No. 01-1572

IN THE

Supreme Court of the United States

COOK COUNTY, ILLINOIS,
Petitioner,
v.
UNITED STATES *EX REL.* JANET CHANDLER, PH.D.,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF OF COUNTY OF ORANGE, CALIFORNIA; COUNTY OF SAN DIEGO, CALIFORNIA; AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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This brief is filed on behalf of the counties of Orange and San Diego, California, and the California State Association of Counties, as amici curiae in support of petitioner, with the written consent of the parties.[1]

INTEREST OF AMICI CURIAE

The amici curiae are, or represent, county-level political subdivisions of the State of California. Each county is a recipient of federal funds, whether directly or through the State, for the administration and implementation of countless essential public services and programs. Amici are concerned that the Seventh Circuit's opinion in this case, *see United States ex rel. Chandler v. Cook County, Ill.*, 277 F.3d 969 (7th Cir. 2002), if affirmed by this Court, may put those programs at significant risk, and wrongly penalize the very local taxpayers who are the intended beneficiaries of these federal funds.

The County of Orange is a political subdivision of the State of California, *see* Cal. Const. art. XI, § 1, and was established in 1889, *see* Cal. Stats. 1889, at 123. It receives federal funds for a variety of purposes, including health care, education, and a variety of other vital functions. One of the divisions of the county that receives and administers federal funds is the county Health Care Agency ("OCHCA"). OCHCA receives federal funds directly through the Medicare program and indirectly through the Medicaid program (which provides funds to the state, which in turn provides them to local government entities).

The County of San Diego is a political subdivision of the State of California, *see* Cal. Const. art. XI, § 1, and was one of the first counties established in the State, *see* Cal. Stats.

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[1] Letters of consent from both parties have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for any party drafted this brief in whole or in part, and no persons or entities other than *amici curiae* made any monetary contribution to its preparation or submission.

1850, ch. 15, at 58 (Feb. 18. 1850). It administers numerous essential local programs and services that receive federal funds.

The California State Association of Counties ("CSAC") is a non-profit corporation. The membership consists of the 58 California counties, including both Orange and San Diego Counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

INTRODUCTION AND SUMMARY OF ARGUMENT

The False Claims Act ("FCA" or "Act") subjects to liability under its provisions "[a]ny person" who, *inter alia*, knowingly submits a false or fraudulent claim for payment to the United States. 31 U.S.C. § 3729. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), this Court held that the term "person" – which is not explicitly defined in the statute – does not encompass States. The question in this case is whether the same term encompasses *local* government entities, such as petitioner Cook County, Illinois and the amici California local government entities. The court of appeals in this case answered that question in the affirmative, distinguishing *Stevens* on the basis of what the court of appeals deemed its "central holding": "states are not within the FCA's definition of 'person' because of the 'longstanding interpretive presumption that "person" does not include the sovereign.'" *Chandler*, 277 F.3d at 980 (quoting *Stevens*, 529 U.S. at 780). Believing that this presumption "cuts the other way for municipalities," *id.*, the court of appeals refused to accept any aspect of *Stevens* as governing here, *see id.* at 981 ("The rationale of *Stevens* sim-

ply cannot support the interpretation that Cook County wishes to place upon it.").

That conclusion is wrong in general and in all its particulars. There is no categorical presumption that local government entities are statutory "persons" unless Congress says otherwise, and even if there were, *Stevens* does not in fact pivot narrowly on the opposite presumption that States are *not* "persons." To the contrary, the Court in *Stevens* found States to be outside the term "persons" for additional, independent reasons based in the text, structure, and history of the Act, as well as in the distinct presumption that States are immune from the kind of punitive damages liability available under the statute. All of those reasons apply equally to local government entities.

The applicability of *Stevens* to such entities is also implicitly demonstrated by the court of appeals' concession that the FCA necessarily excludes local government entities when they are acting as "arms of the state itself." *Chandler*, 277 F.3d at 975 n.8. Given the intensely fact- and local-law specific nature of the arm of the state inquiry, that rule not only would mean that some local government entities within a State are outside the scope of the Act, while others are not; it would also mean that even a single agency might be subject to liability under the Act for some programs and not for others, or perhaps even for the use of some funds but not for others within the same program. The much more sensible rule would treat all local government entities equally under the statute. And since it is *at least* clear that such entities must be excluded when acting as arms of the state, the right result is to exclude them altogether.

Finally, amici are compelled to emphasize that the statutory meaning of "person" – whether it encompasses State and local government entities, that is – does not change with the status of the plaintiff, despite suggestions (but not yet holdings) to the contrary in certain opinions. A local government

entity that is not a "person" when a private relator sues does not somehow transform into a "person" once the United States decides to enter the case. Nor is it a "person" just because it is the United States that sues initially. No plausible reading of the statute's text could confer such simultaneously contradictory meanings on a single term, and this Court should make that simple point clear so that the time and resources of courts and litigants are not diverted down such a blind alley.

ARGUMENT

This Court in *Stevens* held that the False Claims Act does not include States within the undefined statutory "person[s]" subject to liability under its provisions. The question in this case is whether local government entities, too, are excluded from the ambit of the statute. The answer to that question is yes – and the answer is the same whether the active plaintiff is a private relator, the United States, or both.

A. The Analysis In *Stevens* Applies Equally To Local Government Entities

This Court in *Stevens* rested its conclusion that States are outside the scope of the "person[s]" covered by the FCA on several grounds. First, the Court observed, there is the general presumption that States are not statutory "persons" in congressional acts unless Congress clearly says so. Second, the text of the Act supports the conclusion that States are not persons. Third, the statutory history points in the same direction. Fourth, and finally, the presumption that punitive damages are not applicable to government entities supports the same result. Contrary to the conclusion of the court of appeals in this case, all of these reasons equally compel the conclusion that local entities are not "person[s]" under the Act.

1. *The Presumption Against Imposing Liability On Government Entities*

The court of appeals correctly observed that the *Stevens* Court construed the FCA partly on the basis of an interpretive

presumption that "states, as sovereigns, are not included within the term 'person.'" 277 F.3d at 980. The court of appeals incorrectly concluded, however, that this presumption has no application to local government entities. *Id*.

The court of appeals rested its view on the ground that the presumption operative in *Stevens* was one "applied to protect the states because of their dignity as sovereigns within our system of federalism." *Id.* "Such constitutional concerns applicable to states," the court believed, "do not apply to municipalities." *Id.* But the case on which the court primarily relied for its view that local government entities are entitled to no presumptive constitutional respect, *Monell v. Department of Social Services*, 436 U.S. 658 (1978), does not stand for anything nearly so sweeping. To the contrary, this Court has specifically held that the "distinction" drawn in *Monell* and similar cases "between States and municipalities" is "peculiar to the question of whether a governmental entity is entitled to Eleventh Amendment sovereign immunity," and – more to the point for present purposes – does *not* apply "to the question of whether a governmental entity is protected by the Constitution's guarantees of federalism." *Printz v. United States*, 521 U.S. 898, 931 n.15 (1997).[2] Outside the confines of the Eleventh Amendment, in other words, the general federalism guarantee animating the presumption that operated in *Stevens* ensures respect for the dignity and role of government entities *at all levels*.

Indeed, even on its own terms *Monell* did not rely on a sweeping *general* rule that local government entities are "per-

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[2] Ironically, the court of appeals cited *Printz* as an example of the Court's deference to *state* sovereignty, but in fact the federal law at issue in *Printz* acted only upon *county* officials, *see* 521 U.S. at 931 n.15. The point of the quotation in the text is that outside the context of the Eleventh Amendment, counties and their officers are entitled to the same constitutional respect as are states and their officers.

sons" for purposes of congressional enactments unless Congress clearly says otherwise. To the contrary, the entire discussion in *Monell* cited by the court of appeals here is about the *specific* text and history of § 1983. *See Monell*, 436 U.S. at 685-89. And the court of appeals' citation of that same discussion for the proposition that in *Monell* the Court "noted that, by 1844, both private and municipal corporations were presumptively included within the meaning of 'person,'" *Chandler*, 277 F.3d at 974 (citing 436 U.S. at 685-89), is flatly incorrect. What the *Monell* Court actually says is that by 1844 the rule that natural persons do not include *private corporations* was abandoned, in *Louisville R. Co. v. Letson*, 43 U.S. (2 How.) 497, 558 (1844), and that it was not until 1869 – six years *after* the enactment of the False Claims Act – that "the *Letson* principle was automatically and without discussion extended to municipal corporations." *Monell*, 436 U.S. at 688 (citing *Cowles v. Mercer County*, 74 U.S. (7 Wall.) 118, 121 (1869)).[3]

The court of appeals' rule that local government entities are *always* "persons" *unless* Congress clearly says otherwise – the exact opposite of the presumption applied in *Stevens* – thus finds no support in the cases the court cites. Nor does Congress itself appear to count on the existence of such a presumption in its modern statute-drafting: statute after statute explicitly defines "persons" to include counties, municipalities and other local governmental entities within their purview.[4] If silence in a statutory definition mandated the con-

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[3] The *Monell* Court also looked to the Dictionary Act of 1871 for evidence that municipal corporations were subject to liability under 42 U.S.C. § 1983. *See Monell*, 436 U.S. at 688-89 (citing Act of Feb. 25, 1871, § 2, 16 Stat. 431). Because that act was passed eight years after the enactment of the False Claims Act, it also provides no assistance in determining the scope of the word "person" in the earlier legislation.

[4] *See, e.g.*, 10 U.S.C. § 2507(f)(1); 15 U.S.C. § 77b(a)(2); 15 U.S.C. § 3002(1); 15 U.S.C. § 3301(26); 16 U.S.C. § 4903(4); 30 U.S.C. §

clusion that such entities are included because of some presumption to that effect, all of those definitional provisions would be superfluous. They are not, for no such presumption exists, as Congress well knows.

Even if local government entities do not enjoy precisely "the same privilege of place within our constitutional structure enjoyed by the states," *Chandler*, 277 F.3d at 975 n.7, the material point is that local government entities are not burdened with a presumption exactly opposite that of the States, as the court of appeals believed. The question, then, is whether, absent a presumption working against local government entities, the text, history and policies of the False Claims Act support the inference that local government entities are to be considered "persons" even though State government entities are not. But before addressing this question, it is well to note that even with respect to the analysis of States, the Court in *Stevens* did *not* rely solely on a presumption that they are to be excluded. To the contrary, the Court's analysis of the text, history and other policies of the Act stand entirely on their own. As we shall see, they also support the same conclusion with respect to local entities as they do for the States.

2. *The Statute's Text*

Though the statute provides no textual definition of "person," the *Stevens* Court still identified at least several clues in the text of the current statute (beyond a federalism-based interpretive presumption) that States are not to be included within that term. First, the Court compared the empty term "person" in the Act's basic liability provision, 31 U.S.C. § 3729, with the section providing for civil investigative demands, *id.* § 3733, which goes out of its way to define "person" to include "a State," but *only* "[f]or purposes of this sec-

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1522(b)(7); 33 U.S.C. § 1362(5); 33 U.S.C. § 1901(a)(8); 33 U.S.C. § 2701(27); 33 U.S.C. § 1362(5); 42 U.S.C. § 2014(s); 42 U.S.C. § 6903(15); 50 U.S.C. § 167(2).

tion," *id*. § 3733(*l*). "The presence of such a definitional provision in § 3733, together with the absence of such a provision from the definitional provisions contained in § 3729 . . . suggests that States are not 'persons' for purposes of *qui tam* liability under § 3729." *Stevens*, 529 U.S. at 784.[5] That analysis supports the same result here, for § 3733 also defines "person" to include a "political subdivision of a State." The presence of that definitional provision in § 3733, together with its absence from § 3729, thus suggests that counties, too, are not "persons" for purposes of *qui tam* liability under § 3729.[6]

3. *The Statute's History*

An historical look at the statute's text also provided the *Stevens* Court with an even more specific clue to the meaning of "person." The Court explained:

> As the historical context makes clear, and as we have often observed, the FCA was enacted in 1863 with the principal goal of "stopping the massive frauds perpetrated by large [private] contractors during the Civil

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[5] The Seventh Circuit's attempt to distinguish *Stevens* by asserting that the Court's statutory reading there rested on the "presumption that States are not included within the definition of 'person,'" *Chandler*, 277 F.3d at 975 n.7, misreads *Stevens*, which did not rest this point on its earlier discussion of the presumption against State liability but on a reading of the statutory text itself. *See Stevens*, 529 U.S. at 784 (noting that its conclusion that "States [were] not subject to *qui tam* liability" was supported by "[s]everal features of the current statutory scheme").

[6] There is no reason to think that the mere provision to the federal government of the power to issue civil investigative demands ("CIDs") to government entities means that Congress necessarily contemplated that such entities could be substantively liable: as the *Stevens* Court noted, CIDs enable the federal government to obtain from government entities "useful evidence in investigations of private contractors." *Stevens*, 529 U.S. at 784 n.13; *see also United States ex rel. Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 870, 877 (D.C. Cir. 1999) (same).

> War." *United States v. Bornstein*, 423 U.S. 303, 309 (1976); see also *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 547 (1943). Its liability provision – the precursor to today's § 3729(a) – bore no indication that States were subject to its penalties. Indeed, far from indicating that *States* were covered, it did not even make clear that *private corporations* were, since it applied only to "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," and imposed criminal penalties that included imprisonment. Act of Mar. 2, 1863, ch. 67, § 3, 12 Stat. 698.

529 U.S. at 781-82 (alterations in original; footnote omitted).

All of those observations dictate exclusion of local government entities from the meaning of "person." The statute's focus on the frauds of "private contractors," as the Court described it,[7] would no more encompass the acts of local government entities than it would those of States. The Court's suggestion that the original language – "any person not in the military . . ." – focused on "natural persons" would also tend to exclude local government entities as much as it would States. The same is true for the imposition of "criminal penalties that included imprisonment": it is as metaphysically impossible to cart a county off to the hoosegow as it is to lock up a State.

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[7] *See also* John T. Boese, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 1.019[A], at 1-6 (2001-2 Supp.) ("the vast spending that arose from the Union government's military effort led to widely-publicized abuses by unscrupulous private contractors" (emphasis added)).

4. *The Presumption Against Government Liability For Punitive Damages*

A final key point relied upon by the *Stevens* Court was that "the current version of the FCA imposes damages that are essentially punitive in nature" – the Act's treble damages provision – "which would be inconsistent with state *qui tam* liability in light of the presumption against imposition of punitive damages on *governmental entities*." 529 U.S. at 784-85 (emphasis added). On its face that reasoning would extend the presumption to local government entities, and in fact the very case cited by the *Stevens* Court in support of this anti-punitive damages presumption – *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) – applies it to a municipal corporation, to hold that punitive damages are not available under § 1983. As *Stevens* itself describes it, in *City of Newport* the Court was "concerned with imposing punitive damages on taxpayers under any circumstances." 529 U.S. at 785 n.15.

The presumption against punitive damages liability for government entities cited in *Stevens* – which is truly a *general* presumption – rests on the premise that schemes designed to deter, and even to punish, official government wrongdoing, ought not inflict punishment on innocent taxpayers and citizens. Punitive damages "imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers." *City of Newport*, 453 U.S. at 267. It is one thing for the federal government to reclaim funds improperly obtained or converted by a local government entity, and thereby effectively demand that taxpayers cough up benefits they never should have received; it is another thing altogether to make taxpayers

effectively pay additional penalties for acts they never personally committed or ratified:

> [Punitive damages] can never be allowed against the innocent. Those which the plaintiff has recovered in the present case . . ., being evidently vindictive, cannot, in our opinion, be sanctioned by this court, as they are to be borne by widows, orphans, aged men and women, and strangers, who, admitting that they must repair the injury inflicted by the Mayor on the plaintiff, cannot be bound beyond that amount, which will be sufficient for her indemnification.

City of Newport, 453 U.S. at 261 (quoting *McGary v. President & Council of City of Lafayette*, 12 Rob. 668, 677 (La. 1846)). For that reason, the Court explained in *City of Newport*, the common law had long recognized an immunity from punitive damages liability for government entities. *Id.* at 260.

This is not to say – and neither *Stevens* nor *City of Newport* says – that the presumption means the federal government is without recourse in deterring and punishing local government wrongdoing. The federal government has other ways of obtaining recovery of monies wrongfully obtained by local governments, *see, e.g., United States ex rel. Zissler v. Regents of the Univ. of Minnesota*, 154 F.3d 870, 871 (8th Cir. 1998) (claims for unjust enrichment, payment by mistake, disgorgement of profits, and breach of fiduciary duties); Boese, *supra*, at 1-36 (noting that United States frequently brings common law claims instead of False Act Claims because False Claims Act statute of limitations has expired), and the threat of a large compensatory damages or restitution hit, coupled with interest, is itself an adequate deterrent in many cases. The federal government can always pursue criminal sanctions against individual officials who misappropriate funds. Further, because counties and other local governments are inherently political bodies, "the discharge of offending officials who were appointed and the public excoriation of

those who were elected," *Newport*, 453 U.S. at 269, can be expected to exert particularly strong deterrent force. And, in the end, the presumption against government liability for punitive damages is just that: a presumption, one that can be overcome by a sufficiently clear specification of congressional intent to abrogate the traditional government immunity from punitive damages. *See City of Newport*, 453 U.S. at 258.

It is nevertheless a presumption with sharp teeth. The Court simply will not construe a statute silent or ambiguous as to the provision of punitive damages against government entities – *any* government entities – as authorizing such damages. "Unless Congress *clearly* provides otherwise, a local governmental entity is immune from punitive damages awards." *United States ex rel. Dunleavy v. County of Delaware*, 279 F.3d 219, 222 (3d Cir.) (emphasis added), *petition for cert. filed*, 70 U.S.L.W. 3742 (U.S. May 20, 2002) (No. 01-1711). General language alone will not suffice to overcome this presumption – even where the statute in question is one that, like 42 U.SC, § 1983, deliberately targets public entities. *See City of Newport*, 453 U.S. at 258 (noting that the Court "consistently has declined to construe the general language of § 1983 as automatically abolishing such traditional immunities by implication").

The FCA provides for sanctions above and beyond simple restitution, sanctions that are "essentially punitive in nature." *Stevens*, 529 U.S. at 784. These include the *automatic* trebling of damages in *all* cases where the defendant did not actively cooperate in the investigation, as well as civil penalties of up to $10,000 per claim. 31 U.S.C. § 3729(a). As *Stevens* holds, those sanctions implicate the "presumption against imposition of punitive damages on governmental entities." 529 U.S. at 785. And the general language of the FCA providing liability for unspecified "person[s]" obviously cannot overcome the presumption that such punitive damages cannot be applied against a government entity. Nor do the FCA penalty

provisions suggest viable distinctions in the nature of the defendants to whom they might be applied. Interpreting the silent word "person" to include local government entities thus would have the effect of imposing on such entities punitive damages liability without any explicit indication that Congress intended for such entities to be within the category of persons who could be liable for such damages. And if the presumption articulated in *City of Newport* and repeated in *Stevens* means anything at all, it is that such an inference cannot be allowed.

The consequences of disregarding the presumption in this context would be serious. The facts of *United States ex rel. Garibaldi v. Orleans Parish School Board*, 244 F.3d 486 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 808 (2002), illustrate the problem. There, a jury found that the Orleans Parish School Board had submitted false unemployment insurance and worker's compensation insurance claims to the federal government. There can be no doubt those findings were serious, and resulted in a serious loss to the federal government – some $7.6 million, by the jury's reckoning. *See Garibaldi*, 244 F.3d at 488. Because of the treble damage provisions of the False Claims Act, however, this judgment ballooned to an award of *$22.8 million*, on top of a separate civil penalty of *$7.85 million*. *See id.* As the Fifth Circuit noted in following this Court's decisions in *Stevens* and *Newport*,

> [P]unishing a local government is pointless. The punishment, in the form of higher taxes or reduced public services, is visited upon the blameless. Neither the taxpayers nor the schoolchildren of Orleans Parish played any role in the conduct giving rise to the School Board's liability. Extracting damages from them – damages that are far more than is needed to compensate the federal government for whatever losses it has suffered – is supported, as the Supreme Court has said, by, "[n]either reason nor justice." [*Newport*, 253 U.S.

267, 101 S. Ct. 2748].

Garibaldi, 244 F.3d at 491-92.

Garibaldi is just one example of the kind of harm that would be caused by the court of appeals' construction of the FCA. The experience of amici confirms the simple intuition that a huge proportion of the federal funds handled by local government entities are funds relating to education programs or welfare/social safety net funds, all of which are typically directed at assisting especially innocent, vulnerable or needy citizens and taxpayers. Even assuming the worst of motives and conduct by the receiving government entity, it makes little sense to inflict on that entity a crippling financial penalty, which will necessarily be borne by the innocent, vulnerable and needy either in the form of reduced services, or increased taxes to satisfy the exaction. Realistically speaking, however, the motives and conduct of government entities are rarely so starkly invidious. This is especially the case when the entity – like OCHCA – is charged with processing or making claims for payment under federal programs such as Medicare and Medicaid, which have rightly been described as "among the most completely impenetrable texts within human experience." *Rehabilitation Ass'n of Va., Inc. v. Kozlowski*, 42 F.3d 1444, 1450 (4th Cir. 1994); *see Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981) (Medicare laws are "Byzantine"); *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 96 (1995) ("comprehensive and intricate" cost reimbursement regulations consumed some "624 pages of the Code of Federal Regulations" in 1994). It is inevitable that mistakes are made in that process, and it may be unsurprising that such mistakes will sometimes be viewed as willful, but it is wholly unacceptable that extra penalties for such errors should be

exacted from the program intended to help those most in need.[8]

Accordingly, for all the foregoing reasons, the bases identified in *Stevens* for excluding States from the ambit of the undefined "persons" covered by the FCA apply equally to local government entities such as petitioner and the undersigned amici.

B. Congress Did Not Likely Intend To Leave Local Government Entities Subject To FCA Liability Based On An Indeterminate "Arm Of The State" Test

The conclusion that local government entities should be treated the same as States for purposes of substantive FCA liability is confirmed by closer scrutiny of a subtle yet significant concession made in the court of appeals opinion. While local government entities are not themselves excluded from the statute, the court reasoned, that result holds only "so long as they are not properly considered arms of the state itself." 277 F.3d at 975 n. 8. Part of that reasoning has to be correct: inasmuch as *Stevens* holds that the States are not subject to suit under the FCA, no political subdivision that is, or is acting as, a part of the State itself, could logically be subjected to suit either. The problem with the reasoning is that it presup-

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[8] The court of appeals in this case rejected these concerns on the ground that, even though the FCA's penalty provision "shifts" the burden of payment "to the local taxpayers," the shift would not be unjust "because the local taxpayers have already received, without justification, some of the benefit." *Chandler*, 277 F.3d at 978. That argument borders on the frivolous: assuming it is true at all that taxpayers received some of the benefit, the question is *not* whether they should effectively repay the amount they improperly received. It is whether they should be forced to pay penalties *in addition* to that amount, as punishment for the government entity's conduct. This Court's cases have answered that question squarely and consistently no – at least absent the clearest specification by Congress that taxpayers *should* bear such burdens.

poses that Congress would choose to leave the treatment of local government entities' potential liability under the FCA to the "arm of the state" inquiry, which turns out to be a most unlikely presupposition, given the vagaries of that inquiry.

The question whether a local government entity is an arm of the state most often arises in the context of the Eleventh Amendment (or in the closely related context of § 1983 liability). While Eleventh Amendment immunity does not generally "extend to counties and similar municipal corporations," *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977), the immunity afforded States also applies to local entities, including counties and other agencies, when they constitute "arm[s] of the State partaking of the State's Eleventh Amendment immunity." *Id.* The inquiry into whether a local entity is acting as the arm of the State can focus on the "essential nature and effect" of the local entity's conduct, *Regents of University of California v. Doe*, 519 U.S. 425, 429 (1997) (internal quotation marks omitted), or on the particular "nature of the entity created by state law," *id.* (internal quotation marks omitted), or both – which means that the same local agency may be an arm of the state depending on which of its functions are at issue. *See, e.g., McMillian v. Monroe County, Ala.*, 520 U.S. 781, 786 (1997) (concluding that county sheriffs in Alabama are state officers *when performing law enforcement functions*); *Richman v. Sheahan*, 270 F.3d 430, 439 (7th Cir. 2001) ("[A] county sheriff may act as an arm of the state when performing *certain* functions.") (emphasis added), *cert. denied*, 122 S. Ct. 1439 (2002). The complication that arises in the Eleventh Amendment context is that the States vary widely among themselves – and even within themselves – in the ways in which they distribute State power, the forms of the entities designated to exercise such power, the extent to which those entities may exercise such power, and so on. *See City of St. Louis v. Prapotnik*, 485 U.S. 112, 124 (1988) ("The States have extremely wide latitude in determining the form that local government takes, and local preferences have led to a

local preferences have led to a profusion of distinct forms."). Of particular relevance here, the "importance of counties and the nature of county government have varied historically from region to region, and from state to state." *McMillian*, 520 U.S. at 795.

As applied in the FCA context, the individualized arm of the state approach thus would lead to intensely complicated questions of substantive FCA liability for counties and other local government entities. Because the very same local entity can be an arm of the state for one purpose but not another, litigants and courts will be forced to evaluate the extent to which the local entity was handling federal funds pursuant to the mandate of or at the direction of the State, for example. *See Gottfried v. Medical Planning Servs., Inc.*, 280 F.3d 684, 692 (6th Cir. 2002). The problem is not theoretical. As this Court has noted previously, California counties acting within their general authority may not be arms of the state for some purposes. *See Moor v. County of Alameda*, 411 U.S. 693 (1973) (counties are generally not arms of the state and therefore qualify as citizens for purpose of diversity jurisdiction). But California counties do perform many functions as direct agents for the state. For example, the counties are required to prepare detailed contracts with the state which define the scope and range of mental health services which the county will arrange for or provide. *See* CAL. WELF. & INST. CODE §§ 5650 & 5651. These services include those that the State itself is mandated to provide pursuant to federal law. CAL. WELF. & INST. CODE § 5651(a)(2); CAL. GOV. CODE § 7576. Further, each county also can function as the exclusive managed care organization within its geographic boundaries for purposes of controlling the provision of mental health services to Medicaid beneficiaries. CAL. WELF. & INST. CODE §§ 5775, et seq. These functions are intertwined, since the affected populations overlap. Under the view advanced by the court of appeals, such counties could be held liable under the FCA for claims made in conjunction with one function but

not the other if a court was to find that one of these interrelated functions was done as an arm of the state and the other was not. The one thing they will know for sure is that they cannot know for sure to what extent they will be governed by the federal false claims law, which is an outcome no one can applaud.

The fact that such difficulties already arise in the context of establishing basic Eleventh Amendment immunity is no reason to assume Congress wanted to import those same difficulties into the FCA. The nature of Eleventh Amendment immunity essentially dictates differential treatment between State and local government entities in that particular context. On the one hand, no local entity that is truly distinct from the "State" is entitled to the protection of the Amendment by its terms; on the other hand, every "State" *is* entitled to protection under the Amendment. Thus, if some nominally distinct entity is acting *in fact* as an arm of the State, it cannot be denied immunity because of the inconvenience of the inquiry.

While the inquiry is therefore necessarily individualized under the Eleventh Amendment, it does not have to be so under a statute like the FCA. The question is whether to assume that Congress, by making "persons" liable without defining them, would have intended to create disuniformity and uncertainty with respect to local government FCA liability by tracking the individualized Eleventh Amendment inquiry and protecting local governments only to the extent they are found to be arms of the State. The answer surely is no: having excluded States, the sensible policy result would be to provide the same treatment for *all* government entities at *all* levels.

C. Local Government Entities Are Not "Persons" Under the FCA Regardless Of Who Is Suing Them

It should be clear from all we have said that we believe the issue in this case is one of substantive FCA liability, *viz.*, whether or not local government entities are "persons" under

the statute. It remains only to note that the answer to this question cannot turn on the identity or status (private or federal) of the party suing the "person," despite suggestions of a contrary possibility in some opinions. *See Stevens*, 529 U.S. at 789 (Ginsburg, J., concurring); *Dunleavy*, 279 F.3d 219, 221 n.1 (3d Cir. 2002). We submit that the answer is clear and should be made explicit now, to forestall pointless litigation of the point in the lower courts.

It is difficult to identify even a colorable argument for why an entity that is not a "person" when sued by a private relator is transformed into a "person" when sued by the United States. The only remotely plausible argument appears to be this: to the extent *Stevens* can be said to rest entirely on an interpretive canon that presumptively excludes States but not local government entities from the word "person" *in suits by private parties*, that rationale would not apply to suits by the federal government and thus the exact same word can be read differently. The problems with this view are self-evident. Is the entity a "person" when the suit is first filed on behalf of the United States, but then stops being a "person" if the U.S. declines to intervene? Or is the entity *not* a "person at first, but then becomes one *if* the United States decides to participate? Is the entity in that suit only a "person" when the United States seeks discovery, but not when the relator does? What if the U.S. settles, but the private relator wants to object to the settlement? Is the entity a "person" when negotiating with the U.S. but not when the relator tries to object? Or is the entity *never* a "person" unless the suit is brought by the U.S. only? But isn't the relator suing only as an assignee of the U.S. anyway?

The argument that government entities can be treated differently under the FCA as construed in *Stevens*, depending on who is suing, raises these unanswerable questions because it rests on unsound premises. As we have already demonstrated, *Stevens* did not rely *solely* on a federalism-based pre-

sumption – rather, its conclusion was fully supported by independent analyses of the text and history of the statute. And to the extent *Stevens* did rely on such a presumption, it was not limited only to the treatment of States as "persons" in *private* suits. Finally, the more specific presumption cited by *Stevens* – the rule disfavoring punitive damages against government entities – certainly is not limited to private suits, but evinces a concern about "imposing punitive damages on [innocent] taxpayers under *any circumstances*." *Stevens*, 529 U.S. at 785 n.15 (emphasis added). Forcing the typically needy beneficiaries of government programs to suffer a special penalty for a local government entity's wrongdoing is a senseless policy judgment no matter what party is bringing the suit, which is the heart of the reason why *no* government entity – state or local – is properly included within the meaning of the term "person" in the FCA.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals in this case.

Respectfully submitted,

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