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No. 98-1828

IN THE

Supreme Court of the United States

STATE OF VERMONT AGENCY OF
NATURAL RESOURCES,

Petitioner,

v.

UNITED STATES OF AMERICA *ex rel.*
JONATHAN STEVENS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* THE CITY OF NEW YORK, THE CITY OF LOS ANGELES, THE CITY AND COUNTY OF SAN FRANCISCO, AND COOK COUNTY, ILLINOIS, IN SUPPORT OF PETITIONER

MICHAEL D. HESS
Corporation Counsel of the
City of New York
Attorney for Amicus Curiae
City of New York
100 Church Street
New York, New York 10007
(212) 788-0800

LEONARD J. KOERNER*
HILARY B. KLEIN
MARJORIE B. LANDA
Of Counsel

* *Counsel of Record*

(Additional Counsel Listed on Inside Cover)

154592

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INTEREST OF AMICI

The City of New York, the City of Los Angeles, the City and County of San Francisco, and Cook County, Illinois (collectively referred to as "amici") respectfully submit this brief as amici curiae supporting the position of the State of Vermont. Amici urge this Court to reverse the Second Circuit's decision in this case, which conflicts with other circuits in allowing states to be sued under the federal False Claims Act ("FCA"). This decision subjects states and other governmental entities to the FCA's draconian remedies of treble damages plus penalties and undermines the system of cooperative federalism upon which this nation was founded.

Amici are local government entities that receive federal funds annually (either directly from the United States or through the states in which they are located) for numerous essential municipal services and programs. Generally, amici are responsible for providing these essential services to their citizens and for implementing those programs, while the federal government and states disburse the funds and monitor their expenditure. Because they receive federal funds, amici are potential targets for suit under the FCA.[1]

The False Claims Act was enacted in 1863 at the height of the Civil War primarily to "combat rampant fraud in Civil War defense contracts." S. Rep. No. 99-345, 99th Cong., 2d Sess. 8, *reprinted in* 1986 U.S.C.A.A.N. 5266, 5273. The chief purpose of the Act was to address frauds perpetrated by large private contractors. *United States v. Bornstein*, 423 U.S. 303, 310 (1976). Over the years, Congress amended the FCA many times, making significant amendments in 1986

1. Cook County, Illinois has recently filed a petition for certiorari in *Cook County, Illinois v. Chandler*, No. 99-266, in which it seeks review of the question of municipal immunity from suit under the False Claims Act.

by, *inter alia*, increasing the statute's mandatory civil remedies from double to treble damages and from a $2,000 penalty to a $5,000-$10,000 penalty for each violation. 31 U.S.C. § 3729(a). *See* S. Rep. No. 99-345, 99th Cong., 2d Sess. 8, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273. Under the statute, as amended in 1986, a whistleblower, known as the "relator," is generally entitled to receive between 15 and 30 percent of the total recovery. 31 U.S.C. §§ 3730 (d)(1); (d)(2).

Prior to the 1986 amendments, it appears that, with one exception, the statute was not invoked against states or localities. *See United States ex rel. Weinberger v. Florida*, 615 F.2d 1370, 1371 (5th Cir. 1980) (court vacated district court decision that states were not "persons," holding instead that the district court had lacked subject matter jurisdiction over the case). Subsequent to 1986, however, there have been an increasing number of cases brought against governmental entities, thereby subjecting states and localities to the statute's severe remedial structure and allowing private individuals to collect a bounty at state and local taxpayers' expense.

In this case, the State of Vermont argued that it was not a "person" subject to liability under the FCA, because, under the "plain statement rule," states are not normally considered "persons" unless specifically defined as such. *United States ex rel. Stevens v. State of Vermont Agency of Natural Resources*, 162 F.3d 195, 203 (2d Cir. 1998). As a corollary to that argument, Vermont contended that, since courts do not ordinarily impose punitive remedies against states, and the FCA's remedies are punitive, states were not "persons." The Second Circuit rejected that argument, holding that states were "persons," based in part on a cursory analysis of the statute's remedies in which it concluded that those remedies were not punitive. *Id.* at 207.

The Second Circuit's holding has profound implications for the issue of local government liability. For local governments, to which the "plain statement rule" does not apply, the critical question for determining if they are "persons" under the statute is whether the statute is punitive; if so, liability may be imposed on them only if there is unequivocal congressional intent to do so. Therefore, amici's brief will focus on this issue, and will demonstrate that the Second Circuit's perfunctory analysis was incorrect.

In addition, amici will address the policy implications of holding states and local governments liable under the FCA. Allowing government liability under the FCA will adversely affect states and localities' ability to perform their governmental functions. Local governments administer many federal programs, providing services to their residents such as education, healthcare, child welfare and environmental protection, and it is the localities' ability to provide these critical services that is jeopardized by the treble damages and $10,000 per claim penalty imposed against both states and localities under the Second Circuit's reading of the FCA.

SUMMARY OF ARGUMENT

Under principles of common law, governmental entities, which include states and localities, are immune from punitive remedies, unless the legislature's intent to impose such remedies on them is unmistakable. This immunity is based on the understanding that: (1) punitive awards against governments punish only taxpayers, not individual malefactors; (2) punitive sanctions against governments do not deter future violations by individual government employees, since the award would not come out of their pockets; and (3) the imposition of such remedies against states and localities would likely result in an increase in taxes and/or reduction in services for taxpayers.

As courts have recognized, punitive remedies are not limited to punitive damages, but rather encompass all extracompensatory remedies designed to punish and deter defendants. In the case of the False Claims Act, particularly as amended in 1986, its remedies of treble damages plus up to $10,000 per false claim are punitive in purpose and effect. On its face, these remedies do far more than make the government whole. Moreover, Congress specifically intended these remedies both to punish wrongdoers and deter future violations — purposes that make no sense in a case against a governmental entity.

Therefore, under common law, states and other governmental entities are not liable under the FCA unless Congress demonstrated a clear intention to abrogate governments' immunity from punitive sanctions. This Congress did not do. Neither the plain language of the statute nor its legislative history evidences that congressional intent. Rather, the language leaves the term "person" undefined, and states are normally not considered "persons" unless specifically defined as such. Further, the debates both in 1863 and at the time of the 1986 amendments show that Congress was concerned only with fraud by private contractors, not governmental entities, and that its principal goal was to protect taxpayers, a goal undermined by making states and localities potential defendants.

Accordingly, under established common law principles, because the False Claims Act imposes punitive remedies, this Court should hold that governmental entities are not "persons" subject to liability under the Act.

ARGUMENT

I.

STATES AND THEIR POLITICAL SUBDIVISIONS ARE NOT "PERSONS" UNDER THE FALSE CLAIMS ACT, BECAUSE THEY ARE IMMUNE UNDER COMMON LAW FROM THE PUNITIVE REMEDIES THAT THIS STATUTE IMPOSES, AND CONGRESS DID NOT CLEARLY INTEND TO ABROGATE THAT IMMUNITY

A. Governments Generally Are Immune from Punitive Remedies, Because Such Remedies Penalize Innocent Taxpayers and Threaten Disruption of Government Services

Under common law principles, governmental entities are immune from punitive remedies except in instances when Congress clearly intends to abrogate that immunity. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (under § 1983 of the Civil Rights Act of 1851, no punitive damages may be awarded against municipalities because Congress did not intend to subject municipalities to punitive damages). The reason for this common law immunity from punitive damages is simple: punishment should be imposed only against individual wrongdoers. *Id.* at 261. To the extent a punitive award is allowed against a governmental entity, however, it punishes the general public instead. *Genty v. Resolution Trust Corporation*, 937 F.2d 899, 910 (3rd Cir. 1991). Moreover, the goal of deterrence is not served by imposing punitive sanctions against a government, because such sanctions are not likely to restrain future violations by individual actors; the award would not come from their pockets. *Id.* Punitive remedies imposed on a governmental body 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." *City of Newport*, 453 U.S. at 261.[2]

While this common law immunity has been applied most frequently to local governments, the reasoning behind it applies equally to states, as courts have recognized.[3] *See Tang v. State of Rhode Island*, 904 F. Supp. 55 (D. R.I. 1995) ("... a municipality (and, by analogy, a state) is immune from punitive damages under § 1983 ..."); *Ostroff v. State of Florida*, 554 F. Supp. 347, 353 n.10 (M.D. Fla. 1983) (State of Florida immune from punitive damages under *City of Newport* rationale). *See also Rose v. Port Authority of New York and New Jersey*, 13 F. Supp. 2d 516 (S.D.N.Y. 1998) (bi-state authority immune from punitive damages under

2. The court in *Genty* noted two major distinctions between municipal corporations and ordinary corporations that militated against imposing punitive awards on the former — the opportunity for disassociation and the difference in accountability. *Id.* at 910. Unlike citizens of a municipality, shareholders can promptly disassociate themselves from a corporation upon receiving information of improper conduct by selling their stock or bringing a remedial action. In addition, shareholders receive at a minimum quarterly reports of a corporation's activity, but municipal officials make no similar accounting to the public. *Id.*

3. Under principles of sovereign immunity and the Eleventh Amendment, states ordinarily are not liable for damages when private individuals bring suit against them. *See, e.g., Alden v. Maine*, 119 S. Ct. 2240 (1999). The issue of states' specific immunity from punitive damages therefore has not arisen frequently. In the case of the False Claims Act, the Eleventh Amendment applies only to suits in which the relator sues without the intervention of the United States. *See United States ex rel. Long v. SCS Business & Technical Institute, Inc.*, 173 F.3d 870, 882, *supp. op.*, 173 F.3d 890 (D.C. Cir. 1999). Accordingly, to resolve the statutory construction issue in this case, which is relevant both to suits brought by relators and by the United States, amici urge this Court to analyze the punitive nature of the statute and apply governmental entities' traditional common law immunity from punitive remedies.

City of Newport rationale); *Bolden v. Pennsylvania State Police*, 1986 U.S. Dist. LEXIS 21967 (E.D. Pa. 1986) (state agency immune from punitive damages); *Ferguson v. Joliet Mass Transit District*, 526 F. Supp. 222 (N.D. Ill. 1981) (public utility immune from punitive damages). As with a municipality, assessing punitive damages against a state entity would only punish taxpayers, not wrongdoers, and would not deter future misconduct by state employees.

Further, although traditionally government immunity from remedies that punish has arisen in the context of punitive damages, this Court has applied the same principles to other civil remedies that may be viewed as punishment, including treble damages. As this Court commented in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639-40 (1981), a case brought under the Clayton Act, "[t]he very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct ..." In *City of Newport*, this Court relied on *Hunt v. City of Boonville*, 65 Mo. 620 (1877), a case exempting municipalities from treble damages under a state trespass statute, because allowing the imposition of such damages would penalize innocent taxpayers. 453 U.S. at 261. *Accord Genty*, 937 F.2d 899 (municipalities not liable under RICO because of treble damages remedy); *Barnier v. Szentmiklosi*, 810 F.2d 594 (6th Cir. 1987) (treble damages not allowed against a municipality under Michigan false arrest statute). *See also Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 274-75 (1989) (equating treble and punitive damages in discussion of the Eighth Amendment); *Smith v. Wade*, 461 U.S. 30, 36 (1983) (noting that treble damages in the patent code was a punitive civil remedy).[4]

4. Congress also understands treble damages to be punitive sanctions. For example, in passing the Local Government Antitrust Act of 1984, and exempting municipalities from liability for treble damages for antitrust violations, Congress explained: "The record

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This Court also considers civil penalties to be punitive under common law principles. *See United States Department of Energy v. Ohio*, 503 U.S. 607 (1992) (civil penalties under the Clean Water Act and the Resource Conservation and Recovery Act of 1976 intended as punishment); *Tull v. United States*, 481 U.S. 412, 422 n.7 (1987) ("the remedy of civil penalties is similar to the remedy of punitive damages"). *See also Smith v. Wade*, 461 U.S. at 36 (noting that civil fine in 1863 False Claims Act was a punitive remedy).

B. The Second Circuit Wrongly Concluded that the FCA Is Not Punitive

The False Claims Act is punitive because it entitles the federal government to recover both treble damages and a civil penalty of between $5000 and $10,000 for each false claim. 31 U.S.C. § 3729(a). As shown above, courts ordinarily consider statutes with *either* treble damages *or* civil penalties to be punitive.

The legislative history of the False Claims Act confirms that the remedies were largely intended to serve punitive purposes. Enacted in 1863, during the Civil War, the False Claims Act was intended to address widespread and blatant fraud by private military contractors, who had been billing the United States for nonexistent or worthless goods, charging exorbitant prices for goods, and generally

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does support, however, the notion that municipalities — and their taxpayers who must ultimately shoulder the burden — should not be subject to punitive sanctions in the form of treble damages." H. Rep. No. 98-965, 98th Congress, 2d Session 18 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4619. *See also Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 119 S. Ct. 2199, 1999 U.S. LEXIS 4376, at *35 n.11 (1999) (noting that Congress exempted United States from treble damages authorized in patent infringement action against all other parties).

plundering the public treasury. *See United States v. McNinch*, 356 U.S. 595, 599 (1958). Its purpose was not merely to compensate the federal government, but rather its "stringent provisions are required for the purpose of punishing and preventing these frauds." *McNinch*, 356 U.S. at 600, *quoting* Cong. Globe, 37th Cong., 3d Sess. 952 (1863). *See also* Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L. J. 1795, 1855, 1861 (June 1992) (intent of False Claims Act to punish wrongdoers). To accomplish this purpose, Congress provided for a civil action against contractors with remedies of double damages and a $2000 penalty for each false claim. Cong. Globe, 37th Cong., 3d Sess. 957 (1863).

The 1986 amendments to the Act increased the punitive nature of the statute's remedies by establishing the current treble damages and $5,000 to $10,000 penalty per false claim.[5] Making this change, "Congress understood very well that it was instituting new 'punitive sanctions.' " Mann, 101 YALE L.J. at 1860.[6] Congressman Fish, a sponsor of the

5. In addition, section 3730(d)(5) was added in 1986 to provide that prevailing relators may be awarded reasonable attorneys' fees in addition to any other percentage of award recovered. S. Rep. 99-345, 99th Cong., 2d Session 29 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5294. Previously, the FCA did not contain a specific authorization for fees, and these were added to be "payable by the defendant in addition to the forfeiture and damages amount." *Id.* Since the provision for attorneys' fees represents yet another monetary drain on a government defendant's treasury, in addition to treble damages and fines, it renders the current FCA remedial structure more punitive.

6. In fact, in hearings conducted on the 1986 amendments, the Department of Justice had opposed the change from double to treble damages, and had suggested increasing the penalty from $2000 to $5000, rather than $10,000, cautioning that judges would be less
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1986 amendments in the House, explained that the purpose of the unamended Act's

> double damages recovery, with the accompanying civil fine, is intended to be a substantial penalty — to forcefully discourage individuals and companies that do business with the United States from engaging in fraudulent practices . . . the dual purpose of any such law should always be to deter as well as punish fraudulent conduct.

132 Cong. Rec. 22,336-37 (1986). In order to increase the Act's deterrent effect, however, the consensus was that increasing the penalties from $2000 to $10,000 was necessary. *See* 132 Cong. Rec. 22,335, 22,336 (1986) (statements of Rep. Glickman and Rep. Brooks, respectively). Augmenting the House's increase in civil penalties, the Senate bill allowed for the imposition of treble damages; after reconciliation, the Senate's treble damages clause and the increase in civil penalties found in both bills were adopted. *Id.* at 34; 31 U.S.C. § 3729(a).

In the face of this overwhelming evidence of the statute's punitive purpose and effect, the Second Circuit rejected the state's argument that the treble damages and penalties of the FCA were punitive and that the statute therefore did not authorize suits against states. *Stevens*, 162 F.3d at 207. In a

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likely to hold in favor of the government if the penalties to be assessed appeared punitive rather than remedial. Michael Lawrence Colis, *Settling for Less: The Department of Justice's Command Performance under the 1986 False Claims Amendments Act*, 7 Admin. L. J. Am. U. 409 (Summer 1993), citing False Claims Reform Act: Hearings on S. 1562 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 99th Cong., 1st Sess. 2 (1985) (statement of Jay B. Stephens, Deputy Associate Attorney General, U.S. Department of Justice).

cursory discussion, the Second Circuit explained that the double damages in the 1863 FCA were remedial, enacted in order to compensate the government fully for its losses. *Id.* However, the Second Circuit failed to examine either the initial intent of Congress when it enacted the statute in 1863 or the critical issue of whether the change to treble damages and escalation of penalties made the statute punitive.[7]

In contrast, the D.C. Circuit in *United States ex rel. Long v. SCS Business and Technical Institute, Inc.*, 173 F.3d 870, *supp. op.* 173 F.3d 890 (D.C. Cir. 1999) examined both issues, and indicated that it considered the statute punitive. Looking back to the intent of Congress when it enacted the statute in 1863, the D.C. Circuit commented: "The 1863 Congress . . . made clear as day that it intended criminal, and a fortiori punitive, sanctions. . . . Those provisions are surely inconsistent with the concept of state liability." *Id.* at 878. Further, the court pointed out that the statute could be characterized as remedial only prior to the 1986 amendments, when the statute provided for double damages of which the government only received a one-half share. *Id.* at 877, citing *United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343, 349 n.3 (S.D.N.Y. 1998) (holding that states and municipalities were not persons under the FCA and the statute was punitive).[8] Thus, the court reasoned, once the

7. The Second Circuit also failed to consider its own earlier decision in *Hydrolevel Corp. v. American Society of Mechanical Engineers, Inc.*, 635 F.2d 118, 126 (2d Cir. 1980), *aff'd*, 456 U.S. 556 (1982), in which it expressly recognized, even before the 1986 amendments, that the remedial scheme of the False Claims Act was particularly punitive, since it called for *both* multiple damages and civil penalties, rather than one or another.

8. The D.C. Circuit in *Long* relied heavily on the district court's analysis in *Graber* in determining that Congress did not intend states to be liable under the FCA, although it noted that "[o]f course, *Stevens*, not *Graber*, is Second Circuit law." *Long*, 173 F.3d at 875 n.7.

statute was amended to increase the penalties to treble damages and decrease the relator's share, it was no longer merely making "the government whole." *Id.* [9]

In sum, this Court should adopt the reasoning of the D.C. Circuit, reject the perfunctory analysis of the Second Circuit, and find that the statute imposes punitive remedies that ordinarily may not be assessed against governmental entities.

9. The United States may argue that governmental immunity from punitive damages does not apply to suits brought by the United States, an argument that was properly rejected in *Graber*, 8 F. Supp. 2d at 350-351. As the court in *Graber* explained, the doctrine of governmental immunity from punitive damages has its roots in policy considerations, not in the law of sovereign immunity. *Id.* Those policy considerations apply with full force to suits brought by the federal government: "If City of Newport means anything at all, it means that it is up to Congress to clearly signal its desire to subject municipalities to exemplary damages, regardless of the plaintiff." *Id.*

Further, the United States may claim that the FCA's remedies are compensatory rather than punitive, relying on double jeopardy jurisprudence holding that an FCA civil suit does not bar a subsequent criminal prosecution. *See, e.g., United States v. Brekke*, 97 F.3d 1043, 1048 (8th Cir. 1996), *cert. denied*, 520 U.S. 1132 (1997). In relying on double jeopardy law, however, the United States would be ignoring the critical distinction between "punitive" civil sanctions for the purpose of the Double Jeopardy Clause and punitive sanctions for the purpose of governmental immunity from suit. *See Graber*, 8 F. Supp. 2d at 350, citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 550 (1943) (despite the fact that multiple civil damages provided for in the False Claims Act are akin to punitive or exemplary damages, for purposes of the application of the Double Jeopardy Clause, they do not constitute a criminal penalty or cause the remedy to lose the quality of a civil action).

C. Congress Did Not Clearly Intend to Abrogate States' and Localities' Common Law Immunity from Punitive Damages

Once it is established that the False Claims Act is punitive, the only remaining issue is whether Congress intended to abrogate governmental entities' common law immunity from punitive remedies. *City of Newport*, 453 U.S. at 261. In light of the strong public policy reasons against penalizing governments, courts require that congressional intent to abrogate that immunity be clearly and specifically expressed. *Id.* To make this determination, courts examine whether a statute "expressly authorizes" government liability for punitive remedies. *Id.* As shown below, there is no express authorization of state liability in the language of the FCA, and, in fact, the statutory language of the FCA and a companion statute, the Program Fraud Civil Remedies Act, as well as the weight of the legislative history, indicate that Congress did not intend to subject states and their political subdivisions to liability.

The statutory language is paramount in determining congressional intent. *See United States v. Oregon*, 366 U.S. 643, 648 (1961) (where language of a statute is clear, there is no occasion to look at legislative history). In the 1863 Act, there was no mention of the possibility of subjecting states to liability. The Act subjected any "person" (not in the military or naval forces of the United States) to liability for double damages and civil penalties. *See* Cong. Globe, 37th Cong., 3d Sess. 953 (1863). When the term "person" is undefined (as in the 1863 Act), it is generally understood not to include states. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989). *Cf. City of Newport*, 453 U.S. at 258 (in 1863, the term "person" did not include municipalities when punitive remedies involved).

Consistent with the 1863 Act, the plain language of the 1986 amendments supports the notion that states and other governmental entities continued to be excluded from the liability provisions of the Act. Congress specifically included states only in the new "Civil investigative demands" ("CID") provision of the Act. 31 U.S.C. § 3733(l)(4). Under the CID provision, "[w]henever the Attorney General has reason to believe that any person may be in possession, custody or control of any documentary material or information relevant to a false claims law investigation," the Attorney General may serve pre-complaint discovery "upon such person." 31 U.S.C. § 3733(a)(1). The CID provision goes on to define "person," stating, "*[f]or purposes of this section*, the term 'person' means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision." 31 U.S.C. § 3733(l)(4) (emphasis added).

It is clear that "this section" refers only to the CID provision, because that provision differentiates "this section" from "sections 3729 through 3731 of this title," which are, respectively, the liability provision, the *qui tam* provision, and the procedural provisions of the Act. 31 U.S.C. § 3733 (l)(1)(A). Thus, the definition of person in the CID section, which includes states and political subdivisions, is specifically not cross-referenced in the section of the Act that subjects "persons" to liability, despite the fact that the word "person" in the liability section is not defined. 31 U.S.C. § 3729.

By including states and localities in its definition of person only in the pre-complaint discovery provision of the Act, Congress indicated that it did not intend to abrogate their common law immunity from liability under this Act. Had Congress wished to include governmental entities in the definition of person for purposes of liability, it could

easily have done just that. The fact that it included states in one section and not in the other is strong evidence that Congress did not intend to subject them to liability for treble damages and penalties under this Act.[10] *See* Singer, SUTHERLAND STATUTORY CONSTRUCTION § 46.05 (5th ed. 1992) (a statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole). *See also Long*, 173 F.3d at 877 (agreeing with state that limitation "for purposes of this section" defeats relator's argument that CID section evidences congressional intent to subject states to liability).

The policy reasons for including states and political subdivisions in the CID section are readily apparent. Although not wishing to subject them to suit under the False Claims Act, Congress evidently recognized that they may have important information that may shed light on the nature of false claims by private parties. In certain cases, the false claim for payment may actually be made to a State or locality. *See, e.g., United States ex rel. Marcus v. Hess*, 317 U.S. 537, 63 S. Ct. 379 (1943) (contracts to work on federally-funded Public Works Administration project entered into with local government); *United States ex rel. Davis v. Long's Drugs*, 411 F. Supp. 1144 (S.D. Cal. 1976) (claims for Medicaid payments submitted to state). In such a circumstance, Congress wished to ensure access to important evidence against private parties that may reside only in the offices of a governmental entity: "It seems rather obvious, however, that states could provide useful evidence to establish

10. As the CID provision demonstrates, when Congress desires to refer to states and their political subdivisions, it knows how to do so. On many other occasions, Congress has explicitly defined the phrase "person" to include states and political subdivisions. *See, e.g.*, 15 U.S.C. § 3002(1); 15 U.S.C. § 3301 (26); 33 U.S.C. § 1362(5); 33 U.S.C. § 1901(a)(8); 33 U.S.C.§ 2701(27); 42 U.S.C. § 2014(s); 50 U.S.C. § 167(2).

that private contractors, for example, made false claims." *Long*, 173 F.3d at 877.[11]

Still more evidence that Congress did not intend to subject states and localities to liability under the FCA is provided by the language of a companion statute, the Program Fraud Civil Remedies Act ("PFCRA"). Passed by the same Congress within weeks of the 1986 amendments to the FCA, the PFCRA provides an administrative remedy for false claims in cases in which the Department of Justice declines to bring court actions and the claim involves a maximum of $150,000. 31 U.S.C. § 3801 *et seq.* The conduct prohibited by this statute is identical to that prohibited in the FCA, with the sole distinction being the monetary amount at issue. 31 U.S.C. § 3802. Further, the statute provides for penalties of $5000 per false claim and an assessment of double the amount of each false claim as remedies. 31 U.S.C. § 3802(a)(1)(D). On their face, these remedies are less

11. This interpretation is buttressed by the fact that the CID section was modeled on the Hart-Scott-Rodino Antitrust Improvements Act of 1976, which expanded pre-complaint discovery for the Justice Department in antitrust cases. S. Rep. No. 99-345, 99th Cong., 2d Sess. 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5280. Indeed, the Committee "intends that the legislative history and caselaw [sic] interpreting that statute (citation omitted) fully apply to this bill." S. Rep. No. 99-345 at 33, *reprinted in* 1986 U.S.C.C.A.N. 5298. In that antitrust bill, the CID provisions were broadened to allow for discovery against "non-target" third parties, rather than merely targets. H. Rep. No. 94-1343, 94th Cong., 2d Sess. 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2597. At the same time, person was defined in the CID provisions to include "any natural person, partnership, corporation, association, or other legal entity, including any person acting under color or authority of State law," a definition which would seem to encompass governmental entities. 15 U.S.C. § 1311(f). Similarly, here, non-target governmental entities are subject to being served with pre-complaint discovery, even though they cannot be liable under the False Claims Act.

punitive than the treble damages and up to $10,000 penalty per false claim mandated by the FCA.

In the PFCRA, Congress expressed a clear intent *not* to subject governmental entities to liability, because it expressly defined the persons who would be subject to administrative liability and omitted states and localities from that definition. 31 U.S.C. § 3801(a)(6) ("person" means "any individual, partnership, corporation, association or private organization."). As Congress did not mean to subject states to liability for false claims under the PFCRA, it makes no sense that the same Congress would have authorized state liability for the identical conduct under the more punitive FCA. *See Long,* 173 F.3d at 877 ("since both acts proscribe essentially the same conduct, [citations omitted], it would have been quite bizarre for Congress to exempt states from administrative liability if it had thought that states already were subject to the more onerous False Claims Act liability of treble damages and penalties."). *Cf. Imazio Nursery, Inc. v. Dania Greenhouses,* 69 F.3d 1560, 1568 (Fed. Cir. 1995), *cert. denied,* 518 U.S. 1018 (1996) ("Where Congress uses the same form of statutory language in different statutes having the same general purposes, courts presume that Congress intended the same interpretation to apply in both instances.").

Consonant with the statutory language, the legislative history of the 1863 Act supports the view that Congress's sole targets were private entities. As noted earlier, the False Claims Act was intended to address fraud perpetrated by private contractors on the military during the Civil War. The discussion of the Act on the floor of Congress talked only about fraudulent activity by "contractors" and "subcontractors;" there was absolutely no mention of the submission of false claims by states nor any other indication

of an intent to encompass states within the Act's sweep. Cong. Globe, 37th Cong., 3d Sess. 952-58 (1863).[12]

Similarly, the discussions of the 1986 amendments on the floor of Congress reveal no intention to subject states or their political subdivisions to liability. There is absolutely no mention of false claims by governmental entities. Congress's focus was entirely on fraudulent conduct of private corporations. As Senator Grassley, the bill's sponsor explained, the False Claims Act is "even more crucial today as the Government spends hundreds of billions of dollars on contracts with *private corporations* in areas such as defense, aerospace and construction." 131 Cong. Rec. 22,322 (1985) (emphasis added).[13] *See also* 132 Cong. Rec. 22,335, 22,340 (1986) statement of Rep. Stark) (discussing the 1986 amendments as reforming the incentives for "Government contractors" to defraud); 132 Cong. Rec. 28,580, 28581 (1986) (statement of Sen. Grassley) (discussing bill's targets as "corporations").

Indeed, in discussing the purpose of the amendments, the point was made numerous times that the False Claims

12. In this case, the Second Circuit apparently believed that the 1863 Congress was concerned about fraud perpetrated by state officials on the federal government, basing this belief on the publication of a House Report in 1862 that had noted the problem of state officials' participation in fraudulent activities. *Stevens*, 162 F.3d at 206. As the D.C. Circuit explained, however, the fraud of state officials referred to in that House Report was not committed against the United States government, and, in any event, this piece of legislative history was not linked to the passage of the FCA. *Long*, 173 F.3d at 876.

13. The Senate bill originally introduced as the False Claims Reform Act of 1985, S.1562, later was enacted with a few changes as the False Claims Act Amendments Act of 1986. S. Rep. No. 99-345, 99th Cong., 2d Sess. 13 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5278.

Act's ultimate beneficiaries are taxpayers. For example, Senator Grassley stated that the bill "arises from a realization that the government needs help — lots of help — to adequately protect taxpayer funds from growing and increasingly sophisticated fraud." 132 Cong. Rec. 28,580 (1986). Similarly, Congressman Fish explained that the bill "deals with the issue of civil and criminal penalties for those who try to take advantage of taxpayers in this country by filing false claims against the Government." 132 Cong. Rec. 22,335 (1986). Since that is so, absent a clear expression of congressional intent, this Court should not conclude that Congress wished recoveries under the Act to come from some of these same taxpayers — those who unfortunately happen to reside in the particular state or local community found liable under the Act. *Cf. Dammon v. Folse*, 846 F. Supp. 36, 38 (E.D. La. 1994) ("[A]warding punitive damages against the taxpayers of a municipal corporation whom RICO was designed to protect would be counterintuitive to the very purpose of the statute").

In the face of this analysis of the statutory language and legislative history, the Second Circuit nevertheless concluded that states were "persons" subject to liability. With respect to the statutory language, it viewed states as persons under other statutory provisions and applied the principle that, ordinarily, the same word means the same thing throughout the statute. *Stevens,* 162 F.3d at 205. Upon close examination, however, the Second Circuit's arguments fail.

First, the Second Circuit relied on the CID provision's inclusion of "states" in its definition of person. *Id.* at 207. However, as discussed above, Congress's authorization of discovery against states indicates just the opposite, since it expressly limits the CID's definition of "person" to that section alone. *See* pp. 14-15, *supra*. *Accord Long*, 173 F.3d at 877.

Second, the Second Circuit emphasized its belief that the statute authorized states to be relators in two separate provisions of the statute, reasoning that if states may be plaintiffs under those sections they should also be potential defendants. *Stevens*, 162 F.3d at 204-05. *See* 31 U.S.C. § 3730(b)(1) (section defining who may be a relator); § 3732(b) (section conferring jurisdiction on district courts over state law claims brought for the recovery of funds paid by a state or locality). As the D.C. Circuit noted in *Long*, however, it is doubtful that the consistent meaning principle can be applied to this case, because this doctrine has an important exception " '[w]here the subject-matter to which the words refer is not the same in the several places where they are used.' " *Id.* at 881 n.15, quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). Here, imposing liability is a quite different issue from conferring a right to sue. *Id. Accord Graber*, 8 F. Supp. 2d at 351 n.7. In addition, according to the D.C. Circuit, the Second Circuit's reasoning was flawed because it equated "meanings" enacted by two different Congresses — the 1863 Congress that enacted § 3729(a) subjecting persons to liability and the 1986 Congress that amended the term person in § 3730(b)(1). *Long*, 173 F.3d at 881 n.15. *See also United States v. American College of Physicians*, 475 U.S. 834, 847 (1986).[14]

14. Further, the definition of "person" in § 3729 is different from the definition of "person" in § 3730. Section 3730(e) specifically defines which persons may be relators and excludes several categories of persons, but does not exclude states and local governments. It is basic statutory construction that "the enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded." *Erickson ex rel. United States v. American Institute of Biological Sciences*, 716 F. Supp. 908, 913 (E.D. Va. 1989) (citations omitted). In contrast, no specific exclusions are contained in § 3729, the liability provision of the FCA.

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The Second Circuit's analysis of the statute's legislative history is similarly defective, because it is contrary to this Court's established view of the insignificance of post-enactment legislative history. Notwithstanding Congress's clearly articulated concern for combating fraud among private contractors, the Circuit relied on a section in the Senate Report accompanying the 1986 amendments to the FCA, which, in describing the "history of the FCA," states that "the term 'person' is used in its broad sense to include . . . States and political subdivisions thereof." S. Rep. No. 99-345, 99th Cong., 2d Sess. 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 273. *See Stevens*, 162 F.3d at 207. As this Court has held time and time again, statements in Committee Reports are not authoritative if they purport "to define a statutory term enacted by a prior Congress," *United States v. American College of Physicians*, 475 U.S. 834, 847 (1986). *Accord Pierce v. Underwood*, 487 U.S. 552 (1988); *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979).

Applying that principle, the D.C. Circuit in *Long* recognized that this portion of the Senate Report was utterly unconnected to any of the substantive amendments made by the 1986 Congress; it was merely a "legislative observation about what § 3729(a), enacted by an earlier Congress, means." *Long*, 173 F.3d at 878. The court noted that such post-enactment legislative history is of no import "when the

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The D.C. Circuit in *Long* also noted that the consistent meaning rule did not apply because it did not necessarily agree that states could be relators. *See* discussion in *Long* at 173 F.3d at 879-81. Amici, however, believe that states and local governments can be relators, and that is no way inconsistent with shielding them from liability under the Act. Allowing FCA suits *against* government entities implicates common law immunities; allowing suits *by* such entities does not.

subsequent Congress takes on the role of a court (or more precisely, a committee of one House) and in its reports asserts the meaning of a prior statute." *Id.* at 878-79. Moreover, the court reasoned, because the Report was attempting to describe only the way in which the Supreme Court had interpreted the Act, and it was completely wrong in its analysis, "the Report is of no legal significance," *Id.* at 879. *Accord Graber*, 8 F. Supp. 2d at 353-54.[15]

In sum, neither the statute's language nor history evidence Congress's intent to abrogate governmental entities' traditional common law immunity from punitive damages. This Court thus should determine that states are not "persons" subject to liability under the False Claims Act.

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15. The statement appears *only* in a general section entitled "History of the False Claims Act and Court Interpretations" that discusses court interpretations of the Act, not in the Committee's explanation of the specific sections of the Act that reference the term "person." On its face, therefore, it does not purport to be an expression of Congress' intent to include states as liable parties. Rather, it reflects the Committee's understanding of case law under the FCA prior to the 1986 amendments, and, as such, it shows the Committee's fundamental misapprehension of that law. In citing three Supreme Court decisions, the Committee failed to recognize that, in the 123 years in which the FCA had been in effect, no court had ever held a governmental entity liable under the Act. As the D.C. Circuit recognized, the cases cited have nothing to do with the issue of whether an FCA case may be brought against a governmental entity, and in fact do not involve the FCA at all. *See Ohio v. Helvering*, 292 U.S. 360 (1934) (state not immune from federal taxation when it engages in business of a private nature, as opposed to when it performs a governmental function); *Georgia v. Evans*, 316 U.S. 159 (1942) (state may bring case as plaintiff under federal antitrust statutes); *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978) (municipalities may be held liable for compensatory damages under 42 U.S.C. § 1983 if challenged actions taken pursuant to official municipal policy).

II.

ALLOWING STATE AND LOCAL GOVERNMENT LIABILITY UNDER THE FCA THREATENS DISRUPTION OF GOVERNMENT SERVICES AND UNDERMINES PRINCIPLES OF FEDERALISM AND STATE SOVEREIGNTY

States and local governments are unlike private corporations. Treating them the same under the FCA threatens disruption of government services and undermines the cooperative partnership among different levels of government. Rather than pursuing federal monies for profit, state and local governments apply for and utilize federal funds for the benefit of their citizens, sharing with the federal government both legal and financial responsibility for implementing a wide variety of government programs.

Because of the range of services provided by states and cities with federal financial support, however, all of these services are targets under the FCA. In recent years, there has been a dramatic increase in the number of FCA suits against governmental entities, exposing governments and their taxpayers to litigation costs, the risk of draconian remedies and the threatened disruption of government services. Such suits, which are rarely joined by the United States, interfere with statutory procedures for funding and administration designed to ensure both compliance with federal requirements and the provision of government services. Unless this Court reverses the Second Circuit, FCA suits will be able to go forward against states and localities even when the United States has suffered no damages, has declined to intervene, has invoked administrative procedures to correct possible violations, and/or has concluded that there was no fraud involved.

For example, in *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734 (3d Cir. 1997), a relator alleged

improper reporting to the Department of Housing and Urban Development ("HUD") by the County of Delaware concerning the transfer of a parcel of land. Apart from the FCA action, HUD investigated the land transfer and concluded that the County owed HUD approximately $2 million. Ultimately, HUD and the County settled their dispute, with the County agreeing to remit a check to HUD, and HUD in turn consenting to return the funds to the County's line-of-credit so that the monies would be available to fund eligible activities. The United States specifically declined to join the FCA suit, concluding that the matters raised in the relator's complaint did not constitute fraud. *Id.* at 739. The Third Circuit refused to dismiss the case despite HUD's settlement with the County (*id.* at 738-39), thereby throwing a wrench into the cooperative relationship between the two levels of government. As a result of the court's decision, the relator stood to recover a bounty for himself and deprive the County's taxpayers of three times the amount of money that the County allegedly had improperly failed to remit to HUD, notwithstanding the settlement with HUD and the United States' conclusion that no fraud had occurred.

Similarly, in an FCA case against the University of Alabama, the State of Alabama defended against charges by a former graduate student that her work was not properly identified in the University's grant applications to the National Institutes of Health and that, as a result, the University had violated the False Claims Act. *United States ex rel. Berge v. The Board of Trustees of the University of Alabama*, 104 F.3d 1453 (4th Cir.), *cert. denied,* 522 U.S. 916 (1997). The district court allowed the case to proceed to trial, despite the fact that the Office of the Inspector General of the Department of Health and Human Services had investigated the allegations and had recommended that no action be taken because " 'many of the assumptions behind the relator's allegations [were] in error or exaggerations of the truth.' " *Id.* at 1456. Although the Fourth Circuit reversed the jury verdict awarding the United States $1.66 million on the FCA allegations, determining that many of the alleged false

statements were, in fact, true, and that they were immaterial in any event, Alabama nonetheless had to expend substantial resources over the course of several years to defend itself in this action.

In sum, invocation of the FCA against governmental entities undermines the cooperative mechanisms established by Congress to foster the efficacious delivery of government services, threatening the disruption of those services through the imposition of draconian remedies mandated by the statute. Ultimately, this issue of federalism goes to the core of our governmental system, and it should be resolved by this Court's reversal of the Second Circuit's decision in this case.

CONCLUSION

For the foregoing reasons, Court should reverse the Second Circuit's decision in this case.

Respectfully submitted,

MICHAEL D. HESS
Corporation Counsel of the
City of New York
Attorney for Amicus Curiae
City of New York
100 Church Street
New York, New York 10007
(212) 788-0800

LEONARD J. KOERNER*
HILARY B. KLEIN
MARJORIE B. LANDA
Of Counsel

* *Counsel of Record*

JAMES K. HAHN
City Attorney
Attorney for Amicus Curiae
City of Los Angeles
Office of the City Attorney
200 North Main Street
1700 City Hall East
Los Angeles, CA 90012
(213) 485-5406

RICHARD A. DEVINE
Cook County State's Attorney
PATRICK T. DRISCOLL, JR.
Deputy State's Attorney
Chief, Civil Actions Bureau
THOMAS BURNHAM
SANJAY T. TAILOR
DONNA M. LACH
Assistant State's Attorneys
Attorneys for Amicus Curiae
Cook County, Illinois
500 Richard J. Dale Center
Chicago, Illinois 60602
(312) 603-6934

LOUISE H. RENNE
City Attorney
PATRICK J. MAHONEY
Chief Trial Attorney
DONALD P. MARGOLIS
Deputy City Attorney
Attorneys for Amicus Curiae
City and County of
San Francisco
Office of the City Attorney
1390 Market Street
Sixth Floor
San Francisco, CA 94102
(415) 554-8730