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, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

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

2. Whether a *qui tam* suit against a State or state agency is barred by the Eleventh Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-85) is reported at 162 F.3d 195. The opinion of the district court (Pet. App. 86-87) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1998. A petition for rehearing was denied on April 13, 1999. Pet. App. 89-90. The petition for a writ of certiorari was filed on May 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, prohibits any "person" from "knowingly present[ing], or caus[ing] to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1). The Act also prohibits a variety of related deceptive practices involving government funds and property. 31 U.S.C. 3729(a)(2)-(7). A "person" who violates the FCA "is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains." 31 U.S.C. 3729(a).

For purposes of Section 3729, the term "person" is not defined. A different provision of the FCA authorizes the Attorney General to issue civil investigative demands (CIDs) compelling the production of evidence. 31 U.S.C. 3733. A CID may be issued "[w]henever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation." 31 U.S.C. 3733(a)(1). For purposes of Section 3733, "the term 'person' means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State." 31 U.S.C. 3733(*l*)(4).

A suit to collect the statutory penalties may be brought either by the Attorney General, or by a private person (known as a relator) in the name of the United States, in an action commonly referred to as a *qui tam* action. Section 3730(a) states that "[i]f the Attorney General finds that a person has violated or is violating

section 3729, the Attorney General may bring a civil action under this section against the person." Section 3730(b)(1) states that "[a] person may bring a civil action for a violation of section 3729 for the person and for the United States Government * * * in the name of the Government."

When a *qui tam* action is brought, the complaint is filed in camera and remains under seal for at least 60 days. 31 U.S.C. 3730(b)(2). The Act provides the government the opportunity to intervene in the suit "within 60 days after it receives both the complaint and the material evidence and information," *ibid.*, in which case the government "shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action." 31 U.S.C. 3730(c)(1). If the government does not intervene within the initial 60-day period, "the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause." 31 U.S.C. 3730(c)(3). The Act further provides that an FCA suit "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." 31 U.S.C. 3730(b)(1). If a *qui tam* action results in the recovery of civil penalties, those penalties are divided between the government and the relator.[1]

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[1] If the government takes control of the litigation, the relator shall, with limited exceptions, "receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim." 31 U.S.C. 3730(d)(1). If the government declines to take control of the litigation and the relator prosecutes the suit, the relator's share "shall be not less than 25 percent and not more than 30 percent of the proceeds." 31 U.S.C. 3730(d)(2).

2. The instant case involves a *qui tam* suit filed against petitioner State of Vermont Agency of Natural Resources. The relator, Jonathan Stevens (a respondent in this Court), was an employee of petitioner at the time of the alleged FCA violations. The complaint alleged that petitioner had submitted false claims to the United States Environmental Protection Agency (EPA) in connection with federal grant programs administered by the EPA pursuant to, *inter alia*, the Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.*, and the Safe Drinking Water Act, 42 U.S.C. 300f *et seq.* The gravamen of the suit was that petitioner had overstated the amount of time spent by its employees on the federally-funded projects, thereby inducing the EPA to pay grant money to which petitioner was not entitled. Pet. App. 5-7.

As required by the FCA, see 31 U.S.C. 3730(b)(2), the complaint in this case was filed in camera and under seal and was not served upon petitioner. Pet. App. 7. The United States declined to intervene to take over the action, and the complaint was subsequently unsealed and served. *Id.* at 7-8.[2] Petitioner moved to dismiss the action, arguing that (1) a State or state instrumentality is not a "person" subject to liability under the FCA, 31 U.S.C. 3729; and (2) *qui tam* suits against state entities are barred by the Eleventh Amendment. Pet. App. 8.

The district court denied the motion to dismiss. Pet. App. 86-87. The court held that "the Eleventh Amendment does not bar suits such as the instant one

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[2] The United States is a party in this Court, however, because it intervened in the court of appeals pursuant to 28 U.S.C. 2403(a) to defend the *qui tam* provisions of the FCA against petitioner's constitutional challenge. See Pet. App. 9.

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 observed, with respect to the issue of statutory construction, that "it would be anomalous to acknowledge that a state is a 'person' within the meaning of the statute if it chooses to bring a False Claims Act suit, but that the same state is not a 'person' if named as a defendant." *Id.* at 87.

3. Petitioner filed an interlocutory appeal, and the court of appeals affirmed. Pet. App. 1-85.[3]

a. The court of appeals first held that the Eleventh Amendment does not bar a *qui tam* suit against a State or state agency. Pet. App. 14-18. The court observed that under established law, the Eleventh Amendment has no application to suits by the United States. *Id.* at 15-16. The court framed the relevant constitutional question as "whether a *qui tam* suit under the FCA should be viewed as a private action by an individual, and hence barred by the Eleventh Amendment, or one brought by the United States, and hence not barred." *Id.* at 16. In light 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," the court of appeals concluded that the Eleventh Amendment does not bar *qui tam* actions against state defendants. *Ibid.*

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[3] As the court of appeals observed, this Court has held that a district court order denying a motion to dismiss based on a claim of Eleventh Amendment immunity is immediately appealable. See Pet. App. 9 (citing *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993)). The court of appeals concluded that it possessed "pendent appellate jurisdiction" over the question "whether *qui tam* suits against the States are authorized by the Act." *Id.* at 19.

The court explained that in its view "[t]he real party in interest in a *qui tam* suit is the United States," since a *qui tam* suit is intended to redress fraud against the United States and the bulk of any recovery goes to the government. Pet. App. 16. The court also observed that the government possesses substantial control over *qui tam* litigation, since it may intervene at the outset of the suit and retains significant prerogatives even if it does not intervene. *Id.* at 17. "In light of the fact that *qui tam* claims are designed to remedy only wrongs done to the United States, and in light of the substantial control that the government is entitled to exercise over such suits," the court held that a *qui tam* suit "is in essence a suit by the United States and hence is not barred by the Eleventh Amendment." *Id.* at 18.

b. The court of appeals also held that petitioner is a "person" subject to the liability provision of the FCA, 31 U.S.C. 3729. Pet. App. 19-30. The court held that the interpretive question is not governed by any "plain statement" rule, explaining that "[t]he Act does not intrude into any area of traditional state power. The goal of the statute is simply to remedy and deter procurement of federal funds by means of fraud. The States have no right or authority, traditional or otherwise, to engage in such conduct." *Id.* at 20-21. The court observed that "[w]hether the term 'person' when used in a federal statute includes a State cannot be abstractly declared, but depends upon its legislative environment." *Id.* at 21 (quoting *Sims* v. *United States*, 359 U.S. 108, 112 (1959)). In the court of appeals' view, several aspects of the FCA and its legislative history support the conclusion that a State or state agency is a "person" subject to liability under the Act. *Id.* at 21-30. The court explained, *inter alia*, that States have historically been regarded as "person[s]" authorized to

file *qui tam* actions under 31 U.S.C. 3730(b)(1), see Pet. App. 21-24; that the Act has been construed broadly as covering all frauds upon the United States, including frauds perpetrated by state officials, see *id.* at 25-28; and that the word "person" is defined to include States for purposes of 31 U.S.C. 3733, which governs the issuance of CIDs, see Pet. App. 28-29.

c. Senior District Judge Weinstein, sitting by designation on the court of appeals, dissented. The dissenting judge concluded that the suit was barred by the Eleventh Amendment. Pet. App. 31-85.

ARGUMENT

Although we believe that the decision of the court of appeals is correct, we agree with petitioner that the case warrants this Court's review. The broad issue presented here is whether a private relator may prosecute a *qui tam* suit under the FCA against a State or a state agency. That issue encompasses two subsidiary questions. The first is whether, as a matter of statutory interpretation, a State or state agency is a "person" subject to liability under the FCA, 31 U.S.C. 3729. If so, the second question is whether the Eleventh Amendment bars the particular remedy of a private relator's *qui tam* action against an unconsenting State.

As the petition for a writ of certiorari explains (Pet. 5-17), both the broad issue and each of the subsidiary questions are currently the subject of circuit conflicts. In the view of the United States, the instant case provides a good vehicle—and the best available—for resolution of those conflicts, which warrant this Court's attention. The petition should therefore be granted.

1. Like the Second Circuit in the instant case, the Eighth Circuit has held both that a State is a "person" subject to liability under the FCA, 31 U.S.C. 3729, and

that the Eleventh Amendment does not bar *qui tam* suits against state defendants. See *United States ex rel. Zissler* v. *Regents of the Univ. of Minn.*, 154 F.3d 870, 872-875 (1998) (deciding statutory question); *United States ex rel. Rodgers* v. *Arkansas*, 154 F.3d 865, 867-868 (1998) (deciding Eleventh Amendment question), petition for cert. pending, No. 98-1664 (filed Apr. 14, 1999). The Fourth and Ninth Circuits have rejected Eleventh Amendment challenges to such suits without squarely addressing the question whether a State is a "person" within the meaning of Section 3729. See *United States ex rel. Berge* v. *Board of Trustees of the Univ. of Ala.*, 104 F.3d 1453, 1457-1459 (4th Cir.), cert. denied, 522 U.S. 916 (1997); *United States ex rel. Milam* v. *University of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 48-50 (4th Cir. 1992); *United States ex rel. Fine* v. *Chevron, U.S.A., Inc.*, 39 F.3d 957, 962-963 (1994), vacated on other grounds, 72 F.3d 740 (9th Cir. 1995) (en banc), cert. denied, 517 U.S. 1233 (1996).

By contrast, two other courts of appeals have held that *qui tam* suits against state defendants are not permitted. The Fifth Circuit has held that such actions are barred by the Eleventh Amendment. See *United States ex rel. Foulds* v. *Texas Tech Univ.*, 171 F.3d 279, 283-288 (1999). The D.C. Circuit has held that a State or a state agency is not a "person" subject to liability under 31 U.S.C. 3729; the court did not resolve the Eleventh Amendment question, though its statutory analysis was heavily influenced by constitutional considerations. See *United States ex rel. Long* v. *SCS Bus. & Technical Inst., Inc.*, No. 98-5133, 1999 WL 178713, at *2-*17 (Apr. 2, 1999), supplemental opinion, No. 98-5133, 1999 WL 252644 (Apr. 30, 1999). The fact that four different courts of appeals have addressed these issues within the past two months attests to the

recurring importance of the questions presented in this case. Review by this Court is warranted to resolve the existing conflicts in authority.

2. In addition to the petition in the instant case, the State of Arkansas's certiorari petition in *Arkansas* v. *United States ex rel. Rodgers*, No. 98-1664 (filed Apr. 14, 1999), is pending before this Court. That petition, however, is limited to the question whether private *qui tam* actions are barred by the Eleventh Amendment. See Pet. at i, *Arkansas*, *supra* (question presented); *Rodgers*, 154 F.3d at 867-868 (court of appeals' discussion limited to Eleventh Amendment issue).[4] Resolution of that constitutional issue, standing alone, would leave unresolved the existing circuit conflict regarding the question whether a State is a "person" subject to liability under the FCA.

That issue of statutory construction will retain significance regardless of this Court's resolution of the Eleventh Amendment question. If the Eleventh Amendment does not preclude *qui tam* suits against state defendants, such actions can go forward if, but only if, a State is a "person" subject to liability under the Act. If the Eleventh Amendment *does* bar private *qui tam* actions against state defendants, resolution of the statutory question will remain important, since the alternative FCA remedy of a suit brought or taken over by the Attorney General is viable only if a State is a "person" under Section 3729. Because the petition in the instant case presents both the statutory and consti-

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[4] In an opinion issued the same day as its opinion in *Rodgers*, the Eighth Circuit held that a State or state agency is a "person" within the meaning of Section 3729. See *Zissler*, 154 F.3d at 872-875. *Zissler* was subsequently resolved through a monetary settlement, and pursuant to a stipulation among the parties the district court entered an order of dismissal.

tutional issues, it provides a better vehicle for resolution of the existing circuit conflicts than does the petition in No. 98-1664.[5]

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[5] It is not entirely clear that the statutory question was properly before the court of appeals. This case involves petitioner's interlocutory appeal from the district court's denial of its motion to dismiss. See Pet. App. 8-9. This Court has held that the denial of a motion to dismiss on Eleventh Amendment grounds is immediately appealable under the collateral order doctrine. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-145 (1993). In the instant case, the Second Circuit held that it possessed "pendent appellate jurisdiction" over the question whether *qui tam* suits against States are authorized by the FCA. Pet. App. 19; accord *Long*, 1999 WL 178713, at *2.

This Court has generally disapproved the concept of pendent appellate jurisdiction. See *Swint* v. *Chambers County Comm'n*, 514 U.S. 35, 49-50 (1995). The Court has suggested, however, that the exercise of such jurisdiction might be proper under some circumstances, as where the appealable and non-appealable rulings are "inextricably intertwined," or where review of the "pendent" holding is "necessary to ensure meaningful review of the" ruling that is independently appealable. *Id.* at 50-51. Even assuming that the district court's denial of petitioner's motion to dismiss on statutory grounds is not independently subject to immediate appellate review, we believe that the statutory issue is logically antecedent to the Eleventh Amendment question, and that the court of appeals' exercise of pendent appellate jurisdiction was therefore proper. Indeed, it would contravene accepted principles of constitutional adjudication for this Court to determine whether the Eleventh Amendment bars the instant *qui tam* action without first deciding whether Congress has authorized such suits to be filed against state entities.

In any event, any uncertainty about reviewability of the statutory claim in this case affects equally all four cases that are currently ripe for review, as they are all state interlocutory appeals from district court denials of motions to dismiss. Compare *Rodgers*, 154 F.3d at 867; *Long*, 1999 WL 178713, at *2; *Foulds*, 171 F.3d at 283. Thus, because there are strong reasons to find

3. The court of appeals correctly decided the statutory and constitutional issues presented by this case.

a. "Whether the term 'person' when used in a federal statute includes a State cannot be abstractly declared, but depends upon its legislative environment." *Sims* v. *United States*, 359 U.S. 108, 112 (1959) (quoted at Pet. App. 21). Where application of a particular statutory provision to state entities would trench upon sovereign prerogatives or "upset the usual constitutional balance of federal and state powers," *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991), and where the statute's text and history do not affirmatively evidence a congressional intent that States be covered, the term "person" may appropriately be construed to exclude the States. As the court of appeals correctly recognized, however, the FCA "does not intrude into any area of traditional state power." Pet. App. 21. The Act serves "to remedy and deter procurement of federal funds by means of fraud," and "[t]he States have no right or authority, traditional or otherwise, to engage in such conduct." *Ibid.* Petitioner chose to accept the benefits of a federal grant program, and it is neither anomalous nor surprising that petitioner—like other federal fund recipients—is subject to the substantive and remedial provisions designed to ensure that it is entitled to the money and that the funds are used for their intended purpose.[6]

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reviewability here, certiorari should be granted in the instant case, in which the courts below squarely addressed both questions.

[6] In construing the statutory term "person," it is important to bear in mind that *qui tam* actions prosecuted by private relators comprise only one category of FCA suits. The Act also authorizes the Attorney General to file an FCA action, 31 U.S.C. 3730(a), and it permits the government to intervene to take over the conduct of

The FCA's legislative history supports the conclusion that States are subject to the Act's liability provisions. The Senate Report accompanying the 1986 FCA amendments states that "[t]he False Claims Act reaches all parties who may submit false claims. The term 'person' is used in its broad sense to include partnerships, associations, and corporations as well as States and political subdivisions." S. Rep. No. 345, 99th Cong., 2d Sess. 8 (1986) (citations omitted). As the court of appeals explained, moreover, States have historically been regarded as appropriate relators in *qui tam* suits brought under the Act. See Pet. App. 22-23. Because the FCA authorizes *qui tam* suits to be brought by a "person," 37 U.S.C. 3730(b)(1), Congress's use of the same word to describe potential defendants suggests that any entity (including a State) that is authorized to file suit as a relator is also subject to liability under Section 3729. Pet. App. 23-24; *Commissioner* v. *Lundy*, 516 U.S. 235, 250 (1996) (referring to the "normal rule of statutory construction that

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a suit initially filed by a private relator, 31 U.S.C. 3730(c)(1). Where the government intervenes in a *qui tam* action to take over the conduct of the litigation, the suit is not meaningfully different, for Eleventh Amendment purposes, from a suit initially brought by the United States. Because suits brought or taken over by the government are not subject to any colorable Eleventh Amendment objection, the term "person" should not be given an artificially narrow construction simply because inclusion of States as potential defendants may create a difficult constitutional issue in *qui tam* actions prosecuted by private relators. Cf. *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 11 (1989) ("For purposes of * * * lawsuits [brought by the United States against a State], States are naturally just like 'any nongovernmental entity'; 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.").

identical words used in different parts of the same act are intended to have the same meaning").

b. The Eleventh Amendment does not apply to suits by the federal government. See Pet. App. 15 (citing cases). Even where an FCA action is filed and prosecuted by a private relator, the suit is brought (at least in substantial part) on behalf of the United States, both because the suit is intended to redress fraud against the United States and because the government takes the lion's share of any recovery. See *id.* at 16. As the court of appeals explained, moreover, the government retains significant prerogatives in *qui tam* litigation even when it declines to intervene to take over the conduct of a suit. See *id.* at 17. "In light of the fact that *qui tam* claims are designed to remedy only wrongs done to the United States, and in light of the substantial control that the government is entitled to exercise over such suits," the court of appeals correctly held that the instant suit "is not barred by the Eleventh Amendment." *Id.* at 18.

4. Currently pending before this Court are *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, No. 98-149 (argued Apr. 20, 1999); *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, No. 98-531 (argued Apr. 20, 1999); *Kimel* v. *Florida Board of Regents*, cert. granted, No. 98-791 (Jan. 25, 1999); and *United States* v. *Florida Board of Regents*, cert. granted, No. 98-796 (Jan. 25, 1999). At issue in those cases is whether Congress validly authorized private damages actions against States for false advertising (No. 98-149), patent infringement (No. 98-531), and age discrimination in employment (Nos. 98-791 and 98-796). None of those cases arises under the FCA, and none involves application of the principle that suits by the

United States are outside the coverage of the Eleventh Amendment. The Court's decisions in those cases are therefore unlikely to resolve the existing circuit conflicts regarding the statutory and constitutional questions presented here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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