

In the Supreme Court of the United States

STATE OF ARKANSAS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA EX REL. FRANKIE
CAROLYN RODGERS, ET AL.

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

BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
*Solicitor General
Counsel of Record*

DAVID W. OGDEN
*Acting Assistant Attorney
General*

MICHAEL F. HERTZ
DOUGLAS N. LETTER
JOAN E. HARTMAN
MICHAEL E. ROBINSON
Attorneys

*Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217*

QUESTION PRESENTED

Whether a *qui tam* suit against a State or state agency under the False Claims Act, 31 U.S.C. 3729 *et seq.*, is barred by the Eleventh Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	9

TABLE OF AUTHORITIES

Cases:

<i>Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.</i> , 506 U.S. 139 (1993)	5
<i>United States ex rel. Berge v. Board of Trustees of the Univ. of Ala.</i> , 104 F.3d 1453 (4th Cir.), cert. denied, 522 U.S. 916 (1997)	7
<i>United States ex rel. Fine v. Chevron, U.S.A., Inc.</i> , 39 F.3d 957 (1994), vacated, 72 F.3d 740 (9th Cir. 1995) (en banc), cert. denied, 517 U.S. 1233 (1996)	7
<i>United States ex rel. Foulds v. Texas Tech Univ.</i> , 171 F.3d 279 (5th Cir. 1999)	7
<i>United States ex rel. Long v. SCS Bus. & Technical Inst., Inc.</i> , No. 98-5133, 1999 WL 178713 (Apr. 2, 1999), supplemental opinion, No. 98-5133, 1999 WL 252644 (D.C. Cir. Apr. 30, 1999)	7
<i>United States ex rel. Milam v. University of Tex. M.D. Anderson Cancer Ctr.</i> , 961 F.2d 46 (4th Cir. 1992)	7
<i>United States ex rel. Stevens v. Vermont Agency of Natural Resources</i> , 162 F.3d 195 (2d Cir. 1998), petition for cert. pending, No. 98-1828	7
<i>United States ex rel. Zissler v. Regents of the Univ. of Minn.</i> , 154 F.3d 870 (8th Cir. 1998)	6

IV

Constitution and statutes:	Page
U.S. Const. Amend. XI	4, 5, 6, 7, 8
False Claims Act, 31 U.S.C. 3729 <i>et seq.</i>	2
31 U.S.C. 3729	2, 6, 7, 8
31 U.S.C. 3729(a)	2
31 U.S.C. 3729(a)(1)	2
31 U.S.C. 3729(a)(2)-(7)	2
31 U.S.C. 3730(a)	2
31 U.S.C. 3730(b)(1)	3
31 U.S.C. 3730(b)(2)	3
31 U.S.C. 3730(c)(1)	3
31 U.S.C. 3730(c)(3)	3
31 U.S.C. 3730(d)(1)	3
31 U.S.C. 3730(d)(2)	3
31 U.S.C. 3733	2
31 U.S.C. 3733(a)(1)	2
31 U.S.C. 3733(l)(4)	2
28 U.S.C. 2403(a)	4

In the Supreme Court of the United States

No. 98-1664

STATE OF ARKANSAS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA EX REL. FRANKIE
CAROLYN RODGERS, ET AL.

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

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 154 F.3d 865. The opinion of the district court (Pet. App. 10a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1998. A petition for rehearing was denied on January 14, 1999. Pet. App. 13a. The petition for a writ of certiorari was filed on April 14, 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]henver 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

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, *inter alia*, the State of Arkansas and the Arkansas Department of Education. Those state entities are the petitioners in this Court. The relators (respondents in this Court) are Frankie Carolyn Rodgers, a former public school teacher and counselor, and Delbert O. Lewis, a former employee of the Arkansas Division of Rehabilitation Services. The complaint alleged that petitioners had violated the FCA by falsely certifying their compliance with federal antidiscrimination laws, where certification of compliance was a prerequisite to the continued receipt of federal funds. The United States declined to intervene to take over the action.² Petitioners moved to dismiss the suit, arguing that (1) *qui tam* suits against state entities are barred by the Eleventh Amendment, and (2) a State or state agency is not a “person” subject to liability under the FCA. Pet. App. 2a, 10a-11a.

The district court denied the motion to dismiss. Pet. App. 10a-12a. The court held that “the [U]nited States is the real party in interest in any False Claims Act suit, even where it permits a *qui tam* relator to pursue the action on its behalf. Accordingly, [petitioners] are not entitled to sovereign immunity under the Eleventh Amendment.” *Id.* at 11a. The court also rejected petitioners’ statutory claim, explaining that “the legislative history of the 1986 Amendments to the False Claims Act reveals that Congress intended to include state entities within the meaning of ‘person’ under the Act.” *Ibid.*

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 petitioners’ constitutional challenge. See Pet. App. 7a n.1.

3. Petitioners filed an interlocutory appeal limited to the Eleventh Amendment question, and the court of appeals affirmed. Pet. App. 1a-9a.³ The court observed that the United States is not subject to the restrictions imposed by the Eleventh Amendment. *Id.* at 3a. It explained that the United States possesses significant litigation prerogatives in *qui tam* suits filed by private relators, and that “[t]he government will collect the bulk of any damages awarded, and in no case less than 70%, regardless of who prosecutes the suit.” *Id.* at 4a. The court of appeals concluded that

a *qui tam* action under [the FCA] is a suit by the United States for Eleventh Amendment immunity purposes. The focus of the Act is on exposing fraud on the government and recovering resulting government losses. The *qui tam* provisions facilitate this process, but they do not alter the underlying character of the action as one for the aggrieved party as defined by the statute.

Id. at 4a-5a.

District Judge Panner, sitting by designation on the court of appeals, dissented. The dissenting judge concluded that the suit was barred by the Eleventh Amendment because it was commenced and prosecuted by private citizens and the United States had declined to take over the litigation. Pet. App. 6a-9a.

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. 2a-3a (citing *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993)).

ARGUMENT

As petitioners explain (Pet. 5-10), the courts of appeals are divided on the question whether the Eleventh Amendment bars private relators from prosecuting *qui tam* suits against unconsenting state defendants. Although we believe that the court of appeals correctly rejected petitioners' Eleventh Amendment claim, we agree with petitioners that the constitutional issue warrants this Court's review. The courts of appeals are also divided, however, on the antecedent question whether a State or a state agency is a "person" subject to liability under the FCA, 31 U.S.C. 3729. The petition for a writ of certiorari in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No. 98-1828 (filed May 12, 1999), presents both the statutory and constitutional questions. For the reasons set forth below and in our response to the petition in that case, *Vermont Agency of Natural Resources* provides a better vehicle for resolution of the existing circuit conflicts than does the instant case. The petition in the instant case should therefore be held pending this Court's disposition of the petition in *Vermont Agency of Natural Resources*, and then disposed of as appropriate.

1. The Eighth Circuit's decision in the instant case is limited to the question of Eleventh Amendment immunity. In another case decided on the same day, however, the Eighth Circuit held that a State is a "person" subject to liability under the FCA, 31 U.S.C. 3729. See *United States ex rel. Zissler v. Regents of the Univ. of Minn.*, 154 F.3d 870, 872-875 (1998).⁴ The Second Cir-

⁴ *Zissler* was subsequently resolved through a monetary settlement, and pursuant to a stipulation among the parties the district court entered an order of dismissal.

cuit has likewise held that a State is a “person” subject to liability under the Act, and that the Eleventh Amendment does not bar private relators from prosecuting *qui tam* suits against state defendants. See *United States ex rel. Stevens v. Vermont Agency of Natural Resources*, 162 F.3d 195, 199-208 (1998), petition for cert. pending, No. 98-1828 (filed May 12, 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, 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 state agency is not a “person” subject to liability under the FCA; 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).

2. The state defendant’s certiorari petition in *Vermont Agency of Natural Resources* is pending before

this Court. In addition to the Eleventh Amendment question presented in the instant petition, the petition in *Vermont Agency of Natural Resources* also presents the question whether a State is a “person” subject to liability under the FCA. See Pet. at i, 7-12, *Vermont Agency of Natural Resources*, *supra*.

That issue of statutory construction is itself the subject of a circuit conflict, and it 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 *Vermont Agency of Natural Resources* presents both the statutory and constitutional issues, it provides a better vehicle for resolution of the existing circuit conflicts than does the petition in the instant case. The petition in the instant case should be held pending this Court’s disposition of the petition in *Vermont Agency of Natural Resources* and then disposed of as appropriate.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of the petition in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No. 98-1828 (filed May 12, 1999), and then disposed of as appropriate.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
*Acting Assistant Attorney
General*

MICHAEL F. HERTZ
DOUGLAS N. LETTER
JOAN E. HARTMAN
MICHAEL E. ROBINSON
Attorneys

MAY 1999