NO. 20-210

IN THE SUPREME COURT OF THE UNITED STATES

JING SHU ZHENG,

Petitioner,

v.

CHRISTINA ELLIS and JONATHAN ELLIS, Relators; *ex rel.* United States of America,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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** Application of R. Duane Frizell, Esq. For attorney admission for* Pro Bono Publico *service is forthcoming*

QUESTIONS PRESENTED FOR REVIEW

This case involves civil penalties and damages arising under Section 8 housing and the False Claims Act ("FCA"). Petitioner was the landlord, Respondents the tenants. Petitioner represented herself *pro se* in the District Court. Her native language is Mandarin Chinese, and she is not very proficient in the English language. Therefore, she relied upon Google translate. Petitioner did have counsel for her appeal to the Ninth Circuit. At all times, Respondents have been represented by *pro bono* counsel.

The District Court expressly found no bad faith on the part of Petitioner. Nevertheless, the District Court determined that Petitioner's agent made a fraudulent statement in the Section 8 housing contract it signed. Under the contract, Petitioner received automatic payments from the government without further demand, request, or further representation. Contrary to the terms of that contract, and the representations made by Petitioner's counsel, Respondent was overpaid $300 in rent each month for 22 months, for a total of $6,600 in overpayments. The District Court rendered judgment against Petitioner for nearly $177,316, which included civil penalties and treble damages. The Ninth Circuit affirmed.

In upholding the judgment, the Ninth Circuit applied a "promissory fraud" or "fraud-in-the-inducement" theory in calculating the number of FCA civil penalties. Under this approach, it determined that each time rent was overpaid, Petitioner was subject to a civil penalty. Thus, it upheld the District Court's imposition of 22 civil penalties of $5,500 each. This came to a total of $121,000 in civil penalties.

With respect to treble damages, the Ninth Circuit upheld the District Court's methodology, which was not simply three times the overpayments of $6,600. Rather, the District

Court trebled the total amount paid out by the government. The government paid out a total of $18,772. Thus, the District Court awarded $56,316 in treble damages.

With respect to the both the civil penalties and the treble damages, the District Court failed to determine whether they ran afoul of the Due Process Clause of the Fifth Amendment. The Ninth Circuit did not decide that issue, but it did determine the penalties and damages did not constitute excessive fines.

Petitioner is now seeking a writ of certiorari from this Court. The questions presented for review here are as follows:

1. Whether the number of FCA civil penalties is based upon the number of overpayments received by a Section 8 landlord or whether they are based upon the number of times the landlord presents a fraudulent claim or statement to the government;

2. Whether FCA treble damages are based upon the total amount paid out by the government or whether they are based upon the sum of the overpayments alone; and

3. Whether due process is violated when a court imposes FCA civil penalties and treble damages that come to nearly 27 times the total amount of overpayments.

LIST OF ALL PARTIES

Petitioner JING SHU ZHENG ("Zheng") is an individual. She was the Defendant in the case brought against her in the United States District Court of the District of Nevada. She was the Appellant before the Ninth Circuit Court of Appeals.

CHRISTINA ELLIS and JONATHAN ELLIS (collectively the "Ellises") are individuals. As Plaintiffs in the District Court, they filed suit against Zheng.

The UNITED STATES OF AMERICA declined to intervene. Thereafter, the District Court allowed the case to proceed with the Ellises as Relators.

CORPORATE DISCLOSURE STATEMENT

All parties are individuals.

LIST OF ALL PROCEEDINGS

On June 21, 2016, Respondents filed this action in the United States District Court for the District of Nevada, Las Vegas Division, Case No. 2:16-cv-01447-APG-NJK. The District Court granted summary judgment in favor of the Respondents.

On November 16, 2018, Petitioner appealed to the United States Court of Appeals for the Ninth Circuit, Case. No. 18-17248. The Ninth Circuit affirmed.

Petitioner now seeks a writ of certiorari from this Court.

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The Ninth Circuit affirmed the District Court in all respects, holding as follows: (1) the number of FCA civil penalties is properly based upon the number of overpayments received Petitioner; (2) FCA treble damages are correctly based upon the total amount paid out by the government; and (3) due process is not violated with the imposition of FCA civil penalties and treble damages that come to nearly 27 times the total amount of overpayments (*see* Appendix F).

STATEMENT OF JURISDICTION

Under 28 U.S.C. § 1254(1), this Court has jurisdiction to review "[c]ases in the courts of appeals ... after rendition of judgment or decree." A panel of the Ninth Circuit rendered its opinion on April 3, 2020 (*see* Appendix F). It denied panel rehearing and rehearing *en banc* on May 13, 2020 (*see* Appendix G). On May 20, 2020, the Ninth Circuit granted Petitioner's motion to stay the mandate (*see* Appendix H). This Court may issue a writ of certiorari to the Ninth Circuit because the present petition is being deposited with the United States Postal Service within 90 days of the denial of rehearing. *See* 28 U.S.C. § 2101(c); *see also* S. CT. R. 13(1), 29(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST., amend. 5 (Due Process Clause)

"No person shall ... be deprived of life, liberty, or property, without due process of law ...."

31 U.S.C. § 3729 (False Claims Act)

(a) Liability for certain acts.

(1) In general. Subject to paragraph (2), any person who—
(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);
(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;
(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or
(G) 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 Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,
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 (28 U.S.C. 2461 note; Public Law 104-410), plus 3 times the amount of damages which the Government sustains because of the act of that person.

(2) Reduced damages. If the court finds that—
(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and
(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,
the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

(3) Costs of civil actions. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Definitions. For purposes of this section—

(1) the terms "knowing" and "knowingly"—
(A) mean that a person, with respect to information—
(i) has actual knowledge of the information;
(ii) acts in deliberate ignorance of the truth or falsity of the information; or
(iii) acts in reckless disregard of the truth or falsity of the information; and
(B) require no proof of specific intent to defraud;

(2) the term "claim"—
(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—
(i) is presented to an officer, employee, or agent of the United States; or
(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government—
(I) provides or has provided any portion of the money or property requested or demanded; or
(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and
(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

(3) the term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

(4) the term "material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(c) Exemption from disclosure. Any information furnished pursuant to subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

(d) Exclusion. This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

STATEMENT OF THE CASE

At the center of this case is Petitioner Jing Shu Zheng ("Zheng"), an elderly woman of somewhat limited means.[1] Over the years, Zheng scrimped and saved her hard-earned money to purchase a nice home in Las Vegas, where she hoped to retire and live out her golden years. To help cover the home's mortgage, Zheng rented it out to Petitioners Christina Ellis and Jonathan Ellis (collectively the "Ellises").

The Ellises rented Zheng's retirement home and, after moving out, sued her for violations of the False Claims Act ("FCA") related to Section 8 housing. (Doc. 1). Zheng could not afford an attorney; therefore, in the District Court, she represented herself *pro se*. In sharp contrast, the Ellises had the benefit of Nevada Legal Services, which provided experienced and formidable *pro bono* Section 8 attorneys. (Doc. 26 at 1-2 [2 AIER 93-94]; Doc. 50 at 1; Doc. 68 at 5 & n.2; Tr. 10/16/2018 [Doc. 83] at 29 [2 AIER 145]).[2]

Zheng is a U.S. citizen; however, she speaks Mandarin Chinese and has limited English proficiency. (Doc. 26 at 1-2 [2 AIER 93-94]; Tr. 9/18/2018 [Doc. 81] at 8, 12 [2 AIER 116-17]; Tr. 10/16/2018 [Doc. 83] at 22, 29 [2 AIER 138-45]). She used Google Translate for her documents and made all court appearances with a Mandarin interpreter. (Doc. 26 at 1 [2 AIER 93]; Doc. 53; Doc. 58 at 5; Doc. 61; Doc. 64; Tr. 9/18/2018 [Doc. 81] at 2 [2 AIER 114], 12; Tr. 10/9/2018 [Doc. 82] at 2 [2 AIER 125]; Tr. 10/16/2018 [Doc. 83] at 2 [2 AIER 130]). This only compounded her *pro se* difficulties and hardships in the case.

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[1] In the District Court, Zheng explained: "I can't afford a lawyer and there is no legal help to help me, so I am on my own." (Doc. 26 at 1 [2 AIER 93]).

[2] In the Ninth Circuit, Petitioner filed two volumes of the Appellant's Initial Excerpts of Record ("AIER"), which are cited throughout this petition. The citations to "Doc." refer to the docket entries in the District Court.

Relevant Facts.

The District Court found that on March 22, 2013, Zheng (as landlord) and the Ellises (as tenants) executed a Residential Lease Agreement (the "Lease") for Zheng's retirement home, which is located at 4411 Melrose Abbey Place, Las Vegas, NV 89141 (the "Property"). The District Court found further that, per the terms of the Lease, the rent was set at $2,300 per month.[3] (Doc. 28 at 1 [1 AIER 1]). The Ellises admit that they agreed to pay this amount and that they signed the Lease. (Doc. 24-12 [2 AIER 88-92]).

Zheng retained a management company, SJ 5308 Investment Corp ("SJ 5308"), to handle the rental of her retirement home. (Doc. 1 at 2; Doc. 12 at 2; Doc. 26 at 1 [2 AIER 93]). The District Court found that Zheng signed a Statement of Property Ownership/Authorization form ("Authorization Form") from the Southern Nevada Regional Housing Authority ("SNRHA") in which she designated SJ 5308 as her agent. (Doc. 28 at 4 [1 AIER 4]; *see also* Doc. 27 at 4 [2 AIER 100]; Doc. 27-1 [2 AIER 105-06]).

SJ 5308 put the Property on the market with the rent listed at $2,300 per month. The Ellises liked the Property and decided to rent it. SJ 5308 prepared the paperwork for the Ellises' leasing of the Property. All communications between Zheng and the Ellises went through SJ 5308. (Doc. 26 at 1 [2 AIER 93]).

The District Court found that on April 10, 2013, acting on Zheng's behalf, SJ 5308 entered into a Housing Assistance Payments Contract ("HAP") of the U.S. Department of

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[3] The District Court found that there were actually two leases: The first lease, dated May 13, 2013, had a rent set at $2,300 per month; the second, dated April 10, 2013, set the monthly rent at $2,000. In the District Court, Zheng presented evidence that she never signed the second lease and that it was a fraud. The District Court concluded that whether the second lease "is a valid lease is immaterial for the purposes [Plaintiffs' motion for summary judgment], as Zheng charged the Ellises [$2,300] as per the [first lease]." (Doc. 28 at 1 n.2 [1 AIER 1]).

Housing and Urban Development ("HUD") with the SNRHA.[4] (Doc. 28 at 2 [1 AIER 2]). The HAP provided that the Ellises would only be charged $2,000 in monthly rent. Of this amount, the Section 8 program would cover $456 per month, which was subject to change in accordance with HUD requirements. (2 AIER 39, 42). The Section 8 payments were to be made directly to Zheng without her having to send an invoice or make any other request. (2 AIER 40-42). If the Section 8 payments were late, Zheng could, depending on the circumstances, receive a late fee from the government as well. (2 AIER 43).

The District Court found that, per the terms of the Lease, the Zheng was paid rent in the amount of $2,300 per month. Under the HAP, that resulted in an overpayment of $300 per month for 22 months, for a total of $6,600 in overpayments. (Doc. 28 at 7 [1 AIER 7]; *see also* Doc 24-12 at 3, 5 [2 AIER 90-92]; Doc. 24-9; Doc. 24-10 [2 AIER 82-84]). Per the terms of the HAP, the government was entitled to a "recovery of overpayments." (2 AIER 43).

Relevant Procedural History.

On June 21, 2016, the Ellises filed a complaint against Zheng and SJ 5308 in the United States District Court for the District of Nevada. They stated a single claim: violation of the FCA. (Doc. 1 at 4-7). Under 28 U.S.C. § 1331.and 31 U.S.C. § 3732(a), the District Court had jurisdiction. Representing herself *pro se*, Zheng filed an answer and counterclaim. Pursuant to 31 U.S.C. § 3730(b)(4)(B), the United States declined to intervene in the action. (Doc. 4). The District Court then allowed the Ellises to proceed as Relators. (Doc. 7).

On August 14, 2017, the Ellises filed a motion for summary judgment on their FCA claim. On February 26, 2018, the District Court granted the motion but reserved ruling on

[4] In the District Court, Zheng challenged the authenticity and validity of the HAP, explaining that she had never seen it before and that she certainly did not sign it. (Doc. 26 at 2 [1 AIER 94]).

Zheng's counterclaims (*see* Appendix A). On September 7, 2018, the Ellises voluntarily dismissed SJ 5308, which had previously been defaulted. (Doc. 49).

On October 16, 2018, the case came on for a bench trial of Zheng's counterclaims. (Doc. 64; Tr. 10/16/2018 [Doc. 83] [2 AIER 129-49]). On that same date, the Court rendered its findings, conclusions, and order for entry of judgment, ruling against Zheng on her counterclaims (*see* Appendix B). Also on that same date, the District Court Clerk entered judgment on the counterclaims (*see* Appendix C).

In ruling on the Ellis's motion for summary judgment, the District Court found that the Ellises "d[id] not argue that Zheng acted in bad faith[;] nor [was] there any evidence to that effect" (*see* Appendix A). Nevertheless, it found that SJ 5308, Zheng's agent, made a misrepresentation in the HAP: that the Ellises would only be charged rent of $2,000 per month. Because her agent made the representation, the District Court concluded that, under the FCA, Zheng could be held personally liable.

The District Court found that the government's damages equaled the total amount it paid out under the life of the HAP: $18,722. With this basis, it calculated FCA treble damages to come to $56,316. The District Court also concluded that each of the 22 overpayments constituted an independent FCA violation requiring the imposition of a statutorily-imposed penalty between $5,500 and $11,000. *See* 31 U.S.C. § 3729(a)(1)(G); 28 C.F.R. § 85.3(a)(9). The District Court determined that, because Zheng represented herself *pro se* and could not afford an attorney, the inference arose "that she may not be able to pay the maximum penalties." Accordingly, the District Court set a penalty at the minimum of $5,500 for each of the 22 violations, for a total of $121,000 in civil penalties. On October 18, 2018, the District Court entered a final judgment against Zheng for $56,316 in FCA treble damages and $121,000 as

FCA civil penalties, for a total of $177,316 (*see* Appendix E). That judgment disposed of all parties' claims. .

On November 16, 2018, Zheng had an attorney make an appearance on her behalf for the first time.[5] (Doc. 72). On that same date, her attorned filed a notice of appeal to the Ninth Circuit. (Doc. 73 [2 AIER 150-52]). The notice was timely because it was filed within 30 days of the District Court's entry of its final judgment. *See* FED. R. APP. P. 4(a)(1)(A). Under 28 U.S.C. § 1291, the Ninth Circuit had jurisdiction over the final judgment.

Before the Ninth Circuit, Zheng challenged the District Court's calculation of damages. With respect to the treble damages, she argued that the amount should be based upon the total of $6,600 in overpayments, rather than the entire $18,722 the government paid out on the Ellises' behalf. In terms of the penalties, she argued that they should have been assessed only once, based upon the single misrepresentation in the HAP that rent would only be charged in the amount of $2,000 per month. This misrepresentation was made in the HAP by SJ 5308, Zheng's agent, rather than Zheng herself. In the District Court, Zheng presented evidence that, at all material times, she was not even aware of the HAP.[6] The Ninth Circuit rejected Zheng's challenges and affirmed the District Court in all respects.

Under 28 U.S.C. § 1254(1), this Court has jurisdiction to review "[c]ases in the courts of appeals ... after rendition of judgment or decree." A panel of the Ninth Circuit rendered its opinion on April 3, 2020 (*see* Appendix F). It denied panel rehearing and rehearing *en banc* on

[5] Her attorney before the Ninth Circuit, R. Duane Frizell, will be filing an application for admission to practice before this Court forthwith to render service *pro bono publico.*

[6] For these reasons, on appeal to the Ninth Circuit, Zheng also challenged the District Court's ruling that she could be held personally liable under the FCA.

May 13, 2020 (*see* Appendix G). On May 20, 2020, the Ninth Circuit granted Petitioner's motion to stay the mandate (*see* Appendix H).

REASONS FOR ALLOWANCE OF THE WRIT

The District Court found that the Ellises did "*not* argue that Zheng acted in bad faith[;] nor is there any evidence to that effect" (*see* Appendix A at p. 8). If the Ninth Circuit's decision is allowed to stand, this case would likely become the poster child for a grave wrong with Section 8 housing and the FCA. For alleged overpayments in rent totaling only *$6,600*, Zheng has been slapped with a judgment of nearly *$180,000*. This shocks the conscience.

This Court has explained that "[t]he False Claims Act is not 'an all-purpose antifraud statute,' or a vehicle for punishing garden-variety breaches of contract or regulatory violations." *Universal Health Servs. v. United States ex rel. Escobar*, __ U.S. __, __, 136 S. Ct. 1989, 2003 (2016) (citation omitted).

> Enacted in 1863, the False Claims Act "was originally aimed principally at stopping the massive frauds perpetrated by large contractors during the Civil War." *United States v. Bornstein*, 423 U.S. 303, 309 (1976). "[A] series of sensational congressional investigations" prompted hearings where witnesses "painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war." *United States v. McNinch*, 356 U. S. 595, 599 (1958). Congress responded by imposing civil and criminal liability for 10 types of fraud on the Government, subjecting violators to double damages, forfeiture, and up to five years' imprisonment. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696.
>
> Since then, Congress has repeatedly amended the Act, but its focus remains on those who present or directly induce the submission of false or fraudulent claims. *See* 31 U. S. C. §3729(a) (imposing civil liability on "any person who ... knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval"). A "claim" now includes direct requests to the Government for payment as well as reimbursement requests made to the recipients of federal funds under federal benefits programs. *See* § 3729(b)(2)(A). The Act's scienter requirement defines "knowing" and "knowingly" to mean that a person has "actual knowledge of the information," "acts in deliberate ignorance of the truth or falsity of the information," or "acts in reckless disregard of the truth

> or falsity of the information." § 3729(b)(1)(A). And the Act defines "material" to mean "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." § 3729(b)(4).

Id. at 1996.

Here, certiorari is warranted on three grounds: First, because the Ninth Circuit is perpetuating a patently flawed methodology for the computation of the number of FCA civil penalties in the context of Section 8 housing as well as in other cases where automatic payments are made by the government without demand. This is an important question of federal law that has not been, but should be, settled by this Court. Second, certiorari should also issue here because the Ninth Circuit's methodology for the computation of FCA treble damages in the context of section 8 housing is incorrect. This too is an important question of federal law that has not been, but should be, settled by this Court. Finally, certiorari should additionally be allowed here because the courts of appeals are reaching different conclusions as to whether FCA awards constitute punitive damages subject to due process restrictions.

I. CERTIORARI IS WARRANTED HERE BECAUSE THE NINTH CIRCUIT IS PERPETUATING A PATENTLY FLAWED METHODOLOGY FOR THE COMPUTATION OF THE NUMBER OF FCA CIVIL PENALTIES IN THE CONTEXT OF SECTION 8 HOUSING AS WELL AS IN OTHER CASES WHERE AUTOMATIC PAYMENTS ARE MADE BY THE GOVERNMENT WITHOUT DEMAND. THIS IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

"[A]ny person who . . . knowingly [violates the FCA] . . . is liable to the United States Government for a [minimum-to-maximum] *civil penalty* ...." 31 U.S.C. § 3729(a)(1)(G). The current minimum penalty is $5,500; the maximum is $11,000. *See* 28 C.F.R. § 85.3(a)(9). Years ago, in *Bornstein*, this Court set forth a methodology for calculating the number of civil penalties. That case involved false claims related to radio kits sold to the government per the terms of a single contract. *See Bornstein*, 423 U.S. 303, 307-08 (1976). The government sued a subcontractor that fraudulently labeled electron tubes used in a government contractor's production of the kits. *See id.* at 307. The subcontractor sent 21 boxes of those tubes to the contractor in three separately invoiced shipments. *See id.* The contractor, in turn, used 397 of those tubes to make radio kits, which it shipped to the government in connection with 35 different invoices. *See id.*

In *Bornstein*, the district court determined that the subcontractor was liable for 35 separate penalties because it caused the contractor to send 35 invoices the government for radio kits that contained tubes which were fraudulently labeled as to their quality specifications. *See id.* at 308. The court of appeals reversed, holding that because there was only one contract, the subcontractor could only be liable for one penalty. *See id.* This Court rejected both methodologies for determining the number of fraudulent "claims" for the purposes of civil penalties. *See id.* at 311-13. Instead, this Court concluded that under the FCA, "the focus in each case [must] be upon the *specific conduct of the person* from whom the Government seeks to

collect the statutory forfeitures [penalties]." (Emphasis supplied). Along these lines, the *Bornstein* Court announced a per-act approach, under which it held that if a defendant "had committed one act which caused ... a false claim, it would clearly be liable for a single [penalty]." *Id.* at 311. Applying this metric, this Court determined that the subcontractor was liable for three separate penalties, one for each of the invoices it sent to the contractor. *See id.* at 31.

Here, the District Court found that Zheng's agent made *one false statement* when it "certified ... in the [Housing Assistance Payments Contract] Contract [("HAP")] that ... except for the rent to owner payment, she did not receive and would not receive any other payments or contributions for rental of the Property; and ... the terms of the lease were in accordance with all provisions of the HAP Contract." (1 AIER 5). The District Court found further that the Ellises were charged an extra $300 per month for 22 months (a total $6,600 in overpayments). (1 AIER 7). Nevertheless, it slapped Zheng with a conscience-shocking civil penalty of $121,000 ($5,500 for each month's overpayment). (1 AIER 14). The Ninth Circuit affirmed, concluding:

> .... [T]he [District] court correctly held, in calculating the penalties owed under the FCA, that each check Zheng *received* from SNRHA was its own "claim against the government fisc" and thus its own separate FCA violation. *United States ex rel. Hendow v. Univ. of Phx.*, 461 F.3d 1166, 1177 (9th Cir. 2006). The district court appropriately imposed the lowest penalty per violation authorized by the regulations—$5,500—for a total of $121,000 in penalties based on the 22 violations Zheng committed. *See* 31 U.S.C. § 3729(a)(1); 28 C.F.R. § 85.3(a)(9).

(*See* Appendix F at pp.3-4 (emphasis added)).

By focusing on the payments "received," the Ninth Circuit's methodology conflicts with that set forth in *United States v. Bornstein*, 423 U.S. 303, 313 (1976). Under *Bornstein*, Zheng should only be subject to one civil penalty for the single false certification that her agent made in the HAP. Also, unlike the subcontractor in *Bornstein* who sent three fraudulent invoices, Zheng

made no demand for payment. Rather, the Section 8 payments were sent directly to Zheng without her sending an invoice or making any other request. (2 AIER 40-43). If the Section 8 payments were late, Zheng could even, depending on the circumstances, receive a late fee from the government as well. (2 AIER 43).

In ruling that Zheng was subject to 22 civil penalties, the Ninth Circuit appears to have relied upon the "promissory fraud" or "fraud-in-the-inducement" described in *Hendow*, a post-*Bornstein* case. *Hendow* explained:

> Another approach to finding False Claims Act liability in the absence of an explicitly false claim is the "promissory fraud" or "fraud-in-the-inducement" theory. This theory, rather than specifically requiring a false statement of compliance with government regulations, is somewhat broader. It holds that liability will attach to each claim submitted to the government under a contract, when the contractor extension of government benefit was originally obtained through false statements or fraudulent conduct.

Hendow, 461 F.3d at 1773 (citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542 (1943); *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914 (7th Cir. 2005); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999)).

In the context of Section 8 housing, the problem with the promissory fraud theory is that the landlord does not make "claims" for payment under a HAP. Rather, the government simply sends its portion of the monthly rent to the landlord without the landlord making any demand for payment. Under *Bornstein*, a landlord cannot be subject to a civil penalty for each automatic payment.[7] Nevertheless, that is exactly what the Ninth Circuit held in this case.

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[7] In their answering brief before the Ninth Circuit, Respondents cited other cases that are also distinguishable on this ground. *See, e.g.*, *United States ex rel. Drakeford v. Tuomey*, 792 F.3d 364, 384 (4th Cir. 2015) (affirming FCA civil penalty against hospital for $5,500 multiplied by 21,730 false claims relating to procedures on numerous patients); *Mackby I*, 261 F.3d at 824 (allowing $5,000 FCA civil penalty multiplied by 111 claims where each penalty was imposed for each patient for whom defendant made Medicare claim); *United States v. Krizek*, 111 F.3d 934, 936 (D.C. Cir. 1997) (reversing judgment totaling $168,105 relating to unnecessary care of

In *Escobar*, this Court specifically explained that FCA liability attaches to "those who present or directly induce the submission of false or fraudulent claims."[8] *Escobar*, 136 S. Ct. at 1996 (emphasis added). Under *Bornstein*, each such claim must be an affirmative act of fraud on the part of the defendant. This Court should provide guidance to lower courts as to the calculation of "claims" and the number of FCA penalties in Section 8 cases as well as in other cases where automatic payments are made by the government without demand.

Here, in applying the promissory fraud theory described in *Hendow*, the Ninth Circuit followed the lead of district courts in that circuit that have held landlords to be liable for each and every overpayment received under a HAP. *See, e.g., Cummings v. Hale*, 2017 U.S. Dist. LEXIS 142481, *1 (N.D. Cal. May 17, 2017); *United States ex rel. Holmes v. Win Win Real Estate, Inc.*, 2016 U.S. Dist. LEXIS 26276, *5 (D. Nev. Mar. 1, 2016); *United States ex rel. Baran*, 2015 U.S. Dist. LEXIS 125190, *23 (C.D. Cal. Aug. 28, 2015). These cases have been decided both before and after *Escobar*.

Other courts in other circuits have rejected this approach. For example, in *United States ex rel. Price v. Peters*, 66 F. Supp. 3d 1141, 1151 (C.D. Ill. 2013), the court held:

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numerous patients and false upcoding by a psychiatrist when the government sought FCA penalty of $10,000 for each of 8,002 separate codes used to identify discrete services provided to different patients for Medicare/Medicaid reimbursement); *United States v. Woodbury*, 359 F.2d 370, 378 (9th Cir. 1966) (upholding civil penalty of $2,000 multiplied by 10 false claims made by contractors relating to the construction of separate, individual homes). One case cited by the Ellises only one civil penalty imposed for each of four separate contracts. *See United States ex rel. Longhi v. Lithium Power Techs., Inc.*, 530 F. Supp. 2d 888, 901 (S.D. Tex. 2008) (rejecting the argument that a penalty should be assessed for each of 54 vouchers submitted under the four contracts).

[8] In *Escobar*, this Court left open the question "whether all claims for payment implicitly represent that the billing party is legally entitled to payment." *Escobar*, 136 S. Ct. at 2000-01. Because Zheng sent no claims for payment to the government, the Court need not reach this question here.

> ... Defendant received excess rent payments from Relator in nine out of the twelve months that Defendant also received the reasonable rent amount from Relator and the Springfield Housing Authority's Voucher Program. Relator argues that this constitutes nine separate violations of the False Claims Act and should result in nine separate $5,500 penalties being assessed against Defendant.
>
> However, Defendant engaged in a single act of promising the Springfield Housing Authority that she would not charge more than $370 per month. This act serves as the basis for Defendant's liability in this case. Accordingly, Defendant is responsible for this single, fraudulent act and must pay a $5,500 penalty for her conduct.

Id. at 1151; *see also Coleman v. Hernandez*, 490 F. Supp. 2d. 278, 280-81 (D. Conn. 2007) (citing *Bornstein* and imposing civil penalties on a Section 8 landlord six times because the landlord made six separate "false statements," each demanding an additional sum for "water usage" and threatening to evict the tenant if that amount were not paid).

Certiorari is warranted here because the Ninth Circuit is perpetuating a patently flawed methodology for the computation of the number of FCA civil penalties in the context of Section 8 housing as well as in other cases where automatic payments are made by the government without demand. This is "an important question of federal law that has not been, but should be, settled by this Court." S. CT. R. 10(c).

II. CERTIORARI SHOULD ALSO ISSUE HERE BECAUSE THE NINTH CIRCUIT'S METHODOLOGY FOR THE COMPUTATION OF FCA TREBLE DAMAGES IN THE CONTEXT OF SECTION 8 HOUSING IS INCORRECT. THIS TOO IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

In addition to being subject to a civil penalty, "any person who . . . knowingly [violates the FCA] . . . is liable to the United States Government for ... *3 times the amount of damages* which the Government sustains because of the act of that person." 31 U.S.C. § 3729(a)(1)(G). Here, the District Court found that that the Ellises were only overpaid a total of $6,600.

Per the terms of the HAP, the government was entitled to a "recovery of overpayments." (2 AIER 43). Nevertheless, the District Court took it a step further. Specifically, it held that the government's damages equaled the total amount it paid out: $18,722. Trebled, the damages came to $56,316. The Ninth Circuit affirmed, concluding:

> ... [T]he [district] court properly calculated the amount owed in damages. Because the FCA is concerned with fraud on the *government*, damages are determined not by how much Zheng overcharged the Ellises, but rather by how much Zheng overcharged the government—that is, the amounts she received from the government without lawful entitlement. The HAP stated that Zheng would not be entitled to any funds from the government if, as occurred here, she failed to comply with the terms of the agreement. Accordingly, the damages owed are the entire amount Zheng received from the government. *See United States v. Mackby* [hereinafter *Mackby II*], 339 F.3d 1013, 1018–19 (9th Cir. 2003).

(Appendix F ¶ 2, at p.4).

In *Mackby II*, the Ninth Circuit announced the general rule: "Ordinarily the measure of the government's damages [under the FCA] would be the amount that it paid out by reason of the false statements over and above what it would have paid if the claims had been truthful.'" *Mackby II*, 339 F.3d at 1014, 1018. The *Mackby II* Court noted an exception to this general rule, when the defendant is not "qualified" for the program and therefore "entitled to nothing." *Id.* at 1019.

In the case at bar, Ninth Circuit should have applied the general rule rather than the limited exception. In that *Mackby II*, false Medicare claims were at issue. *See Mackby II*, 339 F.3d at 1014. The false claimant was "a layperson and did not provide ... medical services." *Id.* at 1015. In order to access Medicare funds, the false claimant posed as a healthcare professional and used a separate healthcare provider's Medicare personal identification number (PIN). *See id.* at 1018-19. The Ninth Circuit found that "[t]he falsity here was not [the claimant's] representation that patients had received physical therapy, but the use of [another's] PIN to obtain payments to which he was not entitled." *Id.* The *Mackby II* court concluded that had the claimant "been truthful, the government would have known that he was entitled to nothing because he was neither a doctor nor a physical therapist in private practice." *Id.* He simply did not *qualify* for any payment whatsoever.

Unlike the *Mackby II* claimant, Zheng did qualify as a provider under the Section 8 program. No one disputes the facts that Zheng owned the Property, that she was a landlord, and that the pertinent state agency qualified her as a landlord entitled to receive Section 8 subsidy payments. Thus, the general rule is at play, and the exception is completely inapplicable. Under the Ninth Circuit's interpretation, the exception would swallow the rule: Every time any false claim were made, the claimant would be deemed unqualified to receive any funding at all and subject to disgorgement of 100% of all moneys paid (which then would be trebled as damages). This result is preposterous.

The proper metric for the damages calculation would be the $300 overpaid 22 times, for a total of $6,600. (Doc. 28 at 7 [1 AIER 7]). Trebled, the damages come to $19,800. The District Court erred in calculating trebled damages to be $56,316. Other courts applying *Mackby II* in the Section 8 context have used the same methodology. *See, e.g., Coleman v. Hernandez,*

Coleman v. Hernandez, 490 F. Supp. 2d. 278, 281 (D. Conn. 2007) (following *Mackby II* and holding that, under the general rule, "[b]y reason of [the] false statements, the government paid out $60 more per month [in Section 8 rent subsidy] than it would have paid if [the] claims had been truthful .... The government therefore sustained damages of $360, which, when trebled, totals $1,080.")

Certiorari should issue here because the Ninth Circuit's methodology for the computation of FCA treble damages in the context of Section 8 housing is flawed. This too is "an important question of federal law that has not been, but should be, settled by this Court." S. CT. R. 10(c).

III. CERTIORARI SHOULD ADDITIONALLY BE ALLOWED HERE BECAUSE THE COURTS OF APPEALS ARE REACHING DIFFERENT CONCLUSIONS AS TO WHETHER FCA AWARDS CONSTITUTE PUNITIVE DAMAGES SUBJECT TO DUE PROCESS RESTRICTIONS.

The Ninth Circuit altogether failed to address Zheng's argument that the District Court's damages award violated due process.[9] (OB 45-47). As explained below, in so doing, it has conflicted with decisions of the United States Supreme Court.

The Due Process Clause of the Fifth Amendment provides: "No person . . . shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST., amend. 5. The Supreme Court has held that the similar Due Process Clause of the Fourteenth Amendment "prohibits a State from imposing a 'grossly excessive' punishment [including punitive damages] on a tortfeasor." *BMW of N. Am. v. Gore*, 517 U.S. 559, 562 (1996). "[W]hen an award [of punitive damages] can fairly be categorized as 'grossly excessive' in relation to [legitimate State] interests . . . it enter[s] the zone of arbitrariness that violates [due process]." *Id.* at 569.

There is no question that the FCA's damages are punitive in nature, for this Court has held that they are:

> [T]he current version of the FCA imposes damages that are essentially *punitive* in nature . . . . by . . . generally impos[ing] treble damages and a civil penalty . . . . "The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers."

Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 784-786 (2000) (emphasis added); *accord Stev Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639

[9] The Ninth Circuit did, however, consider Appellant's excessive fines argument, holding, "[t]he penalties imposed by the district court are substantial, but they do not violate the Excessive Fines Clause of the Eighth Amendment" (*see* Appendix F ¶ 3, at pp.4).

(2000) ("[The] very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct.").

This Court has noted: "[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). In at least two cases, this Court has held that an award in excess of four times compensatory damages may violate due process. *See id.* (citing *BMW of N. Am. v. Gore*, 517 U.S. 559, 562 (1996); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991)). Here, compensatory damages amounted to $6,600, and the total judgment came to $177,316 (1 AIER 9). Subtracting out the actual damages, the punitive portion of the award comes to $170,716—nearly 26 times the compensatory damages. Due process forbids such an exorbitant penalty.

Certiorari should be allowed here because the courts of appeals are reaching different conclusions as to whether FCA awards constitute punitive damages subject to due process restrictions. *See, e.g.*, *United States ex rel. Drakeford v. Tuomey*, 792 F.3d 364, 387-88 (4th Cir. 2015) ("The 'FCA imposes damages that are essentially punitive in nature.' ... [and] the civil penalty is *completely punitive*."). The Court should settle this matter. *See* S. CT. R. 10(a).

CONCLUSION AND REQUEST FOR RELIEF

Here, certiorari is warranted on three grounds: First, because the Ninth Circuit is perpetuating a patently flawed methodology for the computation of the number of FCA civil penalties in the context of Section 8 housing as well as in other cases where automatic payments are made by the government without demand. This is an important question of federal law that has not been, but should be, settled by this Court. Second, certiorari should also issue here because the Ninth Circuit's methodology for the computation of FCA treble damages in the context of section 8 housing is incorrect. This too is an important question of federal law that has not been, but should be, settled by this Court. Finally, certiorari should additionally be allowed here because the courts of appeals are reaching different conclusions as to whether FCA awards constitute punitive damages subject to due process restrictions.

WHEREFORE, Petitioner JING SHU ZHENG hereby requests the Court as follows:

1. to issue a writ of certiorari to the Ninth Circuit Court of Appeals to decide important issues of law; and
2. to grant Petitioner all such other and further relief to which she may be entitled at law or in equity.

DATED: *August 11, 2020*.

Respectfully submitted,

/s/ Jing Shu Zheng
JING SHU ZHENG
Pro se*

**Application of R. Duane Frizell, Esq. for attorney admission for* Pro Bono Publico *service is forthcoming*