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 A SUPPLEMENTAL BRIEF AS *AMICI CURIAE* AND SUPPLEMENTAL BRIEF OF THE AMERICAN MEDICAL ASSOCIATION, THE ASSOCIATION OF AMERICAN MEDICAL COLLEGES, AND THE AMERICAN SOCIETY OF ANESTHESIOLOGISTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

MICHAEL L. ILE
ANNE M. MURPHY
LEONARD A. NELSON
AMERICAN MEDICAL ASSOCIATION
515 N. State Street
Chicago, IL 60610
(312) 464-4600

JACK R. BIERIG *
PAUL E. KALB
GRIFFITH L. GREEN
ANDREW E. WEIS
SIDLEY & AUSTIN
Bank One Plaza
10 S. Dearborn Street
Chicago, IL 60603
(312) 853-7000

Counsel for *Amici Curiae*

* Counsel of Record

November 30, 1999

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MOTION OF THE AMERICAN MEDICAL ASSOCIATION, THE ASSOCIATION OF AMERICAN MEDICAL COLLEGES, AND THE AMERICAN SOCIETY OF ANESTHESIOLOGISTS FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

The American Medical Association ("AMA") the Association of American Medical Colleges ("AAMC"), and the American Society of Anesthesiologists ("ASA") hereby respectfully request, pursuant to Rule 37 of the Rules of this Court, leave to file the accompanying brief as *amici curiae* in support of petitioner. The AMA, AAMC, and ASA's brief is limited to the issue which this Court directed the parties to address in its November 19, 1999 Order. This Court's resolution of that issue will directly affect the interests of members of the AMA, the AAMC, and the ASA, as set forth in the accompanying brief.

The AMA, AAMC, and ASA have obtained the consent of petitioner to the filing of the accompanying brief and have filed a copy of its letter of consent with the Clerk of the Court. The Office of the Solicitor General has stated that the United States does not oppose the filing of the accompanying brief, and a copy of its letter will be filed with the Clerk once it is received by undersigned counsel. Respondent has objected to the filing of the accompanying brief on the grounds that it was principally authored by attorneys with the law firm of Sidley & Austin, which also represents petitioner State of Vermont Agency of Natural Resources in this case. A copy of respondent's objection letter has been filed with the Clerk.

Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that, following this Court's November 19, 1999 Order inviting briefs addressing the constitutionality of the FCA's *qui tam* provisions under Article III, they requested Sidley & Austin, which regularly represents the AMA and AAMC and had previously submitted an *amicus* brief addressing that issue on their behalf in *Riley* v. *St. Luke's Episcopal Hospital*, No. 97-20948, 1999 WL 1034213 (5th Cir. Nov. 15, 1999), to prepare the accompanying brief. In light of *amici*'s desire to submit a brief addressing the historical usage of *qui tam* actions -- an issue which was fully briefed by Sidley & Austin in *Riley* -- it would, in *amici*'s opinion, have been highly inefficient to have retained another law firm to prepare the accompanying brief.

Amici further state that petitioner did not request that *amici* prepare and submit the accompanying brief, was not consulted regarding it, and made no monetary contribution to its preparation or submission. Moreover, in an abundance of caution, with the agreement of both *amici* and petitioner, Sidley & Austin has observed a "Chinese wall" in this case. No lawyer involved in the representation of petitioner in this case has authored, reviewed, or approved *amici*'s brief, either in whole

or in part. No person or entity other than the *amici* has made any monetary contribution to the preparation or submission of the accompanying brief.

For the foregoing reasons, the AMA, AAMC, and ASA's motion for leave to file a supplemental brief as *amici curiae* in support of petitioner should be granted.

Respectfully submitted,

Michael L. Ile
Anne M. Murphy
Leonard A. Nelson
AMERICAN MEDICAL ASSOCIATION
515 N. State St.
Chicago, IL 60610
(312) 464-4600

Jack R. Bierig*
Paul E. Kalb
Griffith L. Green
Andrew E. Weis
SIDLEY & AUSTIN
Bank One Plaza
10 S. Dearborn St.
Chicago, IL 60603
(312) 853-7000

Counsel for *Amici Curiae*

*Counsel of Record

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Michael L. Ile
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Leonard A. Nelson
AMERICAN MEDICAL ASSOCIATION
515 N. State St.
Chicago, IL 60610
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Paul E. Kalb
Griffith L. Green
Andrew E. Weis
SIDLEY & AUSTIN
Bank One Plaza
10 S. Dearborn St.
Chicago, IL 60603
(312) 853-7000

Counsel for *Amici Curiae*

November 30, 1999

*Counsel of Record

QUESTION PRESENTED

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

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INTEREST OF *AMICI CURIAE*[1]

The American Medical Association ("AMA") is a private, voluntary non-profit organization of physicians, which was founded in 1847 to promote the science and art of medicine and to improve public health. The AMA's approximately 290,000 members practice in all States and in all fields of medical specialization. The Association of American Medical Colleges ("AAMC") is a non-profit association whose membership includes 125 U.S. medical schools, 16 Canadian medical schools, and more than 400 teaching hospitals and health systems. The AAMC's primary mission is to improve the health of the public by enhancing the effectiveness of academic medicine. The American Society of Anesthesiologists ("ASA") is a non-profit organization, whose membership includes approximately 35,000 physicians and scientists, which is dedicated to furthering the practice of anesthesiology and to elevating the general standards of medical practice.

Members of *amici* are directly affected by the *qui tam* provisions of the False Claims Act ("FCA"), 31 U.S.C. § 3730(b). Practicing physicians, medical schools, and teaching hospitals have been named as defendants in numerous cases arising under the FCA, including many suits instigated by

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[1] Pursuant to Rule 37.6, *amici* state that, following this Court's November 19, 1999 Order, they requested Sidley & Austin, which had previously submitted an *amicus* brief addressing the constitutionality of the FCA's *qui tam* provisions under Article III on their behalf in *Riley* v. *St. Luke's Episcopal Hospital*, No. 97-20948, 1999 WL 1034213 (5th Cir. Nov. 15, 1999), to prepare this brief. *Amici* further state that petitioner did not request that *amici* prepare and submit this brief, was not consulted regarding it, and made no monetary contribution to its preparation or submission. Although Sidley & Austin also represents petitioner in this case, no lawyer involved in the representation of petitioner has authored, reviewed, or approved *amici*'s brief, either in whole or in part. No person or entity other than the *amici* has made any monetary contribution to the preparation or submission of this brief.

private citizens seeking, as *qui tam* relators, to litigate claims of fraud upon the government.

SUMMARY OF ARGUMENT

One of the principal arguments offered in defense of the FCA's *qui tam* provisions, which allow private citizens to litigate claims of fraud upon the government, is that the long historical pedigree of *qui tam* provisions establishes their constitutionality under Article III. This argument is, however, untenable both as a matter of history and of law.

Absent invocation of historical usage, the *qui tam* provisions of the FCA are, under this Court's recent Article III precedents, unconstitutional. Article III's "irreducible minimum" that a party invoking federal jurisdiction have suffered an "injury in fact" that is likely to be redressed by a favorable outcome of the suit is simply not met in a *qui tam* action, in which the plaintiff is, by definition, an uninjured private citizen seeking not redress of his or her own injuries, but a reward for bringing the suit.

ARGUMENT

I. THE HISTORY OF THE FCA'S *QUI TAM* PROVISIONS DO NOT ESTABLISH THEIR CONSTITUTIONALITY UNDER ARTICLE III.

1. *Qui tam* suits arose in fourteenth-century England as an aid to the Crown's primitive law-enforcement capabilities. The original *qui tam* statutes authorized private "informers" to bring criminal prosecutions for violations of certain penal laws. Upon conviction of the wrongdoer, the private prosecutor was given a share of the penalty imposed as a reward. See Note, *The History and Development of* Qui Tam, 1972 Wash. U. L.Q.

81, 86-89 (1972) (hereinafter Wash. U. Note). Although some statutes permitted prosecution only by a person who had been injured, others authorized "any person," regardless of injury, to prosecute the wrongdoer in the name of the Crown. Initially, these informer actions were brought by criminal indictment or information, but eventually informers were permitted to bring their suits as either criminal or civil actions. Abuses in the bringing of *qui tam* actions, however, spawned reform legislation as early as the mid-sixteenth century.[2] Indeed, as a result of frivolous *qui tam* suits, such actions commonly came to be seen as abuses of power, and the relators themselves fell into wide social disfavor. Lord Coke described them as among society's "viperous vermin." See 4 William S. Holdsworth, *History of English Law* 356 (1937 ed.).

The United States borrowed both the term *qui tam* and the concept from English law soon after its independence. See Wash. U. Note at 91-97. As an aid to the embryonic Executive's law-enforcement powers, the First Congress sanctioned *qui tam* in limited forms and contexts. For the most part, the First Congress's *qui tam* statutes "resembled simple informer laws," *United States ex rel. Stillwell* v. *Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1086 (C.D. Cal. 1989), that were dramatically different from the FCA's current *qui tam* provisions. For example, several of the early statutes did not permit private parties to sue at all; instead they granted informers a share in recoveries secured in actions brought by

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[2] *See* Common Informer's Act, 1588, 31 Eliz., ch. 5 (Eng.); Common Informer's Act, 1575, 18 Eliz., ch. 5 (Eng.); *see also* Dan D. Pitzer, *The* Qui Tam *Doctrine: A Comparative Analysis of its Application in the United States and the British Commonwealth*, 7 Tex. Int'l L.J. 415, 419 (1972).

government officials.[3] Of those that allowed private actions, most redressed injuries suffered by private individuals -- *not* by the government.[4] Finally, none expressly authorized private parties to sue in the name of the United States for injuries suffered by the government.[5]

Congress largely abandoned the use of *qui tam* statutes in the nineteenth century. See Wash. U. Note at 97-101. In fact, all of the *qui tam* provisions enacted by the First Congress have since been repealed. *Id.* And, with the exception of the FCA,

[3] Five of the *qui tam* provisions enacted by the First Congress fit this model. *See* Act of July 31, 1789, ch. 5, § 38, 1 Stat. 29, 48; Act of Sept. 1, 1789, ch. 11, § 21, 1 Stat. 55, 60; Act of Aug. 4, 1790, ch. 35, § 69, 1 Stat. 145, 177 (customs and maritime laws providing for a share of recovery to informers); Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 65, 67 (penalties levied against Treasury Department officials for violation of prohibitions attached to their office); Act of Mar. 3, 1791, ch. 18, § 1, 1 Stat. 215, 215 (same). Two other statutes authorized government appointed census-takers to bring suits against uncooperative citizens and to retain half of any fines recovered. *See* Act of Mar. 1, 1790, ch. 2, § 6, 1 Stat. 101, 103; Act of July 5, 1790, ch. 25, § 1, 1 Stat. 129, 129.

[4] *See* Act of July 31, 1789, § 29, 1 Stat. at 44-45 (permitting recovery against customs officials who failed to display a table of fees and duties); Act of Aug. 4, 1790, § 55, 1 Stat. at 173 (same); Act of July 20, 1790, ch. 29, § 1, 1 Stat. 131, 131 (allowing recovery against ships' masters who failed to contract with crew); *id.* § 4, 1 Stat. at 133 (permitting recovery against persons harboring runaway seamen). Two other statutory provisions permitted only injured parties to sue. *See* Act of May 31, 1790, ch. 15, §§ 2, 6, 1 Stat. 124, 124-26 (allowing authors and publishers to recover from copyright violators).

[5] The early liquor laws authorized either actions by local district attorneys in the name of the United States or private actions. *See* Act of Mar. 3, 1791, ch. 15, § 44, 1 Stat. 199, 209. Another law authorizing fines against miscreant census-takers expressly barred recovery by private persons when suit was "first instituted on behalf of the United States." Act of Mar. 1, 1790, § 3, 1 Stat. at 102; *see also* Act of July 5, 1790, § 1, 1 Stat. at 129 (extending same to Rhode Island).

the few *qui tam* provisions that have survived do not purport to allow private parties to vindicate a proprietary interest belonging to the government, involve relatively arcane areas, and now lie essentially dormant.[6]

The FCA's *qui tam* provisions were enacted in 1863 during the emergency of the Civil War. The wartime federal government was ill-equipped to combat rampant fraud by its defense contractors, as evidenced by alarming battlefield reports of Union soldiers opening crates of rifles only to find sawdust, see 132 Cong. Rec. H6482 (daily ed. Sept. 9, 1986) (statement of Rep. Berman). In response, Congress revived the archaic device of the *qui tam* suit with the False Claims Act of 1863. The Act authorized any private citizen to file a civil action, in the name of the United States, for alleged fraud against the government. See Act of Mar. 2, 1863, ch. 67, § 4, 12 Stat. 696, 698. As an incentive to bring such suits, it awarded relators 50 percent of any recovery, with the balance of the recovery being paid into the Treasury. See *id.* § 6, 12 Stat. at 698. Other than requiring the relator to bear the cost of pursuing the suit, the original version of the FCA imposed few restrictions on the relator. The Act contained no provision that allowed the government to intervene in the suit. Subsequent amendments in 1943 and 1986 imposed (and then relaxed) limits on the circumstances in which a relator could file a *qui tam* action, see Act of Dec. 23, 1943, ch. 377, § 3491(C), 57 Stat. 608, 608-09; False Claims Amendments Act of 1986, Pub L. No. 99-562, sec. 3, § 3730, 100 Stat. 3153, 3154, and also permitted the government to intervene in the suit, after which

[6] *See* 18 U.S.C. § 962 (forfeiture of vessels privately armed against friendly nations); 25 U.S.C. § 201 (recovery of penalties for violation of Indian protection laws); 35 U.S.C. § 292 (penalties for false marking of patents); 46 U.S.C. § 723 (forfeiture of vessels taking undersea treasure from the Florida coast to foreign nations).

the relator still "continue[s] as a party to the action," 31 U.S.C. § 3730(c)(1).

2. The actions of the First Congress, of course, provide "'contemporaneous and weighty evidence' of the Constitution's meaning since many of the Members of the First Congress 'had taken part in framing that instrument.'" *Bowsher* v. *Synar*, 478 U.S. 714, 723-24 (1986). But this Court repeatedly has stated that historical usage can never validate a practice that is contrary to constitutional principles, even when the practice "covers our entire national existence and indeed predates it." *Walz* v. *Tax Comm'n*, 397 U.S. 664, 678 (1970). *Accord Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983). As one commentator aptly put it, there is not "any sort of 'adverse possession' of constitutionality." Thomas R. Lee, *The Standing of* Qui Tam *Relators Under the False Claims Act*, 57 U. Chi. L. Rev. 543, 549 (1990). In short, the mere fact that the earliest Congresses adopted a practice has never been enough to establish conclusively the practice's constitutionality. See, *e.g.*, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) (striking down Section 13 of the Judiciary Act, a statute enacted by the First Congress).[7]

Although history alone cannot validate a plainly unconstitutional practice, this Court has indicated that a strong historical tradition can provide useful guideposts when the

[7] *See also Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410-14 (1792) (declining to enforce First Congress's grant of non-judicial duties to courts). *Cf. New York Times Co.* v. *Sullivan*, 376 U.S. 254, 276 (1964) (noting "broad consensus" that Sedition Act of 1789 was unconstitutional); *Wallace* v. *Jaffree*, 472 U.S. 38, 100 (1985) (Rehnquist, J., dissenting) (federal aid to sectarian schools viewed as unconstitutional by the courts despite grants of such aid by the First Congress); *INS* v. *Chadha*, 462 U.S. 919, 982 n.18 (1983) (White, J., dissenting) (use by the First Congress of precursors to the legislative veto unconstitutional).

application of constitutional principles is unclear. In such cases, this Court has deferred to history in order to validate a practice where (1) there is evidence that the First Congress (or enacting Congress) actually considered the constitutional ramifications of its actions, see *Marsh*, 463 U.S. at 791 & n.12, and (2) the practice is so longstanding and pervasive that its "unambiguous and unbroken history" indicates that it has become "part of the fabric of our society," *id.* at 792. *Accord Walz*, 397 U.S. at 678. *Qui tam* actions brought by uninjured private citizens to litigate claims of fraud upon the government fail to meet either of these criteria.

As the Fifth Circuit recently observed, "[t]here is no evidence that the early Congresses considered the constitutionality of [*qui tam*] actions." *Riley* v. *St. Luke's Episcopal Hosp.*, No. 97-20948, 1999 WL 1034213, at *3 (5th Cir. Nov. 15, 1999). *Accord* 13 Op. Off. Legal Counsel 207, 234 (1989); Lee, *supra*, 57 U. Chi. L. Rev. at 550. On the contrary, the early *qui tam* statutes, as well as the FCA, bear all the hallmarks of stop-gap measures enacted to assist the fledgling Executive or to respond to the exigencies of the Civil War. See 13 Op. Off. Legal Counsel at 234-35. They are, in short, statutes of the kind to which this Court has given no weight: "action . . . taken thoughtlessly, by force of long tradition and without regard to the problems posed." *Marsh*, 463 U.S. at 791.

Nor can it be seriously maintained that *qui tam* provisions are "part of the fabric of our society." The first Congresses enacted only a handful of *qui tam* statutes, which were largely repealed during the last century. Other than the FCA, only four other *qui tam* statutes -- all of which deal with esoteric areas of the law -- remain in force today. See *supra* at 5 n.6. Most importantly, the early *qui tam* statutes in general bore little resemblance to the FCA's *qui tam* provisions. See *Riley*, 1999

WL 1034213, at *3-*4. See also *supra* at 3-4. Indeed, the Office of Legal Counsel has opined that, before the advent of the FCA, *qui tam* suits were, with few exceptions, confined to government officials or persons who had suffered injury in fact. See 13 Op. Off. Legal Counsel at 213-14. There is thus no "unambiguous and unbroken history" indicating that *qui tam* statutes, especially those permitting suits by uninjured plaintiffs on the government's behalf, ever achieved such importance that they should be entitled to constitutional deference.

II. THE FCA'S *QUI TAM* PROVISIONS ARE UNCONSTITUTIONAL UNDER ARTICLE III.

The *qui tam* provisions of the FCA are unconstitutional under Article III. As this Court has repeatedly stated, "at an irreducible minimum, Article III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury' . . . and that the injury . . . 'is likely to be redressed by a favorable decision.'" *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (internal citation omitted). *Accord Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Since at least 1972, the Court has made clear that Article III's "'injury-in-fact' test requires more than [simply] an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Sierra Club* v. *Morton*, 405 U.S. 727, 734-35 (1972). This Court has also made clear that "[i]n no event . . . may Congress abrogate the Article III minima: A plaintiff must always have suffered 'a distinct and palpable injury to himself' that is likely to be redressed if the requested relief is granted." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979) (internal citation omitted). See also *Valley Forge*, 454 U.S. at 487 n.24 (same).

Applying these principles, this Court just last term rejected a statute which, like the FCA, purported to authorize "citizen suits" for wrongs committed against the government.

> [A]lthough a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.

Steel Co. v. *Citizens for a Better Env't*, 118 S. Ct. 1003, 1019 (1998). This Court further held that the possibility of recovering the costs of an investigation and prosecution was itself not sufficient to create standing. "Obviously . . . a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit. The litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself." *Id.* Thus, the mere prospect that a *qui tam* relator might be awarded a percentage of any recovery is insufficient to support standing.

A *qui tam* relator, by definition, has not suffered any "injury in fact," but is instead an uninjured private citizen seeking to litigate claims of injuries inflicted upon the government. A relator does not seek judicial relief to redress his or her injury, but a reward for bringing the case. Under *Steel Co.* and *Lujan*, the "irreducible minimum" required by Article III simply cannot be met by a *qui tam* relator seeking to litigate claims of fraud upon the government.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

Michael L. Ile
Anne M. Murphy
Leonard A. Nelson
AMERICAN MEDICAL ASSOCIATION
515 N. State St.
Chicago, IL 60610
(312) 464-4600

Jack R. Bierig*
Paul E. Kalb
Griffith L. Green
Andrew E. Weis
SIDLEY & AUSTIN
Bank One Plaza
10 S. Dearborn St.
Chicago, IL 60603
(312) 853-7000

Counsel for *Amici Curiae*

*Counsel of Record

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