

No. 25-10842

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

UNITED STATES *ex rel.* CHERYL TAYLOR,
Appellee / Cross-Appellant,

UNITED STATES OF AMERICA
Intervenor-Appellee / Cross-Appellee

v.

HEALTHCAREASSOCIATES OF TEXAS, LLC,
Defendant / Appellant / Cross-Appellant.

On Appeal from the United States District Court
for the Northern District of Texas
No: 3:19-cv-2486 (Hon. David C. Godbey)

**BRIEF OF *AMICUS CURIAE* THE ANTI-FRAUD COALITION IN
SUPPORT OF APPELLEE / CROSS-APPELLANT CHERYL TAYLOR**

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United States ex rel. Cheryl Taylor v. Healthcare Associates of Texas, LLC,
No. 25-10842

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Fifth Circuit Rule 26.1.1, *amicus curiae* The Anti-Fraud Coalition through its undersigned counsel certifies that it is a 501(c)(3) nonprofit corporation that has no parent company and no person or entity owns any part of it.

Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

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INTEREST OF *AMICUS CURIAE*

Amicus curiae The Anti-Fraud Coalition (“TAF Coalition”) is a non-profit public interest organization dedicated to combating fraud against the government and protecting public resources through public-private partnerships. TAF Coalition is committed to preserving effective antifraud legislation at the federal and state levels. TAF Coalition educates the public and the legal community about the *qui tam* provisions of the False Claims Act (“FCA”), 31 U.S.C. §§ 3729-3733, and provides testimony to Congress about ways to improve the FCA. It regularly participates in litigation as *amicus curiae*, and has defended the FCA against challenges to its constitutionality in federal district courts, courts of appeals, and the Supreme Court.

TAF Coalition is supported by *qui tam* relators and their counsel, by membership dues and fees, and by private donations. TAF Coalition is the 501(c)(3) arm of Taxpayers Against Fraud, which was founded in 1986. TAF Coalition has more than 400 members who, in partnership with the Department of Justice and state attorneys general, have represented whistleblowers in *qui tam* matters that have generated tens of billions of dollars in public recoveries. This brief draws on TAF Coalition’s unparalleled experience in the development of FCA practice over the past four decades to illustrate why relators do not exercise government power but

rather use their own resources to support the government’s fight against fraud, subject to government control.¹

STATEMENT OF THE ISSUES

This brief addresses whether the district court correctly concluded, consistent with this Circuit’s precedent, that the *qui tam* provisions of the False Claims Act do not violate Article II of the Constitution. TAF Coalition does not separately address whether the district court erred in concluding that the Excessive Fines Clause limits the amount of civil penalties in this case and instead adopts the arguments of the United States on that issue.

SUMMARY OF THE ARGUMENT

As this Court has already concluded in *Riley v. St. Luke’s Episcopal Hosp.*, 252 F.3d 749, 752-53 (5th Cir. 2001) (*en banc*), the *qui tam* provisions of the False Claims Act do not violate Article II of the Constitution. Article II’s Appointments Clause provides that “Officers of the United States” must be appointed by the President or persons under the President. U.S. Const., art. II, § 2, cl. 2. Among other things, this provision ensures that persons who exercise significant executive power are “accountable to the President, whose authority they wield.” *Seila Law LLC v.*

¹ The parties have consented to the filing of this brief. No party or their counsel contributed to this brief and no person other than *amicus curiae*, its members, or its counsel contributed to this brief.

Fin. Prot. Bureau, 591 U.S. 197, 213 (2020). In addition to the exercise of significant authority, the hallmarks of holding office are “tenure, duration, emolument, and duties,” with the latter being “continuing and permanent, not occasional or temporary.” *United States v. Germaine*, 99 U.S. 508, 511-12 (1878); *United States v. Maurice*, 26 F.Cas. 1211, 1214 (C.C.D.Va.1823) (No. 15,747) (defining officer as someone in “a public charge or employment” who performed a “continuing” duty). Two other clauses of Article II also address executive power allocation. The Vesting Clause provides that executive power “shall be vested in a President of the United States.” U.S. Const., art. II, § 1, and the Take Care Clause provides that the President “shall take Care that the Laws be faithfully executed.” *Id.* § 3.

The Appellant’s argument that the FCA’s *qui tam* provisions violate Article II rests on the fallacies that: (1) relators exercise significant executive power; and (2) that a relator also occupies a “continuing position” and must be appointed in accordance with the Appointments Clause. Although the history of *qui tam* actions, which existed before and at the founding of the Nation, should be “well nigh conclusive” on the Article II issues Appellant presents,² the past four decades of

² See *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 776-77 (2000) (finding history highly relevant to the conclusion that *qui tam* provisions comport with Article I); see also *id.* at 789, 801 (Stevens, J., dissenting) (contending the same history “is also sufficient to resolve the Article II question”);
[Footnote Text Cont’d on Next Page]

experience under the FCA confirms what this and nearly every other court has concluded: a relator does not exercise executive power, let alone significant power, and does not occupy an office but rather is merely a private actor pursuing an individual lawsuit on their own behalf, which if successful would also benefit the government.

The text and structure of the FCA confirm that at any stage – from filing to resolution of a *qui tam* case – a relator does not exercise executive power and lacks the powers and prerogatives of government officers. That a relator’s efforts benefit the government does not transform their actions into the exercise of executive power.

The practical reality of *qui tam* litigation confirms this understanding. The history of the implementation of the FCA over the past four decades illustrates the many ways in which a relator has no greater, and sometimes less, power than an ordinary litigant and does not exercise executive power or infringe on the Executive’s functions.

Experience implementing the FCA also illustrates that relators do not possess any of the other hallmarks of holding federal office. They have no duties, continuing

Riley, 252 F.3d at 752-53 (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” and noting that while not definitive, history is a “touchstone illuminating” the constitutional issues).

or otherwise. A relator may choose to bring a single case based on the relator's own information, and if a relator dismisses the case, no other private person may take the relator's place. A relator uses their own resources, at great personal risk, with only a prospect of a reward. This arrangement, which resembles no other federal office, does not implicate the Appointments Clause.

ARGUMENT

I. FALSE CLAIMS ACT *QUI TAM* RELATORS ARE PRIVATE INDIVIDUALS ACTING ON THEIR OWN BEHALF AND FOR THE BENEFIT OF THE GOVERNMENT AND DO NOT EXERCISE GOVERNMENT POWER

Every appellate court, including this one, that has considered the issue has concluded that the False Claim Act does not violate Article II.³ And every district court, save one, has reached the same conclusion.⁴ In addition to the historical

³ *Riley*, 252 F.3d 749; *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994); *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148 (2d Cir. 1993); *United States ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787 (10th Cir. 2002); *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032 (6th Cir. 1994). *See also United States ex rel. Montcrief v. Peripheral Vascular Associates, P.C.*, 133 F.4th 395, 403, n.3 (5th Cir. 2025) (declining to consider whether *qui tam* provisions violate Article II as that issue is foreclosed by the court's decision in *Riley*).

⁴ *See, e.g., 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. Wallace v. Exactech*, 703 F. Supp. 3d 1356 (N.D. Ala. 2023); *United States ex rel. Butler v. Shikara*, 748 F.Supp.3d 1277, 1295-97 (S.D. Fla. 2024); *United States ex rel. Gomez v. Koman Constr., LLC*, 706 F.Supp.3d 353, 385 (W.D. Tex 2025) (arguments foreclosed by binding Fifth Circuit precedent); *United States ex rel. Heath v. Wisconsin Bell, Inc.*,
[Footnote Text Cont'd on Next Page]

pedigree of *qui tam* actions, the rationale for this near universal view is that the text and structure of the FCA make clear that a relator is a private individual acting on their own behalf and does not exercise executive power. The decision of a single district court and some dissenting opinions provide neither persuasive reasons to reject this tide, nor warrant revisiting this Court's *en banc* decision in *Riley*. The experience of courts and parties litigating *qui tam* cases over the past four decades confirms the common sense understanding adopted by the overwhelming number of courts that have addressed these issues.

808 F.Supp.3d 917, 934-35 (E.D. Wisc. 2025); *United States ex rel. Gonite v. UnitedHealthcare of Georgia*, 785 F.Supp.3d 1325, 1335-36 (M.D. Ga. 2025); *United States ex rel. Stenson v. Radiology Ltd., LLC*, No. cv-19-00306-TUC-JGZ, 2025 WL1785266 (D. Az. June 27, 2025) (arguments foreclosed by binding Ninth Circuit precedent); *Proctor v. Wound Care Mgmt., LLC*, Civil Action No: 18-4234, 2025 WL 2444133, at **2-3 (E.D. La. Aug. 25, 2025); *United States ex rel. McCullough v. Anthem Ins. Cos, Inc.*, No.1:21-CV-00325-TWP-TAB, 2025 WL 2782576, at **15-16 (S.D. Ind. Sept. 30, 2025); *United States v. JP Pharma, LLC*, No. 7:19-cv-839, 2025 WL 3640892, at **22-26 (W.D. Va. Dec. 16, 2025); *Mayer v. ADCS Clinics, LLC*, No. 21-cv-5303, 2026 WL 369912 (E.D. Pa. Feb. 10, 2026); *United States ex rel. Shepherd v. Fluor Corp.*, Case No.: 6:13-cv-02428-JD, 2026 WL 97279 (D.S.C. Jan. 14, 2026); *United States ex rel. Souza v. Embrace Home Loans, Inc.*, 808 F. Supp. 3d 314 (D.R.I. 2025); *United States ex rel. Shahbavian v. TriHealth, Inc.*, Case No. 1:20-cv-67, 2025 WL 2108197 (S.D. Ohio July 28, 2025), *petitions for permission to appeal denied*, No. 25-0306/0307 (6th Cir. Jan. 9, 2026) (circuit precedent binding).

A. THE TEXT AND STRUCTURE OF THE FALSE CLAIMS ACT CONFIRMS THAT RELATORS ARE PRIVATE ACTORS PURSUING THEIR INDIVIDUAL CASES ON THEIR OWN BEHALF

The FCA provides that “[a] person may bring a civil action [for a violation of the FCA] *for the person and* for the United States Government.” 31 U.S.C. § 3730(b)(1) (“Actions by private persons”) (emphasis added). This is the same structure that existed when the FCA was first enacted in 1863: “Such suit may be brought and carried on by any person, *as well for himself* as for the United States.” Act of Mar. 2, 1863, ch. 67, § 4, 12 Stat. 696, 698 (1863) (emphasis added). The FCA has always provided an award for a successful relator, paid out of the proceeds of the action. Yet it has also always provided that the case is brought “at the sole cost and charge of such person” and the person has no claim against the United States for those costs. *Id.* at ch. 67, §§ 4, 6, 12 Stat. 696, 698; 31 U.S.C. § 3730(f) (“The Government is not liable for expenses which a person incurs in bringing an action under this section.”).

Consistent with the Act’s text, the Supreme Court has recognized that FCA *qui tam* relators are private individuals pursuing a private lawsuit, brought on the relator’s own behalf, but also for the government’s benefit. *United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 425 (2023) (“a *qui tam* suit is, as the statute puts it, ‘for’ both the relator and the Government”) (quoting 31 U.S.C. § 3730(b)(1)); *State Farm Fire and Cas. Co. v. United States ex rel. Rigsby*, 580

U.S. 26, 29 (2016) (“This system is designed to benefit both the relator and the Government.”). “Although [the FCA] explains that the action is brought ‘for the person and for the United States Government’ and ‘in the name of the Government,’ . . . it does not make the relator anything other than a private person” *Cochise Consultancy v. United States ex rel. Hunt*, 587 U.S. 262, 272 (2019); *see also United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 931-32, 937 (2009) (holding that relators who bring “[a] private enforcement action under the FCA” are not subject to the more generous time frame for appeal that Fed. R. App. P. 4(a)(1)(B) provides when “the United States or its officer or agency is a party”); *Stevens*, 529 U.S. at 787 (FCA does not authorize suit by a private *qui tam* relator against a State).

The Supreme Court has described this relationship as one of assignor/assignee, with the FCA granting a relator “a partial assignment of the Government’s own damages claim.” *Polansky*, 599 U.S. at 425 (quoting *Stevens*, 529 U.S. at 773). Although an assignee pursues a claim for the benefit of the assignor, “when there has been . . . a partial assignment the assignor and the assignee each retain an interest in the claim and are both real parties in interest.” 6A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 1545, pp. 351–353 (2d ed.1990), *cited in Eisenstein*, 556 U.S. at 934; *see also United States ex rel. Neher v. NEC Corp.*, 11 F.3d 136, 138 (11th Cir. 1993)

(characterizing FCA *qui tam* provisions as also remedying harm to the relator, noting emotional and financial strain on them).

“The statutory framework confirms the government’s control over *qui tam* litigation.” *Vanderlan v. United States*, 135 F. 4th 257, 263 (5th Cir. 2025). Thus, when the government intervenes in a *qui tam* case and exercises “primary responsibility” for the case, the relator continues as a separate and distinct party, subject to the FCA provisions allowing for government control. 31 U.S.C. § 3730(b)(2), 31 U.S.C. § 3730(c)(1); *see also United States v. Triple Canopy, Inc.*, 775 F.3d 628, 638 (4th Cir. 2015) (reversing dismissal of relator as party in intervened case). Dismissal of the relator for a jurisdictional defect does not impede the government’s ability, as a separate party, to proceed with the case. *See Rockwell Int’l v. United States*, 549 U.S.457, 478 (2007). And when the government declines to intervene in a *qui tam* case, the relator continues as a private party, subject to the government’s control. 31 U.S.C. § 3730(c)(2); *see also Polansky*, 599 U.S. at 425-26; *Vanderlan*, 135 F.4th at 263. While the relator has the ability to continue the case when the government declines to intervene, and the relator’s success benefits the government, the relator does not speak for the government, which is entitled to copies of all pleadings and transcripts, 31 U.S.C. § 3730(c)(3), and can submit its

own statement of its views.⁵ The government may also pursue alternative remedies, such as administrative proceedings. *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 306 (5th Cir. 1999). Although courts occasionally refer to a relator as acting on the government’s “behalf,” the loose use of that term does not mean the relator literally represents the government, as statutory constraints and implementation of the FCA make clear.

B. PRACTICAL EXPERIENCE WITH THE FALSE CLAIMS ACT OVER THE PAST FOUR DECADES CONFIRMS THAT PRIVATE RELATORS DO NOT POSSESS OR EXERCISE EXECUTIVE POWER

The past four decades of experience with the False Claims Act demonstrates that throughout the life of a *qui tam* case a relator does not possess or exercise executive power, let alone significant executive power that can be exercised only by an officer appointed pursuant to the Appointments Clause.

1. After Initiation of a *Qui Tam* Case, a Relator Lacks Control Over the Timing and Pace of the Investigation

To initiate a *qui tam* action, a relator files a complaint under seal, serves it on the government, as the FCA requires, 31 U.S.C. § 3730(b)(2), and then waits. The Department of Justice chooses whether and when to interview the relator, whether

⁵ “The United States regularly files *amicus* briefs in the Fifth Circuit in declined FCA *qui tam* actions.” *United States ex rel. Thompson v. Apollo Path, LLC*, Civil Action No. 3:20-CV-2917-D, 2025 WL 256979, at *3 (N.D. Tex., Jan. 21, 2025) (citing cases).

and when to contact other witnesses and which ones, whether and when to seek documents and which ones, and what approach to take with a particular defendant. A relator cannot issue a civil investigative demand, 31 U.S.C. § 3733 (authorizing the Attorney General to issue a CID for information relevant to an FCA investigation),⁶ or compel the government to do so. *Lovoi v. U.S. Dept. of Just.*, 679 F. Supp. 2d 12, 14 (D.D.C. 2010) (an agency cannot be compelled to perform discretionary acts). Moreover, the Department of Justice typically requests that the relator not independently investigate the case once it is initiated. Although the government may share documents with a relator, the relator must agree to the government's terms, which are spelled out in a common interest agreement between the United States and relator. *See, e.g., Schaefer v. Fam. Med. Ctrs. of S.C.*, C/A No. 3:18-cv-02775-MBS, 2019 WL 5893632, at *1 (D.S.C. Aug. 5, 2019). Such agreements provide, among other things that:

Government Disclosed Information is the property of the United States and may only be used in the investigation of this case. Before Relator can give any other person or entity access to Government Disclosed Information, (a) Relator must obtain the written consent from DOJ counsel, which consent DOJ counsel can refuse or otherwise not give for any reason in DOJ counsel's sole discretion...

The Government expressly reserves the right to seek dismissal under 31 U.S.C. § 3730(e)(4) or any other legally applicable ground, in the event Relator, or any

⁶ *Compare Seila Law*, 591 U.S. at 206 (ALJ's powers include supervising discovery and issuing, revoking, or modifying subpoenas).

other person or entity, uses Government Disclosed Information to add new claims or defendants to the action, pursue any other False Claims Act action, or assist anyone else to file or pursue a False Claims Act action.

See Mot. to Quash Subpoena Duces Tecum by United States, Ex. F at 1-2, *Schaefer v. Fam. Med. Ctrs. of S.C.*, C/A No. 3:18-cv-02775-MBS (D.S.C. Apr. 8, 2019), ECF No. 129-6 (typical common interest agreement between government and relator). The government is also not required to keep the relator informed about the investigation. While involving the relator will often be in the best interests of the case, and the FCA contemplates that the government will benefit from working together with the private sector, S.Rep. No. 99-345, at 7-8 (1986), the relator cannot compel the government to accept the help or to do work for the relator. *See, e.g., United States ex rel. Carver v. Physicians Pain Specialists of Ala., P.C.*, No. 22-13608, 2023 WL 4853328, at *7 (11th Cir. July 31, 2023) (affirming grant of government dismissal motion where relator failed to take steps to pursue a judgment and “sought to have the United States do her work for her”).

A relator can neither seek, nor block, extensions of the seal while the case is under investigation and is not entitled to the government’s *ex parte* submissions to the court in support of an extension. 31 U.S.C. § 3730(b)(2) (denying relator motion to unseal government *ex parte* filings where government’s interests outweighed relator’s). While a relator can oppose a seal extension, and a court may consider the relator’s concerns, “the seal requirement was intended in main to protect the

Government's interests." *State Farm*, 580 U.S. at 34-35. Indeed, the government may seek sanctions against a relator where the relator's violation of the seal harms the government's interests. *See, e.g., United States ex rel. Bibby v. Wells Fargo Home Mortg., Inc.*, 76 F. Supp. 3d 1399 (N.D. Ga. 2015) (imposing monetary sanction for seal breach).

2. If the Government Proceeds With a *Qui Tam* Case, a Relator Continues as a Party, But Does so as a Private Actor Without Government Power and Subject to Government Control

If the government intervenes in the case, the relator can continue as a separate party, represented by private counsel, but is subject to government control. *Yates v. Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1311 (11th Cir. 2021). The government has "primary responsibility" for the litigation, "shall not be bound" by acts of the relator, and may request that the court limit the relator's involvement if it interferes with or unduly delays the government's prosecution of the case. *See* 31 U.S.C. §§ 3730(c)(1); *see, e.g., United States ex rel. Mei Ling v. City of Los Angeles*, No. CV 11-974 PSG (JCx), 2020 WL 6150931 (C.D. Cal. June 20, 2022) (granting government's motion to restrict relator participation). While the government and the relator ideally work in partnership, only one half of the partnership speaks for the government, exercises government powers, or commands government resources.

3. If the Government Declines to Intervene, a Relator May Proceed, But Does so as a Private Actor Without Government Power and Subject to Government Control

When the government declines to intervene, a relator has primary responsibility for the case, 31 U.S.C. § 3730(c), which the United States allows through its election. *Yates*, 21 F.4th at 1310. When the relator proceeds without the government, they do so as a private litigant without government powers and with constraints that do not apply to other private litigants.

As an initial matter, a relator who is an individual cannot appear pro se and must be represented by an attorney. *United States ex rel. Feliciano v. Ardoin*, 127 F.4th 382, 384 (D.C. Cir. 2025) (joining “every other court of appeals to have addressed the question in holding that relator claims under the False Claims Act cannot proceed pro se.”); *see also Jones v. Park at Lakeside Apartments*, Civ. A. No. H-08-0001, 2008 WL 4820083, at *2 (S.D. Tex. Nov. 5, 2008) (“a *pro se* relator cannot prosecute a *qui tam* action”). The lawyers who represent relators are private attorneys, who are not paid by the government,⁷ have no government resources,⁸ and

⁷ A successful relator is entitled to attorney fees and expenses, which are paid by the defendant, not the government. 31 U.S.C. § 3730(d).

⁸ Relators fund their own litigation expenses, which can be substantial, are only recovered when the relator prevails, and even then may not be fully recovered. *See, e.g., United States ex rel. Rigsby v. State Farm and Cas. Co.*, Civil No. 1:06CV433-HSO-RHW, 2014 WL 691500 (S.D. Miss. Feb. 21, 2014).

do not represent the United States.⁹

A relator's authority to pursue a case is limited. A relator may pursue only the government claims the FCA authorizes, 31 U.S.C. § 3730(b)(1), and may not add or pursue government common law claims or contract claims. *United States v. Gonzalez v. Fresenius Medical Care North America*, No. EP-07-CV-247-PRM, 2008 WL 4277150, at *8 (W.D. Tex. Sept. 2, 2008).

The FCA also imposes other limits on the relator's ability to pursue a case. *State Farm*, 580 U.S. at 29-30. A relator's case can be barred by the public disclosure of substantially similar allegations through statutorily specified channels. 31 U.S.C. § 3730(e)(4); *United States ex rel. Schweizer v. Canon, Inc.*, 9 F.4th 269 (5th Cir. 2021). Although the government may exercise a veto and allow the case to proceed notwithstanding that the public disclosure bar could otherwise preclude it, 31 U.S.C. § 3730(e)(4), a relator cannot compel the government to exercise this authority. *See Schweizer*, 9 F.4th at 274 (government objected to dismissal on one ground but did take a position on dismissal on public disclosure grounds).

Other limitations on a relator's ability to pursue a case include the FCA's "first to file" bar, which precludes a private person from bringing a *qui tam* case based on

⁹ Special rules that apply to government attorneys do not apply to relators' counsel. *See, e.g.*, Fifth Circuit Rule 46.1, Admission and Fees (providing that an attorney "appearing on behalf of the United States" need not pay the admission fee); Fed. R. App. P. 29(a)(2) (providing that the United States may file an amicus brief without consent of the parties or leave of court).

facts underlying a pending *qui tam* case. 31 U.S.C. § 3730(c)(5); *United States ex rel. Branch Consultants v. Allstate Insurance Co.*, 560 F.3d 371, 378 (5th Cir. 2009). A *qui tam* action is also barred if the government is already pursuing the allegations. 31 U.S.C. § 3730(e)(3) (“government action” bar). The government may also elect to pursue its remedies through alternative enforcement mechanisms. 31 U.S.C. § 3730(c)(5); *United States ex rel. Babalola v. Sharma*, 746 F.3d 157, 163 (5th Cir. 2014).

While the FCA limits the relator’s authority, it also does not provide relators any powers that are greater than those of other private litigants. For example, with respect to discovery, a relator has no greater ability to compel access to government documents or testimony than any other private litigant. Like other private litigants, a relator must submit a “Touhy” request to the appropriate government agency. *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951); *see, e.g.*, 45 C.F.R. § 2.1, *et seq.* (rules for when government documents or testimony are sought from an employee or former employee of the Department of Health and Human Services in litigation to which the government is not a party). If the government declines to provide the documents, the relator, like any other litigant, must sue to challenge the denial. *See, e.g., Schroeder v. U.S. Dep’t of Veterans Affairs*, 673 F. Supp. 3d 1204 (D. Kan. 2023).

At the same time, the relator may have no ability to enforce Touhy

requirements if the government chooses not to do so. Thus, for example, in *United States ex rel. Howard v. Caddell Constr. Co. Inc.*, No. 7:11-CV-270-H-KS, 2018 WL 2291300 (E.D.N.C. Feb. 23, 2018), the court held that the relator could not block the testimony of a former government employee that did not comply with Touhy regulations where the government did not object. The court explained that the FCA's limited grant of standing to a private relator does not make them a government official entitled to litigate the government's interests in managing its information. *Id.* at *3. *See also Medtronic Inc. v. U.S. Dep't of Veterans Affairs*, No. 23-2497-DDC-GEB, 2024 WL 3360500, at *3 (D. Kan. July 10, 2024) (finding relator had no legally protectable interest in whether the agency provided documents to the defendant).

A relator is subject to the same rules of procedure as other private litigants and not treated like the government in other respects as well. For example, if a relator dies while their case is pending, their estate must file a motion under Federal Rule of Civil Procedure 25 to substitute as the relator's personal representative. *Gose v. Native American Servs. Corp.*, 109 F.4th 1297, 1302, n.2 (11th Cir. 2024); *see also United States ex rel. Kennard v. Comstock Resources, Inc.*, Civil Action No. 9:98-CV-266-TH, 2009 WL 10709091, at *5 (E.D. Tex. Feb. 20, 2009) (citing cases). If a relator were a government officer, the new holder of the office would automatically be substituted as the party because the United States, not the particular

individual holding office, is the party. Fed. R. Civ. P. 25(d) (substitution on appeal).

As another example, when a defendant files for bankruptcy while the *qui tam* case is pending, the relator is treated as a private litigant, subject to the Bankruptcy Code's automatic stay of litigation once a bankruptcy petition is filed. There is an exception to the automatic stay "to enforce [a] governmental unit's ... police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's ... police or regulatory power." 11 U.S.C. § 362(b)(4); *see also* 11 U.S.C. § 101(27) (defining "governmental unit" as "United States ... department, agency, or instrumentality of the United States"). But courts have concluded that the exception does not apply to a relator in a declined case, who is not a governmental unit and brings a case on their own behalf. *See United States ex rel. Kolbeck v. Point Blank Sols., Inc.*, 444 B.R. 336 (E.D. Va. 2011). In *Kolbeck*, the court observed that this result was supported not only by the statutory language of both the Bankruptcy Code and the FCA, but also by the Bankruptcy Code's underlying policy of ensuring that debtors cannot "frustrat[e] necessary governmental functions by seeking refuge in bankruptcy court." *Id.* at 342 (citation omitted). That interest "is greatly diminished" where a relator proceeds without the government. *Id.* at 341-42. *See also In re Commonwealth Cos., Inc.*, 913 F.2d 518, 527 (8th Cir. 1990).

Likewise, in resolving a *qui tam* case, a relator does not exercise government powers and is subject to government control. A relator may not dismiss their case without the consent of the government and the court. 31 U.S.C. § 3730(b)(1). A court's dismissal of a *qui tam* case based on failure to meet the requirements of Fed. R. Civ. P. 9(b) is without prejudice to the United States, even if it is with prejudice to the relator. *United States ex rel. Williams v. Bell Helicopter Textron Inc.*, 417 F.3d 450, 455 (5th Cir. 2005). Although a dismissal on the merits may have *res judicata* effects, the government has the capacity to proceed with a *qui tam* case or dismiss it. *See supra*. The government may also intervene to appeal. *Eisenstein*, 556 U.S. at 931, n.2.¹⁰

The government may withhold consent to settlements reached between the defendant and a relator for any number of reasons. For example, even though the government is not a party to a non-intervened case, it insists on the inclusion of certain language in all settlement agreements to protect its own interests.¹¹

¹⁰ To the extent non-intervened cases create precedent under the substantive law, that does not differ from litigation under other laws that have both public and private enforcement. *See, e.g.*, 15 U.S.C. §§ 15, 15a (actions to enforce violations of antitrust law); 42 U.S.C. § 2000e-5(f) (actions to enforce law prohibiting employment discrimination).

¹¹ *See, e.g.*, Jonathan Cone, et al., Negotiating False Claims Act Settlements, WEST BRIEFING PAPERS, No. 14-3, Feb. 2014, available at <https://www.crowell.com/a/web/nj3Q1bkuuY5DU3niu6NwDP/4TtkHV/negotiating-false-claims-act-settlements.pdf> (discussing non-negotiable clause in False
[Footnote Text Cont'd on Next Page]

The government also has blocked settlements entered between defendants and relators that it considered collusive and intended to divert to private use money that should go to the Treasury. *See, e.g., United States v. Health Possibilities*, 207 F.3d 335, 344 (6th Cir. 2000). And the government has declined to provide a release of government claims when the defendant and relator have agreed to this as a condition of settlement and the government did not agree that that was in the interests of the United States. *See Searcy v. Phillips Electronics N. Am. Corp.*, 117 F.3d 154 (5th Cir. 1997) (vacating settlement order and voluntary dismissal by relator where government objected to breadth of release). And “[s]uch is the United States’ grip that, subject to court approval” it may even settle a non-intervened action over the objection of the relator. *Yates*, 21 F.4th at 1311 (citations omitted); *Riley*, 252 F.3d at 754.

Most fundamentally, the government has the ability to dismiss the case if it is contrary to the government’s policy interests. *Polansky*, 599 U.S. 419; *Riley*, 252 F.3d at 753; *Vanderlan*, 135 F.4th at 262 (“The government... retains the right to commandeer a relator’s case and, if it so chooses, dismiss it.”); *United States v. Eli Lilly and Co., Inc.*, 4 F.4th 255 (5th Cir. 2021) (affirming government dismissal of

Claims Act settlements); Danielle L. Trostorff, Unallowable Costs Under the False Claims Act: When to Hold and When Fold, COMPLIANCE TODAY (Healthcare Compliance Association), Vol. 10, No.5, May 2008, at 29, available at <https://www.bakerdonelson.com/files/Compliance-Volume-10.pdf>.

case over relator's objection). Although a court may review the government's motion to dismiss, the Supreme Court has directed that "[i]f the Government offers a reasonable argument for why the burdens of continued litigation outweigh its benefits, the court should grant the motion. And that is so even if the relator presents a credible assessment to the contrary." *Polansky*, 599 U.S. at 438; *see, e.g., Vanderlan*, 135 F.4th at 268.

Once there is a judgment, the relator has no greater ability than other private litigants to appeal it and is not treated as the United States. *Eisenstein*, 556 U.S. at 937 (relator may not benefit from expanded period of time for the United States to appeal). A relator also has no greater ability than other litigants to enforce a judgment. *See* Federal Debt Collection Procedure, 28 U.S.C.A. §§ 3001, 3202 (authorizing enforcement of judgment by United States). Any funds obtained through a settlement or judgment resolving violations of 31 U.S.C. § 3729 are sent directly to the government, which disburses the funds – a relator has no role in receiving and disbursing the government's money. *Compare Maurice*, 26 F. Cas. at 1214 (agent of fortifications exercised important government duties including disbursement of government funds).

That the relator does not represent the government is also demonstrated by their potential adversity at the conclusion of the case. The government and the relator may dispute the relator's right to a particular share of the proceeds of an

action or alternate remedy. *See, e.g., United States ex rel. Conyers v. Conyers*, 108 F.4th 351 (5th Cir. 2020); *see also, e.g., May v. United States*, No. 2023-1124, 2023 WL 3836088 (Fed. Cir. June 6, 2023) (rejecting relator effort to enforce claim against the United States).

Thus, while a relator may pursue a case if the government does not intervene and does not seek to dismiss the case, the relator does so without any of the powers or prerogatives of the executive branch and instead has only the powers of any private litigant, while being subject to greater limits than other private litigants.

II. A *QUI TAM* RELATOR HAS NONE OF THE OTHER HALLMARKS OF HOLDING OFFICE

In addition to the lack of executive power, an FCA relator possesses none of the other hallmarks of holding federal office. Although the Appellant contends that a relator holds a “continuing position” that is “established by law,” that framing does not align with the body of case law on the indices, in addition to exercising executive power, of holding office. *Lucia v. Sec. and Exch. Comm’n.*, 585 U.S. 237, 245 (2018) (citing *Germaine*, 99 U.S. at 511-12 (continuing duties); *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890) (continuing emolument); *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 115 (2007) (elements beyond delegated executive power and continuing duties are not essential but may provide evidence of whether an office exists under the two essential elements). An individual officer need not have all of these attributes, but a

relator does not have *any* of them. No federal office resembles the FCA's partial assignment to a private citizen.

A relator has *no* tenure or *any* duties, let alone continuing ones. A relator has no obligation "to investigate or prosecute a False Claims Act action." *Cochise Consultancy*, 587 U.S. at 272. Like other non-officers, "[t]here is no penalty for his absence from duty or refusal to perform, except his loss of the fee in the given case." *Germaine*, 99 U.S. at 512. And unlike an office, which is not dependent upon the individual occupying it, *United States v. Donziger*, 38 F.4th 290, 297 (2d Cir. 2022), if a relator elects to voluntarily dismiss their case, no other person is substituted in to carry on the case. The FCA would in many cases prohibit anyone from doing so. *See* 31 U.S.C. § 3730(e)(4) (public disclosure bar); 31 U.S.C. § 3730(c)(5) (first to file bar).

That a relator is merely a private person and holds no office, is also evidenced by the fact that a relator receives no regular or continuing payment for services. *Compare Germaine*, 99 U.S. at 512 (no regular appropriation was made to pay surgeon); *Auffmordt*, 137 U.S. at 327 (merchant appraiser is a "position is without... continuing emolument."). While a reward is offered as an incentive to encourage relators to step forward, the relator receives a reward only if the relator prevails. *King v. United States Government*, 878 F.3d 1265 (11th Cir. 2018) (dismissing

relator suit against government for money damages after his *qui tam* suit had been dismissed).

A relator receives no resources from the government to pursue a case, but instead must invest their own resources with no guarantee they will be reimbursed. And to the extent they are reimbursed, it is the defendant, not the government, that pays the relator. *See supra*, note 7. The relator is not provided office space, supplies, staff or any of the customary resources that often accompany an office and is not required to keep a “place of business for the public use”. *See Germaine*, 99 U.S. at 512. In contrast, examples of “temporary” officers are provided federal resources, in addition to having other hallmarks of office. For example a special prosecutor not only “wields ‘the power to employ the full machinery of the state,’” *Donziger*, 38 F.4th at 299 (citation omitted), they do so with substantial federal resources. *See* 28 C.F.R. § 600.5 (authorizing assignment of Department of Justice personnel to Special Counsel as well as hiring of additional staff); *id.* § 600.8(a) (providing that “[a] Special Counsel shall be provided all appropriate resources by the Department of Justice”); *see also Morrison v. Olsen*, 487 U.S. 654, 663 n.7 (1988) (independent counsel statute specified that the Department of Justice “shall pay all costs relating to the establishment and operation of any office of independent counsel.”). Not only is a relator not employed or otherwise supported by the government, but also a relator is often the employee of the very party accused of cheating the government. This

only highlights the absurdity of the notion that such a person must be a federal officer.

In addition to providing their own resources to pursue cases, relators take on great personal risk, without the immunities generally available to public officers. For example, relators are frequently subjected to counterclaims related to their reporting efforts. *See, e.g., Boundy v. Dolenz*, No. Civ.A. 3:96-CV-03010G, 2002 WL 31415998 (N.D. Tex. Oct. 21, 2002); *United States ex rel. Ruscher v. Omnicare, Inc.*, Civ Action No. 4:08-cv-3396, 2015 WL 5178074, **31-32 (S.D. Tex. Sept. 3, 2015). Although relators have some immunity, *see, e.g.,* 18 U.S.C. § 1833(b); *Siebert v. Gene Sec. Network, Inc.*, No. 11-cv-01987-JST, 2013 WL 5645309 (N.D. Cal. Oct. 16, 2013), it has not proven as protective as the immunity available to federal officeholders. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (federal officers performing discretionary functions have qualified immunity). Relators may also be liable for costs if they do not prevail. *See, e.g., United States ex rel. King v. Solvay Pharmaceuticals*, 871 F.3d 318 (5th Cir. 2017). Those amounts can be substantial for a private individual, and are not a personal exposure that a federal officer would have.

In summary, a relator possesses neither the powers nor other attributes of a federal officer. A relator is simply a private person, pursuing an individual case, at

their own expense and effort, with only the expectation of a reward if their efforts succeed in benefiting the government's fight against fraud. That law-enforcement arrangement, well-grounded in history and demonstrably protective of the government's prerogatives, does not violate Article II.

CONCLUSION

For the foregoing reasons, TAF Coalition urges the Court to affirm the district court's holding that the FCA's *qui tam* provisions do not violate Article II of the Constitution.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
(Fed. R. App. P. 29(a)(5); 32(a); & 32(g)(1))

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6497 words, excluding the parts of the document exempted under Fed. R. App. P. 32(f).

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Dated: March 30, 2026

/s/ Claire M. Sylvia
Claire M. Sylvia

Attorney for *Amicus Curiae* The Anti-Fraud
Coalition

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief for *amicus curiae* The Anti-Fraud Coalition with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on March 30, 2026. All participants in the case are registered CM/ECF users, and services will be accomplished by the appellate CM/ECF system.

Dated: March 30, 2026

/s/ Claire M. Sylvia
Claire M. Sylvia