No. 98-1828

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1999

VERMONT AGENCY OF NATURAL RESOURCES,

Petitioner,

v.

UNITED STATES *ex rel.* STEVENS,

Respondent.

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

AMICUS CURIAE BRIEF OF FMC CORPORATION IN SUPPORT OF PETITIONER

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November 30, 1999

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* FOR FMC CORPORATION IN SUPPORT OF PETITIONER

FMC Corporation hereby moves for leave to file the attached brief as *amicus curiae* on the question that the Court raised in its November 19, 1999, order. Counsel for the petitioner, the respondent and the Solicitor General's office have consented to the filing of this brief, and their letters of consent have been filed with the Court.

FMC Corporation is a widely diversified producer of chemicals and machinery for industry and agriculture. Beginning in World War II, and continuing up until recently, FMC manufactured equipment for sale to the United States military. For almost two decades, FMC, in partnership with the United States Army, developed and produced the Bradley Fighting Vehicle.

FMC's interest in the supplemental issue raised by the Court in its order of November 19, 1999, arises from the fact that it is a defendant in *qui tam* litigation concerning the Bradley Fighting Vehicle. That litigation was filed on September 9, 1986, and continues to this day. Because the case was brought and is controlled by a private citizen, the litigation has persisted for thirteen years, even though, following a joint Department of Defense-Department of Justice investigation of the complaint and following extended congressional hearings into the relator's allegations, the United States continued its procurement without any modifications to address the concerns that the relator was litigating.

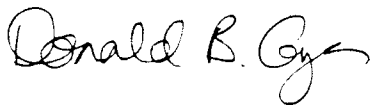
Because of its extensive experience with the False Claims Act's *qui tam* provisions, FMC is well situated to discuss the constitutional impropriety that results from requiring government contractors not only to satisfy the needs and concerns of the government, but also to deal with the allegations of self-appointed prosecutors who have suffered no injury. As FMC's experience amply demonstrates, because the relator has suffered no actual injury and his interest is solely in

the size of his reward, there is often a dramatic divergence between the interests of the relator and the government that he supposedly represents, making it likely that decisions will be rendered with no "realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

While the constitutional infirmity in the False Claims Act's *qui tam* provisions affects several hundred defendants each year -- and so FMC is not alone in being affected by the provisions -- it is perhaps unique in the starkness of the contrast between the position taken by the United States with regard to a government contract and the position taken by the relator, in the length of time that this disagreement has been allowed to continue, and in the fundamental national security policy implications of that disagreement.

For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of petitioner.

Respectfully submitted,



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QUESTION PRESENTED

Does a private person have standing under Article III to litigate claims of fraud upon the government?

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INTEREST OF *AMICUS* AND SUMMARY OF ARGUMENT[1]

FMC Corporation is a widely diversified producer of chemicals, machinery, and, until recently, equipment for sale to the United States military. For over five decades, FMC sold the government armored personnel carriers for use in infantry combat, including almost 7,000 Bradley Fighting Vehicles, which were developed in partnership with the United States Army beginning in the late 1960s, and produced and sold by FMC between 1981 and 1997.[2]

FMC's interest in the standing issue raised by the Court arises from its involvement in protracted *qui tam* litigation, filed in 1986 and continuing to this day, concerning various alleged defects in the Bradley. At no time did the United States join in this lawsuit. On the contrary, following a joint investigation of the *qui tam* allegations by the Department of Defense and the Department of Justice, the government elected not to join in relator's action. Further, following extended hearings on those allegations in the House of Representatives, the United States decided to continue purchasing Bradleys from FMC, on the same terms as before, without any adjustment in contract price or specifications to account for the *qui tam* allegations. Indeed, the Bradley performed with distinction in Operation Desert Storm, and the Army's reliance on it has steadily expanded during the 1990s.

The *FMC* case provides a textbook example of the constitutional impropriety and great unfairness, that result from *qui tam* litigation. Despite providing a vehicle that the government has found to be exceptional, and despite the government's thoroughly considered decisions to continue purchasing additional Bradleys, and to seek no redress for defects alleged by the relator.

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[1] Counsel for all parties have consented to the filing of this brief, and FMC Corporation has filed those consents with the Clerk of Court. No counsel for a party has authored this brief in whole or in part, and no person or entity, other than FMC Corporation, has made a monetary contribution to this brief's preparation or submission.

[2] In 1997, FMC sold its division responsible for the Bradley, which is now produced by United Defense, LLP.

FMC has been subjected to protracted litigation and to a large damages award that, although mostly set aside by the United States District Court for the Northern District of California, remains at issue on appeal in the Ninth Circuit. That litigation was prosecuted not by the United States itself, but by a self-appointed private prosecutor who has no responsibility for ensuring the military preparedness of this Nation; who has suffered no injury at all, much less a concrete and particularized injury, from the Bradley's alleged failure to perform as advertised; and whose only conceivable interest in this case arises from a litigation bounty purportedly provided to him under the *qui tam* provisions of the False Claims Act. Under settled Article III principles, *amicus* contends, such an uninjured party cannot litigate any claims in federal court at all, much less litigate federal government claims that the Executive Branch itself has found to be without merit.

ARGUMENT

"The Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-560 (1992). In particular, the power of the federal courts to interfere with either the legislature or the executive is limited by Article III, Section 2 of the Constitution, which restricts the "judicial power" of the United States to "Cases" and "Controversies." These terms confine the judicial power to the kind of focused disputes that have traditionally been viewed as amenable to resolution by courts. *Muskrat v. United States*, 219 U.S. 346, 356-57 (1911). That result is accomplished by "'[a]ll of the doctrines that cluster about Article III,'" including primarily standing. *Allen v. Wright*, 468 U.S. 737, 750 (1984) (quotation omitted).

Article III limits the jurisdiction of the federal courts to claims raised by a party who has suffered a distinct and particularized injury. On numerous occasions, this Court has held that three requirements constitute the "irreducible constitutional minimum of standing":

> First and foremost, there must be alleged (and ultimately proven) an "injury in fact" – a harm suffered by the plaintiff that is "concrete" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Whitmore v. Arkansas*, [459 U.S.] 149, 155 (1990) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983)). Second, there must be causation – a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976). And third, there must be redressability – a likelihood that the requested relief will redress the alleged injury. *Id.*, at 45-46; see also *Warth v. Seldin*, 422 U.S. 490, 505 (1975).

Steel Co. v. Citizens for a Better Environment, 118 S. Ct. 1003, 1016-17 (1997); *see, e.g.*, *Defenders of Wildlife*, 504 U.S. at 560-61; *Raines v. Byrd*, 118 S. Ct. 2312, 2317 (1997); *Allen*, 468 U.S. at 750-52. By foreclosing claims from parties who assert only an abstract interest in legal compliance by the Executive Branch (and its contracting parties) even where Congress purports to authorize such claims, the standing doctrine serves a core separation-of-power objective. As this Court recently explained:

> 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." Article III, § 3. . . . We have always rejected that vision of our role . . .

Defenders of Wildlife, 504 U.S. at 577. Standing requirements "ten[d] to assure that the legal questions will be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United for*

Separation of Church and State, Inc., 454 U.S. 464, 472 (1982). In *qui tam* litigation, none of the traditional standing requirements is met.

FMC submits this brief to offer a case study, based on its own experience, of what can happen when *qui tam* relators litigate on behalf of the United States, even where the government has knowingly affirmed that it has not been wronged and wishes to go on doing business as before. Indeed, in FMC's case, the government has expanded its procurement of and reliance on the Bradley Fighting Vehicle, even as the relator's litigation, in the name of the government, has dragged on for more than thirteen years. By allowing a private intermeddler to pursue the government's supposed fraud claims even where that party has suffered no injury, the False Claims Act violates both Article II and Article III. It is highly likely, in such circumstances, that the plaintiff's case will be presented in a manner unrelated to the government's true interests, and that decisions will be rendered with no "realistic appreciation of the consequences of judicial action." *Valley Forge*, 454 U.S. at 472. Where the country has a substantial stake in the program at issue (as with the Bradley), the disruptive effects of such judicial action are potentially severe.

During the mid-1960s, in response to a new generation of heavily armed Soviet tanks then being deployed in Europe, the Army called upon FMC to develop a new and improved infantry combat vehicle. The development process was complicated by the multiple uses to which the vehicle was to be put – including the deployment of troops and use in battlefield reconnaissance – and the numerous design compromises thus required. Following the design phase, FMC began to produce the Bradley in 1981, and by the end of 1986, more than 3,500 had been delivered. *See generally* Christopher F. Foss, *Jane's Armoured Personnel Carriers* 167-68 (1985); Christopher Foss & Ian Hogg, eds., *Battlefield: The Weapons of Modern Land*

Warfare 95-98 (1986); Scott R. Gourley, *Veteran Bradley Bridges the Digital Gap*, 32 International Def. Rev. No. 1 (Feb. 1, 1999).

In September 1986, former FMC employee Henry Boisvert filed an action in the district court for the Northern District of California, under the *qui tam* provisions of the False Claims Act, alleging that FMC had fraudulently concealed numerous deficiencies in the Bradley. The United States Department of Justice and the United States Department of Defense conducted an extensive investigation into Boisvert's allegations:

> Our investigation began with an assessment of all the material provided by Mr. Boisvert, and several sessions with him and his counsel to probe for additional details. In addition, two of our attorneys spent several weeks interviewing both government and FMC personnel, and reviewing a substantial amount of documentary materials.

Letter of Dec. 8, 1986, from John R. Bolton, Assistant Attorney General, to Congressman Albert G. Bustamante. The Army concluded that his allegations were meritless:

> The Department of Justice, assisted by the Army and the Department of Defense Inspector General conducted a thorough investigation into these allegations. The Department of Justice determined that Mr. Boisvert's allegations apparently were based upon a misunderstanding of the contract and technical requirements and concluded that there was no merit to the charges that FMC had violated the False Claims Act. Accordingly, the Department of Justice advised the U.S. District Court that the United States would not join the suit. The Army concurred in the Department of Justice conclusions and course of action regarding the fraud allegations.

Capability of the Bradley Fighting Vehicle: Hearing Before the Subcomm. on Oversight & Investigations of the House Comm. on Energy & Commerce ("*Oversight Hearing*"), 100th Cong., 1st Sess. at 211 (1987) (statement of Army Undersecretary James R. Ambrose).

Following this considered Executive Branch decision, Congress itself conducted hearings into Boisvert's allegations and, more broadly, into the Bradley's effectiveness. *Swim Capability*

of the Bradley Fighting Vehicle: Hearing Before the Procurement and Military Nuclear Sys. Subcomm. of the House Comm. on Armed Servs. ("*Procurement Hearing*"), 100th Cong., 1st Sess. (1987); *Oversight Hearing*. At those hearings, Congress adduced testimony from the Army that any limitations on the Bradley's swim capabilities (Boisvert's central complaint) "resulted from trying to satisfy a wide range of competing requirements" (*Oversight Hearing* at 79); that "any vehicle that is made and furnished to the battlefield is a compromise . . . [and] the Bradley is pretty nearly as close to a satisfactory compromise as we are apt to get" (*Procurement Hearing* at 85); and that FMC "has conformed to the contract specs [it] was given to operate on" (*Procurement Hearing* at 82).[3] Based on its hearings, Congress decided not only to continue appropriating funds for the Bradley, but also to authorize production of an upgraded model.

In 1991, the Army used approximately 450 Bradleys to invade Iraq in Operation Desert Storm. Government officials concluded that the vehicle performed superbly. For example, then-Secretary of Defense Richard Cheney concluded that "there are no other weapon systems in our

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[3] In a letter to the Energy & Commerce Committee, the Army further explained the numerous design compromises and trade-offs embodied in any sophisticated military hardware (including the Bradley):

> Any vehicle designed for this class of military action is going to be a compromise of many competing and conflicting requirements. Firepower, armor protection, size, speed, troop carrying capacity, and swimming capability are all examples of competing requirements. Reasonable people have, and will, differ over the details of the compromise. . . . But disagreement over the specific compromise choices is no basis for characterizing the Bradley as an incorrect or inadequate vehicle for these functions.

Oversight Hearing at 81. Because of the need to make such compromises, which often involve a "trade-off between greater safety and greater combat effectiveness," this Court has recognized the government contractor defense to tort liability. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 511 (1988). *Qui tam* actions unsupported by the government, like third-party tort suits challenging weapon safety, may undermine the military's ability to secure the equipment it needs, or at least increase the price it will have to pay.

history that have performed better in war and in combat than the Bradley." Thomas G. Keane, *Cheney Thanks FMC Corp. for the Bradley*, San Francisco Chronicle, Apr. 5, 1991, at A3. Similarly, in testimony before the Senate Armed Services Committee, Major General Barry McCaffrey described the Bradley as "the most magnificent fighting machine that we have ever fielded in anybody's army, period." *Operation Desert Shield/Desert Storm: Hearings Before the Senate Committee on Armed Servs.*, 102d Cong., 1st Sess., at 121 (1991).

The successful use of the Bradley in Operation Desert Storm led the government to rely on it even more heavily in the downsized Army of the 1990s. In addition to its longstanding roles in infantry combat and reconnaissance, the Bradley has been adapted to replace the outmoded M113 in two critical applications – as the vehicle for use by forward observers responsible for targeting and guiding air and missile attacks, and as a platform for mobile ground-to-air Stinger missiles. In addition, Congress has authorized substantial expenditures for a series of upgrades to existing Bradleys. The most significant of these was the development, beginning in 1994, and production, beginning in 1997 and still continuing, of a fully computerized Bradley model, the A3. It is presently anticipated that more than 1,000 Bradleys will be upgraded to the A3 configuration. The government has publicly announced its intention to continue relying on the Bradley until at least 2020. *See generally*, Gourley, *supra*. To date, the government has purchased approximately 6,700 Bradleys since 1981, including approximately 3,200 new Bradleys since reviewing and declining to support Boisvert's fraud allegations in 1986 and 1987.

While all of this activity was going forward, so was Boisvert's *qui tam* lawsuit. Despite repeated approval of the Bradley and rejection of his allegations by the Executive Branch and the Congress, Boisvert could allege, as a relator supposedly litigating on behalf of the United States,

that "serious deficiencies" in the Bradley's design "endangered the lives of the troops using the vehicle." Memo. of Sept. 1, 1988, at 1. Indeed, Boisvert could even contend that the government's own assessment of the Bradley was wholly irrelevant: "In the end, the jury – not DOJ or anyone else – must decide whether FMC submitted false claims. . . . FMC should not be allowed to muddy the waters and gain an unfair advantage by improperly implying that the jury would be second-guessing the Government in finding against FMC." Memo of Nov. 19, 1997, at 4. Nor, Boisvert could argue, should the jury "be influenced or swayed by what a given group of members of Congress did or did not do when pursuing their own inquiries about the BFV many years ago." Memo of Nov. 19, 1997, at 1.

The jury accepted Boisvert's invitation to ignore the considered judgments of the Executive Branch and Congress. Even after most of his allegations were dismissed on jurisdictional grounds, based on the government's specific awareness of the alleged product defects at issue (*see* 31 U.S.C. § 3730(b)(4) (1982)), and even after most of the jury award was set aside on post-trial motions as unsupported by any evidence, Boisvert nonetheless obtained a judgment (following doubling or trebling of damages and assessment of penalties) for approximately $87 million. Of this amount, $53 million arose entirely from the sale of the vehicles *after* the Executive reviewed Boisvert's allegations and decided not to join them, and *after* Congress considered the same allegations and elected to continue procurement of the Bradley. Even after the judgment, Major General John Michitsch, Army Program Officer for Ground Combat & Support Systems, declared: "The Bradley A3 is simply the best vehicle in existence for infantry and cavalry operation. . . . In short, this is acquisition done right - for the soldiers and the taxpayers." Gourley, *supra*.

The *FMC* litigation highlights the unconstitutionality of the *qui tam* provisions of the False Claims Act. In purporting to authorize litigation at the behest of individuals with no cognizable injury, those provisions violate the core Article III requirement of a distinct and particularized injury, as opposed to a generalized grievance. *See, e.g., Defenders of Wildlife*, 504 U.S. at 560 & n.1, 573-78. Nor can standing be sustained based on the litigation bounty given to successful relators. As this Court repeatedly has held, Article III litigation must redress an injury that is not "a byproduct of the litigation itself." *Steel Co.*, 118 S. Ct. at 1019 (individual interest in litigation costs cannot confer Article III standing); *see also Lewis v. Contintental Bank Corp.*, 494 U.S. 472, 480 (1990) (same for individual interest in attorneys' fees). Indeed, by providing would-be relators with substantial financial incentives to pursue litigation, but with none of the countervailing procurement and other enforcement responsibilities, *cf. Morrison v. Olson*, 487 U.S. 654, 729-32 (1987) (Scalia, J., dissenting), those provisions "distort the role of the Judiciary in its relationship to the Executive and the Legislature," *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. at 208, 222 (1974), and ensure abstract adjudication unrelated to the government's actual procurement experience, and thus divorced from "a concrete factual context conducive to a realistic appreciation of the consequences," *Valley Forge*, 454 U.S. at 472.

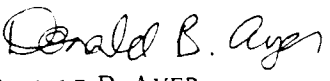
The *FMC* litigation also illustrates the basic unfairness of those provisions. By leaving it to *qui tam* volunteers to define the factual and legal positions advanced on behalf of the United States, the False Claims Act degrades the judicial process and injects a strong note of randomness into judicial proceedings. Ultimately, the whimsical and unpredictable character of these proceedings are bad in all respects: bad for defendants like FMC, who run the risk of large punitive judgments for supposed wrongs to a sophisticated consumer that believes, on full knowledge, that it is being well served; bad for the government, which may find needed

equipment less available or more costly because of the risk of random jeopardy; and bad for the judicial system, which is weakened by decisions that appear arbitrary in the context of the actual facts and interests of the parties concerned.

CONCLUSION

The *qui tam* provisions of the False Claims Act are unconstitutional. Accordingly, the Court should reverse the judgment of the court of appeals in this case.

Respectfully submitted,



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