

No. 26-2620

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

HEALTHNOW NEW YORK, INC., d/b/a BlueCross BlueShield of Western New
York, d/b/a Blueshield of Northeastern New York, n/k/a Highmark Western and
Northeastern New York Inc.

Petitioner,

vs.

UNITED STATES OF AMERICA *ex rel.* MADELYN B. BARNES,
Respondents.

On Petition for Permission to Appeal from the United States District Court for the
Western District of New York, No. 1:16-cv-00088, Hon. John L. Sinatra, Jr.

**BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA IN SUPPORT OF HEALTHNOW NEW
YORK INC.'S PETITION FOR PERMISSION TO APPEAL**

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America (“Chamber”) states that it is a nonprofit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held corporation has 10% or greater ownership in the Chamber.

Dated: September 23, 2026

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (“Chamber”) is the world’s largest business organization and the nation’s leading advocate for business. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation’s business community.

In recent years, profit-driven relators have invoked the False Claims Act’s (“FCA’s”) unusual *qui tam* mechanism to exact a substantial toll on businesses nationwide. The Chamber has a significant interest in preventing such harm to its members. It therefore submits this brief supporting HealthNow’s Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b) (“1292(b) Petition”), both to underscore the importance of this issue and to explain why FCA *qui tam* lawsuits violate Article II of the Constitution.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should grant the 1292(b) Petition because the constitutionality of FCA *qui tam* litigation presents “controlling question[s] of law,” and “there is substantial ground for difference of opinion” on their proper resolution. 28 U.S.C. § 1292(b). Three Justices have recognized that “there is good reason to suspect that Article II does not permit private relators to represent the United States’ interests in FCA suits.” *United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 451 (2023) (Thomas, J., dissenting); *see also id.* at 442 (Kavanaugh, J., joined by

Barrett, J., concurring). That view is correct. Regardless, as the District Court recognized in certifying the question, this Court should settle the matter for all courts in this Circuit.

Article II vests “[t]he executive Power” in one elected President, who must “take Care that the Laws be faithfully executed.” U.S. Const. art. II, §§ 1, 3. The Framers adopted that unitary structure to promote accountability and ensure that “a President chosen by the entire Nation” would “oversee the execution of the laws.” *Free Enter. Fund v. PCAOB*, 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 by wresting the executive Power from the President’s hands. Private relators are not injured parties seeking recovery for personalized harms. They are unaccountable bounty hunters pursuing claims that, in their judgment, the Executive should have asserted. And they are “motivated primarily by prospects of monetary reward rather than the public good.” *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997). That arrangement is patently unconstitutional.

The “primary counterargument” for *qui tam*’s constitutionality emphasizes its “historical pedigree.” *Polansky*, 599 U.S. at 450 (Thomas, J., dissenting). But the “adoption or acceptance of laws that are *inconsistent* with the original meaning of

the constitutional text”—even laws passed near the Founding—“cannot overcome or alter that text.” *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 36 (2022) (citation omitted). And the *qui tam* provisions’ historical roots are limited at best. Many of the early enactments provided relators with only a bounty, not a cause of action, while others authorized private *criminal* enforcement or applied only to relators who *themselves* suffered injury. In all events, these long-repealed *qui tam* statutes reflected an ill-considered, pre-ratification understanding of the Chief Executive. They cannot excuse the manifest conflict between the FCA’s *qui tam* provisions and Article II’s text.

The Petition should be granted.

ARGUMENT

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

I. The FCA’s *Qui Tam* Provisions Violate Article II’s Vesting Clause.

Congress may not authorize bounty hunters to litigate for the United States. Rather, the Framers understood that “[a] basic step in organizing a civilized society” was to take the “sword” of law-enforcement actions “out of private hands and turn

it over to an organized government, acting on behalf of all the people.” *Robertson v. United States ex rel. Watson*, 560 U.S. 272, 282-83 (2010) (Roberts, C.J., dissenting from dismissal of writ of certiorari as improvidently granted). In Article II’s Vesting Clause, the Framers therefore lodged “[t]he executive Power” in a single “President,” U.S. Const. art. II, § 1, cl. 1, establishing a unitary and accountable Executive who alone would be responsible for enforcing federal law.

This conception of centralized executive authority finds roots in the work 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) (“Locke”). 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.

William Blackstone expressed the same understanding. “In a state of society,” he reasoned, the right “to put [the law] in execution” is “transferred from individuals to the sovereign power,” who “alone” bears “the sword of justice by the consent of the whole community.” 4 William Blackstone, *Commentaries on the Laws of England* 7-8 (1769) (“Blackstone”). And when the public “delegate[s] all it[s] 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 258-59. That is his exclusive prerogative.

Of course, the common law recognized that one who “suffered the damage” from a public infraction might demand redress “in his own name.” Locke 196. But he could not pursue relief on the public’s behalf. “[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 219-20. That is because “the law gives no *private* remedy for any thing but a *private* wrong.” *Id.* at 219.

The Framers enshrined this basic understanding in Article II’s Vesting Clause, entrusting “the President alone” with “all” executive Power. *Seila Law LLC v. CFPB*, 591 U.S. 197, 203, 213 (2020). Given that design, it is “utterly inadmissible” for Congress to vest executive authority “in any other person.” *Martin v. Hunter’s Lessee*, 14 U.S. 304, 330 (1816).

Yet that is precisely what the FCA’s *qui tam* provisions do. Congress “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). Relators “lack a personal interest in [FCA] *qui tam* actions” and sue only to remedy harm suffered by the United States. *United States ex rel. Mergent Servs. v. Flaherty*, 540 F.3d 89, 93 (2d Cir. 2008). That defies the “[s]ettled rule” that courts will not 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 Executive represents the government. *Confiscation Cases*, 74 U.S. 454, 457 (1869).

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

The *qui tam* provisions also violate the Appointments Clause, which ensures that executive Power is exercised only by appointed “Officers of the United States.” U.S. Const. art. II, § 2, cl. 2.

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

Buckley forbids such diffusion of executive Power. There, the Court struck down the FEC’s original structure, which permitted congressional leaders to appoint commissioners. *See* 424 U.S. at 113. That violated the Appointments Clause, because commissioners performed executive “functions” by wielding “enforcement power” to “seek judicial relief” for violations of law. *Id.* at 138-40. Such executive “functions may be discharged *only* by persons who are ‘Officers of the United States’

within the language” of the Appointments Clause—and who are appointed by its terms. *Id.* at 140 (emphasis added). Relators, however, appoint themselves.

Some courts have countered that relators lack a “continuing and formalized relationship of employment with the United States.” *Riley v. St. Luke’s Episcopal Hosp.*, 252 F.3d 749, 757 (5th Cir. 2001) (en banc). But that makes the relator’s exercise of prosecutorial power all the worse. Besides, *Morrison v. Olson* held that an independent counsel—a temporary prosecutor appointed for one investigation—was “clear[ly]” an “‘officer’ of the United States.” 487 U.S. 654, 671 & n.12 (1988). This Court held the same for a court-appointed “special prosecutor” in *United States v. Donziger*, 38 F.4th 290, 299 (2d Cir. 2022).

As in *Morrison* and *Donziger*, a *qui tam* relator functions as a single-case officer empowered to sue for the government. While the “office is limited in tenure” and “‘temporary’ in the sense that [relators are] appointed essentially to accomplish a single task,” those limits do not foreclose officer status “in the constitutional sense,” *Morrison*, 487 U.S. at 671-72 & n.12, because relators appoint themselves to serve as “representatives of the public,” *United States ex rel. Kreindler & Krieindler v. United Techs. Corp.*, 985 F.2d 1148, 1155 (2d Cir. 1993) (citation omitted). That arrangement runs afoul of the Appointments Clause.

III. The FCA's *Qui Tam* Provisions Violate the Take Care Clause.

The *qui tam* provisions violate the Take Care Clause too. The Framers knew there “can be no liberty” if a single body “should enact tyrannical laws,” to have them then “execute[d]” “in a tyrannical manner.” The Federalist No. 47, at 300 (Clinton Rossiter ed., 2003) (James Madison) (emphasis omitted). So they divided the Nation’s lawmaking and law-enforcement powers. That separation of 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).

To that end, Article II charges the President alone to “take Care that the Laws be faithfully executed.” U.S. Const. art. II, § 3. That ensures that “the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys).” *TransUnion LLC v. Ramirez*, 594 U.S. 413, 429 (2021). And for good reason: “Private plaintiffs are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant’s” compliance with the law. *Id.*

The FCA’s *qui tam* provisions flout that structural safeguard, permitting unharmed private parties to commandeer the Executive’s enforcement discretion and

decide whether, where, when, and how to sue. This “allows Congress to circumvent the Executive’s check and to have its laws enforced directly by its own private bounty hunters.” *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. O.L.C. 207, 211 (1989) (“OLC Memo”). This reallocation of power not only threatens individual liberty; it also undermines the Executive’s “overall policies.” *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

That is why the Framers entrusted these 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 232. That is, only the President can “take Care that the Laws be faithfully executed,” U.S. Const. art. II, § 3, to best serve the “public-welfare needs of the American people,” *United States v. Texas*, 599 U.S. 670, 680 (2023).

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

History cannot wash away these constitutional shortcomings. After all, “[t]he Constitution, not history, is the supreme law.” OLC Memo 233; *see Bruen*, 597 U.S. at 36. Historical practice thus cannot cure constitutional infirmities even when it “covers our entire national existence and indeed predates it.” *Walz v. Tax Comm’n of City of New York*, 397 U.S. 664, 678 (1970).

At any rate, *qui tam* suffers from a checkered history. In medieval England, *qui tam* “proved a vexatious device that ultimately could not be reconciled with the institutions of free and responsible government.” OLC Memo 235. Accordingly, “many of the old [*qui tam*] enactments were repealed” entirely by the Jacobean era. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 775 (2000).

Some English *qui tam* statutes did remain up through the Founding. But even those provide little support for the FCA’s *qui tam* regime: “[T]he Constitution’s creation of a separate Executive Branch coequal to the Legislature was a structural departure from the English system of parliamentary supremacy, from which many legal practices like *qui tam* were inherited.” *Polansky*, 599 U.S. at 450 (Thomas, J., dissenting).

Nor do the First Congress’s actions change the constitutional calculus. Many early *qui tam* enactments are not “relevantly similar” to the current FCA. *Bruen*, 597 U.S. at 29. The FCA places unharmed plaintiffs in the government’s shoes to litigate on its behalf. But most early statutes offered only a reward to informers, not a cause of action. See *United States ex rel. Zafirov v. Fla Med. Assocs., LLC*, 751 F. Supp. 3d 1293, 1319-20 (M.D. Fla. 2024), *vacated and remanded*, ___ F.4th ___, 2026 WL 2581886 (11th Cir. 2026).¹ Others sought to redress private injuries, with

¹ The Eleventh Circuit in *Zafirov* reserved judgment on the Vesting and Take Care arguments, and its Appointments Clause analysis openly conflicts with *Donziger*. See Pet. at 18.

the government receiving only incidental recoveries. *See id.* These two categories differ in kind from the current FCA and thus have little bearing on the inquiry.

As to the few enactments that allowed informers to pursue sovereign claims, these “were essentially stop-gap measures, confined to narrow circumstances” to assist the fledging Executive. OLC Memo 213. And the “transitory and aberrational” *qui tam* device “never gained a secure foothold within our constitutional structure.” *Id.* It produced “little actual litigation” and was curtailed by Congress in short order. Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich. L. Rev. 689, 728 (2004).

Tellingly, there is “no evidence” Congress ever “considered the constitutional status of *qui tam*.” OLC Memo 214. The early *qui tam* statutes instead have all the hallmarks of action “taken thoughtlessly, by force of long tradition” from an archaic English device, “without regard to the problems” presented to the new constitutional order. *Marsh v. Chambers*, 463 U.S. 783, 791 (1983).

Reliance on early congressional practice also proves too much. For some “*qui tam* provisions authoriz[ed] individuals to sue under *criminal* statutes to help enforce the law.” Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 Am. U. L. Rev. 275, 296-97 & n.104 (1989) (emphasis added). The government cannot dispute that outsourcing such “core executive power” to the plaintiffs’ bar would violate Article II. *Seila Law*, 591 U.S. at 219.

In sum, the FCA's *qui tam* provisions conflict with the original meaning of Article II's text. This Court should grant review to make that clear.

CONCLUSION

The Court should grant HealthNow's Petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This Brief contains 2,597 words, excluding the parts exempted by Fed. R. App. P. 32(f), which is less than half the word count authorized for HealthNow's Petition. *See* Fed. R. App. P. 5(c)(1); *see also* Fed. R. App. P. 29(a)(5) (“[A]n amicus brief may be no more than one-half the maximum length authorized by these rules for a party’s principal brief.”). This Brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using 14-point Times New Roman font.

Dated: September 23, 2026

/s/ Steven A. Engel
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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2026, I caused the foregoing Brief to be filed electronically with the Clerk of Court of the United States Court of Appeals for the Second Circuit using the ACMS system. All participants in this case are registered ACMS users and service will be accomplished by the ACMS system.

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