IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

MADELYN B. BARNES, by and on behalf of the United States of America, and by and on behalf of the State of New York, Plaintiff, v. HEALTHNOW NEW YORK, INC., d/b/a BLUECROSS BLUESHIELD OF WESTERN NEW YORK, and d/b/a BLUESHIELD OF NORTHEATERN NEW YORK, now known as HIGHMARK WESTERN AND NORTHEASTERN NEW YORK, INC., Defendant.	Civil Action No. 1:16-cv-00088-JLS-HKS

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT'S OBJECTIONS TO THE REPORT AND RECOMMENDATION

STEVEN A. ENGEL
(*pro hac vice* application pending)
DECHERT LLP
1900 K Street, NW
Washington, D.C. 20006
Telephone: (202) 261-3369
Facsimile: (202) 261-3333
steven.engel@dechert.com

STEVEN E. BIZAR
MICHAEL H. MCGINLEY
(*pro hac vice* application pending)
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
Telephone: (215) 994-2205
Facsimile: (215) 994-2222
steven.bizar@dechert.com
michael.mcginley@dechert.com

Counsel for Amicus Curiae
The Chamber of Commerce of the United States of America

June 6, 2025

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION AND SUMMARY OF ARGUMENT

The *qui tam* provisions of the False Claims Act ("FCA") violate the Constitution's separation of powers. Article II vests "[t]he executive Power" in one elected President and confers upon him the solemn duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 1, cl. 1; *id.* art. II, § 3. The Framers adopted that unitary structure to promote accountability and ensure that "a President chosen by the entire Nation" would "oversee the execution of the laws." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). Yet the President can ensure that the laws are faithfully executed only when he "oversee[s] the faithfulness of the officers who execute them." *Id.* at 484.

The FCA's *qui tam* provisions violate this core constitutional requirement because they wrest the enforcement of the laws out of the President's hands. Private relators are not legally harmed parties seeking to recover for "personal injury." *United States ex rel. Wood v. Allergan, Inc.*, 899 F.3d 163, 166 (2d Cir. 2018). They are unaccountable bounty hunters charged with pursuing claims that, in their judgment, the United States should have asserted. All the while, they are "motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997).

That cannot be. Three Justices of the Supreme Court have rightly recognized "[t]here are substantial arguments that the *qui tam* device is inconsistent with Article II." *United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 449 (2023) (Thomas, J., dissenting); *see id.* at 442 (Kavanaugh, J., joined by Barrett, J., concurring) (same); *Wisc. Bell, Inc. v. United States ex rel. Heath*, 145 S. Ct. 498, 515 (2025) (Kavanaugh, J., joined by Thomas, J., concurring) (same). Shortly after the 1986 amendments to the FCA "resuscitat[ed] the dormant qui tam device," the Office of Legal Counsel of the Department of Justice likewise concluded that this private enforcement scheme for the vindication of public rights is "patently unconstitutional." *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. O.L.C. 207, 209, 238 (1989) (William P. Barr, Ass't Att'y Gen.) (hereafter, "OLC Memo").[1]

Indeed, when measured against Article II's text, "this is not even a close question." *Id.* at 209. The Framers vested the entire "executive Power" in the President alone. U.S. Const. art. II, § 1, cl. 1. And they "carefully husband[ed] the appointment power" to ensure that the President remained accountable for the "'Officers of the United States'" who wielded executive Power in his name. *Freytag v. Commissioner*, 501 U.S. 868, 881–84 (1991) (quoting U.S. Const. art. II, § 2, cl. 2). The FCA runs roughshod over these structural safeguards, empowering "self-appointed private attorney[s] general" to exercise substantial executive Power outside the Executive Branch. *United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992). Article II forbids such privatization of the President's responsibility to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

The "primary counterargument" for upholding the FCA's *qui tam* provisions emphasizes *qui tam*'s "historical pedigree." *Polansky*, 599 U.S. at 450 (Thomas, J., dissenting). But the "adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text"—even laws passed near the Founding—"cannot overcome or alter that text." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 36 (2022) (citation omitted). And *qui tam*'s

[1] OLC later took a different view about the Appointments Clause. *See Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 77 (2007) (suggesting that relators are not Officers because their position is not "continuing"); *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 142 & n.52 (1996) (stating that relators are not Officers because they are not federal employees); *The Test for Determining "Officer" Status Under the Appointments Clause*, 49 Op. O.L.C. __ (Jan. 16, 2025) (slip op. at 12) (adhering to those positions). The Office's original position was correct and consistent with subsequent Supreme Court precedent.

historical roots are limited at best. Unlike the FCA, many of the early enactments provided relators with only a bounty, not a cause of action, and many provided redress to relators who *themselves* suffered injury. In all events, the early *qui tam* statutes—some of which authorized private *criminal* enforcement—reflected an ill-considered, pre-ratification understanding of the Chief Executive. *Qui tam* thus "rapidly fell into disfavor" with the establishment of the Executive Branch. OLC Memo, *supra*, at 235. Decades later, the Civil War Congress revived *qui tam* with the original FCA, only for the practice to quickly fall into desuetude once again. Such scattered (and often inapposite) historical episodes cannot excuse the manifest conflict between the modern FCA's *qui tam* provisions and Article II's text.

Because the Relator here relies solely upon this unconstitutional mechanism in support of her suit, the Defendant's motion for judgment on the pleadings should be granted.

ARGUMENT

I. The *Qui Tam* Provisions of the False Claims Act Are Unconstitutional.

The *qui tam* provisions of the FCA violate Article II several times over. They empower self-appointed private persons to initiate and conduct litigation on behalf of the United States, in violation of Article II's Vesting Clause and the Appointments Clause. And they inhibit both the President's prosecutorial discretion and his control over declined *qui tam* actions, in violation of the Take Care Clause.

A. The *Qui Tam* Provisions Violate Article II's Vesting Clause.

Congress may not authorize bounty hunters to litigate on the United States' behalf. Rather, the Framers understood that "[a] basic step in organizing a civilized society" was to take the "sword" of law-enforcement actions "out of private hands and turn it over to an organized government, acting on behalf of all the people." *Robertson v. United States ex rel. Watson*, 560 U.S. 272, 282–83 (2010) (Roberts, C.J., dissenting from dismissal of writ of certiorari as improvidently granted). To that end, the Constitution established a unitary and accountable Executive who alone was charged with the responsibility for enforcing federal law.

1. The Framers' Understanding of Executive Power Predated the Constitution.

The Framers' conception of centralized executive authority finds roots in the influential political theory of John Locke. As he explained, "in the state of Nature[,] every one has the executive power of the law of Nature." John Locke, *Two Treatises on Civil Government* 197 (George Routledge & Sons ed., 1884). But "when they enter into society," individuals "give up" the "executive power they had in the state of Nature into the hands of the society." *Id.* at 258. That is, the people delegate their executive authority to public officials, whose power is "to be directed to no other end but the peace, safety, and public good of the people." *Id.* at 259.

William Blackstone's *Commentaries* reflect a similar understanding. "In a state of society," he reasoned, the right "to put [the law] in execution" is "transferred from individuals to the sovereign power," who "alone . . . bears the sword of justice by the consent of the whole community." 4 William Blackstone, *Commentaries on the Laws of England* 7–8 (1769). And because the public "delegate[s] all its power and rights, with regard to the execution of the laws, to one visible magistrate," that officer is "the proper person to prosecute for all public offences." 1 Blackstone, *Commentaries* at 268.

Moreover, this understanding of the executive power was not strictly limited to "criminal" offenses. It instead extended to the pursuit of relief for all "infraction[s] of the public rights belonging to th[e] community." 4 Blackstone, *Commentaries* at 2. Vindicating those public rights is the prerogative of the sovereign actor whom the people have empowered and entrusted to administer the laws. *See id.*

The common law recognized that one who personally "suffered the damage" from a public infraction might have a *concomitant* right to demand redress "in his own name." Locke, *supra*, at 196. But that would not permit him to pursue relief on behalf of the public writ large. "[N]o person" other than the official entrusted with the executive authority "can have an action for a public nuisance, or punish it," unless that "private person suffers some extraordinary damage." 3 Blackstone, *Commentaries* at 219–20. Because individual persons give up the executive power by entering society, "the law gives no *private* remedy for any thing but a *private* wrong." *Id.* at 219; *see also, e.g.*, 5 Matthew Bacon, *A New Abridgement of the Law* 798 (7th ed. 1832) (explaining that "common nuisances against the public are only punishable by a public prosecution").[2]

2. Article II Vests All Executive Power in the President.

The Framers enshrined this basic understanding in Article II's text, which vests "[t]he executive Power" in a single "President." U.S. Const. art. II, § 1, cl. 1. By entrusting "the President alone" with "all" the Nation's executive Power, the Framers sought to ensure that he would remain accountable for all those who would act on his behalf. *Seila Law LLC v. CFPB*, 591 U.S. 197, 203, 213 (2020).

Consistent with this need for accountability, the Framers opted not to vest "[p]rivate entities" with "the 'executive Power.'" *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 62 (2015) (Alito, J., concurring) (citation omitted). They instead insisted "that the first Magistrate should be responsible for the executive department" in its entirety. 1 *Annals of Cong.* 480 (1789)

[2] While Blackstone described *qui tam* suits as "popular actions," he also recognized such suits to enforce "penal statutes." 3 Blackstone, *Commentaries* at 159–60 (italics omitted). Parliament may have occasionally allowed that private delegation of executive authority. But Article II, which vests all the executive Power in the President, represents a "structural departure from the English system of parliamentary supremacy." *Polansky*, 599 U.S. at 450 (Thomas, J., dissenting).

(statement of James Madison); *see also, e.g.*, 1 *The Works of James Wilson* 400 (James DeWitt Andrews ed., 1896) ("In the United States, our first executive magistrate is not obnubilated behind the mysterious obscurity of counsellors . . . . He is the dignified, but accountable magistrate of a free and great people."); The Federalist No. 70, at 429 (Clinton Rossiter ed., 2003) ("UNITY of the executive of this State was one the best of the distinguishing features of our Constitution.").

Given that design, it would be "utterly inadmissible" for Congress to vest executive authority "in any other person" besides the President. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 330 (1816) (Story, J.). But that is precisely what Congress did with the FCA's *qui tam* provisions. The legislature "sought to disperse some quantum of executive authority amongst the general public." *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 750 (9th Cir. 1993).

That defies Article II. Second Circuit precedent makes this clear: Relators "lack a personal interest in False Claims Act *qui tam* actions." *United States ex rel. Mergent Servs. v. Flaherty*, 540 F.3d 89, 93 (2d Cir. 2008). Instead, they "sue 'to remedy an injury in fact suffered by the United States.'" *Wood*, 899 F.3d at 166 (citation omitted). As explained above, such a "public offence[]" may be prosecuted only by the President, who—vested with all the executive Power delegated by the people—is the only "person injured in the eye of the law." 1 Blackstone, *Commentaries* at 268. To uphold a redelegation of that power to private entities would dash the constitutional scheme.

Supreme Court precedent confirms the point. The executive Power includes the "*exclusive* authority and absolute discretion to decide whether to prosecute a case" on the United States' behalf. *United States v. Nixon*, 418 U.S. 683, 693 (1974) (emphasis added); *see also United States v. Texas*, 599 U.S. 670, 678–79 (2023). And the "[s]ettled rule" has long been that courts cannot entertain "any suit, civil or criminal, as regularly before them, if prosecuted in the name and for the benefit of the United States," unless the government is represented by the Executive. *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457 (1869). "[A]ll such suits, so far as the interests of the United States are concerned, are subject to the direction, and within the control of, the Attorney-General," *id.* at 458–59, who answers to the President and may thus exercise executive Power on his behalf, *see United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950). Because *qui tam* plaintiffs are not similarly accountable, the FCA contravenes Article II's Vesting Clause.

B. The *Qui Tam* Provisions Violate the Appointments Clause.

Qui tam litigation also conflicts with the Appointments Clause, which works in tandem with the Vesting Clause to ensure that "executive Power" is exercised only by officers accountable to the President. All such "Officers of the United States" must be appointed by the President, with the advice and consent of the Senate, or for inferior executive officers, by the Heads of Departments, if Congress so provides. U.S. Const. art. II, § 2, cl. 2. The *qui tam* provisions defy that arrangement "by permitting unaccountable, unsworn, private actors to exercise core executive power with substantial consequences to members of the public." *United States ex rel. Zafirov v. Fla Med. Assocs., LLC*, 751 F. Supp. 3d 1293, 1324 (M.D. Fla. 2024).

The key test for an "Officer" is whether the person "exercis[es] significant authority pursuant to the laws of the United States." *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam). Such authority includes the power to "conduct[] civil litigation in the courts of the United States for vindicating public rights." *Id.* at 140. And that describes the power of an FCA relator to a tee: The relator may sue "for the United States" and "in the name of the Government" for "penalt[ies]" and "damages which the Government [has] sustain[ed]." 31 U.S.C. §§ 3729(a)(1), 3730(b)(1).

Buckley forbids such a diffusion of executive Power. There, the Court struck down the original structure of the Federal Election Commission, which had permitted congressional leaders to appoint commissioners. *See* 424 U.S. at 113. That violated the Appointments Clause, because the commissioners performed executive "functions" by wielding "enforcement power" to "seek judicial relief" for violations of law. *Id.* at 138–40. As *Buckley* explained, "[a] lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *Id.* at 138 (quoting U.S. Const. art. II, § 3). Thus, "[s]uch functions may be discharged *only* by persons who are 'Officers of the United States' within the language" of the Appointments Clause. *Id.* at 140 (emphasis added) (quoting U.S. Const. art. II, § 2, cl. 2). Congress cannot vest civil law enforcement authority in any other person—like the Relator here—who has not been appointed through that constitutionally prescribed method. *See id.*

In considering whether one exercises an executive "function," *Buckley*'s interpretation reflects the original public meaning of an "Officer." "Etymologically, an 'office' is an *officium*, a duty; and an 'officer' was simply one whom the King had charged with a duty." Edward S. Corwin, *The President: Office and Powers 1787–1957*, at 70 (4th ed. 1957). In keeping with that understanding, the Crown argued prior to the Founding that "every Man is a publick officer who hath any duty concerning the publick." *King v. Burnell*, Carth. 478, 479 (K.B. 1700). And if one had "any part of the King's publick care," it does not matter that "his authority is confined to narrow limits, because 'tis the duty of his office, and the nature of that duty, which makes him a publick officer, and not the extent of his authority." *Id.* Later dictionaries from the eighteenth and nineteenth centuries reflected the same understanding of the term. *See, e.g.*, *Officer*, 2 Timothy Cunningham, *A New and Complete Law-dictionary* (1765) (tracking the *Burnell* formulation nearly verbatim); *Officer*, 2 Noah Webster, *American Dictionary of the English Language* (1828) ("A person commissioned or authorized to perform any public duty.").

The Framers likewise regarded an "Officer" as one "invested with some portion of the sovereign functions of the government." Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* 2 (1890). In Alexander Hamilton's words, persons to whose "management" the "executive details" of government "are committed ought to be considered as the [President's] assistants or deputies" and thus "ought to derive their offices from his appointment." The Federalist No. 72, at 434 (Alexander Hamilton). Those executive appointees alone are "the officers who may be [e]ntrusted with the execution of [the] laws." The Federalist No. 29, at 179 (Alexander Hamilton); *see also* The Federalist No. 39, at 237 (James Madison) (observing that "persons holding their offices" "administer[]" the government and so should "be appointed, either directly or indirectly, by the people").

This understanding of the word "Officer" explains why the Appointments Clause was no mere matter of "etiquette or protocol." *Buckley*, 424 U.S. at 125. It was instead viewed, for multiple reasons, to be "among the significant structural safeguards of the constitutional scheme." *Edmond v. United States*, 520 U.S. 651, 659 (1997). First, "[t]he Appointments Clause prevents Congress from dispensing power too freely" to those who might wield it improperly. *Freytag*, 501 U.S. at 880. And second, it "ensures that those who exercise the power of the United States are accountable to the President, who himself is accountable to the people." *Ass'n of Am. R.R.*, 575 U.S. at 63 (Alito, J., concurring); *see Freytag*, 501 U.S. at 884.

The FCA's *qui tam* provisions place both concerns in stark relief. Indeed, Congress could hardly have dispensed the executive Power more freely, "effectively permit[ting] all private persons in the entire world to 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). These self-appointees then become "the representatives of the public" for as long as they prosecute that case. *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1155 (2d Cir. 1993) (citation omitted). Congress also shielded relators from removal—and thus presidential supervision—by providing them a "right to continue as a party" even after duly appointed officials intervene. 31 U.S.C. § 3730(c)(1). The result is a relator "that is not accountable to the President, and a President who is not responsible for the [relator]." *Free Enter. Fund*, 561 U.S. at 495. That violates the Appointments Clause.

In holding otherwise, some courts have reasoned that relators do not occupy a "continuing and formalized relationship of employment with the United States." *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 757–58 (5th Cir. 2001) (en banc). *But see id.* at 767–69 (Smith, J., dissenting). Yet there are two problems with that argument.

First, relators unquestionably wield "core executive power." *Zafirov*, 751 F. Supp. 3d at 1300; *see Kelly*, 9 F.3d at 750. So, whether or not relators are "public officers in a strict sense," they may not be "charged with the exercise of executive functions" unless appointed through the method Article II commands. *Springer v. Gov. of Philippine Islands*, 277 U.S. 189, 203 (1928). Certainly, they cannot exercise the core executive function of prosecuting claims on the public's behalf for statutory damages and penalties that are "essentially punitive in nature." *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000). This "power to seek daunting monetary penalties against private parties on behalf of the United States" is a "quintessentially executive power." *Seila Law*, 591 U.S. at 219.

Second, the employment argument reads "Officer" too narrowly. It is true the word often "embraces the ideas of tenure, duration, emolument, and duties." *United States v. Germaine*, 99 U.S. (9 Otto) 508, 511 (1878). But the Supreme Court has never held that all such indicia must be present. To the contrary, *Morrison v. Olson* held that an independent counsel—a temporary prosecutor responsible for a single investigation—was "clear[ly]" an "'officer' of the United States." 487 U.S. 654, 671 & n.12 (1988). The Second Circuit has likewise recognized that "a temporary position can be an office." *United States v. Donziger*, 38 F.4th 290, 296 (2d Cir. 2022). It thus held that a "special prosecutor" charged with litigating a "particular case" was an Officer of the United States. *Id.* at 299.

Like the independent counsel in *Morrison* or the special prosecutor in *Donziger*, *qui tam* relators function as single-case officers empowered to sue on the government's behalf. *See* 31 U.S.C. § 3730; *see also Zafirov*, 751 F. Supp. 3d at 1315–17 (applying *Donziger* to hold "that a relator is an officer"). While their "office is limited in tenure" and "'temporary' in the sense that [they are] appointed essentially to accomplish a single task," those limits do not foreclose officer status "in the constitutional sense." *Morrison*, 487 U.S. at 671–72 & n.12. Rather, "the office of an FCA relator is continuous" by operation of law, "even if it is not continually filled." *Zafirov*, 751 F. Supp. 3d at 1314. And the FCA empowers individuals to appoint themselves to that office.

Relators can then remain entrenched in that office "for years." *Donziger*, 38 F.4th at 299. In fact, they often serve longer than presidential appointees—or the President himself. This case provides a prime example. Ms. Barnes has prosecuted this case for nearly a decade, exercising substantial executive authority in the people's name over the span of four presidential administrations.

Relators also receive "emoluments." *See* 31 U.S.C. § 3730(d). Indeed, their fractional share of recovery may dwarf the compensation of presidential appointees and mirrors the "bounties" many officers received, instead of "fixed salaries," in the first century of the Nation's existence. Nicholas R. Parrillo, *Against the Profit Motive: The Salary Revolution in American Government, 1780–1940*, at 1–48 (2013).

At bottom, "there is not even a fig leaf of constitutional justification" for empowering "private entities" to prosecute alleged FCA offenders on the United States' behalf. *Ass'n of Am. R.R.*, 575 U.S. at 62 (Alito, J., concurring); *see also id.* at 88 (Thomas, J., concurring); *Martin*, 14 U.S. (1 Wheat.) at 330. The legitimacy of such an exercise of executive Power depends upon both (1) a constitutional appointment and (2) ongoing accountability to the President—who is the lone actor to whom the people have entrusted the power to vindicate public rights. *See United States v. Arthrex, Inc.*, 594 U.S. 1, 11–12 (2021). Relators possess neither of those constitutional prerequisites. As independent and self-appointed bounty hunters, they operate well outside Article II's carefully crafted scheme.

C. The *Qui Tam* Provisions Violate the Take Care Clause.

The constitutional problems with *qui tam* litigation do not stop there. The President's "most important constitutional duty" is to "'take Care that the Laws be faithfully executed.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992) (quoting U.S. Const. art. II, § 3). And the FCA impedes that prerogative in multiple ways.

1. The *Qui Tam* Provisions Allow Unharmed Private Actors to Commandeer the Executive's Enforcement Discretion.

The Anglo-American legal system has long afforded the Executive discretion "where the public good demands not the execution of the law." Locke, *supra*, at 196; *see* 1 Blackstone, *Commentaries* at 268–69. After all, the law can be a blunt instrument, and "the condition of society would be miserable if the severity of the law could in no form be mitigated" to account for the particular circumstances of a case. William Rawle, *A View of the Constitution of the United States of America* 163 (1825).

Such enforcement discretion also provides a critical check against legislative overreach. The Framers knew there "can be no liberty" if a single body "should enact tyrannical laws," to have them then "execute[d] . . . in a tyrannical manner." The Federalist No. 47, at 300 (James Madison) (emphasis omitted) (quoting Baron de Montesquieu). So they divided the Nation's lawmaking and law-enforcement powers. That "separation of legislative and executive functions helps prevent tyranny precisely because a discretionary decision by executive officers intervenes between the enactment of the prohibition and its application to any particular individual." Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. 671, 702 (2014).

At the same time, "[t]he Constitution does not leave to speculation who is to administer the laws enacted by Congress"—and thus who is to exercise discretion in their execution. *Printz v. United States*, 521 U.S. 898, 922 (1997). "[T]he President, it says, 'shall take Care that the Laws be faithfully executed,' personally and through officers whom he appoints." *Id.* (quoting U.S. Const. art. II, § 3). Included within that charge "is 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) (opinion of Kavanaugh, J.). And that "special province of the Executive branch" covers both the criminal and civil realms. *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *see also Zafirov*, 751 F. Supp. 3d at 1311 (citing *Seila Law*, 591 U.S. at 219).

Simply put, "the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys)." *TransUnion LLC v. Ramirez,* 594 U.S. 413, 429 (2021). And there are good reasons for that constitutional design. "Private plaintiffs are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law." *Id.*

The FCA's *qui tam* provisions cannot be squared with these principles either. They permit unharmed private parties to commandeer the Executive's enforcement discretion and decide whether, where, when, and how to sue alleged violators of the Act. *See Zafirov*, 751 F. Supp. 3d at 1300. In that way, relators "stand in the position of 'private attorneys general' whom Congress has 'deputized' to enforce federal laws." *Kreindler & Kreindler*, 985 F.2d at 1155 (citation omitted). This transfer of prosecutorial discretion "from the executive branch to *qui tam* relators interferes with the function of the executive branch to protect citizens from the 'improvident exercise of power.'" John T. Boese & Douglas W. Baruch, *Civil False Claims and Qui Tam Actions* § 4.11 (5th ed. 2024) (quoting *INS v. Chadha*, 462 U.S. 919, 957 (1983)).

Indeed, "[t]he legislative history of the 1986 Amendments shows" that overriding the Executive's prerogative was precisely Congress's aim. OLC Memo, *supra*, at 230. Congress passed the amendments "out of generalized distrust of, and dissatisfaction with, the way the Executive Branch was carrying out its law enforcement responsibilities." *Id.*; *see, e.g.*, 131 Cong. Rec. 22322 (daily ed. Aug. 1, 1985) (statement of Sen. Grassley) (stating that the Executive was "unwilling to guard against or aggressively punish fraud" and so *qui tam* amendments were needed because Congress cannot "legislate aggression on the part of investigators and prosecutors"); 132 Cong. Rec. 22339 (daily ed. Sept. 9, 1986) (statement of Rep. Berman) (describing the *qui tam* amendments as a "supplement—and prod—to Government prosecution"). Congress "need[ed] some type of guarantee, so that if there are problems . . . and the Justice Department refuses to do anything about them, there should be some opportunity for the people of our country to see that something is done." *False Claims Act Amendments: Hearings before the Subcomm. on Admin. Law and Gov't Rels. of the Comm. on the Judiciary, House of Representatives*, 99th Cong. 330

(1986) (statement of Rep. Bedell); *see also, e.g.*, H.R. Rep. No. 99-660, at 22–23 (1986) (expressing "concern[]" that the Executive "took no action" to pursue relief on its own initiative).

This legislative history only highlights the problems with *qui tam* litigation, which "allows Congress to circumvent the Executive's check and to have its laws enforced directly by its own private bounty hunters." OLC Memo, *supra*, at 211. 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). Not only does this reallocation of power threaten individual liberty, but it can also undermine the "overall policies" of the Executive Branch. *Heckler*, 470 U.S. at 831. The interests of profit-driven relators and their counsel seldom align with the Executive's priorities. *See Schumer*, 520 U.S. at 949; Boese & Baruch, *supra*, § 4.11 ("[T]he executive branch has no control over initiation of litigation and is thus rendered powerless to protect policy interests of the United States that might be threatened by commencement of particular suits.").

That is why the Framers entrusted these sorts of enforcement decisions to one, publicly accountable President. "[O]nly a unitary executive properly can balance the competing interests at stake, including law enforcement, foreign affairs, national security, and the overriding interest in just administration of the laws." OLC Memo, *supra*, at 232. That is, only the President can "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, so as to best serve the "public-welfare needs of the American people," *Texas*, 599 U.S. at 680.

2. The *Qui Tam* Provisions Interfere with the Executive's Ability to Execute the Laws.

Other features of the FCA compound the Take Care Clause violation. Where the government declines to intervene, as here, the relator obtains "the right to conduct the action" on behalf of the United States. 31 U.S.C. § 3730(b)(4)(B), (c)(3). In turn, she receives "full control over the litigation," even though she "is under no general constraint to pursue Department of Justice litigation policies or procedures." OLC Memo, *supra*, at 215 & n.4. As the litigation unfolds, the Executive may object to a voluntary dismissal, 31 U.S.C. § 3730(b)(1), seek a brief discovery stay, *id.* § 3730(c)(4), and request copies of pleadings and deposition transcripts at taxpayer expense, *id.* § 3730(c)(3). But it "cannot participate actively in the litigation" except on a showing of "'good cause,'" Blanch, *supra*, at 762 (quoting 31 U.S.C. § 3730(c)(3)), and that lack of control interferes "with the Executive Branch's ability to ensure that the laws are 'faithfully executed' by the relator," *id.* at 765 (quoting *Morrison*, 487 U.S. at 696).

Even where the government does intervene, the relator still plays a substantial role. To "keep pressure" on the Executive, 132 Cong. Rec. 29322 (daily ed. Oct. 7, 1986), Congress afforded the relator the "right to continue as a party to the action," 31 U.S.C. § 3730(c)(1), (c)(3). The government cannot limit the relator's "unrestricted participation" without court approval. *Id.* § 3730(c)(2)(C). Nor can it "dismiss the action" without notifying the relator, moving the court for permission, and affording the relator "an opportunity for a hearing on the motion." *Id.* § 3730(c)(2)(A). Nor can it settle the action over the relator's objection without the court's finding, after a hearing, that the "proposed settlement is fair, adequate, and reasonable under all the circumstances." *Id.* § 3730(c)(2)(B).

Thus, whether the Executive chooses to intervene or not, the FCA limits its ability to "exercise authoritative control over the case." *United States ex rel. Foulds v. Tex. Tech Univ.*, 171 F.3d 279, 290 (5th Cir. 1999). That can hardly be reconciled with the Framers' design. Under our constitutional framework, "all" suits involving the government must be "subject to the direction, and within the control of" the Executive. *Confiscation Cases*, 74 U.S. (7 Wall.) at 458–59. *Qui* *tam* lawsuits, like this one, are not. They are instead "controlled and litigated by the relator." *Flaherty*, 540 F.3d at 93. That violates Article II.

II. History Cannot Salvage the *Qui Tam* Provisions' Affront to Article II.

The FCA's *qui tam* provisions conflict with the original meaning of Article II in multiple ways. And historical practice cannot wash away those shortcomings—particularly not where, as here, it is inconsistent and largely inapposite. *See Zafirov*, 751 F. Supp. 3d at 1317–22. After all, "[t]he Constitution, not history, is the supreme law." OLC Memo, *supra*, at 233; *see Bruen*, 597 U.S. at 36 (stressing that "the text controls" when "later history contradicts what the text says"). Historical practice thus cannot cure constitutional infirmities even when 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).

At any rate, *qui tam* suffers from a checkered history. It did not become ubiquitous in this country until Congress amended the FCA in 1986—two centuries after the Founding. And those modern amendments, of course, are the very provisions at issue.

A. Abuses in Early English *Qui Tam* Practice Led to Its Decline.

Qui tam actions originated in medieval times, "when private individuals who had suffered injury began bringing actions in the royal courts on both their own and the Crown's behalf." *Stevens*, 529 U.S. at 774. This practice was originally aimed at getting "private claims into the respected royal courts, which generally entertained only matters involving the Crown's interests." *Id.* But as the "royal courts began to extend jurisdiction to suits involving wholly private wrongs" in the 14th century, "the common-law *qui tam* action gradually fell into disuse." *Id.* at 775.

Around that time, Parliament was "[f]aced with limited public enforcement resources and the difficulty of implementing national policies" over an expansive region. J. Randy Beck, *The False Claims Act and the English Eradication of* Qui Tam *Legislation*, 78 N.C. L. Rev. 539, 567

(2000). It therefore began experimenting with *qui tam* litigation as a creature of statute. *See id.* at 567–73. And, unlike the common-law practice, some of these statutes permitted uninjured plaintiffs to "sue[] the Offender" and receive a bounty "as the King's gift." 12 Edw. 2, ch. 6 (1318) (Eng.); *see also*, *e.g.*, 5 Edw. 3, ch. 5 (1331) (Eng.).

Over the next two centuries, however, *qui tam* "proved a vexatious device that ultimately could not be reconciled with the institutions of free and responsible government." OLC Memo, *supra*, at 235. The persons "occupied in this branch of executive jurisprudence" did not "give impartial efficiency to the laws," but acted instead as "instrument[s] of individual extortion, caprice, and tyranny." 8 Legal Observer No. 204, at 20 (1834) (citation omitted). Informers unearthed old and forgotten statutes "as means to gratify ill-will." 4 William S. Holdsworth, *A History of English Law* 356 (1923). They threatened enforcement suits to "levy[] blackmail" against potential defendants. *Id.* And they stirred up litigation simply in the hopes of recovering money. *Id.* These abuses led to considerable outrage—leading Lord Coke to denounce the informers as "viperous vermin" who "vex and depauperize the subject" for "malice or private ends, and never for love of justice." 3 Sir Edward Coke, *Institutes of the Laws of England* 194 (4th ed. 1797).

In response, Parliament began to curb *qui tam* abuses in the late 1400s. *See* Beck, *supra*, at 574. Among other reforms, Parliament shortened the statute of limitations, *see* 1 Hen. 8, ch. 4 (1509) (Eng.); it required unsuccessful informers to pay the defendant's costs, *see* 18 Eliz., ch. 5, § 4 (1576) (Eng.); and it imposed strict venue requirements for claims, *see* 31 Eliz., ch. 5, § 2 (1589) (Eng.). By the Jacobean era, "many of the old enactments were repealed" entirely. *Stevens*, 529 U.S. at 775 (citing 21 Jac. I, ch. 28, § 11 (1623) (Eng.)); *see* Coke, *supra*, at 192–93.

Some English *qui tam* statutes did remain in effect up through the Founding. *See Stevens*, 529 U.S. at 775–76. But even those lend little support to the constitutionality of *qui tam* litigation. After all, "the Constitution's creation of a separate Executive Branch coequal to the Legislature was a structural departure from the English system of parliamentary supremacy, from which many legal practices like *qui tam* were inherited." *Polansky*, 599 U.S. at 450 (Thomas, J., dissenting). And the English history only underscores the hazards posed by legislative transfers of executive power to private hands.

Article II eliminated those hazards. The Framers vested in one publicly accountable President "the power of appointing, overseeing, and controlling those who execute the laws." 1 *Annals of Cong.* 481 (1789) (statement of James Madison). And that choice forecloses laws—like the FCA's *qui tam* provisions—that "vest" the "executive power" in "any other person." *Martin*, 14 U.S. (1 Wheat.) at 330.

B. Early Congressional Enactments Do Not Support the Constitutionality of the False Claims Act's *Qui Tam* Provisions.

Courts that have upheld the FCA's private-enforcement mechanism have noted that "the First Congress enacted a number of statutes authorizing qui tam actions." *Riley*, 252 F.3d at 752 (majority op.). But that cannot salvage the FCA's glaring conflict with Article II's text, as even "a longstanding history of related federal action does not demonstrate a statute's constitutionality." *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).

In fact, early congressional practice provides a weak precedent for the modern-day FCA. For one thing, many early *qui tam* enactments are not "relevantly similar." *Bruen*, 597 U.S. at 29. They operated differently than the current law, which allows unharmed plaintiffs to "stand[] in the government's shoes," *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1360 (11th Cir. 2006), and litigate "on [its] behalf," *Wood*, 899 F.3d at 166. Most of the early statutes offered only a reward to informers for bringing a matter to the government's attention, without providing a cause of action to sue for the sovereign.[3] Others sought to redress private injuries, with the government receiving only incidental recoveries.[4] These two categories fundamentally differ in kind and thus have little bearing on the inquiry. *See Bruen*, 597 U.S. at 29–30, 46–50; *Zafirov*, 751 F. Supp. 3d at 1319–20.

As to the few enactments that allowed informers to pursue the sovereign's claims, these "were essentially stop-gap measures, confined to narrow circumstances" to assist the fledging Executive. OLC Memo, *supra*, at 213. And the "transitory and aberrational" *qui tam* device "never gained a secure foothold within our constitutional structure." *Id.* It produced "little actual litigation." Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich. L. Rev. 689, 728 (2004); *see* Defendants' Supp. Br. on Founding-Era *Qui Tam* Enforcement at 8–13, ECF 266, *Zafirov* (M.D. Fla. May 21, 2024) (finding a "dearth of founding-era *qui tam* enforcement actions" after conducting an extensive search).

Even the theoretical availability of the practice was short-lived. "Within a decade, 'the tide had turned against' qui tam," leading Congress to "curtail[] its use." OLC Memo, *supra*, at 235–

[3] *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 (similar for Treasury officials who violated bribery laws); Act of Mar. 3, 1791, ch. 18, § 1, 1 Stat. 215, 215 (similar); Act of Feb. 25, 1791, ch. 10, §§ 8, 9, 1 Stat. 191, 195–96 (similar for U.S. Bank agents engaged in improper trading).

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

36 (alterations adopted) (quoting Leonard D. White, *The Federalists* 417 (1956)). As a result, early *qui tam* enactments were never tested in a manner that could have "culminated in some kind of settlement" of the constitutional issues that the statutes presented then and still present. William Baude, *Constitutional Liquidation*, 71 Stan. L. Rev. 1, 18 (2019); *see Bruen*, 597 U.S. at 35–36 (describing the process of constitutional liquidation).

There is also "no evidence" Congress ever "considered the constitutional status of qui tam." OLC Memo, *supra*, at 214. The early *qui tam* statutes instead have all the hallmarks of action "taken thoughtlessly, by force of long tradition" from an archaic English device, "and without regard to the problems" presented to the new constitutional order. *Marsh v. Chambers*, 463 U.S. 783, 791 (1983). The Framers themselves recognized that early congressional practice should receive little weight where, as here, "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. 1867).

In addition, the Constitution created a novel system of separated powers, and so it is unsurprising that "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 Supreme Court famously struck down part of the Judiciary Act of 1789 as "repugnant to the constitution." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The Second Congress directed the circuit courts to register war pensioners subject to correction by the Secretary of War—a non-judicial function that violated 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 prohibited seditious libel in stark violation of the First Amendment. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 275–76 (1964).

Even the Department of Justice must admit that some early *qui tam* enactments were unconstitutional. For many "qui tam provisions authoriz[ed] individuals to sue under *criminal* statutes to help enforce the law." Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 Am. U. L. Rev. 275, 296–97 & n.104 (1989) (emphasis added). An early larceny statute, for example, gave half the fine "to the informer and prosecutor," and provided that, "on conviction," the offender would "be publicly whipped." Act of Apr. 30, 1790, ch. 9, §§ 16–17, 1 Stat. 112, 116. The Government can hardly dispute that outsourcing such "core executive power" to the plaintiffs' bar would violate Article II. *Seila Law*, 591 U.S. at 219.

For all these reasons, "postenactment history" should not receive "more weight than it can rightly bear" in discerning the original meaning of Article II. *Bruen*, 597 U.S. at 35. That sparse history cannot rescue *qui tam* litigation from its constitutional shortcomings.

C. The False Claims Act Revived an Unconstitutional Practice.

The early *qui tam* provisions had fallen into disuse by the antebellum period. During the Civil War, however, Congress revived the concept following investigations that "painted a sordid picture" of wartime fraud. *United States v. McNinch*, 356 U.S. 595, 599 (1958). With the country's resources stretched to the breaking point, Congress passed the FCA "to stop this plundering of the public treasury." *Id.*

Congress viewed aggressive enforcement as critical to the war effort. It thus instructed the "district attorneys of the United States" to "be diligent in inquiring into any violation" and initiating actions. Act of Mar. 2, 1863, ch. 67, § 5, 12 Stat. 696, 698. But the legislature feared that wartime fraud might outpace enforcement. So, it turned to the "unusual" practice of "authorizing private parties" to sue "on the Government's behalf." *Polansky*, 599 U.S. at 423. In the legislature's view, allowing "any person" to sue "for the United States" and share in the proceeds, *see* Act of Mar. 2, 1863, § 4, was the "most expeditious way" of "bringing rogues to justice," Cong. Globe, 37th Cong., 3d Sess. 956 (1863) (statement of Sen. Howard). To that end, Congress "let loose a posse of *ad hoc* deputies to uncover and prosecute frauds against the government." *Milam*, 961 F.2d at 49.

After the Civil War crisis receded, *qui tam* once again "fell into relative desuetude." OLC Memo, *supra*, at 209. Eventually, "both Houses of Congress voted to repeal the FCA['s] *qui tam* provisions" in the early 1940s, albeit in different sessions. Beck, *supra*, at 558. Congress then significantly restricted the role and recovery of relators in 1943. *See id.* at 559–61. Those restrictions all but signaled the death knell for the *qui tam* device, which had "become an anachronism," even if it formally remained on the books. OLC Memo, *supra*, at 209.

By 1986, though, Congress had become "dissatisfied with the way the executive branch was enforcing government procurement laws." *Id.* So it sought to "encourage more private enforcement suits" and "check" the Executive's enforcement discretion. S. Rep. No. 99-345, at 23–24, 26 (1986). For instance, Congress "eliminate[d] a defense to a *qui tam* suit—prior disclosure to the Government—and therefore change[d] the substance of the existing cause of action." *Schumer*, 520 U.S. at 948. It also afforded relators "the right to continue as a party," even where the government chooses to intervene. 31 U.S.C. § 3730(c)(1). And it significantly increased the bounty for relators and their attorneys. *See id.* §§ 3729(a)(1), 3730(d).

The 1986 amendments thus ushered in a new era of litigation, with *qui tam* actions surging more than a hundredfold—to a clip of almost 1,000 per year. *Compare* U.S. Dep't of Justice, *Fraud Statistics—Overview* (Jan. 15, 2025), https://bit.ly/4bfrXgs, *with Zafirov*, 751 F. Supp. 3d at 1302 (citing pre-1986 statistics). That explosion of relator-driven litigation has exacted a substantial toll on businesses nationwide. *See* Mem. of Law in Support of Mot. for Leave to File

Amicus Curiae Br. at 1–2. And it has created major problems for the Executive in ensuring the faithful execution of the laws. For even though many *qui tam* actions are meritless or contrary to the public interest, their sheer volume prevents the government from effectively supervising the litigation. *See Zafirov*, 751 F. Supp. 3d at 1302–03. As a result, the 1986 amendments have threatened the Executive's authority in a way that even the earlier FCA did not. Indeed, private relators now far surpass the Executive Branch as the primary executor of the statute. *See Fraud Statistics*, *supra*. Such an alternative means of federal law enforcement can hardly be reconciled with the original understanding of Article II or this Nation's history.

* * *

The FCA's *qui tam* provisions do not enjoy "unambiguous and unbroken" historical support. *Marsh*, 463 U.S. at 792. And even if they did, "historical patterns cannot justify contemporary violations of constitutional guarantees," *id.* at 790, including those embodied in Article II's text. To allow this litigation to proceed would disregard the Framers' choice to "vest[]" all "executive Power" in the President. U.S. Const. art. II, § 1, cl. 1. It would wrongly permit a relator to serve as an "Officer[] of the United States" outside the safeguards of the Appointments Clause. *Id.* art. II, § 2, cl. 2. And it would contravene the President's prerogative to "take Care that the Laws be faithfully executed." *Id.* art. II, § 3. This Court should reject that affront to Article II and dismiss this case.

CONCLUSION

The Court should overrule the Report and Recommendation and grant Defendant's Motion for Judgment on the Pleadings.

Respectfully submitted,

<u>/s/ Steven E. Bizar</u>

STEVEN E. BIZAR
MICHAEL H. MCGINLEY
(*pro hac vice* application pending)
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
Telephone: (215) 994-2205
Facsimile: (215) 994-2222
steven.bizar@dechert.com
michael.mcginley@dechert.com

STEVEN A. ENGEL
(*pro hac vice* application pending)
DECHERT LLP
1900 K Street, NW
Washington, D.C. 20006
Telephone: (202) 261-3369
Facsimile: (202) 261-3333
steven.engel@dechert.com

Counsel for Amicus Curiae
The Chamber of Commerce of the United States of America

June 6, 2025