No. 98-1828

In The

Supreme Court of the United States

STATE OF VERMONT AGENCY
OF NATURAL RESOURCES,

Petitioner,

v.

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

Respondent.

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

REPLY BRIEF FOR PETITIONER

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ARGUMENT

The relator's actions exemplify why "the National Government must itself deem the case of sufficient importance" so as to justify overriding Vermont's fundamental sovereign right not to be subject to suit. *Alden v. Maine*, 119 S. Ct. 2240, 2269 (1999). A private individual, nominally on behalf of the United States, is seeking relief that would undoubtedly impair Vermont's ability to protect the public health and environment. He has alleged that the Department of Environmental Conservation, Vermont's equivalent to EPA, fraudulently obtained grant monies from EPA. He has asserted a claim for civil penalties of "between $12.5 million and $25 million" – a considerable sum which still "do[es] not include a calculation of [any] actual damages, which would be trebled." Relator's Lodging 9.

The magnitude of the relator's requested relief is plainly revealed by comparing it to DEC's total annual operating costs. In fiscal year 1994, (July 1, 1993 – June 30, 1994) DEC's entire operating budget was $18,210,905. 1993 Vt. Acts & Resolves No. 60, §§ 193-205. Notwithstanding the enormity of the relator's claim, EPA, who with the Department of Justice, investigated the claims thoroughly and interviewed the pertinent DEC employees mentioned in the relator's Lodging, concluded that Vermont did nothing wrong. Vt. Br. App. 1-3.

This lawsuit's potential impact on Vermont is staggering. *See Alden*, 119 S. Ct. at 2264. Yet, the United States chose neither to sue Vermont, nor to pursue Vermont with the decidedly severe remedy of the False Claims Act. Rather, a private person driven by the hope of monetary gain is pursuing this matter in the name of the United States and seeks to assert its sovereign authority to sue the State of Vermont.

There is no plausible basis for concluding that Congress intended the FCA to be used in this manner. Moreover, the Constitution requires that the United States itself exercise what it concedes to be "the essential feature of suits brought by the United States" against a State, *i.e.*, political responsibility for each suit it prosecutes against a State. U.S. Br. 41 (citing *Alden*, 119 S. Ct. at 2267). Given what is at stake for Vermont, the exercise of political responsibility is imperative.

I. STATES ARE NOT "PERSON" DEFENDANTS UNDER THE FCA.

Respondents suggest that this Court should ignore the plain meaning of the term "person," the clear statement rule, and the doctrine of constitutional doubt simply to avoid a holding that prevents the United States – as well as private relators – from bringing suit against a State under the FCA. This argument is misdirected. Neither this case, nor the FCA itself, is primarily concerned with the ability of the United States to sue a State for fraud. The hyperbole contained in respondents' briefs should not distract the Court's attention from the central question of statutory interpretation in this case: did Congress, by its use of the generic term "person" to define the class of potential defendants under the FCA, plainly state its intent to authorize suits against the sovereign States under that statute? In light of this Court's precedents, the answer to that question is "no."

A. The Court has jurisdiction to consider the statutory issue.

This Court's decision in *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995), did not preclude the exercise of pendent appellate jurisdiction where issues are "inextricably intertwined" or where review of another issue is

"necessary to ensure meaningful review" of the issue on appeal. *Id.* at 50-51. In this case, review of the statutory issue is plainly appropriate under *Swint* and other decisions of the Court. As the United States recognizes, the proper interpretation of the FCA is "logically antecedent" to the constitutional issue raised here. U.S. Br. 17, n.9. The Court has repeatedly recognized its inherent authority to consider issues " 'antecedent to . . . and ultimately dispositive of' the dispute before it," even where those issues are not properly raised. *United States Nat'l Bank v. Independent Ins. Agents*, 508 U.S. 439, 447 (1993) (quoting *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990)); *see also Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 381-82 (1995) (Amtrak's status as government entity was "prior question" properly considered by Court, in part to avoid making assumptions that may prove incorrect).

In *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), the Court recognized that whether Congress intended to abrogate state sovereign immunity is necessarily antecedent to the issue of Congress's authority to do so. There, the State of Florida took an interlocutory appeal of the district court's ruling that the Tribe's suit did not violate sovereign immunity. *Id.* at 52. This Court held that it must look first to the relevant statute to determine whether Congress intended to abrogate state sovereign immunity, before considering the constitutional question. *Id.* at 55-56.

Ironically, the relator's discussion of the jurisdictional issue itself reveals the degree to which the Eleventh Amendment issue and the antecedent question of statutory interpretation are "inextricably intertwined." The relator argues that the Court should rule on the Eleventh Amendment issue based on "the assumption that States are 'persons' under the False Claims Act." Rel. Br. 39. The relator thus suggests that the Court ignore the

usual principles that guide the Court's decisionmaking, including avoiding constitutional issues when possible, *see, e.g., Clinton v. Jones*, 520 U.S. 681, 690 n.11 (1998), and declining to issue advisory opinions. *See, e.g., Golden v. Zwickler*, 394 U.S. 103, 108 (1969). But the argument is also an implicit concession that the meaning of the term "person" in the FCA is a "prior question" that must be resolved before the Court addresses the Eleventh Amendment issue. *Cf. Lebron*, 513 U.S. at 382.

B. Interpreting the FCA to exclude States as defendants does not undermine the United States' ability to combat fraud.

The United States maintains that States must be included under the FCA because the FCA is the government's "primary vehicle" for redressing fraud. U.S. Br. 17. This reasoning is specious, however, because interpreting the FCA to exclude suits against the States in no way "preclude[s] the Attorney General from seeking redress . . . for fraud committed by States and state agencies." *Id.* at 23. The States are not immune from suits brought by the United States under the proper control of responsible federal officers and there is thus no barrier to a suit by the United States against a State sounding in common law fraud, unjust enrichment or related principles. Indeed, the United States itself apparently recognizes this avenue for relief, as it asserted such claims in a recent case against the City and State of New York. *See United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343, 345 (S.D.N.Y. 1998). As discussed in Vermont's opening brief and the brief of the Amici States, the federal government also has numerous administrative remedies for noncompliance with grant programs. Vt. Br. 35-36; Br. of Amici Curiae States 16-17; *see also* Pet. App. 79-82 (Weinstein, J., dissenting). Should these remedies

prove inadequate, Congress is of course free to amend the FCA to permit the United States itself to bring suit against a State under the Act.

Moreover, the United States' own statistics reveal that the FCA is not the "primary vehicle" for redressing frauds committed by state and local governments. According to statistics provided to Vermont by the United States, from 1986 to 1997 the United States pursued only nine *qui tam* suits filed against state *and* local entities.

The small scale of the problem and the other remedies available to the United States fatally undermine its assertion that "it would be anomalous to exclude the States from the Act's coverage." U.S. Br. 12. By excluding the States as potential defendants under the FCA, Congress did not give license to the States to commit rampant fraud against the federal government. Congress merely exempted state taxpayers from an admittedly onerous statute that permits private individuals to bring suit for treble damages, penalties, attorney's fees, and costs.

Congress's decision is not surprising. In fact, the same Congress that enacted the 1986 amendments to the FCA also specifically excluded the States from coverage under the Program Fraud Civil Remedies Act (PFCRA), a less punitive statute than the FCA that authorizes the United States to pursue administrative penalties and assessments for false claims. *See* 31 U.S.C. § 3801(a)(6) (defining "person" as "any individual, partnership, corporation, association, or private organization"). Given the normally cooperative nature of federal-state relations and the other remedies available to the United States in the rare case of fraud by a State, it is entirely understandable that Congress excluded States from liability under both the FCA and the PFCRA.

C. The plain meaning of the term "person," the clear statement rule, and the doctrine of constitutional doubt lead inescapably to the conclusion that States are not "person" defendants under the FCA.

In an attempt to avoid the established rules of statutory construction that apply to the FCA, respondents cite the portion of the decision in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), in which the Court concluded that Congress intended to impose liability on States for money damages under CERCLA. *Id.* at 13. *Union Gas* has no bearing on the meaning of the undefined term "person" in the FCA because, as the Court emphasized, " 'States' are *explicitly included* within [CERCLA's] definition of 'persons.' " *Id.* at 7 (emphasis added). What is perhaps most interesting about this point is that although CERCLA specifically included States as "persons," four justices nonetheless concluded that the statute did not contain a sufficiently clear statement of Congress's intent to impose liability on the States. *Id.* at 50 (White, J., concurring in part and dissenting in part).

In any event, neither *Union Gas* nor any other case cited by respondents contravenes the "ordinary rule of statutory interpretation" set out in *Will v. Michigan*, 491 U.S. 58 (1989): in common usage, the term "person" does not include the States, and construing a statute in light of this common usage is "particularly applicable where it is claimed that Congress has subjected the States to liability to which they had not been subject before." *Id.* at 64. Exposing States to the FCA's punitive remedies, including treble damages and substantial civil penalties, is precisely the type of burden or liability that, under *Will*, precludes interpreting "person" to include the States.

Respondents further cite *Union Gas* for the unexceptional proposition that "there are no special rules dictating when [States] may be sued by the Federal Government, nor is there a stringent interpretive principle guiding construction of statutes that appear to authorize such suits." 491 U.S. at 11. That proposition is simply not relevant to the FCA. The Court in *Union Gas* rejected Pennsylvania's argument that CERCLA only authorized suits by the United States against States, reasoning that CERCLA's "highly specific language" regarding States would have been unnecessary to authorize such suits. *Id.* at 12. But, because CERCLA authorized suits by both the United States and private individuals, Congress was required to use specific language to satisfy the clear statement rule. *Id.* at 11-12. The same is true here: because the FCA, like CERCLA, authorizes suits by both the United States and private individuals, the Court must determine whether Congress has clearly stated its intent to subject States to suit.

The potential for enormous awards of civil penalties and treble damages under the FCA provides an independent basis for applying the clear statement rule to the statute. Such punitive remedies are inconsistent with government liability, and have the potential to impose unprecedented liability on the States.[1] *Cf. City of Newport*

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[1] The United States concedes that the treble damages and civil penalties currently available under the FCA may "exceed the amount necessary to compensate the government for the losses it incurs." U.S. Br. 33. The United States complains, however, that Vermont is attempting to avoid "even the component of its potential FCA liability" that is compensatory. *Id.* at 32-33. This argument is baffling, to say the least. With a narrow exception, if liability is established, treble damages and civil penalties of at least $5000 per claim are mandatory under the FCA. 31 U.S.C. § 3729(a). The United States itself may,

v. Fact Concerts, Inc., 453 U.S. 247, 261-63 (1981) (describing historical governmental immunity from punitive damages, including exemplary or treble damages). This Court has held that Congress must plainly state its intent to subject States to new liabilities on this scale, reasoning that Congress would not "implicitly attempt to impose massive financial obligations on the States." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). This reasoning applies with equal force to the FCA.

In short, respondents simply cannot avoid the plain meaning of the term "person," the clear statement rule and the doctrine of constitutional doubt by erroneously characterizing the FCA as a statute that merely "grants a right of action to the United States." Rel. Br. 42. Subjecting States to suit under the FCA raises serious constitutional concerns, both because of the burdens the statute imposes and the right of action it grants to private persons. These established rules of statutory construction demonstrate that States are not potential defendants under the FCA. *See* Vt. Br. 10-17.

D. No provision of the FCA "unambiguously" imposes liability on the States.

Respondents' principal claims with respect to the statutory language and legislative history are fully addressed in Vermont's opening brief. Vt. Br. 18-29. Two points merit separate attention here. First, the relator's claim that, by using the term "any" to modify "person," Congress "unambiguously" imposed liability on the States, Rel. Br. 45, is easily rebutted. This Court addressed similar language in *Will*, and concluded that the phrase

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of course, seek compensatory damages by pursuing administrative or common-law remedies.

"every person" in 42 U.S.C. § 1983 does not include the States. *Will*, 491 U.S. at 65.[2]

Second, respondents attempt to bolster their unpersuasive statutory argument by insisting that, because Congress re-enacted 31 U.S.C. § 3730 in full in 1986, the Background Statement in the 1986 Senate Report (S. Rep. No. 345, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266) is an authoritative source of legislative history as to the meaning of the term "person" in that section. Of course, references in legislative history, as contrasted with clear statutory language, cannot satisfy the clear statement rule. *See Will*, 491 U.S. at 65. Moreover, the 1986 Congress retained the term "person" – the same word used to describe the class of potential defendants under the Act since 1863. There is absolutely no suggestion, in either the text of the amendments or the legislative history, that Congress intended to change the meaning of the term "person." Not surprisingly, respondents ignore *Pierce v. Underwood*, 487 U.S. 552, 566 (1988), in which the Court rejected a strikingly similar use of legislative history. *See* Vt. Br. 26-27.

Respondents do acknowledge that the drafters of the Report may have been mistaken about the meaning of the term "person" prior to the 1986 Amendments. Rel. Br. 47-48; U.S. Br. 29-30 & n.18. Their argument is thus reduced to the following: although Congress mistakenly believed it was not expanding the coverage of the FCA in 1986, this Court should nonetheless rely on an incorrect statement in the historical background section of a committee report to conclude that Congress's continued use of the term "person" in § 3730 signaled an unspoken

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[2] The 1863 Act similarly applied to "any person not in the military or naval forces." Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, § 3.

intent to include the States as potential defendants under the statute. This convoluted use of legislative history – which is entirely inconsistent with *Pierce* – is woefully insufficient to show that Congress clearly intended to alter the ordinary meaning of the term "person" and impose liability on the States under the FCA.

II. THE FCA'S *QUI TAM* PROVISIONS VIOLATE THE ELEVENTH AMENDMENT.

The starting point for assessing whether a private person may sue a State "for the person and for the United States Government," 31 U.S.C. § 3730(b)(1), is the plan of convention. One day before the Court granted Vermont's petition for certiorari, this Court provided a remarkably apt analysis of the nature of the States' consent to suit by the Federal Government pursuant to the plan of convention. In language that directly addresses the issue presented here, the Court recognized that "[a]lthough the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the nation." *Alden*, 119 S. Ct. at 2263. *Alden* reconfirmed that the States' "consent 'inherent in the convention' to suit by the United States – at the instance and under the control of responsible federal officers – is not consent to suit by anyone whom the United States might select . . . . " *Blatchford v. Native Village*, 501 U.S. 775, 785 (1991). "A suit which is commenced and prosecuted against a State in the name of the United States by those who are entrusted with the constitutional duty to 'take Care that the Laws be faithfully executed,' U.S. Const., Art. II, § 3, differs in kind from the suit of an individual." *Alden*, 119 S. Ct. at 2267. Therefore, "[s]uits brought by the United States itself require the exercise of political responsibility

for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States." *Id.*

The relator is not entrusted with any constitutional duties. Nor is his decision to commence and prosecute this matter an exercise of the United States' political responsibility. Indeed, the United States concedes that "[t]o be sure . . . , the *qui tam* relator himself is a private party." U.S. Br. 34. "Unlike a public official conducting litigation on behalf of the government, the relator has a personal financial stake in the suit." *Id.* at 36. As the Court recently recognized, "[a]s a class of plaintiffs, *qui tam* relators are different in kind from the Government. They are motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997). In short, this matter "differs in kind," *Alden*, 119 S. Ct. at 2267, from a suit commenced and prosecuted by the United States and is therefore barred by the Eleventh Amendment.

Dismissing *Alden* and *Blatchford* as mere dicta, and skipping entirely over any meaningful discussion of the plan of convention and the respect accorded the States therein, respondents argue that a private person can sue a State so long as the United States is a "real party in interest." The United States claims to be a real party in interest because it "is the principal beneficiary of any successful action" and retains "incidents of control" over this matter. Respondents, however, eschew any need for the United States' actual responsibility or control over this matter. Rel. Br. 20; U.S. Br. 42-43.

Respondents also argue that the FCA is an exercise of Congress's powers under the Property Clause, U.S. Const. art. IV, § 3, cl. 2, because the FCA generically "assigns" a potential "chose in action" from the United

States to the universe of potential relators. U.S. Br. 38-41. They claim that the Property Clause somehow allows Congress to authorize private persons to sue States.

A. The real-party-in-interest analysis is inappropriate.

Respondents' real-party-in-interest argument stems from an asserted analogy to state sovereign immunity cases: "application of state sovereign immunity principles turns on the nature of the interests affected by a particular suit or category of suits." U.S. Br. 43. Respondents' reliance on the real-party-in-interest analysis is misplaced for several reasons.

1. Respondents' search for an analogy is unnecessary because the *Blatchford/Alden* requirements specifically determine whether the United States is the plaintiff in a suit brought against a State. Those decisions require the Federal Government's exercise of political responsibility and control. The real-party-in-interest test does not determine the existence of these controls. The bare assumption that the relator is protecting the Federal Government's interests does not imbue him with the political accountability of an officer of the United States. *See Alden*, 119 S. Ct. at 2267. Rather, it demonstrates a delegation of the United States' authority – a delegation that, under *Blatchford*, is unconstitutional. 501 U.S. at 785.

Respondents' reliance on the real-party-in-interest test cannot be reconciled with *Alden*. *Alden* recognized the propriety of a suit "by the United States on behalf of the employees." 119 S. Ct. at 2269; *see also United States v. Minnesota*, 270 U.S. 181, 193-95 (1926) (United States may sue State on behalf of Tribe). In such instances, the employees or tribes as opposed to the United States would be considered as real parties in interest. However the determinative inquiry is whether the "rule that the

National Government must itself deem the case of sufficient importance to take action against the State" has been satisfied. *Alden*, 119 S. Ct. at 2269. Otherwise, the suit is not one to which the States have consented. *Id.*

2. Respondents' reliance on the real-party-in-interest test undermines the Eleventh Amendment's fundamental purposes.

> The Eleventh Amendment does not exist solely in order to preven[t] federal-court judgments that must be paid out of a State's treasury; it also serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.

Seminole, 517 U.S. at 58 (internal quotation marks and citations omitted). The real-party-in-interest test protects the state fisc by determining if the State is the effective defendant in a suit brought by a private person. *Edelman v. Jordan*, 415 U.S. 651, 663-64 (1974); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945). Using this test to justify suits directly against States by private persons motivated, not by the public good, but by "the strong stimulus of personal ill will or the hope of [monetary] gain," *Hughes*, 520 U.S. at 949 (internal quotation marks omitted), is flatly inconsistent with protection of the States' treasuries.

The relator also attempts to justify his reliance on the real-party-in-interest test by arguing that there will be no recovery if the United States has not been injured. Rel. Br. 24-25. However, the States' sovereign immunity is immunity, not just from damages, but from suit. *Seminole*, 517 U.S. at 58. When, after discovery and trial, it is determined that the United States has not been injured, the State's sovereign immunity will have been lost and the State will have been subjected to the indignity and coercive process of a judicial tribunal at the instance of a

private person. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993).

3. None of the cases cited by respondents support the notion that an individual may sue a State if the United States is also a mere party in interest. To the contrary, *New Hampshire v. Louisiana*, 108 U.S. 76 (1883) – the case central to respondents' real-party-in-interest theory – held that the lawsuit in that case was "in legal effect commenced" by private persons, and "while the suits are in the names of the states, they are under the *actual control* of individual citizens, and are prosecuted and carried on altogether by and for them." *Id.* at 89 (emphasis added). While this matter is nominally brought in the name of the United States, no one contends that it is under the "actual control" of the United States, nor does anyone contend that the relator is prosecuting this case for any reason other than his own personal stake in the matter. In short, respondents' reliance on *New Hampshire v. Louisiana* is strikingly misguided because that case stands for the proposition that private citizens in actual control of a suit cannot use sovereign authority to circumvent a State's Eleventh Amendment protections.

4. If one is to resort to a test other than *Alden's* specific requirements, the arm-of-the-state test offers a better approach than the real-party-in-interest test. Here, the relator argues that he is under the umbrella of the United States' sovereign authority to sue a State free from Eleventh Amendment limitations. The arm-of-the-state test determines whether a person is sufficiently tied to a sovereign to invoke such sovereign authority. *Alden*, 119 S. Ct. at 2267; *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 400-02 (1979) (bi-state planning agency not arm of the state protected by Eleventh Amendment). Consistent with *Alden*, the arm-of-the-state test essentially requires that the sovereign be responsible

for and in control of the person asserting sovereign authority. *Tahoe*, 440 U.S. at 400-02.

B. The United States does not control this suit.

The relator makes the remarkable assertion that "his presence [in this matter] does not expand the claims before the Court." Rel. Br. 33. His assertion stands in sharp contradiction with the fact that he chose to sue the State of Vermont; he framed the cause of action; and he chose the remedy that is being pursued. The United States had absolutely no control over these decisions. *See* 31 U.S.C. § 3730(b)(1). Were it not for the relator, this matter would not exist.

Respondents nonetheless argue that the relator's commencement and prosecution of this matter satisfies *Alden* because the United States retains unexercised "incidents of control." U.S. Br. 41. *Alden*, however, turned on the Court's recognition that a suit commenced and prosecuted by an individual "differs in kind" from a suit commenced and prosecuted by responsible federal officers. 119 S. Ct. at 2267; *see also Blatchford*, 501 U.S. at 785-86. The theoretical possibility that the United States could intervene in a suit framed, commenced, and prosecuted by a private individual does not convert the suit into one that "is commenced and prosecuted by those entrusted with the constitutional duty to 'take care that the Laws be faithfully executed.' " *Alden*, 119 S. Ct. at 2267 (quoting U.S. Const. art. II, § 3). A private person "with different incentives," *Hughes*, 520 U.S. at 950, from those of the United States brought this suit against Vermont without regard to the "rule that the National Government must itself deem the case of sufficient importance to take action against the State." *Alden*, 119 S. Ct. at 2269. This private person will exercise his right

to conduct the litigation pursuant to his desire to further his private interests, not the public good.

The United States' submission does not remotely suggest that it will take any action to halt this affront to Vermont's sovereign dignity. Rather, the specific "incidents of control" identified by the United States demonstrate that it will merely sit on the sidelines and hope to collect its share of the nuisance value this lawsuit might garner from Vermont. For example, the United States claims "an absolute right to intervene to take over the suit" and asserts that this case can neither go forward nor be dismissed or settled over the Federal Government's objection. U.S. Br. 42, *but see Minotti v. Lensink*, 895 F.2d 100, 104 (2d Cir. 1990) ("Once the United States formally has declined to intervene in an action . . . little rationale remains for requiring consent of the Attorney General before an action may be dismissed."). Here, however, the United States waived its right to intervene and can now do so only upon a showing of good cause and without limiting the relator's status and rights. 31 U.S.C. § 3730(c)(3). Moreover, any settlement or dismissal would be at the instance of the relator and the defendant. The United States would merely proffer its subsequent consent or objection. In short, each of these so-called "incidents of control" are after-the-fact prerogatives that do not meaningfully constrain relators.

Further, the United States' subsequent intervention, motion to dismiss, settlement, and any restriction on the private person's participation in the action are all subject to the private person's objection and judicial review. 31 U.S.C. § 3730(c). The Court should not assume that the United States' requests will simply be rubber stamped by the lower courts. *Cf. Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 424 (1995) (affirming strong presumption of

meaningful judicial review). Therefore, the controls mentioned by the United States rest not with the United States, but with the courts.

The United States also asserts that this matter survived "scrutiny by the United States, which has declined to exercise its power to dismiss the case or to take an active role in the litigation." U.S. Br. 42. What the United States does not argue is telling. It does not claim to have a policy of moving to dismiss claims that lack merit, are contrary to the United States' interests, or that should be pursued through avenues other than the FCA. In any event, this scrutiny was the prelude to the United States' inaction. The United States' inaction guarantees that this matter differs in kind from a suit brought and conducted by the United States because the FCA grants the relator "the right to conduct the action" that he framed and commenced. 31 U.S.C. § 3730(c)(3).

C. The Property Clause, like Article I, is subject to the Constitution's limitations on congressional authority.

1. Respondents' Property Clause argument is nothing more than a thinly disguised end run around *Alden* and *Seminole*. Indeed, the notion that a claim has been assigned to a private "citizen" should, in and of itself, answer the Eleventh Amendment inquiry here because a private citizen cannot sue a State. The crux of respondents' theory, therefore, is that the Property Clause allows Congress to circumvent constitutional limits on its Article I powers.[3]

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[3] Respondents provide no support for their theory that Congress enacted the FCA pursuant to the Property Clause. In fact, the 1863 Congress, seeking to address fraud in military spending, was acting pursuant to its Article I powers to

For example, the Fair Labor Standards Act allows the United States to sue an employer for damages, liquidated damages, and civil penalties. 29 U.S.C. § 216(c), (e). Civil penalties are paid to the United States. *Id.* Likewise, CERCLA allows for civil penalties and damages payable to the United States. 42 U.S.C. §§ 9609, 9607(a)(4)(A). Under respondents' theory, a claim for penalties or damages available under the FLSA or CERCLA is a "chose in action" that, under the Property Clause, could be assigned to a private person who could then sue a State nominally on behalf of the United States. Certainly, the landmark *Alden* and *Seminole* decisions are not subject to facile evisceration by the elevation of form over substance.

Respondents also fail to provide any principle for why the Eleventh Amendment "would interfere . . . with Congress's authority over 'Property belonging to the United States,' " U.S. Br. 39 (quoting U.S. Const. art. IV, cl. 2), but other constitutional limitations would not. Certainly, the Property Clause does not allow the United States to seize property allegedly belonging to the Federal Government in violation of the Due Process Clause

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"provide for the common Defence and general Welfare" and "raise and support Armies." U.S. Const. art. I, § 8, cls. 1, 12; *see also United States ex rel. Marcus v. Hess*, 317 U.S. 537, 547 (1943). Congress, of course, has vast authority under Article I, § 8 to stop and recoup fraudulent claims. What it does not have power to do under any article of the original Constitution is abrogate the States' protections embodied in the Eleventh Amendment. *Seminole*, 517 U.S. at 65-66 (14th Amendment is only recognized authority allowing Congress to abrogate the States' sovereign immunity). In any event, it would be anomalous for the Property Clause – a provision specific to management of the federal government's property – to provide Congress with greater authority to alter the federal-state balance of power than the vast and varied Article I powers.

and Congress cannot exclude persons from federal property based on race or religion. In sum, constitutional limitations on congressional powers do not "interfere . . . with Congress's authority over 'Property belonging to the United States.' " *Id.*

2. Respondents' reliance on the Property Clause assumes the ultimate question posed by the relator's allegations – it assumes that the allegedly defrauded grant monies are, in fact, property belonging to the United States.[4] *See* U.S. Br. 39. Here, Vermont (with apparent support from EPA) has a claim to these funds, and the Property Clause provides that "nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, *or of any particular State.*" U.S. Const. art. IV, § 3, cl. 2 (emphasis added). Therefore, by its terms, the Property Clause does not allow Congress to circumvent the Eleventh Amendment rights of States.

Moreover, if Congress, pursuant to the Property Clause, acts to defeat a State's claim to property, such intent must be "definitely declared or otherwise made very plain" and "the United States would additionally have to establish that Congress affirmatively intended to defeat the future State's title to such land." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 202 (1987). As explained above and on pages 8-29 of Vermont's opening brief, Congress's intent to include States within the FCA's purview, if it exists, is neither plain nor affirmative. Therefore, the Property Clause does not allow Congress to circumvent the Eleventh Amendment.

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[4] Whether property, in fact, belonged to the United States was not at issue in any of the cases cited by respondents. *See, e.g., Ruddy v. Rossi*, 248 U.S. 104 (1918); *Light v. United States*, 220 U.S. 523 (1911). These cases only addressed the United States' dominion over property that unquestionably belonged to the United States.

CONCLUSION

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

Respectfully submitted,

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