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 PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AND APPENDIX OF THE REGENTS OF THE UNIVERSITY OF MINNESOTA, THE NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND GRANT COLLEGES, THE AMERICAN COUNCIL ON EDUCATION, AND THE REGENTS OF THE UNIVERSITY OF SOUTH DAKOTA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI

Amici curiae (University *amici*) are the Regents of the University of Minnesota,[1] the Regents of the University of South Dakota, the National Association of State Universities and Land Grant Colleges (all of whose members are State universities or land grant colleges), and the American Council on Education (comprised of some 1,800 colleges, universities and educational organizations throughout the United States, including State universities). State universities are arms of their respective States and perform vital State functions of higher education: advanced teaching, research, and public service. State universities are engines of economic prosperity and sources of cultural enrichment for their States and for the nation. The research performed at the nation's universities is vital to the national defense and to the health of our people.

Amici share a broad and fundamental interest in preserving a harmonious relationship with the federal government, and in preventing individuals whose interests are inconsistent with those of both the State and the federal government from improperly interfering in that relationship. *Amici* also share an interest that the public resources of which they are stewards not be subject to claims that are wholly disproportionate to any loss to the government.

STATEMENT

For the nation's State universities, this case presents an issue of great importance. The state-federal relationship involving universities exemplifies the healthy cooperative federalism which is described by the panel dissent below. *United States ex rel. Stevens v. Vermont Agency of Natural Resources*, 162 F.3d 195, 214–29 (2nd Cir. 1998) (Weinstein, J., dissenting). The States' funding of higher education and the national government's support of it are prime examples of inter-governmental programs that work.

In recent years, State universities have been named as defendants in increasingly large numbers of *qui tam* False Claims Act (FCA) cases. Such cases typically involve programs in which federal funds support a core State university function, such as performing advanced scientific research or providing medical training. These *qui tam* suits have harmed the nation's State universities and harmed the federal-state relationship. The nature of these harms was generally described in 1989 in an opinion of the Department of Justice Office of Legal Counsel. 13 U.S. Op. Off. Legal Counsel 207, "Constitutionality of the Qui Tam Provisions of the False Claims Act," (July 18, 1989) (available on Westlaw, 1989 WL 595854 (O.L.C.)) (hereafter "OLC Opinion"). While the OLC Opinion cited only litigation against private defendants, the same harms have occurred in cases against State universities. A few examples of cases involving State universities serve to illustrate these harms.

Qui tam plaintiffs are principally interested in money, not healthy federal-state relations. The FCA's provisions for treble damages and multiple $10,000 penalties arm the private plaintiffs with potentially crippling leverage. A typical example of an FCA suit

based on medicare payments is *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279, 282 n.2 (5th Cir. 1999), *pet. for cert. pending*. There, plaintiff had asserted a liability of over $4 billion based on alleged overpayments of $20 million, a 200:1 ratio.

Private plaintiffs in these *qui tam* suits also have intense, but idiosyncratic, personal animosities against the defendant State institutions that do not reflect the views of the United States or any concern for maintaining healthy federal-state relations. Thus, in *United States ex rel. Berge v. University of Alabama at Birmingham*, 104 F.3d 1453 (4th Cir. 1996), *cert. denied*, 522 U.S. 916 (1997), plaintiff continued her vigorous prosecution against the defendant university despite the fact that the United States had investigated her charges and found no wrongdoing.

When the issue is whether the United States should sue one of the States which make up the United States, only federal officials whose sole interest is the public interest should be allowed to decide the question. Moreover, unless Congress expressly so states, even those officials should not be able to seek damages against the States which are vastly out of proportion to any injury to the United States.

SUMMARY OF THE ARGUMENT

1. Two sources of information—litigation decided by this Court in 1795, and contemporaneously adopted *qui tam* legislation—show that the Eleventh Amendment to the United States Constitution was understood and intended to bar *qui tam* actions against States.

a. Two hundred four (204) years ago this Court decided *In re Peters (the Cassius)*, 3 U.S. (3 Dallas) 121 (1795). *Peters* was a libel proceeding commenced by an

individual against the sovereign property of France. Indirectly, *Peters* involved two central features of this case: the Eleventh Amendment and a *qui tam* action. The Eleventh Amendment, which was thought to be pending ratification before the States,[2] was cited to the Court as exemplifying one aspect of the law of nations: an existing jurisdiction "ought not" be exercised against a sovereign in any suit by or at the instance of an individual. 3 U.S. at 127. The Court adopted this principle in the recitals in its writ of prohibition in *Peters*. 3 U.S. at 129–30. *Peters* supports the subsequent, unbroken line of decisions of this Court that the Eleventh Amendment embodies a broad principle of sovereign immunity.

The plaintiff in *Peters* had alleged that the French ship, the *Cassius*, had been fitted out for war within the United States in violation of the Act of June 5, 1794. 1 Stat. 381. That Act authorized *qui tam* actions. Immediately upon issuance of this Court's prohibition in *Peters*, the matter of the *Cassius* was re-filed as a *qui tam* prosecution in Circuit Court. 3 U.S. at 132 n.*; *Ketland qui tam v. the Cassius*, 2 U.S. (2 Dallas) 365 (C.C. Pa. 1796). Consistent with *Peters*, President Washington directed that the District Attorney request that the *Ketland qui tam* litigation be dismissed on grounds of France's sovereignty, *id.*; France considered the *Ketland* prosecution an affront to her sovereignty. *Judge Peters*, 3 U.S. 132 n*. The course of the litigation over the *Cassius* thus shows that both sovereigns considered *qui tam* actions to be barred by the principle of sovereign immunity, which had been incorporated into the Eleventh Amendment.

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[2] Although it was not known at the time, the Eleventh Amendment had been ratified by the requisite number of States well before August 1795, when *Judge Peters* was decided. Clyde E. Jacobs, The Eleventh Amendment and Sovereign Immunity 67 (1972).

Events involving the *Cassius* also illustrate the harm *qui tam* actions can inflict on inter-sovereign relationships. In a strongly worded diplomatic protest which "reviewed the whole quarrel between France and the United States over neutrality,"[3] and which was published in Philadelphia in November and December, 1796, France broke off diplomatic relations with the United States. Both the *qui tam* prosecution of the *Cassius*, and the existence of the Act of June 5, 1794, were featured prominently in France's protest. App. 2a–8a.[4]

b. At the time of the adoption of the Eleventh Amendment, "prosecute" and "prosecutor" were terms of art associated with *qui tam* actions; and *qui tam* prosecutions were a common, well-known form of civil action. The framers of the Eleventh Amendment used terminology which at the time would clearly have been understood to bar a *qui tam* prosecution.

Indeed, Congress approved the Eleventh Amendment and enacted identical *qui tam* language almost simultaneously. Within three weeks of approving the Eleventh Amendment, Congress enacted the *qui tam* statute for prevention of the slave trade (the model for the False Claims Act). 1 Stat. 347 (March 22, 1794). The statute used terminology that was functionally identical to the terms of the Eleventh Amendment: "sue for" / "any suit"; "prosecute" / "prosecuted." *Id.*, §§ 2, 4.

[3] Alexander DeConde, *Entangling Alliance: Politics and Diplomacy Under George Washington* 439 (1958). France's publication of the diplomatic note was a calculated effort to influence the U.S. presidential election of 1796, an act which infuriated the Federalists and which failed. *Id.*, 441, 474–80.

[4] The appendix reproduces the portions of the diplomatic note pertaining to the *Cassius* and the Act of June 5, 1794. *The Pennsylvania Gazette*, November 23, 30, December 7, 1794.

Further, in *Adams qui tam v. Woods*, 6 U.S. 336, 340–41 (1805) (Marshall, C.J.), this Court interpreted the word "prosecuted," used in conjunction with the word "any," very broadly. The language of the Eleventh Amendment, like that of the statute in *Adams qui tam*, applies to "any prosecution whatsoever." *Id.*

2. The panel erred in holding that the False Claims Act of 1863 imposed liability on States. *Stevens*, 162 F.3d at 207–08. Neither the Civil War Congress nor President Lincoln intended that States be defendants under the 1863 False Claims Act.

In his First Inaugural Address, and in his July 4, 1861, address to Congress in special session,[5] President Lincoln articulated the constitutional principles on which he believed the Civil War must be fought. These principles, grounded in The Federalist, No. 16, (Alexander Hamilton) (Clinton Rossiter ed., 1961), held that the Union was indissoluble, that States could not withdraw from the Union, and that attempts at secession were usurpations of power and insurrections – unconstitutional acts that were legally void. Individual insurrectionaries in their persons had violated the law, but the States as such remained inviolate. *See Texas v. White*, 7 Wall. 700, 724–27 (1869); *Poindexter v. Greenhow*, 5 S.Ct. 903, 913–15 (1885).

This understanding of the federal system is incompatible with imposition of legal liability against a State itself for abuses of power of individuals holding State offices. Indeed, six years after the Civil War ended, in enacting 42 U.S.C. § 1983, Congress adhered to these principles by extending liability as defendant "persons" to individual State actors, but not to the

[5] *Reprinted in* Abraham Lincoln: Selected Speeches, Messages and Letters, 138–164 (R. Harry Williams ed., 1961) (hereafter, "*Selected Speeches*").

States themselves. *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989).

The 1863 legislative history cited by the panel majority (162 F.3d at 205–06) referred only to isolated malfeasance by a state official, not to misconduct by a State itself. This scant history furnishes no basis for concluding that a Civil War Congress acted in derogation of widely accepted principles of federalism which were a conceptual foundation of the Union's war effort.

3. The 1986 amendments to the False Claims Act did not create a liability against States. Not a single statement of a Member of Congress or a representative of the Administration of President Ronald Reagan, supports such liability. *Amici* concur in the arguments of Vermont and other *amici* on these points, and on related questions of statutory interpretation, including the applicability of the "plain statement" rule to the question of statutory interpretation presented in this case.

Additionally, the 1979–80 legislative history of proposed FCA amendments does not support the astonishing proposal—made by the Department of Justice (DOJ) at that time—to define defendant "persons" engaged in bribery to include States. From 1982–1986 the DOJ did not repeat such proposals. The broader legislative environment of that period confirms Congress' hostility to such an idea, for Congress passed at least four laws that excluded States or local governments from liability either for penalties or for multiple damages.

In sum, *qui tam* actions against the States are barred by the contemporaneous understanding of the language of the Eleventh Amendment in 1794–95.

Moreover, neither in 1863, nor in 1986, did Congress seek to impose FCA liability on the States.

ARGUMENT

I. The Eleventh Amendment to the United States Constitution was Understood and Intended to Bar *Qui Tam* Actions Against States.

The historical record demonstrates that the Eleventh Amendment was understood and intended at the time of its adoption to bar *qui tam* actions against States. This record consists of (a) the course of litigation decided by this Court in 1795, and (b) the language of the *qui tam* statute enacted within three weeks of Congress' approval of the Eleventh Amendment.

A. The Course of the Litigation in *In re Peters (the Cassius)*, 3 U.S. (3 Dallas) 121 (1795), Shows that *Qui Tam* Actions Against a Sovereign were Understood to be Barred by the Principle of Sovereign Immunity Embodied in the Eleventh Amendment.

This appeal presents the first opportunity in two hundred four (204) years for the Court to consider the relationship between the Eleventh Amendment to the United States Constitution and *qui tam* statutes such as the False Claims Act. In *In re Peters* (the *Cassius*), 3 U.S. (3 Dallas) 121 (1795), the relationship was indirect, for *Peters* itself was not a *qui tam* action. However, Alexander Dallas, representing the *Cassius'* commanding officer, pointed out in argument (3 U.S. at 128) that the case included an allegation that the *Cassius* had been fitted out in violation of the Act of June 5, 1794 (1 Stat. 381)—a statute that did allow a *qui tam* action. Dallas also argued that principles embodied in the law of nations had been accorded at least a

legislative affirmation by the recently proposed Eleventh Amendment. Under these principles an existing jurisdiction "ought not" be exercised against a sovereign in any suit by or at the instance of an individual. *Id.* at 127. This Court's prohibition broadly accepted Dallas' argument. *See id.* at 129–30. Indeed, some twenty years later the Court took particular notice of the correctness of the principles of law laid down in the recitals to the prohibition in the *Cassius*. *L' Invincible*, 14 U.S. (1 Wheat) 238, 259–60 (1816).

The Court's prohibition in *Peters* supports the unbroken line of holdings over the past two centuries that the Eleventh Amendment embodies a broad principle of sovereign immunity. The language of prohibition in *Judge Peters* (3 U.S. 129–30) based on the law of nations, parallels the language of the Eleventh Amendment,[6] which was then thought to be pending before the States ("ought not" / "shall not be construed to"; "at the suit or instance" / "commenced or prosecuted").

A foreign nation and the several States obviously stand on different footings in their relationships to the United States, and the analogy to *Peters* and *Ketland qui tam* is not complete. However, the States do retain aspects of sovereignty, including immunity from suit by individuals, and this element of State sovereignty was at the forefront when the Eleventh Amendment was under consideration by the States and when *Peters* was decided. As Dallas had pointed out in *Peters*, with

[6] The Constitution of the United States, Amendment XI, provides as follows:

> The 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.

respect to that element of sovereignty the Eleventh Amendment and the law of nations are the same.

Subsequent events in the *Cassius* litigation show that *qui tam* actions against a sovereign were understood to be barred by sovereign immunity. Immediately upon issuance of this Court's writ of prohibition, the matter of the *Cassius* was refiled as a *qui tam* action by one Ketland, formerly a subject of the British Crown. *See id.* at 132 n.*; *Ketland qui tam v. the Cassius*, 2 U.S. (2 Dallas) 365 (1796); App. 5a. Consistent with the *Peters* decision, President Washington directed that the District Attorney apply to the Circuit Court for dismissal because the *Cassius* was the sovereign property of France. *Ketland qui tam*, 2 U.S. 365. Like the Supreme Court and President Washington, France considered the prosecution brought by an individual to be a violation of her sovereign rights, and she abandoned[7] the vessel and transformed the affront into "a matter of state." *Peters*, 132 n.*; App. 7a.

The *qui tam* prosecution contributed to a serious deterioration of United States-French relations in 1796. France objected to allegedly unfounded seizures of her ships, instituted without affidavit, and for which she received no costs upon dismissal. App. 2a–3a. She

[7] France's diplomatic note indicated she abandoned the vessel before the Circuit Court belatedly decided it had no jurisdiction. (App. 7a) This is consistent with the report of *Ketland qui tam*, which reported only the arguments of the relator and district attorney, and with Dallas' note in the report, which indicated France had declined to submit a claim. *Ketland qui tam*, 2 U.S. at 365–66. Thus, in *Ketland qui tam* France ultimately responded to the invasion of her sovereign immunity from suit in the same manner as Georgia had in *Chisolm v. Georgia*, 2 U.S. (2 Dallas) 419 (1793), *i.e.*, by refusing to appear. *See Jacobs, supra*, 48, 56. Alexander Dallas, who represented the interests of France in *Peters*, previously had represented Georgia in a later stage of *Chisolm*. *See Jacobs, supra*, at 55 n. 53.

objected to the Act of June 5, 1794. App. 8a–9a. France complained that the United States had opened its Courts to suits against sovereigns at the instance of individuals, whose interests were aligned with hostile foreign states, and who pursued circuitous and vexatious means to interfere with French rights. App. 2a–3a, 5a–6a. France withdrew her emissary, App. 9a, and in December 1796 refused to receive a new envoy from the United States. Leonard D. White, The Federalists 242 (1948). These and many other events (including France's effort to interfere in the 1796 election) led to the dispatch of a special mission to France in 1797 (which failed), preparation in this country for an anticipated war, and finally a 1799 special mission to France, which avoided war. *See id.* 241–249. *See generally* Entangling Alliance *supra*; and William Stinchcombe, The XYZ Affair (1980).

Ketland qui tam is the first known *qui tam* action against a sovereign in our nation's history. The history of the *Cassius* litigation confirms that *qui tam* actions were considered barred by sovereign immunity, and it illustrates why as a matter of policy such actions should be barred. Permitting individuals to interject themselves directly in inter-sovereign affairs is likely to generate conflict between the sovereigns and degrade the relationship. While in the larger scheme the *qui tam* prosecution of the *Cassius* probably exerted but a small force on the tide of events which drove the United States and France apart (*see* Entangling Alliance; The XYZ Affair), the "Affair of the *Cassius*" was featured quite prominently at the time of the rupture in 1796.

B. The Eleventh Amendment Bars *Qui Tam* Actions Against States.

1. Qui tam suits were a well-established feature of federal and state laws in the 1790s.

Although an anachronism throughout most of our nation's history, the *qui tam* action was a not insignificant part of the federal law enforcement machinery from 1789 to 1799. *The Federalists* 415–417. Congress had provided a "general jurisdiction" under which private parties could bring these federal statutory causes of action. *Ketland qui tam*, 2 Dallas at 386.

In some federal statutes, such as the prohibition of engaging in the slave trade, the informer could receive an award only if he or she commenced and prosecuted the case *qui tam*. 1 Stat. 347, 349 §§ 2, 4. In others, such as laws governing customs duties or excises on alcohol, only federal officials could prosecute the case, but informers received a portion of the share of the fines paid to the federal collectors. *The Federalists* 416. In others, such as the Act of June 5, 1794, the statute provided that the informer would receive a share of the fine or forfeiture, but the identity of the prosecutor was not specified. 1 Stat. 381, 383 § 3. As illustrated by *Ketland qui tam*, such statutes were believed to authorize *qui tam* prosecutions in the federal District Courts.[8] *Accord, United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943). Some federal *qui tam* statutes authorized actions against public officials. *The Federalists* 416.

State *qui tam* statutes were also common. *History of Qui Tam*, 91. If federal *qui tam* actions were not barred,

[8] Some commentators have minimized the scope of *qui tam* jurisdiction or questioned whether *Marcus v. Hess* was correct in believing jurisdiction would lie in a case such as *Ketland qui tam*. *See* OLC Opinion, at 232; Note, *The History and Development of Qui Tam*, 1972 Wash. U.L.Q. 81, 101 (hereafter, "History of Qui Tam"). The example of *Ketland qui tam* indicates the scope of *qui tam* actions was broader than the OLC Opinion suggests, and that *qui tam* actions were not confined to marginal or insignificant subjects.

state *qui tam* actions would not be. Such actions, if held to be prosecuted against a State by another State rather than by the individual relator, would come within the original and exclusive jurisdiction of this Court. 28 U.S.C. § 1251(a).

The field of state and federal *qui tam* suits which might have been maintained by individuals against States in federal court was potentially wide. Since *qui tam* suits were common and well known, one would expect that the Eleventh Amendment would address this form of action.

2. The word "prosecute" was a term of art commonly associated with *qui tam* actions, and the Eleventh Amendment, by use of that word, was understood and intended to bar *qui tam* actions against States.

Qui tam suits have deep roots in English law. Civil *qui tam* prosecutions derived from actions in which private parties were allowed to bring criminal prosecutions. *History of Qui Tam*, 88. Having grown out of English criminal law, the terms "prosecute" and "prosecutor"[9] were established terms of art associated with *qui tam* actions.

"Prosecute" was the term used to describe *qui tam* actions in the United States as well. Significantly, the *qui tam* provisions of the False Claims Act were modeled on the statute prohibiting the slave trade, which was approved on March 22, 1794. 1 Stat. 347.

[9] As the Court noted in *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279, 291 n. 20 (5th Cir. 1999), Blackstone, who was widely read in the United States, used the term "prosecute" in connection with *qui tam* actions only thirty (30) years before the word was incorporated into the Eleventh Amendment.

The penalties and damages provided by that statute were to be divided as follows:

> . . . one moiety thereof to the use of the United States, and the other moiety thereof to the use of him or her who shall sue for and prosecute the same.

Id., §§ 2 and 4 (emphasis supplied).

The Eleventh Amendment, which had been approved by Congress less than three weeks earlier (March 4, 1794), Jacobs, *supra* at 66–67, governs "any suit" which is "prosecuted" by a citizen. Thus, identical *qui tam* and constitutional language was considered and passed by Congress almost simultaneously. Both, on its face, and when construed in light of a contemporaneously enacted statute, the Eleventh Amendment bars *qui tam* actions against States.

This Court's interpretation of these same terms from a 1790 statute provides a third layer of analysis establishing that *qui tam* actions against States are barred. The terms "any" and "prosecute" were used in the 1790 statute that established a two-year limitations period applicable to *qui tam* actions. 1 Stat. 114 (April 30, 1790). In *Adams qui tam v. Woods*, 6 U.S. 336, 340–41 (1805), speaking through Chief Justice Marshall, the Court gave the phrase "nor shall any person be prosecuted" an expansive interpretation. The statutory language showed "an intention, not merely to limit any particular form of action, but to limit any prosecution whatsoever." *Id.* The Eleventh Amendment parallels this statutory language; it proclaims, in substance, "nor shall 'any suit' be 'prosecuted.'" Like the 1790 statute, the language of the Eleventh Amendment, approved

four years later, conveys the intent to bar "any prosecution [by a citizen] whatsoever." *Qui tam* actions were certainly prosecutions by citizens, and they are governed by the Eleventh Amendment.

Opponents of the Court's Eleventh Amendment jurisprudence have criticized *Hans v. Louisiana*, 134 U.S. 1 (1890), for "extending" State immunity from suit to federal question jurisdiction, arguing there was no general federal question jurisdiction in 1794. However, as the foregoing discussion shows, in the 1790s there was an important federal question jurisdiction covering then-existing statutes that authorized private causes of action, and the Eleventh Amendment in terms bars such actions. *Hans'* critics are in error. At its inception, the Eleventh Amendment was intended to govern federal question cases.

Since the Eleventh Amendment was intended to apply to *qui tam* actions, an FCA prosecution against a State by a relator could be permitted only if the statute in question were so different from historical *qui tam* statutes that in reality the case is prosecuted by the United States, and not by the relator. The False Claims Act of 1863 plainly fails this test, given that the government had no control over *qui tam* prosecutions under that Act. For the reasons explained by Vermont, by her other *amici*, by the dissent below, and by the Fifth Circuit in *Foulds, supra*, the current version of the FCA also fails this test.[10] The University *amici* concur in those arguments and commend those opinions to the Court.

II. The Civil War Congress Did Not Intend to Include States within the Category of "Persons" Subject to False Claims Act Liabilities.

[10] See also, OLC Opinion, 228–230.

A. Imposition of False Claims Act Liability Upon the States Would Have Contradicted the Constitutional Foundations Upon Which President Lincoln Waged the Civil War.

The panel majority erred in holding that Congress intended in 1863 to include States within the "persons" subject to False Claims Act liabilities. *Stevens*, 162 F.3d at 207–09. The language employed in 1863 ("bringing said suit and prosecuting same," 12 Stat. 698, § 6), showed on its face that a *qui tam* action against a State would be barred by the Eleventh Amendment ("any suit"; "commenced or prosecuted"). Thus, an intent to include States as defendant "persons" cannot be inferred.

More fundamentally, to have accused States themselves of fraud and malfeasance would have contradicted the very constitutional foundations on which President Lincoln waged the Civil War. Those foundations were articulated in the First Inaugural Address and in the July 4, 1861, address to Congress in special session. Selected Speeches, *supra*, at 151–164. Lincoln consistently declared Southern efforts to destroy the Union to be "insurrectionary," and all acts in aid of the rebellion to be unlawful and void. *Id.*, 141–142.

Lincoln set the war effort on constitutional underpinnings established by Alexander Hamilton in Federalist No. 16. The Federalist, No. 16, at 116–118 (Rossiter ed., 1961). In No. 16, Hamilton explored the question of what would happen under the new Constitution if States should become "...disaffected to the authority of the Union..." *See id.* at 116. Because national power would act directly on individuals, States could not succeed in opposing or undermining national authority by mere inaction or evasion. *See id.*

at 117. A direct and open defiance would be required. It was to be hoped that the people of the affected State would be sufficiently enlightened to recognize an illegal usurpation of authority, and that the State's judges would perform their duty to declare such acts unconstitutional and legally void. *Id.* In the First Inaugural, and throughout the Civil War, Lincoln adhered to Hamilton's characterizations of such a bold experiment as insurrectionary, unconstitutional and legally void.

Lincoln's conduct of the war followed these principles. He initiated the Union's war effort, not by declaring war on the southern States, but by ordering the individual insurrectionaries to "disperse and retire peaceably to their respective abodes." Proclamation of April 15, 1861. *Reprinted in,* Willoughby, The Constitutional Law of the United States, § 77, at 137 (2nd ed. 1929). The war ended, not with a treaty, but with a declaration of amnesty for most, and the surrender of each individual Confederate general. (Proclamation of Amnesty and Reconstruction, December 8, 1863, *Selected Speeches* 253-256.) Through the course of the war, Lincoln resisted suggestions that any of the stars of the southern States be removed from the flag of the United States. *Texas v. Johnson*, 491 U.S. 397, 423–24 (1989) (Rhenquist, C.J., dissenting). Lincoln's understanding – that the States had entered the Union irrevocably, and that acts in violation of federal law were personal wrongs – were soon thereafter adopted by this Court. *See Texas v. White*, 7 Wall. 700, 724–27 (1869) (principles articulated were not inconsistent with any statement of the executive department during the Civil War); *Poindexter v. Greenhow*, 5 S.Ct. 903, 913–15 (1885) (reiterating principles discussed in *Texas v. White*).

The panel majority's analysis leads to the illogical conclusion that Congress intended to treat northern States as fraudfeasors capable of violating even criminal laws, at a time when the concerted military power of the nation was marshaled, not against southern States as such, but against individual insurrectionaries and usurpers of State power. From 1861–1865, it would have been an outrage for any loyal Unionist to accuse the northern States of "fraud" in the conduct of the war effort. Of course, had the FCA applied to States in 1863, southern sympathizers would have been given free reign to attempt to sow discord by making such charges.

In 1871, shortly after the close of the Civil War, Congress enacted 42 U.S.C. § 1983, a comprehensive remedy for a wide range of abuses of State power in derogation of federal law. That remedy was limited to individual State actors; it did not extend to States themselves. *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989) (States not "persons" under 42 U.S.C. § 1983). Thus, in 1871 Congress had hewed to the same constitutional principles on which the Civil War had been fought. The panel majority offered wholly inadequate support for its conclusion that a Civil War Congress itself would have violated such principles. The legislative history from 1862–63 on which the panel majority relied (162 F.3d at 205–06) referred only to isolated malfeasance by state officials, not to misconduct by a State itself.

B. President Lincoln Did Not Oppose the Principle of State Immunity From Suits by Individuals.

The dissent below cited a phrase from President Lincoln's First Annual Address to Congress (also quoted at greater length in Jacobs, The Eleventh Amendment and Sovereign Immunity vii (1972)). The

dissent observed that the doctrine of sovereign immunity has received disapprobation for interfering with "the duty of Government to render prompt justice against itself in favor of its citizens." (162 F.3d at 209–10) While disapprobation was Jacobs' argument, it was not Lincoln's. Since the False Claims Act was "Lincoln's Law," President Lincoln's position should be clarified.

In his First Annual Address, President Lincoln did not mention state immunity from suit. The Collected Works of Abraham Lincoln, Vol. V, 35–53 (Basler ed., 1953). The language cited by Jacobs was taken from President Lincoln's discussion of the new Court of Claims. *Id.* at 44. President Lincoln proposed that, to ease the burden on Congress[11] of determining claims against the United States, the Court of Claims should be granted jurisdiction to enter final judgments, appealable to the United States Supreme Court. *Id.*

President Lincoln did not chide the Congress for shirking a duty; he proposed a "more convenient means" to discharge that duty. *Id.* Lincoln acknowledged, however, "the delicacy, not to say the danger" of permitting a court, rather than Congress itself, to authorize a final payment of money against the United States. *Id.* Lincoln's cautious and guarded

[11] From the founding of the nation, claims "of all sorts and descriptions" had been presented directly to the Congress. The Federalists 355. Over two centuries later, state legislatures may still entertain claims against the States, and doing so is consistent with due process of law. *Florida Prepaid Post Secondary Educ. Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199 (1999). As this Court held in *Hans*, the performance of a State's obligations rests upon honor and good faith, and it is the legislative department which represents the polity and will, and which is to judge for itself the honor and safety of the State. 134 U.S. 20–21. *Hans's* language, "honor " and "safety," echoes Lincoln's, "delicacy" and "danger."

approach to the national government's waiver of its own immunity belies any suggestion that either he or the Congress believed the national government had authority to run roughshod over the immunity of the States[12] by making them liable as defendant "persons" in suits to be prosecuted by individuals.

III. Congress Did Not Extend False Claims Act Liability to States in the 1986 Amendments to the False Claims Act.

The legislative history of the 1986 amendments to the False Claims Act does not reveal any statement of intention on the part of even one Member of Congress, or on the part of anyone in the Administration of President Ronald Reagan, to extend False Claims Act liability to States. In *amicus curiae* briefs filed in the Courts of Appeals for the Second, Fourth, Fifth and District of Columbia Circuits, the Regents of the University of Minnesota established the above point through detailed explications of the hearings, reports and floor debates leading to the 1986 amendments. It appears that the point is no longer seriously disputed, and a detailed treatment of the issues of legislative history and statutory interpretation by the University *amici* would add nothing of substance to Vermont's

[12] Lincoln had addressed the question of state sovereignty in his July 4, 1861, address to Congress in Special Session. While he rejected use of that term, he affirmed what is obvious: "Unquestionably the States have the powers, and rights, reserved to them in, and by the National Constitution..." Selected Speeches 160. Among these "government powers," *id.*, are the right of the State legislatures to judge how and whether claims asserted by individuals shall be paid, and immunity from suits prosecuted by individuals. Lincoln considered the relative division of authority between State and Nation to rest on the principle of generality and locality. *Id.* Sovereign immunity is a local matter. *Hans*, 134 U.S. at 20–21.

brief and those of other *amici* supporting Vermont. The University *amici* join those arguments. We also commend to the Court the statutory analysis in *United States ex rel. Long v. New York*, 171 F.3d 890 (D.C.Cir. 1999), and *United States ex rel. Graber v. New York*, 8 F.Supp.2d 343 (S.D.N.Y 1998).

Amici add the following points: (1) even the 1979–80 legislative history does not reveal any legislative support for extending False Claims Act liability to States; and, (2) by 1986 such a proposal would have been wholly inconsistent with the legislative environment.

A. Even the 1979–80 Legislative History of a DOJ Bill that Proposed to Define States as "Persons" that Engage in Bribery Reveals No Support for that Proposal.

The government and *qui tam* plaintiffs have relied heavily on one sentence, found in the history and background section of the 1986 Senate Judiciary Committee report, which asserted erroneously that States had been considered defendant "persons" under the False Claims Act. S.Rep. No. 99-345 at 8 (1986), *reprinted in* U.S.C.C.A.N. 5266, 5273. That sentence, of course, is part of three pages of background materials that were copied from a 1980 Senate Report[13] of a DOJ bill that would have amended the False Claims Act in several ways, including addition of a new bribery section to the Act. S.Rep. No. 96-657 at 15 (subd. (i)(1)). In the new section, defendant "person" was defined to include States. *Id.*

Despite the astonishing DOJ proposal to define the States as entities that engage in bribery, in the 1979

[13] Compare S.Rep. No. 96-657 at 2–4, with S.Rep. No. 99-345 at 8–10.

hearing there was not a word of discussion of the States as possible defendants.[14] Discussion of bribery was limited to private parties. 1979 Hearing, 5, 17. Thus, there is no evidence to be found in the hearing of legislative support for DOJ's 1979–80 proposal to include States as defendant "persons."

Indeed, the inference to be drawn from the 1979 hearing is one of opposition to defining States as "persons." The 1979 Senate Hearing was attended only by the subcommittee chairman, Senator DeConcini. Testimony was taken from current and former DOJ attorneys, who described most of the significant changes being proposed. 1979 Hearing, 2-28. Sen. DeConcini commented favorably on those portions of the bill about which there was testimony. *Id.* However, at the outset, Sen. DeConcini stated on the record that there were unspecified provisions of the bill about which he retained reservations. *Id.* 1. The absence of testimony about defining States as malefactors, the presence of testimony about other important provisions of the bill, and the introductory statement of reservation to some parts of the bill suggest that Sen. DeConcini himself opposed the proposal and let it be known that he did not wish testimony about it. Thus, there is no evidence of any support for the DOJ proposal, and there is an inference of opposition, perhaps from the subcommittee chair himself.

The inference of opposition is strengthened by the 1982–86 legislative history. In 1983, a Department of Justice witness, testifying before another Senate subcommittee, stated the DOJ had been "timid" about

[14] Hearings on Senate Bill 1981 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 96th Congress, 1st. Sess., Nov. 19, 1979, 1-28 (hereafter, "1979 Hearing").

seeking new false claims legislation after the rejection of the 1979–80 bill.[15] DOJ's "timidity" suggests that opposition to at least some aspect of its 1979–80 proposal was rather strong. Furthermore, every DOJ-supported version of the administrative counterpart to the False Claims Act—which was proposed and discussed in 1982, 1983 and 1985[16], prior to being adopted in 1986—limited the definition of defendant "person" to "private" entities. On this one particular, following the rejection of its 1979–1980 bill, there was a marked reversal in DOJ's legislative position.

B. By 1986, the Legislative Environment was Hostile to Assessing Penalties or Multiple Damages Against States.

DOJ's 1982–1986 initiatives were in accord with the legislative climate. During this period, Congress on at least four occasions exempted States and/or local governments from liability for fines or multiple damages, and it expressly did not extend new legislation involving fraud or bribery to them. 31 U.S.C. § 3801(a)(6) (1986) (known as "mini-False Claims Act;" "person" includes only "private" organizations); 41 U.S.C. § 52(3) (1986) (anti-Kickback Enforcement Act) ("person" defined; does not include States or local government); 41 U.S.C. § 51–58 (1984) (Local Government Antitrust Act of 1984, excluding local government from anti-trust damages liability)[17]; 31

[15] Hearing on Senate Bill 1566 before the Senate Committee on Governmental Affairs, 98th Congress, 1st Sess., Nov. 15, 1983, at 31 (hereafter, "1983 Hearing").

[16] *See* 1983 Hearing at 107; Hearing on Senate Bill 1780 before the Senate Committee on Governmental Affairs, 97th Congress, 2nd Sess., April 1, 1982 at 72; S.Rep. No. 99-212 at 44, 55.

[17] The civil investigative demand (CID) provisions of the FCA 31 U.S.C. § 3733, were taken from the antitrust laws, Senate Report No. 99-345, at 15. As of 1986, the antitrust laws (1) did not allow any damages action against any level of government, but (2)

U.S.C. § 3701(c)(1982) (Debt Collection Act of 1982, excluding States or local governments from mandatory pre-judgment interest, late payment penalty, or collection fees). For either Congress or the Administration to have proposed extending False Claims Act liability to States in 1986 would have been contrary to the legislative environment.

Assertions that Congress intended in 1986 to expand False Claims Act liability to States are without support. Indeed, the panel majority in this case did not rest its decision wholly on this ground, for it concluded, erroneously, that Congress already had created the liability in 1863. *Stevens*, 162 F.3d at 205–06. The Eighth Circuit's panel decision in *Zissler* similarly sought refuge in the 1863 Act by asserting Congress may have "mistakenly" believed such a liability already existed. *United States ex rel. Zissler v. Regents of the University of Minnesota*, 154 F.3d 870, 874–75 (8th Cir. 1998).

However, Congress cannot create new causes of action through "mistaken" interpretations, as an en banc decision of the Eighth Circuit itself has recognized. *Zajac v. Federal Land Bank*, 909 F.2d 1181 (8th Cir. 1990) (en banc) (allegedly mistaken belief that a cause of action already existed rejected as basis for interpreting legislative intent to create a cause of action; applying implied private right of action standards). Given the rigor of the plain statement rule standard,

allowed States to sue for treble damages even though they could not be sued for damages. The FCA's CID definition of "person" to include State was carefully limited to the CID provisions of the statute. As of 1986 States had exactly the same status under the FCA as they did under the anti-trust laws from which the CID provisions had been borrowed: (1) they could sue for treble damages; (2) they could not be sued; and (3) any information they possessed was available to the government pursuant to a proper civil investigative demand.

Congress certainly cannot legislate against the States by mistake.

CONCLUSION

The Court should reverse the judgment of the Court of Appeals for the Second Circuit.

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