No. 24-____

IN THE
Supreme Court of the United States

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

v.

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

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The public disclosure bar of the False Claims Act (FCA), 31 U.S.C. § 3729 et seq., forecloses a qui tam FCA action or claim if "substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed." 31 U.S.C. § 3730(e)(4)(A). Ten circuits—the First, Second, Third, Fourth, Fifth, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits—apply the statute as written and hold that the public disclosure bar is triggered if the disclosure identifies substantially the same transactions as the ones at issue in the FCA suit. But two circuits—the Seventh and Eighth Circuits—require the disclosure to additionally contain an express allegation of fraud. The question presented is:

Whether the public disclosure bar requires an express allegation of fraud.

PARTIES TO THE PROCEEDING

Petitioners Dr. Steven Zorn; Iowa Sleep Disorders Center, P.C.; and Iowa CPAP, L.L.C., were the defendants-appellants/cross-appellees below.

Respondent Dr. Stephen Grant was the plaintiff-appellee/cross-appellant below, on behalf of the United States and the State of Iowa.

Respondent United States intervened on appeal in the Eighth Circuit for the purposes of petitioning for panel rehearing and rehearing *en banc*.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners disclose the following: Iowa Sleep Disorders Center, P.C. and Iowa CPAP, L.L.C. do not have a parent corporation, and no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED CASES

All proceedings directly related to this Petition include:

- *United States* v. *Zorn*, No. 24A627 (U.S.)
- *Grant* v. *Zorn*, No. 24-549 (U.S.)
- *Grant ex rel. United States* v. *Zorn*, Nos. 22-3481, 22-3591 (8th Cir.)
- *Grant ex rel. United States* v. *Zorn*, No. 4:18-cv-00095 (S.D. Iowa)

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The Eighth Circuit's decision (Pet. App. 1a-41a) is reported at 107 F.4th 782 (8th Cir. 2024). The District Court's decision is unreported and reproduced at Pet. App. 42a-155a.

JURISDICTION

The Eighth Circuit entered judgment on July 5, 2024, and denied timely petitions for rehearing on October 9, 2024. On December 18, 2024, this Court extended Petitioners' deadline to petition for a writ of certiorari up to and including February 6, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

This Petition presents an important question that has divided twelve circuits regarding the application of the False Claims Act's (FCA) public disclosure bar. Under the FCA, qui tam relators may bring civil claims on behalf of the United States and recover a share of the award. This statutory scheme encourages genuine whistleblowers "to root out fraud" which might otherwise go undetected. *Graham Cnty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 295 (2010). But left unchecked, the FCA's qui tam provisions incentivize opportunistic plaintiffs to bring "parasitic lawsuits" based on stale information that does not further the government's interest in combatting fraud and poses severe costs to industry. *Id.*

The public disclosure bar is Congress's answer for how to strike the right balance between encouraging meritorious suits by "whistle-blowing insiders with genuinely valuable information" and preventing copycat lawsuits. *Id.* at 294 (quotation omitted). Under

the public disclosure bar, the "court shall dismiss" a qui tam suit "if substantially the same allegations or transactions" "were publicly disclosed" through specific channels, including in a government "report," "audit, or investigation." 31 U.S.C. § 3730(e)(4)(A).

This lawsuit should have been dismissed under the public disclosure bar. Petitioner Dr. Steven Zorn is a 78-year-old small-town doctor who practices sleep medicine in West Des Moines and Ankeny, Iowa. In 2016, after a government audit, Zorn received a letter accusing him of improperly billing Medicare for his services. In 2018, the government sent Zorn another letter regarding a second audit. That letter underscored that Zorn had been warned two years earlier and detailed continued billing problems. The government did not take other action against Zorn.

Another doctor who worked with Zorn and co-owned their practice—Respondent Dr. Stephen Grant—was given copies of the letters by the office manager and filed this qui tam suit based on them. Zorn moved to enforce the public disclosure bar because the government audits had been disseminated and already identified the precise fraudulent transactions. The relator added nothing to the government's audits, and in fact *relied* on them. This is the kind of copycat lawsuit Congress intended to prevent.

But the District Court and the Eighth Circuit both refused to dismiss Respondent's parasitic FCA claims. The Eighth Circuit held that, to trigger the public disclosure bar, the government's audit needed to "accuse expressly the defendants of committing fraud." Pet. App. 12a. Because the letters "revealed only the possibility of inaccurate billing" on Zorn's part, and offered to provide Zorn "remedial education," a "reader

would not reasonably infer" that Zorn had the necessary scienter to commit fraud.

Almost every other federal court would have enforced the public disclosure bar in this context. The First, Second, Third, Fourth, Fifth, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits do not require an audit to expressly accuse the defendant of fraud.[1] The overwhelming majority of courts require only that an audit detail the false facts that the defendant allegedly misrepresented to the government and the true state of facts. By contrast, in the Seventh and Eighth Circuits, the audit must effectively accuse the defendant of intentional fraud.[2]

The Eighth Circuit's approach to the public disclosure bar is wrong. This Court has explained that the public disclosure bar's test is "wide-reaching." *Schindler Elevator Corp.* v. *United States ex rel. Kirk*,

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[1] *See United States ex rel. Estate of Cunningham* v. *Millennium Labs. of Cal., Inc.*, 713 F.3d 662, 671-672 (1st Cir. 2013); *United States ex rel. Kirk* v. *Schindler Elevator Corp.*, 437 F. App'x 13, 17 (2d Cir. 2011); *United States ex rel. Zizic* v. *Q2Administrators, LLC*, 728 F.3d 228, 237 (3d Cir. 2013); *United States ex rel. Taylor* v. *Boyko*, 39 F.4th 177, 189 (4th Cir. 2022); *United States ex rel. Solomon* v. *Lockheed Martin Corp.*, 878 F.3d 139, 145 (5th Cir. 2017); *U.S. ex rel. Advocs. for Basic Legal Equal., Inc.* v. *U.S. Bank, N.A.*, 816 F.3d 428, 432-433 (6th Cir. 2016) (Sutton, J.); *United States ex rel. Solis* v. *Millennium Pharms., Inc.*, 885 F.3d 623, 627 (9th Cir. 2018); *United States ex rel. Reed* v. *Keypoint Gov't Sols.*, 923 F.3d 729, 748 (10th Cir. 2019); *United States ex rel. Osheroff* v. *Humana Inc.*, 776 F.3d 805, 814 (11th Cir. 2015); *United States ex rel. Oliver* v. *Philip Morris USA Inc.*, 826 F.3d 466, 473-474 (D.C. Cir. 2016).

[2] *See United States ex rel. Absher* v. *Momence Meadows Nursing Center, Inc.*, 764 F.3d 699, 708-709 (7th Cir. 2014); Pet. App. 1a-41a (decision below).

563 U.S. 401, 408 (2011). It applies whenever the prior disclosure reveals "substantially the same allegations *or transactions*." 31 U.S.C. § 3730(e)(4)(A) (emphasis added). But the Eighth Circuit requires the disclosure to expressly make "allegations" of fraud. This reads the word "transactions" out of the statute.

The question presented is extremely important and merits this Court's review. This past year, plaintiffs' lawyers filed 979 qui tam FCA lawsuits, and settlements and judgments under the statute exceeded $2.9 billion.[3] When the FCA's public disclosure bar applies should not depend on the circuit in which a case is filed. Moreover, the relator has separately petitioned the Court to review a different aspect of the Eighth Circuit's judgment. *See Grant* v. *Zorn*, No. 24-549 (U.S.). Relator's petition challenges the Eighth Circuit's independent holding that the *$8 million* judgment—based on an overpayment by Medicare of roughly *$86,000*—was unconstitutionally excessive. After the Eighth Circuit issued its decision below, the United States also intervened to seek *en banc* review and has indicated it may file a petition in this Court. *See United States* v. *Zorn*, No. 24A627 (U.S.). Should the Court grant either a petition from the relator or the United States on the constitutional question, it should grant this Petition as well. A ruling for Petitioner on the question presented in this Petition would necessitate vacating the judgment and obviate any need for this Court to address the lower court's

[3] Press Release, *False Claims Act Settlements and Judgments Exceed $2.9B in Fiscal Year 2024*, Dep't of Justice (Jan. 15, 2025), https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-29b-fiscal-year-2024.

constitutional holding. *See Ashwander* v. *Tennessee Valley Auth.,* 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

STATEMENT OF THE CASE

A. Legal Background

1. The False Claims Act (FCA) imposes civil liability on "any person who" "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" by the government. 31 U.S.C. § 3729(a)(1)(A). The statutory definition of "knowingly" includes someone who "acts in reckless disregard of the truth or falsity of the information." *Id.* § 3729(b)(1)(A)(iii).

If a defendant is found liable under the FCA, the statute specifies damages of "3 times the amount of damages which the Government" sustained. In addition, the statute imposes a mandatory penalty of between $13,946 and $27,894 per claim. *See* 28 C.F.R. § 85.5 (Table 1). In the Medicare and Medicaid context, relators often argue that the district court must impose a separate statutory penalty for each individual claim submitted to the government. As a result, district courts can impose steep statutory penalties, even where the government experienced little or no tangible harm.

Under the FCA's qui tam provisions, a private person may bring an action as a "relator" on behalf of the United States. 31 U.S.C. § 3730(b)(1). The relator receives up to 30% of the recovery, including any statutory penalties awarded, in addition to attorneys' fees

and costs. *Id.* § 3730(d)(2). Congress recognized that the allure of large FCA judgments could over incentivize plaintiffs' lawyers. The FCA's "public disclosure bar" was Congress's effort "to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits." *Graham Cnty.*, 559 U.S. at 295. Under that provision, a district court must dismiss a qui tam action if "substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed" through a variety of ways, including via an "audit." 31 U.S.C. § 3730(e)(4)(A).

2. In *United States ex rel. Springfield Terminal Railway Co.* v. *Quinn*, 14 F.3d 645 (D.C. Cir. 1994), the D.C. Circuit issued a landmark decision that has long remained a touchstone for courts applying the public disclosure bar.

The D.C. Circuit explained that fraud "requires recognition of two [essential] elements: a misrepresented state of facts *and* a true state of facts." *Id.* at 655. Thus, "if X + Y = Z, Z represents the *allegation* of fraud and X and Y represent its essential elements. In order to disclose the fraudulent *transaction* publicly, the combination of X and Y must be revealed, from which readers or listeners may *infer* Z, *i.e.*, the conclusion that fraud has been committed." *Id.* at 654 (emphasis added). Under this test, the public disclosure must give the government "enough information to investigate the case." *United States ex rel. Doe* v.

Staples, Inc., 773 F.3d 83, 86 (D.C. Cir. 2014) (quotation omitted).

B. Statement of Facts

Petitioner Zorn practices sleep medicine in West Des Moines and Ankeny, Iowa. The other Petitioners are his personal practice and a related medical equipment company.[4]

Dr. Zorn treats Medicare patients, for which he submits bills to the government. Sleep medicine doctors must code the bill to describe the nature of the visit. New patient visits are coded with numbers between 99201 to 99205. Pet. App. 57a. The last digit reflects the visit's complexity, with higher digits indicating greater complexity and a higher payment by Medicare. *Id.*

In September 2016, a Medicare contractor for the Centers for Medicare & Medicaid Services (CMS) audited Zorn's billing and sent his office a letter describing concerns. According to the letter, Zorn had billed new patients with the highest code "100% of the time." *Id*. at 160a. The letter explained that "[m]ore variety would be expected," and it offered "to educate" Zorn's "office" on proper billing. *Id.*

In January 2018, following another audit to identify "fraud, waste, and abuse," the CMS contractor sent Zorn's office a second letter. *Id*. at 171a. This letter explained that the government had previously warned Zorn about incorrectly billing new patient codes at the highest level "100% of the time." *Id*. at 172a. This letter provided "formal notice" regarding

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[4] For simplicity, this brief refers to the three Petitioners in the singular.

Zorn's overbilling and specific "overpayments made to" him. *Id*.

C. Procedural History

1. Respondent Dr. Stephen Grant worked with Zorn and was a partial owner in Zorn's practice. The practice's office manager gave Grant copies of the audit letters. In March 2018, Respondent brought this qui tam action based on the letters and alleged that Zorn had violated the FCA by overbilling for initial patient visits.

Petitioner moved to enforce the public disclosure bar, arguing that the FCA claim was the kind of parasitic lawsuit that Congress intended to foreclose. But the District Court held the public disclosure bar inapplicable because the letters from the contractor did not allege that Petitioner had engaged in "*intentional*" miscoding, while Respondent's complaint did. Pet. App. 97a (emphasis added).

After a bench trial, the District Court found that Petitioner overbilled on initial patient visits causing "actual damages to the government of $86,332." Pet. App. 129a. After trebling the actual damages to $258,996, the court imposed statutory penalties of an astonishing $7,699,525. *Id.* at 131a. Because the District Court used an incorrect statutory minimum for some claims, *see* Pet. App. 21a-22a, the correct statutory penalties should have been even higher—$8,062,025.

The District Court held that this monumental judgment was unconstitutionally excessive and violated the Eighth Amendment. *Id.* at 137a. But it only reduced the statutory penalty to the still extraordinary amount of $6,474,900. *Id.* The District Court

also found that Petitioner had wrongfully retaliated against Respondent Grant for engaging in protected activity under the FCA and awarded backpay and damages for that conduct, none of which is at issue in this Petition. *Id*. at 145a.

2. Petitioner appealed, and Respondent Grant cross-appealed.

The Eighth Circuit explained that the "public disclosure bar aims to 'strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits.' " *Id*. at 11a (quoting *Graham Cnty.*, 559 U.S. at 295). But the Eighth Circuit agreed with the District Court that the public disclosure bar was "inapplicable" in this case on the sole basis that Grant's "complaint did not allege 'substantially the same allegations' contained in the AdvanceMed letters." Pet. App. 12a.

According to the Eighth Circuit, Grant's "complaint alleged that the defendants knowingly submitted false claims to the government," *id*., whereas the government's audits "revealed only the possibility of inaccurate billing" and "failed to suggest" Petitioner "*intentionally*" submitted false bills, *id*. (quoting *United States ex rel. Rabushka* v. *Crane Co.*, 40 F.3d 1509, 1513 (8th Cir. 1994)) (brackets and ellipses omitted). The Eighth Circuit reasoned that an "uninitiated reader of the" government's "letters would infer that the defendants had acted without the requisite scienter." *Id*. "Given the letters' repeated references to" Petitioner's " 'errors' and the accompanying offers for remedial education, an uninitiated reader would not reasonably infer from the letters that" Petitioner "had committed fraud." *Id*. at 13a.

The Eighth Circuit did not analyze the text of the public disclosure bar, which applies when either "*substantially the same* allegations *or transactions*" are disclosed. 31 U.S.C. § 3730(e)(4)(A) (emphasis added). Nor did the Eighth Circuit mention the FCA's scienter requirement, which does not require a defendant to intentionally submit false claims; the statute's definition of "knowingly" includes circumstances in which a defendant acts "in reckless disregard of the truth or falsity of the information" submitted to the government. *Id*. § 3729(b)(1)(A)(iii).

3. The Eighth Circuit separately agreed with Petitioner that the reduced judgment "violates the Excessive Fines Clause." Pet. App. 22a. As the court explained, the "defendants here caused a relatively small amount ($86,332) of only economic loss and did not endanger the health or safety of others." *Id*. at 27a.

The Eighth Circuit recognized that it owed "substantial deference to legislative judgments concerning appropriate sanctions." *Id*. at 29a (quotation marks omitted). But the Court explained it "must be mindful not to give 'undue deference' to legislative judgments about excessiveness," lest the legislature both supply "an answer to the questions of what a fine should be *and* whether it's excessive." *Id*. (quoting *Yates* v. *Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1318, 1323 (11th Cir. 2021) (Newsom, J., concurring)). On the facts of this case, the Eighth Circuit concluded, 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." *Id*. at 27a.

Chief Judge Smith disagreed with the panel's constitutional analysis. Pet. App. 31a-41a (Smith, J., concurring in part and concurring in the judgment).

4. The United States intervened for the purposes of seeking panel rehearing and rehearing *en banc* regarding the panel's Eighth Amendment holding. Respondent Grant also sought rehearing.

Petitioner opposed rehearing but argued that were the Eighth Circuit to rehear the case, the Eighth Circuit should first correct the panel's error regarding the public disclosure bar. As Petitioner explained, reversing the decision on the public disclosure bar would have allowed the Eighth Circuit to avoid needing to opine on the constitutional question.

The Eighth Circuit denied rehearing *en banc*. Judges Erickson, Stras, and Kobes would have granted review.

5. On November 13, 2024, Respondent Grant filed a petition for a writ of certiorari, which asks this Court to review the Eighth Circuit's constitutional holding. *See Grant* v. *Zorn*, No. 24-549 (U.S.). This Court called for a response on December 16, 2024.

The United States has separately filed applications to extend time to file a petition for a writ of certiorari, which this Court granted. *Grant* v. *Zorn*, No. 24A627.

This Petition follows.

REASONS FOR GRANTING THE PETITION

I. THERE IS A DEEP TWELVE-CIRCUIT SPLIT.

The circuits are split 10-2 regarding how to apply the FCA's public disclosure bar. *See* Sup. Ct. R. 10(a). The First, Second, Third, Fourth, Fifth, Sixth, Ninth,

Tenth, Eleventh, and D.C. Circuits do not require an express allegation of fraud to trigger the public disclosure bar. By contrast, the Seventh and Eighth Circuits hold the public disclosure is only triggered where the public disclosure contains an express allegation of fraud.

A. The First, Second, Third, Fourth, Fifth, Sixth, Ninth, Tenth, Eleventh, And D.C. Circuits Do Not Require An Express Allegation Of Fraud.

The majority of circuits do not require an express allegation of fraud to apply the public disclosure bar.

The First Circuit has explained that "the public disclosure bar contains no requirement that a public disclosure use magic words or specifically label disclosed conduct as fraudulent." *United States ex rel. Winkelman* v. *CVS Caremark Corp.*, 827 F.3d 201, 209 (1st Cir. 2016). There need not be "a direct allegation of fraud." *Id*. at 208. Instead, so long as the disclosure reveals both " 'both a misrepresented state of facts and a true state of facts[,] * * * the listener or reader may infer fraud.' " *Id.* at 208 (quotation omitted); *United States ex rel. Ondis* v. *City of Woonsocket*, 587 F.3d 49, 54 (1st Cir. 2009) ("[P]ublic disclosure occurs when the essential elements exposing the particular transaction as fraudulent find their way into the public domain.") (citing *Springfield*, 14 F.3d at 654).

In *United States ex rel. Estate of Cunningham* v. *Millennium Laboratories of California, Inc.*, 713 F.3d 662 (1st Cir. 2013), a relator brought FCA claims against a laboratory, alleging that it encouraged physicians to overbill the government for drug tests and to perform medically unnecessary tests. *Id.* at 664.

The laboratory argued that a number of public disclosures blocked the suit, including emails attached to a complaint in a prior lawsuit between the laboratory and a competitor. *See id.* at 665, 667-669. The emails discussed alleged errors in the laboratory's billing practices, including the incorrect use of billing codes—the exact type of fraud Relator Grant claimed to pursue in this case. *Id.* at 671. The First Circuit explained that even if the emails attached to the prior complaint "did not constitute direct allegations of fraud," they still "compare[d] [the laboratory's] version of the facts associated with its billing practices with the 'true' state of those facts." *Id.* at 671-672. The emails thus did not need to allege that the laboratory committed errors *intentionally* to raise an inference of fraud. Instead, the emails needed to simply identify the error in the billing codes. *See also Ondis*, 587 F.3d at 54-55, 60-61 (applying public disclosure bar where disclosures did not allege intentional misrepresentations).

In the Second Circuit, the public disclosure bar similarly applies where "'either the allegation of fraud or the critical elements of the fraudulent transaction themselves were in the public domain.'" *United States ex rel. Kirk* v. *Schindler Elevator Corp.*, 601 F.3d 94, 103 (2d Cir. 2010) (quoting *Springfield*, 14 F.3d at 654), *rev'd on other grounds*, 563 U.S. 401 (2011). A disclosure can trigger the public disclosure bar without addressing the defendant's "state of mind." *United States ex rel. Kirk* v. *Schindler Elevator Corp.*, 437 F. App'x 13, 17 (2d Cir. 2011). It "is sufficient for the public disclosure bar that the disclosed

transaction creates an inference of impropriety." *Id.* (quotation marks omitted).

In *Schindler*, the FCA relator had alleged that his former employer obtained government contracts while falsely representing that it filed certain government reports required by statute. *Id.* at 15. The company argued that the public disclosure bar applied because its failure to file the reports had been disclosed. *Id.* at 16-17. The Second Circuit held that the fact that the company failed to file the reports was enough to disclose "the essential elements of the alleged fraud." *Id.* at 17-18. Again, no express allegation of intentional fraud was necessary. *See also Monaghan* v. *Henry Phipps Plaza West, Inc.*, 531 F. App'x 127, 130 (2d Cir. 2013) (applying public disclosure bar where disclosures did not allege fraud but rather raised inference that a transaction was fraudulent).

The Third Circuit takes a similar approach. In *United States ex rel. Zizic* v. *Q2Administrators, LLC*, 728 F.3d 228 (3d Cir. 2013), the Third Circuit distinguished between a disclosure of *allegations* of fraud and disclosure of fraudulent *transactions*. *Id.* at 237. In that case, the FCA relator alleged the defendants fraudulently billed the government and never conducted certain Medicare reviews. *Id.* at 231. The district court held that the public disclosure bar applied because the transactions had been identified in prior litigation. *Id.* at 235. On appeal, the relator argued that the prior disclosure had not accused the defendants of performing "*sham*" "Medicare reviews." *Id.* at 237 (emphasis added).

The Third Circuit rejected the relator's argument and explained that an accusation that the defendants conducted sham reviews would have been "an

allegation of fraud." *Id*. (emphasis added). By contrast, to trigger the public disclosure bar as a *transaction*, the disclosure needed to identify only the fact that the defendants "were obligated to perform" the Medicare "reviews" and the fact that they "received payment" "despite their failure to perform such services." *Id*. Again, no disclosure of intentional fraud is necessary. *See also United States ex rel. Moore & Co., P.A.* v. *Majestic Blue Fisheries, LLC*, 812 F.3d 294, 303 (3d Cir. 2016) (differentiating a "'transaction warranting an inference of fraud'" from "'an explicit accusation of wrongdoing'") (quoting *Zizic*, 728 at 236); *id.* at 303-304 (finding a publicly disclosed transaction where the disclosures did not allege intentional misrepresentations); *United States ex rel. Stebbins* v. *Maraposa Surgical, Inc.*, No. 24-1626, 2024 WL 4947274, at *3 (3d Cir. Dec. 3, 2024) (applying public disclosure bar where disclosures related to medical center's claims for reimbursement did not allege wrongdoing).

The Fourth Circuit has also applied the public disclosure bar when the disclosure has neither alleged fraud nor a defendant's scienter. In *United States ex rel. Black* v. *Health & Hospital Corp. of Marion County*, 494 F. App'x 285 (4th Cir. 2012), the relator sued a municipal corporation that owned and operated nursing homes, alleging Medicaid fraud. *Id.* at 286. The Fourth Circuit affirmed the application of the public disclosure bar because the relator's amended complaint "essentially parrot[ed]" concerns outlined in a rule proposed by the federal government and public debate on the issue, and "borrow[ed] heavily from [the government's] publicly disclosed concerns" with the program. *Id.* at 295. Notably, the government had not

alleged *intentional* fraud. Rather, much like the government's audits in this case, the government's prior disclosure had simply detailed a discrepancy in payments. *See also United States ex rel. Jones* v. *Collegiate Fundings Servs., Inc.*, 469 F. App'x 244, 257, 259 (4th Cir. 2012) (applying public disclosure bar where disclosures did not allege wrongdoing).

The Fifth Circuit likewise is on the majority side of the split. In *United States ex rel. Solomon* v. *Lockheed Martin Corp.*, 878 F.3d 139 (5th Cir. 2017), a relator sued Lockheed Martin for knowingly presenting false data to the government. *Id.* at 145. Lockheed argued that disclosures warranted application of the public disclosure bar. *Id.* In response, the relator contended that the reports did not bar the suit "because neither disclosure expressly or implicitly alleges fraud." *Id.* at 145.

The Fifth Circuit rejected the relator's argument. The court explained that it had recently adopted the *Springfield* formula, under which a misrepresented state of facts and a true state of facts are enough to give rise to the inference of fraud. *Id.* at 144. The court explained that "[t]he public disclosures need not expressly allege fraud" and that "[t]he question is whether the relator *could have* synthesized an inference of fraud from the public disclosures." *Id.* at 145.

The Fifth Circuit specifically rejected the realtor's argument that the public disclosure did not apply because "non-public" information provided "a necessary element of intentionality." *Id*. "The language of the FCA conveys congressional intent to prohibit *qui tam* actions 'when either the allegation of fraud *or* the critical elements of the fraudulent transaction themselves were in the public domain.'" *Id.* (quoting *Springfield*,

14 F.3d at 654) (emphasis in original). "When the elements of a fraudulent transaction are present in public disclosures, those public disclosures need not allege fraud in explicit language." *Id.*; *see also United States ex rel. Colquitt* v. *Abbott Labs.*, 858 F.3d 365, 374-375 (5th Cir. 2017) (applying public disclosure bar where disclosures did not allege fraud); *United States ex rel. Vaughn* v. *Harris Cnty. Hosp. Dist.*, No. 22-20659, 2023 WL 8649876 (5th Cir. Dec. 14, 2023) ("[W]hen the elements of a fraudulent transaction are present in public disclosures, those public disclosures need not allege fraud in explicit language.") (quoting *Solomon*, 878 F.3d at 145).

The Sixth Circuit has also stated that the disclosure need not expressly allege fraud. The court recognized that "[f]raud consists of two elements—a misrepresented state of facts and a true state of facts." *United States ex rel. Jones* v. *Horizon Healthcare Corp.*, 160 F.3d 326, 331 (6th Cir. 1998). Those two elements are all that is necessary to identify a fraudulent transaction.

In *United States ex rel. Advocates for Basic Legal Equality, Inc.* v. *U.S. Bank, N.A.*, 816 F.3d 428 (6th Cir. 2016), a relator sued U.S. Bank, alleging that the bank violated the FCA by falsely certifying that it would and did engage in loss mitigation measures. *Id.* at 429, 431. On appeal, the relator argued that the public disclosure bar did not apply because no disclosure discussed the specific fraudulent practice at issue. *Id.* at 432. But Judge Sutton, writing for the court, rejected this argument. Judge Sutton explained that "'the disclosure is not required to use the word 'fraud' or provide a specific allegation of fraud.'" *Id.* (quoting *United States ex rel. Poteet* v. *Medtronic, Inc.*,

552 F.3d 503, 512 (6th Cir. 2009)). Rather, the disclosure "'is sufficient'" if it "'puts the government on notice of the '*possibility* of fraud' surrounding the [ ] transaction.'" *Id.* at 431; *see also Dingle* v. *Bioport Corp.*, 388 F.3d 209, 214 (6th Cir. 2004) ("The words fraud or allegations need not appear in the disclosure for it to qualify."); *id.* at 214, 216 (applying public disclosure bar where disclosures did not allege intentional misrepresentations); *United States ex rel. Rahimi* v. *Rite Aid Corp.*, 3 F.4th 813, 823 (6th Cir. 2021) ("[T]he publicly disclosed documents need not use the word 'fraud,' but need merely to disclose information which creates an inference of impropriety.") (internal quotation and quotation marks omitted); *id.* at 824-826 (applying public disclosure bar where disclosures did not expressly allege fraud).[5]

The Ninth Circuit also does not require an express allegation of fraud. The court has explained that the word "allegation" in the statutory text refers to "a direct claim of fraud," while a "transaction" is "a

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[5] On at least one recent occasion, a Sixth Circuit panel adopted a more restrictive approach. In *United States ex rel. Holloway* v. *Heartland Hospice, Inc.*, 960 F.3d 836 (6th Cir. 2020), a relator alleged that a defendant "submitted false claims by knowingly or recklessly certifying patients' eligibility for hospice care and billing for those claims." *Id.* at 842-843. The defendant argued that the public disclosure bar applied and pointed to an agency report finding that its claims failed to meet the government's requirements. *Id.* at 844. But the Sixth Circuit found the report did not constitute a public disclosure because it identified only "a compliance problem stemming from the technical nature of the claims process." *Id.* The report's "recommended action [wa]s not an *investigation*, but instead better *education, training, and monitoring*. * * * There [wa]s no insinuation of fraud, but at most noncompliance." *Id.* (emphasis added).

combination of facts from which 'readers or listeners may infer' fraud." *United States ex rel. Mateski* v. *Raytheon Co.*, 816 F.3d 565, 571 (9th Cir. 2016) (quoting *Springfield*, 14 F.3d at 653-654). "[T]he substance of the disclosure * * * need not contain an explicit 'allegation' of fraud, so long as the material elements of the allegedly fraudulent 'transaction' are disclosed in the public domain." *Id.* (quoting *United States ex rel. Found. Aiding The Elderly* v. *Horizon West*, 265 F.3d 1011, 1014 (9th Cir. 2011)).

In *United States ex rel. Solis* v. *Millennium Pharmaceuticals, Inc.*, 885 F.3d 623 (9th Cir. 2018), a relator argued that the public disclosure bar was inapplicable because "he alleged fraud, while the [previous] complaint alleged only negligence." *Id.* at 627. The Ninth Circuit rejected that argument. The court explained that 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.'" *Id.* (quotation omitted); *see also Mateski*, 816 F.3d at 572 (finding a reader could infer scienter from disclosures that did not expressly allege fraud); *United States* v. *Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1020 (9th Cir. 1999) ("[F]raud need not be explicitly alleged to constitute public disclosure."); *Silbersher* v. *Valeant Pharms. Int'l, Inc.*, 89 F.4th 1154, 1167 (9th Cir. 2024) (explaining an express allegation of fraud is not required to trigger the public disclosure bar).

The Tenth Circuit takes a similar approach. In *United States ex rel. Fine* v. *Sandia Corp.*, 70 F.3d 568 (10th Cir. 1995), an FCA relator sued a corporation, alleging that it misappropriated nuclear waste funds

in violation of federal law. *Id.* at 569. The relator argued that the prior disclosures did not trigger the FCA's bar because the disclosures stated only that the defendant potentially violated federal nuclear waste law and did not allege an FCA violation. *Id.* at 572. The Tenth Circuit rejected that argument and explained that "the public disclosure of the material elements of the fraudulent transaction bars *qui tam* actions even if the disclosure itself does not allege any wrongdoing." *Id.*

Similarly, in *United States ex rel. Reed* v. *Keypoint Government Solutions*, 923 F.3d 729 (10th Cir. 2019), a relator brought a qui tam action against her former employer, a company that conducted background investigations for the government. *Id.* at 738. She alleged that the company violated the FCA by knowingly billing the government for inadequate or improperly completed work. *Id.* at 736. She argued that the allegations in her complaint were not substantially the same as prior public disclosures. *Id.* at 742. But the Tenth Circuit disagreed and emphasized that "the public disclosures need not allege any False Claims Act violations or even 'any wrongdoing'; they need only disclose 'the material elements of the fraudulent transaction.'" *Id.* at 745 (quoting *Fine*, 70 F.3d at 572).

Critically, the Tenth Circuit explained that prior news reports in that case still qualified as disclosures even though they had not "explicitly accus[ed]" the defendants "of defrauding the government." *Id.* at 748. "[D]irect allegations of fraud" are "unnecessary to put the government on the trail of" the "fraud," and a disclosure need not "say the magic words '[the defendant] defrauded the government.'" *Id*. at 748, 751; *see also*

United States ex rel. Boothe v. *Sun Healthcare Grp., Inc.*, 496 F.3d 1169, 1174 (10th Cir. 2007) (The public disclosure bar applies "where the plaintiff seeks to pursue a claim, the essence of which is 'derived from' a prior public disclosure.").

The Eleventh Circuit likewise adopts the majority approach. The court has applied the *Springfield* formula, stating that "one generally must present a submitted statement or claim (X) and the true set of facts (Y), which shows that X is untrue. These two things together allow the conclusion (Z) that fraud has occurred." *United States ex rel. Bibby* v. *Mortg. Invs. Corp.*, 987 F.3d 1340, 1353 (11th Cir. 2021) (quotation omitted).

In *United States ex rel. Osheroff* v. *Humana Inc.*, 776 F.3d 805 (11th Cir. 2015), a relator sued health clinics and health insurers, alleging that they fraudulently obtained reimbursements for certain medical services in violation of the FCA. *Id.* at 808. The district court dismissed the suit as barred by the public disclosure provision. *See id.* at 807, 812-814. On appeal, the relator argued that his amended complaint was not substantially the same as the public disclosures because the disclosures did not contain "any allegations of wrongdoing." *Id.* at 814. But the Eleventh Circuit explained that its precedent "does not require each source to contain an allegation of wrongdoing," noting that the FCA "requires only disclosures of 'allegations *or transactions*' "—which "suggest[s] that allegations of wrongdoing are not required." *Id.* at 814 (emphasis in original) (citing 31 U.S.C. § 3730(e)(4)(2012)); *see also United States ex rel. Saldivar* v. *Fresenius Med. Care Holdings, Inc.*, 841 F.3d 927, 931-934, 937 (11th Cir. 2016) (holding public disclosure bar

applicable where disclosures did not allege intentional wrongdoing).

The D.C. Circuit has consistently maintained that express allegations of fraud are not required under the public disclosure bar. In *United States ex rel. Oliver* v. *Philip Morris USA Inc.*, 826 F.3d 466 (D.C. Cir. 2016), a relator sued Philip Morris, alleging that it violated the FCA by breaching contracts it had with the government. *Id.* at 469. The district court dismissed the action under the public disclosure provision, finding the complaint substantially similar to transactions disclosed in an administrative report and in news media. *Id.* at 469-470. The relator argued on appeal that "Philip Morris did not publicly disclose that it *falsely* certified compliance" with its contracts. *Id.* at 473 (emphasis added). But the D.C. Circuit explained that "a hypothetical government investigator * * * would be 'alerted [ ] to the likelihood' that the vendor was falsely certifying compliance with the relevant provisions." *Id.* at 473-474 (quotation omitted). Even though the disclosures made no express allegations of fraud, the government could "adequately investigate the case" because it "'was in an identical position to *infer* scienter from the publicly disclosed' documents." *Id.* at 474 (emphasis added) (quotations omitted). The D.C. Circuit therefore affirmed the district court's dismissal under the public disclosure bar. *Id.* at 480.

Likewise, in *United States ex rel. Davis* v. *District of Columbia*, 679 F.3d 832 (D.C. Cir. 2012), the D.C. Circuit found that an auditor's report stating that the defendant lacked adequate documentation for a Medicaid reimbursement claim "provided ample reason for the government to investigate further." *Id.* at 836. The court pointed to no express allegation of fraud in

the report. The court ultimately held the public disclosure bar inapplicable, but only because the relator was an original source of information—not because the report did not raise an inference of scienter. *See id.* at 839; *see also Staples*, 773 F.3d at 86-88 (applying the public disclosure bar where the disclosure did not discuss scienter); *United States ex rel. Shea* v. *Cellco P'ship*, 863 F.3d 923, 934 (D.C. Cir. 2017) ("[A] relator cannot overcome the public disclosure bar by contributing 'speculation, background information or collateral research.'") (quoting *Oliver*, 826 F.3d at 479).

B. The Seventh And Eighth Circuits Require An Express Allegation Of Fraud.

In sharp contrast, just two circuits require the prior disclosure to expressly allege fraud.

The Seventh Circuit purports to endorse *Springfield*'s holding that a disclosure need only identify "the critical elements exposing the transaction as fraudulent." *United States ex rel. Feingold* v. *AdminaStar Fed., Inc.*, 324 F.3d 492, 495 (7th Cir. 2003) (citing *Springfield*, 14 F.3d at 654). But in practice, the Seventh Circuit has taken an extremely restrictive approach to the public disclosure bar that requires the disclosure to include an express allegation of fraud.

In *United States ex rel. Absher* v. *Momence Meadows Nursing Center, Inc.*, 764 F.3d 699 (7th Cir. 2014), FCA relators sued a nursing center for submitting false Medicare and Medicaid claims. *Id.* at 702. The relators alleged that the center provided non-compliant care and hid that fact from regulators. *Id.* at 704-705. The nursing center argued that the public disclosure bar applied, pointing to government reports

documenting the very non-compliant care at issue in the lawsuit. *Id.* at 708.

The Seventh Circuit allowed the suit to proceed, however, because the prior reports had disclosed only instances of non-compliant care, "not [ ] facts establishing that [the defendant] misrepresented the standard of care in submitting claims for payment to the government." *Id.* at 708-709. In other words, in sharp contrast to the majority approach, the Seventh Circuit required the disclosure to include an express allegation about the defendant's state of mind. *Cf. Cause of Action* v. *Chicago Transit Auth.*, 815 F.3d 267, 279 (7th Cir. 2016) (explaining that the public disclosure bar does not apply where, "in order to infer the presence of scienter, one must disregard an equally plausible inference that the defendant was merely mistaken and thus lacked the knowledge required by the FCA").

Much like the Seventh Circuit, the Eighth Circuit has stated that "a public disclosure must reveal both the true state of facts and that the defendant represented the facts to be something other than what they were." *Minnesota Ass'n of Nurse Anesthetists* v. *Allina Health Sys. Corp.*, 276 F.3d 1032, 1044 (8th Cir. 2002) (citing *Rabushka*, 40 F.3d at 1514). But in the decision below, the Eighth Circuit added a further requirement: that a disclosure contain an express allegation of fraud. According to the Eighth Circuit, the government audit had "revealed only the possibility of inaccurate billing." Pet. App. 12a. By contrast, the relator's "complaint alleged that the defendants

knowingly submitted false claims to the government." Pet. App. 12a (emphasis in original).

The Eighth Circuit further explained that "[g]iven the letters['] repeated references to the defendants' 'errors' and the accompanying offers for remedial education, an uninitiated reader would not reasonably infer from the letters that the defendants had committed fraud." Pet. App. 13a. In other words, the Eighth Circuit gave dispositive weight to the manner in which the government audit chose to characterize the transactions and the absence of an express allegation of fraud in the audit itself.

In reaching that holding, the Eighth Circuit relied on an earlier decision, *United States ex rel. Rabushka* v. *Crane Co.*, 40 F.3d 1509 (8th Cir. 1994), in which the court had similarly held the public disclosure bar inapplicable because the disclosures did not expressly allege fraud. *Id.* at 1512-1513. In that case, the relator sued the defendants under the FCA for fraudulently understating pension liability. *Id.* at 1511. On appeal, the defendant argued that news articles, corporate reports, and a creditor's meeting publicly disclosed the fraudulent transactions. *Id.* at 1512. The Eighth Circuit disagreed. The court held the public disclosure provision inapplicable because the disclosures did not expressly allege "any intentional wrongdoing" and those allegations were necessary to raise a reasonable inference of fraud. *Id.* at 1512-1514.

In short, there is a conflict between twelve circuits, and the Eighth Circuit's narrow approach to the public disclosure bar is an outlier. This Court should grant

the Petition and ensure uniformity in this important area of federal law. Sup. Ct. R. 10(a).

II. THE EIGHTH CIRCUIT'S APPROACH IS WRONG.

1. Under the FCA's public disclosure bar, a government audit need not allege fraud, let alone intentional fraud. Instead, the bar is triggered so long as the audit identifies the "misrepresented state of facts" and the "true state of facts" at the heart of the allegedly fraudulent transaction. *Springfield*, 14 F.3d at 655.

This conclusion flows from the FCA's plain text, which applies the public disclosure bar in two different circumstances: when "substantially the same *allegations* or *transactions* as alleged in the action or claim were publicly disclosed." 31 U.S.C. § 3730(e)(4)(A) (emphasis added). Congress's considered decision to reference *transactions* in addition to *allegations* is meaningful. *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (applying the principle that a difference in language implies a difference in meaning); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 176 (2012) ("Because legal drafters should not include words that have no effect, courts avoid a reading that renders some words altogether redundant."). The use of the word "transactions" implies that "allegations of wrongdoing are not required." *Osheroff*, 776 F.3d at 814. Instead, if the material elements of the fraudulent *transaction* are identified—even if there is no allegation of fraud—the

district court "shall dismiss" the action. 31 U.S.C. § 3730(e)(4)(A).

Precedent leads to the same conclusion. This Court has previously explained that dual "phrase 'allegations or transactions' * * * suggests a wide-reaching public disclosure bar." *Schindler*, 563 U.S. at 408. As this Court underscored, "Congress covered not only the disclosure of 'allegations' but also 'transactions,' a term that courts have recognized as having a broad meaning." *Id*. (citing *Moore* v. *New York Cotton Exchange*, 270 U.S. 593, 610 (1926), for the proposition that " '[t]ransaction' is a word of flexible meaning").

Indeed, it is unnecessary for an audit to allege fraud to identify a potentially fraudulent transaction. Consider this case. In 2016, the government's letter stated that Dr. Zorn billed *every single* initial patient visit at the highest complexity code. In 2018, the government's letter indicated that—despite being warned— Zorn had continued to miscode patient visits and even "copied and pasted" supporting records. Pet. App. 64a. Because the letter identified the transactions at issue—billing by Petitioner for specific types of patient care—it was more than enough to "set government investigators on the trail of fraud." *Springfield*, 14 F.3d at 655.

A fulsome application of the public disclosure bar best comports with the statute's structure. The whole purpose of the public disclosure bar is to prevent "parasitic suits by opportunistic late-comers who add nothing to the exposure of fraud." *United States ex rel. Jamison* v. *McKesson Corp.*, 649 F.3d 322, 332 (5th Cir. 2011). This case is an indicative example. The relator added no value to the government's enforcement efforts. His allegations simply parroted the

letters from the CMS contractor. Yet the Eighth Circuit held the public disclosure bar inapplicable simply because Relator Grant included a boilerplate accusation that Zorn "*knowingly*" submitted inaccurately billed claims to the government. Pet. App. 12a. That is precisely the kind parasitic lawsuit that the public disclosure bar was designed to foreclose.

In addition, the FCA separately contains an original source exception, which allows someone to bring a qui tam action if he was the person who "voluntarily disclosed" the information to the government in the first place or "who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions." 31 U.S.C. § 3730(e)(4)(B). As this Court has explained, the original source exception already "carefully preserve[s] the rights of the most deserving *qui tam* plaintiffs." *Graham Cnty.*, 559 U.S. at 301. And if the government thinks an otherwise barred qui tam lawsuit should proceed, the government may oppose dismissal. 31 U.S.C. § 3730(e)(4)(A). There is thus no need to water down the public disclosure bar.

2. In sharp contrast, the Eighth Circuit's rule improperly limits the public disclosure bar to *allegations* of fraud. This approach effectively reads the word "transactions" out of the statute. According to the Eighth Circuit in this case, "an uninitiated reader" of the letters "would infer that the defendants had acted without the requisite scienter" because the government did not formally accuse Zorn of fraud and instead offered to "'educate' Zorn's office on proper billing practices." Pet. App. 12a-13a.

But that confuses *allegations* of fraud with an audit that identifies *transactions* that raise an inference

of fraud. It also leads to highly arbitrary results. If a government audit or news report details a fraudulent transaction, but does not explicitly connect the dots and allege fraud, it will not trigger the public disclosure bar. But if the same report includes a boilerplate accusation, the court must dismiss the case. The application of a critical FCA provision protecting defendants should not turn on that minor distinction.

The problems run even deeper. Because the Eighth Circuit requires the public disclosure to accuse defendants of "*intentionally*" committing fraud, the Eighth Circuit's approach conflicts with the FCA's definition of scienter, too. Pet. App. 12a (quoting *Rabushka*, 40 F.3d at 1513). Under the FCA, defendants have the necessary scienter not only if they act intentionally but also if they act "in reckless disregard of the truth or falsity of the information" they submitted to Medicare. 31 U.S.C. § 3729(b)(1)(A)(iii); *see United States ex rel. Schutte* v. *SuperValu Inc.*, 598 U.S. 739, 751 (2023) (Reckless disregard "captures defendants who are conscious of a substantial and unjustifiable risk that their claims are false, but submit the claims anyway."). Indeed, the second letter detailed how Zorn "copied and pasted" supporting documentation into patient files. Pet. App. 64a. At a minimum, the second letter gave rise to the inference that Zorn was recklessly disregarding the truth of the information he had submitted to the government.

III. THE QUESTION PRESENTED IS IMPORTANT, AND THIS CASE OFFERS AN IDEAL VEHICLE TO ADDRESS IT.

1. The question presented is extremely important. The FCA imposes mandatory statutory penalties

between $13,946 and $27,894 per claim, regardless of any actual harm or lack thereof the government suffered. *See* 28 C.F.R. § 85.5 (Table 1). In the Medicare and Medicaid context in particular, businesses routinely submit numerous claims to the government, and the FCA's statutory penalties can multiply quickly. *See, e.g.*, *United States ex rel. Fesenmaier* v. *Cameron-Ehlen Grp., Inc.*, 715 F. Supp. 3d 1133 (D. Minn. 2024) (FCA produced $487 million judgment against small medical device distributor despite no harm to patients and no additional cost to government); *Yates*, 21 F.4th at 1314 (FCA lawsuit resulted in "a judgment of $1.179 million based on $755.54 in actual damages").

Because qui tam relators and their counsel receive a substantial portion of FCA awards, the "lure of large recoveries has drawn out potential relators like moths to a flame." *Fixing the FCA Health Care Problem*, U.S. Chamber of Commerce Institute for Legal Reform, 3 (August 2022), https://tinyurl.com/yck3eepk (quotation marks omitted). Plaintiffs' lawyers can raise "the possibility of colossal liability" by threatening the magnifying effect of statutory penalties especially for small value claims, and they frequently seek to extract "blackmail settlements," even for otherwise non-meritorious cases. *Coinbase Inc.* v. *Bielski*, 599 U.S. 736, 743 (2023) (quotation marks omitted). In 2024, plaintiffs' lawyers filed 979 qui tam FCA lawsuits, "the highest number in a single year," and settlements and judgments under the statute exceeded $2.9 billion. *See* Press Release, *False Claims Act*

Settlements and Judgments Exceed $2.9B in Fiscal Year 2024, *supra* at n.3.

That ten circuits apply the public disclosure bar without requiring an express allegation of fraud has not deterred FCA lawyers from pursuing these suits. By contrast, upsetting the policy balance Congress struck, and facilitating parasitic lawsuits such as this one, will have severe consequences. The costs to the healthcare industry, in particular, are particularly acute. "Judgments and settlements bring hospitals and other health care entities to the brink of bankruptcy and effectively put them out of business." *Fixing the FCA Health Care Problem*, *supra* at 8.

This case illustrates the problem. Petitioner is a 78-year-old small-town doctor. As the Eighth Circuit detailed, Dr. Zorn's missteps were extremely minor. At most, his practice overbilled the government $86,332. Dr. Zorn in no way "endanger[ed] the health or safety of others." Pet. App. 27a. But the FCA's statutory penalties resulted in an astonishing *$8 million judgment*—nearly 100 times the amount he overbilled the government.

The public disclosure bar is a critical check on this kind of runaway liability. It limits qui tam lawsuits to circumstances in which a genuine whistleblower comes forward with new information which the government might otherwise not have uncovered. The Executive Branch is subject to democratic accountability and may choose to exercise its prosecutorial discretion to pursue minor claims. But plaintiffs' lawyers should not be permitted to bring these kinds of

parasitic lawsuits that threaten major corporations and small-town doctors alike.

2. This case offers an ideal vehicle to address this vital issue. The question presented was litigated below, was directly addressed by the Eighth Circuit's decision, and is the sole basis for the Eighth Circuit's refusal to apply the public disclosure bar.

In addition, the Eighth Circuit held that the statutory penalties in this case violate the Eighth Amendment. Respondent Grant has already filed a petition in this Court seeking review of that constitutional holding. The United States intervened below to seek *en banc* review on that same issue and has sought extensions of time to file a petition in this Court. To be clear, the Eighth Circuit's constitutional holding is entirely correct. But if this Court grants either of those petitions, principles of constitutional avoidance counsel in favor of evaluating whether the public disclosure bar applies in this case before reaching the constitutional question. *See Jennings* v. *Rodriguez*, 583 U.S. 281, 296 (2018); *Spector Motor Serv., Inc*. v. *McLaughlin*, 323 U.S. 101, 105 (1944); *Ashwander*, 297 U.S. at 347 (1936) (Brandeis, J., concurring). This Court may also wish to hold this Petition and Respondent Grant's petition (No. 24-549) as necessary to consider all three petitions at the same conference.

CONCLUSION

For the forgoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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FEBRUARY 2025