly case file audit conducted by quality assurance officials between February to June of 2021, pointed to 60 findings that highlighted an error or discrepancy between ICE's and BI's databases.[199] Of those findings, 55 did not clearly specify whether the discrepancy reflected an error by the contractor or by ICE.[200] The activities that do get monitored focus on case file and billing statement audits,[201] meaning that the physical hardware, case management services, and data collection and usage likely go under-checked by ICE. If some audits are conducted by BI, and

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sand and believes itself to be unseen]: one who attempts to avoid danger or difficulty by refusing to face it.").

195. A whistleblower from BI would be able to provide emails, statements, or other evidence from employees that alerted the company to deficiencies with the ankle bracelets or with the services being provided. An acknowledgment of claims that materially breached the agreement with the government that were subsequently dismissed by higher-ups within BI would be strong evidence of a knowingly made false claim. *See* United States *ex rel.* Hartpence v. Kinetic Concepts, Inc., 44 F.4th 838, 852 (9th Cir. 2022) (noting that email from billing employee "express[ing] serious concerns to higher management" that internal policies contradicted legal guidance can support inference of scienter).

196. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 109.

197. *See id.* at 34.

198. *See id.* at 53.

199. *See id.* at 49.

200. *See id.*

201. *See id.*

some by government agents, then there are potentially many issues that go unreported or un-addressed, indicative of either a willful or unreasonable ignorance of practices contrary to contractual obligations.

There are potential obstacles to each method of proving scienter. The main hurdle with proving actual knowledge is establishing that BI knew of, and was complicit with, the falsehoods being presented. A whistleblower with deeper knowledge of BI's dealings might be able to provide this sort of information. However, a plaintiff still would need to contend with the possibility that the government was already aware of these falsehoods and either expressly or tacitly endorsed their presentation, which would defeat their claim. In these circumstances, appellate courts have applied the "government knowledge inference" doctrine.[202] This doctrine distinguishes between claims submitted with government scienter and those submitted without; when the government knows and approves of facts underlying an allegedly false claim prior to its presentment, the courts infer the claim was not knowingly submitted, regardless of whether the claim is actually false.[203] Invoking government knowledge inference in this case seems unlikely because it would require an explicit confirmation that the government was not only complicit with, but knowingly and actively funded these harmful acts against the immigrant community under the guise of compliance with immigration law and support for the immigrant community.[204] The GAO reports also suggest that the government is likely unaware of the false claims because of its lack of oversight.[205] The best way to establish scienter, therefore, is to

202. *See* United States *ex rel.* Burlbaw v. Orenduff, 548 F.3d 931, 957 (10th Cir. 2008) (applying the inference where both governmental knowledge and governmental cooperation were present); *see also* United States *ex rel.* Becker v. Westinghouse Savannah River Co., 305 F.3d 284, 288 (4th Cir. 2002) (inferring knowledge from the fact that the DOE had as much knowledge as the corporation in question and nonetheless instructed the corporation to act); United States *ex rel.* Durcholz v. FKW, Inc., 189 F.3d 542, 543 (7th Cir. 1999) (applying the inference where a government official gave explicit direction to invoice for work that was unperformed).

203. *See* U.S. Dep't of Transp. *ex rel.* Arnold, 947 F. Supp. 2d 537, 545 (W.D. Pa. 2013) (citing *Burlbaw*, 548 F.3d at 951); *see also* United States v. Southland Mgmt. Corp., 326 F.3d 669, 682 (5th Cir. 2003) (holding that where the government is aware of the falsity but is willing to pay anyway, the claim cannot be said to have knowingly presented a false claim).

204. *See Southland Mgmt. Corp.*, 326 F.3d at 171.

205. *See generally* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 109.

prove deliberate ignorance of willful disregard on BI's part because these paths do not necessitate the use of a whistleblower.

D. PROVING MATERIALITY OF BI'S FALSE CLAIMS

Once a plaintiff proves scienter, to succeed on a False Claims Act suit, a plaintiff must show that BI's alleged misrepresentations about their ability to execute ISAP up to contractual standards were material to the government's decision to pay BI over other corporations. The Supreme Court clarified materiality in the FCA context in *Universal Health Services, Inc. v. United States ex rel. Escobar*, which adopted the common law materiality standard for FCA claims.[206] Namely, a matter is considered material under two circumstances: "(1) 'if a reasonable [person] would attach importance to it in determining his course of action'; or (2) if the defendant knew or had reason to know that the recipient of the representation attaches importance to the specific matter" in determining their course of action, even if a reasonable person would not.[207] Factors relevant to this determination include "whether the government has designated 'compliance with a particular . . . requirement as a condition of payment'; whether the violation of that requirement goes to the 'essence of the bargain'; whether the violation is 'minor or insubstantial'; and whether the government has taken action when it had actual knowledge of similar violations."[208]

By statute, materiality is defined broadly as "having a natural tendency to influence or be capable of influencing the payment or receipt of money or property."[209] Case law, however, has further qualified the FCA materiality standard as one that is rigorous and "demanding."[210] Specifically, the provision relevant to claimed fraudulence in a government contract must be so central to services provided that the government would not have paid claims had it known of the violations.[211] This rigorous standard is not met

206. *See* 579 U.S. 176 (2016).
207. *Id.* at 193 (quoting RESTATEMENT (SECOND) OF TORTS § 538 (AM. L. INST. 1965)).
208. *See* United States *ex rel.* Hueseman v. Pro. Compounding Ctrs. of Am., Inc., 664 F. Supp. 3d 722, 747 (W.D. Tex. 2023) (quoting *Escobar*, 579 U.S. at 193–95 (2016)).
209. 31 U.S.C. § 3729(b)(4).
210. Smith v. Carolina Med. Ctr., 274 F. Supp. 3d 300, 313 (E.D. Pa. 2017) (citing *Escobar*, 579 U.S. at 194).
211. *See* United States *ex rel.* Taylor v. Boyko, 39 F.4th 177, 190 (4th Cir. 2022) (citing *Escobar*, 579 U.S. at 196).

where noncompliance is minor or insubstantial because the FCA is "not an all-purpose antifraud statute or a vehicle for pushing garden-variety breaches of contract or regulatory violations."[212]

How exactly materiality is satisfied will depend on the specific claim upon which the FCA complaint is premised. A starting point for arguing materiality is taking a closer look at the contract itself, wherein a textual analysis could bolster a materiality argument.[213] For example, the contract descriptively outlines BI's obligations to provide strict privacy measures over the data they obtain from participants.[214] Two attachments also cover the quality of GPS monitoring devices[215] and the requirement that BI provide extended case management services to the immigrants.[216] The presence of these provisions in the contract, and the thoroughness with which they are treated, may be indicative of their materiality.

Another valuable tool for arguing materiality is the GAO, specifically GAO decisions denying competitors' protests of BI's ISAP IV contract.[217] GAO reports provide insight into what the contract-awarding government agency (in this case ICE) values when making contractual determinations and a basis for arguing that BI may have made material misrepresentations about ISAP.[218] For example, one GAO decision outlines the reasons why BI was chosen to continue running ISAP and responds to specific points made by their competitor, CoreCivic.[219] The GAO was tasked with examining ICE's decisionmaking in the contract awarding process—where they used the considerations ICE finds most important in its contract award determinations. For one, ICE rated BI's technical performance as "[e]xcellent," meaning that

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212. *Smith*, 274 F. Supp. 3d at 313–14 (quoting *Escobar*, 579 U.S. at 194).

213. Though the contract may support the argument, because it has been made publicly available through FOIA responses, it may not be "central" to the claims. *See* Schindler Elevator Corp. v. United States *ex rel.* Kirk, 563 U.S. 401, 402 (2011) (holding that a "federal agency's written response to a FOIA request for records constitutes a "report" within the meaning of the FCA's public disclosure bar").

214. *See ISAP IV Contract*, *supra* note 140, at 62–77 (detailing the various privacy requirements to which BI must adhere).

215. *See id.* at 47 (*Attachment 1*).

216. *See id.* at 58 (*Attachment 2*).

217. *See* CoreCivic, Inc., B-418620, 2020 WL 4346850 (Comp. Gen. July 8, 2020).

218. In order to prove materiality, a litigant need not show that the government *actually attached* importance to a particular factor in making payment decisions. *See* Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 579 U.S. 176, 193 (2016). A litigant can also prove materiality by establishing that a reasonable person would attach importance to that claim for payment. *See id.*

219. *See CoreCivic*, 2020 WL 4346850, at *8.

they "exceeded requirements in a manner beneficial to the government and demonstrated an exceptional understanding of the goals and objectives of the acquisition with a very low risk of unsuccessful performance."[220] A core component of this rating is BI's "price realism," where the GAO found ICE's determination "unobjectionable."[221] Unrealistically low pricing could indicate an inability to understand requirements of the contract and a high-risk approach to contract performance that "result[s] in a proposal being determined unacceptable."[222] Here, a false claim that emphasizes significantly inflated cost's materiality to the government might be supported by the fact that price realism is a significant component of the agency's initial proposal evaluation.

This type of argument would best suit a complaint that focuses on potential product liability. One could say that the lower quality of ankle monitors (implicated by the numerous injuries and technical faults)[223] that were used in ISAP did not reflect the amount of money projected by BI in its offer, as they might have been produced more cheaply or replaced with inferior models to what the contract promised.[224] Since the basic functionality and product standard would be essential to an estimated cost of performance of contractual duties, a misrepresentation of the actual cost of the product would be material to the government's decision to award the contract.

Further, analysis of the competitor's estimate in the same GAO report on CoreCivic included hiring decision problems.[225] The competitor's estimate specified the numbers of managerial positions for different regions and their pricing, but the estimate was determined to be missing key figures.[226] The inadequate estimate of staffing was a factor ICE deemed to present a risk and indicated a lack of understanding of the contractual requirements.[227] This type of failure, which signals a larger misunderstanding of contractual requirements, can be repurposed

220. *Id.* at *3 n.3.
221. *Id.* at *4.
222. *Id.* at *7.
223. *See supra* Part II.B.
224. *See* Massachusetts v. Mylan Lab'ys, 357 F. Supp. 2d 314, 320–21 (D. Mass. 2005) (finding that reporting false costs associated with the wholesale acquisition of drugs had a natural tendency to influence the state's actions by inflating the amounts used to compute the estimated acquisition costs and thus the amount of state's payment).
225. *See* CoreCivic, Inc., B-418620, 2020 WL 4346850 at *9 (Comp. Gen. July 8, 2020).
226. *See id.* at *8.
227. *See id.*

for materiality arguments. If a significant misunderstanding of the requirements of the contracts prevented one party from winning the contract, potential misrepresentations, without the actual intention of fulfilling the requirements, would likewise raise major red flags under the FCA framework.

Materiality, therefore, could be proven by focusing on the failure to understand provisions requiring particular case management programming. The successful pilot Family Case Management Program (FCMP)[228] was terminated in June 2017, but ICE reports that, although the FCMP is no longer in operation, "ICE incorporated many FCMP case management principles in the standard ISAP through Extended Case Management Services (ECMS) . . . mirror[ing] services that were available under FCMP, in more cities and at a fraction of the cost . . . [I]n creating ECMS, ICE incorporated almost all of the FCMP principles at a significantly lower cost."[229] The agency's own boasting of successful integration of FCMP principles may indicate materiality of those provisions of the contract, making BI's failure to adhere to them,[230] paired with knowing misrepresentations about their staffing and management of these programs, a strong argument for satisfaction of the materiality requirement.

ICE did not change many requirements under the new ATD contract but, after deliberation, affirmatively chose to implement a requirement, similar to the values of the FCMP, that required legal orientation presentations for all ATD participants because ICE "determined it would be meaningful to provide this orientation . . . to ensure that participants had more information about the immigration process at minimal cost to the government."[231] ICE's own statements reflect a specific valuation of certain provisions of the contract that can be used to argue for their materiality. Since these considerations were among the bases of the determination of which prospective contractor to choose, they are necessarily material to the payment.

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228. *See* Part I.B (outlining the FCMP).

229. *See* U.S. DEP'T OF HOMELAND SEC., *supra* note 13, at 10.

230. *See* Bhuiyan, *supra* note 92.

231. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 109, at 55; *see also ISAP IV Contract*, *supra* note 140, at 102–04 (stating that a case specialist will present an orientation along with a participant's enrollment into ISAP); *see also ISAP IV Contract*, *supra* note 140, at 58 (*Attachment 2*) (detailing the extended case management services required).

E. DEMONSTRATING INJURY

The FCA requires relators to articulate an injury that actually took place.[232] As applied here, plaintiffs can successfully premise injury on the financial losses incurred by a faulty contract. BI's potential false claims could have been critical to the government's determination to award it a contract worth over a billion dollars.[233] The damage that BI has wrought on the immigrant community is irreparable, but if a false claim exists, a remedy through the FCA would help end the funding of broadscale surveillance and oppression and pave the way toward complete liberation from immigrant surveillance and detention.

BI's potential false claims through each iteration of ISAP may have caused the government to pay the corporation billions of dollars since 2004. An FCA claim at this stage would not remedy previous faulty contracts, but could still amount to an extraordinary payout if successful. The amount the government has spent on the current ISAP IV contract alone, from March 2020 to May 2025 is $1.4 billion.[234] The precise damage calculation will depend on what type of claim is brought. For example, consider a successful claim based on misrepresentations about the quality of equipment used for ankle monitors. The plaintiff's actual damages would be the difference between the value of the ankle monitors received and the market value that the ankle monitors would have had if they had been of the contractually specified quality.[235] That figure would be tripled, given treble damages, and then any payments previously received by the government would be subtracted.[236]

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232. *See* 31 U.S.C. § 3729(b)(2)(A).

233. *See Recipient Profile: B.I. Incorporated*, USASPENDING.GOV, https://www.usaspending.gov/recipient/4259d8cd-8b3e-8f56-bf03-eb1ab539d8aa-C/latest [https://perma.cc/2DAB-8ULT] (last visited May 1, 2025) (detailing the amount of money paid to by the Department of Homeland Security since ISAP's inception). An FCA claim would likely need to focus on the current contractual period though, where $2.2 billion is at stake but not all of that has been paid yet. *See Intensive Supervision Appearance Program (ISAP IV)*, *supra* note 62.

234. *See Award Profile: Indefinite Delivery Vehicle*, USASPENDING.GOV, https://www.usaspending.gov/award/CONT_IDV_70CDCR20D00000011_7012 [https://perma.cc/6JXM-8HK8] (last visited May 1, 2025).

235. *See* United States v. Bornstein, 423 U.S. 303, 313 (1976).

236. *See id*. at 304.

actual damages = (contractual value - actual value) ×3 - previous payments

This would also be the calculation for damages for services that go unrendered: when a service is not delivered, the damages are measured by the total payment.[237]

Regardless of the specific payout calculation, what remains clear is that an exorbitant amount of money has been paid to BI, so a successful FCA action would result in an extraordinary monetary hit to BI's bottom line that could potentially render them unable to continue to operate ISAP.

F. BARRIERS TO AN FCA CLAIM

An FCA claim against BI would face various hurdles throughout the process of litigation. One is that the FCA litigation can be precluded if the false claims have already been identified by the government's internal investigations. Another issue, exacerbated by the current political climate, is that the government can intervene and drop the case as a matter of right. These problems are not insurmountable because of weak contractual oversight and the significant political expression involved with government intervention.

1. *The Government's Own Investigations and Audits Might Preclude FCA Litigation*

A major issue for any FCA suit is that it is automatically defeated if the government is already aware of the false claim through its own investigations or litigation.[238] In this case, the GAO has issued various reports and decisions in addition to BI's own auditing of ISAP.[239] But the GAO notes that there is still little scrutiny over whether the actual contractual responsibilities are being fulfilled.[240] This lack of government oversight makes it more likely that an actionable claim under the FCA has gone unnoticed

237. *See False Claims Act Damages and Penalties*, BERG & ANDROPHY, https://www.bafirm.com/practice-areas/qui-tam-litigation/overview/false-claims-act-damages-and-penalties [https://perma.cc/L544-CBQP] (last visited May 1, 2025).

238. *See* 31 U.S.C. § 3730(e)(3)–(4).

239. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 109, at 6.

240. *See id.*

by any government agency or audit and therefore any reports that do exist would not immediately disqualify the complaint.

Even assuming that the GAO had some degree of knowledge, the FCA does not preclude a claim where the government is aware of some of the underlying facts. In fact, the FCA allows an action to be based on disclosures of specific information (other than from the relator) relating to allegations in other hearings, reports, audits, investigations, or news media if the relator is the original source of the information or if the publicly disclosed information is not the central basis of the claim.[241] Therefore, the claim can be brought without a whistleblower if there is significant evidence not already included in governmental reports. So, although not necessary, the presence of a whistleblower would allow an FCA claim to be centered around information that might have already been disclosed in a GAO report or other source.[242]

Without a whistleblower, a relator can use this information, but it cannot be the main source of a claim. This Note's analysis of current litigation indicates that there are likely more false claims that have not yet been publicly disclosed and could be the foundation of an FCA claim without a whistleblower, thus making an FCA suit against BI feasible with or without a whistleblower.[243]

2. *The Government Can Intervene and Drop the Case*

By bringing an FCA complaint, no matter how strong or comprehensive, there always remains the concern that the government will intervene and shut down the claim before it even has a chance to succeed. The potential effect of successful litigation might be to exacerbate the problems with current systems of detention and surveillance, and remove alternatives to detention altogether. These are significant considerations in bringing an FCA claim. Because of the strong governmental interest in upholding the legitimacy of its own ISAP program and immigrant detention in general, it is reasonable to think that a settlement achieved between the government and BI would do nothing to change the state of immigrant detention and the over-surveillance perpetrated by BI, or that the government would prevent the case from coming forward in general. This concern is especially

241. *See* 31 U.S.C. § 3730(d).
242. *See id.*
243. *See* supra B. identifying the false claim.

prevalent in the second Trump administration where anti-immigrant and pro-detention policies have been enacted, much to the excitement of the government contractors in charge of incarceration.[244] Given the government's FCA-designated intervention power, it is impossible to know for certain how the government will react. Perhaps the government would move to dismiss an FCA claim or reach a quick settlement to continue ISAP operations as usual if the claim was the only form of pressure applied against the hyper surveillance of the immigrant community.

When considering the potential government obstruction of attempts to end ISAP through an FCA claim, litigation cannot stand alone. There are numerous grassroots efforts,[245] as well as other legal[246] and academic[247] pursuits, aimed at ending this inhumane immigrant "e-carceration" complex.[248] A potential relator ought to harness these efforts and work with community advocates to raise awareness of the problems with ISAP. This type of multidimensional advocacy[249] might even encourage a potential whistleblower to come forward. An FCA claim is an apt tool for placing the government in a precarious position, amidst public outcry, where it is forced to choose whether or not to continue to

244. GEO Group's CEO J. David Donahue has stated that "the scale of the opportunity before our company is unlike any we've previously experienced." Elizabeth Weill-Greenberg, *Private Prison Exec Calls Mass Deportation Plans 'Unprecedented Opportunity'*, THE APPEAL (Feb. 27, 2025), https://theappeal.org/geo-group-earnings-mass-deportations/ [https://perma.cc/2J8G-JTWN]. Likewise, GEO's Executive Chairman George Zoley said Trump's new policies will require a "significant ramp up" in electronic monitoring services. *Id*. *See also* Press Release, The Geo Group, *supra* note 24.

245. *See* Lorah Steichen, *We Won't Trade E-Carceration for Detention: Ending Immigrant Incarceration*, NAT'L PRIORITIES PROJ. (May 26, 2022), https://www.nationalpriorities.org/blog/2022/05/26/no-digital-prisons-or-physical-cages/ [https://perma.cc/4EVE-R5ET].

246. Stanford Law School and Berkeley Law School have both made significant strides in FOIA litigation bringing to light more of the injustices perpetrated by BI. *See supra* note 140 and accompanying text.

247. As put by Sara Sherman-Stokes: "if we are serious about abolition, we must end not only the brick-and-mortar carceral state, but the digital cages that seek to replace it." *See* Sherman-Stokes, *supra* note 26 at 37.

248. The term "e-carceration" was coined by longtime activist and Black liberation thought leader, Malkia Devich-Cyril. *See* James Kilgore & Malkia Devich-Cyril, *Deconfiguring the Security State*, INQUEST (June 1, 2022), https://inquest.org/deconfiguring-the-security-state/ [https://perma.cc/2UDE-BUCY].

249. Suzanne B. Goldberg, *Multidimensional Advocacy as Applied: Marriage Equality and Reproductive Rights*, 29 COLUM. J. GENDER & L. 1, 4 (2015) (discussing how even if litigation is the central strategy to a movement, it is vital to "generate that social and judicial receptivity" through multidimensional advocacy because of the central role that public perception plays in a legal movement's success).

defend an oppressive system. Mounting political and social pressures would only be complimented by the fiscal gravity of FCA claims, as an FCA claim puts potentially billions of dollars at stake.

An FCA claim on its own will not be enough to dismantle ISAP, but it is a start. A complainant need not be dissuaded or disheartened by the potential dismissal of their claim because such a result will still add fuel to the larger conversation about immigrants' rights. Government involvement in counteracting claims against BI will signal to the public the government's explicit endorsement of the injustices wrought by the private corporation under the guise of humane alternatives to detention, even when those practices involve making fraudulent claims to the government in order to receive payment. Not holding BI accountable for its potential failures to comply with its contract would empower it to continue to shirk its obligations with DHS and waste government resources. Even groups who are seemingly apathetic to immigrants' humanity should be troubled by the billions of dollars being given to a corporation with no regard to government oversight.

Though the abolition of ICE ought to be the end-goal for immigrants' rights advocacy,[250] working towards reform does not necessarily mean the overarching goal has been abandoned. Reform can be incremental as advocacy moves toward the end-goal of a country without immigrant detention of any kind. As Professors Marbre Stahly-Butts and Amna A. Akbar discuss, there can be radical reforms rooted in an abolitionist framework that permit progress with abolition as an end goal.[251] As they put it: "Developing alternate horizons and frameworks is essential to advancing demands that make possible the political, economic, and social transformation that so many of us deem necessary."[252]

The end of ISAP could usher in truly humane forms of ATD programming. The FCMP exemplifies what the near future of

250. *See* Peter L. Markowitz, *Abolish ICE . . . and Then What?*, 129 YALE L.J.F. 130, 130 (2019) (discussing how abolition is the "natural extension of years of thoughtful organizing" by immigrant-rights groups); *see also* César Cuahtémoc García Hernández, *Abolishing Immigration Prisons*, 97 BOS. U.L. REV. 245, 246 (2017) (discussing how immigration imprisonment is "inherently indefensible and should be abolished" and that in its place should be a system "grounded in history and attuned to human fallibility").

251. *See* Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544 (2022).

252. *Id.* at 1547.

ATDs post-ISAP can, and should, look like. The program, though more expensive than ISAP, comes at much less of a human cost.[253] The FCMP was designed to increase compliance with immigration responsibilities through comprehensive, community organization-based case management services such as legal orientation programming, stabilization services (food, clothing, and medical services), and interactive monitoring.[254] The FCMP ran from January 2016 to June 2017 and an ICE review showed that compliance rates were consistent with other monitoring programs (if not better),[255] but it was discontinued, supposedly[256] due to its higher costs compared to ISAP III.[257] Even with these higher costs, there has been considerable congressional interest in the effectiveness of the FCMP as an ATD program.[258] This type of program is not only the more humane and successful option for ATD programming, but would allow for more contracts with local non-profit and community-based organizations and de-emphasize dependence on massive for-profit corporations, like BI, for ensuring compliance with immigration obligations.[259] A successful FCA claim could usher in a new wave of actually humane alternatives to detention that replace ISAP using the FCMP as a model.

CONCLUSION

In the midst of the re-emergence of a political regime set on physically incarcerating and deporting enormous swaths of the immigrant community, it is natural for affirmative litigation against electronic detention to take a backseat to defensive legal action. When the time is right, a future litigant should harness the political, social, and legal pressures that have built up against

253. *See* SINGER, *supra* note 21, at 10.
254. *See id.*
255. According to ICE's own records, between FY 2016 and FY 2017 participants attended a total of 610 hearings, including 67 final hearings. *See* U.S. DEP'T OF HOMELAND SEC., *supra* note 13, at 10. During the FCMP's tenure all but one hearing was attended. *See id.*
256. Though some cite costs as the dispositive factor, others have pointed to political reasons for FCMP's termination, as it came during a time of the Trump administration's increased practice of family separation. *See* KATHARINA OBSER, WOMEN'S REFUGEE COMM'N, THE FAMILY CASE MANAGEMENT PROGRAM: WHY CASE MANAGEMENT CAN AND MUST BE PART OF THE US APPROACH TO IMMIGRATION 1 (2019).
257. *See id.*
258. *See id.*
259. *See id.* at 15–16.

the inhumane carceral and over-surveillance systems implemented against immigrants seeking refuge in this country. ISAP has been fueled by profit for a private entity that neglects safety, standard quality of treatment, and potentially even its own contractual obligations, in order to hyper-surveil and oppress the immigrant community with no real consequences. An FCA complaint could be the straw that breaks the camel's back—forcing the government, long indifferent to humanitarian concerns, to confront its ATD failures through the only language it seems to heed: fraud against the federal purse.

APPENDIX: LIST OF ABBREVIATIONS

DHS	Department of Homeland Security
ATD	Alternatives to Detention
ISAP	Intensive Supervision Appearance Program
BI	Behavioral Interventions, Inc.
FCA	False Claims Act
ICE	Immigration and Customs Enforcement
ISAP IV	Intensive Supervision Appearance Program IV
ESR	Enhanced Supervision Reporting
INA	Immigration and Nationality Act
FOIA	Freedom of Information Act
DOJ	Department of Justice
GAO	Government Accountability Office
FCMP	Family Case Management Program
ECMS	Extended Case Management System