MOTION FILED
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No. 98-1828

In The

Supreme Court of the United States

STATE OF VERMONT AGENCY OF NATURAL RESOURCES,

Petitioner,

v.

UNITED STATES OF AMERICA EX REL. JONATHAN STEVENS,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

SUPPLEMENTAL BRIEF OF AMICUS CURIAE FEDERATION OF AMERICAN HEALTH SYSTEMS

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF OF AMICUS CURIAE FEDERATION OF AMERICAN HEALTH SYSTEMS RE: ARTICLE III STANDING

The Federation of American Health Systems hereby moves, pursuant to Sup. Ct. R. 37.3, for leave to file a supplemental brief *amicus curiae* in support of the petitioner, Vermont Agency of Natural Resources.[1] Letters from counsel for each of the parties consenting to the filing of this brief have been submitted to the Clerk of the Court. In addition, because the proposed *amicus curiae* brief is being submitted on a new issue on which the Court has sought supplemental briefing, *amicus* is also filing this motion for leave. A copy of the proposed brief is attached.

The Federation of American Health Systems ("FAHS") represents nearly 1,700 privately owned and managed community hospitals and health systems throughout the United States. Its members range from small rural hospitals to large urban centers and offer a variety of services including acute hospital care, outpatient services, skilled nursing care rehabilitation and psychiatric care.

According to Department of Justice statistics, in Fiscal Year 1998, 61% of qui tam cases involved the health industry and the Department of Health and Human Services. This is not surprising, as hospitals and other health care providers file thousands of repetitive claims to the Medicare program each year, and the False Claims Act's per-claim penalties ($5,000 to $10,000) make hospitals attractive targets for relators. Those same penalties make it doubly important that responsible government officials have the full authority and responsibility to enforce the False Claims Act. Thus, the issue on which the Court has directed supplemental briefing – "Does a private person have standing under

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[1] Pursuant to the Court's Order dated November 19, 1999, *amicus* will shortly file a printed version of this brief prepared in accordance with Rule 33.1 of this Court.

Article III to litigate claims of fraud upon the government?" – is particularly important for FAHS' members.

The proposed brief will assist the Court because *amicus* is uniquely positioned to point out: (1) the importance of this case to the nation's hospitals, whose ability to do business is disproportionately impacted by the current standing jurisprudence; and (2) the broad implications that the question posed by the Court has for all defendants subjected to suit by private persons under the False Claims Act.

For those reasons, *amicus* has an interest in presenting its views to the Court. Moreover, *amicus* believes it will present views that are not reflected in the parties' submissions both because the Article III issue has particular significance for *amicus*, and because the state of Vermont did not raise the Article III standing issue below. Therefore, without this submission, the Court may not fully appreciate the significant Article III (and related Article II) issues presented whenever a relator is allowed to initiate or continue litigation against a private party under the False Claims Act.

Accordingly, *amicus* respectfully requests that the Court grant leave to file the attached *amicus curiae* brief.

November 30, 1999

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

MISCELLANEOUS

INTEREST OF AMICUS CURIAE

The Federation of American Health Systems (FAHS) is the national representative of 1,700 privately owned or managed community hospitals and health systems throughout the United States.[1] Its members range from small rural hospitals to large urban centers and offer a variety of services including acute hospital care, outpatient services, skilled nursing care, rehabilitation, and psychiatric care.

According to Department of Justice statistics, in Fiscal Year 1998, 61% of qui tam cases involved the health industry, and a significant number of these cases are brought against hospitals. Thus, the issue on which the Court has directed supplemental briefing – "Does a private person have standing under Article III to litigate claims of fraud upon the government?"—is particularly important for FAHS' members.

SUMMARY OF ARGUMENT

A private person lacks standing under Article III to litigate claims of fraud upon the government because such a person has not suffered a concrete, personal injury-in-fact, an irreducible constitutional minimum of Article III standing. It is not disputed here that a qui tam relator has suffered no concrete personal injury as a result of a defendant's alleged fraud upon the government. What is disputed is whether a qui tam relator nevertheless has standing purely by operation of the False Claims Act ("FCA"). The FCA's "bounty" provision does not permissibly confer standing on a relator who has otherwise suffered no concrete, personal injury from the challenged conduct. Nor does the FCA purport to, and it could not constitutionally,

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[1] Letters from counsel for each of the parties consenting to the filing of this brief have been submitted to 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 or its members have made a monetary contribution to the preparation and submission of this brief.

confer standing on a qui tam relator by "assigning" the government's claim of injury to the relator.

ARGUMENT

This case, like all others initiated by private persons under the FCA, raises a critical question that goes to the heart of the Constitution's requirement that plaintiffs in the federal courts must suffer distinct personal injury. This Court has repeatedly said that the:

> "irreducible constitutional minimum of standing" contains three requirements. First . . . there must be alleged . . . an "injury in fact" -- a harm suffered by the plaintiff that is "concrete" and "actual or imminent," not "conjectural" or "hypothetical." Second, there must be causation -- a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. And third, there must be redressability -- a likelihood that the requested relief will redress the alleged injury.

Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 102-03 (1998). As this Court explained in Allen v. Wright, 468 U.S. 737 (1984),

> the case-or-controversy doctrines [of standing, mootness, ripeness, political question, and the like] state fundamental limits on federal judicial power in our system of government. The Article III doctrine that requires a litigant to have "standing" to invoke the power of a federal court is perhaps the most important of these doctrines.

Id. at 750. This Court further explained that the "law of Art[icle] III standing is built on a single basic idea – the idea of separation of powers." Id. at 752. Whether standing exists "must be answered by reference to the Art[icle] III notion that federal courts may exercise power only 'in the last resort, and as a necessity,' and only when adjudication is 'consistent with a system of separated powers.'" Id. (citations omitted).

I. AN FCA RELATOR SUFFERS NO PERSONAL INJURY-IN-FACT AND THE INTEREST IN RECEIVING A BOUNTY DOES NOT DISPENSE WITH THE INJURY-IN-FACT REQUIREMENT

It is not disputed that a relator does not suffer injury-in-fact from the alleged fraud upon the government, and the relator's financial interest in the bounty is no substitute. The bounty

provision does not alter the fact that the relator has suffered no injury prior to, or independent of the right to vindicate that injury in Court. The "right" to a bounty is solely an outgrowth of the lawsuit itself, and creates no right that the defendant might violate. A private person is entitled to recover only if he is the first person to file suit on the allegations, and the size of the recovery turns, in part, on how much effort the relator contributes to the litigation and whether the relator was responsible for the violation. See 31 U.S.C. § 3730(d) (1994). Indeed, an FCA judgment is awarded to the government, and a relator's right to the bounty is enforceable solely against the United States, and not against the defendant. See, e.g., United States ex rel. Merena v. SmithKline Beecham Corp., 52 F. Supp. 2d 420 (E.D. Pa. 1998) (dispute between relator and government over relator's percentage of recovery).

The FCA bounty obviously gives the relator a sizable *interest* in the outcome of the case, and creates "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends." See, e.g., Baker v. Carr, 369 U.S. 186, 204 (1962). But this Court has clearly held that while "concrete adverseness" is necessary to confer standing, it is not sufficient. See, e.g., Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 224 (1974) (standing requires both "concrete" injury and "concrete adverseness"). To ensure the constitutional separation of powers and that the courts exercise power "in the last resort, and only as a necessity," a plaintiff must have suffered injury from the challenged conduct. Id. The bounty may create a motivation that brings a relator "sharply into conflict with [a defendant], but motivation is not a substitute for the actual injury needed." Id. at 225.

If an interest in the outcome conferred standing, Congress could manufacture standing simply by adding bounty provisions. Indeed, the following hypothetical statute would pass Article III muster: "(a) Any person may bring suit against any other person for a violation of any

federal law; (b) The person bringing suit need not demonstrate any personal injury from the challenged conduct; and (c) A successful plaintiff in such an action shall be entitled to a bounty from the United States Treasury."

Indeed, if financial interest in the outcome of a case were sufficient to confer standing, every lawyer handling a case on a contingency fee basis would have standing to sue in his own right. After all, the lawyer has a contractual right to a percentage of the recovery and a clear incentive to present forceful arguments. But that adversity alone, which is sure to "sharpen the presentation of issues," surely does not confer standing on the contingent fee lawyer because it does not reflect the existence of a real case or controversy between the lawyer and the defendant.

II. THE RELATOR DOES NOT HAVE STANDING ON THE THEORY THAT THE RELATOR HAS BEEN ASSIGNED THE GOVERNMENT'S CLAIM

The United States and the relator argue that the relator has standing as an "assignee" of the government's fraud claim. On this theory, standing is conferred on the relator by the government's injury-in-fact rather than by any injury personal to the relator himself. The problem with this theory is that Congress lacks the constitutional authority to confer standing on a private person to litigate on behalf of the United States, and the FCA does not purport to assign away the government's claims.

A. Article II and Principles of Separation of Powers Prohibit Congress From Assigning to Relators the Authority to Litigate on Behalf of the United States

The government may not assign its claims and its standing because Congress lacks the authority "to transfer from the President to the courts [and to private parties] the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), and would undermine the Constitution's creation of a "unitary Executive."

Article II of the Constitution commands that "the executive Power shall be vested in a President," U.S. Const. art. II, § 1 (the "Vesting Clause"), and gives the President – and only the President – the power to "take Care that the laws be faithfully executed," U.S. Const. art. II, § 3 (the "Take Care Clause"). The Appointments Clause of Article II, U.S. Const. art. II, § 2, cl. 2, buttresses the President's exclusive authority to oversee the execution of the laws by "vesting the President with the exclusive power to select the principal (noninferior) officers of the United States [with the advice and consent of the Senate]," Edmond v. United States, 520 U.S. 651, 659 (1997), while allowing Congress to vest the appointment of inferior officers "in the President alone, in the Courts of Law, or in the Heads of Departments," U.S. Const. art. II, § 2, cl. 2. Any governmental agent who exercises "significant authority pursuant to the laws of the United States" is covered by the Appointments Clause, Edmond, 520 U.S. at 662, and any other person employed by the United States must be a "lesser functionar[y] subordinate to [an] officer of the United States." Buckley v. Valeo, 424 U.S. 1, 126 n.162 (1976).

The Vesting, Take Care, and Appointments Clauses of Article II work hand-in-glove to create the constitutional structure of the unitary Executive: the Executive Power resides solely with the President, who exercises that power both personally and through officers whom he appoints, and through the inferior officers and employees who are subordinate to the officers controlled by the President. As Madison recognized,

> If the Constitution has invested all executive power in the President, I venture to assert that the Legislature has no right to diminish or modify his executive authority. . . . I conceive that if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws.

1 Annals of Cong. 463 (1789). While this Court has acknowledged its "flexible understanding" of the separation of powers, Mistretta v. United States, 488 U.S. 361, 381 (1989), the Court has

carefully adhered to the fundamental principle identified by Madison as inherent in the notion of a unitary Executive: any person who exercises the executive authority of the United States must be subject to at least some control by the President or his agents. See Morrison v. Olson, 487 U.S. 654, 684 (1988); Bowsher v. Synar, 478 U.S. 714, 730 (1986); INS v. Chadha, 462 U.S. 919, 951-52 (1983).[2]

Morrison is especially instructive here. At the heart of the separation-of-powers challenge to the independent counsel statute in that case was the argument that the statute "reduced the amount of control or supervision that the Attorney General and, through him, the President exercised[d] over the investigation and prosecution of a certain class of alleged criminal activity." 487 U.S. at 695 (internal quotation marks omitted). While acknowledging that the Act reduced the President's control and supervision over the investigation and prosecution of cases, the Court emphasized that the Attorney General could still remove the independent counsel for "good cause" or for "misconduct." Id. at 692. That limitation on removal, the Court held, did not "sufficiently deprive the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws." Id. at 693.

Morrison makes plain that the Executive Branch must retain sufficient control over the actions an individual takes in the name of the United States. The 1986 FCA relator provisions violate this principle. The Constitution commits the power to litigate on behalf of the United States solely to the Executive Branch. See, e.g., Buckley v. Valeo, 424 U.S. 1, 138 (1976) (per curiam) ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the laws be

[2] Young v. United States ex rel. Vuitton, 481 U.S. 787 (1987), is not to the contrary. That case allowed a court to appoint a private attorney to prosecute criminal contempt charges as ancillary to the court's judicial power so that

faithfully executed."). But when the government declines to enter a case, the relator has sole and complete discretion to litigate the matter further, even though the Executive Branch has exercised its discretion *not* to litigate. Neither the President nor the Attorney General can remove the relator, or control his arguments or litigation strategy in any way. The government may seek to dismiss the case, but only upon a heightened showing and with the Court's approval. The relator may oppose the motion – even while he is supposedly acting as its agent. In other words, the Executive Branch exercises *no* control over the actions of the private relator and the statute's delegation of executive authority to the relator is therefore plainly impermissible.

The same is true even when the government elects to join a privately initiated lawsuit. Although at that point the government has primary responsibility for conducting the litigation, it does not have full control and does not control the actions of its putative agent. The statute specifically allows the relator to continue as a party and the relator may issue discovery requests that the government would not, may testify when the government would not call him, may call other witnesses the government would not call, may cross-examine in ways the government would not. Most importantly, a relator is expressly entitled to object to any settlement proposed by the government and force a hearing, at which the court – not the constitutional representatives of the United States – is required to determine whether the settlement is fair, adequate, and reasonable under all the circumstances. Moreover, the government's authority to take responsibility for the action is limited, because if the government seeks to intervene after it has previously declined to do so, it must show good cause. See 31 U.S.C. § 3730(b)-(c).

At this stage, then, not only has the executive power been vested in a private person completely outside the control of the executive branch, it would be vested there in part for the purpose of frustrating the exercise of executive power by the actual, politically accountable,

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the court could protect its own authority. See id. at 800-01.

constitutionally designated executive authority. Even where the government concludes that the public's interests are best served by a particular settlement, the legal, and – more often – practical need to satisfy the purely private, economic self-interest of the relator often precludes the parties from settling the action on terms the government believes appropriate.

B. The 1986 FCA Does Not Transfer To Future Relators As a Class the Ownership Of the Government's Inchoate Claims

The 1986 FCA does not "assign" claims to relators as a class because the fundamental principle of assignment is that "the owner must manifest 'an intention to make the assignee the owner of [the] claim.'" Advanced Magnetics, Inc. v. Bayfront Partners, Inc., 106 F.3d 11, 17 (2d Cir. 1997). This requires a showing that the government, as transferor, has "divest[ed] itself of control over the subject matter assigned." 6 Am. Jur. 2d Assignments § 112 (1999). "An assignment transfers ownership of a right or interest from one party to another. Under a valid assignment, the assignee of a claim *becomes the real party in interest* for that claim . . . . The assignor cannot sue on the claim." 17 James Wm. Moore et al., Moore's Federal Practice § 17.11 (3d ed. 1998). Under these standards, the FCA cannot be interpreted as effecting an assignment, because no relator has been transferred "ownership" of the claim, the relator does not have full control of the claims, and the government retains the right to sue simultaneously on the very same claims. Indeed, one of the limits on the exercise of federal jurisdiction is "the general prohibition on a litigant's raising another person's legal rights." Allen v. Wright, 468 U.S. 737, 750 (1984).

Although relators wield very substantial powers under the FCA, neither they nor the government have full control of the litigation. Since 1986, if the government intervenes in a case, both it and the relator are considered parties and have the right to pursue the exact same claims. See 31 U.S.C. § 3730(c). Each has the right to conduct discovery, file motions, and take

inconsistent positions regarding the very same claim. See id. Yet, the relator cannot settle or dismiss the case without the government's consent, and the government cannot settle without the relator's consent, unless the Court conducts a hearing and approves the government's disposition of the case. See id. § 3730(b)-(c). Thus, the 1986 FCA qui tam provisions force defendants to face both the United States (which originally owned the claims) and the relator (to whom the claim has purportedly been assigned). It defies logic and common sense to assert that Congress "assigned" the claim (so as to confer standing on the relator) and yet retained ownership and the right to proceed with it simultaneously.[3]

Simply referring to the qui tam provisions as effecting a "partial assignment," as the United States does, cannot solve this problem. (See Brief of United States, dated October 22, 1999, at 41.) Where the government intervenes, both parties are litigating the exact same claims. The relator is entitled to a share of the proceeds, but he litigates the full extent of the claims, just like the government. In a partial assignment, the ownership of the claims is divided, and each party controls the litigation of the claims it owns. See Moore et al., supra, § 17.11; Restatement (Second) of Contracts § 326 cmt. b (1981) ("The distinguishing feature of a partial assignment is a manifestation of intention to make an immediate transfer of part but not all of the assignor's right, and to confer on the assignee a direct right against the obligor to the performance *of that part*.") (emphasis added).

III. THE GOALS OF THE QUI TAM PROVISIONS CAN BE SERVED THROUGH OTHER MEANS

Courts have sometimes referred to the purported positive effect of the qui tam laws in explaining their decisions on FCA questions. Such considerations, of course, have no place in

[3] Whether a relator has standing does not turn on whether the government has intervened in the case, because standing must exist at the outset. At all stages, the relator lacks any personal injury and does not appropriately exercise the government's standing. That a relator lacks standing is most clear when the government has intervened.

the standing analysis because the need to adhere to the Constitution's limits on the judiciary's role is paramount. See Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 110 (1998). In any event, Congress can take other steps to encourage citizens to help detect and prosecute fraud. It could create significant rewards for relators who supply information leading to an FCA recovery by the government, and the amount of the reward could be made to depend on the level of effort the citizen puts forth in assisting in the case. Congress may not, however, manufacture standing for citizens to bring and prosecute lawsuits in the federal courts.

CONCLUSION

The Court should conclude that relators lack standing to initiate and prosecute lawsuits under the FCA.

Respectfully Submitted,

November 30, 1999

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because the relator cannot plausibly be said to be exercising standing delegated by the government at the very same time the government is exercising it.

Certificate of Service

I hereby certify that I caused a true and correct copy of the foregoing Supplemental Brief of Amicus Curiae Federation of American Health Systems re: Article III Standing, to be served on the following by depositing one copy of same, addressed to each individual respectively, and enclosed in a post-paid, properly addressed envelope, in an official depository maintained by the United States Postal Service to:

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