No. 97-11182

IN THE UNITED STATES COURT OF APPEALS
FOF THE FIFTH CIRCUIT

UNITED STATES OF AMERICA *ex rel.*
CAROL RAE COOPER FOULDS,
Plaintiffs - Appellees,
v.
TEXAS TECH UNIVERSITY, *et al.*,
Defendants - Appellants.

On Appeal from the United States District Court
for the Nothern District of Texas, Lubbock Division

BRIEF OF APPELLEE, *QUI TAM* PLAINTIFF CAROL RAE COOPER FOULDS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Texas Tech University -- Defendant/Appellant

Texas Tech University Health Sciences Center -- Defendant/Appellant

The State of Texas -- Real Party Defendant in Interest

Lubbock County Hospital District, d/b/a University Medical Center -- Defendant

The United States of America -- Real Party Plaintiff in Interest

Carol Rae Cooper Foulds -- *Qui Tam* Plaintiff/Appellee

Phillips & Cohen, Burgess & Pyles, and Smith, Storrs, Wilson & McConnell, P.C. -- Counsel to *Qui Tam* Plaintiff/Appellee Carol Rae Cooper Foulds

Dan Morales, Jorge Vega, Laquita A. Hamilton, and Toni Hunter (the Attorney General of Texas and his staff affiliated with this case) -- Counsel to Texas Tech University and Texas Tech University Health Sciences Center.

Charles E. Galey, Galey & Wischkaemper -- Counsel to Lubbock County Hospital District, d/b/a University Medical Center

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Attorney of Record for *Qui Tam* Plaintiff/
Appellee Carol Rae Cooper Foulds

STATEMENT REGARDING ORAL ARGUMENT

Appellee Carol Rae Cooper Foulds respectfully requests the opportunity to present oral argument in this case because the issues on appeal are complex and important to the proper administration of the federal False Claims Act in cases in which state agencies have submitted false claims for payment to the Federal Government. The issues raised in this appeal are all matters of first impression before the Fifth Circuit.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Constitution

Other Authorities

STATEMENT OF JURISDICTION

Appellant's Eleventh Amendment challenge to the jurisdiction of federal courts to hear claims brought against state entities under the federal False Claims Act by a *qui tam* plaintiff is properly subject to interlocutory review pursuant to the Supreme Court's rulings in Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 113 S.Ct. 684 (1993), and Cohen v. Beneficial Industrial Loan Corp., 387 U.S. 541, 69 S.Ct. 1221 (1949).

Appellants have offered no independent basis for appellate jurisdiction in support of interlocutory review of the trial court's refusal to find that States are not "persons" within the meaning of the False Claims Act. While this Court has noted that, in the interest of judicial economy, it has discretion to hear arguments closely related to those properly subject to immediate appeal, it has also stated that such authority must be exercised with caution. See Morin v. Caire, 77 F.3d 116, 119-120 (5th Cir. 1996). As noted in Cantu v. Rocha, 77 F.3d 795, 805 (5th Cir. 1996), the Supreme Court "has been reluctant to endorse the exercise of pendant appellate jurisdiction over rulings that, while being related to the denial of . . . immunity, are not themselves independently appealable prior to judgment." Id., citing Swint v. Chambers County Com'n, 514 U.S. 35, 50-51, 115 S.Ct. 1203, 1212 (1995). Only

where other issues are "inextricably intertwined" with matters independently subject to interlocutory appeal or where review of the former is "necessary to ensure meaningful review of the latter" is pendent appellate jurisdiction even arguably proper. Woods v. Smith, 60 F.3d 1161, 1166 & n.29 (5th Cir. 1995), cert. denied, 116 S.Ct. 800 (1996)(re qualified official immunity). See also Martin v. Memorial Hospital at Gulfport, 86 F.3d 1391, 1401 (5th Cir. 1996) (applying same standard to a matter involving a state agency's claim to Eleventh Amendment immunity). While Appellee is as anxious as Appellants to have her arguments regarding statutory interpretation heard and decided, it is within the discretion of the Court to determine whether that question is ripe for review.

SUMMARY OF ARGUMENT

The trial court correctly concluded that the Eleventh Amendment of the United States Constitution does not bar *qui tam* cases under the False Claims Act against States that commit fraud. Because the claim is the Federal Government's, the damages are the Federal Government's, and the ability to control the litigation rests with the Federal Government, the United States is the real party in interest in any False Claims Act case, even in cases where the Government decides not to intervene. Eleventh Amendment immunity offers no refuge to States where the United States is the real party in interest.

Similarly, because the primary purpose of the anti-retaliation provisions of the False Claims Act are to protect those who act on behalf of the United States from discrimination based on lawful acts taken in furtherance of their efforts to protect the Federal Government, the United States is a real party in interest in such litigation as well. If those who have defrauded the Federal Government are permitted to stifle and punish those who are defending the United States' interests, the Federal Government will be the greatest victim of the wrong. The Eleventh Amendment should not be construed to stand as a bar to the United States' right to protect those who are acting on its behalf from retaliation by state agencies that are stealing from the Federal Treasury.

Appellants' statutory argument that the liability provisions of the False Claims Act were never intended to apply to states must fail as well. The "legislative environment" of the False Claims Act leaves no doubt that Congress understood and intended that States and their political subdivisions be included among the "persons" that could be held liable under the Act. That understanding and intent is stated plainly and directly in the legislative history that accompanied the major review and overhaul of the Act that became law in 1986. It is reflected as well in the language and purpose of the Act and in every other factor in the "legislative environment" that the Supreme Court has identified as relevant in determining the intended reach of a

statute. There is thus no basis whatsoever to accept Appellants' invitation to construct new rules of statutory interpretation and to rely on dubious inferences from the text or legislative history of *other* statutes in order to ignore and reverse Congress's obvious intent with respect to the False Claims Act.

ARGUMENT

I. THE ELEVENTH AMENDMENT DOES NOT BAR *QUI TAM* ACTIONS WHERE THE UNITED STATES IS THE REAL PARTY IN INTEREST.

Appellants Texas Tech University and Texas Tech Health Sciences Center (collectively "Texas Tech") seek to invoke the Eleventh Amendment to bar the United States' recovery of monies illicitly obtained by defrauding the federal Medicare and Medicaid programs. As both the court below and the Fourth Circuit have found, the Eleventh Amendment offers no refuge to States that commit fraud from *qui tam* actions brought under the False Claims Act, 31 U.S.C. §§ 3729-3733. *Qui tam* plaintiffs (or "relators") act on behalf of the United States in False Claims Act litigation, and the United States is at the outset, and remains throughout the litigation, the real party in interest. Thus, Eleventh Amendment immunity simply does

not attach. As the Fourth Circuit observed:

> [T]he structure of the *qui tam* procedure, the extensive benefit flowing to the government from any recovery, and the extensive power the government has to control the litigation weigh heavily against the . . . position [that Eleventh Amendment immunity applies].

U.S. ex rel. Milam v. The University of Texas M.D. Anderson Cancer Center, 961 F.2d 46, 49 (4th Cir. 1992).

A. The Eleventh Amendment Does Not Preclude *Qui Tam* Suits Brought on Behalf of the Federal Government Against a State.

Without question, the Eleventh Amendment does not prohibit suits brought by the Federal Government against a State. The Supreme Court has held repeatedly that "States have no sovereign immunity as against the Federal Government." West Virginia v. United States, 479 U.S. 305, 312, 107 S.Ct. 702, 727 (1987). See also United States v. Mississippi. 380 U.S. 128, 140, 85 S.Ct. 808, 814-815 ("nothing in the [Eleventh Amendment] or any other provision of the Constitution prevents or has been seriously supposed to prevent a State's being sued by the United States."); United States v. Texas. 143 U.S. 621, 646, 12 S.Ct. 488, 494 (1892) (by joining the Union, States have consented to appear in suits against the Federal Government). Indeed, the Court has recognized that the power of the United States to sue States is necessary to the "permanence of the Union." Id., 143

U.S. at 644-645, 12 S.Ct. at 493.

Qui tam actions brought under the False Claims Act are suits by the Federal Government. By definition,[1] a *qui tam* action is brought "on behalf of the King," a fact the False Claims Act specifically recognizes by requiring that *qui tam* actions be "brought in the name of the Government." 31 U.S.C. § 3730(b)(1). Moreover, *qui tam* actions under the False Claims Act are authorized only to recover funds wrongfully taken or withheld from the United States. The Government, not the *qui tam* plaintiff, suffers the "injury in fact" required for Article III standing. U.S. ex rel. Kreindler & Kreindler v. United Technologies Corp., 985 F.2d 1148, 1154 (2d Cir.), cert. denied, 508 U.S. 973, 113 S.Ct. 2962 (1993); U.S. ex rel. Milam, 961 F.2d at 49. And, of course, the vast majority of any money recovered by a *qui tam* plaintiff is returned to the United States Treasury. See 31 U.S.C. § 3730(d).

Even in cases where the Government elects not to intervene in a *qui tam* action, numerous provisions of the False Claims Act make plain that the claims alleged are truly those of the United States. First, even if the Government declines to intervene initially, it may do so at any time during the course of litigation, upon a showing of good cause, and assert its primary authority over the prosecution of the

[1] See Black's Law Dictionary 1251 (6th ed. 1990).

action. See 31 U.S.C. §3730(c)(3). Alternatively, the Government may seek to dismiss the action "notwithstanding the objections of the person initiating the action." Id., at § 3730(c)(2)(A). If the Government allows the relator to conduct the litigation on the United States' behalf, the Government still retains the right to be kept informed of any or all aspects of the proceedings. Id., at § 3730(c)(3). In addition, this Court recently held that the U.S. Attorney General always retains the right to object to a *qui tam* plaintiff's effort to dismiss a case in which the Government has declined to intervene or to object to any settlement proposed on the Government's behalf. Searcy v. Phillips Electronics North America Corp., 117 F.3d 154, 159-160 (5th Cir. 1997).

Thus, as this Court and every other circuit considering the question have recognized, the United States is the real party in interest in every False Claims Act case, even if the Government determines not to intervene. Id., 117 F.3d at 156. See also U.S. ex rel. Killingsworth v. Northrop Corp., 25 F.3d 715, 720 (9th Cir. 1994) ("in a *qui tam* action, the government is the real party in interest"); U.S. ex rel. Milam, 961 F.2d at 50 (4th Cir. 1992)("United States is the real party in interest in any False Claims Act suit, even where it permits a *qui tam* relator to pursue the action on its behalf."); Minotti v. Lensink, 895 F.2d 100, 104 (2d Cir. 1990) ("although *qui tam* actions allow individual citizens to initiate enforcement against

wrongdoers who cause injury to the public at large, the Government remains the real party in interest in any such action."); cf. U.S. ex rel. Hall v. Tribal Development Corp., 49 F.3d 1208, 1213 (7th Cir. 1995)("the United States is the real plaintiff in a *qui tam* action"). Once the courts have determined, as they unanimously have, that the United States is the real party in interest in a *qui tam* action, "it stands to reason that challenges to the standing of the government's representative are beside the point." U.S. ex rel. Berge v. Board of Trustees of the University of Alabama, 104 F.3d. 1453, 1457 (4th Cir.), cert. denied, 118 S.Ct. 301 (1997), quoting Hall, 49 F.3d at 1213.

The court below agreed, holding that "sovereign immunity" is unavailable as a defense in a *qui tam* action, even when the Federal Government has decided not to intervene. The trial court relied principally on the Fourth Circuit's decisions in Berge, 104 F.3d at 1453, and Milam, 961 F.2d at 46.[2] In Milam, the Fourth Circuit put Texas Tech's argument simply: "is this a suit by the United States?" The Court held that both the structure of the False Claims Act and the long history of *qui tam*

[2] As Appellants note, Texas Tech Brf. at 12, a panel of the Ninth Circuit came to a similar conclusion in a case that was later vacated on other grounds. See U.S. ex rel. Fine v. Chevron, U.S.A., Inc., et al., 39 F.3d 957, 962-63 (9th Cir. 1994), vacated *en banc*, 72 F.3d 740 (9th Cir. 1995), cert. denied, 116 S.Ct. 1877 (1996).

actions[3] lead inescapably to the conclusion that "the United States is the real party in interest in any False Claims Act suit, even where it permits a *qui tam* relator to pursue the action on its behalf." Having made that determination, the Court held that the "Eleventh Amendment immunity defense therefore evaporates." Id., at 50.

Texas Tech contends that the Fourth Circuit's analysis is flawed because the Court asked the wrong questions. According to Texas Tech, the Fourth Circuit failed to consider whether Congress plainly stated an intent to "abrogate" the Eleventh Amendment in the text of the False Claims Act and, if it did, whether it had the constitutional authority to do so. Texas Tech's argument places the cart before the horse. As the Fourth Circuit noted in Milam, where the United States is the real party in interest in litigation against a State, no *abrogation* of the Eleventh Amendment is necessary:

> We think this is a non-issue. Ordinarily, statutes authorizing suits in federal courts must explicitly displace a state's Eleventh Amendment immunity; silence leaves immunity intact. The False Claims Act is silent, but the states have no Eleventh Amendment immunity against the

[3] Use of *qui tam* provisions predates the founding of the Union. U.S. ex rel. Marcus Hess, 317 U.S. 537, 541 n.4, 63 S.Ct. 379, 83 n.4 (1943). Indeed, during the early years of the Union, such provisions were routine in federal and state legislation. See E. Caminker, The Constitutionality of *Qui Tam* Actions, 99 *Yale L.J.* 341, 342 & nn.2&3 (1989). Thus, while it is unknown when the first *qui tam* suit against a State was filed, it is beyond dispute that the concept that private persons could be recruited legislatively to represent the Government in litigation was well established at the time of the Constitutional Convention.

> United States *ab initio*. Therefore, there is no reason Congress would have displaced it in the False Claims Act.

Milam, 961 F.2d at 50 n.3.

Nor, in the absence of any need to abrogate the Eleventh Amendment, is there reason to establish that Congress would have had the authority to do so had the Amendment applied. Thus, Texas Tech's contentions notwithstanding, the Supreme Court's decision in Seminole Tribe of Florida v. Florida, 517 U.S. 609, 116 S.Ct. 114, 1129-1132 (1996), does not undermine the Fourth Circuit's analysis in the slightest. Indeed, the Fourth Circuit revisited the question of Eleventh Amendment immunity under the False Claims Act in light of Seminole and concluded that "Seminole does not change our view that Eleventh Amendment immunity is a red herring in these circumstances." Berge, 104 F.3d at 1457. According to the Court:

> Seminole's relevant holding here is its reconfirmation that Congress must use unequivocal statutory language if it intends to *abrogate* the sovereign immunity of states in suits brought by and for private parties . . . But as we already said in Milam, this is a non-issue in the False Claims Act context. . . . There is simply no question of abrogation of immunity here. Seminole certainly left intact what is beyond purview: that the federal government may sue states in federal court. . . . We affirm our reasoning in Milam: "[T]he states have no Eleventh Amendment immunity against the United States *ab initio*. Therefore, there is no reason Congress would have

displaced it in the False Claims Act."

Id., at 1458-59 (emphasis in original)(internal citations omitted).

Texas Tech's reliance on Seminole reflects a fundamental misconception of the nature of a *qui tam* action. The question is not, as Texas Tech suggests, one of delegation, but rather of representation. Under the False Claims Act, Congress has not delegated its authority to sue states to private persons for their personal benefit alone; Congress has invited whistleblowers to take action specifically in order to *benefit the Federal Government*.[4]

The difference between delegation and representative authority also

[4] Appellants seek to avoid the difficulty created for their position by the representative nature of *qui tam* plaintiffs' efforts by characterizing them as "private part[ies]" whose suits are "not brought at the instance of the United States." Texas Tech Brf. at 15. In key respects, Texas Tech's characterization simply is not true. While *qui tam* plaintiffs generally are not full-time employees of the United States, with respect to the role they play in initiating and prosecuting *qui tam* litigation they most certainly are acting on behalf of the United States, not as traditional "private parties." Moreover, they are doing so at "the instance of" Congress, which -- through the *qui tam* provisions of the FCA -- has both authorized and invited such representation of the United States' interests.

distinguishes the circumstances in *qui tam* litigation from those addressed in the Supreme Court's *dictum* in Blatchford v. Native Village of Noatak, 501 U.S. 775, 784, 111 S.Ct. 2578, 2584 (1991), cited by Texas Tech in support of its Eleventh Amendment argument. The question raised in Blatchford, was not whether the United States could empower private persons to act on the Government's behalf for purposes of pursuing the Federal Government's claims, but whether it could simply assign to an Indian tribe for the tribe's benefit alone the United States' power to sue States. Id., 501 U.S. at 785-86, 111 S.Ct. at 2584. Because the Court concluded that Congress never intended to make such a delegation in the statute at issue, it did not decide whether Congress has the authority to do so. Id. The Court's comments in *dictum* about whether States have consented to suit by "anyone the United States might select," id., take on a fundamentally different meaning in the context of litigation where wholly private interests -- and not interests of the United States itself -- are at issue.

Texas Tech's citation of this Court's recent decision in Matter of Estate of Fernandez, 123 F.3d 241 (5th Cir. 1997), amended on denial of rehearing, In the Matter of Fernandez, 130 F.3d 1138 (1997), is similarly flawed. In Fernandez, the issue before the Court was whether a private successor-in-interest to a judgment that had been obtained in favor of the Federal Deposit Insurance Corporation could, by

virtue of that purchase, "step[] into the shoes" of that federal agency in order to avoid the reach of the Eleventh Amendment. Id., 130 F.3d at 1138.[5] This Court held that a private successor to a property interest of the United States could not escape the Eleventh Amendment's restrictions on litigation against the States in that manner. The circumstances of Fernandez, however, bear little resemblance to *qui tam* litigation. The United States plainly is not the real party in interest in a claim involving property the Government already has sold. Thus, Fernandez does not touch at all upon the circumstance presented in a case in which private persons represent the Government in order to vindicate the Government's own claims.

At end, Texas Tech's position rests on a rejection of "real party in interest" analysis. Yet the Supreme Court has relied on precisely that standard to determine the reach of the Eleventh Amendment. See, e.g., Ford Motor Co. V. Department of Treasury on Indiana, 323 U.S. 459, 464, 65 S.Ct. 347, 350 (1945)("when an action is in essence one for recovery of money from the state, the state is the real, substan-

[5] While the analogy used in Fernandez of "stepping into the shoes of the United States" has been used to describe the relationship between a *qui tam* plaintiff and the United States, see, e.g., U.S. ex rel. Kelly v. Boeing Co., 9 F.3d 743, 748 (9th Cir. 1993), cert. denied, 510 U.S. 1140, 114 S.Ct. 1125 (1994), the similarity between Fernandez and a *qui tam* case ends there.

tial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants"). Moreover, as a state university, Texas Tech's own ability -- in a proper case -- to invoke Eleventh Amendment immunity of a "State" is founded on a "real party in interest" analysis closely akin to that which Texas Tech now criticizes. In Henry v. Texas Tech University, 466 F. Supp. 141, 145 (N.D. Tex. 1979), Judge Higginbotham applied the "real party in interest" standard outlined by this Court in Hander v. San Jacinto Junior College, 519 F.2d 273, 279 & n.4 (5th Cir. 1975), to determine that Texas Tech should be regarded as "an arm of the state" that is covered by the Eleventh Amendment rather than a mere "political subdivision" that is not. This Court has since cited the Henry decision and adopted its reasoning. See Wallace v. Texas Tech University, 80 F.3d 1042, 1047 n.3 (5th Cir. 1996).

Texas Tech cannot have it both ways. Having benefitted from Eleventh Amendment jurisprudence that goes beyond the literal text of the Amendment to determine the "real party in interest," Texas Tech cannot be heard to argue that a similar analysis should not be invoked to protect the sovereign interests of the United States.[6] And, unquestionably, it is the United States' interest in recovering

[6] Indeed, Texas Tech's very literal reading of the Eleventh Amendment would lead to absurd results. Texas Tech argues that, because *qui tam* plaintiffs are citizens and "citizens" are precluded from bringing suits against States under the Eleventh Amendment, *qui tam* actions are

money fraudulently obtained that is at issue in this *qui tam* action.

B. The United States Is a Real Party in Interest in a Section(h) Claim Included in a *Qui Tam* Complaint.

Texas Tech also seeks to overturn the district court's determination that the Eleventh Amendment does not bar 31 U.S.C. § 3730(h) retaliation claims that often are included in a *qui tam* plaintiff's complaint. As the trial court correctly observed below, the overriding purpose of Section(h) is protect the interest of the United States in uncovering and fighting fraud by protecting those who act on its behalf from retaliation for "lawful acts done . . . in furtherance of an action under [the False Claims Act]." Id. As applied to a *qui tam* plaintiff, the carefully tailored effect of

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barred. The word "citizen" in the Eleventh Amendment, however, must be construed with regard to the capacity in which an individual acts. The United States, like a corporation, can only act through individuals who represent it. U.S. ex rel. Hall v. Tribal Development Corp., 49 F.3d at 1213. If the fact that those representatives are also "citizens" of a State were enough automatically enough to disqualify them under the Eleventh Amendment from "commenc[ing]" or "prosecut[ing]" an action on behalf of the Federal Government against a State, it would be impossible in practice for the United States to exercise its right to sue States. Plainly, individuals representing the interests of the United States are permitted to commence and prosecute actions on behalf of the Federal Government even though they would not be permitted to do so with respect to their own purely private interests.

Section(h) is to protect the individual who has accepted Congress's invitation to act on the United States' behalf from retaliation for lawful acts taken to advance the United States' interests. Tying relief directly to the scope of services properly provided the United States highlights the Federal Government's direct interest in the vindication of the whistleblower's rights and distinguishes Section(h) litigation from other, more thoroughly private interests.

Without Section(h) protection, the *qui tam* provisions of the False Claims Act easily would be undermined. Employers seeking to prevent potential plaintiffs from bringing False Claims Act cases would be free to retaliate against those they suspect are investigating fraud. As the Senate Report that accompanied the 1986 amendments emphasized:

> [F]ew individuals will expose fraud if they fear their disclosure will lead to harassment, demotion, loss of employment, or any other form of retaliation. With the provisions in [Section(h)], the Committee seeks to halt companies and individuals from using the threat of economic retaliation to silence "whistleblowers", as well as assure those who may be considering exposing fraud that they are legally protected from retaliatory acts.

S. Rep. No. 99-345, at 34 (1986), reprinted in 1986 *United States Code of Congressional and Administrative News* 5262.[7] Thus, in order to meaningfully protect its

[7] Congress plainly intended the protection afforded by Section(h) to apply to retaliation by a State "employer" as well. Shortly after the passage quoted above, the Senate Report goes on to explain that the definitions of "employee" and "employer" under whistleblower protection pro-

own interest in encouraging those with knowledge of fraud against the United States to pursue False Claims Act cases, the Government must offer Section(h) protection.

Because Section(h) remedies predominantly serve the interest of the United States in fighting fraud against the Federal Government, the trial court correctly concluded that Eleventh Amendment immunity is not implicated. If, however, this Court concludes that -- notwithstanding the United State's overriding interest in the enforcement of Section(h) so as to protect individuals acting on its behalf -- the Eleventh Amendment applies to such claims unless expressly abrogated by the

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visions of the FCA are meant to be *"all-inclusive*" and that the term "employers" was meant to include *"public* as well as private sector entities." Id., at 34-35 (emphasis added). Cf. California v. United States, 320 U.S. 577, 586, 64 S.Ct. 352, 356 (1944)(holding that legislative history stating that the Shipping Act should apply "no less [to] public than [to] private owners" of water-front terminals shows congressional intent to hold cities and States accountable under that act).

language of the statute, Appellee agrees that no language explicitly abrogating the Eleventh Amendment appears in Section(h) of the Act.[8]

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[8] As noted above in footnote 7, however, the legislative history of Section(h) leaves no doubt that Congress intended the Act's whistleblower protection provisions to apply to state employers. While recognizing that this Court is bound by Supreme Court's requirement in Atascadero State Hospital v. Scanlon, 473 U.S. 234, 244, 105 S.Ct. 3142, 3148 (1985), that such specificity appear in the language of the statute itself to affect any necessary abrogation of Eleventh Amendment immunity, it is relator's belief that the four dissenting Justices in Atascadero correctly concluded that such a requirement is unwarranted where the language of the statute is couched in all-encompassing terms and Congress' specific intent to include public entities in the realm of potential defendants is manifest in legislative history of the Act. Id., 473 U.S. at 254-56, 105 S.Ct. at 3153-54 (Brennan, J., dissenting). Moreover, it is relator's view that, pursuant to the Supremacy Clause, Congress has the inherent authority to abrogate Eleventh Amendment immunity to protect those it has invited to act on the United States' behalf from retaliation by States for their efforts to combat fraud against the Federal Government.

Relator also believes that the four dissenting Justices in Atascadero correctly concluded that the Eleventh Amendment was originally intended only to address cases that come before the federal courts on the basis of diversity jurisdiction. Id., 473 U.S. at 289, 105 S.Ct. at 3171. Properly interpreted, the Amendment does not apply to any case that comes before the federal courts based on federal-question jurisdiction. Id.

II. STATES AND THEIR POLITICAL SUBDIVISIONS ARE "PERSONS" SUBJECT TO FALSE CLAIMS ACT LIABILITY.

Texas Tech asserts that States are not among the "person[s]" that can be held liable under the False Claims Act for defrauding the United States. Specifically, Texas Tech contends that because "person" is not defined in § 3729(a), and -- according to Texas Tech -- Congress never intended States to be included among those that could be held liable under the Act, neither *qui tam* plaintiffs nor the United States itself can sue States for False Claims Act violations. Texas Tech is wrong.

"[T]here is no hard and fast rule" that the term "person" should be construed to exclude States when it is used in federal statutes. See United States v. Cooper Corporation, 312 U.S. 600, 604-05, 61 S.Ct. 742, 743 (1941). Indeed, the term "person" has frequently been held to include States and their political subdivisions even where Congress did not define the term in a statute. See, e.g., Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 91-92, 55 S.Ct. 50, 53 (1934)("It has been held many times that the United States or a state is a 'person' within the meaning of statutory provisions applying only to persons."); Ohio v. Helvering, 292 U.S. 360, 371, 54 S.Ct. 725, 727 (1934) ("The state itself, when it becomes a dealer in intoxi-

cating liquors, falls within the reach of a tax either as a 'person' under the statutory extension of that word to include a corporation, or as a 'person' without regard to such extension."); California v. United States, 320 U.S. at 585, 64 S.Ct. at 356 (Oakland and California each held to be among "entities other than technical corporation, partnership and associations [that] are included among 'persons'" subject to Shipping Act); Plumbers' Union v. Door County, 359 U.S. 354, 359, 79 S.Ct. 844, 847 (1959)("This Court has many times held that

government bodies not expressly included in a federal statute may, nevertheless, be subject to the law.").

"[W]hether the word 'person' when used in a federal statute includes a State cannot be abstractly declared, but depends upon its legislative environment." Sims v. United States, 359 U.S. 108, 112, 79 S.Ct. 641, 645 (1959). If the purpose, subject matter, context, legislative history, or executive interpretation of the statute reveal such an intent, States and other sovereigns should be construed to fall within the meaning of the term. International Primate Protection League v. Administrators of Tulane Educational Fund, 500 U.S. 72, 83, 111 S.Ct. 1700, 1707 (1991); Cooper Corporation, 312 U.S. at 605, 61 S.Ct. at 744.

The "legislative environment" of the False Claims Act leaves no doubt that States are intended to be among the "persons" who can be held liable for defrauding the Federal Government. Every relevant factor leads to that conclusion.

A. The Purpose, Subject Matter and Legislative History of the False Claims Act Demonstrate that Congress Intended the Act to Reach States that Submit False Claims.

The Supreme Court "has repeatedly recognized that the authoritative source of legislative intent lies in the Committee Reports on the bill." Thornburg v. Gingles, 478 U.S. 30, 44 n.7, 106 S.Ct. 2752, 2762 n.7 (1986). When the False Claims Act was substantially amended in 1986, Congress unequivocally expressed

its understanding and intention that the liability provisions of the Act apply to States as well as to any other recipient of federal funds. The Senate Report that accompanied those amendments specifically noted:

> "The False Claims Act reaches *all* parties who may submit false claims. The term 'person' is used in its broad sense to include partnerships, associations, and corporations ... *as well as States and political subdivisions thereof*."

S. Rep. No. 99-345, at 8 (emphasis added, internal citations omitted). This statement of the reach of the statute is entirely consistent with the broad remedial purpose of the Act. In addition, the Senate Report "strongly endorse[d]" the opinion offered by the Supreme Court in United States v. Neifert-White Co., 390 U.S. 228, 232, 88 S.Ct. 959, 961 (1968), that, since its inception, the False Claims Act "was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." S. Rep. No. 99-345, at 19. Indeed, the primary purpose Congress expressed for overhauling the statute in 1986 was to make it a more effective tool for redressing and deterring fraudulent claims that permeate "all Government programs" ranging from welfare and food stamp benefits, to multibillion dollar defense procurements, to crop subsidies and disaster relief programs, to Medicare and Medicaid programs. Id., at 2-3, 21.

In light of Senate Report No. 99-345, it is not surprising that Texas Tech and its supporting *amici* seek to ignore or discredit this unequivocal legislative history. Without even acknowledging the existence of Senate Report No. 99-345, Texas Tech seeks to jerry-rig a rule of law that precludes the Court even from considering it. While *amici* more candidly note the relevant language of the Senate Report, they also seek to avoid its obvious implications by suggesting that the Report is simply wrong. Neither position withstands scrutiny.

In an argument joined by the Association of American Medical Colleges, Texas Tech contends that the Supreme Court's ruling in Will v. Michigan Dept. of State Police, 491 U.S. 58, 109 S.Ct. 2304 (1989), "requires that Congress make its intent 'unmistakably clear *in the language of the statute*' if it intends to subject a state to liability." Texas Tech Brf. at 23, quoting Will, 491 U.S. at 65, 109 S.Ct. at 2309 (emphasis added). In fact, no such broad-based restriction has ever been imposed on Congress. Texas Tech conveniently omits key language from its quotation which demonstrates that Will's discussion of the "clear statement" rule is a mere reference to the uniquely high standard for abrogating the Eleventh Amendment that was established in Atascadero State Hospital v. Scanlon, 473 U.S. at 242,

105 S.Ct. at 3147.[9] Read in their entirety, the relevant passages of Atascadero and Will plainly limit the requirement that congressional intent be unmistakably clear "in the language of the statute" to circumstances in which Congress intends *"to alter the 'usual constitutional balance* between States and the Federal Government.'" Will, 491 U.S. at 65, 109 S.Ct. at 230, quoting Atascadero, 473 U.S. at 242, 105 S.Ct. at 3147 (emphasis added). Indeed, the Supreme Court has expressly disavowed the notion that Will extended the requirement set forth in Atascedero to apply where the issue to be determined is one of statutory construction and not one of altering the constitutional balance between States and the Federal Government. See Hilton v.

[9] See also, Atascadero, 473 U.S. at 253-54, 105 S.Ct. at 3152-53 (Brennan, J., dissenting)(majority in Atascadero creates, solely with respect to abrogating the Eleventh Amendment, a uniquely high hurdle for Congress to overcome in making its legislative intent manifest).

South Carolina Public Railways Com'n, 502 U.S. 197, 205-206, 112 S.Ct. 560, 565-566 (1991).[10]

[10] To be sure, the issue before the Will Court was whether the term "person" as used in 42 U.S.C. § 1983 was intended to include a State. The Supreme Court had already determined that no abrogation of the Eleventh Amendment had occurred. See Will, 491 U.S. at 63, 109 S.Ct. at 2308, citing Quern v. Jordan, 440 U.S. 332, 99 S.Ct. 1139 (1979). Will does not, however, suggest that the language of the statute is the only relevant measure of congressional intent. As noted by the Supreme Court in Hilton, 502 U.S. at 205, 112 S.Ct. at 565, the lack of any clear statement in the language of § 1983 was just one of several factors noted in Will that indicated Congress had never intended to include States as "persons" liable under § 1983. Another factor given substantial weight was the lack of any indication in the legislative history of §1983 that Congress intended that statute to apply to States. Will, 491 U.S. at 68-69, 109 S.Ct. at 2310-11. As noted above, in contrast to that accompanying the § 1983, the legislative history of the False Claims Act clearly shows that Congress understood and intended for States to be among the "persons" who might be held liable.

As explained fully above, the *qui tam* provisions of the False Claims Act do not "alter the usual constitutional balance between States and the Federal Government." Whether it initiates a suit itself or permits a *qui tam* plaintiff to proceed on its behalf, the United States is *always* the real party in interest in False Claims Act action and, since the inception of the Union, has had the inherent right to sue States for violating federal law. There is thus no basis to limit the means of ascertaining Congress's intent with respect to potential State liability under the Act to "unmistakably clear" language in the text of the Act itself.[11]

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[11] Texas Tech is flatly wrong when it argues that Congress is required to make its intent clear in the text of a statute whenever it seeks to impose potential liability on States. See Texas Tech Brf. at 23, citing Michigan v. United States, 40 F.3d 817, 824 (6th Cir. 1994)(addressing whether general federal income tax provisions were intended to apply to investment income realized by public colleges and universities). Such an interpretation ignores the qualifying language contained in Atascadero and Will that is discussed above, as well as the Supreme Court's disavowal in Hilton of any such general restriction on ordinary rules of statutory construction.

In Michigan, moreover, the court did not purport to adopt Atascadero's requirement that Congress make its intent unmistakably clear in the language of the statute. It cited Atascadero only as setting forth a special rule of construction "comparable" to the "plain statement rule" it proposed to apply to the tax issue before it. 40 F.3d at 824. In determining to apply a "plain statement" rule to tax cases, the Michigan court was influenced by the history of Supreme Court jurisprudence that had, until 1946, considered it *unconstitutional* to assess federal taxes against public instrumentalities of a state if the functions being performed were governmental rather than proprietary or business oriented. Id. at 822-23. Indeed, the standard the Michigan court actually adopted was one Justice Rutledge had urged on the Supreme Court in his concurrence to the plurality opinion that abandoned the governmental function/ proprietary function test which had previously been used to determine whether application of a federal tax to a state entity was constitutional. Id. at 822-24, citing New York v. United States, 326 U.S. 572, 66 S.Ct. 310 (1946). With respect to the tax field, there thus has been a change in what was once "the usual constitutional balance between States and the Federal Government" that might warrant application of some version of a "plain statement" rule to insure Congress intended to tax investment income of State entities. (The Michigan court had no occasion to address whether any such plain

statement must appear in the language of the relevant tax statute or whether it could appear in legislative history of the act.) Because, however, no such change in constitutional balance is at issue with respect to the United States' right to recover against States under False Claims Act, there is no reason to deviate from normal principals of statutory construction to determine the reach of that Act.

Adopting a somewhat different tack, Texas Tech's supporting *amici* contend that Congress was mistaken in its understanding of the reach of the False Claims Act prior to its 1986 amendments. Their argument is based on *amici's* observation that the three cases cited in Senate Report No. 99-345 in support of the conclusion that the False Claims Act applies to States were not False Claims Act matters. That fact, however, provides no basis to conclude that Congress misunderstood the proper scope of its own law. The cases cited in the Senate Report were never represented to be False Claims Act decisions, but rather "cf." citations demonstrating that, where appropriate to fully implement the remedial purposes of an act, the term "person" is properly construed to include States and their political subdivisions. See Ohio v. Helvering, 292 U.S. at 370, 54 S.Ct. at 727 (a State is a liable "person" where its activity in selling liquor brings its conduct within area of concern of federal statute); Georgia v. Evans, 316 U.S. 159, 161-62, 62 S.Ct. 972, 973-74 (1942)(state victim is a "person" under terms of the antitrust laws where harm it suffers from an antitrust violation is the same as that suffered by private persons); Monell v. Department of Social Services of City of New York, 436 U.S. 658, 690, 98 S.Ct. 2018, 2035 (1978)(local governments are accountable "persons" under § 1983 where they violate the policies underlying that act). In light of the False

Claims Act's broad-based objective of fighting *all* types of fraud against the United States, the cited cases fully support application of the term to cover any state entity that engages in such misconduct. Indeed, the Supreme Court has concluded that States *must* be considered "persons" within the meaning of a statute if "its plain purposes preclude their exclusion." California v. United States, 320 U.S. at 585, 64 S.Ct. at 356.

Amici for Texas Tech finally assert that Senate Report No. 99-345 is irrelevant with respect to the meaning of "person" because it reflects only the understanding Congress had in 1986 as to the previous scope of the Act it was amending. According to *amici,* it is only the intent of the Civil War Congress that first enacted the False Claims Act that matters. First, as noted above, in light of the broad remedial purposes that have always formed the foundation of the False Claims Act, Congress's interpretation in 1986 of the prior reach of the Act is entirely sound. More fundamentally, however, *amici* are simply wrong in asserting that the intent and understanding of the Congress that amended the statute is unimportant. In fact, it is controlling.

In 1986, Congress dramatically reworked the FCA so as to maximize its

effectiveness in fighting fraud.[12] As part of its overhaul of the Act, Congress made adjustments to the very provision of the Act at issue here -- which persons might be held liable for fraud -- by narrowing the exclusion that had previously existed for members of the armed forces and by adding new exclusions (under some circumstances) for Members of Congress, members of the Judiciary, and senior executive branch officials. See Senate Report No. 99-345, at 39, 43; 31 U.S.C. § 3730(e). Although it obviously could, Congress did not provide any similar sort of exclusion for States. That decision is significant.

The Supreme Court has noted repeatedly that where, in making major changes to a statute, Congress does not seek to overturn an interpretation it knows the courts have applied to retained provisions of pre-existing legislation, it can be inferred that Congress has ratified the courts' interpretation of that aspect of the law. See, e.g., Herman & MacLean v. Huddleston, 459 U.S. 375, 385-86,103 S.Ct. 683, 688-89 (1983); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S.

[12] "Beginning in 1985 and ending in 1986, Congress undertook a major overhaul of the False Claims Act, covering both the substantive and the *qui tam* provisions." Robert Salcido, Screening Out Unworthy Whistleblower Actions: An Historical analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act, 24 *Pub. Contract L.J.* No. 2 (Winter 1995), 250 (citations omitted). See also S. Rep. No. 99-345, *passim*.

353, 381-82 & n.66, 102 S.Ct. 1825, 1841 & n.66 (1982). A similar inference has been drawn where, in substantially reenacting laws, Congress did not seek to overturn prior administrative interpretations of existing provisions. See, e.g., Zemel v. Rusk, 381 U.S. 1, 11-12, 85 S.Ct. 1271, 1278 (1965). There is no reason to afford any less weight to Congress's decision to leave intact its *own* interpretation of the reach of a statute that it has comprehensively reviewed and has otherwise substantially amended.

When Congress overhauled the False Claims Act in 1986, it specifically addressed the definition of liable "persons" under the Act and reaffirmed the inclusive reach of that term. The intent of Congress in 1986 is manifest and controlling.

B. The Language and Statutory Framework and Executive Interpretation of the False Claims Act Demonstrate that "Person[s]" Include States.

The explicit reference to States and their political subdivisions in the Senate Report coupled with the broadly-stated purpose of the Act to reach *all* fraud against the United States are the clearest indication of congressional intent to hold States liable for any fraud they commit. They are by no means, however, the only aspects of the "legislative environment" of the False Claims Act that support that conclusion. Congress's intent to define "person" to include States is evidenced as

well by the text and statutory framework of the Act.

As noted above, although the amended statute specifically provides certain categories of persons partial exclusions from liability under the Act, see 31 U.S.C. § 3730(e)(relating to certain *qui tam* actions), it does not include States or their political subdivisions among the excluded groups. Moreover, the narrow limitations Congress placed on the exclusions it granted military personnel and certain high-ranking federal officials[13] to False Claims Act liability serve only to underscore the breadth of the Act. If Congress was willing, with only limited restrictions, to extend False Claims Act liability to members of the military, Members of Congress, members of the Judiciary, and senior executive branch officials in the Federal Government, there is no reason to presume that it intended to give States and their political subdivisions any greater leeway in defrauding the Federal Government.

The provision of the False Claims Act that was added in 1986 to authorize

[13] The exclusion for members of the armed forces relates only to actions brought against them by other former or present members of the armed forces for claims arising out of service in the armed forces. See 31 U.S.C. § 3730(e)(1). Members of Congress and members of the judiciary are immune only from *qui tam* actions. Id., § 3730(e)(2). And senior executive branch officials are granted an exclusion only with respect to *qui tam* actions that are "based on evidence or information already known to the Government when the action was brought." Id.

civil investigative demands ("CIDs") also confirms that States and their political subdivisions may be held liable under the statute. In 31 U.S.C. § 3733(l)(4), "person" is defined to include "any State or political subdivision of a State." While Texas Tech argues that the inclusion of the phrase "[f]or purposes of this section" at the beginning of the definitions set forth in § 3733(l) indicates that Congress intended the definition of "persons" to be different for CIDs than for the liability provisions of the Act, see Texas Tech Brf. at 24, reviewing the legislative history of § 3733 reveals that precisely the opposite is true.

In explaining the CID provisions that were added to the False Claims Act in 1986, Senate Report No. 99-345 notes that the provisions of § 3733 are "nearly identical" to CID authority that had already been granted the Antitrust Division of the Department of Justice under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, and that it was intended that "the legislative history and case law interpreting that statute (15 U.S.C. [§§] 1311-14), fully apply to this bill." Id., at 33. Where Congress explicitly intends precedent interpreting one statute to control another, its decision to have the language in the newer bill track that of the older law as closely as possible is only prudent. Moreover, where Congress has announced such an objective, substantive variations from the prior statute that are introduced in the new law must be understood to indicate areas in which Congress intended to deviate

from the standards that apply under the older statute. See, e.g., Lorillard v. Pons, 434 U.S. 575, 581-82, 98 S.Ct. 866, 870-71 (1978)(noting importance in ascertaining legislative intent of examining where Congress incorporated the text of an older statute verbatim and where it made changes to the language that had been used in the prior legislation).

It is thus noteworthy that one of the ways that the CID provisions of the False Claims Act deviate substantively from their antitrust predecessor is their inclusion of States and States' political subdivisions within the definition of the term "person." Because antitrust CID law does not include state entities within its definition of a "person," Congress's specific decision to add States and their political subdivisions to definition of "person" in § 3733 *conforms* -- rather than distinguishes -- the use of that term in § 3733 to Congress's understanding of the term "person" in the liability provisions of the Act.[14]

[14] The intended connection between the CID section of the False Claims Act and pre-existing antitrust legislation also clarifies why Congress included of the phrase "[f]or purposes of this section" as an introduction to the definitions contained in § 3733. The phrase tracks the substantively identical passage introducing definitions in the chapter of the Antitrust Act dedicated to CIDs, see 15 U.S.C. § 1311, and thus simply carries forward Congress's stated plan to model

the language and meaning of the FCA's new CID provisions wherever possible directly upon the language used in their antitrust predecessor.

An additional weakness of Texas Tech's analysis regarding how to interpret Congress's decision to include a definition of "person" in the CID provisions of the False Claims Act is the fact that the term is used within those provisions to refer both to "person[s]" to whom CIDs might be served and to "person[s] . . . engaged in any violation of a false claims law." See 31 U.S.C. 3733(l)(2). Section 3733(l)(2) defines the term "false claims act investigation" as "any inquiry conducted by any false claims act investigator for purposes of ascertaining whether any *person* is or has been engaged in any violation of a false claims law." (Emphasis added.) Thus, read in its entirety, § 3733 indicates that States and their political subdivisions may be both recipients of CID requests and entities whose knowing submission of false claims to the United States can result in liability under the FCA. Such a reading of § 3733 is consistent with Senate Report No. 99-345 and with the broad remedial purpose of the Act to reach "all types of fraud, without qualification, that might result in financial loss to the Government." Id., at 19; Niefert-White Co., 390 U.S. at 232, 88 S.Ct. at 961.

In contrast, to sustain Texas Tech's position, this Court would need to conclude that Congress "got it wrong" twice -- first, when it stated in the legislative history of the False Claims Act that it intended to include States among the "persons" whose fraud could be remedied under the Act, and again when it included

the term "person" in its definition of a "false claims law investigation" under § 3733. Where rational alternatives exist, this Court should not adopt a reading of a statute that assumes that Congress was sloppy or ill-informed. In interpreting the law, it is the role of courts "to make sense rather than nonsense out of the *corpus juris*." West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83, 101, 111 S.Ct. 1138, 1148 (1991).

Other aspects of the "legislative environment" demonstrate further that Congress intended to include States in the definition of a "person." In addition to using the term to define who can be held liable under the Act and to whom CID requests might be directed, the False Claims Act also uses the term "person" to define who is eligible to act as a *qui tam* plaintiff in such actions. No one denies States' right to act as *qui tam* relators under the Act. See, e.g., U.S. ex rel. Woodard and State of Colorado v. County View Care Center, Inc., 797 F.2d 888 (10th Cir. 1986); U.S. ex rel. Wisconsin v. Dean, 729 F.2d 1100 (7th Cir. 1984). Indeed, when the 1986 Amendments were drafted, Congress expressly acknowledge that fact and acted upon the request of the National Association of Attorneys General to overrule a lower court ruling that the States believed unduly restricted their ability to bring *qui tam* suits under the Act. See S. Rep. No. 99-345, at 12-13. "Identical words used in different parts of the same statute are intended to have the same

meaning." Commissioner v. Lundy, 516 U.S. 235, ___, 116 S.Ct. 647, 655 (1996).

Having successfully urged Congress to strengthen their standing as "persons" for purposes of reaping the rewards of filing *qui tam* actions under the False Claims Act, it is disingenuous for States now to argue that the one and only time they should be excluded from the definition of a "person" in the False Claims Act is when the term is used to refer to those who may be held responsible for having defrauded the Federal Government.

A final factor favoring inclusion of States within the definition of "person" under the Act is the fact -- evidenced by its intervention and position on this and other appeals -- that the Department of Justice has consistently interpreted the statute in that manner. See Cooper Corporation, 312 U.S. at 605, 61 S.Ct. at 744 (listing "executive interpretation of the statute" among the relevant considerations). The Department's position reflects sound public policy and a common sense view of congressional intent. Federal grants to state and local governments have risen from a reported $2.4 billion in 1950,[15] to about $108 billion in 1987, to approximately $228 billion in 1996.[16] To exclude States from the reach of the Act would

[15] See D. Cantelme, Federal Grant Programs to State and Local Governments, 25 *Pub. Cont. L.J.* 335-336 (1996).

[16] Bureau of the Census, U.S. Dept. of Commerce, Publication FES/96, Table 11, "Federal Expenditures by State for Fiscal Year, 1996" 46 (1997). These amounts do not include

dramatically undermine the ability of the United States to protect the federal fisc.

It also would be wholly illogical to interpret the False Claims Act to exempt state institutions from liability when the Unites States has already successfully prosecuted a private institution for the same fraudulent practices. Yet that will be the result if Texas Tech's interpretation of the False Claims Act prevails. In December 1995, the United States announced the settlement of a False Claims Act suit against the University of Pennsylvania, a private nonprofit corporation, for $30 million. The misconduct charged against the University of Pennsylvania was essentially the same as that Texas Tech is alleged to have committed in this matter. Thus, in Texas Tech's view, Congress intended to subject private institutions to False Claims Act liability but to exempt state institutions, even though both engaged in the same fraudulent practices. A more sensible and sound reading of the statute is that Congress intended the False Claims Act to ferret out and fight fraud against the United States wherever it occurs.

C. Congress's Clear Intent to Include States as Liable "Person[s]" Under the False Claims Act Should Not Be Overridden.

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federal funds other than grants received by state agencies, such as contracts.

In light of the overwhelming evidence that Congress intends False Claims Act liability to extend to the wrongdoing of States and state entities, the other arguments Texas Tech and state *amici* offer in support of their position are entitled to no weight. It is irrelevant that, in passing the Program Fraud an Civil Penalties Act ("PFCPA") and the Anti-Kickback Act of 1986,[17] Congress elected to include a definition of "person" that does not include States. See, e.g., Texas Tech Brf at 25-26. Although the PFCPA provides an administrative compliment to the False Claims Act, it was not intended to be co-extensive with it. See Senate Report 99-212, at 4-5, 34 (1985)(PFCPA procedures for adjudicating program fraud claims apply only to "small-dollar" claims; larger dollar claims "should be prosecuted in court" under the FCA). Thus, far from suggesting that courts are free to ignore Congress's stated intent that False Claims Act liability should extend to States, the fact that a narrower definition was added to the text of PFCPA merely confirms the more limited circumstances in which Congress believed reliance on administrative procedures was appropriate. Likewise, the fact that the definition of "person" under

[17] The PFCPA permits federal agencies that are victims of false claims to proceed administratively to recover damages where the amount in controversy is less than $150,000 and where the Department of Justice has elected not to pursue the matter in federal court under the provisions of the False Claims Act. See 31 U.S.C. § 380, *et seq*. The Anti-Kickback Act of 1986 makes it unlawful for government contractors to pay, solicit, or charge the Federal Government for kickbacks associated with the bidding or performance of federal government contracts See 41 U.S.C. § 51, *et seq.*

the Anti-Kickback Act is narrower than under the False Claims Act provides no basis whatsoever to ignore the clear statement of congressional intent that States may be held liable under the broader provisions of the FCA.[18]

Nor can the reluctance Texas Tech attributes to courts with respect to imposing punitive damages on States justify overriding Congress's intent to include them among the "persons" subject to the False Claims Act. As the Supreme Court has discussed at length, the multiple damages and civil penalty provisions of the False Claims Act are not "punitive damages" but rather "rough remedial justice." United States v. Halper, 490 U.S. 435, 446, 109 S.Ct. 1892, 1900 (1989), abrogated in other respects, Hudson v. United States, 118 S.Ct. 488 (1997); see also United States v. Bornstein, 423 U.S. 303, 314-15, 96 S.Ct. 523, 530 (1976)(purpose of FCA remedies is to make government completely whole); U.S. ex rel. Marcus v. Hess, 317 U.S. at 551-52, 63 S.Ct. at 388 (same); United States v. Brekke, 97 F.3d 1043, 1048 (8th Cir. 1996), cert. denied, 117 S.Ct. 1281 (1997). There is no basis

[18] Section 1 of the United States Code-Rules of Construction also requires no different result. The definition of "person" included in 1 U.S.C. § 1 is one to be used by default only where the context of a particular statute does not indicate otherwise. The Supreme Court has never applied that section to override a different definition of the term that the "legislative environment" shows Congress intended to apply with respect to a specific statute.

to treat States differently than any other entity that knowingly defrauds the United States.

CONCLUSION

For the reasons set forth above, Appellee Carol Rae Cooper Foulds respectfully requests that the judgment of the trial court be affirmed in all respects and that this matter be remanded for discovery and trial.

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CERTIFICATE OF COMPLIANCE

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