IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

UNITED STATES OF AMERICA *ex rel.* CHARLES R. SHEPHERD, DANNY V. RUDE; ROBERT SCOTT DILLARD; AND RICKEY MACKEY, Plaintiffs, v. FLUOR CORPORATION, FLUOR INTERCONTINENTAL, INC., Defendants.	Civil Action No. 6:13-cv-02428-JD

***AMICUS CURIAE* BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS**

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INTRODUCTION AND SUMMARY OF ARGUMENT

The *qui tam* provisions of the False Claims Act ("FCA") violate the Constitution's separation of powers. Article II of the Constitution vests "[t]he executive Power" in the President, who "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 1, cl. 1; *id.* art. II, § 3. By vesting the executive Power in the President alone, the Constitution ensures that "a President chosen by the entire Nation oversee[s] the execution of the laws." *Free Enter. Fund v. Pub. Co. Acct. 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 take the enforcement of the laws out of the hands of the President. Private relators like Plaintiffs are not injured parties seeking to recover for personalized harms under federal law. They are bounty hunters charged with pursuing claims that, in their judgment, should have been asserted by the United States. As three Justices of the Supreme Court recently observed, "[t]here are substantial arguments that the *qui tam* device is inconsistent with Article II and that private relators may not represent the interests of the United States in litigation." *United States ex rel. Polansky v. Exec. Health Res., Inc.*, 143 S. Ct. 1720, 1741 (2023) (Thomas, J., dissenting); *see id.* at 1737 (Kavanaugh, J., joined by Barrett, J., concurring) ("In my view, the Court should consider the competing arguments on the Article II issue in an appropriate case.").

Neither the Supreme Court nor the Fourth Circuit has addressed the constitutionality of the FCA's *qui tam* provisions. Yet shortly after the 1986 amendments to the FCA "resuscitat[ed] the dormant qui tam device," the Department of Justice's Office of Legal Counsel 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) (Barr, Ass't A.G.) (hereafter, "OLC Memo").[1] When measured against Article II's text, "this is not even a close question." *Id.* Such a conclusion is compelled for multiple reasons.

First, *qui tam* litigation violates Article II by vesting executive authority in the hands of private persons. The Framers vested the entire "executive Power" in the President alone. U.S. Const. art. II, § 1, cl. 1. And, at the same time, 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, 883–84 (1991) (quoting U.S. Const. art. II, § 2, cl. 2); *see also Printz v. United States*, 521 U.S. 898, 922 (1997) ("The insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known."); *In re Aiken County*, 645 F.3d 428, 439 (D.C. Cir. 2011) ("*Aiken I*") (Kavanaugh, J., concurring) ("What Article II *did* make emphatically clear from start to finish was that the president would be personally responsible for his branch." (emphasis in original) (quoting Akhil Reed Amar, *America's Constitution: A Biography* 197 (2005))). 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 Texas M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992).

The FCA's *qui tam* provisions also violate the Take Care Clause. "The power to decide when to investigate, and when to prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws." *In re Aiken County*, 725 F.3d 255, 263 (D.C. Cir. 2013) ("*Aiken*

[1] The Office of Legal Counsel later adopted a different view with respect to the application of the Appointments Clause to the *qui tam* provisions. *See Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 77 (2007) (stating that *qui tam* relators are not officers because their position is not a "continuing" one); *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 142 n.52 (1996) (stating that *qui tam* relators are not officers because they are not employed by the federal government). As discussed below, the Office's original position in 1989 was correct and consistent with subsequent Supreme Court precedent. *See infra* Section I.B.

II") (opinion of Kavanaugh, J.) (quoting *Cmty. for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986)). The Framers regarded the Executive's enforcement discretion as an indispensable check against unjust laws and a necessary bulwark for the preservation of individual liberty. *See id.* at 264.

But the FCA transfers the Executive's critical, discretionary decisions into private hands. The statute deputizes private-party relators who are "motivated primarily by prospects of monetary reward rather than the public good" to select targets and initiate litigation on the government's behalf. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997). And, to make matters worse, the FCA significantly curtails the Executive's ability to control the lawsuit as it unfolds. In addition to the statutory constraints placed upon the Executive, the sheer volume of relator-driver lawsuits—many of which are meritless—has taxed the Department of Justice's practical ability to ensure the faithful execution of the laws. Article II simply does not permit 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 emphasizes the "historical pedigree of *qui tam* suits, including the fact that the First Congress passed a handful of *qui tam* statutes." *Polansky*, 143 S. Ct. at 1741 (Thomas, J., dissenting). But as the Supreme Court has recognized, 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*, 142 S. Ct. 2111, 2137 (2022) (emphasis and citation omitted). As always, the text must control.

Further, as discussed below, the historical support for *qui tam* litigation is limited at best. Unlike the FCA, many of the early congressional enactments provided relators with only a

bounty—not a cause of action. And unlike the FCA, many of those *qui tam* provisions focused upon providing redress to relators who *themselves* had suffered an injury—not relators who sought to vindicate the government's general interests in punishing and deterring alleged wrongdoing. In all events, these early statutes were rarely used and "rapidly fell into disfavor." OLC Memo, *supra*, at 235. Decades later, the Civil War Congress revived *qui tam* litigation by passing the original version of the FCA during a time of maximum national peril. But even those *qui tam* provisions fell into desuetude after the war. These scattered historical episodes therefore cannot excuse the manifest conflict between the FCA's current *qui tam* provisions and Article II of the Constitution.

Because the Plaintiffs here rely solely upon this unconstitutional mechanism in support of their suit, the Defendants' 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 "private persons" to initiate and conduct civil litigation on behalf of the United States, 31 U.S.C. § 3730(b), in violation of Article II's Vesting Clause, *see* U.S. Const. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."). They violate the Appointments Clause by allowing relators to exercise such power absent an appointment from a constitutionally appropriate official. *See id.* art. II, § 2, cl. 2 ("He . . . shall appoint Ambassadors, other public Ministers and Consuls . . . and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the 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."). And they grant a

private party the discretion to enforce the laws in violation of the Take Care Clause. *See id.* art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed . . . .").

A. By Enabling Self-Appointed Relators to Exercise Core Executive Power, the False Claims Act's *Qui Tam* Provisions Violate Article II.

Congress may not authorize private bounty hunters to conduct litigation on behalf of the United States. 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 the dismissal of a writ of certiorari as improvidently granted). The Constitution thus established a unitary and accountable Executive who alone was charged with responsibility for enforcing federal law.

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

The Framers' conception of a unitary government exercising a monopoly on the executive power in fact predates the Constitution and 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* reflected 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 (1768). 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 *258–59.

This understanding of the law-enforcement power was not limited to the prosecution of strictly "criminal" offenses. Rather, it 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 to administer the laws. *See id.*

The common law recognized that if one has personally "suffered the damage" from a public infraction, then he might have a *concomitant* right to demand private redress "in his own name." Locke, *supra*, at 196. But that would not permit him to pursue relief that accrues more broadly to 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 *220. Because individual persons give up the right to exercise executive authority by entering into society, "the law gives no *private* remedy for any thing but a *private* wrong." *Id.* at *219 (emphasis in original); *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"). The pursuit of public remedies remains with the executive.

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

The Framers enshrined this understanding in Article II of the Constitution, which vests "[t]he executive Power" in the President. U.S. Const. art. II, §1, cl. 1. As the Supreme Court has repeatedly explained, "Article II confers on the President 'the general administrative control of those executing the laws.'" *Free Enter. Fund*, 561 U.S. at 492 (quoting *Myers v. United States*,

272 U.S. 52, 164 (1927)). And in vesting *all* of the "executive Power" in the President, the Framers ensured that he would remain accountable for all those who would act on his behalf. As James Madison explained, "[i]t is evidently the intention of the Constitution, that the first Magistrate should be responsible for the executive department; so far therefore as we do not make the officers who are to aid him in the duties of that department responsible to him, he is not responsible to his country." 1 Annals of Cong. 480 (1789) (statement of James Madison); *see also, e.g.*, 1 *Collected Works of James Wilson* 730 (Kermit L. Hall & Mark David Hall eds., 2007) ("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 (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("UNITY of the executive of this State was one of the best of the distinguishing features of our Constitution.").

Consistent with this need for accountability, the Framers did not 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) (quoting U.S. Const. art. II, § 1, cl. 1). Instead, they entrusted "the President alone" with "all of" the Nation's executive Power. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191, 2197 (2020). And given that deliberate choice, Justice Story, writing for the Court, recognized early on that it would have been "utterly inadmissible" for Congress to attempt 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 in the FCA's *qui tam* provisions. In violation of Article II, the legislature has "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). After all, relators have "no personal stake in the damages sought—all of which, by definition, were

suffered by the government." *Milam*, 961 F.2d at 49. Such a "public offense[]" may be prosecuted only by the President, who, as the one vested with all executive Power delegated by the people, is the only "person injured in the eye of the law." 1 Blackstone, *Commentaries* at *259. 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 behalf of the United States. *United States v. Nixon*, 418 U.S. 683, 693 (1974) (emphasis added). 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 the Vesting Clause of Article II.

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

Qui tam plaintiffs are also inherently inconsistent with the Appointments Clause because they exercise executive authority that may be wielded only by a properly appointed Officer of the United States. The Appointments Clause works in tandem with Article II's Vesting Clause to ensure that the "executive Power" is exercised only by officers who are accountable to the President. It requires that all such "Officers of the United States" be appointed by the President, with the advice and consent of the Senate, or in the case of inferior officers, by the Heads of the Executive Departments, if Congress so provides. *See* U.S. Const. art. II, § 2, cl. 2. A *qui tam* plaintiff is obviously "n[ot] appointed as an officer of the United States" through this

constitutionally prescribed method. *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1514 (2019).

Although *qui tam* plaintiffs are not appointed in this fashion, the FCA vests in them powers that may be exercised only by Officers of the United States. As the Supreme Court has recognized, the key test for an officer is whether the person "exercis[es] significant authority pursuant to the laws of the United States." *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam)). And such authority includes the power to "conduct[] civil litigation in the courts of the United States for vindicating public rights." *Buckley*, 424 U.S. at 140. This is precisely the power of a relator, who may sue "for the United States Government" 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 prohibits such a diffusion of executive Power. In that case, the Supreme Court considered the original structure of the Federal Election Commission ("FEC"), which had allowed leaders in Congress to appoint commissioners. *See* 424 U.S. at 113. Because such an appointment process obviously conflicted with the Appointments Clause, the Court considered whether the commissioners performed functions that could only be performed by Officers of the United States. Among those functions, *Buckley* cited the FEC's "enforcement power, exemplified by its discretionary power to seek judicial relief," for violations of federal campaign finance laws. *Id.* at 138. 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.* (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); *see also United States v. San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888) (explaining that "there must . . . be an officer or officers of the government to determine when the United States shall sue, to decide for what it shall sue, and to be responsible that such suits shall be brought in appropriate cases"). In other words, Congress may not vest the civil litigation authority of the United States in persons—like the relators here—who have not been appointed consistent with the Appointments Clause.

In considering whether an official exercises a "function" of an executive office, *Buckley*'s interpretation reflects the original public meaning of an "Officer of the United States." As Edward Corwin explained in an historical study of the term, "[e]tymologically, 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, 478–79 (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.* at 479. Later dictionaries in the eighteenth and nineteenth century reflected the same definition of the term. *See, e.g.*, *Officer*, 2 Timothy Cunningham, *A New and Complete Law-dictionary* (1765) (recounting 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). For example, Alexander Hamilton explained that persons "to whose

immediate management" the "executive details" of government "are committed ought to be considered as the assistants or deputies of the Chief Magistrate, and on this account they 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 intrusted 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 should thus "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 considered, 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, the Clause "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 of those principles in full view. Indeed, Congress could have hardly 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 government." James T. Blanch, *Constitutionality of the False Claims Act's* Qui Tam *Provision*, 16 Harv. J.L. & Pub. Pol'y 701, 742 (1993). Congress also shielded relators from removal—and thus the President's ongoing supervision—by providing them a "right to continue as a party" even where 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 concluding otherwise, some courts have reasoned that relators are not "Officers" because they do not occupy a "continuing and formalized relationship of employment with the United States Government." *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 757–58 (5th Cir. 2001) (en banc); *accord United States ex rel. Taxpayers Against Fraud v. GE*, 41 F.3d 1032, 1041 (6th Cir. 1993); *United States ex rel. Wallace v. Exactech, Inc.*, 2023 WL 8027309, at *4 (N.D. Ala. Nov. 20, 2023). *But see Riley*, 252 F.3d at 767–69 (Smith, J., dissenting). Yet that argument ignores the fact that private relators unquestionably wield executive Power. As the Supreme Court has made clear in a related context, whether or not the relators are "public officers in a strict sense," they may not be "charged with the exercise of executive functions" unless appointed consistent with the Appointments Clause. *Springer v. Gov. of Philippine Islands*, 277 U.S. 189, 203 (1928). Such persons certainly cannot exercise the core executive function of prosecuting claims on behalf of the public for statutory relief that is "essentially punitive in nature." *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000). Indeed, the severe penalties imposed by the FCA are analogous to criminal fines, and nobody would doubt that one who initiates a criminal prosecution wields the executive Power. *See, e.g.*, *Seila Law*, 140 S. Ct. at 2200 (stating that criminal prosecution is a "core executive power").

The employment argument also conceptualizes the term "Officer" too narrowly. It is true that "Officer" might generally "embrace[]" the employment-related "ideas of tenure, duration, emolument, and duties" as *indicia* of officer status. *United States v. Germaine*, 99 U.S. (9 Otto) 508, 511 (1878). But the Supreme Court has never held that all of those indicia are *necessary* to confer the same. To the contrary, the Court held in *Morrison v. Olson* that an independent

counsel—a temporary government prosecutor responsible for handling a single investigation—was "clear[ly]" an "'officer' of the United States." 487 U.S. 654, 671 & n.12 (1988).

Like the independent counsel in *Morrison*, a *qui tam* relator functions as a single-case officer with the power to sue for alleged fraud on behalf of the United States. *See* 31 U.S.C. § 3730. As in *Morrison*, the relator's "office is limited in tenure" and "'temporary' in the sense that [he] is appointed essentially to accomplish a single task." *Morrison*, 487 U.S. at 672. Yet those limits do not foreclose officer status "in the constitutional sense." *See id.* at 671 & n.12. In fact, this case demonstrates how a relator can have a tenure longer than most presidential appointees—and longer than that of the President himself. Here, the relators have served in their prosecutorial capacity for more than a decade, exercising executive authority in the people's name over the span of three presidential administrations.

Finally, there is little question that *qui tam* plaintiffs receive "emoluments" for their service in the form of a fractional share of the recovery obtained for the United States. *See* 31 U.S.C. § 3730(d). That form of compensation is no different than the "bounties" that many federal officers received for their services, instead of "fixed salaries," in the first century of this Nation's existence. *See* Nicholas R. Parrillo, *Against the Profit Motive: The Salary Revolution in American Government, 1780–1940*, at 1–48 (2013). And that bounty in many cases can vastly exceed the ordinary compensation received by other Executive officers.

At bottom, "there is not even a fig leaf of constitutional justification" for empowering "private entities" to prosecute alleged offenders of the FCA on the United States' behalf. *Ass'n of Am. R.R.*, 575 U.S. at 62 (Alito, J., concurring); *see also Martin*, 14 U.S. (1 Wheat.) at 330; *Oklahoma v. United States*, 62 F.4th 221, 228 (6th Cir. 2023) (Sutton, C.J.) (recognizing that "the government may not empower a private entity to exercise unchecked legislative or executive

power"). The legitimacy of such an exercise of executive Power depends upon both (1) a constitutional appointment and (2) ongoing accountability to the public through 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.*, 141 S. Ct. 1970, 1979 (2021). *Qui tam* plaintiffs possess neither of those constitutional prerequisites. As independent and self-appointed bounty hunters, they operate well outside the carefully crafted scheme that the Framers adopted in Article II.

C. By Allowing Unharmed Relators to Infringe on the Executive's Enforcement Authority, the False Claims Act's *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 Private Actors to Commandeer and Override the Executive's Enforcement Discretion.

The Anglo-American legal system has long afforded the Executive enforcement discretion "where the public good demands not the execution of the law." Locke, *supra*, at 196; *see also* 1 Blackstone, *Commentaries* at *261. After all, the law can often be a blunt instrument in the pursuit of justice. 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).

Executive enforcement discretion also provides a critical check against legislative overreach. The Framers knew that 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 the necessary discretion in their manner of execution. *Printz*, 521 U.S. at 922. "[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." *Aiken II*, 725 F.3d at 264 (opinion of Kavanaugh, J.). And, once again, that "special province of the Executive branch" extends to both the criminal and civil realms. *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *see also, e.g.*, The Federalist No. 21, at 134–35 (Alexander Hamilton) (observing that the power "to enforce the execution of [the] laws" includes the pursuit of civil remedies like "pecuniary mulcts" (*i.e.*, fines) and the "suspension or divestiture of privileges").

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*, 141 S. Ct. 2190, 2207 (2021). 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.*; *see also Hughes*, 520 U.S. at 949.

The FCA's *qui tam* provisions cannot be squared with these principles. They permit unharmed private persons to commandeer the Executive's enforcement discretion and decide whether, where, when, and how to sue alleged violators of the Act. Indeed, "[t]he legislative history of the 1986 Amendments shows" that overriding the Executive's prerogative was precisely Congress's aim; Congress passed the amendments "out of generalized distrust of, and dissatisfaction with, the way the Executive Branch was carrying out its law enforcement responsibilities." John T. Boese & Douglas W. Baruch, *Civil False Claims and Qui Tam Actions* § 4.11 (5th ed. 2023) (citation omitted); *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 the *qui tam* amendments were needed to address the reality that Congress cannot "legislate aggression on the part of investigators and prosecutors"); 132 Cong. Rec. 22339 (daily ed. Sept. 9, 1986) (statement of Rep. Bedell) (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); *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 problem 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 reallocation of power threatens individual liberty. And it can also undermine the "overall policies" of the Executive Branch itself.

Heckler, 470 U.S. at 831. That is why the Framers wisely 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," *United States v. Texas*, 143 S. Ct. 1964, 1972 (2023).

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, he receives "full control over the litigation," even though he "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 its own expense, *id.* § 3730(c)(3). But the government "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 "interfere[s] severely with the Executive Branch's ability to ensure that the laws are 'faithfully executed' by the relator," *id.* at 764–65 (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); *see also Polansky*, 143 S. Ct. at 1734. 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." 31 U.S.C. § 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. Texas Tech Univ.*, 171 F.3d 279, 290 (5th Cir. 1999). But 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. at 458–59; *see United States v. Mendoza*, 464 U.S. 154, 161 (1984). *Qui tam* lawsuits, like this one, are not. They are therefore unconstitutional.

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

For the reasons explained, the FCA's *qui tam* provisions conflict with the original public meaning of Article II's text. Although there are some historical antecedents to the *qui tam* provisions of the FCA, most were materially different from the current law or proved short-lived. Moreover, appeals to such history cannot wash away *qui tam*'s constitutional shortcomings. The Supreme Court has made clear that historical practice alone cannot cure constitutional infirmities, even when that practice "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). After all, "[t]he Constitution, not history, is the supreme law." OLC Memo, *supra*, at 233; *see Bruen*, 142 S. Ct. at 2137 (emphasizing that "the text controls" when "later history contradicts what the text says").

At any rate, *qui tam* litigation suffers from a checkered history both in England and the United States. In fact, it did not become ubiquitous in this country until Congress amended the

FCA in 1986—two centuries after the Founding. 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 appear to have originated around the end of the 13th century, 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 numerous, geographically separated, local jurisdictions." 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 to experiment with *qui tam* litigation as a creature of statute. *See id.* at 567–73. And, unlike the practice developed at common law, some of these statutes permitted uninjured plaintiffs to "sue[] the Offender" and receive a share of the recovery "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" to "fill their pockets." 8 Legal Observer No. 204, at 20 (1834) (citation omitted). Informers unearthed old and forgotten statutes "as a means to gratify ill-will." 4 William

S. Holdsworth, *A History of English Law* 356 (1924). They used the threat of private 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 public outrage. And that sentiment is perhaps best captured by Lord Coke, who denounced the English 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 for *qui tam* actions, *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 the prosecution of 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. But even those lend little support to the constitutionality of *qui tam* litigation in the United States. 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*, 143 S. Ct. at 1741–42 (Thomas, J., dissenting) (citing Saikrishna Prakash, *The Chief Prosecutor*, 73 Geo. Wash. L. Rev. 521, 589 (2005)). And the English history of *qui tam* litigation only highlights the hazards posed by legislative transfers of the executive power to private hands.

Article II eliminated that concern. As explained above, the Framers decided to vest 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 Congress from adopting legislation that would "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.); *see Wallace*, 2023 WL 8027309, at *6. But 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). Because Article II's text, not history, controls, Congress cannot modify the constitutional division of power by legislative fiat. *See Bruen*, 142 S. Ct. at 2136–37.

The early congressional practice also provides a weak precedent to the modern-day FCA. For one thing, many of the early *qui tam* enactments operated differently than the current law, which allows unharmed plaintiffs to step into the government's shoes and litigate on its behalf. 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.[2] Other laws sought to redress private injuries, with only incidental recoveries flowing to the government.[3]

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

[3] *See, e.g.*, Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 124–25 (giving half of statutory penalty to authors who sued for copyright infringement of their works, with the other half going to the government); Act of July 20, 1790, ch. 29, § 1, 1 Stat. 131, 131 (giving, on top of damages, half of penalty to seamen or mariners not provided with pre-departure shipping contracts, with the other half of the penalty to the government).

Although the First Congress enacted a few provisions that granted informers a cause of action to pursue the sovereign's claims, *see Stevens*, 529 U.S. at 777 n.6 (collecting statutes), these scattered provisions "were essentially stop-gap measures, confined to narrow circumstances" to assist the fledging Executive in the early years of the Republic. OLC Memo, *supra*, at 213, 235. And the "transitory and aberrational" device "never gained a secure foothold within our constitutional structure." *Id.* at 213. It produced "little actual litigation." Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich. L. Rev. 689, 727 (2004). "Within a decade, 'the tide had turned against' qui tam, and Congress started curtailing its use." OLC Memo, *supra*, at 235–36 (alterations adopted) (quoting Leonard D. White, *The Federalists* 417 (1956)).

In addition, the actions of the First Congress provide a highly imperfect guide to interpreting Article II, because there appears to be "no evidence" that the First Congress ever "considered the constitutional status of qui tam." *Id.* at 214. The early *qui tam* statutes have the characteristics of action "taken thoughtlessly, by force of long tradition" from an archaic English device, "and without regard to the problems" that it 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. 1865).

In all events, "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 Constitution established a system of

separated powers, including a unitary Executive, that differed from earlier precedents, and it is thus unsurprising that certain efforts by the First Congress proved to be inconsistent with constitutional limitations. Indeed, 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). And even before *Marbury*, several Justices riding circuit refused to perform a non-judicial function that Congress had imposed upon them. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 (1792); *cf. also N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) (recounting the "broad consensus" that the Sedition Act of 1798 "was inconsistent with the First Amendment"). In short, "postenactment history" should not be given "more weight than it can rightly bear" in discerning the original public meaning of Article II's text. *Bruen*, 142 S. Ct. at 2136.

C. The Civil War Era Statutes Cannot Save the Constitutionality of the False Claims Act.

The early *qui tam* provisions had fallen into disuse by the antebellum period. During the Civil War, however, Congress revived the concept in the face of widespread concerns over war profiteering and fraud. *See Kellogg Brown & Root Servs. v. United States ex rel. Carter*, 575 U.S. 650, 652 (2015). "[A] series of sensational congressional investigations" in the early 1860s "painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war." *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 of the Act as critical to the ongoing war effort. It therefore instructed the "district attorneys of the United States" to "be diligent in inquiring into any violation" and in initiating proceedings "for the recovery of such forfeiture and damages." Act

of Mar. 2, 1863, c. 67, § 5, 12 Stat. 696, 698. But the legislature feared that this traditional mode of enforcement might not keep pace with the wartime fraud. Thus, it turned to the "unusual" practice of "authorizing private parties . . . to sue on the Government's behalf." *Polansky*, 143 S. Ct. at 1726. As a sponsor for the bill explained, allowing "any person" to sue "for the United States" and share in the proceeds, *see* Act of Mar. 2, 1863, c. 67, § 4, 12 Stat. 696, 698, 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.

Yet the exigencies posed by the Civil War eventually ceased. And, as the Nation restored order, *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" entirely in the 1940s, albeit in different sessions. Beck, *supra*, at 558. Faced with the political pressures of World War II, Congress instead settled on the adoption of a bill amending the FCA, which President Franklin Roosevelt signed into law, that considerably restricted the role and recovery of relators. *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.

That all changed in 1986. By then, Congress had become "dissatisfied with the way the executive branch was enforcing government procurement laws." *Id.* So it responded with several amendments designed to "encourage more private enforcement suits" and "check" the Executive's enforcement prerogatives. 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." *Hughes*, 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). On top of that, Congress provided relators with a cause of action for retaliation. *Id.* § 3730(h). And it significantly increased the bounty that relators—and their attorneys—could recover. *See id.* §§ 3729(a)(1), 3730(d).

Having concluded that the President might not fully protect the federal fisc, Congress adopted the 1986 amendments to usher in a new era of litigation. Since those amendments to the FCA, *qui tam* actions have surged more than a hundredfold—to a clip of roughly 700 suits per year. *Compare* U.S. Dep't of Justice, *Fraud Statistics—Overview* (Feb. 7, 2023), https://bit.ly/3N3x9cm, *with* Steve France, *The Private War on Pentagon Fraud*, 76 A.B.A. J. 46, 48 (Mar. 1990). That explosion of relator-driven litigation has created major problems for the Executive in ensuring the faithful execution of the laws. For even though most *qui tam* actions are meritless or otherwise not in the best interests of the United States, the sheer volume of them has prevented the government from being able to intervene and adequately oversee relators' litigation conduct and strategies. As a result, the 1986 amendments have threatened the Executive's authority in a way that even prior versions of the False Claims Act 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.

* * *

In sum, 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. They cannot overcome Article II's text, which makes clear that this litigation should proceed no further. To hold otherwise would disregard the Framers' choice to "vest[]" the "executive Power" in the President. U.S. Const. art.

II, § 1, cl. 1. It would wrongly permit relators to serve as "Officers of the United States" outside the safeguards of the Appointments Clause. *Id.* art. II, § 2, cl. 2. And it would unduly impede the President's prerogative to "take Care that the Laws be faithfully executed." *Id.* art. II, § 3.

CONCLUSION

For the foregoing reasons, the Chamber respectfully urges this Court to grant the Defendants' motion for judgment on the pleadings.

Respectfully submitted,

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