No.

In the Supreme Court of the United States

COLLEEN B. WILCOX, ET AL., CROSS-PETITIONERS

v.

UNITED STATES EX REL. JOHN DAVID STONER

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

CROSS-PETITION FOR A WRIT OF CERTIORARI

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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.

PARTIES TO THE PROCEEDING

Cross-petitioners Colleen Wilcox, Joe Fimiani and David Wong were defendants in the district court and appellees in the court of appeals. The Santa Clara County Office of Education and the East Side Union High School District were also defendants in the district court and appellees in the court of appeals; however, they are not cross-petitioners before this Court.

Cross-respondent John David Stoner, acting *pro se*, commenced and prosecuted this *qui tam* civil action on behalf of the United States, the State of California and Santa Clara County in the district court and before the court of appeals. The United States, the State of California and Santa Clara County all filed notices in the district court declining to intervene in the case. The United States appeared as an *amicus curiae* before the court of appeals solely on the question of whether individual state officials can be sued under the FCA.

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Cross-petitioners Colleen Wilcox, Joe Fimiani and David Wong respectfully submit this cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-22a) is reported at 502 F.3d 1116. The opinion of the district court (App., *infra*, 23a-38a) is unreported, but is available at 2004 WL 5535992.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 2007. The court of appeals denied cross-petitioners' request for en banc rehearing on November 23, 2007 (App., *infra*, 39a). On February 4, 2008, Justice Kennedy extended the time within which cross-petitioners could file a petition for a writ of certiorari to and including April 1, 2008, and on March 6, 2008, Justice Kennedy further extended the time to and including April 21, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh and Fourteenth Amendments to the United States Constitution and pertinent provisions of the FCA are reprinted in the appendix to this cross-petition, as are portions of the Act of March 2, 1863, ch. 67, 12 Stat. 696; the Act of April 20, 1871, ch. 22, 17 Stat. 13; and 42 U.S.C. § 1983 (App., *infra*, 41a-51a).

STATEMENT

This case provides the Court with the opportunity to resolve two important questions of federal law affecting tens of thousands of state officials throughout the United States. The Ninth Circuit below held that state officials are amenable to *qui tam* suits under the FCA for actions taken in their official capacities even if the actions in question did not result in private, pecuniary gain and even if an adverse judgment would ultimately be satisfied using funds from a state treasury. This Court's review is warranted to decide two issues left unresolved by

Stevens: (1) whether individual state officials are "person[s]" amenable to *qui tam* suits under the FCA for actions taken in their official capacities; and (2) whether, even if state officials are "person[s]" within the meaning of the FCA, principles of federalism and state sovereignty embodied by the Eleventh Amendment prohibit the continued prosecution of an FCA *qui tam* suit brought against state officials after the United States declines to intervene in that suit.

1. The FCA was enacted in response to acts of fraud that private military contractors perpetrated upon the Federal Government during the American Civil War. *See* Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (1863 Act); *Stevens*, 529 U.S. at 781. In its original form, the first section of the FCA provided that

> any person in the land or naval forces of the United States, or in the militia in actual service of the United States, in time of war, who shall make or cause to be made, or present or cause to be presented for payment or approval to or by any person or officer in the civil or military service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent . . . shall be deemed guilty of a criminal offence . . . .

1863 Act § 1, 12 Stat. at 696-97. Every such "person"—a term the 1863 Act did not define—could be "arrested and held for trial by a court-martial." *Id.* at 697.

The provisions of § 1 were also applied to "any person not in the military or naval forces of the United States, nor in the militia called into or actu-

ally employed in the service of the United States . . . .” § 3, 12 Stat. at 698. Such “person[s],” however, were not subject to courts-martial; instead, they could be prosecuted in federal court for criminal penalties and sued civilly for the “sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit . . . .” § 4, 12 Stat. at 698. The 1863 Act provided that a *qui tam* suit to collect these amounts could be “brought and carried on by any person, as well for himself as for the United States . . . .” *Id.* If the suit resulted in a monetary recovery, the award was divided evenly between the relator and the United States. § 6, 12 Stat. at 698.

The FCA has been amended on various occasions following its enactment in 1863.[1] However, the un-

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[1] For example, shortly after this Court’s decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), Congress amended the FCA to preclude *qui tam* actions based upon information already in the Federal Government’s possession; to authorize the Federal Government to take over the prosecution of *qui tam* civil suits; and to reduce the relator’s share of any recovery that such actions produced. *See* Act of Dec. 23, 1943, ch. 377, 57 Stat. 608. In 1982, Congress recodified the FCA and amended its civil liability provision, replacing the phrase “any person not in the military or naval forces of the United States, nor in the militia called into or actually employed in the service of the United States,” with the phrase “[a] person not a member of an armed force of the United States.” Act of Sept. 13, 1982, Pub. L. No. 97-258, § 1, 96 Stat. 877, 978 (codified at 31 U.S.C. § 3729 (Supp. III 1983)). The current language of the FCA is the product of amendments enacted in 1986. *See* False Claims

(continued)

defined term "person" has remained in the FCA's liability provision unchanged and undefined. *Stevens*, 529 U.S. at 783 n.12; *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 125 (2003).

In its current form, the FCA provides the Federal Government with a cause of action 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." 31 U.S.C. § 3729(a)(1). No proof of specific intent to defraud is required, 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).

Like its 1863 predecessor, an action under the current version of the FCA can be initiated either directly by the Federal Government or by a private *qui tam* relator who sues not only "for the person," but also for the "United States Government." § 3730(b)(1). If the action is commenced by a relator, the complaint must be filed under seal and served on the Federal Government, along with a written disclosure of substantially all material evidence and information in the relator's possession. § 3730(b)(2). The Federal Government has 60 days to review the complaint and to determine whether to intervene and assume primary responsibility for prosecuting the action. *Id.* For good cause shown, the Federal Government may move the court for extensions of

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Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (codified in scattered sections of 31 U.S.C.).

time during which the complaint remains under seal. § 3730(b)(3). Such extensions are routinely requested and granted. *See, e.g.*, *United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263, 266 (2d Cir. 2006) (noting that over eight-year period, sixteen requests to extend the seal period were granted).

If the Federal Government declines to intervene, the relator retains the right to pursue the action. 31 U.S.C. § 3730(c)(3). A defendant found liable under the current version of the FCA is subject to civil penalties as great as $11,000 per claim, as well as treble damages and attorneys' fees. § 3729(a).[2] The relator is entitled to share in any recovery with the Federal Government. If the Federal Government does not intervene, the relator receives a bounty of between 25 and 30 percent of the recovery. § 3730(d)(2). If the Federal Government intervenes, the relator's bounty is reduced to between 15 and 25 percent. § 3730(d)(1).

2. Cross-respondent John David Stoner is a former employee of the Santa Clara County Office of Education (SCCOE). App., *infra*, 55a (Compl. ¶ 12).[3]

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[2] On its face, the FCA provides for a minimum penalty of $5,000 and a maximum penalty of $10,000 per claim. 31 U.S.C. § 3729(a). In 1999, these amounts were adjusted upward to a minimum penalty of $5,500 and a maximum penalty of $11,000 per claim, pursuant to a statutory mandate applicable to civil penalties enforced by all federal agencies. *See* Civil Monetary Penalties Inflation Adjustment, 64 Fed. Reg. 47,099, 47,104 (Aug. 30, 1999) (codified at 28 C.F.R. § 85.3(a)(9)) (implementing the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890).

[3] Because Mr. Stoner's case was decided at the motion-to-dismiss stage, cross-petitioners refer only to those factual (continued)

During the approximate year-and-a-half he was employed by SCCOE, Mr. Stoner served as an intern with the title "Teacher of Students with Severe Disabilities." *Id.*

Shortly after his employment ended, Mr. Stoner commenced this *qui tam* civil action in the United States District Court for the Northern District of California, naming as defendants SCCOE, the East Side Union High School District (ESUHSD) and cross-petitioners Colleen Wilcox, Joe Fimiani and David Wong. *Id.* at 53a (Compl. ¶ 3). During the time period at issue in Mr. Stoner's complaint, Dr. Wilcox served as the Santa Clara County Superintendent of Schools, *id.* at 56a (Compl. ¶ 16); Mr. Fimiani served as SCCOE's Director of Special Education, *id.* at 56a (Compl. ¶ 17); and Mr. Wong served as a school principal for certain special education programs, *id.* at 57a (Compl. ¶ 19).

Mr. Stoner's *pro se* complaint did not expressly state whether cross-petitioners were being sued in their official and/or their personal capacities. Instead, Mr. Stoner's complaint alleged that ESUHSD and the "County Defendants"—a term Mr. Stoner defined as including SCCOE and cross-petitioners—presented, or caused to be presented, various false claims for payment or approval to the Federal Government. *See id.* at 53a, 94a, 96a (Compl. ¶¶ 3, 170, 177). Among other things, Mr. Stoner claimed that the defendants falsely certified compliance with all federal and state laws in order to induce the Federal

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allegations contained in Mr. Stoner's complaint. *See Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007).

Government to disburse funds for certain special education programs. *Id.* at 94a (Compl. ¶ 170).

Mr. Stoner's complaint also contained several state-law claims, including alleged violations of the California False Claims Act (CAFCA), Cal. Gov't Code §§ 12650-12655, and common-law breach of contract. *Id.* at 99a-116a (Compl. ¶¶ 192-267). On his FCA claims alone, Mr. Stoner sought to recover millions of dollars under the FCA's treble-damages and per-claim-penalties provisions. *See, e.g.*, *id.* at 103a (Compl. ¶ 205) (seeking "three times an amount in excess of $2,560,000 plus up to $10,000 civil penalty for each false claim").

As required by the FCA and CAFCA, Mr. Stoner filed his complaint under seal and served it on the United States, the State of California and Santa Clara County. *See* App., *infra*, 25a. Within 60 days, each of these governmental entities filed notices in the district court declining to intervene in the case. *See id.* The district court then unsealed the complaint and ordered that it be served on the defendants. *See id.* Once served, SCCOE moved to dismiss the claims against it, arguing, *inter alia*, that it was not a "person" amenable to *qui tam* suits under the FCA. *See id.* ESUHSD and cross-petitioners joined in that motion. *Id.*

3. The district court granted the motion to dismiss. *Id.* at 24a. In finding that Mr. Stoner's complaint failed to state a claim upon which relief could be granted, the district court held that the FCA did not provide a cause of action against SCCOE and ESUHSD because each of those entities was an arm of the State of California, and thus neither entity

was a "person" subject to *qui tam* suits following this Court's decision in *Stevens*. *Id.* at 35a.

As for the claims against cross-petitioners, the district court determined that any official-capacity claims were prohibited following *Stevens* because an action against a state official in his official capacity was not a suit against the official but rather was a suit against the State itself. *Id.* at 37a (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989), and *United States ex rel. McVey v. Board of Regents of Univ. of Cal.*, 165 F. Supp. 2d 1052, 1058 (N.D. Cal. 2001)).

The district court also rejected Mr. Stoner's assertion that he was suing cross-petitioners in their personal capacities, explaining:

> In an effort to save his claims, Stoner attempts to characterize his FCA claims against the SCCOE employees as claims against them in their individual capacities. The Court is not convinced. The Court has reviewed the pleadings and finds Stoner offers no evidence that the employee defendants were acting outside their official capacities during the incidents in question. At oral argument, Stoner argued that the employee defendants stepped outside their official capacities because they abused their authorities. The Court concludes that such allegations do not suffice.

Id. at 37a. Acting *sua sponte*, the district court further held that Mr. Stoner could not prosecute a suit on behalf of the United States acting *pro se*. *Id.* at 28a.

Since it had dismissed all of Mr. Stoner's federal claims, the district court declined to exercise sup-

plemental jurisdiction over Mr. Stoner's state-law claims and dismissed them without prejudice. *Id.* at 38a.[4]

4. The district court's ruling was affirmed in part and reversed in part by the Ninth Circuit. App., *infra*, 3a. The only aspect of the district court's ruling with which the Ninth Circuit disagreed was that dealing with cross-petitioners' amenability to suit in their personal capacities. *Id.* at 12a.

According to the court of appeals, the district court had erred in dismissing Mr. Stoner's personal-capacity claims against cross-petitioners. The Ninth Circuit explained:

> The plain language of the FCA subjects to liability "any person" who, among other things, knowingly submits a false claim or causes such a claim to be submitted to the United States. 31 U.S.C. § 3729. Although the FCA does not define the term "person," the Supreme Court has made clear that the term includes "natural persons." *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 125 (2003); *see also* 1 U.S.C. § 1 (defining the term "person" for purposes of "determining the meaning of any Act of Congress" as including an

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[4] After the district court issued its ruling, Mr. Stoner filed a civil suit in the Superior Court of California for Santa Clara County in which he reasserted his state-law claims. The state trial court later granted the defendants' motion for summary judgment. *See California ex rel. Stoner v. Santa Clara County Office of Educ.*, No. 1-04-CV-022563, slip op. (Super. Ct. of Cal. Santa Clara County Feb. 27, 2007), *appeal pending*, No. H031576 (Cal. Ct. App. 6th Dist. argued Apr. 15, 2008).

> individual). Therefore, state employees sued in their personal capacities are "persons" who may be subject to liability for submitting a false claim to the United States.

Id. at 12a.

In so ruling, the Ninth Circuit recognized that its decision conflicted not only with a published district court ruling from within the Ninth Circuit (*McVey*), but with the Eighth Circuit's decision in *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). *Id.* at 13a. The Ninth Circuit expressly disagreed with *Gaudineer* and *McVey*, believing that the "reasoning of these cases [could not] be reconciled with the plain language of the statute." *Id.*[5]

To support its disagreement with *Gaudineer* and *McVey*, the Ninth Circuit relied upon this Court's decision in *Hafer v. Melo*, 502 U.S. 21 (1991), whose reasoning the court of appeals found to be "equally applicable to [its] interpretation of the FCA." *Id.* at 14a. In *Hafer*, this Court held that private persons can sue state officials in their personal capacities

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[5] Although it did not discuss the ruling in detail, the Ninth Circuit also cited with approval a district court ruling from within the Tenth Circuit that had allowed an FCA *qui tam* suit to proceed against individual state officials. App., *infra*, 14a (citing *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)).

under 42 U.S.C. § 1983, which provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the 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 . . . ." *See* 502 U.S. at 27-31. The United States, which appeared before the Ninth Circuit solely as an *amicus curiae* on the issue of state-official liability under the FCA, had championed the use of *Hafer* in arguing that state officials are "person[s]" amenable to *qui tam* suits for actions taken in their official capacities.[6]

The Ninth Circuit believed that if it were to "interpret § 3729 to preclude an action against state officials in their personal capacities, [such a] holding would be tantamount to a grant of absolute immunity under the FCA to state officials for any actions taken in the course of their governmental responsibilities." App., *infra*, 14a. "Such an interpretation," the court of appeals held, "[found] no support in the statutory language." *Id.* The Ninth Circuit therefore declined to "adopt an interpretation of § 3729" that it believed was "at odds with the statutory language and clear guidance from the Supreme Court." *Id.*

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[6] *See* Brief for the United States as *Amicus Curiae* Supporting Plaintiff/Appellant at 11, *United States ex rel. Stoner v. Santa Clara County Office of Educ.*, No. 04-15984 (9th Cir. filed Sept. 2, 2004), available at 2004 WL 2297734, at *11.

In addition, the Ninth Circuit held that Mr. Stoner did not have to allege that cross-petitioners personally profited from the complained-of conduct. *Id.* at 13a. According to the court of appeals: "Nothing in § 3729(a)(1) requires the person knowingly making a false submission to obtain a personal benefit from the wrongful act." *Id.*

The court of appeals also rejected cross-petitioners' assertion that allowing *qui tam* suits against individual state officials would "permit[] an end-run around *Stevens* and the Eleventh Amendment." *Id.* at 15a. The Ninth Circuit explained:

> An individual capacity suit for damages against state officials alleged to have personally violated § 3729 does not implicate the principles of state sovereignty protected by *Stevens* and our Eleventh Amendment jurisprudence because such an action seeks damages from the individual defendants rather than the state treasury. . . . Nor does the fact that a state may choose to indemnify the employees for any judgment rendered against them bring the Eleventh Amendment into play. . . .

Id. at 15a (citations omitted). Based on its decision that cross-petitioners could be sued in their personal capacities, the Ninth Circuit remanded the case to the district court and ordered that Mr. Stoner be given an opportunity to find counsel to prosecute his action against cross-petitioners. *Id.* at 22a.

5. The court of appeals denied cross-petitioners' request for en banc rehearing. App., *infra*, 40a. Shortly thereafter, the court of appeals granted cross-petitioners' motion to stay issuance of the

mandate pending this Court's review of the instant cross-petition. By order of the court of appeals, that stay was later extended until April 28, 2008.

On February 20, 2008, Mr. Stoner filed a petition for a writ of certiorari challenging aspects of the Ninth Circuit's decision not at issue here. The Court denied Mr. Stoner's petition on March 24, 2008. *See Stoner v. Santa Clara County Office of Educ.*, No. 07-1093 (U.S.), *cert. denied*, 76 U.S.L.W. 3470 (2008).

REASONS FOR GRANTING THE CROSS-PETITION

This Court's review is warranted for three, independent reasons. First, the law of the circuits on the issue of whether, or to what extent, a state official may be sued by a *qui tam* relator under the FCA is a patchwork of inconsistent and conflicting rulings. While the Ninth Circuit's decision finds support in rulings issued by courts from within the Tenth and Eleventh Circuits, it conflicts with the law of the Eighth Circuit and rulings from within the Third and Fourth Circuits. This Court's review is therefore warranted to bring uniformity to an important area of federal law left undecided by *Stevens*.

Second, the Ninth Circuit's ruling is inconsistent with the logic of this Court's decisions in *Stevens* and *Chandler*, both of which teach that the intent of the 1863 Congress controls the question of who or what is a "person" amenable to *qui tam* suits under the FCA. By relying upon this Court's decision in *Hafer* to interpret the meaning of the word "person" as it appears in 31 U.S.C. § 3729(a), the Ninth Circuit looked to the intent of the 1871 Congress in enacting what is now 42 U.S.C. § 1983. As is evidenced by the

plain language of § 1983, however, that statute was specifically designed to create a cause of action against state officials who violated certain federal laws. Therefore, this Court's decision in *Hafer* is an inappropriate analog for determining the intent of a *different* Congress that enacted a *different* statute whose plain language and legislative history do *not* reflect the intent to create a cause of action against state officials.

Third, the questions presented by this cross-petition are pure questions of federal law that are of national importance. The Ninth Circuit's decision exposes tens of thousands of state officials—and the state treasuries that may be called upon to indemnify those officials for actions taken within the scope of their official duties—to grave financial risk. Allowing *qui tam* suits against state officials will also interfere with the States' administration of numerous federal grant-in-aid programs in such diverse fields as health care, education and welfare. These programs already contain efficient administrative processes by which the Federal Government can adjudicate alleged contractual or regulatory noncompliance by state actors. Allowing private bounty hunters to police alleged noncompliance through the FCA—with its provision for treble damages and penalties as great as $11,000 per claim—will unnecessarily supplant these administrative remedies and in so doing force more state-federal disputes into federal court.

I. LOWER FEDERAL COURTS ARE DIVIDED ON THE QUESTION OF WHETHER, OR TO WHAT EXTENT, STATE OFFICIALS MAY BE SUED BY *QUI TAM* RELATORS UNDER THE FCA

In holding that state officials may be sued by *qui tam* relators for actions taken in the course of their official duties, the Ninth Circuit acknowledged that its decision conflicted with that of the Eighth Circuit in *Gaudineer*. App., *infra*, 13a. In *Gaudineer*, a private law firm acting as a *qui tam* relator filed suit against the State of Iowa and the state agency responsible for administering that State's Medicaid program. *See* 269 F.3d at 934. The relator also named the head of the state agency as a defendant, but only in his "official capacity." *See id.* The relator alleged that the defendants had established eligibility standards that resulted in the illegal expenditure of federal Medicaid funds. *See id.* at 934. After this Court issued its decision in *Stevens*, however, the relator sought leave to amend its complaint to name the state official as a defendant in his "individual capacity." *Id.* The relator's proposed amended complaint was almost identical to the original complaint and the district court denied the motion to amend. *See id.* at 935.

On appeal, a divided panel of the Eighth Circuit affirmed the district court's decision. *Id.* at 936. The two-judge majority rejected their dissenting colleague's assertion that *Hafer* meant the amendment should be granted as a matter of right. *See id.* Instead, the *Gaudineer* majority held that it was not enough for a relator to simply label the claim as one against the official in his individual capacity. *See id.*

Because the relator had failed to make specific allegations regarding the extent and nature of the state-official-defendant's duties, the court of appeals determined that the "mere assertion that [the state official] issued [eligibility] standards that conflicted with state law [did] not allege actions outside his official duties," and that "[u]nder these circumstances, the district court did not err in denying the motion for leave to amend to add a new claim against [the state official] in his individual capacity." *Id.* at 937.[7]

Gaudineer is consistent with other decisions holding that state officials are not amenable to *qui tam* suits for actions taken in the scope of their official duties. For example, in *Alexander v. Gilmore*, 202 F. Supp. 2d 478 (E.D. Va. 2002), two relators filed suit against several state officials alleging that the officials had violated the FCA by falsely certifying that

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[7] In a footnote, the *Gaudineer* majority stated that it did not need to decide whether the state-official-defendant was a "person" within the meaning of § 3729(a) or whether the Eleventh Amendment barred the suit. *See* 269 F.3d at 937 n.3. Like the Ninth Circuit in this case, however, the dissent in *Gaudineer* would have applied *Hafer* to hold that state officials are amenable to suit by *qui tam* relators for actions taken in their official capacities. *See* 269 F.3d at 938-39 (Gibson, J. dissenting). The relator in *Gaudineer* later filed a petition for a writ of certiorari that sought review of a single question substantially similar to the first question contained in this cross-petition: namely, whether a state official sued in his personal capacity is a "person" under the FCA following this Court's decision in *Stevens*. Pet. for Writ of Cert. at i, *United States ex rel. Gaudineer & Comito, L.L.P. v. Gesaman*, No. 01-1645 (U.S. filed Feb. 26, 2002), available at 2002 WL 32134711, at *i. The relator's petition was denied. *See* 536 U.S. 925 (2002).

the State would comply with certain federal guidelines in order to receive grant funding related to drug testing of prisoners. The *Alexander* court held that state officials acting in their official capacities are not "person[s]" amenable to *qui tam* suits under the FCA. *Id.* at 481-82.

Moreover, there is substantial disagreement regarding the question of whether a *qui tam* relator must allege that the state-official-defendant benefited personally from the complained-of conduct in order to assert a personal-capacity claim against a state official. *See Burlbaw*, 324 F. Supp. 2d at 1216 (recognizing disagreement). In *Alexander*, for example, the court specifically held that in order to assert a personal-capacity claim against state officials under the FCA, a relator must allege that the officials converted federal funds to their personal use. *See* 202 F. Supp. 2d at 482.

The *Alexander* court's ruling is consistent with that of several other courts. *See United States ex rel. Kinney v. Stoltz*, No. Civ. 01-1287, 2002 WL 523869, at *7 n.3 (D. Minn. 2002) (rejecting relator's personal-capacity claim against government officials because relator did not allege that the officials personally benefited from the alleged submission of false claims), *aff'd on other grounds*, 327 F.3d 671 (8th Cir. 2003); *United States ex rel. Honeywell, Inc. v. San Francisco Housing Auth.*, No. C99-1936, 2001 WL 793300, at *4 (N.D. Cal. July 12, 2001) (same); *Lane v. Texas Dep't of Health*, No. 03-02-00578-CV, 2003 WL 21750608, at *5 (Tex. App. 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 offi-

cial or employee converted the federal funds or property to their own personal use or benefit"); *cf. United States ex rel. Dunleavy v. County of Delaware*, 279 F.3d 219, 221 (3d Cir. 2002) (affirming district court decision that government officials are not subject to suit under the FCA when the officials do not benefit personally from the conduct alleged), *vacated on other grounds*, 538 U.S. 918 (2003); *Smith v. United States*, 287 F.2d 299, 301 (5th Cir. 1961) (suggesting that FCA claims against government officials in their personal capacities should require allegations of personal gain); *United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343, 356 (S.D.N.Y. 1998) (same).

The conflict between the Ninth Circuit's decision and a previous decision of that court, as well as several district court decisions from within the Ninth Circuit, provides additional evidence that lower federal courts need this Court's guidance on whether individual state officials are amenable to *qui tam* suits under the FCA for actions taken in their official capacities. In *United States ex rel. Bly-McGee v. California*, 236 F.3d 1014 (9th Cir. 2001), the relator sued several state officials alleging they had conspired to defraud the Federal Government of certain health care funds. *See id.* at 1017. The Ninth Circuit held that the officials were immune from *qui tam* liability for "conduct during performance of official duties." *Id.* at 1018. The court of appeals also determined that the state officials were "not immune for any actions that [were] wholly unrelated to or outside of their official duties." *Id.* The Ninth Circuit held that the relator's allegations of fraud were not pled with sufficient particularity and re-

manded the case with instructions that the relator be granted leave to file an amended complaint. *Id.*[8]

In addition to *Bly-McGee*, prior to the Ninth Circuit's ruling below, three district court decisions from within that Circuit had issued rulings limiting *qui tam* suits against government officials. *See McVey*, 165 F. Supp. 2d at 1058-59 (rejecting relator's reliance on *Hafer* and holding that state officials are immune from *qui tam* suits for actions taken within the scope of their official duties); *United States ex rel. Adrian v. Regents of Univ. of Cal.*, No. C 99-3864, 2002 WL 334915, at *3 n.2 (N.D. Cal. Feb. 25, 2002) (citing *McVey* and holding that *qui tam* relator could not sue state officials in their personal capacities); *Honeywell*, 2001 WL 793300, at *4 (holding that relator must allege government officials personally benefited from conduct in order to assert a personal-capacity claim under the FCA).

On the other hand, the Ninth Circuit's decision is consistent with rulings from within the Tenth and Eleventh Circuits. In *Burlbaw*, for example, two relators brought suit against New Mexico State University alleging that the school had violated the FCA

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[8] At least one court has distinguished *Bly-McGee* on the ground that the officials involved in that case were attorneys within the state attorney general's office. *See Burlbaw*, 324 F. Supp. 2d at 1216 n.4 (concluding that *Bly-McGee* holding was based on the prosecutorial-immunity doctrine). On its face, however, the Ninth Circuit's decision in *Bly-McGee* did not rely upon the prosecutorial-immunity doctrine in holding that the state-official-defendants were immune from *qui tam* liability for conduct during the performance of official duties. *See* 236 F.3d at 1018.

by falsely certifying that the school was a minority institution in order to receive certain research grants from the Federal Government. *See* 324 F. Supp. 2d at 1211. That suit was filed before this Court issued its opinion in *Stevens*. *See id.* As had happened in *Gaudineer,* the relators in *Burlbaw* sought leave to amend their complaint to name certain state officials as defendants in their personal capacities after this Court decided *Stevens*. *See id.*

In granting the motion to amend, the district court expressly recognized that a "holding granting only qualified immunity to an individual [state] employee sued under the FCA is in conflict with at least one circuit-court opinion and several district-court decisions." *Id.* at 1215. However, after surveying the decisions in *Gaudineer*, *Bly-McGee*, *Alexander*, *McVey*, *Kinney* and *Honeywell*, the district court held that state officials were "person[s]" within the meaning of the FCA and that the Eleventh Amendment did not bar *qui tam* suits against state officials. *See id.* at 1215-16. Moreover, the *Burlbaw* court expressly rejected the opinions of those courts that had held a state-official-defendant must benefit personally from the complained-of conduct. *Id.* at 1216.

The *Burlbaw* decision agrees with at least one other decision from within the Tenth Circuit. *See United States ex rel. Navarette v. Rockwell Int'l Corp.*, 730 F. Supp. 1031, 1035 (D. Colo. 1990) (holding that state-official-defendants were amenable to *qui tam* suits and that their "cloak of authority [was] not sufficient to shield them from liability"). Although the Tenth Circuit has heard oral argument in *Burlbaw*, it has yet to issue a decision. *See United*

States ex rel. Burlbaw v. Orenduff, No. 06-2006 (10th Cir. argued Mar. 5, 2007).

The district court rulings in *Burlbaw* and *Navarette* are also consistent with a district court ruling from within the Eleventh Circuit. *See United States ex rel. Battle v. Board of Regents of State of Ga.*, No. 1:00-CV-1637-TWT, 2002 WL 34386372 (N.D. Ga. May 8, 2002). In *Battle*, a former employee of a state university filed suit against various university officials alleging they had violated the FCA by mishandling student financial aid funds received from the Federal Government. *See United States ex rel. Battle v. Board of Regents of State of Ga.*, 468 F.3d 755, 757-58 (11th Cir. 2006) (per curiam) (discussing relator's factual allegations). After dismissing the *qui tam* complaint following this Court's decision in *Stevens*, the district court granted the relator's motion to reconsider and ordered that the case be reinstated. *See* 2002 WL 34386372, at *1. The *Battle* court adopted the logic of the *Gaudineer* dissent in holding that state officials are "person[s]" amenable to *qui tam* suits under the FCA. *Id.* at *2. In so doing, the court agreed with the arguments of the United States, which had submitted a brief solely as an *amicus curiae*. *See id.*

* * * * *

As the preceding discussion demonstrates, the law of the circuits on the issue of whether, or to what extent, state officials may be sued by *qui tam* relators under the FCA is a patchwork of inconsistent and conflicting rulings. This Court's review is therefore warranted to bring uniformity to an important area of federal law left unresolved by *Stevens*.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE LOGIC OF *STEVENS* AND *CHANDLER*

During the past decade, this Court has twice held that a court must look to the intent of the 1863 Congress to determine the meaning of the word "person" as it is used in what is now § 3729(a). *See Stevens*, 529 U.S. at 783 n.12; *Chandler*, 538 U.S. at 125. In *Chandler*, for example, this Court was asked to decide whether § 3729(a)'s use of the word "person" included municipal corporations. In answering that question in the affirmative, the Court asked whether at the time of the FCA's enactment in 1863, such was the understanding of American jurisprudence generally. *See* 538 U.S. at 125-28. Among other things, the Court looked to its own decisions in the early part of the nineteenth century and found that by 1863, there was "no doubt" that the term then extended to corporations. *Id.* at 125. The Court also looked to the "common understanding among contemporary commentators" to support its conclusion. *See id.*

In deciding that state officials acting in their official capacities are "person[s]" amenable to FCA *qui tam* suits, the Ninth Circuit below gave effect to the intent of a different Congress in enacting a different statute that, unlike the FCA, was specifically designed to create a cause of action against state officials. The Ninth Circuit relied upon *Hafer* to conclude that § 3729(a)'s use of the word "person" should be read to include state officials acting in their official capacities. *See* App., *infra*, 14a-15a. In so doing, the Ninth Circuit looked, not to the intent of the 1863 Congress as this Court instructed in *Stevens*

and *Chandler*, but to the intent of the 1871 Congress when it enacted what is now 42 U.S.C. § 1983. *See* Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (Civil Rights Act of 1871) (codified as amended at 42 U.S.C. § 1983).

As this Court recognized in *Hafer*, "Congress enacted § 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.'" 502 U.S. at 28 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974)). Based on the fact that § 1983 was designed in large part to remedy civil rights abuses by state actors, this Court held in *Hafer* that it would be illogical to interpret § 1983's use of the word "person" to exclude state officials—the very class of persons to whom the statute had been directed. *See id.*

The FCA, in contrast, was not directed at state actors, as this Court recognized in *Stevens* when it held that States and state agencies are not "person[s]" amenable to *qui tam* suits. In so holding, this Court traced the history of the statute and specifically rejected the argument that the word "person" as it appears in the FCA should be interpreted as if it were enacted by a modern-day Congress. *See* 529 U.S. at 783 n.12. The Court also reviewed the 1863 Act's legislative history and found no evidence that the 1863 Congress intended the FCA to regulate interactions between States and the Federal Government. *See id.*

The time period between 1863 and 1871 witnessed a fundamental shift in the relationship between the States and the Federal Government—a

fact evidenced by, *inter alia*, the 1868 ratification of the Fourteenth Amendment and the enactment of the Civil Rights Act of 1871. *See, e.g.*, *Quern v. Jordan*, 440 U.S. 332, 342 (1979) ("There is no question that both the supporters and opponents of the Civil Rights Act of 1871 believed that the Act ceded to the Federal Government many important powers that previously had been considered to be within the exclusive province of the individual States."); *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (describing § 1983 as a "product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century").

Therefore, although the meaning of the statutory term "person" as it relates to municipal corporations may not have changed during the eight-year time period between 1863 and 1871, *see Chandler*, 538 U.S. at 125, the 1868 ratification of the Fourteenth Amendment and the enactment of the Civil Rights Act of 1871 provide evidence that the meaning of the statutory term "person" as it relates to individual state officials acting in their official capacities did change and that at the time of the FCA's enactment in 1863, Congress did not intend for the term "person" to include state officials acting in their official capacities. *Cf. Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 610 (1987) (recognizing that in the context of interpreting 42 U.S.C. § 1981's protection of the right of all United States citizens to make and enforce contracts in the same manner enjoyed by "white citizens," that statutory term must be interpreted in light of the "understanding of 'race' in the 19th century" and that "all those who might be deemed Caucasian today were not thought to be of

the same race at the time § 1981 became law"); Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (Civil Rights Act of 1866) (statutory origin of what is now § 1981).

Moreover, Congress knows how to enact language providing for state-official liability when it intends civil statutes of general applicability to be so applied.[9] Congress has never included such language in the FCA.

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[9] *See, e.g.*, 15 U.S.C. § 1127 ("The term 'person' also includes . . . any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any . . . such . . . officer, or employee, shall be subject to the provisions of this chapter [relating to trademark protection] in the same manner and to the same extent as any nongovernmental entity."); 17 U.S.C. § 501(a) ("As used in this subsection [relating to copyright infringement], the term 'anyone' includes . . . any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any . . . such . . . officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity."); 17 U.S.C. § 910(a) ("As used in this subsection [referring to copyright protection for semiconductor chips], the term 'any person' includes . . . any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any . . . such . . . officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity."); 35 U.S.C. § 271(h) ("As used in this section [relating to patent infringement], the term 'whoever' includes . . . any officer or employee of a State or instrumentality of a State acting in his official capacity. Any . . . such . . . officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.").

Under the logic of this Court's decisions in *Stevens* and *Chandler*, it was manifest error for the Ninth Circuit to rely upon the intent of the 1871 Congress in enacting what is now § 1983 to discern the meaning of the word "person" as used by the 1863 Congress in enacting what is now § 3729(a).

III. THE QUESTIONS PRESENTED ARE OF NATIONAL IMPORTANCE AND THIS CASE PROVIDES AN EXCELLENT VEHICLE FOR THEIR RESOLUTION

A. The question of whether *qui tam* relators can haul state officials into federal court based on injuries allegedly sustained by the Federal Government presents a pure question of federal law deserving of this Court's consideration. During the past decade, this Court has recognized the importance of deciding whether or when governmental actors may be sued by *qui tam* relators under the FCA. *See Stevens*, 529 U.S. 765; *Chandler*, 538 U.S. 119; *cf. Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409 (2005) (addressing statute-of-limitations question in *qui tam* case involving governmental actors).

The *qui tam* device presents unique dangers when applied against state actors, as the following colloquy between members of this Court and counsel for the United States during oral argument in *Stevens* makes clear:

> QUESTION [by Justice O'Connor]: Well, presumably the United States has an—an array of additional remedies. It's not like the State is going to get away with something, is it?

MR. KNEEDLER: No, but Congress specifically determined in 1986 that those other remedies were inadequate and that the False Claims Act measures, including the provisions for informers to bring information to the United States or to—to file suit were critical to ferret out and—and redress.

QUESTION [by Justice Breyer]: But that's the very point. Hundreds of billions of dollars of joint programs means that when you bring the States in, it changes the nature of the statute. It's one thing to have private people, you know, going through technical violations and searching the books of private companies. It's quite another to set loose an army of people on the States who will find every technical violation they can because they get money for it.

MR. KNEEDLER: But that—that—

QUESTION [by Justice Breyer]: So, the latter should be left to the political process or other methods, not this one. That's the argument.

MR. KNEEDLER: But that—that concern does not go to the question of whether the United States itself should be able to bring a False Claims Act—

QUESTION [by Justice Breyer]: No, no. It goes to the question of whether you take the word person, which up till 1986 has in practice [not included] States, and then just say that a background statement and a couple of other little—little things in the statute, maybe worth an ounce each,

> should be taken to work what I would characterize pejoratively—I don't really mean it—as a kind of revolution in the way the States—potentially a revolution in the way that the States—
>
> MR. KNEEDLER: But again, your concern goes I—I thought primarily to the question of the *qui tam* provision. That's different from the United States. If the United States is bringing the suit, it can—it can exercise all appropriate cautions.

Tr. of Oral Arg., *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, No. 98-1828, 1999 WL 1134650, at *48-50 (Nov. 29, 1999).

Under the FCA, a *qui tam* relator need not "exercise all appropriate cautions" in prosecuting an action against state officials. As the Ninth Circuit below acknowledged: "Unless it intervenes or moves to dismiss, the United States has little control over the conduct of the action." App., *infra*, 21a. The relator's crusade against state officials can be motivated solely by the desire to settle a political "score," ill-will following the loss of a job or outright greed, for

> [a]s a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good. . . . *Qui tam* relators are thus less likely than is the Government to forgo an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc.

Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939, 949 (1997).

B. The question of whether *qui tam* relators can haul state officials into federal court also raises issues that go to the very core of our federalist system of government. Although this Court's precedents teach that the States' sovereign immunity does not shield them from civil suits prosecuted by the United States, *see United States v. Texas*, 143 U.S. 621, 646 (1892), this Court's precedents also suggest that the United States may not assign its ability to pierce the States' sovereign immunity, *see Blatchford v. Native Village of Noatak*, 501 U.S. 775, 785 (1991) ("The [States'] consent, inherent in the convention, to suit by the United States—at the instance and under the control of responsible federal officers—is not consent to suit by anyone whom the United States might select.") (quotation marks omitted). In similar fashion, the States' consent to suit by the Federal Government is not consent to suit by private, self-deputized bounty hunters presuming to act on behalf of the Federal Government.

This Court has not decided whether the States' sovereign immunity shields state officials from suit when those officials are sued by *qui tam* relators for actions taken within the scope of their official duties. *But see Ford Motor Co. v. Department of Treasury of Ind.*, 323 U.S. 459, 464 (1945) ("[W]hen 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."). The Court has recognized, however, that in cases involving state sovereign immunity, the identity of the person bringing suit is of great importance. For example, in *Alden v. Maine*,

527 U.S. 706 (1999), the Court was asked to decide whether a State's sovereign immunity precluded a suit in state court brought by state employees under the federal Fair Labor Standards Act. In finding that States' immunity from private suit in their own courts was beyond congressional power to abrogate under Article I legislation, the Court explained:

> The difference between a suit by the United States on behalf of the employees and a suit by the employees implicates a rule that the National Government must itself deem the case of sufficient importance to take action against the State; and history, precedent, and the structure of the Constitution make clear that, under the plan of the Convention, the States have consented to suits of the first kind but not of the second.

Id. at 759-80.

If the United States believes that an FCA case is of sufficient importance to take action against state officials for acting in their official capacities, it can bring the case on its own or assume primary responsibility for prosecuting the action rather than ceding that delicate task to private bounty hunters.

C. This case provides an excellent vehicle for resolving the questions presented, which are likely to reoccur. Although the case below was decided at the motion-to-dismiss stage, the questions presented are pure questions of federal law that require no additional factual development. *See, e.g.*, *Chandler*, 538 U.S. at 124 (deciding whether municipal corporations are "person[s]" under § 3729(a) following district court's decision granting motion to dismiss); *Stevens*, 529 U.S. at 770 (deciding whether States and state

agencies are "person[s]" under § 3729(a) on interlocutory review following denial of motion to dismiss). Moreover, unlike in *Gaudineer*, the "person" and Eleventh Amendment questions were decided by the Ninth Circuit below, thereby making this case an excellent vehicle for deciding the questions presented by this cross-petition.

As demonstrated by the progression of events in *Gaudineer*, *Burlbaw* and *Battle*, Mr. Stoner's effort to sue individual state officials under the FCA is representative of relators' efforts to avoid this Court's decision in *Stevens*. *See also* Leon Dayan & Jason Walta, *Qui Tam Suits Against Public Entities After Stevens*, 19 False Claims Act & Qui Tam Q. Rev. 15, 32 (2000) (concluding that "personal-capacity suits provide an alternative option" for "*qui tam* plaintiffs whose claims have been jeopardized by the decision in *Stevens*"). As such, this effort will only continue in light of the uncertainty fostered by rulings such as the Ninth Circuit's below.

D. The Ninth Circuit's ruling will place an undue burden on State treasuries. As the *Burlbaw* court recognized, the financial consequences of allowing *qui tam* suits against state officials for actions taken within their official capacities will in large part be borne by the States. *See* 324 F. Supp. 2d at 1218 n.7 (noting that "even though a judgment against an individual state employee is against the employee himself and not against the state, most states have by statute or otherwise agreed to indemnify an employee who is held liable for actions taken within the course and scope of his duties"). With its provision for treble damages and penalties as great as $11,000 per claim, judgments and settlements of FCA cases

often reach tens of millions of dollars, an expense that under the logic of the Ninth Circuit's decision will be charged to the States.

The Ninth Circuit's ruling will also interfere with the administration of numerous federal grant-in-aid programs. As reflected by the factual diversity of cases discussed herein, the questions presented by this cross-petition arise not only in the context of federal special education funding (as was the case here), but in cases involving the provision of health care under Medicaid and similar programs (*Gaudineer*; *Bly-McGee*), administration of welfare benefits (*Graber*), housing subsidies (*Honeywell*), research grants to institutions of higher education (*Burlbaw*; *Navarette*), administration of federal laboratories (*McVey*) and prison programs (*Alexander*). Those relationships confer extraordinary discretion on state administrators and they are subject to extensive administrative monitoring, audit and financial recovery processes. *See, e.g.*, 42 C.F.R. §§ 430.32-430.48 (describing procedures in Medicaid context). By allowing *qui tam* relators to sue state officials for actions taken within the scope of their official duties, the Ninth Circuit's decision will unnecessarily supplant these carefully tailored discretionary mechanisms and force more state-federal disputes into federal court.

E. Finally, the amount of federal resources already dedicated to adjudicating the questions presented by this cross-petition serves as a strong indicator of the questions' national importance. The United States Department of Justice (DOJ) has deemed the questions presented by this cross-petition to be important enough that it has appeared

unsolicited as an *amicus curiae* in two recent court of appeals cases raising these issues. In addition to filing a brief and appearing at oral argument in the Ninth Circuit below, DOJ likewise appeared before the Tenth Circuit in the as-yet undecided appeal of *Burlbaw*. *See also Battle*, 2002 WL 34386372, at *2 (discussing DOJ *amicus* submission arguing in favor of state-official *qui tam* liability). This dedication of resources clearly reflects that the questions presented by this cross-petition are national in scope and are deserving of this Court's consideration.[10]

CONCLUSION

For the foregoing reasons, the cross-petition for a writ of certiorari should be granted.

Respectfully submitted.

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[10] Interestingly, DOJ has taken a seemingly inconsistent position in the context of who is a "person" capable of *commencing* an action under the FCA. *See United States ex rel. Holmes v. Consumer Ins. Group*, 318 F.3d 1199, 1208 (10th Cir. 2003) (en banc) (discussing DOJ argument that federal officials who obtain information about potential fraud in the scope of their official duties are not "person[s]" capable of commencing *qui tam* actions).