No. 18-911

In the Supreme Court of the United States

INTERMOUNTAIN HEALTH CARE, INC., ET AL.,
PETITIONERS

v.

UNITED STATES, EX REL. GERALD POLUKOFF, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

This brief addresses the following question:

Whether the *qui tam* provisions of the False Claims Act, 31 U.S.C. 3729 *et seq.*, are consistent with the Appointments Clause of Article II of the Constitution.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 17

TABLE OF AUTHORITIES

Cases:

Auffmordt v. *Hedden*, 137 U.S. 310 (1890) 11
Bowsher v. *Synar*, 478 U.S. 714 (1986) 10
Buckley v. *Valeo*, 424 U.S. 1 (1976) 16
Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 8
Go-Bart Importing Co. v. *United States*, 282 U.S. 344 (1931) 15, 16
Heckler v. *Campbell*, 461 U.S. 458 (1983) 7
Lebron v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995) 12
Lucia v. *SEC*, 138 S. Ct. 2044 (2018) 11, 16
Marsh v. *Chambers*, 463 U.S. 783 (1983) 10
Mistretta v. *United States*, 488 U.S. 361 (1989) 10, 12
Morrison v. *Olson*, 487 U.S. 654 (1988) 12, 13, 14, 16
NLRB v. *Noel Canning*, 573 U.S. 513 (2014) 11
Omnicare, Inc. v. *Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015) 8
Richison v. *Ernest Grp., Inc.*, 634 F.3d 1123 (10th Cir. 2011) 7
Ridenour v. *Kaiser-Hill Co.*, 397 F.3d 925 (10th Cir.), cert. denied, 546 U.S. 816 (2005) 15
Riley v. *St. Luke's Episcopal Hosp.*, 252 F.3d 749 (5th Cir. 2001) 9, 11, 12, 16

Cases—Continued: Page

Searcy v. *Philips Elecs. N. Am. Corp.*, 117 F.3d 154 (5th Cir. 1997) ... 15

Singleton v. *Wulff*, 428 U.S. 106 (1976) ... 5

Swift v. *United States*, 318 F.3d 250 (D.C. Cir.), cert. denied, 539 U.S. 944 (2003) ... 15

United States v. *Everglades Coll., Inc.*, 855 F.3d 1279 (11th Cir. 2017) ... 15

United States v. *Germaine*, 99 U.S. 508 (1879) ... 11, 12

United States v. *Hartwell*, 73 U.S. (6 Wall.) 385 (1868) ... 11

United States v. *Maurice*, 26 F. Cas. 1211 (C.C.D. Va. 1823) ... 11

United States ex rel. Kelly v. *Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), cert. denied, 510 U.S. 1140 (1994) ... 9

United States ex rel. Sequoia Orange Co. v. *Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998), cert. denied, 525 U.S. 1067 (1999) ... 15

United States ex rel. Stone v. *Rockwell Int'l Corp.*, 282 F.3d 787 (2002), 92 Fed. Appx. 708 (10th Cir. 2004), cert. denied on constitutional issue, 548 U.S. 941 (2006), rev'd on other grounds, 549 U.S. 457 (2007) ... 8, 9, 12

United States ex rel. Taxpayers Against Fraud v. *General Elec. Co.*, 41 F.3d 1032 (6th Cir. 1994) ... 9, 13

Vermont Agency of Natural Res. v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) ... 9, 10, 13, 16, 17

Wisconsin v. *Pelican Ins. Co.*, 127 U.S. 265 (1888) ... 10

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952) ... 11

Zivotofsky v. *Clinton*, 566 U.S. 189 (2012) ... 8

Constitution, statutes, and rules: Page

U.S. Const.:
Art. II 4, 16
§ 1 (Vesting Clause)........ 7
§ 2, Cl. 2 (Appointments Clause)........ *passim*
§ 3 (Take Care Clause)........ 7
Art. III 9
False Claims Act, 31 U.S.C. 3729 *et seq.* 1
31 U.S.C. 3729(a)........ 2
31 U.S.C. 3729(a)(1)(A)........ 2
31 U.S.C. 3729(a)(1)(B)........ 2
31 U.S.C. 3729(b)(1)(A)(iii)........ 5
31 U.S.C. 3729(b)(2)(A)(i) 2
31 U.S.C. 3730(a)........ 2
31 U.S.C. 3730(b)........ 12
31 U.S.C. 3730(b)(1) 2, 3, 15
31 U.S.C. 3730(b)(2) 2, 14
31 U.S.C. 3730(b)(3) 2
31 U.S.C. 3730(b)(4)(A)........ 2, 14
31 U.S.C. 3730(b)(4)(B)........ 3
31 U.S.C. 3730(c)(1) 2, 14
31 U.S.C. 3730(c)(2)(A) 3, 15
31 U.S.C. 3730(c)(2)(B) 3, 15
31 U.S.C. 3730(c)(3) 2, 3, 14, 15
31 U.S.C. 3730(c)(4) 3, 14
31 U.S.C. 3730(c)(5) 14
31 U.S.C. 3730(d)........ 3
31 U.S.C. 3730(f) 3
31 U.S.C. 3731(c) 3
Medicare Act, 42 U.S.C. 1395 *et seq.* 3
42 U.S.C. 1395y(a)(1)(A) 5
28 U.S.C. 1654 10

Statute and rules—Continued: Page

28 U.S.C. 2403(a) 4, 6

Fed. R. Civ. P.:

Rule 9(b).... 4, 5, 6

Rule 12(b)(6) 4, 5

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 895 F.3d 730. The order of the district court (Pet. App. 32a-61a) is not published in the Federal Supplement.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 2018. A petition for rehearing was denied on October 29, 2018 (Pet. App. 62a-63a). The petition for a writ of certiorari was filed on January 14, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The False Claims Act (FCA or Act), 31 U.S.C. 3729 *et seq.*, imposes civil liability for a variety of decep-

tive practices involving government funds and property. Among other things, the Act renders liable any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," 31 U.S.C. 3729(a)(1)(A); and any person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim," 31 U.S.C. 3729(a)(1)(B). The FCA defines the term "'claim'" to include "any request or demand * * * for money or property [that] * * * is presented to an officer, employee, or agent of the United States." 31 U.S.C. 3729(b)(2)(A)(i).

A person who violates the FCA is liable to the United States for civil penalties plus three times the amount of the government's damages. 31 U.S.C. 3729(a). Suits to collect those penalties and damages may be brought by the Attorney General. See 31 U.S.C. 3730(a). In the alternative, a private person (known as a relator) may bring suit "for the person and for the United States Government." 31 U.S.C. 3730(b)(1). The relator's complaint must initially be filed under seal and served upon the United States. 31 U.S.C. 3730(b)(2). The government then has 60 days, subject to extension, to decide whether to intervene and take over the suit. 31 U.S.C. 3730(b)(2) and (3).

If the United States intervenes in the suit, "the action shall be conducted by the Government." 31 U.S.C. 3730(b)(4)(A). In that circumstance, the government "shall have the primary responsibility for prosecuting the action." 31 U.S.C. 3730(c)(1). The government may intervene either before the complaint is unsealed or "at a later date upon a showing of good cause." 31 U.S.C. 3730(c)(3). If it has intervened, the government may file

its own complaint or may amend the relator's complaint to add or alter claims. 31 U.S.C. 3731(c).

If the United States declines to intervene, "the person bringing the action shall have the right to conduct the action." 31 U.S.C. 3730(b)(4)(B). Even in those circumstances, the government retains several forms of control over the conduct of the suit. Among other things, the government may receive "copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts," 31 U.S.C. 3730(c)(3); and it may stay discovery to avoid "interfere[nce]" with a related governmental investigation or prosecution, 31 U.S.C. 3730(c)(4). The government also may overrule a relator's proposed dismissal or settlement of an action, or may dismiss or settle the action over the relator's objection. 31 U.S.C. 3730(b)(1), (c)(2)(A), and (c)(2)(B).

When a *qui tam* action results in the recovery of damages or civil penalties, the award is divided between the government and the relator. 31 U.S.C. 3730(d). The government is not liable for any expenses that the relator has incurred in bringing suit. 31 U.S.C. 3730(f).

2. In 2012, respondent Dr. Gerald Polukoff filed this suit as a *qui tam* relator. Pet. App. 15a. He alleged that Dr. Sherman Sorensen, a cardiologist, had performed "thousands of unnecessary heart surgeries" while at St. Mark's Hospital and Intermountain Health Care, Inc. *Id.* at 4a, 15a. Intermountain Health Care, Inc. and its corporate parent, IHC Health Services, Inc., are the petitioners in this Court. See Pet. ii n.1. The relator's amended complaint alleged that Dr. Sorensen and the hospitals had sought federal reimbursement for the procedures under the Medicare Act, 42 U.S.C. 1395 *et seq.*, by "fraudulently certifying that the surgeries were medically necessary." Pet. App. 4a; see *id.* at 12a-14a.

The relator further alleged that both hospitals knew or should have known of Dr. Sorensen's conduct but nonetheless had continued to bill the government for the unnecessary procedures. See *id.* at 15a.

After the United States declined to intervene, the district court unsealed the complaint. Pet. App. 15a. The court then dismissed the suit as to all defendants. *Id.* at 32a-61a. The court first held that the relator had pleaded his claims with adequate particularity (see Federal Rule of Civil Procedure 9(b)) against Dr. Sorensen and St. Mark's, but not against petitioners. Pet. App. 45a-49a; see *id.* at 48a (finding that the relator had failed to allege "vital information" bearing on the FCA's knowledge requirement, including "who knew what and when they knew it").

The district court further held that all claims against all defendants failed under Rule 12(b)(6). Pet. App. 49a-60a. In the court's view, a claim for payment cannot be "false" under the FCA unless it involves an "'objective falsehood.'" *Id.* at 51a (citation omitted). The court concluded that the defendants' representations to the government that the cardiac procedures at issue "were medically reasonable and necessary" could not "be proven to be objectively false," because statements of medical necessity inherently involve "medical judgments." *Id.* at 54a.

3. The relator appealed. In their brief to the Tenth Circuit, petitioners asserted for the first time that the claims against them could not go forward because the *qui tam* provisions of the FCA violate Article II of the Constitution. The United States then intervened, pursuant to 28 U.S.C. 2403(a), to defend the statute's constitutionality. See Pet. App. 18a.

The court of appeals reversed the judgment of the district court and remanded for further proceedings. Pet. App. 1a-31a. The court of appeals declined to address petitioners' constitutional arguments, holding that petitioners had "forfeited" those challenges by failing to raise them in the district court. *Id.* at 18a n.7. Noting that "'a federal appellate court'" ordinarily "'does not consider an issue not passed upon below,'" the court of appeals "decline[d]" to exercise its discretion to address petitioner's constitutional arguments "for the first time on appeal." *Ibid.* (quoting *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976)).

The court of appeals then held that the district court had erred in dismissing the relator's claims. Pet. App. 18a-31a. With regard to the Rule 12(b)(6) dismissal, the court of appeals held that "[i]t is possible for a medical judgment to be 'false or fraudulent' as proscribed by the FCA," including when reimbursement is sought for medical care that does not "meet the government's definition of 'reasonable and necessary.'" *Id.* at 23a-24a; see 42 U.S.C. 1395y(a)(1)(A) ("[N]o payment may be made * * * for any expenses incurred for items or services * * * which * * * are not reasonable and necessary for the diagnosis or treatment of illness or injury."). The court further determined that the relator had adequately pleaded that the defendants had "knowingly" (a term that the FCA defines to include reckless conduct, see 31 U.S.C. 3729(b)(1)(A)(iii)) sought reimbursement for Dr. Sorensen's heart surgeries even though the surgeries "w[ere] not, in fact, 'reasonable and necessary.'" Pet. App. 27a; see *id.* at 25a-29a.

Finally, the court of appeals reversed the district court's holding that the relator's allegations against Intermountain failed to satisfy Rule 9(b). Pet. App. 29a-

31a. The court explained that, because Rule 9(b) provides that "*knowledge*, and other conditions of a person's mind may be alleged *generally*," the district court should not have applied the rule's particularity requirement to the complaint's allegations regarding the defendants' knowledge. *Id.* at 30a (quoting Fed. R. Civ. P. 9(b)). The court of appeals also found it appropriate to "excuse deficiencies" in the amended complaint that had resulted from the relator's "inability to obtain information within the defendant's exclusive control." *Ibid.*; see *id.* at 30a-31a ("Intermountain, no doubt, knows which employees handle federal billing for procedures reimbursable under Medicare, and in particular, who reviewed reimbursement claims for Dr. Sorensen during his decade there.") (footnote omitted).

ARGUMENT

The United States intervened in this case for the limited purpose of defending the constitutionality of the FCA's *qui tam* provisions. See 28 U.S.C. 2403(a). The United States accordingly is a party only as to the second question presented—namely, whether the FCA's *qui tam* provisions are consistent with the Appointments Clause of the Constitution. The government therefore takes no position on the proper disposition of the first question presented in the petition for a writ of certiorari.

The second question presented in the petition does not warrant this Court's review. All of the courts of appeals that have considered the question have rejected defendants' Appointments Clause challenges to the Act's *qui tam* provisions. In any event, this case would be an unsuitable vehicle to address the Appointments

Clause issue because petitioners failed to raise the argument in district court, and the court of appeals accordingly declined to address it.

1. As they conceded in the court of appeals, petitioners "did not assert a constitutional challenge" to the FCA's *qui tam* provisions in the district court. Pet. App. 18a n.7 (citation omitted). Instead, petitioners raised such a challenge for the first time on appeal, arguing that the *qui tam* provisions are inconsistent with the Constitution's Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2, with the Vesting Clause, § 1, and with the Take Care Clause, § 3. In their petition for a writ of certiorari, petitioners have abandoned the latter two theories (see Pet. 23 n.5), and in this Court their sole constitutional claim is that the *qui tam* provisions violate the Appointments Clause.

The court of appeals declined to address petitioners' constitutional arguments, holding that petitioners had "forfeited" those challenges by failing to raise them below. Pet. App. 18a n.7. While recognizing that an appeals court has discretion to consider alternative grounds for affirmance, see *ibid.*; see also *Richison* v. *Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011), the court declined to resolve petitioners' belated constitutional arguments "for the first time on appeal," Pet. App. 18a n.7; see *Heckler* v. *Campbell*, 461 U.S. 458, 468 n.12 (1983) (explaining that, although this Court can affirm on grounds different from those on which the court of appeals relied, it considers claims that were not raised below "only in exceptional cases") (citation omitted); see also Pet. App. 18a n.7 (relying on *Heckler*). That exercise of appellate discretion does not warrant this Court's review.

Petitioners do not explicitly argue that the court of appeals abused its discretion by deeming their claims forfeited. They assert, however, that raising those claims would have been "a mere formality" because a prior Tenth Circuit panel had held that the *qui tam* provisions are consistent with the Appointments Clause. Pet. 23 n.6; see *United States ex rel. Stone* v. *Rockwell Int'l Corp.*, 282 F.3d 787, 804-805 (2002), 92 Fed. Appx. 708 (2004), cert. denied on constitutional issue, 548 U.S. 941 (2006), rev'd on other grounds, 549 U.S. 457 (2007). But while petitioners sought rehearing en banc in this case, see Pet. App. 62a-63a, and the en banc court would not have been bound by *Stone*, petitioners did not ask the full court of appeals to overrule that precedent but instead challenged only the panel's statutory analysis, see Pet. C.A. Reh'g Pet. 8-18.

Finally, irrespective of the reasons that petitioners failed to press their constitutional arguments at earlier stages of the litigation, this Court is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). "[A]s a general rule," the Court therefore "'do[es] not decide in the first instance issues not decided below.'" *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1338 (2015) (Thomas, J., concurring in the judgment) (quoting *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012)). Petitioners identify no sound reason for the Court to deviate from that standard practice here.

2. The Appointments Clause specifies the permissible means of appointing "Officers of the United States" to public offices "established by Law." U.S. Const. Art. II, § 2, Cl. 2. Petitioners argue (Pet. 28-33) that the FCA's *qui tam* provisions are inconsistent with the Appointments Clause. Petitioners acknowledge (Pet. 29 &

n.7), however, that every court of appeals to address that issue has rejected the Appointments Clause challenge. See *Stone*, 282 F.3d at 804-805; *Riley* v. *St. Luke's Episcopal Hosp.*, 252 F.3d 749, 757-758 (5th Cir. 2001) (en banc); *United States ex rel. Taxpayers Against Fraud* v. *General Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994); *United States ex rel. Kelly* v. *Boeing Co.*, 9 F.3d 743, 757-759 (9th Cir. 1993), cert. denied, 510 U.S. 1140 (1994). Those decisions are correct.

a. In *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765, 771-778 (2000), this Court held that *qui tam* relators have Article III standing to pursue actions under the FCA. The Court did not decide whether the Act's *qui tam* provisions comport with the Appointments Clause. See *id.* at 778 n.8. In two respects, however, the Court's analysis in *Stevens* suggests that petitioners' Appointments Clause challenge lacks merit.

First, in holding that the FCA's *qui tam* provisions are consistent with Article III, the Court in *Stevens* expressly declined to rely on the theory that a private relator sues as an "agent of the United States." 529 U.S. at 772. The Court instead observed that the relator's statutory entitlement to a share of any ultimate recovery gives him a concrete *personal* stake in the disposition of the suit, *ibid.*, and the Court concluded that "[t]he FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim," *id.* at 773. After addressing standing, the *Stevens* Court held that the FCA does not authorize relators to pursue *qui tam* actions against States because, among other things, actions pursued by relators are "private suit[s]" brought by "private parties." *Id.* at 780-781 n.9, 786 n.17. The core premise of petitioners'

constitutional challenge—that the FCA's *qui tam* provisions make relators federal officers (see, *e.g.*, Pet. 26, 30)—is inconsistent with the *Stevens* Court's emphasis on the relator's personal stake in the litigation.[1]

Second, the Court in *Stevens* observed that, "immediately after the framing, the First Congress enacted a considerable number of informer statutes," some of which (like the FCA) "provided both a bounty and an express cause of action." 529 U.S. at 776-777. That historical evidence bears directly on the Appointments Clause question presented here. Legislation "passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, is contemporaneous and weighty evidence of its true meaning." *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983) (quoting *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 297 (1888)) (ellipsis omitted); see *Bowsher* v. *Synar*, 478 U.S. 714, 723-724 (1986) (giving weight to the conclusion of the First Congress that the Legislative Branch should have no role in the removal of Executive officers); *Mistretta* v. *United States*, 488 U.S. 361,

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[1] To be sure, a *qui tam* suit under the FCA affects the interests of the United States as well as those of the relator, both because the suit is premised on an alleged wrong done to the government, and because the government will receive the bulk of any monetary recovery. Although those effects do not cause relators to act as "Officers of the United States" for purposes of the Appointments Clause, they may affect the application of other litigation rules. For example, the United States has taken the position that, because a declined *qui tam* suit "implicates the interests of both the relator and the United States," such a suit is not properly characterized as the relator's "'own case'" for purposes of 28 U.S.C. 1654, which authorizes non-lawyer parties to "plead and conduct their own cases personally." U.S. Amicus Br. at 7, *Wojcicki* v. *SCANA Corp.*, No. 17-2045 (4th Cir., appeal docketed Sept. 7, 2017) (brackets omitted).

401 (1989) (explaining that "'traditional ways of conducting government give meaning' to the Constitution") (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)) (ellipsis omitted); *Riley*, 252 F.3d at 752 (finding it "logically inescapable that the same history that was conclusive on the Article III question in *Stevens* with respect to qui tam lawsuits initiated under the FCA is similarly conclusive with respect to the Article II question concerning this statute"); see also *NLRB* v. *Noel Canning*, 573 U.S. 513, 524-525 (2014).

b. *Qui tam* relators do not possess the practical indicia of federal officers. The concept of an "office" "embraces the ideas of tenure, duration, emolument, and duties." *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1868); see *Auffmordt* v. *Hedden*, 137 U.S. 310, 327 (1890) (merchant appraiser did not hold an office where his position was "without tenure, duration, continuing emolument, or continuous duties, and he act[ed] only occasionally and temporarily"); *United States* v. *Germaine*, 99 U.S. 508, 511-512 (1879) (surgeon did not hold an office where he was "only to act when called on by the Commissioner of Pensions in some special case"). An office is also not personal; rather, its "duties continue, though the person be changed." *United States* v. *Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747) (Marshall, C.J.). Here, the relator's role is limited in time and scope, confined to a particular case, and fundamentally personal in nature, stemming from his capacity as a plaintiff pursuing what is in essence a partially assigned claim. *See Lucia* v. *SEC*, 138 S. Ct. 2044, 2051 (2018) ("[A]n individual must occupy a 'continuing' position established by law to qualify as an officer.")

(citing *Germaine*, 99 U.S. at 511). In addition, "[r]elators are not entitled to the benefits of officeholders, such as drawing a government salary." *Stone*, 282 F.3d at 805; see *Riley*, 252 F.3d at 757-758 (noting that relators "are not subject to either the benefits or the requirements associated with offices of the United States"). And neither the relator nor his attorney in conducting *qui tam* litigation has any duty to subordinate the relator's interest to that of the government if a conflict between those interests arises. Rather, the task of representing the United States in FCA litigation is entrusted to attorneys within the Department of Justice, who can and do contest legal and factual representations made by relators in *qui tam* actions.

Moreover, although a statutory designation is not dispositive of the constitutional question, cf. *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 392-393 (1995); *Mistretta*, 488 U.S. at 393, it is notable that the FCA does not purport to "establish[] by Law" an "Office[]" of informer or relator, U.S. Const. Art. II, § 2, Cl. 2. Nor does the Act otherwise express an intent that relators should be treated as federal officers. To the contrary, the FCA provision that authorizes *qui tam* suits is entitled "ACTIONS BY PRIVATE PERSONS." 31 U.S.C. 3730(b).

c. Petitioners assert (Pet. 30) that *qui tam* relators are "indistinguishable" from the independent counsel in *Morrison* v. *Olson*, 487 U.S. 654 (1988), whom this Court held was an inferior officer (rather than a principal officer) for purposes of the Appointments Clause. But unlike in *Morrison*, the issue here is not whether an officer of the United States is inferior or principal, but rather whether a *qui tam* relator is an officer at all. The Court in *Morrison* did not discuss and did not need to

reach that question because, unlike a *qui tam* relator, the independent counsel was appointed in a manner provided for by the Appointments Clause, see *id.* at 673-674.

In any event, petitioner's argument disregards important differences between the independent counsel in *Morrison* and a *qui tam* relator. Most fundamentally, the position of independent counsel was not personal, was not limited to a single case, and was endowed with "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice." *Morrison*, 487 U.S. at 662 (citation omitted). A *qui tam* relator, by contrast, bears none of those indicia of being a federal officer. He exercises *no* "investigative and prosecutorial functions and powers of the Department of Justice," *ibid.*, and is instead merely a "private part[y]" pursuing civil litigation in his own personal interest, *Stevens*, 529 U.S. at 786 n.17; see *Taxpayers Against Fraud*, 41 F.3d at 1041 ("Although a relator may sue in the government's name, the relator is not vested with governmental power.").

Unlike the independent counsel in *Morrison*, a relator is not empowered to exercise the vast prosecutorial authority of the United States. The government's own conduct in *qui tam* litigation is entrusted solely to officials within the Executive Branch. A *qui tam* relator is more aptly analogized, not to a Justice Department attorney who represents the United States in litigation, but to a plaintiff who asserts a private right of action under a federal statute. Congress's decision to authorize private lawsuits may often rest in part on its belief that such actions will vindicate a societal interest in deterring and remedying violations of federal law. As with plaintiffs who sue under other federal statutes, the po-

tential for *qui tam* relators to furnish practical assistance in the enforcement of federal law does not transform them into "Officers of the United States" whose selection is governed by the Appointments Clause.

The statute in *Morrison* also required that "the Attorney General and the Justice Department * * * suspend all investigations and proceedings regarding the matter" that had been referred to the independent counsel. 487 U.S. at 662-663. Under the FCA's *qui tam* provisions, by contrast, a relator's filing suit does not limit the ability of the United States to pursue the claim. To the contrary, the FCA specifies that every *qui tam* complaint must be filed under seal and served on the government precisely to ensure that the United States can investigate the matter and determine whether it wishes to "intervene and proceed with the action." 31 U.S.C. 3730(b)(2). If the government chooses to intervene, "the action shall be conducted by the Government," 31 U.S.C. 3730(b)(4)(A), which "shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the" relator, 31 U.S.C. 3730(c)(1). The United States can also "elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty," rather than litigating the FCA suit. 31 U.S.C. 3730(c)(5).

Even if the government declines to intervene or to elect an alternate remedy, it retains a great deal of control over a *qui tam* suit. The United States is entitled, for example, to receive copies of all pleadings and transcripts, 31 U.S.C. 3730(c)(3), and to stay any discovery by the relator that "would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts," 31 U.S.C.

3730(c)(4). Even if the government does not initially intervene, it may do so later "upon a showing of good cause." 31 U.S.C. 3730(c)(3). Regardless of whether it intervenes, the United States can dismiss a *qui tam* suit over the relator's objection. See 31 U.S.C. 3730(c)(2)(A); see also, *e.g.*, *Ridenour* v. *Kaiser-Hill Co.*, 397 F.3d 925, 936-937 (10th Cir.) (permitting the United States to dismiss a *qui tam* suit because the suit might divert government resources from other projects and risk disclosure of sensitive information), cert. denied, 546 U.S. 816 (2005); *Swift* v. *United States*, 318 F.3d 250, 252-253 (D.C. Cir.) (holding that 31 U.S.C. 3730(c)(2)(A) gives the United States "an unfettered right to dismiss" a relator's suit), cert. denied, 539 U.S. 944 (2003).[2] The government can also settle a pending *qui tam* suit even without formally intervening, see 31 U.S.C. 3730(c)(2)(B); *United States* v. *Everglades Coll., Inc.*, 855 F.3d 1279, 1285-1286 & n.3 (11th Cir. 2017); see also *id.* at 1288 (affording "considerable deference to the settlement rationale offered by the government"), and it can veto a relator's proposed settlement or voluntary dismissal of his action. See 31 U.S.C. 3730(b)(1); see also *Searcy* v. *Philips Elecs. N. Am. Corp.*, 117 F.3d 154, 155 (5th Cir. 1997).

Petitioners' proposed analogy between FCA relators and U.S. Commissioners (Pet. 32) is likewise inapt. In *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344

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[2] Other courts of appeals, while recognizing the government's broad authority under 31 U.S.C. 3730(c)(2)(A) to dismiss FCA suits over relators' objections, have viewed that right as subject to some judicially enforceable constraints. See, *e.g.*, *United States ex rel. Sequoia Orange Co.* v. *Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998), cert. denied, 525 U.S. 1067 (1999); cf. *Ridenour*, 397 F.3d at 936 n.17.

(1931), the Court held that U.S. Commissioners—who were "authorized by statute in respect of numerous matters," including the authority to adjudicate criminal cases, and who "h[e]ld their office subject to removal by the court appointing them"—were inferior officers. *Id.* at 352-353. "These commissioners had various judicial and prosecutorial powers, including the power to arrest and imprison for trial, to issue warrants, and to institute prosecutions under laws relating to the elective franchise and civil rights." *Morrison*, 487 U.S. at 673 (citation and internal quotation marks omitted). A *qui tam* relator, by contrast, does not "occupy a 'continuing' position established by law." *Lucia*, 138 S. Ct. at 2051 (citation omitted). Rather, he possesses limited and temporary powers and seeks to vindicate a narrow pecuniary interest that arises from Congress's "partial assignment of the Government's damages claim" to him. *Stevens*, 529 U.S. at 773, 786 n.17.

d. Petitioners suggest (Pet. 34) in the alternative that, even if FCA relators are not officers, the statute nevertheless impermissibly "vest[s]" in them "a core officer function." But someone who is not an officer of the United States need not be appointed in accordance with the Appointments Clause. The lone authority that petitioners cite in support of their assertion is the dissent from the Fifth Circuit's decision rejecting an Article II challenge to the FCA's *qui tam* provisions. See *ibid.* (citing *Riley*, 252 F.3d at 767-768 (Smith, J., dissenting)). And the premise of that argument is again mistaken. Contrary to petitioners' assertion, *qui tam* relators do not "administ[er] and enforce[] * * * public law" in the constitutional sense, *ibid.* (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 141 (1976) (per curiam)), any more than does a plaintiff who asserts a private right of action

under a federal statute. Instead, *qui tam* actions are "private suit[s]" brought by "private parties." *Stevens*, 529 U.S. at 780-781 n.9, 786 n.17. Private parties' pursuit of *qui tam* litigation is also consistent with longstanding historical practice, which suggests strongly that the Framers did not view *qui tam* relators as "Officers" who must be appointed pursuant to the Appointments Clause. See pp. 10-11, *supra*.

CONCLUSION

With respect to the second question presented, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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