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

MOTION OF NEW MEXICO STATE UNIVERSITY FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IS SUPPORT OF CROSS-PETITIONERS

KENNETH L. HARRIGAN
Counsel of Record
ALEX C. WALKER
MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.
500 Fourth Street NW
Albuquerque, NM 87102
(505) 848-1800

Counsel for Amicus Curiae

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

MOTION OF NEW MEXICO STATE UNIVERSITY FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Supreme Court Rule 37.2, New Mexico State University ("NMSU") moves for leave to file the attached *amicus curiae* brief in support of the cross-petition. Cross-Petitioners have consented to the filing of the brief. Petitioner, however, has withheld consent, necessitating this motion.

NMSU's brief is appropriate and will assist the Court in its consideration of this important case. The cross-petition raises a significant question regarding the applicability of the False Claims Act ("FCA") to

state employees acting within the scope of their employment.

NMSU is an active research university, ranking in the top 110 institutions in the country in terms of federal research expenditures, and is a top Department of Defense contractor among Hispanic serving universities. Four of NMSU's past Presidents and other NMSU high level administrators are currently defendants in their individual capacities in a suit under the FCA concerning their certifications of NMSU as a minority institution in applications for federal set aside contracts. The issue of the applicability of the FCA to state employees acting within the scope of their employment is involved in the cross appeal of that case pending before the Tenth Circuit Court of Appeals. *See United States ex rel. Burlbaw v. Orenduff, et al.* 10th Circuit Nos. 05-2393 and 06-2006. NMSU and its staff members would be affected if the Ninth Circuit's flawed decision, in which it dramatically expanded the FCA by holding that state officials are fs"person[s]" subject to *qui tam* suits under the FCA for actions taken within the course and scope of their employment, is allowed to stand.

As explained more fully in NMSU's brief, the Ninth Circuit's decision ignores the intent of Congress when the FCA was enacted in 1863 and would allow *qui tam* litigants to do an end run around this Court's decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 120 S.Ct. 1858 (2000).

Respectfully submitted,

Kenneth L. Harrigan
Counsel of Record
Alex C. Walker
Modrall, Sperling, Roehl,
Harris & Sisk, P.A.
500 Fourth Street NW
Albuquerque, NM 87102
(505) 848-1800
Counsel for
Amicus Curiae

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS – Continued

PAGE

TABLE OF AUTHORITIES

PAGE

Cases

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES – Continued

PAGE

TABLE OF AUTHORITIES – Continued

PAGE

Statutes

Other

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BRIEF OF NEW MEXICO STATE UNIVERSITY AS *AMICUS CURIAE* IN SUPPORT OF CROSS PETITION

Kenneth L. Harrigan
Counsel of Record
Alex C. Walker
Modrall, Sperling, Roehl,
Harris & Sisk, P.A.
500 Fourth Street NW
Albuquerque, NM 87102
(505) 848-1800
Counsel for
Amicus Curiae

INTEREST OF AMICUS CURIAE[1]

New Mexico State University ("NMSU") is a comprehensive land-grant institution of higher learning, founded in 1888 as an agricultural college and preparatory school, NMSU is dedicated to teaching, research, and service at both the undergraduate and graduate levels.

NMSU's statewide system provides learning opportunities through cooperative extension offices in the 33 New Mexico counties, 13 research and science centers statewide, campuses in Alamogordo, Carlsbad, Doña Ana County, Grants and Las Cruces, an Albuquerque Center and distance education programs.

NMSU is a very active research university, with research and public service expenditures exceeding $140 million in 2005-2006. NMSU ranks in the top 110 institutions in the country in terms of federal research expenditures. In addition to its status as a land-grant institution, NMSU also serves as the headquarters for the New Mexico Space Grant Consortium, the New Mexico Water Resources Research Institute, and WERC, a statewide consortium for environmental education and technology development. NMSU is a top U.S. Department of Defense contractor among Hispanic-serving universities. NMSU is the only university to reach the platinum, or highest, level of service to

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[1] This brief was not authored in whole or in part by counsel for either party. No person or entity other than *amicus curiae* has made a monetary contribution to the preparation or submission of this brief.

NASA's Space Alliance Technology Outreach Program, which makes the expertise of corporate and university researchers available to small businesses.

NMSU has a strong interest in this case. The cross-petition raises a significant question regarding the applicability of the False Claims Act ("FCA") to state employees acting within the scope of their employment. Given NMSU's various government contracts, NMSU and its staff members would be affected if the Ninth Circuit's flawed decision, in which it dramatically expanded the FCA by holding that state officials are "person[s]" subject to *qui tam* suits under the FCA for actions taken within the course and scope of their employment, is allowed to stand.

While this Court's previous decisions have clarified the meaning of "person" under the FCA to exclude states and state employees sued in their "official" capacities, uncertainty remains regarding whether the FCA's use of "person" encompasses state employees named in their "individual" capacities. This very issue is currently involved in the cross appeal of a case before the Tenth Circuit in which four former Presidents of NMSU and other NMSU high level administrators were sued in their "individual capacities" under the FCA in connection with their certifications of NMSU as a minority institution in applications for federal set-aside contracts. *See United States ex rel. Burlbaw v. Orenduff et al.*, 10th Circuit Nos. 05-2393 and 06-2006. As the *Burlbaw* cross appeal involves some of the same issues made the subject of the cross-petition, any resolution by this Court of the issues

raised in the cross-petition could directly impact the outcome of the *Burlbaw* matter, not to mention the administration of numerous federal contract and grant programs involving institutions of higher education, like NMSU.

SUMMARY OF ARGUMENT

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 120 S.Ct. 1858 (2000), this Court looked to the intent of Congress when the FCA was enacted in 1863 in concluding that Congress did not intend to include states as "persons" under the FCA. Since Congress did not intend the FCA to include states as "persons" when the FCA was enacted in 1863, then state officials acting within the course and scope of their employment are also not to be considered "persons" subject to suit under the FCA, since there was no recognized distinction in 1863 between "official capacity" and "individual capacity" suits.

Moreover, the FCA should not be interpreted in such a way as to authorize a *qui tam* plaintiff to do indirectly that which he cannot do directly by the simple pleading artifice of labeling the claim as one against the official in his individual capacity. Where the state employee was acting within the course and scope of their employment, basic agency principles dictate that the state is liable for the actions and responsible for any money judgment awarded – which in FCA cases, effectively allowing for a punitive award, can be substantial. Accordingly, a suit against a state employee in his "individual" capacity, albeit for actions taken within the course

and scope of his employment, is a suit against the individual state employee in name only, since the real party in interest remains the state entity that employs him.

ARGUMENT

On April 11, 2000, this Court decided *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, *supra,* holding that the FCA does not apply to a state or state agency because states are not "persons" covered by the Act. *Id.* at 784-787. A necessary corollary of that decision is that the FCA also does not allow FCA claims against individual governmental employees in their official capacities. *See, e.g., Kentucky v. Graham*, 473 U.S. 159, 165, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985) ("Official-capacity suits . . . 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'") (quoting *Monell v. Dept. of Social Services*, 436 U.S. 658, 690, n.55, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978)); *also Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) ("a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office," and for this reason "is no different from a suit against the State itself").

Following *Stevens*, *qui tam* litigants attempted to evade this Court's holding by simply recasting what were previously alleged to have been "official" capacity actions as having been taken in the governmental employee's "individual" capacity. If, as the Ninth Circuit's decision suggests, *qui tam* litigants are allowed to circumvent *Stevens* simply by

changing the wording of the caption, this Court's holding in *Stevens* is meaningless.

I. WHEN CONGRESS ENACTED THE FCA IN 1863, IT DID NOT INTEND FOR STATE OFFICIALS PERFORMING THEIR OFFICIAL DUTIES TO BE SUBJECT TO INDIVIDUAL LIABILITY UNDER THE FCA

In *Stevens*, this Court was asked to determine whether a private individual could bring a *qui tam* action against a state under the FCA. *Stevens*, 529 U.S. 765, 768. In answering that question, this Court focused largely on the fact that the FCA was "enacted in 1863 with the principal goal of 'stopping the massive frauds perpetrated by large [private] contractors during the Civil War.'" *Id.* at 781 (quoting *United States v. Bornstein*, 423 U.S. 303, 309, 46 L. Ed. 2d 514, 96 S. Ct. 523 (1976)). The Court then noted that the 1863 version of the FCA "bore no indication that States were subject to its penalties" and that "the text of the original statute does less than nothing to overcome the presumption that States are not covered." *Id.* at 782. The Court went on to note that while "the liability provision of the original FCA has undergone various changes, none of them suggests a broadening of the term 'person' to include States." *Id.* at 782. The Court concluded that there was nothing to suggest that Congress, when the act was drafted in 1863, intended to include states as "persons" under the FCA. Under the clear holding of *Stevens*, the FCA is simply not directed at the conduct of the state.

If Congress did not intend the FCA to include states as "persons" under the FCA in 1863, then it cannot follow that the same Congress nevertheless intended state *officials* to be considered "persons." This conclusion necessarily flows from the fact that, at the time the FCA was enacted in 1863, there was no recognition of separate "official" and "individual" capacities for state officials. Nor did courts recognize that a state official acting within the course and scope of his duties could be held personally liable, since a state could act only through its employees. *E.g.*, *Tenn. v. Davis*, 100 U.S. 257, 263 (1880) (state "can act only through its officers and agents"). It was not settled until well *after* the enactment of the FCA in 1863 that state officials could be subject to personal liability. *See Ex parte Young*, 209 U.S. 123, 159-160 (1908) (settling the issue of 11th Amendment immunity for state officials and holding that, where injunctive damages are at issue, a state official violating federal law "is subjected in his person to the consequences of his individual conduct"); *also Scheuer v. Rhodes*, 416 U.S. 232 (1974) (Congress enacted 42 U.S.C. § 1983 "to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.") (cited in *Hafer v. Melo*, 502 U.S. 21, 30-31 (1991) ("the Eleventh Amendment does not erect a barrier against suits to impose 'individual and personal liability' on state officials under § 1983")).

Since *Stevens* holds that states are not "persons" under the FCA because, at least in part, there is no indication that Congress so intended in

1863, then state officials are also not "persons" under the FCA, because there is no indication that Congress understood there to be any such thing as a claim for money damages against a state official (acting within the course and scope of his duties) in his "individual" capacity in 1863. As recognized in *United States ex rel. McVey v. Board of Regents of University of California*, 165 F.Supp.2d 1052 (N.D. Cal. 2001), any other reading of the FCA is in conflict with *Stevens*. If Congress intended state officials – but not states – to be subject to suit under the FCA (*i.e.*, a departure from the status quo as of 1863), it would have said so. It did not, leaving no valid basis for the Ninth Circuit's departure from the *Stevens* analysis.

II. A *QUI TAM* SUIT AGAINST INDIVIDUAL STATE EMPLOYEES IS AN UNJUSTIFIED "END RUN" AROUND *STEVENS* AND IGNORES THE REAL PARTY IN INTEREST – THE STATE EMPLOYER

The Ninth Circuit's decision is in open conflict with the decisions of several other courts that have rejected attempts by *qui tam* plaintiffs to bring claims under the FCA alleging personal liability against state officials. For example, in *United States ex rel. Gaudineer & Comito, LLP v. Iowa HHS*, 269 F.3d 932, *rehearing and rehearing en banc denied, cert. denied* 122 S.Ct. 2593 (8th Cir. 2001), the *qui tam* relator originally brought claims against various governmental entities. After this Court's decision in *Stevens* (which effectively dismissed relator's claims), the relator sought to amend to name a state official in his "individual capacity." *Id.* at 934. The relator's proposed amended complaint (naming the state

official in his individual capacity) was almost identical to the original complaint against the governmental entities and the state official in his official capacity. *Id.* at 935. The district court denied the motion to amend and the relator appealed.

On appeal, the state official argued that since he did not act outside of the scope of his duties, he was not a "person" under the FCA because the state was the real party in interest, meaning the claims were barred by the Eleventh Amendment in any event. *Id.* at 936. The Eighth Circuit agreed and declined to adopt relator's argument that the term "person" under the FCA should be construed the same as "person" under 42 U.S.C. § 1983. *Id.* The Eighth Circuit also rejected the dissent's and the relators' argument that *Hafer v. Melo* (discussing "individual" versus "official" capacity claims) meant the amendment should be granted as a matter of right. Instead, the Eighth Circuit reasoned that, in determining whether a state official may be liable for money damages in his individual capacity, courts should not rely wholly on "the elementary mechanics of captions and pleading." *Id.* at 937 (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270, 117 S. Ct. 2028 (1997)). "It is not enough for a relator to simply label the claim as one against the official in his individual capacity." *Id.* at 937 (internal citation and quotation omitted).

A state can act only through its officers and agents. *Nev. v. Hicks*, 533 U.S. 353, 365 (2001) (State can act only through its officers and agents); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 114 (1984) ("an American State can act only

through its officials") (superceded on other grounds by 28 U.S.C. § 1367 as stated in *Raygor v. University of Minn.*, 604 N.W.2d 128, 133 (Minn. Ct. App. 2000)); *Terry v. Midwest Refining Co.*, 64 F.2d 428, 434 (10th Cir. 1933) ("the state could act only through officers or agents"). Since states take no actions independent of the actions of their agents, *Stevens* and the 11th Amendment cannot be properly evaded by a *qui tam* litigant simply asserting that the state employees were acting in their "individual" capacities. The "mere incantation of the term 'individual capacity' is not enough to transform an official capacity action in to an individual capacity action." *Lizzi*, 255 F.3d at 137 (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 543 (1985)); *Coeur d' Alene Tribe of Idaho*, 521 U.S. at 270 ("the real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading.").

Accordingly, even when a complaint expressly names a state official is his or her "individual" capacity, the 11th Amendment will still bar the suit if the state is the real party in interest. *Halderman*, 465 U.S. at 101. Under basic agency principles, a principal is liable for the tortious misrepresentations (*i.e.*, fraud) of the agent if the representation is authorized, apparently authorized, or within the power of the agent to make for the principal. Restatement (2d) Agency, § 257. Further, an employer is responsible for the fraudulent conduct of an employee under the same standard. *Id.*, § 249; *also Taylor v. Phelan*, 912 F.2d 429, 433 (10th Cir. 1990); Restatement (3d) Agency, § 7.07. Thus, unless there is some allegation that the governmental

employees were acting outside the course and scope of their employment, the governmental entity remains the real party in interest for any claim of money damages.

The Ninth Circuit improperly ignored this legal reality. Under its decision, a state official could be acting within the course and scope of his duties and still violate the FCA, thereby subjecting the state to damages. However, the reality is that the perfunctory act of labeling conduct as being performed in the official's "individual" capacity does not magically transform a suit from one against the state to one against an individual. *See Bender*, 475 U.S. at 543; *Lizzi*, 255 F.3d at 136-137; *Wilson v. Graham County Soil and Water Conservation Dist.*, 224 F.Supp.2d 1042, 1049-50 (W.D.N.C. 2002). The state remains the real party in interest.

Indeed, if a state can act only through its employees, and if the state is legally responsible for actions by its employees taken within the course and scope of their duties, then a suit against a state employee for actions taken within the course and scope of his duties is different than a suit directly against the state in name only. To hold that individual state officials (acting on behalf of the state and within the course and scope of their duties) can be sued under the FCA, while also recognizing that the FCA prohibits the state itself from being sued, completely undermines this Court's decision in *Stevens*, and allows *qui tam* plaintiffs to easily skirt the Eleventh Amendment protection that states (the real parties in interest) would otherwise enjoy. Even though *Stevens* clearly says that an FCA suit against

a state is not allowed (in substantial part because of the punitive nature of damages that the state would be forced to incur under the FCA), the Ninth Circuit's ruling means that *qui tam* plaintiffs can effectively ignore *Stevens* and recover from the state the exact damages that *Stevens* says states are not liable for under the FCA.

The Ninth Circuit justified its ruling by suggested that *not* allowing state employees to be sued in their "individual" capacities would be tantamount to granting absolute immunity to all state employees, for FCA purposes. To the contrary, allowing *qui tam* suits against individual state employees creates an exception to the state's sovereign immunity which is not warranted by the FCA or *Stevens*. Indeed, the Ninth Circuit's simplistic assumption that disallowing *qui tam* suits against government employees would equal "absolute immunity" for the actions of a state official overlooks the vast array of common law remedies[2] that the federal government has at its disposal when it believes it have been wronged, which remedies are

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[2] *See, e.g.*, *United States v. Lahey Clinic Hosp., Inc.*, 399 F.3d 1, 6 (1st Cir. 2005) (United States filed an action under 28 U.S.C. § 1345 against hospital alleging "violations of the common law giving rise to causes of action for unjust enrichment and payment under mistake of fact."); *United States v. Mead*, 426 F.2d 118, 124-25 (9th Cir. 1970) (common law remedy of payment by mistake not abrogated by False Claims Act's statutory remedies); *United States v. Borin*, 209 F.2d 145, 148 (5th Cir.) (common law remedy of fraud not abrogated by False Claims Act's statutory remedies), *cert. denied*, 348 U.S. 821, 99 L. Ed. 647, 75 S. Ct. 33 (1954); *United States v. Silliman*, 167 F.2d 607, 610-11 (3d Cir.) (common law remedies not abrogated by False Claims Act), *cert. denied*, 335 U.S. 825, 93 L. Ed. 379, 69 S. Ct. 48 (1948).

not in any way tied to the meaning of "person" under the FCA or to the Eleventh Amendment.

III. IF SUIT IS TO BE ALLOWED AT ALL, *QUI TAM* PLAINTIFFS SHOULD BE REQUIRED TO ALLEGE AND SHOW PERSONAL GAIN BY THE INDIVIDUAL STATE EMPLOYEES

Even if state employees are deemed "persons" under the FCA and subject to suit, in order to avoid a situation in which *Stevens* is rendered virtually meaningless, and in order to prevent litigants from doing an improper "end run" around the Eleventh Amendment, *qui tam* plaintiffs should be required to show some personal gain by the state employees.

For instance, in *United States ex rel. Honeywell, Inc. v. San Francisco Housing Authority, et al.*, 2001 U.S. Dist. LEXIS 9743 (N.D. Ca. 2001) the court granted a motion to dismiss the FCA complaint against public officials in their personal capacity, concluding that such a suit may not be maintained without an allegation that the officials "personally benefited from the freeze benefit obtained from HUD." *Id.*, at * 11. The court noted that any such benefit remained with the San Francisco Housing Authority (employer of the public officials), and explained that: "Given the allegations in the Complaint, it does not appear that Honeywell could amend the Complaint to allege personal gain." *Id.* at *14 n. 4.

In *Alexander v. Gilmore*, 202 F.Supp.2d 478 (E.D. Va 2002), Plaintiffs alleged that the Virginia Department of Corrections made false certifications

and representations to the federal government in order to receive federal grants. The certifications were signed by state employees. Plaintiffs sued these and other Virginia public officials under the FCA in their "individual" capacities. The court emphasized that the complaint did not contain any facts that suggested that the officials who signed and submitted the federal grant application were acting in anything other than their official capacities. *Id.* at 482. Then, relying on *Smith v. United States*, 287 F.2d 299 (5th Cir. 1961), in which the Fifth Circuit noted that FCA claims against government officials in their personal capacities should rest on allegations of personal gain, the court dismissed the complaint for failure to state a claim because there were "no allegations that [individual defendants] converted funds from VOITIG (the federal grant program) to their personal use." *Alexander*, 202 F.Supp.2d at 482; *see also United States ex rel. Graber v. City of New York*, 8 F.Supp.2d 343 (S.D.N.Y. 1998) (stating that suit under FCA could not be brought against public officials absent allegations they personally received funds paid by federal government on basis of alleged false claims); *United States ex rel. Kinney v. Stoltz*, No. CIV. 01-1287, 2002 WL 523869 at *7 n. 3 (D. Minn. April 5, 2002) (stating that officials must have personally benefited from the alleged submission of false claims to Medicare before suit under FCA is anything other than one against the governmental employer); *United States ex rel. Dunleavy v. County of Delaware*, 2000 U.S. Dist. LEXIS 14980 (E.D. Pa. Oct. 12, 2000) (no allegation that official acted for his own benefit, profited at the public's expense, spent the money at issue for any non-public purpose, or acted in any capacity other than his official one);

Lane v. Texas Dep't of Health, 2003 Tex. App. LEXIS 6524, * 17-18 (Ct. App. – Third Dist., Austin July 30, 2003) (holding that "even if individual state officials or employees are sued in their individual capacities, no FCA liability arises unless there is evidence that the official or employee converted the federal funds or property to their own personal use or benefit.").

A rule imposing individual liability on state officials acting within the course and scope of their duties simply because they are sued that way "would do nothing more than adhere to an empty formalism" that other courts have rightly rejected. *Lizzi v. Alexander*, 255 F.3d 128, 137 (4th Cir. 2001) (internal citations omitted). Absent a requirement of a showing of personal gain, the Ninth Circuit's ruling means that state officials can be held personally liable even though the state was the only entity benefiting from the alleged FCA violation. This Court has previously noted the absurdity of such a holding in other contexts. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 687 (U.S. 1978) (in deciding that municipalities can be held liable under § 1983, stating: "it beggars reason to suppose that Congress would have exempted municipalities from suit, insisting instead that compensation for a taking come from an officer in his individual capacity rather than from the government unit that had the benefit of the property taken."). In rejecting the requirement that *qui tam* plaintiffs allege and show some sort of personal benefit to the individual defendants, the Ninth Circuit allowed for the FCA and *Stevens* to be interpreted so as to reach an equally illogical result. *See, e.g., Dodd v. United States*, 545 U.S. 353 (U.S. 2005) (J. Stevens, dissenting) (even clear text should

be interpreted in a manner that avoids an absurd result) (citing *Clinton v. City of New York*, 524 U.S. 417, 429, 141 L. Ed. 2d 393, 118 S. Ct. 2091 (1998) and *Church of Holy Trinity v. United States*, 143 U.S. 457, 459, 36 L. Ed. 226, 12 S. Ct. 511 (1892)).

CONCLUSION

For the foregoing reasons, the cross-petition for a writ of certiorari should be granted and the Ninth Circuit Court of Appeals' holding that state employees may be sued in their individual capacities under the FCA for actions taken in the course of their official duties should be reversed.

Respectfully submitted,

Kenneth L. Harrigan
Counsel of Record
Alex C. Walker
Modrall, Sperling, Roehl,
Harris & Sisk, P.A.
500 Fourth Street NW
Albuquerque, NM 87102
(505) 848-1800
Counsel for
Amicus Curiae