No. 23-1127

IN THE

Supreme Court of the United States

WISCONSIN BELL, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA EX REL. TODD HEATH,
Respondent.

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

BRIEF OF THE ANTI-FRAUD COALITION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

Jacklyn DeMar
THE ANTI-FRAUD COALITION
1220 19th Street, N.W.
Suite 500
Washington, DC 20036
Tel. (202) 296-4826

Chandra A. Napora
Jillian L. Estes
Counsel of Record
MORGAN VERKAMP LLC
4410 Carver Woods Drive
Suite 200
Cincinnati, Ohio 45242
Tel. (513) 651-4400
cnapora@morganverkamp.com
jestes@morganverkamp.com

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INTEREST OF THE *AMICUS*[1]

The Anti-Fraud Coalition ("TAF Coalition") is a non-profit public-interest organization dedicated to preserving effective anti-fraud legislation at all levels. It educates the public and legal community about the *qui tam* provisions of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, has provided testimony before Congress regarding each of the proposed amendments to the FCA since 1986, and participates in litigation as *amicus curiae.* TAF Coalition regularly authors legal publications about the FCA and presents an annual educational conference. Its members include *qui tam* relators and their counsel who bring FCA actions around the country on behalf of private citizens and the United States.

TAF Coalition has a strong interest in ensuring the proper interpretation and application of the FCA and a depth of experience in how the FCA has been implemented over time. It files this brief to address the proper reach of the FCA to protect federal programs, refute the unsupported parade of horribles decried by Petitioner and its amici, and address the erroneous claims regarding the constitutionality of the FCA by Petitioner and its amici, despite that issue not properly being before the Court.

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person other than the *amicus*, its members, and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

For more than two decades, the Federal Communications Commission ("FCC") has overseen the administration of billions of dollars of federal funds flowing to and through the Schools and Libraries Universal Services Support program (the "E-rate program"). Created by Congress in the Telecommunications Act of 1996, the E-rate program is widely recognized as a federal program providing funds to fulfill the critical federal purpose of ensuring schools and libraries across the country have access to telecommunications and information services.

Petitioner's arguments depend entirely on this Court's willingness to accept the fallacy that the E-rate program consists of no more than "a *private* corporation paying out only *private* funds." Pet. Brief. at 2 (emphasis in original). In fact, the E-rate program consists of statutorily-mandated contributions from service providers, held and distributed by an agent of the United States that has no private right to the funds but rather is empowered to act solely at the discretion and direction of the government to execute Congressionally-mandated functions. Application of the FCA to a program of this nature is not new or novel but wholly consistent with the reach of the FCA since its inception.

When courts, including this one, previously construed language of the Act to exclude certain claims made to federal programs, Congress acted swiftly to issue clarifying amendments in 2009 consistent with the FCA's purpose to "broadly to protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the government instrumentality upon which such claims

were made." *Rainwater v. United States*, 356 U.S. 590, 592 (1958). Petitioner seeks a second – or third – bite at the same apple, accompanied by the same hyperbolic floodgate-arguments that did not materialize in 1986 or 2009 and will not now.

Further, Petitioner and amici engage in an unveiled effort to capitalize on Justice Thomas' dissent in *United States ex. rel. Polansky v. Exec. Health Res., Inc.,* 599 U.S. 419, 449 (2023), despite the issue not being decided by the Seventh Circuit and therefore not properly before this Court. At base, the FCA does not offend the separation of powers because the Executive Branch retains sufficient control over *qui tam* litigation, and *qui tam* relators are not officers of the United States and do not exercise government power such that they need to be appointed in accordance with Article II. With the support of the FCA by all three branches of government, together with the history and structure of the FCA, the contention that the FCA is unconstitutional should gain no purchase with this Court, especially where, as here, the issue was not raised, briefed, or decided below.

ARGUMENT

I. The False Claims Act Has a Long History of Protecting Taxpayers from Fraud on Government Programs, Regardless of the Mechanism Through Which False Claims Are Made

Since the dawn of the nation, the United States has contracted with private individuals and entities to provide good and services critical to our operation and success as a country. While unscrupulous contractors have preyed on the government from the founding, the

pace and gravity of the "stupendous abuses" rose to a crescendo during the Civil War, when profiteers capitalized on the Union's surging demands for the "necessities of war." *Polansky*, 599 U.S. at 424. In response, President Lincoln enacted the first federal False Claims Act in 1863, modeled after centuries-old *qui tam* statutes common in England and adopted in the United States at its founding. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens,* 529 U.S. 765, 774-777 (2000).

The FCA, "then as now, imposed civil liability for many deceptive practices meant to appropriate government assets." *Polansky*, 599 U.S. at 424. Indeed, "the objective of Congress was broadly to protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the government instrumentality upon which such claims were made." *Rainwater*, 356 U.S. at 592. Thus, consistent with the intent of the Congress that created it, the liability provisions of the FCA were not to be narrowly construed. *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968).

Amidst a surge in government spending associated with both the New Deal and World War II, this Court decided *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), which confirmed the broad language of the FCA in allowing a *qui tam* suit to proceed even after the defendant had been criminally prosecuted for the same conduct, noting no legislative history indicating an intent to restrict such usage of the Act. Responding to concerns of potential for abuse, Congress shortly thereafter passed an amendment intended to put guardrails around the use of publicly available information (though notably not narrowing the scope of the fraud covered by the Act). *United*

States ex rel. Springfield Terminal Ry. v. Quinn, 14 F.3d 645, 650 (D.C. Cir. 1994). However, the reflexive legislation was onerous, and, "the passage of time revealed that Congress, in its attempt to evade Scylla, had steered precipitously close to Charybdis." *Id.*

A. The Modern False Claims Act, Building on the Lincoln-Era Statute, Was Drafted to Provide Redress For All Types of Fraud on the United States

Following the restrictive amendments to the original FCA, enforcements dropped dramatically by mid-century, causing fraud to run so rampant as to "undermine[] the integrity of Federal programs and make[] people lose confidence in public institutions." Gov't. Accountability Off., AFMD-81-57, *Fraud in Government Programs: How Extensive is it and How Can it be Controlled?* 46 (1981) ("1981 GAO Report"). Following the 1981 GAO Report, and on the heels of several restrictive circuit court decisions narrowing the reach of the Act, Congress recognized that "the growing pervasiveness of fraud necessitates modernization of the Government's primary litigative tool for combatting fraud: the False Claims Act." S. Rep. 99-345, at 1 (1986). Congress amended the Act in 1986 ("the 1986 Amendments"), with strong bipartisan support.

The purpose of the 1986 Amendments was clear: They were "aimed at correcting restrictive interpretations of the act's liability standard, burden of proof, qui tam jurisdiction and other provisions in order to make the False Claims Act a more effective weapon against Government fraud." S. Rep. 99-345 at 3. The 1986 Amendments reflected Congress'

unequivocal intent to broadly reach all types of fraud on government programs, "from welfare and food stamps benefits, to multibillion-dollar defense procurements, to crop subsidies and disaster relief programs." *Id.* at 2.

Congress also recognized that the expanse of programs impacted by fraud is matched only by the different forms of false claims submitted as a result. Thus, Congress expressed its intent that the 1986 Amendments reach all types of false claims, noting "a false claim may take many forms, the most common being a claim for goods or services not provided, or provided in violation of a contract term, statute or regulation." *Id.* at 6 (describing various forms of false claims and rejecting court decisions narrowing the term).[1] The resulting definition of "claim" codified into the FCA for the first time in the 1986 Amendments effectuated Congress' intent for the Act to have a broad reach.

In short, the 1986 Amendments enhanced the Act "to strengthen the Government's hand in fighting false claims, and to encourage more private enforcement suits." *Graham Cnty. Soil & Water Conservation District v. Wilson*, 559 U.S. 280, 298 (2010) (internal citations omitted).

B. Financial Harm to The United States is Not a Precondition for FCA Enforcement

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[2] *E.g.*, "[T]he Committee considers a false application for reduced postal rates to be a false claim for postal services… whether such benefits are received by means of a reduction in the amount paid by the Government or by means of subsequent claims for reimbursement is a matter of bookkeeping rather than of substance."

Petitioner and its amici repeatedly and errantly assert that a direct financial loss to the United States is a condition-precedent to FCA liability. *E.g.* Pet. Brief at 17.

As Respondent accurately asserts, and as addressed below, false submissions to the E-rate program made and caused to be made by Petitioner *do* cause financial harm to the United States. *E.g.,* Resp. Brief at 7-8. However, even were this Court to determine that no financial damage befell the United States as a result of the funding mechanism at issue, Petitioner still does not escape culpability because proof of damage to the United States is not an element of FCA liability. As the statute makes plain, and as uniformly recognized in the case law, the FCA explicitly *does not* include damages as a required element of liability. 31 U.S.C. § 3729(a)(1) (liability provisions); *see also, e.g., United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 189 (5th Cir. 2009) (FCA "lacks the elements of reliance and damages."); *United States ex rel. Bahrani v. Conagra, Inc.*, 465 F.3d 1189, 1203 (10th Cir. 2006), citing *Kennard v. Comstock Resources, Inc.*, 363 F.3d 1039, 1047 (10th Cir. 2004) ("[W]e note that 'there is no requirement in the text [of § 3729(a)(7)] that the Government have an ongoing interest in the funds or that the Government itself suffer a loss.'"). This is not a new interpretation; even in the underutilized era between 1943 and the 1986 Amendments, this Court and others came to the same conclusion. *Rex Trailer Co. v. United States*, 350 U.S. 148, 152-53 (1956) ("no requirement, statutory or judicial, that specific damages be shown"); *United States v. Hughes*, 585 F.2d 284, 286 n.1 (7th Cir. 1978) ("A false claim is actionable under the Act even though the United States has suffered no measurable

damages from the claim"); *Fleming v. United States*, 336 F.2d 475, 480 (10th Cir. 1964) ("Proof of damage to the Government resulting from a false claim is not a necessary part of the Government's case under the Act").

This result is by design. Financial loss is not the only type of fraud the FCA was enacted to address. Securing the integrity of public programs is an integral piece of the FCA's success. As the drafters of the 1986 Amendments explained:

> The cost of fraud and other illegal activities cannot always be measured in dollars. Nonmonetary effects must also be considered in evaluating the seriousness of incidents of fraud against the Government. Possibly the most serious nonmonetary effect is the loss of confidence in the Government's ability to efficiently and effectively manage its programs….In many of these cases it is difficult to pinpoint a direct dollar loss, but individuals or organizations are clearly receiving benefits to which they are not entitled. Violations such as these threaten program integrity and could lead to the eventual cancellation of the programs involved and loss of benefits for the program participants who obey the rules.

1981 GAO Report at 15. *See also*, S. Rep. 99-345 at 2 ("The cost of fraud cannot always be measured in dollars and cents"). Put simply, "[f]raud harms the United States in ways untethered to the value of any ultimate payment." *Yates v. Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1316 (11th Cir. 2021),

citing *United States v. Mackby*, 339 F.3d 1013, 1019 (9th Cir. 2003) ("Fraudulent claims make the administration of Medicare more difficult, and widespread fraud would undermine public confidence in the system").

Because of this, the United States and relators have effectively used the FCA to combat harm to program integrity and critical federal priorities. *E.g., United States ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, 741 F.3d 390, 409 (4th Cir. 2013) (noting that the Excessive Fines Clause thus does not "confine[]" the "concept of harm . . . strictly to the economic realm" in the FCA context and awarding $24 million in penalties where relator "sought no damages"'). For example, in August 2024, the Department of Justice and the U.S. Attorney's Office for the Central District of California announced a $38.2 million settlement with the City of Los Angeles to resolve allegations that it had knowingly failed to meet federal accessibility requirements when it sought and used Department of Housing and Urban Development grant funds for multifamily affordable housing.[2] HUD General Counsel noted that the settlement should send "a clear message that HUD and its partners at the Department of Justice will work tirelessly to protect the integrity of HUD's programs…." *Id.* Similarly, in June 2022, noting the efforts to "protect government programs that exist to assist small or disadvantaged companies," the United

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[3] *City of Los Angeles Agrees to Pay $38.2M to Resolve False Claims Act Suit for Alleged Misuse of Department of Housing and Urban Development Grant Funds,* https://www.justice.gov/opa/pr/city-los-angeles-agrees-pay-382m-resolve-false-claims-act-suit-alleged-misuse-department

States Attorney's Office for the District of Connecticut announced a $5.2 million settlement resolving allegations that a defense manufacturer falsely certified that it was a "small business concern" and "women-owned small business concern" to qualify for small business set-aside contracts that it was ineligible to receive.[3]

Continued enforcement of these sorts of programmatic-harm cases is not only entirely consistent with the letter and spirit of the Act, but is foundational to the United States' successful oversight of federal programs:

> As the [1981 GAO Report] pointed out, fraud erodes public confidence in the Government's ability to efficiently and effectively manage its programs. This is why the FCA is so important to not just the Government, but to American taxpayers. It offers an opportunity for the Government to win back the hearts and minds of taxpayers who believe the Government does not care how taxpayer dollars are spent.

S. Rep. 110-507 at 8 (2008).

C. Congress Clarified the Reach of the FCA When Courts Narrowly Construed Statutory Language in a Manner Inconsistent with Congressional Intent

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[4] *Connecticut Companies Pay $5.2 Million to Resolve Allegations of False Claims Act Violations Concerning Fraudulently Obtained Small Business Contracts*, https://www.justice.gov/usao-ct/pr/connecticut-companies-pay-52-million-resolve-allegations-false-claims-act-violations

Petitioner requests that the Court nonetheless narrow the scope of the FCA by carving out an exception for the claims submitted to the E-rate program. When courts previously accepted defendants' invitations to narrowly construe liability provisions of the FCA, Congress moved to clarify: "With such a great potential for fraud against the Government, it is important that the Committee revisit the FCA and correct erroneous court interpretations that have limited the scope and application of the FCA in contravention of Congress's intent in passing the 1986 Amendments." S. Rep. 110-507 at 6.[4]

In 2009, Congress was prompted into action by this Court's decision in *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 669 (2008) ("under 31 U.S.C. § 3729(a)(2), a defendant must intend that the Government itself pay the claim"), which, in Congress' view, threatened to remove accountability for fraud against the government. *See also*, *United States ex. rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 490 (D.C. Cir. 2004) (holding that, under the FCA, the claim must be "presented to an officer or employee of the Government before liability can attach").

Much like Petitioner is asking this Court to do for service-providers in the E-rate program, the tandem decisions of *Allison Engine* and *Totten* created an FCA-shelter for certain government contractors. Just months after *Allison Engine* was decided, Congress

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[4] The work related to The False Claims Act Correction Act of 2008 was heavily relied upon in the drafting and passing of the FCA provisions of the Fraud Enforcement and Recovery Act of 2009. *See* S. Rep. 111-10 at 2 n.2 (2009).

was unequivocal that the Court's application of the FCA was too narrow:

> The *Allison Engine* holding is contrary to Congress's original intent in passing the law and creates a new element in a FCA claim and a new defense for any subcontractor that are inconsistent with the purpose and language of the statute…The *Totten* decision, like the *Allison Engine* decision, runs contrary to the clear language and congressional intent of the FCA by exempting subcontractors who knowingly submit false claims to general contractors and are paid with Government funds.

S. Rep. 111-10 at 10-11.

In response, Congress passed the FCA provisions of the Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4, 123 Stat. 1617 ("FERA Amendments") to "amend the FCA to clarify and correct erroneous interpretations of the law that were decided in" *Totten* and *Allison Engine*. S. Rep. 111-10 at 10. Further, the Committee made clear that "liability under section 3729(a) attaches whenever a person knowingly makes a false claim to obtain money or property, any part of which is provided by the Government without regard to whether the wrongdoer deals directly with the Federal Government; with an agent acting on the Government's behalf; or with a third-party contractor, grantee, or other recipient of such money or property." *Id*. Importantly, the FERA Amendments did not *create* new liability for subcontractors or entities that received federal funds through an intermediary; it *"clarified"* that these cases are "representative of the types of frauds the FCA was

intended to reach when it was amended in 1986." *Id.* (emphasis added).[5]

The FERA Amendments were also motivated by Congress' desire to repudiate arguments like Petitioner's that there is no FCA remedy for fraud against entities abusing government interests simply because the false claims do not result in the government paying more money. S. Rep. 111-10 at 12, citing *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F. Supp. 2d 617, 646-47 (E.D. Va. 2005), rev'd 562 F.3d 295 (4th Cir. 2009)[6] as "inconsistent with the spirit and intent of the FCA" and recognizing that

> When the U.S. Government elects to invest its resources in administering funds belonging to another entity, or providing property to another entity, it does so because use of such investments or their designated purposes will further the interests of the United States…The FCA should extend to these administered funds to ensure that the bad acts of contractors do not harm the foreign policy goals or other objectives of the Government.

Id. at 12-13. Congress confirmed that FCA liability attaches "to knowingly false requests or demands for money and property from the U.S. Government, without regard to whether the United States holds title to the funds under its administration." S. Rep.

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[5] Indeed, the section of the FERA Senate Report addressing FCA amendments is titled, "Sec. 4. Clarifications to the False Claims Act to reflect the original intent of the law." *Id.*

[6] Looking to the text of the FCA and citing *Marcus*, the Fourth Circuit reversed, holding that the district court erred when it concluded that funds administered by the Coalition Provisional Authority in Iraq were outside the FCA's reach. 562 F.3d at 305.

111-10 at 13. It would be completely incongruous for Congress to intend the FCA to reach funds that the United States administered but did not hold title to, but not, as Petitioner would have this Court hold, to reach funds to which the United States *does* hold title *and* directs the administration of.

"When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *United States ex rel. Garbe v. Kmart Corp.*, 824 F.3d 632, 640 (7th Cir. 2016), quoting *Stone v. I.N.S.*, 514 U.S. 386, 397 (1995). Further, when an amendment is "declaring the intent of an earlier statute," the subsequent legislation "is entitled to great weight in statutory construction." *Loving v. United States*, 517 U.S. 748, 770 (1996). Accordingly, the language chosen by Congress to effectuate its long-held intent to "bolster the resources of the Government to protect the Federal fisc and uncover frauds that otherwise would never have come to light" should be given great deference in determining the applicability of the FCA to the E-rate program. S. Rep. 110-507 at 8.

II. Congress Clearly Intended that the FCA Reach Funds Held in the E-rate Program

In context of the development and purpose of the FCA, application to the E-rate program is apparent. The E-rate program was developed after the 1986 modernization of the FCA, meaning it was conceived of and structured in a time of intense governmental focus on both the protection of the federal fisc and programmatic integrity. It is illogical to conclude that Congress would update its most powerful fraud-fighting tool and shortly after would develop a multi-billion-dollar program to meet a critical federal need

that it excluded from federal oversight. It is even more illogical that such a significant exclusion would be done without any discussion or debate, and, here, the public record shows none.

The FERA Amendments' clarification through the use of the word "agents" confirms congressional intent to reach claims made to the E-rate program. For the reasons well-articulated by Respondent, the USAC plainly acted as an agent of the United States. Moreover, with respect to how agency relationship was considered by the FCC, the USAC, and the financial institutions involved in the USAC's administration of the program, the money speaks for itself: Until moved to the Treasury, the E-rate funds were held by a bank in the name "Universal Service Administrative Company as Agent of the FCC for the Administration of the FCC's Universal Service Fund." U.S. Gov't. Accountability Off., GAO-17-538, *Additional Action Needed to Address Significant Risks in FCC's Lifeline Program*, (2017). The notion that Congress' use of the term "agent" could be interpreted to exclude funds expressly held by the USAC "as Agent of the FCC" at the exact same time requires the suspension of logic and must be rejected. *E.g.*, *W. Air Lines v. Bd. of Equalization*, 480 U.S. 123, 133 (1987) ("The illogical results of applying such an interpretation… argue strongly against the conclusion that Congress intended [those] results…").

Public records reflect that FCA litigation related to the E-rate program was contemplated at or near the inception of the program. In 2005, the GAO identified that the FCC had asked the Department of Justice to recognize "that USF are federal funds for purposes of representing FCC and the United States in litigation involving USF, such as the False Claims Act." U.S.

Gov't Accountability Off., GAO-05-151, *Telecommunications: Greater Involvement Needed by FCC in the Management and Oversight of the E-rate Program* 49 n.13 (2005). And despite extensive evaluation of whether E-rate funds should be considered federal funds for various accounting and budget purposes (funds may be classified differently for different purposes), none of the public discussion contemplated that the fiscal classification would impact the United States' ability to protect the funds through the FCA.[7]

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[7] Petitioner asserts that the OMB concluded in 2000 that the E-rate fund "does not constitute public money," and then "appears to have reversed its position on the status of universal service funds in 2014." Pet. Brief at 9 and n. 5-6. This is an inaccurate representation of the Government's position. Petitioner relies on an April 28, 2000 letter from OMB assessing whether the E-rate funds were "public funds" *for the specific purpose of the Miscellaneous Receipts statute*; it found they were not because they were not generally available to pay debts of the United States. What Petitioner does not include is that the OMB letter was produced as an attachment to a letter from the FCC to the GAO, also dated April 28, 2000, in which the FCC responded to a series of questions related to the fiscal classification of the E-rate funds. Therein, the FCC explained that, "For purposes of the United States Budget, *the [OMB] has classified these contributions and the resulting support payments as federal funds* and more specifically the universal service fund is included in the FCC portion of the budget as a special fund." (Emphasis added.) Further, the FCC explained that, "The Congressional Budget Office has explained that CBO and OMB count payments into the Universal Service Fund as federal revenues and payments from the fund as federal outlays." *Depts. Of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 2001, Hearings before the Subcomm. of the H. Comm. on Appropriations*, 106th Cong. 68-612 (2001) at

Finally, Petitioner briefly acknowledges that the FCC moved the E-rate funds from the private bank account to Treasury in 2018. Pet. Brief at 9, n.6. This is not an inconsequential observation to be relegated to a footnote. The transfer of funds was completed in 2018, shifting approximately $9 billion into Treasury.[8] No statutory amendment was necessary for the funds to be moved; nothing changed about the contributions, the distributions, or the management of the fund; there was no transformation in the character of the funds at all. *See* Resp. Brief at 35-36. And yet, with the E-rate funds transferred to Treasury, Petitioner's arguments about the application of the FCA necessarily dissolve. Petitioner's recognition that the very same funds for the very same program are now received directly into Treasury should be outcome-dispositive: E-rate funds are now and have always been federal funds subject to FCA liability.

III. The Seventh Circuit's Opinion Does Not Open Floodgates or Expose Private Business Relations to Public Fraud Enforcement

The Seventh Circuit's opinion *did not* extend the FCA to private transactions between private entities for private, nongovernmental purposes. Neither

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258 (Apr. 28, 2000, Letter from W. Kennard, FCC, to M. Volpe, GAO, regarding the GAO's on-going study of the E-rate program). https://bit.ly/3ZOEX98 There was no about-face in 2014.

[8] *E-rate, Other Universal-Service Funds to Be Transferred to U.S. Treasury*, https://www.edweek.org/technology/E-rate-other-universal-service-funds-to-be-transferred-to-u-s-treasury/2017/08

Respondent, the United States, nor this Amicus argues that the FCA reaches funds fully divorced from federal programs. Yet, Petitioner and its amici insist this is the inevitable outcome if the Circuit Court's opinion stands. The Court need not credit Chicken Little's cries that the sky is falling when its distress call is based on a legal fiction.[9]

Petitioner and its amici also suggest that FCA enforcement of the E-rate program will harm federal programmatic interests because contractors will not want to participate in the program if they now fear exposure to FCA liability. The best indicator as to whether FCA exposure will deter participation in the program is history itself. It has been nearly a decade since the Eastern District of Wisconsin first denied Petitioner's motion to dismiss Respondent's FCA case, holding the FCA to be an appropriate vehicle for redressing fraud in the E-rate program because "the government 'provided' the money within the meaning

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[9] Petitioner's amici assert that the holding would expose entities like Fannie Mae and Freddie Mac to FCA liability, contrary to *United States ex rel. Adams v. Aurora Loan Servs.*, 813 F.3d 1259, 1260 (9th Cir. 2016). There, the court ruled that the claims at issue made to Fannie Mae and Freddie Mac were not claims as defined by 31 U.S.C. §§ 3729(b)(2)(A)(i), but, "To the extent the district court broadly held that claims made to Freddie Mac and Fannie Mae could never be 'claims' within the FCA's definition of that term, the district court was mistaken. A properly pled claim under § 3729(b)(2)(A)(ii) could give rise to FCA liability, but not as alleged in the three amended complaints pled here." *Id.* Thus, entities like Fannie Mae and Freddie Mac have always been exposed to potential FCA liability under a properly pleaded claim; the instant case does not open any door that has not already been cracked for years.

of the FCA" and because the USAC is an "agent" of the United States. D. Ct. Doc. 126, at 6. Were a decision in favor of Respondent to open the floodgates of litigation and deter program participation, the last decade would have drowned the program out. Instead, the E-rate program has thrived, with a funding cap for FY2024 recently increased to $4.940 billion.[10]

Moreover, recent history has shown that increased enforcement in any space, even highly-regulated spaces involving private contractors administering funds for the United States, does not deter involvement in federal program participation. Nowhere is this clearer than the rapid rise of Medicare Advantage ("MA") amid heightened healthcare regulation. More than half of eligible Medicare beneficiaries are enrolled in MA in 2024, an increase from less-than-one-third 10 years prior.[11] The MA-growth occurred even as DOJ has announced MA as an enforcement priority, noting that it "continues to pursue cases alleging false claims in the Medicare Advantage (or Medicare Part C) program" and highlighting nearly $200 million in settlements in a single year.[12]

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[10] *FY2024 E-rate Funding Cap $4.94 Billion*, https://www.fundsforlearning.com/news/2024/03/fy2024-E-rate-funding-cap-4-94-billion/#:~:text=On%20March%208%2C%202024%2C%20the, FY2023%20cap%20of%20%244.768%20billion.

[11] *Medicare Advantage in 2024: Enrollment Update and Key Trends*, https://www.kff.org/medicare/issue-brief/medicare-advantage-in-2024-enrollment-update-and-key-trends/#:~:text=More%20than%20half%20of%20eligible,enrolled%20in%20Medicare%20Advantage%20plans.

[12] *False Claims Act Settlements and Judgments Exceed $2.68 Billion in Fiscal Year 2023*,

Ultimately, a risk of floodgates opening *is* present here, but not from affirming the Circuit Court's opinion. Rather, the same risk of floodgates that led to the FERA Amendments exists here if this Court emboldens a subset of federal-program participants by excepting their exposure to FCA enforcement. Despite the hyperbolic warnings of doom to the E-rate program by proper regulation, the true risk to the program is foreclosing the United States' ability to protect both the federal fisc and the program's integrity from service-providers like Wisconsin Bell.

IV. The False Claims Act is Constitutional

In its opening brief, Petitioner argues that the FCA's *qui tam* provisions violate Article II. Petitioner also suggests that Article III is compromised by the Circuit Court's decision. Neither argument is properly before the Court, as Petitioner did not raise them in the district court or at the Seventh Circuit.[13] *E.g., OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 38 (2015).

Nonetheless, Petitioner and its amici persist and rest their constitutional challenge both on the fallacy of begging the question (they demand that it be taken as true that the funds at issue here are purely private money outside the reach of the FCA) and on a fundamental misconception of *qui tam* actions. In assessing whether legislation "disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its

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https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-268-billion-fiscal-year-2023

[13] Petitioner attempted to raise the question in its petition for rehearing en banc, but the Seventh Circuit panel did not, in rehearing, consider those improperly raised arguments.

constitutionally assigned functions." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977). By helping the Executive Branch detect fraud that would otherwise go unseen, and by enabling the government to partner with or allow relators to redress those frauds, the FCA's *qui tam* provisions enhance, not usurp, the Executive's ability to take care that laws are enforced.

A. The Qui Tam Provisions of the FCA Do Not Run Afoul of Article II.

Through the *qui tam* provisions of the FCA, the United States "effect[s] a partial assignment of the Government's damages claim." *Stevens*, 529 U.S. at 773. The FCA provides comprehensive rules regarding that assignment such that a *qui tam* plaintiff under the Act is unlike any other plaintiff: "Because the relator is no ordinary civil plaintiff, he is immediately subject to special restrictions." *Polansky*, 599 U.S. at 425. These restrictions confer only discrete authority so limited as to not infringe upon the powers bestowed upon the Executive by Article II.

By design, the FCA does not permit a *qui tam* relator to stop the government from bringing a case it wants to bring, and, critically, nor does it permit a relator to force the government to bring a case it does *not* want to bring. Instead, when a relator brings an FCA action, the government has essentially plenary authority to decide whether that action will proceed. Thus, the lawsuit is served first on the government, and not the defendant, so that the government can investigate and evaluate the case in secret. 31 U.S.C. § 3730(c)(3). The government then has an unfettered right to intervene in the action if it so chooses, in which case the government "shall not be bound" by any of the

relator's actions. *Id.*, § 3730(b)(4), (c)(1). Or, the government has broad power to "dismiss the action notwithstanding the objections of the person initiating the action." *Id.*, § 3730(c)(2)(A); *Polansky*, 599 U.S. at 440. In short, FCA actions do not proceed without the government's effective approval: Either the government will be the party conducting the action, or it will permit the relator's action to go forward.

The Executive's control persists even if the government declines intervention and permits the relator to proceed: The case may not be settled or dismissed without the Attorney General's consent (31 U.S.C. § 3730(b)(1)); the government may seek to restrict the relator's discovery if it would interfere with a criminal investigation or prosecution by the government (c)(4)); and the government may belatedly intervene for "good cause" (c)(3)), at which point it can settle the action (c)(2)(B)), pursue the allegations in an alternative forum (c)(5)), or even dismiss the action, allowed "in all but the most exceptional cases." *Polansky*, 599 U.S. at 437. Practically, the Executive's power is even broader, as it may partially intervene in a *qui tam* matter, and it may dismiss some claims and not others.

In short, the Executive's supervisory powers over *qui tam* actions are broad and flexible, and the *qui tam* provisions of the FCA neither vest executive power in private hands nor prevent the Executive from enforcing or declining to enforce the law as it sees fit.

Every appellate court to consider Article II challenges to the FCA—the Second, Fifth, Sixth,

Ninth, and Tenth Circuits[14]— has upheld the statute's constitutionality. *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749 (5th Cir. 2001) (*en banc*); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993); *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148 (2d Cir. 1993); *United States ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787 (10th Cir. 2002); *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032 (6th Cir. 1994).

The Executive Branch actively supports the constitutionality of the *qui tam* provisions before the judiciary, and it has repeatedly emphasized that "the False Claims Act remains one of the most important tools for ensuring that public funds are spent properly and advance the public interest." *U.S. Dep't of Justice, "False Claims Act Settlements and Judgments Exceed $2 Billion in Fiscal Year 2022*" (statements of Principal Deputy Assistant Attorney General Boynton).[15] The Executive Branch has also expressed gratitude for "the hard work and courage of those private citizens who bring evidence of fraud to [its] attention, often putting at risk their careers and reputations," and observed that its "ability to protect citizens and taxpayer funds continues to benefit greatly from their actions." *Id.*

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[14] While the Eleventh Circuit has not directly addressed an Article II challenge to the FCA, it has embraced the arguments that courts upholding the FCA have accepted, including the United States' significant control over FCA *qui tam* actions. *See Yates*, 21 F.4th at 1311-12 .

[15] *False Claims Act Settlements and Judgments Exceed $2 Billion in Fiscal Year 2022*, https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-2-billion-fiscal-year-2022

1. An Historical Retrospective Supports the Constitutionality of the FCA

The constitutionality of the FCA's qui tam provisions is well-supported by the historical development of the FCA. President Lincoln's Congress grounded the FCA in an ancient and effective procedure for increasing the likelihood of detecting and deterring fraud on the government. S. Rep. 99-345 at 8. Since the Founding Era, the three branches have worked in concert to support the use of the *qui tam* mechanism to promote government interests.

Petitioner's amici urge the Court to ignore history as a source of authority for the FCA's constitutionality, undoubtedly because a true historical retrospective does not support the conclusion Petitioner and its amici desire. The Court should decline this invitation. The idea that the Court should ignore history because Petitioner and its amici would rather brush aside historical evidence that does not serve their purpose is anathema to this Court's approach to constitutional questions and is indicative of the tenuousness of Petitioner's argument.

As discussed below, the Court has long looked to Founding and pre-Founding Era history when presented with constitutional challenges to the FCA. For example, in *Stevens*, this Court held that Article III standing requirements were not offended by the FCA's *qui tam* provision, which conclusion was confirmed "by the long tradition of *qui tam* actions in England and the American Colonies" which conclusively demonstrates that such actions were "'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'" *Stevens*, 529 U.S. 765 at 774, *citing Steel Co. v. Citizens*

for Better Environment, 523 U.S. 83, 102 (1998). Indeed, such history was "well nigh conclusive" as to the constitutional question before the Court. *Id*. at 777.

And, the Court has approached constitutional challenges to other statutes in the same manner. For example, just this year, the Court employed an historical retrospective to support its holding that the Congress' statutory authorization of the CFPB's funding mechanism was constitutional: "The practice of the First Congress . . . 'provides contemporaneous and weighty evidence of the Constitution's meaning.'" *CFPB v. Comty. Fin. Servs. Ass'n of Am., Ltd*., 601 U.S. 416, 432 (2024), *quoting Bowsher v. Synar*, 478 U. S. 714, 723 (1986).

2. Evidence of Founding-Era *Qui Tam* Usage Shows the Constitutionality of the Act

Qui tam suits were well-known in England since the Middle Ages. *Marvin v. Trout*, 199 U.S. 212, 225 (1905) (citing cases). The *Marvin* Court cited older *qui tam* actions while considering the constitutionality of an Ohio gambling statute, which permitted recovery against gamblers and building owners who permitted gambling, by uninjured informers. The Court concluded "[w]e are aware of no provision in the Federal Constitution which prevents this kind of legislation in a State for such a purpose." 199 U.S. at 225. It further observed: "The right to recover the penalty or forfeiture granted by statute is frequently given to the first common informer who brings the action, although he has no interest in the matter whatever except as such informer." *Id.* (citations

omitted). "To say that it must be limited to a provision allowing a recovery of the money by the one who lost it, would be in effect to hold invalid all legislation providing for proceedings in the nature of *qui tam* actions." *Id.*

Indeed, "the First Congress enacted a considerable number of informer statutes." *Stevens,* 529 U.S. at 776-77 (citing statutes). Some of those provided only a reward for bringing the information to the government, and some authorized individuals to pursue the case. *Id*. The use of *qui tam* provisions was not a reflexive move by the Founders: Rather, their use can be found in decisions of the early federal courts, including matters in which Founders such as Alexander Hamilton represented litigants.[16] This Court has always given "great weight" to the historical understandings of "the men who were contemporary with [the Constitution's] formation." *The Laura*, 114 U.S. 411, 416 (1885).[17] And, acts of the First Congress

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[16] *See*, *e.g., Sherman qui tam v. The Schooner Exchange*, U.S.D.C. New York (1803).

[17] Decided twenty years after the passage of the FCA, in *The Laura*, the Court considered Article II challenge to the right of an informer to enforce a lien for penalties when he obtained a pardon from the Secretary of the Treasury. 114 U.S. 411 (1885). The Court rejected that the pardon power was exclusive, because to hold such would mean rejecting practice "which has been observed and acquiesced in for nearly a century." *Id.* at 414. The Court recognized that "none of the cases in this court or in the Circuit and District Courts of the United States, involving the operation or effect of such warrants of remission, was it ever suggested or intimated that the legislation was an encroachment upon the President's power of pardon…" *Id.* at 415. The Court's decision rested on the principle that "[t]he construction placed upon the

have long been regarded as "contemporaneous and weighty evidence of [the Constitution's] true meaning." *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (citations omitted).

In recent years, in direct response to questions raised about the historical roots of private enforcement of public laws, several history scholars have published detailed reviews of the *qui tam* enforcement traditions in place at the time of the framing. *See e.g.,* Randy Beck, *TransUnion, Vermont Agency and Statutory Damages Under Article III* (August 23, 2023), accepted for publication in Florida Law Review;[18] Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 Notre Dame L. Rev. 1235, 1254 (2018) ("Beck, *Neglected History*"); James E. Pfander, *Public Law Litigation in Eighteenth Century America: Diffuse Law Enforcement in a Partisan World*, 92 Fordham L. Rev. 469 (2023) ("Pfander").

Should the Court entertain a constitutional challenge here, this Amicus commends these scholarly works as historical compendia of the Founding Era reliance on *qui tam* statutes. For example, Professor Beck provides a catalog of how early American

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Constitution by the first act of 1790, and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is, of itself, entitled to very great weight; and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is conclusive." *Id*. at 416 (citing *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884)).

[18] *Available at* https://papers.ssrn.com/sol3/papers.cfm?abstract id=4549914.

governments used *qui tam* actions by private citizens to help ensure a wide range of government functions were supported and protected, not merely a reimbursement of government funds. Beck, *Neglected History* at 1269-91. Likewise, Professor Pfander does a close review of the use of the *qui tam* provisions in the Slave Trade Act, passed by the first Congresses. *E.g.*, Pfander at 474-480.

As Pfander details, the Slave Trade Act originated from a proposal in the First Congress to ban slavery, with James Madison urging Congress to enact a middle ground regulating international commerce. Pfander, at 479. By 1789, that middle ground was enacted, in a law deemed to "facilitate federal enforcement at the waterfront." *Id.* at 480. Signed into law by President Washington, the "Act reflects a remarkable consensus as to the legitimacy of no-injury informer litigation." *Id.* at 481. Pfander's evaluation of Founding Era evidence identified many *qui tam* actions brought by informers to enforce the Slave Trade Act. *Id.* at 481-487. In short, the *qui tam* mechanism was seen as a way to shore up limited government resources then, just as it was in 1863, just as it is today.

Thus, both prior to and after the establishment of the separation of powers, *qui tam* actions were not merely tolerated, they were sought out and upheld. Indeed, q*ui tam* statutes with private rights of action by private individuals were enacted not just by the First Congress*, but by the first nine Congresses* and were responsive to the needs served by the particular statute. Indeed, far from the dearth of evidence of *qui tam* statutes designed to enforce a public interest as Petitioner's amici wrongly assert, Congress used *qui tam* actions to enhance the Executive Branch's ability

to do its job. These historical provisions applied in situations where the only money paid out was purely private money (not relevant here), where it was purely public money, and where the role of the relator/informer was to enforce the sovereign's interest. The payment into the federal coffers of a portion of the (sometimes-wholly-private) funds recovered by such statutes was contemporaneously recognized as being of secondary importance to the use of *qui tam* actions, as they were brought "more to give sanction and efficacy to the law, than to mulct the violat[o]rs thereof." *Pfander* at 3.

The historical record confirms that *qui tam* provisions were not merely enacted but were used to enforce federal law, with the approval of this Court. For example, in *Adams, qui tam v. Woods*, the Court applied a statute of limitations in a *qui tam* action under the Slave Trade Act. 6 U.S. (2 Cranch) 336, 342 (Feb. 19, 1805). And Justice Marshall, personally involved in Virginia's ratification of the Constitution, delivered an opinion of this Court regarding jurisdiction over a *qui tam* action under penal provisions governing the District of Columbia. *United States v. Simms*, 5 U.S. (1 Cranch) 252, 259 (1803) ("an action of debt in the name of the United States and of the informer, would seem to be the remedy given by the act"). Justice Story, who had voted to enact *qui tam* laws as a federal Congressman and as a Representative in the Massachusetts legislature, later as a Justice dismissed the suggestion that there was anything improper about the comingling of the interests of the United States and the informer. *Brown v. United States* 12 U.S. (8 Cranch) 110, 130-131 (1814) ("I do not think this exception is entitled to much consideration").

No authority cited by Petitioner or its amici suggests, let alone demands, a finding that empowering and enhancing the government's ability to effectuate its interests creates any constitutional problem, because none exists. To the contrary, the Congress that passed the FCA in 1863 and the Congress that passed the 1986 Amendments both acted consistently with the first Congresses, which were deeply familiar with the use of *qui tam* mechanisms to support governmental interests and whose actions were found to be consistent with constitutional safeguards. Indeed, prior to 1986, the FCA did not permit the government to intervene and assume responsibility for the case, or provide dismissal authority. Nevertheless, there is simply no evidence in the historical review that the Framers, any of the early Congresses, the first Presidents, or any court, questioned whether *qui tam* provisions presented any constitutional concern. And since 1986, the Executive Branch's control over FCA cases has only increased. The FCA simply does not offend Article II.

B. FCA Relators have Article III Standing

The question of whether a *qui tam* relator has standing was conclusively established by this Court nearly 25 years ago, when it held that the law "leaves no room for doubt that a *qui tam* relator under the FCA has Article III standing." *Stevens*, 529 U.S. at 778. Nothing about the Seventh Circuit's decision below touches upon, let alone calls into question, this Court's holding in *Stevens*.

Nevertheless, Petitioner suggests that Article III standing is back in question because, it argues, the

United States suffers no damage when fraud and abuse are committed only against a private party distributing only private funds. This is a strawman. In fact, the E-rate program is established by the United States, funded at least in part with federal money, using a fiscal agent to provide funds collected and allocated for a compelling federal purpose. The relator here has standing for all of the reasons articulated in *Stevens*, just as FCA relators historically have.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

Jacklyn DeMar
The Anti-Fraud Coalition
1220 19th Street, N.W.
Suite 500
Washington, DC 20036
Tel. (202) 296-4826
jdemar@taf.org

Chandra Napora
Jillian Estes
Counsel of Record
MORGAN VERKAMP LLC
4410 Carver Woods Drive
Suite 200
Cincinnati, Ohio 45242
Tel. (513) 651-4400
cnapora@morganverkamp.com
jestes@morganverkamp.com

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