No. 20-293

In the Supreme Court of the United States

BRISTOL-MYERS SQUIBB CO., SANOFI-AVENTIS U.S. LLC, SANOFI US SERVICES, INC., FORMERLY KNOWN AS SANOFI-AVENTIS U.S. INC., AND SANOFI-SYNTHELABO INC., PETITIONERS

v.

STATE OF NEW MEXICO *EX REL.* HECTOR BALDERAS, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

Stripped of its rhetoric, the State's brief in opposition disputes remarkably little about the petition. It does not dispute that the federal *qui tam* judgment in *Dickson* was "with prejudice as to relator," Opp. 30, which is, as this Court recently reaffirmed, "an adjudication on the merits" with "preclusive effect." *Lomax* v. *Ortiz-Marquez*, 140 S. Ct. 1721, 1725 (2020). It does not dispute that the State "had the right to intervene, dismiss, or settle [*Dickson*]," that it "could have *** brought its claims [there]," Opp. 20, 24, or that its counsel *agreed* with the trial court that it was "unfair" that petitioners "ha[d] to defend in two jurisdictions" against what counsel conceded were the same claims, Pet. 7-8 ("I'm not going to argue * * * the common nucleus of facts aren't there."). Nor does it dispute that the decision below means that "the State will get a second bite at the apple whenever a relator is unsuccessful." Opp. 20. It does not dispute that the preclusive effect of *qui tam* judgments on the government is a recurring issue of growing importance because "[m]any states have their own versions of the [False Claims Act]." Opp. 2. It does not really even dispute that the courts are divided about whether a *qui tam* judgment precludes later related suits by the government as real party in interest. Opp. 10-11.

At bottom, the only thing the State truly disputes is whether the decision below was correct. The State contends that, even after the trial court paused this case to permit consolidation with *Dickson* and the State consciously decided to proceed with both, the New Mexico Court of Appeals was correct to rewrite the final *Dickson* judgment—and to free the State from the claim-preclusive effect of a federal court's dismissal of a suit that the State authorized, brought in its name and for its benefit. But the State never explains why a sovereign,

unlike any other litigant, gets more than one "full and fair opportunity to litigate" a claim. *Montana* v. *United States*, 440 U.S. 147, 153 (1979). This Court's review is warranted to provide clarity in this critical area of the law. At an absolute minimum, this Court should grant, vacate, and remand so that the New Mexico courts can consider the effects of this Court's recent decisions in *Lomax* and *Lucky Brand Dungarees, Inc.* v. *Marcel Fashions Group, Inc.*, 140 S. Ct. 1589 (2020).

I. The Circuit Split Is Real

Lower courts are divided on whether a with-prejudice dismissal against a *qui tam* relator has preclusive effect against the government where the government has not intervened. Pet. 12-19. The State calls the split "illusory," Opp. 12, but does nothing to reconcile courts' disparate approaches.

The State accepts that—as petitioners explained—the Fifth and Eleventh Circuits have held that the government is not bound by the dismissal of a relator's *qui tam* complaint for failure to state a claim when the government has not intervened. Opp. 7-8; see Pet. 13-15. The State itself highlights that, in *U.S. ex rel. Williams* v. *Bell Helicopter Textron*, 417 F.3d 450, 455 (2005), the Fifth Circuit rejected a rule that would "essentially require[] the government to intervene in order to avoid forfeiting any future claims against the defendant." Opp. 8. The Eleventh Circuit has done the same. *Urquilla-Diaz* v. *Kaplan University*, 780 F.3d 1039, 1057 (2015).

The Seventh and Ninth Circuits take the opposite approach. Pet. 17-19. The State halfheartedly labels those cases' discussion as "dicta," but must concede their plain implication is that "when a relator's *qui tam* suit is resolved on its merits, the government is precluded from filing its own suit for the same claims against the same defendant." Opp. 9-10 (emphasis omitted). In *U.S. ex rel.*

Lusby v. *Rolls-Royce Corp.*, the Seventh Circuit explained that "the [government] must protect its interest by intervening in a *qui tam* action rather than by asserting a right to file a False Claims Act suit after the defendant has prevailed." 570 F.3d 849, 853 (2009). The Ninth Circuit took the same tack in *In re Schimmels*, holding that the dismissal of relators' claim "has a preclusive effect not only on the relators, but also on the government," since "the government has been conclusively shown to be in privity with the relators." 127 F.3d 875, 884-885 (1997). Other federal courts agree. Pet. 18-19.

In the face of this square conflict, the State weakly contends that the decision below is "not inconsistent" with *Lusby*, *Schimmels*, and others, Opp. 7, because (according to the State) *Dickson* somehow was not "resolved *on its merits*." Opp. 9. But the State later concedes that "*Dickson* was dismissed with prejudice as to relator such that relator is precluded from refiling her claim," Opp. 14, which, as this Court recently reaffirmed, *is* "an adjudication on the merits," *Lomax*, 140 S. Ct. at 1725 (internal quotation marks omitted). A court in the Seventh or Ninth Circuits would have been compelled to hold that the *Dickson* dismissal precluded the State's duplicative lawsuit. A court in the Fifth or Eleventh Circuits would reach the opposite conclusion. Only this Court can resolve this intractable conflict.

II. The Decision Below Is Wrong

A. The State argues that the court below "did not craft any *res judicata* exception," but "simply determined that, because *Dickson* was not decided on the merits, *res judicata* did not apply." Opp. 27. Not so. The New Mexico Court of Appeals squarely held that *Dickson* was "an adjudication on the merits as to Relator, consistent with the general rule that a dismissal under Rule 12(b)(6) is an

adjudication on the merits for claim preclusion purposes." App. 19a. The court exempted the State from "general claim preclusion law," App. 8a (capitalization omitted), based on the "policy considerations in *Williams*" because "claim preclusion in the qui tam context could operate adverse to the public interest," App. 15a-16a.

The State nevertheless argues, relying on *Semtek International Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 506 (2001), that this is "not * * * sufficient" to render the dismissal on the merits for claim preclusion purposes. Opp. 14-15. Of course, *some* dismissals with prejudice may lack preclusive effect in other jurisdictions. See *Semtek*, 531 U.S. at 504-506 (dismissal with prejudice on statute of limitations grounds "does not have claim preclusive effect in other jurisdictions with longer, unexpired limitations periods"). But *Lomax* recently reaffirmed that dismissals for failure to state a claim that do not address leave to amend—the very disposition in *Dickson*—are "with prejudice" and "on the merits," and thus "have preclusive effect." 140 S. Ct. at 1725; see Pet. 20-21.

The State cannot reconcile the decision below with this Court's recognition in *U.S. ex rel. Eisenstein* v. *City of New York*, that the government "is bound by the judgment in all FCA actions regardless of its participation in the case." 556 U.S. 928, 936 (2009). *Eisenstein*, like this case, involved dismissal "for failure to state a claim." *U.S. ex rel. Eisenstein* v. *City of New York*, 540 F.3d 94, 96 (2d Cir. 2008). The State contends that *Eisenstein*'s critical language was only "a statement of appellant's argument." Opp. 15 (quoting App. 16a). But this Court *three times*—not just in reciting the arguments—described it as a "fact that the Government is bound by the [*qui tam*] judgment." 556 U.S. at 936. Tellingly, the court below recognized that its interpretation of *Eisenstein* put it into conflict with *Lusby*. See App. 16a (noting *Lusby* read

Eisenstein to "foreclose[] dismissal without prejudice as to the government").

B. The State argues that reversal would make no difference, contending that it was not a party to *Dickson*, Opp. 16, and that the two cases involve different causes of action, Opp. 22. Neither contention is correct.

1. The State claims "[i]t is black-letter law that a judgment does not bind a nonparty, subject to a few limited exceptions." Opp. 16. The State's recitation of the rule is incomplete; this Court has repeatedly stated that "[a] final judgment on the merits of an action precludes the parties *or their privies* from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981) (emphasis added); accord *San Remo Hotel, L.P.* v. *City & Cty. of San Francisco*, 545 U.S. 323, 336 n.16 (2005). This rule plainly includes the State.

The State tries to downplay its role in *Dickson*, saying its interests were "not fully aligned" with relator's, and it "did not exercise any actual control" over the *qui tam* suit. Opp. 19-20. But it does not deny it "had the right to intervene, dismiss, or settle the action," nor that it consciously engaged in claim-splitting even after the trial court in this matter stayed proceedings to allow the State to consolidate its claims in one jurisdiction. *Ibid.* Nor does it contest "the State's status in *Dickson* as the 'real party in interest.'" Opp. 20. As the Seventh Circuit has explained, "[t]he plaintiff in a *qui tam* action, after all, is the [government] rather than the relator; whether the [government] wins or loses in the initial action, that is the end of the dispute." *U.S. ex rel. Chovanec* v. *Apria Healthcare Grp., Inc.*, 606 F.3d 361, 362 (2010). "That the [government] is bound is why it is a real party in interest." *Lusby*, 570 F.3d at 853. The Ninth Circuit has likewise explained that the government's *ability* to intervene in a

qui tam action, as well as the "unity of interest between the relators and the government who will share *any* and *all* recovery in the *qui tam* action," *Schimmels*, 127 F.3d at 883, "conclusively show[]" that the government is "in privity with the relator[]" and therefore bound by an "involuntary dismissal," *id.* at 884.

The State's attempts to minimize these cases fall flat. The State implies they conflict with *Eisenstein*'s holding that the government is not a party to *qui tam* cases, Opp. 21, but Judge Easterbrook's unanimous opinions in *Lusby* and *Chovanec* postdate *Eisenstein*, and *Lusby* explicitly relies on it. As for *Schimmels*, the State claims that the Ninth Circuit's "privity determination * * * relied on the United States' participation in relators' action, a fact that is not present here." Opp. 21 (citation omitted). On the contrary: *Schimmels* stated the government's appearance in the relators' bankruptcy was "immaterial." 127 F.3d at 862.

The State acknowledges that its position means "the State will get a second bite at the apple whenever a relator is unsuccessful," Opp. 20, but justifies that result on the ground that this Court permits "relitigation of many issues" in the class action context, Opp. 20-21 (quoting *Smith* v. *Bayer Corp*, 564 U.S. 299, 316 (2011)). The analogy is inapt. The relationship between an absent class member and a stranger seeking to pursue claims for the putative class does not remotely resemble the relationship between the government and a relator "deputize[d] * * * to seek recovery on the state's behalf," App. 17a, who can pursue claims only with its blessing.

2. The State's contention that the causes of action "do not arise from a common nucleus of fact" defies reality. Opp. 25. The State conceded the opposite below, App. 105a ("I'm not going to argue * * * the common nucleus of facts aren't there."), and acknowledged it was "unfair" to

force petitioners to defend overlapping claims in two jurisdictions, App. 83a. Indeed, core allegations in the State's complaint (not just "background allegations," Opp. 25 n.8) are materially identical to allegations in the *Dickson* relator's pleadings, see App. 110a-129a, and an earlier version of the *Dickson* complaint included allegations that are both legally and factually indistinguishable from the State's current theories, see App. 100a-112a; see also App. 76a-81a.[1] The State's earlier concession disposes of the State's argument that petitioners "view the operative facts at too high a level of generality." Opp. 25. If doubt remains, the Court should remand for reconsideration in light of its recent *Lucky Brand Dungarees* decision, which clarifies when suits arise from a common nucleus of operative fact sufficient for preclusion.

C. Finally, the State brushes aside the glaring federalism problems created by the New Mexico Court of Appeals' refusal to afford preclusive effect to the *Dickson* dismissal. Opp. 26; see Pet. 23-24. Citing *Bayer*, the State argues that "[d]eciding whether and how prior litigation has preclusive effect is usually the bailiwick of the *second* court." Opp. 26 (quoting 564 U.S. at 307). *Bayer favors* review: It recognized that the way to "correct a state court's erroneous refusal to give preclusive effect to a federal judgment" is through review and reversal by "ultimately this Court." 564 U.S. at 307 n.5 (internal quotation marks omitted).

The State also claims that the court of appeals' decision to construe the *Dickson* judgment as without

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[1] The State is equally wrong that its claim is "not the same as in *Dickson*," likening itself and relator to strangers involved in a car accident. Opp. 22-23 & n.7. But Dickson's claim was a partial assignment of the *State's own* claim. *Vermont Agency of Nat. Resources* v. *U.S. ex rel. Stevens*, 529 U.S. 765, 773 (2000).

prejudice to the State was "consistent with federal law governing claim preclusion," Opp. 26, and thus not a basis for certiorari, see Opp. 12.[2] But even the Fifth and Eleventh Circuits do not simply "presume[], absent contrary language," Opp. 26, that judgments in non-intervened *qui tam* actions do not bind the government; they *modify* judgments on direct appeal precisely to avoid that result. *Williams*, 417 F.3d at 456; *Urquilla-Diaz*, 780 F.3d at 1057; see Pet. 16. State courts may not collaterally review or modify final federal judgments. See Pet. 24.

The State could have—as the federal government routinely does—sought modification in federal district court or on direct appeal to avoid this situation. Pet. 14-15, 24. The State may believe that it was not "required to do so," Opp. 27, but where the State failed to protect its rights either by intervening in the *qui tam* action or seeking modification of the *Dickson* dismissal, the state court could not revise a final federal judgment.

III. The Case Is A Clean Vehicle To Resolve An Important And Recurring Issue

The State does not dispute that the preclusive effect of *qui tam* dismissals is an important and recurring issue. The explosion of both federal and state-law *qui tam* actions has imposed heavy costs on courts and litigants. Exempting governments from ordinary claim preclusion rules on "public policy" grounds multiplies these burdens. This untenable situation requires this Court's intervention, and this is an ideal case for resolving it.

The State contrives two purported vehicle problems. The State first argues that the New Mexico Supreme

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[2] Contrary to the State's contention, Opp. 12-13, Petitioners do not seek certiorari to correct "misapplication of a properly stated rule of law." Sup. Ct. R. 10. The decision below implicates a clear circuit split and interpreted federal preclusion law in a manner contrary to this Court's precedent. Pet. 15-16.

Court's dismissal of the case as improvidently granted (possibly because of a retiring justice) weighs against granting this petition. Opp. 28. But as petitioners noted, this Court has previously granted review of New Mexico Court of Appeals cases in precisely this posture. Pet. 16-17 n.5.

The State next suggests that the fact that the decision below did not address whether the two actions involved the same parties and the same causes of action somehow impedes review. Opp. 28. Those issues are not credibly in dispute, see Pet. 5-11, but in any event, this Court routinely grants review to resolve important issues despite claimed alternative bases for affirmance. *E.g.*, *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 922 (2017).

IV. At Minimum, The Court Should Remand For Reconsideration In Light Of Intervening Precedent

The State argues that *Lucky Brand Dungarees*, which clarified that *res judicata* bars parties and their privies from bringing later claims based on the same transaction, would not affect the outcome. Opp. 29-30. But the State conceded that this action and *Dickson* arose from a common nucleus of operative fact and agreed that it would be unfair not to bring them together. App. 105a. Moreover, the State concedes it "could have * * * brought its claims in *Dickson*." Cf. Opp. 24. That is dispositive under *Lucky Brand*, which clarified that claim preclusion bars "issues that could have been raised and decided in a prior action—even if they were not actually litigated." 140 S. Ct. at 1594. The State contends that "three independent grounds" "compel" the decision below regardless of whether the cases arise from the same transaction. Opp. 29-30. As explained above, see pp. 3-7, *supra*, the State is wrong about all three. But in any event, the court of appeals *never mentioned* those issues, much less suggested it would decide them in the State's favor.

The State's argument that it is unnecessary to remand in light of *Lomax* contradicts its own theory of the case. Arguing that the decision below is already "consistent with *Lomax*," Opp. 30, the State effectively agrees that *Dickson* was dismissed with prejudice, i.e., on the merits, see *Lomax*, 140 S. Ct. at 1725. That concession is sharply at odds with its assertions that dismissal for failure to state a claim is not "on the merits." *E.g.*, Opp. 4, 5, 6, 7, 9, 10, 11, 13, 14, 15, 27, 29, 30. Either the court of appeals agreed that the *Dickson* dismissal was on the merits (making reconsideration in light of *Lomax* unnecessary, but implicating a circuit split warranting this Court's review), or it did not (warranting reconsideration in light of *Lomax*). The State cannot have it both ways.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, this Court should grant the writ of certiorari, vacate the judgment below, and remand for further consideration in light of *Lucky Brand Dungarees* and *Lomax*.

Respectfully submitted.

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