From: Mishaan, Jessica
Sent: Tuesday, April 10, 2018 5:01 AM
To: [redacted]
Subject: response to public records request
Importance: High

Dear Mr. Lu,

I write in response to your public record act request dated April 4, 2018. As a courtesy, attached please find publicly available records in response to your request. We have provided the attached brief that is available through Westlaw. The Attorney General's Office is no longer the custodian of this litigation file from 2000 that relates to your request. However, for additional filings in the case, we recommend you consult with a law library, which will also have access to Westlaw, LexisNexis or another legal research service that should be able to assist you with the U.S. Supreme Court filings you seek.

We hope the attached and above information is helpful to you.

Sincerely,

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1999 WL 1101312 (U.S.) (Appellate Brief)
United States Supreme Court Petitioner's Supplemental 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

SUPPLEMENTAL BRIEF FOR PETITIONER

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***i** QUESTION PRESENTED

Does a private person have standing under Article III to litigate claims of fraud upon the government?

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***1 ARGUMENT**

What the Article III issue identified by the Court does is make the relator's already untenable position under the Eleventh Amendment completely inescapable. There is a logical and irreconcilable inconsistency between what the relator must show to demonstrate standing and what he must show in order to avoid acting as a mere "private person" whose claims against a State are barred by sovereign immunity principles embedded in the plan of the Constitution and the Eleventh Amendment. For decades, the essence of Article III standing has been the requirement of a "personal" injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992); *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). Accordingly, to satisfy Article III the relator must allege (which he has not) that he has suffered some particularized and concrete injury in fact that provides an interest in this dispute over and above any prize from the litigation itself. But, even if relator had been able to make such a claim, then he would have revealed as plain as day that he is not in any sense "entrusted with the constitutional duty to 'take Care that the Laws be faithfully executed' " as required of someone who purports to exercise the United States' authority to sue a sovereign State under the Constitution. *Alden v. Maine*, 119 S. Ct. 2240, 2267 (1999). The Court's insertion of the Article III issue thus places the last nail in the coffin of non-justiciability in which the relator's claims against Vermont finally should be laid to rest.

As this case now stands, the Court is presented with myriad grounds on which to dismiss the relator's lawsuit against Vermont. Vermont suggests that the more prudent course would be to decide this case on the Eleventh Amendment grounds originally raised and briefed by the parties. And, in light of this Court's precedent, the Eleventh Amendment analysis must begin by looking to the False Claims Act to determine whether Congress provided a clear statement of its intent to hold States liable under that statute. *See Seminole Tribe v. Florida*, 517 U.S. 44, 55 (1996); *Green v. Mansour*, 474 U.S. 64, 68 (1985).

***2** In truth, however, Vermont is largely indifferent to the Court's preferred course for approaching the issues in this case. Aside from the Eleventh Amendment and statutory construction issues, compelling arguments also show that the relator lacks Article III standing. 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.

I. A CLAIM OF FRAUD UPON THE GOVERNMENT DOES NOT PROVIDE A PRIVATE PERSON WITH THE PARTICULARIZED, CONCRETE INJURY IN FACT REQUISITE TO STANDING UNDER ARTICLE III.

The judicial power of the United States extends to "Cases" and "Controversies." U.S. Const. art. III, § 2; *Defenders of Wildlife*, 504 U.S. at 559. Standing is "an essential and unchanging part" of the Article III case-or-controversy requirement. *Id.* at 560.

> [T]he irreducible constitutional minimum of standing contains three elements. First, 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 …. Second, there must be a causal connection between the injury and the conduct complained of …. Third, it must be likely … that the injury will be redressed by a favorable decision.

Id. at 560-61 (internal quotation marks and citations omitted). The requirement for a "particularized" injury "mean[s] that the injury must affect the plaintiff in a personal and individual way." *Id.* at 560, n.1. *See also Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) ("Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury' ") (quoting ***3** *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)); *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972) (plaintiff "must allege facts showing that he is himself adversely affected").

The relator does not allege that he has personally suffered any injury. JA 33-41; *see also Steel Co. v. Citizens for a Better Env't,* 118 S. Ct. 1003, 1017 (1998) (Article III requirements will be measured against factual allegations in complaint). Rather, the only alleged injury is that "[t]he United States has been damaged." JA 40, ¶ 44.

The respondents may claim that the financial reward of a successful prosecution is equivalent to injury in fact because it provides an interest or incentive sufficient to sharpen the litigation. However, incentive does not establish the injury requisite to Article III standing. "[S]tanding is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Valley Forge Christian College*, 454 U.S. at 486. The " 'concrete adverseness which sharpens the presentation' … is not a permissible substitute for the showing of injury itself." *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

Indeed, a by-product of litigation such as an interest in a bounty is not injury in fact.[1] *Cf. Steel Co.*, 118 S. Ct. at 1019 ***4** ("Obviously, however, a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit."); *Diamond v. Charles*, 476 U.S. 54, 69-70 (1986). " '[T]he "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured,' " *Defenders of Wildlife*, 504 U.S. at 563 (quoting *Sierra Club v. Morton,* 405 U.S. 727, 734-35 (1972)). Otherwise, the constitutional doctrine of standing becomes subject to a bootstrapping argument: a plaintiff would lack standing to litigate because he suffered no injury, but the litigation could provide the basis on which standing would arise. *See Diamond*, 476 U.S. at 70-71.

[1] This matter is significantly distinct from a citizen suit because citizen suits are premised on the notions that: (1) Congress may abrogate judicially created prudential limitations to standing; and (2) citizens pursuing such suits must have suffered some palpable injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Moreover, plaintiffs pursuing a citizen suit obtain redress for their injury; even though that injury may not be monetary in nature, it is real. For example, a State is injured when water pollution laws are violated. The State obtains redress through the injunctive relief and penalties assessed pursuant to the Clean Water Act's citizen suit provision, 33 U.S.C. § 1365. *See United States Dep't of Energy v. Ohio,* 503 U.S. 607, 615-19 (1992). Indeed, the States, in light of their role under the CWA and through their police powers, have an inherent purpose in seeking specific and general deterrence of Clean Water Act violations. Deterrence is achieved regardless of whether the civil penalties are paid to the State or the United States — the States' partner in the administration of the CWA, *see* 33 U.S.C. § 1251(b). Pursuing penalties therefore meets the redressability element of the standing requirement. *Cf. Steel Co. v. Citizens for a Better Env't,* 118 S. Ct. 1003, 1018-19 (1998). Here, the relator has not suffered any injury and standing is directly barred by Article III's bedrock injury-in-fact requirement.

II. THE RELATOR CANNOT PURSUE A THIRD PARTY'S INJURY OR RIGHTS.

The relator unquestionably relies on an alleged injury to the United States and pursues the United States' rights. JA 40. As explained above, "[t]he Art. III 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." *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *see also Defenders of Wildlife*, 504 U.S. at 560 n.1; *Valley Forge Christian College*, 454 U.S. at 472.

Two other points warrant mention. First, even if the relator were to amend his complaint to allege the only conceivable injury he may have suffered — misuse of his tax dollars — Article III would nonetheless bar his standing.[2]

[2] The FCA provides a vivid example of why standing is necessary to preserve separation of powers. By allowing the relator to raise the undifferentiated public interest, the False Claims Act guarantees the judiciary's entanglement in the prerogatives of the other branches of government. *See Defenders of Wildlife*, 504 U.S. at 576-77. The courts must approve any attempt by the United States to dismiss a relator's claim, 33 U.S.C. § 3730(c)(2)(A); the courts must approve any settlement as "fair, adequate and reasonable under all the circumstances," *id.* § 3730(c)(2)(B); the power to restrict the relator's participation on the basis of his interference

> with the United States rests with the courts, *id.* § 3730(c)(2)(C); and the courts must find good cause for and authorize the United States' late intervention in lawsuits supposedly brought to redress an injury to the United States, *id.* § 3730(c)(3). In short, under the FCA, the courts play the role of safeguarding the United States' interests — a role that, were it not for the relator, would reside largely with the executive branch. Indeed, the FCA expressly provides that the courts may second-guess the executive branch's discretion over such issues thus allowing the courts to " 'assume a position of authority over the governmental acts of another and co-equal department.' " *Defenders of Wildlife*, 504 U.S. at 577 (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 489 (1923)).

***5** We have consistently held that a plaintiff raising only a generally available grievance about government — claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large — does not state an Article III case or controversy.

Defenders of Wildlife, 504 U.S. at 573-74; *see also Powers v. Ohio*, 499 U.S. 400, 410-11 (1991) (plaintiff must show personalized injury in fact even when prudential standing limitations are relaxed allowing plaintiff to pursue third party rights); *Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976) (same); *Massachusetts v. Mellon*, 262 U.S. 447, 488-89 (1923) (taxpayer lacks standing to challenge constitutionality of federal statute).[3]

[3] The relator does not allege that the monies at issue here were spent in derogation of constitutional limits on Congress's Article I, § 8 spending powers. Therefore, this suit does not fall within the narrow circumstances allowing taxpayer standing. *See Flast v. Cohen*, 392 U.S. 83, 105-06 (1968).

***6** Second, the third party rights the relator asserts include the United States' sovereign authority to sue a State and the pursuit of funds allegedly defrauded from EPA by the State of Vermont. However, this Court has held that "the National Government must itself deem the case of sufficient importance to take action against the State." *Alden*, 119 S. Ct. at 2269. Moreover, this Court has recognized that a suit commenced and prosecuted by a private person "differs in kind" from a suit commenced and prosecuted by responsible federal officials. *Id.* at 2267. And here, the United States itself asserts that " '*qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good.' " U.S. Br. 36 (quoting *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997)).

In short, this Court has recognized that the United States is the *only* proponent of its right to pursue its interests against a State. *Alden*, 119 S.Ct. at 2267; *Blatchford v. Native Village*, 501 U.S. 775, 785 (1991). Yet, the United States apparently found these "interests insufficient to justify sending even a single attorney to" Vermont to address this matter. *Alden*, 119 S. Ct. at 2269. Neither Article III nor the Eleventh Amendment countenance the notion that a private person may hijack the alleged injury to the United States and pursue the United States' rights to fulfill the private person's own interests. Therefore, the relator is without standing to pursue this lawsuit based on the alleged injury to, or the rights of, the United States.

III. THERE IS NO OTHER BASIS UPON WHICH THE RELATOR MAY CLAIM STANDING.

Respondents may advance several other theories in support of the relator's standing, including Congressional authorization, assignment of the Federal Government's cause of action, and historical tradition. None of these has merit. *See generally* James T. Blanch, Note, *The Constitutionality of the False Claims Act's Qui Tam Provision*, 16 Harv. J.L. & Pub. Pol'y 701 (1993).

***7** A. Any claim of Congressional authorization as a basis for standing is easily dismissed. "It is settled that Congress cannot erase article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997); *see also Bennett v. Spear*, 520 U.S. 154, 162 (1997) (same); *Gladstone, Realtors*, 441 U.S. at 100 ("In no event, however, may Congress abrogate the Art. III minima: A plaintiff must always have suffered a distinct and palpable injury to himself ….") (internal quotation marks omitted); *Warth v. Seldin*, 422 U.S. at 501 (same). Therefore, the FCA cannot convey standing to persons that do not suffer injury in fact.

B. Contrary to the decisions of some lower courts, the relator cannot claim standing based on an assignment of the Federal

Government's right of action. *See, e.g., United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 748 (9th Cir. 1993). At a minimum, an assignment must "manifest[ ] [an] intention to transfer at least title or ownership." *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 17 (2d Cir. 1997) (citing *Titus v. Wallick*, 306 U.S. 282, 289 (1939)). Nothing in the FCA suggests a contractual relationship between the United States and the relator. There is no manifestation of an intent to contract, no reference to assignment, and no consideration for any claimed agreement. Indeed, at the time Congress passed the FCA, the "chose in action" it supposedly assigned did not even exist. Moreover, under the FCA, the United States retains an interest in the claim litigated by the relator. To effect a valid assignment, an assignor must give up his interest in that which is assigned. *See id.* at 18 (retention of right to terminate assignee's authority to litigate fails to effectuate assignment); *Restatement (Second) of Contracts* § 317(1) (1981). Otherwise, the assignor could harass a defendant by subdividing assignments and allowing dozens of claims arising out of a single transaction. Simply put, the FCA is a statute of general application, not an assignment of a known, specific cause of action to a specific individual.

As applied to the FCA, the assignment theory is no more than a variant of the "statutory abrogation of Article III" ***8** approach to standing that this Court has repeatedly rejected — as well as an impermissible delegation of the United States' authority to sue a State. *See Gladstone, Realtors*, 441 U.S. at 100; *Blatchford v. Native Village*, 501 U.S. 775, 785 (1991). Recognizing a statutory assignment of the Federal Government's right of action under the FCA to a relator in effect permits Congress to eliminate the constitutional requirement of injury in fact. Congress would be able to follow the model of the FCA and assign rights of action for violations of federal employment and environmental laws to any private person willing to bring suit. The bedrock standing principles recognized by the Court cannot be evaded so easily.

C. Respondents may argue that the enactment of *qui tam* statutes in the early years of the United States provides evidence that *qui tam* plaintiffs meet the standing requirements of Article III. Historical practice alone, however, does not establish constitutionality. "[N]o one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it." *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970); *see also Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (historical practice, standing alone, cannot justify contemporary violations of constitutional guarantees). Although this Court has acknowledged that *qui tam* statutes of one kind or another are a part of the nation's legal history, in no case has the Court considered whether a *qui tam* plaintiff has standing to sue under Article III. Should the Court reach that question in this case, the relator's standing must be evaluated not merely in terms of history, but in terms of the Court's well-established modern standing jurisprudence.

In any event, the relator's standing in this case is not supported by the kind of "unambiguous and unbroken history" that the Court has found persuasive in other contexts. *Marsh*, 463 U.S. at 792. Most of the *qui tam* or informer statutes passed by the First Congress fall within one of three categories. The first, and largest, category consists of statutes that simply award a bounty to a person who provides information that results in a penalty, forfeiture, or other recovery. These statutes do not explicitly grant any right of action to the ***9** informer.[4] A second group of statutes authorizes suits by government officials and provides that a portion of the recovery goes to the official bringing suit, and the remainder to the United States.[5] And a third group of these early statutes permits suits by persons who are themselves injured, in effect authorizing such persons to litigate on behalf of themselves and the United States.[6]

[4] *See* Act of July 31, 1789, § 38, 1 Stat. 29, 48 (where penalties, fines and forfeitures authorized under customs and maritime law are recovered based on information from person other than government official, one-half of recovery goes to informer); Act of August 4, 1790, § 69, 1 Stat. 145, 177 (same); Act of Sept. 1, 1789, § 21, 1 Stat. 55, 60 (maritime act that adopts penalties and forfeitures of Act of July 31, 1789); Act of Sept. 2, 1789, § 8, 1 Stat. 65, 67 (where conviction for violation of Treasury Act is based on information from person other than public prosecutor, one-half of penalty given to person providing such information); Act of Feb. 25, 1791, § 8, 1 Stat. 191, 195-96 (where agents of Bank of United States illegally deal or trade in goods or commodities, one-half of penalty given to informer and one-half to United States); *id.* § 9, 1 Stat. 196 (where agents of Bank make illegal loans, one-fifth of penalty given to informer and remainder to United States).

[5] *See* Act of Mar. 1, 1790, § 6, 1 Stat. 101, 103 (census-takers may sue uncooperative citizens and keep one-half of penalty); Act of Aug. 4, 1790, § 4, 1 Stat. 145, 153 (where ship commander fails properly to deposit manifest, one-half of penalty given to officer who should have received manifest and one-half to collector in port of destination); Act of Mar. 3, 1791, § 44, 1 Stat. 199, 209 (where violation of liquor laws has occurred, one-half of penalty given to person who makes seizure or first discovers matter leading to seizure, and one-half of penalty given to United States; penalty recoverable by action of debt in name of person entitled

to it, or by information in name of United States; attorney for district has duty, upon application, to bring such information); *see also id.* §§ 10, 19, 38 (seizures made by officers of inspection).

[6] *See* Act of July 31, 1789, § 29, 1 Stat. 29, 45 (penalties to be paid by customs officials who fail to post fees or who demand payment of fees greater than those authorized; amount forfeited recoverable with costs "for the use of the party grieved"); Act of August 4, 1790, § 55, 1 Stat. 145, 173 (same); Act of May 31, 1790, § 2, 1 Stat. 124, 124-25 (permitting action of debt against violators of copyright law, with one-half of penalty to "author or proprietor … who shall sue for the same" and one-half to the United States); Act of July 20, 1790, § 1, 1 Stat. 131, 131 (where commander of ship carries out seaman on voyage without legal contract, one-half of penalty given to United States and one-half to person prosecuting for same); *id.* § 4, 1 Stat. 133 (where person illegally harbors seaman belonging to ship or vessel, one-half of penalty given to United States and one-half to person prosecuting for same).

***10** Nothing in the Court's decision in *United States ex rel. Marcus v. Hess,* 317 U.S. 537 (1943), suggests that these early informer statutes routinely permitted bounty-seekers to litigate claims on behalf of the United States. Although the Court noted in dicta that informer statutes are "construed to authorize [the informer] to sue," *id.* at 542 n.4, that statement may simply mean that the informer has a cause of action against the United States for his statutory bounty. In any event, these early statutes are relevant, if at all, only to the extent that they illuminate the intent of the Framers. What matters, then, is the language of the statutes enacted by the First Congress, not a presumption imposed on such statutes by the Court over a century and a half later.

These early statutes thus shed little light on whether a private person such as the relator has standing to commence and prosecute a suit solely to redress fraud against the United States.[7] An informer obviously need not have standing to sue merely to collect a bounty after a conviction is obtained. Actions brought by government officials may properly be considered actions by the United States itself, even where the official may be compensated by a share of the proceeds. And, where a person is personally injured and brings suit to redress that injury, standing is not defeated by the fact that the plaintiff shares the recovery with another injured party, the United States. The above cases are easily distinguished from ***11** this one, where the relator's lawsuit is based solely on an injury to the United States.

[7] Any claim that these early statutes reflect the Framer's view of the proper jurisdiction of the federal courts is further weakened by the fact that the first informer statute predates the creation of the lower federal courts in the Judiciary Act of 1789. *See* Act of July 31, 1789, 1 Stat. 29; Act of Sept. 24, 1789, 1 Stat. 73 (Judiciary Act of 1789).

To be sure, a small number of statutes enacted by the First Congress appear to permit prosecutions by informers whose only stake in the matter may have been a share of the proceeds.[8] These statutes do not, however, mandate the conclusion that a private person has standing to sue to redress fraud against the government. First, in this case looking to history proves too much. One of Congress's early criminal statutes contained a *qui tam* provision that permitted an informer to bring suit for larceny and receipt of stolen goods, and to receive in return one-half of any fine assessed (the other half going to the owner of the goods or the United States). Act of April 30, 1790, §§ 16, 17, 1 Stat. 112, 116. Even the most ardent defender of *qui tam* certainly would not suggest that Congress, consistent with the Constitution, could authorize a private person to prosecute federal crimes, with a share of the penalty as an incentive.

[8] *See* Act of Mar. 1, 1790, § 3, 1 Stat. 101, 102 (permitting actions by "debt, information or indictment" against federal marshals who failed to comply with their census-taking obligations; recovery split evenly between the informer and the United States, except "where the prosecution shall be instituted first on behalf of the United States, the whole shall accrue to their use"); Act of April 30, 1790, §§ 16, 17, 1 Stat. 112, 116 (criminal statute allowing informer to prosecute crimes of larceny and receipt of stolen property, and keep one-half of any fine assessed); Act of July 22, 1790, § 3, 1 Stat. 137, 137-38 (providing penalty of forfeiture for unlicensed trade with Indian tribes; upon conviction, one-half of forfeited goods given to United States, and one-half "to the benefit of the person prosecuting").

Second, looking to history shows that *qui tam* actions are not "part of the fabric of our society" such that they warrant a

presumption of constitutionality. *Marsh*, 463 U.S. at 792. There is no longstanding, unbroken practice of permitting private persons to bring suit solely to redress injuries to the United States. Although some such statutes were enacted by early Congresses, there is no evidence of any serious consideration of the constitutional issues involved. *See id.* at 791 (historical argument is more powerful where evidence shows ***12** that "the subject was considered carefully and the action not taken thoughtlessly"). The *qui tam* device fell into disuse during much of the nineteenth-century, until Congress enacted the original version of the FCA in 1863. *See Riley v. St. Luke's Episcopal Hosp.,* No. 97-20948, 1999 WL 1034213, at *3 (5th Cir. Nov. 15, 1999) ("such statutes were adopted in the Republic's early years only sparsely, and they largely disappeared over a century ago"). The FCA also lay essentially dormant for many years, particularly after the restrictive amendments of 1943, until Congress reinvigorated the *qui tam* provisions in 1986 — again, in response to concerns about widespread private fraud against the federal government. Although Congress has on occasion resorted to *qui tam* statutes in times of apparent need (such as the pressing need for law enforcement in the early years of the nation, and the extraordinary problems posed by Civil War fraud), *qui tam* statutes have not played a substantial role in our nation's legal system.[9]

[9] A 1989 Opinion issued by the Department of Justice, Office of Legal Counsel concluded that "[p]rivate qui tam actions violate the well-settled doctrine of Article III standing" because the relator has suffered no personal injury in fact. *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. Off. Legal Counsel 207, 224 (1989). The Opinion examined the historical record, and described *qui tam* as a "transitory and aberrational device that never gained a secure foothold within our constitutional structure because of its fundamental incompatibility with that structure." *Id.* at 213. The Opinion acknowledges that a small number of *qui tam* statutes in "relatively arcane areas" of law were passed during the Federalist period, but notes that the record is "most unclear as to whether these statutes reflected *any* appreciable acceptance of qui tam actions by persons who had sustained no injury." *Id.* Rather, "with very few exceptions, suits under these statutes were brought either by government officials (for whom the moiety was compensation) or by persons who had suffered injury in fact." *Id.* In 1996, the United States partially superseded this Opinion by disavowing the portion of the opinion that concluded that the *qui tam* provisions of the FCA violate the Appointments Clause. Office of Legal Counsel, U.S. Dep't of Justice, *The Constitutional Separation of Powers between the President and Congress*, 1996 WL 876050, at *108 n.53 (May 7, 1996).

*13 CONCLUSION

For the foregoing reasons and those stated in Vermont's opening and reply briefs, the judgment of the court of appeals should be reversed and the matter should be dismissed for lack of jurisdiction.

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