IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

UNITED STATES OF AMERICA ex rel. UPPI, LLC, Plaintiff-Relator, v. CARDINAL HEALTH, INC.; CARDINAL HEALTH 414, LLC d/b/a CARDINAL HEALTH NUCLEAR PHARMACY SERVICES; CARDINAL HEALTH 200, LLC; D'S VENTURES LLC d/b/a LOGMET SOLUTIONS, LLC; CARING HANDS HEALTH EQUIPMENT & SUPPLIES, LLC; OTHER UNNAMED SMALL BUSINESS FRONT COMPANIES, OBIE B. BACON, and DEMAURICE SCOTT, and UNNAMED INDIVIDUALS (DOES), Defendants.	Case No. 9:22-cv-03770-BHH

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

Jacklyn N. DeMar
(*pro hac vice* application forthcoming)
The Anti-Fraud Coalition
1220 19th St. NW
Suite 501
Washington, DC 20036
202-296-4826
jdemar@taf.org

Allison P. Sullivan
Bluestein Attorneys
P.O. Box 7965
Columbia, SC 29202
803-779-7599
allison@bluesteinattorneys.com

Counsel for *Amicus Curiae*
The Anti-Fraud Coalition

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

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 in litigation as a *qui tam* relator and 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.

In the immediate aftermath of the 1986 amendments, courts across the country considered arguments that the FCA's *qui tam* provisions violated Articles II and III. Every appellate court that considered those challenges upheld the FCA's

[1] 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.

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. These courts also concluded that relators have Article III standing, a conclusion that the Supreme Court affirmed, finding history "well nigh conclusive" on that question.[2]

This 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, and expressed gratitude for "the hard work and courage of those private citizens who bring evidence of fraud to the Department's attention, often putting at risk their careers and reputations," observing that the Department's "ability to protect citizens and taxpayer funds continues to benefit greatly from their actions." [3]

[2] *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 776-77 (2000).
[3] U.S. Dep't of Justice, Press Release, False Claims Act Settlements and Judgments Exceed $2 Billion in Fiscal Year 2022 (Feb. 7, 2023), https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-2-billion-fiscal-year-2022 (statements of Principal Deputy Assistant Attorney General Boynton).

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. Indeed, defendants' challenge is based on a fundamental misconception of the nature of FCA *qui tam* actions, which are not a usurpation of executive authority, but instead an enhancement to that power. By helping the executive branch detect fraud that would otherwise go unseen, and by allowing the government to partner with relators and their counsel to redress those frauds when the government's resources are not adequate to the task, the Act's *qui tam* provisions only enhance the executive branch's ability to take care that the laws are enforced. 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 Through Enhanced Enforcement of Laws that Protect the Health and Safety of Citizens.

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.[4] 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.[5] In discussing the proposed law, Senator Jacob Howard of Michigan confidently stated that the *qui tam* aspects of the law were "open to no serious objection."[6] The resulting statute was signed into law by President Abraham Lincoln.[7]

In 1986, after extensive hearings and copious input from the executive branch,[8] Congress amended the FCA to make it "a more useful tool against fraud in modern times."[9] 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."[10] 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

[4] *See* Cong. Globe, 37th Cong., 3d Sess. 956 (1863).
[5] 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.
[6] *Id.*
[7] False Claims Act, ch. 67, 12 Stat. 696-99 (1863).
[8] S. Rep. No. 99-345, at 10-13 (1986). (noting that various Department of Justice officials, including Associate Deputy Attorney General and Assistant Attorney General, "expressed strong support for the amendments to the False Claims Act").
[9] *Id.* at 1.
[10] *Id.*

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.[11]

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 $53 billion for the federal government (out of $78 billion in total recoveries under the Act).[12] Over $5.4 billion came from suits in which the government declined to intervene.[13] 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. The Unanimous Acceptance of *Qui Tam* Actions by All Three Branches of Government for Over Two Hundred Years Firmly Establishes Their Constitutionality.

Qui tam actions have existed since before the 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 courts have

[11] *Id.* at 11-12; 31 U.S.C. § 3730(b)(2), (c)(2)(B).
[12] U.S. Dep't of Justice, Fraud Statistics – October 1, 1986 – September 30, 2024, https://www.justice.gov/archives/opa/media/1384546/dl.
[13] *Id.*

repeatedly rejected challenges to the Act's structure. Defendants' efforts to revive such challenges ring hollow.

A. 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 recently in this district.[14] That fact utterly deflates defendants' argument: They contend that the *qui tam* provisions unduly encroach on the executive branch's power—but the executive branch itself disagrees. As between defendants and the executive branch itself, the latter plainly speaks with greater authority and credibility on this question. 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.

B. Congress Has Employed the *Qui Tam* Mechanism Since the 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

[14] *See* United States Statement of Interest, *United States ex rel. Shepherd v. Fluor Corp., Inc.*, No. 13-cv-02428-JD, Dkt. 411 (D.S.C. Jan. 26, 2024).

government."[15] 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."[16] That trend persisted well beyond the First Congress.[17] In addition to the FCA, three other such laws remain in effect.[18]

The Supreme Court found this history "well nigh conclusive" in establishing FCA relators' Article III standing.[19] The same history compels the conclusion that the FCA's *qui tam* provisions do not violate Article II. Indeed, the Court has always assigned "great weight" to the historical understandings of "the men who were contemporary with [the Constitution's] formation."[20] Thus, acts of the First Congress are "contemporaneous and weighty evidence of [the Constitution's] true meaning,"[21]

---

[15] *Marvin v. Trout*, 199 U.S. 212, 225 (1905) (citing cases).
[16] *Stevens*, 529 U.S. at 776-77 (citing statutes).
[17] *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).
[18] 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).
[19] *Stevens,* 529 U.S. at 777.
[20] *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).
[21] *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.*

and the Supreme Court has upheld practices because the First Congress blessed them—a rule that applies here.

Defendants' history arguments are unpersuasive and largely based on a holding in a single non-controlling case in another district – the only case to hold that the *qui tam* provisions of the FCA are unconstitutional.[22] Historic *qui tam* statutes allowed private relators to sue third parties. Statutes that did not expressly authorize informer suits are analogous to the FCA because it was commonly understood that, absent contrary language, "[s]tatutes providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue."[23]

Early *qui tam* statutes were ubiquitous, 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

Cmty. Fin. Servs. Ass'n of Am., 601 U.S. ---, 2024 WL 2193873, at *8 (U.S. May 16, 2024) (reiterating this principle recently).

[22] *See* Cardinal Health et al. Rule 12(c) Motion for Judgment on the Pleadings, at 19-21, Dkt. 188, Jan. 24, 2025 (citing *United States ex rel. Zafirov v. Florida Medical Associates, Inc.,* 2024 WL 4349242 (M.D. Fla. Sept. 30, 2024))

[23] *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943); *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 341 (1805) (Marshall, C.J.) ("Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt [by a private informer] as well as by information [by the government]," and when a "statute which creates the forfeiture does not prescribe the mode of demanding it . . . either debt or information would lie").

framing believed that a *qui tam* action or informers' action produced a constitutional doubt,"[24] and defendants have not presented any.

Instead, examples illustrate that *qui tam* statutes and private enforcement actions were integral to the fabric of our early legal system. Consider, for instance, the Slave Trade Act of 1794.[25] 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.[26] Professor Pfander conducted a detailed analysis showing that the 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.[27] This history "casts serious doubt on the claim that Article II was understood at the time to vest the executive with an

[24] Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 175-76 (1992).
[25] Pub. L. No. 3-11, 1 Stat. 347.
[26] 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).
[27] 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).

exclusive enforcement discretion that forecloses Congress from relying on private informers to play a supplemental or independent role in law enforcement."[28]

The Slave Trade Act is only one salient example. 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. For example, preeminent jurists have recognized that the Massachusetts Constitution embodied the same separation-of-powers principles as the federal Constitution.[29]

A forthcoming estimate—prepared by a law professor, a historian, and an attorney—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."[30] These laws were also frequently used: "both 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

[28] *Id*. at 491.
[29] *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 881 (1983).
[30] *See* Nitisha Baronia et al., *Private Enforcement and Article II* 27 (May 8, 2024) (unpublished manuscript), *available at* https://ssrn.com/abstract=4821934.

power.'"[31] 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."[32]

Massachusetts is an important example because pivotal figures in the founding generation were there. John Adams litigated *qui tam* actions as an attorney.[33] 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.[34] And Massachusetts was by no means alone. Thomas Jefferson and James Madison revised Virginia's laws, which included twelve informer's actions.[35] Indeed, Jefferson himself was a *qui tam* plaintiff at least once.[36] And Alexander Hamilton drafted a tax law for New York enforceable by "any informer."[37]

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

[31] *Id*. at 28.
[32] *Id*. at 30.
[33] *See id*. at 28.
[34] *See id*. at 34-35.
[35] *See id*. at 30-31.
[36] *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.
[37] Baronia, *supra*, at 36.

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 undermined executive power.

For example, near the end of its first Term, Congress enacted major tax legislation relating to distilled spirits.[38] 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.[39] Congress also provided for forfeitures for fraud or corruption by the federal officers charged with enforcing the act.[40]

These prohibitions were enforceable through a *qui tam* provision that gave "one half of all penalties and forfeitures incurred by virtue of this act" to "the person . . . who shall first discover the matter or thing whereby the same shall have been incurred; and the other half to the United States," recoverable "by action of debt, in the name of the person or persons intitled thereto, or by information, in the name of

[38] *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).
[39] *See id*. §§ 8-10, 13, 20, 27-28, 30-33, 45, 47, 48, 55.
[40] *See id*. § 49.

the United States of America."[41] This was a shift in policy from legislation involving customs duties generally, which provided for *qui tam* actions against government officials—but not as a mechanism to enforce the law against private parties.

Professor Beck has analyzed the historical context around the Distilled Spirits Act and concluded that the expansion of *qui tam* litigation was a likely response "to Alexander Hamilton's report about the inadequacy of centralized monitoring of a dispersed network of customs officials, combined with a new, more challenging tax collection environment."[42] Thus, Congress, responding to a recommendation from the executive branch, utilized *qui tam* actions—illustrating that the founding generation did not believe that *qui tam* actions threatened the separation of powers.

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

The five circuits that have addressed Article II challenges to the constitutionality of the FCA's *qui tam* provision—which include the Second, Fifth,

[41] *Id*. § 44.
[42] Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 Notre Dame L. Rev. 1235, 1298 (2018).

Sixth, Ninth, and Tenth Circuits—have all rejected those challenges.[43] District courts outside of those circuits have also overwhelmingly rejected such challenges.[44]

The Fourth Circuit has not directly addressed an Article II challenge to the FCA, but it has cited favorably to and relied upon the reasoning in the above-referenced cases to evaluate other Constitutional questions impacting FCA enforcement.[45] It has also recognized that the government has absolute veto power over voluntary settlements in *qui tam* actions, as is "consistent with the statutory

---

[43] *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749 (5th Cir. 2001) (*en banc*) (in non-intervened case, rejecting both Take Care and Appointments Clause challenges); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993) (in non-intervened case, 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. 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. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032 (6th Cir. 1994). Defendants note the contrary views of one of the judges sitting en banc in *Riley*, but ignore that thirteen other judges on that panel held the statute constitutional.

[44] *See United States ex rel. Phillips v. Pediatric Servs. of Am., Inc.*, 123 F. Supp. 2d 990, 994 (W.D.N.C. 2000); *United States ex rel. Sharp v. Consolidated Medical Trans.*, 2001 WL 1035720, at *11 (N.D. Ill. 2001); *United States ex rel. Robinson v. Northrop Corp.*, 824 F. Supp. 830, 838 (N.D. Ill. 1993); *United States ex rel. Chandler v. Hektoen Inst. for Med. Research*, 35 F. Supp. 2d 1078, 1081 (N.D. Ill. 1999); *United States ex rel. Fallon v. Accudyne Corp.*, 921 F. Supp. 611, 623-24 (W.D. Wis. 1995); *United States ex rel. Amin v. George Washington Univ.*, 26 F. Supp. 2d 162, 165 (D.D.C. 1998). Defendants cite *United States ex rel. Fender v. Tenet Healthcare Corp.*, 105 F. Supp. 2d 1228 (N.D. Ala. 2000), as contrary authority—but that case did not decide the constitutionality question. *See id.* at 1232. Instead, the court merely indicated that it would be willing to receive briefing about these arguments in the future.

[45] 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 not damages, and finding that *Vermont Agency* resolved that issue of a relator's standing and discussing the long history of *qui tam* statutes, but declining to address Article II arguments that were untimely).

scheme of the FCA"[46] These same factors have been relied upon by other Circuits to uphold the Constitutionality of the FCA's *qui tam* provisions.

Within this district, the only other court to consider an Article II challenge has denied the defendants' Motion for Judgment on the Pleadings on procedural grounds, explaining that the defendants were required to plead their challenge as an affirmative defense.[47] However, in the court noted in denying the motion that "[u]nder the present state of the law, Defendants' separation-of-powers challenge to the *qui tam* provisions of the False Claims Act is insufficient on its own to demonstrate that Relators' complaint is implausible."[48] Further the court explained that "even if '[t]he FCA's *qui tam* provisions have long inhabited something of a constitutional twilight zone,'…and even if it is time to revisit the matter, it is equally true that 'lower federal courts should not 'pass on questions of constitutionality . . . unless such adjudication is unavoidable' . . . ."[49]

Although the Supreme Court has not ruled on an Article II challenge, the Court has held that *qui tam* relators have Article III standing based on founding-era

---

[46] See *United States ex rel. Michaels v. Agape Senior Community Inc*., 848 F.3d 330, 340 (4th Cir. 2017)
[47] See *United States ex rel. Shepherd v. Fluor Corp.,* No. 13-cv-02428-JD, Dkt. 461 (D.S.C. Sept. 13, 2024) (finding that the defendants' Article II challenge was a 'purely legal defense' required to be plead as an affirmative defense, and because defendants' failed to do so, denying the motion.)
[48] *Id.* at p. 4-5. (noting that the defendants admitted that all federal circuits reviewing Article II challenges to the FCA had rejected them)
[49] *Id.* at p. 5. (citations omitted)

qui tam actions.[50] 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."[51] On the other hand, while defendants stress that in *United States ex rel. Polansky v. Executive Health Resources*,[52] three Justices (one dissenting, and two concurring) noted that the FCA raises constitutional questions, no Justice has ever opined that any provision of the Act *actually is unconstitutional*—and of course, a supermajority of six Justices did not even join their colleagues' statements indicating that the FCA raises constitutional questions. The strong appellate consensus thus overwhelmingly favors upholding the statute.

Other district courts that have considered Article II challenges to the FCA's *qui tam* provisions after *Polansky* have rejected the argument. In *United States ex rel. Wallace v. Exactech, Inc.*, then-Chief Judge Coogler held that the FCA does not violate the Appointments Clause because relators are not officers of the United States, as their positions are temporary, they do not "wield governmental power," and the "Government restricts their power as civil litigants: the Government can intervene, monitor and limit discovery, and settle the action without relators'

[50] *See Stevens*, 529 U.S. at 778.
[51] *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.").
[52] 599 U.S. 419 (2023).

consent."[53] Further, the court held that the FCA does not violate the Take Care Clause, explaining that "[d]ue to the limits placed upon relators in *qui tam* actions, the Executive retains sufficient control over the relator's conduct to ensure that the President is able to perform his constitutionally assigned dut[y]."[54] While *Exactech* was one of the first district court to substantively decide the issue post-*Polansky*, every other district court to decide the issue since has also held that the *qui tam* provisions of the FCA are constitutional, except for the outlier decision in *U.S. ex rel. Zafirov v. Florida Medical Associates,*[55] a decision which "relies chiefly on selections of dissents, concurrences, and law review articles" in reaching its holding, while "whistl[ing] past precedent."[56]

---

[53] 2023 WL 8027309, at *4 (N.D. Ala. Nov. 20, 2023).
[54] *Id.* at *6 (citation and quotation marks omitted); *see also 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).
[55] 2024 WL 4349242 (M.D. Fla. Sept. 30, 2024)
[56] *United States v. Chattanooga Hamilton County Hosp.,* 2024 WL 4784372, at *3 (E.D. Tenn. Nov. 7, 2024); *See also*, *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 v. Riverside Med. Group, P.C.*, 2024 WL 4100372 (D.N.J. Sept. 6, 2024), vacated in part on other grounds on reconsideration, 2024 WL 5182395 (D.N.J. Dec. 20, 2024) (same).

III. The Unanimous View of the Three Branches Is Supported by the FCA's Structure, Which Provides the Executive Branch Extensive Control Over *Qui Tam* Actions.

A. The FCA's *Qui Tam* Provisions Do Not Usurp Executive Power; They Enhance It.

Defendants' challenges to the constitutionality of the FCA's *qui tam* provisions are rooted in a misconception about what those provisions do. Put simply, they do not usurp executive power; instead, they enhance it by giving the government access to information it would not otherwise have, as well as additional options for redressing fraud. None of that is constitutionally problematic.

It's important to understand the crux of defendants' challenge. In general, it is uncontroversial that private litigants can bring civil actions to enforce federal laws. They do this all the time, for example with respect to antitrust laws, securities laws, and even quasi-criminal statutes like RICO. Parties can also sue to vindicate the rights of others—as they do, for example, in class actions. As long as the plaintiff has standing, there is nothing constitutionally objectionable about those causes of action. Here, the standing issue was resolved in *Stevens*. As a practical matter, then, the FCA works the same as these other statutes.

Defendants identify one feature that they think distinguishes the FCA from other causes of action: the fact that the relator must sue in the name of the United States. According to defendants, this feature somehow transfers executive power

into the hands of private parties, and compels the Court to strike down a statute that has been on the books since 1863.

That is wrong. Although relators bring actions "in the name of the Government,"[57] they do not thereby obtain any powers that a private litigant lacks. They do not obtain subpoena power or access to government resources. They cannot bring criminal charges or administrative enforcement actions. And they do not receive a government salary. Instead, requiring relators to sue in the name of the United States has two effects, neither of which poses a constitutional problem. First, it affects how cases are captioned. But such formalisms have no constitutional significance. Second, requiring relators to sue in the government's name protects the government's interests by allowing the government to participate in the case and to recover its share of the proceeds without bringing a separate action. None of the authorities defendants cite suggest that empowering the government in this manner creates any constitutional problem—because it doesn't.

Defendants counter that by allowing the relator to file a complaint in the government's name, the FCA permits the relator to usurp the executive branch's prosecutorial and enforcement discretion. Thus, they explain, it is the relator who drafts her complaint and decides which facts to allege and which theories of liability

[57] 31 U.S.C. § 3730(b)(1).

to assert. This, they argue, is an executive function that no private person can exercise. But the FCA comprehensively addresses that concern by granting the executive branch broad control over *qui tam* actions.

Start with the most obvious point: The FCA allows the government to initiate enforcement actions on its own[58]—and nothing in the statute permits a *qui tam* relator to stop the government from bringing a case it wants to bring. Similarly, contrary to defendants' insinuation, nothing permits a *qui tam* relator to force the government to bring a case it does *not* want to bring. Instead, when a *qui tam* relator brings an FCA action, the government has essentially plenary authority to decide whether that action will proceed. Thus, the lawsuit is served first on the government, and not the defendant, so that the government can investigate and evaluate the case in secret.[59] The government then has an unfettered right to intervene in the action if it so chooses, in which case the government "shall not be bound" by any of the relator's actions.[60] Or, if the government wants, it can "dismiss the action notwithstanding the objections of the person initiating the action."[61] The Supreme Court just explained that this dismissal authority is governed by Federal Rule of Civil Procedure 41, which empowers the government to dismiss an action whenever

[58] *Id.* § 3730(a).
[59] *Id.* § 3730(b)(2).
[60] *Id.* § 3730(b)(4), (c)(1).
[61] *Id.* § 3730(c)(2)(A).

it wants before an answer or summary-judgment motion has been served.[62] Thus, the only practical way that a *qui tam* action can proceed into litigation is if the government decides not to intervene, and also decides not to dismiss it. The upshot is that FCA actions do not proceed without the government's effective approval. Either the government will be the party conducting the action, or it will permit the relator's action to go forward. But the key point is that the executive branch alone decides whether or not a case will proceed into litigation.

That ought to end the inquiry because it makes clear that the *qui tam* provisions do not take any power from the executive branch; they only give the government extra information and options. But there is more. The executive branch's control persists even after the government permits the relator to proceed. Thus, the case may not be settled or dismissed without the Attorney General's consent.[63] The government may seek to restrict the relator's discovery if it would interfere with a criminal investigation or prosecution by the government.[64] And the government may belatedly intervene for "good cause,"[65] at which point it can settle the action,[66] pursue the allegations in an alternative forum,[67] or even seek to dismiss

[62] *Polansky*, 599 U.S. at 435-36.
[63] 31 U.S.C. § 3730(b)(1).
[64] *Id.* § 3730(c)(4).
[65] *Id.* § 3730(c)(3).
[66] *Id.* § 3730(c)(2)(B).
[67] *Id.* § 3730(c)(5).

the action, which will be permitted if the government credibly contends that the action is not in the interests of the United States.[68]

As a practical matter, the government's powers are even broader than that. It is commonplace, for example, for the government to partially intervene in *qui tam* actions, taking over some claims while leaving others to the side. The government's dismissal power is also not all-or-nothing; instead, the government's greater power to dismiss an entire *qui tam* action encompasses the lesser power to dismiss some claims and not others.[69] In other words, the executive branch's supervisory powers are both broad and flexible.

These considerations show how contrived defendants' challenge truly is. Defendants have no legitimate argument against private parties suing to enforce federal law. They have no answer to the relator's role as an assignee. And they have no principled explanation for why a statute that enhances the executive branch's ability to enforce the law should be regarded as a usurpation of executive power. All they really have is a problem with the *form* of these actions. That is not enough.

---

[68] *Polansky*, 599 U.S. at 437.

[69] *Juliano v. Fed. Asset Disposition Ass'n (FADA)*, 736 F. Supp. 348, 351 (D.D.C. 1990) ("The Act nowhere states that federal prosecutors are confined to proceed in an all or nothing manner, being forced to take or leave the qui tam plaintiff's charges wholesale."), *aff'd* 959 F.2d 1101 (D.C. Cir. 1992).

B. The FCA's *Qui Tam* Provisions Do Not Violate the Vesting or Take Care Clauses.

The *qui tam* provisions do not violate the Vesting or the Take Care Clauses because, for the reasons explained above, they neither vest executive power in private hands nor inhibit the executive branch from enforcing (or declining to enforce) the law as it sees fit. Prior to 1986, the FCA did not permit the government to intervene and assume responsibility for the case, nor provide dismissal authority. Nevertheless, there were no doubts about the Act's constitutionality from 1863 until then. Since 1986, the executive branch's control over FCA cases has only increased.

Contrary to defendants' suggestion that *Morrison v. Olson,*[70] supports their position, the circuit courts have unanimously concluded that *Morrison* supports the constitutionality of the *qui tam* provisions because, taken as a whole, the *qui tam* provisions interfere far less with the executive branch's prerogatives than the independent counsel provisions did.[71] Courts have declined to treat the features of the statute in *Morrison* as a checklist of mandatory requirements. Thus, even though the FCA does not permit the executive branch to control initiation of a case, courts

[70] 487 U.S. 654 (1988).

[71] *See Riley*, 252 F.3d at 754; *Kelly*, 9 F.3d at 752; *Kreindler & Kreindler*, 985 F.2d at 1155; *see also* Peter Shane, *Returning Separation-of-Powers Analysis to Its Normative Roots: The Constitutionality of Qui Tam Actions and Other Private Suits to Enforce Civil Fines*, 30 Env't. L. Rep. 11,081 (Dec. 2000); Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 Yale L.J. 341, 364-66 (1989); Bret Boyce, *The Constitutionality of the Qui Tam Provisions of the False Claims Act Under Article II*, 24 False Claims Act and Qui Tam Q.Rev. 10 (Oct. 2001).

have not found this distinction significant. The independent counsel statute delegated authority for criminal prosecutions of the President's closest advisors, whereas the *qui tam* provisions authorize only representation in civil fraud cases. And while the government cannot control the initiation of a *qui tam* suit, once an action has begun, "the government has greater authority to limit the conduct of the prosecutor and ultimately end the litigation in a *qui tam* action than it [had] in an independent counsel's action."[72]

In contrast, under the independent counsel statute, the Attorney General had no authority to terminate a particular investigation early.[73] Although the Attorney General could remove a particular independent counsel upon a showing of "good cause," subject to judicial review, such a removal would not end the investigation because another counsel could be appointed.[74] Here, by contrast, the government can effectively replace the relator by taking over the action—or it can dismiss the action altogether. "[B]ecause the Executive Branch has power . . . to end *qui tam* litigation, it is not significant that it cannot prevent its start."[75]

More broadly, for the reasons explained *supra*, the *qui tam* provisions neither vest executive power in the hands of relators, nor inhibit the executive branch's

[72] *Kelly*, 9 F.3d at 754.
[73] 28 U.S.C. § 596(b)(2).
[74] 28 U.S.C. § 593(e).
[75] *Kelly*, 9 F.3d at 754.

ability to enforce the law. Instead, they empower the executive to enforce the law more effectively and flexibly.

C. The FCA's *Qui Tam* Provisions Do Not Violate the Appointments Clause.

The Appointments Clause requires that officers of the United States be appointed by the President or the President's appointees.[76] As numerous courts have recognized, relators do not possess the traditional hallmarks of office, such as tenure, salary and continuing duties.[77] The relator's temporary *ad hoc* relationship with the government has never been thought to create the position of officer of the United States.[78] Because relators are not officers of the United States, the Appointments Clause does not apply to them.

Defendants do not argue otherwise; instead, they argue that because relators *function* as officers, they must be treated as such. In support, defendants cite *Buckley v. Valeo,*[79] which is clearly inapposite. *Buckley* held that Congress could not appoint members of the Federal Election Commission. The commissioners in *Buckley*, in addition to being appointed by Congress, were salaried employees, occupying

---

[76] *See* U.S. Const. art. II, § 2, cl. 2.
[77] *Riley*, 252 F.3d at 757- 58; *Gen. Elec. Co*., 41 F.3d at 1041; *Kelly*, 9 F.3d at 759; *Stone*, 282 F.3d at 805.
[78] *See*, *e.g.*, *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935) (recognizing that independent agency, with authority to bring cases to prevent unfair competition, was not subject to control by the executive).
[79] 424 U.S. 1 (1976).

tenured positions, with ongoing responsibility over the administration of the Federal Election Campaign Act. They had all the hallmarks of officers, as well as "wide-ranging rulemaking and enforcement powers."[80] Among these, they could bring lawsuits to enforce the statute—many of which "[i]n no respect . . . require[d] the concurrence of or participation by the Attorney General."[81] Against this backdrop, the Court concluded that the provisions enabling Commissioners to sue violated the Appointments Clause.[82]

Buckley was not about *qui tam* relators, whose roles are far more limited than FEC commissioners,[83] and *Buckley* did not consider the specific historic considerations underlying *qui tam* statutes—nor the substantial role the executive branch plays in every FCA action. For those reasons, courts have uniformly held that *Buckley* does not pose any problem for FCA actions.

The executive branch agrees. In a Memorandum Opinion, the Office of Legal Counsel explained that "lower federal courts have been correct in rejecting Appointments Clause challenges to the exercise of federally derived authority by . . .

[80] *Id*. at 118.
[81] *Id*. at 111.
[82] *Id*. at 140.
[83] *Qui tam* relators are also unlike the director of the Consumer Financial Protection Bureau, who "wield[ed] vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U.S. economy." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020).

qui tam relators under the False Claims Act."[84] That is because, under *Buckley*—as well as the precedents cited therein and decided after—the Appointments Clause applies only to employees of the federal government; it "simply is not implicated when significant authority is devolved upon non-federal actors."[85]

Defendants' argument to the contrary has scary implications not only for *qui tam* relators, but for federal contracting across the board. If defendants were correct that private parties can never exercise executive power, a slew of government contracts would be unconstitutional. Contractors perform key executive duties, including fighting alongside our military, securing our borders, collecting and parsing sensitive intelligence, supplying mission-critical technology, building and maintaining infrastructure, and administering the Medicare program, for a start. Those duties are just as central to executive power as litigating civil actions. Defendants' position, taken to its logical conclusion, would upend modern government as we know it because none of those arrangements would survive defendants' reading of *Buckley*.

CONCLUSION

The Court should deny Defendants' motion.

---

[84] Walter Dellinger, *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. OLC 124, 146 (1996).
[85] *Id*. at 145.

Respectfully submitted,

February 11, 2025

The Anti-Fraud Coalition

/s/*Allison P. Sullivan*
Allison P. Sullivan (SC Fed. Id. No. 10480)
Bluestein Attorneys
PO Box 7965
Columbia, SC 29202
Telephone: 803-779-7599
Email: allison@bluesteinattorneys.com

Jacklyn DeMar, DC Bar No. 998370
(*pro hac vice* forthcoming)
The Anti-Fraud Coalition
1220 19th Street, N.W.
Suite 501
Washington, DC 20036
Telephone: 202-296-4826
Email: jdemar@taf.org