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

BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a State is a "person" subject to liability under the False Claims Act.

2. Whether the Eleventh Amendment bars a *qui tam* action against a State.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. *Amici* have a compelling interest in legal issues that affect state and local governments.[1]

The question whether States are subject to suit under the False Claims Act is of utmost importance to *amici*. *Amici* respectfully submit that the court of appeals profoundly erred when it held that subjecting States to suit under the Act does not result in an "alteration of 'the usual constitutional balance of federal and state powers.'" Pet. App. 20a (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). On the contrary, as Judge Weinstein observed in his dissent, exposing States to treble damages and substantial civil penalties "distorts the dynamics of our federal system, denigrates the traditional role of congresspersons as bridges between their state communities and the national executive branch, and undermines cooperative relationships between federal and state agencies." *Id.* at 32a.

The correctness of Judge Weinstein's view is corroborated by the position taken by the United States in this Court in an analogous case seven years ago. The question in *United States Department of Energy v. Ohio*, 503 U.S. 607 (1992), was whether the federal government had waived its sovereign immunity from liability for civil fines imposed by a State for violations of federal environmental laws. In support of its successful contention that Congress had not waived federal immunity with the requisite clarity,

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* or their members, made a monetary contribution to the preparation or submission of this brief.

the United States argued that "payment of such civil penalties would plainly alter 'sensitive federal-state relationships,' and should thus trigger a particularly rigorous application of the clear statement rule." Reply Br. of United States, Nos. 90-1341 and 90-1517, at 3 n.2 (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). *See also* Br. of United States, Nos. 90-1341 and 90-1517, at 16 ("where the asserted waiver would subject the federal government to penal laws, courts require a particularly clear statement in order to find that a statute phrased in general terms waives federal sovereign immunity") (citing *Missouri Pac. R.R. Co. v. Ault*, 256 U.S. 554 (1921)).

The Eleventh Amendment issue presented in this case—whether FCA suits are barred by the States' sovereign immunity—is also of utmost importance to *amici*. This Court's recent Eleventh Amendment jurisprudence has reaffirmed the vital role of state sovereign immunity in preserving the federal-state balance. The holding of the court of appeals that *qui tam* relators principally advance the interests of the United States, and thus share the United States' extraordinary power to sue States in federal court, is irreconcilable with the realities of FCA litigation. More fundamentally, it disregards the Constitution's reservation to the States of "a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status." *Alden v. Maine*, 119 S.Ct. 2240, 2247 (1999).

Because of the importance of these issues to the preservation of the federal-state balance, *amici* submit this brief to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

1. A State is not a "person" under 31 U.S.C. § 3729(a) and therefore cannot be sued by relators under the False Claims Act. This Court has long recognized that " 'in common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it.' " *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 64 (1989) (citations omitted). In *Will*, the Court explained that "[t]his approach is particularly applicable where it is claimed that Congress has subjected the States to liability to which they had not been subject before." *Id.* The Court has further held that it is "the ordinary rule of statutory construction that if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' " *Id.* at 65 (citation omitted). These principles foreclose a reading of the FCA that permits *qui tam* actions against States.

The court of appeals' conclusion that subjecting States to *qui tam* actions does not alter the federal-state balance rests on a one-sided view of the federal system and an unrealistic assessment of the workings of the False Claims Act. *Qui tam* suits fundamentally alter the federal-state balance in a number of ways. First, as plaintiffs, "*qui tam* relators are different in kind than the Government." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997). Rather than being motivated by the public good, they act " 'under the strong stimulus of personal ill will or the hope of gain.' " *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.5 (1943) (citation omitted).

Relators are thus highly unlikely to drop their lawsuits in circumstances in which federal and state officials are

most likely to resolve differences in a mutually agreeable manner. Moreover, the existence of a *qui tam* action undermines the constructive role that members of Congress can play in brokering the resolution of disagreements between federal and state officials. *See* Pet. App. 74a-76a (dissenting opinion).

The punitive sanctions imposed by the False Claims Act—treble damages plus substantial civil penalties—buttress the conclusion that making States suable under the Act fundamentally alters the federal-state balance. This Court has held that subjecting States to liability for compensatory damages effects such an alteration, *see Will*, 491 U.S. at 65; subjecting States to treble damages and civil penalties necessarily has the same result. Indeed, when States have sought to impose civil penalties on the United States, it has forcefully argued that "payment of such civil penalties would plainly alter 'sensitive federal-state relationships,' and should thus trigger a particularly rigorous application of the clear statement rule." Reply Br. of United States at 3 n.2, *United States Dept. of Energy v. Ohio*, 503 U.S. 607 (1992) (Nos. 90-1341 & 90-1517).

Even if the ordinary rules of statutory construction are applied to § 3729(a), there is no basis for concluding that States are suable "persons" under the False Claims Act. *See* 1 U.S.C. § 1 (Dictionary Act definition of "person" does not include States). That the Act uses the term "person," as the court of appeals put it, to "categorize both those who may sue and those who may be sued," Pet. App. 21a, does not alter this conclusion. The fact that States are persons under § 3730(b)(1) and can therefore bring actions under the FCA does not mean that the term "person" has the same meaning when it is used in § 3729(a). Sections 3729 and 3730 of the Act have fundamentally different purposes. As this Court has explained, the presumption of consistent meaning is "not

rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the same act with different intent." *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). And the Court has expressly recognized that whether the term "person" includes a sovereign depends upon whether the "statute imposes a burden or limitation, as distinguished from conferring a benefit or advantage." *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979).

The court of appeals also relied on § 3733(a)(1), which authorizes the Attorney General to issue a civil investigative demand whenever there is "reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation." Although the CID provision defines "person" to include a State, *see* 31 U.S.C. § 3733(*l*)(4), it does so only "[f]or purposes of this section." *Id.* § 3733(*l*). If, as the court of appeals believed, the term "person" as used in § 3729 included States, there would have been no need for the separate definition in the CID provision. Moreover, the CID provision demonstrates that Congress was able to include States within the coverage of specific provisions of the FCA when it wished to do so. That it did not provide this definition when it simultaneously amended § 3729 demonstrates that it did not intend to subject States to suit.

The legislative history is no more supportive of the court of appeals' construction of the statute than the statutory text. That Congress enacted the FCA to " 'stop[] the massive frauds perpetrated by large contractors during the Civil War,' " Pet. App. 24a-25a (citation omitted), says nothing about whether the FCA subjects States to

suit. The fact that Congress' concerns included "instances of fraud by state officials in the procurement of military supplies for state troops," Pet. App. 25a, likewise fails to support that conclusion, as the House Report expressly noted that the frauds in question were carried out for the officials' "personal aggrandizement," and not for the States. *Government Contracts,* H.R. Rep. No. 37-2, pt. ii-a, xxxix (1861). Nothing in the legislative history supports the conclusion that States themselves were engaged in fraudulent acts or that Congress intended to subject States to suit.

Finally, the court of appeals erred in relying on post-enactment legislative history, specifically, part of a sentence in the Senate Report which asserts that proper defendants under the FCA include "States and political subdivisions thereof." S. Rep. No. 99-345, at 8, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273. This Court has consistently treated Congress' post-enactment expressions of the meaning of a statute with skepticism. *See Wright v. West,* 505 U.S. 277, 295 n.9 (1992). None of the cases cited in this passage involved FCA suits against States. Moreover, none of the cases involved whether Congress has subjected States to suit at the instance of a private person. This brief, conclusory passage in the Senate Report is entitled to no weight.

2. Even if a State is a person subject to liability under the FCA, the Eleventh Amendment bars a *qui tam* suit against a State. The Eleventh Amendment prohibits a suit by a citizen against a State. While the States consented to suits by the United States as part of the constitutional plan, they did so with the expectation that this power would be exercised by politically accountable officials of the Executive Branch.

Section 3730(b) expressly recognizes that a *qui tam* relator is a "private person" and thus is a citizen for

purposes of the Eleventh Amendment. And the Court has explained that "[a]s a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good." *Hughes,* 520 U.S. at 949. A *qui tam* relator is simply not an official of the United States, but rather a private citizen who is subject to the Eleventh Amendment.

Furthermore, absent intervention by the United States it is the relator who controls the litigation. Thus, a *qui tam* action remains a "suit in law . . . commenced or prosecuted against one of the United States" by a citizen. U.S. Const. amend XI. Moreover, even where the United States takes over the suit, a *qui tam* relator has the right to continue as a party, and the right to a hearing on a government motion to dismiss or settle a case. *See* 31 U.S.C. § 3730(c). These rights demonstrate that the relator and the United States are distinct parties with frequently divergent interests in FCA litigation. A *qui tam* relator is, in short, a citizen whose suit against a State is barred by the Eleventh Amendment.

ARGUMENT

STATES ARE NOT SUBJECT TO SUIT UNDER THE FALSE CLAIMS ACT

In recent times, the Federal Government has increasingly sought the cooperation of the States to administer a wide range of programs. The statutes and regulations governing such programs, however, are often highly complex and unclear. *See, e.g., Schweiker v. Gray Panthers,* 453 U.S. 34, 43, 44 n.14 (1981). Until recently, disputes between state or local officials and their federal counterparts over the interpretation of these federal laws were customarily resolved in a manner consistent with the

scheme of " 'cooperative federalism.' " *See New York v. United States*, 505 U.S. 144, 167 (1992) (citation omitted). In most instances, informal mechanisms of negotiation between federal agency and state officials settled the matter. *See* Pet. App. 80a-82a (Weinstein, J., dissenting). In other instances, members of Congress have helped to mediate such disputes. *See id.* at 74a-77a. Indeed, while federal grant programs commonly contain mechanisms by which the Federal Government can seek compliance (such as auditing, reporting, monetary sanctions and withdrawal of state program authority, *see id.* at 79a), the Federal Government rarely uses formal sanctions. *See* Daniel J. Elazar, *American Federalism: A View from the States* 182 (3d ed. 1984).

The court of appeals' holding that a State is suable for treble damages at the behest of private parties is antithetical to this system of cooperative federalism. *See United States ex rel. Dunleavy v. Delaware County*, 123 F.3d 734, 738-39 (3d Cir. 1997) (court of appeals declines to dismiss FCA suit despite settlement between federal and county officials). As explained below, the court erred when it construed the term "person" as used in the False Claims Act's liability provisions to include a State. The court then compounded its error by holding that the Eleventh Amendment does not bar a private citizen from bringing a *qui tam* suit against a State. The judgment of the court of appeals should therefore be reversed.

I. A STATE IS NOT A "PERSON" UNDER THE FALSE CLAIMS ACT'S LIABILITY PROVISIONS

The False Claims Act subjects "[a]ny person who" commits any of seven prohibited acts related to the submission of a false or fraudulent claim to the United States to "a civil penalty of not less than $5,000 and not more

than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person." 31 U.S.C. § 3729(a). The Act does not define the operative term "person." Pet. App. 10a.

This Court has long recognized that " ' "in common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it." ' " *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 64 (1989) (quoting *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979) (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941))); *see also United States v. United Mine Workers of America*, 330 U.S. 258, 275 (1947). In *Will*, the Court explained that "[t]his approach is particularly applicable where it is claimed that Congress has subjected the States to liability to which they had not been subject before." 491 U.S. at 64. Thus, in *Will* the Court held that "a State is not a person within the meaning of § 1983," reasoning that the "common usage of the term 'person' provides a strong indication that 'person' as used in § 1983 likewise does not include a State." *Id.*

The Court has further held that it is "the ordinary rule of statutory construction that if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' " *Id.* at 65 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). *See also Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984); *United States v. Bass*, 404 U.S. 336, 349-50 (1971). As the Court has explained, " '[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the

critical matters involved in the judicial decision.' " *Will*, 491 U.S. at 65 (quoting *Bass*, 404 U.S. at 349).

The court of appeals acknowledged that " 'in common usage, the term "person" does not include the sovereign.' " Pet. App. 21a (quoting *Cooper*, 312 U.S. at 604-05). The court then committed two fundamental errors. First, it rejected the State's contention that the *Will* clear statement rule applies, holding that "[i]n the FCA, we see no alteration of 'the usual constitutional balance of federal and state powers' such as to require application of the plain statement rule." Pet. App. 20a. Second, it concluded that Congress intended to subject States to FCA suits on the basis of a tortured and unpersuasive analysis that falls far short of rebutting the ordinary presumption that the term "person" does not include a State.

A. The False Claims Act Fundamentally Alters The Federal-State Balance

The court of appeals' conclusion that subjecting States to *qui tam* suits does not alter the usual constitutional balance of powers rests on a myopic view of the federal system and the workings of the False Claims Act. The court's rational for its conclusion—that "[t]he goal of the statute is simply to remedy and deter procurement of federal funds by means of fraud," and that "States have no right or authority, traditional or otherwise, to engage in such conduct," Pet. App. 21a—trivializes the issue, ignoring the highly corrosive effect such suits have on the federal system.[2]

[2] The same could have been said in every case in which the Court has applied the clear statement rule to protect the States from unintended liability. The States "have no right or authority" to violate constitutional rights. *Will* nonetheless held that the States were not "persons" subject to suit under Section 1983, recognizing that such liability would fundamentally alter the federal-state balance. *See* 491 U.S. at 64-66. The States likewise claim no authority to violate other congressionally created federal rights. This Court, however, has recognized repeatedly that the very act of subjecting States to suits for damages fundamentally alters the federal-state balance. *See, e.g., Alden v. Maine*, 119 S.Ct. 2240 (1999); *Atascadero*, 473 U.S. at 238-39.

Qui tam suits fundamentally alter the federal-state balance in multiple ways. First, this Court has recognized that "[a]s a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997). *Qui tam* relators act " 'under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.' " *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.5 (1943) (quoting *United States v. Griswold*, 24 F. 361, 366 (D. Or. 1885)).

Because of their personal stake in the outcome, "[*q*]*ui tam* relators are thus less likely than is the Government to forego an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc." *Hughes*, 520 U.S. at 949. This, however, is exactly the situation in which federal and state officials can settle disputes through informal mechanisms in an expeditious and mutually satisfactory manner. *See, e.g.*, Pet. App. 79a-85a. Moreover, as the dissent explained, Members of Congress "frequently intervene on behalf of their states and home communities to influence the policy positions and particular decisions of administrative agencies charged with implementing federal statutes." *Id.* at 74a. "Let[ting] loose a posse of *ad hoc* deputies," *United States ex rel. Milam v. University of Texas*, 961 F.2d 46, 49 (4th Cir. 1992), who are often motivated by "personal ill will or the hope of gain,"

Hess, 317 U.S. at 541 n.5, undermines Congress' own role in the process of resolving intergovernmental disputes and gravely harms the "cooperative federalism" that is essential to the effectiveness of federal, state and local governments.

The sanctions imposed by the False Claims Act buttress the conclusion that the statute fundamentally alters the federal-state balance. Section 3729(a) subjects an offending "person" to treble damages plus "a civil penalty of not less than $5,000 and not more than $10,000." Moreover, it is well settled that a civil penalty can be imposed for each separate false claim. *See United States v. Bornstein*, 423 U.S. 303, 309 n.4 (1976); *see also United States v. Halper*, 490 U.S. 435, 437-39 (1989) (government sought $2,000 civil penalty under then-existing statute for each of 65 separate false claims for Medicare reimbursement when actual damages were $585).

The False Claims Act's imposition of treble damages is also punitive in nature. *See United States ex rel. Long v. SCS Business & Tech. Inst., Inc.*, 173 F.3d 870, 877 (D.C. Cir. 1999).[3] To be sure, in *Bornstein* the Court concluded that the False Claims Act's former liability provision, which imposed double damages, was remedial in nature. *See* 423 U.S. at 314-15. But the then-existing False Claims Act provided that a *qui tam* relator was

[3] *United States ex rel. Garibaldi v. Orleans Parish School Bd.*, 46 F. Supp. 2d 546 (E.D. La. 1999), graphically demonstrates the FCA's punitive nature. There, the district court, while reducing the civil penalty, determined that the FCA required it to assess treble damages amounting to $22.8 million against "a public school district responsible for educating children, many of them poor." *Id.* at 565. The damages were thus $15 million more than the United States' actual damages. Equally disturbing, the relator's award was more than $5.5 million, thus resulting in a massive redistribution of the school district's resources from the students to the relators. *Id.* at 56 (awarding relators 25% of the verdict).

entitled to half of the recovery. Thus, in most cases the Federal Government was only being made whole. *See Hess*, 317 U.S. at 540, 550. Moreover, while *Hess* rejected the contention that the double damages provision was a criminal sanction subject to the Fifth Amendment's double jeopardy clause, the Court acknowledged that " '[p]unishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrongdoer is concerned.' " 317 U.S. at 551 (quoting *Brady v. Daly*, 175 U.S. 148, 157 (1899)).

In any event, it is beyond dispute that treble damages are a punitive sanction. *See Texas Industries, Inc. v. Radcliff Materials*, 451 U.S. 630, 639 (1981); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 (1977); *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 912-13 (3d Cir. 1991); *United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343, 349 n.3 (S.D.N.Y.), *overruled by U.S. ex rel. Stevens v. Vermont*, 162 F.3d 195 (2d Cir. 1998), *cert. granted*, 119 S.Ct. 2391 (1999). As the Court explained in *Texas Industries*, "[t]he very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct." 451 U.S. at 639.

If subjecting the States to liability for compensatory damages fundamentally alters the federal-state balance, *see, e.g., Will*, 491 U.S. at 64-65, then it is obvious that subjecting States to punitive sanctions (whether at the instigation of the United States or private parties) also alters the constitutional balance. *Cf. City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).[4] Indeed, when States have sought to impose penalties on the United States, the United States has forcefully argued that "pay-

[4] *See also* Br. *Am. Cur.* City of New York at 5-8 (discussing policy against imposing penalties on cities).

ment of such civil penalties would plainly alter 'sensitive federal-state relationships,' and should thus trigger a particularly rigorous application of the clear statement rule." Reply Br. of United States at 3 n.2, *United States Dept. of Energy v. Ohio*, 503 U.S. 607 (1992) (Nos. 90-1341, 90-1517) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). The Court has agreed, holding in *Dept. of Energy* that provisions of the Clean Water Act and Resource Conservation and Recovery Act, which authorized a suit "against any person (including . . . the United States)" and the district courts "to apply any appropriate civil penalties," were insufficiently clear to subject the United States to civil penalties. 503 U.S. at 615-20 (quoting 33 U.S.C. § 1365(a) and 42 U.S.C. § 6972(a)). Section 3729 of the False Claims Act, which makes no reference to States, provides even less of an indication of congressional intent to subject States to suit than the provisions which the Court found in *Dept. of Energy* insufficient to subject the United States to liability. And most significantly, the Court, in determining what rule of construction to follow, did not define the relevant activity as polluting in violation of federal and state law, but rather the impact of civil penalties on the United States' sovereign immunity.[5]

[5] *Missouri Pac. R.R. Co. v. Ault*, 256 U.S. 554 (1921), is to similar effect. There, Congress provided that the Director General of Railroads " 'shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law' " and "that the 'lawful police regulations of the several states' shall continue unimpaired." *Id.* at 563 (quoting Federal Control Act § 10 & § 15, 40 Stat. 451 (1918)). A state law directed that railroads pay their discharged employees full wages within seven days and provided that if payment was not made, the railroad was liable for wages on a continuing basis until they were paid.

The Court rejected the contention that the Director General was liable for penalty wages. The Court acknowledged that "[b]y these provisions the United States submitted itself to the various laws, state and federal, which prescribed how the duty of a common carrier by railroad should be performed and what should be the remedy for failure to perform." 256 U.S. at 563. The Court held, however, that "there is nothing either in the purpose or the letter of these clauses to indicate that Congress intended to authorize suit against the government for a penalty, if it should fail to perform the legal obligations imposed." *Id.* The Court further explained that while the United States "undertook as carrier to observe all existing laws . . . it did not undertake to punish itself . . . by the imposition upon itself of fines and penalties or to permit any other sovereignty to punish it." *Id.*

As the United States has explained, *Ault* stands for the proposition that "where the asserted waiver would subject the federal government to penal laws, courts require a particularly clear statement in order to find that a statute phrased in otherwise general terms waives federal sovereign immunity." U.S. Br. 16, *Dept. of Energy v. Ohio*. That view likewise rests on the recognition that allowing one sovereign to penalize another "would plainly alter 'sensitive federal-state relationships.' " Reply Br. of United States at 3 n.2., *Dept. of Energy* (citation omitted).

As the foregoing demonstrates, an attempt by the United States to impose a penalty on a State fundamentally alters the federal-state balance. At least then, however, the suit is conducted by politically accountable officials. "Let[ting] loose a posse of" politically unaccountable "*ad hoc* deputies" to sue the States, *Milam*, 961 F.2d at 49, would mark an unprecedented intrusion into the federal-state relationship. Contrary to the reasoning of the court of appeals, the clear-statement rule and the presumption that a State is not a "person" therefore apply.

B. Even Under The Usual Standards Of Statutory Construction, The FCA Does Not Subject States To Suit

In reaching the conclusion that "the term '[a]ny person' in § 3729(a) is sufficiently broad to encompass the States," Pet. App. 30a, the court of appeals asserted that it was simply applying "the usual standards of statutory con-

struction." *Id.* at 21a. As explained below, the court's effort at statutory construction is unpersuasive even assuming the inapplicability of the ordinary presumption regarding the meaning of the term "person." Moreover, the conclusions the court drew from history are not sustainable. In short, the court of appeals' holding cannot be justified under either approach to statutory construction.

The court began its analysis by noting that the False Claims Act uses the term person "to categorize both those who may sue and those who may be sued." Pet. App. 21a. The court then relied on the fact that States have brought suits under the *qui tam* provision, which, it believed, "clearly indicat[es] that [States] viewed themselves as 'persons' within the meaning of § 3730(b)(1)."[6] Pet. App. 22a.

The court found "[f]urther confirmation that Congress viewed the States as persons who could be *qui tam* plaintiffs" in another 1986 amendment, Pet. App. 23a, which authorized the joinder of "any action brought under the

[6] The court observed that a Senate Report on the 1986 FCA amendments had cited *United States ex. rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984), which held that a *qui tam* action cannot be brought when the United States already possesses the information upon which the suit is based. *See* Pet. App. 22a. The Senate Report expressed its disapproval with *Dean* and the 1986 amendments overturned its holding to allow a *qui tam* suit on the basis of information in the United States' possession where the relator was the original source of the information. S. Rep. No. 99-345, at 12-13, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5277-78. The Senate Report had also cited a resolution of the National Association of Attorneys General which had stated that "to prohibit sovereign states from becoming *qui tam* plaintiffs because the U.S. Government was in possession of information provided to it by the State and declines to intercede in the State's lawsuit, unnecessarily inhibits the detection and prosecution of fraud on the Government." *Id.* at 13, 1986 U.S.C.C.A.N. at 5278. In the court of appeals' view, "there was no question whatever that *qui tam* suits could be brought by the States." Pet. App. 23a.

laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730." 31 U.S.C. § 3732(b). The Senate Report described this section as "allowing State and local governments to join State law actions with False Claims Act actions brought in Federal district court if such actions grow out of the same transaction or occurrence." S. Rep. No. 99-345 at 16, 1986 U.S.C.C.A.N. at 5281. In the court of appeals' view, "[s]ince intervention, other than by the [federal] government, is not allowed in a *qui tam* suit, Congress's provision for joinder of claims of a State must have been premised on the view that the State may be the *qui tam* plaintiff." Pet. App. 23a.

Based on its analysis of these amendments, the court concluded that it is "plain that the States are 'person[s]' within the meaning of § 3730(b)(1)" and can therefore be *qui tam* plaintiffs. Pet. App. 23a. Reasoning that "[a]bsent some indication to the contrary, we normally infer that in using the same word in more than one section of a statute . . . Congress meant the word to have the same meaning," the court concluded that States are also "'person[s]' within the meaning of § 3729(a) or § 3730(a)." Pet. App. 23a-24a.

The court's analysis is flawed in several respects. First, even if States are "persons" authorized to sue under Section 3730, it does not follow that they are also "persons" who are suable under Section 3729. Sections 3729 and 3730 have fundamentally different purposes, thus rendering the consistent meaning rule inapplicable. The Court has explained that "the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *Atlantic Clean-*

ers & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932). And the Court has expressly recognized that whether the term "person" includes a sovereign depends upon whether "the statute imposes a burden or limitation, as distinguished from conferring a benefit or advantage." *Wilson,* 442 U.S. at 667. It is thus entirely consistent with the ordinary rules of statutory construction for States to be "persons" authorized to bring *qui tam* suits, but not "persons" subject to such suits.

Second, the court's reasoning ignores Congress' general instruction to the courts that "the word[] 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1.[7] This definition clearly excludes the States from the ranks of persons liable under the False Claims Act.

The court of appeals' reliance on Section 3732(b), which authorizes the joinder of "any action brought under the laws of any State for the recovery of funds paid by a State," is likewise misplaced. The text of Section 3732(b) is susceptible to several interpretations, two of which say nothing about whether States are persons under Sections 3729 and 3730. As the D.C. Circuit explained:

> [t]he more obvious reading of § 3732(b) . . . is that it authorizes permissive intervention by states for recovery of state funds (creating what is in effect an exception to § 3730(b)(5)'s apparent general bar on intervention by all other parties except for the United States). Or Congress might even have meant § 3732(b) to provide supplemental jurisdiction for a non-state relator to join a federal false claim action with an action to recover state funds under a *state qui tam* statute, which several states have enacted.

United States ex rel. Long, 173 F.3d at 880 (citing Cal. Gov't Code §§ 12650 *et seq.*; Fla. Stat. Ann. § 68.081-092) (other citation and internal parenthetical omitted). Indeed, in light of the many programs (such as Medicaid) which are jointly funded by the States and the Federal Government and the fact that a fraudulent or false claim affects both sovereigns, it is consistent with the principles of cooperative federalism to allow the federal courts to hear state law claims arising out of the same transaction.

The court of appeals relied on one other piece of statutory text, Section 3733(a)(1), which authorizes the Attorney General to issue a civil investigative demand whenever there is "reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation." As the court of appeals noted, the CID provision defines the term person as "any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State," 31 U.S.C. § 3733(*l*)(4), and defines a "false claims investigation" as "any inquiry conducted . . . for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law." *Id.* § 3733(*l*)(2); *see* Pet. App. 29a. According to the court of appeals, "Congress would not have authorized such an investigation into whether States were engaged in violating the FCA unless States were among the 'persons' who are suable under the Act." Pet. App. 28a.

The court ignored, however, that the definition Congress gave the term "person" applies only "[f]or purposes

[7] The Dictionary Act, 1 U.S.C. § 1, reflects the common understanding that the term "person" includes a corporation. While local governments are typically given corporate status, a sovereign, while enjoying corporate powers, is not a corporation. *See, e.g., Will,* 491 U.S. at 69 n.9.

of this section." 31 U.S.C. § 3733(*l*). If the term "person" as used in the liability provision of the False Claims Act (§ 3729) included States, there would have been no need for the CID provision's separate definition. Moreover, Section 3733(*l*)(4)'s reference to States demonstrates that Congress is able to express its intent to subject States to some of the provisions of the False Claims Act. Yet when Congress simultaneously amended Section 3729 in 1986 to delete the reference to "[a] person not a member of an armed force of the United States," Congress provided no definition of the term person. 31 U.S.C. § 3729(a)(1). Surely if Congress had intended the broad definition of the CID provision to apply to Section 3729, it could have inserted that definition into the statute along with the other definitions it provided. *See id.* § 3729(b) & (c) (defining terms "[k]nowing and knowingly," and "[c]laim."). That it did not do so is a telling indication that it did not intend for States to be suable under § 3729(a). *See, e.g., INS v. Cardoza Fonseca,* 480 U.S. 421, 432 (1987) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation and quotations omitted). This rule has particular force, where, as here, the CID provisions were enacted concurrently with the amendment of Section 3729. *See Cardoza Fonseca,* 480 U.S. at 432.

Moreover, the court of appeals' conclusion that "Congress would not have authorized such an investigation into whether States were engaged in violating the FCA unless States were among the 'persons' who are suable under the Act," Pet. App. 28a, assumes too much. As States are not "persons" under Section 3729, by definition they cannot violate the FCA. Contrary to the reasoning

of the court of appeals, Congress did not enact the CID provision to authorize investigations into whether States are violating the FCA. Rather, States are subject to the CID provision because, given the large number of federal programs they administer, they will frequently have information relevant to a false claim submitted by a contractor or private person who receives federal funds. *See Long,* 173 F.3d at 877.

The text of the False Claims Act thus provides no support for the notion that States are "persons" subject to liability under the False Claims Act. Nor, contrary to the reasoning of the court of appeals, do any non-textual materials support its holding.

Indeed, the court's analysis of the history surrounding the FCA's enactment, which led it to conclude that States have been subject to it all along, is simply wrong. That Congress enacted the FCA to " 'stop[] the massive frauds perpetrated by large contractors during the Civil War,' " Pet. App. 24a-25a (quoting *Bornstein,* 423 U.S. at 309), may have justified reading the statute to include artificial entities such as corporations. It says nothing, however, about subjecting States to suit.

The conclusion that the 1863 Act did not subject States to liability is not altered by the fact that "among the concerns of Congress at the time were instances of fraud by state officials in the procurement of military supplies for state troops, the costs of which were ultimately borne by the United States." Pet. App. 25a (citing *Government Contracts,* H.R. Rep. No. 37-2, pt. ii-a (1862)). The House Report expressly noted that the frauds were carried out for the officials' "personal aggrandizement," and not for the States. *Government Contracts,* at xxxviii-xxxix. The fraud committed by such officials was fully embraced by the 1863 Act's provisions, which imposed both criminal

and civil liability on "any person not in the military or naval forces of the United States, nor in the militia called into or actually employed in the service of the United States." An Act to prevent and punish Frauds upon the Government of the United States, ch. 67, § 3, 12 Stat. 696, 698 (1863). The evidence thus does not support the conclusion that States themselves were engaged in fraudulent acts and the text of the 1863 act demonstrates that Congress did not intend to subject States to suit.

Finally, the court of appeals relied on post-enactment legislative history, the 1986 Senate Report, which purports to explain the "History of the False Claims Act and Court Interpretations." S. Rep. No. 345 at 8; 1986 U.S.C.C.A.N. at 5273. In particular, the report asserts that:

> [t]he False Claims Act reaches all parties who may submit false claims. The term "person" is used in its broad sense to include partnerships, associations, and corporations . . . as well as States and political subdivisions thereof. *Cf. Ohio v. Helvering*, 292 U.S. 360, 370 (1934); *Georgia v. Evans*, 316 U.S. 153, 161 (1942); *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

Id. (other citations omitted).

This Court has consistently treated Congress' post-enactment expressions of the meaning of a statute with skepticism. *See, e.g., Wright v. West*, 505 U.S. 277, 295 n.9 (1992) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.") The above quoted language warrants similar skepticism.

First, none of the cited cases raised the issue of whether a State is a person subject to liability under the False Claims Act. Indeed, neither the Senate Report nor any

of the lower courts that have upheld state liability cite any decision between the Act's enactment in 1863 and the 1986 amendments in which States were sued under the Act.[8] As this suggests, the notion that States are suable under the FCA is of recent vintage.

Second, two of the cases provide no support for the notion that States are suable "persons" under the FCA. *Monell* held that a municipal corporation is suable as a person under 42 U.S.C. § 1983. *See* 436 U.S. at 687-90. The term "person," however, has generally been viewed as not rendering States suable for damages. *See, e.g., Will*, 491 U.S. at 69 ("the phrase [person] was used to mean corporations, both private and public (municipal), and not to include the States"). And *Georgia v. Evans* held only that a State was a "person" for purposes of bringing a suit to recover damages it had sustained under the Sherman Act, 15 U.S.C. § 15, "as [a] purchaser[] of commodities shipped in interstate commerce." 316 U.S. at 162. The Court, however, has long recognized that this is a far different and easier question than whether a State is a suable "person" under a statute. *See Wilson*, 442 U.S. at 667 (citing *United States v. Knight*, 39 U.S. (14 Pet.) 301, 315 (1840)).

That leaves only *Ohio v. Helvering*, in which the Court held that a State that entered the business of selling alcoholic beverages was a "person" for purposes of the Internal Revenue Code. *See* 292 U.S. at 370. The statute

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[8] To *amici's* knowledge, the only pre-1986 FCA suit against a State is *United States ex rel. Weinberger v. Florida*, 615 F.2d 1370 (5th Cir. 1980). There, however, the district court dismissed the suit, "holding that a state is not a 'person' subject to liability under the False Claims Act." *Id.* at 1371. On appeal, the Fifth Circuit vacated the district court's judgment on the ground that the court lacked subject matter jurisdiction because the suit was based on information which was in the United States' possession at the time it was filed. *See id.*

did not, however, subject States to suit at the instance of private parties. Moreover, in light of the numerous cases in which this Court has construed the term "person" not to impose liability on a State, and the absence of any textual indication in the FCA that Congress intended to do so, this snippet is too meager to support subjecting States to suit. *Cf. Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) ("evidence of congressional intent [to abrogate state sovereign immunity] must be both unequivocal and textual"). Indeed, the paucity of FCA suits against States prior to the 1986 amendments—notwithstanding the legislative history's assertion that States were already suable "persons"—demonstrates that the legislative history deserves no weight.

Congress' use of the term "person" is simply insufficient to subject the States to the False Claims Act's punitive sanctions of civil penalties and treble damages. And contrary to the court of appeals' reasoning, *see* Pet. App. 30a, the False Claims Act—post-1986—can no longer be viewed as being a remedial scheme. *See infra* 12-13. It is, of course, also the ordinary rule of construction that statutes which impose a penalty or forfeiture " 'are to be construed strictly,' " *United States v. Campos-Serrano*, 404 U.S. 293, 297 (1971) (quoting *FCC v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954)), and "that one 'is not to be subjected to a penalty unless the words of the statute plainly impose it.' " *Id.* (quoting *Keppel v. Tiffin Savings Bank*, 197 U.S. 356, 362 (1905)). Thus, even under "the usual standards of statutory construction," Pet. App. 21a, it is clear that a State is not suable under the False Claims Act.

This does not leave the United States without remedies against the States. Rather, the United States has available an arsenal of common law remedies including fraud, breach of contract, breach of fiduciary duties, unjust enrichment, payment under mistake of fact and negligent misrepresentation. *See* John T. Boese, *Civil False Claims and Qui Tam Actions* 1-36 (1997 Supp.); *see also United States ex rel. Zissler v. Regents of Univ. of Minn.*, 154 F.3d 870, 871 (8th Cir. 1998); *United States ex rel. Graber*, 8 F.Supp. 2d at 345. Indeed, the United States frequently uses these remedies "because the statute of limitations has expired on FCA claims." Boese, *Civil False Claims*, at 1-36. These remedies are fully adequate to protect the United States from a false claim made by a State.

II. THE ELEVENTH AMENDMENT BARS A *QUI TAM* ACTION AGAINST A STATE

Even if a State is a "person" subject to liability under the FCA, the Eleventh Amendment bars a *qui tam* suit against a State. While a suit commenced and prosecuted by the United States against a State is not prohibited by the Eleventh Amendment, *see United States v. Texas*, 143 U.S. 621, 646 (1892), the States, in forming the Union and consenting to suits against themselves by the United States, did so on the expectation that this weighty power would be exercised by politically accountable officials of the Executive Branch. Absent the United States' intervention in a suit under 31 U.S.C. § 3730(b)(4)(A), the suit is barred by the Eleventh Amendment.

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[9] The Amendment embodies the understanding of

[9] The Court has long recognized that the Eleventh Amendment also bars a suit against a State by a citizen thereof. *See Hans v. Louisiana*, 134 U.S. 1 (1890).

the Framers that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 780 n.1 (1991) (quoting Alexander Hamilton, *The Federalist* No. 81, 548-49 (J. Cooke ed. 1961)). As Madison explained, "[i]t is not in the power of individuals to call any state into court." 3 J. Elliot, *The Debates In the Several State Conventions on the Adoption of the Federal Constitution* 533 (2d ed. 1863) (quoted in *Blatchford*, 501 U.S. at 780 n.1). And John Marshall observed that "an individual cannot proceed to obtain judgment against a state, though he may be sued by a state." 3 Elliot, *Debates* at 555-56 (quoted in *Blatchford*, 501 U.S. at 780 n.1.) *See also Hans v. Louisiana*, 134 U.S. 1 (1890).

A *qui tam* action against a State runs headlong into the Eleventh Amendment's prohibition on the exercise of the federal judicial power. As Section 3730(b) expressly recognizes, a *qui tam* relator is a private person and thus a citizen for purposes of the Eleventh Amendment. That a *qui tam* action is "brought in the name of the Government," 31 U.S.C. § 3730(b), does not render a *qui tam* relator an official of the United States who is outside the scope of the Amendment. Section 3730 authorizes two distinct categories of suits under the FCA—one, which is commenced by the Attorney General, and the other, which is commenced by a "private person." *Compare* 31 U.S.C. § 3730(a) *with* § 3730(b). Moreover, a *qui tam* relator brings the action both "for the person and for the United States Government." *Id.* § 3730(b)(1). As the Court has recognized, "[a]s a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good." *Hughes*, 520 U.S. at 949.

In short, a *qui tam* relator remains a citizen who is subject to the Eleventh Amendment.

Moreover, absent intervention by the United States in the suit under § 3730(b)(4)(A), a *qui tam* action remains, in the words of the Eleventh Amendment, a "suit in law . . . commenced or prosecuted against one of the United States" by a citizen. As the Fifth Circuit recently explained:

> It is [the relator]—not the United States as sovereign —who controls all strategic litigation decisions in the case such as how, when and in what manner to make demands on a state, whether to sue a state, how far to push the state toward a jury trial in extended litigation, whether to settle with a state and on what terms; and it is [the relator] who maintains *sole* responsibility for financing the litigation and for its costs.

United States ex rel. Foulds v. Texas Tech Univ., 171 F.3d 279, 293 (5th Cir. 1999). *See also* S. Rep. No. 345, at 25, 1986 U.S.C.C.A.N. at 5290 ("If the Government takes over the civil false claims suit, the litigation will be conducted solely by the Government. If the Government declines, the suit will be litigated by the individual who brought the action."). *Cf. New Hampshire v. Louisiana*, 108 U.S. 76, 89 (1983) (Eleventh Amendment prohibits a suit by a State against another State where the prosecuting state and its attorney general "are only nominal actors in the proceeding").

The court of appeals rejected the State's contention that this suit is barred by the Eleventh Amendment, relying upon "[t]he interests to be vindicated, in combination with the government's ability to control the conduct and duration of the *qui tam* suit." Pet. App. 16a. According to the court of appeals, "[t]he real party in interest in a *qui tam*

suit is the United States," and the *qui tam* relator's interest "is less like that of a party than that of an attorney working for a contingent fee." *Id.*

The court's analysis is flawed on several counts. First, it ignores that a *qui tam* relator brings the action both "for the person and for the United States Government." 31 U.S.C. § 3730(b)(1). Second, it ignores that a *qui tam* relator retains substantial rights in the litigation even when the United States has intervened, including "the right to continue as a party to the action," *id.* § 3730(c)(1), and the right to a hearing on a government motion to dismiss or settle the case. *Id.* § 3730(c)(2)(A) & (B). As the Senate Report explains, these rights were created to "provide *qui tam* plaintiffs with a more direct role not only in keeping abreast of the Government's efforts and protecting his [sic] financial stake, but also in acting as a check that the Government does not neglect evidence, cause unduly [sic] delay, or drop the false claims case without legitimate reason." S. Rep. No. 345 at 25-26, reprinted in 1986 U.S.C.C.A.N. at 5290-91.

Moreover, "[i]f the Government proceeds with the action, it . . . shall not be bound by an act of the person bringing the action." 31 U.S.C. § 3730(c)(1). This further demonstrates that a relator and the United States are distinct parties. In short, a *qui tam* relator is a separate party in the litigation with interests that frequently diverge from those of the United States. *See Hughes,* 520 U.S. at 949; *United States ex rel. Dunleavy v. Delaware County,* 123 F.3d at 738-39 (relator continues to prosecute FCA action notwithstanding settlement between federal and county officials).

Nor is the court's analogy to a lawyer working for a contingent fee persuasive. Clients are typically bound by the actions of their lawyers. *See* 31 U.S.C. § 3730(c)(1).

Moreover, a lawyer typically does not have the right to prosecute a suit without the client's authorization, or to obtain a hearing to object to the client's desire to dismiss the suit, *see id.* § 3730(c)(2)(A), or to obtain a hearing to determine whether a settlement agreed to by the client is "fair, adequate, or reasonable [to the lawyer] under all the circumstances." *Id.* § 3730(c)(2)(B). And as the D.C. Circuit explained, it is quite odd that the client would need to show "good cause" to intervene in its own lawsuit. *Id.* § 3730(c)(3); *see Long,* 173 F.3d at 886.

As the foregoing demonstrates, *qui tam* relators are separate parties from the United States who seek to vindicate interests which do not necessarily coincide with those of the Federal Government. And contrary to the reasoning of the court of appeals, Congress has intentionally provided relators with legal rights to challenge the decisions made by the Executive Branch's politically accountable officials.

Blatchford makes clear that, absent intervention by the United States, a relator's suit against a State is subject to the Eleventh Amendment. While the States surrendered their immunity from suits by the United States as part of the plan of the convention, *see* 501 U.S. at 782 (citing *United States v. Texas,* 143 U.S. 621), the terms of the surrender did not include subjecting themselves to suits by "a posse of *ad hoc* deputies," *Milam,* 961 F.2d at 49, who have no obligation to act in the public interest.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfuly submitted,

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