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

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

This case presents 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. 31 U.S.C. 3730(c).

This case involves one of those rights—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 Third 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.*

* 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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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 17 F.4th 376. The opinion of the district court (Pet. App. 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 petition for a writ of certiorari was filed on January 26, 2022, and granted on June 21, 2022. The jurisdiction of this Court rests on 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. * * *
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> * * * * *

INTRODUCTION

This case presents an important question regarding the government's authority to dismiss a False Claims Act suit after initially declining to intervene.

According to the Third Circuit, the government does not have a freestanding, unconditional right to dismiss a relator's action under the FCA. Instead, the government must "intervene" to activate its dismissal authority, but the government is free to intervene after the fact—and once it does intervene, it can dismiss a relator's action despite "declining" to "proceed" in the first instance, and merely by satisfying the defendant-friendly standard under Fed. R. Civ. P. 41(a).

The Third Circuit was mistaken, and its view cannot be squared with the plain text, structure, history, or purpose of the FCA. Under a proper reading, 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 government has every opportunity to "proceed" at the outset and control an action, but (consistent with centuries of practice) it has no right to displace the relator's "exclusive" control after taking a pass in the first instance.

The Third Circuit's error permitted the government's belated dismissal to wipe out a $20 million investment of time and resources in an action with billion-dollar stakes. Because its decision directly contravenes the FCA and frustrates the statutory scheme, the judgment should be reversed.

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]

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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.").

*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 an Executive Medical Director for respondent EHR, a "physician advisor" company that "provides review and billing certification services to hospitals and physicians that bill Medicare." Pet. App. 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. Pet. App. 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). Pet. App. 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. Pet. App. 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. Pet. App. 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). Pet. App. 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. Pet. App. 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).

SUMMARY OF ARGUMENT

I. The government has no statutory authority to dismiss a private FCA case after initially declining to proceed with the action.

A. The FCA's plain text and structure establish that the government's dismissal authority is limited to cases where it "proceeds" with an action and takes over the case. The FCA is structured to give the government a choice at the outset: it may take over the case or vest the relator with "the right to conduct the action." The Act then dictates the parties' respective rights based on the government's initial choice.

But once the government defers to a private relator, that relator is granted a unitary right to conduct the action. Its ability to control the case is "exclusive," and its "status and rights" cannot be "limited" by the government—whether as a non-party to the action or as a belated intervenor. There is no basis in the Act's plain language or structure for permitting the government to unilaterally *dismiss* the relator's action after the fact—a decision that undoubtedly "limits" the relator's "status and rights."

Congress reinforced this plain-text reading with the Act's obvious structure. The Act specifies the respective rights of each party based on the government's initial decision—enumerating rights for scenarios where "the Government proceeds with the action," "the Government elects not to proceed with the action," and "[w]hether or not the Government proceeds with the action." Congress vested the government's FCA dismissal authority in one section, and that section is textually linked to situations where "the Government proceeds with the action." Respondents maintain that the government's dismissal au-

thority nevertheless applies in *every* scenario, but that understanding renders each introductory clause superfluous—contrary to settled canons of construction.

Nor can the government dismiss the action without intervening. For one, there is no basis in law or logic for an entity to dismiss an action without first being a party to the suit. Non-parties typically cannot file *anything* in someone else's action, and the government is not a party to an FCA action until it intervenes. But a belated intervention still cannot revive the government's dismissal authority. Once the relator is vested with "the right to conduct the action," that right cannot be disturbed by the government's intervention—a fact confirmed by an express textual precondition limiting the government's ability to intervene, and the very fact that Congress used the term "intervene"—but not "intervene *and proceed with the action*"—in the operative section.

B. The FCA's history and purpose bolster the plain-text understanding of the Act. Contrary to respondents' contention, there is nothing extraordinary about petitioner's textual reading. Indeed, when the FCA was enacted in 1863, the government had no right to participate at all; and once the FCA was amended in 1943, the government obtained a right to proceed with the action at the outset, but was later barred from intervening. Petitioner's reading is consistent with that long historical practice—respondents' atextual reading, by contrast, would vest a right in the government that did not exist for over a century of the Act's existence.

Petitioner's understanding is also consistent with the Act's purpose—while respondents' is not. The Act is designed to offer the government every opportunity to vet a case at the outset. That initial period is the critical inflection point, and the government is expected to make its decision during that period (just as it had historically done

for decades). Even if the government declines to take over the case, the government still has ample means to participate in the action, control the overall litigation (including by pursuing similar claims in other forums), and shape the claims and their disposition—although not by invoking its unique FCA dismissal authority. And the government's interests are likewise protected from hassle and abuse by the same litigation tools that protect the government in every other type of litigation. There is no basis for presuming that the government's dismissal authority alone is necessary to advance the government's interests.

C. Respondents resist the import of the Act's plain text, but their efforts fall short. They overstate the government's burden in forfeiting its dismissal authority and understate the real protections the government otherwise has under a variety of legal mechanisms. And respondents' suggestion that petitioner's construction would violate Article II's Take Care Clause is exceedingly insubstantial. Qui tam actions have been around since the founding, and the government often lacked the ability to intervene or participate at all; if such lawsuits nevertheless presented any constitutional issues, assuredly someone would have noticed at some point over two centuries of practice.

II. If the government nevertheless retains its FCA dismissal authority, the government remains subject to ordinary baseline checks on executive action—including the basic requirement that the government act rationally and non-arbitrarily in extinguishing a relator's protected-property interest.

A. Respondents suggest that the government can dismiss a case in its unfettered discretion, but this is wrong. Such a boundless right is at odds with the Act's hearing requirement (which invites judicial scrutiny); the Act's

settlement provision (which presumes judicial oversight); and traditional constitutional backstops.

B. Nor does the Third Circuit's Rule 41 standard fare any better. Rule 41 is designed for a purpose having nothing to do with this situation: a single plaintiff looking to dismiss its own lawsuit without judicial review. Here, by contrast, the FCA requires a judicial hearing; the government is attempting to dismiss a *two-party* action over the objection of one party, contrary to Rule 41's ordinary operation; and Rule 41 is designed to protect defendants, whereas the FCA's dismissal provision provides protection for relators—protections that Rule 41 is ill-suited to provide.

C. In the end, the government must establish that its stated basis for dismissal is reasonable and supported by the record. The effective constitutional floor *always* requires the government to act rationally—if Congress cannot pass irrational statutes, then Congress cannot pass statutes authorizing *the Executive* to act irrationally. The FCA assigns an actual property right to the relator, which the government typically cannot extinguish without a legitimate justification; the FCA imposes a hearing requirement, which implies *actual* review of *actual* evidence, not just convening court for no purpose; the legislative history supports applying an APA-like standard; and if the government wishes to *settle* a claim, the statute imposes a heightened standard of review—and since a dismissal is effectively a settlement for *nothing*, it makes little sense that the government could dismiss under a lesser showing than a settlement.

D. Because the Third Circuit applied solely the Rule 41 standard, this Court should remand if it determines that a different standard applies; and if the Court agrees that the government has no dismissal authority at all, it should outright reverse.

ARGUMENT

I. POST-DECLINATION, THE GOVERNMENT LACKS THE UNILATERAL AUTHORITY TO DISMISS A RELATOR'S FCA CASE UNDER SECTION 3730(c)(2)(A)

The government has no statutory authority to dismiss a private FCA action after declining to "proceed" with the action. This conclusion follows directly from the FCA's plain text, structure, history, and purpose. Congress gave the government ample opportunity to investigate FCA claims upfront; once it declines to "proceed," the relator is vested with the "exclusive" right to litigate the action, and the government cannot frustrate that right by dismissing the relator's case.

A. The FCA's Text And Structure Establish That The Government Cannot Invoke Section 3730(c)(2)(A) After "Declin[ing]" To "Proceed With The Action"

Under the FCA's plain text and structure, the government lacks statutory authority to dismiss a private FCA case after declining to "proceed." 31 U.S.C. 3730(b)(4). Congress gave the government a "binary" choice upfront (*UCB*, 970 F.3d at 845): it "shall" either (A) "proceed" and take over the case; or (B) "decline[]," "in which case the [relator] *shall have the right to conduct the action*." 31 U.S.C. 3730(b)(4) (emphasis added). 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* (read: *non*-parties cannot file motions), 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). Those "limited" rights nowhere include the right to dismiss, and respondents'

contrary contention flouts the text and makes nonsense of the statutory scheme.[2]

1. According to the FCA's text and structure, the government's FCA dismissal power is limited to cases where it "proceeds" at the outset and takes over the case. 31 U.S.C. 3730(b)(4). Once the government "declines" to proceed, the FCA vests the relator with "the right to conduct the action." 31 U.S.C. 3730(b)(4)(B). That right is unitary; it grants the relator "exclusive" control. *Stevens*, 529 U.S. at 769; *United States* v. *Health Possibilities, P.S.C.*, 207 F.3d 335, 340 (6th Cir. 2000). The government cannot even *intervene* without "good cause," and any intervention must not "limit[] the status and rights of the person initiating the action" (31 U.S.C. 3730(c)(3))—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); see *United States ex rel. Kelly* v. *Boeing Co.*, 9 F.3d 743, 746 (9th Cir. 1993); *Riley* v. *St. Luke's Episcopal Hosp.*, 252 F.3d 749, 763 n.19 (5th Cir. 2001) (Smith, J., dissenting). It is impossible to understand how

[2] Respondents take issue with petitioner's reading of this Court's decision in *Stevens*, 529 U.S. at 769, which recognized the relator's "exclusive" right to "conduct the action" after the government's initial declination. Respondents 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.

the government respects a relator's "exclusive right to control the action" (Stevens, 529 U.S. at 769) by seizing absolute control and involuntarily dismissing his or her case.

Respondents have no answer for this plain text or Congress's unqualified prohibition on "limiting the [relator's] status and rights." Congress did not say it was enough for the relator to retain *some* rights post-intervention (contra U.S. Br. in Opp. 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. Respondents surely have not explained why the FCA forbids the *lesser* step of an intervention that frustrates the relator's "right to conduct the action," but allows the *greater* step of an outright dismissal. Nor have respondents explained how the relator's "exclusive" control is maintained if the government unilaterally dictates the case's ultimate disposition.

Section 3730(c)(3) confirms that once the government vests control with the relator, the government cannot later eliminate that control without violating an express precondition in the Act's unambiguous language. And it remains a mystery how the Third Circuit could adopt a holding below—where the government's intervention admittedly "'limit[ed]'" "the rights of the relator" (Pet. App. 19a (citing 31 U.S.C. 3730(c)(1)-(2)))—without endorsing precisely what Congress said intervention may *not* do: "limit[] the status or rights of the [relator]." 31 U.S.C. 3730(c)(3). The Third Circuit's position invites a direct conflict between the Act's neighboring sections.

The FCA is constructed so that the government's upfront binary choice dictates who "conduct[s]" the action

going forward. 31 U.S.C. 3730(b)(4); *UCB*, 970 F.3d at 844; Pet. App. 8a-15a. Congress gave the government every conceivable tool to exhaustively examine the case before making that decision[3]—but once the decision is made, the government is thereafter limited to participating on the sidelines or intervening while leaving the relator (per his "status and rights") in primary control. *UCB*, 970 F.3d at 845 ("§ 3730(b)(4)(B) gives the relator 'the right to conduct the action'—without qualification—when the government has declined to intervene"). Respondents' views flout Congress's straightforward textual scheme.

2. a. Congress reaffirmed this statutory design with Section 3730(c)'s clear structure. That structure is incompatible with respondents' belief that the government can invoke its dismissal authority at any time, with or without taking over the case. On the contrary, every textual indication confirms that the government's FCA dismissal power exists only when the government initially "proceeds" with the action. See, *e.g.*, *UCB*, 970 F.3d at 844-846; Pet. App. 8a-15a.

Congress marched through a clear progression in subsection (c): once the government makes its initial choice under Section 3730(b), the Act specifies the "[r]ights of the [p]arties," linking each paragraph to the government's initial choice. 31 U.S.C. 3730(c). Paragraph (1) applies "[i]f the Government proceeds with the action," with the relator participating "subject to the limitations set forth in

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[3] For example, Congress granted the government tools to conduct extensive discovery, including obtaining documentary and testimonial evidence (31 U.S.C. 3733(a)); it required the relator to immediately provide "substantially all material evidence and information the person possesses" (31 U.S.C. 3730(b)(2)); and it authorized the government to obtain liberal extensions until satisfied that it has fully vetted the complaint (31 U.S.C. 3730(b)(3)).

paragraph (2)." Paragraph (2) then sets forth those "limitations." Paragraph (3) applies "[i]f the Government [instead] elects *not* to proceed with the action" (emphasis added), and paragraph (4) applies "[w]hether or not the Government proceeds with the action." 31 U.S.C. 3730(c)(1)-(4). Each paragraph thus applies in a different situation—with a clause "at the outset" "announc[ing]" its scope. *UCB*, 970 F.3d at 844.

This structure is directly at odds with respondents' assertion of an unconditional right to dismiss. The government's dismissal authority is located exclusively in paragraph (2), which specifies "limitations" on the relator's participation when "*the Government proceeds with the action*" (per paragraph (1)). There is no mention of any FCA dismissal authority in paragraph (3) (where "the Government elects *not* to proceed") or paragraph (4) ("[w]hether or not the Government proceeds"). Its dismissal rights are found solely in paragraph (2), which is textually linked to paragraph (1) and "plainly operates against the backdrop of government intervention." *UCB*, 970 F.3d at 845 (establishing that each right in paragraph (2) makes sense *if the government is prosecuting the action*, but not otherwise); Pet. App. 13a-14a ("the other subparagraphs in § 3730(c)(2) * * * only make sense if the Government is a party to the case"). If Congress wished to grant the government the right to dismiss at any time ("[w]hether or not the Government proceeds with the action"), it presumably would have put those rights in *paragraph (4)*, not in paragraph (2). Or if Congress wanted to preserve the government's right to dismiss even where the government elected *not* to "proceed," it would have at least repeated those rights in *paragraph (3)*; it would not have left its

dismissal authority solely in a different paragraph interlocked with certain "limit[s]" when *the government retains "primary" control*. 31 U.S.C. 3730(c)(1)-(2).[4]

Respondents' contrary reading upsets the clear statutory progression and would require scrambling the provisions in each distinct paragraph. On a proper reading, "paragraph (2) fits in best right where paragraph (1) puts it: as a limit on the right of the relator to continue as a party after the government has intervened. It can have no other independent operation without disrupting the structure of the statute as a whole." *UCB*, 970 F.3d at 845; see also Pet. App. 9a, 12a-14a; *Ridenour*, 397 F.3d at 940-941 (Eagan, J., dissenting).

Congress, in short, enumerated the "[r]ights of the [p]arties" both where "the Government elects not to proceed with the action" and "[w]hether or not the Government proceeds with the action"—the subjects of paragraphs (3) and (4). Congress, however, vested the government's dismissal authority in a *different* paragraph that otherwise addresses issues arising *only* where the government conducts the action. See *United States ex rel. Poteet* v. *Medtronic, Inc.*, 552 F.3d 503, 519 (6th Cir. 2009) ("Section 3730(c)(2)(A) applies only when the government has decided to 'proceed[] with the action' and has assumed

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[4] Or in the Seventh Circuit's words: "[w]hen Congress wanted to qualify the relator's 'right to conduct the action' absent intervention, it did so in paragraph (c)(3)" (*UCB*, 970 F.3d at 845), and the dismissal authority is conspicuously *not* found in that section: "It would be odd if the unqualified 'right to conduct the action' in subparagraph (b)(4)(B) and the nearly unqualified 'right to conduct the action' in paragraph (c)(3) were in fact the profoundly qualified right to conduct the action so long as the government does not wish to have it dismissed or settled under subparagraphs (c)(2)(A) or (B)." *Ibid.*

'primary responsibility for prosecuting the action.'"). Respondents offer no basis for overriding that obvious legislative choice.[5]

b. In response below, respondents turned to weak formalism: they insisted that Congress would have included paragraph (2) as a subset of paragraph (1) if it intended those two paragraphs to apply together. That may be "true as a typographic matter," but it "otherwise fails to capture how the five paragraphs of subsection (c) relate to one another in text and logic." *UCB*, 970 F.3d at 845; see also Pet. App. 13a n.10 (likewise rejecting respondents' position). There is rarely a single way to draft any statute, and Section 3730(c)'s progression makes perfect sense as structured—with Congress delineating the parties' rights "[i]f the Government proceeds with the action" (in paragraphs (1) and (2)) before addressing "[i]f the Government [instead] elects not to proceed" (paragraph (3)) or "[w]hether or not the government proceeds" (paragraph (4)). Congress made itself perfectly clear in the statute's current form. Respondents' reading, by contrast, introduces defects in "text and logic" that extend beyond mere "typographic" preferences.

Respondents also argued that the government can dismiss post-declination—without running afoul of any statutory restrictions—because "ending" a case via dismissal is not "proceeding with the action." This "awkward" reading is unavailing: by concocting a "third" option, it "neuter[s] the binary choice put to the government" under Section 3730(b)(4)(A)-(B)—either "proceed" with the action or "decline[]" to "proceed" with the action. *UCB*, 970 F.3d

[5] The fact that Congress conspicuously invoked the same distinctive phrase—"proceed[] with the action"—in both Section 3730(b)(4) and the key paragraphs in Section 3730(c) eliminates any conceivable doubt regarding Congress's intent or its deliberate decision to link each set of rights with the government's specific initial choice.

at 845-846. There is no "dismissal-only" alternative. Nor is there any reason that "proceeding" with a lawsuit "requires litigating to favorable judgment or involuntary dismissal, to the exclusion of [a] voluntary dismissal, particularly upon settlement." *UCB*, 970 F.3d at 845-846 (explaining these and other flaws). The fact that respondents' theory requires adopting a bizarre understanding of otherwise common and ordinary terms is reason alone to reject it.

3. Respondents' position suffers from another significant textual defect: it "makes surplusage" of subsection (c)'s surrounding language. *UCB*, 970 F.3d at 844. If the government is correct that paragraph (2) applies "[w]hether or not the Government proceeds with the action," then it was pointless for Congress to include *that very language* in paragraph (4). *Ibid.*; see also, *e.g.*, Pet. App. 14a-15a ("if we were to conclude * * * that the Government can move to dismiss a relator's case whether or not it 'proceeds with the action,' 31 U.S.C. § 3730(c)(1), it would render at least two provisions superfluous," citing language in subsections (c)(1) and (c)(4)). Under respondents' reading, that language would serve no purpose, and respondents cannot explain why Congress included it in subsection (c)(4) but not subsection (c)(2)—despite each provision supposedly applying in the same circumstance. See, *e.g.*, *Salinas* v. *United States R.R. Ret. Bd.*, 141 S. Ct. 691, 698 (2021) ("'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'").

When Congress actually wished to grant certain rights "[w]hether or not the Government proceeds with the action" (31 U.S.C. 3730(c)(4)), it said so expressly. Its decision *not* to place the government's dismissal authority

in paragraph (4) speaks volumes—and respondents err in reading that predicate language straight out of the FCA. *E.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

Respondents' reading likewise "makes surplusage out of the provision in paragraph (1) that a post-intervention relator has the right to continue as a party 'subject to the limitations set forth in paragraph (2).'" *UCB*, 970 F.3d at 844-845. If the government could invoke "its rights under paragraph (2) under all circumstances and in any posture, there would have been no reason to specify that the relator's continued participation as a party * * * is 'subject to' paragraph (2)"—as everything would *always* be subject to paragraph (2). *Ibid.*; see also Pet. App. 14a-15a.

Respondents' position thus requires judicially redlining Section 3730(c)(3) and (4) to include dismissal authority that Congress withheld from those provisions, or presuming that Congress included specific language in multiple clauses for no reason at all. See, *e.g.*, *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001); see also Pet. App. 14a (citing similar problems). Either assumption violates one of this Court's cardinal principles of statutory construction.

4. Respondents' position is further at odds with procedural norms. Post-declination, the government is not even a party to the case, and non-parties typically are not allowed to file *anything* in another party's lawsuit—much less a dispositive motion. Put simply, "[t]he power of a non-party to force dismissal of another's lawsuit is otherwise unheard of in our law." *UCB*, 970 F.3d at 842; *United States ex rel. Thrower* v. *Academy Mortg. Corp.*, 968 F.3d 996, 1006 (9th Cir. 2020).

Respondents' weak textual arguments fail to justify this procedural anomaly. If the government wishes to invoke Section 3730(c)(2)(A)'s special authority to dismiss a

relator's claim, it has to satisfy the statutory preconditions—electing to "proceed with the action" at the outset, activating its rights under subsections (c)(1) and (2).

5. a. Contrary to the decision below, the government cannot revive its forfeited FCA dismissal authority with a post-hoc intervention. Pet. App. 16a. The Third Circuit's contrary logic fails for multiple reasons.

First, as established above, any intervention is conditioned on *not* "limiting the status and rights of the person initiating the action," which includes "the right to conduct the action." 31 U.S.C. 3730(c)(3). The Act nowhere says that if the government "intervenes" the relator *loses* that right; indeed, quite the contrary—Congress reaffirmed that the relator's "rights" (phrased categorically and unconditionally) must be preserved. Any effort to displace the relator from his or her leading role undeniably "limit[s] the [relator's] status and rights"—just as the Third Circuit (inadvertently) conceded below. See Pet. App. 19a.

Second, the Third Circuit misread the government's limited authority in subsection (c)(3). While that subsection grants the government the right to "intervene," it does *not* grant the government the right "to proceed with the action." 31 U.S.C. 3730(c)(3). And Congress drew a clear distinction between those two concepts. See, *e.g.*, 31 U.S.C. 3730(b)(2) ("[t]he Government may elect to intervene *and proceed with the action*") (emphasis added); 31 U.S.C. 3731(c) ("[i]f the Government elects to intervene *and proceed with an action brought under 3730(b)*, the Government may file its own complaint or amend the complaint of a person who has brought an action") (emphasis added). Indeed, in putting the critical choice to the government, Congress instructed the government to "proceed with the action" to handle the case—not merely to

"intervene." 31 U.S.C. 3730(b)(4)(A). And, of course, subsection (c)(3) itself acknowledges that the relator may "proceed[] with the action" at the same time the government seeks to "intervene"—again solidifying the division between those two concepts.

Congress's consistent usage of different terminology was presumptively deliberate. *E.g.*, *Russello*, 464 U.S. at 23. And the one place where the government is permitted to "proceed with the action" is under Section 3730(b)(4)—and that right "expir[es]" after "the 60-day period or any extensions" elapses. If Congress nevertheless intended to let the government turn back the clock and displace the relator, it would have (i) removed subsection (c)(3)'s clause unconditionally protecting the relator's "status and rights"; and (ii) rewritten subsection (c)(3) to say the court "may nevertheless permit the Government to intervene *and proceed with the action* at a later date upon a showing of good cause." Congress's more limited license cannot be expanded by judicial fiat; and because the FCA dismissal authority requires not just intervention but "the Government proceed[ing] with the action" (31 U.S.C. 3730(c)(1)-(2)), the Third Circuit erred in suggesting the government could revive the dismissal authority it ceded with its initial declination. See 31 U.S.C. 3730(b)(4)(B).[6]

In short, Congress could have drafted a statute that re-vests full control in the government once it decides to intervene. But that is not the statute that Congress drafted. The *actual* statute assigns responsibilities based on the government's initial choice. And while Congress amended the statute in 1986 to give the government *some*

[6] As noted above, Congress repeatedly invoked the phrase "proceed[] with the action" throughout the statute. There is little reason to believe Congress deliberately repeated those words at critical junctures unless it believed the phrase carried distinctive meaning.

participation rights post-declination, it limited those rights to respect the relator's primary role—expressly conditioning the government's belated intervention on *not* affecting "the [relator's] status and rights."

b. Finally, while the overwhelming majority of the Seventh Circuit's *UCB* analysis was correct, that court was wrong that the government, post-declination, can invoke its Section 3730(c)(2)(A) dismissal authority without impermissibly "limiting the [relator's] status and rights." 970 F.3d at 853-854. *UCB* reasoned that, under petitioner's argument, the government could already intervene under Fed. R. Civ. P. 24(b), obtain "the same rights as the original plaintiff," and thus effectively replicate Section 3730(c)(3)—"construe[ing] § 3730(c)(3) so that it would add nothing." *Ibid.*

This flips Section 3730(c)(3) on its head. That section does not replicate Rule 24(b)—it *restricts* the government's Rule 24 rights by imposing a "good[-]cause" standard and confirming that any intervention must preserve "the [relator's] status and rights." 31 U.S.C. 3730(c)(3). Far from leaving the relator and the government "co-equal plaintiffs," it assures they are *not* co-equal—by guaranteeing the relator retains the "status and rights" conferred by the government's declination decision.

Nor is it plausible that Section 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)*." 970 F.3d at 854 (emphasis added). As explained, the statute's structure confirms Congress meant subsections (c)(1) and (2) to apply only when the government *initially* intervenes. And, again, Congress anyhow did not limit the relator's protection to "*some* status and rights"—it spoke categorically. And the full category of "rights" includes "the right to conduct the action" found *two sentences above*. If Congress meant to single out the subclass of

rights found in other subsections, it would have said so expressly.

One thing is indisputable: the relator's "status and rights" are indeed impaired if the government *replaces* the relator as the primary party with full discretion to direct and dispose of the litigation, including by *limiting* the relator's rights under subsection (c)(2). Courts have struggled to make sense of Section 3730 (*UCB*, 970 F.3d at 856 (Scudder, J., concurring)) because they have refused to follow its plain text to its logical conclusion. But once accepting that the language means what it says, all the pieces fall into place. The scheme grants the government broad authority at the outset, but the government cannot pull the plug after declining the case and delegating "exclusive" control to a private party.

B. The FCA's History And Purpose Confirm That The Government Cannot Invoke Section 3730(c)(2)(A) After "Declin[ing]" To "Proceed With The Action"

1. a. The plain-text reading is bolstered by historical practice. 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, 99th Cong., 2d Sess. 10 (1986); see also Act to Prevent and Punish Frauds upon the Government, Ch. 67, §§ 4-6, 12 Stat. 696, 696-699 (1863).

In 1943, the Act was amended to "g[i]ve the Department of Justice the right to take over cases initiated by relators." Claire M. Sylvia, *The False Claims Act: Fraud*

Against the Government § 2:8; see also Act To Limit Private Suits for Penalties and Damages Arising Out of Frauds Against the United States, Ch. 377, 57 Stat. 608, 608-609 (1943). But even under the 1943 version, "the Government [was] barred from reentering the litigation once it ha[d] declined to intervene during th[e] initial period." S. Rep. No. 345, *supra*, at 26. It was not until the 1986 amendments that Congress "provided the Government, for the first time, the option of intervening later in a case it had initially declined to join." Sylvia, *supra*, § 2:9. But even then, Congress explicitly refused to permit the government's late intervention to frustrate "the [relator's] status and rights." 31 U.S.C. 3730(c)(3).

The Act's plain text thus reflects the history of the statute: while Congress slowly 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"). There is no established practice of the government intervening and taking the lead post-hoc in declined FCA cases.

b. Consistent with these longstanding historical restrictions, it was the rare case (until recently) that the government attempted to dismiss after declining intervention. *E.g.*, *Ridenour*, 397 F.3d at 933 (citing S. Rep. No. 345, *supra*, at 26-27). Indeed, the government itself had previously understood the FCA to bar the practice—limiting its dismissal rights to the outset where the government elects to "proceed" and take charge of the action. See *United States ex rel. Sequoia Orange Co.* v. *Baird-Neece Packing Corp.*, 151 F.3d 1139, 1142 (9th Cir. 1998)

("At the time of the Secretary's announcement, the government apparently did not believe it had the authority to dismiss the qui tam actions over the relators' objections.").

The government lacks a longstanding pedigree of dismissing declined FCA actions. There is no reason to depart from the FCA's text, structure, and purpose to disrupt the careful balance Congress struck on the face of the statute.

2. The FCA's measured restriction on the government's ability to unilaterally dismiss declined FCA cases promotes Congress's legislative objectives.

First, requiring the government to make an upfront choice is consistent with the Act's overall design. The FCA sets up the initial filing period as the government's critical inflection point. It permits the government 60 days to investigate the claims, subject to robust extensions that often last months or years. 31 U.S.C. 3730(b)(3); *Ridenour* v. *Kaiser-Hill Co.*, 397 F.3d 925, 930 (10th Cir. 2005) (two years). It grants the government elaborate procedures during that stage to investigate the claims, including the power to subpoena documents, depose witnesses, and collect all the information it deems necessary to intelligently assess the claims and decide whether it wishes to prosecute the action on its own. 31 U.S.C. 3733(a)(1) (so providing); see also 31 U.S.C. 3730(b)(2) (requiring the relator to formally "serve[] on the Government" "written disclosure of substantially all material evidence and information the person possesses").

But once that period expires, the FCA puts the government to a simple choice: the government "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) (emphasis added).

The statutory design, in short, is not hard to follow. It sets up the initial period as the time for the government to act; gives the government all the tools necessary to make an informed decision; and then mandates, in unambiguous terms, that the government's choice will dictate who has the power to "conduct the action"—vesting the relator with the "*exclusive* right" where the government declines intervention. *Stevens*, 529 U.S. at 769. And should the government later change its mind, its rights are limited—indeed, even if it is has "good cause" to intervene, it still cannot displace the relator's "status and rights," which includes "the right to conduct the action." 31 U.S.C. 3730(c)(3); *Health Possibilities*, 207 F.3d at 343. Nothing in this clear system vests the government with the power to pull the plug after passing up the case and delegating "exclusive" control to a private party.[7]

Second, this measured restriction does not materially interfere with the government's prerogatives. Congress set up the initial FCA period (under Section 3730(b)) to give the government ample opportunity to consider the case and its options, and move to take over the litigation if it foresees any risk to federal interests. And while the FCA limits the government's dismissal authority to cases where it intervenes at the outset, that does not mean Congress left the government's overall interests unprotected:

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[7] To the extent the government believes petitioner's view encourages early dismissals (Br. in Opp. 17), that is a feature, not a bug. Early action saves everyone (relators, defendants, and the government) time and money, and it is consistent with the actual legislative design: which deliberately channels the government's assessment at this early stage. This is why all rights are tied to the government's initial decision.

it granted the government, for example, the right to pursue "alternative remed[ies]" (31 U.S.C. 3730(c)(5)), limit discovery interfering with related civil or criminal matters (31 U.S.C. 3730(c)(4)), and intervene to assist the relator's efforts (31 U.S.C. 3730(c)(3)). The government can file statements of interest, amicus briefs, and even file ordinary dispositive motions (under the Federal Rules, not the FCA's unique dismissal authority) if it feels a case should be dismissed.

And, of course, the government always retains its independent authority, for example, to resist burdensome discovery, dismiss actions that would require the disclosure of state secrets, and require safeguards on disclosures affecting national security. These traditional tools work well to protect the government in non-FCA litigation that happens to involve government parties; if the government nevertheless believes that it should retain the unilateral right to dismiss any FCA action at any time, it should make its case to Congress, which is always free to amend the Act.

Finally, petitioner's reading preserves proper incentives under the Act. Private FCA litigation is expensive. Relators will be understandably reluctant to invest the time and resources necessary to prosecute an action if the government can dismiss the case at any time. See Sen. Grassley Ltr. to A.G. Barr 5-6 (May 4, 2020) (Grassley Ltr.) <https://tinyurl.com/grassley-fca>. This is why Congress granted an express "right to conduct the action" and ensured that, going forward, the relator's "status and rights" were protected, even if the government later chooses to intervene. 31 U.S.C. 3730(c)(3).

If relators are instead forced to invest with the ever-present cudgel of an opposed dismissal over their heads, few will devote the time and effort necessary to prosecute

actions essential to redressing fraud and protecting the federal fisc.

C. Respondents' Efforts To Distract Away From The Act's Plain And Ordinary Meaning Fall Short

Respondents assert that refusing to permit the government to dismiss post-declination would impermissibly encroach upon the government's control of its own case, exposing it to unwanted costs and raising constitutional concerns. Not so.

First, as explained above, the government has ample opportunity to exercise full control—*at the outset*. Congress created multiple mechanisms to facilitate the government's ability to investigate and assess the litigation's merit and decide whether and how to proceed. *Thrower*, 968 F.3d at 1008 (the Executive's interests are "attenuated" where "it has declined to intervene"). Historically, it was the rare case where the government sought dismissal post-declination. *E.g.*, *Ridenour* v. *Kaiser-Hill Co.*, 397 F.3d 925, 933 (10th Cir. 2005). The sky did not fall during that extended period, and there is no reason to believe it will suddenly fall now.

Second, as again explained above, respondents overlook significant protections for the government—both in shaping the existing action and the government's interests more broadly. 31 U.S.C. 3730(c)(3)-(5). There is no reason the government cannot invoke traditional tools—available in all private litigation—to resist burdensome discovery and avoid disclosing protected or sensitive materials. *Thrower*, 968 F.3d at 1006. If the government concludes that defendants should win, it can always advise them accordingly, submit its views to the court, or even intervene and file motions on defendants' behalf. If the government's assessment is correct, the relator presumably will lose—on the merits; and if the government is wrong, the FCA serves its goal by remedying fraud

against the government. See *UCB*, 970 F.3d at 847-848 ("a common function of qui tam actions, and one of the earliest, has been to regulate the exercise of executive power itself").

Third, respondents overstate the government's typical burden: "As a practical matter, the Government need not do anything beyond respond to discovery requests like any other third party, provide its views if the relator seeks to dismiss the case, and wait to see if the suit succeeds, in which case the Government receives the bulk of any recovery." *Thrower*, 968 F.3d at 1008 (citations omitted). The government is not "forced" to "actively prosecute an action against its will." *Ibid.*

Fourth, 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, 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.

Finally, while respondent EHR nods to constitutional doubt, there is no serious constitutional issue to avoid. Contra EHR Br. in Opp. 14-15.

The "ancient pedigree" of qui tam actions, "together with their widespread use at the time of the Founding, suggests that the False Claims Act as a whole is not in imminent danger of unconstitutionally usurping the executive power." *UCB*, 970 F.3d at 847; accord *Stevens*, 529 U.S. at 801 (Stevens, J., dissenting). Indeed, "[i]n separation-of-powers cases this Court has often 'put significant weight upon historical practice.'" *Zivotofsky ex rel. Zivotofsky* v. *Kerry*, 576 U.S. 1, 23 (2015). And the "history" here both "matters" and is dispositive. *Department of Commerce* v. *New York*, 139 S. Ct. 2551, 2567 (2019) (quoting *NLRB* v. *Noel Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in judgment)). "Here, as in other areas, [this Court's] interpretation of the Constitution is guided by a Government practice that 'has been open, widespread, and unchallenged since the early days of the Republic.'" *Ibid.*

For over a century, the government had no intervention rights at all; it could not take over a relator's case, and it could not even intervene after initially declining to proceed. If there were any serious Take Care Clause (or any other Article II) issue, one would imagine *some* objection during the nation's first two-hundred or so years. Cf., *e.g.*, *Carpenter* v. *United States*, 138 S. Ct. 2206, 2252 (2018) (Alito, J., dissenting) ("If the Founders thought the Fourth Amendment applied to the compulsory production of documents, one would imagine that there would be *some* founding-era evidence of the Fourth Amendment

being applied to the compulsory production of documents."). There is no basis for reading a constitutional defect into a settled practice that prompted no objection—especially based on a constitutional provision whose exact contours are exceedingly vague to say the least. Cf., *e.g.*, *Rita* v. *United States*, 551 U.S. 338, 379 (2007) (Scalia, J., concurring in judgment) ("'[W]hen a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down. Such a venerable and accepted tradition is not to be laid on the examining table and scrutinized for its conformity to some abstract principle of [constitutional] adjudication devised by this Court.").

In any event, as described above, the Executive has ample control over these cases. It has the option to take full control at the outset; it has the ability to pursue alternative remedies in other forums; it can limit discovery and participate (via intervention) later in the case. The Executive's control is at least as strong here as in *Morrison* v. *Olson*, 487 U.S. 654, 696 (1988)—and the context here is civil, not criminal, and involves an actual assignment of a claim. See *Stevens*, 529 U.S. at 773.

"The constitutional-doubt canon can be used to resolve genuine doubts when the language is ambiguous and the constitutional danger clear and present. It should not be used where, as here, the constitutional questions are more dubious than the statutory text." *UCB*, 970 F.3d at 849 (citation omitted).

II. AT A MINIMUM, THE GOVERNMENT IS SUBJECT TO ORDINARY BASELINE CHECKS ON EXECUTIVE ACTION—AND CANNOT SEEK DISMISSAL FOR IRRATIONAL OR ARBITRARY REASONS

Even if the government retains the power to dismiss, respondents are wrong that the government can extinguish a relator's rights in its "unfettered discretion," and the Third Circuit is wrong that Fed. R. Civ. P. 41 supplies the appropriate dismissal standard in this context. On the contrary, the appropriate standard (to the extent one applies) is the constitutional framework applied by the Ninth Circuit in *Sequoia Orange* and the Tenth Circuit in *Ridenour*: First, the government must identify "'a valid government purpose'" and "'a rational relation between dismissal and accomplishment of th[at] purpose'"; and second, if the government satisfies that showing, "the burden switches to the relator 'to demonstrate that dismissal is fraudulent, arbitrary, and capricious, or illegal.'" *Sequoia*, 151 F.3d at 1145; *Ridenour*, 397 F.3d at 936.

Respondents have not explained how the government can deprive a private party of a recognized right without satisfying even minimal constitutional scrutiny, and their position should be rejected.[8]

A. Respondents' "Unfettered Discretion" Standard Fails For Multiple Reasons

Respondents instead read the FCA to permit dismissals in the government's unfettered discretion (*Swift* v. *United States*, 318 F.3d 250, 252-253 (D.C. Cir. 2003)), but that reading is at odds with the FCA and bedrock norms

[8] Indeed, if the constitutional-avoidance canon has any role in this case, that role is here: petitioner's interpretation avoids the constitutional doubt of extinguishing a private right for arbitrary or irrational reasons or no reason at all.

governing executive action. It has been rejected by multiple circuits for good reason, and the Court should reject it here—assuming the FCA permits the government to dismiss a declined case at all.

1. a. First and foremost, an unfettered right to dismiss is inconsistent with Section 3730(c)(2)(A)'s hearing requirement. The FCA expressly conditions the government's dismissal authority on the court providing the relator "an opportunity for a hearing on the motion." 31 U.S.C. 3730(c)(2)(A). Congress does not ordinarily provide hearings in order for courts to do nothing. It expects findings of law or fact, and it provides an opportunity for judicial scrutiny of the subject at issue. Grassley Ltr. 3-5. If Congress merely wanted to provide a venue for a public gathering, it would have said so using language far different than this. *E.g.*, *United States ex rel. Graves* v. *ICANN*, 398 F. Supp. 3d 1307, 1310 (N.D. Ga. 2019); *United States* v. *EMD Serono, Inc.*, 370 F. Supp. 3d 483, 488-489 (E.D. Pa. 2019).

b. The government's theory also conflicts with the FCA's settlement provision. Congress grouped this provision together with the dismissal provision, setting out the requirements for the government to settle "[i]f it proceeds with the action": it may settle over the relator's objections "if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances." 31 U.S.C. 3730(c)(2)(B).

This provision again cuts directly against the government's theory. A dismissal is a settlement for nothing in return. It is irrational to presume that Congress restricted the government's right to settle a case but permitted an outright dismissal for no reason at all. Indeed, under the government's logic, the government could simply dismiss the action—and get even *less* in return—if

a court declares the government's proposed settlement inadequate. *United States ex rel. Schweizer* v. *Oce N.V.*, 677 F.3d 1228, 1234 (D.C. Cir. 2012). There is no reason to think Congress endorsed a gaping loophole in the statute.

c. While it is true that Congress did not specify a controlling standard under Section 3730(c)(2)(A), that hardly means the government can do whatever it wants. Congress had no reason to reiterate that the government must act with a rational purpose because the government must *always* act with a rational purpose. Arbitrary and irrational actions are unconstitutional when affecting private interests, and FCA relators have a vested interest in the case. *E.g.*, *Ridenour*, 397 F.3d at 936.

As the Supreme Court has explained, a relator is not simply the government's agent; the relator has been *assigned* a direct interest in the claim, and it thus brings the action "*for the person* and for the United States Government." 31 U.S.C. 3730(b) (emphasis added). It would be extraordinary for Congress to "effect[] a partial assignment" of its claim (*Stevens*, 529 U.S. at 773), expressly grant the relator a textual "right to conduct the action" (31 U.S.C. 3730(c)(3)), and then permit the government to extinguish that private interest for arbitrary reasons or no reason at all.

As the settlement provision confirms, Congress understood that these decisions are subject to judicially manageable standards and the sound exercise of judicial discretion. Nothing in the FCA suggests Congress gave the government carte blanche to do whatever it wishes with its "own" cause of action—at least not after a relator invests the time and effort to prosecute a declined case under the FCA. *E.g.*, Sen. Report 25-26.

2. The government's counter-arguments are unavailing. As the government sees it, any limitation on the government's dismissal authority impermissibly interferes

with executive discretion. Under this logic, a decision to dismiss is tantamount to the government's decision not to prosecute, which the government says is unreviewable. And if the government wishes to throw in the towel on its own claims, it insists it is entitled to do that. *E.g.*, *Hoyte* v. *Am. Nat'l Red Cross*, 518 F.3d 61, 65 (D.C. Cir. 2008); *Swift*, 318 F.3d at 252.

This logic fails on multiple levels. First, the government ignores that its interests are not the only interests at play. Congress effected a partial assignment of the government's claim; even if it can abandon its *own* interests for irrational reasons, it cannot force a private party to abandon its separate rights without satisfying judicial scrutiny. Cf. *Health Possibilities*, 207 F.3d at 342.

Second, the government is wrong that the FCA grants it unfettered discretion to dispose of FCA actions. Congress refused to let the government settle without judicial approval; indeed, it would not even let the government *intervene* without judicial permission. 31 U.S.C. 3730(c)(2)(B), (c)(3). It is perplexing how the government squares those express statutory provisions with its claim of unbridled authority to terminate private FCA claims.[9]

Third, the government overlooks the posture of these cases. Even if the government has full discretion to decide which prosecutions to bring, it lacks the same discretion to dismiss *after the prosecution is underway*. *E.g.*,

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[9] *Swift* suggests that the government need not intervene, because it does not wish to "'proceed with the action,'" but "end[] it." 318 F.3d at 251-252. That cramped view is incompatible with the FCA's natural meaning: one can "proceed" with an action in multiple ways, including by bringing it to a swift end. And it is curious to think that Congress refused to permit intervention "without *limiting* the status and rights of the [relator]" (31 U.S.C. 3730(c)(3)), but was fine outright *exterminating* those rights with no review.

Schweizer, 677 F.3d at 1236; *Kelly*, 9 F.3d at 754 n.12 (describing Fed. R. Crim. P. 48(a)). Here, the government is not even trying to dismiss its own case; upon declination, the action is controlled by the relator (31 U.S.C. 3730(c)(3)), with his own distinct Article III interest. *Stevens*, 529 U.S. at 771-773. There is no obvious authority permitting the government to unilaterally withdraw such actions midstream.

B. The Third Circuit's Rule 41 Standard Is Inapposite In This Context

According to the Third Circuit, the appropriate standard for reviewing FCA dismissals is found in Rule 41(a). Pet. App. 27a. This is meritless.

The Third Circuit effectively concluded that Rule 41 applies except for all the reasons that it plainly does *not* apply. Unlike Rule 41, the FCA requires a hearing before any dismissal can take place. Critically, unlike Rule 41, this situation does not involve a single plaintiff dismissing its own suit; this involves *two* plaintiffs, and one seeking to dismiss the entire action—including involuntarily *for a different plaintiff*. That has nothing to do with the ordinary Rule 41 scenario.

And, of course, Rule 41 authorizes judges to impose conditions on any dismissal—but largely for the protection *of the defendant*. The FCA imposes a hearing requirement to protect the unwilling *relator*, not the defendant, and the Third Circuit could not explain how Rule 41's limited authority could possibly protect the relator or accomplish Congress's statutory objectives.

Multiple circuits have refused to apply Rule 41 in the past, and the Third Circuit failed to account for any of these obvious defects in its decision. See, *e.g.*, *United States ex rel. Borzilleri* v. *Bayer Healthcare Pharm., Inc.*, 24 F.4th 32, 41 (1st Cir. 2022) ("We are unpersuaded by this application of Rule 41 to the unique context of a qui

tam action."); *Sequoia Orange*, 151 F.3d at 1145 (declaring Rule 41 inapplicable because it "protects defendants from vexatious plaintiffs," whereas in the context of an FCA dismissal, "the plaintiffs, or relators, seek protection from the dismissal decision of the real party in interest, the government, under a specific statute establishing unique relationships among the parties").

C. The FCA Instead Imposes Rationality Review On Government Requests To Dismiss FCA Actions

For multiple reasons, the government must satisfy rationality review before extinguishing a private relator's FCA claim.

First and foremost, the question here is not what standard applies to executive actors interfering with a protected property interest; the question here is *legislative* in nature: what standard Congress adopted *for the statute*, not whether government actors violated petitioner's rights independently in dismissing his action. Congress cannot rationally authorize *irrational and arbitrary* dismissals consistent with baseline constitutional norms—just as Congress generally cannot pass irrational and arbitrary legislation. And since respondents read this statute to authorize the government to dismiss a pending case—which reflects the relator's assigned property interest in a cause of action (*Stevens*, 529 U.S. at 773)—the statute must impose at least some constitutional scrutiny. See, *e.g.*, *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) ("a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause").

This incidentally explains the Third Circuit's error in believing that the "shocks the conscience" standard instead applies. Pet. App. 23a n.17 (quoting *County of Sacramento* v. *Lewis*, 523 U.S. 833, 846 (1998)). That test is relevant in cases involving specific, individualized acts of

government officials. See 524 U.S. at 846-847; see also *Nicholas* v. *Penn. State Univ.*, 227 F.3d 133, 139 (3d Cir. 2000) (Alito, then-J.). The question presented here, by contrast, is *what standard Congress imposed in the FCA itself*. Whether individuals *satisfy* that standard will present individualized questions; but if the statute itself imposes a *Sequoia*-based rationality review, then the government must meet that standard—even if the statutory test exceeds the constitutional minimum for individual, ad hoc official misconduct.

Second, the FCA's hearing requirement supports a heightened form of review. 31 U.S.C. 3730(c)(2)(A). As noted above, courts do not hold hearings without reason; a hearing implies the need to make actual findings, based on concrete evidence—and not merely to uncritically accept hypothetical or theoretical justifications. See, *e.g.*, *UCB*, 970 F.3d at 850 (courts are not in the habit of "serv[ing] as a mere convening authority" to offer parties "'some donuts and coffee'"). Congress granted a hearing for a reason, and the requirement ensures a court can review whether the government satisfied "background constraints on executive action." *Id.* at 850-851.

Third, as the Ninth Circuit explained, the *Sequoia* standard tracks "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.

Finally, the existence of an express standard for policing settlements—requiring the court to find that "the proposed settlement is fair, adequate, and reasonable under all the circumstances" (31 U.S.C. 3730(c)(2)(B))—supports a comparable standard here. Again, a dismissal is effectively a settlement for *nothing in return*. If the government cannot settle a case without surviving judicial scrutiny, it is bizarre to read the Act as permitting the

government to dismiss a case for irrational reasons or no reasons at all.

The government must, at a minimum, establish that its stated basis is not irrational or arbitrary in light of the record facts. Because the Third Circuit failed to apply such a standard below, its judgment should be reversed.

D. This Court Should Remand For The Third Circuit To Apply The Correct Standard

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. In the proceedings below, the Third Circuit applied a single standard: an abuse-of-discretion analysis under Rule 41(a)'s "proper" test (Pet. App. 28a)—it 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. But if the Court instead adopts the Ninth and Tenth Circuit approach, it should 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).

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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