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QUI TAM CAN; QUI TAM CAN'T: AN ANALYSIS OF VERMONT AGENCY OF NATURAL RESOURCES V. UNITED STATES EX REL. STEVENS

INTRODUCTION

Rooted in the history of the Civil War and reinvigorated by Congress in 1936, the False Claims Act (FCA) provides a powerful weapon to fight fraud committed against the United States government. The FCA provides a dual enforcement mechanism to recover damages suffered by the United States as a result of fraudulent claims submitted to the federal government for the purpose of procuring federal funds. Under the FCA, either the federal government may bring a civil suit, or a private individual (known as a "qui tam plaintiff" or "relator") may bring a qui tam suit on behalf of and in the name of the United States government. The incentive for private citizens to fight the government's battles lies in the relator's ability to collect a portion of the proceeds from the suit.

Recent cases have revealed constitutional and statutory interpretation problems with the FCA and its enforcement through qui tam actions. For instance, what happens when a

2. For a brief history of the FCA and its amendments, see Anna Mae Walsh Burke, Qui Tam: Blowing the Whistle for Uncle Sam, 21 NOVA L. REV. 889, 871-74 (1997), and John P. Robertson, Comment, The False Claims Act, 29 ARIZ. ST. L.J. 899, 900-03 (1994).
4. See 31 U.S.C. § 3730(a)-(b); see also Robertson, supra note 2, at 899. "Qui tam" is a shortened version of 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." Id. (citing Erickson ex rel. United States v. Am. Inst. of Biological Sci., 716 F. Supp. 808, 809 n.1 (E.D. Va. 1989) (citing WILLIAM BLACKSTONE, COMMENTARIES *160)).
5. See 31 U.S.C. § 3730(d)(1)-(2); see also Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939, 949 (1997) (acknowledging that qui tam relators are "motivated primarily by prospects of monetary reward rather than the public good").
6. See Bucy, supra note 3, at 689, 708 (noting three features of the FCA that complicate its application and listing four common constitutional challenges to the FCA: separation of powers, appointments of executive officers, standing, and due process); Robertson, supra note 2, at 804-08 (discussing the constitutional challenges to the FCA).
state engages in fraudulent conduct to acquire federal grants for its programs? Is the state a “person” subject to liability and suit under the FCA? Does a private citizen have Article III standing to sue under the *qui tam* provisions of the FCA? Is the state immune from a *qui tam* suit under the Eleventh Amendment because the plaintiff is a private citizen? In the past decade, several *qui tam* plaintiffs have brought FCA *qui tam* suits against states, thus pressing the courts to answer these questions. 7

Part I of this Comment briefly reviews the FCA by describing its historical context and by outlining the relevant statutory provisions. Part II discusses the disagreement among the federal courts on the issues of whether a *qui tam* relator has Article III standing, whether a state is a “person” subject to suit and liability under the FCA, and whether states can assert Eleventh Amendment immunity to bar a suit by a private *qui tam* plaintiff. Part III reviews the history of the case at the district court and court of appeals levels. Part IV presents the parties’ arguments in the case that finally put these issues before the U.S. Supreme Court, *Vermont Agency of Natural Resources v. United States ex rel. Stevens.* 8 Part V discusses the Supreme Court’s decision. Finally, Part VI analyzes the Supreme Court’s holdings, discussing the implications for the future of *qui tam* litigation.

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8. U.S. CONST. amend. XI. “The Judicial power of the United States shall not be construed to extend 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.” *Id.*

I. OVERVIEW OF THE FALSE CLAIMS ACT

A. Historical Background

Congress initially enacted the False Claims Act (FCA) in 1863 to combat defense contractors who were defrauding the Union Army during the Civil War. The FCA provides penalties for a person who knowingly presents a false claim to the government, and it offers incentives for “whistleblowers,” or “informers,” who expose fraud on the government.

Realizing that the United States government could not fight this fraud without the help of private citizens, Congress created a dual enforcement system in the Act. The executive branch, through the Department of Justice, can litigate on behalf of the United States in a civil action under the FCA. Private citizens can also represent the United States in a qui tam action under the FCA. Their involvement is important because private citizens often have inside information on people or agencies that defraud the government.

B. Relevant Provisions of the FCA

The False Claims Act imposes civil liability on “[a]ny person” who knowingly submits for payment a false or fraudulent claim...
to the United States government.\textsuperscript{16} A person who defrauds the United States is liable to the government for a civil penalty of up to $10,000 per claim, plus three times the amount of damages that the government has suffered as a result of the fraud (treble damages).\textsuperscript{17}

The Attorney General of the United States can bring a civil action against any person who violates section 3729(a) of the FCA.\textsuperscript{18} The FCA also provides that a private person may bring a civil suit in the name of the United States government against a violator.\textsuperscript{19} Such action by a private person is called a "\textit{qui tam} suit,"\textsuperscript{20} and the private person, called a "relator," is entitled to a percentage of the damages he recovers for the United States.\textsuperscript{21}

Once a private person initiates a \textit{qui tam} suit, he must give the United States an opportunity to intervene and take control of the action.\textsuperscript{22} The FCA requires that the relator provide the government with a copy of the complaint and "substantially all material evidence and information the person possesses."\textsuperscript{23} The relator must file the complaint in camera and under seal, giving the government a sixty-day period to investigate and decide whether to intervene.\textsuperscript{24} After the government decides to intervene or to allow the relator to proceed alone, the court orders that the complaint be served on the defendant.\textsuperscript{25}

If the United States decides not to intervene at the beginning of the suit, the relator has the "right to conduct the action," subject to a few limitations.\textsuperscript{26} However, the United States government still retains significant control over the suit,\textsuperscript{27} and

\begin{enumerate}
\item \textsuperscript{16} 31 U.S.C. § 3729(a).
\item \textsuperscript{17} Id.
\item \textsuperscript{18} Id. § 3730(a).
\item \textsuperscript{19} Id. § 3730(b); see Caminker, supra note 3, at 341.
\item \textsuperscript{20} 31 U.S.C. § 3730; see Bucy, supra note 3, at 707; supra note 4 and accompanying text.
\item \textsuperscript{21} 31 U.S.C. § 3730(d); see Bucy, supra note 3, at 707; Caminker, supra note 3, at 341; Robertson, supra note 2, at 899, 903.
\item \textsuperscript{22} 31 U.S.C. § 3730(b)-(c); see Burke, supra note 2, at 880.
\item \textsuperscript{23} 31 U.S.C. § 3730(b)(2); see Burke, supra note 2, at 880.
\item \textsuperscript{24} 31 U.S.C. § 3730(b)(2). The government may request a time extension for further investigation, but it must present the court with a well-founded argument for the necessity of the extension. 31 U.S.C. § 3730(b)(3); see Burke supra note 2, at 880.
\item \textsuperscript{25} 31 U.S.C. § 3730(b)(3); see Robertson, supra note 2, at 903.
\item \textsuperscript{26} 31 U.S.C. § 3730(c)(3); see infra note 27 and accompanying text.
\item \textsuperscript{27} See, e.g., 31 U.S.C. § 3730(b)(5) (providing that only the government can intervene in a \textit{qui tam} action or bring a related suit on the same facts); id. § 3730(c)(2)(C) (allowing
it may intervene at any time upon a showing of "good cause." When the government intervenes, it assumes complete control of the suit. The relator has a right to continue as a party, subject to some restrictions, but no act of the qui tam relator can bind the government. Furthermore, the government can dismiss or settle the suit at any time, regardless of the relator's objections, provided that the government notifies the relator and the court provides the relator an opportunity for a hearing on the motion to dismiss or proposed settlement.

Generally, in a qui tam suit, the proceeds of the action or settlement belong principally to the United States government, even if the government does not intervene in the action. If the government intervenes, the qui tam relator receives between fifteen and twenty-five percent of the government's recovery, plus attorneys' fees and costs. If the relator proceeds alone, he receives between twenty-five and thirty percent of what he recovers for the government, plus attorneys' fees and costs.

II. RECENT DEVELOPMENTS IN FALSE CLAIMS ACT LITIGATION

Before the summer of 2000, one question was the subject of much disagreement in the circuit courts of appeals: Can states

the government to limit the number of witnesses and the length of testimony); id. § 3730(c)(3) (providing that the government can request copies of all pleadings and deposition transcripts to monitor the proceedings); id. § 3730(c)(4) (entitling the government to stay discovery in the qui tam action if it interferes with the government's investigation or prosecution of another civil or criminal action arising out of the same facts).

28. 31 U.S.C. § 3730(c)(3); see Burke, supra note 2, at 880-81; Robertson, supra note 2, at 903.

29. 31 U.S.C. § 3730(c)(1); see Robertson, supra note 2, at 903.

30. The government can seek a court order to limit the relator's participation in the case. 31 U.S.C. § 3730(c)(2)(C); see Robertson, supra note 2, at 903.


32. Id. § 3730(c)(2)(A)-(B).

33. See United States ex rel. Stevens v. Vt. Agency of Natural Res., 162 F.3d 105, 201 (2d Cir. 1998) (noting that the government gets seventy to eighty-five percent of the proceeds recovered in a qui tam action).

34. 31 U.S.C. § 3730(d)(1). The amount of the relator's award depends on the relator's contribution to the prosecution. See Burke, supra note 2, at 880; Robertson, supra note 2, at 903.

35. 31 U.S.C. § 3730(d)(2). The amount of the relator's award depends on the court's assessment of what is reasonable. See Burke, supra note 2, at 880; Robertson, supra note 2, at 903.
and state agencies be defendants in *qui tam* actions under the False Claims Act? To answer this question, several courts of appeals considered two issues: (1) whether states and state agencies can assert Eleventh Amendment immunity to FCA *qui tam* suits brought by private citizens, and (2) whether states and state agencies are "persons" subject to liability and suit under the FCA. 36 The federal courts of appeals were split on both issues. 37 Many courts have held that states do not enjoy Eleventh Amendment immunity because the United States is the real party in interest in a *qui tam* action under the FCA, and states are not immune from suits brought by the United States. 38 However, at least one court has held that the Eleventh Amendment bars a private citizen from bringing a *qui tam* action against a state when the United States does not intervene. 39 The courts also differed on whether the state is a "person" subject to liability and civil suit under the FCA. 40 Some courts have held that the definition of "person" in the FCA includes states. 41 Other courts have excluded states from the reach of the FCA. 42

Another related issue was yet to be decided by the Supreme Court: whether *qui tam* relators have Article III standing to litigate fraud upon the government. Unlike the disagreement over whether states could be sued by *qui tam* relators under the FCA, every court of appeals to consider the question of standing concluded that suits by *qui tam* relators satisfy Article III. 43

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36. See cases cited supra note 7.
37. See infra notes 38–41 and accompanying text.
41. See *Stevens,* 162 F.3d 195.
42. See *Long,* 173 F.3d 890.
43. See, e.g., *Foulds,* 171 F.3d at 288 n.12; *Rodgers,* 154 F.3d at 888; United States *ex rel.* Benge v. Bd. of Trustees of the Univ. of Ala., 104 F.3d 1453, 1457–58 (4th Cir. 1997); United States *ex rel.* Hall v. Tribal Dev. Corp., 49 F.3d 1208, 1213 (7th Cir. 1995); United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 748 (9th Cir. 1993); United States *ex rel.* Kreindler & Kreindler v. United Techs. Corp., 985 F.2d 1148, 1154 (2d Cir. 1993); United States *ex rel.* Woodard v. Country View Care Ctr., Inc., 797 F.2d 888, 893 (10th Cir. 1986).
The United States Supreme Court finally answered at least two of these questions, and hinted about the third, in *Vermont Agency of Natural Resources v. United States ex rel. Stevens.*

III. *United States ex rel. Stevens v. Vermont Agency of Natural Resources: The District Court and Court of Appeals for the Second Circuit*

A. Facts of the Case

The United States Environmental Protection Agency (EPA) provides federal grants to the Vermont Agency of Natural Resources (VANR). Specifically, through its Department of Environmental Conservation (DEC) and a subdivision called the Water Supply Division (WSD), the VANR receives funds to administer its Clean Water Act and Safe Drinking Water Act programs. The grants provide funds to pay only “allowable costs” incurred while implementing or enforcing federal laws concerning ground water protection and public water system management. One such “allowable cost” was the salary and wage expenses for work performed on an hourly basis by DEC/WSD employees in connection with public water supply projects. In this funding relationship, the EPA required the VANR to submit time and attendance records of its employees who worked on federally funded projects.

Jonathan Stevens was an employee of the VANR during the time relevant to the claim in this case. During his employment, Stevens noticed that the DEC estimated and pre-allocated the time to be worked on federally funded programs during the

44. 529 U.S. 765, 120 S. Ct. 1858, 146 L. Ed. 2d 838 (2000).
47. 42 U.S.C. §§ 300f to 300j-28.
48. *See Stevens, 162 F.3d at 198; Petitioner’s Brief at 3; Respondent’s Brief at 3. See Petitioner’s Brief at 35aa.
49. *See Stevens, 162 F.3d at 198; Petitioner’s Brief at 36aa.
50. *See Stevens, 162 F.3d at 198; Petitioner’s Brief at 36ac; Respondent’s Brief at 3.
51. *See Stevens, 162 F.3d at 198; Petitioner’s Brief at 3; Respondent’s Brief at 4.
upcoming fiscal year. When employees completed their biweekly time and attendance reports for submission to the EPA to justify the federal grants, the DEC instructed all WSD employees to use the advance estimates for time and attendance, regardless of the actual time worked. DEC employees "did not work the hours which were arbitrarily assigned to them, nor did they record the hours they actually worked ...." Mr. Stevens and other employees notified the DEC that the reports were inaccurate and that the employees were not actually working these pre-allocated hours. However, DEC managers advised the employees to continue reporting pre-allocated hours as previously instructed, and the DEC continued to submit these reports to the EPA for payment from the federal grants.

These erroneous time and attendance reports were the basis of Stevens' complaint that the VANR had defrauded the United States government in violation of the FCA. Stevens alleged in his complaint that the VANR "knowingly and continuously submitted false claims to EPA for salary and wage expenses of its employees purporting to show that employees were working on federally-funded projects when, in fact, they were not working the hours as reported." These reports created the false impression that VANR employees were actually working the reported time on grant-eligible tasks, which allowed the VANR to retain EPA grant funds to which it was technically not entitled. Additionally, the false reports allowed the VANR to maintain or increase its funding for the next fiscal year because the agency reported, although based on pre-determined

53. See Stevens, 162 F.3d at 198; Petitioner's Brief at 37aa; Respondent's Brief at 4.
54. See Stevens, 162 F.3d at 198; Petitioner's Brief at 37aa-38aa; Respondent's Brief at 4.
55. Petitioner's Brief at 39aa.
56. See Stevens, 162 F.3d at 198; Petitioner's Brief at 39aa; Respondent's Brief at 4-5.
57. See Stevens, 162 F.3d at 198; Petitioner's Brief at 39aa; Respondent's Brief at 5.
58. See Stevens, 162 F.3d at 198-199; Petitioner's Brief at 3, 39aa; Respondent's Brief at 3.
59. Petitioner's Brief at 39aa.
60. See Stevens, 162 F.3d at 198; Petitioner's Brief at 39aa-40aa; Respondent's Brief at 4-5.
estimates, that it properly used all of the grant funds it had received the previous year.61

B. District Court Proceedings

On May 26, 1995, Stevens filed his complaint against the VANR in the United States District Court for the District of Vermont.62 Stevens' suit was a qui tam action brought on his behalf and on behalf of the United States in accordance with the provisions of the FCA.63 Pursuant to the FCA, Stevens filed the complaint in camera and under seal.64 He simultaneously served a copy of the complaint and all the relevant evidence to the United States.65 After many time extensions, on June 26, 1998, the government notified the court that it would not intervene.67 However, the government requested that the parties provide copies of all pleadings filed in the case, reserved the rights to order transcripts of depositions and to intervene against the VANR at any time for good cause, and asked to be notified and given an opportunity to be heard in the event that either party sought to have the action dismissed, settled, or otherwise ended.67 In July 1996, the district court unsealed the complaint and ordered that it be served on the VANR as defendant.63 On November 7, 1996, Stevens served the complaint and began prosecuting his lawsuit as a qui tam relator.63

In the complaint, Stevens alleged that VANR employee time records constituted false claims submitted to the EPA and were intended to defraud the United States government.70 Stevens sought to recover damages "in a sum not less than the total amount of federal grant funding obtained by the DEC . . ."

61. See Stevens, 162 F.3d at 198; Petitioner's Brief at 39a-40a; Respondent's Brief at 5.
62. See Stevens, 162 F.3d at 198; Petitioner's Brief at 4; Respondent's Brief at 3.
63. See Stevens, 162 F.3d at 198; Petitioner's Brief at 4-5, 33a.
65. See 31 U.S.C. § 3730(b)(2); Stevens, 162 F.3d at 199; Respondent's Brief at 4 n.1.
66. See Stevens, 162 F.3d at 199; Petitioner's Brief at 5; Respondent's Brief at 5. The Attorney General requested and was granted extensions until June 1998 to investigate and decide about intervention. See id; see also supra note 24.
67. See Stevens, 162 F.3d at 199; Respondent's Brief at 5-6.
68. See Stevens, 162 F.3d at 199.
69. See 31 U.S.C. § 3730(c)(3); Petitioner's Brief at 5.
70. See Stevens, 162 F.3d at 198; Petitioner's Brief at 3, 39a-40a; Respondent's Brief at 3.
represent[jing] a substantial financial injury to the United States. Stevens, as *qui tam* plaintiff suing on behalf of the United States, sought to recover civil penalties of not more than $10,000 per false claim and treble damages, of which twenty-five percent would go to Stevens as relator, and he sought to recover his attorneys' fees and costs.

Vermont moved to dismiss the action in March 1997, arguing that the district court lacked subject matter jurisdiction. The VANR contended that (1) a state (or state agency) is not a "person" subject to liability or suit under the FCA, and (2) a *qui tam* action against a state defendant in federal court violates the Eleventh Amendment. Stevens opposed the motion to dismiss, and the United States supported him as amicus curiae. The district court denied VANR's motion to dismiss in an unpublished order on May 9, 1997, and it denied reconsideration on June 10, 1997. Vermont filed an interlocutory appeal to the United States Court of Appeals for the Second Circuit, and the district court stayed further proceedings in the case pending the appeal. On appeal, the United States intervened to support the district court's decision.

**C. Court of Appeals for the Second Circuit**

In its appeal, Vermont again argued that Congress did not intend to include states as "persons" subject to liability or suit under the FCA and that a *qui tam* action against a state is barred by the Eleventh Amendment. A divided panel disagreed, holding that (1) in a *qui tam* action against a state,
the United States is the real party in interest, so the Eleventh Amendment does not apply, and (2) states are “persons” subject to suit and liability under the FCA. Accordingly, the court affirmed the district court’s denial of the VANC’s motion to dismiss.  

1. Qui Tam Suits Against States Are Not Barred by the Eleventh Amendment

The court of appeals first addressed Vermont’s claim that the qui tam suit brought by a private citizen was barred by the Eleventh Amendment. The court began by noting that states do not enjoy sovereign immunity from suits by the United States government. Then the court turned to the issue of 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. The court reasoned that because the United States is the real party in interest and because the government maintains substantial control over the conduct and duration of the suit, a qui tam action against a state defendant is viewed as a suit by the United States, and the state cannot assert Eleventh Amendment immunity as a defense.

In concluding that the United States is the real party in interest in a qui tam suit, the court gave four reasons: (1) the federal government suffers an injury as the result of fraudulent claims it receives from the defendant; (2) the FCA requires that any qui tam suit be brought in the government’s name; (3) damages are measured by the harm that the government sustains as a result of the fraud; and (4) the United States

80. Id. at 198, 203, 207-208.
81. Id. at 203.
82. Id. at 201.
84. Stevens, 162 F.3d at 202.
85. Id. at 202-203.
86. Id.; see Hartnett, supra note 6, at 2244 (discussing an approach taken by some courts to consider only the injury in fact to the United States, not to the qui tam relator, and to treat the relator as a representative or agent of the United States).
87. 31 U.S.C. § 3730(b) (1994); Stevens, 162 F.3d at 202.
88. 31 U.S.C. § 3729(a); Stevens, 162 F.3d at 202.
receives the majority of the proceeds from the suit—at least seventy percent.\textsuperscript{89} The court recognized that a \textit{qui tam} plaintiff does have an interest in the suit, but it compared that interest to an attorney’s interest in a case when he works for a contingent fee.\textsuperscript{90} Ultimately, the court concluded that a private citizen who brings a \textit{qui tam} suit is not trying to vindicate a right of his own, but is instead acting on the government’s behalf.\textsuperscript{91} A \textit{qui tam} plaintiff simply acts as the government’s agent to rectify the injury to the United States and the harm done to the public treasury.\textsuperscript{92} Thus, even when the government chooses not to intervene, “[t]he real party in interest in a \textit{qui tam} suit is the United States.”\textsuperscript{93}

The court then discussed its second rationale for concluding that the Eleventh Amendment does not apply to a \textit{qui tam} suit under the FCA—the government’s constant control over the suit.\textsuperscript{94} Only the government can intervene or bring a related action using the same facts, and the \textit{qui tam} plaintiff cannot stop it from doing so.\textsuperscript{95} Even if it does not intervene, the government may request copies of pleadings, depositions, and transcripts.\textsuperscript{96} Additionally, the government may monitor and prevent discovery if it interferes with the government’s investigation or prosecution.\textsuperscript{97} If the government chooses to intervene, it assumes complete control over the suit.\textsuperscript{98} The government may limit the participation of the relator,\textsuperscript{99} and no act of the relator can bind the government.\textsuperscript{100} The government also has the right to dismiss or settle the action, even over the relator’s objections.\textsuperscript{101} Furthermore, the only way the relator can

\textsuperscript{89} 31 U.S.C. § 3730(d); \textit{Stevens}, 162 F.3d at 202.
\textsuperscript{90} \textit{Stevens}, 162 F.3d at 202.
\textsuperscript{91} \textit{Id.}
\textsuperscript{92} \textit{Id.; see Caminker, supra note 3, at 349-350; Hartnett, supra note 6, at 2244.}
\textsuperscript{93} \textit{Stevens}, 162 F.3d at 202.
\textsuperscript{94} \textit{Id.} at 202-03; \textit{see also supra note 27.}
\textsuperscript{95} \textit{Stevens}, 162 F.3d at 202; \textit{see 31 U.S.C. § 3730(b)(5).}
\textsuperscript{96} \textit{Stevens}, 162 F.3d at 202; \textit{see 31 U.S.C. § 3730(c)(3).}
\textsuperscript{97} \textit{Stevens}, 162 F.3d at 202; \textit{see 31 U.S.C. § 3730(c)(4).}
\textsuperscript{98} \textit{Stevens}, 162 F.3d at 202; \textit{see 31 U.S.C. § 3730(c)(1).}
\textsuperscript{99} \textit{Stevens}, 162 F.3d at 202; \textit{see 31 U.S.C. § 3730(c)(2)(C).}
\textsuperscript{100} \textit{Stevens}, 162 F.3d at 202; \textit{see 31 U.S.C. § 3730(c)(1).}
\textsuperscript{101} \textit{Stevens}, 162 F.3d at 203; \textit{see 31 U.S.C. § 3730(c)(2)(A).}
dismiss or settle the suit is to obtain the written consent of the government.  

2. The False Claims Act Applies to the States

The court of appeals then turned to the question of whether the FCA authorizes *qui tam* actions against the states.  

After analyzing and rejecting each of Vermont's arguments, the court concluded that this *qui tam* suit against an agency of the state of Vermont was indeed authorized by the FCA.  

First, the court considered Vermont's argument that the court should apply the plain statement rule when interpreting the meaning of "person" in the FCA.  

The plain statement rule provides that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." However, the court noted that this is not a per se rule that applies any time Congress imposes liability on the states; the Supreme Court applies the plain statement rule only when a statute intrudes on the states' traditional authority and disrupts "the usual constitutional balance of federal and state powers." In this case, the court refused to apply the plain statement rule because the FCA does not alter the ordinary constitutional balance between states and the federal government; it simply remedies and deters fraudulent procurement of federal monies. Furthermore, states have no traditional right or authority to defraud the government.  

Next, the court of appeals used standards of statutory construction to determine whether states are included in the definition of "person" in the FCA. The term "person" is not defined by the FCA, but in common usage, the term "person" does not include the sovereign. However, this is not a per se rule; when there is doubt, "[t]he purpose, the subject matter, the

103. *Stevens*, 162 F.3d at 203.
104. *Id.* at 207-08.
105. *Id.* at 203.
106. *Id.* (quoting United States v. Bass, 494 U.S. 335, 349 (1971)).
107. *Id.* (quoting Gregory v. Ashcroft, 501 U.S. 452, 460 (1991)).
108. *Id.* at 204.
109. *Id.*
110. *Id.*
111. *Id.*
context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent . . . to bring [a] state . . . within the scope of the law."112 In the FCA, the term "person" is used indiscriminately to describe those who may sue under the FCA and those who may be sued by the government or a qui tam plaintiff.113 In fact, states have brought several suits against private parties as qui tam plaintiffs, indicating that states view themselves as "persons" within the meaning of section 3730(b)(1).114 The court concluded that states cannot consider themselves "persons" for only certain beneficial parts of the FCA but not for all parts of the statute.115 Because neither the FCA's language nor the its legislative history indicates that Congress intended the term "person" to have different meanings in different sections of the statute, the term has the same meaning for those who can sue and be sued under the FCA.116

When the court looked to the legislative history for guidance in its interpretation, it found what is arguably the most powerful evidence that the FCA covers the states.117 A section of a Senate report that described the history of the FCA stated that the FCA "reaches all parties who may submit false claims. The term 'person' is used in its broad sense to include partnerships, associations, and corporations . . . as well as States and political subdivisions thereof."118 Thus, the court of appeals concluded that both the FCA's creators and the members of Congress who

112. Id. (quoting United States v. Cooper Corp., 312 U.S. 600, 605 (1941)).
113. Id. The term "person" is found in the FCA at section 3729(a) ("[a]ny person" is liable for violating the FCA), section 3730(a) (the United States Attorney General can bring an action "against the person" who violates the statute), and section 3730(b)(1) (a "person" can bring a qui tam action under the FCA).
114. Stevens, 182 F.3d at 204 (collecting cases in which a state has brought a qui tam suit as a relator under the FCA). Congress conditioned states bringing qui tam actions under the FCA to recover damages suffered by the federal government. See id. Congress also permits states to join state law claims with FCA qui tam actions if they arise out of the same transaction or occurrence. See id. This provides further evidence that Congress intended for states to be qui tam plaintiffs. See id.
115. Id. at 205.
116. Id.
117. Id. at 206-07.
amended the statute in 1986 intended an all-encompassing meaning of "person" that included states.110 Vermont's final argument was that treble damages and civil penalties under the FCA are punitive in nature and not usually associated with lawsuits against the states.120 The court rejected this argument, noting that the purpose of treble damages under the FCA is to fully remedy the government's harm.121 Because the damages are remedial, not punitive, Congress may apply "this remedial structure against States who, in participating in federally funded programs, knowingly present fraudulent claims to the government."122

3. The Court of Appeals' Conclusion

Finding both that Eleventh Amendment immunity does not apply when states are sued under the FCA's qui tam provision and that states are "persons" subject to suit and liability under the FCA, the court of appeals affirmed the district court's denial of Vermont's motion to dismiss.123 Vermont then filed a petition in the U.S. Supreme Court for a writ of certiorari.124 The Court granted the writ of certiorari on June 24, 1999.125

IV. VERMONT AGENCY OF NATURAL RESOURCES V. UNITED STATES EX REL. STEVENS:
THE PARTIES' ARGUMENTS TO THE SUPREME COURT

Vermont, as Petitioner, filed its brief with the Supreme Court on September 3, 1999.126 On October 22, 1999, the United States and Stevens, as Respondents, filed their briefs with the Court.127

119. Id. at 205-07.
120. Id. at 207.
121. Id.
122. Id.
123. Id. at 203.
124. See Petitioner's Brief at 1.
Nine amici curiae filed briefs in support of the Petitioner,¹²⁸ and six amici curiae filed briefs in support of the Respondent.¹²⁹

Just ten days before oral argument, the Supreme Court sua sponte ordered the parties to file briefs addressing the following question: Does a private person have standing under Article III of the Constitution to litigate claims of fraud upon the United States government?¹³⁰ The parties filed supplemental briefs to


address the Article III standing issue. On November 29, 1999, the Supreme Court heard oral argument in the case.

A. Petitioner’s Arguments to the Supreme Court

The State of Vermont ("Petitioner") asked the Supreme Court to reverse the court of appeals’ decision that would allow Stevens’ qui tam suit to go forward. The Petitioner argued that "whether the Court begins with Article III, the Eleventh Amendment, or the meaning of the term ‘person’ in the FCA, dismissal is the inevitable result" because the district court lacks subject matter jurisdiction.

1. A Qui Tam Relator Lacks Article III Standing

To address the Court’s request for a briefing on a qui tam relator’s Article III standing, the Petitioner argued in its supplemental brief that a private person lacks standing to litigate claims of fraud upon the government. First, the Petitioner argued that a claim of fraud upon the United States does not provide a private plaintiff with the particularized, concrete injury necessary for standing under the Article III case or controversy requirement. The Petitioner identified three elements of standing: (1) "the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent"; (2) "there must be a causal connection between the injury and the conduct complained of"; and (3) "it must be likely . . . that the injury will be redressed by a favorable decision." In this case,

133. See Petitioner’s Brief at 6-50.
134. Supp. Brief for Petitioner at 2; see also Petitioner’s Brief at 29-49.
136. See id. at 2.
137. Id. (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).
the relator did not allege that he had personally suffered any injury in his complaint; rather, the only alleged injury is monetary harm to the United States.\textsuperscript{138} Furthermore, the relator’s financial reward (bounty) upon successful prosecution is not equivalent to injury in fact because incentive alone does not establish the injury required for Article III standing.\textsuperscript{139}

Second, the Petitioner asserted that a \textit{qui tam} relator lacks standing because a relator cannot pursue a third party’s injury or rights.\textsuperscript{140} Article III’s “judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court’s judgment may benefit others collaterally.”\textsuperscript{141} Because a relator relies only on an alleged injury to the United States and pursues the United States’ rights, he does not have Article III standing, even though he collects part of the government’s damages award if the suit is successful.\textsuperscript{142}

Finally, by rebutting several theories that a relator may use to support standing, the Petitioner contended that a \textit{qui tam} relator has no other basis upon which he could claim Article III standing.\textsuperscript{143} First, since “Congress cannot erase [A]rticle III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing,” any claim of congressional authorization as a basis for standing fails.\textsuperscript{144} Thus, the FCA cannot statutorily convey Article III standing to persons that do not suffer injury in fact.\textsuperscript{145} Second, any claim to standing based on an assignment of the United States’ right of action fails because nothing in the FCA suggests a contractual relationship, or an intention to transfer interest, between the

\begin{footnotes}{\footnotesize
138. See id. at 3.
139. See id.
140. See id. at 4.
141. Id. (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975)).
142. See id. As a subpart to this argument, the Petitioner asserted that even if a \textit{qui tam} relator were to allege in his complaint that his injury was misuse of his tax dollars, he would still lack Article III standing. See id. at 4-5 (discussing taxpayer standing). In addition, the Petitioner contended that a relator lacks standing because a suit “commenced and prosecuted by a private person ‘differs in kind’ from a suit commenced and prosecuted by responsible federal officials,” and to assert the sovereign authority to sue the states, the United States “must itself deem the case of significant importance” to initiate an action. Id. at 6.
143. See id. at 6-12.
144. Id. at 7 (quoting Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997)).
145. See id.
}\end{footnotes}
federal government and the relator. Third, although Congress enacted numerous *qui tam* statutes in the early years of the United States, there is no evidence that Congress seriously considered the constitutional issues involved. Moreover, although *qui tam* statutes have been part of the nation's legal history, the Supreme Court has never decided whether *qui tam* plaintiffs meet the standing requirements of Article III. A *qui tam* relator's standing must be measured by the Court's "well-established modern standing jurisprudence," not history alone.

2. A State Is Not a "Person" Subject to Liability Under the False Claims Act

The Petitioner urged the Supreme Court to overturn the court of appeals' ruling that the states are "persons" subject to liability and suit under the FCA. The Petitioner argued that such a holding is inconsistent with the FCA's plain language, the clear statement rule, and the doctrine of constitutional doubt. Furthermore, a meaning of "person" that excludes states is consistent with the FCA's purpose and context.

First, the Petitioner contended that the Court's analysis of this provision of the FCA should be limited to the plain language of the statute itself. Since the word "person" is not defined in the FCA, the Court should interpret its meaning in conformance with its ordinary meaning in common usage. Here, the term "person" in common usage "does not include the sovereign," and "statutes employing the [word] are ordinarily construed to exclude it." The Petitioner also noted that because the statute imposes a burden and liability to which the states have not been historically subject, the Court should follow

146. *See id.* at 7-8.
147. *See id.* at 11-12.
148. *See id.* at 8-11.
149. *Id.* at 8.
150. *See Petitioner's Brief* at 8-10.
151. *See id.* at 10.
152. *See id.* at 9-10, 18-22.
153. *See id.* at 11.
155. Petitioner's Brief at 10 (quoting Will v. Mich. Dep't of State Police, 491 U.S. 58, 64 (1989) (internal citations omitted)).
the common meaning and exclude states from the definition of "person."\textsuperscript{158}

Next, the Petitioner argued that if the Court were to look past the plain language, the clear statement rule and the doctrine of constitutional doubt demand a conclusion that states are not subject to FCA liability.\textsuperscript{157} The clear statement rule requires that if Congress intends to alter the "usual constitutional balance between the States and the Federal Government," Congress must make that intent unmistakably clear in the statute.\textsuperscript{158} The Petitioner argued that FCA liability is one of those instances in which imposing liability on the states would alter that "usual constitutional balance,"\textsuperscript{159} and because Congress did not explicitly abrogate the states' authority in the FCA, the clear statement rule dictates that "person" should be construed to exclude the states.\textsuperscript{160}

The Petitioner also asserted that the doctrine of constitutional doubt requires exclusion of states from the FCA's definition of "person."\textsuperscript{161} The doctrine of constitutional doubt should be applied when a "statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided."\textsuperscript{162} In this situation, the Court must construe the statute as to avoid constitutional doubt; by applying this doctrine to the definition

\textsuperscript{158} See id. at 11. To make this point, the Petitioner relied heavily on Supreme Court cases, Will v. Michigan Department of State Police, 491 U.S. 58 (1989), and Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979). See id. at 11-12. In those cases, the Court held that it would construe "person" as excluding the sovereign when the statute would otherwise subject states to liability to which they had not been previously subject (such as punitive damages), or when the statute imposes a burden or limitation, rather than confers a benefit or advantage. See id.

\textsuperscript{157} See Petitioner's Brief at 12.

\textsuperscript{158} Id. (quoting Will, 491 U.S. at 65 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985))).

\textsuperscript{159} See id. at 12-16. The Petitioner provided three reasons for its determination that the FCA would tip the substantive constitutional balance between the federal government and the states: (1) the FCA would subject states to suit by private persons, thus violating the Eleventh Amendment, (2) the FCA would subject states to possible substantial financial liability, including the punitive sanctions of treble damages and civil penalties, and (3) FCA suits against states would impede the states' exercise of their police power functions. See id. at 13-15.

\textsuperscript{160} See id. at 12-16.

\textsuperscript{161} See id. at 16-17.

\textsuperscript{162} Id. at 16 (quoting United States ex rel. Attorney Gen. v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)).
of "person" under the FCA, excluding the states seems to be the obvious choice.\textsuperscript{163}

Finally, the Petitioner argued that the ordinary meaning of "person" as excluding the states is consistent with the purpose and context of the FCA.\textsuperscript{164} The Petitioner quoted the FCA's original language which subjected "any person in the land or naval forces of the United States" and "any person not in the military or naval forces" who defrauded the federal government to civil penalties and criminal imprisonment.\textsuperscript{165} Because states cannot serve in the military, nor can they be imprisoned, the original language supports the conclusion that states are not "persons" under the FCA.\textsuperscript{166} Although the 1986 Amendments to the FCA changed many of the substantive provisions, the definition of "person" did not change.\textsuperscript{167} Additionally, the 1986 Amendments increased the punitive nature of the FCA, and this cannot be reconciled with a definition of "person" that includes states.\textsuperscript{168}

3. The Eleventh Amendment Bars Private Persons from Bringing Qui Tam Actions Against States

The Petitioner did not contest that the United States as sovereign can sue the states. The United States’ right to sue states rests on the idea that federal executive branch officers will responsibly exercise discretion and due care in commencing and prosecuting actions against the states.\textsuperscript{169} The case must be particularly important for the United States to bring an action and disrupt the sensitive relationship and balance of power between the federal government and the states.\textsuperscript{170}

\textsuperscript{163} See id. at 16-17.
\textsuperscript{164} See id. at 18-22.
\textsuperscript{165} See id. at 18-19.
\textsuperscript{166} See id.
\textsuperscript{167} See id. at 19-20.
\textsuperscript{168} See id. at 21-22. States are not historically subject to punitive damages because imposing punitive damages on governmental entities places a great burden on taxpayers without deterring future government misconduct. See id. at 21 (referring to the Supreme Court's reasoning in City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 257 (1981)).
\textsuperscript{169} See id. at 33; see also Hartnett, supra note 6, at 359.
\textsuperscript{170} See Petitioner's Brief at 33-34.
The Petitioner asserted that the United States cannot delegate its right to sue states to private individuals.\(^{171}\) \textit{Qui tam} suits against states, even though masked with the name of the United States, are still suits by individuals and thus barred by the Eleventh Amendment.\(^{172}\) Furthermore, \textit{qui tam} suits give the private relator the power to impact a state's relationship with the United States; this intrusion transforms the cooperative relationship between the federal government and the state into an adversarial battle that impedes the state's police powers.\(^{173}\) The Petitioner also argued that allowing a private person, "nominally on behalf of the United States," to proceed with a \textit{qui tam} action against a state may create enormous burdens and threaten a state's financial integrity.\(^ {174}\) In sum, Congress cannot delegate to private citizens the federal government's power to sue a state; such delegation violates the Eleventh Amendment.\(^ {175}\)

In essence, the Petitioner argued that \textit{qui tam} suits are commenced and prosecuted by private individuals, not the United States.\(^ {176}\) Private individuals, motivated by potential monetary reward, bring \textit{qui tam} actions pursuant to an unconstitutional delegation of the United States' authority to sue states.\(^ {177}\) The purpose of the individual's suit is not to vindicate the wrong done to the federal government; rather, the motive is personal monetary benefit.\(^ {178}\) Therefore, the Court cannot pretend that the federal government is the "real party in interest" in these suits.\(^ {179}\)

\begin{flushright}
\textbf{171. See id. at 31-34.}
\textbf{172. See id. at 31-35.}
\textbf{173. See id. at 35-38. The Petitioner cited three reasons for this proposition: (1) the disruption caused by \textit{qui tam} actions would affect the working relationship ("cooperative federalism") between state and federal agencies, (2) the agencies would be deprived of the safeguards and predictability associated with responsible federal officers enforcing federal laws, and (3) \textit{qui tam} actions against states would affect the political relations of the states and federal government. See id. at 55-58.}
\textbf{174. See id. at 39-39.}
\textbf{175. See id. at 34-38.}
\textbf{176. See id. at 38-45.}
\textbf{177. See id. at 49.}
\textbf{178. See id.}
\textbf{179. See id. at 45-49.}
\end{flushright}
B. Respondent's and the United States' Arguments to the Supreme Court

Stevens and the United States ("Respondents") urged the Supreme Court to affirm the court of appeals' decision and allow Stevens' *qui tam* suit to go forward. The Respondents asserted that a *qui tam* relator has the requisite Article III standing, that a *qui tam* action against a state is proper because a state and its agencies are "persons" subject to liability and suit under the FCA, and that "while a *qui tam* suit is not literally a suit brought by a federal officer, it is properly treated as the equivalent of such for purposes of Eleventh Amendment immunity."\(^{183}\)

1. *Qui Tam* Plaintiffs Have Article III Standing

The Respondents addressed the Court's request for a briefing on Article III standing of a *qui tam* relator in supplemental briefs. By relying on the history of *qui tam* actions and by presenting a thorough analysis of the Court's Article III standing jurisprudence, the Respondents argued that *qui tam* suits satisfy Article III requirements.\(^{183}\)

The Respondents cited a longstanding common law history of *qui tam* actions and the widespread adoption of *qui tam* statutes by the early Congresses to argue that "[a]djudication of *qui tam* suits by the federal courts is fully consistent both with the Framers' conception of the proper judicial role, and with the values that Article III's limitations on the judicial power are intended to protect."\(^{183}\) *Qui tam* suits fall well within

\(^{180}\) See Respondent's Brief at 49; United States' Brief at 50.


\(^{182}\) See Respondent's Brief at 37-49; United States' Brief at 16-33. The Respondents also asserted that the court of appeals exercised improper appellate jurisdiction over the issue of whether a state is a "person" under the FCA. See Respondent's Brief at 37-49. Although the immunity issue was immediately appealable and properly considered by the court of appeals, the "person" issue was neither "inextricably intertwined" nor certified as immediately appealable by the district court. See id. at 38-39.

\(^{183}\) United States' Brief at 14, 33-49; see also Respondent's Brief at 11-37.


\(^{186}\) Supp. Brief for the United States at 1; see also Supp. Brief for Respondent at 6-9.
Article III's traditional conceptions of the "judicial Power"; because the *qui tam* suit was an established mechanism at (and before) the time the Constitution was ratified, *qui tam* actions are properly regarded as "cases or controversies" within the meaning of Article III. Further, the federal courts have always exercised jurisdiction over *qui tam* suits without doubting the propriety of such jurisdiction under Article III. In fact, every court of appeals to consider the issue has concluded that *qui tam* actions are in accord with Article III requirements. Thus, the use of the *qui tam* mechanism is consistent with the principles underlying Article III's case or controversy requirement.

Next, the Respondents asserted that *qui tam* suits satisfy Article III because the real party in interest, the United States, satisfies all the requirements of Article III standing. The fact that a *qui tam* relator brings the suit in the name of and on behalf of the United States does not change the Article III standing analysis. A *qui tam* relator merely "stands in the shoes" of the United States to assert the government's fraud claim "and invokes the standing of the government resulting from the fraud injury." A *qui tam* statute does not create different causes of action or remedies for the United States and

187. Article III, section 2 of the Constitution provides: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . ." and "to Controversies to which the United States shall be a Party . . ." U.S. CONST. art. III, § 2.


191. See Supp. Brief for Respondent at 1 (citing United States *ex rel.* Foulds v. Tex. Tech. Univ., 171 F.3d 278, 288 n.12 (5th Cir. 1999); United States *ex rel.* Rodgers v. Arkansas, 154 F.3d 865, 868 (8th Cir. 1998); United States *ex rel.* Berge v. Bd. of Trustees of the Univ. of Ala., 104 F.3d 1453, 1457-58 (4th Cir. 1997); United States *ex rel.* Hall v. Tribal Dev. Corp., 49 F.3d 1208, 1213 (7th Cir. 1995); United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 749 (8th Cir. 1993); United States *ex rel.* Kreindler & Kreindler v. United Techna. Corp., 985 F.2d 1140, 1154 (2d Cir. 1993); United States *ex rel.* Woodard v. Country View CareCtr., Inc., 797 F.2d 868, 893 (10th Cir. 1986)).


the *qui tam* relator; rather, the statute addresses "a single injury, a single cause of action, and a single recovery, and in each instance it belongs solely to the United States."\(^{163}\) A *qui tam* relator's concrete stake in the litigation is intertwined with the United States because the relator's award is calculated as a percentage of the government's recovery.\(^{167}\) Furthermore, the judgment in a *qui tam* suit precludes any subsequent suit on the same cause of action, either by another relator or by the United States itself.\(^{163}\)

In addition, the Respondents contended that the United States' standing, not that of the relator, governs the Article III analysis under the general rule that an assignee of a claim has standing to assert a cause of action based on the injury in fact suffered by the assignor.\(^{163}\) Federal courts "validly adjudicate suits in which a plaintiff has not personally been injured by a defendant's primary conduct, but has nevertheless acquired an adequate concrete stake in the litigation through the acquisition of rights from a person who has suffered injury."\(^{162,163}\) *Qui tam* suits reflect the same constitutional principle because a *qui tam* statute explicitly authorizes the relator to bring suit on behalf of the United States to redress the government's injuries; thus, the United States' injury in fact confers standing on the *qui tam* relator.\(^{201}\)

#### 2. A State Is a "Person" Under the False Claims Act

The Respondents argued that the FCA is unambiguous and clearly encompasses states within its scope of potentially liable

\(^{186}\) Id. at 4.
\(^{188}\) See Supp. Brief for the United States at 7; see also 31 U.S.C. 3730(b)(5).
\(^{189}\) See Supp. Brief for the United States at 9. Respondent Stevens phrased this standing principle as "representational litigation" or "associational standing." See Supp. Brief for Respondent at 4-5 (asserting that "claims or choses in action may be freely transferred or assigned to others" (quoting Advanced Magnetics, Inc. v. Bayfront Partners, Inc., 106 F.3d 11, 17 (2d Cir. 1997))). "In a variety of circumstances, both traditional and modern, a party is permitted to appear in court as a formal representative of other interests. Trustees, guardians and personal representatives are familiar examples." Id. at 5 (quoting CHARLES A. WRIGHT ET AL., 13 FEDERAL PRACTICE & PROCEDURE § 3531.9, at 627 (1984)).
\(^{200}\) Supp. Brief for the United States at 10; see also Supp. Brief for Respondent at 5.
"persons.\textsuperscript{202} Three points support this contention. First, the FCA reaches "any person" without qualification or limitation; when Congress used the term "any," it intended the broad, expansive meaning that includes states as members of the category.\textsuperscript{203} Second, in the 1986 Amendments, Congress added the "civil investigative demands" (CID) provision to the FCA.\textsuperscript{204} This CID provision expressly defines "person" to include "any State or political subdivision of a State," and the section authorizes the Attorney General to investigate "any person" for violations of the FCA.\textsuperscript{205} If states were not "persons" who could be liable under section 3729 of the FCA, authorizing the Attorney General to issue CIDs to states for alleged FCA violations would be completely moot.\textsuperscript{206} Third, states consider themselves "persons" under section 3730, which allows "persons" to initiate \textit{qui tam} suits against violators of the FCA.\textsuperscript{207} Since a term is presumed to have the same meaning throughout a statute, a state cannot assert that it is a "person" only for purposes of being a \textit{qui tam} plaintiff, but not a "person" for purposes of being a defendant in a \textit{qui tam} action.\textsuperscript{208}

Furthermore, the Respondents asserted that interpreting the FCA to reach all parties who may potentially defraud the government is consistent with the FCA's broad remedial purpose to compensate the federal government for its financial loss.\textsuperscript{209} The Supreme Court has previously held that the FCA's treble damages and civil penalties are intended to serve remedial, not punitive, purposes.\textsuperscript{210}

\textsuperscript{202} See Respondent's Brief at 40-42. The Respondents rejected the Petitioner's claim that the Court should use the rules of statutory construction (clear statement rule and doctrine of constitutional doubt), arguing that these are not per se rules, and they only apply when the statute is ambiguous. See Respondent's Brief at 40-43.

\textsuperscript{203} See Respondent's Brief at 45.

\textsuperscript{204} See 31 U.S.C. § 3733(a) (1994); Respondent's Brief at 45-46; United States' Brief at 28-28. The CID provisions authorize the Attorney General to investigate "any person" suspected of violating any of the provisions of the FCA, expressly including section 3729, the liability provision. See 31 U.S.C. § 3733(1)(2); Respondent's Brief at 40; United States' Brief at 28-27.

\textsuperscript{205} 31 U.S.C. § 3733(1)(4); see Respondent's Brief at 46; United States' Brief at 28-27.

\textsuperscript{206} See Respondent's Brief at 48; United States' Brief at 27.

\textsuperscript{207} See Respondent's Brief at 46-47; United States' Brief at 27-28.

\textsuperscript{208} See Respondent's Brief at 46-47; United States' Brief at 28.

\textsuperscript{209} See Respondent's Brief at 47-49; United States' Brief at 24-25.

\textsuperscript{210} See Respondent's Brief at 48-49; United States' Brief at 30-32; see also United States v. Halper, 490 U.S. 435, 444-45 (1989).
3. States Do Not Enjoy Eleventh Amendment Immunity to Qui Tam Suits

To determine the issue of whether a state may assert its Eleventh Amendment immunity in a *qui tam* action, the Respondents relied on Supreme Court precedent that establishes the concept that "questions of immunity must be resolved by inquiring whether a State or the United States 'is the real party in interest.'"\(^{211}\) If the United States is the "real party in interest" in *qui tam* actions, states cannot assert an Eleventh Amendment immunity defense.\(^{212}\)

In FCA *qui tam* actions, the United States is the "real party in interest" for three main reasons.\(^{213}\) First, the suit must be brought in the name of the United States.\(^{214}\) Second, the *qui tam* suit vindicates an injury to the federal government; it is not an action to redress an injury to the *qui tam* relator.\(^{215}\) Third, although a member of the executive branch does not commence a *qui tam* action, the United States maintains significant control over the action, and this satisfies the requirement that the executive branch participate in government suits against unconsenting states.\(^{216}\) In conclusion, the *qui tam* action is a suit brought by the United States to which a state cannot assert its Eleventh Amendment immunity.\(^{217}\)

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211. Respondent's Brief at 13; see United States' Brief at 43-49.
212. See Respondent's Brief at 11-13; United States' Brief at 33-34.
213. See Respondent's Brief at 24, 33-37; United States' Brief at 35-43.
215. See Respondent's Brief at 24; United States' Brief at 35-41. The Respondents distinguished this case from *Alden v. Maine*, 527 U.S. 706 (1999), and *Bintz v. Native Village of Noatak*, 501 U.S. 775 (1991), because those cases involved private citizens who sued states to enforce their own federal rights, not, as in this case, a *qui tam* suit against a state to enforce the federal government's rights. See Respondent's Brief at 20-24. The Respondents also noted that the *qui tam* plaintiff cannot recover if the United States has not been injured. See id. at 24-25.
216. See Respondent's Brief at 33-37; United States' Brief at 41-43. To rebut the Petitioner's concerns that states will lose their "fundamental safeguard of federalism" unless FCA suits are commenced by the executive branch, the Respondents asserted that since the Attorney General has a statutory right to intervene or terminate a *qui tam* action, the executive branch remains accountable for the litigation. See Respondent's Brief at 35-37.
217. See Respondent's Brief at 11-13; United States' Brief at 33-34.
V. VERMONT AGENCY OF NATURAL RESOURCES
V. UNITED STATES ex rel. STEVENS:
THE SUPREME COURT'S DECISION

On May 22, 2000, the U.S. Supreme Court decided the case.\textsuperscript{218} However, the Supreme Court did not address the same issues as the court of appeals; instead, the Court discussed Article III standing and decided the case on the statutory interpretation of "person" in the FCA.\textsuperscript{219} The Court unanimously upheld the constitutionality of \textit{qui tam} suits as compatible with Article III standing requirements, but the Court divided seven to two in concluding that states are not "persons" subject to \textit{qui tam} suits under the FCA.\textsuperscript{220} Justice Scalia delivered the majority opinion, in which Chief Justice Rehnquist and Justices O'Connor, Kennedy, Thomas, and Breyer joined.\textsuperscript{221} Justice Ginsburg, joined by Justice Breyer, filed an opinion concurring in the judgment.\textsuperscript{222} Justice Stevens filed a dissenting opinion, in which Justice Souter joined.\textsuperscript{223}

A. The Majority Opinion

The Supreme Court held that a private individual has Article III standing to sue in federal court on behalf of the United States under a \textit{qui tam} statute because such statutes effect a partial assignment of the federal government's damages claim to the \textit{qui tam} relator.\textsuperscript{224} However, reversing the court of appeals' decision, the Court held that relators cannot bring \textit{qui tam} suits against states under the FCA because states (and state agencies) are not "persons" subject to FCA liability.\textsuperscript{225}

\textsuperscript{219} See generally Vt. Agency, 529 U.S. 765.
\textsuperscript{220} See generally id.
\textsuperscript{221} See id. at 787.
\textsuperscript{222} See id. at 788.
\textsuperscript{223} See id. at 789.
\textsuperscript{224} See id. at 787.
\textsuperscript{225} See id. at 788.
1. A Qui Tam Relator Has Article III Standing

The majority first addressed the jurisdictional question: whether a qui tam relator has standing under Article III of the Constitution to bring a qui tam action in federal court on behalf of the United States. The Court concluded that a qui tam relator meets the requirements necessary to establish Article III standing: (1) "injury in fact"—a harm that is both "concrete" and "actual or imminent, not conjectural or hypothetical," (2) causation—a fairly traceable "connection between the alleged injury in fact and the alleged conduct of the defendant," and (3) "redressability—a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact." The Court asserted that these elements "together constitute the 'irreducible constitutional minimum' of standing, ... which is an 'essential and unchanging part' of Article III's case-or-controversy requirement... and a key factor in dividing the power of government between the courts and the two political branches...."

The majority found that a qui tam relator satisfies the "injury in fact" requirement because he sues to remedy an injury suffered by the United States—"both the injury to its sovereignty arising from violation of its laws ... and the proprietary injury resulting from the alleged fraud." The Court determined that an adequate basis for a qui tam relator's standing is found in the doctrine that the assignee of a claim has standing to assert an action based on the injury in fact suffered by the assignor. Because the FCA reasonably effects a partial assignment of the federal government's damages claim, the United States' injury in fact suffices to confer standing on a qui tam relator.

The majority confirmed its conclusion with a lengthy discussion about the rich tradition of qui tam actions in England.

226. Id. at 771.
227. Id.
228. Id. (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).
230. Id. (citing Simon, 426 U.S. at 49).
231. Id. (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992)).
232. Id.
233. Id. at 773-74.
234. Id.
and the United States. The Court reasoned that when combined with a theoretical justification for relator standing, found in the doctrine of assignment, this history conclusively demonstrates that qui tam actions are “cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.” Thus, the Court concluded that a qui tam relator has Article III standing necessary to bring his suit in federal court. The Court then turned to the merits of the case.

2. The False Claims Act Does Not Subject States (or State Agencies) to Qui Tam Liability

The Court then considered the Petitioner’s two contentions: (1) that a state (or state agency) is not a “person” subject to qui tam liability under the FCA; and (2) that the Eleventh Amendment bars qui tam actions against states (or state agencies). In deciding which issue to discuss first, the majority recognized that the courts of appeals had disagreed as to the order in which these statutory and Eleventh Amendment immunity questions should be addressed. Although conceding that questions of jurisdiction should be given priority, the majority, citing a list of cases, nonetheless addressed the statutory issue before the Eleventh Amendment question. The Court reasoned that addressing the statutory issue first was

235. Id. at 774-77.
236. Id. at 774 (quoting Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 102 (1998)).
237. Id. at 778. In a footnote, the Court clarified that it expressed no view on two other constitutional challenges to qui tam relator standing: whether qui tam suits violate Article II, in particular the Appointments Clause and the “take Care” Clause. See id. at 778 n.8. The Petitioner did not challenge the qui tam mechanism under either of those provisions, nor did the parties ask the Court to resolve these questions as a jurisdictional issue in the case. See id.
238. Id. at 778.
240. Vt. Agency, 529 U.S. at 778 (citing Steel Co., 523 U.S. at 93-102). “Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” Exparte McCordle, 74 U.S. 506, 514 (1868).
appropriate because deciding whether the statute provides for suits against the states does not, as a practical matter, permit the Court to consider any issue beyond the scope of an Eleventh Amendment inquiry anyway.\textsuperscript{243} The "ultimate issue in the statutory inquiry is whether States can be sued under [the FCA]; and the ultimate issue in the Eleventh Amendment inquiry is whether un consenting States can be sued under this statute."\textsuperscript{244}

The majority approached the statutory issue by citing a "longstanding interpretive presumption that 'person' does not include the sovereign."\textsuperscript{245} This presumption is "particularly applicable [when] it is claimed that Congress has subjected the States to liability to which they had not been subject before,"\textsuperscript{246} and the presumption can only be disregarded upon some affirmative showing of statutory intent to the contrary.\textsuperscript{247} After reviewing the historical context of the FCA and various features of the statutory scheme, both as originally enacted and as amended, the Court concluded that the FCA lacks the requisite affirmative indications that the term "person" includes the states for purposes of \textit{qui tam} liability under section 3729 of the FCA.\textsuperscript{248}

First, the majority analyzed the liability provision of the original FCA as enacted in 1863—the precursor to today's section 3729—which applied only to "any person not in the military or naval forces of the United States, nor in the militia called into or actually employed in the service of the United States," and imposed criminal penalties that included imprisonment.\textsuperscript{249} The majority found no indication, in the statutory language or the legislative history, that clearly showed a congressional intent to subject states to FCA liability.\textsuperscript{250}

Second, the majority discussed several features of the current statutory scheme to support its conclusion that states are not
subject to *qui tam* liability under the FCA. The Court compared the CID provision of the FCA, section 3733, to the liability provision, section 3729. While the CID provision, newly enacted in the 1986 amendments, contains a provision expressly defining “person” to include states, the liability provision contains no such definition. The majority concluded that the presence of such a definition in the CID provision, together with the absence of such a definition from the definitional provisions contained in the liability section, suggested that states are not “persons” for purposes of *qui tam* liability under the FCA. Further, the current version of the FCA imposes treble damages, which the Court classified as “essentially punitive in nature,” and applying these punitive treble damages to the states would be inconsistent with the presumption against imposition of punitive damages on governmental entities.

Third, the Court discussed the Program Fraud Civil Remedies Act of 1986 (PFCRA), a similar statutory scheme creating administrative remedies for false claims, which was enacted just before the FCA was amended in 1986. Unlike the FCA, the PFCRA contains a definition of “persons” subject to liability, and this definition does not include states. The majority reasoned that subjecting states to treble damages and civil penalties in *qui tam* actions under the FCA would be “most peculiar” when states are exempted from smaller damages in the PFCRA.

Finally, the Court reinforced its arguments with two doctrines of statutory construction: (1) the clear statement rule—“If Congress intends to alter the usual constitutional balance

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251. *Id.* at 783-88.
252. *Id.* at 783-84.
257. *Id.* at 784-85 (citing City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 262-63 (1981)).
258. *Id.* at 786. Neither party raised this argument in their briefs. See generally Petitioner’s Brief; Respondent’s Brief; United States’ Brief.
260. *Id.* (citing 31 U.S.C. § 3802(a)(1)).
between States and the Federal Government, it must make its intention to do so unmistakably clear in the statute's language—and (2) the doctrine of constitutional doubt—"statutes should be construed so as to avoid difficult constitutional questions." Under both doctrines, the majority concluded that the states are not "persons" subject to liability under the FCA.

3. Eleventh Amendment Question Left Undecided

Because the Court reversed the court of appeals, thereby dismissing the case, on the basis that a state is not a "person" subject to a FCA qui tam suit, it precluded the need to address the Eleventh Amendment question. Although the Court expressed "no view as to whether an action in federal court by a qui tam relator against a State would run afoul of the Eleventh Amendment," it warned that "there is 'a serious doubt' on that score."

B. The Concurrence

Justices Ginsburg and Breyer concurred in the judgment, agreeing with the majority that a qui tam relator has Article III standing as an assignee of a portion of the government's claim for damages. They also agreed that the Court properly decided the statutory question first, and because they did not find any clear statement in the FCA subjecting states to qui tam suits brought by private individuals, they concurred in the Court’s resolution of the statutory question. However, the concurring justices noted that although the clear statement rule applies to private suits against a state, this rule has not been applied when the United States is the plaintiff. Therefore, they read the

281. Id. at 787.
282. Id.
283. Id. (quoting Ashwander v. TVA, 297 U.S. 288, 346 (1936) (Brandels, J., concurring)).
284. Id. at 788-89 (Ginsburg, J., concurring).
285. Id.
286. Id. at 789 (citing Sims v. United States, 359 U.S. 103, 112 (1959) (holding that a state agency ranks as a "person" subject to suit by the United States under federal tax levy provision); United States v. California, 297 U.S. 175, 185-87 (1936) (finding that a state-owned railway ranks as a "common carrier" under Federal Safety Appliance Act subject to suit for penalties by the United States)).
Court's decision as leaving open the question whether the word "person" includes states when the United States government, not a private relator, sues under the FCA. The concurring justices also agreed that because the majority properly concluded that Congress did not authorize qui tam suits against states under the FCA, the Court appropriately left the Eleventh Amendment issue undecided.

C. The Dissent

Justices Stevens and Souter dissented, asserting that the court of appeals correctly affirmed the district court's denial of Vermont's motion to dismiss. To explain its position, the dissent discussed pre-1986 cases in which the Supreme Court construed federal statutes, the legislative history of the 1986 amendments to the FCA, and the statutory text of the FCA. The dissent argued that all of these support the view that Congress intended states to be included within the meaning of the word "person" and subjected to qui tam liability under the FCA. The dissent argued that the majority construed the FCA through a lens of post-1986 cases in which the Court has cloaked the states with "an increasingly protective mantle of 'sovereign immunity' from liability for violating federal laws."

First, the dissent discussed pre-1986 cases, which uniformly support the proposition that the FCA's broad language includes states as possible defendants in qui tam actions. The FCA's all-embracing scope and national purpose indicate that the law was intended to cover all types of fraudulent acts, including those perpetrated by states. The dissent also took issue with the majority's "presumption" argument. The dissent agreed that "general statutory references to 'persons' are not normally construed to apply to the enacting sovereign", for example, an

287. Id.
288. Id. at 788.
289. Id. at 789 (Stevens, J., dissenting).
270. Id. at 790.
271. Id.
272. Id. at 790-91.
273. Id. at 790-91.
274. Id. at 791-93.
275. Id. at 790 (citing United States v. United Mine Workers, 330 U.S. 258, 275 (1947)) (emphasis added).
act of Congress will not be construed to apply to Congress itself, and a law enacted by the Georgia General Assembly will not subject the state of Georgia to liability under its own law. However, the dissent contended that when Congress uses the word “person” in federal statutes, it applies to states (and state agencies) as well as to private individuals and corporations. 270

Second, the dissent argued that the legislative history of the 1986 amendments to the FCA indicates that both federal and state officials understood that states (and state agencies) were “persons” within the meaning of the FCA. 271 To support this argument, the dissent quoted a section of the 1986 Senate Report in which a committee member stated that the FCA reaches all parties who may submit false claims to the federal government and 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.” 272 In fact, some federal courts have accepted qui tam cases brought by states, thus indicating their view that states were “persons” who could bring qui tam actions as relators under the FCA. 273 These cases also demonstrate that the states considered themselves to be statutory “persons” under the FCA. 274 Thus, the dissent concluded that when Congress adopted the 1986 amendments to the FCA, there was a general understanding that states (and state agencies) were “persons” within the meaning of the FCA. 275

In addition, the text of the 1986 amendments to the FCA confirms this understanding. Under the CID provision of the FCA, a state is a “person” who may violate section 3729; a state is a “person” who may be named as a defendant in an action

270. Id. The dissent cited the Sherman Act as an example: Although the word “person” in the Sherman Act does not include the federal government as the enacting sovereign, it does include states and state agencies. See id. (citing United States v. Cooper Corp., 312 U.S. 600 (1941); Georgia v. Evans, 316 U.S. 159 (1942)); see also id. at 781-98 (discussing the history of this statutory presumption).

271. Id. at 793.


275. Id. at 795.
brought by the Attorney General; and a state is a “person” who may bring a *qui tam* action on behalf of the United States.282 Thus, the dissent argued that “[i]t therefore seems most natural to read the adjacent uses of the term ‘person’ in [sections] 3729, 3730(a), 3730(b), and 3733 to cover the same category of defendants,”283 and “it seems even more natural to read the single word ‘person’ (describing who may commit a violation under [section] 3729) to have one consistent meaning regardless of whether the action against that violator is brought under [section] 3730(a) or under [section] 3730(b).”284 Therefore, the dissent argued that a state may be named as a defendant in a *qui tam* action brought by a relator on the United States’ behalf.285

The dissent then attacked the majority’s textual argument that inclusion of states in the definition of the term “person” in the CID provision implies exclusion of states from the liability provision.286 The dissent quoted the majority opinion: “The presence of such a definitional provision in [section] 3733, together with the absence of such a provision from the definitional provisions contained in [section] 3729 . . . suggests that States are not ‘persons’ for purposes of *qui tam* liability under [section] 3729.”287 The dissent asserted that this “negative inference drawn by the Court, if taken seriously, would therefore prove too much.”288 The definition of “person” in the CID provision includes not only states but also “any natural person, partnership, corporation, association, or other legal entity.”289 If the premise of the majority’s argument—that the inclusion of certain items in the definition of “person” in section 3733 implies their exclusion as a “person” in section 3729—were

282. *Id.* at 795-98.
283. *Id.* at 797 (citing United States v. Cooper Corp., 312 U.S. 600, 608 (1941) (“It is hardly credible that Congress used the term ‘person’ in different senses in the same sentence.”)).
284. *Id.* (citing Ratzlaf v. United States, 510 U.S. 135, 143 (1994) (“A term appearing in several places in a statutory text is generally read the same way each time it appears.”)).
285. *Id.* at 797-98.
286. *Id.* at 798-99.
287. *Id.* at 788 (quoting Vt. Agency, 529 U.S. at 784).
288. *Id.* at 789.
289. *Id.* (quoting 31 U.S.C. § 3733(0)(4)).
correct, then absolutely no one would be a “person” subject to liability under the FCA.\textsuperscript{290}

The dissent also criticized the majority’s reliance on the Program Fraud Civil Remedies Act of 1986 (PFCRA) to interpret the definition of “person” in the FCA.\textsuperscript{291} Even though the PFCRA sits next to the FCA in the United States Code, they are separate statutes, and the Court can interpret them differently.\textsuperscript{292} Furthermore, the dissent disagreed with the majority’s efforts to protect states from punitive damages.\textsuperscript{293} The dissent argued that the FCA was designed to protect federal taxpayers, not the citizens of any individual state that might violate the FCA.\textsuperscript{294} Accordingly, a treble damages remedy against a state, even though that state’s taxpayers will ultimately bear the burden of paying the treble damages, does not burden the taxpayers that the FCA was designed to protect.\textsuperscript{295}

Finally, the dissent concluded by addressing the Petitioner’s Eleventh Amendment sovereign immunity defense.\textsuperscript{296} The dissent adhered to the view that \textit{Seminole Tribe of Florida v. Florida}\textsuperscript{297} was wrongly decided.\textsuperscript{298} Thus, Congress’ intention to subject states to \textit{qui tam} actions, as indicated by the history of \textit{qui tam} litigation and the text of the FCA, is also sufficient to abrogate the states’ sovereign immunity.\textsuperscript{299} Moreover, even if \textit{Seminole Tribe} were to control, an Eleventh Amendment immunity claim would still fail. Given that a \textit{qui tam} relator, in effect, sues as an assignee of the United States, and the Attorney General retains significant control over the action, the

\textsuperscript{290} Id.
\textsuperscript{291} Id. at 799.
\textsuperscript{292} Id. The dissent noted that the Court has interpreted “similar definitions of ‘person,’ which included corporations, partnerships, and associations, to include states as well, even though states were not expressly mentioned in the statutory definition.” Id. at 800.
\textsuperscript{293} Id. at 800-01.
\textsuperscript{294} Id. at 801.
\textsuperscript{295} Id.
\textsuperscript{296} Id. at 801-02.
\textsuperscript{297} 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996).
\textsuperscript{298} \textit{Vt. Agency}, 529 U.S. at 801 (citing \textit{Kimel v. Fla. Bd. of Regents}, 528 U.S. 62, 97 (2000) (Stevens, J., dissenting); \textit{Seminole Tribe}, 517 U.S. at 100-85 (Souter, J., dissenting)).
\textsuperscript{299} Id. at 801-02.
Eleventh Amendment does not provide the states with a defense to claims asserted by the United States.  

VI. ANALYSIS AND IMPLICATIONS

The decision in Vermont Agency of Natural Resources v. United States ex rel. Stevens presents a rather incongruous result. On one hand, the Court judicially sanctioned the right of private individuals to bring qui tam actions under the FCA by holding that qui tam relators have Article III standing. However, on the other hand, the Court vastly limited the realm of possible defendants in qui tam actions by ruling that states and state agencies are excluded from the reach of FCA liability. Thus, "the Court has armed private individual plaintiffs with a secure position of standing in the fight against fraud, while simultaneously protecting potential perpetrators of such fraud."

The Court's holding on the Article III standing of qui tam relators bolsters enforcement of federal laws through qui tam provisions, as well as through the generally accepted citizens' suit provisions of many statutes. For example, the Court's standing ruling in Vermont Agency, coupled with its decision in Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc. provide a clear victory for qui tam relators who sue to avenge fraud committed against the government and for environmental groups who bring citizen suits to ensure

300. Id. (citing United States v. Mississippi, 380 U.S. 128, 140 (1965) ("[N]othing in [the Eleventh Amendment] or any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States.").
302. See supra Part V.A.2; see also Plorek, supra note 301, at 1233.
303. Plorek, supra note 301, at 1233.
305. See McAllister & Glicksman, supra note 130.
compliance with federal laws.\textsuperscript{307} By ruling that \textit{qui tam} relators and citizens suit plaintiffs have Article III standing, the Court has explicitly endorsed the use of these powerful mechanisms for enforcing federal statutes and addressing fraud.\textsuperscript{303}

Although the Court refrained from an Eleventh Amendment analysis in the case, its holding prohibiting \textit{qui tam} actions against the states is consistent with a rather protectionist stance taken by the Court in interpreting the Eleventh Amendment.\textsuperscript{303} In bypassing the Eleventh Amendment issue and shrouding it with a textual analysis of the FCA, the Court might have strengthened the Eleventh Amendment even beyond this case.\textsuperscript{310} Although the interpretation of the term “person” in the FCA was the subject of this case, the holding may extend to other statutes, both federal and state, and may create an atmosphere in which governmental entities may be effectively immunized from all litigation.\textsuperscript{311} Consequently, the \textit{Vermont Agency} decision may set the stage for an omnipotent, omnipresent Eleventh Amendment.

On a brighter note, Congress may still have some options to permit \textit{qui tam} actions against states. By the Court’s avoiding the Eleventh Amendment issue and simply holding that states are not “persons” subject to suit and liability under the FCA, Congress can reinvigorate the FCA by amending the FCA to explicitly define “person” as including states and state agencies.\textsuperscript{312} To overcome the presumption that the word

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\textsuperscript{307} See McAllister & Glicksman, \textit{supra} note 130.

\textsuperscript{308} See Piereik, \textit{supra} note 301, at 1240. But see McAllister & Glicksman, \textit{supra} note 130 (arguing that the Court’s generous standing ruling in \textit{Vermont Agency} must be qualified because the Court refused to address whether \textit{qui tam} provisions violate the Article II “take Care” clause, which the Court has used in some of its most restrictive standing cases during the 1990s (citing Defenders of Wildlife v. Lujan, 504 U.S. 555 (1992))).

\textsuperscript{309} See, e.g., Alden v. Maine, 527 U.S. 706, 765-68, 119 S. Ct. 2240, 144 L. Ed. 2d 633 (1999) (defending state sovereign immunity by relying on Article II of the Constitution to hold that individual actions are different from actions “commenced and prosecuted against a State in the name of the United States by those who are entrusted with the constitutional duty to “take Care that the Laws be faithfully executed”’ (quoting U.S. CONST. art. II § 3)); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 627, 119 S. Ct. 2199, 144 L. Ed. 2d 575 (1999).

\textsuperscript{310} See Piereik, \textit{supra} note 301, at 1240.

\textsuperscript{311} See Id. at 1240-41.

\textsuperscript{312} This amendment would sufficiently indicate congressional intent to subject states to suit and liability under the FCA. See Siegel, \textit{supra} note 83, at 563, 568. Siegel argues that Congress’ power to abrogate state sovereign immunity lies in the power of the
"person" in a statute excludes sovereign states, Congress must include a "clear statement to the contrary" in the text of any statute when it intends that statute to apply to states and state agencies. 313 However, because the Court did not reach the Eleventh Amendment issue in Vermont Agency, the Eleventh Amendment question could be a significant issue in future litigation against a state under the FCA, even if Congress amends the statute to include state in the definition of "person." 314

To avoid a future problem with the Eleventh Amendment, Congress can pass legislation that would effectively condition the receipt of federal grant money on the recipient state's consent to be subject to qui tam actions if the state is suspected of violating the FCA. 315 For example, on May 22, 2001, the United States Senate introduced legislation that would require states and state agencies that receive federal funds to waive their immunity to suits brought by state employees alleging violations of the Age Discrimination in Employment Act (ADEA). 316 This legislation is designed to remedy the U.S. Supreme Court's decision in Kimel v. Florida Board of Regents that Congress lacked the power to subject states to suits under

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313. See McAllister & Glicksman, supra note 130; see also Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 781 (2000).
314. See McAllister & Glicksman, supra note 130; see also supra note 312.
315. See South Dakota v. Dole, 483 U.S. 203, 207-08 (1987). Congress may condition the states' receipt of federal funds if this exercise of the Spending Power meets four limitations: (1) the condition must be in pursuit of the "general welfare"; (2) the condition must be unambiguous such that states knowingly accept federal funds subject to specific conditions; (3) the condition must be related to the "federal interest in particular national projects or programs"; and (4) the condition must be consistent with other constitutional provisions. See id.
the federal age discrimination laws. Similarly, Congress could enact a law that would require states and state agencies that receive federal funds to waive their immunity to lawsuits brought by *qui tam* relators under the FCA.

CONCLUSION

The FCA and its *qui tam* provisions give the federal government a "primary vehicle" for prosecuting fraud committed by "persons" who submit false claims to the United States government to attain federal grant money or payment for goods or services. In the 1986 amendments to the FCA, Congress exercised its ability to "avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances" by reinvigorating the FCA's *qui tam* framework: Congress recognized the necessity of supplementing the government's enforcement efforts by allowing private citizens to use their knowledge and resources to fight fraud committed against the government. Since Congress amended the FCA in 1986, relators have filed 2961 *qui tam* cases, resulting in almost $3 billion recovered for the United States Treasury. The Supreme Court's standing decision in *Vermont Agency* will certainly invite more *qui tam* litigation, thus allowing the federal government to recoup even more money lost as a result of fraudulent activities.

However, by excluding states from the reach of the *qui tam* liability provisions of the FCA, the Supreme Court has eviscerated the possibility of using this tool to fight fraud when

317. Id. § 2(3); see Bill Would Restore Right To Sue States for Age Bias in Employment, 69 U.S.L.W. (BNA Legal News) 2761, 2761 (June 12, 2001).
320. See Caminker, supra note 3, at 343-44; see also supra notes 10-15 and accompanying text.
323. See id. at 60.
states or state agencies are the offenders. With the Court’s ruling in Vermont Agency, when states misuse federal money or fail to use federal grants appropriately to administer federal or state programs, only the United States, through the Department of Justice, can sue to hold them accountable under the FCA. Thus, one of the most effective provisions of the FCA, the qui tam (or "whistleblower") provision, is lost, and the federal government’s efforts to fight fraud will be impaired.

In the end, in its Vermont Agency decision, the Supreme Court answered, “Qui tam can; qui tam can’t. Relators can bring qui tam actions because they have Article III standing, but they can’t bring qui tam actions against states.” Rather ironically, this lengthy discussion only leads to more questions. Are FCA qui tam actions against states dead forever? Or will Congress breathe new life into qui tam suits against states by amending the FCA to clearly indicate that states are “persons” subject to FCA qui tam liability? Further, will this congressional action be

324. Federal courts have dismissed several FCA qui tam suits against states and other political subdivisions by relying on the Vermont Agency precedent. See, e.g., United States ex rel. Dunleavy v. County of Delaware, No. CIV.A.04-7000, 2000 WL 1622854 (E.D. Pa. Oct. 12, 2000) (dismissing qui tam case against a county and citing the Supreme Court’s reasoning in Vermont Agency on the FCA’s treble damages as applied to governmental entities); United States ex rel. Bhatnagar v. Kiewit Pac. Co., No. C99-02068-MHP, 2000 WL 1458940 (N.D. Ca. Sept. 22, 2000) (dismissing qui tam suit against the California Department of Transportation on the grounds that state agencies are not subject to FCA qui tam liability); United States ex rel. Coleman v. Indiana, No. IP00-0714-C-T/G, 2000 WL 1367791 (S.D. Ind. Sept. 19, 2000) (dismissing qui tam action against the state of Indiana because states are not “persons” subject to qui tam liability under the FCA).

325. See Bucy, supra note 3, at 695 (“The FCA has been used to pursue providers who file claims for services never rendered, bill for unnecessary medical services . . . , misrepresent the Medicare eligibility of patients, include non-reimbursable items in Medicare cost reports, misrepresent what services were provided, . . . and conceal the existence of insurance which makes Medicare the secondary payer rather than the primary payer.”). Health care fraud and abuse, which costs the American public approximately ninety billion dollars a year, drains federal resources and can also physically harm people. See id. at 693-94; see also Burke, supra note 2, at 913 n.262. Other examples of the types of cases that FCA qui tam plaintiffs have initiated are: defense contractor fraud, bid rigging by using a false claim, agricultural supplements, and overcharging for products rendered or services performed. See id. at 913.

326. See Burke, supra note 2, at 913.
enough to abrogate states' Eleventh Amendment sovereign immunity?

*Jaime McMahon* 327

327. The author expresses her sincerest gratitude to her husband, Joel, for his loving support and steadfast patience.