No. 21-1052

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

REPLY BRIEF FOR THE PETITIONER

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As the petition established, there is a "deeply entrenched circuit split" over the government's dismissal authority under the False Claims Act. *United States ex rel. Health Choice All* v. *Eli Lilly & Co.*, 4 F.4th 255, 263 (5th Cir. 2021). This is the unusual case where that deep split is effectively conceded; indeed, there is no genuine dispute that the circuits have astoundingly fractured at least *four* different ways. There is no dispute that the issue arises routinely in high-stakes cases, often involving millions or even billions of dollars. There is no dispute that the issue is wasting judicial and party time and resources, forcing everyone to deal with the endless confusion the issue generates. *E.g.*, *id.* at 269 (Higginbotham, J., concurring) ("this uncertainty has divided our sister courts"); *United States ex rel. CIMZNHCA, LLC* v. *UCB, Inc.*, 970 F.3d 835, 856 (7th Cir. 2020) (Scudder, J., concurring) (noting "the difficulty of landing on the right answer"). And there is no dispute that the issue is ripe for review: respondents never explain how further percolation would sharpen the issues or produce any practical or theoretical benefit, and it takes only a quick glance at the exhaustive analyses on every side of the split to understand the issue arrives fully ventilated from every conceivable angle.

There is a reason that key stakeholders have cried out for guidance: 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), and it leaves relators exposed after investing millions of dollars in litigation (Taxpayers Against Fraud C.A. Amicus Br. 3-11). This "'pure question of law'" is a matter "'of public importance'" (Pet. App. 9a n.7); there is an obvious "need to clarify" this issue for "district courts" (*United States ex rel. Borzilleri* v. *Bayer Healthcare Pharm., Inc.*, 24 F.4th 32, 39 (1st Cir. 2022)), and all sides "would benefit

from guidance on a question that has divided the Courts of Appeals" (Pet. App. 9a n.7).

In the proceedings below, both EHR and the government asked the Third Circuit to affirm under any standard, but the panel refused—it decided the case solely under its Rule 41 approach. Pet. App. 28a-30a; U.S. Br. 9 (so conceding: "[a]pplying its approach to the circumstances of this case, the court of appeals held that the district court had not abused its discretion in granting the United States' motion to dismiss"); EHR Br. 10 (so conceding: "[a]pplying that [Rule 41] standard, the Court of Appeals concluded that the District Court did not abuse its discretion by granting the Government's motion to dismiss"). It did not address the outcome under any competing analysis, which is especially telling given the parties' hotly contested views on how the case should be resolved under the Ninth and Tenth Circuits' approach. See, *e.g.*, C.A. Opening Br. 34-46 (exhaustively briefing this question); C.A. Reply Br. 17-24 (same). This Court can now decide the correct legal standard and remand for its application in the first instance. That makes this an optimal vehicle for finally resolving this entrenched split.

Because this case provides the ideal opportunity to resolve an exceptionally important question affecting dozens of substantial FCA cases, review should be granted.

A. There Is A Square And Intolerable Conflict

1. Despite respondents' best efforts to kick up dust, the case for review remains exceptionally clear. The circuit conflict is undeniable. See, *e.g.*, *Borzilleri*, 24 F.4th at 37 & nn.2-3 (flagging the "divergent approaches" by multiple circuits, including "[a]t least two courts of appeals" that "noted the split among the circuits but have avoided weighing in"). The courts of appeals are not merely adopting conflicting standards, but expressly confronting, and rejecting, each other's logic on every level. *E.g.*, *id.* at 42

("counsel[ing] against the wholesale adoption of the primary approaches used by other courts"); *UCB*, 970 F.3d at 838-839 (attacking other circuits as "misunderstanding" "the government's rights and obligations under the False Claims Act"); *Swift* v. *United States*, 318 F.3d 250, 252 (D.C. Cir. 2003) (declining "to adopt the *Sequoia* test").[1]

Respondents say there is no urgent need to resolve this conflict, which is perplexing. The issue is spinning out of control. There is already a four- or five-way split. The Eleventh Circuit just went en banc. *United States* v. *Republic of Honduras*, 26 F.4th 1252 (Mar. 9, 2022) (mem.). The issue is not going anywhere, and there is no point in waiting to see if another circuit adopts yet another standard. The practical effect is that parties on all sides must now brief *which* standard applies and the proper outcome under *all conflicting standards*. The result is mass confusion and waste for litigants (and judges) in high-stakes disputes that frequently arise in courts nationwide. This issue is essential to the FCA's effective administration, and it is untenable to have at least a *four-way split* where no one knows the correct legal standard in billion-dollar cases.[2]

Respondents likewise insist the difference between the circuits' "divergent" standards is "modest." U.S. Br. 20; EHR Br. 10-11. This blinks reality. Parties do not vig-

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[1] EHR sheepishly characterizes this obvious conflict as an "alleged" split. Br. 11. Yet this "deeply entrenched" conflict is as clear as it gets. *Health Choice*, 4 F.4th at 263.

[2] Respondents themselves supply a sample of cases where courts and parties were forced to confront the conflicting standards. EHR Br. 20-21 & n.7; U.S. Br. 22-23. Each case suffers from the wasted time and resources devoted to briefing this "unsettled" issue. *Health Choice*, 4 F.4th at 269 (Higginbotham, J., concurring).

orously litigate irrelevant differences; courts do not publish extensive opinions to parse meaningless distinctions; and circuits do not go en banc to correct trivial disagreements. See Fed. R. App. P. 35(a)(2) (asking whether "the proceeding involves a question of exceptional importance"); *Honduras*, *supra* (sua sponte granting rehearing en banc). The daylight between the *five* approaches is obvious, and has been recognized by the circuits themselves. See, *e.g.*, *Health Choice*, 4 F.4th at 267 (*Sequoia* is "the test most favorable" to relators); *United States ex rel. Borzilleri* v. *AbbVie, Inc.*, 837 Fed. Appx. 813, 816 (2d Cir. 2020) (flagging "the more stringent [*Sequoia*] standard"); *UCB*, 970 F.3d at 840 (Rule 41 "lies much nearer to *Swift* than to *Sequoia*"); Pet. App. 30a (Rule 41 provides a "'broad grant of discretion'"); *Ridenour* v. *Kaiser-Hill Co.*, 397 F.3d 925, 936 (10th Cir. 2005) (conducting "an exhaustive review of the record" under *Sequoia*). There is a reason the government itself continues to support the D.C. Circuit's standard in *Swift*, rather than acquiesce in any of the competing standards adopted by the First, Third, Seventh, Ninth, Tenth, or Eleventh Circuits. See Pet. 10-22 (outlining the five approaches adopted by those circuits, together with a sixth, plain-text approach suggested by the Sixth Circuit).

And the cost of this ongoing confusion is palpable. As the U.S. Chamber explained below, based on its members' experience, "[t]he current legal uncertainty * * * makes it even more difficult for defendants to convince the government to exercise its dismissal discretion," and otherwise "deters the government from the appropriate exercise of [its dismissal] authority." U.S. Chamber C.A. Amicus Br. 6-7. The conflict thus not only burdens litigants forced to needlessly brief (and re-brief) the question in every case, but it also short-circuits the process before a dismissal motion might even be filed.

In short, courts have recognized the urgent need for guidance; one circuit has gone en banc, reflecting the issue's obvious importance; and key stakeholders have pleaded for clarity and certainty. Until this Court intervenes, parties will be stuck relitigating this issue in dozens of cases while courts nationwide continue to enforce conflicting standards. And unlike some conflicts implicating obscure federal schemes, the FCA is a prominent federal law that frequently generates cases with overwhelming stakes that can dwarf the entire universe of litigation in other areas where this Court regularly grants review. The national standards in cases of such magnitude should not vary based on geography. Respondents offer no good reason to ignore this intolerable division over such an important federal scheme.[3]

2. Because respondents cannot adequately explain why *this* case should be denied, they instead suggest the Court should deny here because it "recently" denied review over "similar arguments" in two other cases. U.S. Br. 11 (citing *United States ex rel. CIMZNHCA, LLC* v. *UCB, Inc.*, 141 S. Ct. 2878 (2021) (No. 20-1138), and *United States ex rel. Schneider* v. *JPMorgan Chase Bank*, 140 S. Ct. 2660 (2020) (No. 19-678)); EHR Br. 19-20 (same). Yet those cases only highlight precisely why review *is* warranted.

First, *Schneider* involved an unpublished, single-page per curiam order at a time when only three circuits had weighed in on a two-way split. See *United States ex rel.*

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[3] Underscoring the confusion, the government readily admits it believes the Third Circuit erred in *both* parts of its core analysis: "The court below erred in requiring the United States to intervene before moving to dismiss an FCA action under Section 3730(c)(2)(A), and in holding that the government must establish 'good cause' and 'proper' justification in order to obtain dismissal." Br. 14. This hardly inspires confidence in its recommendation to deny review.

Schneider v. *JPMorgan Chase Bank*, No. 19-7025, 2019 WL 4566462, at *1 (D.C. Cir. Aug. 22, 2019); see also Br. in Opp. 7 (No. 19-678) (making the same point). In the short time since *Schneider* was decided, *three* new published decisions have emerged (including one that since went en banc), leaving a staggering *four-way* split among seven circuits. The fact that the Court denied review over an unpublished, perfunctory order implicating a shallow split says nothing about the merits of this petition—involving an extensive published opinion and an intractable, heavily fractured circuit conflict. Indeed, if anything, *Schneider* highlights how quickly the situation is getting worse—and will continue its downward spiral until this Court intervenes.

Second, *CIMZNHCA* was not only decided before the Third, First, and Eleventh Circuits issued conflicting opinions, but it also was "an unsuitable vehicle * * * because the court below held that petitioner's suit would be dismissed under any standard." Br. in Opp. 9 (No. 20-1138); see also *UCB*, 970 F.3d at 852 ("Wherever the limits of the government's power lie, this case is not close to them. * * * We must disagree with the suggestion that the government's decision here fell short of the bare rationality standard borrowed by *Sequoia Orange*"); *id.* at 856 (Scudder, J., concurring) ("[e]ven under the Ninth Circuit's standard, the government's dismissal request easily satisfied rational basis review"). In fact, that case was so weak the court found the relator's complaint "challenge[d]" *lawful* conduct that was "'appropriate and beneficial to federal healthcare programs and their beneficiaries.'" Br. in Opp. 19.

A relator that indisputably lost under any standard is far different from a vehicle where, as here, the panel decided the case solely under Rule 41 and *declined* respondents' invitation to separately affirm under the competing

Sequoia framework. Put simply, that case had unsurpassable vehicle flaws that this case does not, merely highlighting why this case is an optimal vehicle.

3. As petitioner explained, other judges and parties have suggested a different construction that alone is consistent with the FCA's plain text, context, structure, and history: post-declination, the government lacks the unilateral authority to dismiss the relator's FCA case under Section 3730(c)(2)(A). Pet. 19-22. Respondents disagree, but their objections are generally better suited for plenary review. A few short points for now.

First, respondents argue that petitioner's plain-text reading is "extreme" (U.S. Br. 23) and contrary to the government's "longstanding authority to dismiss *qui tam* actions" (EHR Br. 20). This is exactly backwards. As previously explained (Pet. 21), under the original version of the FCA, the government had no authority to intervene *at all*; the relator had full control. The statute was later amended to allow the government to take over the case at the outset, but the government (post-declination) was otherwise barred from participating. See *United States* v. *Health Possibilities, P.S.C.*, 207 F.3d 335, 342 (6th Cir. 2000) (outlining FCA's history from 1863). It was not until the 1986 amendments that Congress gave the government *any* right to intervene at later stages; but Congress expressly conditioned that intervention on *not* "limiting the status and rights of the person initiating the action"—rights that Congress twice confirmed (including two sentences earlier) included "*the* right to conduct the action." 31 U.S.C. 3730(b)(4)(B), (c)(3).

For over a century, the government accordingly lacked the very right it (atextually) insists it now has. Petitioner's reading alone comports with the FCA's longstanding history.

Second, respondents have no answer for the plain text. Congress did not say it was enough for the relator to retain *some* rights post-intervention (contra U.S. Br. 16); Congress instead spoke categorically: Post-declination, the rights vested by the FCA include the "right to conduct the action," and the FCA itself says that the relator's "status and rights" cannot be disturbed by intervention. It is perplexing what else that plain language could possibly mean. And it remains a mystery how the panel could support its holding—which explicitly allowed intervention to "'limit[]'" "the rights of the relator" (Pet. App. 19a)—without endorsing precisely what Congress said intervention may *not* do: "limit[] the status or rights of the [relator]."

Third, respondents take issue with petitioner's reading of this Court's decision in *Vermont Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 769 (2000), which recognized the relator's "exclusive" right to "conduct the action" after the government's initial declination. They say this Court "used 'exclusive' to mean that only the relator, as opposed to any other private individual, could proceed with an FCA action after the Government declines it." Pet. App. 15a; U.S. Br. 15. Yet the relevant passage (which nowhere mentions "other private individuals") shows this Court meant what it said—it was describing the relator's rights vis-à-vis *the government*: "If the Government declines to intervene within the 60-day period, the relator has the exclusive right to conduct the action, and the Government may subsequently intervene only on a showing of 'good cause.'" 529 U.S. at 769. Respondents have not explained (aside from their bald declaration) in what sense these plain words were referencing the rights of "other private individual[s]" rather than the "exclusive" rights the relator secured *against the government* in conducting the action going forward.

Finally, the government notes that the Sixth Circuit's decisions "did not involve a government motion to dismiss under Section 3730(c)(2)(A)." U.S. Br. 17. This is true, which is why petitioner did not say the Sixth Circuit had adopted his reading *as its holding* in any case. But the Sixth Circuit's language does reflect its *reading of the statute*, which was directly relevant to the Sixth Circuit's dispositive rationale. And that reading (which matches petitioner's) directly conflicts with the holdings of other circuits.

It is well past time for a definitive resolution of these important issues. The vast majority of circuits have weighed in, and the decisions are only straying further from the FCA's actual text. Immediate review is warranted.

B. The Question Presented Warrants Review In This Case

Petitioner has already explained why the question presented is exceptionally important and warrants review in this case. Pet. 22-24. Respondents' efforts to undercut the case as a suitable vehicle fall woefully short.

1. EHR says this is a poor vehicle "because [p]etitioner does not defend the standard adopted by any court of appeals." Br. 11. This is wishful thinking. As petitioner explained, while he believes his plain-text reading controls, he does indeed plan to argue (in the alternative) that *Sequoia* is otherwise correct, the competing standards are not, and petitioner would prevail under the *Sequoia* standard—a point he argued at length below. Respondents inexplicably ignore the obvious import of petitioner's prior statements. See, *e.g.*, Pet. 24.[4]

[4] Petitioner did not include a full merits argument because a petition is not a merits brief.

2. Respondents argue review should be denied because they might ultimately prevail under the *Sequoia* standard. EHR Br. 24. Yet the Third Circuit resolved this case solely under Rule 41; it did not analyze the result under *Sequoia*. And this Court "routinely grants certiorari to resolve important questions that controlled the lower court's decision notwithstanding a respondent's assertion that, on remand, it may prevail for a different reason." Reply Br., *Kisor* v. *Wilkie*, No. 18-15, at 2 (filed Nov. 19, 2018). Respondents cannot avoid review *of the predicate legal issue* by predicting how the Third Circuit *might* rule under the correct legal standard.

Respondents' predictions, anyhow, are wrong. Suffice it to say that the problem below was not the government's failure to identify relevant factors; the problem was that its underlying reasoning was arbitrary and irrational even under minimal scrutiny. Three examples. First, the government complained about the case's drain on its resources—yet it substantiated that claim by citing the desire to avoid an extra 332 hours of work over 1.5 months by a few government attorneys. It is not rational to sacrifice a potential billion-dollar taxpayer recovery to avoid a "significant litigation burden" constituting a few government attorneys conducting a month or so of extra work. C.A. Opening Br. 35.

Second, the government says petitioner failed to amend his complaint as promised—while ignoring that petitioner's amended complaint *was specifically approved in advance by the government*. C.A. Reply Br. 19-21. Respondents' contrary contention is mystifying.

Third, respondents suggest that the government was spooked by petitioner's deposition testimony. Yet respondents have yet to describe anything new or material at that deposition, and have not once substantiated that raw allegation in any fashion whatsoever.

Under Rule 41, the Third Circuit was not required to probe the stated basis of the government's dismissal; the government will not be so lucky under a proper application of *Sequoia*. Respondents may prefer to litigate these fact-bound issues now, but there will be every opportunity to argue those points on remand should this Court grant and reverse.

Respectfully submitted.

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