

No. 07-1336

IN THE
Supreme Court of the United States

COLLEEN B. WILCOX, *et al.*,
Cross-Petitioners,

v.

UNITED STATES EX REL. JOHN DAVID STONER,
Respondent.

**On Cross-Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF THE STATEWIDE ASSOCIATION
OF COMMUNITY COLLEGES, NORTHERN
CALIFORNIA REGIONAL LIABILITY EXCESS
FUND, SOUTHERN CALIFORNIA REGIONAL
LIABILITY EXCESS FUND, AND SCHOOLS
ASSOCIATION FOR EXCESS RISK AS
AMICI CURIAE IN SUPPORT OF THE
CROSS-PETITION FOR CERTIORARI**

CRAIG E. FARMER
Counsel of Record
EMMANUEL R. SALAZAR
FARMER SMITH & LANE, LLP
3620 American River Drive
Suite 218
Sacramento, CA 95864
(916) 679-6565

Attorneys for Amici Curiae

May 22, 2008

QUESTIONS PRESENTED

The False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, authorizes a private individual (the relator) to bring a *qui tam* civil action for treble damages and per claim penalties against “[a]ny person” who, *inter alia*, “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.” First enacted in 1863, the FCA’s liability provision does not include a definition of the word “person.” In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), this Court held that States and state agencies are not “person[s]” amenable to *qui tam* suits under the FCA. Although the Court expressed “serious doubt” as to whether such suits would even be permitted under the Eleventh Amendment, it did not decide the issue, nor did it decide whether individual state officials are “person[s]” amenable to *qui tam* suits under the FCA. The questions presented are:

1. Whether the Ninth Circuit erred in holding that state officials are “person[s]” amenable to *qui tam* suits under the FCA for actions taken in their official capacities.
2. Whether the Ninth Circuit erred in holding that the Eleventh Amendment does not bar the continued prosecution of an FCA *qui tam* suit brought against state officials after the United States declines to intervene in that suit.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES.....	v
STATEMENT OF INTEREST OF THE <i>AMICI CURIAE</i>	1
BRIEF OF THE STATEWIDE ASSOCIATION OF COMMUNITY COLLEGES, NORTHERN CALIFORNIA REGIONAL LIABILITY EXCESS FUND, SOUTHERN CALIFORNIA REGIONAL LIABILITY EXCESS FUND, AND SCHOOLS ASSOCIATION FOR EXCESS RISK AS <i>AMICI CURIAE</i> IN SUPPORT OF THE CROSS-PETITION FOR CERTIORARI.....	4
SUMMARY OF ARGUMENT	4
REASONS TO GRANT CERTIORARI	7
I. THE COURT OF APPEAL’S EXPANSION OF “PERSON” UNDER THE FCA IS WITHOUT PRECEDENT.....	7
II. THE DECISION BELOW OVERRIDES CONGRESSIONAL POLICY	14
III. THE DECISION BELOW THREATENS STATE SOVEREIGNTY.....	16
CONCLUSION	23
APPENDIX A — Member Listing of <i>Amici Curiae</i>	1a
APPENDIX B — Original and Current Language of 42 U.S.C. § 1983	19a

TABLE OF CONTENTS—Continued

	Page
APPENDIX C — Sample of Federal Regulations Auditing States with respect to Federally Funded Programs.....	21a
APPENDIX D — States and Their State-Official Indemnification Policies	23a

TABLE OF AUTHORITIES

CASES	Page
<i>Atchison, Topeka & Sante Fe Railway Co. v. O'Connor,</i> 223 U.S. 280 (1912).....	13
<i>Cook County v. United States ex rel. Chandler,</i> 538 U.S. 119 (2003).....	7
<i>Edelman v. Jordan,</i> 415 U.S. 651 (1974).....	6, 19-21
<i>Ford Motor Co. v. Dep't of Treasury,</i> 323 U.S. 459 (1945).....	20
<i>Great Northern Life Ins. Co. v. Read,</i> 322 U.S. 47 (1944).....	20
<i>Hafer v. Melo,</i> 502 U.S. 21 (1991).....	12-13, 22
<i>Harlow v. Fitzgerald,</i> 457 U.S. 800 (1982).....	22
<i>Kentucky v. Graham,</i> 473 U.S. 159 (1985).....	12, 21, 22
<i>Matthews v. Rodgers,</i> 284 U.S. 521 (1932).....	13
<i>Monroe v. Pape,</i> 365 U.S. 167 (1961).....	12, 13, 22
<i>Moor v. County of Alameda,</i> 411 U.S. 693 (1973).....	12, 22
<i>Myers v. Anderson,</i> 238 U.S. 368 (1915).....	12, 22
<i>Osborn v. Bank of the United States,</i> 22 U.S. (9 Wheat.) 738 (1824).....	13

TABLE OF AUTHORITIES—Continued

	Page
<i>Scheuer v. Rhodes</i> , 416 U.S. 232 (1974).....	12, 22
<i>Piokowski v. Parziale</i> , 2003 U.S. Dist. LEXIS 7624 (D. Conn. 2003)	15
<i>United States v. McNinch</i> , 356 U.S. 595 (1958).....	7
<i>United States ex rel. Gaudineer & Comito</i> , <i>L.L.P. v. Gesaman</i> , 536 U.S. 925 (2002).....	12
<i>United States ex rel. Gaudineer & Comito</i> , <i>L.L.P. v. Iowa</i> , 269 F.3d 932 (8th Cir. 2001), <i>cert. denied sub nom.</i>	12
<i>United States ex rel. Burlbaw v. Orenduff</i> , No. 06-2006 (10th Cir. Argued Mar. 5, 2007).....	12
<i>United States ex rel. Burlbaw v. Regents of</i> <i>N.M. State Univ.</i> , 324 F. Supp.2d 1209 (D.N.M. 2004), <i>appeal pending sub nom.</i> ...	12
<i>United States ex. rel. McVey v. Board of</i> <i>Regents of Univ. of Cal.</i> , 165 F. Supp. 2d 1052 (N.D. Cal. 2001)	12
<i>Vermont Agency of Natural Res. v. United</i> <i>States ex. rel. Stevens</i> , 529 U.S. 765 (2000).....	<i>passim</i>
<i>Whitmire v. United States Veterans</i> <i>Admin.</i> , 661 F.Supp. 720 (W.D. Wash. 1986)	15

TABLE OF AUTHORITIES—Continued

	Page
<i>Will v. Mich. Dep't of State Police</i> , 491 U.S. 58 (1989).....	12, 22
<i>Wilson v. Layne</i> , 526 U.S. 603 (1999).....	22
<i>Wood v. Strickland</i> , 420 U.S. 308 (1975).....	12, 22
CONSTITUTION AND STATUTES	
U.S. Const. amend. XI.....	19
18 U.S.C. § 666	6, 15
31 U.S.C. § 3729(a).....	2, 7
31 U.S.C. § 3729(b).....	2, 18
42 U.S.C. § 1983	<i>passim</i>
MISCELLANEOUS	
J. Randy Beck, <i>The False Claims Act and the English Eradication of Qui Tam Legislation</i> , 78 N.C. L. Rev. 539.....	11
Evan Caminker, <i>The Constitutionality of Qui Tam Actions</i> , Yale L.J. 341 (1989) ... <i>passim</i>	
Thomas A. Colthurst & Shelley R. Slade, <i>Healthcare-Care Fraud and the False Claims Act: The Supreme Court Supports a Federal Weapon</i> , 10 Bus. L. Today, Sept./Oct. 2000.....	11
Sharon Finnegan, <i>The False Claims Act and Corporate Criminal Liability: Qui Tam Actions, Corporate Integrity Agree- ments and the Overlap of Criminal and Civil Law</i> , 111 Penn St. L. Rev. 625 (2007).....	18

TABLE OF AUTHORITIES—Continued

	Page
Janet Goldstein & John Phillips, <i>The False Claims Act in Practice, in Qui Tam: Beyond Government Contracts</i> 469 (John T. Boese ed., 1993)	11
<i>The History and Development of Qui Tam</i> , 1972 Wash. U. L.Q. 81 (1972).....	8-10, 13
Kary Klismet, Note, <i>Quo Vadis, “Qui Tam”? The Future of Private False Claims Act Suits Against States After Vermont Agency of Natural Resources v. United States ex rel. Stevens</i> , 87 Iowa L. Rev. (2001) 283.....	11
William C. Kovacic, <i>Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting</i> , 29 Loy. L.A. L. Rev. 1799 (1996).....	18, 19
Elizabeth C. McNichol & Iris J. Lav, <i>25 States Face Total Budget Shortfall of at Least \$40 Billion in 2009; 6 Others Expect Budget Problems</i> , Center on Budget and Policy Priorities, at http://www.cbpp.org/1-15-08sfp.pdf (last modified April 29, 2008), Governor’s Budget May Revision 2008- 2009, at http://www.ebudget.ca.gov/pdf/Revised/BudgetSummary/FullBudgetSummary.pdf (last visited May 15, 2008).....	16, 17
Michael Murray, <i>Seeking More Scienter: The Effect of False Claims Act Interpretations</i> , 117 Yale L.J. 981 (2008).....	18

TABLE OF AUTHORITIES—Continued

	Page
Jack O’Connell, <i>Schools Chief Jack O’Connell Responds to Governor’s May Budget Revision</i> , California Department of Education News Release #08-61, May 14, 2008, <i>available at</i> http://www.cde.ca.gov/nr/ne/yr08/yr08rel61.asp (last visited May 15, 2008).....	17
S. Rep. No. 345, reprinted in 1986 U.S.C.C.A.N. 5266, 18 U.S.C. § 666 (added Oct. 12, 1984, Pub. L. No. 98-473, Title II, Ch. XI, Part C, § 1104(a), 98 Stat. 2143. Pub. L. No. 98-473, Title II, Ch. XI, Part C, § 1104(a), 98 Stat. 2143. Act of Nov. 10, 1986, Pub. L. No. 99-646, § 59(a), 100 Stat. 3612	14
Cass R. Sunstein, <i>What’s Standing After Lujan? Of Citizen Suits, “Injuries” Article III</i> , 91 Mich L. Rev. 163 (1992).....	10
Carlos Manuel Vazquez, <i>Eleventh Amendment Schizophrenia</i> , 75 Notre Dame L. Rev. 859 (2000).....	22

**STATEMENT OF INTEREST
OF THE *AMICI CURIAE***

This amicus curiae brief is submitted on behalf of the Statewide Association of Community Colleges (“SWACC”), Southern California Regional Liability Excess Fund (“SCR”), Northern California Regional Liability Excess Fund (“NCR”), and Schools Association For Excess Risk (“SAFER”).¹ These amici are joint powers authorities (“JPAs”), formed to meet the self-insurance needs of the community colleges and K-12 school districts in the State of California. The JPAs are risk pools where members cooperatively pool contributions of public funds to afford themselves different types of risk protection, including, tort liability coverage. These amici share a commitment to minimize the excess-liability risks that member school districts and community colleges face. This commitment ensures that public funds appropriated for schools and community colleges truly benefit students of the State of California.

SWACC represents a majority of community college districts in California. NCR consists of over 400 K-12 school districts, county offices of education, regional occupational programs, and other public educational entities. SCR represents ninety-two

¹ Pursuant to Supreme Court Rule 37.3(a), the amici curiae state that the parties have consented to the filing of this brief and have filed letters of consent in the office of the Clerk. Pursuant to Supreme Court Rule 37.6, the amici curiae state that no counsel for a party authored this brief in whole or in part, and no party made a monetary contribution intended to fund the preparation or submission of this brief. Amici curiae further state that no other than SWACC, SCR, NCR, SAFER and their counsel made a monetary contribution to the preparation or submission of this brief.

California public educational agencies. SAFER provides the excess liability coverage to SWACC, NCR, and SCR liability pools, representing approximately 50% of the total average daily attendance of the students in the State of California. For a complete list of respective members of these amici, *see* App. A.

Pursuant to the memorandum of coverage governing each of these amici, the JPAs provide excess liability coverage to a member's officials or employees, while acting for or on behalf of the member. Coverage extends not only to damages compensable to claimants but also to expenses, including costs and fees, incurred in the investigation and defense of claims against such officials or employees.

For the first time in the long history of the FCA, and admittedly in disagreement with other courts, the court of appeal below announced that state employees may be sued in their individual² capacities under the FCA for actions taken in the course of their official duties. Under the FCA, a liable defendant is subject to civil penalties as great as \$11,000 per claim, as well as treble damages and attorneys' fees. 31 U.S.C. § 3729(a). FCA liability does not require proof of specific intent to defraud, as the term "knowingly" includes a person who, with respect to information, "acts in deliberate ignorance" or "in reckless disregard" of the "truth or falsity of the information." § 3729(b).

The cross-petition implicates the important interest of amici JPAs in protecting the fiscal health of schools and community colleges in the State of California. For almost a century and a half since

² In this brief, "individual" and "personal" are used interchangeably.

Congress adopted the FCA, it has been generally understood that state officials were not subject to FCA liability either in their official or individual capacities for actions taken in the course of their official duties. Until the decision of the court of appeals in this case, state officials have not been targeted by FCA *qui tam* plaintiffs.

Accordingly, the holding below undeniably poses anew huge personal liability risk to state officials. It would dramatically change the FCA landscape since it opens without limit FCA *qui tam* litigation against state officials. In turn, these amici JPAs would have to additionally assess FCA liability risks, for which damages may easily reach millions of dollars, if awarded against state officials whose duties regularly involve administering federally funded programs. In order to guarantee adequate defense and liability protection of state officials from FCA *qui tam* claims, the holding below—if not addressed—would necessarily require a significant increase of publicly funded contributions to group self-insured public education risk pools from their respective members. As States face burgeoning budget deficits, where public education funds are expectedly subject to major cuts, the holding below comes at an inopportune time for schools, community colleges, and their students. Without the Court's intervention, students would be deprived of diminishing public monies the States allocate for their students' educational needs, instead of requiring these funds to be used for defending and funding awards against public school officials.

Based on their collective interests in minimizing the liability risks schools and community colleges face and in ensuring that students receive the

maximum benefit from public funds appropriated for their education, SWACC, NCR, SCR, and SAFER respectfully request that this Court consider the following arguments in support of petitioners' cross-petition for writ of certiorari.

**BRIEF OF THE STATEWIDE ASSOCIATION OF
COMMUNITY COLLEGES, NORTHERN
CALIFORNIA REGIONAL LIABILITY EXCESS
FUND, SOUTHERN CALIFORNIA REGIONAL
LIABILITY EXCESS FUND, AND SCHOOLS
ASSOCIATION FOR EXCESS RISK AS
AMICI CURIAE IN SUPPORT OF THE
CROSS-PETITION FOR CERTIORARI**

SUMMARY OF ARGUMENT

The Court must grant the cross-petition for writ of certiorari to review the decision below. The holding is inconsistent with the history of the informer *qui tam* mechanism generally and specifically under the FCA. It is also a questionable expansion of the scope of damage suits against state officials in their individual capacities. It supplants congressional policy in dealing with the sovereign States. It raises constitutional challenges, particularly from the Eleventh Amendment.

Notwithstanding the disagreement among federal courts, review is necessary because the decision below permits informer *qui tam* actions against state officials without precedent. The history of the *qui tam* mechanism reveals that the early Colonies inherited the unique tradition from England. At the time, several statutes had authorized private citizens, who suffered no personal injury, to sue others for legal violations and as an incentive receive a portion of the statutory fines. The Federal Gov-

ernment subsequently adopted similar statutory mechanisms authorizing informer *qui tam* actions, but the provisions were intended to enforce penal laws. By the time Congress adopted the FCA in 1863 federal informer *qui tam* statutes were neither intended nor applied to regulate States or their officials. Accordingly, the FCA informer *qui tam* mechanism was originally enacted to stop private defense contractors from defrauding the Federal Government during the Civil War. The FCA has undergone several amendments, but none suggest a broadening of the undefined term “person” to include States or their officials. The legal practice, from the time of the FCA’s original adoption in 1863 until even after Congress rekindled the informer *qui tam* mechanism in 1986, confirms this understanding as well. It was only recently that informers began to target the States and—post-*Stevens*—their officials as FCA defendants.

It turns out, however, that the scope of federal suits against state officials in their individual capacities for official actions is historically also very limited. Such suits are permitted only where plaintiffs claim to have actually suffered an individuated injury, in the form of either wrongful taxation or civil rights violation. Thus, the decision below again without precedent broadens the scope of suits against state officials to include actions where the *qui tam* plaintiff was not personally aggrieved.

Furthermore, the Court should grant the cross-petition for writ of certiorari because the decision below supplants congressional policy in dealing with the several States. Rather than permitting private citizens to file suits against States and their officials, Congress has adopted specific and detailed auditing

and internal-control policies within the frameworks of the various federal programs in which States participate. In addition, two years prior to the 1986 amendment of the FCA, Congress specifically addressed state-employee fraud by enacting 18 U.S.C. § 666, which criminalized such conduct. Under the numerous auditing regulations and penal statute, Congress did not authorize a private cause of action.

Lastly, the holding below raises more constitutional questions, specifically from the Eleventh Amendment. Allowing informer *qui tam* actions against state officials poses a very serious danger to the States, a supermajority of which is facing huge budget deficits. In the State of California alone the gap is projected at \$24.3 billion for fiscal year 2008-2009. Given the nature of the informer *qui tam* mechanism, where in the past years billions of dollars of *treble* damages have been recovered against private defendants, the fiscal peril to the States is undeniable. To dismiss the Eleventh Amendment challenge, the court of appeal below cites civil rights cases but failed to explain or distinguish *Edelman v. Jordan*, 415 U.S. 651 (1974), which held that States are entitled to invoke their sovereign immunity where the action is *essentially* one for the recovery of money from the States. Moreover, the court of appeal's use of the distinction between official- and personal-capacity suits when applied in the context of informer *qui tam* actions would practically result to grossly unfair consequences, particularly when the state official did not personally benefit. Finally, since the application of the informer *qui tam* mechanism against state officials is not historically supported, the unavailability of official immunity as a defense in order to establish FCA individual-capacity suits

against state officials is doubtful. With this uncertainty and all the other reasons stated in this brief, we urge the Court to grant the cross-petition for writ of certiorari.

REASONS TO GRANT CERTIORARI

I. THE COURT OF APPEAL'S EXPANSION OF "PERSON" UNDER THE FCA IS WITHOUT PRECEDENT

Since the FCA's adoption in 1863 and despite subsequent Congressional amendments the word "person" in the FCA has remained unchanged and undefined. *See Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 783, n. 12 (2000); *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 125 (2003). Thus, to determine the meaning of the word "person" as it is used in what is now § 3729(a) courts are instructed to look for guidance to the FCA's history from its original adoption. *See Stevens*, 529 U.S. at 783, n. 12 (2000); *Chandler*, 538 U.S. at 125; *United States v. McNinch*, 356 U.S. 595, 599 (1958) (finding that the FCA "was not designed to reach every kind of fraud practiced on the Government").

Accordingly, in determining whether States are "persons" under the FCA, the Court found that the FCA was enacted in 1863 to principally stop the massive frauds large private contractors perpetrated during the Civil War. *Stevens*, 538 U.S. at 781. The Court established that the original FCA liability provision bore no indication that States were subject to its penalties. *Ibid.* Further, in light of the presumption against imposition of punitive damages against governmental entities, the punitive nature of FCA damage provisions were found to be inconsistent

with state *qui tam* liability. *Id.* at 784-785. Thus, the Court concluded that States are not “persons” subject to FCA liability. *Stevens*, 529 U.S. at 787. Since the statutory analysis provided a conclusive answer, the Court declined to discuss whether or not an action in federal court by a *qui tam* relator against a State would run afoul of the Eleventh Amendment. *Ibid.* The Court, however, claimed that “there is a ‘serious doubt’ on that score.” *Stevens*, 529 U.S. at 787, citation omitted.

Guided by *Stevens*, the court of appeal below held that school districts and county offices of education are also not “persons” subject to FCA liability because they are arms of the State for purposes of the Eleventh Amendment. However, expressly claiming to rely only on the plain language of the statute, the court of appeal below held that state officials in their personal capacities for actions taken within the scope of their official duties are “persons” who may be liable under the FCA, even if said officials did not personally benefit. In so holding, the decision below violated the principle enunciated in *Stevens*, ignored the history of the FCA, and expanded without precedent the reach of informer *qui tam* actions, where the Federal Government does not intervene, to include state official liability suits.³

The history of *qui tam* actions has been extensively chronicled. See *Stevens*, 529 U.S. at 769, 775-777; Note, *The History and Development of Qui Tam*, 1972 Wash. U. L.Q. 81 (1972) (hereinafter *History*); Evan

³ Throughout this brief, state official liability suits are suits instituted by private citizens for damages against state officials in their personal capacities for actions taken within the scope of their official duties.

Caminker, *The Constitutionality of Qui Tam Actions*, Yale L.J. 341 (1989) (hereinafter *Constitutionality*). Briefly, the *qui tam* action arose in the thirteenth century as a means of allowing plaintiffs to pursue private claims in England's royal courts, which had previously heard only cases involving interests of the Crown. *Stevens*, 529 U.S. at 776. In the fourteenth century, Parliament began adopting statutory mechanisms for bringing *qui tam* actions. *Id.* Parliament's enactments resulted in the development of two kinds of *qui tam* statutes. One type allowed injured parties to seek relief on their own behalf as well as the Crown's. *Id.* at 775. More relevant here is the other type—those that entitled informers to a portion of a wrongdoer's fine, regardless of whether the informer had suffered any personal injury as a result of the statutory violation (informer *qui tam* actions). *Id.* Problems with vexatious and collusive informers later developed, and statutes were passed to either deter and penalize vexatious informers or repeal old statutes. *Id.*; *History, supra*, at 89. By the seventeenth century, the two forms of statutory *qui tam* were subject to such different procedural limitations as to make them quite dissimilar. *History, supra*, at 90.

The unique English tradition of *qui tam* became part of American law upon the establishment of English Colonies in America. *History, supra*, at 93-97. *Qui tam* actions appear to have been similarly prevalent in America at least in the period immediately before and after the framing of the Constitution. *Stevens*, 529 U.S. at 776. Colonies, however, apparently did not allow common-law *qui tam* actions probably because American lawyers in the Colonies were unfamiliar with their use to bring suits in royal as opposed to local courts and because

the popularity of common-law *qui tam* actions had dwindled in England by that time. *Stevens*, 529 U.S. at 776; *History, supra*, at 94. Nevertheless, Colonies did pass several informer statutes expressly authorizing *qui tam* actions. *Stevens*, 529 U.S. at 776. Similar to the English experience, Colonies faced abuses by informers. *History, supra*, at 97.

The early federal experience with *qui tam* was quite similar to that of the States', except that federal *qui tam* statutes focused more in enforcing penal laws. *History, supra*, at 99, n. 105. The First and subsequent early Congresses routinely authorized informer *qui tam* provisions to enforce diverse interests, such as the prohibition of importing liquor without the payment of a duty, of trading slaves with foreign countries, and of trading with Indian tribes in violation of federal regulations. *Stevens*, 529 U.S. at 776-777, fn. 5; *Constitutionality, supra*, at 342, n. 3. See Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich L. Rev. 163, 175 (1992) (hereinafter *Standing*). Most of these early *qui tam* statutes have long been repealed, and of those remaining, most lie essentially dormant. *Constitutionality, supra*, at 342, n. 5. By the time of the enactment of the FCA in 1863, it seems clear that federal informer *qui tam* statutes were neither intended nor applied to regulate States or their officials in their official dealings with the Federal Government. *Stevens*, 529 U.S. at 776-777, fn. 5; *Constitutionality, supra*, at 342, n. 3, *Standing, supra*, at 175.

Thus, although the liability provision of the original FCA has undergone various changes, none suggest a broadening of the term "person" to include

States⁴ or, pertinent here, their officials. *See Stevens*, 529 U.S. at 782; Thomas A. Colthurst & Shelley R. Slade, *Healthcare-Care Fraud and the False Claims Act: The Supreme Court Supports a Federal Weapon*, 10 Bus. L. Today, Sept./Oct. 2000, at 24, 26 (stating that the FCA was sparingly used prior to the late 1980s); J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. Rev. 539, 541-542, n. 8 (indicating that pre-1986 statutes generated relatively little FCA litigation) (hereinafter *Eradication*). In fact, even after Congress amended the FCA in 1986 to re-invigorate its use, informers (or even perhaps the federal attorneys general) still did not initially file FCA cases against the States or their officials. *See Janet Goldstein & John Phillips, The False Claims Act in Practice, in Qui Tam: Beyond Government Contracts* 469, 480 (John T. Boese ed., 1993) (stating that, from 1986 through 1993, approximately seventy-five percent of FCA *qui tam* cases had been filed against defense contractors). Eventually by the early 1990s, informers sought to use the FCA against the States. *See Kary Klismet, Note, Quo Vadis, "Qui Tam"? The Future of Private False Claims Act Suits Against States After Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 87 Iowa L. Rev. (2001) 283, 292-293, n. 57. However, the Court put to rest such FCA *qui tam* suits since, as previously explained, States were held not to be "persons" liable under the FCA. *Stevens*, 529 U.S. at 787.

Informers, as here, despite the long history of federal informer *qui tam* statutes and of the FCA, now attempt to overcome *Stevens* and ultimately

⁴ Hereinafter "States" also include arms of the State.

reach the States by targeting their officials. *See e.g.*, *United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa*, 269 F.3d 932 (8th Cir. 2001), *cert. denied sub nom. United States ex rel. Gaudineer & Comito, L.L.P. v. Gesaman*, 536 U.S. 925 (2002); *United States ex. rel. McVey v. Board of Regents of Univ. of Cal.*, 165 F. Supp. 2d 1052 (N.D. Cal. 2001); *United States ex rel. Burlbaw v. Regents of N.M. State Univ.*, 324 F. Supp.2d 1209 (D.N.M. 2004), *appeal pending sub nom. United States ex rel. Burlbaw v. Orenduff*, No. 06-2006 (10th Cir. Argued Mar. 5, 2007). This recent and novel development of suing state officials for FCA liability appears to digress from historical legal practice of federal informer *qui tam* actions, yet the court of appeal below stamped its approval by claiming that such suits are permissible against state officials in their individual capacities. The court of appeal below claimed to draw support from case law involving state official liability suits, primarily *Hafer v. Melo*, 502 U.S. 21 (1991).

Hafer, 502 U.S. 21, addressed whether or not state officials may be sued in their individual capacities under 42 U.S.C. § 1983 (hereinafter section 1983). It turns out that for more than a century and a quarter state official liability suits have found its most widespread use in civil rights actions under section 1983. *See generally Hafer*, 502 U.S. 21; *Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989); *Kentucky v. Graham*, 473 U.S. 159 (1985); *Wood v. Strickland*, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Moor v. County of Alameda*, 411 U.S. 693 (1973); *Monroe v. Pape*, 365 U.S. 167 (1961); *Myers v. Anderson*, 238 U.S. 368 (1915). In contrast to the FCA, however, section 1983 was expressly directed to the States. *See App. B. Monroe*, 365 U.S. at 183. Moreover, section 1983 cases reveal that in those

cases plaintiffs' claims arise from deprivations of individual plaintiffs' "constitutional rights, privileges and immunities by an official's abuse of his position." *Hafer*, 502 U.S. at 27 (quoting *Monroe*, 365 U.S. at 172).

Historically, in addition to section 1983 cases, state official liability suits have also been permitted in cases involving unconstitutional taxation. See *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 858 (1824). In *Osborn v. Bank of the United States*, the Court ruled that the Eleventh Amendment did not bar a suit against Ohio state officials for recovery of money taken from the plaintiff bank under an unconstitutional tax provision. *Id.* at 741-744, 858. Later in 1912, the Court similarly held that a plaintiff corporation may recover back from the Secretary of State of Colorado taxes it paid under protest since the state tax imposed an unconstitutional burden on interstate commerce. *Atchison, Topeka & Santa Fe Railway Co. v. O'Connor*, 223 U.S. 280, 286 (1912); cf. *Matthews v. Rodgers*, 284 U.S. 521, 528 (1932).

Review of cases dealing with state official liability suits demonstrates that such suits are limited to actions where plaintiffs actually suffered an individualized injury in the form of either wrongful taxation or civil rights violation. Obviously, individualized injury is what informer *qui tam* actions lack. See *Stevens*, 529 U.S. at 773 ("A *qui tam* relator has suffered no such invasion—indeed, the 'right' he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails."); *History, supra*, at 85 ("In comparison with the aggrieved party, an informer was motivated by the chance of gain, not by the need for recovery.");

Constitutionality, supra, at 345 (“The *qui tam* litigant is not personally injured by the defendant’s challenged conduct; her interest in the litigation arises rather from the statutory bounty offered for successful prosecution.”). Thus with the decision below, the court of appeal independently authorized informer *qui tam* actions as a mechanism to commence state official liability suits. This contrived result does not follow the histories of the FCA, of federal informer *qui tam* actions, and of state official liability suits.

II. THE DECISION BELOW OVERRIDES CONGRESSIONAL POLICY

Not only does the decision below ignore the history of the FCA, but it also supplants congressional policy in dealing with the several States. In adopting the FCA, Congress recognized that detecting fraud against the federal treasury often is extremely difficult for the Federal Government without the aid of informers. *See* S. Rep. No. 345, at 4, reprinted in 1986 U.S.C.C.A.N. 5266 (“Detecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity.”).

In dealing with States, however, Congress has not expressed the need to utilize informers to detect fraud. Rather, to ensure state compliance and to deter state-official fraud, Congress has adopted specific and detailed auditing and internal-control policies within the frameworks of the various federal programs in which States participate. *See* App. C. In these federal funding schemes, Congress has particularly selected various members of the Executive Branch, such as inspectors general of involved de-

partments, to conduct or supervise audits on the States or their agencies. Therefore, it appears that Congress has decided to assign the duty to detect state-official fraud of federal funds to particular federal officials and not to *qui tam* informers.

Moreover, two years prior to the 1986 revitalization of the FCA, Congress amended Title 18 of the United States Code to add section 666, which specifically criminalizes fraud committed by an “agent” of the State or local government. *See* 18 U.S.C. § 666 (added Oct. 12, 1984, Pub. L. No. 98-473, Title II, Ch. XI, Part C, § 1104(a), 98 Stat. 2143. In its original form, state officials who violated section 666 were punishable for a maximum imprisonment of ten years and a fine not more than \$100,000 or an amount equal to twice that which was obtained in violation of the section, or whichever was greater. Pub. L. No. 98-473, Title II, Ch. XI, Part C, § 1104(a), 98 Stat. 2143. In 1986, the same year that Congress amended the FCA, Congress reorganized section 666 and removed the penalty provisions to coincide with federal sentencing guidelines. Act of Nov. 10, 1986, Pub. L. No. 99-646, § 59(a), 100 Stat. 3612. Courts generally understand that section 666 does not create a private cause of action. *See Piokowski v. Parziale*, 2003 U.S. Dist. LEXIS 7624 at *27 (D. Conn. 2003); *Whitmire v. United States Veterans Admin.*, 661 F.Supp. 720 (W.D. Wash. 1986).

Considering the special relationship the Federal Government has with the States, Congress has enacted numerous regulations and statutes that specifically address state-official fraud; none of which incorporate informer *qui tam* mechanisms. In connection with the history of the FCA, the court of appeal, by authorizing informer *qui tam* actions

against state officials, appears to have legislated new means of overseeing appropriations of federal funds to the States.

III. THE DECISION BELOW THREATENS STATE SOVEREIGNTY

Finally, the decision below appears to violate the doctrine that courts must interpret statutes so as to avoid difficult constitutional questions. *See Stevens*, 529 U.S. at 787. Holding that state officials in their personal capacities for actions taken within the scope of their official duties are “persons” under the FCA faces a significant hurdle brought by the Eleventh Amendment.⁵

Permitting informers *qui tam* to pursue FCA actions against state officials even in their individual capacities presents a very serious danger to the States. More than half of the States, including some of the Nation’s largest, are facing an estimated \$40 billion in combined shortfalls in their fiscal year 2009 budgets. Elizabeth C. McNichol & Iris J. Lav, *25 States Face Total Budget Shortfall of at Least \$40 Billion in 2009; 6 Others Expect Budget Problems*, Center on Budget and Policy Priorities, at <http://www.cbpp.org/1-15-08sfp.pdf> (last modified April 29, 2008), at 2. On average, the shortfall is 8.6% of the States’ general fund budgets. *Id.* Some of the States’ budget gaps are expected to last for several fiscal years. *Id.* Similar to how States have in the past

⁵ In addition, the Due Process Clause of the Fourteenth Amendment, the Appointments Clause of section 2 and the “take care” Clause of section 3 of the United States Constitution similarly raise difficult constitutional questions arising from the holding below.

addressed fiscal problems, States would be expected to cut services like health and education. *Id.* at 3.

With respect to the State of California, it projects a revised state budget gap of \$24.3 billion for fiscal year 2008-2009. *See* Governor's Budget May Revision 2008-2009 at 1, at <http://www.ebudget.ca.gov/pdf/Revised/BudgetSummary/FullBudgetSummary.pdf> (last visited May 15, 2008). Due to the State's deepening fiscal difficulties, Medi-Cal expenditures would be cut by \$353.2 million. *Id.* at 35. The budget allocation for the State's Department of Corrections and Rehabilitation would be decreased by \$115.2 million. *Id.* at 55. The workload budget reduction for the University of California would be \$233.4 million. *Id.* at 75. For the California State University, it would be \$215.3 million. *Id.* at 76. The expected budget cut for administered child care programs totals \$198.9 million. *Id.* at 68. Overall, the budget reductions in education would affect students. *See* Jack O'Connell, *Schools Chief Jack O'Connell Responds to Governor's May Budget Revision*, California Department of Education News Release #08-61, May 14, 2008, available at <http://www.cde.ca.gov/nr/ne/yr08/yr08rel61.asp> (last visited May 15, 2008). "Many teachers and other essential school staff will still face layoffs, classroom sizes are likely to increase, and there is no cost-of-living increase at a time when the cost of gas, food, and other school essentials is increasing." *Id.*

Given the nature of the informer *qui tam* mechanism and attendant expenses associated with it, the fiscal peril to the States would be exponential. As of September 1999, 2959 *qui tam* actions had been filed since 1986, and more than 50% of those cases had been filed only since the beginning of fiscal year

1997. *Eradication*, *supra*, at 542, n. 11. *Qui tam* settlements and judgments totaled well over \$9 billion from the enactment of the 1986 amendments through 2005. See Sharon Finnegan, *The False Claims Act and Corporate Criminal Liability: Qui Tam Actions, Corporate Integrity Agreements and the Overlap of Criminal and Civil Law*, 111 Penn St. L. Rev. 625, 643-644, n. 155, 156 (2007) (hereinafter *Integrity*). Over the same period, *qui tam* plaintiffs recovered over \$1.5 billion in cases where the government intervened, and over \$99 million in cases in which the government did not intervene. See *ibid.* Since 2000, the Federal Government has recovered well over one billion dollars in all but one year. See Michael Murray, *Seeking More Scienter: The Effect of False Claims Act Interpretations*, 117 Yale L.J. 981 (2008). The grave concern is that these numbers most likely did not even consider the States or their officials. See *Eradication*, *supra*, at 542, n. 11 (explaining that the principal targets of *qui tam* litigation thus far have been the defense industry and health care providers); *Integrity*, *supra*, at 651 (stating that of the \$4 billion awarded in FCA *qui tam* actions as of 2001, \$2.3 billion was recovered from suits involving the health care industry).

In addition to the damages that could be awarded against state officials, States would also incur other significant burdens resulting from the decision below. Since to hold a person liable for FCA does not require specific intent to defraud, see 31 U.S.C. § 3729(b), an overwhelming majority of the States would be confronted with and have to dedicate additional public funds for litigation costs in defense of their state officials. See App. D. States might also have to expend funds for preventative measures to reduce the likelihood of a *qui tam* suit. See William C. Kovacic,

Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting, 29 Loy. L.A. L. Rev. 1799, 1827 (1996). Officials might have to resort to internal consensus to avoid sole responsibility for dealings with the Federal Government. *Id.* This would necessitate more bureaucracy and more time but result in less efficiency. *Id.* Conversely, the informer *qui tam* mechanism might turn state employees into opportunistic bounty hunters. *See id* at 1833, 1841.

The court of appeal dismissed the Eleventh Amendment challenge by concluding that the damages would come from the individual defendants and not the state treasury. The court of appeal further indicated that the fact that States may choose to indemnify the employee for judgment rendered against their officials does not bring the Eleventh Amendment into play. In this regard, similar to its statutory construction of “person” under the FCA, the court of appeal attempted to overcome the Eleventh Amendment challenge with a somewhat unconventional explanation. This time it borrowed section 1983 case law and the mechanism of individual-capacity actions. The rationale nonetheless is inconsistent with Eleventh Amendment jurisprudence.

The Eleventh Amendment provides: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State” U.S. Const. amend. XI. In *Edelman v. Jordan*, 415 U.S. 651 (1974), plaintiff filed a complaint in a federal district court, individually and as a class representative, seeking declaratory and injunctive relief against former state officials. These officials had allegedly administered

the federal-state programs of Aid to the Aged, Blind, or Disabled (AABD) in a manner inconsistent with various federal regulations and with the Fourteenth Amendment. *Id.* at 653. AABD was one of the State's categorical aid programs funded by the State and the Federal Governments. *Id.* Plaintiff specifically requested "a permanent injunction enjoining the defendants to award to the entire class of plaintiffs all AABD benefits wrongfully withheld." *Id.* at 656. Ultimately, the district court ordered the state officials to "release and remit AABD benefits wrongfully withheld to all applicants. . . ." *Id.* The court of appeal affirmed and, partly due to a conflict with another court of appeal, the Court granted certiorari. *Id.* at 658.

The Court explained that the Eleventh Amendment bars suits not only against the State when it is the named party but also when it is the party in fact. *Edelman*, 415 U.S. at 651. "While the Amendment by its terms does not bar suits against a State by its own citizens, [the] Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State. [citations omitted]." *Id.* at 662-663. "When the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit *even though individual officials are nominal defendants.*" *Ibid.* (quoting *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459 (1945) (italics added)). Thus the rule has evolved that a suit by private plaintiffs to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. *Edelman*, 415 U.S. at 663. *See also Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944).

In light of these principles, the Court found that the funds to satisfy the award sought by plaintiff would inevitably come from the general revenues of the State and so would resemble more closely a monetary award against the State itself. *Edelman*, 415 U.S. at 665. The Court also stated that the award in many aspects would be of damages against the State, which to a virtual certainty, would be paid from state funds. *Id.* The Court therefore reversed the district court's order of retroactive payment of benefits found to have been wrongfully withheld. *Id.*

Amici believe that *Edelman*, rather than section 1983 cases, applies in this case. Particularly where fraudulent intent and personal benefit from an alleged false claim are not required to prove FCA liability, an informer *qui tam* FCA action is essentially one for the recovery of money from the State and not the individual defendant. FCA liability against state officials practically would be indemnified by the employer State, thus an award funded by, recovered from, and against the State, times three. The court of appeal below, however, without distinguishing or explaining *Edelman*, seemed to have eased into the conclusion that the FCA *qui tam* action was not against the State.

Furthermore, the limitation of suits against officials in their individual capacities seems unhelpful in this case. Should the state official die pending final resolution of a personal-capacity action, the plaintiff could pursue his action against the decedent's estate. *Kentucky*, 437 U.S. at 167, fn. 11. It would seem illogical and grossly unjust to permit an informer *qui tam* to sue a former official's decedents to recover an award of FCA damages, particularly when allegedly misappropriated funds

could not be traced to the former official's personal assets.

Lastly, the Court has indicated that damages are available against state officials sued in their personal capacities only after the rule is well-established. State officials sued in their personal capacities for committing constitutional torts should be liable for damages only to the extent that the law has become clear and well-known and to the extent that official immunity is therefore not available as a defense. *See Wilson v. Layne*, 526 U.S. 603, 614-615 (1999); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Indeed, the Court's announcement in *Hafer* that state officials under section 1983 may be sued in their personal capacities for actions taken within the scope of their official duties was nothing new. It was simply a clarification of a previous (and perhaps vague) holding in *Will*, 491 U.S. 58. *Hafer*, 502 U.S. at 22. *See* Carlos Manuel Vazquez, *Eleventh Amendment Schizophrenia*, 75 Notre Dame L. Rev. 859, 875-876 (2000). Undeniably, the section 1983 rule regarding state official liability was fairly well-established by the time of *Hafer*. *See generally*, *Kentucky*, 473 U.S. 159; *Wood*, 420 U.S. 308; *Scheuer*, 416 U.S. 232; *Moor*, 411 U.S. 693; *Monroe*, 365 U.S. 167; *Myers*, 238 U.S. 368. In sharp contrast, both the history of and the legal practice under the FCA do not support extending its reach to FCA liability against state officials even in their individual capacities for actions taken within the scope of their official duties.

CONCLUSION

For the reasons stated above, and those stated in the cross-petition, these amici urge the Court to grant certiorari and summarily reverse the decision below.

Respectfully submitted,

CRAIG E. FARMER

Counsel of Record

EMMANUEL R. SALAZAR

FARMER SMITH & LANE, LLP

3620 American River Drive

Suite 218

Sacramento, CA 95864

(916) 679-6565

Attorneys for Amici Curiae

May 22, 2008

APPENDIX A

Statewide Association Of Community Colleges

Bay Area Community College Districts JPA
Allan Hancock Joint Community College District
Contra Costa Community College District
Gavilan Joint Community College District
Hartnell Community College District
Monterey Peninsula Community College District
Ohlone Community College District
San Jose/Evergreen Community College District
San Luis Obispo County Community College District
South Bay Regional Public Safety Consortium
West Valley-Mission Community College District
Northern California Community Colleges JPA
Butte-Glenn Community College District
College Of Marin
Feather River Community College District
Lassen Community College District
Mendocino-Lake Community College District
Napa Valley College District
Redwoods Community College District
Siskiyou Joint Community College District
Solano County Community College District
Yuba Community College District
Cabrillo Community College District
Cerritos Community College District
Chabot-Las Positas Community College District
Citrus Community College District
Coast Community College District
Compton Community College District
Desert Community College District
El Camino College Compton District
Lake Tahoe Community College District
Long Beach Community College District
Mt. San Jacinto Community College District

2a

Palomar Community College District
Pasadena Community College District
San Bernardino Community College District
San Francisco Community College District
Santa Clarita Community College District
Santa Monica Community College District
Shasta-Tehama-Trinity Joint Community College
District
Santa Rosa County Junior College District
South Orange County Community College District
Southwestern Community College District
Ventura County Community College District
Victor Valley Community College District
West Kern Community College District

**Northern California Regional Liability
Excess Fund**

Central Valley Schools JPA
Hilmar Union Elementary School District
Livingston Union Elementary School District
Winters Joint Unified School District
Yolo County Office of Education
Contra Costa/Solano Counties Sd & Sia Jpa
Benicia Unified School District
Brentwood Union Elementary
Byron Union Elementary
Canyon Elementary
Knightsen Elementary
Lafayette Elementary
Liberty Union High School District
Martinez Unified School District
Moraga Elementary
Oakley School District
Pittsburg Unified
East Bay Schools Insurance Group (EBSIG)
Acalanes Union High School District

Alameda City Unified School District
Alameda Community Learning Center Charter
School
Antioch Unified School District
Castro Valley Unified School District
Contra Costa SELPA
Eden Area ROP
John Swett Unified School District
Mid Alameda SELPA
Mission Valley ROP
Mountain House Elementary School District
Orinda Union School District
Pleasanton Unified School District
San Leandro Unified School District
Sunol Glen School District
Tri Valley Regional Occupational Program
Walnut Creek School District
Marin Schools Insurance Authority (Marin SIA)
Bollinas-Stinson Union School District
Dixie School District
Kentfield School District
Laguna Joint School District
Lagunitas School District
Larkspur School District
Lincoln School District
Marin County Superintendent of Schools
Phoenix Academy
Marin Pupil Transportation Agency
Mill Valley School District
Nicasio School District
Reed Union School District
Ross School District
Ross Valley School District
San Rafael City High School District
San Rafael City School District
Sausalito/Marin City School District

Willow Creek Academy Charter School
Tamalpais Union High School District
Union Joint School District
Monterey/San Benito County Property & Liability
JPA
Alisal Union School District
Aromas-San Juan Unified School District
Bradley Union School District
Carmel Unified School District
Chualar Union School District
Gonzales Unified School District
Graves School District
Greenfield Union School District
Hollister School District
Jefferson School District
King City Joint Union High School District
King City Union School District
Lagunita School District
Mission Union School District
Monterey County Office of Education
Monterey County Schools WC JPA Program
Monterey County SIG Benefits JPA Program
North County Joint Union School District
North Monterey County Unified School District
Pacific Grove Unified School District
Pacific Unified School District
Salinas City School District
Salinas Union High School District
San Antonio Union School District
San Ardo Union School District
San Benito County Schools Medical IP
San Benito High School District
San Lucas Union School District
Santa Rita Union School District
Soledad Union School District
Spreckels Union School District

Washington Union School District
North Coast Schools Insurance Group
Arcata School District and
Coastal Grove Charter School
Big Lagoon Union School District
Big Lagoon Charter Network
Blue Lake Union School District
Bridgeville School District
Cuddeback Union School District
Cutten School District
Del Norte County Office of Education
Del Norte Unified School District
Castle Rock Home Charter School
Eureka City Schools
Ferndale Unified School District
Fieldbrook School District
Fortuna Union High School District
Fortuna Union School District
Freshwater School District
Freshwater Charter Middle School
Garfield School District
Green Point School District
Humboldt County Office of Education
Hydesville School District
Jacoby Creek School Charter District
Klamath-Trinity Joint Unified School District
Kneeland School District
Loleta Union School District
Maple Creek School District
Mattole Unified School District
McKinleyville Union School District
Northern Humboldt Union High School District
Six Rivers Charter High School
Orick School District
Pacific Union School District
Peninsula Union School District

6a

Rio Dell School District
Rohnerville School District
Scotia Union School District
South Bay Union School District
Southern Humboldt Joint Unified District
Trinidad Union School District
Northern California Schools Insurance Group
(NCSIG)
Acorns to Oaks Charter School
Anderson Union High School Dist
Anderson New Technology High School
Antelope Elementary
Arena Union Elementary
Bangor Union Elementary
Bella Vista Elementary
Bend Elementary
Big Springs Union Elementary
Big Valley Unified
Black Butte Elementary
Bogus Elementary
Burnt Ranch Elementary
Butte Valley Unified
Butteville Union Elementary
Cascade Union Elementary
Castle Rock Union Elementary
Charter Academy of the Redwoods
Chico Unified
Chrysalis Charter School
Coffee Creek Elementary
Columbia Elementary
Corning Union Elementary
Corning Union High School District
Cottonwood Union Elementary
Cox Bar Elementary
Delphic Elementary
Douglas City Elementary

7a

Dunsmuir Elementary
Dunsmuir Jt. Union High School District
Eel River Charter School
Elkins Elementary
Enterprise Elementary
Etna Union Elementary
Etna Union High School District
Evergreen Union Elementary
Fall River Jt. Unified
Flournoy Elementary
Forks of Salmon Elementary
Fort Bragg Unified
Fort Jones Union Elementary
Fort Sage Unified
French Gulch Whiskeytown Elementary
Gateway Unified (Unified 7/1/92)
Gazelle Union Elementary
Gerber Union Elementary
Grant Elementary
Grenada Elementary
Happy Camp Union Elementary
Happy Valley Elementary
Hornbrook Elementary
Igo Ono Platina Elementary
Indian Springs Elementary
Janesville Elementary
Johnstonville Elementary
Junction City Elementary
Junction Elementary
Junction Elementary
Kirkwood Elementary
Klamath River Union Elementary
La Vida Independent Study Charter School
Lassen COE & ROP
Diamond Mountain Charter High School
Lassen Union High School District

Lassen View Union Elementary
Laytonville Unified
Leggett Valley Unified (Unified 7/1/90)
Lewiston Elementary
Little Shasta Elementary
Live Oak Unified
Los Molinos Unified
Manchester Union Elementary
Manton Jt. Union Elementary
McCloud Union Elementary
Mendocino COE
Mendocino Unified
Millville Elementary
eScholar Academy
Mineral Elementary
Modoc County Office of Education
Modoc Jt. Unified
Monarch Learning Center - Charter School
Montague Elementary
Mountain Union Elementary
Mountain Valley Unified
Mt. Shasta Union Elementary
North Cow Creek Elementary
North Woods Discovery School
Northeastern JPA for Workers Comp (liab only)
Oak Run Elementary
Pacheco Union Elementary
Plum Valley Elementary
Plumas County Office & ROP
Plumas Unified
Pope Valley Union Elementary
Pt. Arena Jt. Union High School Dist
Quartz Valley Elementary
Ravendale-Termo Elementary
Red Bluff Union Elementary
Red Bluff Union High School District

Redding Elementary
Shasta Secondary Home School
Shasta Trades Academy
Reeds Creek Elementary
Richfield Elementary
Richmond Elementary
Rocky Point Charter School
Round Valley Unified
Scott Valley Unified (Unif 7/1/07)
Etna Academy of Arts, Science & Technology
Seiad Elementary
Shaffer Union Elementary
Shasta COE
Stellar Charter School of Technology & Home Study
Shasta Trinity Regional Occupation Program
Shasta Trinity Schools Insurance Group
Shasta Union Elementary
Shasta Union High School District
Stellar Secondary Charter High School
Siskiyou COE
Siskiyou ROP JPA
Siskiyou Union High School District
Southern Trinity Jt. Unified
Surprise Valley Jt. Unified
Susanville Elementary
Tehama COE
Tree of Life School -Charter School (The Beginning
Project, A CA Public Benefit Corp)
Trinity Center Elementary
Trinity COE
Trinity Union High School District
Tulelake Basin Jt. Unified
Ukiah Unified
University Preparatory Charter School
Weaverville Elementary
Weed Union Elementary

Westwood Unified
Whitmore Elementary
Willits Charter School
Willits Unified
Willow Creek Elementary
Yreka Union Elementary
Yreka Union High School District
Organization Of Self Insured Schools (OSS)
Alvina Elementary Charter School District
American Union School District
Armona Union Elementary School District
Crossroads Charter School
Central Unified School District
Central Valley Preschool
Clay Elementary School District
Delta View Districtwide Comm. Charter
Dinuba Unified School District
Firebaugh-Las Deltas Unified School District
Fowler Unified School District
Fresno County Office of Education
Fresno County Self Insurance Group (FCSIG)
Golden Plains School District
Island Union Elementary SD Community Charter
Kerman Unified School District
Kings Canyon Unified School District
Kings River-Hardwick Union Elem School
Districtwide CS
Kingsburg Joint Union Elementary Charter School
District
Kingsburg Joint Union High School District
Kit Carson Elementary School District
Mid-Valley Alternative Charter School
Lakeside Union Elementary School District
Laton Unified School District
Los Banos Unified School District
Mendota Unified School District

Monroe Elementary School District
Orange Center School District
Pacific Union School District
Parlier Unified School District
Raisin City Elementary School District
Riverdale Joint Unified School District
Sanger Unified School District
Sanger Hallmark Charter School
Sanger Academy Charter School
Quail Lake Environmental Charter School
Selma Unified School District
South County Support Services Agency
Southwest Transportation Agency
Valley Regional Occupational Program
Washington Colony School District
Washington Union High School District
West Park School District and
West Park Charter Academy
Blue Mountain, Allensworth and Santa Ana
Westside Elementary School District
San Joaquin Co. Schools Property & Liability
Insurance Group
Banta School District
Escalon Unified School District
Jefferson School District
Lammersville School District and
Lammersville Charter School
Lincoln Unified School District
Linden Unified School District
New Hope School District
New Jerusalem School District
New Jerusalem Charter School
Delta Charter High School
Oakview Union School District
Ripon Unified School District
San Joaquin County Data Processing JPA

San Joaquin County Office of Education
Venture Academy (Previously One Charter)
San Joaquin County Work Comp IG
Santa Clara County Schools' Insurance Group
Cambrian School District
Sartorette Charter School
Ida Price Charter Middle School
Farnham Charter School
Fammatre Charter School
East Valley Transportation
Franklin-McKinley School District
Gilroy Unified School District
Institute of Computer Technology
Loma Prieta Joint Union School District
Los Gatos-Saratoga Community Education and
Recreation
Los Gatos Union School District
Luther Burbank School District
Moreland School District
Morgan Hill Unified School District
Mount Pleasant School District
Oak Grove School District
Orchard School District
Santa Clara County SIG JPA Office
Saratoga Union School District
Silicon Valley Joint Powers Transportation Agency
South East Consortium for Special Education
Sunnyvale School District
Union School District
West Valley Schools Transportation JPA
Signal
Anderson Valley Unified School District
Lakeport Unified School District
Lake County Office of Education
Lucerne School District
Middletown Unified School District

Potter Valley Community Unified
Upper Lake Union High School District
Upper Lake Union School District
Southern Peninsula Regional Insurance Group
(SPRIG)
Bitterwater-Tully Union School District
Bonny Doon Union School District
Cienega Union School District
Happy Valley School District
Live Oak School District
Cypress Charter School
Tierra Pacifica Charter School
Mountain School District
North Santa Cruz County SELPA
Pacific Elementary School District
Panoche School District
San Benito County Office of Education
San Lorenzo Valley Unified School District
San Lorenzo Valley USD Charter School
Santa Cruz/San Benito County SIG
Santa Cruz City Schools
Delta Charter School
Santa Cruz County Health IG Benefits Program
Santa Cruz County Office of Education
Pacific Collegiate Charter School
Scotts Valley Unified School District
Soquel Union School District
Southside School District
Tres Pinos Union School District
Willow Grove Union School District
Tulare County Schools Self Insurance Authority
Alpaugh Unified School District
Alta Vista School District
Burton Elementary School District
Burton ESD—Summit Charter School
College of the Sequoias

Columbine School District
Cutler-Orosi Unified School District
Earlimart School District
Farmersville School District
Kings River Union School District
Pixley Union School District
Richgrove School District
School Employees Trust-Tulare County JPA
Stone Corral School District
Terra Bella Union School District
Three Rivers Union School District
Traver Joint School District
Tulare County Office of Education
La Sierra Charter High School
Eleanor Roosevelt Community Learning Center
Tulare County SIG
Visalia Unified School District
Visalia USD Charter Home School Academy
Visalia USD Charter Alternatives Academy Charter
School
Visalia Charter Independent Study
Contra Costa County Office Of Educatio
Cupertino Union School District
East Side Union High School District
Fremont Unified School District
The Circle of Independent Learning Charter School
Fremont Union High School District
Grant Joint Union High School District
Grant Community Outreach Academy
Community Collaborative Charter
Futures Academy
Higher Learning Academy
California Aerospace Academy
Phoenix Rising Charter Academy
Sacramento Academic & Vocational Academy
Livermore Valley Unified School District

Lodi Unified School District
Joe Serna Jr. Charter School
Manteca Unified School District
Marysville Joint Unified School District
Marysville Charter Academy Of The Arts
Monterey Peninsula Unified School District
Newark Unified School District
Novato Unified School District
Novato Charter School
Oakland Alameda ROP
Pajaro Valley Unified School District
Pacific Coast Charter School
Alianza Charter School
Linscott Charter School
Academic/Vocational Charter Institute
Watsonville Charter School of the Arts
Palo Alto Unified School District
San Lorenzo Unified School District
San Ramon Valley Unified School District
Stockton Unified School District
James L. Urbani Institute for Lang Dept
Institute of Business, Management and Law
Tracy Joint Unified School District
Turlock Unified School District
Washington Unified School District
West Sacramento Early College Preparatory
West Contra Costa Unified School District

**Southern California Regional Liability
Excess Fund**

Northern Orange County L&P SIA (NOC L/P SIA)
ABC Unified School District
Anaheim City School District
Buena Park School District
Capistrano-Laguna Beach ROP
Centralia School District

Coastline Regional Occupational Program
Cypress School District
GASELPA
La Habra City School District
Los Alamitos Unified School District
Magnolia School District
North Orange County Regional Occupational
Program
North Orange County Self-Funded Workers'
Compensation Program
Orange County Fringe Benefits Program
Savanna School District
Westminster School District
Riverside Schools Insurance Authority (RSIA)
Banning Unified School District
Beaumont Unified School District
Coachella Valley Unified School District
Desert Center Unified School District
Desert Sands Unified School District and
Washington Charter School
Menifee School District
Murrieta School District Educational Facilities
Corporation
Murrieta Valley Unified School District
Nuvview Union School District
Nuvview Bridge Academy
Palo Verde Community College District
Palo Verde Unified School District
Perris School District
Perris Union High School District
Choice 2000 Online School
California Military Institute
Riverside Employer Employee Partnership JPA
Riverside County Superintendent of Schools
Riverside Schools Risk Management Authority
Romoland School District

San Jacinto Unified School District
Temecula Valley Unified School District
Temecula Valley Charter School
Temecula Prep Charter School
Val Verde Unified School District
Self Insurance Risk Management Authority Ii
(SIRMA II)
Acton-Agua Dulce Unified School District
Antelope Valley Community College District
Antelope Valley Schools' Transportation Agency
Castaic Union School District
Eastside Union School District
Gorman School District
Gorman Charter School
Guidance Charter School
Hughes-Elizabeth Lakes Union School District
Keppel Union School District
Lancaster School District
Palmdale School District
Santa Clarita Valley Food Services Agency
Saugus Union School District
Self Insurance Risk Management Authority Self-
Funded Workers' Compensation Program
Self Insurance Risk Management Authority III –
Employee Benefits
Sulphur Springs Union School District
Whittier Area L/P SIA (WALSPIA)
East Whittier City School District
Los Nietos School District
Pupil Transportation Cooperative
South Whittier School District
Tri-Cities Regional Occupational Program
Alvord Unified School District
Calexico Unified School District
El Rancho Unified School District
Fontana Unified School District

Fountain Valley Unified School District
Garden Grove Unified School District
Hacienda-La Puente Unified School District
Irvine Unified School District
Jurupa Unified School District
Oceanside Unified School District
Orange Unified School District
El Rancho Charter School
Palm Springs Unified School District
Poway Unified School District
Redlands Unified School District
Rialto Unified School District
Santa Barbara Elementary/High School District
Santa Barbara Charter School
Peabody Charter School
Cesar Estrada Chavez Dual Language CS
Snowline Joint Unified School District
Victor Valley Union High School District
Vista Unified School District
William S. Hart Union High School District

APPENDIX B

Section 1 in the bill as originally introduced in 1871 read as follows:

That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication," and the remedial laws of the United States which are in their nature applicable in such cases.

Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13. Presently, section 1983 reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

20a

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX C

Code of Federal Regulation	Federal Program Affected
7 C.F.R. § 210.8	school lunch
7 C.F.R. § 215.13	milk for children
7 C.F.R. § 220.15	school breakfast
7 C.F.R. § 225.10	summer food service
7 C.F.R. §§ 226.8, 235.5, 240.11	child and adult care food
7 C.F.R. §§ 246.20, 246.23, 248.20	supplemental food for women, infants, and children
7 C.F.R. § 249.20	senior farmers' market nutrition
7 C.F.R. § 277.17	food stamp and food distribution
7 C.F.R. § 1290.10	specialty crop block grants
7 C.F.R. § 1948.96	energy-impacted area development assistance
7 C.F.R. § 3015 App. B	uniform federal assistance regulations
12 C.F.R. 1805.804	community development financial institutions
20 C.F.R. § 658.603	job service system
20 C.F.R. § 667.400	employment and training administration
21 C.F.R. § 1403, App. A	drug control policy
23 C.F.R. § 172.7	highways
23 C.F.R. §§ 1200.35, 1250.4, 1251.4	highway traffic safety

22a

24 C.F.R. §§ 92.201, 92.550	home investment partnership
24 C.F.R. § 511.71	rental rehabilitation grants
24 C.F.R. §§ 570.490, 470.493	state community development block grants
31 C.F.R. § 205.9	federal assistance program included in Treasury-State agreements
34 C.F.R. § 76.783	education grants
34 C.F.R. § 303.123	early intervention for infants and toddlers with disabilities
34 C.F.R. § 370.48	special education
40 C.F.R. Part 31, App. A	environmental protection
40 C.F.R. § 35.3570	drinking water
40 C.F.R. § 52.2270	air
44 C.F.R. Part 14, App. A	emergency management
45 C.F.R. § 262.3	public welfare)
49 C.F.R. § 266.23	assistance for local rail service
49 C.F.R. § 350.313	commercial motor carrier safety assistance

APPENDIX D

At least two-thirds of the States generally require that the States themselves, directly or through self-insurance funds, bear the costs of both defense and indemnification of their officials against claims resulting from actions within the officials' scope of employment. These States and the statutory indemnification provisions are:

Alaska	Alaska Stat. §14.12.115 (Michie 2007).
California	Cal. Gov. Code § 825(a) (Deering 2007).
Colorado	Colo. Rev. Stat. § 24-10-110 (2007).
Connecticut	Conn. Gen. Stat. § 5-141d (2008).
Delaware	Del. Code Ann. tit. 10, § 4002 (2008).
Idaho	Idaho Code § 6-903(b)(i) (Michie 2007).
Illinois	5 Ill. Comp. Stat. 350/2, subd. (a) & (e) (2008).
Kentucky	Ky. Rev. Stat. Ann. § 65-2005 (Michie 2008).
Louisiana	La. Rev. Stat. Ann. § 13:5108.1 (West 2008).
Maine	Me. Rev. Stat. Ann. tit. 14, § 8112 (West 2007).
Maryland	Md. Code Ann. Cts. & Jud. Proc. § 5-302 (2008).
Massachusetts	Mass. Gen. Laws ch. 12, §§ 3, 3E, ch. 258, §§ 2, 9 (2008).
Minnesota	Minn. Stat. §§ 375A.10, 466.07 (2007).
Mississippi	Miss. Code Ann. § 11-46-7 (2008).
Missouri	Mo. Rev. Stat. § 105.711 (2008).
Montana	Mont. Code. Ann. § 2-9-305 (2007).

Nebraska	Neb. Rev. Stat. §§ 41.0339, 41.0349, 81-8,239.05 (2007).
New Hampshire	N.H. Rev. Stat. Ann. § 99-D:2 (2008).
New Jersey	N.J. Stat. Ann. §§ 59:10-1, 59:10A-1 (West 2008).
New Mexico	N.M. Stat. Ann. §§ 41-4-23, 41-4-25 (Michie 2008).
New York	N.Y. Pub. Off. Law § 17 (McKinney 2008).
North Dakota	N.D. Cent. Code § 32-12.2-03 (2008).
Ohio	Ohio. Rev. Code. Ann. §§ 9.87, 109.361 (Anderson 2008).
Oklahoma	Okla. Stat. tit. 51, § 162 (2007).
Oregon	Or. Rev. Stat. § 30.285 (2007).
Pennsylvania	42 Pa. Cons. Stat. §§ 8525, 8547, 8548 (2007).
South Carolina	S.C. Code Ann. §§ 15-78-20, 1-7-50 (Law. Co-op. 2007).
Texas	Tex. Civ. Prac. & Rem. Code Ann. §§ 104.002, 104.004 (Vernon 2007).
Utah	Utah Code. Ann. §§ 67-5-1, 63-30d-902, 63-30d-904 (2008).
Vermont	Vt. Stat. Ann. tit. 12, § 5606 (2007); tit. 3, § 1101.
Washington	Wash. Rev. Code Ann. §§ 4.92.060, 4.92.070, 4.92.075 (West 2008).
West Virginia	W. Va. Code §§ 5-3-1, 29-12A-11 (2007).
Wisconsin	Wis. Stat. § 895.46 (2007).
Wyoming	Wyo. Stat. Ann. § 1-39-104 (Michie 2007).

Some States only require indemnification of their officials for official actions.

Florida	Fla. Stat. Ann. § 768.28 (West 2008).
Kansas	Kan. Stat. Ann. § 75-6103 (2006).
North Carolina	N.C. Gen. Stat. §§ 143-300.6, 143-300.3 (defense optional).

Others only require that the States at least defend their state officials.

Indiana	Ind. Code Ann. § 4-6-2-1.5 (Michie 2008).
Iowa	Iowa Code § 13.2 (2008).
Rhode Island	R.I. Gen. Laws §§ 9-31-8, 9-31-12 (2008) (indemnification optional).

Two States require that the States bear the costs related to insurance or self-insurance of state official liabilities.

Alabama	Ala. Code § 36-1-6-1 (2007).
Arizona	Ariz. Rev. Stat. § 41-621 (2007).

Only a few actually may opt not to provide liability insurance to or indemnity or defense of their state officials.

Georgia	Ga. Code Ann. § 20-2-991 (2007).
Hawaii	Haw. Rev. Stat. §§ 46-71.5, 662-16 (2008).
Michigan	Mich. Comp. Laws Ann. § 691.1408 (West 2008).
South Dakota	S.D. Codified Laws § 3-19-1 (Michie 2008).
Tennessee	Tenn. Code. Ann. §§ 8-42-103, 29-20-310 (2008).
Virginia	Va. Code Ann. § 2.2-2817 (Michie 2008).