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,
Cross-Respondent.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF STATE AGENCIES AS *AMICI CURIAE* IN SUPPORT OF CROSS-PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Amici curiae are state social service agencies responsible for administering complex federal-state programs. (A list of *amici* appears on the inside cover of this motion.) *Amici* respectfully move for leave to file the attached brief. The attorney for cross-petitioners has consented to the filing of this brief. *Amici* requested the consent of the cross-respondent, Mr. Stoner, but he refused to consent.

Amici have a strong interest in this case. The Ninth Circuit reversed the district court's dismissal of counts under the False Claims Act, 31 U.S.C. §§ 3729-33, brought against three public officials in their individual capacities. The courts below considered the agencies that employed these officials to be arms of the State of California. If state officials can be subjected to the threat of litigation and held personally liable under the False Claims Act, the greatest potential liability for such suits will arise in connection with the federal-state programs administered by *amici.*

If allowed to stand, the decision below will disrupt the state agencies' implementation of federal-state programs by undermining the intricate relationships between the federal and state governments in the administration of these programs. If state employees responsible for administering federal-state programs face the threat of potentially massive personal liability under the False Claims Act, state agencies will have difficulty

recruiting and retaining qualified candidates for these essential positions.

Respectfully submitted,

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The state agencies listed below respectfully submit this brief *amicus curiae* in support of cross-petitioners in this case.[1]

INTEREST OF *AMICI CURIAE*

Amici curiae are state social service agencies responsible for administering complex federal-state programs. States play an important role in administering many federal programs, including Medicaid, Temporary Assistance to Needy Families (TANF), Emergency Assistance, Child Support Enforcement, Foster Care and Adoption Assistance, the Child Health Insurance Program, and Food Stamps. States that choose to operate within the parameters set out in the governing federal statute are entitled to claim federal funding to cover some percentage of their programmatic and administrative expenditures.

Amici have a strong interest in this case. The Ninth Circuit reversed the district court's dismissal of counts under the False Claims Act, 31 U.S.C. §§ 3729-33, brought against three public

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[1] Pursuant to Rule 37.6, *amici* state that no counsel for any petitioner or respondent authored this brief in whole or in part. No person or entity, other than *amici*, their members, or counsel, made a monetary contribution to the preparation or submission of this brief.

Counsel of record for all parties and cross-respondent received notice at least 10 days prior to the filing of this brief. Mr. Stoner did not consent to the filing of this brief. Thus, *amici* file this brief with a Motion for Leave to File Brief as *Amici Curiae*.

employees in their individual capacities. These individuals, employees of the Santa Clara County Office of Education, are responsible for implementing a federal program — the Individuals with Disabilities Education Act — as part of their official duties. The plaintiff (cross-respondent here) asserted that these employees falsely certified compliance with this statute to obtain more federal funds for educational programs. Both the district court and the court of appeals held that a California county office of education is an arm of the State for purposes of this case. Appendix to Cross-Petition ("Pet. App.") 6a-7a.

If state officials can be subjected to the threat of litigation and held personally liable under the False Claims Act, the greatest potential liability for such suits will arise in connection with the federal-state programs administered by *amici*. These are the programs that generate the greatest volume of claims submitted to the federal government. State officials are regularly called upon to interpret and implement numerous federal statutes and regulations in determining the amount of federal funds a State may claim in connection with these programs.

If allowed to stand, the decision below will disrupt the state agencies' implementation of federal-state programs by undermining the intricate relationships between the federal and state governments in the administration of these programs. If state employees responsible for administering federal-state programs face the threat of potentially massive personal liability under the False Claims Act, state agencies will have difficulty

recruiting and retaining qualified candidates for these essential positions.

STATEMENT

1. *Amici* state agencies administer numerous federal-state programs. These programs, most of which involve provision of services to individuals, are largely administered by the States and are partially supported by the federal government through federal financial participation. These programs include, among many others, Medicaid, 42 U.S.C. §§ 1396 *et seq.,* TANF, 42 U.S.C. §§ 601 *et seq*., and Food Stamps, 7 U.S.C. §§ 2011 *et seq*. Individual state officials must make numerous policy decisions about how these programs will be implemented in accordance with a multitude of federal statutory and regulatory guidelines. State employees also must determine the amount of federal funds that may properly be claimed under these programs. For most federal-state programs, Congress and the responsible federal agencies have established extensive schemes governing compliance, audit, disallowance of claims, and repayment of any federal funds incorrectly claimed. *See*, *e.g.*, 42 U.S.C. § 1396(c) (Medicaid); 42 U.S.C. § 609 (TANF); 7 U.S.C. § 2020(g) (Food Stamps).

The federal government disburses huge sums in connection with these federal-state programs. Federal grants to state and local governments doubled from $115 billion in 1988 to $230 billion in 1997. *See* U.S. Department of Commerce, Bureau of the Census, Publication FES/97, Federal Expenditures by State for Fiscal Year 1997 at 46, Table 11 (April 1998). By 2005, this figure had grown to over $403 billion. *See* U.S.

Department of Commerce, Bureau of the Census, Publication FAS/05, Federal Aid to States for Fiscal Year 2005 at v (2005). Medical assistance programs (including Medicaid) and TANF accounted for over half of this amount. *See id.* at viii, figure 3.

2. The False Claims Act provides that "any person" who knowingly presents a false or fraudulent claim for federal funds is liable to the United States for a civil penalty of up to $10,000 per claim and treble damages. 31 U.S.C. § 3729(a). Suits under the False Claims Act may be brought either by the United States, or by a private individual on behalf of the United States (a "qui tam relator"), *id.* § 3730(b). If a relator brings the suit, the United States has the opportunity to intervene and direct the case. *Id.* § 3730(b)(2) & (4). If the United States declines to intervene, the relator may continue to pursue the suit on behalf of the government. *Id.* § 3730(b)(4)(B). In either case, if the suit is successful, the relator receives a portion of the recovery, generally between fifteen and twenty-five percent. *Id.* § 3730(d).

3. This False Claims Act suit was brought against the Santa Clara County Office of Education, the East Side Union High School District, and three employees of the Santa Clara County Office of Education who were sued in their official and individual capacities. Pet. App. 11a. The relator, John David Stoner (cross-respondent here), alleged that the defendants submitted false certifications of compliance with the Individuals with Disabilities Education Act, which in turn allegedly caused the federal government to provide additional federal funds for educational programs. *Id.* at 3a. The United States declined to intervene. *Id.* at 4a. All of

the defendants then moved for dismissal on the ground that they are not "persons" under the False Claims Act. *Id.*

The district court granted dismissal as to all defendants. The court held that the Office of Education and the high school district were arms of the State and thus are not subject to liability under the False Claims Act. *Id.* at 6a-7a; *see also Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787-88 (2000) (States are not "persons" under the False Claims Act). The claims against the individual defendants in their official capacities were dismissed under a similar rationale. Pet. App. 11a (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (official capacity suit for money damages is suit against the State itself)). Finally, the district court dismissed the personal capacity claims against the individual defendants because the relator "could not allege that the defendants' actions exceeded the scope of their official responsibilities." Pet. App. 12a.

4. The Ninth Circuit agreed that the claims against the Office of Education, the high school district, and the individual defendants in their official capacities were properly dismissed. It held, however, that the individual defendants could be sued in their personal capacities under the False Claims Act for actions taken within the scope of their duties. *Id.* at 12a-13a. In reaching this conclusion, the court of appeals relied heavily on *Hafer v. Melo*, 502 U.S. 21, 27-31 (1991), in which this Court construed the term "person" as it is used in a civil rights statute, 42 U.S.C. § 1983. Pet. App. 13a-15a.

SUMMARY OF ARGUMENT

The Ninth Circuit's holding that a False Claims Act suit may proceed against state employees in their individual capacities is erroneous and dangerous. There is no evidence that Congress intended the term "persons" under the False Claims Act to include state officials, particularly in view of this Court's holding that States themselves are not covered by the statute. The Ninth Circuit's holding is also sharply at odds with the reality that state employees are likely to be public-spirited individuals of modest means. It is simply not credible to conclude that Congress meant to expose such employees to the threat of massive damages and penalties under the False Claims Act. At a minimum, there is no basis for such a suit against a state employee in his personal capacity where the employee acted within the scope of his official responsibilities and not for his own personal financial gain. The Ninth Circuit's decision is inconsistent with the approach taken by the Eighth Circuit and by district courts in other circuits. Moreover, False Claims Act suits against state employees would be inconsistent with the statutory and regulatory framework of numerous programs jointly administered by federal and state officials.

If the decision below is allowed to stand, it will impair the administration of federal-state programs that provide necessary services to citizens and will cause serious administrative problems for state agencies. State officials will face the threat of devastating financial liability when they submit claims for federal funds to help support social services in accordance with their job duties. Even a

remote possibility of such crippling liability will make it difficult for state agencies to recruit and retain qualified candidates for these positions. These serious consequences both support grant of the petition and demonstrate the error of the decision below to the extent it permits a False Claims Act suit against state officials.

ARGUMENT

The undersigned state agencies urge the Court to grant review to address a question of great significance to them, whether state officials may be sued in their individual capacities under the False Claims Act. The decision of the Ninth Circuit, which holds that such suits may be brought, makes little sense. States themselves are not covered by the False Claims Act. There is no reason to think that Congress intended that state employees — ordinarily public-spirited individuals of modest means — would face the threat of onerous liability under the statute, at least in cases where the employee has acted within the scope of his or her official duties and not for personal financial gain.

The Ninth Circuit holding is at odds with the approach taken by the Eighth Circuit and other courts. Moreover, if allowed to stand, the decision below will seriously undermine state agencies' ability to administer numerous federal-state programs. *Amici* therefore request that this Court grant the petition for a writ of *certiorari* and reverse the decision below to the extent it permits a False Claims Act suit against state officials.

I. The Decision Below Is Inconsistent with Congressional Intent and with the Approach Taken by Other Federal Courts.

A. There Is No Evidence that Congress Intended the False Claims Act to Cover State Officials Sued in Their Personal Capacities.

The Ninth Circuit concluded that the term "person" in the False Claims Act is broad enough to include state officials sued in their individual capacities. But the history and the broader context of the statute suggest otherwise, as does common sense. There is no indication that Congress intended the False Claims Act to reach state officials, even when they are sued in their individual capacities.[2]

While the language of the statute is broad, "it is . . . clear that the False Claims Act was not designed to reach every kind of fraud practiced on the Government." *United States v. McNinch*, 356 U.S. 595, 599 (1958). As this Court has recognized, when Congress enacted the False Claims Act in 1863, its goal was to stop "the massive frauds perpetrated by large [private] contractors during the

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[2] This Court has noted that the term "person" "presumptively" includes natural persons. *Stevens*, 529 U.S. at 784 n.14; *see also* 1 U.S.C. § 1. However, the context of a particular provision may overcome such a presumption. *See*, *e.g.*, *Deal v. United States*, 508 U.S. 129, 132 (1993); 1 U.S.C. § 1 (definitions in the Dictionary Act are to be applied unless "the context [of any Act of Congress] indicates otherwise").

Civil War." *Stevens*, 529 U.S. at 781 (quoting *United States v. Bornstein*, 423 U.S. 303, 309 (1976)) (alteration in original); *see also United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343, 352 (S.D.N.Y. 1998) (purpose of False Claims Act was "to address war fraud by private contractors"). The United States had been billed for nonexistent or worthless military goods, and Congress sought to stem the tide of fraud by enacting the False Claims Act. *See* 62 Cong. Globe 952-58 (1863). Thus, the goal was to reach *private* contractors. There is no indication that Congress wanted to cover state officials who administered federal programs.[3]

The Ninth Circuit holding makes little sense unless one assumes that state employees are out to bilk the federal government in connection with their administration of federal programs and that onerous penalties and treble damages are necessary deterrents in this setting. But there is no reason to conclude that Congress would have had this view. Experience suggests that state employees are generally public-spirited individuals who are not looking for personal financial gain at the expense of the federal government. Moreover, state employees are not generally wealthy; their personal financial

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[3] A year before enactment of the False Claims Act, Congress issued a report on the extensive fraud being perpetrated by private contractors during the Civil War. H.R. Rep. No. 2, 37th Cong., 2d Sess., pt. ii-a (1862). That report included mention of fraud by a state official against the federal government. *Id.* at xxxvii-xxxix. This Court noted, however, that the report in question "is utterly irrelevant, since it was not prepared in connection with the 1863 Act, or indeed with any proposed false claims legislation." *Stevens*, 529 U.S. at 783 n.12.

resources are usually quite limited. It is not plausible to think that Congress intended that these public servants would face the threat of devastating financial liability under the False Claims Act.

Moreover, the conclusion that state officials are subject to suit makes little sense in view of settled boundaries on the reach of the False Claims Act. This Court held in *Stevens* that States and state agencies are not covered by the term "person" as it is used in the False Claims Act. 529 U.S. at 787. Thus, States and state agencies are not subject to liability under the statute in connection with receipt of federal grant funds.

If States that submit claims for federal funds under grant programs are not subject to suit under the False Claims Act, there is no reason to think that Congress intended the statute to reach the state officials who administer such programs for the States. State officials are the instrumentality or agent by which States submit claims for federal funding. Like the States themselves, state officials who claim federal funds on behalf of a State in the normal course of their duties must be beyond the reach of the statute. To impose liability on such officials for undertaking their responsibilities on behalf of the State would be at odds with this Court's conclusion that Congress did not intend to cover States under the statute.

Indeed, the decision below might be best described as an end-run around this Court's holding in *Stevens*. In the context of claims for federal funding under a joint federal-state program, a suit against a state official in his or her individual capacity is essentially an attack on state policy and

state administrative decisions, not on the actions of a particular state official. The threat of False Claims Act liability for a state employee's claims for federal funding could pressure the State to alter its administrative and policy decisions in connection with federal programs and to fund settlements with relators through indemnification. Relators' efforts to recover damages from individual state administrators, in amounts that would clearly be beyond the capacity of these individuals to bear, amount to an effort to obtain through the back door a form of relief against the State that *Stevens* precludes.

In the context of the Fair Labor Standards Act, the Seventh Circuit has recognized that suits against state officials in their personal capacities should not be allowed where those suits are "really and substantially . . . against the state." *Luder v. Endicott*, 253 F.3d 1020, 1023 (7th Cir. 2000) (citing *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997)). This occurs when "the effect of the judgment [is] to restrain the Government from acting, or to compel it to act." *Id.* (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984)). *Luder* involved a suit for back wages allegedly owed to state employees, brought against state officials in their individual capacities. The court held that this suit, which sought damages that "obviously exceed[] the ability of [the state officials] to pay," *id.* at 1024, in fact was aimed at the State, *id.* If the State did not indemnify the officials, they would have to declare bankruptcy and either quit or comply with the plaintiffs' demands. If they quit, new employees

would face similar pressures. *Id*. The court barred the suit because "[the plaintiffs] are seeking to force the state to accede to their view of the Act." *Id*.

The situation faced by States and state officials under the False Claims Act is similar to that in *Luder*. Because of the treble damages provision of the statute and because of the magnitude of the sums that flow from the federal government to fund joint federal-state programs, no state employee could personally bear liability for filing a claim that resulted in an overpayment to the State. Whether or not the State indemnified the official, it would face pressure to comply with a relator's demands that it alter the administration of a federal-state program. Accordingly, in the case of the False Claims Act, suit against a state official in his or her personal capacity is in essence a suit against the State and should be barred under *Stevens*.

B. A State Official Who Is Not Alleged to Have Acted for Private Financial Gain Is Not Covered by the False Claims Act.

At a minimum, state officials should not be subject to suit in their personal capacities under the False Claims Act where they acted within the scope of their duties and not for personal financial benefit. As discussed above, Congress's goal in enacting the False Claims Act was to stop fraudulent claims by private contractors. Only state employees acting outside of their official duties and for their own personal gain could plausibly be considered analogous to private contractors who submit fraudulent claims to the federal government.

There is no allegation that the employees here acted in any way outside of their official duties, or that they were motivated in any respect by personal financial gain. Stoner alleged that the supposedly false certifications of compliance "induce[d] the government to disburse more money for certain educational programs." Pet. App. 3a. Thus, all of the federal funds at issue here were to go to the benefit of the federal-state program, not to the benefit of the individual defendants. It is utterly implausible that Congress would have intended that state employees be subject to a False Claims Act suit in these circumstances.

The court of appeals' conclusion that a relator need not allege actions outside of an official's authority or motivation by personal financial gain to maintain a False Claims Act suit against a state official is inconsistent with the approach taken by the Eighth Circuit. In *United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa*, 269 F.3d 932 (8th Cir. 2001), a relator brought a False Claims Act suit against a state employee in his individual capacity. The relator alleged that the employee had induced the federal government to continue making Medicaid payments for services to certain individuals even though he knew they were no longer eligible for such payments. The Eighth Circuit dismissed the claim, holding that because the relator did not "allege[ ] actions outside [the state employee's] official duties as administrator of the waiver program," the employee could not be personally liable. *Id.* at 937.

This Court's decision in *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986),

supports the Eighth Circuit approach. In *Bender*, a school board member sought to appeal in his personal capacity a decision allowing a prayer club to meet during school hours. *Id.* at 541. The Court held that the member did not have standing to appeal in his personal capacity. Although the complaint alleged claims against the member "in [his] individual and official capacities," the Court held that the "course of proceedings" indicated that no relief was actually sought against the member in his personal capacity. *Id.* at 543; *see also Lizzi v. Alexander*, 255 F.3d 128, 137 (4th Cir. 2001) (quoting *Bender*, 475 U.S. at 543) ("[t]he mere incantation of the term 'individual capacity' is not enough to transform an official capacity action into an individual capacity action"), *overruled on other grounds, Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

Other courts have dismissed False Claims Act suits against officials in their individual capacities where there was no allegation of personal profit. *See*, *e.g.*, *United States ex rel. Dunleavy v. County of Del.*, 279 F.3d 219, 221 (3d Cir. 2002) (local government employee not subject to False Claims Act suit when employee does not personally benefit from transaction constituting violation), *rev'd on other grounds*, 538 U.S. 918 (2003); *Alexander v. Gilmore*, 202 F. Supp. 2d 478, 482 (E.D. Va. 2002) (complaint failed to state cause of action under False Claims Act where no allegation that defendants converted funds to their personal use); *Graber*, 8 F. Supp. 2d at 356 (rejecting individual capacity suit under False Claims Act where there was no suggestion that official personally profited from

alleged fraud and all monies were used for foster care program). The decision below is inconsistent with these decisions. The Court should grant review to clarify that state employees who do not seek personal benefit or otherwise act outside the scope of their official duties are not subject to a False Claims Act suit.

C. The Ninth Circuit Erred in Relying on *Hafer v. Melo*.

Presumably recognizing that there is no support in the statute itself or in its history for allowing False Claims Act suits against state officials, the Ninth Circuit turned to this Court's precedent regarding a different cause of action: claims under 42 U.S.C. § 1983. Pet. App. 13a-15a. This Court has held that Section 1983 imposes liability for actions taken under the color of state law that violate constitutional or statutory rights "whether [officials] act in accordance with their authority or misuse it." *Hafer v. Melo*, 502 U.S. 21, 22 (1991). Under *Hafer*, state officials acting under the color of state law are not shielded from personal liability for violation of constitutional or statutory rights simply because they acted in the course of their duties. *Id.* at 31. The Court concluded that holding that officials were not subject to personal liability under Section 1983 where they acted within the scope of their duties would be equivalent to granting them absolute immunity. *Id.* at 28-29. Because absolute immunity is granted only to those "whose special functions or constitutional status requires complete protection from suit," *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982), the Court

declined to read Section 1983 to preclude liability for state officials sued in their individual capacities.

The court below erred in relying on *Hafer*. Section 1983 and the False Claims Act are very different statutes. In enacting Section 1983, Congress specifically intended to reach actions by state officials. *Hafer*, 502 U.S. at 28 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974)); *see also Monroe v. Pape*, 365 U.S. 167, 172 (1961). In contrast, Congress enacted the False Claims Act to reach fraud committed by private contractors against the federal government. *See* page 8-9, *supra*. Thus, there is no reason to construe the two statutes in a similar way.

Moreover, the framework of the False Claims Act itself suggests that *Hafer* is irrelevant here. *Hafer* addressed actions of a state official acting within the scope of her authority. It would be impossible, however, for a state official acting within the scope of her authority to violate the False Claims Act, which addresses actions *knowingly* taken to defraud the federal government. 31 U.S.C. § 3729(a). Only a state official acting outside of the scope of her authority could knowingly submit a false claim to the federal government. Because conduct of state officials acting within the scope of their authority could not constitute a knowing act of fraud against the federal government, *Hafer* is inapplicable.

II. The Decision Below Is Incompatible with the Framework for Administration of Federal-State Programs.

The Ninth Circuit's interpretation of the False Claims Act to apply to state officials sued in

their individual capacities is incompatible with Congress's framework for joint federal-state programs. The programs jointly financed by the federal and state governments represent the largest source of federal funds paid to (and claimed by) the States. In general, federal officials oversee such programs, but state officials are responsible for filling in details and administering the program on a day-to-day basis. The governing federal laws and regulations and implementing state laws and regulations that together provide the framework for federal-state programs are notoriously complicated.

Given the complexity of the statutory and regulatory framework for federal-state programs, it is almost inevitable that States on occasion will claim more federal funds than federal officials think is authorized. Congress and federal agencies have developed a comprehensive administrative framework to handle disagreements about whether a State claimed the proper amount of federal funds. Disputes that cannot be handled through negotiation (most of them are) move through a multi-step administrative process in which the position of the federal agency is fully aired and evaluated before the matter proceeds to federal court. It is not unusual for some issues of particular importance to the States or the federal government to be resolved politically or through legislation.

This system of cooperative federalism is well illustrated by the Medicaid system, "as complex a legislative mosaic as could possibly be conceived by man." *City of New York v. Richardson*, 473 F.2d 923, 926 (2d Cir. 1973). States received over $172 billion in federal funds for Medicaid alone in 2005. *See* U.S.

Department of Commerce, Bureau of the Census, Publication FAS/05, Federal Aid to States for Fiscal Year 2005, at Appendix A, A-7 (2005). The Department of Health and Human Services ("HHS") and its Centers for Medicare and Medicaid Services ("CMS") oversee the program, but the States administer the program and receive federal funds to match amounts the States spend for medical assistance to low-income individuals. The Secretary of HHS is charged with approving state plans and state plan amendments, and regional offices of CMS serve as the States' primary contact in their respective regions.

A CMS regional office works with the States in its region to ensure that they are in compliance with federal statutory and regulatory requirements. The regional offices are also responsible for approving the States' claims for federal financial participation. As this Court noted, "[a]lthough the federal contribution to a State's Medicaid program is referred to as a 'reimbursement,' the stream of revenue is actually a series of huge quarterly advance payments that are based on the State's estimate of its anticipated future expenditures." *Bowen v. Massachusetts*, 487 U.S. 879, 883-84 (1988); *see also* 42 U.S.C. § 1396b(d). These estimates are periodically adjusted to reflect actual experience, so that overpayment amounts from one period are withheld from advances in a subsequent period. 42 U.S.C. § 1396b(d)(5).

A State reconciles its quarterly advances and actual expenditures through a quarterly expenditure report submitted to its regional office. 42 C.F.R. § 430.30(c). If the regional

office questions the allowability of a State's claim, CMS may "defer" payment of the claim. 42 C.F.R. § 430.30(c). Deferral is accomplished by excluding the questioned amount from the grant award pending further review. 42 C.F.R. § 430.40(b).

If a regional office ultimately determines that a State's claim is improper, CMS will "disallow" the claim. 42 C.F.R. § 430.42. The State may appeal the disallowance to the HHS Departmental Appeals Board. 42 C.F.R. § 430.42(b), (c). If the Board's decision requires an adjustment of the amount received by the State, either upward or downward, a subsequent grant award will reflect the amount of increase or decrease. In the event of a decrease (*i.e.*, a "repayment" due to the disallowance of federal funds the State had previously drawn), the regulations specify various timetables for repayment that ensure that the financial integrity of the State's program will not be threatened. 42 C.F.R. § 430.48. A State may seek review of a disallowance decision in federal district court. *Bowen*, 487 U.S. at 892.

There is no reason to think that Congress anticipated that the orderly processes Congress itself and federal agencies established for dealing with overpayments under federal-state programs would be supplemented (and distorted) by a *qui tam* relator's suit. Such suits will interfere with the proper administration of federal-state programs. False Claims Act suits against state officials, even in their personal capacities, may create pressure for changes in the States' administration of their policies as States attempt to resolve such suits. Where the United States does not intervene in a suit brought by a relator, these

changes will be directed not by the federal government in accordance with Congress's intent regarding money granted to the States; rather, they will be directed by a private citizen. Relators will not be motivated to ensure that federal funds provided to the States are spent consistently with congressional intent; instead, they will focus on their own monetary interests. *See Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997) ("relators are motivated primarily by prospects of monetary reward rather than the public good"). The result will be an overlay of private interests on the administrative schemes that govern joint federal-state programs.

Moreover, the framework of the False Claims Act is antithetical to the approach Congress has taken to complex federal-state programs. The False Claims Act is a litigation-based scheme, with a focus on liability, penalties, and treble damages and largely enforced by private citizens. The administrative framework for handling overpayments of federal funds in federal-state programs is quite different. As this Court has noted, administrative disallowances are not "damages," but instead simply "adjustments" in the amount of a federal grant to the State. *Bowen*, 487 U.S. at 892. Taking what might otherwise be a disallowance and trebling it and imposing large penalties on top plainly distorts the division of financial responsibility and the cooperative system that underlies the administration of federal-state programs. The distortion is even more extreme when the extra financial liability is imposed on an

individual state official responsible for administering the program.

False Claims Act suits brought by relators against state officials are a manifestly unsuitable means to answer questions regarding the proper division of financial obligations between the state and federal governments. There is no need to add the threat of such suits to existing federal schemes to ensure compliance with federal law.

III. If Not Reversed, the Decision Below Will Severely Impact State Program Administration.

Unless this Court grants review and reverses the holding that state officials may be sued in their individual capacities, the decision below will cause severe negative consequences for state agencies and state officials charged with administering federal-state programs. Damages and penalties under the False Claims Act are potentially massive, particularly in connection with administration of a large federal program like Medicaid. An individual state employee could never pay such amounts from his or her own pocket. At least in the Ninth Circuit, state officials will likely perceive that any action to draw down federal funds under a federal-state program could lead a relator to file a False Claims Act suit. State officials in other circuits may well fear that other courts will follow the Ninth Circuit's lead.

Even a remote threat of massive personal liability under the False Claims Act will likely dissuade qualified professionals from public service. State agencies need expert administrators

to manage the many complex federal-state programs that provide services to millions of state residents. Decisions about what federal funds the State may properly claim in connection with a program or about policies that will affect the amount of such claims require state officials to interpret complex federal laws and regulations, and reasonable minds can differ regarding federal requirements. It will be difficult for state agencies to administer such programs efficiently with the threat of massive personal damages looming for state officials who implement the programs. The federal government, too, will be harmed if the threat of personal liability dissuades qualified state professionals from accepting positions as federal-state program administrators.

The Ninth Circuit suggested that a state official sued in his or her individual capacity under the False Claims Act might be able to assert a qualified immunity defense. Pet. App. 15a n.3; *see also Gaudineer*, 269 F.3d at 940 (dissent). The prospect that a state official might ultimately be able to prevail on a qualified immunity defense is not sufficient to avoid the harms identified above. The application of the qualified immunity doctrine to a False Claims Act suit against state officials is not well established. Indeed, the only court of appeals to consider the issue to date held that state officials are not entitled to qualified immunity under the False Claims Act, at least in connection with the anti-retaliation provisions of the statute. *See Samuel v. Holmes*, 138 F.3d 173, 178 (5th Cir. 1998). A federal district court has held that qualified immunity is available to state officials sued under the False

Claims Act, but that decision is on appeal. *See United States ex rel. Burlbaw v. Orenduff*, 400 F. Supp. 2d 1276, 1281-89 (D.N.M. 2005), *appeal docketed*, No. 05-2393 (10th Cir. argued Mar. 5, 2007).

Moreover, in *Burlbaw* the court decided the qualified immunity issue only after discovery and development of a factual record. *See id.* Qualified immunity is meant to be an immunity from suit, not merely a defense to liability. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). But under the district court's analysis in *Burlbaw*, it is difficult for a state official to establish qualified immunity at the outset of litigation. Rather, state officials may be required to undergo discovery and multiple adjudications before the immunity defense is resolved.

Even if application of the qualified immunity doctrine to False Claims Act suits were well defined, the mere threat of liability under the statute would likely interfere with the state agencies' ability to implement federal-state programs by deterring qualified professionals from accepting responsibility for administering these programs. Because application of the qualified immunity doctrine is not clearly effective as a protection, it is even more important that this Court clarify that the False Claims Act does not reach state officials sued in their individual capacities.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted and the decision below reversed to the extent it holds that state officials may be sued in their individual capacities.

Respectfully submitted,

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