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 FOR *AMICI CURIAE* ORLEANS PARISH SCHOOL BOARD, LOUISIANA STATE SCHOOL BOARD ASSOCIATION, LOUISIANA STATE SCHOOL SUPERINTENDENTS ASSOCIATION, MISSISSIPPI ASSOCIATION OF SCHOOL SUPERINTENDENTS AND MISSISSIPPI SCHOOL BOARDS ASSOCIATION IN SUPPORT OF THE PETITIONER

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INTEREST OF THE AMICI CURIAE

Amici Curiae Orleans Parish School Board ("the Board"), the Louisiana State School Board Association, the Louisiana State School Superintendents Association, the Mississippi School Boards Association, and the Mississippi Association of School Superintendents are vitally interested in the Court's resolution of this case.[1] The Court's decision is likely to have a direct impact on the continued economic viability of public school systems nationwide.

Recent events justify this concern. The Board was cast in judgment in a *qui tam* suit filed under the False Claims Act, 31 U.S.C.A. §§ 3729-3733 (West Supp. 1999) ("the FCA"). *See United States ex rel. Garibaldi v. Orleans Parish School Board*, 46 F. Supp. 2d 546 (E.D. La. 1999). The relators, two of the Board's internal auditors, alleged that the Board had been allocating a disproportionate share of federal dollars, compared to local dollars, to fund its unemployment compensation and workers' compensation programs. This allocation was based on a methodology that had been recommended by a third party contractor and reviewed annually by a national accounting firm for more than a decade. Nonetheless, a jury determined that this accounting technique fraudulently overcharged the federal government over a ten year period in the amount of $4.6 million for unemployment compensation and $3 million for workers' compensation.

Under the FCA's mandatory trebling provisions, those "compensatory" damages were tripled. In addition, under the FCA's mandatory civil penalties, the court felt compelled to assess the minimum of $5000 "per claim" against the 1570 reimbursement requests made over the years by the Board.

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1. Neither counsel for the Petitioner nor counsel for the Respondent authored this brief in whole or in part. No person or entity, other than the amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. *See* Supreme Court Rule 37.6.

Finally, with the addition of mandatory attorneys' fees, the ultimate judgment exceeded $31 million. Both the Board and the relators appealed the judgment.[2] The United States Department of Justice had originally declined to intervene in the suit[3] and specifically refused to be involved in the appeal.

Contemporaneously with the litigation, but entirely separate from it, the United States Department of Education has been attempting to obtain reimbursement for the same "overcharges." In an OIG audit, the Inspector General found that for the years 1992-96 the Board overcharged $2.6 million for the unemployment compensation program; it said overcharges in workers' compensation, if any, were *de minimis*. The report did not mention fraud.

As a result of the Orleans Parish School Board litigation, all of the amici herein are concerned for their members. Because the *qui tam* relators in the Board's case used public records to develop a theory of accounting fraud, among other reasons, amici are concerned they could become easy prey for enterprising bounty hunters who will subject school systems — supposedly "deep pockets" — to expensive litigation that could impair if not cripple them in achieving their mission of educating our youth. Moreover, amici are concerned that the apparent overlap with available administrative remedies of the

2. Responding to the Board's post-trial motions, the trial court reduced the total judgment to slightly more than $22 million, still a substantial imposition. The Court, after assessing 1570 claims at a $5000 civil penalty each, for a total of $7,850,000, decided that a "penalty of $100,000 is an adequate forfeiture, as the automatic trebling of the verdict as prescribed in the statute has already resulted in a judgment for $15.8 million more than was actually falsely claimed by the [Board]." *See Garibaldi*, 46 F. Supp. 2d at 565. The court found the judgment, for "over four times the losses actually incurred" by the Government, to be "excessive." *Id.*

3. The Government has the option to intervene and to direct the course of the proceedings if it elects to intervene. *See* 31 U.S.C.A. §§ 3730(b)&(c) (West 1998).

U.S. Department of Education will subject them to a kind of double jeopardy.

Amici curiae are also concerned about the ongoing exposure to punitive FCA liability for another reason. Local governmental entities are particularly vulnerable to lawsuits by disgruntled employees intent on winning a share of the FCA's bounty. In recent years, the number of FCA actions filed against local public entities has increased. These suits expose taxpayers of local governments to litigation costs, the risk of harsh penalties, and the threat of disruption of federally funded government services. In the case of the Board and the other amici curiae, the costs are borne ultimately by public school students of all ages.

Unlike a private corporation, a local governmental agency enjoys a cooperative relationship with the federal government. The federal government provides funding for services that a local government, in turn, provides directly to its residents. The effect of FCA suits is to frustrate the cooperative relationship between the federal and local governments. The threat of disruption of services or the reticence of a local government's availing itself of federal funding because of its vulnerability to an FCA lawsuit for draconian damages are each impediments under which amici curiae must operate daily.

The Orleans Parish School Board is a "creature[] of the Louisiana Constitution with [its] duties and obligations defined by statute." *Rousselle v. Plaquemines Parish School Board*, 633 So. 2d 1235, 1241 (La. 1994); *see* La. Const. art. VIII, § 9(A) (West 1996) (directing the legislature to "create parish school boards and provide for the election of their members"). The legislature created one parish[4] school board for each parish. *See* La. Rev. Stat. Ann. § 17:51 (West 1982). It has entrusted the management of public schools statewide to the parish school boards. *Rousselle*, 633 So. 2d at 1241 (citing *Caddo Parish School Bd. v. Board of Elections Sup'r of Caddo Parish*, 384

4. Parishes are Louisiana's equivalent to counties. *See* 1 U.S.C.A. § 2 (West Supp. 1999).

So. 2d 448 (La. 1980)). Under Louisiana law, "[a]s administrators of public education, school boards are agencies of the state." *Id.*

While Louisiana caselaw deems the Board an agency of the state, the Court of Appeals for the Fifth Circuit has held that school boards in Louisiana are *not* arms of the state for purposes of Eleventh Amendment analysis. *See Minton v. St. Bernard Parish School Board*, 803 F.2d 129, 132 (CA5 1986). Consequently, should this Court resolve the case on the basis of the Petitioner's Eleventh Amendment immunity, the judgment would afford no protection to the Board and its many counterparts, leaving school boards and districts in many states vulnerable to FCA claims.[5]

5. Courts of Appeals have reached varying conclusions on the question whether a school board is an arm of the state for purposes of the Eleventh Amendment. The Tenth Circuit, in *Ambus v. Granite Board of Education*, 995 F.2d 992, 997 (CA10 1993) (en banc), denied Eleventh Amendment immunity to the Utah school districts. It likewise denied immunity to Kansas school districts, *Unified Sch. Dist. No. 480 v. Epperson*, 583 F.2d 1118 (CA10 1978), based upon the facts of each case. In *Bertot v. School District No. 1, Albany County, Wyo.*, 613 F.2d 245 (CA10 1979) (en banc), the court noted that the issue of Wyoming school district immunity under the Eleventh Amendment was not directly implicated, but assumed that the applicable test would compel a ruling against a finding of immunity. *See id.* at 248 n.3. Nearly all other courts considering the issue have refused to grant local school districts Eleventh Amendment immunity. *See, e.g., Lester H. ex rel. Octavia P. v. Gilhool*, 916 F.2d 865 (CA3 1990) (Pennsylvania school districts), *cert. denied*, 499 U.S.923 (1991); *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499 (CA11 1990) (Alabama school boards); *Rosa R. v. Connelly*, 889 F.2d 435 (CA2 1989) (Connecticut school boards), *cert. denied*, 496 U.S. 941 (1990); *Fay v. South Colonie Cent. Sch. Dist.*, 802 F.2d 21 (CA2 1986) (New York school districts); *Gary A. v. New Trier High School Dist. No. 203*, 796 F.2d 940 (CA7 1986) (Illinois school districts); *Travelers Indem. Co. v. School Bd.*, 666 F.2d 505 (CA11) (Florida boards of education), *cert. denied*, 459 U.S. 834 (1982); *Eckerd v. Indian River Sch. Dist.*, 475 F. Supp. 1350 (D. Del. 1979) (Delaware school boards); (Cont'd)

Resolving the case on the Eleventh Amendment issue would leave many public entities at substantial risk of financial ruin. Similarly, a determination by this Court that the Petitioner cannot be deemed a "person" under section 3729 because it is an agency of a sovereign state would leave the same entities with substantial punitive exposure. The amici curiae agree with the Petitioner that the FCA does not apply to States. Rather, the purpose and intent of the FCA, as well as sound public policy, compel a ruling that public entities of all kinds cannot be "persons" under the Act.[6]

Blameless state and local taxpayers should not be mulcted, nor innocent school children deprived of educational opportunities, so that a *qui tam* relator might earn a handsome fee. Thus, the amici curiae urge this Court to reverse the judgment of the Second Circuit, direct that court to dismiss the claims against the Petitioner, and hold that the term "person," as used in the FCA, does not include public entities.

(Cont'd)
but see Belanger v. Madera Unified Sch. Dist., 963 F.2d 248 (CA9 1992) (granting Eleventh Amendment immunity to California school districts in light of "near total authority" exercised by state), *cert. denied*, 507 U.S. 919 (1993).

6. As the Court has recognized by granting the petition for certiorari in this case, a conflict among the circuits exists regarding various aspects of the FCA, namely, whether a public entity can be a "person" as that term is used in the statute, whether the Eleventh Amendment bars such suits against states, whether the penalty provisions are mandatory, and whether the FCA itself is punitive in nature. While many of the FCA defendants are either sovereign states or "arms of the state," still others that have fallen victim to the FCA's bounty hunters are public entities other than states. *See, e.g., United States ex rel. Chandler v. Hektoen Institute for Medical Research*, 35 F. Supp. 2d 1078 (N.D. Ill. 1999) (county); *United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343 (S.D.N.Y. 1998) (municipality).

SUMMARY OF THE ARGUMENT

The Court is presented with two grounds for reversing the judgment of the Second Circuit. First, there is a statutory basis for reversing the lower court's ruling that a State is included as a "person" defendant under the FCA. Second, there is a constitutional basis for determining that a State is not subject to liability under the FCA because of immunity from suit under the Eleventh Amendment. Based upon principles of judicial restraint espoused in the federal judicial system, the Court should resolve this case on the statutory basis and resort to the constitutional argument only if the Court resolves that the term "person" includes States.

This determination will allow the Court to avoid the constitutional question unless it is necessary to the disposition of the case. Nor must the Eleventh Amendment issue be addressed first as one of subject matter jurisdiction. The Court has not held Eleventh Amendment immunity to be determinative of subject matter jurisdiction. Indeed, Eleventh Amendment immunity may be waived. Holding Eleventh Amendment immunity to be jurisdictional would be contrary to the maxim that the parties may not confer jurisdiction upon a court. It would allow a party to supply subject matter jurisdiction by waiver.

The FCA does not apply to States, or to municipalities or other public entities, for the simple reason that it mandates punitive damages. This Court has held that public entities are not subject to punitive damages because the retributive and deterrent effects of such damages are not visited upon the actual wrongdoers, but upon taxpayers and citizens.

The FCA originally included criminal sanctions, and, in its present form, mandates the trebling of compensatory damages and the imposition of additional civil penalties of $5,000 to $10,000 per claim. This Court has held the previous version of the FCA to be compensatory, but has not addressed the punitive nature of the present version. The Court, however,

has held other federal statutes that impose treble damages to be punitive. Likewise, the Court has recognized that civil penalties, like those imposed by the FCA in addition to treble damages, are punitive. The present version of the FCA imposes both treble damages and heavy civil penalties, in addition to attorney's fees. It is clearly punitive and does far more than compensate the Government for its losses.

Under this Court's precedent, public entities, including not just States but also municipalities and other local governmental entities, are not subject to liability for punitive damages unless Congress expressly provides otherwise. Such damages are intended to have retributive and deterrent effects, and those effects are not properly visited upon taxpayers and citizens who ultimately bear the cost of punitive damages. The taxpayers and citizens are innocent of any act to be punished or deterred. Instead, the only thing an award of punitive damages against such a public entity accomplishes is the creation of a risk to the financial integrity of the governmental entity and its ability to serve the needs of the citizenry. In the case of some statutes that award both compensatory and punitive damages, all a court need do in dealing with a public entity is award the compensatory damages. The FCA leaves no discretion or distinction for the award of compensatory damages but mandates that damages be trebled and that an additional civil penalty be assessed. In such a case, the immunity is from the statute, not from the damages. However, such immunity does not leave the Government without a remedy. For instance, in the case of the Board, administrative remedies are available and indeed are being utilized to address the same transactions that form the basis for the FCA action.

A finding that a State is not a "person" defendant under the FCA based purely on statutory interpretation, legislative history, and the traditional notion that the term "person" does not include a sovereign state will not necessarily assist a public entity such as the Board. Such public entities may not be considered to be

the State for purposes of determining Eleventh Amendment immunity or sovereignty issues. Thus, even though such a finding will free States from the threat of punitive damages under the FCA, the taxpayers and citizens served by municipalities and other local governmental entities will remain subject to the mandatory treble damages, civil penalties, and attorney's fees. This Court, however, can easily hold, under its clear precedent, that the FCA does not apply to States, municipalities, or other local governmental entities because it is punitive and does not expressly apply to such public bodies.

ARGUMENT

I. This Case is Properly Resolved on Statutory Grounds

The Petitioner, State of Vermont Agency of Natural Resources, asserts that it is not subject to liability in a *qui tam* action for two reasons: (1) because it is not a "person" that may be a defendant under 31 U.S.C.A. § 3729 (West 1998); and (2) because a *qui tam* action brought against a state or one of its agencies under 31 U.S.C.A. § 3730 (West 1998) is barred by the Eleventh Amendment. Principles of judicial restraint, however, counsel that the Court should first address whether the Petitioner may be a "person." The Court need not, and should not, reach the constitutional issue unless it first answers that question in the affirmative.

A fundamental principle of judicial restraint requires that federal courts avoid resolving constitutional questions in advance of the necessity of deciding them. *See, e.g., Lyng v. Northwest Indian Cemetery Prot. Ass'n*, 485 U.S. 439, 445-46 (1988); *Ashwander v. TVA*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring). In *Harmon v. Brucker*, 355 U.S. 579 (1958), for example, the Court, recognizing its "duty to avoid deciding constitutional questions presented unless essential to proper disposition of a case," "look[ed] first to [the] petitioners' nonconstitutional claim that respondent acted in excess of powers granted him by Congress." *Id.* at 581.

Similarly, in *Blair v. United States*, 250 U.S. 273 (1919), the Court explained that "[c]onsiderations of propriety, as well as long-established practice, demand that [it] refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of [its] judicial function, when the question is raised by a party whose interests entitle him to raise it." *Id.* at 279. The fundamental proposition that an Article III court should avoid deciding a case on constitutional grounds if it may resolve the matter by construing a statute persists today throughout the federal judiciary, where exceptions are few.[7]

In a recent False Claims Act case, *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279 (CA5 1999), the Court of Appeals for the Fifth Circuit chose to resolve a constitutional question, i.e., the Eleventh Amendment issue, before reaching a question of statutory interpretation. The *Foulds* court viewed Eleventh Amendment immunity as immunity from suit, and, therefore, deemed the immunity issue jurisdictional, requiring a threshold determination of the matter. *Id.* at 285-87.

In the same opinion, however, the Fifth Circuit recognized that whether Eleventh Amendment immunity is jurisdictional remains an open question in this Court. *Id.* The Court itself has explicitly so stated. *See Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, __, 118 S. Ct. 2047, 2054 (1998). Bearing in mind that Eleventh Amendment immunity may be waived by a

7. This Court recognized one such exception in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). There, the Court concluded that special considerations mandated that it first resolve the constitutional questions. *Id.* at 122-23. At issue was the Speech or Debate Clause of the Constitution, whose purpose is to protect Members of Congress " 'not only from the consequences of litigation's results but also from the burden of defending themselves.' " *Id.* (quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967)). No such issue is present here where, by contrast, a resolution of the case, on statutory grounds, in favor of the Petitioner yields the same result as would a determination of the constitutional issue.

State, thereby conferring federal "subject matter jurisdiction," but that subject matter jurisdiction cannot be stipulated by the parties, the amici curiae urge that the Eleventh Amendment is better viewed as providing a waivable immunity rather than as depriving a court of subject matter jurisdiction.

In light of the foregoing principles of judicial restraint, however, the Court need not reach this issue if the case can be resolved on statutory grounds. This point is illustrated by the District of Columbia Circuit in *United States ex rel. Long v. SCS Business & Technical Industries, Inc.*, 173 F.3d 870 (CADC 1999), *supplemented*, 173 F.3d 890 (CADC 1999), *petition for cert. filed*, 68 USLW 3116 (1999), another False Claims Act case. In a supplemental opinion on the merits, the court reached a result directly contrary to that of the Fifth Circuit in *Foulds*. *See Long*, 173 F.3d at 898. In the words of the District of Columbia Circuit, its approach "has the significant virtue of avoiding a difficult constitutional question. . . ." *Id.*

The *Long* court wrote its supplemental opinion after the Fifth Circuit issued *Foulds*. The District of Columbia Circuit, per Silberman, J., noted first that the *Foulds* court believed it was compelled to decide the Eleventh Amendment issue before reaching the statutory question. Because the *Long* court viewed *Foulds* as an implicit challenge to its jurisdiction, and because the court had not yet issued its mandate, it addressed the question whether it was *required* to decide the Eleventh Amendment issue first. *See Long*, 173 F.3d at 891.

The Eleventh Amendment bar on suits against the states in federal court "is not a garden variety jurisdictional issue." *Id.* at 892. Although the Amendment speaks in terms of the limits of the judicial power, a state can waive its Eleventh Amendment defense and consent to suit in federal court, and this Court has held that there is no obligation for a court to raise the issue *sua sponte*. *See Schacht*, 524 U.S. at __, 118 S. Ct. at 2052-53.

Further, this Court has recognized that the Eleventh Amendment is a rather peculiar kind of jurisdictional issue. *See Calderon v. Ashmus*, 523 U.S. 740, __ n.2, 118 S. Ct. 1694, 1697 n.2 (1998) ("While the Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court's judicial power, and therefore can be raised at any stage of the proceedings, we have recognized that it is not coextensive with the limitations on judicial power in Article III"). "The Amendment . . . enacts a sovereign immunity from suit, rather than a nonwaivable limit on the federal judiciary's subject-matter jurisdiction." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997). That this Court in *Calderon* thought itself obliged to decide first the case-or-controversy question suggests that the Eleventh Amendment, a less than pure jurisdictional question, need not be decided before a merits question. *See Long*, 173 F.3d at 894.

As the *Long* court explained, when a court decides that a statute does not provide for a suit against the states, there is no risk at all that the court is issuing a hypothetical judgment, i.e., an advisory opinion by a court whose very power to act is in doubt. Rather, the conclusion that the statute does not provide for suits against the states in federal court is, in effect, a resolution of the jurisdictional question in that the Eleventh Amendment can no longer be said to apply. *See id.* at 896. This Court, only two terms ago, adopted this reasoning in deciding a class action certification issue before reaching an asserted array of jurisdictional barriers, including ripeness, standing, and subject matter jurisdiction. In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231 (1997), the Court explained that, because resolution of the class certification issues was "logically antecedent to the existence of any Article III issues, it [was] appropriate to reach them first." *Id.* at __, 117 S. Ct. at 2244.

Here, the jurisdictional issue would arise solely because of the Court's assumption of the answer to the statutory question in favor of the Respondent. Because the Eleventh Amendment

issue would not exist but for that assumption, *see id.*, it is appropriate for the Court to decide the logically prior issue first. In fact, the Court has done so in other contexts. *See, e.g., Hafer v. Melo*, 502 U.S. 21, 21-30 (1991) (holding that state officials sued in their individual capacities are persons under 42 U.S.C.A. § 1983 (West 1998), and then holding that the Eleventh Amendment presents no bar to such a suit); *Mt. Healthy City School District Bd. of Educ. v. Doyle*, 429 U.S. 274, 278-80 (1977) (deciding first that the contention that municipalities were not persons under section 1983 was a merits question that had been waived, and then deciding that the Eleventh Amendment does not bar a suit against a municipality in federal court).

Based upon this Court's willingness to decide other statutory questions in advance of an Eleventh Amendment issue, and considering the salutary effect of avoiding a troublesome constitutional issue, amici curiae urge the Court to adopt the better-reasoned approach of the District of Columbia Circuit and resolve the case based upon the construction of the FCA.

II. The mandatory treble damages and penalty provisions, coupled with the attorney's fees provisions of the FCA, are punitive, and therefore the FCA should not apply to states, municipalities, or other local public entities

The Petitioner has argued that the Court should hold that the definition of a defendant "person" under the FCA does not include a State because the plain language of the FCA shows that it does not include a State, and the legislative history of the FCA does not indicate otherwise. Additionally, the Petitioner has set forth that the term "person" does not generally include a State, because the term "person" does not ordinarily include the sovereign. Contrary to the assertions of some courts that have reviewed the FCA's legislative history, there is no indication whatsoever that Congress intended to include a state or other public entity within the FCA statutory term "person."

In fact, Judge Silberman, for the court in *Long*, engaged in an exhaustive refutation of such assertions. *See Long*, 173 F.3d at 875-81. Particularly significant is the discussion of a so-called "smoking gun" piece of legislative history. The relators in *Long* pointed to a Senate Report issued at the time Congress amended certain provisions of the Act. That report, S. Rep. No. 345, 99th Cong., 2d Sess., at 8 (1986), purported to be purely descriptive legislative history of the FCA. According to the relators, the Senate Report confirmed that the Congress of 1863, 103 years earlier, intended to include states as defendant persons, an argument accepted by both the Second Circuit in this case and the Eighth Circuit in *United States ex rel. Zissler v. Regents of the Univ. of Minn.*, 154 F.3d 870, 874-75 (CA8 1998). Skeptical of the validity of such "postenactment legislative history," the *Long* court explained that this sort of "history" becomes of "absolutely no significance" when the subsequent Congress, or, more precisely, a committee of one House, "takes on the role of a court and in its reports asserts the meaning of a prior statute." *Long*, 173 F.3d at 878-79. This particular Senate Report appeared only to describe the way in which this Court had interpreted the FCA. The author of the report apparently had not read the cases carefully, as not one of the cases to which the report refers interpreted the term "person" under the FCA. *Id.* at 879. Moreover, "all three stand for the unremarkable proposition that governmental entities can be included in the term person when Congress so intends." *Id.* Courts that have held that the FCA includes states as persons have based their opinions not on the granite of Vermont but on the ever-flowing swamp of the Everglades.

Amici curiae, of course, agree with the Petitioner's position in this regard but add that the Court should find that the FCA does not apply to States, municipalities, or other local governmental entities because the FCA imposes punitive damages. Under this Court's authority, such entities are not subject to claims for punitive damages absent express Congressional intent to the contrary. This is so because these

damages are borne by the taxpayers who support the governmental entity or the citizens served by it. The retributive and deterrent effects of punitive damages are not achieved by aiming them at those taxpayers and citizens who, in the case of amici curiae, are public school children. Congress has expressed no such intent in the FCA.

A. The FCA, as amended in 1986 to include provisions for treble damages, civil penalties, and attorney's fees, provides for punitive damages.

The FCA, as amended in 1986, declares that a person who makes a false claim "is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person. . . ." 31 U.S.C.A. § 3729(a)(7) (West Supp. 1999). The 1986 amendments thus dramatically increased the mandatory civil remedies from double to triple the amount of actual damages suffered by the United States, *and* increased the fines from $2,000 per false claim to the heavier civil penalty of $5,000 to $10,000 per false claim. In addition, it provides for the award of attorney's fees. *See* 31 U.S.C.A. § 3730(d) (West Supp. 1999). Courts have assessed the civil penalty on a per claim basis. *See, e.g., United States v. Stella Perez*, 839 F. Supp. 92, 97-98 (D. Puerto Rico 1993), *reversed on other grounds*, 55 F.3d 703 (CA1 1995).

Although the double damages awardable under the pre-1986 version of the FCA have been called compensatory, *see United States v. Halper*, 490 U.S. 435, 449 (1989); *United States v. Bornstein*, 423 U.S. 303, 314-15 (1976), a review of the present version of the FCA, including its provisions for heavier civil penalties and treble damages, as well as attorney's fees, indicates that the FCA is truly punitive.[8] The pre-1986 statute

8. A circuit split exists on the question whether the mandatory treble damages, increased fines, and attorney's fees instituted by the (Cont'd)

allowed a *qui tam* relator one half of the total recovery by the United States, and thus the award of double damages only made the United States whole. *Bornstein*, 423 U.S. at 315. This Court hypothesized, in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), that Congress could have provided for treble damages in the FCA as it did in the antitrust laws and that such damages might be considered "punishment." *Id.* at 550.

With the 1986 amendments, the FCA provides for mandatory treble damages and a much heavier, mandatory civil penalty of $5,000 to $10,000 per alleged false claim. Further, the United States is made far more than whole by the treble damages and civil penalties. A *qui tam* relator is no longer entitled to recover one-half of that amount. Instead, he has the potential to receive from 15 percent to 30 percent of the amount recovered, depending upon whether the Government proceeds with the action. 31 U.S.C.A. §§ 3730(d)(1)&(2) (West Supp. 1999). Thus, even if the *qui tam* plaintiff recovers the maximum 30 percent, the Government receives 210 percent of the actual damages, and 70 percent of the civil penalties.

The Court of Appeals for the District of Columbia Circuit, in *Long*, explained that regardless whether the pre-amendment act was punitive, the 1986 amendments to the FCA, creating treble damages and heavier civil penalties, plus attorney's fees, created a form of punitive damages. *Id.* at 877. The amounts recoverable by the Government are clearly in excess of what is needed to make the Government whole.

Indeed, this Court, in *Smith v. Wade*, 461 U.S. 30 (1983), referring to Congress's ability to subject "persons" to punitive damages remedies, explained that other statutes enacted contemporaneously with 42 U.S.C. § 1983 illustrate that where

(Cont'd)
1986 amendments to the FCA constitute punitive damages. While the Second Circuit in this case held the FCA provisions are not punitive, the District of Columbia Circuit, in *Long*, held that they are. The District of Columbia Circuit was right.

Congress wished to subject persons to a punitive damages remedy, it did so *explicitly*. *Id.* at 85. As an example, the Court cited the "False Claims Act, 12 Stat. 696, 698 (1863)," which "provided a civil remedy of double damages and a $2,000 civil forfeiture penalty for certain misstatements to the government." 461 U.S. at 85. Thus, the Court, at least for illustrative purposes, has previously viewed the original version of the FCA as punitive.

When the FCA was enacted, it was intended as a criminal, and, consequently, punitive, statute. The *Long* court observed that in 1863 Congress made clear that it intended the FCA to include criminal, and, *a fortiori*, punitive, sanctions. The original statute provided for criminal penalties, including imprisonment for one to five years, for non-military "persons" convicted under the FCA, as well as for fines. *Id.* at 877-78.[9]

This Court has held in the context of other statutes that where treble damages are allowed as a civil remedy they are punitive rather than merely compensatory. In *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), a case filed under the Clayton Act, the Court stated that "[t]he very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers." *Id.* at 639; *see also Ross v. Bernhard*, 396 U.S. 531, 536 (1970) (noting that treble damages imposed for a securities violation are punitive). In *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), the Court favorably cited the Missouri Supreme Court's reasoning in *Hunt v. City of Boonville*, 65 Mo. 620 (1877) that a municipality could not be held liable for treble damages under a trespass statute because such damages are punitive. *Newport*, 453 U.S. at 261.

9. Of course, it is no more likely Congress contemplated that a local governmental entity be imprisoned than it did a sovereign State. Neither could Congress have contemplated that states or municipalities are military or non-military "persons" who would face incarceration. *See Long*, 173 F.3d at 876.

Likewise, the important characteristic of a civil penalty, as awardable under the FCA, is that it exacts punishment and is, in that way, equivalent to punitive damages in both purpose and effect. *Tull v. United States*, 481 U.S. 412, 422 n.7 (1987). Similarly, the Court stated that fines under the Clean Water Act and the Resource Conservation and Recovery Act are " 'punitive,' imposed to punish past violations." *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 613 (1992). The treble damages and heavy civil penalties provided by the FCA are no different. They are clearly punitive, returning to the United States far more than is necessary to compensate for any false claim, even after any bounty is paid to a *qui tam* plaintiff.

B. State and local governmental entities, absent express action of Congress, are not subject to liability for punitive damages; therefore, they cannot be "persons" under the False Claims Act, which imposes punitive damages

Without dispute, punitive damages, such as those provided by the FCA, are intended to punish past and deter future misconduct. *See Memphis Community School District v. Stachura*, 477 U.S. 299, 306 n.9 (1986) (purpose of punitive damages is to punish the defendant for his willful or malicious conduct and to deter others from similar behavior); *Newport*, 453 U.S. at 266-67; *Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (punitive damages are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence). Such damages are not appropriately directed against a State, municipality, or other local public entity because they will not be borne by the malefactors who committed acts deserving of such punishment, but by innocent taxpayers who support, and citizens who are served by, the public entity. Those taxpayers and citizens have not committed and will not commit acts to be punished or deterred. This Court has held, based upon those circumstances, that absent express Congressional intent to the

contrary, liability for punitive damages is not to be imposed upon a municipality or other local government entity. Otherwise, innocent taxpayers shoulder the blame, paying such judgments through either increased taxes or a reduction in services. *See Newport*, 453 U.S. at 267.

Courts have since followed the rule of law set forth in *Newport* and denied the award of punitive damages against municipalities in a number of cases arising under federal law. *See Woods v. Graphic Communications*, 925 F.2d 1195, 1205 (CA9 1991); *Wulf v. City of Wichita,* 882 F.2d 842 (CA10 1989); *Barnier v. Szentmiklosi*, 810 F.2d 594, 598-99 (CA6 1987); *Haynesworth v. Miller*, 820 F.2d 1245 (CADC 1987) (punitive damages may not be assessed against a municipality in a *Bivens* action).

As amici have previously stated, the damages awardable under the FCA are not merely compensatory, but punitive. The FCA has historically contained attributes of a criminal statute. The statute, however, does not expressly state that it applies to municipalities or other local or state governmental entities. In *Newport*, this Court held that absent clear expression to the contrary, Congress does not intend punitive damages to be assessed against public entities. *Id.* at 271. In that § 1983 civil rights case, the Court held that a municipality may not be held liable for punitive damages. *See Newport*, 453 U.S. at 271.

There, the trial court had upheld the award of punitive damages against the municipality. The court reasoned that the payment would focus taxpayer and voter attention upon the municipality's conduct and that this might produce accountability at the next election. *Id.* at 255. This Court expressly disagreed with that rationale. *Id.* at 268-70.

The Court ruled that the retributive and deterrent goals of punitive damages are not met when punitive damages are imposed on a municipality or other local public entity, because the punishment is visited upon the taxpayers, not upon the perpetrators of the conduct warranting such damages. This principle existed in the jurisprudence at the time that the civil

rights act at issue in *Newport* was enacted in 1871 (and likewise existed at the time the FCA was enacted in 1863).

The Court explained that by the time Congress enacted what is now section 1983, while courts generally understood that a municipality was subject to suit in tort, "this understanding did not extend to the award of punitive or exemplary damages. Indeed, the courts that have considered the issue prior to 1871 were virtually unanimous in denying such damages against a municipal corporation." *Newport*, 453 U.S. at 259-60 (citing *City Council of Atlanta v. Gilmer & Taylor*, 33 Ala. 116 (1858); *Order of Hermits of St. Augustine v. County of Philadelphia*, 4 Clark 120, Brightly NP 116 (Pa. 1847); *McGrary v. President & Council of City of Lafayette,* 12 Rob. 668, 674 (La. 1846)) (further citations omitted).

Relying upon *McGrary*, the Court recognized that those who violate laws, disregard the courts, and wantonly inflict injuries are properly assessed punitive damages for their wrongdoing. " '[Punitive damages], however, can never be allowed against the innocent.' " *Newport,* 453 U.S. at 261 (quoting *McGrary*, 12 Rob. at 677). In *McGrary*, because the punitive damages were to have been "borne by widows, orphans, aged men and women, and strangers," the Supreme Court of Louisiana disallowed their imposition. *Id.* at 677. Ultimately, damages imposed upon a public entity, i.e., the taxpayers, could not exceed that which would be sufficient to make the plaintiff whole. *Id.*

Courts have viewed awards of punitive damages against public entities as contrary to sound public policy "because such awards would burden the very tax payers and citizens for whose benefit the wrongdoer was being chastised." *Newport*, 453 U.S. at 263. For instance, in the case of the Board and the members of the other amici curiae, the windfall from the punitive damages award must be funded by the taxpayers who support the various school boards, making this burden particularly onerous. "Neither

reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers." *Id.*

The liability of a State, municipality, or local governmental entity for the acts of its officials is not analogous to that of a corporation for the acts of its agents. Even were a public entity's officers to commit fraud, punitive damages may not be awarded against the entity.

> [T]he relation which the officers of a municipal corporation sustain toward the citizens thereof for whom they act, is not in all respects identical with that existing between the stockholders of a private corporation and their agents; and there is not the same reason for holding municipal corporations, engaged in the performance of acts for the public benefit, liable for willful or malicious acts of its officers, as there is in the case of private corporations.

Newport, 453 U.S. at 261-62.

For the same reason that a punitive damages award cannot visit retribution upon a public entity, neither can it serve to deter future misconduct by the public entity. *Id.* at 268. This Court concluded in *Newport* that it is not at all clear that public officials would be deterred by knowledge that punitive damages would be awarded against their municipalities. In fact, it is reasonable to assume that such an award would be a matter of complete indifference to a public official. While the public entity might conceivably seek indemnification from the officials, indemnity may not be available against the public officials, and if even it were, the officials most likely could not pay the award. *Id.*

Similarly, the Court in *Newport* did not assume that corrective action, such as discharge of those appointed or excoriation of those elected, would fail to occur absent an assessment of punitive damages against the public entity. The more reasonable assumption is that responsible superiors, and

the electorate at large, may be assumed to be motivated not only by concerns for the public fisc but also for governmental integrity. *Id.* at 269.

This assumption is indeed true in the case of the Board, which now consists of elected members different from those serving at the time of the alleged acts giving rise to the judgment against the Board. The Board has since seen the arrival of two new school superintendents and has replaced many administrative personnel. The imposition of punitive damages upon the present board for transgressions occurring in the past may indeed have an unintended consequence. The electorate may vote out of office the very officials who have brought about change based upon the public perception that the present board members are responsible for the acts that brought about the punitive damages to be borne by the electorate.

The absence of liability under the FCA decidedly does not allow public entities to abscond with federal funds with impunity. For instance, in the case of the Board, the General Education Provisions Act, 20 U.S.C.A §§ 1221-1234h (West 1990), unlike the FCA, sets forth an administrative claims procedure that expressly allows recovery against state or local educational agencies. *See* 20 U.S.C.A. § 1234(b) (West 1990). Significantly, this Act does not permit the imposition of punitive awards such as the trebling of damages, the heavy civil penalties, and the attorney's fees allowed by the FCA. Thus, it does not result in the loss of services necessitated by an award of such damages.

Additionally, it does not allow a relator to collect a bounty, and thus does not encourage a *qui tam* plaintiff to prey ultimately upon the taxpayers and citizens served by the Board. Moreover, the actual perpetrators of a fraud on the Government remain subject to state and federal criminal laws outside of the FCA. A holding that the FCA does not apply to States, municipalities, or other local public entities will not give *carte blanche* to such entities to submit false claims. It will merely move the

punishment for any such claims from the backs of the citizenry to those of the individual perpetrators of the fraud, leaving the public entity itself to pay only compensatory damages through other available remedies.

Although the benefits of an award of punitive damages against a public entity are questionable, "the costs may be very real." *Newport*, 453 U.S. at 270. The exposure to punitive damages "may create a serious risk to the financial integrity of these governmental entities." *Id.*; *Barnier v. Szentmiklosi*, 810 F.2d 594, 599 (CA6 1987). "The impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial, and we are sensitive to the possible strain on local treasuries and therefore on the services available to the public at large." *Newport*, 453 U.S. at 270-71. There is no doubt that, for a local public entity such as a school board, the treble damages and fines imposed by the FCA create a serious risk to the entity's continuing financial viability.

Notably, in the case of a public entity such as the Petitioner or the Board, there is neither allegation nor evidence that money went into an individual's pocket. Were it otherwise, an action under the FCA would be appropriately aimed at the individual wrongdoer. *Newport*, 453 U.S. at 267.

The claim against the Petitioner involves an accounting issue, as does the claim against the Board. Resolving accounting disputes with public entities has never been the FCA's target. Rather, the Act was aimed at fraud by contractors during the Civil War who sought to defraud the Government by providing either inferior products or services or no products or services at all. Those who steal from the government for their own financial gain were, and are, appropriate targets of an FCA suit. The punishment for such fraud is appropriately visited upon *them*, not upon taxpayers and citizens who fund and are served by a public entity. Because the FCA is a punitive statute, and because a public entity is not subject to liability for punitive damages,

the Court should conclude that governmental entities are immune from liability under the FCA.

In *Newport*, the Court was required to determine only that the punitive damages aspects of section 1983 did not apply to a municipality. Other relief remained available under the statute. With respect to the FCA, however, the only relief available under the statute is punitive: treble damages; heavy civil penalties; and attorney's fees. In fact, the FCA does not authorize relief that is not punitive.

In such a case, where punitive damages are mandated and compensatory damages are not authorized, affording no discretion to reduce the damages to a non-punitive level, the immunity from punitive damages necessarily requires immunity from suit under the statute. For instance, a claim under RICO requiring mandatory punitive damages in the form of treble damages cannot be maintained against a municipality. *See Genty v. Resolution Trust Corp.*, 937 F.2d 899, 914 (CA3 1991); *Pelfresne v. Village of Rosemont*, 22 F. Supp. 2d 756, 761 (N.D. Ill. 1998); *Massey v. City of Oklahoma*, 643 F. Supp. 81, 85 (W.D. Okl. 1986). Similarly, a claim for mandatory punitive relief under the FCA cannot be maintained against a State, municipality, or other local governmental entity.

Finally, in a different context, this Court has held that both substantive and procedural due process protection is required where a tribunal seeks to impose punitive damages on an alleged malefactor. For instance, determining the constitutionality of punitive damages requires consideration of the reasonableness of the award and the adequacy of the guidance from the court in cases tried to a jury. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 563 (1996); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18-19 (1991).

It is doubtful, however, that a state or local governmental entity is entitled to such protection. Relying on *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), holding that States are not

persons under the Fifth Amendment, and thus are not entitled to due process protection, *see id.* at 323-24, courts have held that local public entities, too, are not entitled to constitutional due process protection. *See, e.g., Stanley v. Darlington County School Board Dist.*, 84 F.3d 707, 717 (CA4 1996) (a political subdivision is not a "person" protected by the Fourteenth Amendment); *City of East St. Louis v. Circuit Court*, 986 F.2d 1142, 1144 (CA7 1993) (municipalities cannot challenge an action on due process grounds because they are not "persons" under the due process clause); *Delta Special Sch. Dist. No. 5 v. State Bd. of Educ.*, 745 F.2d 532, 533 (CA8 1984) (political subdivision of a state cannot invoke Fourteenth Amendment due process protection).

While the Court of Appeals for the Third Circuit, in *In re Real Estate Title and Settlem. Servs. Antitrust Litig.*, 869 F.2d 760, 765 n.3 (CA3), *cert. denied*, 493 U.S. 821 (1989), concluded that school boards are persons within the meaning of the Fifth Amendment and are therefore entitled to due process protection, the overwhelming majority view is that States and local public entities are entitled to no due process protection. Should the Court permit the FCA's remedies to be assessed against such entities, it will subject them to punitive damages without the due process protection afforded all other defendants targeted by such claims. Taxpayers and citizens who ultimately pay any punitive damages will not be protected by the due process afforded to an individual malefactor even though those taxpayers and citizens are undeniably innocent of any fraud.

When enacting and amending the FCA, Congress could not reasonably have intended such a result, one that affords greater protection to corporate persons and their shareholders than it does to individual taxpayers and public school children. Rather, such a result further demonstrates why States, municipalities, and other local governmental entities cannot be "persons" subject to liability under the FCA.

CONCLUSION

The liability of a public entity under the FCA is wholly inconsistent with the congressional purpose underlying that statute. The amici curiae have shown the devastating effects of huge punitive awards assessed against public school boards. They have demonstrated why such entities were never intended to fall within the scope of the FCA. Therefore, the Board and the other amici curiae respectfully urge the Court to reverse the judgment of the Second Circuit and hold that neither States nor other public entities may be deemed defendant "persons" as that term is used in the FCA.

Respectfully submitted,

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