No. 98-1828

IN THE
SUPREME COURT OF THE UNITED STATES

VERMONT AGENCY OF NATURAL RESOURCES,
Petitioner,

v.

U.S. EX REL. STEVENS,

_____ *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of the State of Vermont

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MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN HOSPITAL ASSOCIATION IN SUPPORT OF PETITIONER

HERBERT L. FENSTER*
MCKENNA & CUNEO, L.L.P.
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500
* Counsel of Record for *Amici Curiae* Chamber of Commerce of the United States of America and the American Hospital Association

Of Counsel:
Stephen A. Bokat
Robin S. Conrad
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Maureen D. Mudron
Washington Counsel
American Hospital Association
325 Seventh Street, N.W.
Washington, D.C. 20004
(773) 561-7166

MOTION FOR LEAVE TO FILE UNDER RULE 37.3

Pursuant to Supreme Court Rule 37.3(b), amici curiae move this Court for leave to file the attached brief. Pursuant to Rule 37.3, consent to file the brief was requested from the parties. Counsel for Petitioner, Vermont Agency of Natural Resources, consented to the filing of the brief. Counsel for Respondent, the United States, indicated that he did not object to the filing of the brief. The originals of these letters have been filed with the Court today. Pursuant to this Court's Order of November 19, 1999, it was not possible for the brief to be filed within the time allowed for filing the petitioner's opening brief pursuant to Rule 37.3(a).

Because of the statements of interest outlined in the brief, amici curiae respectfully request this Court to grant their motion for leave to file this brief.

Respectfully submitted,

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Herbert L. Fenster*
McKENNA & CUNEO, L.L.P.
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500
*Counsel of Record for *Amici Curiae* Chamber of Commerce of the United States of America and the American Hospital Association

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INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation.[1] It represents more than 3 million businesses and business organizations of every size, industrial sector, and geographic region. Many of the Chamber's members provide goods and services to the United States under government contracts. The Chamber regularly advocates its members' views in Supreme Court and other appellate litigation involving issues of national concern to the American business community.

The American Hospital Association ("AHA") is the primary national membership organization for hospitals and health care institutions in this country, consisting of approximately 5,000 hospitals and other healthcare institutions. The AHA's goal is to promote high-quality healthcare and health services through leadership and assistance to hospitals in meeting the healthcare needs of their communities. AHA's members deliver healthcare services to millions of Americans. The federal government funds many of those services in whole or in part through Medicare, Medicaid, CHAMPUS and/or other federally-funded healthcare programs.

The principal question presented in this case—whether a private citizen has standing under Article III to litigate claims of fraud upon the government—has tremendous practical importance to a substantial number of the members of the Chamber and the AHA. Many of their members are frequently subjected to litigation that private citizens bring against them under the False Claims Act.

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[1] Pursuant to Supreme Court Rule 37.6, the Chamber and the AHA hereby affirm that no counsel for either party authored any part of this brief, and that no person or entity other than the Chamber and its legal affiliate, the National Chamber Litigation Center, Inc., and the AHA provided financial support for its preparation or submission.

SUMMARY OF ARGUMENT

> Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.

Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

The not-so-sheepish wolf in this case is a provision of the False Claims Act Amendments of 1986 in which Congress has delegated a prosecutorial function to private litigants who not only have no individuated injury related to the subject matter of the case, but have no fealty whatsoever to any branch of the government. The amendment has grown an immense cottage industry for the plaintiffs' bar, and a combination of unhappy company employees and even unhappy government employees have sprung up everywhere as "relator" plaintiffs. It has frequently created a tension between these self-appointed prosecutors and the Executive Branch that absurdly contradicts the prosecutorial prerogatives of that branch.

The "sheep's clothing" adorning this statute and its qui tam provisions dresses the public interest in the prevention and rooting out of fraud against the United States. There seems little doubt that this substantial public interest has motivated many of the courts that have considered the subject thus far. Unfortunately, the "wolf" that lurks within is the profound damage done to elemental concepts of separation of powers, standing, and appointment, including the delegation of the prosecutorial function beyond the Executive Branch to a relator who cannot possibly claim individuated injury. Attorney General William Barr, publishing his own Memorandum on this subject, put the matter in very graphic terms: "These qui tam suits pose a devastating threat to the Executive's constitutional authority and to the doctrine of

separation of powers." 13 U.S. Op. Off. Legal Counsel 207, 208 (1989), 1989 WL 595854.

Before this court, in addition to the instant case, is at least one other case, *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, No. 98-822, which bears on the standing issue that the Court has opened. In addition, as the Court may already be aware, the Fifth Circuit has before it *Riley v. St. Luke's Episcopal Hospital*, No. 97-20948, 1999 WL 1034213 (5th Cir. Nov. 15, 1999), in which a split panel opinion was rendered. Sua sponte, the Circuit then withdrew its panel opinion and ordered rebriefing and rehearing en banc. While withdrawn, the panel opinion sheds exceptional light on both the standing issue and the other constitutional issues presented by the qui tam provisions. Rendered only a month ago, it is the first Circuit decision declaring the provisions unconstitutional.

ARGUMENT

Here, the Court has determined that it should consider the standing prong of what is a three-prong constitutional dilemma. Tied to this issue of standing are issues of violation of the Appointments Clause and the doctrine of separation of powers, namely the "take care" provision of art. II, § 3. The amici here urge the Court to consider all three of these constitutional issues and not attempt to limit consideration only to the standing question, as important as it is.

A. The Standing Issue

The three elements necessary to establish standing are injury, causation, and redressibility; all three must be present for a plaintiff to demonstrate standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 558 (1992). We believe that only the subject of injury need be addressed here. We also address the "substitutes" for injury (and for all elements of standing) which have been posited by the Circuits in the several qui tam cases decided to date.

It is now accepted that standing requires that the plaintiff have an "injury in fact" which is "concrete and particularized" as to the "invasion of a legally-protected interest." *Lujan*, 504 U.S.

at 558. This court has recently reemphasized that minimum requirement in *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83 (1998). Now, the question is simply: Does a qui tam relator have such an individuated injury to a particularized legally protected interest?

An analysis of the decisions of this Court demonstrate that the answer is in the negative. No court has yet seriously suggested otherwise, and even the former Attorney General concedes that there is no such injury to support the presence of a qui tam relator, other than the so-called substitutes for injury.

Two lines of cases have emerged with regard to standing. One, led by this Court's decision in *Baker v. Carr*, 369 U.S. 186, 204 (1962), requires that the plaintiff "have alleged such a personal stake in the outcome of the controversy as to assure . . . the concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for the illumination of difficult constitutional questions." It would seem that this "stake" test requires *no* "injury" at all, but only some, perhaps economic, interest in the outcome. Surely, say the proponents, Congress can create such an interest. The adoption of such a test, however, would enable Congress also to establish a prosecutorial system entirely outside the Executive Branch.

A separate line of cases, however, does indeed require that the plaintiff demonstrate an individuated injury, that is, one to itself personally, before standing will be accorded. No Circuit, having considered the question of standing under the qui tam provisions, has demonstrated the hubris to suggest that the relators actually are suffering some injury of their own. Nor have most of them adopted the "stake" line of cases. Most have sought devices to accomplish the "injury" objective even where this has required the illogic of "assignment" of the government's injury to the relators. *See United States ex rel Kelly v. Boeing Co.*, 9 F.3d 743.

But, if it is conceded that injury, however attenuated and vicarious it might be, is required, then, as we shall discuss below, this Court should consider whether Congress can legislate to create a right which can be subject to "injury" by a private party and, by this mechanism, transfer the functions of the executive to

others. At this point, standing has become inextricably intertwined with separation of powers and with executive appointment.

At one point, some courts seem to have suggested that standing could be 'conferred' on a plaintiff by the substance of legislation. *See, e.g.*, *United States ex rel. Weinberger v. Equifax*, 557 F.2d 456, 460 (5th Cir. 1977). This approach, although clearly repudiated by this Court, nevertheless lives on in the qui tam cases that have stated that the government's claims (not quite its injuries) may be assigned. But such notions are directly in conflict with this Court's controlling decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). That decision made it clear that individuated injury is the "irreducible constitutional minimum of standing." *Id.* at 560. Then, more recently, this Court addressed the "conference" theory stating that "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997). And most recently, this Court has plainly rejected such notions in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-04 (1998); *Clinton v. New York*, 118 S. Ct. 2091, 2108-10 (1998) (Kennedy, J. concurring); and *Printz v. United States*, 521 U.S. 898, 936 (1997).

The dichotomy in *Steel Company* between "injury" and the collection of fines and penalties makes it crystal clear that no citizen may maintain a suit on behalf of the government to collect fines and penalties unless it can, at the same time, demonstrate that it has suffered an injury. This conclusion is determinative of the instant case because all that the relators *ever* have alleged is the right to recover the government's damages, fines, and penalties. The relators have *never* had injuries of their own.

The decisions of the Circuits that have addressed the presence of an injury in fact have found none. In each instance where the courts have addressed this question they have started with the assumption, plain on the facts, that no such injury can be demonstrated. For this reason, and in order to preserve the qui tam actions, the courts have quickly resorted to an assortment of alternatives, none of which can withstand scrutiny. The most ambitious of these alternative exercises was indulged by the Ninth

Circuit in *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743. There the Circuit stated:

> We . . . hold that the FCA effectively assigns the government's claims to the qui tam plaintiffs . . . , who then may sue based upon an injury to the federal treasury.

9 F.3d at 747.

That same year, the Second Circuit reached a similar conclusion without actually stating that an "assignment" had been made. It put the matter slightly differently: "Here . . . , the qui tam relator stands in the shoes of the government, which is the real party in interest." *United States ex rel. Kreindler & Kreindler v. United Tech. Corp.*, 985 F.2d 1148, 1153-54 (2d Cir. 1993).

But we do not believe that this melange of excuses rises to the equivalent of, or substitute for, the much stricter requirement of individuated injury which must be "concrete and particularized" and which "invades a legally protected interest."

Unfortunately, the "conferral" theories not only fail the requirements set forth in *Lujan* and *Steel Company*, they also embody the mischief precluded by other provisions of the Constitution. It is for this reason, among others, that we urge the Court to consider the entire panoply of constitutional issues embedded in this case. It is our view that there is no practical way to isolate the "standing" issue from the umbrella issue of separation of powers, and from the subordinate issues of executive appointment and the "take care" provision.

What is happening in these cases is that the required individuated injury and interest are being separated from the power to appoint and execute, the former remaining with the government and the latter being "assigned" to relators by Congress. Not only does this approach not solve the standing problem, it creates a second problem of appointment and the executory powers of the "take care" provision of the Constitution.

B. The Other Two Prongs of the Constitutional Issue – Appointment and Separation of Powers

Over a period of years there has emerged a pattern of unconstitutional legislative enactments which challenge the separation of powers. The infringement of the powers of a coordinate branch represented by the instant case is demonstrated by legislation which seeks to *reassign* a power vested in one branch either to another branch or outside our tricameral system entirely. That is an issue that this Court addressed in *Morrison v. Olson.* 487 U.S. at 699.

We believe that the standing issue arises as a by-product of an effort on the part of the Congress to avoid the appointment and execution powers of the Executive Branch. The qui tam provisions flow directly from the discontent of Congress with the enforcement of the False Claims Act by the Executive Branch. The simple solution was to "assign" that enforcement power to someone not a part of the Executive Branch, not subject to its appointment or discharge control, and not subject to either the political or the prudential considerations that are encompassed by the notion of prosecutorial discretion. For when, if ever, would a private individual, driven primarily by a profit motive, ever exercise "discretion" not to "prosecute" a qui tam case? The effort was to sic profit-driven junkyard dogs on what Congress perceived to be a host of falsely claiming supplicants at the public trough.

Whatever may be said of the motivation, Congress was not informed of the Constitutional need for an "appointment" and it did not consider that only the Executive Branch is charged with "faithful execution" of the law.

The "Appointments" clause of Article II specifies that the President shall have (with the advice and consent of the Senate) exclusive authority to appoint officers and lesser officers of the Executive Branch. U.S. Const. art. II, § 2, cl. 2.

It is incontestable that this provision is central to the obligation of the President to execute the laws passed by

Congress. Thus, the appointments clause enables the executive to fulfill its obligation to "take care that the Laws be faithfully executed . . . ." *Id.* § 3.

The power of appointment is also central to the tricameral form of government designed by the Constitution. And these functions, operating together, enable the separation of the powers of lawmaking and execution. In this case, we are dealing with the prosecutorial function embedded in the False Claims Act, the execution of which would lie exclusively with the Executive Branch and with the Department of Justice absent the qui tam provisions. That this prosecutorial function must be carried out by appointed officers is clear in the precedents of this court. Furthermore, the take-care provision requires that the executive be able to command fealty. *Morrison v. Olson*, 487 U.S. at 670-74; *Buckley v. Valco*, 424 U.S. 1, 126 (1976).[2]

The two fundamental criteria for compliance with this provision are that the person have been appointed and that the person be under the control of the executive. *Morrison v. Olson* identified four Executive Branch powers for determining whether the statute enabled appointment and control. These are appointment, discharge, subject matter control, and procedural control.

In the case of the qui tam provisions, not a single one of these five criteria is met. The relators "self appoint" with no input whatsoever from the executive branch. Similarly, the Attorney General has absolutely no authority or power to remove a relator. And once the relator is in its self-appointed office, the executive branch exercises absolutely no controls over what the relator litigates or how it is litigated.

The structure of the qui tam provisions would not even come close to that enabling appointed state enforcement officers

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[2] In the recent panel decision in *Riley*, the Circuit Court noted that *Morrison v. Olsen* "express[es] the outer boundary of executive encroachment; any legislation that leads to more encroachment than that the *Morrison* Court considered must be unconstitutional." 1999 WL 1034213 at *39.

which this court rejected in *Printz v. United States*, 521 U.S. 898, 936 (1997). This more recent decision strongly supports the concept that execution of the laws must indeed come from within the executive branch and its appointed officers.

Nor has any court considering this provision suggested that the appointment requirement is met by this statute. Instead, we are again treated to a series of expedient contrivances. These include the delegation by Congress, the notion that the relator is not an officer at all, and appointment does not matter because the executive actually has adequate control. But such contrivances should be to no avail; they merely extend the notion that the entire function of detecting and prosecuting fraud could rightly be delegated by Congress to persons outside the executive branch.[3] Standing is here fused with appointment and execution in the very concept of the qui tam provisions.

Appointment and execution are the means by which the executive branch fulfills its obligation to take care that the laws passed by Congress are made effective. But what if Congress elects to bypass the executive branch and place the powers of appointment and execution in the hands of others not a part of the executive branch? This was the ultimate issue that this Court addressed in *Morrison v. Olsen* and *Buckley v. Valeo*. And does it matter that Congress bypassed the executive branch with the consent of that branch, or at least its intermittent silence?[4] *See Clinton v. New York*, 118 S. Ct. 2091, 2108-10 (1998) (Kennedy, J. concurring).

The mechanisms employed by an unabashed Congress had the specific intent of taking the execution of a civil law outside the executive branch. That much is very clear. While this is not the

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[3] Even when the United States does intervene, it cannot control adequately the litigation to meet the appointment and "take care" requirements. This is so because the relator still may exert significant influence on the litigation including the authority to block settlement.

[4] *See* 13 U.S. Op. OLC 207 (1989), 1989 WL 1034213.

kind of improper delegation seen in arrogation cases, nor in cases of delegation to coordinate branches, it is no more subtle and no less damaging an imposition on Constitutional separation provisions. If permitted, it becomes a generic model for countless delegations of executory authority outside the executive branch.

CONCLUSION

There should be no doubt that, in this case, the relator is seeking to enforce a law made to requite an injury of the United States and not that of the relator: the relator has no individuated injury to claim. This fact distinguishes the qui tam provisions from all other citizen suit provisions and from all private attorney general actions. But at its heart, the issue is really one of separation of powers. Overlapping the issue of standing is the question of whether Congress can "confer" standing and overlapping that issue is whether Congress can delegate out of the Executive branch the constitutional power to enforce the law. That this bypassing of the executive enforcement power was accomplished explicitly and intentionally by Congress is plain from the legislative history and the manner in which the bypassing actually works. It is, however, "a devastating threat to the Executive's constitutional authority and to the doctrine of Separation of Powers," just as Attorney General Barr stated.

Respectfully submitted,

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Herbert L. Fenster*
McKENNA & CUNEO, L.L.P.
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500
*Counsel of Record for *Amici Curiae* Chamber of Commerce of the United States of America and the American Hospital Association

Of Counsel:
Stephen A. Bokat
Robin S. Conrad
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Maureen D. Mudron
Washington Counsel
American Hospital Association
325 Seventh Street, N.W.
Washington, D.C. 20004
(773) 561-7166

CERTIFICATE OF SERVICE

The foregoing Motion for Leave to File and Brief of *Amici Curiae* Chamber of Commerce of the United States of America and the American Hospital Association in Support of Petitioner was sent via Federal Express this _____ day of November 1999 to:

Miguel A. Estrada
Gibson, Dunn & Crutcher, LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306

Ronald L. Shems
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05602

_____