No. 24-13581

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES ex rel. CLARISSA ZAFIROV,
Plaintiff-Appellant, and

UNITED STATES OF AMERICA
Intervenor-Appellant

v.

FLORIDA MEDICAL ASSOCIATES, LLC, *et al*.
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida
No: 8:19-cv-01236-KKM-SPF

BRIEF OF *AMICUS CURIAE* THE ANTI-FRAUD COALITION IN SUPPORT OF PLAINTIFF-APPELLANT CLARISSA ZAFIROV AND IN SUPPORT OF REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Eleventh Circuit Rule of Procedure 26.1-1, 26.1-2, and 26.1-3, *amicus curiae* The Anti-Fraud Coalition, through its undersigned counsel, submits this Certificate of Interested Persons and Corporate Disclosure Statement.

Amicus curiae The Anti-Fraud Coalition is a 501(c)(3) nonprofit corporation that has no parent company and no person or entity owns any part of it.

The following is a list of persons or parties, in addition to those listed in Appellants' briefs, that may have an interest in the outcome of this appeal:

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2. Goldberg Kohn LTD
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Dated: January 15, 2025

s/ Claire M. Sylvia
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

U.S. Constitution

Statutes

Other Authorities

Rules

Regulations

Treatises

INTEREST OF *AMICUS CURIAE*

Amicus curiae The Anti-Fraud Coalition ("TAF Coalition") is a non-profit public interest organization dedicated to combating fraud against the government and protecting public resources through public-private partnerships. TAF Coalition is committed to preserving effective antifraud legislation at the federal and state levels. TAF Coalition educates the public and the legal community about the *qui tam* provisions of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, and provides testimony to Congress about ways to improve the FCA. It regularly participates in litigation as *amicus curiae,* and has defended the FCA against challenges to its constitutionality in federal district courts, courts of appeals and the Supreme Court.

TAF Coalition is supported by *qui tam* relators and their counsel, by membership dues and fees, and by private donations. TAF Coalition is the 501(c)(3) arm of Taxpayers Against Fraud, which was founded in 1986. TAF Coalition has more than 400 members who, in partnership with the Department of Justice and state attorneys general, have represented whistleblowers in *qui tam* matters that have generated tens of billions of dollars in public recoveries. This brief draws on the TAF Coalition's unparalleled experience in the development of FCA practice over the past four decades to illustrate why relators do not exercise government power

but rather use their own resources to support the government's fight against fraud, subject to government control.[1]

STATEMENT OF THE ISSUE

Whether the *qui tam* provisions of the False Claims Act are consistent with the Appointments Clause of the Constitution.

SUMMARY OF THE ARGUMENT

The Appointments Clause provides that officers of the United States must be appointed by the President or persons under the President. U.S. Const., art. II, § 2, cl. 2. Among other things, this provision ensures that persons who exercise significant executive power are "accountable to the President, whose authority they wield." *Seila Law LLC v. Fin. Prot. Bureau*, 591 U.S. 197, 213 (2020). In addition to the exercise of significant authority, the hallmarks of holding office are "tenure, duration, emolument, and duties," with the latter being "continuing and permanent, not occasional or temporary." *United States v. Germaine,* 99 U.S. 508, 511-12 (1878); *United States v. Maurice*, 26 F.Cas. 1211, 1214 (C.C.D.Va.1823) (No. 15,747) (defining officer as someone in "'a public charge or employment'" who performed a "continuing" duty).

[1] The parties have all consented to the filing of this brief. No party or their counsel contributed to this brief and no person other than *amicus curiae*, its members, or its counsel contributed to this brief.

The district court's holding that the *qui tam* provisions of the False Claims Act violate the Appointments Clause rests on the fallacies that: (1) relators exercise significant executive power; and (2) there is an "office of relator" that an unlimited number of *qui tam* relators hold. Although the history of *qui tam* actions, which existed before and at the founding of the Nation, should be "well nigh conclusive" on the Appointments Clause question,[2] the past four decades of experience under the FCA confirms what nearly every other court has concluded: a relator does not exercise executive power, let alone significant power, and is merely a private actor pursuing an individual lawsuit on their own behalf, which if successful would also benefit the government.

The text and structure of the FCA confirm that at any stage – from filing to resolution of a *qui tam* case – a relator lacks the powers and prerogatives of government officers. That a relator's efforts benefit the government does not transform the relator into a government officer.

The practical reality of *qui tam* litigation confirms this understanding. The history of the implementation of the FCA over the past four decades illustrates the

[2] *See Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 776-77 (2000) (finding history highly relevant to the conclusion that *qui tam* provisions comport with Article I); *see also id.* at 789, 801 (Stevens, J., dissenting) (contending the same history "is also sufficient to resolve the Article II question").

many ways in which a relator has no greater, and sometimes less, power than an ordinary litigant and does not exercise executive power.

Experience implementing the FCA also illustrates that relators do not possess any of the other hallmarks of holding federal office. They have no duties, continuing or otherwise. A relator may choose to bring a single case based on the relator's own information, and if a relator dismisses the case, no other private person may take the relator's place. A relator uses their own resources, at great personal risk, with only a prospect of a reward. This arrangement, which resembles no other federal office, does not implicate the Appointment Clause.

ARGUMENT

I. FALSE CLAIMS ACT *QUI TAM* RELATORS ARE PRIVATE INDIVIDUALS ACTING ON THEIR OWN BEHALF AND FOR THE BENEFIT OF THE GOVERNMENT AND DO NOT EXERCISE GOVERNMENT POWER

Every appellate court that has considered the issue, and until this case, nearly every district court, has concluded that the False Claim Act does not implicate the Appointments Clause.[3] The rationale for this near universal view is that the text and

[3] *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749 (5th Cir. 2001) (*en banc*); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), *cert. denied,* 510 U.S. 1140 (1994); *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148 (2d Cir. 1993); *United States ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787 (10th Cir. 2002); *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032 (6th Cir. 1994). *See also United States ex rel. Phillips v. Pediatric Servs. of Am., Inc.*, 123 F. Supp. 2d 990, 994 (W.D.N.C. 2000);
[Footnote Text Cont'd on Next Page]

structure of the FCA make clear that a relator is a private individual acting on their own behalf and does not exercise executive power. The experience of courts and parties litigating *qui tam* cases over the past four decades confirms this common sense understanding.

A. THE TEXT AND STRUCTURE OF THE FALSE CLAIMS ACT CONFIRMS THAT RELATORS ARE PRIVATE ACTORS PURSUING THEIR INDIVIDUAL CASES ON THEIR OWN BEHALF

The FCA provides that "[a] person may bring a civil action [for a violation of the FCA] *for the person and* for the United States Government." 31 U.S.C. § 3730(b)(1) ("Actions by private persons") (emphasis added). This is the same structure that existed when the FCA was first enacted in 1863: "Such suit may be brought and carried on by any person, *as well for himself* as for the United States." Act of Mar. 2, 1863, ch. 67, § 4, 12 Stat. 696, 698 (1863) (emphasis added). The FCA has always provided an award for a successful relator, paid out of the proceeds

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United States ex rel. Sharp v. Consol. Med. Transp., No. 96 C 6502, 2001 WL 1035720, at *11 (N.D. Ill. Sept. 4, 2001); *United States ex rel. Chandler v. Hektoen Inst. for Med. Rsch.*, 35 F. Supp. 2d 1078, 1081 (N.D. Ill. 1999); *United States ex rel. Fallon v. Accudyne Corp.*, 921 F. Supp. 611, 623-624 (W.D. Wis. 1995); *United States ex rel. Wallace v. Exactech*, 703 F. Supp. 3d 1356 (N.D. Ala. 2023). Even after the decision below, other district courts have continued to reject challenges to the constitutionality of the FCA. *See United States ex rel. Butler v. Shikara*, No. 20-80483-CV-Middlebrooks, 2024 WL 4354807 (S.D. Fla. Sept. 6, 2024); *United States ex rel. Adams v. Chattanooga Hamilton Cnty. Hosp. Auth.*, No. 1:21-cv-84, 2024 WL 4784372 (E.D. Tenn. Nov. 7, 2024).

of the action. Yet it has also always provided that the case is brought "at the sole cost and charge of such person" and the person has no claim against the United States for those costs. *Id.* at ch. 67, §§ 4, 6, 12 Stat. 696, 698; 31 U.S.C. § 3730(f) ("The Government is not liable for expenses which a person incurs in bringing an action under this section.").

Consistent with the Act's text, the Supreme Court has recognized that FCA *qui tam* relators are private individuals pursuing a private lawsuit, brought on the relator's own behalf, but also for the government's benefit. *United States ex rel. Polansky v. Exec. Health Res., Inc*., 599 U.S. 419, 425 (2023) ("a *qui tam* suit is, as the statute puts it, 'for' both the relator and the Government") (quoting 31 U.S.C. § 3730(b)(1)); *State Farm Fire and Cas. Co. v. United States ex rel. Rigsby*, 580 U.S. 26, 29 (2016) ("This system is designed to benefit both the relator and the Government."). "Although [the FCA] explains that the action is brought 'for the person and for the United States Government' and 'in the name of the Government,'. . . it does not make the relator anything other than a private person . . . ." *Cochise Consultancy v. United States ex rel. Hunt*, 587 U.S. 262, 272 (2019); *see also United States ex rel. Eisenstein v. City of New York,* 556 U.S. 928, 931-32, 937 (2009) (holding that relators who bring "[a] private enforcement action under the FCA" are not subject to the more generous time frame for appeal that Fed. R. App. 4(a)(1)(B) provides when "the United States or its officer or agency is a party"); *Stevens*, 529

U.S. at 787 (FCA does not authorize suit by a private *qui tam* relator against a State and not addressing the United States as a plaintiff).

The Supreme Court has described this relationship as one of assignor/assignee, with the FCA granting a relator "a partial assignment of the Government's own damages claim." *Polansky,* 599 U.S. at 425 (quoting *Stevens*, 529 U.S. at 773). Although an assignee pursues a claim for the benefit of the assignor, "when there has been . . . a partial assignment the assignor and the assignee each retain an interest in the claim and are both real parties in interest." 6A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 1545, pp. 351–353 (2d ed.1990), *cited in Eisenstein*, 556 U.S. at 934; *see also United States ex rel. Neher v. NEC Corp*., 11 F.3d 136, 138 (11th Cir. 1993) (characterizing FCA *qui tam* provisions as also remedying harm to the relator, noting emotional and financial strain on them).

Thus, when the government intervenes in a *qui tam* case and exercises "primary responsibility" for the case, the relator continues as a separate and distinct party, subject to the FCA provisions allowing for government control. 31 U.S.C. § 3730(b)(2), 31 U.S.C. § 3730(c)(1); *see also United States v. Triple Canopy, Inc*., 775 F.3d 628, 638 (4th Cir. 2015) (reversing dismissal of relator as party in intervened case); *United States v. Public Warehousing Co*., 242 F.Supp.3d 1351, 1358 (N.D. Ga. 2017) (dismissing as moot motion to dismiss relator complaint in

intervened case).[4] Dismissal of the relator for a jurisdictional defect does not impede the government's ability, as a separate party, to proceed with the case. *See Rockwell Int'l v. United States,* 549 U.S.457, 478 (2007). And when the government declines to intervene in a *qui tam* case, the relator continues as a private party, subject to the government's control. 31 U.S.C. § 3730(c)(2); *see also Polansky*, 599 U.S. at 425-26; *Yates v. Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1311 (11th Cir. 2021). While the relator has the ability to continue the case when the government declines to intervene, and the relator's success benefits the government, the relator does not speak for the government, which is entitled to copies of all pleadings and transcripts, 31 U.S.C. § 3730(c)(3), and can submit its own statement of its views.[5] Although courts occasionally refer to a relator as acting on the government's "behalf," the loose use of that term does not mean the relator literally represents the

[4] The district court considered the relator's ability to assign a portion of their potential recovery to a litigation funder as an indication that the relator's power was equivalent to the government's, but a litigation funding agreement does not mean the relator has assigned their standing to litigate the case. *See, e.g., United States ex rel. Ruckh v. Salus Rehab. LLC,* 963 F.3d 1089, 1101 (11th Cir. 2020) (relator gave funder only small percentage of potential recovery and funder had no power or authority to influence litigation of case).

[5] *See, e.g.*, Brief for the United States as *Amicus Curiae* Supporting Appellant, *United States ex rel. 84Partners LLC v. General Dynamics Elec. Boat*, No. 21-13673 (11th Cir. Jan. 20, 2022), ECF No. 29 (addressing government position on application of Fed.R.Civ.P. 9(b)); Brief for the United States as *Amicus Curiae* Supporting Appellant, *United States ex rel. Ruckh v. Salus Rehab.,* No. 18-10500, (11th Cir. July 20, 2018), ECF No. 44 (addressing government position on materiality and causation).

government, as statutory constraints and implementation of the FCA make clear.

B. PRACTICAL EXPERIENCE WITH THE FALSE CLAIMS ACT OVER THE PAST FOUR DECADES CONFIRMS THAT PRIVATE RELATORS DO NOT POSSESS OR EXERCISE EXECUTIVE POWER

The understanding of relators as private individuals acting on their own behalf and for the benefit of the government is consistent with the reality of *qui tam* litigation. The past four decades of experience with the False Claims Act demonstrates that throughout the life of a *qui tam* case a relator does not possess or exercise executive power, let alone significant power that can be exercised only by an officer appointed pursuant to the Appointments Clause.

1. After Initiation of a *Qui Tam* Case, a Relator Lacks Control Over the Timing and Pace of the Investigation

To initiate a *qui tam* action, a relator files a complaint under seal, serves it on the government, as the FCA requires, 31 U.S.C. § 3730(b)(2), and then waits. The Department of Justice chooses whether and when to interview the relator, whether and when to contact other witnesses and which ones, whether and when to seek documents and which ones, and what approach to take with a particular defendant. A relator cannot issue a civil investigative demand, 31 U.S.C. § 3733 (authorizing the Attorney General to issue a CID for information relevant to an FCA

investigation),[6] or compel the government to do so. *Lovoi v. U.S. Dept. of Just.*, 679 F. Supp. 2d 12, 14 (D.D.C. 2010) (an agency cannot be compelled to perform discretionary acts). Moreover, the Department of Justice typically requests that the relator not independently investigate the case once it is initiated. Although the government may share documents with a relator, the relator must agree to the government's terms, which are spelled out in a common interest agreement between the United States and relator. *See, e.g.*, *Schaefer v. Fam. Med. Ctrs. of S.C.*, C/A No. 3:18-cv-02775-MBS, 2019 WL 5893632, at *1 (D.S.C. Aug. 5, 2019). Such agreements provide, among other things that:

> Government Disclosed Information is the property of the United States and may only be used in the investigation of this case. …. Before Relator can give any other person or entity access to Government Disclosed Information, (a) Relator must obtain the written consent from DOJ counsel, which consent DOJ counsel can refuse or otherwise not give for any reason in DOJ counsel's sole discretion…
>
> The Government expressly reserves the right to seek dismissal under 31 U.S.C. § 3730(e)(4) or any other legally applicable ground, in the event Relator, or any other person or entity, uses Government Disclosed Information to add new claims or defendants to the action, pursue any other False Claims Act action, or assist anyone else to file or pursue a False Claims Act action.

[6] *Compare Seila Law*, 591 U.S. at 206 (Consumer Financial Protection Bureau can issue CIDs and subpoenas); *Lucia v. Sec. and Exch. Comm'n*, 585 U.S. 237, 241 (2018) (ALJ's powers include supervising discovery and issuing, revoking, or modifying subpoenas).

See Mot. to Quash Subpoena Duces Tecum by United States, Ex. F at 1-2, *Schaefer v. Fam. Med. Ctrs. of S.C.*, C/A No. 3:18-cv-02775-MBS (D.S.C. Apr. 8, 2019), ECF No. 129-6 (typical common interest agreement between government and relator). The government is also not required to keep the relator informed about the investigation. While involving the relator will often be in the best interests of the case, and the FCA contemplates that the government will benefit from working together with the private sector, S.Rep. No. 99-345, at 7-8 (1986), the relator cannot compel the government to accept the help or to do work for the relator. *See, e.g.*, *United States ex rel. Carver v. Physicians Pain Specialists of Ala., P.C.*, No. 22-13608, 2023 WL 4853328, at *7 (11th Cir. July 31, 2023) (affirming grant of government motion to dismiss *qui tam* action where relator failed to take steps to pursue a judgment and "sought to have the United States do her work for her").

A relator can neither seek, nor block, extensions of the seal while the case is under investigation and is not entitled to the government's *ex parte* submissions to the court in support of an extension. 31 U.S.C. § 3730(b)(2); *see, e.g.*, *United States ex rel. Ryan v. Endo Pharms. Inc.,* Civil Action Nos. 05-3450, 10-2039, 11-7767, 2014 WL 5364908 (E.D. Pa. Oct. 22, 2014) (denying relator motion to unseal government *ex parte* filings where the government's interest in preserving confidentiality outweighed relator's interest). While a relator can express opposition to a seal extension, and a court may consider the relator's concerns, "the seal

requirement was intended in main to protect the Government's interests." *State Farm*, 580 U.S. at 34-35. Indeed, the government may seek sanctions against a relator where the relator's violation of the seal harms the government's interests. *See, e.g.*, *United States ex rel. Bibby v. Wells Fargo Home Mortg., Inc.*, 76 F. Supp. 3d 1399 (N.D. Ga. 2015) (imposing monetary sanction for seal breach).

2. If the Government Proceeds With a *Qui Tam* Case, a Relator Continues as a Party, But Does so as a Private Actor Without Government Power and Subject to Government Control

If the government intervenes in the case, the relator can continue as a separate party, represented by private counsel, but is subject to government control. *Yates*, 21 F.4th at 1311. The government has "primary responsibility" for the litigation, "shall not be bound" by acts of the relator, and may request that the court limit the relator's involvement if it interferes with or unduly delays the government's prosecution of the case. *See* 31 U.S.C. §§ 3730(c)(1); 3730(c)(2)(C); *see, e.g.*, *United States ex rel. Mei Ling v. City of Los Angeles*, No. CV 11-974 PSG (JCx), 2020 WL 6150931 (C.D. Cal. June 20, 2022) (granting government's motion to restrict relator participation). While the government and the relator ideally work in partnership, only one half of the partnership speaks for the government, exercises government powers, or commands government resources.

3. If the Government Declines to Intervene, a Relator May Proceed, But Does so as a Private Actor Without Government Power and Subject to Government Control

When the government declines to intervene, a relator has primary responsibility for the case, 31 U.S.C. § 3730(c), which the United States allows through its election. *Yates,* 21 F.4th at 1310; *United States ex rel. Zafirov v. Fla. Med. Assocs., LLC,* No. 8:19-cv-01236-KKM-SPF, 2024 WL 4349242, at *4 (M.D. Fla. Sept. 30, 2024) (observing that the Department of Justice "allows Zafirov to drive the litigation"). When the relator proceeds without the government, they do so as a private litigant without government powers and with constraints that do not apply to other private litigants.

As an initial matter, a relator who is an individual cannot appear pro se and must be represented by an attorney. *Timson v. Sampson*, 518 F.3d 870, 873-74 (11th Cir. 2008). The lawyers who represent relators are private attorneys, who are not paid by the government,[7] have no government resources,[8] and do not represent the

[7] A successful relator is entitled to attorney fees and expenses, which are paid by the defendant, not the government. 31 U.S.C. § 3730(d).

[8] Relators fund their own litigation expenses, which can be substantial, are only recovered when the relator prevails, and even then may not be fully recovered. *See, e.g.*, *Graves v. Plaza Med. Ctrs., Corp.,* No. 1:10-23382, 2018 WL 3699325 (S.D. Fla., May 23, 2018).

United States.[9]

A relator's authority to pursue a case is limited. A relator may pursue only the government claims the FCA authorizes, 31 U.S.C. § 3730(b)(1), and may not add or pursue government common law claims or contract claims. *United States v. Physician Surgical Network, Inc.*, No. 6:20-cv-1582-WWB-EJK, 2022 WL 22879207, at *7 (M.D. Fla. Aug. 24, 2022); *Public Warehousing Co.*, 242 F. Supp. 3d at 1361.

The FCA also imposes other limits on the relator's ability to pursue a case. *State Farm*, 580 U.S. at 29-30. A relator's case can be barred by the public disclosure of substantially similar allegations in certain fora. 31 U.S.C. § 3730(e)(4); *United States ex rel. Jacobs v. JP Morgan Chase Bank, N.A.*, 113 F.4th 1294, 1303-04 (11th Cir. 2024). Although the government may exercise a veto and allow the case to proceed notwithstanding that the public disclosure bar could otherwise preclude it, 31 U.S.C. § 3730(e)(4), *United States ex rel. Marcus v. BioTek Labs, LLC*, No. 8:18-cv-2915 WFJ-JSS, 2023 WL 374334 (M.D. Fla. Jan. 24, 2023), a relator cannot compel the government to exercise this authority. *See, e.g.*, *Wichansky v. Zoel Holding Co., Inc.*, No. CV-13-01924-PHX-DGC, 2014 WL

[9] Special rules that apply to government attorneys do not apply to relators' counsel. *See, e.g.*, 11th Cir. R. 46-3, Admission for Particular Proceeding (providing that "an attorney appearing on behalf of the United States" shall be admitted without the necessity of formal application or payment of the admission fee).

6633513, at *6 n.2 (D. Ariz. Nov. 24, 2014) (government filed a statement of interest on one issue but did not state an objection to the public disclosure bar), *rev'd on other grounds,* 702 F. App'x 559 (9th Cir. 2017).

Other limitations on a relator's ability to pursue a case include the FCA's "first to file" bar, which precludes a private person from bringing a *qui tam* case based on facts underlying a pending *qui tam* case. 31 U.S.C. § 3730(c)(5); *Cho ex rel. States v. Surgery Partners,* 30 F.4th 1035 (11th Cir. 2022). A *qui tam* action is also barred if the government is already pursuing the allegations. 31 U.S.C. § 3730(e)(3) ("government action" bar). The government may also elect to pursue its remedies through alternative enforcement mechanisms. 31 U.S.C. § 3730(c)(5); *King v. United States Gov't*, 878 F.3d 1265, 1267 (11th Cir. 2018).

While the FCA limits the relator's authority, it also does not provide relators any powers that are greater than those of other private litigants. For example, with respect to discovery, a relator has no greater ability to compel access to government documents or testimony than any other private litigant. Like other private litigants, a relator must submit a "Touhy" request to the appropriate government agency. *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951); *see, e.g.*, 45 C.F.R. § 2.1, *et seq*. (rules for when government documents or testimony are sought from an employee or former employee of the Department of Health and Human Services in litigation to which the government is not a party). If the government declines to

provide the documents, the relator, like any other litigant, must sue to challenge the denial. *See, e.g.*, *United States ex rel. Lewis v. Walker*, No. 3:06-CV-16 (CDL), 2009 WL 2611522 (M.D. Ga. Aug. 21, 2009); *Schroeder v. U.S. Dep't of Veterans Affairs*, 673 F. Supp. 3d 1204 (D. Kan. 2023).

At the same time, the relator may have no ability to enforce Touhy requirements if the government chooses not to do so. Thus, for example, in *United States ex rel. Howard v. Caddell Constr. Co. Inc*., No. 7:11-CV-270-H-KS, 2018 WL 2291300 (E.D.N.C. Feb. 23, 2018), the court held that the relator could not block the testimony of a former government employee that did not comply with Touhy regulations where the government did not object. The court explained that the FCA's limited grant of standing to a private relator does not make them a government official entitled to litigate the government's interests in managing its information. *Id*. at *3. *See also Medtronic Inc. v. U.S. Dep't of Veterans Affairs*, No. 23-2497-DDC-GEB, 2024 WL 3360500, at *3 (D. Kan. July 10, 2024) (finding relator had no legally protectable interest in whether the agency provided documents to the defendant).

A relator is subject to the same rules of procedure as other private litigants and not treated like the government in other respects as well. For example, if a relator dies while their case is pending, their estate must file a motion under Federal Rule of Civil Procedure 25 to substitute as the relator's personal representative.

Gose v. Native American Servs. Corp., 109 F.4th 1297, 1302, n.2 (11th Cir. 2024); *NEC*, 11 F.3d 136. If a relator were a government officer, the new holder of the office would automatically be substituted as the party because the United States, not the particular individual holding office, is the party. Fed. R. Civ. P. 25(d); *see also* Fed. R. App. P. 43(c)(2) (substitution on appeal).

As another example, when a defendant files for bankruptcy while the *qui tam* case is pending, the relator is treated as a private litigant, subject to the Bankruptcy Code's automatic stay of litigation once a bankruptcy petition is filed. There is an exception to the automatic stay "to enforce [a] governmental unit's … police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's … police or regulatory power." 11 U.S.C. § 362(b)(4); *see also* 11 U.S.C. § 101(27) (defining "governmental unit" as "United States … department, agency, or instrumentality of the United States"). But courts have concluded that the exception does not apply to a relator in a declined case, who is not a governmental unit and brings a case on their own behalf. *See United States ex rel. Kolbeck v. Point Blank Sols., Inc*., 444 B.R. 336 (E.D. Va. 2011). In *Kolbeck*, the court observed that this result was supported not only by the statutory language of both the Bankruptcy Code and the FCA, but also by the Bankruptcy Code's underlying policy of ensuring that debtors cannot "'frustrat[e] necessary

governmental functions by seeking refuge in bankruptcy court.'" *Id*. at 342 (citation omitted). That interest "is greatly diminished" where a relator proceeds without the government. *Id*. at 341-42. *See also In re Commonwealth Cos., Inc*., 913 F.2d 518, 527 (8th Cir. 1990); *United States ex rel. Macias v. Pacific Health Corp*., No. CV-12-960 RSWL (JPRx), 2015 WL 3742467, at *3 (C.D. Cal. June 15, 2015).

Likewise, in resolving a *qui tam* case, a relator does not exercise government powers and is subject to government control. A relator may not dismiss their case without the consent of the government and the court. 31 U.S.C. § 3730(b)(1). A court's dismissal of a *qui tam* case based on failure to meet the requirements of Fed. R. Civ. P. 9(b) is without prejudice to the United States, even if it is with prejudice to the relator. *United States ex rel. Williams v. Bell Helicopter Textron Inc*., 417 F.3d 450, 455 (5th Cir. 2005); *Urquilla-Diaz v. Kaplan Univ*., 780 F.3d 1039, 1057 (11th Cir. 2015) (citing *Williams*). Although a dismissal on the merits may have res judicata effects, the government has the capacity to proceed with a *qui tam* case or dismiss it. *See supra*. The government may also intervene to appeal. *Eisenstein*, 556 U.S. at 931, n.2.[10]

[10] To the extent non-intervened cases create precedent under the substantive law, that does not differ from litigation under other laws that have both public and private enforcement. *See, e.g*., 15 U.S.C. §§ 15, 15a (actions to enforce violations of antitrust law); 42 U.S.C. § 2000e-5(f) (actions to enforce law prohibiting employment discrimination).

The government may withhold consent to settlements reached between the defendant and a relator for any number of reasons. For example, even though the government is not a party to a non-intervened case, it insists on the inclusion of certain language in all settlement agreements to protect its own interests.[11] The government also has blocked settlements entered between defendants and relators that it considered collusive and intended to divert to private use money that should go to the Treasury." *See, e.g.*, *United States ex rel. DeMartino v. Intelligent Decisions, Inc.,* 308 F.Supp.2d 1318 (M.D. Fla. 2004) (objecting on grounds that payment to relator was collusive); *United States v. Health Possibilities*, 207 F.3d 335, 344 (6th Cir. 2000) (reversing voluntary dismissal of non-intervened *qui tam* case following settlement where government did not consent). And the government has declined to provide a release of government claims when the defendant and relator have agreed to this as a condition of settlement and the government did not agree that that was in the interests of the United States. *See, e.g.*, *United States ex rel. Allen v. Alere Home Monitoring, Inc.*, 355 F. Supp. 3d 18, 25-26 (D. Mass.

[11] *See, e.g.*, Jonathan Cone, et al., Negotiating False Claims Act Settlements, WEST BRIEFING PAPERS, No. 14-3, Feb. 2014, available at https://www.crowell.com/a/web/nj3Q1bkuuY5DU3niu6NwDP/4TtkHV/negotiating-false-claims-act-settlements.pdf (discussing non-negotiable clause in False Claims Act settlements); Danielle L. Trostorff, Unallowable Costs Under the False Claims Act: When to Hold and When Fold, COMPLIANCE TODAY (Healthcare Compliance Association), Vol. 10, No.5, May 2008, at 29, available at https://www.bakerdonelson.com/files/Compliance-Volume-10.pdf.

2019). And "[s]uch is the United States' grip that, subject to court approval" it may even settle a non-intervened action over the objection of the relator. *Yates*, 21 F.4th at 1311 (citations omitted).

Most fundamentally, the government has the ability to dismiss the case if it is contrary to the government's policy interests. *Polansky*, 599 U.S. 419. Although a court may review the government's motion to dismiss, the Supreme Court has directed that "[i]f the Government offers a reasonable argument for why the burdens of continued litigation outweigh its benefits, the court should grant the motion. And that is so even if the relator presents a credible assessment to the contrary." *Id*. at 438; *see, e.g*., *United States ex rel. Doe v. Credit Suisse AG*, 117 F.4th 155, 162-63 (4th Cir. 2024) (government contended that case would infringe on privileged information and ongoing discussions regarding defendants' plea agreement obligations); *Carver*, 2023 WL 4853328 (government contended relator failed to prosecute the case and caused the government to waste resources).

Once there is a judgment, the relator has no greater ability than other private litigants to appeal it and is not treated as the United States. *Eisenstein,* 556 U.S.at 937 (relator may not benefit from expanded period of time for the United States to appeal). A relator also has no greater ability than other litigants to enforce a judgment. *See* Federal Debt Collection Procedure, 28 U.S.C.A. §§ 3001, 3202 (authorizing enforcement of judgment by United States). Any funds obtained

through a settlement or judgment resolving violations of 31 U.S.C. § 3729 are sent directly to the government, which disburses the funds – a relator has no role in receiving and disbursing the government's money. *Compare Maurice*, 26 F. Cas. at 1214 (agent of fortifications exercised important government duties including disbursement of government funds).

That the relator does not represent the government is also demonstrated by their potential adversity at the conclusion of the case. The government and the relator may dispute the relator's right to a particular share of the proceeds of an action or alternate remedy. *See, e.g.*, *United States ex rel. Alderson v. Quorum Health Grp, Inc.*, 171 F. Supp. 2d 1323 (M.D. Fla. 2001); *see also, e.g.*, *May v. United States*, No. 2023-1124, 2023 WL 3836088 (Fed. Cir. June 6, 2023) (rejecting relator effort to enforce claim against the United States); *King*, 878 F.3d 1265 (sovereign immunity precluded relator action against the United States for damages).

Thus, while a relator may pursue a case if the government does not intervene and does not seek to dismiss the case, the relator does so without any of the powers or prerogatives of the executive branch and instead has only the powers of any private litigant, while being subject to greater limits than other private litigants.

II. A *QUI TAM* RELATOR HAS NONE OF THE OTHER HALLMARKS OF HOLDING OFFICE

In addition to the lack of executive power, an FCA relator possesses none of the other hallmarks of holding federal office. Although the district court

characterized the FCA as creating an "office of relator," that can be held by an unlimited number of litigants, that framing does not align with the body of case law on the indices, in addition to exercising executive power, of holding office. *Lucia*, 585 U.S. at 245 (citing *Germaine*, 99 U.S. at 511-12 (making clear that duties must be "continuing" to distinguish an officer from an employee); *Auffmordt v. Hedden,* 137 U.S. 310, 327 (1890) (continuing emolument); Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 115 (2007) (elements beyond delegated executive power and continuing duties are not essential but may provide evidence of whether an office exists under the two essential elements). An individual officer need not have all of these attributes, but a relator does not have *any* of them. No federal office resembles the FCA's partial assignment to a private citizen.

A relator has no tenure or any duties, let alone continuing ones. A relator has no obligation "to investigate or prosecute a False Claims Act action." *Cochise Consultancy*, 587 U.S. at 272. Like other non-officers, "[t]here is no penalty for his absence from duty or refusal to perform, except his loss of the fee in the given case." *Germaine*, 99 U.S. at 512. And unlike an office, which is not dependent upon the individual occupying it*, United States v. Donziger*, 38 F.4th 290, 297 (2d Cir. 2022), if a relator elects to voluntarily dismiss their case, no other person is substituted in to carry on the case. The FCA would in many cases prohibit anyone from doing so.

See 31 U.S.C. § 3730(e)(4) (public disclosure bar); 31 U.S.C. § 3730(c)(5) (first to file bar).

That a relator is merely a private person and holds no office, is also evidenced by the fact that a relator receives no regular or continuing payment for services. *Compare Germaine,* 99 U.S. at 512 (no regular appropriation was made to pay surgeon); *Auffmordt,* 137 U.S. at 327 (merchant appraiser is a "position is without… continuing emolument."). While a reward is offered as an incentive to encourage relators to step forward, the relator receives a reward only if the relator prevails. *King*, 878 F.3d 1265 (dismissing relator suit against government for money damages after his *qui tam* suit had been dismissed).

A relator receives no resources from the government to pursue a case, but instead must invest their own resources with no guarantee they will be reimbursed. And to the extent they are reimbursed, it is the defendant, not the government, that pays the relator. *See supra*, note 7. The relator is not provided office space, supplies, staff or any of the customary resources that often accompany an office and is not required to keep a "place of business for the public use". *See Germaine*, 99 U.S. at 512. In contrast, the examples of "temporary" officers the district court cited are provided federal resources, in addition to having other hallmarks of office. For example a special prosecutor not only "wields 'the power to employ the full machinery of the state,'" *Donziger*, 38 F.4th at 299 (citation omitted), they do so

with substantial federal resources. *See* 28 C.F.R. § 600.5 (authorizing assignment of Department of Justice personnel to Special Counsel as well as hiring of additional staff); *id*. § 600.8(a) (providing that "[a] Special Counsel shall be provided all appropriate resources by the Department of Justice"); *see also Morrison v. Olsen*, 487 U.S. 654, 663 n.7 (1988) (independent counsel statute specified that the Department of Justice "shall pay all costs relating to the establishment and operation of any office of independent counsel.").[12] Not only is a relator not employed or otherwise supported by the government, but also a relator is often the employee of the very party accused of cheating the government. This only highlights the absurdity of the notion that such a person must be a federal officer.

In addition to providing their own resources to pursue cases, relators take on great personal risk, without the immunities generally available to public officers. For example, relators are frequently subjected to counterclaims. *See, e.g*., *United States ex rel. Cooley v. Ermi, LLC*, No. 1:20-CV-4181-TWT 2024 WL 815514 (N.D. Ga. Feb. 27, 2024) (counterclaims for breach of contract by retaining and disclosing confidential documents and for breach of fiduciary duty). Although relators have some immunity, *see, e.g.,* 18 U.S.C. § 1833(b) (immunity from trade secret claims

[12] Bank receivers had federal resources in addition to exercising executive authority. *United States v. Weitzel*, 246 U.S. 533, 541 (1918) (bank receiver represented by United States Attorney). The court's arbitrator example involved a person with the power to issue binding agency decisions. *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp*., 821 F.3d 19, 37–38 (D.C. Cir. 2016).

for disclosure of information in confidence for the purpose of reporting misconduct); *Siebert v. Gene Sec. Network, Inc*., No. 11-cv-01987-JST, 2013 WL 5645309 (N.D. Cal. Oct. 16, 2013) (acknowledging public policy exception precluding certain counterclaims), it has not proven as protective as the immunity available to federal officeholders.[13] Relators may also be liable for costs if they do not prevail. *See, e.g., United States ex rel. Saldivar v. Fresenius Med. Care Holdings, Inc*., 291 F. Supp. 3d 1345 (N.D. Ga. 2017). Those amounts can be substantial for a private individual, and are not a personal exposure that a federal officer would have.

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In summary, a relator possesses neither the powers nor other attributes of a federal officer. A relator is simply a private person, pursuing an individual case, at their own expense and effort, with only the expectation of a reward if their efforts succeed in benefiting the government's fight against fraud. That law-enforcement arrangement, well-grounded in history and demonstrably protective of the government's prerogatives, does not implicate the Appointments Clause.

[13] *See, e.g., Siebert,* 2013 WL 5645309 (allowing counterclaim to proceed to determine whether all the documents taken were required for *qui tam* action). *Compare Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (federal officers performing discretionary functions have qualified immunity).

CONCLUSION

For the foregoing reasons, TAF Coalition urges the Court to reverse the judgment below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
(Fed. R. App. P. 29(a)(5); 32(a); & 32(g)(1))

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6443 words, excluding the parts of the document exempted under Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief for *amicus curiae* The Anti-Fraud Coalition with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on January 15, 2025. All participants in the case are registered CM/ECF users, and services will be accomplished by the appellate CM/ECF system.

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