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A Framework for Assessing Whether Civil Penlities Under the False Claims Act Violate the Excessive Fines Clause of the Eighth Amendment

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A FRAMEWORK FOR ASSESSING WHETHER CIVIL PENALTIES UNDER THE FALSE CLAIMS ACT VIOLATE THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT

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I. INTRODUCTION

The False Claims Act ("FCA")[1] is the government's primary tool for combatting fraud and recovering ill-gotten gains.[2] In 1986, to combat rising fraud, Congress overhauled the FCA.[3] One key purpose of the amendments was to increase the amount of damages and civil penalties imposed for violations. As a result of the amendments, damages increased from double to triple and civil penalties increased from $2,000 to a mandatory civil penalty of "not less than $5,000 and not more than $10,000" for each violation of the FCA. Because many fraud schemes are large and remain undetected for years, the number of civil penalties often rises into the hundreds or thousands. Thus, fraudsters may face millions of dollars in civil penalties. Defendants have questioned whether the civil penalties provision violates the Excessive Fines Clause of the Eighth Amendment, which provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[4]

Although the Supreme Court has indicated that the clause could apply to the FCA, it has yet to provide definitive guidance. To date, only a

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1. *See generally* 31 U.S.C. § 3729.

2. Avco Corp. v. U.S. Dep't of Just., 884 F.2d 621, 622 (D.C. Cir. 1989) ("The False Claims Act is the government's primary litigative tool for the recovery of losses sustained as the result of fraud against the government.").

3. Joel D. Hesch, *Allowing Whistleblowers to Copy Company Documents to File Qui Tam Complaints Under the False Claims Act When Reporting Medicare Fraud*, 13 LIBERTY U. L. REV. 265, 270 (2019).

4. U.S. CONST. amend. VIII. The Supreme Court has dispelled arguments that the award of civil penalties could violate either the Fifth Amendment or the Double Jeopardy Clause. Hudson v. United States, 522 U.S. 93 (1997). Lower courts have interpreted *Hudson* as rejecting Double Jeopardy. *See, e.g.*, United States v. Lippert, 148 F.3d 974 (8th Cir. 1998); United States v. Sazama, 88 F. Supp. 2d 1270 (D. Utah 2000).

handful of circuit courts have tackled the topic. Each court applied a variation of common factors, and each found that the penalties in the cases before them were permissible. However, the circuit courts have not provided guidance on the extent to which the clause could apply to the FCA. This article recommends factors courts should use and provides a framework to guide practitioners and courts for awarding appropriate civil penalties under the FCA without violating the Excessive Fines Clause. Section II of this article states the history and role of the civil penalty provision. Section III analyzes the generalized two-part test suggested by the Supreme Court for the Excessive Fines Clause. Section IV proposes a framework to apply the test to FCA cases to guide courts and practitioners for determining when FCA recoveries become excessive and proposes ways to avoid running afoul of the Constitution. Section IV also applies the framework to hypothetical examples and facts from representative circuit court cases. Section V explains how defendants can avoid the full measure of FCA penalties. Finally, Section VI contains the conclusion.

II. HISTORY OF CIVIL PENALTIES UNDER THE FALSE CLAIMS ACT

The False Claims Act was first enacted in 1863 by President Abraham Lincoln to combat widespread fraud against the military during the Civil War.[5] Originally, the FCA provided for payment of double damages as a result of false claims, plus a $2,000 forfeiture for each claim.[6] However, the FCA sat dormant from 1943 to 1986 because other provisions were too strict to attract whistleblowers.[7] In 1986, Congress modernized the FCA to address escalating fraud.[8] Congress raised the amount of damages and penalties by increasing recovery from double to treble damages.[9] It also raised the statutory penalty from $2,000 to a range of between $5,000

5. Joel D. Hesch, *Understanding the Revised Reverse False Claims Provision of the False Claims Act and Why No Proof of a False Claim Is Required*, 53 J. MARSHALL L. REV. 461, 464 (2021) (citing S. REP. NO. 99-345, at 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273); United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994) ("The False Claims Act of 1863 was adopted during the Civil War in order to combat fraud and price-gouging in war procurement contracts.").

6. S. REP. NO. 99-345, at 17 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5282.

7. Hesch, *supra* note 3, at 270. For instance, "in 1943, Congress amended the FCA to include a jurisdictional bar amending the eligibility aspect by prohibiting suits 'based on information in the possession of the Government . . . .'" Joel D. Hesch, *Breaking the Siege: Restoring Equity and Statutory Intent to the Process of Determining Qui Tam Relator Awards Under the False Claims Act*, 29 T.M. Cooley L. Rev. 217, 231 (2012) (The 1943 amendments also contained low reward percentages, ranging from 0% to 10% for an intervened case). *Id.* at 219.

8. Avco Corp. v. U.S. Dep't of Just., 884 F.2d 621, 622 (D.C. Cir. 1989).

9. S. REP. NO. 99-345, at 17 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5282. The FCA is codified at 31 U.S.C. § 3729 et seq. Treble damages and civil penalties are found at 31 U.S.C. § 3729(a)(1) .

and $10,000.[10] In addition, Congress made the imposition of penalties mandatory.[11] Due to continual inflation, in 1990, Congress required that civil penalties be adjusted for inflation every four years.[12] Over the years, civil penalties have increased to the range of between $11,803 and $23,607.[13]

III. ANALYZING THE SUPREME COURT'S *BAJAKAJIAN* TWO-PART TEST FOR DETERMINING WHETHER A PENALTY VIOLATES THE EXCESSIVE FINES CLAUSE

When facing an excessive fines argument in a FCA setting, two issues arise: (1) what portion of FCA remedies are subject to the Excessive Fines Clause; and (2) whether the penalty portion of the total FCA judgment violates the Excessive Fines Clause. While the Supreme Court has not directly tackled whether penalties under the FCA are subject to the Excessive Fines Clause, it has provided guidance on the issue in other settings. The Supreme Court, in its landmark case *United States v. Bajakajian*, established a two-part test for determining whether a penalty violates the Excessive Fines Clause.[14] At issue in *Bajakajian* was a criminal forfeiture.[15] The defendant attempted to leave the United States without reporting, as required by federal law, that he was transporting more than $10,000 in currency.[16] A grand jury indicted the defendant for

10. S. REP. NO. 99-345, at 17 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5282.

11. *Id.* ("The Committee reaffirms the apparent belief of the act's initial drafters that defrauding the Government is serious enough to warrant an automatic forfeiture rather than leaving fine determinations with district courts, possibly resulting in discretionary nominal payments."). The House Judiciary Committee Report observed that $2,000 in 1863 would amount to $18,000 in 1986. Pub. L. No. 104-410, 104 Stat. 890-92.

12. Pub. L. No. 104-410, 104 Stat. 890-92.

13. The Federal Civil Penalties Inflation Act of 1990 limited the initial adjustment to no more than 10 percent of the penalty. Pub. L. No. 104-410, 104 Stat. 890 to 92. The Department of Justice initially increased the penalties under the False Claims Act by the maximum amount of 10 percent. 28 C.F.R. § 85.3(a)(9) (2010). As adjusted at that time, the penalties are not less than $5,500 and not more than $11,000 per violation. *Id.* Subsequent adjustments, raising the minimum penalty to $10,871 and maximum to $21,563, became effective August 1, 2016 and apply to violations after November 2, 2015. 28 C.F.R. § 85.3(a)(9) (2010); 81 Fed. Reg. 42491 (June 30, 2016); *see also* 28 C.F.R. § 85.5. Penalties for violations occurring after November 2, 2015 and assessed after February 3, 2017 were set at the range of $10,957 to $21,916. 82 Fed. Reg. 9131 (Feb. 2, 2017). Penalties for violations occurring after November 2, 2015 and assessed after January 29, 2018 were set at the range of $11,181 to $22,363. 83 Fed. Reg. 3944 (Jan. 29, 2018). Penalties for violations occurring after November 2, 2015 and assessed after June 19, 2020 are at the range of $11,665 to $23,331. 85 Fed. Reg. 37004 (June 19, 2020). Penalties for violations occurring after November 2, 2015 and assessed after December 13, 2021 are set at the range of $11,803 to $23,607. 86 Fed. Reg. 70740 (Dec. 13, 2021).

14. United States v. Bajakajian, 524 U.S. 321, 324 (1998). The constitutionality of a damages award is a legal question that appellate courts review *de novo*. *See* Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 436 (2001).

15. *Bajakajian*, 524 U.S. at 324.

16. *Id.* at 324-25.

willfully failing to report $357,144.[17] After a bench trial, the district court found that the entire $357,144 was subject to forfeiture.[18] The issue before the Court was whether the forfeiture violated the Excessive Fines Clause.[19]

The Court observed that "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principal of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense it is designed to punish."[20] It found that "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of the defendant's offense."[21] Thus, a fine is unconstitutionally excessive if (1) the fine constitutes a punishment; and (2) it is grossly disproportionate to the gravity of the offense.[22]

Applying the test to the forfeiture in *Bajakajian*, the Court held that the forfeiture was a punishment[23] and grossly disproportionate to the gravity of the offense.[24] With respect to the "punishment" element, the Court distinguished fines that punish from those that serve remedial purposes.[25] A fine that serves as "an additional sanction" above and beyond the original sentence or one that seeks to deter illicit conduct is considered a punishment.[26] In contrast, a fine that serves the purpose of compensating the government for losses to the treasury is considered remedial.[27] The *Bajakajian* Court found that the government's confiscation of the defendant's $357,144 was a punishment.[28] The Court reasoned that "[a]lthough the [g]overnment has asserted a loss of information regarding the amount of currency leaving the country, that loss would not be remedied by the [g]overnment's confiscation of [the defendant's] $357,144."[29]

The Court then assessed whether the punishment was "grossly disproportionate to the gravity of the offense."[30] In doing so, the Court considered three factors: (1) the seriousness of the defendant's offense; (2) the harm caused; and (3) the maximum penalty faced.[31] The Court

17. *Id.* at 325.
18. *Id.*
19. *Id.* at 324.
20. *Id.* at 334 (citing Austin v. United States, 509 U.S. at 602, 622-23 (1993)).
21. *Id.*
22. Mackby v. United States (*Mackby I*), 261 F.3d 821, 830 (9th Cir. 2001).
23. *Bajakajian*, 524 U.S. at 328.
24. *Id*. at 339.
25. *Id.* at 328-29.
26. *Id.*
27. *Id.* at 329.
28. *Id.* at 328.
29. *Id.* at 329.
30. *Id.* at 337.
31. *Id.* at 337-40.

observed that the defendant's crime was solely a reporting offense,[32] the harm he caused was minimal,[33] and the maximum sentence that could have been imposed was six months with a maximum fine of $5,000.[34] Accordingly, the Court found that a forfeiture of $357,144 was grossly disproportionate to the gravity of the defendant's technical offense.[35]

The next parts evaluate how to adapt this two-part test and accompanying factors to the congressionally mandated treble damages plus civil penalties under the FCA.

A. Do Any Portion of FCA Recoveries Constitute a Punishment?

It is important to correctly identify what portion of FCA recoveries constitute a punishment for two reasons. First, any remedial portion is not subject to the Excessive Fines Clause.[36] Second, assessing whether the punitive amount is grossly disproportionate to the gravity of the offense often involves comparing the relationship between the remedial and punitive portions of the total FCA judgment. The FCA mandates that a defendant pay both treble damages and civil penalties. The starting point is determining what portion of the total judgment is punitive.

1. Civil Penalties are Punitive

Civil penalties under the FCA are "punitive."[37] Indeed, the handful of circuit courts that have addressed the issue have found that the FCA's civil penalties are punitive in nature—and are thus subject to the Excessive Fines Clause.[38]

32. *Id.* at 337.
33. *Id.* at 338.
34. *Id.*
35. *Id.* at 339-40.
36. The clause only applies to fines, not restitution or remedial recoveries: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. XVIII; *see also* United States *ex rel.* Drakeford v. Tuomey, 792 F.3d 364, 387-89 (4th Cir. 2015) (finding that relator share is remedial not punitive portion of the total recover).
37. United States *ex rel*. Bunk v. Gosselin World Wide Moving N.V., 741 F.3d 390, 409 (4th Cir. 2013); United States v. Aleff, 772 F.3d 508, 513 (8th Cir. 2014); United States v. Mackby (*Mackby II*), 339 F.3d 1013, 1014 (9th Cir. 2003); Yates v. Pinellas Hematology Oncology P.A., 21 F.4th 1288, 1307 (11th Cir. 2021). In 2021, the 11th Circuit in *Yates* became the first Circuit Court to decide whether the Excessive Fines Clause applies to non-intervened qui tam actions. *Yates*, 21 F.4th at 1307. The FCA suit was brought by an employee of the defendant and the United States did not intervene. *Id.* at 1296. The *Yates* court found that the Excessive Fines Clause applies even when the United States is not a party because it is still imposing and receiving a penalty for an offense committed against it. *Id.* at 1314.
38. *Supra* note 37.

2. Double Damages Plus Relator Share are Remedial

The next consideration is determining what portion of treble damages is remedial and what portion is punitive.[39] The Supreme Court has repeatedly stated that treble damages under the FCA serve both deterrent and remedial purposes.[40] The Court has also explained in numerous opinions that at least double damages are remedial. Nevertheless, a handful of circuit courts facing excessive fines arguments have mistakenly considered single damages to be the measuring post when calculating a ratio between remedial and punitive portions of a FCA judgment.[41] This oversight is sensible because a jury is tasked only with assessing the amount of funds the government paid to the defendant based upon false claims, which are referred to as single damages. Under the FCA, the trial court is tasked with trebling the so-called single damage amount assessed by a jury.[42]

This article points out that FCA single damages represent purely the amount of funds the defendant wrongfully obtained, but do not consider the other economic loss to, and recovery by, the government that are clearly remedial. Indeed, the Supreme Court has held that not only are double damages remedial, but so are any relator share fees paid from the judgment in a FCA case.[43] Thus, the remedial portion of a FCA judgment includes both the economic costs of double damages plus any relator share paid, which this article refers to as the *real economic costs*. These are the amounts that should be used when calculating any ratio between remedial and punitive portions of the FCA judgment against a defendant.

In 1976, the Supreme Court, in *United States v. Bornstein*, was faced with the task of calculating the FCA double damage provision.[44] Specifically, the Court addressed whether a court should double the amount of the false claims paid to the defendant before crediting the defendant with any offsets, such as repayments made prior to the FCA suit.[45] In reaching the decision that the multiplier must be assessed before taking into account credits, the *Bornstein* Court considered the purpose and nature of FCA double damages.[46] According to the Court, "the chief

39. Cook Cnty. v. United States. *ex rel*. Chandler, 538 U.S. 119, 129-34 (2003).

40. *Id*.

41. *E.g.*, *Drakeford*, 792 F.3d at 387-89 (mistakenly applying single damages plus relator share). In short, all out of pocket costs to remedy the harm are remedial, which are captured by double damages plus the relator share amount. *See infra* notes 91-95 and accompanying text (discussing *Drakeford*).

42. *Drakeford*, 792 F.3d at 387-89.

43. *See Cook*, 538 U.S. at 129-34. When a FCA case is initiated by a whistleblower, known as a relator, Congress mandates that the relator receive a share of the total amount paid by a defendant (typically 15-30%). *See* 31 U.S.C. § 3730(d)(1)-(2).

44. United States v. Bornstein, 423 U.S. 303, 314 (1976).

45. *Id*.

46. *Id*.

purpose of the [FCA's civil penalties] was to provide for restitution to the government of money taken from it by fraud, and . . . the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole."[47] The Court concluded that "double damages are necessary to compensate the [g]overnment completely for the costs, delays, and inconveniences occasioned by fraudulent claims."[48]

In 2000, the Supreme Court, in *Vermont Agency of Natural Resources*, addressed whether a private relator can bring a *qui tam* action against a state.[49] Generally, a private person is not able to bring a punitive action against a state.[50] Therefore, the Court faced the issue of whether the FCA is punitive. However, by this time, Congress amended the FCA to require treble damages.[51] The Court determined that "the current version of the FCA imposes damages that are essentially punitive in nature, which would be inconsistent with state *qui tam* liability in light of the presumption against imposition of punitive damages on governmental entities."[52] In reaching this decision, the Court noted that in *Bornstein* it had suggested that the FCA was entirely remedial and only became at least partially punitive when it imposed treble damages.[53] Accordingly, the *Vermont Agency of Natural Resources* Court effectively reaffirmed that double damages under the FCA are remedial.[54] It was only when Congress increased damages to treble that the *Vermont Agency of Natural Resources* Court found that the FCA remedies shifted to at least partially punitive in nature.[55]

In 2003, the Supreme Court in *Cook County v. United States ex rel.*

47. *Id*. (citation omitted).

48. *Id*.

49. Vt. Agency of Nat. Res. v. United States *ex rel*. Stevens, 529 U.S. 765, 785 (2000) ("Although this Court suggested that damages under an earlier version of the FCA were remedial rather than punitive, that version of the statute imposed only double damages and a civil penalty of $2,000 per claim, the current version, by contrast, generally imposes treble damages and a civil penalty of up to $10,000 per claim." (citations omitted)).

50. *Vt. Agency of Nat. Res.*, 529 U.S. at 784-85.

51. 31 U.S.C. § 3729(a)(1).

52. *Vt. Agency of Nat. Res.*, 529 U.S. at 784-85.

53. *Id*. at 785-86 ("[D]ouble damages in original FCA were not punitive, but . . . treble damages, such as those in the antitrust laws, would have been).").

54. *Id.* at 785.

55. *Id.* A few years later, the Court in *Cook* noted that because the Government must also pay a relator's share to whistleblowers, the amount is often closer to double damages. Cook Cnty. v. United States. *ex rel*. Chandler, 538 U.S. 119, 130-31 (2003) ("The 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 who began the action. In qui tam cases the rough difference between double and triple damages may well serve not to punish, but to quicken the self-interest of some private plaintiff who can spot violations and start litigating to compensate the Government, while benefiting himself as well. The treble feature thus leaves the remaining double damages to provide elements of make-whole recovery beyond mere recoupment of the fraud." (citations omitted)).

Chandler again reaffirmed that, at a minimum, FCA double damages are remedial.[56] In *Cook*, the Court ruled that while states are exempt from *qui tam*-initiated FCA suits, municipalities are not.[57] In doing so, the Court again discussed the remedial nature of double damages.[58] The Court observed that a multiplier above the amount wrongfully paid to a defendant and accompanying civil penalties not only deters fraud, but also ensures that the government is made whole for the often immeasurable costs of fraud.[59] According to the *Cook* Court, double damages accounts for costs above the amount wrongfully paid to the defendant, including "costs, delays, and inconveniences occasioned by fraudulent claims" and "ancillary costs, such as the costs of detection and investigation, that routinely attend the [g]overnment's efforts to root out deceptive practices directed at the public purse."[60] Double damages also help make the government whole because "[t]he FCA has no separate provision for prejudgment interest, which is usually thought essential to compensation."[61] Indeed, pre-judgment interest is significant in most FCA cases, which can easily amount to 40% when compounded using 5% interest based on six years of fraud plus three years of litigation and nearly 50% based on ten years of fraud plus three years of litigation.[62] Moreover, the Court noted that the FCA does not "expressly provide for the consequential damages that typically come with recovery for fraud."[63] In short, double damages are designed to take into account the total economic costs associated with the fraud against the government and the steps the government takes to pursue the case, including interest and investigative costs.

The *Cook* Court went one step further by adding another economic loss, the relator share. The relator share is considered remedial because it

56. *Cook*, 538 U.S. at 130-31.

57. *Id*.

58. *Id*.

59. *Id*.

60. *Id*. (citations omitted).

61. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 549(1)(b), 549(1)(b) cmt. d (AM. L. INST. 1976)).

62. The FCA SOL contains two timelines, one of 6 years and other of 10 years. *See* Joel D. Hesch, *A Comprehensive Analysis of the False Claims Act's Unique Statute of Limitations: The Supreme Court's Ruling in Chochise Consultancy, Inc. Was a Good Start but Left Much to Do*, 70 SYRACUSE L. REV. 773 (2020). Interest is a big factor in the loss to the government. Assuming a defendant falsely obtained $1 million a year for 6 years and the case lasted 3 years, the total interest at 5% on the $6 million would amount to $2,334,301.75. This equals roughly 40%. (The calculations were made using the formula at this website: https://www.calculatorsoup.com/calculators/financial/compound-interest-calculator.php.) If the fraud was over a ten-year period, the amount of interest over the 10-year fraud plus 3 years of litigation would be closer to 50%. Thus, in cases where the fraud lasted 10 years and a relator share is paid, the full treble amount would all be remedial to account for economic costs to the government.

63. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 549(1)(b), 549(1)(b) cmt. d (AM. L. INST. 1976)).

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.[64] Nearly 80% of FCA cases are initiated by relators, known as *qui tam* suits.[65] Congress mandated that the relator receive a share of the total judgement in an amount between 15-30%.[66] Accordingly, in most FCA cases, the government must pay the relator a finder's fee. Because a relator share is a separate remedial cost over and above the costs double damages are designed to capture and since it further increases the government's cost to obtain a FCA recovery, it too is remedial.[67]

In sum, based upon *Bornstein, Vermont Agency of Natural Resources,* and *Cook*, it is clear that both *double* damages and any *relator share* paid to the whistleblower in bringing the case are considered remedial and not subject to the Excessive Fines Clause.[68] This article refers to double damages plus relator share, collectively, as the *real economic harm*.

The next part analyses how to calculate the punitive portion of the total FCA judgment in particular cases (i.e., the real economic harm) and when the punishment portion may become excessive.

B. Are FCA Recoveries "grossly disproportionate to the gravity of the offense"?

When providing guidance to the lower courts addressing excessive fines analysis, the Supreme Court in *Bajakajian* recognized two underlying principles. First, deference is required when a punishment is legislatively mandated because "the appropriate punishment for an offense belong[s] in the first instance to the legislature."[69] Second, "any

64. *Cook*, 538 U.S. at 130-31 ("The 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 who began the action. In *qui tam* cases the rough difference between double and triple damages may well serve not to punish, but to quicken the self-interest of some private plaintiff who can spot violations and start litigating to compensate the Government, while benefiting himself as well. The treble feature thus leaves the remaining double damages to provide elements of make-whole recovery beyond mere recoupment of the fraud. It may also be necessary for full recovery even when there is no *qui tam* relator to be paid. The FCA has no separate provision for prejudgment interest, which is usually thought essential to compensation, and might well be substantial given the FCA's long statute of limitations. Nor does the FCA expressly provide for the consequential damages that typically come with recovery for fraud." (citations omitted)).

65. *Id.*

66. *Id*.

67. *Id*.

68. United States v. Bornstein, 423 U.S. 303, 315 (1976); Vt. Agency of Nat. Res. v. United States *ex rel*. Stevens, 529 U.S. 765, 784-85 (2000); *Cook*, 538 U.S. at 129-34; *see also* 31 U.S.C. § 3730(d) (outlining relator share under the FCA).

69. United States v. Bajakajian, 524 U.S. 321, 336 (1998). Lower courts appropriately have "assigned great weight to the fines approved by Congress," which "as a representative body[] can distill the monetary value society places on harmful conduct." United States v. Chaplin's, Inc., 646 F.3d 846,

judicial determination regarding the gravity of a particular . . . offense will be inherently imprecise."[70] These principles are especially applicable in the FCA setting. Indeed, the FCA reflects Congress' express determination that the magnitude of treble damages and civil penalties are an "appropriate" sanction for draining the public fisc and harming government programs.[71] The only leeway Congress provided to the courts was in selecting the amount of civil penalties to assess within a range provided by statute. Thus, in the FCA context, it should be presumed that imposing treble damages plus civil penalties for each violation is constitutional.[72]

The Court also pronounced that a punishment violates the Excessive Fines Clause only if it is "grossly disproportional to the gravity of the defendant's offense."[73] The Court in *Bajakajian* identified three factors to consider when determining whether a punishment is grossly disproportionate: (1) the seriousness of the defendant's offense, (2) the harm caused, and (3) the maximum penalty the defendant faced.[74] The next subparts analyze each of these factors in the FCA context.

1. The Seriousness of the Offense

The first, and most important, factor considers the seriousness of the defendant's offense.[75] Violating the FCA is a very serious offense.[76] "An estimated ten percent of federal government spending, or approximately $350 billion a year, is lost due to fraud."[77] Congress enacted the FCA to

852 (11th Cir. 2011).

70. *Bajakajian*, 524 U.S. at 336.

71. United States *ex rel.* Drakeford v. Tuomey, 792 F.3d 364, 373 (4th Cir. 2015).

72. *Id*. Indeed, a money judgment that "fall[s] below the maximum statutory fine[] for a given offense" is entitled to a "'strong presumption' of constitutionality." *Chaplin's* 646 F.3d at 852 (quoting United States v. 817 N.E. 29th Drive, 175 F.3d 1304, 1309 (11th Cir. 1999)).

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

74. *Id.* Not all of the factors are equal, and a single factor can justify a higher penalty. *See* Saunders v. Branch Banking & Tr. Co. of Va., 526 F.3d 142, 153 (4th Cir.2008) (finding that even the presence of a single *State Farm* factor "can provide justification for a substantial award of punitive damages"). In addition, excessive fines analysis is a legal question that is reviewed *de novo* by appellate courts. *See* Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 436 (2001).

75. *Drakeford*, 792 F.3d at 373.

76. *Mackby II*, 339 F.3d 1013, 1017-18 (9th Cir. 2003) ("The fact that Congress provided for treble damages and an automatic penalty per false claim shows that Congress believed that making a false claim to the government is a serious offense.") (citing *Drakeford*, 792 F.3d at 373).

77. Joel D. Hesch, *Worthless Services and Drugs is a Viable Theory of Recovery Under the False Claims Act: Establishing a Uniform Standard for Courts to Adopt*, 92 MISS. L.J. 67, 68 (2022). Medicare fraud is particularly troubling because spending is expected to top $1 trillion per year, with ten percent lost due to fraud. *Id.* Severity of the harm is also present with respect to Medicare fraud because the defendant's false claims caused harm to the public "both in the form of monetary damages and harm to the administration and integrity of Medicare." *Mackby II*, 339 F.3d at 1019.

combat rising fraud.[78] When the government is defrauded, it affects the integrity of its programs[79] and undermines public confidence.[80] It also reduces the amount of program services. This is especially troublesome in the context of Medicare because it impacts services to the elderly and most vulnerable citizens and in the military context – preparedness for war.[81]

The *Cook* case highlights the importance of FCA civil penalties and why they are needed to address serious offenses.[82] Unlike common law punitive damages applied to private citizens, the FCA involves a legislative act of Congress intended to address harm to government programs.[83] In this setting, deference and "great weight" must be given, and the penalty is presumed to be constitutional.[84] According to the Eleventh Circuit, when Congress sets a penalty for harm to the government, courts must defer to Congress' responsibility to determine the "monetary value society places on harmful conduct" and that "[penalties] falling below the maximum statutory fines for a given offense . . . receive a strong presumption of constitutionality."[85]

Congress spoke clearly to the severity of a FCA offense by mandating both treble damages and civil penalties on those who submit false claims.[86] The Supreme Court has repeatedly recognized that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature."[87] As a representative body, Congress "can distill the monetary value society placed on harmful conduct."[88] Accordingly, courts "should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes."[89] Therefore, an analysis of whether an FCA penalty is unconstitutional must begin with deference to Congress' authority to set appropriate punishments for those who defraud the government.

78. *Id*.

79. United States v. Aleff, 772 F.3d 508, 513 (8th Cir. 2014).

80. *Mackby II*, 339 F.3d at 1019.

81. *See Drakeford*, 792 F.3d at 389; United States *ex rel*. Bunk v. Gosselin World Wide Moving N.V., 741 F.3d 390, 409 (4th Cir. 2013) ("As a defense contractor, Gosselin is precisely within the class of wrongdoers contemplated by the FCA.").

82. Cook Cnty. v. United States. *ex rel*. Chandler, 538 U.S. 119, 129-34 (2003).

83. *Id*.

84. Yates v. Pinellas Hematology Oncology P.A., 21 F.4th 1288, 1307 (11th Cir. 2021) (quoting United States v. Chaplin's Inc., 646 F.3d 846, 852 (11th Cir. 2011)).

85. *Id*.

86. 31 U.S.C. § 3729(a).

87. United States v. Bajakajian, 524 U.S. 321, 336 (1998); *see also* Solem v. Helm, 463 U.S. 277, 290 (1983); Gore v. United States, 357 U.S. 386, 393 (1958) ("Whatever views may be entertained regarding severity of punishment, . . . these are peculiarly questions of legislative policy.").

88. *Chaplin's Inc.*, 646 F.3d at 851.

89. *Solem*, 463 U.S. at 290.

The severity of FCA violations is also heightened because it only applies when a defendant knowingly submits false claims for payment of government funds.[90] Thus, civil penalties can only be assessed when a defendant acted with scienter.[91] Courts have stated that a violation of the FCA forecloses arguments that violations were inadvertent because a jury must find scienter.[92] Similarly, courts have foreclosed defendants seeking to diminish the gravity of its violation because the FCA requires materiality.[93] In addition, the FCA only applies to public funds.[94] It is a serious offense to cheat the government.[95] Thus, every FCA violation involves a serious offense because every violation drains the public fisc and impacts government programs.

Nevertheless, there is a distinction between a "substantive offense" and a merely "technical offense."[96] In *United States* ex rel. *Bunk v. Gosselin World Wide Moving N.V*, the defendant engaged in a massive bid-rigging scheme to win contracts to transport belongings of the military stationed aboard.[97] The *Bunk* court considered the misdeeds to be of substance because it was a fraud scheme to defraud the military out of funds used to support military operations.[98] An example of a technical violation, on the other hand, would be if a regulation required that a doctor sign a form before treatment may start. Assuming that the treatment was medically necessary, the government would not have suffered actual economic injury or any loss to the treasury. Technical violations are not as serious

90. 31 U.S.C. § 3729(a)(1), (b)(2).

91. *E.g.*, United States *ex rel.* Drakeford v. Tuomey, 792 F.3d 364, 380 (4th Cir. 2015) ("The purpose of the FCA's scienter requirement is to avoid punishing "honest mistakes or incorrect claims submitted through mere negligence."). *See id*. ("Under the Act, the term "knowingly" means that a person, with respect to information contained in a claim, (1) "has actual knowledge of the information;" (2) "acts in deliberate ignorance of the truth or falsity of the information;" or (3) "acts in reckless disregard of the truth or falsity of the information." (citation omitted)).

92. Yates v. Pinellas Hematology Oncology P.A., 21 F.4th 1288, 1315 (11th Cir. 2021); *Drakeford*, 792 F.3d at 389 (rejecting an argument that, as the defendant's FCA violations were the result of a "mere accident," damages should be reduced, because the jury had already found that the defendant had acted knowingly).

93. *Yates*, 21 F.4th at 1315 ("Pinellas is trying to diminish the gravity of its violation, our ruling on materiality forecloses that gambit as well.").

94. 31 U.S.C. § 3729 (a)(1).

95. *See Drakeford*, 792 F.3d at 388 (submitting false claims to the government is a serious offense).

96. In *State Farm*, the Court provided this guidance: "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." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003).

97. United States *ex rel*. Bunk v. Gosselin World Wide Moving N.V., 741 F.3d 390, 395-96 (4th Cir. 2013).

98. *Id.* ("Gosselin did not commit some sort of technical offense; its misdeeds were of substance.").

as schemes to defraud Medicare by providing services that are not medically necessary or engaging in schemes to overcharge the government.[99]

2. The Overall Harm Caused to the Government

The second factor is the overall harm caused to the government.[100] It is clear that submitting false claims to obtain federal funds has both economic and non-economic costs.[101] Both can be considered when assessing if the penalty is grossly disproportionate to the gravity of the offense.[102]

a. Economic Harm

The economic costs include the amount the defendant defrauded the government coupled with an estimated cost the government incurred by investigating the fraud. The amount the defendant defrauded the government is generally easily calculable. For example, if a government contractor overcharges the government $10 million, $10 million is the amount the government was defrauded. The government's investigative costs are naturally more difficult to quantify. However, the jury ultimately quantifies those costs.

In addition, the Court in *State Farm Mutual Automobile Insurance Company v. Campbell* instructed courts to consider and weigh more heavily conduct that involved repeated actions and those that were done knowingly versus mere accidents.[103] Thus, those who engage in large-scale fraud schemes over many years or who knowingly bilk the government out of large sums deserve more severe punishments than those who are guilty of mere "technical offenses" or small-scale fraud.

b. Non-Economic Harm

Non-economic effect fraud against the government is also very serious. "When the [government] is defrauded, 'the government has been

99. At the same time, the materiality requirement forecloses from the FCA claims that are not material. Universal Health Servs., Inc. v. United States, 579 U.S. 176, 192 (2016) ("A misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision in order to be actionable under the False Claims Act.").

100. United States v. Bajakajian, 524 U.S. 321, 337-40 (1998).

101. *Bunk*, 741 F.3d at 409 ("The concept of harm need not be strictly confined to the economic realm.").

102. *Mackby I*, 261 F.3d 821, 830 (9th Cir. 2001).

103. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 424-25 (2003) ("Turning to the second *Gore* guidepost, we have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed." (citations omitted)).

damaged to the extent that such corruption causes a diminution of the public's confidence in the government.'"[104] Defrauding the government damages the integrity of its programs,[105] "shakes the public's faith in the government's competence,"[106] and "undermines public confidence in the system."[107] As a result, "[f]raud harms the United States in ways untethered to the value of any ultimate payment."[108] This form of harm suffered by the government is of course difficult to quantify but it is nonetheless a critical factor when determining whether the harm the defendant caused is serious enough to merit the FCA fine. Because of the severity of the non-pecuniary harm fraud causes to the government, courts should not apply a strict monetary formula when determining whether the FCA penalty is disproportionate to the actual harm caused to the government.

3. The Maximum Penalty Faced

The third factor is the maximum penalty the defendant faced.[109] Congress provided the courts with the discretion to apply civil penalties within a range of between $5,000 and $10,000, which was increased to between $11,803 and $23,607.[110] Although the maximum FCA penalties are presumed constitutional, when a court exercises discretion in selecting from the legislatively permitted range there is a stronger reason why it passes muster. Courts have stated that when penalties fall below the maximum statutory penalty, they "receive a strong presumption of constitutionality."[111] Thus, an Excessive Fines Clause issue should only arise when a court imposes the statutory maximum penalty—and, even in that case, the penalty should be presumed valid as it is within the limit prescribed by Congress.

104. Yates v. Pinellas Hematology Oncology P.A., 21 F.4th 1288, 1316 (11th Cir. 2021) (quoting United States v. Killough, 848 F.2d 1523, 1532 (11th Cir. 1988)).

105. United States v. Aleff, 772 F.3d 508, 513 (8th Cir. 2014).

106. *Bunk*, 741 F.3d at 409.

107. *Mackby II*, 339 F.3d 1013, 1019 (9th Cir. 2003).

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

109. United States v. Bajakajian, 524 U.S. 321, 337-40 (1998). This factor also implicates companion criminal penalties and even years in jail when assessing the maximum penalty a defendant faces. Indeed, when a defendant defrauds the government, it faces the risk of both civil and criminal false claims. There is a criminal False Claims Act. *See* 18 U.S.C. § 287 ("Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.").

110. *See supra* notes 12-13.

111. *Yates*, 21 F.4th at 1314 (quoting United States v. Chaplin's Inc., 646 F.3d 846, 852 (11th Cir. 2011)).

IV. PROPOSED FRAMEWORK FOR ASSESSING WHEN PUNITIVE PORTIONS OF FCA RECOVERIES VIOLATE THE EXCESSIVE FINES CLAUSE

This Section proposes a ratio framework for determining whether FCA penalties violate the Excessive Fines Clause. Specifically, this Section proposes three separate ratios depending on the size of the case. These ratios are designed to establish the constitutional floor of a FCA penalty—that is, they define the point at which FCA penalties should be considered per se constitutional. Courts may exceed these suggested ratios on a case-by-case basis depending on the egregiousness of the defendant's conduct and other particulars of the case.

A. How to Calculate the Ratio

This article suggests that calculating the appropriate ratio to use when assessing the constitutionality of a FCA penalty is a two-step process. First, the court determines the real economic harm to the government, which consists of double actual damages plus any relator share. Second, a court compares the real economic harm amount to the punitive amount of the total judgment. The punitive amount is calculated by subtracting the real economic harm (double damages plus relator share) from the total amount paid by the defendant.

For instance, assume that a jury determines the defendant submitted $5 million in false claims. The FCA mandates that the court treble this amount to $15 million. Assume the defendant submitted 1,000 false claims, which are subject to civil penalties of between $11,803 to $23,607 each.[112] Assume the court awards the maximum civil penalty of $23,607,000 (1,000 times $23,607). Accordingly, the total FCA judgment would amount to $38,607,000 (treble damages plus civil penalties). Assume next the court awards the relator a 20% share of the total recovery, the relator share is $7,721,400 ($38,607,000 times .20), which the government pays the relator from the total recovery and reduces the amount recovered by the government.[113]

Based on these facts, the amount of real economic harm to the government is $17,721,400 (double damages of $10 million plus the relator share of $7,721,400). The penal amount is $20,885,600, calculated by subtracting the real economic harm of $17,721,400 from the total judgment of $38,607,000. Thus, the ratio between the punitive portion of $20,885,600 to the real economic harm of $17,721,400 is 1.179.

112. *See supra* note 13.

113. The government pays the relator a share from the amount paid by the defendant, and thus does not keep the full amount paid by the defendant. 31 U.S.C. § 3730(d).

B. Ratios Depending on the Size of the Case

This Part proposes three separate ratios depending on the size of the case. The following ratios should be considered per se constitutional: for large cases (over $100 million), a ratio of four; for medium-sized cases (between $10 and $100 million), a ratio of nine; for small cases (under $10 million), no ratio.

1. Large FCA cases (over $100 million)[114]

With respect to FCA cases where the real economic harm exceeds $100 million, a ratio of four should be per se constitutional, which can be exceeded on a case-by-case basis depending upon the two other factors and particulars of a case. Support for this ratio is found in at least two circuit court opinions that found a factor of four is always appropriate in extremely large FCA cases.[115]

This article proposes that when the punitive portion of the FCA judgment is four times the amount of real economic harm, it is per se constitutional. In other words, the proposed ratio of four constitutes an amount that is always appropriate. Any higher amount must be justified on a case-by-case basis depending on a deeper assessment of the seriousness of the offense and the overall harm caused to the government. For instance, in cases above $100 million, if the ratio exceeds four, the court might choose to award only the minimum civil penalty (i.e., $11,803) per false claim. The government (or the relator in a declined *qui tam* case) might also elect to reduce the number of false claims to keep the judgment below the maximum penalties to ensure constitutionality.[116]

However, care must be taken to apply the ratio correctly. It is a ratio between the portion of a judgement that is remedial versus punitive. As shown above, the remedial portion consists of the real economic harm, i.e., double damages plus any relator share. Only the remaining portion is punitive. For instance, if a jury awards $100 million in single damages

114. The size of FCA cases keeps increasing. FCA cases over $100 million are becoming more common and are causing extreme harm to Government programs. Cite (if statistics available). Extremely large cases have competing factors. The larger the amount, the more serious and bigger harm caused, which warrants a higher punishment. At the same time, it may be difficult for a defendant to pay extremely large punishments.

115. United States *ex rel.* Drakeford v. Tuomey, 792 F.3d 364, 373 (4th Cir. 2015); United States v. Rogan, 517 F.3d 449, 454 (7th Cir. 2008).

116. A district court has authority to remit an FCA penalty below the minimum amount mandated by the statute if remittitur is necessary to prevent a constitutional violation. *See* United States v. Halper, 490 U.S. 435, 450 (1989), *abrogated on other grounds by* Hudson v. United States, 522 U.S. 93 (1997) (explaining that the district court in an FCA action has "discretion" over "the size of the civil sanction the Government may receive without crossing the line between remedy and punishment"); *accord Bunk*, 741 F.3d at 409 (relator chose to remit or reduce $50 million in civil penalties to $24 million.).

and finds that the defendant submitted 5,000 false claims, the court would award the government treble damages of $300 million and 5,000 penalties in the range of $11,803 and $23,607, for total civil penalties available between $59 million and $118 million. Here, the maximum judgment based upon the maximum civil penalty would be $418 million. If the court awarded the maximum and the 20% share to the relator, the real economic harm would be $283 million (consisting of double damages of $200 million plus a relator share of $83 million). The ratio between the remedial amount ($283 million) and the total judgement ($418 million) is just under 1.5, which is less than a factor of four and therefore per se constitutional. This is entirely appropriate because the amount of the harm is so significant.

The *Drakeford* case is a good example despite the Fourth Circuit's miscalculation of real economic harm.[117] In that case, a health care provider entered into compensation arrangements with certain physicians that violated the Stark Law by billing Medicare for procedures and services rendered pursuant to a prohibited referral and then knowingly submitted 21,730 false claims to Medicare for reimbursement.[118]

In *Drakeford*, the jury awarded the government single damages of $39,313,065, which the court trebled, plus it awarded civil penalties of $5,500 for each violation amounting to $119,515,000, for a FCA judgment of $237,454,195.[119] The court also awarded the relator a share of $11,793,920.[120] When examining the ratio between the remedial and punitive portion of the judgment, the court treated "single" damages plus the relator share as remedial and the balance as punitive.[121] The court upheld the award because the ratio of punitive damages to compensatory damages is approximately 3.6 to 1, which is less than four and per se constitutional.[122] The result was correct, but the reasoning was wrong. The court incorrectly used single damages as the remedial portion of the total judgment. Instead, the court should have considered both double damages plus the relator share as remedial. Thus, it should have calculated the real economic harm in the amount of $90,420,050 based upon double damages of $78,626,130 plus the relator share of $11,793,920. The pun-

117. 792 F.3d at 387-89.

118. *Id.*; Robert B. Vogel, M.D., *Implied Certification and Materiality Should Be Distinct Elements When Assessing False Claims Act Liability*, 8 Liberty U.L. Rev. 449, 494 (2014) ("The Stark Law forbids a physician from referring to an entity, for a designated health service, if the physician has a financial relationship with that entity, and the entity may not present a Medicare claim for payment as a result of a prohibited referral. If the entity violates the Stark Law and receives a payment, a so-called overpayment has occurred.") (citing 42 U.S.C. § 1395nn (2012)). *See also* 42 C.F.R. § 411.350-389.

119. 729 F.3d at 387-89.

120. *Id.*

121. *Id.*

122. The court also noted that the harm was long-spanning, the violation was knowingly, and resulted in significant loss to Medicare. *Id.*

itive portion is the balance when the real economic harm of $90,420,050 is subtracted from the total judgment of $237,454,195, consisting of $147,034,145. Thus, the actual ratio between the punitive and remedial portions of the judgement is closer to 1.6 ($237,454,195 divided by $147,034,145). Nevertheless, the court found that the punitive award was not excessive even in a larger case because the ratio between the remedial and punitive amounts was less than four. Of course, the ratio of four is not the outer limit. A court may still award higher than a ratio of four when the misconduct is egregious.

This article argues that the conduct in *Drakeford* was serious enough to justify a higher award—namely the mid-range of penalties or even the maximum amount. The defendant engaged in a massive fraud scheme to pay referral fees to gain Medicare patients.[123] The scheme lasted thirteen years and consisted of over 21,730 false claims.[124] Congress enacted the Stark Law to prevent the exact type of misconduct the defendant engaged in.[125] Given the shear breadth of the fraud and the knowing nature, civil penalties in the mid-range would have been permissible. Based on these new numbers, civil penalties would be $168,407,500 (21,730 times $7,750), and the total judgment would be $286,346,695. The relator would receive a share of 20% of the total or $57,269,339. Thus, the real economic harm would be $135,895,469 (double damages of $78,626,130 plus the relator share of $57,269,339). Therefore, the ratio between remedial and punitive would be 2.1 to 1.

2. Medium FCA cases (above $10 million)

With respect to medium-sized FCA cases where the real economic harm is between $10 and $100 million, this article proposes that a punitive portion of a payment nine times the amount of real economic harm is per se constitutional. This is in line with the single-digit ratio mentioned in *State Farm*, albeit simply for punitive damages between private citizens.[126] Because the harm in a FCA case is much more serious and legislatively mandated, a higher ratio is permissible compared to the mere punitive damages in *State Farm*. Accordingly, if the judgment exceeds nine times, then a more detailed analysis is required. For instance, in cases between $10 million and $100 million, the court could award a medium range of civil penalty (i.e., the midpoint between $11,803 and $23,607) for each false claim if the ratio would otherwise exceed nine times. The courts would consider factors such as the seriousness of the conduct, and

123. *Id.* at 386-88.
124. *Id.* at 370, 384.
125. *Id.* at 388.
126. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003).

the size, length, and breadth of the fraud. Thus, in nearly every case, a court could impose at least the minimum range of civil penalties and not run afoul of the Constitution.

The ratio becomes more of an issue when the amount of civil penalties dwarf the amount of the real economic harm. For instance, assume that single damages are $10 million but there are 5,000 false claims. The maximum judgment would be $148 million, consisting of $30 million in treble damages and $118 million in civil penalties. Assuming there is no relator, the real economic harm is double damages of $20 million. Here, the ratio between the real economic harm ($20 million) and the punitive portion ($128 million) would be 6.4, which is higher than a ratio of four for extremely large cases but less than a ratio of nine for medium sized cases.

3. Small FCA cases (under $10 million)

Although *State Farm* indicated that punitive damages between private citizens would rarely be permissible above a single digit factor,[127] the same principle does not apply to small FCA cases, especially where the harm to the public in smaller dollar cases is immeasurably greater than the amount the cheating defendant stole from the public fisc.[128] When the real economic harm is under $10 million, courts should not use a ratio as a gauge. Rather, courts should examine the non-economic harm to government programs. It should be presumed that applying a civil penalty to each violation is constitutional.[129]

In *Yates*, the Eleventh Circuit was faced with deciding whether civil penalties of $1,177,000 was excessive when the actual damages were merely $755.54.[130] The court held the punishment was not excessive but in so doing, the court did not constrain itself to a ratio. Rather, the *Yates* court explained that deference must be given to the civil penalty structure in the FCA and that the statutory minimum is presumed to be constitutional.[131] The court found that the large penalty compared to the funds the defendant received was justified for several reasons. First, "[f]raud harms the United States in ways untethered to the value of any ultimate payment."[132] It damages public confidence and shakes confidence in the

127. *Id.*

128. *E.g.*, U.S. *ex rel*. Shutt v. Cmty. Home & Health Care Servs., Inc., 305 F. App'x 358, 361 (9th Cir. 2008) ("Given the seriousness of the offense, the resulting non-pecuniary harm caused to the government, and the need to deter difficult-to-detect fraudulent claims, Congress's decision to impose a penalty that may sometimes substantially exceed actual damages is not unreasonable.").

129. Yates v. Pinellas Hematology Oncology P.A., 21 F.4th 1288, 1314 (11th Cir. 2021).

130. *Id.* at 1307.

131. *Id.* at 1314.

132. *Id.* at 1316.

government.[133] Second, FCA penalties are designed to have a strong deterrent effect.[134] Thus, even when damages are small, the punishment must be large enough to both punish and deter. The court concluded that applying the minimum range of the civil penalty would be constitutional.[135]

Nevertheless, if a ratio was used, it would have been 3.32, based upon the real economic harm of $354,611.08 (double damages of $1,511.08, plus the relator share of $353,100) divided by the total judgment of $1,177,000.[136] Again, the real economic harm is the correct remedial portion of the judgment because it is based upon all losses to the government and not simply the amount the defendant received. Thus, the real economic harm is the correct amount to compare to the remaining punitive portion of the judgment.

The Fourth Circuit, in *Bunk*, faced a similar excessive fines challenge to the award of $24 million in civil penalties when actual damages were not quantifiable.[137] In *Bunk*, the defendant engaged in a massive bid-rigging scheme to win contracts to transport belongings of the military stationed aboard.[138] The jury found that the defendant submitted 9,136 false claims, which would amount to $50 million in civil penalties based on the $5,500 minimum.[139] The relator agreed to remit the amount of penalties to $24 million to avoid the fines being excessive.[140] Without relying upon any ratio, the Fourth Circuit held that the penalties were constitutional.[141] The court began by distinguishing *Bajakajian*, which did not involve the seriousness of FCA violations.[142] Because the punishment in *Bunk* was based upon a statute to protect the public fisc and the misdeeds were of substance, the punishment of $24 million was justified and proper.[143]

This article argues that providing civil penalties above the minimum range for each false claim would have been justified in *Bunk* based on the extensive bid-rigging scheme. Congress chose a range of civil penalties to contemplate the case where damages are small. Applying the minimum penalty is the proper approach. Moreover, because the government had to

133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. United States *ex rel*. Bunk v. Gosselin World Wide Moving N.V., 741 F.3d 390, 409 (4th Cir. 2013).
138. *Id.* at 397-98.
139. *Id.* at 401.
140. *Id*.
141. *Id.* at 408-09.
142. *Id.* at 409.
143. *Id.*

pay between 25-30% of the proceeds to the relator in this declined case,[144] the government suffered economic loss of at least $6 million out of the $24 million. Assuming the court awarded $50 million (the statutory minimum), the government would have had to pay the relator at least $12 million out of the judgment of $50 million. Thus, an award of $50 million would not only be reasonable because it was the minimum statutory amount but would only have a true ratio of four when considering the real economic harm versus the punitive portion of the judgment.

C. Courts May Exceed the Ratios When the Defendant's Conduct is Especially Egregious

The ratios mentioned above merely define a constitutionally permissible floor for FCA penalties. When the defendant's conduct is especially egregious, courts are permitted to exceed the ratio. While determining the egregiousness of the defendant's conduct is an inherently subjective analysis, there are three factors courts should consider when making such a determination: (1) whether the violations involved a substantive or mere technical offense; (2) whether the violations involved a repeated or an isolated offense; and (3) whether the defendant knowingly defrauded the government.

D. The Maximum Penalty the Defendant Faced

Congress provided the courts with the discretion to apply civil penalties within a range of between $5,000 and $10,000, which was increased to between $11,803 and $23,607.[145] When the ratios between remedial and punitive amounts are above the per se allowable levels discussed in the prior section, courts may either justify higher amounts by examining other factors or reduce the amount of civil penalties below the maximum level. In short, any award less than the maximum permitted by Congress is presumed to be proper but must be justified based on the seriousness of the misconduct, considering the size, length, and breadth of the fraud. When civil penalties are awarded at an amount less than the maximum penalty permitted by law, they should rarely, if ever, be deemed excessive.

144. *Id.* at 398 n.7 ("The government's decisions as to intervention bear not only on who conducts the litigation in the respective matters, but also the eventual award, if any, to the relator. *Compare* [31 U.S.C.] § 3730(d)(1) (providing that where 'the Government proceeds with an action brought by a person under subsection (b), such person shall . . . receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim'), *with id.* § 3730(d)(2) ('If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount ... not less than 25 percent and not more than 30 percent of the proceeds.').").

145. *See supra* notes 12-13.0

E. Courts Should Not Consider the Defendant's Ability to Pay When Determining the Constitutionality of FCA Penalties

One area of continued uncertainty is the role of a defendant's ability to pay. By itself, ability to pay is not a recognized factor for courts to consider when determining whether an FCA penalty is unconstitutional. However, some courts have at least mentioned or passingly considered the defendant's ability to pay when ruling upon Excessive Fines cases. This Part discusses the appropriateness of the ability to pay as a factor for courts to consider.

Initially, the Supreme Court in *Bajakajian* indicated that ability to pay is not even relevant when it stated, "the test for the excessiveness of a punitive forfeiture involves *solely* a proportionality determination."[146] Indeed, the Court framed that inquiry in terms of "how disproportional to the gravity of an offense a fine must be."[147] However, in *Timbs v. Indiana*, the Supreme Court characterized *Bajakajian* as having "tak[en] no position on the question whether a person's income and wealth are relevant considerations in judging the excessiveness of a fine."[148] Accordingly, it is unclear whether the Supreme Court considers the ability to pay as a permissible consideration.[149]

Although a few district courts have indicated a willingness to consider the ability to pay, thus far, no circuit court has found the ability to pay to either be a separate or controlling factor. For instance, in 2016, the Second Circuit in *United States v. Viloski* also indicated it would be permissible to consider the ability to pay in the rare instance where it might "deprive the defendant of his livelihood, i.e., his 'future ability to earn a living.'"[150] In doing so, the *Viloski* court noted that when considering the ability to pay, "we heed the Supreme Court's instruction that 'the test for the excessiveness of a punitive forfeiture involves *solely* a proportionality determination.'"[151] Accordingly, the *Viloski* court opined that the ability to pay would only play a minor role in assessing constitutionality but is

146. United States v. Bajakajian, 524 U.S. 321, 333-34 (1998) (emphasis added).

147. *Id.* at 336.

148. Timbs v. Indiana, 139 S.Ct. 682, 688 (2019) (majority opinion).

149. Pimentel v. City of Los Angeles, 974 F.3d 917, 924-25 (9th Cir. 2020) (noting that the Supreme Court left open this issue). In 2020, the Ninth Circuit noted the open question, but declined to decide this issue. *Id.* ("This is a novel claim in this circuit, and one the Supreme Court expressly declined to address in *Bajakajian*. The Court in *Timbs* likewise left the question open. We, too, decline Pimentel's invitation to affirmatively incorporate a means-testing requirement for claims arising under the Eighth Amendment's Excessive Fines Clause." (citations omitted)).

150. United States v. Viloski, 814 F.3d 104, 111 (2d Cir. 2016) ("[W]hen analyzing a forfeiture's proportionality under the Excessive Fines Clause, courts may consider—in addition to the four factors we have previously derived from *Bajakajian*—whether the forfeiture would deprive the defendant of his livelihood.'" (citation omitted)).

151. *Id.* (quoting *Bajakajian*, 524 U.S. at 333-34).

not a litmus test or separate inquiry.[152]

A few circuit courts have read *Bajakajian* to outright prohibit examining the ability to pay. For instance, in 2019 the D.C. Circuit rejected the defendants' argument that $40 million in forfeitures was unconstitutional because the court effectively sentenced them "to lifetimes of bankruptcy" and held that the district court did not plainly err "by ordering forfeitures without considering [the defendants'] ability to pay them."[153] In addition, the Eighth Circuit held that a money judgment forfeiture imposed on an indigent defendant did not violate the Excessive Fines Clause, noting that "there is always a possibility that he might legitimately come into money."[154]

Although there is no clear guidance by the courts, the ability to pay should not be a separate factor or a litmus test, but should only be considered when determining whether to exceed the per se acceptable ratios outlined earlier. In other words, ability to pay should never be used to lower a judgment below the per se allowable ratios. Indeed, the primary focus must be on the proportionality between the real economic harm and the punitive portion of the total judgment, as originally framed in *Bajakajian.*[155] To do otherwise incentivizes fraud by rewarding fraudsters who either conceal assets or quickly spend ill-gotten gains. The main thrust of the Excessive Fines Clause analysis is whether the punitive assessment is grossly disproportionate to the real economic harm.

The FCA remedies are designed to make the government whole and deter other fraudsters who knowingly cheat on government programs.[156] Thus, the focal point must remain on the proportionality and not the financial standing of a particular defendant that defrauded the government.[157] It is not Congress' obligation, when setting statutory penalties, "to make illegal behavior affordable, particularly for multiple violations."[158] "[W]hether a forfeiture is 'excessive' is determined by comparing the amount of the forfeiture to the gravity of the offense and not by comparing the amount of the forfeiture to the amount of the owner's assets."[159] Again, the test is not what amount a defendant can repay when it squandered fraudulently obtained funds otherwise

152. *Id.* ("Whether a forfeiture would destroy a defendant's livelihood is a component of the proportionality analysis, not a separate inquiry.").

153. United States v. Bikundi, 926 F.3d 761, 796 (D.C. Cir. 2019).

154. United States v. Smith, 656 F.3d 821, 828-29 (8th Cir. 2011).

155. *Bajakajian*, 524 U.S. at 333-34 ("[T]he test for the excessiveness of a punitive forfeiture involves solely a proportionality determination.").

156. Cook Cnty. v. United States. *ex rel*. Chandler, 538 U.S. 119, 130-31 (2003); United States v. Bornstein, 423 U.S. 303, 314 (1976).

157. *Id.*

158. Phillips Randolph Enters., LLC v. Rice Fields, No. 06 C 4968, 2007 WL 129052, at *3 (N.D. Ill. Jan. 11, 2007).

159. United States v. 817 N.E. 29th Drive, 175 F.3d 1304, 1311 (11th Cir. 1999) (citation omitted).

earmarked for vital government programs, but whether the penal amount is grossly disproportionate to the real economic harm suffered by the government.[160]

Finally, the Excessive Fines Clause does not apply to remedial portions of judgments, only to fines or punitive portions of a judgment.[161] Thus, even if the ability to pay is present, a court can never reduce the amount below the real economic harm portion of an FCA judgment, which consists of double damages plus any relator share, because those amounts are remedial. Nor should it award an amount less than the per se minimum ratios suggested in this article.

Although the ability to pay might be an open question under an excessive fines analysis, there are escape valves available to a defendant facing ability to pay concerns. As explained in the next Section, the Department of Justice ("DOJ") has a policy of considering the ability to pay when fashioning a settlement. Of course, when settling cases, defendants with financial troubles may be required to make payments over time with interest and enter into corporate compliance agreements to ensure the fraud does not repeat.

The next Section explains why ability to pay should never need to be considered by courts—namely, because a defendant can eliminate this issue by settling the case. The DOJ has a policy of accepting settlements based upon ability to pay. It is only when a defendant rolls the dice that they face the full extent of the FCA's civil penalties and fines, a choice entirely within their control.

V. AN ESCAPE VALVE FOR SETTLING DEFENDANTS

Excessive Fines Clause cases are rare under the FCA for good reason. The maximum penalties under the FCA are reserved for those who not only engage in extensive fraud against the government but are unremorseful and insist on taking the case all the way to trial. Specifically, the DOJ has policies of accepting double damages and reducing or eliminating civil penalties in appropriate settings, by giving credit for cooperation and taking into account ability to pay.[162] Thus, it is nearly impossible for a settling defendant to risk paying excessive fines. Two of the primary DOJ policies that implicate excessive fines include (1)

160. *Id.*

161. The clause only applies to fines, not restitution or remedial recoveries: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. XVIII; *see also* United States *ex rel.* Drakeford v. Tuomey, 792 F.3d 364, 373 (4th Cir. 2015) (finding that relator share is the remedial, not punitive, portion of the total recovery).

162. U.S. Dep't of Just., Just. Manual § 4-4.112 (2019), https://www.justice.gov/jm/jm-4-4000-commercial-litigation#4-4.112 (Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in False Claims Act Matters).

reducing the total settlement to double damages for certain types of cooperation; and (2) taking into consideration the ability to pay when settling a case instead of taking it to trial.[163] Thus, eliminating excessive fines based on ability to pay is within the defendant's control simply by cooperating and settling an FCA case.

First, a defendant can mitigate its monetary exposure either by (1) self-disclosing its fraud; or (2) being cooperative during the litigation process.[164] The FCA itself contains a provision that limits the multiplier to double damages for companies that self-disclose. According to the FCA:

> (2) Reduced damages.—If the court finds that—
>
> (A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;
>
> (B) such person fully cooperated with any Government investigation of such violation; and
>
> (C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation, the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.[165]

In short, if a defendant accepts responsibility for their actions by self-reporting their violations, they are subject to double instead of treble damages. This will greatly reduce the risk of paying fines that might be considered excessive, even if constitutional.

Because the FCA has strict time limits for eligibility on self-disclosure,[166] it is likely that many defendants do not meet these statutory requirements. Therefore, the DOJ has developed its own set of published guidelines to reduce treble damages and civil penalties for cooperation. The DOJ has also published guidelines for defendants facing FCA suits that want a reduction from the full measure of damages.[167] The DOJ gives credit for a wide range of cooperation, listed in the guidelines.[168] Thus, defendants that want to reduce fines simply have to cooperate in the FCA

163. *Id.*
164. *Id.*
165. 31 U.S.C. § 3729(a)(2).
166. *Id.* (30 days).
167. U.S. Dep't of Just., Just. Manual § 4-4.112 (2019).
168. *Id.*

case.[169] Similarly, the DOJ guidelines provide that a defendant taking remedial measures to avoid repeat offenses is also eligible for damage or penalty reductions.[170]

The guidelines conclude by restating: "Where the conduct of the entity or individual warrants credit, the Department has discretion in FCA cases to reward such credit. Most often, this discretion will be exercised by reducing the penalties or damages multiple sought by the Department."[171] These guidelines are more than a mere gesture. In practice, cooperating defendants are typically able to settle for double damages and little or no civil penalties.[172]

Second, the defendant can further reduce its exposure based upon ability to pay. Although not required under the Constitution, the DOJ has a policy of taking into account the ability to pay when fashioning a settlement. The guidelines specifically state that one factor the DOJ may consider is "the ability of a wrongdoer to satisfy an eventual judgment."[173] Much like plea bargains in criminal cases, the policy only applies when a defendant settles the case and is not available for those taking cases to trial. Thus, a defendant only faces ability to pay issues if it elects to go to trial.

In sum, the ability to pay is not a strong consideration in cases where a defendant knowingly submitted false claims to obtain government funds. Rather, deference and great weight must be given to legislatively imposed penalties, which are presumed to be constitutional.[174] The focus must remain on the standard of whether penalties are grossly disproportional to the gravity of the defendant's offense and not the size of the defendant's post-fraud pocketbook.[175]

VI. CONCLUSION

Congress established a strict mandatory penalty scheme for those who defraud the government, which has led to FCA defendants paying tens to hundreds of millions of dollars in penalties. The issue that has confronted the courts over the past couple decades is whether such FCA penalties violate the Excessive Fines Clause. The few circuit courts that have

169. *Id.*

170. *Id.*

171. *Id.*

172. The author has knowledge regarding these policies based upon working as a Trial Attorney with the Civil Fraud Section of the Department of Justice in Washington, D.C., which is the office responsible for nationwide administration of the False Claims Act.

173. U.S. Dep't of Just., Just. Manual § 4-4.112 (2019).

174. Yates v. Pinellas Hematology Oncology P.A., 21 F.4th 1288, 1307 (11th Cir. 2021) (quoting United States v. Chaplin's Inc., 646 F.3d 846, 852 (11th Cir. 2011)).

175. *Id.*

tackled the issue have found that the Excessive Fines Clause applies to FCA penalties, but none have concluded that the cases before them violated the clause. The circuit courts use a variety of factors or ratio assessments to guide their analysis. This article proposes a uniform ratio system that incorporates the common factors used by the circuit courts to guide courts and practitioners when assessing whether FCA penalties are constitutionally excessive.

This article proposes a ratio system depending on the size of the case. The ratios are designed to set a constitutional floor to FCA penalties—that is, they are the point at which FCA penalties should be considered per se constitutional. The ratios consider the real economic harm to the government in relation to the punitive amount of the damages. For large cases (where judgments exceed $100 million), a ratio of four should be considered per se constitutional. For medium-sized cases (between $10 and $100 million), a ratio of nine should be used. For small cases (less than $10), no ratio should be used. These ratios consider that all fraud—no matter how small—harms the government, both economically and non-economically. Congress recognized the destructive force of government fraud when it strengthened the FCA penalties. Consequently, even fraud that results in smaller actual economic harm to the government has a cumulatively significant impact on the functioning of government programs. As such, this article suggests that courts should not be constricted to any ratio when dealing with small cases. However, as FCA judgments increase into the tens and hundreds of millions of dollars, there is an increased likelihood of running afoul of the Excessive Fines Clause. Accordingly, this article provides a ratio framework—which incorporates commonly used factors by the Supreme Court in Excessive Fines Clause cases and the circuit courts in FCA cases—to guide courts in awarding constitutionally permissive FCA judgments.