No. 19-678

IN THE

Supreme Court of the United States

UNITED STATES EX REL. LAURENCE SCHNEIDER,
Petitioner,

v.

JPMORGAN CHASE BANK NAT'L ASS'N, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENTS JPMORGAN CHASE BANK NATIONAL ASSOCIATION, ET AL. IN OPPOSITION

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QUESTION PRESENTED

Whether a provision of the False Claims Act that permits "the Government" to dismiss a qui tam suit over a relator's objections authorizes a court to review the Executive Branch's traditionally unreviewable decision not to prosecute.

CORPORATE DISCLOSURE STATEMENT

Respondent JPMorgan Chase & Co. has no parent corporation and no publicly held corporation owns 10% or more of its stock. Respondent JPMorgan Chase Bank, N.A. is a wholly owned subsidiary of JPMorgan Chase & Co. Respondent Chase Home Finance LLC merged into JPMorgan Chase Bank, N.A., in 2011 and no longer exists as a separate entity.

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INTRODUCTION

Petitioner alleges a circuit split on the question whether the government's decision to dismiss a qui tam suit is subject to judicial review. But the minor differences in approach that Petitioner identifies are largely academic, as all circuits that have addressed the issue are highly deferential to the government's dismissal authority. Indeed, no court of appeals has *ever* held that a qui tam case should be allowed to proceed despite a government decision to dismiss. The petition thus fails to present a circuit split that warrants this Court's review.

Petitioner also fails to demonstrate that the government's motion to dismiss this case would have been denied under any plausible approach. When the government moved to dismiss, Petitioner already had litigated his claims for more than five years. The district court had dismissed all of Petitioner's claims—some with prejudice and some without prejudice—and the D.C. Circuit had affirmed that ruling. Petitioner was seeking leave to present a fourth version of his complaint in an attempt to salvage the claims previously dismissed without prejudice.

It was only then that the government sought dismissal of this action. The government explained that Petitioner's suit should be dismissed because his remaining claims lacked merit, and further litigation of those claims threatened to impose substantial burdens on the government. These justifications have been held sufficient by every court of appeals to consider them. The D.C. Circuit's decision thus does not

implicate any difference in approach among the circuits that has an impact on the outcome of this case. The petition should be denied.

STATEMENT

1. The False Claims Act provides that "[t]he Government may dismiss [a qui tam] action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion." 31 U.S.C. § 3730(c)(2)(A).

Invoking this provision, the government notified the parties in July 2018 that it was considering exercising its statutory right to dismiss this action. D.Ct. Dkt. 130. At the time, the case had been pending for more than five years. Pet. App. 4a. The government had twice reviewed the complaint to decide whether to intervene and prosecute Petitioner's claims, and both times it declined. *Id.* The only claims remaining in the case had been dismissed by the district court without prejudice, and that decision had been affirmed by the D.C. Circuit. Pet. App. 4a-5a. Petitioner was seeking permission from the district court to amend his complaint for a third time in an attempt to cure the deficiencies previously identified by the district court and the D.C. Circuit. Pet. App. 5a.

Rather than simply seeking dismissal based on the prior rulings in the case, the government conducted a careful review of the merits of Petitioner's remaining claims. During that process, Petitioner and Respondents JPMorgan Chase & Co., JPMorgan Chase Bank,

N.A., and Chase Home Finance LLC ("Chase") met with the government "to provide Government counsel with information that the parties believe is relevant to the United States' review." D.Ct. Dkt. 130. Following those meetings, the government requested additional information from both parties, which they provided. D.Ct. Dkt. 131. The government obtained two extensions of time to facilitate its evaluation of the parties' submissions, D.Ct. Dkt. 131, 132, and then obtained a third extension after Petitioner provided further information, D.Ct. Dkt. 133.[1]

On November 13, 2018, after completing its review of the merits, the government moved to dismiss the action. The government concluded that dismissal was appropriate because Petitioner's claims "lack substantial merit, litigation of them would require further unnecessary expenditures of scarce Government resources, and the United States believes it is prudent to exercise control of this litigation, including in light of its current procedural posture." Pet. App. 55a.

Petitioner opposed the motion and requested a hearing. On February 27, 2019, the district court held

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[1] Petitioner provided the government with internal Chase documents that he obtained in a separate action against Chase. In that action on behalf of three loan companies owned by Petitioner, Petitioner tried to recover for *himself* the same sums that he seeks to recover for the government in this action. *See S&A Capital Partners, Inc. v. JPMorgan Chase Bank, N.A.*, Defs.' Mem. of Law in Support of Partial Summ. J., No. 15-cv-00293, Dkt. 361 at 16-17 (S.D.N.Y. filed Mar. 8, 2019). Chase was granted summary judgment on all claims in that action. *See Mortg. Resolution Servicing, LLC v. JPMorgan Chase Bank, N.A.*, 2019 WL 4735387 (S.D.N.Y. Sept. 27, 2019), *motion for reconsideration pending*.

a hearing that provided Petitioner with an opportunity to convince the government not to dismiss the case. Pet. App. 27a-39a. At the hearing, the government explained that it had considered all of Petitioner's evidence and arguments, and it also noted that Petitioner was given a chance to convince the court that he had stated a claim before the government filed its motion to dismiss. Pet. App. 40a.

During the hearing, the government reiterated its view that "the claims lack substantial merit," and that "litigation of them would require further unnecessary expenditures of scarce governmental resources." Pet. App. 48a. The government was concerned, among other things, that the litigation would require "large amounts of discovery from the Department of the Treasury" because "materiality would be at play and what [T]reasury knew and when they knew it would be a central[] question" under *Universal Health Services., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2003 (2016). *Id.*

The government also noted that Petitioner had already "created potentially adverse decisions for the United States requiring substantial involvement by the Department of Justice at the D.C. Circuit to weigh in and ensure that the holding is not overly enshrined in controlling precedent in an overly expansive matter such that it will [a]ffect meritorious cases moving forward." Pet. App. 40a.

On March 6, 2019, the district court dismissed the case, holding that, under D.C. Circuit precedent, "the United States may, without the consent of the Relator, dismiss actions brought on its behalf." Pet. App. 8a.

The court also found that "there is no evidence here to suggest any fraud or any other 'exceptional circumstance to warrant departure from the usual deference we owe the Government's determination whether an action should proceed in the Government's name.'" *Id.* n.3 (citation omitted).

2. Petitioner appealed to the D.C. Circuit. The government and Chase moved for summary affirmance, and Petitioner moved for summary reversal. Petitioner did not argue that the D.C. Circuit's interpretation of § 3730(c)(2)(A) conflicted with other circuits' interpretations. Instead, he insisted that D.C. Circuit precedent was "fully consistent" with the standard of review applied by other circuits. *See* D.C. Cir. Reply Br. 8. According to Petitioner, § 3730(c)(2)(A) incorporated the arbitrary and capricious standard of the Administrative Procedure Act (APA). *See id.* at 9.

The D.C. Circuit summarily affirmed in an unpublished order. Pet. App. 2a. The court held that Petitioner had "presented no evidence of 'fraud on the court or any similar exceptional circumstance to warrant departure from the usual deference we owe the Government's determination whether an action should proceed in the Government's name.'" *Id.* (quoting *Hoyte v. Am. Nat'l Red Cross*, 518 F.3d 61, 65 (D.C. Cir. 2008)).

REASONS FOR DENYING THE PETITION

The petition should be denied for several reasons. *First*, the alleged circuit split has no practical significance because no court of appeals has ever held that the government's motion to dismiss a qui tam suit

should be denied. *Second*, the question presented makes no difference to the outcome of this case because Petitioner's case was properly dismissed under any plausible standard. *Third*, the D.C. Circuit's interpretation of § 3730(c)(2)(A) is correct, as it follows the statutory text and the settled principle that the Executive Branch's exercise of its prosecutorial discretion ordinarily is unreviewable. *Fourth*, this case is a poor vehicle for resolving the question presented because, in the courts below, Petitioner expressly denied the existence of a circuit split and argued for a standard of judicial review that he has now abandoned.

I. Courts of Appeals Have Uniformly Sustained the Government's Decisions to Dismiss Qui Tam Suits.

Petitioner contends that this Court's review is warranted to resolve a circuit split over the appropriate standard for reviewing the government's decision to dismiss a qui tam action. Pet. 6-7. But the standards adopted by different circuits vary only slightly, and those minor differences have never affected the outcome of a court of appeals decision. All circuits apply a standard that is so deferential to the government that no appellate court has ever permitted a qui tam suit to proceed when the government moved to dismiss the case.

Petitioner's suit was dismissed under the D.C. Circuit's longstanding interpretation of § 3730(c)(2)(A). Pet. App. 2a. Consistent with the statutory text and the historical practice of treating exercises of prosecutorial discretion as unreviewable, *see* Part III *infra*, D.C. Circuit precedent holds that the government has

"virtually 'unfettered' discretion to dismiss [a] qui tam claim." *Hoyte v. Am. Nat'l Red Cross*, 518 F.3d 61, 65 (D.C. Cir. 2008); *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003). The D.C. Circuit also recognizes, however, that judicial review might be available in cases involving "'fraud on the court'" or a "similar exceptional circumstance." *Hoyte*, 518 F.3d at 65; *see also Swift*, 318 F.3d at 253.

In construing § 3730(c)(2)(A) to preclude judicial review absent exceptional circumstances, the D.C. Circuit "declined to adopt the judicial review standard for a qui tam action endorsed by the Ninth Circuit." *Hoyte*, 518 F.3d at 65 n.4 (citing *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.,* 151 F.3d 1139, 1145 (9th Cir. 1998)). Although the Ninth Circuit uses a slightly different standard than the D.C. Circuit, it likewise gives great deference to the government's decisions to dismiss qui tam suits. *See, e.g.*, *Sequoia*, 151 F.3d at 1146 ("no reason to construe" § 3730(c)(2)(A) as "pos[ing] significant barriers" to government dismissals (quoting *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 746 (9th Cir. 1993))).

Recognizing the "respect" afforded to "the Executive Branch's prosecutorial authority," the Ninth Circuit reviews the government's dismissal decisions only under principles of substantive due process. *Id.* As a result, the Ninth Circuit's approach "requires no greater justification than that required by the Constitution itself." *Id.*; *see also id.* (standard incorporates the Constitution's prohibition on "arbitrary or irrational prosecutorial decisions"). This Court's decisions emphasize just how narrow this constitutional review should be: "only the most egregious

official conduct can be said to be 'arbitrary' in the constitutional sense." *Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 198 (2003).

Sequoia illustrates the highly deferential nature of the Ninth Circuit's approach. There, the relator appealed an order granting the government's motion to dismiss, "contending that because the false claims action had some merit, the government cannot seek dismissal." 151 F.3d at 1141. In rejecting that argument, the Ninth Circuit acknowledged that "the government's power to dismiss or settle an action is broad," and that the 1986 Amendments to the False Claims Act—which included § 3730(c)(2)(A)—had "actually increased, rather than decreased, executive control over qui tam lawsuits." *Id.* at 1144. The Ninth Circuit correctly held that this "broad" authority "permits the government to dismiss a *meritorious* qui tam action over a relator's objections." *Id.* at 1147 (emphasis added).

In the nearly two decades since *Swift* and *Sequoia*, only one circuit has adopted either court's articulation of the standard of review under § 3730(c)(2)(A). That circuit——the Tenth—adopted the Ninth Circuit's *Sequoia* approach. *See Ridenour v. Kaiser-Hill Co., L.L.C.*, 397 F.3d 925, 937 (10th Cir. 2005) (adopting *Sequoia*). The Third Circuit and numerous district courts, by contrast, have seen no need to choose between the *Swift* and *Sequoia* articulations. *See, e.g.*, *Chang v. Children's Adv. Ctr. of Del. Weih Steven Chang*, 938 F.3d 384 (3d Cir. 2019) (affirming dismissal without adopting a standard). Recognizing that

both standards are highly deferential to the government, those courts held that they would grant the government's motion under either approach. *See id.*[2]

Several circuits that have not squarely addressed the question presented here likewise recognize the broad deference that courts owe the government's decisions to dismiss qui tam cases. *See, e.g., United States v. Everglades Coll., Inc.*, 855 F.3d 1279, 1288 (11th Cir. 2017) ("[w]hen the government seeks to dismiss the FCA action, the statute does not prescribe a judicial determination of reasonableness" (citing 31 U.S.C. § 3730(c)(2)(A)); *United States ex rel. Zissler v. Regents of Univ. of Minn.*, 154 F.3d 870, 872 (8th Cir. 1998) (holding that "the United States is the real party in interest because of its significant control over the course of the litigation," including its "considerable control over the dismissal and settling of the case"); *Searcy v. Philips Elecs. N. Am. Corp.*, 117 F.3d

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[2] *See also United States ex rel. Borzilleri v. AbbVie, Inc.*, 2019 WL 3203000, at *2 (S.D.N.Y. July 16, 2019) ("The Court need not take a side in the dispute" between the standards.); *United States ex rel. Johnson v. Raytheon Co.*, 395 F. Supp. 3d 791, 794 (N.D. Tex. 2019) ("Regardless which standard the court employs in this case, the outcome is the same."); *United States ex rel. Maldonado v. Ball Homes, LLC*, 2018 WL 3213614, at *4 (E.D. Ky. June 29, 2018) (granting motion under either standard); *United States ex rel. NHCA-TEV, LLC v. Teva Pharm. Prod. Ltd.*, 2019 WL 6327207, at *3 (E.D. Pa. Nov. 26, 2019) ("Although the rational relation test is 'slightly more demanding' than the unfettered right standard, both standards are extremely deferential to the Government." (citation omitted)); *United States ex rel. Graves v. Internet Corp. for Assigned Names & Numbers, Inc.*, 398 F. Supp. 3d 1307, 1310 (N.D. Ga. 2019) (both standards "give substantial deference to the Government's decision to dismiss this action"); *Nasuti ex rel. U.S. v. Savage Farms, Inc.*, 2014 WL 1327015, at *1 (D. Mass. Mar. 27, 2014) (only "minor doctrinal difference" between the standards).

154, 160 (5th Cir. 1997) (observing that "the government retains the power to take the more radical step of unilaterally dismissing the defendant"); *see also U.S. ex rel. Stevens v. State of Vt. Agency of Nat. Res.*, 162 F.3d 195, 201 (2d Cir. 1998), *rev'd on other grounds Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000) (noting that "although the qui tam plaintiff must be given a hearing, the court need not, in order to dismiss, determine that the government's decision is reasonable" (citing *Sequoia*, 151 F.3d at 1142)).

As these decisions demonstrate, the alleged circuit split has no practical significance. No court of appeals has ever held that a government motion to dismiss a qui tam action should be denied. Only two district courts have ever done so, and both of those district court decisions are currently pending on appeal. *See United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, 2019 WL 1598109 (S.D. Ill. April 15, 2019), *appeal filed*, No. 19-2273 (7th Cir.); *United States ex rel. Thrower v. Academy Mortgage Corp.*, 2018 WL 3208157 (N.D. Cal. June 29, 2018), *appeal filed*, No. 18-16408 (9th Cir.). In the absence of a single court of appeals decision rejecting the government's decision to dismiss a qui tam case, this Court's review is not warranted.[3]

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[3] The two district court decisions denying government motions to dismiss do not provide a basis for this Court's review. Those two decisions are the subject of pending appeals, and in any event, this Court does not grant certiorari to resolve disputes generated by district court decisions. *See* S. Ct. R. 10(a) (certiorari may be warranted when "a United States court of appeals has entered a

II. Petitioner's Suit Was Properly Dismissed Under Any Plausible Standard.

This Court's review is also unwarranted because the question presented has no impact on the outcome of this case. That is because the government was entitled to dismiss this action under any plausible interpretation of § 3730(c)(2)(A).

A. The government moved to dismiss Petitioner's suit because his claims lacked merit. Pet. App. 55a. That is a proper ground for dismissing a qui tam suit, even in the Ninth Circuit. *See, e.g.*, *Agyeman v. Corr. Corp. of Am.*, 143 F. App'x 66 (9th Cir. 2005) (government may dismiss a suit where it has "determined that the [claims] lacked merit"); *see also Sequoia*, 151 F.3d at 1144 (affirming dismissal of claim that the court assumed to be meritorious).

Petitioner contends that the government's decision to dismiss his suit was "arbitrary and capricious," Pet. 11, but he cannot satisfy the Ninth Circuit's *Sequoia* test. Under that test, the government's motion to dismiss would be denied only if it rested on such "egregious official conduct" that it was "'arbitrary' in the constitutional sense." *Cuyahoga Falls*, 538 U.S. at 198; *see Sequoia*, 151 F.3d at 1146 (adopting constitutional test for arbitrariness). Here, far from engaging in any "egregious" conduct, the government conducted a careful analysis of Petitioner's claims and reasonably concluded that the claims were meritless.

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decision in conflict with the decision of another United States court of appeals on the same important matter").

Petitioner's claims revolve around an alleged violation of the rules of the Home Affordable Modification Program ("HAMP"). HAMP is a Treasury Department program that "provides eligible borrowers the opportunity to modify their first-lien mortgage loans to make them more affordable." MHA Handbook at 13.[4] Under the program, lenders like Chase receive incentive payments from Treasury for each eligible mortgage loan that they agree to modify. *See id.* at 57-64, 123-24. According to Petitioner, Chase violated HAMP rules by failing to solicit the borrowers on certain highly distressed loans to apply for HAMP modifications. *See* Pet. 14-19. The loans at issue were loans for which Chase had released the mortgage lien and "charged off" the loan as uncollectible. *Id.* at 13.

The government reasonably concluded that Petitioner's claims lacked merit. Although Petitioner faults Chase for not soliciting the borrowers on its charged-off loans to apply for HAMP modifications, the petition makes clear that these loans were categorially ineligible for HAMP. HAMP applies only to loans with intact first-lien mortgages. *See, e.g.*, MHA Handbook at 13 (noting that HAMP provides "eligible borrowers" with an opportunity to modify "first-lien mortgage loans"); *id.* at 57 (stating that loans eligible for HAMP are "first lien mortgage loan[s]"). Petitioner, by contrast, recognizes that Chase "released liens" on charged-off loans, "which eliminated any

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[4] MHA Program Handbook for Servicers of Non-GSE Mortgages ("MHA Handbook") (version 4.0, Aug. 17, 2012), *available at* https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_40.pdf.

chance of Chase foreclosing on a defaulting homeowner because the mortgage was no longer secured by the property." Pet. 13. Chase had no obligation to solicit HAMP applications from borrowers whose loans were no longer secured by intact first-lien mortgages and who therefore were ineligible for HAMP. *See, e.g.*, MHA Handbook at 66 (limiting the HAMP pre-screening and solicitation requirements to "first lien mortgage loans"). Indeed, at no point in the five-year history of this litigation has Petitioner offered a coherent explanation of why Chase should have solicited HAMP applications from borrowers who could not qualify for HAMP and who faced no risk of foreclosure on their unsecured, charged-off loans.[5]

B. The government properly identified the prospect that continued litigation would drain scarce government resources as an independent basis for dismissal. *See* Pet. App. 48a.

Petitioner asserts that "the avoidance of discovery is not a justification envisioned by Congress" for dismissing a qui tam suit, Pet. 22, but he cites no support for that bare assertion, and the *Sequoia* decision he relies upon reaches a contrary conclusion. There, the

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[5] In a footnote, Petitioner states that he found—in the discovery produced by Chase in the separate litigation— "a document that describes the volume and value of incentive payments Chase received under the HAMP for extinguishment of *second* lien" charged-off loans. Pet. 13. n.1 (emphasis added). This assertion is irrelevant: second-lien loans are covered by Treasury's 2MP program rather than HAMP. *See* MHA Handbook at 157-79 (setting out 2MP requirements). Chase received no HAMP incentive payments on its charged-off first-lien loans, *see* Pet. 14, and it properly earned the 2MP incentive payments it received on certain charged-off second-lien loans.

Ninth Circuit made clear that the government can "legitimately consider the burden imposed on the taxpayers by its litigation, and that, even if the relators were to litigate the FCA claims, the government would continue to incur enormous internal staff costs." 151 F.3d at 1146.

The dismissal here is easily sustainable under *Sequoia*. The government correctly recognized that "large amounts" of discovery from the Treasury Department would be required if Petitioner's case were to proceed beyond the motion-to-dismiss stage. Pet. App. 48a. To prevail on his FCA claim, Petitioner would have to prove that Chase made "material" misrepresentations to the government. *See Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2003 (2016). Any attempt to prove materiality would require extensive discovery from the Treasury Department to determine, for instance, whether "the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement" at issue. *Id.* Even under the *Sequoia* standard, the government was well within its rights to dismiss this action to avoid the prospect of squandering government resources on protracted discovery in a case it believes lacks merit.[6]

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[6] The government's decision is all the more reasonable given that Petitioner previously tried (albeit unsuccessfully) to recover for himself the very same HAMP incentive payments that he now seeks to recover for the government in this action. *See* p. 3 n.1, *supra; S&A Capital Partners, Inc. v. JPMorgan Chase Bank, N.A.*, Defs.' Mem. of Law in Support of Partial Summ. J., No. 15-

III. The D.C. Circuit's Approach Is Correct.

The Court should also deny review because the D.C. Circuit correctly interpreted § 3730(c)(2)(A). The D.C. Circuit held that the government's decision to dismiss a qui tam suit is unreviewable in the absence of exceptional circumstances such as fraud on the court. That interpretation is dictated by the statutory text and the well-established principle that the Executive Branch's decision not to prosecute is generally unreviewable.

A. The D.C. Circuit follows the text of § 3730(c)(2)(A), which states that "[t]he *Government* may dismiss" the action over a relator's objection, 31 U.S.C. § 3730(c)(2)(A) (emphasis added). The False Claims Act makes clear that references to the "Government" refer to the Executive Branch, not to the courts. *Compare, e.g.*, 31 U.S.C. § 3730(c)(1) ("[i]f the Government proceeds with the action"); *id.* § 3730(c)(3) ("[i]f the Government elects not to proceed with the action"), *with id.* §§ 3730(b)(1), (b)(2), (c)(2)(A)-(C) (addressing what "the court" may do). Because § 3730(c)(2)(A) authorizes the Executive Branch, not the courts, to dismiss a qui tam suit, the

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cv-00293, Dkt. 361 at 16-17 (S.D.N.Y. filed Mar. 8, 2019), *dismissed and mot'n for reconsideration filed*.

statutory text "suggests the absence of judicial constraint" on the government's decision to dismiss. *Swift*, 318 F.3d at 252.

This conclusion is reinforced by a neighboring statutory provision. In the same subsection of § 3730, Congress addressed the government's authority to settle a qui tam suit. 31 U.S.C. § 3730(c)(2)(B). There, Congress allowed "[t]he Government" to "settle the action with the defendant notwithstanding the objections of the" relator, but only if "*the court determines*, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances." *Id.* (emphasis added). This provision shows that when Congress wished to provide for judicial review of the government's decisions regarding qui tam cases, it did so expressly. In § 3730(c)(2)(A), by contrast, Congress imposed only the purely procedural requirement that a hearing take place prior to a dismissal, without authorizing the courts to "determine" anything at the hearing or to review the substance of the government's dismissal decision. The absence of any substantive role for the court in reviewing the government's dismissal decisions shows that Congress did not intend to subject such decisions to judicial review. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

B. The D.C. Circuit's approach is also supported by the well-established principle that the Executive

Branch's decisions not to prosecute are generally unreviewable. *See Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).

In *Heckler*, the Court explained that an "agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Id.* at 831. Among the many reasons for courts to avoid encroaching on Executive Branch discretion, the Court highlighted that "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise," including that "the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Id.* at 831. Therefore, an "agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Id.* at 831-32.

Against the backdrop of *Heckler*, the D.C. Circuit correctly held that "[n]othing in § 3730(c)(2)(A) purports to deprive the Executive Branch of its historical prerogative to decide which cases should go forward in the name of the United States." *Swift*, 318 F.3d at 253. Petitioner concedes that § 3730(c)(2)(A) "provides no express standard for evaluating a motion to dismiss," Pet. 8, thus confirming the D.C. Circuit's conclusion that "[t]he provision neither sets 'substantive priorities' nor circumscribes the government's

'power to discriminate among issues or cases it will pursue.' " *Swift*, 318 F.3d at 253 (quoting *Heckler*, 470 U.S. at 833); *cf. Heckler*, 470 U.S. at 833 ("Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue.").

The D.C. Circuit's interpretation also avoids the prospect of satellite litigation over the wisdom of the government's decisions to decline to litigate qui tam cases. By contrast, allowing judicial review of every government decision not to prosecute a qui tam action would waste judicial and government resources on litigation challenges to the government's decisions *not* to litigate. For instance, one district court applying the Ninth Circuit's approach held a five-day hearing on the government's decision to dismiss a qui tam action. *See Ridenour*, 397 F.3d at 936. Nothing in § 3730(c)(2)(A) suggests that Congress intended to open the door to week-long evidentiary hearings regarding the government's dismissal decisions. Even the possibility of such burdensome hearings could easily deter the government from dismissing meritless qui tam actions, thus curtailing the government's exercise of the prosecutorial discretion that Congress intended to confer. The D.C. Circuit's approach avoids that prospect by properly locating the authority to dismiss where Congress did—in the Executive Branch.

C. Petitioner's criticisms of the D.C. Circuit's rule are unpersuasive. Petitioner first contends that courts must be permitted to review the merits of the government's decisions to dismiss qui tam suits or else

the statutory requirement of a hearing on the government's dismissal decisions would be rendered meaningless. Pet. 8 (citing § 3730(c)(2)(A)). That is incorrect.

Section 3730(c)(2)(A) provides for an in-court hearing to give the relator an opportunity to convince the government to reevaluate its decision to dismiss the case. Pet. App. 8a-9a ("the Court must give the Relator an opportunity to be heard"). That the relator must persuade the government, rather than the court, to refrain from dismissal does not render the hearing requirement meaningless. The hearing requirement guarantees, at a minimum, that relators will have a procedural opportunity to be heard by the government before their cases are dismissed. It also provides relators with a public forum in which to challenge the government to explain on the record its reasons for proceeding with a dismissal. Finally, the hearing requirement gives relators an opportunity to present evidence of fraud on the court or other exceptional circumstances that the D.C. Circuit has suggested might justify judicial review. *See Hoyte,* 518 F.3d at 65.

Petitioner also contends that the D.C. Circuit's interpretation is contrary to the False Claims Act's legislative history. Pet. 9-10. Even if Petitioner were correct, it would not matter because legislative history cannot trump the statutory text, which does not provide for judicial review of the government's dismissal decisions. *See Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) ("Even those of us who sometimes consult legislative history will never

allow it to be used to 'muddy' the meaning of 'clear statutory language.'" (citation omitted)).

In any event, the legislative history invoked by Petitioner discusses a proposed statutory amendment that was never enacted. *See* Pet. at 9-10 (citing S. Rep. No. 99-345 at 25-26); S. Rep. No. 99-345 at 42 (proposed provision would have allowed a relator to "petition for an evidentiary hearing to object . . . to any motion to dismiss filed by the Government"). The legislative history of a provision that was never enacted is irrelevant to the interpretation of § 3730(c)(2)(A). *See Vt. Agency*, 529 U.S. at 783 n.12 (declining to rely on a different sentence from the same Senate Report where "the sentence was not even describing the consequence of the proposed revision" at issue); *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 297 (2010) (similar).

IV. If the Court Were Inclined to Consider the Question Presented, It Should Await a Better Vehicle to Do So.

This case is a poor vehicle for addressing the question presented. As an initial matter, the D.C. Circuit decided this case in a non-precedential summary affirmance, without full briefing or oral argument. The Court thus lacks the benefit of a fully reasoned court of appeals decision or even full briefing of the issues in the court of appeals.

Moreover, Petitioner's arguments in the courts below directly contradict the arguments he makes in this Court. In the courts below, rather than arguing a circuit split, Petitioner argued that D.C. Circuit precedent was "fully consistent" with the standard of

review applied by the Ninth Circuit. *See, e.g.,* D.C. Cir. Reply Br. 8. In addition, despite asserting that the D.C. Circuit and the Ninth Circuit apply consistent standards, Petitioner did not urge the D.C. Circuit to apply the substantive-due-process test that the Ninth Circuit uses. Instead, he argued that both courts permit a district court to apply the APA's arbitrary-and-capricious standard to the government's decisions to dismiss qui tam suits. *Id.*

Petitioner did not present this APA argument in his petition for certiorari, and for good reason. No court has ever held that the government's decision to dismiss a qui tam action is subject to review under the APA. Moreover, Petitioner failed to preserve any argument that the government's dismissal decision fails the substantive-due-process test applied by the Ninth Circuit: he never argued in the courts below that the decision arose from such "egregious official conduct" that it is "'arbitrary' in the constitutional sense." *Cuyahoga Falls*, 538 U.S. at 198.

Even in this Court, Petitioner makes no attempt to satisfy the Ninth Circuit's test. Instead, he contends that an internal Department of Justice memorandum—not the Constitution—establishes the framework for judging "whether the Government's motion is arbitrary and capricious." *See* Pet. 11-12. But the cited memorandum is a textbook example of an internal document that lacks the force of the law. *See Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) ("enforcement guidelines . . . lack the force of law"). The memorandum is labeled "For Internal Government Use Only" and is addressed to various

attorneys within the Department.[7] Nothing in the memorandum suggests that it was intended to provide a binding standard for judicial review of § 3730(c)(2)(A) dismissals, and no court has given it that effect. Petitioner thus lacks any viable framework for evaluating § 3730(c)(2)(A) dismissals. His approach is both unworkable in practice and unsupported by the statutory text.[8]

The Court should also deny review because other cases in the courts of appeals would provide better vehicles for deciding the question presented. Only two district courts have ever denied a government motion to dismiss a qui tam suit. Both of those district court rulings are currently on appeal and have been fully briefed and argued. *See United States v. United States ex rel. Thrower*, No. 18-16408 (9th Cir.) (argued November 14, 2019); *United States v. CIMZNCHA, LLC*, No. 19-2273 (7th Cir.) (argued January 23, 2020). If, for the first time ever, the courts of appeals in those cases conclude that the government should not be permitted to dismiss a qui tam action, then those cases will be ripe for this Court's review in a posture where the Court's review might make a difference to the outcome. Here, by contrast, this Court's review would make no difference because Petitioner's action was

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[7] The memorandum is now publicly available, though not from an official government source. *See* https://assets.documentcloud.org/documents/4358602/Memo-for-Evaluating-Dismissal-Pursuant-to-31-U-S.pdf; *see also* Pet. App. 121a.

[8] Petitioner asserts that this internal DOJ memorandum has resulted in "increased use" of § 3730(c)(2)(A). Pet. 6. Even if that were true, it would not provide a reason for granting certiorari before any court of appeals has ever held that a government motion to dismiss should be denied.

properly dismissed under any plausible interpretation of § 3730(c)(2)(A).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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