No. 21–1052

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, EX REL.
JESSE POLANSKY M.D., MPH.,
Petitioner,

v.

EXECUTIVE HEALTH RESOURCES, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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October 24, 2022

QUESTION PRESENTED

Whether the Government has authority to dismiss a False Claims Act *qui tam* suit after initially declining to intervene in the action, and what standard applies if the Government has that authority.

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INTEREST OF *AMICUS CURIAE*[1]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center. WLF promotes free enterprise, individual rights, limited government, and the rule of law. WLF often appears as an *amicus curiae* in significant cases to argue for the proper construction of the False Claims Act (FCA). See, *e.g.*, *Cochise Consultancy, Inc.* v. *United States ex rel. Hunt*, 139 S. Ct. 1507 (2019); *Universal Health Servs., Inc.* v. *United States ex rel. Escobar*, 579 U.S. 176 (2016); *Graham Cnty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280 (2010).

The FCA has taken on a life of its own in recent years. Enacted during the Civil War, the statute began as an important, but limited, tool against government procurement fraudsters and wartime opportunists. Today, the opportunists are often not the targets of the statute, but rather its putative enforcers: enterprising relators have weaponized the FCA into a vehicle for debilitating lawsuits over just about anything that arguably touches—even remotely—the federal fisc. But, sometimes, even the government realizes that—after having itself declined to prosecute an FCA case—a relator has pushed her case too far or pursued claims that the government does not think should be pursued.

That is what this case is about: whether the government retains the ability to dismiss a case brought *in the government's own name* and for wrongs

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person other than Washington Legal Foundation and its counsel made any monetary contribution toward the preparation and submission of this brief. All parties consented to WLF's filing this brief.

allegedly done *to the government*, or whether a private-party relator gets to ignore the government's wishes and keep litigating if the government has declined to intervene. Although the statutory text clearly answers that question in respondents' favor, WLF focuses on another problem with petitioner's position: its threat to separation of powers. Maintaining robust dismissal authority is essential to avoiding the serious constitutional difficulties that would arise if the FCA were read to strip the Executive Branch of its control over *qui tam* actions and to place that control exclusively in the hands of a private party.

STATEMENT

The facts of this case are detailed in the parties' briefs, but WLF highlights a few points relevant to its separation of powers argument.

Petitioner Jesse Polansky filed this *qui tam* action in 2012. Pet. App. 5a. He alleged that respondent Executive Health Resources enabled hospitals to certify inpatient services when, under Medicare rules, those services should have been outpatient. *Id.* at 4a. According to relator, these inpatient stays were not "reasonable and necessary" for the patient's diagnosis or treatment and therefore did not comply with the statute authorizing reimbursement under Medicare. *Id.*

The government investigated the allegations for two years before electing not to intervene. Pet. App. 5a. Petitioner then prosecuted the case on his own for several years, garnering sanctions for his discovery behavior along the way. *Id.* at 5a–6a, 35a–36a.

In 2019, the government reentered the picture. It told the parties that it was considering dismissal but agreed to refrain to give petitioner a chance to

significantly narrow his claims. *Id.* at 6a, 37a, 55a. Petitioner did not adequately do so. *Id.* at 6a, 38a. That failure, combined with increasing concerns about impending discovery burdens and petitioner's credibility, led the government to move to dismiss the now-seven-year-old action. *Id.* at 37a–38a, 39a, 55a–56a. The district court granted the government's motion, and the Third Circuit affirmed. *Id.* at 7a, 30a.

SUMMARY OF ARGUMENT

I. Petitioner interprets the FCA to mean that the Executive has *no* authority to dismiss an FCA action after declination. That would violate core separation-of-powers principles by extinguishing one of the Executive's necessary (and few) mechanisms for controlling the prosecution of government claims.

A. The separation of powers into three coordinate branches is foundational. Within this constitutional scheme, Article II vests the executive power wholly and exclusively in the Executive. That power includes the Executive's decision to prosecute a case, and the Executive's corollary right to control any such prosecutions. Keeping that power where the Constitution vests it—in the Executive Branch—requires that the Executive maintain "sufficient control" over government prosecutions. *Morrison* v. *Olson*, 487 U.S. 654, 696 (1988).

B. Petitioner's position collides with these principles. The FCA's enlistment of private prosecutors already pushes against Article II confines. The statute has thus far survived more sweeping constitutional challenges, but it has done so only *because of* the significant control that the dismissal power provides to the Executive. Taking that power away would

irretrievably undermine the Executive Branch and violate the Constitution's separation of powers.

II. Petitioner derogates these Article II concerns as insignificant because, he says, *qui tam* litigation has an "ancient pedigree." Pet. Br. 33. Maybe so, but that pedigree bears no resemblance to the modern-day FCA provisions at issue here. More specifically, the 1986 amendments vastly expanded relators' independence and control over *qui tam* suits, while also making explicit the government's backstop ability to dismiss cases. Alongside that FCA expansion, moreover, the expansion of the administrative state has provided relators with nearly endless sources of potential FCA claims. And relators have taken notice and action. This litigation environment is not "ancient"; it is uniquely present-day. History therefore cannot justify petitioner's bid to hamstring the Executive's ability to control *qui tam* suits.

ARGUMENT

I. PETITIONER'S INTERPRETATION OF THE FALSE CLAIMS ACT WOULD VIOLATE SEPARATION OF POWERS.

More than 20 years ago, this Court "express[ed] no view on the question whether *qui tam* suits violate Article II." *Vermont Agency of Nat. Res.* v. *United States ex rel. Stevens,* 529 U.S. 765, 778 n.8 (2000). Petitioner puts that question squarely back in the Court's crosshairs when he argues that the Executive "has *no right* to displace the relator's 'exclusive' control" over an FCA action after an initial declination. Pet. Br. 4 (emphasis added). That is as alarmingly forthright as it is wrong. Although the FCA *already* strains Article II boundaries, divesting the Executive of its ability to control *qui tam* litigation would

irreparably transgress them. The Court should reject petitioner's interpretation and avoid such a result.

A. The Constitution Vests the Right to Control Litigation in the Executive Branch.

1. Chief among the Constitution's innovations is the "separation of governmental powers into three coordinate Branches." *Mistretta* v. *United States*, 488 U.S. 361, 380 (1989). The division "was not simply an abstract generalization in the minds of the Framers." *Buckley* v. *Valeo*, 424 U.S. 1, 124 (1976) (per curiam). Instead, it entails "a carefully crafted system of checked and balanced power within each Branch," *Mistretta*, 488 U.S. at 380–81, the "ultimate purpose of [which] is to protect the liberty and security of the governed," *Metro. Wash. Airports Auth.* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991).

Within this tripartite system, "the executive power—all of it—is vested in a President." *Seila Law, LLC* v. *CFPB*, 140 S. Ct. 2183, 2191 (2020) (internal quotation marks omitted); U.S. Const. art. II, § 1. Splitting the executive authority, by contrast, "might impede or frustrate the most important measures of the government, in the most critical emergencies of the state" or divide the nation into "irreconcilable factions." Alexander Hamilton, *The Federalist* No. 70 at 429 (Bantam ed. 2003). Consolidating the executive power in one Executive protects against those outcomes and ensures national uniformity.

"The vesting of the executive power in the President was essentially a grant of power to execute the laws." *Myers* v. *United States*, 272 U.S. 52, 117 (1926). To that end, the President's "most important constitutional duty" is to "take Care that the Laws be

faithfully executed." *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 559 (1992) (citing U.S. Const. art. II, § 3). That duty includes the "*exclusive* authority and *absolute* discretion to decide whether to prosecute a case." *United States* v. *Nixon*, 418 U.S. 683, 693 (1974) (emphases added). And it extends to both criminal and civil matters. See *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985) (explaining that this Court has "recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion").

The Executive's prosecution authority likewise includes the subsidiary right to control litigation brought in the government's name. "'[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.'" *Seila Law*, 140 S. Ct. at 2197 (quoting 1 Annals of Cong. 463 (1789)). "The President's power to execute the laws includes … the discretion to decide whether to prosecute a claim, *and* the control of litigation brought to enforce the government's interests." William P. Barr, *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. OLC 207, 228–29 (1989) (emphasis added) (Barr OLC Memo). In other words, "so far as the interests of the United States are concerned, [all suits] are subject to the direction, and within the control of, the Attorney-General." *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458–59 (1868).

2. This Court has, "[t]ime and again," "reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches." *Morrison*, 487 U.S. at 693. One

branch cannot "possess directly or indirectly, an overruling influence over the others in the administration of their respective powers." James Madison, *The Federalist* No. 48 at 300 (Bantam ed. 2003). A statute violates that precept when it "either accrete[s] to a single Branch powers more appropriately diffused among separate Branches or … undermine[s] the authority and independence of one or another coordinate Branch." *Mistretta*, 488 U.S. at 382. In the particular context of Executive intrusions, the inquiry is whether a law "impermissibly undermines the powers of the Executive Branch, or disrupts the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions." *Morrison*, 487 U.S. at 695 (cleaned up).

The Court has "not hesitated to invalidate provisions of law which violate th[ese] principle[s]." *Id.* at 693. That includes congressional delegations of Executive power to other actors, *e.g.*, *Printz* v. *United States*, 521 U.S. 898, 922 (1997), or to Congress itself, *e.g.*, *Bowsher* v. *Synar*, 478 U.S. 714, 726 (1986) ("The structure of the Constitution does not permit Congress to execute the laws" or permit Congress to retain "control over the execution of the laws."). Only when the Executive Branch retains "sufficient control" over litigation can a law "ensure that the President is able to perform his constitutionally assigned duties." *Morrison*, 487 U.S. at 696.

B. Divesting the Executive of Dismissal Authority Would Impermissibly Impede the Executive's Take Care Powers.

Petitioner's interpretation of the False Claims Act is categorical: "[t]he government has *no* statutory authority to dismiss a private FCA action after

declining to 'proceed' with the action," and "cannot revive its forfeited FCA dismissal authority with a post-hoc intervention." Pet. Br. 14, 23 (emphasis added). Reading the FCA to shackle the Executive's ability to terminate cases, however, would create the sort of "encroachment and aggrandizement" that violates "separation-of-powers jurisprudence." *Mistretta*, 488 U.S. at 382. The Court should reject that view.

1. The FCA's *qui tam* provisions start from a point of considerable strain on Executive power. Their very premise is that a private relator—not the Executive Branch—investigates and commences litigation "for the person *and* for the United States Government." 31 U.S.C. § 3730(b)(1) (emphasis added). Once filed, the Executive must either intervene or allow the relator to proceed with the case. *Id.* §§ 3730(c)(1), 3730(c)(3). From the outset, therefore, the FCA obligates the Executive Branch to investigate a case it otherwise might not have investigated, and then to either litigate or cede control to a private citizen. If the government does not intervene, moreover, relators can shape the arguments and litigation according to their own whims.

What is more, the interests of these deputized private citizens are *not* the same as the government's. As this Court has explained, "*qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 949 (1997). They are "private persons acting … under the strong stimulus of personal ill will or the hope of gain." *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 541 n.5 (1943).

Placing Executive power into the hands of financially motivated profiteers was evidently by design: Congress "sought to disperse some quantum of executive authority amongst the general public." *United States ex rel. Kelly* v. *Boeing Co.*, 9 F.3d 743, 750 (9th Cir. 1993). Indeed, in 1986, when Congress greatly expanded relators' powers, legislators were remarkably candid about the fact that Congress simply did not like how the Executive Branch was performing its constitutionally assigned duties. One legislator, for example, said that "the Government bureaucracy [was] unwilling to guard against or aggressively punish fraud," and another lamented that the "Department of Justice has not done an acceptable job of prosecuting defense contractor fraud." Barr OLC Memo at 230 (quoting 131 Cong. Rec. 22,322 (daily ed. Aug. 1, 1985); 132 Cong. Rec. H6482 (daily ed. Sept. 9, 1986) (statement of Rep. Berman)). Their solution: assign more Executive power to private relators.

2. These infractions have prompted frontal attacks on the FCA's constitutionality. According to the Executive's own Office of Legal Counsel, for example, the statute "effectively strips [the authority to enforce the laws] away from the Executive and vests it in private individuals, depriving the Executive of sufficient supervision and control over the exercise of these sovereign powers" "even under [*Morrison*'s] most lenient standard for judging threats to separation of powers." Barr OLC Memo at 210, 229.

Courts of appeals have thus far stopped short of holding that the FCA violates "Article II's Take Care Clause" or "the principle of separation of powers," but they have only done so "*[p]recisely because of* the United States' significant control." *Yates* v. *Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1312

(11th Cir. 2021) (emphasis added). That "control," moreover, has been explicitly and directly tied to the government's dismissal authority. In *Kelly*, therefore, it was critical that the government has "authority to limit the conduct of the prosecutor and ultimately *end* the litigation in a qui tam action." 9 F.3d at 754. For the Fifth Circuit, "the unilateral power to dismiss an action notwithstanding the objections of [relator]" was essential to a holding that "the Executive retains significant control over litigation pursued under the FCA by a qui tam relator." *Riley* v. *St. Luke's Episcopal Hosp.*, 252 F.3d 749, 753 (5th Cir. 2001) (en banc); see also, *e.g.*, *Ridenour* v. *Kaiser-Hill Co.*, 397 F.3d 925, 934 (10th Cir. 2005) (warning of "constitutionally unsteady ground" without dismissal authority). Indeed, "[n]othing in § 3730(c)(2)(A) purports to deprive the Executive Branch of its historical prerogative to decide which cases should go forward in the name of the United States." *Swift* v. *United States*, 318 F.3d 250, 253 (D.C. Cir. 2003); cf. *Sierra* v. *City of Hallandale Beach*, 996 F.3d 1110, 1135 n.14 (11th Cir. 2021) (Newsom, J., concurring) ("One possible explanation" for the constitutionality of *qui tam* suits is that they "didn't raise Article II problems because the executive branch retained full control over them.").

3. Petitioner proposes to take away the Executive's unfettered dismissal power and, with it, the linchpin on which the FCA has survived broader constitutional challenges to date. In doing so, petitioner offers only the passing assertion that "[t]he Executive's control is at least as strong here as in" *Morrison*, because the Executive "has the option to take full control at the outset; it has the ability to pursue alternative remedies in other forums; [and] it can limit discovery and participate (via intervention) later in the case."

Pet. Br. 34. Petitioner is incorrect for at least two reasons.

First, an FCA without a government dismissal authority would *not* provide "sufficient control over the [relator] to ensure that the President is able to perform his constitutionally assigned duties." *Morrison*, 487 U.S. at 696. *Morrison* upheld the Attorney General's authority to appoint an independent counsel under the Ethics in Government Act. The Court focused on four built-in protections: (1) the Attorney General could remove the independent counsel for good cause, (2) the independent counsel would be appointed only at the request of the Attorney General, (3) the Attorney General's factual submission defined the scope of the investigation and the independent counsel's jurisdiction, and (4) the independent counsel generally had to follow DOJ policies. *Id*. Those features meant that the statute did not "impermissibly undermine the powers of the Executive Branch." *Id.* at 658.

Nothing like those "controls" exists under the FCA. The government does not choose or appoint relators, much less control the scope of their claims. Indeed, a significant genesis of the government's dismissal motion in this case was that relator *refused* to appropriately narrow his claims. *Supra* at 2–3. Relators do not follow DOJ policy, and the government cannot stop a relator from initiating suit. See Barr OLC Memo at 229–30 (explaining how *Morrison* "highlights the unconstitutionality of the *qui tam* provisions").

One of the few tools that the Executive has at its disposal is the power to dismiss a *qui tam* suit. Placing the FCA and the independent counsel statute side by side, that authority has made all the difference. The independent counsel's removal authority was "[m]ost

important[]" in *Morrison*. 487 U.S. at 696. For its part, the "only practicable way to 'remove' a relator [under the FCA] is to end the qui tam litigation—and this the government has power to do." *Kelly*, 9 F.3d at 755. In a similar vein, although "the government has greater authority to prevent the initiation of prosecution by an independent counsel than by a qui tam relator[,] … once prosecution has been initiated, the government has greater authority to limit the conduct of the prosecutor and ultimately *end* the litigation in a qui tam action." *Id.* at 754. Petitioner would abolish that authority.

Second, allowing *qui tam* actions to proceed despite the Executive's dismissal motion would elevate the judgments of private individuals over the Executive. A *qui tam* relator is "a self-appointed agent" of Congress "who answers to no one." *Riley*, 252 F.3d at 760 (Smith, J., dissenting). "[M]otivated primarily by prospects of monetary reward rather than the public good," relators are undeniably self-interested. *Schumer*, 520 U.S. at 949. "As the interests of the government and relator diverge," however, the "congressionally created enlistment of private enforcement is increasingly ill served." *United States ex rel. Harman* v. *Trinity Indus., Inc.*, 872 F.3d 645, 669–70 (5th Cir. 2017). So is the Constitution's vesting of executive power in the Executive rather than in congressionally deputized "bounty hunters." Barr OLC Memo at 211, 238.

4. According to some, "[t]he FCA's most severe violations of the separation of powers principles embedded in the Take Care Clause include the fact that unaccountable, self-interested relators are put in charge of vindicating government rights, and that the transparency and controls of the constitutional system are not in place to influence the outcome of such

litigation." *Riley*, 252 F.3d at 766 (Smith, J., dissenting).

Such questions about the statute's constitutionality are not explicitly before the Court, but petitioner's interpretation places them directly in play. The cornerstone of separation-of-powers jurisprudence in this context requires that the Executive maintain "sufficient control" over relators. But petitioner urges the Court to read the FCA to eliminate one of the Executive's most powerful controls—under a statute that already limits the Executive's usual set of controls. That would render the FCA unconstitutional. As this Court has done many times, therefore, the FCA should be "construed as to avoid serious doubt of [its] constitutionality," *CFTC* v. *Schor*, 478 U.S. 833, 841 (1986), and petitioner's interpretation should be rejected.

II. PETITIONER'S APPEAL TO HISTORICAL PRACTICE IS MISGUIDED.

Petitioner brushes aside the constitutional problems with his interpretation as "no[t] serious" because, in his view, *qui tam* actions have an "ancient pedigree" that is "dispositive." Pet. Br. 33. Although petitioner is correct that "historical practice" matters, *Zivotofsky* v. *Kerry*, 576 U.S. 1, 23 (2015), his entire argument is based on the wrong historical frame of reference. The relevant date is 1986—not 1789—because that is when Congress "permitt[ed] actions by an expanded universe of plaintiffs with different incentives … [and] essentially create[d] a new cause of action." *Schumer*, 520 U.S. at 950.

1. The early history of *qui tam* statutes was unsteady. The practice dates to thirteenth century England. Note, *The History and Dev. of Qui Tam*, 1972 Wash. U. L. Q. 81, 83 (1972). But it soon "became

subject to several forms of abuse," and "overly aggressive informers" "outraged" the public. *Id.* at 89; Sir Edward Coke, *The Third Part of the Insts. of the L. of England* 191-92 (The Lawbook Exch., LTD 2002). "From the 16th century forward, the history of *qui tam* is one of retreat, as Parliament progressively restricted and curtailed its use" before "ultimately … abolish[ing it] in 1951." Barr OLC Memo at 235; see also J. R. Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. Rev. 539 (2000).

In the United States, "[*q*]*ui tam* enforcement has never been as widespread … as it once was in England." Beck, *supra*, at 553. "Adopted when the Executive was embryonic, [early] statutes were essentially stop-gap measures, confined to narrow circumstances where the Executive lacked the resources to enforce the law. Their intent was to assist a fledgling Executive, not supplant it." Barr OLC Memo at 235.

The modern-day FCA got its start in 1863, during the Civil War. One of its "chief purposes … was to stimulate action to protect the government against war frauds." *Hess*, 317 U.S. at 547. Its enactment followed from a "series of sensational congressional investigations [that] prompted hearings where witnesses painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war." *Escobar*, 579 U.S. at 181–82 (internal quotation marks omitted). With the Act, Congress hoped to "hold out to a confederate a strong temptation to betray his coconspirator, and bring him to justice." Beck, *supra*,

at 556 n.64 (citing Cong. Globe, 37th Cong., 3d Sess. 955–56 (1863) (statement of Sen. Howard)).

2. Today's FCA looks nothing like that modest wartime measure. Although there were earlier amendments, the statute was dramatically overhauled and expanded in 1986. Pub. L. No. 99-562. Relevant here, the 1986 amendments increased the authority and independence of *qui tam* relators by increasing the maximum penalty for each violation of the act, § 3729(a), increasing relator recovery caps to 30 percent, § 3730(d)(2), allowing relator participation after government intervention, § 3730(c)(1), and allowing the relator to share in the recovery when the government pursues an alternative remedy, § 3730(c)(5). Alongside this massive growth of relators' power, Congress made explicit a critical backstop for the Executive: the dismissal provision in § 3730(c)(2)(A).

These amendments, moreover, have coincided with an ongoing expansion of federal programs and budgets. "The Federal Government has," of course, "expanded dramatically over the past two centuries." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 535 (2012). But even more recently, the administrative state has seen "explosive growth … since 1970." *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2619 & n.2 (2022) (Gorsuch, J., concurring). There are "dozens of new federal administrative agencies," "produc[ing] thousands, if not millions, of guidance documents" and issuing "three thousand to five thousand final rules" each year. *Id.* (internal quotation marks omitted). *Every corner* of that administrative morass provides fodder for potential FCA suits.

Financially motivated relators have predictably tried to take advantage. According to DOJ, because the

1986 amendments "substantially strengthened the civil False Claims Act … by increasing incentives for whistleblowers to file lawsuits," lawsuits are way up—"with 598 *qui tam* suits filed [in 2021 for] an average of over 11 new cases every week." Dep't of Just., *Just. Dep't's False Claims Act Settlements and Judgments Exceed $5.6 Billion in Fiscal Year 2021* (Feb. 1, 2022), https://bit.ly/3MMSUMl. These post-1986 lawsuits have garnered more than $70 billion in judgments or settlements, the vast majority of which have come from government-initiated or intervened cases. *Id.*; https://www.justice.gov/file/1467871/download.

In 2018, after assessing this post-1986 onslaught, the Department of Justice took more formal action to reaffirm the importance of its dismissal authority. See Michael D. Granston, *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. § 3730(c)(2)(A)* (Jan. 10, 2018) (Granston Memo). The memo starts by explaining that, "[o]ver the last several years, the Department has seen record increases in *qui tam* actions filed," and that the dismissal provision is "an important tool to advance the government's interests, preserve limited resources, and avoid adverse precedent." *Id.* at 1–2. The government identified various "factors that the government has relied upon in seeking to dismiss a *qui tam* action pursuant to section 3730(c)(2)(A)." *Id.* Petitioner seeks to render that authority obsolete.

3. Petitioner's appeal to history as a supposedly "dispositive" cure-all for the constitutional issues with his position (Pet. Br. 33) is incompatible with the actual history of the FCA and *qui tam* litigation before it.

To support his historical argument, petitioner reasons from silence. In particular, he contends that

the government first had "no intervention rights at all" and then could intervene only at the case's outset, before finally securing a dismissal right in 1986. Pet. Br. 26–27, 33. Because petitioner can find no Article II "objection during the nation's first two-hundred years or so," he concludes that there must be no "serious Take Care Clause (or any other Article II) issue." *Id.* at 33. Petitioner is mistaken.

To start, even petitioner's cursory version of the history is not "dispositive," because "a longstanding history of related federal action does not demonstrate a statute's constitutionality." *United States* v. *Comstock*, 560 U.S. 126, 137 (2010). That is true "even when that span of time covers our entire national existence and indeed predates it." *Walz* v. *Tax Comm'n of City of N.Y.*, 397 U.S. 664, 678 (1970).

More to the point, however, petitioner's version of the history is woefully incomplete. It was not until 1986 that the modern FCA litigation ecosystem was formed—both through the FCA's amendments and the consonant government expansions. For the FCA, the "entire historical inquiry is essentially pointless, since [the current FCA] differs essentially from *qui tam* as it existed in history." Barr OLC Memo at 232. The 1986 amendments were so pervasive—"permitting actions by an expanded universe of plaintiffs with different incentives"—that this Court has said they "essentially create[] a new cause of action." *Schumer*, 520 U.S. at 950. Outside the FCA, "[t]he proliferation of Government, State and Federal, would amaze the Framers, and the administrative state with its reams of regulations would leave them rubbing their eyes." *Alden* v. *Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting). History simply cannot save petitioner's

interpretation from the constitutional quagmire that it would create. The Court should reject it.

CONCLUSION

The Court should affirm.

Respectfully submitted,

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