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No. 98-1828

IN THE
Supreme Court of the United States

STATE OF VERMONT AGENCY OF
NATURAL RESOURCES,
Petitioner,
v.

UNITED STATES OF AMERICA *ex rel.*
JONATHAN STEVENS,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AS *AMICUS CURIAE* AND SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PETITIONER

CHARLES G. COLE
Counsel of Record
JERALD S. HOWE, JR.
SHANNEN W. COFFIN
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-6270
Counsel for *Amicus Curiae*

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AS *AMICUS CURIAE*

In response to this Court's November 19, 1999 Order requesting that the parties brief the issue of relator standing under the False Claims Act, the Aerospace Industries Association of America, Inc. ("AIA") respectfully moves this Court for leave to file the Supplemental Amicus Curiae Brief of Aerospace Industries Association of America, Inc. in Support of Petitioner that has been lodged with this motion. The lodged brief addresses only the standing issue raised by this Court's November 19 Order and is limited to the ten pages permitted for supplemental briefs.

AIA has contacted all of the parties to this dispute to obtain permission to file this brief. Petitioner State of Vermont Agency of Natural Resources has expressly consented to the filing. Respondents United States of America and Jonathan Stevens have indicated that they do not object to the filing. Those letters have been filed with the Clerk of this Court.

AIA is a national, non-profit trade association representing manufacturers of commercial, military and business aircraft, helicopters, aircraft engines, missiles, space craft, and related components and equipment. Virtually all of AIA's members provide goods and services under contracts with the federal government. *Amicus* has an interest in the resolution of the relator standing issue raised by the Court's November 19 Order. AIA's members are exposed to allegations of fraud under the False Claims Act simply by virtue of their performance of obligations under federal government contracts. In recent years, AIA members have faced increasing numbers of FCA actions initiated—and, more often than not, maintained after the Attorney General has investigated and declined to intervene—by *qui tam* relators who have

suffered no personal injury in connection with the alleged wrongdoing. Since the absence of a truly injured party in such suits distorts the judicial process, undercuts the relationship between federal agencies and their contractors, and subjects its members to burdensome and often frivolous litigation, AIA seeks clarification of the requirements of Article III with respect to relator standing.

Because it believes the perspective of its members, which have actively litigated many *qui tam* actions, would assist the Court in resolving this important Article III issue, AIA asks that this Court grant its motion for leave to file a brief *amicus curiae*.

Respectfully submitted,

CHARLES G. COLE
Counsel of Record
JERALD S. HOWE, JR.
SHANNEN W. COFFIN
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-6270
Counsel for *Amicus Curiae*

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SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS*

The Aerospace Industries Association of America, Inc. ("AIA") is a national, non-profit trade association representing manufacturers of commercial, military and business aircraft, helicopters, aircraft engines, missiles, space craft, and related components and equipment.[1] Virtually all of AIA's members provide goods and services under contracts with the federal government. *Amicus* has an interest in the resolution of the relator standing issue raised by this Court's November 19, 1999 Order. AIA's members are exposed to allegations of fraud under the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.* (1994), simply by virtue of their performance of obligations under federal government contracts. In recent years, AIA members have faced increasing numbers of FCA actions initiated—and, more often than not, maintained after the Attorney General has investigated and declined to intervene—by *qui tam* relators who have suffered no personal injury in connection with the alleged wrongdoing. Because the absence of a truly injured party subjects its members to burdensome and often frivolous litigation, AIA seeks clarification of the requirements of Article III with respect to relator standing.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent Jonathan Stevens lacks Article III standing to pursue this action as a *qui tam* relator under the FCA

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than *amicus curiae* and its members, made a monetary contribution to the preparation or submission of this brief.

for one simple but compelling reason: he has not personally suffered injury as a result of the fraudulent acts allegedly committed by the petitioner Vermont Agency of Natural Resources ("Vermont"). The exercise of federal jurisdiction where the plaintiff cannot satisfy Article III's "injury in fact" test violates fundamental principles of Separation of Powers.

The primary constitutional safeguard against the excessive accumulation of power within the judiciary is Article III. An "essential and unchanging part of the case-or-controversy requirement of Article III" is the doctrine of standing. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). This doctrine " 'serv[es] to identify those disputes which are appropriately resolved through the judicial process.' " *Id.* at 560 (citation omitted). As this Court has noted, "the law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Allen v. Wright,* 468 U.S. 737, 752 (1984).

The Court has derived from Article III the "irreducible constitutional minimum" necessary to satisfy this standing requirement: (1) injury in fact; (2) causation; and (3) redressibiilty. *Lujan,* 504 U.S. at 560-61. These standards serve as a bulwark against interference by the judiciary with the proper functions of coordinate governmental branches, *see Valley Forge Christian College v. Americans for Separation of Church & State,* 454 U.S. 464, 472 (1982)—in this case, the role of the Executive Branch in supervising its own spending and prosecuting fraud perpetrated against it.

The relator here asks a federal court to hear a claim in which he asserts no injury to himself. Mr. Stevens cannot assert that he was harmed by Vermont's alleged fraud in any respect apart from his general interest in ensuring that the federal government is not victimized. This Court has made clear that this concern—common to all citizens—falls far short of the particularized showing of injury

to the plaintiff necessary to support Article III standing. *See, e.g., Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 227 (1974).

Congress cannot "create" an injury to the *qui tam* relator by providing a bounty in the *qui tam* statute. *See* 31 U.S.C. § 3730(d). This Court repeatedly has held that Congress may not dispense with the constitutional prerequisites to standing. *See Gladstone, Realtors v. Bellwood,* 441 U.S. 91, 100 (1979). Although a bounty creates a financial *interest* in the litigation for the relator, it does not create personal *injury* to the relator—the touchstone of Article III standing.

Nor may the relator's standing be upheld on the theory that Congress has "assigned" the federal government's rights to vindicate its injury to the relator. Congress may not delegate to a private party the power to initiate civil litigation claiming fraud committed against the federal government because that is the exclusive province of the Executive. *See* U.S. Const. art. II, § 3. Thus, the statute impermissibly interferes with the Executive's core Article II authority. In any event, the terms of the statute do not, in fact, "assign" the government's interest to the relator.

ARGUMENT

I. RESPONDENT STEVENS LACKS STANDING IN HIS OWN RIGHT BECAUSE HE HAS SUFFERED NO INJURY IN FACT

"[O]ne of the essential elements" of Article III standing doctrine is that a plaintiff "must have suffered an 'injury in fact'—an invasion of a legally protected interest" which is " 'concrete and particularized.' " *Lujan,* 504 U.S. at 560, 576 (citations omitted). This Court repeatedly has emphasized that this standard is not met by allegations of harm to another party. Rather, the " 'plaintiff must allege *personal injury* fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the re-

quested relief.'" *Raines v. Byrd,* 521 U.S. 811, 818 (1997) (citation omitted) (emphasis in original); *see also Lujan,* 504 U.S. at 563 (injury-in-fact test "requires that the party seeking review be himself among the injured"). Even in the rare circumstances where this Court has allowed a plaintiff to assert the rights of a third party, it has required that the plaintiff show some concrete injury to himself. *See, e.g., Craig v. Boren,* 429 U.S. 190, 194 (1976); *Singleton v. Wulff,* 428 U.S. 106, 112-19 (1976).

Here, as in virtually all *qui tam* actions, the *qui tam* relator cannot meet this injury-in-fact standard. He has suffered no particularized, personal injury as a result of the fraud alleged. Indeed, as both the relator and the United States recognize, the only party allegedly harmed is the United States. *See* Brief of Respondent Stevens at 24; Brief for the United States at 34. The only conceivable injury to the relator is a generalized one, arising from his status as a citizen of the United States—a status that this Court consistently has rejected as insufficient to confer standing. *See, e.g., Lujan,* 504 U.S. at 575-77; *Allen,* 468 U.S. at 754; *Ex parte Levitt,* 302 U.S. 633, 634 (1937).

II. CONGRESS CANNOT CREATE STANDING BY GRANTING A BOUNTY TO A RELATOR

Recognizing that a relator lacks the requisite injury to his own interests, some lower courts have held that the relator's statutorily-conferred interest in a financial reward is enough to give the relator standing. This "bounty" theory of standing does nothing to cure the principal Article III defect in a relator's claim—Congress's action does not create an interest that has been "injured" by the action of the FCA defendant.

To be sure, the FCA's promise of a bounty gives the relator a financial incentive to prosecute the action. But the Constitution requires more than motivation: "[M]otivation is not a substitute for the *actual injury* needed by the courts and adversaries to focus litigation efforts and judicial decisionmaking." *Schlesinger,* 418 U.S. at 226 (emphasis added). Indeed, were an interest in the outcome—even a passionate one—enough, the *Schlesinger* plaintiffs undoubtedly would have met the criteria.

The argument that a personal financial interest in the outcome of the litigation alone satisfies the Article III standing test takes out of context language in prior opinions of this Court suggesting that a plaintiff must have a "personal stake" in the litigation. Whenever this Court has used the "personal stake" language, it has done so in the context of discussing the need for an actual, concrete injury to the plaintiff. *See Sierra Club v. Morton,* 405 U.S. 727, 735, 738 (1972); *Warth v. Seldin,* 422 U.S. 490, 498-99 (1975); *Baker v. Carr,* 369 U.S. 186, 206-07 (1962). None of these "personal stake" cases holds that a party who did not himself suffer personal injury independently satisfies Article III standing. Thus, the "personal stake" required by this Court is not just *any* personal stake, but rather a personal stake *in vindicating an actual injury suffered by the plaintiff himself.*

Consequently, the relator's "interest" in the litigation is no different than a prevailing party's "interest" in attorneys' fees, held insufficient to support standing in *Diamond v. Charles*, 476 U.S. 54 (1986). Like the attorneys' fees award in *Diamond,* the relator's reward is simply a "byproduct" of the litigation, not an independent "injury" stemming from the underlying fraud. *Id.* at 69-71. Indeed, under the bounty theory, an attorney working on a contingent fee basis would have independent standing to assert his client's claims even in the absence of the client. Surely Article III would not countenance such actions.

Most importantly, were a bounty enough to confer standing, Congress would have free rein to circumvent all of this Court's Article III jurisprudence. For example,

Congress might artificially create standing by offering to private persons a bounty of perhaps $10,000 for each proved violation of federal law by the Executive Branch. Such a result would nullify this Court's decisions in *Lujan, Schlesinger, Levitt* and similar cases and also invite substantial judicial interference with the functions of the political branches.[2]

"It is settled 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,* 521 U.S. at 820, n.3; *id.* at 830 n.1 (Souter, J., concurring); *see also Gladstone,* 441 U.S. at 100. The judiciary no more has the power to disregard the injury-in-fact standard at the directive of Congress than it does on its own initiative: "Whether the courts were to act on their own, *or at the invitation of Congress,* in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch . . . ." *Lujan,* 504 U.S. at 576 (emphasis added). Only by adhering to the strict requirement that plaintiffs have suffered actual and particularized harm can the Court preserve the Separation of Powers contemplated by the Constitution.

III. CONGRESS NEITHER HAS THE POWER TO ASSIGN NOR HAS ASSIGNED THE INTERESTS OF THE UNITED STATES TO THE RELATOR

In order to overcome the obvious injury-in-fact barrier presented by *qui tam* relator actions, lower courts have relied on yet another legal fiction to support standing—

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[2] Because no substantive rights are conferred upon the relator, the legislative bounty is unlike the situation in which Congress adopts laws that create personal legal interests, the invasion of which can constitute injury in fact. *See Linda R.S. v. Richard D.,* 410 U.S. 614, 617 n.3 (1973); *Lujan,* 504 U.S. at 580 (Kennedy, J., concurring).

that the FCA actually "asigns" the United States' claim for injury to the relator, who may then sue to enforce it. *See, e.g., United States ex rel. Kelly v. Boeing Co.,* 9 F.3d 743, 748 (9th Cir. 1993), *cert. denied,* 510 U.S. 1140 (1994). This assignment theory suffers from two principal faults. First, Congress has no power to assign to a private party the authority to enforce a claim of harm against the United States; second, it did not do so here.

A. The "Assignment" Theory Subverts the Doctrine of Separation of Powers

In *Lujan,* the Court rejected the argument that Congress can create standing by granting a procedural right to a private party where that party has suffered no injury. The Court's chief objection to the statute at issue there was that it unduly interfered with the authority of the Executive Branch:

> To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed." 504 U.S. at 577.

This concern to preserve Executive authority is no less where Congress attempts to transfer to private parties the power to prosecute alleged fraud against the government. The right to initiate prosecution of civil fraud cases on behalf of the United States belongs to the Executive as part of its Article II powers. *See Buckley v. Valeo,* 424 U.S. 1, 138 (1976); *United States v. Nixon,* 418 U.S. 683, 693 (1974); *Confiscation Cases,* 74 U.S. (7 Wall.) 454, 457 (1869). It is not a legislative power. Thus, Congress cannot grant to a private party the power to vindicate the federal government's injury. Put simply,

"Congress cannot grant . . . what it does not possess." *Bowsher v. Synar,* 478 U.S. 714, 726 (1986).

In this critical respect, the *qui tam* provisions differ from the Independent Counsel statute upheld in *Morrison, v. Olson,* 487 U.S. 654, 696-97 (1988). In *Morrison,* the decision to appoint an independent counsel was committed in the first instance to the "unreviewable discretion" of the Attorney General. *Id.* at 696. By contrast, the FCA confers upon a relator unfettered discretion to initiate prosecution of a lawsuit, thus depriving the Executive of its critical gatekeeper function of bringing cases on behalf of the federal government.

Moreover, the burden imposed on the Executive as a result of relators' suits is heavy, even in cases in which the government decides not to intervene. In the first six years following the 1986 FCA amendments, lawyers in the Justice Department's Civil Division "spent about 20,000 hours investigating the 150 *qui tam* cases that were dismissed by the courts or not pursued after [it] declined to intervene. . . ." *Hearings before the Subcommittee on Civil and Constitutional Rights, House Judiciary Committee,* 102d Cong., 19-20 (Apr. 1, 1992) (statement of Assistant Attorney General Stuart M. Gerson) ("*Gerson Statement*"). Congress lacks the power to impose this onerous burden on the Executive.

B. The FCA Does Not Assign the Government's Claim to the Relator

Even assuming Congress had the power to delegate the Executive Branch's prosecutorial power to a private citizen, the FCA, on its own terms, simply does not assign the federal government's claims to a *qui tam* relator. An assignment requires "an intention to make a present transfer of the right without further action by the owner or by the obligor." 3 E. Allan Farnsworth, *Farnsworth On Contracts* § 11.3, at 67 (1998). The assignor of an interest, even a partial interest, must relinquish that interest; the right must be transferred. *See United States ex rel. Riley v. St. Luke's Episcopal Hosp.,* No. 97-20948, 1999 WL 1034213, at *23 (DeMoss, J., concurring), *reh'g en banc granted* (5th Cir. Nov. 15, 1999); 3 *Restatement (Second) of Contracts* § 317(1) (1981). While the federal government is deprived by the FCA of its control over the initiation of a suit, it still retains some discrete powers with respect to the litigation and a substantial financial interest in the outcome. *See* 31 U.S.C. § 3730(c), (d). The relator does not "stand in the shoes" of the federal government because the government continues to fill its own shoes.

Nothing in the statute or the Justice Department's decision not to prosecute an action evidences an intent to transfer control over a property interest—the core concept of assignment. *See* 31 U.S.C. § 3730(c), (d). No intent to assign can be inferred from a Justice Department decision not to prosecute an FCA claim: the Justice Department need not state its reasons for declining prosecution, and it often declines to do so because it decides that a claim has no merit. *See Gerson Statement, supra,* at 19-20.

Consequently, the *qui tam* defendant is often forced to litigate non-meritorious claims where the federal government itself has concluded that the pursuit of litigation would not be worthwhile. Although the allegedly injured party declines to prosecute the claim, the *qui tam* defendant continues to incur the costs of litigation, which, in many instances, results in no recovery for the federal government. *See id.* at 19 (nearly 40 percent of *qui tam* cases filed between 1986 and 1992 were dismissed or abandoned after federal government declined to intervene). The "injury-in-fact" test is designed to prevent precisely this waste of judicial and defendant resources arising from unnecessary litigation.

Thus, there is no basis for relieving the relator from compliance with the "injury in fact" test. In fact, the *only* situation in which this Court explicitly has permitted an uninjured person to assert the rights of another is in the capacity of a "next friend," when two prerequisites—disability of the real party-in-interest and an identity of interests between the real party-in-interest and the next friend—are present. *See Whitmore v. Arkansas,* 495 U.S. 149, 163 (1990). Here, however, the federal government is certainly able to "appear on [its] own behalf to prosecute the action." *Id.* at 163. Moreover, the interests of the federal government and the *qui tam* relator are far from co-extensive. *See id.*

As this Court has noted and experience demonstrates: "[*Q*]*ui tam* relators are different in kind than the Government. They 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). For instance, the threat of *qui tam* suits may deter contractors from participating in voluntary disclosure programs administered by the Executive in which contractors that come forward voluntarily and cooperate fully in resolving liability are ligible for reductions in multiple damages. Similarly, the unfettered ability of a *qui tam* relator to convert what the contracting agency itself may have considered to be, at worst, a garden variety contract dispute into an action for fraud under the FCA cannot help but interfere with the Executive's ability to manage and resolve routine disputes with its own contractors. This lack of coincidence of goals and tactics illustrates the dangers of permitting government litigation to be initiated by an uninjured person.

CONCLUSION

For all of the reasons stated herein, the Court should hold that respondent Stevens lacks standing in this case.

Respectfully submitted,

CHARLES G. COLE
Counsel of Record
JERALD S. HOWE, JR.
SHANNEN W. COFFIN
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-6270
Counsel for *Amicus Curiae*

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