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IN THE SUPREME COURT OF TEXAS

IN RE NOVARTIS PHARMACEUTICALS CORPORATION,
Relator.

SIXTH DISTRICT COURT OF APPEALS CASE NO. 06-24-00005-CV,
FROM THE 71ST DISTRICT COURT IN HARRISON COUNTY, TEXAS
CAUSE NO. 23-0276 • THE HONORABLE BRAD MORIN PRESIDING

BRIEF OF *AMICUS CURIAE* U.S. CHAMBER OF COMMERCE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the state and federal courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the business community.

The federal False Claims Act ("FCA") and parallel state laws, such as the Texas Medicaid Fraud Prevention Act ("TMFPA") at issue here, together affect nearly every sector of the economy, from healthcare, defense, and construction, to technology, education, and banking. These acts no doubt promote the worthy goal of protecting the federal and state treasuries from fraud. But the Chamber believes that the *qui tam* mechanisms in such statutes have been grossly abused, particularly over the past few decades, where relators have sought to exploit the

extraordinary powers granted by such mechanisms to seek private profit in cases that do not involve genuine fraud against the federal and state governments.

The unusual *qui tam* device deputizes individual relators to exercise government power and pursue litigation on behalf of the sovereign, even when the government refuses to intervene. And that transfer of core government power to private hands has exacted a substantial economic toll. Companies frequently spend millions of dollars, or more, conducting investigations, fielding discovery demands, and engaging in motions practice—all to defend against baseless allegations that the government has deemed unworthy of prosecution. Those litigation costs quickly add up. As a result, even meritless cases can be used to extract enormous settlements.

Because *qui tam* provisions impose costs that affect businesses across the Nation, the Chamber files this *amicus* brief to assist the Court.[1]

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[1] The Chamber agrees with Novartis that the relator lacks constitutional standing, but files this brief to address the separation of powers problems underlying the TMFPA.

INTRODUCTION

In 2007, Texas amended the TMFPA to include *qui tam* provisions. Those added provisions violate the separation of powers under the Texas Constitution. That foundational document guarantees that "[t]he powers of the Government of the State of Texas shall be divided into three distinct departments"—Legislative, Executive, and Judicial—and that "no person, or collection of persons, being one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted." Tex. Const. art. II, § 1.

The Texans who ratified the State's Constitution understood that "[t]he principle of separation of powers is foundational for federal and state governments in this country and firmly embedded in our nation's history." *Fin. Comm'n of Texas v. Norwood*, 418 S.W.3d 566, 570 (Tex. 2013). That is so because a government of separated powers ensures that no single institution attains overweening political dominance over the State, and that politically accountable government officials bear responsibility for the enforcement of the State's law—including the provisions of the TMFPA. Thus, maintaining the separation of powers is critically important to protecting the liberties of the People from governmental overreach.

The *qui tam* provisions of the TMFPA violate these core constitutional requirements. Through those provisions, the State

legislature has wrested the enforcement power from the hands of the government attorneys to whom it is assigned by the Texas Constitution and has placed that power in the hands of unaccountable private plaintiffs who are free to pursue claims that state officials have declined to chase. Such a transfer of power is unconstitutional.

The separation of powers principles of the Texas Constitution reflect the separation of powers principles of the federal Constitution. Just last year, three Justices of the U.S. Supreme Court observed that "[t]here are substantial arguments that the *qui tam* device is inconsistent with Article II" of the U.S. Constitution. *United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 449 (2023) (Thomas, J., dissenting); *see id.* at 442 (Kavanaugh, J., joined by Barrett, J., concurring). And just last month, a federal district judge thoroughly considered those concerns and held that the *qui tam* provisions of the FCA, which the TMFPA mirrors, violate the federal Constitution. *See United States ex rel. Zafirov v. Florida Medical Associates, LLC*, 2024 WL 4349242, at *18 (M.D. Fla. Sept. 30, 2024).

The TMFPA's *qui tam* provisions are likewise invalid under the Texas Constitution, which even more explicitly safeguards the separation

of powers that protects the liberties of the People and ensures official accountability. *See, e.g.*, *Kinney v. Barnes*, 443 S.W.3d 87, 92 (Tex. 2014); *Pidgeon v. Turner*, 538 S.W.3d 73, 83 (Tex. 2017). Much as the FCA's *qui tam* provisions contravene the separation of powers principles underpinning the federal Constitution, the TMFPA's *qui tam* provisions run roughshod over the separation of powers principles expressly protected by the Texas Constitution. The *qui tam* provisions empower self-appointed private citizens with substantial governmental power to enforce public rights that only Texas government attorneys are authorized to enforce. This Court should therefore deem the TMFPA's *qui tam* provisions repugnant to the Texas Constitution and issue a writ of mandamus directing the district court to dismiss Health Selection Group's ("HSG's") claims.

Amicus curiae states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Tex. App. R. 11(c).

ARGUMENT

I. The Separation of Powers Is Fundamental To Both The Texas And United States Constitutions.

A. The Texas Constitution Makes Clear That The Separation Of Powers Safeguards Liberty.

Like the federal Constitution, the Texas Constitution "expressly preserves three distinct departments of government." *Texas Dep't of Transp. v. T. Brown Constructors, Inc.*, 947 S.W.2d 655, 659 (Tex. App. 1997). But the Texas Constitution's ratifiers went even further and adopted Article II, § 1 to *explicitly* ensconce the inviolability of the separation of powers into the State's foundational document. The Article first mandates that "the Government of the State of Texas shall be divided into three distinct departments"—the "Legislative," "Executive," and "Judicial." Tex. Const. art. II, § 1; *see, e.g.*, *Johnson ex rel. MAII Holdings, Inc. v. Jackson Walker, L.L.P.*, 247 S.W.3d 765, 777 (Tex. App. 2008). The Article then makes plain what is implied in the federal Constitution—"no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted." Tex. Const. art. II, § 1. This separation of powers "reflects a belief on the part of those who drafted and adopted [Texas's] [C]onstitution that one of the greatest

threats to liberty is the accumulation of excessive power in a single branch of government." *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (Tex. Crim. App. 1990) (en banc). As this Court has explained, due regard for this separation of powers mandates that "governmental authority vested in one department of government cannot be exercised by another department unless expressly permitted by the [Texas C]onstitution." *Garcia v. City of Willis*, 593 S.W.3d 201, 206 (Tex. 2019) (quoting *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993)).

One branch can violate the separation of powers principles embodied in Article II, § 1 without directly arrogating to itself the powers of another branch. *See Armadillo Bail Bonds*, 802 S.W.2d at 239. It can do so by "*unduly* interfer[ing] with another branch so that the other branch cannot *effectively* exercise its constitutionally assigned powers." *Id.*; *see Jones v. State*, 803 S.W.2d 712, 715 (Tex. Crim. App. 1992). Relevant here, the Texas legislature might unduly interfere with another branch's authority by delegating that branch's powers to a private entity via statute. *See Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*, 952 S.W.2d 454, 465–75 (Tex. 1997) (holding that "improperly delegating government authority to" a private foundation violated the

separation of powers in part because it did not delegate executive functions to an "administrative" agency). Such a move would not merely offend the separation of powers. "More fundamentally, the basic concept of democratic rule under a republican form of government is compromised when public powers are abandoned to those who are neither elected by the People, appointed by a public official or entity, nor employed by the government" to exercise a power assigned to one of the branches. *Id.* at 469.

B. The Separation Of Powers Under The Texas Constitution Derives From The U.S. Constitution.

The State of Texas derived its understanding of separated powers from the U.S. Constitution, including its conception of the executive power. Just as the authors of the Texas Constitution drew on, and elaborated upon, the concept of executive power embodied in the U.S. Constitution, the Texas Founders drew on, and elaborated upon, the U.S. Founders' understanding of separated powers, which vested the executive power in accountable government officers. Thus, to understand

the nature of the Texas executive power, it is necessary to understand its origin in the Anglo-American legal tradition.

The conception of centralized executive authority under the U.S. Constitution finds roots in the influential political theory of the English political philosopher John Locke. As Locke explained, "in the state of Nature[,] every one has the executive power of the law of Nature." John Locke, *Two Treatises on Civil Government* 197 (George Routledge & Sons ed., 1884); *see* Montesquieu, *The Spirit of the Laws* 157 (A. Cohler, B. Miller, & H. Stone eds. 1989). But "when they enter into society," individuals "give up the . . . executive power they had in the state of Nature into the hands of the society." Locke, *supra*, at 258. That is, the people delegate their executive authority to public officials, whose power is "to be directed to no other end but the peace, safety, and public good of the people." *Id.* at 259.

William Blackstone's Commentaries reflect a similar understanding. "In a state of society," he reasoned, the right "to put [the law] in execution" is "transferred from individuals to the sovereign power," who "alone . . . bears the sword of justice by the consent of the whole community." 4 William Blackstone, *Commentaries on the Laws of*

England *7–8 (1768). And because the public "delegate[s] all its power and rights, with regard to the execution of the laws, to one visible magistrate," that officer is "the proper person to prosecute for all public offences." 1 Blackstone, *Commentaries* at *258–59. Importantly, this understanding of the executive power was not strictly limited to the prosecution of "criminal" offenses. Rather, it extended to the pursuit of relief for all "infraction[s] of the public rights belonging to th[e] community." 4 Blackstone, *Commentaries* at *2. Vindicating those public rights is the prerogative of the sovereign actor whom the people have empowered to administer the laws. *See id.*

The common law recognized that, if a person has personally "suffered the damage" from a public infraction, then he might have a concomitant right to demand redress "in his own name." Locke, *supra*, at 196. But that private wrong would not permit him to pursue relief on behalf of the public writ large. "[N]o person" other than the official entrusted with the executive authority "can have an action for a public nuisance, or punish it," unless that "private person suffers some extraordinary damage." 3 Blackstone, *Commentaries* at *219–20. Because individual persons give up the right to exercise executive

authority when they enter society, "the law gives no private remedy for any thing but a private wrong." *Id.* at *219; *see also* 5 Matthew Bacon, *A New Abridgement of the Law* 798 (7th ed. 1832) (explaining that "common nuisances against the public are only punishable by a public prosecution"). Only the public office or entity vested with the executive power may vindicate such public rights.

C. Courts Have Long Recognized That The U.S. Constitution's Separation of Powers Vests All Executive Power In A Politically Accountable Executive.

The Framers of the U.S. Constitution enshrined this understanding in Article II's text, which vests "[t]he executive Power" in a single "President of the United States." U.S. Const. art. II, § 1, cl. 1. The Framers adopted that unitary structure to promote accountability and ensure that "a President chosen by the entire Nation" would "oversee the execution of the laws." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010). By entrusting "the President alone" with "all of" the Nation's executive Power, the Framers sought to ensure that he would remain accountable for all those who would act on his behalf. *Seila Law LLC v. CFPB*, 591 U.S. 197, 203, 213 (2020). The Framers understood that "[a] basic step in organizing a civilized society" was to

take the "sword" of law-enforcement actions "out of private hands and turn it over to an organized government, acting on behalf of all the people." *Robertson v. United States ex rel. Watson*, 560 U.S. 272, 282–83 (2010) (Roberts, C.J., dissenting from the dismissal of a writ of certiorari as improvidently granted).

Consistent with this need for accountability, the Framers did not vest "[p]rivate entities . . . with the 'executive Power.'" *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 62 (2015) (Alito, J., concurring) (quoting U.S. Const. art. II, § 1, cl. 1). "[T]he intention of the Constitution" was instead "that the first Magistrate should be responsible for the executive department" in its entirety. 1 Annals of Cong. 480 (1789) (statement of James Madison). To that end, the federal Constitution established a unitary and accountable Executive who alone was charged with the responsibility for enforcing federal law. *See Free Enter. Fund*, 561 U.S. at 496–97; *Ass'n of Am. R.R.*, 575 U.S. at 67–68 (Thomas, J., concurring in the judgment).

More to the point, the Framers understood that the branch entrusted with the legislative power—Congress—could not strip the President of the executive power that the Constitution vested in that

office. That is so because the Constitution created "a separate Executive Branch *coequal* to the Legislature," *United States ex rel. Polansky v. Executive Health Resources, Inc.*, 599 U.S. 419, 450 (2023) (Thomas, J., dissenting) (emphasis added), in which *only* the President "shall be vested" with the executive power, U.S. Const. art. II cl. 1. Given that design, it is "utterly inadmissible" for Congress to attempt to vest executive authority "in any other person" besides the President. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 330 (1816) (Story, J.); *see also Ass'n of Am. R.R.*, 575 U.S. at 62 (Alito, J., concurring) (questioning the propriety of "citizen suits" that might delegate "the 'Executive power'").

II. The Texas Constitution Vests The Attorney General And County Attorneys With The Authority Of The State.

By dividing its government into three parts, the Texas Constitution adopts the model set by the U.S. Constitution. If anything, that model is "more aggressively enforce[d]" in Texas because, unlike the federal Constitution, the Texas Constitution contains an "express separation of powers provision" in Article II, Section 1. *State v. Stephens*, 663 S.W.3d 45, 49–50 (Tex. Crim. App. 2021); *State v. Rhine*, 297 S.W.3d 301, 315 (Tex. Crim. App. 2009) (Keller, P.J., concurring); *see also Kirk v. State*, 454 S.W.3d 511, 514 (Tex. Crim. App. 2015) (characterizing Texas

Supreme Court holdings as persuasive authority). That "explicit Separation of Powers provision—something the U.S. Constitution lacks—prohibits not just the *exercise* of one branch's powers by another branch, but also any *interference* with another branch's exercise of its own authority." *In re Allcat Claims Serv., L.P.*, 356 S.W.3d 455, 485–86 (Tex. 2011) (Willet, J., concurring) (footnote omitted).

Although the Texas Constitution does not have a unitary executive like the federal government, it expressly specifies the politically accountable officials who may exercise the executive power of the State. Article IV, Section 22 provides that the Attorney General "shall represent the State in all suits and pleas in the Supreme Court of the State . . . and perform such other duties as may be required by law." Article V, Section 21 provides that county attorneys "shall represent the State in all cases in the District and inferior courts in their respective counties." Read together, these provisions confirm that the "Texas Constitution authorizes the attorney general, county attorneys, and district attorneys

to represent the state in various cases." *State ex rel. Durden v. Shahan*, 658 S.W.3d 300, 303 (Tex. 2022) (per curiam).

Given the clarity of the Constitution's text, this Court has held that Article IV, Section 22 and Article V, Section 21 "mark the limits of legislative authority to prescribe who shall represent the state and control its interests in a lawsuit in the district court." *Allen v. Fisher*, 9 S.W.2d 731, 732 (Tex. 1928). That is so even though Texas categorizes the Attorney General as an executive officer and the county attorneys as judicial officers. *See State v. Stephens*, 663 S.W.3d 45, 54 (Tex. Crim. App. 2021). What matters is that the authors of the Texas Constitution entrusted specific state officers with the fundamentally executive power to enforce the State's laws. But the authors nowhere authorized the legislature to transfer that power to private citizens via a private right of action to vindicate public rights. *See State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 928 (Tex. Crim. App. 1994); *Michaelis v. Rollins*, 1999 WL 33748054, at *1 (Tex. App. May 6, 1999).

The text is unmistakably clear: the Texas Constitution uses the word "shall." This Court "presume[s] the language of the Constitution was carefully selected, interpret words as they are generally understood,

and rely heavily on the literal text." *In re Allcat Claims Serv., L.P.*, 356 S.W.3d 455, 466 (Tex. 2011). Here, "the word 'shall' is generally construed to be mandatory." *Chisholm v. Bewley Mills*, 287 S.W.2d 943, 945 (Tex. 1956); *Image API, LLC v. Young*, 691 S.W.3d 831, 841 (Tex. 2024) ("[U]sing words like shall or must, is mandatory."); *Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958, 961 (Tex. 1999) ("We generally construe the word 'shall' as mandatory, unless legislative intent suggests otherwise."); A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 114 (2012) ("[W]hen the word shall can reasonably be read as mandatory, it ought to be so read"); *see also Murphy v. Smith*, 583 U.S. 220, 223 (2018) ("[T]he word 'shall' usually creates a mandate, not a liberty.").

As a result, the "shall" language of Article IV, Section 22 and Article V, Section 21 create a duty and "vests in the county attorney and" the attorney general the authority to enforce Texas law. *State ex rel. Downs v. Harney*, 164 S.W.2d 55, 58 (Tex. Civ. App. 1942). That clear language means that the Texas legislature cannot "divest these officials of their collective constitutional authority by shifting representation to some

other attorney." *El Paso Electric Co. v. Texas Department of Insurance*, 937 S.W.2d 432, 439 (Tex. 1996).

III. The TMFPA's *Qui Tam* Provisions Violate The Texas Constitution.

A. The TMFPA Violates The Separation-Of-Powers Principles Enshrined In Article II, Section 1; Article IV, Section 22; And Article V, Section 21.

The TMFPA provides that a "person may bring a civil action for a violation" of the Act "for the person and for the state," which "shall be brought in the name of the person and of the state." Tex. Hum. Res. Code § 36.101(a). For the first decade after its enactment, the TMFPA provided that the court "shall dismiss the action" if the State declined to bring it. *Id.* § 36.104(b) (2005). But the Texas Legislature amended the statute in 2007 to allow private individuals to continue litigation without the State's consent. 2007 Tex. Sess. Law Serv. Ch. 29, § 4 (S.B. 362). Now, if the State declines to take over the action, "the person bringing the action may proceed without the state's participation." Tex. Hum. Res. Code § 36.104(b). And if a private person succeeds in her *qui tam* action, the defendant must pay the same civil penalties as if the State had brought the action itself. *Id.* § 36.101(b). The private person receives a significant bounty from that penalty award. *Id.* § 36.110(a-1). In other

words, the TMFPA authorizes (indeed, incentivizes) private individuals to sue on behalf of the State in circumstances where the State attorneys specifically empowered by Section 21 and Section 22 affirmatively decline to press the litigation.

By authorizing a private person to "proceed without the state's participation," Tex. Hum. Res. Code § 36.104(b), the Texas legislature unconstitutionally devolved the State's power to individuals who lack the constitutional authority to exercise it. That is so because the Texas Constitution exclusively empowers the Texas Attorney General and the county attorneys with the vested duty to enforce the law and seek redress for violations of public rights. *See Dao v. Trinh*, 2024 WL 2069933, at *3 (Tex. App. May 9, 2024); *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 464 (Tex. 1993) (Doggett, J., concurring in part). The Texas legislature may not "divest" those attorneys of the executive power that the Texas Constitution assigns to them. *El Paso Electric Co*, 937 S.W.2d at 439. Only Texans, through constitutional amendment, may do so. *See* Tex. Const. art. 17 (amendment process). This Court should therefore hold that the TMFPA *qui tam* provisions violate Article II, Section 1, Article IV, Section 22, and Article V, Section 21 because the Texas

Legislature's effort to give a private party the power to pursue public litigation violates the separation-of-powers principles enshrined in the state's Constitution.

B. Federal Caselaw Reinforces The Conclusion That The TMFPA Is Unconstitutional.

If this Court were to find that the TMFPA *qui tam* provisions violate the Texas Constitution, it would be following a path already trod in proceedings involving the *qui tam* provisions of the comparable federal False Claims Act ("FCA"). These recent federal proceedings reinforce the conclusion that the TMFPA violates the Texas separation of powers.

The Texas Constitution reflects the same separation of powers principles as the federal Constitution. *See supra.* That fact has led this Court to look to federal precedent where persuasive and helpful to interpret the Texas Constitution's separation of powers. *See In re Abbott*, 628 S.W.3d 288, 296 (Tex. 2021) ("We frequently look to federal constitutional decisions when interpreting analogous state constitutional provisions, particularly when the constitutional text is functionally identical."); *Mosley v. Texas Health & Hum. Servs. Comm'n*, 593 S.W.3d 250, 264 (Tex. 2019) (similar); *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 804 (Tex. 2010) ("Texas courts look to analogous federal law in

applying the state Act."); *Kinney v. Barnes*, 443 S.W.3d 87, 92 (Tex. 2014) ("[I]n interpreting our own constitution, we 'should borrow from well-reasoned and persuasive federal procedural and substantive precedent when this is deemed helpful, but should never feel compelled to parrot the federal judiciary.'" (citation omitted)); *Pidgeon v. Turner*, 538 S.W.3d 73, 83 (Tex. 2017) ("[Federal] decisions, particularly those regarding federal constitutional questions, can certainly be helpful and may be persuasive for Texas trial courts."). But Texas does not follow federal court interpretations in lockstep. Rather, Texas courts must give due effect where, as here, the Texas Constitution provides for more explicit protections than the federal counterpart. *See Ex parte Davis*, 957 S.W.2d 9, 12 (Tex. Crim. App. 1997) ("We note initially that this Court, as well as the Texas Supreme Court, has held that the Texas Constitution gives greater protection in some instances to Texas citizens than does its federal counterpart."); *Satterfield v. Crown Cork & Seal Co.*, 268 S.W.3d 190, 202 (Tex. App. 2008) ("[S]tate constitutions can, and often do, provide additional rights for their citizens.").

A few lower federal courts have upheld the constitutionality of the federal FCA. But those decisions predate a line of U.S. Supreme Court

precedents over the past 20 years that have enforced the structural limits of the federal Constitution with renewed vigor. For example, in *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197 (2020), the Supreme Court held that Congress violated Article II's vesting clause by creating an independent agency led by a single director insulated from presidential removal. And in *Lucia v. Securities and Exchange Commission*, 585 U.S. 237 (2018), the Court held that administrative law judges were "officers of the United States," who must be appointed in a presidentially accountable manner consistent with the Appointments Clause of the U.S. Constitution; *see also Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 587 U.S. 262, 272 (2019) (holding that a relator is not "appointed as an officer of the United States"). In those cases and others, the Court has pushed back on Congress's attempts to diminish the President's control over the Executive Branch.

Last year, three Justices of the Supreme Court observed that, in light of these precedents, "[t]here are substantial arguments that the *qui tam* device is inconsistent with Article II" because it too strips the President of his ability to exercise a part of the executive power of the United States. *United States ex rel. Polansky v. Exec. Health Res., Inc.*,

599 U.S. 419, 449 (2023) (Thomas, J., dissenting); *see id.* at 442 (Kavanaugh, J., joined by Barrett, J., concurring). And just last month, a federal court determined that the FCA's *qui tam* provisions violated the Appointments Clause of the federal Constitution. *See Zafirov*, 2024 WL 4349242, at *18. As that court correctly concluded, *qui tam* laws violate Article II by stripping executive power from the executive branch and assigning it to private actors despite the Framers' decision to vest the entire "executive Power" in the President and properly appointed officers accountable before him. U.S. Const. art. II, § 1, cl. 1; *id.* art. II, § 2, cl. 2. The *qui tam* provisions of the TMPFA likewise violate the Texas constitution by shifting power to pursue redress for public wrongs from the Attorney General and county attorneys and delegates it to private actors who are unaccountable to the Texas electorate.

C. History Cannot Salvage The Texas *Qui Tam* Provisions' Affront To The Separation Of Powers.

In federal court, a "primary counterargument" for upholding the federal FCA's *qui tam* provisions emphasizes the "historical pedigree of *qui tam* suits." *Polansky*, 599 U.S. at 450 (Thomas, J., dissenting). Whatever the purchase such arguments might have in informing the interpretation of Article II of the U.S. Constitution, they cannot save the

qui tam provisions of the TMFPA. The TMFPA was amended to add its *qui tam* provisions very recently—in 2007. The State thus cannot rely upon historical provenance to counter the Texas Constitution's plain text. *See* Pamela Bucy et. al., *States, Statutes, and Fraud: A Study of Emerging State Efforts to Combat White Collar Crime*, 31 Cardozo L. Rev. 1523, 1542–43 (2010) (noting that Texas is one of many States "relatively new to the world of qui tam litigation").

In all events, the historical roots of the federal *qui tam* are limited at best, and they do not support the federal constitutionality of the FCA's *qui tam* provisions, much less the constitutionality of the TMFPA under the Texas Constitution.

Many of the early federal *qui tam* enactments operated differently than the current FCA, which allows unharmed plaintiffs to "stand[] in the government's shoes" and litigate on the people's behalf. *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1360 (11th Cir. 2006). Most of the early statutes offered only a reward to informers for bringing a matter to the government's attention, without providing a cause of action to sue on behalf of the sovereign. *See, e.g.*, Act of July 31, 1789, ch. 5, §§ 8, 29, 38, 1 Stat. 29, 38, 45, 48 (penalties against collectors, naval officers, and

surveyors who failed to take an oath or display rate tables, with a bounty to the informer); Act of Sept. 1, 1789, ch. 11, § 21, 1 Stat. 55, 60 (similar for a maritime law); Act of Aug. 4, 1790, ch. 35, §§ 55, 69, 1 Stat. 145, 173, 177 (similar for a customs law); Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 65, 67 (penalties for Treasury Department officials who violated conflict-of-interest and bribery prohibitions, with a bounty to the informer); Act of Feb. 25, 1791, ch. 10, §§ 8, 9, 1 Stat. 191, 195–96 (penalties for agents of the United States Bank that engaged in improper trading practices, with a bounty to the informer).

Others merely sought to redress private injuries, with only incidental recoveries flowing to the government. *See, e.g.*, Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 124–25 (giving half of statutory penalty to authors who sued for copyright infringement of their works, with other half to the government); Act of July 20, 1790, ch. 29, § 1, 1 Stat. 131, 131 (giving, on top of damages, half of statutory penalty to seamen or mariners deprived of pre-departure shipping contracts, with other half to the government).

As to the few enactments that allowed informers to pursue the sovereign's claims, *see Stevens*, 529 U.S. at 777 n.6, these provisions

"were essentially stop-gap measures, confined to narrow circumstances" to assist the fledlging Executive, *Constitutionality of the* Qui Tam *Provisions of the False Claims Act*, 13 Op. O.L.C. 207, 213 (1989) (William Barr, Ass't Att'y Gen.) ("OLC Memo"). And the "transitory and aberrational" *qui tam* device "never gained a secure foothold within our constitutional structure." *Id.* It produced "little actual litigation," Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich. L. Rev. 689, 728 (2004), and "[w]ithin a decade, 'the tide had turned against' qui tam, and Congress started curtailing its use," OLC Memo, *supra*, at 235–36 (alterations adopted) (quoting Leonard D. White, *The Federalists* 417 (1956)).

These early statutes were rarely used and "rapidly fell into disfavor." OLC Memo, *supra*, at 235. Decades later, Congress revived *qui tam* litigation by adopting the original version of the FCA during the Civil War. But those *qui tam* provisions too "fell into relative desuetude" once the crisis of the Civil War retreated. *Id.* at 209. Eventually, "both Houses of Congress voted to repeal the FCA['s] *qui tam* provisions" in the early 1940s, albeit in different sessions. J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. Rev.

539, 558 (2000). These scattered historical episodes thus cannot excuse the manifest conflict between the FCA's *qui tam* provisions and the text, structure, and history of Article II of the Constitution—much less justify the *qui tam* provisions of the TMFPA.

The few historical antecedents cannot wash away *qui tam*'s constitutional shortcomings in any event. After all, "[t]he Constitution, not history, is the supreme law." OLC Memo, *supra*, at 233; *see New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 36 (2022) (stressing that "the text controls" when "later history contradicts what the text says"). The "basic principle" of constitutional interpretation is that the document controls over "contrary historical practices," *United States v. Rahimi*, 144 S. Ct. 1889, 1912 n.2 (2024) (Kavanaugh, J., concurring), meaning that, "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees," *Marsh v. Chambers*, 463 U.S. 783, 790 (1983); *see Zafirov*, 2024 WL 4349242, at *15. That holds true even for historical practices that "cover[] our entire national existence and indeed predate[] it." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 678 (1970). Nor can it cure infirmities under the Texas Constitution. The "guiding principle when interpreting" that

document "is to give effect to the intent of the voters who adopted" it. *In re Dallas Cnty.*, 697 S.W.3d 142, 158 (Tex. 2024). As described above, the Texas voters who ratified the Texas Constitution's separation-of-powers provisions intended to give the Texas Attorney General and the county attorneys the exclusive power to seek remedies for public wrongs. No amount of history can alter that fact.

PRAYER

This Court should issue a writ of mandamus directing the district court to dismiss HSG's claims brought under the *qui tam* provisions of the TMFPA.

Dated: October 29, 2024

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CERTIFICATE OF COMPLIANCE

I further certify that this brief complies with the type-volume limitation in Texas Rule of Appellate Procedure 9.4(i) because, according to Microsoft Word, it contains 5,386, excluding exempted parts.

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I certify that on October 29, 2024, a true and correct copy of the foregoing brief has been served on counsel of record for all parties through electronic service via www.efiletexas.gov.

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