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**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999**

No. 98-1828

**STATE OF VERMONT AGENCY OF NATURAL RESOURCES,
Petitioner,**

v.

**UNITED STATES EX REL. JONATHAN STEVENS,
Respondent.**

**On Writ of Certiorari to the
United States Court of Appeals
For the Second Circuit**

SUPPLEMENTAL BRIEF AMICUS CURIAE OF THE PROJECT ON GOVERNMENT OVERSIGHT IN SUPPORT OF RESPONDENT, AND MOTION FOR LEAVE TO FILE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Project on Government Oversight ("Project" or "POGO") files this unobjected-to motion to file a brief amicus curiae. On November 26, 1999, counsel for petitioner and for respondent both told counsel for movant that they did not object to the Project filing an amicus brief. This motion is submitted because the Court's order for supplemental briefing did not expressly make applicable the non-motion consent procedure of Supreme Court Rule 37.3(a).

Leave is requested so that the Project on Government Oversight may address the Court's question regarding the standing of individuals to sue regarding fraud on the Treasury. As further discussed in the brief's section on "Interest of the Amicus Curiae," the Project on Government Oversight is a non-partisan non-profit organization that for over fifteen years has addressed - by investigation, exposure, and formal written submissions - waste and fraud in government spending. The Project on Government Oversight previously filed an amicus brief regarding the False Claims Act with the Supreme Court in Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939 (1997).

This Court has raised by its order for supplemental briefing a question that is not a narrow one solely concerning the parties before the Court, but an important one of general significance. A ruling will affect one of the major statutory mechanisms regarding waste and fraud in government spending, the subject of central interest to the Project on Government Oversight. The Project is not connected to any of the parties and hopes that its submission will bring to the attention of the Court relevant matters not already brought to its attention by the parties. Counsel for amicus has previously written

certain books and articles, cited herein, of relevance and therefore hopes this submission will be helpful to the Court.

Whereupon, the Project on Government Oversight respectfully requests leave of this Court to file a brief amicus curiae.

Respectfully submitted,

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SUPPLEMENTAL BRIEF AMICUS CURIAE OF THE PROJECT ON GOVERNMENT OVERSIGHT IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS CURIAE

The Project on Government Oversight ("POGO")[1] is a non-partisan non-profit organization that for over fifteen years has addressed - by investigation, exposure, and formal written submissions - waste and fraud in government spending. Its goal is to change the way the government works by revealing examples of systemic problems and offering possible solutions.

Originally named the Project on Military Procurement, the organization focused on military spending abuses. It made outrageously overpriced spare parts, such as the $7,600 coffee maker and the $1,000 pair of pliers, household words. The organization also revealed serious inadequacies in weapons, such as the Bradley Fighting Vehicle and the Sgt. York DIVAD Air Defense Gun. In 1990, the organization changed its name and broadened its focus to include fraud and abuse in non-military federal government spending.[2]

POGO's methods include formal submissions to the government forums considering important matters of government contracting, including both the courts and the Congress. POGO filed an amicus brief regarding the False Claims Act with the Supreme Court in Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939 (1997).[3]

ARGUMENT

Relators have standing because Congress confers on whistleblowers, for their special knowledge of a particular false claim, standing to serve as statutory collection representatives. For two centuries, Congress has statutorily prescribed that the doors of the federal courthouse stay open to admit whistleblowers - individuals with special knowledge of particular wrongs and the courage and decency to do something about them - filing qui tam suits in which they share in the resulting recovery on behalf of the Treasury. Whistleblower suits pursuant to qui tam statutes present some of the most important, classic, and yet contemporarily necessary litigation of the whole federal system. In particular, since 1863 the qui tam provision of the False Claims Act has allowed insiders of conscience to challenge specific procurement fraud in court by using their special knowledge and the rights conferred by Congress, and, if vindicated, to do well by doing good. This Court's sua sponte question about the standing of qui tam relators appears to ask whether the Congresses of today, of 1986, of 1863, even of the 1790s, should be denied this great and historic tool for harnessing knowing insiders as collection representatives.

I. Whistleblower-Relators With Nonpublic, Commercially Valuable Knowledge of Specific False Claims Have Statutorily-Conferred Standing To File Suit.

The Court asked for supplemental briefing about whether individuals had standing to sue regarding fraud against the Treasury. Standing requires the "triad of injury in fact, causation, and redressability." Steel Co. v. Citizens for a Better Environment, 118 S. Ct. 1003, 1016-17 (1998). When the Court asks about "fraud against the Treasury," it is taken for purposes of analysis that the United States itself suffers injury in fact, with

causation and redressability in a suit for damages against the false claimant; the question is whether Congress can give an individual, rather than the United States suing by itself, standing to file that suit. It is also taken, for purposes of analysis, that the courts have allowed an initially injured party to transfer to, or to share with another, or be represented by another, so that on the injury to the former, the latter can file suit. Classic representative capacities akin to relators include a trustee filing suit for "the use of" a party, or a trustee under the Bankruptcy Code who have the requisite capacity to file suit upon the commercially valuable rights of the debtor. This is partly why, in recent dicta, this Court distinguished qui tam relators from plaintiffs with a standing problem. Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 (1992)(alluding to "the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff").[4]

What is the problem with Congress using this form of suit in a representative capacity? Challengers seek to describe qui tam suits as taxpayer or general-public suits, to apply this Court's precedents against standing in such suits. Such challengers assert the following characteristic aspects allegedly shared by qui tam relators and general-public suitors, but not valid representative-suitors like bankruptcy trustees: (1) "public law enforcement," i.e., the assertion that qui tam relators, like the general-public suitors, seek to enforce the unbounded category of public laws, unlike representative parties (e.g., bankruptcy trustees) who sue only to collect the bounded category of commercial rights; (2) and "disconnection," i.e., the contention that relators, like general-public suitors, sue merely from Congress' enactment without a specific pre-suit relationship with the primary conduct, whereas valid representative parties obtain their capacity by a direct connection such as the assignment of a chose in action. Neither of these arguments by challengers has merit.

As to "law enforcement," qui tam relators do not assert, like general-public suitors, some general right to enforcement of the Constitution in general or the canon of public law, but only the comparatively bounded, quasi-commercial basis involved in contract-like claims. The False Claims Act does not provide for suit to enforce the universal array of federal statutes, not even to enforce the range of public fraud laws. Quite the opposite, relators cannot sue on the kind of fraud cases brought by law enforcement agencies of the United States such as securities fraud, tax fraud, election fraud, consumer and advertising fraud, mail and wire fraud, bankruptcy fraud, fraud on the courts, fraud in the course of labor or other racketeering, or the rest of the laws for when false representations to obtain things of value in the world at large amount to fraud. The False Claims Act only concerns false claims, i.e., the United States not in its broad capacity as enforcer of the public laws for the whole Gross National Product and the population's non-economic interactions, but basically the United States in its capacity as a payer-out of cash and property, just like private entities that similarly, as they sell, buy or insure, pay claims of cash and property.

In short, the False Claims Act addresses not the broad world of law enforcement, but the comparatively narrow federal capacity, akin to private entities, of claims from procurement of goods and services.[5] Linked with this, the form of redress in the False

Claims Act tracks, not the universe of law enforcement remedies, but the narrow remedies of quasi-commercial private analogues for such claims suits. Qui tam relators cannot and do not seek criminal penalties, injunctions, divestitures, forfeitures, license revocations, or even the public officials' essential tools regarding contracts such as termination for default, suspension, or debarment. See generally Charles Tiefer & William A. Shook, Government Contract Law: Cases and Materials (1999). As this Court has said often enough, the "rough remedial" nature of statutes like qui tam provides for "compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages." United States v. Halper, 490 U.S. 435, 446 (1989). In a word: qui tam relators have standing as collection representatives for the federal government[6]to seek a quasi-commercial compensatory type of damages.[7]

As to the second argument, "disconnection," Congress has statutorily imposed an enormously important jurisdictional barrier, the "public disclosure" rule, narrowing the class of potential relators to true whistleblowers - not members of the general public, but those who have personally acquired prior to suit the special, valuable knowledge of the specific conduct in the case. As provided in 31 U.S.C. Section 3730(e)(4)(A)(1998):

No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

See generally Robert L. Vogel, Eligibility Requirements for Relators Under Qui Tam Provisions of the False Claims Act, 21 Pub. Cont. L.J. 593 (1992). The qui tam act no more amounts to a random or at-large giveaway of claims-collection rights to any and all of the general public - in fact, quite less so- than the homestead, mining claim, patent, or broadcast spectrum laws amount to such in their contexts. For the right to file suit for a concealed false claim, Congress has singled out, as the jurisdictional prerequisite, the type of special nonpublic knowledge - like the mining claimant's discovery of where the minerals are, or the patent-filer's discovery of what the invention is - best both for conferring, and then for using, the statutory right.[8]

II. Whistleblowers' Qui Tam Standing Draws Support From the Centuries-Established Tradition of Such Suits and from Congress' Soundly Exercised Power to Define Individual Rights to File Suit.

If this Court measured standing without consideration of history, it would be a court adrift from moorings as to its own jurisdiction. Fortunately, this Court does not determine standing that way. The classic cynosure of an Article III "case or controversy" continues to be what "characterized those controversies which were `the traditional concern of the courts at Westminster,'" Federal Election Commission v. Akins, 118 S. Ct. 1777, 1786 (1998)(quoting Coleman v. Miller, 307 U.S. 433, 460 (1939)(Frankfurter, J., dissenting)).

Qui tam suits constituted, at the time of the Framers, familiar and classic "cases or controversies." This Court noted in 1905 that such qui tam statutes "have been in existence for hundreds of years in England, and in this country since the foundation of our government." Marvin v. Trout, 199 U.S. 212, 225 (1905). England knew the qui tam suit since the fourteenth century, it has an honored place in Blackstone, and it was extensively used in colonial America[9]. The early Congresses of the 1790s enacted a number of such statutes as part of its early system for court actions[10]. Chief Justice Marshall, like the other early federal judges to rule on such cases, blessed them[11].

Unhistorically-minded critics may argue that only a number of the early Congress's statutes precisely match the False Claims Act qui tam provision. These critics overlook that because the early Congresses created so limited a system of federal criminal or other public enforcement at all, with a part-time Attorney General who did not control the decentralized "district attorneys" and relatively few early federal criminal statutes, the more precisely one assesses qui tam at the time of the Framers, the more striking it is what a large portion of the federal statutory landscape it was at that time[12].

Congress had full power to confer on qui tam relators a right to sue regarding false claims in the 1863 Act known as "Lincoln's Law" that responded to the Civil War federal procurement crisis. In part, this owes to Congress' broad power to confer standing in an otherwise justiciable case, such as a false claim. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972); Sierra Club v. Morton, 405 U.S. 727, 732 (1972); FCC v. Sanders Bros. Radio Station, 309 U.. 470, 477 (1940); see also Bennett v. Spear, 520 U.S. 154, 165-66 (1997)(Scalia, J.)(approvingly citing Trafficante regarding Congress' conferring "expanded standing"and "to encourage enforcement by so-called `private attorneys general'").

Critics have mistakenly characterized Congress's power as merely the conferring of a cash bounty, followed often by a parade of horrible hypotheticals about how Congress might overrule all jurisdictional limits by such devices as universal cash bounties. But, the qui tam of the 1790s, employed in 1863 and reformed in 1986, is quite incorrectly describes as just a cash bounty cobbled onto taxpayer standing. The whistleblowing nature of the qui tam relators - that they bring special knowledge of the particular false claim, together with the courage to challenge it - is no mere trivial or vestigial element. In policy terms, in practical terms, and in standing terms, the whistleblower-filed case is a concrete, real, contest between appropriate adversaries. The essential element in a lawsuit concerning a false claim consists of penetrating its double layer of concealment: concealment by defendant's falsity, and concealment because the claim would not be made against private-sector entities who would bring their own suit about victimization.

The 1863 Act and its 1986 reform did not consist of tacking a cash bounty upon generalized law enforcement, but of conferring a right to sue on the whistleblower who, by bringing the essential combination of special knowledge of the particular false claim and courage, pierces that double layer of concealment. That is what has made the qui tam mechanism such a success, with increasing recoveries by the government from increasing

numbers of useful suits. Allan N. Taffet, Qui Tam Amendments: 10 Years Later, N.Y.L.J., Feb. 23, 1996, at 1.

A last historical point reflects, from a different angle, the strength of False Claims Act qui tam standing. At times such as the late 1980s and early 1990s, on issues other than qui tam, lines of analysis critical of standing have won support from the Executive Branch, but qui tam is quite different[13]. Known in this century as "Lincoln's Law" (see 89 Cong. Rec. S10.741 (daily ed. Dec. 16, 1943)(remarks of Sen. Langer)), revision efforts for qui tam enjoyed strong bipartisan support leading to the 1986 reforms co-sponsored by Sen. Charles Grassley (R-Iowa) and Rep. Howard Berman (D-Calif.), with supportive testimony by the Department of Justice under Attorney General Edwin Meese and signature into law by President Reagan[14].

CONCLUSION

Pursuant to the qui tam provision of the False Claims Act, whistleblowers who satisfy the jurisdictional requirement of nonpublic knowledge have standing to sue regarding false claims on the Treasury.

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[1]In fulfillment of the Supreme Court Rules, it is noted that (1) none of the parties provided any part of this brief, and (2) none of the funding for this brief came from anyone except the named amicus curiae.

[2]In 1994-95, POGO became involved on the defense industry's unsuccessful efforts to water down the False Claims Act, which POGO considers a vital means to protect and reward whistleblowers and to return billions of dollars to the government. POGO exposed how often the defense contractors lobbying to weaken the False Claims Act themselves paid heavily to resolve charges of fraud and abuse in their government contracting. POGO produced a survey from public records which revealed that from FY 1990 to FY 1993, over 90% of the lobbying contractors had themselves been found guilty, pled guilty or settled in civil cases for such conduct. During that time frame, these companies had paid over half a billion dollars in fines, penalties and settlements for such conduct. In 1997, a special updated POGO study followed the approach of the 1994-95 survey.

[3]In 1996, it made a highly regarded submission to the House of Representatives regarding the Treasury's enormous losses due to shortfalls in royalty payments by oil producers. See Valuation of Federal Oil -- Is the U.S. Getting the Royalties It Is Owed?: Hearings Before the Subcomm. on Government Management, Information and Technology of the House Comm. on Government Reform and Oversight, 104th Cong., 2d Sess. (June 17, 1996).

[4]Critics have sometimes contended that although this Court adjudicated any number of qui tam cases, it did so without actually providing support for the proposition that qui tam relators had standing. Quite the contrary, great analysts of jurisdiction on this Court have made a point of articulating how qui tam fits into Article III. Flast v. Cohen, 392 U.S. 83, (1968) (Harlan, J., dissenting); Priebe & Sons v. United States, 332 U.S. 407, 417-18 (1947) (Frankfurter, J., dissenting)(in "qui tam actions...society makes individuals the representatives of the public...by legislation").

[5]The United States both buys in the market, and makes grants as in this case. Private sector entities like charities and will-writers make grants of cash and property too, and may fall prey to false claims. That qui tam extends beyond buying, selling, and insuring, to grants, should not obscure the basic distinction between the United States in its broad capacity as universal enforcer of all the public laws, and the United States in its narrow capacity, akin to private sector entities, as payer of (sometimes false) claims.

[6]Other cases raise questions such as the standing of aggrieved citizen plaintiffs pursuant to the environmental laws to secure payments to the Treasury. What has been said about qui tam standing here is distinct from such environmental plaintiffs, but does not denigrate their own arguments for standing. For example, the qui tam statutes of the 1790s can be seen as part of a larger pattern regarding the existence of "cases or controversies" brought by plaintiffs analogous to today's environmental plaintiffs. See

generally GeorgeVan Cleve, Congressional Power to Confer Broad Citizen Standing in Environmental Cases, 29 Envir. L. Rep. 10028 (1999)

[7]*Accord*, United States v. Bornstein, 423 U.S. 303, 315 (1976)("double damages are necessary to compensate the Government completely for the costs, delays, and inconveniences occasioned by fraudulent claims"); United States ex rel. Marcus v. Hess, 317 U.S. 537, 551-52 (1943)(the act's purpose is "restitution"; "double damages plus a specific sum was chosen to make sure that the government would be made completely whole").

[8]A theory that puts this in formal terms is that qui tam can be seen as "an enforceable unilateral contract...accepted by the relator upon filing suit." United States ex rel. Kelly v. Boeing Co., 9 F .3d 743, 748 (9th Cir. 1993).
In contrast to private or basic contract law, government contract law abounds in situations where a statute, or regulation, operates to shape the legal status of a private party, such that simply by the private party's entering at all into the interaction contemplated by the statute or regulation, legal consequences follow - rather than, as in private contracting, the private party having more "connection" such as bilateral negotiations embodied in express terms of a bilateral instrument. For example, when a private party becomes a government contractor, then even when their written contract omits various mandatory terms, those mandatory terms operate on the private party by virtue of statutes or regulations. See, e.g., Office of Personnel Management v. Richmond, 496 U.S. 414 (1990); G.L. Christian & Associates v. United States, 312 F .2d 418 (Ct. Cl.), cert. denied, 375 U.S. 954 (1963).
That is the sense in which critics who complain that a qui tam relator cannot be like a private sector representative, such as a bankruptcy trustee, because of lack of a formalized bilateral "connection" miss the mark. It is perfectly characteristic of government contract law that a qui tam relator could become a representative of the government regarding suing about a particular false claim, by dint of the statute and the relator's special knowledge, without the government having more "connection" in the nature of a bilateral agreement pronouncing him to be a representative, or other characteristics of a formal private sector assignment. For a review of what has become known as the "assignment" conceptualization of qui tam, see Sean Hamer, Lincoln's Law: Constitutional and Policy Issues Posed by the Qui Tam Provisions of the False Claims Act, 6 Kan. J.L. & Pub. Pol'y 89 (1997); Thomas R. Lee, Comment, The Standing of Qui Tam Relators Under the False Claims Act, 57 U. CHI. L. REV. 543 (1990).

[9]William Blackstone, Commentaries on the Laws of England, 1765-1769, at 437 (1979 ed.); Note, The Qui Tam Doctrine: A Comparative Analysis of its Application in the United States and the British Commonwealth, 7 Tex. Int'l L.J. 415, 417-18 (1972); Note, The History and Development of Qui Tam, 1972 Wash. U.L.Q. 81;

[10]Riley v. St. Luke's Episcopal Hospital, --F.3d--, 1999 WL 1034213 (5th Cir Nov. 15, 1999)(Stewart, J., dissenting), at *27-*28 & nn. 6-13.

[11]Adams qui tam v. Woods, 6 U.S. (2 Cranch) 336 (1805); United States v. Simms, 5 U.S. (1 Cranch) 252, 2 L.Ed. 98 (1803); Ketland, qui tam v. The Cassius, 2 U.S. (2 Dall.) 365 (C.C.D. Pa. 1796); Evans, qui tam v. Bollen, 4 U.S. (4 Dall.) 342, 1 L.Ed. 859 (C.C.D. Pa. 1800).

[12]For the federal legal landscape at the time of the Framers, see Cass R. Sunstein, What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III, 91 Mich. L. Rev. 163, 175 (1992); Harold J. Krent, Executive Control Over Criminal Law Enforcement: Some Lessons From History, 38 Am. U.L. Rev. 275 (1989); Charles Tiefer, The Constitutionality of Independent Officers as Checks on Abuses of Executive Power, 63 B.U.L. Rev. 59, 91 (1983); Comment, Qui Tam Actions: The Role of the Private Citizen in Law Enforcement, 20 U.C.L.A. L. Rev. 778 (1973);

[13]For the contrast between the challenge to other standing, and the lack of such a challenge to qui tam, see Charles Tiefer, The Semi-Sovereign Presidency 52-53 & 177 n. 75 (1994). Critics of qui tam sometimes cite a memorandum written within the Office of Legal Counsel in the early 1990's. That memorandum was not the official position of the Department of Justice, which has never joined any of the defendants' challenges to qui tam, either before or after the 1986 reforms. United States ex rel. Newsham v. Lockheed, 722 F. Supp. 607 (N.D. Cal. 1989); United States ex rel. Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084 (C.D. Cal. 1989). When the Justice Department has taken any official position at all, it has taken the position it is taking before this Court in the submission by the United States.

[14]For a discussion of the supportive testimony of the Justice Department, see False Claims Amendments Act of 1986: S. Rept. No. 345, 99th Cong., 2d Sess., reprinted in 1986 U.S. Code Cong. & Admin. News 5266, 5278-79.