Nos. 23-2134, 23-2958, 24-1352, 24-1884, 23-2216, 23-3035

United States Court of Appeals for the Seventh Circuit

UNITED STATES, ET AL., EX REL. RONALD J. STRECK,

Plaintiff-Appellee, *Cross-Appellant*,

v.

ELI LILLY AND COMPANY,

Defendant-Appellant, *Cross-Appellee*.

On Appeal from the United States District Court
for the Northern District of Illinois
Case No. 1:14-cv-09412
Hon. Harry D. Leinenweber

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANT-APPELLANT URGING GRANT OF PETITION FOR REHEARING EN BANC

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Appellate Court No: 23-2134

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CORPORATE DISCLOSURE STATEMENT

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation ("PLF")[1] submits this amicus brief urging this Court to grant Defendant-Appellant Eli Lilly and Company's ("Appellant") rehearing en banc petition and reverse. Founded in 1973, PLF is a nonprofit, tax-exempt corporation organized under California law for the purpose of engaging in public interest litigation. PLF is the most experienced public-interest legal organization advocating for private property rights and the separation of powers. PLF attorneys served as counsel or participated as counsel for amici in numerous administrative law, property rights, and separation of powers cases. *E.g.*, *Sackett v. EPA*, 598 U.S. 651 (2023); *Seila Law LLC v. CFPB*, 591 U.S. 197 (2020). PLF's advocacy for constitutional principles and litigation experience offer the Court an important perspective regarding whether the FCA's *qui tam* provision violates Article II.

ARGUMENT

I. Due to Differences in Constitutional Text and Structure, Pre-Ratification *Qui Tam* Statutes Do Not Justify the FCA's *Qui Tam* Provision

A. Article II's Vesting Clause Represented a Break from the English System of Parliamentary Supremacy

Any attempt to justify the FCA with pre-ratification English *qui tam* statutes ignores "that the Constitution's creation of a separate Executive Branch coequal to the Legislature was a structural departure from the English system of parliamentary supremacy, from which many legal practices like *qui tam* were inherited." *United*

[1] PLF affirms that no counsel for any party authored this brief in whole or in part, and no counsel/party made a monetary contribution intended to fund its preparation/submission. No person other than PLF, its supporters, or its counsel made a monetary contribution to its preparation/submission.

States ex rel. Polansky v. Exec. Health Res., Inc., 599 U.S. 419, 450 (2023) (Thomas, J., dissenting);[2] *see Bowsher v. Synar*, 478 U.S. 714, 722 (1986) (Our government is "[u]nlike parliamentary systems such as that of Great Britain" because the "Framers provided . . . a separate and wholly independent Executive Branch[.]"). Such arguments are based on the flawed premise that, because American colonists objected to the King's abuses, the President is necessarily weaker than the King. "In fact, our Constitution's executive is stronger than the English counterpart in" that "[w]hile the English executive's powers were subject to modification by ordinary legislation . . . our executive's powers can never be altered by statute." Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. Ill. L. Rev. 701, 717–18; *see United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000) (The Framers "[d]eparted from their parliamentary past[.]").

Trump v. United States confirms our system is not one of parliamentary supremacy, where all nine Justices agreed "Congress cannot act on, and courts cannot examine, the President's actions on subjects within his 'conclusive and preclusive' constitutional authority." 603 U.S. 593, 609 (2024); *see id.* at 678 (Sotomayor, J., dissenting). This appeal implicates a subject within the President's conclusive and preclusive constitutional authority because the Executive Branch has "traditional discretion over whether to take enforcement actions against violators of federal law." *United States v. Texas*, 599 U.S. 670, 684 (2023). Congress violated

[2] The parenthetical "(citation omitted)" has been removed throughout.

this prohibition through the FCA by empowering private citizens to execute federal law when the President exercises his discretion to not sue.

B. Article II's Vesting Clause Represented a Break from the Weak Executive Under the Articles of Confederation

A proper consideration of the period between independence and the Constitution's ratification, when the federal government was organized under the Articles of Confederation, bolsters Appellant's arguments. Understanding this period is important because the "Framers drafted and approved many provisions of the Constitution precisely to depart from rather than adhere to certain pre-ratification laws, practices, or understandings." *United States v. Rahimi*, 602 U.S. 680, 720 (2024) (Kavanaugh, J., concurring) ("[T]he 'defects' of the Articles of Confederation inspired some of the key decisions made by the Framers[.]"). One of the Articles' defects that the Framers remedied was the absence of an independent national Executive. Prakash, *supra*, at 764–68. Because under the Articles there was no independent Executive vested with the executive power, "Congress either made or superintended executive decisions without even the pretense that another entity was constitutionally empowered to direct law execution." *Id.* at 767. "Congress was the plural executive power," and "there were neither checks and balances nor a separation of powers." *Id.* at 764. The Articles allowed Congress to appoint "committees and civil officers . . . for managing the general affairs of the United States under [Congress's] direction." Articles of Confederation of 1781, art. IX, ¶ 5. Thus, Congress accomplished execution by making "appeals to the state executives,"

established ad hoc or standing committees, and only "belatedly created executive departments." Prakash, *supra*, at 765–66 (footnotes omitted).

The Congress under the Articles even "sought to transfer 'executive business' to separate boards composed of people outside Congress," *id.* at 766 n.359, leading Alexander Hamilton to lament "that one defect" under the Articles was "'the want of a proper executive.'" *Id.* at 765. The Constitution departed from the flawed Articles, creating "a national executive capable of executing the laws across the nation" that would be neither a "servant[] of Congress" nor "a creature of statute." *Id.* at 753, 768. "Rather, the executive was a creature of the Constitution itself, with rights and powers that Congress was bound to respect." *Id.* at 768.

Thus, although the American colonists sought to depart from the English monarch's abuses, they essentially overcorrected by creating a weak Executive. But when the Framers departed from the Articles, they did not return to parliamentary supremacy. They created the strong, independent President. Therefore, early *qui tam* statutes carry little weight regarding the FCA *qui tam* provision's constitutionality.

C. Because the Framers Sought to Depart from State Constitutions That Created Weak Executives, the Existence of State-Level, Pre-Ratification *Qui Tam* Statutes Is Irrelevant

The existence of State-level, pre-ratification *qui tam* statutes does not justify the FCA. The Framers sought "to depart from rather than adhere to" pre-ratification State constitutions, *Rahimi*, 602 U.S. at 720 (Kavanaugh, J., concurring), because they lacked strong, independent executives. Prakash, *supra*, at 757. For example, (1) the power of State executives "was exercised at the sufferance of the legislature"; (2) "state executives lacked veto authority"; (3) most "state constitutions left selection of

the chief executive with the legislature"; and (4) "[n]ominal chief executives often lacked appointment and removal authority and thus had a difficult time controlling other executives." *Id.* at 760–61. Indeed, "the Framers hardly viewed State Governors as a reliable guide in fashioning the Federal Executive." *Seila Law*, 591 U.S. at 227 n.10; *see* Prakash, *supra*, at 763.

At best, only New York's 1777 Constitution "stood as an example for the federal Constitution" because it had provisions the Framers favored: vesting and take care clauses, and clauses giving the governor veto power, a share of the appointment power, and allowing for popular elections. Prakash, *supra*, at 761–62. But despite some similarities, two textual differences make New York's Constitution unhelpful to the question of whether Article II precludes *qui tam* suits.

First, New York's Constitution contained a clause incorporating existing English and colonial law:

> that such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony on [April 19, 1775], shall be and continue the law of this State . . . .

N.Y. Const. of 1777, § 35. Thus, there is no tension between New York's vesting clause and the existence of New York *qui tam* suits because Section 35 incorporated existing *qui tam* statutes.

Second, the people of New York vested only "the *supreme* executive power and authority of this State . . . in a governor." *Id.* § 17 (emphasis added). This clause can be contrasted with Article II, which vested "[t]he executive Power," which means that "the 'executive Power'—all of it—is 'vested in a President.'" *Seila Law*, 591 U.S. at

203; *see id.* at 213. Tellingly, at the 1787 Convention, Hamilton proposed a clause similar to New York's, vesting "the supreme Executive authority," but the Framers opted for the now-operative language. Prakash, *supra*, at 771. Because only the "supreme" executive power was vested in the governor, the people of New York might have retained a portion of executive power, which in turn might have allowed them to pursue *qui tam* suits.

The Pennsylvania and Vermont Constitutions had the same textual difference and, thus, do not shed light on the constitutionality of *qui tam* statutes under Article II. Pa. Const. of 1776, ch. 2, § 3; Vt. Const. of 1777, ch. 2, § 3. These differences matter because "the executive power" had a publicly understood meaning at the time of the Framing. *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1133–36 (11th Cir. 2021) (Newsom, J., concurring); Prakash, *supra*, at 701. After all, "the text controls." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 36 (2022).

The Massachusetts and Virginia Constitutions are particularly irrelevant because they lacked executive vesting clauses. Mass. Const. of 1780, pt. 1, art. XXX; Va. Const. of 1776. This is critical because "the Vesting Clauses would categorically preclude" "a private entity" "from exercising the legislative, executive, or judicial powers of the Federal Government." *Dep't of Transp. v. Ass'n of Am. R.R.s.*, 575 U.S. 43, 88 (2015) (Thomas, J., concurring in judgment); *see Nat'l Horsemen's Benevolent & Prot. Ass'n v. Black*, 53 F.4th 869, 872–73 (5th Cir. 2022). In contrast, State constitutions lacking executive vesting clauses might not have prohibited private

people from exercising the States' executive power (because those people never delegated it to States' executives).

Due to these differences, *qui tam* statutes might have been permissible under State constitutions. But because State constitutions "paid lip service to the separation [of powers] adage" and "made their executive powers appendages of the legislature." Prakash, *supra*, at 756, these pre-ratification constitutions shed little light on whether *qui tam* statutes violate Article II.

II. The FCA's *Qui Tam* Provision Fails Two Criteria That Courts Consider When Evaluating if Congress Violated Article II

A. The FCA's *Qui Tam* Provision Threatens Liberty

"'The Framers recognized that . . . structural protections against abuse of power were critical to preserving liberty.'" *Seila Law*, 591 U.S. at 223. To preserve liberty, they "thought it necessary to secure the authority of the Executive" in a single man to ensure "'the steady administration of the laws.'" *Id.* at 223–24. The FCA's *qui tam* provision undermines the steady administration of the laws and leads to a loss of "liberty as described by Locke," which was "to be free from 'the inconstant, uncertain, unknown, arbitrary will of another man.'" *Ass'n of Am. R.R.s.*, 575 U.S. at 75–76 (Thomas, J., concurring in judgment). The *qui tam* provision subjects defendants to inconstant and uncertain law enforcement because it allows relators to bring the very claim the Executive Branch declined to pursue.

Thus, the *qui tam* provision impinges on the President's ability to employ prosecutorial discretion, which is "one discrete aspect of the executive power." *Texas*, 599 U.S. at 684; *see id.* at 689 (Gorsuch, J., concurring in judgment); *In re Aiken Cnty.*,

725 F.3d 255, 262 (D.C. Cir. 2013) (op. of Kavanaugh, J.). *Trump* confirms that Congress may not create *qui tam* provisions to second-guess the Executive Branch's enforcement decisions, as the Court reiterated that "'the Executive Branch possesses authority to decide how to prioritize and how aggressively to pursue legal actions against defendants who violate the law.'" 603 U.S. at 620 (citations omitted). It also held that, "once it is determined that the President acted within the scope of his exclusive authority, his discretion in exercising such authority cannot be subject to further judicial examination." *Id.* at 608. Congress violated this prohibition through the FCA's *qui tam* provision by empowering private citizens to bring the very claims the President declined to pursue.

Prosecutorial discretion "protect[s] individual liberty by essentially under-enforcing federal statutes regulating private behavior." *Aiken Cnty.*, 725 F.3d at 264; *see Donziger v. United States*, 143 S. Ct. 868, 869 (2023) (Gorsuch, J., dissenting from denial of cert.). But because FCA *qui tam* suits prevent Article II from properly operating, private plaintiffs who disagree with the Executive's decision not to enforce can bring suit, depriving defendants of Article II's promised liberty.

B. The FCA's *Qui Tam* Provision Undermines Accountability

To justify the vesting of the entire executive power in the President, the Framers "made the President the most democratic and politically accountable official in Government" by making him be "elected by the entire Nation." *Seila Law*, 591 U.S. at 224. His "political accountability is enhanced by the solitary nature of the Executive Branch, which provides 'a single object for the jealousy and watchfulness

of the people.'" *Id.* *Qui tam* statutes interfere with this accountability mechanism in three ways.

First, by allowing individuals outside of the Executive Branch to enforce the law, "the solitary nature of the Executive Branch" is violated, and the people no longer have "a single object for the[ir] jealousy and watchfulness." *Id.* Thus, if a *qui tam* suit is litigated poorly and fails to remedy the alleged frauds, "the public can only wonder 'on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'" *United States v. Arthrex*, 594 U.S. 1, 16 (2021).

Second, the FCA's *qui tam* provision undermines accountability by allowing the over-enforcement of federal law without democratic accountability, which creates an incentive for Presidents to accept infringements on their executive power. Because it vested enforcement power and discretion in the President alone, Article II allows voters to hold the President accountable for under- or over-enforcing federal law. For example, if the President over-enforces the FCA, this could lead to business closures, with resulting job losses, or higher prices if businesses pass the costs of defending such suits on to consumers. If voters are frustrated with these consequences, they can hold him accountable at the ballot box. However, *qui tam* suits allow the FCA to be over-enforced without Presidential involvement.

This sets up a perverse incentive for Presidents who want to ramp up FCA enforcement and avoid accountability for adverse, unintended consequences. To skirt accountability, Presidents need only sign, rather than veto, *qui tam* bills. Even though these statutes limit Presidents' enforcement discretion, now "the

Government can regulate without accountability . . . by passing off a Government operation as an independent private concern." *Ass'n of Am. R.R.s.*, 575 U.S. at 57 (Alito, J., concurring). Presidents "may be happy to wash their hands of these decisions" rather than face tough questions from the electorate. *Arthrex*, 594 U.S. at 30 (Gorsuch, J., concurring in part); *see Black*, 53 F.4th at 880.

Third, *qui tam* statutes prevent the Appointments Clause's accountability mechanism from functioning. "Assigning the nomination power to the President guarantees accountability for the appointees' actions because the 'blame of a bad nomination would fall upon the president singly and absolutely.'" *Arthrex*, 594 U.S. at 12. Because FCA relators are not appointed as officers of the United States, the President no longer has to make tough nomination choices. Also, Congress lets itself off the hook for tough confirmation votes because it no longer "shares in the public blame 'for both the making of a bad appointment and the rejection of a good one.'" *Id.* The political branches should not be allowed to devise a mechanism that allows them to escape political accountability.

CONCLUSION

This Court should grant the petition and reverse.

DATED: November 3, 2025.

Respectfully submitted,

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