2018 WL 780484 (C.A.10) (Appellate Brief)
United States Court of Appeals, Tenth Circuit.

UNITED STATES OF AMERICA ex rel. Gerald Polukoff, Plaintiff-Appellant,

v.

ST. MARK'S HOSPITAL; Intermountain Healthcare, Inc.; Sherman Sorenson, M.D.; Sorensen Cardiovascular Group; Intermountain Medical Center; and HCA, Inc., Defendants-Appellees.

No. 17-4014.
January, 2018.

On Appeal from the United States District Court for the District of Utah
[District Court Case No. 2:16-CV-304-JNP-EJF (Judge Jill N. Parrish)]

Brief for the United States of America as Intervenor Pursuant to 28 U.S.C. s 2403

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STATEMENT OF RELATED APPEALS PURSUANT TO CIR. R. 28.2(C)(1)

Counsel for the United States is not aware of any prior or related appeals.

GLOSSARY

FCA	False Claims Act

INTRODUCTION

The district court dismissed this *qui tam* action because it concluded that defendants' alleged false statements were not within the scope of potential liability under the False Claims Act (FCA). That conclusion was incorrect, as the United States explained in the amicus curiae brief it submitted to this Court several months ago.

After the United States filed its amicus brief, one of the three sets of defendants filed a brief asserting, for the first time, that the *qui tam* provisions of the FCA violate Article II of the Constitution. The Court certified that constitutional challenge to the Attorney General pursuant to Federal Rule of Appellate Procedure 44(a). The United States intervened to defend the constitutionality of the statute and explains in this brief that the newly raised constitutional arguments - which courts of appeals have unanimously rejected - lack merit.

STATEMENT OF THE ISSUES

1. Whether the *qui tam* provisions of the FCA are consistent with the constitutional separation of powers.

2. Whether the *qui tam* provisions of the FCA are consistent with the Appointments Clause of the Constitution.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

*2 STATEMENT OF THE CASE

A. Statutory Background

When Congress enacted the FCA in 1863, it followed "long tradition … in England and the American Colonies" and incorporated "*qui tam*" provisions that authorized private persons to bring suit to recover damages suffered by the United States. *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768, 772-74 (2000). The provisions were also consistent with practice in the early United States: "immediately after the framing, the First Congress enacted a considerable number of informer statutes," some of which "provided both a bounty and an express cause of action." *Id.* at 776-77.

The contemporary version of the FCA retains the basic structure of the *qui tam* mechanism. Under the current statute, the Attorney General may bring a civil action to recover treble damages and civil penalties for a violation of the FCA. *See* 31 U.S.C. § 3730(a). Alternatively, a private person known as a "relator" may bring suit "for the person and for the United States Government." *Id.* § 3730(b)(1). The relator's complaint must be filed under seal and served upon the United States. *Id.* § 3730(b)(2). The government then has 60 days, subject to extension, to decide whether to intervene and take over the suit. *Id.* § 3730(b)(2), (3).

If the United States intervenes, "the action shall be conducted by the Government." 31 U.S.C. § 3730(b)(4)(A). In that circumstance, the government "shall have the primary responsibility for prosecuting the action." *Id.* § 3730(c)(1).

***3** The government may intervene either initially or "at a later date upon a showing of good cause," *id.* § 3730(c)(3), and, upon doing so, may file its own complaint or amend the relator's complaint to add or clarify claims, *id.* § 3731(c).

If the United States declines to intervene, "the person bringing the action shall have the right to conduct the action." 31 U.S.C. § 3730(b)(4)(B). The relator is neither the government nor its legal representative, however. He does not appear on behalf of the United States, nor are his legal and factual representations those of the United States. He is a "private part[y]" seeking to vindicate his independent interest, which arises by virtue of the statute's "partial assignment of the Government's damages claim" to him. *Stevens*, 529 U.S. at 773, 786 n.17; *see also* 31 U.S.C. § 3730(d) (entitling a relator to a share of the award if his action results in a financial recovery).

Under the current version of the FCA, the government retains considerable control over *qui tam* suits that the Attorney General has declined to take over. For example, the government is entitled to ongoing information about such cases, can limit discovery to avoid interference with a government investigation or prosecution, and can pursue alternate remedies against the defendant. 31 U.S.C. § 3730(c)(3)-(5). The government can veto a relator's proposed dismissal or settlement of an action or, conversely, dismiss or settle the action over the relator's objection. *Id.* § 3730(b)(1), (c)(2)(A), (B); *see also, e.g.*, *Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 935-38 (10th Cir. 2005); *Searcy v. Philips Elecs. N. Am.*

Corp., 117 F.3d 154, 155 (5th Cir. 1997). The ***4** government is not liable for any expenses the relator incurs in bringing suit. 31 U.S.C. § 3730(f).

B. Prior Proceedings

Relator Gerald Polukoff brought this *qui tam* suit alleging that a physician and two hospitals sought federal reimbursement for medically unnecessary cardiac procedures. *See* Am. Compl. ¶ 2 [Aplt. App. 506-07]. The United States declined to intervene in the action, *see* United States' Notice of Election to Decline Intervention (June 15, 2015) [Aplt. App. 60-62], and defendants then moved to dismiss on statutory and procedural grounds. The district court granted defendants' motions, dismissing the case with prejudice because the court did not believe the relator's allegations could form the basis for FCA liability. *See* Op. 18-21 [Aplt. App. 2526-29]. The relator appealed to this Court, and the United States filed an amicus brief in his support. All three sets of defendants then filed briefs responding to the statutory arguments the relator and the United States had made. One set of defendants ("Intermountain") also asserted for the first time, however, that the *qui tam* provisions of the FCA violate Article II of the U.S. Constitution. *See* Intermountain Br. 54-64. Intermountain conceded that it had failed to make these arguments below and that this Court and others had rejected them in prior cases. *See id.*

SUMMARY OF ARGUMENT

The Court should decline to consider Intermountain's belatedly raised contention that the *qui tam* provisions of the FCA violate Article II of the ***5** Constitution. If the Court chooses to entertain the claim, however, the Court should reject it.

Courts of appeals have unanimously agreed that the *qui tam* provisions of the FCA are consistent with the constitutional separation of powers. In determining 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 constitutionally assigned functions." *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977). As the Supreme Court made clear in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), a *qui tam* relator is a private litigant pursuing his private interest: a partial assignment of a damages claim of the United States. That is true even though a relator's suit may also vindicate a federal interest in remedying and deterring fraud on the United States.

Courts have also correctly recognized that the FCA is consistent with long tradition in England and the early United States; the unique *qui tam* mechanism was already familiar when the Constitution was ratified, and the Framers would not likely have viewed relators as improperly exercising government power. Indeed, the early Congresses enacted numerous statutes authorizing such actions. Moreover, the Executive Branch retains ample authority, regardless of whether the United States intervenes in a given case, to prevent uses of the FCA *qui tam* mechanism that might disserve the interests of the United States.

***6** The *qui tam* provisions are also consistent with the Appointments Clause. As Intermountain concedes, binding circuit precedent squarely forecloses its contention on this point. This Court has correctly held that *qui tam* relators are not "Officers of the United States" to whom the Clause would apply. *See* *United States ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787, 805 (10th Cir. 2002).

ARGUMENT

This Court should decline to entertain Intermountain's constitutional challenge for the first time on appeal. Although a court of appeals has discretion to affirm a decision "on any basis supported by the record," *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011), prudential principles counsel strongly against deciding a constitutional issue

that no party raised below and that the district court did not consider. *Cf.* *Heckler v. Campbell*, 461 U.S. 458, 468 n.12 (1983) (explaining that, although the Supreme Court can affirm on grounds different than those on which the court of appeals relied, it considers claims that were not raised below "only in exceptional cases"); *Richison*, 634 F.3d at 1130 (explaining that it is the function of an appellate court "to correct errors made by the district court in assessing the legal theories presented to it, not to serve as a second-shot forum … where secondary, back-up theories may be mounted for the first time") (quotation marks omitted).

Even if the Court were inclined to excuse Intermountain's forfeiture of its constitutional arguments, the arguments lack merit. As Intermountain acknowledges, this Court and other courts of appeals have unanimously rejected similar challenges to ***7** the FCA. *See* *United States ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787 (10th Cir. 2002); *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749 (5th Cir. 2001) (en banc); *United States ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032 (6th Cir. 1994); *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).

I. The *Qui Tam* Provisions Of The FCA Are Facially Consistent With The Constitutional Separation Of Powers

A. Intermountain contends that the *qui tam* provisions of the FCA on their face violate the Take Care Clause and the Executive Vesting Clause of Article II of the Constitution. "[I]n determining 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 constitutionally assigned functions." *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977). Regardless of whether the United States intervenes in a given suit, relators' conduct of *qui tam* litigation does not prevent the President from carrying out his constitutional functions - a point on which courts have long agreed.

Qui tam relators are private litigants. The Supreme Court made this clear in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, where it expressly declined to adopt a theory that a private relator sues as an "agent of the United States." 529 U.S. 765, 772 (2000). The Court instead held that, although it is the United States whose injury underlies an FCA suit, the relator has Article III standing ***8** because of his independent stake: he has a "concrete *private* interest in the outcome of the suit" that arises from Congress's "partial assignment of the Government's damages claim" to him. *Id.* at 772-73 (emphasis added). That a relator brings a *qui tam* action "in the name of the Government," 31 U.S.C. § 3730(b)(1), is a procedural practice that does not alter this conclusion, and the merits analysis in *Stevens* further underscores the point. After addressing standing, the Supreme Court held that the FCA does not authorize relators to pursue *qui tam* actions against states because, among other things, actions pursued by relators are "private suit[s]" brought by "private parties." *Stevens*, 529 U.S. at 780-81 n.9, 786 n.17; *see also* *United States ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161, 1167 (10th Cir. 2009) (holding that a would-be relator had validly released potential future *qui tam* claims because "the relator has an interest in some part of the civil action apart from the government").

That a relator's suit may also vindicate a federal interest in remedying and deterring fraud on the United States does not change the analysis. As the en banc Fifth Circuit explained when it rejected a claim analogous to Intermountain's, the Take Care Clause "does not require Congress to prescribe litigation by the Executive as the *exclusive* means of enforcing federal law." *Riley*, 252 F.3d at 753. Instead, as the Sixth Circuit noted, "[o]ur current statutory framework includes many laws that authorize individuals to act as 'private attorneys-general,' bringing causes of action for the common weal," *Taxpayers Against Fraud*, 41 F.3d at 1041, such as Title VII and the Sherman Act.

***9** Courts have also correctly recognized that historical evidence helps establish the validity of the *qui tam* provisions. "Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our government." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943). In *Stevens*, the Supreme Court reviewed this "long tradition of *qui tam* actions in England and the American Colonies," as well as the "considerable number" of such statutes that the First Congress itself enacted, [1] and found the evidence "well nigh conclusive with respect to the question … whether *qui tam* actions were cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." 529 U.S. at 774, 776-77 (quotation marks omitted).

The historical evidence is also highly relevant to the constitutional question presented here. *See, e.g.*, *Riley*, 252 F.3d at 752-53. That the First Congress enacted numerous *qui tam* provisions makes clear that the Framers did not believe relators were performing functions that only federal officers could properly perform. *See* *Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986) (explaining that acts of the First Congress ***10** "provide [] contemporaneous and weighty evidence of the Constitution's meaning since many of the Members of the First Congress had taken part in framing that instrument") (quotation marks omitted). And the long tradition of *qui tam* actions in the United States after the Framing provides "additional evidence that the doctrine of separated powers does not prohibit" this unique practice, given that "'traditional ways of conducting government … give meaning' to the Constitution." *Mistretta v. United States*, 488 U.S. 361, 401 (1989) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)); *see also* *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559-60 (2014).

B. This Court has likewise upheld the *qui tam* provisions as constitutional, though it has not yet had reason to address that issue in a case in which the government has not intervened. In *Stone*, this Court cited the decisions of its sister circuits and concluded that, "at least where the Government is permitted to intervene and does so, the *qui tam* provisions of the FCA do not violate the Take Care Clause provisions of Article II and their separation of powers principles." 282 F.3d at 806. That conclusion was correct, and it is equally so where the government does not intervene. As explained above, a *qui tam* relator is a private litigant pursuing a suit in his private interest, pursuant to a well-established historical framework.

In *Stone*, this Court explained that the government maintains significant control over *qui tam* litigation in which it intervenes. *See* 282 F.3d at 805-07. Numerous courts of appeals have correctly recognized that, under the current version of the ***11** FCA, the United States likewise retains significant control over *qui tam* suits in which it does not intervene. *See* *Riley*, 252 F.3d at 753-57; *Taxpayers Against Fraud*, 41 F.3d at 1041; *Kelly*, 9 F.3d at 753-55; *Kreindler & Kreindler*, 985 F.2d at 1155. Regardless of whether it intervenes, for example, the United States is entitled to receive copies of all pleadings and transcripts, 31 U.S.C. § 3730(c)(3); to stay any discovery by the relator that "would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts," *id.* § 3730(c)(4); and to pursue "any alternate remedy available to the Government" against the defendant, *id.* § 3730(c)(5). The government may intervene in a *qui tam* suit at any time "upon a showing of good cause." *Id.* § 3730(c)(3). After doing so, the government has "the primary responsibility for prosecuting the action, and shall not be bound by an act of" the relator. *Id.* § 3730(c)(1).

Even if it never intervenes, the United States can dismiss a *qui tam* suit over the relator's objection. *See* 31 U.S.C. § 3730(c)(2)(A); *see also* *Ridenour*, 397 F.3d at 932 (holding that the government need not intervene before dismissing a relator's case). The government can, for example, dismiss even a meritorious *qui tam* suit simply because the government

has separately resolved the claims at issue and wishes to prevent duplicative litigation, *see United States ex rel. Wickliffe v. EMC Corp.*, 473 F. App'x 849, 853-54 (10th Cir. 2012), or because the suit might divert government ***12** resources from other projects or risk disclosure of sensitive information, *see* *Ridenour*, 397 F.3d at 936-37. [2]

The government can also settle a pending *qui tam* suit even without formally intervening. *See* 31 U.S.C. § 3730(c)(2)(B); *United States v. Everglades Coll., Inc.*, 855 F.3d 1279, 1285-86 & n.3 (11th Cir. 2017) (Ebel, J., sitting by designation); *see also id.* at 1288 (affording "considerable deference to the settlement rationale offered by the government"). The government can veto a relator's proposed settlement or voluntary dismissal of his action. *See* 31 U.S.C. § 3730(b)(1); *Ridenour*, 397 F.3d at 931 n.8. And because the first-to-file bar and the public disclosure bar do not apply to the government, the government can bring its own action even after a relator's suit is dismissed, subject to principles of claim preclusion. *See* 31 U.S.C. § 3730(b)(5), (e)(4).

All of these control mechanisms have been fully available here. Like *Stone*, this is not a case in which "the Government … sought permission to intervene, but was denied intervention by the district court, or … the Government desired to remove the relator from the action but was prevented from doing so by application of the statute." 282 F.3d at 806 n.6. Nor did the government seek to dismiss the action or otherwise oppose the relator's prosecution of the claim. Instead, the district court's ***13** order unsealing the case acknowledged the United States' statutory rights, *see* Order (June 19, 2015) [Aplt. App. 65-66], and the government has monitored the litigation and actively participated in support of the relator before this Court. [3]

C. Intermountain's contrary contentions lack merit.

Intermountain suggests that the FCA is unconstitutional because the President cannot "remove" a relator. *See* Intermountain Br. 57-58. The government may, however, intervene and displace the relator's authority to litigate a case, and even if it does not do so, it is empowered to dismiss the relator's lawsuit, eliminating any ability of the relator to exercise any sort of power whatsoever. The Constitution does not require that the Executive Branch have any additional power to preclude a private litigant whose suit would vindicate public rights from prosecuting a case. *Morrison v. Olson*, 487 U.S. 654 (1988), on which Intermountain primarily relies, upheld restrictions on the President's ability to remove an independent counsel who possessed "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice." *Morrison*, 487 U.S. at 662. By contrast, under the FCA's *qui tam* provisions, a relator is not a government official and does not litigate as the United States. The government's own conduct in ***14** the litigation is entrusted solely to officials within the Executive Branch, and the government has far greater authority over the relator's conduct of *qui tam* litigation than it had over the independent counsel in *Morrison* in any event. Moreover, insofar as Intermountain focuses more generally on the fact that *qui tam* relators' suits can vindicate the public interest, that is no different than private plaintiffs under statutes like the Sherman Act and Title VII. Intermountain's focus on "removal" is thus fundamentally misplaced. *See also* *Kelly*, 9 F.3d at 755 (explaining that the "concept of removal does not make sense in the qui tam context, in which there is no 'office' from which to remove the relator and subsequently fill with someone else").

For the same reasons, it makes no difference that the government "cannot stop a relator *ex ante* from filing suit." Intermountain Br. 61. Article II does not require that Executive Branch officials be able to prevent private litigants from suing to vindicate their "private interest[s]," *Stevens*, 529 U.S. at 772, even if those private interests may overlap with public ones. Intermountain does not contend that the Constitution would require that the Executive Branch approve private suits under Title VII or under the Sherman Act, for example, before they are filed. And, once a *qui tam* suit is

filed under the FCA, the statute includes many provisions by which the Executive Branch can prevent uses of the *qui tam* mechanism that might be inconsistent with United States interests. *See supra* pp. 10-13.

Intermountain's reference to *Printz v. United States*, 521 U.S. 898 (1997), likewise underscores the validity of the *qui tam* provisions. *Printz* invalidated, largely on ***15** federalism grounds, a statute that required state and local law enforcement officers to conduct background checks on gun purchasers. The Court's opinion explained that the statute was also problematic because it delegated the administration of federal law to state and local officers "without meaningful Presidential control." *Id.* at 922. Unlike in *Printz*, however, *qui tam* relators are not state officers who are being "dragooned … into administering federal law," *id.* at 928 (quotation marks omitted), in what the Supreme Court viewed as a significant departure from historical precedent, *id.* at 905-18. They are instead private litigants who voluntarily file civil lawsuits in their own interest. Moreover, as explained above, the President does retain meaningful control over the conduct of *qui tam* litigation. *See supra* pp. 10-13.

Intermountain also mistakenly invokes a footnote from the *Stevens* opinion, in which the Justices in the majority noted that they were expressing no view on whether the FCA's *qui tam* provisions are consistent with Article II. *See* 529 U.S. at 778 n.8. As explained above, however, although *Stevens* did not resolve the Article II issue, it clarified that relators are not government agents, but "private parties" who file suit to vindicate their own personal interest, consistent with "the long tradition of *qui tam* actions in England and the American Colonies." *Id.* at 774, 786 & n.17.

II. The *Qui Tam* Provisions Are Consistent With The Appointments Clause

Intermountain concedes that Circuit precedent squarely forecloses its Appointments Clause claim. As this Court has held, the Appointments Clause ***16** governs the procedures by which "Officers of the United States" are appointed, U.S. Const. art. II, § 2, cl. 2, but relators "do not serve in any office of the United States," *Stone*, 282 F.3d at 805. "There is no legislatively created office of informer or relator under the FCA"; "[r]elators are not entitled to the benefits of officeholders, such as drawing a government salary"; and relators "are not subject to the requirement, noted long ago by the Supreme Court, that the definition of an officer 'embraces the ideas of tenure, duration, emolument, and duties, and the latter were continuing and permanent, not occasional or temporary.'" *Id.* (quoting *United States v. Germaine*, 99 U.S. 508, 511-12 (1879)); *see also Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890). No intervening decision of the Supreme Court undermines *Stone*' s continuing validity. The Appointments Clause thus does not apply.

***17** CONCLUSION

For the foregoing reasons, the Court should decline to consider, or reject, Intermountain's contention that the *qui tam* provisions of the FCA are unconstitutional.

Respectfully submitted,

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JANUARY 2018

REQUEST FOR ORAL ARGUMENT

The Court has scheduled oral argument for March 21, 2018. The United States requests the opportunity to participate in the argument.

Appendix not available.

Footnotes

1 *See, e.g.*, Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 101, 102 (census); Act of July 5, 1790, ch. 25, § 1, 1 Stat. 129, 129 (extending census provisions to Rhode Island); Act of July 20, 1790, ch. 29, §§ 1, 4, 1 Stat. 131, 133 (regulation of seamen); Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137, 137-38 (trade with Indians); Act of Mar. 3, 1791, ch. 15, § 44, 1 Stat. 199, 209 (duties on liquor); *see also* Act of Feb. 20, 1792, ch. 7, § 25, 1 Stat. 232, 239 (Post Office); Act of Mar. 1, 1793, ch. 19, § 12, 1 Stat. 329, 331 (trade with Indians); Act of Mar. 22, 1794, ch. 11, §§ 2, 4, 1 Stat. 347, 349 (slave trade).

2 The D.C. Circuit has held that 31 U.S.C. § 3730(c)(2)(A) gives the government "an unfettered right to dismiss" a relator's suit. *Swift v. United States*, 318 F.3d 250, 252-53 (D.C. Cir. 2003). This Court has left open the possibility of adopting that approach where the defendant has not yet been served. *See Wickliffe*, 473 F. App'x at 853.

3 That the FCA includes these mechanisms for government control of private parties litigating a *qui tam* suit does not imply that such control mechanisms would be constitutionally sufficient in litigation brought by government actors. As explained above, *qui tam* relators are not government actors; they are instead private litigants acting pursuant to a unique historical scheme. *See Stevens*, 529 U.S. at 772-73.