

No. 25-1126

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IN THE  
**Supreme Court of the United States**

ELI LILLY & CO.,

*Petitioner,*

v.

UNITED STATES et al., ex rel. RONALD J. STRECK,

*Respondent.*

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**On Petition for Writ of Certiorari to the  
United States Court of Appeals for the  
Seventh Circuit**

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**BRIEF OF WASHINGTON LEGAL FOUNDATION  
AS AMICUS CURIAE SUPPORTING PETITIONER**

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## **QUESTION PRESENTED**

Whether the False Claims Act's qui tam provisions are unconstitutional.

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**INTEREST OF AMICUS CURIAE\***

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free markets, individual rights, limited government, and the rule of law. It often appears as an amicus curiae to champion Article II's limits on the False Claims Act. *See United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419 (2023); *United States ex rel. Zafirov v. Fla. Med. Assocs., LLC*, No. 24-13581 (11th Cir., pending).

Enacted during the Civil War, the FCA was designed to deter and punish government procurement fraudsters and wartime opportunists. Today, the opportunists are less often the statute's targets than its putative enforcers. Enterprising relators have transformed the FCA into a vehicle for debilitating lawfare over just about anything that touches—even remotely—the federal fisc. In 2025, over twelve hundred qui tam suits underscored this trend, many targeting defendants for reasons unrelated to public welfare. *See* U.S. Dep't of Justice, *False Claims Act Settlements Exceed \$6.8B in Fiscal Year 2025* (Jan. 16, 2026), <https://perma.cc/P5AU-8KBV>.

These qui tam suits contravene our constitutional structure. Only the Executive may represent the interests of the United States in litigation. Congress cannot delegate that power to private actors. Because Article II protects against the abuse of

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\* No party's counsel authored any part of this brief. No one, other than WLF and its counsel, helped pay for the brief's preparation or submission. All counsel of record received timely notice of WLF's intent to file this brief.

prosecutorial discretion, Executive officers are appointed to an office of public trust under obligation of oath, at peril of impeachment. The FCA upends that design by allowing private relators to wield the tremendous power of public prosecution with no meaningful constitutional checks on their discretion. This Court should take these constitutional infirmities seriously and grant review.

## INTRODUCTION

A serial litigant named Ronald J. Streck decided that Eli Lilly & Company had misread a byzantine corner of the Medicaid statute governing drug rebates. Never mind that the Third Circuit—in a case Streck himself had brought—had unanimously called Lilly’s reading (and the industry’s) reasonable. Never mind that Lilly had disclosed its approach to the government time and again, and the government never hinted that it violated the law. Never mind that four federal judges had already found the interpretation sound. Streck sued anyway in the name of the United States, won nearly \$200 million in treble damages and penalties, and the Seventh Circuit affirmed. In its view, Lilly’s position was not merely incorrect but so “objectively unreasonable” that it furnished “highly probative circumstantial evidence of a culpable state of mind.” Pet. App. 38.

That jarring outcome should be an aberration. Yet it is an increasingly inevitable byproduct of the FCA’s qui tam provisions. Under those provisions, any private person may step into the shoes of the United States, investigate alleged fraud, file suit, conduct discovery, and extract massive civil penalties—all without the slightest supervision by the President or

any executive officer. The relator answers to no one. He cannot be removed. He owes no duty of faithful execution. His only loyalty is to the bounty—up to 30% of whatever he can recover. As this case vividly shows, the FCA’s qui tam regime turns complex, ambiguous regulatory questions into jackpot litigation, rewarding the most aggressive reading of the law and punishing companies that followed the only guidance the government ever gave them—make “reasonable assumptions.”

These privatized prosecutions cannot be reconciled with Article II. The Constitution vests the entire “executive Power” in the President and charges him alone with seeing that the laws are “faithfully executed.” It does not contemplate an army of unaccountable bounty hunters wielding that power for personal gain. Three members of this Court have already flagged the “substantial arguments that the *qui tam* device is inconsistent with Article II,” *United States ex rel. Polansky*, 599 U.S. at 442 (Kavanaugh, J., concurring, joined by Barrett, J.); *id.* at 449 (Thomas, J., dissenting). The decision below—creating a clear circuit split on the proper treatment of “objectively reasonable” legal interpretations under the FCA while presenting an exceptionally strong vehicle on the constitutional question—makes this the ideal case for the Court to resolve both issues.

WLF’s brief emphasizes why the Court should grant review to decide whether the False Claims Act’s qui tam provisions can be squared with the separation of powers. Because they cannot, the petition should be granted.

## SUMMARY OF ARGUMENT

No one disputes that the False Claims Act's aim of ferreting out fraud against the public fisc is a worthy goal. But good intentions cannot override constitutional limits. These structural protections are not picayune formalities; they are a crucial bulwark of our liberties.

Start with the Vesting Clause. Article II, Section 1, Clause 1 vests "the executive Power" solely in the President, a deliberate choice to ensure unified, accountable enforcement of the nation's laws. U.S. Const. art. II, § 1, cl. 1. Yet the FCA permits private relators to sue "in the name of the Government" for public wrongs, wielding the Executive's sword with only limited executive oversight. 31 U.S.C. § 3730(b)(1). This arrangement, however practical, upends the constitutional balance. The Constitution entrusts the President with plenary executive authority, save for explicit exceptions. By allowing relators to pursue public rights for private gain, the FCA encroaches on the President's singular role. Congress has stretched its authority too far.

The Appointments Clause exposes another defect. Article II, Section 2, Clause 2 requires that those exercising "significant authority" as officers of the United States be appointed by the President, often with Senate confirmation. U.S. Const. art. II, § 2, cl. 2; *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam). Qui tam relators, suing to recover penalties for the United States, wield such authority, yet they do so without appointment or confirmation.

Relators may argue that their temporary status or lack of formal employment exempts them, but this view clashes with precedent recognizing even limited prosecutorial roles as requiring proper appointment. *See Morrison v. Olson*, 487 U.S. 654, 671 (1988). The FCA’s structure, offering bounties akin to early officers’ fees, confirms that relators occupy a continuous and formal enough role to demand Article II’s safeguards. *See Lucia v. SEC*, 585 U.S. 237, 245 (2018). This conflict—between statutory innovation and constitutional rigor—can be resolved only by this Court.

Even if the Vesting and Appointments Clauses do not wholly dispatch the FCA’s *qui tam* provisions, the Take Care Clause finishes the job. The Constitution obliges the President to “take Care that the Laws be faithfully executed.” U.S. Const. art. II, § 3. This duty requires the President to weigh competing priorities and balance enforcement with the public good, as Washington did in directing prosecutions and granting pardons during and after the Whiskey Rebellion.

The FCA, however, grants relators broad discretion to initiate suits, often driven by private gain rather than the broader public interest. Even when the government intervenes, relators retain significant control, constraining the President’s ability to align enforcement with the Executive’s broader policy goals. *See* 31 U.S.C. § 3730(c)(1). Because this delegation impermissibly fragments the Executive’s undivided authority, the FCA erodes the careful separation of powers that safeguards individual liberty.

Historical pedigree offers no reprieve. Yes, early Congresses enacted such statutes, but their

actions do not override the Constitution's text. See *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 36 (2022) ("the text controls"). Those early laws, unlike the FCA, imposed fewer barriers to presidential oversight and reflected a nascent government's practical needs, not a considered constitutional endorsement. See 13 Op. O.L.C. 207, 235 (1989). And cases like *Marvin v. Trout*, 199 U.S. 212 (1905), sidestepped Article II's deeper questions, limiting their weight.

The FCA's modern framework, revised in 1986, goes much further, insulating relators from executive control in ways its predecessors did not. But the Constitution demands a unitary Executive, answerable to the people, to wield the sword of federal enforcement. The FCA's *qui tam* provisions, however well-intended, do violence to that principle. This Court should grant review to ensure that expedient innovation does not outstrip constitutional bounds.

## ARGUMENT

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), this Court held that the FCA’s “partial assignment of the Government’s damages claim” to the relator, alongside “the long tradition of qui tam actions in England and the American Colonies,” showed that qui tam actions were “cases and controversies” under Article III. *Id.* at 774–77. Yet the Court left unanswered 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. Fully preserved below, those questions are squarely presented here.

### I. REVIEW IS NEEDED BECAUSE THE FCA’S QUI TAM PROVISIONS VIOLATE ARTICLE II.

#### A. The Vesting Clause: Executive power belongs to the President alone—no bounty hunters allowed.

The Constitution’s opening salvo in Article II is unmistakable: “The executive Power shall be vested in a President of the United States of America.” U.S. Const. art. II, § 1, cl. 1. The singular “a” and the verb “vested” leave no room for ambiguity—all executive power resides in one President, not in Congress, subordinate officials, or private profit-driven relators. Unlike Article I, which grants Congress only enumerated powers, or Article III, which shares judicial power with inferior courts, Article II’s Vesting Clause is absolute. It entrusts the President alone with the nation’s executive authority, ensuring accountability to the people. *Seila Law LLC v. Consumer Fin. Prot.*

*Bureau*, 591 U.S. 197, 203–04 (2020). As Alexander Hamilton put it, this “general clause” grants the President the full sweep of executive power, subject only to specific constitutional exceptions. Alexander Hamilton, *Pacificus No. 1* (1793), <https://perma.cc/V6KB-GXQ3>.

Law enforcement is the quintessence of that power. The Framers, echoing John Locke and William Blackstone, understood that in a civilized society, individuals surrender their natural right to enforce the law to a centralized authority. See John Locke, *Two Treatises of Government* 4, 136–39 (Thomas Hollis ed., London, 1764) (1689); 1 William Blackstone, *Commentaries on the Laws of England* 119–20 (Philadelphia, J.B. Lippincott Co. 1893) (1765). The President, as the “avenger of public wrongs,” holds the exclusive authority to prosecute public rights, whether in criminal or civil cases. See Letter from A Farmer, II, *Balt. Md. Gazette* (Feb. 29, 1788); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 344–45 (2016) (Thomas, J., concurring) (only the government can sue for public rights violations).

President Washington exercised this prerogative by directing prosecutions during the Whiskey Rebellion while ordering dismissals and granting pardons when justice demanded—as when he instructed a *nolle prosequi* for two innocent rebels in 1793. See Letter from George Washington to William Rawle (Mar. 13, 1793), <https://perma.cc/K6XQ-72AG>.

Yet the FCA’s qui tam provisions turn this principle on its head. They place the Executive’s sword in the hands of private citizens by supplanting prosecutorial discretion with a bounty to enforce

federal law. They allow self-appointed relators—unharmd by the alleged fraud—to sue “in the name of the Government” for penalties and damages owed to the United States. 31 U.S.C. § 3730(b)(1). These relators aren’t vindicating personal injuries, like a plaintiff suing for discrimination under Title VII; they’re enforcing *public* rights, a role reserved for the Executive. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576–77 (1992) (suits for “undifferentiated public interest” belong to the Executive).

Worse still, the FCA insulates relators from presidential control. The government gets a mere 60-day window to intervene, and even then, it must show “good cause” to take over or later dismiss the suit. *Id.* § 3730(c)(3). If it declines, relators—motivated by bounties as high as 30%—can press on, relegating the Executive to a bystander in its own litigation. This isn’t just a practical inconvenience, it’s constitutionally forbidden. Congress itself cannot initiate a federal law enforcement action to vindicate public rights—that’s the President’s job. See *TransUnion LLC v. Ramirez*, 594 U.S. 413, 429 (2021); *United States v. Nixon*, 418 U.S. 683, 693 (1974). Nor may Congress circumvent its own powerlessness by handing Executive power to a non-Executive.

The Constitution’s structure reinforces this rule. Congress can authorize private rights of action, like those under civil rights laws, where individuals remedy concrete, personal injuries. See *Martinez v. UPMC Susquehanna*, 986 F.3d 261, 264–65 (3d Cir. 2021) (age discrimination suit for private injury). But *qui tam* suits are different. The bulk of the recovery goes to the government, with relators pocketing a bounty—essentially a salary for acting as federal

enforcers. See Christine Kexel Chabot, *The Founders’ Purse*, 110 Va. L. Rev. 1027, 1093–99 (2024). If the case captions in qui tam suits weren’t proof enough, this shared recovery confirms they are acting for the United States, making presidential oversight nonnegotiable. The Constitution carves out (at best) one exception: Congress’s power to grant Letters of Marque and Reprisal, allowing privateers to act as government agents in wartime. U.S. Const. art. I, § 8, cl. 11. Even there, however, history’s custom and practice is that the Executive designates who may privateer. Zac Morgan & Ian Merritt, *Reviving Letters of Marque*, Ctr. for Maritime Strategy (Oct. 29, 2024), <https://bit.ly/4cJ2azA>. No such “Qui Tam Clause” exception exists for domestic law enforcement, proving that the Framers knew how to authorize private enforcers when they wanted to—and didn’t here.

**B. The Appointments Clause: Relators behave as Officers of the United States.**

The decision below elides yet another flaw: Qui tam relators violate the Appointments Clause by exercising “significant authority” without being appointed as officers of the United States. U.S. Const. art. II, § 2, cl. 2. An “Officer” is one who wields “significant authority pursuant to the laws of the United States,” including conducting litigation to vindicate public rights. *Buckley*, 424 U.S. at 126, 140.

Qui tam relators fit the bill—they sue “for the United States” to recover penalties and damages, a “quintessentially executive power.” *Seila Law*, 591 U.S. at 219. Yet they’re self-appointed, bypassing the President’s appointment power and Senate

confirmation. Even if relators have a partial interest in the bounty, the non-bounty portion of the claim belongs solely to the government. That alone violates Article II. For although the government assigns to the relator a “sufficient partial interest in the litigation to qualify for Article III standing, the majority interest that is not signed over—and therefore still owned by the government—must be prosecuted by an officer of the United States under the Appointments Clause, and must be faithfully managed by the Executive under the Take Care Clause.” *Riley v. St. Luke’s Episcopal Hosp.*, 252 F.3d 749, 772 (5th Cir. 2001) (Smith, J., dissenting).

Justices Thomas, Kavanaugh, and Barrett have signaled that qui tam suits raise serious Article II concerns, inviting review in an “appropriate case.” *United States ex rel. Polansky*, 599 U.S. at 442 (Kavanaugh, J., concurring, joined by Barrett, J.); *id.* at 449 (Thomas, J., dissenting); *Wisconsin Bell, Inc. v. United States ex rel. Heath*, 604 U.S. 140, 166–67 (2025) (Kavanaugh, J., concurring, joined by Thomas, J.) (“The Act’s *qui tam* provisions raise substantial constitutional questions under Article II.”). Those concerns are well founded.

Qui tam defenders argue that relators aren’t officers because their role is temporary or lacks formal employment. That’s unpersuasive. The Supreme Court has recognized even temporary prosecutors, like independent counsel, as officers. *Morrison*, 487 U.S. at 671. Relators’ bounties, often vastly exceeding the salaries of appointed government officials, mirror the fee-based compensation of early federal officers. See Nicholas R. Parrillo, *Against the Profit Motive* 1–48 (2013). Their “office” is continuous under the FCA,

even if filled case-by-case. *See Lucia*, 585 U.S. at 245 (continuous office requires an appointment).

By prescribing the exclusive means for appointing any “Officer of the United States,” the Appointments Clause safeguards the Constitution’s “structural integrity” by ensuring that those who wield significant federal authority are “accountable to political force and the will of the people.” *Freytag v. Comm’r*, 501 U.S. 878, 884 (1991). But political accountability collapses if, as here, private enforcers of federal law have no need to answer to one of the elected branches.

### **C. The Take Care Clause: Relators hijack the Executive’s discretion.**

The qui tam provisions also gut the President’s duty to “take Care that the Laws be faithfully executed.” U.S. Const. art. II, § 3. The Framers separated legislative and executive powers to prevent tyranny, ensuring the President alone decides how (and when) to enforce the law. *See The Federalist* No. 47 (James Madison). This discretion—whether to prioritize certain cases, under-enforce statutes for public welfare, or halt prosecutions—protects liberty and balances national priorities. *See In re Aiken Cnty.*, 725 F.3d 255, 264 (D.C. Cir. 2013) (Kavanaugh, J.) (prosecutorial discretion protects against oppressive enforcement). President Washington exercised this discretion in the Whiskey Rebellion, for example, directing prosecutions and dismissals to align with justice and policy—as when he ordered prosecutions for neutrality violations in 1793. *See Proclamation of Neutrality* (Apr. 22, 1793).

The FCA, however, hands all this discretion to private relators, who decide when, where, and how to sue, driven by profit rather than public interest. These “bounty hunters” impose unpredictable litigation costs, with 1,297 qui tam suits filed in 2025 alone. See U.S. Dep’t of Justice, *False Claims Act Settlements*, *supra*. Some qui tam suits, brought in the name of the United States, are motivated by ideological aims like opposition to fracking. See *United States ex rel. Relators v. Muskingum Watershed Conservancy Dist.*, 2017 WL 4102369, at \*5 (N.D. Ohio Sept. 15, 2017). These suits are often contrary to the Executive’s own policy preferences. See Liam Mayo, *Local representatives and Trump administration reopen fracking conversation for Delaware River Basin*, Delaware Currents (March 4, 2025), <https://perma.cc/48K7-X5P9>.

Only a unitary Executive, answerable to the people, can faithfully execute the laws. Yet even when the government intervenes, relators retain rights to continue as parties, constraining executive control. 31 U.S.C. § 3730(c)(1). This “shadow executive” undermines the President’s ability to set enforcement priorities, risking conflicts with public welfare, national security, or economic stability. See Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive* 4–5 (2008). This constitutional infirmity in the FCA is a deep structural defect that demands the Court’s immediate attention.

**II. THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT HISTORY CANNOT OVERRIDE CONSTITUTIONAL TEXT.**

Respondents may point to early *qui tam* statutes enacted by the First Congress to claim constitutional legitimacy. But history cannot trump clear constitutional text. *N.Y. State Rifle*, 597 U.S. at 36 (“to the extent [history] contradicts what the text says, the text controls”).

Early Congresses weren’t infallible. Their first statute, prescribing state officials’ oaths, was blatantly unconstitutional. See Gary Lawson, *The Constitution’s Congress*, 89 B.U. L. Rev. 399, 404–06 (2009). Or take the Sedition Act, which criminalized “false, scandalous, and malicious” statements against the government. See An Act in Addition to the Act, Entitled “An Act for the Punishment of Certain Crimes Against the United States,” 1 Stat. 596 (1798). Although the Sedition Act was never tested in court, “the attack upon its validity has carried the day in the court of history.” *N.Y. Times v. Sullivan*, 376 U.S. 254, 276 (1964).

Nor is early presidential acquiescence to *qui tam* suits dispositive. Although one or more Presidents might accept a novel practice that violates Article II, “the separation of powers does not depend on the views of individual Presidents, nor on whether the encroached-upon branch approves the encroachment.” *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 497 (2010) (internal quotation marks and citation omitted). A President cannot “choose to bind his successors by diminishing their powers.” *Id.*

Those early qui tam “stop-gap measures” were reflexively adopted from English practice—rooted in parliamentary supremacy, not the Constitution’s separation of powers—and quickly fell into disuse as the Executive developed enforcement capacity. *See* 13 Op. O.L.C. 207, 235 (1989) (Barr Memo); *Polansky*, 599 U.S. at 450 (Thomas, J., dissenting).

At all events, early qui tam statutes, unlike the FCA, didn’t explicitly bar presidential control. The modern FCA’s limits—requiring “good cause” for intervention or dismissal—create a novel insulation from executive oversight, unlike their founding-era counterparts. The 1791 case of customs inspector Samuel Dodge shows why. When President Washington pardoned Dodge, the government remitted its fine, but the relator kept his share—not because the President lacked control, but because the fine was already paid, and the pardon’s scope was debated. *See* Letter from Richard Harrison to Alexander Hamilton (May 24, 1791). This reflects practical limits, not constitutional ones. Early cases like *Trout*, 199 U.S. at 212, and *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) upheld qui tam statutes but never squarely addressed Article II’s Vesting or Take Care Clauses, limiting their relevance. What isn’t considered isn’t decided.

The FCA’s modern provisions, revised in 1986, go far beyond their early counterparts. They create a system in which relators operate as a “shadow body” of enforcers, insulated from the President’s Article II authority. That’s a bridge too far. Congress can always incentivize private suits for private rights. It is free to expand non-litigation bounty systems, like the Centers for Medicare & Medicaid Services’ incentive

programs, which allow whistleblowers to report fraud and receive rewards—without filing suit. But Congress cannot privatize the Presidency. Nor can it discard the Constitution’s crucial structural limits.

In sum, the FCA’s qui tam provisions defy Article II’s text, structure, and purpose. They disperse executive power to unappointed relators, erode presidential accountability, and threaten the separation of powers. The Framers crafted a system where one President, answerable to the people, wields the Executive’s sword. It’s time to honor that design. And that starts with granting the writ.

## CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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