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IN THE UNITED STATES DISTRICT COURT

FOR THE TERRITORY OF GUAM

MARK S. SMITH, Petitioner, v. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Respondent.	Case No. 25-CV-00016 MOTION TO GRANT PETITION FOR REVIEW AND FOR SUMMARY JUDGMENT

COMES NOW, petitioner Mark S. Smith, by and through undersigned counsel, and respectfully submits this motion to grant his petition for review and for summary judgment.

Respectfully submitted,

s/Benjamin L. Coleman, *s/Curtis Van de veld*

Dated: July 29, 2025

BENJAMIN L. COLEMAN
CURTIS VAN DE VELD

Counsel for Mark S. Smith

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INTRODUCTION

Petitioner Mark S. Smith respectfully submits this motion requesting that the Court enter judgment in his favor and grant his petition for review of administrative orders finding that he submitted 25 false and fraudulent claims to the United States Department of Housing and Urban Development ("HUD" or "agency") and imposing assessments and penalties totaling $735,372 pursuant to the Program Fraud Civil Remedies Act ("PFCRA"), 31 U.S.C. §§ 3801-3812.

This case involves a dispute about the meaning of a conflict-of-interest provision in a contract and corresponding regulation, 24 CFR § 982.161. As discussed below, Mr. Smith's interpretation is correct, as the agency has ignored the plain language in the governing provisions and traditional tools of construction, and its contrary interpretation of the conflict provision is entitled to no deference under *Kisor v. Wilkie*, 588 U.S. 558 (2019). Because there was no conflict of interest, there were no false representations in the first place, undermining the entire basis for the administrative order.

Furthermore, even if the agency's interpretation were somehow valid, it has dramatically overreached in claiming fraud and demanding enormous assessments and penalties. A Supreme Court opinion, *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 195 (2016), clearly shows that the materiality element required for fraudulent claims was lacking given that the relevant government agencies continued to make payments with actual knowledge of the purported conflicts. Likewise, the stringent standard for materiality in this context is lacking because HUD received the essential benefit of what it paid for – the rental units, units Mr. Smith had been providing long before any purported conflict even arose. Indeed, HUD has searched in vain for any real conflict and has failed to show that Mr. Smith did anything unfairly furthering the financial interests that he had in the contracts at issue.

For these reasons, and others, including a basic jurisdictional defect and the imposition of unconstitutional penalties pursuant to a regulatory standard that has no basis in the statutory language, this Court should grant Mr. Smith's petition for review.

BACKGROUND

The agency expressed a preference that this action proceed with a "summary judgment" motion filed by Mr. Smith, and therefore he has partially styled this motion as a motion for summary judgment although he is essentially asking this Court to grant his petition for review. This motion proceeds by largely accepting the facts contained in the administrative orders under review, although some underlying exhibits and pleadings are attached to this motion where those facts need to be clarified or amplified. Accordingly, the requirement of a separate statement of material facts under Guam Local Rule 56(a) is not really applicable, and Mr. Smith will supplement this motion with a more detailed statement to the extent necessary. *See* Ex. A. Furthermore, Mr. Smith does not concede the accuracy of all of the facts contained in the underlying administrative orders. Instead, this motion demonstrates that, even under the agency's version of the facts, the administrative order is unreasonable, unlawful, and plainly erroneous. This background also proceeds with the understanding that the Court presided over the related criminal case and therefore has some familiarity with the allegations.

The underlying administrative case actually involved two complaints filed by HUD, which were consolidated and ruled upon together. HUD originally filed one complaint against Mr. Smith in 2017, which was given administrative case numbers HUDOHA 17-JM-0135-PF-004, OGC Case No. 15-0076-PF. *See* Ex. D. HUD filed another complaint in 2018, HUDOHA 18-JM-0208-PF-010, OGC Case No. 18-0026-PF. *See* Ex. E. Administrative Law Judge J. Jeremiah Mahoney entered a consolidated order dated November 15, 2024 as to both complaints, finding Mr. Smith submitted 25 false and fraudulent claims and imposing assessments totaling $532,872, and civil penalties totaling $202,500 for a total penalty of $735,372 pursuant to the PFCRA. *See* Ex. C. On or about February 11, 2025, Secretarial Designee Andrew Hughes issued a final Order on Secretarial Review affirming that finding. *See* Ex. B.

The 2017 complaint charged that Mr. Smith made five false and fraudulent claims and requested assessments and penalties under 31 U.S.C. § 3802(a)(1). *See* Ex. D. The

five claims were made during the three-month period from September 1, 2011 to December 1, 2011 and totaled $48,140. *Id.* The complaint essentially alleged that HUD provides funding to local public housing agencies, including the Guam Housing and Urban Renewal Authority ("GHURA"), through the "section 8" program in order to assist low-income families in the private rental market. *Id.* It further alleged that Mr. Smith was a landlord who received section 8 funds from GHURA and that he knew or had reason to know that he was not entitled to those funds because he became a prohibited "covered individual" under the conflict of interest provision in the governing contracts when he was hired as outside legal counsel for GHURA in March of 2011. *Id.* The complaint alleged that Mr. Smith was a "covered individual" because he was a "contractor, sub-contractor or agent of [GHURA], who formulates policy or who influences decisions with respect to the program[,]" *id.* at 5, specifically relying on the "influences decisions" language. *Id.* at 7. The complaint did not allege any specific decisions that Mr. Smith influenced and instead asserted that he was "*in a position* to influence decisions of GHURA with respect to the Section 8 HCV Program." *Id.* at 6. The complaint sought the maximum double-assessments (twice the $48,140 total) and the maximum penalties of $7,500 for each of the five counts. *Id.* at 9.

The 2018 administrative complaint charged 20 counts for claims received during the time period of August 2, 2012 to May 2, 2014 and again sought maximum double-assessments (totaling $436,592) and maximum civil penalties. *See* Ex. E. It alleged that, around the end of 2011, Mr. Smith conveyed the rental properties receiving funds from GHURA to his friend, Glenn Wong, who then received the payments, but Mr. Smith continued to have a direct or indirect interest in the properties and the payments in violation of the conflict of interest provision. *Id.* It further alleged that, in June 2013, GHURA requested a waiver of the conflict of interest provision due to Mr. Smith's status as outside counsel for GHURA but HUD never granted the waiver. *Id.* at 9.

As the Court is aware, the government also filed federal criminal charges against Mr. Smith, and the administrative proceedings were stayed for several years while the

criminal case proceeded. Ex. B at 6. After the criminal case concluded in acquittals, the administrative proceedings resumed, and, in 2024, HUD moved for "summary judgment." Ex. F. Its motion contained numerous admissions defeating its claims. HUD's motion recognized that Mr. Smith became a landlord receiving section 8 funds under the contracts at issue as early as June 2004, several years before he was hired as outside counsel. *Id.* at 10. It also recognized that around the same time that Mr. Smith began serving as counsel for GHURA in June 2011, GHURA also contracted with a "conflicts counsel" to handle matters where Mr. Smith may have a conflict. *Id.* at 14. HUD's motion admitted that GHURA was aware of a potential conflict of interest as early as July 2011, *before* the first purported fraudulent claim alleged in the 2017 case. *Id.* at 17. The motion also recognized that payments to a "covered individual" can continue if the housing authority requests a waiver from HUD. *Id.* at 21.

HUD's motion also admitted that, as early as March 2012, GHURA was aware that Mr. Smith had a purported interest in the properties even after he transferred them to Mr. Wong. *Id.* at 25-26. Indeed, GHURA had placed a hold on payments from January to July 2012 for this reason. *Id.* HUD's motion also recognized that Mr. Smith's interest in the properties was discussed at a meeting held in April 2012. *Id.* at 26-28. HUD admitted that, in May 2012, the Executive Director of GHURA concluded that Mr. Smith was not a "covered individual" because GHURA had conflicts counsel and Mr. Smith did not influence decisions with respect to the section 8 program. *Id.* at 28. Accordingly, he ordered GHURA to release the funds that had been withheld. *Id.* at 29.

HUD's motion even admitted that HUD itself was aware of the purported conflict problem as early as September 9, 2012. *Id.* at 46. On September 20, 2012, HUD notified GHURA that it was not authorized to waive conflict requirements and ordered it to stop any conflict and demanded an accounting. *Id.* On that day, GHURA again suspended payments to Mr. Wong and other landlords with potential conflicts of interest. *Id.* On October 31, 2012, however, the Executive Director again directed the payments to resume. *Id.* at 48. Likewise, on December 10, 2012, the Executive Director ordered payments to be

released to Mr. Wong despite concerns expressed by HUD's Honolulu Field Office. *Id.* at 48-49. "On December 28, 2012, HUD's Honolulu Field Office relayed the concerns of HUD's Regional Administrator that Wong's 'contracts continue to receive money without this matter coming to a head.'" *Id.* at 49.

Despite all of these admissions, the administrative judge granted HUD's motion and imposed the maximum assessments and penalties in a ruling dated November 15, 2024, Ex. C, and this ruling was affirmed in the administrative appeal in a final order dated February 11, 2025. Ex. B. The administrative order rejected Mr. Smith's argument that he was not a covered individual, concluding that he influenced decisions "related to" the section 8 program. *Id.* at 12. The order stated that Mr. Smith proposed revisions to a disclosure form, prepared a legal memorandum addressing consequences to GHURA for failure to comply with HUD requirements, and he lobbied on his own behalf to GHURA that he was not a covered individual. *Id.* at 12-13. The order also rejected Mr. Smith's argument that any purported false statements were not material under *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U.S. 176 (2016), although its explanation is difficult to comprehend (as discussed in more detail later in this brief). *Id.* at 13-14. Finally, the order imposed the absolute maximum in assessments and penalties totaling $735,372, relying on a regulation stating that "ordinarily" the maximum should be imposed. *Id.* at 17 (quoting 24 CFR § 28.40(b)). The order also explained that the same regulation lists 18 factors for consideration and that several of them were purportedly aggravating while supposedly only one was mitigating. *Id.* at 17-19.

ARGUMENT

I. The $150,000 "jurisdictional cap" under the PFCRA was exceeded; at the very least, there was no jurisdiction for the 2018 case.

When the alleged conduct was committed in this case and up until the end of December 2024, the PFCRA provided: "No allegations of liability under section 3802 of this title with respect to any claim made, presented, or submitted by any person shall be referred to a presiding officer under paragraph (2) of subsection (b) if the reviewing

official determines that – (A) an amount of money in excess of $150,000; or (B) property or services with a value in excess of $150,000, is requested or demanded in violation of section 3802 of this title in such claim or in a group of related claims which are submitted at the time such claim is submitted." 31 U.S.C. § 3803(c)(1). On December 23, 2024, while Mr. Smith's administrative appeal was pending, the $150,000 limit was increased to $1,000,000, but that amendment does not apply retroactively to this case. *See Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

Section 3803(c)(1) establishes a "jurisdictional cap" that precludes proceeding under the PFCRA when "more than $150,000" is sought for "a fraudulent claim or a group of related claims." *Roberts v. Shinseki*, 647 F.3d 1334, 1341 (Fed. Cir. 2011). Thus, in *Roberts*, the Federal Circuit held that the Department of Veterans' Affairs could not proceed under the PFCRA when the claimant had fraudulently obtained more than $260,000 in benefits that had been paid over the course of several years and originated with a false claim that he had PTSD from witnessing the death of his friend, which was then repeated in subsequent years to obtain higher disability ratings. *Id.*

Here, the 2017 case alleged false claims in the amount of $48,140, *see* Ex. D, while the 2018 case alleged false claims in the amount of $218,296, *see* Ex. E, for a total of more than $260,000. All of these claims are related and stem from the same alleged false statement that Mr. Smith was not a covered individual benefitting under a HAP contract. As a result, the entire administrative order should be vacated.

Alternatively, the Court should conclude that the claims in the 2017 case form one set of related claims, while the claims in the 2018 case form another set of related claims. Under this alternative interpretation, the Court should vacate the administrative order in the 2018 case for exceeding the jurisdictional cap, as the amount of alleged false claims in that case alone was $218,296 and thus exceeded the § 3803(c)(1) limit. *See* Ex. E. Indeed, when addressing materiality (discussed later), the administrative order suggested that all of the claims in the 2018 case relate to a false statement made by Mr. Smith in April 2012. Ex. B at 13-14.

II. The Court should vacate the administrative order because Mr. Smith was not a "covered individual" under the governing regulation and contract terms.

Under traditional tools of interpretation, it is clear that Mr. Smith was not a "covered individual" under the language in the contract and corresponding regulation. The agency reached a contrary conclusion because it failed to employ any of these traditional tools of construction and indeed ignored the language and context of the regulation as a whole. Mr. Smith will first explain that it is clear that he is not a covered individual. He will then return to the question of whether the agency's contrary determination is entitled to deference – the answer is a resounding no under *Kisor v. Wilkie*, 588 U.S. 558 (2019).

One of the fundamental flaws with the agency's analysis is that it never quoted the applicable provision as a whole, which is necessary for employing traditional tools of construction. The regulation as a whole states:

> **§ 982.161 Conflict of interest.**
>
> (a) Neither the PHA nor any of its contractors or subcontractors may enter into any contract or arrangement in connection with the HCV program in which any of the following classes of persons has any interest, direct or indirect, during tenure or for one year thereafter:
>
> (1) Any present or former member or officer of the PHA (except a participant commissioner);
>
> (2) Any employee of the PHA, or any contractor, subcontractor or agent of the PHA, **who formulates policy or who influences decisions with respect to the programs**;
>
> (3) Any public official, member of a governing body, or State or local legislator, **who exercises functions or responsibilities with respect to the programs**; or
>
> (4) Any member of the Congress of the United States.
>
> (b) Any member of the classes described in paragraph (a) of this section must disclose their interest or prospective interest to the PHA and HUD.
>
> (c) The conflict of interest prohibition under this section may be waived by the HUD field office for good cause.

24 C.F.R. § 982.161 (emphases added). The agency found that Mr. Smith fell under the (a)(2) definition as an agent who influences decisions with respect to the program, but numerous tools of construction, which it ignored, refute that conclusion.

As an initial matter, the agency did not find that Mr. Smith formulated policy and only relied on the "influences decisions" language in subdivision (a)(2) of the regulation. The agency's apparent recognition that Mr. Smith did not formulate policy is important because that language informs what it means to influence decisions. A fundamental principle of construction is "the familiar interpretive canon *noscitur a sociis*, 'a word is known by the company it keeps.'" *Dubin v. United States*, 599 U.S. 110, 124 (2023); *see Fischer v. United States*, 603 U.S. 480, 487 (2024). This principle establishes that a "decision" under the regulation must be on a disputed matter of major importance, similar to the importance of a policy determination. The "decision" language does not include any ministerial or minor matter that may bear some relation to the program. *See McDonnell v. United States*, 579 U.S. 550, 568-69 (2016) (relying on noscitur principle to limit corruption statute to major decisions).

Other language in the regulation reinforces this interpretation. In particular, subdivision (a)(3) states that a "public official" is covered if he or she "exercises functions or responsibilities with respect to the programs." Although subdivision (a)(2) applying to subcontractors and agents certainly could have used the broader "functions and responsibilities" language, it instead requires a much higher standard of influencing important decisions about the program. In other words, exercising functions or responsibilities related to the program does not trigger status as a covered individual for purposes of subdivision (a)(2), and this distinction makes sense, as the standard should be more stringent for public officials. Furthermore, the language makes clear that, for purposes of subdivision (a)(2), the individual must *actually* influence important decisions. If the regulation meant that the person was merely in a position or *capable* of influencing decisions, it would have said so. *Compare* 31 U.S.C. § 3729(b)(4) ("capable of influencing").

The Supreme Court has also stated that the title of a provision is a contextual clue as to its meaning. *See Dubin*, 599 U.S. at 120-21. This is especially true when the "key terms" of the provision "are so 'elastic' that they must be construed 'in light of the terms

surrounding them,' and the title . . . chose[n] is among those terms." *Id.* at 121 (citation omitted). Here, the title of the regulation is "Conflict of interest." Thus, the type of "decision" meant by the regulation is an important disputed controversy that would affect financial interests. The language in subdivision (a)(2) also states that the decision must be "with respect to" the Section 8 program, and the Supreme Court has explained that such phrases include a "limiting principle consistent with the structure of the [regulation] and its other provisions." *Maracich v. Spears*, 570 U.S. 48, 60 (2013). Indeed, the "with respect to" language is less broad than the "in connection with" language in *Maracich* and establishes that the decision must be directly related to the Section 8 program.

Under these principles of interpretation, it is clear that the agency incorrectly determined that Mr. Smith was a covered individual, which is not surprising because it failed to recognize any of these traditional tools. In reaching its conclusion, the agency ignored GHURA's determination that Mr. Smith did not influence its decisions with respect to the section 8 program and instead provided three examples of him purportedly influencing decisions. First, the agency stated that Mr. Smith proposed revisions to a conflict-of-interest disclosure form applicable to the Section 8 program. Ex. B at 12. The form involved was an *omnibus* form that was *not* specific to the Section 8 program, Ex. F at 15, nor did the agency identify any specific revision that had any material effect at all, let alone with respect to the Section 8 program. Ex. B at 12. All that was involved was a minor and ministerial task that did not approach the type of "influence" or "decision" contemplated under the regulation.

The second example supporting the agency's conclusion was that Mr. Smith prepared a "legal memorandum" addressing consequences to GHURA for failures to comply with HUD requirements. Ex. B at 12. In actuality, Mr. Smith prepared a one-page letter (omitting the letterhead and address) that simply commented on a decision that GHURA had *already* made to pursue adverse actions against employees who "violated a number of GHURA personnel rules and regulations by discrediting the Authority through poor behavior, by unauthorized possession of Authority property and basically failing to

perform their job responsibilities and duties when managing various GHURA projects." Ex. G. As the decision had already been made, there was no decision to influence, and any purported decision was not with respect to the Section 8 program. Again, this was a ministerial task and not the type of "influence" or "decision" contemplated under the regulation and contract.

The third example relied on by the agency was that Mr. Smith "lobbied" on his own behalf to GHURA that he was not a covered individual. Ex. B at 13. That cannot be what the regulation contemplated, as it would be unworkable and non-sensical, applying to any contractor who openly advocates for his own position, which almost all do. Assume that, up until now, Mr. Smith's interpretation of his status as a covered individual is correct (which it is). According to the agency, that does not matter; once he "lobbied" GHURA for his correct position, he then became a covered individual. That is quite the Catch 22 and an absurdly incorrect interpretation. *See Barroso v. Gonzales*, 429 F.3d 1195, 1200 (9th Cir. 2005) ("the 'Catch 22' created by the BIA's interpretation" was an "absurd" construction). Moreover, the administrative orders explicitly recognized that Mr. Smith "lobbied" that he was not a covered individual because GHURA had conflicts counsel to advise on any matters where he had a potential conflict. Ex. C at 7. Thus, it was clear that Mr. Smith was acting in his personal capacity, not as counsel, and was specifically advocating that GHURA should consult with *other* counsel on the matter. And even if this absurd rationale had some legitimate basis, it would only establish that Mr. Smith was a covered individual as of April 12, 2012 and would not justify any assessments or penalties before that date, meaning that it could not sustain the 2017 case.

For all of these reasons, Mr. Smith was not a covered individual as that term is established under traditional tools of construction. Despite this clear conclusion, the government may contend that the agency's contrary determination is entitled to deference. It is not, as "the possibility of deference can arise only if a regulation is genuinely ambiguous." *Kisor*, 588 U.S. at 573. When the Supreme Court "use[s] that term," it "mean[s] it – genuinely ambiguous, even after a court has resorted to all the standards tools

of interpretation." *Id.* Furthermore, "not all reasonable agency constructions of those truly ambiguous rules are entitled to deference." *Id.*

As explained, the agency did not recognize any of the traditional tools of construction, which show that the regulation is not ambiguous and Mr. Smith was not a covered individual. Even if the regulation were somehow ambiguous, the agency's interpretation was not reasonable, as exemplified by its Catch 22 rationale. And even if the agency's interpretation were reasonable, it is still not entitled to weight due to its character and context. *See Kisor*, 588 U.S. at 576. HUD's interpretation did not involve a technical issue within its expertise, such as one concerning apartment buildings and the financial needs of low-income residents; instead, what is at issue here is a conflict-of-interest provision that is much more in "a judge's bailiwick." *Id.* at 578. Furthermore, the agency's interpretation in this case is essentially a "litigation position," which is entitled to no deference. *Id.* at 579.

In sum, the agency's interpretation was wrong, and it is entitled to absolutely no deference for the numerous reasons articulated in *Kisor*. Accordingly, the Court should grant this petition, as there is a lack of substantial evidence that Mr. Smith was a covered individual and therefore that a false representation was made.

III. The Court should vacate the administrative order because the alleged false representations were not material.

To show a violation of the PFCRA, the alleged false representation must be material. *See* 31 U.S.C. § 3802(a) (repeatedly using the term "material"); *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U.S. 176 (2016). Importantly, when considering materiality in the context of false and fraudulent claims to government agencies, "if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material." *Id*. at 195.

There was clearly a lack of materiality with respect to the 2017 case. The 2017 case alleged payments made to Mr. Smith during the three-month period from September

1, 2011 to December 1, 2011. Ex. D. During that relatively brief time frame, GHURA was well aware of Mr. Smith's status and still elected to make the payments. If the purported violation of the conflict provision was so important, GHURA could have easily terminated payments while Mr. Smith attempted to rectify the supposed breach of the contract. Instead, it chose to make the payments in full despite its actual knowledge, and the reality is that any purported conflict would have been waived for at least this brief period of time so that the tenants would not be hastily uprooted. Ex. C at 5 n.3. The administrative order did not address materiality with any specificity as to the 2017 case, undoubtedly because there was no basis to find materiality. In short, there was a lack of substantial evidence to support the materiality requirement for the allegations underlying the 2017 case.

As for the 2018 case, the administrative complaint and HUD's own motion for summary judgment make clear that materiality was lacking under *Universal Health Services*. Except for the first two counts, which alleged payments on August 2, 2012 and September 5, 2012, all of the other counts alleged payments after September 9, 2012. Ex. E. GHURA was aware of the purported conflict with Mr. Wong and Mr. Smith even before the first payment alleged in the 2018 case on August 2, 2012, and the administrative orders and the government's own summary judgment motion recognized that *both* GHURA and HUD were aware of the conflict with Mr. Wong and Mr. Smith as of at least September 9, 2012. Ex. F at 26-29, 46-49. Moreover, HUD purportedly ordered GHURA to suspend payments on September 20, 2012, which GHURA did. *Id.* at 46. Nonetheless, GHURA elected to resume payments to Mr. Wong in December of 2012. *Id.* at 48-49. The agency admitted that, on "December 28, 2012, HUD's Honolulu Field Office relayed the concerns of HUD's Regional Administrator that Wong's 'contracts continue to receive money without this matter coming to a head.'" *Id.* at 49. GHURA also requested a waiver from HUD in June 2013. Ex. E at 9. These facts fall precisely within the Supreme Court's admonition that "if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material." *Universal Health Services*, 579 U.S. at 195.

The administrative order's attempt to deal with *Universal Health Services* was inscrutable. The order first stated that the PFCRA "extends to false statements even in the absence of any claim." Ex. B at 13. It then asserted that Mr. Smith made a false statement that he did not have any direct or indirect interest in the Section 8 program on April 12, 2012 and then summarily jumped to the conclusion that HUD's knowledge of the conflict was "immaterial." *Id.* at 13-14. It is difficult to follow or even understand the logic in this analysis, which has no legal basis.

Even if the false-statement provision does not maintain a materiality requirement, a suggestion that is wrong under the statute's plain language, *see* 31 U.S.C. § 3802(a)(2), that would not support the allegations and requests for assessments and penalties in the administrative complaints, which were based on false *claims* under § 3802(a)(1). Ex. D; Ex. E. In other words, if HUD wanted to proceed under a theory that materiality was not required for the allegedly false statement made in April 2012, a point that is completely wrong under the statute's plain language, then it was only entitled to one civil penalty and no assessments for this one supposed false statement. Of course, that was not the theory that HUD proceeded on, as the complaints did not allege the April 12, 2012 false statement as an individual count and instead only alleged counts related to specific *claims*. *Id.* Thus, materiality was clearly required and was clearly lacking under *Universal Health Services*.

While *Universal Health Services* is conclusive in this case, Justice Thomas's concurring opinion in *Kousisis v. United States*, 145 S. Ct. 1382, 1400-01 (2025) reinforces a lack of materiality. The materiality test is the "very 'essence of the bargain' standard" mentioned in footnote 5 of *Universal Health Services*. *Id.* at 1400-01 (Thomas, J., concurring); *United States v. Milheiser*, 98 F.4th 935, 944 (9th Cir. 2024). "[T]he essence-of-the-bargain standard is rigorous and context specific." *Kousisis*, 145 S. Ct. at 1404 (Thomas, J., concurring).[1]

[1] *Kousisis* and *Milheiser* were decided after Mr. Smith's criminal trial and thus were not considered in the criminal case.

In explaining that it was doubtful that a misrepresentation about a Disadvantaged Business Enterprise ("DBE") term in a contract was material, Justice Thomas stated that the materiality standard "does not rest solely on a contract's labels[,]" and "[e]ven in the face of contrary contract language, materiality 'cannot be found where noncompliance is minor or insubstantial.'" *Kousisis*, 145 S. Ct. at 1401 (quoting *Universal Health Services*, 579 U.S. at 194). Here, the alleged misrepresentations were "minor or insubstantial[,]" *Universal Health Services*, 579 U.S. at 194, thereby failing the rigorous essential benefit of the bargain standard. *Kousisis*, 145 S. Ct. at 1401, 1404 (Thomas, J., concurring).

It is "clear that regulatory requirements in a contract are not automatically material." *Id.* at 1401. The contracts in this case were for rental properties, which GHURA received. *Id.* at 1401-02 ("The contracts at issue in this case were for bridge repairs, not minority hiring."). "If the [conflict of interest] conditions 'went to the very essence of the parties' bargain,' the failure to meet those conditions presumably would have had some impact on the final work product." *Id.* at 1402 (citation omitted). Obviously, the conflict provision had no impact on the quality of the rental units, *id.*, and GHURA itself concluded that there was no conflict. Furthermore, like the condition allegedly misrepresented in *Kousisis*, the conflict provision here was waivable and thus did not require termination or go to the essential benefit of the bargain. *Id.*

Also like *Kousisis*, there were a number of employees at GHURA who may have created potential violations of the conflict provision in other similar contracts, and yet payments were still made; as mentioned, payments even continued to Mr. Smith and Mr. Wong even after both GHURA and HUD were well aware of a potential conflict. *Id.* at 1403. "Looking at materiality 'from the viewpoint of the [allegedly misleading statement's] maker,' knowledge of rampant misrepresentations in the . . . program could suggest to a reasonable contractor that, contract language notwithstanding, the Government does not actually consider [conflict] compliance essential to its contracts." *Id.*

The lack of materiality here is even more clear than it was in *Kousisis*. In *Kousisis*, the petitioner had clearly made misrepresentations about the DBE term in the contract,

defeating the very essence of its purpose. As discussed above, it is far from clear that the conflict of interest provision at issue here was violated, and the agency failed to show that Mr. Smith used his position to enrich himself unfairly. Indeed, Mr. Smith was receiving payments for the rental units long before he even assumed his role with GHURA, and, even after he assumed his counsel position, GHURA took the position that there was no conflict. At bottom, HUD's view of materiality can only be based on a theoretical conflict under a hypertechnical and flawed interpretation of a contract term that had nothing to do with the quality of the units that Mr. Smith rented, units that were rented long before the theoretical conflict even arose. Under these circumstances, the agency failed to produce substantial evidence that the purported misrepresentation went to the very essence of the bargain and therefore failed to show materiality.

In sum, under both *Universal Health Services* and Justice Thomas's opinion in *Kousisis*, the administrative order should be vacated due to a lack of substantial evidence of materiality. The administrative order had no valid or reasonable response to the materiality deficiency. To the extent that the administrative order interpreted the PFCRA as not requiring materiality, that decision is entitled to no deference under *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). As mentioned, even if that interpretation were somehow correct, it would not justify the *claims*-based assessments and penalties that were alleged in HUD's complaints. *See* Ex. D; Ex. E.

IV. The Court should vacate the amount of the assessments and penalties in the administrative order because it was based on a misapplication of an agency interpretation and regulation that has no basis in the relevant statutory language; likewise, the amount imposed violates the Excessive Fines Clause of the Eighth Amendment and the Fifth Amendment.

The Secretary ordered assessments totaling $532,872 and civil penalties totaling $202,500 for a total penalty of $735,372. Ex. B. Under the PFCRA, Mr. Smith was subject to a *maximum* assessment of twice the amount paid to him plus a *maximum* penalty of $5,000 per claim. *See* 31 U.S.C. § 3802(a). The administrative order imposed the

absolute maximum pursuant to a regulation stating: "Because of the intangible costs of fraud, the expense of investigating fraudulent conduct, and the need for deterrence, ordinarily twice the amount of the claim as alleged by the government, and a significant civil penalty, should be imposed." 24 CFR § 28.40(b).

The agency's interpretation of § 3802(a) and its corresponding regulation is entitled to no deference, *see Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), and it has no basis in the statutory language. There is nothing in § 3802(a) or other provisions of the PFCRA stating that the default assessment should be the absolute maximum and that a significant civil penalty should be imposed on top of that maximum double-assessment. If Congress had intended such a penalty regime, it clearly knew how to say so. *See* 28 U.S.C. § 994(h) ("Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum"); 28 U.S.C. § 994(i) ("Commission shall assure that the guidelines specify a sentence to a substantial term"). The word "maximum" in § 3802(a) means what it says – the maximum. The word does not essentially mean the default minimum.

While the amount of the administrative order was imposed under a standard that had no basis in the statute, which alone is a basis to vacate the order, the amount also violated the Excessive Fines Clause of the Eighth Amendment because it was grossly disproportional to the gravity of the conduct. *See United States v. Bajakajian*, 524 U.S. 321, 336-37 (1998) (finding forfeiture amount of $357,144 was grossly disproportionate to a felony currency violation). Remarkably, the administrative order failed to recognize that Mr. Smith was renting the units long before any purported conflict arose, he provided the rental units that were paid for, and there never was an actual conflict where Mr. Smith exploited his position to obtain more favorable terms. Ex. B at 16-19.

Instead, the agency's complaints were about a mere theoretical and after-the-fact conflict that caused no monetary damages. *See Hendrix; ex rel. United States v. J-M Manufacturing Company, Inc.*, 76 F.4th 1164, 1174-75 (9th Cir. 2023). In other words, Mr. Smith "caused no loss to the public fisc." *Bajakajian*, 524 U.S. at 339. Had Mr. Smith's

conduct "gone undetected, the Government would have been deprived only of the information that" a strained and technical conflict theoretically existed. *Id.* "It is impossible to conclude, for example, that the harm [Mr. Smith] caused is anywhere near 30 times greater than that caused by a hypothetical" con artist who receives $25,000 from the government by falsely promising to provide services that he never intended to provide. *Id.*

Like *Bajakajian*, the alleged conduct was essentially "a reporting offense" as opposed to the class of cases for which the statutory regime is designed -- cases where claimants rip off the government by taking something for nothing. *Id.* at 337-38. Under the most directly applicable criminal statute, the alleged conduct constituted a misdemeanor with a statutory maximum fine of $100,000, *see* 18 U.S.C. §§ 1012, 3571, and the guidelines maximum for the fine was far less, about $10,000. *See* U.S.S.G. § 5E1.2. "Such penalties confirm a minimal level of culpability." *Bajakajian*, 524 U.S. at 338. The more than $735,000 in penalties, in addition to receiving the actual rental units, is larger than the guidelines fine of $10,000 "by many orders of magnitude, and it bears no articulable correlation to any injury suffered by the Government." *Id.* at 340. A similar constitutional analysis establishes that the penalty imposed violates due process. *See State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408, 428 (2003) (conducting similar analysis under Due Process Clause for punitive damages award).

In addition to these constitutional and statutory flaws, the order ignored several mitigating factors articulated in 24 CFR § 28.40(b) in electing to impose the maximum penalties. Thus, even if the regulation had any legal validity, it was misapplied in an unreasonable manner. Remarkably, the administrative order ignored that there was no "actual loss" given that the rental units were provided, as set forth in factor (5) of the regulation, nor did it consider the relationship of the penalty being imposed to the absence of actual loss, as discussed in factor (6). Ex. B at 16-19.

The only discussion arguably addressing these highly important mitigating factors was the agency's assertion that "hundreds, if not thousands, of federal man-hours" were spent on this case. *Id.* at 18. The bulk of those hours were presumably spent in the

criminal prosecution, which resulted in *complete acquittals* and where the government elected to dismiss its appeal following the acquittals. Given these circumstances, it was clear error to emphasize this as an aggravating factor, and the agency's analysis failed to consider that Mr. Smith spent hundreds of thousands of dollars defending himself in the criminal case, which ultimately resulted in a judgment in *his* favor. It is puzzling that the administrative orders mention the criminal case but fail to recognize that it resulted in acquittals. *Id.* at 6, 18.

The administrative order emphasized that Mr. Smith did not assist in the prosecution of others or cooperate in the investigation of his own misconduct. *Id.* at 18. Given that a criminal case was brought, this analysis violates the Fifth Amendment right to silence. In any event, the analysis is legally unsound due to the acquittals. It makes no sense to reason that Mr. Smith should have cooperated and assisted in his own prosecution in a case in which he was acquitted. Moreover, the agency well knew that Mr. Smith made a very serious offer to resolve the civil and administrative proceedings after the acquittals. Again, the agency's analysis erroneously converted a mitigating factor into an aggravating one.

Similarly, the administrative order considered the publicity of the criminal proceedings against Mr. Smith as an aggravating factor. *Id.* at 18. This too ignores that he was acquitted, and it certainly should not be viewed as an aggravating factor that HUD elected to issue press releases about the criminal case, creating its own publicity, only for the government's case to result in acquittals. If anything, the publicity surrounding the criminal case caused significant professional and personal harm to Mr. Smith, harm that is difficult to undo even with the acquittals. Again, all of this should have been considered a mitigating factor, not an aggravating one.

Nor did the administrative orders recognize that both GHURA and HUD were aware of the purported conflict with Mr. Smith and Mr. Wong and yet continued to issue payments. Even if this were not an outright defense to the materiality requirement -- which it clearly is under *Universal Health Services* -- it is certainly a mitigating factor. The

government should not be allowed to issue payments with knowledge about a purported contractual violation, and then turn around and claim double-assessments and additional penalties because it elected to make those payments.

In sum, there were ample mitigating factors, and most of the aggravating factors mentioned in the administrative order were either unsubstantiated, legally flawed, or actually mitigating. It should come as no surprise then, that the administrative penalty in this case is without a statutory basis and is also unconstitutional. Accordingly, the administrative order should be vacated.

CONCLUSION

For the foregoing reasons, the Court should enter judgment vacating the administrative orders in full, or reducing the monetary penalties imposed, or for such other and further relief as the Court may deem proper.

RESPECTFULLY SUBMITTED this 29th day of July, 2025.

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