No. 13-___

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. The Shipping Act exempts from federal antitrust laws any "agreement or activity relating to the foreign inland segment" of "through transportation" between the United States and a foreign country. 46 U.S.C. § 40307(a)(5). The question presented is whether the Fourth Circuit erred in holding, in conflict with the Ninth Circuit, that this immunity does not apply where a collusive agreement relating to the "foreign inland segment" indirectly affects prices for overall "through transportation"?

II. 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*?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, who were Defendants-Appellees-Cross-Appellants below, are Gosselin World Wide Moving, N.V, Gosselin Group N.V., and Marc Smet. Gosselin World Wide Moving, N.V., which has never been a publicly-owned company, was reorganized in 2007 and renamed Gosselin Group N.V. Gosselin Group N.V. also has never been, and is not now, a publicly-owned company. The privately-owned shares of Gosselin Group N.V. are held by the company SAK Portielje, which is also not a publicly-owned company. SAK Portielje is a holding company trust with no operational activity.

Respondents, who were Plaintiffs-Appellants below, are relators Kurt Bunk and Ray Ammons, and the United States.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 10

ARGUMENT 14

I. THE PANEL MAJORITY, BY EVISCERATING THE SHIPPING ACT'S IMMUNITY, CREATED A CIRCUIT SPLIT ON AN IMPORTANT ISSUE OF ANTITRUST LAW FOR INTERNATIONAL SHIPPING 14

A. The Decision Below, In Effectively Repealing the Immunity, Conflicts with the Ninth Circuit's Construction 15

B. The Question Presented Is of Great Practical Importance for International Shipping and Implicates U.S. Foreign Affairs Interests 18

C. The Decision Below Is Wrong............. 21

TABLE OF CONTENTS
(continued)

Page

II. THE FOURTH CIRCUIT'S RIGID IMPOSITION OF PENALTIES "PER-INVOICE," WITHOUT REGARD TO A DEFENDANT'S CULPABILITY, CONFLICTS WITH OTHER COURTS AND EXACERBATES FCA LITIGATION 24

A. Other Courts Assess FCA Penalties Based on the Defendant's Culpability, but the Fourth Circuit Has Imposed a Strict Per-Invoice Rule, Unchecked by the Eighth Amendment 25

B. Whether FCA Civil Penalties Must Be Based On the Defendant's Culpability Is of Exceptional Importance 32

C. The Decision Below Is Wrong as Both a Statutory and Constitutional Matter 35

CONCLUSION 37

APPENDIX A: Opinion of the United States Court of Appeals for the Fourth Circuit (Dec. 19, 2013) 1a

APPENDIX B: Opinion of the United States District Court for the Eastern District of Virginia (Aug. 26, 2011) 46a

TABLE OF CONTENTS
(continued)

	Page
APPENDIX C: Opinion of the United States District Court for the Eastern District of Virginia (Feb. 14, 2012)	71a
APPENDIX D: Order of the United States District Court for the Eastern District of Virginia (Feb. 14, 2012)	112a
APPENDIX E: Opinion of the United States District Court for the Eastern District of Virginia (Oct. 19, 2011)	117a
APPENDIX F: Order of the United States District Court for the Eastern District of Virginia (Oct. 19, 2011)	163a
APPENDIX G: Order of the United States Court of Appeals for the Fourth Circuit (Feb. 14, 2014)	167a

TABLE OF AUTHORITIES

Page(s)

CASES

Air Wisconsin Airlines Corp. v. Hoeper,
133 S. Ct. 2824 (2013) 11

Ashwander v. TVA,
297 U.S. 288 (1936) 35

Clark v. Rameker,
134 S. Ct. 678 (2013) 11

Coats v. Penrod Drilling Corp.,
61 F.3d 1113 (5th Cir. 1995) (en banc) 20

Continental Ore Co. v. Union Carbide & Carbon Corp.,
370 U.S. 690 (1962) 17

EEOC v. Arabian Am. Oil Co.,
499 U.S. 244 (1991) 21

Ex parte Young,
209 U.S. 123 (1908) 33

Fidelity Fed. Bank & Trust v. Kehoe,
547 U.S. 1051 (2006) 33

Harrison v. Westinghouse Savannah River Co.,
352 F.3d 908 (4th Cir. 2003) 26, 36

Harrison v. Westinghouse Savannah River Co.,
176 F.3d 776, 793-94 (4th Cir. 1999) 8, 31

Hays v. Hoffman,
325 F.3d 982 (8th Cir. 2003) 28, 29, 31

In re Baycol Prods. Litig.
732 F.3d 869 (8th Cir. 2013) 26

Kiobel v. Royal Dutch Petroleum Co.,
133 S. Ct. 1659 (2013) 21

TABLE OF AUTHORITIES
(continued)

Page(s)

Matter of Rhone-Poulenc Rorer, Inc.,
51 F.3d 1293 (7th Cir. 1995) 33

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985) 19

Morrison v. Nat'l Australia Bank Ltd.,
130 S. Ct. 2869 (2010) 20

N.C. Bd. of Dental Examiners v. FTC,
134 S. Ct. 1491 (2014) 11

Plumhoff v. Rickard,
134 S. Ct. 635 (2013) 11

Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.,
549 F.2d 597 (9th Cir. 1976), *superseded by statute*, Pub. L. No. 97-290, 96 Stat. 1233, *as recognized in McGlinchey v. Shell Chem. Co.*, 845 F.2d 802 (9th Cir. 1988)........................ 20

United States ex rel. Dyer v. Raytheon Co.,
No. 08-cv-10341, 2013 WL 5348571 (D. Mass. Sept. 23, 2013), *appeal dismissed*, No. 13-2315 (1st Cir. Jan. 31, 2014) 29, 31

United States ex rel. Lamberts v. Stokes,
640 F. Supp. 2d 927 (W.D. Mich. 2009) 30

United States ex rel. Longhi v. Lithium Power Technologies,
530 F. Supp. 2d 888 (S.D. Tex. 2008).............29, 31

United States ex rel. Marcus v. Hess,
317 U.S. 543 (1943) ....*passim*

TABLE OF AUTHORITIES
(continued)

Page(s)

United States ex rel. Ryan, No. 2:05-cv-3450 (E.D. Pa.) 33

United States ex rel. Smith v. Gilbert Realty Co., 840 F. Supp. 71 (E.D. Mich. 1993) 30, 32

United States v. 3814 NW Thurman St., Portland, Or., 164 F.3d 1191 (9th Cir. 1999) 36

United States v. Advance Tool Co., 902 F. Supp. 1011 (W.D. Mo. 1995) 30, 32

United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945) 20

United States v. Bajakajian, 524 U.S. 321 (1998) 26, 35, 36

United States v. Bormes, 132 S. Ct. 1088 (2012) 11

United States v. Bornstein, 423 U.S. 303 (1976) 27, 28, 29, 31

United States v. Caronia, 703 F.3d 149 (2d Cir. 2012) 34

United States v. Gosselin World Wide Moving N.V., 411 F.3d 502 (4th Cir. 2005) .... *passim*

United States v. Krizek, 111 F.3d 934 (D.C. Cir. 1997) 29, 31

United States v. Tucor Int'l, Inc., 189 F.3d 834 (9th Cir. 1999) .... *passim*

TABLE OF AUTHORITIES
(continued)

Page(s)

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U.S. Const. amend. VIII .... *passim*

15 U.S.C. § 22 19

28 U.S.C. § 1254(1) 1

31 U.S.C. § 3729(a) 1, 24

31 U.S.C. § 3732 .... 19, 35

46 U.S.C. app. § 1706(a) 14

46 U.S.C. § 40102(25) 17

Shipping Act, 46 U.S.C. § 40307 .... *passim*

OTHER AUTHORITIES

48 C.F.R. § 17.207(c) 7

1981 Shipping Act: Hearing Before Subvomm. On Merchant Marine of the S. Comm. on Commerce, Science & Transp., 97th Cong. 208 (1981) 21

Am. Ass'n of Port Authorities, *U.S. Ports Ranked by Cargo Volume - 2012*, available at http://goo.gl/jrKwvu 18

John T. Boese, CIVIL FALSE CLAIMS AND QUI TAM ACTONS (4th ed. 2011) 13

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TABLE OF AUTHORITIES
(continued)

Page(s)

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OPINIONS BELOW

The Court of Appeals' opinion (Pet.App.1a) is published at 741 F.3d 390. The District Court's opinions granting petitioners' motion for a partial directed verdict (Pet.App.46a) and addressing respondents' post-trial motion for civil penalties (Pet.App.71a) can be found at 2011 U.S. Dist. LEXIS 158057 and 2012 U.S. Dist. LEXIS 18445, respectively.

JURISDICTION

The Fourth Circuit issued its decision on December 19, 2013, and denied rehearing en banc on February 14, 2014. Pet.App.167a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

46 U.S.C. § 40307(a) provides, in relevant part:

> The antitrust laws do not apply to — … (5) 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.

31 U.S.C. § 3729(a)(1) provides, in relevant part:

> [A]ny person who — (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval … is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, …, plus 3 times the amount of damages which the Government sustains because of the act of that person.

STATEMENT OF THE CASE

This petition presents two distinct questions. As to each, the panel below (i) adopted statutory readings contrary to holdings of other courts; (ii) imposed substantial burdens on businesses in this country and around the world; and (iii) created rather than avoided constitutional concerns.

The case arises out of two distinct U.S. military shipping programs in which petitioners ("Gosselin") participated, leading to suits against them under the False Claims Act ("FCA"). First, the International Through Government Bill of Lading ("ITGBL") program involves shipping military household goods between the U.S. and abroad. U.S. companies subcontracted with Belgium-based Gosselin to handle the German component of international moves. The Government alleged that Gosselin and other European shippers entered into an unlawful pricing agreement for services in Germany. The Eastern District of Virginia dismissed these claims because the Shipping Act immunizes collusion on the "foreign inland segment" of international shipping. Over dissent, and in conflict with the Ninth Circuit, the Fourth Circuit reversed.

The second program, the Direct Procurement Method ("DPM"), involves the military directly contracting with European shippers to transport goods exclusively within Europe. In 2001, Gosselin won the DPM contract. Relators alleged that every invoice submitted under this 3-year contract was a false claim, because Gosselin's initial bid certified that its prices had been arrived at independently. Although Gosselin arrived at its overall price independently, a group of European shippers had

agreed on what the winning bidder would pay the others for one item of the required subcontracting work. Notwithstanding this agreement, the military twice renewed Gosselin's contract. The District Court, finding that the Government had suffered no monetary harm and there was substantial, uncontested mitigating evidence, held that imposing the FCA's $5,500 statutory minimum civil penalty for *each* of the 9,136 invoices, as Fourth Circuit precedent required, would violate the Eighth Amendment's Excessive Fines Clause because it would be grossly disproportional to Gosselin's culpability regarding the DPM contract. The panel below, hands tied by its statutory precedent, reversed by rejecting the constitutional holding.

A. The ITGBL Claims.

The shipping of goods between the United States and abroad under the ITGBL program is called "through transportation"—the goods move door-to-door from the U.S. "through" to a foreign destination, or vice versa. Pet.App.49a, 59a. "Carriers" in the United States act as general contractors with the government—here, the Department of Defense ("DOD"). Pet.App.49a, 51a. They obtain prices for each segment of the move—domestic, ocean, and foreign—and combine them and their own markup into a single "through rate." Pet.App.49a-51a. Carriers bid for specific routes, or "channels," and the bids cover six-month cycles. Pet.App.49a-50a.

Between the U.S. and Germany (the country at issue here), there are in each cycle 104 channels—52 Eastbound and 52 Westbound. Pet.App.49a-50a. In 2004, the Government alleged criminal antitrust violations as to 12 of those channels in one cycle, due

to Gosselin's directly contacting U.S. carrier Cartwright, the low through-rate bidder on those channels, convincing it to withdraw its bid, and directly pressuring other U.S. carriers not to match Cartwright's bid. Pet.App.13a. The District Court held Gosselin's conduct immune under the Shipping Act, 46 U.S.C. § 40307, but the Fourth Circuit reversed on the ground that the conduct was "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) ("*Gosselin I*").

In 2008, the Government intervened in two sealed FCA *qui tam* suits against Gosselin, which raised three distinct ITGBL claims. Pet.App.15a-16a. One claim was based on the Cartwright conduct, and another alleged nearly identical conduct (in 2001) on 14 other U.S.-Germany channels, known as the Covan channels. Pet.App.47a n.1.

At issue here is a third claim, alleging that Gosselin and its European competitors had agreed to handle all ITGBL business in 2001 and 2002 using bundled (or "landed") rates, which combined packing, trucking, storage, and other German services into a single fee. Pet.App.52a, 57a. There was no allegation that charging a landed rate is itself unlawful, either in Germany or the U.S., or that the companies had agreed to charge any particular landed rate. And, unlike with the Cartwright and Covan conduct, there was no allegation that Gosselin had contacted U.S. carriers to influence the through-rate bids; rather, the landed rate agreement was limited to services for the German portion of these international moves. Pet.App.52a-53a, 56a-57a.

The Government contended that the agreement to provide services only under landed rates violated U.S. antitrust law and "had the effect of increasing the price that the United States paid," because the carriers' through-rate bids incorporating the foreign segment were higher as a result. Pet.App.56a. The Government argued that because the landed rate agreement was a "fraudulent course of conduct, all claims for payment resulting from that conduct are false as a matter of law." Pet.App.57a.

Invoking the Shipping Act, which immunizes from U.S. antitrust law collusive agreements concerning "the foreign inland segment of through transportation," 46 U.S.C. § 40307(a)(5), Gosselin moved for judgment as a matter of law on both the landed rate agreement claim and the Covan claim.[1] The District Court denied the motion as to the Covan claim, relying on *Gosselin I*, and submitted that claim to the jury, which found Gosselin not liable. Pet.App.47a n.1. But the Court granted the motion as to the landed rate agreement, which was limited to the German component of through transportation moves, *i.e.*, the "foreign inland segment," to which the immunity applies. Pet.App.64-65a.

Over Judge Shedd's dissent, the Fourth Circuit reversed this last ruling. The majority described the landed rate agreement as "materially similar" to the Cartwright conduct addressed in *Gosselin I*, because price-fixing on a foreign inland segment affects the overall "through rate." Pet.App.44a.

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[1] The District Court had earlier entered summary judgment against Gosselin as to the Cartwright channels, based on *Gosselin I*. Pet.App.18a.

B. The DPM Claims.

Qui tam relator Kurt Bunk alleged that Gosselin violated the FCA due to conduct on the separate DPM program. The Government did not intervene in this claim until the Fourth Circuit appeal.

Unlike the ITGBL program, DPM contracts involve transporting military household goods between installations entirely within Europe. Pet.App.73a-74a. The Army solicits bids from European companies and contracts with them directly. Pet.App.74a.

In 1999, DOD discovered that Bunk, who handled pricing and bidding for another DPM contractor, was significantly overcharging the Army. In response to Bunk's "abusive pricing and billing," DOD overhauled its DPM program in 2000. Pet.App.88a. Among other changes, DOD moved from regional contracts to a single DPM contract for all of Europe. Pet.App.74a. Because no one company could fulfill the new requirements by itself, the new rules anticipated significant subcontracting or joint ventures between bidders. Pet.App.91a-92a. They also required bidders to list the names and warehouse and truck capacities of subcontractors in each geographic area covered by the contract. The new program was to take effect for the 2001 DPM contract. Pet.App.74a.

To explain these and other changes, DOD met with potential bidders at an Army installation in Europe. *Id.* Immediately thereafter, the bidders met in the Army's cafeteria, discussed the necessary subcontracting, and agreed on a subcontracting price for one line item. *Id.* Each bidder then independently determined its own offer prices on all

50 other line-items as well as its own total offer price. Pet.App.90a-91a, 93a. As required, Gosselin filed with its bid a certification that it had arrived at its offer prices independently. Pet.App.76a. Gosselin was awarded the 2001 DPM contract. *Id.*

Bunk, eventually as relator, subsequently alleged that Gosselin's certification violated the FCA on the "sole basis" that Gosselin had agreed with other shippers on a subcontracting price for the one line item. Pet.App.83a-84a. Bunk reported this allegation to a DOD contracting officer, who nevertheless renewed the contract with Gosselin for a second year (and a year later it was renewed again). Pet.App.92a. Renewals depended on the Army's affirmatively determining that "[t]he exercise of the option is the most advantageous method of fulfilling the Government's need." 48 C.F.R. § 17.207(c).

A jury found that the single certification of independent pricing in Gosselin's original bid violated the FCA. Pet.App.77a, 93a. The District Court then held that each of the 9,136 invoices Gosselin had submitted under the contract had to be deemed "false" by operation of law, even though "none . . . contained any factually false information." Pet.App.93a; *see United States ex rel. Marcus v. Hess*, 317 U.S. 543-44 (1943). The District Court recognized that the number of invoices was determined by happenstance: "the number of jobs the government assigned to Gosselin over the life of the contract; and how Gosselin decided to bill those jobs." Pet.App.93a. Therefore, the court found that "the number of invoices, in and of themselves, is not reflective of Defendants' level of culpability." *Id.*

A prior Fourth Circuit case, *Harrison v. Westinghouse Savannah River Co.*, had held that a company that falsely induced approval of a subcontract must face separate penalties "for each claim for payment under" it, even though the invoices contained no distinct falsities. 176 F.3d 776, 793-94 (4th Cir. 1999). Under this precedent, the minimum statutory penalty here was $50,248,000—one $5,500 penalty for each invoice Gosselin submitted—even though the Government suffered *no* monetary harm. Pet.App.81a, 89a.[2] In fact, the District Court found "strong evidence" that Gosselin's "pricing [was] more favorable to the government than [DPM contracts] in prior years," and DOD paid "about the same or less" than it had paid to Gosselin in previous years on Gosselin's prior DPM contracts. Pet.App.89a. The court also found DOD paid only $3.3 million for the relevant line item through the life of the three-year contract, and that Gosselin's overall profit on the contract was only 4.4%—which, when applied to the relevant line item, amounted to only about $150,000. Pet.App.96a.

At the penalty phase, Relator Bunk offered to accept $24 million in penalties instead of the full $50 million. Pet.App.23a. The District Court evaluated both amounts under the Excessive Fines Clause.

After a full-day evidentiary hearing, the District Court found additional and uncontested evidence mitigating Gosselin's culpability regarding the DPM contract. Among other things, (1) the contract and

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[2] Due to inflation adjustments, the minimum statutory penalty was $5,500, and the maximum was $11,000. *See* Pet.App.22a n.10.

DOD required communications among competing bidders; (2) the subcontracting agreement on a single line item did not extend to overall bids; (3) Gosselin performed well on the contract; and (4) Gosselin designed and implemented a tracking program, under no obligation and at its own expense, that saved the Government additional money. Pet.App.90a-93a. Further, the District Court found that DOD's contract renewals despite Bunk's allegations—which necessarily increased the number of invoices—were "probative of how the government viewed the merits of Gosselin's bid, the value of the 2001 DPM contract to the government, Gosselin's performance under that contract, and the propriety of the solicitation process that resulted in that bid and contract." Pet.App.92a. The District Court also expressly found that the DPM claim was "distinct from and unrelated to" the ITGBL allegations. Pet.App.94a.

The District Court held that even a $24-million penalty would be grossly disproportionate to the gravity of Gosselin's offense and thus unconstitutionally excessive; and therefore the court did not impose a penalty. Pet.App.108a, 110a.

The Fourth Circuit reversed, holding that $24 million in civil penalties was not excessive given the intangible harm that fraud causes to the government contracting process and the general importance of "deterrence." Pet.App.40a-41a. The panel did not address any of the above evidence specific to, and mitigating, Gosselin's culpability.

REASONS FOR GRANTING THE PETITION

As to both questions that this petition presents, the panel below wrongly interpreted federal statutes in conflict with other courts, gravely impacting numerous industries in this country and beyond.

I. To avoid extraterritorial application of U.S. antitrust law in the context of international shipping, Congress enacted an immunity for collusive agreements that relate to the "foreign inland segment" of "through transportation." This ensures that foreign shippers are not brought under U.S. antitrust law simply by handling foreign components of shipping originating or terminating in the United States. But that is precisely the impact of the panel majority's construction, which squarely conflicts with that of the Ninth Circuit.

According to the panel majority here, Gosselin's participation in the "landed rate agreement," which addressed pricing for moving services exclusively within Germany, was not immune because that agreement inflated the overall cost of international shipping—and thus was not limited to just a "foreign inland segment" of through transportation. But that would be true in *every* case in which this immunity might apply, because the price of a *component* always affects the price of the *whole*. The panel majority thus effectively repealed the immunity.

The Ninth Circuit—which analyzed the same statute under materially identical circumstances and which the District Court here followed—properly immunized a pricing agreement on ITGBL services in the Philippines that was similarly incorporated into the carriers' through-rate bids. That court found the statute "clear and unambiguous" and held that it

immunized "precisely" this conduct. The decision below thus creates a clear conflict between circuits situated on two U.S. coasts, together accounting for nearly a third of the Nation's ocean shipping.

This Court often grants review when lower courts disturb well-established immunities. *See, e.g.*, *N.C. Bd. of Dental Examiners v. FTC*, 134 S. Ct. 1491 (2014) (state-action antitrust immunity); *Air Wisconsin Airlines Corp. v. Hoeper*, 133 S. Ct. 2824 (2013) (Aviation and Transportation Security Act immunity); *Clark v. Rameker*, 134 S. Ct. 678 (2013) (bankruptcy immunity for tax-exempt retirement accounts); *Plumhoff v. Rickard*, 134 S. Ct. 635 (2013) (qualified immunity); *United States v. Bormes*, 132 S. Ct. 1088 (2012) (sovereign immunity). It certainly should do so here. The Fourth Circuit's evisceration of the Shipping Act immunity conflicts with the Ninth Circuit's approach, and implicates constitutionally based concerns over extraterritorial application of U.S. law. And this extraterritorial application will require international shippers to revisit their activities *all over the world*, especially because broad venue rules will make it difficult if not impossible for them to shield their activities from the Fourth Circuit's jurisdiction.

II. In addition to treble damages, the FCA imposes a minimum civil penalty of $5,500. But when, as here, multiple invoices are deemed "false" only by operation of law (*e.g.*, only the initial, underlying contract was actually tainted), does the FCA require a penalty *for each invoice*, or must the court instead consider the defendant's culpability and impose penalties corresponding to each distinct falsity or act of fraud?

The Fourth Circuit in *Harrsion* had interpreted the FCA to *require* imposition of one penalty for each claim submitted by the defendant—even if the claims were only "false" by virtue of a single falsity in the initial contract. Even the panel below called this mechanical rule a "monster of our own creation," because it invites penalties inherently at odds with the Excessive Fines Clause. Here, that "monster" produced an arbitrary penalty in the *tens of millions*, simply because of the happenstance of how many DPM invoices were submitted and despite a lack of any economic harm. As the panel saw, this construction of the FCA thus walked right into the Excessive Fines Clause. The panel responded by warping the constitutional inquiry—ignoring powerful uncontested mitigating evidence regarding Gosselin's conduct under the DPM contract and instead upholding a huge penalty based only on categorical generalities that will equally apply in every FCA case.

Other courts, by contrast, have ensured that FCA penalties remain linked to the defendant's culpability. Some, following this Court's lead, have interpreted the FCA itself to account for culpability, basing civil penalties on the defendant's number of fraudulent contracts, false statements, or otherwise "fraudulent acts," rather than on the arbitrary number of invoices. They thereby have avoided Eighth Amendment questions—not invited them, as the Fourth Circuit did here. A smaller set of courts has used the Excessive Fines Clause to avoid per-invoice penalties under the FCA that would be out-of-step with the gravity of the defendant's offense.

The decision below stands in conflict with *both* camps. Indeed, as the author of the leading FCA treatise—John T. Boese, CIVIL FALSE CLAIMS AND QUI TAM ACTONS (4th ed. 2011)—has recognized, the panel's "Alice in Wonderland" decision is "squarely at odds with a number of constitutional protections," and the panel's "sole reliance on intangible and non-economic factors such as 'deterrent effects' and public policy considerations to override the traditional excessive fines analysis lacks precedent and should result in en banc and, if necessary, Supreme Court review." *FraudMail Alert* (Dec. 20, 2013), http://goo.gl/epbZoG.

With the Government collecting increasing *billions* in FCA litigation every year, the recurring importance of how to calculate civil penalties consistent with the statute and the Constitution is self-evident. As Mr. Boese further noted, the panel's decision will only trigger even *more* FCA litigation, as relators discover the value of targeting high-invoicing industries even where damages are negligible or absent—and particularly in the Fourth Circuit, where a large volume of federal contracting occurs. Indeed, relators and the Government have extorted massive settlements in analogous cases—stunting the law's development—because companies cannot afford to risk incurring hundreds of millions of dollars in penalties. It is time for this Court to clarify the operation of FCA civil-penalty liability, and this case presents an ideal vehicle for doing so.

ARGUMENT

I. THE PANEL MAJORITY, BY EVISCERATING THE SHIPPING ACT'S IMMUNITY, CREATED A CIRCUIT SPLIT ON AN IMPORTANT ISSUE OF ANTITRUST LAW FOR INTERNATIONAL SHIPPING.

The Shipping Act expressly exempts from the antitrust laws any collusive agreement or activity relating to the "foreign inland segment" of "through transportation." 46 U.S.C. § 40307(a)(5).[3] Congress enacted that immunity in 1984 to restrict the extraterritorial application of U.S. law and so reduce "jurisdictional friction." Until now it has been clear that entities engaged in foreign shipping who act collusively in their own countries—*e.g.*, set collective prices—are immune from U.S. antitrust law even if their services are used in "through transportation" shipping to or from the United States. The Ninth Circuit unanimously affirmed that rule in 1999, and the District Court here appropriately followed it.

In the decision below, however, a divided Fourth Circuit panel has thrown this area of law into disarray, holding that the immunity did not apply because Gosselin's agreement to set prices for the German component of international shipping had the *effect* of increasing *overall* shipping costs. That reasoning conflicts with the Ninth Circuit and eliminates the immunity: The immunity only applies to agreements concerning a "*segment*" of "*through* transportation," and collusion on a component affects the price of the whole. This Court's review is needed

[3] Before 2006, the immunity was codified at 46 U.S.C. app. § 1706(a)(4). *See* Pet.App.42a n.15.

to resolve this conflict and thereby to reinstate the clear rules of liability on which international shippers depend.

A. The Decision Below, In Effectively Repealing the Immunity, Conflicts with the Ninth Circuit's Construction.

The decision below squarely conflicts with the Ninth Circuit's decision in *United States v. Tucor International, Inc.*, 189 F.3d 834 (9th Cir. 1999), which granted "foreign inland segment" immunity in a case involving materially identical facts.

1. *Tucor* involved Philippines-based companies that transported U.S. military household goods "from United States military bases in the Philippines to other points within the Philippines." *Id.* at 835. Other companies then shipped the goods to the United States. *See id.* at 836. The defendants were accused of fixing prices for their shipping services in the Philippines, allegedly impacting the overall costs paid by the U.S. military because those prices were incorporated into the through-rate bid. Affirming the district court, the Ninth Circuit found the statute "clear and unambiguous," and held without dissent that the Shipping Act "unambiguously exempts the activities of [defendants] from antitrust liability"—indeed, that it exempts "precisely" that conduct. *Id.* at 835-36, 838.

2. This case arises out of the same shipping program (ITGBL) as *Tucor*. As in that case, the Government here alleged that Gosselin's pricing agreement on foreign shipping services (here, within Germany) "had the effect of increasing the price that the United States paid" for through transportation, because the U.S.-based carriers submitted higher

bids so that they could pay higher "landed rates" for German services. Pet.App.56a. Citing *Tucor*, the District Court held that the pricing agreement "concern[ed] exclusively the German inland segment" and "falls squarely within the scope of the Shipping Act immunity." Pet.App.64a.

But the Fourth Circuit panel, over Judge Shedd's dissent, reversed. It reasoned that "Gosselin's price-fixing scheme did not inflate in isolation merely the landed rate quoted the [carriers]; it inflated the all-inclusive through rates that the [carriers] were induced to bid (and [the government] was compelled to pay)." Pet.App.43a. Thus, the majority concluded, Gosselin's conduct "concerned more than just the foreign inland segment" and so did not come within the protection of the immunity. *Id.*

The majority baldly asserted in a footnote that the "circumstances surrounding Gosselin's case are dissimilar to those in *Tucor*." Pet.App.42a n.16. But the panel did not even purport to identify any dissimilarity, and no material one exists. Both this case and *Tucor* involved pricing agreements as to the "foreign inland segment" of "through transportation" under the *same* ITGBL program. And any indirect effect Gosselin's agreement had on the overall cost of through transportation was equally present in *Tucor*: The military's contract in the latter was also for "transportation provided under one bill of lading that includes all of the interrelated segments from the point of origin in the Philippines to the service person's new home in the U.S.," and thus necessarily incorporated the costs of each segment. *Tucor*, 189 F.3d at 836.

In the absence of any actual or even alleged "dissimilar[ity]" between this case and *Tucor*, the panel majority also simply declared that *Tucor* "is not the law of this Circuit." Pet.App.42a n.16. It thereby confirmed the circuit conflict.

3. The effect of the Fourth Circuit's rule highlights the starkness of that conflict. Whereas the Ninth Circuit applied the immunity (and did not even find the question close), the panel here refused to apply it, and on grounds that will govern in *every* case where the immunity matters, thus effectively repealing it. The immunity protects only collusion as to foreign inland segments of "through transportation," meaning transportation "between a United States port or point and a foreign port or point." 46 U.S.C. § 40102(25). That link to transportation to or from the United States is necessary for U.S. antitrust law to potentially apply in the first place. *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962). And because the overall rate assessed for "through transportation" will necessarily be a function of the various "foreign inland segments" of the shipping (among other things), it will *always* be true that collusive agreements as to the foreign inland segment will implicate the overall price for "through transportation." Thus, the panel majority's limitation of the immunity reads it out of existence—in plain conflict with *Tucor*, which straightforwardly applied the law's "clear" text.

B. The Question Presented Is of Great Practical Importance for International Shipping and Implicates U.S. Foreign Affairs Interests.

This Court's immediate resolution of the circuit conflict regarding the scope of the "foreign inland segment" immunity is warranted for two principal reasons. *First*, the conflict is of great practical significance for international shipping, creating damaging uncertainty that reaches well beyond the Fourth Circuit. *Second*, by effectuating a broad extraterritorial expansion of U.S. antitrust law, the decision below implicates foreign-policy interests, trampling on powers constitutionally allocated to the political branches.

1. The circuit conflict over the "foreign inland segment" exemption implicates a massive volume of international shipping activity. In 2012, over *1 billion tons* of goods were shipped through U.S. ports, to or from foreign destinations. *See* Am. Ass'n of Port Authorities, *U.S. Ports Ranked by Cargo Volume - 2012*, available at http://goo.gl/jrKwvu. The two circuits in conflict accounted for roughly one-third of this traffic, as they embrace numerous important ports such as Charleston, Norfolk, and Baltimore in the Fourth Circuit, and Long Beach, Los Angeles, Oakland, Richmond, Portland, Tacoma, and Seattle in the Ninth Circuit. *See id.*

Any shipper with a hand in this vast amount of shipping may be ensnared by the conflict, notwithstanding that, like Gosselin, its conduct is all outside of the United States, and regardless of whether the laws in the foreign country where the relevant segment occurs allow the conduct that U.S. antitrust law condemns. The venue provisions of the

Sherman Act and FCA—both of which allow jurisdiction in any district where a corporation can be found or transacts business, *see* 15 U.S.C. § 22; 31 U.S.C. § 3732—give plaintiffs, including the Government, a wide net for hauling shippers into the Fourth Circuit's district courts. Beyond that, any entity, anywhere in the world, that participates in foreign transportation of goods as part of "through transportation" to or from the United States (at least if outside the Ninth Circuit) now must take account of possible exposure to U.S. antitrust law.

The effects of the circuit conflict are thus both *global* and *immediate*, as the decision below compels industry members around the world to conform their conduct to U.S. standards or risk treble damages, civil penalties—and even criminal prosecution. Yet, as a leading antitrust scholar has noted, "the world's competition systems do not conform to a single model," and "[t]he multiplication of antitrust laws raises concerns that enforcement by jurisdictions with dissimilar substantive standards, procedures, and capabilities will discourage legitimate business transactions and needlessly increase the cost of controlling anticompetitive conduct." William E. Kovacic, *Extraterritoriality, Institutions, and Convergence in International Competition Policy*, 97 AM. SOC'Y INT'L L. PROC. 309, 311 n.9 (2003).

All of these concerns are particularly problematic in an industry that depends on stable, predictable rules. Indeed, courts have recognized a special need for predictability in the contexts of international transactions and maritime law, and this case involves *both*. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985)

(displaying "sensitivity to the need of the international commercial system for predictability in the resolution of disputes"); *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1137 (5th Cir. 1995) (en banc) (recognizing that "need for predictability in the commercial maritime arena is arguably greater than in other areas").

2. Beyond its profound impact on international business, the circuit conflict also implicates serious foreign-affairs considerations, impinging on powers that this Court has held properly belong to the other branches of government.

Although U.S. laws presumptively do *not* apply extraterritorially, courts have long held that the antitrust laws *do*. *See Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2886 n.11 (2010) (noting that Court in 1962 "overruled the holding … that the antitrust laws do not apply extraterritorially"); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) (Hand, J.). That rule, however, "discourag[ed] international trading involvement with the United States" and caused "general damage to its foreign relations," because other nations object to having their industries subjected to U.S. antitrust rules. P. Pettit & C. Styles, *The International Response to the Extraterritorial Application of United States Antitrust Laws*, 37 BUS. LAWYER 697, 698 (1982). Indeed, it is "axiomatic that in antitrust matters it may be the policy of one state to defend what it is the policy of another to attack." *Id.* Thus, other nations have "resented and protested, as excessive intrusions into their own spheres, broad assertions of authority by American courts." *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*,

549 F.2d 597, 609 (9th Cir. 1976), *superseded by statute,* Pub. L. No. 97-290, 96 Stat. 1233, *as recognized in McGlinchey v. Shell Chem. Co.*, 845 F.2d 802 (9th Cir. 1988).

Against this backdrop, Congress enacted the Shipping Act of 1984. Its "foreign inland segment" immunity exempted foreign shipping activity from the antitrust laws to "reduce jurisdictional friction and confrontations" with trade partners. *1981 Shipping Act: Hearing Before Subcomm. on Merchant Marine of the S. Comm. on Commerce, Science & Transp.*, 97th Cong. 208 (1981).

The Fourth Circuit's decision below revives that very "jurisdictional friction." Yet, as this Court has explained, "the danger of unwarranted judicial interference in the conduct of foreign policy" is why courts must *not* apply U.S. laws extraterritorially absent a clear expression of intent from Congress. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013). Congress "alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). All the more must courts respect that limitation when, as here, Congress has *expressly* provided that its laws should *not* apply extraterritorially.

C. The Decision Below Is Wrong.

On the merits, the panel majority's construction of the "foreign inland segment" immunity is plainly erroneous, and the Ninth Circuit's plainly correct.

1. The Shipping Act provides that the U.S. antitrust laws "do not apply 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) (emphases added). This plain text clearly embraces the type of agreement at issue here and in *Tucor*—*i.e.*, an agreement as to pricing for services exclusively within a foreign country.

The panel majority thought it relevant that the *effects* of such agreements are not limited to the "foreign inland segment," in that they indirectly affect pricing for through transportation as a whole. But even with such an indirect effect, the conduct still "relat[es] to" the foreign inland segment. And, as explained above, a contrary reading would nullify the immunity: Whenever the immunity could apply, the conduct, even though limited to the foreign inland segment, will always be "part" of overall through transportation. *Id.* Accordingly, it will be equally true that collusion as to the foreign "part" will indirectly affect the overall price of through transportation, leaving the immunity with no effect.

2. In justifying its rationale, the panel below relied on the Fourth Circuit's earlier decision in the criminal case, *Gosselin I*. That case actually illustrates the panel's error here.

In *Gosselin I*, the court held that misconduct "*aimed at* the entire through transportation market, rather than just the foreign inland segment," was not immune. *Gosselin I*, 411 F.3d at 510 (emphasis added). It thus ruled that Gosselin could be indicted for having convinced U.S. carrier Cartwright to withdraw its low *through-rate bid* on 12 particular channels, and for pressuring other U.S. bidders not to match that bid. *See id.* at 506-07, 510-11.

Gosselin I acknowledged that, consistent with *Tucor*, the landed rate agreement itself "may have had the relationship to a 'foreign inland segment' that the statute requires." *Id.* at 510. As to the specific channels and conduct there, however, Gosselin had gone further, taking "additional steps" that exceeded the immunity by targeting through rates. *Id.*

The Fourth Circuit in its prior decision thus adopted a workable reading of the immunity that left room for it to operate—conduct limited to the "foreign inland segment" is exempt from antitrust scrutiny, but efforts to directly influence the overall through-rate bids are not exempt. Its reading of the immunity also was, as the court acknowledged, reconcilable with *Tucor*. *Id.* And the District Court below readily saw and applied the line that *Gosselin I* drew, dismissing claims of collusion on the foreign inland segment while refusing to direct a verdict as to the Covan channel conduct, which was alleged to be nearly identical to Gosselin's conduct on the Cartwright channels. Pet.App.63a-65a, 47a n.1.

Here, however, the panel majority held that even when Gosselin did *not* take any action to interfere with or otherwise aimed at the bidding on "through transportation," the *indirect* effect of its landed rate agreement on those bids rendered the immunity inapplicable. Pet.App.43a. It thus called the conduct at issue here "materially similar" to the Cartwright channel conduct, merely less "drastic." Pet.App.43a-44a. But that misconstrues the line drawn by *Gosselin I*, under which direct bid-rigging efforts aimed at U.S. carriers—absent here—were *dispositive* in rendering the immunity inapplicable.

Gosselin I rejected a broad construction of the immunity that "threaten[ed] to excise antitrust liability from the through transportation market completely." 411 F.3d at 511. But the decision below, through its narrow construction, excised the immunity itself from the U.S. Code.

II. THE FOURTH CIRCUIT'S RIGID IMPOSITION OF PENALTIES "PER-INVOICE," WITHOUT REGARD TO A DEFENDANT'S CULPABILITY, CONFLICTS WITH OTHER COURTS AND EXACERBATES FCA LITIGATION.

Under the FCA, a defendant who presents or causes to be presented to the Government a false claim for payment is liable not only for trebled damages but also for a civil penalty. *See* 31 U.S.C. § 3729(a)(1). The question here is whether that penalty must be imposed mechanically for every submitted invoice, even if the invoices were only "false" by operation of law (such as under a fraudulently induced contract), or whether penalties instead must be based on the defendant's specific culpable conduct.

While other courts (including this one) have imposed separate civil penalties only for distinct, culpable acts, the Fourth Circuit has interpreted the FCA to strictly require a separate penalty for each and every *invoice*. The panel below described that rule as a "monster of our own creation," because by delinking penalties from the defendant's individual culpability, the FCA as so construed runs into the Excessive Fines Clause. Pet.App.35a. Indeed, here the Fourth Circuit's rule required a penalty in the *tens of millions of dollars* even though the Relator proved *no* monetary damage. The District Court

held that penalty unconstitutionally excessive. The panel below, however, neutered the one remaining check on its extreme construction of the FCA by misconstruing the Excessive Fines analysis, upholding the penalty here by invoking generalities applicable to *every* FCA case.

This Court's review is needed to resolve the split in authority over how to calculate FCA penalties. The FCA in general is an area of increasing importance, and this question in particular is critical to that area. The FCA already has been producing a rising tide of abusive litigation (usually leading to massive settlements, which prevent development of the law). And the decision below—allowing relators to threaten massive, unchecked penalties without bearing any need to prove damages—will let loose an even greater deluge. As the author of the leading FCA treatise, John Boese, predicts, the decision below will trigger a "new groundswell of *qui tam* cases," as relators are "incentivized" to use the FCA as a "bludgeon" against defendants who did not cause any "actual loss to the government." *FraudMail Alert*, *supra*.

A. Other Courts Assess FCA Penalties Based on the Defendant's Culpability, but the Fourth Circuit Has Imposed a Strict Per-Invoice Rule, Unchecked by the Eighth Amendment.

If a company makes a single false statement to win a government contract, and then files one thousand truthful invoices over the course of the contract, is the company liable for *one* penalty (for the one actual falsity) or *one thousand* (for the thousand truthful claims that are deemed "false")? Courts at every level of the federal judicial system

have required penalties to be tied to the defendant's specific culpability—whether as a matter of interpretation of the FCA or under the Eighth Amendment's Excessive Fines Clause, which bars civil penalties that are "grossly disproportional to the gravity of a defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

In its earlier *Harrison* decision, however, the Fourth Circuit "eschewed" this approach in the FCA context. Pet.App.36a. And now, the Fourth Circuit has exacerbated the harsh effects of its mechanical FCA construction by reducing the Excessive Fines Clause inquiry to a meaningless formality that likewise fails to account for the defendant's specific culpability.

1. The FCA does not say that a civil penalty must be imposed "per" false claim, and many courts have accordingly construed the Act to impose a penalty only for a defendant's *culpable* acts.

This Court has done just that on the two occasions it has construed the civil-penalty provision. In *United States ex rel. Marcus v. Hess*, the Court considered the case of electrical subcontractors who collusively fixed their bids on 56 separate municipal projects. 317 U.S. at 539-40. Because the fraud was in the collusive bidding, not in any of the claims for payment, there was a question whether the conduct even came within the prohibition of the statute. *Id.* at 540-42. This Court held that it did, by imputing the "taint" of the "initial fraudulent action" in the bidding to the ultimate claims for payment. *See id.* at 543-44; *see also In re Baycol Prods. Litig.*, 732 F.3d 869, 876 (8th Cir. 2013) (noting that this Court "first recognized fraud-in-the-inducement as a viable

theory of FCA liability" in *Hess*). That did not, however, answer the question of how to calculate the civil penalty, as the Court recognized. The relator had argued below that a separate civil penalty "should be exacted for every form submitted … in the course of [defendants'] enterprise," while defendants countered that "there should be merely one" penalty "for all the acts done." 317 U.S. at 552; *id.* at 543. Rejecting both extremes, the district court imposed a penalty "for each separate … project," *i.e.*, for each distinct commission of bid-rigging. *Id.* This Court affirmed, reasoning that "the fraud on each additional project is as clearly individualized as is the theft of mail from separate bags in a post office." *Id.*

Decades later, in *United States v. Bornstein*, 423 U.S. 303 (1976), the defendant subcontractor sent three shipments of mislabeled parts to a contractor, who in turn sent 35 invoices to the Government for products incorporating the improper parts. *Id.* at 307. The court of appeals had imposed one penalty, because one contract was involved. *See id.* at 310. While rejecting such "automatic measurement," this Court equally rejected the Government's argument for 35 penalties, one for each invoice that the contractor had submitted to it. *Id.* at 311-12. The latter, the Court explained, would base penalties on "wholly irrelevant," "fortuitous" matters. *Id.* at 312. Instead, the Court looked to the "fraudulent acts" committed: Because the defendant engaged in three separate "causative acts" (three shipments), it was liable for three penalties. *Id.* at 311-12. "[T]he focus in each case [must] be upon the specific conduct of the person from whom the Government seeks to collect the statutory forfeitures." *Id.* at 313.

Together, *Hess* and *Bornstein* hold that, when imposing FCA penalties, courts should look to the number of "fraudulent acts," *Bornstein*, 423 U.S. at 312, and "individualized" culpable acts, *Hess*, 317 U.S. at 552, in view of the "specific conduct" at issue, *Bornstein*, 423 U.S. at 313. They reject any rigid, "automatic" measurement, particularly a mechanical per-invoice rule. *Id.* at 311; *Hess*, 317 U.S. at 552.[4]

Lower courts have followed this Court's lead in construing the FCA as imposing penalties only for culpable acts. For example, in *Hays v. Hoffman*, 325 F.3d 982 (8th Cir. 2003), the Eighth Circuit cited *Bornstein* to hold that the defendants could face only eight penalties—corresponding to eight false requests for Medicaid reimbursement—even though those requests affected the defendants' Medicaid "payment rates" and thus also tainted hundreds of subsequent reimbursement requests. *See id.* at 982, 993-94. The court saw a "fundamental problem" with penalizing each reimbursement request, because the requests "bea[r] no rational relationship to the false claim misconduct" at issue. *Id.* at 993. Instead, the court construed the FCA to impose

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[4] While both decisions involved subcontractors rather than prime contractors, that distinction matters only where a prime contractor submits many "individual false payment demands," each independently false. *Bornstein*, 423 U.S. at 309 n.4. In such a case, the prime contractor would be liable for each separately false claim, *see id.*, while the subcontractor would be liable only for his own "causative acts," *id.* at 312—with each party's liability thus tracking its individual culpability. But when (as here) only the initial contract is tainted but the invoices submitted thereunder are not "individual[ly] false," *id.* at 309 n.4, the culpability considerations of *Hess* and *Bornstein* apply equally to prime and subcontractors.

penalties only for the culpable acts, thereby also avoiding the "Excessive Fines Clause implications" of a $1.68 million penalty where the jury found "these false claims caused *no* measurable damages to the United States." *See id.* at 986. *Cf. United States v. Krizek*, 111 F.3d 934, 940 (D.C. Cir. 1997) (rejecting "government's definition of claim" that resulted in "astronomical $81 million" award despite low actual damages).

Likewise, in *United States ex rel. Longhi v. Lithium Power Technologies*, 530 F. Supp. 2d 888 (S.D. Tex. 2008), the defendant submitted 54 vouchers for payment in connection with four fraudulently induced contracts. *See id.* at 900. Citing *Hess* and *Bornstein*, the court held that, since "the false statements were the Four Contracts and that falseness was imputed to the invoices," the relevant "causative acts" were the four contracts, not the 54 individual invoices. *Id.* at 901. It thus imposed four penalties, not 54. *Id. Accord United States ex rel. Dyer v. Raytheon Co.*, No. 08-cv-10341, 2013 WL 5348571, at *31-32 (D. Mass. Sept. 23, 2013) (rejecting claim that thousands of invoices triggered penalties, because a "fine of this magnitude simply cannot have any rational relationship to the alleged misconduct in this case"; looking instead to proposals that included false certifications), *appeal dismissed*, No. 13-2315 (1st Cir. Jan. 31, 2014).

2. Other courts, while assuming that the FCA authorized a separate penalty for each claim or invoice, have similarly considered a defendant's particularized culpability, by instead applying the Eighth Amendment.

For example, in *United States ex rel. Smith v. Gilbert Realty Co.*, 840 F. Supp. 71 (E.D. Mich. 1993), a landlord charged an unlawfully high rent for low-income units. He endorsed 51 rent checks, and made seven false certifications to the housing authority that the checks complied with the law. *Id.* at 74-75. The court held it would violate the Eighth Amendment to impose 58 penalties (for 51 checks plus seven certifications) amounting to $290,000, with only $1,630 in damages. *Id.* The rent checks were false "only as a result of the [defendant's] contract with the housing authority," and the landlord could not be expected to consider rental agreement terms each time he cashed a check. *Id.* The court thus imposed only seven penalties—one for each of the false certifications, which "were false claims in every sense of the word." *Id.* at 75.

Likewise, in *United States v. Advance Tool Co.*, 902 F. Supp. 1011 (W.D. Mo. 1995), the court held that 686 penalties—one for each of the 686 invoices the defendant submitted for deficient tools that he sold to the government—would be unconstitutionally excessive. *See id.* at 1018. Instead, the court imposed a penalty for each of the 73 *types* of tools that the defendant had improperly sold, since the defendant had engaged in distinct culpable conduct as to each. *See id.* at 1014, 1018-19. *Cf. United States ex rel. Lamberts v. Stokes*, 640 F. Supp. 2d 927, 933 (W.D. Mich. 2009) (awarding only 17 penalties, not 8,481, where even the government conceded that the latter "would be excessive").

3. In conflict with both camps above, the Fourth Circuit construes the FCA to rigidly demand a separate civil penalty for each technically "false"

invoice, disregarding specific culpability under both the statute and the Constitution.

As explained above, the Fourth Circuit set out its statutory rule in *Harrison*, under which a separate penalty must be assessed for every invoice, even if the invoices contained no false information and thus involved no specific culpability. *See* 176 F.3d at 793-94; *see also Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 920 & n.13 (4th Cir. 2003) (after remand, affirming imposition of 26 penalties, one for fraudulent contract and 25 for invoices thereunder). The panel below reaffirmed and applied that mechanical rule, calculating a minimum civil penalty of $50,248,000, which is simply $5,500 (the statutory minimum) multiplied by the 9,136 invoices that Gosselin submitted over the DPM contract's three-year life. Pet.App.22a.[5]

By thus lashing FCA penalties to the number of invoices submitted under a tainted contract—often an arbitrary figure that even the panel admitted was "hardly a perfect indicator of the relative liability that ought to attach," Pet.App.37a—the *Harrison* rule conflicts with *Hess* and *Bornstein*, with court of appeals decisions like *Hays* and *Krizek*, and with district court decisions like *Lithium Power* and *Raytheon*, all of which construe the FCA to impose penalties on the basis of a defendant's culpable acts.

[5] The panel ultimately imposed $24 million on the novel theory that the relator has "virtually unbounded" discretion to accept a "lesser judgment," and had offered to accept that lower amount. Pet.App.34a. Either way, the Fourth Circuit's per-invoice rule produced the penalties' large order of magnitude, and the conflicting approach taken by the other courts discussed above would not have done so.

Nor, unlike the courts in *Gilbert Realty* and *Advance Tool*, does the Fourth Circuit correct for its rigid statutory construction through an Eighth Amendment analysis focused on the defendant's culpability. Rather, the panel below blessed a massive penalty through generalities about the FCA—the need for "deterrence," an undefined "profit motive," and the tendency of FCA violations to "shak[e] the public's faith in the government's competence." Pet.App.40a-41a. Such considerations exist in *every* FCA case that gets to the civil-penalty stage, and so add nothing to the Eighth Amendment inquiry beyond the fact of liability. Limiting itself to generalities, the panel ignored the substantial and uncontested mitigation evidence regarding the DPM contract (including Gosselin's minimal profit and the Government's renewal of the contract, twice), which had caused the District Court to hold that the *appropriate* fine in this case, based on Gosselin's culpability, would be $500,000, and the *maximum* constitutional fine, $1.5 million. Pet.App.108a, 110a.

B. Whether FCA Civil Penalties Must Be Based On the Defendant's Culpability Is of Exceptional Importance.

Two factors in addition to the conflict in authority particularly counsel in favor of review. *First*, the sums at stake are enormous, which is why defendants settle rather than risk huge penalties. *Second*, the issue of how to determine FCA civil penalties is growing in importance, with leading commentators predicting a "groundswell" of new litigation arising from the decision below.

1. The magnitude of potential liability that turns on the question presented is a strong reason

for review. *See Fidelity Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051 (2006) (Scalia, J., concurring in denial of certiorari) (petitioner's potential liability of $1.4 billion, which was "$2,500 per violation" of Driver's Privacy Protection Act, as well as $40 billion value of "other class actions" raising same issue, was "strong factor" in favor of granting certiorari). And the sums recovered through FCA litigation are immense and growing. For example, in the 2013 fiscal year, the Government netted $3.8 billion in settlements and judgments in FCA cases, the second largest annual recovery ever. *See* DOJ Press Release (Dec. 20, 2013), http://www.justice.gov/opa/pr/2013/December/13-civ-1352.html. And since 2009, the Government has recovered $17 billion, "nearly half the total recoveries since the Act was amended 27 years ago in 1986." *Id.*

These enormous sums point to an additional, related reason for certiorari: The issue presented, even while arising frequently, will often evade review. *See Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995) (Posner, J.) (granting mandamus relief where decision below threatened to create "intense pressure to settle," leaving legal issue effectively unreviewable); *Ex parte Young*, 209 U.S. 123, 144-47 (1908) ("enormous penalties" prevented company "from resorting to the courts," inhibiting "judicial construction of laws"). Relators and the Government can coerce huge FCA settlements, because companies cannot risk losing where penalties would be so devastating.

To take a recent example, in February 2014 a defendant paid $171.9 million to settle *United States ex rel. Ryan*, No. 2:05-cv-3450 (E.D. Pa.), in which it

had allegedly caused "thousands of claims to be submitted to Medicaid" that were "fraudulent"—not because any of the claims contained any false information, but rather only because the defendant "promot[ed] the off-label use" of its drug contrary to FDA regulations. *Cf. United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012) (invalidating conviction for violation of FDA off-label regulations under First Amendment).

Where contractors face such intense economic pressure to settle, pressure that the Fourth Circuit's rule compounds, it may be difficult for this recurring issue to stay alive through appellate review. That is a reason *for* review, not *against* it.

2. Review also is warranted because the decision below is likely to release a flood of FCA litigation in marginal cases. The decision creates a new incentive simply to target high-invoicing industries—pharmaceutical manufacturers, for example, or defense contractors—even where damages likely are low, or where a relator wants to avoid investing the time and money into developing proof of damages. Especially without the check of a meaningful Excessive Fines Clause, nothing would stop plaintiffs who sue in the Fourth Circuit from obtaining (through either the increased settlement value or judgment) huge awards completely disproportionate to both damages and culpability.

That the decision below is from the Fourth Circuit promises a particularly large groundswell, given that court's importance in the development and exposition of FCA law. The Fourth Circuit embraces many important government agencies (like DOD) that initiate a large volume of federal

contracting. And any claims submitted to those agencies give rise to FCA jurisdiction in the Fourth Circuit. 31 U.S.C. § 3732(a) (jurisdiction in any district "in which any act proscribed by [FCA] occurred"). The Eastern District of Virginia and the District of Maryland are thus among the most popular venues for FCA cases. *See* Gov't Accountability Office, *Qui Tam Cases Filed in U.S. District Courts* 27 (2006), http://www.gao.gov/new.items/d06320r.pdf.

C. The Decision Below Is Wrong as Both a Statutory and Constitutional Matter.

Finally, the decision below is wrong on the merits. A "cardinal principle" of statutory interpretation is that when one reading of a statute would produce "serious doubt of constitutionality," a court should "ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). Here, the panel below (i) conceded that the FCA might be "construed as authorizing" a single civil penalty on facts like those presented here, Pet.App.35a; and (ii) "reluctantly acknowledge[d]" that the contrary construction, requiring one penalty per invoice, was in "tension" (*id.*) with the principle of the Excessive Fines Clause that fines cannot be "grossly disproportional to the gravity of a defendant's offense," *Bajakajian*, 524 U.S. at 334. Nonetheless, the court adopted the latter construction—inviting not only a flood of litigation (as discussed above) but also serious constitutional challenges in any case that does not settle. Indeed, as the panel admitted, such challenges are now all but "inevitable," "in view

of the vast number of government contracts—many of prodigious size and sophistication"—that involve "thousands of invoices" and thus (under the Fourth Circuit's FCA interpretation) "millions of dollars of liability for civil penalties." Pet.App.37a.

Rather than construing the *statute* to avoid constitutional problems, the panel instead warped the constitutional inquiry. Under *Bajakajian*, the penalty must be compared to the *particular* gravity of the *particular* defendant's *particular* offense. *See* 524 U.S. at 337-39 (looking to specific facts, including that harm was "minimal" and crime was "solely a reporting offense," "unrelated to any other illegal activities"); *United States v. 3814 NW Thurman St., Portland, Or.*, 164 F.3d 1191, 1197 (9th Cir. 1999) ("The culpability of the offender should be examined specifically, rather than examining the gravity of the crime in the abstract."). Here, those defendant-specific facts, as found by the District Court, were mitigating, substantial, and uncontested, leading the District Court to find the *maximum* constitutional fine to be $1.5 million. Yet the panel ignored all of them in imposing a fine 16 times that.

And the panel was "comfortable" in doing so. Pet.App.37a. It reasoned that, "[w]hen an enormous public undertaking spawns a fraud of comparable breadth," the Government must be made "completely whole." *Id.* The panel did not explain, however, how the *Harrison* rule satisfies that purpose at all. Indeed, it does not. The FCA's treble-damages provision already ensures the Government is *more than* made whole; the civil-penalty provision is a *punishment* on top of that (which is why the Excessive Fines Clause applies). Moreover, as here,

the number of invoices is generally a function of how a particular agency chooses to reimburse contractors, and so does not represent the size of the contract, the materiality of the falsity, the "breadth" of the scheme or public undertaking—or anything else of relevance to making the Government whole. Pet.App.93a. The Fourth Circuit's approach is thus indefensible not only under the statute and Constitution, but also as a matter of common sense.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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