Nos. 24-13581 & 24-13583

In the United States Court of Appeals for the Eleventh Circuit

UNITED STATES EX REL. CLARISSA ZAFIROV,
PLAINTIFF-APPELLANT

UNITED STATES OF AMERICA,
MOVANT-APPELLANT

v.

FLORIDA MEDICAL ASSOCIATES, LLC, D/B/A VIPCARE; PHYSICIAN PARTNERS, LLC; ANION TECHNOLOGIES, LLC; FREEDOM HEALTH, INC.; OPTIMUM HEALTHCARE, INC.,
DEFENDANTS-APPELLEES

PHYSICIAN PARTNERS SPECIALITY SERVICES, LLC, ET AL.,
DEFENDANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA (CIV. NO. 19-1236) (THE HONORABLE KATHRYN KIMBALL MIZELLE, J.)

SUPPLEMENTAL APPENDIX

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CLERK US DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,
ex rel. DR. CLARISSA ZAFIROV,

Plaintiffs,

v.

Case No.: 8:19-cv-1236-T-23SPF

FILED *EX PARTE*
AND UNDER SEAL

FLORIDA MEDICAL ASSOCIATES, LLC, *et al.*,

Defendants.
_____/

UNITED STATES' *EX PARTE* CONSENT APPLICATION FOR AN EXTENSION OF TIME TO CONSIDER ELECTION TO INTERVENE

Pursuant to the False Claims Act ("FCA"), as amended, 31 U.S.C. § 3730(b)(3), the United States of America hereby respectfully moves this Court for a sealed Order extending from July 22, 2019, to and including January 22, 2020, the time in which the government may notify the Court of its decision regarding intervention in this *qui tam* action, and during which time the Complaint and other filings in this case shall remain under seal[1]. The relator, through her counsel, has been advised of, and consents to, both the proposed enlargement of time as well as the proposed extension of the seal. A separate memorandum is filed in support of this motion.[2]

[1] The relator filed a motion to seal the record pursuant to 31 U.S.C. § 3730(b)(2) and Local Rule 1.09 (Doc. S-2), which the Court granted on May 23, 2019. (Doc. S-3). The Court's Order sealing this matter states the record is sealed "for a minimum of sixty days[.]" Though service of the complaint and disclosure statement was not perfected until July 10, 2019, the United States files this motion and supporting memorandum in accordance with the deadline established in the Court's May 23, 2019 Order.

[2] The United States is serving this motion upon the relator, but is not serving her with its supporting memorandum because that memorandum contains information concerning the government's

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Dated: July 22, 2019 By: s/
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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing sealed motion and proposed Order to be served on this day, July 22, 2019, via U.S. mail to the following counsel of record:

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investigation. Section 3730(b)(3) of the FCA permits the United States to submit such documents *in camera* when seeking extensions of time.

TAB 5

FILED

2019 JUL 22 PM 4:33

CLERK US DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,
ex rel. DR. CLARISSA ZAFIROV,

Plaintiffs,

v.

Case No.: 8:19-cv-1236-T-23SPF

FILED *EX PARTE*
AND UNDER SEAL

FLORIDA MEDICAL ASSOCIATES, LLC, *et al.*,

Defendants.
_____/

UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF ITS *EX PARTE* CONSENT APPLICATION FOR AN EXTENSION OF TIME TO CONSIDER ELECTION TO INTERVENE

The United States of America hereby respectfully submits this memorandum in support of its *ex parte* consent Application for an Order pursuant to the False Claims Act ("FCA"), as amended, 31 U.S.C. § 3730(b)(3), for a six-month extension of time – July 22, 2019, to and including January 22, 2020 – in which to notify the Court of its decision regarding intervention in this *qui tam* action, and during which time the complaint and all other filings in the action shall remain under seal. The relator, through her counsel, has advised that she consents to the requested extension of both the seal and the intervention deadlines.

I. Background

This *qui tam* action alleges the defendants are defrauding the Medicare Advantage ("MA") Program and violating the FCA by knowingly submitting and causing the submission of thousands of false claims, and the corresponding false statements and records,

and knowingly retained overpayments resulting from the submission of false diagnosis codes. *See* 31 U.S.C. § 3729 (a)(1)(A), (B), (G).

The relator's complaint identifies two categories of defendants: managed care entities ("MA Defendants") and the healthcare provider organizations who treat beneficiaries enrolled in the MA plans ("PO Defendants"). According to the relator, the PO Defendants, in order to increase their own per-member-per-month risk adjustment gain sharing payments from the MA Defendants, falsified patient diagnoses and then submitted false diagnosis codes to the MA Defendants. The MA Defendants, who knew or should have known of the PO Defendant's misconduct, in turn, submitted to CMS false and unsubstantiated diagnosis codes in order to fraudulently obtain higher capitation rates than they were entitled to receive.

II. Points and Authorities

The government has at least sixty days "after it receives both the complaint and the material evidence and information" to elect to intervene in the action. 31 U.S.C. § 3730(b)(2). Congress contemplated, however, that the government might require additional time within which to investigate *qui tam* actions and to decide whether to intervene, and that such extensions should be granted upon a showing of "good cause." The relevant portions of the Act provide:

> A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

> The Government may, for good cause shown, move the court for extensions of time during which the complaint remains under seal under [the preceding paragraph].

31 U.S.C. §§ 3730(b)(2) and (b)(3). Thus, the FCA provides for extensions of time to allow the government to complete its evaluation of the allegations contained in a *qui tam* complaint, and to reach an informed decision as to whether to intervene. The only requirement is that the government show good cause for the requested extension.

The United States respectfully submits that good cause exists here for the requested extension of both the seal and the intervention deadlines. Since the government's receipt of the relator's complaint, the government has assembled an investigative team to examine the merits of the relator's allegations. The government has also coordinated with relator's counsel to interview the relator in August 2019. Once the government completes that interview, it will require additional time to interview other potential witnesses as well as to secure those records and documentation that might shed further light on the merits of the relator's allegations.

III. Conclusion

For all of the above reasons, the United States respectfully requests that the Court grant the government's Application for a six-month extension of the seal and intervention deadlines in this matter. A proposed Order is submitted herewith for the Court's consideration.

Respectfully submitted,

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Dated: July 22, 2019

By: _____

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TAB 6

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNDER SEAL

UNITED STATES OF AMERICA
ex rel. CLARISSA ZAFIROV,

Plaintiff,

v. CASE NO. 8:19-cv-1236-T-23SPF

FLORIDA MEDICAL ASSOCIATES, LLC, *et al.*,

Defendants.
_____/

ORDER

The United States moves (Doc. S-4) unopposed to extend the time within which to decide whether to intervene. The motion (Doc. S-4) is **GRANTED**. No later than **JANUARY 22, 2020**, the United States must decide whether to intervene. This action remains under seal.

ORDERED in Tampa, Florida, on July 26, 2019.

STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

TAB 11

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

EX PARTE
UNDER SEAL

UNITED STATES OF AMERICA
ex rel. CLARISSA ZAFIROV,

Plaintiff,

v. CASE NO. 8:19-cv-1236-T-23SPF

FLORIDA MEDICAL ASSOCIATES,
et al.,

Defendants.
_____/

ORDER

A May 23, 2019 order (Doc. S-3) seals this action under the False Claims Act, and a July 26, 2019 order (Doc. S-6) grants the United States' motion to extend the intervention deadline by six months. The United States moves (Doc. S-9) unopposed to extend the intervention deadline by another six months. To support the request, the United States submits (Doc. S-10) an *in camera* memorandum — not served on the relator — that "contains information concerning the government's investigation." (Doc. S-9 at 1)

The False Claims Act grants a seal of sixty days and affords no right to, or expectation of, an indefinite seal. Although the United States' pursuit of an investigation in some circumstances might constitute the "good cause" necessary for

an extension, the *in camera* memorandum provides no basis for finding "good cause" for delay. The memorandum is entirely conclusional (that is, not based on facts) and fails to inform the reader about the progress of the United States' investigation, the efforts applied to conclude the investigation, the matters necessary to know — but remaining unknown — to permit the United States to decide whether to intervene, the steps the United States proposes to determine the unknown matters, and the schedule on which the United States proposes to complete these steps. The relator alleges a widespread, fraudulent scheme in which managed-care entities and healthcare providers act in concert to bilk the public fisc and otherwise injure the public. If true, the activity presents an ongoing and serious injury to the public.

The motion (Doc. S-9) is **DENIED**. No later than **FEBRUARY 21, 2020**, the United States must decide whether to intervene. The clerk is directed to mail a copy of this order (1) to counsel for the United States and (2) to counsel for the relator.

ORDERED in Tampa, Florida, on January 28, 2020.

STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

TAB 17

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNDER SEAL

UNITED STATES OF AMERICA
ex rel. CLARISSA ZAFIROV,

Plaintiff,

v. CASE NO. 8:19-cv-1236-T-23SPF

FLORIDA MEDICAL
ASSOCIATES, LLC, *et al.*,

Defendants.
_____/

ORDER

In this action under the False Claims Act, an order (Doc. S-11) permits the United States until February 21, 2020, to decide whether to intervene, and another order (Doc. S-13) grants the relator's motion to extend the seal. The United States timely announces (Doc. S-14) that the United States "is not intervening at this time."

Because other filings in this action reveal information about the status of a pending investigation, the United States moves (Doc. S-15) unopposed to file a redacted version of (1) the United States' motion (Doc. S-7) for a partial lifting of the seal and (2) the United States' memorandum (Doc. S-10) filed in support of the United States' motion for an extension of the intervention deadline. The United States appends to an *in camera* memorandum (Doc. S-16) a redacted version of each document.

The motion (Doc. S-15) is **GRANTED**, and the clerk is directed to file separately each of the redacted documents appended to the United States' *in camera* memorandum (Doc. S-16). On **JUNE 25, 2020**, the clerk must publish the docket sheet to CM/ECF and unseal each item except for Document S-16 and the unredacted versions of Document S-7 Document S-10. The clerk must e-mail a copy of this order to counsel for the United States and to counsel for the relator.

ORDERED in Tampa, Florida, on June 11, 2020.

STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

TAB 180

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA ex rel. DR. CLARISSA ZAFIROV,

Plaintiff,

-vs- CASE NO. 8:19-cv-1236-KKM-SPF

FLORIDA MEDICAL ASSOCIATES, LLC d/b/a VIPCARE, PHYSICIAN PARTNERS, LLC, ANION TECHNOLOGIES, LLC, FREEDOM HEALTH, INC., and OPTIMUM HEALTHCARE, INC.,

Defendants.
_____/

DEFENDANTS' JOINT MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

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Defendants hereby submit this Joint Motion for Judgment on the Pleadings or to Dismiss for Lack of Subject-Matter Jurisdiction. *See* Fed. R. Civ. P. 12(c), 12(b)(1).

INTRODUCTION

"[T]he 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'" *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2191 (2020) (quoting U.S. Const. art. II, § 1, cl. 1; *id.* § 3). The FCA's *qui tam* provisions violate that fundamental principle by empowering private citizens to initiate and conduct litigation on behalf of the United States. The Executive cannot control whether a relator files suit, determine the scope of the claims, require a relator to follow Department of Justice policy, or unilaterally remove a relator from the case. Relators instead exercise unilateral control within their spheres, interpreting the law in the first instance and policing compliance within every corner of the modern regulatory state.

The FCA also violates the Appointments Clause by permitting relators to wield power that only an "Officer of the United States" may wield, without satisfying the Constitution's appointment requirements for such Officers. The Supreme Court has held that "conducting civil litigation" to "vindicat[e] public rights" is a function that "may be discharged ***only*** by persons who are 'Officers of the United States.'" *Buckley v. Valeo*, 424 U.S. 1, 140 (1976) (per curiam) (emphasis added).

Last term, Justice Thomas observed that "there are substantial arguments that the *qui tam* device is inconsistent with Article II"—an observation with which Justice Kavanaugh and Justice Barrett agreed. *United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 449 (2023) (Thomas, J., dissenting); *id.* at 442 (Kavanaugh &

Barrett, JJ., concurring). The arguments are not merely substantial, they are correct. The Court should enter judgment on the pleadings for Defendants under Rule 12(c), or dismiss for lack of jurisdiction under Rule 12(b)(1).

BACKGROUND

I. Legal Background

The FCA "is unusual in authorizing private parties—known as relators—to sue on the Government's behalf" by initiating a *qui tam* action. *Polansky*, 599 U.S. at 423; *see* 31 U.S.C. § 3730(b)(1). When a relator files a *qui tam* suit, the Government has 60 days during which the case remains under seal, and during which the Government "may elect to intervene." *See* 31 U.S.C. § 3730(b)(2).

When (as here) the Government declines to intervene, the relator takes "the lead role" as "the only person then pressing the suit." *Polansky*, 599 U.S. at 423; 31 U.S.C. § 3730(c)(3). The relator's suit will have preclusive effect on the Government, *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 936 (2009), even though the Government retains only limited rights to participate,[1] and receives only partial proceeds from any judgment or settlement, 31 U.S.C. § 3730(d)(2). After initially declining intervention, the Government can later intervene to re-assert primary control over the litigation only by showing "good cause," and without limiting "the status and rights" of the relator. *Id.* § 3730(c)(3); *Polansky*, 599 U.S. at 433.

[1] The Government may, for instance, request to be served with copies of pleadings and deposition transcripts, 31 U.S.C. § 3730(c)(3), or move for a temporary discovery stay if it shows that the relator's efforts "would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts," *id.* § 3730(c)(4).

Even when the Government intervenes and takes "primary responsibility for prosecuting the action," the relator remains a party with the ability to participate. 31 U.S.C. § 3730(c)(1). The Government cannot dismiss the action without notifying the relator, and the court must provide her "with an opportunity for a hearing on the motion." *Id.* § 3730(c)(2)(A). The Government cannot settle the action over the relator's objection without establishing at a hearing that the "proposed settlement is fair, adequate, and reasonable under all the circumstances." *Id.* § 3730(c)(2)(B). And the Government cannot limit the relator's "unrestricted participation during the course of the litigation" without establishing that such participation "would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment," *id.* § 3730(c)(2)(C), or "cause the defendant undue burden or unnecessary expense," *id.* § 3730(c)(2)(D).

II. Facts and Procedural History

The relator in this *qui tam* action, Clarissa Zafirov, currently based in Canada, brings claims that implicate highly complex aspects of the Medicare Advantage ("MA") program. She alleges that the Provider Defendants[2] "acted in concert" with the MA Defendants[3] to defraud the Government by knowingly submitting false claims in the form of unsupported risk-adjusting diagnosis codes. Dkt. 124 at 1, 6 (citing Dkt. 86 ("FAC") ¶¶ 195, 201). Zafirov's allegations are wide-ranging, and include claims

[2] The Provider Defendants include Florida Medical Associates, LLC, d/b/a VIPcare, Physician Partners, LLC, and Anion Technologies, LLC.

[3] The MA Defendants include Freedom Health, Inc., and Optimum Healthcare, Inc.

that the Defendants improperly trained their physicians on billing issues, *e.g.*, FAC ¶ 11, submitted claims for unsupported diagnosis codes, *e.g.*, *id.* ¶¶ 92, 95, and failed to conduct the oversight Medicare Advantage requires, *e.g.*, *id.* ¶¶ 181-82.

Zafirov filed this *qui tam* action in May 2019. Dkt. 1. After investigating Zafirov's claims for nine months, the United States declined to intervene in February 2020. Dkt. 14. For the past three-and-a-half years, Zafirov has continued to press this litigation on her own. Dkt. 81, 86. Since the Court's denial of Defendants' second motions to dismiss, Dkt. 124, Zafirov has prosecuted and controlled the Government's claims, including by moving to compel far-reaching discovery. Dkt. 129, 130, 143.

LEGAL STANDARD[4]

Under Rule 12(c), a motion for judgment on the pleadings should be granted when "there are no material facts in dispute and the moving party is entitled to judgment as a matter of law." *Cannon v. City of West Palm Beach*, 250 F.3d 1299, 1301 (11th Cir. 2001). A motion for judgment on the pleadings is timely so long as the motion will not "delay trial." Fed. R. Civ. P. 12(c). Here, a motion for judgment on the pleadings will not delay trial, which remains 18 months away.

A party may move to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1). Challenges to standing are jurisdictional, *Torres v. Wendy's Co.*,

[4] Although Defendants did not raise a constitutional defense in their answers, "[s]ubject-matter jurisdiction can never be waived or forfeited." *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). At any rate, this Court should consider Defendants' constitutional defense because it is adequately raised by pre-trial motion and without unfair surprise. *E.g.*, *Peters v. Cheval Golf & Athletic Club, LLC*, No. 8:20-CV-2080-KKM-AAS, 2022 WL 88197, at *4 (M.D. Fla. Jan. 7, 2022). If the Court considers an amendment necessary, Defendants hereby request leave to amend their answers to include an affirmative defense that the *qui tam* provisions are unconstitutional. Fed. R. Civ. P. 15(a)(2).

195 F. Supp. 3d 1278, 1281 (M.D. Fla. 2016), and the Court "may consider motions to dismiss for lack of subject[-]matter jurisdiction at any time," *Roberts v. Swearingen*, 358 F. Supp. 3d 1341, 1346 (M.D. Fla. 2019).

ARGUMENT

I. The FCA's *Qui Tam* Provisions Violate the Vesting and Take Care Clauses.

Article II of the Constitution reflects that "the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'" *Seila L.*, 140 S. Ct. at 2191 (quoting U.S. Const. art. II, § 1, cl. 1; *id.* § 3.). The officers whom the President oversees "must remain accountable to the President, whose authority they wield." *Id.* at 2197. The FCA's *qui tam* provisions violate the Vesting and Take Care Clauses because an FCA relator exercises quintessential executive power by conducting civil litigation on behalf of the United States, and the President can neither remove nor adequately supervise her.

A. The FCA Impermissibly Vests Executive Power in Relators.

The Supreme Court has long made clear that central to the executive power is the authority to "enforce" laws "or appoint the agents charged with the duty of such enforcement." *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928). Bringing enforcement actions in court is fundamental to the executive power because "a lawsuit is the ultimate remedy for a breach of the law." *Buckley*, 424 U.S. at 138.

Accordingly, since at least the mid-19th century, "civil suits, in the name and for the benefit of the United States," have been initiated by a United States attorney, "and, in the absence of any directions from the Attorney-General, he controls the

prosecution of the same in the district and circuit courts." *The Confiscation Cases*, 74 U.S. 454, 457 (1868). The rule has been "settled" that "courts will not recognize any suit, civil or criminal, as regularly before them, if prosecuted in the name and for the benefit of the United States" absent a United States attorney's involvement. *Id.*; *accord United States v. San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888) (Attorney General in charge of the "litigation … necessary to establish the rights of the [G]overnment").

The executive power to enforce the law includes the discretion not to bring an action at all. *See United States v. Nixon*, 418 U.S. 683, 693 (1974); *see also Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Such discretion also encompasses decisions on "what precise charge shall be made" and "whether to dismiss a proceeding once brought." *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967).

The FCA's *qui tam* provisions undoubtedly grant executive power to relators. A relator brings an action "in the name of the Government" to enforce the FCA and, often as here, compliance with other federal statutes and regulations. 31 U.S.C. § 3730(b)(1). And a relator's only "injury" derives from the United States' "injury-in-fact," including "injury to its sovereignty arising from the violation of its laws." *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000).[5] The United States is a "real party in interest" and "bound by the judgment in all FCA actions

[5] The Supreme Court in *Stevens* rejected that a relator had a *private* interest (injury-in-fact) in addressing fraud on the Government and instead determined that a relator has standing only as a partial assignee of the Government's damages claim. 529 U.S. at 771-74; *accord Polansky*, 599 U.S. at 437 ("A *qui tam* suit … alleges injury to the Government alone."). *Stevens* expressly declined to consider whether the FCA's *qui tam* device violated Article II. 529 U.S. at 778 n.8.

regardless of its participation in the case." *Eisenstein*, 556 U.S. at 934, 936. The relator decides whether to file suit, which claims to assert, and the scope of such claims—that is, she exercises prosecutorial discretion. A relator thus conducts civil litigation on behalf of the United States that would otherwise be conducted by the Executive, despite the Constitution's command that such executive power be wielded only by the President, "personally and through officers whom he appoints." *Printz v. United States*, 521 U.S. 898, 922 (1997). The FCA's *qui tam* provisions empower private individuals to litigate interests that are solely the Government's. *Cf. TransUnion LLC v. Ramirez*, 594 U.S. 413, 429 (2021) ("A regime where Congress could freely authorize unharmed plaintiffs to sue defendants who violate federal law … would infringe on the Executive Branch's Article II authority."). This is all the more remarkable given that "the FCA imposes damages that are essentially punitive in nature." *Stevens*, 529 U.S. at 784.

At bottom, the *qui tam* provisions impermissibly authorize a private citizen to litigate on the United States' behalf, whereas "[t]he Constitution requires that a President chosen by the entire Nation oversee the execution of the laws." *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010); *see also Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 88 (2015) (Thomas, J., concurring in the judgment); *Printz,* 521 U.S. at 923.

B. The *Qui Tam* Provisions Deny the President Necessary Removal Authority and Sufficient Supervisory Control over an FCA Relator.

The FCA's *qui tam* provisions violate the Take Care Clause because they deny the President sufficient supervisory control over the relator. The President must retain

"the ability to supervise and remove the agents who wield executive power in [the President's] stead." *Seila L.*, 140 S. Ct. at 2211. The removal power is essential: "The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them," *Free Enter. Fund*, 561 U.S. at 484, and remove "those for whom he can not continue to be responsible," *id.* at 493 (quoting *Myers v. United States*, 272 U.S. 52, 117 (1926)).

The Supreme Court has only once—in *Morrison v. Olson*, 487 U.S. 654 (1988)—upheld limited restrictions on the President's ability to remove and supervise those who conduct litigation on behalf of the United States. The FCA's *qui tam* provisions are unconstitutional under the test articulated in *Morrison*, which upheld restrictions representing "the outermost constitutional limits of permissible congressional restriction on the President's removal power." *Seila L.*, 140 S. Ct. at 2200 (citation and quotation marks omitted).[6]

In *Morrison*, the Ethics in Government Act authorized the Special Division (a court created by the Act) to appoint an independent counsel "to investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws." 487 U.S. at 660. The Act insulated the independent counsel from removal except for good cause and granted the counsel full and independent

[6] *Morrison*—the high-water mark of permissible interference—"has been called into doubt by seemingly all quarters." *United States v. Concord Mgmt. & Consulting LLC*, 317 F. Supp. 3d 598, 617 & n.8 (D.D.C. 2018) (Friedrich, J.) (collecting authorities). Defendants maintain that Justice Scalia's dissent in *Morrison* states the correct test for Take Care Clause and separation-of-powers violations, such that *any* denial of the President's exclusive control over executive power violates the separation of powers. 487 U.S. at 705 (Scalia, J., dissenting). But assuming the continued viability of *Morrison*'s majority opinion, the FCA's *qui tam* provisions fail even under the majority's test, *see infra* at pp. 9-13.

authority to "exercise all investigative and prosecutorial functions and powers of the Department of Justice." *Id.* at 662.

The Court upheld the Act on the ground that the President retained "sufficient control over the independent counsel." *Id.* at 686. "Most importantly," the Attorney General (who is directly accountable to the President) could remove the independent counsel for good cause. *Id.* at 695-96. In addition, the Attorney General decided whether to authorize the appointment, helped define the independent counsel's jurisdiction, and oversaw Department of Justice policy, which the independent counsel was required to follow. *Id.* at 694-96; *see also Free Enter. Fund*, 561 U.S. at 495 (observing that *Morrison* "sustained the statute" because the President had "several means of supervising or controlling the independent counsel" (cleaned up)).

The FCA's *qui tam* provisions far exceed the restrictions on the President's Take Care authority upheld in *Morrison*. "[T]he Executive has no power to remove the relator from the litigation under any circumstances." *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 763 & n.19 (5th Cir. 2001) (en banc) (Smith, J., dissenting) (citing, *inter alia*, 31 U.S.C. § 3730(c)(1), (c)(3)). The United States can fully stop a relator from pursuing the suit only by seeking court approval to dismiss the entire action. To do so, the Executive must demonstrate that "the burdens of continued litigation outweigh its benefits." *Polansky*, 599 U.S. at 438. If the motion is granted—after expending prosecutorial resources and subjecting the executive power to judicial oversight—dismissal terminates the "entire action, and not an individual claim." *Rosell v. VMSB,*

LLC, 67 F.4th 1141, 1144 (11th Cir. 2023). Forcing the President to decide between allowing a relator to remain in their position or dismissing the action impedes the Executive from "accomplishing its constitutionally assigned functions," *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977).

The *qui tam* provisions also lack the other supervisory controls that rescued the Ethics in Government Act in *Morrison*.[7] Unlike the Ethics in Government Act, under which the Attorney General (an Officer accountable to and removable by the President) had discretion to authorize an independent counsel (or not) and determine the factual basis for her investigation, *see* 487 U.S. at 661, the FCA delegates those powers to a private citizen. A relator need not seek approval to initiate a suit, thus blunting "[o]ne of the greatest *unilateral* powers a President possesses under the Constitution"—"the power to protect individual liberty by essentially under-enforcing federal statutes regulating private behavior." *In re Aiken County*, 725 F.3d 255, 264 (D.C. Cir. 2013) (Kavanaugh, J.).

And the Department of Justice has no control over which allegations, claims, or legal theories a relator chooses to advance; it cannot "control the breadth of the matter." *Riley*, 252 F.3d at 763 (Smith, J., dissenting). This suit shows the importance of that prerogative—the viability of Zafirov's claims depends on the complex interplay of federal statutes and regulations in a massive federal program. The Court may need

[7] To undersigned counsel's knowledge, to date in the Middle District of Florida—one of the busiest *qui tam* dockets in the country—the Government has never moved to dismiss a *qui tam* action (other than for settlement purposes) or moved to limit discovery. The Government has not, in other words, even exercised the limited controls available to it.

to define what constitutes a "claim" in the MA context, outline the proper components of a medically sound diagnosis, and select and apply the proper tests for "knowledge" and "materiality" under the FCA. And, here, it will be Zafirov—not the Government—pressing her own favored interpretations in the first instance. Needless to say, Zafirov's chosen interpretations of these federal laws may vary from the Government's, since its broad interests lie in administering a functional government program, and the relator's interests lie only in maximizing her monetary award. *See Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 & n.5 (1997).

To that point, relators are unbound by both general and FCA-specific Department of Justice policies. For instance, the Department applies detailed requirements to determine whether to file FCA actions of consequence, including those involving "a novel question of law or a question of policy." *See* DOJ Civil Div. Dir. No. 1-15, § 1(e)(1)(ii)-(iv), 80 Fed. Reg. 31998, 31999 (June 5, 2015). And Department of Justice attorneys must confer with agencies responsible for the government programs affected by FCA litigation, and coordinate litigation with any parallel criminal, regulatory, or administrative proceedings. *See* U.S. Dep't of Just., Just. Manual § 4.4.110. The existence of unaccountable FCA relators undermines the President's ability "to secure that unitary and uniform execution of the laws" that the Constitution meant to guarantee by "vesting general executive power in the President alone." *Myers*, 272 U.S. at 135.

True enough, four courts of appeals outside the Eleventh Circuit have held that the President's control over FCA actions avoids a Take Care Clause violation.[8] Such decisions are not binding in the Eleventh Circuit, where the constitutional question remains open.[9] *See Yates v. Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1312 (11th Cir. 2021). More importantly, these cases—all decided decades ago—are wrong under current law, as Justice Thomas's dissent in *Polansky* explained. Those decisions did not have the Supreme Court's intervening cases clarifying that *Morrison* marks the outer limit on interference with the Executive. *See Free Enter. Fund.*, 561 U.S. at 493; *Seila L.*, 140 S. Ct. at 2199; *see also Collins v. Yellen*, 141 S. Ct. 1761, 1786 (2021). In short, the Supreme Court has made clear that a restriction on the Executive that exceeds the Ethics in Government Act at issue in *Morrison* is unconstitutional.

When answering an open question in the Eleventh Circuit, this Court should apply the law as it stands today. Under that law, as described by Justice Thomas in his dissent, "the *qui tam* device is inconsistent with Article II and … private relators

[8] *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 749-55 (9th Cir. 1993); *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994); *Riley*, 252 F.3d at 752-57; *United States ex rel Stone v. Rockwell Int'l Corp.*, 282 F.3d 787, 805-07 (10th Cir. 2002). The Second Circuit has also rejected arguments that the *qui tam* provisions violate "traditional Article III separation-of-powers concerns" or "usurp the executive branch's litigating function." *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1154-55 (2d Cir. 1993). Its opinion does not, however, discuss the Take Care Clause or the Appointments Clause.

[9] Several district courts in the Eleventh Circuit have rejected constitutional challenges to the *qui tam* provisions. The most recent decision, *United States ex rel. Wallace v. Exactech, Inc.*, No. 7:18-cv-1010, 2023 WL 8027309 (N.D. Ala. Nov. 20, 2023), relied on the unpersuasive reasoning from past courts of appeals decisions, did not address all the arguments raised in this motion, and engaged in only cursory historical analysis. The earlier decisions, issued in 1999 and 2014, predated Justice Thomas's dissent in *Polansky* and followed the faulty reasoning of the courts of appeals. *See United States ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr.*, 997 F. Supp. 2d 1272 (M.D. Fla. 2014); *United States ex rel. Butler v. Magellan Health Servs., Inc.*, 74 F. Supp. 2d 1201 (M.D. Fla. 1999).

may not represent the interests of the United States in litigation." *Polansky*, 599 U.S. at 449 (Thomas, J., dissenting).

II. The FCA's *Qui Tam* Provisions Violate the Appointments Clause.

An "Officer of the United States" must be appointed through the methods outlined in the Appointments Clause. *Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018); *see* U.S. Const. art. II, § 2, cl. 2. Since no one contends that a *qui tam* relator is "*appointed* as an officer of the United States," *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1514 (2019) (emphasis added), the only question before the Court is whether a *qui tam* relator qualifies as an "Officer."

Two requirements determine whether an individual qualifies as an "Officer of the United States." *Lucia*, 138 S. Ct. at 2051. First, an individual must exercise "significant authority pursuant to the laws of the United States." *Buckley*, 424 U.S. at 126. Second, "an individual must occupy a continuing position established by law." *Lucia*, 138 S. Ct. at 2051 (cleaned up). An FCA relator satisfies both requirements, so the FCA's *qui tam* provisions violate the Appointments Clause.

A. An FCA Relator Exercises Significant Federal Authority.

An FCA relator wields significant federal authority because, as explained above, "[a] lawsuit is the ultimate remedy for a breach of the law." *Buckley*, 424 U.S. at 138. In *Buckley*, the Supreme Court recognized that "primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights … may be discharged only by persons who are 'Officers of the United States' within the language of that section." *Id.* *Buckley* thus held that Congress violated the

Appointments Clause by establishing a commission, whose members were improperly appointed, to enforce federal election laws. *Id.* at 138-40.

Buckley controls the issue here. An FCA relator brings an action "in the name of the Government" to enforce public rights. 31 U.S.C. § 3730(b)(1); *see supra* at pp. 6-7. In this respect, a relator enforcing the FCA "in the name of the Government" through civil litigation is no different from a commission enforcing the Federal Election Campaign Act. And enforcing federal law is at the heart of the executive power. *See, e.g.*, *Springer*, 277 U.S. at 202 ("Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement.").[10]

B. An FCA Relator Holds a Continuing Position under *Morrison v. Olson*.

While there is no formal test for when a position is continuing under the Appointments Clause, *see United States v. Donziger*, 38 F.4th 290, 296 (2d Cir. 2022), *Morrison* and related cases establish that a person who litigates on the United States' behalf holds a continuing position.

In *Morrison*, the Supreme Court held that the independent counsel was an "'inferior' officer in the constitutional sense." 487 U.S. at 672. "[T]he office of independent counsel" was "'temporary' in the sense that an independent counsel" was

[10] Two courts of appeals outside the Eleventh Circuit have held—in 1993 and 1994—that an FCA relator does not exercise substantial authority, reasoning that the Executive retains the ability to intervene or otherwise participate in litigation. *Taxpayers Against Fraud*, 41 F.3d at 1041; *Kelly*, 9 F.3d at 757-59. As the Supreme Court has since clarified, the level of supervision does not determine whether a person is an officer, but rather divides *principal* from *inferior* officers. *See Edmond v. United States*, 520 U.S. 651, 663 (1997); *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1976 (2021).

"appointed essentially to accomplish a single task, and when that task [was] over the office [was] terminated, either by the counsel herself or by action of the Special Division." *Id.* Nonetheless, the temporary nature of the independent counsel's position did not preclude her from being an Officer. *Id.* at 671 n.12 ("It is clear that appellant is an 'officer' of the United States, not an 'employee.'").

The D.C. Circuit has twice recognized that those who litigated on the United States' behalf for a singular purpose—an independent counsel and a special counsel—qualified as Officers. *In re Sealed Case*, 829 F.2d 50, 56-57 (D.C. Cir. 1987); *In re Grand Jury Investigation*, 916 F.3d 1047, 1053 (D.C. Cir. 2019). In both cases, the Attorney General appointed a private prosecutor to conduct a single investigation. Although "'charged with the performance of the duty of the superior [i.e., the Attorney General] for a limited time and under special and temporary conditions'" the independent counsel was nonetheless "an 'inferior Officer' whom the Attorney General … may appoint under the express terms of the Appointments Clause." *In re Sealed Case*, 829 F.2d at 56-57 (quoting *United States v. Eaton*, 169 U.S. 331, 343-44 (1898)); *accord In re Grand Jury Investigation*, 916 F.3d at 1051-53.

Most recently, the Second Circuit held that special prosecutors, appointed by the district court, qualified as Officers. *Donziger*, 38 F.4th at 296. The Second Circuit considered three factors instructive. First, the appointment was "not specific to the attorneys appointed," and "the individuals appointed as special prosecutors could be

replaced without the duties of the positions terminating." *Id.* at 297.[11] Second, the position was "not transient or fleeting" when the special prosecutors had "already served for nearly three years." *Id.* Third, the special prosecutors' duties were "more than incidental to the regular operations of government … because prosecution generally is a core power of government." *Id.* at 297-98.

This case law establishes that an FCA relator occupies a continuing position, despite that an FCA relator is likewise "appointed" to "accomplish a single task" and has "no ongoing responsibilities that extend beyond the accomplishment of the mission." *Morrison*, 487 U.S. at 672. When that mission entails the exercise of core government power to pursue a *qui tam* case for years, the position is a "continuing" one. And it matters not that the FCA involves conducting civil litigation, while past cases involved criminal enforcement; both are core executive powers. *United States v. Providence J. Co.*, 485 U.S. 693, 700 (1988) (recognizing that "prosecution" is "an exercise of the sovereign power of the United States"); *Buckley*, 424 U.S. at 138 (recognizing *civil* litigation as another quintessentially executive power).

That a relator does not hold a specific employment position created by statute is immaterial. "The Constitution constrains governmental action 'by whatever instruments or in whatever modes that action may be taken' … [a]nd under whatever

[11] The FCA "does not bar [existing] parties from amending a complaint to add, remove, or swap relators," *In re Plavix Marketing, Sales Practices & Products Liability Litigation (No. II)*, 974 F.3d 228, 236 (3d Cir. 2020), but only with relators' consent, since relators retain the right to participate in the litigation even if the government intervenes, *see* 31 U.S.C. § 3730(c)(1), (c)(3). *See also, e.g.*, *United States ex rel. Spicer v. Westbrook*, 751 F.3d 354, 364 (5th Cir. 2014) (upholding substitution of bankruptcy trustee as relator); *United States v. NEC Corp.*, 11 F.3d 136, 139 (11th Cir. 1993) (holding "that a relator's *qui tam* action survives his death").

congressional label." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392-93 (1995) (quoting *Ex parte Virginia*, 100 U.S. 339, 346-47 (1880)). Under *Morrison*, a party who conducts litigation on the United States' behalf for a single case holds a continuing position. Thus, if Congress created an "office of the relator" and appointed Dr. Zafirov to the position, the law would violate the Appointments Clause because she would be an inferior Officer—but not duly appointed. The *qui tam* provisions do the same thing through indirect means. The result, if upheld, would allow Congress to exceed the Appointment Clause's limits on "the universe of eligible recipients of the power to appoint." *Freytag v. Comm'r*, 501 U.S. 868, 880 (1991).

In cases such as *Riley* that have rejected Appointments Clause challenges to the FCA, courts have reasoned that *qui tam* relators do not hold continuing positions because they are not "subject to … the benefits or the requirements associated with offices of the United States." 252 F.3d at 757-58. But the fact that a *qui tam* relator is even *farther* outside of Article II's chain of authority than other non-"Officer" federal employees cannot make *qui tam* delegations permissible. *See id.* at 768 (Smith, J., dissenting). If that were true, "all that Congress or the President must do to circumvent the strictures of the Appointments Clause is to delegate authority to someone who has not officially been appointed to any federal office." *Id.*

Finally, an FCA relator bears no resemblance to the individuals whom the Supreme Court has determined to fall outside the Appointments Clause, such as civil surgeons who examined pensioners only "when called on by the Commissioner of

Pensions in some special case," *United States v. Germaine*, 99 U.S. 508, 512 (1878), or merchant appraisers who examined and appraised merchandise "upon the request of the importer for a reappraisal," *Auffmordt v. Hedden*, 137 U.S. 310, 326 (1890). Those individuals were hired to perform occasional, discrete services on the United States' behalf. And their positions "lacked 'any duration as to time,'" and involved "duties that were narrowly limited, specialized, or insignificant." *Donziger*, 38 F.4th at 298. In contrast to those narrow, ad hoc duties, litigating on the United States' behalf—"which can last for years and encompass[es] a wide array of assignments"—plainly involves the exercise of core executive power. *Id.* at 299. An FCA relator thus holds a "continuing position" without any appointment, violating the Appointments Clause.

III. Historical Practice Does Not Cure the *Qui Tam* Provisions' Defects.

The FCA's *qui tam* provisions violate the text and settled understanding of Article II of the Constitution. The Court thus need not analyze the history of the FCA nor of *qui tam* provisions generally. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2137 (2022). Even if this history were relevant, however, it would not support the constitutionality of the FCA's *qui tam* provisions.

A. The Text and Structure of the Constitution Are Conclusive, Rendering History Irrelevant.

History has a role to play in constitutional interpretation, but only when the Constitution's text is ambiguous. *See id.* "[H]istorical patterns cannot justify contemporary violations of constitutional guarantees, even when the practice in question covers our entire national existence." *Polansky*, 599 U.S. at 450 (Thomas, J.,

dissenting) (cleaned up); *see also Medellin v. Texas*, 552 U.S. 491, 532 (2008) ("Past practice does not, by itself, create power." (cleaned up)). Thus, the Court can—and should—grant this motion without examining the history of *qui tam* actions.

B. History Does Not Support the *Qui Tam* Provisions' Constitutionality.

Regardless, the historical record does not justify the modern FCA. Historical practice is relevant to constitutional interpretation only insofar as the practice has been "open, widespread, and unchallenged since the early days of the Republic." *Bruen*, 142 S. Ct. at 2137; *see, e.g.*, *Marsh v. Chambers*, 463 U.S. 783, 791-92 (1983) (finding relevant an "unambiguous and unbroken history of more than 200 years" that the framers had "considered carefully" in Founding-era debates). When, in contrast, history is inconclusive, past practice cannot serve as a proxy for constitutional legitimacy. *See*, *e.g.*, *Gamble v. United States*, 139 S. Ct. 1960, 1970-74 (2019); *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2259 (2020).

The Supreme Court has been especially skeptical toward historical arguments that would blur the separation of powers. "[W]hen questions involving the Constitution's government-structuring provisions are presented in a justiciable case, it is the solemn responsibility of the Judicial Branch 'to say what the law is.'" *NLRB v. Noel Canning*, 573 U.S. 513, 571 (2014) (Scalia, J., concurring in the judgment) (quoting *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012)).

1. *The Modern FCA Is Regulatory in Nature and Seriously Interferes with the Executive Power.*

The FCA "was originally passed in 1863 after disclosure of widespread fraud against the Government" during the Civil War. *Rainwater v. United States*, 356 U.S. 590, 592 (1958). The Act was used sparingly between the Civil War and World War II. *See* Boese & Baruch, *Civil False Claims & Qui Tam Actions* § 1.01[A], [B].[12] When relators filed a flurry of actions during World War II, Congress responded with amendments to *narrow* the FCA, including by barring actions premised on information known to the Government, *id.* § 1.02, and the Act returned to obscurity, S. Rep. No. 110-507, at 3 (2008) (noting that "only about six to ten FCA cases [were] filed per year" from 1943 through 1986). Thus, the FCA's history from 1863 to 1986 does not provide a basis to sustain the FCA of today.

The modern FCA is also disconnected from its early history because, in 1986, Congress dramatically changed the Act. The 1986 amendments increased awards available to relators, recognized new causes of action for reverse false claims and retaliation against whistleblowers, expanded the Act's statute of limitations, wrote specific intent out of the Act's knowledge requirement, and lifted the total ban on actions based on information already in the Government's possession. *See* Boese & Baruch § 104[C]-[G]; Charles Doyle, Cong. Rsch. Serv., R40785, *Qui Tam: The False Claims Act and Related Federal Statutes*, at 8-9 (updated Apr. 26, 2021). "In permitting

[12] Both the Supreme Court and the Eleventh Circuit have relied on this FCA treatise. *See Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 n.8 (2010); *United States ex rel. Bibby v. Mortg. Invs. Corp.*, 987 F.3d 1340, 1348 (11th Cir. 2021).

actions by an expanded universe of plaintiffs with different incentives, the 1986 amendment essentially create[d] a new cause of action, not just an increased likelihood that an existing cause of action will be pursued." *Schumer*, 520 U.S. at 950.

Moreover, the modern FCA has become a backdoor to regulatory enforcement. To obtain federal funding, recipients frequently must certify that they are in compliance with all federal laws, regulations, contract terms—and often even subregulatory guidance. In many FCA cases, a relator alleges a violation "of a federal statute, regulation, or contract term … as the basis for liability under the FCA in the absence of a factually false claim." Boese & Baruch § 2.03[B][1]; *see also Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 180 (2016) (describing implied-certification theory of FCA liability). This marks a departure from early FCA cases, where relators brought suit against contractors for factually false claims, representing, for example, that the contractor has delivered X, when in fact, it had delivered Y.

Today, relators often base FCA suits on theories of alleged regulatory violations that the Government itself has not previously advanced. That is especially problematic and costly in the healthcare context, where providers face "highly ambiguous standards … complicated by the comprehensive, bewildering array of government and administrative regulations and review processes." *See* Robert Fabrikant & Glenn E. Solomon, *Application of the Federal False Claims Act to Regulatory Compliance Issues in the Health Care Industry*, 51 Ala. L. Rev. 105, 116 (1999). "[I]n addition to health care fraud, the Act also has been used to allege violations of food stamp program requirements, false certifications regarding minority, veterans, or women's ownership

of business enterprises, payment of enrollment incentive fees by universities and other educational institutions, against federal mortgage lenders," "in labor disputes," and "with environmental regulations," among other things. Boese & Baruch § 1.05[A].

The modern FCA, paired with the growth of the regulatory state, has created a Constitutional anomaly in which unaccountable, private litigants play a lead role in pursuing the Government's regulatory interests in federal court. Relators now file hundreds of *qui tam* actions each year. They have, in many ways, eclipsed the Government's lawyers in enforcing the FCA: From 1987 through 2022, relators have filed over 15,246 *qui tam* actions, whereas the Department of Justice has opened only 6,234 FCA non-*qui tam* matters—many of which never result in a suit.[13]

2. *The Modern Regulatory FCA Has No Historical Tradition.*

The modern regulatory FCA lacks "the open, widespread, and unchallenged" tradition "since the early days of the Republic" that could help settle constitutional meaning. *Bruen*, 142 S. Ct.at 2137 (citation omitted). It is true that the First Congress passed five statutes with *qui tam* provisions expressly authorizing uninjured parties to initiate an action on the Government's behalf. *See Stevens*, 529 U.S. at 776-77 & n.6 (collecting statutes).[14] But each such statute provided only a narrow right of action allowing relators to prosecute violations of established federal law.[15] At the time,

[13] *See* U.S. Dep't of Justice, *Fraud-Statistics–Overview* 2 (2022), available at *https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-2-billion-fiscal-year-2022.*

[14] The First Congress also passed laws providing whistleblowers a reward but no express cause of action; some such laws were later read as implying rights of action. *See Stevens*, 529 U.S. at 777 & n.7.

[15] *See*, *e.g.*, Act of March 1, 1790, ch. 2, §§ 3, 6, 1 Stat. 102, 103 (providing *qui tam* authorization to

"[t]here was no DOJ, and the nugatory prosecutorial arm of the Executive could not adequately monitor fraud committed by governmental contractors." *Riley*, 252 F.3d at 774 (Smith, J., dissenting). These few early *qui tam* provisions were a holdover from "the English system of parliamentary supremacy," from which "the Constitution's creation of a separate Executive Branch" was a structural departure, and there is no indication that the early Congress meaningfully considered how *qui tam* provisions would alienate fundamentally "Executive" power away from the President. *Polansky*, 599 U.S. at 450 (Thomas, J., dissenting); *see also Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. O.L.C. 207, 237 (1989) ("OLC FCA Mem.").

The early *qui tam* statutes also differed in kind from the modern FCA. "The Framers, who envisioned a limited Federal Government, could not have anticipated the vast growth of the administrative state." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 755 (2002). The ubiquitous presence of broad certifications of compliance with all statutes, regulations, contracts, and subregulatory guidance did not exist before recent decades. *Id.* While the narrow *qui tam* laws at the Founding incentivized informers to report and prosecute violations of federal law—a pure enforcement role—relators now not only perform an enforcement role in the Executive's stead but also devise *legal positions* for the United States. The difference between purely enforcing public rights and defining public rights through litigation

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punish United States marshals who refused to file census returns (§ 3) and persons failing to cooperate with the census (§ 6)); Act of July 20, 1790, ch. 29, §§ 1, 4, 1 Stat. 131, 133 (providing *qui tam* authorization to punish the illegal carriage of seamen (§ 1) and harboring of runaway seamen (§ 4)).

heightens a *qui tam* action's capacity to interfere with the Constitution's vesting of "general executive power in the President alone" "to secure [a] unitary and uniform execution of the laws." *Myers*, 272 U.S. at 135; *Riley*, 252 F.3d at 775 n. 38 (Smith, J., dissenting) ("To encroach on this prosecutorial discretion now is thus a greater violation of separation of powers principles than was the historic use of the FCA.").

Moreover, early *qui tam* statutes never became embedded within the Nation's legal system. Congress has long since repealed all the *qui tam* provisions enacted in the Founding era. *Riley*, 252 F.3d at 774 (Smith J., dissenting). "By the turn of the twentieth century, qui tam statutes had largely fallen into disuse in this country," including the FCA. Doyle, *supra* at 4. And only one rarely used *qui tam* provision still exists outside the FCA, 25 U.S.C. § 201. *See Doyle*, *supra* at 33.

Qui tam actions became a mainstay of federal litigation only after the FCA's 1986 amendments. But the FCA's prevalence since 1986 is hardly "part of the fabric of our society." *Marsh*, 463 U.S. at 792. To the contrary, once FCA actions became more frequent after 1986, constitutional questions did too: The Office of Legal Counsel issued an opinion declaring the *qui tam* provisions unconstitutional,[16] separation of powers challenges worked their way through multiple courts of appeals, and the Supreme Court expressly left open in *Stevens* whether the FCA's *qui tam* provisions violate the Take Care or Appointments Clauses, 529 U.S. at 778 n.8. In

[16] *See generally OLC FCA Mem.*, *supra*. OLC has since changed its position to assert that the FCA's *qui tam* provisions do not violate the Appointments Clause. *See The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 146 (1996).

sum, this Court should conclude that history does not justify the modern FCA's interference with the Executive Power.

IV. The Relator Lacks Standing Because the *Qui Tam* Provisions Are Invalid.

If the Court agrees that the *qui tam* provisions are unconstitutional, this Court should dismiss the action for lack of subject-matter jurisdiction. The *qui tam* provisions are void. *Moore v. Harper*, 600 U.S. 1, 12 (2023) ("'[A]n act of the legislature, repugnant to the constitution, is void.'" (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803))). Zafirov alleges harm only to the United States. FAC ¶¶ 296-346. So, without the *qui tam* provisions, she lacks standing and this Court should dismiss for lack of subject-matter jurisdiction. *See Stalley ex rel. United States v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1234-35 (11th Cir. 2008) (per curiam).

Stevens is not to the contrary. It held only that a relator, as a proper assignee of a portion of the United States' damages claim, could rely on the United States' injury to establish standing, expressly setting aside arguments to the FCA's constitutionality. 529 U.S. at 773-74, 778 n.8. Because the FCA's purported assignment of the claim is void, Zafirov can no longer rely on the United States' injury-in-fact and lacks standing. *MSPA Claims 1, LLC v. Tenet Fla., Inc.*, 918 F.3d 1312, 1318 (11th Cir. 2019) ("Although *FHCP* suffered an injury-in-fact, *MSPA* only has standing if it was validly assigned the right to sue to vindicate that injury.").

CONCLUSION

For these reasons, this Court should grant Defendants' Joint Motion for Judgment on the Pleadings or to Dismiss for Lack of Subject-Matter Jurisdiction.

Dated this 16th day of February, 2024

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Local Rule 3.01(g) Certification

Defendants certify that they have conferred with Plaintiff via telephone, who opposes this motion in its entirety.

/s/ *Jason P. Mehta*
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Certificate of Service

I hereby certify that on February 16, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to all attorneys of record.

/s/ *Jason P. Mehta*
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TAB 217

FUNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,
ex rel. DR. CLARISSA ZAFIROV,

Plaintiffs,

v. Case No.: 8:19-cv-1236-T-23SPF

FLORIDA MEDICAL ASSOCIATES, LLC, *et al.*,

Defendants.
_____/

UNITED STATES' STATEMENT OF INTEREST

The United States of America respectfully submits this Statement of Interest, in accordance with 28 U.S.C. § 517 and with the Court's leave, to respond to several important legal questions raised by the Defendants' Joint Motion for Judgment on the Pleadings or to Dismiss for Lack of Subject-Matter Jurisdiction, Dkt. 180. The False Claims Act – a statute that has been the United States' primary fraud-fighting tool for 160 years – does not violate the Take Care Clause, Vesting Clause or Appointments Clause of the U.S. Constitution. As every federal circuit to consider these arguments has done, this Court should find the statute is consistent with those Clauses and deny Defendants' Joint Motion for Judgment on the Pleadings.

The United States has not intervened in this False Claims Act ("FCA") *qui tam* case and therefore is not a party to this action. Nevertheless, the United States remains the real party in interest, entitled to share in any recovery that may be

obtained by Relator. *See* 31 U.S.C. § 3730(d); *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 934-35 (2009); *Timson v. Sampson*, 518 F.3d 870, 873 (11th Cir. 2008). And, because the FCA is the United States' primary civil tool for remedying fraud against the government, the United States has a substantial interest in the development of the law in this area. *See U.S. ex rel. Doe v. Staples, Inc.*, 773 F.3d 83, 84 (D.C. Cir. 2014) (citing S. Rep. No. 99-345, at 2, 4 (1986)). The United States is not taking a position on the merits of the factual allegations and only seeks to address Defendants' legal arguments regarding the constitutionality of the *qui tam* provisions of the False Claims Act.

DISCUSSION

Congress has carefully crafted the False Claims Act to discover and redress fraud against the government. In fiscal year 2023, federal spending topped $7.7 trillion.[1] Though it is difficult to estimate the percentage of funds lost each year to fraud, even the lowest of estimates produces staggering numbers. It is as necessary today to incentivize the public to report fraud as it was in 1863 when the FCA, 31 U.S.C. §§ 3729–3733, was enacted. While the infrastructure of the United States agencies is more robust today than in 1863, so too is the federal budget. Indeed, the

[1] U.S. Dep't of Treasury, Fin. Rep. of the United States: Fiscal Year 2023 (Feb. 15, 2024), https://www.fiscal.treasury.gov/files/reports-statements/financial-report/2023/02-15-2024-FR-(Final).pdf (last visited Mar. 8, 2024).

challenges of rooting out fraud in the modern era are more complex; and the FCA has in turn been made more potent through its *qui tam* provisions.

As explained below, the federal courts of appeals that have considered the question have all found the government's control over *qui tam* cases to be constitutionally sufficient. This Court should do the same.

I. Background of this *Qui Tam* Action

This *qui tam* case involves allegations that Defendants submitted false or fraudulent diagnosis data resulting in inflated payments for beneficiaries enrolled in Medicare Advantage or Part C. Relator Zafirov filed her action on May 20, 2019. Dkt. 1. The United States investigated Relator's allegations and on February 21, 2020, notified the court that it was not intervening. Dkt. 14. In its Notice, the United States requested that the Court solicit the written consent of the United States before granting approval of any settlement or dismissal; reserved its right to seek dismissal of the Relator's action or claim; noted that it may move to intervene in the action at a later date for good cause; requested that it receive all pleadings in the action; and reserved its right to order deposition transcripts. *Id.* Relator thereafter proceeded to litigate the action. On February 16, 2024, Defendants filed the instant motion challenging the constitutionality of the *qui tam* provisions of the False Claims Act. Dkt. 180.

II. History of *Qui Tam* Provisions and Statutory Framework

The essence of the *qui tam* mechanism is that a private party may bring suit because of a wrong done to the sovereign and is entitled to a share of the recovery if the action is successful. The Supreme Court has recognized the "long tradition of *qui tam* actions in England and the American Colonies," as well as the "considerable number" of such statutes that the First Congress itself enacted. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774, 776–77 (2000).

Qui tam suits were thus far from novel when Congress enacted the FCA in 1863. *See* Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (1863). The FCA was originally designed to "stop[] the massive frauds perpetrated by large contractors during the Civil War." *United States v. Bornstein*, 423 U.S. 303, 309 (1976). It authorized *qui tam* suits to "be brought and carried on by any person, as well for himself as for the United States," and provided that the action "shall be at the sole cost and charge of such person, and shall be in the name of the United States." Act of Mar. 2, 1863, § 4, 12 Stat. at 698 (1863).

The contemporary version of the FCA retains the basic structure of the *qui tam* mechanism. Under the current statute, the Attorney General may bring a civil action to recover treble damages and civil penalties for a violation of the FCA. *See* 31 U.S.C. § 3730(a). Alternatively, a private person known as a "relator" may bring suit "for the person and for the United States Government." *Id*. § 3730(b)(1). The relator's complaint must be filed under seal and served upon the United States. *Id.* §

3730(b)(2). The government then has 60 days, subject to extension, to decide whether to intervene and take over the suit. *Id.* § 3730(b)(2), (3).

If the United States intervenes, "the action shall be conducted by the Government." *Id.* § 3730(b)(4)(A). In that circumstance, the government "shall have the primary responsibility for prosecuting the action." *Id.* § 3730(c)(1). The government may intervene either initially or "at a later date upon a showing of good cause," *id.* § 3730(c)(3), and, upon doing so, may file its own complaint or amend the relator's complaint to add or clarify claims, *id.* § 3731(c).

If the United States declines to intervene, "the person bringing the action shall have the right to conduct the action." *Id.* § 3730(b)(4)(B). The relator, however, is neither the government nor its legal representative. The relator does not appear on behalf of the United States, nor are her legal and factual representations those of the United States. She is a "private part[y]" seeking to vindicate her independent interest, which arises by virtue of the statute's "partial assignment of the Government's damages claim" to her. *Stevens*, 529 U.S. at 773, 786 n.17; *see also* 31 U.S.C. § 3730(d) (entitling a relator to a share of the award if her action results in a financial recovery). The government is not liable for any expenses the relator incurs in bringing suit. 31 U.S.C. § 3730(f).

III. The FCA's *Qui Tam* Provisions Are Constitutional

Defendants ask the Court to hold that the FCA's *qui tam* provisions are unconstitutional. At bottom, Defendants' contention is that these provisions (1)

interfere with the Executive's responsibility to take care that federal law is faithfully executed, as found in the Take Care Clause and the Vesting Clause, and (2) violate the Appointments Clause by not requiring relators to be appointed as "Officers of the United States." *See* Dkt. 180 at 1. But every federal court of appeals to consider these arguments has rejected them, recognizing that the FCA's *qui tam* provisions are consistent with Article II of the Constitution. *See United States ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787 (10th Cir. 2002); *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749 (5th Cir. 2001) (*en banc*); *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032 (6th Cir. 1994); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993). And, notably, district courts within this circuit have concluded the same. S*ee United States ex rel. Wallace v. Exactech, Inc.*, No. 7:18-cv-01010-LSC, 2023 WL 8027309, at *4 (N.D. Ala. Nov. 20, 2023); *United States v. Halifax Hosp. Med. Ctr.*, 997 F. Supp. 2d 1272, 1278 (M.D. Fla. 2014); *United States ex rel. Butler v. Magellan Health Servs., Inc.*, 74 F. Supp. 2d 1201, 1212 (M.D. Fla. 1999). For the reasons that follow, this Court should also hold that the *qui tam* provisions are constitutional.

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

Defendants' contention that *qui tam* actions violate the Take Care Clause of Article II is meritless. Under the Take Care Clause, the President "shall take Care that the laws be faithfully executed." U.S. Const. art. II, § 3. The Vesting Clause states that "The executive power shall be vested in a President of the United States."

U.S. Const. art. II, § 3. In assessing whether legislation "disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977). Defendants' primary contention is that the FCA's *qui tam* provisions interfere with the President's "quintessential executive power" by permitting a relator to proceed in an FCA action, thus diffusing executive authority and limiting executive oversight. Dkt. 180 at 5, 13. As courts have long agreed, however, *qui tam* litigation does no such thing. *See Stone*, 282 F.3d at 805–07; *Riley*, 252 F.3d at 752–57; *Taxpayers Against Fraud*, 41 F.3d at 1041; *Kelly*, 9 F.3d at 749–57; *see also United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1154–55 (2d Cir. 1993).

1. *Qui Tam* Litigation Does Not Prevent the President from Carrying Out his Constitutional Function

Most fundamentally, regardless of whether the United States intervenes in a given suit, relators' conduct of *qui tam* litigation does not prevent the President from carrying out his constitutional functions—a point on which courts have long agreed. *Qui tam* relators are private litigants. The Supreme Court made this clear in *Stevens*, where it expressly declined to adopt a theory that a private relator sues as an "agent of the United States." *Stevens,* 529 U.S. 765, 772 (2000). The Court in *Stevens* instead held that, although it is the United States whose injury underlies an FCA suit, the relator has Article III standing because of his independent stake: he has a

"concrete private interest in the outcome of the suit" that arises from Congress's "partial assignment of the Government's damages claim" to him. *Id*. at 772-73. That a relator brings a *qui tam* action "in the name of the Government," 31 U.S.C. § 3730(b)(1), is a procedural practice that does not alter this conclusion, and the merits analysis in *Stevens* further underscores the point. After addressing standing, the Supreme Court held that the FCA does not authorize relators to pursue *qui tam* actions against states because, among other things, actions pursued by relators are "private suit[s]" brought by "private parties." *Stevens*, 529 U.S. at 780-81 n.9, 786 n.17; *see also United States ex rel. Ritchie v. Lockheed Martin Corp*., 558 F.3d 1161, 1167 (10th Cir. 2009).

That a relator's suit may also vindicate a federal interest in remedying and deterring fraud on the United States does not change the analysis. As the *en banc* Fifth Circuit explained when it rejected a claim analogous to Defendants', the Take Care Clause "does not require Congress to prescribe litigation by the Executive as the exclusive means of enforcing federal law." *Riley*, 252 F.3d at 753. Instead, as the Sixth Circuit noted, "[o]ur current statutory framework includes many laws that authorize individuals to act as 'private attorneys-general,' bringing causes of action for the common weal," *Taxpayers Against Fraud*, 41 F.3d at 1041, such as Title VII and the Sherman Act.

Courts have also correctly recognized that historical evidence helps establish the validity of the *qui tam* provisions. "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 foundation of our government." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943). In *Stevens*, the Supreme Court reviewed this "long tradition of *qui tam* actions in England and the American Colonies," as well as the "considerable number" of such statutes that the First Congress itself enacted,[2] and found the evidence "well nigh conclusive with respect to the question . . . whether *qui tam* actions were cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." 529 U.S. at 774, 776-77 (quotation marks omitted), *see also Wallace*, 2023 WL 8027309, at *6.

The historical evidence is also highly relevant to the constitutional question presented here. *See, e.g., Riley*, 252 F.3d at 752-53. That the First Congress enacted numerous *qui tam* provisions makes clear that the Framers did not believe relators were performing functions that only federal officers could properly perform. *See Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986) (explaining that acts of the First Congress "provide[] contemporaneous and weighty evidence of the Constitution's meaning since many of the Members of the First Congress had taken part in framing

[2] *See, e.g.,* Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 101, 102 (census); Act of July 5, 1790, ch. 25, § 1, 1 Stat. 129, 129 (extending census provisions to Rhode Island); Act of July 20, 1790, ch. 29, §§ 1, 4, 1 Stat. 131, 133 (regulation of seamen); Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137, 137-38 (trade with Indians); Act of Mar. 3, 1791, ch. 15, § 44, 1 Stat. 199, 209 (duties on liquor); see also Act of Feb. 20, 1792, ch. 7, § 25, 1 Stat. 232, 239 (Post Office); Act of Mar. 1, 1793, ch. 19, § 12, 1 Stat. 329, 331 (trade with Indians); Act of Mar. 22, 1794, ch. 11, §§ 2, 4, 1 Stat. 347, 349 (slave trade).

that instrument") (quotation marks omitted). And the long tradition of *qui tam* actions in the United States after the Framing provides "additional evidence that the doctrine of separated powers does not prohibit" this unique practice, given that "'traditional ways of conducting government . . . give meaning' to the Constitution." *Mistretta v. United States*, 488 U.S. 361, 401 (1989) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)); *see also NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559-60 (2014).

2. FCA Litigation Is Not "quintessential executive power"

Contrary to Defendants' argument, *qui tam* relators do not administer and enforce public law in the constitutional sense, any more than does a plaintiff who asserts a private right of action under a federal statute. Relator's *qui tam* actions are "private suit[s]" brought by "private parties," *Stevens* 529 U.S. at 780-81 n.17, and this is consistent with long-standing historical practice, which suggests strongly that the Framers did not view *qui tam* relators as exercising a "quintessential executive power."

Defendants rely heavily on *Morrison v. Olson*, 487 U.S. 654 (1988), to argue that the FCA exceeds the outer limit of permissible congressional restrictions on executive power. In *Morrison*, the Court upheld restrictions on the President's ability to remove an independent counsel who possessed "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice." *Id.* at 662. As a threshold matter, *Morrison* is inapposite.

Kelly, 9 F.3d at 752–53; *Riley*, 252 F.3d at 754–55. First, there was no question that the independent prosecutor was an officer. Second, in *Morrison* the prosecutor was assigned to represent the United States itself and to bring criminal prosecutions—a "function [that] cuts . . . to the heart of the Executive's constitutional duty to take care that the laws are faithfully executed." *Riley*, 252 F.3d at 755. Therefore, Congress could not—at least not without raising serious separation of powers questions—have assigned that responsibility to a private party outside the Executive and not subject to Executive control.

Further, unlike the independent counsel in *Morrison*, a relator is not empowered to exercise the vast prosecutorial authority of the United States. The government's own conduct in *qui tam* litigation is entrusted solely to officials within the Executive Branch. A *qui tam* relator is more aptly analogized, not to a Justice Department attorney who represents the United State in litigation, but a plaintiff who asserts a private right of action under a federal statute. Congress' decision to authorize private lawsuits may often rest in part on its belief that such actions will vindicate a societal interest in deterring and remedying violations of federal law. As with plaintiffs who sue under other federal statutes, the potential for *qui tam* relators to furnish practical assistance in the enforcement of federal law does not transform them into the constitutional equivalent of a Justice Department attorney or any other federal officer.

Qui tam relators are simply civil litigants; they are not government officials and they do not represent the United States. *See id.*; *Wallace*, 2023 WL 8027309, at *5. In any event, as discussed below, a relator's case is subject to substantial control by the Executive Branch, thus ensuring it does not infringe the constitutional limitations set by *Morrison*. *See, e.g.*, *Kelly*, 9 F.3d at 752–53.

3. The FCA's Control Mechanisms Sufficiently Limit Relators' Powers

As courts have recognized, the FCA includes several control mechanisms to ensure that the Executive Branch's prerogatives are not impinged by *qui tam* suits. *See id.* at 753–57; *Taxpayers Against Fraud*, 41 F.3d at 1041; *Kelly*, 9 F.3d at 753–55; *Kreindler & Kreindler*, 985 F.2d at 1155. From the outset, every *qui tam* complaint must be filed under seal and served on the government precisely to ensure that the United States can investigate the matter and determine whether it wishes to "intervene and proceed with the action" or potentially move to dismiss it. 31 U.S.C. §§ 3730(b)(2); (c)(2)(A). If the government chooses to intervene, "the relator loses control" and the action is "'conducted by the Government.'" *See United States ex rel. Polansky v. Exec. Health Res., Inc.*, 143 S. Ct. 1720, 1728 (2023) (quoting 31 U.S.C. § 3730(b)(4)(A)). In that circumstance, the government "shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the" relator. 31 U.S.C. § 3730(c)(1); *Polansky*, 143 S. Ct. at 1728. The government can also "elect to pursue its claim through any alternate remedy available to the

Government, including any administrative proceeding to determine a civil money penalty," rather than litigating the FCA suit. 31 U.S.C. § 3730(c)(5).

And if the government initially declines to intervene, it may still intervene at a later time for good cause and move to dismiss the relator's claims. *See Polansky*, 143 S. Ct. at 1732, 1734. Such motions are subject to highly deferential review under Federal Rule of Civil Procedure 41(a); indeed, the Supreme Court emphasized that district courts must grant dismissal "in all but the most exceptional cases"—"even if the relator presents a credible assessment to the contrary," *Polansky*, 143 S. Ct. at 1734. And even where the government does not intervene, it retains a great deal of control over a *qui tam* suit. The government can settle a pending suit, *see* 31 U.S.C. § 3730(c)(2)(B), and it can veto a relator's proposed settlement or voluntary dismissal of his action, *see id.* § 3730(b)(1).[3] Further, after declining to intervene, the United States is entitled to receive copies of all pleadings and transcripts, *id.* § 3730(c)(3), and to stay any discovery by the relator that "would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts," *id.* § 3730(c)(4).

[3] For example, in *United States ex rel. Dimartino v. Intelligent Decisions, Inc.*, 308 F. Supp. 2d 1318 (M.D. Fla. 2004), a declined *qui tam* action filed in this District, the United States objected to relator's attempt to voluntarily dismiss his case without the Government's consent. The court held that the FCA is clear that the Attorney General's consent is required and further stated that "Relator's position would leave this Court impotent to deal with relators who 'manipulate settlements in ways that unfairly enrich them and reduce benefits to the government.'" *Id* (citations omitted).

These control mechanisms have been fully available here. Specifically, the United States has closely monitored the docket in this case, received filings, entered its own filing, *see* Dkt. 120, and could, upon a showing of good cause, move to intervene, settle, or dismiss this case if it chose to do so.

Nevertheless, Defendants insist that the FCA's safeguards insufficiently protect Executive Branch prerogatives. They argue, for example, that the relator need not seek approval to initiate a suit or seek approval for the substantive allegations of a suit, equating this with prosecutorial discretion. Dkt. 180 at 7. But Article II does not require that Executive Branch officials be able to prevent private litigants from suing to vindicate their "private interest[s]," *Stevens*, 529 U.S. at 772, even if those private interests overlap with public ones. Tellingly, Defendants do not contend that the Constitution would require the Executive Branch to approve private suits under Title VII or the Sherman Act, for example, before they are filed—even though plaintiffs bringing such actions may vindicate public rights. The FCA empowers the Executive to take measures, up to and including intervention and dismissal of the case, that it deems appropriate. *Polansky*, 143 S. Ct. at 1732, 1734.

Finally, Defendants contend that the FCA impermissibly constrains the Executive's ability to "remove" relators without dismissing the action in its entirety. Dkt. 180 at 7-8. That contention is unpersuasive. As the Ninth Circuit explained, the "concept of removal does not make sense in the *qui tam* context, [where] there is no 'office' from which to remove the relator and subsequently fill with someone

else." *See Kelly*, 9 F.3d at 755. The Court should reject Defendants' removal argument for that reason alone. In any event, the Executive's power to intervene and dismiss *qui tam* actions—thus displacing the relator's authority to litigate a case—sufficiently protects Executive Branch prerogatives. *See Polansky v. Exec. Health Res. Inc.*, 17 F.4th 376, 387 (3d Cir. 2021), *cert. granted sub nom. United States ex rel. Polansky v. Exec. Health Res., Inc.*, 142 S. Ct. 2834 (2022), and *aff'd sub nom. Polansky*, 143 S. Ct. 1720. The Constitution does not require that the Executive Branch have any additional power to preclude a private party whose suit would vindicate public rights from litigating a case.

For these reasons, the FCA's *qui tam* provisions are consistent with the Take Care Clause and the Vesting Clause.

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

Defendants concede that a *qui tam* relator is not "appointed as an officer of the United States" pursuant to the Appointments Clause. Dkt 180 at 13. Defendants cite *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1514 (2019) for this statement, yet they ignore particularly relevant language in *Cochise* that states:

> [A] private relator is not an "official of the United States" in the ordinary sense of that phrase. A relator is neither appointed as an officer of the United States, see U. S. Const., Art. II, § 2, cl. 2, nor employed by the United States. Indeed, the provision that authorizes *qui tam* suits is entitled "Actions by Private Persons." § 3730(b). Although that provision explains that the action is brought "for the person and for the United States Government" and "in the name of the Government,"

> *ibid*., it does not make the relator anything other than a private person, much less "the official of the United States" referenced by the statute.

Cochise, 139 S. Ct. at 1514 (citing *Stevens*, 529 U.S. at 773, n.4). Although *Cochise* addressed the FCA's use of the term "official" in its statute of limitations provisions, the unequivocal view that a relator is a private person and not an "the official of the United States charged with responsibility to act" is instructive here and underscores Congress's determination that *qui tam* relators are not part of the government and do not exercise its powers.

Further, as discussed in detail above, an FCA relator does not exercise significant federal authority and the *Morrison* test is plainly not relevant to the status of an FCA relator. Defendants also attempt to draw an analogy to the Federal Election Commission members whom the Supreme Court held to be "Officers of the United States" in *Buckley v. Valeo*, 424 U.S. 1 (1976). *See* Dkt. 180 at 14. But Defendants' argument, much like their argument regarding *Morrison's* relevance, disregards critical differences between members of the Federal Election Commission and a *qui tam* relator. Most fundamentally, the positions in *Buckley* were not personal, were not limited to a single case, and were endowed with "primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights." *Buckley*, 424 U.S. at 140. A *qui tam* relator, by contrast, bears none of those indicia of being a federal officer. He is instead merely a "private

part[y]" pursuing civil litigation in his own personal interest. *Stevens*, 529 U.S. at 786 n.17; *see Taxpayers Against Fraud*, 41 F.3d at 1041.

The Supreme Court in *Buckley* also emphasized the Federal Election Commission's "extensive rulemaking and adjudicative powers." 424 U.S. at 110. In particular, the Court noted that the Commission could bring civil enforcement actions without any "concurrence of or participation by the Attorney General," and "the decision not to seek judicial relief . . . appear[ed] to rest solely with the Commission." *Id.* at 111. Under the FCA's *qui tam* provisions, by contrast, a relator's filing suit (or not filing suit) does not limit the ability of the Department of Justice to pursue a claim on behalf of the United States. To the contrary, as the Eleventh Circuit has recognized, the United States has "considerable authority over intervened and non-intervened qui tam actions." *Yates v. Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1312 (11th Cir. 2021).

In sum, relators are not officers of the United States and, therefore, the *qui tam* provisions of the FCA do not violate the Appointments Clause. *See Wallace*, 2023 WL 8027309, at *5.

C. Defendants' "Modern Regulatory State" Argument Does Not Change the Constitutional Analysis

Defendant's argument that the "Modern Regulatory State," Dkt. 180 at 1, has created a "Modern Regulatory FCA," *id* at 22, is merely an effort to dissuade this Court from considering the long history of the FCA in particular and *qui tam* statutes

more generally. At its core, Defendants' argument is that the 1986 amendments to the FCA so drastically changed the statute that it essentially is a new statute, no longer tied to the historical legacy of the pre-1986 FCA. Although the 1986 amendments were significant, they did not fundamentally transform the FCA. Instead, they were just another step in the development of the statute that adds another chapter to the history of the FCA.

As discussed above, the Court should consider the entirety of the relevant history, including the fact that the First Congress readily embraced *qui tam* statutes and that the FCA has long been understood by the Supreme Court and other courts as an integral fraud fighting tool to protect the federal fisc from unscrupulous parties who have defrauded the Government.

It is unsurprising, as defendants stress, that federal regulation has increased substantially since the FCA was first enacted. The national economy and the federal budget have grown equally if not more than the regulatory structure has grown. In the Medicare Program alone, last year the Government spent $ 829.9 billion,[4] and of that $454 billion[5] was spent on the Medicare Advantage Program. Given this vast expenditure of federal funds, the United States must be fully equipped to root out

[4] Cubanski, Juliette, et al., *FAQs on Health Spending, the Federal Budget, and Budget Enforcement Tools*, (Mar. 20, 2023), https://www.kff.org/medicare/issue-brief/faqs-on-health-spending-the-federal-budget-and-budget-enforcement-tools/ (last visited Mar. 10, 2024)

[5] Ochieng, Nancy, et al., *Medicare Advantage in 2023*, https://www.kff.org/medicare/issue-brief/medicare-advantage-in-2023-enrollment-update-and-key-trends/#:~:text=In%202023%2C%2030.8%20million%20people,spending%20(net%20of%20premiums) (last visited Mar. 10, 2024)

fraud in Medicare and other federal programs. A robust FCA is necessary to achieve this objective, and the *qui tam* provisions of the FCA are a critical piece of that undertaking.

CONCLUSION

For these reasons, the FCA's *qui tam* provisions are consistent with the Constitution's Take Care Clause, Vesting Clause and Appointments Clause. Accordingly, the Court should reject Defendants' arguments – as every federal Circuit Court to decide the issues has done – and deny Defendants' Motion for Judgment on the Pleadings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2024, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will provide electronic service to all counsel of record.

/s/ Sean P. Keefe
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TAB 218

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA *ex rel.* DR. CLARISSA ZAFIROV, Plaintiff/Relator, v. PHYSICIAN PARTNERS, LLC; FLORIDA MEDICAL ASSOCIATES, LLC, d/b/a VIPCARE; ANION TECHNOLOGIES, LLC; FREEDOM HEALTH, INC.; and OPTIMUM HEALTHCARE, INC., Defendants.	Case No. 8:19-cv-01236-KMM-SPF

RELATOR'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

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INTRODUCTION

Defendants Freedom Health, Inc., Optimum Healthcare, Inc., Physician Partners, LLC, Florida Medical Associates, LLC d/b/a VIPcare, and Anion Technologies, LLC (jointly, "Defendants") filed a joint motion for judgment on the pleadings or to dismiss for lack of subject matter jurisdiction (Doc. 180) asking this Court to become the sole court in the United States to find that the *qui tam* provisions of the False Claims Act are facially unconstitutional. Despite not identifying a single court that agrees with their proposed constitutional interpretation, and legions of caselaw (both historical and immediately recent) which recognize the well-established constitutionality of the nation's leading tool to remedy fraudulent misconduct against the United States, Defendants assert for the first time in this litigation that the False Claims Act ("FCA") violates Article II of the Constitution, specifically the Take Care Clause and the Appointments Clause. Defendants arguments are neither supportable nor novel; courts around the county have considered and rejected both angles time and again.

For the reasons set forth herein, and for the reasons articulated by every court to reach the same conclusions on the same arguments, Defendants' motion is due to be denied in its entirety. *United States ex rel. Butler v. Magellan Health Servs.*, 74 F.Supp.2d 1201, 1212 (M.D. Fla. 1999) ("A standard defense is an attack on the constitutionality of the FCA. Defendant[s] argue[ ] that the qui tam provisions of the FCA violate (1) the separation of power clause of the Constitution, [and] (2) the appointments clause.… Each of these arguments has been brought repeatedly by defendants in qui

tam cases, and each has been rejected resoundingly by the District and Circuit courts….").

FACTS AND PROCEDURAL HISTORY

Defendants' recitation of the procedural history of this case and the summary of Relator's allegations are generally accurate. (Doc. 180 at 3-4.) However, Defendants' representations that "Zafirov has continued to press this litigation on her own" and that "Zafirov has prosecuted and controlled the Government's claims" gloss over realities of the litigation which are critical to this motion. (Doc. 180 at 4.) And while "the facts and procedural history of this case are not crucial to the resolution" of a facial constitutional challenge, "a brief summary illustrates the control that the Government retains in FCA actions" generally, and has exercised in this action in particular. *United State ex rel. Wallace v. Exactech, Inc.*, No. 7:18-cv-01010, 2023 U.S. Dist. LEXIS 207881, at *4-5 (N.D. Ala. Nov. 20, 2023).

Following the Government's declination, Zafirov has "conduct[ed] the action," but has far from done so in a silo. Relator conferred with the United States regarding the dismissal of four defendants in advance of filing her Amended Complaint, and the United States consented to the dismissal. (Docs. 85, 87.) In response to Defendants' motions to dismiss Relator's Amended Complaint, the United States exercised its authority to object to dismissal on the basis of the public disclosure bar. (Doc. 105.)[1]

[1] This interjection by the United States was particularly significant because of the Court's prior assessment that "the public disclosure bar prohibited Relator from bringing her claims." (Doc. 81 at 1.) But, the Government's ability to veto a public disclosure dismissal is absolute, so dismissal on those grounds was foreclosed here. *United States ex rel. Vt. Nat'l Tel. Co. v. Northstar Wireless LLC*, No. 15-

Also in response to Defendants' motions to dismiss, and with the Court's consent, the United States filed a Statement of Interest to provide its position on two critical issues in this case: "whether diagnosis codes are material to payments under the False Claims Act" and "whether diagnosis codes directly impact the amount of capitated payments received by a managed care provider." (Docs. 115, 117, 120.) Similarly, the Court has granted permission for the United States to submit a response to Defendants' constitutional challenge (Doc. 203) and, as the real-party-in-interest, the United States will share time with Relator during oral arguments as.

LEGAL ARGUMENT

I. DEFENDANTS SEEK THE EXTRAORDINARY RELIEF OF INVALIDATING THE FALSE CLAIMS ACT, COUNTER TO EVERY COURT TO CONSIDER SUCH CHALLENGES.

Challenges to the constitutionality of a statute are requests for extraordinary relief that require an extraordinary showing. A court should invalidate an act of Congress only "for the most compelling constitutional reasons." *Mistretta v. United States*, 488 U.S. 361, 384 (1989), *quoting Bowsher v. Synar*, 478 U.S. 714, 736 (1986). Such constitutional caution is particularly necessary where, as here, the statute in question reflects a "considered scheme for resolving [an] intractable dilemma." *Mistretta*, 488 U.S. at 384; *see also United States by Dep't of Hous. & Urban Dev. ex rel. Givler v. Smith*, 775 F. Supp. 172, 175 (E.D. Pa. 1991)(upholding FCA against constitutional challenge, recognizing it addresses a "deeply vexing national problem").

0728, 2023 U.S. Dist. LEXIS 201259, at *30 (D.D.C. Nov. 9, 2023)("Court must permit a claim to proceed where dismissal is opposed by the United States").

Defendants assert that they are entitled to judgment on the pleadings, or alternatively for dismissal for lack of subject matter jurisdiction based on lack of standing if the *qui tam* provisions of the False Claims Act are found to be unconstitutional. Defendants admit that this claim is not timely brought within their pleadings (Doc. 180 at 4), and they make no showing of good cause for their untimeliness. The defect can no longer be remedied by amendment, as the deadline to amend pleadings expired nearly a year ago on April 3, 2023.[2]

Defendants also admit that the question of whether a *qui tam* relator has standing has already been conclusively established by the Supreme Court, which held that the law "leaves no room for doubt that a *qui tam* relator under the FCA has Article III standing." *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778 (2000) ("*Stevens*").[3] Given this controlling precedent, Defendants' inability to draw a straight line between their Article II constitutional challenges and a lack of subject matter jurisdiction or standing is unsurprising. Indeed, over the history of the False

[2] *See Eagle R&R LLC v. Louisiana*, No. 1:20-00417, 2021 U.S. Dist. LEXIS 245462, at *5-6 (S.D. Ala. Sept. 23, 2021) (failure to assert a claim or timely amend establishes lack of diligence, and lack of good cause to amend to pursue claim). Here, Defendants are represented by more than a dozen experienced *qui tam* attorneys, and have established no good cause why this claim was not raised years ago.

[3] Although *Stevens* did not engage in an Article II analysis, Defendants are incorrect that the Supreme Court "expressly left open" whether the FCA violated Article II. (Doc. 180 at 24). If the Court interpreted the *qui tam* provisions to be a jurisdictional bar to the case, it would necessarily have resolved that before rendering the remainder of its decision, irrespective of the issues raised by the petitioner. *See, Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 132 n.1 (1995) (Ginsburg, J., concurring) ("Of course, every federal court, whether trial or appellate, is obliged to notice want of subject matter jurisdiction on its own motion"). And, as Justice Stevens in his dissent put more directly: "The historical evidence summarized by the Court…is obviously sufficient to demonstrate that *qui tam* actions are 'cases' or 'controversies' within the meaning of Article III. That evidence, together with the evidence that private prosecutions were commonplace in the 19th century, is also sufficient to resolve the Article II question…." 529 U.S. at 801 (Stevens, J. dissenting).

Claims Act, the Supreme Court, and every court of appeal and district court to address the Article II challenges raised by Defendants has universally rejected them.[4]

Most recently, an Eleventh Circuit sister court—the Northern District of Alabama—assessed arguments virtually identical to those set forth by Defendants and found that "Defendant's constitutional arguments lack merit." *Wallace*, 2023 U.S. Dist. LEXIS 207881, at *3, 10 (noting, like here, "much of Defendant's arguments stem from dissenting opinions from the Supreme Court and other circuits"). In sum, "every circuit court to consider the issue has concluded that the FCA does not violate Article II" and Defendants offer no basis for this Court to depart from those conclusions. *Id.*

II. THE FALSE CLAIMS ACT DOES NOT VIOLATE ARTICLE II OF THE CONSTITUTION.

A. The False Claims Act's Partial Assignment to Relator Rests Solidly in the Property Clause of the Constitution and Maintains Executive Controls Under Article II.

While Defendants focus their constitutional arguments on the scope of the executive powers set forth in Article II, it is useful to begin any constitutional analysis of the FCA with recognition of the constitutional source for the FCA itself. The

[4] *See, e.g.*, *United States ex rel. Kelly v. Boeing Corp*, 9 F.3d 743,757 (9th Cir. 1993) (*qui tam* provisions of the FCA do not "impermissibly interfere" with executive or "disrupt the 'proper balance'" between branches); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F. 2d 1148, 1154-55 (2d Cir. 1993) (*qui tam* suits "do not constitute an intrusion into areas committed to other governmental branches, for the courts are specifically engaged in the implementation of legislative policy"); *United States ex rel. Taxpayers Against Fraud v. GE*, 41 F.3d 1032 (6th Cir. 1994); *Riley v. St. Luke's Episcopal Hospital*, 252 F.3d 749 (5th Cir. 2001); *United States ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787 (10th Cir. 2002); *United States v. Halifax Hosp. Med. Ctr.*, 997 F. Supp. 2d 1272 (M.D. Fla. 2014); *Butler*, 74 F. Supp. 2d at 1212.

Property Clause of the United States Constitution vests Congress with the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, § 3, cl.2. The broad purpose of the FCA was "stopping the massive frauds perpetrated by contractors supplying goods and services" to the government. *United States v. Hibbs*, 568 F.2d 347, 350 (1977). Because the United States' claims in litigation resulting from contractors' fraudulent conduct are a form of property, *Logan v. Zimmerman Brusch Co.*, 455 U.S. 422, 428 (1982), and the Constitution expressly empowers Congress to dispose of that property as it sees fit, the FCA and its *qui tam* provisions are authorized by the Property Clause. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542 (1943)("Congress has power to choose this method [*qui tam*] to protect the government from burdens fraudulently imposed upon it….").

Through the *qui tam* provisions of the FCA, the United States "effect[s] a partial assignment of the Government's damages claim." *Stevens*, 529 U.S. at 773. The FCA provides comprehensive rules regarding that assignment such that a *qui tam* plaintiff under the FCA is unlike any other plaintiff. "Because the relator is no ordinary civil plaintiff, he is immediately subject to special restrictions." *United States ex rel. Polansky*, 599 U.S. 419, 143 S. Ct. 1720, 1727 (2023)("*Polansky*").[5] In fact, "in non-intervened

[5] *See also United States ex rel. Rigsby*, 580 U.S. 26, 29 (2016)("The FCA places a number of restrictions on suits by relators."); *Yates v. Pinellas Hematology & Oncology, P.A.*, 21 F. 4th 1288, 1310-11 (11th Cir. 2021); *Stalley v. Orlando Reg'l Healthcare Sys.*, 524 F.3d 1229, 1234 (11th Cir. 2008) (comparing FCA to Medicare Secondary Payer Act, holding that "FCA vests the government with several significant procedural controls, including the rights to dismiss the action without the consent of the relator, to review the complaint *in camera* before it is served, and the right to veto or approve a settlement").

qui tam actions, the relator has primary responsibility to assert the rights of the United States only because the United States allows it to do so by declining to intervene." *Yates v. Pinellas Hematology & Oncology*, 21 F. 4th 1288, 1310 (11th Cir. 2021). Thus, contrary to Defendants' arguments, which exaggerate both the power that the FCA bestows on relators and the limitations it places on the Department of Justice, the *qui tam* provisions confer only discrete authority so limited as to not infringe upon the powers bestowed upon the executive branch by Article II of the Constitution.

For example, a relator must file the complaint "in camera," and the complaint "shall remain under seal for at least 60 days," during which time a *qui tam* plaintiff cannot publicly discuss the case. 31 U.S.C. § 3730(b)(2); *United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242, 245 (9th Cir. 1995). During the seal period, the Government conducts an investigation of the matter. § 3730(b)(3). The Government determines if it will seek extensions of the seal period to complete its investigation, and supports those requests with sealed memoranda, as it did in this matter. (*See* Doc. 17, maintaining seal of Government's briefs in support of extension of intervention deadline.)

After the investigation, if the government decides not to intervene and the relator conducts the action, the government retains "continuing rights" throughout the case as it is still the "real party in interest." *Polansky*, 143 S. Ct. at 1728, *citing United States ex rel. Eisenstein v. City of New York,* 556 U.S. 928, 930 (2009). As the Supreme Court recognized in *Eisenstein*, the federal government is at least "minimally involved

in every FCA action," even if it is not a party. 556 U.S. at 931. The government is entitled to be served with all pleadings and discovery on request, 31 U.S.C. § 3730(c)(3); it may stay specified discovery, 31 U.S.C. § 3730(c)(4); it regularly files Statements of Interest in non-intervened litigation, 28 U.S.C. § 517; and it has the right to appeal orders entered in non-intervened *qui tam* litigation, 556 U.S. at 931, n.2.

In addition, the government retains the right to "intervene at a later date upon a showing of good cause," § 3730(c)(3). This right was interpreted broadly in *Polansky*, with the Supreme Court blessing late intervention when the government "decided that the varied burdens of the suit outweighed its potential value." *Polansky*, 143 S. Ct. at 1724 and 1733 (consistent with the "[g]overnment-centered purposes" of the FCA, "Congress enabled the Government, in the protection of its own interests, to reassess *qui tam* actions and change its mind"). Notably, the converse is not true: the relator cannot settle or voluntarily dismiss the action without the government's consent. *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 (9th Cir. 1994); *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 48-49 (4th Cir. 1992).

And, of course, the government retains the right to the "lion's share" of any recovery in the action. *Polansky*, 143 S. Ct. at 1728; 31 U.S.C. 3730(d)(2). The relator's judgment is subject to limitation under the Eighth Amendment on the grounds that the judgment "is imposed by, and attributable to, the United States," even in a non-intervened case. *Yates*, 21 F. 4th at 1309. In addition, the relator's share of the recovery

is subject to court approval, and may be reduced based on specific findings by the court. 31 U.S.C. §3730(d)(2)-(3).

B. The False Claims Act Does Not Violate the Vesting and Take Care Clauses.

The Constitution's Vesting and Take Care Clauses together provide that "the executive power shall be vested in a President of the United States" and the President "shall take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 1, cl. 1, 3. Defendants contend that Congress, in enacting the FCA's *qui tam* provisions, has impermissibly diffused executive authority in violation of separation-of-powers principles. However, courts have consistently recognized that the Department of Justice's ultimate authority over *qui tam* actions permits the public-private partnership authorized by the FCA. *Wallace*, 2023 U.S. Dist. LEXIS 207881 at *13-16, *citing United States ex rel. Taxpayers Against Fraud v. GE*, 41 F.3d 1032, 1041 (6th Cir. 1994); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 752 (9th Cir. 1993); *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 756 (5th Cir. 2001). No courts have found the opposite to be true.[6]

Defendants' arguments are predicated on complete disregard for the reality that in all FCA litigation, it is the executive branch that decides whether the case proceeds,

[6] *See also*, *United States ex rel. Phillips v. Pediatric Servs. of Am., Inc.*, 123 F. Supp. 2d 990, 993 (W.D.N.C. 2000) ("authority to intervene and manage the suit clearly gives the government sufficient control"); *United States ex rel. Robinson v. Northrop Corp.*, 824 F. Supp. 830, 837 (N.D. Ill. 1993) ("the Executive Branch has considerably more power over the *qui tam* plaintiffs than it had over the independent counsels"); *United States ex rel. St. John LaCorte v. SmithKline Beacham Clinical Labs., Inc.*, No. 96-1380 C/W 97-942, 1999 U.S. Dist. LEXIS 13036, at *18 (E.D. La. Aug. 19, 1999)(FCA "does not impermissibly interfere with the constitutional functions of the Executive branch").

whether it settles, and whether it is dismissed voluntarily, with only modest procedural limitations. See Section II.A, *supra.* For want of supportive case law, Defendants rely only on dissenting opinions which depart from the actual law of the cases. For example, they cite to the *Riley* dissent for the proposition that the government "cannot 'control the breadth of the [qui tam] matter.'" (Doc. 180 at 10, *citing* 252 F.3d at 763 (Smith, J., dissenting).) The *Riley* majority, by contrast, held that the qui tam relator's powers were "slim indeed." 252 F.3d at 756. The *Riley* court went on to explicitly reject Defendants' position,

> Any intrusion by the qui tam relator in the Executive's Article II power is comparatively modest, especially given the control mechanisms inherent in the FCA to mitigate such an intrusion and the civil context in which qui tam suits are pursued. Hence, the qui tam portions of the FCA do not violate the constitutional separation of powers by impinging upon the Executive's constitutional duty to take care that the laws are faithfully executed under Article II of the constitution.

252 F.3d at 757.

In considering whether the FCA is consistent with the Constitution's requirement for the separation of powers, the inquiry into whether the FCA impermissibly undermines the executive authority should not focus on a complete lack of overlap. *See, e.g., United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F. 2d 1148, 1154 (2d. Cir. 1993). "The Supreme Court has noted that the Framers of the Constitution 'did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct.'[ ] Where the functions of two coordinate branches of Government overlap without intrusion, there is no constitutional violation. [ ] Since that is the situation here, we reject [defendants]

contention that the [FCA] violates the separation of powers doctrine." *Friedman v. Rite Aid Corp.*, 152 F. Supp. 2d 766, 772 (E.D. Pa. 2001), *quoting Mistretta*, 488 U.S. at 380; *see also*, *United States ex rel. Gublo v. Novacare, Inc.*, 62 F. Supp. 2d 347, 353 (Mass. 1999) (There is "no delegation by Congress of the Executive power, merely a conferral of discretion on Executive Branch officials to decide whether, when, and how to intervene").

Defendants assert that "only once" has the Supreme Court "upheld limited restrictions on the President's ability to remove and supervise those who conduct litigation on behalf of the United States." (Doc. 180 at 8, citing *Morrison v. Olson*, 487 U.S. 654, 696 (1988)). In *Morrison*, the Supreme Court rejected a separation of powers challenge to the office of the independent counsel created by the Ethics in Government Act. The Court concluded that the act gave the executive branch—specifically, the Attorney General—"several means of supervising or controlling the prosecutorial powers that may be wielded by an independent counsel" and therefore the law did not impermissibly undermine executive authority. 487 U.S. at 696. Here, as in other recent cases, Defendants assert "that the four mechanisms that limited the independent counsel's power in [*Morrison*] must be present in the FCA to save it from violating the Constitution." *Wallace*, 2023 U.S. Dist. LEXIS 207881, at *13 (rejecting identical arguments raised by defendants).[7]

[7] Defendants' reliance on *Seila L. LLC v. Consumer Financial Protection Bureau* to say that *Morrison* alone represents the outer limits of constitutional bounds is both misplaced and misquoted. (Doc. 180 at 8, citing 140 S. Ct. 2183, 2200 (2020)). *Seila L.* actually said that *Morrison* and *United States v. Perkins*, 116 U.S. 483 (1886), *together* "represent what up to now has been the outermost constitutional limits of

However, time and again, courts faced with constitutional separation of powers challenges to the FCA have evaluated *Morrison* and have found that the FCA "accord[s] the Executive Branch 'sufficient control' over the conduct of relators to 'ensure that the President is able to perform his constitutionally assigned duties.'" *Kelly*, 9 F.3d at 751; *Riley*, 252 F.3d at 765; *Wallace*, 2023 U.S. Dist. LEXIS 207881, at *13. "Subject to such 'substantial control,'" as articulated herein at Section II.A, *supra*, "a relator's power falls well short of the 'quite broad' powers of the independent counsel in *Morrison*." *Wallace*, 2023 U.S. Dist. LEXIS 207881, at *15, *citing Yates*, 21 F.4th at 1311.

Defendants' reliance on Justice Thomas' dissent in *Polansky* does not move the needle on their Article II arguments. While Justice Thomas theorized about "constitutional questions" based on his view that the Government *lacked* the power to dismiss a declined *qui tam* case, his interpretation was, plainly, in the minority. 599 U.S. at 449 (Thomas, J., dissenting). The *actual* holding of the Supreme Court found that the FCA requires "substantial deference" to a government request for dismissal, stating that "a district court should think several times over before denying a [government] motion to dismiss…even if the relator presents a credible assessment to

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permissible congressional restrictions on the President's removal power." 140 S. Ct. at 2198-2200 restriction on President's ability to remove the Director of the Consumer Financial Protection Bureau to be an unconstitutional where it would be "impossible for the President … to take care that the laws be faithfully executed"). Removal, however, does not present the same conundrum in FCA cases because the Government retains control and can dismiss the case, even over the relator's objection. *See generally, Polansky,* 143 S. Ct. at 1720; *Kelly*, 9 F. 3d at 755 ("[T]he concept of removal does not make sense in the *qui tam* context, in which there is no 'office' from which to remove the relator and subsequently fill with someone else.").

the contrary." *Id.* at 1734. Whether setting the bar any higher *could* create constitutional concerns by usurping executive power is not something that this court needs to decide: the Supreme Court has held that the bar is low. *See also United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, 970 F.3d 835, 848 (7th Cir. 2020)("good cause" restrictions on government right to dismissal did not raise Article II concerns).

C. The False Claims Act Does Not Violate the Appointments Clause.

As with the Take Care Clause, the entire body of caselaw assessing whether the FCA violates the Appointments Clause squarely holds that it does not. In sum, Relators do not exercise the powers of "officers" under Article II's Appointments Clause, and so they do not need to be appointed pursuant to that clause. U.S. Const. Art. II, § 2, cl. 2. Numerous courts, including the Supreme Court, have recognized that *qui tam* plaintiffs are not "officers." In *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, Justice Thomas wrote for a unanimous court that:

> [A] private relator is not an "official of the United States," in the ordinary sense of that phrase. A relator is **neither appointed as an officer of the United States, nor employed by the United States**. Indeed, the provision that authorizes *qui tam* suits is entitled "Actions by Private Persons." Although that provision 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 . . . .

139 S. Ct. 1507, 1514 (2019) (internal citations omitted, emphasis added); *see also Taxpayers Against Fraud,* 41 F. 3d at 1041 (holding FCA does not violate Appointments Clause; "[a]lthough a relator may sue in the government's name, the relator is not vested with governmental power."); *United States ex rel. Stone v. Rockwell Int'l Corp.*, 282

F. 3d 787, 805 (10th Cir. 2002) ("*[Q]ui tam* relators do not serve in any office of the United States"); *United States ex rel. Miller v. ManPow, LLC*, 2023 U.S. Dist. LEXIS 179199 at *10 (C.D. Cal. 2:21-cv-05418, Aug. 30, 2023); *Friedman*, 152 F. Supp. 2d at 771; *United States ex rel. Amin v. George Washington Univ.*, 26 F. Supp. 2d 162, 170 (D.D.C. 1998) ("It is clear that the relators enjoy limited powers and benefits and are not 'officers' within the meaning of the Appointments Clause.").

It is well settled that litigation conducted in the name of the United States can be performed by those who are not Article II "officers." Defendants claim that *Buckley v. Valeo ,* 424 U.S. 1 (1976), creates a requirement that all litigation be conducted by a duly-appointed officer. Here again, Defendants' arguments mirror those made in and rejected in *Wallace*: "Contrary to Defendant's assertion, *Buckley* … does not govern this case." 2023 U.S. Dist. LEXIS 207881, at *11-12. This is because the facts in *Buckley* are wholly different, and, therefore, inapplicable to an analysis of the FCA. *Buckley* involved the creation of the Federal Election Commission ("FEC") and the grant of "broad administrative powers" to be "exercised free from day-to-day supervision of either Congress or the Executive Branch," including the "primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights." 424 U.S. at 140. *Buckley* examined the powers granted to "any appointee," not any person; relators are simply not appointees. *Wallace*, 2023 U.S. Dist. LEXIS 207881, at *12. Thus, "Defendant[s] read *Buckley* too broadly." *Id.; see also Stone*, 282 F. 3d at 805 (applying the *Buckley* holding to the FCA "construes *Buckley* too broadly").

The Ninth Circuit, in *Kelly*, 9 F. 3d at 758, further dispensed with the flawed application of *Buckley* to a False Claims Act case:

> The *qui tam* provisions do not contravene *Buckley's* rule. The fact that relators sue in the name of the government does not vest them with any governmental powers; they conduct litigation under the FCA with only the resources of private plaintiffs. Furthermore, relators have no greater authority to enforce the FCA than does the Attorney General, and under the terms of the statute must yield do the government's assumption of 'primary responsibility' when it elects to intervene in a qui tam action. 31 U.S.C. 3730(c)(1). When the government does not intervene, a relator retains primary responsibility for the litigation, thus presenting what may seem a close question under *Buckley;* but even in that situation, the relator's responsibility only extends to a single case, and the relator's activities can still be limited by the court upon the request of either the government or the defendant. Thus, the qui tam scheme does not threaten the interest in preventing the exercise of unchecked or unbalanced government power which underlies the Appointments Clause.

Defendants also seek refuge in *Morrison* and related cases to assert that "a person who litigates on the United States' behalf holds a continuing position" (Doc. 180 at 14), although continuity alone would still not implicate the Appointments Clause.[8] But unlike the appointed officers at issue in the cases on which Defendants rely, the limited assignment of interests granted to a relator is temporary (lasting only as long as the case itself) and discrete, conveying authority for the relator's case alone, not to the regular operation of the government.[9] This difference is determinative: "[o]ver a

[8] For an individual to be considered a federal officer, the person must *both* hold a "'continuing' office established by law" *and* "'exercis[e] significant authority pursuant to the laws of the United States.'" *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (citations omitted). The lack of "significant authority" has been addressed herein at length. *See generally*, *Polansky*, 143 S. Ct. 1720 at 1733 (the government's interest, controlled through the Attorney General remains "the predominant one").

[9] *Contra United States v. Donzinger*, 38 F.4th 290, 297 (2022) (finding a special prosecutor to be an officer where he "wields 'the power to employ the full machinery of the state' including "executing search

century ago, the Supreme Court distinguished an officer from a relator, whose 'position is without tenure, duration, continuing emolument, or continuous duties.'" *Friedman*, 152 F. Supp. 2d at 771, *quoting Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890); *see also United States v. Germaine*, 99 U.S. 508, 511-12 (1878) (an officer must have duties that are "permanent, not occasional or temporary").

Although Defendants attempt to distance the role of a relator from the positions evaluated in *Auffmordt* and *Germaine,* courts have repeatedly applied the standards therein to current-day False Claims Act relators. *Id.*; *Riley*, 252 F.3d at 757 (recognizing *Auffmordt* and *Germaine*, and holding "[t]here is no such relationship with regard to qui tam relators"); *Taxpayers Against Fraud*, 41 F.3d at 1041 (quoting *Auffmordt* and finding "the relator is not an 'officer' within the meaning of the Appointments Clause"). Despite the myriad cases which have evaluated the False Claims Act in relation to the Appointments Clause, none has considered the limited, single-case, removable power assigned to a relator and found that such a role shares the hallmarks of an officer required to be appointed by the President. *United States ex rel. Burch v. Piqua Engineering, Inc.*, 803 F. Supp. 115, 119 (S.D. Ohio 1992) ("*[Q]ui tam* plaintiffs are not officers of the United States. *Qui tam* plaintiffs are not appointed by Congress, they do not receive a federal salary, and they serve for no specified term"); *United States ex rel. Fallon v. Accudyne Corp.*, 921 F. Supp. 611, 623 (W.D. Wis.

warrants, issuing subpoenas, granting immunity, entering into plea bargains, and representing the government in court both at trial and on appeal"). Relators have no similar authority. *Kelly*, 9 F. 3d at 758; *see also United States ex rel. Chandler v. Hektoen Inst. for Med. Research*, 35 F. Supp. 2d 1078, 1082 (N.D. Ill. 1999) (relators unlike prosecutors).

1995)("clear that the authority of the Executive Branch to appoint officers and execute laws has not been improperly delegated through the *qui tam* provision").

This Court has considered similar Appointments Clause challenge to the FCA, and disposed of the notion summarily. *Butler*, 74 F. Supp. 2d at 1212, *citing United States ex rel. Truong v. Northrop Corp.,* 728 F.Supp. 615, 620 (C.D.Cal. 1989) ("relators 'enjoy limited powers, have no formal duties, hold no established office, have no prescribed tenure, and receive no federal emoluments. As such, they are more appropriately classified as 'agents' for Appointment Clause purposes.' A relator is not attached to Congress or the judiciary as to make the executive branch's 'responsibility to execute the laws faithfully' threatened"); *United States v. Halifax Hosp. Med. Ctr.*, 997 F. Supp. 2d 1272, 1278 (M.D.Fla. 2014) (Appointments Clause challenge is "easily disposed of" because "relators meet none of [the *Germaine*] requirements" and were therefore not "'officers'" within the meaning of Article II). Defendants offer no basis for which the Court should now depart from those well-settled holdings.[10]

D. The History of the False Claims Act Confirms Its Constitutionality.

Defendants argue that the long history of *qui tam* suits in America does not point toward the FCA's constitutionality. (Doc. 180 at 18).[11] Here, Defendants are simply

[10] Defendants attempt to distance from *Butler* and *Halifax* by noting that they "predated Justice Thomas' dissent in *Polansky*." Justice Thomas' dissent did not change any law, let alone the myriad cases which underpin the *Butler, Halifax* and similar holdings around the country.

[11] Defendants also argue that the Court should not consider the history of the FCA because history should be considered "only when the Constitution's text is ambiguous." (Doc. 180 at 18). But "historical evidence illuminates how the Constitution's drafters intended for it to interact with *qui tam* statutes." *Wallace*, 2023 U.S. Dist. LEXIS 207881, at *16 ("Together with the reasons stated above, this historical evidence confirms the FCA's constitutionality").

wrong in asserting that historical context cannot be applied to the modern False Claims Act; the *Stevens* Court analyzed the historical context of *qui tam* statutes in its consideration of the modern False Claims Act, finding that the history was "well nigh conclusive" to the question of Article III standing. 529 U.S. at 774-78.

Defendants endeavor to carve a wide gap between the original FCA and the modern statute as amended in 1986. (Doc. 180 at 22-24.) But, the differences are inconsequential to this analysis. Empowering relators to address fraud with the tools equal in scope and sophistication to the tools used by fraudsters to bilk the government is what the early *qui tam* statutes did, and exactly what the modern False Claims Act does now. Frauds leading to the first iteration of the False Claims Act were simple, yet devastating to the nation: "For sugar, [the Army] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys; and for serviceable muskets and pistols, the experimental failures of sanguine inventors, or the refuse of shops and foreign armories." F. Shannon, *The Organization and Administration of the Union Army 1861-1865*, at 54-56 (Peter Smith Press 1965). In response, the combatting legislation was equally simple, yet devastating to the fraudsters: Sen. Jacob Howard of Michigan, one of the sponsors of the original legislation, acknowledged that providing a reward to whistleblowers "is the safest and most expeditious way I have ever discovered of bringing rogues to justice."

But, in the years when the False Claims Act was essentially gutted and fell into disuse, simple schemes of the Civil War era transformed into complex operations, and

fraud permeated every corner of government contracting because "the sad truth [was] that crime against the Government often [did] pay." S. Rep. 99-345, 1986 U.S.S.C.A.N. 5266, 5268. It was "in the face of [this] sophisticated and widespread fraud" that Congress sought "a coordinated effort of both the Government and citizenry [to] decrease this wave of defrauding public funds." *Id.* at 5267. As it had done more than 120 years earlier, Congress again sought to "allow and encourage assistance from the private citizenry [to] make a significant impact on bolstering the Government's fraud enforcement efforts." *Id.* at 5273. Importantly, the 1986 Congress recognized that the modernized statute followed in the same steps as its predecessor: "The idea of private citizen aid in false claims actions is, of course, not a new one, but dates back to the original enactment of the False Claims Act in 1863." *Id.*

It is in that lens that Defendants' revisionist argument fails. The 1986 Amendments were specifically contemplated to bolster the Government's ability to recover defrauded funds in *qui tam* suits in the manner of the original enactment. *Id.* Far from creating anew any categories of claims, the drafters recognized that the most common types of false claims were not just factually false claims but false claims provided "in violation of contract terms, specification, statute, or *regulation*." *Id.* at 5274 (emphasis supplied).

Thus, despite Defendants' red herrings, it matters not whether the drafters of the Constitution could have envisioned the complex regulatory structure necessary to implement a roughly $4 trillion annual budget, the limitless ways in which government contractors would manipulate that structure to bilk the federal fisc, or even the

complex litigation required to protect the former from the latter. The question is simply whether there is a role for the long history of the False Claims Act in evaluating the Article II Take Care Clause and Appointments Clause questions presented here. And there is: "it 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 this statute." *Riley*, 252 F.3d at 752. "[H]istory, although not the sole definitive argument supporting the view that the FCA's qui tam provisions do not violate Article II, is certainly a 'touchstone illuminating' their constitutionality." *Id.* at 753 (internal quotations omitted).

III. RELATOR HAS ARTICLE III STANDING.

Defendants admit that their assertion that Relator lacks standing prevails only "if the Court agrees that the *qui* tam provisions are unconstitutional." (Doc. 180 at 25.) For the reasons set forth above, which wholly refute Defendants' assertion that the FCA violates the Take Care Clause or the Appointments Clause of the Constitution, Defendants' challenge to standing fails as well.

CONCLUSION

For the foregoing reasons, Relator asks this Court to enter an order denying Defendants' Motion to Dismiss and Motion for Judgment on the Pleadings.

Respectfully submitted this 29th day of March, 2024,

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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2024, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system, which will provide electronic service to all counsel of record.

By: */s/ Jillian L. Estes*
Jillian L. Estes (Lead Counsel)

Counsel for Relator Dr. Clarissa Zafirov

TAB 239

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CLERK'S MINUTES

CASE NO. 8:19-cv-1236-KKM-SPF	**DATE:** April 22, 2024
HONORABLE KATHRYN K. MIZELLE	**COURTROOM: 13B**
CLARISSA ZAFIROV, **Relator,** **v.**	**COUNSEL** Jillian Estes
FLORIDA MEDICAL ASSOCIATES, LLC, et al., **Defendants.**	Matthew Krueger
CHAMBER OF COMMERCE (Amicus)	Steven Engel
ANTI-FRAUD COALITION (Amicus)	Tejinder Singh
UNITED STATES (Statement of Interest)	Jennifer Koh
COURT REPORTER: Bill Jones	**DEPUTY CLERK:** Gretchen O'Brien
TIME: 1:02 p.m.–3:01 p.m. 3:15 p.m.–4:56 p.m.	**TOTAL:** 3 hours, 40 minutes

PROCEEDINGS: ORAL ARGUMENT

- The parties argued whether the False Claims Act violates 1.) The Appointments Clause or 2.) The Take Care and Vesting Clauses.

- The parties addressed the following questions from the Court:
  1.) What is the standard for continuity for officers under the Appointments Clause?
  2.) What does the historical record bear out for purposes of the constitutionality of the False Claims Act?
  3.) What is the impact of *Polansky* on *Stevens*' partial assignment theory for relators?

- Hearing concluded

TAB 240

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA
ex rel. CLARISSA ZAFIROV,

Relator/Plaintiff,

v. Case No: 8:19-cv-01236-KKM-SPF

FLORIDA MEDICAL
ASSOCIATES, LLC, et al.,

Defendants.

ORDER

To assist in the Court's fully informed resolution of Defendants' motion for judgment on the pleadings, the Parties, their Amicus, and the United States are invited to file supplemental briefs providing additional founding-era historical evidence regarding federal qui tam enforcement. The most helpful briefing will identify founding-era federal qui tam statutes, analyze whether those statutes provide relevant historical analogues for the False Claims Act, and discuss federal enforcement practice under those statutes. Supplemental briefs are not to exceed 15 pages and are due no later than **May 21, 2024**.

ORDERED in Tampa, Florida, on April 23, 2024.

Kathryn Kimball Mizelle
Kathryn Kimball Mizelle
United States District Judge

TAB 262

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA *ex rel.* CLARISSA ZAFIROV, Plaintiff, v. FLORIDA MEDICAL ASSOCIATES, LLC; PHYSICIAN PARTNERS, LLC; PHYSICIAN PARTNERS SPECIALTY SERVICES, LLC; SUN LABS USA, INC.; ANION TECHNOLOGIES, LLC; ANTHEM, INC.; FREEDOM HEALTH, INC.; OPTIMUM HEALTHCARE, INC.; and SIDDHARTHA PAGIDIPATI, Defendants.	Civil Action No. 8:19-cv-01236-KKM-SPF

SUPPLEMENTAL *AMICUS CURIAE* BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS' JOINT MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

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May 21, 2024

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PRELIMINARY STATEMENT

At oral argument, this Court recognized that the False Claims Act's *qui tam* provisions would not present a "very close question" under Article II if Congress had adopted the provisions "today for the first time." Oral Arg. Tr. at 150. The *qui tam* provisions cannot be reconciled with the text of Article II, as construed by the Supreme Court, and so, the anomalous statutes adopted during the early Republic reflect the sole remaining thread in support of the constitutionality of the *qui tam* provisions.

The Chamber of Commerce of the United States of America ("Chamber") submits this brief in response to the Court's invitation for additional Founding-era evidence with respect to the enforcement of the early *qui tam* statutes. *See* ECF 240. In reviewing that evidence, the Court must "guard against giving postenactment history more weight than it can rightly bear." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 35 (2022). "[T]o the extent later history contradicts what the text says, the text controls." *Id.* at 36.

And as the prior briefing noted, the historical support for *qui tam* litigation is limited at best. *See* ECF 187-1 ("Chamber Amicus Br."), at 17–25. The early statutes reflected an ill-considered, pre-ratification understanding of the Chief Executive, which included private *criminal* enforcement, and which rapidly fell into disuse with the establishment of the Executive Branch. The history does not establish any consistent, deliberative practice that suggests *qui tam* can be reconciled with the

Constitution. Nor could history excuse the manifest conflict between the FCA's *qui tam* provisions and Article II of the Constitution.

ARGUMENT

This Court correctly viewed "the history [as] the hardest part of this case." Oral Arg. Tr. at 121. But that history does not save the FCA's *qui tam* provisions. There were just a few "FCA-like Qui Tam" statutes in the early days of the Republic. *Id.* at 16. And there does not appear to be any evidence that the First Congress considered the constitutionality of those laws giving informers a cause of action to vindicate harms to the United States.

Nor does there appear to be evidence that those statutes led to meaningful *qui tam* litigation. The *qui tam* device instead "rapidly fell into disfavor," only to be briefly revived three quarters of a century later during the heat of the Civil War—before it quickly "fell into relative desuetude" once again. *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. O.L.C. 207, 209, 235 (1989) (William Barr, Ass't Att'y Gen.) (hereafter, "OLC Memo"). That is not the sort of "unambiguous and unbroken history" that could support the constitutionality of *qui tam* litigation. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

I. The Scattered History of *Qui Tam* Cannot Excuse a Present Constitutional Violation.

Historical practice will not cure constitutional infirmities even if it "covers our entire national existence and indeed predates it." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 678 (1970). And though the practices of the First Congress bear

upon constitutional meaning, the simple fact of legislative action has never been sufficient to demonstrate constitutionality.

After all, history shows that the "members of the First Congress were not infallible interpreters of the constitutional text." Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541, 556 (1994). The First Congress granted to the Supreme Court in the Judiciary Act of 1789 original jurisdiction that was "repugnant to the constitution." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The next Congress, with many of the same members, directed the circuit courts to register war pensioners subject to correction by the Secretary of War—a non-judicial function that several Justices concluded was an unconstitutional blending of the separation of powers. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 (1792). And later that decade, Congress adopted the Sedition Act, which made it a crime to utter or publish "any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame . . . or to bring them . . . into contempt or disrepute." Act of July 14, 1798, ch. 74, § 2, 1 Stat. 597, 597. That criminal provision has long been recognized to violate the First Amendment. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964).

All this shows why the Court has made clear that post-ratification history should be considered, not as determinative proof of constitutional meaning, but as a way of liquidating textual ambiguities into an accepted interpretation. That is, "a regular course of practice can liquidate [and] settle the meaning of disputed or indeterminate

terms [and] phrases in the Constitution." *Bruen*, 597 U.S. at 36 (quotation marks omitted); *see also Baldwin v. United States*, 140 S. Ct. 690, 693 (2020) (Thomas, J., dissenting from denial of certiorari) (describing "the more general principle of 'liquidation,' in which consistent and longstanding interpretations of an ambiguous text could fix its meaning").

To that end, the Supreme Court has looked to three guiding principles when considering the relevance of history.[1] *First,* the Court must start with the constitutional text because "'[l]iquidating' indeterminacies in written laws is far removed from expanding or altering them." *Bruen*, 597 U.S. at 36 (citation omitted). And therefore, "postratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text"—no matter how pervasive—"obviously cannot overcome or alter that text." *Id.* (emphasis in original; citation omitted).

Second, the Court must consider the extent to which the early Congress adopted a measure after considering its constitutionality. Thus, the Court has given great weight to the "extensive[]" constitutional debate that led to the "Decision of 1789," which established that the President must have the power to remove his subordinate officers. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492 (2010); *Myers v. United States*, 272 U.S. 52, 144, 148–54 (1926). The Court similarly credited the constitutional debate over legislative prayer, which was "considered carefully,"

[1] *See also* William Baude, *Constitutional Liquidation*, 71 Stan. L. Rev. 1, 1 (2019) (observing that "historical practice" can liquidate the meaning of a constitutional provision where there is: (1) "a textual indeterminacy," and (2) "a course of deliberate practice," which (3) "result[ed] in a constitutional settlement") (cited by *Bruen*, 597 U.S. at 36).

and was not an action "taken thoughtlessly, by force of long tradition." *Marsh*, 463 U.S. at 791. By contrast, as James Madison himself observed, other "[l]egislative precedents" should be "entitled to little respect" when Congress established them "without full examination and deliberation." Letter from James Madison to Spencer Roane (May 6, 1821), in 3 *Letters and Other Writings of James Madison* 217, 221 (J.B. Lippincott & Co. 1865).

Third, the Court must consider whether an early practice had become an accepted and settled "part of the fabric of our society," consistent with a shared understanding of our country's governing document. *Marsh*, 463 U.S. at 793. For instance, the Decision of 1789 and legislative prayer were not just adopted by the First Congress but would also come to enjoy widespread acceptance for the better part of our history. That history stands in marked contrast with the *qui tam* statutes, which not only produced little litigation, but quickly fell into disuse.

A. *Qui Tam* Litigation Violates Article II's Text.

The early *qui tam* statutes cannot be reconciled with Article II's text. As the government admitted, *qui tam* relators exercise "substantial" and "core executive power" when prosecuting claims on behalf of the United States. Oral Arg. Tr. at 68; *see* Chamber Amicus Br. at 2, 4–9. But the Framers did not allow Congress to freely dispense that authority among self-interested bounty hunters. *See* Chamber Amicus Br. at 4–10. They instead chose to "vest[]" the entire "executive Power" in one publicly accountable President. U.S. Const. art. II, § 1, cl. 1. This "insistence of the Framers upon unity in the Federal Executive" was a critical feature of the

Constitution, as it helped "to ensure both vigor and accountability." *Printz v. United States*, 521 U.S. 898, 922 (1997). *Qui tam* litigation defies the Framers' choice by vesting "executive Power" in private, self-interested individuals. "[N]ot even a fig leaf of constitutional justification" exists for that troubling arrangement. *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 62 (2015) (Alito, J., concurring); *see id.* at 88 (Thomas, J., concurring) (recognizing that a "private entity" is "categorically preclude[d]" from exercising executive Power). These early statutes are thus inconsistent with the Vesting Clause.

In much the same way, the Framers "carefully husband[ed] the appointment power" to ensure that the President could be held responsible for the "'Officers of the United States'" who wielded executive Power in his name. *Freytag v. Commissioner*, 501 U.S. 868, 877, 883–84 (1991) (quoting U.S. Const. art. II, § 2, cl. 2). As a result, "only" properly appointed officers may "conduct[] civil litigation in the courts of the United States for vindicating public rights." *Buckley v. Valeo*, 424 U.S. 1, 140 (1976) (per curiam). That is a core executive Power. But Congress has allowed "all private persons in the entire world" to seize that power and "appoint themselves special fraud prosecutors in the name of the United States." James T. Blanch, *The Constitutionality of the False Claims Act's* Qui Tam *Provision*, 16 Harv. J.L. & Pub. Pol'y, 701, 742 (1993). That dispersal of executive authority cannot be squared with the original understanding of the Appointments Clause. *See* Chamber Amicus Br. at 8–13.

Finally, the early *qui tam* provisions are also inconsistent with the Constitution's obliging the President to "take Care that the Laws be faithfully executed." U.S. Const.

art. II, § 3. The FCA's *qui tam* mechanism delegates that prerogative to private actors. It allows them to commandeer and override the Executive's enforcement discretion. *See* Chamber Amicus Br. at 13–16. And it permits them to interfere with and undermine the Executive's authoritative control over litigation involving the United States. *See id.* at 16–17. That "do[es] not fit with the Constitution's vision of executive control of law execution." Saikrishna Prakash, *The Chief Prosecutor*, 73 Geo. Wash. L. Rev. 1701, 1778 (2005).

In short, "[t]he Framers designed our constitutional structure with the idea that unaccountable power is inconsistent with individual liberty." *In re Aiken County*, 645 F.3d 428, 440 (D.C. Cir. 2011) (Kavanaugh, J., concurring). Article II thus "makes emphatically clear from start to finish . . . that the president would be personally responsible for his branch." *Id.* at 439 (quoting Akhil Reed Amar, *America's Constitution: A Biography* 197 (2005)). The FCA's *qui tam* provisions, however, dash that constitutional scheme by allowing "self-appointed private attorney[s] general" to exercise substantial executive Power outside the Executive branch. *United States ex rel. Hunt v. Cochise Consultancy, Inc.*, 887 F.3d 1081, 1087 (11th Cir. 2018) (citation omitted), *aff'd*, 139 S. Ct. 1507 (2019).

No amount of historical practice could cure that plain constitutional violation—not even a historical pattern that "covers" (or indeed "predates") "our entire national existence." *Walz*, 397 U.S. at 678; *see, e.g.*, *United States v. Comstock*, 560 U.S. 126, 137 (2010). There is simply not "any sort of 'adverse possession' of

constitutionality." Thomas R. Lee, *The Standing of Qui Tam Relators Under the False Claims Act*, 57 U. Chi. L. Rev. 543, 549 (1990).

B. Congress Did Not Consider the Constitutionality of *Qui Tam*.

The early congressional enactments also provide scant support for the FCA's constitutionality because they were adopted without any consideration at the time. The Chamber has not identified any discussion of *qui tam*'s constitutionality in the legislative history of the First Congress.

Nor were most of the *qui tam* statutes "relevantly similar" to the FCA. *Bruen*, 597 U.S. at 29. At oral argument, the Court recognized that the early *qui tam* statutes fell into "three buckets," two of which are not analogous to the modern-day FCA. Oral Arg. Tr. at 74; *see id.* at 13–14. Many of the early statutes offered just a reward to informers for bringing a matter to the government's attention, without providing a private party with a cause of action to sue in the shoes of the sovereign.[2] And other early statutes sought to redress private injuries, with only incidental recoveries flowing to the government.[3] The statutes in these two categories are fundamentally different

[2] *See, e.g.*, Act of July 31, 1789, ch. 5, §§ 8, 29, 38, 1 Stat. 29, 38, 45, 48 (penalties against collectors, naval officers, and surveyors who failed to take an oath or display rate tables, with a bounty to the informer); Act of Sept. 1, 1789, ch. 11, § 21, 1 Stat. 55, 60 (similar for a maritime law); Act of Aug. 4, 1790, ch. 35, §§ 55, 69, 1 Stat. 145, 173, 177 (similar for a customs law); Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 65, 67 (penalties for Treasury Department officials who violated conflict-of-interest and bribery prohibitions, with a bounty to the informer); Act of Mar. 3, 1791, ch. 8, § 1, 1 Stat. 215, 215 (similar); Act of Feb. 25, 1791, ch. 10, §§ 8, 9, 1 Stat. 191, 195–96 (penalties for agents of the United States Bank that engaged in improper trading practices, with a bounty to the informer).

[3] *See, e.g.*, Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 124–25 (giving half of statutory penalty to authors who sued for copyright infringement of their works, with other half to the government); Act of July 20, 1790, ch. 29, § 1, 1 Stat. 131, 131 (giving, on top of damages, half of statutory penalty to seamen or mariners deprived of pre-departure shipping contracts, with other half to the government).

in kind, and they thus have limited bearing on a proper originalist inquiry. *See Bruen*, 597 U.S. at 29–30, 46–50.

As to those early statutes that allowed informers to pursue claims on behalf of the sovereign, some provided a cause of action against executive officials, not private parties. *See, e.g.*, Act of July 31, 1789, ch. 5, § 36, 1 Stat. 29, 36 (customs officials); Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 101, 102 (census officials). These types of statutes addressed a unique exigency of the early Republic. Encumbered by vast Revolutionary War debts, the First Congress "had to figure out how to incentivize and monitor executive compliance with congressional directives, even though federal officials would be geographically dispersed throughout a vast territory." Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 Notre Dame L. Rev. 1235, 1291 (2018). So, to accomplish those aims, the First Congress borrowed "from the practices of the English Parliament and earlier American legislatures, selectively employing *qui tam* regulation of executive branch officials alongside provisions for litigation by injured parties and by government officials." *Id.* Such private suits to check abuses from public officials raise different concerns from those posed by actions that authorize private parties to act on behalf of the United States.

That leaves just a handful of "true" *qui tam* statutes from the Founding era that authorized private enforcement actions. Oral Arg. Tr. at 13. But "[t]here is no evidence" that the First Congress ever seriously considered the constitutionality of these enactments. OLC Memo, *supra*, at 214; *see Riley v. St. Luke's Episcopal Hosp.*, 196

F.3d 514, 519 (5th Cir. 1999), *rev'd en banc*, 252 F.3d 749 (5th Cir. 2001) ("There is no evidence that the early Congresses considered the constitutionality of [*qui tam*] actions."). To the contrary, the early *qui tam* statutes were expeditiously passed "stop-gap measures" designed to assist the nascent federal government with responding to the demands of administering a new regime that had to govern a broad geographic region. OLC Memo, *supra*, at 213, 235; *see Riley*, 252 F.3d at 773 (en banc) (Smith, J., dissenting) ("A careful review of the history of *qui tam* laws leads one to conclude that they should be classified among those statutes that have been passed more from expediency than from reasoned constitutional analysis.").

To the extent that the Founding generation did contemplate *qui tam*, the limited evidence suggests that members of the First Congress and the Washington Administration viewed it as a tool to combat government overreach rather than as a mechanism to employ private parties to carry out the work of the nascent federal bureaucracy. The members of the First Congress viewed *qui tam* as a necessary mechanism for enforcing the customs laws, but reliance on relators was no more popular in the early Republic than under the English common law. *See* Beck, *supra*, at 1292–93; Chamber Amicus Br. at 19. In a letter to Massachusetts Congressman Benjamin Goodhue, a merchant expressed hope for a collection system that would operate "without having recourse to the encouragement of a contemptible and infamous host of informers." Letter from Epes Sargent to Benjamin Goodhue (May 26, 1789), in *The Documentary History of the First Federal Congress of the United States, March 4, 1789–March 3, 1791*, at 631, 632 (Charlene Bangs Bickford et al., eds. 2019)

(hereafter, "*Documentary History*"). James Sullivan, a former judge and future governor of Massachusetts, captured the mood in a letter to Massachusetts Congressman Elbridge Gerry, noting "the contempt & abhorrence to informers which has long Existed in the united States." Letter from James Sullivan to Elbridge Gerry (July 25, 1789), in *Documentary History* at 1133; *see also* Letter from James Sullivan to Elbridge Gerry (June 23, 1789), in *Documentary History* at 843 (expressing that the "body of the people" believed that "an Informer against Smuglers was more odious than a theif [sic]"). Given some of the animosity directed against *qui tam*, Congress opted against *qui tam* enforcement of the penalties in the Collection Act, *see* Act of July 31, 1789, ch. 5, § 36, 1 Stat. 29, 36, to the extent they were directed at private parties. *See* Beck, *supra*, at 1293.

In reporting to Congress on the early *qui tam* provisions, Secretary of the Treasury Hamilton advised that informers had proven "essential to a due supervision of the conduct of the particular officers engaged in the collection of the revenues." Alexander Hamilton, Report of the Secretary of the Treasury (Apr. 23, 1790), in *Documentary History* at 456; *see also id.* (remarking that it would be impossible for the supervision of government officials to be satisfied "by any attention or vigilance of an Individual or Individuals at the Head of the Treasury. Distance, and the multiplicity of avocations, are conclusive bars."). Considerations of expediency, not constitutionality, marked Hamilton's discussion of *qui tam*.

The First Congress's failure to appreciate such constitutional concerns becomes all the more clear given that a number of these earlier statutes called for criminal

penalties. For example, an early larceny statute gave one half of the fine "to the informer and prosecutor," and provided that, "on conviction," the offender would "be publicly whipped, not exceeding thirty-nine stripes." Act of Apr. 30, 1790, ch. 9, §§ 16–17, 1 Stat. 112, 116; *see also* Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 Am. U. L. Rev. 275, 296–97 & n.104 (1989) (collecting "qui tam provisions authorizing individuals to sue under criminal statutes to help enforce the law").

As the government acknowledged at oral argument, the power of criminal enforcement "goes to the heart of the executive power." Oral Arg. Tr. at 81. There can be no serious dispute that allowing a private citizen to enforce criminal law unconstitutionally transgresses the Executive's "*exclusive* authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974) (emphasis added). The Court thus cannot rely upon the early Congress's haphazard enactments to delineate the bounds of Article II.

Indeed, the First Congress legislated shortly after the adoption of the Constitution, at a time when a number of fundamental questions concerning the separation of powers were still being settled. "Because American-style separation of powers had never been put into practical operation before the 1780s, members of the First Congress could not possibly have grasped all of the questions that it raised, let alone worked out coherent answers to them." Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich. L. Rev. 689, 727 (2004); *see also* Prakash, *The Chief Prosecutor*, *supra*, at 589 (noting that, for this reason, "we ought to

be cautious about importing English constraints or exceptions to the executive power, when those limitations might be based on the principle of parliamentary supremacy").

The First Congress's overriding concern was to quickly get the new federal government up and running. The *qui tam* statutes thus have all the characteristics of action "taken thoughtlessly, by force of long tradition" from an archaic English device, "without regard to the problems" that those statutes posed under the new constitutional order. *Marsh*, 463 U.S. at 791; *see United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 449–50 (2023) (Thomas, J. dissenting). And as discussed above, the early Congresses adopted not one, but multiple laws, that were soon seen to be unconstitutional. *See supra* at p. 3.

Add it all up, and the simple adoption of the early *qui tam* statutes cannot be viewed as meaningful evidence of their constitutionality. These are prototypical examples of instances where "the question of Constitutionality was but slightly, if at all, examined." Letter from James Madison to President Monroe (Dec. 27, 1817), *in* 3 *Letters and Other Writings of James Madison* 54, 55–56 (J.B. Lippincott & Co. 1865).

C. Even if the First Congress Had Considered the Constitutionality of *Qui Tam*, It Came Nowhere Close to Settling the Question.

The early *qui tam* enactments could not have liquidated any ambiguity in Article II for another reason: Namely, they were never tested in a manner that could have "culminated in some kind of settlement" of the constitutional questions that the statutes presented then and still present. Baude, *supra*, at 18.

On the contrary, "the *qui tam* statutes adopted by the First Congress gave rise to little actual litigation, and subsequent Congresses rarely used the device." Woolhandler & Nelson, *supra*, at 727 (footnote omitted); *accord* J. Randy Beck, *The False Claims Act and the English Eradication of* Qui Tam *Legislation*, 78 N.C. L. Rev. 539, 541–42 (2000). The anomalous enforcement device was also remarkably short-lived. "Within a decade, 'the tide had . . . turn[ed] against' qui tam, and Congress started curtailing its use." OLC Memo, *supra*, at 235–36 (quoting Leonard D. White, *The Federalists* 417 (1956)). *Qui tam* then fell into such desuetude that "[e]ventually all of the[] early *qui tam* statutes would be repealed." James B. Helmer, Jr., *False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites and Patriots*, 81 U. Cin. L. Rev. 1261, 1264 (2013).

During the Civil War, Congress revived *qui tam* to crack down on procurement fraud among military contractors. *See United States v. McNinch,* 356 U.S. 595, 599 (1958). But *qui tam*'s renaissance in response to the national crisis proved transitory, and the FCA's "*qui tam* provisions were used sparingly." *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994); *see* Beck, *English Eradication*, *supra*, at 541–42 ("While qui tam statutes have been on the books since the first Congress and the FCA has contained a qui tam provision since the Civil War, these pre-1986 statutes generated relatively little litigation."). After the Civil War, *qui tam* once again "fell into disuse for several decades until a new law enforcement need arose." Paul E. McGreal & DeeDee Baba, *Applying Coase to Qui Tam Actions Against*

the States, 77 Notre Dame L. Rev. 87, 123 (2001). A pattern had formed. The First Congress and later Congresses did turn to *qui tam* out of necessity, yet they did so without much thought to the mechanism's constitutionality.

* * *

In the end, "[h]istory cannot save qui tam." OLC Memo, *supra*, at 232. Nor is this a "close question." *Id.* The historical "use of qui tam, far from being ingrained in our legal institutions, has been marginal at most"—and the text of Article II is clear. *Id.* The *qui tam* provisions are inconsistent with Article II.

CONCLUSION

The Court should grant the Defendants' Joint Motion for Judgment on the Pleadings or to Dismiss for Lack of Subject-Matter Jurisdiction.

Respectfully submitted,

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May 21, 2024

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2024, I caused the foregoing Supplemental *Amicus Curiae* Brief to be filed with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to all attorneys of record.

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TAB 266

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA ex rel. DR. CLARISSA ZAFIROV,

Plaintiff,

-vs- CASE NO. 8:19-cv-1236-KKM-SPF

FLORIDA MEDICAL ASSOCIATES, LLC d/b/a VIPCARE, PHYSICIAN PARTNERS, LLC, ANION TECHNOLOGIES, LLC, FREEDOM HEALTH, INC., and OPTIMUM HEALTHCARE, INC.,

Defendants.
_____/

DEFENDANTS' SUPPLEMENTAL BRIEF ON FOUNDING-ERA *QUI TAM* ENFORCEMENT

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INTRODUCTION

In response to this Court's April 23, 2024 order, Defendants jointly submit this Supplemental Brief providing additional founding-era evidence regarding *qui tam* enforcement. ECF No. 240. The Supreme Court has made clear that the Vesting and Take Care Clauses of Article II require that the President have authority to remove and supervise those who litigate on the United States' behalf—a core executive power. And Supreme Court precedent confirms that those who litigate for the United States must be appointed in accordance with the Appointments Clause. The FCA's *qui tam* provisions violate these firmly established principles; there is no need to review historical *qui tam* enforcement.

At any rate, the historical record does not create an exception to the Constitution that can rescue the FCA's *qui tam* device. There is no apparent historical evidence that the founding generation considered the Article II implications of the *qui tam* device (Part I, *infra*); that the First Congress considered Article II when enacting early informer statutes (Part II, *infra*); nor that private individuals—rather than the government—actually used those *qui tam* statutes to litigate on behalf of the United States with meaningful frequency (Part III, *infra*). The transient *qui tam* enforcement practice at the Founding—imported from England's parliamentary system—does not justify an enduring exception to Article II for the FCA. *See* Part IV, *infra*.

LEGAL STANDARD

Constitutional interpretation starts with "textual analysis focused on the normal and ordinary meaning of the . . . language." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*,

597 U.S. 1, 20 (2022) (cleaned up). An "examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification . . . is a critical tool of constitutional interpretation." *D.C. v. Heller*, 554 U.S. 570, 605 (2008).

When, as here, the Constitution's meaning is clear, there is no cause to consult post-enactment historical practice. *See Bruen*, 597 U.S. at 36. By contrast, when the Constitution's meaning remains indeterminate, post-enactment practice may help liquidate meaning. *Id.* at 35-36. Even then courts "must . . . guard against giving postenactment history more weight than it can rightly bear." *Id.* at 35. Only "where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision." *Id.* at 36 (citation omitted). "[P]ost-ratification adoption or acceptance of laws that are inconsistent with the original meaning of the constitutional text obviously cannot overcome or alter that text." *Id.* (citation omitted).

DISCUSSION

I. The Founding Generation Did Not Endorse—or Even Consider—the Constitutionality of the *Qui Tam* Device.

The founding generation debated numerous constitutional questions, and in those circumstances, the "views of the Framers and their contemporaries" have helped guide constitutional interpretation. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 214 (2020). For example, "[t]he removal of executive officers was discussed extensively in Congress when the first executive departments were created," and "[t]he

view that prevailed . . . was that the executive power included a power to oversee executive officers through removal." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492 (2010) (cleaned up). Founding-era consideration weighed heavily in *Myers v. United States*, 272 U.S. 52 (1926)—the path-marking decision on removal authority. Other examples beyond Article II abound. *See, e.g.*, *I.N.S. v. Chadha*, 462 U.S. 919, 947 (1983) (interpreting Presentment Clause); *Alden v. Maine*, 527 U.S. 706, 718 (1999) (interpreting Article I authority to abrogate state sovereign immunity); *Marsh v. Chambers*, 463 U.S. 783, 784 (1983) (constitutionality of legislative prayer).

The *qui tam* device lacks any comparable historical record. "There is no evidence that the Framers considered the constitutional status of qui tam." *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. O.L.C. 207, 214 (1989). Defendants searched across founding-era sources[1] and uncovered no evidence that the founding generation considered—let alone endorsed—the constitutional implications of the *qui tam* device. Nor could Defendants locate any secondary sources—no law review articles, no treatises, no scholarly books—providing evidence that the founding generation discussed such issues. Given that record, The Anti-Fraud Coalition resorts to citing evidence that certain founding generation members were

[1] Defendants searched for references to terms such as "informer," "qui tam," "moiety," and "prosecuting," among others, across the following sources: *The Federalist Papers*; James Madison, *Papers of James Madison, Purchased by Order of Congress; Being His Correspondence and Reports of Debates during the Congress of the Confederation and His Reports of Debates in the Federal Convention*; James Madison, *Secret Proceedings and Debates of the Convention Assembled at Philadelphia, in the Year 1787, for the Purpose of Forming the Constitution of the United States of America*; Jonathan Elliot, *Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787*; Jonathan Elliot, *Debates, Resolutions, and Other Proceedings, in Convention, on the Adoption of the Federal Constitution*; and Joseph Story, *Commentaries on the Constitution of the United States*.

aware of the existence of *qui tam* actions, but that is a far cry from discussing how *qui tam* actions comported with Article II. *See* ECF No. 261 at 6-9.[2] Thus, the expressed views of the Framers and their contemporaries give no reason to conclude that Article II accommodates the FCA *qui tam* provisions.

II. Early Informer Statutes Do Not Qualify as Relevant Analogs and Were Enacted Without Due Consideration.

The Supreme Court has also recognized that "early congressional enactments provide contemporaneous and weighty evidence of the Constitution's meaning." *Printz v. United States*, 521 U.S. 898, 905 (1997) (cleaned up); *see CFPB v. Cmty. Fin. Servs. Ass'n of Am.*, 601 U.S. ___, 2024 WL 2193873, at *7 (May 16, 2024). But, of course, "enactment by the First Congress" is not "a guarantee of a statute's constitutionality." *United States, ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 450 (2023) (Thomas, J., dissenting) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)); *see also, e.g.*, *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

The First Congress enacted a number of informer statutes, but none was a true analog to the modern FCA's *qui tam* provisions. Analogical reasoning calls for determining "whether . . . two regulations are relevantly similar." *Bruen*, 597 U.S. at 29 (cleaned up). For the Second Amendment, a court determines "whether modern and historical regulations impose a comparable burden on the right of armed self-

[2] Analogies to early state constitutions are unavailing. There is no evidence that Massachusetts or other states thoughtfully considered the impact of *qui tam* enforcement on their Executive Branches, and states often permit greater infringement than the U.S. Constitution permits—Massachusetts, for example, permits its legislature to restrict more severely the chief Executive's removal authority. *See Edwards v. Commonwealth*, 174 N.E.3d 1153, 1165 (Mass. 2021).

defense." *Id.* Here, the question is whether these informer statutes interfered with the Executive Power or raised Appointments Clause concerns comparable to the FCA. The FCA's constitutionally relevant features are a private party who has no personal injury but who sues on the United States' behalf, to vindicate the United States' interests across a broad array of highly reticulated regulatory schemes, where the President cannot remove the relator or fully supervise the litigation, as the relator remains a party with rights even when: (1) the government investigates but declines to intervene; (2) the government intervenes; or (3) the government moves to dismiss. *Polansky*, 599 U.S. at 449 (Thomas, J., dissenting); *see* 31 U.S.C. § 3730.

The First Congress enacted 13 laws that had 20 informer provisions. *See Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 776-77 (2000). Of those early informer provisions, ten provided only a bounty for supplying information.[3] Eight provisions provided a bounty and a cause of action.[4] Three provided a cause of action for an injured party.[5][6]

Most of those early informer provisions are completely irrelevant. A bounty statute does not grant a private party the right to litigate the United States' interest, which is the foundation of the Article II questions here.[7] Early bounty statutes were

[3] *Stevens*, 529 U.S. at 777 & n.7 (collecting authorities).

[4] *Stevens*, 529 U.S. at 777 & n.6 (collecting authorities).

[5] *Stevens*, 529 U.S. at 776 & n.5 (collecting authorities).

[6] *Stevens* included Act of July 5, 1790, ch. 25, § 1, 1 Stat. 129 both as (1) a provision that allowed injured parties to sue for damages on both their own and the United States' behalf and (2) a provision that allowed "both a bounty and an express cause of action." 529 U.S. at 776-77 & nn.5, 6.

[7] As *Stevens* noted, the Supreme Court in 1943 "suggested, in dictum, that '[s]tatutes providing for a

instead the historical antecedents of today's whistleblower laws. *See*, *e.g.*, 7 U.S.C. § 26 (CFTC whistleblower statute); 15 U.S.C. § 78u-6 (Securities whistleblower statute); 26 U.S.C. § 7623 (IRS whistleblower statutes).

The two informer statutes that allowed *injured* parties to sue under federal law likewise lack the FCA's constitutionally relevant features. One such statute allowed a copyright holder to sue for infringement but granted half the forfeiture to the United States. *See* Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124-125. The other statute allowed an assistant census taker to file an action and keep half the penalty when citizens failed to cooperate with the census. *See* Act of Mar. 1, 1790, ch. 2, § 6, 1 Stat. 103. These ordinary claims do not allow a private party to litigate the United States' interest.

This leaves as the only potentially relevant analogs to the modern FCA the eight informer provisions that provided both a cause of action and a bounty. These statutes appear to have authorized private parties who lacked a personal injury to conduct litigation on the United States' behalf. But the statutes are, at most, imperfect analogs for at least two reasons. First, the early statutes were silent as to the government's control of *qui tam* suits, and thus did not expressly empower private individuals to litigate the government's interest as a party even when the government affirmatively declined to intervene, or when it did intervene, or when it moved to dismiss. Second,

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reward to informers which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue.'" 529 U.S. at 777 n.7 (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943)). That dictum is likely wrong given the Court's warning against courts creating causes of action, *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001), but in any event, the precise number of relevant *qui tam* statutes is not constitutionally significant given their transient nature and the lack of consideration afforded to Article II concerns. *See* Part IV, *infra*.

these statutes were narrow in scope and did not grant relators broad authority to assert the government's legal positions in complex regulatory schemes, as the modern regulatory FCA does. Consequently, these early statutes did not pose nearly the same measure of intrusion on the Executive Power as the FCA presents today.

After the First Congress, Congress continued to enact various informer statutes in the 1790s, but these statutes continued to depart from the FCA in relevant ways.[8] Some offered only a bounty;[9] others created a cause of action for an injured party but split the forfeiture between the informer and the United States;[10] and others offered a bounty and a right of action but remained silent as to the government's control of *qui tam* suits.[11] Defense counsel have found no early informer statutes that expressly permitted a private individual to continue litigating as a party even when the government had declined to pursue the action, and even when the government did

[8] *See* Leonard D. White, *The Federalists: A Study in Administrative History* 415 (1956) ("From 1789 to 1801 Congress made provision for rewards to informers in over twenty instances."); Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 Am. U. L. Rev. 275, 296 (1989) ("Within the first decade after the Constitution was ratified, Congress enacted approximately ten qui tam provisions authorizing individuals to sue under criminal statutes to help enforce the law.").

[9] *See*, *e.g.*, Act of March 1, 1793, ch. 19, § 12, 1 Stat. 329, 331 (allowing informer to recover bounty and prosecute for violations of the "Act to regulate Trade and Intercourse with the Indian Tribes"); Act of March 22, 1794, ch. 11, §§ 2, 4, 1 Stat. 347, 349 (providing bounty and allowing private prosecution for violations of the "Act to prohibit the carrying on the Slave Trade from the United States to any foreign place or country"); Act of April 20, 1818, ch. 91, § 3, 4, 6, 7, 3 Stat. 450, 451 (same, but for violations of the "Act to prohibit the introduction (importation) of slaves into any port or place within the jurisdiction of the United States . . .").

[10] *See*, *e.g.*, Act of February 28, 1800, ch. 12, § 6, 2 Stat. 11, 13 (allowing census taker to sue for and receive half of penalty for failure to cooperate in census).

[11] *See*, *e.g.*, Act of June 5, 1794, ch. 50, § 3, 1 Stat. 381, 383 (allowing informer to recover one half of property forfeited for outfitting vessel for foreign service); Act of July 6, 1797, ch. 11, § 20, 1 Stat. 527, 532 (allowing informer to recover one half of fines, penalties, and forfeitures incurred under the "Act laying Duties on stamped Vellum, Parchment and Paper"); Act of March 3, 1801, ch. 24, § 2, 2 Stat. 115, 115 (allowing informer to recover one half of fines from the "inspection of tobacco and flour, surveyors, mills, highways and ferries" in the "district of Columbia").

choose to pursue the action, and even when the government sought to dismiss the action. Thus, it is not accurate to characterize the early Congresses as having regularly enacted true analogs to the modern FCA's *qui tam* provisions.

Defense counsel also searched the Annals of Congress for the first seven Congresses (1789-1803) and found no relevant legislative history discussing the constitutionality of the early informer statutes. As with the constitutional debates, there is no apparent evidence that the First Congress (or any other early Congress) considered the Article II implications of enacting informer statutes.[12] The early informer statutes—*qui tam* provisions among them—were a carryover from the English parliamentary system and apparently adopted without any recorded Article II consideration. *Polansky*, 599 U.S. at 450 (Thomas, J., dissenting).[13]

III. Evidence of Founding-Era *Qui Tam* Enforcement Is Limited.

"[T]he qui tam statutes adopted by the First Congress gave rise to little actual litigation."[14] Although "[t]he definitive survey of early federal popular actions has yet

[12] One scholar argues that the First and Second Congresses "borrowed" the *qui tam* device to monitor *federal officials'* compliance with federal law. Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of A Neglected History*, 93 Notre Dame L. Rev. 1235, 1291 (2018). Defendants have found just one instance in the early Congressional record of *any* discussion of *qui tam*, and it reflects that concern: Alexander Hamilton, in a 1790 Report to Congress, noted difficulties enforcing the federal revenue laws, but proposed typical executive solutions, such as new bureaucratic posts and increased naval funding. *See* Alexander Hamilton, Report of the Secretary of the Treasury (April 23, 1790), in *6 The Papers of Alexander Hamilton* at 380-81, 396-97 (Univ. of Va. Press 2019). Hamilton proposed *qui tam* as a potential solution only to address *over*-enforcement, expressing concern that far-flung federal officials might be inadequately supervised. *Id.* at 396-97. Critically, Hamilton nowhere considered the constitutional questions presented here.

[13] *See generally* Note, *The History and Development of Qui Tam*, 1972 Wash. U.L.Q. 81 (1972).

[14] Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich. L. Rev. 689, 727 (2004); *accord* J. Randy Beck, The False Claims Act and the English Eradication of Qui Tam Legislation, 78 N.C. L. Rev. 539, 541-42 (2000).

to be written," Saikrishna Prakash, *The Chief Prosecutor*, 73 Geo. Wash. L. Rev. 521, 587 (2005), Defendants conducted extensive searches within HeinOnline's "Early American Case Law" database, which includes "all available lower federal case law up to 1880."[15] Defendants' independent research supports Woolhandler and Nelson's observation about the dearth of founding-era *qui tam* enforcement actions.

Early reported cases include few express citations to the informer statutes enacted by the First Congress. Of those first thirteen acts,[16] ten were not cited in a reported decision between 1789 and 1820. The Act of April 30, 1790 appears in three reported decisions—each a criminal action prosecuted by the government.[17] The Act of July 20, 1790 also appears in three reported decisions—two involved merchants suing for unpaid wages (not *qui tams*),[18] the other was a petition for habeas corpus (not a *qui tam*).[19] Finally, the Act of March 3, 1791 has one reported decision—an assumpsit action between a tax inspector and tax collector, also not a *qui tam* action.[20]

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[15] HeinOnline, *Early American Case Law* (last visited May 21, 2024), https://home.heinonline.org/content/early-american-case-law/. Defendants first searched for express references to any Act of the First Congress containing an informer statute. Then Defendants searched again for express references to Statutes at Large citations for each of the informer provisions enacted by the First Congress.

[16] The First Congress passed 13 acts with informer provisions, and some had multiple informer provisions. Defendants thus note 20 different informer *provisions* above and note 13 different *acts* here.

[17] *United States v. Morgan*, 26 F. Cas. 1314 (C.C.D.C. 1805); *United States v. Peter*, 27 F. Cas. 506 (C.C.D.C. 1814); *United States v. Hamilton*, 1 Mas. 52 (C.C.D. Mass. 1816).

[18] *Gammell v. Skinner*, 9 F. Cas. 1142 (C.C.D. Mass. 1814); *Brown v. Jones*, 4 F. Cas. 404 (C.C.D. Mass. 1815).

[19] *Ex parte D'Olivera*, 7 F. Cas 853 (C.C.D. Mass. 1813). The Act of July 20, 1790, ch. 29, § 7 allowed an employer to have a seaman or mariner held in a "house of correction" if he deserted his ship during a voyage and while under contract.

[20] *Wells v. Neville*, 29 F. Cas. 674 (C.C.D. Pa. 1818).

Going beyond express statutory references, Defendants searched for informer-related litigation arising between 1789 and 1820, reviewing hundreds of cases that hit upon broad search terms.[21] Despite the search's breadth, Defendants identified only two reported decisions that expressly involved informer-led litigation on the United States' behalf.[22] In one, *Evans v. Bollen*, 8 F. Cas. 836 (C.C.D. Pa. 1800), an informer brought a *qui tam* action for the United States against a defendant who violated a statutory prohibition against "the carrying on the slave trade, from the United States to any foreign place or country." *Id.* at 837 (citing Act of March 22, 1794). In the second, an informer brought a *qui tam* action arguing that a vessel was illegally outfitted within the jurisdiction of the United States. *Ketland v. The Cassius*, 2 U.S. (2 Dall.) 365 (C.C.D. Pa. 1796). That is all: two reported cases from 1789 to 1820.

In just two other cases that Defendants found, private uninjured individuals may have enforced federal law for a bounty, albeit not expressly on the United States' behalf. *See Tryphenia v. Harrison*, 24 F. Cas. 252 (C.C.D. Pa. 1806) (reversing sentence for unlawfully engaging in slave trade under Act of March 22, 1794); *Coxe v. Pennington*, 6 F. Cas. 692 (C.C.D. Pa. 1803) (plaintiff sued over applicability of tax provision to refined sugar under Act of June 5, 1794's informer provisions for non-payment of taxes). Beyond those, however, Defendant's broad search of all reported

[21] This search again used HeinOnline's "Early American Case Law" database. Defendants conducted a key word search using the following terms: "informer," "person giving such information," "the other half," "moiety," "person prosecuting," "persons informing," "qui tam," "on behalf of the United States," or "instituted on behalf of the United States." At least one of the terms or phrases appeared in nearly all informer statutes from the 1790s.

[22] It is unclear whether *Adams v. Woods*, 6 U.S. (2 Cranch) 336 (1805) was informer-led.

cases uncovered no other cases involving private individuals, who lacked a personal injury, litigating a claim to enforce federal law.

Indeed, most early informer-related cases identified through Defendants' research bore no resemblance whatsoever to modern *qui tam* litigation. Some reported cases involve the *government*—rather than a private individual—suing or prosecuting under statutes that provided a cause of action both to the government and informers. *See*, *e.g.*, *The Bolina*, 3 F. Cas. 811 (C.C.D. Mass. 1812) (seizure action); *United States v. Burr*, 25 F. Cas. 1 (C.C.D. Ky. 1806) (criminal prosecution).[23] Other decisions involved informers (or other parties) suing over unpaid bounties but without indication they had prosecuted the underlying cause of action for the government. *See Sawyer v. Steele*, 21 F. Cas. 586 (C.C.D. Pa. 1818); *Sawyer v. Steele*, 21 F. Cas. 583 (C.C.E.D. Pa. 1819); *The Langdon Cheeves & The Caledonian* (*Ex parte Cahoone*), 14 F. Cas. 1112 (C.C.D.R.I. 1820); *see also Ex parte Marquand*, 16 F. Cas. 776 (C.C.D. Mass. 1815) (collector sues marshal for possession of fines paid to court for distribution under informer statute). These cases would be akin to a modern-day IRS whistleblower suing to recover his or her share of a bounty and are not relevant analogs.

The opposition briefs only underscore how sparse is the history of relevant *qui tam* enforcement. The government chiefly relies on an essay discussing early

[23] *See also, e.g.*, *United States v. Smith*, 27 F. Cas. 1186 (C.C.D.N.Y. 1806) (criminal prosecution); *United States v. Workman*, 28 F. Cas. 771 (C.C.D. La. 1807) (criminal prosecution); *United States v. Smith*, 27 F. Cas. 1246 (C.C.D. Pa. 1811); *Ex parte Needham*, 17 F. Cas. 1274 (C.C.D. Pa. 1817) (habeas corpus petition related to informer statute); *United States v. Malebran*, 26 F. Cas. 1145 (C.C.D.N.Y. 1820) (criminal prosecution).

enforcement of the Slave Trade Act of 1794. ECF No. 260 at 4-7. The essay's appendix, however, reflects that most of the cases identified involved the United States as the lead or sole plaintiff, where the only recorded attorneys of record were federal district attorneys, and where (for a majority of cases) no informer was identified.[24] These are not relevant analogs; if anything, they show that *the government* actively enforced federal laws that had informer provisions.

Beyond that, the government cobbles together a few other Slave Trade Act cases through the mid-1800s, *see* ECF No. 260, at 8-9; a few cases involving copyright enforcement, primarily by injured plaintiffs, *id.* at 10-11; and a few cases involving other statutes decided in the mid-1800s, long past the Framing and not all involving relevant analogs, *id.* at 12.[25] For its part, TAF cites a collection of cases filed from nearly 100 years after the Framing (1866-1891) that involved a "Moiety Award," but offers no evidence that those cases involved an informer who actually litigated the government's claim, rather than simply received a bounty. ECF No. 261 at 6. That the opposition reach so far to make their case speaks volumes.

Contrary to the opposition's claims, the lack of evidence is not explained by pointing to challenges in researching early enforcement cases. *See* ECF 260 n.5. Numerous scholars have studied the topic, yet none has shown a widespread pattern of uninjured individuals litigating the government's claims. As Defendants' research

[24] *See* James E. Pfander, *Public Law Litigation in Eighteenth Century America: Diffuse Law Enforcement in a Partisan World*, 92 Fordham L. Rev. 469, 493-98 & nn. 196-219 (2023).

[25] The government cites *The Emulous*, 8 F. Cas. 697 (C.C.D. Mass. 1813), but it involved a *district attorney*'s action for forfeiture after a citizen initially seized the cargo—not a *qui tam* action.

shows, there are readily accessible databases of thousands of early reported federal cases. There is no reason to think those reported cases are not representative of early enforcement activity, yet those reported cases show hardly any relevant *qui tam* suits.

In sum, the scant early enforcement history does not suffice to show that the Constitution's original public meaning permitted private individuals to wield core Executive authority—a result that contradicts established Supreme Court decisions elucidating that meaning. At best, the early reported decisions indicate only that there were a few, scattered incidents of a hold-over practice from England, at a time when the Executive branch was still being established, and the conflict that *qui tam* practice poses to the separation of powers was not yet recognized.

IV. History Does Not Justify the FCA's *Qui Tam* Provisions

As Justice Thomas explained, "we should be especially careful not to overread the early history of federal *qui tam* statutes given that the Constitution's creation of a separate Executive Branch coequal to the Legislature was a structural departure from the English system of parliamentary supremacy." *Polansky*, 599 U.S. at 450 (Thomas, J., dissenting). "[T]he early statutes are the kind to which the Court gives no weight—'action . . . taken thoughtlessly, by force of long tradition and without regard to the problems posed.'" *Constitutionality of the Qui Tam Provisions of the False Claims Act*, *supra* at 214 (quoting *Marsh*, 463 U.S. at 791).

The lack of consideration of *qui tam* actions makes the subsequent diminishment of *qui tam* actions all the more pertinent. "At most, . . . the early qui tam statutes provide some legislative precedents that arguably started the process of 'liquidating'

the Constitution's meaning on these debatable points." Woolhandler & Nelson, *supra* at 726. But the liquidation was never perfected. *See generally* William Baude, *Constitutional Liquidation*, 71 Stan. L. Rev. 1, 13-21 (2019). "By 1799 the tide had begun to turn against informers," and Congress enacted reforms to curb informer abuses. White, *supra* at 417. "By the turn of the twentieth century, qui tam statutes had largely fallen into disuse in this country." Charles Doyle, Cong. Rsch. Serv., R40785, *Qui Tam: The False Claims Act and Related Federal Statutes* at 6 (Apr. 26, 2021).

There has been no "open, widespread, and unchallenged" practice of *qui tam* litigation "since the early days of the Republic." *Bruen*, 597 U.S. at 36 (citation omitted). The FCA itself was essentially dormant from the 1880s until World War II, used briefly during World War II, and then returned to obscurity until the 1986 Amendments.[26] Robust *qui tam* litigation in the United States only started in 1986 in the modern regulatory FCA and has been disputed on constitutional grounds since.

Our legal tradition has abandoned *qui tam* in other ways. "[T]he English legal system made . . . extensive use" of private *criminal* prosecutions, and this tradition "carried over to the English colonies . . . and persisted . . . after the Constitution went into effect." John D. Bessler, *Private Prosecution in America* 125 (2022). The First Congress enacted at least one informer provision allowing an informer to prosecute and collect a bounty "for criminal larceny or receipt of stolen goods." *Stevens*, 529 U.S. at 777 n.6 (citing Act of Apr. 30, 1790, ch. 9, §§ 16, 17, 1 Stat. 116). Likewise,

[26] *See* Boese & Baruch, *Civil False Claims & Qui Tam Actions* § 1.01[A], [B]; S. Rep. No. 110-507, at 3 (2008) (noting that "only about six to ten FCA cases [were] filed per year" from 1943 through 1986).

"citizens in the first years under the Constitution evidently presented evidence of crimes directly to the grand jury." Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 Am. U. L. Rev. 275, 292 (1989).

If "the historical practice of qui tam is per se constitutional because of its pedigree, then we must accept the entire practice as it actually existed, not merely those aspects of it that seem least objectionable to modem sensibilities." *Constitutionality of the Qui Tam Provisions of the False Claims Act*, *supra* at 236 n.21. But courts today would not countenance private federal prosecutions or involvement in grand jury proceedings. *In re Sealed Case*, 131 F.3d 208, 214 (D.C. Cir. 1997); *accord United States v. Ucciferri*, 960 F.2d 953, 954 (11th Cir. 1992). Far from being "part of the fabric of our society," *Marsh*, 463 U.S. at 792, the *qui tam* device is an anachronism abandoned by our legal tradition until the FCA revived it less than forty years ago.

In the end, "[t]he Constitution does not leave to speculation who is to administer the laws enacted by Congress." *Printz*, 521 U.S. at 922. And "[a] lawsuit is the ultimate remedy for a breach of the law" entrusted "to the President." *Buckley v. Valeo*, 424 U.S. 1, 138 (1976). The President must have authority to remove and supervise those who litigate on the United States' behalf, and such persons must be appointed in accordance with the Appointments Clause. The FCA's *qui tam* provisions violate these principles, and history does not warrant a different result.

CONCLUSION

This Court should grant Defendants' Motion for Judgment on the Pleadings or to Dismiss for Lack of Subject-Matter Jurisdiction.

Dated this 21st day of May, 2024

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to all attorneys of record.

/s/ Jason P. Mehta
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TAB 292

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

UNITED STATES OF AMERICA *ex rel.* DR. CLARISSA ZAFIROV,

Plaintiff/Relator,

v.

PHYSICIAN PARTNERS, LLC; FLORIDA MEDICAL ASSOCIATES, LLC, d/b/a VIPCARE; ANION TECHNOLOGIES, LLC; FREEDOM HEALTH, INC.; and OPTIMUM HEALTHCARE, INC.,

Defendants.

Case No. 8:19-cv-01236-KKM-SPF

DEFENDANTS FREEDOM HEALTH, INC. AND OPTIMUM HEALTHCARE, INC.'S OPPOSITION TO RELATOR'S MOTION TO COMPEL DISCOVERY FROM FREEDOM DEFENDANTS AND REQUEST FOR ORAL ARGUMENT

Defendants Freedom Health, Inc. and Optimum HealthCare, Inc. (collectively, "Freedom Defendants") oppose Relator Dr. Clarissa Zafirov's ("Relator") motion to compel (ECF 279, "Motion" or "Mot.").

This Motion is Relator's latest attempt to gin up a dispute sufficient to reopen discovery. First, Relator's core demands for either every medical record or 1,200-1,800 "member years" of those records misapprehends Freedom Defendants' business. As health insurers, Freedom Defendants do not treat patients and therefore do not create or maintain medical records in the normal course. Freedom Defendants would first have to ask hundreds, if not thousands, of third-party medical providers to give them the records, before then producing them to Relator. Relator's request seeks a universe of documents that Freedom Defendants do not possess, have no legal right to obtain, and could not possibly produce on any reasonable time scale—let alone in the two weeks remaining in discovery when Relator first identified her "sample." Relator's request is also untethered to the specific allegations in her Complaint, as she seeks a boundless supply of medical records with which she (or more likely, her experts) may explore unspecified theories of false or fraudulent diagnosis codes—a patently improper use of discovery in a False Claims Act ("FCA") case.

Second, Relator raises other purported deficiencies, most of which she first raised just one business day before the close of fact discovery. Freedom Defendants explained why Relator's contentions lacked merit before she filed this Motion, but Relator proceeded anyway (wrongly claiming, along the way, that Freedom Defendants never responded, *see* Mot. 6). To the extent Relator's requests are proper,

Freedom Defendants have fully complied with their obligations, either by (1) already producing the requested discovery, or (2) searching for responsive documents based on the parties' agreements on responsiveness, search terms, and document custodians. Over 19 months, Freedom Defendants have expended substantial resources to comply with their discovery obligations, and Relator's Motion should be denied.

I. DISCOVERY BACKGROUND

Discovery in this case began with months-long negotiations over a protective order and ESI Protocol. Decl. of Amanda M. Santella ISO Opposition ("Santella Decl."), Ex. A,[1] at 2 n.2; Ex. B (ESI Protocol).[2] The parties also simultaneously negotiated the substantive scope of document discovery pursuant to Relator's First Set of RFPs, *see* ECF 279-1. These negotiations also lasted months, culminating eventually in an agreement on each Request. *See* Exs. C-D (memorializing parties' compromises). The parties also negotiated extensively over custodians and search terms in accordance with the ESI Protocol,[3] and Freedom Defendants eventually produced 329,645 pages of documents, including six full years of encounter data submissions to the Centers for Medicaid and Medicare Services, plus 8,674 pages of

[1] All citations to Exhibits in this Opposition are to Exhibits attached to the Santella Declaration.
[2] Pertinent here, the ESI Protocol required the parties to share initial lists of custodians, after which the parties would "meet and confer if any Party reasonably believes that there are additional custodians likely to have unique, relevant information." Ex. B, at 2. As to search terms, the ESI Protocol required the parties to share lists of proposed search terms, and permitted the requesting party to "provide additional search terms that it believes in good faith are necessary to identify responsive documents." *Id.* at 3. The ESI Protocol further contained a detailed dispute resolution provision, requiring negotiation about any purported deficiencies before permitting motions practice. *Id.* at 10.
[3] Relator requested and received certain concessions through these negotiations—custodians were added at Relator's request, *see* Ex. A, at 2 n.2, and search terms were renegotiated after Freedom Defendants provided "hit counts" for various proposed search terms, *see id.* at 3-4 n.3.

documents obtained from third parties. Santella Decl. ¶ 11.[4]

In December 2023, at Relator's request, Freedom Defendants agreed to extend the close of fact discovery to May 29, 2024. *See* ECF Nos. 170-72.

On February 19, 2024, Relator served her Second Set of Requests for Production, to which Freedom Defendants timely responded on March 20, 2024. *See* ECF 279-2. Relator's Second RFPs included RFP 41, which requested "[a]ll medical and billing records related to any Physician Partners patient whose services were paid in whole or in part by any Government health insurance program." *Id.* As Relator's demand for every medical and billing record for 189,000 member years far exceeded what Freedom Defendants could possibly obtain and produce, Freedom Defendants did not agree to produce any documents they had not already produced. *Id.* Freedom Defendants objected based on overbreadth, burden, vagueness, and relevance, and as duplicative of an identical request to Provider Defendants. *Id.*[5]

With discovery set to close on May 29, 2024, Relator began a series of moves to extend the deadline to which she had previously agreed. First, on April 25, Relator sought a time-sensitive stay of discovery in light of the Defendants' pending dispositive motion. ECF 242. The Court denied Relator's motion on April 29, explaining that

[4] While Relator appears to fault Freedom Defendants for making their first substantive ESI production in January 2024 (*see* Mot. 3), that production occurred within six weeks of having reached agreement on search terms, and was preceded by various productions of non-custodial documents even before those search terms had been negotiated, *see* Santella Decl. ¶ 11.

[5] Relator's assertion that Freedom Defendants "refuse to produce any responsive records" even for the patients referenced in the Amended Complaint (Mot. 12) elides *the* critical fact—Freedom Defendants' production of medical records for those patients would be duplicative, because Provider Defendants have already produced their medical records to Relator. *See* Santella Decl. ¶ 12.

the action had "been pending for almost five years," and that the parties had already "expended substantial resources to comply" with the Court's operative deadlines. ECF 245. That same day, Relator served 59 new discovery requests on Freedom Defendants, including Relator's Third Set of RFPs. Santella Decl. ¶ 13. Freedom Defendants' responses to these requests, and any necessary document productions, would be due on the final day of the fact discovery period. *Id.* About two weeks later, on May 14, 2024, Relator filed a joint motion to stay other aspects of the case beyond fact discovery, reiterating to the Court that the "parties have agreed to complete fact discovery by May 29" subject to an exception for certain depositions. ECF 252.

On May 15, the day after representing to the Court that the parties would complete fact discovery by May 29, Relator's counsel emailed Defendants concerning Relator's requests for 1,800 years of medical records. *See* Ex. E. Relator's counsel explained that Relator had "retained an expert to assist in creating a sample of patient records to ensure that the necessary request for medical records is proportional to the needs of the case," and identified a list of 1,800 "member years," from which a "sample" of 1,200 could be pulled. *Id.* The letter contained no information as to how Relator generated her sample, but Relator has subsequently explained that she started with a population of all "189,000 member years," took a random sample of those member years, and requested from both sets of Defendants the production of full medical records for at least 1,200 (of 1,800 total) member years. *See* Mot. 4.[6]

[6] Relator demands that, to the extent any of the first 1,200 member years lack full medical records, Defendants supplement their production with another member year from the larger sample. Mot. 4.

On May 20, Relator filed a second time-sensitive motion, this time seeking an emergency hearing to address purported deficiencies in Defendants' ESI document productions (some of which Relator raises again in this Motion), ECF 255. The Court denied that motion, too. *See* ECF 268.

On Sunday, May 26—one business day before the fact discovery deadline, because of the Memorial Day holiday—Relator sent a letter to Freedom Defendants outlining the purported deficiencies that would become the subject of this Motion. *See* Ex. F. On May 29, at approximately 9:32 pm ET, Freedom Defendants responded to Relator's May 26 letter. *See* Exs. A, G. Freedom Defendants' response explained why their discovery efforts had been sufficient, rebutted certain factual and legal assertions, and described *additional* efforts they had undertaken to supplement existing productions and discovery responses. *See* Ex. A. On this last day of fact discovery, Freedom Defendants also met their deadline to respond to Relator's outstanding discovery requests, and made additional document productions. Santella Decl. ¶ 14.

Approximately twenty minutes after receiving the letter, Relator filed this Motion. In the Motion, Relator stated that Freedom Defendants had "not responded to the May 26, 2024 letter nor offered availability for meet-and-confer," and cited "Freedom Defendants' failure to respond to multiple requests to engage in a meet-and-confer." Mot. 6-7; *see also* Mot. 19 ("Freedom Defendants did not respond….").

II. LEGAL STANDARD

Discovery must be "relevant … and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in

controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). Parties may request documents within these parameters, but only when they are within the "responding party's possession, custody, or control." Fed. R. Civ. P. 34(a)(1). "Control" includes the "legal right to obtain the documents requested upon demand." *See Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984). While courts assess the extent to which parties have "actually shared responsive information and documents in the normal course of their business dealings" in determining questions of "control," *Sergeeva v. Tripleton Int'l Ltd.*, 834 F.3d 1194, 1201 (11th Cir. 2016), a party's occasional ability to successfully obtain documents does not create a "*legal right* to obtain the documents on demand," *Searock*, 736 F.2d at 654 (emphasis in original).

The trial court has "wide discretion in setting the limits of discovery." *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985). The party moving to compel bears the burden of proving relevance, while the party resisting discovery bears the burden of showing that the production of relevant discovery is improper, unreasonable, or unduly burdensome. *E-Ventures Worldwide, LLC v. Toll Bros., Inc.*, 2023 WL 4419736, at *1 (M.D. Fla. July 10, 2023). The party seeking production (i.e. Relator) also bears the "burden of proving that the responding party has 'control' over the requested documents." *Grayson v. No Labels, Inc.*, 2022 WL 1222577, at *1 (M.D. Fla. Feb. 17, 2022) (citing *Supreme Fuels Trading FZE v. Sargeant*, 2011 WL 13172599, at *3 (S.D. Fla. Sept. 15, 2011)).

III. ARGUMENT

Relator's Motion seeks discovery that Freedom Defendants do not possess, cannot produce without enormous and undue burdens, is not relevant, has *already* been produced, or is otherwise improper. The Motion should be denied in full.

A. Relator's Request for Medical Records Is Overbroad, Unduly Burdensome, and Improper.

Relator's RFP 41 seeks "All medical and billing records related to any Physician Partners patient." ECF 279-2. Relator variously argues that she is "Entitled to All Medical Records," Mot. 8, or that the Court should compel Freedom Defendants to produce all medical records for her sample of 1,200 to 1,800 "member years." Either demand is enormous and improper: Freedom Defendants do not even possess the requested medical records, and regardless, Relator's overbroad request is unduly burdensome and therefore disproportionate to the needs of this case.

1. *The requested documents are not within Freedom Defendants' possession, custody, or control.*

Relator bears the burden of proving "control," *see Grayson*, 2022 WL 1222577, at *1, yet addresses it only in a footnote, *see* Mot. 8 n.5. Relator does not argue that these documents are within Freedom Defendants' *actual* possession. Nor could she. *See* Ex. A, at 5 ("Freedom Defendants …, as a general matter, do not possess medical records, and only obtain them for limited purposes….").[7] Relator thus rests her

[7] "When pressed, Relator's counsel admitted that they did not know if Freedom Defendants possessed any of the medical records, and did not select the purported 'sample' based on whether Freedom Defendants were more likely to have possession of them—which would have been the case if, for example, the sample was geared toward records that would have been implicated by one of Freedom Defendants' targeted audits." Ex. A, at 5 (emphasis omitted).

"control" arguments on a theory of constructive possession, *see* Mot. 8 n.5. Relator's entire argument, relegated to a footnote, is that pursuant to Freedom Defendants' "Provider Agreement" with Physician Partners, Freedom Defendants have a "legal right to obtain medical records for any covered service provided by a Physician Partners physician." Mot. 8 n.5. Relator cites no such agreement, let alone its terms, for this proposition, and fails to disclose to the Court that the only employee or former employee of Freedom Defendants who was deposed on this topic told Relator that Freedom Defendants **did not have** such a broad contractual right to these records.[8]

Relator apparently refers to the "Group Participation Agreement" ("GPA") between Freedom Defendants and Physician Partners, but the GPA does not give Freedom Defendants the "legal right," *Searock*, 736 F.2d at 653, to demand the documents Relator seeks to compel. It gives Freedom Defendants the right, "upon reasonable request," to "obtain, copy and have access" to Physician Partners' medical records for "Covered Services provided by [Physician Partners]," but *only* "pursuant to authorization of the Member signed at time of enrollment during the application process." *See* ECF 241 (GPA) § 3.14.1; *see also* Decl. of Radha Rai ISO Freedom Defendants' Opp. ("Rai Decl.") ¶ 19. Thus, Freedom Defendants' access to the relevant documents is governed not by the GPA, but by the agreements with *members* that the GPA incorporates. Rai Decl. ¶ 19. Those agreements typically authorize the

[8] *See* Ex. H, Karen Kelly Dep. at 57:4-12 ("Q: Is it your understanding that in general providers who contracted with Freedom are required to make their charts available to Freedom for [chart] review? A: I wished. No. I have often said it should be in their contracts to provide that but that never happened.")

release of information to Freedom Defendants only "as … necessary for treatment, payment and health care operations." *Id.* (quotation omitted).

And the GPA is only one of the documents that would govern Freedom Defendants' "control" over the requested documents. Relator's request also sweeps in records from countless *other* providers, which may or may not be contracted with Freedom Defendants at all. *Id.* To the extent there is a contract between Freedom Defendants and these unknown providers, its provisions would govern the scope of Freedom Defendants' legal right. *Id.* There is no world in which Relator can meet her burden of showing constructive control, and Relator hardly makes any attempt.

2. *Relator's request is overbroad and unduly burdensome.*

Even now, Relator purports to seek every single medical record from every single one of Freedom Defendants' tens of thousands of Provider Defendant-affiliated patients over the course of six years. *See* Mot. 8 (demanding "All Medical Records"). That's exactly the type of boundless request the Eleventh Circuit and this Court have repeatedly chastised.[9] That request is plainly ridiculous, and while Relator refuses to abandon it completely, Relator's Motion shows that even Relator understands that such a request is indefensible. That is why Relator has "narrowed that request to a statistician-generated sample" (Mot. 2) that she claims ought to resolve the Defendants' objections. It does not. First, Relator's supposed "narrowed" sample

[9] *See, e.g.*, *U.S. ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1359 (11th Cir. 2006) (expressing worry that a relator given a "ticket to the discovery process" will "request production of every … claim submitted by the Defendant," whereupon "the Defendant may decide to settle the case to avoid the enormous cost of such discovery and the possible disruption of its ongoing business" (internal quotations omitted)); *U.S. ex rel. Fernandez v. Freedom Health*, 2021 WL 2954309, at *2 (M.D. Fla. Mar. 25, 2021).

remains boundless, as Relator has not tethered this sample to her allegations, or to any particular theory of fraud. Second, Relator's eleventh-hour demand—even as narrowed to 1,200-1,800 patient years—represents an enormous and disproportional burden on Freedom Defendants that Relator cannot justify.

Overbreadth. Relator's "sample" was drawn from a random sample of all of Freedom Defendants' Provider Defendant-affiliated members. Relator summarizes her "theory" of fraud (Mot. 11) by citing "the universality of the conduct" she alleges, as if it justifies discovery into every single action Freedom Defendants took between 2015 and 2020, and every single medical record. And even when Relator cites facets of the alleged "fraudulent scheme," *id.*, she frames them as merely illustrative ("*including*"), in another bid to refuse to tailor discovery in this case to any specific issue, or any specific set of allegedly false claims. Relator's 'every-claim-is-suspect' strategy is anomalous in FCA litigation—and improper.

Normally, in FCA litigation, relators use the fact discovery period to identify a particularized set of allegedly false claims that will be placed at issue at trial. Courts therefore routinely demand that any "allegedly false claims at issue must be narrowed in time for Defendants to conduct their own discovery and avoid potentially large costs associated with investigating every claim for every identified physician." *See, e.g.*, *U.S. ex rel. Fesenmaier v. Cameron-Ehlen Grp., Inc.*, 2019 WL 1453063, at *3 (D. Minn. Apr. 2, 2019), *R&R adopted by* 2019 WL 3245003[10]; *see also* Order at 1, *U.S. ex rel. Poehling v.*

[10] The magistrate judge in *Fesenmaier*—a case litigated by Relator's counsel here—explained that "identification of specific claims … allows [d]efendants to conduct third-party discovery on only those

United Health Group, Inc., No. 2:16-cv-08697 (C.D. Cal. June 8, 2020), ECF No. 400 (ordering response to demand that plaintiff "identify each and every diagnosis code that Plaintiff contends Defendant improperly failed to delete"); *U.S. ex rel. Vainer v. DaVita, Inc.*, 2014 WL 11516330, at *5 (N.D. Ga. July 18, 2014) (discussing orders compelling responses to interrogatory demanding identification of alleged false claims). That is how a relator *must* pursue discovery, because discovery in FCA cases is limited by the relator's knowledge (as Relator recognized in open court in this case, *see* Tr. of Apr. 22, 2024 Oral Argument at 104-105). *See U.S. ex rel. Phalp v. Lincare Holdings, Inc.*, 116 F. Supp. 3d 1326, 1341 (S.D. Fla. 2015) (*Phalp I*) & *U.S. ex rel. Phalp v. Lincare Holdings, Inc.* (*Phalp II*), 2016 WL 3961840, at *9-11 (S.D. Fla. Jan. 11, 2016), *both aff'd as modified*, 857 F.3d 1148 (11th Cir. 2017).

Relator cites precedents establishing that FCA discovery can extend beyond exemplars pleaded in a relator's complaint, *see* Mot. 9, but she fails to accept the core principle that representative samples must be *representative*. Relator's leading cases on this point are *U.S. ex rel. Bledsoe v. Cmty. Health Sys. Inc.*, 501 F.3d 493 (6th Cir. 2007) and *U.S. ex rel. McCartor v. Rolls-Royce Corp.*, 2013 WL 5348536 (S.D. Ind. Sep. 24, 2013), but neither does her any favors. The *McCartor* court recognized that relators should not be barred from "discovering other examples of behavior substantially similar to those described" in a complaint, but also *repeatedly* stressed the "high risk"

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claims actually at issue without wasting resources on potentially hundreds or thousands of irrelevant claims…." 2019 WL 1453063 at *3. Here, after 19 months of intensive discovery, Relator has insisted on her right to review every single diagnosis code submitted, and every single medical record generated, for tens of thousands of patients over a six-year period.

that discovery in that case could "outsize significantly its worth and impose unfair burden and expense, and … be used as the proverbial fishing expedition." 2013 WL 5348536, at *1, *6-7. And the *McCartor* court refused to compel sweeping productions of documents concerning even the sample, instead limiting production to a single type of summary-level report (the "Major Quality Failure Logs"), which the relator could analyze to identify violations "sufficiently similar" to those described in their complaint and request discovery about them. *Id.* at *7. Relator, in contrast, seeks a large and random sample of every single patient chart, where the production of each "member year" could involve producing hundreds or thousands of pages of records that Freedom Defendants do not currently possess, *see supra*, Section III.A.1.

The Sixth Circuit in *Bledsoe* likewise recognized that representative examples can "support more generalized allegations of fraud only to the extent that the relator's examples are *representative samples* of the broader class of claim," 501 F.3d at 510, and in fact upheld Rule 9(b) dismissals of the relator's "scheme"-based claims because they departed from the *specific* examples of fraud that the relator pleaded in the complaint, *id.* at 513-14.[11] Relator's other cases are similarly aligned on the fundamental principle that even if FCA discovery may extend beyond the specific examples in a complaint, surviving a Rule 9(b) motion does not grant a relator license to examine each of the

[11] Relator's Motion (at 8-9) overreads this Court's dismissal order as if it put its imprimatur on *every* allegation in the Amended Complaint, including Relator's conclusory assertions that the defendants worked to "increase[] risk adjustment scores" through "high-pressure tactics," *see* Mot. 11. The dismissal order instead found that Relator adequately pleaded specific *examples* of false claims. *See* ECF 124, at 13. Under *Bledsoe*, Relator could pursue discovery of a "materially similar set of claims," 501 F.3d at 511, but cannot, by simple virtue of surviving Rule 9(b) as to *some* examples, demand a random sample of *every claim* Freedom Defendants ever submitted for a Provider Defendant patient.

defendant's daily interactions in the hopes of substantiating broad claims of fraud.[12]

Applying these principles, Relator's sample population is a sample of everything, and nothing. Relator's sample makes no effort to test any of her particular theories: for instance, Relator faults Freedom Defendants for "push[ing] … high-value risk-adjusting codes," Mot. 11, and could have analyzed the produced claims data to select a sample of specific codes. Relator did nothing of the sort, opting instead to root around in thousands of medical records *in search* of a theory of fraud that she failed to plead or even devise through discovery. It is Relator who puts the "cart before the horse." *Contra* Mot. 2. Relator's demand here, shorn of any limiting principle, far outstrips the scope of discovery permitted in the cases she cites. The FCA and the Federal Rules forbid a relator to proceed in that manner, and this Court should, too.

Burden. The burden imposed by Relator's request is undue and disproportionate.[13] Far narrower audits conducted by Freedom Defendants are burdensome enough, and Relator's demand outstrips them by orders of magnitude. *See* Rai Decl. ¶¶ 8, 13-15.

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[12] *See U.S. ex rel. Walker v. R & F Props. of Lake Cnty., Inc.*, 433 F.3d 1349, 1359 (11th Cir. 2005) (discussing only the temporal scope of discovery); *U.S. ex rel. Brooks v. Stevens-Henager Coll., Inc.*, 2018 WL 296088, at *8 (D. Utah Jan. 4, 2018) (agreeing with plaintiff on temporal scope, but otherwise warning parties not to engage in "fishing expedition"); *U.S. ex rel. Polukoff v. Sorensen*, 2020 WL 4904164, at *7-8 (D. Utah Aug. 20, 2020) (compelling production of records associated with *a single type of procedure*, from a *single physician*); *U.S. ex rel. Rigsby v. State Farm Fire & Cas. Co.*, 794 F.3d 457, 467-69 (5th Cir. 2015) (remanding for "limited discovery" where district court denied "*any* additional discovery" after relator had won a bellwether trial on alleged false claim (emphasis in original)). Relator's final case is not an FCA case, was not governed by Rule 9(b), and is therefore irrelevant. *See Uchytil v. Avande, Inc.*, 2018 U.S. Dist. LEXIS 31737, at *6 (W.D. Wash. Feb. 27, 2018).

[13] Relator's sample asks directly for full medical records for 1,200 member years—already an extraordinary request—but, in practice, Freedom Defendants would need to collect records for all 1,800. *See* Rai Decl. ¶ 18 (explaining that Freedom Defendants will not know whether a member year needs to be "skipped" until they collect the records).

Unlike the requests involved in Government or Freedom Defendants' internal MRA audits, Relator's request is not limited to specific dates of service, diagnosis codes, or Hierarchical Condition Categories ("HCCs"). *Id.* ¶¶ 8, 13-15, 18. To attempt to satisfy Relator's request, then, Freedom Defendants would first need to analyze the encounter data for each of the 1,800 member years to determine how to even locate a "full" medical record for each member year. *Id.* ¶ 9. This would require a manual review of the data to determine which primary care providers, specialists, hospitals, or other medical providers the member visited in that year and what records those encounters would have generated. *Id.* While it is likely that Freedom Defendants have collected *some* medical records for *some* of the 1,800 member years, it is "highly unlikely" that Freedom Defendants previously collected the *full* medical record for many of them. *Id.* ¶ 16. Freedom Defendants generally collect far narrower sets of medical records in the ordinary course of their business. *See id.* ¶¶ 6, 16.

Only after completing these threshold steps can Freedom Defendants begin the massive undertaking of collecting the full medical records for all 1,800 member years. *Id.* ¶¶ 11-12. It would be impossible to precisely identify how long that would take, and how much money it would cost. *Id.* ¶ 17. Far narrower IRO audits—wherein Freedom Defendants need only collect provider records sufficient to justify individual diagnostic codes rather than *full* medical records—required 8-9 employees to work for 4-6 months to complete.[14] *Id.* ¶ 13. And those audits concerned just 100 member years

[14] This feature of Relator's request further crystallizes its disproportionate burden—many of the medical records Relator demands will be irrelevant, since *other* medical records (perhaps more easily

(rather than 1,800), and happened on a regular cadence that permitted Freedom Defendants to plan ahead and allocate resources accordingly. *Id.* ¶¶ 8, 13.

Setting employee resources aside, Relator's request would also be costly. Many specialists, hospitals, and primary care providers use vendors to transmit medical records to Freedom Defendants, and these vendors generally charge $10–25 per patient chart. *Id.* ¶ 17. Other specialists transmit the records themselves, but charge upward of $30 per chart. *Id.* Even if each member year required Freedom Defendants to pay $10 each for just 10 charts, Freedom Defendants would be out $180,000.

Lastly, Relator never considers the "parties' relative access to relevant information," but this Court must. *See* Fed. R. Civ. P. 26(b)(1). Freedom Defendants do not here suggest that Relator's identical request to Provider Defendants is legitimate, or that compliance with it would be proportional to the case (or even feasible). Indeed, Freedom Defendants are confident that Relator's last-minute demand to Provider Defendants presents a significant hardship to them, too. But Provider Defendants likely have far *greater* access to the majority of the documents than do Freedom Defendants. There is simply no reason to simultaneously compel duplicative and burdensome discovery from *both* sets of Defendants, and Relator offers no contrary argument. Relator's request for medical records should be denied.

B. Relator's Other Supposed Deficiencies Are Groundless.

Relator's laundry list of other complaints is baseless, as Freedom Defendants

obtained) will be sufficient to provide the necessary support for the specific diagnosis codes at issue. *See* Rai Decl. ¶ 13.

explained in their letter preceding this Motion. *See* Ex. A. Relator first raised them on May 26, one business day before the close of fact discovery. In the midst of other responsibilities—including completing and serving responses and objections to 59 discovery requests served on the last possible day and producing documents requested in 23 new requests for production—Freedom Defendants diligently reviewed Relator's purported deficiencies and addressed them one-by-one. In some cases, Freedom Defendants located and produced additional documents and information notwithstanding their objections to the propriety of Relator's requests.

Had Relator sought the requested discovery in a timely fashion—or read Freedom Defendants' response, Ex. A—this Motion could have been avoided. Relator's conduct suggests that the information is not the point—the *dispute* is the point. While this background provides critical context, Relator's arguments are clearly meritless even without that context. Freedom Defendants have already addressed each of these disputes in detail, and thus refer the Court to their letter instead of recounting those specifics again here. *See* Ex. A.

Relator's demands for new discovery fall into these categories: (1) information Freedom Defendants already produced earlier in the discovery window; (2) documents Freedom Defendants produced the same day Relator filed this Motion—either in response to the discovery requests due on May 29, or voluntarily as a compromise in response to Relator's May 26 letter; (3) documents already requested in Relator's May 20 emergency motion (which Freedom Defendants produced, to the extent such documents *existed*); and (4) discovery not permitted under the Federal Rules.

Discovery already produced. As explained in Freedom Defendants' letter, Freedom Defendants already produced documents such as certain audit documents, reports on IPAs, and certain documents incorporating "risk registers." *See* Ex. A, at 4 (noting that "Freedom Defendants produced responsive audit materials to Relator, some of which Relator has used at the depositions of Freedom Defendants' personnel," and providing examples of documents); *id.* at 5 (providing examples of produced IPA reports, and noting that Relator's counsel questioned Ms. Rai about one such example in her deposition). Relator apparently argues that other documents (which may or may not exist) are "responsive" to RFPs as *Relator drafted them*, without analyzing whether they are "responsive" to the RFPs as they were narrowed through (1) the parties' extensive negotiations and Relator's *agreement* to narrow the substantive reach of many of her RFPs, and (2) the parties' extensive negotiations on custodians and search terms (as governed by the ESI Protocol).[15] Relator's "deficiencies" are illegitimate to the extent she has already received the documents she now demands.

Documents produced on May 29. Freedom Defendants also produced additional

[15] To provide a more detailed case study into just one of Relator's demands here, Relator's letter demanded "every audit, including the audited records and resulting report, associated with a Physician Partners physician that Freedom conducted between 2015 and 2020." Ex. F, at 4; *see also* Mot. 15 (reiterating request for "audit results"). In response to the only RFPs touching on "audits" (RFPs 16 and 17), Freedom Defendants promised to produce "final versions of nonprivileged Medicare Advantage risk adjustment review reports" and documents, if any, "that evaluate the financial impact on Freedom Defendants of any increase in [risk scores]" for certain members referenced in the Amended Complaint. *See* ECF 279-1, at 58-63; Relator *agreed* with the scope of the search that Freedom Defendants promised to undertake. *See* Exs. C-D. Freedom Defendants *produced those records*. *See* Ex. A, at 4. Freedom Defendants also produced *additional* audit records that were responsive to other RFPs. *Id.* at 4-5. Freedom Defendants then produced *additional audit records* on the final day of discovery based on a *subsequent* request in Relator's Third Set of RFPs (served on the final day such discovery could have been served). It is unclear what more (if anything) Relator believes she should receive, but she nonetheless raises this "dispute" in her Motion.

documents after Relator's May 26 letter but before the close of fact discovery. *See* Santella Decl. ¶ 15. Much of this discovery was never requested or promised before April 29, when Relator issued 59 new discovery requests—responses to which were not due until May 29. *See, e.g.*, Ex. A, at 6 (explaining Freedom Defendants' May 29 document production of "minutes and/or [PowerPoint] presentations for quarterly Medicare compliance meetings and for the delegation oversight committee," which Relator did not request until April 29). While Freedom Defendants voluntarily produced other documents responsive to these new requests *early*, so that Relator could use the documents at depositions, many of the documents were not located, reviewed for privilege, and produced until May 29—the day their production was due. Santella Decl. ¶¶ 14-15. Freedom Defendants also went above and beyond the parties' agreements on search parameters to locate and produce additional documents on May 29 based solely on the requests made in Relator's May 26 Letter. *Id.* In other words, Freedom Defendants spent Memorial Day weekend responding to Relator's last-minute requests, only to be served with a Motion to Compel those same documents as they were being produced. *See* Ex. A, at 6 (describing production of additional "risk register" documents). Relator's Motion is baseless as to these documents, too.

Documents already sought through May 20 emergency motion. Relator here renews her request for documents related to Ms. Gareau, despite this Court already having reviewed (and rejected) Relator's assertions of impropriety, *see* ECF 268. As Freedom Defendants have already explained to the Court, *see* ECF 263, Relator's allegations are a red herring. Relator's grievance concerns Dr. Mansour's production (by counsel *who*

also represent Relator in this case) of a letter he sent to Physician Partners, with copy to Ms. Gareau, that contains a single mention of a "5 Star Checklist." *See id.* Freedom Defendants did not produce the document because Ms. Gareau was not a custodian—an outcome to which Relator did not object, despite having ample opportunity. Ex. A, at 2, 3-4. No prejudice resulted, including because Freedom Defendants searched for any similar documents and found only documents that Relator's counsel already had; Freedom Defendants re-produced those documents to Relator regardless. *Id.* at 5. All of these facts were before the Court when the Court denied Relator's motion for an emergency status conference, finding that "[g]iven Defendants' representations, the Court is not persuaded that the April 2019 emails reveal any production deficiencies." *See* ECF 268 at 3. This is no basis to reopen document discovery.

Improper discovery. Relator also seeks, for instance, "data" and "source[s]" that Freedom Defendants can supposedly "query" to generate information for Relator, and discovery on discovery about Freedom's instant messaging services. As to the data, the Federal Rules impose no obligation to create reports to produce them to Relator. Rule 34(a) does not require "another party to create or prepare a new or previously non-existent document solely for its production." *Advanced Cable Ties, Inc. v. Am. Elite Molding, LLC*, 2019 WL 13280288, at *5 (N.D. Fla. Feb. 7, 2019) (quoting *Mir v. L-3 Commc'ns Integrated Sys., L.P.*, 319 F.R.D. 220, 227 (N.D. Tex. 2016)).[16] As to

[16] *See also Hallmark v. Cohen & Slamowitz*, 302 F.R.D. 295, 299 (W.D.N.Y. 2014) (litigant need not create audited financial statements to comply with plaintiff's discovery request); *Alexander v. F.B.I.*, 194 F.R.D. 305, 310 (D.D.C. 2000) ("Rule 34 only requires a party to produce documents that are already in existence.").

documents from the "Microsoft Teams" platform, Relator ignores Ms. Kortsch's testimony that she did not personally use the platform "for work purposes," and that (to her knowledge) other employees used the platform only for "general communication." *See* Ex. A, at 5 (quotation omitted).

* * *

As evidenced by the foregoing, Relator's claims of deficiencies lack merit. Freedom Defendants expended enormous resources to comply with the "ambitious discovery schedule" in this case, *see* ECF 268 at 3, and satisfied the obligations imposed by the Federal Rules and the parties' own, extensively negotiated agreements. Relator seeks to upend those agreements—which were the product of compromise on both sides—at the final hour. The Court should hold Relator to her side of the bargains she struck, and reject her demands for additional and unwarranted discovery.

IV. CONCLUSION

For these reasons, the Court should deny Relator's motion to compel in full.

Dated: June 12, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2024, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system, which will provide electronic service to all counsel of record.

By: */s/ Amanda Santella*

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