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 OF *AMICUS CURIAE* AND SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* AMERICAN CLINICAL LABORATORY ASSOCIATION IN SUPPORT OF PETITIONER

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November 30, 1999

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

The American Clinical Laboratory Association ("ACLA"), pursuant to Supreme Court Rule 37.3(b), hereby moves for leave to file this *amicus curiae* brief in support of Petitioner with respect to the issue of whether a private person has standing under Article III to litigate claims of fraud upon the government. ACLA is a Washington, D.C.-based not-for-profit association representing the nation's leading independent clinical laboratories, *i.e.*, those laboratories not affiliated with hospitals or physicians' offices, in the advocacy of sound governmental policies. ACLA's members, which include local, regional and national laboratories, furnish testing services to patients in all fifty states. Collectively, ACLA members supply more than sixty percent of the clinical laboratory testing provided by independent laboratories.

ACLA seeks to file an *amicus curiae* brief because its members will be affected by this Court's ruling on the narrow issue of whether a private person has standing under Article III to proceed as a *qui tam* relator when the government has declined intervention and the relator has no claim of retaliatory discharge. ACLA moves to file this brief now because, although aware of this litigation, ACLA did not anticipate the Court's November 19, 1999 Order requesting briefing on the standing issue.

ACLA members, as defendants in at least four unsealed *qui tam* cases that are proceeding without the government's intervention – one of which is a consolidation of three separate cases – have a clear interest in the standing issue now before this Court. This Court's ruling on whether a *qui tam* relator has standing under Article III to pursue a False Claims Act case absent the government's intervention may result in a resolution of all four matters and, in addition, will have an impact on the lower courts' rulings in two of the cases in which motions to dismiss based, in part, on relators' lack of standing under Article III, are pending.

In addition, although ACLA supports Petitioner in this case, the interests of private entities, and health care providers in particular, such as those represented by ACLA, may not be adequately represented by Petitioner and may require further elucidation. Petitioner is a public entity and, although a defendant in the *qui tam* matter before this Court, may have a conflicting interest as a potential *qui tam* relator.[1] Moreover, because Petitioner does not participate in federal health care programs, it has not been singled out for particular attention by *qui tam* relators, as have ACLA members.

Due to the direct effect that the Court's decision in this case will have on the ACLA members involved in at least four active *qui tam* matters in which the government has declined intervention, as well as the unique information or perspective ACLA can provide as a representative of an industry that has been particularly hard hit by the False Claims Act, the Court should grant ACLA leave to file its Brief of *Amicus Curiae* In Support of Petitioner.

Respectfully submitted,

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[1] State governments and agencies have served as *qui tam* relators in numerous cases. *See, e.g., United States ex rel. Hartigan v. Palumbo Bros., Inc.*, 797 F. Supp. 624 (N.D. Ill. 1992); *United States ex rel. Woodard v. Country View Care Center*, 797 F.2d 888 (10th Cir. 1986); *State of Oklahoma ex rel. Dep't of Human Servs. v. Children's Shelter*, 604 F. Supp. 871 (W.D. Okla. 1985); *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984).

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INTEREST OF *AMICUS CURIAE**

Amicus Curiae the American Clinical Laboratory Association ("ACLA") submits this supplemental brief in support of Petitioner. The interest of ACLA is described in Appendix A to this supplemental brief.

SUMMARY OF ARGUMENT

The Constitution confines the jurisdiction of the federal courts to the adjudication of actual "Cases" and "Controversies." U.S. Const., Art. III. In order to make the required showing of a case or controversy sufficient to invoke subject matter jurisdiction in the federal courts, a party seeking relief must have "standing," that is, he must have suffered an "injury in fact." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003 (1998). Absent intervention by the federal government or the pursuit of a claim of retaliatory discharge, a *qui tam* relator cannot make the necessary showing of injury in fact to establish standing.

Under this Court's well-established jurisprudence governing standing in "citizen suits" brought by "private attorneys general" as well as in other third-party actions, there can be no question that the injury in fact requirement is absolute and cannot be waived by the parties, the courts, or Congress. *See, e.g., Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 16 (1981); *Lujan*, 504 U.S. at 562-63; *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972).

> The Supreme Court has repeatedly held that under Article III, a plaintiff is ineligible to invoke federal judicial

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* Pursuant to Rule 37.6, *Amicus Curiae* ACLA states that counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, ACLA, its members, or its counsel, made a monetary contribution to the preparation of submission of this brief.

Copies of Petitioner's letter of consent and Respondent's letter indicating no objection have been filed with the Clerk of the Court. If Respondent's lack of objection is considered to be a withholding of consent, ACLA contends its Motion for Leave satisfies the requirements of Rule 37.3(b) and the 5-page limitation requirement of Rule 37.5.

> power unless he can demonstrate that he has suffered "injury in fact" as a result of the defendant's allegedly illegal conduct. Qui tam relators suffer no injury in fact and thus fail to meet this bedrock Constitutional requirement. Because Congress may not abrogate this requirement, . . . the False Claims Act's grant of universal standing to any person violates Article III.[1]

Absent intervention by the government or the pursuit of a colorable claim of retaliatory discharge, there is no party that has suffered an injury in fact as required to establish a "Case" or "Controversy" under Article III. Consequently, sections 3730(b)(4)(B) and 3730(c)(3) of Title 31 of the United States Code cannot survive scrutiny under Article III.

ARGUMENT

WELL-SETTLED JURISPRUDENCE COMPELS THIS COURT TO HOLD THAT A PRIVATE PERSON DOES NOT HAVE STANDING UNDER ARTICLE III TO PROCEED AS A *QUI TAM* RELATOR WHEN THE GOVERNMENT HAS DECLINED INTERVENTION AND THE RELATOR HAS NO CLAIM FOR RETALIATORY DISCHARGE

A. The *Qui Tam* Provisions Of The False Claims Act Do Not Confer Standing On A Relator Absent Intervention By The Federal Government Or The Assertion Of A Colorable Claim Of Retaliatory Discharge

The jurisdiction of the federal courts is defined and limited by Article III of the Constitution. Article III, Section 2 of the

[1] Opinion of the Office of Legal Counsel, United States Department of Justice, *Constitutionality of the Qui Tam Provisions of the False Claims Act*, *available in* 1989 OLC LEXIS 109, **6, 7. Although then-Assistant Attorney General William P. Barr's opinion that the *qui tam* provisions of the False Claims Act are "patently unconstitutional" has since been rescinded by the Department of Justice based on its analysis of the Appointments Clause, *see* Opinion of the Office of Legal Counsel, United States Department of Justice, *The Constitutional Separation of Powers Between the President and Congress*, *available in* 1996 OLC LEXIS 6, *57, the reasoning of the 1989 opinion remains forceful, persuasive, and, in ACLA's view, correct.

Constitution requires that those who seek to invoke the power of the federal courts must allege an actual case or controversy. This concept of standing is "an essential and unchanging part of the case-or-controversy requirement of Article III" and a vital component of subject matter jurisdiction. *Lujan*, 504 U.S. at 560. It is well-established that the "irreducible constitutional minimum of standing" requires a plaintiff in federal court to demonstrate that: (1) he suffered an "injury in fact" – a harm to a legally protected interest that is "concrete" and particularized and "actual or imminent, not 'conjectural' or hypothetical"; (2) the injury was caused by the challenged action of the defendant; and (3) the relief sought will redress the injury. *Lujan*, 504 U.S. at 560; *Steel Co.*, 118 S.Ct. at 1016-17; *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 482-83 (1982).

A plaintiff cannot rely solely on an abstract injury or generalized grievances shared by all citizens and taxpayers in order to establish standing. *See Allen v. Wright*, 468 U.S. 737, 754 (1984); *Valley Forge*, 454 U.S. at 482-83. If the plaintiff has not suffered from a particularized harm that is "distinct and palpable," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979), there is no case or controversy under Article III. *See generally Lujan*, 504 U.S. 555; *Warth v. Seldin*, 422 U.S. 490 (1975).

Under these well-established standards, a *qui tam* relator bringing an action under the False Claims Act when the government has declined intervention and the relator has no claim of retaliatory discharge does not have standing because the relator is unable to allege as to himself (1) injury, (2) causation, or (3) damages, all of which are required for standing. The fact that Congress specifically authorized such uninjured persons to bring *qui tam* actions through the False Claims Act in no way cures these Article III deficiencies. Congress, like the courts, is bound by Article III's "case or controversy" restriction and cannot abolish the requirement of "injury in fact." Congress cannot confer standing on persons who fail to meet this test. Congress can, however, consistent with the limitations set forth in Article III, enact statutes creating new substantive legal rights, the violation of which can give rise to an actual injury of the kind necessary to create standing. *See, e.g., Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973). In enacting the *qui tam* provisions of the False Claims Act,

however, Congress did not create a new substantive legal right for *qui tam* relators, the violation of which would give rise to the type of injury that confers standing under Article III. Instead, the *qui tam* provisions, as amended in 1986, merely permit the relator to sue on behalf of the United States, the true party in interest who suffers damages. *See* 31 U.S.C. § 3729(a) (defining *qui tam* suit as an action brought to recover "damages which the Government sustains"). A *qui tam* relator, absent the government's intervention or a claim of retaliatory discharge, simply does not have the type of personal stake that is necessary to trigger Article III standing.

B. Well-established Jurisprudence Governing Standing In Citizen Suits Compels A Finding That A Private Person Lacks Standing To Bring A *Qui Tam* Action Absent Governmental Intervention Or A Claim Of Retaliatory Discharge

The United States Code is replete with various statutory schemes that enlist the aid of private citizens in furthering the public interest by authorizing private citizens to bring suit on behalf of the public interest. The most typical example of such a statutory scheme, often referred to as "citizen suit" provisions, allows an individual or "private attorney general" to bring suit on behalf of his own interests as well as those of the general public.[2] The best known and most widely used examples of such provisions are found in environmental protection statutes, which in sharp contrast to the *qui tam* provisions at issue in this case, often specifically require that the plaintiff have some sort of injury to bring suit. *See* 15 U.S.C. § 797(b) (restricting citizen suits to "[a]ny person suffering legal wrong because of any act or practice arising out of any violation . . . "); 30 U.S.C. § 1270(a) (restricting suits to citizens, defined as persons having an interest "which is or may be adversely affected"); 33 U.S.C. § 1365 (same); 33 U.S.C. § 1515(a) (authorizing any person to commence a civil suit "whenever such action constitutes a case or controversy"); 42 U.S.C. § 8435(a) (restricting suits to those brought by "any aggrieved person"); 42 U.S.C. § 9124(a) (authorizing suit by "any person having a valid legal interest which is or may be adversely affected"); 43 U.S.C. § 1349(a)(1) (same); *see also Middlesex County,* 453 U.S. at 16 (noting that citizen suit provisions of the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act require an injury in fact).

[2] Federal citizen suit provisions are listed in Appendix B.

Similarly, numerous other citizen suit provisions that do not include an explicit "injury in fact" requirement, have been interpreted as containing such a requirement in order to survive scrutiny under Article III. Under the Court's analysis, Congress's authority to create a private right of action for "any person" is limited by the "case and controversy" requirement of Article III. Therefore, unless an individual bringing a private attorney general action under a citizen suit provision can demonstrate his own personal injury from the claimed illegal conduct, this Court has held that the individual does not have standing. *Compare Bennett v. Spear*, 520 U.S. 154, 117 S.Ct. 1154 (1997) (holding that the plaintiffs alleged sufficient injury in fact for Article III standing purposes under the Endangered Species Act by asserting that the proposed use of water to protect an endangered species of fish would result in less water available for plaintiffs' irrigation needs) *with Lujan*, 504 U.S. at 578 (holding that plaintiff organizations dedicated to wildlife conservation and other causes which sought to extend the reach of the Endangered Species Act to foreign nations failed to show sufficient injury in fact); *see also Middlesex County*, 453 U.S. at 16 (holding that citizen suit provisions of the Federal Water Pollution Control Act "apply only to persons who can claim some sort of injury"); *Sierra Club*, 405 U.S. at 737 ("injury is what gives a person standing to seek judicial review . . . but once review is properly invoked, that person may argue the public interest in support of his claim"). Given that Article III requires a plaintiff in federal court to demonstrate that he suffered an "injury in fact" that is "concrete" and particularized, *Lujan*, 504 U.S. at 560, there is no rational reason why the same requirement would not apply when a plaintiff seeks to further the interests of the United States.

C. Jurisprudence Governing Similar *Qui Tam* Provisions Supports A Finding That A Relator Lacks Standing To Bring A Claim Absent Governmental Intervention Or The Assertion Of A Claim Of Retaliatory Discharge

Congress has, in limited instances, empowered private citizens to further the public interest by bringing suit on behalf of the United States through so-called *qui tam* provisions. In addition to the *qui tam* provisions in the False Claims Act, there are as many as four extant federal statutory schemes that have been described as incorporating *qui tam* provisions.[3] Only one of these statutory schemes, 25 U.S.C. §§ 81, 201, has continued viability as an independent action.

The Indian law *qui tam* provisions, like the *qui tam* provisions in the False Claims Act, authorize an individual to recover damages "in the name of the United States," 25 U.S.C. §§ 81, 201, and "on behalf of the United States." *Compare* 25 U.S.C. §§ 81, 201 *with* 31 U.S.C. § 3730(b)(1) (authorizing a person to "bring a civil action . . . for the person and for the United States Government" and "in the name of the Government"). In addition, like the *qui tam* provisions of the False Claims Act, the Indian law *qui tam* provisions create a "bounty" for a plaintiff, authorizing recovery of "all money or other thing of value paid . . . in excess of the amount approved . . . and one-half thereof shall be paid to the person suing." 25 U.S.C. § 81; *see also* 25 U.S.C. § 201 (authorizing recovery of "one half to the use of the informer").

Interestingly, however, the viability of these *qui tam* provisions, which bear a strong resemblance to the provisions contained in the False Claims Act, has been called into question by the Court of Appeals for the Eighth Circuit when the plaintiff-relator is a non-Indian and, therefore, cannot allege an injury in fact. *See Schmit v. International Finance Management Co.*, 980 F.2d 498 (8th Cir. 1992) (holding that plaintiff, as a non-Indian, has alleged no injury and, therefore, lacks standing to bring an action under 25 U.S.C. § 81); *see also In re United States ex rel. Hall, et al.*, 27 F.3d 572 (8th Cir. 1994), (affirming, without opinion, district court

[3] Federal *qui tam* provisions are set forth in Appendix C.

holding published at 825 F. Supp. 1422, that *qui tam* provisions of 25 U.S.C. §§ 81, 201 do not expressly establish standing for third parties who claim no direct interest in the contract at issue and, thus, can claim no injury in fact), *cert. denied*, 513 U.S. 1155 (1995). *But see United States ex rel. Hall v. Tribal Development Corp.*, 49 F.3d 1208 (7th Cir. 1995) (holding that *qui tam* provisions of section 81 meet constitutional requirements of Article III insofar as the true party in interest, the United States, had standing to proceed); *see also United States ex rel. The Yankton Sioux Tribe v. Gambler's Supply, Inc.*, 925 F. Supp. 658, 668 n.12 (D.S.D. 1996) (declining to address standing because plaintiffs, as the tribe and its members, had personal stakes in the litigation but noting, in dicta, that a *qui tam* relator may have standing under either an assignment or bounty rationale).[4] Like the plaintiffs in *United States ex rel. Hall*, who were not Indians or representatives of Indian tribes, *qui tam* relators proceeding under 31 U.S.C. §§ 3730(b)(4)(B) and 3730(c)(3), cannot allege any "actual or concrete injury to themselves or their interests. Therefore, they fail to satisfy the indispensable actual injury requirement for standing to bring suit in federal court." *In re United States ex rel. Hall*, 825 F. Supp. 1422, 1425 (D.Minn. 1993). The affirmation of the applicability of *Lujan* to Indian law *qui tam* provisions that are strikingly similar to the False Claims Act *qui tam* provisions should be considered by this Court in determining whether a relator without a claim of retaliatory discharge has standing to bring suit when the true injured party – the federal government – has declined to pursue the matter.

[4] The *United States ex rel. Hall* and *Schmit* decisions of the Court of Appeals for the Eighth Circuit indicate that there is a split among the circuit courts with respect to the constitutionality, under Article III, of the Indian law *qui tam* provisions. Although the constitutionality of only the False Claims Act *qui tam* provisions is before this Court, ACLA suggests that, to the extent that the Indian law *qui tam* provisions are interpreted in a manner that is consistent with the Seventh Circuit's interpretation in *Tribal Development Corp.*, that disinterested third parties may bring suit on behalf of the United States without any involvement by the government, they, like sections 3730(b)(4)(B) and 3730(c)(3) of the False Claims Act, do not satisfy the standing requirements of Article III.

D. Federal Judicial Hostility To The Broad Standing Provisions Of The California Unfair Competition Act Confirms The Absolute Necessity Of A Showing Of Injury In Fact To Maintain Standing Under Article III

Outside of the context of other *qui tam* provisions, which are unique and used sparingly by litigants, perhaps the best analog for the False Claims Act *qui tam* provisions is a California state statute that provides for third-party suits, the California Unfair Competition Act ("UCA"), Cal. Bus. & Prof. Code § 17200. The California UCA, like the False Claims Act *qui tam* provisions, on its face, allows a private plaintiff to bring an action on behalf of the general public regardless of the plaintiff's ability to show an actual injury to himself. *See* Cal. Bus. & Prof. Code § 17204 (providing an action for relief under the Act to be prosecuted by "any person acting in the interests of itself, its members, *or* the general public") (emphasis added).

Like the *qui tam* provisions of the False Claims Act, the UCA imposes no injury in fact requirement, thereby allowing plaintiffs devoid of any true interest or actual injury to pursue claims that properly belong to a person not a party to the litigation.[5] Abrogating the injury in fact requirement in this manner "is so fundamentally incompatible with the established doctrines of standing and separation of powers that if qui tam were accepted, these doctrines would be drained of any meaning." 1989 OLC LEXIS 109, *72. In addition, both the UCA and the False Claims Act share incentive systems that invite plaintiffs to bring actions on behalf of third parties by including or incorporating attorneys' fees provisions. *Compare* Cal. Civ. Proc. Code § 1021.5 (private attorney general fee shifting provision applicable to UCA actions) *with* 31 U.S.C. § 3730(d)(1) (provision allowing for an award of fees in *qui tam* actions). Moreover, relators' counsel are known to enter into contingency arrangements with relators resulting in the

[5] A discussion of problems associated with relators and their counsel is set forth in Appendix D.

attorney sharing as much as forty-five percent of the relator's recovery. *See, e.g.*, Pamela Sherrid, *How to Really Make A Killing in Health Care: The Rewards to Whistle-Blowers Soar,* U.S. News & World Rpt., Nov. 2, 1998 at 8. With that kind of money at stake, incentives for filing *qui tam* and UCA suits are high and not necessarily in line with the interests of the United States or the general public.

Although the UCA has been embraced by California state courts not governed by the limitations of Article III,[6] UCA claims by plaintiffs with no direct interest or actual injury that have been filed in or removed to federal courts have consistently been invalidated on Article III standing grounds. *See, e.g., Toxic Injuries Corporation v. Safety-Kleen Co.*, 57 F. Supp.2d 947, 952 (C.D. Cal. 1999) (holding UCA allegations by disinterested third parties do not indicate an injury that is "concrete or particularized" as required by Article III); *As You Sow v. Sherwin-Williams Co., Inc.*, 1993 WL 560086, *560087 (N.D.Cal. 1993) (holding that the UCA does not confer "injury" sufficient to satisfy federal standing requirements without an allegation of a "distinct and palpable injury" by the plaintiff); *Mangini v. R.J. Reynolds Tobacco Co.*, 793 F. Supp. 925, 928 (N.D. Cal. 1992) (holding that absent an injury that was "shared in equal measure by all or a large class of citizens" . . . [the claim] "represents a generalized grievance not normally appropriate for judicial resolution") (citation omitted). Accordingly, both statutes are fundamentally flawed and, in their current state, provide improper incentives to plaintiffs' counsel to proceed with claims that would otherwise fail for lack of standing. The Court should consider the federal courts' consistent rejection of UCA claims brought by parties without a direct interest or actual injury in reaching a decision regarding the constitutionality of the *qui tam* provisions set forth at 31 U.S.C. §§ 3730(b)(4)(B), (c)(3).

[6] At least one federal court has noted that these state court decisions "unquestionably establish a very liberal State standing rule . . . that [ ] fail[s] to address the particular requirements of federal standing doctrine." *Mail Systems Corp. v. UIPS*, 856 F. Supp. 538, 541 (N.D. Cal. 1994).

CONCLUSION

Sections 3730(b)(4)(B) and 3730(c)(3) of Title 31 of the United States Code are unconstitutional under Article III, absent a claim for retaliation, as relator lacks injury in fact, an absolute threshold requirement necessary to establish federal court jurisdiction. Well-settled jurisprudence compels a holding that a private person does not have standing to proceed as a *qui tam* relator when the government has declined intervention and the relator has no claim for retaliatory discharge. Such a narrow holding will not adversely affect other statutory schemes that permit individuals to sue to enforce a federal or public interest, as such schemes either explicitly require injury in fact, or have been interpreted by this Court to require injury in fact. Nor will such a holding adversely affect law enforcement, as meritorious *qui tam* cases are assumed by the United States and, if necessary, other constitutional means exist to enhance such enforcement efforts, a number of which Congress already has enacted. Allowing the *qui tam* provisions of the False Claims Act to continue to authorize third-party claims on behalf of the United States undermines the Court's well-established Article III standing jurisprudence, and contradicts decisional law interpreting other federal *qui tam* provisions.

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