FOR ARGUMENT

No. 98-1828

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

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 AMICUS TAXPAYERS AGAINST FRAUD SUPPORTING RESPONDENT

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STATEMENT OF INTEREST[1]

Taxpayers Against Fraud is a nonprofit, tax exempt organization dedicated to preserving effective anti-fraud legislation at the federal and state level. The organization has worked to publicize the qui tam provisions of the False Claims Act, has participated in litigation as a qui tam relator and as an amicus curiae, and has provided testimony to Congress about ways to improve the Act. Taxpayers Against Fraud's interest in this case is to support vigorous enforcement of the Act by contributing its understanding of the Act's proper interpretation and constitutional application.

INTRODUCTION AND SUMMARY OF ARGUMENT

The False Claims Act (FCA), 31 U.S.C. §§ 3729 *et seq.*, imposes civil liability on "any person" who makes a false monetary claim to the United States government. *Id.* § 3729(a). The Act authorizes the Department of Justice (DOJ) to initiate suits on behalf of the United States, over which it enjoys exclusive and plenary control. *Id.* § 3730(a). The Act also authorizes qui tam enforcement, providing that "[a] person may bring a civil action for a violation of [the Act] for the person and for the United States Government. The action shall be brought in the name of the Government." *Id.* § 3730(b)(1).

I. A qui tam suit raises no constitutional concerns under the Eleventh Amendment or associated principles of state sovereign immunity. "In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government." *Alden v. Maine*, 119 S.Ct. 2240, 2267 (1999). The United States is a real party in interest in qui tam suits under the False Claims Act, which seek to vindicate the United States' sovereign and

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[1] Letters indicating the parties' consent to the filing of this brief have been filed with the Clerk of the Court. This brief has not been authored in whole or in part by counsel for a party. No person, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

proprietary interests. Because a qui tam relator sues on behalf of the United States, her suit qualifies as a suit by the United States for purposes of the states' immunity waiver. Any requirement that the United States' interests be advanced only by executive branch officials would run counter to the framers' original understanding.

II. States are "persons" subject to liability under the False Claims Act. Any contrary determination would apply to suits initiated by the Department of Justice as well as by relators, and thus would deprive the Department of its most effective weapon against fraud. Moreover, this interpretation is supported by conventional modes of statutory construction, including text, purpose, history, and established usage. And not only is the federalism-based "plain statement" rule this Court sometimes invokes to limit private actions against states inapposite here, but state liability under the False Claims Act actually preserves the traditional balance of federalism by precluding one state from siphoning into its own coffers some of the federal funds intended to benefit the entire country.

ARGUMENT

I. A QUI TAM SUIT CONSTITUTES A SUIT BY THE UNITED STATES FOR PURPOSES OF SOVEREIGN IMMUNITY DOCTRINE, AGAINST WHICH A STATE DEFENDANT HAS NO VALID ELEVENTH AMENDMENT DEFENSE

We begin with the incontestable premise that the states waived their erstwhile sovereign immunity from suits by the United States when the states joined the federal union. "[N]othing in [the Eleventh Amendment] or in any other provision of the Constitution prevents . . . a State's being sued by the United States." *United States v. Mississippi*, 380 U.S. 128, 140 (1965); *see also, e.g., Alden v. Maine*, 119 S.Ct. 2240, 2267 (1999); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 71 n.14 (1996). Because a qui tam action brought to enforce the False Claims Act asserts the United States' sovereign and proprietary interests, it qualifies for

the state immunity waiver for suits by the United States (hereinafter "US/p waiver").

A. The United States is a "Real Party in Interest" in Qui tam Suits Under the False Claims Act, Which Seek to Vindicate the United States' Sovereign and Proprietary Interests

The United States can act only through the agency of natural persons. In a qui tam enforcement scheme, Congress authorizes both public officials and private persons to assert the United States' interests by bringing suit "in the name of the Government." 31 U.S.C. § 3730(b)(1). As the lower courts have concluded,[2] the United States is a real party in interest in False Claims Act litigation whether the suit is initiated by a public prosecutor or a private relator.

First, when a person submits a false claim for payment as defined by the Act, the United States directly suffers the injury since the fraudulently obtained money is siphoned from the federal treasury. Thus the litigation asserts the United States' proprietary interest in protecting its own fisc, as well as its more abstract sovereign interest in enforcing its valid civil code against all entities within its regulatory jurisdiction. Indeed, state-engineered fraud directly threatens the national government's own interests just as much, and in much the same way, as if a state took possession of and claimed ownership to federal lands.

Second, qui tam litigation directly asserts, and thus either vindicates or extinguishes, these interests of the United States. The requirement that the action be filed "in the name of the United States" is not mere window-dressing; there is only one cause of action generated by any particular instance of fraud, and it

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[2] *See, e.g., United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1154 (2nd Cir. 1993); *United States ex rel. Berge v. Board of Trustees of Univ. of Alabama*, 104 F.3d 1453, 1457 (4th Cir. 1997); *United States ex rel. Hall v. Tribal Development Corp.*, 49 F.3d 1208, 1213 (7th Cir. 1995).

belongs to the United States. No matter whether the first suit is brought by DOJ or a relator, claim preclusion bars subsequent DOJ or relator suits.[3]

Third, the predominant share of any monetary recovery accrues to the United States. Just as financial responsibility is a paramount factor in determining whether the defendant in a particular suit is "the state" or not, *see, e.g., Regents of the Univ. of California v. Doe*, 519 U.S. 425, 430 (1997), the promise of financial recovery should equally manifest the sovereign interest of a government plaintiff.

The fact that the relator is also defined as a "party" under the Act does not change the nature or diminish the extent of the United States' interest in the litigation. The relator sues for himself as well as the government only in the sense that, once filed, the action itself gives him an inchoate interest in the outcome of the litigation.[4] And this interest is both derivative and contingent: derivative in the sense that the injury and cause of action are not his but rather those of the United States, and contingent in the sense that if he is not the first-filing plaintiff he never acquires any such interest.[5] To be sure, if he is the first-filing plaintiff he then becomes a party to the litigation, perhaps even a real party in interest for some purposes. But the United States unquestionably

[3] *See* Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 Yale L.J. 341, 354 n.71 (1989).

[4] *See, e.g.*, 2 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, 1765-1769, at 437 (1979 ed.) ("[H]e that brings his action, and can bona fide obtain judgment first, will undoubtedly secure a title to it, in exclusion of every body else. He obtains an inchoate imperfect degree of property, by commencing his suit; but it is not consummated till judgment . . . ."). It is only in this inchoate sense that "by commencing the suit the informer has made the popular action his own private action . . . ." *Id.*

[5] This understanding dates back to the English qui tam tradition during the colonial period. *See* Note, *The History and Development of Qui Tam*, 1972 Wash. U.L.Q. 81, 84 n.18 ("The informer's rights to the penalty did not attach until the suit was instituted, whereupon his rights attached absolutely and to the exclusion of all other potential informers.").

remains a real party in interest as well, whose interests the suit purports to vindicate.[6]

B. Because The United States Is A Real Party In Interest, The Suit Qualifies As A United States Suit For Purposes Of The States' Immunity Waiver

A suit in which the United States is a real party in interest qualifies for the US/p waiver for two reasons. First, this Court has invariably applied such a real party in interest test in determining the "governmental status" of a litigant for purposes of immunity doctrine. Second, this test conforms to the historical rationales for the US/p waiver.

Many aspects of sovereign immunity doctrine turn on whether a "sovereign" is truly involved in the dispute, either as a defendant (in order to claim immunity in the first place) or as a plaintiff (in order to defeat an immunity claim due to a plan waiver). Whenever ambiguity has arisen as to whether the relevant

[6] Indeed, even if one views the relator as "sharing" a portion of the United States' monetary interest in the litigation (typically 15-30%, determined only after-the-fact), this perspective does not preclude the relator from litigating on behalf of the United States for the portion he will ultimately share. The relator can obtain no recovery above and beyond what DOJ could obtain on the United States' behalf; his share merely reduces the amount recoverable by the United States that is ultimately returned to the federal treasury. This Court has previously held that the sovereign immunity waiver for United States suits still applies when a private party joins the United States in litigation if the private plaintiff seeks no greater relief than that already being sought by the United States. *See Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981) (Eleventh Amendment inapplicable when the United States, a federal agency, and private companies were allowed to intervene as plaintiffs in an original action between two states); *Arizona v. California*, 460 U.S. 605, 614 (1983) (in a suit between two states in which the United States had intervened on behalf of Indian tribes, the tribes themselves allowed to intervene; because the tribes did not seek to raise any new claims, "our judicial power . . . is not enlarged" and state "sovereign immunity . . . is not compromised").

defendant or plaintiff should be considered a sovereign for doctrinal purposes, this Court has employed the same interest-based test.

Most frequently, this Court uses this test to determine whether a state is the true defendant in an action although it is not technically named as such. As this Court has emphasized many times, "the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding. And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945) (citations omitted).[7] In other words, a state counts as the defendant for purposes of sovereign immunity when it is the real party in interest, even if it is "represented" in the litigation (by dint of the plaintiff's pleading) by a state official or entity.

With respect to governmental plaintiffs, consider this Court's application of the states' waiver in the constitutional plan of their immunity from suit by sister states. Occasionally in a state-against-state suit it is unclear whether the plaintiff state seeks to vindicate its own sovereign or proprietary interests, or rather seeks merely to vindicate the interests of private persons. In such cases, this Court inquires whether the plaintiff state has a true governmental interest at stake in the litigation, and holds that the immunity waiver applies if the answer is yes.[8]

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[7] *See also, e.g., Edelman v. Jordan*, 415 U.S. 651, 663 (1974); *Regents of the Univ. of California v. Doe*, 519 U.S. 425, 429 (1997).

[8] Consider, for example, the juxtaposition of *New Hampshire v. Louisiana*, 108 U.S. 76 (1883), and *South Dakota v. North Carolina*, 192 U.S. 286 (1904). In *New Hampshire*, this Court held that sovereign immunity barred actions by the states of New Hampshire and New York against Louisiana to collect on bonds and coupons originally issued by Louisiana to its citizens, even after those citizens assigned their claims to the plaintiff states as invited by state law. Because the plaintiff states were only "nominal actors in the proceeding," 108 U.S. at 89, and the real parties in interest were the private bondholders, this Court held that the plan waiver for sister-state suits was inapplicable and thus the actions violated both "the letter and the spirit of the Constitution." *Id.* at 91. By contrast, in *South Dakota*, this Court allowed South Dakota to sue North Carolina to recover for defaulted bonds originally owned by South Dakotans. The difference, this Court explained, was that the individuals gifted, rather than assigned, the bonds to their state such that South Dakota owned them outright rather than held them "as representative of individual owners." 192 U.S. at 310. South Dakota thus had a direct proprietary interest in the suit, and therefore its suit was not embarrassed by the Eleventh Amendment. *Id.* at 315-18. *See Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 392-33 (1938) (unlike the action in *South Dakota*, the actions in New Hampshire were barred because "the State was not seeking a recovery in its own interest, as distinguished from the rights and interests of the individuals who were the real beneficiaries"); *see also Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258 n.12 (1972).

[9] In both *Monaco v. Mississippi*, 292 U.S. 313 (1934), and *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), the Court distinguished between the United States and sister states as plaintiffs from foreign nations and Indian tribes as plaintiffs based on the presence of a mutual benefit from waiver. *See Monaco*, 292 U.S. at 330 ("The foreign State lies outside the structure of the Union. The waiver or consent, on the part of a State, which inheres in the acceptance of the constitutional plan, runs to the other States who have likewise accepted that plan, and to the United States as the sovereign which the Constitution creates."); *Blatchford*, 501 U.S. at 782 ("What makes the States' surrender of immunity from suits by sister States plausible is the mutuality of the concession. There is no such mutuality with either foreign sovereigns or Indian tribes.").

The familiar real party in interest test makes sense in this particular context, for it dovetails with the premise of the US/p waiver. As this Court has repeatedly explained, the states entered into a set of mutually beneficial immunity waivers when they joined the Union.[9] Each state took upon itself a reciprocal set of affirmative and negative obligations running to its sister states (e.g., aiding extraditions, eschewing import duties) and to the United States (e.g., holding federal elections, not obstructing federal instrumentalities). Each state desired to establish some way of enforcing the obligations its sister states owed to it. To this end,

each state insisted upon the right to sue its neighbors, waiving its own immunity from suit by those same neighbors in a "mutual concession" designed to promote the benefit of all. Similarly, each state desired to authorize the United States to sue fellow states, for two reasons. First, the United States could help police the obligations owed between two or more states. Second, each state wanted the United States to be able to enforce her neighbors' new commitments to the national government, and to prevent their interference with that government's own interests and institutions which, after all, purported to benefit the country as a whole. To these ends, each state granted the United States the authority to sue states, waiving its own immunity in a mutual convenant with its neighbors.

A qui tam suit under the FCA seeks to police mutually-incurred state obligations; one state's fraud imposes externalities on other states by redirecting funds to itself that were meant to benefit the entire country, essentially making maintenance of the national government more costly for law-abiding states. The suit also implicates a core proprietary interest of the United States because it redresses an injury to the federal treasury. Thus the sovereign and proprietary interests underlying this qui tam suit match those that historically motivated the US/p waiver.

Moreover, suits by individuals seeking to vindicate their own personal legal interests are often said to threaten the states' dignitary interests. *See Alden*, 119 S.Ct. at 2247 ("The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity."). Suits by the United States, however, "as the sovereign which the Constitution creates," *Monaco*, 292 U.S. at 330, do not similarly threaten such interests. Where the United States is the real plaintiff in interest, the suit has the backing of the superior sovereign and thus the state-dignity rationale for immunity holds no sway.[10]

[10] Petitioner's reliance on *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104 n.12 (1984), *see* Petr. Br. at 46, is misplaced. As made clear in the sentence following the one Petitioner quotes, this Court declared that the United States' intervention to seek injunctive relief does not affect the Eleventh Amendment's bar of a private suit seeking damages to redress a purely personal injury. Here, however, the private relator is statutorily authorized to vindicate the interests of the United States, not her own, and she seeks damages for the primary benefit of the United States, not herself.

C. The United States Does Not Forfeit Its Sovereign Status For Purposes Of Immunity Doctrine By Authorizing A Private Person Rather Than Public Official to Advance Its Interests In Litigation

Petitioner Vermont maintains that the United States essentially forfeited its sovereign status by choosing a private rather than public champion of its interests. Notwithstanding Petitioner's protest, Petr. Br. 39-45, the mere fact that qui tam suits involve a private plaintiff in some sense cannot, without more, bar the suit; immunity doctrine does not track a bright-line distinction between public and private litigants.[11]

[11] The basic immunity principle protects a state defendant from suit by any governmental entity or private person. *See, e.g., Idaho v. Couer d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997) (the Court has "rejected the contention that sovereign immunity only restricts suits by individuals against sovereigns, not by sovereigns against sovereigns"). And waiver doctrine also fails to track a public/private distinction. This Court has held that the states waived their immunity for suits by some governmental plaintiffs but not others, *see, e.g., Monaco*, 292 U.S. 313 (immunity waiver encompasses suits by the United States or a sister state but not a foreign state), and for suits by some private plaintiffs but not others, *see, e.g., McKesson Corp. v. Division of Alcohol Beverages & Tobacco*, 496 U.S. 18 (1990) (states waived their immunity from Supreme Court appellate jurisdiction over all federal claims brought by private individuals); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (states waived their immunity from private suits pursuant to valid congressional statutes enforcing the Fourteenth Amendment); *Reich v. Collins*, 513 U.S. 106 (1994) (where a state promises a postdeprivation remedy for taxes collected in violation of federal law, due process requires the state to provide a state judicial forum in which such remedy may be sought). The fact that qui tam litigation superficially resembles a private suit merely asks rather than answers the relevant question: whether the

Echoing Judge Weinstein's dissent below, *see* 162 F.2d at 225-29, Petitioner argues that contemporary values of "process federalism" dictate that the states' immunity waiver extends only to suits prosecuted by an executive branch official.[12] The claim underlying this proposed "executive form" requirement is that vesting prosecutorial discretion solely in executive branch officials will provide an additional procedural buffer against such suits, and thus preserve more breathing room for states. On its own terms, the argument rests on dubious empirical and normative premises.[13] More significantly, however, the argument assumes a

framers envisioned a plan waiver for this form of litigation brought on the United States' behalf.

[12] Petr. Brief at 34-39. In *dicta*, this Court has mentioned such a possible limitation on the US/p waiver's scope. *See Blatchford*, 501 U.S. at 785 (noting "[t]he consent, 'inherent in the convention,' to suit by the United States — at the instance and under the control of responsible federal officers — is not consent to suit by anyone whom the United States might select"); *Alden*, 119 S.Ct. at 2267 ("Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States."). In neither *Blatchford* nor *Alden*, however, did this Court purport to justify equating suits by the United States and suits by federal officers. Moreover, the *Blatchford* comment is *dicta* because this Court held that Congress had not attempted to delegate the United States' exemption from state sovereign immunity from the plaintiff Indian tribes. *Blatchford*, 501 U.S. at 785-86. The *Alden* passage is *dicta* both because the private plaintiffs asserted only their own interests, not those of the United States, and because Congress did not purport to authorize private assertion of the United States' interests.

[13] As an empirical matter, for example, it is unclear whether DOJ prosecutors on their own accord do, or could be lobbied to, take states' sovereignty concerns into account when exercising their prosecutorial discretion. Surely federal prosecutors consider national interests that might counsel against litigation, such as foreign policy issues; such interests are commonly and properly considered by prosecutors whose professional loyalty runs to their employer, the federal government. But federal prosecutors have no duty of loyalty to states *per se*, and thus it

methodological commitment — bowing to contemporary functionalist concerns — that this Court has elsewhere eschewed.

1. An Executive Form Requirement For United States Suits Would Run Counter To The Framers' Original Understanding

Petitioner's argument for an executive form requirement is flatly inconsistent with this Court's self-professedly originalist approach to interpreting the scope of the US/p waiver. As explained earlier, this Court has always viewed the framers as waiving states' sovereign immunity for certain categories of suit because of the nature of the interests being asserted, rather than the form of the litigation. Thus the US/p waiver applies whenever litigation on the United States' behalf asserts a true sovereign or proprietary interest, so long as the litigation form — whether old

seems dubious that they would refrain from initiating an otherwise promising suit out of concern for a state's sovereignty interests.

As a normative matter, one cannot persuasively argue that a raw reduction in the number of suits filed against states serves contemporary federalism values. Suits might interfere with states' "ability to govern in accordance with the will of their citizens," *Alden*, 119 S.Ct. at 2264, but this is merely a byproduct of the principle of federal supremacy; as this Court emphatically reaffirmed, "[t]he States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design." *Id.* at 2266. Surely a state cannot complain that a suit to recover funds it defrauded from the federal treasury is an unwarranted interference with its control over its own treasury!

More generally, states cannot claim that principles of state sovereignty grant them an enforceable interest in a light litigation load. States could not persuasively protest a congressional decision to increase the budget and staff of DOJ's civil fraud division 100-fold or create a special division focusing exclusively on state fraud, nor could states protest a presidential proclamation that policing state fraud is the Department's highest priority — even though each of these decisions might dramatically increase suits against states for damages (more so than even the FCA's qui tam provisions). Thus, any objection to qui tam suits must focus on some attribute other than their quantity.

or novel, widespread or idiosyncratic — comports with all relevant constitutional requirements such that it lies within Congress's authority to employ.[14]

Indeed, deciding today that a constitutional mode of litigating the United States' interests no longer qualifies for the US/p waiver would be akin to the Court having decided in *McKesson* that the states' original waiver of immunity from Supreme Court appellate review was limited to the form of appellate review then envisioned and practiced. The *McKesson* Court did not tie the scope of the waiver to the original method of judicial nomination and confirmation (which was subsequently modified to the detriment of state control by the Seventeenth Amendment), or to the prevailing practice of "circuit-riding" (which arguably kept the Justices more in touch with regional and local interests), or any other aspect of judicial form. Instead, this Court straightforwardly applied the waiver to the function of Supreme Court review, in whatever form that review would eventually take.

But even if the US/p waiver is limited to those forms of litigation to which the states most likely would have consented at the founding, the qui tam form still qualifies. "Statutes providing for actions by a common informer, who himself has no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943). The American colonies and early states patterned much of their law enforcement efforts on this English convention.[15] Because state governments

[14] Every federal circuit court to have considered a constitutional challenge to the FCA's qui tam framework has rejected it. Moreover, no general constitutional challenge to the qui tam framework was raised below or is fairly encompassed within the grant of certiorari. For a general defense of the framework's constitutionality, *see Caminker, supra* note 3.

[15] *See, e.g.*, Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan. L. Rev. 1371, 1406 (1988) ("The colonies and the states employed informers' statutes in a wide variety of

frequently authorized qui tam relators to pursue their own interests, it is difficult to deny that states would have expected the national government to do the same.

And this expectation would have been fulfilled: the First Congress enacted numerous qui tam statutes.[16] Subsequent early

cases, including the enforcement of regulatory statutes and morals legislation."); *id.* at 1406-07 & nn. 189-91 (providing examples of state qui tam statutes); Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 Yale L.J. 816, 825-27 (1969) (highlighting early history of qui tam actions in pre- and post-revolutionary America); Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 Am. U.L. Rev. 275, 296-303 (1989) (observing that the early American employment of qui tam actions was designed to supplement public criminal law enforcement); Note, *supra* note 5, at 94: ("There are, however, numerous examples of statutory qui tam in early American history. Many colonies expressly adopted in toto certain English statutes which could be enforced by qui tam procedures. In addition, other statutes were adopted with minor modifications. Moreover, American legislatures did use qui tam provisions similar to those found in English statutes."); *id.* at 95 ("Statutes providing for qui tam suits were common in eighteenth century America.").

[16] The First Congress employed qui tam actions in various forms and contexts. Six statutes imposed penalties and/or forfeitures for conduct injurious to the general public and expressly authorized suits by private informers, with the recovery being shared between the informer and the United States. Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 101, 102 (marshals' misfeasance in census-taking); Act of July 5, 1790, ch. 25, § 1, 1 Stat. 129 (same); Act of July 20, 1790, ch. 29, § 4, 1 Stat. 131, 133 (harboring runaway mariners); Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137, 137-38 (unlicensed Indian trade); Act of Feb. 25, 1791, ch. 10, §§ 8, 9, 1 Stat. 191, 195-96 (unlawful trades or loans by Bank of United States subscribers); Act of Mar. 3, 1791, ch. 15, § 44, 1 Stat. 199, 209 (avoidance of liquor import duties).

Three statutes similarly imposing penalties and/or forfeitures for conduct injurious to the general public authorized informers bringing successful prosecutions to keep the entire recovery. Act of July 31, 1789, ch. 5, § 29, 1 Stat. 29, 44-45 (import duty collectors' failure to post accurate rates); Act of Sept. 1, 1789, ch. 11, § 21, 1 Stat. 55, 60 (failure to

Congresses continued to expand qui tam authorization,[17] and as late as the turn of this century, this Court acknowledged that the "right to recover the penalty or forfeiture granted by statute is frequently given to the first common informer who brings the action, although he has no interest in the matter whatever except as such informer." *Marvin v. Trout*, 199 U.S. 212, 225 (1905). This "early congressional practice" more than "provides 'contemporaneous and weighty evidence of the Constitution's meaning'" thus confirming the constitutionality of the enforcement regime in general. *Alden*, 119 S.Ct. at 2261 (citation omitted). It also makes clear that states would have assumed their immunity waiver for suits by

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register vessels properly); Act of Aug. 4, 1790, ch. 35, § 55, 1 Stat. 145, 173 (import duty collectors' failure to post accurate rates).

Two other qui tam statutes imposed penalties and/or forfeitures for conduct injurious both to the general public and more concretely to a subclass thereof. One allowed any person to sue, Act of July 20, 1790, ch. 29, § 1, 1 Stat. 131, 131 (failure of vessel commander to contract with mariners); and the other allowed suits by anyone whose private rights were violated, Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 124-25 (copyright infringement).

Congress conferred federal jurisdiction over qui tam actions in the first Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (authorizing federal district jurisdiction "of all suits for penalties and forfeitures incurred, under the laws of the United States").

[17] *See, e.g.*, Act of Mar. 22, 1794, ch. 11, §§ 2, 4, 1 Stat. 347, 349 (an act to prohibit slave trading from the United States to any foreign country); Act of May 8, 1792, ch. 36, § 5, 1 Stat. 275, 277 (providing rules for awarding costs in cases brought by "any informer or plaintiff on a penal statute to whose benefit the penalty or any part thereof if recovered is directed by law"). Professor Harold Krent has reported that "[w]ithin the first decade after the Constitution was ratified, Congress enacted approximately ten qui tam provisions authorizing individuals to sue under criminal statutes." *Krent, supra* note 15, at 296. He noted that this "number is particularly significant given the relative paucity of criminal provisions passed by Congress." *Id.* at 296 n.104. *See Adams, qui tam, v. Woods*, 6 U.S. (2 Cranch) 336, 341 (1805) ("Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt [by qui tam plaintiffs] as well as by information [by the public prosecutor].").

the United States would have encompassed qui tam suits on the United States' behalf.

Moreover, any requirement that United States-against-states suit be controlled by politically accountable officials would be foreign to the framers' experience and expectations. The founding generation evidenced little if any concern that prosecutors be politically accountable to any centralized federal authority. Due to a lack of hierarchical organization, federal District Attorneys were quite isolated from one another; for all practical purposes, they were not meaningfully accountable to the President, the Attorney General, or any other high-ranking executive officer.[18] Furthermore, the enforcement regime was heavily reliant on supplementation by private counsel, even putting qui tam relators aside.[19]

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[18] *See, e.g.*, Leonard D. White, THE FEDERALISTS 406, 408 (1948) (federal district attorneys were subject to the supervision of the Secretary of State rather than the Attorney General, and they "apparently received no standard instructions, nor did they render annual or other regular reports. Apart from cases of exceptional importance and difficulty, they operated largely on their own responsibility."); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 16 (1994) (the Judiciary Act of 1789 "created district attorneys who prosecuted suits on behalf of the United States in the district courts. Until 1861, however, these district attorneys did not report to the Attorney General, and were not in any clear way answerable to him. Before 1861, the district attorneys reported either directly to no one (1789 to 1820) or to the Secretary of the Treasury (1820 through 1861). Throughout this period, they operated without any clear organizational structure or hierarchy."); Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent*, 99 Yale L.J. 1069, 1085 (1990) ("[C]ontacts between the district attorneys and the Department of State were 'largely fortuitous.' In general, the district attorneys conducted prosecutions for federal officials on a fee basis.") (citation omitted).

[19] *See, e.g.*, Lincoln Caplan, THE TENTH JUSTICE 4-5 (1987) (DOJ's creation reflected growing dissatisfaction with having private attorneys handle the public's cases); *Dangel, supra* note 18, at 1083 ("Federal departments and local officers routinely resorted to hiring private attorneys as 'special counsel' to prosecute government cases.").

This patchwork pattern of law enforcement belies the claim that the framers placed a high priority on the political accountability of public prosecution.[20]

From an originalist perspective, it is clear that the framers would have contemplated federal qui tam actions against states, given their prevalence during the founding and immediate endorsement by Congress. And it is equally clear that the framers

[20] *See Lessig & Sunstein, supra* note 18, at 19-20 ("[F]ederal prosecutorial authority was also granted to private individuals wholly outside the executive's control. Both through citizen access to federal grand juries, and through civil qui tam actions (treated for at least some purposes as criminal actions), citizens retained the power to decide whether and in what manner to prosecute for violations of federal law."); Daniel N. Reisman, *Deconstructing Justice Scalia's Separation of Powers Jurisprudence: The Preeminent Executive*, 53 Albany L. Rev. 49, 58 (1988) ("In the period after the framing of the Constitution, therefore, federal law enforcement powers were dispersed among private individuals, state officials, and largely independent United States district attorneys.").

For several reasons, one cannot persuasively argue that states might have assumed that they would be party defendants only in the Supreme Court's original jurisdiction, and that an executive branch official would be responsible for litigating cases in that court even if no others. First, neither Article III nor the Judiciary Act of 1789 provided textual authority for this Court's exercise of original jurisdiction in a dispute between the United States and a member state; such jurisdiction was not statutorily granted until 1948, well after the decision in *United States v. Texas*, 143 U.S. 621 (1892), holding that sovereign immunity did not preclude a suit by the United States against a state. Second, states could not fairly assume any original Supreme Court jurisdiction would be exclusive of (rather than concurrent with) original lower court jurisdiction, where they would have expected the United States to be represented by relators, private counsel, and independent district attorneys. *See Ames v. Kansas*, 111 U.S. 449, 469 (1884) (Congress may render Court's original jurisdiction concurrent rather than exclusive). Most significantly, qui tam actions to enforce federal statutory directives would necessarily present federal claims, and the Court's original jurisdiction was understood as being limited to suits that fell within Article III jurisdiction only because a state was a party, and not for any other reason. *See, e.g., Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 393-94, 398 (1821).

would not have insisted upon state suability only by centrally organized and politically accountable officials, an organizational pattern that was simply absent at the founding and that only emerged slowly and sporadically over a period of fourscore years. To embrace an executive form requirement on process value grounds, this Court would have to break sharply from its proclaimed commitment to reconstructing the framers' original understanding of state suability — precisely what it refused to do in either *Seminole Tribe* or *Alden*.[21]

2. The False Claims Act's Provisions for DOJ Oversight and Takeover Satisfy Any Reasonable Executive Form Requirement

Even if this Court chose to graft a modern executive form requirement onto US/p waiver doctrine, the fact that the FCA provides DOJ with ample means to monitor and take over privately-initiated litigation against states should suffice to satisfy any reasonable constitutional standard. The Court in *Alden* expressed concern over the lack of political accountability occasioned by a "broad delegation" of litigation authority to private persons. *Alden*, 119 S.Ct. at 2267 (emphasis added). But the Act's delegation of authority to qui tam plaintiffs is significantly circumscribed.

Indeed, compared to its founding-era precursors, the FCA affords executive officials an unprecedented degree of oversight and control over qui tam litigation. At time of the founding, if a private relator filed a qui tam action first she acquired exclusive control over the suit, and public prosecutors were entirely excluded from involvement.[22] By contrast, the modern Act

[21] In *Alden*, for example, this Court felt it unnecessary to respond to the dissent's claim that "past practice, even if unbroken, provides no basis for demanding preservation when the conditions on which the practice depended have changed in a constitutionally relevant way." 119 S.Ct. at 2290 (Souter, J., dissenting).

[22] *See, e.g., United States v. Griswold*, 24 F. 361, 364 (D. Ore. 1885) (at common law, an action initiated by a qui tam plaintiff remained

provides public officials with significant avenues for oversight and supervision. After a qui tam plaintiff files an action, she must give the United States the opportunity to intervene and take control of the action. The Act requires that the complaint filed by a qui tam plaintiff (or "relator") be kept under seal, without service on the defendant for at least sixty days, *Id.* §§ 3730(b)(2), (3), and that the government be provided with a copy of the complaint and "written disclosure of substantially all material evidence and information the person possesses" in order to permit the government to decide whether to intervene at the outset. *Id.* § 3720(b)(2). DOJ thus has sixty days (or more, with court consent) in which to conduct a "diligent" investigation of the qui tam plaintiff's allegations and decide whether to enter and direct the litigation. *Id.* § 3730(a), (b)(2)-(4).

If DOJ elects to intervene, it takes control of the suit: "it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action," *Id.* § 3730(c)(1), though the qui tam plaintiff remains a party and may continue to participate in the litigation. *Id.*[23] The government has substantial authority to terminate the suit even over the qui tam relator's objection.[24]

"exclusively under his control"); *Krent, supra* note 15, at 302 (noting that the government historically had no authority to intervene in a privately-initiated qui tam action).

[23] DOJ may seek a court order restricting the relator's participation upon a showing that unfettered participation would "interfere with or unduly delay the government's prosecution of the case, or would be repetitious, irrelevant, or for the purposes of harassment." *Id.* § 3730(c)(2)(C).

[24] The qui tam plaintiff is entitled to notice and a hearing prior to dismissal, 31 U.S.C. § 3730(c)(2)(A), so as to prevent DOJ from "drop[ping] the false claims case without legitimate reason." S. Rep. No. 345, 99th Cong., 2d Sess. 26, reprinted in 1986 U.S.C.C.A.N. 5266. DOJ may settle the case over the qui tam plaintiff's objections if the court determines after a hearing that the settlement is "fair, adequate, and reasonable under all the circumstances." 31 U.S.C. § 3730(c)(2)(B).

Alternatively, DOJ may leave the primary responsibility for directing the litigation to the qui tam plaintiff and monitor her progress and performance. *Id.* § 3730(c)(3). DOJ must consent prior to any dismissal of the action. *Id.* § 3730(b)(1). And DOJ may change its mind and intervene at any later date, upon a showing of good cause, to assume a more significant role in the litigation. *Id.* § 3730(c)(3).[25]

Through these various avenues, public officials can still consider and protect the state's abstract or tangible interests in avoiding liability, and they can still be responsive to direct political pressure from state officials, or any indirect pressure from the state's congressional representatives. One might even view a decision by DOJ not to exercise its authority to take over the litigation as a voluntary and politically accountable relinquishment of its enforcement power to enable a specific individual (and her counsel) to advocate the interests of the United States. Therefore, even if some measure of executive prosecutorial discretion were deemed necessary to secure important process values, the oversight role provided DOJ in the False Claims Act would satisfy this requirement.

Accordingly, a qui tam suit raises no constitutional concerns under the Eleventh Amendment or associated principles of state sovereign immunity.

II. STATES ARE "PERSONS" SUBJECT TO LIABILITY WITHIN THE MEANING OF THE FALSE CLAIMS ACT

At its core, the False Claims Act authorizes suits by the DOJ against "[a]ny person" who, among other things, knowingly submits false claims or false statements in support of false claims to the Federal Government. 31 U.S.C. § 3729(a)(1) and (2). Any holding that states are not "persons" for purposes of the FCA

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[25] To monitor the litigation prior to an intervention decision, DOJ may request that it be served with copies of all pleadings filed, and copies of all deposition transcripts. *Id.*

would prevent not merely individual enforcement actions against states under this provision, but also suits against states by the United States. Such a holding would be untenable and would disable the Federal Government from enforcing an important anti-fraud provision (meant by Congress to be all-encompassing) against a prime category of recipients of federal aid.

A. The Purposes of the FCA Require That States Be Deemed to Qualify as "Persons" Subject to Liability

States receive a massive and increasing amount of federal aid. Federal grants to state and local government more than doubled from $108 billion in 1987 to $228 billion in 1996. *See* Bureau of the Census, U.S. Department of Commerce, Publication FES/96, Federal Expenditures by State for Fiscal Year 1996 at 46, Table 11 (1997). For fiscal year 1998 (October 1, 1997 to September 30, 1998), the amount rose to $253 billion. Bureau of the Census, U.S. Department of Commerce, Federal Aid to States for Fiscal Year 1998.

State governments, as well as state universities, research facilities, hospitals, and political subdivisions, are thus in a position to commit substantial fraud against the United States. *See* David J. Cantelme, *Federal Grant Programs to State and Local Governments*, 25 Pub. L. Cont. L.J. 335, 335-36 (1996). The False Claims Act will not serve its intended purpose as an effective anti-fraud provision unless it is construed to subject states to liability. *See, e.g.*, John T. Boese, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS 2-91 (1993) (states qualify as defendants because they are "major recipients of federal funds").

This Court has long held that fraud with respect to federal-state aid creates liability under the FCA. Half a century ago, this Court explained:

> While at the time of passage of the original 1863 Act, federal aid to states consisted primarily of land grants, in subsequent years the state aid program has grown so that in 1941 approximately 10% of all federal money was distributed in this form. These funds are as much in need of protection from fraudulent claims as any other federal money. . . . The Senatorial sponsor of this bill broadly asserted that its object was to provide protection against those who would "cheat the United States."

United States ex rel. Marcus v. Hess, 317 U.S. 537, 544 (1943). The need to include states as defendants potentially subject to liability under the FCA is even more urgent today.

The understanding shared by Congress and the states that the False Claims Act includes states as "persons" subject to liability is mirrored by the history of the FCA. The Act has always been construed as a sweeping statute with narrowly confined exceptions carefully specified by Congress. "The original False Claims Act was passed in 1863 as a result of investigations of the fraudulent use of government funds during the Civil War. Debates at the time suggest that the Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." *United States v. Neifert-White Co.*, 390 U.S. 229, 232 (1968) (emphasis added).

An 1862 House Committee Report, in discussing various frauds committed during the Civil War, referred to certain state officials who had used war contracts for personal profit. *See* H.R. Rep. No. 2, 37th Cong., 2d Sess. at xxxviii-xxxix (1862). It is difficult to suppose that Congress had forgotten the results of this extensive investigation when it passed the False Claims Act the next year.[26]

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[26] To be sure, states have not been sued as defendants with great frequency under the FCA. But the lack of frequency is attributable not to any considered view that the statute excludes states from liability but rather to a combination of two factors: the fact that many federal-state grant programs are of relatively recent vintage and the fact that the FCA was historically an under-utilized statute (a flaw which Congress sought to remedy in the 1986 amendments).

B. The Text of the FCA Provides that States Are "Persons" Subject to Liability

"Whether the term 'person' when used in a federal statute includes a State cannot be abstractly declared, but depends upon its legislative environment," including "the subject matter [of the statute], the context, the legislative history, and the executive interpretation." *Sims v. United States*, 359 U.S. 108, 112 (1959); *see also United States v. Cooper*, 312 U.S. 600, 605 (1941). Thus, this Court has frequently held, as an ordinary matter of statutory interpretation, that the term "person" in a federal statute includes a state — even where Congress did not expressly define the term.[27]

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[27] *See, e.g., Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 205-07 (1991) (state is a "person" for purposes of federal railroad regulation); *Plumbers' Union v. Door County*, 359 U.S. 354, 359 (1959) ("This Court has held many times that government bodies not expressly included in a federal statute may, nevertheless, be subject to the law."); *California v. United States*, 320 U.S. 577, 585 (1944) (state held subject to Shipping Act); *Georgia v. Evans*, 316 U.S. 159, 161 (1942) (state is a "person" entitled to bring antitrust action under Sherman Act); *United States v. California*, 297 U.S. 175, 186 (1936) (state-run railroads subject to Federal Safety Appliance Act because it would be a mistake to exclude the states from an "act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action"); *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 91-92 (1934) ("It has been held many times that the United States or a state is a 'person' within the meaning of statutory provisions applying only to 'persons.'"); *Ohio v. Helvering*, 292 U.S. 360, 370 (1934) (holding that states engaged in sale of liquor were "persons" subject to federal liquor tax: "A state is a person within the meaning of a statute punishing the false making or fraudulent alteration of a public record 'with intent that any person may be defrauded.' Under a statute defining a negotiable note as a note made by one person whereby he promises to pay money to another person, and providing that the word 'person' should be construed to extend to every corporation capable by law of making contracts, it was held that the word included a state. And a state is a person or a corporation within the purview of the priority provisions of the Bankruptcy Act.") (citations omitted).

For several reasons, it is clear that the FCA — as initially enacted in 1863 and certainly as strengthened in 1986 — includes states as "persons" subject to liability.

1. The 1986 CID Provisions Make Clear that a State is a "Person" Under the FCA

Congress did not expressly define "person" in the liability section of the FCA. But the term is defined in the Civil Investigative Demands (CID) section of the Act, 31 U.S.C. § 3733, which Congress added in 1986. The CID provision authorizes as part of a "false claims law investigation" the service of CIDs on "person[s]." It defines "false claims law investigation" as "any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law." 31 U.S.C. § 3733(l)(2) (emphasis added). The CID provision of the FCA expressly defines "person" as "any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State." *Id.* § 3733(l)(4).[28]

The CID provision unmistakably demonstrates that a state is one of the "persons" subject to liability under the FCA. The CID provision is not limited (as some have suggested) to the issue of third-party discovery from innocent bystanders who are not themselves subject to FCA liability. Rather, a "false claims law investigation" is defined as an inquiry into "whether any person" — which the CID provision defines to include a state — "is or has been engaged in any violation of a false claims law." *Id.*

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[28] Petitioner contends that, if the term "person" as used in the FCA already included the states, this added definition would have been unnecessary. Petr. Br. at 20. But the added definition also makes clear that natural persons, corporations, and other entities are "persons" for purposes of the CID section of the Act; surely Petitioner cannot suggest that natural persons and corporations are outside the scope of the FCA! In short, it is obvious that in the CID section Congress was restating, rather than modifying, the definition of "persons" for purposes of the FCA.

§ 3733(a)(1)(B)(2). Any such "person" is subject to a lesser fine under the FCA if it cooperates with the federal investigation. *Id.* § 3729(a). Section 3733 demonstrates that a state may be a target of a "false claims law investigation" — and thus that a state may be a potential defendant subject to liability under the FCA.

It would be absurd to contend that states, defined as "persons" under § 3733, could be the targets of "false claims law investigations," but that states could not qualify as "persons" liable for any violations under § 3729. It would not make sense for Congress to use the identical term in two different parts of the same statute, intend two different meanings for the term, but only explicitly set out one of the two differing definitions. To the contrary, "identical words used in different parts of the same act are intended to have the same meaning." *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996).

In fact, the FCA contains only four specific exclusions from the broad class of "persons" who may be defendants under the Act: Members of Congress, members of the Judiciary, certain senior executive branch officials, and members of the armed forces under certain circumstances. 31 U.S.C. § 3730(e). Hence, Congress considered the types of potential defendants that should be excluded from the FCA but chose not to exclude states from the Act's scope.

2. The History of the 1986 Amendments Confirms That a State is a "Person" Under the FCA

The history of the 1986 amendments to the FCA confirms Congress's understanding that states had always qualified as "persons" subject to liability under the statute. The Senate Report stated that "[t]he False Claims Act reaches all parties who may submit false claims. The term 'persons' is used in its broad sense to include partnerships, associations, and corporations — as well as States and political subdivisions thereof." S. Rep. No. 345, 99th Cong., 1st Sess. 8 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5273 (emphasis added). To clarify and underscore the breadth of the category of defendants subject to liability under the FCA,

Congress in 1986 amended § 3729 to extend liability to "[a]ny person."[29]

Whatever its utility in other contexts,[30] such unmistakable legislative history should be accorded significant weight in the context of federal-state relations. The prominent statement in the 1986 Committee Report was adopted in the context of an amendment to § 3729 and put the states on notice that they were subject to liability under the FCA. The statement thereby enabled the political safeguards of federalism, *see Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 552-54 (1985), to function properly.

3. The States Have Long Understood that They Are "Persons" Under the FCA

Indeed, the states themselves have long understood that they are "persons" entitled to sue under the FCA. States have often brought suit as relators. *See, e.g., United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 650 (D.C. Cir. 1994); *United States ex rel. Woodward & State of Colorado v. County View Ctr., Inc.*, 797 F.2d 888 (10th Cir. 1986); *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984); *United States ex rel.*

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[29] The previous version of § 3729 applied to "a person not a member of an armed forces . . . ," 31 U.S.C. § 3729 (1982), which — while inartful — nonetheless included states, corporations, and other artificial persons and legal entities. *See, e.g., United States ex rel. Woodward & State of Colorado v. Country View Care Ctr., Inc.*, 797 F.2d 888 (10th Cir. 1986) (applying FCA to corporate defendant). Any suggestion that the pre-1986 version of § 3729 was limited to natural persons would be untenable.

[30] *See Garcia v. United States*, 469 U.S. 70, 76 (1984) ("[W]e have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation'") (*quoting Zuber v. Allen*, 396 U.S. 168, 186 (1969)).

Hartigan v. Palumbo Bros., Inc., 797 F. Supp. 624 (N.D. Ill. 1992).

Yet the same term — "person" — defines who may sue and who may be sued under the FCA; indeed, the term "person" is used interchangeably throughout the statute to describe both parties. Compare § 3729, § 3730(a), and § 3730(b). It is inconsistent for states to maintain that they are not "persons" for purposes of § 3729 when they have long availed themselves of the benefits of the statute by asserting that they are "persons" for purposes of § 3730(b).

Moreover, a 1986 amendment confirmed state authority to bring suit under the FCA by conferring jurisdiction on the district courts "over any action brought under the 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 [a qui tam suit] brought under Section 3730." 31 U.S.C. § 3732(b). This provision, enacted at the behest of the National Association of Attorneys General, was intended to allow "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. 345, 99th Cong., 2d Sess. 16 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5281; *see also id.* at 12-13, reprinted in 1986 U.S.C.C.A.N. at 5277-78 (disapproving *Dean* decision on unrelated jurisdictional grounds but not questioning Wisconsin's ability to be qui tam plaintiff). By its terms, § 3732(b) is not limited to allowing states to intervene to assert their "related" state-law claims, it also permits them to assert FCA claims in federal district court. In fact, because states are forbidden by 31 U.S.C. § 3730(b)(5) from intervening in FCA suits brought by private plaintiffs[31] the provision conferring

[31] Section 3730(b)(5) provides that "when a person brings an action under this subsection no person other than the [Federal] Government may intervene or bring a related action based on the facts underlying the pending action."

jurisdiction over a state's related claim under state law would be meaningless unless states could be qui tam relators.

C. The "Plain Statement Rule" Is Inapplicable

Because the FCA authorizes suits against the states by the United States (and not simply by private persons), the "plain statement" rule of such decisions as *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989), and *Gregory v. Ashcroft*, 501 U.S. 452 (1991), does not apply. "[T]he Constitution presents no barrier to lawsuits brought by the United States against a State. For purposes of such lawsuits, States are naturally just like 'any nongovernmental entity'; there are no special rules dictating when they may be sued by the Federal Government, nor is there a stringent interpretive principle guiding construction of statutes that appear to authorize such suits." *Pennsylvania v. Union Gas Co.*, 499 U.S. 1, 11 (1989), *overruled on other grounds*, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). Indeed, the United States may sue a state "with or without specific authorization from Congress." *United States v. Mississippi*, 380 U.S. 128, 140 (1965); *see also United States v. California*, 332 U.S. 19, 26-28 (1947) (no explicit statutory authorization is necessary before the Federal Government may sue a state).

Indeed, if anything, state liability under the False Claims Act preserves the essential balance of federalism. Such liability prevents an individual state from imposing externalities on its neighbors, by siphoning to itself federal funds intended for the benefit of the entire nation. By deterring as well as remedying state fraud, the FCA works to preserve the proper balance of federalism by reducing the ability of a state wrongfully to divert benefits to itself or to impose unjustified costs on sister states. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 428-29 (1819) (state tax on the national bank raised federalism concerns because the tax siphoned into Maryland's coffers federal funds intended to benefit all of the other states). The False Claims Act thus operates as a Union-reinforcing measure which reflects the same basic anti-discrimination and anti-protectionism principles as — for

example — the dormant Interstate, Foreign, and Indian Commerce Clauses.

Will and *Gregory* are inapposite. Those cases involved suits by private parties (not the United States) against a state. Implicit in each case was the notion that suits by private parties would alter the usual constitutional balance between the states and the federal government. In the case at bar, by contrast, there is no such alteration of the usual constitutional balance because the United States has unquestioned authority to sue the states. *See* Part I, *supra*.

In *Will*, for example, this Court held that a private party could not bring suit against a state agency in state court under 42 U.S.C. § 1983 because Congress had not abrogated the states' sovereign immunity in their own courts by enacting § 1983 as the Civil Rights Act of 1871. This Court explained that "[t]he doctrine of sovereign immunity was a familiar doctrine at common law. The principle is elementary that a State cannot be sued in its own courts without its consent. We cannot conclude that § 1983 was intended to disregard the well-established immunity of a State from being sued without its consent." 491 U.S. at 57-58. States have no corresponding immunity from suit by the United States.

In *Gregory*, this Court applied a "plain statement" rule only after concluding that application of the federal Age Discrimination in Employment Act to displace a Missouri state constitutional provision requiring state judges at a specified age would intrude upon a state's ability to structure its own form of government — a privilege reserved to the states by the Tenth Amendment. 501 U.S. at 460-64. By contrast, the application of the False Claims Act to prevent states, along with private corporations, researchers, universities, and others, from defrauding the federal government manifestly does not intrude upon any core governmental function. The states have no right or authority, traditional or otherwise, to engage in fraudulent conduct, wholly apart from whether such tortious activity is actionable under the FCA. *See Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 554 (1985) ("[N]othing in the overtime and minimum-wage requirements of

the FLSA . . . is destructive of state sovereignty . . . [because the state entity] faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet.").

Nor does the process by which a state receives federal funds resemble an essential state function. The state is in the position of a supplicant coming to the federal sovereign. "There is no coercion in subjecting states to the same conditions for federal funding as other grantees: States may avoid these requirements simply by declining to apply for and to accept these funds. But if they take the King's shilling, they take it cum onere." *United States ex rel. Zissler v. Regents of the University of Minnesota*, 154 F.3d 870, 873 (8th Cir. 1998) (Arnold, C.J.). Thus, in *Oklahoma v. Civil Service Comm'n*, 330 U.S. 127 (1947), this Court rejected a Tenth Amendment challenge to the application of the Hatch Act to the political activities of federally funded state employees, opining that the state could "follow the 'simple expedient' of not yielding to what she urges is federal coercion." *Id.* 143-44. *See also South Dakota v. Dole*, 483 U.S. 203, 210 (1987).

In *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 205-07 (1991), this Court held that the clear statement rule is a matter of statutory construction, not constitutional law, and that application of the rule would be inappropriate where it would frustrate congressional expectations. The same reasoning should govern here. *See also Alden v. Maine*, 119 S. Ct. 2240, 2258 (1999) (*Hilton* premised on the view that "[c]losing the door to FELA suits against state employers would have dislodged settled expectations and required an extensive legislative response").

Nor is the plain statement rule triggered by the treble damages provision of the FCA. *See* Petr. Br. 20-21. This Court has repeatedly held that the FCA is remedial in nature.[32]

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[32] The pre-1986 version of the FCA provided for double damages and penalties, yet this Court held that it was a remedial rather than punitive statute. *See United States v. Halper*, 490 U.S. 435, 449 (1988) (FCA's damages provision represents "rough remedial justice" as long as rational

In any event, even if the "plain statement" rule were applied in this case, it would be satisfied, for the reasons previously explained. Accordingly, this Court should hold that states are "persons" subject to liability under the FCA.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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relation exists between the government's loss and the damages imposed); *United States v. Bornstein*, 423 U.S. 303, 314-15 (1976) ("Congress intended the double-damages provision to play an important role in compensating the United States in cases where it has been defrauded," and the provision serves a "make-whole" function); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 551-52 (1943) ("the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole. . . . The inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress."). The 1986 amendments did not transform the statute from a remedial to a punitive one. See S. Rep. No. 99-345, at 7 (the Committee clarified that knowing standard did not require actual knowledge of fraud or specific intent to commit the fraud). The change from a double damages remedy to treble damages reflects Congress' judgment as to what constitutes "rough procedural justice." *Halper*, 490 U.S. at 449.