No. 05-1272

In the Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the *qui tam* relator in this False Claims Act case was "an original source," within the meaning of 31 U.S.C. 3730(e)(4), of the information on which the suit was based.

2. Whether the *qui tam* provisions of the False Claims Act, 31 U.S.C. 3729 *et seq.*, are consistent with the Appointments Clause and the Take Care Clause of Article II of the United States Constitution.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution and statutes:

Statutes—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 49a-55a) is not published in the *Federal Reporter*, but is reprinted in 92 Fed. Appx. 708. An earlier opinion of the court of appeals (Pet. App. 1a-48a) is reported at 282 F.3d 787. The opinions of the district court (Pet. App. 58a-63a, 66a-68a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2004. A petition for rehearing was denied on January 4, 2006 (Pet. App. 56a-57a). The petition for a writ of certiorari was filed on April 4, 2006. 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 FCA also prohibits an array 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 * * * plus 3 times the amount of damages which the Government sustains." 31 U.S.C. 3729(a).

Suits to collect the statutory damages and 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 known as a *qui tam* action. See 31 U.S.C. 3730(a) and (b)(1). When a *qui tam* action is brought, the government is given an opportunity to intervene to take over the suit. 31 U.S.C. 3730(b)(2) and (c)(3). If a *qui tam* action results in the recovery of damages and/or civil penalties, the award is divided between the government and the relator. 31 U.S.C. 3730(d).

The FCA's "public disclosure" provision states:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General

> or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. 3730(e)(4); see *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 944, 946 (1997).

2. From 1975 through 1989, petitioner Rockwell International Corporation operated the Rocky Flats nuclear-weapons facility pursuant to a contract with the Department of Energy (DOE). Under the contract, DOE paid petitioner on a cost-plus fee basis. DOE reimbursed petitioner for allowable costs that petitioner incurred in operating the plant, and petitioner received an annual base fee derived using a predetermined percentage of the contract's overall value. In addition, petitioner received a semiannual bonus based on DOE's evaluation of petitioner's performance in areas that included environmental, safety, and health operations. Pet. App. 3a.

From November 1980 until March 1986, respondent James B. Stone worked as a Principal Engineer in the Facilities, Engineering, and Construction Division at Rocky Flats. After Stone's employment with the company terminated, he informed a special agent of the Federal Bureau of Investigation (FBI) that environmental crimes had allegedly been committed at Rocky Flats during the period of Stone's employment. Based upon the information that Stone had provided, the special

agent prepared an affidavit and obtained a warrant to search the Rocky Flats facility. The search was conducted on June 6, 1989. The special agent's affidavit was unsealed three days later, and the allegations of environmental violations at Rocky Flats received substantial media coverage. Pet. App. 3a-4a.

3. Approximately one month after the search of the Rocky Flats facility, Stone filed this *qui tam* action against petitioner. Stone's complaint alleged that, in an effort to maximize its receipt of award fees and other payments under its government contract, petitioner had violated the FCA by falsely representing to DOE that petitioner had complied with applicable environmental, safety, and health requirements in its operation of the Rocky Flats facility. While Stone's FCA action was proceeding, the government conducted a criminal investigation into petitioner's management of Rocky Flats, which culminated in March 1992 in a plea agreement in which petitioner pleaded guilty to ten environmental violations. Pet. App. 4a-7a.

Petitioner moved to dismiss Stone's complaint for want of jurisdiction. Under the FCA, a court lacks jurisdiction over a *qui tam* suit that is "based upon the public disclosure of allegations or transactions" unless the relator is an "original source of the information." 31 U.S.C. 3730(e)(4)(A); see pp. 2-3, *supra*. Petitioner contended (see Pet. App. 7a-8a, 60a) that Stone's complaint was based upon publicly-disclosed information and that Stone could not qualify as an "original source" because he lacked the requisite "direct and independent knowledge of the information on which the allegations are based." 31 U.S.C. 3730(e)(4)(B); see p. 3, *supra*.

After Stone filed an opposition supported by an additional affidavit, the district court denied petitioner's

motion to dismiss. Pet. App. 58a-63a. The court found that Stone qualified as an "original source" even though he could not identify the specific individuals who had made misrepresentations to the government on petitioner's behalf or the specific documents in which those misrepresentations had been made. See *id.* at 60a-61a. The court explained that, in the course of his employment at Rocky Flats, Stone had "gained knowledge of various environmental, health and safety problems"; had been "informed that [petitioner's] compensation was based on compliance with applicable environmental, health and safety regulations"; and had been "instructed not to divulge environmental, health and safety problems to the DOE." *Id.* at 61a. The court concluded that Stone "had direct and independent knowledge that [petitioner's] compensation was linked to its compliance with environmental, health and safety regulations and that it allegedly concealed its deficient performance so that it would continue to receive payments." *Ibid.* The court held on that basis that Stone had the requisite "direct and independent knowledge of the information on which the allegations are based" and therefore qualified as an "original source." *Ibid.*

In November 1995, the United States moved to intervene in the action, and the district court granted that motion. In an amended complaint filed the following month, Stone and the United States restated Stone's initial allegations concerning petitioner's misrepresentations about the operation of the Rocky Flats facility. The government also asserted several common-law claims, including claims for fraud and breach of contract. Pet. App. 8a-9a.

At the ensuing jury trial, "[t]he main issue * * * was whether [petitioner] concealed from DOE environ-

mental, safety, and health problems related to the processing and storage of saltcrete and pondcrete, two forms of processed toxic waste." Pet. App. 9a. The jury found that petitioner had violated the FCA over an 18-month period beginning April 1, 1987. *Ibid.*; Pet. 4. The district court subsequently entered judgment in favor of the United States and Stone in the amount of $4,172,327. Pet. App. 10a.

4. The court of appeals affirmed in part and remanded the case to the district court for additional findings on one aspect of the "original source" question. Pet. App. 1a-48a.

a. The court of appeals held that Stone had established "direct and independent knowledge of the information on which the allegations are based" (31 U.S.C. 3730(e)(4)(B)), which a relator is required to possess when a *qui tam* suit is based upon publicly-disclosed information. Pet. App. 11a-22a. The court stated that, to satisfy the FCA's "direct and independent knowledge" requirement, "the knowledge possessed by the relator must be marked by the absence of any intervening agency and unmediated by anything but the relator's own labor." *Id.* at 15a (ellipses, brackets, internal quotation marks, and citation omitted). The court rejected petitioner's contention that an "original source" must have "direct and independent knowledge of the actual fraudulent submission to the government." *Id.* at 20a. Rather, the court explained, a relator "need only possess 'direct and independent knowledge of the information on which the allegations are based.'" *Ibid.* (quoting 31 U.S.C. 3730(e)(4)(B)).

The court of appeals also rejected petitioner's contention that "Stone could not be an original source for the pondcrete claim because he no longer worked at

Rocky Flats when the manufacture of pondcrete blocks commenced." Pet. App. 21a. The court explained:

> The gravamen of Stone's claim is that he learned from studying [petitioner's] plans for manufacturing pondcrete that the blocks would leak toxic waste. The fact that he was not physically present at Rocky Flats when production began is immaterial to the relevant question, which is whether he had direct and independent knowledge of the information underlying his claim, in this case [petitioner's] awareness that it would be using a defective process for manufacturing pondcrete.

Ibid.

b. In addition to possessing "direct and independent knowledge of the information on which the allegations are based," an "original source" must "voluntarily provide[] the information to the Government before filing" an action under the FCA. 31 U.S.C. 3730(e)(4)(B). The court of appeals concluded that the record was insufficient to enable it to determine whether Stone had satisfied that requirement. Pet. App. 22a. The court therefore remanded the case to the district court for additional proceedings to resolve that question. *Id.* at 22a-23a.

c. Petitioner raised various constitutional challenges to the *qui tam* provisions of the FCA. The court of appeals rejected those claims. Pet. App. 23a-29a.

i. Based on this Court's intervening decision in *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), the court of appeals held that Stone had Article III standing to pursue his *qui tam* suit. Pet. App. 23a-24a.

ii. The court of appeals rejected petitioner's contention that the FCA's *qui tam* provisions violate the Appointments Clause of Article II, Section 2, of the Constitution. Pet. App. 24a-26a. The Court observed that "[t]he procedural requirements of the Appointments Clause only apply to the appointment of officers," and it concluded that "*qui tam* relators do not serve in any office of the United States." *Id.* at 25a. The court explained:

> There is no legislatively created office of informer or relator under the FCA. Relators are not entitled to the benefits of officeholders, such as drawing a government salary. And they are not subject to the requirement, noted long ago by [this] Court, that the definition of an officer "embraces the ideas of tenure, duration, emolument, and duties, and the latter were continuing and permanent, not occasional or temporary."

Ibid. (quoting *United States* v. *Germaine*, 99 U.S. 508, 511-512 (1879)).

iii. The court of appeals held that the application of the FCA's *qui tam* provisions in this case did not unconstitutionally interfere with the President's ability, pursuant to Article II, Section 3, to take care that the laws be faithfully executed. Pet. App. 26a-29a. The court limited its holding to cases, like this one, in which the government exercises its statutory right to intervene in ongoing *qui tam* litigation. The court explained:

> The Government sought, and was granted permission, to intervene. Consequently, the Government was a full and active participant in the litigation as it jointly prosecuted the case with Stone. Given that the Government was permitted to intervene, we re-

> main unconvinced by [petitioner's] contention that the presence of a *qui tam* relator in the litigation so hindered the Government's prosecutorial discretion as to deprive the Government of its ability to perform its constitutionally assigned responsibilities.

Id. at 27a; see *id.* at 28a ("[A]t least where the Government is permitted to intervene and does so, the *qui tam* provisions of the FCA do not violate the Take Care Clause provisions of Article II and their separation of powers principles.").

d. Judge Briscoe concurred in part and dissented in part. Pet. App. 44a-48a. She would have held that Stone failed to qualify as an "original source" because the record contained "no evidence that [Stone] directly and independently knew about the actual problems that arose with the pondcrete after it was produced or [petitioner's] efforts to conceal those problems from the DOE." *Id.* at 46a.

5. On remand, the district court issued additional findings and conclusions pursuant to the court of appeals' order. Pet. App. 69a-76a. The court noted that Stone had "concede[d] that he did not provide any information to any government representatives concerning claims relating to saltcrete." *Id.* at 70a. With respect to pondcrete, the district court found, inter alia, that Stone had submitted to the government an engineering order with Stone's handwritten notation commenting on the design of one particular aspect of Rockwell's proposed toxic waste removal system. *Id.* at 72a-73a. The handwritten notation stated: "This design will not work in my opinion. I suggest that a pilot operation be designed to simplify and optimize each phase of the operation." *Id.* at 73a. In accordance with its understanding of the limited scope of the remand order, the district court de-

clined to determine the legal significance of its findings. *Id.* at 75a.

6. The court of appeals affirmed the judgment in favor of the United States and Stone. Pet. App. 49a-55a. In concluding that Stone had adequately apprised the government of the allegations on which his *qui tam* suit was based, the court attached "critical importance" to the engineering order with Stone's handwritten notation. *Id.* at 51a.

Judge Briscoe dissented, again expressing the view that Stone did not qualify as an "original source" under 31 U.S.C. 3730(e)(4)(B). Pet. App. 53a-55a.

ARGUMENT

1. Petitioners contend (Pet. 14-24) that Stone does not qualify as an "original source" within the meaning of 31 U.S.C. 3730(e)(4)(B), principally because (in petitioners' view) Stone did not possess the "direct and independent knowledge of the information on which the allegations are based" that Section 3730(e)(4)(B) requires. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

a. Petitioners contend that Stone's direct knowledge of the relevant facts was limited to "background information" (Pet. 15), and that the Tenth Circuit's treatment of Stone as an "original source" "effectively eviscerates the jurisdictional bar of [31 U.S.C.] 3730(e)(4)" (Pet. 13). Those characterizations substantially understate the significance of Stone's knowledge. In the course of his employment with petitioner Rockwell, Stone learned that petitioner's compensation under its government contract "was based on compliance with applicable envi-

ronmental, health and safety regulations." Pet. App. 61a. And because Stone "was instructed not to divulge environmental, health and safety problems to the DOE," Stone could reasonably infer, again based on knowledge that he acquired as a company insider, that petitioner was engaged in an ongoing practice of "conceal[ing] its deficient performance so that it would continue to receive payments." *Ibid.* In addition, Stone "obtained, through his own efforts and not through the labors of others, direct and independent knowledge that [petitioner's] designs for manufacturing pondcrete blocks would result in the release of toxic waste." *Id.* at 17a.

Thus, in his capacity as a Rockwell employee, Stone acquired substantial information concerning both the company's representations to the government and its actual practices at the Rocky Flats facility. Stone's role in this case was therefore very different from that of the "parasitic" relators at whom the "public disclosure" bar is directed. See *United States ex rel. Springfield Terminal Ry.* v. *Quinn*, 14 F.3d 645, 649-651 (D.C. Cir. 1994) (*Springfield*) (describing historical development of the "public disclosure" bar and its role in curbing "parasitic" *qui tam* suits). The Tenth Circuit's analysis reflects a pragmatic effort to distinguish between those relators who provide meaningful assistance in putting the government on the trail of fraud, and those who simply exploit pre-existing knowledge of possible wrongdoing. That approach is consistent with both the text and purposes of 31 U.S.C. 3730(e)(4).

In the court of appeals, petitioners' principal argument with respect to Section 3730(e)(4)(B) was that, in order "to establish himself as an original source, Stone needed to have had direct and independent knowledge of the specific documents that informed DOE that Rocky

Flats was in compliance with environmental, health and safety laws, as well as the specific individuals who submitted those inaccurate claims." Pet. App. 20a. The Tenth Circuit correctly rejected that contention. See *id.* at 20a-21a. Section 3730(e)(4)(B) requires that an "original source" must have "direct and independent knowledge of the information on which the allegations are based." 31 U.S.C. 3730(e)(4)(B) (emphasis added). It does not require that the relator have direct and independent knowledge of particular fraudulent documents or other details of the fraud. The text of Section 3730(e)(4)(B) therefore does not require that an "original source" must personally observe the fraud, in whole or in part, as it is occurring.[1]

b. Petitioners' claim of a circuit conflict (Pet. 14-22) is unfounded.

In *United States ex rel. Mistick PBT* v. *Housing Authority*, 186 F.3d 376 (3d Cir. 1999), cert. denied, 529 U.S. 1018 (2000), the court of appeals held that the relator could not qualify as an "original source" because it learned of the defendant's alleged misrepresentations to

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[1] In order to qualify as an "original source," an individual must both "ha[ve] direct and independent knowledge of the information on which the allegations are based" and "ha[ve] voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. 3730(e)(4)(B). In requiring that the relevant "information" be "voluntarily provided * * * to the Government," Congress was presumably concerned not with the details of the pertinent requests for payment (which would already be in the government's possession), but with extrinsic evidence showing those requests to be fraudulent. Because the text of Section 3730(e)(4)(B) indicates that an "original source" must have "direct and independent knowledge" of the *same* information that must be "voluntarily provided * * * to the Government," a similar focus is appropriate here.

the federal government through a public release under the Freedom of Information Act and therefore lacked "direct and independent" knowledge of those misrepresentations. See *id.* at 388-389. That conclusion is consistent with the Tenth Circuit's decision in this case. In *Mistick*, the relator apparently learned of the allegedly fraudulent requests for additional funding submitted to the government only through the FOIA release from the government, see *id.* at 380-381, while in this case Stone gained knowledge as an insider with Rockwell. Stone learned during the course of his employment that payments under Rockwell's government contract were "based on compliance with applicable environmental, health and safety regulations" and that Rockwell had not complied with those laws, and he "was instructed not to divulge environmental, health and safety problems to the DOE." Pet. App. 61a. Thus, while Stone did not have access to particular requests for payment submitted by petitioner, his status as a company insider apprised him of petitioner's willingness to misrepresent relevant facts in order to increase its compensation under the federal contract. The court in *Mistick* had no occasion to address the question whether knowledge of that character is sufficient to satisfy the statute.

There is also no basis for petitioners' contention (Pet. 16-17) that the Tenth Circuit's decision in this case conflicts with the ruling in *Cooper* v. *Blue Cross & Blue Shield of Florida, Inc.*, 19 F.3d 562 (11th Cir. 1994), in which the court of appeals, like the Tenth Circuit in this case, held that the relator *did* qualify as an "original source." The court in *Cooper* pointed out that the particular information that the relator obtained through his own efforts was "potentially specific, direct evidence of fraudulent activity" and was "more than background

information." *Id.* at 568 n.12; see *id.* at 568. The court in *Cooper* made no effort to describe the categories of information that a relator must acquire directly and independently in order to satisfy the requirements of 31 U.S.C. 3730(e)(4)(B), and it therefore did not exclude information such as that acquired by Stone. And the knowledge that Stone acquired in this case, like that in *Cooper*, was more than mere "background information."

Petitioners' reliance (Pet. 18) on *United States ex rel. Aflatooni* v. *Kitsap Physicians Services*, 163 F.3d 516 (9th Cir. 1999), is also misplaced. In *Aflatooni*, the relator claimed to have "learned of [the defendant's] alleged fraudulent activities by speaking with patients who had previously received medical services from [the defendant], and by reviewing their medical records," *id.* at 525, and yet even then could not recall the name of a single Medicare patient who had allegedly been charged for unnecessary procedures, see *id.* at 526. Stone, by contrast, was a company insider who acquired substantial knowledge of petitioner Rockwell's practices while acting in that capacity. And while the court in *Aflatooni* stated that an "original source" must have "'information,' as opposed to speculation," that the defendant has submitted false claims, *ibid.*, it did not announce any test for distinguishing between the two. There is consequently no basis for concluding that the Ninth Circuit would have reached a different outcome in this case.

Finally, the Tenth Circuit's decision in this case does not conflict with the District of Columbia Circuit's ruling in *Springfield* or that of the Eighth Circuit in *Minnesota Ass'n of Nurse Anesthetists* v. *Allina Health System Corp.*, 276 F.3d 1032 (*Minnesota Ass'n*), cert. denied, 537 U.S. 944 (2002). As petitioners acknowledge (Pet. 19), the District of Columbia and Eighth Circuits

have squarely *rejected* the contention that an "original source" must have "direct and independent" knowledge of the specific content of the defendant's misrepresentations. See *Springfield*, 14 F.3d at 656-657; *Minnesota Ass'n*, 276 F.3d at 1050. Rather, it is sufficient in both courts' view if the relator has "direct and independent" knowledge of the true state of affairs that the defendant has falsely represented. See *Springfield*, 14 F.3d at 657 (relator qualified as "original source" because it "had direct and independent knowledge of essential information underlying the conclusion that fraud had been committed"); *Minnesota Ass'n*, 276 F.3d at 1050 ("If the relator has direct knowledge of the true state of the facts, it can be an original source even though its knowledge of the misrepresentation is not first-hand."). Those holdings are fully consistent with the Tenth Circuit's determination that Stone satisfied the requirements of 31 U.S.C. 3730(e)(4)(B) because "he obtained, through his own efforts and not through the labors of others, direct and independent knowledge that [petitioner's] designs for manufacturing pondcrete blocks would result in the release of toxic waste." Pet. App. 17a.

c. The petition for a writ of certiorari in *Comstock Resources, Inc.* v. *Kennard*, cert. denied, 125 S. Ct. 2957 (2005) (*Comstock*) (No. 04-165), also asserted a circuit conflict regarding the proper interpretation of 31 U.S.C. 3730(e)(4)(B). The government's amicus brief in *Comstock* explained (at 12-13) that Section 3730(e)(4)(B) does not lend itself to bright-line rules because a relator's knowledge of different categories of relevant information will often be acquired through different means, and the text of Section 3730(e)(4)(B) provides no set formula for determining what portion of that information the relator must perceive "directly" in order to qualify as an

"original source." That amicus brief further explained (at 18) that the existence of some imprecision in the statutory language has not created significant practical difficulties in the government's enforcement of the FCA. This Court denied the petition for a writ of certiorari in *Comstock*, and there is no reason for a different result here.

2. Petitioners contend (Pet. 24-30) that the FCA's *qui tam* provisions violate the Appointments Clause and the Take Care Clause of Article II. As petitioners acknowledge (Pet. 26-27 & nn.23-24), the courts of appeals have uniformly rejected similar constitutional challenges. See *Riley* v. *St. Luke's Episcopal Hosp.*, 252 F.3d 749, 752-758 (5th Cir. 2001) (en banc); *United States ex rel. Taxpayers Against Fraud* v. *General Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994); *United States ex rel. Kelly* v. *Boeing Co.*, 9 F.3d 743, 757-759 (9th Cir. 1993), cert. denied, 510 U.S. 1140 (1994). Petitioners' claims lack merit and do not warrant this Court's review.

a. In *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765, 771-778 (2000) (*Stevens*), this Court held that *qui tam* relators have Article III standing to pursue actions under the FCA. The Court did not decide whether the Act's *qui tam* provisions comport with the Appointments Clause and the Take Care Clause. See *id.* at 778 n.8. In two respects, however, the Court's analysis in *Stevens* supports the conclusion that the *qui tam* provisions are consistent with Article II.

First, the Court in *Stevens* observed that, "immediately after the framing, the First Congress enacted a considerable number of informer statutes," some of which (like the FCA in its current form) "provided both

a bounty and an express cause of action." 529 U.S. at 776-777; see *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 541 n. 4 (1943) ("Statutes providing for actions by a common informer, who himself has no interest whatever 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.") (quoting *Marvin* v. *Trout*, 199 U.S. 212, 225 (1905)). Legislation "passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning." *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983) (quoting *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 297 (1888)). Contrary to petitioner's contention (Pet. 30 n.25), that historical evidence bears directly on the Article II questions presented here. See *Bowsher* v. *Synar*, 478 U.S. 714, 723-724 (1986) (giving weight to the conclusion of the First Congress that the Legislative Branch should have no role in the removal of Executive officers); *Riley*, 252 F.3d at 752 (finding it "logically inescapable that the same history that was conclusive on the Article III question in *Stevens* with respect to qui tam lawsuits initiated under the FCA is similarly conclusive with respect to the Article II question concerning this statute"); cf. *INS* v. *Chadha*, 462 U.S. 919, 946-951 (1983) (attaching significance to the Framers' conception of the manner in which the legislative process would operate).[2]

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[2] Petitioners contend that the "early *qui tam* statutes required a citizen to have suffered some private injury before he could sue on behalf of the government." Pet. 30 n.25 (quoting *Riley*, 252 F.3d at 773) (Smith, J., dissenting)). In *Stevens*, however, this Court identified several *qui tam* statutes passed by the First Congress that imposed no

Second, in holding that the FCA's *qui tam* provisions are consistent with Article III, the Court in *Stevens* expressly *declined* to rely on the theory that a private relator sues as an "agent of the United States." 529 U.S. at 772. The Court instead observed that the relator's statutory entitlement to a share of any ultimate recovery gives him a concrete *personal* stake in the disposition of the suit, *ibid.*, and the Court concluded that "[t]he FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim," *id.* at 773. The core premise of petitioners' Article II challenges—*i.e.*, that the FCA's *qui tam* provisions effectively vest relators with *governmental* power (see, *e.g.*, Pet. 25, 27)—is inconsistent with the *Stevens* Court's emphasis on the claimant's personal stake in the litigation.

b. Even if the constitutional questions presented in the petition otherwise warranted this Court's review, the instant case would be an unsuitable vehicle for resolving them. The government was granted leave to intervene in this case, and its interests were thereafter represented by attorneys with the Department of Justice. Under those circumstances, it is particularly clear

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such requirement. See 529 U.S. at 777 n.6. Indeed, some of those statutes dealt with wrongful conduct that by its nature would have no individual victim. See *ibid.* (citing statutory provisions authorizing informers to sue concerning, and to recover half the fine for, failure to file census returns). The Court's description of *qui tam* statutes in *United States ex rel. Marcus* v. *Hess,* 317 U.S. at 541 n.4, and *Marvin* v. *Trout,* 199 U.S. at 225 (quoted at p. 17, *supra*), is similarly inconsistent with petitioners' characterization of early examples of the *qui tam* mechanism. And if the early statues had required a showing of injury to the relator, they would have been irrelevant to the Article III question addressed in *Stevens,* which concerned the standing of a relator who had *not* suffered such an injury. See *id.* at 773.

that Stone as a *qui tam* relator did not exercise governmental power. Indeed, with respect to petitioners' challenge under the Take Care Clause, the court of appeals limited its holding to FCA cases in which the government seeks and is granted leave to intervene. See Pet. App. 27a-29a & n.6.

c. Petitioners' claim under the Appointments Clause (Pet. 24-27) lacks merit. Although a statutory designation is not dispositive of the constitutional question, cf. *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 392-393 (1995); *Mistretta* v. *United States*, 488 U.S. 361, 393 (1989), it is notable that the FCA does not purport to "establish[] by Law" an "Office[]" of informer or relator, nor does it otherwise express an intent that relators be treated as part of the federal government or exercise federal governmental authority as such. To the contrary, the Act's *qui tam* provision is entitled "ACTIONS BY PRIVATE PERSONS." 31 U.S.C. 3730(b).

Qui tam relators also do not possess the practical indicia of federal officers. This Court has explained that the concept of "Officer" "embrace[s] the ideas of tenure, duration, emolument, and duties." *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1868); see *Auffmordt* v. *Hedden*, 137 U.S. 310, 327 (1890) (constitutional definition of "Officer" requires a continuing and formalized relationship of employment with the Government); *United States* v. *Germaine*, 99 U.S. 508, 511-512 (1879) (same). A *qui tam* relator does not have any tenure, and his role has no prescribed duration. Rather, the relator's role is limited in time, confined to a particular case, and essentially personal in nature, stemming from his capacity as a plaintiff pursuing what is, in essence, a partially assigned claim. Neither the relator nor his attorney in conducting *qui tam* litigation has any duty to

subordinate the relator's interest to that of the government should a conflict between those interests arise. Rather, the task of representing the United States in FCA litigation is entrusted to attorneys with the Department of Justice, who can and do contest legal and factual representations made by relators in *qui tam* actions.

Insofar as the Appointments Clause is concerned, because the FCA can reasonably be regarded as effecting a partial assignment of a claim, a *qui tam* relator is more aptly analogized, not to a Justice Department attorney who represents the United States in litigation, but to a plaintiff who asserts a private right of action under a federal statute. Congress's decision to authorize private lawsuits may often rest in part on its belief that such actions will vindicate a societal interest in deterring and remedying violations of federal law. As with plaintiffs who sue under other federal statutes, the potential for *qui tam* relators to furnish practical assistance in the enforcement of federal law does not transform them into "Officers of the United States" whose selection is governed by the Appointments Clause.

Petitioners' reliance (Pet. 24, 26) on this Court's decisions in *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), and *Edmond* v. *United States*, 520 U.S. 651 (1997), is misplaced. Both of those cases involved the exercise of federal power by government officials who had been appointed to positions of continuing responsibility and tenure. See *Buckley*, 424 U.S. at 109-113, 137-143 (members of the Federal Election Commission); *Edmond*, 520 U.S. at 653 (judges on the Coast Guard Court of Criminal Appeals). Those cases presented no question whether a private individual who has received no formal government appointment, but has been assigned

a personal stake in a claim and been authorized by federal law to exercise significant practical prerogatives with respect to that claim, might be regarded for purposes of the Appointments Clause as an "Officer[] of the United States." For the reasons given above, a *qui tam* relator having such attributes is not an Officer of the United States.

d. The FCA's *qui tam* provisions likewise do not unconstitutionally impair the President's performance of his duties pursuant to the Take Care Clause. Petitioners contend (Pet. 27-30) that the Act's *qui tam* provisions are invalid because relators may initiate suits that the Executive Branch has chosen not to pursue and may oppose the Executive Branch's litigation strategy even after the government intervenes. "[I]n determining whether the [FCA] disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977). For at least three reasons, petitioners' claim under the Take Care Clause lacks merit.

i. Private plaintiffs are frequently authorized to file civil actions under federal law even when government officials believe that no violation has occurred. See, *e.g.*, 42 U.S.C. 2000e-5(f)(1) (private plaintiff may file Title VII action if charge of unlawful employment discrimination is dismissed by the Equal Employment Opportunity Commission). Nor is it unusual for private parties in litigation to assert legal or factual positions that differ from those of the United States, even when the private and governmental parties agree as to the proper ultimate disposition of the case. Thus, the conduct through which the relator in this case is alleged to have inter-

fered with the functioning of the Executive Branch—*i.e.*, filing documents in judicial proceedings in which the relator had a concrete stake in the outcome—is not the sort of activity that ordinarily raises separation-of-powers concerns.

ii. The FCA vests the Attorney General with substantial authority to resist uses of the *qui tam* mechanism that disserve the interests of the United States. The FCA authorizes the Attorney General to terminate a *qui tam* case through settlement or otherwise, and it makes any settlement between the relator and the defendant contingent on the Attorney General's approval. 31 U.S.C. 3730(c)(2)(A)-(C); see *Ridenour* v. *Kaiser-Hill Co.*, 397 F.3d 925, 936 (10th Cir.), cert. denied, 126 S. Ct. 341 (2005); *Swift* v. *United States*, 318 F.3d 250, 251-252 (D.C. Cir.), cert. denied, 539 U.S. 944 (2003); *Juliano* v. *Federal Asset Disposition Ass'n,* 736 F. Supp. 348, 351 (D.D.C. 1990), aff'd, 959 F.2d 1101 (D.C. Cir. 1992) (Table). If the Attorney General initially declines to intervene in the suit, the court "may nevertheless permit the government to intervene at a later date upon a showing of good cause." 31 U.S.C. 3730(c)(3). On the government's motion, the district court may limit the relator's right to call, examine, or cross-examine witnesses, or otherwise to participate in the litigation. 31 U.S.C. 3730(c)(2)(C). And whether or not the government intervenes in the action, the trial court may stay discovery "upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prose-

cution of a criminal or civil matter arising out of the same facts." 31 U.S.C. 3730(c)(4).[3]

iii. The FCA grants the *qui tam* relator no role whatever in formulating the government's *own* litigation strategy. Rather, the decision whether the government will intervene in a *qui tam* suit, and the conduct of the litigation on behalf of the United States if the government chooses to intervene, is entrusted solely to officials within the Executive Branch. For that reason, petitioners' reliance (see Pet. 27, 29-30) on *Morrison* v. *Olson*, 487 U.S. 654 (1988), is misplaced. The law at issue in *Morrison* provided that, in a specified category of cases, an individual appointed by a federal court and not subject to the President's complete control could exercise the investigative and prosecutorial authority of the United States. See *id.* at 660-663. Under the FCA's *qui tam* provisions, by contrast, a relator does not litigate as the United States. That is particularly clear in *qui tam* suits, like this one, in which the United States intervenes as a party and is thereafter represented by Department of Justice attorneys. See pp. 18-19, *supra*.

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[3] In contending that the FCA's *qui tam* provisions violate the Take Care Clause, petitioners observe (Pet. 28-29) that the relator remains a party to the suit even after the government intervenes and may oppose the government's preferred disposition of the case. In the instant case, however, the Attorney General did not seek dismissal of Stone's causes of action, his removal from the case, or any limits on the scope of his participation. Because Stone's participation in *this* case did not intrude impermissibly upon the prerogatives of the Executive Branch, any constitutional issues that might be raised by the FCA's application in other settings would provide no basis for reversal of the court of appeals' judgment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2006