

GINSBURG, J., concurring in judgment

SUPREME COURT OF THE UNITED STATES

No. 98–1828

VERMONT AGENCY OF NATURAL RESOURCES,
PETITIONER v. UNITED STATES
EX REL. STEVENS

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

[May 22, 2000]

JUSTICE GINSBURG, with whom JUSTICE BREYER joins,
concurring in the judgment.

I join the Court’s judgment and here state the extent to
which I subscribe to the Court’s opinion.

I agree with the Court that the *qui tam* relator is prop-
erly regarded as an assignee of a portion of the Govern-
ment’s claim for damages. See *ante*, at 6. And I agree,
most vitally, that “Article III’s restriction of the judicial
power to ‘Cases’ and ‘Controversies’ is properly understood
to mean ‘cases and controversies of the sort traditionally
amenable to, and resolved by, the judicial process.’” *Ante*,
at 7. On that key matter, I again agree that history’s
pages place the *qui tam* suit safely within the “case” or
“controversy” category. See *ante*, at 7–11.

In *Steel Co. v. Citizens for Better Environment*, 523 U. S.
83 (1998), I reasoned that if Congress did not authorize a
citizen suit, a court should dismiss the citizen suitor’s
complaint without opining “on the constitutionality of
what Congress might have done, but did not do.” *Id.*, at
134 (opinion concurring in judgment). I therefore agree
that the Court properly turns first to the statutory ques-
tion here presented: Did Congress authorize *qui tam* suits
against the States. Concluding that Congress did not
authorize such suits, the Court has no cause to engage in

an Eleventh Amendment inquiry, and appropriately leaves that issue open.

I do not find in the False Claims Act any clear statement subjecting the States to *qui tam* suits brought by private parties, and therefore concur in the Court’s resolution of the statutory question. See *ante*, at 21. I note, however, that the clear statement rule applied to private suits against a State has not been applied when the United States is the plaintiff. See, e.g., *Sims v. United States*, 359 U. S. 108, 112 (1959) (state agency ranks as a “person” subject to suit by the United States under federal tax levy provision); *United States v. California*, 297 U. S. 175, 186–187 (1936) (state-owned railway ranks as a “common carrier” under Federal Safety Appliance Act subject suit for penalties by the United States). I read the Court’s decision to leave open the question whether the word “person” encompasses States when the United States itself sues under the False Claims Act.