

[SCHEDULED FOR ORAL ARGUMENT ON FEBRUARY 12, 2002]

No. 01-5092

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA *ex rel.* JAMES C. WOOD, JR.,
Plaintiff/Appellant,

v.

THE AMERICAN INSTITUTE IN TAIWAN,
Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE DEFENDANT/APPELLEE

ROSCOE C. HOWARD, JR.
United States Attorney

ROBERT D. McCALLUM, JR.
Assistant Attorney General

R. CRAIG LAWRENCE
LYDIA KAY GRIGGSBY
Assistant United States Attorneys

DOUGLAS N. LETTER
(202) 514-3602
*Appellate Litigation Counsel
Civil Division, Room 9106
U.S. Department of Justice
601 D St., N.W.
Washington, D.C. 20530-0001*

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. Parties

The parties appearing before the district court and this Court were all listed in the brief of the appellant

II. Rulings Under Review

References to the ruling at issue appear in the appellant's brief.

III. Related Cases

This case has not previously been before this Court.

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GLOSSARY

“The American Institute” and “AIT” refer to the American Institute in Taiwan

**STATEMENT OF DISTRICT COURT
AND APPELLATE JURISDICTION**

The plaintiff asserted district court jurisdiction under 28 U.S.C. § 1331. As explained in this brief, we believe that the district court correctly ruled that it lacked jurisdiction. The district court entered final judgment on February 28, 2001. A timely

notice of appeal was filed on March 21, 2001. App. Tab 1, at 5.¹ This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Under the *qui tam* provisions of the False Claims Act (31 U.S.C. § 3730), a private person (known as a “relator”) may file an action for himself and for the United States against a defendant that has submitted false claims to the Government. Such an action is based solely on an injury to the United States. This appeal arises out of a *qui tam* action brought for an alleged injury against the United States Government assertedly caused by fraud of the American Institute in Taiwan, an entity created by Congress following the severance of diplomatic relations with the Republic of China, to operate under the direction of the President to carry on the commercial, cultural, and other relations between Taiwan and the United States.

This appeal raises the following questions:

1. Whether the district court had Article III jurisdiction over a False Claims Act action in which the Executive is on both sides of the case because the suit has been brought for alleged injury to the United States and against an entity that operates under the control of the President of the United States.

¹ “App. ___” citations refer to the Appendix filed by the appellant in this Court with his opening brief.

2. Whether the district court correctly dismissed this action because it found no intent by Congress to waive sovereign immunity for suits against the defendant American Institute in Taiwan.

3. Whether there is no cause of action here as a matter of law because the American Institute in Taiwan is not a “person” that Congress intended to be liable under the False Claims Act.

STATEMENT OF THE CASE

A. Nature of the Case

As noted above, under the False Claims Act (31 U.S.C. § 3730(b)), a *qui tam* relator may file an action for himself and for the United States in order to recover for injury to the United States. The relator here, plaintiff/appellant James C. Wood, Jr., was a political appointee who served as the Managing Director and Chairman of the Board of Trustees of the defendant/appellee American Institute in Taiwan (hereafter “the American Institute” or “AIT”). Following his resignation from that position, as requested by then-Secretary of State Warren Christopher, Wood brought this suit against the American Institute because he alleged that this entity had committed fraud against the U.S. Treasury.

Wood's allegations were investigated by the Department of State and the Department of Justice, and the Government declined to intervene to take over the

litigation. As is permitted by the statute, Wood decided nevertheless to prosecute the case alone.

The Government moved to dismiss Wood's action because: (1) the district court lacked Article III jurisdiction since entities under the control of the President were on both sides of the litigation; (2) Congress had not waived sovereign immunity to allow this suit against the American Institute; and (3) pursuit of this action was contrary to the interests of the United States. Wood opposed this motion, but the district court granted it, dismissing the action. The court held that Congress had not waived sovereign immunity to allow this suit against the American Institute. Wood appeals from that decision.

II. Statement Of The Facts

A. The Taiwan Relations Act and the Establishment and Operation of the American Institute in Taiwan

The Taiwan Relations Act (22 U.S.C. §§ 3301, *et seq.*), which established the American Institute, is at the heart of this case, and an understanding of its development and its terms is therefore essential for this appeal. This statute grew out of the peculiar relationship among the United States, Taiwan, and the People's Republic of China.

1. The American Institute is a unique entity created by statute in 1979, so that the United States Government can manage its relations with Taiwan (recognized by some as the “Republic of China”) after it recognized the People’s Republic of China as the sole legal government of China, each of which for years (prior to the creation of the American Institute, as well as thereafter) claimed to be the sole legitimate government of China and the Chinese people. (Taiwan is the principal area administered by the “Republic of China” since it abandoned the mainland of China in 1949.)

Although the United States had officially recognized the “Republic of China” as the sole legal government of China since 1913, United States foreign policy changed in this regard in the 1970s, when the People's Republic gained acceptance elsewhere in the world as the legal government of China. In 1971, the United Nations admitted delegates from the People's Republic to the seats reserved for China in the General Assembly and the Security Council, and those from the Republic of China walked out. By the late 1960’s, the United States had begun to pursue a policy of closer relations with the People's Republic. See *New York Chinese TV Programs v. U.E. Enterprises*, 954 F.2d 847, 850-51 (2d Cir.) (describing development of U.S. recognition of the People’s Republic of China), *cert. denied*, 506 U.S. 827 (1992).

The process of normalizing relations between the United States and the People's Republic first attracted public attention with President Nixon's visit to China in 1972, which resulted in the Shanghai Communique. See *Goldwater v. Carter*, 617 F.2d 697, 700 (D.C. Cir.) (describing these events), *vacated on other grounds*, 444 U.S. 996 (1979). In that joint policy statement, the People's Republic insisted that "the Taiwan question is the critical question obstructing the normalization of relations between China and the United States." It called on the U.S. to withdraw United States military units and installations from Taiwan. *Goldwater*, 617 F.2d at 700.

Closer ties between the United States and the People's Republic continued to develop until, in December 1978, President Carter announced that the United States would recognize that entity as the sole legal government of China. President Carter also announced that the United States would simultaneously withdraw its official recognition of the Republic of China as the sole legal government of China. We announced at that time our intention to maintain unofficial relations with Taiwan.

This action placed the United States in a very delicate and awkward foreign relations posture, which continues to this day. See *New York Chinese TV Programs*, 954 F.2d at 850 ("Recognition of the [People's Republic], of course, enveloped the [Republic of China] in a diplomatic fog").

While severing official ties with the Republic of China, Congress and the President nevertheless wished to “maintain peace, security, and stability in the Western Pacific * * *.” 22 U.S.C. § 3301(a)(1). The United States sought “to promote the foreign policy of the United States” by ensuring “the continuation of commercial, cultural, and other relations between the people of the United States and the people on Taiwan.” 22 U.S.C. § 3301(a)(2). See *Mingtai Fire & Marine Insurance Co., Ltd. v. United Parcel Service*, 177 F.3d 1142,1145 (9th Cir.), *cert. denied*, 528 U.S. 951 (1999). By establishing diplomatic relations with the People's Republic and unofficial relations with Taiwan, the United States could effectively manage its dealings with both entities, while maintaining a “one China” policy, essential to peace and stability in the region.

Thus, there is no United States ambassador or embassy in Taiwan, and no formal government-to-government relations between the United States and Taiwan. Rather, as explained next, the extensive relations between the United States and Taiwan are carried out through the American Institute in Taiwan, a truly unique institution designed to promote United States interests in Taiwan.

2. The Taiwan Relations Act established the statutory framework for relations with the people on Taiwan. Through this statute, the United States created the American Institute, as a nonprofit corporation. As this Court has explained, the

American Institute was meant as a means by which “[r]elations between the United States Government and the authorities on Taiwan are conducted * * *.” *Goldwater*, 617 F.2d at 700 n.3 (citing the Taiwan Relations Act).

Accordingly, as a result of foreign policy necessity, the American Institute was created by Congress and the President as a “nonprofit corporation incorporated under the laws of the District of Columbia” (see 22 U.S.C. § 3305(a)(1)).² This entity serves as the mechanism by which the United States Government can maintain an effective substantive relationship with the authorities on Taiwan while at the same time enabling diplomatic relations with the People’s Republic of China. Indeed, President Carter directed that “[e]xisting international agreements and arrangements in force between the United States and Taiwan shall continue in force and shall be performed and enforced by departments and agencies beginning January 1, 1979, in accordance with their terms and, as appropriate, through [the American Institute].” *Relations With the People on Taiwan, Memorandum for All Departments and Agencies*,

² The legislative history of the Taiwan Relations Act reveals that a conference substitute bill expressly rejected a proposed Senate amendment that would have stated that the American Institute shall not be an agency or instrumentality of the United States; Congress instead provided merely that the American Institute should be a “nongovernmental entity.” H.R. Rep. No. 96-71, 96th Cong., 1st Sess., 16 (1979), reprinted in 1979 U.S. Code Cong. & Admin. News 100.

reprinted in 1979 U.S. Code Cong. & Admin. News 36, 75, §§ (B) and (D) (December 30, 1978).

Given the exceptional importance of the relations between the United States and the People’s Republic of China, the American Institute is thus at the vortex of a critical and delicate foreign policy relationship for this country.

Not surprisingly, therefore, and of considerable importance to this case, Congress provided that “[p]rograms, transactions, and other relations conducted or carried out by the President or any agency of the United States Government with respect to Taiwan shall, in the manner and to the extent directed by the President, be conducted and carried out by or through [the American Institute].” 22 U.S.C. § 3305(a). Further, when the laws of the United States authorize or require the United States to “perform, enforce, or have in force an agreement or transaction relative to Taiwan, such agreement or transaction shall be entered into, performed, and enforced, in the manner and to the extent directed by the President, by or through the [American] Institute.” *Id.* at § 3305(b).

These statutory provisions mean that the American Institute is the mechanism through which the United States Government conducts foreign relations involving Taiwan, and does so “in the manner and to the extent directed by the President.”

The President has delegated to the Secretary of State almost all of his authority for directing the American Institute. See Executive Order 13014 (61 Fed. Reg. 42963 (1996)). Utilizing its authority, in 1979, the State Department entered into a contract with the American Institute, pursuant to 22 U.S.C. § 3305, authorizing this instrumentality to carry out programs, transactions, and other relations with or relating to the people on Taiwan, and enforce existing international and other agreements and arrangements between the United States Government and the people on Taiwan, and to represent the United States and the American people, and carry out functions on their behalf with respect to the people on Taiwan.

In addition, and again of substantial significance to the legal issues raised in this appeal, under the bylaws of the American Institute (Sections 2.02(b) and 2.05), the trustees of the American Institute are appointed by the Secretary of State, and may be removed at any time by him without cause. See App. Tab 4, at 13.

3. The character of the American Institute is further illustrated by the fact that its employees may be authorized to protect the interests of United States persons by performing acts “for consular purposes by such laws of the United States as the President may specify.” 22 U.S.C. § 3306(a)(3). And, acts performed by the American Institute’s employees are “valid, and of like force and effect within the United States, as if performed by any other person authorized under the laws of the

United States to perform such acts.” *Id.* at § 3306(b). Arms sales to Taiwan, a uniquely governmental function, are also conducted through the American Institute. See 22 U.S.C. § 3302, and 22 U.S.C. § 2776(b) (Arms Export Control Act).

Moreover, the United States has recognized a Taiwanese counterpart for the American Institute, the Coordination Council for North American Affairs, with authority to act on behalf of Taiwan.³ See Executive Order No. 12143 (44 Fed. Reg. 37191 (1979)). The two counterpart organizations concluded an “Agreement on Privileges, Exemptions and Immunities between the American Institute in Taiwan and the Coordination Council for North American Affairs,” which recognized the functional immunities and privileges of each, such as are enjoyed by foreign state missions and their personnel, and such as are enjoyed by public international organizations in the United States.⁴

This Court has held that the American Institute’s Taiwanese counterpart is an instrumentality of the Taiwan authorities, and that this instrumentality, for all intents and purposes, is Taiwan. See *Millen Industries, Inc. v. Coordination Council For*

³ The Coordination Council later changed the name of its office in the United States to Taipei Economic and Cultural Representative Office in the United States.

⁴ The two counterpart instrumentalities have signed numerous agreements of the type and kind that governments enter into – concerning such subjects as agriculture, aviation, customs, energy, maritime, taxation, and trade – all of which have full force and effect under the law of the United States. See 63 Fed. Reg. 71507 (1998).

North American Affairs, 855 F.2d 879, 883 (D.C. Cir. 1988). See also *Taiwan v. United States District Court for the Northern District of California*, 128 F.3d 712, 714 (9th Cir. 1997) (“Under the [Taiwan Relations Act], those relations [between the United States and the people of Taiwan] are to be conducted by a nonprofit corporation called the American Institute in Taiwan (AIT) on behalf of the United States * * * and by a counterpart ‘instrumentality’ on behalf of the people of Taiwan”).

In sum, the American Institute was created by Congress and the President as a non-profit corporation to fulfill a crucial foreign policy and relations function of the United States in light of the highly unusual situation posed by the U.S. strategic requirement to maintain effective relations with both the People's Republic of China and Taiwan. This instrumentality carries out tasks of a patently governmental nature under the direction of the President and the Secretary of State, which is hardly surprising given the nature of its delicate foreign affairs function. Moreover, the American Institute's leaders – the members of the Board of Trustees – are appointed by the Secretary of State and are removable by him at will.

B. The False Claims Act

As noted above, this action was filed under the *qui tam* provisions of the False Claims Act, whose operation is well described in the Fifth Circuit's recent *en banc*

opinion in *Riley v. St. Luke's Episcopal Hospital*, 252 F.3d 749 (5th Cir. 2001), and in the Supreme Court's decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000).

The False Claims Act establishes civil penalties for “[a]ny person” who “knowingly presents, or causes to be presented, to an officer or employee of the United States Government * * * a false or fraudulent claim for payment or approval.” 31 U.S.C. § 3729(a)(1). Such a “person” is “liable to the United States Government for a civil penalty,” plus “3 times the amount of damages which the Government sustains.” *Id.* at § 3729(a).

Suits to collect damages and statutory penalties may be brought by the Department of Justice. *Id.* at § 3730(a). Alternatively, a private relator may bring a *qui tam* action “for the person and for the United States Government,” and such an action “shall be brought in the name of the Government.” *Id.* at § 3730(b)(1).

The False Claims Act provides the Government with the opportunity to intervene in a *qui tam* suit “within 60 days after it receives both the complaint and the material evidence and information” (*id.* at § 3730(b)(2)), in which event the Government “shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action.” *Id.* at § 3730(c)(1). If the Government declines to take over the case, “the person bringing the action shall

have the right to conduct the action.” *Id.* at § 3730(b)(4)(B). However, the Government retains important powers of control over the suit even when it declines to take it over; a *qui tam* action cannot be settled and dismissed by the relator without the written consent of the Attorney General, and the Government can intervene later in the case and dismiss it even over the relator’s opposition if the suit is against the interests of the United States. See *id.* at § 3730(c)(2)(A); *Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1143-45 (9th Cir. 1998), *cert. denied*, 525 U.S. 1067 (1999).

When a *qui tam* action results in the recovery of damages and/or civil penalties, the relator is entitled to a share of the Government's recovery, but the United States Treasury retains the bulk of any recovery. *Id.* at § 3730(d).

C. This Litigation and the District Court's Ruling

1. Relator Wood filed this action against the American Institute, its former Chairman and Managing Director, Natale Bellocchi, and 20 Doe defendants, contending that they had violated the False Claims Act in connection with approximately \$5.3 million in supposedly missing visa fee revenues. In addition, Wood claimed that he had been retaliated against by the American Institute, in violation of the whistleblower protection provision of that statute (31 U.S.C. §

3730(h)). He seeks treble the damages suffered by the United States, penalties, and damages for retaliation.

The State Department Inspector General and the Department of Justice fully investigated relator's claims, and declined to intervene to prosecute the action. Wood decided to pursue the case anyway.

The Government then moved to dismiss Wood's case on several grounds: (1) the district court lacked Article III jurisdiction because the American Institute is controlled by the Executive, and the United States cannot under such circumstances be on both sides of the same suit; (2) Congress has not waived sovereign immunity to allow a suit against the American Institute; (3) this entity is not a "person" that can be liable under the wording of the False Claims Act; and (4) in any event, this litigation contravenes the interests of the United States. The district court dismissed relator's complaint, finding no waiver of sovereign immunity.

2. The district court first addressed our case-or-controversy argument, finding that jurisdiction exists because the Supreme Court determined in *Vermont Agency*, 529 U.S. at 774, that a relator has a concrete private interest in the outcome of the suit, providing the necessary Article III controversy. App. Tab 4, at 4-5.

However, the court then found no waiver of sovereign immunity, relying on this Court's recent decision in *Galvan v. Federal Prison Industries*, 199 F.3d 461 (D.C.

Cir. 1999). The court explained that, as *Galvan* holds, a suit is against the sovereign when “the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration.” App. Tab 4, at 6. The court looked in addition to the nature of the control exercised by the Government over the American Institute. *Ibid.*

With regard to funding, the district court noted that the relator concedes that the American Institute “receives a substantial portion of its funding from federal sources.” *Id.* at 7. Although the relator contended that the American Institute receives money from processing visa applications, the court recognized that these fees are collected by the entity “in its capacity as an agent of the State Department, and, in other circumstances, these fees are typically collected by State Department officials.” *Id.* at 8.

As the district court explained, “[i]t is further undisputed that, following the collection of these fees, at the direction of the State Department, AIT then applies this revenue to cover general operating expenses which otherwise would have been provided by Congress or Executive Agencies.” *Ibid.*

The court noted that the relator claimed that the American Institute had other sources of funds, as well as assets in buildings, equipment, and other business property. However, the court found that relator’s allegations on this point were

“general” and did not give any indication as to amounts. In addition, the relator did not dispute the Government’s contention that the American Institute does not own any buildings or other real property that would provide a source to pay a judgment because “government property furnished to AIT remains the property of the Department of State.” *Id.* at 9.

Overall, the district court concluded that “any impairment of AIT’s capital will necessarily be replaced out of the public treasury.” *Ibid.* “[A]ny payment of damages by AIT will necessarily draw from public funds.” *Id.* at 11.

Turning to the question of control by the U.S. Government over the American Institute, the district court explained that “[r]elator does not dispute that the delegation of authority to the Secretary of State confers upon that office the ability to impose upon AIT policy direction as well as legal, management, and fiscal discipline.” *Id.* at 12. Moreover, the State Department office of Taiwan Coordination Staff provides direction to the American Institute “on a daily basis.” *Ibid.* The court also noted that the latter’s bylaws reflect its close control by the Government. *Id.* at 12-13.

Based on these points, the district court concluded that the American Institute “is a closely controlled entity whose sole function is to serve the government’s interests. AIT does not appear to have any interests independent from that of the federal government, nor any independent source of funds.” *Id.* at 13.

The district court captured the essence of the American Institute’s odd existence: “The seemingly intentional ambiguity of the status of AIT under the Taiwan Relations Act is the product of necessity – the need to create an entity which can maintain foreign relations with Taiwan on behalf of the United States government, notwithstanding the fact that the United States had ‘terminated governmental relations between the United States and the governing authorities on Taiwan.’” *Id.* at 14.

The district court also analyzed the operation of the False Claims Act itself in examining sovereign immunity for the American Institute. The court recognized that “the financial goals of the [False Claims Act] are thwarted when a financial recovery under [the statute] has the effect of transferring government funds from one agency pocket to another. More troubling still is the fact that in such circumstances, the United States stands to lose money rather than to recover it, while the relator who brings the action on behalf of the United States reaps a sizeable profit for himself.” *Id.* at 17-18.

The court then looked to see if Congress had unequivocally waived sovereign immunity for the American Institute, and concluded that it had not. The court recognized that this Court’s precedent holds that the False Claims Act itself is not a waiver of such immunity. *Id.* at 19 (citing *Galvan*, 199 F.3d at 467).

The district court next examined relator’s argument that the sovereign immunity of the American Institute has been waived obliquely by Congress because this entity is a “nonprofit corporation incorporated under the laws of the District of Columbia” (22 U.S.C. § 3305(a)(1)), and the D.C. Code provides generally that such a body “shall have the power * * * to sue and be sued, complain, and defend, in its corporate name.” App. Tab 4, at 19 (quoting D.C. Code Ann. § 29-505(2)). The court found that this general corporation code provision was not a clear waiver of sovereign immunity because Congress in the Taiwan Relations Act had expressly provided that any law of the District of Columbia that “impedes or otherwise interferes with the performance of the functions of the [American] Institute” is preempted. App. Tab 4, at 20 (quoting 22 U.S.C. § 3305(c)). The court realized that a waiver of the American Institute’s sovereign immunity through the D.C. Code would certainly impede that body’s performance. App. Tab 4, at 21.

Because the district court found that the immunity of the American Institute from suit had not been waived, sovereign immunity further barred relator’s retaliation and wrongful discharge claims under the False Claims Act, which can be brought only against a relator’s employer. *Id.* at 21-22 n.7.

The district court also declined to let Wood engage in discovery regarding the source of funding for any possible judgment against the American Institute. The court

explained that its conclusions about the status of this entity derived primarily from the Taiwan Relations Act itself “and not from the Court’s resolution of factual disputes. * * * The legislation indicates that AIT is a closely controlled entity which exists for the sole benefit of the federal government.” *Id.* at 22. The court further made clear that, to the extent it relied on any factual assertions, they were “specific factual statements by the government which remain *uncontested* in Relator’s Opposition.” *Id.* at 23 (emphasis in original). The court therefore found that discovery would not change the outcome.

The district court also recognized that the Government had alternatively sought dismissal on the ground that prosecution of this suit is contrary to the interests of the United States, and that the Government could therefore dismiss the action under 31 U.S.C. § 3730(c)(2)(A). However, the court declined to rule on that ground at this stage because it might be required to hold a hearing on the reasonableness of the Government’s decision to dismiss. App. Tab 4, at 23-25.

Finally, the district court dismissed the claims against the individual defendants as well. *Id.* at 26.

RELEVANT STATUTORY PROVISIONS

The pertinent parts of the Taiwan Relations Act are reprinted in an addendum at the end of appellant's opening brief. The pertinent parts of the False Claims Act are reprinted at the end of this brief.

STANDARD OF REVIEW

Because this case involves review of a judgment granting a motion to dismiss based on pure legal issues, the standard of review in this Court is *de novo*.

SUMMARY OF ARGUMENT

We note initially that the Government disputes the relator's account of the facts. Contrary to relator's strongly expressed beliefs, as we informed the district court, full investigation has revealed that no American Institute funds are actually missing from the U.S. Treasury. Moreover, there has been no nefarious conspiracy within either the State Department or the Justice Department to stifle Wood's case illegitimately. However, there is no need for this Court to delve into these points, nor would it be proper for it to do so at this stage of the litigation. As the district court's decision makes clear, dismissal here is warranted as a matter of law, based on undisputed statements of fact. We raise three independent grounds on which affirmance should be based; they are separate from each other, and any one will suffice.

I. In the first part of our Argument, we show that there was actually no Article III case or controversy here.

Supreme Court precedent instructs that there can be no justiciable controversy when both sides in a dispute are controlled by the same master. In this instance, regardless of what label one places on the American Institute, this entity is indisputably controlled by the President and the Secretary of State.

As we have taken some pains to describe above, by statute, the American Institute carries out its functions “in the manner and to the extent directed by the President” (22 U.S.C. §§ 3305(a) and (b)). And, its leaders are appointed solely by the Secretary of State, and serve completely at his pleasure. This level of control is hardly unexpected given the exceedingly delicate task this entity has of maintaining appropriate relations with the people of Taiwan in light of the President’s recognition of the People’s Republic of China, and all that such recognition entails. The importance of the mission of the American Institute cannot be overstated because it is difficult to conceive of a more fragile and crucial relationship than that between the United States Government and the People’s Republic of China.

Although the Executive cannot simultaneously be on both sides of a justiciable controversy, the district court here tried to avoid that problem on the basis of the Supreme Court’s decision in *Vermont Agency*, holding that a relator has Article III

standing to pursue a *qui tam* case declined by the United States against a third party. The Supreme Court held that a relator could do so even though he had suffered no concrete, personalized injury to himself; the necessary adversariness was provided by the alleged injury to the United States caused by the defendant, and the effective assignment of the cause of action by Congress through the False Claims Act to a relator.

Contrary to the district court's understanding, this holding in *Vermont Agency* has no application here because there was no justiciable case to assign to the relator in the first place, unlike the situation in *Vermont Agency* where the Federal Government could have sued the State of Vermont if it believed fraud had been committed against the U.S. Treasury. In this instance, by contrast, the Department of Justice could not have validly sued the American Institute in federal court, since doing so would have placed the Executive on both sides of such a case. This constitutional problem obviously cannot be evaded through the simple expedient of assigning the case instead to a relator to prosecute.

If Wood were right that he can pursue this case, he could just as validly pursue a False Claims Act case against the State Department or the Justice Department, even though the Justice Department clearly cannot sue itself in federal court. Wood's

theory of justiciability thus makes no sense, and this case should have been dismissed for lack of the requisite Article III case or controversy.

II. In any event, the district court correctly ruled that Congress has not waived the sovereign immunity of the American Institute to allow a suit against it under the False Claims Act. On this point, we heavily rely on the district court's thorough opinion, which analyzes the issues at some length.

Given the federal funding for the American Institute, the substantial control exercised over it by the Executive, and the governmental nature of its functions, the district court correctly concluded that this entity is protected by the principle of sovereign immunity. Wood claims that this immunity was nevertheless waived obliquely by Congress because, by making the American Institute a nonprofit corporation under District of Columbia law, Congress necessarily made the entity subject to the D.C. code, which includes a "sue and be sued" clause for such types of entities. Thus, Wood claims that the American Institute can be sued for an essentially unlimited range of issues, just like any private, nonprofit corporation in the District of Columbia.

There is no evidence that Congress intended such a result, which would be quite an odd one in light of the governmental type of mission the American Institute carries out, and the sensitive role for U.S. foreign relations that it serves.

Moreover, Congress provided that state and local ordinances that interfere with the operation of the American Institute are preempted by federal law. As the district court found, a broad waiver of sovereign immunity to allow a wide array of suits against the American Institute would undoubtedly interfere with that entity's efficient and proper operation. Accordingly, the waiver in the D.C. Code is either preempted, or the existence of this federal preemption provision raises sufficient doubt to negate a finding that Congress quite indirectly waived the immunity of the American Institute.

III. There is a third, independent ground on which the judgment of dismissal here can be affirmed: an instrumentality such as the American Institute is not a "person" within the scope of those that can be liable under the False Claims Act.

The Supreme Court has applied a presumption that the term "person" does not include parts of the enacting sovereign, unless the legislature makes clear an intent to cover such entities. In this instance, there is no such clear intent. "Person" is not defined in the False Claims Act itself, and thus the wording of the statute cannot be used to overcome the presumption against statutory coverage. And, for the reasons used to support the first two arguments above, it would have been strange for Congress to have made the American Institute liable under the False Claims Act since

this entity operates under the direction and control of the President of the United States and the Secretary of State.

* * * * *

For any of these reasons, the judgment of dismissal against the American Institute should be affirmed. In addition, the relator has not stated in his opening brief any separate grounds to attack the dismissal of his retaliation and wrongful discharge claims, as well as his claims against the individual defendants. Any such arguments are therefore clearly waived under this Court's precedent, and cannot be raised later for the first time in a reply brief. See *Students Against Genocide v. Department of State*, 257 F.3d 828, 835 (D.C. Cir. 2001); *Adams v. Hinchman*, 154 F.3d 420, 424 n.7 (D.C. Cir. 1998), *cert. denied*, 526 U.S. 1158 (1999).

Accordingly, if this Court affirms the judgment in favor of the American Institute on any of the grounds we propose, that order necessarily also affirms the dismissal against the individual defendants and on the retaliation/wrongful discharge claims.

ARGUMENT

I. Dismissal Was Proper Here Because There Was No Valid Article III Case Or Controversy.

A. Under Article III of the Constitution, a justiciable case requires the presence of two adverse parties independent of one another; that requirement is not met when a court is faced with rendering a judgment in favor of a party against itself. See *United States v. Interstate Commerce Commission*, 337 U.S. 426, 430 (1949).

Of great significance here, if one party controls the other, or if both parties are subject to control by the same *dominus litis* (master of the suit), the requisite constitutional adversity is absent and “adjudication must be refused.” *Gould v. Control Laser Corp.*, 866 F.2d 1391, 1393-1394 (Fed. Cir. 1989); *South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co.*, 145 U.S. 300, 301 (1892) (no justiciable controversy exists where the same person is “the *dominus litis* on both sides”). For purposes of this jurisdictional rule, “[a]ctual control * * * is not necessary”; “rather, the *ability* to control suffices.” *Gould*, 866 F.2d at 1394 (emphasis added).

B. In this case, as the district court recognized and as we showed at the outset of this brief, the applicable provisions of law and the American Institute’s bylaws make clear that this entity is controlled and governed by the Executive. Not

surprisingly, given its extremely sensitive foreign affairs mission of maintaining appropriate relations with Taiwan in the face of our full diplomatic recognition of the People's Republic of China (and all that such recognition entailed in light of the demands of that government), the American Institute carries out its functions "in the manner and to the extent directed by the President" (22 U.S.C. §§ 3305(a) and (b)). Further, the American Institute is totally beholden to the Secretary of State, since he wields the power to dismiss its Board of Trustees at will at any time. Obviously too, the Secretary of State is under the full control of the President since he holds office solely at the pleasure of the President. See *In re Sealed Case*, 121 F.3d 729, 752-53 n.22 (D.C. Cir. 1997) ("the President has unqualified power to appoint and remove cabinet officers").

Thus, regardless of whether one views the American Institute as a private corporation completely divorced from the United States Government, or as an instrumentality of it, or even as something else entirely, the indisputable fact remains that this body is under the control of the Executive Branch of the Federal Government. Consequently, any conflict between the American Institute and the United States does not present an Article III justiciable controversy because both parties are subject to control by the same person – the President of the United States. See *Edmond v.*

United States, 520 U.S. 651, 664 (1997) (“The power to remove officers * * * is a powerful tool for control”); *Bowsher v. Synar*, 478 U.S. 714, 726-27 (1986).⁵

This situation is quite similar to that resolved by the district court in *Juliano v. Federal Asset Disposition Association*, 736 F. Supp. 348, 351-53 (D.D.C. 1990), which was upheld by this Court, 959 F.2d 1101 (D.C. Cir. 1992) (table). In *Juliano*, the court dismissed a *qui tam* action against an entity chartered by an agency of the United States, whose directors had been appointed by the chartering agency of the United States Government, whose purpose was to assist the agency of the United States Government to carry out its functions, whose funding was provided by the United States Government through the agency, and whose profits earned were the property of the United States Government agency. 736 F. Supp. at 349.

The status of the entity at issue in *Juliano* is analogous to that of the American Institute, which was created by the United States Government, and which has as its purpose assisting the President and the Department of State in the conduct of United

⁵ Because of the President’s control here, this case is not like those such as *United States v. Interstate Commerce Commission*, 337 U.S. 426 (1949), or *United States v. Federal Maritime Commission*, 694 F.2d 793, 809-10 (D.C. Cir. 1982), involving suits between the Executive and regulatory commissions with a certain amount of independence from the President (and also involving significant private party interests).

States foreign relations, and which is funded by the United States Government, and which obtains funds that become the property of the United States Government.

The court dismissed the action in *Juliano* because a *qui tam* suit by the United States against itself is not provided for under the False Claims Act. 736 F. Supp. at 352-53 (“The Court is aware of nothing in the [False Claims] Act that allows a private individual to sue selected federal agencies to recover money from the United States for the benefit of the United States, and to reap a sizeable profit in the process.”).

It mattered not to the *Juliano* court’s determination to dismiss that the relator would thereby not be able to pursue his claim independent of the interests of the United States; the court dismissed the *qui tam* action notwithstanding that “the only person who would benefit by forcing such a transfer of millions of dollars from one government account to another would be *qui tam* plaintiff, who by law is entitled to share in the recovery.” *Ibid.* This reasoning carries particular force where, as here, the Government has made clear that it does not wish to pursue this *qui tam* action, and has moved to dismiss it as contrary to the interests of the United States.

C. The court below denied this argument, and questioned the continuing vitality of *Juliano* as precedent in this Circuit because of the Supreme Court’s ruling in *Vermont Agency*, 529 U.S. 771-73, where the Court held that Article III jurisdiction exists when a private relator pursues a *qui tam* case brought against another party, but

declined by the Government. The district court, however, misunderstood the effect of *Vermont Agency* on the separate question posed here of whether Article III jurisdiction exists when a relator wishes to prosecute a False Claims Act case for the United States against an entity controlled by the President.⁶

In *Vermont Agency*, the defendant contested Article III jurisdiction because it argued that the person pursuing the case – the relator – could not do so since he personally had suffered no concrete injury at the hands of the defendant; rather, only the United States had been injured by the asserted false claims. The Supreme Court rejected this argument because the complaint alleged a clear controversy: an injury to the United States caused by the defendant.

The Court explained that a False Claims Act relator is given by statute an interest in the suit, and does not merely have the right to retain a portion of the recovery to the United States; the relator has a concrete interest in the bounty he will receive if the suit is successful. 529 U.S. at 772. The Court’s pivotal reasoning was that an “assignee of a claim has standing to assert the injury in fact suffered by the assignor.” *Id.* at 773. Thus, the injury in fact suffered by the United States conferred

⁶ On this point, the district court also looked to (App. Tab 4, at 4-5) this Court’s decision in *United States ex rel. Long v. SCS Business & Technical Institute*, 173 F.3d 870, 885-86 (D.C. Cir. 1999), *supplemented by* 173 F.3d 890 (D.C. Cir.), *cert. denied* 530 U.S. 1202 (2000). However, the discussion in *Long* was quite similar to, and superseded by, the Supreme Court’s later analysis in *Vermont Agency*.

standing on the relator because Congress had effected a partial assignment of its claim to him. *Ibid.*

This holding does not establish an Article III case or controversy in the quite different case at bar, though, because there was no justiciable Article III claim to assign in the first place. In other words, the Department of Justice could not sue the American Institute in federal district court over an asserted false claim; both entities are under the control of the President, and, as established above, no Article III jurisdiction exists when the President is on both sides of the case.

A justiciable controversy cannot be manufactured simply by arguing that this non-justiciable claim has been assigned to a *qui tam* relator instead. Such sleight-of-hand cannot be used to avoid the Constitution's requirement that there must be a case or controversy in the first place for the Article III courts to adjudicate.

Indeed, if Wood's Article III argument were correct, a *qui tam* relator could bring suit against the State Department itself or the Department of Defense, or even against the Department of Justice, even though, obviously, the Department of Justice could not bring a False Claims Act suit against itself, or against some other Cabinet Department. Thus, the district court's reasoning here would lead to bizarre results, making a mockery of the Article III case or controversy requirement in the

Constitution. Nothing in the *Vermont Agency* decision supports such an odd conclusion.

Our argument is strengthened by the fact that a *qui tam* relator does not operate totally outside the control of the Executive. Several of this Court's sister Circuits have concluded that the *qui tam* provisions of the False Claims Act are constitutional under the separation of powers doctrine and the Take Care Clause in Article II because the Executive can exercise significant control over a *qui tam* case. See *Riley v. St. Luke's Episcopal Hospital*, 252 F.3d 749, 754-55 (5th Cir. 2001) (*en banc*); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 745 (9th Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994); *United States ex rel. Taxpayers Against Fraud v. General Electric Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994). Accord *Long*, 173 F.3d at 885 (describing Executive controls over *qui tam* suits). Indeed, the Government has the ability to dismiss even valid *qui tam* suits if the Executive believes that their prosecution is contrary to the interests of the United States. See *Sequoia Orange Co.*, 151 F.3d at 1143-45.

Thus, in one sense, the Executive always remains part of a *qui tam* case, and this point severely undermines the notion that a relator has Article III power to sue a federal agency or an entity controlled by the Executive.

The judgment of dismissal here should therefore be upheld simply on the ground that no Article III case or controversy existed given the Executive's power

over the American Institute. This Court need not reach any other issues. In any event, as we show next, the judgment can be affirmed on the independent sovereign immunity rationale used by the district court.

II. The District Court Correctly Dismissed This Case Because Congress Has Not Waived The Sovereign Immunity Of The American Institute.

A. Probably the best brief for the Government on the sovereign immunity defense to Wood’s suit is the district court’s opinion itself. As described earlier, the district court fully analyzed the arguments by both sides and the relevant case law, and explained its reasoning at some length, concluding that the doctrine of sovereign immunity covers the American Institute and that Wood had not demonstrated a clear intent by Congress to waive that immunity. We thus heavily rely upon the district court’s analysis, and have only a few points to add.

The primary thrust of Wood’s argument on the sovereign immunity issue is that attempting to apply labels such as “agency” or “instrumentality” to the American Institute is fruitless; rather, Wood contends (Br. at 10, 12) that the key question is one of Congressional intent. We do not disagree. We believe, though, that Wood has failed to show that Congress wanted to allow suits against the American Institute in the same way such suits can be pursued against nonprofit corporations under District

of Columbia law, and, in particular, to make the American Institute subject to a suit under the False Claims Act.

Accepting Wood’s invitation to focus on Congressional intent, we note first that such intent must be gauged against the appropriate legal principles. Congress established the American Institute in the Taiwan Relations Act in 1979, pursuant to a backdrop of clear Supreme Court instructions that waivers of sovereign immunity will not be implied, but must instead be unequivocally expressed by Congress. See *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992). Congress is deemed to be well aware of Supreme Court precedent regarding statutory construction, and to legislate with such case law in mind. See *McNary v. Haitian Refugee Center*, 498 U.S. 479, 496 (1991).

In this instance, there should be little doubt that the district court correctly concluded that sovereign immunity covers the American Institute.⁷ As discussed previously, this entity serves a crucial governmental foreign affairs function, operates with federal funds and revenue generated by activities in its capacity as an agent of

⁷ In a suit actually brought by the United States, sovereign immunity for a defendant would not usually be an issue. Cf. *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965) (immunity for state irrelevant in suit brought by the United States); *United States v. California*, 297 U.S. 175 (1936) (same). But, here, Wood cannot have it both ways. Either this case is a suit brought by the United States – in which event the argument we made in the preceding section requires dismissal – or it is not – in which event sovereign immunity principles are relevant.

the Federal Government, and carries out its functions under close supervision and control by the Executive Branch. In addition, acts performed by the American Institute's employees are valid as a matter of law, and have the same force and effect as if performed by authorized persons under U.S. law. 22 U.S.C. § 3306(b). And, this body is exempt from federal, state, or local taxation. *Id.* at § 3307(a). Finally, federal agencies are authorized to provide services to the American Institute, and vice-versa, and the Comptroller General of the United States has access to this entity's books and records, as well as the opportunity to audit its operations. *Id.* at § 3308.

Under such circumstances, Wood cannot quarrel reasonably with the district court's conclusions that the American Institute serves the interests of the United States Government, is funded by the Government, is closely controlled by the Government (App. Tab 4, at 13), and "as an arm or instrumentality of the government, * * * has the same need for protection from suit, via sovereign immunity, as the government" (*id.* at 18).

As the district court pointed out (*id.* at 17-18), given the purposes of the False Claims Act, it would have been quite odd for Congress to have meant to waive immunity and subject the American Institute to False Claims Act liability. Such actions would largely move funds from one part of the U.S. Treasury to another, since "any impairment of AIT's capital will necessarily be replaced out of the public

treasury” (*id.* at 9). The only party who would benefit financially from such an action would be the *qui tam* relator, siphoning off a portion of the money as it moved within the Treasury.

Even if in this particular case it might be possible for a judgment to be satisfied without affecting the U.S. Treasury in any way – something we dispute – the fact remains that some False Claims Act judgments against the American Institute would have that effect. (We note that Wood himself in his opening brief (at 9) asserts that, because \$5.3 million were “missing” from American Institute funds, the entity had to draw additional sums from its State Department contract account.) Thus, for purposes of determining if sovereign immunity protects that entity, the Court should assume that in certain instances, a judgment would have an impact on the Treasury.

B. Wood believes that Congress nevertheless indirectly waived the immunity covering the American Institute because it created this entity as a non-profit corporation incorporated under the laws of the District of Columbia, and the law of that jurisdiction provides that such bodies “shall have the power * * * to sue and be sued, complain, and defend, in its corporate name.” App. Tab 4, at 19 (quoting D.C. Code Ann. § 29-505(2)). Thus, if Congress indeed waived the American Institute’s immunity it did *not* do so expressly, but only obliquely.

In Wood's view, Congress accordingly meant to subject the American Institute to a wide variety of suits, in the same way as a private corporation under District of Columbia law. This result would be quite strange from Congress' perspective in light of the sensitive nature of the American Institute's mission and functions.

In other words, Wood's position is that Congress meant a private party to be able to sue the American Institute just as any person can sue a private company, even though this entity is carrying out the foreign relations of the United States with Taiwan – deeply concerned at all times with the effect of its actions on the critical relationship between the United States and the People's Republic of China – under the direction and control of the Executive.

However, as the district court pointed out (App. Tab 4, at 20), Congress provided that the law of the District of Columbia or any State in which the American Institute is incorporated or does business is preempted if it “impedes or otherwise interferes with the performance” of the entity's functions. 22 U.S.C. § 3305(c).

There is no question that reading District of Columbia law to allow suits against the American Institute in the same way as against private corporations would impede or interfere with the performance of its function. See *Brown v. Secretary of the Army*, 78 F.3d 645, 650 (D.C. Cir.), *cert. denied*, 519 U.S. 1040 (1996). Thus, Congress

preempted District of Columbia law to the extent that it might otherwise waive sovereign immunity.

C. Wood nonetheless argues (Br. at 14-15) that the American Institute is analogous to other entities for which sovereign immunity has been waived indirectly through a state incorporation statute. (Wood appears to concede in his brief (at 14) that the American Institute is not like entities in several of the cases he cites, involving a “sue and be sued” clause in the federal organic statute itself establishing those entities or setting out their powers.)

The first problem with this argument is that the American Institute is clearly a unique entity – there is *no* other instrumentality like it because there is no other situation in which important foreign relations of the United States must be conducted through a private corporation under the gaze of another substantial foreign power jealous of its status. Any argument about Congress’ intent regarding the American Institute cannot disregard this critical point.

Wood contends though that the American Institute is like the United States Shipping Board Emergency Fleet Corporation, an entity formed under the laws of the District of Columbia for the purchase, construction, and operation of merchant vessels during World War I. In the Shipping Act of September 7, 1916, Congress “contemplated a corporation in which private persons might be stockholders and

which was to be formed like any business corporation under the laws of the District, with capacity to sue and be sued.” *Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corporation*, 258 U.S. 549, 565 (1922). In *Sloan Shipyards*, the Supreme Court decided that this corporate entity did not share the immunity of the Federal Government, but could instead be sued for its wrongful acts.

Wood’s argument is mistaken because, as the district court held, the American Institute is indeed covered by sovereign immunity in light of its functions, and the question here is whether Congress nevertheless clearly waived that immunity. In *Sloan Shipyards*, the Supreme Court did not deal with a preemption provision like that in Section 3305(c), which expressly protects the operation of the American Institute from interference by District of Columbia law. See App. Tab 4, at 19-20.

Thus, this case is closer to *Galvan v. Federal Prison Industries, Inc.*, 199 F.3d 461, 464 (D.C. Cir. 1999), in which this Court found immunity for the Federal Prison Industries, a “government corporation of the District of Columbia.” The Court analyzed the various ways in which the D.C. Code for corporations did not fit well the mission Congress set for Federal Prison Industries. *Id.* at 466. As shown above, a similar analysis in this case should lead to affirmance of the district court’s judgment.

In sum, the district court here properly concluded that Wood’s suit is barred by sovereign immunity. That conclusion is supported by provisions of law in the Taiwan

Relations Act, the bylaws of the American Institute, the False Claims Act, and general principles concerning the scope of sovereign immunity. Wood’s argument (Br. at 28-30) that further factual development in the district court was necessary is wrong since no amount of factual development would change the fact that the American Institute operates under the control of the Executive, receives substantial funding from the Federal Government, and carries out governmental foreign affairs functions.

III. The American Institute Is Not A “Person” Liable Under The False Claims Act.

There is yet a third independent ground on which the dismissal here can be based: the American Institute is not a “person” within the meaning of the False Claims Act, and thus cannot be liable under that statute.

Unlike our Article III and sovereign immunity defenses, this ground does not go directly to the jurisdiction of the district court, and this Court thus should address those points before this one. See *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). But if the Court is not persuaded by our jurisdictional points, this statutory argument is sufficient by itself to support the dismissal of Wood's claim.

As the Supreme Court made clear in *Vermont Agency*, only a “person” can be liable under the False Claims Act. 529 U.S. at 780. There, the Court held that a State is not a “person” within the meaning of that act in a suit brought by a *qui tam* relator.

In so ruling, the Court relied in part on the presumption that “‘person’ does not include the sovereign.” *Ibid.* See *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 82-83 (1991) (statutes employing the word “person” are typically interpreted to exclude the enacting sovereign, and the Federal Government is not a “person” under removal statute); *United States v. Cooper*, 312 U.S. 600, 604-05 (1942) (the United States is not a “person” under the Sherman Act).

Quite recently, this Court applied this presumption in holding that the Federal Government is not a “person” under 28 U.S.C. § 1782. See *Al Fayed v. Central Intelligence Agency*, 229 F.3d 272 (D.C. Cir. 2000). The Court noted (*id.* at 274) that the Supreme Court has construed the word “person” not to cover the Federal Government even though the Dictionary Act (1 U.S.C. § 1) says that this word includes corporations. See *United States v. United Mine Workers of America*, 330 U.S. 258, 275 (1947).

This Court made clear in *Al Fayed* that there must be “affirmative evidence of * * *an inclusory intent” before “person” will include the sovereign whose statute is at issue. 229 F.3d at 274. The Court added that “the Supreme Court applies the constructional principle against finding ‘person’ to include a sovereign even in the absence of sovereign immunity or comity concerns.” *Id.* at 275.

In this instance, as we have already demonstrated, the American Institute carries out uniquely governmental functions under the control of the Executive. And, judgments against this entity would likely, if not surely, have an impact on the U.S. Treasury. Under such circumstances, this entity is not a “person” liable under the False Claims Act.

As the district court explained (App. Tab 4, at 7-11), a False Claims Act judgment against the American Institute would move money from one part of the Treasury to another, with some portion of the judgment being paid to the relator, for no net gain to the Government. Given this conclusion, it is highly unlikely that Congress meant to expose the American Institute to suits under the False Claims Act in order to achieve such an odd result. Congress certainly did not provide any clear evidence that it meant to override the norm and make the American Institute liable as a “person” despite the closeness between this entity and the United States Government.

Hence, the judgment here can be affirmed on the alternative ground that the American Institute is not a “person” that Congress meant to include within the meaning of that term in the False Claims Act.⁸

⁸ As noted above, we also moved to dismiss this case because its pursuit is contrary to the interests of the United States. If this Court does not affirm the judgment of dismissal, this issue can then be addressed immediately in the district court through

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

ROSCOE C. HOWARD, JR.
United States Attorney

ROBERT D. McCALLUM, JR.
Assistant Attorney General

R. CRAIG LAWRENCE
LYDIA KAY GRIGGSBY
Assistant United States Attorneys

DOUGLAS N. LETTER
(202) 514-3602
Appellate Litigation Counsel
Civil Division, Room 9106
U.S. Department of Justice
601 D St., N.W.
Washington, D.C. 20530-0001

December 7, 2001

a hearing.

CERTIFICATE REGARDING WORD COUNT

I certify that this brief contains 9,912 words, as reported by Corel Word Perfect 9.0, and conforms to the word limit requirements of FRAP 32(a)(7)(B).

DOUGLAS N. LETTER
Appellate Litigation Counsel

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December 2001, I caused 16 copies of the foregoing Brief for the Defendants/Appellees to be hand delivered to the Clerk of this Court, and caused two copies to be sent by Federal Express delivery to the following:

Bradley S. Weiss, Esq.
Fourth Floor
513 Central Ave.
Highland Park, IL 60035

Wm. Paul Lawrence, II, Esq.
100 Congress Ave.
Suite 2100
Austin, TX 78701

DOUGLAS LETTER
Appellate Litigation Counsel