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No. 98-1828

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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.*

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

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**SUPPLEMENTAL BRIEF FOR RESPONDENT**

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**QUESTION PRESENTED**

This Court's November 19, 1999 Order asked the parties to address the following question:

Does a private person have standing under Article III to litigate claims of fraud upon the government?

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## ARGUMENT

### **QUI TAM SUITS UNDER THE FALSE CLAIMS ACT SATISFY ARTICLE III**

This Court has always interpreted Article III's requirement of "Cases" and "Controversies" "to mean cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998). *Qui tam* or "informer" suits, which at the time of the Founding already had a long pedigree and were widely embraced as an appropriate means of vindicating claims of the United States, clearly qualify as such a "traditional" form of action. Not surprisingly, every court of appeals to consider the question has concluded that suits by *qui tam* relators under the False Claims Act ("FCA") satisfy Article III.<sup>1</sup>

#### **A. *Qui Tam* Suits Satisfy Article III Because The Real Party In Interest—The United States—Plainly Has Standing**

1. Article III standing encompasses three related requirements: (1) there must be an "injury in fact," defined

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<sup>1</sup> See, e.g., *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1154 (2d Cir. 1993); *United States ex rel. Berge v. Board of Trustees of the Univ. of Alabama*, 104 F.3d 1453, 1457-58 (4th Cir. 1997); *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279, 288 n.12 (5th Cir. 1999); *United States ex rel. Hall v. Tribal Development Corp.*, 49 F.3d 1208, 1213 (7th Cir. 1995); *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865, 868 (8th Cir. 1998); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 748 (9th Cir. 1993); *United States ex rel. Woodard v. Country View Care Center, Inc.*, 797 F.2d 888, 893 (10th Cir. 1986).

as “an invasion of a judicially recognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical,” (2) the invasion of that interest must be “fairly traceable” to the defendant’s actions, and (3) it must be “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Bennett v. Spear*, 520 U.S. 154, 167 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). “[T]he point” of this three-part test, as this Court recently noted, “has always been the same: whether a plaintiff ‘personally would benefit in a tangible way from the court’s intervention.’” *Steel Co.*, 523 U.S. at 103 n.5.

*Qui tam* suits under the FCA fully satisfy those requirements because, as respondent demonstrated in its opening brief (Resp. Br. 24-37), the United States is the real party in interest to such suits. Because the *qui tam* relator sues in the “name of” and for the benefit of the United States (31 U.S.C. § 3730(b)) to vindicate a unitary liability to the United States created by the Act (*id.* § 3729), and because the *only* claim in the case is the fraud claim of the United States (*ibid.*), the Act explicitly recognizes that “the United States” is the real plaintiff in the case. *E.g.* 31 U.S.C. § 3731(c) (“In any action brought under section 3730, the *United States* shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.”) (emphases added). It is the standing of the United States, therefore, rather than that of the relator, that governs the Article III analysis. *See, e.g., Hall*, 49 F.3d at 1213 (“the United States is the real plaintiff in a *qui tam* action,” and therefore “challenges to the standing of the government’s representative are beside the point”); *see also Berge*, 104 F.3d at 1458 (*qui tam* relator has standing “as the government’s representative”).

There can be no doubt that the United States, as the real party in interest, satisfies all the requirements of Article III standing. Under the facts as alleged, which this Court must assume are true (*Steel Co.*, 523 U.S. at 104; *Defenders of Wildlife*, 504 U.S. at 561), the United States suffered a concrete and particularized injury when Vermont fraudulently procured federal public funds. The United States also easily satisfies the causation and redressability prongs of the Article III analysis, because the United States' payments of public funds to Vermont are directly traceable to the State's repeated fraudulent representations, and that injury to the federal fisc undoubtedly will be redressed by a favorable award in this case. Not only will any such award be based on, and compensate for, the actual losses the United States suffered as a result of Vermont's fraud, but it will also serve to deter Vermont and others from engaging in similar fraudulent acts against the federal government in the future.

2. The fact that a *qui tam* relator prosecutes the case on behalf of the United States does not change the Article III analysis. In return for coming forward with valuable information and prosecuting the suit on the government's behalf, the relator is entitled under the Act to receive a portion of the government's recovery. 31 U.S.C. § 3730(d)(1). But the relator merely "stands in the shoes" of the United States to assert the government's fraud claim "and invokes the standing of the government resulting from the fraud injury." *Kreindler*, 985 F.2d at 1154; *accord Rodgers*, 154 F.3d at 868; *United States ex rel. Barajas v. Northrop Corp.*, 147 F.3d 905, 910 (9th Cir. 1998); *Berge*, 104 F.3d at 1458; *Hall*, 49 F.3d at 1213-14. Just as "no one would question whether [an] Assistant United States Attorney prosecuting the government's case has suffered a sufficient injury-in-fact \* \* \* to satisfy the requirements of Article III," the analysis does not change as a result of Congress's decision to "enlist a private party \* \* \* to champion the

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government's case." *Hall*, 49 F.3d at 1213. For that reason, "[r]equiring an additional showing of injury on the part of the *qui tam* relator would be an analytical redundancy." *Id.* at 1214; *Kreindler*, 985 F.2d at 1154 (same); *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Center*, 961 F.2d 46, 49 (4th Cir. 1992) (same).

Nor is it significant for standing purposes that an FCA *qui tam* suit is brought "for the person and for the United States Government." 31 U.S.C. § 3730(b). The FCA does not create separable interests or causes of action or remedies for the United States and the relator. Rather, the Act makes clear that there is a single injury, a single cause of action, and a single recovery, and in each instance it belongs solely to the United States. The relator's reward is carved out of the United States' recovery and does not add to the amount the United States would receive had the Attorney General intervened at the outset or filed the complaint in the first instance herself. The statutory phrase "for the person," like its Latin antecedent "for himself," is merely a term of art identifying the case as a *qui tam* action. Resp. Br. 32. A relator sues "for himself" only in the limited sense that he may be rewarded out of any judgment that may be entered in favor of the United States. In sum, the relator has no separate cause of action for fraud, but instead is compensated for prosecuting, on the government's behalf, the single cause of action that the FCA creates for the United States.

3. The conclusion that the standing of the United States, and not that of the relator, governs the Article III analysis fully accords with the settled understanding of the Article III standing principles that apply to representational litigation. Although a litigant "ordinarily [is] not \* \* \* permitted to assert the rights of \* \* \* third parties" (*United Food & Commercial Workers Union v. Brown Group, Inc.*, 517 U.S. 544, 557 (1996) (quoting *Flast v. Cohen*, 392 U.S. 83, 99

n.20 (1968)), that rule “is a ‘judicially self-imposed limi[t] on the exercise of federal jurisdiction,’ not a constitutional mandate.” *Ibid.* (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Accordingly, that rule must give way whenever “a statute, federal rule, or accepted common-law practice permits one person to sue on behalf of another.” *Ibid.*

Indeed, “[i]n a variety of circumstances, both traditional and modern, a party is permitted to appear in court as a formal representative of other interests. Trustees, guardians and personal representatives are familiar examples.” CHARLES A. WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, 13 FEDERAL PRACTICE AND PROCEDURE § 3531.9 at 627 (1984); *see also National Ass’n of Realtors v. National Real Estate Ass’n, Inc.*, 894 F.2d 937, 941 (7th Cir. 1990). Thus, for example, the Court has recognized “an accepted basis for jurisdiction” over certain common-law “next friend” actions, which permit a friend of a detained prisoner—“who remains the real party in interest”—to appear in court on the prisoner’s behalf. *Whitmore v. Arkansas*, 495 U.S. 149, 162, 163 (1990). Similarly, this Court has long followed the doctrine of “associational” standing, under which “[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members” if those members “are suffering immediate or threatened injury \* \* \* of the sort that would make out a justiciable case had the members themselves brought suit” and that injury is germane to the association’s purpose. *Warth v. Seldin*, 422 U.S. 490, 511 (1975); *see also Brown Group*, 517 U.S. 551-58; *UAW v. Brock*, 477 U.S. 274, 282-89 (1986). The same principles govern here, because there can be no question that the Act explicitly authorizes the relator to bring suit in the name of the United States to redress the government’s injuries. There

is, accordingly, no basis for questioning the relator's Article III standing in a suit under the Act.<sup>2</sup>

**B. History Confirms That *Qui Tam* Suits Under The FCA Are Fully Consistent With Article III**

Congress's judgment that *qui tam* relators may properly represent the interests of the United States in litigation under the FCA is entitled to special deference in light of the longstanding common-law history of *qui tam* actions and the widespread adoption of *qui tam* statutes by the early Congresses, many of whose members also served as framers of our Constitution. See *Bowsher v. Synar*, 478 U.S. 714, 723-24 & n.3 (1986); see also Resp. Br. 27-29. Indeed, this Court has long assumed that *qui tam* suits satisfy Article III. As noted in *Marcus*, soon after the adoption of Article III this Court held that statutes that provide a reward to an informer will be construed to authorize a *qui tam* suit by the informer even where the statute does not expressly provide for one. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943) (citing *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 341

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<sup>2</sup> That the *qui tam* relator is authorized to sue on behalf of the United States fully distinguishes the FCA from the broad "citizen-suit provision" at issue in *Steel Co.* That provision granted "any person" the right to "commence a civil action *on his own behalf*" against a facility's owner or operator for violations of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11046(a)(1) (emphasis added). See 523 U.S. at 87. Unlike the FCA, the statute before the Court in *Steel Co.* had no provision demonstrating that Congress intended that plaintiffs represent the government's proprietary interest in litigation. Cf. *FEC v. Akins*, 524 U.S. 11, 20 (1998) ("explicit grant of authority to bring suit 'eliminates any prudential standing limitations'") (quoting *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997)).

(1805)). The Court could scarcely have embraced such a rule of statutory construction if there were any substantial question concerning the justiciability of such a suit under the provisions of the newly adopted Constitution.<sup>3</sup>

Indeed, this Court and the lower federal courts have exercised jurisdiction over *qui tam* suits during the ensuing two centuries without doubting the propriety of such jurisdic-

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<sup>3</sup> For that reason, it cannot plausibly be argued that the early *qui tam* statutes that did not expressly authorize the informer to sue on the government's behalf suggest that the Framers somehow viewed *qui tam* suits as falling outside the purview of Article III. Rather, *Adams* and *Marcus* demonstrate that, as in the case of those early *qui tam* statutes expressly authorizing suits by private informers (e.g., Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 125 (copyright infringement); Act of July 20, 1790, ch. 29, §§ 1, 4, 1 Stat. 131, 131, 133 (seaman regulations); Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137, 137-38 (regulation of trade with Indian tribes); Act of Feb. 20, 1792, ch. 7, § 25, 1 Stat. 232, 239 (postal service)), all of the 23 *qui tam* provisions enacted by the first four Congresses were understood and operated to authorize suits by relators. Resp. Br. 28-29, nn.7, 8; see also Act of April 30, 1790, ch. 9, § 16, 1 Stat. 112, 116 (larceny); Act of July 6, 1797, ch. 11, § 20, 1 Stat. 527, 532 (stamp duties). Moreover, only three of the early statutes contain any restrictions on the class of potential relators. See Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 125 (limiting the right to sue for copyright infringement to the author or owner of the copyrighted work); Act of July 31, 1789, ch. 5, § 29, 1 Stat. 29, 45 (restricting recovery for an overcharge of import duties to the party aggrieved, but permitting any informer to recover a fine with costs for the failure of customs collectors to publicly display duty rates); Act of Aug. 4, 1790, ch. 35, § 55, 1 Stat. 145, 173 (same). It is inescapably clear that neither the members of the early Congresses nor this Court harbored any Article III concerns over informer suits.

tion under Article III. To the contrary, in reaffirming the *Adams v. Wood* canon more than 50 years ago, the Court in *Marcus* expressly held that “Congress *has power* to choose this method to protect the government from burdens fraudulently imposed upon it.” 317 U.S. at 541-42 (emphasis added). More recently, this Court in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), refused to review an Article III challenge to the FCA’s *qui tam* provisions even though such a challenge was explicitly raised by the petitioner (see Petition for Writ of Certiorari, No. 95-1340 at pp. i, 25-26), and even though the Court shortly thereafter reiterated the “inflexible” rule established by “a long and venerable line” of cases that courts must resolve all jurisdictional issues, such as Article III standing, before proceeding with any other issues in a case. *Steel Co.*, 523 U.S. at 94-95.

2. The fact that Article III jurisdiction was assumed by the Framers, and was not questioned or disputed in the ensuing centuries until very recently, should be “conclusive” of the constitutional question. *The Laura*, 114 U.S. 411, 416 (1885). Any doubt on that score, however, is dispelled by the nature of the incentives that the FCA creates for the government’s representative, which amply ensure the concrete adverseness required by this Court’s cases. This Court in *Defenders of Wildlife* strongly suggested that standing would lie, notwithstanding a plaintiff’s “inability to allege any discrete injury” to himself, in “the unusual case in which Congress has created a concrete private interest in the outcome of a suit \* \* \* for the Government’s benefit[] by providing a cash bounty to the victorious plaintiff.” 504 U.S. at 572-73. This “concrete private interest in the outcome of a suit” differs markedly from the type of “generally available grievance about government” (*ibid.*) that the Court frequently has found insufficient to support standing. That concrete interest fully “preserves the vitality of the adversarial process

by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that ‘the legal questions presented \* \* \* will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.’” *Id.* at 581 (Kennedy, J., concurring) (quoting *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)).<sup>4</sup>

The FCA is also consistent with those separation of powers concerns that the Court has found relevant to the Article III standing inquiry, most notably the requirement that federal courts maintain their properly limited role in a democratic society by ensuring that cases are presented in a form “traditionally thought to be capable of resolution through the judicial process.” *Flast*, 392 U.S. at 97; see *Valley Forge*, 454 U.S. at 472-73. Few causes of action could qualify as more traditionally capable of resolution through the judicial process than *qui tam* suits, which have been a consistent part of the American legal landscape since the Founding. See *Akins*, 524 U.S. at 24 (courts’ focus on the type of concrete “controversies which were ‘the traditional concern of the courts at Westminster’ \* \* \* prevents a plaintiff from obtaining what would, in effect, amount to an advisory opinion”).

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<sup>4</sup> The FCA relator’s concrete interest is also directly traceable to the defendant’s fraudulent conduct against the United States, since no recovery would be possible but for the defendant’s fraudulent acts and the relator’s possession of information exposing those acts, and the relief sought under the FCA will serve to vindicate the relator’s interest by rewarding him for actions undertaken in reliance upon the statute.

FCA *qui tam* suits are not suits *against* the United States seeking “to vindicate the public’s nonconcrete interest in the proper administration of the laws” (*Defenders of Wildlife*, 504 U.S. at 581 (Kennedy, J., concurring)), but rather are brought on *behalf of* the United States to compensate the government for specific acts of fraud committed against it. *Cf. id.* at 573-78. The FCA therefore does not enable courts “to assume a position of authority over the governmental acts of another and co-equal department,” or “to become ‘virtually continuing monitors of the wisdom and soundness of Executive action.’” *Defenders of Wildlife*, 504 U.S. at 577 (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 489 (1923), and *Allen*, 468 U.S. at 760). To the contrary, *qui tam* actions cannot proceed under the FCA without the Attorney General’s concurrence, and she may elect to intervene to dismiss any such action for any legitimate reason. 31 U.S.C. §§ 3730(b), (c). In these circumstances, any Article III objection to suits under the FCA is plainly meritless.

### CONCLUSION

Under the FCA, *qui tam* relators have standing to litigate claims of fraud upon the government.

Respectfully submitted.

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