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

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

BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

BARBARA D. UNDERWOOD
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor 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

QUESTIONS PRESENTED

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

2. Whether a *qui tam* suit under the FCA 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, and was granted on June 24, 1999. 119 S. Ct. 2391. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Property Clause of the United States Constitution, Article IV, Section 3, Clause 2; the Eleventh Amendment to the United States Constitution; and pertinent provisions of Sections 3729 and 3730 of Title 31, United States Code, are reproduced as an appendix to this brief.

STATEMENT

1. The False Claims Act (FCA or Act), 31 U.S.C. 3729 *et seq.*, "is used as the primary vehicle by the Government for recouping losses suffered through fraud." H.R. Rep. No. 660, 99th Cong., 2d Sess. 18 (1986). The FCA was enacted in 1863 (see Act of Mar. 2, 1863 (1863 Act), ch. 67, 12 Stat. 696), and "was originally aimed principally at stopping the massive frauds perpetrated by large contractors during the Civil War," *United States* v. *Bornstein*, 423 U.S. 303, 309 (1976). In addition, Congress had before it substantial evidence "of fraud by state officials in the procurement of military supplies for state troops, the costs of which were ultimately borne by the United States." Pet. App. 25; see *id.* at 25-26 (discussing H.R. Rep. No. 2, 37th Cong., 2d Sess. Pt. ii-a (1862)). The 1863 Act provided that "any person not in the military" who submitted a false or fraudulent claim for payment by the United States government would "forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained." § 3, 12 Stat. 698.

The 1863 Act further provided that a suit to recover the statutory forfeiture "may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States." § 4, 12 Stat. 698. If the suit resulted in a monetary recovery, the award was divided evenly between the private plaintiff and the United States.

§ 6, 12 Stat. 698. In authorizing suits by private parties (known as relators) to collect the statutory forfeitures, the 1863 Act employed a venerable mode of procedure commonly referred to as a *qui tam* action.[1]

The Act was amended in 1943 to preclude "parasitical" *qui tam* actions derived from information in the government's possession; to authorize the government to take over the prosecution of *qui tam* suits; and to reduce the relator's share of any recovery that such actions produced.[2] Except

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[1] The term "*qui tam*" is an abbreviation for the Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," which means "who brings the action for the King as well as for himself." *United States ex rel. Stillwell* v. *Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1086 n.1 (C.D. Cal. 1989). Blackstone explained:

> [M]ore usually, these forfeitures created by statute are given at large, to any common informer; or, in other words, to any such person or persons as will sue for the same: and hence such actions are called *popular* actions, because they are given to the people in general. Sometimes one part is given to the king, to the poor, or to some public use, and the other part to the informer or prosecutor; and then the suit is called a *qui tam* action, because it is brought by a person "*qui tam pro domino rege, &c, quam pro seipso in hac parte sequitur*." If the king therefore himself commences this suit, he shall have the whole forfeiture. But if any one hath begun a *qui tam*, or *popular* action, no other person can pursue it; and the verdict passed upon the defendant in the first suit is a bar to all others, and conclusive even to the king himself.

3 William Blackstone, *Commentaries on the Laws of England* *160 (footnotes omitted).

[2] In *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 545-548 (1943), this Court held that a *qui tam* suit under the FCA could go forward even if the allegations in the complaint were derived entirely from a criminal indictment filed by the government in a related case. Congress amended the Act shortly thereafter to preclude *qui tam* suits "based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." Act of Dec. 23, 1943, ch. 377, § 1, 57 Stat. 609; 31 U.S.C. 232(C) (1946); see *United States ex rel. Springfield Terminal Ry.* v. *Quinn*, 14 F.3d 645, 649-

for the 1943 amendments, however, the Act remained substantially unchanged between 1863 and 1986. After a comprehensive re-examination of the FCA, Congress enacted the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153, which substantially revised the Act "[i]n order to make the statute a more useful tool against fraud in modern times." S. Rep. No. 345, 99th Cong., 2d Sess. 2 (1986). *Inter alia*, the 1986 amendments increased the amount of damages and penalties to be awarded for violations; clarified the Act's scienter requirement and its definition of "claim"; expanded the rights of *qui tam* relators and allowed them to recover a somewhat greater share of any monetary award; and enhanced the government's ability to conduct investigations prior to the filing of FCA suits. See H.R. Rep. No. 660, 99th Cong., 2d Sess. 17 (1986).

In its current form, the FCA 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).[3]

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650 (D.C. Cir. 1994). The 1943 amendments also authorized the United States to take over the prosecution of a *qui tam* action at any time within 60 days after the suit was filed. § 1, 57 Stat. 608; 31 U.S.C. 232(C) (1946). Finally, the amendments provided that the relator would receive no more than 10% of the proceeds in suits taken over by the United States, and no more than 25% in suits prosecuted by the relator. § 1, 57 Stat. 609; 31 U.S.C. 232(E)(1) and (2) (1946).

[3] Such a person "shall also be liable to the United States Government for the costs of a civil action to recover any such penalty or

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). The term "false claims law investigation" is defined to mean "any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law." 31 U.S.C. 3733(*l*)(2). 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).

The FCA continues to authorize enforcement actions to be filed either by the Attorney General or by private relators. Section 3730(a) provides 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." 31 U.S.C. 3730(a). 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. The action shall be brought in the name of the Government." 31 U.S.C. 3730(b)(1).

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 complaint "shall not be served on the de-

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damages." 31 U.S.C. 3729(a). The "costs" to which Section 3729(a) refers do not include attorneys' fees or the costs of the government's investigation. The relator in a successful *qui tam* action may recover "an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs." 31 U.S.C. 3730(d)(1).

fendant until the court so orders," 31 U.S.C. 3730(b)(2), and the defendant "shall not be required to respond to any complaint filed under [Section 3730] until 20 days after the complaint is unsealed and served upon the defendant," 31 U.S.C. 3730(b)(3). 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," 31 U.S.C. 3730(b)(2), 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). The 60-day period may be extended by the district court if the government shows "good cause" for an extension. 31 U.S.C. 3730(b)(3).

The government retains significant prerogatives in *qui tam* litigation even when it declines to intervene at the outset of a suit. A *qui tam* 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).[4] 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). When it has intervened in a *qui tam* suit, "[t]he Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has

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[4] In the government's view, Section 3730(b)(1) makes the consent of the Attorney General an absolute prerequisite to the dismissal, pursuant to settlement, of a *qui tam* action. The Fifth Circuit has agreed. See *Searcy* v. *Philips Elecs. N. Am. Corp.*, 117 F.3d 154, 156-158 (5th Cir. 1997). The Ninth Circuit, by contrast, has held that the district court may approve the voluntary settlement and dismissal of a *qui tam* suit, notwithstanding the Attorney General's objection, if the court finds that the settlement is fair and reasonable. See *United States ex rel. Killingsworth* v. *Northrop Corp.*, 25 F.3d 715, 720-724 (9th Cir. 1994).

provided the person with an opportunity for a hearing on the motion." 31 U.S.C. 3730(c)(2)(A).[5]

If a *qui tam* action results in a monetary award, the recovery is divided between the government and the relator. If the government takes control of the litigation, the relator generally "receive[s] 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). Under certain circumstances the relator's share may be reduced to 10% or less of the total recovery. *Ibid.* 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 grava-

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[5] Section 3730(c)(2)(A) entitles the relator to a hearing on the government's motion to dismiss a *qui tam* suit, but it does not specify the legal standard that the district court should apply in ruling on the relator's objection to such a motion. The Ninth Circuit has held that the government may intervene and dismiss a *qui tam* action, notwithstanding the relator's objection, if a rational relation exists between dismissal and accomplishment of a valid government purpose. See *United States ex rel. Sequoia Orange Co.* v. *Baird-Neece Packing Corp.*, 151 F.3d 1139, 1143-1147 (1998), cert. denied, 119 S. Ct. 794 (1999). The court held, in particular, that the government may obtain dismissal of even a potentially meritorious *qui tam* suit if it reasonably believes that dismissal would serve a valid governmental interest, such as maintaining stability in a particular industry. 151 F.3d at 1144-1146.

men 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. See Pet. App. 5-7; J.A. 33-41 (complaint).

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.[6] 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 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.[7]

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[6] 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.

[7] 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.*,

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.*

The court of appeals explained that in its view "[t]he real party in interest in a *qui tam* suit is the United States." Pet. App. 16. The court observed that

> [a]ll of the acts that make a person liable under [31 U.S.C.] § 3729(a) focus on the use of fraud to secure payment from the government. It is the government that has been injured by the presentation of such claims; it is in the government's name that the action must be brought; it is the government's injury that provides the measure for the damages that are to be trebled; and it is the government that must receive the lion's share—at least 70%—of any recovery.

Ibid. The court also explained 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

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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.

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 supported the conclusion that States are "person[s]" subject to suit under the Act. See Pet. App. 21-30. The court noted 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. 21-23, and it found no basis for inferring that Congress intended the word to have a different meaning in Section 3729(a)'s liability provision, see *id.* at 23-24. The court also explained that the FCA has consistently been given a broad construction as covering all frauds upon the United States, including frauds perpetrated by state officials, see *id.* at 25-27, and that the Senate Report accompanying the 1986 FCA amendments had expressed Congress's understanding that the term "person" as used in the Act includes States, see *id.* at 27-28. The court of appeals also pointed out 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.[8]

Finally, the court of appeals rejected petitioner's contention that the FCA should be construed not to impose liability upon the States on the ground that the remedies available under the Act are "punitive" in nature. See Pet. App. 28-29. The court explained that the double-damages remedy provided by the FCA until its amendment in 1986

> ha[d] been held not to be punitive but remedial, multiple damages being recoverable in order "to make sure that the government would be made completely whole," *United States ex rel. Marcus v. Hess*, 317 U.S. at 551-52, in light of the need "to compensate the Government completely for the costs, delays, and inconveniences occasioned by fraudulent claims," *United States v. Bornstein*, 423 U.S. at 315.

Id. at 29. The court saw "no impediment to Congress's applying this remedial structure against States who, in participating in federally funded programs, knowingly present fraudulent claims to the government." *Id.* at 29-30.

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.

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[8] In discussing the CID provision, the court of appeals noted (see Pet. App. 28) that the term "false claims law investigation" is defined by 31 U.S.C. 3733(*l*)(2) to mean "any inquiry conducted . . . for the purpose of ascertaining whether *any person* is engaged in any violation of a false claims law." For purposes of Section 3733 generally, including Section 3733(*l*)(2), the term "person" is defined to include the States. See Pet. App. 28 (citing 31 U.S.C. 3733(*l*)(4)). The court of appeals observed that "[p]resumably, Congress would not have authorized such an investigation into whether States were engaged in violating the FCA unless States were among the 'persons' who are suable under the Act." *Id.* at 28.

SUMMARY OF ARGUMENT

I. A State or state agency is a "person" subject to potential FCA liability under 31 U.S.C. 3729(a). A contrary reading would not only preclude *qui tam* suits against state defendants, but would also foreclose the Attorney General from initiating FCA actions against state entities.

A. In construing statutes that define the relationship between regulated parties and the United States, this Court has repeatedly held that the term "person," or similarly general language, may appropriately be read to include the States, even in the absence of an express statutory directive to that effect. Whatever the constitutional status of *qui tam* suits against state defendants, FCA suits initiated by the Attorney General are not subject to any colorable Eleventh Amendment objection. The term "person" in the Act's liability provision, 31 U.S.C. 3729(a), therefore should not be given an artificially narrow construction simply because inclusion of States as potential defendants may create a substantial constitutional issue in *qui tam* litigation conducted by private relators.

B. The larger statutory context strongly suggests that a State or state agency is a "person" subject to potential FCA liability. This Court has consistently understood the FCA to establish a comprehensive remedy for fraud against the United States. Given the magnitude of federal financial assistance to States, it would be anomalous to exclude the States from the Act's coverage, particularly since the Act's prohibition of false or fraudulent claims does not impinge on any traditional state prerogative.

C. The FCA's other uses of the word "person" confirm Congress's intent to subject the States to FCA liability. For purposes of 31 U.S.C. 3733, the term "person" is defined to include States. 31 U.S.C. 3733(*l*)(4). Section 3733 uses the word "person" to describe both the class of entities to whom civil investigative demands may be issued, and the class of

entities who may be "engaged in a[] violation of a false claims law." 31 U.S.C. 3733(*l*)(2). The latter use of the word presupposes that a State is subject to FCA liability if it knowingly submits a false claim. The Act also uses the word "person" to describe the class of potential relators. States have filed *qui tam* actions in the past; their right to do so has not been questioned; and Congress in enacting the 1986 FCA amendments assumed that a State is a proper relator. Because a word is generally presumed to carry a consistent meaning when it appears in different sections of the same statute, Congress's use of the word "person" to describe both relators and FCA defendants reinforces the view that a State or state agency is subject to the Act's liability provision.

D. The legislative history of the 1986 FCA amendments also demonstrates Congress's intent that States would be subject to the Act. The Senate Report accompanying those amendments expressed the understanding that States were covered under pre-existing law. Although Congress engaged in a comprehensive review of the Act and amended it in numerous respects, the Act as amended continues to use the word "person" to describe the class of entities subject to potential liability. In light of Congress's expressed understanding that the word in this context includes the States, its continued use of the term to describe potential defendants is highly probative evidence that Congress intended that the States be subject to the Act's liability provisions.

E. There is nothing anomalous or improper about subjecting state entities to the remedies (three times the amount of the government's damages, plus a civil penalty of between $5000 and $10,000) provided by the FCA. This Court has squarely held that the FCA remedies in effect prior to 1986—double damages plus a $2000 civil penalty—were intended to serve predominantly compensatory purposes. There is no reason to suppose that Congress in 1986 sought fundamentally to transform the nature of the re-

medies available under the Act. The Court has also recognized, in discussing the relief available under the antitrust laws, that while treble damages remedies serve in part to punish violators, they further substantial compensatory and deterrent purposes as well. Finally, common law and/or administrative remedies would consistently fail to make the government whole, since they would not compensate the United States for its costs of investigation and suit. There is no reason that the federal rather than the state government should bear that loss in a case where the State has knowingly submitted a false claim.

II. In ratifying the Constitution, the States consented to suits brought by the federal government. While a *qui tam* suit is not literally a suit brought by a federal officer, it is properly treated as the equivalent of such a suit for purposes of Eleventh Amendment immunity. A *qui tam* suit is brought to redress an injury to the United States; the monetary recovery goes largely to the United States; and the suit may not go forward over the objection of the United States. Because a *qui tam* action under the FCA vindicates the proprietary interests of the federal government, and is subject to significant control by the United States, it is not barred by the Eleventh Amendment.

A. At (and before) the Constitution was ratified, the *qui tam* suit was a well-established mechanism for collecting obligations owed to the government. A *qui tam* suit under the FCA is an unusual hybrid having significant characteristics of both a private and a public action. The relator (like the typical plaintiff in private civil litigation) has a personal financial stake in the suit, and the premise of the Act is that he will seek to further that private interest. On the other hand, the gravamen of a *qui tam* suit is an allegation of wrong done to the federal government (rather than to the relator personally), and the bulk of any monetary recovery goes to the United States. Thus, while a *qui tam* relator possesses a personal stake in the outcome of his suit, Congress

employed the *qui tam* mechanism to further the important *public* interest in redressing and deterring acts of fraud against the government.

The Property Clause of the Constitution, Art. IV, § 3, Cl. 2, vests Congress with broad authority to control and dispose of the property of the United States. A bar on *qui tam* suits against state defendants would impair Congress's exercise of that authority by disabling it from using what it believed to be the most efficacious way of protecting the federal government from fraudulent claims. Moreover, the United States' chose in action against a State or state agency that has submitted a false claim is itself a species of property that may, under ordinary principles of property law, be assigned to a private party. The *qui tam* mechanism is in practical effect a partial assignment of that chose in action to the private party who first files suit. If the Eleventh Amendment is construed to bar *qui tam* suits against state defendants, then Congress is effectively precluded from assigning the government's chose in action, in derogation of Congress's authority under Article IV to dispose of property belonging to the United States.

B. Even where the government initially declines to intervene to take over the conduct of a *qui tam* action, it retains significant incidents of control over such suits. Because the relator cannot proceed over the objection of the Attorney General, the dissenting judge in the court of appeals was mistaken in asserting that a *qui tam* suit is insulated from the judgment of politically accountable officials.

C. In a variety of contexts, this Court has held that application of state sovereign immunity principles turns on the nature of the interests affected by a particular suit or category of suits. Thus, the determination whether a suit is one "against one of the United States" depends not simply on the identity of the nominal defendant, but on the suit's likely practical effects upon the State. The Court has employed a similar "real party in interest" test to decide

whether a State is a real or merely a nominal plaintiff in a suit brought against another State. The Court has also held that "*Ex parte Young*" suits may be brought against individual state officers, notwithstanding the acknowledged impact of such suits upon the State itself, because they play a crucial role in ensuring the supremacy of federal law. Similarly here, the gravamen of an FCA suit is an allegation of wrong done to the United States as a corporate entity, the federal government is the principal beneficiary of any successful action, and the government retains ultimate control over whether or not the suit will proceed. The suit therefore retains its fundamental public character regardless of whether it is brought by the government or by a *qui tam* relator.

ARGUMENT

I. PETITIONER IS A "PERSON" SUBJECT TO LIABILITY UNDER THE FCA

The FCA imposes liability on any "person" who engages in specified fraudulent or deceptive practices involving the funds or other property of the United States. 31 U.S.C. 3729(a). That liability may be enforced through any one of three basic mechanisms. First, the Attorney General may bring suit directly against a "person" she believes to be in violation of the Act. 31 U.S.C. 3730(a). Second, the government (through the Attorney General) may intervene to take over the conduct of a *qui tam* suit. 31 U.S.C. 3730(b)(4)(A) and (c)(1). Finally, if the government declines to intervene, the relator "shall have the right to conduct the action." 31 U.S.C. 3730(b)(4)(B).

Relying on various canons of construction largely developed in the context of private suits, petitioner argues (see Br. 12-17) that a State or state agency may not be treated as a "person" subject to potential liability under the FCA unless Congress has unequivocally manifested that intent. Petitioner's argument in that regard focuses almost exclu-

sively on the dangers to federalism ostensibly posed by *qui tam* suits against state defendants. The practical consequence of petitioner's reading of the word "person," however, is that *none* of the Act's enforcement mechanisms will be available against state entities that knowingly submit false claims to the federal government. Although petitioner's objections are directed almost exclusively to the FCA's *qui tam* provisions, petitioner would "save" the statute by disabling the Attorney General from enforcing the Act against entities that receive a substantial (and rapidly growing) share of federal outlays. Such a construction of the statute would be inconsistent with the text, the history, and the purposes of the FCA, which is "used as the primary vehicle by the Government for recouping losses suffered through fraud," H.R. Rep. No. 660, 99th Cong., 2d Sess. 18 (1986) (*1986 House Report*). Nothing in this Court's jurisprudence supports that anomalous result.[9]

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[9] 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 *United States ex rel. Long* v. *SCS Business & Technical Inst., Inc.*, 173 F.3d 870, 873, supp. op., 173 F.3d 890 (D.C. Cir. 1999), petition for cert. pending, No. 99-213 (filed Aug. 2, 1999).

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

A. In Statutes That Define The Relationship Between Regulated Parties And The United States, The Word "Person" Has Generally Been Construed To Include The States

Petitioner contends (Br. 10-12) that the word "person" presumptively excludes the States and their agencies, and that a clear statement of congressional intent is required to rebut that presumption.[10] That claim is incorrect.

In cases involving private suits against state defendants, this Court has stated that "in common usage, the term 'person' does not include the sovereign, and statutes employing the word are ordinarily construed to exclude it." *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989) (brackets omitted); accord, *Wilson* v. *Omaha Tribe*, 442 U.S. 653, 667 (1979). In construing statutes that define the relationship between regulated parties and the United States, however, the Court has repeatedly held that the term "person," or similarly general language, may appropriately be read to include the States, even in the absence of an express statutory directive to that effect.

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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.

[10] Petitioner also contends (Br. 10-12) that the "plain language" of Section 3729(a) compels the conclusion that States are not covered. Petitioner thus appears to suggest that the word "person" cannot, as a matter of law, include a State. That position is directly contrary to this Court's precedents. See, *e.g.*, *Sims* v. *United States*, 359 U.S. 108, 112 (1959) ("Whether the term 'person' when used in a federal statute includes a State cannot be abstractly declared, but depends upon its legislative environment."); *Georgia* v. *Evans*, 316 U.S. 159, 161 (1942); page 19, *infra*.

Thus, in *California* v. *United States*, 320 U.S. 577, 585 (1944), the Court held that a State in its operation of wharves and piers is a "person" subject to the regulatory authority of the United States Maritime Commission under the Shipping Act, 1916. The Court explained that "with so large a portion of the nation's dock facilities * * * owned or controlled by public instrumentalities, it would have defeated the very purpose for which Congress framed the scheme for regulating waterfront terminals to exempt those operated by governmental agencies." *Id.* at 585-586. In *Ohio* v. *Helvering*, 292 U.S. 360, 367-371 (1934), the Court held that a State was subject to a federal tax imposed on "[e]very person" engaged in the sale of alcoholic beverages. And in *United States* v. *California*, 297 U.S. 175, 183-187 (1936), the Court held that a State in operating a railroad is a "common carrier" subject to an action for penalties brought by the United States under the Safety Appliance Act. The Court explained that

> [t]he presumption [against construing general language to include the enacting sovereign] is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated. We can perceive no reason for extending it so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action.

Id. at 186 (citation omitted). Indeed, petitioner has identified *no* case involving a dispute between the United States and a State in which the word "person" has been held to exclude the States.

The foregoing lines of authority are easily harmonized. In light of "the constitutional role of the States as sovereign

entities," *Alden* v. *Maine*, 119 S. Ct. 2240, 2247 (1999), statutory provisions that primarily serve to define the obligations that private parties owe to each other—and, in particular, provisions that define the circumstances under which private suits can go forward—cannot readily be assumed to apply to the States. In *Will*, for example, the Court emphasized that to construe the word "person" in 42 U.S.C. 1983 to include a State or state agency would effectively divest the States of their traditional immunity from private suits. See 491 U.S. at 66-67 & nn.6-7, 70.[11] In its relations with the national government, however, a State is not "the sovereign." This Court has

> recognized that the Constitution presents no barrier to lawsuits brought by the United States against a State. For purposes of such lawsuits, 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. Indeed, this Court has gone so far as to hold that *no* explicit statutory authorization is necessary before the Federal Government may sue a State. See *United States* v. *California*, 332 U.S. 19, 26-28 (1947).

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[11] The Court in *Will* made clear that its construction of the word "person" as excluding state entities "applie[d] only to States or governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes," and did not extend to municipalities (which have no Eleventh Amendment immunity). 491 U.S. at 70. The Court also tracked Eleventh Amendment jurisprudence in holding that a state officer sued in his official capacity is a "person" when sued for prospective injunctive relief, but is not a "person" when sued for retrospective monetary relief. *Id.* at 70-71 & n.10; see pages 43-44, 45-46, *infra*.

Pennsylvania v. *Union Gas Co.*, 491 U.S. 1, 11-12 (1989);[12] cf. *North Dakota* v. *Block*, 461 U.S. 273, 288-290 (1983) (noting general rule of construction that statutes of limitation do not apply to States absent a clear indication that States are covered, but holding that the rule is inapplicable where a State attempts to sue the United States).

As we explain in Part II, *infra*, the Eleventh Amendment does not bar *qui tam* suits under the FCA against States or state agencies because such actions serve to redress legal wrongs done to the federal government itself, and because *qui tam* actions are subject to significant control by the Attorney General. Insofar as the question of statutory construction is concerned, however, the crucial point is that, whatever the constitutional status of *qui tam* suits against state defendants, FCA suits initiated by the Attorney General pursuant to Section 3730(a) are not subject to any colorable Eleventh Amendment objection. See, *e.g.*, *Alden*, 119 S. Ct. at 2267 ("In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government."); *West Virginia* v. *United States*, 479 U.S. 305, 311 (1987) ("States have no sovereign immunity as against the Federal Government."). The term "person" in the Act's liability provision, 31 U.S.C. 3729(a), therefore should not be given an artificially narrow construction simply because inclusion of States as potential defendants may create a substantial constitutional issue in *qui tam* litigation conducted by private relators.[13]

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[12] The Court has since overruled *Union Gas*'s holding that Congress in the exercise of its Commerce Clause authority may abrogate the States' Eleventh Amendment immunity. See *Seminole Tribe* v. *Florida*, 517 U.S. 44, 63-73 (1996). Neither *Seminole Tribe* nor any other decision of this Court, however, casts doubt on the principle of statutory construction set forth in the text.

[13] 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

The Court made a quite similar point in *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943). That case involved a *qui tam* suit against electrical contractors who had engaged in a bid-rigging scheme; the defendants' contracts were with local governmental units, but a large portion of their pay came from the United States. *Id.* at 539 & n.1. The court of appeals held that the FCA's liability provision should be narrowly construed to exclude persons having no direct contractual relationship with the federal government, on the ground that *qui tam* suits had traditionally been regarded with disfavor. See *id.* at 540-541.

United States. The filing of a *qui tam* complaint carries no immediate consequence for the named defendant(s). To the contrary, the FCA specifically provides that "[t]he complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." 31 U.S.C. 3730(b)(2). If the United States intervenes to take over the litigation during the period when the complaint remains under seal, its intervention effectively cures any Eleventh Amendment defect that might otherwise exist. The relator's continued participation as a party after the United States' intervention (see 31 U.S.C. 3730(c)(1)) also creates no constitutional difficulty, at least so long as the relator raises no claims distinct from those of the government. Cf. *Arizona* v. *California*, 460 U.S. 605, 614 (1983) (Indian Tribes were properly allowed to intervene in suit brought by the United States against a State; because "[t]he Tribes d[id] not seek to bring new claims or issues against the States, * * * [the Court's] judicial power over the controversy [wa]s not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment [wa]s not compromised.").

Unpublished statistics maintained by the Civil Division of the Department of Justice indicate that total civil fraud recoveries between October 1986 and September 1999 have been approximately $6 billion, of which just under half represents recoveries in *qui tam* suits. Of the government's total *qui tam* recoveries, approximately $224 million came in suits conducted to their conclusion by private relators; the remainder was derived from cases where the government intervened to take over the prosecution of the suit.

This Court rejected that approach. It first questioned the contention that *qui tam* suits are disfavored, noting that such actions "have been frequently permitted by legislative action, and have not been without defense by the courts." 317 U.S. at 541. It also explained, however, that the court of appeals'

> interpretation of "utmost strictness" narrows not only the qui tam aspect of the Act, but also the criminal provisions. The decision below treats the language of [the FCA's liability provision] in such fashion that no criminal proceedings could be brought against the respondents, a result to which the policy on qui tam actions is immaterial even if it exists or could properly be applied. This "qui tam policy" could not be used to detract from the meaning of the language in the criminal section; and we cannot say that the same substantive language has one meaning if criminal prosecutions are brought by public officials and quite a different meaning where the same language is invoked by an informer.
>
> Congress has power to choose this method [*i.e.*, criminal prosecutions] to protect the government from burdens fraudulently imposed upon it; to nullify the criminal statute because of dislike of the independent informer sections would be to exercise a veto power which is not ours.

Id. at 541-542. Essentially the same analysis applies here. Insofar as petitioner's statutory argument rests on objections that are specific to *qui tam* suits, those objections provide no basis for construing the FCA's liability provision in a manner that would preclude the Attorney General from seeking redress under the Act for fraud committed by States and state agencies.[14]

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[14] For the reasons stated above, the supposed proliferation of *qui tam* suits against state defendants would provide no basis for construing

B. The Subject Matter Of The FCA Strongly Suggests That States And State Agencies Are Subject To Potential Liability Under The Act

The larger statutory context strongly suggests that a State or state agency is a "person" subject to potential FCA liability. The Act is intended to supply a comprehensive remedy for fraud against the United States, and the submission of false claims by state officials causes precisely the same harms as do other fraudulent efforts to obtain federal money or property. "In the various contexts in which questions of the proper construction of the [FCA] have been presented, the Court has consistently refused to accept a rigid, restrictive reading." *United States* v. *Neifert-White Co.*, 390 U.S. 228, 232 (1968). Rather, the Court has construed the Act to extend to "all fraudulent attempts to cause the Government to pay out sums of money." *Id.* at 233; see S. Rep. No. 345, 99th Cong., 2d Sess. 9 (1986) (*1986 Senate Report*) ("The False Claims Act is intended to reach all fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services.").

Over half a century ago, this Court observed that "[w]hile at the time of the passage of the original 1863 Act, federal aid to states consisted primarily of land grants, in subsequent years the state aid program has grown so that in 1941 approximately 10% of all federal money was distributed in this form. These funds are as much in need for protection from fraudulent claims as any other federal money." *Marcus*, 317 U.S. at 544. In more recent years, "States have received a significant and increasing amount of federal funding: federal grants to state and local governments more

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Section 3729(a) in a manner that would preclude the Attorney General from bringing FCA actions against state defendants. It nevertheless bears noting that petitioner's citation of six cases decided within the past decade hardly establishes that "the number of *qui tam* suits brought against States has mushroomed." Pet. Br. 14 n.4.

than doubled from $108 billion in 1987 to $228 billion in 1996." *United States ex rel. Zissler* v. *Regents of the Univ. of Minn.*, 154 F.3d 870, 874 (8th Cir. 1998). In light of the increased (and increasing) magnitude of federal financial assistance to States, it would be anomalous to exclude the States from coverage by "the Government's primary litigative tool for combatting fraud." *1986 Senate Report* 2. Cf. *United States* v. *California*, 297 U.S. 175, 186 (1936) (finding "no reason * * * to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action").

The requirement that States refrain from submitting false claims to the United States does not impinge on any sovereign prerogative or "upset the usual constitutional balance of federal and state powers." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). As the court of appeals correctly recognized, 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.[15]

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[15] The Court in *Gregory* held that, absent an unambiguous expression of congressional intent, it would not construe the Age Discrimination in Employment Act to invalidate a Missouri constitutional provision requiring state judges to retire at age 70. The Court explained that the establishment of qualifications for state judges "is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." 501 U.S. at 460. It

C. The FCA's Other Uses Of The Word "Person" Confirm That States And Their Agencies Are Subject To Potential FCA Liability

1. Congress's intent to subject States to the FCA's liability provisions is confirmed by 31 U.S.C. 3733, which authorizes the Attorney General to issue civil investigative demands (CIDs) compelling the production of evidence. 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). Section 3733 uses the word "person" in two distinct contexts. First, Section 3733 provides that 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) (emphasis added). Second, Section 3733 defines the term "false claims law investigation" to mean "any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any *person* is or has been engaged in any violation of a false claims law." 31 U.S.C. 3733(*l*)(2) (emphasis added).

Thus, Section 3733's use of the word "person" is not limited to describing the class of entities to whom CIDs may be issued. Rather, Section 3733(*l*)(2) uses the word "person"

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concluded on that basis that "[c]ongressional interference with this decision of the people of Missouri * * * would upset the usual constitutional balance of federal and state powers." *Ibid.*

Unlike the State in *Gregory*, petitioner does not contend that the *substantive* prohibition contained in the FCA—*i.e.*, the Act's ban on the knowing submission of false claims to the federal government—could impair a State's exercise of sovereignty. Rather, petitioner argues (Br. 13-15) that application of the FCA to the States would alter the federal-state balance because the Act (1) provides for enforcement by private *qui tam* suits and (2) contains remedial provisions that are "punitive" in nature. We address those contentions at pages 18-23 *supra*, and 30-33, *infra*.

—specifically defined to include the States—to describe the class of entities who may be "engaged in a[] violation of a false claims law." That use of the word presupposes that States are subject to potential FCA liability under Section 3729(a). See Pet. App. 28 ("Presumably, Congress would not have authorized such an investigation into whether States were engaged in violating the FCA unless States were among the 'persons' who are suable under the Act.").

2. Both before and after the 1986 amendments, the FCA has also used the word "person" to describe the class of potential relators. See 31 U.S.C. 3730(b)(1) ("A person may bring a civil action for a violation of section 3729 for the person and for the United States Government."). As the court of appeals explained (Pet. App. 22-23), States have filed *qui tam* actions in the past; their right to do so has not been questioned; and Congress in enacting the 1986 FCA amendments assumed that a State is a proper relator.[16]

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[16] The 1986 Senate Report discussed the case of *United States ex rel. State of Wisconsin* v. *Dean*, 729 F.2d 1100 (7th Cir. 1984). See *1986 Senate Report* 12-13. The court in *Dean* construed the pre-1986 version of the FCA to preclude a *qui tam* action based on information in the federal government's possession, even where the relevant information had been brought to the government's attention by the relator (the State of Wisconsin) itself. The National Association of Attorneys General (NAAG) shortly thereafter urged Congress to amend the FCA, arguing that "to prohibit sovereign states from becoming *qui tam* plaintiffs because the U.S. Government was in possession of information provided to it by the States and declines to intercede in the State's lawsuit, unnecessarily inhibits the detection and prosecution of fraud on the Government." *1986 Senate Report* 13 (quoting NAAG resolution). The 1986 Senate Report also observed that the federal government had filed a brief in *Dean* "indicating its belief that Wisconsin was a proper relator." *Ibid.*; see *Dean*, 729 F.2d at 1102-1103 n.2 (noting government filing in the district court).

Congress directly addressed the *Dean* decision in the 1986 FCA amendments by enacting 31 U.S.C. 3730(e)(4). Section 3730(e)(4) modified the prior jurisdictional barrier by changing its focus from government

Because the "normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning," *Commissioner* v. *Lundy*, 516 U.S. 235, 250 (1996), Congress's use of the same word to describe both relators and FCA defendants reinforces the view that a State or state agency is subject to the Act's liability provision.

D. The Legislative History Of The 1986 FCA Amendments Demonstrates Congress's Intent That States Would Be Subject To The Act

The FCA was comprehensively amended in 1986 (see False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153) in order "to strengthen and clarify the government's ability to detect and prosecute civil fraud and to recoup damages suffered by the government as a result of such fraud." *1986 House Report* 16. The Senate Report accompanying the 1986 legislation expressed the understanding, with respect to the pre-amendment version of the Act, that "[t]he term 'person' is used in its broad sense to include partnerships, associations, and corporations * * * as well as States and political subdivisions thereof." *1986 Senate Report* 8. As amended in 1986, the FCA continues to use the word "person" to describe the class of entities subject to potential liability. 31 U.S.C. 3729(a); see Pub. L. No. 99-562, § 2, 100 Stat. 3153. In light of Congress's expressed understanding that the word in this context includes the States, its continued use of the term to describe potential defendants is highly probative evidence that Congress

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possession to "public disclosure" of the relevant information, and by adding an "original source" exception to the jurisdictional bar. Although Congress substantially rewrote the FCA's *qui tam* provisions, the Act as amended in 1986 continues to use the word "person" to describe the class of potential relators—a class that has long been assumed to include the States.

intended that the States be subject to the Act's liability provisions.

Petitioner contends (Br. 25-26) that the 1986 Senate Report is "entitled to no weight" because "[i]t is simply an attempt by committee members of a later Congress to expound on the meaning of a statute passed by another Congress some 123 years earlier." Contrary to petitioner's suggestion, however, the disputed provision of current law—*i.e.*, the phrase "[a]ny person who" in Section 3729(a)—was enacted in 1986, not in 1863. Section 2 of the 1986 FCA amendments began:

> Section 3729 of title 31, United States Code, is amended—
>
> (1) by striking the matter preceding paragraph (1) and inserting the following:
>
> "(a) LIABILITY FOR CERTAIN ACTS.—Any person who—"

§ 2, 100 Stat. 3153. Thus, the word "person" in current Section 3729(a) is the product of the 1986 legislation, not a remnant of prior law.[17]

The 1986 Congress's understanding of the word "person" is therefore directly relevant to the proper construction of the present statutory language. The 1986 Senate Report—the authoritative source for finding the Legislature's intent, see *Garcia v. United States*, 469 U.S. 70, 76 (1983)—expressed a clear understanding that the Act in its then-

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[17] The fact that the word "person" had also been used in earlier versions of the FCA does not alter the fact that in construing Section 3729(a) in its present form, the relevant intent is that of the 1986 Congress. Compare *United States* v. *Sheffield Board of Comm'rs*, 435 U.S. 110, 134 (1978) ("When a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and this Court is bound thereby.").

current form included States within the class of "persons" subject to potential liability for the submission of false claims. Congress then amended the Act in numerous respects but continued to use the term "person" to describe the class of potential defendants. That sequence of events can only be understood as an expression of congressional intent to include States within the class of potential defendants.[18]

E. The Remedies Provided By The FCA Are Not Presumptively Inapplicable To Governmental Entities

Petitioner contends that the remedies provided by the FCA (three times the amount of the government's damages, plus a civil penalty of between $5000 and $10,000) are "inherently punitive in nature" (Pet. Br. 20-21) and are therefore presumptively inapplicable to governmental entities (*id.* at 21-22). That argument is incorrect.

1. This Court has squarely held that the FCA remedies in effect prior to 1986—double damages plus a $2000 civil penalty—were intended to serve predominantly compensatory purposes. See *United States* v. *Bornstein*, 423 U.S. 303, 315 (1976) (FCA's remedial provisions reflect "the congressional judgment that double damages are necessary to compensate the Government completely for the costs, delays, and inconveniences occasioned by fraudulent claims"); *Marcus*, 317 U.S. at 551-552 ("We think the chief purpose of

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[18] This is so whether or not Congress correctly interpreted preexisting law. There may be instances in which Congress's overriding intent is to maintain in place the current rules—regardless of precisely what those rules are—on the theory that it is sometimes more important that legal questions be settled than that they be settled right. No such intent can plausibly be ascribed, however, to the Congress that enacted the 1986 FCA amendments, which were preceded by comprehensive scrutiny of all aspects of the FCA, and which effected a thoroughgoing revision of the Act. See *1986 House Report* 29 (explaining that the 1986 amendments would accomplish "a complete rewrite of Section 3729 of title 31, United States Code").

the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole."); see also *United States* v. *Halper*, 490 U.S. 435, 446 (1989) (in order to obtain "rough remedial justice," the government "may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages"). Nothing in the legislative history of the 1986 FCA amendments suggests that Congress sought fundamentally to transform the nature of the remedies available under the Act—much less that it contemplated that the increase would have the effect of excluding governmental bodies from the Act's coverage.[19]

2. This Court has rejected efforts to equate statutory treble damages provisions with a common law punitive damages remedy. In *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556 (1982), the Court concluded that its prior decision in *Lake Shore & Mich. S. Ry.* v. *Prentice*, 147 U.S. 101 (1893), which held that a principal cannot be found liable for punitive damages based on the conduct of an agent acting with apparent authority, should not be extended to a claim for treble damages under the antitrust laws. The Court explained:

> It is true that antitrust treble damages were designed in part to punish past violations of the antitrust laws. But

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[19] The 1986 House Report recommended that the damages and civil penalties available under the Act be increased "in order that the False Claims Act penalties will have a strong deterrent effect; will make the Government whole for its losses; and to update the penalty enacted in 1863 to reflect the passage of time and the effects of inflation." *1986 House Report* 20. With respect to the civil penalty provision in particular, the Report stated that the then-existing penalty of $2000 per violation was "outdated" because it had not been changed since 1863 and "the buying power of $2,000 in 1863 would be close to $18,000" in 1986. *Id.* at 17.

> treble damages were also designed to deter future antitrust violations. Moreover, the antitrust private action was created primarily as a remedy for the victims of antitrust violations. Treble damages make the remedy meaningful by counterbalancing the difficulty of maintaining a private suit under the antitrust laws. Since treble damages serve as a means of deterring antitrust violations and of compensating victims, it is in accord with both the purposes of the antitrust laws and principles of agency law to hold [the defendant] liable for the acts of agents committed with apparent authority. See Restatement § 217C, Comment *c*, p. 474 (rule limiting principal's liability for punitive damages does not apply to special statutes giving triple damages).

456 U.S. at 575-576 (citations and internal quotation marks omitted). See also *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-486 (1977) (although treble damages under the antitrust laws "play an important role in penalizing wrongdoers and deterring wrongdoing, * * * [i]t nevertheless is true that the treble-damages provision, which makes awards available only to injured parties, and measures the awards by a multiple of the injury actually proved, is designed primarily as a remedy").[20]

3. In arguing that the term "person" should be construed to exclude the States, petitioner seeks to escape even the component of its potential FCA liability (*i.e.*, the pre-1986

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[20] The Court has characterized antitrust treble damages awards as serving important compensatory purposes despite the fact that the antitrust laws provide for a separate award of attorneys' fees. 15 U.S.C. 15(a); see *Brunswick*, 429 U.S. at 481-482. Because the United States cannot separately recover attorneys' fees or its costs of investigation in an FCA suit (see note 3, *supra*), the trebling of damages in this context is even more readily understood as a means of roughly approximating the losses incurred by the government as a result of a defendant's fraudulent act.

remedy of double damages plus a $2000 civil penalty for each false claim) that this Court has specifically held to be compensatory in nature. We may assume that in some cases the remedies currently available under the FCA will exceed the amount necessary to compensate the government for the losses it incurs as a result of the defendant's fraud. It is beyond dispute, however, that common law and/or administrative remedies would consistently fail to make the government whole, since they would not compensate the United States for its costs of investigation and suit. There is no reason that the federal rather than the state government should bear that loss in a case where the State has knowingly submitted a false claim.[21]

II. BECAUSE A *QUI TAM* ACTION SERVES TO PROTECT THE PROPERTY OF THE UNITED STATES GOVERNMENT, AND IS SUBJECT TO SIGNIFICANT CONTROL BY THE UNITED STATES, IT IS NOT BARRED BY THE ELEVENTH AMENDMENT

This Court's Eleventh Amendment jurisprudence reflects the Court's continuing effort properly to define "the fundamental constitutional balance between the Federal Government and the States." *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 238 (1985). On the one hand, the States are

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[21] *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), originated as a *qui tam* suit brought against an officer of the Bank of the United States by a private party under a Maryland law giving an informer one-half of the statutory penalty. *Id.* at 317, 321-322; see *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 537 (1832) (noting that *McCulloch* "was a *qui tam* action, brought to recover a penalty"). Perhaps because the Bank's charter contained a sue-and-be-sued provision, see Act of Apr. 10, 1816, ch. 44, § 7, 3 Stat. 269, the officer's susceptibility to suit was not contested. The Court—while obviously cognizant of the threat to federal authority that the Maryland tax entailed—appears to have seen no anomaly in the use of a *qui tam* suit for penalties as a means of adjudicating the rights and obligations of an instrumentality of the United States.

"sovereign entities," *Seminole Tribe* v. *Florida*, 517 U.S. 44, 71 n.15 (1996), whose interests ordinarily may not—even with the authorization of Congress—be subordinated to the interests of individuals. The States are themselves subordinate, however, to the national government and the national polity, and their immunity from suit does not extend so far as to thwart the vindication of important federal interests or undermine the supremacy of federal law.

A *qui tam* suit under the FCA is a mechanism by which the energies of private citizens are enlisted to serve fundamentally national ends. As the court of appeals in this case recognized, a *qui tam* suit serves to redress an injury done to the United States; the government receives the bulk of any recovery; and the government retains significant prerogatives in *qui tam* litigation under the FCA. Pet. App. 16-17. Based on those considerations, the court concluded 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 (emphasis added).

The court of appeals was correct. To be sure, a *qui tam* action is not literally filed by a federal officer: the *qui tam* relator himself is a private party rather than an officer or employee of the Executive Branch. Nonetheless, because a *qui tam* suit vindicates the property interests of the United States and is subject to significant control by the United States, it is "in essence" a suit by the United States—the equivalent of such a suit—for purposes of Eleventh Amendment immunity.

A. The *Qui Tam* Mechanism Is A Well-Established Hybrid That Has Characteristics Of Private Suits But Was Employed By Congress In The FCA As A Means Of Protecting The Property Of The United States

1. At (and before) the time the Constitution was ratified, the *qui tam* suit was a well-established mechanism for collecting monetary obligations owed to the government. In *Marvin* v. *Trout*, 199 U.S. 212 (1905), the Court observed:

> Statutes providing for actions by a common informer, who himself had 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. The right to recover the penalty or forfeiture granted by statute is frequently given to the first common informer who brings the action, although he has no interest in the matter whatever except as such informer.

Id. at 225; see also *Marcus*, 317 U.S. at 541 n.4 (quoting *Marvin*, 199 U.S. at 225); note 1, *supra*. The Court in *Marvin* also noted that "[l]egislation giving an interest in the forfeiture to a common informer has been frequent in Congressional legislation relating to revenue cases." 199 U.S. at 225.[22]

A *qui tam* suit under the FCA is an unusual hybrid having significant characteristics of both a private and a public action. The hybrid character of the suit is reflected in the fact that the relator brings suit "for the person and for the United States Government," 31 U.S.C. 3730(b)(1)—a formulation that accords with historical usage. See note 1,

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[22] One district court has explained that "[o]f the fourteen statutes imposing penalties enacted by the First Congress, between ten and twelve authorized *qui tam* suits." *United States ex rel. Stillwell* v. *Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1086 (C.D. Cal. 1989); see *id.* at 1086 n.2 (citing statutes).

supra (explaining that the term "*qui tam*" is derived from a Latin phrase meaning "who brings the action for the king as well as for himself").

On the one hand, the relator in an FCA *qui tam* suit is similar in significant respects to a plaintiff in a private civil action. The relator does not hold a formal position within the government, and he is not selected in the manner specified by the Appointments Clause of the Constitution (Art. II, § 2, Cl. 2) for "Officers of the United States." The relator does not take an oath of office, and in his conduct of a *qui tam* action he does not owe primary allegiance to the government. Unlike a public official conducting litigation on behalf of the government, the relator has a personal financial stake in the suit, and the premise of the Act is that he will be motivated at least in substantial part by the desire to further that private interest. Thus, the Court recently observed that "[a]s a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 949 (1997).

In other respects, however, a *qui tam* suit is properly regarded as public rather than private litigation. A *qui tam* complaint does not allege that the relator was personally injured by the defendant's unlawful conduct.[23] Rather, the

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[23] In some cases the relator in a *qui tam* suit may also allege personal injury arising from the defendant's overall course of conduct. The most obvious example is the allegation that the relator was subjected to adverse employment action in retaliation for his participation or assistance in a false claims investigation. The FCA's "whistleblower" provision, 31 U.S.C. 3730(h), establishes a federal cause of action for the victims of such retaliation. A suit under Section 3730(h), however, is not a *qui tam* action: it is brought on behalf of the employee alone; it requires no allegation of fraud against the United States; and the employee keeps the entire recovery (if the suit is successful) rather than sharing it with the government.

gravamen of a *qui tam* suit is an allegation of wrong done to the federal government as a corporate entity. And because the government takes 70% or more of any recovery, see 31 U.S.C. 3730(d)(1) and (2), the suit if successful will redound primarily to the benefit of the United States. In addition, the government retains significant prerogatives in *qui tam* litigation, including the authority to intervene either to prosecute the suit or obtain its dismissal, even when it declines to take over the suit at the outset of the case. See pages 6-7, *supra*.

Thus, while a *qui tam* relator possesses a personal stake in the outcome of his suit, Congress employed the *qui tam* mechanism to further the important *public* interest in redressing and deterring acts of fraud against the government. Of course, suits for compensatory relief brought by individual victims of unlawful conduct may themselves serve larger public interests. See, *e.g.*, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1975) (backpay award under Title VII of the 1964 Civil Rights Act serves a "prophylactic" purpose because "[i]f employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality"). But providing compensation to actual victims has traditionally been regarded as an end in itself. See *id.* at 418 ("It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination."). By contrast, the monetary awards authorized by 31 U.S.C. 3730(d)(1) and (2) rest solely on Congress's pragmatic determination that private enforcement efforts will ultimately serve the *government's* interest in increasing its total FCA recoveries and deterring the submission of false claims—not on any notion that private persons who have information concerning fraud against the government have a "right" to be paid for that information.[24]

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[24] As the Court observed in *Hughes Aircraft*, *qui tam* provisions are

2. The Property Clause of the Constitution states:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

U.S. Const. Art. IV, § 3, Cl. 2. Although the principal significance of the Property Clause has lain in its broad grant of authority over land owned by the United States, particularly the Territories, the powers that the Clause vests in Congress are not limited to real property. As Justice Story explained, Congress's authority under the Property Clause "is not confined to the territory of the United States," but "may be applied to the due regulation of all other personal and real property rightfully belonging to the United States."

> passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain.

520 U.S. at 949. Citing the government's brief in *Hughes Aircraft*, petitioner contends (Br. 44) that "[t]he United States itself acknowledges that the relator does not act on behalf of the United States, but instead acts in a private capacity." We argued in *Hughes Aircraft*, and we continue to believe, that the relator is properly characterized as a "private" party rather than as an "Officer of the United States." Congress chose to employ the *qui tam* mechanism, however, not because it regarded the enrichment of relators as an end in itself, but because it believed that relators' self-interested pursuit of personal gain would ultimately serve important governmental interests. A *qui tam* suit under the FCA is thus "the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party *for the Government's benefit*, by providing a cash bounty for the victorious plaintiff." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 572-573 (1992) (emphasis added).

Joseph Story, *Commentaries on the Constitution of the United States* 478 (Ronald D. Rotunda & John E. Nowak eds., 1987).

Congress "has the exclusive right to control and dispose of" the property of the United States, "and no State can interfere with this right, or embarrass its exercise." *Van Brocklin* v. *Tennessee*, 117 U.S. 151, 168 (1886). This Court has held that "[t]he power of Congress to dispose of any kind of property belonging to the United States 'is vested in Congress without limitation.'" *Alabama* v. *Texas*, 347 U.S. 272, 273 (1954) (quoting *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 474 (1915)). It could hardly have escaped the Framers' attention that the protection and disposition of property frequently involves resort to judicial proceedings. In ratifying the Constitution, the States therefore necessarily consented to Congress's use of appropriate judicial mechanisms for carrying into effect its authority over federal property. Congress's authority to utilize the courts for that purpose surely includes the power to employ an enforcement mechanism, such as the *qui tam* action, that was well-accepted by the founding generation as a means of collecting monetary obligations owed to the government.

To construe the Eleventh Amendment as barring *qui tam* suits against state agencies would interfere, in two distinct senses, with Congress's authority over "Property belonging to the United States." First, and most obviously, a State's submission of a "false or fraudulent claim for payment or approval" (31 U.S.C. 3729(a)(1)) is itself a direct threat to congressional control over federal property: the FCA serves both to safeguard the integrity of the public fisc and to ensure that federal resources are ultimately used in the manner prescribed by Congress. Recognizing that the government lacks the resources to detect, investigate, and pursue every instance of fraud against the United States, see *1986 Senate Report* 7-8, Congress provided a financial incentive for private relators to supplement the govern-

ment's efforts. The bar on *qui tam* suits against state defendants that petitioner advocates is objectionable not because it would deprive potential relators of their "right" to a monetary recovery, but because it would disable Congress from using what it believed to be the most efficacious means of protecting the property of the United States. Such a barrier would subvert rather than protect "the fundamental constitutional balance between the federal government and the States." *Atascadero*, 473 U.S. at 238.[25]

In addition, the United States' chose in action against a State or state agency that has knowingly submitted a false claim is itself a species of property that may, under ordinary principles of property law, be assigned to a private party. Compare *Spiller* v. *Atchison, Topeka & Santa Fe Ry.*, 253 U.S. 117, 135 (1920) ("A claim for damages sustained through the exaction of unreasonable charges for the carriage of freight is a claim not for a penalty but for compensation, is a property right assignable in its nature, and must be regarded as assignable at law, in the absence of a legislative intent to the contrary.") (citations omitted); *Standard Oil Co.* v. *New Jersey*, 341 U.S. 428, 439-441 (1951) (a chose in action is a form of intangible property that can escheat to the

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[25] This Court's Eleventh Amendment decisions have emphasized the States' substantial interest in controlling the manner in which their financial obligations to private parties will be determined and enforced. See, *e.g.*, *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 465 (1945); *Great N. Ins. Co.* v. *Read*, 322 U.S. 47, 54 (1944); *Hans* v. *Louisiana*, 134 U.S. 1, 16 (1890). That concern is not implicated by the FCA's *qui tam* mechanism, the purpose of which is to determine and enforce the defendant's obligation to the federal government. The fact that a portion of any *qui tam* recovery goes to the relator does not alter the constitutional analysis. The process of recovering money owed to the United States inevitably requires the expenditure of federal funds, both in the form of wages to the government's own employees and in the form of payments to private parties. The relator's share of a *qui tam* recovery is simply an expense incurred by the federal government in the course of recouping money owed to it.

State); *Advanced Magnetics, Inc.* v. *Bayfront Partners, Inc.*, 106 F.3d 11, 17 (2d Cir. 1997) ("In general, claims or choses in action may be freely transferred or assigned to others."). The statutory authorization for *qui tam* suits operates in practical effect as a partial assignment of the United States' chose in action to the private party who first files suit. See *United States ex rel. Kelly* v. *Boeing Co.*, 9 F.3d 743, 748 (9th Cir. 1993) (FCA "effectively assigns the government's claims to qui tam plaintiffs"), cert. denied, 510 U.S. 1140 (1994).[26] If the Eleventh Amendment is construed to bar *qui tam* suits against state defendants, then Congress is effectively precluded from assigning the government's chose in action, in derogation of its authority under Article IV to dispose of property belonging to the United States.

B. The United States Retains Significant Incidents Of Control Over *Qui Tam* Suits Under The FCA, Thereby Insuring Ultimate Political Accountability For Such Suits

This Court explained in *Alden* that the essential feature of suits brought by the United States is that they "require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue unconsenting States."

[26] The judgment in a *qui tam* suit has traditionally been given preclusive effect in a subsequent action brought by the government. See note 1, *supra* (Blackstone explains that "the verdict passed upon the defendant in the first [*qui tam*] suit is a bar to all others, and conclusive even to the king himself"). Although the text of the FCA does not address the question directly, the legislative history of the 1986 amendments reflects Congress's understanding that the traditional preclusion rule would apply. See *1986 Senate Report* 27 ("if the Government declines to intervene in a *qui tam* action, it is estopped from pursuing the same action administratively or in a separate judicial action"). The applicable preclusion rule reinforces the fact that the effect of the FCA's *qui tam* provisions is to assign to the relator the *government's* cause of action.

119 S. Ct. at 2267. That requirement is satisfied here. Even before a *qui tam* complaint is served upon the defendant, it must be served upon the government, which has an absolute right to intervene to take over the suit. 31 U.S.C. 3730(b)(2). A *qui tam* suit cannot go forward if the government objects, see pages 6-7 & note 5, *supra*, and it likewise cannot be dismissed or settled over the government's objection. See 31 U.S.C. 3730(b)(1) (*qui tam* suit "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting"); *Searcy* v. *Philips Elecs. N. Am. Corp.*, 117 F.3d 154, 156-158 (5th Cir. 1997); note 4, *supra*; but see *United States ex rel. Killingsworth* v. *Northrop Corp.*, 25 F.3d 715, 720-724 (9th Cir. 1994).

Every *qui tam* suit that proceeds without government intervention has therefore survived scrutiny by the United States, which has declined to exercise its power to dismiss the case or to take an active role in the litigation; the United States at all times retains the power to intervene. Thus, the dissenting judge in the court of appeals was simply mistaken in suggesting (Pet. App. 72-85) that a *qui tam* suit is insulated from the judgment of politically accountable officials. Although a *qui tam* relator is not himself politically accountable, he cannot proceed over the objection of the Attorney General, who is "entrusted with the constitutional duty to 'take Care that the Laws be faithfully executed.'" *Alden*, 119 S. Ct. at 2267 (quoting U.S. Const. Art. II, § 3).

In this respect, *qui tam* suits for defrauding the United States are utterly unlike the suits brought by state employees for back wages in *Alden*, or the suits brought by Alaskan native villages for funding pursuant to state statute in *Blatchford* v. *Native Village*, 501 U.S. 775, 782 (1991). In neither of those cases was the private plaintiff subject to the control of the United States as is a *qui tam* relator. And that difference in control is related to the difference in the interests at stake. Because a *qui tam* suit under the FCA is brought to redress an injury done to the United States, and

the bulk of any recovery goes to the United States, the suit is appropriately subject to the control of the federal government—unlike the suit for back wages brought by the employees in *Alden*, or the *Blatchford* plaintiffs' attempt to obtain funds allegedly due them under state law.

C. The Application Of Eleventh Amendment Principles Characteristically Turns On An Examination Of The Interests At Stake In A Particular Suit

As we explain above, the FCA's *qui tam* provisions are a means by which Congress sought to redress and deter acts of fraud against the federal government. This suit is therefore fundamentally different from the cases on which petitioner relies, which uniformly involve allegations of legal wrong done to private parties. The thrust of petitioner's argument is that the relator's private status is dispositive of the Eleventh Amendment inquiry, regardless of the interests that the FCA's *qui tam* provisions are intended to serve. That theory is inconsistent with this Court's precedents. In a variety of contexts, this Court has made clear that application of state sovereign immunity principles turns on the nature of the interests affected by a particular suit or category of suits.

1. The determination whether a particular case involves a suit "against one of the United States" depends not simply on the identity of the nominal defendant, but upon the relationship between that defendant and the State, and upon the practical consequences that the litigation (if successful) will entail. The Court has repeatedly held that

> the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding. And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.

Ford Motor Co. v. *Department of Treasury*, 323 U.S. 459, 464 (1945) (citation omitted); see also, *e.g.*, *Edelman* v. *Jordan*, 415 U.S. 651, 663 (1974) ("the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment"). The Court undertakes a similar functional analysis in determining whether a particular state instrumentality is an "arm of the State" that may invoke the State's Eleventh Amendment immunity. See, *e.g.*, *Regents of Univ. of Cal.* v. *Doe*, 519 U.S. 425, 429-431 (1997).

2. The States, "pursuant to the plan of the Convention," consented to suits by other States. *Alden*, 119 S. Ct. at 2267; accord, *e.g.*, *Blatchford* v. *Native Village*, 501 U.S. 775, 782 (1991); *Principality of Monaco* v. *Mississippi*, 292 U.S. 313, 328-329 (1934). The Court has made clear, however, that a State's presence as a named plaintiff is not a sufficient basis for permitting such suits to go forward. Thus, in *New Hampshire* v. *Louisiana*, 108 U.S. 76 (1883), the Court held that suits brought in the names of the States of New Hampshire and New York, seeking to collect on bonds and coupons issued by the State of Louisiana, were barred by the Eleventh Amendment. *Id.* at 88-91. Although the private bond and coupon holders had formally assigned their claims to the plaintiff States in conformity with those States' laws, this Court found that the plaintiff States and their officers were "only nominal actors in the proceeding," since the proceeds of the suits would flow entirely to the private parties. *Id.* at 88-89.

In *South Dakota* v. *North Carolina*, 192 U.S. 286 (1904), by contrast, a private bond holder donated his bonds outright to the State of South Dakota. The Court observed that there could be no "question respecting the title of South Dakota to these bonds," since "[t]hey [we]re not held by the State as representative of individual owners, * * * for they were given outright and absolutely to the State." *Id.* at 310

(citing and distinguishing *New Hampshire* v. *Louisiana*, *supra*). The Court concluded on that basis that the suit was properly regarded as "an action brought by one State against another to enforce a property right" and was therefore permitted to go forward. *Id.* at 318; see *Oklahoma ex rel. Johnson* v. *Cook*, 304 U.S. 387, 392-393 (1938) (discussing *New Hampshire* and *South Dakota*). Thus, the question whether a suit has been brought *by* a State, like the question whether it has been brought *against* a State, is resolved by reference to the suit's practical effect on the State's interests.

3. A suit against a government officer in his official capacity "generally represent[s] only another way of pleading an action against the entity of which an officer is an agent." *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985) (quoting *Monell* v. *New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)); see also *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 269-270 (1997). Consistent with that principle, the Court has held that official-capacity suits against individual state officers seeking retrospective monetary awards are barred by the Eleventh Amendment. See pages 43-44, *supra*. However, official-capacity suits arising under federal law and seeking prospective injunctive relief (commonly known as "*Ex parte Young* suits," see *Ex parte Young*, 209 U.S. 123 (1908)) are permitted to go forward, "notwithstanding the obvious impact on the State itself," *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 104 (1984), that such relief entails.

The justification for the *Ex parte Young* rule is that private suits for prospective relief play a crucial role in ensuring the supremacy of federal law. "[T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst*, 465 U.S. at 105; see also *Alden*, 119 S. Ct. at 2263 (*Ex parte Young* rule reflects a determination "that certain

suits for declaratory or injunctive relief against state officers must * * * be permitted if the Constitution is to remain the supreme law of the land"). As the Court explained in *Green* v. *Mansour*, 474 U.S. 64 (1985):

> Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment.

Id. at 68 (citations omitted). This Court's *Ex parte Young* jurisprudence confirms that even a private action that is in substance one against the State may proceed if it will serve sufficiently important *national* objectives.[27]

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[27] The original rationale for the rule announced in *Ex parte Young* was that a state official who behaves in an unconstitutional manner is thereby "stripped of his official or representative character," and that a suit to compel compliance with the Constitution is for that reason properly regarded as one against the individual officer rather than against the State. *Ex parte Young*, 209 U.S. at 160. The Court has since recognized, however, that in official-capacity suits the distinction between the officer and the State posited in *Ex parte Young* is essentially a fiction, see *Coeur d'Alene*, 521 U.S. at 269-270; *Pennhurst*, 465 U.S. at 114 n.25, and that the more persuasive justification for permitting suits for prospective relief to go forward is that they play a crucial role in ensuring the supremacy of federal law. See *Green*, 474 U.S. at 68; *Pennhurst*, 465 U.S. at 104-105; see also *Coeur d'Alene*, 521 U.S. at 293 (opinion of O'Connor, J.). The Court in *Pennhurst* held on that basis that the Eleventh Amendment bars an official-capacity suit against individual state officers seeking prospective relief on *state-law* grounds. 465 U.S. at 106-117. The Court observed that "the general criterion for determining when a suit is in fact one against the sovereign is the *effect* of the relief sought." *Id.* at 107. The Court declined to extend the *Ex parte Young* rule to state-law claims, explaining that "[i]n such a case the entire basis for the doctrine of *Young* * * * dis-

Like a *qui tam* relator, the plaintiff in an *Ex parte Young* suit will have a personal stake in the case (else he would lack Article III standing) and will presumably conduct the litigation in a self-interested manner. The premise of this Court's *Ex parte Young* jurisprudence is that such suits should nevertheless be allowed to go forward because the plaintiffs' pursuit of their own self-interest will (at least in the aggregate) ultimately serve the national interest in ensuring the supremacy of federal law. The FCA's *qui tam* provisions similarly reflect Congress's considered judgment that private relators' pursuit of personal financial gain will further quintessentially national objectives.

4. The Court in *Alden* indicated that Congress could validly authorize federal officials to file suit against a State to obtain retrospective monetary relief for state employees injured by violations of the Fair Labor Standards Act (FLSA). See 119 S. Ct. at 2269.[28] The Court held, however,

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appears," because "[a] federal court's grant of relief against state officials on the basis of state law * * * does not vindicate the authority of federal law." *Id.* at 106.

[28] Federal officials may properly be authorized to file suit to enforce federal civil and criminal laws, regardless of whether the government as a corporate body has a pecuniary or similarly tangible interest in the outcome of the suit. See, *e.g.*, *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 132-133 (1995); *INS* v. *Chadha*, 462 U.S. 919, 931 (1983); *SEC* v. *United States Realty & Improvement Co.*, 310 U.S. 434, 459-460 (1940); *Coleman* v. *Miller*, 307 U.S. 433, 441-442 (1939); *In re Debs*, 158 U.S. 564, 584-586 (1895); cf. *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986) ("[A] State has standing to defend the constitutionality of its statute."). That principle serves to distinguish the hypothetical Labor Department enforcement action discussed in *Alden* from the suit in *New Hampshire* v. *Louisiana*. The claim in that case was that Louisiana had breached its obligations under bonds and coupons that it had issued; New Hampshire did not (and presumably could not) assert that the case implicated its sovereign interest in the enforcement of its own legal code. Because New Hampshire had neither a sovereign nor a proprietary interest in the proceeding, the suit was in substance one by the private bond and coupon holders, and it was therefore barred by the Eleventh

that Congress could not properly confer the authority to sue upon the employees themselves. The Court explained:

> The difference between a suit by the United States on behalf of the employees and a suit by the employees implicates a rule that the National Government must itself deem the case of sufficient importance to take action against the State; and history, precedent, and the structure of the Constitution make clear that, under the plan of the Convention, the States have consented to suits of the first kind but not of the second.

Ibid.

That passage does not suggest that the participation of a federal officer is an absolute prerequisite to the maintenance of any suit against a State. To the contrary, the passage is in terms a comparison between two different methods *of enforcing the FLSA*. The gravamen of an FLSA suit is a claim of legal wrong done to individual employees, and the relief requested is an award of money to those private parties. In that context, the Court in *Alden* found the participation of a constitutional officer to be necessary to ensure that the federal interests involved in a particular case are sufficiently important to justify subjecting the State to suit. By contrast, the FCA's *qui tam* mechanism was established by Congress as a means of vindicating quintessentially *national* interests. Because the gravamen of an FCA suit is an allegation of wrong done to the United States as a corporate body, and because the United States is the principal beneficiary of any successful action, the suit retains its

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Amendment. By contrast, a Labor Department FLSA enforcement action would further the federal government's sovereign interest in the enforcement of its own law, even if the monetary relief flowed entirely to the aggrieved employees. Cf. *General Tel. Co.* v. *EEOC*, 446 U.S. 318, 326 (1980) ("When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.").

fundamental public character regardless of whether it is brought by the government or by a *qui tam* relator.[29]

Moreover, the government retains significant prerogatives in a *qui tam* suit under the FCA. The government may intervene, at the outset of the suit or later, either to prosecute or to dismiss the action. See pages 6-7, 41-43, *supra*. The Act also provides that a *qui tam* 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); see note 4, *supra*. Insofar as it permits the relator to go forward absent affirmative government action to take control of the suit, the FCA reflects a congressional determination that *qui tam* suits will presumptively serve the interests of the United States. Federal officials retain ample authority, however, to protect the national interest if they believe that interest to be threatened by a particular *qui tam* action.

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[29] Petitioner's reliance (Br. 31-32) on *Blatchford* is misplaced for the same reason. The plaintiff Tribes in *Blatchford* alleged an injury to themselves and sought an order requiring the State to pay them money. 501 U.S. at 778. The case did not involve an allegation of wrong done to the United States as a corporate body, nor would any of the requested monetary relief have flowed to the federal treasury.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Acting Assistant Attorney General

BARBARA D. UNDERWOOD
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

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

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APPENDIX

1. The Property Clause of the United States Constitution, Article IV, Section 3, Clause 2, provides:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

2. The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

3. Section 3729 of Title 31, United States Code, provides in pertinent part:

(a) LIABILITY FOR CERTAIN ACTS.—Any person who—

> (1) knowingly presents, or causes 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;

* * * * *

> 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 because of the act of that person.

4. Section 3730 of Title 31, United States Code, provides in pertinent part:

> (a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.—The Attorney General diligently shall investigate a violation under section 3729. If 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.
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> (b) ACTIONS BY PRIVATE PERSONS.— (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.