No. 23-1127

In the Supreme Court of the United States

WISCONSIN BELL, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA EX REL. TODD HEATH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE CENTER FOR CONSTITUTIONAL RESPONSIBILITY IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Center for Constitutional Responsibility is a nonprofit organization dedicated to preserving the separation of powers and the accountability of the political branches at all levels of government in the United States.[1] In particular, the Center is concerned with the increasingly common delegation of the Executive's exclusive power to enforce public laws to politically unaccountable private parties. This delegation—which deputizes the plaintiffs' bar and private citizens to act as roving, unaccountable "private attorneys general"—is a threat to democratic accountability and the cohesiveness of our union. Laws, especially on contentious topics, should be enforced by governmental officials that answer to the Constitution and the people. The Center aims to prevent the unwise and unconstitutional delegation of sovereign enforcement authority.

SUMMARY OF ARGUMENT

The decision below interprets the False Claims Act ("FCA") to protect not only funds that belong to the United States, but private funds belonging to private corporations. This Court should reject that expansive interpretation for two primary reasons.

First, the reading adopted below would expand the ability for private parties to file unconstitutional *qui tam* actions as self-appointed private attorneys

[1] In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus curiae*, its members, and its counsel made such a monetary contribution.

general. This reading should be avoided as a species of constitutional avoidance.

Article II of the Constitution vests "the executive Power" in the "President of the United States," U.S. CONST. art. II, § 1, and charges the President to "take Care that the Laws be faithfully executed," *id.* art. II, § 3. This exclusive executive power includes the exercise of prosecutorial discretion with respect to enforcement actions as well as the power to litigate civil enforcement actions as appropriate. That the power to litigate on the United States' behalf resides solely with the President does not mean that private individuals may never enforce federal law. Private plaintiffs may, of course, sue to vindicate their own private rights, even when doing so may have the indirect effect of enforcing federal law. But a private citizen has no ability to act as a private attorney general, suing to vindicate the United States' sovereign interests or other public rights.

The FCA's *qui tam* device, however, does what Article II says Congress may not do: vest in private individuals, known as relators, the President's executive power to litigate on behalf of the United States. Multiple members of this Court have already expressed serious concern that the FCA's *qui tam* device violates Article II by empowering private individuals to "represent the interests of the United States in litigation." *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., concurring, joined by Barrett, J.). And those concerns are well-placed. The FCA's *qui tam* provision does not

hide the ball—it expressly allows private individuals to litigate "in the name of the [U.S.] Government," 31 U.S.C. § 3730(b)(1), to vindicate both the United States' sovereign interest in law enforcement and its pecuniary interest in funds lost from the Federal Treasury. And the counterarguments seeking to reconcile this device with Article II, including arguments from history, are unpersuasive.

In an appropriate case, this Court should grant certiorari to decide whether the FCA's *qui tam* device violates Article II. But, for now, this Court should heed the admonitions that there are "substantial arguments that the *qui tam*" provision is unconstitutional, *Polansky*, 599 U.S. at 449 (Thomas, J., dissenting), and decline to adopt an expansive reading of the FCA that will encourage more *qui tam* suits.

Second, this Court should reject the Seventh Circuit's broad reading of the FCA because that reading exacerbates the Article II problems with the *qui tam* device. In the traditional FCA *qui tam* action, the private relator is pursuing both the government's monetary interest in recovering funds for the Treasury through a partial assignment of that interest, and the United States' sovereign interest in remedying violations of law. *See Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771-74 (2000). But if the FCA encompasses claims related to private funds belonging to private corporations, then the relator is *only* pursing the United States' sovereign interests, as there is no damages claim to partially assign. And that is

precisely the type of claim Article II vests solely with the President. Moreover, the historical arguments that purport to justify *qui tam* actions despite their clear inconsistency with Article II hold even less weight with respect to *qui tam* actions to recover private funds because there is no material history of statutes authorizing *qui tam* actions where the federal Treasury did not stand to gain from the enforcement action.

ARGUMENT

I. Private parties may not exercise the President's exclusive authority to litigate on behalf of the United States.

The President is the Chief Executive of the Executive Branch. As the Chief Executive, the President—and no one else—is exclusively responsible for exercising the executive power and supervising those who exercise it on his behalf. That power includes the authority to litigate claims on behalf of the United States.

A. Article II vests the executive power exclusively in the President and his subordinates.

This principle of the separation of powers is so fundamental to our Constitution that no fewer than three constitutional provisions in Article II work in concert to ensure that executive power does not escape the President's control.

Most directly, the Vesting Clause provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II,

§ 1. The executive power in Article II is of "unrivaled gravity and breadth." *Trump v. United States*, 144 S. Ct. 2312, 2327 (2024) (quoting *Trump v. Vance*, 591 U.S. 786, 800 (2020)); *see also id.* (listing various executive powers). But the power is not diffuse. Rather, it has long been established that the Vesting Clause not only vests the executive power in the President but prohibits the vesting of the executive power in anyone else or in any other branch of government. *Seila Law LLC v. CFPB*, 591 U.S. 197, 203-04 (2020). The notion that Congress could "vest [the executive power] in any other person" is "utterly inadmissible." *Martin v. Hunter's Lessee*, 14 U.S. 304, 329-30 (1816) (Story, J.).

The Take Care Clause—which states that the President "shall take Care that the Laws be faithfully executed"—makes clear that a species of executive power vested exclusively in the President is the execution of federal law of behalf of the federal government. U.S. CONST. art. II, § 3. As this Court wrote in *Nixon v. Fitzgerald*, "the enforcement of federal law" is vested firmly in the hands of the President as "the chief constitutional officer of the Executive Branch." 457 U.S. 731, 750 (1982). The Take Care Clause thus necessarily gives the President, as "the chief constitutional officer of the Executive Branch," "supervisory . . . responsibilit[y]" over those who execute the law. *Id.* If the President were deprived of the "general administrative control of those executing the laws," it would be "impossible" for him "to take care that the laws be faithfully executed." *Myers v. United States*, 272 U.S. 52, 117, 163-64

(1926); *see also* Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 63 (2d ed. 1868) ("[W]here a general power is conferred or duty enjoined, every particular power necessary for the exercise of the one, or the performance of the other, is also conferred.").

Finally, the Appointments Clause states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States . . . which shall be established by Law." U.S. CONST. art. II, § 2. The Clause also states that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.* A person is an officer under the Appointments Clause if they hold a "continuing" office established by law and wield "significant authority." *Lucia v. SEC*, 585 U.S. 237, 245 (2018) (quoting *United States v. Germaine*, 99 U.S. 508, 511-12 (1879); *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam)). The Clause ensures that "the President remains responsible for the exercise of executive power" by mandating that every "exercise of executive power . . . must at some level be subject to the direction and supervision of an officer nominated by the President." *United States v. Arthrex, Inc.*, 594 U.S. 1, 27 (2021).

The Vesting Clause, Take Care Clause, and Appointments Clause together ensure that the power to enforce federal law—and accountability for enforcement decisions—rests solely with President

and his duly-appointed designees in the Executive Branch.

B. Litigation enforcing federal law on behalf of the United States is the exercise of executive power vested exclusively in the President.

The executive power in the domestic context is broad. It includes, among other things, making "public regulations interpreting a statute and directing the details of its execution." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406-07 (1928) (collecting cases); *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928) (describing enforcing laws and "appoint[ing] the agents charged with the duty" to enforce them as executive functions). But, at its core, it is the power to institute litigation and prosecute in court those who violate federal law.

It is well-established that criminal prosecutions are an exercise of executive power within the exclusive province of the President and his subordinates. For instance, when presented with the question whether an independent counsel performed an executive power, this Court explained that "[t]here is no real dispute that the functions performed by the independent counsel"—namely, criminal investigation and prosecution—"are 'executive' in the sense that they are law enforcement functions." *Morrison v. Olson*, 487 U.S. 654, 691 (1988). Justice Scalia in dissent was even more forceful, stating that "[g]overnmental investigation and prosecution of crimes is a quintessentially executive function." *Id.* at 706 (Scalia, J., dissenting) (collecting cases); *see also*

Robertson v. United States ex rel. Watson, 560 U.S. 272, 278 (2010) (Roberts, C.J., dissenting) ("Our entire criminal justice system is premised on the notion that a criminal prosecution pits the government against the governed, not one private citizen against another.").

Civil suits to enforce alleged violations of federal law on behalf of the federal government are likewise within the President's "exclusive Executive power" as they are "to some extent analogous to criminal prosecution decisions and stem from similar Article II roots." *In re Aiken Cnty.*, 725 F.3d 255, 264 n.9 (D.C. Cir. 2013) (op. of Kavanaugh, J.) (citation omitted). As this Court explained in *Buckley v. Valeo*, 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.'" 424 U.S. at 138 (emphasis added); *see also The Confiscation Cases*, 74 U.S. 454, 458-59 (1868) ("[I]t is clear that all such suits [on behalf of the United States], so far as the interests of the United States are concerned, are subject to the direction, and within the control of, the Attorney-General.").

Moreover, it is not only the power to file and prosecute a civil enforcement action, but the power to refuse to bring an action that falls within the President's exclusive authority. The "refusal to institute [civil enforcement] proceedings" by the federal government must be vested in the Executive Branch. *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (citing U.S. CONST. art. II, § 3). Accordingly, both the

decision whether the federal government should enforce an alleged violation of federal law, as well as the enforcement action itself, must rest exclusively with the President and his subordinates. *Buckley*, 424 U.S. at 138; *see also TransUnion LLC v. Ramirez*, 594 U.S. 413, 429 (2021) ("[T]he 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)."); *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case[.]" (citation omitted)).

C. Private persons may not act as private attorneys general without violating Article II.

Because both the exercise of prosecutorial discretion (in both the civil and criminal context) and litigation on behalf of the United States to enforce an alleged violation of federal law are executive powers vested solely in the President, private individuals cannot exercise these powers consistent with Article II.

This is not to say that private individuals can never enforce federal law. Congress may from time to time create private rights of action for private citizens to sue to redress concrete and personalized injuries caused to them by violations of federal law. But Article II limits them to redressing only "[i]ndividual rights," not "public rights." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992). A private individual who has

personally been injured (say, because she was fired due to a disability) may file suit to redress that injury (seeking, for example, reinstatement and backpay) provided she has a cause of action. *See id.* at 577-78. That kind of suit incidentally advances the public interest in deterring the activity made unlawful by federal law, and Congress is well within its authority to consider that effect when choosing whether to create a private cause of action. But the primary result of such a suit must be the redress of the plaintiff's personal, specific injuries. *See Laufer v. Arpan LLC*, 29 F.4th 1268, 1291 (11th Cir. 2022), *vacated as moot*, 77 F.4th 1366 (11th Cir. 2023) (Newsom, J., concurring).

Suits on behalf of the government or that primarily advance "the *public* interest," by contrast, are "the function of Congress and the Chief Executive" alone. *Lujan*, 504 U.S. at 576. If private citizens were to share the power to advance "the undifferentiated public interest in . . . compliance with the law," they would usurp "the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" *Id.* at 577 (quoting U.S. CONST. art. II, § 3). Accordingly, when "*unharmed* plaintiffs . . . sue defendants" merely because they "violate[d] federal law," they "infringe on the Executive Branch's Article II authority." *TransUnion*, 594 U.S. at 429.

This distinction between suits that redress private injuries and those that advance the public interest traces to common law. "Common-law courts" had "broad power to adjudicate suits" brought by plaintiffs "involving the alleged violation of private rights"—

rights "belonging to individuals," like "personal security . . . property rights, and contract rights." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 344 (2016) (Thomas, J., concurring) (quoting 3 W. Blackstone Commentaries *2). But the rule was different for public rights. When the suit involved "a harm borne by the public at large, such as the violation of the criminal laws" or "'general compliance with regulatory law,' . . . only the government had the authority to" sue. *Id.* at 345 (citation omitted).

This distinction maps onto Article II. To ensure the appropriate separation of powers mandated by the Constitution, private individuals must not act as private attorneys general exercising the Executive Branch's exclusive authority to enforce federal law. They may only act as citizens suing to redress real and concrete injuries that they have personally suffered.

II. The False Claims Act should not be read expansively given the substantial Article II problems with the *qui tam* mechanism.

A. The False Claims Act's *qui tam* provision raises serious constitutional concerns.

The FCA makes it unlawful for an individual or company to assert false claims for payment to the United States and authorizes as a remedy treble "damages that are essentially punitive in nature." *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000). This draconian penalty is enforced in two ways. First, the Attorney General may bring a civil action against the alleged false claimant. 31 U.S.C. § 3730(a). Second—and more

frequently used—an uninjured private individual (referred to as the "relator") may file suit against the alleged false claimant "in the name of the [U.S.] Government." *Id.* § 3730(b)(1). This mechanism by which a private individual sues on both his own behalf and on behalf of the government is known as a *qui tam* action.

Because a private relator through the *qui tam* mechanism sues "for the United States government," the Act requires the relator to provide notice to the government so that it may decide whether to intervene in the case. *Id.* § 3730(b)(1)-(2). If the government intervenes, then "it shall have primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action." *Id.* § 3730(c)(1). But if the government decides not to intervene, then the relator has the exclusive right to conduct the action, subject only to the government's ability to request service of copies of litigation materials and intervene later "upon a showing of good cause." *Id.* § 3730(c)(3). To incentivize private individuals to file suit, a "relator receives a share of any proceeds from the action—generally ranging from 15 to 25 percent if the Government intervenes . . . and from 25 to 30 percent if it does not"—"plus attorney's fees and costs." *Stevens*, 529 U.S. at 769-70 (citation omitted).

This *qui tam* device authorizing private individuals to "represent the interests of the United States in litigation" raises serious constitutional issues under Article II, as several members of this Court have recently recognized. *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., concurring, joined by Barrett, J.) (agreeing that there are "substantial arguments" that the FCA violates Article II and urging the Court to "consider the competing arguments … in an appropriate case"). As this Court's cases have repeatedly explained, Article II vests executive power—including the power to exercise prosecutorial discretion with respect to civil enforcement and to litigate any enforcement claims on behalf of the United States—exclusively with the President. *See supra* at pp. 2, 4-11. The FCA's *qui tam* device, by contrast, does exactly what this Court's cases say Article II prohibits: it authorizes uninjured private individuals outside the President's appointment power and control not only to decide whether and when to bring a civil enforcement action, but to litigate that enforcement action—involving no private right whatsoever—on behalf of the United States.

That there are some mechanisms, including notice and intervention, by which the President has limited ability to control litigation brought by private relators cannot save the *qui tam* device. Justice Scalia was correct in his dissent in *Morrison* that an admission that the President has only some control over the exercise of executive power is "alone enough to invalidate" that exercise because the President is vested not with "*some* of the executive power, but *all* of the executive power." *Morrison*, 487 U.S. at 705-06 (Scalia, J., dissenting). In any event, *amicus* is not aware of any case in which this Court has held that a

purely private individual or entity can exercise executive power outside the full control and supervision of the President or his subordinates. *Cf. Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 88 (2015) (Thomas, J., concurring in the judgment) ("Because a private entity is neither Congress, nor the President or one of his agents, nor the Supreme Court or an inferior court established by Congress, the Vesting Clauses would categorically preclude it from exercising the legislative, executive, or judicial powers of the Federal Government.").

The fact that a private relator also sues in part on his or her own behalf, 31 U.S.C. § 3730(b)(1) (person brings a "civil action … for the person and for the United States Government"), is also no answer to the Article II problem. As this Court explained in *Stevens*, a private relator is uninjured, 529 U.S. at 772, and thus a person who ordinarily could not enforce federal law consistent with either Article II or Article III. Yet the "FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim," and this partial assignment provides the relator a sufficient stake in the litigation to satisfy Article III's injury-in-fact requirement. *Id.* at 773. A partial assignment, however, is still insufficient to satisfy Article II because "the part of the claim the relator is not litigating for himself he is litigating for the government." *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 772 (5th Cir. 2001) (Smith, J., dissenting).

The same term that this Court decided *Stevens*, it also decided *Friends of the Earth, Inc. v. Laidlaw Env't*

Servs. (TOC), Inc., 528 U.S. 167 (2000), in which multiple members of the Court explained that (as with a private relator) a plaintiff may have a sufficient stake in litigation to satisfy Article III's standing requirements but nonetheless be prohibited by Article II from litigating that claim because it is fundamentally the government's. The Court's primary holding in that case was that private individuals had standing to pursue a Clean Water Act claim seeking civil penalties payable to the United States Treasury because those penalties would deter future violations that could again cause them injury. *Id*. at 174. Despite that holding, Justice Kennedy wrote separately to explain that "[d]ifficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II." *Id*. at 197 (Kennedy, J., concurring). Justice Scalia, joined by Justice Thomas, agreed, explaining in dissent that allowing private individuals to seek penalties payable to the Treasury intrudes on the President's Article II powers by "turn[ing] over to private citizens the function of enforcing the law." *Id.* at 209 (Scalia, J., dissenting).

The history of *qui tam* actions also cannot save the FCA's constitutionality. In *Stevens*, this Court relied heavily on "the long tradition of *qui tam* actions in England and the American Colonies" to conclude that relators have Article III standing. *Stevens*, 529 U.S. at 774. Still, the Court reserved the Article II question

for another day. *Id.* at 778 n.8 ("[W]e express no view on the question whether *qui tam* suits violate Article II."). And there is good reason to believe that this "long tradition" cannot authorize private relators to sue on behalf of the United States. As Justice Thomas has explained:

> "Standing alone" … "historical patterns cannot justify contemporary violations of constitutional guarantees," *Marsh v. Chambers*, 463 U.S. 783, 790 (1983), even when the practice in question "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). Nor is enactment by the First Congress a guarantee of a statute's constitutionality. *See Marbury v. Madison*, 1 Cranch 137 (1803). Finally, we should be especially careful not to overread the early history of federal *qui tam* statutes given that the Constitution's creation of a separate Executive Branch coequal to the Legislature was a structural departure from the English system of parliamentary supremacy, from which many legal practices like *qui tam* were inherited. *See* S. Prakash, T*he Chief Prosecutor*, 73 Geo. Wash. L. Rev. 521, 589 (2005) (noting that, for this reason, "we ought to be cautious about importing English constraints or exceptions to the executive power, when those limitations might be based on the principle of parliamentary supremacy").

Polansky, 599 U.S. at 450 (Thomas, J., dissenting).

Judge Jerry Smith likewise persuasively explained in dissent from a decision by the Fifth Circuit upholding the constitutionality of the FCA's *qui tam* provision that history is not dispositive for the Article II question:

> [The] history of *qui tam* laws leads one to conclude that they should be classified among those statutes that have been passed more from expediency than from reasoned constitutional analysis; and further, that history provides no indication of what were the founders' general opinions of the constitutionality of *qui tam* statutes, nor what would have been their particular opinion of this case in which an unappointed, unaccountable citizen sues on the government's behalf without government participation.

Riley, 252 F.3d at 773 (Smith, J., dissenting).

In short, the reasons why the FCA's *qui tam* provision violates Article II are straightforward: the FCA authorizes uninjured private individuals to usurp the President's exclusive authority to litigate on behalf of the United States. At a bare minimum, therefore, there is serious concern that *qui tam* suits under the FCA are unconstitutional.

B. Construing the FCA to protect private funds would exacerbate those constitutional problems.

For more than a century, the FCA has been understood to protect "government assets," and more specifically, "the funds and property of the

Government." *Polansky*, 599 U.S. at 424 (quoting *Rainwater v. United States*, 356 U.S. 590, 592 (1958)). But this case presents the question whether it also protects purely private funds of a private, nonprofit corporation. *See* 47 C.F.R. §§ 54.706(a)-(b), 54.709 (E-rate program financing is drawn from the Universal Service Fund, which is in turn funded by contributions from private telecommunications carriers based on their revenues and the program's needs).

The best reading of the FCA as a matter of text, context, and structure is that it does not apply to the E-rate program because the government does not itself supply the funds at issue and the private corporation that administers the program is not a government agent. *See* Petitioner's Br. 26-33, 43-45. In addition, construing the FCA to protect against false claims related to private funds avoids two significant constitutional problems.

First, as this case demonstrates, construing the FCA to protect private funds would not only empower the President and his duly-appointed subordinates to undertake enforcement actions with respect to private funds, but would empower private individuals to do the same. Given the choice between a reading of the FCA that would broaden the reach of arguably unconstitutional *qui tam* enforcement actions and a reading that would circumscribe those enforcement actions to the recovery of government funds, this Court should choose the latter. *Cf. Clark v. Martinez*, 543 U.S. 371, 381 (2005) (explaining that the Court should choose a plausible but constitutional interpretation of a statute over an alternative

interpretation that would raise "serious constitutional doubts").

And the concern that unconstitutional *qui tam* actions will further proliferate if their reach is broadened is far from speculative. FCA actions are a favorite of the plaintiff's bar. In Fiscal Year 2023 alone, FCA settlements and judgments exceeded $2.6 billion, *see* U.S. Department of Justice, Office of Public Affairs, *False Claims Act Settlements and Judgments Exceed $2.68 Billion in Fiscal Year 2023*, https://perma.cc/KNR3-YPYK, and the government only intervenes in approximately 20% of these cases. U.S. Dep't of Justice, *Acting Assistant Attorney General Stuart F. Delery Speaks at the American Bar Association's Ninth National Institute on the Civil False Claims Act and Qui Tam Enforcement* (June 7, 2012), https://perma.cc/9RQ7-43NF. Relators often target whole industries, *see, e.g.*, *ILR Briefly: Fixing the FCA Health Care Problem*, U.S. Chamber of Com. Inst. For Legal Reform, (Aug. 2022), https://perma.cc/KKA5-YGVL (reviewing statistics and explaining that the False Claims Act has been disproportionately enforced against the health care industry), and ignore pre-filing diligence and specific pleading in service of quick and cheap filing, *see, e.g.*, *Atkins v. McInteer*, 470 F.3d 1350, 1360 n.17 (11th Cir. 2006) (explaining that it often assumes relators bring an action "solely to use the discovery process as a fishing expedition for false claims"). A holding that provides relators more targets therefore poses a material risk not only of more actions with serious

constitutional concerns, but more meritless actions with those concerns.

Second, this Court should avoid interpreting the FCA to protect private funds because that would only exacerbate the already serious constitutional concerns with the *qui tam* device. The United States in a traditional FCA matter is twice injured, with an "injury to its sovereignty arising from violation of its laws (which suffices to support a criminal lawsuit by the Government)" as well as a "proprietary injury resulting from the alleged fraud." *Stevens*, 529 U.S. at 771. That second, pecuniary injury is then partially assigned to the relator to create standing because "the assignee of a claim has standing to assert the injury in fact suffered by the assignor." *Id.* at 773. But if, as in this case, the government has not been defrauded of any funds because all funds are private, there is no pecuniary injury to partially assign. That not only robs the relator of Article III standing but leaves the relator asserting *only* the United States' "sovereign" interest in the matter. That places the *qui tam* action in even greater tension with Article II because the relator's sole cognizable interest in the case is a sovereign interest in regulatory enforcement and vindicating public rights. And that is the exact type of claim that cannot be delegated to a non-injured party. *See supra* at pp. 9-11, 13-17.

Moreover, the historical arguments attempting to justify the constitutionality of *qui tam* actions are weaker where, as here, the only interest the relator may vindicate is a sovereign regulatory enforcement interest because a recovery of funds would not accrue

to the government fisc. In *Stevens*, this Court cited multiple statutes enacted in the early years of the Republic as evidence that private individuals could litigate *qui tam* actions consistent with Article III. *See Stevens*, 529 U.S. at 774-82 & nn.5-7. These examples, however, largely involve statutes authorizing private individuals to vindicate, at least in part, the government's pecuniary interest through the collection of a fine or penalty. *E.g.*, Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 102 (allowing informer to sue for, and receive half of fine for, failure to file census return); Act of July 31, 1789, ch. 5, § 38, 1 Stat. 48 (giving informer quarter of penalties, fines, and forfeitures authorized under a customs law).

To be sure, these statutes pose serious constitutional difficulties themselves because imposing fines payable to the United States Treasury is an executive power reserved for the President and his subordinates. *See supra* at pp. 14-15 (discussing *Friends of the Earth,* 528 U.S. 167). But even by their own terms they do not support the notion that there was a robust history at the time of the founding whereby private individuals could enforce the United States' pure sovereign interest as opposed to an interest in collecting funds for the Federal Treasury.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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