IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MSP RECOVERY CLAIMS, SERIES LLC, *Plaintiff*, v. LIBERTY MUTUAL INSURANCE COMPANY, *Defendant*.	Civil Action No. 22-10809-RWZ (Consolidated Lead Case) **MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE CONSOLIDATED ACTIONS**
MSP RECOVERY CLAIMS, SERIES LLC, *Plaintiff*, v. SAFECO INSURANCE COMPANY OF AMERICA, *Defendant*.	Civil Action No. 22-10888-RWZ (Consolidated With: No. 22-10809-RWZ)
MSP RECOVERY CLAIMS, SERIES LLC, *Plaintiff*, v. LIBERTY MUTUAL INSURANCE COMPANY, *Defendant*.	Civil Action No. 22-10928-RWZ (Consolidated With: No. 22-10809-RWZ)
MSP RECOVERY CLAIMS, SERIES LLC, *Plaintiff*, v. LIBERTY MUTUAL INSURANCE COMPANY, *Defendant*.	Civil Action No. 22-10929-RWZ (Consolidated With: No. 22-10809-RWZ)

MSP RECOVERY CLAIMS, SERIES LLC, *Plaintiff*, v. LIBERTY MUTUAL INSURANCE COMPANY; LM GENERAL INSURANCE COMPANY, *Defendants*.	Civil Action No. 22-10940-RWZ (Consolidated With: No. 22-10809-RWZ)
MSP RECOVERY CLAIMS SERIES 44, LLC, *Plaintiff*, v. LIBERTY MUTUAL INSURANCE COMPANY, *Defendant*.	Civil Action No. 22-10987-RWZ (Consolidated With: No. 22-10809-RWZ)
MSP RECOVERY CLAIMS SERIES 44, LLC, *Plaintiff*, v. LIBERTY MUTUAL INSURANCE COMPANY, *Defendant*.	Civil Action No. 22-10995-RWZ (Consolidated With: No. 22-10809-RWZ)
MSP RECOVERY CLAIMS SERIES 44, LLC, *Plaintiff*, v. LIBERTY MUTUAL INSURANCE COMPANY, *Defendant*.	Civil Action No. 22-11039-RWZ (Consolidated With: No. 22-10809-RWZ)

The Chamber of Commerce of the United States of America ("the Chamber") respectfully moves for leave to submit the attached amicus curiae brief in support of the Defendants' motion to dismiss the consolidated actions. The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. In accordance with Rule 7.1(a)(2) of the United States District Court for the District of Massachusetts, counsel for the Chamber asked counsel for the parties for their clients' position regarding this motion. Counsel for the Defendants do not oppose this motion. Counsel for the Plaintiffs oppose the motion. The proposed amicus brief is attached to this motion as Exhibit A.

Although the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the District of Massachusetts do not address the subject of amicus curiae briefs, federal district courts "have inherent authority and discretion" to grant a motion for leave to file an amicus brief. *Boston Gas Co. v. Century Indem. Co.*, No. CIVA 02-12062-RWZ, 2006 WL 1738312, at *1 n.1 (D. Mass. June 21, 2006) (collecting authorities and granting motion for leave); *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970) ("[T]he acceptance of amicus briefs is within the sound discretion of the court."). Applying these principles, this court has frequently permitted amici to participate in its proceedings, including over an opposition. *See, e.g., Steinmetz v. Coyle & Caron, Inc.*, No. 15-cv-13594-DJC, 2016 WL 4074135, at *2 n.1 (D. Mass. July 29, 2016) (noting that the court, "[i]n reaching its decision," had "reviewed and considered not only the briefing filed by the parties, but also the amicus brief" submitted in the case); *Boston Gas Co.*, 2006 WL 173812, at *1 n.1 (granting motion for leave over opposition).

The Defendants' motion to dismiss raises important constitutional questions regarding the separation of powers at the heart of our government's structure. (ECF No. 35 at Section II.C). Specifically, the Medicare Secondary Payer Act's novel enforcement scheme—which authorizes private parties to file civil enforcement actions for double damages to vindicate the financial interests of the Medicare program without any control by the Executive Branch—raises difficult and unresolved constitutional issues. *See Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 62 (2015) (Alito, J., concurring) ("'[D]ifficult and fundamental questions' about 'the delegation of Executive power' [arise] when Congress authorizes citizen suits." (citations omitted)).

The Chamber's proposed amicus brief would ensure a more "complete and plenary presentation of [these] difficult issues so that the court may reach a proper decision." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 308 F.R.D. 39, 52 (D. Mass. June 15, 2015). This is because the proposed brief both fleshes out the constitutional issues raised by the Defendants and reflects the Chamber's substantial experience litigating constitutional issues on behalf of the business community. It cites binding precedent and persuasive authority discussing the constitutional provisions at issue in the case, explains the analytical framework under Article II, and "[h]ighlight[s] . . . [the] legal nuance" of the constitutional issues, all of which will "contribute in clear and distinct ways" to this Court's analysis of the Medicare Secondary Payer Act's private right of action. *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 763 (7th Cir. 2020).

Moreover, the Chamber's proposed brief may be particularly helpful to the full presentation of issues because the United States is likely to participate in this case to defend the constitutionality of the Medicare Secondary Payer Act that the Defendants (and the Chamber)

argue is unconstitutional. *See* (ECF No. 21) (notifying the Attorney General, in accordance with Federal Rule of Civil Procedure 5.1, that the Defendants challenge the constitutionality of 42 U.S.C. § 1395y(b)(3)(A)). The Chamber and the United States can thus offer wider perspectives on the constitutional arguments, even as they may do so from opposing positions.

Drawing on the Chamber's members' extensive experience defending against Medicare Secondary Payer Act claims, the proposed brief will also aid the court by providing additional context about the Act and its effect on the business community. *See Neonatology Assocs., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.) ("Even when a party is very well represented, an amicus may provide important assistance to the court" by "explain[ing] the impact a potential holding might have on an industry or other group" (citation omitted)); *Gallo v. Essex Cnty. Sherriff's Dep't*, No. 10-10260-DPW, 2011 WL 1155385, at *6 n.7 (D. Mass. Mar. 24, 2011) (noting that, "[w]hile the motion was ably presented by" defendant's counsel, "the very thoughtful *amicus* submissions were quite helpful in putting the immediate controversy in its larger context"). Specifically, the brief explains the history of the private right of action under the Medicare Secondary Payer Act, and how this provision has incentivized abusive litigation across the country. *See MAO-MSO Recovery II, LLC v. State Farm Mut. Auto. Ins. Co.*, 994 F.3d 869, 871, 878 (7th Cir. 2021) (MSPA lawsuits "have all the earmarks of abusive litigation and indeed have drawn intense criticism from many a federal judge.").

Although there is no Local Rule or Federal Rule of Civil Procedure regarding the time for filing amicus briefs in this Court, the Plaintiffs would not be prejudiced by this brief. The United States has not yet appeared in this case, but this Court may certainly order a further round of briefing among the parties once the United States files a statement of interest addressing the

constitutional issues in this case. Thus, the Plaintiffs would have ample opportunity to respond to the arguments in the proposed amicus brief.

For these reasons, the Chamber respectfully requests that the Court grant it leave to participate as amicus curiae and accept the attached amicus brief.

Dated: October 11, 2022

Respectfully submitted,

/s/ Edwina Clarke

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LOCAL RULE 7.1(a)(2) CERTIFICATE AND CERTIFICATE OF SERVICE

I, Edwina Clarke, hereby certify that counsel for the parties conferred concerning the subject of this motion prior to filing. Counsel for the Defendants do not oppose this motion. Counsel for the Plaintiffs oppose this motion.

I hereby certify that on October 11, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record who have consented to electronic notification.

Dated: October 11, 2022

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
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CORPORATE DISCLOSURE STATEMENT

Per Rule 7.1 of the Federal Rules of Civil Procedure, the Chamber of Commerce of the United States of America ("the Chamber") states that it is a non-profit, tax-exempt organization incorporated and headquartered in the District of Columbia. It has no parent company, and no publicly held company owns 10% or greater ownership interest in the Chamber.

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million 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 the 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.

The Chamber, its members, and the business community have a significant interest in privatized enforcement schemes, including the Medicare Secondary Payer Act's distinctive private right of action. That Act offers private individuals a financial bounty to bring suits to enforce a federal statute, without any mechanism for the Executive Branch to control those enforcement efforts. Every year a substantial number of entirely meritless private lawsuits are filed under the Medicare Secondary Payer Act against insurance companies and other businesses, many of whom are the Chamber's members. The Chamber has frequently filed amicus briefs and pursued litigation to ensure that the Congress does not improperly delegate the Executive Branch's constitutional power and duty to "take Care that the Laws be *faithfully* executed," U.S. CONST. art. II, § 3 (emphasis added). *See, e.g.*, Brief for Chamber of Commerce of the United States as Amicus Curiae Supporting Petitioner, *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020) (No. 19-7); Complaint, *Chamber of Com. of the United States v. CFPB*, 3:17-cv-02670 (N.D. Tex. Sept. 29, 2017). This case presents similar concerns.

INTRODUCTION

The Medicare Secondary Payer Act's private right of action, 42 U.S.C. § 1395y(b)(3)(A), which authorizes private parties to file civil enforcement actions for double damages to vindicate the financial interests of the Medicare program without any control by the Executive Branch, violates the separation of powers set forth in the Constitution of the United States in multiple ways.

As an initial matter, the Act's private right of action violates the Vesting and Take Care Clauses in Article II of the Constitution by delegating Executive power—*all* of which is given to the President—to persons entirely outside of the President's control. The Medicare Secondary Payer Act's private right of action unlawfully empowers private plaintiffs to serve as private "Attorneys General" who enforce Medicare's provisions and the federal government's rights through litigation in exchange for a financial bounty equal to the amount that a defendant failed to reimburse Medicare. Worse still, the statute deprives the President (and his accountable subordinates) of any ability to control or supervise these enforcement actions: unlike the False Claims Act, for example, the President cannot oversee and supervise a Medicare Secondary Payer Act action, cannot take over prosecution of the action, cannot settle the action, and cannot dismiss the action. Thus, the Medicare Secondary Payer Act's private right of action unconstitutionally strips the President of his Executive authority and his indefeasible responsibility to take care that the laws are faithfully executed.

The Medicare Secondary Payer Act's private right of action also violates the Appointments Clause. Any individual who exercises continuous significant authority on behalf of the United States—even if the position in which he exercises that authority is temporary—is an "Officer[] of the United States" and must be appointed consistent with the Appointments Clause. Plaintiffs under the Medicare Secondary Payer Act plainly qualify as officers of the United States, as they

litigate major enforcement actions to vindicate Medicare's financial interests with absolutely no supervision. The Congress cannot circumvent the requirements of the Appointments Clause by delegating Executive power to persons who have not officially been appointed to any office: that would make a mockery of the structural separation of powers if the Congress could so easily disempower the Executive.

Finally, the Medicare Secondary Payer Act's private right of action violates the Due Process Clause of the Fifth Amendment by delegating enforcement authority to private individuals who have a personal, financial stake in the outcome of the litigation. The Due Process Clause both limits delegations of government authority to interested private parties and requires a degree of neutrality from prosecutors and civil enforcers, which private plaintiffs become when bringing Medicare Secondary Payer Act civil actions. That is because when enforcement authority is separated from political accountability, there is always a risk that enforcement will run amok, serving private rather than public interests. That is exactly what has happened with the Medicare Secondary Payer Act's private right of action: private plaintiffs have taken full advantage of the lack of accountability to bring vexatious and abusive litigation. They have repeatedly filed meritless litigation where they cannot establish standing, cannot establish that businesses failed to pay Medicare, rely on rejected legal theories, and replead their claims numerous times to drive businesses to settlement. The Constitution requires better.

ARGUMENT

I. The Medicare Secondary Payer Act's Private Right of Action Violates the Vesting and Take Care Clauses in Article II.

The Vesting and Take Care Clauses "require[] that [officers wielding significant authority] remain dependent on the President, who in turn is accountable to the people." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191-92, 2211 (2020). The Medicare Secondary Payer Act's private right

of action in 42 U.S.C. § 1395y(b)(3)(A) violates these clauses by delegating Executive power, which belongs exclusively to the President, to unaccountable, unsupervised private litigants. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021) ("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."). Because "the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law" is an exercise of significant Executive authority, it "falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys)." *Id*.

A. The Vesting and Take Care Clauses prohibit the Congress from delegating Executive power to those outside the President's control.

The Vesting Clause provides: "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1. This has long been understood as prohibiting the vesting of the Executive power in anyone else or any other branch of government, because "all" of the Executive power resides with the President. *Seila Law LLC*, 140 S. Ct. at 2191. As Justice Story explained, the proposition that the Congress could "vest [the Executive power] in any other person" is "utterly inadmissible." *Martin v. Hunter's Lessee*, 14 U.S. 304, 329-30 (1816).

The Executive power vested entirely in the President "includes the ability to supervise and remove the agents who wield executive power in his stead." *Seila Law LLC*, 140 S. Ct. at 2191-92, 2211. That is why, when the Congress recently attempted to vest Executive power in individuals who were beyond the reach of presidential supervision and control, the Supreme Court held the law unconstitutional as a violation of the separation of powers and the Vesting Clause. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 485, 492 (2010) (holding unconstitutional a provision of Sarbanes-Oxley that vested the Executive power to enforce securities laws in board members outside of the President's control).

But the Vesting Clause is not the only constitutional provision protecting our separation of powers and ensuring that the President is able to direct the actions of those exercising Executive power on his behalf. The Take Care Clause—which states that the President "shall take Care that the Laws be faithfully executed"—serves a similar function. U.S. CONST. art. II, § 3. That Clause necessarily gives the President, as "the chief constitutional officer of the Executive Branch," "supervisory . . . responsibilit[y]" over those who execute the law. *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982). If the President were deprived of the "general administrative control of those executing the laws," it would be "impossible" for him "to take care that the laws be faithfully executed." *Myers v. United States*, 272 U.S. 52, 117, 163-64 (1926); *see also* Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 63 (2d ed. 1868) ("[W]here a general power is conferred or duty enjoined, every particular power necessary for the exercise of the one, or the performance of the other, is also conferred.").

Thus, the Congress cannot place Executive power—including the power to file suit to enforce federal law—outside the supervising eye of the President. *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (per curiam) (explaining that the Federal Election Commission could not be housed within the Legislative Branch because the Commission was granted "enforcement power, exemplified by its discretionary power to seek judicial relief").

B. The private right of action in Section 1395y(b)(3)(A) unconstitutionally delegates Executive power to private individuals and deprives the President of the ability to control the exercise of that power.

Section 1395y(b)(3)(A) violates the separation of powers, including the Vesting and the Take Care Clauses, by placing Executive power belonging exclusively to the President—specifically, the power to enforce and protect the federal Medicare program—in the unchecked hands of private individuals.

The Congress created Medicare to provide insurance to those over the age of 65. Not infrequently, however, Medicare beneficiaries have more than one insurer who may be liable for their expenses. Before 1980, Medicare generally paid for a beneficiary's medical services whether the beneficiary was also covered by another health plan. But this was quite costly to Medicare, and thus to the American people. To lower the costs to taxpayers, the Congress enacted the Medicare Secondary Payer Act in 1980 and has subsequently amended and expanded the Act multiple times. The Act designates private insurers covering medical care for Medicare beneficiaries as primary payers and designates Medicare as only a secondary payer. *See* 42 U.S.C. § 1395y(b)(2). These designations mean that if private insurance and Medicare both cover a beneficiary's medical procedure, then the private insurer as the primary payer is responsible for making the payment, while Medicare as the secondary payer is responsible only to the extent that the health care provider's bill exceeds the private insurer's coverage.

Recognizing, however, that Medicare may at times conditionally pay a medical bill that should instead be paid by a primary payer, in 1984 the Congress created a right of action for the United States to enforce the primary-payer rule after Medicare has paid the bill. This right of action authorizes the United States to sue the primary payer that should have paid, but did not pay, the costs of health care for a Medicare beneficiary, subject to a three-year statute of limitations period. 42 U.S.C. § 1395y(b)(2)(B)(iii); Deficit Reduction Act of 1984, Pub. L. No. 98–369, § 2344(a)(3), 98 Stat. 494. The right of action was later amended to, among other things, provide the United States with recovery of double damages—*i.e.*, reimbursement of the unpaid amount owed to Medicare plus that same amount as a penalty for failing to pay previously. Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101–239, § 6202, 103 Stat. 2106 (codified at 42 U.S.C. § 1395y(b)(2)(B)(iii)).

There is no doubt that these actions are the exercise of Executive power. After all, a "lawsuit is the ultimate remedy for a breach of the law, and it is to the President . . . that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *Buckley*, 424 U.S. at 138 (citation omitted). "[I]t is clear that all such suits [on behalf of the United States], so far as the interests of the United States are concerned, are subject to the direction, and within the control of, the Attorney-General." *Id.* at 139 (quoting *Confiscation Cases*, 74 U.S. 454, 458-59 (1868)). That is why these actions are prosecuted by attorneys at the United States Department of Justice accountable to the President through the Attorney General of the United States and his subordinates.

The Congress separately created a second right of action, aggrandizing private individuals to sue the *same* primary payers for the *same* alleged failures to pay and to recover the *same* double damages as the federal government. 42 U.S.C. § 1395y(b)(3)(A); Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99–509, § 9319, 100 Stat. 1874. These purportedly private actions are no less the exercise of Executive power than the near-identical actions brought by the United States because they, like their governmental counterparts, "enforce[] Medicare's rights" and "prevent[] depletion of the Medicare trust fund." *United Seniors Ass'n v. Philip Morris USA*, 500 F.3d 19, 22, 25 (1st Cir. 2007). Indeed, the right of action was created to "enable[] a [private] plaintiff to vindicate harm" to the Medicare trust fund "caused by a primary plan's failure to meet its MSP primary payment or reimbursement obligations." *Humana Med. Plan, Inc. v. W. Heritage Ins. Co.*, 832 F.3d 1229, 1238 (11th Cir. 2016); *see also MSP Recovery Claims, Series LLC v. ACE Am. Ins. Co.*, 974 F.3d 1305, 1312–13 (11th Cir. 2020) (noting that courts have generally understood "the underlying objective of [the private right of action] to be help[ing] the government recover conditional payments from insurers or other primary payers or otherwise reducing the healthcare

costs borne by Medicare" (internal quotation marks and citation omitted)). These private actions are subject to no procedural limitations, not even the statute of limitations period required under the United States' right of action. *See* 42 U.S.C. § 1395y(b)(2)(B)(iii).

Yet the Congress has no authority to give away to private actors the Executive's power and responsibility to enforce the government's Medicare program. The decision whether to enforce the law is the "special province of the Executive Branch." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *see In re Aiken Cnty.*, 725 F.3d 255, 264 n.9 (D.C. Cir. 2013) (Kavanaugh, J.) ("[C]ivil enforcement decisions brought by the Federal Government are presumptively an exclusive Executive power."). And that remains the case even when the private plaintiff has Article III standing. *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring) ("Difficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II."); *Laufer v. Arpan LLC*, 29 F.4th 1268, 1284, 1288-97 (11th Cir. 2022) (Newsom, J. concurring) (explaining that there are "circumstances in which a plaintiff's suit may satisfy all Article III requirements but nonetheless constitute an impermissible exercise of 'executive Power' in violation of Article II").

The private right of action here is especially concerning because the Executive has absolutely no way to supervise—much less control—a private plaintiff's decision of who to sue, when to sue, or how to conduct litigation under the Medicare Secondary Payer Act. The Court's decision in *Morrison v. Olson* upholding the position of an independent counsel is (at best) the outer limit of how much control the Congress may constitutionally strip from the President. 487 U.S. 654 (1988). Yet even there, the relevant statute "g[a]ve the Attorney General"—an officer

directly responsible to the President and "through [whom]" the President could act—"several means of supervising or controlling" the independent counsel. *Id.* at 695-96. The same is true of False Claims Act *qui tam* actions: courts upholding those actions against Article II challenges have emphasized the multiple ways in which the Executive may influence or control a *qui tam* action. *E.g.*, *U.S. ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787, 807 (10th Cir. 2002); *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 753-57 (5th Cir. 2001) (en banc).[1]

The Medicare Secondary Payer Act's private right of action, by contrast, "fails to include any . . . procedural mechanisms . . . designed to ensure that the government is to be kept informed and permitted to determine the extent to which it will participate in the litigation." *Philip Morris USA*, 500 F.3d at 25; *see also Stalley ex rel. United States v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1234 (11th Cir. 2008) (stating that the Act "provides to the government none of the procedural safeguards to manage or direct an action"). A private plaintiff can bring an action under the Medicare Secondary Payer Act without notifying the government; the government cannot intervene to take over prosecution of the action; the government cannot remove a private plaintiff from its position as a self-appointed prosecutor; and the government has no say over how the litigation is conducted. Private plaintiffs are not even limited by the three-year statute of limitations that applies to the United States' right of action. *See* 42 U.S.C. § 1395y(b)(2)(B)(iii).

With absolutely no way for the Executive to supervise or control private individuals' exercise of the Executive's exclusive and indefeasible power to enforce Medicare, the Medicare Secondary Payer Act's private right of action runs afoul of the Vesting and Take Care Clauses.

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[1] The Supreme Court has specifically reserved the question whether *qui tam* actions under the False Claims Act are consistent with Article II. *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 778 n.8 (2000) ("[W]e express no view on the question whether *qui tam* suits violate Article II, in particular the Appointments Clause of § 2 and the 'take Care' Clause of § 3.").

II. The Medicare Secondary Payer Act's Private Right of Action Violates the Appointments Clause.

The Appointments Clause states that the President "shall nominate, and by and with the Advice and Consent of the Senate shall appoint . . . Officers of the United States." U.S. CONST. art II, § 2. This ensures that "the President remains responsible for the exercise of executive power" by mandating that every "exercise of executive power . . . must at some level be subject to the direction and supervision of any officer nominated by the President." *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1988 (2021). The Medicare Secondary Payer Act's private right of action, however, removes this presidential control over Executive power by authorizing private litigants to appoint themselves "Officers of the United States" in charge of enforcing Medicare's secondary payer provisions.

An individual is an officer of the United States if he (1) holds a "continuing" position established by law, and (2) "exercis[es] significant authority pursuant to the laws of the United States." *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (citing *United States v. Germaine*, 99 U.S. 508, 511-12 (1879); *Buckley*, 424 U.S. at 126). The self-appointed plaintiff under the Medicare Secondary Payer Act's private right of action satisfies both criteria.

First, private plaintiffs under the Act hold a continuing position established by law—indeed, they are analogous to the independent counsel in *Morrison* that the Court held was "clear[ly]" an "'officer' of the United States, not an 'employee.'" 487 U.S. at 671 n.12. Like the independent counsel, the plaintiff's position is statutorily created in the Medicare Secondary Payer Act, and the statutory right of action entitles the plaintiff to continuously exercise Executive power until he completes his task or fails to do so—that is, until there is a final judgment rendered. And like the independent counsel, it does not matter that the plaintiff is authorized "to perform only certain, limited duties" confined to particular matters and has "limited . . . tenure . . . in the sense

that" his job is "essentially to accomplish a single task"—that of pursuing the case(s) brought by the plaintiff. *Id.* at 671-72. All that matters is that the plaintiff maintains ongoing responsibility for those civil actions while in the position, and the Medicare Secondary Payer Act plaintiff unambiguously and continuously maintains that responsibility.

Second, plaintiffs under the Medicare Secondary Payer Act exercise significant authority pursuant to the laws of the United States. When determining whether someone exercises significant authority, the Supreme Court has often looked to whether that individual's duties are similar to the duties of other individuals who have previously qualified as officers. *See Lucia*, 138 S. Ct. at 2051-52 (holding that SEC administrative law judges wielded significant authority because they were "near-carbon copies" of "adjudicative officials" held to be officers in *Freytag v. Commissioner*, 501 U.S. 868 (1991)).

Here, a plaintiff's duties under the Medicare Secondary Payer Act right of action are similar to the duties of numerous different officers. To begin with, their duties are functionally similar—identical, really—to the duties of the governmental agency, the Center for Medicare and Medicaid Services (CMS), which is part of the Department of Health & Human Services (HHS), and to the duties of the Assistant Attorney General for the Department of Justice (DOJ) Civil Division who is responsible through subordinates for the recovery under the parallel right of action for the United States. S*ee* 28 U.S.C. § 506. Like the officers in DOJ and HHS, the Federal Election Commissioners in *Buckley*, and the independent counsel in *Morrison*, Medicare Secondary Payer Act plaintiffs choose against whom and when to file enforcement litigation in federal court. *Buckley*, 424 U.S. at 126; *Morrison*, 487 U.S. at 671. And like the administrative law judges in *Lucia*, plaintiffs exercise "significant discretion," though they do so in a purely Executive manner. 138 S. Ct. at 2053 (internal quotation marks omitted).

Because private plaintiffs under the Medicare Secondary Payer Act qualify as officers of the United States and are self-appointed rather than appointed either by the President and confirmed by the Senate or by another method appropriate for inferior officers, their appointment is unconstitutional. But even if they were not officers subject to the Appointments Clause, the Medicare Secondary Payer Act's private right of action would still violate the Appointments Clause because "responsibility for conducting civil litigation in the courts of the United States for vindicating public rights," is a duty that could be "discharged *only* by persons who are 'Officers of the United States.'" *Buckley*, 424 U.S. at 140 (emphasis added). If non-officers (who are not selected by nor accountable to the President) could lawfully exercise such authority, which includes "prosecut[ing] claims owned by the United States" without any supervision of the Executive, then "all that Congress or the President must do to circumvent the strictures of the Appointments Clause is to delegate authority to someone who has not officially been appointed to any federal office." *Riley*, 252 F.3d at 767-68 (Smith, J., dissenting).

III. The Medicare Secondary Payer Act's Private Right of Action Violates the Due Process Clause of the Fifth Amendment.

The private right of action also violates the Due Process Clause by delegating Executive enforcement authority to private individuals who have a personal, financial stake in the outcome of the litigation. The Due Process Clause states that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. "[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause." *Ford v. Wainwright*, 477 U.S. 399, 424 (1986) (Powell, J., concurring); *see also Ass'n of Am. Railroads v. DOT*, 821 F.3d 19, 27 (D.C. Cir. 2016) ("Since the Fifth Amendment's ratification, one theme above all others has dominated the Supreme Court's interpretation of the Due Process Clause: fairness." (citing *Snyder v. Com. of Mass.*, 291 U.S. 97, 116 (1934))).

Courts have relied on this Clause to limit delegations of government authority to interested private parties. Most notably, in *Carter v. Carter Coal Co.*, the Supreme Court held that an act empowering majority coal producers to exercise delegated legislative authority to set wage and hour requirements for minority coal producers was "clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment." 298 U.S. 238, 311 (1936). Although this dealt with delegation of legislative, not Executive power, the fundamental due process problem in *Carter Coal* was the "self-interested character of the delegatees." *Ass'n of Am. Railroads*, 821 F.3d at 28. And that problem is forefront with private enforcement through statutes such as the Medicare Secondary Payer Act because the statute creates a double-damages "bounty" for plaintiffs to file suit. *See Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 525 (8th Cir. 2007) (explaining that even if a plaintiff must "pay back the government for its outlay," it will "still have money left over to reward him for his efforts").

This naked self-interest is especially pernicious where, as here, Plaintiffs cannot even show a demonstrable injury. (ECF No. 35 at Section I.B). This concern about non-injured but self-interested plaintiffs prompted the U.S. Solicitor General in *Nike, Inc. v. Kasky*, to argue as an amicus curiae that a California law unconstitutionally provided a private right of action to uninjured private plaintiffs to bring suit for allegedly false advertising. *See* Brief for the United States as Amicus Curiae Supporting Petitioners, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575), 2003 WL 899100 [hereinafter *Nike* SG Br.]. According to the Solicitor General, the "California regime lack[ed] the institutional checks that have traditionally accompanied government enforcement schemes, including legislative oversight and public accountability, and raise[d] the prospect of vexatious and abusive litigation." *Id.* at *23. Although *Nike, Inc.*, and the Solicitor General's brief addressed First Amendment concerns, additional concerns may be raised

by private enforcement lawsuits "that are motivated, not by the need to redress for actual harm, but rather by" the "prospect of financial gain." *Id.* Such concerns sound—as they did in *Carter Coal*—in due process. *See* Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 592 n.15 (2005).

Indeed, the Supreme Court has cautioned that a statutory "scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-43, 250 (1980) (explaining that due process imposes limits on the ability of interested individuals to prosecute violations of law); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 (1987) (explaining that a party is entitled to a "disinterested" prosecutor, even as "prosecutors may not necessarily be held to as stringent a standard of disinterest as judges"). The private right of action under the Medicare Secondary Payer Act fails this test because it is a scheme based entirely on incentivizing individuals to vindicate the government's rights by injecting personal financial interest into enforcement decisions.

IV. The Medicare Secondary Payer Act's Private Right of Action Highlights the Practical Problems with Unconstitutionally Delegating Enforcement Authority.

The Constitution places the exercise of Executive power squarely in the hands of the President, "the most democratic and politically accountable official in Government." *Seila Law LLC*, 140 S. Ct. at 2203. He is the only official "elected by the entire Nation" and his "political accountability is enhanced by the solitary nature of the Executive Branch, which provides 'a single object for the jealousy and watchfulness of the people.'" *Id.* (quoting The Federalist No. 70, at 479 (Alexander Hamilton)). This direct political accountability checks the President's broad enforcement discretion and ensures that he only pursues actions that he believes to be in the public interest and that he pursues them in a responsible manner.

By contrast, when the Congress separates enforcement authority from this important political check, there is a risk that enforcement will run amok as unaccountable actors pursue enforcement actions not for the public interest, but to satisfy their own whims, preferences, and financial interest. The fact is, "discretionary enforcement authority . . . can be used to discriminate against, or otherwise unfairly target, certain individuals or groups." Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 783 (2009). This discretionary enforcement authority, when entrusted to private individuals without oversight, tends to lead to "vexatious and abusive litigation." *Nike* SG Br. at *23. And, especially here, where it imbues one set of citizens with governmental power and pits them against another group of citizens, it promotes the "unrestrained factionalism" that our Founders worried would "do significant damage to the fabric of government." *Storer v. Brown*, 415 U.S. 724, 736 (1974); *see also* The Federalist No. 51, at 349 (James Madison) (noting that the best security of liberty is a system where "each" branch "may be a check on the other").

It comes as no surprise, then, that private plaintiffs have been taking full advantage of the lack of accountability to bring vexatious and abusive litigation under the Medicare Secondary Payer Act's private right of action against businesses across the country. These cases "have all the earmarks of abusive litigation and indeed have drawn intense criticism from many a federal judge." *MAO-MSO Recovery II, LLC v. State Farm Mut. Auto. Ins. Co.*, 994 F.3d 869, 871, 878 (7th Cir. 2021). Plaintiffs, for example, routinely file multiple private actions "in the hope that discovery will show whether an actual case or controversy exists." *Id.* at 878 (citing *MSP Recovery Claims, Series LLC v. AIG Prop. Cas., Inc.*, No. 20-cv-2102, 2021 WL 1164091, at *1 (S.D.N.Y. Mar. 26, 2021) (criticizing the complaint at issue as "long on invective and indignation but short on facts")). Then, they plead and replead their claims over and over, hoping to survive a motion to dismiss so

they can exert pressure on defendants to settle to avoid further litigation. *E.g.*, *MSP Recovery Claims, Series, LLC v. Zurich Am. Ins. Co.,* No. 18 C 7849, 2019 WL 6893007, at *3 (N.D. Ill. Dec. 12, 2019) (criticizing the Plaintiffs' "[n]ine attempts to establish standing and plead a cause of action"). And in pleading and repleading, they often "play[] fast and loose with facts, corporate entities, and adverse judicial rulings." *MSP Recovery Claims, Series LLC v. USAA Gen. Indem. Co.*, No. 18-21626, 2018 WL 5112998, at *13 (S.D. Fla. Oct. 19, 2018); *see Stalley v. Methodist Healthcare*, 517 F.3d 911, 920 (6th Cir. 2008) (ordering plaintiff to show cause why sanctions were not appropriate where plaintiff "and his attorneys know that he has no standing," "cited no legal authority," and "failed to persuade a single one of the many other courts in which he has raised" his claim). These "tactics are a flagrant abuse of the legal system." *MSP Recovery Claims, Series LLC v. New York Cent. Mut. Fire Ins. Co.*, No. 6:19-CV-00211, 2019 WL 4222654, at *6 (N.D.N.Y. Sept. 5, 2019).

Litigation-funded entities, like Plaintiffs, have used these abusive tactics to build up a lucrative "cottage industry of filing cookie-cutter, putative class action complaints for double damages against liability insurers." Laura Besvinick & Julie Nevins, *The State of Medicare Secondary Payer Act Litigation*, LAW360 (July 27, 2018), https://bit.ly/3RZ9udI. MSP Recovery, for example, built its entire practice around buying aggregated potential claims from Medicare Advantage Organizations and other third parties and suing under the Act's private right of action in return for a 50% contingency payment. (ECF No. 35 at 7 n.4).

This industry has been built on the backs of responsible businesses that seek to satisfy their Medicare Secondary Payer Act obligations but must constantly defend against meritless litigation. And the industry harms more than these businesses—it harms society by discouraging insurers from settling claims. "The central goal of a settlement agreement is to fashion a final and

permanent resolution of a dispute." *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 217 F.3d 8, 11 (1st Cir. 2000). But because Medicare Secondary Payer Act plaintiffs routinely file suit when they are unsure of whether a primary payer failed to pay or settled claims, liability insurers no longer have certainty that they can avoid the costs of further litigation by settling their insureds' claims. In effect, the Act's privatized enforcement scheme transforms "once-settled tort liability claims into new actions that seek not just reimbursement for paid Medicare benefits, but also an award of double damages." Besvinick & Nevins, *The State of Medicare Secondary Payer Act Litigation*, *supra* p. 16 ("A liability insurer that settled and paid a claim once now is potentially liable for paying the same claim again—two more times, years later.").

Absent court intervention, plaintiffs will continue to engage in repeat abusive tactics against businesses under a statute designed to benefit the Medicare program because they are accountable to no one and nothing but their own financial self-interest.[2] This is not how our constitutional system was designed. Under Article II, federal law is to be enforced through the President (and his subordinates), who is accountable to the people for promoting the public interest, not through "[u]naccountable private parties (and their fee-conscious lawyers) [who] have no incentive to play that role." *Laufer*, 29 F.4th at 1296 (Newsom, J., concurring).

CONCLUSION

The Court should grant the Defendants' motion to dismiss the consolidated actions on the ground that 42 U.S.C. § 1395y(b)(3)(A) is unconstitutional.

[2] If the Medicare Secondary Payer Act's private right of action is declared unconstitutional, Medicare Advantage Organizations (and potentially Medicare beneficiaries) will not be left without a remedy for *their* injuries. They, of course, could pursue contractual and potentially other state law remedies to assert injuries personal to them.

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Respectfully submitted,

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