**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.*

Appeal from the United States District Court
for the Middle District of Florida, Hon. Kathryn Kimball Mizelle,
No. 8:19-cv-01236-KKM

## BRIEF OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS-APPELLEES

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**CERTIFICATE OF INTERESTED PERSONS**

Under Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 and 29-1, Washington Legal Foundation, through its undersigned counsel, certifies that the list of interested persons identified by *amicus curiae* Pacific Legal Foundation in their Certificate of Interested Persons, filed on March 17, 2025, ECF No. 96, is correct and complete, except for the omission of the following interested persons:

1. Washington Legal Foundation;
2. Cory L. Andrews.

Dated: March 17, 2025

Respectfully submitted,

/s/ Cory L. Andrews
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## CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 and 29-1, Washington Legal Foundation, through its undersigned counsel, certifies that it is a nonprofit, tax-exempt corporation under section 501(c)(3) of the Internal Revenue Code. It has no parent, issues no stock, and no publicly held company has any ownership interest in it.

Dated: March 17, 2025

Respectfully submitted,

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## IDENTITY AND 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. It often appears as an *amicus curiae* in significant cases to argue for the proper constitutional construction of the False Claims Act (FCA). *See, e.g.*, *United States ex rel. Polansky v. Exec. Health Res.*, 143 S. Ct. 1720 (2023).

The FCA has taken on a life of its own in recent years. Enacted during the Civil War, the statute was designed to deter and punish government procurement fraudsters and wartime opportunists. Today, the opportunists are often not the targets of the statute, but 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.

This perverse result contravenes our constitutional structure. Only the executive branch may represent the interests of the United States in litigation; Congress cannot delegate that power to private actors. Officers in the executive branch are appointed to an office of public trust and act under obligation of oath, at peril of impeachment. And Article II's directives protect against the abuse of prosecutorial discretion. The FCA upends that design by allowing private relators to wield the

[1] No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

tremendous power of public prosecution with no constitutional checks on their discretion. The district court correctly held that such a regime cannot be squared with Article II. WLF submits this brief to show why, among other things, the citations to history from appellants and their *amici* are misguided and cannot save the statute's constitutionality.

## STATEMENT OF THE ISSUE

Whether the False Claims Act's *qui tam* provisions are contrary to the Vesting, Take Care, and Appointments Clauses in Article II of the Constitution.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), the Supreme Court held that the FCA "effect[ed] a partial assignment of the Government's damages claim" to the relator, which, alongside "the long tradition of *qui tam* actions in England and the American Colonies," conclusively showed that "*qui tam* actions were 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'" *Id.* at 773–77 (citation omitted). The Court, however, left open whether the FCA's partial assignment of the government's right of action "violate[s] Article II, in particular the Appointments Clause of § 2 and the 'take Care' Clause of § 3." *Id.* at 778 n.8. This case squarely presents that question.

Article II forbids Congress from delegating executive power to a private party

free from executive supervision and control. "[A]t its core, the 'executive power' entail[s] the authority to bring legal actions on behalf of the community for remedies that accrued to the public generally." *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1134 (11th Cir. 2021) (Newsom, J., concurring). Similarly, the executive power also entails the right to seek redress for wrongs against the government as a body corporate—that is, claims sounding in tort, property, or contract law. *See* Henry Monaghan, *The Protective Power of the Presidency*, 93 Colum. L. Rev. 1, 11, 66–70 (1993) ("[T]he constitutional conception of a Chief Executive authorized to enforce the laws includes a general authority to protect and defend the personnel, property, and instrumentalities of the United States from harm."); *see also Cotton v. United States*, 52 U.S. (11 How.) 229, 231 (1850) ("[A]s a corporation or body politic [the United States] may bring suits to enforce their contracts and protect their property . . . ."). Congress cannot delegate those powers to persons outside the supervision and control of the Executive Branch.

Like the relator in *Stevens*, Appellants and their *amici* have argued that the history of *qui tam* settles the constitutionality of the False Claims Act under Article II. *See, e.g.*, Zafirov Opening Br. 19–33; Gov't Opening Br. 19–21. This theory is sometimes referred to as "liquidation," whereby an indeterminate constitutional meaning can be settled or "liquidated" based on deliberate historical conduct confirming its meaning. But "history alone is an insufficient justification, particularly

when the issue is whether the [FCA's] *qui tam* provision is constitutional, not whether all *qui tam* actions are unconstitutional." *Unique Prod. Sols., Ltd., v. Hy-Grade Valve, Inc.*, 765 F. Supp. 2d 997, 1004 (N.D. Ohio 2011). The history does not bear as directly on the Article II issue as it did on the Article III question in *Stevens*. Nor does it carry the weight that appellants and their *amici* hope it does—and need it to.

First, as explained in section I, founding-era statutes do not "liquidate" the constitutionality of the False Claims Act. That doctrine has three main elements, and appellants satisfy none of them. They identify no indeterminacy in Article II itself that would justify looking to historical practice. Even if they had, there was no course of deliberate practice concerning *qui tam* statutes and no evidence that their constitutionality was seriously considered at all. Nor is there any trace of acquiescence to conduct that the FCA purports to authorize—private parties suing to vindicate public wrongs. If anything, the history cuts the other way.

Second, as explained in section II, the early *qui tam* statutes cited by appellants and their *amici* do not share the problematic features of the FCA. Some authorized a victim of the defendant's wrongful conduct—a private wrong—to sue for a remedy that would benefit both the relator and the government. Others are not actually direct *qui tam* actions at all. And the rest include all kinds of diverse provisions that point in many directions. This diverse array does not remotely show a pattern of

"relevant[] similar[ity]" needed to try to infer meaning from historical analogues. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 28–29 (2022).

All this dismantles appellants' various appeals to history as a reason to uphold the FCA's constitutionality. Relators are almost never personally harmed by the statutory violation, and Zafirov makes no such claim herself. The False Claims Act purports to assign to relators only a bare right of action sounding in fraud—*i.e.*, a right to vindicate a public wrong. But that is a delegation of executive power and an "usurpation of [the executive's] function." *Commonwealth v. Burrell*, 7 Pa. (7 Barr.) 34, 41 (1847). The district court's conclusion that the FCA's *qui tam* provision violates Article II should be affirmed.

## ARGUMENT

### I. THE CONSTITUTIONALITY OF THE FALSE CLAIMS ACT DOES NOT HINGE ON FOUNDING-ERA *QUI TAM* STATUTES.

Appellants and their *amici* have suggested that historical *qui tam* practice in this country is "dispositive," Zafirov Opening Br. 25, and "conclusive with respect to the Article II question." Gov't Opening Br. 20 (quoting *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 752 (5th Cir. 2001) (en banc)); *see also* Beck *Amicus* Br. 2 ("History resolves both constitutional objections raised below."). The argument that history is dispositive of Article II's meaning is known as a liquidation argument: in other words, appellants claim that the history of *qui tam* litigation has "liquidated" the meaning of Article II in a way that settles the False Claims Act's compliance

with it. *Gamble v. United States*, 587 U.S. 678, 721 (2019) (Thomas, J., concurring).

Appellants are wrong. "[E]vidence of 'tradition' unmoored from original meaning is not binding law." *United States v. Rahimi*, 602 U.S. 680, 738 (2024) (Barrett, J., concurring). As James Madison explained, although the Constitution can be "expounded" by legislative practice, it "[can]not [be] controuled or varied by the subordinate authority of a legislature." Letter from James Madison to Charles J. Ingersoll (June 25, 1831). The historical record belies any claim that early *qui tam* statutes solidify Article II's meaning for purposes of assessing the constitutionality of the FCA's *qui tam* provisions.

### A. There Was No Deliberate Course of Conduct Confirming Today's *Qui Tam* Practice.

The first two elements of a liquidation argument ask whether an indeterminacy exists in the constitutional text and, if so, whether a deliberate course of conduct helps clarify how to resolve it. Neither is true here.

*First*, a liquidation theory must start by identifying "an indeterminacy in the meaning of the Constitution." William Baude, *Constitutional Liquidation*, 71 Stan. L. Rev. 1, 13 (2019). Appellants do not do that. They never say what term or phrase in Article II is allegedly indeterminate—whether it is, for example, "executive Power," "Officers of the United States," "take Care," or something else. Appellants thus falter at the very first step.

This starting point also highlights a core difference between the Article II

questions here and the Article III questions in *Stevens*. In *Stevens*, the Court looked to historical practice not only to resolve the indeterminacies inherent in the terms "Cases" and "Controversies," but also because those terms necessarily refer to the kinds of suits that courts had entertained before 1789. 529 U.S. at 774. The relevant provisions of Article II, by contrast, do not import the English practice of executing laws. Instead, Article II builds on and in some respects departs from that pre-Constitution practice. These distinctions are important: rather than history providing *direct* evidence of constitutional meaning, as it was for Article III, historical practice pre- and post-ratification is, at most, *indirect* evidence of the meaning of Article II.

*Second*, even if an indeterminacy were identified, appellants must show a "[c]ourse of deliberate practice" that gives meaning to that indeterminacy. Baude, *supra*, at 16–18. No early *qui tam* practice is sufficiently deliberate to do that. On the contrary, "early *qui tam* statutes do not . . . demonstrate a determinate 'original understanding' of the constitutional separation of powers. Because American-style separation of powers had never been put into practical operation before the 1780s, members of the First Congress could not possibly have grasped all of the questions that it raised, let alone worked out coherent answers to them." Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich. L. Rev. 689, 727 (2004). There is simply no evidence that the constitutionality of these statutes was ever seriously considered in our nascent republic. This lack of deliberation is fatal

to appellants' argument. *See* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. Chi. L. Rev. 519, 527–28 (2003) (explaining Madison's view that statutes "passed with little deliberation" over their constitutionality are not entitled to liquidating weight).

### B. There Was No Acquiescence to Today's Qui Tam Practice.

The final element of a liquidation argument requires showing "acquiescence and public sanction" of any interpretive gloss on the constitutional text. Baude, *supra*, at 18–21. That did not happen here either: the practice of allowing private persons to sue, *qui tam* or otherwise, to vindicate a public wrong without some special interest of their own has never received official acquiescence or public sanction.

Just the opposite: "[f]rom 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." William P. Barr, *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. OLC 207, 235 (1989). In England, *qui tam* actions "became subject to several forms of abuse," abuse that "outraged" the public. Note, *The History and Development of Qui Tam*, 1972 Wash. U. L. Q. 81, 89 (1972). And in the United States, "[*q*]*ui tam* enforcement has never been as widespread . . . as it once was in England." J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. Rev. 539, 553 (2000). Indeed, the "entire historical inquiry is essentially pointless, since [the

current False Claims Act] differs essentially from *qui tam* as it existed in history." Barr, *supra*, at 232; *see also Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 950 (1997) (explaining that the 1986 amendments "essentially create[d] a new cause of action").

Far from providing public sanction or acquiescence, American courts in the early republic repeatedly affirmed the principle that "the law gives no *private* remedy for any thing but a *private* wrong." 3 William Blackstone, *Commentaries on the Laws of England* *219 (1768); *see, e.g.*, *Ketchum v. City of Buffalo*, 14 N.Y. (4 Kern.) 356, 371–72 (1856) ("[The plaintiffs] complain of the invasion of no private right. They ask not the enforcement or protection of such a right, nor the redress or prevention of a wrong done or threatened to them as private persons in their individual character."); *O.B. Farrelly & Co. v. City of Cincinnati*, 3 Ohio Dec. Reprint 115, 116 (Super. Ct. 1859) ("Individuals cannot enforce a public right, or redress a public injury by suits in their own names. The law gives no private remedy for anything but a private wrong."); *Bailey v. Phila., Wilmington & Balt. R.R.*, 4 Del. (4 Harr.) 389, 411 (1846) (Houston, J., concurring) (discussing the "competen[cy] [of] the legislature" to enact such a statute).

As the New York Court of Appeals put it, "[n]o private person or number of persons can assume to be the champions of the community." *People v. Ingersoll*, 58 N.Y. (13 Sickels) 1, 45 (1874). When the government and the public have been

wronged, "the sole remedy is by public prosecution, unless special damage is caused to individuals." *Wesson v. Washburn Iron Co.*, 95 Mass. (13 Allen) 95, 103 (1866).

This rule applied equally in *qui tam* actions. *Commonwealth v. Burrell*, 7 Pa. (7 Barr.) 34 (1847), is illustrative. A private relator sued arguing that a state-court judge unlawfully held office because "the Senate had refused its advice and consent to the appointment." *Id.* at 34. Earlier, the Pennsylvania legislature had passed a statute that could have been read to allow suit by "any person or persons desiring to prosecute." *Id.* at 36–37. The court rejected that reading, questioning whether Pennsylvania courts had "ever allow[ed] an information on [the] suggestion [of a private relator] for a public wrong." *Id.* at 38 (discussing *Respublica v. Griffiths*, 2 U.S. (2 Dall.) 112 (Pa. 1790), and *Respublica v. Prior*, 1 Yeates 206 (Pa. 1793)). Had there been an example of such a case, even in a neighboring jurisdiction, surely the parties would have raised it and the court would have commented on it.

The court then explained that constitutional concerns bolstered its statutory construction. The court observed that a "private counsel could, at most, be allowed to act by [the attorney general's] permission and under his control." *Id.* at 39. It wondered what "impartiality is there to be expected from a private prosecutor flushed with the excitement of party victory or defeat?" *Id.* Contrasting an Executive Branch officer acting "under the obligation of an oath, and at the peril of impeachment," the court recognized that "a private prosecutor [was] under no obligation or

responsibility at all." *Id.* "[Y]et we are called upon, without any clear warrant, to let him wield at will the tremendous power of public prosecution." *Id.* The court refused to do so.

Problems like these are precisely what Article II's Vesting Clause and Take Care Clause were supposed to prevent. The executive's ability to control the initiation, prosecution, and termination of federal actions is crucial to taking care that the laws are enforced. But prosecutorial discretion also "creates a troubling potential for abuse, even when it is exercised by a governmental entity that is subject to constitutional and other legal and political constraints." Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781, 790 (2009). That is why "the Constitution prohibits Congress and the Executive Branch from delegating such prosecutorial discretion to private parties, who are subject to no such requirements." *Id.* "The legal presumption is, that an officer will do his duty," including exercising enforcement discretion where warranted; to allow private relators to perform that duty in the officer's stead "would deprive the attorney-general of his official discretion, and compel him to act against the dictates of his judgment, perhaps not, as in this instance, at the bidding of a respectable lawyer, but at the bidding of the most ignorant and despicable man in the community." *Burrell*, 7 Pa. at 40–41. That would be a "usurpation of [the attorney general's] function"—a usurpation of executive power. *Id.* at 41.

Other courts from the nineteenth century came to analogous conclusions. *See, e.g.*, *Cleary v. Deliesseline*, 12 S.C.L. (1 McCord) 35, 36 (S.C. Const. App. 1821) ("If this be a wrong done to the relator, in his individual capacity, he has in this, or some other form, a remedy; but if it be a wrong done, or an offence against the whole community, it belongs to them and not to an individual to redress it."); *In re Wellington*, 33 Mass. (16 Pick.) 87, 105 (1834) ("[I]t is for the public officers exclusively to apply, where public rights are to be subserved.").[2] Years later, the Supreme Court reached the same result—refusing to interpret the federal *quo warranto* statute to authorize *qui tam* suits "by persons who had no claim on the office, no right in the office, and no interest which was different from that of every other citizen and taxpayer of the United States." *Newman v. United States ex rel. Frizzell*, 238 U.S. 537, 552 (1915).

* * *

At bottom, even if there are some rough historical analogues for the False Claims Act, that history is not dispositive here. Liquidation is a high bar, and appellants simply do not meet it. The Article II issue was not liquidated in favor of the

[2] *See also, e.g.*, *Sanger v. Kennebec Cnty. Comm'rs*, 25 Me. 291, 296 (1845) ("A private individual can apply for [*mandamus*] only in those cases, where he has some private or particular interest . . . independent of that which he holds in common with the public at large; and it is for the public officers, exclusively to apply, when public rights are to be subserved."); *People ex rel. Russell v. State Prison Inspectors*, 4 Mich. 187, 188–89 (1856) ("[A] private individual can apply [for a writ on relation of the sovereign] only when specially interested.").

False Claims Act's constitutionality; if anything, the historical evidence points in the other direction.

## II. HISTORICAL *QUI TAM* PRACTICE LACKED THE FALSE CLAIMS ACT'S CONSTITUTIONALLY PROBLEMATIC FEATURES.

Appellants and their *amici* cite several historical statutes as allegedly analogous to the superpowered *qui tam* provisions in today's False Claims Act. These arguments fundamentally misunderstand the nature of historical *qui tam* practice and how it relates to the False Claims Act.

Appellants' *amici* do get some things right: as a few have emphasized, *qui tam* litigation by private relators was generally understood as a suit for the vindication of private rights that also happened to vindicate concomitant public rights. *See* Beck *Amicus* Br. 4 ("Qui tam litigation was understood as private enforcement authorized by statute, not an exercise of governmental power requiring constitutional appointment."); *id.* at 30 ("Qui tam informers were understood to exercise a private right rather than executive power, . . . .")[3]; Legal History Scholars *Amici* Br. 6–7 ("[Founding-era] jurists simply regarded the plaintiff's interest in a *qui tam* penalty as a type of conditional private property right, which vested upon commencement of the suit—not an exercise of executive authority."). But that does not help appellants, because this feature of historical *qui tam* practice comes from unique qualities of the

[3] This explains precisely why "we would" *not* "expect to find evidence of [Article II] objections from the Founding era." *Contra id.*

actions themselves, *not* from the fact that the relator was a private person.

That makes all the difference. Key features that gave historical *qui tam* actions their private character—and presumably brought those statutes outside Article II's reach—are conspicuously absent from the False Claims Act. As the district court recognized, D. Ct. Dkt. 346, at 43, the statutes cited by appellants and their *amici* can be categorized into three general buckets, all of which meaningfully differ from the FCA and none of which establish a pattern of relevantly similar statutes.

### A. Statutes That Authorize a Victim to Sue as a Relator Do Not Implicate the FCA's Article II Problems.

One set of statutes includes those authorizing suit when the relator has suffered a private injury concomitant with the injury to the government's interests. Article II problems arise when Congress assigns *the government's* injury to a private relator. In these cases, however, there is no need for Congress to assign away any of the government's claims—a redressable injury to the relator already exists, and Congress need only grant the relator a right of action. By statutorily authorizing the victim to bring suit on behalf of the government as well, Congress is *at most* saying that the government is bound by a court's determination of the issues. *Cf. Taylor v. Sturgell*, 553 U.S. 880, 893 (2008) ("A person who agrees to be bound by the determination of issues in an action between others is bound in accordance with the terms of his agreement." (citation omitted)). That is akin to Congress's recognized powers to waive "the res judicata effect of a prior judicial decision rejecting the validity of

a legal claim against the United States," *United States v. Sioux Nation of Indians*, 448 U.S. 371, 407 (1980), or "to give [effected parties] authority to litigate the validity of [administrative] orders, and, regardless of joinder by the Attorney General, to obtain by appeal a review effective as to the United States." *ICC v. Or-Wash. R.R. & Nav. Co.*, 288 U.S. 14, 25–27 (1933).

Statutes enacted under these powers are not germane to the Article II issues presented here. As the Supreme Court has said, private-injury *qui tam* actions have the deepest roots in Anglo-American jurisprudence, "hav[ing] originated around the end of the 13th century." *Stevens*, 529 U.S. at 774. And such statutes were enacted during the early republic. *See, e.g.*, Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124–25 (authorizing copyright holders to sue *qui tam* for infringement, splitting the penalty 50/50 with the government). The FCA, by contrast, contains no requirement or recognition that a relator be personally aggrieved by the defendant's conduct. These statutes do not liquidate the Article II question.

### B. Statutes That Do Not Expressly Authorize a Private Person to Prosecute for and Recover Statutory Penalties or Forfeiture Do Not Implicate the FCA's Article II Problems.

Appellants' next misstep is to try to cram assorted statutes into the overbroad assertion that "early American courts understood that '[s]tatutes providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue.'" Zafirov Br. 31–32

(quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943)). Wrong again.

"The distinction between public and private wrongs was evidently preserved" in the early nineteenth century. *Burrell*, 7 Pa. at 38. As one treatise explained, "although every statute giving a penalty is, strictly speaking, a penal statute, a common informer or plaintiff *qui tam*, cannot sue upon every such statute, nor on any such statute in which such power is not expressly given to him to do so." Isaac Espinasse, *A Treatise on the Law of Actions on Penal Statutes* 15 (1822).[4] On one side, "[i]f the statute is of a private nature, and there is the same omission in not pointing out who is to sue, [only] the party grieved may sue, [even] though not mentioned, but a common informer, or *qui tam* plaintiff, cannot." *Id.* at 15–16. On the other side, "[i]f the statute has for its object a matter of public concern, and orders any thing to be done under pain of forfeiture, but points out no person who is to sue for the same," then a public officer may sue for the forfeiture. *Id.* at 15. Such statutes should not be read to grant a relator an implied right of action.

The mere mention of an informer receiving part of the penalty changes nothing. Even statutes that allow a private party "to proceed by information, and to

[4] The term "penal statutes" does not mean criminal statutes. *See United States v. Mann*, 26 F. Cas. 1153, 1154 (Story, Circuit Justice, C.C.D.N.H. 1812) (No. 15,718) ("[I]t is the mode of prosecution, and not the nature of the prohibitions, which ordinarily distinguishes penal statutes from criminal statutes.").

convict in a certain penalty" do not authorize relators to sue directly for statutory violations. Espinasse, *supra*, at 16. Such provisions authorize only "an action founded on the judgment of conviction," *id.*; they do not delegate any power to vindicate a public wrong *ex ante*. A debt under a judgment was considered a species of implied contract—and therefore assignable without necessarily implicating Article II. *See* 3 Blackstone, *supra*, at *159–60; *Sawyer v. Vilas*, 19 Vt. 43, 46–47 (1846) ("Judgments are frequently classed by legal writers under the head of contracts. . . . The effect of a judgment is a merger of the original cause of action, upon which the suit is founded, whether it be in tort, or contract; and in either case the judgment constitutes a debt, with the same incidents, in the one case, as in the other."); *see also infra* Section II.C (explaining that a right of action to recover debt for sum certain owed under an express or implied contract was considered to be a species of property).

Only statutes that purport to give "a power . . . in express terms to a common informer to sue directly for the penalty by action," Espinasse, *supra*, at 16, are potentially analogous to the FCA. These express grants were typically made via "terms of art"—the statutes would provide "that one 'moiety' would be paid into the general treasury of the [government] and the other moiety paid 'to and for the [u]se of the Person or Persons who shall prosecute for and recover the same.'" James E. Pfander, *Public Law Litigation in Eighteenth Century America: Diffuse Law Enforcement in*

*a Partisan World*, 92 Fordham L. Rev. 469, 476 (2023) (quoting An Act to Prevent the Slave-Trade and to Encourage the Abolition of Slavery, 1787 R.I. Pub. Laws 4).

These principles distinguish the balance of appellants' historical *qui tam* laws. The presence or absence of such direct-penalty language afflicts most of appellants' cited statutes. Many lack the crucial language altogether and thus do not even purport to authorize a direct suit for a penalty.[5] Others are not even plausibly penal statutes and make no mention of a moiety of any penalty or forfeiture going to an informer or relator.[6] A small number merely entitled an officer to sue for a portion of the penalty as compensation for performance of their duties.[7] Needless to say, these statutes simply have no bearing on the liquidation issue.

### C. Statutes That Could Be Viewed as Authorizing Relators to Sue for Discrete Property Are Not Proper Historical Analogues for the FCA.

The final group of statutes is a mishmash. In order to be relevant to any

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[5] *See, e.g.*, Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 101, 102; Act of Mar. 1, 1793, ch. 19, § 12, 1 Stat. 329, 331; Act of June 5, 1794, ch. 50, § 3, 1 Stat. 381, 383; Act of May 19, 1796, ch. 30, § 18, 1 Stat. 469, 474; Act of May 10, 1800, ch. 51, § 7, 2 Stat. 70, 71; Act of Mar. 30, 1802, ch. 13, § 18, 2 Stat. 139, 145.

[6] *See, e.g.*, Act of Mar. 3, 1797, ch. 20, 1 Stat. 512, 512; Act of June 25, 1798, ch. 60, 1 Stat. 572, 572.

[7] *See, e.g.*, Act of Mar. 3, 1791, ch. 15, § 44, 1 Stat. 199, 209; Act of July 6, 1797, ch. 11, § 20, 1 Stat. 527, 532; Act of Feb. 28, 1799, ch. 17, § 5, 1 Stat. 622, 623. "As the Supreme Court made clear, the [officer] who prosecuted suits for statutory penalties was doing so 'as the agent of the government' rather than as a private citizen." Woolhandler & Nelson, *supra*, at 729 n.188 (quoting *United States v. Morris*, 23 U.S. (10 Wheat.) 246, 290 (1825)).

liquidation inquiry, a historical statute must be "a proper analogue" for the FCA, which "requires a determination of whether the two [statutes] are 'relevantly similar.'" *Bruen*, 597 U.S. at 28–29; *see also Rahimi*, 602 U.S. at 740 (Barrett, J., concurring) ("[A] court must be careful not to [draw the analogy] at such a high level of generality that it waters down the [constitutional limitation]."). Appellants and their *amici* have not made that showing.

In truth, there is no compellingly similar history because the historical landscape is diverse and complicated. One way to think about this statutory heterogeneity is that many of the older laws appear to concern Congress's power to "dispose of . . . Property belonging to the United States." U.S. Const. Art. IV, § 3, cl. 2. In particular, at the Founding, some (but not all) litigable claims were considered to be assignable choses in action, a species of property. When Congress invokes this power, the assignee of that property is arguably suing to vindicate what, after assignment, has become her private right.

These principles help frame many of the statutes on which appellants and their *amici* rely. Appellants have cited, for example, statutes that establish a penalty for prohibited conduct and grant informers a right of action. *See, e.g.*, Zafirov Opening Br. 22–25 (suggesting that "47 separate statutes enacted between 1789 and 1909 [] authorized uninjured informers to bring qui tam actions" (referring to statutes cited in Doc. 264-6)); Gov't Opening Br. 19–20 & n.2 (arguing that such statutes are

conclusive on the Article II question). But appellants' arguments wrench these statutes from their historical context and, when properly viewed in context, those laws are neither internally consistent with one another nor relevantly similar to the False Claims Act.

One set of statutes concerns securing official compliance with statutory duties. For instance, Zafirov cites an early federal statute that required "every collector, naval officer, and surveyor" to keep in his office "a fair table of the rates of fees and duties demandable by law" and to "give a receipt for the fees he shall receive" as part of his duties; "and in case of failure therein, [the official] shall forfeit and pay one hundred dollars, to be recovered with costs, . . . to the use of the informer" of the violation. Act of Aug. 4, 1790, ch. 35, § 55, 1 Stat. 145, 173; *see also* Act of June 18, 1798, ch. 54, §§ 2–3, 7, 1 Stat. 566, 567, 569; Act of May 3, 1802, ch. 48, § 4, 2 Stat. 189, 191; Act of Feb. 20, 1792, ch. 7, § 25, 1 Stat. 232, 239.

These statutes provided for a forfeiture on a bond—*i.e.*, a debt owed under a contract—not just some fine for violation of public law. *See* Nathan Dane, *A General Abridgement and Digest of American Law* 488 (1823) ("All property in action depends entirely upon *contracts*, either expressed or implied; . . . . [The creditor] has property in the evidence of the debt, as the bond &c.; and may maintain trover to recover it."). In the early Republic, to secure faithful execution of the laws by administrative personnel, "oaths were often backed by bonds that might be forfeited

should the official falter in his duties." Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 Yale L.J. 1256, 1309–10 (2006). "Instead of providing disciplinary machinery within bureaus for the hierarchical control of wayward administrators, Congress peppered the early federal statutes with fines, penalties, and forfeitures." *Id.* at 1316. Bonds made it easier to collect on such fines and "also facilitated recovery of funds from dispersed officials who collected taxes or collected fees for postage," among other duties. *Id.* at 1317. "[Q]ui tam actions were often provided by statute as a means of recovering from wayward officials." *Id.* at 1317–18. So when Congress assigned this "injury" to the informer, it could be said to be simply alienating an assignable chose in action rather than executive power.

Beyond securing official compliance with statutory duties, moreover, shipping and commerce regulations were often enforced via *qui tam* action. *See, e.g.*, Act of Mar. 22, 1794, ch. 11, §§ 2–4, 1 Stat. 347, 349 (providing penalty for actively engaging in the slave trade, "one moiety thereof to the use of the United States, and the other moiety thereof to the use of him or her who shall sue for and prosecute the same"); *see also* Act of July 20, 1790, ch. 29, §§ 1, 4, 1 Stat. 131, 131, 133. As such statutes reflect, "bond-and-surety requirements were ubiquitous in eighteenth-century governance." Nicholas R. Parrillo, *Foreign Affairs, Nondelegation, and Original Meaning: Congress's Delegation of Power to Lay Embargoes in 1794*, 172 U.

Pa. L. Rev. 1803, 1840 (2024); *see also* Mashaw, *supra*, at 1299–1300 (discussing an early statute regulating commerce with the Indian tribes requiring a bond). But these statutes seem to assign a property right—a debt on a bond—not a bare right of action to enforce shipping and Indian commerce regulations.

Finally, appellants cite varied statutes under which certain property—such as a ship and its cargo, or smuggled merchandise from Indian territory—is made subject to forfeiture, and the forfeited property is split "one half to the benefit of the person prosecuting, and the other half to the benefit of the United States." Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137, 137–38; *see also* Act of June 13, 1798, ch. 53, § 1, 1 Stat. 565, 565; Act of May 10, 1800, ch. 51, § 1, 2 Stat. 70, 70. These actions likewise appear to involve a transfer of property. The Supreme Court has explained that, when "a forfeiture is given by statute, the rules of the common law may be dispensed with, and [title to] the thing forfeited may . . . vest immediately" in the government, *United States v. Grundy*, 7 U.S. (3 Cranch) 337, 351 (1806), which it could then assign. When a statute provided that certain items "shall be forfeited" upon commission of the offense, it was settled law that "the commission of the offence marks the point of time on which the statutary [sic] transfer of right takes place." *United States v. 1,960 Bags of Coffee*, 12 U.S. (8 Cranch) 398, 405 (1814). The upshot is that suits providing for such forfeitures seemingly alienate title to some of the forfeited property and allow for the relator to sue to "perfect[]" her title via

"judicial condemnation." *United States v. Stowell*, 133 U.S. 1, 16–17 (1890).

The FCA is different, and its right of action does not seem to concern alienable property. It does not provide for possession of a sum certain owed under a contract or particular chattels, but a bare right to sue for uncertain damages sounding in fraud. *Cf.* Walter R. Warren, *The Law Relating to Choses in Action* 269–75 (1899) (explaining that "a *bare right* to bring an action for fraud" and "a *mere right* of action for a tort" were not considered to be alienable rights of action at common law "by reason of their nature and the general circumstances investing them"). Nor does it seem as though title to the damages has vested in the government before judgment—the offender is only "liable" for such damages if proven. 31 U.S.C. § 3729(a)(1). Under that view, the FCA would not concern alienable property because it concerns neither a right of action to a *certain thing*—such as sum certain owed under a contract or particular chattels—nor has title to that certain thing vested in the government at the time of assignment.

When viewed in this light—and however the FCA is characterized—appellants' historical statutes do not support the FCA's constitutionality. There is nothing consistently or "relevantly similar" to the FCA in history. *Bruen*, 597 U.S. at 28–29. Without any settled course of historical practice, appellants' historical arguments simply do not hang together—just as the district court recognized.

## CONCLUSION

For all these reasons, and those in defendants' briefing, the district court's judgment should be affirmed.

Dated: March 17, 2025

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the word limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7) because it contains 6,132 words, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f).

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 17, 2025, I electronically filed the foregoing with the Clerk of the Court using the Court's CM/ECF system, which will send notification of such filing to all registered CM/ECF users.

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