NO. 20-_____

In the Supreme Court of the United States

CITIZENS AGAINST CORPORATE CRIME, LLC,

Petitioner,

v.

LENNAR CORP., A/K/A LENR PROPERTIES LLC, A/K/A NWHL INVESTMENT LLC,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This petition for a writ of certiorari raises a matter of exceptional importance — whether or not a false claims act *qui tam* claim on behalf of the public may be released in a bankruptcy case prior to the appropriate government official obtaining knowledge of and having an opportunity to even investigate the claim?

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant Below

- Citizens Against Corporate Crime, LLC

Respondent and Defendant-Appellee Below

- Lennar Corp., a/k/a LENR Properties LLC, a/k/a NWHL Investment LLC

CORPORATE DISCLOSURE STATEMENT

Petitioner Citizens Against Corporate Crime, LLC has no parent corporation and no publicly held corporation that owns 10 percent or more of its stock.

LIST OF PROCEEDINGS

The United States Court of Appeals for the Third Circuit

No. 20-1134

In re: Landsource Communities Development LLC, Et al., *Debtors*. Citizens Against Corporate Crime, LLC, *v.* Lennar Corporation, *Appellee*.

Opinion: December 3, 2020

Rehearing: January 7, 2021

United States District Court for the District of Delaware

No. 18-1793-CFC

In re: Landsource Communities Development LLC, Et al., *Debtors*. Citizens Against Corporate Crime, LLC, *v.* Lennar Corporation, *Appellee*.

Opinion: January 3, 2020

United States Bankruptcy Court for the District of Delaware

No. 08-11111 (KJC)

In re: Landsource Communities Development LLC, Et al., *Debtors*.

Order: November 1, 2018

Superior Court of the State of California, County of Sacramento

No. 34-2017-00208469

Citizens Against Corporate Crime, LLC, a Wyoming limited liability company as Relator. *Plaintiff, v.* Lennar Corporation, a Delaware corporation, and Does 1 Through 100, Inclusive, *Defendants.*

Order to Transfer: May 17, 2018

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Citizens Against Corporate Crime, LLC, respectfully petitions this Court for a Writ of Certiorari to review the Judgement of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit, dated December 3, 2020, is included in the Appendix at (App.1a). The Order Denying a Sur Petition for Rehearing, dated January 7, 2021, is included at App.48a. The Opinion of the United States District Court for the District of Delaware, dated January 3, 2020. is included at App.9a, along with its accompanying Order at App.40a.

JURISDICTION

The bankruptcy court found jurisdiction for this matter pursuant to 28 U.S.C. §§ 157 and 1334, and found venue proper in the district pursuant to 28 U.S.C. § 1409, and found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). The district court had jurisdiction over this matter pursuant to 28 U.S.C. § 158(a) because this appeal is from a final order of a bankruptcy judge that resolves all remaining issues between the parties and closed the Chapter 11 bankruptcy cases referred to the bankruptcy judges under 28 U.S.C. § 157.

STATUTORY PROVISIONS INVOLVED

The following Statutory Provisions are attached in the Appendix at App.50a.

- 11 U.S.C. § 1141(d)(6)(A)
- 28 U.S.C. § 1334
- Cal. Gov. Code § 12651(a)
- Cal. Bus. & Prof. Code § 17200

STATEMENT OF THE CASE

The court below denied the one—and only—California False Claims Act *qui tam* relator challenging a $1 billion real estate fraud against CalPERS, California's state employees' pension fund, by the Lennar Corporation, America's largest home builder.

The basis for the Third Circuit's decision was that a fraudster can use bankruptcy to evade responsibility for a billion-dollar fraud even if the people defrauded are not parties to the case, and even if the fraud claim is not even before the bankruptcy court. The petitioner, representing the interest of millions of Californians, included a founder who was familiar with Lennar merely because a different company he was part of, Briarwood Capital, was one of roughly 5,000 unsecured creditors in Lennar's prior bankruptcy. The petitioner had very limited involvement in the bankruptcy proceedings, and he resigned from the creditors' committee shortly after his appointment. It is absurd for the Third Circuit Court to rule that such a brief stint on a bankruptcy panel in Delaware negates the rights of millions of Californians to secure a remedy for corporate fraud. As a relator, petitioner brings the *qui tam* lawsuit for the public, not himself.

The Third Circuit Court's Opinion to deny petitioner's *qui tam* action conflicts with three decades of case law, including decisions from the United States Court of Appeals for the Ninth and Tenth Circuits, and creates the precise bankruptcy loophole to discharge unknowing public fraud claims that were deliberately closed by other circuits. How can millions of Califor-

nians lose their right to obtain remedy for fraud upon the public because a Delaware bankruptcy court "released" it when no such claim was even before the court and no public representative on the claim was before the court?

STATEMENT OF FACTS

On or near March 1, 2007, Lennar Corporation swindled the nation's largest public pension fund, CalPERS, in the approximate amount of $970 million dollars. Petitioner filed a *qui tam* action on behalf of the California public seeking remedy.

Lennar is a Miami, Florida based home-builder whose principal officers were directly involved in this scheme. The Lennar Defendants controlled and managed an entity called LandSource Communities Development LLC ("LandSource"). Lennar executives induced CalPERS to enter into a Contribution and Formation Agreement ("Contribution Agreement") that required CalPERS to contribute nearly a billion dollars in assets to LandSource. Lennar then induced CalPERS to let Lennar strip all of the cash and loan proceeds from the LandSource balance sheet in a "Special Distribution." The cash was then transferred directly to Lennar and its sister company LNR. This loan placed LandSource on an inevitable and foreseeable path to bankruptcy. CalPERS relied on a promise by Lennar that Lennar and LNR would purchase 70 percent of LandSource's assets over a three-year period. Unfortunately, nothing could have been further from the truth.

This transfer of all available liquidity left LandSource technically insolvent. And, in fact, LandSource was forced into a Chapter 11 bankruptcy proceeding shortly more than one year after the transfer.

Although LandSource was insolvent the day Lennar and LNR took the Special Distributions of approximately $700 million dollars each, Lennar strategically waited for the insider preference period of one year to expire before filing LandSource's bankruptcy. This strategy avoided a potential "claw back" repayment of the large Special Distributions taken by Lennar and LNR.

With the housing market in free fall and Lennar posting record losses, Lennar needed a cash infusion desperately; Lennar's executives knew LandSource was insolvent when it incurred a huge amount of debt without the intent or ability to pay; Lennar knew it had no intention to follow-up on their business plan to buy a majority of the real property from LandSource over the next three years; Lennar knew they could take a Special Distribution of approximate $1.4 billion dollars of CalPERS money even though LandSource was sure to fail; and Lennar knew they could file a bankruptcy petition for LandSource shortly thereafter.

The CalPERS Retirement System serves 1.9 million members, all of whom have a personal stake in the pension system's health.

CalPERS not only provides pension benefits statewide, but also contributes substantially to local economies. As CalPERS retirees spend their monthly pension benefit payments, they generate an estimated $23.5 billion in economic activity that supports jobs and increases business and tax revenue. The economic

impacts are significant throughout the state, and especially important in smaller communities. The $23.5 billion economic contribution to California's economy from CalPERS pension benefits is equivalent to each Californian receiving $600 a year.

However, Lennar executives also appeared to know in advance that CalPERS' management would not get involved, assert creditor rights, or otherwise intervene in the bankruptcy process, even though CalPERS was the majority owner of the debtor entity, had almost a billion dollars of assets at stake, and had a history of being an activist investor.

A possible reason for this "hands off" approach was that the CEO of CalPERS was Federico Buenrostro Jr. (hereinafter "Buenrostro") at the time Lennar and CalPERS entered into the agreement. Buenrostro was indicted in 2014 for taking paper bags and shoe boxes filled with a total of $200,000 in cash as part of a "pay-to-play" operation. Buenrostro quickly agreed to a plea agreement after his 2013 indictment and was sent to federal prison in Oregon.

In 2008, Landsource, LLC was reorganized in a Chapter 11 bankruptcy proceeding overseen by the United States Bankruptcy Court for the District of Delaware.

The Landsource, LLC, plan of reorganization was confirmed on July 20, 2009.

Prior to the confirmation of the Landsource, LLC reorganization plan, no notice was provided to the People of the State of California via the California Department of Justice Office of the Attorney General ("CAGO") concerning any potential false claims act liability to be discharged by the plan.

The Landsource, LLC reorganization plan was fully consummated, and the bankruptcy cases were closed, on July 29, 2013.

Years later, on February 24, 2017, Petitioner-Appellant Citizens Against Corporate Crime, LLC ("CACC")—as a *qui tam* relator—filed a California False Claims Act ("FCA") action against Respondent-Appellee Lennar Corporation ("Lennar") under seal in the California Superior Court for the County of Sacramento.

The False Claims Act provides in pertinent part that a person is liable to the State of California or to the appropriate political subdivision thereof for three times the amount of damages that the government sustains plus a penalty if the person:

- "knowingly presents or causes to be presented a false or fraudulent claim for payment or approval." Cal. Gov. Code § 12651(a)(1).
- "knowingly makes, uses, or causes to be made or used a false record or statement material to a false or fraudulent claim." Cal. Gov. Code § 12651(a)(2).
- "conspires to commit a violation of [the FCA]." Cal. Gov. Code § 12651(a)(3).
- "knowingly makes, uses, or causes to be made or used a false record or statement material to an obligation to pay or transmit money or property to the state or to any political subdivision, or knowingly conceals or knowingly and improperly avoids, or decreases an obligation to pay or transmit money or

> property to the state or to any political subdivision." Cal. Gov. Code § 12651(a)(7).

No other entities or individuals were party to the FCA Action, which involved only questions of state law.

CACC sought a jury trial in the State of California, under the oversight of the California Department of Justice. Pursuant to the FCA, the California Department of Justice began investigating the allegations in order to determine whether to intervene in the case, which was twice extended by the State, during which time CACC filed an amended complaint under the guidance of the State. On or about January 24, 2018, approximately 11 months after the initial complaint was filed, the People of the State of California filed their notice of election to decline intervention and an application for an order lifting the seal.

In the notice to decline intervention, the State affirmed its status as "a real party in interest in this action," noted the "CAGO's decision to decline intervention is without prejudice," and explicitly reserved its right to intervene in the future, writing "the CAGO has the continuing authority to file a motion seeking to intervene in the future, or otherwise move to dismiss, or settle this action."

The case was then unsealed by order of the Sacramento Court, and Lennar was served with the first amended complaint on or about April 17, 2018.

On May 17, 2018, Lennar Corporation removed the FCA Action to the United States District Court for the Eastern District of California on the basis of diversity jurisdiction, which was given case number 2:18-at-01269. On May 29, 2018, Lennar filed an

answer to the complaint in the Eastern District of California.

On May 18, 2018, Lennar filed a motion in the Bankruptcy Court for the District of Delaware to reopen the Landsource, LLC chapter 11 bankruptcy cases, which were initiated in 2008 and for which the reorganization plan was confirmed on July 20, 2009, and the case closed on July 29, 2013. Specifically, Lennar's motion requested the Bankruptcy Court to reopen the bankruptcy cases for the sole purpose of enforcing the release and injunction contained in Landsource, LLC's reorganization plan against CACC to bar CACC's litigation against Lennar in California.

On July 2, 2018, CACC timely filed an opposition to Lennar's motion, arguing that: (1) no *qui tam* FCA claim, as CACC brought against Lennar in California in 2017, could be discharged or released by the citizens of California or the CAGO via the Landsource, LLC bankruptcy in 2009; (2) due process and jurisdiction prevent the Bankruptcy Court from enjoining millions of non-parties to the bankruptcy proceeding from obtaining a remedy in the state courts of California for a claim never before adjudicated or addressed by the Bankruptcy Court; and (3) the more appropriate venue for adjudication of this dispute was in California, not Delaware.

On July 17, 2018, the Bankruptcy Court granted Lennar's motion to reopen the Landsource, LLC, bankruptcy cases "for the limited purpose of adjudicating the Proposed Enforcement Motion and matters directly related to the motion" and authorized Lennar "to file the Proposed Enforcement Motion."

In reopening the proceeding, the bankruptcy court stated that, although the matter was already pending in an Article III court and although the court did not draft the order to be interpreted, it would nevertheless reopen the bankruptcy cases.

Following a period of discovery requested by Lennar, Lennar filed on October 5, 2018, its motion to enforce the injunction and release in the debtor's Chapter 11 plan and confirmation order from the Landsource, LLC bankruptcy in 2009. In its motion, Lennar argued that a man by the name of Nicolas Marsch, who operated an entity by the name of Briarwood Capital, LLC, which was an unsecured creditor in the Landsource, LLC bankruptcy, had released the FCA claims against Lennar by operation of the injunction and release in the Landsource, LLC reorganization plan and the order thereon and confirmed Plan.

CACC timely filed its objections to Lennar's motion on October 18, 2018. In opposition, CACC argued that the law is clear that the CAGO neither discharged nor released any FCA *qui tam* claims on behalf of the citizens of California via the injunction or release from the Landsource, LLC bankruptcy, due process and jurisdictional limitations prevent Lennar's requested relief—to enjoin millions of non-parties to the bankruptcy cases from obtaining a remedy in the state courts of California for a claim never before adjudicated by the Bankruptcy Court, and that Nicolas Marsch nor Briarwood Capital, LLC have any bearing on the analysis before the Court.

Also, on October 18, 2018, the CAGO filed a "statement of non-opposition" to Lennar's motion. Therein, the State confirmed that the People of the State of California are the real party in interest to the Cali-

fornia FCA lawsuit and such claims can only be waived or released by the California Attorney General, and that the California Attorney General "has neither waived nor released the Peoples CFCA claims . . . "

Further, the CAGO echoed CACC's opposition writing that FCA claims are not dischargeable in bankruptcy, and the FCA claims brought on behalf of the people of California "were not discharged and survive the Injunction and Release."

Independent from Lennar's motion, CACC also filed a motion on October 17, 2018, for the District of Delaware to abstain from this matter under 28 U.S.C. § 1334. Therein, CACC argued that abstention was proper under Section 1334 because the overwhelmingly majority of the twelve-factor analysis under Section 1334 favor abstention. Lennar filed objections to CACC's motion for the District of Delaware to abstain on October 22, 2018. CACC also filed a motion to shorten the 7-day notice period supported by good cause on October 22, 2018.

On October 23, 2018, the Bankruptcy Court denied CACC's motion for abstention "for the reasons stated in Lennar Corporation's Objection." CACC filed a second motion to abstain on October 24, 2018.

On October 25, 2018, Lennar's motion to enforce came for hearing, at which time the bankruptcy court granted Lennar's motion. In ruling, the Bankruptcy Court explained Mr. Marsch, Briarwood Capital, LLC, and CACC are all bound by the injunction and release from the Landsource, LLC reorganization plan and confirmation order because Mr. Marsch received notice of the plan via his entity Briarwood Capital, LLC, Mr. Marsch is the sole and controlling member of

CACC, and the people of California did not oppose Lennar's relief.

The Court then ruled that CACC's pending motion to abstain is moot. Finally, the Court ordered the parties to meet and confer and prepare an order of the court in accordance with its ruling. (Ibid.) Following a disagreement of the parties and the submission of competing proposed orders, the bankruptcy court signed the order presented by Lennar on November 1, 2018. This appeal followed on November 14, 2018.

Pursuant to the Bankruptcy Court's order dated November 1, 2018, both CACC and the California Attorney General's Office were dismissed from the FCA action and the case was closed by the United States District Court for the Eastern District of California on November 16, 2018. CACC appealed to the Third Circuit, which affirmed the district court, preventing the *qui tam* claim from proceeding against Lennar.

REASONS FOR GRANTING THE PETITION

In granting Lennar's request to enforce the 2009 Landsource, LLC Chapter 11 Confirmation Plan against CACC, the Third Circuit affirmed the Bankruptcy Court order which enjoined non-parties never before the court, including millions of Californians, the California Department of Justice Office of the Attorney General ("CAGO"), and even lawyers, from ever seeking relief under the False Claims Act laws of California and its *qui tam* remedy. This act granted protections to a non-debtor—Lennar—that the Chapter 11 corporate debtor would not even have itself, thereby shielding Lennar from millions of harmed California citizens and a wronged State sovereign.

The Third Circuit decision conflicts with the decisions of fellow circuits, poses a pure question of law that involves a matter of exceptional public concern, and offends principles and precepts of Constitutional due process.

I. THE THIRD CIRCUIT DECISION CONFLICTS WITH FELLOW FEDERAL CIRCUITS.

For nearly three decades, courts around the country agreed that fraudsters cannot use bankruptcy to release claims of public fraud, as that would undermine the incentives of the *qui tam* laws, and were therefore unenforceable as a matter of public policy. The Ninth Circuit, where this case was initially filed, disagreed with the Third Circuit. *See U.S. ex rel. Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230, 234 (9th Cir. 1997). The D.C. Circuit disagreed

with the Third Circuit. *See U.S. ex rel. El Amin v. George Washington University*, 2007 WL 1302597 *3–8 (D.D.C. 2007) [finding the public policy objectives of the False Claim Act outweigh the Case: 20-1134 Document: 42-1 Page: 7 Date Filed: 12/17/2005 interest in enforcing the release]. Federal district courts within the Fifth Circuit disagreed with the Third Circuit. *See U.S. ex rel. Longhi v. Lithium Power Technologies*, 481 F.Supp.2d 815, 818 (S.D. Tex. 2007) [finding that enforcement of a release would run counter to public policy and serve to potentially shield those who allegedly commit fraud against the United States]. Federal district courts within the Tenth Circuit disagreed with the Third Circuit. *See U.S. ex rel. Bahrani v. ConAgra, Inc.*, 1983 F.Supp.2d 1272 (D. Colo. 2002) [denying defendant's motion to dismiss and finding a prefiling release invalid], *rev'd on other grounds* 465 F.3d 1189 (10th Cir. 2006). Federal district courts within the Sixth Circuit disagreed with the Third Circuit. *See U.S. ex rel. Pogue v. American Healthcorp, Inc.*, 1995 WL 626514 (M.D. Tenn. Sep. 14, 1995), *vacated on other grounds*, 914 F.Supp. 1507 (M.D. Tenn. 1996); *see also U.S. ex rel. McNulty v. Reddy Ice Holdings, Inc.*, 835 F.Supp.2d 341, 360 (E.D. Mich. 2011). Federal district courts within the Second Circuit disagreed with the Third Circuit. *See U.S. ex rel. DeCarlo v. Kiewit/AFC Enters., Inc.*, 937 F.Supp. 1039 (S.D.N.Y. 1996).

II. THE FRAUDSTER LOOPHOLE CREATED BY THE THIRD CIRCUIT ENDANGERS *QUI TAM* CLAIMS & IS A MATTER OF PURE LAW OF EXCEPTIONAL PUBLIC IMPORT.

Until this Third Circuit decision, a *qui tam* claim may not be released unless: 1) the government agency in charge of *qui tam* prosecutions had full knowledge of the claim before the release was executed, and 2) the government agency in charge of *qui tam* prosecutions had already investigated the allegations prior to their release, and 3) the government agency in charge of *qui tam* prosecutions had already decided they would not pursue the case. All three must occur prior to the release for any release by a relator to be enforceable. *See e.g.*, *U.S. ex. rel. Green v. Northrop Corp.*, 59 F.3d 953, 956 (9th Cir. 1995) (*Green*); *U.S. ex rel. Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230, 234 (9th Cir. 1997). Otherwise, the release could be used to prevent the government from learning about the alleged fraud, help cover up the fraud, and prevent the injured parties from recovering, thereby undermining the policy and congressional intent behind the *qui tam* principles.

The enforceability of a prefiling release of a *qui tam* claim was first considered in the prevailing case of *U.S. ex rel. Green*, wherein the whistleblower Michael Green, a former employee of Northrop, had negotiated a settlement agreement of all disputes between Green and Northrop in exchange for $190,000, including a general release of "any and all claims . . . rights to payment . . . actions and causes of action of every nature, under any theory under the law . . . whether known or unknown." (*U.S. ex. rel. Green v. Northrop Corp.*, 59 F.3d 953, 956 (9th Cir. 1995)

(*Green*).) Subsequently, Case: 20-1134 Document: 42-1 Page: 8 Date Filed: 12/17/2006 Green filed a complaint under the *qui tam* provisions of the FCA against Northrop, and the United States declined to intervene in the suit. (*Id.* at 956–957.) Northrop then moved for summary judgment, contending that Green had discharged all claims against Northrop and therefore lacked standing to bring a *qui tam* claim. (*Id.* at 957.) While the district court granted the motion for summary judgment, the Ninth Circuit reversed, noting that, even lacking clear direction from Congress, the federal common law and public interest behind the *qui tam* principles is more than sufficient to guide its decision, and upholding a prefiling release of an *qui tam* claim would frustrate the policies underlying the *qui tam* provisions of the FCA and would impair a substantial public interest in that enforcing the Release would threaten to nullify the incentives Congress intended to create in amending the provisions of the False Claims Act in 1986. (*Id.* at 961–63.) As the Ninth Circuit explained: Congress clearly was of the judgment that, without creating incentives for relators to bring *qui tam* actions, the government in many cases might not even learn of the fraud. Moreover, the concerns with deterring frivolous suits and protecting the rights of the United States in a claim are not implicated when the relator chooses not to file. As the court reiterated: the focus must be on what impact the release will have on the incentive effect on *qui tam* goals of detecting and deterring fraud on the government. As the court concluded: "We think it plain that enforcing a prefiling release of a *qui tam* claim would dilute significantly the incentives that Congress attempted to augment in amending the Act." *Green*, *supra*, 59 F.3d at 965.

Due process concerns further inform this interpretation of federal bankruptcy releases and their application to *qui tam* claims. Here, millions of Californians cannot bring a *qui tam* claim based on a nebulous release they were not even party to for a claim that was not even before the bankruptcy court, adjudicated by a court other than their own state court or federal Circuit.

Here, the People of the State of California are the real party in interest to a California FCA complaint, and the California Department of Justice, Office of the Attorney General (CAGO) is the governmental body responsible for investigating those claims and represents the people of California. (*See* Cal. Gov. Code §§ 12650, *et seq*. *See also Green*, *supra*, 59 F.3d 953.) Thus, because the CAGO did not have full knowledge of the claim before the release was executed, did not already investigate the allegations prior to their release, and did not already decide that it would not pursue the case, the claim cannot be released prefiling. As in *Green*, the government here learned of the allegations of fraud and conducted its investigation only because of the filing of the *qui tam* complaint, a result that would not occur under the Court's ruling allowing parties to release these claims before they see the light of day.

In sum, CACC seeks to rectify Lennar's extraordinary request to enjoin non-parties, including millions of California citizens the petitioner's *qui tam* action represents as the real party in action, from pursuing meritorious and substantial allegations of fraud against the public that have never before been brought nor adjudicated and that are governed under California State law. If CACC's allegations have merit, Lennar

has single-handedly defrauded in Delaware bankruptcy court millions of victims three thousand miles away. That cannot be law, and this court's remedial action is necessary.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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