No. 98-1828

In The

Supreme Court of the United States

STATE OF VERMONT AGENCY OF NATURAL RESOURCES,

Petitioner,

v.

UNITED STATES OF AMERICA *EX REL.* JONATHAN STEVENS,

Respondent.

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

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether a State is a "person" subject to liability under 31 U.S.C. § 3729(a) of the False Claims Act.

2. Whether the Eleventh Amendment precludes a private relator from commencing and prosecuting a False Claims Act suit against an unconsenting State.

PARTIES TO THE PROCEEDING BELOW

The parties in the United States Court of Appeals for the Second Circuit were the plaintiff, Jonathan Stevens, a *qui tam* relator under the False Claims Act, and the Defendant State of Vermont, Agency of Natural Resources. The United States, while listed as a plaintiff, has not participated as a plaintiff at any stage of this matter. The United States intervened in the court of appeals to defend the False Claims Act's constitutionality as applied to the States, and to address Vermont's contention that the False Claims Act does not allow suits to be brought against the States.

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OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1-85) is published as *United States ex rel. Stevens v. State of Vermont Agency of Natural Resources*, 162 F.3d 195 (2d Cir. 1998). The decision of the United States District Court for the District of Vermont (Pet. App. 86-87) is not published.

JURISDICTION

The court of appeals' decision was entered on December 7, 1998. Rehearing and rehearing *en banc* were both denied on April 13, 1999. Pet. App. 89-90. Vermont's petition for writ of certiorari was filed on May 12, 1999 and was granted on June 24, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eleventh Amendment to the United States Constitution provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The False Claims Act, 31 U.S.C. §§ 3729-3733, is reproduced in the appendix to the petition for certiorari, Pet. App. 91-125.

STATEMENT OF THE CASE

1. The False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, imposes liability on "[a]ny person" who knowingly presents for payment a false or fraudulent claim to the United States. 31 U.S.C. § 3729(a)(1). Such a

person may be required to pay a civil penalty "of not less than $5,000 and not more than $10,000" per violation together with "3 times the amount of damages which the Government sustains." 31 U.S.C. § 3729(a). The term "person" as used in § 3729(a) is not defined in the FCA.

As explained in section II.C, below, the FCA specifically delegates to "private persons" the authority to bring "civil action[s] for a violation of section 3729" for themselves and for the United States Government. 31 U.S.C. § 3730(b). Such actions, also known as *qui tam*[1] actions, are brought by the private person "in the name of the Government." *Id.* When a private person files suit under the FCA, the complaint remains sealed for at least 60 days, while the United States decides whether to intervene and proceed with the action. 31 U.S.C. § 3730(b)(2). If the United States chooses not to intervene, the private "person who initiated the action shall have the right to conduct the action." 31 U.S.C. § 3730(b)(4)(B). Regardless of whether the United States intervenes, the private person has the right to continue as a party to the action. 31 U.S.C. § 3730(c)(1).

The private person receives "at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim" if the United States intervenes and "not less than 25 percent and not more than 30 percent of the proceeds" if the United States does not intervene. 31 U.S.C. § 3730(d)(1),(2). The private person is also entitled to costs, expenses, and attorneys' fees. *Id.*

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[1] "*Qui tam*" is the shortened version of the Latin phrase "*qui tam pro domino rege quam pro se imposo sequitur,*" which means "who brings the action as well for the king as for himself."

2. Vermont administers and enforces public health and environmental laws including the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.*, and state laws that implement these federal statutes. *See, e.g.*, Vt. Stat. Ann. tit. 10, chs. 47, 48, 56. These comprehensive public health and environmental protection statutes rely on the States' police powers and the traditional role of the States in our federalist system. *See, e.g.*, 33 U.S.C. § 1251(b) (Clean Water Act) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution."). Vermont administers and enforces these statutes in partnership with the Federal Government. *See, e.g.*, 33 U.S.C. § 1329(a),(b) (delegation to States to develop non-point source water pollution prevention programs). This partnership is facilitated through grants provided by the Environmental Protection Agency (EPA) to the Vermont Agency of Natural Resources ("VANR").

The plaintiff, Jonathan Stevens, was employed by VANR for a six-month period ending in January of 1994. He alleges that "[a]t times material to this action, [he] was an employee of the defendant." App. 33. He claims that Vermont's use of pre-approved percentages to account for staff time spent working under EPA grants violated Office of Management and Budget ("OMB") Circular A-87, and thus VANR's employee time records constitute false claims to the Federal Government.[2] App. 36, 38-39.

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[2] The pertinent provision of OMB Circular A-87 in effect while Stevens was employed by Vermont was issued in 1981 and remained in effect until September 1, 1995. It provides:

> Payroll and distribution of time. Amounts charged to grant programs for personal services, regardless of

The plaintiff does not allege, nor could he, that Vermont is not protecting the public health and environment. Moreover, EPA has no complaint with Vermont's administration of these grants. Vermont asked EPA to review the propriety of VANR's procedures in light of the plaintiff's allegations. EPA, with the assistance of the Department of Justice, has reviewed pertinent documents and interviewed several current and former VANR employees. EPA concluded that the procedures in place during the plaintiff's tenure with VANR "complied with the requirements of the 1981 version of Circular A-87, which was in effect until the first awards made after September 1, 1995." Letter from Stephen S. Perkins, EPA to E. Hale Ritchie, VANR (Feb. 20, 1998) (appended to this Brief at App. 1-App. 3). EPA also concluded that although Vermont was in technical non-compliance with the OMB circular from September 1, 1995 until May 25, 1997 – a time outside of the Complaint's scope – "we note that our review did not uncover any improprieties in the time charges during this period." *Id.*

3. On May 26, 1995, Stevens filed suit, under seal, against the State of Vermont under the *qui tam* provisions

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> whether treated as direct or indirect costs, will be based upon payrolls documented and provided in accordance with generally accepted practice of the State, local, or Indian tribal government. Payrolls must be supported by time and attendance or equivalent records for individual employees. Salaries and wages of employees chargeable to more than one grant program or other cost objective will be supported by appropriate time distribution records. The method used should produce an equitable distribution of time and effort.

OMB Circular No. A-87 Attach. B § 8 (h), 46 Fed. Reg. 9548, 9552 (1981).

of the FCA. App. 33, 41. He seeks twenty-five percent of treble damages and civil penalties arising out of the allegedly false claims Vermont made to EPA, plus attorneys' fees and costs. App. 40-41. The district court putatively exercised jurisdiction pursuant to 31 U.S.C. §§ 3729, 3730(b), 3732(a) and 28 U.S.C. § 1331. On June 26, 1996, after having conducted the diligent investigation required by 31 U.S.C. § 3730(a), the Federal Government gave notice of its election not to intervene in this matter.

On November 7, 1996, Stevens, exercising his right under the FCA, served the complaint on the State of Vermont, and began prosecuting, on his own behalf and nominally on behalf of the United States, the lawsuit he filed. *See* 31 U.S.C. § 3730(c)(3). Vermont moved to dismiss the complaint on the grounds that: (1) the district court lacks jurisdiction to entertain Stevens' suit because States are not "persons" subject to liability under the FCA and (2) the FCA's *qui tam* provisions violate the Eleventh Amendment as applied to State defendants. On May 9, 1997, the district court denied Vermont's motion to dismiss. Pet. App. 86-89. On June 10, 1997, the district court denied reconsideration. App. 42.[3] The proceedings before the district court have been stayed pending Vermont's appeal to the court of appeals and this Court.

4. On December 7, 1998, a divided court of appeals affirmed the district court's denial of Vermont's motion to dismiss. It held that the Eleventh Amendment does not bar this lawsuit because the United States is the real party in interest and therefore the Eleventh Amendment does

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[3] Due to a printing error, the order denying reconsideration is not accurately reproduced in the appendix to Vermont's petition for certiorari. The correct version is in the Joint Appendix.

not apply. Pet. App. 18. The court of appeals also held that Congress intended to include States as "persons" subject to suit under the FCA. *Id.* at 30.

Judge Weinstein, sitting by designation, dissented. He concluded that "the False Claims Act unnecessarily upsets a cooperative process essential to American federalism" and thus, Stevens' claim should be barred by the Constitution. *Id.* at 85.

SUMMARY OF THE ARGUMENT

The FCA uses only the undefined term "person" to describe those liable under the Act. 31 U.S.C. § 3729(a). As this Court has repeatedly held, the term "person" does not ordinarily include the sovereign States. *See, e.g., Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979). Thus, the Court need look no further than the plain language of § 3729(a) to determine that States are not "persons" who may be sued under the Act.

This ordinary meaning of the term "person" is nonetheless reinforced by both the clear statement rule and the doctrine of constitutional doubt. As the FCA would alter the "usual constitutional balance" between the States and the Federal Government, this Court should not interpret the FCA to impose liability on the States absent a clear statement of Congressional intent. *See, e.g., Will*, 491 U.S. at 65. Following the plain meaning of the term "person" as excluding States also permits the Court to avoid a "grave and doubtful constitutional question": whether a suit under the Act commenced and prosecuted against a State by a private person violates the Eleventh Amendment. *See, e.g., United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 407 (1909).

The purpose and context of the FCA do not support inclusion of States within the term "person." Nothing in the language of the original Act – passed in 1863 as a response to fraud by Civil War contractors – suggests that Congress intended to permit suits against States and subject them to liability for double damages and civil penalties. Although the FCA has subsequently been amended to provide for treble damages and increased civil penalties, the meaning of the term "person" has not changed. These added measures are punitive and are not appropriately assessed against States and other governmental units, thus further indicating that States are not "persons." *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981).

The States' consent to suit by the United States is limited to suits commenced and prosecuted under the discretion and control of responsible executive branch officials. The exercise of such discretion and authority cannot be delegated or assigned: "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." *Alden v. Maine*, 119 S. Ct. 2240, 2267 (1999) (emphasis added).

The FCA, to the extent that it imposes liability on the States, allows a private person to commence and prosecute a suit against a State. The private person's commencement and prosecution of such litigation does not involve the United States' discretion and control. To the contrary, pursuit of this matter stems from plaintiff Stevens' exercise of rights granted to private persons by the FCA. Thus, this suit violates the Eleventh Amendment because it is not subject to the United States' direct responsibility and control.

ARGUMENT

Jonathan Stevens is a private individual, not subject to the executive branch's control, who seeks to exercise the United States' sovereign authority to sue a State free from Eleventh Amendment limitations. As this Court recognized last Term, the States in the plan of convention reserved their sovereign immunity to suits by private persons and consented only to suit by other States and the Federal Government. *See Alden*, 119 S. Ct. at 2267. Such suits, of course, must be of sufficient importance to require the United States to take action against another sovereign. *See id.* The decision that an issue has risen to such importance rests exclusively with politically responsible executive branch officers. *See Blatchford v. Native Village*, 501 U.S. 775, 785 (1991). There can be no question that a suit against a State brought solely at a private person's behest is not a suit by the United States.

However, the Court need not address the issue of whether the United States may delegate to private persons its sovereign authority to sue a State. In light of the States' role in the plan of convention, Congress must be unusually explicit if it really intends to authorize suit against States under the FCA. The FCA contains no such explicit statements. Indeed, Congress never contemplated, much less intended, to permit suits by private persons against States under the False Claims Act.

I. A STATE IS NOT A "PERSON" SUBJECT TO LIABILITY UNDER 31 U.S.C. § 3729(a) OF THE FALSE CLAIMS ACT.

In 1863, in the midst of the Civil War, Congress faced growing frustration with "the massive frauds perpetrated by large contractors." *United States v. Bornstein*, 423 U.S. 303, 309 (1976). Anxious to stop this plundering of the

Nation's treasury, Congress enacted the statute now known as the False Claims Act. *See* An Act to prevent and punish Frauds upon the Government of the United States, ch. 67, 12 Stat. 696 (1863). The Act authorized *qui tam* suits – suits prosecuted by private individuals on behalf of themselves and the United States – as a device for recovering monies of which the Federal Government had been defrauded. Members of Congress saw some advantage in permitting private individuals "acting . . . under the strong stimulus of personal ill will or the hope of gain," *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997) (internal quotation marks omitted), to pursue actions against persons alleged to have defrauded the government. Authorizing *qui tam* actions allowed Congress to harness the potential greed of private citizens in pursuit of those guilty of fraud. *See id.* (*qui tam* actions are one of the least expensive and most effective devices for preventing frauds on government).

The court of appeals examined the FCA against this background and nonetheless concluded that Congress intended to impose liability on States under the Act. This interpretation of the FCA defies common sense. The 1863 Congress had no intention of enacting a statute that subjected the States to suits by private individuals and informers – persons motivated primarily by greed and not by an interest in the public good. That particular Congress, well aware of the burdens and costs of the Civil War on the States of the Union, would not have subjected the States to liability for double damages and substantial fines. Indeed, there is not a shred of evidence, in either the language of the Act or in its legislative history, that suggests that Congress even contemplated such a result. Congress merely enacted a statute that

imposed liability on "person[s]." In other words, Congress described those subject to liability under the Act with a term that ordinarily does *not* include the States. *See, e.g., Will*, 491 U.S. at 64.

The holding of the court of appeals, that States are "persons" subject to liability under the FCA, is inconsistent with the FCA's plain language, the clear statement rule, the doctrine of constitutional doubt, and with the FCA's context and purpose. It should not stand.

A. THE FALSE CLAIMS ACT'S PLAIN LANGUAGE EXCLUDES STATES.

As this Court recently reaffirmed, analysis of an issue of statutory construction "begins with 'the language of the statute.' And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 119 S. Ct. 755, 760 (1999) (citation omitted) (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)). Here, the relevant statutory language is straightforward: the FCA provides only that "any person who" commits certain fraudulent acts against the United States is liable for civil penalties, treble damages, fees, and costs. 31 U.S.C. § 3729(a). Although the term "person" as used in § 3729(a) is not defined in the Act, this Court has repeatedly held that " ' "in common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it." ' " *Will*, 491 U.S. at 64 (quoting *Wilson*, 442 U.S. at 667 (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941))); *see also FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (where term is not defined in statute, Court construes term in accordance with its ordinary or natural meaning). Thus, the statutory language provides a clear

answer to this issue of statutory construction: States are not "persons" liable under the FCA.

This Court's holdings in *Will* and *Wilson* are particularly relevant to the interpretation of the FCA. *See Will*, 491 U.S. at 64 (State is not a "person" subject to liability under the Civil Rights Act of 1871, 42 U.S.C. § 1983); *Wilson*, 442 U.S. at 667 (State is not a "white person" for purposes of 25 U.S.C. § 194, which shifts burden of proof in property rights case between Indian and "white person"). Like the FCA, the statutes at issue in *Will* and *Wilson* were first enacted in the nineteenth-century; indeed, the Civil Rights Act of 1871, at issue in *Will*, was enacted just eight years after the FCA. *See Smith v. Wade*, 461 U.S. 30, 85 (1983) (Rehnquist, J., dissenting) (as FCA and § 1983 are "roughly contemporaneous," express provision for double damages and civil forfeiture penalty under FCA indicates that Congress did not intend to permit punitive damages under § 1983). And, in both *Will* and *Wilson*, the Court recognized that following the common usage of the term "person" is particularly appropriate in interpreting a statute that imposes a burden or a liability. *See Will*, 491 U.S. at 64 (following common usage of "person" as excluding sovereign is "particularly applicable where it is claimed that Congress has subjected the States to liability to which they had not been subject before"); *Wilson*, 442 U.S. at 667 (ordinary rule that "person" does not include sovereign is "[p]articularly . . . true where the statute imposes a burden or limitation, as distinguished from conferring a benefit or advantage").

In light of the Court's holdings in *Will* and *Wilson*, the Court's analysis of this provision of the FCA should begin, and end, with the language of the statute. As applied to the States, the meaning of the term "person" in § 3729(a) of the FCA is clear and unambiguous. States are

not "persons" and therefore they are not subject to liability under the Act.

B. THE CLEAR STATEMENT RULE AND THE DOCTRINE OF CONSTITUTIONAL DOUBT COMPEL THE CONCLUSION THAT STATES ARE NOT PERSONS SUBJECT TO FALSE CLAIMS ACT LIABILITY.

1. If this Court is to look further than § 3729(a)'s plain language, the FCA must nonetheless be construed in light of this Court's "clear statement" jurisprudence. The clear statement rule requires Congress to make its intention "to alter the 'usual constitutional balance between the States and the Federal Government' . . . '*unmistakably clear in the language of the statute.*' " *Will*, 491 U.S. at 65 (emphasis added) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). The Court has described the clear statement rule as "nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). To that end, the Court has traditionally applied the clear statement rule to construe federal statutes that potentially impose financial liability on States, subject States to suit by private parties, or otherwise intrude on state sovereignty. *See, e.g., id.* at 467 (declining to interpret Age Discrimination in Employment Act to apply to state court judges, absent clear statement from Congress that it intended such a result); *Will*, 491 U.S. at 65 (declining to hold that States are "persons" subject to liability under 42 U.S.C. § 1983, absent clear statement of Congressional intent); *Atascadero*, 473 U.S. at 246 (declining to interpret Rehabilitation Act as overriding state sovereign immunity,

absent unequivocal statutory language showing that Congress specifically chose to subject States to federal jurisdiction); *Pennhurst State Sch. & Hosp. v. Halderman ("Pennhurst I")*, 451 U.S. 1, 24-25 (1981) (declining to interpret federal statute as imposing affirmative obligations on States where Congress did not clearly express its intent to impose conditions on grant of federal funds to States); *United States v. Bass*, 404 U.S. 336, 349-50 (1971) (absent clear statement from Congress, Court will not assume that Congress intended to change significantly sensitive relationship between federal and state criminal jurisdiction).

There can be no question that imposing liability on the States under the FCA would alter the "usual constitutional balance" between the States and the Federal Government. The Act bears several of the characteristics that have elsewhere prompted this Court to apply the clear statement rule. First, the Act would subject the States to suits commenced and prosecuted by private individuals, calling into question the protections of the Eleventh Amendment. As argued in Part II, *infra*, a *qui tam* suit by a private individual against a State under the FCA violates state sovereign immunity. "[P]rinciples of federalism," however, "require [the Court] always to apply the clear statement rule before . . . consider[ing] the constitutional question." *Seminole Tribe v. Florida*, 517 U.S. 44, 71 n.15 (1996). Typically, then, this Court first asks whether Congress " 'unequivocally expressed its intent to abrogate the immunity' " in a particular statute, and only then considers whether Congress "acted 'pursuant to a valid exercise of power.' " *Id.* at 55 (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)). The FCA's " 'general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.' " *Id.* at 56 (quoting *Atascadero*, 473 U.S. at

246). Moreover, authorizing private persons rather than responsible federal officials to sue States on behalf of the United States strikes directly at the balance of federal/state power struck in the plan of convention, altering the "usual constitutional balance" between the Federal Government and the States. *See Hilton v. South Carolina Public Rys. Comm'n*, 502 U.S. 197, 209 (1991) (O'Connor, J., dissenting) (clear statement rule protects balance of power between States and Federal Government as established in Constitution).

Second, the Act would place States at risk for substantial financial liability, including costs of defense and the punitive sanctions of civil penalties and treble damages – yet nowhere in the Act did Congress indicate that it intended to impose such unprecedented financial liability on the States. As the States routinely rely on federal funds to administer and enforce a wide range of necessary government programs, the potential cost to the States to litigate and defend suits under the Act cannot be overstated.[4] This Court should adhere to its reasoning in

[4] This is not an idle concern; in recent years, the number of *qui tam* cases brought against States has mushroomed. *See, e.g., United States ex rel. Long v. SCS Business & Tech. Inst., Inc.*, 173 F.3d 870, *supp. op.*, 173 F.3d 890 (D.C. Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3116 (U.S. Aug. 2, 1999); *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279 (5th Cir. 1999); *United States ex rel. Zissler v. Regents of the Univ. of Minn.*, 154 F.3d 870 (8th Cir. 1998); *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865 (8th Cir. 1998), *cert. dismissed*, 119 S. Ct. 2387 (1999); *United States ex rel. Milam v. University of Texas*, 961 F.2d 46 (4th Cir. 1992). Regardless of the merit of the underlying allegations, such cases – which probe the most arcane details of complicated federal-state programs – impose substantial defense costs on the States. *Cf. United States ex rel. Berge v. Board of Trustees of the Univ. of Ala.*, 104 F.3d 1453, 1458-59, 1462 (4th Cir. 1997) (after lengthy litigation, reversing trial court's decision in favor of relator on ground that relator failed to show that statements at issue were either false or material).

Pennhurst I, and "assume that Congress w[ould] not implicitly attempt to impose massive financial obligations on the States." 451 U.S. at 17.

Third, suits against States under the FCA impede the States' exercise of essential police power functions. The FCA's *qui tam* provisions permit private individuals – individuals motivated by nothing more than greed or perhaps ill will – to target and disrupt a State's core governmental functions. *See Hughes*, 520 U.S. at 949 (*qui tam* relators "are motivated primarily by prospects of monetary reward rather than the public good"). Whether a State expends its resources and funds to defend a suit, or settles a suit to avoid the risk of even greater liability, the State is forced to shift its limited resources away from essential programs intended to protect and benefit the general public. *Cf. Alden*, 119 S. Ct. at 2264 (private suits for money damages against nonconsenting States "may threaten financial integrity of States," creating "staggering burdens" and posing "a severe and notorious danger to the States and their resources").

In light of the concerns underlying this Court's "clear statement" rule, Congress's use of the undefined term "person" in § 3729(a) is plainly insufficient to provide evidence of Congressional intent to impose liability on the States under the FCA. *See Will*, 491 U.S. at 65 (Congress's use of undefined term "person" in § 1983 "falls far short of satisfying" the clear statement rule); *Atascadero*, 473 U.S. at 246 (statutory provision authorizing suits against "any recipient of federal assistance" insufficient to authorize suit against State in federal court).

The court of appeals nonetheless unpersuasively reasoned that the FCA does not alter the usual constitutional balance of federal and state powers because the goal of the FCA "is simply to remedy and deter . . . fraud" and the "States have no authority, traditional or otherwise, to engage in such conduct." Pet. App. 21. This narrow view of both the FCA and the States' sovereign interests is at odds with this Court's precedents. In applying the clear statement rule to § 1983 in *Will*, and the Age Discrimination in Employment Act in *Gregory*, the Court did not ask whether the States traditionally had authority to deprive citizens of their civil liberties or to discriminate against the elderly. Instead, the Court looked more broadly at whether applying those statutes to the States was consistent with the role of the States in our federal system. *See Gregory*, 501 U.S. at 460 (Congressional interference with decision of people of Missouri to define their constitutional officers would upset usual constitutional balance of federal and state powers); *Will*, 491 U.S. at 65 (applying clear statement rule to § 1983). As discussed above, permitting suits against States under the FCA would have a substantial impact on State authority. Accordingly, the court of appeals erred in not applying the clear statement rule.

2. Similarly, the court of appeals erred in not applying the "doctrine of constitutional doubt" in deciding whether States are "person" defendants under the FCA. The doctrine has force "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. at 408; *accord Pennsylvania Dep't of Corrections v. Yeskey*, 118 S. Ct. 1952, 1956 (1998). In such circumstances, a " 'statute must be

construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.' " *Rust v. Sullivan*, 500 U.S. 173, 190 (1991) (quoting *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916)).

Applying the doctrine of constitutional doubt eliminates any doubt that the FCA could reasonably be construed to impose liability on States. Adopting an interpretation of "person" that includes the States raises what is unquestionably a "grave and doubtful constitutional question": namely, whether suits under the Act commenced and prosecuted by private individuals against unconsenting States violate the States' Eleventh Amendment immunity. This question has led to a profound split of authority among the courts of appeals. *Compare* Pet. App. 18 (*qui tam* suits are in essence suits by United States and hence not barred by Eleventh Amendment) *with United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279, 294 (D.C. Cir. 1999) (where United States has not actively intervened in action, Eleventh Amendment bars *qui tam* plaintiffs from instituting suits against sovereign States in federal court) *and United States ex rel. Long v. SCS Business & Tech. Inst., Inc.*, 173 F.3d 870, 886 (D.C. Cir. 1999) (indicating "profound doubts" that Eleventh Amendment permits *qui tam* suit against State). As the term "person" used in § 3729(a) does not ordinarily include the States, this Court need not and should not entertain a contrary interpretation that raises such a fundamental constitutional issue.

C. THE FALSE CLAIMS ACT'S PURPOSE AND CONTEXT ARE ENTIRELY CONSISTENT WITH THE PLAIN MEANING OF "PERSON."

It is instructive that the overall purpose and context of the FCA fully support the plain, ordinary meaning of the term "person" as excluding the sovereign States. *See, e.g., Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) (words of statute should be read in their context and with view to their place in overall statutory scheme).

1. The Act was first passed in 1863, as "An Act to prevent and punish Frauds upon the Government of the United States." Act of Mar. 2, 1863, ch. 67, 12 Stat. 696. Nothing in the language of the original Act or in its legislative history suggests that Congress in 1863 intended or even contemplated that States would be subject to suit under the Act. The language chosen by the 1863 Congress, which imposed liability for false claims on "any person in the land or naval forces of the United States," and on "any person not in the military or naval forces," *id.* §§ 1, 3, is plainly inconsistent with an intent to include States – which cannot engage in military service – as potential defendants. In fact, as this Court has recognized, the Act's purpose was to stop "the massive frauds perpetrated by *large contractors* during the Civil War." *Bornstein*, 423 U.S. at 309 (emphasis added); *see also United States ex rel. Marcus v. Hess*, 317 U.S. 537, 547, 551-52 (1943). Contemporary statements by members of Congress indicate this widespread concern with fraud by private defense contractors. *See, e.g.*, Cong. Globe, 37th Cong., 3d Sess. 952 (1863) (statement of Senator Howard, describing numerous complaints of fraud and corruption by "persons who are contractors, or who are employed to contract for ships, vessels, steamers, watercraft, ordnance, arms, munitions of war").

Other provisions of the original Act are similarly inconsistent with an intent to impose liability on States. The Act provided for civil penalties, including double damages and fines, as well as possible criminal imprisonment for up to five years. Act of Mar. 2, 1863, § 3, 12 Stat. 696, 698. Obviously, a term of imprisonment may not be imposed on a State. Nor is it at all likely that Congress, in the midst of the Civil War, sought to burden the States fighting the war for the Union with liability for double damages and civil penalties. In short, there is simply no evidence that the 1863 Congress envisioned that the Act applied to the States.

2. The relevant language of the FCA remained virtually unchanged until the 1986 amendments.[5] At that time, § 3729(a) was changed slightly to apply to "[a]ny person," and the exception for actions involving persons in the armed forces was moved to a different section. False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 2, 100 Stat. 3153 (1986), *codified at* 31 U.S.C. §§ 3729(a), 3730(e). Although the 1986 amendments made substantive changes to other provisions of the FCA, the term "person" in § 3729(a) was retained and its meaning

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[5] In 1943, the FCA was amended to reduce the relator's share of the recovered proceeds and to require relators to contribute new information previously unknown to the government in order to bring suit. Act of Dec. 23, 1943, Pub. L. No. 213, 57 Stat. 608. The statute continued to impose liability on "[a]ny person not in the military." A 1982 amendment reorganized the statute but did not make any substantive changes; the liability section of the statute was rewritten slightly to apply to a "person not a member of the armed forces of the United States." Act of Sept. 13, 1982, Pub. L. 97-258, 96 Stat. 877, 978; *see also* H.R. Rep. No. 651, 97th Cong., 2d Sess. 1, 3, 143 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1895, 1897, 2037.

was not changed. *See* S. Rep. No. 345, 99th Cong., 2d Sess. 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267 ("1986 Senate Report") (discussing purposes of proposed amendments to FCA).

Moreover, as with the original Act, other provisions of the 1986 amendments are inconsistent with including States as defendants under the FCA. The 1986 Congress added 31 U.S.C. § 3733, which authorizes the Attorney General to issue a civil investigative demand to "any person" with information relevant to a false claims investigation. Solely for purposes of this new section, Congress specifically defined "person" to include "any State or political subdivision of a State." 31 U.S.C. § 3733(*l*)(4). If the term "person" as used in the FCA already included the States, this added definition would have been unnecessary. The decision to include this definition of "person" in § 3733 plainly shows that Congress used express language where it intended the term "person" in the FCA to include the States. *See, e.g., Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) (where Congress includes particular language in one section of statute but omits it in another section of same statute, Court generally presumes that Congress acted intentionally and purposely in so doing).

The 1986 amendments also substantially increased the punitive nature of the FCA by changing the provision for double damages to treble damages and increasing the civil penalty from two thousand dollars to between five and ten thousand dollars.[6] Treble damages are inherently

[6] A report from the Congressional Budget Office, included as part of the legislative history of the 1986 amendments, noted that the proposed amendments increased the penalties and damages under the Act, but concluded that the amendments would "involve no significant costs to the federal government or to state or local governments." 1986 Senate Report at 37, 1986 U.S.C.C.A.N. at 5302 (Letter from Rudolph G. Penner, Director, Congressional Budget Office, to Senator Strom Thurmond, Chairman, Committee on the Judiciary, June 12, 1986). If States were thought to be potential defendants under the Act, the conclusion reached by the Congressional Budget Office would be grossly inaccurate.

punitive in nature.[7] *See, e.g., American Soc'y of Mechanical Engs., Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 574 (1982) (treble damages serve both punitive and deterrent purposes); *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) ("The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct. . . . "). Imposing such punitive sanctions on States would be unprecedented. In fact, just a few years before

[7] In *Hess*, the Court concluded that a *qui tam* action under the FCA does not violate double jeopardy where the defendant was previously subject to a criminal prosecution for the same conduct. 317 U.S. at 549. The Court declined to characterize the double damages provision of the original Act as punitive or criminal in nature, noting that "requiring payment of a lump sum and double damages will do no more than afford the government complete indemnity for the injuries done it." *Id.* The court of appeals in the present case relied on *Hess* to conclude that the present Act's treble damages provision is remedial, and not inconsistent with imposing liability on States. Pet. App. 29-30. This analysis is mistaken, for two reasons. First, the issue in *Hess* was whether the *qui tam* action was "punishment" for purposes of the double jeopardy clause, not whether States should be subjected to exemplary or punitive damages. *Hess*, at 548-49. The Court in *Hess* itself recognized that Congress could impose punitive damages as a civil remedy without running afoul of the double jeopardy clause. *Id.* at 550. Second, the present Act provides for treble damages as well as penalties, costs and fees; thus, it is no longer true that the Act does no more than make the government whole for its loss.

these amendments passed, this Court ruled that the 1871 Congress did not authorize awards of punitive damages against municipalities under 42 U.S.C. § 1983: "Damages awarded for punitive purposes . . . are not sensibly assessed against the governmental entity itself." *City of Newport*, 453 U.S. at 267 (1981). As the Court explained in *City of Newport*, imposing punitive awards on governmental entities places an unjustified burden on innocent taxpayers while doing little to deter future misconduct. *Id.* at 267-69. Particularly in light of this Court's decision in *City of Newport*, the punitive sanctions authorized by the 1986 amendments cannot be reconciled with an interpretation of § 3729(a) that includes States as potential defendants.

D. THE COURT OF APPEALS ERRED IN CONCLUDING THAT STATES ARE SUBJECT TO FALSE CLAIMS ACT LIABILITY.

In reaching its conclusion in this case, the court of appeals ignored the plain language of § 3729(a) of the FCA, declined to follow accepted rules of statutory construction and misconstrued the Act's purpose and context. Instead, the court of appeals determined that States are "person" defendants under the FCA based on: (1) the "consistent meaning" canon of statutory construction, (2) so-called legislative history pertaining to the Act, and (3) the Act's overall purpose of deterring fraud. In each case, the court of appeals was mistaken.

1. The court of appeals invoked the "consistent meaning" canon after looking to the use of the term "person" in 31 U.S.C. § 3730(b)(1), which provides that "[a] person may bring a civil action for a violation of section 3729 for the person and for the United States

Government." The court of appeals assumed that, because States are "person[s]" who may bring *qui tam* actions under § 3730(b)(1), States also must be "person" defendants under § 3729(a). *See* Pet. App. 23-24. This assumption is unfounded. Although the court of appeals "th[ought] it plain that the States are person[s] within the meaning of § 3730(b)(1)," *id.* at 23, in fact, to Vermont's knowledge, no court has held that a State is a "person" authorized to bring a *qui tam* action under the FCA.[8] That some States have acted as *qui tam* relators – and their authority to do so was apparently not challenged – is hardly conclusive as a matter of statutory interpretation. As the meaning of the term "person" as applied to *qui tam* plaintiffs is far from clear, the consistent meaning canon is simply irrelevant here.

Moreover, application of the consistent meaning canon to the uses of the term "person" in the FCA ignores the critical difference between authorizing a State to act as a *plaintiff* in some circumstances and imposing liability on a State as a *defendant*. States are sovereign entities, exercising authority jointly with the federal government as part of our federalist system. As this Court recently reaffirmed, " '[t]he constitutional role of the States sets them apart from other . . . defendants.' " *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2231 (1999) (quoting *Welch v. Texas Dep't of Highways*, 483 U.S. 468, 477 (1987)); *cf. Will*, 491 U.S. at 64

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[8] Vermont is aware of three published decisions in which a State brought a *qui tam* suit under the FCA. *See United States ex rel. Woodard v. Country View Care Center, 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. Hartigan v. Palumbo Bros.*, 797 F. Supp. 624 (N.D. Ill. 1992). None of these decisions address the issue of whether a State is a "person" plaintiff under the Act.

(following rule that statutes employing term "person" are ordinarily interpreted to exclude the sovereign is particularly appropriate where statute purports to impose liability on States). Thus, the question of whether a State may be a plaintiff under the FCA is a wholly different inquiry than the question of whether a State can be a defendant under the Act. The consistent meaning canon has no force under such circumstances. *See, e.g., Atlantic Cleaners & Dryers, Inc. v. United States*, 286 U.S. 427, 433 (1932) (presumption that term has same meaning in different parts of statute is "not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent"). The court of appeals therefore erred in relying on the consistent meaning canon to hold that a State may be a person defendant under the FCA.

2. The court of appeals relied on certain legislative reports that it erroneously characterized as legislative history. First, the court of appeals found persuasive evidence of Congressional intent in a Congressional report from 1862 that discussed instances of fraud on the part of state officials in connection with government contracts. *See* Pet. App. 25 (citing *Government Contracts*, H.R. Rep. No. 37-2, pt. Ii-a (1862)). This report was not prepared in connection with any proposed false-claims legislation and contains no reference to such legislation. Furthermore, while the report addresses instances of fraud by state officials, it does not suggest that Congress intended to impose liability on the States themselves. *Cf. Will*, 491 U.S. at 68 (although Congress intended to provide remedy under § 1983 for unconstitutional state action, Congress did not intend to include States themselves as

persons subject to liability). Contrary to the reasoning of the court of appeals, the 1862 report thus provides no indication that Congress intended to authorize *qui tam* suits against the States under a statute passed the following year.

The court of appeals also devoted substantial attention to the background statement of a Senate Committee report prepared in connection with the 1986 amendments to the FCA, *see* Pet. App. 11, 22-23, 25, 27-28, despite the fact that the 1986 amendments did not alter, amend or in any way change the meaning of the term "person" in § 3729(a). *See* 1986 Senate Report at 2, *reprinted in* 1986 U.S.C.C.A.N. at 5266-67 (discussing purposes of proposed amendments to FCA). This so-called "Background Statement" discussed the history of the FCA and past court interpretations of the Act. *See id.* at 8-13, 1986 U.S.C.C.A.N. at 5273-78. It suggests that the term "person" as used in the FCA included the States: "The False Claims Act reaches all parties who may submit false claims. The term "person" is used in its broad sense to include partnerships, associations, and corporations – as well as States and political subdivisions thereof." *Id.* at 8, 1986 U.S.C.C.A.N. at 5273 (citations omitted). This statement is supported by reference to three decisions of this Court, none of which in fact addressed the definition of "person" in the FCA. *Id.* (citing *Ohio v. Helvering*, 292 U.S. 360, 370 (1934); *Georgia v. Evans*, 316 U.S. 159, 161 (1942); *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978)).

This "Background Statement" is inaccurate and, in any event, entitled to no weight with respect to the meaning of the term "person" in the FCA. The Background Statement is not an explanation of Congress's intent in passing the 1986 amendments to the Act. It is simply an attempt by committee members of a later Congress to

expound on the meaning of a statute passed by another Congress some 123 years earlier. As this Court has often warned, " 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)).

Indeed, this Court has repeatedly rejected attempts to discern the views of an earlier Congress by relying on the opinions and observations of a later Congress. *See, e.g., NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 582 (1994) (isolated statement in 1974 committee report did not provide authoritative interpretation of portion of National Labor Relations Act enacted in 1947); *Pierce v. Underwood*, 487 U.S. 552, 566-67 (1988) (House report pertaining to 1985 reenactment of Equal Access to Justice Act did not provide authoritative interpretation of statute as originally enacted in 1980); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979) (legislative observations in Senate Report written eleven years after Age Discrimination in Employment Act was passed were in no sense part of legislative history of Act). The Court's reasoning in *Pierce* is particularly relevant here. In *Pierce*, the Court considered the meaning of the phrase "substantially justified" in the Equal Access to Justice Act (EAJA). The EAJA was originally enacted in 1980, and reenacted with the same language in 1985. *Pierce*, 487 U.S. at 566-67. The Court acknowledged that a House Report prepared in connection with the 1985 reenactment approved the holdings of several courts that "substantially justified" was a higher standard than mere reasonableness. *See id.* at 566. The Court declined to give force to the interpretation endorsed by the House Report, however:

> If this language [in the House Report] is to be controlling upon us, it must be either (1) an authoritative interpretation of what the 1980 statute meant, or (2) an authoritative expression of what the 1985 Congress intended. It cannot, of course, be the former, since it is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means. Nor can it reasonably be thought to be the latter – because it is not an explanation of any language that the 1985 Committee drafted, because on its face it accepts the 1980 meaning of the terms as subsisting, and because there is no indication whatever in the text or even the legislative history of the 1985 reenactment that Congress thought it was doing anything insofar as the present issue is concerned except reenacting and making permanent the 1980 legislation.

487 U.S. at 566-67.

Here, the 1986 Senate Report pertaining to the amendments to the FCA suffers from the same limitations as the House Report at issue in *Pierce*. There is no suggestion in the text of the 1986 amendments or in the legislative history that Congress thought it was changing the meaning of the term "person" in the Act. Rather, the 1986 Senate Report accepts the meaning of the term "person" as originally enacted. A mistake made by the drafter of the 1986 Senate Report in describing the meaning of the term "person" is not sufficient to expand the meaning of the term as enacted in 1863.

In any event, the Report is simply inaccurate. At the time it was written, no court had held that a State could properly be named as a defendant "person" under the Act. In fact, the only court known to have addressed the issue held that States could *not* be sued under the FCA.

See United States ex rel. Weinberger v. Florida, 615 F.2d 1370, 1371 (5th Cir. 1980) (describing district court's ruling that defendant State was not "person" subject to liability under FCA; vacating and remanding decision on other jurisdictional grounds). As noted, the cases cited in the Report did not address the meaning of the word "person" in the FCA. *See Ohio v. Helvering*, 292 U.S. at 370-71 (word "person" in statute dealing with liquor dealers included States); *Georgia v. Evans*, 316 U.S. at 162-63 (State is "person" who can be plaintiff in Sherman Act suit); *Monell v. Department of Social Svs.*, 436 U.S. at 690 (local governments not immune from suit under 42 U.S.C. § 1983). In sum, the Report provides no basis for interpreting "person" in the FCA to include States.

3. Finally, the court of appeals justified its interpretation of the term "person" by looking to the Act's broad and remedial purpose to remedy and deter fraud against the federal government. The court of appeals characterized the provisions of the Act as "all-encompassing" and concluded that there was "no indication that Congress meant to carve out any safe haven for frauds perpetrated by the States." Pet. App. 26. This is, however, plainly the wrong inquiry. Regardless of the remedial nature of a statute, imposing liability on States is a far different matter than imposing liability on other classes of defendants. *Cf. College Sav. Bank*, 119 S. Ct. at 2231 (recognizing that constitutional role of States sets them apart from other defendants). The fact that Congress did not expressly reject applying the FCA to the States is beside the point. What is relevant here is that Congress did not affirmatively provide for suits against States. Absent such express statutory language, Congress should not be presumed to have taken the extraordinary step of imposing liability on the States under the FCA.

* * *

The term "person" in § 3729(a) of the False Claims Act cannot reasonably be construed to include the sovereign States. The plain language of the statute is to the contrary; the purpose and context of the False Claims Act are inconsistent with imposing liability on the States; Congress's use of the term "person" is entirely inadequate to meet the requirements of the clear statement rule; and the contrary interpretation raises grave doubts as to the constitutionality of the statute. Indeed, the contrary interpretation – the interpretation adopted by the court of appeals – finds no support in this Court's precedents or in any recognized rule of statutory construction. This Court should reverse the decision of the court of appeals, and hold that States are not "persons" subject to liability under § 3729(a) of the False Claims Act.

II. THE ELEVENTH AMENDMENT BARS PRIVATE PERSONS FROM COMMENCING AND PROSECUTING FALSE CLAIMS ACT SUITS AGAINST STATES.

The Eleventh Amendment provides that the "Judicial Power of the United States shall not . . . extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . . " These words, however, do not establish or limit the States' immunity from suit. Rather, the Eleventh Amendment has long been understood " 'to stand not so much for what it says, but for the presupposition . . . which it confirms.' " *Seminole*, 517 U.S. at 54 (1996) (quoting *Blatchford*, 501 U.S. at 779). This presupposition is that: (1) each State in our federalist system is a sovereign entity, and (2) "that ' "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual

without its consent." ' " *Id.* (quoting *Hans v. Louisiana*, 134 U.S. 1, 10 (1890) (quoting The Federalist No. 81, p. 487 (A. Hamilton) (C. Rossiter ed. 1961))). Accordingly, Congress, pursuant to its Article I powers, cannot authorize private parties to sue a State. *Id.* at 72-73; *see also Alden*, 119 S. Ct. at 2266.

It is undisputed that the State of Vermont and its Agency of Natural Resources are protected by the Eleventh Amendment. *See Pennhurst State Sch. & Hosp. v. Halderman* ("*Pennhurst II*"), 465 U.S. 89, 100 (1984) ("It is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment."). Nor is it disputed that Vermont has not consented to be sued in federal court by a private citizen. *See* Vt. Stat. Ann. tit. 12, § 5601(g) ("Nothing in [Vermont's partial waiver of sovereign immunity] waives the rights of the state under the Eleventh Amendment of the United States Constitution."). Finally, there is no question that this matter was commenced and is being prosecuted by a private person. On its face, therefore, plaintiff Stevens' lawsuit violates the Eleventh Amendment.

In order to avoid this straightforward conclusion, the court of appeals deemed Stevens' lawsuit to be "in essence a suit by the United States" brought pursuant to its sovereign exemption from Eleventh Amendment limitations. Pet. App. 18. What is really at issue, therefore, is whether the Congress, by the simple expedient of the *qui tam* device, can sidestep its inability to authorize private parties to sue States and "strip the States of their immunity from private suits." *Alden*, 119 S. Ct. at 2264. Put another way, may the balance struck in the plan of convention be altered through the subterfuge of a *qui tam* action? The answer is "no" because such a result is flatly

contrary to this Court's decisions in *Blatchford* and *Alden*, and is inconsistent with the concept of federalism established in the plan of convention.

A. A SUIT AGAINST A STATE BY A PRIVATE PERSON NOMINALLY ON BEHALF OF THE UNITED STATES VIOLATES THE ELEVENTH AMENDMENT.

As the Court recognized last Term, the Constitution "reserves" to the States "a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status." *Alden*, 119 S. Ct. at 2247. An essential attribute of the sovereignty reserved to the States is that States are immune from suit " 'save where there has been "a surrender of this immunity in the plan of convention." ' " *Id.* at 2254 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 323 (1934) (quoting The Federalist No. 81, at 487).

The States of course, through the plan of convention, consented to suit by other States or by the Federal Government. *Alden*, 119 S. Ct. at 2267; *Principality of Monaco*, 292 U.S. at 328-29; *United States v. Texas*, 143 U.S. 621, 644-46 (1892). However, the fact that the United States purported to delegate or assign its rights to Stevens does not convert this case into a suit brought by the United States that can override Vermont's sovereign immunity. *See Blatchford*, 501 U.S. at 785. In *Blatchford*, Alaska Native villages brought an action against an Alaska state official. Alaska claimed Eleventh Amendment immunity from suit, and in response, the Native Villages argued that Congress delegated to the Tribes the United States' authority to sue a State. The Court in *Blatchford* stated:

> We doubt, to begin with, that that sovereign exemption *can* be delegated – even if one limits

> the permissibility of delegation (as respondents propose) to persons on whose behalf the United States itself might sue. The 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; and even consent to suit by the United States for a particular person's benefit is not consent to suit by that person himself.

Id.

The rule that only the United States itself can exercise its power to sue a sovereign State was reaffirmed in *Alden*. The *Alden* Court recognized that the States' consent to suits by the United States was meant to provide an "alternative to extralegal measures." *Alden*, 119 S. Ct. at 2267. However, the consent to suit in lieu of extralegal measures was not understood as diminishing the gravity of a sovereign pursuing a fellow sovereign. There are strong countervailing pressures on States and the Federal Government not to prosecute a suit against a fellow sovereign. The decision to sue "require[s] the exercise of political responsibility," which is a significant protection that each partner to the plan of convention relies upon to ensure against litigation over mere trifles. *Id.* But this political control "is absent from a broad delegation to private persons to sue nonconsenting States." *Id.*

For this reason, this Court in *Alden* specifically defined the circumstances in which a State's immunity from suit must give way to claims by the United States, *viz.*, "[a] suit which is commenced and prosecuted against a State in the name of the United States *by those who are entrusted with the constitutional duty* to 'take Care that the Laws be faithfully executed.' " *Alden*, 119 S. Ct. at 2267

(quoting U.S. Const., art. II, § 3) (emphasis added). Whatever else can be said about the relator in this case, it cannot seriously be contended that he is invested with any "constitutional dut[ies]."

Moreover, any claim that the United States may delegate its sovereign exemption from Eleventh Amendment limitations is nothing more than an attempted "end run" around the Eleventh Amendment. *Cf. Green*, 474 U.S. at 73. Congress cannot use its Article I powers to abrogate the States' sovereign immunity and impose liability on the States. *Alden*, 119 S. Ct. at 2266; *Seminole*, 517 U.S. at 72-73. Yet, if delegation of the United States' sovereign authority to sue a State is permissible, Congress could achieve the same result through use of the *qui tam* device. It could create private causes of action against the States in the name of the United States without constitutional impediment. For example, persons claiming violations of the Fair Labor Standards Act or Native American Tribes in disagreement with a State would become self-appointed deputies and pursue causes of action nominally on behalf of the United States.

Alden and *Seminole* cannot be eviscerated by mere use of the *qui tam* device. The exercise of the United States' sovereign exemption from Eleventh Amendment restrictions requires more than the mere name of the United States. Responsible executive branch officers must exercise discretion, and be responsible for and in control of commencement and prosecution of suit against a State on behalf of the United States. Otherwise, the lawsuit is constitutionally barred.

B. THE *BLATCHFORD/ALDEN* RULE IS CRITICAL TO MAINTAINING THE FEDERAL-STATE RELATIONSHIP ESTABLISHED THROUGH THE CONSTITUTIONAL PLAN.

The rule prohibiting delegation of the United States' sovereign authority to private parties is supported not only by this Court's prior decisions, but also by sound policies imbedded in the Constitutional plan. The Constitution establishes a "structure of joint sovereigns," and a " 'mandated balance of power' between the States and the Federal Government." *Gregory*, 501 U.S. at 458 (quoting *Atascadero*, 473 U.S. at 242). Through this balance, the States and the Federal Government " 'exercise concurrent authority.' " *Alden*, 119 S. Ct. at 2247 (quoting *Printz v. United States*, 521 U.S. 898, 919-920 (1997)).

Maintaining the balance established by this structure of joint sovereigns requires that sovereigns responsibly exercise discretion. This is particularly true when the United States contemplates suit against a State.

> The difference between a suit by the United States on behalf of the employees and a suit by the employees implicates a rule that the National Government must itself deem the case of sufficient importance to take action against the State; and history, precedent, and the structure of the Constitution make clear that, under the plan of Convention, the States have consented to suits of the first kind but not of the second.

Id. at 2269. Here, as in *Alden*, "despite specific statutory authorization" that would have allowed the United States to prosecute this case – a case supposedly brought on behalf of the United States and baldly charging that Vermont deceitfully mismanaged its relations with the Federal Government – the United States apparently found

the relator's allegations "insufficient to justify sending even a single attorney to [Vermont] to prosecute this litigation." *Id.*

The United States' abdication is no small matter to Vermont. Indeed, this lawsuit requires the obvious to be stated: lawsuits, and in particular suits claiming fraud or other forms of deceit, turn a cooperative relationship into an adversarial one. Giving a private person the power to police Vermont's relationship with the United States disrupts the federal-state relationship and impedes Vermont's exercise of its police powers.

1. This disruption of federal-state relations is apparent on at least three different levels. First, it affects the working relationship between federal and state agencies. Vermont's Agency of Natural Resources works hand-in-hand with EPA to assure compliance with the Clean Water and Safe Drinking Water Acts. The Court has termed this rapport " 'a program of cooperative federalism.' " *New York v. United States*, 505 U.S. 144, 167 (1992) (quoting *Hodel v. Virginia Surface Mining & Reclam. Ass'n*, 452 U.S. 264, 289 (1981)). Indeed, the Court in *New York v. United States* cited the States' role under the Clean Water Act – one of the programs at issue here – as a prime example of "cooperative federalism." *Id.* at 167 ("Clean Water Act 'anticipates a partnership between the States and the Federal Government, animated by a shared objective.' ") (quoting *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992)).

EPA normally provides the States with substantial flexibility to administer these programs. Such flexibility is essential to best adapting national programs to local conditions and interests. Corresponding to the flexibility accorded the States by EPA is a full range of remedies

available to EPA in the event that a State does not correctly administer these programs. For example, the EPA may: request all financial and programmatic records and supporting documents, 40 C.F.R. § 31.42 (1998); require performance reviews, *id.* §§ 31.40, 31.41; temporarily withhold cash payments pending correction of any noncompliance, *id.* § 31.43(a)(1); disallow all or part of the cost of the program, *id.* § 31.43(a)(2); wholly or partly suspend, terminate or annul the award, *id.* § 31.43(a)(3); withhold further awards, *id.* § 31.43(a)(4); and seek reimbursement of funds. *Id.* § 31.51. The EPA may also disapprove and take over administration of State programs. 42 U.S.C. § 300h-7(c), (i)(4); 33 U.S.C. § 1329(d), (h)(8)-(11).

As recognized by Judge Weinstein, below, "[u]se of extreme measures by the federal bureaucracy to penalize a state is infrequent because of the realities of politics, and the need to avoid disaffection with federal officials." Pet. App. 80.

> "The federal government needs the states as much as the reverse, and this mutual dependency guarantees state officials a voice in the process. Not necessarily an equal voice: because federal law is supreme and Congress holds the purse strings, the federal government is bound to prevail if push comes to shove. But federal dependency on state administrators gives federal officials an incentive to see that push doesn't come to shove, or at least that this happens as seldom as possible, and that means taking state interests into account."

Id. at 81-82 (quoting Larry Kramer, *Understanding Federalism*, 47 Vand. L. Rev. 1485, 1544 (1994)).

Here, the private *qui tam* plaintiff, by his unfettered choice, seeks to impose the harshest of available remedies upon the State of Vermont – liability for fraud carrying

treble damages and civil penalties. Vermont cannot remedy this situation by working with its federal partner because a private *qui tam* plaintiff has unilaterally decided that "push has come to shove." This represents a total breakdown of cooperative federalism.

Second, the private *qui tam* plaintiff's prosecution of this matter disrupts federal-state relations because it deprives Vermont of the affirmative discretion exercised by responsible federal officers in their enforcement of federal laws. Indeed, the FCA operates largely by default – unless the United States takes affirmative action, the private *qui tam* plaintiff has the "right" to prosecute the case. 31 U.S.C. § 3730(c)(3). The FCA therefore insulates federal officials from having to exercise any discretion, while allowing the United States to obtain a portion of the benefit of any damages obtained by a private person under the FCA. State legal officers can convince the Department of Justice of the propriety of State actions only to have federal officers "watch from the sidelines" while the State mounts a costly defense to a matter supposedly brought on behalf of the United States. *United States ex rel. Long*, 173 F.3d at 885. And, the United States collects whatever monies the private plaintiff can obtain regardless of whether these monies represent the action's nuisance value or some other settlement or judgment. "That could be described as allowing the [federal] government to have its constitutional cake and eat it too." *Id.*

Third, a private *qui tam* plaintiff's ability to sue a State impairs federal-state relations on a political level. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-52 (1985) (federal government designed so that States may protect their interests through federal political process). A State's congressional delegation may legitimately

question, on behalf of a State, the correctness of federal agency decisions. *See* Pet. App. 74-76 (Weinstein, J. dissenting). Or, the United States may be influenced by more "subtle political pressures that might have precluded the lawsuit in the first place had the United States been more actively involved from the start." *Long*, 173 F.3d at 885. Yet, the *qui tam* device allows the United States to remove itself from political accountability.

The Federal Government's decision to sue a State is weighty and based on innumerable factors including, to name only a few, the public good, preservation of federal-state relations, costs to taxpayers, and impacts on State services and functions. To remove the United States from decision-making and accountability for such a suit has a critical impact on federal-state relations. Certainly, a private person's suit is at odds with the Federal Government's constitutional role because such a suit is not "at the instance and under the control of responsible federal officers," *Blatchford*, 501 U.S. at 785, nor is such a suit an "exercise of political responsibility." *Alden*, 119 S. Ct. at 2267.

2. Allowing an individual, nominally on behalf of the United States, to sue a State for treble damages, penalties, costs, expenses, and attorneys' fees "create[s] staggering burdens" that may threaten a State's financial integrity. *Alden*, 119 S. Ct. at 2264. This is especially true in light of the depth and complexities of the federal-state relationship and the concomitant transfers of public funds. The potential power of such suits "would pose a severe and notorious danger to the States and their resources" and provide individuals with "a leverage over the States that is not contemplated by our constitutional design." *Id.*

Vermont's police powers will be this suit's first victim. Vermont is a small state and its Agency of Natural Resources reflects Vermont's size. If this matter goes to trial, virtually all staff involved with Vermont's water supply and water quality programs will have to devote significant time to this matter's defense. This is time that would normally be devoted to protecting the public health and environment by fulfilling the mandates of the Clean Water and Safe Drinking Water Acts. In addition, time and resources that the Vermont Attorney General's Office would otherwise spend enforcing Vermont's public health and environmental laws are now dedicated to defending this matter. Vermont should be able to formulate policy, manage its resources and implement programs based on mutual understandings with EPA without fear of being second-guessed by private persons seeking a bounty or acting upon personal ill will.

C. *QUI TAM* SUITS UNDER THE FALSE CLAIMS ACT ARE COMMENCED AND PROSECUTED BY PRIVATE INDIVIDUALS AND THEREFORE ARE BARRED BY THE CONSTITUTION.

The Constitution, this Court's decisions and the policies favoring cooperative federalism all preclude the United States from delegating its sovereign authority to sue a State. Because the FCA does just that, it violates the Eleventh Amendment.

1. This matter was neither commenced, nor is it being prosecuted by the United States. It is based solely on an impermissible delegation of the United States' sovereign power. The FCA, under a provision entitled "**Actions by private persons**," states plainly that "[a] person may bring a civil action for a violation of section

3729 for the person and for the United States Government." 31 U.S.C. § 3730(b)(1).[9] In *Hughes*, this Court recognized:

> [t]hat a *qui tam* suit is brought by a private party 'on behalf of the United States' . . . does not alter the fact that a relator's interests and the Government's do not necessarily coincide. Moreover, as the statute specifies, *qui tam* actions are brought

[9] The FCA is replete with provisions that acknowledge the sharp distinction between the United States and a private person who commences and prosecutes FCA suits. 31 U.S.C. § 3730(b)(1) ("A person may bring a civil action"), 3730(b)(5) ("When a person brings an action . . . no person other than the Government may intervene or bring a related action"), 3730(c)(1) ("If the Government proceeds with the action . . . [it] shall not be bound by an act of the person bringing the action."), 3730(c)(2)(A) ("The Government may dismiss the action notwithstanding the objections of the person initiating the action"), 3730(c)(2)(B) ("The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action"), 3730(c)(2)(C) ("Upon a showing by the Government that unrestricted participation . . . by the person initiating the action"), 3730(c)(2)(D) ("Upon a showing by the defendant that unrestricted participation . . . by the person who initiating the action"), 3730(c)(3) ("If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action."), 3730(c)(4) ("the person initiating the action"), 3730(c)(5) ("If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights"), 3730(d)(1) (" If the Government proceeds with an action brought by a person"), 3730(d)(2) ("If the government does not proceed with an action under this section, the person bringing the action or settling the claim"), 3730(d)(4) ("If . . . the person bringing the action conducts the action"), 3730(f) ("The Government is not liable for expenses which a person incurs in bringing an action").

> both "*for the person* and for the United States Government."

520 U.S. at 949 n.5.

The United States had no control over plaintiff Stevens' commencement of this lawsuit. Indeed, the FCA does not allow the United States to prevent initiation of a suit by a private person. *See* 31 U.S.C. § 3730(b)(1). Rather, to preclude a private person's FCA suit, the United States' only option is to take the awkward, if not self-defeating step of filing its action first. *See* 31 U.S.C. § 3730(e)(3) (private person may not bring FCA suit based on allegations underlying proceeding in which United States is already a party).

Once a private person has commenced such an action, the United States becomes a party to the action if it "elect[s] to intervene and proceed with the action." 31 U.S.C. § 3730(b)(2). Such intervention, however, merely confers on the United States "primary responsibility" – not exclusive control over prosecution of the action. 31 U.S.C. § 3730(c)(1). When, as in this case, "the Government elects not to proceed with the action, the person who initiated the action shall have the *right* to conduct the action." 31 U.S.C. § 3730(c)(3) (emphasis added). Indeed, the United States has assumed the passive, non-party role of being "served with copies of all pleadings filed in the action." Government's Notice of Election to Decline Intervention and Mot. to Extend Seal, D. Ct. Docket Entry No. 26 (June 26, 1996); *see also* 31 U.S.C. § 3730(c)(3). Jonathan Stevens has therefore commenced and is prosecuting this action against the State of Vermont.

Jonathan Stevens will not prosecute this matter to achieve the United States' aims, but rather his own. The Court in *Hughes* explicitly recognized that "[a]s a class of

plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good." 520 U.S. at 949. This monetary reward can be substantial. The private person is entitled to between 15 and 30 percent of the proceeds of the action, depending on whether the United States intervenes. 31 U.S.C. § 3730(d)(1), (2). The "proceeds" include treble damages and civil penalties of up to $10,000 per violation. *Id.* § 3729(a). The private person is also entitled to costs, expenses, and attorneys' fees. *Id.* § 3730(d)(1), (2). In addition, private persons also may have an interest in acting upon " 'personal ill will' " – an interest that certainly would not be shared by the United States. *United States ex rel. Marcus v. Hess*, 317 U.S. at 541 n.5 (quoting *United States v. Griswold*, 24 F. 361, 366 (D. Or. 1885)).

Moreover, the United States is making no effort to control Stevens' prosecution of this matter. The FCA does allow the United States, if it so chooses and can demonstrate good cause, subsequently to assert some control over an action conducted by a private person. *See* 31 U.S.C. § 3730(c)(3) ("When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause."). However, the United States has yet to exercise any control over this case, and its potential exercise of control does not alter the reality that an individual commenced this action and is now prosecuting this lawsuit directly against the State of Vermont. In short, the United States' inaction cannot be reconciled with any suggestion that the United States is responsible for commencing and prosecuting this matter.

Even if the United States eventually decided to exercise the control allowed by the FCA, the fact remains that an individual commenced this suit and retains independent rights in prosecuting the suit. Subsequent intervention does not give the United States authoritative control over the litigation. To the contrary, the FCA provides that such intervention (assuming the United States can show good cause) is only allowed "without limiting the status and rights of the person initiating the action." *Id.*

The FCA further protects the private person's right to prosecute FCA actions by allowing the Government to dismiss an action only if "the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion." 31 U.S.C. § 3730(c)(2)(A).[10] Likewise, the Government may settle FCA actions commenced by a private person only "if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances." 31 U.S.C. § 3730(c)(2)(B). Thus, on a functional level, this lawsuit was commenced and is being prosecuted by a private citizen against a State in violation of the Constitution.

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[10] The only published account of the United States moving to dismiss an FCA action brought by a private person is *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 794 (1999). *Sequoia Orange* well-illustrates the shortcomings of the United States' authority over FCA suits pursued by private persons. Once the United States finally decided that it would seek dismissal, it filed a motion to that effect in August of 1994. *Id.* at 1142. The private plaintiff objected and as a result, dismissal was not final until four years and four months later when this Court denied certiorari.

2. The United States itself acknowledges that the relator does not act on behalf of the United States, but instead acts in a private capacity.

> *Qui tam* relators are not "Officers of the United States," and their selection is not governed by the Appointments Clause. Congress has not "established by Law" a government "Office" of FCA informer or relator. To the contrary, the Act's *qui tam* provision is entitled "ACTIONS BY PRIVATE PERSONS." 31 U.S.C. § 3730(b). Insofar as the Appointments Clause is concerned, the relator is more aptly analogized to a plaintiff who invokes a private right of action under a federal statute. Congress's decision to create a private right of action may often rest in part on its belief that such provisions will vindicate a societal interest in deterring and remedying violations of federal law by enlisting private individuals in the process by which the law is enforced. The fact that a private lawsuit assists in the effectuation of federal policy does not transform the plaintiff into an "Officer of the United States" whose selection is governed by the Appointments Clause.

Brief for the United States as Amicus Curiae at 19-20, *Hughes Aircraft Co. v. United States ex rel. Schumer* (On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit) (No. 95-1340) (Sept. 1996). *See also* Office of Legal Counsel, U.S. Dep't of Justice, *The Constitutional Separation of Powers between the President and Congress*, 1996 WL 876050, at *108-109 n.53.[11]

[11] In *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. Off. Legal Counsel 207 (1989), the U.S. Department of Justice, Office of Legal Counsel concluded, in part, that the FCA's *qui tam* provisions violate the Appointments Clause and Article III standing doctrine. In 1996, the United States partially superseded this opinion by disavowing the portion of the opinion that concluded that the *qui tam* provisions violate the Appointments Clause. Office of Legal Counsel, U.S. Dep't of Justice, *The Constitutional Separation of Powers between the President and Congress*, 1996 WL 876050, at *108-109 n.53.

The United States has also taken the position that:

> *qui tam* suits under 31 U.S.C. § 3730(b), such as the present case, are not "commenced by the United States" for the purposes of this court's [of International Trade] jurisdiction because the Government may only choose to become a party after the suit has been "brought" by a private actor.

United States ex rel. Felton v. Allflex USA, Inc., 989 F. Supp. 259, 262 (Ct. Int'l Trade 1997) (describing the United States' argument as to whether FCA action was commenced by the United States for purposes of 28 U.S.C. § 1582).

The FCA's provisions, relevant case law, and the United States' views of the FCA all confirm that this matter was commenced and is being prosecuted by Jonathan Stevens – not the United States. In sum, the State of Vermont is being subjected to suit commenced and prosecuted by a private person in violation of the Constitution.

D. THE COURT OF APPEALS' HOLDING THAT PRIVATE PERSONS CAN SUE A STATE IF THE UNITED STATES IS A "REAL PARTY IN INTEREST" CANNOT BE RECONCILED WITH THE *BLATCHFORD/ALDEN* RULE.

The court of appeals held that because the United States is "the real party in interest" to FCA actions, this

"suit is in essence by the United States and hence is not barred by the Eleventh Amendment." Pet. App. 17-18. It also concluded that *Blatchford* is immaterial to this matter because the *Blatchford* plaintiffs were suing for their own benefit rather than for that of the United States.[12] Pet. App. 18.

1. Whether or not the United States is a "real party in interest" is irrelevant to Vermont's sovereign immunity. The United States' presence as a party, or, as is the case here, its mere name on the caption, does not eliminate the States' sovereign immunity with regard to a party that is not the United States and is not under the United States' control. In *Pennhurst II*, private plaintiffs were seeking to avoid the Eleventh Amendment's bar by arguing that the United States' active participation as an actual co-plaintiff eliminated any Eleventh Amendment immunity. The Court disagreed:

> We also do not agree with [private plaintiff] respondents that the presence of the United States as a plaintiff in this case removes the Eleventh Amendment from consideration. Although the Eleventh Amendment does not bar the United States from suing a State in federal court, *the United States' presence in the case for any purpose does not eliminate the State's immunity for all purposes.*

465 U.S. at 104 n.12 (emphasis added) (citation omitted). Thus, assuming that the United States is the real party in

[12] The court of appeals' assumption that *qui tam* suits in fact benefit the United States is suspect. *See* Pet. App. 18. As detailed in *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. Off. Legal Counsel 207, 215-220 (1989), a private person's decision to initiate suit, conduct of the litigation, and resulting judgment or settlement are often adverse to the United States' interests.

interest does not mean that a private person can commence and prosecute this lawsuit. If the United States' actual presence in a lawsuit is not sufficient to allow a private party to sue a State, then it follows, *a fortiori*, that the Federal Government's mere potential interest in the litigation is insufficient to allow a private person to commence and prosecute an action against a State.

2. The court of appeals' attempt to distinguish *Blatchford* on the grounds that the *Blatchford* plaintiffs were suing for their own benefit rather than for the benefit of the United States is also unfounded. Under *Blatchford* and *Alden* the Court identifies who is responsible for and in control of the suit – not who benefits from the suit – to determine whether the suit is brought by the United States. *Blatchford*, 501 U.S. at 785; *Alden*, 119 S. Ct. at 2269.

Moreover, resting this determination on potential benefit to the United States instead of whether the United States is ultimately responsible for the action is flatly inconsistent with the larger body of this Court's sovereign immunity decisions. The Court has never allowed sovereign authority to be exercised by any person or entity other than the sovereign. For example, the Court has consistently held that sovereign immunity lies exclusively with States or arms of the States. *See Alden*, 119 S. Ct. at 2267 ("The second important limit to the principle of sovereign immunity is that it bars suits against States but not lesser entities."); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) ("State and its 'arms' are, in effect, immune from suit in federal court"). Likewise, only the United States or its instrumentalities may assert the United States' sovereign immunity. *See, e.g., Dugan v. Rank*, 372 U.S. 609, 620 (1963) (setting out test for determining if defendant is United

States or its instrumentality for purposes of United States' sovereign immunity).

In *Regents of the Univ. of Cal. v. John Doe*, 519 U.S. 425 (1997) – a case that addressed the mirror image of the issues presented here – this Court would not look past the State to determine California's Eleventh Amendment protections:

> The respondents seek to detach the importance of a State's legal liability for judgments against a state agency from its moorings as an indicator of the relationship between the State and its creation and to convert the inquiry into a formalistic question of ultimate financial liability. But none of the reasoning in our opinions lends support to the notion that the presence or absence of a third party's undertaking to indemnify the agency should determine whether it is the kind of entity that should be treated as an arm of the State.
>
> Just as with the arm-of-the-state inquiry, we agree . . . that with respect to the underlying Eleventh Amendment question, it is the entity's potential legal liability rather than its ability or inability to require a third party to reimburse it, or discharge the liability in the first instance, that is relevant. Surely, if the sovereign State of California should buy insurance to protect itself against potential tort liability to pedestrians stumbling on the steps of the State Capitol, it would not cease to be "one of the United States."

Id. at 430-31. The fact that a third party would relieve California of potential financial liability does nothing to alter the fact that the defendant is a State. Likewise, the fact that the United States could potentially benefit from FCA actions pursued by private persons does nothing to alter the fact that this matter was commenced and is

being prosecuted by a private person – not a responsible executive branch officer of the United States.

In light of these decisions, it would be aberrant to allow the blanket delegation of the United States' sovereign authority to sue a State to any private person seeking a bounty. Rather, consistent with the plan of convention, only the "United States – at the instance and under the control of responsible federal officers," may exercise its sovereign exemption from Eleventh Amendment limitations. *Blatchford*, 501 U.S. at 785.

* * *

The pertinent inquiry here is whether the United States, through a responsible executive branch officer, commenced and is prosecuting this matter. The answer to this inquiry is clear: a private person motivated by a potential bounty commenced and is prosecuting this suit against the State of Vermont pursuant to a delegation of the United States' sovereign authority to sue a State. Such a suit violates Vermont's constitutionally recognized sovereign immunity. This Court should therefore reverse the court of appeals and hold that only the United States itself may exercise its sovereign authority to sue the State of Vermont.

CONCLUSION

The decision of the court of appeals should be reversed and the case dismissed for want of jurisdiction.

Respectfully submitted,

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