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.

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF OF TAXPAYERS AGAINST FRAUD EDUCATION FUND AS *AMICUS CURIAE* SUPPORTING PETITIONER AND REVERSAL

Jacklyn N. DeMar
TAXPAYERS AGAINST FRAUD
EDUCATION FUND
1220 19th Street, N.W.
Washington, DC 20036

David J. Chizewer
Roger A. Lewis
GOLDBERG KOHN LTD.
55 East Monroe Street
Suite 3300
Chicago, IL 60603

Tejinder Singh
Counsel of Record
SPARACINO PLLC
1920 L Street, NW
Suite 835
Washington, DC 20036
(202) 629-3530
tejinder@sparacinopllc.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF THE AMICUS[1]

Amicus curiae Taxpayers Against Fraud Education Fund ("TAFEF") is a nonprofit public interest organization dedicated to combating fraud against the government and protecting public resources through public-private partnerships. TAFEF is committed to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to publicize the *qui tam* provisions of the False Claims Act ("FCA"), regularly participates in litigation as *amicus curiae*, and has provided testimony to Congress about ways to improve the FCA. TAFEF is supported by whistleblowers and their counsel, by membership dues and fees, and by private donations. TAFEF is the 501(c)(3) arm of Taxpayers Against Fraud, which was founded in 1986.

TAFEF has a strong interest in ensuring proper interpretation and application of the FCA. It files this brief to address the law governing the government's motions to dismiss FCA cases under 31 U.S.C. § 3730(c)(2)(A).

SUMMARY OF ARGUMENT

The FCA provides the government with substantial control over every *qui tam* action at the outset by allowing the government to intervene and take primary responsibility for pursuing the action. If the government does so, it need not litigate to the bitter end; it can settle the action or voluntarily dismiss it—even

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[1] All parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than the amicus and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

over the objection of the relator who initiated the action. On the other hand, when the government declines to intervene in a relator's action, Congress provided that the relator "shall have the right to conduct the action." 31 U.S.C. § 3730(c)(3). From that point forward, the government may intervene only upon establishing "good cause" and only "without limiting the [relator's] status and rights." *Id.*

The parties disagree over whether this language permits the government to belatedly move to dismiss a relator's complaint after declining to intervene. Petitioner argues that the language protecting the relator's "status and rights" means that the government effectively loses the right to dismiss an action once it declines to intervene; respondents have argued that the "status and rights" language does not grant the relator this protection, stressing the government's need to control *qui tam* litigation.

This brief does not address that dispute, which the parties have ably covered. Instead, this brief advances an alternative (and in our view easier) path to reversal that is faithful to the statutory text and addresses both sides' concerns. Even if the government can belatedly seek dismissal, it can only do so by first intervening, and the statute conditions belated intervention on a showing of "good cause." This standard requires the government to explain not only its rationale for dismissal, but also the timing of its decision. And it requires courts not to simply accept that explanation at face value, but instead permit the relator to challenge its accuracy and legal sufficiency. When the government cannot provide a satisfactory explanation for its delay—*e.g.*, by identifying material information that it did not know when it initially declined to intervene—

courts can and should deny the government's belated motions to dismiss.

This makes policy sense because Congress recognized that *qui tam* relators and their counsel take declined cases forward at great personal and financial risk. Relators risk their careers, reputations, and time to pursue declined cases. Their lawyers invest millions of dollars and thousands of hours of labor. Those efforts have recovered billions for the government through trial and settlement even when the government has not intervened. Congress sought to encourage relators to pursue these cases. In particular, it provided that relators in declined cases are entitled to a larger share of the proceeds than relators in cases in which the government intervenes. Congress also limited the government's ability to intervene late in the day by imposing the "good cause" requirement.

Courts should accordingly subject the government's motions to dismiss to a level of scrutiny appropriate to the procedural posture of the case. If the government seeks to dismiss a case at the outset, a deferential standard may be appropriate because the relator's investment in the case will be comparatively small. But when, as here, the government seeks to dismiss a case belatedly (*e.g.*, after years of discovery and at the threshold of summary judgment), Congress required it first to establish "good cause"—and that standard demands more than a rubber stamp from the court. It imposes real limits on belated motions so that relators and their counsel know that the government will not unreasonably dismiss their cases. A substantive inquiry—which goes beyond mere rational-basis review—into the reasons for delay is also appropriate because the government can *always* come up with

some rational reason to dismiss a case, *e.g.*, a desire to avoid responding to discovery, or spending resources to monitor a case. In belated dismissal cases, the government should have to explain why those considerations did not support dismissal at the outset, or why they became more salient later.

On the other side of the balance, applying a "good cause" standard to belated motions to dismiss would not unduly hinder the government's ability to control *qui tam* cases. Under any standard, the government has broad powers to dismiss cases at the outset, as well as additional powers to weigh in on legal questions, resist or limit discovery, and participate in settlement discussions as cases progress. These powers provide the government with an unusual degree of control over *qui tam* actions. A "good cause" approach to belated intervention also addresses any legitimate policy concern the government has by permitting the government to explain, on a case by case basis, why belated dismissal is warranted. In light of those accommodations, the government does not need unfettered power to dismiss mature declined cases—and granting the government such power is inconsistent with the text and purpose of the statute.

ARGUMENT

I. The False Claims Act Does Not Permit the Government to Belatedly Move to Dismiss a *Qui Tam* Action Without First Intervening and Showing Good Cause.

The first key point is that the government must intervene before moving to dismiss a relator's *qui tam* action. That ought to be intuitive: the ordinary rule in civil litigation is that only a plaintiff or a court may

dismiss the plaintiff's action. A third party—even the government—cannot usually show up and make a case go away. But FCA cases are unusual because the relator sues on the government's behalf as well as his own. Accordingly, Congress granted the government special powers in FCA cases, including the power to intervene and dismiss a relator's action.

The FCA empowers any "person" to sue for violations of the statute. 31 U.S.C. § 3730(b)(1). The filing procedure is unique: relators must file their complaints under seal, and serve the complaint together with a disclosure of the supporting evidence on the government, and not the defendant, so that the government may investigate the allegations. *Id*. § 3730(b)(2). The government presumptively has sixty days to investigate, though that time may be extended for good cause. *See id*. § 3730(b)(2), (3). At the conclusion of the investigation period (and any extensions), the government *must* either intervene in the action, "in which case the action shall be conducted by the Government," or decline to intervene, "in which case the person bringing the action shall have the right to conduct the action." *Id*. § 3730(b)(4).

The government's power to dismiss a *qui tam* action is located in the next subsection of the statute, entitled "Rights of the Parties to *Qui Tam* Actions." 31 U.S.C. § 3730(c). This subsection begins by providing that when the government intervenes in an 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)." *Id*. § 3730(c)(1).

Paragraph 2, in turn, includes multiple limitations on relators' rights to continue as parties after the government has intervened. The first of these is that "[t]he 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." 31 U.S.C. § 3730(c)(2)(A). The dismissal provision sits alongside other limitations, which permit the government to settle an action, and permit the government and the defendant to seek to limit the relator's participation in the litigation to avoid undue burden or disruption. *See id.* § 3730(c)(2)(B), (C), (D).

The rights of parties in cases in which the government has not intervened are described in paragraphs (3) and (4). Paragraph (3) provides that "[i]f the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action." 31 U.S.C. § 3730(c)(3). In that circumstance, the government has limited rights, including a right to be served with the pleadings and with copies of deposition transcripts. Paragraph (3) further provides that "[w]hen 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*." *Id*. (emphasis added). The statute thus contemplates that if the government wants to exercise additional control over the case, it has to make a showing of good cause and join the case as a party. Notably, paragraph (3) does *not* say that the relator "shall have the right to conduct the action *subject to the limitations set forth in paragraph (2)*," or

otherwise reference paragraph (2) at all—strongly suggesting that the limitations in paragraph (2) (including the power to dismiss an action over the relator's objection) do not apply in cases governed by paragraph (3). Paragraph (4) grants the government the power to seek a stay of discovery "[w]hether or not the Government proceeds with the action," in order to protect government investigations. *Id*. § 3730(c)(4). No such "whether or not" language exists in paragraph (2), again showing that the availability of the dismissal power therein is conditioned on intervention.

The order of the paragraphs confirms that paragraph (2) only modifies paragraph (1), and does not create independent powers available in every *qui tam* case. If paragraph (2) enumerated powers that apply in declined cases governed by paragraph (3), it would make sense to put it after that paragraph—and indeed to consolidate it with the other generally available powers enumerated in paragraph (4). The fact that Congress did not do so is good evidence that paragraph (2)'s limitations only apply in cases governed by paragraph (1). For these and the additional reasons outlined by petitioner, allowing the government to belatedly move to dismiss a declined *qui tam* case without intervention and a showing of good cause contravenes the text and intent of the FCA.

As noted above, none of this ought to be surprising because the ordinary rule in civil cases is that only parties can file dispositive motions. In an ordinary civil action, a non-party—even the government—cannot simply appear and start filing dispositive motions whenever it pleases. It must first intervene and become a party. The text, structure, and purpose of the FCA do not abrogate that ordinary rule; they confirm

it. As this Court held in *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 931 (2009), the government "is not a 'party' to an FCA action for purposes of the appellate filing deadline unless it has exercised its right to intervene in the case." In support, the Court explained that:

> If the United States declines to intervene, the relator retains "the right to conduct the action." [31 U.S.C.] § 3730(c)(3). The United States is thereafter limited to exercising only specific rights during the proceeding. These rights include requesting service of pleadings and deposition transcripts, § 3730(c)(3), seeking to stay discovery that "would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts," § 3730(c)(4), and vetoing a relator's decision to voluntarily dismiss the action, § 3730(b)(1).

Id. at 932. Notably, the Court did not identify the right to dismiss the action in Section 3730(c)(2)(A) as one of the "specific rights" that the government keeps after declination. The Court further emphasized that Congress:

> gave the United States discretion to intervene in FCA actions—a decision that requires consideration of the costs and benefits of party status. The Court cannot disregard that congressional assignment of discretion by designating the United States a 'party' even after it has declined to assume the rights and burdens attendant to full party status.

Id. at 933-34 (citations omitted).

The text is accordingly clear. If the government wants to dismiss an FCA action, it must first intervene. The FCA permits the government to intervene as a matter of course at the start of a case. *See* 31 U.S.C. § 3730(b)(4). But once the government has declined to intervene and entrusted the action to the relator, it cannot flip-flop on a whim; instead, it can only reverse its decision upon a showing of "good cause." *See id.* § 3730(c)(3). That "good cause" standard exists to protect the relator's "right to conduct the action," which Congress deemed important to the proper functioning of the FCA. *Id.*

Although the phrase "good cause" is inherently flexible, it is also well-established in the law and capable of judicial administration. Indeed, the FCA imposes "good cause" requirements on the government to extend the period in which cases remain under seal, 31 U.S.C. § 3730(b)(3), and to hold settlement-related hearings in camera, *id*. § 3730(c)(2)(B), and so the concept is a familiar one in the context of FCA procedure. Moreover, the text provides guidance about what constitutes good cause for belated intervention because Congress was clear that the "good cause" must relate to the government's decision "to intervene at a later date." *Id*. § 3730(c)(3). At a minimum, this means that the government must explain what material information it now has that it lacked at the time it declined to intervene, and why that information warrants a change in position. Such a standard is flatly inconsistent with the government's contention that it has unfettered discretion to belatedly dismiss *qui tam* actions, or that it may do so if it identifies any rational basis (*e.g.*, by pointing out the truism that the government can save energy and money by dismissing a case

rather than monitoring it). The good cause standard instead puts the onus on the government to provide real reasons when it changes positions, which a court can assess under the flexible and familiar good-cause framework.

II. Belated Motions to Dismiss Risk Undermining the Purposes and Objectives of the False Claims Act.

A "good cause" rule also makes policy sense because, when the government has declined to intervene, thus entrusting the action to the relator, and then allowed the action to proceed *for years* before flip-flopping to seek dismissal, it harms the reliance interests of relators and their counsel and sends a chilling signal to potential relators and members of the bar. Courts should at least require the government to provide a reasoned basis for taking such drastic action.

That policy is rooted in the FCA itself, which is designed to encourage—not chill—private enforcement suits. Prior to 1986, the FCA's *qui tam* provisions were effectively defunct due to judicial decisions that had undermined the statute. Consequently, fraud against the government had become endemic. Congress sought to understand "why fraud in Government programs is so pervasive yet seldom detected and rarely prosecuted." S. Rep. No. 99-345, at 4 (1986). Congress determined that there were "serious roadblocks to obtaining information as well as weaknesses in both investigative and litigative tools." *Id*. People were unwilling to come forward—most frequently because they believed "that nothing would be done to correct the activity even if reported," and also because they feared reprisal. *Id*. at 4-5.

The problems were not limited, however, to fraud detection. Enforcement was anemic, too. In Congress's view, "the most serious problem plaguing effective enforcement is a lack of resources on the part of Federal enforcement agencies." S. Rep. No. 99-345, at 7. Consequently, "[a]llegations that perhaps could develop into very significant cases are often left unaddressed at the outset due to a judgment that devoting scarce resources to a questionable case may not be efficient." *Id*. Then, when "large, profitable corporations" became "the subject of a fraud investigation," they were able "to devote many times the manpower and resources available to the Government"; the resulting "resource mismatch" disadvantaged taxpayers. *Id*. at 8.

Congress determined that "only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds." S. Rep. No. 99-345, at 2. It decided "to encourage more private enforcement suits." *Id*. at 23-24. Congress's goal was not only to encourage relators to come forward, but also to empower them to litigate if the government was unable or unwilling to do so.

The statutory provisions at issue here were part of these amendments. Recognizing that potential relators were frequently deterred due to "a lack of confidence in the Government's ability to remedy the problem," Congress gave relators increased rights even in cases in which the government intervenes. S. Rep. No. 99-345, at 25. These include the right to act "as a check that the Government does not . . . drop the false claims case without legitimate reason" by "formally object[ing] to any motions to dismiss or proposed settlements between the Government and the defendant."

Id. at 25-26. As the bill was originally drafted, Congress envisioned that such objections would receive a hearing "if the relator presents a colorable claim that the settlement or dismissal is unreasonable in light of existing evidence, that the Government has not fully investigated the allegations, or that the Government's decision was based on arbitrary and improper considerations." *Id*. at 26. Those were just examples. Congress contemplated that hearings would occur whenever "the *qui tam* relator shows a 'substantial and particularized need' for a hearing." *Id*. In the final statute, Congress made hearings mandatory, relieving relators of the need to justify a hearing at all. *See* 31 U.S.C. § 3730(c)(2)(A).

The 1986 amendments—as well as additional amendments in 2009 and 2010— succeeded in spurring more private enforcement suits. In 1987, 31 new *qui tam* suits were filed. Five years later, that number had risen to 116. Five years after that, it was 548. And in each of the last twelve years, more than 500 suits have been filed. All in, a total of 14,595 *qui tam* actions were filed from October 1, 1986 to September 30, 2021.[2] These cases have recovered over $48 billion for the government (compared to around $22 billion from government-initiated cases).[3] Cases in which the government declined to intervene account for almost $3.5 billion in recoveries for the government.[4]

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[2] *See Fraud Statistics – Overview*, U.S. Dep't of Justice, Off. of Pub. Affairs 1-3 (2022), https://www.justice.gov/opa/press-release/file/1467811/download.

[3] *Id.* at 3.

[4] *Id*.

The FCA's success is largely attributable to relators. As the Principal Deputy Assistant Attorney General for the Civil Division, Brian M. Boynton, has explained, whistleblowers "have been critical to identifying and pursuing new and evolving fraud schemes that might otherwise remain undetected. They also bring considerable technical expertise to complex investigations."[5] Emphasizing that *qui tams* "were responsible for more than 70 percent of the Department's recoveries [in 2020]" and "will continue to be an essential source of new leads" in the future,[6] Mr. Boynton singled out relators as critical to the fight against fraud on the government: "Industry insiders are uniquely positioned to expose fraud and false claims and often risk their careers to bring these schemes to light. . . . Our efforts to protect taxpayer funds benefit from the courageous actions of these whistleblowers, and they are justly rewarded under the False Claims Act."[7]

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[5] Press Release, U.S. Dep't of Justice, Off. of Pub. Affairs, Acting Assistant Attorney General Brian M. Boynton Delivers Remarks at the Cybersecurity and Infrastructure Security Agency (CISA) Fourth Annual National Cybersecurity Summit (Oct. 13, 2021), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-brian-m-boynton-delivers-remarks-cybersecurity-and.

[6] Press Release, U.S. Dep't of Justice, Off. of Pub. Affairs, Acting Assistant Attorney General Brian M. Boynton Delivers Remarks at the Federal Bar Association Qui Tam Conference (Feb. 17, 2021), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-brian-m-boynton-delivers-remarks-federal-bar.

[7] Press Release, U.S. Dep't of Justice, Off. of Pub. Affairs, Justice Department's False Claims Act Settlements and Judgments Exceed $5.6 Billion in Fiscal Year 2021 (Feb. 1, 2022),

Relators' ability to pursue a case after the government declines to intervene has been critical to the FCA's success. Congress contemplated that such suits would proceed—which is why it provided that when the government declines to intervene, the relator "shall have the right to conduct the action." 31 U.S.C. § 3730(c)(3). Declined cases are important for at least three reasons. First, they are valuable to taxpayers. As explained above and illustrated below, they have generated billions of dollars of recoveries without requiring any government litigation. Second, the fact that declined cases can be pursued incentivizes relators to step forward and reveal fraud. As Congress found, a major concern that deterred relators from coming forward was fear that the government would do nothing. Allowing relators to proceed when the government does not act allays that concern and therefore encourages whistleblowing. Third, the prospect of a declined case being litigated by relators gives defendants an incentive to settle with the government.

Taking a declined case forward is not easy. The elements of FCA liability can be challenging, expensive, and time-consuming to prove. Defendants are typically well-resourced and willing to litigate. And courts sometimes (wrongly) draw negative inferences about the merits of a case because of the government's declination decision. Accordingly, relators and their counsel take substantial risk when litigating declined cases—and many decide not to. But the cases are no less important for the difficulty, and the relators who

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https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year.

pursue them perform vital work that Congress wanted done. That is why Congress provided for an increased share of the proceeds to relators in such cases. *See* 31 U.S.C. § 3730(d)(1), (2) (providing that relators in declined cases shall receive between 25 and 30 percent of the proceeds, while relators in intervened cases shall receive between 15 and 25 percent of the proceeds).

The results in declined cases demonstrate both the effort that goes into them and the public benefit that comes out of them. A recent example is *United States ex rel. Bawduniak v. Biogen Idec Inc.*, No. 1:12-cv-10601-IT (D. Mass.), where a *qui tam* relator in a declined case achieved an extraordinary $900 million settlement on behalf of the government.[8] The relator in that case litigated without government intervention for seven years before achieving this result. *See id.* (government declined to intervene in 2015 (ECF No. 68) and the case settled on July 20, 2022 (ECF No. 615)).

Bawduniak is an impressive recent case, but it is by no means unique. Almost every successful declined case involves years of active litigation after declination. As just a few additional examples, in *United States ex rel. Brown v. Celgene Corp.*, No. 2:10-cv-3165-RGK-SS (C.D. Cal.), the government declined to intervene in 2013 (ECF No. 59), and the case settled for

[8] Press Release, Greene LLP, Biogen Inc. Agrees to Pay $900 Million to Resolve Whistleblower Claim Regarding Payment of Unlawful Kickbacks (July 20, 2022), https://www.prnewswire.com/news-releases/biogen-inc-agrees-to-pay-900-million-to-resolve-whistleblower-claim-regarding-payment-of-unlawful-kickbacks-301589750.html.

$280 million in 2017 (ECF No. 500).[9] In *United States ex rel. Vainer v. DaVita, Inc.*, No. 1:07-cv-2509-CAP (N.D. Ga.), the government declined in 2011 (ECF No. 32), and 1,059 docket entries and four years later, the case settled for $450 million (ECF No. 1091).[10] In *United States ex rel. Garbe v. Kmart Corp.*, No. 3:12-cv-881-NJR-RJD (S.D. Ill.), the government declined in 2010 (ECF No. 19), and the case settled in late 2017 for $32 million (ECF No. 505).[11] In *United States ex rel. Bergman v. Abbott Laboratories*, No. 2:09-cv-4264-CDJ (E.D. Pa.), the government declined in 2012 (ECF No. 23), and the case settled in 2018 for $25 million (ECF No. 206).[12] Those cases involved thousands of

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[9] Press Release, U.S. Dep't of Justice, U.S. Atty's Office, C.D. Cal., Celgene Agrees to Pay $280 Million to Resolve Fraud Allegations Related to Promotion of Cancer Drugs for Uses Not Approved by FDA (July 24, 2017), https://www.justice.gov/usao-cdca/pr/celgene-agrees-pay-280-million-resolve-fraud-allegations-related-promotion-cancer-drugs.

[10] Press Release, U.S. Dep't of Justice, Off. of Pub. Affairs, DaVita to Pay $450 Million to Resolve Allegations That it Sought Reimbursement for Unnecessary Drug Wastage (June 24, 2015), https://www.justice.gov/opa/pr/davita-pay-450-million-resolve-allegations-it-sought-reimbursement-unnecessary-drug-wastage.

[11] Press Release, U.S. Dep't of Justice, Off. of Pub. Affairs, Kmart Corporation to Pay $32.3 Million to Resolve False Claims Act Allegations for Overbilling Federal Health Programs for Generic Prescription Drugs (Dec. 22, 2017), https://www.justice.gov/opa/pr/kmart-corporation-pay-us-323-million-resolve-false-claims-act-allegations-overbilling-federal.

[12] Press Release, U.S. Dep't of Justice, U.S, Atty's Office, E.D. Pa., Abbott Laboratories and AbbVie, Inc. to Pay $25 Million to Resolve False Claims Act Allegations of Kickbacks and Off-Label Marketing of the Drug Tricor (Oct. 26, 2018), https://www.justice.gov/usao-edpa/pr/abbott-laboratories-and-abbvie-inc-pay-25-million-resolve-false-claims-act-allegations.

hours of attorney time and considerable expense. They also were fraught with risk for relators (who often face retaliation that limits their opportunity to work) and their counsel (who must carry the litigation expenses and the contingency risk).

Against that backdrop, government motions to dismiss—and especially belated motions like the one here—threaten to undermine Congress's objective of encouraging more private enforcement suits. A belated dismissal motion thwarts the reliance interests of relators and their counsel, flushing away years of hard work and expense.

This case is illustrative. Here, the government declined to intervene on June 27, 2014 (ECF No. 19). The case proceeded through active litigation for four and a half years, when on February 21, 2019, the government informed the parties that it intended to seek dismissal. The government then walked that back on May 9, 2019 (ECF No. 430), and the case proceeded to the threshold of summary judgment. According to the relator, his counsel spent over $20 million in attorney time and costs working the case before the United States sought dismissal. *See* Pet'r Br. 8 (reciting this history). That is a nightmare scenario for any relator, and any relator's counsel. Many relator-side law firms cannot afford to lose $20 million in time and costs over a five-year period.

If the government can belatedly dismiss cases on a whim, potential relators and relators' counsel will recognize that they face yet another layer of risk when pursuing a declined FCA action: they may jeopardize their livelihoods, or invest millions of dollars and years of effort, only for the government unilaterally to scuttle the case. Worse still, it will increase the power of

aggressive FCA defendants to use a weapon that they have already been deploying in declined cases: pressuring the government to dismiss by issuing burdensome discovery requests to the government, and suggesting dismissal as an alternative to complying. Such abusive litigation tactics can silently subvert the FCA if the government gives in to improper discovery pressure and is permitted to effectuate dismissals without scrutiny of its reasons. These risks are likely to deter the pursuit of declined cases even further, undermining Congress's goal of encouraging private suits, and allowing fraud to flourish.

The Court need not take our word for this. Senator Charles Grassley, the architect of the 1986 FCA amendments, has written the last two U.S. Attorneys General about government dismissal motions. On September 4, 2019, the Senator explained, in a letter to then-Attorney General Barr, that when the government moves to dismiss cases based on a desire to avoid litigation costs, it "will send a clear message that bad actors can get away with fraud as long as they make litigating painful and sufficiently burdensome for the government." Letter from U.S. Sen. Charles Grassley to U.S. Att'y Gen. William Barr, at 5 (Sept. 4,2019), https://tinyurl.com/mruz6p6d. The Senator explained that "[b]y opting to save resources without first conducting a sufficient cost-benefit analysis, DOJ is circumventing Congress and taking a shortsighted position that may end up costing taxpayers much more money in the future." *Id*. More recently, expressing concern about DOJ's recent dismissal of "multiple cases brought by whistleblowers" and DOJ's claim of "unfettered and unchecked discretion to seek these dismissals," Senator Grassley urged Attorney General

Garland, then a nominee to the position, in a handwritten, pointed postscript "to not hinder use of the False Claims Act, whether it's DOJ/Relator or just the individual, when DOJ doesn't want to participate." Letter from U.S. Sen. Charles Grassley to U.S. Attorney General Nominee Merrick B. Garland, at 2-3 (Feb. 24, 2021), https://tinyurl.com/43e5zbw4.

As these sources show, the good cause standard also promotes transparency and its attendant benefits. Without a good cause check, the potential for arbitrary or improper government action is heightened—and courts and Congress would lack effective means of reviewing the government's decision-making. Requiring the government to explain its decisions would have the opposite effect.

Independently, belated dismissals also affect the court system. Judges in declined cases must decide dispositive and non-dispositive motions, preside over discovery disputes, and keep the litigation moving. By flip-flopping regarding dismissal, the government disrespects the effort that our overworked district courts put into managing the litigation. The government should, at a minimum, have to provide a reasonable explanation for doing so.

On the other hand, the government does not need unfettered (or barely fettered) belated dismissal power to control FCA cases or protect its interests. Indeed, until recently, the government almost never used this power at all: one survey found that from 1986 until 2013, the government sought to dismiss as few as 30 FCA cases in total, and "[n]early all of these dismissals" were not based on "a judgment about underlying case merits," but instead noted jurisdictional problems. David Freeman Engstrom, *Public Regulation of*

Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act, 107 Nw. Univ. L. Rev. 1689, 1717 n.89 (2013). Although the government began using the dismissal mechanism more in 2018, belated dismissals like this one remain relatively rare—and there is absolutely no reason to think that the government would be unduly prejudiced by a flexible "good cause" standard.

Indeed, even if the government had no belated dismissal power, the FCA does not leave the government defenseless against litigation abuse or deprive it of a voice in the case. Far from it. First, the government is already free—categorically and without restriction—to intervene in every single *qui tam* case from the time it is filed to the time it comes out from under seal (a period that frequently lasts years). *See* 31 U.S.C. § 3730(b)(4). In declined cases (including this case), the government routinely uses its non-party status to limit its discovery obligations. *See, e.g.*, United States' Response to Relator's Motion for Leave to File Third Amended Complaint, D. Ct., ECF No. 430, at 2 ("[T]he United States does not intend to play an active role in the ongoing litigation and accordingly should be treated as a non-party for discovery purposes."). *See also* 31 U.S.C. § 3730(c)(4) (empowering the government to seek a stay of discovery that "would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts"). The government can veto a relator's decision to voluntarily dismiss the action. *See id*. § 3730(b)(1). The United States routinely submits statements of interest and *amicus* briefs promoting or opposing the application and interpretation of the FCA and underlying statutes and regulations at issue in declined *qui*

tam cases, including this one. *See* (ECF No. 152). And of course, as discussed above, the government retains discretion to change course in a case in which it previously declined intervention to intervene "upon a showing of good cause" so long as such intervention does not "limit[] the status and rights of the [relator]." 31 U.S.C. § 3730(c)(3).

Ultimately, the policy decision that matters is the one Congress made. The statutory text unambiguously requires the government to intervene before moving to dismiss, and to show good cause for any belated intervention. Congress inserted these protections to encourage private lawsuits, and to protect relators' rights. This Court should respect that choice and hold the government to its burden.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

Tejinder Singh
Counsel of Record
SPARACINO PLLC
1920 L Street, N.W.
Suite 835
Washington, DC 20036
(202) 629-3530
tejinder@sparacinopllc.com

Jacklyn N. DeMar
TAXPAYERS AGAINST FRAUD
EDUCATION FUND
1220 19th Street, N.W.
Washington, DC 20036

David J. Chizewer
Roger A. Lewis
GOLDBERG KOHN LTD.
55 E. Monroe St.
Suite 3300
Chicago, IL 60603