No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, EX REL.
JESSE POLANSKY, M.D., M.P.H., PETITIONER

v.

EXECUTIVE HEALTH RESOURCES, INC., ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents a clear, recognized, and intractable conflict regarding an important statutory question under the False Claims Act (FCA), 31 U.S.C. 3729-3733.

When a relator files a *qui tam* action, the FCA puts the government to an initial choice: it "shall" either "(A) proceed with the action, in which case the action shall be conducted by the Government; or (B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action." 31 U.S.C. 3730(b)(4). The FCA then specifies the "Rights of the Parties to the Qui Tam Action[]" based on the government's initial choice.

This case involves the government's dismissal authority under 31 U.S.C. 3730(c)(2)(A). The courts are sharply divided over whether, and when, the government can invoke this authority and dismiss a relator's FCA case after initially "declin[ing] to take over the action." The Seventh Circuit below held that the government could dismiss the case if it first intervenes and then satisfies Fed. R. Civ. P. 41(a)'s general standard. Other circuits expressly disagree on every single part of that determination.

The question presented is:

Whether the government has authority to dismiss an FCA suit after initially declining to proceed with the action, and what standard applies if the government has that authority.

PARTIES TO THE PROCEEDING BELOW

Petitioner is Dr. Jesse Polansky, the appellant below and plaintiff-relator in the district court.

Respondents are Executive Health Resources, Inc., an appellee below and defendant in the district court; and the United States, an appellee below who was deemed to have intervened in the district court.*

RELATED PROCEEDINGS

United States District Court (E.D. Pa.):

Jesse Polansky, M.D., M.P.H., et al. v. *Executive Health Resources, Inc., et al.*, No. 12-CV-4239 (Nov. 5, 2019)

United States Court of Appeals (3d Cir.):

Jesse Polansky, M.D., M.P.H., et al. v. *Executive Health Resources Inc., et al.*, No. 19-3810 (Oct. 28, 2021)

* Although the official caption in the court of appeals included multiple additional parties as both appellants and appellees, the claims involving those additional parties were resolved below and not raised in the court of appeals; the parties listed above are the only parties who participated in the proceedings at the appellate level.

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Dr. Jesse Polansky, the *qui tam* relator below, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-30a) is reported at 17 F.4th 376. The opinion of the district court (App., *infra*, 31a-77a) is reported at 422 F. Supp. 3d 916.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3730 of the False Claims Act (FCA), 31 U.S.C. 3729-3733, provides in relevant part:

> (b) ACTIONS BY PRIVATE PERSONS.—(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.
>
> (2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.
>
> (3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2).
> * * *
>
> (4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—
>
> (A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

* * * * *

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the 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.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

* * * * *

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the

court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. * * *

* * * * *

INTRODUCTION

This case presents a direct and undeniable conflict over the government's authority to dismiss a False Claims Act suit after initially declining to intervene. And the case for a grant is simple and overwhelming. The existence of a "deeply entrenched" split is undisputed. The circuits are now divided a staggering *four* different ways, with other judges entertaining still alternative approaches. The Third Circuit held below that petitioner lost under its application of Fed. R. Civ. P. 41(a)'s "proper" test, but it did not resolve the issue under the more exacting standards endorsed by at least two other circuits. And the plain text, context, structure, and history of the FCA underscore a more fundamental point: the government lacks *any* FCA dismissal authority after initially declining to intervene and instead vesting the relator with "*the* right to conduct the action"—a statutory right framed in unitary terms that this Court has recognized as "exclusive." *Vermont Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 769 (2000).

The question presented repeatedly arises in disputes across the country, and it continues to generate problems and confusion for countless litigants and courts. And the underlying cases are significant: this one alone has billion-dollar stakes, and the government's belated dismissal wiped out a $20 million investment of time and resources. It is little surprise that stakeholders on all sides of the "v." have been urging courts to provide clarity. Because this case presents an excellent vehicle for resolving this important question of federal law, the petition should be granted.

STATEMENT

A. Statutory Background

The False Claims Act imposes civil liability for deceptive practices involving government funds. It specifically targets any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," or who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C. 3729(a)(1)(A)-(B). A person who violates the FCA is liable for civil penalties plus treble damages. 31 U.S.C. 3729(a)(1)(G).

The FCA authorizes private parties, known as relators, to bring a *qui tam* action "*for the person and* for the United States Government." 31 U.S.C. 3730(b)(1) (emphases added). While the action is brought in the government's name (*ibid.*), relators have Article III standing and their own distinct interest in the action: the FCA "effect[s] a partial assignment of the Government's damages claim," *Stevens*, 529 U.S. at 773, and that assignment vests relators with certain rights once the action is filed.

Private FCA actions are initially filed under seal; the government then has 60 days (subject to robust extensions) to investigate the claims. 31 U.S.C. 3730(b)(2)-(3).

Once that period expires, the government has a binary choice: it "shall" either "(A) proceed with the action, in which case the action shall be conducted by the Government; or (B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action." 31 U.S.C. 3730(b)(4). Where the government declines intervention, the relator's "right to conduct the action" is "exclusive," *Stevens*, 529 U.S. at 769, and the government can later intervene only upon establishing "good cause" and "without limiting the [relator's] status and rights." 31 U.S.C. 3730(c)(3).

After Section 3730(b) requires the government to make its choice, Congress set out the parties' respective "[r]ights" in the very next section. 31 U.S.C. 3730(c) ("Rights of the Parties to Qui Tam Actions"). And those rights are directly linked to the government's initial decision:

*Paragraph (1) explains what happens "[i]f the Government proceeds with the action." 31 U.S.C. 3730(c)(1). It confirms the government's "primary responsibility for prosecuting the action," and also confirms the relator's "right to continue as a party to the action, *subject to the limitations set forth in paragraph (2).*" *Ibid.* (emphasis added).

*Paragraph (2) then sets forth those "limitations": it says what happens if the government moves to "dismiss" or "settle" the case "notwithstanding the [relator's] objections," and it permits both the government and the defendant to move to limit the relator's "unrestricted participation" in certain circumstances. 31 U.S.C. 3730(c)(2)(A)-

(D). This is the single paragraph that grants the government any authority to dismiss.[1]

*Paragraph (3) then explains what happens "[i]f the Government elects *not* to proceed with the action" (emphasis added). It confirms the relator's "right to conduct the action," the government's right to "be served with copies of all pleadings," and the government's limited right to intervene—upon a showing of "good cause" and "without limiting the status and rights of the person initiating the action." 31 U.S.C. 3730(c)(3).

*Paragraph (4) then outlines certain limits on relator discovery "[w]hether or not the Government proceeds with the action." 31 U.S.C. 3730(c)(4).

Again, the government's dismissal authority is lodged exclusively in paragraph (2).

When an FCA action is successful, private plaintiffs are entitled to a share of the award, depending on their role and whether "the Government proceeds" or "does not proceed" with the action. 31 U.S.C. 3730(d)(1)-(2). Congress assigned relators this interest to create incentives for private parties (often at great personal sacrifice and expense) to bring wrongdoing to light and combat fraud against the government.

B. Facts And Procedural History

1. a. Petitioner is a doctor who was both an official at the Centers for Medicare and Medicaid Services (CMS) and later a consultant for respondent, a "physician advisor" company that "provides review and billing certifica-

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[1] See 31 U.S.C. 3730(c)(2)(A) ("The Government may dismiss the 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.").

tion services to hospitals and physicians that bill Medicare." App., *infra*, 4a. During his work for respondent, petitioner discovered that respondent was "systematically enabling its client hospitals" to misclassify patients—certifying treatment as "inpatient services" that should have been certified as "outpatient services." *Ibid.* This scheme "exploited the difference in reimbursement rates for inpatient and outpatient services, causing hundreds of thousands of claims" for services improperly billed at higher rates. *Id.* at 32a-33a; see also *id.* at 33a ("According to Relator, 'Medicare generally pays about $4,500-$5,000 more for inpatient services * * * than it does when the same services are provided to a patient classified as outpatient observation.'").

b. In 2012, petitioner filed this FCA action. App., *infra*, 5a. The government investigated the claims for two years before ultimately declining to intervene. The litigation then continued for several more years, with petitioner's counsel incurring approximately $20 million in attorney time and costs. C.A. J.A. 744. Given the size of respondent's operation, petitioner's experts provided uncontroverted evidence of a potential billion-dollar recovery. C.A. J.A. 1772-1774.

2. "In February 2019, however, the case took an unexpected turn: The Government notified the parties that it intended to dismiss the entire action" under Section 3730(c)(2)(A). App., *infra*, 6a. After extensive negotiations with the parties, the government ultimately elected not to seek dismissal, and permitted the case to continue. *Ibid.* But when the case was right on the verge of summary judgment, the government again appeared and filed a motion to dismiss. *Ibid.*

3. The district court granted the motion. App., *infra*, 31a-77a. As relevant here, the district court examined the

"[c]ircuit [s]plit" on the relevant standard for the government's FCA dismissal authority, but ultimately declined to weigh in, despite the extensive submissions by the parties. *Id.* at 43a-49a. As the court saw it, the government's motion would prevail under the Ninth Circuit's "more demanding" standard, so it was unnecessary to decide if a lesser standard applied. *Id.* at 49a.

4. The Third Circuit affirmed on different grounds. App., *infra*, 1a-30a. The court of appeals recognized that it would have to resolve "two key questions that have divided our sister circuits: (1) whether the Government * * * can move for dismissal without first intervening, and (2) if the Government properly moves for dismissal, what, if any, standard must it meet for its motion to be granted?" *Id.* at 3a.

The court first determined that the FCA's "text and structure" reveal that the government must intervene in a declined case before it can invoke its authority under Section 3730(c)(2)(A). App., *infra*, 8a-19a. In so holding, the court rejected the views of the "D.C., Ninth, and Tenth Circuits," and instead adopted the contrary position of the Seventh Circuit. *Id.* at 11a & n.8. The court separately rejected petitioner's argument that the government's FCA dismissal authority is activated only where the government initially proceeds with the case at the outset. *Id.* at 15a-17a.

Although the government had not moved to intervene below, the court treated its motion to dismiss as a combined motion to intervene and dismiss, and thus proceeded to the merits. App., *infra*, 19a. The court again recognized the circuit conflict over the proper standard, and again sided with the Seventh Circuit. *Id.* at 19a-20a. In doing so, the court concluded that Fed. R. Civ. P. 41(a) supplies the "proper" standard for evaluating the government's motion to dismiss. *Id.* at 21a; see also *id.* at 25a-27a

(rejecting the "considered views of other courts"). The court then "review[ed the] district court's order under Rule 41(a)(2) for an abuse of discretion," and "perceive[d] no abuse of discretion." *Id.* at 28a. The court did not separately evaluate the district court's rationale under the competing standards adopted by other courts. See *id.* at 30a (mentioning "Rule 41(a)(2)[]" exclusively as the basis for its disposition).

REASONS FOR GRANTING THE PETITION

A. There Is A Square And Intolerable Conflict Over A Significant Statutory Question Under The False Claims Act

The decision below further cements a "deeply entrenched circuit split" over the government's FCA dismissal authority. *United States ex rel. Health Choice All* v. *Eli Lilly & Co.*, 4 F.4th 255, 263 (5th Cir. 2021). That conflict is both square and indisputable: the courts of appeals have repeatedly recognized the conflict, rejected each other's positions, and ultimately fractured along multiple lines. The confusion over this "unsettled" area is palpable (*id.* at 269 (Higginbotham, J., concurring))—indeed, judges often throw up their hands rather than take sides in the conflict. See, *e.g.*, *United States ex rel. Borzilleri* v. *AbbVie, Inc.*, 837 F. App'x 813, 816 & n.1 (2d Cir. 2020). But the "uncertainty" exacts a clear toll (*Eli Lilly*, 4 F.4th at 269 (Higginbotham, J.)): the practical effect is that parties on all sides must now waste time and resources briefing both (i) which standard applies and (ii) the proper outcome *under all potential standards* (now five and counting)—as it is anyone's guess which approach any court might ultimately accept. *United States ex rel. Borzilleri* v. *Bayer Healthcare Pharm., Inc.*, No. 20-1066, 2022 WL 190264, at *4 (1st Cir. Jan. 21, 2022) (recognizing the obvious "need to clarify" this issue for "district courts").

The existing situation is untenable. The conflict is mature, and there is no possible hope of the split resolving itself. The rampant "uncertainty currently burden[s] businesses and the government's exercise of its dismissal authority" (U.S. Chamber C.A. Amicus Br. 6-7)—in addition to relators who are investing millions of dollars in litigation that could disappear out from under them (at least depending on what standard any circuit might apply). A definitive answer is long overdue, and the Court's guidance is urgently warranted.

1. a. As the first circuit-level approach, the Ninth Circuit adopted a rationality standard in *United States ex rel. Sequoia Orange Co.* v. *Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998). The government initially declined to take over the case, but later "intervened several years after the litigation began." 151 F.3d at 1141. At that time, "the government apparently did not believe it had the authority to dismiss the qui tam actions over the relators' objections," but it "solicit[ed] advice from all parties" and ultimately sought dismissal under Section 3730(c)(2)(A). *Id.* at 1142.[2]

Recognizing that "[t]he qui tam statute itself does not create a particular standard for dismissal," the Ninth Circuit looked to the text, context, and history of the provision to devise a standard. 151 F.3d at 1145. It first rejected the relators' contention that the government, post-declination, lacked dismissal authority (*id.* at 1145), and then rejected the contention that Rule 41 supplied the govern-

[2] As the court recognized, for over a century the FCA did not permit the government to intervene at all after initially declining to participate. It was not until Congress's 1986 amendments that the government was allowed "to intervene at a later date upon a showing of good cause." 151 F.3d at 1144 (describing the new version of 31 U.S.C. 3730(c)(3)).

ing standard (*ibid.*). It instead adopted a "'two step'" burden-shifting analysis: First, the government must identify "'a valid government purpose'" and "'a rational relation between dismissal and accomplishment of th[at] purpose.'" *Ibid.* Second, if the government satisfies that showing, "the burden switches to the relator 'to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal.'" *Ibid.*

The Ninth Circuit grounded its approach in the "same analysis" used "to determine whether executive action violates substantive due process," and tracked "significant support" from the key Senate Report behind the FCA's 1986 amendments—"which explained that the relators may object if the government moves to dismiss without reason." 151 F.3d at 1145; see also *ibid.* ("A hearing is appropriate 'if the relator presents a colorable claim that the settlement or dismissal is unreasonable in light of existing evidence, that the Government has not fully investigated the allegations, or that the Government's decision was based on arbitrary or improper considerations'" (quoting S. Rep. No. 345, 99th Cong., 2d Sess. 26 (1986))). The court finally concluded that its "rational relation test avoids any separation of powers concerns." *Id.* at 1145-1146.

The Ninth Circuit has consistently applied the *Sequoia* standard since its adoption. See, *e.g.*, *United States* v. *United States ex rel. Thrower*, 968 F.3d 996, 1001 (9th Cir. 2020) (reaffirming the circuit's "two-step test"); see also *United States* v. *Academy Mortg. Corp.*, No. 16-2120, 2018 WL 1947760, at *3 (N.D. Cal. Apr. 25, 2018) (flagging the circuit conflict but finding itself "bound by Ninth Circuit precedent").

b. The Tenth Circuit reached the same conclusion in *Ridenour* v. *Kaiser-Hill Co.*, 397 F.3d 925 (10th Cir. 2005). In doing so, the Tenth Circuit sided expressly with the

Ninth Circuit and rejected the contrary position of the D.C. Circuit. 397 F.3d at 935-936.

In *Ridenour*, the government spent "two years" "investigat[ing] the merits of the *qui tam* action" before declining to intervene. 397 F.3d at 930. But with litigation underway, the government later moved to dismiss under Section 3730(c)(2)(A). *Ibid.*

The Tenth Circuit initially held that the government could seek dismissal without first intervening under Section 3730(c)(3). 397 F.3d at 932. The court found nothing in Section 3730(c)(2)(A)'s language or legislative history "suggest[ing] the authority of the Government to dismiss a *qui tam* action is dependent upon prior intervention in the case." *Id.* at 933. On the contrary, the court reasoned, "the purpose of late intervention is to pursue litigation, not dismiss it." *Ibid.* The court also bolstered its conclusion with constitutional avoidance: it explained that conditioning the right to dismiss "upon a requirement of late intervention tied to a showing of good cause" would tread upon executive power under the Take Care Clause. *Id.* at 934.

The Tenth Circuit next addressed the proper standard applied to the government's dismissal authority. 397 F.3d at 935-936. After surveying the competing views of the Ninth and D.C. Circuits, the Tenth Circuit adopted the Ninth Circuit's rationality test. *Id.* at 936. As the court explained, the Ninth Circuit's approach "recognizes the constitutional prerogative of the Government under the Take Care Clause, comports with legislative history, and protects the rights of relators to judicial review." *Ibid.* The court also found the D.C. Circuit's conflicting views gave insufficient weight to Section 3730(c)(2)(A)'s "hearing" requirement, which "impart[s] more substantive rights" for relators. *Id.* at 935.

Judge Eagan dissented in part. 397 F.3d at 940-942. While she agreed that the Ninth Circuit's standard was correct, she disagreed with the majority's view "that the FCA does not require the Government to intervene prior to moving to dismiss a *qui tam* action." *Id.* at 940. As Judge Eagan explained, the majority's approach "disregards the surrounding provisions and the context in which the dismissal provision appears": because "subsection (c)(2) contains limitations applicable only to subsection (c)(1)"—"the provision relating to the Government's election to proceed with the action"—"subsections (c)(1) and (c)(2) do not apply where the government elects *not to proceed during the seal period*." *Ibid.* (emphasis added). It thus followed that "the government has unfettered discretion to dismiss if it intervenes within the sixty-day seal period, but not after." *Id.* at 941.

While Judge Eagan concluded that the government could seek "late intervention" under subsection (c)(3), it could not move to dismiss without establishing independent "good cause" and formally intervening. 397 F.3d at 942.

Like the Ninth Circuit, the Tenth Circuit has consistently endorsed *Sequoia*'s rationality standard. See, *e.g.*, *United States ex rel. Wickliffe* v. *EMC Corp.*, 473 F. App'x 849, 853 (10th Cir. 2012).

2. a. The D.C. Circuit adopted a contrary position in *Swift* v. *United States*, 318 F.3d 250 (D.C. Cir. 2003). According to *Swift*, the FCA "give[s] the government an unfettered right to dismiss [a *qui tam*] action." 318 F.3d at 252. The court found that Section 3730(c)(2)(A) "does not say that the government must intervene in order to seek dismissal," and it does not "give[] the judiciary general oversight of the Executive's judgment" to dismiss. *Id.* at 251-252. On the contrary, the D.C. Circuit reasoned, the provision vests dismissal authority in the Executive

Branch alone, which "suggests the absence of judicial constraint." *Id.* at 252.

The D.C. Circuit found this "unfettered" authority consistent with the government's "unreviewable" prosecutorial discretion, general dismissal rights under Rule 41, and the separation of powers, including the Executive's "historical prerogative to decide which cases should go forward in the name of the United States." 318 F.3d at 252-253. It also declared Section 3730(c)(2)(A)'s hearing requirement insufficient to grant the judiciary any role in the decision: "the function of a hearing * * * is simply to give the relator a formal opportunity to convince the government not to end the case." *Id.* at 253. Under *Swift*'s view, a hearing does not permit courts to decide if "the Executive is acting rationally and in good faith." *Ibid.*

The D.C. Circuit recognized that the Ninth Circuit endorsed a conflicting standard, but it declined "to adopt the *Sequoia* test." 318 F.3d at 252.

b. While *Swift* factually involved the government moving to dismiss in the initial seal period (318 F.3d at 250-251), the D.C. Circuit later extended the *Swift* standard to all cases, including those where the government initially "decline[d] to take over the action" (31 U.S.C. 3730(b)(4)(B)) and sought dismissal with litigation underway. See *Hoyte* v. *American Nat'l Red Cross*, 518 F.3d 61, 64-65 & n.4 (D.C. Cir. 2008) (rejecting *Sequoia* and re-affirming "the Government's virtually 'unfettered' discretion to dismiss the *qui tam* claim"). This position is firmly entrenched in the D.C. Circuit. See, *e.g.*, *United States ex rel. Schneider* v. *JPMorgan Chase Bank, Nat'l Ass'n*, No. 19-7025, 2019 WL 4566462, at *1 (D.C. Cir. Aug. 22, 2019) (recognizing the circuit conflict but applying *Swift*). And the government continues to promote *Swift*'s "unfettered discretion" standard in courts nationwide, including in the proceedings below.

3. a. Adopting still another approach, the Seventh Circuit canvassed the existing conflict in *United States ex rel. CIMZNHCA, LLC* v. *UCB, Inc.*, 970 F.3d 835 (7th Cir. 2020), and declared that all three circuits were wrong: it rejected the rationality standard (adopted by the Ninth and Tenth Circuits) and rejected the unfettered-discretion standard (adopted by the D.C. Circuit). See 970 F.3d at 838-839 (attacking the other circuits as "misunderstanding" "the government's rights and obligations under the False Claims Act"). According to the Seventh Circuit, the government could not seek dismissal without first intervening under Section 3730(c)(3), and it further held that any subsequent dismissal motion should be evaluated under Rule 41's general standards. *Id.* at 839; see also *id.* at 840 (noting that "the correct answer lies much nearer to *Swift* than to *Sequoia*").

The Seventh Circuit initially declared that the government could not invoke its Section 3730(c)(2)(A) authority without properly intervening. 970 F.3d at 843-844 (disavowing the conflicting views of the Third, Ninth, Tenth, Eleventh, and D.C. Circuits). The court explained that "[t]he power of a non-party to force dismissal of another's lawsuit is otherwise unheard of in our law." *Id.* at 842. And it parsed the Act's text and structure to confirm that the FCA was no exception. It explained how the government's dismissal authority is lodged in subsection (c)(2), which necessarily operates only "against the backdrop of government intervention." *Id.* at 844-845. It further showed how *Swift*'s opposite position "makes surplusage" of multiple provisions of the Act, and otherwise frustrates the relator's categorical "'right to conduct the action'—without qualification—when the government has declined to intervene." *Ibid.*; see *id.* at 845-849 (concluding that contrary arguments, including perceived "constitutional

doubt[s]," "are not persuasive": "here, the constitutional questions are more dubious than the statutory text").

The Seventh Circuit then announced its "standard on the merits of dismissal" under Section 3730(c)(2)(A): "The standard is that provided by the Federal Rules of Civil Procedure, as limited by any more specific provision of the False Claims Act and any applicable background constraints on executive conduct in general." 970 F.3d at 849. It acknowledged that the FCA's hearing requirement cuts back on Rule 41(a)'s ordinary command, but it declared that Rule 41(a)'s "proper" standard otherwise applies. *Id.* at 850. While not fleshing out exactly what that means, the court declared the role was sufficient to leave the "hearing" requirement with some work to do. *Ibid.* ("the court is not called upon to serve as a mere convening authority—'and perhaps,' as the district judge put it here, 'serve you some donuts and coffee'—while the parties carry on an essentially private conversation in its presence"). And it expressly declared that the Ninth Circuit's "'two-step test'" "impos[ed]" an impermissibly high burden on the government. *Id.* at 853.

The Seventh Circuit finally held that the government's intervention under Section 3730(c)(3) and dismissal under Section 3730(c)(2)(A) would not impermissibly "'limit[] the status and rights' of the relator." 970 F.3d at 853; see also 31 U.S.C. 3730(c)(3) (dictating that the government could belatedly intervene only "without limiting the status and rights of the person initiating the action"). The court believed that constraining the government's dismissal authority would unduly leave it in the same position as an ordinary intervenor, which the Seventh Circuit suggested was already authorized "under Rule 24(b)(2)." *Id.* at 853. Instead, it found "[t]he better reading is that § 3730(c)(3) instructs the district court not to limit the relator's 'status and rights' as they are defined by §§ 3730(c)(1) and (2)"—

but, apparently, not (c)(3) itself. *Ibid.* Indeed, the court did not explain how that "better reading" would somehow *not* "limit[]" the relator's unitary "right to conduct the action," which Section 3730(c)(3) grants "without qualification" in the very same provision. *Id.* at 845 (so acknowledging).

Judge Scudder concurred in the judgment. 970 F.3d at 855-856. Given the weakness of that particular relator's suit, he saw no need to confront "the difficulty of landing on the right answer" regarding the FCA's "odd provision[s]." *Id.* at 856.

b. The Third Circuit below adopted the Seventh Circuit's position on each of these issues, further deepening the split. App., *infra*, 19a (intervention), 20a (dismissal standard).

And after the Third Circuit's decision issued, the Eleventh Circuit weighed in—rejecting the Third and Seventh Circuit's position on intervention, but apparently agreeing with the Third and Seventh Circuit's position on the proper standard for assessing dismissal. See *United States* v. *Republic of Honduras*, No. 20-10604, 2021 WL 6143686, at *1, *3 (11th Cir. Dec. 30, 2021); see also *id.* at *2 n.1 (flagging the circuit conflict). In a two-judge concurrence, Judge Tjoflat suggested that the result was preordained by circuit authority, which should be "overturned." *Id.* at *3-*4 (declaring intervention necessary because "the limitations in paragraph [(c)](2) are dependent on the Government proceeding with the action under § 3730(c)(1)"). But he did "agree" with the Court's decision to follow the Third and Seventh Circuits (rather than the Ninth, Tenth, or D.C. Circuits) on the dismissal standard. *Id.* at *6.

4. In the past week, the First Circuit has now also confronted these issues—and, astoundingly, repudiated the views of *all* circuits in adopting yet a *fourth* standard:

> After considering the FCA as a whole and the various approaches that have been adopted by other circuits, we conclude that (i) although the government does not bear the burden of justifying its motion to the court, the government must provide its reasons for seeking dismissal so that the relator can attempt to convince the government to withdraw its motion at the hearing; and (ii) if the government does not agree to withdraw its motion, the district court should grant it unless the relator can show that, in seeking dismissal, the government is transgressing constitutional limitations or perpetrating a fraud on the court.

United States ex rel. Borzilleri v. *Bayer Healthcare Pharm., Inc.*, No. 20-1066, 2022 WL 190264, at *1 (1st Cir. Jan. 21, 2022).

In reaching this conclusion, the First Circuit examined the "divergent approaches by the Ninth Circuit and the D.C. Circuit," as well as "a third approach[] taken by the Seventh and Third Circuits." 2022 WL 190264, at *2 & n.2. It declared that "the statute contemplates a judicial judgment of some kind, providing a level of protection for the relator's interest in the suit," but it found "[t]he nature of that judicial judgment" "the more difficult question." *Id.* at *5. It concluded that *Swift*'s approach was too little, *Sequoia*'s too much, and the Rule 41 inquiry "inapposite to the qui tam relator's unique situation as, in effect, an objecting co-plaintiff." *Id.* at *4-*6 ("counsel[ing] against the wholesale adoption of the primary approaches used by other courts"). In crafting its pseudo-hybrid standard, the First Circuit conceded that its novel judicial check will "rarely" apply to the government's invocation of its FCA dismissal authority. *Id.* at *9.

5. Finally, there is a still a fifth option suggested by language in Sixth Circuit opinions, tacitly adopted by a dissenting judge on the Fifth Circuit, and advanced by

multiple corporate parties: post-declination, the government lacks the unilateral authority to dismiss the relator's FCA case under Section 3730(c)(2)(A). As petitioner explained below, this approach alone is consistent with the FCA's plain text, context, structure, and history, and it solves the quagmire left in the wake of the rapidly splintering circuit conflict. See C.A. Opening Br. 22-29; C.A. Reply Br. 4-15.

Under this view, "Section 3730(c)(2)(A) applies only when the government has decided to 'proceed[] with the action' and has assumed 'primary responsibility for prosecuting the action.'" *United States ex rel. Poteet* v. *Medtronic, Inc.*, 552 F.3d 503, 519 (6th Cir. 2009). It thus necessarily does *not* apply after the government takes a pass after the initial seal period is over. Congress gave the government a "binary" choice upfront (*UCB*, 970 F.3d at 845): it "shall" either (A) "proceed with the action, in which case the action shall be conducted by the Government," or (B) "notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action." 31 U.S.C. 3730(b)(4). Once the government declines, the relator's "control" is "exclusive." *Vermont Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 769 (2000). The government is *not even a party*, and is "thereafter limited to exercising only specific rights during the proceeding." *United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928, 932-933 (2009). While the government is later permitted to intervene, any intervention must not "limit[] the status and rights of the person initiating the action"—rights that Congress *twice* confirmed (including *two sentences earlier*) include "*the right to conduct the action*." 31 U.S.C. 3730(b)(4)(B), (c)(3). It is baffling to understand how the

government respects the relator's "exclusive" (and unitary) "right to conduct the action" by seizing absolute control and involuntarily dismissing his case.

Nor is this reading at all exceptional: Under the original version of the FCA, "once the action was commenced by the relator, no one could interfere with its prosecution"; "[t]he act contained no provision for the Government to take over the action and, in fact, the relator's interest in the action was viewed, at least in one instance, as a property right which could not be divested by the United States if it attempted to settle the dispute with the defendant." S. Rep. No. 345, *supra*, at 10. Indeed, under the pre-1986 Act, "the Government [was] barred from reentering the litigation once it ha[d] declined to intervene during th[e] initial period." *Id.* at 26. The Act's plain text thus reflects the history of the statute: while Congress expanded the government's ability to intervene post-declination, it retained the traditional restriction on supplanting the relator after vesting that relator with primary control over the case. See, *e.g.*, *United States* v. *Health Possibilities, P.S.C.*, 207 F.3d 335, 343 (6th Cir. 2000) (the 1986 amendments "limit[ed] the opportunity for the government to completely take over a *qui tam* action after the initial sixty-day period").

While this approach has been rejected by the Third, Seventh, and Ninth Circuits (and implicitly by others), it is not without support. Judge Smith favorably referenced this argument in *Riley* v. *St Luke's Episcopal Hosp.*, 252 F.3d 749, 763 n.19 (5th Cir. 2001) (Smith, J., dissenting). It has been advanced by multiple corporations. See, *e.g.*, *United States ex rel. Stone* v. *Rockwell Int'l Corp.*, 282 F.3d 787, 806 (10th Cir. 2002) ("if the Executive is allowed to intervene after initially declining to do so, it is barred from dismissing the relator's claims"); *United States ex rel. Kelly* v. *Boeing Co.*, 9 F.3d 743, 746-747 (9th Cir. 1993)

("Boeing claims that this proviso"—intervention "may not limit the relator's 'status and rights'"—means the relator retains primary authority to conduct the action"). And the government itself apparently thought it was correct—at least before it changed its mind. See *Sequoia*, 151 F.3d at 1142. The argument has been fully vetted by multiple courts, and it casts further doubt on the decision below.

* * *

The conflict over this fundamental statutory question is deep, obvious, and entrenched. The circuits are in complete disarray. There are now at least four (if not five) conflicting approaches adopted by various circuits, who have confronted, and rejected, the opposing analyses. All aspects of the debate have been fully exhausted, and additional percolation is pointless—the courts disagree over every facet of the question presented, and there is no chance of this split dissipating on its own.

In the meantime, parties and courts continue to waste countless hours and resources arguing over the appropriate standard and, inevitably, needlessly litigating whether *each* standard is met—given the impossibility of predicting which of the conflicting standards any court might ultimately adopt. See, *e.g.*, *United States ex rel. Hinds* v. *SavaSeniorcare LLC*, No. 18-1202, 2021 WL 1663579, at *8 (M.D. Tenn. Apr. 28, 2021) (one of many examples). This Court's immediate review is warranted.

B. The Question Presented Is Exceptionally Important And Warrants Review In This Case

1. The question presented is of obvious legal and practical importance. The circuits have fractured multiple ways, and the profound confusion is interfering with the effective administration of the FCA. The issue arises all the time, and stakeholders are desperate for a clear answer, which only this Court can provide. See, *e.g.*, U.S. Chamber C.A. Br. 6-7 (explaining the significant economic

and practical costs of uncertainty, and urging the Third Circuit to resolve the scope of the government's FCA dismissal authority).

Nor is there any hope of this issue resolving itself. The number of annual FCA cases are staggering. See, *e.g.*, U.S. Department of Justice, Press Release, *Deputy Associate Attorney General Stephen Cox Delivers Remarks at the Federal Bar Association Qui Tam Conference* (Feb. 28, 2018) <https://tinyurl.com/daag-fca-remarks> ("since 2011, more than 600 qui tam cases have been filed annually, and in many years the number of cases topped 700"; "the Department intervenes in only about 1 in 5 cases that are filed"). The stakes are often massive, which leads to full litigation of all open questions—including the potential outcome(s) under any conceivable standards a court might adopt. See, *e.g.*, *UCB*, 970 F.3d at 853 (flagging the "burden" imposed in litigating under certain standards). Indeed, this case is a perfect example: experts have confirmed the billion-dollar stakes, and petitioner's counsel invested over $20 million of time and resources developing his claims over a period of years—all to watch the government suddenly pull the plug on the eve of summary judgment.

Since 2018, the government has vastly increased its efforts to dismiss declined FCA actions. See Sen. Grassley Ltr. To A.G. Barr 2 (May 4, 2020) <https://tinyurl.com/grassley-fca> (explaining that prior to the so-called "Granston memo," post-declination motions to dismiss were rare; but there were approximately 45 examples from January 2018 through May 2020 alone). The issue is already affecting dozens upon dozens of cases, and burdening the dockets of courts nationwide. There is no advantage to waiting to see how many other conflicting positions might surface in those circuits that have yet to weigh in.

2. This case is an excellent vehicle for deciding this significant question. The dispute turns on a pure question of law: the proper construction of the FCA and the government's Section 3730(c)(2)(A) dismissal authority. It has no factual or procedural impediments. The question presented was squarely resolved below, and the statutory issue is outcome-determinative. Unlike certain other cases, the Third Circuit did *not* find that the result would be the same under any standard—and, indeed, it would not. The panel solely applied an abuse-of-discretion analysis under Rule 41(a)'s "proper" test (App., *infra*, 28a)—and neither addressed nor resolved the proper application of the competing *Sequoia* framework. See also *UCB*, 970 F.3d at 840 (noting that the Rule 41(a) standard "lies much nearer to *Swift* than to *Sequoia*").

If the Court agrees with petitioner that the government lacks any post-declination Section 3730(c)(2)(A) dismissal authority, petitioner automatically wins. And if the Court instead adopts the Ninth and Tenth Circuit approach, it can remand for the Third Circuit to decide in the first instance whether the government's "stated" basis can withstand scrutiny under the heightened *Sequoia* analysis. See, *e.g.*, C.A. Opening Br. 34-46 (exhaustively briefing this question); C.A. Reply Br. 17-24 (same). The legal question is thus squarely teed up and ripe for disposition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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