**Nos. 24-549 and 24-845**

# In the Supreme Court of the United States

STEPHEN B. GRANT, ON BEHALF OF THE UNITED STATES AND THE STATE OF IOWA, PETITIONER

*v.*

STEVEN ZORN, ET AL.

STEVEN ZORN, ET AL., PETITIONERS

*v.*

STEPHEN B. GRANT, ON BEHALF OF THE UNITED STATES AND THE STATE OF IOWA, ET AL.

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

D. JOHN SAUER
*Solicitor General*
*Counsel of Record*
YAAKOV M. ROTH
*Acting Assistant Attorney General*
MICHAEL S. RAAB
CHARLES W. SCARBOROUGH
DANIEL WINIK
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

## QUESTION PRESENTED

This brief addresses the first question presented in the petition for a writ of certiorari in No. 24-549:

Whether a statutory civil penalty under the False Claims Act, 31 U.S.C. 3729 *et seq.*, must be limited to a single-digit multiplier of the actual damages under the Eighth Amendment, in a non-intervened qui tam action.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

Constitution, statutes, and regulations: Page

# In the Supreme Court of the United States

No. 24-549

STEPHEN B. GRANT, ON BEHALF OF THE UNITED STATES AND THE STATE OF IOWA, PETITIONER

*v.*

STEVEN ZORN, ET AL.

No. 24-845

STEVEN ZORN, ET AL., PETITIONERS

*v.*

STEPHEN B. GRANT, ON BEHALF OF THE UNITED STATES AND THE STATE OF IOWA, ET AL.

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a[1]) is reported at 107 F.4th 782. The order of the district court announcing its findings of fact and conclusions of law (Pet. App. 40a-151a) is unreported.

[1] All references to "Pet. App." are to the appendix to the petition for a writ of certiorari in No. 24-549.

## JURISDICTION

The judgment of the court of appeals was entered on July 8, 2024. Petitions for rehearing were denied on October 9, 2024 (Pet. App. 152a-154a). The petition for a writ of certiorari in No. 24-549 was filed on November 13, 2024. On December 18, 2024, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including February 6, 2025, and the petition in No. 24-845 was filed on February 5, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The False Claims Act (FCA or Act), 31 U.S.C. 3729 *et seq.*, imposes civil liability for a variety of deceptive practices involving government funds and property. Among other things, the Act imposes liability on 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).

A person who violates the FCA "is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 * * * , plus 3 times the amount of damages which the Government sustains because of the act of that person." 31 U.S.C. 3729(a)(1); see 28 U.S.C. 2461 note. For violations occurring on or after September 29, 1999, and on or before November 2, 2015, the adjusted minimum civil penalty is $5500 per false claim. 28 C.F.R. 85.3(a)(9). For civil penalties assessed after May 9, 2022, and on or before January 30, 2023, for violations occurring after November 2, 2015, the adjusted minimum civil penalty is $12,537 per false claim. 28 C.F.R. 85.5(b) & Tbl.1.

"An FCA action may be commenced in one of two ways." *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 769 (2000). "First, the Government itself may bring a civil action against the alleged false claimant." *Ibid.* (citing 31 U.S.C. 3730(a)). Second, "a private person (the relator) may bring a *qui tam* civil action 'for the person and for the United States Government' against the alleged false claimant, 'in the name of the Government.'" *Ibid.* (quoting 31 U.S.C. 3730(b)(1)).

When a relator brings a qui tam suit, the government "may elect to intervene and proceed with the action" during the seal period—an initial 60-day period (which the court may extend "for good cause shown") while the relator's complaint remains under seal. 31 U.S.C. 3730(b)(2) and (3). If the government elects to intervene, "the action shall be conducted by the Government." 31 U.S.C. 3730(b)(4)(A). If the government declines to intervene, the relator "shall have the right to conduct the action," 31 U.S.C. 3730(b)(4)(B); but the government may "intervene at a later date upon a showing of good cause," 31 U.S.C. 3730(c)(3), and may exercise control over the suit through various other mechanisms, see, *e.g.*, 31 U.S.C. 3730(c)(2). The relator receives a share of any monetary award, including civil penalties, that is recovered through the litigation; the government receives the rest of the award. 31 U.S.C. 3730(d).

2. In 2018, Stephen Grant (the relator) filed a qui tam action against Steven Zorn, Iowa Sleep Disorders Center, P.C., and Iowa CPAP, L.L.C. (collectively, the defendants), alleging that the defendants had knowingly overbilled Medicaid, Medicare, and Tricare for sleep-medicine services. Compl. ¶ 1. The relator alleged violations of both the FCA and the Iowa False Claims Act, Iowa Code § 685.1 *et seq.*, which mirrors the FCA. Compl.

¶¶ 58-67; see Third Am. Compl. ¶¶ 81-90. The United States declined to "intervene and proceed with the action" under the FCA. 31 U.S.C. 3730(b)(2); see D. Ct. Doc. 15, at 1-2 (Sept. 26, 2019). The State of Iowa likewise declined to intervene under the Iowa False Claims Act. D. Ct. Doc. 15, at 1.

After a bench trial, the district court found that the defendants had submitted 1050 false claims, resulting in damages to the government of $86,332. Pet. App. 124a-125a. The court trebled the damages to $258,996. *Id.* at 125a. It then calculated a statutory minimum civil-penalty award of $7,699,525. *Id.* at 126a-127a. The court arrived at that amount by first dividing the 1050 false claims into two groups: 725 false claims that had been submitted on or before November 2, 2015, and 325 false claims that had been submitted after that date. *Id.* at 126a. The court then multiplied those figures by what it believed to be "lowest end" of the statutory civil-penalty range applicable to each group—$5000 per claim for the first group, and $12,537 per claim for the second group. *Ibid.*

The district court concluded, however, that a civil penalty of $7,699,525 would violate the Excessive Fines Clause of the Eighth Amendment. Pet. App. 127a-133a. The court agreed with the Eleventh Circuit's decision in *Yates* v. *Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288 (2021), that the Excessive Fines Clause applies to civil penalties in an FCA qui tam action in which the government has declined to intervene. Pet. App. 128a-129a. To avoid what it perceived to be a constitutional violation, the district court reduced the civil penalty in this case to $6,474,900. *Id.* at 132a. The court stated that a civil penalty of $7,699,525 would be 29.7 times the amount of trebled damages, which the court equated with "actual damages." *Ibid.* The court took the view

that a multiplier of only "25 times the actual damages" was "appropriate," so it reduced the civil penalty to 25 times $258,996. *Ibid.*

The district court requested further briefing on how the monetary award should be distributed among the relator, the United States, and Iowa. Pet. App. 149a. In a joint submission, the United States and Iowa took "no position" on the relator's share, "other than to note that [it] should be within the statutorily mandated range of 25-30 percent" that applies to qui tam suits in which the government has declined to intervene. D. Ct. Doc. 141, at 1 (Oct. 24, 2022) (citing 31 U.S.C. 3730(d)(2)). As for the rest of the monetary award, the United States and Iowa asked that it "be paid to the United States," which would "then redistribute any amounts owing to the State of Iowa." *Id.* at 2. The court entered final judgment awarding the relator a 30% share and directing that the rest of the monetary award be paid to the United States. D. Ct. Doc. 144 (Nov. 9, 2022).

3. The relator and the defendants both appealed the district court's judgment. See Pet. App. 1a. The court of appeals affirmed in part, vacated in part, and remanded for further proceedings. *Id.* at 1a-39a.

As an initial matter, the court of appeals determined that, for the first group of false claims identified by the district court, the adjusted minimum civil penalty was $5500 per claim—not $5000, as the district court had believed. Pet. App. 20a-21a. The court of appeals then considered the constitutionality of the district court's $6,474,900 civil-penalty award. *Id.* at 23a-29a. The court of appeals held that "the Excessive Fines Clause applies in non-intervened *qui tam* actions." *Id.* at 23a. The court further held that "[a] punitive sanction under the FCA is 'excessive' when it is 'grossly disproportional to the

gravity of a defendant's offense.'" *Ibid.* (quoting *United States* v. *Bajakajian*, 524 U.S. 321, 334 (1998)).

The court of appeals then identified what it believed to be "two errors in the district court's analysis." Pet. App. 24a. First, the court of appeals held that "the district court should not have used the entire treble damages amount of $258,996 as the representative amount of 'the gravity of the defendants' offense.'" *Ibid.* (brackets and citation omitted). The court of appeals stated that the district court should have used only the "compensatory" portion of the treble damages award. *Ibid.* While recognizing that "treble damages have a compensatory aspect 'beyond the amount of the fraud,'" *ibid.* (citation omitted), the court of appeals "decline[d] to decide the exact amount of compensatory damages" and instead "le[ft] to the district court the task of determining that amount in the first instance," *id.* at 25a.

Second, the court of appeals held that "the district court should have limited the punitive sanction to a single-digit multiplier of compensatory damages." Pet. App. 27a. The court of appeals took the view that "cases analyzing punitive damages under the Due Process Clause are instructive in analyzing punitive sanctions under the Excessive Fines Clause." *Id.* at 23a. In light of those due-process decisions, the court of appeals concluded that the defendants' conduct was not sufficiently "reprehensible" to justify the district court's application of a double-digit multiplier. *Id.* at 26a. The court of appeals therefore vacated the $6,474,900 civil-penalty award and remanded for further proceedings. *Id.* at 29a. The court instructed the district court on remand to "apply a baseline civil penalty of $5,500 for those violations that occurred on or before November 2, 2015"; to "determine the amount of treble damages that is compensatory and

the amount that is punitive"; and to "ensure the punitive sanction falls within an appropriate single-digit multiplier of the amount of compensatory damages." *Ibid.*

Then-Chief Judge Smith concurred in part and concurred in the judgment. Pet. App. 30a-39a. He viewed the majority's reliance on Due Process Clause precedents as misplaced, *id.* at 36a, and he concluded that the Excessive Fines Clause did not "require[] a downward adjustment" of the civil penalty "to a single-digit ratio," *id.* at 30a. Chief Judge Smith would have remanded with instructions to "increase the civil penalties award to the minimum amount that the FCA prescribes." *Ibid.*

4. After the court of appeals issued its decision, the United States moved to intervene under 28 U.S.C. 2403(a) "for the limited purpose of defending the constitutionality of the civil-penalty provision of the False Claims Act." Gov't C.A. Mot. to Intervene 1 (Aug. 9, 2024). The court of appeals granted the motion. C.A. Order (Aug. 15, 2024). The government then petitioned for rehearing en banc, arguing that the court had erred in relying on due-process precedents to require a civil-penalty award below the statutory minimum prescribed by Congress. Gov't C.A. Pet. for Reh'g 5-14 (Aug. 16, 2024). The relator also petitioned for rehearing en banc. The court denied rehearing over the noted dissents of Judges Erickson, Stras, and Kobes. Pet. App. 152a-154a.

## ARGUMENT

After the court of appeals panel issued its decision in this case, the United States intervened under 28 U.S.C. 2403(a) to defend the constitutionality of the FCA's civil-penalty provision, 31 U.S.C. 3729(a)(1). Accordingly, the United States has participated as a party only to address the question whether the Act's civil-penalty provision, as applied in this case, violates the Excessive

Fines Clause of the Eighth Amendment. The government therefore takes no position on the proper disposition of either the second question presented in the petition for a writ of certiorari in No. 24-549, or the question presented in the petition for a writ of certiorari in No. 24-845.

This brief addresses only the first question presented in the petition for a writ of certiorari in No. 24-549: "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." 24-549 Pet. i.[2] Although the court of appeals erred in interpreting the Excessive Fines Clause to require that the civil penalty in this case fall within a single-digit multiplier of compensatory damages, this Court's review is not warranted at this time. When the court of appeals panel issued its decision, it did not have the benefit of the government's argument that the proper analysis under the Excessive Fines Clause differs from that under the Due Process Clause, and this Court typically refrains from addressing new issues in the first instance. The question presented also implicates a threshold issue about the applicability of the Excessive Fines Clause to qui tam actions, and the need to decide that

---

[2] The first question presented in No. 24-549 characterizes the court of appeals' decision as requiring the civil penalty in this case to be "limited to a single-digit multiplier of the actual damages." 24-549 Pet. i. But the court of appeals required that the civil penalty be limited to a single-digit multiplier of the "compensatory damages," not the actual damages. Pet. App. 29a. The court of appeals understood the amount of "actual damages" to be $86,332, *id.* at 24a, but it remanded for the district court to determine the amount of "compensatory damages," *id.* at 29a, which the court of appeals viewed as encompassing some (as-yet-undetermined) amount beyond $86,332, see *id.* at 24a-25a.

issue could complicate this Court's review. In addition, this case arises in an interlocutory posture, and the district court has not yet determined on remand (pursuant to the court of appeals' instructions) the amount of "compensatory" damages under the circumstances of this case. Until that determination is made, and potentially reviewed by the Eighth Circuit in a second appeal, the practical effect of the court of appeals' single-digit-multiplier approach will be unclear. Accordingly, the petition for a writ of certiorari in No. 24-549 should be denied with respect to the first question presented.

1. The court of appeals interpreted the Excessive Fines Clause to require that the FCA civil penalty in this case be limited to "a single-digit multiplier of compensatory damages." Pet. App. 27a. That holding was erroneous.

The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII. A monetary fine "violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *United States* v. *Bajakajian*, 524 U.S. 321, 334 (1998). The "standard of gross disproportionality" is the same standard "articulated in [this Court's] Cruel and Unusual Punishments Clause precedents." *Id.* at 336.

The court of appeals' decision in this case cannot be squared with that standard. That standard reflects two principles. "The first, which [this Court] ha[s] emphasized in [its] cases interpreting the Cruel and Unusual Punishments Clause, is that judgments about the appropriate punishment for an offense belong in the first instance to the legislature." *Bajakajian*, 524 U.S. at 336. "The second is that any judicial determination regard-

ing the gravity of a particular criminal offense will be inherently imprecise." *Ibid.* "Both of these principles counsel against requiring strict proportionality between the amount of a punitive [sanction] and the gravity of a criminal offense." *Ibid.*

In requiring that the civil penalty in this case be limited to "a single-digit multiplier of compensatory damages," Pet. App. 27a, the court of appeals did not rely on this Court's Eighth Amendment precedents. Instead, the court of appeals relied on this Court's decisions applying the Fourteenth Amendment's Due Process Clause to state-law punitive-damages awards. *Id.* at 23a-24a, 26a-27a. Those decisions, however, reflect considerations that are not present here.

First, this Court's Due Process Clause precedents reflect a concern about fair notice. Due process requires that "a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 574 (1996); see *State Farm Mut. Aut. Ins. Co.* v. *Campbell*, 538 U.S. 408, 417 (2003). But where, as in the FCA, Congress has specified the penalty for violating a given prohibition, the statute itself gives a potential violator fair notice of the penalty that may be imposed. See 31 U.S.C. 3729(a)(1).

If the defendants in this case "wanted to know the severity of penalties imposed on persons who knowingly submit false claims," they "merely needed to consult the statute." Pet. App. 36a (Smith, C.J., concurring in part and concurring in the judgment). That "fair notice diminishes any concern about the civil penalties award being excessive." *Ibid.* To be sure, the FCA prescribes a per-claim penalty *range* rather than a precise per-claim penalty *amount*. In this case, however, the courts be-

low held that even the statutory minimum civil penalty was constitutionally excessive. The defendants had clear notice that the knowing submission of false claims would subject them to penalties of at least that amount.

Second, this Court's due-process precedents reflect a concern that juries may be inflamed by "'passion or prejudice'" to impose "arbitrary" punitive-damages awards. *State Farm*, 538 U.S. at 417-418 (citation omitted). The fact that "[j]ury instructions typically leave the jury with wide discretion in choosing amounts" exacerbates that concern and creates the potential that different defendants within the same jurisdiction may receive significantly different sanctions for similarly culpable conduct. *Id.* at 417 (citation omitted). Under the FCA, by contrast, Congress has specified the permissible civil-penalty range, thereby minimizing disparities among defendants. See 31 U.S.C. 3729(a)(1). Unlike a jury's calculation of punitive damages, Congress's judgments about the appropriate penalty for a statutory violation are entitled to "substantial deference" in light of "the broad authority that legislatures necessarily possess in determining the types and limits of punishments." *Solem* v. *Helm*, 463 U.S. 277, 290 (1983); see *Bajakajian*, 524 U.S. at 336. And as noted above, the courts below declined on constitutional grounds to impose even the minimum civil penalty that Congress had mandated.

The court of appeals' reliance on this Court's due-process decisions therefore was misplaced. "Those cases concerned the Due Process Clause; this case concerns the Excessive Fines Clause." Pet. App. 36a (Smith, C.J., concurring in part and concurring in the judgment). This Court's punitive-damages decisions, moreover, have found individual jury awards to be constitutionally excessive, but they have not rejected legislative judg-

ments regarding the minimum awards that must be imposed in specified circumstances. And even if the Court concluded that the FCA's minimum civil-penalty award might be constitutionally excessive in some cases, there would be no sound basis for treating "a single-digit multiplier of compensatory damages," *id.* at 27a, as the maximum penalty the Eighth Amendment allows.

2. Although the court of appeals erred in imposing the single-digit-multiplier limitation, further review is unwarranted, for at least three reasons.

First, the United States did not address the Excessive Fines Clause issue until very late in the case. Although the district court asked for the government's views on how the monetary award should be distributed, see p. 5, *supra*, neither court below formally notified the government that the constitutionality of an Act of Congress had been "drawn in question," 28 U.S.C. 2403(a), and the government did not address the Excessive Fines Clause issue until after the court of appeals panel had ruled. That court therefore did not have the benefit of the government's argument that the proper analysis under the Excessive Fines Clause differs from that under the Due Process Clause. Instead, the court noted the parties' agreement that this Court's due-process precedents established an appropriate framework for identifying constitutional limits on FCA civil-penalty awards. See Pet. App. 23a ("The plaintiffs assert, and the defendants accept, that cases analyzing punitive damages under the Due Process Clause are instructive in analyzing punitive sanctions under the Excessive Fines Clause."). Because this Court is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), the Court may wish to await a vehicle in which the ap-

plicability of its due-process jurisprudence was directly addressed below.

Second, this Court has previously reserved the question whether the Excessive Fines Clause applies in qui tam suits. See *Austin* v. *United States*, 509 U.S. 602, 607 n.3 (1993); *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.21 (1989). That issue is not the subject of any circuit split, and the government has not disputed that the Excessive Fines Clause applies to civil penalties in an FCA qui tam suit in which the government has declined to intervene. It would make little sense, however, for this Court to review the court of appeals' Excessive Fines Clause analysis without addressing whether that Clause applies in the first place. And the need to decide that "threshold" issue (24-549 Pet. 14) could complicate this Court's review of the decision below. See, *e.g.*, *Arizona* v. *City & County of San Francisco*, 596 U.S. 763, 766, (2022) (Roberts, C.J., concurring) (concurring in the dismissal of a writ of certiorari as improvidently granted because other issues "could stand in the way of * * * reaching the question presented" or, "at the very least, complicate [this Court's] resolution of that question").

Third, this case is in an interlocutory posture because the court of appeals vacated the civil-penalty award and remanded for the district court to redetermine the appropriate amount. Pet. App. 29a. The interlocutory posture of a case ordinarily "alone furnishe[s] sufficient ground for the denial" of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (observing that a case remanded to the district court "is not yet ripe for review by this Court");

*Abbott* v. *Veasey*, 580 U.S. 1104, 1105 (2017) (statement of Roberts, C.J., respecting the denial of certiorari).

Here, the court of appeals has directed the district court on remand to determine "the amount of treble damages that is compensatory and the amount that is punitive." Pet. App. 29a; see *id.* at 24a-26a. Under the approach adopted by the court of appeals, the amount of compensatory damages will serve as the measure of the gravity of the defendants' conduct, *id.* at 24a, and the district court will then apply an "appropriate single-digit multiplier" to calculate a new civil-penalty award, *id.* at 29a. Because neither of the courts below has applied that approach to determine the civil penalty in this case, the full practical consequences of the court of appeals' decision are not yet clear.

## CONCLUSION

With respect to the first question presented in No. 24-549, the petition for a writ of certiorari should be denied.

Respectfully submitted.

D. JOHN SAUER
*Solicitor General*
YAAKOV M. ROTH
*Acting Assistant Attorney General*
MICHAEL S. RAAB
CHARLES W. SCARBOROUGH
DANIEL WINIK
*Attorneys*

APRIL 2025