Nos. 12-1369 (L), 12-1417, & 12-1494

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES ex rel. BUNK, et al.,
Plaintiffs-Appellants,

v.

GOSSELIN WORLD WIDE MOVING, et al.,
Defendants-Appellees.

On Appeal from the U.S. District Court for the Eastern District of Virginia
Hon. Anthony J. Trenga, District Judge

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLEES/CROSS-APPELLANTS AND REVERSAL

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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(name of party/amicus)

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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ M. Miller Baker Date: October 16, 2012

Counsel for: U.S. Chamber of Commerce

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, 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 courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community, including in cases involving the proper interpretation of the False Claims Act ("FCA"), 31 U.S.C. § 3729, *et seq*.

The Chamber has a substantial interest in the Article III standing, Article II separation of powers, and FCA civil penalty issues in this case. The FCA authorizes private citizens who have suffered no individualized injury to bring civil actions in the name of the government "for the person and for the United States Government" alleging that false or fraudulent claims for payment were submitted

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this brief. No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

to the United States or to contractors, grantees, or other recipients using federal funds to advance government programs and interests. 31 U.S.C. § 3730(b)(1). A private citizen litigant, known as a relator, need not prove (or even allege) that a defendant had specific intent to defraud the government, *id.* § 3729(b)(1), and yet may pursue both treble damages and per-false-claim penalties of $5,500-$11,000. Relators and their attorneys have a strong inducement to bring and pursue qui tam lawsuits for the lucrative bounties they collect when a suit results in recovery. If the United States intervenes and pursues the action, a relator keeps 15 to 25 percent of any recovery, as well as attorneys' fees and costs; if the United States declines to intervene, a relator keeps up to 30 percent of any recovery, as well as attorneys' fees and costs. *See id.* § 3730(d)(1)-(2).

The Chamber's interest in the proper application of the FCA is especially heightened in cases like this brought by qui tam relators, who are not subject to Executive Branch oversight and who are "motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997).

Here, the government challenges the district court's failure to award a windfall $24 million in civil penalties sought by the relator, primarily on the remarkable basis that the court should have deferred to the "*government's*" prosecutorial discretion, *see* Gov't Br. at 32-38—for a claim that the government

never intervened to prosecute, presumably because the government fully appreciated that it never suffered any actual economic injury from the conduct giving rise to the claim. As discussed below, prosecutorial discretion is too important—as a matter of constitutional principle and sound public policy—to be left to anyone other than actual prosecutors.

INTRODUCTION

The FCA is violated when any person, *inter alia*, "knowingly presents, or causes to be presented" to the government "a false or fraudulent claim for payment or approval," 31 U.S.C. § 3729(a)(1)(A), or "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim," *id.* § 3729(a)(1)(B). A violator "is liable to the United States Government for a civil penalty of not less than [$5,500] and not more than [$11,000] . . . plus 3 times the amount of damages which the Government sustains because of the act of that person." *Id.* § 3729(a)(1)(G).[2]

In this FCA case, Plaintiff-Appellant Bunk brought as relator several claims against Appellees (collectively "Gosselin"), including a claim for submitting a false "Certificate of Independent Price Determination" in connection with a bid for

[2] The amount of the penalty is subject to periodic adjustment under the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, Public Law 101-410. The figures in brackets reflect the current penalty range.

shipping of household goods of U.S. military personnel stationed in Europe under a "Direct Procurement Method" contract ("DPM" claim). JA1588. The certificate affirmed that the prices in the bid had "been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement" with any other offeror or competitor. *Id.* The government intervened as to other claims, but not the DPM claim, which relator Bunk prosecuted alone. *Id.* Before trial, Bunk expressly abandoned his complaint's allegation that the false certification caused economic loss to the government, and limited the relief sought to FCA's civil penalty. *Id.* The jury found in Bunk's favor on the DPM claim. JA1116.

After the verdict, the district court considered the amount of the civil penalty to impose for the DPM claim violation. The district court specifically found that the government suffered no economic injury from Gosselin's violation of the FCA. JA1599.

The relator Bunk asserted,[3] and the district court agreed, that under this Court's decision in *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776 (4th Cir. 1999), the FCA's civil penalty of no less than $5,500 and not more than

[3] The government purported to join Bunk's post-verdict submission seeking statutory penalties, but did not actually intervene in the district court in connection with the DPM claim at any time.

$11,000 must be assessed for each of the 9,136 invoices submitted under the DPM contract, JA1589, even though it is undisputed that none of those invoices "contained any factually false information." JA1602. Under *Harrison*, therefore, the district court was statutorily obliged to assess a civil penalty of no less than $50,248,000 (the product of $5,500 times 9,136) and not more than $100,496,000 (the product of $11,000 times 9,136) for the DPM claim prosecuted exclusively by relator Bunk.

Nevertheless, the district court declined to impose any penalty because the minimum statutory penalty would violate the Excessive Fines Clause of the Eighth Amendment, JA1607—a conclusion that Bunk did not challenge below or on appeal. The district court also concluded that it did not have the authority to "fashion some other civil penalty other than the one required by statute, as that statute has been construed by the Fourth Circuit." JA1608. On appeal, Bunk—now joined by the government, which belatedly purported to intervene on the DPM claim after this appeal was docketed—complains that the district court erred in not rewriting the FCA to award $24 million in civil penalties.

SUMMARY OF THE ARGUMENT

1. FCA relators such as Bunk lack Article III standing to seek civil penalties to vindicate the government's sovereign interests. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), the Supreme Court

upheld an FCA relator's standing to seek damages on the theory that the statute assigned the government's proprietary injury claim, but did not directly or by implication address a relator's standing to seek civil penalties, which are designed to punish violation of the sovereign's laws, rather than compensate the government for its proprietary injury. Nothing in the rationale of *Vermont Agency* supports the conclusion that its holding extends to a relator's standing to seek civil penalties for the government's sovereign injury.

Vermont Agency's distinction between proprietary and sovereign injury reflects the distinction between private and public rights that lies at the heart of Article III standing. Indeed, because the government's sovereign interests are public rights, such interests are incapable of assignment for two reasons. First, the government's sovereign interests are personal to the government, and personal rights are not assignable at common law. Second, the government's sovereign interest in punishing violation of the law is the very definition of the "undifferentiated public interest" that the Supreme Court rejected as a basis for private party standing in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992).

Limiting FCA relator standing to seek damages for the government's proprietary injury harmonizes *Vermont Agency* not only with *Lujan*, but also with two other decisions contemporaneous with *Vermont Agency*. In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), decided two years before

Vermont Agency, the Court expressly held that a private environmental group lacked standing to enforce a statute's provision for civil penalties, because such relief sought "not remediation of its own injury . . . but vindication of the rule of law—the 'undifferentiated public interest' in faithful execution [of the statute]." *Id.* at 106 (quoting *Lujan*, 504 U.S. at 577). Two years later, in the interval between argument and decision in *Vermont Agency* during the Court's 1999 October Term, the Court characterized *Steel Co.* as standing for the proposition that "private plaintiffs, unlike the Federal Government, may not sue to assess [civil] penalties for wholly past violations." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 188 (2000). If *Vermont Agency* holds that relators have standing to enforce the FCA's civil penalty provisions, then *Vermont Agency* necessarily abrogated *Steel Co.* and *Laidlaw* in addition to *Lujan.*

Finally, limiting a relator's standing to a damages claim for the government's proprietary injury will avoid a constitutional collision between the FCA and Article II.

2. The FCA's delegation of civil law enforcement authority to seek civil penalties to vindicate public rights violates the Appointments Clause of Article II of the Constitution. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court held that only persons appointed in conformity with the Appointments Clause can exercise civil law enforcement of public rights in the courts of the United States. It

further invalidated the 1974 version of the Federal Election Campaign Act because that law vested civil law enforcement authority in persons not appointed in conformance with the Appointments Clause. The rationale and holding of *Buckley* squarely apply to the FCA's qui tam provisions allowing for relator enforcement of civil penalty claims.

Some circuits have rejected this reading of *Buckley*, and instead view the strictures of the Appointments Clause as only applying to persons actually holding office. With respect, under that logic *Buckley* would have permitted the vesting of authority to enforce the Federal Election Campaign Act of 1974 in private parties. Indeed, under that logic, the Appointments Clause would pose no obstacle to Congress vesting the full authority of the Attorney General of the United States in a private person, without the necessity for Presidential appointment and Senate confirmation. That cannot be right.

The Supreme Court's more recent decision in *Morrison v. Olson*, 487 U.S. 654 (1988), reinforces the conclusion that the FCA's civil penalty provision for qui tam relators violates the Appointments Clause. In *Morrison*, the Court again recognized that law enforcement is a function that must be exercised by persons appointed in conformance with the Appointments Clause, and upheld the independent counsel statute on the basis that the statute properly authorized an Article III court to appoint such an inferior officer. As in *Buckley*, the function

performed by the independent counsel in *Morrison* triggered the applicability of the Appointments Clause.

Finally, even if the indicia of office are relevant to whether the FCA's delegation of law enforcement to self-appointed private parties comports with the Appointments Clause, a qui tam relator shares most if not all of the indicia of office possessed by an independent counsel, the inferior officer at issue in *Morrison*. Like the independent counsel in *Morrison*, a qui tam relator seeking civil penalties has prosecutorial duties, a temporary assignment that ends at the conclusion of the litigation, and receives emoluments—on contingency. In effect, a qui tam relator is an independent counsel paid on contingency, albeit with more independence and subject to fewer controls than the independent counsel at issue in *Morrison*.

3. If necessary to reach the issue, this Court should affirm the district court's determination that it had no authority to remit the FCA's minimum penalty to conform that penalty to the Excessive Fines Clause. Because the FCA very precisely limits the range of a district court's authority to mete out civil penalties, the district court had no choice but to refuse to award any penalty when the statute's minimum penalty would violate the Excessive Fines Clause. A district court cannot rewrite the clear language of a statute to prevent its unconstitutional application.

Finally, this Court should reject out of hand the government's extraordinary claim to the prerogative, as the purported exercise of prosecutorial discretion, to define the punishment that a court must mete out for offenses against the United States. First, the government waived that argument by not intervening below and purportedly allowing Bunk to exercise the government's prosecutorial discretion. Second, Congress, not the Executive, defines both offenses and punishments in the exercise of its legislative powers under Article I. The Executive has no authority to unilaterally rewrite the statutory range of punishment prescribed by Congress.

ARGUMENT

I. This Court Should Vacate the Verdict of Liability for the DPM Claim Because Private Parties Lack Article III Standing to Seek Civil Penalties to Vindicate the Government's Sovereign Interests.

A plaintiff in federal district court must meet three requirements to satisfy Article III standing: injury in fact, causation, and redressability. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 71 (2000). The plaintiff must demonstrate these "irreducible constitutional minimum" requirements "in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). And because standing "is not dispensed in gross," a plaintiff "must demonstrate standing for . . . *each form of relief that is sought*." *Davis v. Fed.*

Election Comm'n, 554 U.S. 724, 734 (2008) (citations omitted and emphasis added).

Relator Bunk indisputably lacked any individual "injury in fact." To have Article III standing to pursue the government's civil penalty claim, he would have had to satisfy the "partial assignment" theory of relator standing the Supreme Court articulated in *Vermont Agency*. As discussed below, however, that theory has no application to a relator's claim for civil penalties.

A. *Vermont Agency* Found Article III Standing for FCA Relators Based on the Assignment of the Government's Proprietary Damages Claim, Rather than the Government's Sovereign Interests.

In *Vermont Agency*, the Supreme Court considered whether a private relator had Article III standing under the FCA. The relator claimed that the Vermont Agency of Natural Resources "had overstated the amount of time spent by its employees on the federally funded projects, thereby inducing the [federal] Government to disburse more grant money than [the Vermont state agency] was entitled to receive." 529 U.S. at 770. The Court first noted that the FCA relator's complaint alleged injury to the United States in two distinct forms: "both the injury to its sovereignty arising from violation of its laws (which suffices to support a criminal lawsuit by the Government) and the *proprietary injury* resulting from the alleged fraud." *Id.* at 771 (emphasis added). Article III judicial power,

however, exists only to redress injury "to the complaining party," *id.*, and the relator had suffered no such injury.

The Court first observed that standing might exist if the FCA relator were "simply the statutorily designated agent of the United States, in whose name . . . the suit is brought—and that the relator's bounty is simply the fee he receives *out of the United States' recovery* for filing and/or prosecuting a successful action on behalf of the Government." *Id.* at 772 (emphasis by the Court). This analysis was "precluded, however, by the fact that the statute gives the relator himself *an interest in the lawsuit*, and not merely the right to retain a fee out of the recovery." *Id.* (emphasis by the Court). That is to say, under the FCA, the relator sued for both himself and the United States, and the FCA expressly gave the relator various rights to control the lawsuit. *See id.* Because the FCA thereby expressly invested the relator with an interest in the lawsuit itself, "some explanation of standing other than agency for the Government must be identified." *Id.*

After rejecting the contention that the relator's interest in the bounty itself established standing, *see id.* ("an interest unrelated to injury in fact is insufficient to give a plaintiff standing"), the Court in *Vermont Agency* reasoned that the FCA relator had standing, notwithstanding his lack of personal injury, because the FCA partially assigned the government's claim for *proprietary* injury, *i.e.*, economic injury resulting from the alleged fraud:

> [A]dequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor. The FCA can reasonably be regarded as effecting a partial assignment of the Government's *damages* claim.

Id. at 773 (emphasis added). The Court explained that it had repeatedly entertained, as a form of "representational standing," suits by both assignees and subrogees, "who have been described as 'equitable assignees.'" *Id.* at 773–74 (citations omitted). Thus, the Court concluded, "the United States' injury in fact suffice[d] to confer standing on [relator] Stevens." *Id.* at 774.

The Court in *Vermont Agency* then reviewed the history of qui tam statutes in Britain and early America, which confirmed that "qui tam actions were 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'" *Id.* at 777. This history, "*when combined* with the theoretical justification for relator standing discussed earlier," left "no room for doubt that a qui tam relator under the FCA has Article III standing." *Id.* at 778 (emphasis added). Thus, while relevant, this history did not *independently* establish standing in the absence of the theoretical justification explained by the Court earlier in the opinion: the assignment of the government's proprietary damages claim.

Most significantly for present purposes, the Court in *Vermont Agency* did not construe the FCA as assigning the government's *sovereign* interests, nor did the Court intimate that such an assignment would be permissible. Rather, by

defining the government's assigned interest as the government's "damages" claim, the Court necessarily implied that the government's assigned interest was the government's proprietary injury, as damages by definition are remedial. *See Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001) ("[C]ompensatory damages . . . are intended to redress the concrete loss that the plaintiff has suffered.").

The FCA's civil penalties, however, are not designed to compensate the government for any proprietary injury, but rather to vindicate the government's sovereign interests by punishing offenses against the sovereign. *See Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989) (fines are penalties imposed by the sovereign for violations of its law); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106 (1998) (civil penalties for statutory violations vindicate the "'undifferentiated public interest'") (quoting *Lujan*, 504 U.S. at 577). It is precisely because the FCA's civil penalty provision is designed to punish rather than compensate that neither the government nor the relator here disputes that the penalty is subject to review under the Excessive Fines Clause. *See United States v. Bajakajian*, 524 U.S. 321, 327–33 (1998) (fine or penalty that is not designed to compensate the government but instead is designed to punish offenses against the government is subject to Excessive Fines Clause limitations).

Vermont Agency's distinction between the government's sovereign and proprietary interests is another way of stating the distinction between public and private rights, a distinction that "is central to the issue of standing." Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich. L. Rev. 689, 694 (2004) ("*History*"). In the context of the Seventh Amendment's civil jury trial requirement, the Supreme Court has explained the distinction this way: public rights involve the government "in its sovereign capacity" asserting claims against "persons subject to its authority" under "an otherwise valid statute creating enforceable public rights." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51 & n.8 (1989). Private rights, by contrast, involve "the liability of one individual to another under the law as defined," as in "tort, contract, and property cases." *Id.* at 51 n.8. *See also Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 601-02 (1982) (distinguishing the government's sovereign interests in enforcing its law from its private proprietary interests; "like other such proprietors [the government] may at times need to pursue those [proprietary] interests in court"); *History*, 102 Mich. L. Rev. at 693.

In view of this long-standing distinction between public and private rights, the cases cited in *Vermont Agency* in support of the assignment theory of relator standing not surprisingly all involved assignments of private rights, that is,

proprietary claims.[4] There is simply no Supreme Court authority upholding the standing of a private individual to assert the government's sovereign interests, that is, public rights.

* * *

In sum, the rationale of *Vermont Agency* demonstrates that in holding that "the United States' injury in fact suffices to confer standing on [relator] Stevens," 529 U.S. at 774, the Supreme Court meant the government's *proprietary* injury sufficed to confer standing to seek damages. There is nothing in the opinion's rationale that indicates the government's *sovereign* injury suffices to confer standing on a relator to seek civil penalties. Hence, *Vermont Agency* cannot be read to support such standing. *See Steel Co.*, 523 U.S. at 91 ("[D]rive-by jurisdictional rulings . . . have no precedential effect").[5]

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[4] *See Vermont Agency*, 529 U.S. at 774 (citing *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 465 (1962) (assignee of television company asserting proprietary interest in financial damages resulting from antitrust misconduct); *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827, 829 (1950) (assignee of patent licensor asserting proprietary interest in recovering unpaid royalties from licensee); *Hubbard v. Tod*, 171 U.S. 474, 475 (1898) (assignee of loan/trust company asserting proprietary interest in disposition of securities)).

[5] *But see Stauffer v. Brooks Bros., Inc.*, 619 F.3d 1321, 1326-27 (Fed. Cir. 2010) (reading *Vermont Agency* as holding that qui tam relators have standing to assert both proprietary and sovereign injuries of the government).

B. The Government's Sovereign Interests Are Not Assignable Because Those Interests Are the Undifferentiated Public Interest.

The government's sovereign interest in enforcing compliance with federal law is not assignable. The "doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor," *Vermont Agency*, 529 U.S. at 773, only applies to the government's assignment of its "proprietary" claims.

At common law, only proprietary claims arising from contracts, property interests, and torts to real or personal property are assignable. Myriam E. Gilles, *Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation*, 89 Cal. L. Rev. 315, 343 (2001) ("*Representational Standing*"). In contrast, personal claims, e.g., personal injury, false imprisonment, and marital claims, are not. *See Comegys v. Vasse*, 26 U.S. 193, 213 (1828) ("[M]ere personal torts . . . are not capable of passing by assignment"); 6 Am. Jur. 2d *Assignments* § 11 (2008) ("In general, rights that are personal to the assignor are incapable of assignment.").

In her law review article examining *Vermont Agency*, Professor Gilles explains that because government's sovereign interests are analogous to "personal" rights at common law, "claims seeking to vindicate the government's non-proprietary, sovereign interests are not assignable." *Representational Standing*, 89 Cal. L. Rev. at 344. The sovereign's interest in enforcing its laws is incapable of assignment because that interest, by definition, is the "undifferentiated public

interest." *Lujan*, 504 U.S. at 577. For the same reason that the Supreme Court in *Lujan* held that citizens who do not themselves suffer concrete injury do not have standing to enforce the law, even if authorized by statute to do so, *see id.*, Bunk lacks standing to seek civil penalties under the FCA.[6] To read *Vermont Agency* otherwise would suggest that it overruled *Lujan*.

C. Limiting Relator Standing to Claims of Proprietary Injury Harmonizes *Vermont Agency* With the Supreme Court's Recognition that Private Parties Lack Article III Standing to Seek Civil Penalties.

The rationale of *Vermont Agency* supports relator standing to seek only damages for proprietary injury to the government for good reason—the Supreme Court's contemporaneous decisions expressly rejected private standing to seek civil penalties. In two decisions issued shortly before *Vermont Agency*, the Court recognized that private parties lack standing to seek civil penalties to vindicate the government's sovereign interests.

Two years before *Vermont Agency*, the Court held in *Steel Co.* that a private environmental organization without injury to itself lacked standing to seek civil

[6] Bunk would lack standing to seek civil penalties even if he had proven that the government had sustained assignable proprietary injury, which he failed to do. As noted above, Article III standing "is not dispensed in gross," and a plaintiff "must demonstrate standing for . . . each form of relief" that is sought. *Davis*, 554 U.S. at 734. Thus, even if relator Bunk had proven the government suffered proprietary injury, he would have standing to seek only damages, not civil penalties.

penalties to enforce an environmental statute, notwithstanding that the statute expressly authorized such relief. *See* 523 U.S. at 106 ("In requesting [civil penalties payable to the Treasury], respondent seeks not remediation of its own injury . . . but vindication of the rule of law—the 'undifferentiated public interest' in faithful execution of [the statute] . . . . This does not suffice.") (quoting *Lujan*, 504 U.S. at 577). And in the same term that the Court decided *Vermont Agency*, the Court cited *Steel Co.* for the proposition that "private plaintiffs, unlike the Federal Government, may not sue to assess [civil] penalties for wholly past violations." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 188 (2000).[7]

Not only did *Vermont Agency not* overrule *Steel Co.*, the Court adopted the relator's rationale of proprietary injury that expressly distinguished *Steel Co.* The *Vermont Agency* relator argued that "[u]nlike the FCA, the statute before the Court in *Steel Co*. had no provision demonstrating that Congress intended that plaintiffs represent the government's *proprietary* interest in litigation." Supp. Br. for Respondent at 6 n.2, *Vermont Agency*, 529 U.S. 765 (No. 98-1828), 1999 WL 1276923 (emphasis added). Similarly, the government's own brief distinguished

[7] The Supreme Court issued *Laidlaw* in January 2000, just several weeks after *Vermont Agency* was argued in November 1999, and four months before the Court issued *Vermont Agency* in May 2000.

between an assignable claim for proprietary damages and a claim for penalties. *See* Supp. Br. for United States at 9-10, *Vermont Agency*, 529 U.S. 765 (No. 98-1828), 1999 WL 1086464 (quoting *Spiller v. Atchison, Topeka, & Santa Fe Ry.*, 253 U.S. 117, 135 (1920) for the proposition that "a claim for damages . . . is a claim not for a penalty but for compensation, is a property right assignable in its nature, and must be regarded as assignable at law, in the absence of a legislative intent to the contrary") (brackets omitted).

In view of the Court's holding in *Steel Co.* and characterization of *Steel Co.* in *Laidlaw* just four months before deciding *Vermont Agency*, as well as the rationale advanced by the relator and the government in *Vermont Agency* to delicately steer clear of *Steel Co.*, *Vermont Agency* should not be read as abrogating both *Steel Co.* and *Laidlaw*. This Court should follow *Steel Co.* and *Laidlaw* and hold that relator Bunk lacked standing to prosecute the DPM claim, vacate the verdict of liability accordingly, and remand with instructions to dismiss the DPM claim for lack of subject matter jurisdiction.

D. Enforcing Article III's Requirement of Standing Will Avoid a Constitutional Collision Between the FCA and Article II Separation of Powers Principles.

As the Supreme Court observed in *Lujan*, Article III's standing requirement protects the separation of powers under Article II. *See* 504 U.S. at 577; *see also Raines v. Byrd*, 521 U.S. 811, 820 (1997) ("[T]he law of Art. III standing is built

on a single basic idea—the idea of separation of powers.") (citation omitted); *Steel Co.*, 523 U.S. at 125 n.20 ("[O]ur standing doctrine is rooted in separation of powers concerns.") (Stevens, J., concurring).

If this Court holds that relator Bunk had Article III standing to assert the government's DPM claim for civil penalties, that will produce the collision with Article II that Justice Kennedy foresaw in *Laidlaw*: "Difficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States." *Laidlaw*, 528 U.S. at 197 (Kennedy, J., concurring). *See also Vermont Agency*, 529 U.S. at 778 n.8 (reserving judgment on "whether qui tam suits violate Article II, in particular the Appointments Clause of § 2 and the 'take Care' Clause of § 3"). Enforcing Article III's requirement of standing here is the last clear chance to avoid a constitutional collision between the FCA and Article II in this case.

II. Alternatively, the Judgment Below of No Civil Penalties for the DPM Claim Should be Upheld Because the Relator's Enforcement of Public Rights Would Violate the Appointments Clause of Article II.

The Appointments Clause of Article II requires that the President appoint, "by and with the Advice and Consent of the Senate . . . Officers of the United States," but that "Congress may by law vest the Appointment of such inferior

Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. The Appointments Clause is "among the significant structural safeguards of the constitutional scheme," *Edmond v. United States*, 520 U.S. 651, 659 (1997), and supports the separation of powers by "prevent[ing] congressional encroachment upon the Executive and Judicial Branches." *Id.*

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court held that the Federal Election Campaign Act of 1974 violated the Appointments Clause because the Act vested "primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights" in persons (members of the Federal Election Commission) appointed by Congress. *Id.* at 140. The Court explained that "[s]uch *functions* may be discharged only by persons who are 'Officers of the United States' within the language of that section." *Id.* (emphasis added).

The FCA's civil penalty mechanism, like the Federal Election Campaign Act of 1974's civil enforcement mechanism,[8] or the environmental statute's civil

[8] Section 437d(a)(6) of the 1974 Act authorized the Federal Election Commission "to initiate (through civil proceedings for injunctive, declaratory, or other appropriate relief) . . . any civil action in the name of the Commission for the purpose of enforcing the provisions of this Act." *Buckley*, 424 U.S. at 166.

penalty provision at issue in *Steel Co.*,[9] is indisputably a mechanism for vindicating public rights. *Cf. Granfinanciera*, 492 U.S. at 51 n.8 (public rights "arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments"). Therefore, to the extent that the FCA deputizes private citizens, such as relator Bunk, with responsibility for conducting civil litigation for the purpose of vindicating public rights, the FCA violates the Appointments Clause.

To be sure, four other circuits have reached the contrary conclusion, holding that the Appointments Clause only requires *officeholders* to have been appointed in compliance with its strictures, and does not prevent Congress from vesting the functions of officeholders in private parties and thereby bypassing the Appointments Clause. *See, e.g., United States ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787, 805 (10th Cir. 2002); *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 757 (5th Cir. 2001) (en banc); *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 758 n.21 (9th Cir. 1993).

With due respect to this Court's sister circuits, their focus on whether a relator holds an office trivializes the Appointments Clause, elevating form (office)

[9] *See* 523 U.S. at 106.

over separation of powers substance (function). It "ignores . . . the question that logically follows [the] conclusion that realtors are not officers: whether non-officers may prosecute claims owned by the United States." *Riley*, 252 F.3d at 767 (Smith, J., dissenting). *Buckley's holding* emphatically turns not on what office a person holds, if any, but on the functions exercised by the person: "We hold that these provisions of the Act, vesting in the Commission primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights, violate Art. II, § 2, cl. 2 of the Constitution. Such *functions* may be discharged only by persons who are 'Officers of the United States' . . . ." 424 U.S. at 140 (emphasis added). Otherwise, the statute struck down in *Buckley* would have been upheld if the civil law enforcement function had been delegated to wholly private parties, rather than commissioners holding office. Indeed, under that logic, the Appointments Clause would pose no obstacle to Congress vesting the full authority of the Attorney General of the United States in a private person chosen by Congress, without the necessity for Presidential appointment. That cannot be right, because the Appointments Clause prevents "congressional encroachment upon the Executive and Judicial Branches." *Edmond*, 520 U.S. at 659. Because *Buckley* holds that the function of prosecuting civil litigation to vindicate public rights is a function that can be exercised only by persons appointed in compliance with the Appointments Clause, the FCA is

unconstitutional at least to the extent that it permits private relators to enforce the FCA's civil penalty mechanism.

This understanding of *Buckley* is buttressed by the Supreme Court's more recent analysis of the Appointments Clause in *Morrison v. Olson*, 487 U.S. 654 (1988), which involved an Article II challenge to the now-repealed independent counsel provisions of the Ethics in Government Act of 1978, 28 U.S.C. §§ 49, 591 *et seq*. In *Morrison*, the Court recognized that an independent counsel vested with prosecutorial authority was an "officer of the United States," and not a mere employee, because that officer "exercise[ed] significant authority pursuant to the laws of the United States." *Buckley*, 424 U.S. at 126. *See Morrison*, 487 U.S. at 671 n.12 (citing *Buckley*); *see also id*. at 673 (comparing the independent counsel's function to that of United States commissioners, inferior officers with the power "to institute prosecutions under 'laws relating to the elective franchise and civil rights'") (citation omitted).

It was precisely because the independent counsel had the *function* of exercising significant law enforcement authority that required her appointment to conform with the Appointments Clause. At issue in *Morrison* was whether she was a principal officer, requiring Presidential appointment and confirmation by the Senate, or an inferior officer, who may be appointed "by the President alone, by the heads of departments, or by the Judiciary." 487 U.S. at 670. Olson contended

that the independent counsel was a principal officer, but the Court disagreed, holding that she was an inferior officer, and thus her appointment by an Article III court complied with the Appointments Clause. *See id.* at 670-73. The independent counsel's *function* required her to be appointed in conformance with the Appointments Clause, and had the independent counsel statute vested that function in a person appointed by Congress, as in *Buckley*, or in a self-appointed private party, as the FCA allows here, it would have violated the Appointments Clause.

Finally, even if the indicia of office are relevant to whether the FCA's delegation of law enforcement to self-appointed private parties comports with the Appointments Clause, *cf. United States v. Hartwell*, 73 U.S. 385, 393 (1868) (the term office "embraces the ideas of tenure, duration, emolument, and duties"), a qui tam relator shares most if not all of the indicia of office possessed by an independent counsel, the inferior officer at issue in *Morrison*.

Like the independent counsel, a relator indisputably has prosecutorial *duties*. Like the independent counsel, a relator receives "emolument" from the government, albeit through sharing in any recovery rather than by salary. Like the independent counsel, a relator is "limited in tenure" and "'temporary' in the sense that [the appointment] is essentially to accomplish a single task." *Morrison*, 487 U.S. at 672. Unlike other prosecutors, but like an independent counsel, a relator "has no ongoing responsibilities that extend beyond the accomplishment of the

mission that she was appointed . . . to undertake." *Id.* "These factors relating to the 'ideas of tenure, duration . . . and duties'" of a relator "are sufficient to establish" that a relator, like an independent counsel, has the attributes of "an 'inferior' officer in the constitutional sense." *Id.* (citing *United States v. Germaine*, 99 U.S. 508, 511 (1878)). But unlike the independent counsel at issue in *Morrison*, who received her appointment from an Article III court and therefore in conformity with the Appointments Clause, qui tam relators are self-appointed, in violation of the Appointments Clause.[10]

III. If Necessary to Reach the Issue, the District Court's Award of Zero Civil Penalties Should be Affirmed Because the District Court Lacked Authority to Rewrite the Statute.

The district court found, and neither the government nor relator Bunk disputes, that the minimum fine dictated by the FCA for the 9,136 invoices deemed false claims by the district court—more than $50 million—violates the Excessive Fines Clause under the "grossly disproportional" test set forth in *Bajakajian*. *See* 524 U.S. at 337. The government instead argues that the district court erred by not reducing the penalty award to an amount ($24 million) that the government contends comports with the Excessive Fines Clause. Most remarkably, the

[10] In deciding whether the FCA violates the Appointments Clause by investing authority in private relators to seek civil penalties, this Court need not reach the question whether the FCA's assignment of the government's proprietary damages claim also violates the Appointments Clause.

government argues that the district court was obligated to reduce the award because the *relator* so requested—in the exercise of the *government's* prosecutorial discretion.[11]

The government asserts that if a statutory penalty is unconstitutionally severe, the appropriate remedy is to reduce the penalty to levels that comport with the Constitution. The district court correctly rejected this argument in the context of the FCA, which mandates a "civil penalty that authorized the courts to exercise a certain amount of discretion, but no more." JA1609. The FCA thus contrasts with "other congressional enactments that establish a maximum penalty, with no minimum, and grants to the court complete discretion as to whether or to what extent that maximum penalty should be imposed." *Id.* Because Congress has so "precisely delineated and circumscribed" a district court's discretion under FCA, *id.*, the district court lacked the authority to rewrite the statute to avoid a violation of the Excessive Fines Clause. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986) ("[Although] this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of the statute . . . *or judicially rewriting it*.") (emphasis added).

[11] The government did not purport to intervene in connection with the DPM claim until this appeal.

Finally, this Court should reject out of hand the government's extraordinary assertion that the district court was obliged to reduce the penalty below the statutory minimum because the government, in the exercise of its prosecutorial discretion, sought a reduced penalty. First, even if this argument had any validity, the government waived it by not intervening below. This claim of prosecutorial discretion is nothing more than a post-hoc rationalization.

Second, it is axiomatic that Congress in the exercise of its powers under Article I, Section 8, defines both offenses against the United States and the concomitant punishments. The Executive, by contrast, executes the law that Congress has enacted. *See* Art. II, § 3 (the President "shall take care that the Laws be faithfully executed"). The Executive's prosecutorial discretion in executing the law does not extend to seeking to impose punishment outside of the range that Congress has prescribed in the exercise of legislative powers. *See Abuelhawa v. United States*, 556 U.S. 816, 823 n.3 (2009) ("Congress legislates against a background assumption of prosecutorial discretion, but this tells us nothing about the boundaries of punishment *within which* Congress intended the discretion to be exercised; prosecutorial discretion is not a reason for courts to give improbable breadth to criminal statutes.") (emphasis added). In the FCA, Congress has precisely defined the boundaries of prosecutorial discretion to seek penalties—$5,500 to $11,000 per invoice submitted—and the government's post-hoc

invocation of that discretion in this Court provides no authority to reverse the district court's scrupulous adherence to the terms of the statute.

CONCLUSION

This Court should vacate the jury's verdict that Gosselin violated the FCA, and remand with instructions to dismiss the DPM claim for lack of subject matter jurisdiction. Alternatively, this Court should affirm the district court's award of no civil penalties.

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Respectfully submitted,

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RULE 32 CERTIFICATE OF COMPLIANCE

I certify that this brief complies with FRAP 29(a) because it is printed in a 14-point, proportionally spaced font and because, based on word processing software, the brief contains 6,951 words.

/s/ *M. Miller Baker*

CERTIFICATE OF SERVICE

I certify that on October 17, 2012, I electronically filed the foregoing *Amicus Curiae* Brief of the Chamber of Commerce of the United States of America by using the Court's Case Management/Electronic Case Filing system, that counsel for the other parties are registered CM/ECF users, and that service will therefore be accomplished through the Court's CM/ECF system.

/s/ *M. Miller Baker*