

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

**United States of America  
*ex rel.* Adam Josephs,**

**Plaintiff,**

**vs.**

**Amentum Services, Inc., et al.,**

**Defendants.**

**Case No. 1:25-cv-1477-SAG**

**BRIEF OF *AMICUS CURIAE* THE ANTI-FRAUD COALITION  
IN SUPPORT OF PLAINTIFF**

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### INTEREST OF *AMICUS CURIAE*<sup>1</sup>

The Anti-Fraud Coalition (“TAF Coalition”) is a nonprofit, public interest organization dedicated to combating fraud against the government and protecting public resources through public-private partnerships. The organization has worked to publicize the *qui tam* provisions of the federal False Claims Act (“FCA”), has participated as an *amicus curiae*, including on the issues presented in this case, and has provided testimony to Congress about ways to improve the FCA. TAF Coalition has a strong interest in defending the FCA and ensuring its proper interpretation and application.

### INTRODUCTION

Congress enacted the False Claims Act in 1863 to combat widespread fraud on the Treasury. The Act enlists private citizens to aid in this endeavor, authorizing *qui tam* relators to sue those who present false claims to the United States. Since Congress strengthened the statute in 1986, such cases have helped return over \$78 billion to the government and had an even greater deterrent effect.<sup>2</sup>

In the immediate aftermath of the 1986 amendments, courts across the country considered arguments that the FCA’s *qui tam* provisions violated Article II. Every appellate court that considered those challenges upheld the FCA’s constitutionality. These courts concluded that the Act does not offend the separation of powers because the executive branch retains sufficient control over *qui tam* litigation and because relators, who pursue only an individual case, are not officers of the United States and do not exercise government power such that they need to be appointed in accordance with Article II.

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<sup>1</sup> No counsel for a party authored this brief in whole or part, and no party other than *amicus* or its counsel made a monetary contribution to the preparation or submission of the brief.

<sup>2</sup> U.S. Dep’t of Justice, Press Release, False Claims Act Settlements and Judgments Exceed \$2.9 Billion 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>.

The appellate courts' unanimous view is well-supported by the FCA's history and structure. Congress grounded the Act in an ancient and effective procedure to detect and redress fraud, and has worked with the executive branch to improve the Act's effectiveness and enhance executive control over *qui tam* actions. The executive branch has defended the *qui tam* provisions in court across presidential administrations, including in this case.

The considered positions of all three branches of government, together with the history and structure of the FCA, debunk the contention that the FCA's *qui tam* provisions are unconstitutional. This Court should join the chorus of judicial opinions rejecting meritless constitutional challenges to this venerable and successful regime.

## ARGUMENT

### **I. Since 1863 the False Claims Act's Public-Private Partnership Has Successfully Protected the Federal Treasury from Fraud and Served the Public Interest**

In 1863, the federal government, fighting for the survival of the Union, was spending more money and buying more goods than it had ever had. Unscrupulous contractors sought to exploit this flood of federal money. As Senator Henry Wilson of Massachusetts noted during debates on the proposed FCA, although Congress's "Halls have rung with denunciations of the frauds of contractors upon the Government of the United States," and although "[t]he Government is doing what it can to stop these frauds and punish those who commit them," it was not enough.<sup>3</sup> To assist the government's efforts, Congress proposed "a reward to the informer who comes into court" to provide information about fraud against the government.<sup>4</sup> Senator Jacob Howard of Michigan confidently stated that the *qui tam* aspects of the law were "open to no serious objection."<sup>5</sup> The Act was signed into law by President Abraham Lincoln.<sup>6</sup>

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<sup>3</sup> See Cong. Globe, 37th Cong., 3d Sess. 956 (1863).

<sup>4</sup> Senator Howard noted that the typical informer would be one who "betrays his coconspirator," but, the law was "not confined to that class." *Id.* at 955.

<sup>5</sup> *Id.*

<sup>6</sup> False Claims Act, ch. 67, 12 Stat. 696-99 (1863).

In 1986, after extensive hearings and copious input from the executive branch, Congress amended the FCA to make it “a more useful tool against fraud in modern times.”<sup>7</sup> The 1986 amendments gave the government enhanced tools to detect false claims. Congress also determined that “only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds.”<sup>8</sup> To that end, it reinvigorated the public-private partnership that formed the core of the 1863 Act by both providing relators a greater stake in *qui tam* cases and enhancing the government’s control over such cases. Among other things, the government was given the right to intervene and assume responsibility for the case, as well as the right to settle or dismiss a case over the relator’s objections.<sup>9</sup>

The public-private partnership embodied in the FCA has been a vital force for redressing and preventing fraud on the government. Since the 1986 amendments, *qui tam* lawsuits originated by whistleblowers have recovered more than \$55 billion for the federal government (out of \$78 billion in total recoveries under the Act).<sup>10</sup> As Congress recognized, without the information provided by individuals who are aware of fraud and are incentivized to pursue it, the government would not likely have learned of these frauds, and the resources the private sector brings to assist the government have been critical in effectively pursuing these cases.

## **II. Overwhelming Approval of *Qui Tam* Actions by All Three Government Branches for Over Two Hundred Years Firmly Establishes Their Constitutionality.**

*Qui tam* actions have existed since before the Nation’s founding, and the FCA itself is over 150 years old. Throughout the Act’s history, Congress and the executive branch have worked together to enhance the FCA’s effectiveness, and the executive branch has consistently

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<sup>7</sup> S. Rep. No. 99-345, at 10-13 (1986) The 1986 Senate Report notes that various Department of Justice officials, including the Associate Deputy Attorney General and the Assistant Attorney General, “expressed strong support for the amendments to the False Claims Act.” *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 11-12; 31 U.S.C. § 3730(b)(2), (c)(2)(B).

<sup>10</sup> U.S. Dep’t of Justice, Fraud Statistics – October 1, 1986 – September 30, 2024, <https://www.justice.gov/archives/opa/media/1384546/dl>.

defended the FCA’s *qui tam* provisions against constitutional attack, including in this case.<sup>11</sup> The judicial branch has repeatedly rejected challenges to the Act’s structure. Defendants’ efforts to revive such challenges ring hollow.

### **A. Congress Has Employed the *Qui Tam* Mechanism Since the Nation’s Founding**

In enacting the FCA in 1863, Congress employed a well-established tool. “Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the formation of our government.”<sup>12</sup> Indeed, “[*q*ui tam actions appear to have been as prevalent in America as in England, at least in the period immediately before and after the framing of the Constitution,” when “the First Congress enacted a considerable number of informer statutes.”<sup>13</sup> That trend persisted well beyond the First Congress.<sup>14</sup> In addition to the FCA, three other such laws remain in effect.<sup>15</sup>

The Supreme Court found this history “well nigh conclusive” in establishing FCA relators’ Article III standing.<sup>16</sup> The same history compels the conclusion that the FCA’s *qui tam* provisions do not violate Article II. The Court has always assigned “great weight” to the historical understandings of “the men who were contemporary with [the Constitution’s]

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<sup>11</sup> Dkt. 69.

<sup>12</sup> *Marvin v. Trout*, 199 U.S. 212, 225 (1905) (citing cases).

<sup>13</sup> *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 776-77 (2000).

<sup>14</sup> See, e.g., Richard A. Bales, *A Constitutional Defense of Qui Tam*, 2001 Wis. L. Rev. 381, 439 n.38 (2001) (citing additional *qui tam* statutes enacted from 1792 through 1870, many of which were re-enacted throughout the 1800s).

<sup>15</sup> 25 U.S.C. § 201 (penalties for violation of laws protecting commercial interests of Native Americans); 18 U.S.C. § 962 (forfeitures of vessels privately armed against friendly nations); 46 U.S.C. § 723, now codified at 46 U.S.C. § 80103(b) (forfeiture of vessels taking undersea treasure from the Florida Coast).

<sup>16</sup> *Stevens*, 529 U.S. at 777.

formation”<sup>17</sup> and thus, acts of the First Congress are “contemporaneous and weighty evidence of [the Constitution’s] true meaning.”<sup>18</sup>

*Qui tam* statutes were ubiquitous in early America, and their wisdom was frequently debated as a policy matter. Despite there being every opportunity for opponents to raise constitutional arguments, there is “no evidence that anyone at the time of the framing believed that a *qui tam* action or informers’ action produced a constitutional doubt,”<sup>19</sup> and defendants have not presented any.

Indeed, the evidence suggests that *qui tam* statutes and private enforcement actions were in fact integral to the fabric of our early legal system. Consider, for instance, the Slave Trade Act of 1794.<sup>20</sup> Enacted by the Third Congress and signed into law by President Washington, the statute created a *qui tam* cause of action against any person or vessel used in the slave trade.<sup>21</sup> This statute was frequently invoked by private parties opposed to the slave trade, and gave rise to litigation in the Supreme Court—where nobody questioned the statute’s constitutionality.<sup>22</sup> This history “casts serious doubt on the claim that Article II was understood at the time to vest the

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<sup>17</sup> *The Laura*, 114 U.S. 411, 416 (1885). See also, e.g., *Clinton v. City of New York*, 524 U.S. 417 (1998) (presidential veto power); *Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986) (removal of officer); *United States v. z-Wright Export Corp.*, 299 U.S. 304, 322 (1936) (President’s authority in foreign relations); *Myers v. U.S.*, 272 U.S. 52, 136 (1926) (removal of officers); *Stuart v. Laird*, 5 U.S. 299, 309 (1803) (assignment of judges).

<sup>18</sup> *Marsh v. Chambers*, 463 U.S. 783, 790 (1983); see also *The Laura*, 114 U.S. at 416 (describing the unchallenged practices of early Congresses as “conclusive” evidence of the Constitution’s meaning when upholding an early *qui tam* statute); *Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass’n of Am.*, 601 U.S. 416, 432 (2024) (reiterating this principle recently).

<sup>19</sup> Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 Mich. L. Rev. 163, 175-76 (1992).

<sup>20</sup> Pub. L. No. 3-11, 1 Stat. 347.

<sup>21</sup> By our count, fourteen members of the Third Congress—Abraham Baldwin, Pierce Butler, Jonathan Dayton, Oliver Ellsworth, Thomas Fitzsimons, Nicholas Gilman, Rufus King, John Langdon, James Madison, Alexander Martin, Robert Morris, George Read, Roger Sherman, and Caleb Strong—were also delegates at the Constitutional Convention, as was President Washington and three members of his cabinet, *i.e.*, Alexander Hamilton, James McHenry, and Edmund Randolph. Originalist analyses in the Supreme Court have relied on acts of the Third Congress as evidence of the Constitution’s original meaning. See *Dep’t of Transp. v. Ass’n of Am. R.R.*, 575 U.S. 43, 78 (2015) (Thomas, J., concurring); *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 599 (2014) (Scalia, J., concurring in the judgment).

<sup>22</sup> James E. Pfander, *Public Law Litigation in Eighteenth Century America: Diffuse Law Enforcement in a Partisan World*, 92 Fordham L. Rev. 469, 486-87 (2023).

executive with an exclusive enforcement discretion that forecloses Congress from relying on private informers to play a supplemental or independent role in law enforcement.”<sup>23</sup>

Many colonies and early States relied on *qui tam* actions. These governments’ separation-of-powers rules were analogous to, and often stricter than, the federal standard.<sup>24</sup> A forthcoming estimate reports that “[a]pproximately ten percent of all public acts passed in Massachusetts between 1690 and 1820 expressly relied on private litigants for enforcement,” reaching “public policy in nearly every domain of legislative activity.”<sup>25</sup> “[B]oth government officials and private citizens frequently brought these types of statutory claims”—yet “despite the ubiquity of private claims . . . and frequent complaints about the excesses of ‘common informers,’ and endemic constitutional debates, *no one* in Revolutionary Massachusetts seems to have made the argument . . . that private litigants who sought to enforce a public right were unconstitutionally exercising an ‘executive power.’”<sup>26</sup> And “Massachusetts was not an outlier. Every state in the union continued to pass penal statutes (with both private damages awards and *qui tam* provisions) in the first twenty-five years of independence.”<sup>27</sup>

The pivotal figures in state legislatures that adopted *qui tam* laws were also part of the founding generation. For example, John Adams litigated *qui tam* actions as an attorney.<sup>28</sup> Joseph Story helped compile the laws of Massachusetts, including dozens of informer’s actions—and also voted to enact *qui tam* laws as a federal congressman and a representative in the Massachusetts legislature.<sup>29</sup> Thomas Jefferson and James Madison revised Virginia’s laws, which

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<sup>23</sup> *Id.* at 491.

<sup>24</sup> See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 881 (1983).

<sup>25</sup> See Nitisha Baronia et al., *Private Enforcement and Article II 27* (May 8, 2024) (unpublished manuscript), available at <https://ssrn.com/abstract=4821934>. The coauthors include a law professor, an historian, and a practicing constitutional litigator.

<sup>26</sup> *Id.* at 28.

<sup>27</sup> *Id.* at 30.

<sup>28</sup> See *id.* at 28.

<sup>29</sup> See *id.* at 34-35.

included twelve informer's actions.<sup>30</sup> Indeed, Jefferson himself was a *qui tam* plaintiff at least once.<sup>31</sup> And Alexander Hamilton drafted a tax law for New York enforceable by “any informer.”<sup>32</sup>

Beginning in 1789, Congress began enacting federal *qui tam* statutes. Nearly all of these statutes infringed far more on executive power than the modern FCA because the government generally could not intervene in or extinguish an informer's action, nor supervise the litigation. Indeed, many of these statutes included provisions permitting uninjured informers to sue *federal officials* who were lax in their duties, thus posing a direct conflict between relators and the executive branch. Nevertheless, nobody suggested that such statutes unconstitutionally undermined executive power.

For example, near the end of its first Term, Congress enacted major tax legislation relating to distilled spirits.<sup>33</sup> In addition to adjusting duties imposed on imported liquor and imposing new ones on domestic product, Congress included a variety of ancillary requirements designed to ensure that the taxes were paid—for example by requiring inspections and documentation, and prohibiting evasion.<sup>34</sup> Congress also provided for forfeitures for fraud or corruption by the federal officers charged with enforcing the act.<sup>35</sup>

**B. Every Appellate Court to Have Considered the Question Has Concluded that the FCA's *Qui Tam* Provisions Are Constitutional.**

The five circuit courts that have addressed Article II challenges to the constitutionality of the FCA's *qui tam* provision—which include the Second, Fifth, Sixth, Ninth, and Tenth

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<sup>30</sup> *See id.* at 30-31.

<sup>31</sup> *See* Statement on the Legal Action Against Richard Johnson, 21 May 1804, Founders Online, National Archives, <https://founders.archives.gov/documents/Jefferson/01-43-02-0355>.

<sup>32</sup> Baronia, *supra*, at 36.

<sup>33</sup> *See* An Act Repealing, After the Last Day of June Next, the Duties Heretofore Laid upon Distilled Spirits Imported from Abroad, and Laying Others in Their Stead; and Also upon Spirits Distilled Within the United States, and for Appropriating the Same, ch. 15, 1 Stat. 199 (1791).

<sup>34</sup> *See id.* §§ 8-10, 13, 20, 27-28, 30-33, 45, 47, 48, 55.

<sup>35</sup> *See id.* § 49.

Circuits—have all rejected those challenges.<sup>36</sup> While the Fourth Circuit has not directly addressed this question, it has cited favorably to and relied upon the reasoning in the circuits that have to evaluate other Constitutional questions impacting FCA enforcement.<sup>37</sup> It has also recognized that the government has absolute veto power over voluntary settlements in *qui tam* actions, as is “consistent with the statutory scheme of the FCA,”<sup>38</sup> which is a factor relied upon by other Circuit courts in upholding the Constitutionality of the FCA’s *qui tam* provisions. Moreover, no district court in this Circuit has ever doubted the FCA’s constitutionality.<sup>39</sup>

Although the Supreme Court has not ruled on an Article II challenge to the FCA, the Court has held that *qui tam* relators have Article III standing based on founding-era *qui tam* actions.<sup>40</sup> Two Justices contended that “[t]he historical evidence [that supports a finding of Article III standing] ... is also sufficient to resolve the Article II question.”<sup>41</sup> While defendants stress that in *United States ex rel. Polansky v. Executive Health Resources*,<sup>42</sup> three Justices (one dissenting, and two concurring) noted that the FCA raises constitutional *questions*, no Justice has

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<sup>36</sup> See *Riley v. St. Luke’s Episcopal Hosp.*, 252 F.3d 749 (5th Cir. 2001) (*en banc*) (in non-intervened case, rejecting both Appointments Clause and Take Care challenges); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993) (in non-intervened case, rejecting both Appointments Clause and Take Care challenges); *United States ex rel. Stone v. Rockwell Int’l Corp.*, 282 F.3d 787 (10th Cir. 2002) (rejecting both Take Care and Appointments Clause challenges); *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148 (2d Cir. 1993) (in non-intervened case, rejecting separation of powers challenge); *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032 (6th Cir. 1994).

<sup>37</sup> See *United States ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, 741 F.3d 390, 402-04 (4th Cir. 2013) (rejecting the defendant’s argument that the relator lacked Article III standing because he pursued penalties only and finding that *Vermont Agency* resolved that issue of a relator’s standing).

<sup>38</sup> See *United States ex rel. Michaels v. Agape Senior Community Inc.*, 848 F.3d 330, 340 (4th Cir. 2017).

<sup>39</sup> See *United States ex rel. Phillips v. Pediatric Servs. of Am., Inc.*, 123 F. Supp. 2d 990, 994 (W.D.N.C. 2000) (rejecting Take Care Clause and Appointments Clause challenges to the FCA).

<sup>40</sup> See *Stevens*, 529 U.S. at 778.

<sup>41</sup> *Stevens*, 529 U.S. at 801 (Stevens, J., dissenting); see also *Riley*, 252 F.3d at 752 (“[I]t is logically inescapable that the same history that was conclusive on the Article III question in *Stevens* with respect to *qui tam* lawsuits initiated under the FCA is similarly conclusive with respect to the Article II question concerning the statute.”).

<sup>42</sup> 599 U.S. 419 (2023).

ever opined that any provision of the Act *is* unconstitutional—and a supermajority of six Justices did not join their colleagues’ statements indicating that the FCA raises constitutional questions.<sup>43</sup>

With one exception, every district court that has considered Article II challenges to the FCA’s *qui tam* provisions after *Polansky* has rejected them.<sup>44</sup> Defendants rely extensively on the only post-*Polansky* district court that has held that the FCA violated the Appointments Clause.<sup>45</sup> Every other district court that has considered that court’s reasoning has declined to follow it.<sup>46</sup> As one court said, the outlier court relies “chiefly on selections of dissents, concurrences, and law review articles” in reaching their holdings, while “whistl[ing] past precedent.”<sup>47</sup>

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<sup>43</sup> While Justice Kavanaugh, joined by Justice Thomas, again raised the issue of the FCA’s constitutionality in a concurrence in *Wisconsin Bell, Inc. v. United States ex rel. Heath*, Justice Barrett, who had previously joined them in *Polansky*, declined to join them again. 145 S. Ct. 498, 515 (2025).

<sup>44</sup> See, e.g., *United States ex rel. Wallace v. Exactech, Inc.*, 2023 WL 8027309, at \*4 (N.D. Ala. Nov. 20, 2023); *United States ex rel. Lagatta v. Reditus Laboratories, Inc.*, 2024 WL 4351862 (C.D. Ill. Sept. 30, 2024) (denying motion to dismiss on Article II grounds); *United States ex rel. Butler v. Shikara*, 2024 WL 4354807 (S.D. Fla. Sept. 6, 2024) (same); *United States ex rel. Thomas v. Mercy Care*, 2023 WL 7413669, at \*4 (D. Ariz. Nov. 9, 2023) (denying the defendant’s motion to dismiss on Article II grounds).

<sup>45</sup> *United States ex rel. Zafirov v. Fla. Med. Assocs., LLC*, 751 F. Supp. 3d 1293 (M.D. Fla. 2024) and *United States ex rel. Gose v. Native Am. Servs. Corp.*, No. 8:16-CV-03411-KKM-AEP, 2025 WL 1531137, at \*1 (M.D. Fla. May 29, 2025). The relators in both cases—joined by the U.S. government—have appealed to the Eleventh Circuit.

<sup>46</sup> See *United States v. Chattanooga Hamilton County Hosp.*, 2024 WL 4784372, at \*3 (E.D. Tenn. Nov. 7, 2024) (finding that “*Zafirov* is unpersuasive”); *United States ex rel. Adler v. Sporn Co. Inc.*, No. 2:24-CV-00617, 2025 WL 1371272, at \*17 (D. Vt. May 12, 2025) (same); *Kenley Emergency Med. v. Schumacher Grp. of La. Inc.*, No. 20-CV-03274-SI, 2025 WL 1359065, at \*5 (N.D. Cal. May 9, 2025) (same); *United States ex rel. Gonite v. UnitedHealthcare of Ga., Inc.*, No. 5:19-CV-246 (MTT), 2025 WL 1184109, at \*3–4 (M.D. Ga. Apr. 23, 2025) (declining to agree with *Zafirov* and instead holding that the *qui tam* provision of the FCA violates neither the Appointments Clause nor the Take Care Clause); *United States ex rel. Penelow v. Janssen Prods., LP*, No. CV 12-7758 (ZNQ) (JBD), 2025 WL 937504, at \*12 (D.N.J. Mar. 28, 2025) (“The Court declines to follow this singular non-precedential and out-of-circuit court decision [*Zafirov*], and instead follows every federal circuit court of appeals that has addressed this issue and holds that the FCA’s *qui tam* provisions are constitutional.”); *United States ex rel. Permenter v. eClinicalWorks, LLC*, No. 5:18-CV-382 (MTT), 2025 WL 1762264, at \*11 (M.D. Ga. June 25, 2025) (“At this point, the Court sees no reason to swim against a tidal bore and again declines to rule that the FCA’s *qui tam* provisions are unconstitutional.”); *United States ex rel. Publix Litig. P’ship, LLP v. Publix Super Markets, Inc.*, No. 8:22-CV-2361-TPB-AAS, 2025 WL 1381993, at \*3 (M.D. Fla. May 13, 2025) (“[E]very federal appellate court to consider it has concluded that the FCA is constitutional.”); *Kane v. Select Med. Corp.*, No. 8:21-CV-1050-CEH-TGW, 2025 WL 1726253, at \*1 n1 (M.D. Fla. June 20, 2025) (stating that even if a constitutional challenge to the FCA had been raised like in *Zafirov*, the Court would have rejected it).

<sup>47</sup> *Chattanooga Hamilton County Hosp.*, 2024 WL 4784372 at \*3.

**C. The Executive Branch Itself Argues that the FCA's *Qui Tam* Provisions Do Not Usurp Executive Power.**

The executive branch has consistently defended the FCA's *qui tam* provisions against constitutional attack, including in this case. Defendants contend that the *qui tam* provisions unduly encroach on the executive branch's power, but the executive branch itself disagrees. The Court should give the government's views great weight here. Indeed, it would be bizarre if, in the name of defending the executive branch's prerogatives, the Court chose to disregard the considered, clear, and consistent position of that very branch.

**CONCLUSION**

The Court should deny Defendants' motions.

September 5, 2025

Respectfully submitted,

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