

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATE OF CALIFORNIA, et al.

S119046

Plaintiffs and Appellant,

v.

ALTUS FINANCE, S.A., et al.,

Defendants,

CDR ENTERPRISES, et al.,

Defendants and Respondents

From the United States Court of Appeals For The Ninth Circuit
No. 02-56038

United States District Court for the Central District of California
No. CV-01-08587-AHM
The Honorable A. Matz, Judge

**APPLICATION FOR PERMISSION TO FILE BRIEF
AMICUS CURIAE AND BRIEF OF AMICUS CURIAE
TAXPAYERS AGAINST FRAUD IN SUPPORT OF PETITIONER
STATE OF CALIFORNIA**

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**APPLICATION FOR PERMISSION
TO FILE BRIEF *AMICUS CURIAE***

Taxpayers Against Fraud Education Fund (TAF), a nonprofit public interest organization located in Washington, D.C., submits this application to file the enclosed brief as *amicus curiae*. TAF is dedicated to educating the legal community, the public, legislators, and others about the Federal False Claims Act and its *qui tam* provisions and the state false claims acts, including the California False Claims Act (CFCA), with the goal of preserving effective

anti-fraud legislation at the federal and state level. The organization has published educational materials about the state and federal statutes and has participated in litigation as a *qui tam* relator and as an *amicus curiae*. Its sister organization, the nonprofit False Claims Act Legal Center, has lobbied to prevent legislative amendments to the federal and state False Claims Acts which would reduce their effectiveness as fraud-fighting tools.

TAF's interest in this case is to promote the use of the CFCA as a tool for remedying fraud and corruption directed to state programs and officials. TAF can provide valuable information about the jurisdictional questions under the CFCA before this Court which is different from that provided by the parties. Specifically, this case presents important questions about the role of the California Attorney General under the CFCA to act as chief law enforcement officer for the State of California and to protect the integrity of state operations from fraud and corruption. To achieve those ends, the Attorney General may exercise his power to bring a criminal enforcement action or he may seek civil remedies, including treble damages and penalties, against those who use false or fraudulent statements or other corrupt means to influence state officials to obtain an illicit benefit including even where the affected state official would oppose a prosecution because he has been bribed or otherwise corrupted. The role of the Insurance Commissioner, by

comparison, is markedly different; he acts solely as a conservator of the insolvent company with exclusive jurisdiction to bring suit to protect the derivative interests of policyholders in obtaining a fair buy-out.

TAF's brief addresses the fundamentally different roles assigned to the Attorney General and the Insurance Commissioner. TAF's brief also explains why the district court's conclusion that the Insurance Commissioner's authority precludes the Attorney General's exercise of law enforcement authority has disturbing ramifications for future cases in which wrongdoers corrupt the Commissioner's functions or those of other state officials with exclusive jurisdiction over particular subjects. Adoption of defendants' arguments in this case would leave the State of California with no civil enforcement remedy even if the Insurance Commissioner was part of a scheme to defraud his own agency. Moreover, allowing the Attorney General's action to proceed is in the interests of policyholders as it increases their chances of recovery. As such, TAF is able to provide a perspective on the questions before this Court from the citizens and taxpayers who have provided the impetus for enactment of the CFCA and similar statutes. TAF is also able to provide insight into cases involving the federal False Claims Act that have rejected similar arguments to those made by defendants in this case.

For the foregoing reasons, Taxpayers Against Fraud should be granted permission to file the enclosed brief as *amicus curiae*

Dated: August 5, 2004.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

Taxpayers Against Fraud Education Fund (TAF) is a nonprofit public interest organization located in Washington, D.C. dedicated to educating the legal community, the public, legislators, and others about the Federal False Claims Act and its *qui tam* provisions and the state false claims acts, with the goal of preserving effective anti-fraud legislation at the federal and state level. The organization has published educational materials about the state and federal statutes and has participated in litigation as a *qui tam* relator and as an *amicus curiae*. Its sister organization, the nonprofit False Claims Act Legal Center, has lobbied to prevent legislative amendments to the federal False Claims Act which would reduce its effectiveness as a fraud-fighting tool and has presented testimony on state false claims acts. TAF's interest in this case is to support vigorous enforcement of the California False Claims Act by contributing its understanding of the proper interpretation and application of the CFCA. In addition, TAF is able to provide insight into cases involving the federal Act that have rejected similar arguments to those made by defendants in this case. TAF is submitting this brief together with a Motion for Leave to File in compliance with California Rules of Court 29.1(f).

INTRODUCTION

This case presents important questions about the authority granted the Attorney General under the California False Claims Act (CFCA) to act as chief law enforcement officer for the State of California and to protect the integrity of state programs from fraud and corruption. The CFCA delegates to the Attorney General the duty to vindicate the interests of the public in redressing false and fraudulent claims submitted to state officials. The CFCA also empowers the Attorney General to act to protect the integrity of the operation of state programs, even if the state treasury suffers no monetary loss. To achieve those ends, the Attorney General may exercise his power to bring a criminal enforcement action (which even the defendants concede here), or he may seek civil remedies, including treble damages and penalties, against those who use false or fraudulent statements or other corrupt means to influence state officials to obtain an illicit benefit. The Attorney General's authority includes pursuing those who would defraud the government even where the affected state official would oppose a prosecution because he, himself, has been bribed or otherwise corrupted. Thus, the Attorney General's primary role is to ensure the integrity of State programs and services, not to ensure the "correct" substantive outcome if program integrity is untainted by fraud.

The role of the Insurance Commissioner under the Insolvency Act is markedly different. The Commissioner has separate and broad powers to act as a conservator of an insolvent insurance company. In this role, the Commissioner has exclusive authority to bring suit to protect the derivative interests of policyholders in obtaining a fair buy-out of the assets of the insolvent company. Unlike the Attorney General, the Commissioner's primary role is to ensure the proper substantive outcome of a liquidation based on a presumption of lawful conduct by the participants in the process. The Commissioner is not charged with achieving the public interest in ensuring fairly administered state programs and uncorrupted state officials.

In finding that the Insolvency Act precludes the Attorney General from bringing suit under the CFCA to redress the corruption of the proceedings before the Insurance Commissioner, the district court failed to distinguish between the fundamentally different roles assigned to the Commissioner and the Attorney General. The district court concluded that the Attorney General's action could not proceed because the Insurance Commissioner has exclusive standing to pursue claims "in connection with" the liquidation of an insolvent insurer. The district court's failure to distinguish between the state actor charged with protecting the integrity of state programs (the Attorney General), and the state actor charged with protecting insurance policy holders

(the Commissioner), led the court to conclude that the Attorney General's action was "unnecessary" because it involved "virtually identical claims against substantially the same defendants" and because the interests of the State of California are "adequately protected by the Insurance Commissioner's suit." ER 124-25.

The district court's conclusion not only is incorrect in this case, but also has disturbing ramifications for future cases in which wrongdoers corrupt the Commissioner's functions, or those of other state officials with exclusive jurisdiction over particular subjects. Indeed, adoption of defendants' argument would leave the State of California with no civil enforcement remedy even if the Insurance Commissioner was part of a scheme to defraud his own agency.

In addition, the district court also erred by suggesting that the Attorney General's action does not state a claim for "government property." The State had a property interest in the assets of the insolvent insurance company and, thus, defendants were acquiring state property through false and fraudulent means. The CFCA also defines a false claim to include claims for government "services." Here, defendants' misrepresentations and fraudulent scheme were intended to induce, and did induce, the Insurance Commissioner to transfer the

assets of the insolvent estate, a government “service” within the meaning of the CFCA.

ARGUMENT

I. The Attorney General Has The Authority To Prosecute Frauds Committed Against the Insurance Commissioner in an Insolvency Proceeding.

1. In 1987, the California legislature enacted the False Claims Act, patterned on a similar federal statutory scheme set forth at 31 U.S.C. § 3729 et seq., to supplement governmental efforts to identify and prosecute fraudulent claims made against state governmental entities by authorizing private parties (referred to as *qui tam* plaintiffs or relators) to bring suit on behalf of the government. See *City of Hawthorne v. H&C Disposal Co.* (2003) 109 Cal. App. 4th 1668, 1677-78; see also *Rothschild v. Tyco Intl.* (2000) 83 Cal. App. 4th 488, 495 (citing legislative history materials). The CFCA permits the recovery of civil penalties and treble damages from any person who “knowingly presents or causes to be presented [to the state] ... a false claim for payment or approval.” Cal. Govt. Code § 12651(a)(1). A claim is defined as “any request or demand for money, property, or services made to any employee, officer, or agent of the state ... or to any contractor, grantee or other recipient, whether under contract or not, if any portion of the money, property or services requested or demanded issued from or was

provided by the state.” Id. §12650(b)(1), So as to give the widest possible coverage and effect to its prohibitions and remedies, the CFCA must be liberally construed. Id. §12655(c); see also *LeVine v. Weis* (2001) 90 Cal. App. 4th 201, 210.

The Attorney General is the only government official charged with enforcement of the CFCA as it applies to state operations. Under the CFCA, a *qui tam* relator files a complaint under seal and serves it, along with a written disclosure statement of the material evidence and information in support of the claim, on the Attorney General. See Cal. Govt. Code § 12652(c)(3). If the Attorney General elects to proceed with the action, the Attorney General has the primary responsibility for prosecuting the action. Id. § 12652(c)(8)(D)(iii) & (f). The Attorney General may proceed with an action under the CFCA even if the affected state agency or official demonstrates no interest in seeking compensation or, as discussed *infra*, even if the state official had been bribed to accept the false claim or otherwise corrupted.

Moreover, it is clear that the CFCA is intended to protect the integrity of state operations, not merely the state treasury. Although the CFCA was based on the nearly identical federal False Claims Act, the CFCA is broader. The federal Act proscribes only false claims for “money or property.” See 31 U.S.C. § 3729(c). The California Legislature, however, deliberately extended

the CFCA to false claims for “money, property *or services*” See Cal. Gov’t Code § 12650(b)(1) (emphasis added). That careful change illustrates the Legislature’s intent to protect the integrity of state operations even in the absence of any monetary loss. The Attorney General’s authority does not depend on whether the substantive outcome of the state action – here, the sale of assets – would have been different without the fraud. The Attorney General acts when the integrity of state programs is compromised.

2. Enacted in 1935, the Insolvency Act confers a completely distinct set of powers and responsibilities on the Insurance Commissioner from those vested in the Attorney General under the CFCA. Under sections 1010 to 1061 of the California Insurance Code, the Insurance Commissioner has the authority to file a petition for appointment as a conservator when it is disclosed, after examination, that the financial condition of the insurance company is such that further transactions would be hazardous to policyholders, creditors or the public. See *Carpenter v. Pacific Mutual Life Insurance Co.* (1937) 10 Cal. 2d 307 (describing in detail the powers conferred on the Insurance Commissioner and upholding the Insolvency Act against constitutional challenge). On further petition, the court may vest the Commissioner with title to all of the assets of the insolvent company and direct the Commissioner, as conservator, to conduct the business of the

company in an effort to rehabilitate the assets and to avoid liquidation. *Id.* at 330. In this capacity, the Commissioner serves as a trustee for all creditors including policyholders. *Id.* at 338.

Section 1037(f) grants the Insurance Commissioner the exclusive authority, acting as conservator or liquidator, to prosecute and defend any and all suits and other legal proceedings in the name of the person affected by the conservation or liquidation proceeding or in the Commissioner's own name. This "sue and be sued" clause, in effect, places the Commissioner in the shoes of the insolvent party and permits him to act as a fiduciary for the company's policyholders by collecting moneys that were owed to the company. A typical lawsuit brought under section 1037(f) would be one filed against the insurance company's auditor for negligence. See *Quackenbush v. Superior Court* (2000) 79 Cal. App. 4th 867.

Thus, the Insurance Commissioner acts as a fiduciary to protect the substantive rights of policyholders and creditors of insurance companies. The Commissioner is specifically not charged with vindicating the larger public interest in prosecuting those who attempt to corrupt the processes of the

Commissioner by obtaining assets of the insolvent insurer through false or fraudulent claims.¹

1

An analogy to the separate functions between the Attorney General and the Insurance Commissioner under state law can be found in the separation of functions set forth in the Inspector General Act of 1978, 5 U.S.C. App. 3. The Inspector General Act establishes independent Inspector General offices to conduct audits and investigations of specified federal programs to combat “fraud, abuse, waste and mismanagement.” See S. Rep. No. 1071, 95th Cong., 2d Sess. 1 (1978) reprinted in 1978 U.S.C.C.A.N. 2676, 2676. The Inspector General Act, however, directs that no “program operating responsibility” of the agency be transferred to the IG. 5 U.S.C. App. 3 § 9(a)(2). The IG, therefore, conducts broad investigations without assuming substantive responsibilities over federal programs.

3. Nothing in the language of section 1037(f) directs, or even implies, that the Attorney General, proceeding under separate statutory authority, is precluded from proceeding with his CFCA action. The district court held that the exclusive authority granted the Commissioner to pursue claims “in connection with” the sale of the assets in the insolvency precluded the Attorney General’s action. See *State of California ex rel. Rono LLC v. Altus Finance, S.A.*, 2002 WL 1008251, at *5 (May 8, 2002). That the Commissioner may undertake these actions for the benefit of ELIC creditors does not impliedly preempt the authority of the chief law enforcement officer of the State of California, the Attorney General, acting independently, from prosecuting, through criminal charges or civil claims for redress, unlawful conduct committed against the Insurance Commissioner and against the rehabilitation court.²

Were this Court to conclude otherwise, it would mean that even where the Insurance Commissioner himself had been corrupted by those fraudulently seeking the assets of an insolvent insurer, the Attorney General would be

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That the Attorney General’s action also will benefit policyholders, who will be paid one-third of any treble damage award, does not encroach upon the Commissioner’s exclusive jurisdiction over the interests of policyholders. Such restitution is an incidental benefit of the Attorney General’s law enforcement function, and is no greater intrusion on the Commissioner’s authority than a similar order of restitution in a criminal case, which even

powerless to act. Recognizing that flaw in their argument, defendants here concede that their preemption claim does not affect the Attorney General's criminal prosecution authority. See Brief of Apollo Advisors at 50-51; Brief of Artemis S.A., et al., at 34-37. But defendants' attempt to limit their concession is entirely unpersuasive.

There is no basis in the text or policy of the Insolvency Act or the CFCA for a distinction between civil and criminal enforcement actions. If the Attorney General's criminal jurisdiction remains intact, there is no reason to conclude that the Legislature intended to curtail his civil enforcement authority. Moreover, elimination of all civil enforcement remedies, even where the Commissioner's function has been corrupted through fraud, bribery or other means, would severely compromise the government's ability to police the operations of state programs. See *United States v. Sells Engineering*, 463 U.S. 418, 472 (1983) (C.J. Burger, J. Powell, Rehnquist and O'Connor, dissenting) ("Many civil actions seek precisely the same object [as criminal enforcement] and are of at least equal importance in promoting the public welfare. In a number of areas, Congress has enacted civil legislation, that together with related criminal law provisions, forms an integrated law enforcement scheme.") The false claims statutes, including the CFCA, were defendants concede the Attorney General could pursue here.

enacted as part of an integrated scheme of civil and criminal law enforcement. *Id.* (citing *United States v. Bornstein*, 423 U.S. 303, 305-07 n.1 (1976)). The government would be needlessly handicapped if it were required to rely exclusively upon the blunt instrument of the criminal law in dealing with corruption of state programs. See *Pomona v. Superior Court* (2001) 89 Cal.App.4th 793, 802 (False Claims Act is “the government’s ‘primary litigative tool for combatting fraud’ against the ... government”) (citing federal Act).

The specter of potential corruption and conflict of interest in the office of an Insurance Commissioner is more than a pure hypothetical as recent events have borne out. See, e.g., *Quackenbush Took Trips As Insurance Firms’ Guest*, *Los Angeles Times*, Feb. 20, 2001 (detailing ethics scandal involving former California Insurance Commissioner Charles Quackenbush); *Brown Exhausts Appeals; Resigns as Louisiana Commissioner*, www.insurancejournal.com, April 1, 2003 (describing federal convictions for three consecutive Louisiana Insurance Commissioners on bribery and corruption charges); *Former Louisiana Insurance Commissioner Released From Federal Prison*, *AP Newswire*, Sept. 17, 2003 (same); *Oklahoma Insurance Commissioner Charged in Corruption Scheme*, *AP Newswire*, Feb. 18, 2004 (felony charges for mismanaging funds); *Regulator’s Marriage Stirs*

Flap: Spouse Works for Big Insurer, The Atlanta Journal-Constitution, June 30, 2004 (describing conflicts of interest and questionable practices of Georgia Insurance Commissioner). There is no basis for limiting the Attorney General's authority to criminal enforcement for corruption, especially where the fraudulent acts impose damages on the state and its citizens through the submission of false claims and where civil remedies might be most appropriate.³

3

We are not seeking to imply that there has been any public corruption in this case. The independent authority of the Attorney General under the CFCA, however, serves as an important safeguard against the risk that an Insurance Commissioner might be compromised by bribery or other influences and might choose not to prosecute wrongdoers.

4. In light of the severe restriction on the Attorney General’s civil law enforcement authority that defendants propose, one would expect a clear statement of legislative intent. The lack of a clear statement, or any statement, displacing the Attorney General’s law enforcement powers is particularly telling because the CFCA was enacted some 52 years after the Insolvency Act. Legislatures are generally charged with knowledge of existing statutes. See *Bagration v. Superior Court* (2003) 110 Cal. App. 4th 1677, 1686. If the legislature had intended to carve out a specific exception for application of the CFCA in insolvency proceedings, it would have done so expressly. In fact, in enacting the CFCA in 1987, the legislature did carve out several exceptions from the broad reach of the CFCA including workers’ compensation and tax fraud. See Cal. Govt. Code § 12651(e),(f). It is a well-established principle of statutory construction that the existence of certain specified exceptions suggests that other exceptions should not be implied. *Rojas v. Superior Court*, (2004) – Cal. App. 4th –, 93 P.3d 260 (*expressio unius est exclusio alterius maxim*).⁴

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For similar reasons, the federal courts have repeatedly held that the federal False Claims Act was not impliedly repealed by other statutory schemes. See, e.g., *United States ex rel. Sequoia Orange Co. v. Oxnard Lemon Co.*, 1992 WL 795477 (E.D. Cal. 1992) (Agricultural Marketing Agreement Act); *United States ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542 (D.C. Cir. 2002) (Amtrak Reform and Accountability Act); *United States*

v. General Dynamics Corp., 19 F.3d 770 (2d Cir. 1994) (Anti-Kickback Act); United States v. Beatrice Food Co., 330 F. Supp. 577, 580 (D. Utah 1971) (federal antitrust laws); United States ex rel. Fallon v. Accudyne Corp., 880 F. Supp. 636, 639 (W.D. Wis. 1995) (federal environmental laws); United States v. Carpentieri, 23 F. Supp. 2d 433, 436-37 (S.D.N.Y. 1998)(Federal Employees Compensation Act); United States ex rel. Sutton v. Double Day Office Services, Inc., 121 F.3d 531, 534 (9th Cir. 1997)(Service Contract Act); United States v. Blue Cross and Blue Shield of Alabama, Inc., 156 F.3d 1098 (11th Cir. 1998) (Social Security Act); United States v. Foster Wheeler Corp., 447 F.2d 100, 101 (2d Cir. 1971) (Truth in Negotiations Act).

So too, the case law cited by defendants concerning preclusion of the Attorney General's authority under other statutory schemes reinforces the impression that the legislature has not acted to preclude the Attorney General's action here. Thus, in *People v. New Penn Mines, Inc.*, (1963) 212 Cal App. 2d 667, the court held that the Attorney General's common law power to abate a public nuisance was precluded only where the legislature had crafted a detailed administrative scheme for water pollution and control. *Id.* at 675. Likewise, in *Van de Kamp v. Gumbiner* (1990) 221 Cal. App. 3d 1260, the court considered the legislature's enactment of a fairly complex series of legislative enactments which ultimately granted the power to regulate charitable trusts in the health care field to the Commissioner of the Department of Corporations while expressly abrogating the common law powers of the Attorney General. *Id.* at 1268. These statutes clearly describe the respective roles for the Attorney General and the other responsible state official administering the state program. They suggest that the Attorney General cannot be divested of his civil law enforcement authority under the CFCA without a clear statement.

5. Compelling policy interests in maximizing recovery for policyholders also counsel in favor of permitting the Attorney General's and the Commissioner's actions to proceed in tandem. The Attorney General's action permits recovery with fewer elements of liability, lower standards of proof, treble damages, penalties and the lack of certain defenses than a fraud action by the Commissioner. See Attorney General's Brief at 37-42. Treble damages and penalties are available in the Attorney General's action under a preponderance of the evidence burden of proof of a knowing violation of the CFCA. These remedies are cumulative of other damages and both punitive and remedial in nature. See *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 123 (2003) (treble damages under federal False Claims Act serve both "remedial purposes and punitive objectives"). The Commissioner, by comparison, must demonstrate fraud by clear and convincing evidence and must separately establish fraud, malice or oppression to recover punitive damages. The Attorney General's action also names as defendants four individuals and three partnerships not named in the Commissioner's suit.

The district court's order also extinguishes the interest of the *qui tam* relator, accorded by statute, to a share of any recovery to the state and to protection from retaliation for blowing the whistle on this massive fraud. The district court's holding, thus, eliminates the incentives carefully crafted by the

legislature to induce private citizens to come forward with invaluable insider information of misconduct. Application of the *qui tam* statute is an essential means of protecting the public in the future from such multi-billion dollar schemes to mislead state officials including the state courts.

II. The Attorney General’s Complaint States A Claim Under the CFCA for Submission of False or Fraudulent Claims for Government Property and/or Services.

By submitting false statements to induce the Commissioner to transfer the ELIC’s assets to Credit Lyonnaise, defendants submitted “false claims” within the meaning of the CFCA. The April 1991 order vested the Commissioner with a legal property interest in the ELIC assets. Therefore, the action by defendants constitutes a false claim for government “property.” In addition, the CFCA defines claim to include requests for “services” made to a state official. Here, defendants’ bid to purchase the ELIC assets was a request for “services” – a request to the Commissioner to accept defendants’ bid and a request to the rehabilitation court to confirm the plan. See Cal. Insurance Code § 1059 (defining the Commissioner in the performance of his public duties as “a public officer acting in his official capacity on behalf of the State”).

Accordingly, this Court may answer the second certified question from the Ninth Circuit in the affirmative without deciding whether property held in

trust by the Commissioner for an insolvent insurance company is “state property” or “state funds.” The legislature’s expansive definition of the term “claim” to include “services” makes clear that the legislature intended to redress and to deter all false and fraudulent attempts to interfere with state programs and services through submission of false claims to a state official.”⁵

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Defendants rely on *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176 (3d Cir. 2001) to argue that there was no claim for government money or property. *Hutchins* is completely distinguishable from the facts of this case. In *Hutchins*, the Third Circuit was construing the federal FCA which does not reach claims for “services” unlike the CFCA. Recent opinions construing the federal statute also have distinguished and limited *Hutchins*. See *Kennard v. Comstock Resources, Inc.*, 363 F.3d 1039 (10th Cir. 2004); *United States ex rel. Hayes v. CMC Electronics, Inc.*, 297 F. Supp. 734 (D. N.J. 2003) *United States ex rel. Campbell v. Lockheed Martin Corp.*, 282 F. Supp.2d 1324 (M.D. Fla. 2003).

CONCLUSION

For the foregoing reasons, *amicus curiae* Taxpayers Against Fraud urges this Court to hold that the Insolvency Act does not bar the Attorney General's prosecution of defendants under the CFCA and the UCL and that the Attorney General's complaint states a claim for government "property or services" within the meaning of the CFCA.

Dated: August 5, 2004.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rule 29.1(c), I certify that the Brief of Amicus Curiae Taxpayers Against Fraud in Support of Petitioner State of California contains 3885 words, as counted by the Corel WordPerfect version 12 word processing program used to generate the brief.

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