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 K. ZORN and IOWA SLEEP DISORDERS CENTER P.C.,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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REPLY

The Briefs in Opposition reinforce cert is appropriate now—in both what they include and what they omit. The first question presented has divided not only the panel below, but courts around the country. Courts are explicitly asking for this Court's guidance. Finally, two lower courts here reached three distinct conclusions as to the propriety of longstanding federal law. Respondents ask this Court to shrug these off. Given the constitutional implications, it should not.

Cert is appropriate here.

ARGUMENT

As the Solicitor General's brief also points out, the Eighth Circuit below conducted the wrong analysis and reached the wrong conclusion. Solicitor General BIO, at 8, 9. It is no wonder Respondents attempt to focus instead on their unavailing cross-petition.[1]

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[1] It is unclear why Respondents push this unrelated issue here, other than obfuscating the true cert-worthy claims. Even were it proper (it is not), Respondents continue to provide unhelpful authority from the *prior* iteration of what they call the "Public Disclosure Bar." *Cf.* 31 U.S.C. § 3729(e)(4). Of course, that provision is no longer a "bar" at all; the statute was amended in 2010 to transform the jurisdictional bar into an affirmative defense that must be proved at trial. Pub. L. 111-148, 124 Stat. 119 § 10104(j)(2); *United States ex rel. Beauchamp v. Academi Training Ctr.*, 816 F.3d 37, 40 (4th Cir. 2016). This is why courts now call it the "public disclosure defense."

I. This Court's pronouncements matter.

Lower courts have refashioned this Court's authority. This Court should not stand by.

1. The panel majority below infected Eighth Amendment analysis with the burdens of substantive due process. It should not have. *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997) (finding it to be "plainly without merit" to permit Eighth Amendment claims to be analyzed "under the rubric of substantive due process").[2] *Lanier* demonstrates precisely how far afield the Eighth Circuit's analysis has strayed. As cited below, this Court has held "[t]he review of a jury's award for arbitrariness and the review of legislation surely are significantly different." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 456 (1993). The Eighth Circuit nevertheless continues to commingle them.

Petitioner-Relator made the precise argument the Office of the Solicitor General argues it did not raise to the district court: "What [Respondents' due process authority] does not stand for or address is the reduction of a statutory penalty." *Compare* D. Ct. Doc. 138, at 8 n.4, *with* Solicitor General BIO, at 12–13. Below, Petitioner-Relator relied on *Bajakajian*—not substantive due process. D. Ct. Doc. 138, at 8 & n.4. It

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[2] It was *Respondents* who appealed below; it was *Respondents* who cited the Due Process caselaw below. *E.g.*, CA.8 Appellant's Brief, at 58 ("Courts have adopted the Due Process Clause's test for grossly-excessive punitive damages…."). It was Petitioner who hewed closely to *Bajakajian*, only citing due process principles to confront Respondents' invocation. *E.g.*, CA.8 Appellee's Principal and Response Brief, at 57, 58.

did not matter. The District Court rejected Petitioner's position because the Eighth Circuit had already conflated these constitutional questions. *See* App. 129a ("The Eighth Circuit has applied the Due Process Clause's test for punitive damages when determining if FCA penalties are grossly excessive."). This is not a case where the correct law was absent below.

Accordingly, the Solicitor General's suggestion that its briefing would have made headway below is baseless. *See* Solicitor General BIO, at 12–13 (opining that the Court should address the Eighth Circuit's established practice when challenged below). Respondents' due process precedent *was* challenged below.[3] Rather, the Eighth Circuit's 2-1 decision is unique and contrary to this Court's authority. *Accord Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality) ("Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.' " (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989))).

The dissenting Chief Judge of the Circuit summarized the majority's erroneous activism: "The Supreme Court never has held that the punitive damages guideposts are applicable in the context of

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[3] The Solicitor General's ask is curious. Would going back to the district court, citing the same law, making the same arguments, and having the district court still bound by the same erroneous Circuit precedent really be more efficient? Is *that* what Supr. Ct. R. 10 requires?

statutory damages…." App. 36a (Smith, C.J., concurring in the judgment) (internal quotations omitted).

Cert is appropriate to determine the role (if any) of substantive due process in the application of the Excessive Fines Clause to the FCA.

2. *Bajakajian* itself directed "the district courts in the first instance" to "compare the *amount* of the forfeiture to the *gravity* of the defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 336–37 (1998) (emphases supplied). The appellate courts, then, are to "of course…accept[]" the factual findings below. *Id.* at 336 n.10.

The district court here did so in its 88-page trial order. *See* Pet. App. 132a ("This is a significant penalty which the Court believes reflects the appropriate proportionality in light of Dr. Zorn's conduct discussed herein."). The Eighth Circuit did not do what this Court instructed. It instead took the struthious position that the district court simply did not so find. Pet. App. 26a–27a. *But see Anderson v. Bessemer City, N.C.*, 470 U.S. 564, 574–75 (1985) (deferential standard for factfinding). The panel majority was wrong.

The statutory penalties imposed on Respondents fell below even the *minimum* prescribed by statute, certainly substantially less than the $16,124,700 statutory maximum on 1050 knowing false claims. *Bajakajian* directs deference to that legislative pronouncement. 524 U.S. at 336 ("[J]udgments about the appropriate punishment for

an offense belong in the first instance to the legislature.").

Cert is appropriate to clarify the degree of deference to which a statutory penalty enshrined since the Civil War is entitled, particularly as against what the district court found to be a pervasive fraudster.

3. This Court has left open whether the Eighth Amendment applies in non-intervened *qui tam* actions. *See Austin v. United States*, 509 U.S. 602, 607 n.3 (1993); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275 n.21 (1989). Respondents argue that this issue of first impression presents a vehicle problem. BIO, at 12–15. It does not.

Assuming *arguendo* the Eighth Circuit correctly presumed the Excessive Fines Clause applies to non-intervened *qui tam* actions, the panel provided no guidance for that remand. Is the relator's share, 31 U.S.C. § 3730(d)(2), subject to Excessive Fines remittitur? *But see Browning-Ferris*, 492 U.S. at 268 ("payable *to*[] the government" (emphasis supplied)); *United States ex rel. Drakeford v. Tuomey*, 792 F.3d 364, 389 (4th Cir. 2015) ("[W]e may safely assume that the portion of the trebled award allocated to the relator is compensatory."). This is the sort of question warranting cert to remedy a misguided remand—a remand which has suddenly become binding in federal courts across seven states and

relates to the application of the Constitution to widely cited federal law.[4]

And, like in *Browning-Ferris* and *Austin*, this Court can find the merits analysis employed below to be flawed, and never need to address the issue of first impression. *See, e.g.*, *Stop Ill. Health Care Fraud, LLC v. Sayeed*, 100 F.4th 899, 907 (7th Cir. 2024) ("This case does not require us to resolve whether a civil damages award under the FCA constitutes 'punishment' within the meaning of the Eighth Amendment…[because] the fines levied against [Defendants] would not be unconstitutionally excessive."). The BIO's position presupposes the integration of substantive due process into discrete constitutional protections is appropriate. It is not.

II. The Eighth Circuit imposed a presumptive single-digit cap on FCA penalties.

Respondents argue that this Court should not grant cert because the panel below discussed the facts "of this case." Of course the panel decided the case before it. That does not mean, however, that its decision comported with the Constitution.

The divided panel fashioned a presumptive single-digit cap for FCA statutory penalties under the Excessive Fines Clause. It started there—"[a]lthough

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[4] In the fiscal year ending September 30, 2024, 979 *qui tam* actions were initiated, plus 423 civil FCA claims brought by the Government. *See Fraud Statistics—Overview*, U.S. DEP'T OF JUST. (2025), *available at* https://www.justice.gov/archives/opa/media/1384546/dl.

we have previously upheld double-digit multipliers…." App. 26a. The majority left the district court to impose an arbitrary single-digit threshold. The panel majority then left the door open for rebutting that presumption in cases involving "tortious" conduct. *Id.* It then proceeded to ignore the district court's factfinding as "speculat[ive]," without even looking. *Id.* Some Circuit judges have noted this process "has all the feel of judicial alchemy." *Adeli v. Silverstar Automotive, Inc.*, 960 F.3d 452, 466 (8th Cir. 2020) (Stras, J., concurring).

The presumptive cap the panel majority imposed is inconsistent with the Constitution. *Bajakajian*, 524 U.S. at 336 n.10. If ever there was a reason to reinforce the appropriate role of appellate courts in constitutional questions, this is it.[5]

III. The Circuits are split not just in outcomes, but in analyses.

Factual applications to constitutional text have not hindered granting cert before. It should not here.

This Court has recognized that an Excessive Fines question inherently "calls for the application of

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[5] This judgment was not the product of targeting an innocent doctor. Respondents tried that defense below. App. 104a ("Defendants' position on scienter is that any up-coding by Dr. Zorn was based on a reasonable interpretation of the Guidelines and good-faith belief…."). The factfinder quickly dispensed with that contention. *Id.* at 110a ("Rather than genuine confusion as to the correct billing codes under the…regulations, the Court finds this was an attempt by Dr. Zorn to retrofit his pre-determined billing code into the highest available reimbursement category.").

a constitutional standard to the facts of a particular case," but that the lower court's factfinding "must be accepted unless clearly erroneous." *Bajakajian*, 524 U.S. at 336 n.10. Respondents are wrong in suggesting that fundamental judicial feature forecloses certiorari. Respondents' argument that frauds precipitate from different facts is a strawman. Of course. Petitioner does not challenge the district court's comprehensive factfinding—he challenges the constitutional *analysis* the panel majority perverted.

1. Respondents employ that strawman only to argue the Court should not be troubled by the outcome disparity the Eighth Circuit created, through its unprecedented holding. *E.g.*, *Sayeed*, 100 F.4th at 904 (awarding $5,940,972.16 on 673 false Medicare claims); *Yates v. Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1316 (11th Cir. 2021) (entering $1,179,000 in statutory penalties on $755.54 in actual damages); *United States ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, 741 F.3d 390, 409 (4th Cir. 2013) (holding $24 million in statutory penalties on $0 of actual damages is constitutional).

2. But the split hardly ends there. It is the disparate Excessive Fines Clause *analysis* which warrants cert, and curiously goes unaddressed in Opposition. The *analysis* employed by every other Circuit differs from the Eighth Circuit's.[6] Respondents implicitly argue it is okay for the Constitution to mean different things across the

[6] A separate district court decision from the very same Eighth Circuit hardly moves the needle in disproving a circuit split. *United States ex rel. Fesenmaier v. Cameron-Ehlen Grp., Inc.*, 715 F. Supp. 3d 1133, 1158 (D. Minn. 2024); BIO, at 20 n.3.

country. Cert is warranted to at least consider that proposition.

Other Circuits differentiate the Due Process Clause and Excessive Fines Clause. *Yates*, 21 F.4th at 1307 & n.4; *Drakeford*, 792 F.3d at 387 ("*By contrast*, the Due Process Clause 'imposes substantive limits beyond which penalties may not go.' " (internal quotations omitted) (emphasis supplied)). The Eighth Circuit does not. App. 23a ("[C]ases analyzing punitive sanctions under the Due Process Clause are instructive in analyzing sanctions under the Excessive Fines Clause."). Even the recent unpublished authority Respondents cite clarifies that "the Fifth Circuit has rejected the notion that the Due Process clause limits statutory penalties," holding such authority "is inapplicable" to Eighth Amendment analysis. *United States ex rel. Taylor v. Healthcare Assocs. of Tex., LLC*, No. 3:19-CV-02486-N, 2025 WL 624493, at *7 n.2 (N.D. Tex. Feb. 26, 2025).

Other courts have recognized that the "fail[ure] to prove all of [Relator's] actual damages…does not control [the courts'] analysis for the constitutionality of the civil penalties." *E.g.*, *United States ex rel. Morsell v. Gen Digital, Inc.*, 712 F. Supp. 3d 14, 28 n.12 (D.D.C. 2024). The Eighth Circuit holds the opposite. App. 25a n.4 (acknowledging that the compensatory damages it credited are incomplete, but nevertheless imposing a single-digit multiplier on that rewritten factfinding).

Other courts employ a "strong presumption of constitutionality" for fines imposed within a statutory range, *United States v. 817 Ne. 29th Drive, Wilton*

Manors, 175 F.3d 1304, 1309 (11th Cir. 1999), and confer strong deference to the legislature, *Yates*, 21 F.4th at 1318 (Newsom, J., concurring). The Eighth Circuit does not even look. *See generally* App. 1a–29a (panel majority). In fact, the panel majority specifically rejected that deference. App. 28a n.5.

Other courts compare the penalty assessed to the "additional and greater penalties [which] could have been (but were not) imposed, and [whether] the harm caused by the scheme was farreaching." *United States v. Eghbal*, 548 F.2d 1281, 1285 (9th Cir. 2008); *see also Sayeed*, 100 F.4th at 908 ("[T]he defendants could have fared much worse given the seriousness and persistence of their fraudulent scheme."). The Eighth Circuit looks to determine whether an arbitrary, presumptive single-digit cap has been rebutted, according only to *it*.

Other courts have found *Bajakajian* is "by no means onerous," *Bunk*, 741 F.3d at 408, and that FCA statutory penalties could only "infrequent[ly]," violate the Excessive Fines Clause. *Drakeford*, 792 F.3d at 387 (internal quotation omitted). The Eighth Circuit adopts an exacting scrutiny. The panel majority would have appellate courts coopt due process to treat a federal judge's careful factfinding and Congress's democratic enactments as just as suspect as an impassioned jury's verdict. Nowhere does the Constitution allow them to be conflated.

Simply, no two courts *analyze* this constitutional question the same.

3. Finally, courts around the country are asking for this Court's review. App. 32a (Smith, C.J., concurring in the judgment) ("The standard for assessing shock value is a dim and dotted line in Eighth Amendment jurisprudence."); *Yates*, 21 F.4th at 1324 (Newsom, J., concurring) ("Perhaps another court in another case will answer those questions.");[7] *Drakeford*, 792 F.3d at 389 ("Although the Supreme Court has not told us where to draw the line…."); *Bunk*, 741 F.3d at 407 (recognizing the difficulty of "navigat[ing]…FCA claims through the uncertain waters of the Eighth Amendment"); *United States v. Wagoner Cnty. Real Estate*, 278 F.3d 1091, 1101 (10th Cir. 2002) ("To adapt the *Bajakajian* standard to these circumstances, we must supplement the factors discussed by the Supreme Court."); *see also McDonald v. City of Chi., Ill.*, 561 U.S. 742, 813 (2010) (Thomas, J., concurring in part and concurring in the judgment) ("I believe this case presents an opportunity to reexamine, and begin the process of restoring, the meaning of the Fourteenth Amendment agreed upon by those who ratified it.").

Respondents propose their strawman stands in the way of cert. It should not. *The analysis* among the Circuits—not just the outcomes—is disparate.

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[7] A second concurring judge in *Yates* wrote separately to argue for the application of the 18 U.S.C. § 3553(a) factors to FCA statutory penalties in lieu of *Bajakajian*. *Id.* at 1334 (Tjoflat, J., concurring in part and dissenting in part). *But see Fesenmaier*, 715 F. Supp. 3d at 1158 ("At the outset, however, the Court notes is [sic] mindful that this is not a sentencing."). Melissa Ballengee Alexander, Bajakajian: *New Hope for Escaping Excessive Fines Under the Civil False Claims Act*, 27 J.L. MED. & ETHICS 366, 371 (1999) ("The Court has not articulated a clear test for [*Bajakajian*'s] ['grossly disproportional'] determination.").

IV. When may a finding of FCA scienter also satisfy the "false or fraudulent" element?

A specific intent to defraud is not necessary to establish FCA liability. 31 U.S.C. § 3729(b)(1)(B). But when such an intent is present, is there still an obligation to prove "falsity"? Petitioner submits "no"—that is the result compelled by *Schutte. United States ex rel. Schutte v. SuperValu Inc.*, 598 U.S. 739, 750 (2023) ("To this day, the FCA refers to 'false or *fraudulent*' claims….").

The second question presented would not be reviewed merely for clear error. *Alexander v. S.C. State Conference of the NAACP*, 602 U.S. 1, 19 (2024) ("[I]n a case like this, there is a special danger that a misunderstanding of what the law requires may infect what is labeled a finding of fact. 'If a trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard.' " (quoting *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 855 n.15 (1982))).[8]

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[8] By contrast, of course, whether Education Letters constitute a public disclosure per Section 3730(e)(4)'s affirmative defense (the question presented in No. 24-845), is no claim of legal error at all. *See* App. 12a–13a ("[A]n uninitiated reader would not reasonably infer from the letters that the defendants had committed fraud. The district court thus properly rejected the defendants' public disclosure defense."). *Respondents'* ask goes to the heart of clear error, and in the face of the evidence. Respondents offered nothing contrary to the district court. App. 93a (finding Respondents' ask came "[w]ithout pointing to any specific testimony….").

There is no dispute that the District Court found claims submitted. There is no dispute that the District Court found scienter as clarified in *Schutte*. The problem, then, on this record, is the "false or fraudulent" element. The district court perceived this as a distinct element. Petitioner respectfully submits *Schutte* counsels for a different outcome where, *as here*, a fraudulent intent may be found below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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