Nos. 25-4070, 25-4083

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

UNITED STATES *ex rel.* KATIE BROOKS and NANNETTE WRIDE,

Plaintiffs-Appellants/Cross-Appellees,

vs.

STEVENS-HENAGER COLLEGE, INC.; CENTER FOR EXCELLENCE IN HIGHER EDUCATION, INC.; CALIFORNIA COLLEGE SAN DIEGO, INC.; COLLEGEAMERICA DENVER, INC.; COLLEGEAMERICA ARIZONA, INC.; CARL BARNEY,

Defendants-Appellees/Cross-Appellants,

and

SHAW, MUMFORD & CO., P.C.; SHAW & CO., P.C.; PRICEWATERHOUSECOOPERS LLP; WEWORSKI & ASSOCIATES,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Utah,
No. 2:15-cv-00119-JNP, Hon. Jill N. Parrish

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS

MICHAEL H. MCGINLEY
BRIAN A. KULP
CORY J. KOPICKI
BRENDAN M. BELL
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104

STEVEN A. ENGEL
Counsel of Record
DECHERT LLP
1900 K Street, NW
Washington, DC 20006
(202) 261-3369
steven.engel@dechert.com

(Additional Counsel Listed on Inside Cover)

ANDREW R. VARCOE
U.S. CHAMBER LITIGATION
CENTER
1615 H Street, NW
Washington, DC 20062

Counsel for the Chamber of Commerce of the United States of America

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America ("Chamber") is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business organization. As the nation's leading advocate for business, the Chamber represents companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. 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 abused the False Claims Act's ("FCA") *qui tam* mechanism. That abuse has exacted a substantial economic toll on businesses nationwide, and the Chamber has a significant interest in preventing such harm to its members. The Chamber therefore submits this brief to make two points. First, *qui tam* lawsuits under the FCA violate Article II of the Constitution. Second, even if this Court does not reach the constitutionality of FCA *qui tam* suits, the constitutional problems with the FCA further confirm that the statute's text must be

---

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Counsel for all parties consented to the filing of this brief.

read to prohibit relators from asserting claims that the Government has chosen not to assert after it intervenes.

INTRODUCTION AND SUMMARY OF ARGUMENT

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 to recover for personalized harms. They are unaccountable bounty hunters charged with pursuing claims that, in their judgment, the Executive should have asserted. All the while, they are "motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997).

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

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

Even if this Court does not reach the constitutionality of FCA *qui tam* suits, the constitutional problems described above underscore that the FCA must be read to bar a relator, in an intervened case, from pursuing claims that the Government does not. This conclusion flows from the statute's plain text, which provides that once the Government intervenes in a *qui tam* action, it assumes "primary responsibility" for the entire "action." 31 U.S.C. § 3730(c)(1). The relator loses control, and her residual right to "continue as a party" is not a license to press claims that the Government has declined. *Id.* Reading the FCA to permit that result would collapse the statute's careful distinction between an "action" and a "claim." *See id.* § 3730(e)(4)(A). And it would violate the canon of consistent usage.

The canon of constitutional avoidance confirms that FCA relators may not pursue claims on behalf of the Government that the Department of Justice has decided not to pursue. Permitting relators to litigate independent claims within an intervened action exacerbates the Article II problems—under the Vesting Clause, the Appointments Clause, and the Take Care Clause—that infect the FCA's *qui tam* mechanism more generally. At a minimum, therefore, the Court should hold that the FCA, properly construed, bars the Relators from asserting claims that the Government chooses not to bring.

ARGUMENT

I. The FCA's *Qui Tam* Provisions Are Unconstitutional.

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, in violation of 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, in violation of the Take Care Clause.

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

Congress may not authorize private 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). To that end, the Constitution vested "[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). 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 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). And when 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 William Blackstone, *Commentaries on the Laws of England* 258–59 (1765). Vindicating those public rights 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, *supra*, at 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 William Blackstone, *Commentaries on the Laws of England* 219–20

(1768). 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. By entrusting "the President alone" with "all" executive Power, the Framers sought to ensure that he would remain accountable for the execution of the laws and for all those who act on his behalf. *Seila Law LLC v. CFPB*, 591 U.S. 197, 203, 213 (2020). It is therefore "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). 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). The FCA's redelegation of the executive Power to private parties thwarts the Constitution's assignment of that power to the President alone.

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

The *qui tam* provisions also conflict with the Appointments Clause, which works in tandem with the Vesting Clause to ensure that executive Power is exercised only by properly 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 the 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 consistent with its constitutionally prescribed method. *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. And it does not foreclose "officer" status. It is true the word "officer" often "embraces the ideas of tenure, duration, emolument, and duties" as *indicia* of officer status. *United States v. Germaine*, 99 U.S. 508, 511 (1878). But the Supreme Court has never held that all such indicia must be present. To the contrary, *Morrison v. Olson* held that an independent counsel—a temporary prosecutor appointed for one investigation—was "clear[ly]" an "'officer' of the United States." 487 U.S. 654, 671 & n.12 (1988); *see also United States v. Donziger*, 38 F.4th 290, 299 (2d Cir. 2022) (same, for court-appointed "special prosecutor").

As in *Morrison*, 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." 487 U.S. at 671–72 & n.12. Rather, "the office of an FCA relator is continuous" by operation of law, "even if it is not continually filled." *United States ex rel. Zafirov v. Fla. Med. Assocs., LLC*, 751 F. Supp. 3d 1293, 1314 (M.D. Fla. 2024), *appeal docketed*, Nos. Nos. 24-13581, 24-13583 (11th Cir. Oct. 30, 2024). And the FCA empowers private individuals to appoint themselves to that office. That arrangement runs afoul of the Appointments Clause.

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

The FCA's *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).

At the same time, "[t]he Constitution does not leave to speculation who is to administer the laws enacted by Congress"—and exercise discretion in their execution. *Printz v. United States*, 521 U.S. 898, 922 (1997). "[T]he President, it says, 'shall take Care that the Laws be faithfully executed,' personally and through officers whom he appoints." *Id.* (internal citation omitted). Included within that charge "is the power to protect individual liberty by essentially under-enforcing federal statutes regulating private behavior," *In re Aiken County*, 725 F.3d 255, 264 (D.C. Cir. 2013) (opinion of Kavanaugh, J.), especially "where the public good demands not the execution of the law," Locke, *supra*, at 196. That "special province of the Executive branch" covers both the criminal and civil realms. *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

Simply put, "the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys)," *TransUnion LLC v. Ramirez*, 594 U.S. 413, 429 (2021). And 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 cannot be squared with these principles. The provisions permit 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." OLC Memo at 211. This reallocation of power does not just threaten individual liberty; it also, and necessarily, undermines the Executive's "overall policies." *Heckler*, 470 U.S. at 831.

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 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*, 599 U.S. 670, 680 (2023).

D. 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 at 233; *see N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 36 (2022). 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 at 235. The persons "occupied in this branch of executive jurisprudence" did not "give impartial efficiency to the laws," but acted instead as "instrument[s] of individual extortion, caprice, and tyranny." 8 Legal Observer No. 204, at 20 (1834) (citation omitted). Informers unearthed old and forgotten statutes "as means to gratify ill-will." 4 William S. Holdsworth, *A History of English Law* 356 (1924). They threatened enforcement suits to "levy[] blackmail" against potential defendants. *Id.* And they stirred up litigation simply in the hopes of recovering money. *Id.* These abuses led to considerable outrage—leading Lord Coke to denounce the informers as "viperous vermin" who "vex and depauperize the subject" for "malice or private ends, and never for love of justice." 3 Sir Edward Coke, *Institutes of the Laws of England* 194 (4th ed. 1797).

In response to this indignation, Parliament began to curb *qui tam* abuses in the late 1400s. *See* J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. Rev. 539, 574–89 (2000). And "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. After all, "the Constitution's creation of a separate Executive Branch coequal to the Legislature was a structural departure from the English system of parliamentary supremacy, from which many legal practices like *qui tam* were inherited." *Polansky*, 599 U.S. at 450 (Thomas, J., dissenting). And the English history only underscores the hazards posed by legislative transfers of executive power to private hands. Article II eliminated those hazards.

The First Congress's actions do not change the constitutional calculus either. For one thing, 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, without providing a cause of action. *See Zafirov*, 751 F. Supp. 3d at 1319–20. Others sought to redress private injuries, with 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 at 213. And the "transitory and aberrational" *qui tam* device "never gained a secure foothold within our constitutional structure." *Id.* It produced "little actual litigation" and was curtailed by Congress in short order. Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich. L. Rev. 689, 728 (2004).

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

If anything, reliance on early congressional practice 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 can hardly dispute that outsourcing such "core executive power" to the plaintiffs' bar would violate Article II. *Seila Law*, 591 U.S. at 219.

For all these reasons, "postenactment history" should not receive "more weight than it can rightly bear." *Bruen*, 597 U.S. at 35. The FCA's *qui tam* provisions conflict with the original meaning of Article II's text.

E. *Stone* Is No Obstacle to Holding the *Qui Tam* Provisions Unconstitutional.

This Court in *United States ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787, 804–07 (10th Cir. 2002), held that the FCA's *qui tam* provisions were consistent with the Appointments Clause and Take Care Clause in some cases. That decision is inconsistent with Supreme Court precedent, but even so, *Stone* never addressed the Vesting Clause. *See id.*

Moreover, the Court in *Stone* was careful to limit its Take Care Clause holding to "the circumstances of [that] case where the Government intervened" with respect to *all* the claims at issue. *Id.* at 807; *see also id.* at 795–96 (noting that the jury trial and appeal encompassed only the claims in which the Government had intervened). The court "express[ed] no opinion" on whether the law would be constitutional "in circumstances other than those." *Id.* at 806 n.6. And these are those other circumstances. The Government chose not to pursue the claims that the Relators now hope to litigate on their own.

Stone is also no obstacle to the Appointments Clause challenge. "[A] Supreme Court decision that predates a decision of this court can still qualify as 'intervening' if this court's subsequent decision did not mention or address the Supreme Court decision." *Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1183 (10th Cir. 2018) (citation omitted). And *Stone* "never mentioned" the Supreme Court's prior decision in *Morrison* when analyzing the Appointments Clause. *United States v. Brooks*, 751 F.3d 1204, 1211 n.4 (10th Cir. 2014). *Morrison*, as explained above, held that a temporary, single-case prosecutor—just like a relator—was "clear[ly]" an "'officer' of the United States." 487 U.S. at 671 & n.12. That is contrary to the analysis in *Stone*. This Court is thus bound to follow *Morrison* on the Appointments Clause issue. *See Lincoln*, 900 F.3d at 1183; *Brooks*, 751 F.3d at 1211 n.4; *see also, e.g.*, *Ne. Ohio Coalition for the Homeless v. Husted*, 831 F.3d 686, 720 (6th Cir. 2016) (collecting cases holding that appellate courts can "revisit" their decisions absent en banc review "in the unusual situation where binding circuit precedent overlooked earlier Supreme Court authority").

* * *

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

II. The FCA Prohibits Relators from Asserting Additional Claims Once the Government Intervenes in a *Qui Tam* Action.

The constitutional problems inherent in the *qui tam* provisions leave no doubt that the Relators here may not litigate on their own claims on behalf of the United States. But even if the Court does not decide whether the *qui tam* provisions are constitutional, the Court should still conclude that the Relators' claims must fail. The Government has intervened in the action. And, as the District Court correctly held, relators may not bring additional claims once the Government has done so. The FCA's plain text compels that result. And the canon of constitutional avoidance further confirms that the FCA must be interpreted to bar relators from asserting separate claims once the Government takes over the litigation.

A. The FCA's Plain Text Forecloses Relators from Asserting Claims that the Government Declines to Pursue.

"In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself." *Food*

Mktg. Inst. v. Argus Leader Media, 588 U.S. 427, 436 (2019). And "[w]here, as here, that examination yields a clear answer, judges must stop." *Id.*

Several provisions within the FCA make clear that, once the Government intervenes, the Government takes responsibility over the entire action. It follows that the relator may not then assert separate claims in the same case.

First, section 3730(c) governs the "Rights of the Parties to Qui Tam Actions." And it expressly assigns authority over an intervened "action" to the Government. When the Government "proceeds with the action," *i.e.*, intervenes, "it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the [relator]." 31 U.S.C. § 3730(c)(1). The relator retains a limited "right to continue as a party," *id.*, which enables her to "participate in discovery, engage in motions practice, and participate at trial," *ACLU v. Holder*, 673 F.3d 245, 250 (4th Cir. 2011). But she cannot "conduct the action," as the statute provides, when "the Government proceeds with the action." 31 U.S.C. § 3730(c)(1), (3). "Only if the Government passes on intervention does the relator 'have the right to conduct the action.'" *Polansky*, 599 U.S. at 425 (quoting 31 U.S.C. § 3730(b)(4)).

This statutory structure shows that the Government's intervention triggers a transfer of control over the "action." Congress knew how to give relators the authority to "conduct" an action. But it reserved that authority for declined actions alone. This Court "must give effect to, not nullify," that "choice to include limiting language in some provisions but not others." *Gallardo v. Marstiller*, 596 U.S. 420, 431 (2022) (citation omitted).

Second, the FCA's text makes clear that "action" means the entire case, not individual claims. That is the ordinary meaning of the term. The word "'[a]ction' is generally understood to imply a 'judicial proceeding.'" *Obduskey v. Wells Fargo*, 879 F.3d 1216, 1222 (10th Cir. 2018) (citation omitted). And it thus refers to the "whole of the lawsuit." *Brownback v. King*, 592 U.S. 209, 220 (2021) (Sotomayor, J., concurring). "Individual demands for relief within a lawsuit, by contrast, are 'claims.'" *Id.* Dictionaries at the time of the 1986 amendments agreed with this understanding. *See Black's Law Dictionary* 26 (5th ed. 1979) (defining "action" as "a suit brought in a court" or "[a]n ordinary proceeding in a court of justice"); *id.* at 224 (defining "claim" as a "[c]ause of action").

Reading "action" and "claim" as synonyms would defy this ordinary meaning, and it would make no sense in context. Statutes are "to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (internal citations omitted). And here, the FCA's public-disclosure bar contains a powerful clue that Congress did not mean to collapse "action" and "claim" into a single concept, as the Relators and the Government urge. *See* Relator Br. at 35–43; Gov. Br. at 10–25. Instead, Congress provided that "[t]he court shall dismiss an *action or claim*" if the underlying facts "in the *action or claim* were publicly disclosed." 31 U.S.C. § 3730(e)(4)(A) (emphases added). Congress therefore treated the two terms separately. And courts must "give effect, if possible, to every clause and word of a statute." *Loughrin v. United States*, 573 U.S. 351, 358 (2014) (internal quotations omitted). The District Court's reading does that. The Relators and the Government's reading, by contrast, would render one of those terms "insignificant, if not wholly superfluous." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). That is another strike against it.

The Relators and the Government's view also runs afoul of the rule that when a statute repeats a term "in several places," that term "is generally read the same way each time it appears." *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). The FCA, in consecutive sentences, uses the term "action"—consistent with its ordinary meaning—to mean a filed "civil action": "A person may bring a *civil action* for violation of section 3729 for the person and for the United States Government. *The action* shall be in the name of the Government." 31 U.S.C. § 3730(b)(1) (emphases added). The Relators and Government's argument that "action" means "cause of action" would require this Court to ignore that one section of the FCA undeniably uses "action" to mean "civil action," *i.e.*, an entire lawsuit. Their reading thus conflicts with the presumption of consistent usage, which teaches that "identical words . . . within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007).

In sum, once the Government intervenes and assumes responsibility for a *qui tam* action, a relator's right to remain as a party does not carry with it any right to pursue claims that the Government has chosen to leave aside. The Relators and the Government's contrary reading would rewrite the FCA's text and transform a relator's right to participate in an intervened action into an independent license to exert control over the Government's litigation. This case proves the point. "Relators' claims against PwC directly contradict the Government's theory of the case against the Colleges." PwC Br. at 61. Exercising its judgment as to how best to conduct the litigation, the Government left those claims aside, whether because the Government concluded that they were meritless or for other strategic reasons. *See id.* at 62–63. Allowing the Relators to pursue those claims would contravene the Government's judgment and its "primary responsibility for prosecuting the action." 31 U.S.C. § 3730(c)(1).

B. The Canon of Constitutional Avoidance Further Supports Interpreting the FCA to Bar Relators from Asserting Separate Claims in an Intervened Action.

The FCA's clear text, alone, commands that the Relators are barred from asserting additional claims in this action. But the constitutional avoidance canon provides another reason to hold that the Relators may not splinter the action and pursue separate claims from those that the Government chooses to assert.

The constitutional avoidance canon is a "cardinal principle" of statutory interpretation. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). It instructs that where a statutory reading would raise constitutional doubts, the Court should adopt the alternative reading that avoids them if "fairly possible," even if that alternative reading is "not the best one." *United States v. Hansen*, 599 U.S. 762, 781 (2023) (quotation marks omitted). This Court has applied that canon to reject interpretations that "would place the FCA on constitutionally unsteady ground." *Ridenour v. Kaiser-Hill Co., Ltd. Liab. Co.*, 397 F.3d 925, 934 (10th Cir. 2005). And the canon here should cure any remaining interpretative doubt. Indeed, permitting the Relators to exercise an independent, parallel right to litigate an action after the Government has intervened would violate Article II, for the reasons explained above. *See supra* Section I.

First, permitting the Relators to continue to proceed with their claims would vest in self-appointed private persons the executive power to litigate on behalf of the United States within a proceeding that the Government has already claimed as its own. Article II forbids that diffusion of "executive Power." U.S. Const. art. II, § 1, cl. 1; *see supra* Section I.A. The problem is illustrated even more starkly here than when the Government does not intervene at all. The Government's own presence in the action—and its choice of which claims to bring—makes plain that the executive Power is being exercised. This "'discretionary power to seek judicial relief' lies at the very core of executive authority." *Trump v. Slaughter*, No. 25-332, Slip Op. at 26 (U.S. June 29, 2026) (quoting *Buckley*, 424 U.S. at 138). A relator's independent assertion of claims amounts to a direct intrusion into that exercise, without appointment or accountability.

Second, allowing a relator to pursue claims within an intervened action would raise heightened Appointments Clause concerns. The Framers included the Appointments Clause as a structural safeguard to "prevent[] Congress from dispensing power too freely" to those who might wield it improperly. *Freytag*, 501 U.S. at 880. But permitting a relator to press independent claims alongside the Government's claims would do precisely that. It would embed an unaccountable bounty hunter into an ongoing federal prosecution. And it would transfer the power to "conduct[] civil litigation in the courts of the United States for vindicating public rights" from a properly appointed prosecutor to a self-appointed relator. *Buckley*, 424 U.S. at 140.

Third, the Relators and the Government's reading of the FCA would violate the Take Care Clause. When the Government intervenes, it has exercised its prosecutorial discretion to take "primary responsibility" for the action. 31 U.S.C. § 3730(c)(1). Allowing relators to pursue claims that the Government has affirmatively declined to bring within that same action would override, not merely supplement, the Executive's judgment about which claims to press. *See supra*

Section I.C. That would "run up against the Executive's Article II authority to enforce federal law." *Texas*, 599 U.S. at 678. After all, it is "the Executive Branch [that] has exclusive authority and absolute discretion to decide whether to prosecute a case" for the United States—and how best to do so. *United States v. Nixon*, 418 U.S. 683, 693 (1974).

To avoid these serious constitutional issues, the Court should construe the FCA to bar relators from asserting separate claims once the Government has intervened in the case.

CONCLUSION

This Court should hold that the FCA's *qui tam* provisions violate Article II. If the Court does not reach this question, the Court should hold, at a minimum, that the FCA's text bars relators from pursuing additional claims after the Government has intervened.

Respectfully submitted,

/s/ Steven A. Engel

STEVEN A. ENGEL
Counsel of Record
DECHERT LLP
1900 K Street, NW
Washington, DC 20006
(202) 261-3369
steven.engel@dechert.com

MICHAEL H. MCGINLEY
BRIAN A. KULP
CORY J. KOPICKI
BRENDAN M. BELL
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104

ANDREW R. VARCOE
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

Counsel for the Chamber of Commerce of the United States of America

CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7) because it contains 5,671 words, excluding the parts exempted by Fed. R. App. P. 32(f). 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: July 2, 2026

/s/ Steven A. Engel
Steven A. Engel

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing Brief: (1) there are no required privacy redactions under 10th Cir. R. 25.5; (2) if required to file additional hardcopies, this ECF submission is an exact copy of those documents; and (3) this digital submission has been scanned for viruses with the most recent version of VirusTotal, and according to the program is free of viruses.

Dated: July 2, 2026

/s/ Steven A. Engel
Steven A. Engel

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2026, I caused the foregoing Brief to be filed electronically with the Clerk of Court of the United States Court of Appeals for the Tenth Circuit using the CM/ECF system. All participants in this case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

Dated: July 2, 2026

/s/ Steven A. Engel
Steven A. Engel