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 AMICI CURIAE AND BRIEF FOR AMERICAN PETROLEUM INSTITUTE, NATIONAL ASSOCIATION OF MANUFACTURERS, AND NATIONAL DEFENSE INDUSTRIAL ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONER

The American Petroleum Institute (API), the National Association of Manufacturers (NAM), and the National Defense Industrial Association (NDIA) respectfully move for leave to file the attached supplemental brief as amici curiae in support of petitioner in this case. Counsel for petitioner and the United States have consented to the filing of this brief; counsel for respondent has stated that he does not object to its filing.

API is a national trade association representing the entire petroleum industry, including exploration and production, transportation, refining, and marketing. With over 400 member companies and with petroleum councils in many

states, API works to protect and advance the interests of all parts of the oil and natural gas industry.

NAM is the nation's oldest and largest broad-based industrial trade association. Its nearly 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately 85 percent of all manufacturing workers and produce over 80 percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the NAM through its Associations Council and National Industrial Council.

NDIA is a non-partisan, non-profit organization with a membership that includes nearly 900 companies and 26,000 individuals. NDIA is dedicated to maintaining a close working relationship between American industry and the United States government in pursuit of national security objectives. NDIA has a specific interest in government policies and practices concerning the acquisition of goods and services, including research and development, procurement, and logistics support. NDIA members, who include some of the nation's largest defense contractors, provide a wide variety of goods and services to the government.

The amici curiae represent a wide spectrum of business interests. Each organization has members who have been forced to defend actions pursued by private individuals pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. §§ 3729-3733, notwithstanding the decisions of the United States not to intervene in the suits. These suits are frequently meritless, but they impose substantial burdens upon defendants. Even if a case is ultimately dismissed for lack of merit, *qui tam* litigation is extremely burdensome and imposes public dishonor on a defendant through the accusation, in the name of the United States, that the defendant has committed fraud against the government. That dishonor is not fully erased by the dismissal.

The amici curiae believe that such *qui tam* actions are unconstitutional, and both API and NDIA have previously filed amicus briefs addressing that question. Most recently, API filed a brief addressing the issue in *Riley v. St. Luke's Episcopal Hospital*, No. 97-20948, 1999 U.S. App. LEXIS 29820 (5th Cir. Nov. 15, 1999). Because of amici curiae's keen interest in this issue and the considerable work they have done in considering the constitutionality of the *qui tam* provisions, we believe that the Court would benefit from their views concerning the question being addressed in the parties' supplemental briefs.

The attached brief addresses only the constitutional question raised by this Court's November 19, 1999, order requesting supplemental briefing. Accordingly, the attached brief could not have been filed at the time that petitioner's opening brief was filed. The brief is being filed within the time allowed to petitioner for filing a supplemental brief.

Respectfully submitted,

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INTEREST OF THE AMICI CURIAE

Amici curiae the American Petroleum Institute, the National Association of Manufacturers, and the National Defense Industrial Association are organizations representing a wide spectrum of U.S. business interests. Amici's members do billions of dollars worth of business with the United States annually pursuant to thousands of contracts, agreements, and leases. Amici's members have been subjected to suits initiated by private individuals pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. §§ 3729-3733 ("FCA"), and their work exposes them to the possibility of more such suits in the future. Many of these suits are pursued by the *qui tam* relator alone, after the United States has declined to intervene, and such suits, although often meritless, still subject the defendants to severe litigation burdens and public dishonor. Accordingly, amici have a strong interest in the question of the constitutionality of such lawsuits.[1]

SUMMARY OF ARGUMENT

A. *Raines v. Byrd,* 521 U.S. 811 (1997), demonstrates that the *qui tam* provisions of the False Claims Act are unconstitutional. *Raines* held 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." *Id.* at 820 n.3. Because the FCA purports to authorize suit by an individual who has not suffered a personal injury caused by the alleged misconduct and who therefore cannot meet the fundamental standing requirements of Article III, *Raines* establishes that *qui tam* plaintiffs lack standing. The bounty awarded to the successful relator is a collateral "byproduct" of litigation that cannot itself support

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[1] In accordance with Rule 37.6, amici curiae certify that counsel for a party did not author this brief in whole or in part and that no entity other than the amici, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

standing in the absence of injury. *Diamond v. Charles*, 476 U.S. 54 (1986). Finally, the relator's lack of standing cannot be cured by characterizing him as acting on behalf of the United States. When the government declines to intervene, the relator alone conducts the litigation – outside effective government control and often with motives that conflict with government interests.

B. Reliance on the history of *qui tam* statutes in this country to save the FCA's *qui tam* provisions is unfounded. When the Supreme Court has upheld a long-standing practice on the basis of historical evidence, it has done so only where an "unambiguous and unbroken history" indicates the practice was "part of the fabric of our society." *Marsh v. Chambers*, 463 U.S. 783, 791-92 (1983). *Qui tam* statutes do not enjoy such a privileged status. To the contrary, such statutes have never been common, and no new *qui tam* statutes have been enacted since 1871.

ARGUMENT

I. A *QUI TAM* RELATOR LACKS STANDING TO SUE FOR FALSE CLAIMS ACT VIOLATIONS

A. This Court's *Raines* Decision Established that Congressional Authorization of Suits Does Not Eliminate Constitutional Standing Requirements

Article III requires plaintiffs to prove "personal injury fairly traceable to the defendant's allegedly unlawful conduct." *Allen v. Wright*, 468 U.S. 737, 751 (1984). Because relators do not suffer any "particularized" injury that affects them "in a personal and individual way," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 & n.1 (1992), they claim Congress conferred standing on them by legislatively authorizing *qui tam* suits. But this Court rejected precisely that argument in *Raines v. Byrd*, 521 U.S. 811 (1997).

In *Raines*, legislators sought to challenge the constitutionality of the Line Item Veto Act under authority of a provision of the Act expressly authorizing any Member of Congress to bring such an action. *Id.* at 815-16. The Court held this provision did not "confer" standing on the legislators: "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." *Id.* at 820 n.3.

The Court then held that in order to establish standing, the legislators must meet the fundamental constitutional requirement of personal injury: "We have consistently stressed that a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him." *Id.* at 819. *See also Lujan*, 504 U.S. at 560 n.1; *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972). The plaintiffs, who relied on a theory of legislator standing, "ha[d] alleged no injury to themselves as individuals," but only institutional injury to the legislature. *Raines*, 521 U.S. at 829. Thus, despite Congress's clear intent to allow individual Members of Congress to sue, the Court ruled that the Article III requirements for standing nevertheless barred their suit.

The identical analysis applies to the FCA's *qui tam* provisions. Congress's authorization of individuals to bring *qui tam* lawsuits does not erase Article III's requirement that these individuals have suffered a personal injury for which they seek redress. Like the legislators, *qui tam* plaintiffs lack standing because they have suffered no "concrete and particularized" injury caused by the alleged misconduct; rather, they seek to reap a windfall benefit. The federal government is the only victim of the submission of a false claim, and therefore only the government has standing to sue for conduct that violates the FCA's substantive provisions.

Simply put, a *qui tam* plaintiff brings suit for someone else's injury, a type of suit that Article III clearly prohibits.

The *qui* tam mechanism is not an implicit legislative "assignment" that might cure the Article III deficiency. The FCA does not expressly or implicitly make any assignment of government rights to a relator, nor does a *qui tam* action bear the characteristics of an assigned action. The claim remains that of the government, the United States retains some control over the action, and the amount of the relator's bounty, if any, is subject to the discretion of the court. *See* 31 U.S.C. §§ 3730(c)(2)(A), (c)(2)(B), (d)(2). *See also Riley v. St. Luke's Episcopal Hospital*, No. 97-20948, 1999 U.S. App. LEXIS 29820, at *78-81 (5th Cir. Nov. 15, 1999) (concurring opinion).

B. The "Bounty" Provided Under the False Claims Act Cannot Provide the Requisite Injury "Fairly Traceable" to Defendants' Alleged Misconduct

Supporters of the *qui tam* provisions have contended that the bounty provided to successful relators constitutes the required personal "stake." This argument seizes on this Court's references to a "personal stake" in a case's outcome. But this argument cannot be squared with the Court's insistence that a plaintiff prove both "injury" and "causation." The Court has used "stake" not in a simplistic monetary sense, but as a synonym for "injury": "[A] plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him." *Raines*, 521 U.S. at 819; *see also Lujan*, 504 U.S. at 583 (connecting personal stake to direct injury). A "stake" in a potential bounty does not constitute a personal injury that is caused by, or "fairly traceable" to, the alleged misconduct of the defendant in an FCA suit. Only the government, not the relator, has suffered such an injury.

This Court has rejected similar attempts to bootstrap standing through the "byproducts" of litigation. *See Diamond v. Charles*, 476 U.S. 54 (1986); *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1019 (1998). In *Diamond*, the plaintiff claimed that the district court's award of attorney's fees against him gave him a direct monetary stake in the outcome of the case sufficient to confer standing. 476 U.S. at 69-70. The Court held that this "personal stake" in an attorney's fee judgment was insufficient because "Article III standing requires an injury with a nexus to the substantive character of the statute or regulation at issue"; the "stake" cannot be "a byproduct of the suit" that "is wholly unrelated to the subject matter of the litigation." *Id.* at 70-71. Similarly, the bounty that the *qui tam* plaintiff hopes to recover is "wholly unrelated" to the false or fraudulent conduct that is the "subject matter of the suit." Instead, the bounty is a "byproduct" that does not confer standing.

C. The Relator's Lack of Standing Cannot be Overcome by Viewing the Suit as Brought on Behalf of the United States

The United States, of course, would have had standing in its own right as the injured party to litigate the fraud claim alleged here, but the United States elected not to intervene. Once the relator went forward alone, the limited connection that the government retained to the suit (as the nominal plaintiff and a potential beneficiary of a favorable judgment) cannot serve to overcome the relator's standing defect.

The standing inquiry must be concerned with the practicalities of who *conducts* the litigation, not with the abstraction of how the case is captioned. When the government declines to intervene in a *qui tam* suit, the statute explicitly provides that the relator "shall have the right to conduct the litigation." 31 U.S.C. §§ 3730(b)(4)(B), (c)(3).

Nor can it be said that the relator is simply acting as a representative of the interests of the United States and therefore can rely upon the government's injury to support standing. The interests of the relator and the government are not congruent and may even be directly at odds. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 & n.5 (1997); *Searcy v. Philips Elecs. N. Am. Corp.*, 117 F.3d 154, 160 (5th Cir. 1997). For example, a relator may institute litigation when the government's interests are better served by settlement or refraining from litigation. *See, e.g., United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991) (government employee relator sued to challenge an arrangement blessed by his superiors); *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 777 F. Supp. 195, 204 (N.D.N.Y. 1991) (relator sued when government officials knew of the problem and preferred to seek an engineering solution without litigation), *aff'd*, 985 F.2d 1148 (2d Cir. 1993). Or the relator may choose to settle the FCA claim on terms inimical to the government's interest because of other benefits to the relator, such as an award on a personal non-FCA claim. *See, e.g., United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 (9th Cir. 1994), *cert. denied*, 519 U.S. 928 (1996). The relator's independence from the government goes directly to the concern for the adversary process at the heart of Article III.[2]

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[2] The relator's power to affect the litigation in contravention of the interests of the United States, as discussed here and also in other respects, reflects another constitutional defect in the *qui tam* provisions – that they violate the constitutional separation of powers by interfering with the Executive's "responsibility to 'take care that the Laws be faithfully executed.'" *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (quoting U.S. Const. art II, § 3). *See generally Riley v. St. Luke's Episcopal Hospital*, No. 97-20948, 1999 U.S. App. LEXIS 29820 (5th Cir. Nov. 15, 1999).

II. THE SPARSE HISTORY OF *QUI TAM* STATUTES IN THIS COUNTRY DOES NOT RENDER THE *QUI TAM* PROVISIONS IN THE FALSE CLAIMS ACT CONSTITUTIONAL

Supporters of *qui tam* argue that the existence of *qui tam* actions in England and the adoption by early Congresses of statutes providing for such actions indicate that the Framers of the Constitution believed *qui tam* suits to be justiciable. This "historical" argument is too slender a reed to support the constitutionality of the *qui tam* provisions.

Early use of *qui tam* statutes does not resolve the constitutional issue. This Court has held acts of early Congresses unconstitutional. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (striking down a provision of the Judiciary Act of 1789); *cf. Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) (declining to enforce the First Congress's grant of non-judicial duties to courts). The Court has also identified other early statutes that would not pass constitutional muster today. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 100 (1985) (Rehnquist, J., dissenting) (noting that the First Congress had authorized federal aid to sectarian schools, which is now seen as unconstitutional); *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) (noting "broad consensus" that the Sedition Act of 1798 was unconstitutional). Furthermore, "long use" of a practice does not overcome its unconstitutionality, "even when that span of time covers our entire national existence and indeed predates it." *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970).

Two cases in which this Court has relied upon historical evidence to hold certain practices constitutional provide instructive contrast to the history of *qui tam* statutes. In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Court held that the appointment of paid chaplains to open legislative proceedings did not violate the Establishment Clause. The

Court reviewed the Framers' extensive debates regarding the practice's constitutionality and drew a distinction between carefully considered actions by the Framers and those "taken thoughtlessly, by force of long tradition and without regard to the [constitutional] problems." *Id.* at 791. The Court also noted that "the unambiguous and unbroken history of more than 200 years" indicated that the practice "ha[d] become part of the fabric of our society." *Id.* at 792. Similarly, in *Walz*, the Court upheld the granting of tax exemptions to religious organizations for certain properties, noting this was an "unbroken practice" that was "deeply embedded in the fabric of our national life." 397 U.S. at 678, 676.

By contrast, there is no evidence that early Congresses considered the constitutionality of *qui tam* actions, or that the Framers viewed them as consistent with Article III. The *qui tam* action was an English legal device "thoughtlessly" incorporated into minor law enforcement provisions as early Congresses sought to establish the mechanisms of a new government – at a time when the extent to which American federal law adopted English common law was still uncertain.

Furthermore, the presence of a few early *qui tam* statutes does not amount to an "unambiguous and unbroken history." Such statutes were only sparsely adopted in the Republic's early years, and largely disappeared over a century ago. Many of the early statutes granting bounties to individuals were merely informer statutes, granting informers a reward but no right to sue on the government's behalf.[3] Only four

[3] *See* Act of July 31, 1789, ch. 5, § 38, 1 Stat. 48 (penalties for violations of customs and maritime laws); Act of Aug. 4, 1790, Ch. 35, § 69, 1 Stat. 177 (same); Act of September 2, 1789, ch. 12, § 8, 1 Stat. 67 (penalties against Treasury Department officers violating restrictions on personal transactions), extended by Act of March 3, 1791, ch. 18, § 1, 1 Stat. 215 (same against Treasury clerks); Act of February 25, 1791, ch. 10, §§ 8, 9, 1 Stat. 195-96 (penalties for banking violations); Act of June

statutes enacted by the First Congress actually authorized individuals to bring suit to recover penalties; these were narrow, piecemeal statutes that bear no resemblance to the modern FCA.[4] Later Congresses authorized *qui tam* actions sporadically, and over time even this spotty use declined.[5]

5, 1794, ch. 51, § 21, 1 Stat. 389 (fines for failure to pay duties on snuff and refined sugar). In contrast to the explicit and broad *qui tam* authority in the FCA, many early statutes that provided rewards to informers did not address the issue of who could sue. *See* Act of July 31, 1789, ch. 5, § 29, 1 Stat. 44-45 (fines against port officials for failure to post tables of duties), referenced by Act of September 1, 1789, ch. 11, § 21, 1 Stat. 60 (penalties related to registration of vessels); Act of July 6, 1797, ch. 11, § 20, 1 Stat. 532 (penalties related to duties on paper products), adapted by Act of Feb. 28, 1799, ch. 17, § 5, 1 Stat. 623 (penalties for stamp duty violations).

[4] Act of March 1, 1790, ch. 2, § 3, 1 Stat. 102 (permitting informers to sue for and keep half the penalties against marshals failing to file census returns), extended by Act of July 5, 1790, ch. 25, § 1, 1 Stat. 129 (applying same to Rhode Island); Act of July 20, 1790, ch. 29, §§ 1, 4, 1 Stat. 131, 133 (permitting individuals to sue for and keep half the penalties levied against vessel captains leaving port without contracts with seamen, or hiding runaway seamen); Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137-38 (permitting individuals to sue for and receive half of the forfeitures of merchandise from unlicensed trading with Indians); Act of March 3, 1791, ch. 15, § 44, 1 Stat. 209 (allowing individuals to sue for and keep half of the penalties for avoidance of duties on distilled spirits).

[5] Besides the False Claims Act, subsequent Congresses originated only six statutes giving private persons the right to sue for and recover penalties (and no new ones after 1871): **(1)** Act of Feb. 20, 1792, ch. 7, § 25, 1 Stat. 239 (permitting informers to sue for penalties under postal statute and keep half), reenacted by Act of Mar. 3, 1845, ch. 43, § 17, 5 Stat. 738; **(2)** Act of Mar. 22, 1794, ch. 11, §§ 2, 4, 1 Stat. 349 (permitting individuals to prosecute on government's behalf for slave trading), reenacted by Act of Mar. 26, 1804, ch. 38, § 10, 2 Stat. 286; Act of Mar. 2, 1807, ch. 22, § 3, 2 Stat. 426; Act of Mar. 4, 1909, ch. 321, §§ 254-257, 35 Stat. 1140; **(3)** Act of May 3, 1802, ch. 48, § 4, 2 Stat. 191 (permitting individuals to prosecute on government's behalf for employment of other than a "free white person" in postal service); **(4)**

Thus, as the Fifth Circuit recently concluded in holding the *qui tam* provisions unconstitutional, "the *qui tam* mechanism's historical pedigree is not sufficient to insulate the FCA's *qui tam* provisions from serious constitutional scrutiny." *Riley v. St. Luke's Episcopal Hospital*, 1999 U.S. App. LEXIS 29820, at *9.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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Act of Aug. 5, 1861, ch. 45, § 11, 12 Stat. 296-97 (allowing individuals to sue and keep half the fine against import assessors acting without taking oath); (5) Act of July 8, 1870, ch. 230, § 39, 16 Stat. 203 (allowing individuals to sue for false patent marking and keep half the penalty), reenacted by Act of July 19, 1952, ch. 950, § 292, 66 Stat. 814 (same); (6) Act of Mar. 3, 1871, ch. 120, § 3, 16 Stat. 570 (allowing individual suit on government's behalf for unlawful contracting with Indians), reenacted by Act of May 21, 1872, ch. 177, § 3, 17 Stat. 137. The First Congress's statute regarding unlawful trading with Indians was also reenacted. Act of Mar. 1, 1793, ch. 19, § 12, 1 Stat. 331; Act of May 19, 1796, ch. 30, § 18, 1 Stat. 474; Act of Mar. 30, 1802, ch. 13, § 18, 2 Stat. 145; Act of June 30, 1834, ch. 161, § 27, 4 Stat. 733-34.