No. 13-1399

IN THE

Supreme Court of the United States

GOSSELIN WORLD WIDE MOVING, N.V.; GOSSELIN GROUP N.V.; and MARC SMET,

Petitioners,

v.

UNITED STATES *EX REL.* KURT BUNK; UNITED STATES *EX REL.* RAY AMMONS; and UNITED STATES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

I. The panel majority held that while the Shipping Act immunizes collusion relating to the "foreign inland segment" of transportation to or from the United States, its immunity does *not* apply if the collusion affects prices for that overall "through" transportation. That holding directly conflicts with a Ninth Circuit decision. The panel majority thereby sowed confusion for every foreign actor with a hand in shipping the billions of dollars of goods that this Nation exports and imports each year. It also extended U.S. antitrust law around the globe, creating foreign-policy friction that the judiciary is ill-positioned to address and that Congress enacted the statutory immunity specifically to avoid.

The Government's only relevant response is to offer an alternative, factbound reading of the panel's basis for denying immunity. Not only is this reading legally and factually erroneous, but it misrepresents what the panel said and is certainly not how affected foreign parties will understand the state of the law. The Government also defends the judgment below in light of two supposed limits on the Act's immunity that even the panel majority did not accept. Neither, however, reduces the independent importance of the actual question presented or undermines the basis for granting certiorari. And, in any event, both arguments are demonstrably wrong.

Review of the conflict between the rule evident on the face of the opinion below and the contrary Ninth Circuit ruling thus remains essential. Indeed, the Government does not challenge Gosselin's showing that this issue is of exceptional importance to the international shipping industry.

II. The panel below also reaffirmed the Fourth Circuit's outlier mechanical rule that *every* invoice submitted under a tainted contract must trigger a civil penalty under the False Claims Act ("FCA"), even if the invoices included no distinct falsehoods but rather are merely deemed false under a judicial construction of the FCA. That rule conflicts with decisions of this Court and others, all of which base civil penalties on *culpability*. The Fourth Circuit's rule also invites constitutional objections, and rewards abusive lawsuits that target high-invoicing industries regardless of actual harm.

The Government concedes at least "some tension" between the Fourth and Eighth Circuits—and ignores other conflicting lower-court decisions that Gosselin identified. Yet it still opposes review, because the court below supposedly properly followed this Court's precedent and statutory text. But even the panel admitted that its decision was compelled by *neither*, and was instead a "monster of our own creation." In fact, this Court has previously rejected penalties that ignored individualized culpability, and the Government cannot square the opinion below with that guiding principle.

Nor does the Government deny the importance of this issue to FCA litigation, underscored by the range of industry groups that have filed as *amici* in support of review. Health-care and defense sectors, especially, are vulnerable to enormous fines under the Fourth Circuit's rule, which often evades review due to intense settlement pressure—as the Government also does not deny. Thus, this Court also should review the second question presented.

ARGUMENT

I. THE SHIPPING ACT CONFLICT WARRANTS THIS COURT'S REVIEW.

The panel majority held that the Shipping Act's immunity for collusion relating to the "foreign inland segment" of "through transportation," 46 U.S.C. § 40307(a)(5), was inapplicable, because Gosselin's collusion as to shipping within Germany indirectly "inflated the all-inclusive through rates" for shipping between the U.S. and Germany, and thus affected "more than just the foreign inland segments." Pet.App.43a. That construction of the Act not only conflicts with the Ninth Circuit's construction—which the District Court and dissent below followed, and the panel majority scorned—but also eviscerates the statutory immunity, exposing shippers all over the world to U.S. antitrust law. (Pet.14-24.)

A. The Government's only relevant response is to argue that the panel held nothing of the sort. The Government insists immunity was denied because the agreement with other agents to provide German services using landed-rate pricing was purportedly part of "a single, overarching conspiracy," together with Gosselin's bid-rigging efforts on the Cartwright and Covan Channels, "with the specific purpose and intent to inflate the prices" paid for overall "through transportation" between the U.S. and Germany. (Opp.14.) The Government distinguishes the Ninth Circuit's decision, *United States v. Tucor Int'l, Inc.*, 189 F.3d 834 (9th Cir. 1999), as not involving such an "overarching conspiracy." (Opp.14-15.)

The Government misrepresents the majority's reasoning, which it tellingly never quotes. Neither the District Court nor the panel *ever* held (i) that the

landed-rate agreement formed a "single conspiracy" with the bid-rigging conduct; (ii) that the landed-rate agreement was directly aimed at influencing overall through rates; or (iii) that either was a basis for denying immunity to the landed-rate conduct.

Rather, the panel actually reasoned:

> Gosselin's *price-fixing scheme* did not inflate *in isolation* merely the landed rate quoted the freight forwarders; it inflated the *all-inclusive through rates* that the freight forwarders were induced to bid (and MTMC was compelled to pay) on each of the channels between the United States and Germany. The scheme *thus* concerned more than just the foreign inland segments ….

Pet.App.43a (emphases added). This articulation leaves no doubt that the majority's basis for denying immunity for Gosselin's "price-fixing" had nothing to do with the Government's separate bid-rigging claim, but rather rested on the incorporation of inflated German rates into "all-inclusive through rates," thus extending the collusion's effects beyond "just the foreign inland segments." *Id.* That is, the majority denied immunity because the landed-rate collusion that inflated rates for German services ultimately inflated overall through rates; that *indirect* effect supposedly made the landed-rate conduct "materially similar" to bid-rigging aimed *directly* at through rates. Pet.App.44a. As the Government admits, however, through rates *always* "tak[e] into account the prices that various subcontractors will charge … for particular legs," including foreign inland "legs." (Opp.3.) The panel majority's construction of the immunity therefore eviscerates it. (Pet.17.)

As legally flawed as the majority's reasoning is, the reasoning that the Government imagines is even worse, which is why the panel did not adopt it. The Government never explains why conduct *within* the immunity's scope (*e.g.*, "price-fixing" for services in Germany) would somehow become actionable if the defendant also engaged in *other* conduct *outside* of its scope (*e.g.*, direct bid-rigging of through rates). That result would be particularly anomalous where, as here, the two sets of conduct are alleged to have caused harm through entirely distinct means (one by causing *cancellation* of through-rate bids; the other by causing their *inflation*). And the notion that the sets of conduct are somehow conjoined is belied by the District Court's ruling that bid-rigging evidence is *inadmissible* on retrial of the landed-rate claim at issue here. (Dkt. 1254.)

Apart from its revisionist reading of the opinion, the Government offers no basis to reconcile it with *Tucor*, which the majority disregarded as "not the law of this Circuit," Pet.App.42a n.16. As Gosselin showed, no basis exists. (Pet.15-17.) The conflict is therefore plain, and ripe for resolution.

B. The court's holding *as the panel explains it*, rather than as the Government reinterprets it, is also how the numerous foreign actors threatened by the ruling will be forced to construe it, if they want to avoid exposure. As the Government fails to dispute, any foreign actor with a role in shipping the billion-plus tons of goods that this Nation imports or exports annually must now conform all its conduct to U.S. antitrust law (regardless of the governing law in the foreign state) or risk being dragged before a district court in the Fourth Circuit. (Pet.18-20.)

The resulting uncertainty is especially damaging to an industry that depends on "predictability in the resolution of disputes." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985). It also creates a serious foreign-policy danger given the wide global variance in antitrust laws and historical resistance by other sovereigns to American enroachment. (Pet.20-21.) The Government briefly notes that Congress has nonetheless chosen to extend U.S. antitrust law to "certain 'foreign anticompetitive conduct'" (Opp.14 n.4), but the point is that Congress specifically chose *not* to do so *here*. By effectively overriding that policy determination, in an area "where the possibilities of international discord are so evident and retaliative action so certain," *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957), the panel majority reached beyond its ken in a manner that warrants correction.

C. The Government primarily opposes review by defending the judgment on two *alternative* grounds, neither of which was the majority's actual rationale. (Opp.11-13.) Even if they had merit, however, neither would undermine the need for review: If the Shipping Act immunity were irrelevant in FCA suits, and/or limited to ocean common carriers and marine terminal operators—questions not presented here and that this Court would have no need to address—the conflict over the scope of the immunity would remain important. The split between the opinion below and *Tucor* affects *at least* Sherman Act cases and *at least* those market participants identified by the Government. That is reason enough to resolve it, especially given the immediate practical impacts of the opinion below.

In any event, the Government's arguments are demonstrably wrong. Of course the Shipping Act does not "explicitly cove[r] an FCA suit like this" (Opp.11), but the Government's theory of liability is that claims were "false or fraudulent" because they were inflated by *collusive* conduct. Pet.App.57a. If that collusion was "statutorily lawful and specifically exempt from liability under the antitrust laws," it surely cannot "nevertheless be the basis for liability under the FCA." Pet.App.66a; *see also* Pet.App.67a-68a. The Government cites no contrary authority.

As for the claim that the immunity applies only to ocean carriers and marine terminal operators, the only courts to have addressed that reading squarely rejected it. *Tucor*, 189 F.3d at 837; Pet.App.61a-62a. The Act's relevant text covers "any agreement or activity"—not, as do other of the Act's immunities, only an "agreement … within the scope of this part." 46 U.S.C. § 40307(a)(3) & (5). It thus "clearly applies to any agreement—without limitation—concerning the foreign inland segment." *Tucor*, 189 F.3d at 837. For that reason, among others, the Government's interpretation both "ignores the Act's plain language" and conflicts with "the statute as a whole." *Id.*

II. THE FALSE CLAIMS ACT CONFLICT ALSO WARRANTS THIS COURT'S REVIEW.

The panel held that the FCA *mandates* distinct penalties for *each* invoice under a three-year contract tainted by *one* false statement. That mechanical rule conflicts with the culpability-based approach other courts use when facing claims deemed "false" only by imputation. And it has indisputably grave implications—enormous, arbitrary, coercive fines—for important sectors of the U.S. economy.

A. The Government confesses that the opinion below is "in some tension with" *Hays v. Hoffman*, 325 F.3d 982 (8th Cir. 2003), which rejected a strict invoice-based approach to FCA penalties. (Opp.19.) While the Government pleads uncertainty over whether the Eighth Circuit "would actually reach a different result … on the particular facts of this case" (*id.*), that court surely would: *Hays* expressed a "fundamental problem" with penalties that bore "no rational relationship to the false claim misconduct" at issue, 325 F.3d at 993; the Fourth Circuit, by contrast, is "entirely comfortable" basing penalties on arbitrary invoice figures that even it admits are (to put it mildly) "hardly a perfect indicator of the relative liability that ought to attach," Pet.App.37a. *Accord* Amicus Br. of NDIA 7 (explaining arbitrariness of number of invoices); Amici Br. of PhRMA *et al.* 7 (same).

As for the other decisions that squarely conflict with the panel's opinion by refusing to impose a civil penalty for each invoice, the Government ignores them. *See* Pet.29-30 (discussing *United States ex rel. Longhi v. Lithium Power Technologies*, 530 F. Supp. 2d 888 (S.D. Tex. 2008); *United States ex rel. Dyer v. Raytheon Co.*, No. 08-cv-10341, 2013 WL 5348571 (D. Mass. Sept. 23, 2013); *United States ex rel. Smith v. Gilbert Realty Co.*, 840 F. Supp. 71 (E.D. Mich. 1993); *United States v. Advance Tool Co.*, 902 F. Supp. 1011 (W.D. Mo. 1995)).

Instead, the Government principally argues that a categorical per-invoice rule is consistent with this Court's civil-penalty jurisprudence. (Opp.17-19.) Actually, the opinion below defies the most basic principle of that jurisprudence.

United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943), established the rule deeming claims filed under a fraudulent contract to be constructively false for FCA liability purposes, *id.* at 543-44, regardless whether the claims were "false or fraudulent in and of themselves," *In re Baycol Prods. Litig.*, 732 F.3d 869, 878 (8th Cir. 2013). Yet the Court in *Hess* affirmed a penalty based on the number of *projects* tainted by bid-rigging, not the number of *invoices*. 317 U.S. at 552. The Government points out that the relator did not seek additional penalties (Opp.17-18), but if it were so obvious that every constructively false invoice—rather than just each "individualized" "incidence of fraud," 317 U.S. at 552—requires a further penalty, the Court surely would have noticed this anomaly in its judgment.

In any event, the issue of how to assess civil penalties was squarely presented in *United States v. Bornstein*, 423 U.S. 303 (1976), and the Court there rejected a per-invoice rule, as turning on "wholly irrelevant" and "fortuitous" matters. *Id.* at 312. It instead imposed a penalty for each mislabeled *shipment*, which aligned more fairly with the defendant's "specific conduct." *Id.* at 313.

The Government admits that *Bornstein* based its penalty calculus on the number of "culpable acts," but insists that this approach applies only to "*subcontractor* liability." (Opp.18.) That misses the point. Where a prime contractor submits "individual false payment demands," *i.e.*, invoices that are each individually false as a matter of fact, each submission *is* culpable, which is why the number of penalties is "generally" tied to the number of invoices. *Bornstein*, 423 U.S. at 309 n.4. A different

rule is required for subcontractors, who have no control over the number of invoices, which therefore does not track their culpability. *Id.* at 312-13.

So also is a different rule required where prime contractors submit invoices that are not *individually* false, but only deemed false, constructively, due to a falsity in an earlier contract. In that situation—as in *Bornstein*—an unyielding per-invoice rule would transform FCA penalties from punishing *culpability* into punishing "irrelevant," "fortuitous" matters, at odds with any conceivable congressional intent and also the Excessive Fines Clause. *Id.* at 312.

The Government also suggests that *Hess* and *Bornstein* are somehow no longer good law, because they predate certain 1986 amendments to the FCA. (Opp.17.) But all the cases in conflict with the decision below were decided after 1986, and many expressly relied on *Hess* and *Bornstein*. (Pet.28-30.) Even more tellingly, the Government never quotes or even *identifies* those amendments—because they are obviously irrelevant. Pub. L. 99-562, 100 Stat. 3153 (1986). All the Government cites is a snippet from a Senate Report confirming that every claim submitted under a fraudulent contract "constitutes a false claim." (Opp.16.) Indeed it does, under the rule of *Hess*, but that judicial construction says nothing about how the Act's *penalty* provision (as opposed to its liability provisions) should be construed in that context. And, "as various courts have indicated," imposing "wholesale" that language onto the FCA's penalty provision "lead[s] to perverse and irrational results." *Raytheon*, 2013 WL 5348571, at *32. Yet that did not stop the court below, highlighting further its extreme, outlier approach.

In short, the Government *admits* a conflict with another Circuit, *ignores* a conflict with many district courts, and *fails to refute* a conflict with this Court. Review is needed to unify the law.

B. Review is also *warranted*, given the issue's importance—which the Government never disputes. As Gosselin explained and *amici* corroborate, the question how to assess civil penalties for FCA claims involving fraudulent contracts arises in many cases and controls a great magnitude of potential liability. (Pet.32-33.) Literally billions of dollars are recovered annually in FCA cases; and "fraudulent inducement" is the most lucrative theory—precisely because of the contention that it compels penalties for each invoice, which leaves certain sectors especially vulnerable to abusive litigation. *See* Amici Br. of PhRMA *et al.* 7-10; Amicus Br. of NDIA 6-11. The opinion below encourages that problematic trend.

Moreover, this case presents an ideal vehicle to resolve the question—another point the Government does not dispute. Although most non-frivolous FCA cases seeking massive penalties settle under intense pressure, leaving the issue effectively unreviewable, *see id.*, Gosselin litigated the case to its end. The legal issue is thus neatly presented here, and makes an undeniable $24 million difference.

C. Finally, the Government defends the opinion below on the merits. (Opp.15-17, 20-22.) But that would be no basis for denying review, and, in any event, the Government is wrong.

As a statutory matter, the Government insists that the FCA's text is clear that a separate penalty is required for each invoice. (Opp.16.) Even the court below, however, admitted that the text could fairly

be construed otherwise, and that its *Harrison* rule was therefore a "monster of our own creation." Pet.App.35a. Indeed, while other statutes specify the unit by which to assess civil penalties, *e.g.*, 42 U.S.C. § 11045(d)(1) ("per claim"); 33 U.S.C. § 1391(d) ("per day"), the FCA does not. Hence *Bornstein* held that measurement is not "automatic." 423 U.S. at 311.

As a constitutional matter, the Government says any error applying *United States v. Bajakajian*, 524 U.S. 321 (1998), is only factbound. (Opp.21.) Not so. The Government cannot explain why the panel's grounds for approving the penalty here—its "sole reliance on intangible and non-economic factors such as 'deterrent effects' and public policy considerations to override the traditional excessive fines analysis," John T. Boese, *FraudMail Alert* (Dec. 20, 2013), http://goo.gl/epbZoG—would not sustain *any* FCA fine, regardless of mitigation or culpability and even absent any economic harm. The panel thus applied the wrong *legal* standard, effectively writing off the Excessive Fines Clause entirely as a constraint on the FCA.

CONCLUSION

The petition should be granted.

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Respectfully submitted,

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