Nos. 12-1369 (L), 12-1417, & 12-1494

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA *ex rel.* KURT BUNK & RAY AMMONS,

Plaintiffs-Appellants/Cross-Appellees,

v.

BIRKART GLOBISTICS, GmbH & Co. et al.

Defendants-Appellees/Cross-Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

BRIEF *AMICUS CURIAE* OF TAXPAYERS AGAINST FRAUD EDUCATION FUND IN SUPPORT OF PLAINTIFFS-APPELLANTS/CROSS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed R. App. P. 26.1 & 28(a)(1), (b), and Local Rule 26.1, *Amicus Curiae* Taxpayers Against Fraud Education Fund ("TAFEF") makes the following disclosures:

1. TAFEF is not a publicly held corporation or other publicly held entity.

2. TAFEF does not have any parent corporations.

3. No publicly held corporation or other publicly held entity owns 10% or more of any TAFEF stock, as TAFEF is a non-profit organization.

4. TAFEF is not a publicly held corporation or other publicly held entity and does not have a direct financial interest in the outcome of this litigation.

5. This case does not arise out of a bankruptcy proceeding.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Taxpayers Against Fraud Education Fund ("TAFEF") is a nonprofit, tax exempt organization dedicated to combating fraud against the government and protecting public resources through public-private partnerships. The organization has worked to maintain the integrity and advance the effectiveness of the whistleblower reward and private enforcement provisions in the federal False Claims Act (the "Act"), 31 U.S.C. § 3729, *et seq.* In addition, TAFEF and its sister nonprofit organization, the False Claims Act Legal Center, have filed *amicus* briefs on important legal and policy issues in False Claims Act cases before numerous federal courts, including this Court and the United States Supreme Court.

TAFEF presents a yearly educational conference for False Claims Act attorneys, typically attended by more than 200 practitioners from around the nation. TAFEF collects and disseminates information concerning the False Claims Act and its *qui tam* provisions, and regularly responds to inquiries from a variety of sources, including the general public, the legal community, the media, and government officials. TAFEF possesses extensive knowledge about the origin and

[1] Counsel for proposed *amicus curiae* represents that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

purposes of the False Claims Act and its implementation and has a profound interest in ensuring that the Act is appropriately interpreted and applied. TAFEF's participation in this matter will assist the Court's consideration of the False Claims Act issues raised on appeal.[2]

TAFEF has a particular interest in addressing the constitutional challenges to the role of *qui tam* relators that Cross-Appellants have raised. The Article III standing of *qui tam* relators, which is critical to the continued successful implementation of the False Claims Act, was conclusively resolved by the Supreme Court in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), and has been considered settled law since that time. The Article II challenges raised by the Cross-Appellants, while not conclusively resolved by the Supreme Court, have been resoundingly rejected by the lower courts, given the historical pedigree of *qui tam* actions, and the limited role provided to relators to pursue a single case, with the Executive retaining some control.

STATEMENT OF THE ISSUE

Whether a private litigant has standing under Article III of the Constitution to seek or recover only civil penalties under the False Claims Act, and whether this

[2] The parties have consented to the filing of this brief.

suit violates the Take Care or Appointments Clauses of Article II of the Constitution.

SUMMARY OF THE ARGUMENT

Qui tam provisions, which authorize a private person to pursue a legal claim on behalf of the government, have enjoyed a long tradition in American legal history and existed both immediately before and after the framing of the United States Constitution. The Supreme Court has held that that history, together with the recognition that a *qui tam* action functions as a partial assignment of the government's claim, "leaves no room for doubt that a *qui tam* relator under the [False Claims Act] has Article III standing." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778 (2000).

Because the Supreme Court's decision in *Stevens* conclusively resolved that *qui tam* relators under the False Claims Act have Article III standing, the effort by Cross-Appellants Gosselin World Wide Moving N.V., now known as Gosselin Group N.V., and Gosselin's CEO, Marc Smet (collectively "Gosselin"), to relitigate well-settled law should be rejected. *See* Brief for Defendants-Appellees/Cross-Appellants at 21-29.

The Supreme Court's endorsement of *qui tam* relator standing in *Stevens* did not turn on any distinction in the type of harm suffered by the government as Gosselin and its *amicus curiae,* Chamber of Commerce urges. Id.; *see also* Brief

of *Amicus Curiae* Chamber of Commerce of the United States of America at 10-20. Nor can the harms redressed by the False Claims Act be readily separated into the categories of proprietary and sovereign. Moreover, the long historical tradition of recognizing *qui tam* actions as justiciable cases or controversies – which the Supreme Court relied on in *Stevens* – includes *qui tam* actions to collect statutory penalties even in the absence of quantifiable monetary harm to the government.

Gosselin's belated challenges under Article II of the Constitution fare no better. The same historical tradition that supports the status of *qui tam* actions as justiciable cases or controversies under Article III undermines Gosselin's contention that *qui tam* actions are inconsistent with the constitutional separation of powers among the branches of government. The historical pedigree of *qui tam* actions, which both predated and immediately followed the adoption of the Constitution, supports the proposition that *qui tam* actions are consistent with the constitutional structure of our government. Moreover, the Executive Branch exercises sufficient control over False Claims Act *qui tam* actions to avoid unconstitutional intrusion upon that branch of government. Finally, relators are not officers of the United States and their limited role in bringing a single case on the government's behalf does not violate the Appointments Clause of Article II. For these reasons, lower courts have resoundingly and properly rejected the contention that a *qui tam* relator's involvement in a False Claims Act case violates Article II's

directive that the Executive "take Care that the laws be faithfully executed" or the requirement that officers of the United States be appointed in accordance with the Constitution.

ARGUMENT

I. THE SUPREME COURT'S DECISION IN *VERMONT AGENCY OF NATURAL RESOURCES V. UNITED STATES EX REL. STEVENS* FORECLOSES THE CONTENTION THAT THE RELATORS LACK ARTICLE III STANDING

The Court should reject the challenge to the relators' standing because the Supreme Court over a decade ago unanimously held in *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000), that *qui tam* relators under the False Claims Act ("FCA") have Article III standing. In *Stevens*, the Supreme Court held that although a *qui tam* relator personally suffers no injury as a result of fraud against the federal government, "the United States' injury in fact suffices to confer standing" on the relator because the relator's entitlement to a share of the proceeds of the action can be regarded as effecting a partial assignment of the government's claim to the relator. *Id.* at 773-74. The Supreme Court observed that this assignment, together with the long historical pedigree of *qui tam* actions, "leaves *no room for doubt* that a qui tam relator under the FCA has Article III standing." *Id.* at 778 (emphasis added); *see also Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 752 n.3 (5th Cir. 2001) (*en banc*) (not addressing standing because the Supreme Court had decided it); *United States ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787, 804 (10th Cir. 2002) (stating that the defendant's "challenge to the Article III standing of relators is easily disposed of" in light of *Stevens*), *rev'd on other grounds*, 549 U.S. 457, 479 (2007).

Under *Stevens*, although a relator who brings an FCA action sues to redress the government's injury rather than his own injury, this representational standing is permitted because of the relator's right to sue for a bounty, or a portion of the government's recovery. The FCA provides that the United States is entitled to three times the amount of the damages sustained. 31 U.S.C. § 3729(a)(1). The government is also entitled to a civil penalty of not less than $5,000 and no more than $10,000 per false claim, *id.*, "regardless of whether the United States sustained damages." *ACLU v. Holder*, 673 F.3d 245, 249 (4th Cir. 2011).[3] A *qui tam* relator is entitled to an award, or "bounty" of between 15 and 30 percent of "the proceeds of the action." 31 U.S.C. §§ 3730(d)(1) and (2).

In *Stevens*, the Supreme Court held that "adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor," because "the FCA can reasonably be regarded as effecting a partial assignment" of the government's claim. *Stevens*, 529 U.S. at 773. The *Stevens* Court noted that while it had not previously explicitly recognized such "'representational standing' on the part of assignees," it had "routinely entertained their suits." *Id.* The Court concluded, therefore, that the United States' injury provides the basis for the *qui tam* relator's

[3] The amount of the statutory penalties may be adjusted according to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, and is currently adjusted to not less than $5,500 and not more than $11,000. *See* 28 C.F.R. § 85.3(a)(9).

standing. *Id.* at 774. The Court described the government's "injury" as consisting of *both* the injury to its sovereignty from a violation of its laws and the propriety injury resulting from the alleged fraud. *Id*. at 771; *see also Sprint Commc'ns Co. v. APCC Servs.*, 554 U.S. 269, 305 (2008) (Roberts, J. dissenting, joined by Scalia, J.) (observing that he would treat the point that assignees have standing to sue on their assigned claims as settled by *stare decisis*) (citing *Stevens*, 529 U.S. at 773).

The Supreme Court also found support for *qui tam* relator standing in "the long tradition of *qui tam* actions in England and the American Colonies," which it regarded as "'particularly relevant to the constitutional standing inquiry,'" as "Article III's restriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'" *Stevens*, 529 U.S. at 774 (quoting *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998) and citing *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.) (observing that the Constitution established that "judicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies'")). Justice Scalia, writing for the majority in *Stevens*, detailed the extensive history of *qui tam* actions in the Anglo-American legal tradition, reaching back to the 14th century and "through the period immediately before and

after the framing of the Constitution." *Id.* at 774-76. The *Stevens* majority regarded this history as "well nigh conclusive" with respect to whether *qui tam* actions were cases or controversies within the meaning of Article III. *Id.* at 777 (quoting *Steel Co.*, 523 U.S. at 102). And the Justices who parted ways with the majority on the other question presented in that case – whether states are immune from suit under the FCA – viewed that history alone as dispositive of the standing question. Justice Ginsburg, writing for herself and Justice Breyer, observed that "history's pages place the *qui tam* suit safely within the 'case' or 'controversy' category." *Id.* at 788 (Ginsburg, J., concurring). Justice Stevens, for his part, wrote that "[t]he historical evidence summarized by the Court . . . is obviously sufficient to demonstrate that *qui tam* actions are 'cases' or 'controversies' within the meaning of Article III." *Id.* at 801 (Stevens, J., dissenting).

The Supreme Court recently reaffirmed the significance of history in evaluating standing claims. In *Sprint Communications Co.*, the Court noted that it has often observed "that history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider." 554 U.S. at 274-75. Once again, the Supreme Court observed that courts had long permitted assignees to bring suit and that "a clear historical answer at least demands a reason for change," which the Court did not find. *Id.* at 275. Indeed, it is telling that the dissenters in *Sprint* sought to distinguish the historical record in that case, which

they regarded as "unsettled and conflicting," from the *qui tam* tradition at issue in *Stevens*, which was "long and unbroken." *Id.* at 311. Here, as in *Sprint*, there is no reason to depart from the "clear historical answer" that *qui tam* actions have always been understood by the nation's courts as justiciable "cases" or "controversies" within the meaning of Article III.

II. THE ANALYSIS OF RELATORS' STANDING IS NOT AFFECTED BY THE TYPE OF RECOVERY RELATORS SEEK

Nothing in the Supreme Court's decision in *Stevens* supports the contention that its holding was limited to cases in which a relator seeks to collect the amount of actual monetary damages sustained and proved, as opposed to statutory penalties. The *Stevens* Court held that relators under the False Claims Act had standing as assignees to assert the government's "injury in fact," 529 U.S. at 774, which the Court defined to include *both* the government's interest in the violation of its laws and the monetary injury sustained as a result of the fraud. *Id.* at 771. The portion of the recovery assigned to the relator – the bounty – consists of the proceeds of the action, which can include either damages or penalties, or both. 31 U.S.C. § 3730(d).

Moreover, the history that the Court in *Stevens* found "well nigh conclusive" on the issue of whether *qui tam* actions presented justiciable cases or controversies under Article III, included numerous laws that involved the collection of penalties only for the violation of a law and provided the relator "a portion of the penalty as

a bounty for their information." *Stevens*, 529 U.S. at 775 (citing 14th century law "Prohibiting the Sale of Wares After the Close of Fair"); *see also id.* at 776 (citing colonial New York's Act for the Restraining and Punishing of Privateers and Pirates which allowed "informers to sue for, and receive [a] share of, fine[s] imposed upon officers who neglect their duty to pursue privateers and pirates"); *id.* at 777 n.6. (citing 1790 federal statute "allowing informer[s] to sue for, and receive half of [the] fine for, failure to file [a] census return"). Thus, the Supreme Court recognized the fact that, as one commentator has put it, "[w]hen the Constitution was drafted, 'cases or controversies' included qui tam cases in which the federal government assigned to private individuals its right to enforce federal laws in general, not simply its right to sue when the government was the financial victim of the wrongdoing." Pamela H. Bucy, *Private Justice and the Constitution*, 69 Tenn. L. Rev. 939, 976-77 (2002).

In any event, Congress's selection of remedies for violation of the False Claims Act cannot be neatly divided into remedies for harm to the government's "sovereign interest" or to its "proprietary interest" as Gosselin and its supporting *amicus* attempt to do. *See* Brief *Amicus Curiae* of Chamber of Commerce at 14-15. Congress's decision to provide for both a multiple of actual damages established in a particular case and a fixed sum in the form of a penalty, were together intended "to make sure that the government would be made completely

whole." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 551-52 (1943) (recognizing that "[t]he inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress"). Civil penalties in part compensate the government when the monetary harm from fraud cannot be quantified or established. *See United States ex rel. Main v. Oakland Univ.*, 426 F.3d 914, 917 (7th Cir. 2005) (observing that "[t]he statute provides for penalties even if (indeed, *especially* if) actual loss is hard to quantify"); *see also* S. Rep. No. 345, 99th Cong. 2d Sess. at 8, 1986 U.S.C.C.A.N. 5266, 5273 ("The United States is entitled to recover such forfeitures solely upon proof that false claims were made, without proof of any damages."). Likewise, the treble damages provide for recovery beyond the quantifiable monetary harm from the fraud. *See Cook Cnty. v. United States ex rel. Chandler*, 538 U.S. 119, 130 (2003) (treble damages provides some payment beyond the amount of the fraud "necessary to compensate the government completely for the costs, delays and inconveniences occasioned by fraudulent claims") (quoting *United States v. Bornstein*, 423 U.S. 303, 315 (1976)).

Moreover, the Supreme Court's statement that the relator is a "partial" assignee of the government's "damages" claim, does not reflect an intention to limit the Court's holding to claims involving quantifiable monetary harm to the government as Gosselin contends. *See* Cross-Appellants' Brief at 23-34. The assignment of the government's claim is "partial" because the relator is not

assigned the right to the *entire* recovery of the United States, but rather is assigned only a *portion* of the recovery – namely the bounty. *See Stevens*, 529 U.S. at 788 (Ginsburg, J., concurring in judgment) ("I agree with the Court that the *qui tam* relator is properly regarded as an assignee of a portion of the Government's claim for damages").

Nor does the Supreme Court's use of the word "damages," in referring to the assignment of the Government's claim suggest that the Article III standing of *qui tam* relators does not extend to cases involving only civil penalties. The term "damages" can be used to refer to fixed amounts set by statute as well as to amounts that must be proved. *See, e.g., Hudson v. United State*s, 522 U.S. 93, 100 (1997) (describing False Claims Act penalties as "statutory damages"). Indeed, the *Stevens* Court used the word "damages" elsewhere in the opinion to refer to the government's sovereign interest in the enforcement of laws that did not involve *any* direct monetary harm to the government. *See Stevens*, 529 U.S. at 776 n.5 (noting that "the First Congress passed one statute allowing injured parties to sue for *damages on both their own and the United States behalf*" and citing two statutes that permitted a person to sue for and receive half of the penalty for a violation of copyright and for failure to cooperate in the census) (emphasis added).

Finally, reading *Stevens* to conclusively resolve that *qui tam* relators under the FCA have Article III standing is fully consistent with the Supreme Court's

opinions addressing "citizen suit" standing in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), *Steel Co.*, 523 U.S. 83, and *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167 (2000), despite Gosselin and *Amicus* Chamber of Commerce's arguments to the contrary. *See* Cross-Appellants' Brief at 27; Brief *Amicus Curiae* of Chamber of Commerce at 18-20. Unlike the *qui tam* provisions of the FCA, the citizen suit provisions at issue in those cases do not assign citizens a stake in the Government's recovery. Thus, standing in those cases depends upon citizens establishing their own injury-in-fact, traceable to the defendant and redressable by the relief sought.

Even before *Stevens*, the Supreme Court recognized this distinction between *qui tam* actions and citizen suit provisions. In *Lujan*, 504 U.S. 555, which involved a citizen suit challenging a Government regulation interpreting the Endangered Species Act, the Supreme Court held that the plaintiffs had failed to allege a concrete interest in the controversy and, therefore lacked Article III standing. In holding that Congress cannot give a private party a right to sue to vindicate the public interest in the Government's proper enforcement of the laws in the absence of a concrete personal injury to the litigant, the Supreme Court explicitly distinguished the facts of that case from *qui tam* actions where a private citizen is provided a concrete interest in the lawsuit. *Id.* at 572-73 (noting that this was not "the unusual case in which Congress has created a concrete private interest

in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff").

Thus, *Amicus* Chamber of Commerce's reliance on *Lujan* for the proposition that citizens cannot enforce the laws even when authorized by statute, Brief *Amicus Curiae* of Chamber of Commerce at 18, is misplaced, as it ignores that *Lujan* explicitly distinguished *qui tam* actions from the citizen suit provisions at issue there. *Amicus* Chamber of Commerce also mischaracterizes *Steel Co*. and *Laidlaw* as standing for the broad proposition that private citizens may not collect civil penalties on behalf of the Government. *Id.* In fact, in *Laidlaw*, the Supreme Court held that citizens *had* standing to collect civil penalties under the Clean Water Act that were payable to the United States Treasury, where the citizens alleged an actual injury that was redressable by the assessment of the civil penalties that would deter ongoing and future misconduct. *Laidlaw*, 528 U.S. at 186 ("To the extent that [the penalties] encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct."). In reaching this holding, the Supreme Court expressly rejected the argument that citizen plaintiffs have no standing to collect penalties for the United States. *Id.* at 187-88 (clarifying holding in *Steel Co.*, 523 U.S. at 106-07).

Not only is the Chamber's characterization of *Laidlaw* wrong, but also both *Steel Co*. and *Laidlaw* are fully consistent with *Stevens*. *Qui tam* relator standing is not dependent upon establishing the type of actual and concrete injury that a citizen suit plaintiff must allege to seek redress through the imposition of civil penalties. Rather, the *qui tam* relator's standing arises from the fact that the FCA provides "the relator himself an interest in the lawsuit" through assignation of a portion of the Government's recovery. *Sprint*, 554 U.S. at 300 (Scalia, J., dissenting).

Since *Stevens*, federal courts, including this Court, have continued to adjudicate penalty-only FCA cases in which the government did not intervene. For example, in *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908 (4th Cir. 2003), this Court upheld penalties of $195,000 in a case where the government had declined to intervene at trial and where the relator failed to prove actual damages. *Id.* at 912-13, 924. Other circuit courts have taken the same approach. *See, e.g.*, *United States ex rel. Davis v. District of Columbia*, 679 F.3d 832, 840 (D.C. Cir. 2012) (noting, in a non-intervened case where there were no actual damages, that if the relator "proves his claims he may still be eligible to share in the statutory penalties assessed against the District"); *Main*, 426 F.3d at 917; *Bly-Magee v. California*, 236 F.3d 1014, 1017 (9th Cir. 2001) (stating that "a *qui tam* plaintiff need not prove that the federal government will suffer monetary harm to state a claim under the FCA" and holding that the relator "alleged

sufficient injury to satisfy Article III" even though the government did not intervene and economic harm to the United States could not be proven). Thus, even where quantifiable monetary harm to the Treasury is not alleged or proven, *qui tam* suits are still "cases" or "controversies" for Article III purposes, just as they were at the time of the founding of the Constitution. *See Stevens*, 529 U.S. at 777.

These holdings are consistent with Congress's intent when it enacted amendments in 1986 strengthening the *qui tam* provisions of the False Claims Act. Members of Congress made clear both that the Act extended to cases in which damages could not be proved, *see, e.g.*, S. Rep. No. 99-345, at 8, *reprinted in* 1986 U.S.C.C.A.N. at 5273, and that the purpose of those amendments was to encourage citizen participation in fraud enforcement. *See, e.g.*, *id.* at 8, 23, *reprinted in* 1986 U.S.C.C.A.N. *at* 5273, 5288 (stating that "the Committee believes that the amendments in S. 1562 which allow and encourage assistance from the private citizenry can make a significant impact on bolstering the Government's fraud enforcement effort," and that "the Committee's overall intent in amending the *qui tam* section of the False Claims Act is to encourage more private enforcement").

Congress understood that there are many instances of fraud that do not result in quantifiable or provable economic damages but nonetheless violate the Act and undermine the integrity of the Government's national defense, health care, and

other programs. Interpreting the statute to prohibit *qui tam* relators from bringing cases where damages cannot be proved would significantly undermine Congress's goals in enlisting private citizens to combat fraud against the Government.

III. *QUI TAM* ACTIONS UNDER THE FALSE CLAIMS ACT DO NOT VIOLATE ARTICLE II

The belated contention that the relators cannot proceed because their pursuit of this case would violate the Appointments and Take Care Clauses of Article II of the U.S. Constitution also fails. Courts have resoundingly rejected such challenges. There is no reason to depart from this consistent line of authority.

A. *Qui Tam* Actions Under the False Claims Act Do Not Violate the "Take Care" Clause Because the Executive Exercises Sufficient Control Over Them

Although the Supreme Court in *Stevens* was not presented with the contention that *qui tam* actions under the FCA violate Article II's directive that the President shall "take care" that the laws are faithfully executed, 529 U.S. at 778 n.8, every circuit court that has considered that argument has rejected it. *See Riley*, 252 F.3d at 752-757(en banc); *United States ex rel. Kelly v. Boeing Co*., 9 F.3d 743, 750-757 (9th Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994); *United States ex. rel. Taxpayers Against Fraud v. Gen. Elec. Co.,* 41 F.3d 1032, 1041 (6th Cir. 1994); *see also United States ex rel. Kreindler & Kreindler v. United Techn. Corp*., 985 F.2d 1148, 1155 (2d Cir. 1993) (stating that the FCA's *qui tam* provision did not violate the constitutional separation of powers); *United States ex rel. K&R Ltd.*

P'ship v. Massachusetts Hous. Fin. Agency, 154 F. Supp. 2d 19, 26 (D.D.C. 2001); *Friedman v. Rite Aid Corp*., 152 F. Supp. 2d 766, 772 (E.D. Pa. 2001); *United States ex rel. Kinney v. Hennepin Cnty. Med. Ctr.*, No. CIV.971680, 2001 WL 964011, at *4 (D. Minn. Aug. 22, 2001). Some courts have reached this conclusion based on the Supreme Court's analysis in *Morrison v. Olson*, 487 U.S. 654 (1988), which upheld the creation of an independent counsel under the Ethics in Government Act ("EGA") to investigate and prosecute senior Executive Branch officials. Those courts concluded that the *qui tam* provisions of the False Claims Act, taken as a whole, do not interfere with the Executive Branch any more than did the independent counsel provisions of the EGA. *Kelly*, 9 F.3d at 757; *see also United States ex rel. Burch v. Piqua Eng'g, Inc*., 803 F. Supp. 115, 121 (S.D. Ohio 1992).

Other courts have viewed the history of *qui tam* actions that supported relator standing as also conclusive evidence that *qui tam* actions do not violate the "Take Care" clause. *Riley*, 252 F.3d at 753. The Supreme Court has always assigned great weight to the historical understanding of the people who were contemporary with the Constitution's formation. *See, e.g.*, *The Laura*, 114 U.S. 411, 416 (1885) ("'The construction placed upon the Constitution . . . by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is, of itself, entitled to very great weight; and when it

is remembered that the rights thus established have not been disputed during a period for nearly a century, it is conclusive.'") (citations omitted). Given that *qui tam* actions were a familiar form of law enforcement at the time the Constitution was adopted, it is doubtful this type of action could be viewed as violating the constitutional structure of government. *See Stevens*, 529 U.S. at 801 (Stevens, J., dissenting) (stating that the historical evidence relied upon by the majority to support Article III standing, "is also sufficient to resolve the Article II question"); *Riley*, 252 F.3d at 753 (observing that "we are persuaded that it is logically inescapable that the same history that was conclusive on the Article III question in *Stevens* . . . is similarly conclusive with respect to the Article II question"); *see also United States ex rel. Phillips v. Pediatric Servs. of America, Inc.*, 123 F. Supp. 2d 990, 993 (W.D.N.C. 2000); *United States ex rel. Sharp v. Consol. Med. Transp., Inc.*, *No. 96 C 6502* 2001 WL 1035720, at *11 (N.D. Ill. Sept. 4, 2001).[4]

B. *Qui Tam* Actions Under the False Claims Act Do Not Violate The Appointments Clause Because *Qui Tam* Relators are Not Officers of the United States and Have Only Limited Authority

[4] More recently, courts have considered and rejected similar challenges to the *qui tam* provisions of the false marking statute, which provided even less control over the litigation to the Executive Branch and involved only the recovery of penalties. *See, e.g.*, *Pequignot v. Solo Cup*, 640 F. Supp. 2d 714, 726, 728 (E.D. Va. 2009) ("It is unlikely that the framers would have written a Constitution that outlawed this practice, and then immediately passed several *qui tam* laws that unconstitutionally encroached on Executive Branch power before the ink on the Constitution was even dry."). The false marking statute has since been repealed. *See* Leahy-Smith America Invents Act of 2011, Pub. L. No. 112-29, § 16(b)(1), 125 Stat. 329.

The overwhelming consensus among the courts is that *qui tam* actions do not violate the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, which requires officers of the United States to be appointed in accordance with the Constitution. Relators are not officers of the United States and relators do not exercise sufficient power such that only officers of the United States may perform the *qui tam* relator's function.

The Appointments Clause does not define "officer of the United States," but the Supreme Court has described the hallmarks of "office" as involving tenure, duration, continuing emolument, and continuing duties. *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890). The relator receives no salary, holds no position with tenure, and receives no other resources from the government. Moreover, relators have only limited authority to pursue a single case, the government may assume control of that case, and the government may restrict the relator's participation. *See* 31 U.S.C. § 3730(c). For these reasons, courts have uniformly rejected challenges to the False Claims Act based on the Appointments Clause. *See Kelly*, 9 F.3d at 758-59 (distinguishing *Buckley v. Valeo*, 424 U.S. 1 (1976), where Federal Election Commissioners had primary responsibility for conducting civil litigation on behalf of the government); *Riley*, 252 F.3d at 757 (noting that this argument was even less persuasive than the "Take Care" clause argument); *see also Gen. Elec. Co.*, 41 F.3d at 1041; *K&R Ltd. P'ship*, 154 F. Supp.2d at 27;

Friedman, 152 F. Supp. 2d at 771; *Phillips*, 123 F. Supp. 2d at 994; *United States ex rel. Wright v. Cleo Wallace Ctrs.*, 132 F. Supp. 2d 913, 921 (D. Colo. 2000).

CONCLUSION

For the foregoing reasons, *amicus curiae* Taxpayers Against Fraud Education Fund urges this Court to reject the contention that permitting relators to seek civil penalties on behalf of the government, pursuant to the False Claims Act's *qui tam* provision, is unconstitutional.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5234 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in Times New Roman 14 point font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on December 4, 2012. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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