A CONSTITUTIONAL FALSE CLAIMS ACT

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ABSTRACT

The False Claims Act (FCA) represents one of the most important sources, if not the most important source, of liability in the healthcare system and other industries that routinely provide goods and services to the federal government. Originally designed to police fraud during the Civil War, the FCA has become a general statute to enforce many other complex legal schemes. Because failure to comply with complicated statutes and regulations can lead to a reimbursement claim being defined as false under the FCA, the FCA serves as a blunt instrument to cudgel those who fail to comply with the minutiae of federal regulatory schemes. And because the FCA provides for treble damages and a civil monetary penalty of nearly $30,000 per claim and because individual relators can file suit on behalf of the United States and collect a bounty up to 30% of the recovery, the FCA has become a vehicle for pervasive and extremely large damages.

Using detailed data on over thirty years of all FCA cases filed in the United States, this Article demonstrates that FCA liability has come to rival that of medical malpractice liability in the healthcare system. It also shows that FCA liability generally has surpassed liability associated with blockbuster punitive damages awards. Between 1986 and 2018, FCA liability averaged over $1.3 billion per year. In some years, total FCA liability sometimes exceeds and is often in the same general range of total medical malpractice liability as well as total blockbuster punitive damages awards, which includes punitive awards of $100 million or more across all types of cases.

Based on the size and nature of liability under the FCA, this Article offers a new path to restraining these large awards under the Excessive Fines and Due Process Clauses. By carefully separating the compensatory and punitive aspects of FCA liability, this Article demonstrates the conditions under which the Excessive Fines and Due Process Clauses must apply to sanctions and damages under the FCA. Having done so, it provides specific recommendations on how to vindicate the underlying goals of both these constitutional clauses and ensure that defendants have adequate protection from extreme liability based on byzantine regulatory schemes.

TABLE OF CONTENTS

INTRODUCTION

When the terms "healthcare" and "liability" appear in the same phrase together, they tend to evoke images of sponges left in body cavities or amputations of the wrong limb. Indeed, in the past five decades, scholars and policymakers have debated multiple liability "crises" around medical malpractice and various "waves" of tort reform aimed at ameliorating these crises. And much of the consternation around the potential for legal liability has been aimed at medical malpractice. Less attention, however, has been

paid to an equally important source of healthcare liability: fraud and abuse. Though multiple statutes may form the basis of this liability, the False Claims Act (FCA) represents the most important source of liability. Its provisions allow private parties to pursue *qui tam* suits[1] against individuals and entities that violate a myriad of federal statutes with no requirement of government oversight.

This Civil War–era statute provides for the liability of individuals who submit fraudulent claims to the federal government and has allowed for the recovery of billions of dollars since the 1980s.[2] And most of the money recovered has come from the healthcare industry. The FCA's ability to police the healthcare system so well stems from two interlocking features. First, the FCA incentivizes private individuals—called "relators" when they file suit—to police fraud by offering bounties for successful cases.[3] Relators are often employees, former employees, or others who have knowledge of a healthcare provider's billing practices.[4] Relators' incentives are made more powerful by the fact that relators can file *qui tam* suits themselves, with the government retaining only the option (as opposed to a mandate) to intervene in these cases.[5] Depending on how the lawsuit proceeds, relators are entitled to keep between fifteen and thirty percent of the proceeds recovered from the defendants.[6]

Second, the complexity of the healthcare system and the regulations governing that system make healthcare providers easy targets for *qui tam* suits under the FCA. While the archetypal example of fraud involves paying for a good or service that was never provided,[7] the FCA includes a much

1. A *qui tam* suit is one that is brought by a private citizen—called a relator—on behalf of the government. Bryan Lemons, *An Overview of "Qui Tam" Actions*, FED. L. ENF'T TRAINING CTRS., https://www.fletc.gov/sites/default/files/imported_files/training/programs/legal-division/downloads-articles-and-faqs/research-by-subject/civil-actions/quitam.pdf [https://perma.cc/LQD4-2876]. See *infra* Section I.A for a more thorough explanation.

2. According to the DOJ, since the 1986 amendments, $72 billion has been recovered as of February 7, 2023. Press Release, Off. of Pub. Affs., U.S. Dep't of Just., False Claims Act Settlements and Judgments Exceed $2 Billion in Fiscal Year 2022 (Feb. 7, 2023), https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-2-billion-fiscal-year-2022 [https://perma.cc/Y8DG-ND5X]. In the fiscal year 2022 alone, the recoveries totaled $2.2 billion. *Id.*

3. *Id.*

4. *See, e.g.*, United States *ex rel.* Prather v. Brookdale Senior Living Cmtys., Inc., 892 F.3d 822, 827 (6th Cir. 2018) (former employee); *see also* Taylor Sample, *False Claims Act Fundamentals: What Is a Relator?*, BASS, BERRY & SIMS: INSIDE FALSE CLAIMS ACT (Mar. 4, 2022), https://www.insidethefalseclaimsact.com/relator-false-claims-act/ [https://perma.cc/2X59-RJG5] ("Relators are often past or present employees, contractors, vendors, auditors, consultants, or associates of a defendant organization.").

5. 31 U.S.C. § 3730(b).

6. 31 U.S.C. § 3730(d).

7. *Cf.* Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 579 U.S. 176, 181–82 (2016) (describing the motivation of the False Claims Act as originating in congressional findings that

more capacious definition. It includes what may be called technical fraud—the failure to comply with arcane statutes and regulations when submitting bills for services or products to the government.[8] Because so many different statutes and regulations govern each healthcare transaction—both federal and state statutes and regulations may serve as the basis of a technical fraud claim[9]—committing technical fraud may come down to whether an individual wishes to file a *qui tam* suit instead of whether the government has actually suffered harm through fraud.

Unsurprisingly, a statute effectively deputizing the entire population to police violations of a wide range of byzantine laws has proved a powerful tool in the government's arsenal. In one case alone in 2018, a defendant agreed to pay $625 million to resolve its alleged liability under the FCA.[10] The defendant in that case likely chose to settle, like so many defendants before them, because of the severity of the sanctions for FCA violations. In addition to allowing for the recovery of the full amount of the false claim submitted to the government, the FCA provides for treble damages and penalties of up to $27,018 per claim.[11] With individual FCA cases sometimes involving thousands, or tens of thousands, of individual claims, the treble damages and penalties add up quickly, providing obvious incentives for defendants to settle for the damages claims.

The FCA's ability to generate such large settlements for violations of many different federal and state statutes is often touted as a strength of the FCA—particularly following a large recovery. However, the breadth, depth, and complexity of the FCA and its interactions with other statutes has led to criticisms of over-enforcement and inappropriate enforcement. For example, Isaac Buck explained that the FCA is particularly susceptible to problems of over-enforcement, highlighting the use of the FCA to inappropriately regulate overtreatment in various healthcare contexts.[12]

"the United States had been billed for nonexistent or worthless goods" (quoting United States v. McNinch, 356 U.S. 595, 599 (1958))).

8. *See id.* at 187.

9. For example, the technical fraud at issue in *Escobar* involved the violation of Massachusetts's regulations. *Id.* at 184–85.

10. Press Release, Off. of Pub. Affs., U.S. Dep't of Just., AmerisourceBergen Corporation Agrees to Pay $625 Million to Resolve Allegations That It Illegally Repackaged Cancer-Supportive Injectable Drugs to Profit from Overfill (Oct. 1, 2018), https://www.justice.gov/opa/pr/amerisourcebergen-corporation-agrees-pay-625-million-resolve-allegations-it-illegally?utm_medium=email&utm_source=govdelivery [https://perma.cc/YJ9M-R9WZ].

11. Civil Monetary Penalties Inflation Adjustments for 2023, 88 Fed. Reg. 5776, 5778 (Jan. 30, 2023); 28 C.F.R. § 85.5 (2023).

12. *See* Isaac D. Buck, *Enforcement Overdose: Health Care Fraud Regulation in an Era of Overcriminalization and Overtreatment*, 74 MD. L. REV. 259, 263 (2015) [hereinafter Buck, *Enforcement Overdose*] ("[T]his Article advances the analysis by examining the overtreatment enforcement framework's particular susceptibility to overenforcement.").

Nearly twenty years ago, David Hyman argued that the FCA, along with other common "anti-fraud" statutes, performed poorly at regulating truly fraudulent and abusive behavior and lacked the ability to address important problems in the healthcare system.[13] And before that, James Blumstein argued that the FCA and other anti-fraud statutes were so out of sync with market realities that the healthcare industry had become a "speakeasy" where many important and desirable tasks are deemed illegal conduct.[14]

Many of the over-enforcement and inappropriate enforcement issues surrounding the FCA, and the various statutes with which it interacts to create liability, stem from the severe sanctions that accompany an FCA violation. This Article addresses these important issues directly by examining the constitutionality of FCA sanctions. While several courts have danced around the fringes of this important problem, none have addressed it head on. More specifically, we address the sanctions and damages available to relators as part of *qui tam* suits. The FCA explicitly authorizes criminal sanctions, but we reserve analysis of those sanctions to future work because the civil sanctions have generated the most controversy and criticism and (based on their size) present the greatest risk to potential defendants.

The initial step in our evaluation is properly categorizing FCA sanctions for constitutional analysis. The sanctions and damages available to relators straddle the two important lines. First, the civil damages and sanctions have both compensatory and punitive characteristics. To address the complications created by the quasi-compensatory and quasi-punitive nature of FCA sanctions, we begin our examination by disaggregating them into their civil and punitive components. The base damages available under the FCA are clearly compensatory in nature, and we argue that the per claim penalties are entirely punitive in nature. The treble damages could arguably constitute both remuneration and punishment, and we consider both scenarios in our analysis. Given that at least part of the civil damages and

13. David A. Hyman, *Health Care Fraud and Abuse: Market Change, Social Norms, and the Trust "Reposed in the Workmen*,*"* 30 J. LEGAL STUD. 531, 564 (2001) ("There are substantial reasons to doubt the merits of existing fraud control measures. . . . In addition, all of the fraud control measures were primarily designed to protect the fiscal integrity of these programs and are not well suited to other tasks, including ensuring the quality of care. . . . In practice, these strategies amount to the haphazard extraction of ex post discounts from some providers and the ritual sacrifice (either through conviction/program exclusion or the imposition of staggering defense costs) of other providers.").

14. James F. Blumstein, *The Fraud and Abuse Statute in an Evolving Health Care Marketplace: Life in the Health Care Speakeasy*, 22 AM. J.L. & MED. 205, 218 (1996) ("In sum, the modern American health care industry is akin to a speakeasy—conduct that is illegal is rampant and countenanced by law enforcement officials because the law is so out of sync with the conventional norms and realities of the marketplace and because respected leaders of the industry are performing tasks that, while illegal, are desirable in improving the functioning of the market.").

sanctions available under the FCA are punitive in nature, we turn to the next duality of these damages and sanctions.

Focusing on the punitive component of FCA damages and sanctions, the next step in our analysis requires us to confront another duality of these damages and sanctions. Specifically, these damages and sanctions arguably qualify as both damages in the sense of damages available in many civil proceedings and as fines imposed by the state. This duality matters because if FCA damages and sanctions are treated the same as fines, they should be subject to the Excessive Fines Clause of the Eighth Amendment. And if they are treated as damages along the lines of compensatory and punitive damages available in other civil suits, we argue they should be subject to the Due Process Clause requirements imposed on punitive damages to the extent they function as punitive damages.

In general, if the Excessive Fines Clause applies to the punitive component of the sanctions and damages available under the FCA, we argue that the Supreme Court should expand its current understanding of the Excessive Fines Clause. Specifically, Excessive Fines Clause jurisprudence should include a more robust livelihood analysis in addition to the proportionality analysis that currently predominates. This new livelihood analysis should consider whether a particular fine will effectively bankrupt a given defendant. Because FCA sanctions and damages can reach astronomical levels, individual providers as well as smaller and more rural hospitals face larger risks from the crushing amounts of liability available under the FCA. We argue that a more robust application of the Excessive Fines Clause will ameliorate the problems with such exorbitant levels of liability.

Next, if the punitive component of the sanctions and damages under the FCA are best characterized as akin to punitive damages in other civil contexts, we argue that the Supreme Court's due process jurisprudence should apply. Specifically, the Court's decisions establishing that punitive damages must have a minimal level of predictability should constrain FCA damages. Drawing on recent work that elucidated the chaotic nature of large punitive damages awards, we argue that compliance with the Supreme Court's existing jurisprudence requires constitutional constraints on FCA damages. Applying the Court's reasoning from *State Farm Mutual Automobile Insurance Co. v. Campbell*,[15] we argue that the current method of applying per claim penalties constitutes a per se constitutional violation when those individual claims are valued less than a specified amount—that amount will vary from year to year since the civil monetary penalties are

15. 538 U.S. 408 (2003).

now tied to inflation. To address this critical issue, we argue that the same due process limitations that apply to punitive damages generally should apply to civil sanctions and damages under the FCA.

Imposing constraints on the civil sanctions and damages available under the FCA through either the Excessive Fines Clause or the Due Process Clause will not only address the fundamental unfairness inherent in the current approach, but will also relieve the healthcare system of a huge liability burden. Removing this burden could have important benefits such as allowing clinicians to provide healthcare consistent with the best interests of patients without concern that they may find themselves beneath millions of dollars in damages. Rural hospitals in particular stand to benefit from limitations on FCA damages. Because they lack the resources and large compliance departments of urban hospitals and large hospital systems, rural hospitals are particularly vulnerable to committing technical fraud. Without limitations on the crushing liability that can be imposed under the FCA currently, rural hospitals face higher risks of closure following FCA suits. While we certainly do not argue that actual fraud should go unpunished or that the government should simply pay claims that are clearly fraudulent, curtailing the huge awards available to relators under the FCA can generate important benefits.

The remainder of this Article proceeds as follows. Part I provides an overview of the FCA. Part II delves into the technical details of the FCA. It demonstrates the FCA's potential to generate huge damages awards for relatively minor violations of technical statutes. This Part also provides an overview of multiple data sources we use to elucidate the importance of the FCA and the risks it poses to potential defendants, particularly those in healthcare. Part III disentangles the compensatory and punitive aspects of civil damages and sanctions available under the FCA. Part IV applies the Excessive Fines Clause and Due Process Clause to those damages and sanctions to curtail some of the excesses of the FCA. A brief conclusion follows.

I. THE FALSE CLAIMS ACT AND A NEW ERA OF LIABILITY

Although closely associated with the healthcare industry today, the FCA was never designed to target modern healthcare providers or regulate the provision of health care. In fact, it grew out of a Civil War–era desire to protect the federal government from paying for fake gunpowder and cardboard infantry boots.[16] This simple statute, which was designed to deal

16. James B. Helmer, Jr., *False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites and Patriots*, 81 U. CIN. L. REV. 1261, 1264–65 (2013).

with a century-old military procurement problem, has undergone a substantial transformation since the days of Grant and Lee, and the modern federal government uses it as one of its primary tools to regulate and police some of the most complex government programs in human history.[17] This Part traces the development of the FCA from its origins of combatting the sale of lame mules to its modern usage as a tool in the fight against healthcare fraud and abuse. This historical background provides important context for the remainder of our analysis in subsequent Sections.

A. The Evolution of the False Claims Act

Emerging from concerns of the same horses being sold over and over again to the Army[18] and freshly painted rotted hulls being sold to the Navy during the Civil War,[19] the FCA was originally introduced "to prevent and punish frauds upon the Government of the United States."[20] The original FCA contained a number of provisions designed to punish fraudsters and encourage individuals to aid in the effort to root out fraud. In addition to criminalizing fraud and providing for criminal penalties, the FCA created a civil cause of action and included a structure of civil penalties and incentives designed to encourage fraudsters to turn on each other.[21]

Specifically, the FCA included a provision that allowed private parties to bring *qui tam* actions against fraudsters on the government's behalf (and where the government is the allegedly defrauded party).[22] Originating in fourteenth-century England, *qui tam* suits named after the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means a person "who pursues this action on our Lord the King's behalf as well as his own."[23] *Qui tam* suits, which supplemented suits that the FCA authorized individual U.S. attorneys to pursue, encouraged those with knowledge of fraud to both bring it to the attention of the government and seek to recover damages on the government's behalf by allowing those individuals—called "relators"—to keep part of the proceeds of any recovery.[24] The original FCA allowed relators to retain 50% of the recovery, and included a provision for

17. *See generally id.*
18. 132 CONG. REC. 22339 (1986) (statement of Rep. Berman).
19. WAYNE ANDREWS, THE VANDERBILT LEGEND 77–94 (1941).
20. CONG. GLOBE, 37th Cong., 3d Sess. 348 (1863).
21. False Claims Act, 12 Stat. 696, 698 (1863) (current version at 31 U.S.C. §§ 3729–33).
22. *See* Helmer, *supra* note 16, at 1266 (discussing the debates around and eventual provisions of the original FCA).
23. Pamela H. Bucy, *Federalism and False Claims*, 28 CARDOZO L. REV. 1599, 1600 (2007) (quoting Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768 n.1 (2000)).
24. Helmer, *supra* note 16, at 1266.

double damages and a $2,000 per false claim penalty.[25] These provisions allowed the government to be made whole, provided a substantial incentive to relators, and punished those (via the penalty) who submitted false claims.[26] The original FCA was signed into law by President Lincoln on March 2, 1863.[27]

The FCA worked relatively well in the ensuing decades.[28] At least one federal court appreciated the reasoning behind the enactment of the FCA explaining that the FCA "is intended to protect the treasury against the hungry and unscrupulous host that encompasses it on every side."[29] The court went on to note that, consistent with the legislative history, the FCA "was passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain."[30] The court specifically recognized that incentivizing private actions on behalf of the government "compare[s] with the ordinary methods as the enterprising privateer does to the slow-going public vessel,"[31] i.e., incentivizing privateers is more likely to result in recoveries than relying solely on slow-moving government enforcement.

While the FCA was initially popular and well received by Congress, by the time World War II began, the threat of parasitic lawsuits had emerged. Instead of relying on their inside knowledge of fraud as conceived in the original FCA, relators had begun to wait outside federal courthouses where US attorneys were routinely filing criminal complaints against fraudsters.[32] At the time, US attorneys did not typically file an accompanying civil complaint, so the "parasites" would rush to file one of their own in hopes of recovering the 50% bounty.[33] Following pressure from the Attorney General, Congress enacted a series of reforms to the FCA in 1943. These reforms included eliminating the 50% bounty for relators and requiring that any *qui tam* suit filed by a relator be dismissed if the government had any

25. *Id.*
26. *Id.*
27. False Claims Act, 12 Stat. 696, 699 (1863) (current version at 31 U.S.C. §§ 3729–3733).
28. Helmer, *supra* note 16, at 1266–67.
29. United States v. Griswold, 24 F. 361, 366 (D. Or. 1885); *see also* United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 541 n.5 (1943) (citing *Griswold* with approval); Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 949 (1997) (same).
30. *Griswold*, 24 F. at 366.
31. *Id.*
32. Helmer, *supra* note 16, at 1267–68.
33. *Id.*

knowledge of the fraud at the time the suit was filed.[34] This latter reform effectively eliminated so-called parasitic lawsuits, as someone in the government almost invariably had some knowledge of the alleged fraud.[35] Following the passage of these amendments, "*[q]ui tam* [suits] virtually disappeared from the legal landscape."[36]

Nearly forty years later in the 1980s, Congress reinvigorated the FCA to combat fraud in the defense industry.[37] In the wake of $400 hammers, Congress reinstated many provisions of the FCA and created new ones in 1986 to encourage relators to aggressively pursue fraudsters.[38] Particularly relevant was the restoration of bounties, which varied between fifteen and thirty percent depending on whether the government became involved with the suit.[39] Congress also increased the size of the recovery generally by requiring that damages in an FCA action be trebled instead of doubled as they had been previously.[40] For the first time since the original passage of the FCA in 1863, the size of the penalty for each false claim was increased to $5,000–$10,000.[41] And the 1986 amendments included provisions allowing relators, for the first time, to recover attorney's fees from fraudsters.[42]

In addition to increasing the damages and restructuring the incentives for relators under the FCA, the 1986 amendments also included a number of reforms to what constituted a false claim and how a relator or the government could establish that such a claim had been submitted. First, the 1986 amendments set the burden of proof at the typical civil standard of

34. 31 U.S.C. § 232(C), (E)(1)–(2) (1976) (current version at 31 U.S.C. §§ 3729–3733). The 1943 Amendments to the FCA further required a relator to provide all evidence in her possession to the Government at the time she filed her action. 31 U.S.C. § 232(C) (1976) (current version at 31 U.S.C. §§ 3729–3733). The United States then had sixty days to determine whether it would prosecute the case. If the Government elected to proceed, the relator was effectively excluded from the case. *Id.* If the Government declined to proceed, the relator was allowed to continue the action at her own expense. Although the 50% bounty was eliminated, courts were allowed (but not required) to award up to 10% to a relator of the United States handled the case and up to 25% if the relator did. 31 U.S.C. § 232(E)(1)–(2) (1976) (current version at 31 U.S.C. §§ 3729–3733).

35. Helmer, *supra* note 16, at 1270.

36. *Id.* at 1271.

37. *False Claims Act*, CONSTANTINE CANNON, https://constantinecannon.com/practice/whistleblower/whistleblower-types/whistleblower-reward-laws/fca/ [https://perma.cc/TTV8-97T5].

38. *Id.*

39. 31 U.S.C. § 3730(d)(1)–(2) (1988) (amended 2022).

40. 31 U.S.C. § 3729(a) (1988) (amended 2022). Moving from double to treble damages also effectively increases the size of a relator's bounty, as the amount from which the relator's share is calculated is necessarily larger. In particular, the amount received by a relator when damages are trebled would be equivalent to receiving 22.5–37.5% (if the United States intervened) and 37.5–45% (if the United States declined to intervene) under a regime in which damages were only doubled.

41. 31 U.S.C. § 3729(a)(7) (1988) (amended 2022).

42. 31 U.S.C. § 3730(d)(1)–(2) (1988) (amended 2022).

preponderance of the evidence.[43] Courts had previously disagreed on the standard of proof with some using a preponderance standard and others varying upwards to a clear and convincing or reasonable doubt standard.[44] Second, Congress resolved another source of confusion in the courts by clarifying the degree of intent required for an FCA violation.[45] Third, and perhaps most significantly, Congress abrogated the defense of prior government knowledge, which had required dismissal of suits if any government official who knew of the fraud could be found.[46] In its place, Congress substituted the new "public disclosure" exception as a means of stymying future parasitic lawsuits. Under this provision, a *qui tam* suit is barred if it is based on the prior public disclosure of the allegations (in the media or in a judicial proceeding) unless the relator bringing the suit was the "original source," i.e., has direct and independent knowledge of the information on which the allegations are based.[47]

Currently, the FCA continues to encourage the filing of *qui tam* suits by relators and allows U.S. attorneys to file civil suits as well. A relator seeking to file a *qui tam* suit must first supply a copy of lawsuit to DOJ along with a report detailing "material evidence and information" in possession of the relator.[48] The relator then may file his or her lawsuit under seal, and the lawsuit remains sealed to allow DOJ to investigate the claims made by the relator.[49] After investigating, DOJ decides whether to intervene in the lawsuit. If DOJ intervenes, it assumes "primary responsibility for prosecuting the action," with the original plaintiff continuing to play a participatory role.[50] The degree to which DOJ takes over a suit varies from case to case.[51] If DOJ does not intervene, the relator may continue the case alone, but DOJ may exercise authority over the case in several important ways, such as joining the case later, settling or dismissing the case (as long as the relator has an opportunity to be heard in court first), or choosing to pursue different remedies in lieu of the relator's suit.[52] If the government

43. 31 U.S.C. § 3731(c) (1988) (amended 2022).

44. *See, e.g.*, United States v. Ueber, 299 F.2d 310, 314–15 (6th Cir. 1962) (employing a clear and convincing standard); United States v. Shapleigh, 54 F. 126, 128–30 (8th Cir. 1893) (using a reasonable doubt standard).

45. 31 U.S.C. § 3729(b) (1988) (amended 2022).

46. 31 U.S.C. § 3730(e)(4) (1988) (amended 2022).

47. *Id.*

48. 31 U.S.C. § 3730(b)(2).

49. *Id.*

50. 31 U.S.C. § 3730(c)(1).

51. *See* Bucy, *supra* note 23, at 1600 (noting that DOJ sometimes handles the entire case and other times allows the original plaintiff to play a more prominent role).

52. *See* 31 U.S.C. § 3730(c)(3) ("When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government

decides to intervene in the relator's case, the relator is guaranteed at least fifteen percent of any judgment or settlement and up to twenty-five percent.[53] If the government does not intervene, the relator is guaranteed twenty-five percent of any settlement or judgment and may receive up to thirty percent.[54]

While the FCA has undergone additional changes since the 1986 amendments, commentators generally agree that the modern FCA was formed as a result of the 1986 amendments.[55] And "[t]he vastness of liability that characterizes the [modern] FCA has been well documented."[56] This vastness of liability is particularly relevant to the healthcare context, and the modern FCA has become an important tool for directly and indirectly regulating the provision of healthcare in the United States. Indeed, one commentator went so far as to opine that, given its current structure, the "FCA . . . can demolish a health care provider."[57] The next Section discusses the use of the FCA in the healthcare sector with a particular emphasis on the structural problems that encourage the overuse of the FCA, overenforcement generally, and the imposition of large damages awards.

B. The False Claims Act: A Byzantine Source of Liability

Though not originally designed as healthcare-focused, the FCA has become an important vehicle for policing the behavior of many different actors in the healthcare sphere, from individual providers, to large hospitals, drug manufacturers, medical device manufacturers, and others.[58]

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to intervene at a later date upon a showing of good cause."); 31 U.S.C. § 3730(c)(2)(A) ("The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion."); 31 U.S.C. § 3730(c)(2)(B) ("The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances."); 31 U.S.C. § 3730(c)(5) ("Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty.").

53. 31 U.S.C. § 3730(d)(1).

54. 31 U.S.C. § 3730(d)(2).

55. Buck, *Enforcement Overdose*, *supra* note 12, at 283–84. Of note is the fact that "penalties assessed after August 1, 2016, rose to between $10,781 and $21,563 per claim." Joan H. Krause, *Reflections on Certification, Interpretation, and the Quest for Fraud That "Counts" Under the False Claims Act*, 2017 U. ILL. L. REV. 1811, 1815; 28 C.F.R. §§ 85.3(a)(9), 85.5 (2024).

56. Buck, *Enforcement Overdose*, *supra* note 12, at 283.

57. Pamela H. Bucy, *The Path from Regulator to Hunter: The Exercise of Prosecutorial Discretion in the Investigation of Physicians at Teaching Hospitals*, 44 ST. LOUIS U. L.J. 3, 40 (2000).

58. This is not to suggest that the FCA is not relevant in other sectors of the economy. For example, DOJ has specifically touted the utility of the FCA in combatting housing and mortgage fraud in addition to healthcare fraud. *See* Press Release, Off. of Pub. Affs., U.S. Dep't of Just., *Justice*

Unsurprisingly, attempting to regulate twenty-first-century healthcare with a heavily modified statute from the mid-nineteenth century has created a number of issues and garnered criticism from scholars, policymakers, and healthcare practitioners alike. While an exhaustive review of all of the issues surrounding the FCA is beyond the scope of this Article, a review of the structural underpinnings of the FCA's problems can inform the ultimate question this Article seeks to answer: what constitutional protections apply to FCA sanctions.

The FCA itself does little to directly regulate healthcare. It does not, for example, offer guidance as to which treatment or procedure should (not) be given to or performed on a patient with a particular diagnosis. Instead, the FCA regulates healthcare by creating liability for the submission of "false or fraudulent" claims by healthcare providers or others to the government for payment. More specifically, the FCA creates "[l]iability" when "any person . . . knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval."[59] The FCA itself does not define the terms "false or fraudulent," and what constitutes a false claim has been the subject of much debate and consternation among lawyers, courts, and scholars, not to mention those who may be subject to liability based on the submission of false claims.[60]

In general, "false" claims fall into two broad categories.[61] First, factually false claims (sometimes referred to as "raw fraud") include claims for services that were never provided or claims for services greater than what was provided.[62] "Historically, most health care FCA cases involved straightforward, 'factually false' claims requesting payment for more expensive categories of care than were delivered or for services that were never provided."[63] Cases of raw fraud often involve clear culpability and,

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Department Recovers Over $3.7 Billion from False Claims Act Cases in Fiscal Year 2017 (Dec. 21, 2017), https://www.justice.gov/opa/pr/justice-department-recovers-over-37-billion-false-claims-act-cases-fiscal-year-2017 [https://perma.cc/Z8AB-REMW]. However, because the focus of the analysis in this Article is healthcare, this Section is focused on that context to the exclusion of others.

59. 31 U.S.C. § 3729(a)(1)(A). For a complete list of acts for which the FCA provides liability, see 31 U.S.C. § 3729.

60. Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 579 U.S. 176, 187–88 (2016) (citing Neder v. United States, 527 U.S. 1, 22 (1999)).

61. United States *ex rel.* Quartararo v. Cath. Health Sys. of Long Island Inc., 84 F.4th 126, 130 (2d Cir. 2023) ("The FCA recognizes two types of false claims: factually false claims and legally false claims. . . . A claim is factually false when it includes an 'incorrect description of goods or services provided or a request for reimbursement for goods or services never provided.' . . . A claim is legally false when it falsely certifies—expressly or impliedly—compliance with a governing statutory, regulatory, or contractual provision." (quoting Mikes v. Straus, 274 F.3d 687, 696–97 (2d Cir. 2001), *abrogated on other grounds by Escobar*, 579 U.S. 176)).

62. Krause, *supra* note 55, at 1816; *see also* Hyman, *supra* note 13, at 548 (describing "raw fraud" as including actions like "billing by sham entities or for services that were not provided").

63. Krause, *supra* note 55, at 1816.

while the facts of a given case may be complex, the imposition of liability is not. "It does not require much analytical sophistication to condemn garden-variety raw fraud."[64]

The same cannot be said of the second, and much more complex, category of false claims. Legally false claims (sometimes referred to as "technical fraud") involve claims for services that were actually provided but where the claimant fails to satisfy some underlying legal requirement.[65] This underlying legal requirement need not, and often is not, related directly to the FCA, but a claim is rendered false by a claimant's false certification of compliance with a legal requirement, which may be statutory, regulatory, or contractual.[66] Within the broad category of legal falsity, two types of certification may give rise to liability: express certification and implied certification.

As its name indicates, express certification requires that a claimant explicitly certify compliance with a particular legal requirement (e.g., by indicating such compliance on an invoice or healthcare claim).[67] In contrast, under a theory of implied certification, a claimant certifies compliance with any applicable requirements simply by submitting a claim to the government for reimbursement.[68] Thus, it is the claimant's silence with respect to the failure to acknowledge noncompliance with some legal requirement that gives rise to liability based on implied certification.[69] Implied certification may be more problematic for claimants than express certification because, through only silence, a claimant may be liable under the FCA for "failure to comply with thousands of additional program conditions."[70]

Compounding the problems claimants face under an implied certification theory is the lack of clarity surrounding this theory. While a full discussion of the confusion surrounding the implied certification theory is well beyond the scope of this Article, Joan Krause provides a thorough discussion of the

64. Hyman, *supra* note 13, at 548.

65. Krause, *supra* note 55, at 1816; *see also* Christopher J. Climo, Note, *A Laboratory of Regulation: The Untapped Potential of the HHS Advisory Opinion Power*, 68 VAND. L. REV. 1761, 1769 (2015) (describing "technical fraud" as that which "does not appear to constitute fraud in any ordinary legal use of the term and that may in fact be value maximizing").

66. Krause, *supra* note 55, at 1816.

67. *E.g.*, United States *ex rel.* Smith v. Boeing Co., 825 F.3d 1138, 1148 (10th Cir. 2016) ("Express false certification occurs when a government contractor falsely certifies compliance with a particular statute, regulation, or contract term and compliance is a prerequisite to payment." (citing United States *ex rel.* Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1163, 1168 (10th Cir. 2010))).

68. *Id.* ("Implied false certification occurs when a government contractor doesn't expressly certify compliance, but knowingly and falsely implies that it is entitled to payment when it submits a claim." (citing *Lemmon*, 614 F.3d at 1168)).

69. Krause, *supra* note 55, at 1817.

70. *Id.*

approaches taken by different federal appellate courts and the Supreme Court's recent foray into the implied certification theory in *Escobar*.[71] She criticizes the latter as offering more questions than answers and providing little guidance on what constitutes an implied certification for the purposes of FCA liability.[72]

In addition to the problems generated by the implied certification theory, there currently exists another circuit split regarding falsity under the FCA: whether liability under the FCA requires an objective falsehood. The Fourth, Seventh, and Eleventh Circuits require objective falsity, meaning that a mere difference in expert opinion will not be sufficient to establish falsity under the FCA.[73] But the Third, Sixth, Tenth, and Ninth Circuits disagree and have allowed a difference in expert opinion to establish falsity, i.e., a jury decides whether a claim is false based on that difference in opinion.[74] At the end of 2020, defendants in the Third and Ninth Circuit cases attempted Supreme Court review, but the Supreme Court denied both petitions on February 22, 2021, leaving the circuit split unresolved.[75] For

71. Krause, *supra* note 55.

72. *See id.* at 1813 ("Ironically—or perhaps fittingly—for a case that was expected to define the contours of fraudulent omissions, the opinion was notable as much for what it did *not* say as for what it did.").

73. United States *ex rel.* Wilson v. Kellogg Brown & Root, Inc., 525 F.3d 370, 376–77 (4th Cir. 2008) (explaining "false or fraudulent" requires an objective falsehood); United States *ex rel.* Yannacopoulos v. Gen. Dynamics, 652 F.3d 818, 836 (7th Cir. 2011) (requiring statements to be objective falsehoods to establish falsity); United States v. AseraCare, Inc., 938 F.3d 1278, 1296–97 (11th Cir. 2019) (rejecting that expert testimony disagreeing with a medical provider's judgment can establish falsity because FCA liability requires "an objective falsehood").

74. United States v. Paulus, 894 F.3d 267, 277 (6th Cir. 2018) ("These opinions [that the doctor exaggerated what he saw on patient angiograms], having been accepted into evidence, are sufficient to carry the government's burden of proof [under criminal health care fraud statutes]."); United States *ex rel.* Polukoff v. St. Mark's Hosp., 895 F.3d 730, 742 (10th Cir. 2018) (providing three reasons why a medical judgment can be "false or fraudulent" under the FCA); United States *ex rel.* Druding v. Care Alts., 952 F.3d 89, 97–98 (3d Cir. 2020) (relying on reasoning from the Sixth and Tenth Circuits to conclude "medical opinions may be 'false' and an expert's testimony challenging a physician's medical opinion can be appropriate evidence for the jury to consider on the question of falsity"); Winter *ex rel.* United States v. Gardens Reg'l Hosp. & Med. Ctr., Inc., 953 F.3d 1108, 1119 (9th Cir. 2020) (concluding "the FCA does not require a plaintiff to plead an 'objective falsehood'").

75. RollinsNelson LTC Corp. v. United States *ex rel.* Winters, 141 S. Ct. 1380 (2021) (mem.); Care Alts. v. United States, 141 S. Ct. 1371 (2021) (mem.). The Supreme Court may have declined to resolve the split for similar reasons as it likely declined to resolve the application of the Federal Rules of Civil Procedure 9(b) particularity requirement to FCA pleadings: any alleged circuit split is merely superficial. *See* Brief for United States as Amicus Curiae Supporting Respondents at 8, United States *ex rel.* Owsley v. Fazzi Assocs., 143 S. Ct. 362 (2022) (No. 21-936), 2022 U.S. S. Ct. BRIEFS LEXIS 2974, at *11 ("Further review by this Court would not likely produce greater uniformity or materially clarify the Rule 9(b) pleading standard for FCA complaints."); United States *ex rel.* Owsley v. Fazzi Assocs., 143 S. Ct. 362 (2022) (mem.) (denying petition for writ of certiorari). For example, in rejecting the "objective falsehood" requirement for falsity, the Ninth Circuit explicitly distinguishes the Eleventh Circuit's decision in *AseraCare*, which it in turn said explicitly distinguished the Tenth Circuit's decision in *Polukoff*, ultimately claiming that its "decision today does not conflict with *AseraCare*." *Winter*, 953 F.3d at 1118–19.

the circuits that have arguably more lenient standards for falsity, courts have addressed concerns of more expansive FCA liability by pointing out the limiting effect of the scienter requirement.[76]

But the scope of the scienter requirement's limiting effect has historically faced its own problems, and other important factors—not often present in a single statutory scheme—make the FCA simultaneously one of the most powerful and most dangerous tools in the government's (and relators') arsenal. First, by creating liability based on the violation of other statutes (many of which include no private right of action), regulations, and contractual terms, the FCA reaches more conduct than many other statutes creating civil liability. Second, the intent requirement and burden of proof requirement of the FCA are relatively low given the severity of the potential sanctions.

Turning first to the breadth of liability created by the FCA, a brief review of some of the myriad (and dispersed) requirements for which a claimant may be held liable under the FCA illustrates the vast extent of potential liability. Historically, the FCA has been an important vehicle for enforcing the Anti-Kickback Statute and Stark Law, which prohibit, respectively, healthcare providers from accepting remuneration for referring patients to other providers and from referring patients to entities with which they have certain financial (or other) relationships.[77] Unlike virtually every other sector of the American economy, where referral fees are common, accepting remuneration for referring a patient to another provider can result in substantial liability.[78] Similarly, critics have noted that the Stark Law sweeps broadly to impose strict liability for conduct that raises no ethical problems at all.[79]

While the FCA has often been used in conjunction with the Anti-Kickback Statute[80] and Stark Law, it is certainly not limited to creating

76. *See Druding*, 952 F.3d at 96; *Polukoff*, 895 F.3d at 743; *Winter*, 953 F.3d at 1117–18.

77. *See* Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b); Stark Law, 42 U.S.C. § 1395nn.

78. Buck, *Enforcement Overdose*, *supra* note 12, at 284 ("Since the passage of the ACA, a violation of the anti-kickback statute ("AKS") is explicitly a false claim for purposes of FCA liability, no matter the challenges associated with proof."); Hyman, *supra* note 13, at 549 ("Read literally, the anti-kickback statute criminalizes or casts serious doubt on the legality of an extensive array of behavior that has become commonplace in the medical marketplace and that is widely viewed as unobjectionable in other sectors of the economy.").

79. *See* Hyman, *supra* note 13, at 551 (noting that the Stark Law imposes liability for "conduct that appears on economic, health policy, and ethical grounds to be unobjectionable").

80. Another circuit split exists regarding what connection is required between the kickbacks and claims. Some circuits take a more lenient approach while others require a stricter "but-for" causation requirement. *See False Claims Act: Appellate Court Deepens Circuit Split in Favor of Healthcare Defendants*, POLSINELLI (Apr. 5, 2023), https://www.polsinelli.com/publications/false-claims-act-appellate-court-deepens-circuit-split-in-favor-of-healthcare-defendants [https://perma.cc/964C-GKXW].

liability for violations of these laws. Indeed, the FCA does not even limit itself to creating liability for violations of federal law. For example, the violations that formed the basis of the alleged FCA liability in *Escobar* concerned state laws.[81] More specifically, the alleged violations at the heart of the relator's case in *Escobar* concerned state regulatory requirements for mental health professionals and the requirements for which professional must supervise another in the provision of care.[82] Beyond the violations of state licensing laws at issue in *Escobar*, a litany of federal appellate cases evidence the breadth of conduct that falls under the umbrella of the FCA.[83]

Next, with respect to the burden of proof and intent requirements under the FCA, the FCA provides relatively little protection to defendants, given the severity of the sanctions they may face if held liable. The statutory language of the FCA requires a defendant to act "knowingly,"[84] which includes "actual knowledge,"[85] "act[ing] in deliberate ignorance of the truth or falsity of the information,"[86] and "act[ing] in reckless disregard of the truth or falsity of the information."[87] However, this language has been interpreted as requiring little more than gross negligence by some courts based on congressional intent.[88] Isaac Buck explained that "[a]s the DOJ has used the FCA against health care providers, this intent standard has offered little protection for providers who, while not 'knowing' that they were filing a false claim with the government, made a negligent decision that related to the filing of a claim with the federal government."[89] Thus, "[g]iven the

81. Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 579 U.S. 176, 182–84 (2016).

82. *See, e.g.*, *id.* at 184 (noting "employees lacked licenses to provide mental health services, yet—despite regulatory requirements to the contrary—they counseled patients and prescribed drugs without supervision").

83. *See, e.g.*, United States *ex rel.* Wilkins v. United Health Grp., Inc., 659 F.3d 295, 300 (3d Cir. 2011) (involving, among others, allegations that a healthcare company "used marketing flyers that [the Center for Medicare and Medicaid Services] did not approve beforehand . . . [allowed] its licensed sales agents [to] engage[] in marketing activities in the waiting rooms of clinics and doctors' offices . . . [allowed] non-licensed individuals [to] engage[] in marketing activities . . . [and] used an excessive number of sales representatives at presentations in an attempt to 'overwhelm the public'"); United States v. NHC Healthcare Corp., 115 F. Supp. 2d 1149, 1153 (W.D. Mo. 2000) (involving allegations that a nursing home was understaffed); United States *ex rel.* Aranda v. Cmty. Psychiatric Ctrs., 945 F. Supp. 1485, 1487 (W.D. Okla. 1996) (involving allegations that a psychiatric hospital failed to provide a "reasonably safe environment" for patients).

84. 31 U.S.C. § 3729(a)(1).

85. *Id.* § 3729(b)(1)(A)(i).

86. *Id.* § 3729(b)(1)(A)(ii).

87. *Id.* § 3729(b)(1)(A)(iii).

88. *See, e.g.*, United States *ex rel.* Williams v. Renal Care Grp., Inc., 696 F.3d 518, 530 (6th Cir. 2012) (discussing a congressional report which suggests "those who act in 'gross negligence' of [the duty to act reasonably and prudently] will be found liable under the False Claims Act" (quoting S. REP. NO. 99-345, at 20 (1986))). *But see* United States *ex rel.* Baltazar v. Warden, 635 F.3d 866, 869 (7th Cir. 2011) (holding that negligence alone does not give rise to liability under the FCA).

89. Buck, *Enforcement Overdose*, supra note 12, at 286.

reduced proof of intent required for FCA liability, individuals who make negligent mistakes could be liable under the FCA."[90]

Combined with the standard civil law standard of "preponderance of the evidence," the FCA's negligence standard offers a relatively low bar to liability. For example, as Buck points out, relators and the government will have relatively little difficulty establishing liability for straightforward billing errors in claims submitted to Medicare and Medicaid.[91] This is problematic for potential defendants not only because every claim submitted to Medicare and Medicaid involves compliance with billing requirements, but also because, as one court explained, "the statutes and provisions . . . involving the financing of Medicare and Medicaid . . . are among the most completely impenetrable texts within human experience."[92]

Fortunately for FCA defendants, the Supreme Court's recent decision in *United States ex rel. Schutte v. SuperValu Inc.* may serve to limit defendants' FCA liability under a negligence standard.[93] There, the Supreme Court held: "The FCA's scienter element refers to respondents' knowledge and subjective beliefs—not to what an objectively reasonable person may have known or believed."[94] Since the typical formulation of negligence entails that a defendant's actions deviated from what an objectively reasonable person would have done under the same or similar circumstances, *Schutte* appears to reject that negligence alone can suffice for FCA liability. Interestingly, however, the party advocating for an objective standard was not the relator or government but the defendant.[95] Given the complexity of many regulations and rules with which defendants must comply, a standard allowing defendants to escape FCA liability if an objectively reasonable person could have interpreted those rules favorably, even if the defendants themselves did not, would have provided defendants with a substantial shield. But an objective standard is more favorable to relators and the government under different facts, and enterprising counsel may attempt to argue *Schutte*'s holding is limited to those particular facts. Ultimately, given the freshness of the opinion (June 1, 2023), its effect remains to be seen.

By themselves, the breadth of liability created by the FCA and the ease with which defendants can be held liable create an arena ripe for the overuse and inappropriate use of the FCA in the healthcare context. And prior work

90. *Id.*
91. *Id.* at 286–87.
92. Rehab. Ass'n of Va., Inc. v. Shalala, 42 F.3d 1444, 1450 (4th Cir. 1994).
93. United States *ex rel.* Schutte v. SuperValu Inc., 598 U.S. 739, 749 (2023).
94. *Id.*
95. *Id.* at 754.

has highlighted several specific instances of these problems.[96] However, the full potential for the misuse of the FCA depends on the penalty structure within the FCA. The FCA imposes more severe sanctions than any other antifraud statute or regulation, and these sanctions—coupled with the ability of private parties to pursue them in *qui tam* suits—facilitate the spread of FCA liability to ever greater array of contexts. The next Part details this penalty structure, illustrates the growth of FCA liability in healthcare, and explains how this severe liability—when coupled with the aspects of the FCA detailed here—encourage the misuse of the FCA.

II. SANCTIONS UNDER THE FALSE CLAIMS ACT

The damages available under the FCA dwarf those available in other civil actions and have been described as "draconian" on more than one occasion.[97] The severity of FCA damages has important implications for the ripples (or tsunamis) the FCA creates in the healthcare system, and this severity also sets up FCA damages for a constitutional challenge. Before reviewing the nature of potential challenges, however, this Part reviews the specifics of damages available under the FCA. It then demonstrates that FCA liability has become one of the most important sources of liability in the healthcare sector.

A. What's in a Claim?

Before delving into the sanctions and damages available under the FCA, it is necessary to clarify what constitutes a "claim" for the purposes of the FCA. The FCA defines "claim" as "any request or demand, whether under

96. *See, e.g.*, David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1913 (2014) ("[T]he data also support the concern that entrepreneurial private enforcers will relentlessly press law's boundaries, exploiting regulatory ambiguities in industry-wide lawsuits that public-minded prosecutors would reject, thus driving law down interpretive pathways it would not travel if enforcement were in purely public hands."); Isaac D. Buck, *Caring Too Much: Misapplying the False Claims Act to Target Overtreatment*, 74 OHIO ST. L.J. 463, 513 (2013) ("Even though DOJ has applied the powerful FCA to overtreatment cases without missing a beat, the consequences of such an enforcement model must be examined in a critical way. Seeking to curtail spiraling health-care costs is an endeavor that cannot be avoided sooner or later, but by applying the most powerful anti-fraud statute to overtreatment cases, DOJ is providing nothing but a piecemeal, person-by-person strategy without addressing any of the root causes of America's overtreatment problem.").

97. Sarah Helene Duggin, *The Impact of the War over the Corporate Attorney-Client Privilege on the Business of American Health Care*, 22 J. CONTEMP. HEALTH L. & POL'Y 301, 335 n.172 (2006); Buck, *Enforcement Overdose*, *supra* note 12, at 269; *see also* Christopher L. Martin, Jr., *Reining in Lincoln's Law: A Call to Limit the Implied Certification Theory of Liability Under the False Claims Act*, 101 CALIF. L. REV. 227, 235 (2013) ("In practice, damages under the False Claims Act vastly exceed those available under other civil actions.").

a contract or otherwise, for money or property."[98] Despite this definition, however, courts have faced difficulties in determining what constitutes a claim. In *United States v. Bornstein*, the Supreme Court had to determine for how many claims a subcontractor was liable when there was *one* contract between the subcontractor and prime contractor; *twenty-one* boxes of falsely marked tubes sent from the subcontractor to the prime contractor in *three* separately invoiced shipments; radio kits containing *397* of the falsely marked tubes sent from the prime contractor to the United States; and *thirty-five* invoices sent from the prime contractor to the United States.[99] The subcontractor argued that there was only one claim based on the single contract between it and the prime contractor, with which the appellate court agreed, after the trial court had determined there were thirty-five claims.[100] The Supreme Court rejected both and held there were three claims—based on the three separately invoiced shipments—because the subcontractor was "liable only for certain identifiable acts that it itself committed."[101]

Determining the number of claims has important implications for FCA liability because, as described in more detail below, each claim is subject to a separate monetary penalty, even if the overall amount of financial harm to the government is unchanged. In the healthcare context, which often involves providers seeking reimbursement from Medicare or Medicaid, the question is what constitutes a claim when providers submit batches of individual forms which include multiple codes for different services. Because a form can contain multiple codes,[102] the government would prefer claims determined by code while a defendant would prefer by form.

The D.C. Circuit addressed the issue of counting claims in *United States v. Krizek*.[103] There, the district court had appointed a Special Master to count the number of claims. The court determined each code on the form was a separate claim, and the government supported this position on appeal, arguing that otherwise, providers would be able to easily control their liability by strategically structuring how they submit claims, e.g., submitting fewer forms with more codes.[104] Relying on *Bornstein*, the *Krizek* court rejected the government's argument as exactly the point: "Precisely so. It is conduct of the medical practitioner, not the disposition of the claims by the

98. 31 U.S.C. § 3729(b)(2)(A).
99. United States v. Bornstein, 423 U.S. 303, 307 (1976).
100. *Id.* at 308, 310.
101. *Id.* at 309, 313.
102. *See, e.g.*, *Health Insurance Claim Form*, CTRS. MEDICARE & MEDICAID SERVS., https://www.cms.gov/medicare/cms-forms/cms-forms/downloads/cms1500.pdf [https://perma.cc/XN4U-GHEZ].
103. United States v. Krizek, 111 F.3d 934, 938 (D.C. Cir. 1997).
104. *Id.* at 940.

government, that creates FCA liability."[105] Ultimately, the court concluded that each submission of a form to the government was a "request or demand" on the government for payment and therefore, a claim.[106] Since then, most courts appear to have adopted the *Krizek* approach and have held the claim corresponds to the form and not individual codes.[107] Despite this small victory for defendants, however, per claim penalties remain high,[108] and providers routinely submit multiple forms for reimbursement through Medicare and Medicaid.[109]

B. Multiple Avenues of Severe Sanctions

Like many civil statutes, the FCA provides for full compensation in connection with the submission of a false claim.[110] It further provides, however, for the trebling of damages in connection with false claims, and the imposition of a "civil penalty of not less than $5,000 and not more than $10,000."[111] These civil penalties increase over time. They increased to a

105. *Id.*

106. *Id.*

107. *See* United States *ex rel.* Bahnsen v. Bos. Sci. Neuromodulation Corp., No. 11-1210, 2018 U.S. Dist. LEXIS 163669, at *10–11 (D.N.J. Sept. 24, 2018) (explicitly relying on *Krizek* to conclude "the Form 1500 represents a claim, regardless of the number of diagnostic codes or line entries included on each form"); United States v. Bondar, No. 03-C-1248, 2006 U.S. Dist. LEXIS 65888, at *2 (E.D. Wis. Aug. 29, 2006) (time sheets submitted to Medicaid); United States *ex rel.* Simpson v. Bayer Corp., 376 F. Supp. 3d 392, 397–98 (D.N.J. 2019) (forms submitted to CMS); United States v. Rogan, No. 02 C 3310, 2006 U.S. Dist. LEXIS 103309, at *37–43 (N.D. Ill. Oct. 2, 2006) (Medicare cost reports and forms); *cf.* State v. Agadjanian, HHDCV176082335S, 2019 Conn. Super. LEXIS 3284, at *15–18 (Super. Ct. Dec. 10, 2019) (relying on *Krizek* for dental services); United States *ex rel.* Garibaldi v. Orleans Par. Sch. Bd., 46 F. Supp. 2d 546, 553–54 (E.D. La. 1999) (unemployment and worker's compensation applications); United States *ex rel.* Maxwell v. Kerr-McGee Oil & Gas Corp., No. 04-cv-01224, 2010 U.S. Dist. LEXIS 97018, at *11–16 (D. Colo. Sept. 16, 2010) (oil and gas leases relying on *Krizek*'s reasoning); United States v. Williams, No. 02 C 4990, 2003 U.S. Dist. LEXIS 9988, at *3 (N.D. Ill. June 10, 2003) (Pell Grant applications).

108. *See infra* notes 111–13 and accompanying text.

109. The vast majority of providers participate in Medicare. *Annual Medicare Participation Announcement*, CTRS. MEDICARE & MEDICAID SERVS. (Nov. 17, 2023, 9:52 AM), https://www.cms.gov/medicare-participation [https://perma.cc/ZF85-DWRF]. On average across the states, a majority of providers also participate in Medicaid. Robert Hest, *Assessing Physician Acceptance of Medicaid Patients Using State Health Compare*, SHADAC (Aug. 25, 2022), https://www.shadac.org/news/14-17-physician-Mcaid-SHC [https://perma.cc/MR5U-Z3PM]. Combined, nearly 40% of patients are covered by Medicare and Medicaid. Katherine Keisler-Starkey, Lisa N. Bunch & Rachel A. Lindstrom, *Health Insurance Coverage in the United States: 2022*, U.S. CENSUS BUREAU (Sept. 12, 2023), https://www.census.gov/library/publications/2023/demo/p60-281.html [https://perma.cc/5X42-LJDT]. Healthcare providers must submit claim forms for government programs to reimburse them for their services. *See Professional Paper Claim Form (CMS-1500)*, CTRS. MEDICARE & MEDICAID SERVS. (Sept. 6, 2023, 4:51 PM), https://www.cms.gov/Medicare/Billing/ElectronicBillingEDITrans/1500 [https://perma.cc/BN9X-XPR4].

110. 31 U.S.C. § 3729(a) (stating that, under the FCA, liability extends to "3 times the amount of damages which the Government sustains because of the act of that person").

111. *Id.*

range of $13,508 to $27,018 in January 2023.[112] Unlike other civil statutes, which permit a court to award up to a certain amount, the FCA mandates a minimum penalty per claim.[113] And some courts have interpreted these penalties as non-discretionary, meaning courts are required to impose at least the minimum penalty.[114]

While treble damages and civil penalty provisions often guarantee substantial recoveries for even small violations, the FCA's imposition of its penalties on a *per-claim* basis can lead to the extreme damages awards.[115] To illustrate the potential of FCA damages to reach enormous proportions based on its per-claim penalty structure, consider two hypothetical physicians who routinely bill Medicare. The first is a family physician who spends most of her time treating patients in an underserved area of Houston, Texas. The second is a surgeon who routinely performs repairs of diaphragm hernias as a member of a large practice in Houston.

According to the Centers for Medicare and Medicaid Services (CMS), a surgeon in Houston completing a repair of a diaphragm hernia may submit a claim for $6,092.10.[116] In contrast, a claim for an office visit submitted by the family physician is only eligible for $70.73 in reimbursement.[117] Thus, to receive the same reimbursement from Medicare, the family physician would need to submit more than eighty-six claims for office visits to equal

112. *See id.* (stating that the civil penalties are adjusted for inflation); Civil Monetary Penalties Inflation Adjustments for 2023, 88 Fed. Reg. 5776, 5778 (Jan. 30, 2023); 28 C.F.R. § 85.5 (2024). Additionally, an FCA violation may result in the exclusion from Department of Health and Human Services such as Medicare. 42 U.S.C. § 1320a-7.

113. Buck, *Enforcement Overdose*, *supra* note 12, at 287 ("The Act is unique in that the penalty provision explicitly provides a minimum amount a court must award . . . .").

114. *See, e.g.*, United States *ex rel.* Lamberts v. Stokes, 640 F. Supp. 2d 927, 933 (W.D. Mich. 2009) (noting that "[a] district court has 'considerable discretion' in determining the amount of a penalty," but mentioning that "the Court must impose a penalty ranging from a minimum of $5,500 to a maximum of $11,000 per violation" (quoting Miller v. Holzmann, 563 F. Supp. 2d 54, 146 (D.D.C. 2008))); Lodge Constr., Inc. v. United States, 158 Fed. Cl. 23, 62 (2022) (describing the attachment of civil penalties for violating the FCA as "mandatory").

115. One circuit has recognized that liability could have been limited under the FCA if courts had instead construed the penalty provision as linked to a scheme rather than to claims. *See* United States *ex rel.* Bunk v. Gosselin World Wide Moving, N.V., 741 F.3d 390, 407 (4th Cir. 2013).

116. This amount was derived from using CMS's physician fee search tool in February 2024. The Healthcare Common Procedure Coding System ("HCPCS") code for the repair of a diaphragm hernia is 39503. *Search the Physician Fee Schedule*, CTRS. MEDICARE & MEDICAID SERVS. (Oct. 17, 2024, 10:44 AM), https://www.cms.gov/apps/physician-fee-schedule/search/search-results.aspx?Y=0&T=4&HT=1&CT=2&H1=99213&H2=39503&C=54&M=5 [https://perma.cc/TAX9-WX8B].

117. Office visits and many other procedures (including diaphragm hernia repair) have multiple HCPCS codes depending on a variety of factors. The details of how Medicare claims are coded is beyond the scope of this Article, and for the purposes of this example, we assume the hypothetical family physician submits all office visit claims under the HCPCS code 99213. *Id.*

the amount received by the surgeon for a single repair of a diaphragm hernia.[118]

Suppose that the family physician submits eighty-six claims for office visits, requesting a total of $6,082.78 from Medicare, and that the surgeon submits a single claim for the repair of a diaphragm hernia, requesting a total of $6,092.10. Suppose further that both the family physician and surgeon violated some arcane statute, such as the Anti-Kickback Statute that rendered their claims false for the purposes of the FCA.[119] In this example, the damages suffered by the government will be $6,082.78 and $6,092.10 for the family physician and surgeon, respectively. Trebling these amounts yields $18,248.34 for the family physician and $18,276.30 for the surgeon. Given the similarity in the damages caused, trebling the damages does little to affect the relative amount owed to the government by the family physician and surgeon.

The same is not true when calculating the civil penalties. Assuming both doctors are maximally liable,[120] the surgeon's total liability would be $45,294.30.[121] This amount seems rather severe given that the surgeon's original claim for reimbursement was just $6,092.10 and that the surgeon competently performed the relevant procedure.[122] This amount, however, pales in comparison to the total amount of damages for which the family physician is liable. With base damages of $6,082.78 and eighty-six separate civil penalties, the family physician's final damages tally is $2,341,796.34.[123] If the damages imposed on the surgeon were "severe," then "draconian" seems an appropriate description of the damages imposed on the family physician (which are more than 384 times greater than the original amount submitted for Medicare reimbursement). More troubling than the sheer amount of damages for which the family physician is liable is the fact that, though total amount of "harm" suffered by the government at the hands of the family physician was slightly less than the "harm" suffered at the hands of the surgeon, the family physician is liable for an amount fifty-two times greater than that for which the surgeon is liable under the FCA.

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118. To be sure, conducting a surgery requires more time to complete than a conducting an office visit, but the amount of time required to complete the procedures discussed here is not germane to the point of this example.

119. As noted above, many different arcane statutes would suffice here. They may have violated the Anti-Kickback Statute in some indirect way or may have violated some state medical licensing law by failing to submit their professional dues on time.

120. The following analysis assumes the submission of all these claims occurred after the introduction of the new January 2023 penalty amounts.

121. $18,276.30 + $27,018 = $45,294.30.

122. $6,092.10 ÷ ($18,276.30 + $27,018) ≈ 0.1345 = 13.45%.

123. $(3 \times \$6{,}082.78) + (86 \times \$27{,}018) = \$2{,}341{,}796.34$.

Suppose instead of violating some arcane statute, the surgeon never performed the surgery at all and billed Medicare for a procedure he did not perform. Even though everyone would agree the surgeon is more culpable than the family physician, the family physician is still liable for fifty-two times more than the surgeon. If instead the trial court were to impose the minimum penalty on the family physician, the family physician would be liable for $1,179,936.34.[124] Under these circumstances, the family physician's liability is twenty-six times greater than the surgeon's and 194 times greater than the harm to the government.

This example illustrates several important aspects of damages awards under the FCA. First, and perhaps most obviously, FCA damages can easily reach enormous size. Second, the final damages tally may be wildly out of proportion to both the size of the original false claim (in the original version, the family physician must compensate the government for nearly 400 times greater than the amount she requested from the government) and the degree of culpability (in the modification, the family physician's liability is more than twenty times larger than the surgeon's). Third, the civil penalty, as opposed to the trebling provision of the FCA, can play a primary role in driving FCA damages to extreme levels. The fact that FCA damages can stem primarily from the number of claims filed—a number based on semi-arbitrary definitions of claims found in some of "the most completely impenetrable texts within human experience"[125]—rather than the actual harm suffered provides fertile soil for the growth of disproportionate and inconsistent sanctions under the FCA.[126]

While the example here illustrates the potential of extreme results under the FCA, it is by no means a fanciful example. *Krizek* offers a real-world illustration.[127] In that case, a psychiatrist was accused of submitting a total 8,002 false claims based on the government's preference for defining codes as claims.[128] Based on "alleged actual damages of $245,392," the government sought "an astronomical $81 million" in total damages under the FCA.[129] On remand, the district court determined there were only three false claims—based on what the government could prove—and imposed the

124. $(3 \times \$6{,}082.78) + (86 \times \$13{,}508) = \$1{,}179{,}936.34$.

125. Rehab. Ass'n of Va., Inc. v. Shalala, 42 F.3d 1444, 1450 (4th Cir. 1994).

126. *See* Buck, *Enforcement Overdose*, *supra* note 12, at 288 ("Measuring the majority of the penalties based upon how many claims providers file—as opposed to primarily linking the penalty to the magnitude or substance of the overall harm suffered by the federal government (that is, taxpayers), or even suffered by patients themselves—provides the potential for seemingly disordered results.").

127. 111 F.3d 934 (D.C. Cir. 1997).

128. *Id.* at 936.

129. *Id.* at 940.

maximum penalty of $10,000 for each claim.[130] Ultimately, the defendants' total liability was $77,105.39, far less than even 1% of the damages initially sought by the government.[131] While the courts prevented the government from recovering a huge amount, the fact that the government sought it in the first place illustrates the potential of the FCA to result in extreme and disproportionate sanctions. Indeed, the ability of the government to seek such large awards at the outset encourages settlement by defendants. And "[w]ithout the purifier of trial, and with no real limiting force," FCA sanctions can easily extend into the hundreds of millions of dollars.[132] The next Section discusses data that substantiates the rise of the FCA as an important source of liability in the healthcare system.

C. A Data-Driven Demonstration of the Relevance of False Claims Act Liability

To better understand the role of FCA sanctions, we rely on a complete dataset of all FCA sanctions imposed between 1986 and 2018.[133] The dataset includes all FCA cases over a thirty-three-year period and is similar to the dataset recently examined by David Engstrom.[134] For much of our analysis, we consider all FCA cases, but we sometimes separate the healthcare cases for two reasons. First, the laws governing healthcare that can give rise to FCA liability are often more complex than those governing other industries. This makes healthcare cases different in kind, not just degree, from other cases. Second, healthcare cases are the most numerous type of case generally, and they tend to dominate the largest awards. Indeed, Engstrom notes "the dominance of healthcare cases . . . at the high end of recovery dollar amounts," suggesting that these cases deserve separate treatment.[135] These two factors militate in favor of analyzing healthcare cases differently. They also suggest that the FCA likely has larger impact on the healthcare industry than other industries where it may potentially apply. We explore this in more detail below.

The FCA dataset includes information on the date each suit was filed, the district court where it was filed, whether the United States intervened, the

130. United States v. Krizek, 7 F. Supp. 2d 56, 60 (D.D.C. 1998).

131. *Id.*

132. Buck, *Enforcement Overdose*, *supra* note 12, at 264.

133. We thank Jetson Leder-Luis for sharing data on FCA cases with us. He originally obtained the data through a series of Freedom of Information Act (FOIA) requests to the Department of Justice. Jetson Leder-Luis, Dataset of FCA Sanctions from 1986 to 2018 [hereinafter Leder-Luis, FCA Dataset] (on file with authors); Jetson Leder-Luis, *Can Whistleblowers Root Out Public Expenditure Fraud? Evidence from Medicare*, 106 REV. ECON. & STAT. (forthcoming 2024).

134. *See* Engstrom, *supra* note 96, at 1950 (describing a similar dataset).

135. *Id.* at 1957.

date each suit was terminated (either by settlement or judgment), the total settlement or judgment amount, and the relator's share of the total award.[136] This rich set of information allows us to present a complete picture of FCA sanctions, including those imposed on healthcare defendants.

To offer a point of comparison to the damages awarded as part of FCA cases and demonstrate the relevance of the FCA generally and with respect to healthcare specifically, we also examine two other sources of liability. First, data on medical malpractice award amounts comes from the National Practitioner Data Bank (NPDB).[137] Initiated in 1986, the NPDB is a national repository of information on malpractice claims from across the country.[138] Under federal law, any payment made to resolve a malpractice claim asserted against a healthcare practitioner must be reported to the NPDB.[139] In addition to the amount of the payment,[140] this report must include information about the practitioner, the date of the underlying incident(s), and the date the payment was made. Using information contained in the NPDB, we organize a national-level dataset of all malpractice payments to use as a comparator for the dataset on FCA sanctions.

Second, we rely on a dataset of blockbuster punitive damages created by Benjamin McMichael and Kip Viscusi.[141] A blockbuster award is a "punitive damages award exceeding $100 million."[142] Among other information, this dataset includes information on the amount of compensatory and punitive damages awarded in connection with over 100 blockbuster awards beginning in the early 1980s.[143] While this dataset is not specific to

136. Leder-Luis, FCA Dataset, *supra* note 133. The dataset contains detailed information on multiple parties for each case. We aggregate this information to the case level. For the purposes of dating each case, we use the last settlement or judgment date.

137. *Statement on the National Practitioner Data Bank Public Use File*, NPDB (May 6, 2013), https://www.npdb.hrsa.gov/resources/publicDataStatement.jsp [https://perma.cc/2WER-QTMZ] (making the data available for download).

138. *Id.*

139. *See* 42 U.S.C. § 11131; 45 C.F.R. § 60.4 (2024). Though reporting malpractice payments is required by law, prior work has documented reporting loopholes and noted that the NPDB may exclude up to 20% of otherwise reportable payments. *See* Benjamin J. McMichael, R. Lawrence Van Horn & W. Kip Viscusi, *"Sorry" Is Never Enough: How State Apology Laws Fail to Reduce Medical Malpractice Liability Risk*, 71 STAN. L. REV. 341, 365 (2019) (discussing issues with the NPDB).

140. To protect confidentiality, the NPDB does not report actual payment amounts. Instead, it reports payments as roughly the midpoint of different payment bands. Throughout our analysis, we adopt the coding used in prior work and use these midpoints as the payment amounts. *See, e.g.*, Benjamin Ho & Elaine Liu, *Does Sorry Work? The Impact of Apology Laws on Medical Malpractice*, 43 J. RISK & UNCERTAINTY 141 (2011); Benjamin Ho and Elaine Liu, *What's an Apology Worth? Decomposing the Effect of Apologies on Medical Malpractice Payments Using State Apology Laws*, 8 J. EMPIRICAL LEGAL STUD. 179 (2011).

141. Benjamin J. McMichael & W. Kip Viscusi, *Taming Blockbuster Punitive Damages Awards*, 2019 U. ILL. L. REV. 171, 198–200 (describing a dataset of large punitive damages awards).

142. *Id.* at 173 n.3.

143. *Id.* at 198–200.

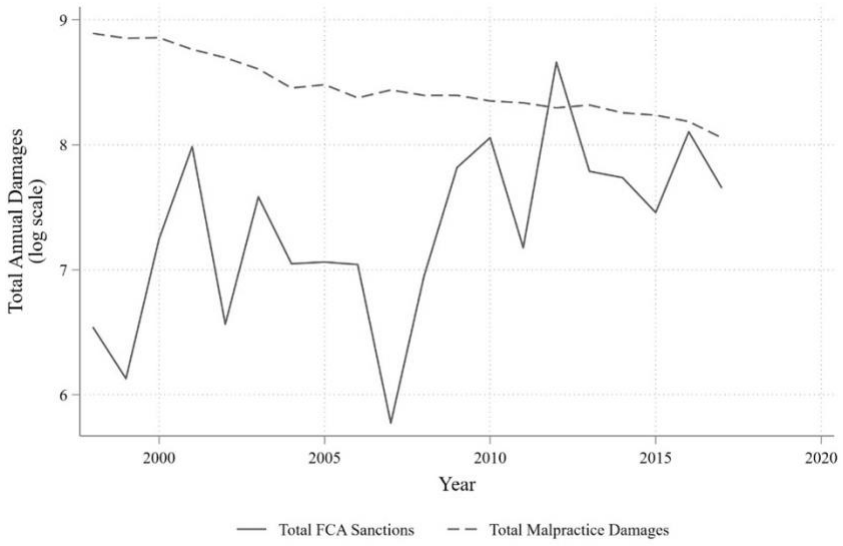
healthcare, it provides a useful comparator of more general damages awards. It also serves as an important point of comparison in the constitutional analysis of the predictability of FCA sanctions below.[144]

Collectively, this main dataset of FCA sanctions and two secondary datasets of malpractice damages and blockbuster punitive damages awards offer novel insight into the role of FCA sanctions. The first question these datasets can elucidate is the prominence of FCA sanctions in relation to medical malpractice damages. As the recipient of substantial attention from scholars and policymakers alike for the amount of liability it generates within the healthcare system, medical malpractice represents an ideal point of comparison for FCA sanctions.

Figure 1 reports the total amount value of all malpractice damages and FCA sanctions imposed on healthcare defendants from the late 1990s through 2018 to demonstrate the relative importance of FCA sanctions. Because of the large amount of money awarded each year in connection with FCA and malpractice cases, Figure 1 reports logarithmic transformation of amounts (in millions) instead of raw amounts. For reference, the total amount of FCA sanctions in 2017 was $2.1 billion, and the total amount of malpractice damages was $3.1 billion. From the 1990s through 2018, the total amount of damages awarded in connection with medical malpractice claims has declined. At the same time, the total amount of FCA sanctions has generally increased, though this increase has occurred with substantial year-to-year variability. In the late 1990s, malpractice damages dwarfed FCA sanctions as a source of liability in the healthcare system. Beginning in the 2000s, however, malpractice damages began to decline and FCA sanctions began to increase. By the mid-2010s, FCA sanctions regularly approached malpractice damages as a source of healthcare liability, and even exceeded malpractice liability in one year. While Figure 1 demonstrates the growing importance of FCA sanctions relative to malpractice damages, it evidences the broader point that FCA liability should be taken as seriously, if not more seriously, than malpractice liability in the healthcare system.

144. *See infra* Section IV.A.

FIGURE 1: FCA SANCTIONS AND MEDICAL MALPRACTICE DAMAGES OVER TIME



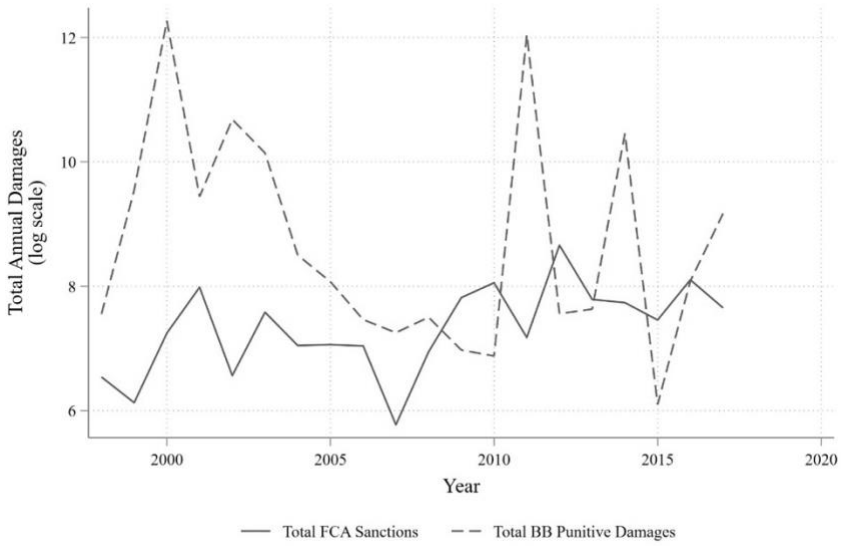
Notes: All monetary values have been inflation-adjusted to 2018 dollars and logarithmically transformed to facilitate comparison of large numbers.

To further illustrate the growing relevance of FCA sanctions, Figure 2 compares the total amount of damages and sanctions imposed under the FCA to the total amount of punitive damages awarded in connection with a blockbuster punitive damages award. In contrast to the malpractice liability comparison—which focuses on two sources of liability unique to the healthcare system—the comparison offered in Figure 2 demonstrates the general size and severity of FCA. As with Figure 1, Figure 2 reports logarithmic transformation of amounts. In general, the total amount awarded in connection with blockbuster awards exceeds the amount awarded in connection with FCA cases, but this is not the case in every year. And FCA sanctions begin to approach blockbuster punitive damages in total size beginning in the mid-2000s. This size comparison illustrates the growing salience of FCA sanctions.

Unlike blockbuster punitive damages awards, which are imposed by courts across the country to punish and deter a wide range of behavior, the FCA sanctions considered here are limited to federal courts and a specific statutory scheme. That the total amount of FCA sanctions awarded even approaches the total amount of (the much more general category) of

blockbuster punitive damages demonstrates the potential of the FCA to generate substantial liability.

FIGURE 2: FCA SANCTIONS AND BLOCKBUSTER PUNITIVE DAMAGES AWARDS OVER TIME



Notes: All monetary values have been inflation-adjusted to 2018 dollars and logarithmically transformed to facilitate comparison of large numbers.

Collectively Figures 1 and 2 demonstrate the growing importance of FCA sanctions generally, though they do not suggest that there has been an "explosion" of FCA liability.[145] The increase in FCA liability reported in Figures 1 and 2 is better understood as a general increase. This general increase is coupled with a general decrease in malpractice liability as reported in Figure 1, suggesting that, even absent an "explosion," FCA liability has become relatively more important in healthcare over the last several decades. Similarly, coupled with a relatively stagnant level of blockbuster punitive damages awards, the general increase in FCA liability has brought the latter more on par with the former in recent years. Thus, the information reported in Figures 1 and 2 evidence the general point that FCA liability has, over the last several years, become an important and substantial source of liability.

145. *See* Engstrom, *supra* note 96, at 1951 ("reject[ing] widespread claims that qui tam litigation is in the midst of an inefficient 'explosion' of enforcement effort").

To better understand where FCA liability is concentrated across the country, Table 1 reports information on the claims that were resolved in each circuit between 1986 and 2015. Table 1 reports all damages amounts in millions of 2018 dollars for readability and comparability. On average, about $1.3 billion in FCA sanctions are imposed each year. Of the 6,281 FCA cases involving a healthcare defendant, the most were filed in the Ninth and Eleventh Circuits. Though the First, Second, Third, and DC Circuits saw relatively fewer cases, their cases tended to involve more damages per case, with the First Circuit's average damages per case far outstripping the average amounts in other Circuits.

TABLE 1: FALSE CLAIMS ACT SANCTIONS BY CIRCUIT IN MILLIONS OF 2018 DOLLARS

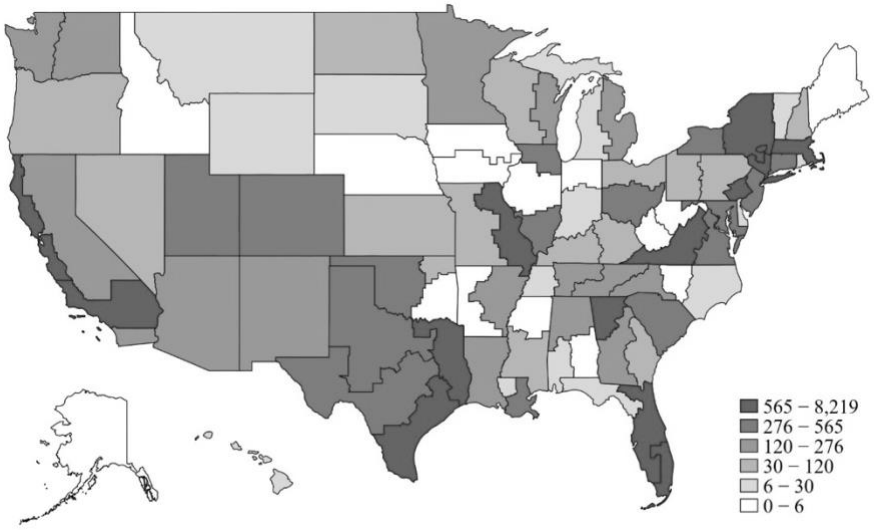
Circuit	Number of Cases	Mean No. Cases Per Year	Total Damages	Mean Damages Per Case	Mean Damages Per Year
All	6,281	196.281	40,568	6.459	1,267.748
First	236	8.429	8,333	35.307	297.590
Second	446	14.867	4,609	10.333	153.622
Third	445	14.833	5,714	12.840	190.461
Fourth	498	15.563	2,491	5.001	77.829
Fifth	681	21.968	3,098	4.550	99.947
Sixth	591	19.065	1,450	2.453	46.763
Seventh	367	13.107	1,163	3.168	41.519
Eighth	314	10.467	1,106	3.523	36.871
Ninth	1,170	36.563	4,380	3.744	136.889
Tenth	374	12.065	1,439	3.848	46.420
Eleventh	906	30.200	5,069	5.595	168.958
DC	253	9.036	1,718	6.789	61.341

Notes: All monetary values have been inflation-adjusted to millions of 2018 dollars.

To further examine FCA "hot spots" across the country, Figure 3 presents a heat map of the total amount of FCA sanctions imposed in each federal district court between 1986 and 2015. Unsurprisingly, the districts including major cities tend to fall into the highest category of FCA sanctions. The within-state differences for states such as California, Texas, and Florida are particularly noteworthy. That these districts have high level of FCA

sanctions is predictable given their large populations and the fact that each includes several large medical centers. Some of the disparity in FCA sanctions may be explainable by the allocation of enforcement resources by DOJ and HHS. For example, the militaristically named "Medicare Fraud Strike Force Teams," which use sophisticated techniques to uncover Medicare fraud, are located in many districts that fall into the highest category.[146]

FIGURE 3: HEAT MAP OF TOTAL FCA SANCTIONS ACROSS FEDERAL DISTRICT COURTS



Notes: Total amounts of FCA damages at the district level are reported in millions of 2018 dollars.

Overall, Table 1 and Figure 3 demonstrate the unequal distribution of FCA sanctions across the country. These figures also reinforce earlier evidence that the FCA has become an important source of liability in the healthcare system. Far from being a notable factoid, the rise of the FCA has important implications for healthcare providers across the country, particularly given the way in which the FCA is structured. The next Part

146. Currently, "[these teams] operate in the following areas: Miami, Florida; Los Angeles, California; Detroit, Michigan; Houston, Texas; Brooklyn, New York; Baton Rouge and New Orleans, Louisiana; Tampa and Orlando, Florida; Chicago, Illinois; Dallas, Texas; Washington, D.C.; Newark, New Jersey/Philadelphia, Pennsylvania; New England; and the Appalachian Region." Off. of Inspector Gen., *Medicare Fraud Strike Force*, U.S. DEP'T HEALTH & HUM. SERVS., https://oig.hhs.gov/fraud/strike-force/ [https://perma.cc/K8VK-LXG7].

engages with the structure of the FCA to set the stage for potential challenges to the huge damages available under the Act.

III. A CATEGORIZATION OF LIABILITY UNDER THE FALSE CLAIMS ACT

Categorizing the purpose of FCA liability—whether compensatory or punitive—is crucially important to determining the constitutional protections available to FCA defendants. Specifically, unless FCA liability is at least partially punitive, any Fifth or Eighth Amendment protections are inapplicable.[147] The FCA undeniably serves a compensatory purpose. A defendant who violates the FCA is liable for the actual damages sustained by the government, thereby compensating the government for the harm the defendant's actions imposed on the government. However, the FCA does not stop there; the government does not merely receive its actual damages but three times its damages plus a fine per claim. The amount of liability on top of the actual damages sustained cannot serve solely a compensatory function. But the question is how much of the liability serves a non-compensatory function. The first Section of this Part answers that question.

A. The Punitive Component of False Claims Act Sanctions

What function the FCA serves is not a new question. In *United States ex rel. Marcus v. Hess*, the Supreme Court addressed that very issue: "Is the action now before us, consisting of double damages and the $2,000 forfeiture, criminal or remedial?"[148] The Court determined the answer was remedial because "the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole."[149] That from the defendant's perspective the penalty structure would function as punishment was not sufficient to transform the civil statute into a criminal one.[150] But over fifty years later, after Congress had amended the FCA to allow for

147. The protections afforded by the Due Process Clause apply to *punitive* damages. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003). For the importance of a punitive classification for the Excessive Fines Clause, see *infra* note 200 and accompanying text.

148. 317 U.S. 537, 549 (1943). The Supreme Court was faced with this question when trying to determine whether the Fifth Amendment's Double Jeopardy Clause applied to the FCA due to its criminal counterparts. *Id.* at 548–49. Note too that the FCA once only imposed double damages and a $2,000 fine.

149. *Id.* at 551–52.

150. *See id.* at 551.

treble damages and fines up to $10,000, the Court reached a different conclusion.[151]

To separate the punitive and compensatory components of the FCA's sanctions, the Supreme Court has explained that the function or purpose of the relevant provision, and not the label placed upon that provision, determines whether that provision serves a punitive function.[152] Given this framework, a proper examination of FCA sanctions requires considering each component—the compensatory award, the treble damages provision, and the civil penalty provision—separately.

Beginning with the most straightforward component, the amount the defendant must repay the government in compensation of the underlying false claim undeniably falls into the compensatory category. Reimbursement for a false claim can serve no other purpose than compensating the government for its losses and therefore appropriately falls clearly outside the punitive realm. This is not to say that every single instance of "fraud" under the FCA should be compensable, and there are strong arguments that some types of technical fraud cause no harm to the government.[153] We reserve those arguments for future work, and to the extent technical fraud constitutes harm, damages connected with that fraud are purely compensatory.

The civil penalty attached to each false claim similarly requires almost as little analytical work to classify properly. The Supreme Court has clearly stated that "the FCA imposes damages that are essentially punitive in nature,"[154] and extending this holding to the FCA's civil penalty, the Fourth

151. *See* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 784 (2000) ("[T]he current version of the FCA imposes damages that are essentially punitive in nature . . . .").

152. United States v. Halper, 490 U.S. 435, 447–48 (1989) ("[T]he labels 'criminal' and 'civil' are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties. . . . [T]he determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve." (citing *Hess*, 317 U.S. at 554 (Frankfurter, J., concurring))); Hicks *ex rel.* Feiock v. Feiock, 485 U.S. 624, 631 (1988) ("[T]he labels affixed either to the proceeding or to the relief imposed . . . are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law."); *see, e.g.*, United States *ex rel.* Drakeford v. Tuomey, 792 F.3d 364, 387–88 (4th Cir. 2015) (applying this approach); United States v. Mackby, 261 F.3d 821, 830 (9th Cir. 2001) ("In determining whether a civil sanction is punitive or remedial, 'the court considers factors such as the language of the statute creating the sanction, the sanction's purpose(s), the circumstances in which the sanction can be imposed, and the historical understanding of the sanction.'" (quoting Louis v. Comm'r, 170 F.3d 1232, 1236 (9th Cir. 1999))).

153. For example, "not all of the arrangements within the [Anti-Kickback Statute]'s broad prohibition are harmful." Climo, *supra* note 65, at 1764. Yet, violating the Anti-Kickback Statute exposes a person to False Claims Act liability. Importantly, even though the Anti-Kickback Statute is a criminal law, for recovery under the False Claims Act, the violation can be proven by a preponderance of the evidence. United States *ex rel.* Cairns v. D.S. Med. LLC, 42 F.4th 828, 834 (8th Cir. 2022).

154. *Stevens*, 529 U.S. at 784.

Circuit recently (and bluntly) stated that "the civil penalty is completely punitive."[155] In doing so, it relied on an earlier analysis by the Ninth Circuit. That court noted that "[t]he language of the FCA does not specify whether its sanction . . . is meant to be punitive or remedial," but determined that "the sanction clearly has a punitive purpose."[156] In reaching this conclusion, the Ninth Circuit found it germane that "[n]o damages to the government need be shown" before the penalty is imposed.[157] The court further noted that the recoverability of treble damages "demonstrat[ed] that the [civil penalty's] purpose is not to provide a form of damages."[158] The legislative history of the FCA also informed the court's ultimate conclusion that the civil penalty served a punitive, not a compensatory function[159]—a point the Supreme Court has agreed with.[160]

While the compensatory aspect of the FCA and its civil penalty are easy to classify as compensatory and punitive in nature, respectively, the treble damages provision does not fit neatly into either category. The Supreme Court has provided somewhat conflicting guidance on whether the treble damages provision serves a punitive function.[161] With respect to the treble damages provision implemented alongside the civil penalty in the 1986 version of the FCA, the Court commented that "[t]he very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers,"[162] i.e., accomplish the same goals as punitive damages,[163] which are to "punish[] unlawful conduct and deter[] its repetition."[164] The Court, however, subsequently explained that the treble damages provision of the FCA is "necessary to compensate the Government completely for the costs, delays, and

155. *Tuomey*, 792 F.3d at 388 (citing *Mackby*, 261 F.3d at 830).

156. *Mackby*, 261 F.3d at 830.

157. *Id.* (citing United States *ex rel.* Hagood v. Sonoma Cnty. Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991)).

158. *Id.* (citing Wright v. Riveland, 219 F.3d 905, 915 (9th Cir. 2000)).

159. *Id.* (discussing the legislative history of the FCA).

160. United States v. Bornstein, 423 U.S. 303, 309 n.5 (1976) ("According to its sponsor, the False Claims Act was adopted 'for the purpose of punishing and preventing . . . frauds.'" (quoting CONG. GLOBE, 37th Cong., 3d Sess. 952 (1863) (statement of Sen. Jacob Howard))).

161. *See* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 784–86 (2000) (noting the Court's prior determination that a double damages provision under an older version of the FCA was remedial but that the treble damages provision under the current statute suggests an intent to punish and deter, consistent with a punitive function).

162. *Id.* at 786–87 (quoting Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981)).

163. Exxon Shipping Co. v. Baker, 554 U.S. 471, 511–13 (2008).

164. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996) (first citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974); then citing City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 266–67 (1981); and then citing Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 22 (1991)).

inconveniences occasioned by fraudulent claims."[165] Reconciling these statements, the Court further explained "that treble damages have a compensatory side, serving remedial purposes in addition to punitive objectives" and "that the damages multiplier has compensatory traits along with the punitive."[166] Ultimately leaving the question of the nature of the treble damages provision open, the Court noted that "the tipping point between payback and punishment defies general formulation."[167]

When a relator brings the suit, Professor Hesch argues that the compensation paid to the government includes the treble damages and the relator share.[168] According to Professor Hesch, the relator share is "paid as a bounty or finder's fee to a whistleblower (which initiates the FCA action); it is a cost that Congress requires the government to pay in FCA cases and are added out-of-pocket costs to the government."[169] His classification of the relator share as remedial (or compensatory) stems from the Court's decision in *Cook County v. United States ex rel. Chandler*.[170] But the *Cook* court did not say that the relator share itself was compensatory; instead, the Court said, "[t]he most obvious indication that the *treble damages* ceiling has a remedial place under this statute is its *qui tam* feature with its possibility of diverting as much as 30 percent of the Government's recovery to a private relator."[171] In other words, the Court was explaining that the treble damages provision serves a dual function due to the costs of pursuing litigation, lack of prejudgment interest and consequential damages, and relator share in *qui tam* suits—not that the relator share itself is remedial.[172] The Court recognized that treble damages "will exceed full compensation in a good many cases."[173] One approach would be to classify the portion of the treble damages award beyond the relator's share as purely punitive in nature. A more conservative approach, however, would be to classify the entire treble damages amount as compensatory.

Overall, the FCA's sanctions structure includes clearly compensatory, clearly punitive, and partially punitive components. At the very least, the

165. Cook Cnty. v. United States *ex rel.* Chandler, 538 U.S. 119, 130 (2003) (first quoting *Bornstein*, 423 U.S. at 315; and then citing United States v. Halper, 490 U.S. 435, 445 (1989)).

166. *Id.*

167. *Id.*; *see also* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 401 (2003) (discussing the punitive nature of treble damages provisions in the FCA and other statutes).

168. Joel D. Hesch, *A Framework for Assessing Whether Civil Penalties Under the False Claims Act Violate the Excessive Fines Clause of the Eighth Amendment*, 91 U. CIN. L. REV. 1012, 1018–20 (2023).

169. *Id.* at 1020.

170. *Id.* at 1018–20.

171. Cook Cnty. v. United States *ex rel.* Chandler, 538 U.S. 119, 131 (2003) (emphasis added).

172. *See id.* at 130–31.

173. *Id.* at 131.

inclusion of punitive and partially punitive components raises the question of whether the restrictions that the Court has placed on punitive damages or excessive fines similarly apply to the punitive components of FCA sanctions. The Supreme Court has never directly addressed this issue, and though the federal appellate courts have entertained the possibility that the Fifth and/or Eighth Amendments limit sanctions under the FCA, their analysis of this issue has been cursory. This Article seeks to extend that analysis, but before doing so, it is necessary to classify what the monetary payments under the FCA are: damages, fines, something else? The last Section aims to answer that question, but an important threshold issue concerns the applicability of the Due Process and Excessive Fines Clauses to different types of monetary payments in civil suits. We address this threshold issue in the next Section.

B. Applying the Fifth and Eighth Amendments to Monetary Payments in Civil Suits

The classification of the monetary payments under the FCA—as fines or damages or something else—has important implications for which, if any, constitutional provision limits the amount of FCA liability. First, in *Browning-Ferris Industries v. Kelco Disposal*, the Court held that the Excessive Fines Clause does not apply to punitive damages.[174] The *Browning-Ferris* court admitted that the Court had "never considered an application of the Excessive Fines Clause" but given the context of the Eighth Amendment, considered the possibility that the protections of the Eighth Amendment only applied to criminal cases.[175] The Court avoided making this decision but determined that the Excessive Fines Clause "does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."[176] This decision—that the Excessive Fines Clause does not apply to punitive damages[177]—was not unanimous, however. Justice O'Connor's dissent, with which Justice Stevens joined, argued the Clause does apply to punitive damages because "punitive

174. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 260 (1989).

175. *Id.* at 262. Notably, in her partial dissent, Justice O'Connor points out that while the Framers decided to limit the Fifth Amendment's Self-Incrimination Clause to criminal cases, there was no similar discussion about the Eighth Amendment even though its discussion immediately followed that of the Fifth Amendment. *Id.* at 294 (O'Connor, J., concurring in part and dissenting in part).

176. *Id.* at 264 (majority opinion).

177. The petitioners in *Browning-Ferris* also asked the Court to determine whether the punitive damages award violated the Due Process Clause, but because the petitioners did not raise the issue in either of the lower courts, the Court declined to decide "whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit." *Id.* at 276–77.

damages serve the same purposes—punishment and deterrence—as the criminal law, and [when] excessive . . . present precisely the evil of exorbitant monetary penalties that the Clause was designed to prevent."[178] O'Connor also argued that the majority's understanding of the word "fine"[179] was too narrow and ignored some broader historical understandings.[180] Justice Stevens later reiterated their conviction that the Clause applies to punitive damages awards.[181]

Second, the Due Process Clause applies more broadly than the Excessive Fines Clause.[182] Unlike the Excessive Fines Clause, the Court has held the Due Process Clause applies to punitive damages,[183] fines,[184] and general statutory damages.[185] But even though the Due Process Clause has broader application than the Excessive Fines Clause, it is not clear that the Due Process Clause's limitations on the types of monetary payments are the same.[186] Though the Court in articulating the standards for determining whether a punitive damages award violated the Due Process Clause did not specify that the standards only applied to punitive damages,[187] some Circuits have held the *Gore* standard for punitive damages does not apply to statutory

178. *Id.* at 287 (O'Connor, J., concurring in part and dissenting in part).

179. According to the majority, the Framers "understood [fine] to mean a payment to a sovereign as punishment for some offense." *Id.* at 265 (majority opinion).

180. *Id.* at 295–97 (O'Connor, J., concurring in part and dissenting in part). Indeed, Justice O'Connor cites a decade-old Court decision, *id.* at 297 (citing Int'l Bhd. Of Elec. Workers v. Foust, 442 U.S. 42, 48 (1979)), where the Court said "Punitive damages 'are not compensation for injury. Instead, they are private *fines* levied by civil juries to punish reprehensible conduct and to deter its future occurrence.'" *Foust*, 442 U.S. at 48 (emphasis added) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974)).

181. Philip Morris USA v. Williams, 549 U.S. 346, 358–61 (2007) (Stevens, J., dissenting).

182. United States *ex rel.* Drakeford v. Tuomey, 792 F.3d 364, 387 (4th Cir. 2015).

183. *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

184. Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 111 (1909) (applying Due Process Clause to recovery of penalties by state government); *cf.* Seaboard Air Line Ry. v. Seegers, 207 U.S. 73, 78 (1907) ("We know there are limits beyond which penalties may not go.").

185. St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63, 66 (1919) (applying Due Process Clause to recovery of penalties by private party).

186. Much of the Court's due process jurisprudence concerns the application of the Fourteenth Amendment's Due Process Clause to damages imposed under state law. Because the FCA is a federal law, however, the Fifth Amendment's Due Process Clause applies. The Court has previously proven willing to apply the restrictions imposed on states under the Fourteenth Amendment to the federal government under the Fifth Amendment. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (applying the Fourteenth Amendment's Equal Protection Clause under the Fifth Amendment); *see also* Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 409–10 (1995) (discussing the interplay between the Due Process Clauses of the Fourteenth and Fifth Amendments). *See generally* Richard A. Primus, Bolling *Alone*, 104 COLUM. L. REV. 975 (2004) (same). Accordingly, our analysis proceeds as if Fourteenth Amendment jurisprudence applies under the Fifth Amendment.

187. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–75 (1996).

damages.[188] Instead, the standard articulated in *Williams* applies to statutory damages.[189] Given that the *Gore* standard is predicated on providing fair notice to potential defendants, these Circuits have argued that because statutes set statutory damages, notice is not a concern.[190] Presumably, since statutes also define penalties and fines, these Circuits would similarly decline to apply the *Gore* standard to penalties and fines.

Thus, the classification of monetary payments has important implications for determining which constitutional provisions apply and then, within those constitutional provisions, how great the limiting effect is. As described in the above Section, the FCA's structure makes it difficult to categorize its function; rather than being entirely remedial or punitive, the FCA is a mixture of both. Similarly, the structure of the FCA precludes a straightforward determination of what type of monetary payment it imposes, but making that determination is the goal of the next Section.

C. Classifying FCA Sanctions: Damages, Fines, or What?

Before embarking on our task of attempting to classify that which defies classification, it is helpful to consider the dimensions of the FCA that affect the structure of monetary payments under the FCA. First is who initiated the action: the government or a relator. If the government initiated the action, the government receives the entirety of the imposed monetary payment. If a relator filed suit, the size of the government's portion depends on whether the government intervenes (generally 75%–85%)[191] or not (70%–75%).[192] Second is the defendant's amount of liability. Generally, the defendant's liability includes treble damages (three times the amount of actual damages) and a civil penalty.[193] If, however, the defendant cooperates with the investigation, the defendant's liability may be as low as double damages (two times the amount of actual damages).[194] The combination of these dimensions affects the classification of the monetary payments. In parsing these dimensions to classify FCA sanctions as damages (and thus

188. *See* Sony BMG Music Ent. v. Tenenbaum, 719 F.3d 67, 70–71 (1st Cir. 2013); Capitol Recs., Inc. v. Thomas-Rasset, 692 F.3d 899, 907–08 (8th Cir. 2012); Zomba Enters., Inc. v. Panorama Recs., Inc., 491 F.3d 574, 587 (6th Cir. 2007).

189. A state's enactments "transcend the limitation [of the Due Process Clause] only where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *Williams*, 251 U.S. at 66–67 (first citing Coffey v. Harlan Cnty., 204 U.S. 659, 662 (1907); then citing *Seegers*, 207 U.S. at 78; then citing *Waters-Pierce Oil Co.*, 212 U.S. at 111; and then citing Collins v. Johnston, 237 U.S. 502, 510 (1915)).

190. *See, e.g.*, *Capitol Recs.*, 692 F.3d at 907–08.

191. 31 U.S.C. § 3730(d)(1).

192. *Id.* § 3730(d)(2).

193. 31 U.S.C. § 3729(a)(1).

194. *Id.* § 3729(a)(2).

subject to the Due Process Clause) or fines (and thus subject to the Excessive Fines Clause), we focus our attention on fines because the Excessive Fines Clause applies more narrowly than the Due Process Clause. If FCA sanctions are fines, then the Excessive Fines Clause clearly applies. If not, then the Due Process Clause represents the only constitutional limitation on FCA sanctions.

In *Browning-Ferris*, which the Court acknowledges as the first time it has dealt with an application of the Excessive Fines Clause,[195] the dissent stated that now (1989) "fine" is defined as "a forfeiture or penalty recoverable in a civil action."[196] At least by a modern definition then, the $5,000–$10,000 penalty imposed for each violation of the FCA is a fine.[197] But at the time of the Eighth Amendment's adoption, "fine" was defined as "a payment to a sovereign as punishment for some offense."[198] Per the *Browning-Ferris* court, the Excessive Fines Clause does not apply to payments "when the government neither has prosecuted the action nor has any right to receive a share of the damages."[199] Four years later, the Court clarified that the Excessive Fines Clause is not limited to criminal cases but applies so long as the sanction "can only be explained as serving in part to punish," even if the sanction also serves remedial purposes.[200] In his concurrence, Justice Scalia lamented that the *Austin* opinion "obscure[d] [the] clear statement" of the definition of fine expressed in *Browning-Ferris*.[201] Fortunately for Scalia, the Court later reaffirmed its commitment to *Browning-Ferris*'s definition.[202]

Thus, to determine whether a monetary payment falls under the Excessive Fines Clause's purview, clearly part of the test is determining whether the payment is imposed at least partially to punish.[203] The other part

195. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 262 (1989).

196. *Id.* at 297 (O'Connor, J., concurring in part and dissenting in part).

197. Interestingly, the First Circuit recently decided a case that challenged the imposition of a civil penalty of $2,173,703 for failing to report a foreign bank account and held the Excessive Fines Clause did not apply because the penalty was not punishment and so not a fine. United States v. Toth, 33 F.4th 1, 19 (1st Cir. 2022). The Supreme Court denied the petition for writ of certiorari, but Justice Gorsuch dissented from the denial: "For all these reasons, taking up this case would have been well worth our time. As things stand, one can only hope that other lower courts will not repeat its mistakes." Toth v. United States, 143 S. Ct. 552, 553 (2023) (Gorsuch, J., dissenting).

198. *Browning-Ferris*, 492 U.S. at 265.

199. *Id.* at 264.

200. Austin v. United States, 509 U.S. 602, 610 (1993).

201. *Id.* at 623 (Scalia, J., concurring).

202. *See* United States v. Bajakajian, 524 U.S. 321, 327 (1998). Ironically, Scalia joined Justice Kennedy's dissent. *Id.* at 344 (Kennedy, J., dissenting).

203. *See, e.g.*, Tyler v. Hennepin Cnty., 598 U.S. 631, 648 (2023) (Gorsuch, J., concurring) ("It matters not whether the scheme has a remedial purpose, even a predominantly remedial purpose. So long as the law 'cannot fairly be said *solely* to serve a remedial purpose,' the Excessive Fines Clause applies." (quoting *Austin*, 509 U.S. at 610)).

of the test requires determining whether "the government neither has prosecuted the action nor has any right to receive a share of the damages."[204] Logically,[205] the FCA satisfies the second half of the test because regardless of whether the FCA suit is government initiated or relator initiated, the government receives a share (indeed, the majority) of the damages. Furthermore, as detailed above, the FCA monetary payment structure is at least *partially* punitive, with the penalties being entirely punitive. Therefore, when the Excessive Fines Clause test is formulated from the logical negation of the *Browning-Ferris* statement, the Excessive Fines Clause clearly applies to the FCA's punitive components.[206]

However, when faced with the explicit question of whether the Excessive Fines Clause applies to the FCA,[207] not all courts have used the logical formulation. Instead, these courts have formulated the second half of the test as requiring *both-and* rather than *either-or*.[208] The both-and requirement does not make a difference when the FCA suit is government initiated. In such cases, the government is both prosecuting the action[209] and receiving a share of the damages—specifically, all the damages. But an issue arises when the FCA suit is relator initiated,[210] especially if the government does

204. *Browning-Ferris*, 492 U.S. at 264.

205. For the Excessive Fines Clause to apply, the negation of that statement must be true. Since the statement can be reworded as "the government has not prosecuted the action and does not have any right to receive a share of the damages," from a purely logical perspective, the negation would be "the government has prosecuted the action or has a right to receive a share of the damages."

206. In perhaps one of the most foundational FCA-Excessive Fines Clause Circuit opinions, the *Mackby* court states "A fine is unconstitutionally excessive if (1) the payment to the government constitutes punishment for an offense, and (2) the payment is grossly disproportionate to the gravity of the defendant's offense." United States v. Mackby, 261 F.3d 821, 829 (9th Cir. 2001) (citing *Bajakajian*, 524 U.S. at 327–28, 334). This test appears to support the logical formulation: the Excessive Fines Clause applies if (1) a fine is punishment for an offense and (2) the government receives the payment. This test does not ask whether the government instituted the action. However, this was a government-initiated action, so the *Mackby* court may have simply taken that for granted and not addressed it directly.

207. *See* Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 844 & n.40 (2013).

208. *See, e.g.*, Yates v. Pinellas Hematology & Oncology, P.A., 21 F.4th 1288, 1308 (11th Cir. 2021) ("Consequently, the Excessive Fines Clause applies only to payments imposed by the United States (or the States) and payable to it (or them)." (first citing Austin v. United States, 509 U.S. 602, 607–08 (1993); and then citing *Browning-Ferris*, 492 U.S. at 264)).

209. "[T]he Attorney General [is] bring[ing] a civil action under [31 U.S.C. § 3730] against the person" who has violated 31 U.S.C. § 3729. 31 U.S.C. § 3730(a).

210. In the future, this issue may disappear entirely. In Justice Thomas's dissent in *United States ex rel. Polansky v. Executive Health Resources, Inc.*, 599 U.S. 419, 442–52 (2023) (Thomas, J., dissenting), he indicated the viability of an argument that the FCA's *qui tam* provision is unconstitutional as violating Article II. Justice Thomas is not a lone wolf; in his concurrence, Justice Kavanaugh, with whom Justice Barrett joined, agreed with Justice Thomas: "In my view, the Court should consider the competing arguments on the Article II issue in an appropriate case." *Id.* at 442 (Kavanaugh, J., concurring). The Supreme Court may soon have an opportunity to address this issue as a district court judge has answered Justice Thomas's call to action. *See* United States *ex rel.* Zafirov v. Fla. Med.

not intervene. If the government does intervene, the FCA states that the government "shall have the primary responsibility for prosecuting the action,"[211] so at least for relator-initiated actions where the government has intervened, the both-and requirement appears to be satisfied.

Regardless of whether the government intervenes, however, in any relator-initiated action, the action is "brought in the name of the Government."[212] Without Congress enacting the FCA and including the *qui tam* provision, a relator could not institute an action against a violator of the FCA. The United States, not the relator, suffers an injury when someone submits a false or fraudulent claim to the government. Thus, without the *qui tam* provision, a relator would lack Article III standing; indeed, the Court in *Stevens* had to determine whether a relator has standing since she does not suffer the injury in fact that is the basis of the suit.[213] Relying on "the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor," the Court held "[t]he FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim,"[214] thereby providing a relator with standing. By including the *qui tam* provision in the FCA, Congress made a strategic choice: relators "are motivated primarily by prospects of monetary reward," making *qui tam* statutes "'one of the least expensive and most effective means of preventing frauds on the Treasury . . . . Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.'"[215]

In a non-intervened action, the government may not be the prosecutor *in name*, but Congress included the *qui tam* provision to incentivize relators to do some of the heavy lifting *for* the government. Additionally, even if the government does not decide to intervene at first, the government always has the ability to intervene later "upon a showing of good cause."[216] As long as the government intervenes at some point, "the Government may seek

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Assocs., LLC, No. 19-cv-01236, 2024 U.S. Dist. LEXIS 176626, at *59 (M.D. Fla. Sept. 30, 2024). If the Supreme Court were to hold that *qui tam* provisions are unconstitutional, FCA suits could only be brought and therefore prosecuted by the government. We avoid any analysis of (and assume) the constitutionality of *qui tam* provisions because such analysis is outside the scope of this Article, and as one scholar has noted, "[d]octrinal analysis of the application of Article II to *qui tam* is an awful mess." Richard A. Bales, *A Constitutional Defense of* Qui Tam, 2001 WIS. L. REV. 381, 403.

211. 31 U.S.C. § 3730(c)(1).

212. *Id.* § 3730(b)(1).

213. Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 771 (2000).

214. *Id.* at 773.

215. Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 949 (1997) (quoting United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 541 n.5 (1943)).

216. 31 U.S.C. § 3730(c)(3).

dismissal of an FCA action over a relator's objection."[217] A conclusion denying that the government is prosecuting the action in any FCA action ignores the significant amount of control the government exercises over the action and Congress's motivations for including a *qui tam* provision.[218]

Some practical considerations also weigh in favor of defining all FCA-imposed sanctions as fines for the purposes of the Excessive Fines Clause. If the government chooses to intervene in a relator-initiated action, the government does not have to wholly intervene; instead, the government can choose to partially intervene. If only intervened relator actions are subject to the Excessive Fines Clause, then if the government partially intervenes, the Excessive Fines Clause would limit some of the claims within the same case and not others. There is no strong principle to determine where to draw that line.[219] Additionally, as Justice Scalia underscored in *Harmelin*, and Justice Ginsburg reiterated in *Timbs*, fines are a unique form of punishment because unlike other types of punishment, which cost the government money, fines generate revenue, and so "it makes sense to scrutinize governmental action more closely when the State stands to benefit."[220] The government undeniably stands to benefit in a successful FCA action, receiving at least 70% of the settlement or judgment. Given monetary payments under the FCA function as punishment and benefit the government, it makes sense to scrutinize the FCA monetary payments as fines.

Another question is whether the entirety or only a portion of the monetary payment under the FCA is a fine. The Court has determined that the FCA's sanctions serve both remedial and punitive purposes, but the

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217. United States *ex rel.* Polansky v. Exec. Health Res., Inc., 599 U.S. 419, 424 (2023); *see also* 31 U.S.C. § 3730(b)(1) ("The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.").

218. Though the Eleventh Circuit imposed the both-and requirement, the *Yates* court ultimately concluded a non-intervened action satisfied the requirement. *See* Yates v. Pinellas Hematology & Oncology, P.A., 21 F.4th 1288, 1308 (11th Cir. 2021). While the Supreme Court has not weighed in on whether the Excessive Fines Clause applies to *qui tam* provisions, the Court has certainly not foreclosed the possibility. *See* Austin v. United States, 509 U.S. 602, 607 n.3 (1993) ("In *Browning-Ferris*, we left open the question whether the Excessive Fines Clause applies to *qui tam* actions in which a private party brings suit in the name of the United States and shares in the proceeds.").

219. Though we provide an argument to support applying the Excessive Fines Clause to all forms of actions under the FCA even if there is a both-and requirement, it seems highly likely that the Supreme Court would support an either-or requirement. In *Paroline v. United States*, the Court stated that the Excessive Fines Clause may apply to the payment of restitution to victims even though the government does not receive the payment because "it is imposed by the Government" and "still implicates 'the prosecutorial powers of government.'" 572 U.S. 434, 456 (2014) (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 275 (1989)). Thus, the Court does not seem committed to a both-and requirement.

220. Harmelin v. Michigan, 501 U.S. 957, 978 n.9 (1991); *see also* Timbs v. Indiana, 586 U.S. 146, 154 (2019) (quoting *Harmelin*, 501 U.S. at 978 n.9).

Excessive Fines Clause applies to payments made as punishment,[221] suggesting the Excessive Fines Clause only limits the portion of FCA sanctions that are punitive. Yet, the Excessive Fines Clause applies so long as the sanctions are partially punitive,[222] suggesting the Excessive Fines Clause limits the entirety of the sanctions. At least some circuits that have addressed this issue take the latter approach.[223] For the purposes of this Article, we are not overly concerned with divining the correct answer. As we have explained above, the main driver of the size of FCA sanctions is the imposition of civil penalties, so we will use the conservative approach and assume the Excessive Fines Clause only limits the FCA's civil penalties—the portion of FCA sanctions that are entirely punitive.

While it is clear that the civil penalties imposed under the FCA in a government-initiated action operate as fines for the purposes of the Excessive Fines Clause, some may remain unpersuaded that the same is true for relator-initiated actions—intervened or not. Accordingly, we consider the application of the Due Process Clause to limit FCA sanctions in addition to the Excessive Fines Clause.

IV. DISJUNCTIVE CONSTITUTIONAL LIMITATIONS ON FALSE CLAIMS ACT SANCTIONS

Because sanctions under the FCA arguably fall within both the Excessive Fines Clause and Due Process Clause, we evaluate them under each. Because the former is narrower than the latter, we begin our analysis with the Excessive Fines Clause.

A. Excessive Fines

1. The Two Prongs of an Excessive Fines Analysis

Above, we argued that the civil penalties imposed under the FCA are fines for the purposes of the Excessive Fines Clause. This is just one half of an Excessive Fines analysis. The other half asks whether the sanctions are excessive. This Section answers that question.

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221. *Browning-Ferris*, 492 U.S. at 265.

222. *See* Tyler v. Hennepin Cnty., 598 U.S. 631, 648 (2023) (Gorsuch, J., concurring).

223. *See Yates*, 21 F.4th at 1314–16 (holding the monetary award, which included the treble damages and civil penalties, did not violate the Excessive Fines Clause); United States v. Mackby, 261 F.3d 821, 831 (9th Cir. 2001) ("We conclude that the FCA's treble damages provision, at least in combination with the Act's statutory penalty provision, is not solely remedial and therefore is subject to an Excessive Fines Clause analysis under the Eighth Amendment.").

The Court's jurisprudence on the Excessive Fines Clause is very limited. As the Court admitted in 1989, it had never before "considered an application of the Excessive Fines Clause," but in *Browning-Ferris*, the Court never reached an excessiveness analysis because it determined the Excessive Fines Clause did not apply.[224] Nearly ten years later, the Court again acknowledged its limited jurisprudence: "This Court has had little occasion to interpret, and has never actually applied, the Excessive Fines Clause."[225]

In its first application of the Clause, the Court, in a 5-4 opinion, struck down a civil *in personam* forfeiture as excessive, explaining "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality."[226] With proportionality at the center of an Excessive Fines analysis, the question is whether the fine "is grossly disproportional to the gravity of a defendant's offense."[227] Forfeiting $357,144 because the respondent failed to report he was taking more than $10,000 in cash out of the country was disproportional to his offense and therefore an excessive fine.[228] Specifically, the nature of the offense, level of culpability required, and harm caused were insufficient to warrant the forfeiture of the entirety of what the respondent failed to report.[229] The Court also rejected that the forfeiture was proportional based on an argument that the First Congress had enacted statutes requiring full forfeiture because "the type of forfeiture that they imposed was not considered punishment for a criminal offense."[230]

Since *Bajakajian*, the Court has not evaluated the excessiveness of a fine. However, in *Cooper Industries*, the Court clarified the grossly disproportional test: (1) "the degree of the defendant's reprehensibility or culpability"; (2) "the relationship between the penalty and the harm to the

224. 492 U.S. at 262–64.

225. United States v. Bajakajian, 524 U.S. 321, 327 (1998).

226. *Id.* at 334.

227. *Id.* The Court "adopt[ed] the standard of gross disproportionality articulated in our Cruel and Unusual Punishments Clause precedents," citing to *Solem v. Helm*, 463 U.S. 277, 288 (1983) and *Rummel v. Estelle*, 445 U.S. 263, 271 (1980). *Bajakajian*, 524 U.S. at 336. This resort to the far more developed jurisprudence of the Cruel and Unusual Punishments Clause is unsurprising; in her *Browning-Ferris* dissent, Justice O'Connor adapted the *Solem* test for her analysis of the excessiveness of a punitive damages award: "First, the reviewing court must accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue. Second, the court should examine the gravity of the defendant's conduct and the harshness of the award of punitive damages. Third, because punitive damages are penal in nature, the court should compare the civil *and* criminal penalties imposed in the same jurisdiction for different types of conduct, and the civil *and* criminal penalties imposed by different jurisdictions for the same or similar conduct." 492 U.S. at 300–01 (O'Connor, J., concurring in part and dissenting in part).

228. *Bajakajian*, 524 U.S. at 337.

229. *See id.* at 337–39.

230. *Id.* at 340.

victim caused by the defendant's actions"; and (3) "the sanctions imposed in other cases for comparable misconduct."[231] This test is not specific to the Excessive Fines Clause; this test is also used for evaluating punishments under the Due Process and Cruel and Unusual Punishments Clauses.[232] But the grossly disproportional test is—or at least, should be—only one-half of the test for excessiveness under the Excessive Fines Clause; the other half concerns a consideration of the defendant's assets.[233]

The Supreme Court has never officially determined whether ability to pay is part of the Excessive Fines analysis. In a footnote in *Bajakajian*, the Court said that the respondent did not make any arguments regarding his ability to pay, nor did the district court make any relevant factual findings.[234] The *Timbs* court acknowledged *Bajakajian* "t[ook] no position on the question whether a person's income and wealth are relevant considerations in judging the excessiveness of a fine"[235] but also did not take a clear position.[236] However, both opinions, and another Supreme Court opinion addressing the Excessive Fines Clause, detailed the history of the Excessive Fines Clause, which included the requirement that a fine not deprive a person of his livelihood.[237]

Without an official stance from the Court on whether the defendant's assets are relevant in an excessiveness analysis, the Circuits have taken their own approaches with the majority not adopting a clear stance. The First and Second Circuits have both explicitly incorporated the question of whether a fine would deprive a person of his livelihood as a factor in their excessiveness analysis[238] while the Eleventh and D.C. Circuits have rejected

231. Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 434–35 (2001) (citations omitted).

232. *Id.* at 433–34.

233. *See, e.g.*, Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 300 (1989) (O'Connor, J., concurring in part and dissenting in part) (rejecting arguments that the wealth of the defendant should not be considered in an Excessive Fines Clause analysis). *But see* Hesch, *supra* note 168, at 1034 ("Although there is no clear guidance by the courts, the ability to pay should not be a separate factor or a litmus test . . . . The main thrust of the Excessive Fines Clause analysis is whether the punitive assessment is grossly disproportionate to the real economic harm.").

234. 524 U.S. at 340 n.15.

235. Timbs v. Indiana, 586 U.S. 146, 151–52 (2019) (citing *Bajakajian*, 524 U.S. at 340 n.15).

236. Though stating, "*[a]s relevant here*, Magna Carta required that economic sanctions 'be proportioned to the wrong' *and* 'not be so large as to deprive [an offender] of his livelihood,'" *id.* at 151 (emphasis added) (quoting *Browning-Ferris*, 492 U.S. at 271), *Timbs* merely holds that the Fourteenth Amendment incorporates the Excessive Fines Clause. *Id.*

237. *See Bajakajian*, 524 U.S. at 335; *Timbs*, 586 U.S. at 151; *Browning-Ferris*, 492 U.S. at 271.

238. United States v. Levesque, 546 F.3d 78, 83–85 (1st Cir. 2008); United States v. Viloski, 814 F.3d 104, 111–12 (2d Cir. 2016).

the incorporation.[239] The Seventh and Ninth Circuits have declined to decide whether to incorporate, citing to the Supreme Court's refusal in *Bajakajian* and *Timbs*.[240] The stance of the remaining Circuits is unclear.[241] Given the lack of consensus among the Circuits, whether the excessiveness analysis includes a defendant's ability to pay is a question ripe for the Court's attention.[242] When, or if, the Court answers the question, it should do so affirmatively.

Nicholas M. McLean has identified three problems for the Circuits that refuse to consider personal circumstances:

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239. United States v. 817 N.E. 29th Drive, 175 F.3d 1304, 1311 (11th Cir. 1999) ("[E]xcessiveness is determined in relation to the characteristics of the offense, not in relation to the characteristics of the offender."); Duckworth v. United States *ex rel.* Locke, 705 F. Supp. 2d 30, 48 (D.C. Cir. 2010) ("[A]bility to pay is not a component of the Eighth Amendment proportionality analysis." (citing United States v. Emerson, 107 F.3d 77, 81 (1st Cir. 1997))). Neither of these holdings have escaped criticism. A recent Eleventh Circuit concurrence stated, "It may be, then, that our excessive-fines jurisprudence rests in part on a misreading of *Bajakajian*," regarding the Eleventh Circuit's rejection of ability to pay in excessiveness analysis. Yates v. Pinellas Hematology & Oncology, P.A., 21 F.4th 1288, 1321 (11th Cir. 2021) (Newsom, J., concurring). A California district court criticized *Duckworth* because its "analysis appears to rely, almost exclusively, on [an opinion decided before *Bajakajian*]." Pimentel v. City of Los Angeles, No. cv 14-1371, 2018 U.S. Dist. LEXIS 85054, at *21 n.18 (C.D. Cal. May 21, 2018).

240. Grashoff v. Adams, 65 F.4th 910, 921 (7th Cir. 2023); Pimentel v. City of Los Angeles, 966 F.3d 934, 941 (9th Cir. 2020). In the wake of the Ninth Circuit's declination in 2020, a district court has incorporated ability to pay as part of the analysis, claiming there is an "absence of binding authority from the Ninth Circuit or Supreme Court on this important question." Fitzpatrick v. City of Los Angeles, No. cv 21-6841, 2023 U.S. Dist. LEXIS 17220, at *119 (C.D. Cal. Jan. 31, 2023).

241. United States v. Collins, No. 18-1069, 2021 U.S. Dist. LEXIS 23260, at *25 (W.D. Pa. Feb. 8, 2021) (referencing *Levesque* and *Viloski* without mentioning any Third Circuit decisions); United States v. Bennett, 986 F.3d 389, 400 (4th Cir. 2021) ("[W]e have never expressly considered a defendant's means in evaluating the proportionality of a forfeiture judgment. However, to the extent that it is an appropriate consideration, it is merely one factor to be weighed with all other factors."); United States v. Suarez, 966 F.3d 376, 385 (5th Cir. 2020) (listing the factors considered in a proportionality analysis without mentioning ability to pay or livelihood); United States v. Zakharia, 418 F. App'x 414, 421–22 (6th Cir. 2011) (listing the factors considered in a proportionality analysis without mentioning ability to pay or livelihood); United States v. Johnson, 956 F.3d 510, 519 (8th Cir. 2020) ("Johnson asks this court to find that the personal money judgment will unconstitutionally deprive him of his livelihood . . . . This we decline to do, for the evidence suggests that a finding to the contrary would not be plainly erroneous."); United States v. King, 231 F. Supp. 3d 872, 902–03 (W.D. Okla. 2017) (relying on *Levesque* and *Viloski* with no mention of Tenth Circuit decisions).

242. The Supreme Court had a recent opportunity to address the question in *Rosales-Gonzalez v. United States*, 142 S. Ct. 781 (2022) (mem.), but as is custom, the Court denied the petition without opinion. *Rosales-Gonzalez* was on appeal from the Eleventh Circuit (one of the circuits that definitively answers in the negative) and posed the question: "Whether a defendant's ability to pay a fine is a relevant consideration when determining if a fine is excessive under the Eighth Amendment." Petition for a Writ of Certiorari at i, Rosales-Gonzalez v. United States, 142 S. Ct. 781 (2022) (No. 21-5305), 2021 U.S. S. CT. BRIEFS LEXIS 4696, at *3. Justice Gorsuch's recent dissent in the denial of certiorari in *Toth v. United States* provides some hope that at least one justice is interested in clarifying the Court's Excessive Fines Clause jurisprudence. 143 S. Ct. 552, 552–53 (2023) (Gorsuch, J. dissenting). Additionally, during oral arguments for *Timbs*, Chief Justice Roberts asked: "What if . . . the person doing this, you know, was a multimillionaire? Forty-two thousand dollars doesn't seem excessive to him. . . . [A]nd yet, if someone is impoverished, it is excessive? Does that matter?" Transcript of Oral Argument at 28, Timbs v. Indiana, 586 U.S. 146 (2019) (No. 17-1091).

> First, it is simply not correct to regard *Bajakajian*'s holding as compelling a lower court to disregard a defendant's personal circumstances when undertaking an Excessive Fines Clause analysis. Second, the majority approach is arguably inconsistent with the analytical frameworks the Supreme Court has adopted in other Eighth Amendment contexts. Third, attempts to justify the majority approach on historical grounds have relied upon an incomplete and selective reading of the historical record.[243]

McLean identified these three problems before the Court's decision in *Timbs*. Given the *Timbs* Court's characterization of *Bajakajian* as "taking no position on the question,"[244] courts that seek to exclude personal circumstances will have to find some other justification for doing so.

Regarding the second problem, McLean points to *United States v. United Mine Workers*,[245] *Stack v. Boyle*,[246] and *Miller v. Alabama*.[247] However, none of these cases deals with the Excessive Fines Clause.[248] Given the Court's relatively undeveloped Excessive Fines jurisprudence, it seems likely that the Court would look to its other Eighth Amendment jurisprudence for guidance.[249] The Court has considered the characteristics of the defendant in holding sentences unconstitutional under the Cruel and Unusual Punishments Clause,[250] indicating the Court is amenable to considering both the offender and the offense. And the case for considering the offender's characteristics in determining what is an excessive fine appears stronger

243. McLean, *supra* note 207, at 847.

244. 586 U.S. at 152.

245. McLean, *supra* note 207, at 848 (quoting United States v. United Mine Workers, 330 U.S. 258, 304 (1947)) (stating a court should consider the defendant's financial resources and effect of the fine on him when determining the size of a fine for contempt).

246. *Id.* at 848–49 (quoting Stack v. Boyle, 342 U.S. 1, 5 n.3 (1951)) (identifying "the financial ability of a defendant" as relevant in determining bail).

247. *Id.* at 849 (quoting Miller v. Alabama, 567 U.S. 460, 469 (2012)) (explaining proportionality refers to both the offense and the offender).

248. *United Mine Workers* responded to the arguments that the defendants' fines "were arbitrary, excessive, and in no way related to the evidence adduced at the hearing." 330 U.S. at 302. The Eighth Amendment is not mentioned, and *Browning-Ferris*, over forty years later, was the first time the Court considered the Excessive Fines Clause. Austin v. United States, 509 U.S. 602, 606 (1993). The latter two are Eighth Amendment cases. *Stack*, 342 U.S. at 3 (excessive bail); *Miller*, 567 U.S. at 465 (cruel and unusual punishment).

249. *See, e.g.*, Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 300 (1989) (O'Connor, J., concurring in part and dissenting in part) ("Determining whether a particular award of punitive damages is excessive is not an easy task. The proportionality framework that the Court has adopted under the Cruel and Unusual Punishments Clause, however, offers some broad guidelines.").

250. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 568 (2005) ("The death penalty may not be imposed on certain classes of offenders, such as juveniles under 16, the insane, and the mentally retarded, no matter how heinous the crime." (first citing Thompson v. Oklahoma, 487 U.S. 815 (1988); then citing Ford v. Wainwright, 477 U.S. 399 (1986); and then citing Atkins v. Virginia, 536 U.S. 304 (2002))).

than for determining what is a cruel and unusual punishment,[251] leading to McLean's third identified problem.

There was no mention of the Excessive Fines Clause during discussion of the Bill of Rights,[252] and in the absence of legislative history, the Court has resorted to its origins. The text of the Eighth Amendment is nearly copied and pasted from Virginia's Declaration of Rights adopted in 1776.[253] That language in turn came from the English Bill of Rights of 1689,[254] which "reaffirmed Magna Carta's [same] guarantee."[255] Central to the Magna Carta's own Excessive Fines Clause was not only proportionality but also *salvo contenemento*, which expressed the idea that a fine (or amercement at that time) would not deprive a person of his livelihood.[256] The Supreme Court, in detailing the history of the Excessive Fines Clause, has included both principles.[257] Given that the Supreme Court derived the principle of proportionality from the same sources that included a consideration of livelihood, it seems counterintuitive to include proportionality but exclude livelihood in an excessiveness analysis.[258] Therefore, when assessing the excessiveness of a fine, courts should conduct both a proportionality and livelihood analysis.

Even with the proper test of excessiveness clarified, lower courts will undoubtedly struggle to determine what is excessive thanks to the lack of Supreme Court precedent. First, the Supreme Court has only addressed whether a fine was excessive once.[259] Second, in doing so, the Court only attended the question of proportionality and not livelihood since the fine

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251. *Roper* was not decided based on the understanding of the Eighth Amendment at the time of its enactment but instead the "evolving standards of decency" framework of *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958). 543 U.S. at 560–61. As detailed below, the case for considering the defendant's ability to pay in determining excessiveness dates back centuries. *See infra* notes 253–57 and accompanying text.

252. *Browning-Ferris*, 492 U.S. at 294 (O'Connor, J., concurring in part and dissenting in part).

253. VA. CONST. art. I, § 9 ("That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted . . . ."); *The Virginia Declaration of Rights*, NAT'L ARCHIVES (Sept. 29, 2016), https://www.archives.gov/founding-docs/virginia-declaration-of-rights [https://perma.cc/X9YY-4HF2].

254. *Browning-Ferris*, 492 U.S. at 266.

255. Timbs v. Indiana, 586 U.S. 146, 152 (2019).

256. McLean, *supra* note 207, at 854–57, 868.

257. *See Browning-Ferris*, 492 U.S. at 271; *Timbs*, 586 U.S. at 152; United States v. Bajakajian, 524 U.S. 321, 335–36 (1998); *see also Browning-Ferris*, 492 U.S. at 300 (O'Connor, J., concurring in part and dissenting in part) (rejecting an argument that an excessiveness analysis under the Excessive Fines Clause would not include an assessment of the defendant's finances given its history).

258. *See Browning-Ferris*, 492 U.S. at 264 n.4 ("[I]n considering the scope of the Excessive Fines Clause . . . . [w]e look to the origins of the Clause and the purposes which directed its Framers."); *see also* Wesley Hottot, *What Is an Excessive Fine? Seven Questions to Ask After* Timbs, 72 ALA. L. REV. 581, 606 (2021).

259. *See Bajakajian*, 524 U.S. at 327 (1998).

failed on proportionality and the issue of livelihood had not been raised.[260] Thus, to guide their proportionality analysis, lower courts have a split 5-4 decision that determined a forfeiture of $357,144 for failing to report that currency in excess of $10,000 was leaving the country was grossly disproportional.[261]

Arguably, lower courts could also look to *United States v. Halper* for guidance. There, the Fifth Amendment's Double Jeopardy Clause, and not the Excessive Fines Clause, was at issue, and the Court held the defendant's "liability is sufficiently *disproportionate* that the sanction constitutes a second punishment in violation of double jeopardy."[262] *Halper*, despite being unanimous, was quickly overruled in *Hudson* as being unworkable and "deviat[ing] from [the Court's] traditional double jeopardy doctrine in two key respects": (1) focusing on whether the penalty constituted punishment rather than whether it was criminal, and (2) evaluating the penalty as applied rather than facially.[263]

Halper may have deviated from double jeopardy doctrine, but it sounds awfully reminiscent of the Court's subsequent excessive fines doctrine. Indeed, Justices in opinions issued after *Halper* recognized such. In his *Hudson* concurrence, Justice Breyer stated, "[T]he Court in *Halper* might have reached the same result through application of the constitutional prohibition of 'excessive fines.'"[264] Earlier, in his *Department of Revenue of Montana* dissent, Justice Scalia similarly said, "The Excessive Fines Clause . . . may well support the judgment in *Halper*. Indeed, it may even *explain* the judgment in *Halper*, since much of the language of that opinion suggests that the Court was motivated by concern for the harsh consequences of applying a per-transaction penalty to a 'prolific but small-gauge offender.'"[265] Accepting these conjectures that the Excessive Fines Clause would have rendered the penalty in *Halper* unconstitutional, lower courts have the additional proportionality guidance that a $130,000 penalty was disproportional to a loss of $585 plus approximately $16,000 in expenses.[266] *Halper* is even more useful for our purposes because the

260. *See id.* at 339–40, 340 n.15.
261. *See id.* at 324, 344.
262. United States v. Halper, 490 U.S. 435, 452 (1989) (emphasis added).
263. Hudson v. United States, 522 U.S. 93, 101–02 (1997).
264. *Id.* at 116 (Breyer, J., concurring).
265. Dep't of Revenue v. Ranch, 511 U.S. 767, 803 n.2 (1994) (Scalia, J., dissenting) (quoting *Halper*, 490 U.S. at 449).
266. 490 U.S at 441, 452.

$130,000 penalty was imposed for violating the FCA.[267] Still, like *Bajakajian*, *Halper* is only relevant to the proportionality analysis.

The lower courts that have addressed the livelihood prong have demonstrated that it is difficult to satisfy.[268] The *Levesque* and *Viloski* courts have underscored that a defendant's current financial circumstances are not sufficient to render a fine excessive under the Eighth Amendment.[269] *Viloski* rejected the defendant's argument that a forfeiture was excessive despite "'compelling personal factors concerning [his] age, health and dire financial circumstances'" because there was no evidence the forfeiture "would prevent him from earning a living upon his release from prison," i.e., deprive him of his livelihood.[270] Following *Levesque*, the First Circuit held "findings about [the defendant's] net worth, familial obligations, and inability to earn a professional-level salary simply are not sufficient" to render a forfeiture excessive.[271] Instead of focusing on a defendant's ability to pay *now*, these courts consider whether the imposition of the fine would destroy the defendant's ability to support himself in the future.[272]

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267. *Id.* at 441. The defendant in *Halper* submitted sixty-five false claims before the 1986 amendments, which meant that he was subject to a civil penalty of $2,000, leading to a total penalty liability of $130,000. *Id.* at 438, 441.

268. *See, e.g.*, United States v. Chin, 965 F.3d 41, 58 (1st Cir. 2020) ("[T]he bar for a forfeiture order to be unconstitutionally excessive on livelihood-deprivation grounds is a high one.").

269. *See, e.g.*, United States v. Levesque, 546 F.3d 78, 85 (1st Cir. 2008) ("[W]e note that a defendant's inability to satisfy a forfeiture at the time of conviction, in and of itself, is not at all sufficient to render a forfeiture unconstitutional, nor is it even the correct inquiry. . . . [E]ven if there is 'no sign' that the defendant could satisfy the forfeiture in the future, there is always a possibility that she might be fortunate enough 'to legitimately come into money.' And it is notable, moreover, that the Attorney General may choose to remit a forfeiture on the grounds of hardship to the defendant." (first citing 19 U.S.C. § 1618; then citing 21 U.S.C. §§ 853(j), 881(d); and then citing United States v. Ortiz-Cintrón, 461 F.3d 78, 82 (1st Cir. 2006))).

270. United States v. Viloski, 814 F.3d 104, 114–15 (2d Cir. 2016) (quoting Opening Brief for Appellant Viloski Including Special Appendix at 8, *Viloski*, 814 F.3d 104 (No. 14-4176), 2015 WL 1140814, at *8). However, the Second Circuit does not completely foreclose the consideration of personal characteristics. *See, e.g.*, United States v. Muzaffar, 714 F. App'x 52, 58 (2d Cir. 2017) ("Since Irfan presents evidence that the forfeiture would deprive him of his future ability to earn a living—including the fact that he has a ninth-grade education, no meaningful employment history, and will enter the job market after release from prison as a convicted felon—we vacate and remand to the District Court so that it may consider Irfan's forfeiture in light of *Viloski*.").

271. *Chin*, 965 F.3d at 58.

272. *See, e.g.*, Santiago-Lugo v. United States, No. 11-1363, 2011 U.S. Dist. LEXIS 56142, at *9 (D.P.R. May 20, 2011) ("As Petitioner is serving a life sentence and parole has been abolished in the federal system, his livelihood will be provided for by the federal government for the rest of his natural life. . . . Even if the forfeiture here were found to be so onerous ['as to deprive a defendant of his or her future ability to earn a living'], this concern is negated where, as here, Petitioner is serving a life sentence and, thus, has no need for a livelihood." (quoting *Levesque*, 546 F.3d at 85)).

But others take a broader view of the livelihood analysis.[273] Professor Colgan argues when conducting an excessive analysis, courts should consider "the nature of the offense, *the offender's characteristics*, and *the effect on the offender*."[274] Other scholars similarly insist on considering the defendant's personal circumstances[275] and ensuring the fine would not exceed what "could reasonably be expected to be paid" and "permit[] an individual to maintain some minimal level of economic subsistence."[276]

For at least three reasons, it makes sense to adopt the broader view. First, the Supreme Court has emphasized that reliance on the history of the Eighth Amendment is more appropriate for determining its application than its scope.[277] Thus, even if the Eighth Amendment's historical background supports the more restrictive view,[278] the courts are not foreclosed from adopting the more expansive view that a defendant's personal circumstances are relevant to the excessiveness analysis. Second, Congress has recognized the relevance of evaluating a defendant's ability to pay when imposing fines in the criminal context.[279] Given that application of the Eighth Amendment hinges on a fine being considered at least partially punishment, "evolving standards of decency" in the context of imposing fines for the purpose of punishment appear to support consideration of ability to pay. Third, separating the defendant's ability to pay from the excessiveness analysis does not make sense in light of the view of punishment as retribution and deterrence.[280] Retributivism demands that a punishment be based on what an offender deserves, which certainly mirrors the proportionality prong. But deterrence admits of the livelihood prong. There are two types of deterrence: specific (preventing the defendant from offending again) and general (preventing others from offending). Divorcing consideration of personal circumstances from determining punishment is at odds with specific

273. *See, e.g.*, Fitzpatrick v. City of Los Angeles, No. cv 21-6841, 2023 U.S. Dist. LEXIS 17220, at *119 (C.D. Cal. Jan. 31, 2023) ("Plaintiffs lack the 'present ability to pay' the fines. . . . Plaintiffs' inability to pay the fines imposed supports their claim under the Eighth Amendment." (quoting People v. Dueñas, 242 Cal. Rptr. 3d 268, 276 (Ct. App. 2019))).

274. Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 346 (2014) (emphasis added).

275. *See* McLean, *supra* note 207, at 900; Hottot, *supra* note 258, at 604–06.

276. McLean, *supra* note 207, at 896.

277. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 264 n.4 (1989).

278. *But see* Brief of *Amici Curiae* Eighth Amendment Scholars in Support of Petitioner at 2, Rosales-Gonzalez v. United States, 142 S. Ct. 781 (2022) (No. 21-5305) ("This brief provides an historical account of the importance of considering financial condition—the ability to pay a fine or absorb the loss of cash or property through forfeiture—to the Excessive Fines Clause and its two key antecedents: Magna Carta of 1215 and the English Bill of Rights of 1689.").

279. 18 U.S.C.S. app. § 5E1.2 (LexisNexis 2024).

280. *See* United States v. Halper, 490 U.S. 435, 448 (1989).

deterrence, which is geared specifically to the defendant,[281] and does not seem to help general deterrence and may even hurt. For one, increasing the severity of punishment does not appear to increase the deterrence effect.[282] Secondly, having a set fine that is divorced from consideration of the defendant's circumstances likely fails to deter wealthy defendants at all while potentially bankrupting poorer defendants.[283] Therefore, effectively serving one of the "twin aims"[284] of punishment demands consideration of the defendant's personal circumstances.

The Supreme Court in *Bajakajian* also specified that when conducting an excessiveness analysis, courts should grant substantial deference to the legislature,[285] and the lower courts have faithfully followed this mandate. This is a mistake, but unsurprising given the Court's copying and pasting of its Cruel and Unusual Punishments jurisprudence.[286] Even assuming that the Court is correct to defer to legislatures in the Cruel and Unusual Punishments context,[287] such deference is illogical in the realm of Excessive Fines. An excessiveness analysis is necessarily specific to a defendant, both the proportionality and livelihood prongs. Legislatures make laws that are *generally* applicable. Because laws are meant to have prospective application, a legislature cannot account for the idiosyncrasies of each individual to whom the law applies. A law setting a penalty does not and cannot know a particular defendant's culpability or ability to pay. These considerations are necessarily within the province of the court. Furthermore, fines are distinct from other punishments in that the former generate revenue for the government while the latter costs the government, creating an incentive for legislatures to set exorbitantly high fines.[288] Given this difference, "it makes sense to scrutinize governmental action more

281. *Cf.* Yates v. Pinellas Hematology & Oncology, P.A., 21 F.4th 1288, 1330 (11th Cir. 2021) (Tjoflat, J., concurring in part and dissenting in part) ("If a child steals a candy bar, a $100 fine and a $1,000 fine will both deter the child, but the $1,000 fine would probably be disproportionate to the offense. So, the $100 fine is probably more appropriate. . . . My point is that the statutory fine ranges are not at all tethered to what will efficiently deter a particular defendant based on evidence . . . .").

282. *Five Things About Deterrence*, U.S. DEP'T JUST., NAT'L INST. JUST. (May 2016), https://www.ojp.gov/pdffiles1/nij/247350.pdf [https://perma.cc/HLD9-K3FR].

283. A $5,000 fine to someone who makes minimum wage may be multiple months' worth of income while to another may be mere pocket change. *Cf.* Transcript of Oral Argument at 28, Timbs v. Indiana, 586 U.S. 146 (2019) (No. 17-1091) ("What if . . . the person doing this, you know, was a multimillionaire? Forty-two thousand dollars doesn't seem excessive to him. . . . [A]nd yet, if someone is impoverished, it is excessive?").

284. *Halper*, 490 U.S. at 448.

285. United States v. Bajakajian, 524 U.S. 321, 336 (1998).

286. *See* Colgan, *supra* note 274, at 281; Harmelin v. Michigan, 501 U.S. 957, 967 (1991) (explaining why cruel and unusual is different from excessive).

287. *But see* Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1157 (2006).

288. *See Harmelin*, 501 U.S. at 978 n.9.

closely"[289] and deferring to the legislature seems exactly antithetical to the Eighth Amendment's purpose.[290] For these reasons, substantial deference to the legislature has no place in an excessive analysis.

With the *Bajakajian* gross proportionality test and consideration of ability to pay in mind, it becomes clear that any excessiveness analysis will be highly fact specific. Recognizing the Excessive Fines Clause does not provide a bright-line rule for determining whether a fine is excessive, the next Section aims to provide a broad overview of the Excessive Fines Clause's limiting effect on the FCA.

2. Applying the Excessive Fines Clause to the FCA

As mentioned above, the Supreme Court has only applied the Excessive Fines Clause once (and not in the FCA context), but applying the Excessive Fines Clause to FCA cases is not so foreign to lower courts.[291] Most of these cases adhere strictly to *Bajakajian*: forgoing any livelihood analysis and substantially deferring to the legislature.[292] Often, appellate courts practically hold an award per se constitutional if the relator/government seeks civil penalties at or below the statutory minimum.[293] The way these courts have applied the Excessive Fines Clause to FCA awards does not appear to offer defendants much protection. For example, courts have held constitutional judgments of $1.179 million based on $755.54 in actual damages (1,560:1),[294] more than $1 million based on no actual loss,[295] approximately $25 million based on $865,000 (29:1),[296] and approximately $30 million based on $2.7 million (11:1).[297] However, we expect that if

289. *Id.*

290. *See* Yates v. Pinellas Hematology & Oncology, P.A., 21 F.4th 1288, 1318–19 (11th Cir. 2021) (Newsom, J., concurring); Melissa Ballengee, Bajakajian*: New Hope for Escaping Excessive Fines Under the Civil False Claims Act*, 27 J.L. MED. & ETHICS 366, 371–74 (1999).

291. A Lexis Plus search of ["false claims act" AND ("eighth amendment" OR excessive fine*)] produces 315 cases at the federal level and 56 at the state level (as of Oct. 24, 2024). These results are undoubtedly overinclusive as they include three Supreme Court cases and may be underinclusive, though this seems less likely. For an unusual application of the Excessive Fines Clause to FCA awards, see United States *ex rel.* Fesenmaier v. Cameron-Ehlen Grp., Inc., No. 13-cv-3003, 2024 U.S. Dist. LEXIS 21897, at *43–60 (D. Minn. Feb. 8, 2024). The court claims to be limiting the award under the Excessive Fines Clause but does so using the due process framework from *State Farm*. *Id.*

292. *See, e.g.*, United States v. Mackby, 339 F.3d 1013, 1015, 1019 (9th Cir. 2003).

293. *See* United States v. Aleff, 772 F.3d 508, 512–13 (8th Cir. 2014); *Yates*, 21 F.4th at 1314.

294. *Yates*, 21 F.4th at 1314.

295. Hays v. Hoffman, No. 97-cv-1656, 2001 U.S. Dist. LEXIS 25701, at *7 (D. Minn. Aug. 22, 2001), *rev'd*, 325 F.3d 982 (2003) (reducing the FCA award to $80,000 after discarding all but eight claims for lack of jurisdiction).

296. United States *ex rel.* Bunk v. Gosselin World Wide Moving, N.V., 741 F.3d 390, 400–01, 409 (4th Cir. 2013).

297. United States *ex rel.* Montcrieff v. Peripheral Vascular Assocs., P.A., 649 F. Supp. 3d 404, 412, 428 (W.D. Tex. Jan. 9, 2023).

courts were to instead adopt the excessiveness analysis framework detailed above, the Excessive Fines Clause would afford FCA defendants more protection than it has heretofore.

First, and arguably most important, is eliminating substantial deference to the legislature. By doing so, courts would no longer be able to reject an excessiveness challenge simply by considering whether the judgment imposed on the defendant is at or below the statutory minimum but would instead have to engage in the fact-specific analysis of excessiveness that the Excessive Fines Clause demands. Some may argue that because the FCA specifies a range of penalty amounts, courts engage in a fact-specific analysis when choosing where to set the penalty within that range. But the FCA does not provide any guidelines for this determination.[298] This elimination may have changed the outcome in *Yates*: "Seeing a judgment of $1.179 million based on $755.54 in actual damages may raise an eyebrow. . . . The district court here imposed the lowest-possible statutory penalty of $5,500 for all of the 214 violations, and treble damages are mandated by the FCA. Therefore, no matter the perspective, the monetary award imposed represents the lowest possible sanction under the FCA."[299] The *Yates* court gave the judgment "a strong presumption of constitutionality" before turning to factors based on *Bajakajian*, determining the defendant could not rebut the presumption.[300] Without such a presumption, FCA defendants may get to fight on level ground rather than an uphill battle.

Second, incorporating a robust livelihood protection will ensure judgments will not be imposed on FCA defendants that will bankrupt them for life. This protection will promote effective deterrence, deterring all potential fraudsters regardless of wealth, while also ensuring fraudsters can continue to be contributing members of society after imposing punishment. This is especially important in the context of applying the FCA to medical providers. As described above, the FCA has been increasingly applied to the healthcare sector. This focus on the healthcare sector correspondingly alters the incentives of entering the healthcare sector; specifically, using the FCA to target the healthcare sector raises the cost of being part of the healthcare sector, thus disincentivizing outsiders from joining and incentivizing insiders to leave. Such an incentive structure is particularly dangerous given

298. *See Yates*, 21 F.4th at 1324 (Tjoflat, J., concurring in part and dissenting in part).
299. *Id.* at 1314 (majority opinion).
300. *Id.*

the United States' worsening physician shortage.[301] Alternatively, it may encourage medical providers not to take Medicare and Medicaid patients, thereby reducing the number of available providers to two vulnerable populations. But a robust livelihood protection reduces the cost of being in the healthcare sector, and even if the livelihood protection does not entirely eliminate the FCA's ills, it at least has a palliative effect.

Livelihood protections may also realign the perverse incentives that FCA defendants currently have to settle.[302] Presumably, defendants settle for an amount that they actually can pay. Given the low procedural protections afforded to FCA defendants,[303] even innocent defendants may choose a settlement that they know they can pay rather than face a judgment exceeding their net worth by multiple magnitudes just as innocent criminal defendants will accept a plea deal.[304] But if FCA defendants know that the Excessive Fines Clause will protect them from any judgment that deprives them of their livelihood, they may be more willing to go to trial and take the chance of paying nothing at all, which seems like the preferable option at least for innocent defendants.

Third, the proportionality requirement will serve to limit the effect of the lack of procedural protections for FCA defendants through its focus on culpability and the relationship between penalty and harm. The FCA allows for liability under a wide range of culpabilities. One defendant may be liable under the FCA for submitting a claim to the government with the thought that she may not be complying with some unrelated regulation.[305] She has no intent to defraud the government and arguably has not since she has provided the service for which she is charging the government. Another defendant may be liable under the FCA for submitting a claim to the government for services that he knows he did not provide.[306] He is intentionally defrauding the government. Yet despite the obvious difference in culpability between the former and latter, under the FCA, they both could

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301. *See* Andis Robeznieks, *Doctor Shortages Are Here—and They'll Get Worse if We Don't Act Fast*, AM. MED. ASS'N (Apr. 13, 2022), https://www.ama-assn.org/practice-management/sustainability/doctor-shortages-are-here-and-they-ll-get-worse-if-we-don-t-act [https://perma.cc/T8DQ-BW9U].

302. *See* Dayna Bowen Matthew, *Tainted Prosecution of Tainted Claims: The Law, Economics, and Ethics of Fighting Medical Fraud Under the Civil False Claims Act*, 76 IND. L.J. 525, 581–85 (2001).

303. *See* discussion *supra* Section I.B.

304. *See generally* Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 WASH. & LEE L. REV. 73 (2009).

305. *See* United States *ex rel.* Schutte v. SuperValu Inc., 598 U.S. 739, 757 (2023) ("For scienter, it is enough if respondents believed that their claims were not accurate."); Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 579 U.S. 176, 190 (2016) (upholding the validity of the implied certification theory); *see also supra* notes 65–66 and accompanying text.

306. *See supra* notes 62–64 and accompanying text.

face the same amount in civil penalties.[307] Likely, a court would impose a higher penalty on the latter,[308] but the FCA does not mandate such. The proportionality prong's emphasis on culpability will help to ensure that the civil penalties imposed on defendants adheres more closely to their culpabilities.

The harm to the government can also differ substantially in FCA cases. In some cases, there is no financial harm to the government at all,[309] or the difference between the services claimed and performed is only a few dollars.[310] Courts may attempt to distinguish cases like these, where the financial harm is de minimis, from *Bajakajian* to justify the imposition of civil penalties because even though the *Bajakajian* respondent also "caused no loss to the public fisc," *Bajakajian* did not involve "fraud on the United States."[311] But liability under the FCA is different: "Fraud harms the United States in ways untethered to the value of any ultimate payment."[312] This may be true, but FCA liability premised on theories such as implied false certification are arguably not fraud at all. Or at the very least, the harms wrought by such actions are significantly less severe than when a defendant acts with the specific intent to defraud the government, even if the FCA does not require such intent for liability.[313] When applying the Excessive Fines Clause and engaging in the proportionality analysis, courts should be vigilant about engaging with the particular facts of the instant case. Simply concluding that because fraud harms the government beyond financially, the Excessive Fines Clause permits a higher fine against a liable FCA defendant inadequately protects defendants under the Eighth Amendment. The Excessive Fines Clause demands nothing less than an evaluation of *the* defendant—not the general targets of the FCA.

The proper application of the Excessive Fines Clause to FCA awards involves not only a proportionality analysis but also a livelihood analysis. The combination of these two prongs and the rejection of substantial deference to Congress's set penalties will provide much-needed protection

307. The text of the False Claims Act does not provide any guidance regarding the imposition of penalties, *see* 31 U.S.C. § 3729, although courts do interpret the imposition of the penalties, within the range provided in the Act, as being mandatory and not discretionary, *see, e.g.*, United States v. Killough, 848 F.2d 1523, 1533 (11th Cir. 1988).

308. *See, e.g.*, Yates v. Pinellas Hematology & Oncology, P.A., 21 F.4th 1288, 1316 (11th Cir. 2021) ("In this case, the imposition of the lowest-possible monetary award—though, as the district court noted, 'very harsh'—properly balances the need to deter potential fraudsters with the gravity of Pinellas' conduct.").

309. *See, e.g.*, Hays v. Hoffman, No. 97-cv-1656, 2001 U.S. Dist. LEXIS 25701, at *7 (D. Minn. Aug. 22, 2001), *rev'd*, 325 F.3d 982 (2003).

310. *See, e.g.*, *Yates*, 21 F.4th at 1296.

311. United States v. Bajakajian, 524 U.S. 321, 339 (1998).

312. *Yates*, 21 F.4th at 1316.

313. 31 U.S.C. § 3729(b)(1)(B).

to FCA defendants. However, the Excessive Fines Clause is not the sole constitutional provision that may provide protection. The next Section identifies and describes another in the Due Process Clause.

B. Due Process

Turning to the application of the Due Process Clause to FCA sanctions, the Court's jurisprudence has made clear that arbitrary or grossly excessive punitive damages fail to satisfy the requirements of that Clause. However, articulating exactly what constitutes an arbitrary or grossly excessive punitive damages award has proven somewhat elusive. Thus, before delving into the application of the Due Process Clause to FCA sanctions, we first explore the motivating concerns behind the Court's limitations on punitive damages under the Due Process Clause.

1. The Importance of Predictability

In its most recent foray into the arena of punitive damages, the Supreme Court bluntly stated that "[t]he real problem, it seems, is the stark unpredictability of punitive awards."[314] And this general concern has animated most of the Court's attempts to limit awards it perceives as unpredictable and "grossly excessive." The Court first addressed punitive damages under the Due Process Clause in *Pacific Mutual Life Insurance v. Haslip*, holding that allowing juries to determine the amount of punitive damages did not violate due process.[315] The Court did, however, express a "concern about punitive damages that 'run wild,'" and considered whether the Due Process Clause imposes limits on punitive damages.[316] While the Court "[could not] draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable," it could "say . . . that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus."[317] After considering the various factors that juries were required to consider under state law before imposing punitive

314. Exxon Shipping Co. v. Baker, 554 U.S. 471, 499 (2008).

315. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 17 (1991) ("So far as we have been able to determine, every state and federal court that has considered the question has ruled that the common-law method for assessing punitive damages does not in itself violate due process. In view of this consistent history, we cannot say that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional." (citation omitted)).

316. *Id.* at 18.

317. *Id.*

damages,[318] the Court determined that "[t]he application of these standards . . . impose[d] a sufficiently definite and meaningful constraint on the discretion of . . . factfinders in awarding punitive damages."[319]

Returning to the Due Process Clause in *TXO Production Corp. v. Alliance Resources Corp.*,[320] the Court explained that certain awards may be so "'grossly excessive' as to violate the Due Process Clause of the Fourteenth Amendment."[321] Given this possibility, the Court reiterated its earlier decision in *Haslip*, noting that a "concern for reasonableness" motivates the inquiry into whether a "punitive award . . . [is] so 'grossly excessive' as to violate the substantive component of the Due Process Clause."[322] Though the defendant urged the Court to hold that the punitive award in *TXO*, which was 526 times larger than the compensatory award, was unreasonable, the Court declined that invitation. In so doing, the Court refused to say that the Due Process Clause imposes any kind of mathematical relationship between compensatory and punitive damages.[323] The Court similarly declined to articulate a clear, but non-mathematical, test of reasonableness and instead endorsed the factors in use by state courts to determine whether an award was reasonable.[324]

Taking issue with this approach, Justice O'Connor observed in dissent that "[a]s little as 30 years ago, punitive damages awards were 'rarely assessed' and usually 'small in amount'" but "[r]ecently . . . the frequency and size of such awards ha[d] been skyrocketing."[325] Importantly, Justice

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318. *See id.* at 21–22 ("It was announced that the following could be taken into consideration in determining whether the award was excessive or inadequate: (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the 'financial position' of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.").

319. *Id.* at 22.

320. 509 U.S. 443 (1993).

321. *Id.* at 458 (quoting Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 111 (1909)).

322. *Id.*

323. *Id.* at 458–59.

324. *Id.* at 459–60 (endorsing the approaches used by the Alabama and West Virginia Supreme Courts in determining the reasonableness of a particular punitive damages award). The Court further added that the size of the potential harm to the plaintiff could be relevant in the reasonableness determination as well. *Id.* at 462 ("Thus, even if the actual value of the 'potential harm' to respondents is not between $5 million and $8.3 million, but is closer to $4 million, or $2 million, or even $1 million, the disparity between the punitive award and the potential harm does not, in our view, 'jar one's constitutional sensibilities.'" (quoting *Haslip*, 499 U.S. at 18)).

325. *Id.* at 500 (O'Connor, J., dissenting) (quoting Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 2 (1982)).

O'Connor noted that this increase in frequency and size "ha[d] not been matched by a corresponding expansion of procedural protections or *predictability*."[326] She further explained that the Court's opinion in *TXO* failed to "make good on [the Court's earlier] promise" that courts would conduct meaningful reviews of punitive damages awards to "guarantee constitutional results."[327]

The Court began to take steps toward improving the predictability of awards and offering clearer guidance on reasonability and what constituted a "grossly excessive" punitive award in *BMW of North America, Inc. v. Gore*.[328] There the Court held that the ability of defendants to predict punitive awards motivates the constitutional protections against "grossly excessive" awards. The Court explained that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."[329] Offering more guidance on the determination of whether a given award was "grossly excessive," the Court articulated three "guideposts": (1) the "degree of reprehensibility" of the defendant's conduct, (2) the "disparity between the harm" caused by the defendant and the "punitive damages award," and (3) the "difference between [the punitive damages award] and the civil penalties authorized or imposed in comparable cases."[330] Expounding on these guideposts, the Court noted that "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."[331] The Court further explained that "exemplary damages must bear a 'reasonable relationship' to compensatory damages" and observed that the ratio of punitive to compensatory damages in this case was 500:1.[332] While declining again to offer a "mathematical formula" to "mark[]" the "constitutional line," the Court held that the 500:1 ratio between punitive and compensatory damages fell outside the constitutional range.[333]

326. *Id.* (emphasis added).
327. *Id.* at 501.
328. 517 U.S. 559, 568 (1996) ("[W]e believe[] that a review of this case would help to illuminate 'the character of the standard that will identify unconstitutionally excessive awards' of punitive damages." (quoting Honda Motor Co. v. Oberg, 512 U.S. 415, 420 (1994))).
329. *Id.* at 574.
330. *Id.* at 574–75.
331. *Id.* at 575.
332. *Id.* at 580–82.
333. *Id.* at 582–83. The Court also considered the third guidepost in reaching this conclusion. *See id.* at 583–84 ("In this case the $2 million economic sanction imposed on BMW is substantially greater than the statutory fines available in Alabama and elsewhere for similar malfeasance.").

The Court began to reverse course with respect to its refusal to provide a clear mathematical rule on what constituted an unreasonable punitive damages award in *State Farm v. Campbell*.[334] There, a Utah jury imposed compensatory and punitive damages of $2.6 million and $145 million, respectively.[335] After the trial court reduced the compensatory and punitive awards to $1 million and $25 million, respectively, the Utah Supreme Court reinstated the $145 million punitive damages award after applying the *Gore* decision.[336] Disagreeing with the Utah Supreme Court, the Supreme Court of the United States held that the punitive award in this case violated the Due Process Clause.[337] The Court emphasized its "concern[] over the imprecise manner in which punitive damages systems are administered,"[338] and applied the three guideposts from *Gore*. In this application, the second guidepost proved most relevant.[339] The Court "decline[d] again to impose a bright-line ratio which a punitive damages award cannot exceed," but it held that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[340]

The Court's ratio limit announced in *State Farm* leaves substantial room for interpretation and does not provide a bright line to separate clearly constitutional and clearly unconstitutional punitive awards.[341] Nevertheless, this fuzzy line remains the clearest statement from the Court on which awards violate the Due Process Clause and represents a clear indication of the Court's continued reliance on the importance of predictability in the

334. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).

335. *Id.* at 414–15.

336. *Id.* at 415–16.

337. *Id.* at 418 ("Under the principles outlined in *BMW of North America, Inc. v. Gore*, this case is neither close nor difficult. It was error to reinstate the jury's $145 million punitive damages award.").

338. *Id.* at 417–18.

339. Under the first guidepost, the Court concluded that while the conduct at issue in *State Farm* was reprehensible, it was not sufficiently reprehensible to support the punitive damages awarded. *Id.* at 419–20 ("While we do not suggest there was error in awarding punitive damages based upon State Farm's conduct toward the Campbells, a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further."). The Court declined to "dwell long on [the third *Gore*] guidepost" but noted that the Utah Supreme Court's "analysis [under this guidepost] was insufficient to justify the [punitive damages] award." *Id.* at 428.

340. *Id.* at 425; *see also id.* ("When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.").

341. *See id.* ("The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff."); *see also id.* ("Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' . . . When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996))).

awarding of punitive damages. From the defendant's perspective a rule (even a fuzzy rule) limiting punitive damages to a multiple of compensatory damages—which are generally easier to predict—allows them to cabin their forecasts of punitive damages to a narrower range.[342]

Though *State Farm*'s ratio limit remains the Court's clearest statement on "grossly excessive" and unpredictable awards, it has returned to punitive damages twice since that decision. First, in *Philip Morris USA v. Williams*, the Court held that courts may not impose punitive damages as punishment for actions that caused harm to nonparties.[343] Although the Court declined to delve into whether the award in *Williams* was "grossly excessive," it took the opportunity to reiterate its commitment to predictability in punitive damages awards generally.[344] The Court explained that it had "emphasized the need to avoid an arbitrary determination of an award's amount. Unless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of 'fair notice . . . of the severity of the penalty that a State may impose,' [and] it may threaten 'arbitrary punishments . . . .'"[345]

Next, in *Exxon Shipping Co. v. Baker*, the Court examined potential limits on punitive damages awards under federal maritime law. There, the Court sat as a common law court of last resort and did not examine the constitutionality of punitive awards explicitly.[346] However, its approach to punitive damages under maritime law nevertheless informs the concerns that underlie its approach to the same under the Due Process Clause.[347] The

342. *See* McMichael & Viscusi, *supra* note 141, at 184 ("Defendants, who are likely better able to forecast specific economic harms of their actions, can better predict punitive damages knowing that those damages are limited (in most cases) to a specific multiple of a forecastable dollar amount.").

343. Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007) ("In our view, the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation.").

344. *Id.* at 358 ("[W]e shall not consider whether the award is constitutionally 'grossly excessive.'").

345. *Id.* at 352 (quoting *Gore*, 517 U.S. at 574).

346. Exxon Shipping Co. v. Baker, 554 U.S. 471, 502 (2008) ("Our review of punitive damages today, then, considers not their intersection with the Constitution, but the desirability of regulating them as a common law remedy for which responsibility lies with this Court as a source of judge-made law in the absence of statute."); *see also id.* (declining to opine on "the constitutional significance of the unpredictability of high punitive awards").

347. *Compare id.* at 499 ("The real problem, it seems, is the stark unpredictability of punitive awards. Courts of law are concerned with fairness as consistency . . . ."), *with* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416–17 (2003) ("While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards. . . . The reason is that '[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.'" (quoting *Gore*, 517 U.S. at 574)).

Court emphasized the same problems with punitive damages under maritime law motivated its desire to limit these damages as under the Fourteenth Amendment.[348] Under maritime law, the Court explained, it simply had more options to address those problems.[349] Accordingly, while the limits on punitive damages imposed in *Exxon Shipping* may be more severe than those imposed under the Due Process Clause, the Court's analysis of the underlying problems is similar in both the maritime and constitutional contexts.

In *Exxon Shipping*, the Court explained that "a penalty should be reasonably predictable in its severity, so that even Justice Holmes's 'bad man' can look ahead with some ability to know what the stakes are in choosing one course of action or another."[350] In an effort to eliminate unpredictable penalties from maritime law, the Court first considered imposing "verbal" criteria for awarding punitive damages, such as tests for whether an award "shock[s] the conscience."[351] This and other "examples [left the Court] skeptical that verbal formulations, superimposed on general jury instructions, are the best insurance against unpredictable outliers."[352]

Instead of these "verbal" options, the Court decided that a quantitative limit on punitive damages would be more appropriate and turned to the empirical legal studies literature to determine the most appropriate restriction on punitive awards.[353] Relying on this literature and its analysis of punitive damages data, the Court concluded "given the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ratio, which is above the median award, is a fair upper limit in such maritime cases."[354] While the Court imposed a stricter limit on punitive damages under maritime law than the constitutional limit announced in *State Farm*, the Court's analysis clearly demonstrates the importance of predictability in determining the need for limits on

348. *See Exxon Shipping*, 554 U.S. at 503–14 (discussing similar concerns about punitive damages under maritime law as those that animated the Court's constitutional jurisprudence, particularly its decision in *State Farm*).

349. *Id.* at 506 ("This is why our better judgment is that eliminating unpredictable outlying punitive awards by more rigorous standards than the constitutional limit will probably have to take the form adopted in those States that have looked to the criminal-law pattern of quantified limits.").

350. *Id.* at 502 (quoting *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897)).

351. *Id.* at 503.

352. *Id.* at 504.

353. *Id.* at 512–13.

354. *Id.* at 513.

penalties—punitive damages or otherwise.[355] The next Section delves into the predictability of sanctions under the FCA and analyzes whether the lack of predictability in that context justifies similar limits as those placed on punitive damages.

2. Unpredictability and the Fat-Tailed Distribution of False Claims Act Sanctions

Given the importance of predictability to the Court's approach to punitive damages, a natural question arises as to the predictability of sanctions under the FCA. This question, in turn, raises the more general question about an appropriate method by which to determine whether damages, sanctions, or penalties are predictable. The Court's approach to punitive damages over the years offers little insight, as it has consistently relied on generalized, qualitative factors associated with its inquiry into whether each award was "grossly excessive." However, mathematicians and social scientists have developed more rigorous, quantitative techniques to measure the predictability of a set of awards.

Specifically, we explore the tails of the distribution of these sanctions. Most people are familiar, at least intuitively, with a normal distribution. With this distribution, most of the observations fall relatively close to the mean of the distribution. For example, the average height among males in the United States is 5'9".[356] Most men in the United States will fall fairly close to this mean because height is normally distributed. Moving further away from the mean height yields fewer and fewer people. Relatively few men, for example, are shorter than 4'7" or taller than 7'.

Unlike many phenomena in everyday life, catastrophic outcomes tend to follow power-law distributions. The United States Geological Survey, for example, estimates that the losses connected with floods, tornadoes, hurricanes, and earthquakes follow a power-law distribution.[357] "With these distributions, the event with the greatest impact may be several times as large as the next most significant event, which is a type of variation not

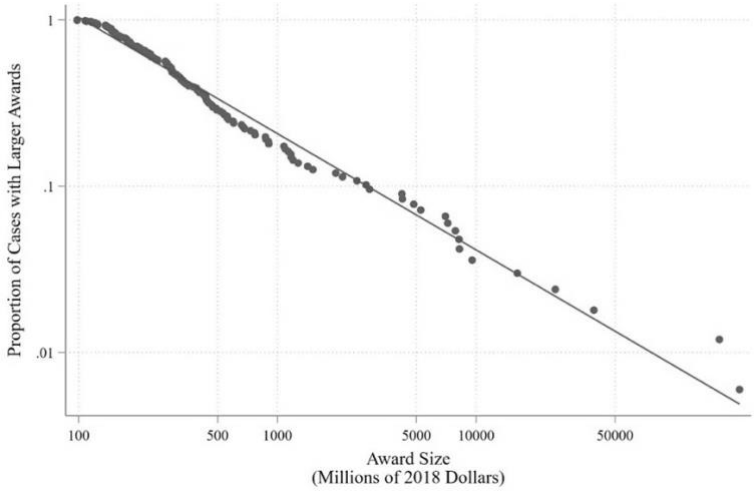
355. *Id.* at 514–15 ("And our explanation of the constitutional upper limit confirms that the 1:1 ratio is not too low. In *State Farm*, we said that a single-digit maximum is appropriate in all but the most exceptional of cases, and '[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.'" (quoting State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003))).

356. *Body Measurements*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 10, 2021), https://www.cdc.gov/nchs/fastats/body-measurements.htm [https://perma.cc/N57A-YD28].

357. *Natural Disasters—Forecasting Economic and Life Losses*, U.S. GEOLOGICAL SURV. (Nov. 29, 2016, 5:58 PM), https://pubs.usgs.gov/fs/natural-disasters/ [https://perma.cc/D4PC-2N86] ("Earthquakes are examples of complex natural high-energy phenomena whose cumulative size-frequency distributions have long been known to exhibit fractal (power-law) scaling properties.").

exhibited by events that adhere to a normal distribution."[358] Prior work has found that blockbuster punitive damages awards follow a power-law distribution,[359] and Figure 4 reports what that research calls the inverse cumulative density function. An inverse cumulative density function reports "the size of [each] award (plotted along the horizontal axis) and the proportion of awards that are smaller (plotted along the vertical axis)."[360] In this way, it summarizes how much bigger the awards in the tail are than the next largest award. Because of the extreme sizes of these awards, we follow previous work and calculate the logarithm of award sizes to compress the tails and make the distribution more readable.[361] Figure 4 demonstrates the potential for huge awards at the tail of the distribution of blockbuster punitive damages awards. Near the tail, the largest awards tend to be much larger than the next largest award, which makes these awards difficult to predict, particularly among individuals who may assume these awards follow a normal distribution.

FIGURE 4: FAT-TAILED DISTRIBUTION OF BLOCKBUSTER PUNITIVE DAMAGES AWARDS



Notes: Each point represents a single blockbuster punitive damages award. The line represents the logarithmic function of best fit and appears linear because the horizontal axis has a logarithmic scale.

358. W. Kip Viscusi & Benjamin J. McMichael, *Shifting the Fat-Tailed Distribution of Blockbuster Punitive Damages Awards*, 11 J. EMPIRICAL LEGAL STUD. 350, 354 (2014).

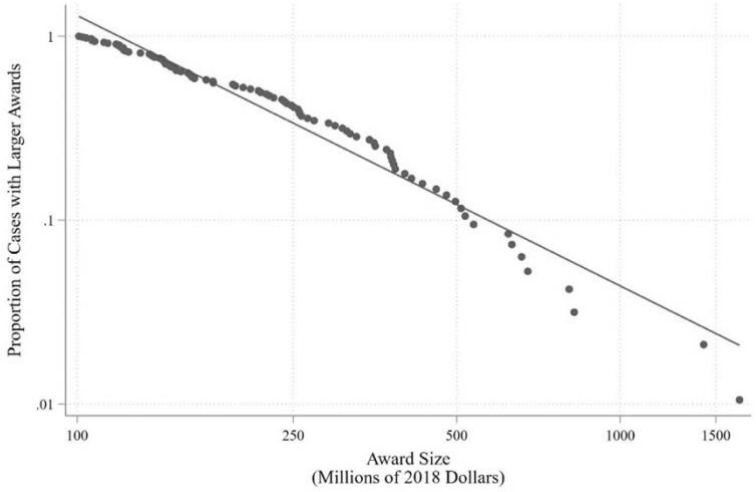
359. *Id.* at 355 ("Instead of a normal distribution, or even a lognormal distribution, a power-law distribution best describes blockbuster awards.").

360. *Id.*

361. *Id.* at 355–56.

Extending the analysis of the unpredictability of punitive damages awards to FCA sanctions, Figure 5 reports the inverse cumulative density function of these sanctions. As with blockbuster punitive damages awards, the largest single-case FCA sanctions tend to be much larger than the next largest sanctions in the tail of the distribution. "With such large [sanctions] possible, defendants will likely not be able to predict what amount of monetary liability they may face for their actions."[362] In general, then, FCA sanctions exhibit the same type of lack of predictability seen in blockbuster punitive damages. And given the importance of predictability in the Supreme Court's punitive damages jurisprudence, the next logical step is extending that jurisprudence to FCA sanctions. The next Subsection addresses this extension.

FIGURE 5: FAT-TAILED DISTRIBUTION OF FALSE CLAIMS ACT AWARDS



Notes: Each point represents a single False Claim Act award. The line represents the logarithmic function of best fit and appears linear because the horizontal axis has a logarithmic scale.

3. *Applying Due Process Limitations to Sanctions Under the False Claims Act*

Because predictability underlies the Court's due process jurisprudence on punitive damages and because FCA sanctions are similarly unpredictable, the next steps are straightforward: Apply the due process

362. *Id.* at 356.

limitations developed for punitive damages to sanctions under the FCA. As noted above, those limitations come in the form of three guideposts. The third guidepost is not particularly helpful in the context of the FCA since it pertains to civil penalties. Obviously, FCA sanctions are, themselves, civil penalties, and the Court would have to extend its limitations to them nevertheless. Doing so is certainly justified based on their unpredictability, and the Court could simply ignore the third guidepost for the purpose of limiting FCA sanctions and restoring predictability.

Turning to the first two *Gore* guideposts, both militate in favor of strong limits on FCA sanctions. The first concerns the degree of reprehensibility of the defendant's conduct,[363] and under this guidepost, most instances of fraud—certainly technical fraud where noncompliance with complex statutes are the basis of such fraud—do not involve what the Court would consider reprehensible conduct.[364] In general, violations of the FCA cause economic, not physical, harm; do not generally "evince[] . . . a reckless disregard of the health or safety of others"; do not involve targets that are financially vulnerable (since the target is the federal government); and do not necessarily involve "trickery" or "deceit" because the FCA's scienter requirement does not require this type of behavior or intent.[365] All these considerations favor stricter limits on FCA sanctions generally. Thus, the question becomes what types of limits should courts apply in most cases. The second guidepost offers relatively clear guidance on that issue.

To measure disparity between the harm caused by the defendant and the punitive damages award, the Court has focused on the ratio between compensatory and punitive damages. In doing so, the Court has expressed a clear willingness to follow the economic theory of punitive damages.[366] In

363. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996) ("[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.").

364. *See id.* at 575–80 (describing "the aggravating factors associated with particularly reprehensible conduct is present," such as harm more than "purely economic in nature" and "deliberate false statement[s]").

365. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003) ("We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." (citing *Gore*, 517 U.S. at 576–77)).

366. First, the Court relied explicitly on an empirical study of punitive damages in reaching its conclusion in *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 499 (2008) ("A recent comprehensive study of punitive damages awarded by juries in state civil trials found a median ratio of punitive to compensatory awards of just 0.62:1, but a mean ratio of 2.90:1 and a standard deviation of 13.81." (citing Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 J. EMPIRICAL LEGAL STUD. 263, 269

particular, the Court in *State Farm* "decline[d] . . . to impose a bright-line ratio which a punitive damages award cannot exceed" but held that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[367] Based on the Court's willingness to rely on economic theory, the usefulness of that theory, and the relevance of the punitive to compensatory damages ratio, we apply economic theory to that ratio to gain clearer insight into the potential role of the second guidepost in restraining FCA sanctions.

For the purposes of this theory, let p denote the probability with which the defendant faces liability, *CD* denote the compensatory damages, and *PD* denote the punitive damages.[368] Using this notation, the defendant's expected liability is $p * CD$. Under the assumption that the court will correctly calibrate the compensatory award, so that it accurately represents the harm the defendant imposes on society, the defendant's incentives to avoid or mitigate this harm are not aligned with those of society. This misalignment occurs because defendant conducts any cost-benefit analysis using $p * CD$ as the relevant cost instead of *CD*, i.e., the defendant discounts the harm he or she imposes on society the probability that he or she faces liability. To adjust the defendant's incentives and correct for this discounting, a court can impose punitive damages of PD, such that the defendant pays $CD + PD$ instead of only *CD*. Thus, the defendant faces expected liability of $p * (CD + PD)$.

The question then becomes at what level should the court set PD. To perfectly realign the defendant's incentives with those of society, the amount of PD should return the defendant's expected liability costs to society's cost. To do so, a court can set the costs to society, *CD*, equal to the costs the defendant must pay discounted by the probability of liability: $CD = p * (CD + PD)$. Rearranging this equation offers a simple formula for calculating the optimal amount of punitive damages: $PD = (\frac{1-p}{p}) * CD$. In other words, a court should set punitive damages at a level determined

(2006))). Second, the Court delved into the ratio between compensatory and punitive damages based on the economic theory of optimal deterrence (in addition to the promotion of predictability). *Id.* at 513 ("On these assumptions, a median ratio of punitive to compensatory damages of about 0.65:1 probably marks the line near which cases like this one largely should be grouped. Accordingly, given the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ratio, which is above the median award, is a fair upper limit in such maritime cases." (footnote omitted)).

367. *State Farm*, 538 U.S. at 425.

368. STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 243–47 (2004); Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. LEGAL STUD. 1, 3–4 (2004); *see also* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 887–96 (1998) (offering an in-depth discussion of the theory of punitive damages).

by the amount of compensatory damages multiplied by an amount that depends on the probability of liability.[369] This amount is "optimal" in the sense that, if awarded, this amount of punitive damages returns the defendant's expected liability, $p * (CD + PD)$, back to the amount of harm the defendant actually inflicts on society, *CD*,[370] and thereby induces the defendant to take the appropriate amount of care.[371]

We can further rearrange the above equation to derive an expression for the punitive to compensatory damages ratio: $\frac{PD}{CD} = (\frac{1-p}{p})$. Thus, the *State Farm* Court limited $(\frac{1-p}{p})$ to a single digit, i.e., $\left(\frac{1-p}{p}\right) < 10$. Mathematically, there is no justification for limiting this ratio to a single digit if the only goal is punishment and deterrence, as this ratio can vary from zero to positive infinity. If, however, the court is concerned with tempering the goals of punishment and deterrence in favor of promoting predictability in punitive damages as it has said, then limiting this ratio to a single digit is certainly warranted.

Applying this limit to FCA sanctions to similarly restore predictability is straightforward, and predictability may also benefit courts who can simply implement a rule instead of developing complex new case guidance. The compensatory component of those sanctions stands in for compensatory damages, and the punitive component stands in for punitive damages. A simple example may help illustrate this application and some of the issues with FCA sanctions when this single-digit ratio is not in place. Consider a claim submitted to Medicare for $1,000. Under our conservative assumption that the entirety of the treble damages is compensatory in nature, the compensatory portion of FCA sanctions will amount to $3,000. If a court applies the minimum sanction, the punitive portion of the FCA sanctions will amount to $13,508, yielding a punitive to compensatory ratio of about 4.5. Applying the maximum $27,018 penalty yields a ratio of about 9. Relaxing our conservative assumption that the treble damages serve an entirely compensatory function to assume they serve a punitive function yields a ratio of 29, which violates the single digit requirement by nearly a factor of three.

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369. *See* Polinsky & Shavell, *supra* note 368, at 874 ("When an injurer has a chance of escaping liability, the proper level of *total damages* to impose on him, if he is found liable, is the harm caused multiplied by the reciprocal of the probability of being found liable.").

370. In particular, plugging this optimal amount of punitive damages into the defendant's expected liability yields: $p * (CD + PD_{optimal}) = p * \left(CD + \left(\frac{1-p}{p}\right) * CD\right) = p * CD + (1-p) * CD = CD + p * CD - p * CD = CD$.

371. Hersch & Viscusi, *supra* note 368, at 3.

Generalizing this simple example, it is possible to derive a series of thresholds that, under different assumptions, yield a punitive-to-compensatory ratio that presumptively violates due process. Focusing first on the case where the treble damages are entirely compensatory and a court imposes the maximum per claim penalty, the punitive-to-compensatory ratio for a claim of $\$x$ can be expressed as $\frac{27{,}018}{3x}$. Assuming that this ratio must be less than 10 to comport with due process, we can solve the inequality, $\frac{27{,}018}{3x} < 10$, to conclude that any claim less than about $90 will lead to a presumptively unconstitutional imposition of sanctions under the FCA.

Table 2 reports the values above which individual claims under the FCA will presumptively violate due process under the assumptions that the court imposes the minimum and maximum monetary penalty and the assumptions that the treble damages are compensatory and punitive.[372] Each threshold in Table 2 represents the amount below by which a claim subject to the FCA will presumptively violate the due process requirements outlined by the Court in *State Farm*. The lowest amount is $45.03, and the largest amount is $3,377.25. This information is relevant for the purposes of constitutional analysis, but, more importantly, these amounts have important implications for the functioning of the healthcare system. The next Section explores these implications as well as the importance of imposing constitutional restrictions on FCA sanctions more generally.

TABLE 2: DUE PROCESS THRESHOLD AMOUNTS

Penalty Amount	Treble Damages	Claim Threshold
$ 13,508	Compensatory	$ 45.03
$ 27,018	Compensatory	$ 90.06
$ 13,508	Punitive	$ 1,688.50
$ 27,018	Punitive	$ 3,377.25

Notes: Each threshold amount represents the smallest claim that can be filed and still satisfy the due process requirements outlined by the Supreme Court in State Farm*. Any claim amount over the given threshold will presumptively violate the Constitution. All amounts are expressed in 2023 dollars and are based on the most recently available monetary penalty amounts available under the FCA.*

372. Under the assumption that treble damages are punitive in nature, that means that a claim of $\$x$ includes a compensatory portion of $\$x$ and a punitive portion of $\$(2x + 27{,}018)$ if a court elects to impose the maximum per claim penalty. This yields a punitive-to-compensatory ratio of $\frac{2x+27{,}018}{x}$. See *supra* Section III.A for a discussion of whether to classify the treble damages as compensatory or punitive.

C. Implications of Constitutional Limitations for the Healthcare System

While the FCA applies to all claims submitted for payment by the government, it is particularly relevant for the healthcare system. Because so many individual and institutional healthcare providers routinely submit claims to government healthcare programs, the threat of FCA sanctions is both very real and may affect the ability of these providers to continue delivering health care. Two groups of vulnerable healthcare providers may be particularly sensitive to the FCA and therefore need greater protections from its potentially arbitrary and unpredictable sanctions: primary care providers and rural hospitals.

Focusing first on primary care providers, these individuals represent the front lines of the healthcare system and care for a wide range of patients in a wide range of settings. Unfortunately, primary care providers are becoming an increasingly endangered species of healthcare provider. The president of the American Medical Association recently noted that "more than 83 million people in the U.S. currently live in areas without sufficient access to a primary care physician."[373] The Association of American Medical Colleges projects "[a] primary care physician shortage of between 17,800 and 48,000 . . . by 2034."[374]

Given these shortages and the importance of primary care in the healthcare system, policy should be particularly sensitive to protecting these providers. However, the structure of FCA sanctions is calibrated to have the exact opposite effect. Healthcare providers bill Medicare based on the individual services they provide, and each service has a specific reimbursement amount attached to it.[375] More complex services like surgeries and complicated non-surgical procedures have higher reimbursement rates than office visits and the evaluation and management services provided by primary care providers.[376] Thus for any given number of services submitted for reimbursement, primary care physicians (who receive a lower reimbursement per service) are more likely to be subject to unconstitutional sanctions under the FCA and are more likely to have a

373. Press Release, Am. Med. Ass'n, AMA President Sounds Alarm on National Physician Shortage (Oct. 25, 2023), https://www.ama-assn.org/press-center/press-releases/ama-president-sounds-alarm-national-physician-shortage [https://perma.cc/96ZQ-33NF].

374. IHS MARKIT LTD., THE COMPLEXITIES OF PHYSICIAN SUPPLY AND DEMAND: PROJECTIONS FROM 2019 TO 2034, at viii (2021), https://digirepo.nlm.nih.gov/master/borndig/9918417887306676/9918417887306676.pdf [https://perma.cc/5BLP-NS25].

375. The Centers for Medicare and Medicaid Services provide information on the physician fee schedule each year. *See Calendar Year (CY) 2023 Medicare Physician Fee Schedule Final Rule*, CTRS. MEDICARE & MEDICAID SERVS. (Nov. 1, 2022), https://www.cms.gov/newsroom/fact-sheets/calendar-year-cy-2023-medicare-physician-fee-schedule-final-rule [https://perma.cc/8GHR-N3R3].

376. *Id.*

larger percentage of their claims to serve a punitive purpose (because the size of the monetary penalty is not tied to the size of the claim).

Recent research "estimate[d] the influence of healthcare policies on these earnings, physicians' labor supply, and allocation of talent" and concluded that "health policy has a major impact" on these important outcomes.[377] Given the size of FCA sanctions, they have the potential to meaningfully impact the delivery of healthcare, particularly in primary care where they may induce physicians to choose alternative specialties or decrease the amount of care they supply. Based on this important consideration, moving forward with limitations on FCA sanctions may be justified on policy grounds in addition to constitutional ones.

Moving to rural hospitals, which are similarly becoming an increasingly endangered species of hospital,[378] FCA sanctions have the potential to shift decisions of where rural residents can access care from the healthcare system to the legal system. A recent Fourth Circuit case is instructive on this issue. In *U.S. ex rel. Drakeford v. Tuomey*, a *qui tam* relator asserted an FCA claim against Tuomey Healthcare System ("Tuomey"), "a nonprofit hospital located in Sumter, South Carolina, a small, largely rural community that is a federally-designated medically underserved area."[379] Individual physicians began to perform surgeries at outpatient surgery centers instead of at Tuomey, leading to a decrease in revenues for the rural hospital.[380] In an attempt to entice physicians, "Tuomey sought to negotiate part-time employment contracts with a number of local physicians."[381] Ultimately, these contracts violated the byzantine Stark Law, which "prohibits physicians from making referrals to entities where '[t]he referring physician . . . receives aggregate compensation . . . that varies with, or takes into account, the volume or value of referrals or other business generated by the referring physician for the entity furnishing' the designated health services."[382]

The relator pursued the claim, and Tuomey found itself facing FCA sanctions for 21,730 claims (which had been submitted to Medicare). The

377. Joshua D. Gottlieb, Maria Polyakova, Kevin Rinz, Hugh Shiplett & Victoria Udalova, *Who Values Human Capitalists' Human Capital? The Earnings and Labor Supply of U.S. Physicians* (Nat'l Bureau of Econ. Rsch., Working Paper No. 31469, 2023), https://www.nber.org/papers/w31469 [https://perma.cc/NJJ9-M8ZR].

378. *194 Rural Hospital Closures and Conversions since January 2005*, CECIL G. SHEPS CTR. FOR HEALTH SERVS. RSCH., https://www.shepscenter.unc.edu/programs-projects/rural-health/rural-hospital-closures/ [https://perma.cc/9JPX-RUHF] (as of Oct. 24, 2024).

379. 792 F.3d 364, 370 (4th Cir. 2015).

380. *Id.* ("Tuomey estimated that it stood to lose $8 to $12 million over a thirteen-year period from the loss of fees associated with gastrointestinal procedures alone.").

381. *Id.* at 370–71.

382. *Id.* at 371 (quoting 42 C.F.R. § 411.354(c)(2)(ii) (2024)).

district court awarded and the Fourth Circuit upheld "damages and civil penalties totaling $237,454,195."[383] Before the case concluded, Tuomey warned that it would be forced to close if required to pay such a draconian amount.[384] Sounding the alarm more generally, Judge Wynn concurred in the Fourth Circuit's opinion "to emphasize the troubling picture [the] case paints: An impenetrably complex set of laws and regulations that will result in a likely death sentence for a community hospital in an already medically underserved area."[385] Judge Wynn further opined that "the Stark Law has become a booby trap rigged with strict liability and potentially ruinous exposure—especially when coupled with the False Claims Act."[386]

Judge Wynn is quite correct, and the fact that the unrestricted FCA has come to govern which rural hospitals may survive and which may not is particularly problematic given who decides to bring FCA actions. Neither individual relators nor U.S. attorneys have the expertise, capacity, or even incentives to determine whether a given community needs access to the services provided by rural hospitals. They are not trained in healthcare policy and lack access to detailed data on what will happen to communities who lose access to their rural hospitals following ruinous FCA sanctions. More importantly, the incentives of relators and U.S. attorneys favor increased recovery, whatever the consequences to an individual community.

Imposing constitutional limits on sanctions under the FCA has the potential to remove the authority of the legal system to make decisions that are clearly best left to the healthcare system. With these limitations in place, the government can continue to recover damages when it has been defrauded. However, these damages will bear a closer resemblance to the actual amount of money needed to compensate the government and avoid the very real possibility that an individual relator or U.S. attorney makes the catastrophic decision to eliminate a rural hospital from a community that needs it.

While imposing constitutional limits on FCA sanctions has important benefits beyond ensuring due process and protecting individuals and entities from excessive fines by promoting better access to health care, these limits are not without costs. For example, Jetson Leder-Luis estimates "that deterrence from $1.9 billion in whistleblower settlements generated

383. *Id.* at 370.

384. Julie Bird, *Tuomey Healthcare Warns It Will Close if Forced to Pay $237.5M Medicare Fraud Judgment*, FIERCE HEALTHCARE (Jan. 6, 2014, 5:20 PM), https://www.fiercehealthcare.com/finance/tuomey-healthcare-warns-it-will-close-if-forced-to-pay-237-5m-medicare-fraud-judgment [https://perma.cc/28HK-TTQ8].

385. *Tuomey*, 792 F.3d at 390 (Wynn, J., concurring).

386. *Id.* at 395.

Medicare cost savings of nearly $19 billion."[387] On its face, our proposed constitutional limits on FCA sanctions appears to risk removing the incentives individual relators have to file suit, though it is worth noting that unpredictable outlier sanctions do not promote deterrence.

However, this is not necessarily the case. The issues we identify in our analysis stem from the abrogation of defendants' rights to due process and to be protected against excessive fines. These rights necessarily require the large damages awards that have come to define the FCA to shrink, but they do not necessarily mean that relators can no longer receive large incentive payments for identifying and prosecuting fraud. Instead of relying on large awards of damages and sanctions as the source of these large incentive payments, the government could simply pay individual relators out of the savings generated from fraud reductions. Indeed, Leder-Luis identifies these large incentive payments as an important source of encouragement that results in meaningful deterrence. He finds that for every one dollar recovered, another ten are saved from reduction in future fraud.[388] The government could easily convert these cost savings into incentive payments to relators. Through this approach, the FCA could continue to serve a fraud reduction purpose while defendants are simultaneously able to enjoy their constitutional rights. In other words, our proposal is consistent with the government's continued ability to combat fraud—though we do not opine on whether everything currently defined as fraud deserves to be so defined.

CONCLUSION

The FCA is one of the most important, if not the most important, source of liability in the healthcare system, and it touches many other industries that substantially involve government payments. Congress amended this century-plus old statute in the 1980s to create one of the most potent weapons in the government's legal arsenal. In doing so, however, Congress created a statutory scheme that facilitates the imposition of huge, unpredictable, and arbitrary awards. Our novel constitutional analysis offers a way to rein in a runaway statute.

Every FCA award includes two components: a compensatory award and a punitive sanction. By separating the two, we offer an analytic framework of the FCA that is susceptible to the application of both the Excessive Fines Clause and Due Process Clause. Importing those constitutional restrictions to the FCA offers different avenues of protection and at least one will apply whether courts interpret sanctions under the FCA as akin to criminal fines

387. Leder-Luis, *supra* note 133, at 1.
388. *See id.*

or civil damages. In either case, the Constitution provides for meaningful constraints on FCA sanctions, and we offer federal courts a clear path to applying those restrictions.