

Case No. S139133

**SUPREME COURT
THE STATE OF CALIFORNIA**

LES G. MIKLOSY *et al.*,
Plaintiffs and Appellants,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA *et al.*,
Defendants and Respondents.

**PROJECT ON GOVERNMENT OVERSIGHT'S
APPLICATION FOR PERMISSION TO
FILE *AMICUS CURIAE* BRIEF
AND
AMICUS CURIAE BRIEF
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

After an Order by the Court of Appeal
First Appellate District, Division Four, Case No. A107711;
On Appeal from Alameda County Superior Court,
Case No. RG04140484, Hon. John Kraetzer

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**APPLICATION OF THE PROJECT ON GOVERNMENT
OVERSIGHT TO FILE *AMICUS CURIAE* BRIEF**

To the Honorable Ronald M. George, Chief Justice:

Project On Government Oversight (“POGO”) respectfully applies for permission to file the accompanying *amicus curiae* brief in support of the plaintiffs and appellants, Les G. Miklosy and Luciana Messina, pursuant to California Rules of Court Rule 29.1(f).

Founded in 1981, POGO is an independent, nonpartisan, nonprofit organization that investigates and exposes government corruption and other misconduct to achieve a more honest, open, and accountable federal government. POGO made its mark by looking into Pentagon waste, fraud, and abuse, spotlighting overspending, including on overpriced toilet seats (\$640), coffee makers (\$7,600), and other spare parts (\$436 hammers). POGO’s investigations have expanded to include national defense and homeland security concerns, government subservience to commercial interests, abuse in government contracting, excessive secrecy, and mismanagement of natural resources by federal agencies. POGO is often asked to testify at congressional hearings and to provide background information to members of Congress, executive branch agencies, the Government Accountability Office (“GAO”), and Inspectors General. By applying internal and external pressure through the media, the public, elected officials, and other policymakers, POGO helps ensure that the

federal government implements policies and programs in a manner that benefits all Americans. Additional information can be found at www.pogo.org.

In those efforts, POGO has worked with thousands of whistleblowers who have shed light on government misconduct and systemic problems that harm the public. Recognizing the importance of the information provided by those government insiders, POGO has fought for stronger laws to ensure protection for whistleblowers who step forward for the common good. It has been POGO's experience that once one whistleblower discloses government abuse, many more insiders are willing to step forward and support POGO's efforts to analyze and bring attention to the problem.

This case presents the question of how to interpret the administrative exhaustion provision of the California Whistleblower Protection Act ("WPA"), Government Code sections 8547 *et seq.*, specifically, whether it should be interpreted in a way that would preclude University of California employees from filing court claims under the WPA for damages. As an organization with over twenty-five years of experience in working with whistleblowers for the public interest, POGO is vitally interested in the resolution of this issue and offers the Court the additional perspective of its extensive real-world experience.

POGO is well-situated to highlight the policy ramifications of limiting the legal protections for whistleblowers, not just for the whistleblowers themselves but also the public at large. A thorough analysis of the issues raised in this case should take into account the interests of taxpayers, who are frequently subjected to waste, fraud, and abuse by government agencies. Precluding civil actions under the WPA would deter honest civil servants from coming forward to report waste, fraud, or abuse, leaving public in the dark about ongoing government wrongdoing. POGO represents the interest of the public in protecting whistleblowers, and respectfully suggests that its brief will assist the Court by illuminating the broader policy ramifications of its decision.

For the foregoing reasons, Project On Government Oversight respectfully requests permission to file the following brief in this case as *amicus curiae*.

DATED: December 15, 2006

KERR & WAGSTAFFE LLP

By



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I. INTRODUCTION

California's Whistleblower Protection Act (the "WPA"), Government Code sections 8547 *et seq.*, protects state employees who report government misconduct. It states, in part:

The Legislature finds and declares that state employees should be free to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution. The Legislature further finds and declares that public servants best serve the citizenry when they can be candid and honest without reservation in conducting the people's business.

(Gov. Code, § 8547.1.) Employees of the University of California (the "UC") explicitly fall within the scope of the public employees protected by the WPA. (Gov. Code, § 8547.10.)

The protections of the WPA include the right of a whistleblower to file a claim for damages stemming from retaliation:

In addition to all other penalties provided by law, any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a university employee, including an officer or faculty member, or an applicant for employment for having made a protected disclosure shall be liable in an action for damages brought against him or her by the injured party.

(Gov. Code, § 8547.10(c).) The issue in this appeal calls upon this Court to decide whether that protection has any practical meaning for UC employees.

Before bringing a legal claim under the WPA in court, any protected public employee must first file an administrative complaint with the appropriate agency. (Gov. Code, §§ 8547.8(c), 8547.10(c) and 8547.12(c).) For UC employees, the administrative complaint must be filed with the UC itself, and according to the UC's own regulations. (Gov. Code, § 8547.10(c).) The administrative complaint requirement gives the UC the initial opportunity to remedy wrongdoing, without the need for litigation. As properly understood, the statute says that if the UC rejects its employee's administrative claim, or fails to render a decision on that claim in a timely manner, then the employee is free to bring his or her damages claim in court. (*Ibid.*)

The Court of Appeals misread the administrative complaint provision in a way that bars, for all practical purposes, any UC employee from bringing the damages claims expressly allowed in Government Code section 8547.10(c). Under the Court of Appeals' misinterpretation, a damages claim in court is allowed *only* if the UC waits too long to render a decision on the administrative complaint. If, as alleged by Appellants here, the UC simply rejects an administrative complaint under the WPA, the whistleblower is blocked from seeking redress in court. That misreading would lead to an absurd result: the UC would have unreviewable immunity from claims by whistleblowers for wrongfully retaliation so long as it denied their claim promptly. The misreading is based on an overly literal,

hyper-technical reading of the statute that flies in the face of clear legislative intent and standard principles of statutory interpretation.

The Court should overrule the lower courts' error, for two reasons:

First, the WPA reflects the clear intention of the Legislature to protect the rights of whistleblowers, and explicitly allows UC employees to protect those rights by bringing damages claims in court. The Court of Appeals' interpretation of the administrative complaint requirement would eviscerate that protection, and allow the UC to completely immunize itself from damages for its wrongful retaliation against whistleblowers. This Court has repeatedly held that statutes must be interpreted in light of the Legislature's intent, and that even the literal language of a statute must be disregarded if doing otherwise would lead to absurd results. (See, e.g., *Younger v. Superior Court* (1978) 21 Cal. 3d 102, 113.) To avoid the absurd result of giving the UC the ability to block its employees from the remedies set out in the WPA, this Court should construe the administrative complaint provision of the WPA as an exhaustion requirement, and leave intact the ability of UC employees to seek damages in court if the UC rejects their administrative claim.

Second, the WPA's protections for whistleblowers supports not just a public policy judgment, but important rights and constitutional principles as well. Last year, the United States Supreme Court declined to extend First Amendment protections for certain on-the-job communications by

public employees, a decision it reached in part based on its understanding that public employees' free speech rights were already protected by a "powerful network" of whistleblower protection laws. (*Garcetti v. Ceballos* (2006) 547 U.S. ___, 126 S. Ct. 1951, 1954) (page citations to the United States Reports not yet available). This Court should sustain that "powerful network" and the fundamental interests it protects. The WPA also protects the due process rights of UC employees. Public employees have a protected property interest in their jobs and are entitled to procedural safeguards before being deprived of that interest. The Court of Appeals' misreading of the statute denies UC employees the legislatively-established right to a fair hearing in court, and instead installs the UC itself as final arbiter of its own liability. The due process shortcomings of such a process are self-evident. Finally, the absence of any rational basis for denying to UC employees the fundamental right to access the courts, a protection enjoyed by all other state employees, raises equal protection concerns.

These constitutional problems do not arise if the Court preserves the right of UC employees to bring damages claims under the WPA, after exhausting administrative remedies, and statutes should be interpreted to avoid constitutional violations. To preserve the WPA's protections for these important rights, the Court it should reverse the Court of Appeals.

II. INTEREST OF *AMICUS CURIAE*

Founded in 1981, Project On Government Oversight (“POGO”) is an independent, nonpartisan, nonprofit organization that investigates and exposes corruption and other misconduct to achieve a more honest, open, and accountable federal government. POGO made its mark by looking into Pentagon waste, fraud, and abuse, spotlighting overspending, including on overpriced toilet seats (\$640), coffee makers (\$7,600), and other spare parts (\$436 hammers). POGO’s investigations have expanded to include national defense and homeland security concerns, government subservience to commercial interests, abuse in government contracting, excessive secrecy, and mismanagement of natural resources by federal agencies. POGO is often asked to testify at congressional hearings and to provide background information to members of Congress, executive branch agencies, the Government Accountability Office (“GAO”), and Inspectors General. By applying internal and external pressure through the media, the public, elected officials, and other policymakers, POGO helps ensure that the federal government implements policies and programs in a manner that benefits all Americans.

In those efforts, POGO has worked with thousands of whistleblowers who have shed light on government misconduct and systemic problems that harm the public. Recognizing the importance of the information provided by those government insiders, POGO has fought for

stronger laws to ensure protection for whistleblowers who step forward for the common good. As an organization with over twenty-five years of experience in working with whistleblowers and promoting laws to protect them, POGO is vitally interested in ensuring that they continue to enjoy the full protection of those laws, which benefit not just them but the public at large.

III. FACTUAL BACKGROUND

Defendants and Respondents are the Regents of the University of California, and Lawrence Livermore National Laboratory (“LLNL”) supervisors Kim Minuzzo, Larry Lagin, and Jerry Krammen (collectively, “Respondents”)—all UC officials and proper defendants under the WPA.

Plaintiffs and Appellants Les Miklosy and Luciana Messina (“Appellants”) were employed by the UC as computer scientists at LLNL to work on the National Ignition Facility (“NIF”). In the course of their work, both employees noted safety, mechanical, and structural issues that would delay a project that LLNL hoped would proceed more promptly. (AA 3-8; *see* opinion of the Court of Appeals at 2).

In February 2003, Appellants raised these issues at a risk analysis meeting. Later that month, Miklosy was terminated. Messina claims that after learning that Respondents intended to terminate her, she resigned in March 2003. (AA 8-10; *see* opn. at 2.)

Both tried to file employee grievances with LLNL, but they were not allowed to do so; Miklosy because he was not a full-time, indefinite term employee and Messina because she had resigned. Both were ruled ineligible for any administrative remedy under LLNL's internal grievance procedures. (AA 10.) Each Appellant also filed an administrative complaint with the UC under the WPA in August 2003, claiming they were terminated in retaliation for whistleblowing. (AA 11.) Later in August, LLNL's Director, acting for the UC, denied each complaint, finding that neither Appellant left the UC's employ as a result of retaliation. (AA 10-12; *see opn.* at 2-3.) LLNL's Director found that Miklosy was terminated for "poor performance" and that LLNL did not want Messina to leave at all. (AA 51.) Needless to say, Miklosy and Minuzzo vigorously dispute UC's self-serving findings.

In February 2004, Appellants filed a four-count complaint against the UC, Minuzzo, Lugin, and Krammen in the Alameda County Superior Court. The UC demurred, arguing that because the UC made timely decisions on Appellants' administrative complaints, Appellants were barred from asserting WPA claims by Government Code section 8547.10(c). (AA 63-105, 196-216.) The Superior Court sustained Respondents' demur without leave to amend and dismissed the action. (AA 539-540.) The judgment was affirmed by the Court of Appeal, which held that Appellants "had no right to bring a civil action for damages under the WPA." (AA

634-643). Appellants filed a petition for review, which was granted by the Court on January 4, 2006.

IV. ARGUMENT

A. THE WPA'S ADMINISTRATIVE COMPLAINT PROCEDURE IS AN EXHAUSTION REQUIREMENT, NOT A MECHANISM FOR THE UC TO BAR ITS EMPLOYEES' WPA DAMAGES CLAIMS FROM REACHING COURT

The Whistleblowers Protection Act explicitly allows public employees—including UC employees—to invoke the WPA's protection through a civil suit for damages in court. (Gov. Code, § 8547.10.) That right would be rendered meaningless if the UC could *itself* bar its employees claims from reaching court simply by quickly rejecting their administrative claims. The Court of Appeals' reading of the statute would leave the UC the sole arbiter of its own misconduct, subject only the requirement that it act within its own self-imposed deadlines. That reading is incorrect.

The purpose of the WPA is expressly set out in the statute itself:

The Legislature finds and declares that state employees should be free to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution. The Legislature further finds and declares that public servants best serve the citizenry when they can be candid and honest without reservation in conducting the people's business.

(Gov. Code, § 8547.1.)

Among the WPA's protections is the right to bring a damages claim in court. Government Code section 8547.10(c) expressly authorizes such claims by UC employees:

In addition to all other penalties provided by law, any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a university employee, including an officer or faculty member, or applicant for employment for having made a protected disclosure shall be liable in an action for damages brought against him or her by the injured party. Punitive damages may be awarded by the court where the acts of the offending party are proven to be malicious.

(Gov. Code. § 8547.10(c).) The right to seek damages in court provides important protection for whistleblowers and a powerful deterrent against retaliation.

Prior to bringing a damages claim in court, however, an aggrieved employee must first raise the claim through internal UC administrative proceedings. The last sentence of Government Code section 8547.10(c) says:

However, any action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the university officer identified pursuant to subdivision (a), and the university has failed to reach a decision regarding that complaint within the time limits established for that purpose by the regents.

(Gov. Code. § 8547.10(c).) Properly read, that section establishes an administrative exhaustion requirement, giving the UC first opportunity to remedy the wrongdoing raised by its employee.

The UC argues that the final sentence of subdivision (c) means that a UC employee can only bring a damages case under the WPA *only if* the UC has failed to decide the employee's administrative claim *in a timely manner*. In other words, the UC argues that so long as it denies claims against it promptly, it is immune from civil suits damages under the WPA. That crabbed reading of the statute ignores not just the preceding sections of the same subsection, which expressly establishes the right of UC employees to seek damages in court, but also the legislative intent explicitly set forth in the statute itself. The statute must be read in the context of its entirety. (*People v. Ledesma* (1997) 16 Cal. 4th 90, 97.) Looking at the statute as a whole, it is clear that the administrative complaint provision is merely an exhaustion requirement.

The UC's misreading of the statute also leads to the absurd result that the UC itself would have the power to decide whether its employees were able to sue it in court for damages under the WPA. All the UC would need to do to avoid *any* damages suit would be promptly to reject any administrative claims of retaliation. Nothing would preclude the UC from establishing a process by which it automatically and summarily rejects all WPA claims, thus depriving the UC of any liability for retaliating against

whistleblowers. That is not what the statute means, and is not how it should be read.

This Court is not shackled to a mechanical interpretation of a statute's words. Even if the last sentence of subdivision (c) might be literally read—abstracted from the context of the Legislature's intent and the remedies established in the preceding part of subdivision (c)—to have the meaning the UC contends, that literal meaning should be disregarded if doing otherwise would lead to absurd results or contravene the Legislature's intent. As this Court has held:

“It is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend.”

(*Younger v. Superior Court* (1978) 21 Cal. 3d 102, 113.) The principle has been repeatedly upheld by this Court:

[A] court may determine whether the literal meaning of a statute comports with its purpose. ... We need not follow the plain meaning of a statute when to do so would “frustrate [] the manifest purposes of the legislation as a whole or [lead] to absurd results.”

(*California School Employees Assn. v. Governing Board of Marin Community College District* (1994) 8 Cal. 4th 333, 340. (also noting that textual ambiguity is not a prerequisite to applying the rule); *see also Times Mirror Co. v. Superior Court* (1991) 53 Cal. 3d 1325, 1335 n. 7. (“The literal meaning of the words of a statute may be disregarded to avoid absurd

results or to give effect to manifest purposes that, in the light of the statute's legislative history, appear from its provisions considered as a whole."), quoting *Silver v. Brown* (1966) 63 Cal. 2d 841, 845; *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal. 3d 247, 259. ("Once a particular legislative intent has been ascertained, it *must* be given effect even though it may not be consistent with the strict letter of the statute.") (emphasis added) (superseded by statute on other grounds); *Disabled and Blind Action Committee of California v. Jenkins* (1974) 44 Cal. App. 3d 74, 81. ("Even literal language of a statute may be disregarded to avoid absurdities or to uphold a clear contrary intent of the Legislature."))

Giving the UC exclusive control over whether its employees can sue under the WPA is exactly the type of absurd result to be avoided. Because the statute says that its purpose is to broadly protect whistleblowers and give them an opportunity to bring their claims in a neutral court, that absurd result also undermines the clear intent of the Legislature. In real life, the statute's words providing for damages actions in court would be meaningless if the UC could block its employees from bringing such claims simply by rejecting their administrative claims in the first instance. That is clearly not what the Legislature intended. UC employees, like all other state employees, are entitled to bring damages claims under the WPA in court once they have exhausted the administrative proceedings.

Though the WPA directly protects UC employees and other state employees, its benefits are also felt by the state's taxpayers and the public as a whole. The public benefits greatly from disclosures of government waste and misconduct, which are often hidden from view until disclosed by an insider. Unfortunately, disclosure often comes at significant risk to the individual whistleblower, who may face retaliation or other consequences. The WPA restores the balance by assuring that in return for acting in the public interest, the whistleblower will have recourse to a neutral forum (i.e., the courts) and the right to compensation for any personal losses from retaliation for speaking out. Stripping UC employees of that right will force those individuals to bear the entire burden of those consequences and allow the UC to wrongfully deter whistleblowers through fear of reprisal without any real accountability. It follows as common sense that fewer employees would step forward, and thus more government wrongdoing would remain hidden from view.

Throughout its history, POGO has relied on brave government employees with the courage to speak out, and POGO has long advocated that for the sake of the public good whistleblowers should be afforded the broad protection of statutes designed to prevent retaliation for those selfless acts. To protect them, and to ensure that the public continues to benefit from whistleblowers willing to come forward and speak up, the Court

should read the legislative language in light of its purpose and preserve UC employees' right to bring WPA damages claims in court.

B. THE COURT SHOULD INTERPRET THE WPA IN LIGHT OF THE IMPORTANT RIGHTS AND CONSTITUTIONAL PRINCIPLES IT PRESERVES

The Appellants' argument is supported not just by the clear legislative intent and the language of the statute as a whole, but also because the statute protects important rights and constitutional principles. The WPA and other whistleblower statutes protect conduct that lies at a key intersection of rights and principles that are essential not just for the individuals themselves, but for the effective operation of our democratic government. Because public employees enjoy the public trust and serve our public welfare, we offer them heightened protection when they speak out for the common good by disclosing government misconduct. Thus, nearly forty states, including California, have enacted laws that specifically protect government whistleblowers from retaliation.

The United States Supreme Court last year relied on the existence of statutory protections for whistleblowers when it decided that extending First Amendment protections for public employees in certain contexts was unnecessary. Recognizing the importance of whistleblowers, however, it stated:

Exposing governmental inefficiency and misconduct is a matter of considerable significance. ...[P]ublic employers should, as a matter of good judgment, be

receptive to constructive criticism offered by their employees. The dictates of sound judgment are reinforced by the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing.

(*Garcetti v. Ceballos* (2006) 547 U.S. ___, 126 S. Ct. 1951, 1954 (internal citations and quotation marks omitted) (page citations to the United States Reports not yet available).) Were this Court to follow the Court of Appeals and effectively bar damages claims by UC employees, the statute would offer little practical protection to UC whistleblowers, much less the “powerful network” on which the *Garcetti* court said they can rely. The Court’s decision should be guided by these employees’ interest—and the public’s interest—in protecting free disclosure that serves the common good.

The WPA also protects the due process rights of state employees. California has long recognized that its public employees have property interest in their job that is protected by the due process clauses of both the United States and California Constitutions. (*Skelly v. State Personnel Bd.* (1975) 15 Cal. 3d 194, 207.) Under the Court of Appeals’ misreading of the WPA, when that protected property interest is threatened because of a UC employee’s public disclosure of wrongdoing, the sole procedural protection to which the employee is entitled is an administrative claim before the UC itself. A procedure in which the defendant is not just judge

and jury, but can also block all subsequent appeals, falls well short of the protections required by due process.

As the United States Supreme Court has long recognized, “a fair trial in a fair tribunal is a basic requirement of due process.” (*Withrow v. Larkin* (1975) 421 U.S. 35, 47.) Allowing the UC to reject claims brought against it under the WPA without any possibility of court review violates this basic principle of due process by allowing the accused to become the adjudicator of its own guilt. “Not only is a biased decisionmaker constitutionally unacceptable but our ‘system of law has always endeavored to prevent even the probability of unfairness.’” (*Ibid.*) This Court has also clearly recognized that due process requires an unbiased decisionmaker, and that even the appearance of bias can render a proceeding constitutionally invalid. (*Haas v. County of San Bernardino* (2002) 27 Cal. 4th 1017, 1025-27.) Indeed, this Court has pointed to “adjudicators serving, in effect, as judges of their own cases” as a “paradigmatic example” of a constitutionally flawed decision maker. (*Id.* at p. 1027.) This Court should not interpret the WPA to create such a biased process for UC employees; instead, as with other state employees the WPA should be interpreted to allow UC employees to bring their WPA claims in court after the employee has exhausted administrative remedies.

Finally, the Court of Appeals’ ruling creates a disparity between UC employees and all other state employees, who are provided a right to seek

damages in court under the WPA when and if their employers deny their internal grievance. Access to the courts to settle disputes is a fundamental right. (*Payne v. Superior Court* (1976) 17 Cal. 3d 908, 914.) As this Court held in the context of litigation by prisoners, the legislature cannot allow some citizens to sue while disallowing others from pursuing the same rights unless it has a compelling state interest in doing so. “[T]o be heard in court to defend one’s property is a right of fundamental constitutional dimension; in order to justify granting the right to one group while denying it to another, the state must show a compelling state interest.” (*Id.* at p. 919 (“The denial of access [to the courts] also constitutes a prima facie equal protection violation.”).) There is simply no rational basis for the legislative distinction created by the Court of Appeals’ interpretation of the WPA, much less the type of compelling state interest necessary to deny UC employees the right of other state employees to bring WPA damages claims in court.

Of course, these constitutional issues come into play only if the Court sustains the Court of Appeals’ misreading of the statute. It is a maxim that “a statute must be construed, if possible, to avoid constitutional issues.” (*People v. Brown* (1993) 6 Cal. 4th 322, 335.) To do so, and to preserve the statute’s protection of these important rights, the Court should find that UC employees are, like all other state employees, entitled to bring

WPA damages claims in court once they have exhausted the administrative proceedings.

V. CONCLUSION

This Court should reverse the decision of the Court of Appeal, and reinstate Appellants' case, for at least two reasons. First, under clear rules of statutory interpretation requiring that even the literal meaning of words give way to legislative intent and the statute as a whole, the WPA's administrative claim provision should be interpreted as an exhaustion requirement only. Once the UC has rejected its employee's claim, the employee is entitled to bring a damages claim in court. Second, such an interpretation is the only way to preserve the important rights and constitutional principles protected by the statute. For these reasons, *amicus curiae* POGO respectfully requests that the Court reverse the Court of Appeals and reinstate Appellants' case.

DATED: December 15, 2006

KERR & WAGSTAFFE LLP

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CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

Pursuant to California Rule of Court 14(c)(1). I certify that this Opening Brief is proportionately spaced, has a typeface of 13-point, proportionally-spaced font, and contains 4,048 words according to the word count feature of Microsoft Word 2003.

DATED: December 15, 2006

KERR & WAGSTAFFE LLP

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Project On Government Oversight

PROOF OF SERVICE

I, Andrew Hanna, declare that I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Kerr & Wagstaffe LLP, 100 Spear Street, Suite 1800, San Francisco, California 94105.

On December 15, 2006, I served the following document(s):

PROJECT ON GOVERNMENT OVERSIGHT'S APPLICATION FOR
PERMISSION TO FILE AMICUS CURIAE BRIEF AND
AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS-
APPELLANTS

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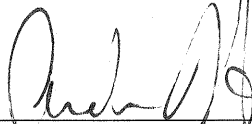
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By first class mail by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid and placing the envelope in the firm's daily mail processing center for mailing in the United States mail at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 15, 2006, at San Francisco, California.



Andrew Hanna