U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

February 24, 2025

The Honorable Mike Johnson
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: *Grant* v. *Zorn*, 107 F.4th 782 (8th Cir. 2024) (Nos. 22-3481 & 22-3591)

Dear Mr. Speaker:

Consistent with 28 U.S.C. 530D, I write to advise you that the Department of Justice has decided not to file a petition for a writ of certiorari in the above-referenced case. A copy of the decision of the United States Court of Appeals for the Eighth Circuit is attached.

The case involves an Eighth Amendment challenge to a civil-penalty award under the False Claims Act (FCA or Act), 31 U.S.C. 3729 *et seq.* The FCA prohibits various deceptive practices involving government funds and property, including "knowingly present[ing], or caus[ing] to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1)(A). A person who violates the Act "is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 * * * , plus 3 times the amount of damages which the Government sustains because of the act of that person." 31 U.S.C. 3729(a)(1).

The FCA permits private persons (known as relators) to bring qui tam actions "in the name of the Government" against persons who have violated the Act. 31 U.S.C. 3730(b)(1). In this case, a relator filed an FCA qui tam action alleging that the defendants had knowingly overbilled Medicaid, Medicare, and Tricare for sleep-medicine services. The government declined to "intervene and proceed with the action" under the FCA. 31 U.S.C. 3730(b)(2). After a bench trial, the district court concluded that the defendants had submitted 1,050 false claims, resulting in damages to the government of $86,332. The court then trebled the damages to $258,996 and calculated a civil-penalty award of $7,699,525, which was what the court believed to be the statutory minimum penalty award given the number of false claims and the times when they were submitted. The court concluded, however, that such an award would violate the Excessive Fines Clause of the Eighth Amendment. To avoid what it perceived to be a constitutional violation, the court reduced the civil-penalty award to $6,474,900.

A panel of the court of appeals vacated the civil-penalty award and remanded for further proceedings. As relevant here, the panel held that "the Excessive Fines Clause applies in *qui tam* actions where the government has chosen not to intervene." Op. 16; see Op. 16-17. The panel

also took the view that "cases analyzing punitive damages under the Due Process Clause are instructive in analyzing punitive sanctions under the Excessive Fines Clause." Op. 18. The panel then held, in light of those due-process cases, that the civil-penalty award of $6,474,900 violated the Excessive Fines Clause because it exceeded "a single-digit multiplier of compensatory damages." Op. 21; see Op. 17-22. Chief Judge Smith wrote separately, expressing the view that "the FCA's civil penalties are not excessive." Op. 22.

After the panel issued its ruling, the government moved to intervene under 28 U.S.C. 2403(a) to defend the constitutionality of the FCA's civil-penalty provision. The court of appeals granted that motion. The government then filed a petition for rehearing en banc, arguing that the panel's reliance on due-process cases was misplaced and that the statutory minimum civil-penalty award was not excessive. The court of appeals denied rehearing en banc over the noted dissents of Judges Erickson, Stras, and Kobes.

The Department of Justice has determined that a petition for a writ of certiorari is not warranted in this case. First, the panel relied on the Excessive Fines Clause to invalidate a particular application of a federal statute regarding penalties in a particular case. Second, the government did not address the Excessive Fines Clause issue until very late in the case. Although the district court asked for the government's views on how the monetary award should be distributed, see D. Ct. Doc. 139, at 87 (Sept. 23, 2022), neither court below notified the government that the constitutionality of an Act of Congress had been "drawn in question," 28 U.S.C. 2403(a), and the government did not address the Excessive Fines Clause issue until after the panel had already ruled. The panel therefore did not have the benefit of the government's argument that due-process precedents were inapposite to the Excessive Fines Clause analysis. Third, the Supreme Court has previously reserved the question whether the Excessive Fines Clause applies in qui tam suits. 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, 276 n.21 (1989). The need to decide that threshold issue could complicate the Court's review of the panel's decision in this case.

A petition for a writ of certiorari would be due on March 7, 2025. Please let me know if we can be of any further assistance in this matter.

Sincerely,

Sarah M. Harris
Acting Solicitor General

Enclosure