No. 13-1399

In the Supreme Court of the United States

GOSSELIN WORLD WIDE MOVING, ET AL., PETITIONERS

v.

UNITED STATES, EX REL. KURT BUNK, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Shipping Act of 1984, 46 U.S.C. App. 1706(a)(4) (2000), which granted antitrust immunity to "any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade," precluded a suit under the False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, against moving companies that conspired to increase prices paid by the military on shipments of goods between Germany and the United States.

2. Whether the FCA authorizes the imposition of a civil monetary penalty, 31 U.S.C. 3729(a) (2006), for each claim or payment made under a contract that was obtained through fraud or false pretenses.

3. Whether the court of appeals correctly applied this Court's decision in *United States* v. *Bajakajian*, 524 U.S. 321 (1998), in determining that the civil penalties to be imposed on petitioners in this case would not violate the Excessive Fines Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 741 F.3d 390. The pertinent opinions of the district court (Pet. App. 46a-70a, 71a-111a) are not reported but are available at 2011 U.S. Dist. LEXIS 158057 and 2012 U.S. Dist. LEXIS 18445.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2013. A petition for rehearing was denied on February 14, 2014 (Pet. App. 167a-173a). The petition for a writ of certiorari was filed on May 15, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. As applicable to this case, the False Claims Act (FCA) imposes civil liability on "[a]ny person who,"

inter alia, "knowingly present[ed], or cause[d] to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment," 31 U.S.C. 3729(a)(1) (2006); "knowingly ma[de], use[d], or cause[d] to be made or used, a false record or statement material to a false or fraudulent claim," 31 U.S.C. 3729(a)(1)(B); or conspired to do either of those things, 31 U.S.C. 3729(a)(3) (2006).[1] Subject to exceptions that are not relevant here, such a person is "liable to the United States Government for a civil penalty of not less than [$5500] and not more than [$11,000], plus 3 times the amount of damages which the government sustains because of the act of that person." 31 U.S.C. 3729(a) (2006); see Pet. App. 22a & n.10 (explaining that original statutory civil penalties may be, and have been, increased by regulation).

The Attorney General may bring a civil action if he finds that a person has violated the FCA. 31 U.S.C. 3730(a). Alternatively, a private person (known as a relator) may bring his own suit (commonly referred to as a *qui tam* action) "for the person and for the United States Government." 31 U.S.C. 3730(b)(1); see *United States ex rel. Eisenstein* v. *City of New York*,

[1] The FCA was amended after the conduct in this case occurred. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4, 123 Stat. 1621. The amendments were principally intended to clarify, rather than change, the prior law, § 4(a), 123 Stat. 1621, although certain amended provisions (such as the definition of "claim" in 31 U.S.C. 3729(b)(2)) were made applicable to all pending cases, § 4(f), 123 Stat. 1625. Although the amendments are not material to the questions presented in this case, this brief cites (when relevant) the version applicable to this case of each pertinent FCA provision.

556 U.S. 928, 930 (2009). The United States may elect to intervene in a *qui tam* action and pursue the suit on its own behalf. See 31 U.S.C. 3730(b)(2); see also 31 U.S.C. 3730(c)(3). Whether or not the government intervenes, if a *qui tam* action results in the recovery of damages or civil penalties, the award is divided between the government and the relator. 31 U.S.C. 3730(d).

2. This case concerns unlawful bid-rigging, collusive price-fixing, and other fraudulent conduct in obtaining contracts for transporting the household goods of United States military and civilian personnel stationed overseas. Pet. App. 10a-13a. As relevant here, the Department of Defense transports such goods and effects in two different ways. First, for transportation of goods between the United States and Europe, the Department uses the International Through Government Bill of Lading program (ITGBL program). *Id.* at 10a-11a. Under that program, the Department contracts with a single domestic "freight forwarder[]" to provide door-to-door shipping service along a particular route, or "channel"—*e.g.*, the Virginia-to-Germany channel, or the Germany-to-Virginia channel. *Ibid.* Freight forwarders submit bids to obtain the contract for a given channel. *Id.* at 11a. The price quoted in the bid takes into account the prices that various subcontractors will charge the freight forwarder for particular legs of the journey. *Ibid.* Second, for transportation of goods within Europe, the Department of Defense relies on the Direct Procurement Method (DPM) to contract directly with local foreign movers. *Id.* at 11a-12a.

Petitioners are local foreign movers and the chief executive officer of one of those companies. Pet. App.

12a. Petitioners subcontracted with freight forwarders operating under the ITGBL program and also directly contracted with the Department of Defense through DPM. *Ibid*. In 2000 and 2001, petitioners colluded with many of their industry peers to fix the rates that they would charge for packing and transportation services within Germany. *Ibid.*

The conspiring companies specifically intended that those collusive rates would affect the ITGBL program, by increasing the rates that freight forwarders would use to determine the prices charged to the Department of Defense for door-to-door shipping services. Pet. App. 12a. Petitioners also conspired with their "supposed competitors" to "artificially inflate" the prices they would charge directly to the Department of Defense for intra-European shipping under DPM contracts. *Ibid.* Petitioners cajoled and threatened competitors who tried to submit lower bids, and the conspirators shared the profits of their schemes among themselves by subcontracting work to one another. *Id.* at 12a-13a. Petitioners were ultimately convicted of federal criminal offenses based on their activities with respect to certain shipping channels. *Id.* at 13a.

3. Two relators brought FCA suits against petitioners (and other defendants, who have been dismissed via settlement or otherwise) in the United States District Court for the Eastern District of Virginia. Pet. App. 14a-17a. As relevant here, the relators sought recovery under the FCA on two rationales. The first, on which the government intervened, was that petitioners had "collud[ed] with [their] industry cohorts to inflate the landed rate component of ITGBL bids involving all German channels, which

caused those bids as a whole—and the resultant [government] payments—to be higher than they would have been absent such collusion." *Id.* at 18a; see *id.* at 16a-17a. The relators' second theory was that petitioners, in presenting claims for payment under DPM contracts, had "falsely represented, directly or indirectly * * * that they had not engaged in common discussions or agreements regarding prices to be offered and terms and conditions of service." *Id.* at 15a (citation omitted). Liability for the DPM-related conduct was premised on the contentions that petitioners' DPM contract with the government had been tainted with fraud, and that each claim for payment under that fraudulently-obtained contract was an actionable FCA violation. *Id.* at 93a.

The district court granted partial summary judgment to the government with respect to the conduct that had been directly at issue in the previous criminal proceedings against petitioners. Pet. App. 19a. The court granted judgment for petitioners, however, on most of the remaining ITGBL-related FCA counts, on the ground that those counts were precluded by the Shipping Act of 1984, 46 U.S.C. App. 1706(a)(4) (2000). Pet. App. 19a. At the time petitioners engaged in the scheme at issue in this case, Section 1706(a)(4) exempted from federal antitrust law "any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade." See *ibid.*[2]

[2] The Shipping Act was revised and recodified in 2006, and the current version of this antitrust exemption appears at 46 U.S.C. 40307(a)(5). See Act of Oct. 6, 2006, Pub. L. No. 109-304, § 7, 120 Stat. 1532. Although the 2006 recodification was intended simply

The district court permitted the DPM-related counts to proceed. Pet. App. 22a. After a trial, petitioners were found liable for submitting 9136 false claims to the government, "corresponding to the number of invoices stipulated by the parties to have been submitted under the DPM contract." *Ibid.*; see *id.* at 20a. The prevailing relator did not seek damages but instead confined his requested recovery to the civil monetary penalties specified in the FCA. *Id.* at 76a & n.5. Applying the minimum civil penalty of $5500 to each of the 9136 false claims would have resulted in a total penalty of $50,248,000. *Id.* at 22a.

In post-trial briefing about remedies, the relator, in consultation with the government, sought $24 million. Pet. App. 23a. The district court concluded, however, that any amount in excess of $1.5 million would violate the Excessive Fines Clause. *Ibid.*; see U.S. Const. Amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed."). Believing that it lacked discretion under the FCA to award any amount less than $50,248,000, the court found the FCA unconstitutional as applied and declined to award any recovery at all for the false claims submitted in connection with the DPM scheme. Pet. App. 103a, 110a.

4. The court of appeals reversed in relevant part. Pet. App. 1a-45a. The court disagreed with the district court's conclusion that the Shipping Act barred the ITGBL-related counts. *Id.* at 41a-44a. It as-

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to clarify existing law, see § 2, 120 Stat. 1485, it modified the wording of the antitrust-immunity provision at issue here, which now applies to "*an* agreement or activity *relating to* the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade." 46 U.S.C. 40307(a)(5) (emphasis added).

sumed, "strictly for purposes of this decision," that the Shipping Act's antitrust exemption, 46 U.S.C. App. 1706(a)(4) (2000), which "applies by its literal terms merely to liability under the antitrust laws," could "also apply to exempt persons from FCA liability." Pet. App. 42a n.15. The court observed, however, that in the previous criminal prosecution of petitioners, it had interpreted Section 1706(a)(4), in light of "the canon that exemptions from antitrust liability are to be narrowly construed," not to immunize a "'collusive effort * * * aimed at the entire through transportation market, rather than just the foreign inland segment.'" *Id.* at 43a (quoting *United States* v. *Gosselin World Wide Moving, N.V.*, 411 F.3d 502, 510 (4th Cir. 2005), cert. denied, 547 U.S. 1002 (2006)). The court of appeals reasoned that the scheme at issue here, like the "nearly identical" and "materially similar" scheme at issue in the criminal proceedings, "concerned more than just the foreign inland segments." *Id.* at 43a-44a. The court explained that the scheme "did not inflate in isolation merely the landed rate quoted the freight forwarders; it inflated the all-inclusive through rates that the freight forwarders were induced to bid (and [the government] was compelled to pay) on each of the channels between the United States and Germany." *Id.* at 43a.

With respect to the DPM counts, the court of appeals concluded that the district court should have granted the relator's request for a reduced award of $24 million in civil penalties. Pet. App. 31a-41a. The court adhered to circuit precedent in which it had held, based in part on "substantial amendments to the FCA" enacted in 1986, that when a defendant has fraudulently procured a contract with the government,

"'each invoice'" under that contract "'constitutes a claim'" for payment from the government within the meaning of the FCA. *Id.* at 35a-37a (brackets omitted) (quoting *Harrison* v. *Westinghouse Savannah River Co.*, 176 F.3d 776, 792 (4th Cir. 1999)). The court explained that, "[w]hen an enormous public undertaking spawns a fraud of comparable breadth," permitting the imposition of a civil penalty for each invoice "helps to ensure * * * the primary purpose of the FCA: making the government completely whole." *Id.* at 37a. The court further observed that the district court's "award of nothing at all because the claims were so voluminous provides a perverse incentive for dishonest contractors to generate as many false claims as possible, siphoning ever more resources from the government." *Ibid.* The court of appeals additionally reasoned that any potential "injustice" that could arise from using the number of invoices as a proxy for relative culpability "is avoided in [a] particular case by the discretion accorded the government and a relator to accept reduced penalties within constitutional limits, as ultimately adjudged by the courts." *Ibid.*; see *id.* at 31a-35a (concluding that the government or relator has such discretion).

The court of appeals then determined that, "[u]nder the circumstances before [the court]," the $24 million requested by the relator in this case was not constitutionally excessive. Pet. App. 41a; see *id.* at 37a-41a. The court recognized that *United States* v. *Bajakajian*, 524 U.S. 321 (1998), provided the relevant framework for analyzing that issue. Pet. App. 37a-39a. In *Bajakajian*, this Court found forfeiture of $357,144 in cash to be an excessive penalty for failing to report that the cash was being taken out of the

United States. 524 U.S. at 324. The Court reasoned that the violation was "solely a reporting offense," *id.* at 337; that the offense was "unrelated to any other illegal activities," *id.* at 338; that the defendant "d[id] not fit into the class of persons for whom the statute was principally designed," *ibid.*; that the criminal penalty for failure to report was relatively minor, *id.* at 338-339; that the harm to the government was "minimal," *id.* at 339; and that the defendant's conduct involved "no fraud on the United States" and "no loss to the public fisc," *ibid.*

The court below concluded that "[t]he circumstances of this appeal could not be more readily distinguishable from those evaluated by the Supreme Court in *Bajakajian*." Pet. App. 39a. The court explained that petitioners were "precisely within the class of wrongdoers contemplated by the FCA," which had been "enacted specifically in response to overcharges and other abuses by defense contractors." *Ibid.* (internal quotation marks and citation omitted). The court further observed that "analogous misconduct" by petitioners had led to their convictions for criminal offenses carrying serious penalties. *Ibid.*

The court of appeals also found that petitioners' scheme had caused substantial harm to the government. Pet. App. 40a-41a. The court explained that the "undisputed evidence revealed a substantial short-term price increase under the DPM contract for similar services previously provided, perhaps in excess of $2 million, and there is no doubt that the government has suffered significant opportunity costs from being deprived of the use of those funds for more than a decade." *Id.* at 40a. The court of appeals also observed that "scams" by defense contractors can cause

considerable non-economic harm, by "shak[ing] the public's faith in the government's competence" and "encourag[ing] others similarly situated to act in a like fashion." *Ibid.* The court accordingly found that a $24 million penalty "appropriately reflects the gravity of [petitioners'] offenses and provides the necessary and appropriate deterrent effect going forward." *Id.* at 41a.

Judge Shedd concurred in part and dissented in part. Pet. App. 45a. He agreed with the majority's conclusion that a $24 million award was appropriate on the DPM counts, but he would have held that Section 1706(a)(4) barred the ITGBL counts. *Ibid.*

ARGUMENT

Petitioners contend (Pet. 14-24) that the Shipping Act bars FCA liability for their ITGBL price-fixing scheme. Petitioners argue as well (Pet. 24-37) that $24 million was an impermissible civil penalty for petitioners' DPM price-fixing scheme. The court of appeals correctly rejected those contentions, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. At the time of the conduct at issue in this case, the Shipping Act provided that "[t]he antitrust laws do not apply to * * * any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade." 46 U.S.C. App. 1706(a)(4) (2000); see note 2, *supra* (discussing amended law). The court of appeals correctly held that this antitrust exemption did not bar an FCA suit seeking recovery based on petitioners' conspiracy to fix the rates charged to the federal government under

the ITGBL program. This Court has previously denied a petition for certiorari filed by one of these same petitioners, seeking review of a similar question regarding Section 1706(a)(4)'s scope. See *Gosselin World Wide Moving, N.V.* v. *United States*, 547 U.S. 1002 (2006) (No. 05-677). There is no reason for a different result here.

As a threshold matter, it is far from clear that Section 1706(a)(4) applies to FCA suits. See Pet. App. 42a n.15 (noting this question). This Court has "frequently expressed" the "view that exemptions from antitrust laws are strictly construed," *Federal Mar. Comm'n* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 732-733 (1973), and nothing in Section 1706(a)(4)'s text explicitly covers an FCA suit like this. Even assuming, *arguendo*, that Congress sought to immunize conduct like petitioners' in circumstances where the victim of the fraudulent conduct is a private entity and the suit is brought directly under the antitrust laws, Congress should not lightly be presumed to have granted similar immunity where the victim of the fraudulent conduct is the United States and the suit is brought under the FCA.

Even if Section 1706(a)(4) applies to FCA actions, it would not bar this particular suit, for two independent reasons. First, petitioners' conspiracy with other foreign moving companies was not an "agreement" as that term was used in Section 1706(a)(4).[3] Another

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[3] Section 1706(a)(4) applied not only to "agreement[s]," but also to "activit[ies]" that met the stated criteria. 46 U.S.C. App. 1706(a)(4) (2000). The petition correctly acknowledges that the conduct for which petitioners were found liable was an "agreement." See, *e.g.*, Pet. 22 (discussing the "agreement at issue here"). If the textual limitations on the term "agreement" could be

provision of the same chapter in which Section 1706(a)(4) appeared, entitled "[a]greements within scope of chapter," specified only two categories of agreements to which "[t]his chapter applie[d]": certain "agreements by or among ocean common carriers," and certain "agreements among marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers." 46 U.S.C. App. 1703(a)-(b) (2000). As the government pointed out below (Gov't C.A. Opening Br. 50-60), the collusive conduct at issue here does not fall within either of those categories, and it thus was not "within [the] scope of [the] chapter" that included Section 1706(a)(4).

Construing the scope of agreements covered by Section 1706(a)(4) to be congruent with the scope of agreements covered by the chapter more generally makes sense not only textually but practically. For the agreements actually covered by the chapter, the Shipping Act substituted a different form of federal oversight, see 46 U.S.C. App. 1704 (2000) (requiring, *inter alia*, that covered agreements be submitted to a federal agency), in place of potential liability under the antitrust laws. Applying Section 1706(a)(4) to conspiracies like the one at issue here, however, would allow potentially harmful conduct to escape federal oversight entirely, regardless of its effect in the United States. See *Transpacific Westbound Rate Agreement* v. *Federal Mar. Comm'n*, 951 F.2d 950, 954 (9th Cir. 1991) ("It does not seem logical that Congress intended to confer antitrust immunity on parties

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avoided simply by recharacterizing an "agreement" as an "activity," then Section 1706(a)(4)'s reference to "agreement[s]" would be surplusage.

largely outside of the regulatory power of the [Federal Maritime] Commission.").

Second, as the court of appeals correctly recognized (Pet. App. 41a-44a), even if petitioners' collusion met the definition of an "agreement," it still fell outside the scope of Section 1706(a)(4). Section 1706(a)(4) was limited to agreements concerning "the foreign inland segment of through transportation." 46 U.S.C. App. 1706(a)(4). Its narrowness in that regard stands in contrast to a separate provision of the Shipping Act, 46 U.S.C. App. 1703(a)(1) (2000), which more broadly covered agreements about the rates charged for through transportation in its entirety. See *ibid.* (covering agreements about "through rates"); 46 U.S.C. App. 1702(23) (2000) (defining "'through rate'" as "the single amount charged by a common carrier in connection with through transportation"). Petitioners accordingly do not dispute the correctness of the court of appeals' conclusion, in the prior criminal proceedings, that Section 1706(a)(4) is inapplicable to conduct "aimed at the entire through transportation market, rather than just the foreign inland segment." *United States* v. *Gosselin World Wide Moving, N.V.*, 411 F.3d 502, 510 (4th Cir. 2005), cert. denied, 547 U.S. 1002 (2006); see Pet. 22. Applying that standard to this case, the court of appeals determined that Section 1706(a)(4) did not cover petitioners' conduct, which was "nearly identical" to the conduct at issue in the criminal prosecution. Pet. App. 43a-44a.

Petitioners contend (Pet. 21-24) that the court of appeals' fact-specific application of that undisputed legal standard to this case had the effect of reading Section 1706(a)(4) out of the Shipping Act. In their view, the decision below effectively holds that *every*

agreement about the inland segment of through transportation is actionable under the antitrust laws, because such agreements can always be seen as having an effect on the through transportation itself. The court of appeals, however, had no occasion in this case to reach such an expansive conclusion. It did not view petitioners' price-fixing scheme to be directed at the inland segment of through transportation, but instead considered it to have been part of a single, overarching conspiracy, with the specific purpose and intent to inflate the prices the government would be charged for through transportation between the United States and Germany. Pet. App. 43a-44a; see *id.* at 12a (describing the "intended effect" of petitioners' conspiracy "upon the ITGBL program"). Although petitioners disagree with the court of appeals' assessment of the facts of their particular conspiracy, that factual dispute neither suggests that the decision below should be read in the expansive manner they advocate nor warrants this Court's review.[4]

Contrary to petitioners' contention (Pet. 15-17), the court of appeals' decision does not conflict with the Ninth Circuit's application of Section 1706(a)(4) in *United States* v. *Tucor International, Inc.*, 189 F.3d 834 (1999). In *Tucor*, the defendants were motor carriers who picked up household goods from American military bases and delivered them to Philippine seaports, "where the defendants' involvement [in the

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[4] Because the antitrust laws apply to certain "foreign anticompetitive conduct" having specified connections to the United States, *F. Hoffmann-La Roche Ltd* v. *Empagran S.A.*, 542 U.S. 155, 165 (2004), petitioners are wrong in suggesting (Pet. 20-21) that the decision below constitutes an impermissible judicial intrusion into the sphere of foreign policy.

transportation of the goods] ended." *Id.* at 835-836. Unlike petitioners, the *Tucor* defendants did not orchestrate a conspiracy in which a local price-fixing agreement was part of a plan to influence bids for through transportation between the United States and a foreign country. Accordingly, "[t]he facts and circumstances surrounding [this] case are dissimilar to those in *Tucor.*" Pet. App. 42a n.16.[5]

2. Petitioners' challenge to the civil-penalty award on the DPM counts likewise does not warrant this Court's review.

a. On the DPM counts, the court of appeals correctly held that the FCA imposes a civil penalty for each invoice submitted to the government under a contract obtained through fraud or false statements. As relevant to this case, the FCA provided that anyone who "knowingly present[ed], or cause[d] to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment," 31 U.S.C. 3729(a)(1) (2006), would be "liable to the United States Government for a civil penalty," 31 U.S.C. 3729(a) (2006). The FCA defines the term "claim" to include "any request or demand, whether under a contract or otherwise, for money or property * * * that * * * is presented to an officer, employee, or agent of the United States." 31 U.S.C. 3729(b)(2)(A)(i).

Petitioners presented a separate "false or fraudulent claim" to the government, thereby committing a

[5] The court of appeals in *Tucor* did reject the government's argument (which the court of appeals here did not reach) that Section 1706(a)(4)'s scope is limited to agreements involving ocean common carriers. 189 F.3d at 837-838.

separate violation of the FCA warranting a separate civil penalty, each time they submitted an invoice under the DPM contract. Petitioners acknowledge (Pet. 24) that where, as here, an invoice is submitted under a fraudulently-obtained contract, that invoice is "false" within the meaning of the FCA. See Pet. App. 12a (observing that petitioners conspired to "artificially inflate" prices under the DPM contract). Petitioners' invoices in this case fall within the FCA's definition of "claim" because each invoice was a "request or demand, * * * under a contract * * * for money or property * * * presented to an officer, employee, or agent of the United States." 31 U.S.C. 3729(b)(2)(A)(i). The legislative history of the 1986 FCA amendments confirms Congress's intent that "each and every claim submitted under a contract * * * which was originally obtained by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation, constitutes a false claim." S. Rep. No. 345, 99th Cong., 2d Sess. 9 (1986).

Petitioners appear to contend (Pet. 24-37) that, no matter how many times a defendant violates the FCA by filing a false claim under a fraudulently procured contract, that defendant is subject to only one civil penalty. That contention cannot be squared with the text of Section 3729, which specifies that the civil penalty applies whenever a defendant knowingly presents to the United States "a false or fraudulent claim for payment." 31 U.S.C. 3729(a)(1) (2006). Accordingly, each time a defendant presents a false claim for payment, his conduct triggers the statutory civil penalty. For purposes of the civil-penalty provision, it is irrelevant whether a particular claim is "false" because it

contains a false statement (*e.g.*, a charge for services not actually rendered), or because it is submitted under a fraudulently-obtained contract.

b. Petitioners' reliance (Pet. 26-28) on this Court's decisions in *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943), and *United States* v. *Bornstein*, 423 U.S. 303 (1976), is misplaced. Those decisions predate the 1986 amendments that clarified Congress's intent on this issue, and they do not support petitioners' reading of the statutory text.

Hess involved collusion by electrical contractors to inflate prices charged under contracts with local governmental entities. 317 U.S. at 539 & n.1. This Court held that, because the federal government supplied most of the funds used to pay the electrical contractors, the electrical contractors' conduct violated the FCA. *Id.* at 540-545. Consistent with the court of appeals' approach in this case, the Court reasoned that "the fraud did not spend itself with the execution of the contract," but rather that the fraud's "taint entered into every swollen estimate which was the basic cause for payment" by the government. *Id.* at 543.

The Court in *Hess* also rejected the electrical contractors' contention that only one civil penalty should be assessed "for all the acts done." 317 U.S. at 552. The Court instead affirmed the district court's conclusion—to which the relator did not object—that a penalty should be imposed "for each separate * * * project" on which the electrical contractors had worked. *Ibid*. Contrary to petitioners' contention (Pet. 27), the Court in *Hess* did not hold that this represented the maximum number of civil penalties that could permissibly have been imposed. As the

Court subsequently explained, "[n]o party" in *Hess* "argued in this Court that more * * * forfeitures should have been imposed, and no statement in the *Hess* opinion expressly limited the number of imposable forfeitures to the number of contracts involved in a case." *Bornstein*, 423 U.S. at 310.

In *Bornstein*, a subcontractor supplied the prime contractor on a federal contract with electron tubes that did not meet the government's specifications, but were falsely marked to appear as though they did. 423 U.S. at 307. This Court considered "whether the subcontractor should be liable for each claim submitted by its prime contractor or whether it should be liable only for certain identifiable acts that it itself committed." *Id.* at 309. Relying in part on *Hess*, the Court rejected the proposition that, because only one contract was involved, only one penalty could be imposed. *Id.* at 311. The Court explained that "[s]uch a limitation would * * * convert the [FCA's] forfeiture provision into little more than a [fixed-price] license for subcontractor fraud." *Ibid.* (internal quotation marks and citation omitted).

The Court in *Bornstein* also concluded that the subcontractor was not liable for every invoice submitted by the prime contractor because the number of culpable acts committed by the subcontractor (three shipments of falsely branded goods) bore no relation to the number of invoices (35) that the prime contractor had submitted to the government. 423 U.S. at 307, 311-313. Contrary to petitioners' contention (Pet. 27-28), that rule of *subcontractor* liability has no application where, as here, the defendant is *itself* the prime contractor and directly presented a false claim to the government each time it submitted an invoice. In-

deed, the Court in *Bornstein* observed that "[i]n cases involving prime contractors the number of imposable forfeitures has generally been set at the number of individual false payment demands that the contractor has made upon the Government," and the Court found that practice to be "in accord" with its precedents. 423 U.S. at 309 n.4.

c. The decision below also does not conflict with the court of appeals decisions cited by petitioners. In *Hays* v. *Hoffman*, 325 F.3d 982, cert. denied, 540 U.S. 877 (2003), the Eighth Circuit concluded that eight hospitals' false requests for Medicare reimbursement for apples purchased as gifts for medical residents should be treated as eight false claims under the FCA. *Id.* at 991-994. The court noted a lack of sound evidence on the issue of the number of actual invoices submitted to the government. *Id.* at 993. It also observed that, under the particular Medicare payment system at issue, "a one-time expense for a multi-facility provider may be reimbursed over hundreds or many thousands of claims for reimbursement of services provided to individual residents," and it reasoned that treating each reimbursement request as a separate claim for FCA purposes would be improper. *Ibid.*

Although that latter rationale is in some tension with the Fourth Circuit's general approach of treating every invoice as a claim under the FCA, it is not clear that the Eighth Circuit would actually reach a different result from the Fourth Circuit on the particular facts of this case. This case does not involve a "one-time expense" that was distributed across hundreds of individual invoices as the result of a detailed regulatory scheme. Rather, the invoices at issue here were

submitted in the most natural manner possible, namely, one for each instance in which petitioners transported military or civilian goods for the Department of Defense. The circumstances of this case thus accord with the paradigmatic situation contemplated in *Bornstein*, in which the number of false claims is "set at the number of individual false payment demands that the contractor has made upon the Government." 423 U.S. at 309 n.4. Nothing in *Hays* would prevent the Eighth Circuit from viewing the facts of this case in that fashion and reaching the same result as the court below.

United States v. *Krizek*, 111 F.3d 934 (D.C. Cir. 1997), affirmatively supports the decision below. In that case, the D.C. Circuit concluded that the defendants had proffered a separate claim for FCA purposes "every time they submitted" a particular reimbursement form. *Id.* at 940. Although the court rejected the government's argument that individual line items in a single form could be treated as distinct claims, it recognized that each submission of the form requesting payment from the government was a separate claim. *Ibid.* That is consistent with the conclusion that the court of appeals reached here.

3. Finally, this case presents no issue under the Excessive Fines Clause that would warrant this Court's review. The court of appeals accepted that the Excessive Fines Clause applies to aggregate civil penalties under the FCA. See Pet. App. 37a-38a. The court determined, however, that "[u]nder the circumstances before [it]," the relator's requested award of $24 million for petitioners' numerous FCA violations was constitutionally permissible. *Id.* at 41a; see *id.* at 37a-41a. In reaching that determination, the court of

appeals applied the framework set forth in *United States* v. *Bajakajian*, 524 U.S. 321 (1998), on which petitioners themselves rely (Pet. 35-36).

Although petitioners disagree with the court of appeals' application of *Bajakajian* to the circumstances of this case, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law." Sup. Ct. R. 10. The decision below leaves open the possibility that the court of appeals could find a constitutional violation in a case involving different facts. Indeed, the award that the court below upheld was approximately half the amount ($50,248,000) of the minimum civil penalty as calculated under the literal terms of the FCA. See p. 6, *supra*. The Fourth Circuit's decision therefore does not suggest that FCA civil-penalty awards are insulated from meaningful review for unconstitutional excessiveness. And petitioners identify no court of appeals decision reaching a different constitutional conclusion on facts materially identical to those presented here.

In any event, petitioners' criticisms of the Fourth Circuit's *Bajakajian* analysis are misplaced. Petitioners suggest (Pet. 26, 35-36) that the court of appeals failed to conduct a case-specific analysis of their "culpability." But the court specifically determined that petitioners' "misdeeds were of substance," Pet. App. 39a (noting petitioners' criminal conviction for similar conduct), and that the civil penalty "appropriately reflects the gravity of [their] offenses and provides the necessary and appropriate deterrent effect going forward," *id.* at 41a. Petitioners are also wrong in suggesting (*e.g.*, Pet. 34-35) that the court of appeals viewed this as a case in which the government suf-

fered no actual harm. Although the court of appeals noted the district court's finding of no harm, it viewed that finding as "seemingly inconsistent with [petitioners'] apparent profit motive." Pet. App. 40a.

The court of appeals also emphasized that the "undisputed evidence revealed a substantial short-term price increase under the DPM contract for similar services previously provided, perhaps in excess of $2 million." Pet. App. 40a. The court perceived "no doubt that the government has suffered significant opportunity costs from being deprived of the use of those funds for more than a decade," *ibid.*, and it highlighted the noneconomic harms that supported the particular award in this case, *id.* at 40a-41a. Further review of that award is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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