No. 24-13581

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES ex rel. CLARISSA ZAFIROV,
Plaintiff-Appellant, and

UNITED STATES OF AMERICA,
Intervenor-Appellant,

v.

FLORIDA MEDICAL ASSOCIATES, LLC, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida
No. 8:19-cv-01236

PLAINTIFF-APPELLANT'S REPLY BRIEF

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No. 24-13581
U.S. ex rel. Zafirov and United States v. Florida Medical Assoc., et al.

Certificate of Interested Persons and Corporate Disclosure Statement

I certify that all persons and entities known to have an interest in the outcome of this case or appeal have already been identified in prior certificates filed in this case.

Plaintiff-Appellant Clarissa Zafirov is an individual and not a corporate entity and therefore has nothing to declare in a Corporate Disclosure Statement pursuant to Eleventh Circuit Rule 26.1.

Date: April 30, 2025

/s/ Jennifer M. Verkamp
Jennifer M. Verkamp

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Other Authorities

REPLY BRIEF

This case presents a challenge to the qui tam provisions of the False Claims Act (FCA)—provisions with a heritage older than the Republic itself. For centuries, private individuals have brought qui tam actions on behalf of the United States. This unbroken historical practice, coupled with the Government's substantial control over FCA actions, decisively resolves both constitutional questions presented: Qui tam plaintiffs are not officers under the Appointments Clause, nor do they usurp executive power in violation of the Vesting and Take Care Clauses.

Defendants' contrary arguments are jarring. For Defendants to be correct, all of the following must be true: (1) every circuit court and every other district court that has addressed these questions was wrong; (2) the Founders of the Republic—including Presidents Washington, Adams, Jefferson, and Madison; Alexander Hamilton; early Congresses, Supreme Court Justices, and state governments—"thoughtlessly" enacted and enforced dozens of unconstitutional statutes; and (3) the executive branch—which has consistently insisted that the FCA's qui tam provisions comply with Article II and defended them in court (including in this case)—does not understand the nature of executive power. In short, Defendants ask this Court to defy centuries of consensus in every branch of Government. The Court should decline the invitation.

I. Originalist Principles Establish the Constitutionality of the False Claims Act's Qui Tam Provisions.

1. The best evidence—indeed, *all* the evidence—of Article II's original meaning supports upholding the FCA's qui tam provisions. Dr. Zafirov's opening brief (OB) identified more than fifty early federal qui tam statutes *expressly* authorizing private informers to sue (including nine from the First Congress), as well as more granting implied rights of action. OB30-32. It showed that these statutes were enacted, signed into law, and then litigated by many Framers of the Constitution. OB19, 23-25. And it identified Supreme Court precedents holding that far less robust historical records sustained various practices, including under Article II. OB20-21. These arguments resolve both the Appointments and Vesting/Take Care challenges because originalist principles apply equally to both.

2. Defendants speculate that early Congresses enacted qui tam statutes "thoughtlessly." Red Brief (RB) 49. Defendants infer this solely from the absence of any Founding-era suggestion that qui tam statutes violated Article II. Thus, they reason that because nobody at the Founding said the qui tam provisions violated Article II, the Founders must not have noticed that they were repeatedly enacting, enforcing, and interpreting myriad unconstitutional statutes. This argument has multiple flaws.

First, Defendants' logic inappropriately assumes the conclusion of the constitutional analysis. Originalist interpretation uses historical facts to determine

the meaning of the Constitution. Defendants would instead have this Court work backwards by adopting Defendants' preferred view of the Constitution without reference to history, and then minimize historical facts that do not square with it. The Supreme Court's originalist approach forecloses that methodology.

Second, Defendants' inference is wrong. The absence of constitutional doubt is not evidence of a problem that the entire Founding generation failed to notice. It instead shows that the Founders regarded qui tam statutes as constitutional. As the Supreme Court explained (in a case arising out of a qui tam statute), when acts of early Congresses have "not been disputed during a period of nearly a century," the inference of their validity is "conclusive." *The Laura*, 114 U.S. 411, 416 (1885). Defendants' argument is especially weak given the robustness of the historical record, encompassing dozens of statutes that were enforced and litigated (including in the Supreme Court). OB19-25. Moreover, the potential for qui tam actions to interfere with executive prerogatives was obvious—indeed, some early qui tam statutes allowed private persons to sue Government officials—so this issue was unlikely to be overlooked. In an era where constitutional debates were endemic, the fairest inference from silence is that there is no constitutional problem.

Learned *amici* further refute Defendants' argument. Legal historians identify "multiple pre- and post-ratification debates about qui tam," where the participants—"especially the critics and targets of informers—would almost certainly have

considered constitutional objections," had any been available. Legal History Scholars' Br. 21. These debates included legislative deliberations in the 1780s, an exchange between President Washington and Alexander Hamilton regarding the President's power to limit a qui tam award, and the aggressive enforcement of the Slave Trade Act of 1794 by private abolitionist societies against defendants supported by well-organized mercantile interests. *See id.* at 22-31. Professor Beck shows that in States with constitutions analogous to the federal one—including Pennsylvania, New York, and Vermont—qui tam statutes were frequently enacted and litigated.[1] He also highlights the work of Pennsylvania's Council of Censors, a group tasked with auditing state constitutional compliance, observing that "the Council never questioned the frequent enactment of qui tam provisions," a silence that "speaks volumes given the Council's willingness to condemn even minor deviations from proper separation of powers among the governmental branches." Beck Br. 15-16. These authorities show that qui tam statutes were not enacted thoughtlessly, but instead against a backdrop of careful deliberation.

[1] The Pacific Legal Foundation argues that Pennsylvania and Vermont vested power in an executive council instead of a single person. This is immaterial because if qui tam informers were usurping executive power, it would not matter whether they usurped it from a single person or a council; it would be unlawful either way. PLF's attempts to distinguish New York's constitution are similarly misdirected. In Federalist No. 69, Hamilton argues at length that the powers vested by Article II in the President more closely resemble those vested in the governor of New York than the British king.

Third, Defendants invented their proposed legal rule. In *Marsh v. Chambers*, the Court explained that early objections to legislative prayer did not undermine its constitutionality, but instead reinforced it by confirming that prayer was not adopted "thoughtlessly." 463 U.S. 783, 791 (1983). But the Supreme Court has never held or even suggested that a *lack* of historical opposition allows a court to assume that early Congresses were "thoughtless." In fact, such a rule was flatly rejected in *The Laura* (and other cases cited at OB27-28) and implicitly rejected each time the Supreme Court upheld legislative practices on originalist grounds when the historical record did not disclose any opposition.

3. Defendants accuse Dr. Zafirov and the Government of overstating the historical record. RB52-53. But even confining the analysis to qui tam statutes containing express rights of action reveals over fifty federal statutes plus additional state statutes. OB30-32. Dr. Zafirov is unaware of *any authority* in which a similar volume of early enactments was offered, let alone deemed insufficient to support the constitutionality of an analogous provision. That number is an under-count because statutes authorizing recoveries for informers were construed to authorize private suits. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943). Defendants call this dictum—but that doesn't make it wrong. And historical analyses support it. OB31-32.

4. Defendants observe that early qui tam statutes did not have the same control mechanisms that Congress incorporated into the FCA. RB53-55. Defendants cry "Gotcha!": Dr. Zafirov must either admit that these control mechanisms are superfluous, or that the early statutes were unconstitutional. RB54. Not so. The FCA's controls resolve conflicts between the Government and private plaintiffs in the Government's favor. This shows two things. First, if the Court accepts—as it should—that historic qui tam statutes were constitutional, then the FCA is constitutional *a fortiori* because it poses even less conflict between private lawsuits and executive prerogatives. Second, *even if* the Court questions whether the dozens of historic qui tam statutes were constitutional, it may nevertheless uphold the FCA by relying on the control mechanisms. Far from being superfluous, the controls enhance both the originalist and modern defense of the FCA's qui tam provisions—even if they are not necessary to either.

5. Defendants argue that "early qui tam statutes 'prove too much' because some authorized criminal penalties." RB55 (emphasis removed). Defendants reason that because such statutes "appear to be plainly unconstitutional," the history of civil qui tams should also be disregarded. *Id*. But the constitutionality of private criminal enforcement is not presented, and the Court should not address it.

Defendants never explain why early statutes authorizing criminal penalties must violate Article II; they just assume it. But, evidence indicates that Defendants

are wrong to argue that early qui tam statutes allowed private plaintiffs to impose criminal penalties. Instead, when a statute provided for both civil and criminal remedies, the criminal consequences were *only* available in Government prosecutions. *See* Allan W. May, *Qui Tam Actions and the Rivers and Harbors Act*, 23 Case W. Res. L. Rev. 173, 195 (1971) (explaining that when a penal statute "mentions imprisonment," "such provisions are merely ignored when the action is civil").

Even if private criminal enforcement occurred, the Court need not pass on its constitutionality: There are no criminal qui tam provisions before the Court (or on the books at all). And criminal enforcement presents different and more grave constitutional concerns than civil litigation. *See, e.g.*, *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 755-56 (5th Cir. 2001) (en banc).[2] Especially because Defendants raise the issue only perfunctorily, the Court can and should simply resolve the civil case before it, leaving criminal questions for a future case that actually presents them—if one ever arises.

[2] Parroting the district court, Defendants argue that the Supreme Court has "rejected a distinction between civil and criminal cases when evaluating whether an individual exercises core executive power [or] significant authority." RB42. But neither case the district court cited (*Seila Law LLC v. CFPB*, 591 U.S. 197 (2020); *Buckley v. Valeo*, 424 U.S. 1 (1976)) equates criminal and civil enforcement.

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

Independently, Defendants' Appointments Clause challenge fails because qui tam plaintiffs neither hold continuing offices nor exercise significant power.

A. The Appointments Clause Does Not Apply to Non-Governmental Actors.

1. Government employment is a prerequisite to officer status. OB36-40; U.S. Br. 22-24. This follows from Supreme Court precedents (OB36), circuit court cases rejecting Appointments Clause challenges to the FCA on this ground (OB37), and additional circuit precedents holding that the Appointments Clause does not apply to non-Government persons (OB37 n.2). A contrary rule would threaten other private rights of action, state enforcement of federal law, and contracting arrangements (OB38-40).

These arguments are bolstered by several amici, including:

- The Constitutional Accountability Center, which recounts the history of the Appointments Clause and explains that it focuses exclusively on the Government workforce;
- The American Association for Justice, which highlights the practical consequences of sweeping qui tam plaintiffs into the Appointments Clause; and
- Public Citizen, which explains why *Buckley*'s holding does not apply to individuals not employed by the Government.

2. Defendants acknowledge that qui tam plaintiffs are outside the Government—but contend that the Appointments Clause applies anyway. RB37-39. The three citations Defendants offer, on balance, support Dr. Zafirov. First is a 2007 OLC opinion agreeing with Dr. Zafirov that "a qui tam relator does not hold an office." Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 114 (2007). Moreover, a subsequent OLC opinion rejects Defendants' characterization of the 2007 opinion. The Test for Determining "Officer" Status Under the Appointments Clause, 49 Op. O.L.C. ____, (Jan. 16, 2025). Defendants urge the Court to ignore this opinion (RB38 n.1), but present no authority for doing so.

Defendants cite *United States v. Maurice*, 26 F. Cas. 1211 (CCD. Va. 1823), for the proposition "that a private contractor might hold an office under the Appointments Clause." RB37. But the court recognized that "an office is 'an employment.'" 26 F. Cas. at 1214. The condition under which *Maurice* suggested a contractor might be treated as an officer is if an office was "converted into a contract … to perform the duties of the office." *Id*. The individual in that circumstance would be effectively "employed on the part of the United States." *Id*. Absent such employment, the case clearly recognizes that private individuals are not officers.

Finally, Defendants cite the dissent in *Alpine Securities Corp. v. FINRA*, 121 F.4th 1314, 1341 (D.C. Cir. 2024), for the proposition that private actors cannot

exercise executive authority. But this dissent cites no authority other than the district court's opinion in this case. This citation also illustrates the implications of Defendants' rule: The dissent would have found the Financial Industry Regulatory Authority unconstitutional, upending self-regulation in the securities industry, a practice that "has existed for centuries," with repeated endorsements by Congress. *Id*. at 1337 (majority op.).

3. Lacking any persuasive authority, Defendants try policy arguments, contending that Dr. Zafirov's position would allow the Government to outsource executive functions to the private sector. They speculate that Congress might "allow[] a private law firm entirely to take over civil litigation or even criminal prosecutions on behalf of the Department of Justice." RB38. But other constitutional doctrines, including private nondelegation, prevent those outcomes. Moreover, despite hundreds of years of qui tam enforcement in thousands of cases, no such outsourcing has occurred.

The practical implications of accepting Defendants' position, on the other hand, are grave. Senator Grassley describes how qui tam cases "not only recoup money for taxpayers, but they protect the public, and public servants, from harm," highlighting recoveries from frauds in an array of industries including health care, defense, customs, and COVID relief programs. Grassley Br. 19. The Leukemia & Lymphoma Society explains that qui tam suits "also benefit patient welfare,"

including by protecting patient health and lowering costs. LLS Br. 2-3, 7-15. A group of former U.S. Attorneys explains that the Government will recover far less without the assistance of qui tam plaintiffs and their counsel. Prosecutors' Br. 3-6. A group of whistleblowers describes significant fraud matters currently pending in the Eleventh Circuit. Amici Relators' Br. 11-17. *See also* OB39-40.

Additionally, Defendants' rule would imperil many private rights of action (OB38-39); undermine state enforcement of federal law (OB39); and throw many federal contracting arrangements into doubt (OB39-40). Defendants unsuccessfully try to minimize these concerns.

Regarding private rights of action, Defendants simply say that other plaintiffs "do not litigate on behalf of the United States." RB38. That may be true as a matter of form, but not substance. Private litigation frequently overlaps with Government enforcement: Many private lawsuits arise out of statutes that the Government also enforces, seeking to redress or deter misconduct that injures the public at large, including through penalties paid to the U.S. Treasury or punitive damages. AAJ Br. 6-8, 11-14. Such cases are not brought in the United States' name, but if Defendants' constitutional angst could be resolved by captioning cases differently, then any "problem could be resolved simply by severing the portion of the statute telling such plaintiffs how to captain their claims." OB39. Defendants give no answer.

Defendants' response to the argument that their position would imperil state-level enforcement of federal law is even more puzzling. They say state officials are not litigating on behalf of the United States. RB38. But "[s]tates have no inherent power to enforce federal statutory law." Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. Rev. 698, 708 (2011). Instead, "[a]s is true of private parties, states' authority to sue under any given statute is … dependent on congressional intent," and many federal statutes "require state enforcers to notify the relevant federal agency in advance of filing a complaint, permit the federal agency to intervene in the case, and restrict states from suing on violations that are the subject of a pending federal enforcement action." *Id*. In other words, states often enforce federal law in a manner closely analogous to qui tam plaintiffs. It is hard to see why state officials—who are concededly not federal officers—can enforce federal law if qui tam plaintiffs cannot.

In response to Dr. Zafirov's point about contractors, Defendants say that "the vast majority of contractors presumably do not exercise significant authority or serve in continuing positions." RB38. But the opening brief highlights that contractors fight battles, secure borders, handle sensitive intelligence, supply critical technology, build and maintain infrastructure, administer Medicare and Medicaid, and undertake other life-or-death functions involving billions of federal dollars. OB39-40. Defendants ignore these examples—which easily involve as much

authority and continuity as qui tam plaintiffs—and the Court should count that as a concession that Defendants' rule would threaten all of these arrangements.

Importantly, the risk flows in one direction. Dr. Zafirov's position has been embraced by courts and tested by time, resulting in none of the sky-falling harm of which Defendants warn. Defendants' novel position would upend that status quo, inviting chaos across the Government.

B. Qui Tam Plaintiffs Do Not Hold a Continuing Position.

Even if the Court eschews the bright-line rule that the Appointments Clause applies only to Government employees, qui tam plaintiffs do not hold any continuing position. Instead, their role is temporary, limited, and personal. *See* OB40-48.

1. As other circuits have recognized (OB40), a qui tam plaintiff's role is temporary and limited to the case she brings—like the appraiser in *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890), or the surgeon in *United States v. Germaine*, 99 U.S. 508, 512 (1878). Defendants attempt to analogize plaintiffs to independent counsels or bank receivers—but the opening brief refuted those analogies. OB40-48. Defendants' additional arguments are particularly anemic.

First, Defendants argue that Congress created an "office of the relator" by enacting a statute allowing any person to sue. RB22. But the FCA never speaks of any "office of the relator." It merely says that "[a] person may bring a civil action for a violation of section 3729…." 31 U.S.C. § 3730(b)(1). That language bears no

resemblance to statutes creating actual offices, including the independent counsel statute. *See, e.g.*, 28 U.S.C. § 594. This textual disparity matters because Defendants emphasize that plaintiffs' roles are created by statute. When, as here, the statute does not even vaguely resemble any other statute creating a continuing position, the Court should interpret it not to do so.

Second, officers must receive "continuing emolument." *Auffmordt*, 137 U.S. at 327. Independent counsels, for example, "receive[d] compensation at the per diem rate equal to the annual rate of basic pay payable for level IV of the Executive Schedule," alongside other resources. 28 U.S.C. § 594(b)(1). Defendants concede that the only compensation a qui tam plaintiff receives is a one-time contingent award upon success. *See* RB22. There is nothing "continuing" about that. *Cf. Germaine*, 99 U.S. at 512 (finding no continuity when "[n]o regular appropriation is made to pay … compensation" and compensation was variable and uncertain).

Third, Defendants' characterization of plaintiffs' role as impersonal falls flat. A role is "personal" if it belongs to the specific person performing it; it is impersonal if others can succeed into it. Generally, no third party can succeed a qui tam plaintiff. *See* OB43-44 (detailing statutory provisions tying the action to the specific person who brought it).

2. The limited counterexamples Defendants identify only prove the point. Defendants argue that if a plaintiff's suit is dismissed, another person can file a

different suit raising the same claims. RB24-25. But that is only because the original plaintiff's action is no longer pending. *See KBR v. United States ex rel. Carter*, 575 U.S. 650, 662-63 (2015). The second plaintiff's action is not a continuation of the first plaintiff's role; it is a new case that starts from scratch. On the other hand, when an independent counsel succeeded a previous one in the same investigation, she filled the same office as her predecessor, continuing where he left off. *See Morrison v. Olson*, 487 U.S. 654, 667 (1988); 28 U.S.C. § 593(e) (requiring court to "appoint an independent counsel to complete the work" after resignation, death, or removal).

3. Defendants also argue that if the plaintiff dies or goes bankrupt, her estate steps in. RB45. But this only proves that the plaintiff's interest is more like a personal asset, not an office. OB45-46. Indeed, the opening brief asked: "[W]hat other Government office is ever filled by the legal representative of the estate of its deceased former holder?" and answered, "None!" OB45. Instead of offering a different answer, Defendants say, "[t]he real question is, what other major enforcement mechanism relies on *self*-appointed private parties to bring enforcement actions in the name of the United States?" RB45. Defendants' question is a non-sequitur with no bearing on whether a plaintiff's position is personal or continuing. Indeed, this is not even a proper strawman; it is more like Defendants throwing straw in the air and shouting, "Look at that man!" And this failed misdirection tells the

Court everything it needs to know about the weakness of Defendants' position. Qui tam actions are personal—and therefore not continuing roles.

C. Qui Tam Plaintiffs Do Not Exercise Significant Authority Under the Laws of the United States.

Independently, qui tam plaintiffs do not exercise significant authority because they do not have any powers or resources that distinguish them from other private litigants. *See* OB48-53. To wit, qui tam plaintiffs cannot issue investigative subpoenas, nor rely on Government funds, personnel, or data to investigate and pursue claims. *See* The Anti-Fraud Coalition Br. 9-20.

1. Defendants principally assert that the ability to bring an action on behalf of the United States satisfies this element of the test. RB19-20. In support, Defendants cite cases holding that Government officials bringing enforcement actions exercise significant power. *See* RB14-15 (citing *Buckley* and *Seila Law*). This is sleight of hand. As the Fifth Circuit explained in *Riley*, there is a world of difference between suing "as the United States itself" and merely suing "in the name of the United States." 252 F.3d at 755. When a Government official initiates an enforcement action, it means that the Government—with all its power and resources—is coming for the defendant, and the defendant must answer on pain of default.

The filing of a qui tam complaint, by contrast, has no comparable effect on the defendant. Instead, the case is filed under seal and served *only* on the

Government—not the defendant. *See* 31 U.S.C. § 3730(b). And, although named in the caption, the Government is not a party to the action. *See United States ex rel. Eisenstein v. City of N.Y.*, 556 U.S. 928, 932 (2009). The plaintiff has no power to force the Government to pursue the case, or even to commit resources to considering it. Thus, when the Government investigates potential FCA violations, it has sole discretion to decide *how* to investigate—including what resources to devote to the task, and whether to seek extensions of time. *See* U.S. Br. 28-29 (explaining that the plaintiff "has no role in directing the government's investigation of her allegations"); *Yates v. Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1310 (11th Cir. 2021). In this way, the FCA is indistinguishable from other federal statutes requiring the Government to investigate reported wrongdoing—none of which violates Article II. *See, e.g.*, 42 U.S.C. § 2000e-5(b) (requiring EEOC investigations of Title VII claims); 18 U.S.C. § 2339B(e) (requiring Attorney General investigations of terrorism offenses); 28 U.S.C. 591 (requiring Attorney General investigations of misconduct by high-ranking government officials); 41 U.S.C. § 4712 (requiring Inspector General investigations of reprisal against whistleblowers). This refutes Defendants' contention that the plaintiff exercises significant authority because she "can force the government to investigate and take action." RB40.

Once the Government's investigation concludes, the plaintiff does not acquire any new power. The Government alone decides whether to take over the case,

dismiss it, or permit the plaintiff to conduct it. If the Government takes over, then it is the Government—not the plaintiff—exercising power. If the Government chooses to dismiss the action, the plaintiff is essentially powerless to prevent dismissal.[3] And if the Government chooses to let the plaintiff conduct the litigation, the plaintiff does not thereby acquire any additional powers. Defendants in such cases know that they are not facing the Government's enforcement apparatus—but instead only the resources that the private plaintiff can personally bring to bear. In fact, as the Government confirms, "relators exercise less control over their suits than private plaintiffs under Title VII, the antitrust laws, or the Clean Water Act" because the FCA grants the Executive substantial ongoing control over the litigation. U.S. Br. 28.

Defendants describe the Government's power to direct the litigation as "back-end" supervision that does not negate the "front-end" decision to bring the action. RB41. But the Government's supervision kicks in as soon as the case is filed, before the complaint is even served on the defendant. That is hardly "back-end." Moreover,

[3] Defendants repeatedly overstate the limits on the Government's dismissal power. Before an answer is filed, the Government is entitled to dismissal for any constitutional reason. *See United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 438 n.4 (2023). Recent cases further hold that a live hearing is not required. *See Vanderlan v. United States*, --- F.4th ----, 2025 U.S. App. LEXIS 9273, *13-14 (5th Cir. Apr. 18, 2025) ("a hearing on the briefs" suffices, and "the court … had no adjudicatory role in disposing of a pre-answer (c)(2)(A) motion and no discretion to deny dismissal absent a claim that the Constitution forbids it"); *United States ex rel. Doe v. Credit Suisse AG*, 117 F.4th 155, 161-62 (4th Cir. 2024) (same).

the Government's supervision can *entirely negate* the decision to bring the action because the Government's power to dismiss at the outset is extremely broad, limited only by the Constitution. *See supra* n.3. Thus, the Government can eliminate any action it deems inconsistent with its enforcement priorities before the defendant even knows that the action was filed. The Government has confirmed that its "upfront review" "ensures that qui tam actions proceed only when they are consistent with the government's priorities for the enforcement of federal law." U.S. Br. 28. The Court should heed the Government's views, as the executive branch is certainly best positioned to assess whether a person is exercising executive power.

2. Defendants argue that qui tam plaintiffs are effectively using Government resources to litigate because they may receive an award from the proceeds of the action. RB43. Nonsense. The "Government is not liable for expenses which a person incurs in bringing an action under this section." 31 U.S.C. § 3730(f). Awards are not guaranteed—and even when they come, they come far too late to finance the action. Defendants themselves emphasize that these matters take a long time, and are funded privately when a plaintiff conducts the action. RB26, 43. Plaintiffs who cannot retain counsel and cover costs cannot litigate. And, even plaintiffs who can access funds do not have access to the Government's tools. *See* OB3, 10, 48.

3. Defendants never dispute that qui tam plaintiffs cannot bind the Government in the sense of speaking for it. OB53; RB43. Defendants contend that it is enough that the Government may be bound by certain merits judgments. But they ignore Dr. Zafirov's showing that the Government frequently is *not* bound that way. OB53. Moreover, the Supreme Court explained that this is not a serious concern because "[i]f the United States believes that its rights are jeopardized by an ongoing qui tam action, the FCA provides for intervention" so the Government can protect its interests. *Eisenstein*, 556 U.S. at 936.

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

To win their remaining arguments, Defendants must show that the FCA's qui tam provisions unduly "interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed.'" *Morrison*, 487 U.S. at 689-90. They do not.

1. Qui tam actions augment, rather than usurp, executive power. OB54-55. Without qui tams, the Government has two options to address suspected fraud: (1) investigate and litigate using its own resources; or (2) allow the conduct to continue. The qui tam provisions do not take either choice away from the Government. Instead, they simply add a third option: Allow the private plaintiff to litigate the case using her own resources. As this Court recognized, the qui tam provisions accordingly do not displace the Government's role in "the protection of

the public fisc." *Yates*, 21 F.4th at 1310. Instead, they "merely grant the United States the flexibility" to meet that obligation using private litigants. *Id*. Logically, a law that grants the executive branch more flexibility cannot unduly constrain the executive branch.

Defendants respond that private FCA litigation "distorts the normal process by which the Executive Branch prioritizes and conducts litigation." RB48. Not so. To the extent Defendants complain that the FCA requires the Attorney General to investigate potential violations, that is not unconstitutional. As explained *supra*, many statutes require the Government to investigate reported wrongdoing—and no such statute has ever been found to violate Article II. To the extent Defendants' concern is that the FCA forces the executive branch to pursue qui tam actions that it does not want to pursue—or permits plaintiffs to pursue them—they are wrong. As explained *supra* n.3, the Government can dismiss disfavored actions, and it freely exercises that power. *See, e.g.*, *Borzilleri v. Bayer Healthcare Pharms., Inc.*, 24 F.4th 32, 46 (1st Cir. 2022); *United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, 970 F.3d 835, 849 (7th Cir. 2020); *United States ex rel. USN4U, LLC v. Wolf Creek Fed. Servs.*, 2025 U.S. App. LEXIS 7754, *21-22 (6th Cir. Mar. 31, 2025). The Executive's point-blank statement that it only allows qui tam actions to proceed "when they are consistent with the government's priorities for the enforcement of federal law" (U.S. Br. 28) negates any suggestion of distortion. Moreover, dismissal

is not the only control mechanism; the Government has many other tools to ensure that it "retains a significant amount of control over the litigation." *Yates*, 21 F.4th at 1311; 31 U.S.C. § 3730(c)(3)-(4).

Defendants insist that "the Constitution does not seek to achieve *maximum* enforcement of federal law," but instead permits the President to "under-enforc[e] federal statutes" in appropriate cases. RB34-35, 48. It is unsurprising that defendants credibly accused of stealing millions of dollars from Medicare prefer under-enforcement. But Defendants present no evidence that the FCA is a statute the President wants to under-enforce—and so their generic statements carry no weight. In fact, the executive branch has consistently supported this case, filing statements of interest supporting Dr. Zafirov against several of Defendants' motions below.

Assuming *arguendo* that the faithful execution of the law permits deliberate under-enforcement of the FCA, nothing in the statute clashes with that principle. If the President wishes to under-enforce the FCA, he can direct the Attorney General to dismiss more actions. That easily satisfies the dictum Defendants cite—which indicates that the President's power is intact if he can either not "seek charges" or "pardon violators." *See In re Aiken County*, 725 F.3d 255, 264 (D.C. Cir. 2013). The Government's dismissal power is closely akin to not seeking charges—and certainly timelier and more potent than a pardon, as it applies before any finding of liability.

The bottom line is that if—as this Court determined in *Yates*—the FCA's qui tam provisions provide the Executive Branch with more flexibility than it would otherwise have, then they cannot abridge executive power in any unconstitutional way. And it is so: The qui tam provisions make it easier for the executive branch to detect, investigate, redress, and deter fraud—without undermining prosecutorial discretion.

2. Defendants misstate the law by arguing that any delegation of investigatory or enforcement discretion violates Article II. *Morrison* proves the point. There, the Court held that it was "undeniable that the [Ethics in Government] Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity." 487 U.S. at 695. But *Morrison* nevertheless determined that the statute did not "disrupt[] the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions" because it had sufficient safeguards. *Id*. (quotation marks omitted). Numerous courts have recognized that the constitutionality of qui tam actions flows *a fortiori* from *Morrison*. *See Riley*, 252 F.3d at 755-56 (holding that *Morrison*'s test is too stringent because qui tam plaintiffs exercise less power than independent prosecutors, and do so only in civil cases; reasoning that because the EIGA was constitutional, the FCA is even more

clearly so); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 755 (9th Cir. 1993) ("[T]he Executive Branch exercises at least an equivalent amount of control over qui tam relators as it does over independent counsels.").

The grand jury supplies another counterexample. Grand juries were not mentioned in the original Constitution, but—like qui tam actions—were used at the time of the Founding. Beck Br. 10. Then, as now, grand juries comprised randomly selected citizens given broad powers to investigate offenses and decide whether prosecutors could pursue a criminal case. *See, e.g.*, *United States v. Calandra*, 414 U.S. 338, 342-45 (1974); *Costello v. United States*, 350 U.S. 359, 362 (1956). Although the grand jury plainly exercises prosecutorial discretion, it "belongs to no branch of the institutional Government." *United States v. Williams*, 504 U.S. 36, 47 (1992). And it is "free to pursue its investigations unhindered by external influence or supervision," including from the "prosecuting attorney." *Id*. at 48-49 (cleaned up).

Under Defendants' view of Article II, the grand jury should be impossible: It vests what Defendants describe as core executive power in ordinary people, while operating free from presidential control. But, rather than jettison grand juries after adopting Article II, the Framers two years later—through the Fifth Amendment—*mandated* grand jury proceedings for serious offenses. Today, federal grand juries function as critical gatekeepers, retaining their power to investigate offenses, issue charges, and prevent federal prosecutors from initiating cases, all with no

accountability to the executive branch. Plainly, this does not present any issues under Article II—which conclusively disproves Defendants' interpretation. Again, the FCA's constitutionality follows: Like grand juries, qui tam actions have a long tradition dating back to the Founding—and qui tam plaintiffs exercise even less power over the executive branch than a grand jury, as they have no investigative subpoena power, no ability to initiate criminal actions, and no ability to veto Government enforcement actions.[4]

The private nondelegation doctrine provides yet another example. Specifically, a private party may exercise executive power so long as it functions subordinately to an agency that has authority and surveillance over it. *See Consumers' Rsch., et al. v. FCC*, 88 F.4th 917, 926 (11th Cir. 2023), *cert. denied* 144 S. Ct. 2629 (2024). Such is the case here: The Department of Justice has authority and surveillance over qui tams.

These examples establish a simple proposition: Prosecutorial discretion is not nearly as concentrated as Defendants suggest—and it does not violate the Vesting or Take Care Clauses any time somebody outside the President's supervision

[4] The Framers' decision to expressly include grand juries in the Fifth Amendment does not diminish the point: This clause was not added to make grand juries permissible, but to make them mandatory in serious cases. Certainly, grand juries were used even before the Fifth Amendment was ratified, and their breadth of function and power is far beyond the Amendment's language.

exercises such power. Instead, the law looks to whether any encroachment is so severe that it threatens the executive branch's ability to fulfill its constitutional role.

For the reasons explained *supra*, qui tam actions do not cross that line. In the first instance, the FCA *does not* "vest[] private parties with powers equivalent to the Attorney General and her subordinates." *Contra* RB28. That is because the plaintiff does not wield executive power, but instead merely acts as a partial assignee of a claim. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773-74 (2000). That assignment does not come with investigative power, access to federal resources, or the ability to compel the Government's enforcement apparatus to pursue a case. It only gives the plaintiff the right to pursue a civil action just like any other private plaintiff. Put another way, Congress did not take anything from the Executive when it enacted the FCA's qui tam provisions; it merely created a parallel private cause of action.

To the extent that is not enough, the Attorney General has broad power to dismiss a qui tam action, settle it, take it over and litigate it, and otherwise control plaintiffs. These mechanisms—like the controls in *Morrison* and the private nondelegation cases—dispel any constitutional concerns.

3. Defendants argue that the President lacks effective supervision or removal authority over qui tam plaintiffs because the plaintiffs cannot literally be fired. RB29-34. This legal framework applies, however, only to executive officers;

Defendants cite no case applying it to a private party, and courts have recognized that "the 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." *Kelly*, 9 F.3d at 755. To the extent the framework can be adapted to the FCA, it is satisfied by the Attorney General's power to end qui tam actions. Defendants counter (RB31-32) that dismissal of the lawsuit is not the same as removal of the plaintiff—but there is little daylight between the two, as dismissal conclusively removes the plaintiff from her role. Moreover, it is undisputed that the Government can seek dismissal of the plaintiff without prejudice to the Government's own ability to bring a related claim, or that the Government can intervene and conduct the litigation. *See* OB53.

Defendants also argue that the dismissal power is insufficient because the Government does not appoint the plaintiff in the first instance. No precedent requires appointment—but in any event, that is basically what the Government does when it declines to intervene and allows the plaintiff to conduct the action. As this Court explained in *Yates*, "in non-intervened qui tam actions, the relator has primary responsibility to assert the rights of the United States *only because the latter allows it to do so*." 21 F.4th at 1310 (emphasis added). This Court has also recognized the obvious point that the executive branch exercises "significant control over FCA qui tam actions"—and that this fact has convinced every other circuit that has considered

it to hold that the qui tam provisions do not violate Article II. *Id*. at 1312. This Court should join that robust consensus.

CONCLUSION

This Court should reverse the judgment below.

Date: April 30, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Date: April 30, 2025

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Reply Brief for Plaintiff-Appellant with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on April 30, 2025. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

Date: April 30, 2025

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