No. 25-10842

In the United States Court of Appeals for the Fifth Circuit

UNITED STATES EX REL. CHERYL TAYLOR,

Appellee / Cross-Appellant,

v.

HEALTHCARE ASSOCIATES OF TEXAS, LLC,

Defendant / Appellant / Cross-Appellee.

On Appeal from the United States District Court
for the Northern District of Texas

BRIEF OF LEGAL HISTORY SCHOLARS JARED LUCKY, JAMES PFANDER, AND DIEGO ZAMBRANO AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, I hereby certify that I am aware of no persons or entities, besides those listed in the party briefs, that have a financial interest in the outcome of this litigation. In addition, I hereby certify that I am aware of no persons with any interest in the outcome of this litigation other than the signatories to this brief and their counsel, and those identified in the party and *amicus* briefs filed in this case.

Dated: January 27, 2026

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are scholars of legal history who have extensively researched and written about the origins of qui tam litigation and its role in our constitutional republic.

Amicus James Pfander is the Owen L. Coon Professor of Law at Northwestern University Pritzker School of Law. Professor Pfander is an authority on the history of litigation in the Founding era, and a co-author of leading casebooks on civil procedure and federal courts. He has published extensively on the history and early application of Article III, including *Public Law Litigation in Eighteenth Century America: Diffuse Law Enforcement in a Partisan World*, 92 Fordham L. Rev. 469 (2023).

Amicus Diego Zambrano is a Professor of Law at Stanford Law School. Professor Zambrano is an expert in complex litigation and private enforcement, has published voluminously in top law reviews, and is the co-author of a prominent civil procedure casebook. With *amicus* Jared Lucky, as well as another colleague, he coauthored *Private Enforcement at the Founding and Article II*, 114 Cal. L. Rev. 101 (forthcoming 2026). He and Lucky are also co-authors of a new paper, which demonstrates that beyond the Founding and throughout the 1800s, Congress and

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

state legislatures continued to pass statutes authorizing private litigators to file actions challenging public wrongs. *See* Jared Lucky & Diego Zambrano, *Common Informers* (Jan. 20, 2026) (unpublished manuscript) (on file with authors).

Amicus Jared Lucky is a PhD candidate in history at Yale University. In addition to coauthoring the two pieces above, he is writing a dissertation on the origins of American consumer protection law and the development of private enforcement in the Founding Era.

As scholars who teach and write about federal courts, civil procedure, and the history of private enforcement, *amici* have a strong interest in ensuring that this Court has a full understanding of the developing law in these important fields.

INTRODUCTION AND SUMMARY OF ARGUMENT

As the Supreme Court recognized decades ago, statutory qui tam suits brought by private individuals to enforce public laws were "prevalent" in both America and England "in the period immediately before and after the framing of the Constitution." *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000). Relying in part on that history, this Court has held that the False Claims Act's provisions authorizing qui tam suits impose no "unconstitutional intrusion" on the executive power conferred by Article II. *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 751 (5th Cir. 2001) (en banc). Since that time, further historical research by *amici* and others has confirmed not just that qui tam enforcement was widespread,

but that Americans in the Founding era and the early Republic regarded private enforcement by qui tam relators as an appropriate and indispensable tool for enforcing both state and federal law. Indeed, even though qui tam enforcement remained ingrained in American legal culture throughout the nineteenth century, it was apparently never challenged as infringing on executive power.

Qui tam statutes originated centuries ago in England. Between the fourteenth and eighteenth centuries, Parliament enacted hundreds of statutes authorizing private litigants to enforce public laws. *See, e.g.*, 2 William Hawkins, *A Treatise of the Pleas of the Crown* ch. 26, at 376-99 (6th ed. 1787). Colonists brought qui tam actions with them to America, enacting dozens of additional statutes with qui tam provisions in their colonial assemblies. *See* Nitisha Baronia, Jared Lucky, & Diego Zambrano, *Private Enforcement at the Founding and Article II*, 114 Cal. L. Rev. 101, 147 (forthcoming 2026) [hereinafter *Private Enforcement at the Founding*]. After independence, fledging state legislatures—the primary training ground for delegates to the 1787 Constitutional Convention—drew from these deep wells of tradition in relying heavily on qui tam actions to enforce new fiscal and regulatory statutes. *See id.* at 155-59.

In the period immediately after ratification, Congress enacted a plethora of statutes authorizing private enforcement to effectuate nearly every one of its constitutionally enumerated powers. *See id.* at 171. Under the Slave Trade Act of

1794, ch. 11, § 1, 3 Stat. 347, for example, antislavery organizations repeatedly sued slave merchants in federal court, recovering thousands of dollars for their violations. *See* James E. Pfander, *Public Law Litigation in Eighteenth Century America: Diffuse Law Enforcement in a Partisan World*, 92 Fordham L. Rev. 469, 484 (2023). Federal courts adjudicated those cases without Article II concerns ever being raised. Founding-era contemporaries simply did not perceive private enforcers and penal statutes as infringing on executive power.

Significantly, during this period, default rules of qui tam jurisprudence gave executive officers practically no control over these actions once a relator commenced a suit. The Washington administration, for example, recognized that it could not void a penalty recovered by a private plaintiff through a qui tam action against a customs officer. *See Private Enforcement at the Founding*, *supra*, at 171-73. The Jefferson administration, too, concluded that it could not pardon a defendant imprisoned for failing to pay a successful qui tam relator. *See* Pfander, *supra*, at 485. This early evidence strongly suggests that while qui tam relators routinely enforced the law, the presidential administrations closest to the Founding did not view those litigants as usurping the executive power vested in the President by Article II. Rather, like contemporary jurists and legislators, executive branch officials understood such suits as actions by plaintiffs to recover conditional property rights to the statutory penalty vested in them.

As at the federal level, early state legislatures passed countless laws authorizing qui tam prosecutions designed to incentivize private citizens to aid the government in enforcing regulatory laws. And state courts routinely adjudicated qui tam actions. *See, e.g.*, *State v. Mathews*, 4 S.C.L. (2 Brev.) 82 (S.C. Const. Ct. App. 1806); *Commonwealth v. Churchill*, 5 Mass. 174 (1809). Many states had constitutional provisions analogous to Article II's Vesting Clause. But despite frequent and vigorous qui tam litigation, and widespread concern about vexatious informers' suits, state lawmakers did not invoke their state constitutions to rein in qui tam. *See Private Enforcement at the Founding*, *supra*, at 160-61. Instead, they enacted procedural guardrails for informers' actions—like short statutes of limitations and strict rules of preclusion—while continuing to enact qui tam provisions and adjudicate qui tam actions. *See id.*

Founding-era jurists and other government officials at both the federal and state level thus carefully considered how qui tam provisions cohered with the new constitutional order. Those debates played out in Congress, in federal courts adjudicating actions under the Slave Trade Act, within multiple early presidential administrations, and in state legislatures and courts. If qui tam actions encroached on the executive power, those debates surely would have called their constitutionality into question. But, to the best of *amici*'s knowledge, Article II concerns never arose.

Finally, there is overwhelming evidence that American jurists and lawmakers continued to perceive no conflict between qui tam and the constitutional prerogatives of executive officials through the remainder of the nineteenth century. Congress and the state legislatures enacted qui tam statutes throughout the century, and Americans regularly litigated qui tam actions in federal and state courts. Their ubiquity was noteworthy to Alexis de Tocqueville who, after traveling through the northern states in the 1830s, wrote of Americans' heavy reliance on private informers. *See* Alexis de Tocqueville, 1 *Democracy in America* 81 (Henry Reeve, trans., 4th ed. 1841) (1835). Yet so far as *amici* are aware, in the nineteenth century, as in the eighteenth, no constitutional challenge to qui tam enforcement was raised on the ground that it infringed on executive power—despite the fact that well-organized business interests vigorously challenged many regulatory informers' actions in court on other grounds.

In short, the historical record strongly supports the view that Article II was not understood—either at the Founding, or after decades of constitutional "liquidation"—to bar or even meaningfully limit qui tam enforcement.

ARGUMENT

I. Qui Tam Litigation Was Ubiquitous in England and the Preratification Era.

For centuries before the ratification of the Constitution, qui tam lawsuits were ubiquitous in England. Short for "*qui tam pro domino rege quam pro se ipso*,"

literally meaning "he who as much for the king as for himself," such lawsuits arose in the common law in the thirteenth century as plaintiffs used them to gain access to the royal courts. *See Vt. Agency*, 529 U.S. at 774; 3 William Blackstone, *Commentaries on the Laws of England* *160. Because those courts typically heard only matters involving the king, *see* F.C. Milsom, *Trespass from Henry III to Edward III, Part III: More Special Writs and Conclusions*, 74 L.Q. Rev. 561, 585 (1958), commoners would allege royal interests in addition to their own private interests to "obtain a common law remedy . . . for a private wrong that also affected the king[]," Note, *The History and Development of Qui Tam*, 1972 Wash. U. L.Q. 81, 85 (1972).

By the start of the fourteenth century, Parliament had largely displaced common law qui tam actions by expressly authorizing them in enactments called "penal statutes." These were not necessarily statutes which defined a crime in the modern sense; rather they were called "penal" simply because they permitted plaintiffs to recover a portion of the statutory "penalty" owed by the defendant. *Private Enforcement at the Founding*, *supra*, at 141-42. Suits under penal statutes were often known as "informers' actions" or "popular actions," because any person could bring them. *See* Randy Beck, *Popular Enforcement of Controversial Legislation*, 57 Wake Forest L. Rev. 553, 556-57 (2022). And many penal statutes

had qui tam provisions, which required plaintiffs to split any penalty that they recovered with the Crown. *Id.*

By the late eighteenth century, parliamentary penal statutes numbered in the hundreds. *See, e.g.*, 2 Hawkins, *supra*, at 376-77 (discussing "actions on statutes"); 2 Blackstone, *supra*, at *420 (observing that it would be too "tedious" to enumerate the vast number of extant penal statutes). These statutes spanned an "extraordinarily wide range of offenses," from tax dodging to price gouging and church skipping. Ruth Paley, *Introduction* to 1 Blackstone, *supra*, at iii. Most of these statutes were regulatory, touching "matters of police and public convenience," such as the failure to pay customs duties, which affected the public fisc. 2 Blackstone, *supra*, at *420-21. Accordingly, most penal statutes gave plaintiffs the option to initiate their suit with either criminal or civil process; a civil action of debt appears to have been the default option. *See* Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* 164 (1772 ed.).

The Crown possessed little discretion or oversight over such private enforcement. *See Private Enforcement at the Founding*, *supra*, at 138. Private litigants could initiate litigation under penal statutes without any permission from the King. *See id.* at 138-42. "The Crown was similarly limited in its ability to terminate actions under penal statutes." *Id.* at 143. And once a litigant brought suit, the Crown could not pardon the alleged violator. *See id.* The King could only remit

"his own part of the penalty" owed by the offender, who remained liable to the private informer for the rest. *Id.* at 143-44 (internal citation omitted).

The Crown's limited control over actions under penal statutes stemmed from the understanding that the statutory awards were a "kind of private property." *Id.* at 143. As Blackstone explained, penalties made available by Parliament to "any person that will sue for the same" are "placed, as it were, in a state of nature . . . open therefore to the first occupant, who declares his intention to possess them . . . by obtaining judgement to recover them." 2 Blackstone, *supra*, at *437. Accordingly, if no private informer brought an action on a penal statute, the king was free to pardon the defendant's conduct and bar any future claims. *See, e.g.*, *Vanderbergh v. Blake*, 145 Eng. Rep. 447, 451 (1672). But by commencing a qui tam action, the informer "made the popular action his own private action," and it was not "in the power of the crown, or of any thing but parliament, to release the informer's interest." 2 Blackstone, *supra*, at *437; *see, e.g.*, *Stretton and Taylor's Case*, 74 Eng. Rep. 111, 111 (K.B. 1588) (explaining that the Attorney General could only enter a *nolle prosequi* for the Crown's portion of the recovery).

British colonists brought penal statutes with them to America, where "[q]ui tam actions appear to have been as prevalent . . . as in England, at least in the period immediately before and after the framing of the Constitution." *Vt. Agency*, 529 U.S. at 776. Both before and after the American Revolution, colonial assemblies passed

countless new qui tam laws for local regulatory purposes. *See Private Enforcement at the Founding*, *supra*, at 147.[2] Approximately ten percent of all public acts passed in Massachusetts between 1692 and 1820, for example, contained at least one provision authorizing enforcement by an informer, permitting uninjured, third-party individuals to sue and recover a portion of the penalty, with the remainder often going to the provincial government. *See Private Enforcement at the Founding*, *supra*, at 150 & n.166, 152. Colonists apparently even brought suit under English penal statutes that had not been reenacted by the colonial assemblies. *See* Elizabeth Gaspar Brown, *British Statutes in American Law, 1776-1836*, at 1-22 (1964).

The Framers too participated in this culture of qui tam litigation. Alexander Hamilton, for instance, drafted a tax law enforceable by "any informer" during his time as a Representative in the New York State Assembly. *See* Second Draft of an Act for Raising Certain Yearly Taxes Within This State (Feb. 9, 1787), *in* 4 *Papers of Alexander Hamilton* 41-50 (Harold Syrett ed., 1965) [hereinafter *Hamilton*

[2] *See, e.g.*, Act for the Restraining and Punishing of Privateers and Pirates, 1st Assemb., 4th Sess. (N.Y. 1692), *reprinted in* 1 *Colonial Laws of New York* 279, 281 (1894) (allowing informers to sue for, and receive share of, fine imposed upon officers who neglect their duty to pursue privateers and pirates); An Act to Explain and Amend an Act Entitled, "An Act for the Gradual Abolition of Slavery," 1788 Pa. Laws 589 (dividing recovery of statutory penalties between government and informer); An Act to Regulate the Fisheries, and to Prevent the Obstruction of the Navigation in the River Delaware, 1784 N.J. Laws 180, Ninth Gen. Assemb. (same); *see also State v. Bishop*, 7 Conn. 181 (1828) (describing the Miller's Toll statute in colonial Connecticut, taken directly from England).

Papers]. And John Adams regularly represented litigants in civil qui tam actions. *See* 2 *Legal Papers of John Adams* 3, 147-68, 181 n.28, 396-411 (Wroth & Zobel eds., 1965). Qui tam litigation thus abounded in the preratification era, including among those who would go on to craft our founding charter.

II. In the Decades Following the Ratification of the Constitution, Qui Tam Enforcement Remained Prevalent But Was Never Thought to Infringe on the Executive Power.

After the Founding, both Congress and the state legislatures enacted a plethora of statutes with qui tam provisions. Federal and state courts regularly adjudicated actions brought under those provisions, which were frequently initiated and pursued by private informers with no oversight or control by executive officers. Aware of these limitations, executive branch officials themselves expressed no concerns that qui tam suits infringed on their Article II powers.

A. At the federal level, all three branches of government blessed qui tam lawsuits.

1. The first Congresses enacted many statutes with qui tam provisions, largely out of "fear[] that exclusive reliance upon federal law enforcement machinery would not suffice to enforce the penal laws of the nation." Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 Am. U. L. Rev. 275, 303 (1989). Congress thus enlisted citizens in public law enforcement, passing statutes covering a wide range of regulatory subjects. *See Private*

Enforcement at the Founding, *supra*, at 171. Between 1789 and 1820, Congress deployed informers' actions to implement nearly every one of its constitutionally enumerated powers: to make war; raise and support a military; grant copyrights and patents; regulate immigration; establish post offices; lay and collect taxes; coin money; and regulate commerce between the states and with Indian tribes. *See id.*[3] In some of the most prominent debates regarding these statutes—those discussing the Slave Trade Act of 1794—members of Congress expressed no concerns that the Act's qui tam provision infringed on Article II. *See* Pfander, *supra*, at 491.

2. Eighteenth and early-nineteenth-century jurists were keenly aware that legislators habitually incentivized private litigants to enforce the law by giving "a right to a common informer to sue for and recover the penalties," even where the statute imposed "penalties for breach of a public duty." Isaac Espinasse, *A Treatise on the Law of Actions on Penal Statutes* 6 (1st Am. ed. 1822). Yet courts regularly adjudicated these actions without expressing any concern about infringing on

[3] *See also, e.g.*, Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 124-25 (permitting statutory damages for copyright infringement); Act of Mar. 3, 1791, ch. 15, § 44, 1 Stat. 199, 209 (informer's action for import of liquor without paying duties); Act. of Feb. 20, 1792, ch. 7, § 25, 1 Stat. 232, 239 (informer's action for failure to comply with postal regulations); Act of Feb. 21, 1793, ch. 11, § 5, 1 Stat. 318, 322 (informer's action for infringing on patent); Act of Mar. 22, 1794, ch. 11, § 2, 1 Stat. 347, 349 (informer's action against slave trade with foreign nations); Act of May 19, 1796, ch. 30, § 18, 1 Stat. 469, 474 (informer's action prohibiting trade with Indian tribes).

executive enforcement discretion, including with respect to the critical powers to initiate suits and to terminate them, as described further below.

Perhaps the most significant federal court qui tam actions were brought under the Slave Trade Act of 1794, enacted to curb American involvement in the international trade in enslaved people. Act of March 22, 1794, ch. 11, § 1, 3 Stat. 347. That Act imposed stiff penalties on the owners and operators of the ships that transported enslaved people: forfeiture of the vessel, fines of $2,000 on any individual preparing such a ship, and an additional penalty of $200 for each person on board for the purpose of "selling them as slaves." *Id.* One half of the recovery would go to the United States, and the other to the "use of him or her who shall sue for and prosecute the same." *Id.*

The Providence Society, a private association of antislavery activists from Rhode Island, brought the first qui tam suit under the Act in 1797 in Rhode Island federal court, seeking to recover substantial fines and penalties. *See* Pfander, *supra*, at 481-82. Without any Article II concerns being raised, the case proceeded to a trial on the merits, where a jury ruled for the defendant. *See id.* Several years later, another anti-slavery association, the New York Manumission Society, brought suit under the Act's qui tam provisions in New York federal district court to recover $30,000 in penalties under the Act. *See id.* at 483; *see also* Craig A. Landy, *Society of United Irishmen Revolutionary and New-York Manumission Society Lawyer:*

Thomas Addis Emmet and the Irish Contributions to the Antislavery Movement in New York, 95 N.Y. Hist. 193, 202-09 (2014) (citing *James Robertson, qui tam v. Philip M. Topham*, Law Case Files of the U.S. Circuit Court for the Southern District of New York, 1790-1846, Records of the District Courts of the United States, Record Group 21, *NARA*, M883, roll 38). At trial, the Society succeeded in recovering $16,000. *See* Pfander, *supra*, at 484. Unable to pay that amount, the merchant was imprisoned. *See id.*

Concerns about private infringement on executive authority were not raised in either of these lawsuits, even though the associations exercised complete discretion in enforcing the Slave Trade Act. Pfander, *supra*, at 491. They investigated alleged traders, chose which ones to sue, pursued their own legal theories, and settled cases entirely on their own without any control by federal executive officers. *Id.* at 482-83. There is no record of anyone finding those actions problematic.

3. Like Congress and the federal courts, early presidential administrations also carefully considered qui tam actions—unsurprisingly, given the ubiquitous role such actions played in public law enforcement—yet apparently never raised Article II concerns about them. That is true even as these administrations recognized just how little control they exercised over early qui tam actions.

That last point is most apparent from the Washington administration's handling of a qui tam action against a New York customs inspector named Samuel Dodge. *See* 7 *Papers of George Washington* 493-95 & n.1 (Jack D. Warren, Jr. ed., 1988) (editorial note) [hereinafter *Washington Papers*]. The action was brought by an informer suing in the name of the United States under the 1790 Customs Act, which awarded half of any recovered fine to the United States, and divided the other half between the private informer and local treasury officials. *See* Act of Aug. 4, 1790, ch. 35, § 69, 1 Stat. 145, 177. After being indicted under the Act for impermissibly allowing a vessel to unload molasses in the dark, Dodge appealed to Washington for a pardon, "maintain[ing] that he had been entirely ignorant" of applicable regulations, "which had gone into effect only a few days before the incident." *Washington Papers*, *supra*, at 493-95 & n.1.

Unsure how the division of the statutory penalty between the United States and a private litigant would affect the presidential pardon power, Washington sought Hamilton's advice. Hamilton in turn requested the assistance of Richard Harrison, a respected lawyer employed as the Auditor of the Treasury Department. Letter from Hamilton to Harrison (Apr. 26, 1791), *in* 8 *Hamilton Papers*, *supra*, at 312-14. Harrison concluded that Washington could remit only the United States' portion of the fine and any applicable criminal punishments, but any pardon would be a "mere nullity" with respect to the portion of the penalty awarded to the private informer.

Letter from Harrison to Hamilton (May 24, 1791), *in* 8 *Hamilton Papers*, *supra*, at 352-54. Adopting this determination, Washington required payment of the portion of the penalty owed to the private informer as a condition for any pardon. 7 *Washington Papers*, *supra*, at 493-95 & n.1.

The Washington administration understood that its lack of control over the qui tam suit against Dodge was entirely consistent with the executive power vested by Article II. The administration recognized that the executive branch had no inherent power to displace the private portion of a qui tam penalty even though the relator had proceeded in the name of the United States. That was because, as in England, private qui tam awards were understood to be a kind of statutory property right—a conditional right which vested at the time of "the commission of the offence." *United States v. 1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398, 405 (1814); *see* Gregory Ablavsky, *Getting Public Rights Wrong: The Lost History of the Private Land Claims*, 74 Stan. L. Rev. 277, 347 (2022) (discussing how, in the new Republic, an imperfect or inchoate property right was considered vested, even though title was not yet absolute); *supra* Part I (discussing the English origins of this rule). That right could not be displaced by executive action. Accordingly, in the suit against Dodge, the informer's rights had already vested, and Washington could not extinguish those rights, even though he could release the property rights of the United States in the penalty.

Subsequent administrations, too, followed the Washington administration's rationale. When petitioned for a pardon by an insolvent qui tam defendant who had been found liable under the 1794 Slave Trade Act, the Jefferson administration concluded that it "could release" him "from prison and remit any penalty the government had collected," but that "a presidential pardon did not reach the private property rights of third parties." Pfander, *supra*, at 485. The administration expressed no constitutional "qualms about the public or private enforcement of the 1794 Act." *Id.*

B. As with the federal government, many states adopted English and colonial qui tam statutes wholesale or with minor modifications after the ratification of the Constitution. *See, e.g.*, New Jersey Gaming Law, 1797 N.J. Laws 224-25, §§ IV, V (1800) (repealed 1847) (adopted from the English Gaming Law, 9 Ann., c.14, § 2 (1710)). And in the decades following the Constitutional Convention, every state in the union enacted qui tam legislation.[4] In Virginia, for example, a sweeping

[4] *See, e.g.*, An Act to Regulate Marriages, 2 Del. Laws 976 (1790); An Act to Regulate the General Elections in This State, So Far as to Impose a Fine on Persons Voting out of the County Wherein They Reside, 1801 Ga. Laws 11; An Act for Suppressing Mountebanks, Rope-Dancers, Tumblers, &c., 1798 Conn. Acts 487 May Sess.; An Act to Prevent the Introduction and Communication of Contagious Diseases, 1793 N.C. Regular Sess. 37-38; An Act to Restrain Surveyors, to Regulate Certain Proceedings in the Land-Office, and to Compel the Attendance of Witnesses on Surveys Under the Authority of the Chancery, General and County Courts, 1789 Md. Laws xli-xlii; An Act Regulating the Inspection of Beef, Pork, Pickled Fish and Tobacco, and for Other Purposes Therein Mentioned, 1790 R.I. Gen. Assemb. Sept.

modernization of state statutes—proposed by Thomas Jefferson in 1776 and later guided to passage by James Madison—included twelve informers' actions. *See* 8 *Papers of James Madison* 391-99 (Rutland & Rachal eds., 1973) (reproducing Madison's manuscript list of Jefferson's proposed bills with editorial note).

State courts regularly adjudicated actions brought under qui tam statutes as well. For example, the South Carolina Constitutional Court held that qui tam actions did not violate Article II of South Carolina's Constitution, which, like Article II of the federal Constitution, "invested" the governor with "the executive authority of this State," S.C. Const. art. II, § 1 (1790), and also mandated that "all prosecutions shall be carried on in the name and by the authority of the State of South Carolina," *id.* art. III, § 2; *Mathews*, 4 S.C.L. at 82. The court clarified that a 1784 statute, which permitted any informer to recover a qui tam penalty against the operator of an unlicensed billiards table, *see Mathews*, 4 S.C.L. at 82, was enforceable by private litigants, who could recover "the penalty by suit at law, or by information in nature of a qui tam action," *id.* at 84. That was because the qui tam action was "in truth but a civil remedy, to recover a particular sum, which the party from whom it is demanded, is bound by law to pay." *Id.* Although the "Attorney General [could]

Sess. 16; An Act to Explain and Amend an Act Entitled, "An Act for the Gradual Abolition of Slavery," 1788 Pa. Laws 589; Fish Act, 1788 N.H. Laws Dec. Sess. 480.

enter a nolle prosequi," and thereby pretermit the state's interest in the litigation, "the informer may, notwithstanding, proceed for his part," the court concluded. *Id.*

Similarly, the Massachusetts Supreme Court recognized the validity of qui tam enforcement actions in *Churchill*, 5 Mass. at 174. There, a private relator sued to recover a penalty under a 1783 qui tam statute prohibiting usury, but lost at trial. *Id.* at 175. Subsequently, the state's Solicitor General brought an action "for the same offence, and to recover the same penalty." *Id.* After carefully considering a series of English cases concerning the traditional rules of qui tam preclusion, Chief Justice Theophilus Parsons held that the relator's suit precluded the state's subsequent enforcement action, provided it had been properly pleaded. *Id.* at 181-82.

So even Chief Justice Parsons, who prominently defended executive power in the Founding era, *see, e.g.*, *Result of the Convention of Delegates Holden at Ipswich in the County of Essex* 5-6 (Mycall ed., 1778) (Parsons criticizing failed Massachusetts Constitution of 1778 "because the supreme executive officer [was] not vested with proper authority"), did not perceive any concerns with qui tam actions infringing on executive authority in early American history, *see Private Enforcement at the Founding*, *supra*, at 163-64. And he was not alone. Jurists across the states reconciled qui tam enforcement with constitutional provisions that tracked Article II's language, *see, e.g.*, N.Y. Const. art. xvii (1777) ("the supreme executive

power and authority of this State shall be vested in a governor"), without ever suggesting that private enforcement of public laws infringed on executive authority, *see Private Enforcement at the Founding*, *supra*, at 164.

C. Rather than fearing that qui tam actions would unconstitutionally infringe on executive power, state legislatures in the early United States worried about informers in terms of public policy; they feared that vexatious plaintiffs would collude with defendants or bring unwarranted cases to line their own pocketbooks. Note, *supra*, at 97. These concerns were not new. As early as the reign of Queen Elizabeth, Parliament had imposed limitations on penal statutes to reduce the potential for abuse. *See, e.g.*, Giles Jacob, *A Review of the Statutes, Both Ancient and Modern* 8-9 (1715). And even though qui tam litigation had become ubiquitous by the eighteenth century, the term "common informer" was an "epithet" on par with "extortioner," "heretic," and "vagabond." 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 140 (1819).

Accordingly, when state legislatures in the new Republic chose to reform qui tam actions, they primarily imposed procedural safeguards to reduce abusive lawsuits rather than subjecting them to heightened executive control. Massachusetts, for example, enacted a one-year statute of limitations, required informers to bring actions in the county where the offense occurred, and permitted defendants to make

a general denial. *See* Act for the Ease of the Citizens Concerning Actions Upon Penal Statutes, ch. 12, 1788-89 Mass Acts. 19-20.

Similarly, Virginia enacted legislation—originally drafted by Jefferson and ushered through the legislature by Madison in 1786—providing that collusive private prosecutions under a penal statute would not bar recovery by a subsequent good-faith plaintiff. *See* Thomas Jefferson, *A Bill Providing That Actions Popular, Prosecuted by Collusion, Shall Be No Bar to Those Which Be Pursued with Good Faith*, *in* 2 *Papers of Thomas Jefferson* 626-27 (Julian P. Boyd ed., 1950) [hereinafter *Jefferson Papers*] (reproducing Jefferson's manuscript copy); 12 William Hening, *The Statutes at Large* 354-55 (1823). The statute also made any private prosecutor who settled or discontinued a qui tam action without leave of court liable for the whole penalty. *See* 2 *Jefferson Papers*, *supra*, at 626-27.

New York adopted Virginia's anti-collusion provisions and Massachusetts's procedural restrictions on informers' actions. *See* Act to Redress Disorders by Common Informers and to Prevent Malicious Informations, ch. 9., 1788 N.Y. Laws 608-11; *see also Haskins, qui tam v. Newcomb*, 2 Johns. 405, 408 (N.Y. Sup. Ct. 1807) (discussing New York statute authorizing a $100 fine against informers who "compound or agree with the offender for the offence alleged to be committed").

Early legislatures thus were deeply attuned to the problems that qui tam actions could present. Certainly, if they viewed such actions as infringing on

executive power, one would expect them to have said so. *Amici* have found no evidence that they did.

III. Vigorous Qui Tam Enforcement Continued Throughout the Nineteenth Century.

The Founding-era consensus that qui tam did not infringe upon the executive power continued to prevail throughout the nineteenth century. Qui tam remained a critical part of American legal culture throughout the nineteenth century, but it was apparently never challenged on Article II grounds.

Congress passed dozens of statutes authorizing informers' actions, across every decade of the nineteenth century. *See, e.g.*, Act of Jan. 9, 1809, ch. 5, 2 Stat. 506, 506; Act of Mar. 14, 1820, ch. 24, 3 Stat. 548, 548-51; Act of Aug. 25, 1841, ch. 12, 5 Stat. 445, 449; Act of Aug. 5, 1861, ch. 45, 12 Stat. 292, 296. These statutes spanned a wide range of regulatory areas, from intellectual property rights to customs collection, with some even designed to raise revenue during the Civil War. *See, e.g.*, Internal Revenue Act of 1862, ch. 119, § 31, 12 Stat. 432, 444.

Federal courts continued to adjudicate qui tam actions throughout the nineteenth century just as they had done during the Founding era. The federal appellate reports abound with informers' lawsuits throughout the century, *see, e.g.*, *United States v. Voss*, 28 F. Cas. 385 (C.C.D.C. 1802); *The Thomas & Henry v. United States*, 23 F. Cas. 988 (C.C.D. Va. 1818) (Marshall, J.); *Levy Ct. of Washington Cnty. v. Ringgold*, 15 F. Cas. 439 (C.C.D.C. 1826), and informers'

actions seem to have comprised a substantial portion of the federal district court docket, *see, e.g.*, *United States Court*, Van Buren Press, May 17, 1870, at 2 (on file with Libr. of Cong., Chronicling America, https://tinyurl.com/3ekea9zm). Indeed, the seminal case of *McCulloch v. Maryland*, 17 U.S. 316 (1819), which concerned Maryland's statute taxing the Bank of the United States, began as an informer's action. *See id.* at 322.

Well-resourced defendants knew how to mount constitutional challenges to qui tam suits; they often challenged them under the Due Process Clause. *See, e.g.*, *Marvin v. Trout*, 199 U.S. 212 (1905). But, to *amici*'s knowledge, these litigants did not raise any challenge based on the purportedly exclusive enforcement authority of executive officers. *See* 16 David S. Garland & Lucius P. McGehee, *The American and English Encyclopaedia of Law* 324 (2d ed. 1900) (describing, in a section titled "Constitutionality of Statutory Provision for Informers," various unsuccessful attacks on informers' actions, none of which included challenges based on infringement on executive power). Notably, even the objections that were raised to these actions were broadly rejected, and in rejecting them, the Supreme Court often highlighted the long tradition of informers' suits, explaining, for instance, that statutes "providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence

for hundreds of years in England, and in this country ever since the foundation of our government." *Marvin*, 199 U.S. at 225.

Like Congress, state legislatures also continued to enact statutes with informers' provisions throughout the nineteenth century. *See, e.g.*, J.B.C. Murray, *The History of Usury* 75 (1866) (describing 1821 Maine statute against usury which awarded "one moiety to the informer, and the other to the State"); *Marvin*, 199 U.S. at 224-25 (describing Ohio gambling statute with informer provision effective since, at least 1831). These statutes covered a wide range of regulatory areas, from environmental conservation, *see, e.g.*, *Eastman v. Curtis*, 1 Conn. 323, 324 (1815), to financial regulation, *see, e.g.*, Murray, *supra*, at 75. And state courts, too, adjudicated informers' actions throughout the nineteenth century. *See, e.g.*, *Palmer v. Hicks*, 6 Johns. 133 (N.Y. Sup. Ct. 1810) (informer's action under statute regulating the gathering of clams); *Morrell, qui tam v. Fuller*, 8 Johns. 218 (N.Y. 1811) (action to recover on a usurious loan); *Williams v. Jackson*, 5 Johns. 489 (N.Y. 1809) (action to determine the validity of land transfer); *Perrin v. Sikes*, 1 Day 19 (Conn. 1802) (action to regulate railroad monopoly).

Informers' actions remained so widespread throughout the nineteenth century that *amici*'s research has unearthed hundreds of cases involving informers between 1800 and 1890 in state and federal courts. *See* Jared Lucky & Diego Zambrano, *Common Informers*, at 3 (Jan. 20, 2026) (unpublished manuscript) (on file with

authors). These lawsuits had the same goal as the qui tam suits at the Founding: to "ensure the execution of the laws," as Alexis de Tocqueville put it. Tocqueville, *supra*, at 81. As one state court explained, without such statutes, "many salutary laws would never be enforced, because no one would be interested in seeing them enforced." *State v. Delano*, 49 N.W. 808, 809 (Wis. 1891).

In short, the continuing tradition of qui tam enforcement throughout the nineteenth century forecloses any suggestion that constitutional doubt about the compatibility of private enforcement and the duty of executive officers to enforce the law developed in the decades after the Founding Era.

* * *

Qui tam actions have a "long tradition" in our constitutional structure, *Vt. Agency*, 529 U.S. at 774, and despite spirited Founding-era debates in all three branches of the federal government, as well as the states, *amici* have identified no evidence of anyone registering concerns that such litigation infringed on Article II or executive power. That consensus continued well beyond the Founding era—American jurists and lawmakers continued to perceive no conflict between qui tam and the constitutional prerogatives of executive officials throughout the remainder of the nineteenth century.

CONCLUSION

For the foregoing reasons, if this Court addresses the merits of Appellants' constitutional challenges to the False Claims Act's qui tam provisions, it should consider the history of qui tam practice, including its prevalence in the Founding era and continuing into the nineteenth century.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on January 27, 2026.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 27th day of January, 2026.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,168 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using 14-point Times New Roman font.

Executed this 27th day of January, 2026.

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