No. 98-1828

IN THE
SUPREME COURT OF THE UNITED STATES

VERMONT AGENCY OF NATURAL RESOURCES,
Petitioner,

v.

UNITED STATES, ex rel. JONATHON STEVENS,
Respondents.

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

BRIEF OF *AMICUS CURIAE* NATIONAL WHISTLEBLOWER CENTER IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE* NATIONAL WHISTLEBLOWER CENTER

The National Whistleblower Center ("Center")[1] is a nonprofit, tax-exempt, non-partisan, charitable and educational organization dedicated to the protection of citizens and employees who "blow the whistle" and report misconduct. The Center assists whistleblowers who have been discriminated against for reporting violations of law and threats to public safety.

In addition to its involvement in whistleblower litigation, the Center remains active in public education and the advocacy of whistleblower protection. The Center sponsors and participates in public education programs and training seminars throughout the country. The Center also operates an attorney referral service for whistleblowers, with members in 33 states, and maintains an informative website at *www.whistleblowers.org*. The Center was previously admitted as an *amici* by this Court in *English v. General Electric*, 496 U.S. 72 (1990), *Haddle v. Garrison*, 119 S.Ct. 489 (1998) and *Beck v. Bellaza, et al.*, No. 98-1-01480 (1999).

The present case involves several issues that are integral to the Center's interests. Among those is Congress' plenary

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[1]Pursuant to Rule 37.6, the Center maintains that no monetary contributions were accepted for the preparation or submission of this *amicus curiae* brief and that the Center's counsel authored this brief in its entirety. Counsel for all parties have consented to the filing of an *amicus curiae* brief by the Center in this matter.

authority to safeguard the federal treasury by enlisting the aid of citizen relators. This issue goes to the core of national authority.

SUMMARY OF THE ARGUMENT

This case involves an integral predicate question[2] that goes to the very heart of Congressional authority over wholly federal matters. The trail laid down by the various briefs filed on behalf of the Petitioner, will never lead this Court to the crux of this case. Rather, the Court itself must ask whether Congress' authority under the Constitution to manage and safeguard the federal fisc includes the authority to bring states within the jurisdiction of the False Claims Act. The text of the Constitution[3] and this Court's decisions in *United States ex rel. Marcus v. Hess*[4] and *United States v. Morris*[5] resoundingly answer that question in the affirmative.

This case differs from sovereign immunity cases decided under Congress' Fourteenth Amendment powers to abrogate state sovereign immunity. In those cases, there is a

[2]*See, e.g., United States v. International Business Machines Corporation*, 517 U.S. 843, 867-68 (1996)(Kennedy, J. dissenting)(collecting cases).

[3]*See* U.S. Const., Art. IV, Sec. 3, Cl. 2 (the "Property Clause")("Congress shall have the power to dispose of and make all needful rules and regulations respecting ... property belonging to the United States"); and U.S. Const., Art. I, Sec. 9, Cl. 7 (the "Appropriations Clause")("No money shall be drawn from the Treasury but in consequence of appropriations made by law").

[4] 317 U.S. 537 (1943).

[5] 23 U.S. 246 (1825).

careful balance that must be maintained between how much sovereignty the states retain and how much they willingly relinquished by ratifying the Fourteenth Amendment. Here, the focus is not properly on whether the states are constitutionally immunized from liability for defrauding the federal government. Rather, as reiterated just last term in *Davis v. Monroe County Board of Education*,[6] the Court should respect Congress' power to protect itself from those – including the states – who would defraud it. As a result, this case is first properly analyzed under the Spending and Property Clauses of the United States Constitution.

Under the Spending and Property clauses of the Constitution, the key inquiry is whether the states have "adequate notice"[7] of their potential for liability. Because of Congress' constitutionally and historically broad powers over the purse and the property of the federal government – it is clear that the states have had more than "adequate" notice that they will be liable when they defraud the federal government.

In regard to the second question on which this Court has granted *certiorari*, this Court's prior decisions and the Congress' historic reliance upon relators and the legislative history of the False Claims Act, unquestionably established Congress' authority to utilize *qui tam* relators to act on behalf of the United States. To find unconstitutional Congress' authority to utilize *qui tam* relators to protect the public fisc and to enforce Congress' broad powers under the spending and property clauses of the U.S. Constitution would fundamentally disrupt the balance of power within our system of government.

[6]119 S.Ct. 1661, 1670 (1999).

[7]*Id.*

ARGUMENT

I. CONGRESS' WELL-ESTABLISHED AND PLENARY AUTHORITY IN THIS FIELD HAS GIVEN MORE THAN ADEQUATE NOTICE TO THE STATES

A. Congress' Spending Clause Power Includes The Power To Implement The False Claims Act's Enforcement Scheme

Unlike the statutes at issue in previous sovereign immunity cases,[8] the federal False Claims Act is not designed to make states liable for abrogating individual, group or economic "rights." Rather, the False Claims Act goes to the heart, the very essence, of Congress' plenary authority to appropriate funds and safeguard the federal fisc and property of the United States.[9]

This Court has long recognized Congress' broad "power of the purse" to condition the states' receipt of federal funds upon their agreement to be bound by conditions attached to

[8] *See, e.g., Welch v. Texas Department of Highways*, 483 U.S. 468 (1987)(the Jones Act); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996)(the Indian Gaming Regulation Act); *Alden v. Maine*, 119 S.Ct. 2240 (1999)(the Fair Labor Standards Act).

[9] *See, e.g., United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542-547 (1943).

receipt of those funds.[10] The Court has distinguished the analysis in these "Spending Clause" cases from cases involving legislation created pursuant to Congress' Fourteenth Amendment authority.

Most recently, Justice O'Connor discussed how this type of spending legislation creates a relationship "in the nature of a contract" between the federal and state sovereigns.[11] This description of the relationship is most apt in the present context and better informs the kind of inquiry relevant here. Rather than being a legislative act that intrudes into traditional state spheres, the False Claims Act implicates questions about what we should expect from the states when they enter into a contractual relationship with the federal government.

Moreover, the False Claims Act is unique because of the nature and consequences of the relationship between the state and federal sovereigns when the states are receiving

[10] *See, e.g., Pennhurst State School v. Halderman*, 451 U.S. 1 (1981); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985). In "Spending Clause" cases, the Court employs an analysis which asks whether Congress has manifested a clear intent sufficient to put the states on notice that their acceptance of the funds will result in the voluntary waiver of their sovereign immunity. *See, e.g., Atascadero*, 473 U.S. at 247.

[11] *See Davis v. Monroe County Board of Education*, 119 S.Ct. 1661, 1670 (1999). While the Spending Clause analysis goes further and requires that Congress act sufficiently to put states on notice when receiving funds, it is important to note that False Claims Act cases are much more closely analogous to this analysis than to the two-pronged analysis used when Congress acts pursuant to its Fourteenth Amendment, Section 5 authority.

federal money. Unlike other legislation, where the states' liability attaches as a result of activity incidental to the subject matter of the contract with the federal government, states' liability under the False Claims Act is a result of the states' fraud as to the very subject matter of the contract itself.[12]

Because the subject matter of False Claims Act litigation is federal money, subject matter in which the state has no interest without federal permission, the interest of the federal sovereign must remain above that of any contractor — whether a private individual or a state.

Just as this Court has been a fervent protector of state sovereignty where state interests are in jeopardy, it must now step forward and safeguard the inviolate nature of the federal

[12]The debates in the Senate concerning the False Claims Act support this interpretation. Senator Howard, the Act's sponsor, unreservedly stated that the "purpose" of the law was to stop the "defrauding and plundering of the government" and that the law covered "contractors and the agents of contractors." Congressional Globe, 37th Cong., 3d Sess., Feb. 14, 1863. Immunizing states from liability for "defrauding and plundering" the federal government defeats the primary purpose of the Act, overrides Congress' plenary authority to protect the property of the federal government, and is inconsistent with this Court's holding in *Hess*, which recognized that pilfering state treasuries that contain federal moneys was equally covered under the Act as a direct pilfering of the treasury. *Hess*, 317 U.S. at 544 (state treasuries which contain federal dollars "are as much in need of protection from fraudulent claims as any other federal money").

power to protect its own treasury. In *Alden v. Maine*,[13] Justice Kennedy discussed how the federal government can overstep its bounds when Congress acts in such a way as to "blur the distinct responsibilities of state and national governments."[14] The same principle applies here. A state cannot obtain immunity in order to improperly blur the distinction between federal and state responsibilities. When a state becomes a federal contractor, it has one responsibility – to refrain from defrauding the government of the union. Nowhere is any state function or inherent state responsibility implicated.

Thus, a state, when acting as a federal contractor, has no special immunities superior to Congress' explicit and inherent authority to protect the federal government – it's revenues and its property – and the False Claims Act applies to all federal contractors alike, including state entities, state employees, and state corporations.

Under Spending Clause analysis, this Court simply asks whether the Congressional enactment at issue gives adequate notice to the states that their conduct may result in liability.[15] In the present case, the states have raised questions about whether Congress adequately defined "person" so that the states could know that it is wrong and punishable for them to defraud the federal government. These technical arguments are disingenuous and have an absurd result. Without the protections of the False Claims Act and the private attorneys general who help the federal government enforce it, the states would be free to ignore the very terms of their contracts with

[13]119 S.Ct. 2240 (1999).

[14]*See Alden*, 119 S.Ct. at 2266.

[15]*See Davis v. Monroe County Board of Education*, 119 S.Ct. 1661, 1670 (1999).

the federal government and be unjustly enriched by federal dollars. This is an obvious attempt by the states to gain by judicial fiat what they have been either unwilling or unable to obtain in negotiating their federal contracts.

B. This Court's Consistent Interpretations of Congress' Powers Gave The States More Than "Adequate" Notice That They Will Be Liable For Fraud Against The Federal Government

The states have pursued the statutory construction question of whether they are "persons" under the False Claims Act to the exclusion of a common sense understanding of the history of both the False Claims Act and Congress' power under the Appropriations and Property Clauses of the Constitution.

The False Claims Act was intended to protect Congress' constitutional powers over federal revenue and property. This fundamental congressional authority to oversee the federal fisc has long been recognized by this Court.[16] Likewise, the framers of the False Claims Act understood that corruption in the control of federal revenues or property could lead to the

[16]This is crucial to the instant case. Where Congress has passed legislation specifically designed to ferret out and punish fraud against the federal treasury, its authority is most broad. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542-546 (1943)(discussing how this Court does not possess the veto power, particularly in this field, to nullify a provision of the False Claims Act).

destruction of the government itself,[17] and set out to create a statute which put all purveyors of fraud on notice that their conduct will not be tolerated. Consequently, the *qui tam* provisions of the False Claims Act represent a constitutionally permissible exercise of Congress' powers under the Property[18] and Appropriations[19] Clauses of the United States Constitution to make all needful rules to protect the treasury. This Court *must* uphold Congress' power to hold states accountable when they chase ill-gotten federal largess.

The plain language of the Constitution itself extends Congress' plenary power over the treasury beyond merely the authority to attach conditions to the receipt of federal moneys.[20] This Court has repeatedly interpreted both the Property Clause and the Appropriations Clause in very sweeping terms, and has established that no actor can usurp Congress' authority to dictate the expenditure of Treasury funds.[21]

[17] *See* H.R. Rep. No. 2, 37th Cong., 2d. Sess. (1862), at 41 ("No government that has ever existed can sustain itself with such improvidence ...").

[18]U.S. Const., Art. IV, Sec. 3, Cl. 2 (the Property Clause).

[19]U.S. Const., Art. I, Sec. 9, Cl. 7 (the Appropriations Clause).

[20]*See* U.S. Const. Art. I, Sec. 9, Cl. 7; U.S. Const. Art. IV, Sec. 3, Cl. 2.

[21]Congress' authority over Treasury funds is "without limitation." *United States v California*, 332 U. S. 19, 27 (1947) *citing United States v County of San Francisco*, 310 U. S. 16, 29-30 (1940). This court has alluded to this notion as recently as last term; "No trace is to be found in the Constitution of an intention to create a dependence of the Government of the Union on those of the states for the

(continued...)

Further, in *Hess*, this court upheld Congress' broad authority – in the very context of the False Claims Act at issue here.[22] The case is illuminating both because this Court discussed the nature of Congress' power in this area, *and* because Congress affirmed its support for that decision over 40 years later, in the 1986 amendments to the False Claims Act.[23]

In *Klepps v New Mexico*,[24] this court noted the great breadth of congressional power over Federal property. There, the State of New Mexico sought a declaration that the Wild Free Roaming Horses and Burros Act exceeded Congress' power under the Property Clause. New Mexico also asserted that the Act[25] intruded on the state's "sovereignty, legislative authority ... police power and ... traditional trustee power over

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[21](...continued)
execution of the great powers assigned to it." *Alden v Maine*, 119 S.Ct. at 2265 (*quoting M'Culloch v Maryland*, 4 Wheat. 316, 424 (1819)). Furthermore, "Congress is vested with the absolute right to designate the persons to whom real property belonging to the United States shall be transferred, and to prescribe the conditions and mode of the transfer, and a state has no power to interfere with that right or to embarrass the exercise of it." *United States v Board of Commissioners of Fremont County Wyoming*, 145 F. 2d 329, 330 (10th Cir. 1944), *cert. denied*, 323 U. S. 804 (1944).

[22]*United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).

[23]*See, e.g.*, S. Rep. No. 99-345, "Legislative History – False Claims Act Amendments Act of 1986." *Reprinted* in 1986 U.S.C.C.A.N. at 5266-5303.

[24]426 U.S. 529 (1976).

[25]The Act prohibited interference with unclaimed horses and burros on both federal and private land.

wild animals." [26] The Court rejected these arguments and used an "expansive reading" to find, in broad terms, that the Clause gives Congress the power to determine without limitations what are "needful" rules.[27]

This Court has likewise read broad Congressional powers into the Appropriations Clause. In *O.P.M. v. Richmond*,[28] the court stated that:

> "[t]he obvious practical consideration ... for this adherence to the requirement [of the Appropriations Clause] is the necessity, existing now as much as at the time the Constitution was ratified, of preventing fraud and corruption ... but the clause has a more fundamental and more comprehensive purpose ... to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of government agents or the individual pleas of litigants." [29]

This language supports the very purpose of the False Claims Act: to ferret out and deter frauds against the integrity of the federal treasury. The False Claims Act is a clear and necessary attempt to ensure that public funds are spent "according to the letter of the difficult judgments reached by

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[26]426 U.S. at 541.

[27]*Id.*at 539.

[28]496 U.S. 14 (1990).

[29]*Id.* at 27-28.

Congress."[30] It is absurd for the states to argue that they are both unaware of this power and somehow immunized from liability when they try to usurp it and defraud the federal government.

II CONGRESS' EXPANSIVE AUTHORITY IN THIS FIELD INCLUDES THE POWER TO ENLIST THE AID OF CITIZENS TO PROTECT THE TREASURY

A. Suits Under The False Claims Act Are Suits By The United States And Not Private Actions

That a suit brought and controlled by a citizen in the name of the United States is not a private lawsuit is not novel. In 1825, in the case of *United States v. Morris*,[31] this Court recognized and upheld the principle that the citizen, the relator, is not the legal actor but merely an agent of the government. In *Morris*, two officials of the port of Portland, Maine had reported to the federal marshal a shipper's acts of wrongdoing that were in contravention of the non-intercourse acts then in existence. Under the Collection Act of 1799, the informers were due one half of the forfeiture gained by the United States from the wrongdoer. In this instance, however, the forfeitures were remitted to the wrongdoers. The officials then brought a lawsuit in the name of the United States in order to recover their portion of the original forfeiture.

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[30] *Id. See also Hess*, 317 U.S. at 547 (upholding a provision of the False Claims Act because "the very fact Congress passed [the False Claims Act] shows that it concluded that other considerations of policy outweighed those now emphasized by the government ...").

[31] 23 U.S. 246 (1825).

The defendant demurred on the ground that the remission of the forfeiture by the United States divested the officials of any interest in what would have been the proceeds of the forfeiture. The Court took this opportunity to discuss the nature of cases where a citizen brings a lawsuit in the name of the United States, and the principles enunciated there are very analogous to those involved in the present case.

The Court made clear that, when a citizen sues in the name of the United States, the citizen is not the legal party in interest, for "the United States are, *pro tanto*, trustees for them; but as to the forfeiting party, the government is the only legal actor."[32] This involves two very important understandings. First, that the relator, even though in control of the litigation, has no vested rights – rather, they are "merely conditional and the forfeiture is to the United States."[33] Second, the relator is no more than an agent of the government who is rewarded *after the fact of the litigation* by the government. The reasoning in *Morris* is even more compelling here because the underlying claim is federal money whereas in *Morris*, the subject matter was money or property that did not originate in the federal treasury but came about as the result of a civil forfeiture.

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[32] *Id.* at 269.

[33] *Id.* at 290.

B. Congress' Use Of The *Qui Tam* Provisions In The False Claims Act Is A Valid Exercise Of Spending And Property Clause Authority

Any doubt over the validity of Congress' election to use *qui tam* relators and the notice-giving effect that had is put to rest upon a review of the original committee report relied upon by the framers of the False Claims Act.

As this report spells out, Congress was equally concerned with both fraudulent contractors and "irresponsible" civil servants.[34] After a thorough investigation, Congress had uncovered evidence implicating government employees in the "gross mismanagement," "total disregard for the interests of government," and the "total recklessness in the expenditure of the funds of the government."[35] In fact, Congress found "every reason to believe that there was collusion on the part of employees of the government to assist in the robbing of the treasury."[36]

Consequently, Congress *needed* the assistance of the *qui tam* relators to protect the integrity of federal revenues and property from both unscrupulous contractors and federal employees. Congress' decision to use a *qui tam* relator in these circumstances is absolutely reasonable, especially in light of the fact that the very employees authorized to protect the federal treasury were robbing it.

Congress recognized that without the strongest checks on the fraudulent use of federal moneys, by both contractors

[34]H. Rep. at 68.
[35]*Id.* at 69.
[36] *Id.*

and civil servants in league, the government itself might go bankrupt:

> With such a state of things existing, if officers of the government, who should be imbued with patriotism and integrity enough to have a care of the means of the treasury, are ready to assist speculating contractors to extort upon and defraud the government, where is this system of speculation to end, and how soon may not the finances of the government be reduced to a [woeful] bankruptcy?[37]

In addition to the committee report, the Supreme Court has also relied on the Senate debates published in the Congressional Globe as legitimate authority in interpreting the False Claims Act.[38] The sponsor of the bill, Senator Howard,[39] explained how the law was, in part, "based on" the "old-fashioned idea of holding out a temptation and 'setting a rogue to catch a rogue.'" The Senator also explained how the interests of the United States were being served by this "safest and most expeditious" method to bring "rogues to justice."[40] Likewise, the law *also* rewarded the altruistic and "vigilant" civil servant who would appropriately file a claim on behalf of the United States.[41]

Congress' utilization of *qui tam* relators to protect and advocate the interests of the United States is a reasonable and

[37]*Id.* at 69.
[38]*See Hess*, 317 U.S. at 544, note 8.
[39]Cong. Globe, 37th Cong. 3d Sess., Feb. 14, 1863 at 952.
[40]*Id.* at 956.
[41]*Id.* at 955 (Remarks of Senator Howard).

carefully crafted response to the problem of fraud against the treasury. Because of its reasonableness, and pursuant to the plain language of the Constitution, the False Claims Act's use of action by relators on behalf of the United States is well within the authority granted to Congress under the Spending and Property Clauses of the Constitution.[42]

C. Congress' Power to Use *Qui Tam* Suits and Relators Is Well Grounded In The History And Tradition Surrounding The Framing of The Constitution

From the earliest time, *our* union has faced the threat of fraud, and has taken actions to detect and punish that fraud. In so doing, the federal government has enlisted citizen agents in the battle to protect the federal treasury.

Consider the extraordinary step taken by the Continental Congress, in 1778, when it passed the following:

> "*Resolved*, That it is the duty of all persons in the service of the United States, as well as all other inhabitants thereof, to give the earliest information to Congress or any other proper authority of any misconduct, frauds or misdemeanors committed by any persons in the service of these states, which may come to their knowledge."[43]

This resolution contains two key clauses. First, it speaks of the "duty" to uncover and report fraud. Not merely the duty of

[42] *See, e.g., Klepps*, 426 U.S. 529.

[43] *See* Journals of Congress, July 1778 at 732.

government officers and employees – but the duty of "all inhabitants thereof." There can be no more clear statement by Congress as to its intent to enlist citizens to combat fraud. Neither can there be a more clear statement warning all whom would engage in such subversive activity.

Second, the resolution declares that the fraud that citizens are to be on watch for is that committed by any "officers or persons in the service of these states." The effect of this statement is twofold. On the one hand, it is clearly analogous to the False Claims Act in general, and the present case in particular. In both instances, Congress enlists citizens to specifically look for fraud being committed by the states. On the other hand – in direct contravention of much of the selected history typically cited in sovereign immunity cases today – it implies that Congress understood, over two centuries ago, that it had the authority to police the states with respect to fraud against the federal government *and used that authority in a very conspicuous manner* to which the states acquiesced. There can hardly be a more clear notice to the states that citizens will be used to detect fraud, and that the integrity of the treasury will be vindicated.

The Continental Congress' reliance upon citizens to assist in the protection of federal interests was nothing new. As this Court has, on more than one occasion, recognized:

> Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of

years in England, and in this country ever since the foundation of our government.[44]

Unquestionably, Congress has the authority to empower *qui tam* litigants to act on behalf of the United States in order to protect its interest as a Sovereign.

CONCLUSION

This case concerns a truism of American democracy: that "in free governments the rulers are the servants, and the people their superiors and sovereigns."[45] As has been recognized by this Court in *United States v. Morris* and *United States ex rel. Marcus v. Hess*, Congress has the power to authorize its citizens to act on behalf of the United States of America and to protect this country's vital interests. Nowhere is this power more apparent than under the Property and Appropriations Clauses of the Constitution.[46] Moreover, stealing is wrong. The states' underlying suggestion that they have had no notice of their fiduciary responsibility not to steal or misuse federal funds on its face is not credible.

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[44]*Hess*, 317 U.S. at 541, note 4, *citing Marvin v. Trout*, 199 U.S. 212, 225 (1905).

[45] Benjamin Franklin, in Debates of the Constitutional Convention, July 26, 1787. *Reprinted* in 457 Formation of the Union: Documents, Government Printing Office, 1927.

[46]*See United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943); U.S. Const., Preamble.

For the foregoing reasons, the decision of the Second Circuit Court of Appeals should be affirmed.

Respectfully Submitted,

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