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.

BRIEF FOR RESPONDENT

Filed October 22, 1999

QUESTIONS PRESENTED

1. Whether a *qui tam* suit against a State under the False Claims Act is barred by the Eleventh Amendment.

2. Whether a State is a "person" subject to suit under the False Claims Act, 31 U.S.C. § 3729 *et seq.*

PARTIES TO THE PROCEEDING

All parties to the proceedings below appear in the caption.

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BRIEF FOR RESPONDENT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution and the relevant provisions of the False Claims Act, 31 U.S.C. § 3729 *et seq.*, are set forth at Pet. App. 91-125. The Property Clause of the United States Constitution, U.S. Const. art. IV, § 3, cl. 2, provides:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

STATEMENT

1. The False Claims Act "was originally passed in 1863 after disclosure of widespread fraud against the Government during the War Between the States." *Rainwater v. United States*, 356 U.S. 590, 592 (1958); *see United States v. Bornstein*, 423 U.S. 303, 309 (1976). "Testimony before the Congress painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war." *United States v. McNinch*, 356 U.S. 595, 599 (1958). In order "to provide protection against those who would 'cheat the United States,'" *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544 (1943) (citation omitted), and "broadly to protect the funds and property of the Government," *Rainwater*, 356 U.S. at 592, Congress made it illegal "to present or cause to be presented for payment or approval * * * any claim upon the Government of the United States * * * knowing such claim

to be false, fictitious, or fraudulent." Act of March 2, 1863, ch. 67, § 1, 12 Stat. 696.

The Act, which was substantially rewritten, expanded, and enacted afresh in 1986, now makes "any person" who knowingly presents a false or fraudulent claim to the United States "liable to the United States Government for a civil penalty" not exceeding $10,000 "plus 3 times the amount of damages which the Government sustains." 31 U.S.C. § 3729. As it has in substance since 1863, the Act directs federal prosecutors to "diligently investigate" violations of the Act, and it authorizes them to "bring a civil action * * * against the person" that submitted the false claim. 31 U.S.C. § 3730(a). The Act also provides, as did the original statute, an additional enforcement mechanism in the form of a "*qui tam*" suit: it authorizes "[a] person [to] bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government." 31 U.S.C. § 3730(b).

A person who brings a *qui tam* action (called a "relator") must file his complaint in camera and under seal. The complaint and a "written disclosure" of the facts on which the relator bases his complaint must be served on the Attorney General and on the local United States Attorney. 31 U.S.C. § 3730(b)(2). The complaint, however, may "not be served on the defendant until the court so orders," usually after it is unsealed. The complaint must remain under seal for at least 60 days—a period that may be extended by leave of the court—while government attorneys investigate the complaint's allegations. By the end of that 60-day period (and any extensions) the Attorney General must inform the district court whether government attorneys will take over the action. *Ibid.*

If government attorneys do take over the case, they "have the primary responsibility for prosecuting the action" and

they may, subject to court approval, dismiss it altogether "notwithstanding the objections of the [relator]," compromise it, or prosecute it to judgment. *Id.* at § 3730(c)(2). If the Attorney General elects *not* to take over the case, on the other hand, the relator may prosecute the action in the name of the United States—but he must do so at his own expense and may become liable for the defendant's attorneys fees and expenses if the suit later is found by the court to be frivolous or vexatious. *Id.* at §§ 3730(c)(3), 3730(d)(4), 3730(f). Moreover, the Attorney General still retains the right to intervene and litigate the action upon "a showing of good cause." *Id.* at § 3730(c)(3). A portion of any recovery by the United States—whether or not the Attorney General elected to take over the litigation—must be shared with the relator.

2. Respondent Jonathan Stevens commenced this *qui tam* action against the State of Vermont Agency of Natural Resources ("VANR") in May 1995. The allegations of the complaint, which "must" be presumed to be true "for the purpose of disposing of the jurisdictional issue[s]" raised by this case, *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371, 374 (1945); *see Ickes v. Fox*, 300 U.S. 82, 96 (1937), disclosed that VANR systematically defrauded the United States Government by instructing its employees to prepare documents that falsely certified that those employees had worked on matters funded by certain federal grants administered by the United States Environmental Protection Agency ("EPA"). Pet. App. 6-7.

The EPA administers a number of federal grants under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and the Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.* As a recipient of federal funds under those grants, VANR must meet certain reporting requirements, including the submission of time-and-attendance records that reflect the amount of time spent by VANR employees or agents on each [illegible]

grant money. Pet. App. 6. Mr. Stevens was employed as an attorney by the Water Supply Division of the Department of Environmental Conservation, an arm of VANR. While Mr. Stevens was employed by VANR, he and his fellow employees were instructed by their superiors to complete time-and-attendance records that falsely reflected that their time was being spent on grant-eligible tasks. *Id.* at 6-7. Indeed, employees were told to fill out time-sheets *in advance*, and to allocate specific proportions of their reported time to particular federal grant codes that were dictated by agency supervisors. Those allocations bore no relation to the tasks actually performed by VANR employees. *Id.* at 6; *see also* Relator's Written Disclosure of Material Evidence and Information at 4 ("Written Disclosure").[1]

The Written Disclosure that Mr. Stevens submitted to the Attorney General in accordance with the Act documented those allegations in detail, including contemporaneous VANR memoranda allocating employee hours to federal grants in advance of any work being performed.[2] The Written Disclosure showed that Mr. Stevens repeatedly had questioned his supervisors' orders, pointing out that the time

[1] Because the False Claims Act requires that the Written Disclosure be served on the Attorney General, and because that disclosure forms the basis for her investigation and ultimate decision concerning intervention, Mr. Stevens has lodged copies of the Written Disclosure with the Clerk.

[2] In one e-mail exchange, a VANR supervisor instructed an employee to continue using the codes prescribed for federal funding even though, three months into the fiscal year, she no longer had federal responsibilities; the State later reported that 95% of her time during that year had been devoted to those responsibilities. Written Disclosure at Tabs G, H, I.

forms he was required to complete required him personally to certify falsely "under the pains and penalties of perjury * * * that the for[e]going report does accurately reflect the time worked * * *." *See* Written Disclosure, at Tab L. Mr. Stevens also alerted his supervisors to the criminal penalties prescribed by state law for making false statements to governmental bodies, and reminded his supervisors that, as an attorney, he was required by the Code of Professional Responsibility to take a "proactive role" in urging a client to rectify an ongoing fraud and, if necessary, to reveal the fraud to the affected person or tribunal. *Id.* at Tab O. Mr. Stevens additionally sought a meeting, and did meet, with the Secretary of VANR in order to apprise him of the agency's improper conduct. *Id.* at 5.

Mr. Stevens' efforts proved wholly unavailing. The General Counsel of VANR warned Mr. Stevens that he "should choose [his] battles more carefully." Written Disclosure at 6. Other employees who questioned VANR's practices "were told that if they wanted to keep their jobs they should not raise this issue." *Id.* at 4. In the end, VANR simply "failed to change its practices or make any effort to account for the discrepancies." *Id.* at 7. In fact, VANR "never has maintained any accounting procedure to verify that pre-allocated employee hours assigned to federal grant funding sourcing codes were actually worked," and no adjustments have ever been made "to account for, or even identify, discrepancies" between hours worked and the arbitrary pre-allocated figures. JA 38 (¶¶ 33-34).

3. The Attorney General investigated the allegations of the complaint and its supporting materials from May 1995 until June 1996. Pet. App. 7. The Attorney General then informed the court that federal prosecutors would not take over the action, but she did not intervene, as was her statutory right, to terminate the suit. Instead, she expressly reserved

her statutory right to intervene against the State at a later time as the case proceeded. *Id.* She also requested to be served with copies of all pleadings filed in the case. *Id.*

After the complaint was unsealed and served upon Vermont, the State moved to dismiss it. JA 7. Vermont contended that States and their instrumentalities are not persons under the Act and that, in any event, this suit is barred by the Eleventh Amendment. Pet. App. 8. The United States, appearing as *amicus curiae*, opposed the State's motion, noting that despite the Attorney General's election not to take over the litigation, "the United States remains the real party in interest in this * * * *qui tam* action * * *." U.S. Memorandum In Opposition to Defendant's Motion To Dismiss at 1; *see also id.* at 7 ("the United States remains the real party in interest and, ultimately, the primary beneficiary should the relator's efforts prove successful.")

The district court denied Vermont's motion to dismiss. Pet. App. 86-87. The court first rejected Vermont's Eleventh Amendment claim, agreeing with the Attorney General's position that "the Eleventh Amendment does not bar suits such as the instant one because the United States, which has the ability to sue a state, is the real party in interest and ultimately the primary beneficiary of a successful *qui tam* action." *Id.* at 86. The court also rejected Vermont's claims that States are not "persons" under the Act, noting that States can be "persons" when they appear as plaintiffs under the Act and "identical words used in different parts of the same act should be afforded the same meaning." *Id.* at 87 (citing *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996)).

4. Vermont took an interlocutory appeal from the district court's Eleventh Amendment ruling, as permitted by *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). The United States intervened to

defend the district court's decision. Pet. App. 9. The court of appeals affirmed. Pet. App. 1-30.

In rejecting Vermont's claim of Eleventh Amendment immunity, the court of appeals found dispositive the nature of "[t]he interests to be vindicated, in combination with the government's ability to control the conduct and duration of the *qui tam* suit." Pet. App. 16. In particular, the court agreed with the district court's conclusion that "[t]he real party in interest in a *qui tam* suit is the United States." The court reasoned:

> All of the acts that make a person liable under § 3729(a) focus on the use of fraud to secure payment from the government. It is the government that has been injured by the presentation of such claims; it is in the government's name that the action must be brought; it is the government's injury that provides the measure for the damages that are to be trebled; and it is the government that must receive the lion's share * * * of any recovery.

Id. The court also emphasized that "the government has the right to control the action" by intervening, has "the right to be kept abreast of discovery" even if it does not intervene, and "has both the right to prevent a dismissal sought by the *qui tam* plaintiff and the right to cause the action to be dismissed for any rational governmental reason, notwithstanding the *qui tam* plaintiff's desire that it continue." *Id.* at 17.

Those factors established, the court found, that a *qui tam* suit "is in essence a suit by the United States and hence is not barred by the Eleventh Amendment" (Pet. App. 18), because "[a]s against the United States * * * the States have no sovereign immunity." *Id.* at 15. The court rejected the contention that a contrary conclusion was required by *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), which held

that the Eleventh Amendment bars Indian tribes from directly suing States on claims that the United States might have brought against those States on the tribes' behalf. The court found it "plain[]" that "in those circumstances * * * the injury to be remedied was one to the tribes, not to the federal government, and the cause of action did not belong to the government." Pet. App. 18.

Vermont also sought interlocutory review of the district court's conclusion that States are "persons" under the Act. The court of appeals purported to exercise "pendent appellate jurisdiction" over that statutory question and affirmed. Pet. App. 19. The court first rejected Vermont's contention that a "plain statement" of Congress' intent to render States liable is required here, explaining that "[t]he Act does not intrude into any area of traditional state power" since the "[t]he goal of the statute is simply to remedy and deter procurement of federal funds by means of fraud." *Id.* at 20-21.

The court then concluded that "[u]nder the usual standards" of construction, Congress plainly intended for the Act to authorize suits against States. *Id.* at 21. The court of appeals found significant the fact that the term "person" is "used to categorize both those who may sue and those who may be sued, whether by the government itself or by a *qui tam* plaintiff." Pet. App. 21. The court noted that States have brought suit under the Act as *qui tam* plaintiffs, and that the 1986 legislation reinforced a State's ability to do so by permitting joinder, in an action under the Act, of related state-law claims seeking money for the benefit of a State. *Id.* at 22-23. The court concluded that States are plainly "persons" under the Act, because courts "normally infer that in using the same word in more than one section of a statute—or indeed twice within the same section, as in subsections (a) and (b) of § 3730—Congress meant the word to have the same meaning." *Id.* at 23-24.

The court of appeals also noted that its interpretation of the term "person" is supported by the Senate Report that accompanied the 1986 law. Pet. App. 25-27. That report expressly stated that the term "'person' is used in its broad sense to include * * * States and political subdivisions thereof." *Id.* at 27-28 (quoting S. REP. No. 345, 99th Cong., 2d Sess. 8 (1986)).

District Judge Weinstein, sitting by designation, dissented. Pet. App. 31-85.

SUMMARY OF ARGUMENT

Vermont presents two questions for review: whether States are "persons" under the Act and whether the States' sovereign immunity precludes *qui tam* suits against States. Although the court of appeals addressed both issues, its jurisdiction in this interlocutory case was limited to the question of immunity. The court of appeals' assertion of "pendent appellate jurisdiction" over Vermont's statutory claim cannot be squared with *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995), which precludes appellate consideration of issues not independently appealable or certified as such by the district court. Because only the Eleventh Amendment ruling was properly the subject of interlocutory review, Mr. Stevens will address that claim before addressing the State's statutory defense.

I. This Court has consistently held that questions of sovereign immunity must be resolved by evaluating whether a State or the United States is the real party in interest. Because suits under the False Claims Act vindicate the sovereign proprietary interests of the United States, the United States is indisputably the real party in interest in such suits. Few principles are better established in the field of sovereign immunity than that States have no Eleventh Amendment immunity as against the United States. *See*

United States v. Texas, 143 U.S. 621 (1892). Vermont's sovereign immunity defense, therefore, must fail.

Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991), and *Alden v. Maine*, 119 S. Ct. 2240 (1999), do not establish, as Vermont contends, that the United States can be a party to litigation only when Executive Branch officials personally conduct the litigation. Those cases instead address an issue different from that presented here, because they involved suits by private individuals seeking to enforce their *own* personal federal rights. What is at issue in this case, by contrast, is whether Congress may authorize *qui tam* litigation against States when the United States' own property rights are at issue. Neither *Blatchford* nor *Alden* speaks to that question.

While Executive Branch participation may be necessary to demonstrate the sovereign's interest in suits that appear to redress purely *private* grievances, it is *not* necessary in suits under the Act. *Every* suit under the False Claims Act—be it initiated by the Attorney General or by a *qui tam* relator—vindicates the proprietary interest of the United States. Because Congress has exceptionally broad authority in respect of those interests (*see* U.S. Const. art. IV, §3, cl. 2), it was assuredly within its constitutional authority to vindicate those interests through the *qui tam* mechanism, a form of action that was well known to the Framers. And in any event, even if *Blatchford* and *Alden* could plausibly be read to require some level of control by Executive Branch officials, *qui tam* litigation under the Act would meet any test that this Court might reasonably fashion in that regard.

II. Were the Court to reach Vermont's statutory argument, it would have to reject Vermont's interpretation of the Act. The words "any person" in the Act plainly encompass States of the Union, a conclusion buttressed by the civil investigative demand provisions of the Act, which unambiguously define States as "persons," and by the undisputed proposition that States are "persons" that can initiate *qui tam* proceedings under the Act as relators. Vermont errs in contending that Congress need have made a "plain statement" of its intent to subject States to suit, because the Act is not ambiguous. Accordingly, should the Court reach Vermont's statutory claim, it must affirm the judgment of the court of appeals on this ground as well.

ARGUMENT

I. THE UNITED STATES MAY USE THE "*QUI TAM*" VEHICLE TO SUE A STATE OF THE UNION FOR FRAUDULENTLY OBTAINING FEDERAL PROPERTY

The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Although by its literal terms the amendment "would appear to restrict only the Article III diversity jurisdiction of the federal courts," *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996), this Court has concluded that the text of the amendment is not controlling. Thus, the Court has held that the amendment shields States from suits by their own citizens, *Hans v. Louisiana*, 134 U.S. 1 (1890), by foreign countries, *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934), and by Indian tribes, *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991). Similarly, the Court has ruled that the amendment applies in federal question cases, *see Hans*, *supra*, and—notwithstanding the textual limitation to "suits in law or equity"—to certain suits in admiralty as well. *See Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468 (1987); *Ex parte New York, No. 1*, 256 U.S. 490 (1921).

Because it is now settled that the Eleventh Amendment embodies general principles of sovereign immunity that antedate the Constitution, rather than any particular rule discernable from its text (*Alden v. Maine*, 119 S. Ct. 2240, 2250-53 (1999)), it is surprising that so much of Vermont's argument is predicated on the purely text-based argument that *qui tam* suits are "commenced" or "prosecuted" "by" private individuals. *E.g.*, Vt. Br. 29, 30, 43, 45; *see also* Brief of the National Governors' Association *et al.* as *Amici Curiae* 27. In fact, Vermont's entire argument proceeds as though the Second Circuit—whose conclusion is in accord with the views of all but one court of appeals to consider the constitutional question presented here—had invented the real-party-in-interest inquiry out of whole cloth.[3] According to Vermont, the Second Circuit's analysis "is flatly inconsistent with the larger body of this Court's sovereign immunity decisions" (Vt. Br. 47), because under an inflexible "rule" (*id.* at 34) purportedly adopted by this Court in *Blatchford* and reaffirmed in *Alden*, the question of sovereign immunity turns on "who is responsible for and in control of the suit—not [on] who benefits from the suit." *Id.* at 47, 31-32.

[3] Of the five courts of appeals that have ruled on the question, only the Fifth Circuit has held that the Eleventh Amendment precludes *qui tam* suits brought against States under the False Claims Act. *See United States ex rel. Foulds v. Texas Tech University*, 171 F.3d 279, *petition for cert. filed*, 68 U.S.L.W. 3138 (Aug. 23, 1999). The majority view is that the Eleventh Amendment has no bearing on such suits because the United States is the real party in interest. *See 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. Stevens v. State of Vermont Agency of Natural Resources*, 162 F.3d 195 (2d Cir. 1998) (decision below); *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 39 F.3d 957 (9th Cir. 1994), *vacated on other grounds*, 72 F.3d 740 (9th Cir. 1995); *United States ex rel. Milam v. University of Texas*, 961 F.2d 46 (4th Cir. 1992).

It is Vermont's position, however, that cannot be reconciled with this Court's sovereign immunity cases. In a long line of authority—which Vermont does not even cite, much less attempt to distinguish—this Court has consistently held that questions of immunity must be resolved by inquiring whether a State or the United States "is the real party in interest." *E.g.*, *Kansas v. United States*, 204 U.S. 331, 341 (1907). Far from stating a "rule" to the contrary, *Blatchford* is one of several cases in which this Court has *enforced* the real-party-in-interest inquiry by requiring proof that some sovereign or quasi-sovereign interest is actually at stake when a suit appears solely to benefit private persons. That concern has no relevance here, because suits under the False Claims Act plainly vindicate the sovereign proprietary interests of the United States—interests over which Congress has plenary authority and which no State is empowered to hinder. *See* U.S. Const. art. IV, §3, cl. 2. Nothing in the Eleventh Amendment prevents Congress from vindicating those sovereign interests against a State through a *qui tam* suit, a form of action that was well known to the Framers of the Constitution, especially in light of the numerous provisions of the Act that ensure that modern *qui tam* litigation is subject to Executive Branch control. Indeed, even if Vermont were correct that "control" rather than real-party status determines the sovereign immunity issue, the Attorney General's right to control litigation under the Act would more than suffice to meet any such requirement.

A. States Of The Union Have No Eleventh Amendment Immunity Against The United States

1. This Court first explicitly addressed whether the United States may sue a State in *United States v. Texas,* 143 U.S. 621 (1892), a dispute over the ownership of property—a tract of land—claimed by both sovereigns. Congress, by statute, had directed the Attorney General to commence suit on behalf of the United States "in order that the rightful title to said land may be finally determined." *Id.* at 622 (Statement of the Case, quoting Act of May 2, 1890, ch. 182, § 25, 26 Stat. 81, 92). Texas demurred, asserting that the United States did not have the constitutional authority to bring suit against a State in federal court. Indeed, in an argument that recalls the "cooperative federalism" contentions advanced by Vermont here (*e.g.*, Vt. Br. 34-35), "Texas insist[ed] that no such jurisdiction has been conferred [by the Constitution], and that the only mode in which the * * * dispute [could] be peaceably settled [was] by agreement, in some form, between the United States and that State." 143 U.S. at 641.

This Court decisively rejected Texas' claim. The Court was unwilling to presume that the Framers "overlooked the possibility that controversies, capable of judicial solution, might arise between the United States and some of the States," especially since the Constitution expressly makes other inter-sovereign controversies cognizable in federal court. *Texas*, 143 U.S. at 644-45. As the Court put it, "the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more States of the Union," could not have "intended to exempt a State altogether from suit by the General Government." *Ibid.* While acknowledging the limitations placed by the Eleventh Amendment on the jurisdiction of the federal courts (*id.* at 645-46), the Court emphasized that the Constitution necessarily makes States amenable to "the suit of the government established for the common and equal benefit of the people of all the States." *Id.* at 646.

2. As this Court has observed, *Texas* established that the United States may sue a State of the Union "without the consent of the latter. While that jurisdiction is not conferred by the Constitution in express words, it is inherent in the constitutional plan." *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934); *see also United States v. Michigan*, 190 U.S. 379, 396 (1903). And since *Texas*, this Court has repeatedly reaffirmed that "nothing" in the Eleventh Amendment "or any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States." *United States v. Mississippi*, 380 U.S. 128, 140 (1965). To the contrary, "[t]he United States in the past has in many cases been allowed to file suits in this and other courts against States * * * with or without specific authorization from Congress." *Ibid.* Accordingly, it is now established, and it cannot reasonably be disputed by Vermont here, that "States have no sovereign immunity as against the Federal Government." *West Virginia v. United States*, 479 U.S. 305, 311 (1987).

B. This Court Has Applied A Real-Party-In-Interest Test To Determine Whether The United States Is A Party to Litigation

Although one would not know it from Vermont's brief, this Court has long held that "[t]he question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the *effect* of the judgment or decree that can be entered." *Kansas*, 204 U.S. at 341 (emphasis added); *accord Dugan v. Rank*, 372 U.S. 609, 620-21 (1963); *Oregon v. Hitchcock*, 202 U.S. 60, 69-70 (1906). The question is determined, in other words, not by the executive-officer "rule" advocated by

Vermont, but by asking whether "the United States [is] the real party in interest." *Naganab v. Hitchcock*, 202 U.S. 473, 476 (1906).

The real-party-in-interest doctrine was originally developed by this Court in a series of Eleventh Amendment cases involving suits against individuals who claimed sovereign immunity on the basis of their official duties on behalf of a State, and soon was extended to suits *by* one State against a sister State—in which the Court dismissed suits brought on behalf of States by their respective attorneys general after concluding that the putative plaintiffs were not the real parties in interest. In light of the "correlation between sovereign immunity principles applicable to States and the Federal Government," *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 506-07 (1998), this Court long ago held that the same real-party-in-interest principles "must apply to the United States." *Kansas*, 204 U.S. at 341; *Minnesota v. Hitchcock*, 185 U.S. 373, 387 (1902). Those Eleventh Amendment cases, therefore, control the inquiry here.

1. The real-party-in-interest rule was not always the touchstone for this Court's sovereign immunity jurisprudence. In *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), for example, this Court rejected an Eleventh Amendment defense to a suit against State officials, announcing "as a rule, which admits of no exception, that in all cases where jurisdiction depends on a party, it is the party named in the record." *Id.* at 857-58. The Court generally followed *Osborn*'s party-of-record rule well into the 19th century, repeatedly rejecting the Eleventh Amendment pleas of state officers who had been sued in their official capacities. *See, e.g., Davis v. Gray*, 83 U.S. (16 Wall.) 203, 220 (1872). In *In re Ayers*, 123 U.S. 443, 487-508 (1887), however, the Court discarded *Osborn* altogether and held that a suit against state officers is a suit against the State for purposes of the Eleventh Amendment when the relief prayed for would constitute performance of one of the State's obligations. *See Ex parte Young*, 209 U.S. 123, 150-51 (1908). And "that construction of the Amendment has since been followed." *Missouri, Kansas & Texas Ry. Co. v. Missouri R.R. & Warehouse Comm'nrs*, 183 U.S. 53, 59 (1901).

The modern rule is that "what is to be deemed a suit against a State * * * *is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding*, as it appears from the entire record." *Ex parte New York, No. 1*, 256 U.S. at 500 (emphasis supplied). Thus, "when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity" even if private parties, who obviously are not themselves the State, are the named defendants. *Ford Motor Co. v. Department of the Treasury*, 323 U.S. 459, 464 (1945). In other words, "the general criterion for determining when a suit is in fact against the sovereign is the *effect* of the relief sought." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 107 (1984) (emphasis in original); *accord Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269-70 (1997).

2. This Court's cases make clear that the same real-party-in-interest inquiry is also required when a State seeks to proceed as a *plaintiff* in a suit against a sister State—the situation most analogous to suits, such as this one, in which the United States seeks redress of its claims against one of the States. Federal courts may exercise jurisdiction in such State-against-State cases only if the suit is brought to further the plaintiff State's own substantial interests, and is not merely "a controversy in the vindication of grievances of particular individuals." *Louisiana v. Texas*, 176 U.S. 1, 16 (1900).

That rule is exemplified by the leading case of *New Hampshire v. Louisiana*, 108 U.S. 76 (1883). The States of New Hampshire and New York had enacted statutes permitting their citizens to assign to their respective States any past due bonds issued by another State, and to deliver such bonds, together with the costs of suit, to the States' attorneys general for collection. *Id.* at 76-79. In reliance on their respective State statutes, the attorneys general of New Hampshire and New York brought original actions in this Court seeking to collect on past-due bonds issued by the State of Louisiana.

Although each cause was ostensibly commenced and prosecuted in the name of a State by its attorney general (108 U.S. at 78, 81)—and thus undoubtedly met the executive-officer "rule" that Vermont urges in this case as the true test for sovereign immunity questions—this Court dismissed both suits. The Court was satisfied that the suits "were in legal effect commenced, and [were being] prosecuted, *solely* by the owners of the bonds and coupons." *Id.* at 89 (emphasis added). The Court emphasized that the bond owners paid the expenses of the suit, had the authority to compromise it, "and if any money is ever collected, it must be paid to [them]." *Ibid.* Because it was plain from those facts "that both the State and the attorney-general are only nominal actors in the proceeding," *ibid.*, the suit was barred by the Eleventh Amendment. *See Missouri v. Illinois & Sanitary Dist. of Chicago*, 180 U.S. 208, 231 (1901) (reaffirming reasoning of *New Hampshire*). As the Court later noted, "the effort * * * to use the name of the complainant States in order to evade the application of the Eleventh Amendment" failed because "the State was not seeking a recovery in its own interest, as distinguished from the rights and interests of the individuals who were the real beneficiaries." *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 392-93 (1938).

In *South Dakota v. North Carolina*, 192 U.S. 286 (1904), by contrast, private holders of certain North Carolina bonds—who concededly were barred by the Eleventh Amendment from suing to collect the debt—*donated* a number of the bonds to South Dakota, which then brought an original action to recover on them. *Id.* at 310. This Court rejected North Carolina's Eleventh Amendment defense, explaining that the bonds were "not held by the State as representative of individual owners, as in [*New Hampshire*], for they were given outright and absolutely to the State." *South Dakota*, 192 U.S. at 310. Unlike the cases framed by New Hampshire and New York, "[t]he title of South Dakota [was] as perfect as though it had received the[] bonds directly from North Carolina." *Id.* at 312. Because "the clear import of the decisions of this court * * * [was] in favor of its jurisdiction over an action brought by one State against another to enforce a property right," *id.* at 318, the Court concluded that South Dakota was the real party in interest. The Court overruled North Carolina's Eleventh Amendment defense, in other words, because "[t]he case was * * * one 'directly affecting the property rights and interests of a State.'" *Oklahoma ex rel. Johnson*, 304 U.S. at 393 (quoting *South Dakota*, 192 U.S. at 314, 318).[4]

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[4] In *Missouri, Kansas & Texas Railway Co. v. Missouri Railroad and Warehouse Commn'rs*, *supra*, the Court examined whether a suit brought *by individuals*—certain railroad commissioners—should be characterized, for purposes of removal jurisdiction, as a suit *by* the State of Missouri. The Court decided that issue by relying on its Eleventh Amendment real-party precedents, explaining that "it may be fairly held that the State is such a real party" when the relief would inure to the State's benefit "and * * * the judgment or decree, if for the plaintiff, will effectively operate"

3. Vermont does not address this Court's cases establishing that questions of sovereign immunity—whether the party defendant is entitled to immunity or whether the party plaintiff is a sovereign who may sue despite that immunity—turn on real-party-in-interest status, and must therefore be decided on the basis of "the essential nature and effect of the proceeding." *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371, 374 (1945). Vermont contends instead that *Blatchford* and *Alden* adopted a "rule" that the United States is a party *only* when a case is actively prosecuted by Executive Branch officials. *E.g.*, Vt. Br. 32, 34. Leaving aside the fact that the language on which Vermont relies was unnecessary to the judgment in each of those cases, and thus scarcely could be taken to promulgate a "rule" of any sort, *see, e.g.*, *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 379 (1994), both *Blatchford* and *Alden* in fact reflect the traditional understanding that sovereign immunity questions turn on real, rather than nominal, parties. Thus, neither case supports Vermont's position here.

In both *Blatchford* and *Alden* individuals attempted to sue a State in order to assert *their own rights*, rather than any rights of the United States as a sovereign. In *Blatchford*, Indian tribes sued State officials to recover money that the tribes allegedly were owed under a state revenue-sharing statute. *Alden* was a suit against the State by a group of the State's employees, who sought compensatory and liquidated

[Footnote continued from previous page]
in the State's favor. 183 U.S. at 59. Under that test, the Court concluded, the suit was *not* one by the State of Missouri, because it was "not an action to recover any money for the State" and "[i]ts results [would] not enure to the benefit of the State as a State in any degree." *Ibid.*

damages for the State's alleged violation of their rights under the overtime provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, codified as amended at 29 U.S.C. § 201 *et seq.* Not surprisingly, the Court's rejection of each of those suits emphasized the fundamental character of the case as involving the vindication of purely private grievances.

Thus, *Blatchford* pointed out that even if the plan of the convention contemplated that the United States would have the power to sue States "for the benefit of private parties," it would not follow that those parties could sue a State themselves. *Blatchford*, 501 U.S. at 785 ("even consent to suit by the United States for a particular person's benefit is not consent to suit by that person himself"). Similarly, in *Alden,* the Court noted that, unlike suits brought by the employees themselves pursuant to a "broad delegation" by Congress of authority to sue nonconsenting States, "[s]uits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State." 119 S. Ct. at 2267. In other words, "[t]he 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." *Id.* at 2269 (emphasis added).

Because both *Blatchford* and *Alden* addressed only the United States' authority *to vindicate the interests of private parties* through litigation against States, "[t]he language in [those] opinion[s] upon which [Vermont] relies cannot be taken as a decision upon a point which the facts of th[ose] case[s] did not present" (*United States v. Neifert-White Co.*, 390 U.S. 228, 231 (1968))—*i.e.*, whether the United States may recover damages from States that fraudulently obtain federal property only if the government's claim is personally and actively prosecuted by Executive Branch officials. In fact, the real-party-in-interest analysis that Vermont omits

from its brief fully explain the Court's insistence on Executive Branch involvement when litigation is brought by the United States for the apparent benefit of private parties. That involvement, in furtherance of legislatively declared federal policies, provides a necessary assurance that the interests of the United States are actually at stake in litigation that otherwise would be suspect as purely private under *New Hampshire*.[5]

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[5] The Court resolved a variant of that issue in *United States v. Minnesota*, 270 U.S. 181 (1926), a case that *Blatchford* distinguished. *See* 501 U.S. at 783. In *Minnesota*, federal officials brought suit against Minnesota, in the name of the United States, to enforce the rights of Indian tribes to certain land. It was alleged that federal land officers had issued land patents to the State unlawfully, in disregard of the applicable statute and of tribal treaty rights. *Minnesota*, 270 U.S. at 192-93. The State defended on the ground that a suit by individual Indians would violate the Eleventh Amendment (*id.* at 194-95), and "that the United States [was] only a nominal party—a mere conduit through which the Indians are asserting their private rights." *Id.* at 193. Although this Court readily "conceded" that it could not entertain the suit "if the Indians [were] the real parties in interest and the United States only a nominal party," *ibid.* (citing, *inter alia*, *New Hampshire* and *Hans*), it nonetheless concluded that the United States "ha[d] a real and direct interest" in the controversy because it had a "sovereign" interest in fulfilling its treaty and other obligations. *Id.* at 194. As the Court noted, it is a "duty" of government to fulfill "an obligation incurred by it * * * which personal litigation could not remedy." *Id.* at 195. In other words, the suit's obvious benefit to private parties notwithstanding, the suit was not barred by *New Hampshire* because the circumstances indicated that the government was in fact pursuing its own, sovereign policy objectives.

Alden and *Blatchford* belong to the class of cases in which this Court has recognized that the United States (and the States) may properly engage in litigation that appears to benefit identifiable private parties when such litigation serves larger governmental goals. *See North Dakota v. Minnesota*, 263 U.S. 365, 375-76 (1923) (notwithstanding *New Hampshire*, one State can sue another "to protect the general comfort, health or property rights of its inhabitants"). Such suits—some of which this Court has analyzed under the rubric of "*parens patriae*"—are permissible when the government "is not merely litigating as a volunteer the personal claims of its citizens" but instead establishes that "sovereign or quasi-sovereign interests are implicated." *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) (*per curiam*); *see also Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 600-01 (1982). Although "neither an exhaustive formal definition nor a definitive list of qualifying interests can be presented in the abstract," *Alfred L. Snapp & Son*, 458 U.S. at 607, the Court over time has emphasized such considerations as the subject matter of the suit (*e.g.*, general health and well-being of the citizenry) and the government's ability "to address [the asserted injury] through its [own] sovereign lawmaking powers." *Id.* at 607.

Examining whether Executive Branch officials take affirmative steps to prosecute a suit that primarily appears to benefit private parties, as was suggested in *Blatchford* and *Alden*, is best understood as a way of assuring that the United States is a real party in interest in such cases, and of foreclosing suits that merely "redress private grievances." *Pennsylvania*, 426 U.S. at 665. Indeed, that is the clear implication of *Alden*, which expressly stressed the need to be sure that the interests of the Nation are truly implicated when a suit benefits particular employees. *Alden*, 119 S. Ct. at 2269. When the only apparent injury was suffered by a private party, and the recovery will inure solely to him,

Executive Branch participation provides a basis for concluding that federal interests—such as generalized deterrence or securing favorable interpretations of federal statutes for programmatic reasons—are actually at stake in the litigation.

That need to make sure that the interests to be vindicated in the suit are indeed sovereign or quasi-sovereign has little bearing in cases like this one, which involves a cause of action that manifestly belongs to the United States. Because this case, unlike *Alden* and *Blatchford*, inherently implicates the United States' property interests, Vermont's nearly complete reliance on those cases is entirely misplaced.

C. The United States Is The Real Party In Interest In *Qui Tam* Suits Under The Act

The court of appeals correctly determined that the United States is the real party in interest in *qui tam* suits brought under the Act, because such suits plainly redress injuries to the property rights of the United States. It is particularly appropriate to conclude that Congress may vindicate those interests through *qui tam* suits, because similar informer statutes were frequently enacted by the early congresses.

1. While contesting (albeit erroneously) the relevance of the inquiry, Vermont scarcely disputes that the United States is the real party in interest in litigation brought under the Act, nor could it. Under the plain terms of the Act, suit *must* be brought in the name of the government, and the essence of the case is the defendant's fraudulent procurement of government property—an injury to the United States Treasury that the government undoubtedly is entitled to remedy by legal action. That injury to the fisc provides the measure for any damages that may be assessed, and, when recovered, the bulk of those damages must be paid over to the federal treasury. Indeed, as the court of appeals observed, "if there has been no injury to the United States, the *qui tam* plaintiff cannot

recover." Pet. App. 17. And, of course, the United States may not seek a "dual recovery on the same claim or claims"—because the United States is the real party in interest, "if the Government declines to intervene in a *qui tam* action, it is estopped from pursuing the same action administratively or in a separate judicial action." S. REP. 345, at 27; *see In re Schimmels*, 127 F.3d 875, 881-84 (9th Cir. 1997) (government is bound by prior adjudication against relator).

Vermont darkly suggests that Congress might use *qui tam* remedies broadly to circumvent recent rulings by this Court that deny Congress the power to abrogate a State's immunity under Article I of the Constitution. Vt. Br. 32-33. But that alarmist rhetoric is unjustifiable and misleading: what is at issue here is whether Congress may authorize *qui tam* litigation against States *when the United States is the real party in interest*, not whether Congress may invoke the *qui tam* vehicle to permit the vindication of purely private grievances that it might make actionable under Article I. Indeed, Vermont's arguments overlook the fact that the False Claims Act was enacted "broadly to protect the funds and property of the Government" (*Rainwater*, 356 U.S. at 592), and thus is based on the Property Clause of Article IV of the Constitution, U.S. Const. art. IV, § 3, cl. 2, rather than solely on Article I.

The Property Clause gives Congress the "power to dispose of and make all needful Rules and Regulations respecting * * * Property belonging to the United States." It goes on expressly to provide that "nothing" in the original Constitution "shall be so construed as to Prejudice any Claims of the United States * * *." U.S. Const. art. IV, § 3, cl. 2. This Court repeatedly has held that Congress' power to protect the property of the United States is "plenary," *Utah Div. of State Lands v. United States*, 482 U.S. 193, 201 (1987); *Ruddy v. Rossi*, 248 U.S. 104, 106 (1918), and "sub-

ject to no limitations." *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92, 99 (1871). Moreover, because "Congress has the absolute right to prescribe the times, the conditions and the mode of transferring" federal property (*id.*), it "can prohibit absolutely or fix the terms on which its property may be used." *Light v. United States*, 220 U.S. 523, 536 (1911). Neither Vermont nor any other State "can interfere with this right or embarrass its exercise." *Gibson*, 80 U.S. (13 Wall.) at 99; *Van Brocklin v. Tennessee*, 117 U.S. 151, 168 (1886). Thus, the exercise of congressional authority under the Property Clause inherently disallows "apprehension of any encroachments upon state rights." *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840).[6]

The breadth of Congress' authority to provide for the protection of federal property, and to vindicate the claims of the United States against those who convert such property or obtain it fraudulently, cannot be doubted. Indeed, because the Property Clause expressly forecloses any interpretation of the original Constitution that might prejudice the United States'

[6] Although the bulk of this Court's cases concerning the Property Clause address congressional power over public lands, the Clause by its terms applies to any "other Property belonging to the United States." As the Court noted in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), "[t]he grant was made in broad terms, and the power of regulation and disposition was not confined to territory * * * so that the power may be applied, as [Justice] Story says, 'to the due regulation of all other personal and real property rightfully belonging to the United States.' And so, he adds, 'it has been constantly understood and acted upon.'" *Id.* at 331 (quoting STORY ON THE CONSTITUTION §§ 1325, 1326); *see also Gratiot*, 39 U.S. (14 Pet.) at 536-37 (Congress' power over property is "the same" as over lands); *Van Brocklin*, 117 U.S. at 168 (same).

ability to vindicate its "Claims," it is difficult to see how the Eleventh Amendment can stand as an obstacle to the accomplishment of the means chosen by Congress in the False Claims Act to secure that end. After all, it is now settled that the Eleventh Amendment did not "change" the constitutional plan devised by the Framers, but merely "restore[d] the original constitutional design." *Alden*, 119 S. Ct. at 2251. By the express terms of the Constitution, the authority of Congress under Article IV to prescribe the conditions under which federal property is available to States—and the terms under which federal "Claims" against States for the misuse of such property will be prosecuted in federal court—are not powers cabined by the text of the Constitution itself, much less by an immunity for States that is implicit in the original constitutional plan.

2. The fact that Congress chose to protect federal property rights through *qui tam* litigation supports the appropriateness of Congress' exercise of its Article IV power here, because *qui tam* suits have a long-standing pedigree. "Statutes providing for actions by a common informer, who himself has no interest in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government." *Marvin v. Trout*, 199 U.S. 212, 225 (1905); *see also United States ex rel. Marcus*, 317 U.S. at 541, n.4 (same). Indeed, such *qui tam* actions are among the oldest forms of action known to the common law. *See, e.g.*, 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 160 (1768); 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 265 (1972 ed.).

American colonial legislatures not only adopted English *qui tam* statutes but also drafted new laws containing *qui tam* provisions based on the English model, creating a system in early America that was "virtually identical" to the English

system. *See* Note, *The History and Development of Qui Tam*, 1972 WASH. U.L.Q. 81, 97. Thus, *qui tam* actions had "entered American law through the general introduction of British statutory law at the time independence was declared." JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS 1-8 (1999). Those early American statutes adhered to Blackstone's formulation, generally giving half of the recovery to the informer and half to the government. *See* Dan D. Pitzer, Comment, *Qui Tam: A Comparative Analysis of Its Application in the United States and the British Commonwealth*, 7 TEX. INT'L L. J. 415, 417 (1972).

In addition to *qui tam* statutes enacted by state legislatures, the federal government engaged in the "widespread early congressional creation of the *qui tam* action." Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 175 (1992). The First Congress alone enacted at least a dozen statutes that expressly authorized an informer to share in a portion of the authorized recovery.[7] Similar provisions were

[7] *See* Act of July 31, 1789, ch. 5, § 8, 1 Stat. 29, 38, 44-45, 48 (import duties); Act of Sept. 1, 1789, ch. 11, § 21, 1 Stat. 55, 60 (vessel registration); Act of March 1, 1790, ch. 2, § 3, 6, 1 Stat. 101, 102-03 (census); Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 124-25 (copyright infringement; recovery of the moeity by the injured author); Act of July 20, 1790, ch. 29, §§ 1, 4, 1 Stat. 131, 133 (sea regulations); Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137, 137-38 (regulation of trade with Indian tribes); Act of Aug. 4, 1790, ch. 35, §§ 55, 69, 1 Stat. 145, 173, 177 (import duties); Act of Feb. 25, 1791, ch. 10, §§ 8, 9, 1 Stat. 191, 195-96 (Bank of the United States); Act of March 3, 1791, ch. 15, § 44, 1 Stat. 199, 209 (duties on liquor); *see also* Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 65, 67 (regulation of Treasury officers); Act of March 3, 1791, ch. 8, § 1, 1 Stat. 215 (extension of same); Act of July 5, 1790, ch. 25,

contained in acts passed by the Second, Third, and Fourth Congresses.[8] Like the actions of the early congresses, the decisions of this Court during the infancy of our Constitution demonstrate that *qui tam* actions were viewed as a lawful and proper means of advancing sovereign interests. Soon after the Constitution was adopted, for example, the Court held that statutes that provide a reward to an informer will be construed to authorize a *qui tam* suit by him even if that cause of action does not expressly appear in the statute. *United States ex rel. Marcus*, 317 U.S. at 537 n.4 (citing *Adams v. Woods*, 6 U.S. (2 Cranch) 336 (1805)). And one of the earliest and most celebrated landmarks in this Court's jurisprudence of federal-state relations—*McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)—"was a *qui tam*

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§ 1, 1 Stat. 129 (extending provisions of the census Act of March 1, 1790, *supra*, to Rhode Island).

[8] The Second Congress, for example, enacted informer provisions in statutes governing the postal service, while extending *qui tam* enforcement of laws regulating trade with Indian tribes. *See* Act of Feb. 20, 1792, ch. 7, § 25, 1 Stat. 232, 239 (postal service); Act of March 1, 1793, ch. 19, § 12, 1 Stat. 329, 331 (regulation of trade with Indian tribes). Among statutes enacted by the Third Congress, similar provisions appeared in the Neutrality Act, *see* Act of June 5, 1794, ch. 50, § 3, 1 Stat. 381, 383, and in many provisions dealing with the collection of duties. *See, e.g.*, Act of June 5, 1794, ch. 48, § 5, 1 Stat. 376, 378; *see also* Act of June 9, 1794, ch. 65, § 12, 1 Stat. 397, 400; Act of June 5, 1794, ch. 45, § 10, 1 Stat. 373, 375; Act of June 5, 1794, ch. 51, § 21, 1 Stat. 384, 389. The Fourth Congress extended earlier statutes regulating trade with Indian tribes, *see* Act of May 19, 1796, ch. 30, § 18, and provided that the government's decision to mitigate a fine or forfeiture would not affect an informer's interest in his moiety. Act of March 3, 1797, ch. 13, §3, 1 Stat. 506, 506-07.

action, brought to recover a penalty." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 537 (1832).

Because "early congressional enactments provide contemporaneous and weighty evidence of the Constitution's meaning" (*Printz v. United States*, 521 U.S. 898, 905 (1997) (internal quotations and brackets omitted)), the fact that Congress so extensively relied on informer statutes to protect the federal fisc and further federal regulatory policies "when the founders of our government and framers of our Constitution were actively participating in public affairs" (*Knowlton v. Moore*, 178 U.S. 41, 56 (1900)) "goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 327-28 (1936); *see also Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986); *Myers v. United States*, 272 U.S. 52, 175 (1926); *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803) ("[i]t is a contemporary interpretation of the most forcible nature"). Of particular relevance here, the prevalence of informer statutes at the founding provides powerful evidence that the Framers well understood that the United States might rely on *qui tam* actions to vindicate its rights. Because the "plan of the Convention" necessarily subjects States to suit by the United States (*Alden*, 119 S. Ct. at 2267), compelling proof would be needed to show that the Framers somehow intended to preclude the United States from relying on that traditional form of action in protecting its rights against state interference—especially where, as here, Congress does so to protect federal property from fraud. Vermont provides no such evidence. [9]

[9] *Amici* Regents of the University of Minnesota *et al.* contend that this Court's decision in *United States v. Peters*, 3 U.S. (3 Dallas) 121 (1795), somehow establishes that *qui tam* suits may not be maintained against States. No State was even remotely a party to the case, however, and *amici* concede that *Peters* was not a *qui tam* action—it was a libel filed for various alleged torts committed on the high seas by a ship owned by the Republic of France. In fact, even on their own terms, *amici*'s claims are strained to the point of absurdity: the contention is that counsel for the French ship's captain mentioned the then-proposed Eleventh Amendment by way of analogy during his *argument*, and that the facts of the case might support a *qui tam* action, which had indeed separately been filed. This Court did not "broadly accept[]" all of counsel's arguments, as alleged by *amici* (Minn. Br. 8-9); it issued a three-line opinion stating that Members of the Court held differing views on the issues, but that a majority was of the view that a writ of prohibition should issue. 3 U.S. (3 Dallas) at 129. The recitals to that writ cited, as support for the prohibition, the law of nations and our *treaties* with the French. *Id.* at 129-30. *L'Invincible*, 14 U.S. (1 Wheat.) 238, 259-60 (1816), also relied on by *amici* as reaffirming the supposed holding of *Peters*, stated only that the recitals to the writ issued in *Peters* correctly stated the law applicable to alleged war prizes.

3. Finally, Vermont suggests that even if the United States is a real party in interest, and therefore properly viewed as the plaintiff in this action, Mr. Stevens is an *additional* party whose participation in the suit is barred by Vermont's sovereign immunity. According to Vermont, that conclusion follows from the fact that a *qui tam* plaintiff under the Act brings suit "for [himself] and for the United States Government," 31 U.S.C. § 3730(b), and from this Court's purported holding in *Pennhurst II* that the United States' presence as a plaintiff never eliminates a State's immunity with respect to a "co-plaintiff." Vt. Br. 40-41, 46-47. Neither objection is sound.

Vermont's reliance on the Act's description of a *qui tam* suit as an action brought by a person both for himself and for the government advances the analysis very little. The statutory language merely mirrors the phraseology used at common law to denote that an action is brought by the plaintiff as a *qui tam* relator. *Compare McCulloch v. Maryland*, 17 U.S. (4 Wheat.) at 317 ("John James, who sued as well for himself as for the state of Maryland"). Like other terms of art used by Congress, the phrase bears only the meaning given it by the accumulated tradition that it invokes. *Morissette v. United States*, 342 U.S. 246, 263 (1952); *Bell v. United States*, 462 U.S. 356, 360 (1983). Nothing in the common law tradition suggests that a relator's suit redresses any injury other than that suffered by the sovereign as a result of the defendant's violation of the pertinent statutory norms.[10] Indeed, the relator sues "for himself" only in the sense that he may receive, as a reward, part of the sovereign's recovery. Because the relator does not have a personal cause of action against a *qui tam* defendant, it is error to view him as a "co-plaintiff" in the sense suggested by Vermont.

In any event, Vermont's reading of *Pennhurst II* is itself erroneous, and thus Vermont's claim must fail even if a *qui tam* relator properly is characterized as a "co-plaintiff." The question this Court considered in *Pennhurst II* was whether the Eleventh Amendment barred monetary suits against a State for violations of *state* law. One of the arguments advanced by the plaintiffs was that the United States was

[10] Because Mr. Stevens has not sued the State on the basis of the adverse employment action taken against him by his employer, the Court need not consider in this case whether a different analysis would apply to a claim brought under the Act's anti-retaliation provision, 31 U.S.C. § 3730(h).

already a plaintiff in the case, having sued the State for violations of *federal* law. This Court ruled that the United States' participation did not authorize the private parties to assert their own *additional* claims under state law. "[T]he United States does not have standing to assert the state-law claims of third parties," the Court observed, and therefore "the applicability of the Eleventh Amendment to respondents' state-law claim is unaffected by the United States' participation in the case." *Pennhurst II*, 465 U.S. at 103 n.12.

Pennhurst II did not address the situation that, on Vermont's view of the statute, is presented here: a case in which the United States and a private party are "co-plaintiffs" on the same federal-law claim. In fact, *Arizona v. California*, 460 U.S. 605 (1983), a case raising those facts but not cited by Vermont, rejects Vermont's argument. In that case, the United States brought water claims against several States on behalf of certain Indian tribes. The tribes sought to intervene, but the defendant States objected to the tribes' intervention on the basis of the Eleventh Amendment. This Court squarely rejected the States' Eleventh Amendment claim, explaining that "the tribes do not seek to bring new claims or issues against the States" and "[t]herefore our judicial power over the controversy is not enlarged by granting leave to intervene." *Id.* at 614. Thus, even on Vermont's view that Mr. Stevens should be considered a "co-plaintiff" of the United States in this case, his presence in that purported role does not expand the claims before the Court and, therefore, "the State['s] sovereign immunity protected by the Eleventh Amendment is not compromised." *Ibid.*

D. The False Claims Act Satisfies Any Requirement For Executive Branch Control That This Court Reasonably Might Impose

Even if the Eleventh Amendment in fact invariably required Executive Branch participation in government suits

against States, as alleged by Vermont, the Attorney General's power under the Act to control *qui tam* litigation surely would meet any standard for such participation that this Court reasonably might impose.

1. The Act expressly requires a relator to provide the Attorney General, when the complaint is filed, with a "written disclosure of substantially all material evidence and information the [relator] possesses * * *." 31 U.S.C. § 3730(b)(2). On the basis of that information and of her own "diligent[]" investigation of the allegations supporting the complaint (*id.* §§ 3730(a), 3730(b)(2)), the Attorney General must make an affirmative decision whether to take over the prosecution of the case. That means, as the court of appeals noted, that she is authorized to intervene at the outset, take control of the case, and compromise it or end it for any legitimate governmental purpose "notwithstanding the *qui tam* plaintiff's desire that it continue." Pet. App. 17. In effect, the statute allows the Attorney General to leverage her resources by permitting the continuation of fraud cases that she might not otherwise have the ability to prosecute, despite their potential for redressing an injury to the public fisc.

The Act also provides the Attorney General the means for keeping abreast of later developments in the litigation, such as evidence that might "escalate the magnitude or complexity of the fraud * * * or [that otherwise] make[] it difficult for the *qui tam* relator to litigate alone," so that she may elect to intervene at a later time. S. REP. 345, at 26-27. Although Vermont stresses that such later intervention by the Attorney General does not "'limit[] the status and rights'" of the relator under the Act (Vt. Br. 43, quoting 31 U.S.C. § 3730(c)(3)), the State is wrong to contend that that provision denies the Attorney General "authoritative control over the litigation." *Ibid.* Congress contemplated that even intervention at a later stage of the case would still "allow the Government to take over the suit." S. REP. 345, at 27. Indeed, if there were any doubt on that score it would be rather odd to construe the statutory language, as Vermont urges, more broadly than its text fairly requires solely to bolster Vermont's challenge to the Act's constitutionality.[11]

2. Vermont contends, however, that States somehow will lose a fundamental safeguard of federalism unless this Court requires Executive Branch officials to conduct personally all litigation by the United States against a State of the Union. According to Vermont, *qui tam* suits under the Act "deprive[] Vermont of the affirmative discretion exercised by federal officers in their enforcement of federal laws," prevent States from seeking the intercession of their congressional delegation in persuading Executive Branch officials not to prosecute, and generally "allow[] the United States to remove itself from political accountability." Vt. Br. 37-38. Those claims are meritless.

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[11] The language on which Vermont relies is most naturally read as making clear that later intervention does not divest the relator of his share of any eventual recovery or of the limited right to participate in the action that he would have enjoyed had the Attorney General intervened at the outset. Indeed, because the Attorney General ordinarily is presumed to have the right to control all litigation in which the United States is a party, to the exclusion even of counsel for other government departments, *see United States v. San Jacinto Tin Co.*, 125 U.S. 273, 278-82 (1888); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458 (1868); *The Gray Jacket*, 72 U.S. (5 Wall.) 370, 371 (1866), stronger language than that relied on by Vermont would be necessary to conclude that the Attorney General does not have the ultimate authority to speak for the United States in litigation conducted under a statute that specifically gives her the right to intervene.

Vermont cites no authority, apart from its indefensibly broad reading of *Blatchford* and *Alden*, for the proposition that States invariably are entitled to an exercise of "discretion" by Executive Branch officials as a condition to suit. Moreover, Vermont is simply wrong in asserting that the False Claims Act forecloses that "discretion," relieves the Attorney General from accountability, or somehow disables a State's congressional delegation from interceding with the Executive Branch.

Because the Attorney General has the statutory right to intervene and terminate a *qui tam* suit, she remains accountable for the litigation. The paradoxical premise of Vermont's argument is that, while Executive Branch officials *alone* are empowered by our Constitution to make the sensitive litigation judgments that might be required by federal-state conflicts, the Attorney General will cravenly rely on the fact that a suit was filed by a relator (rather than a federal prosecutor) to look the other way, shirk her duties, and escape political accountability. *E.g.*, Vt. Br. 38. Although Vermont's own acts (as detailed in the Complaint and Written Disclosure) persuasively demonstrate that public officers on occasion engage in reprehensible conduct, it hardly needs saying that this Court, in framing rules of law, ordinarily proceeds on the opposite assumption—*i.e.*, that public officers will "properly discharge[] their official duties." *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926); *see also United States v. Mezzanatto*, 513 U.S. 196, 210 (1995). Indeed, Vermont's argument rings particularly hollow in this case, where the Attorney General has affirmatively opposed Vermont's arguments in every court to which Vermont has presented them.

Moreover, invoking the *qui tam* provisions of the Act in suits against States scarcely diminishes the value of States' congressional representation. A State's congressional delegation can make as effective an argument for dismissal in this context as it can in any run-of-the-mine case in which a federal prosecutor has brought suit, in the name of the United States, against a State of the Union. Moreover, Vermont retains the key procedural safeguard that congressional representation affords States in the federal system: Vermont can seek the enactment of federal *legislation* that fully implements Vermont's jaundiced view of *qui tam* litigation. *South Carolina v. Baker*, 485 U.S. 505, 512-13 (1988). That safeguard is more than sufficient to protect the general federalism concerns asserted by Vermont here, at least absent some "extraordinary defect[] in the national political process" that somehow has deprived Vermont "of its right to participate" in the process of framing federal legislation. *Baker*, 485 U.S. at 512. In fact, if this Court were to credit Vermont's and its *amici*'s assertions about the patent unwisdom of subjecting States to *qui tam* liability, it would also have to conclude that Vermont and her sister States will encounter little difficulty in enlisting their respective congressional delegations to dispense with such liability entirely.

II. STATES OF THE UNION ARE "PERSONS" THAT MAY SUE AND BE SUED UNDER THE ACT

A. Because The Court Of Appeals Lacked Jurisdiction Over Vermont's Statutory Arguments, This Court May Not Consider Them

While the court of appeals correctly reviewed Vermont's Eleventh Amendment claim, that court's assertion of "pendent appellate jurisdiction" over the statutory issue cannot be reconciled with *Swint v. Chambers County Comm'n*, 514

U.S. 35, 49-50 (1995).[12] *Swint* held that courts of appeals lack discretion "to append to an * * * appeal from a collateral order further rulings of a kind neither independently appealable nor certified by the district court." 514 U.S. at 47.[13] Although the Solicitor General correctly noted at the certiorari stage that *Swint* left open the possibility that courts of appeals may have jurisdiction to review an otherwise non-appealable ruling that is "inextricably intertwined" with a properly appealable interlocutory order, or that must be decided to ensure "meaningful review" of the issue properly before the court (U.S. Pet. Br. at 10 n.5 (May 26, 1999)),

[12] Vermont's interlocutory appeal of the denial of its motion to dismiss on Eleventh Amendment grounds falls within the narrow class of exceptions to the final judgment rule recognized in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). *See Metcalf & Eddy, Inc.*, 506 U.S. at 147. States may appeal such orders immediately because the immunity from suit conferred by the Eleventh Amendment "is effectively lost if a case is erroneously permitted to go to trial." *Id.* at 144. The State's statutory claim, however, is a defense to *liability*, not an immunity from suit, and it may be asserted by the State on appeal from a final judgment.

[13] The Court reasoned that the statutory scheme of 28 U.S.C. §§ 1292(a)-(b) contemplates that *district courts* have "first line discretion" (514 U.S. at 47), to determine which orders not enumerated in 28 U.S.C. § 1291 or otherwise appealable under *Cohen, supra*, are appropriate for interlocutory review; that the Rules Enabling Act empowers the Court to expand the list of orders appealable on an interlocutory basis only through the rulemaking process of 28 U.S.C. § 2072 and not through judicial decision; and that "loosely allowing pendent appellate jurisdiction would encourage parties to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets." 514 U.S. at 49-50.

those circumstances do not justify review of the statutory issue pressed by Vermont here.

The Eleventh Amendment issue is not "inextricably intertwined" with the statutory question decided by the court of appeals, because that court could fully determine the constitutional issue on the assumption that States are "persons" under the False Claims Act. Indeed, this Court has followed precisely that course in the past. In *Edelman v. Jordan*, 415 U.S. 651 (1974), for example, the Court adjudicated the scope of a State's Eleventh Amendment immunity without addressing whether States are "persons" under 42 U.S.C. § 1983, an issue that the Court only decided fifteen years later. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 63 n.4 (1989). Moreover, the Eleventh Amendment question is not coterminous with the statutory question, nor does it subsume it. To the contrary, the statutory question is far broader: *the State's arguments on that question, if accepted, would preclude even suits brought by the Attorney General*, who concededly is not bound by the constitutional immunity that justified Vermont's interlocutory appeal in the first place.

The Solicitor General has suggested that the court of appeals may have properly reviewed the statutory question because "accepted principles of constitutional adjudication" require this Court to decide the "logically antecedent" statutory issue before the constitutional one. U.S. Pet. Br. at 10 n.5. That approach, however, begs the question of jurisdiction. While this Court has long adhered to a "*policy* of avoiding the unnecessary adjudication of federal constitutional questions," *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 294 (1981) (emphasis added); *see also United States v. National Treasury Emp. Union*, 513 U.S. 454, 477 (1995), that prudential doctrine presupposes that the Court *has* jurisdiction to review both the constitutional and non-

constitutional grounds of decision. The doctrine does not itself confer jurisdiction on an appellate court to decide an issue not otherwise before it. Indeed, it is, to say the least, anomalous to assert "pendent" jurisdiction over a question, not otherwise before the Court, for the sole purpose of avoiding, if possible, decision of the only issue subject to interlocutory review. In sum, there is no substantial basis on which to conclude that Vermont's statutory challenge was properly before the court of appeals or can be addressed by this Court.

B. No Canon of Construction Requires This Court To Presume That States Are Not Persons Under The Act

Were this Court to reach the statutory question presented by Vermont, it would have to reject Vermont's interpretation of the Act. Vermont's position flows almost entirely from its contention that *Will* establishes that "the plain meaning" of the word person "excludes" States unless Congress uses a "plain statement" to refer to them by name. Vt. Br. 11-12, 18. Vermont is wrong both in its reading of *Will* and in supposing that any "plain statement" canon applies here.

1. *Will* did not "adopt a *per se* rule prohibiting the interpretation of general liability language to include the States, absent a clear statement by Congress to the effect that Congress intends to subject the States to the cause of action." *Hilton v. South Carolina Public Rys. Comm'n*, 502 U.S. 197, 205 (1991). As this Court repeatedly has ruled—both before and after its decision in *Will*—"'there is no hard and fast rule of exclusion' of the sovereign." *Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 83 (1991) (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 604-05 (1941)). Not surprisingly, this Court "many times has * * * held that the United States or a state is a 'person' within the meaning of statutory provisions applying

only to persons." *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 91-92 (1934); *see also Jefferson County Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150, 154-55 (1983); *Ohio v. Helvering*, 292 U.S. 360, 371 (1934).

Instead, *Will* simply "appl[ied] an 'ordinary rule of statutory construction,'" *Hilton*, 502 U.S. at 205 (quoting *Will*, 491 U.S. at 65), that operates "'where statutory intent is ambiguous.'" *Id.* at 206 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991)). In those circumstances, "[s]ince, in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it." *United States v. Cooper Corp.*, 312 U.S. at 604. The principle on which Vermont relies, in other words, is a tie-breaker that comes into operation at the *end* of the process of construction, not, as Vermont would have it, a rule of law that States are not "persons" unless Congress invokes explicit language of inclusion. *See Salinas v. United States*, 522 U.S. 52, 60 (1997) ("the rules of statutory construction we have followed to give proper respect to the federal-state balance * * * d[o] not apply when a statute [is] unambiguous. A statute can be unambiguous without addressing every interpretive theory offered by a party" (internal citations omitted)).[14]

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[14] Vermont's invocation of the doctrine of constitutional "doubt" (Vt. Br. 16-17) fails for much the same reason. That canon may be applied only to embrace a statutory reading "not plainly contrary to the intent of Congress," *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994), and thus can have no operation where, as here, the statute unambiguously reaches the challenged conduct. In any event, even if there were some doubt about the constitutionality of a particular application of the Act (*i.e.*, suits by *qui tam* relators), that doubt would scarcely justify the statutory construction urged by Vermont, which would have the primary

2. In any event, that tie-breaking canon would have no bearing in this case even if Vermont could establish that the Act is ambiguous, because the Act makes "person[s]" liable *to the United States* for fraud against the federal government. Under Vermont's statutory theory, the Attorney General herself could not have brought suit against Vermont. Neither Vermont nor its *amici*, however, have cited a single case from this Court that applies *Will*'s rule of statutory construction where, as here, a federal statute grants a right of action *to the United States*. In fact, *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), concluded that States were "persons" suable under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.*, based in part on the Court's express *rejection* of such a proposition. As the Court noted, "the Constitution presents no barrier to lawsuits brought by the United States against a State" and "[f]or purposes of such lawsuits, States are naturally just like 'any nongovernmental entity.'" *Id.* at 11. Accordingly, "there are no special rules dictating when they may be sued by the Federal Government, nor is there a stringent interpretive principle guiding construction of statutes that appear to authorize such suits." *Ibid.*[15]

[Footnote continued from previous page]
effect of foreclosing suits brought by *the Attorney General* on behalf of the United States that are not open to any conceivable constitutional objection.

[15] Although the Court subsequently repudiated the *constitutional* holding of *Union Gas* in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), the Court never has wavered from the *statutory* analysis that commanded a majority of the Court in *Union Gas*. As the Court noted in *Union Gas*, a rule exempting States from suits by the United States, save where Congress expressly names States as

The Court's refusal to apply any "stringent interpretive principle" (*Union Gas*, 491 U.S. at 11) to federal statutes that authorize suits by the United States in no way denigrates "the systemic importance of the federal balance." *Arkansas v. Farm Credit Servs.*, 520 U.S. 821, 827 (1997). It simply recognizes that in cases in which the United States is a plaintiff "the other side of the federal balance must be considered," because "[i]n our constitutional system the National Government has sovereign interests of its own." *Id.* As this Court explained in *Block v. North Dakota*, 461 U.S. 273 (1983), "[t]he judicially created rule that a sovereign is normally exempt from the operation of a generally worded statute * * * serves the public policy of preserving the public rights, revenues and property from injury and loss, by the negligence of public officers." *Id.* at 290. Because that "judge-created rule [is] designed to protect the interests of the citizens of one particular State," it "must yield in the face of * * * evidence that Congress has determined that the national interest requires a contrary rule." *Ibid.*

[Footnote continued from previous page]
parties defendant, would effectively repudiate the traditional rule "that *no* explicit statutory authorization is necessary before the Federal Government may sue a State." *Union Gas*, 491 U.S. at 11 (citing *United States v. California*, 332 U.S. 19, 26-28 (1947)); *see also West Virginia*, 479 U.S. at 311-12. Indeed, Justice Scalia fully joined the part of the Court's opinion in *Union Gas* that embraced that statutory analysis—and which rejected the interpretive methodology urged by Vermont here—while dissenting from the Court's Eleventh Amendment holding and later joining the *Seminole Tribe* majority in overruling that holding.

C. The Act Unambiguously Applies To States Of The Union

To the extent Vermont and its *amici* even attempt to address whether Congress intended to make States suable under the Act by using traditional "aids to construction," *Cooper Corp.*, 312 U.S. at 604-05; *Primate Protection League*, 500 U.S. at 83, their arguments are almost entirely misdirected. According to Vermont and its *amici*, the controlling question is whether Congress intended to subject States to suit *in 1863*. In 1986, however, Congress *repealed* the entire paragraph that formerly defined the scope of the Act and enacted, in its place, language that applies the Act's proscriptions to "[a]ny person." *See* False Claims Amendments Act of 1986, Pub. L. 99-562, 100 Stat. 3153, 3153.[16]

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[16] Before 1986, the language preceding paragraph (1) of Section 3729 read:

> A person not a member of an armed force of the United States is liable to the United States Government for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and costs of the civil action, if the person—

31 U.S.C. § 3729 (1982). The Act then went on to enumerate the prohibited conduct in paragraphs (1) through (6). In 1986 Congress entirely *deleted* that introductory paragraph and enacted *new* charging language:

> Section 3729 of Title 31, United States Code, is amended– (1) by striking the matter preceding paragraph (1) and inserting the following: "(a) LIABILITY FOR CERTAIN ACTS. —*Any person who*—"

False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153, 3153 (emphasis added).

Moreover, Congress made other changes to the text of the Act that unambiguously establish its intent to subject the States to suit. And Congress *also* expressly stated that intent in the relevant Committee Report. Vermont's statutory argument to the contrary is simply untenable.

1. Three distinct aspects of the statutory text squarely demonstrate that Congress clearly intended that the Act apply to the States. *First*, the Act reaches "*[a]ny* person" without qualification. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 97 (1976)); *see also Brogan v. United States*, 118 S. Ct. 805, 808 (1998) (statute that criminalizes "any" false statement reaches "a false statement 'of whatever kind'"). Because the term "any" imports "no restriction" (*United States v. Turkette*, 452 U.S. 576, 580 (1981)) or "limit[ation]" (*International Union of Operating Engineers v. Flair Builders, Inc.*, 406 U.S. 487, 491 (1972); *Shea v. Vialpando*, 416 U.S. 251, 260 (1974)), it "leaves no doubt as to the Congressional intention to include all" members of the category identified by the enactment. *United States v. Rosenwasser*, 323 U.S. 360, 363 (1945). And since States *can* be "persons" suable under federal statutes, *see, e.g.*, *Sims v. United States*, 359 U.S. 108, 112-13 (1959); *Georgia v. Evans*, 316 U.S. 159, 161 (1942), Congress' use of the expansive term "any" necessarily manifested its intent to reach States among the "person[s]" that might be subjected to suit.

Second, the 1986 enactment included a provision authorizing the Attorney General to issue "civil investigative demands" (CIDs) when she conducts "false claim law investigations." 31 U.S.C. § 3733(a). The CID provisions define a "false claims law investigation" as an inquiry con-

ducted "for the purpose of ascertaining whether *any person* is or has been engaged in any violation of a false claims law," *id.* § 3733(*l*)(2), and expressly include the provisions of the Act that are at issue here ("sections 3729 through 3732") as "false claims laws" subject to such investigation. *Id.* § 3733(*l*)(1)(A). Because the CID provisions also expressly *define* "person" to include "any State or political subdivision of a State" (*id.* § 3733(*l*)(4)), the conclusion is inescapable that States are "persons" under Section 3729—else there would be little point in authorizing the Attorney General to investigate whether a State "is or has been engaged in any violation" of that section.

Vermont objects, however, that the definitions in Section 3733(*l*) apply only "for purposes of" the CID provisions. It contends that those definitions therefore bespeak an intent to exclude States from other parts of the Act, since "[i]f the term 'person' as used in the FCA already included the States, this added definition would have been unnecessary." Vt. Br. 20-21. That argument overlooks the fact that the CID provisions do not merely define "person" to include States, but also expressly refer to Section 3729 as one of the laws that such "person[s]" may "violat[e]." Moreover, the definition of "person" in the CID provisions includes not only States, but also "any natural person, partnership, corporation, association, or other legal entity." 31 U.S.C. § 3733(*l*)(4). Under Vermont's interpretive theory, therefore, Section 3729 would apply to *no one*. There is no reason for this Court to accept such an absurd interpretation of the Act. *See, e.g., Citizens Bank v. Strumpf*, 516 U.S. 16, 20 (1995) ("[i]t is an elementary rule of construction that the act cannot be held to destroy itself") (internal quotation marks and citation omitted).

Third, Vermont does not seriously dispute that States are "persons" that can initiate *qui tam* proceedings as plaintiffs

under the Act, nor could it. Before the 1986 enactment, the National Association of Attorneys General "strongly urge[d]" Congress to remove impediments that had been fashioned by lower courts to such suits (S. REP. 345, at 13), and Congress responded by, *inter alia*, amending the Act to permit "State and local governments to join State law actions with False Claims Act actions brought in Federal district court * * *." *Id.* at 16; *see* 31 U.S.C. § 3732(b). "Since there is a presumption that a given term is used to mean the same thing throughout a statute," *Brown v. Gardner*, 513 U.S. 115, 118 (1994), and Section 3730 uses the term "person" to refer both to *qui tam* relators and to potential defendants, "it is virtually impossible" (*ibid.*) to read the Act to say that States are persons in the former sense but not in the latter. While Vermont stresses that this canon of interpretation is "not rigid" (Vt. Br. 24), the State offers nothing to counteract the force of that canon here.

2. The plain-language interpretation of the Act is fully consistent with the Act's broad remedial purposes. This Court has long recognized that the Act "was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." *Niefert-White*, 390 U.S. at 232. Indeed, more than 50 years ago, this Court held that the Act covers contractors who defraud State agencies out of federal grant monies, since "Government money is as truly expended whether by checks drawn directly against the Treasury to the ultimate recipient or by grants in aid to the states." *United States ex rel. Marcus*, 317 U.S. at 544. As the Court noted, grants in aid to the States "are as much in need of protection from fraudulent claims as any other federal money." *Ibid.*

Whatever ambiguity may have existed before 1986 concerning whether the Act fully addressed that "need" in cases in which a State itself attempted to cheat the Union, the

1986 amendments unambiguously removed any doubt on the question. Indeed, as the court of appeals noted, the Senate Report that accompanied the legislation expressly noted that the Act "reaches all parties" who might defraud the government, including "States and political subdivisions thereof." S. REP. 345, at 8-9. While Vermont attempts to denigrate that statement as nothing more than the uninformed views of a later Congress on the meaning of language enacted more than a century earlier (Vt. Br. 26-27), its argument completely overlooks the fact that the controlling language ("any person") was enacted for the first time by the 1986 Congress. Thus, even if Vermont were correct in asserting that the 1986 Congress misconceived the original Act's scope, and that consequently it erred in its belief that the 1986 Act did not change the statute's breadth, the Court would still have to treat the Senate Report as "the authoritative source for legislative intent" with respect to the language at issue here, which was clearly enacted by the 1986 Congress. *See Thornburg v. Gingles*, 478 U.S. 30, 44 n.7 (1986); *see also Blanchard v. Bergeron,* 489 U.S. 87, 91 (1989).

3. Finally, there is no force to Vermont's contention that Congress could not have intended that States be "persons" under the Act, because public entities are not ordinarily exposed to the "punitive" liability for treble damages or civil fines. Vt. Br. 20-21. This Court has repeatedly held that the double damages and fines provided for in the original Act were intended to serve remedial rather than punitive purposes, and afforded the government no more than "complete indemnity for the injuries done it," including "not merely the amount of the fraud itself, but also ancillary costs, such as the costs of detection and investigation, that routinely attend the Government's efforts to root out deceptive practices directed at the public purse." *United States v. Halper*, 490 U.S. 435, 444-45 (1989); *see also United States v. Bornstein*, 423 U.S. at 314-15 & n.11; *United States ex rel. Marcus*, 317 U.S. at 549, 551-52.

That remedial rationale for the Act's damages and civil fines does not disappear, as Vermont contends, merely because Congress determined in 1986 that presumptively larger liquidated damages are now necessary to make the government whole. Indeed, even if Vermont were correct that the Act incorporates some punitive elements, that would not establish any incongruity in subjecting States to its provisions. Public entities ordinarily are exempt from such liability in order to spare innocent taxpayers from the burden of paying for the misdeeds of public officials. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267-69 (1981). That rationale carries little force where, as here, the issue is *which* set of taxpayers—state or federal—will be left to pay for the State's fraud. It is hardly incongruous to ascribe to Congress the intent to ensure that that burden will not be placed on the taxpayers of this Nation who have no direct ability to control the State's conduct. *Compare Block*, 461 U.S. at 290.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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