For Opinion See 120 S.Ct. 1858, 119 S.Ct. 2391

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United States Supreme Court Amicus Brief.
STATE OF VERMONT AGENCY OF NATURAL RESOURCES, Petitioner,
v.
UNITED STATES OF AMERICA ex rel. Jonathan STEVENS, Respondent.
No. 98-1828.
November 30, 1999.

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

MOTION FOR LEAVE TO FILE, AND SUPPLEMENTAL BRIEF CONCERNING ARTICLE III STANDING, OF TAXPAYERS AGAINST FRAUD AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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Amicus Curiae Taxpayers Against Fraud (TAF) respectfully seeks leave of this Court to file a supplemental amicus brief addressing the question whether qui tam plaintiffs under the False Claims Act have Article III standing. With the consent of all parties, TAF previously filed an amicus brief addressing the two questions upon which this Court originally granted certiorari ("TAF's Original Amicus Brief"). TAF's ongoing interest in preserving effective anti-fraud legislation at the federal and state level extends as well to resolution of the Article III question. Counsel of record for all parties have by letter manifested their consent or lack of objection to the filing of this brief.

***ii** This Court's order directing the parties to file supplemental briefs on the Article III question neither invited nor disclaimed interest in amicus briefing. In light of the truncated briefing schedule and the obvious importance of the issue (the constitutionality of a 136-year-old federal statute), TAF believes this Court might welcome concise input from an organization that has submitted briefs on this issue numerous times before in the lower federal courts.

For the foregoing reasons, TAF respectfully requests that this Court grant leave to file the accompanying supplemental amicus brief concerning Article III standing.

***iii** TABLE OF CONTENTS

***iv** TABLE OF AUTHORITIES

Cases

***1** INTERESTS OF AMICUS CURIAE

Amicus Curiae Taxpayers Against Fraud (TAF) is a §501 (c)(4) social welfare organization devoted to educational, litigation and other efforts to combat fraud in the use of taxpayers' monies. As such it has an interest in the use of qui tam statutes to combat waste, and believes it can be of assistance to this Court in evaluating the constitutional question raised by the Court's order of November 19, 1999.[FN1]

> FN1. Letters indicating the parties' consent or nonobjection to the filing of this brief have been filed with the Clerk of the Court. This brief has not been authored in whole or in part by counsel for a party. No person, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

History and tradition play a uniquely central role in determining the scope of Article III's "case or controversy" requirement. Not only does this Court look directly to the traditions of the Framers' era in defining "cases of a Judiciary nature,"[FN2] but modern standing doctrine has been designed to address the Framers' original concerns as applied to the new regulatory state. Given the initial heavy reliance of the Founding Generation on qui tam enforcement of federal law, and the acceptance of this mechanism by both this Court and the Executive Branch for over two centuries, it would be quite extraordinary for this Court to override Congress' carefully considered judgment concerning how best to protect the proprietary interests of the United States.

> FN2. 2 The Records of the Federal Convention of 1787, at 430 (Max Farrand ed., 1911) (Aug. 27, 1787).

***2** ARGUMENT

1. Qui tam actions are encompassed within the historical meaning of "cases or controversies" to which the judicial power extends. As detailed in TAF's Original Amicus Brief at 12-15, the lineage of qui tam actions extends in an unbroken line from the birth of American governance to the present. Most significantly, the first and early Congresses relied heavily on the qui tam mechanism in enforcing federal law.[FN3]

> FN3. A majority of the First Congress' qui tam provisions expressly authorized private persons to prosecute the suit. Some statutes referred to the informer's share without expressly authorizing the informer to bring suit, but this Court has repeatedly recognized the then-prevailing interpretive canon holding that informer statutes "which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue." *United States ex rel. Marcus v. Hess,* 317 U.S. 537, 541 n.4 (1943).

> Any suggestion that qui tam litigation assumed a plaintiff concretely injured by the defendant's misconduct is simply foreign to the entire qui tam tradition, on both sides of the Atlantic. Of eleven qui tam statutes enacted by the First Congress, only one limited the right to sue to aggrieved individuals, *see* Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 124-5 (authorizing suit by persons injured by copyright violations). *See generally* Evan Caminker, *The Constitutionality of Qui Tam Actions,* 99 Yale L. J. 341, 342 n. 3 (1989). This Court has recognized that the paradigmatic qui tam plaintiff "has no interest in the matter whatever except as such informer," *Marvin v. Trout,* 199 U.S. 212, 225 (1905). *See id.* ("To say that [the qui tam mechanism] must be limited to a provision allowing a recovery of the money by the one who lost it, would be in effect to hold invalid all legislation providing for proceedings in the nature of qui tam actions."); *Hess,* 317 U.S. at 541 n.4 ("Statutes providing for actions by a common informer, who himself has 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.").

***3** Congress' reliance on this mechanism waned to some extent in the early to mid-nineteenth century, in response to the steady expansion of the federal government's public prosecutorial machinery. But when Congress thought it necessary to authorize qui tam enforcement of the False Claims Act in 1863, it was reinvigorating a traditional form of action rather than inventing a new one. Indeed, at every moment throughout this Nation's history, from 1789 to the present, Congress has authorized qui tam enforcement of one or more federal statutes. We are aware of no evidence, throughout this entire period until this decade, suggesting that any of the three governmental branches considered qui tam suits to lie beyond judicial cognizance.[FN4] Inferior federal courts entertained numerous qui tam suits under various federal statutes, this Court entertained qui tam cases spread over the centuries without any expression of jurisdictional concern,[FN5] and some of the foundational cases in federal constitutional law were qui tam suits, most notably *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819).

> FN4. *See, e.g.,* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III,* 91 Mich. L. Rev. 163, 175-76 (1992) ("[T]here is no evidence that anyone at the time of the framing believed that a qui tam action or informers' action produced a constitutional doubt. No one thought to suggest that the 'case or controversy' requirement placed serious constraints [on such actions].").

> FN5. *See, e.g., The Laura,* 114 U.S. 411 (1885); *Trout,* 199 U.S. 212 (1905); *Hess,* 317 U.S. 537 (1943); *Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939 (1997).

This long tradition of qui tam enforcement is critical to this Court's Article III inquiry, and not merely because early congressional practice always "provides 'contemporaneous and weighty evidence of the Constitution's meaning.' " *Alden v.* ***4** *Maine,* 119 S.Ct. 2240, 2261 (1999) (citation omitted).[FN6] Rather, it is because the history of federal court jurisdiction in particular has always played a central role in shaping understandings of the specific contours of Article III.

FN6. *See also, e.g., The Laura,* 114 U.S. at 416 (discussing one aspect of qui tam procedure):
"The construction placed upon the Constitution by the first act of 1790, and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is, of itself, entitled to very great weight; and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is conclusive." (quoting, with one omission, *Lithographic Co. v. Sarony,* 111 U.S. 53, 57 (1884)).

Indeed, if the *absence* of congressional statutes of a particular form signifies a conventional understanding that such statutes were constitutionally impermissible, *see Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 230 (1995); *Printz v. United States,* 521 U.S. 898, 907-08 (1997), it follows that the continued *presence* of statutes of a particular form signifies a conventional understanding that such statutes were constitutionally permissible. *See Myers v. United States,* 272 U.S. 52, 175 (1926) ("contemporaneous legislative exposition of the Constitution …, acquiesced in for [many] years, fixes the construction to be given its provisions").

2. Both in construing the opaque but important limitations of the judicial power to "cases or controversies," and in construing longstanding organic jurisdictional statutes, this Court -- sometimes in both majority and dissenting opinions in the same case -- places substantial weight on the traditions of federal jurisdiction. This Court has often defined the case or controversy requirement through direct reference to the Framers' original understanding of the scope of the judicial power. The Framers understood that power to encompass only ***5** "cases of a Judiciary nature,"[FN7] a term of art referring to cases traditionally considered judicially cognizable at common law. *See Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 102 (1998) ("We have always taken [Article III] to mean cases and controversies *of the sort traditionally amenable to and resolved by the judicial process.* ") (emphasis added). As Justice Frankfurter put it, the case or controversy requirement was designed to capture "what was, generally speaking, the business of the Colonial courts and the courts of Westminster when the Constitution was framed." *Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring).[FN8]

FN7. 2 The Records of the Federal Convention of 1787, at 430 (Max Farrand ed., 1911) (Aug. 27, 1787).

FN8. To be sure, in certain respects the Article III judicial power was intentionally narrowed from its English counterpart. As this Court explained in *Flast v. Cohen,* while English judges could issue advisory opinions at the time of the Founding, the Framers withheld this power from federal judges. 392 U.S. 83, 96 (1968). But this sharp break from English practice was immediately and steadfastly made manifest. See *id.* (rule against advisory opinions is " 'the oldest and most consistent thread in the federal law of justiciability' ") (citation omitted); *id.* n.14 (rule "was established as early as 1793 … and the rule has been adhered to without deviation"). In contrast, the Framers' substantial reliance on qui tam actions and the courts' willingness to entertain such actions make clear that the Framers intended no such break from the longstanding qui tam tradition in English and colonial law.

For example, in *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211 (1995), this Court looked to the understandings of those who framed and defended the provisions of Article III and to early uses of the federal judicial power to determine that Congress lacks authority to interfere with the finality of judicial judgments. *See id.* at 219-23 (employing Framers' intent to ***6** justify finality requirement); *id.* at 223 (observing that "[j]udicial decisions in the period immediately after ratification of the Constitution confirm the understanding that it forbade interference with the final judgments of courts"); *see also id.* at 224-25 (relying on President Lincoln's views to confirm understanding of Article III's finality requirement); *id.* at 241 (Breyer, J., concurring in the judgment) ("The majority provides strong historical evidence that Congress lacks the power simply to reopen, and to revise, final judgments in individual cases.").

The importance of history to understanding the scope of Article III's requirements was emphasized by both the plurality and the dissenting opinions in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. 50

(1982). Justice Brennan, writing for the plurality, noted that while the need for Article III jurisdiction was arguably "greatest" in cases between the government and an individual, the public-rights line of cases was not based in political theory "but rather in Congress' and the Court's understanding of what power was reserved to the Judiciary by the Constitution *as a matter of historical fact." Id.* at 68 n.20 (emphasis added). Justice White, in dissent, invoked historical understandings to contest the majority's conclusion. *See id.* at 93-94 (while reading Art. III to bar creation of federal courts without constitutional tenure and salary protections might be "eminently sensible," Court was not "free to disregard 150 years of history"). *See also Seminole Tribe v. Florida*, 517 U.S. 44, 67-71 (1996) (discussing historical understandings of state sovereign immunity under the Constitution); *id.* at 100-30 (Souter, J., dissenting) (likewise relying on history but reaching a different conclusion).

In many contexts, therefore, the Court is careful to construe the contours of the judicial power in general and the ***7** case or controversy requirement more particularly in light of the Constitution's historic understanding. Since qui tam provisions were so central to the first Congress' enforcement machinery and have been utilized throughout the nation's history, they clearly fall within -- indeed, help define -- "cases of a Judiciary nature." *See, e.g., Flast v. Cohen*, 392 U.S. 83, 120 (1968) (Harlan, J., dissenting) (proclaiming it is "clear that non-Hohfeldian plaintiffs as such [including qui tam relators] are not *constitutionally* excluded from the federal courts").[FN9]

> FN9. For scholarly discussion of the importance of the First Judiciary Act as evidence of the meaning of Article III, *see, e.g.*, Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. Pa. L. Rev. 1499, 1515-16 (1990); Daniel J. Meltzer, *The History and Structure of Art. III*, 138 U. Pa. L. Rev. 1569, 1570, 1585, 1611 (1990).

3. The historical understanding of "cases of a Judiciary nature" is relevant to current doctrine for a further reason: the Court's modern standing requirements have been designed to translate the original concerns underlying the case or controversy requirement to bring them to bear on new forms of action. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 402 (1980) ("Determining Art. III's 'uncertain and shifting contours,' with respect to nontraditional forms of litigation…requires reference to the purposes of the case-or-controversy requirement.") (citation omitted). Modern standing doctrine emerged in the mid-twentieth century when Congress began to enact statutes to redress perceived injuries associated with governmental regulations or failures to regulate, injuries that were not cognizable at common law.[FN10] Thus, when ***8** Congress creates new legal interests lacking a common law analog and grants standing to vindicate those interests in federal court, the Court insists that the person bringing suit have suffered a personal injury that is traceable to the defendant's alleged misconduct and is judicially redressable, *see Steel Co.*, 523 U.S. at 103, so as to remain faithful to the various separation of powers principles underlying the original understanding of the judicial power.

> FN10. *See generally* Richard H. Fallon, Jr., *et al.*, Hart & Wechsler's The Federal Courts and the Federal System 136-37 (4th ed. 1996); Sunstein, *supra* note 4, at 179-97; Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 Colum. L. Rev. 1432 (1988).

Indeed, the modern tripartite doctrinal test can be seen as a contemporary elaboration of the more basic historical axioms that "the parties before the court have an actual, as opposed to professed, stake in the outcome," and that the issues " 'will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.' " *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring) (citation omitted). Since the modern doctrinal requirements applied to interests unprotected at common law have been designed to secure the traditional values of the "Judiciary nature" constraint, it is entirely unsurprising that the False Claims Act's qui tam mechanism -- the private bounty derived from the recovery of funds redressing the concrete injury to the United States -- comports with the purposes of current standing doctrine. See Respondents' Supplemental Briefs. Consistent with this conclusion, the Court has observed that recent congressional efforts to "convert the undifferentiated public interest … into an 'individual right' vindicable in the courts" are distinguishable from Congress' creating "a concrete private interest in the outcome of a suit against a private party for the Government's benefit, by providing a cash bounty for the victorious plaintiff." *Lujan*, 504 U.S. at

577, 573.

***9** It would, moreover, be incongruous to invoke nuances of modern standing doctrine -- designed to address the protection of new legal interests through new forms of action (*e.g.*, citizen suits vindicating public interests against executive branch officials) -- to invalidate a very traditional form of action protecting a common law "legal" interest. Given their historical pedigree and extensive employment by the first and early Congresses, qui tam actions are properly considered a defining referent for Article III's case or controversy requirement, not subject to the same skepticism the Court has directed at newly minted enforcement schemes. It is one thing to reshape standing doctrine over time to make room for the protection of some (not all) novel legal interests or the use of some (not all) novel enforcement mechanisms. Such considered doctrinal expansion might appropriately respond to new conditions and circumstances of modern life, such as the advent of the regulatory state with its concomitant proliferation of interests and injuries. But it is quite another to reshape standing doctrine to now exclude an enforcement mechanism once considered a core example of "cases of a Judiciary nature." Modern doctrine should be understood to supplement, not displace, historical understandings of Article III.

4. Congress appropriately has broad discretion to determine how best to protect the proprietary interests of the United States. And this Court has made clear that Congress' enforcement arsenal includes qui tam authorization: "Congress has power to choose this method [of qui tam enforcement] to protect the government from burdens fraudulently imposed upon it." *Hess*, 317 U.S. at 542.[FN11] Ever since the Founding, ***10** Congress occasionally has determined that using bounties to harness private resources and energies toward a public-spirited end is an essential means of protecting the United States' interests, and the other branches of government have consistently acquiesced to this determination. It would be quite extraordinary for this Court, after the Framers' initial endorsement and 21 decades of settled practice, now to invalidate the qui tam enforcement scheme. And it would be all the more extraordinary for it to do so while allowing only minimal time for input by the parties and concerned amici.

> FN11. *Cf. United States v. Standard Oil Co.*, 332 U.S. 301, 314-15 (1947) (Congress as primary, often "exclusive arbiter of federal fiscal affairs").

> Were this Court to hold that qui tam suits fall outside of Article III, Congress could still authorize such suits to be brought in state court where Article III has been held not to apply. But it would be highly incongruous to relegate Congress' preferred means of protecting the federal treasury to state court, where ultimate federal jurisdiction through Supreme Court review would be available only if the qui tam plaintiff (asserting the United States' interests), but not the original defendant, wins in the highest state court. *See ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617-24 (1989).

CONCLUSION

For these reasons, the Court should conclude that qui tam actions under the False Claims Act satisfy Article III.

Vermont Agency of Natural Resources v. U.S. ex rel. Stevens
1999 WL 1125251 (U.S.) (Appellate Brief)

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