Nos. 24-13581, 24-13583

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES *ex rel*. CLARISSA ZAFIROV,

Plaintiff-Appellant,

and

UNITED STATES,

Intervenor-Appellant,

v.

FLORIDA MEDICAL ASSOCIATES, LLC, *et. al.*,

Defendants-Appellees.

On Appeal from the U.S. District Court
for the Middle District of Florida, No. 8:19-cv-01236

BRIEF FOR PUBLIC CITIZEN AS AMICUS CURIAE IN SUPPORT OF APPELLANTS AND REVERSAL

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January 15, 2025

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Nos. 24-13581, 24-13583
U.S. ex rel. Zafirov v. Florida Med. Assocs.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

A. Pursuant to Eleventh Circuit Rules 26.1-1 through 26.1-3 and Fed. R. App. P. 26.1, undersigned counsel for amicus curiae Public Citizen certifies that he believes the Certificates of Interested Persons filed in the opening briefs of appellants Zafirov and the United States are, together, complete, except for the omission of the following persons who have an interest attributable to the filing of this brief:

Nelson, Scott L.

Public Citizen Foundation, Inc.

Public Citizen, Inc.

Public Citizen Litigation Group

Zieve, Allison M.

B. Amicus curiae Public Citizen, Inc., is a nonprofit, non-stock corporation. It has no parent corporation, and no publicly traded corporation has an ownership interest in it of any kind.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, a consumer advocacy organization with members in all 50 states, appears on behalf of its members before Congress, administrative agencies, and the courts, to advocate on issues including accountability of the government, corporations, and others for wrongdoing. Public Citizen has longstanding interests in issues involving separation of powers. It has often appeared as a party or amicus curiae in cases, like this one, that implicate separation of powers issues in general and, in particular, issues relating to the Constitution's Appointments Clause and the scope of presidential authority under Article II. In addition, Public Citizen has long supported the right of individuals to access the courts to pursue remedies made available to them by law, and has frequently submitted briefs as amicus curiae to advance that interest. This case, in which the district court's decision forecloses individuals from asserting the claims and obtaining the

[1] All parties have consented to the filing of this brief. The brief was not authored in whole or part by counsel for a party; no party or counsel for a party contributed money that was intended to fund this brief's preparation or submission; and no person other than the amicus curiae, its members, or its counsel contributed money intended to fund the brief's preparation or submission.

accompanying remedies assigned them by the False Claims Act, implicates Public Citizen's interests both in protecting access to the courts and in separation of powers issues.

STATEMENT OF THE ISSUE

Whether the qui tam provisions of the False Claims Act, 31 U.S.C. §§ 3730(b)–(d), violate the Constitution's Appointments Clause, U.S. Const., art. II, § 2, cl. 2.

SUMMARY OF ARGUMENT

The district court's holding that the qui tam provisions of the False Claims Act violate the Constitution's Appointments Clause rests largely on a misconstruction of the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). According to the district court, *Buckley* holds that no person may bring litigation aimed at redressing losses suffered by the United States as a result of a violation of federal law unless that person has been appointed as a federal officer in compliance with the Appointments Clause, which requires that the President appoint all principal "Officers of the United States" and that "inferior Officers" be appointed by the President unless Congress by law vests their

appointment "in the Courts of Law, or in the Heads of Departments." U.S. Const., art. II, § 2, cl. 2.

Buckley, however, did not decide the question posed here, which is whether, or with what limitations, individuals who are not government officials at all may be empowered to bring litigation to enforce federal law. *Buckley* addressed a very different question: whether Congress may assign law enforcement tasks to *government officers* who lack the relationship to the President that the Appointments Clause helps to protect. *Buckley* holds that if Congress chooses to assign significant law enforcement or implementation authority to government officials, or to a body of officials constituting an agency, those officials qualify as officers subject to the Appointments Clause's requirements. Thus, *Buckley* established that Congress is not free to create new classes of government officials dependent on itself rather than on the President's appointment power to carry out executive governmental functions. In short, *Buckley* addresses what tasks *assigned to federal government functionaries* may be assigned only to "officers" appointed in accordance with Article II. It did not decide what tasks may only be performed by federal government officials.

ARGUMENT

The Supreme Court decided *Buckley v. Valeo* nearly half a century ago. In the decades since then, litigants have repeatedly sought to invoke *Buckley*'s construction of the Appointments Clause, as well as the Supreme Court's more general observations about Article II's role in establishing separation of powers among the federal government's three branches, to support the argument that the False Claims Act's qui tam provisions, which allow private persons to initiate litigation to recover damages and penalties for frauds against the United States, are unconstitutional. Every circuit that has addressed those arguments has rejected them.[2] And recently, in a case before the Supreme Court concerning the construction of the False Claims Act's provisions governing when the United States may seek dismissal of an action brought by a qui tam relator, the qui tam defendant argued that the relator's construction of the statute would render it unconstitutional

[2] *See United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1155 (2d Cir. 1993); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 749–59 (9th Cir. 1993); *United States ex rel. Taxpayers Against Fraud*, 41 F.3d 1032, 1040–42 (6th Cir. 1994); *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 752–58 (5th Cir. 2001) (en banc); *United States ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787, 804–07 (10th Cir. 2002).

under the Appointments Clause. The Court's majority opinion, however, addressed the statutory questions presented without even mentioning those constitutional concerns, still less suggesting that they might affect its decision. *See United States ex rel. Polansky v. Exec. Health Resources, Inc.*, 599 U.S. 419 (2023).[3]

The federal appellate courts have good reason for declining to give credence to the argument that *Buckley*'s analysis condemns qui tam actions as unconstitutional: *Buckley*'s holding that federal officials who have substantial executive powers must be appointed consistently with the requirements of the Appointments Clause has no application to qui tam relators, who are private individuals holding no federal government position.

I. *Buckley* addressed application of the Appointments Clause to officials who held positions in the federal government.

Buckley's observations about the meaning of the Appointments Clause cannot be divorced from the context of the case and the specific

[3] The single dissenting Justice viewed the statute as presenting "serious constitutional questions," *id.* at 443 (Thomas, J., dissenting), but only two other Justices suggested that such questions might one day merit the Supreme Court's attention, *see id.* at 442 (Kavanaugh, J., joined by Barrett, J., concurring).

issues that it presented for decision. *Buckley* addressed a host of constitutional challenges to the Federal Election Campaign Act, which created a comprehensive regulatory scheme governing the financing of congressional and presidential election campaigns. The Act assigned the task of administering its provisions to a new federal agency, the Federal Election Commission (FEC). The Act gave the FEC extensive powers, including authority to issue regulations implementing the Act's substantive provisions, to collect and make public the extensive reports the Act required candidates to make regarding campaign contributions and expenditures, to investigate and hold hearings on complaints of violations of the Act, to bring actions for declaratory and injunctive relief enforcing certain provisions of the Act, and to require the Attorney General to initiate civil proceedings in the federal courts seeking remedies in cases where the FEC determined that a violation of other provisions had occurred. *See Buckley*, 424 U.S. at 109–10. As Justice White's concurring opinion in *Buckley* put it, "It is apparent that the FEC is charged with the enforcement of the election laws in major respects. Indeed, except for the conduct of criminal proceedings, it would appear that the FEC has the entire responsibility for enforcement of the statutes

at issue." 424 U.S. at 280 (White, J. concurring in part and dissenting in part).

Unlike most government agencies granted such enforcement authority, however, the FEC as originally constituted by Congress was neither an Executive Branch Department with a principal officer appointed by the President and subject to direct Presidential oversight, nor an "independent" Executive Branch agency headed by Presidential appointees. Rather, two of the FEC's six voting Commissioners were appointed by the President pro tem of the Senate on the recommendations of the majority and minority leaders of the Senate, and two by the Speaker of the House on the recommendations of the House majority and minority leaders. Only the remaining two were appointed by the President of the United States, and all were subject to confirmation by *both* houses of Congress. *See Buckley*, 424 U.S. at 113. Because the Appointments Clause requires Presidential appointment and Senate confirmation for principal officers, and requires appointment by the President, heads of executive departments, or courts of law for inferior officers, the Supreme Court had to consider whether the FEC's

functions could be assigned to government officials who were not appointed through the means specified in the Appointments Clause.

As the question came to the Court, there was no doubt that the FEC Commissioners were officials of an agency of the federal government. Indeed, even the law's defenders agreed that FEC Commissioners were "officers." But they argued that the Commissioners should be viewed as officers of the Legislative Branch and that the Appointments Clause was not intended to "deny[ ] to the Legislative Branch authority to appoint its own officers." 424 U.S. at 119. Thus, the issue addressed by the Court was whether government officials appointed by the Legislative Branch could perform the administrative and law enforcement functions bestowed on the FEC, or whether a government agency performing those tasks must be headed by officers subject to the Appointments Clause. Put more baldly, the question was whether Congress could assign to its own officers the authority to execute the law.

Buckley answered that question in the negative. Construing the Appointments Clause as an expression of broader principles of separation of powers embedded in the Constitution's structure, the Court explained that the clause was designed to ensure a Presidential role in the selection

of government officials assigned to perform executive functions, including the implementation and enforcement of the laws. Thus, while not contesting that Congress could appoint inferior Legislative Branch officers to "carry out appropriate *legislative* functions," *id.* at 128 (emphasis added), the Court held that government officials assigned "significant authority" to carry out federal law must be appointed in the manner specified in the Appointments Clause, *id.* at 126.

With respect to the FEC itself, the Court held that, to the extent its powers were purely "investigative and informative," of the kind a congressional committee could exercise, Congress could permissibly have delegated them to its own appointees. *Id.* at 137. But aside from such "functions that Congress may carry out by itself," Congress may not create government offices and assign to "the holders of those offices" powers of "administration and enforcement of the public law" unless the offices are held by "Officers of the United States" properly appointed under the Appointments Clause. *Id.* at 139. The Court held that the power wielded by the FEC—including the power to bring litigation in the federal courts to enforce federal law as well as the authority to engage in rulemaking, issue advisory opinions, and make other determinations

required in implementing the campaign finance laws—was power that could not be bestowed on government officials who had not been appointed as "Officers of the United States" in conformity with the Appointments Clause. *Id*. at 140–41.

II. *Buckley* neither holds nor implies that persons not appointed to any office or otherwise employed in any position in the federal government are subject to the Appointments Clause.

The question whether private individuals not appointed by anyone to any government position may be given a legal right to bring actions to vindicate federal law is not addressed in *Buckley*, because that question was not even remotely presented in the case. *Buckley*'s focus on the nature of the tasks assigned to the FEC Commissioners, rather than on whether they were government officials to begin with, reflects the obvious and undisputed fact that the FEC Commissioners headed a federal agency and held offices of some kind within the government of the United States. As the Justice Department's Office of Legal Counsel (OLC) explained nearly three decades ago, "there was no question that the officials at issue in *Buckley* held 'employment[s]' … under the federal government, and thus the question of the inapplicability of the Appointments Clause to persons not employed by the federal government

was not before the Court." OLC, *The Constitutional Separation of Powers Between the President and Congress*, 20 U.S. Op. Off. Legal Counsel 124, 142 (1996). The decision thus neither held nor implied that a person who has *not* been appointed in any manner to any position within the federal government is subject to the Appointments Clause merely because he or she has been given a legal entitlement to take some action to enforce federal law, such as initiating a lawsuit.

To be sure, *Buckley* at various points refers to the circumstances under which "persons" must be viewed as "Officers of the United States." But although the circumstances of the case did not require extensive discussion of the issue, at other points in the opinion the Court made clear that the "persons" who must be viewed as officers of the United States if they hold significant law enforcement responsibilities are only those "persons who can be said to hold an office under the government." 424 U.S. at 126 (quoting *United States v. Germaine*, 99 U.S 508, 510 (1879)). *Buckley*'s core holding is that "any *appointee* exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of … Article [II]," *id.* (emphasis added).

That holding does not apply to a private individual who was not appointed to a government position.

Buckley's reliance on the Supreme Court's previous opinions in *Germaine* and *Auffmordt v. Hedden*, 137 U.S. 310 (1890), reinforce the point. *Germaine* and *Auffmordt* held that individuals who contracted to perform specific tasks to assist the government were not officers subject to the Appointments Clause. Both opinions relied in turn on the definition of a "public officer" in the Supreme Court's seminal decision in *United States v. Hartwell*, 73 U.S. 385 (1868). There the Court equated an "officer" with one who holds an "office," and went on to say: "An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties." *Id.* at 393. Applying that understanding of the term, *Germaine* and *Auffmordt* held the Appointments Clause inapplicable to persons who were involved in the execution of federal law but were not appointed to employment as holders of public offices with the characteristics of continuing tenure, duration, emoluments, or duties.

Buckley's favorable citation of *Germaine* and *Auffmordt* is inconsistent with any suggestion that the Court intended to dispense

with the core concept that a government officer is someone appointed to a government office—that is, someone employed in a position within the government. *Buckley* cannot reasonably be read as having "overruled, *sub silentio*, *Germaine* and *Auffmordt*—cases upon which it expressly relies in its analysis." 20 U.S. Op. Off. Legal Counsel at 142. Rather, the opinion is best read as taking that criterion for granted, as the FEC Commissioners undisputedly met it, and focusing on the question before it: whether the responsibilities of the officials at issue were such as to subject them to the Appointments Clause's requirements.

As a result, *Buckley* may well stand for the proposition that, if Congress creates a federal office or agency tasked with bringing litigation to recover damages and penalties for frauds committed against the government, that office or agency must be headed by an "Officer of the United States" appointed in the manner specified by the Appointments Clause. But the opinion does not address whether a private individual *not* employed in any office of the government may bring such litigation. Indeed, it does not suggest that the Appointments Clause ever applies to an individual who is not appointed to any federal governmental position, or limits what entitlements may be conferred on such an individual.

III. Qui tam relators are not subject to *Buckley*'s Appointments Clause analysis.

The district court's analysis in this case did not entirely disregard the *Hartwell-Germaine-Auffmordt* view that an officer, in addition to having significant responsibility for carrying out federal law, must be appointed to an office with the attributes of tenure, duration, emoluments, and duties. But the district court treated those requirements as secondary to and derivative of its understanding of significant law enforcement responsibilities. Indeed, it gave the requirements of tenure, duration, and duties such broad and abstract application that they would likely be satisfied in any case where federal law gave an individual any role in the vindication of federal law that could not be carried out through one action at a singular point in time. Similarly, the district court read the idea of emoluments so broadly as to encompass any benefit a private individual would receive by playing a role in the enforcement of federal law. The district court's expansive views of tenure, duration, emoluments, and duties, if correct, would have led the Supreme Court to holdings in *Germaine* and *Auffmordt* opposite to the ones it reached, because the work of the individuals held not to be officers in those cases, like those of a qui tam relator, involved some

degree of ongoing activity, as well as payments that the district court's analysis would treat as emoluments.

Moreover, the district court's analysis effectively eliminated the most basic element of the *Hartwell-Germaine-Auffmordt* definition of "officer": the requirement that an officer occupy an office, a "public station, or employment, conferred by the appointment of government." *Hartwell*, 73 U.S. at 393. The district court's analysis focuses only on whether the role of a qui tam relator could be described in some sense as having attributes of tenure, duration, emoluments, and duties, but it fails to establish that those attributes attach to appointment to and employment in a governmental position.

Indeed, the district court acknowledged that its view that a private qui tam relator is an "Officer of the United States" resulted in the application of that term to a person who, as the Supreme Court has expressly recognized, "is not an 'official of the United States' in the ordinary sense of that phrase"—one who "is neither appointed as an officer of the United States … nor employed by the United States," and is not "anything other than a private person." *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 587 U.S. 262, 272 (2019). The district court

brushed this point aside on the ground that *Cochise Consultancy* involved a statutory question, not application of the Appointments Clause. But that distinction begs the question whether there is any basis for reading the Appointments Clause to apply the term "Officer of the United States" to one who does not, in any ordinary sense of the words, hold an office in the government of the United States.

Such a reading runs counter to the principle that the Constitution's "words and phrases were used in their normal and ordinary as distinguished from technical meaning." *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). The Supreme Court's decisions in *Hartwell*, *Germaine*, and *Auffmordt* also support giving the Appointments Clause's use of the term "Officer" its common meaning, as does *Buckley* itself, which quotes *Germaine*'s statement that the term encompasses "all persons who can be said to hold an office under the government." 424 U.S. at 126. Moreover, the demonstration in the briefs of the qui tam relator in this case and the United States that qui tam actions were a widely known and accepted practice at the time of the Founding negates any suggestion that the Constitution was intended to embody some special meaning of the

term "Officers of the United States" that would foreclose the use of qui tam actions to remedy violations of federal laws. Contrary to the district court's view, reliance on that history does not suggest advocacy of a history-based "exception" to otherwise applicable Appointments Clause principles to allow qui tam actions. Rather, the historical record strongly supports the conclusion that qui tam relators do not fall within the Appointments Clause's language to begin with, and that the Clause's words and the precedents construing them should not be extended to foreclose qui tam actions.

In sum, what *Buckley* and the Supreme Court precedents on which it was based hold is that the Appointments Clause determines whether a government official who exercises particular functions must be appointed in the manner set forth in the Clause. That holding does not apply to non-governmental actors at all, and hence it does not have any bearing on whether they may exercise legal entitlements or roles bestowed on them by law.

Moreover, by its terms, the Appointments Clause specifies only the means of appointment of government officers. As the Supreme Court recently put it, the Clause "cares not a whit" about anything other than

who appoints a functionary with a continuing government position and significant government authority. *Lucia v. SEC*, 585 U.S. 237, 245 (2018). The Clause does not say anything about what actions may be performed only by public officials as opposed to private individuals. The answer to that question must instead be sought and found in more general separation-of-powers and structural constitutional principles, including Article II's vesting of the "executive Power" in the President, U.S. Const., art. II, § 1, cl. 1, and its imposition on the President of the duty to "take Care that the Laws be faithfully executed," U.S. Const., art. II, § 3. Under those principles, the False Claims Act, like other laws, must be tested to determine whether "it prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 443 (1977). The district court's erroneous reliance on the Appointments Clause kept it from reaching that question. But as the briefs of the qui tam plaintiff and the United States demonstrate, both the long history of qui tam actions and the extensive powers that the Executive Branch has to control how they are resolved negate the suggestion that, at this late date, they should be declared

incompatible with the President's ability to fulfill his duty to see that the laws are faithfully executed.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32 and 29, I certify that the foregoing brief complies with applicable typeface, type-style, and type-volume requirements because it uses a proportionally spaced, 14-point roman style typeface with serifs (Century Schoolbook), and, as calculated by my word processing software (Microsoft Word for Microsoft 365), it contains 3,694 words, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Eleventh Circuit Rule 26.1-3(c).

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I hereby certify that this brief has been served through the Court's ECF system on counsel for all parties required to be served on January 15, 2025.

/s/ Scott L. Nelson
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