No. 24-549

IN THE
Supreme Court of the United States

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

v.

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

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit correctly held that the Excessive Fines Clause limits the statutory penalties in this particular case to a single-digit multiplier of actual damages, which the District Court should determine on remand.

2. Whether the District Court clearly erred by declining to infer that Respondents overbilled the Government on certain patient visit codes when Petitioner did not produce evidence as to those patient codes.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents 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.)
- *Zorn v. Grant*, No. 24-845 (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)

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES:

TABLE OF AUTHORITIES—Continued

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BRIEF IN OPPOSITION

INTRODUCTION

Petitioner asks this Court to grant certiorari to review the Eighth Circuit's decision about how the Excessive Fines Clause applies on the facts of this case, and whether the Eighth Circuit correctly found no clear error in the District Court's determination that certain overbilling claims failed for lack of evidence. Neither of those issues or the sub-questions they implicate are cert-worthy; indeed, most are fact-bound, none implicate a split, and all suffer from vehicle problems.

This case arises from a dispute between two doctors in a small-town sleep medicine practice. In 2016

and 2018, a Medicare auditor sent Dr. Steven Zorn audit letters accusing him of overbilling Medicare by miscoding the complexity of certain patient visits. The Medicare auditor took no further action. Dr. Stephen Grant, another doctor who worked with Zorn and co-owned the practice, saw copies of those letters and filed a qui tam suit under the False Claims Act (FCA). Grant's suit relied on the letters and the same underlying information they disclosed. The FCA's public disclosure bar should have precluded that parasitic suit, but the District Court and Eighth Circuit found the bar inapplicable. Dr. Zorn has petitioned for review of that holding. *See* Pet., *Zorn* v. *Grant*, No. 24-845 (U.S. Feb. 5, 2025).

Grant's suit alleged that Zorn submitted claims for sleep-related services that falsely described the patient encounters as more complex than they were. After a bench trial, the District Court found that Zorn had submitted 1,050 false claims and caused approximately $86,000 in actual damages. The final judgment took account of the FCA's treble damages provision for actual losses and the statute's penalty provision. Here, the District Court calculated the statutory penalties for $86,000 in actual damages at approximately *$7.7 million*. Applying the Eighth Amendment's Excessive Fines Clause, the court reduced the statutory penalties to approximately $6.7 million. On appeal, the Eighth Circuit agreed that the statutory penalties violated the Excessive Fines Clause, but found the District Court's reduction insufficient. The appeals court held that the penalties were still unconstitutionally excessive and should be further reduced. It ordered the District Court on remand to determine the appropriate statutory penalties, but instructed

that the penalty should be no larger than a single-digit multiplier of the actual damages, given the facts of this case.

Petitioner takes issue with that decision on various fronts, but none warrant this Court's review.

First, neither of the issues under the Excessive Fines Clause are cert-worthy. Those holdings—that the Excessive Fines Clause applies to non-intervened qui tam cases and that the statutory penalties imposed here were unconstitutionally excessive based on the record—do not implicate a circuit split. Every circuit to address the question has correctly concluded that the Excessive Fines Clause applies to relator-litigated actions. And every circuit Petitioner points to applies this Court's proportionality test to determine whether a given fine in a given case is excessive—like the Eighth Circuit did here.

Petitioner attempts to contrive a split by describing the Eighth Circuit as imposing a "facial" single-digit multiplier cap for all FCA cases. Pet. 20. The court did no such thing. It held that, on "these facts," in "this case," a double-digit multiplier was excessive. Pet. App. 27a. As a result, this case does not even present the first question presented, which is whether "the FCA's statutory penalty must be limited to a single-digit multiplier of the actual damages." Pet. i. The Eighth Circuit took no position on whether more egregious conduct in some other case might warrant a larger multiplier. Nor is it surprising that, in deciding whether a particular fine is disproportional to particular conduct, different courts have reached different conclusions. That shows that disparate cases warrant disparate outcomes, not that courts are split.

The Eighth Circuit also got it right on the merits. Consistent with this Court's guidance in the Due Process Clause context, the Eighth Circuit concluded that cases involving a relatively small amount of purely economic harm are less reprehensible than ones involving tortious conduct or other illegal activity. The court below adhered to this Court's instruction that the legislature's judgment is entitled to substantial—but not absolute—deference. After all, the Bill of Rights does not grant the fox the run of the henhouse.

Second, Petitioner seeks review of the Eighth Circuit's decision, on clear-error review, to affirm the District Court's finding that Petitioner failed to prove part of his case. Once again, there is no split or conflict with this Court's precedents, this issue is wholly case-specific, and there are significant vehicle problems—namely, that the District Court also found Petitioner failed to prove multiple elements of his FCA claims as to this part of his case.

The Eighth Circuit's decision does present one cert-worthy issue—just not one that Petitioner identified. As explained in Zorn's separate petition, certiorari is warranted to review the Eighth Circuit's decision that the public disclosure bar is only triggered when there is an express accusation of fraud through one of the statutorily defined channels. Pet., *Zorn* v. *Grant*, No. 24-845. That question is the subject of a twelve-circuit split. The Eighth Circuit's approach is deeply wrong. The issue is exceptionally important. And a ruling for Zorn on that issue would obviate the need to address the issues Petitioner raises here.

The Court should accordingly deny certiorari on Grant's petition and grant Zorn's. But if the Court

grants certiorari on Grant's petition, it should also grant Zorn's petition and consider the cases together.

STATEMENT OF THE CASE

A. Legal Background

The FCA imposes significant financial penalties 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). Under the FCA's qui tam provisions, a private person may bring an action as a relator on behalf of the United States. *Id.* § 3730(b)(1).

If a defendant is found liable under the FCA, the statute specifies damages of "3 times the amount of damages which the Government" sustained. *Id.* § 3729(a)(1). In addition, the statute imposes a mandatory penalty of between $13,946 and $27,894, which courts interpret to be a per-claim penalty. *See id.*; 29 C.F.R. § 85.5 (Table 1). The relator receives up to 30% of the recovery, including any statutory penalties, in addition to attorneys' fees and costs. 31 U.S.C. § 3730(d)(2).

Because the statutory penalties are not connected to the dollar amount of the claim, large numbers of claims causing little damage can nevertheless lead to massive penalties. In the healthcare field in particular, providers routinely submit thousands of relatively small-dollar-value claims each year. The magnitude of FCA penalties in these cases can result in tremendous upwards settlement pressure, even where the Government experienced little or no tangible harm. *See* Melissa Ballengee Alexander, Bajakajian: *New Hope for Escaping Excessive Fines Under the Civil False Claims Act*, 27 J.L. Med. & Ethics 366, 368

(1999) (explaining that "[w]hen numerous claims are at issue the FCA's per claim fines can metamorphize from rough remedial justice to grossly disproportionate penalties").

The FCA also contains a "public disclosure bar" that directs dismissal of a relator's action if "substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed," including via an "audit." 31 U.S.C. § 3730(e)(4)(A). This provision is designed "to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits." *Graham Cnty. Soil & Water Conservation Dist.* v. *United States ex. rel. Wilson*, 559 U.S. 280, 295 (2010).

B. Statement of Facts

Respondent Dr. Steven Zorn practices sleep medicine in West Des Moines and Ankeny, Iowa. The other Respondents are his personal practice and a related medical equipment company.[1]

Dr. Zorn treats Medicare, Medicaid, and Tricare 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 for reimbursement from 99201 through 99205. Pet. App. 3a. Return visits are coded for reimbursement from 99211 to 99215. *Id.* The last digit in these codes reflects the visit's complexity; higher digits

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[1] Petitioner did not name Iowa CPAP, LLC as a Respondent. *See* Pet. iii. Because Iowa CPAP was also a defendant-appellee below along with Zorn and Iowa Sleep, this brief collectively refers to all three as "Respondent" or "Zorn."

indicate greater complexity and seek a higher payment. *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 its concerns. According to the letter, Zorn had billed new patients with the highest dollar-value code "100 percent" of the time. *Id*. at 60a. The letter explained that "[m]ore variety would be expected" and offered "to educate" Zorn on proper billing. *Id*.

In January 2018, following another audit to identify "fraud, waste, and abuse," the same CMS contractor sent Zorn a second letter. *Id*. at 61a. This letter explained that the Government had previously warned Zorn about incorrectly billing new patient codes at the highest level 100 percent of the time. *Id*. at 61a-62a. The letter provided "formal notice" regarding Zorn's overbilling and specific "overpayments made to" him by Medicare. Pet. App. 172a, *Zorn*, No. 24-845.

C. Procedural History

1. Petitioner Dr. Stephen Grant worked with Zorn and was a partial owner in Zorn's practice. The practice's office manager gave Dr. Grant copies of the audit letters. Two months after the second audit letter, in March 2018, Grant brought this qui tam action based on the letters, alleging that Zorn had violated the FCA by overbilling.

Zorn sought to dismiss the action under the public disclosure bar, arguing that Grant's FCA claim should be foreclosed because it was based on the audit letters. The District Court held the public disclosure bar inapplicable because the letters from the CMS contractor

did not allege that Zorn had engaged in "*intentional*" miscoding, while Grant's complaint did. *Id*. at 93a.

Following a bench trial, the District Court found that Zorn overbilled on initial Medicare patient visits causing "actual damages to the Government of $86,332"—"approximately $113 per false claim"—which the court trebled to $258,996. *Id*. at 125a, 127a.

The court, applying what it thought was the statutory minimum for FCA penalties, calculated the penalty amount at $7,699,525 based on 1,050 false claims submitted by Zorn. *Id.* at 126a-127a. As the Eighth Circuit pointed out on appeal, the District Court used an incorrectly low statutory minimum for some claims. *See id.* at 20a-21a. The Government has since asserted that the correct minimum statutory penalties should have been $8,062,025. USG Pet. for Rehearing 4 n.1; *accord* Pet. 3 n.1.

The District Court found that imposing the minimum statutory penalties violated the Eighth Amendment's Excessive Fines Clause. Pet. App. 148a-149a. It accordingly reduced the penalty amount to $6,474,900. *Id*.

2. Zorn appealed, and Grant cross-appealed. On Zorn's appeal, the Eighth Circuit first addressed the public disclosure bar. It held the bar was "inapplicable" because it applies only when "substantially the same allegations" have been publicly disclosed through one of the specified channels, and the allegations in Grant's complaint differed from the CMS contractor letters. *Id*. at 11a. According to the Eighth Circuit, the difference was that Grant "alleged that the defendants *knowingly* submitted false claims to the government," *id*. (emphasis added), whereas the

CMS auditor's letters "revealed only the possibility of inaccurate billing" and "failed to suggest" Zorn "*intentionally*" submitted false bills, *id*. at 12a (citation and brackets omitted). "Given the letters' repeated references to" Zorn's "errors and the accompanying offers for remedial education," the Eighth Circuit reasoned that "an uninitiated reader would not reasonably infer from the letters that" Zorn "had committed fraud." *Id*. at 12a.[2]

The Eighth Circuit next addressed the Excessive Fines Clause. The court of appeals held the Excessive Fines Clause applies to non-intervened qui tam suits, consistent with the Eleventh Circuit—the only other court to decide the issue. *Id*. at 22a-23a (citing *Yates* v. *Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1308 (11th Cir. 2021)).

The Eighth Circuit also agreed with Zorn that the fine imposed here was unconstitutionally excessive. *Id*. at 24a. The court acknowledged that it owed "substantial deference to legislative judgments concerning appropriate sanctions." *Id*. at 28a (quotation marks omitted). But the court recognized that the Excessive Fines Clause does not permit Congress to impose a penalty "grossly disproportional to the gravity of a

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[2] As explained more in Zorn's petition for certiorari, 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 acknowledge that the FCA's scienter requirement does not require the intentional submission of false claims. *Id*. § 3729(b)(1)(B); *United States ex rel. Schutte* v. *SuperValu Inc.*, 598 U.S. 739, 750 (2023) (necessary mental state for FCA liability includes "actual knowledge, deliberate ignorance, or recklessness").

defendant's offense." *Id*. at 23a (quoting *United States* v. *Bajakajian*, 524 U.S. 321, 334 (1998)). The Eighth Circuit accordingly was "mindful" of its obligation "not to give 'undue deference' to legislative judgments about excessiveness," lest the legislature supply both "an answer to the question of what a fine should be *and* whether it's excessive." *Id*. (quoting *Yates*, 21 F.4th at 1323 (Newsom, J., concurring)).

At the parties' joint invitation, the Eighth Circuit drew from this Court's insights in Due Process Clause cases to conclude that "purely economic harm * * * is less reprehensible than 'tortious conduct that evinces an indifference to the health or safety of others.' " *Id*. at 26a (quoting *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 419 (2003)) (brackets and ellipses omitted). 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*. (quotation marks omitted). This case was thus unlike other cases involving "tortious conduct that evinced an indifference to the health or safety of others," in which courts found double-digit multipliers were appropriate. *Id*. The Eighth Circuit concluded that on the facts of this case, including because it involves "purely economic harm," *id*., "the district court should have limited the punitive sanction to a single-digit multiplier of compensatory damages," *id*. at 27a. Rather than set that number itself, the court left the precise sanction to the District Court's discretion on remand. *Id.* at 29a.

Chief Judge Smith disagreed with the panel's constitutional analysis. *Id*. at 30a-39a (Smith C.J., concurring in part and concurring in the judgment). "[O]n this record," he would have concluded that imposing a

$7.7 million fine for only $86,332 in actual losses was not excessive. *Id*. at 33a.

3. The United States intervened for the purpose of seeking panel rehearing and rehearing en banc. Grant also sought rehearing. Zorn opposed rehearing but argued that, if the Eighth Circuit reheard the case, it should first correct the panel's error regarding the public disclosure bar. As Zorn explained, a different decision on the public disclosure bar would have allowed the Eighth Circuit to avoid the constitutional question. The Eighth Circuit denied rehearing en banc. *Id*. at 154a.

4. Both Grant and Zorn petitioned this Court for a writ of certiorari. The United States, despite seeking rehearing en banc on the Excessive Fines Clause question and multiple extensions from this Court, ultimately "determined that a petition for a writ of certiorari" on that fact-bound issue "is not warranted in this case." Letter from Acting Solicitor General Sarah M. Harris to Speaker Mike Johnson at 2 (Feb. 24, 2025) ("Solicitor General Letter"), https://perma.cc/4NWY-MR9N. As the Government explained in its letter to Congress, the Eighth Circuit's decision invalidated "a particular application of a federal statute regarding penalties in a particular case," rendering certiorari inappropriate. *Id.* The United States also suggested that this case is a poor vehicle because this Court "has previously reserved the question whether the Excessive Fines Clause applies in qui tam suits" and "[t]he need to decide that threshold issue could complicate th[is] Court's review." *Id.*

REASONS FOR DENYING THE PETITION

I. CERTIORARI REVIEW OF THE EIGHTH CIRCUIT'S EIGHTH AMENDMENT ANALYSIS IS UNWARRANTED.

A. Certiorari Is Unwarranted On Whether The Excessive Fines Clause Applies To Non-Intervened Qui Tam Actions.

As the United States recognized when it declined to seek certiorari, there is a threshold question to the Eighth Circuit's fact-bound Excessive Fines Clause analysis: whether the Clause applies in non-intervened qui tam suits. Solicitor General Letter, *supra*, at 2. There is no split on that question, and the panel's unanimous decision holding that the Excessive Fines Clause applies to such suits is correct. Nor is there any need for this Court to weigh in on Petitioner's unpreserved secondary question about whether the portion of a judgment payable to a relator is exempt from the Excessive Fines Clause.

1. No court of appeals has held the Excessive Fines Clause inapplicable to relator-litigated actions. The Court left that question open in 1989, *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.21 (1989), and again in 1993, *Austin* v. *United States*, 509 U.S. 602, 607 n.3 (1993). In the decades since, two courts of appeals have addressed the issue—the Eleventh Circuit in 2021 and the Eighth Circuit below. Both reached the same result: the Excessive Fines Clause applies to relator-litigated actions. Pet. 15; *see* Pet. App. 23a (majority op.); *id*. at 30a-39a (Smith, C.J., concurring in part and concurring in the judgment); *Yates*, 21 F.4th at 1308.

Petitioner invokes the possibility of a future split based on the Seventh Circuit's 17-year-old supposed "skepticism" of that approach. Pet. 15 (citing *United States* v. *Rogan*, 517 F.3d 449, 453-454 (7th Cir. 2008)). But *Rogan* was a suit litigated by the Government, not a relator, and the Seventh Circuit offered no view on the Clause's application in relator-litigated suits. *See Rogan*, 517 F.3d at 451. It merely observed that whether "the Excessive Fines Clause applies to civil actions under the" FCA was an open question. *Id.* at 453-454. The Seventh Circuit had no need to resolve that issue, which was unpreserved. *Id.*

2. In any event, the decision below is correct. "[T]he Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government." *Austin*, 509 U.S. at 607 (quoting *Browning-Ferris*, 492 U.S. at 268). The Eighth and Eleventh Circuits correctly hold that non-intervened qui tam awards meet that standard.

Beginning with the latter requirement, "the monetary awards in non-intervened qui tam actions are 'payable' to the government because the government shares in the proceeds of the action." Pet. App. 22a (quoting *Yates*, 21 F.4th at 1308). Even in relator actions, "the United States generally receives between 70 and 75 percent of the recovery." *Yates*, 21 F.4th at 1308. Indeed, the Eleventh Circuit had "no difficulty concluding" the payable-to-the-government requirement was met in non-intervened qui tam cases. *Id.*

"The monetary awards in non-intervened qui tam actions are also 'imposed' by the government because the government maintains 'sufficient control' over the action." Pet. App. 22a (quoting *Yates*, 21 F.4th at 1310). The Eleventh Circuit deemed this "too plain to

be contested." *Yates*, 21 F.4th at 1309. (quoting *Marbury* v. *Madison*, 5 U.S. 137, 177 (1803)). The Eighth Circuit agreed. *See* Pet. App. 23a (finding "no reason to depart from *Yates*"). For one, qui tam awards are fines "imposed by" the Government under the FCA, a federal law. *Yates*, 21 F.4th at 1309. That law instructs individuals to pay "the United States as punishment * * * for an offense" committed against the United States, irrespective of whether the United States intervenes. *Id.* The United States also retains "substantial control" over relator-litigated actions, even when it initially chooses not to intervene. *Id*. at 1311. It may "request to intervene at any time, can obtain a stay of discovery, and can settle the action notwithstanding the objections of the relator." Pet. App. 22a. Finally, "the history and nature of qui tam actions support" this result. *Yates*, 21 F.4th at 1313. "[Q]ui tam actions were viewed as a routine enforcement mechanism in the early Republic," so failure to include qui tam penalties in the Eighth Amendment's prohibition on excessive fines would have left a gaping loophole for Congress to exploit. *Id.*

Petitioner disputes none of this. He instead suggests that the Excessive Fines Clause only applies in criminal proceedings. Pet. 14-15. The Eighth Circuit did not directly pass on that argument because Petitioner conceded below that the Eighth Amendment applies to the FCA. *See* Appellee's Principal and Response Br. 57 (applying Eighth Amendment test). For good reason: This Court has already rejected the argument that the Eighth Amendment is confined to "criminal proceedings." *Austin*, 509 U.S. at 608-609 (quotation marks omitted). "The question is not, as [Petitioner] would have it, whether" a penalty "is civil

or criminal, but rather whether it is punishment." *Id.* at 610. Courts have accordingly "accepted that FCA monetary awards are fines for the purposes of the Excessive Fines Clause" because they are "at least in part punitive." *Yates*, 21 F.4th at 1308 (collecting cases); *see also Vermont Agency of Nat. Res.* v. *United States ex. rel. Stevens*, 529 U.S. 765, 784 (2000) (describing the FCA's treble damages and civil penalties as "essentially punitive in nature").

3. Nor is certiorari warranted to resolve what Petitioner terms a "[s]econd[ary]" question—to which he devotes a solitary paragraph: "whether the portions of the award to be paid solely to the private relator are exempt from any Excessive Fines Clause remittitur." Pet. 16. Petitioner faults the Eighth Circuit for failing to address this. *Id.* But any blame lies at his feet. Petitioner did not raise this argument in his briefing before the Eighth Circuit at the merits or rehearing stage.

Petitioner is wrong in any event. He suggests that the Excessive Fines Clause comes into play only "*after* the relator's share is awarded—as the Government is not entitled to any part of it." *Id.* But as the Eleventh Circuit explained, "*all* monetary awards in FCA qui tam actions" are imposed and controlled by the United States and are thus subject to the Excessive Fines Clause. *Yates*, 21 F.4th at 1308. The relator is effectively an "avatar in litigation." *Id.* at 1310. That "a small share of the award" is given by the Government to the relator "as a bounty for prosecuting the action on the United States' behalf" does not change that analysis. *Id.* at 1311.

B. Certiorari Is Unwarranted On The Eighth Circuit's Fact-Bound Excessive Fines Analysis.

1. The decision below does not create or exacerbate a circuit split.

There is no meaningful division among the circuits as to the application of the Excessive Fines Clause in FCA cases. In *Bajakajian*, this Court held that "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." 524 U.S. at 334. The circuits have heeded that guidance when analyzing Excessive Fines Clause arguments under the FCA. Proportionality, however, is inherently a fact-intensive inquiry that can lead to different results on different facts in different cases. Petitioner seizes on those differing outcomes in an attempt to create the illusion of a circuit split, asserting that the Eighth Circuit adopted a per se "single-digit multiplier" rule for all non-intervened FCA cases. Pet. i. The Eighth Circuit did no such thing. It determined that, in this case, a single-digit multiplier was proportional to the gravity of the offense. That splitless, fact-bound decision does not merit this Court's review.

Every Circuit in Petitioner's supposed split follows *Bajakajian* and treats proportionality as the touchstone for application of the Excessive Fines Clause. That includes the Eighth Circuit. As the panel explained, "[a] punitive sanction under the FCA is 'excessive' when it is 'grossly disproportional to the gravity of a defendant's offense.' " Pet. App. 23a (quoting

Bajakajian, 524 U.S. at 334); *id.* at 30a (Smith, C.J., concurring in part and concurring in the judgment) (applying the same standard); *see also* Pet. App. 129a. The other circuits Petitioner lists—the Fourth, Seventh, and Eleventh—apply the same rule. *See* Pet. 21-22 (collecting cases); *Yates*, 21 F.4th at 1314 ("A fine 'violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense.' ") (quoting *Bajakajian*, 524 U.S. at 334); *Stop Ill. Health Care Fraud, LLC* v. *Sayeed*, 100 F.4th 899, 907 (7th Cir. 2024) ("To violate the Excessive Fines Clause, a penalty must be 'grossly disproportional to the gravity of the defendant's offense.' ") (quoting *Bajakajian*, 524 U.S. at 334); *United States ex rel. Bunk* v. *Gosselin World Wide Moving, N.V.*, 741 F.3d 390, 408 (4th Cir. 2013) ("A cumulative monetary penalty such as that imposed under the FCA will violate the Eighth Amendment * * * [when] 'grossly disproportional to the gravity of a defendant's offense.' ") (quoting *Bajakajian*, 524 U.S. at 334).

Determining what is "grossly disproportional to the gravity of" the offense is "inherently imprecise" and necessarily varies in each case. *Bajakajian*, 524 U.S. at 334, 336; *see also Yates*, 21 F.4th at 1314 (acknowledging this is "not a simple task") (brackets and citation omitted). That is a feature—not a bug. The purpose of the Excessive Fines Clause inquiry is to assess whether a particular fine is excessive for a particular defendant based on particular conduct. As a consequence of this fact-dependent inquiry, courts unsurprisingly reach different results about the propriety of varying fines under the FCA. *See, e.g.*, *Yates*, 21 F.4th at 1316 ("On this record, the monetary award imposed does not violate the Excessive Fines Clause."); *Sayeed*,

100 F.4th at 907-908 (concluding that "the gravity of the defendant's" specific conduct warranted the statutory penalty imposed); *Bunk*, 741 F.3d at 409 (finding no excessive fine "[u]nder the circumstances before us").

No circuit has adopted a "facial cap" on the appropriate multiplier for non-intervened FCA cases. *Contra* Pet. 20. As the Petition acknowledges, the Fourth, Seventh, and Eleventh Circuits have all upheld awards exceeding a single-digit multiplier. Pet. 20-21. So has the Eighth Circuit in non-FCA cases. *See, e.g.*, *Adeli* v. *Silverstar Auto. Inc.*, 960 F.3d 452 (8th Cir. 2020) (upholding 1:24.75 ratio); *Grabinski* v. *Blue Springs Ford Sales, Inc.*, 203 F.3d 1024 (8th Cir. 2000) (upholding 1:27 ratio).

Here, the Eighth Circuit applied *Bajakajian* and determined that, in "this case," on "these facts," a "double-digit multiplier is unwarranted." Pet. App. 27a. It accordingly remanded for the District Court to determine the appropriate award in the "first instance." *Id.* at 25a. The appeals court took no position on whether a higher multiplier might be appropriate on other facts in some other case.

2. The Eighth Circuit's Excessive Fines Clause analysis is correct on the merits.

The Eighth Circuit's decision tracks this Court's precedents. The panel applied the governing legal standard and held that on these facts—which involve "purely economic harm" as opposed to tortious activity—Zorn's conduct was not sufficiently reprehensible to justify an award greater than a single-digit multiplier of actual damages. *Id.* at 26a. It accordingly remanded for the District Court to choose an

appropriate award in light of that conclusion. Nothing about that warrants this Court's review.

Starting with the gravity of the offense, the Eighth Circuit concluded that Zorn's purely economic harm was not as reprehensible as tortious conduct that poses a risk to others. *Id.* Although *Bajakajian* did not provide extensive guidance on how to assess "gravity," courts often look to this Court's Due Process Clause cases as "instructive." *Id.* at 23a; *see, e.g.*, *United States ex rel. Drakeford* v. *Tuomey*, 792 F.3d 364, 388 (4th Cir. 2015). Consistent with that approach, the Eighth Circuit embraced *State Farm*'s insight "that purely economic harm * * * is less reprehensible than 'tortious conduct that evinced an indifference to the health or safety of others.' " *Id.* at 27a (quoting *State Farm*, 538 U.S. at 419).

Bajakajian strongly supports that conclusion, too. The defendant in that case attempted to leave the United States with more than $357,000 in cash, without following the applicable reporting requirements. 524 U.S. at 325. The Government sought forfeiture of the full sum under a statute permitting as much. *Id.* (citing 18 U.S.C. § 982(a)(1)). This Court deemed that forfeiture unconstitutionally excessive. The crime at issue "was solely a reporting offense," "unrelated to any other illegal activities," and it "affected only one party, the Government." 524 U.S. at 337-339.

The Eighth Circuit also looked to precedent to assess whether the fine calculated using the statutory minimum was "grossly disproportional" to Zorn's conduct. Pet. App. 23a (quoting *Bajakajian*, 524 U.S. at 334). It distinguished two cases approving of double-digit multipliers that involved "tortious conduct that

evinced an indifference to the health or safety of others." *Id.* at 27a (citing *Adeli*, 960 F.3d 452, and *Grabinski*, 203 F.3d 1024). By contrast, "[t]he defendants here caused a relatively small amount ($86,332) of only economic loss and did not endanger the health or safety of others." *Id*. The court also looked to another FCA case that affirmed an award of "4.3 times the amount of actual damages." *Id.* at 28a (citing *United States* v. *Aleff*, 772 F.3d 508, 513 (8th Cir. 2014)). Only after comparing and contrasting the facts of this case against those did the Eighth Circuit "conclude the district court should have limited the punitive sanction to a single-digit multiplier." *Id.*[3]

In so holding, the Eighth Circuit acknowledged that it owed "substantial deference" to the legislature's decision "concerning appropriate sanctions for the conduct at issue." Pet. App. 28a. Nevertheless, the court observed that it "must be mindful not to give 'undue deference' to legislative judgments about excessiveness," lest it risk ceding the constitutional question to Congress. *Id.* (quoting *Yates*, 21 F.4th at 1323 (Newsom, J., concurring)). The court accordingly

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[3] Other courts have likewise reduced FCA civil penalties under the Excessive Fines Clause to single-digit multipliers where the statutory penalty was significantly out of proportion to the Government's actual damages and there were no allegations of physical harm. *See United States ex rel. Cheryl Taylor* v. *Healthcare Assocs. of Texas, LLC*, No. 3:19-cv-2486, 2025 WL 624493, at *7 (N.D. Tex. Feb. 26, 2025) (reducing penalty in Medicare FCA case from 100x to 3x actual damages); *United States ex rel. Fesenmaier* v. *Cameron-Ehlen Grp., Inc.*, 715 F. Supp. 3d 1133, 1159, 1164 (D. Minn. 2024) (reducing penalties in Medicare FCA case to 4x actual damages), *appeal dismissed*, 2024 WL 4026210, at *1 (8th Cir. 2024).

held that, on these facts, "[a] more modest punishment * * * could have satisfied the government's legitimate objectives." *Id.* at 29a (quotation marks omitted).

Petitioner challenges several aspects of the Eighth Circuit's decision. None of those arguments is meritorious.

First, Petitioner accuses the Eighth Circuit of "appl[ying] Due Process precedent to overwrite Excessive Fines Clause authority." Pet. 19-20. The Eighth Circuit did not hold that the Due Process Clause somehow trumps the Excessive Fines Clause; it looked for guideposts in this Court's Due Process Clause cases in determining whether the penalties here were unconstitutionally excessive under the Excessive Fines Clause.[4]

There is nothing improper about that approach. Courts borrow insights from other areas of the law all the time. In *Bajakajian* itself, this Court took a page from its Cruel and Unusual Punishments Clause jurisprudence to assist "in deriving a constitutional excessiveness standard." 524 U.S. at 336. In *Fulton* v. *City of Philadelphia*, this Court applied the rule that "speculation is insufficient to satisfy strict scrutiny" in a Free Exercise case even though that teaching came from a Free Speech precedent. 593 U.S. 522, 542 (2021) (citing *Brown* v. *Entertainment Merchants Ass'n*, 564 U.S. 786, 799-800 (2011)). Just last term,

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[4] Other courts have regularly looked to this Court's Due Process Clause cases for relevant insights when assessing whether a FCA penalty is unconstitutionally excessive. *See, e.g.*, *Tuomey*, 792 F.3d at 388; *United States ex rel. Fesenmaier*, 715 F. Supp. 3d at 1159.

in *DeVillier* v. *Texas*, a case about the Fifth Amendment Takings Clause, this Court referenced the general rule that "[c]onstitutional rights do not typically come with a built-in cause of action," citing a precedent raising First and Fourteenth Amendment claims. 601 U.S. 285, 291 (2024) (citing *Egbert* v. *Boule*, 596 U.S. 482, 490-491 (2022)). In each of those cases, the Court still analyzed the relevant constitutional claim "under the standard appropriate to that specific provision." Pet. 19 (quoting *United States* v. *Lanier*, 520 U.S. 259, 272 n.7 (1997)). It simply looked to other areas of the law to help define what that standard should be.

Regardless, any error on this score is of Petitioner's own making. Petitioner invited the Eighth Circuit to consider this Court's Due Process Clause cases. *See* Pet. App. 23a ("The plaintiffs assert, and the defendants accept, that cases analyzing punitive damages under the Due Process Clause are instructive in analyzing punitive sanctions under the Excessive Fines Clause."). Like the Eighth Circuit's opinion, the section of Petitioner's appellate brief analyzing the reprehensibility of Zorn's conduct cites due process decisions—including by listing the *State Farm* factors. *See* Appellee's Principal and Response Br. 60-63; *see also* Appellee's Reply Br. 13-18. Any attempt by Petitioner to rescind these arguments in an ambiguous statement at oral argument, *see* Pet. 17, was insufficient to preserve the issue at this late stage.

Even now, Petitioner urges application of Due Process Clause principles when to his benefit. In a separate section of his petition, Petitioner faults the Eighth Circuit for not attending *more* closely to Due Process Clause precedents, which, Petitioner says,

required the Eighth Circuit to account for various "[a]ggravating factors." Pet. 26; *see id.* at 29. For the reasons explained below, *infra* p. 25, the Eighth Circuit made no such error. But more to the present point, Petitioner cannot have it both ways.

Second, Petitioner argues that the Eighth Circuit failed to give sufficient deference to the legislature's judgment, as codified in the FCA's statutory penalties. Pet. 19. That argument ignores the Eighth Circuit's recognition that it owed "substantial deference" to Congress. Pet. App. 28a (quotation marks omitted).

Petitioner's real complaint is that the Eighth Circuit did not blindly defer to the legislature on the constitutional question. But this Court has never endorsed a rule of absolute deference in the Excessive Fines Clause context. To the contrary, *Bajakajian* found the fine at issue unconstitutionally excessive even though it was what the statute required. 524 U.S. at 324.

Nor would a rule of absolute deference be consistent with the text or history of the Excessive Fines Clause. Under such a rule, "Congress would in effect be 'suppl[ying] an answer to the questions of what a fine should be *and* whether it's excessive.' " Pet. App. 28a (quoting *Yates*, 21 F.4th at 1318 (Newsom, J., concurring)). But as Judge Newsom colorfully put it, "we didn't end up with the Bill of Rights because of the founding generation's great faith in the powers that be." *Yates*, 21 F.4th at 1318 (Newsom, J., concurring). Anti-federalists like Robert Yates and Patrick Henry advocated the adoption of the Eighth Amendment to "limit the power of Congress to punish." *Id*; *see also Weems* v. *United States*, 217 U.S. 349, 372 (1910) (observing that the "predominant political impulse"

behind the Bill of Rights "was distrust of power"). That skepticism is particularly warranted as to monetary fines. After all, "[i]mprisonment, corporal punishment, and even capital punishment cost a State money; fines are a source of revenue." *Harmelin* v. *Michigan*, 501 U.S. 957, 978 n.9 (1991).[5]

Third, Petitioner again objects that the Eighth Circuit adopted "a rigid multiplier" rule. Pet. 22. As discussed *supra* pp. 16-18, the Eighth Circuit did not demand strict proportionality or announce a bright-line single-digit multiplier rule for all FCA cases. It did not even mandate the specific single-digit multiplier that would be the maximum constitutional penalty in this case. Rather, it asked whether on the facts of this case the FCA's statutory penalties would be "grossly disproportional to the gravity" of Zorn's offense. Pet. App. 23a (quoting *Bajakajian*, 524 U.S. at 334). Having answered "yes," the Eighth Circuit followed this Court's example and left the District Court wide discretion to select an appropriate award. *Id*. at 30a; *see State Farm*, 538 U.S. at 429 (remanding for further proceedings in light of the Court's conclusion that due process would allow "a punitive damages award at or

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[5] It is questionable whether the statutory fine Petitioner seeks here reflects a legislative judgment as opposed to "a monster of [courts'] own creation." *Bunk*, 741 F.3d at 407. The FCA does not instruct whether the civil penalty provision applies on a per-invoice level. Courts have read this language to require a separate monetary penalty for each and every invoice submitted to the Government, but that approach is particularly problematic for doctors, who "tend to submit a large number of relatively small claims each year." Krause, *"Promises to Keep": Health Care Providers and the Civil False Claims Act*, 23 Cardozo L. Rev. 1363, 1370 (2002).

near the amount of compensatory damages"); *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 585 (1996) (same, following the Court's holding that a punitive damages award 500 times larger than actual damages was grossly excessive).

Fourth, Petitioner quibbles (at 23-26) with the manner in which the Eighth Circuit weighed the gravity of Zorn's conduct. At best, Petitioner is asking for precisely the sort of case-specific error correction that does not warrant this Court's intervention. *See* Sup. Ct. R. 10. Petitioner accuses the Eighth Circuit of "disregard[ing]" the District Court's fact findings. Pet. 23, 25. But the findings in question are selectively quoted from a portion of the District Court's opinion deeming certain evidence credible "as Rule 404(b) evidence" to show motive, opportunity, intent, or the like. Pet. App. 120a; *see* Fed. R. Evid. 404(b)(2). The District Court went on to conclude that "even if considered as direct evidence, this is insufficient to meet Dr. Grant's burden" as to the vast majority of the alleged false claims. Pet. App. 120a. If anyone is engaged in "[r]ecord revisionism," it is Petitioner. *See* Pet. 23.

Finally, Petitioner highlights (at 26-31) several so-called "aggravating factors," which he accuses the Eighth Circuit of ignoring. Not so. The Eighth Circuit accounted for the size of the compensatory award and the nature of Petitioner's "malfeasance" and "fraud" in its analysis, but found a higher figure unwarranted based on the degree of reprehensibility of Zorn's conduct or lack thereof. *See* Pet. App. 28a-29a (weighing the fact that Zorn "damaged government programs" against the fact that he caused only "a modest amount of economic loss"). Petitioner simply wishes the Eighth Circuit had weighed those factors differently.

C. This Case Is A Poor Vehicle To Address The Constitutional Question Presented.

Because the Eighth Circuit did not hold that "the FCA's statutory civil penalty must be limited to a single-digit multiplier of the actual damages under the Eighth Amendment," Pet. i, the petition has a fundamental vehicle problem. The court below applied established precedent to hold that *on the facts of this case*, the Eighth Amendment does not permit a penalty amount that is greater than a single-digit multiplier of the Government's actual loss.

The concurrence characterized its disagreement with the majority in fact-bound terms, opining that, "on this record," the fines were "not excessive." *Id*. at 30a (Smith, C.J., concurring in part and concurring in the judgment). That is perhaps why the concurring judge did not vote to rehear the case en banc. *See* Pet. App. 154a; Fed. R. App. P. 40(b)-(c) (rehearing en banc is inappropriate for mere error correction).

Additionally, the constitutional question is only at issue if the Eighth Circuit was correct in its analysis of the FCA's public disclosure bar. At minimum, that counsels in favor of granting Zorn's petition for certiorari if the Court grants this petition so that the Court can consider the case as a whole. *See* Pet. 32, *Zorn* v. *Grant*. A decision reversing the Eighth Circuit on application of the public disclosure bar would obviate the need to address the Eighth Circuit's constitutional holding. As the Court explained just last term in *DeVillier* when confronted with a similar situation, it would be "imprudent to decide [a constitutional] question" when the "case does not require us to." 601 U.S. at 292. So too here.

II. CERTIORARI IS UNWARRANTED TO REVIEW WHETHER PETITIONER CARRIED HIS BURDEN AS TO CERTAIN BILLING CODES.

The Eighth Circuit rejected Petitioner's argument that the District Court clearly erred in finding certain overbilling claims lacked proof. *See* Pet. App. 16a-17a (majority op.); *id*. at 30a (Smith, C.J., concurring in part and concurring in the judgment) (joining this part of the majority opinion). Specifically, Petitioner asserts that the District Court erred in differentiating between patient visits coded as 99205, and patient visits coded as 99215, 99214, and 99204. Pet. 33. That fact-bound question does not merit certiorari.

To start, there is no split on this issue or conflict with this Court's precedent. Nothing in *Schutte*, 598 U.S. 739, or *Universal Health Services., Inc.* v. *United States ex rel. Escobar*, 579 U.S. 176 (2016), conflicts with how the court below addressed any particular billing code. The FCA requires proof a defendant submitted, or caused to be submitted, a "*claim* for payment or approval" that is false or fraudulent. 31 U.S.C. § 3729(a)(1)(A) (emphasis added). Absent proof of such a claim, there is no FCA liability.

Petitioner's argument rests on his disagreement with the District Court's case-specific ruling about whether to extrapolate damages from certain record evidence. The only evidence of "false or fraudulent documentation" that Petitioner produced at trial "pertained to initial patient visits" coded under 99205. Pet. App. 16a. The trial record thus had no evidence relating to patient visits coded under 99204, 99214, or 99215. *Id.* at 16a, 118a. As the District Court found

and the Eighth Circuit affirmed, it is inappropriate to "extrapolat[e]" from the 99205 visit charts to impose liability for bills submitted under "entirely different codes." *Id.* at 16a (quoting Pet. App. 118a). Neither *Schutte* nor *Escobar* have anything to say on that question, which is reviewed under the deferential clear-error standard. *See id.*

Petitioner also appears to argue that because the District Court found initial visits under 99205 were fraudulently coded as complex, it should have assumed established patient visits coded under 99214 and 99215 were also fraudulent. *See* Pet. 36-37. But Petitioner bore the burden of proving "all essential elements of the cause of action * * * by a preponderance of the evidence." Pet. App. 118a (quoting 31 U.S.C. § 3731(d)). The District Court rightly refused to impose liability where Petitioner failed to carry his evidentiary burden. *See id.* at 119a. As the District Court explained, the requirements for coding initial patient visits as complex are more stringent than established patient visits, meaning that a non-complex initial visit could be followed by a complex established visit. *Id.* at 55a. Thus, "one cannot necessarily infer the defendants fraudulently overbilled the government on established patient visits just because they did so on initial patient visits." *Id.* at 17a.

Third, even setting aside the lack of a split, conflict, or viable merits arguments, this question runs headlong into a vehicle problem. The FCA requires proof that a person "knowingly presents * * * a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A). The District Court separately concluded that Petitioner had not submitted sufficient evidence to prove Zorn's scienter with respect "to the

other codes." Pet. App. 119a. That alternative holding provides a separate and independent basis to affirm.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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