No. 13-1399

IN THE

Supreme Court of the United States

GOSSELIN WORLD WIDE MOVING, N.V.; GOSSELIN GROUP N.V.; AND MARC SMET,
Petitioners,

v.

UNITED STATES *EX REL.* KURT BUNK; UNITED STATES *EX REL.* RAY AMMONS; AND UNITED STATES,
Respondents.

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

BRIEF FOR THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE AMERICAN HOSPITAL ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

JAMES M. (MIT) SPEARS
MELISSA B. KIMMEL
PHRMA
950 F Street, NW, Suite 300
Washington, DC 20004

RACHEL L. BRAND
STEVEN P. LEHOTSKY
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062

MELINDA REID HATTON
MAUREEN MUDRON
AMERICAN HOSPITAL ASSOCIATION
325 Seventh Street, NW
Suite 700
Washington, DC 20001

DAVID W. OGDEN
Counsel of Record
JONATHAN G. CEDARBAUM
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
david.ogden@wilmerhale.com

BROOK HOPKINS
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109

QUESTION PRESENTED

The False Claims Act ("FCA") provides that a person who submits to the Government a false claim for payment is liable for treble damages plus "a civil penalty of not less than $5,000." 31 U.S.C. § 3729(a)(1). Under *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943), claims for payment that contain nothing untruthful may be deemed false for purposes of establishing a violation of the FCA, if submitted under a fraudulently obtained contract or in connection with some other fraudulent conduct. The question presented is whether the Fourth Circuit erred in holding, in conflict with this Court's jurisprudence and with decisions of other courts, that the FCA requires—and the Eighth Amendment's Excessive Fines Clause condones—mechanical imposition of a separate civil penalty for *each invoice* submitted to the Government (here, over 9,000), without regard to the defendant's culpability, even where the invoices are "false" only by operation of law under *Hess*?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. RESOLUTION OF THE QUESTION PRESENTED IS OF VITAL IMPORTANCE TO PHARMACEUTICAL, HEALTH CARE, PROCUREMENT, AND OTHER COMPANIES DOING BUSINESS WITH THE GOVERNMENT 4

A. Mechanically Calculating Civil Penalties Based On Submitted Invoices Results In Unjustifiably Large Penalties 5

B. The Prospect Of Massive Penalties Forces Defendants To Settle, Thus Frustrating Development Of The Law 10

C. Delay To Permit Further Consideration of the Issues By Lower Courts Is Unwarranted 12

II. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S PRECEDENTS 14

III. THE LOWER COURTS ARE DIVIDED, BOTH OVER HOW TO CALCULATE FALSE CLAIMS ACT PENALTIES AND OVER HOW TO APPLY THE EXCESSIVE FINES CLAUSE 18

A. Courts Are Divided Over The Method For Calculating Penalties 18

B. Courts Follow Differing Approaches To Applying The Excessive Fines Clause.....20

CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Page(s)

Harrison v. *Westinghouse Savannah River Co.*, 176 F.3d 776 (4th Cir. 1999).....6

Hays v. *Hoffman*, 325 F.3d 982 (8th Cir. 2003).....19, 20

Hudson v. *United States*, 522 U.S. 93 (1997).....15

Kelly v. *EPA*, 203 F.3d 519 (7th Cir. 2000).....17

Ohio Hospital Ass'n v. *Shalala*, 978 F. Supp. 735 (N.D. Ohio 1997) 10

United States ex rel. Ackley v. *International Business Machines, Corp.*, 76 F. Supp. 2d 654 (D. Md. 1999) 13

United States ex rel. Ahumada v. *National Center for Employment of Disabled*, Civ. No. 06-713, 2013 WL 2322836 (E.D. Va. May 22, 2013).....13

United States ex rel. Beauchamp v. *Academi Training Center, Inc.*, 933 F. Supp. 2d 825 (E.D. Va. 2013).....13

United States ex rel. Doe v. *DeGregorio*, 510 F. Supp. 2d 877 (M.D. Fla. 2007) 20

United States ex rel. Dyer v. *Raytheon Co.*, Civ. No. 08-10341, 2013 WL 5348571 (D. Mass. Sept. 23, 2013).....19

United States ex rel. Fahner v. *Alaska*, 591 F. Supp. 794 (N.D. Ill. 1984).....9

United States ex rel. Frascella v. *Oracle Corp.*, Civ. No. 07-529 (E.D. Va. 2010).....13

TABLE OF AUTHORITIES—Continued

Page(s)

United States ex rel. Longhi v. *Lithium Power Technologies, Inc.*, 530 F. Supp. 2d 888 (S.D. Tex. 2008) 19

United States ex rel. Marcus v. *Hess*, 317 U.S. 537 (1943) 3, 14, 15

United States ex rel. Smith v. *Gilbert Realty Co.*, 840 F. Supp. 71 (E.D. Mich. 1993) 10, 20, 21

United States ex rel. Tyson v. *Amerigroup Illinois, Inc.*, 488 F. Supp. 2d 719 (N.D. Ill. 2007) 9

United States v. *Advance Tool Co.*, 902 F. Supp. 1011 (W.D. Mo. 1995) 21

United States v. *Bajakajian*, 524 U.S. 321 (1998) 4, 14, 16, 17

United States v. *Bornstein*, 423 U.S. 303 (1976) 3, 9, 14, 15

United States v. *Diamond*, 657 F. Supp. 1204 (S.D.N.Y. 1987) 6

United States v. *Domestic Industries, Inc.*, 32 F. Supp. 2d 855 (E.D. Va. 1999) 13

United States v. *Ehrlich*, 643 F.2d 634 (9th Cir. 1981) 9

United States v. *Incorporated Village of Island Park*, Civ. No. 90-992, 2008 WL 4790724 (E.D.N.Y. Nov. 3, 2008) (unpublished) 20

United States v. *Krizek*, 111 F.3d 934 (D.C. Cir. 1997) 6

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Mackby*, 261 F.3d 821 (9th Cir. 2001) 20

United States v. *Mackby*, 339 F.3d 1013 (9th Cir. 2003) 20

United States v. *Rachel*, 289 F. Supp. 2d 688 (D. Md. 2003) 13

United States v. *Rivera*, 55 F.3d 703 (1st Cir. 1995) 6

United States v. *Rogan*, 517 F.3d 449 (7th Cir. 2008) 20

STATUTES, RULES, AND REGULATIONS

False Claims Act, 31 U.S.C. §§ 3729 *et seq.* 2
31 U.S.C. § 3729(a) 5, 6, 18
31 U.S.C. § 3729(b)(2) 6
31 U.S.C. § 3732(a) 13

33 U.S.C. § 1319(d) 17

42 U.S.C. § 11045(d)(1) 17

Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 6

64 Fed. Reg. 47,099 (Aug. 30, 1999) 6

OTHER AUTHORITIES

Ballengee, Melissa, Bajakajian*:* *New Hope for Escaping Excessive Fines Under the Civil False Claims Act*, 27 J.L. Med. & Ethics 366 (1999) 8

TABLE OF AUTHORITIES—Continued

Page(s)

Eichel, Kristin McCreary, *Focusing on Fraud: The Federal Government Expands Its Use of the False Claims Act to Police Off-Label Pharmaceutical Promotion*, 8 Ind. Health L. Rev. 399 (2011) 11

Finegan, Sharon, *The False Claims Act and Corporate Criminal Liability: Qui Tam Actions, Corporate Integrity Agreements and the Overlap of Criminal and Civil Law*, 111 Penn St. L. Rev. 625 (2007) 11

Girard, Vicki W., *Punishing Pharmaceutical Companies for Unlawful Promotion of Approved Drugs: Why the False Claims Act Is the Wrong Rx*, 12 J. Health Care L. & Pol'y 119 (2009) 12

Huberfeld, Nicole, *Pharma on the Hot Seat*, 40 J. Health L. 241 (2007) 12

Hyman, David A., *Health Care Fraud and Abuse: Market Changes, Social Norms, and the Trust "Reposed in the Workmen,"* 30 J. Leg. Stud. 531 (2001) 11

Krause, Joan H., *"Promises to Keep": Health Care Providers and the Civil False Claims Act*, 23 Cardozo L. Rev. 1363 (2002) 9

Krause, Joan H., *Twenty-Five Years of Health Law Through the Lens of the Civil False Claims Act*, 19 Annals Health L. 13 (2010) 8, 11

TABLE OF AUTHORITIES—Continued

Page(s)

Lansdale, Edward P., *Used as Directed? How Prosecutors Are Expanding the False Claims Act To Police Pharmaceutical Off-Label Marketing*, 41 New Eng. L. Rev. 159 (2006) 8

Meador, Patricia & Elizabeth S. Warren, *The False Claims Act: A Civil War Relic Evolves into a Modern Weapon*, 65 Tenn. L. Rev. 455 (1998) 8

Osborn, John E., *Can I Tell You the Truth? A Comparative Perspective on Regulating Off-Label Scientific and Medical Information*, 10 Yale J. Health Pol'y & Ethics 299 (2010) 8

Press Release, United States Attorney's Office, S.D. Ga., *Open MRI in Brunswick, Douglas, and Savannah Pays More than $1.2 Million for False Medicare Claims* (Jan. 11, 2013), http://www.justice.gov/usao/gas/press_releases/2013/20130111_MRI.html 9

INTEREST OF AMICI CURIAE[1]

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is an association whose members include the nation's leading research-based pharmaceutical and biotechnology companies. PhRMA members are devoted to inventing medicines that allow patients to live longer, healthier, and more productive lives. PhRMA closely monitors legal issues that affect the pharmaceutical industry and has frequently filed amicus curiae briefs with this Court in matters of significance to its members.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

The American Hospital Association ("AHA") represents nearly 5,000 hospitals, health care systems, and other health care organizations, plus 43,000 individual members. AHA's members are committed to improving the health of communities they serve and to helping en-

---

[1] Amici certify that this brief was written by undersigned counsel, that no counsel for a party authored any portion of this brief, and that no entity or person, aside from amici, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of the brief.

sure that care is available to, and affordable for, all Americans. AHA advocates on behalf of its members in legislative, regulatory, and judicial fora as part of its commitment to improving health care policy and health care delivery for the communities its hospitals serve. The AHA also has frequently participated as amicus curiae in cases with important consequences for its members, including cases arising under the False Claims Act.

This case raises important issues about the application of the Eighth Amendment's Excessive Fines Clause to penalties imposed under the False Claims Act, 31 U.S.C. §§ 3729 *et seq.* These issues are of critical importance to the many sectors of the nation's business community that provide goods and services to the government. In many False Claims Act investigations and suits in recent years, relators have sought penalties in the millions (or hundreds of millions) of dollars, based on the mandatory penalty provision at issue in this case, even though the government suffered little or no loss as a result of the alleged violations. As discussed in detail below, the threat of these penalties frequently drives unjustifiably costly settlements or judgments. PhRMA, the Chamber, and AHA submit this brief in support of Petitioners to urge this Court to interpret the Eighth Amendment to bar imposition of penalties that irrationally exceed the harm actually suffered by the government.

SUMMARY OF ARGUMENT

Interpreting the False Claims Act's penalty provision to require a separate civil penalty for every invoice submitted to the government that is in any way connected with a false statement frequently results in penalties that are in no way proportional to the defendant's culpability or the harm suffered by the government.

Indeed in this case, the Fourth Circuit condoned $24 million in penalties despite the district court's determination that the government suffered *no* financial injury as a result of Petitioners' conduct.

Irrationally large penalties under the False Claims Act are of great concern to American businesses that contract with the government or participate in government programs such as Medicare and Medicaid. Often companies face enormous penalties not because of the severity of the fraud or the magnitude of the harm to the government, but merely because of the way that invoicing is typically performed under their contracts—a procedure over which they have no control. The risk of incurring gigantic penalties leads many defendants to settle claims rather than bring them to trial, even when such claims are weak or meritless, thus stunting further development of the law in this area. Given the immense pressure on defendants to settle and the volume of False Claims Act cases brought in the Fourth Circuit, this Court should not wait for additional circuits to weigh in. This case presents an ideal opportunity to determine the proper method of calculating civil penalties under the False Claims Act and to clarify the constitutional limits on those fines.

The inflexible approach to calculating False Claim Act penalties adopted by the Fourth Circuit and a number of other courts runs contrary to this Court's approach in *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943), and *United States* v. *Bornstein*, 423 U.S. 303 (1976), which was to tailor the penalty to the defendant's culpable acts, not to the number of invoices they happened to submit. It also runs headlong into the Eighth Amendment's prohibition on excessive fines. Indeed, the Fourth Circuit evaded the constitutional implications of the $24 million penalty it condoned by

disregarding two of the four factors this Court set out in *United States* v. *Bajakajian*, 524 U.S. 321 (1998), as governing inquiries under the Excessive Fines Clause: economic harm to the government and severity of the offense. Although some courts have hewn more closely to this Court's precedents, the lower courts that have addressed these issues are divided both over how penalties should be calculated under the False Claims Act and how the Excessive Fines Clause applies to False Claims Act judgments. The Fourth Circuit is not alone in its misguided approach to both the Act and the Excessive Fines Clause. Review is warranted to resolve this division.

ARGUMENT

I. RESOLUTION OF THE QUESTION PRESENTED IS OF VITAL IMPORTANCE TO PHARMACEUTICAL, HEALTH CARE, PROCUREMENT, AND OTHER COMPANIES DOING BUSINESS WITH THE GOVERNMENT

Petitioners face a judgment of $24 million in civil penalties under the False Claims Act despite the district court's determination that they caused the government *zero* injury. Pet. App. 85a-89a ("there was in fact no evidence during the trial of any cognizable financial harm to the United States"). This kind of unfair and unwarranted penalty—with which relators and the government increasingly threaten defendants—is precisely the type of grossly disproportionate fine that the Eighth Amendment is meant to guard against. Such irrationally large penalties are arising with increasing frequency, particularly in cases, like this one, where a defendant has submitted many individual claims for payment, each of which involves a relatively small sum. In such cases, the penalties imposed under the False Claims Act, as construed by the Fourth Circuit and

several other courts of appeals, often far exceed even the total outlays made by the government, to say nothing of any actual harm the government has suffered.

Thus, even where (as here) the government suffers little or no actual harm, relators or the government may nevertheless seek enormous penalties based on the view that the False Claims Act requires a separate penalty for each invoice submitted to the government. As a result, many defendants reach the rational conclusion that they have no real choice but to settle cases for very large amounts, even though the claims against them are meritless or weak. This pattern of vast penalties untethered from either actual injury or any other plausible gauge of the defendant's culpability comports with neither the most sensible reading of the False Claims Act nor the Eighth Amendment. It also represents a growing drain on economic resources that could otherwise be devoted to productive activities. This Court's review is warranted to establish limits on False Claims Act penalties that are consistent with the Act, the Excessive Fines Clause, and this Court's prior decisions interpreting those authorities.

A. Mechanically Calculating Civil Penalties Based On Submitted Invoices Results In Unjustifiably Large Penalties

The False Claims Act imposes civil liability upon "any person who," inter alia, "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" to an officer, employee, or agent of the United States. 31 U.S.C. § 3729(a). Violating the False Claims Act subjects defendants not only to treble damages but also to "a civil penalty of not less than

$5,500 and not more than $11,000" per violation.[2] *Id.* A "claim" under the False Claims Act includes "any request or demand … for money or property" where the government provides any portion of the money or property requested. *Id.* § 3729(b)(2).

As the Petition explains, the Fourth Circuit and other lower courts have interpreted the False Claims Act's penalty provision to permit a single purportedly false statement to snowball exponentially into millions (or even hundreds of millions) of dollars in penalties. Pet. 24-29. Under this interpretation, the Act requires a penalty for each separate claim for payment that is tainted by even a single statement made at the contracting stage. *See, e.g.*, *Harrison* v. *Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999) ("'[T]he statute attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the 'claim for payment.'" (quoting *United States* v. *Rivera*, 55 F.3d 703, 709 (1st Cir. 1995))). Nor need the government have suffered any actual damages as a result of the alleged fraud for a court to impose civil penalties. *See id.* at 785 n.7.

A number of courts have noted the irrationality of the resulting disparity between penalties and any sensible measure of harm or culpability. *See, e.g.*, *United States* v. *Krizek*, 111 F.3d 934, 940 (D.C. Cir. 1997) ("government's definition of claim permitted it to seek an astronomical $81 million worth of [penalties] for alleged actual damages of $245,392"); *United States* v.

[2] Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890, the minimum civil penalty for each violation of 31 U.S.C. § 3729(a) was increased from $5,000 to $5,500, and the maximum penalty was increased from $10,000 to $11,000, effective September 29, 1999. *See* 64 Fed. Reg. 47,099, 47,103-47,104 (Aug. 30, 1999).

Diamond, 657 F. Supp. 1204, 1206 (S.D.N.Y. 1987) (court "troubled" by possibility of injustice where little relationship between fine imposed and illicit gain). But this Court's intervention is needed to establish that neither the Act's text nor its purposes require this method of calculating penalties.

This case exemplifies, in stark terms, the senselessness of the inflexible approach adopted by the Fourth Circuit and other courts of appeals. Relator Bunk could not prove any actual harm to the government and *did not seek any damages* at trial (Pet. App. 76a). But the Fourth Circuit nevertheless held (*id.* at 36a-37a) that the Act required a civil penalty for each of the 9,136 invoices submitted to the government (absent Relator Bunk's purely discretionary decision to accept a smaller penalty). Thus, under the Fourth Circuit's interpretation, the Act would have mandated a civil penalty of between $50 million and $100 million for a single purportedly false certification from which the government suffered no damages.

Companies in certain sectors are particularly vulnerable to the irrationally large penalties caused by this reading of the False Claims Act—not because of the severity of the fraud or the harm to the government, but because of a factor completely outside the companies' control: the way in which the government typically structures payments. In cases against pharmaceutical and health care providers, for example, relators and the government often rely on a vast number of small-value prescriptions or claims submitted under Medicare and Medicaid to threaten astronomical penalties that far exceed the value of the underlying transactions, without being required to allege serious harm to the government. When each invoice necessarily constitutes a "claim," the total penalty can easily reach hun-

dreds of millions of dollars, even when the violation is technical and the government has sustained little or no actual harm. "When numerous small claims are at issue," as one commentator has noted, "the FCA's per claim fines can metamorphize from rough remedial justice to grossly disproportionate penalties." Ballengee, Bajakajian*: New Hope for Escaping Excessive Fines Under the Civil False Claims Act*, 27 J.L. Med. & Ethics 366, 368 (1999).

American pharmaceutical manufacturers in particular "are under siege." Osborn, *Can I Tell You the Truth? A Comparative Perspective on Regulating Off-Label Scientific and Medical Information*, 10 Yale J. Health Pol'y & Ethics 299, 301 (2010). "While actual damages collected by the government might be relatively modest, the sheer volume of prescriptions written along with attendant reimbursement requests, which easily number in the tens of thousands, can quickly translate into hefty fines." Lansdale, *Used as Directed? How Prosecutors Are Expanding the False Claims Act To Police Pharmaceutical Off-Label Marketing*, 41 New Eng. L. Rev. 159, 177 (2006).

The False Claims Act has also "proved to be particularly (although perhaps inadvertently) powerful" against doctors, hospitals, and other healthcare providers, "who usually bill on a fee-for-service basis." Krause, *Twenty-Five Years of Health Law Through the Lens of the Civil False Claims Act*, 19 Annals Health L. 13, 15 (2010). "[P]hysicians submit thousands of bills for relatively small amounts. … For a physician … the per-claim penalties may rise quickly[.]" *Id.* The health care industry is thus "particularly susceptible to actions under the False Claims Act due to the many forms health professionals must sign in order to receive compensation from federal health care programs." Meador

& Warren, *The False Claims Act: A Civil War Relic Evolves into a Modern Weapon*, 65 Tenn. L. Rev. 455, 456 (1998). "Because health care providers … tend to submit a large number of relatively small claims each year, the statutory penalties quickly can reach astronomical proportions." Krause, *"Promises to Keep": Health Care Providers and the Civil False Claims Act*, 23 Cardozo L. Rev. 1363, 1370 (2002); *see, e.g.*, *United States ex rel. Fahner* v. *Alaska*, 591 F. Supp. 794, 801-802 (N.D. Ill. 1984) (optometrist ordered to pay more than $1 million in penalties where damages equaled $19,500); Press Release, United States Attorney's Office, S.D. Ga., Open MRI in Brunswick, Douglas, and Savannah Pays More than $1.2 Million for False Medicare Claims (January 11, 2013), http://www.justice.gov/usao/gas/press_releases/2013/20130111_MRI.html ($1.2 million settlement with healthcare facilities for failure to provide sufficient physician supervision despite no allegation of lack of medical necessity and thus no apparent harm to government).

Government contractors who must make threshold certifications in order to gain access to the government marketplace also face unjustifiably large penalties under the Fourth Circuit's approach. When the initial certification contains a misstatement, every subsequent transaction may be subject to a civil penalty regardless of the loss to the government or the nature of the misstatement. *See, e.g.*, *United States* v. *Ehrlich*, 643 F.2d 634, 637-638 (9th Cir. 1981) (76 penalty amounts imposed for two false certifications); *id.* at 639 (Canby, J., dissenting) (explaining that majority's approach was inconsistent with *United States* v. *Bornstein*, 423 U.S. 303 (1976)); *see also United States ex rel. Tyson* v. *Amerigroup Illinois, Inc.*, 488 F. Supp. 2d 719, 723 (N.D. Ill. 2007) ("the civil penalties (even if fixed at the

minimum allowable) grossly outrun any damages estimate"); *United States ex rel. Smith* v. *Gilbert Realty Co.*, 840 F. Supp. 71, 74-75 (E.D. Mich. 1993) (penalties totaling 178 times damages under a housing program).

Amici fully support appropriate enforcement of the False Claims Act, and the importance of compliance with laws designed to prevent fraud is indisputable. But the mistaken approach adopted by the Fourth Circuit and a number of other courts has created a troubling disconnect between the sanctions imposed and any reasoned measure of culpability that the Act and the Excessive Fines Clause require.

B. The Prospect Of Massive Penalties Forces Defendants To Settle, Thus Frustrating Development Of The Law

The risk of facing massive penalties (on top of treble damages) makes many companies leery of taking False Claims Act cases to trial, even when the allegations against them are meritless. Especially with the government's and relators' increasing reliance on false certification theories, liability can turn on the meaning of ambiguously worded regulations or contractual provisions. Plus, the financial and logistical burdens of extended discovery add substantially to the costs of choosing to fight in the courts. Many defendants therefore increasingly settle False Claims Act suits rather than contest them, even when the underlying case may be meritless or weak. "Because the risk of loss in a False Claim[s] Act case carries potentially devastating penalties, unlike most litigation or even an administrative recoupment action," companies are discouraged from even attempting to defend themselves in court. *Ohio Hosp. Ass'n* v. *Shalala*, 978 F. Supp. 735, 740 n.6 (N.D. Ohio 1997), *aff'd in part*, *rev'd in part*, 201 F.3d 418 (6th Cir.

1999); *see also* Eichel, *Focusing on Fraud: The Federal Government Expands Its Use of the False Claims Act to Police Off-Label Pharmaceutical Promotion*, 8 Ind. Health L. Rev. 399, 419 (2011) ("Between 2003 and 2007, the DOJ has settled at least eleven cases involving off-label marketing allegations against various pharmaceutical companies. Of these settlements, at least nine involved the imposition of civil monetary fines through the FCA." (footnote omitted)). Medical "[p]roviders who believe they are blameless are under tremendous pressure to settle because of the legal expenses associated with mounting a defense and the high probability of bankruptcy and professional disgrace if the jury does not see things the same way the provider does." Hyman, *Health Care Fraud and Abuse: Market Changes, Social Norms, and the Trust "Reposed in the Workmen,"* 30 J. Leg. Stud. 531, 552 (2001).

As numerous commentators have observed, "[t]he potential for the imposition of significant penalties is enough to cause many defendants to think twice about taking a case to trial, even if the plaintiff's case is unlikely to succeed. Thus, many qui tam cases are not adjudicated before a judge, but decided in negotiations between lawyers." Finegan, *The False Claims Act and Corporate Criminal Liability: Qui Tam Actions, Corporate Integrity Agreements and the Overlap of Criminal and Civil Law*, 111 Penn St. L. Rev. 625, 674-675 (2007); Krause, 19 Annals Health L. at 15 ("Faced with potential exposure in the tens or hundreds of millions of dollars, it is no wonder that most defendants choose to settle FCA allegations rather than testing their luck at trial."). The result, as many scholars have noted, is that companies "lack the benefit of precedent and reliable information on which to base decisions about the legitimacy of the DOJ's use of the False Claims Act" against

them. Girard, *Punishing Pharmaceutical Companies for Unlawful Promotion of Approved Drugs: Why the False Claims Act Is the Wrong Rx*, 12 J. Health Care L. & Pol'y 119, 153 (2009). "From an industry perspective, one major disadvantage of settlements (as opposed to judgments) is that the precedential and informational function that case law serves in a common law system is largely absent. … [E]ach new investigation presents legal uncertainty for the company subject to inquiry because the bounds of the law remain unknown." Huberfeld, *Pharma on the Hot Seat*, 40 J. Health L. 241, 245 (2007). This uncertainty is itself another harm inflicted on companies subjected to False Claims Act suits, and also presents another compelling reason for this Court's intervention.

C. Delay To Permit Further Consideration Of The Issues By The Lower Courts Is Unwarranted

As the Petition demonstrates and as we discuss further below, the lower courts are already divided over both the appropriate method of calculating False Claims Act penalties and the application of the Excessive Fines Clause to False Claims Act judgments. Delay to allow further consideration of the issues would be particularly unwise for two reasons.

First, the overwhelming pressure to settle that many defendants experience in the face of potentially massive penalties will hinder consideration of the question presented by additional courts of appeals. Even innocent defendants will not risk bankruptcy in order to take a case to judgment. The Court should thus seize the opportunity to address this important issue of federal law that is cleanly presented in the Petition and that already divides a number of lower courts.

Second, review of the Fourth Circuit's erroneous holding in this case is particularly urgent given that a large number of False Claims Act cases are brought within that Circuit. False Claims Act cases may be brought "in any judicial district in which the defendant … can be found, resides, transacts business, or in which any act proscribed by [the Act] occurred." 31 U.S.C. § 3732(a). Many companies that contract with the government are located (or have branch offices) in the Eastern District of Virginia and the District of Maryland due to their proximity to Washington, D.C. Accordingly, False Claims Act suits are often brought in those Fourth Circuit jurisdictions.[3] The presence in the Fourth Circuit of many government agencies that engage in a great deal of contracting, including the Department of Defense, as well as of dozens of military bases, also makes the Fourth Circuit a particularly important site for False Claims Act litigation.[4] Indeed, if

---

[3] *See, e.g.*, *United States ex rel. Beauchamp* v. *Academi Training Ctr., Inc.*, 933 F. Supp. 2d 825, 829 (E.D. Va. 2013) (jurisdiction appropriate where defendant, a private security contractor, was based in Arlington, Virginia); Complaint ¶ 2, *United States ex rel. Frascella* v. *Oracle Corp.*, Civ. No. 07-529 (E.D. Va. 2010) (Dkt. No. 1) (jurisdiction based on defendant's Virginia "federal government sales group" location); *United States* v. *Rachel*, 289 F. Supp. 2d 688, 690-691 (D. Md. 2003) (jurisdiction based on defendant's Maryland location, which contracted to provide on-site computer maintenance for all IRS facilities in the Washington, D.C. region).

[4] *See, e.g.*, *United States ex rel. Ahumada* v. *National Ctr. for Empl. of Disabled*, Civ. No. 06-713, 2013 WL 2322836 (E.D. Va. May 22, 2013) (government buyers in district); *United States ex rel. Ackley* v. *International Business Machines, Corp.*, 76 F. Supp. 2d 654, 657 (D. Md. 1999) (case transferred to District of Maryland in part because district was "the locus of NASA's Goddard Space Center"); *United States* v. *Domestic Indus., Inc.*, 32 F. Supp. 2d 855, 858 (E.D. Va. 1999) (jurisdiction based on sale of oil to Yorktown Naval Weapons Station in Virginia).

the Fourth Circuit's decision is allowed to stand, even more relators will likely choose to file claims there in order to take advantage of the civil penalty windfall the Fourth Circuit permits, even when the government suffers no harm and declines to pursue the claim.

II. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S PRECEDENTS

The Fourth Circuit's interpretation of the False Claims Act's penalty provision runs afoul of the reasoning of *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943), and *United States* v. *Bornstein*, 423 U.S. 303 (1976). And its approach to the Excessive Fines Clause fails to consider the factors identified in *United States* v. *Bajakajian*, 524 U.S. 321 (1998), as the ones appropriate to determining whether a fine exceeds the limits established by that Clause.

The Fourth Circuit's failure to account for defendants' actual culpability in calculating civil penalties is at odds with this Court's approach to the False Claims Act. In *Hess*, this Court first recognized the theory of fraud-in-the-inducement under the False Claims Act. 317 U.S. at 543-544. The Court held that the collusive bidding that led the government to award the project to the defendants "did not spend itself with the execution of the contract," but rather "taint[ed]" all future claims for payment under the contract. *Id.* But the Court did not levy a separate penalty for "every form submitted by" the defendants, *id.* at 552, as the Fourth Circuit would do. Instead it rationally imposed a penalty for each of the "clearly individualized" projects for which defendants rigged the bidding. *Id.* In other words, it tailored the penalty to the defendant's genuinely culpable acts.

Similarly, in *Bornstein*, this Court tied a subcontractor's civil penalty to its culpability, rather than mechanically tabulating the number of claims for payment tainted by fraud. 423 U.S. at 311-313. In *Bornstein*, a subcontractor sent three shipments of mislabeled parts to a government contractor, which in turn submitted 35 invoices for products containing those parts. *Id.* at 307. Reasoning that the statute "imposes liability only for the commission of acts which cause false claims to be presented," the Court held that the subcontractor's three shipments were the culpable acts on which a civil penalty could be levied. *Id.* at 312. It refused to assess a separate penalty for each of the 35 invoices that resulted from the fraud because the submission of those invoices was "completely fortuitous and beyond the knowledge or control" of the defendant. *Id.*

The Fourth Circuit's approach in this case is incompatible with *Hess* and *Bornstein*. Rather than identifying the "clearly individualized" acts of fraud, *Hess*, 317 U.S. at 552, and basing the penalty on those "acts which cause[d] false claims to be presented," *Bornstein*, 423 U.S. at 312, the Fourth Circuit mechanically calculated the fine based on the number of invoices submitted. The resulting penalty is untethered from Petitioners' culpability and the damage the government suffered as a result of their conduct (or lack thereof).

The Fourth Circuit's constitutional analysis was equally misguided. The Excessive Fines Clause "protects against excessive civil fines, including forfeitures," *Hudson* v. *United States*, 522 U.S. 93, 103 (1997), and the Fourth Circuit at least acknowledged that the Clause applies to False Claims Act penalties (Pet. App. 38a), as the United States conceded below (Resp. C.A. Br. 26-27 (Doc. No. 33)). But the Fourth Circuit's analysis failed to follow the test established in *Bajakajian*.

Under *Bajakajian*, "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." 524 U.S. at 334. The *Bajakajian* Court identified four factors to "compare the amount of the forfeiture to the gravity of the defendant's offense": (1) the severity of the defendant's offense, (2) its relation to other criminal activity, (3) the maximum penalty the defendant faced, and (4) the harm caused to the government. *Id.* at 336-337. The Fourth Circuit adopted a test that effectively erased the first and fourth *Bajakajian* factors from the list.

As to the fourth factor, Respondents failed to show that the government suffered *any* economic harm as a result of Petitioners' conduct; indeed, at trial they did not even seek to prove damages, only belatedly attempting to offer some evidence in post-trial briefing. Pet. App. 85a-89a, 76a. The court of appeals noted that fraud by government contractors "shakes the public's faith in the government's competence." *Id.* 40a. But that is arguably true of every False Claims Act violation. The Fourth Circuit failed to consider, as *Bajakajian* requires, the particular harm to the government *in this case* compared to the magnitude of the penalty imposed. *See Bajakajian*, 524 U.S. at 339 (government's non-economic harm—"loss of information regarding the amount of currency leaving the country"—was "minimal" compared to civil forfeiture of $357,144).

The court of appeals also disregarded *Bajakajian*'s teaching when it failed to take into account the severity of Petitioners' offense and aspects of their conduct that reflect reduced culpability. When the district court considered these factors, it concluded that (1) Petitioners' services under the contract were in no way deficient; (2) the demands of the contract solicitation were novel and would require some amount of communica-

tion among companies; and (3) Petitioners' liability was based "on the one-time filing of a single [certificate of independent price determination] that was false with respect to one line item of the 51 line item bid." Pet. App. 90a-93a. Under *Bajakajian*'s framework, each of those factors mitigated Petitioners' culpability; but the Fourth Circuit considered none of them in its analysis.

An additional consideration relevant to the Excessive Fines Clause analysis recognized in *Bajakajian* also demonstrates the erroneousness of the Fourth Circuit's analysis. *Bajakajian* explains that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." 524 U.S. at 336. Thus, courts will sometimes approve a statutory penalty in part because the statutory language makes clear that "Congress has made a judgment about the appropriate punishment." *Kelly* v. *EPA*, 203 F.3d 519, 524 (7th Cir. 2000). The False Claims Act, however, is not such a statute. Its penalty provision stands in stark contrast to nearly every other civil penalty provision in the United States Code, which specify the unit by which penalties are to be multiplied, such as "per claim," "per day," or per "violation." *See, e.g.*, 42 U.S.C. § 11045(d)(1) ("trade secret claimant is liable for a penalty of $25,000 *per claim*" (emphasis added)); 33 U.S.C. § 1319(d) (civil penalties for violation of Clean Water Act "not to exceed $25,000 *per day for each violation*" (emphasis added)); Pet. App. 96a-97a (collecting statutes).

When a statute sets both the amount of the penalty and the penalty unit, it may be reasonable to conclude that Congress—through its express choice of wording—made a judgment about the level of penalties that would be appropriate in different circumstances. In the False Claims Act, however, Congress made no such judgment. On the contrary, the Act is silent on the unit

by which the penalty amount should be multiplied to reach an appropriate penalty. It provides only that a person who violates the statute in any of the enumerated ways "is liable to the United States Government for a civil penalty." 31 U.S.C. § 3729(a). It is the Fourth Circuit, not Congress, that has filled in the Act's silence with a determination that False Claims Act penalties should be calculated "per invoice," regardless of the constitutionally excessive size of the resulting fine.

III. The Lower Courts Are Divided, Both Over How To Calculate False Claims Act Penalties And Over How To Apply The Excessive Fines Clause

The lower courts are divided, both as to how civil penalties should be calculated under the False Claims Act and as to how the Excessive Fines Clause applies to judgments under it. Some courts impose fines based on the specific fraudulent conduct at issue and the harm the government suffered. Many, like the Fourth Circuit, mechanically apply a civil penalty for each invoice submitted, regardless of the nature of the fraudulent conduct. Even lower courts that follow the Fourth Circuit's approach to calculating civil penalties recognize in principle that the Excessive Fines Clause places a meaningful limitation on penalty amounts, and many reduce penalties accordingly. The Fourth Circuit, by contrast, adopted an Excessive Fines Clause test that makes it no obstacle to imposition of grossly disproportionate fines.

A. Courts Are Divided Over The Method For Calculating Penalties

While many courts have adopted the Fourth Circuit's inflexible approach to assessing False Claims Act penalties, some have rejected it. The Eighth Circuit

tailors its imposition of False Claims Act penalties to the specific fraudulent conduct and the defendant's culpability. In *Hays* v. *Hoffman*, 325 F.3d 982 (8th Cir. 2003), for example, the court reversed a $1 million penalty against a network of healthcare facilities for a scheme involving invalid Medicaid reimbursement requests for $6,000 worth of apples. The court of appeals held that the penalty should be calculated based on the number of false requests for reimbursement (eight), rather than the number of subsequent reimbursement requests affected due to the Medicaid's rate-based regime (200). *Id.* at 993-994. It concluded that the 200 invoices tainted by fraud bore "no rational relationship to the false claim misconduct." *Id.* at 993.

Some district courts have also rejected a mechanical, per-invoice calculation of False Claims Act penalties. In a case involving fraudulent inducement of four contracts, for example, one court acknowledged that each of the 54 invoices submitted was "tainted by the initial fraud," but still assessed the penalty based on the "causative acts," which it deemed to be the four contracts, not the invoices. *United States ex rel. Longhi* v. *Lithium Power Techs., Inc.*, 530 F. Supp. 2d 888, 900-901 (S.D. Tex. 2008), *aff'd*, 575 F.3d 458 (5th Cir. 2009). Similarly, in *United States ex rel. Dyer* v. *Raytheon Co.*, the court rejected the per-invoice rule on the ground that it would produce a fine with no "rational relationship to the alleged misconduct in this case." Civ. No. 08-10341, 2013 WL 5348571, at *32 (D. Mass. Sept. 23, 2013) (penalty based on cost-rate proposals that contained false certifications). These courts, contrary to the Fourth Circuit, have faithfully applied the teachings of *Hess* and *Bornstein*. This Court should make clear that they have been right to do so.

B. Courts Follow Differing Approaches To Applying The Excessive Fines Clause

Courts are doubly divided in their understandings of the Excessive Fines Clause as a ceiling on False Claims Act judgments. First, they disagree over whether False Claims Act penalties are punitive in the sense necessary to bring them under the Clause altogether. *Compare United States* v. *Mackby*, 261 F.3d 821, 829-831 (9th Cir. 2001) (False Claims Act subject to Eighth Amendment), *and Hays*, 325 F.3d at 992 (same, in dicta), *with United States* v. *Rogan*, 517 F.3d 449, 453-454 (7th Cir. 2008) ("far from clear that the Excessive Fines Clause applies to civil actions under the False Claims Act"); *United States* v. *Incorporated Vill. of Island Park*, Civ. No. 90-992, 2008 WL 4790724, at *6 (E.D.N.Y. Nov. 3, 2008) (unpublished) (rejecting Eighth Amendment objection because False Claims Act judgment "entirely remedial"); *United States ex rel. Doe* v. *DeGregorio*, 510 F. Supp. 2d 877, 892 (M.D. Fla. 2007) ("given the remedial nature of the False Claims Act, it is unlikely that statutory penalties would constitute an excessive fine").

Second, among the courts that recognize the Clause's applicability there is disagreement over the factors that govern the Excessive Fines Clause analysis. Courts other than the Fourth Circuit have often looked to the *Bajakajian* factors in applying the Excessive Fines Clause in False Claims Act cases. *See United States* v. *Mackby*, 339 F.3d 1013, 1016-1017 (9th Cir. 2003) (collecting cases).

For example, in *United States ex rel. Smith* v. *Gilbert Realty Co.*, 840 F. Supp. 71 (E.D. Mich. 1993), a landlord contracting with a local housing authority was found liable for fraudulently charging excessively high

rent. The court noted that the False Claims Act authorized a civil penalty for each of the seven false certifications to the housing authority and each of the 51 rent checks the defendant endorsed pursuant to those certifications. *Id.* at 74-75. But because the resulting penalty of $290,000 would have been "extremely harsh and unjust," in light of damage to the government of only $1,630, the court held that the Eighth Amendment demanded a lower fine. *Id.* The court examined "the nature of the conduct," and determined that cashing a rent check does not involve the same level of culpability as making certifications to the housing authority, which are "false claims in every sense of the word." *Id.* at 75. Thus the court held that any civil penalty applied for acts beyond the seven certifications would be excessive in violation of the Eighth Amendment. *Id.*

In *United States* v. *Advance Tool Co.*, the court similarly held that a penalty based on 686 invoices for improper tools was excessive due to "plaintiff's inability to prove actual damages at trial, the government's poor investigative procedures, and its confusing regulatory and contractual purchasing arrangements which virtually encourage the type of conduct at issue here." 902 F. Supp. 1011, 1018 (W.D. Mo. 1995), *aff'd without op.*, 86 F.3d 1159 (8th Cir. 1996). Instead, the court based the penalty on the 73 types of tools provided. *Id.*

Given the division in the lower courts, this Court's intervention is warranted to determine both the proper method for calculating civil penalties under the False Claims Act and to clarify the proper framework for application of the Excessive Fines Clause to such penalties.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JAMES M. (MIT) SPEARS
MELISSA B. KIMMEL
PHRMA
950 F Street, NW, Suite 300
Washington, DC 20004

RACHEL L. BRAND
STEVEN P. LEHOTSKY
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062

MELINDA REID HATTON
MAUREEN MUDRON
AMERICAN HOSPITAL
ASSOCIATION
325 Seventh Street, NW
Suite 700
Washington, DC 20001

DAVID W. OGDEN
Counsel of Record
JONATHAN G. CEDARBAUM
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
david.ogden@wilmerhale.com

BROOK HOPKINS
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

JUNE 2014