

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID OLSHAN, ESQ.
Counsel of Record
DAWN JENSEN, ESQ.
NEVADA LEGAL SERVICES, INC.
701 E. Bridger Avenue,
Suite 701
Las Vegas, Nevada 89101
(702) 386-0404
dolshan@nlslaw.net

*Attorneys for Christina and
Jonathan Ellis*

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
ARGUMENT	1
Circuit Courts Assess Civil Penalties Based on the Number of Payments	1
Circuit Courts and the Department of Justice Base Damages Under False Claims Act on Total Amount Paid by Government	3
The Ninth Circuit Did Not Rule On Due Process and the Damages Assessed in this Case Do Not Violate Due Process of Law	4
CONCLUSION	6

TABLE OF AUTHORITIES

	PAGE(S)
Cases	
<i>State Farm v. Campbell</i> , 538 U.S. 408, 123 S.Ct. 1513 (2003)	4
<i>United States v. Bornstein</i> , 423 U.S. 303, 96 S.Ct. 523 (1976)	2, 3
<i>United States ex rel. Drakeford v. Tuomey</i> , 792 F.3d 364 (4th Cir. 2015)	5
<i>United States ex rel. Feldman v. van Gorp</i> , 697 F.3d 78 (2nd Cir. 2012).....	3
<i>United States ex rel. Mikes v. Straus</i> , 274 F.3d 687 (2nd Cir. 2001).....	2
<i>United States ex rel. Siewick v. Jamieson Science & Eng'g, Inc.</i> , 214 F.3d 1372 (D.C. Cir. 2000)	3
Statutes/Rules	
24 C.F.R. § 982.507(a)	1
24 C.F.R. § 982.515.....	0
Miscellaneous	
<i>Housing Choice Voucher Guidebook</i> , 7420.10G	2, 3

INTRODUCTION

The petition for writ of certiorari filed by Petitioner implicates none of the factors set out in Supreme Court Rule 10. The Ninth Circuit affirmed the decision of the district court and the elements of the Ninth Circuit's decision are supported by federal statutory or case law that does not implicate any unsettled area or area of conflict. This Court determines whether the issues raised by Petitioner are important questions of federal law, but each issue raised by Petitioner finds support in a statute or court of appeals decision and any conflict raised by Petitioner is inapposite or the conflict exists between a district court and another district court.

ARGUMENT

Circuit Courts Assess Civil Penalties Based on the Number of Payments

The Section 8 Housing Choice Voucher Assistance Payments contract [“HAP”] between the housing authority and Petitioner forms the basis for the False Claims Act violations in this case. In the HAP, the housing authority determines the total rent that the Petitioner may charge Respondents. 24 C.F.R. § 982.507(a). The housing authority also sets how much rent Respondents and the housing authority pay Petitioner. 24 C.F.R. § 982.515. The HAP prohibits the landlord from demanding or accepting payments from the Respondents that exceed the amount set forth in the HAP. Appendix 3 at 2. Any amount that exceeds the HAP is a “side-payment” that violates the HAP and provides a claim under the False Claims Act. If the housing authority discovers the side-payment, it must cease payments and

demand that Petitioner pay Respondents back the full amount the Petitioner illegally collected. Housing Choice Voucher Guidebook, 7420.10G at 22-15; *see also* Appendix 3 at 2 (where HAP prohibits Petitioner from receiving any rent subsidy).

In executing the HAP, Petitioner promised not to accept side-payments and Petitioner's promise carried forward with each rental payment under the implied certification theory of the False Claims Act. With any implied certification theory, the Second, Fourth, Fifth, Ninth, and D.C. Circuits, assess civil penalties based on the number of payments. *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 697 (2nd Cir. 2001). No other Circuit Court supports Petitioner's argument that civil penalties should be based on the number of false statements.

Petitioner claims "the Ninth Circuit's methodology conflicts with that set forth in *United States v. Bornstein*, 423 U.S. 303, 313 (1976)." Petition for Writ of Certiorari at 14. *Bornstein* differs markedly in that Petitioner here is not a subcontractor and the issue before the *Bornstein* Court was "whether the subcontractor should be liable for each claim submitted by its prime contractor or whether it should be liable only for certain identifiable acts that it itself committed." *Bornstein*, 423 U.S. at 309, 96 S.Ct. 523, 528 (1976). With multiple payments, this Court held that the False Claims Act standard is not based on the number of contracts because this will almost always result

in but a single forfeiture, no matter how many fraudulent acts the subcontractor might have committed. This result would not only be at odds with the statutory language;

it would also defeat the statutory purpose. Such a limitation would, in the language of the Government's brief, convert 'the Act's forfeiture provision into little more than a \$2,000 license for subcontractor fraud.'¹

With any implied certification False Claims Act case, damages accrue with each payment if violation of the HAP would cause the housing authority to cancel the contract. *United States ex rel. Siewick v. Jamieson Science & Eng'g, Inc.*, 214F.3d 1372, 1376 (D.C. Cir. 2000). Here, the HAP required payment each month while Petitioner collected fraudulent side-payments. Each payment is a separate violation of the False Claims Act under the implied certification theory and *Bornstein* does not apply.

*Circuit Courts and the Department of Justice
Base Damages Under False Claims Act
on Total Amount Paid by Government*

Because Petitioner was not eligible for payments under the HAP if she collected side-payments,² the measure of damages is the total amount paid by the government. The Department of Justice, the Second, Fifth, Seventh, Ninth, and D.C. Circuits agree that under these facts, damages are based on the total amount paid by the government. *United States ex rel. Feldman v. van Gorp*, 697 F.3d 78, 88 (2nd Cir. 2012). No other circuit court supports Petitioner's argument that damages are measured by the overpayment. Petition for Writ of Certiorari at 19.

¹ *Bornstein*, 423 U.S. at 311, 96 S.Ct at 529.

² Housing Choice Voucher Guidebook, 7420.10G at 22-15.

Petitioner cites to *Mackby II* to support her argument (*id.*) without realizing the Petitioner's right to payment was conditioned upon her not accepting side-payments. Had the housing authority known of the side-payments, it was obligated to cease payments and request a return of the prior payments from Petitioner. *Supra* at 2.

*The Ninth Circuit Did Not Rule On Due Process
and the Damages Assessed in this Case
Do Not Violate Due Process of Law*

The Ninth Circuit has not ruled on this due process argument in its memorandum decision and it was not raised by Petitioner in her Opening Brief below. *See Appendix F.* Petitioner did raise an Excessive Fines argument in the Ninth Circuit. The Ninth Circuit ruled that "the severity of [Petitioner's] crime, as adjudged by Congress, the harm to the government, and the difference between the fine imposed and the penalties authorized," did not violate the Eighth Amendment's prohibition on excessive fines. Appendix F at 25.

Even if the due process issue had been properly raised, the punitive damages awarded in the district court's decision, when properly calculated, totaled only 5.5 times the compensatory damages and this single digit generally does not violate due process. *See State Farm v. Campbell*, 538 U.S. 408, 425, 123 S.Ct. 1513, 1524 (2003)(where single digit ratios between compensatory damages and punitive damages do not violate due process of law).

Petitioner claimed the district court awarded compensatory damages of \$6,600 and punitive damages of \$170,716. Petition for Writ of Certiorari at 22. These figures misstate what the district court determined (Appendix A at 10) and how courts

calculate punitive damages in a False Claims Act case. The total amount of government payments illegal received by Petitioner was \$18,722 and the district court tripled this amount to \$56,316. Appendix A at 10. The penalty assessed against the Petitioner was \$121,000. *Id.* There is no basis in the record for the Petitioner's figure of \$6,600 in compensatory damages.

Because Respondents are entitled to at least 25% of the damages awarded under 31 U.S.C. § 3730(d)(2), the Fourth Circuit determined that the private party share (25%) renders 25% of the \$56,316 compensatory damages or \$14,079. *U.S. ex rel. Drakeford v. Tuomey*, 792 F.3d 364, 389 (4th Cir. 2015).

So, \$14,079 and \$18,722 equal \$32,801. Thus, \$32,801 is compensatory and \$144,515 is punitive (\$177,316 total award minus compensatory damages of \$32,801). Compensatory damages of \$32,801 are 5.5 times the punitive damages of \$144,515 and do not violate due process.

CONCLUSION

For the reasons stated above, the Ellises respectfully request that this Court deny the Petition for Writ of Certiorari.

DATED this 21st day of September, 2020.

NEVADA LEGAL SERVICES, INC.

David Olshan, Esq.
Counsel of Record
Nevada Bar No. 4126
Dawn Jensen, Esq.
Nevada Bar No. 10933
701 E. Bridger Avenue, Suite 701
Las Vegas, Nevada 89101
Telephone (702) 657-6000
Facsimile (702) 657-0065
dolshan@nlslaw.net

Attorneys for Christina and Jonathan Ellis