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 RESPONDENT EXECUTIVE HEALTH RESOURCES, INC.

Matthew M. Shors
UNITEDHEALTH GROUP INCORPORATED
9900 Bren Road East
Minnetonka, MN 55343

S. Conrad Scott
COVINGTON & BURLING LLP
New York Times Building
620 Eighth Avenue
New York, NY 10018

Ethan M. Posner
Christopher M. Denig
Mark W. Mosier
Counsel of Record
Matthew F. Dunn
Krysten Rosen Moller
Daniel G. Randolph
Sarah Suwanda
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000
mmosier@cov.com

Counsel for Executive Health Resources, Inc.

QUESTIONS PRESENTED

Whether the Government has authority to dismiss a False Claims Act qui tam suit after initially declining to intervene in the action, and what standard applies if the Government has that authority.

CORPORATE DISCLOSURE STATEMENT

Executive Health Resources, Inc., is a wholly owned subsidiary of Optum360 Solutions, LLC. Optum360 Solutions, LLC is a wholly owned subsidiary of OptumInsight, Inc., which is a wholly owned subsidiary of OptumInsight Holdings, LLC, which is a wholly owned subsidiary of Optum, Inc., which is a wholly owned subsidiary of United HealthCare Services, Inc., which is a wholly owned subsidiary of UnitedHealth Group Incorporated. UnitedHealth Group Incorporated is publicly traded, and no publicly traded corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes and Rules

Other Authorities

INTRODUCTION

Petitioner urges the Court to interpret the False Claims Act ("FCA") to impose unprecedented and unconstitutional limitations on the Government's authority to dismiss qui tam suits. According to Petitioner, the FCA contains an ultimatum, directed at the Executive Branch: Either intervene at the outset of a case or forever lose the right to seek dismissal of a suit brought in the name of the United States to recover funds allegedly owed to the United States.

No court has ever adopted this interpretation of the FCA. As courts have uniformly held, the statutory text does not limit when the Government may dismiss qui tam suits. In describing the Government's dismissal authority, this Court has observed that, regardless of whether the Government initially declines to intervene, it "retains the right at any time to dismiss the action entirely." *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 575 U.S. 650, 653 (2015).

Petitioner's interpretation would render the qui tam provisions unconstitutional. In separating federal power among the different branches, the Constitution vests all executive power in the President. That power includes the power to enforce federal laws like the FCA by filing lawsuits on behalf of the United States. It also includes the power to control those lawsuits, including by deciding to dismiss a previously filed suit. These exercises of prosecutorial discretion require quintessential policy judgments, such as whether a suit serves the Executive's overall enforcement priorities or is, instead, an unwarranted drain on the Government's resources or even contrary to the

Executive's broader enforcement agenda. The Constitution entrusts those decisions to the President.

Indeed, even properly interpreted in favor of the Government's dismissal authority, the FCA's qui tam provisions are in considerable tension with separation-of-powers principles. They delegate executive power to self-appointed, financially motivated, politically unaccountable private relators who, unlike the President, have no constitutional duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. And they allow individuals who have not been appointed pursuant to the Appointments Clause to exercise substantial executive power.

Petitioner's reading stretches the qui tam provisions beyond their constitutional breaking point. To ensure the faithful execution of federal law, the President must retain control over litigation brought on behalf of the United States. But on Petitioner's reading of the FCA, if the Government initially declines to intervene, it is powerless to dismiss a suit even if, for example, (1) it later concludes the suit is meritless; (2) the case imposes substantial discovery burdens on the Government, siphoning resources it believes are better used elsewhere; or (3) the Government reasonably fears that the case could make bad law that would hamper its other enforcement priorities. Petitioner's approach would allow one Administration to tie the hands of the next, preventing the new Administration from dismissing cases that do not align with current enforcement priorities. If Petitioner's reading of the qui tam provisions is correct, the Court should strike down those provisions as unconstitutional.

Petitioner also contends that the Government's dismissal decisions should be subject to searching judicial review. In Petitioner's view, courts should engage in "APA-like" review, in which the Government has the burden of establishing the reasonableness of its decision. Neither the FCA nor the Constitution authorizes judicial review of the reasonableness of the Government's dismissal decision, much less requires the Government to bear the burden of justifying that choice.

The District Court and Third Circuit correctly refused to permit Petitioner's suit to proceed over the Government's objection. Petitioner may disagree with the Government's weighing of the actual and potential costs of his suit against its potential benefits. But he offers no good reason for courts to second-guess a decision that the FCA and the Constitution assign to the Executive Branch. The Third Circuit's judgment should be affirmed.

STATEMENT

A. Constitutional and Statutory Framework

1. To protect individual liberty and guard against abuses of power, the Framers "split the atom of sovereignty" between the federal and state governments and then "divided the powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2202 (2020) (quotation marks omitted). By dividing federal power in this way, the Framers sought to "assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility." *INS v. Chadha*, 462 U.S. 919, 951 (1983).

"Under our Constitution, the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'" *Seila Law*, 140 S. Ct. at 2191 (quoting U.S. Const. art. II, §§ 1, 3). This executive power includes the authority to conduct civil litigation on behalf of the United States. Indeed, "[a] lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (per curiam).

The President's authority to enforce federal law through litigation necessarily includes the discretion to decide whether to bring an enforcement action. "This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *see also United States v. Nixon*, 418 U.S. 683, 693 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"). That discretion extends to the decision "to dismiss a proceeding once brought." *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967) (Burger, J.).

The Constitution vests all executive power in the President, but it does not expect that only the President will exercise that power. Because "no single person could fulfill that responsibility alone, the Framers expected that the President would rely on subordinate officers for assistance." *Seila Law*, 140 S. Ct. at 2202.

Those subordinate officers remain subject to presidential control. As a general rule, individuals who exercise significant executive powers must be appointed under the Appointments Clause and are subject to removal by the President. *See id.* at 2192, 2197-2200.

2. The FCA empowers private individuals to exercise executive power by litigating on behalf of the United States. FCA qui tam actions are brought "for the [relators] and for the United States Government" and "in the name of the Government." 31 U.S.C. § 3730(b)(1). They seek to redress injuries allegedly suffered by the United States, *id.* §§ 3729(a)(1), 3730(b)(1), and the United States remains the real party in interest in the suit, *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 934 (2009). Relators need not have suffered injury-in-fact; they can instead derive standing from injuries suffered by the United States, as a partial assignee of the Government's claim. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774-75 (2000).

Qui tam suits are "an archaic form of litigation." J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. Law Rev. 539, 541-42 (2000). They were widely used in England "[p]rior to the advent of modern law enforcement and the development of the regulatory state." *Id.* at 565-66. Reliance on private individuals "to perform many tasks that today are the work of police officers, prosecutors, and administrative officials" came at a cost: When "personal and public interests collide, [relators] tend to pursue pecuniary gain at the expense of the common good," with the result that qui tam suits "transform law enforcement into a business pursued

for the private enrichment of profit-motivated bounty hunters." *Id.* at 549, 566.

Congress enacted the FCA in 1863, when "the Executive was unable to monitor and prosecute fraud by defense contractors occurring in a war-torn country in which military requisitions had multiplied enormously." *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 760-67 (5th Cir. 2001) (en banc) (Smith, J., dissenting). At the time, "[t]here was no [Department of Justice], and the nugatory prosecutorial arm of the Executive could not adequately monitor fraud committed by government contractors." *Id.*; *see also* Act of June 22, 1870, 16 Stat. 162 (establishing the Department of Justice).

From its enactment in 1863 to its amendment in 1986,[1] the FCA "generated relatively little litigation." Beck, *supra*, at 541-42 (identifying 306 cases filed during that entire 123-year period); *see also* S. Rep. No. 110-507, at 3 (2008) (estimating "only about six to ten" cases per year before 1986). But since then, qui tam litigation has exploded, increasing a hundredfold, with more than 6,700 suits filed in the past decade.[2]

The dramatic increase in qui tam litigation can be traced to a host of relator-friendly measures introduced in the 1986 Amendments. Most notably, the FCA was amended to provide for treble damages, sub-

---

[1] *See* False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (codified as amended at 31 U.S.C. §§ 3729-33) ("1986 Amendments").

[2] *See* Dep't of Justice, Fraud-Statistics – Overview 2 (2021), https://www.justice.gov/file/1467871/download.

stantially increase the penalties for each violation, allow for the recovery of attorney's fees, and increase the relator's share of any recovery. *See* 31 U.S.C. §§ 3729(a), 3730(d) (1988). By increasing the monetary awards for relators, Congress greatly increased the likelihood that a relator would litigate claims alleging violations that the Government did not deem worth pursuing.

3. By fundamentally changing relators' incentives to pursue qui tam suits, as well as the structure of the FCA itself, the 1986 Amendments began "an extensive experiment with a curious method of statutory enforcement." Beck, *supra*, at 541. The constitutionality of the Amendments was immediately questioned. The Department of Justice's Office of Legal Counsel initially determined that the qui tam provisions violated both the Take Care and Appointments Clauses. *See* Constitutionality of the Qui Tam Provisions of the False Claims Act, 13 Op. O.L.C. 207 (1989), *superseded in part by* The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124 (1996). And a panel of the Fifth Circuit held that the qui tam provisions were unconstitutional. *See Riley v. St. Luke's Episcopal Hosp.*, 196 F.3d 514, 526-27 (5th Cir. 1999), *vacated*, 196 F.3d 561, *on reh'g en banc*, 252 F.3d 749.

This Court has expressly reserved the questions whether qui tam suits violate the Take Care and Appointments Clauses. *See Stevens*, 529 U.S. at 778 n.8. Lower courts have upheld the constitutionality of these suits, but they have done so by interpreting the qui tam provisions to permit the Government to exercise substantial control over the suits—including by

having broad authority to seek dismissal of a qui tam suit at any stage of the litigation. *See, e.g.*, *Riley*, 252 F.3d at 753-54; *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 752-55 & n.8 (9th Cir. 1993); *Ridenour v. Kaiser-Hill Co., L.L.C.*, 397 F.3d 925, 934-35 (10th Cir. 2005).

B. Procedural History

1. In 2012, Petitioner filed this qui tam suit asserting claims under the FCA and state law. Pet. App. 5a. His principal allegation was that Executive Health Resources ("EHR") incorrectly recommended to its hospital clients that, when submitting reimbursement claims to Medicare, they classify some hospital stays as "inpatient" instead of "outpatient." Pet. App. 4a, 33a n.4. After investigating these allegations for two years, the Government declined to intervene and take over the action. Pet. App. 5a.

After the District Court dismissed all of Petitioner's claims except his FCA claim against EHR, the parties conducted discovery on the remaining claim. During discovery, the Government notified Petitioner and EHR that it intended to dismiss the case. Pet. App. 37a. Petitioner amended his complaint in an effort to stave off dismissal, *id.*, but that amendment failed to address the Government's concerns about the case.

In August 2019, the Government moved to dismiss the suit. J.A. 69. The Government stated that it "remain[ed] concerned about relator's ability to prove a FCA violation." J.A. 91. It also noted that discovery had "imposed a tremendous, ongoing burden on the government," necessitating the full-time attention of one Government attorney and "frequent assistance"

from other attorneys and staffers. J.A. 88, 90. That burden was likely to increase due to the parties' requests for more documents from the Government and to take depositions of Government employees—efforts that threatened to reveal information allegedly protected by the deliberative-process privilege. J.A. 90. If the litigation were to proceed, the Government anticipated that it would "need to continue devoting considerable resources to monitoring the case," including "a considerable amount of time" from four Government attorneys. J.A. 91.[3]

The Government also expressed its "concern[] about relator's credibility in light of relator's actions in this case." J.A. 92. This concern presumably arose, at least in part, from Petitioner's failure to produce before the close of discovery a DVD in his possession containing 14,000 records from his former employer, the Centers for Medicare & Medicaid Services. Order at 1, DC Dkt. 400 (Feb. 21, 2019) (granting in part EHR's motion for sanctions).

After "appropriately consider[ing] the potential costs and benefits," the Government "concluded that dismissal of this case best serves the public interest," "based on its assessment of the claims and its interest in conserving federal resources for more meritorious matters and in preserving important government privileges." J.A. 107.

---

[3] The Government attested that the action had already occupied "over 1,500" hours of time from Department of Justice attorneys, as well as requiring the "nearly exclusive[]" attention of two attorneys from the Department of Health and Human Services. Pet. App. 53a n.15.

Following briefing and a hearing, the District Court granted the Government's motion to dismiss. The District Court observed that courts have applied different standards for reviewing motions to dismiss under Section 3730(c)(2)(A). Pet. App. 44a. But the District Court did not decide which standard should apply, because it concluded that the Government was entitled to dismiss the case under any of them. Pet. App. 48a-49a. As the District Court found, the Government's reasons for dismissing the action were "well-reasoned and supported." Pet. App. 56a.

2. The Third Circuit affirmed. Pet. App. 3a. The Court of Appeals rejected the argument that the Government forfeits its right to dismiss a case if it initially declines to pursue the case itself, as has every other court of appeals to consider the argument. Pet. App. 8a-19a. The court held that the Government must formally intervene before moving to dismiss a qui tam suit, but that holding was rendered academic by the court's decision to "construe the Government's motion to dismiss as including a motion to intervene." Pet. App. 28a.

The Third Circuit also held that a motion by the Government to dismiss a qui tam suit should be reviewed under a standard based on Federal Rule of Civil Procedure 41. Pet. App. 21a. Applying that standard, the court noted that the District Court had "exhaustively examined the interests of the parties, their conduct over the course of the litigation, and the Government's reasons for terminating the action." Pet. App. 29a. In particular, the District Court had weighed the considerable "litigation costs that [this]

suit imposed on the Government," against the minimal risk of prejudice to the other parties, who either supported the motion (EHR) or faced a "doubtful" prospect of success and had already "engaged in potentially sanctionable conduct" (Petitioner). Pet. App. 29a-30a. "In light of this thorough examination and weighing of the interests of all the parties," the Third Circuit held that the District Court did not abuse its discretion by granting the Government's motion to dismiss. Pet. App. 30a.

SUMMARY OF ARGUMENT

I. Petitioner would force the Government to intervene at the beginning of a qui tam action or lose the right to dismiss altogether. No court has ever interpreted the FCA that way.

A. The FCA is best read to permit the Government to dismiss at any time, whether or not it has intervened. The relevant statutory provision contains no language limiting the Government's dismissal authority to a particular phase or stage of proceedings—language that would be expected given the inclusion of time constraints elsewhere in the statute. Petitioner's attempt to read a time limitation into the statute—within the first 60 days, before defendants are even served—would limit not only the Government's dismissal authority, but also its settlement authority and ability to control interfering relators. Congress's silence on when the Government may move to dismiss should not be read to impose such a significant limitation on the Government's authority or to relieve a relator of so many controls on its litigation authority.

B. At a minimum, the Government may dismiss after intervening. Once the Government intervenes,

it may "proceed[] with the action" under Section 3730(c)(1) and may dismiss under Section 3730(c)(2). Petitioner's alternative reading—in which the Government may intervene, but must then defer entirely to the relator on how to litigate the Government's claims—is not supported by the statutory text, context, or purpose.

II. If Petitioner is correct that the FCA prohibits the Government from dismissing a declined qui tam suit, then the qui tam provisions are unconstitutional. The 1986 Amendments profoundly changed the FCA and immediately raised serious questions about the constitutionality of the qui tam provisions. Where presented in a few instances, courts have upheld the 1986 Amendments by stressing how much control the Government retains over qui tam suits, including its broad authority to dismiss suits over the relator's objection. If the Government's dismissal authority is restricted to the first 60 days of the litigation, then qui tam suits would impermissibly intrude on the Executive's authority to enforce federal law.

A. Petitioner's interpretation cannot be reconciled with constitutional separation-of-powers principles. Article II vests all executive power in the President, and that power includes the authority to bring actions in court on behalf of the United States. The President can faithfully execute federal law only if the Executive Branch has, at a minimum, substantial control over lawsuits brought on behalf of the United States, including the ability to remove individuals exercising federal power. The qui tam provisions, even when properly interpreted, are in tension with these constitutional principles. If anything possibly reconciles the

FCA's qui tam provisions with the separation of powers, it is the Government's continuing authority to dismiss these actions at any time and over relators' objections—because that power allows the Government to control the lawsuit and effectively remove the relator. By construing the FCA to deprive the Government of that authority, Petitioner would render the qui tam provisions unconstitutional.

B. Petitioner's interpretation also raises constitutional concerns under the Appointments Clause. This Court has held that only "officers of the United States" may be vested with primary responsibility for litigating on behalf of the United States. *See Buckley*, 424 U.S. at 138, 140. Yet Petitioner claims for himself *exclusive* authority to litigate this case, even though he was not appointed pursuant to the Appointments Clause. Courts have pointed to the Government's broad dismissal authority to hold that relators' litigating authority is not so significant as to require them to be "officers" under the Appointments Clause. But that reasoning would not hold if Petitioner's view of a relator's exclusive litigation authority were correct.

C. Petitioner falls back on a purported "longstanding historical tradition" that the Government could not dismiss a qui tam action prior to the 1986 Amendments. But an incursion on the President's executive powers cannot be justified based on history alone. And here that history should have little bearing on the constitutional analysis, in light of the fundamental differences between qui tam suits today and those that predated the 1986 Amendments.

III. Petitioner contends that, even if the Government has the authority to dismiss the case, courts

must conduct an APA-like review in which the Government has the burden of proving the reasonableness of its actions. Neither the FCA nor the Constitution supports that approach.

A. The FCA does not authorize courts to second-guess the reasonableness of the Government's dismissal decision. The statute provides for judicial review of the reasonableness of *settlements*, but is conspicuously silent as to what, if any, standard of review should apply to *dismissals*. Congress's decision to treat settlements and dismissals differently was entirely rational and forecloses Petitioner's attempt to interpret the FCA as adopting the same standard of review for dismissals and settlements. Nor does the hearing requirement in Section 3730(c)(2)(A) invite courts to scrutinize the Government's dismissal decision. The hearing serves an important public function of providing the relator with an opportunity to proffer relevant evidence or considerations that the Government may have overlooked. It does not implicitly authorize judicial review of the reasonableness of the Government's dismissal decision.

B. Petitioner contends that the Constitution requires the Government to prove the reasonableness of its dismissal decisions. But he identifies no constitutional provision that imposes that obligation. If anything, constitutional separation-of-powers principles prohibit this sort of judicial review of the Executive's exercise of prosecutorial discretion. Petitioner argues for the Ninth Circuit's test, which is based on substantive due process case law. But the Government's dismissal decisions do not implicate, much less violate, relators' substantive due process rights. And even if Petitioner could allege a deprivation of a property

right—he cannot—the Due Process Clause would afford him only a right to notice and hearing, which he has already received.

C. Remand is unnecessary even if the Court adopts a test grounded in substantive due process. The District Court held that dismissal was warranted under that test because the Government had adequately explained its reasons for dismissing this case. The Third Circuit also rejected Petitioner's constitutional arguments. Under these circumstances, there is no need for a remand; the Court may simply affirm the decision below.

ARGUMENT

I. The FCA's Text and Structure Confirm that the Government May Dismiss Qui Tam Suits Even When It Initially Declines to Intervene.

As Petitioner sees it, the FCA forces the Government to make an irrevocable decision at the outset of the case: Either intervene within 60 days or forever lose the right to seek dismissal. That interpretation is directly contrary to how this Court has described the Government's dismissal authority. *See Carter*, 575 U.S. at 653 (regardless of whether the Government initially intervenes or declines, "it retains the right at any time to dismiss the action entirely"). And every court to decide the issue has also rejected Petitioner's reading.[4] Courts disagree about whether the

[4] Nine courts of appeals—including the Third Circuit here—have explicitly or implicitly rejected Petitioner's interpretation. *See* EHR Br. in Opp'n 12 (collecting cases).

Government must intervene before seeking dismissal, but that disagreement is largely academic. Under either view, the Government retains the authority to dismiss a case, even if it initially declined to intervene.

A. The FCA Imposes No Limitations on When the Government May Exercise Its Dismissal Authority.

Section 3730(c)(2)(A) is straightforward and virtually unqualified. It provides that "[t]he Government may dismiss the action notwithstanding the objections of the" relator as long as the relator receives notice and the opportunity for a hearing on the motion. 31 U.S.C. § 3730(c)(2)(A). It contains no language limiting the Government's dismissal authority to a particular stage of the proceedings; no exception for circumstances where the Government initially declines the case; and no clause directing that the Government may dismiss only when it has opted to intervene during the initial 60-day sealing period.[5]

If the Government's dismissal authority were constrained as Petitioner suggests, those omissions would be surprising. Elsewhere in the statute, Congress was explicit about when the Government could or must exercise particular authority. *See, e.g.*, 31 U.S.C. § 3730(b)(2)-(4) (allowing 60 days for the Government to decide whether to intervene). Because the

---

[5] Qui tam suits are filed under seal and *in camera*. 31 U.S.C. § 3730(b). The Government has 60 days to decide whether to intervene and take over the action or decline. *Id.* After the Government decides, the complaint is served on the defendant and the litigation commences. *Id.*

Court "must give effect to, not nullify, Congress' choice to include limiting language in some provisions but not others," *Gallardo ex rel. Vassallo v. Marstiller*, 142 S. Ct. 1751, 1759 (2022), it should reject Petitioner's attempt to limit the Government's dismissal authority to cases in which it intervenes during the initial 60-day period.

Petitioner contends that the Government may move to dismiss under Section 3730(c)(2)(A) only when it initially "proceeds with the action" under Section 3730(c)(1). Pet. Br. 17-18. Under this interpretation, paragraph (2) of Section 3730(c) is merely an extension of paragraph (1), and thus the limitation found at the beginning of paragraph (1)—"If the government proceeds with the action"—also applies to paragraph (2). *Id.* That interpretation overlooks key features of the statute's text and structure.

Congress's decision to include limiting language ("If the government proceeds with the action") in paragraph (1), but not paragraph (2), means that Congress meant for those provisions to be interpreted differently. *See, e.g.*, *Russello v. United States*, 464 U.S. 16, 23 (1983) ("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."). Had Congress intended to limit the Government's dismissal authority under Section 3730(c)(2)(A) to circumstances in which the Government "proceed[ed]" with the case, it could have included the same limiting language in paragraph (2), or it could have merged the two provisions into one. *See Swift v. United States*,

318 F.3d 250, 251 (D.C. Cir. 2003). Congress's decision to enact separate paragraphs—one addressing circumstances in which the Government "proceeds with the action," and the other affording the Government virtually unqualified dismissal authority—shows that the Government's dismissal authority is not limited by Section 3730(c)(1).

Petitioner's attempt to read Section 3730(c)(1)'s limitation into Section 3730(c)(2) would have broad implications that extend beyond the Government's right to dismiss a qui tam suit. Section 3730(c)(2) also sets forth the Government's settlement authority, 31 U.S.C. § 3730(c)(2)(B), and its ability to address relator conduct that interferes with proceedings or is "repetitious, irrelevant, or for purposes of harassment," *id.* § 3730(c)(2)(C). If Sections 3730(c)(1) and (2) were linked the way Petitioner contends, then the Government's decision not to intervene would also deprive it of the right to settle the case or to seek protection from the relator's improper conduct. No court has ever interpreted Section 3730(c)(2) this way.

Petitioner places great emphasis on Section 3730(c)(4)'s use of the phrase "whether or not the Government proceeds with the action," arguing that this phrase is surplusage if Section 3730(c)(2) also applies whether or not the Government proceeds with the action. But sometimes "the better overall reading of the statute contains some redundancy." *Rimini St., Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 881 (2019). That is the case here, where any reading of the statute will have some redundancy. The FCA is full of provisions like Section 3730(c)(2)(A) that apply "whether or not

the Government proceeds with the action," while not expressly saying as much.[6]

Petitioner also considers it to be "at odds with procedural norms" that the Government, as a non-party, would be permitted to move for dismissal. Pet. Br. 22. But reliance on normal procedural rules is misplaced in qui tam suits, because there is nothing normal about permitting a private relator to exercise substantial executive power. *See infra* Part II. Indeed, the FCA expressly contemplates that the Government retains considerable authority—including the authority to file motions—even in cases where it initially declines to intervene. For instance, the Government may file a motion to extend the sealing period before it has decided whether to intervene. *See* 31 U.S.C. § 3730(b)(3). And even if the Government has not intervened, it may file a motion to stay discovery that would interfere with its "investigation or prosecution of a criminal or civil matter arising out of the same facts." *Id.* § 3730(c)(4).

The FCA authorizes the Government to dismiss a qui tam suit, but "it does not say the government must intervene in order to seek dismissal." *Swift*, 318 F.3d

---

[6] *See, e.g.*, 31 U.S.C. § 3730(b)(1) ("The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting."); *id.* § 3730(e)(4) ("The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed[.]"); *id.* § 3730(f) ("The Government is not liable for expenses which a person incurs in bringing an action under this section.").

at 250. The Government thus need not intervene before moving to dismiss a suit, and it certainly does not need to intervene at the outset of the case in order to do so.

B. At a Minimum, the FCA Authorizes the Government to Seek Dismissal After Intervening.

The Third Circuit concluded that the Government must first intervene before it moves to dismiss. Pet. App. 19a. But the question whether the Government must intervene before moving to dismiss is "largely academic." *Swift*, 318 F.3d at 252. Regardless of whether intervention is necessary, the Government still has authority to dismiss a case after initially declining to pursue it.

Petitioner acknowledges that the Government may intervene at any point in the suit, but he contends that, when the Government intervenes after initially declining, the relator retains an exclusive and unqualified right to litigate the Government's claims. Pet. Br. 14-34. On that view, the Government could become a party to an ongoing qui tam suit, but it would be powerless to determine how to litigate its own claims. Petitioner offers no explanation for why Congress would permit the Government to intervene in an ongoing case, but prohibit it from litigating its claims as it sees fit. Nor does he explain why Congress would so carefully delineate the allocation of litigating authority between the Government and relator when the Government intervenes at the outset, but provide no guidance for that relationship when the intervention happens at a later stage. The better reading of the statute is that the Government

has the same rights and responsibilities regardless of when it intervenes in a case.

Petitioner contends that he retains the exclusive right to litigate the suit after the Government intervenes because the FCA states that a relator's "status and rights" should not be "limit[ed]" when the Government intervenes. 31 U.S.C. § 3730(c)(3). But that provision states that "the court" may not limit the relator's rights. *Id.* It thus prohibits *the court* from imposing limitations on the relator's status and rights beyond those limitations imposed *by Congress* in Section 3730(c)(2). It cannot be read—as Petitioner does—to relieve relators of the statutory limitations found in Section 3730(c)(2). Courts have thus correctly held that a relator's "status and rights" remain subject to statutory limitations, and that the Government's and relator's roles and responsibilities do not change depending on when the Government intervenes. Pet. App. 16a.[7]

Petitioner also contends that the Government has no litigation authority when it intervenes in an ongoing case because Section 3730(c)(3) authorizes it only to "intervene" and not to "proceed with the action." Pet. Br. 23-24. Petitioner fails in his attempt to separate the actions of intervening and proceeding with an action. As Petitioner concedes, the Government "intervene[s]" to "proceed with the action," Pet. Br. 38

---

[7] Nor does the Court's dicta in *Stevens* help Petitioner. In the background section of its opinion, the Court used "exclusive" to describe the relator's litigating responsibility when the Government declines to intervene, not the relator's responsibility after the Government intervenes. 529 U.S. at 765.

n.9, not to sit idly by as the relator litigates the Government's claim. Intervention is the *first step* towards proceeding with the case, which is why Section 3730(c)(3) addresses only intervention when establishing the "good cause" standard for intervention.

Section 3730(c)(3)'s omission of the phrase "proceed with the action" cannot be construed, as Petitioner does, as a prohibition on the Government proceeding with the action. It is "unlikely that Congress meant to introduce a new"—and bizarre—"configuration of the government-relator relationship . . . in an ancillary provision without otherwise providing for its terms in § 3730(c)." *United States ex rel. CIM-ZNHCA, LLC v. UCB, Inc.*, 970 F.3d 835, 853-54 (7th Cir. 2020) (citing *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("elephants in mouseholes" canon)). Indeed, this Court is especially "reluctant" to find delegations of authority "lurking" in "ambiguous statutory text" when that approach could offend the separation of powers. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). Those same concerns are present here.

II. Petitioner's Interpretation Would Render the FCA's Qui Tam Provisions Unconstitutional.

Petitioner does not identify a single case holding that Congress may deprive the Government of the authority to dismiss a previously declined qui tam action. That is not surprising. The Constitution vests the President with all executive power, which includes the responsibility to bring legal actions on behalf of the United States and to enforce federal law. The FCA

divests the Executive Branch of a portion of that authority and transfers it to self-appointed, financially motivated, politically unaccountable private relators. In light of that arrogation of executive power, the FCA's qui tam provisions at best "stand on shaky constitutional ground with respect to the principle of separation of powers as embodied in Article II's Appointments and Take Care Clauses." *United States ex rel. Stevens v. Vt. Agency of Nat. Res.*, 162 F.3d 195, 219 (2d Cir. 1998) (Weinstein, J., dissenting), *rev'd on other grounds*, 529 U.S. at 765.

If the qui tam provisions are nevertheless constitutional—and that is an open question—it is only because they permit the Executive Branch to exercise sufficient control over the litigation. Petitioner's interpretation of the FCA, however, would deprive the Executive Branch of the ability to control a qui tam case following an initial declination. If Petitioner is correct that the FCA unambiguously deprives the Government of that authority, the Court should affirm on the alternate ground that the qui tam provisions are unconstitutional.

A. Under Petitioner's Interpretation, the Qui Tam Provisions Violate Separation-of-Powers Principles.

Qui tam suits implicate constitutional separation-of-powers principles because, by permitting relators to bring claims on behalf of the United States, Congress has authorized relators to exercise part of the executive power that the Constitution vests in the President. Even if a proper interpretation of the FCA would leave the President with sufficient control over

qui tam suits, Petitioner's interpretation clearly would not.

1. The President must retain substantial control over qui tam suits.

"The entire 'executive Power' belongs to the President alone." *Seila Law*, 140 S. Ct. at 2197. Others may exercise executive power only if they "remain accountable to the President," *id.*, which requires them to be "subject to the ongoing supervision and control of the elected President," *id.* at 2203. As part of the responsibility to supervise and control, the Constitution empowers the President to remove individuals exercising executive power. *Id.* at 2197. Qui tam suits threaten these separation-of-powers principles because the qui tam provisions delegate executive power to relators and restrict the President's ability to control those suits.

a. Relators exercise executive power when they litigate qui tam suits. When a relator files suit, he or she litigates on behalf of the United States. *See* 31 U.S.C. § 3730(b)(1). The suit seeks to remedy injuries suffered by the United States and to recover "damages that are essentially punitive in nature," *Stevens*, 529 U.S. at 784, including treble damages, civil penalties, and the relator's attorney's fees, 31 U.S.C. §§ 3729(a)(1), (3), 3730(d)(1)-(2).

In litigating on behalf of the United States, a relator necessarily exercises executive power. By the mid-19th Century, it was already the "[s]ettled rule" that courts would entertain actions "prosecuted in the name and for the benefit of the United States" only if brought by a U.S. attorney or his proxy. *The Confis-*

cation Cases, 74 U.S. 454, 457 (1868). And it was likewise established that the Attorney General is "undoubtedly the officer who has charge of the institution and conduct of the pleas of the United States, and of the litigation which is necessary to establish the rights of the government." *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888). More recently, the Court has acknowledged that enforcing federal law by filing civil lawsuits constitutes an exercise of executive power. *See Buckley*, 424 U.S. at 138 ("lawsuit is the ultimate remedy for a breach of the law").

b. Given that relators exercise executive power, the President must supervise and control qui tam suits to take care that the laws are faithfully executed. "As Madison explained, '[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.'" *Seila Law*, 140 S. Ct. at 2197 (quoting 1 Annals of Cong. 463 (1789)); *see also Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928) (executive power vested in the President includes the authority to "enforce [federal law] or appoint the agents charged with the duty of such enforcement").

This Court has made clear that the President's control over the exercise of executive power must be substantial, even if not absolute. In *Morrison v. Olson*, the Court acknowledged that Congress could not divest the Executive Branch of its prosecutorial authority if doing so would "impermissibly undermine the powers of the Executive Branch," or would "disrupt[] the proper balance between the coordinate branches." 487 U.S. 654, 693 (1988) (cleaned up). The

Court upheld the statute at issue there only by determining that it provided the Attorney General "sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties." *Id.* at 696.[8]

The Court has also stressed the important role that removal plays in ensuring presidential control and supervision of executive functions. "The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 484 (2010). He "therefore must have some power of removing those for whom he can not continue to be responsible." *Id.* (cleaned up). In *Morrison*, the Court upheld a provision allowing the special prosecutor to be removed only for "good cause," 487 U.S. at 663, but the Court has recently clarified that this restriction, along with

---

[8] The dissent disagreed that Congress could deprive the President of some control over the exercise of executive power, because "the Constitution seems to require, as the Founders seemed to expect, and as [this Court's] past cases have uniformly assumed [that] all purely executive power must be under the control of the President." *Morrison*, 487 U.S. at 734 (Scalia, J., dissenting). Because responsibility for representing the United States in litigation is "quintessentially executive activity," "it is ultimately irrelevant *how much* the statute reduces Presidential control." *Id.* at 706, 708. Although this Court has not overruled *Morrison*, that case "has been called into doubt by seemingly all quarters." *United States v. Concord Mgmt. & Consulting, LLC*, 317 F. Supp. 3d 598, 617 (D.D.C. 2018); *see also id.* at 617 n.8 (collecting authorities). Because Petitioner's interpretation of the qui tam provisions violates the separation of powers under either the *Morrison* decision or Justice Scalia's dissent, the Court need not revisit that decision here.

good-cause tenure protections for "inferior officers with limited duties and no policymaking or administrative authority," represent "the outermost constitutional limits of permissible congressional restrictions on the President's removal power." *Seila Law*, 140 S. Ct. at 2200 (quoting *PHH Corp. v. CFPB*, 881 F.3d 75, 196 (D.C. Cir. 2018) (Kavanaugh, J., dissenting)).

2. Petitioner's interpretation prevents the President from fulfilling his constitutional duty to control FCA suits.

Given the extent to which the FCA appropriates and interferes with the Executive Branch's power to vindicate federal interests in court, there are longstanding and serious questions about whether the FCA is consistent with separation-of-powers principles. *See supra* p.7; 13 Op. O.L.C. at 210, 228-32. But regardless of whether a proper interpretation of the FCA can save the qui tam provisions, Petitioner's proposed interpretation renders them unconstitutional.

a. In *Morrison*, the Court held that Congress could restrict the President's ability to supervise and remove the independent counsel because the Attorney General retained "several means of supervising or controlling" the independent counsel, which together provided the Attorney General with "sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties." 487 U.S. at 696. Specifically, the Attorney General (1) had "unreviewable discretion" not to appoint an independent counsel in the first place, (2) could control the scope of the investigation by providing the statement of facts establishing the independent counsel's jurisdiction, (3) retained the ability

to remove the independent counsel for "good cause," and (4) set Department of Justice policy with which the independent counsel was required to comply, if possible. *Id.*

Even when the FCA is properly interpreted to allow the Government to dismiss declined qui tam actions, each of these methods of control is arguably lacking. *First*, by enabling a relator unilaterally to file a case, the qui tam provisions intrude on the Government's prosecutorial discretion not to initiate an action. If the Government, after reviewing the relator's complaint and evidence, wishes to pursue the action, those provisions force it to work with the first relator to file suit, even if there are better-counseled or more credible alternatives. 31 U.S.C. § 3730(b)(5). Indeed, even when the Government has investigated alleged wrongdoing and has exercised its discretion not to pursue claims, a relator can overrule that decision and bring the claims himself. *Second*, a qui tam relator determines the breadth of the claims and alleged wrongdoing to investigate. *Third*, the Government can effectively remove a relator only by dismissing the entire qui tam action. *Fourth*, a relator is not obligated to follow Department of Justice policy. Rather, "qui tam relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997).

b. Courts that have upheld the qui tam provisions against separation-of-powers challenges have done so "[p]recisely because of the United States' significant control over FCA qui tam actions." *Yates v. Pinellas*

Hematology & Oncology, P.A., 21 F.4th 1288, 1312 (11th Cir. 2021). Courts have specifically identified the Government's ability to dismiss a declined qui tam action over the relator's objection as one of the several ways the Government can exercise constitutionally sufficient control over such litigation. *See Ridenour*, 397 F.3d at 934-35; *Riley*, 252 F.3d at 753; *cf. Kelly*, 9 F.3d at 753-54 & nn.8, 10.

Petitioner, however, interprets the FCA as requiring the Government to elect within 60 days of receiving notice of a qui tam action whether to take over the action or instead to cede "exclusive control" to the relator for the duration of the case. Pet. Br. 26. So interpreted, the qui tam provisions are plainly unconstitutional, because they would deprive the President of control over litigation brought in the name of the United States to enforce federal law.

The FCA delegates to the private relator the discretion to decide whether to initiate an enforcement action, even when doing so would effectively overrule the Government's decision not to pursue the same claims. Exercising prosecutorial discretion in this manner lies at the core of executive power. It involves the "complicated balancing of a number of factors," including "whether a violation has occurred," "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Chaney*, 470 U.S. at 831.

This limitation on the Government's control of enforcement actions is insignificant, courts have reasoned, because the Government can simply dismiss a qui tam suit that it would not have brought in the first place. *See, e.g.*, *Riley*, 252 F.3d at 753. Petitioner suggests that this reasoning holds, even under his interpretation, because the Government can intervene and dismiss an action within 60 days of receiving the relator's complaint and material supporting evidence. Pet. Br. 31; *see* 31 U.S.C. § 3730(b)(2). But Petitioner ignores the fact that the Executive's prosecutorial discretion remains relevant throughout a proceeding, and includes discretion "to dismiss a proceeding once brought." *Newman*, 382 F.2d at 480; *see also United States v. Fokker Servs. B.V.*, 818 F.3d 733, 742 (D.C. Cir. 2016) ("decisions to dismiss pending criminal charges—no less than decisions to initiate charges and to identify which charges to bring—lie squarely within the ken of prosecutorial discretion").

Petitioner's reading of the Government's dismissal authority also ignores the many circumstances in which the Government could reasonably decide to dismiss a previously declined qui tam action well after the initial 60-day period. As in this case, discovery may reveal facts that change the Government's assessment of the case's merits or the burdens the case imposes on agency resources. Current events may necessitate reallocation of Government resources. A new President may wish to implement different enforcement priorities or may disagree with a predecessor's interpretation of statutes or regulations that the defendant is alleged to have violated. In any of these scenarios, the President's constitutional obligation to take care that the laws are faithfully executed would

be frustrated if he lacked the ability to dismiss a qui tam action that conflicted with those priorities.

Petitioner's interpretation also imposes unconstitutional restrictions on the President's removal power. The FCA does not permit the President to remove a particular relator from a qui tam suit. Courts have treated this restriction on the removal authority as insignificant because the Government can effectively remove a relator by dismissing the qui tam suit. *See, e.g.*, *Kelly*, 9 F.3d at 755. Under Petitioner's reasoning, this essential constitutional safeguard would be eliminated.

This Court has held that the President has "unrestricted removal power" over Executive Branch officers, subject only to the limitations that Congress can make members of multi-member expert agencies or "certain inferior officers with narrowly defined duties" removable only for good cause. *Seila Law*, 140 S. Ct. at 2200. Yet Petitioner's interpretation would transgress these "outermost constitutional limits of permissible congressional restrictions on the President's removal power," *id.*, by making a relator who wields executive power unremovable *for any reason*. The Constitution does not allow Congress to reallocate executive power to private parties who become unremovable two months into a case.

Morrison is again instructive. There, the Court concluded that a "good cause" removal provision, among others, adequately preserved the President's "ample authority to assure that the counsel is competently performing his or her statutory responsibilities." 487 U.S. at 692; *see also id.* at 696 (power to remove independent counsel for good cause the

"[m]ost important[]" means for the Executive Branch to control the independent counsel's actions). In so doing, the Court distinguished the independent counsel statute from "a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the 'faithful execution' of the laws." *Id.* at 692. Petitioner interprets the FCA to effect just such an intrusion on the President's constitutional duties.

c. The *Morrison* Court noted that the independent counsel statute "d[id] not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch" and that the case did not involve a "*judicial* usurpation of properly executive functions." 487 U.S. at 694-95. At a minimum, when interpreted as Petitioner proposes, the same cannot be said about the FCA. Under Petitioner's interpretation, its qui tam provisions would "impair [the Executive Branch] in the performance of its constitutional duties." *See Clinton v. Jones*, 520 U.S. 681, 701 (1997). EHR "need show no more than this to establish a . . . separation-of-powers violation." *Riley*, 252 F.3d at 761 (Smith, J., dissenting). But Petitioner's interpretation would go further still, transferring some of this executive power to legislative and judicial control.

If Congress empowered private relators to exercise executive power without Presidential oversight, it has increased its own power at the expense of the President. The 1986 Amendments gave relators such significant financial incentives to bring qui tam suits of marginal merit that they greatly increased the likelihood that a relator would proceed with a case when

the Government would not. *See Schumer*, 520 U.S. at 949 (relators are "less likely than is the Government to forgo an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc"). This prospect of conflicting enforcement decisions was not accidental. In enacting the 1986 Amendments, some members of Congress expressed their dissatisfaction with the Executive Branch's exercise of its prosecutorial discretion, and thus chose to "deputize private citizens to prosecute the claims of the United States." *Riley*, 252 F.3d at 775 (Smith, J., dissenting).[9]

The FCA would also result in a judicial usurpation of executive power if it is interpreted as Petitioner and his amicus propose. Amicus Taxpayers Against Fraud Education Fund contends that the "good cause" requirement for intervention imposes a significant limitation on the Government's right to intervene. ATAFEF Br. 2-4. But the courts that have required the Government to intervene before moving to dismiss have held that this requirement comports with the

---

[9] *See, e.g.*, *False Claims Act Amendments: Hearings before the Subcomm. on Admin. Law*, 99th Cong. 295, at 179 (1986) (statement of Rep. Bedell) ("[W]e need some type of guarantee, so that if there are problems . . . and the Justice Department refuses to do anything about it, there should be some opportunity for the people of our country to see that something is done."); S. Rep. No. 99-345, at 25-26 (1986) (amendments allow relators to act "as a check that the Government does not neglect evidence, cause undue delay, or drop the false claims case without legitimate reason"); Beck, *supra*, at 564 ("[Q]ui tam enforcement was justified as a corrective measure for the Justice Department's unwillingness to enforce the law.").

separation of powers at least partly because the Government will have little difficulty demonstrating "good cause." *UCB*, 970 F.3d at 846-47 (construing intervention standard to "defer[] consideration of genuine constitutional concerns until they ripen in a specific context"); Pet. App. 17a-18a (similar).

Likewise, interpreting the FCA to require courts to scrutinize the Government's reasons for dismissing qui tam actions would risk "judicial usurpation" of executive power. The FCA already conditions the Executive Branch's ability to dismiss a qui tam action on appearing at a judicial hearing, and makes courts the arbiters of whether the Government can settle a qui tam action over the relator's objection or limit the relator's participation in an action. 31 U.S.C. § 3730(c)(2)(A)-(C); *see Riley*, 252 F.3d at 762-63 (Smith, J., dissenting). Requiring searching judicial review of the Government's reasons for dismissing a qui tam action would give courts primary authority to decide whether to maintain or discontinue enforcement actions on behalf of the United States. In so doing, it would deprive the President of "[o]ne of the greatest *unilateral* powers a President possesses under the Constitution"—"the power to protect individual liberty by essentially under-enforcing federal statutes regulating private behavior." *In re Aiken Cnty.*, 725 F.3d 255, 264 (D.C. Cir. 2013) (Kavanaugh, J.); *see also id.* at 265 n.9. And it would foist on courts the responsibility of reviewing non-enforcement decisions, a task for which courts are "general[ly] unsuit[ed]." *Chaney*, 470 U.S. at 831; *see also infra* Part III.B. Federal judges should decide cases, not whether the Executive pursues them.

d. Petitioner's interpretation would have concrete and wide-ranging impacts on the President's ability to ensure the faithful execution of federal law. Relators file hundreds of qui tam actions each year. *See supra* p.6. These actions impose significant burdens on the Department of Justice, which must decide whether to take over each case within 60 days (absent a court-ordered extension), 31 U.S.C. § 3730(b)(2), and which may invest hundreds or thousands of hours of attorney time in dealing with even a declined action, *see supra* p.9 n.3. Petitioner's interpretation would force the Department to decide in the initial 60-day period whether to take over a case, knowing that by declining, the Government would waive its ability to dismiss a meritless or otherwise undesirable case in the future. And given that the Department declines most FCA qui tam actions, that interpretation would mean that, in hundreds of cases each year, the United States would be represented by private bounty-hunters operating outside the Executive Branch's supervision and control. That prospect cannot be reconciled with the Take Care Clause.

B. Petitioner's Interpretation Also Raises Constitutional Concerns Under the Appointments Clause.

The FCA's vesting of executive power in private relators also raises concerns under the Appointments Clause, which "lays out the permissible methods of appointing 'Officers of the United States.'" *Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018) (quoting U.S. Const. art. II, § 2, cl. 2). Relators are not "appointed as an Officer of the United States" pursuant to the Appointments Clause, *Cochise Consultancy, Inc. v. United States ex*

rel. Hunt, 139 S. Ct. 1507, 1514 (2019), but if Petitioner is correct that relators have exclusive litigation authority in declined cases, then they must be appointed pursuant to that Clause, *see Buckley*, 424 U.S. at 138.

In applying the Appointments Clause, the Court has looked to two factors: First, whether the individual wields "significant authority pursuant to the laws of the United States," and second, whether the individual occupies a position that is "continuing," not "temporary or episodic." *Lucia*, 138 S. Ct. at 2051-52 (quotation marks omitted). Under Petitioner's interpretation of the qui tam provisions, relators do both.

1. Relators wield "significant authority pursuant to the laws of the United States." *Buckley*, 424 U.S. at 138. In *Buckley*, the Court reasoned that "primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights" is a function that "may be discharged only by persons who are 'Officers of the United States.'" *Id.* Accordingly, the Appointments Clause prohibited Congress from lodging power to enforce federal election law in commissioners who were not appointed in conformity with that Clause. *Id.*

Some courts have rejected Appointments Clause challenges to the qui tam provisions based in significant part on the Government's substantial control over qui tam actions. *See United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994) (noting, among other things, that "the government may take complete control of the case if it wishes"); *Kelly*, 9 F.3d at 758 (given Government's control, relator's power is not "significant"). But the

Government's ability to control a qui tam action depends on its authority to dismiss the suit at any point. If Petitioner were correct that the Government cannot remove a relator by dismissing the qui tam action, the relator would wield "significant authority" without being "subordinate to" anyone. A relator, so empowered, must be an "officer" subject to the Appointments Clause. *See Buckley*, 424 U.S. 126 n.162.

2. A relator also occupies a position that is "continuing" within the meaning of the Appointments Clause. In *Morrison*, the Court held that the independent counsel was an "officer of the United States" even though she was "appointed essentially to accomplish a single task, and when that task is over the office is terminated," and she had "no ongoing responsibilities that extend beyond the accomplishment of the mission that she was appointed for and authorized . . . to undertake." 487 U.S. at 672. Those limitations meant only that the independent counsel was an *inferior* officer, not that she was a mere employee. *Id.* Her appointment thus needed to comply with the Appointments Clause. *Id.* The distinction between principal and inferior officers is irrelevant here, because relators are not appointed in conformity with the Appointments Clause regardless of how they are classified.

Like the prosecutor in *Morrison*, a relator does not provide only "occasional and intermittent services" on an ad hoc basis "when called on." *See Auffmordt v. Hedden*, 137 U.S. 310, 327-28 (1890); *United States v. Germaine*, 99 U.S. 508, 511-12 (1878). Rather, a relator's position is "continuous" because it is not necessarily personal to the individual who brings the

action. *See, e.g.*, *United States ex rel. Neher v. NEC Corp.*, 11 F.3d 136, 139 (11th Cir. 1993) (FCA claim survives death of original relator); *cf. United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (Marshall, C.J.) (if the law imposes duties on a position that "continue, though the person be changed," it is an "office," not mere "employment").[10]

The relator's role is continuing notwithstanding the absence of a formal employment relationship with the Government. That is because "the Appointments Clause protects against power improperly granted, whether to federal employees or private citizens." *Riley*, 252 F.3d at 768 (Smith, J., dissenting). If anything, the prospect that significant governmental authority is being wielded by someone with no formal employment relationship should *heighten*, not defuse, Appointments Clause concerns. *Id.* at 768-69.

C. Petitioner's Historical Arguments Are Unpersuasive.

Petitioner contends that the history of qui tam suits in the United States both supports his interpretation of the statute and demonstrates that "there is no serious constitutional issue to avoid." Pet. Br. 33. According to Petitioner, before the 1986 Amendments, the Government had no authority to dismiss qui tam

---

[10] The Second Circuit recently surveyed this Court's precedent on the "continuing position" requirement and concluded that a contempt prosecutor was an "officer" despite the temporary nature of the position. *See United States v. Donziger*, 38 F.4th 290, 299 (2d Cir. 2022) (concluding that contempt prosecutor was "Officer of the United States," but upholding appointment); *id.* at 313-15 (Menashi, J., dissenting) (appointment violated Appointments Clause and separation of powers).

suits, Pet. Br. 27, and if that limitation "presented any constitutional issues," then "assuredly someone would have noticed at some point over two centuries of practice," Pet. Br. 12. This argument is flawed in numerous respects.

In attempting to invoke centuries of historical practice, Petitioner ignores the fundamental differences between qui tam suits brought before and after the 1986 Amendments. Those amendments fundamentally changed qui tam litigation by: (1) greatly increasing the financial incentives for relators, which gave them reason to pursue cases that the Government would not, s*ee supra* pp.6-7; *see also Schumer*, 520 U.S. at 949; (2) eliminating any requirement to prove specific intent to defraud the Government, 31 U.S.C. § 3729(b)(1)(B); (3) allowing relators to remain in the case even when the Government intervenes, *compare id.* § 3730(b)(3) (1982), *with id.* § 3730(c)(1) (2022); and (4) allowing relators in some circumstances to maintain suits based on information known to the Government before the suit was filed, *compare id.* § 3730(b)(4) (1982), *with id.* § 3730(e)(4) (2022).

The constitutional problems created by the 1986 Amendments were widely recognized. The Office of Legal Counsel initially determined that the Amendments were unconstitutional, 13 O.L.C. Op. at 221, academics have exhaustively debated the issue, *see* Beck, *supra*, at 543-45, and a leading FCA treatise devotes an entire section to the question, *see* John T. Boese & Douglas W. Baruch, *Civil False Claims and Qui Tam Actions* § 4.11 (5th ed. 2022). The constitutional issues have been litigated, with courts upholding the

statute by adopting an interpretation of the Government's dismissal authority that Petitioner rejects. *See supra* p.16 & n.4. And this Court is unlikely to have reserved the question, *see Stevens*, 529 U.S. at 778 n.8, if it considered the issue insubstantial or already settled based on historical practice.

The *Stevens* Court was correct to treat the constitutionality of the qui tam provisions as an open question because historical practice is not "dispositive" in this case, as Petitioner contends. Pet. Br. 37. Even if there were a tradition of allowing relators to litigate on behalf of the United States without Executive Branch oversight, this Court has "recognize[d] that even a longstanding history of related federal action does not demonstrate a statute's constitutionality." *United States v. Comstock*, 560 U.S. 126, 137 (2010); *see also Walz v. Tax Comm'n of N.Y.C.*, 397 U.S. 664, 678 (1970) ("[N]o one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it."). The fact that qui tam actions persisted into the early Republic says little about whether and when such actions are constitutional, given that "they rarely were employed by the time courts began scrutinizing the constitutionality of federal statutes." Boese & Baruch, *supra*, at § 4:11.

In any event, there is no longstanding tradition of qui tam litigation free from executive oversight. Petitioner identifies no past version of the FCA that affirmatively barred the Government from dismissing a qui tam action. He also does not cite a single judicial decision from the past 159 years holding or even stating in dicta that the Government lacks that authority.

Petitioner's only support for these purported restrictions is a fragment of a committee report that accompanied the 1986 Amendments. *See* Pet. Br. 26-27 (citing S. Rep. No. 99-345 (1986)). But a congressional staffer's impressions of what the law used to be are self-evidently not themselves the law today. *See generally Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (reliance on legislative history "may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history").[11] Contrary to the committee report, statutory silence regarding the Government's dismissal authority does not demonstrate that the Government lacked such authority. Even in the absence of statutory authorization, the Executive Branch could have moved to dismiss qui tam suits by exercising the powers vested in the President by Article II of the U.S. Constitution. *See* Part II.A *supra*.

---

[11] The only decision cited in the committee report does not support the report's view. In *United States v. Griswold*, the court held that the Government could not settle a qui tam action that had been litigated to final judgment without confiscating the relator's "absolutely vested" interest in his share of the recovery. 30 F. 762, 763-64 (C.C.D. Or. 1887); *see also United States v. Griswold*, 24 F. 361, 361-63 (D. Or. 1885). That reasoning in no way implies that the Government cannot dismiss a *pending* qui tam action, in which the relator has no "absolutely vested" interest. *See, e.g.*, *Brooks v. Dunlop Mfg. Inc.*, 702 F.3d 624, 632 (Fed. Cir. 2012) ("a *qui tam* plaintiff has no vested right" (quotation marks omitted)).

III. The Government's Decision to Dismiss This Qui Tam Suit Is Not Subject to Judicial Review, But That Decision Was Reasonable in Any Event.

Petitioner contends that, even if the Government had the authority to dismiss his case, courts must apply an "APA-like standard" to review the Government's dismissal decision. Pet. Br. 13. Petitioner does not—and cannot—argue that the Administrative Procedure Act actually applies here. Instead, he urges the Court to import a similar test into the FCA, under which "the government must establish that its stated basis for dismissal is reasonable and supported by the record." *Id.* Neither the FCA nor "baseline constitutional norms," Pet. Br. 40, supports that approach. Rather, the Constitution entrusts to the President the responsibility to weigh the costs and benefits of pursuing an enforcement action, and rigorous judicial review of that discretionary policy judgment would violate separation-of-powers principles.

A. The FCA Does Not Authorize Judicial Review of the Reasonableness of the Government's Dismissal Decisions.

The FCA does not provide any standard for courts to apply in reviewing the Government's decision to dismiss a qui tam suit. Petitioner contends that the statute should nevertheless be read to permit courts to place the burden on the Government to prove the

reasonableness of its decision. Pet. Br. 38. Petitioner's attempt to rewrite the statute lacks merit.[12]

Petitioner notes that the FCA authorizes judicial review of a proposed settlement to determine if it "is fair, adequate, and reasonable under all the circumstances." 31 U.S.C. § 3730(c)(2)(B). Because (in Petitioner's view) "[a] dismissal is a settlement for nothing in return," it would be "irrational to presume that Congress restricted the government's right to settle a case but permitted an outright dismissal." Pet. Br. 36.

That approach to statutory interpretation stands the relevant interpretive canon on its head. Congress's decision to authorize judicial review of the reasonableness of settlements, but not dismissals, demonstrates that Congress did not authorize judicial review of the reasonableness of dismissals. *See, e.g*, *Russello*, 464 U.S. at 23; *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 341 (2005) (courts "do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply," and this "reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest").

Nor is it irrational for Congress to treat dismissals and settlements differently. A voluntary dismissal is

---

[12] Petitioner generally argues for the Ninth Circuit's test for reviewing Government dismissal decisions. Pet. Br. 35. But that court acknowledged that "[t]he qui tam statute itself does not create a particular standard for dismissal." *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998). The court instead based its standard (incorrectly) on substantive due process case law. *See infra* Part III.B.

not the same as a zero-dollar settlement. The dismissal is typically without prejudice, which does not preclude the Government from refiling its claims. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990) ("'[D]ismissal . . . without prejudice' is a dismissal that does not 'operat[e] as an adjudication upon the merits," . . . and thus does not have a res judicata effect." (quoting Fed. R. Civ. P. 41(a)(1))). A settlement, on the other hand, may extinguish the Government's claims. *See, e.g.*, *Eisenstein*, 556 U.S. at 936 ("United States is bound by the judgment in all FCA actions regardless of its participation in the case."). It thus "makes sense that Congress would provide for more stringent review of a settlement than of a motion to dismiss." *United States ex rel. Borzilleri v. Bayer Healthcare Pharms., Inc.*, 24 F.4th 32, 40 (1st Cir. 2022).

Invoking the hearing requirement in Section 3730(c)(2)(A), Petitioner argues that Congress must have had a purpose for requiring a hearing, and that purpose must have been to place the burden on the Government to prove the reasonableness of its decision. Pet. Br. 36. Even if Congress expected the hearing to serve a purpose, there is no basis to conclude that the purpose was to authorize judicial review of the reasonableness of the Government's decision. The hearing requirement serves the valuable purpose of providing the relator an opportunity to bring any relevant evidence or considerations that the Government may have overlooked to its attention. *Cf. Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972) ("when a person has an opportunity to speak up in his own defense, and

when the State must listen to what he has to say, substantively unfair and simply mistaken" decisions can be prevented).[13]

In short, nothing in Section 3730(c)(2)(A) "gives the judiciary general oversight of the Executive's judgment." *Swift*, 318 F.3d at 252. To the contrary, that provision provides "[t]he Government"—"meaning the Executive Branch, not the Judicial [Branch]"—with the authority to dismiss. *Id.* That Congress vested dismissal authority only in the Government suggests, at the very least, "the absence of judicial constraint." *Id.*

B. Far from Mandating Judicial Review of the Reasonableness of the Government's Dismissal Decisions, the Constitution Prohibits It.

Petitioner also contends that the Constitution requires the Government to convince courts of the reasonableness of its dismissal decision. Pet. Br. 40-41. Petitioner does not identify any constitutional provision that establishes this requirement. He instead invokes "baseline constitutional norms," without even alleging that his constitutional rights have been violated in any way. *Id.*

The "constitutional norm" that Petitioner invokes—that the Executive Branch must always prove the reasonableness of its discretionary actions to the Judicial Branch, even when the party seeking judicial

---

[13] Courts have left open the possibility that they would deny a Government motion to dismiss if it involved "fraud on the court." *Swift*, 318 F.3d at 253. The hearing requirement gives the relator a forum to make such an allegation.

review has not alleged a violation of his or her rights—does not exist. The relevant constitutional provisions establish that all executive power is vested in the President and require him to faithfully execute the law. *See supra* Part II.A. The Government's enforcement decisions involve the "complicated balancing of a number of factors," including (among other things) the likelihood of proving a violation and the resources that the enforcement action would require. *Chaney*, 470 U.S. at 831. Rather than permitting judicial review of the Government's balancing of these factors, this policy judgment is "generally committed to [the] agency's absolute discretion" because of its "general unsuitability for judicial review." *Id.*

The Court has permitted judicial review of prosecutorial discretion where a criminal defendant has credibly alleged that the "selective enforcement" of federal law resulted in a violation of his or her own constitutional rights. *See United States v. Armstrong*, 517 U.S. 456, 464-65 (1996). But even in the context of an actual criminal prosecution, the Court emphasized that the prosecutor's decision carries a "presumption of regularity" for which the opposing party must produce "clear evidence" to rebut that presumption. *Id.*; *Rinaldi v. United States*, 434 U.S. 22, 30 (1977) (per curiam) ("[W]e will not presume[] bad faith on the part of the Government at the time it sought leave to dismiss"). This presumption of regularity precludes placing the burden on the Government to prove the reasonableness of its actions.[14]

---

[14] The Court need not foreclose the possibility that, in a rare case,

Petitioner endorses the Ninth Circuit's test for reviewing the Government's dismissal decision, Pet. Br. 35, but he does not defend the constitutional basis for that test. In *Sequoia Orange*, the Ninth Circuit concluded that applying a burden-shifting, balancing test was "reasonable" because "[t]he same analysis is applied to determine whether executive action violates substantive due process." 151 F.3d at 1145.

Petitioner's failure to defend this reasoning is understandable. A substantive due process analysis would be warranted only if the Government's dismissal decision implicated a relator's substantive due process rights. The Ninth Circuit did not even consider that threshold issue, and Petitioner does not suggest that he has a liberty interest in the qui tam suit that is so "deeply rooted in this Nation's history and tradition" that it warrants substantive protection under the Due Process Clause. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

Even if substantive due process rights were at stake, the Ninth Circuit's test is nonetheless flawed because it does not apply the correct framework for substantive due process challenges to executive action. A reviewing court cannot second-guess the Government's dismissal decision for reasonableness based on a burden-shifting, balancing test. Instead, executive action violates substantive due process rights

---

a court could review credible evidence that the dismissal resulted from "fraud on the court," *Swift*, 318 F.3d at 253, or was based on an impermissible consideration such as religion or race, *Armstrong*, 517 U.S. at 464-65. No relator has ever successfully made such an allegation, and Petitioner does not raise such an argument here.

only when the action constitutes such an "abuse of power" that it "shocks the conscience." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

Petitioner attempts to invoke another "baseline constitutional norm" by suggesting that the dismissal deprives him of a property interest, but he does not (and cannot) argue that the decision violated his due process rights. Pet. Br. 40. In *Stevens*, the Court recognized that "the 'right' [relator] seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails." 529 U.S. at 773; *see also id.* n.3 ("Blackstone noted, with regard to English qui tam actions, that 'no particular person, A or B, has any right, claim or demand, in or upon [the bounty], till after action brought,' and that the bounty constituted an "inchoate imperfect degree of property . . . [which] is not consummated till judgment." (citations omitted)). Petitioner's purported property right thus would not arise unless he prevails on the merits in this case.

Even if Petitioner had a vested property interest in the qui tam action, the Due Process Clause would afford him only the right to notice and an opportunity to be heard. *See Mathews v. Eldridge*, 424 U.S. 319, 348 (1976). That is exactly what the FCA provides, 31 U.S.C. § 3730(c)(2)(A), and what Petitioner received here, Pet. App. 5a.

C. Remand Is Unnecessary Even If the Court Adopts a Substantive Due Process Test.

Petitioner contends that, if the Court adopts the Ninth Circuit's *Sequoia Orange* test, it should remand for the lower courts to apply that burden-shifting, balancing test. A remand is unnecessary because those

courts have already determined that the Government thoroughly explained why dismissal was warranted under any recognized standard, including *Sequoia Orange*.

When the Government moved to dismiss Petitioner's case, it submitted extensive briefing and emphasized that its grounds for dismissal would satisfy any recognized standard, including *Sequoia Orange*. *See, e.g.*, J.A. 86, 96. The Government moved to dismiss based on its judgment that "the potential benefits of permitting relator's case to proceed are outweighed by both the actual and potential costs to the United States." J.A. 71. Specifically, the Government anticipated that discovery in the case would continue to "impose[] a tremendous, ongoing burden on the government," by (among other things) placing significant demands on Government attorneys' time, requiring depositions of Government officials, and threatening the production of privileged and sensitive information. J.A. 88-91. Those burdens could not be justified in light of the Government's "concern[s] about [Petitioner's] ability to prove a FCA violation"—in particular, his failure to obtain evidence that would allow him to prove his claims—as well as concerns about Petitioner's credibility given his conduct in the case. J.A. 91-92.

When granting the Government's dismissal motion, the District Court held that the Government's explanation was sufficient under *Sequoia Orange*. Pet. App. 49a. The court explained that the Government had a legitimate interest in "minimizing unnecessary or burdensome litigation costs," Pet. App. 54a, partic-

ularly in light of "genuine concerns regarding the likelihood that Relator will successfully establish FCA liability," Pet. App. 51a.

In affirming the District Court's judgment, the Third Circuit credited the court's "thorough examination and weighing of the interests of all the parties." Pet. App. 30a. The Court of Appeals also expressly rejected Petitioner's argument "that the Government's dismissal was arbitrary and irrational because it did not assess[] the potential benefits of proceeding with the case[.]" Pet. App. 23a n.17. The court explained that Petitioner had misunderstood the "showing of arbitrariness that due process requires," and that Petitioner had "not come close to meeting that exceedingly high standard." *Id.*

When, as here, both lower courts have rejected Petitioner's *Sequoia Orange*-based arguments, the Court need not review those courts' application of the law to the facts of the case. *See, e.g.*, *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996) (when district court and court of appeals have reached the same conclusion applying "law to fact," this Court will review that determination only upon an "obvious and exceptional showing of error"). Rather than remanding for the courts to reach the same result they have already reached, the Court should affirm the Third Circuit's judgment.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

Matthew M. Shors
UNITEDHEALTH GROUP INCORPORATED
9900 Bren Road East
Minnetonka, MN 55343

S. Conrad Scott
COVINGTON & BURLING LLP
New York Times Building
620 Eighth Avenue
New York, NY 10018

Ethan M. Posner
Christopher M. Denig
Mark W. Mosier
Counsel of Record
Matthew F. Dunn
Krysten Rosen Moller
Daniel G. Randolph
Sarah Suwanda
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000
mmosier@cov.com

October 2022

Counsel for Executive Health Resources, Inc.