No. 24-

IN THE

Supreme Court of the United States

STEPHEN B. GRANT on behalf of The United States of America and on behalf of the State of Iowa,

Petitioner,

v.

STEVEN K. ZORN and IOWA SLEEP DISORDERS CENTER P.C.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The False Claims Act ("FCA") prescribes statutory damages, including trebled actual damages and civil penalties adjusted for inflation for each violation. 31 U.S.C. § 3729(a). In this non-intervened *qui tam* action, a divided Eighth Circuit panel borrowed this Court's Due Process precedent to find the imposition of the statutory relief unconstitutional under the Eighth Amendment's Excessive Fines Clause. This Court has previously prescribed the Excessive Fines Clause test in *United States v. Bajakajian*, 524 U.S. 321, 326 (1998), noting the importance of legislative deference. Accordingly, the first question presented is:

1. Whether the FCA's statutory civil penalty must be limited to a single-digit multiplier of the actual damages under the Eighth Amendment, in a non-intervened *qui tam* action? (No.).

As to liability, the FCA makes it unlawful to, *inter alia*, knowingly present "false or fraudulent" claims for payment. 31 U.S.C. § 3729(a)(1)(A), (B). This Court recently reviewed the FCA's scienter requirement, suggesting the "false or fraudulent" language creates alternatives, with a nod to common law fraud principles. *United States ex rel. Schutte v. SuperValu Inc.*, 598 U.S. 739, 750 (2023). The District Court did not have the benefit of *Schutte* at the time of its trial order, though its sentiment was argued below. Accordingly, the second question presented is:

2. Whether the FCA's "false or fraudulent" language provides two distinct manners of establishing liability, such that a finding of *fraudulent* claim submissions obviates a finding of *falsity*? (Yes.).

PARTIES TO THE PROCEEDING

Petitioner Dr. Stephen B. Grant is Relator for the following Governments under their respective False Claims Acts: the United States of America and the State of Iowa.

Respondents are Dr. Steven K. Zorn and Iowa Sleep Disorders Center, P.C.

Intervenor is the United States of America.

Defendant and Cross-Appellee is Iowa CPAP, LLC.

RELATED PROCEEDINGS

United States ex rel. Grant v. Zorn, No. 4:18-cv-00095-SMR-SBJ, United States District Court for the Southern District of Iowa. Judgment was entered Nov. 9, 2022.

United States ex rel. Grant v. Zorn, Nos. 22-3481 and 22-3591, United States Court of Appeals for the Eighth Circuit. Judgment was entered July 5, 2024. Rehearing was denied on October 9, 2024.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

CONSTITUTION, STATUTES, AND REGULATIONS

COURT RULES

OTHER AUTHORITY

OPINION BELOW

Petitioner, Relator Dr. Stephen B. Grant, respectfully prays that a writ of certiorari issue to review the divided judgment of the United States Court of Appeals for the Eighth Circuit in Case Numbers 22-3481 and 22-3591 entered on July 5, 2024. *United States ex rel. Grant v. Zorn*, 107 F.4th 782 (8th Cir. 2024). Rehearing was denied October 9, 2024, available at 2024 WL 4456550.

JURISDICTION

The panel of the United States Court of Appeals for the Eighth Circuit entered its judgment on July 5, 2024. Rehearing was denied on October 9, 2024. Jurisdiction of this court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant statutory provision is 31 U.S.C. § 3729(a)(1) (reproduced at Pet. App. 155a–156a).

The relevant constitutional provision is U.S. CONST. amend. VIII, reproduced below:

AMENDMENT VIII: Excessive Bail, Fines, Punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

INTRODUCTION

This case presents a question of constitutional law on which the two lower courts arrived at three different outcomes. Between the District Court and the divided panel of the United States Court of Appeals for the Eighth Circuit, the lower courts have produced three distinct resolutions in applying the Excessive Fines Clause of the Eighth Amendment to this non-intervened False Claims Act ("FCA") *qui tam*; created a significant split among the Circuits; and decided questions in conflict with decisions of this Court. Petitioner-Relator respectfully requests this Court grant certiorari. Supr. Ct. R. 10(a), (c).

The FCA prohibits "knowingly present[ing]…a false or fraudulent claim for payment or approval" to an arm of the federal Government. 31 U.S.C. § 3729(a)(1)(A). When FCA liability is established, the statutory relief includes actual damages (trebled) and a per-claim civil penalty adjusted for inflation. 31 U.S.C. § 3729(a)(1).

Undisputed here, and undisturbed on appeal, Respondent (an Iowa sleep physician) perpetrated a protracted, sophisticated, and self-augmenting fraud scheme on state and federal insurance programs (Medicare, Medicaid, and Tricare). Disputed here, however, are two legal questions: *first*, the degree to which the Governments of the United States and the State of Iowa are entitled to recover for the pervasive fraud perpetrated against them; and *second*, the degree to which an appellate court can second-guess the comprehensive factfinding of a district court "on nothing more than a cold record and a few briefs."

Adeli v. Silverstar Automotive, Inc., 960 F.3d 452, 465 (8th Cir. 2020) (Stras, J., concurring). In this case, that undue appellate activism resulted in a conclusion never before reached by a Court of Appeals—the gross unconstitutionality of the FCA statutory relief.

First, the District Court awarded a civil penalty which fell below the statutory *minimum*. In doing so, the District Court invoked its two parallel roles: it was the anointed factfinder in this bench trial to assess the gravity and scope of Respondents' "pervasive misconduct," *see* Pet. App. 124a, but it was also the arbiter of legal questions. It was the latter role pursuant to which the District Court felt obligated to reduce the civil penalty award it initially calculated to be $7,699,525.[1] The former role, according to the District Court, counseled only for a *modest* reduction of the civil penalty to $6,474,900. In other words, whatever obligation existed under the Excessive Fines Clause, the District Court properly found tempered by Respondents' conduct: "This is a significant penalty which the Court believes reflects the appropriate proportionality in light of [Respondent's] conduct discussed herein." Pet. App. 132a.

A divided panel of the United States Court of Appeals for the Eighth Circuit overwrote the District Court's trial order on both fronts. The panel majority concluded the District Court should have varied

[1]The appellate panel unanimously determined the District Court under-calculated the civil penalty at the outset. *See* Pet. App. 21a. The civil penalty should have been no lower than $8,062,025.

downward further,[2] afforded the legislative remedy no deference,[3] and instead applied a "single-digit multiplier of the amount of compensatory damages."[4] Pet. App. 29a. It also disregarded the District Court's factfinding, which would be relevant to—and vital for—application of this Court's *Bajakajian* proportionality standard. The decision was not unanimous; one judge wrote separately, finding the District Court should not have varied below the statutory relief at all. *See* Pet. App. 30a–39a. In other words, according to the concurrence, the damages award should have been *greater* than the District Court ordered.

Accordingly, the first question presented is whether application of the longstanding civil penalty prescribed by the FCA is unconstitutional under the Eighth Amendment as applied to Respondent, who knowingly submitted over 1,000 false or fraudulent claims to Government insurers, fabricated medical records, contrived false diagnoses for the purpose of self-referring all patients to his wholly-owned CPAP

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[2]*But see* 31 U.S.C. § 3729(a)(1) (prescribing relief).

[3]*But see United States v. Bajakajian*, 524 U.S. 321, 326 (1998) ("[J]udgments about the appropriate punishment for an offense belong in the first instance to the legislature."); *Solem v. Helm*, 463 U.S. 277, 290 (1983) ("Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments….").

[4]*But see Bajakajian*, 524 U.S. at 336 ("Both of these principles [substantial legislative deference and inherently imprecise judicial determinations] counsel against requiring strict proportionality.").

company, and manufactured a false and inappropriate template to yield the most profitable medical code outputs. Petitioner submits Lincoln's Law[5] is not unconstitutional, particularly on these facts.

Second, the panel of the Eighth Circuit affirmed the District Court on a separate challenge—whether Petitioner-Relator established additional FCA liability. At trial, the District Court was satisfied that each patient encounter (whatever medical code billed, including CPT codes 99205, 99204, 99215, 99214) was propped up by fraudulent records, created as a means to justify top-level medical coding. Simply, the District Court found 'fraud.'

It also looked at expert reports, medical coding guidelines, countless prior education Dr. Zorn received related to coding, and resultant patient charts (among others) to determine that each initial visit which Dr. Zorn had billed to public insurers as a CPT code 99205 was "false." Only after finding the 99205 claims both 'false' and 'fraudulent' did the District Court award damages. By contrast, it did not believe it could find liability and award damages on any other CPT codes (99204, 99215, 99214) because no resultant patient charts were reviewed. Pet. App. 118a. That is, the District Court imposed a legal requirement to review resulting patient charts, which it already found were fraudulent, before finding liability.

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[5]Because of its Civil War roots, "the [FCA] has been called Lincoln's Law." *Am. Bankers Mgmt. Co., Inc. v. Heryford*, 885 F.3d 629, 634 n.4 (9th Cir. 2018).

Nearly a year later, this Court clarified: "To this day, the FCA refers to 'false or *fraudulent*' claims." *United States ex rel. Schutte v. SuperValu, Inc.*, 598 U.S. 739, 750 (2023) (internal quotations omitted, emphasis in original). Petitioner takes no issue with the District Court's factfinding, Petitioner asks only that this Court's word in *Schutte* be meaningfully applied. The District Court lacked opportunity to consider this intervening authority. Accordingly, the second question presented is whether the FCA requires courts to review and receive expert testimony on "falsity" despite already finding "fraud." Petitioner submits "fraud" is sufficient itself to establish FCA liability. *See* 31 U.S.C. § 3729(a)(1)(A) (providing *either* false claims "or" fraudulent claims are unlawful).

STATEMENT OF THE CASE

Having federal question and pendent jurisdiction over the claims, per 28 U.S.C. §§ 1331, 1367, and following a week-long bench trial, the United States District Court for the Southern District of Iowa entered judgment in the amount of $7,598,991.50 against Respondents[6] for 1,050 violations of the FCA and for retaliatory discharge in violation of the FCA's whistleblower protections. *See* 31 U.S.C. §§ 3729(a)(1)(A), 3730(h)(1). The District Court memorialized its comprehensive factfinding and legal analysis in its 88-page trial order. Pet. App. 40a–149a.

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[6]Respondents are a sleep doctor (Dr. Zorn) and his sleep practice, Iowa Sleep Disorders Center, P.C. ("Iowa Sleep").

District Court Factfinding

The District Court specifically found Respondents engaged in fraudulent conduct by "upcoding," a process by which a provider fraudulently bills his patient encounters at the highest level, to generate greater reimbursement from public insurance programs. Pet. App. 59a (finding that at no year between 2012–2016 had Dr. Zorn billed fewer than 97.1% of his patients at the highest coding level). The District Court further found that Dr. Zorn created a "results-oriented" template to output the highest billing code. *Id.* at 105a, 109a ("This implies [Respondent] was working backwards, which is to say—his confusion did not arise from what the appropriate code should be, but that his confusion was how he could justify coding at the highest level."). The District Court also found that of the physical examination components included in Dr. Zorn's template, many "were not medically necessary and could not be physically performed in the examination rooms at Iowa Sleep." *Id.* at 66a. Respondent's patient records nevertheless included certification that he performed those services to falsely inflate and misstate the complexity and care provided.

With respect to scienter, the District Court cited to Respondent's fraudulent template, but also his "overutilization of the highest level of reimbursement; the degree to which [he] was a billing outlier; duration and pattern of his billing; and falsification of medical records." *Id.* at 106a. The District Court acknowledged the resulting medical records were "false" and done with fraudulent intent—certainly sufficient scienter to violate the

FCA. *See* 31 U.S.C. § 3729(b)(1). The District Court also found other evidence of scienter in Respondents' results-oriented billing, including conscripting private coding specialists to help justify his predetermined billing code and otherwise make recommendations for and approve of Respondents' billing template. Pet. App. at 107a.

The District Court heard the testimony of two medical experts in the case, and both supported its conclusion. Even Respondent's medical coding expert (not a sleep physician) testified that of a 31-patient representative sample, only 1 patient was properly coded at 99205 (the highest-level CPT code for an initial patient encounter) based on patient complexity. *Id.* Relator's expert witness (a longtime practicing sleep physician) found none of the patients to be properly coded. *Id.* at 108a. And, of course, that review would have consisted entirely of outputs from Zorn's template—the veracity of which the District Court had already discredited.

The record also reflected a separate, interrelated fraud scheme by which Dr. Zorn would almost always order a polysomnography (sleep study) performed on his patients. The polysomnography would produce an "AHI score" (apnea-hypopnea index score), which, if greater than 5.0 "events" per hour, would precipitate an obstructive sleep apnea ("OSA") diagnosis:

> At trial, the Court heard extensive evidence regarding allegations that Dr. Zorn would alter the score on patient's sleep studies. Specifically, the allegation

> is that he would re-score sleep studies which fell just below an AHI of 5 to make the patient eligible for CPAP therapy. Among the testimony the Court heard regarding "up-scoring" of sleep studies included the destruction of previous sleep study records. Numerous former Iowa Sleep employees testified that Dr. Zorn frequently altered or destroyed medical records.

Id. at 120a. In short, "[t]he Court [found] that the evidence of up-scoring, and the attendant allegations of destroying and/or altering medical records, is credible…." *Id.*

Respondent referred the newly (but falsely) diagnosed patients to Iowa CPAP, his durable medical equipment company. Any OSA diagnosis precipitated numerous follow-up visits, which Respondent nearly uniformly billed using the two highest level follow-up encounter CPT codes (99215, 99214).

District Court Damages Calculations

The District Court found 1,050 false claims (billed at 99205) across Medicare (764 false claims); Iowa Medicaid (230 false claims), and Tricare (56 false claims). *Id.* at 124a. The District Court assigned a loss of $113 per Medicare false claim, but entered $0 as to both Iowa Medicaid and Tricare. Accordingly, the actual damages calculated were $86,332. *Id.* at 125a. The District Court trebled the calculations, per 31 U.S.C. § 3729(a)(1), amounting to $258,996.

The District Court next applied what it intended was the *minimum* civil penalty for Respondents' 1,050 false claims. *Id.* at 126a ("There is little statutory direction on where within the range the civil penalty should be assessed. This Court will apply the lowest end of the range."). The District Court assessed $5,000 per violation for the 725 false claims between 2011–2015, though a separate regulation increased the $5,000 figure to $5,500 for inflation. *Compare id.*, *with* 28 C.F.R. § 85.3(a)(9). For Respondents' 325 false claims submitted between 2016–2018, the District Court applied the correct minimum civil penalty adjusted for inflation ($12,537). *See* 28 C.F.R. § 85.5. The total civil penalty calculated was $7,699,525, though damages sought in post-trial briefing were several orders of magnitude greater. *See* Pet. App. 127a. The District Court noted the relationship between the civil penalty ($7,699,525) and the compensatory award ($258,996) was a ratio of 29.7:1, from which the District Court perceived an Excessive Fines Clause obligation to reduce to a ratio of 25:1. *Id.* at 132a.

Appeal

Both parties appealed. On July 5, 2024, a divided panel of the United States Court of Appeals for the Eighth Circuit issued its published opinion, affirming in large part and remanding only the civil penalty calculations and Excessive Fines Clause analysis. The remand was not unanimous. In relevant part, the panel majority determined the District Court's ratio remained too high, holding the FCA civil penalty unconstitutional to the extent it exceeds a "single-digit multiplier of the amount of compensatory

damages." Pet App. 29a. The panel also concluded the trebled sum might be a combination of compensatory and punitive amounts, remanding for the District Court to find which portion of the trebled figure ($86,332–$258,996) is compensatory. *Id.* at 24a–25a. The concurrence differed from both the District Court and the panel majority—the FCA should be applied as written; "[a]t least on this record, the FCA's civil penalties are not excessive." *See* Pet. App. 30a (Smith, J., concurring in part and concurring in the judgment).

In short, two courts looked at this case, and arrived at three distinct decisions on a matter of constitutional law.[7] Petitioner-Relator timely filed his Petition for Rehearing. The Government intervened to file a Petition for rehearing pursuant to its authority to defend a federal statute from constitutional challenge. *See* 28 U.S.C. § 2403(a). Both petitions emphasized the panel majority had used the Due Process test—*not* the Excessive Fines Clause analysis. After the Eighth Circuit solicited a response from Respondents, and on October 9, 2024, a divided Circuit Court of Appeals denied rehearing (three additional Circuit judges would have granted the petitions).

Petitioner-Relator separately petitioned for rehearing on the grounds that additional FCA liability was established (codes 99204, 99215, 99214). Evidence of "falsity," the argument goes, is

[7] *First*, the District Court found appropriate a modest reduction from the statutory minimum. *Second*, the panel majority found a significant reduction mandatory. *Third*, the concurrence determined the law should be applied as written.

unnecessary where the District Court already found "fraudulence." Despite this Court's intervening authority, *Schutte*, 598 U.S. 739, the Eighth Circuit declined to rehear—or even cite *Schutte*.

This Petition follows.

REASONS FOR GRANTING THE WRIT

Petitioner-Relator petitions this Court for a writ of certiorari on two questions presented. First, this Court should grant certiorari and reverse the divided Eighth Circuit's holding that the FCA's civil penalty is unconstitutional to the extent it exceeds a bright-line "single-digit" ratio to compensatory damages. *See* Supr. Ct. R. 10(a), (c); *Allen v. Cooper*, 589 U.S. 248, 254 (2020) ("Because the Court of Appeals held a federal statute invalid, this Court granted certiorari."); *Iancu v. Brunetti*, 588 U.S. 388, 392 (2019) ("As usual when a lower court has invalidated a federal statute, we granted certiorari."). Second, this Court should clarify that a finding of "falsity" is unnecessary to establish FCA liability when the factfinder has already found the claims "fraudulent," putting the Eighth Circuit's opinion in conflict with this Court's precedent. *See* Supr. Ct. R. 10(c).

I. The FCA civil remedy provision is not unconstitutional.

Both lower courts held the FCA's civil penalty to be unconstitutional under the Excessive Fines Clause of the Eighth Amendment, albeit to varying degrees. This Court should grant certiorari because

the divided panel (A) decided an issue of first impression as to the applicability of the Excessive Fines Clause to a non-intervened *qui tam* action; (B) applied the wrong test under the Eighth Amendment; (C) created a significant circuit split as to a frequently recurring question when it required a "single-digit" ratio where no other Circuit does; and (D) supplanted the District Court's careful factfinding with its incomplete recitation.

A. Whether the Excessive Fines Clause applies in non-intervened *qui tams* is an issue of first impression.

Whistleblower claims under the FCA are pursued as *qui tam* actions. 31 U.S.C. § 3730(b). Where the rights of the relator are prescribed by statute, the rights of the Government are less clear. In some circumstances, the Government is deemed *not* to be a "party" to the case. *E.g.*, *United States ex rel. Eisenstein v. City of N.Y.*, 556 U.S. 928, 931 (2009) ("[W]e hold that [the United States] is not a 'party' to an FCA action for purposes of the appellate filing deadline unless it has exercised its right to intervene in the case."). In other circumstances, the Government may retain appellate rights notwithstanding its failure to intervene. *E.g.*, *id.* at 931 n.2.

For standing purposes, however, the Government is assumed to be a "partial assign[or]" and relator "assignee." *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000). The FCA itself provides the same, if non-intervened: "[i]f the Government elects not to proceed with the action, the person who initiated the action shall have

the right to conduct the action." 31 U.S.C. § 3730(c)(3). The threshold inquiry on Petitioner's first question presented is whether a private relator's action is subject to the Excessive Fines Clause when the Government declines intervention. This Court has previously left the question open. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275 n.21 (1989). This Court has not had opportunity to address it since. *Austin v. United States*, 509 U.S. 602, 607 n.3 (1993). Petitioner respectfully requests the Court answer it now.

Though unanswered, the question is not devoid of guidance. And it starts with the fundamental proposition that the scope of constitutional text is to be informed by how it was understood when ratified. *E.g.*, *id.* at 610 (analyzing the understanding "at the time the Eighth Amendment was ratified"); *Browning-Ferris*, 492 U.S. at 264 n.4. For the Excessive Fines Clause, that began with the English Bill of Rights in 1688, responsive to the Bloody Assizes at Winchester, "to avoid an excessive pecuniary fine imposed upon Lord Devonshire by the court of King's bench." *Weems v. United States*, 217 U.S. 349, 376 (1910). The Amendment was initially intended to focus *not* on the legislative arms of Government—but of its *prosecutorial* and *punitive* arms. *Id.* ("In other words, that it had ceased to be a restraint upon legislatures, and had become an admonition only to the court not to abuse the discretion which might be [e]ntrusted to them.").

Seventy-seven years prior to *Weems*, this Court's first decision on excessive fines held the same: "The eighth amendment is addressed to courts of the

United States exercising criminal jurisdiction, and is doubtless mandatory to them and a limitation upon their discretion." *Ex parte Watkins*, 32 U.S. 568, 573–74 (1833). This prosecutorial focus of the Amendment has been oft repeated. *E.g.*, *Browning-Ferris*, 492 U.S. at 275 ("[T]he text of this Amendment points to an intent to deal only with the prosecutorial powers of government."); *Rummel v. Estelle*, 445 U.S. 263, 274 (1980) ("[T]he length of the sentence imposed is purely a matter of legislative prerogative."); *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) ("[T]he text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government."); *In re Kemmler*, 136 U.S. 436 (1890) ("This declaration of rights had reference to the acts of the executive and judicial departments of the gover[n]ment of England."). A non-intervened *qui tam* action falls outside the criminal arm of Government. In fact, the Government, in such a case, has forgone all participation.

The divided Eighth Circuit panel decision below joined another sister Circuit Court of Appeals in concluding the Excessive Fines Clause applies to FCA civil penalties in non-intervened *qui tam* actions. *See* Pet. App. 22a–23a; *Yates v. Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1308 (11th Cir. 2021). Both decisions highlighted that the action is brought in the name of the Government (in part), and that the ultimate award is paid to the Government (in part). By contrast, however, the Seventh Circuit has voiced skepticism of the Excessive Fines Clause's applicability to the FCA. *See, e.g.*, *United States v. Rogan*, 517 F.3d 449, 453–54 (7th Cir. 2008). There remains substantial constitutional interest in this

question. Even if the panel majority below and *Yates* are correct, however, neither provides the guidance necessary on this important question of constitutional law.

To wit, this threshold question—whether the Excessive Fines Clause applies to non-intervened *qui tam* actions—has *two* important consequences on this case, only the first is mentioned by the panel below. *First*, if the Clause does not apply, the divided Eighth Circuit panel below would have significantly erred. *E.g.*, *Browning-Ferris*, 492 U.S. at 260 ("[O]ur concerns in applying the Eighth Amendment have been with criminal process and with direct actions initiated by government to inflict punishment.").

Second, even if the Clause *did* apply, another question remains unanswered: whether the portions of the award to be paid solely to the private relator are exempt from any Excessive Fines Clause remittitur. *See id.* at 268 ("[T]he Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government."). The relator is statutorily entitled to a relator's share of the award of between 25-30% in a *qui tam* action. 31 U.S.C. § 3730(d)(2). In other words, when is the remittitur applied? If there is to be reduction at all, Petitioner submits it should occur *after* the relator's share is awarded—as the Government is not entitled to any part of it.[8] The Eighth Circuit's opinion provides no citation to the contrary and no guidance on remand.

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[8]In such a circumstance, the damages and civil penalty should be fully calculated, as required by statute. 31 U.S.C. § 3729(a). The relator share is next awarded, as not subject to the

Certiorari is appropriate on this question of first impression.

B. On the merits, the divided Eighth Circuit panel conflated constitutional tests.

Regardless of the answer to the threshold question, the divided Eighth Circuit panel below erred further—it conflated this Court's Due Process test (and dicta) with the Excessive Fines Clause analysis. The panel majority below decided questions of constitutional law inapposite to this Court. *See* Supr. Ct. R. 10(c).

The divided panel below justified conflating this Court's distinct analyses: "The plaintiffs assert, and the defendants accept, that cases analyzing punitive sanctions under the Due Process Clause are instructive in analyzing sanctions under the Excessive Fines Clause." Pet. App. 23a. Not so—Petitioner's oral argument below began by urging faithful appreciation of "the distinction between the Excessive Fines Clause and the Due Process Clause because that distinction *does* matter." *Oral Argument*, at 16:26, No. 22-3481 (8th Cir. Dec. 13, 2023), *available at* http://media-oa.ca8.uscourts.gov/OAaudio/2023/12/223481.MP3

Excessive Fines Clause. 31 U.S.C. § 3730(d)(2). Then, to the extent the Excessive Fines Clause analysis comes into play, it is limited only to those amounts "imposed by, and payable to, the government." *Browning-Ferris*, 492 U.S. at 268. This appears consistent with the impetus for the Clause—limit the sovereign from "raising revenue in unfair ways." *Id.* at 272.

(emphasis supplied); *see also* Appellee Br., at 58 (8th Cir. April 28, 2023) (emphasizing the need to apply *Bajakajian*'s standard which "d[oes] not require assessing the penalty relative to the *value* of the defendant's offense"); Appellee Reply Br., at 9 ("All the Eighth Amendment demands—'reasonableness'—entitles a legislative directive to far more deference than a jury's impassioned award untethered to the reprehensibility of a defendant's given conduct."); D. Ct. Doc. 138, at 8 n.4 (differentiating Respondents' reliance on Due Process precedent—"What *Campbell* does not stand for or address is the reduction of a statutory penalty").

Indeed, under the Excessive Fines Clause, this Court has set out a two-step inquiry, beginning with the legislature's chosen remedy, and second, affording some deference to the District Court's proportionality assessment. *Bajakajian*, 524 U.S. at 336–37 ("[J]udgments about the appropriate punishment for an offense belong in the first instance to the legislature" and "the district court[]…must compare the amount of the forfeiture to the *gravity* of the defendant's offense."); *Solem*, 463 U.S. at 290. In no circumstance, however, has this Court required "strict proportionality." *Bajakajian*, 524 U.S. at 336.

By contrast, the Due Process test for considering an impassioned jury's award of punitive damages requires different elements: (1) "the degree of reprehensibility"; (2) "the disparity between the harm or potential harm…and his punitive damages award"; and (3) "the difference between this remedy and the civil penalties authorized or imposed in

comparable cases." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996).

This Court has expressed these tests are not to be conflated. *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997) (holding that Eighth Amendment "claim[s] must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process"); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 456 (1993) ("The review of a jury's award for arbitrariness and the review of legislation surely are significantly different."). The concurrence below recognized the same: "Those cases [on which the panel majority relied] concerned the Due Process Clause; this case concerns the Excessive Fines Clause." *See* Pet. App. 36a (Smith, J., concurring in the judgment). But, even under the Due Process Clause, this Court has recognized legislative deference is necessary. *E.g.*, *Gore*, 517 U.S. at 583 ("[A] reviewing court engaged in determining whether an award of punitive damages is excessive should 'accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue.' " (quoting *Browning-Ferris*, 492 U.S. at 301 (O'Connor, J., concurring in part and dissenting in part))); *Gore v. United States*, 357 U.S. 386, 393 (1958) ("Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, these are peculiarly questions of legislative policy." (citation omitted)).

The panel majority below accorded no legislative deference. The panel majority below applied Due Process precedent to overwrite Excessive

Fines Clause authority. Because the panel majority's decision did not abide by *Bajakajian*'s plain standard, certiorari is appropriate. Supr. Ct. R. 10(c).

C. The panel majority created a substantial Circuit split.

The divided panel decision created a significant Circuit split on a frequently recurring question of constitutional interest. This Court should grant certiorari to harmonize the constitutional application and clarify "the uncertain waters of the Eighth Amendment" as it relates to the FCA. *See United States ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, 741 F.3d 390, 407 (4th Cir. 2013). Courts are asking for it. And, as an outlier in imposing a facial cap on the FCA's statutory relief seen nowhere in the caselaw before, this case is the appropriate one to take.

First, the Eleventh Circuit's *Yates* case confronted similar allegations: false claims submitted to Medicare. *Yates*, 21 F.4th at 1296 ("[T]he jury found it liable for having knowingly submitted 214 materially false claims to Medicare, thereby violating the FCA.").[9] *Yates*, too, was non-intervened. *Id.* at 1314. But the panel majority in the instant case created a significant split with *Yates* in remanding under the Excessive Fines Clause. The panel majority below found unconstitutional a civil penalty award of $6,474,900 on $86,332 of actual damages, requiring a "single-digit multiplier"; whereas the *Yates* Court

[9] *Yates* properly recognized the Due Process Clause differs from Excessive Fines Clause analysis. *Id.* at 1307 n.4.

affirmed a $1,179,000 civil penalty award on $755.54 of actual damages, a ratio of 1,557:1. *Compare* Pet. App. 29a, *with Yates*, 21 F.4th at 1316 ("On this record, the monetary award imposed does not violate the Excessive Fines Clause.").

The divided panel split from the Seventh Circuit, too. In a bench trial (like here), a Northern District of Illinois district court calculated FCA damages of $5,940,972.16 on 673 false claims to Medicare. *Stop Ill. Health Care Fraud, LLC v. Sayeed*, 100 F.4th 899, 904 (7th Cir. 2024). That computation was properly affirmed. *Id.*

Finally, the divided panel split with the Fourth Circuit. After an FCA trial, "[t]he court…concluded that there was insufficient evidence of any harm," awarding $0 in actual damages, but still holding that "entry of judgment on behalf of [relator] for $24 million…would not constitute an excessive fine under the Eighth Amendment." *Bunk*, 741 F.3d at 409. In so holding, the *Bunk* Court recognized *Bajakajian*'s "test is by no means onerous." *Id.* at 408. In its well-reasoned decision, the Fourth Circuit panel noted it was "entirely comfortable" with FCA defendants being subjected "to millions of dollars of liability for civil penalties" for submitting "thousands" of false claims. *Id.* at 407. In further contrast to the divided panel below, the *Bunk* Court recognized that for purposes of the Eighth Amendment proportionality analysis, "the concept of harm need not be confined strictly to the economic realm." *Id.* at 409.

Respondents in the instant case submitted 1,050 false claims, but, if the Eighth Circuit's divided

panel decision is to stand, would be subject to far less scrutiny than either defendants in *Yates*, *Sayeed*, or *Bunk*. Certiorari is warranted. Supr. Ct. R. 10(a).

D. The divided panel's appellate activism conflicts with this Court's precedent.

Certiorari should issue for another reason—clarifying the role (1) bright-line multipliers; (2) record revisionism; and (3) aggravating factors direct or control the Excessive Fines Clause analysis. The divided appellate panel's approach on each is in conflict with decisions of this Court. Supr. Ct. R. 10(c).

1. Bright-line multipliers

Under either the Excessive Fines Clause or Due Process Clause analyses, this Court has consistently rejected precisely what the divided panel below did: apply a rigid multiplier. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) ("We decline again to impose a bright-line ratio which a punitive damages award cannot exceed."); *Bajakajian*, 524 U.S. at 336 ("Both of these principles [substantial legislative deference and inherently imprecise judicial determinations] counsel against requiring strict proportionality."); *Gore*, 517 U.S. at 582 ("Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula…."); *TXO Prod.*, 509 U.S. at 458 ("We need not, and indeed, we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable.");

Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991) (same).

2. Record revisionism

The text of the Constitution does not limit a fine to an amount strictly proportional to the *value* of the damages. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed…."). Rather, "excessive," in this context, means "grossly disproportional to the gravity of a defendant's offense." *Bajakajian*, 524 U.S. at 334; *id.* at 336 (holding courts "must compare the *amount* of the forfeiture to the *gravity* of the defendant's offense" (emphases supplied)). Proportionality to the *gravity* of the offense, in turn, requires considering (1) the nature of the offense; (2) whether the defendant "fit[s] into the class of persons for whom the statute was principally designed"; (3) "the maximum sentence" or "maximum fine" which is authorized by law; and (4) the nature of the harm caused by the violative conduct. *Id.* at 337–39. Nowhere is the precise economic impact of Respondents' fraud the appropriate comparator.

With respect to these factors, "[t]he factual findings made by the district courts in conducting the excessiveness inquiry, of course, must be accepted unless clearly erroneous." *Id.* at 336 n.10. Though the District Court documented thorough factfinding, the divided panel below disregarded it entirely. *See* Pet. App. 26a–27a ("Even though Grant asserts the defendants engaged in tortious conduct by destroying medical records, contriving false diagnoses, and declining to consider treatment alternatives, Grant

does not cite any record support for these allegations."). Quite the contrary.

First, Petitioner's Appellee Brief below documents Respondents' destruction of patients' medical records at length:

> To conceal his upscoring scheme, Zorn ordered the original polysomnographic records destroyed. *See, e.g.*, (Tr. at 172:19–21) (witness Baker describing Zorn's direction to have the true, original record "taken out of the patient's chart and to put a new one in"); (Tr. at 190:13–19) (witness Richmond, same); (Tr. 207:13–17) (witness Bettey, same); (Tr. at 228:21–24) (witness Barton, same). At trial, Dr. Zorn admitted he would direct the deletion of such records. (Tr. at 849:11–16) ("We will destroy that….").

Appellee Br., at 21 (8th Cir. Apr. 28, 2023).

Second, Petitioner's Appellee Brief extensively detailed Respondents' efforts to contrive false sleep apnea diagnoses:

> Dr. Zorn routinely falsified polysomnography records to indicate a higher [Apnea Hypopnea Index score]. Each time, the patient's true AHI score was below 5 (not diagnostic for OSA), and Dr. Zorn would upscore it to be above 5 (diagnostic for OSA). (Tr. at 125:21–25) ("The records were altered to make the

> patient positive, basically an AHI over 5, so that a CPAP referral could be produced.").

Appellee Br., at 19 (8th Cir. Apr. 28, 2023). Petitioner also cited the testimony of Respondents' employees directed to upscore (and contrive false diagnoses). *Id.* at 19–20. The District Court adopted the same: "The Court finds that the evidence of up-scoring, and the attendant allegations of destroying and/or altering medical records, is credible…." Pet. App. 120a.[10]

Without citation, and ignoring the testimony in the record, the divided Circuit panel below discredited the District Court's factfinding—a clear break with *Bajakajian*. 524 U.S. at 336 n.10; *see also Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) ("Ours is 'a court of final review and not first view.' " (quoting *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam))). This is precisely why district courts—not appellate courts—should be entrusted with the proportionality determination under the Excessive Fines Clause.

This Court should grant certiorari to emphasize a district court's factfinding is entitled to deference,

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[10]*Third*, Petitioner described Respondents' refusal to consider treatment alternatives—that is, Respondents' only treatment modality was the sister CPAP company. *See* Appellee Br., at 27 n.5 (8th Cir. Apr. 28, 2023) ("Dr. Grant recalled treating multiple Zorn patients who found CPAP incompatible, but for whom Dr. Zorn refused to offer alternatives. (Tr. at 517:13–22)."). The District Court found Dr. Zorn's patient encounters and uniform CPAP therapy was "unrelated to the treatment of his patient's condition." Pet. App. 101a.

and the manner in which reviewing courts are to conduct the Excessive Fines Clause analysis consistent with *Bajakajian*.

3. Aggravating factors

This Court has revealed other facts which, when present, expand constitutional latitude. Indeed, these often arise under the Due Process analysis, with which the divided Eighth Circuit panel replaced *Bajakajian*'s Excessive Fines Clause analysis. Nevertheless, this divided panel treated and cited none.

a. Small compensatory award

The FCA imposes no obligation to prove damages. *Rex Trailer Co. v. United States*, 350 U.S. 148, 152–53 & n.5 (1956) ("But there is no requirement, statutory or judicial, that specific damages be shown…."). And, even when damages are not established, other Circuits have found the civil penalty recoverable. *E.g.*, *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995) ("[A] contractor who submits a false claim for payment may still be liable under the FCA for statutory penalties, even if it did not actually induce the government to pay out funds or to suffer any loss."); *United States ex rel. Hagwood v. Sonoma Cty. Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991) ("No damages need be shown in order to recover the [civil] penalty."); *United States v. Killough*, 949 F.2d 1523, 1533–34 (11th Cir. 1988) ("Even if no payment was made on a claim or the government cannot prove actual damages, a forfeiture shall be awarded *on each false claim submitted*." (emphasis supplied)); Pet. App. 112a ("Damages do

not need to be proven to establish a violation of the FCA.").

Accordingly, even if damages are not established or otherwise "result[] in only a small amount of economic damages," higher ratios are not only permitted, but expected. *E.g.*, *Campbell*, 538 U.S. at 425 (quoting *Gore*, 517 U.S. at 582); *Bunk*, 741 F.3d at 409 (reversing trial court and assessing $24 million on $0 of actual damages in FCA case); *Payne v. Jones*, 711 F.3d 85, 102 (2d Cir. 2013) (justifying a prior 75,000-to-1 award when a factfinder awarded nominal $1 damages, noting "the ratio of a reasonable punitive award to the small compensatory award will necessarily be very high").

Here, the District Court's $86,332 actual loss comes only from Medicare—not Medicaid or Tricare. Pet. App. 125a ("The Court will not assess any damages amount for the false Medicaid or Tricare claims…."). But, for those 230 false Medicaid claims and 56 false Tricare claims, the District Court properly awarded the statutory civil penalty. Pet. App. 126a–127a. In other words, the divided Eighth Circuit panel compared the civil penalties from *three* public payors to the actual damages from *one* public payor—necessarily inflating the ratio. The divided panel's inappropriate ratio metric leaves the Government uncompensated for 286 false claims submitted to it.

b. "Repeated" malfeasance

"[E]vidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law." *Gore*, 517 U.S. at 576–77. In similar application, this Court upheld a 526-to-1 ratio of punitive damages to compensatory damages, again under the Due Process Clause. *TXO Prod.*, 509 U.S. at 462 (finding "the dramatic disparity between the actual damages and the punitive damage award" not controlling due to the defendant's "malicious and fraudulent course," "bad faith," and "larger pattern of fraud, trickery and deceit"). Two justices noted that second-guessing the factfinder (here, the District Court) is inappropriate. *Id.* at 472 (Scalia, J., concurring in the judgment) ("[T]he Constitution gives federal courts no business in this area.").

The District Court here made its findings unambiguous. *See, e.g.*, Pet. App. 101a ("Simply put, the Court did not find Dr. Zorn credible."); *id.* ("Dr. Zorn submitted false claims…by billing for medical services that were medically unnecessary, beyond the scope of his practice, and unrelated to the treatment of the patient's condition."); *id.* at 109a (finding Respondent Zorn "was working backwards, which is to say—his confusion did not arise from what the appropriate code should be, but that his confusion was how he could justify coding at the highest level" and how "to retrofit his predetermined billing code"); *id.* at 124a ("The Court's decision is further bolstered by Dr. Zorn's altering of medical records and persistent up-

coding of other services. His pervasive misconduct does not earn any inferences in his favor.").

Simply, the District Court concluded Respondents deliberately and permanently frauded medical records; destroyed other records; contrived false diagnoses for a chronic, lifelong illness without addressing what might be a true cause of the patients' presenting problems; declined to consider treatment alternatives to CPAP—the only machine Iowa CPAP carries; and pressured other providers to act the same way. Where the District Court found "pervasive misconduct" here, *see id.*, *Bajakajian* confronted only "[a] single willful failure to declare…currency." 524 U.S. at 337 n.12. This Court has long recognized that "[t]he mere fact that cumulative punishments may be imposed for distinct offenses in the same prosecution is not material" to the Eighth Amendment analysis. *O'Neil v. Vermont*, 144 U.S. 323, 331 (1892); *see also Badders v. United States*, 240 U.S. 391, 394 (1916) ("[T]here is no doubt that the law may make each putting of a letter into the postoffice a separate offense. And there is no ground for declaring the punishment unconstitutional." (citations omitted)). That the District Court found so many violative acts here should be no source of absolution.

The divided panel's failure to credit the District Court's factfinding implicates a broader question about the role of a reviewing court in conducting Excessive Fines Clause analysis, and is otherwise in conflict with precedent.

c. "[L]oss to the public fisc"

In the fourth *Bajakajian* proportionality factor (the nature of the harm), this Court noted that one of the reasons the forfeiture confronted was constitutionally excessive was because "[t]here was no fraud on the United States[] and respondent caused no loss to the public fisc." *Bajakajian*, 524 U.S. at 339. That can be no basis for leniency here.

Bajakajian did not confront an FCA claim. That distinction matters.[11] The civil components of the FCA, including a relator's right to bring a *qui tam* action and be accorded statutory relief, date back to the Civil War and Congress's efforts to stymie the intentional misappropriation of Government monies intended to support the Union war effort. *See, e.g.*, James B. Helmer, Jr., *False Claim Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites and Patriots*, 81 U. CINCINNATI L. REV. 1261, 1264–66 (2013). "Cheating the government has been historically wide-spread, has endangered lives, and has even put the future of the nation at risk." *Id.* at 1261. As of late, that expensive fraud has substantially burdened Government programs like Medicare. *Id.* at 1281–82 & n.114. This case presents another illustration of blatant disregard for honest services.

If the absence of fraud against the Government counsels for Excessive Fines Clause relief, then the presence of fraud against the Government should

[11]The *Bunk* Court similarly noted that a pervasive violator of the FCA "could not be more readily distinguishable" from the facts in *Bajakajian*. *Bunk*, 741 F.3d at 409.

counsel for enforcing the law as written. At the very least, the divided panel's disregard for this Court's aggravating factors warrants clarity.

E. The divided panel's remand warrants certiorari.

The first question presented—whether the FCA's longstanding civil penalty is constitutionally limited to a single-digit bright-line multiplier of actual damages (it is not)—warrants certiorari. The divided Eighth Circuit panel reached a conclusion no other United States Court of Appeals had; presents an issue of first impression in this Court; conflates this Court's Excessive Fines Clause and Due Process Clause jurisprudence; creates a significant Circuit split; and fails to consider factors this Court and others have found important, exacerbating the Circuit split. *See* Supr. Ct. R. 10(a), (c). Due to the competing claims in this case and others, this Court's clarity is necessary to ensure uniformity among the Circuits in the application of both (1) the Excessive Fines Clause; and (2) the FCA's statutory relief. On the merits, and of the three lower court positions staked out in this case, the Eighth Circuit concurrence reaches the correct conclusion.

II. Additional FCA liability was established at trial.

Petitioner respectfully requests this Court grant certiorari on a separate question of law, which also has bearing on the first: whether a finding of "fraud" obviates the need for a finding of "falsity." Petitioner submits it does, and the lower courts erred.

A. The District Court emphasized the need for guidance.

The FCA establishes liability for any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," 31 U.S.C. § 3729(a)(1)(A), or "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim," 31 U.S.C. § 3729(a)(1)(B). While the statute defines "knowingly" (31 U.S.C. § 3729(b)(1)), "claim" (31 U.S.C. § 3729(b)(2)), and "material" (31 U.S.C. § 3729(b)(4)), the statute does not define "false or fraudulent." *See Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 187 (2016) ("Congress did not define what makes a claim 'false' or 'fraudulent.' "). The District Court repeated that observation. Pet. App. 95a ("The FCA does not define what makes a claim 'false' or 'fraudulent.' "); *id.* at 103a ("Unlike the false or fraudulent element, scienter is defined by the FCA.").

Just over eight months after the District Court issued its Trial Order, and while Eighth Circuit briefing was underway, this Court released the opinion in *Schutte*, 598 U.S. 739. Because the District Court lacked opportunity to consider the import of *Schutte*, this intervening authority may, alternatively, warrant a "GVR" here.[12]

[12]Though a GVR on this question would still leave unanswered the constitutional questions presented in Question number 1.

B. The Eighth Circuit panel majority decision is in conflict with two decisions of this Court.

Petitioner respectfully requests this Court grant certiorari and clarify the significance of the "false or fraudulent" disjunctive as alluded to in two prior decisions of this Court—*Schutte*, 598 U.S. 739; *Escobar*, 579 U.S. 176. *See* Supr. Ct. R. 10(c).

The District Court assessed relief to the United States for Respondents' false 99205 codes submitted to Medicare, Medicaid, and Tricare. Pet. App. 122a ("Based on the foregoing discussion, the Court finds that only code 99205 claims are false."). Respondents' 99205 codes represented *initial* patient encounters billed at the highest coding-level. *Id.* at 55a. By contrast, the District Court did not find liability for three other codes: 99215, 99214, and 99204. *Id.* at 118a ("The Court finds that he has failed to do so as it relates to codes 99215, 99214, and 99204."). Codes 99215 and 99214 represent *established* (or return visit) patient encounters billed at the two highest levels, whereas 99204 represents an initial visit billed at the second-highest level. *Id.* at 55a. The basis the Court gave for the disparate treatment (liability for 99205, but no liability for 99215, 99214, and 99204), was that "[n]ot a single patient chart coded with those [latter] three codes was introduced into evidence." *Id.* at 118a. Of course, there was good reason for that—fraudulent records have no business controlling a court's outcome. The District Court impermissibly heightened the statutory burden.

"[T]he FCA encompasses claims that make fraudulent misrepresentations, which include certain misleading omissions." *Escobar*, 579 U.S. at 187. "To this day, the FCA refers to 'false or *fraudulent*' claims…." *Schutte*, 598 U.S. at 750 (emphasis in original). *Escobar* confronted a certification theory regarding false "payment codes" submitted to "the Medicaid program, a joint state-federal program." *Escobar*, 579 U.S. at 183, 184. This Court thoroughly analyzed liability elements, holding:

> [T]he implied certification theory can be a basis for liability, at least where two conditions are satisfied: first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.

Id. at 190. In 2023, this Court continued that pragmatic approach in *Schutte*, a case regarding culpable scienter under the FCA. 598 U.S. at 751 n.5 ("[I]t is enough to say that the FCA's standards can be satisfied by a defendant's subjective awareness of the claim's falsity or an unjustifiable risk of such falsity."). That is because "the FCA is largely a fraud statute," *id.* at 750, and fraud is fraud.

Relevant here, the District Court found *fraud*. The District Court found Respondent's template to be "results-oriented," Pet. App. 105a, and "continually

altered," for the purpose of "retrofit[ting] his predetermined billing code," *id.* at 110a. The District Court found the physical examination components included in Respondents' countless template iterations were medically unnecessary for a practicing sleep physician. *Id.* at 101a ("Dr. Zorn expanded examinations far beyond the scope of what is typical of a sleep physician, which included repeating services over and over again."). Further, many of the items listed (e.g., abdominal palpation) "could not be physically performed in the examination rooms at Iowa Sleep." *Id.* at 66a; *id.* at 99a ("The Court credits the testimony of Dr. Suleman regarding stomach palpations which is supported by evidence that they cannot be performed properly within the examination rooms."). Finally, Dr. Zorn testified he conducts each patient visit pursuant to an identical "routine." Trial Tr., at 739:5–6, 743:25 – 744:2. Respondents otherwise "inflated the overall time spent with patients." *Id.* at 102a.

In short, the District Court found liability where Respondents' claims were supported by "services that were medically unnecessary, beyond the scope of his practice, and unrelated to the treatment of his patient's conditions." *Id.* at 101a. And, elsewhere, the District Court acknowledged the above conduct had the intended consequence of concealing the fraud further, appreciating the records submitted to the experts were, themselves, fraudulent. *Id.* at 121a; *United States ex rel. Miller v. Bill Harberts Int'l Constr., Inc.*, 608 F.3d 871, 905 (D.C. Cir. 2010) (finding higher damages acceptable where "the defendants' own misconduct has foreclosed any exact

calculation"). The District Court made other important findings, too:

> Several former Iowa Sleep employees testified that Dr. Zorn would alter sleep study records in order to qualify a patient for a CPAP machine. This is consistent with other evidence tending to show that Dr. Zorn would up-code his patient visits, all with the goal of increasing his overall financial compensation.

Pet. App. 121a. The District Court found "the evidence of up-scoring, and the attendant allegations of destroying and/or altering medical records, is credible…." *Id.* at 120a. Each CPAP prescription would inure several return visits, at least annually, which Respondent billed as 99215 or 99214 (the two return visit codes for which the Court did *not* find FCA liability) at 99.0% frequency from 2012–2017.

Notwithstanding those significant findings, including that fraud permeated each and every patient encounter, and that over 100 patients annually received contrived diagnoses and inured hundreds of unnecessary and improper 99215/99214 patient visits, the District Court perceived an obligation to review the resultant patient charts to establish falsity. The FCA is not so narrow. Nor should it be. Whether a patient chart was or was not admitted is of no value to the factfinder under the FCA. Where a claim for reimbursement from a public insurer was found to be *fraudulent*, there should be no obligation to review concededly fraudulent

documentation to assess "falsity." "False" and "fraudulent" are *alternatives* under the statute—not prerequisites. 31 U.S.C. § 3729(a)(1)(A), (B). Congress's disjunctive "or" must be given effect. *Escobar*, 579 U.S. at 187 ("To reach this conclusion, 'we start, as always, with the language of the statute.'" (quoting *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 668 (2008))).

Because the District Court perceived an obligation to establish both *falsity* and *fraudulence*, and this position is in conflict with the statute, *Escobar*, and *Schutte*, this Court should grant certiorari on the significance of the "false or fraudulent" disjunctive. *See* Supr. Ct. R. 10(c); 31 U.S.C. § 3729(a)(1).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the divided opinion of the United States Court of Appeals for the Eighth Circuit reversed and remanded on the merits.

Respectfully submitted,

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