Nos. 24-13581, 24-13583

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES ex rel. CLARISSA ZAFIROV,

Plaintiff-Appellant, and

UNITED STATES OF AMERICA,

Intervenor-Appellant,

v.

FLORIDA MEDICAL ASSOCIATES, LLC, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida
No. 8:19-cv-01236-KKM-SPF

BRIEF OF *AMICI CURIAE* RELATORS IN ONGOING RELATOR-LED *QUI TAM* PROCEEDINGS IN SUPPORT OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 28-1 and Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for Amici states that no signatory of this brief is a publicly held corporation, issues stock, or has a parent corporation.

I also hereby certify that I am aware of no persons or entities, other than those listed in the party and amicus briefs previously filed in this case, that have a financial interest in the outcome of this litigation. Further, I am aware of no persons with any interest in the outcome of this litigation other than those previously identified in the party and amicus briefs filed in this case and the signatories to this brief and their counsel. The signatories to this brief and their counsel are identified as follows:

- Sean Gose and Brent Berry, relators in *United States ex rel. Gose v. Native American Services Corp.*, Case No. 8:16-cv-03411 (M.D. Fla.);
- Beverly Marcus, relator in *United States ex rel. Marcus v. BioTek Labs, LLC*, Case No. 8:18-cv-2915 (M.D. Fla.);
- Brian Butler, relator in *United States ex rel. Butler v. Shikara*, Case No. 9:20-cv-80483 (S.D. Fla.);
- Robert Farley and Dr. Manuel Fuentes, relators in *United States ex rel. Wallace v. Exactech Inc.*, Case No. 7:18-cv-01010 (N.D. Ala.); and
- Glenn E. Chappell, Jonathan K. Tycko, and Jaclyn S. Tayabji of Tycko & Zavareei LLP, counsel for the above-listed individuals.

Tycko & Zavareei LLP represents the *Gose* relators in their pending District Court action, but does not represent any of the other *amici* for any purpose other than this brief.

Dated: January 15, 2025

/s/ *Glenn E. Chappell*
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INTEREST OF *AMICI CURIAE*[1]

This brief is submitted on behalf of the following individuals, who are Plaintiff-Relator(s) in ongoing *qui tam* cases in district courts in the Eleventh Circuit in which the Government did not intervene and instead allowed the case to proceed with the relator leading the litigation:

- Sean Gose and Brent Berry, relators in *United States ex rel. Gose v. Native American Services Corp.*, Case No. 8:16-cv-03411 (M.D. Fla.);
- Beverly Marcus, relator in *United States ex rel. Marcus v. BioTek Labs, LLC*, Case No. 8:18-cv-2915 (M.D. Fla.);
- Brian Butler, relator in *United States ex rel. Butler v. Shikara*, Case No. 9:20-cv-80483 (S.D. Fla.); and
- Robert Farley and Dr. Manuel Fuentes, relators in *United States ex rel. Wallace v. Exactech Inc.*, Case No. 7:18-cv-01010 (N.D. Ala.).

Amici have a strong interest in this appeal because it will substantially affect their ability to continue prosecuting their cases in their current posture. Amici and their counsel have expended substantial time, money, and energy in their respective cases.[2]

[1] No party's counsel authored this brief in whole or in part or contributed money intended to fund the preparation or submission of this brief. Further, no person other than the signatories and their counsel contributed money intended to fund preparation or submission of this brief.
[2] All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

We submit this brief in support of Appellants to highlight some practical aspects of relators' roles in relator-led *qui tam* litigation that are relevant to the Court's resolution of the issues presented in this appeal. One issue is whether relators who bring actions to recover Government funds under the False Claims Act ("FCA") are "officers of the United States" who must be appointed pursuant to Article II of the Constitution. In answering "yes" to the question, the District Court misunderstood the relator's role and its relationship with the Government. We write, based on our collective experience, to expound upon the legal and practical distinctions between an "officer" of any organization (including the United States Government) and a *qui tam* relator, who performs an independent function that is not done in any official capacity.

This brief advances two main points. First, when a person serves as an "officer" of an organization (in this case, the federal Government), three features (among others) are typically present. First, the officer has the organization's backing in key respects because of the person's official capacity. Second, the person has at least some discretion to employ the organization's resources. Third, the person has authority to speak on the organization's behalf. A *qui tam* relator bears none of these features. On the contrary, they bear all the costs and risks of pursuing the case, they have no authority to wield Government resources in the litigation, and they have no authority to speak on the Government's behalf.

Second, a survey of pending relator-led *qui tam* cases in this Circuit illustrates the

value of the FCA's *qui tam* provisions—and warns as to what would be lost if the District Court's decision stands. Relator-led *qui tam* litigation protects taxpayer funds from all sorts of fraud in many different industries. A summary of the facts alleged in these ongoing cases shows that relators' ability to pursue cases based on their unique knowledge and experience is a crucial bulwark against fraud in Government programs and contracts. From construction to healthcare to medical device manufacturing to Department of Defense contracting, relators have pursued and are pursuing important cases that the Department of Justice could not or did not take over for myriad reasons often not related to the merits of those cases, such as lack of resources.

STATEMENT OF THE ISSUE

Amici agree with Dr. Zafirov's articulation of the issue presented, which is "[w]hether the district court erred by holding that the qui tam provisions of the False Claims Act ("FCA")—which were enacted in 1863, have been invoked in over 15,000 cases, and have been universally upheld by other federal courts—violate the Appointments Clause of Article II of the Constitution." Plaintiff-Appellant's Opening Brief at 1.

ARGUMENT

I. *Qui tam* relators do not enjoy the Government's financial backing in their cases, have no power over how the Government's resources are allocated, and do not speak for the Government.

An officer of an organization (including an officer of the United States Government) can be identified by several defining characteristics that flow from the

organizational authority and trust vested in the position.

First, by virtue of serving in an official capacity and acting in accordance with the organization's policies, the officer enjoys backing from the organization. *See United States v. Germaine*, 99 U.S. 508, 511-12 (1878) (explaining that the concept of an officer "embraces the ideas of tenure, duration, emolument, and duties"). For example, when a lawyer for the Department of Justice pursues a fraud case, the Government funds the litigation. If the case is unsuccessful, the Government absorbs the costs of litigation. The lawyer is an employee paid a guaranteed salary to litigate in the name of the Government. And the Government directs the lawyer's work in accordance with the Government's policy agenda. *See Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890) (an officer has "tenure, duration, continuing emolument, or continuous duties").

A *qui tam* relator does not benefit from organizational backing of this sort. When a relator comes forward with a *qui tam* suit, their independent status requires that they bear the costs and risks associated with the litigation. And "[b]ecause of their complexity, FCA cases are expensive to prepare and lengthy to resolve." Pamela H. Bucy, *Game Theory and the Civil False Claims Act: Iterated Games and Close-Knit Groups*, 35 Loy. U. Chi. L.J. 1021, 1033 (2004). A relator is not an employee of the Government and thus receives no salary or financial support. *See Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 758 (5th Cir. 2001) (observing that "qui tam plaintiffs do not draw a government salary and are not required to establish their fitness for public employment"). Nor does a relator receive Government backing with respect to the

costs of litigation. Relators assume these costs without assurance of success or compensation. *See* Julie Rose O'Sullivan, *"Private Justice" and FCPA Enforcement: Should the SEC Whistleblower Program Include A Qui Tam Provision?*, 53 Am. Crim. L. Rev. 67, 91 (2016) (discussing the "many costs" relators shoulder in bringing and litigating *qui tam* suits). For this reason, relators typically retain counsel to represent them on a contingency basis. Bucy, *supra*, at 1033. Additionally, as the District Court acknowledged, some relators also rely on third-party litigation funding, which may be the only way to allow them to afford the costs of their case. *See Ruckh v. Salus Rehab., LLC*, 963 F.3d 1089, 1100 (11th Cir. 2020) (relator had litigation funding agreement with third party). If the relator enjoyed the United States' organizational backing as an officer, they would not face these financial risks.

The second defining feature of an officer is at least some discretion to bring the organization's resources to bear. For example, when a district attorney makes a prosecutorial decision, that reflects a judgment concerning the propriety of expending Government resources on the case. *See Donahue v. Gavin*, 280 F.3d 371, 384 (3d Cir. 2002) (explaining how a state prosecutor's decision not to retry a defendant "reflected an informed and reasoned exercise of prosecutorial discretion as to how best to use [the state's] limited resources").

A *qui tam* relator has no authority to leverage Government resources in this way. *See U.S. ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 758 (9th Cir. 1993) ("The fact that relators sue in the name of the government does not vest them with any governmental powers;

they conduct litigation under the FCA with only the resources of private plaintiffs."). When the relator brings their action, the FCA preserves full Government control over whether to intervene and take the lead or conserve Government resources by letting the relator pursue the case. A *qui tam* complaint must be filed under seal for an initial 60-day period, which can be and often is easily extended far longer to allow the Government to investigate and decide whether to intervene. *See* 31 U.S.C. § 3730(b)(2), (3); U.S. Gov't Accountability Office, GAO-06-320R, *Information on False Claims Act Litigation* 3 (2006), available at https://www.gao.gov/products/gao-06-320r (finding that the median FCA investigation took 38 months, with investigations ranging from 4 to 187 months).

Because a relator cannot oblige the Government to intervene, relators often go to great lengths during this statutory investigatory period (again, at their own expense) to persuade the Government to step in. The FCA requires the relator to serve a "written disclosure of substantially all material evidence and information the person possesses" on the United States Attorney for the judicial district where the *qui tam* was filed and the Attorney General. *See id.* § 3730(b)(2). The written disclosure is a significant undertaking, and relators often provide detailed evidence and documentation in the hope of convincing the Government that the case is strong. *See, e.g.*, Claire M. Sylvia, *The False Claims Act: Fraud Against the Government* § 11:13 (July 2024 update) (discussing the need for relators "to provide the Government with as much information and evidence as possible in an understandable form" in the written disclosure); *U.S. ex rel.*

Bagley v. TRW, Inc., 212 F.R.D. 554, 557 (C.D. Cal. 2003) (finding that Congress intended to encourage a working partnership between relators and the Government in the investigation of *qui tam* claims, and this purpose is best served when a relator's written disclosure is "as complete, detailed, and thoughtful as possible").

During this period, the relator also typically sits for one or more extensive interviews by Government attorneys and/or investigators. Kathleen McDermott, *Qui Tam: An AUSA's Perspective*, 11 False Cl. Act and Qui Tam Q. Rev. 9, 24 (Oct. 1997). This is a pivotal part of the investigative process, and if the relator is not prepared for the interview or does not present a convincing case, the Government may refuse to intervene. *See* McDermott, *supra*, at 24 (explaining that in the interview process, the Government focuses "on the personal knowledge and corroboration the relator can bring to the allegation," examines "the motive and background of the relator," and evaluates the case based on "the relator's interview and disclosure of material evidence"). As these common practices show, the only power the relator holds relative to the commitment of Government resources is the power to persuade. The decision is the Government's alone.

The Government's power to decide whether and how to use its resources (and the Relator's lack of such power) continues if the Government chooses not to intervene in the case and allows the relator to pursue the case. After the Government informs the court of that decision, the matter is unsealed and the litigation commences—at which point the relator must serve all pleadings and deposition transcripts on the Government

if the Government requests them. 31 U.S.C. § 3730(c)(3). The FCA then gives the Government authority to intervene at any point in the case—even if the intervention comes at a disadvantageous juncture for the relator—upon a showing of good cause.[3] *See id.*

Indeed, the Government can even intervene and obtain dismissal of a case it previously declined any time it "offers a reasonable argument for why the burdens of continued litigation outweigh its benefits." *United States, ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 437-38 (2023). This includes burdens on the Government's resources. In *Polansky*, the Supreme Court affirmed the Government's dismissal of a previously declined case after "its discovery obligations mounted and weighty privilege issues emerged" and the Government concluded the case's potential value did not justify this strain on its resources. *Id.* at 428, 437-38. Further confirming the Government's ability to prioritize and allocate resources among matters as it sees fit, the Government can obtain a stay of a relator-led case if the litigation 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).

A third characteristic of an "officer" is their authority to speak for the

[3] Moreover, the Supreme Court has confirmed that "good cause" in this context is "a uniquely flexible and capacious concept" that embraces intervention for the purpose (among many other valid reasons) of obtaining dismissal when the Government determines that the burden on its resources is unjustified when compared to the likelihood of the case's success. *See United States, ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 429 n.2 (2023).

organization. For instance, when a Government lawyer takes a position on a legal issue, the lawyer is expressing the view of their employer, not their view as an individual. *See* Brief for the United States of America as Amicus Curiae Supporting Appellants, *Gose v. Native Am. Servs. Corp.*, No. 23-10600 (11th Cir., filed May 12, 2023) (expressing the position of the United States in non-intervened *qui tam* litigation before this Court).

But in a *qui tam* action, the relator does not speak for the Government and cannot agree to bind the Government in future litigation. Once they have filed their case, they cannot dismiss it (and thus cannot settle it) unless the Government approves. *See* 31 U.S.C. § 3730(b)(1) (providing that an action "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting"). Because of this, it is a best practice for relators' counsel to keep the Government involved during mediation or settlement discussions and seek input on proposed terms. *See* Lee Tarte Wallace, *Mediating a Qui Tam Suit: The Impossible Dream?* 4 (2019), https://www.fedbar.org/wp-content/uploads/2019/12/FRI-11-30-Mediation-Paper-Mediating-a-Qui-Tam-Suit-pdf-1.pdf.

Nor can a relator adopt a litigation position on behalf of the Government. For example, the Government has no obligation to agree with a relator on a legal question. To the contrary, the Government sometimes files statements of interest or amicus briefs disagreeing with a relator's view on an issue. *See, e.g.*, Brief for the United States as Amicus Curiae in Support of Neither Party, *United States ex rel. Greenfield v. Medco Health Sols., Inc.*, No. 17-1152 (3d Cir., filed Apr.17, 2017) (Government argued that the

district court properly rejected relator's argument concerning the FCA's falsity element); Brief for the United States as Amicus Curiae Supporting Neither Party, *United States ex rel. Donegan v. Anesthesia Assocs. of Kansas City*, No. 15-2420 (8th Cir., filed Sept. 16, 2015) (Government urged Eighth Circuit to affirm the district court's grant of summary judgment against relator and disagreed with relator's argument on whether the relator established scienter under the FCA's standard).

Because the relator must live with the specter of the Government exercising its various statutory rights to affect the litigation strategy or even alter the case's outcome, relators often consult the Government on key legal issues or motions and allow the Government's position to drive their own strategy. When the Government and the relator are aligned on case strategy and the issues, the Government can be a key partner in the case. For example, Government attorneys sometimes review and comment on relators' drafts. *Cf.* McDermott, *supra*, at 24 (explaining that the Government stays apprised of non-intervened *qui tam* cases and "in rare, appropriate instances is available to assist the Court or parties on litigation issues"). And in cases that proceed to appeal, the relator may work with the Government to coordinate oral argument strategy, sometimes dividing argument time if the Government opts to participate as an amicus. *See* Order of Jan. 29, 2024, *Gose v. Native Am. Servs. Corp.*, No. 23-10600 (11th Cir.) (counsel for relator in declined *qui tam* case shared oral argument time with the Government in appeal that led to reversal of dismissal).

In sum, an officer holds a position with the Government, enjoys the

Government's financial backing, has the discretion to leverage the Government's resources, and speaks on behalf of the Government as an organization. A relator in a *qui tam* case does not.

II. As evidenced by Relators' ongoing proceedings, relator-led *qui tam* cases protect taxpayer funds in a broad range of industries and settings.

We now turn to a practical illustration of the wide range of alleged misconduct that the FCA's *qui tam* provisions protect against. The numbers alone make this point: from 1997 to 2023, *qui tam* actions led to the recovery of $52.75 billion in Government funds through settlements and judgments, with non-intervened actions generating $5.19 billion of that total. Civil Division, U.S. Dep't of Justice, *Fraud Statistics Fiscal Year 2023*, https://www.justice.gov/opa/media/1339306/dl?inline. These totals far exceed the amount recovered in non-*qui tam* cases (that is, cases brought by the Department of Justice without a relator), which adds up to $22.55 billion over the same period. *See id.*

The value extends beyond the numbers. A survey of the relevant cases currently pending in this Circuit concretely illustrates the breadth of misconduct remedied through the FCA's provisions on relator-led cases. At the time of this writing, Amici are aware of at least 31 *qui tam* cases pending in district courts in this Circuit in which relators are taking the lead on some or all of the claims.[4] This list excludes cases

[4] This list does not include two cases within this Circuit where the Government intervened as to some claims and indicated in its notice of intervention that the relators intend to dismiss the remaining claims. *See US ex rel. Lau v. Ellwood Medical Center, LLC*,

currently pending on appeal. The chart below lists those cases, along with a brief summary of the alleged fraud in each:

Case Caption	**Docket No.**	**Alleged Fraud**
U.S. ex rel. Gose v. Native American Services Corp.	8:16-cv-03411 (M.D. Fla.)	Government Contracts Fraud (misrepresenting 8(a) program eligibility)
U.S. ex rel. Marcus v. Biotek Labs, LLC	8:18-cv-2915 (M.D. Fla.)	Healthcare Fraud (unnecessary allergy testing and immunotherapy services, kickbacks)
U.S. ex rel. Butler v. Shikara	9:20-cv-80483 (S.D. Fla.)	Healthcare Fraud (kickbacks to steer patients to Medicare Advantage organizations)
U.S. ex rel. Wallace v. Exactech Inc.	7:18-cv-01010 (N.D. Ala.)	Healthcare Fraud (defective medical device, kickbacks)
U.S. ex rel. Permenter v. eClinical Works, LLC	5:18-cv-00382 (M.D. Ga.)	Cybersecurity Fraud (security vulnerabilities in electronic health records software)
U.S. ex rel. Angela D'Anna v. Lee Memorial Health System	2:14-cv-00437 (M.D. Fla.)	Healthcare Fraud (unlawful compensation arrangements with employed physicians)
U.S. ex rel. Cohn v. Genesis Global Healthcare	4:18-cv-00128 (S.D. Ga.)	Healthcare Fraud (kickbacks for invasive vascular procedures, unnecessary and excessive vascular procedures)
U.S. ex rel. Southard v. Kipper Tool Co.	2:23-cv-00225 (N.D. Ga.)	Government Contracts Fraud (sale of excessively priced tool products to Government)
U.S. ex rel. Nancy D'Anna v. Capstone Medical Resources	2:19-cv-00391 (N.D. Ala.)	Healthcare Fraud (upcoding mental health services, billing for services by unqualified administrative staff, kickbacks)
U.S. ex rel. Hunt v. Cochise Consultancy, Inc.	5:13-cv-02168 (N.D. Ala.)	Government Contracts Fraud (failure to disclose conflict of interest to improperly influence

No. 1:22-cv-02698-JPB (N.D. Ga.) (ECF No. 44); *US ex rel. Boone v. All Heart Pharmacy Inc.*, No. 1:19-cv-21402-KMW (S.D. Fla.) (ECF No. 43).

		award of military contract)
U.S. ex rel. Rubino v. ASAP Lab, LLC	8:20-cv-01292 (M.D. Fla.)	Healthcare Fraud (billing for COVID-19 and other tests not provided, kickbacks)
U.S. ex rel. Boger v. Select Rehabilitation, LLC	3:24-cv-00893 (M.D. Fla.)	Healthcare Fraud (excessive and unnecessary physical, occupational, and speech-language therapy at nursing homes)
U.S. ex rel. Publix Litigation Partnership, LLP v. Publix Supermarkets, Inc.	8:22-cv-2361 (M.D. Fla.)	Healthcare Fraud (failure to provide gatekeeping function regarding controlled substances)
U.S. ex rel. McCutcheon v. QBR, LLC	5:17-cv-00462 (N.D. Ala.)	Healthcare Fraud (kickbacks and fraudulent billing for electrodiagnostic testing)
U.S. ex rel. Pritchard v. Rockwell Collins Simulation and Training Solutions, LLC	5:14-cv-01452 (N.D. Ala.)	Government Contracts Fraud (false representations about flight training simulator intellectual property to obtain military contracts)
U.S. ex rel. Scarborough v. Alabama Cancer Care, LLC	1:22-cv-01533 (N.D. Ala.)	Healthcare Fraud (unnecessary radiation oncology services, billing for services not performed and performed using unsafe equipment)
U.S. ex rel. Bryant v. Comfort Care Hospice, LLC	2:20-cv-00911 (N.D. Ala.)	Healthcare Fraud (ineligible hospice admissions, billing for services not provided, falsifying records, kickbacks)
U.S. ex rel. Williams v. Muses Partners, LLC	1:22-cv-03561 (N.D. Ga.)	Government Contracts Fraud (misrepresenting compliance with Section 8 housing program requirements)
U.S. ex rel. Tucker v. Affinity Hospice Holdings, LLC	2:24-cv-01369 (N.D. Ala.)	Healthcare Fraud (ineligible hospice admissions, falsifying records, kickbacks)
U.S. ex rel. Wiggins v. CRH Americas Materials, Inc.	2:21-cv-00686 (S.D. Ala.)	Government Contracts Fraud (quality control testing fraud related to construction of public roadway)
U.S. ex rel. Kane v. Select Medical Corporation	8:21-cv-01050 (M.D. Fla.)	Healthcare Fraud (upcoding physical therapy services,

		billing for un-reimbursable services)
U.S. ex rel. Collins v. Robertson	1:22-cv-02634 (N.D. Ga.)	Paycheck Protection Program Fraud (misuse of PPP funds)
U.S. ex rel. Switzer v. Parfenchuck	1:23-cv-00158 (S.D. Ga.)	Healthcare Fraud (kickbacks for spinal equipment and devices)
U.S. ex rel. Colapinto v. Ear, Nose & Throat Plastic Surgery Center, P.A.	1:20-cv-04156 (N.D. Ga.)	Healthcare Fraud (unnecessary audiology procedures, upcoding, billing for testing done by unlicensed staff
U.S. ex rel. Gonite v. UnitedHealthCare of Georgia, Inc.	5:19-cv-00246 (M.D. Ga.)	Healthcare Fraud (kickbacks to solicit Medicare Advantage Institutional Special Needs Plan enrollees)
U.S. ex rel. Deligdish v. North Brevard County Hospital District	6:22-cv-00696 (M.D. Fla.)	Healthcare Fraud (improperly retaining funds, illegal remuneration to physicians)
U.S. ex rel. Relator, LLC, v. Gorski	2:23-cv-00104 (M.D. Fla.)	Paycheck Protection Program Fraud (misrepresenting eligibility for PPP loan)
U.S. ex rel. Thornton v. Novopharm of Tampa, LLC	8:23-cv-01783 (M.D. Fla.)	Healthcare Fraud (kickbacks for pharmaceutical products and nursing home services)
U.S. ex rel. Valentine v. Memorial Health Care System, Inc.	3:22-cv-00143 (N.D. Ga.)	Healthcare Fraud (unlawful compensation arrangements with employed physicians)
U.S. ex rel. De Vera Pulido v. Health Associates of Georgia, Inc.	2:21-cv-00186 (N.D. Ga.)	Healthcare Fraud (billing for services performed by midlevel providers, upcoding, falsifying documentation)
U.S. ex rel. Williams v. The Southern Company, Inc.	1:18-cv-00680 (N.D. Ga.)	Government Contracts Fraud (false representations to secure DOE construction grants)

Amici's cases also illustrate the diverse contexts in which relator-led *qui tam* cases protect against fraud.

Gose involves alleged fraudulent exploitation of federal small-business development programs in the construction field. There, the relators allege the defendants fraudulently obtained contracts that were set aside for small businesses owned and controlled by economically disadvantaged individuals pursuant to the U.S. Small Business Administration's 8(a) program. *See Gose v. Native Am. Servs. Corp.*, 109 F.4th 1297 (11th Cir. 2024). After the district court granted the defendants' motion to dismiss, the relators obtained a published opinion from this Court reversing the dismissal and deciding important questions concerning interpretation of the applicable 8(a) Program statutes and regulations. *See generally id.*

Marcus concerns alleged overbilling and kickbacks in the medical industry. There, the relator alleges that third-party providers billed Government healthcare programs for medically unnecessary allergy testing and immunotherapy services marketed, managed and provided by the defendants, and that these claims were the product of unlawful kickbacks to the defendants. *See Marcus v. BioTek Labs, LLC*, No. 8:18-CV-2915-WFJ-JSS, 2023 WL 374334, at *1-*2 (M.D. Fla. Jan. 24, 2023). At the pleading stage (where the relator successfully litigated a motion to dismiss presenting multiple challenges to the relator's allegations, *see id.* at *3), the Government filed a statement of interest opposing dismissal of the case and disagreeing with the defendants on multiple legal issues upon which their motion to dismiss was premised. *See* United States' Opposition to Public Disclosure Dismissal and Statement of Interest Re Motion to Dismiss, *Marcus*, ECF No. 94 (filed Nov. 17, 2022).

Shikara deals with alleged healthcare fraud under the Medicare Advantage program. Relators allege that defendants—a group of Medicare Advantage organizations, a Florida physician, and companies under the physician's control—engaged in a kickback scheme and conspired to steer patients to specific Medicare Advantage Organizations. *United States ex rel. Butler v. Shikara*, No. 20-80483-CV, 2024 WL 4354807, at *2 (S.D. Fla. Sept. 6, 2024). The relators successfully guided the case through the pleading stage, and the Government filed two statements of interest urging the Court to deny defendants' motions to dismiss. *Id.* at *2. The Court did, finding the relators plausibly alleged their allegations and upholding the constitutionality of the FCA's *qui tam* provision. *Id.* at *11, *18.

Wallace addresses an alleged scheme to induce the use of a defective medical device in surgery. There, the relators allege that the defendant, a medical device manufacturer, sold its knee replacement device to be surgically implanted in patients despite knowing it was defective and not reasonable or necessary for treatment, and further provided kickbacks to surgeons to induce its continued use. *See United States ex rel. Wallace v. Exactech, Inc.*, No. 2:18-CV-01010-LSC, 2022 WL 2919349 (N.D. Ala. July 25, 2022). The relators have successfully litigated two motions to dismiss, a motion for judgment on the pleadings, and a motion for summary judgment. *See id.* at *1, *5, *6-*13; *United States ex rel. Wallace v. Exactech, Inc.*, 703 F. Supp. 3d 1356, 1365-66 (N.D. Ala. 2023). At the pleading stage, the Government filed a statement of interest opposing dismissal and disagreeing with defendant's argument that the FCA's *qui tam* provision

violates the Constitution's Appointments Clause and Take Care Clause. ECF No. 248 (filed Sept. 12, 2023).

If this Court were to depart from the heavy weight of authority upholding the FCA's *qui tam* provisions, relators, the Government, and the public would lose a valuable tool for protecting Government funds in these and many other industries and contexts.

CONCLUSION

For all the reasons in Appellants' briefs and for those we have shown here, *qui tam* relators are not "officers of the United States." Further, in their roles as independent litigators working to protect Government funds, they safeguard the public fisc from a wide range of misconduct across numerous industries, often bringing their valuable knowledge and expertise to bear in specialized and technical contexts. Their contributions are unique, vital, and squarely within constitutional bounds. The Court should reverse.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Eleventh Circuit Rule 28-1(m), I, Glenn E. Chappell, certify the following:

This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) because it contains 4,323 words (exclusive of the portions exempted by Fed. R. App. P. 32(f) and Eleventh Circuit Rule 32-4), which is less than the maximum length of 6,500 words allowed for an amicus brief.

This brief complies with the typeface and formatting requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) as it has been written in Garamond, a 14-point proportionally spaced font set in plain, roman style.

Dated: January 15, 2025

/s/ *Glenn E. Chappell*
Glenn E. Chappell

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 Eleventh Circuit by using the appellate CM/ECF system on January 15, 2025 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.

Dated: January 15, 2025

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