No. 24A__

IN THE

Supreme Court of the United States

STEVEN ZORN; IOWA SLEEP DISORDERS CENTER, P.C.; IOWA CPAP, L.L.C.,

Applicants,

v.

STEPHEN B. GRANT, on behalf of the UNITED STATES OF AMERICA and on behalf of the STATE OF IOWA; the UNITED STATES OF AMERICA,

Respondents.

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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December 5, 2024

APPLICATION

To the Honorable Brett M. Kavanaugh, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eighth Circuit:

Pursuant to Rule 13.5 of the Rules of this Court and 28 U.S.C. § 2101(c), Applicants Steven Zorn, Iowa Sleep Disorders Center, P.C., and Iowa CPAP, L.L.C. respectfully request a 30-day extension of time, to and including February 6, 2025, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

1. The Eighth Circuit issued its judgment on July 5, 2024, and denied timely petitions for rehearing on October 9, 2024. *See* App. 48a. Unless extended, the time to file a petition for a writ of certiorari will expire on January 7, 2024. This application is being filed more than ten days before a petition is currently due. *See* Sup. Ct. R. 13.5. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

2. This case presents an important question about the False Claims Act's (FCA) public disclosure bar that has divided the circuits and is worthy of this Court's review.

3. Applicant Dr. Steven Zorn is a sleep medicine practitioner in West Des Moines and Ankeny, Iowa. This case concerns how Zorn coded initial patient visits for medical care provided at his practice (Iowa Sleep Disorders Center). Zorn billed certain patient visits as "complex." Respondent Stephen Grant filed this *qui tam* action alleging Zorn should have used a code for less complex visits.

4. For billing purposes, initial patient visits can be coded from 99201 to 99205, with 99205 indicating "the most complex" initial visits and receiving the highest reimbursement. App. 3a-4a. In 2016, a contractor for the Centers for Medicare & Medicaid Services (CMS) sent Zorn a letter "expressing concern that Zorn was overbilling the government." *Id* at 4a. An audit showed that Zorn had billed "all of his initial patient visits at code 99205"; according to CMS's contractor, "more variety would be expected." *Id*. (brackets omitted). In 2018, "following an audit of patient records from January 2017 to September 2017," the CMS contractor sent another letter to Zorn. It noted that Zorn had previously been warned about improper coding and explained that the second audit identified continued "overpayments made to him." *Id* at 4a-5a. (quotation marks omitted).

5. Grant obtained the audit letters and filed this qui tam action based on them. Zorn argued that this action was precluded by the FCA's public disclosure bar, which directs a court to "dismiss an action or claim" brought by a private relator "if substantially the same allegations or transactions as alleged in the action or claim were" previously "disclosed" in a variety of ways, including via an "audit." 31 U.S.C. § 3730(e).

6. As this Court has explained, the FCA's public disclosure bar is designed to prevent "parasitic lawsuits," in which qui tam relators sue based on previously disclosed information for which the relator was not the original source. *Graham Cnty. Soil & Water Conservation Dist.* v. *U.S. ex rel. Wilson*, 559 U.S. 280, 295 (2010). The bar is "wide-reaching," *Schindler Elevator Corp.* v. *U.S. ex rel. Kirk*, 563 U.S. 401, 408

(2011), and applies if the disclosure could "set government investigators on the trail of fraud," *U.S. ex rel. Springfield Terminal Ry. Co.* v. *Quinn*, 14 F.3d 645, 655 (D.C. Cir. 1994).

7. In this case, the District Court held that the FCA's public disclosure bar was inapplicable because the government's audit did not state that Zorn had engaged in "*intentional* fraudulent misrepresentations sufficient to disclose his scienter." D. Ct. Dkt. 139 at 43 (quotation marks omitted, emphasis original). After a bench trial, the District Court then found "that the defendants had overbilled on initial patient visits." App. 9a. The court concluded that defendants submitted 1,050 false claims and caused "actual damages to the government of $86,332." *Id*. After trebling damages as required by the FCA, the court calculated statutory penalties of an astonishing $7,699,525. *Id*. at 10a.

8. On appeal, the Eighth Circuit agreed with the District Court that the public disclosure bar did not apply because the letters from the government's contractor stated that Zorn had been repeatedly warned and made repeated *errors*, but the letters did not accuse Zorn of *intentionally* submitting incorrect claims. *Id*. at 15a. According to the panel, because the letters had "offered to 'educate' Zorn's office on proper billing practices," "an uninitiated reader * * * would infer that the defendants had acted without the requisite scienter."

9. The Eighth Circuit separately held that the multi-million-dollar judgment in this case violated the Excessive Fines Clause. *Id*. at 29a. As the Eighth Circuit explained, the defendants in this case—Dr. Zorn and two closely-held

corporations—"caused a relatively small amount ($86,332) of only economic loss and did not endanger the health or safety of others." *Id*. at 32a. Because the Constitution does not permit "the imposition of a punitive sanction twenty-six times the amount of treble damages and seventy-eight times the amount of actual damages awarded," the Eighth Circuit vacated the judgment and directed the District Court to determine a constitutionally appropriate penalty on remand. *Id*. at 31a.

10. The United States had declined to intervene in the District Court and in the appeal before the Eighth Circuit panel. But after the panel issued its decision, the United States intervened in the Eighth Circuit and sought rehearing *en banc* in light of the panel's constitutional holding. Respondent Grant also sought rehearing *en banc*. Applicants opposed reconsideration of the Eighth Circuit Excessive Fines Clause holding, but argued that if the Eighth Circuit did rehear the case *en banc*, the Eighth Circuit should first review the panel's erroneous decision on the public disclosure bar.

11. The Eighth Circuit denied rehearing. Judges Erickson, Stras, and Kobes voted to rehear the case *en banc*.

12. The Eighth Circuit's legal holding regarding the public disclosure bar is wrong. The Eighth Circuit effectively requires a government audit to accuse a defendant of fraud to trigger the public disclosure bar, and as a result dramatically underenforces the public disclosure bar. The decision also creates a circuit split that warrants this Court's review.

13. The qui tam complaint in this case was precisely the kind of parasitic action that the FCA's public disclosure bar was designed to prevent. The CMS contractor's audits involved "substantially the same"—indeed *the very same*—"transactions as alleged in the action." 31 U.S.C. § 3730(e). These letters were more than enough to "set government investigators on the trail of fraud," and therefore triggered the public disclosure bar. *U.S. ex rel. Springfield Terminal Ry. Co.*, 14 F.3d at 655. The letters also easily gave rise to the inference of scienter as defined by the FCA. The FCA was violated if Zorn acted "in reckless disregard of the truth or falsity of the information" submitted to the government. 31 U.S.C. § 3729(b)(1)(A)(iii). In this case, Zorn repeatedly submitted multiple miscoded bills, even after being warned by the government that his conduct was improper. At a minimum, that conduct gave rise to an inference that Zorn acted with reckless disregard for the truth or falsity of the claims he submitted. *See U.S. ex rel. Schutte* v. *SuperValu Inc.*, 598 U.S. 739, 751 (2023) (explaining that reckless disregard "captures defendants who are conscious of a substantial and unjustifiable risk that their claims are false, but submit the claims anyway.").

14. But the Eighth Circuit concluded that "an uninitiated reader of the" letters "would infer that the defendants had acted without the requisite scienter" because the Government's contractor did not formally accuse Zorn of intentional fraud and instead offered "to 'educate' Zorn's office on proper billing practices." App. 14a-15a. That holding effectively requires an audit to expressly accuse a defendant of fraud to trigger the public disclosure bar.

15. The Eighth Circuit's approach to the public disclosure bar is in deep tension with the law in other circuits. As Judge Sutton has explained, "the disclosure is not required to use the word 'fraud' or provide a specific allegation of fraud." *U.S. ex rel. Advocs. for Basic Legal Equal., Inc.* v. *U.S. Bank, N.A.*, 816 F.3d 428, 432 (6th Cir. 2016) (quotation marks omitted). The disclosure need only provide "notice of the possibility of fraud." *Id*. at 433 (same); *see also, e.g.*, *United States ex rel. Reed v. KeyPoint Gov't Sols.*, 923 F.3d 729, 748 (10th Cir. 2019) ("[D]irect allegations of fraud were unnecessary to put the government on the trail."); *United States ex rel. Solis* v. *Millennium Pharms., Inc.*, 885 F.3d 623, 627 (9th Cir. 2018) ("The absence of any explicit allegation of wrongdoing in the prior public disclosure is simply of no moment so long as the material transactions giving rise to the defendant's allegedly unlawful schemes were publicly disclosed." (cleaned up)); *United States ex rel Solomon* v. *Lockheed Martin Corp.*, 878 F.3d 139, 145 (5th Cir. 2017) ("The public disclosures need not expressly allege fraud. The question is whether the relator *could have* synthesized an inference of fraud from the public disclosures."); *U.S. ex rel. Osheroff* v. *Humana Inc.*, 776 F.3d 805, 814 (11th Cir. 2015) (explaining that public disclosure bar "requires only disclosures of 'allegations *or transactions*,' suggesting that allegations of wrongdoing are not required"). In sharp contrast, the Eighth Circuit placed outsized emphasis on the precise label the government audit had assigned to the defendants' conduct, effectively requiring an audit to literally accuse a defendant of fraud to trigger the public disclosure bar.

16. Counsel for Applicants recently has been and will be occupied with briefing deadlines and oral argument in a variety of matters. These include: Oral argument in *United States ex rel. O'Neill* v. *PST Services LLC*, No. 23-15973 (9th Cir.), on December 5, 2024; a reply brief in *Alliance for Hippocratic Medicine* v. *FDA*, No. 2:22-cv-00223 (N.D. Tex), due December 6, 2024; an opening brief in *Hetsler* v. *Ford Motor Company*, No. 5D2024-2368 (Fla. 5th Dist. Ct. App.), due on December 26, 2024; an *amicus* brief in *Cunningham* v. *Cornell University*, No. 23-1007 (U.S.), due on January 3, 2025; a reply brief in *Epic Games, Inc.* v. *Google LLC*, No. 24-6256 (9th Cir.), due on January 17, 2025; and oral argument before this Court in *Barnes* v. *Felix*, No. 23-1239 (U.S.), on January 22, 2025. Applicants request this extension of time to permit counsel to research the relevant legal and factual issues and to prepare a petition that fully addresses the important questions raised by the proceedings below.

17. For these reasons, Applicants respectfully request that an order be entered extending the time to file a petition for certiorari to and including February 6, 2024.

Respectfully Submitted,

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