NO. 19-678

In the Supreme Court of the United States

UNITED STATES OF AMERICA, EX REL.
LAURENCE SCHNEIDER, ET AL.
AND LAURENCE SCHNEIDER,

Petitioners,

v.

JPMORGAN CHASE BANK,
NATIONAL ASSOCIATION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

REPLY BRIEF OF PETITIONERS

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This Petition presents an important question regarding the proper role of courts in reviewing the actions of the Executive Branch and the Government in dismissing relators' claims under 31 U.S.C. § 3730(c)(2)(A) and, within that role, the proper standard to apply. That role is central to the False Claims Act and, at its heart, asks whether citizens who seek to aid in the enforcement of the law are to be protected and encouraged in such a role or chilled and urged to stay silent.

I. DESPITE THE INSISTENCE OF THE RESPONDENTS THAT THE CIRCUIT SPLIT HAS NO REAL IMPACT, THE SPLIT IS NOT SIMPLY ACADEMIC.

Nowhere in the filings of the Government or JPMorgan Chase Bank ("Chase") do the parties dispute that a split exists between the Circuits. As specifically referenced in the Per Curiam Order of the Court of Appeals for the District of Columbia, issued August 22, 2019 (App.1a.), the Court references the split and "decline[s] to adopt the standard of the Ninth Circuit under which the Government must initially show that dismissal is rationally related to a valid purpose . . . " *citing United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998)). (App.2a). Left with no choice, the Respondents agree the split exists (Gov.Opp.8 and Chase.Opp.6) but attempt to minimize its impact and call it "academic" (Chase.Opp.1). Yet this attempt to diminish the split with a dismissive comment does not eliminate the split in the law, nor lessen its extent. This split in

the circuits has clearly been called out in other decisions from district courts around the nation as cited in Petitioner's brief and should be addressed.

More troubling than the existence of a split, the Government appears reluctant to have the law made whole and the split remedied. The Government seeks to ignore the split, downplay it and argue that no effective difference exists between the standards set by the DC Circuit ("*DC Standard*") and the 9th and 10th Circuits ("*9th Standard*"). The reason Chase argues that this matter not to be heard is obvious. Chase wishes to escape any true assessment of its behavior and hide its malfeasance. But the Government's rationale is more difficult to ascertain. While the Government states that multiple courts have declined to choose between the competing standards, the Government also cites to the Third Circuit's recent statement that the *9th Standard* is "the more restrictive standard" (Gov.Opp.16). The Government even reluctantly acknowledges that such a difference could be "outcome determinative" (Gov.Opp.16). The Government cites to various cases to argue that the split had no impact. Then the Government does something more curious, it dismisses the cases are different and infers that the difference was not the reason for the denial of the dismissal. The Government argues that the two cases using the *9th Standard* to deny the dismissal "reflect misapplications of Section 3730(c)(2)(A) even under the *Sequoia Orange* standard" (Gov.Opp. 17). This wordplay indicates the Government's acknowledgement that the difference is real and impactful, but it leaves an impression that the Government seeks a different route to its objective of unfettered and unreviewable power. The Government appears to be

trying to whittle down the more restrictive standard to reduce judicial review through other means that are less absolute than a head on resolution of the split by this Court.

The Government and Chase cite cases in which they claim that the end result would be the same, a quasi-outcome determinative argument. They argue that nothing has happened so far that needs this Court's attention, so let the split remain. The problem is that this is not true.

Allowing the current split would permit the Government to whittle down the more restrictive standard to the point where the Executive Branch acts without question. The Government seeks to interpret the language of the *9th Standard* itself, taking for the Executive Branch the role of the courts. Such a method of arriving at their final objective must not be allowed. This variance in the law should be remedied by this Court. A split between the circuits is frequently cited as reason for granting of a petition. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 286 (1992); *Vartelas v. Holder*, 566 U.S. 257, 265 (2012); *Husky Intern. Electronics, Inc. v. Ritz.*, 136 S.Ct. 1581, 1585 (2016); *Jones v. Harris Associates, LLP*, 559 U.S. 335, 343 (2010); *Rubin v. Islamic Republic of Iran*, 138 S.Ct. 8169, 821 (2018); *Mims v. Arrow Financial Services, LLC*, 565 U.S. 368, 376 (2012); *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 188 (2012).

Further, the split leaves the law unclear and FCA whistleblowers chilled by the prospect of no recourse for their sacrifice. The split forces the Government and Relators in different parts of the nation to face different standards of review following Section 3730(c)(2)(A) dismissals. DC Circuit U.S. Attorneys are able

to act without oversight of the courts, dismissing with no concern for whether they will be challenged or whether they may have even erred, an error that will never matter. U.S. Attorneys in the 9th and 10th Circuits are held to a more restrictive standard and must actually perform the investigations and reviews necessary to justify dismissing cases brought forward by public actors. The Government's (and Chase's) dependence on a determinative argument to avoid review, only to allow for attrition to act on the issue is not the proper way of addressing a split in the Circuits, a split that is more than academic.

II. SINCE THE MERITS OF SCHNEIDER'S ARGUMENT THAT THE GOVERNMENT'S MOTION TO DISMISS IS ARBITRARY AND CAPRICIOUS HAVE NOT BEEN ADDRESSED BY THE LOWER COURTS, IT WOULD NOT BE APPROPRIATE TO DO SO AT THE PETITION STAGE.

This split and its harm to predictability in our laws is not where the Government, and Chase, choose to focus their attention in their oppositions. While it is completely understandable and self-serving for Chase to do so, the Government aids the Defendants in their objective of hiding their malfeasance. The two Respondents artificially minimize the effect of the split while redirecting this Court's attention toward an unjustified attack on the merits of the Petitioner's case. The Respondents' merits argument is wholly unsupported. Since the lower courts conducted no review of Schneider's demonstration that the Government's motion to dismiss was arbitrary and capricious, it is inappropriate and unjust to address the merits for the very first time in a Petition for Certiorari Review. No facts were tested by the lower courts. There was only a complaint and an attempted amendment.

Further aggravating this tactic is that such a test of the merits would have been simple at the lower court, with little to no risk to the Government, and with the potential for a great return for the taxpayers. The present case's companion case brought in the Southern District of New York presents a unique opportunity. That companion case has had extensive factual discovery, including extraordinarily telling depositions of one of the main actors in the FCA case, the National Mortgage Settlement Monitor. Such discovery clearly and appreciably reduces the claimed risk to the Government. Yet the Government has made no effort to investigate or review documentation from the companion case. Indeed, it appears that the Government even failed to present the Petitioner's case to auditors and other investigators during its many extensions of the FCA seal periods. If, as has been claimed, an investigation was done into the case, why would such easily accessible discovery go completely unreviewed. Instead, now the Government attempts to bootstrap on this failure to argue merits that it never investigated.

Both Respondents seek to redirect attention towards claimed factual issues in the underlying case. This misdirection misses the point of the Petitioner's claim, intentionally so. But should a test be made; the Petitioner would pass. As but one example, the Government argues that "petitioner 'd[id] not allege that Chase received HAMP incentive payments on' any of the loans that were the subject of his claims". (Gov. Opp.18). What the Government does not admit is that Chase issued blatantly contrary certifications to the Government that were false on their face, false as a matter of law, and that Chase did not have an explanation for such a flagrant lie. In fact, when such infor-

mation was made available at the Section 3730(c)(2)(A) dismissal hearing, the lower court's response was that it lacked discretion to make any other finding. (App.3a). But this Court is not the forum to test the point by point merits of the Petitioner's case. As stated, if called to do so, the Petitioner could easily address each claim, but the *DC Standard* makes such a practice not only impossible, but its denial unreviewable.

The Government argues that its dismissal was "rational" (Gov.Opp.18) and that there was nothing arbitrary in its decision. In truth, the very fact that the Petitioner's case was subjected to a Section 3730(c)(2)(A) dismissal without review of any of the readily available information is the essence of arbitrariness. The Government's wholly unsupported argument that it would be dealing with "large amounts of discovery" is countered by the fact that it failed to ever ask for any discovery while supposedly investigating the claim. (Gov.Opp.18). To now make a merit-based argument after failing to examine the merits, is to strip any semblance that the process was not arbitrary.

III. WHERE THE FCA ASKS PRIVATE CITIZENS TO ENTER INTO ENFORCEMENT ACTIONS IN AID OF THE GOVERNMENT, THE COURT MUST PROTECT SUCH RELATORS TO AVOID A CHILLING EFFECT THAT UNDERMINES THE OBJECTIVES OF THE STATUTE.

The Respondents have this Court leave the *DC Standard* in place and relegate the presiding judge of a dismissal hearing to the position of a spectator, albeit one with the best seat in the house. They would reduce the judicial role and power of the judiciary to that of a casual observer. The *DC Standard* forces the court to act as the preverbal potted plant.

But the Judiciary is not subordinate to the Executive Branch. It is a foundational element of our laws that the co-equal branches each play a role in our legal framework, and the judiciary's role is not one of a bystander. By applying the *DC Standard*, the only review allowed, according to what the Government stated at the hearing, would be for a fraud on the court (App.25a). Such a standard allows a litany of abuses and errors of executive power to occur without review, all aimed at citizens who did nothing more than step into the shoes of the Government and assume all of the risk to prevent fraud on taxpayers. Meanwhile, on the other side of the bench, the Government sits beside the alleged fraudulent actor, an unnatural alliance created by an unreachable standard. Limiting the judge's involvement to fraud on the court leaves the defendant free to act fraudulently without fear, so long as they can threaten the Executive Branch with additional work. Yet, even if this current matter were examined through the lens of a cost benefit analysis, the potential return to the taxpayers is far greater than the cost of allowing the Relator to move forward in his attempts to hold Chase accountable, especially since the Relator is bearing the majority of the costs.

Contrary to the Government's argument (Gov. Opp.12) that "[t]he hearing that Section 3730(c)(2)(A) mandates serves useful functions even if the court cannot review the substantive reasonableness of the government's dismissal decision," public confidence is eroded by a hearing that serves no purpose other than to allow the Government to publicly punish a whistle-blower for attempting to hold corporations accountable while being cheered on by the accused fraudulent

actor. "To perform its high function in the best way 'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). Here, there is no appearance of justice, not even a small one. The balance against being attacked by the Government, the very party the Relator sought to help, can only be determined with the aid of the judge. The False Claims Act makes a request on the public to come forward and aid the Government in combatting fraud. For a relator to have entered into the legal fray with an eye toward bringing malfeasance to light and to find no unbiased seeker of truth prepared to test the case's merit, is to abandon the very idea that our courts have an appearance of justice.

This type of public chastisement without the protections of an unbiased judiciary chills the involvement of the public in upholding the laws of the United States. Instead of engendering public involvement, it provides a disturbing image for the prospective whistleblower: Offenders punishing whistleblowers with unending litigation costs which only come to an end when the Government aides those perpetrators with a dismissal untested by an independent judiciary. To argue that such an image is "increasing public confidence" would be laughable if it was not so troubling. The singular recourse of a relator is to seek the protection of an unbiased judge, a protection denied to him when all powers only aid the defendants.

Such a limitation of the judiciary in favor of the executive is a misapplication of the law. It would be harsh enough to leave an individual to the whims of fate after they rose to the occasion and sought to aid the Government in its enforcement. *Schuster v. City*

of New York, 5 N.Y.2d 75, 81 (1958) ("The duty of everyone to aid in the enforcement of the law, which is as old as history, begets an answering duty on the part of government, under the circumstances of contemporary life, reasonably to protect those who have come to its assistance in this manner.") While the Government does have absolute discretion not to prosecute criminal and most civil cases, that discretion in this instance is circumscribed by the existence of the FCA, which gives the public a role in combatting fraud against the Government. The FCA asks the public to take a direct part in enforcing our laws, it is an invitation, and the public, as an invitee, is owed the minimum of a right to be judged by an unbiased party. In such an instance, the public actor, the relator, trusts that the risk in voluntarily entering into an enforcement action will not harm him but will help the greater good. The judge's role must be to ensure that the public actor is protected for his sacrifice and not simply dismissed out of hand without recourse to the courts.

CONCLUSION

For the foregoing reasons, as well as those contained in the Petition for Certiorari, the Petition should be granted.

Respectfully submitted,

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