No. 21-1052

In the Supreme Court of the United States

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

v.

EXECUTIVE HEALTH RESOURCES, INC., ET AL.

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, permits a private party (known as a relator) to file a civil action "in the name of the Government" to redress certain wrongs done to the United States. 31 U.S.C. 3730(b)(1). The FCA provides that "[t]he Government may dismiss the action notwithstanding the objections of the [relator] if the [relator] has been notified by the Government of the filing of the motion and the court has provided the [relator] with an opportunity for a hearing on the motion." 31 U.S.C. 3730(c)(2)(A). The question presented is as follows:

Whether the court of appeals correctly affirmed the district court's order granting the United States' motion to dismiss this FCA action under 31 U.S.C. 3730(c)(2)(A).

PARTIES TO THE PROCEEDING

Petitioner is Jesse Polansky, the plaintiff in the district court and the appellant in the court of appeals.

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

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OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on October 28, 2021. The petition for a writ of certiorari was filed on January 26, 2022, and granted on June 21, 2022. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-16a.

STATEMENT

A. The False Claims Act

The False Claims Act (FCA or Act), 31 U.S.C. 3729 *et seq.*, imposes civil liability for a variety of deceptive practices involving government funds and property. *Inter alia*, the Act imposes liability on any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1)(A). A person who violates the FCA is liable to the United States for civil penalties plus three times the amount of the government's damages. 31 U.S.C. 3729(a)(1).

The FCA permits private parties (known as relators) to bring suit "in the name of the Government" against persons who have violated the Act, 31 U.S.C. 3730(b)(1), through a mechanism commonly known as a qui tam action. When a qui tam suit is filed, the government "may elect to intervene and proceed with the action" during the seal period—an initial 60-day period (which the court may extend "for good cause shown") while the relator's case remains under seal. See 31 U.S.C. 3730(b)(2) and (3). If the government elects to intervene, "the action shall be conducted by the Government." 31 U.S.C. 3730(b)(4)(A). If the government declines to intervene, the relator "shall have the right to conduct the action," 31 U.S.C. 3730(b)(4)(B), but the United States remains a "real party in interest." *United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928, 930 (2009) (citation omitted). In either event, the relator receives a share of any monetary award recovered through the litigation. 31 U.S.C. 3730(d). Every FCA action is premised on an alleged legal wrong done to the United States, and the Act "can reasonably be regarded as effecting a partial assignment [to the relator] of the Government's

damages claim." *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 773 (2000).

The Act establishes several mechanisms for the United States to maintain control over an FCA suit. As most relevant here, the FCA provides that "[t]he Government may dismiss the action notwithstanding the objections of the [relator] if the [relator] has been notified by the Government of the filing of the motion and the court has provided the [relator] with an opportunity for a hearing on the motion." 31 U.S.C. 3730(c)(2)(A). The FCA also provides that, if the government does not intervene during the seal period, "the court, without limiting the status and rights of the [relator], may nevertheless permit the Government to intervene at a later date upon a showing of good cause." 31 U.S.C. 3730(c)(3).

B. Facts And Procedural History

1. Petitioner is a physician who worked for the Centers for Medicare and Medicaid Services (CMS) from 2003 to 2011. 196 F. Supp. 3d 477, 483. After leaving CMS, petitioner spent two months working for respondent Executive Health Resources, Inc. (EHR), a company that assists hospitals in submitting bills to the United States for services covered by Medicare. Pet. App. 4a.

In 2012, petitioner filed an FCA qui tam action against EHR. Pet. App. 32a. In his Second Amended Complaint, filed in March 2014, petitioner alleged that EHR was violating the FCA by causing its client hospitals to submit false claims for payment to the United States. Second Am. Compl. ¶¶ 275-281, 289-295. Specifically, petitioner alleged that EHR was causing the hospitals to falsely designate certain services as "inpatient" rather than "outpatient" and to bill Medicare for those services at higher, inpatient rates. *Id.* ¶ 2. On

"behalf of the United States," petitioner sought "three times the amount of damages * * * plus civil penalties * * * for each false claim." *Id.* ¶ 612.

In June 2014, the government declined to intervene, but invoked its statutory right to be served with all pleadings in the case. D. Ct. Doc. 19, at 2-3 (June 27, 2014); see 31 U.S.C. 3730(c)(3).

2. In 2016, the district court declined to dismiss petitioner's FCA claims against EHR. 196 F. Supp. 3d 477. The court later bifurcated the case into two phases. Phase I involved Medicare claims submitted before, and Phase II involved Medicare claims submitted after, the 2013 promulgation of a federal regulation known as the Two Midnight Rule, under which billing for inpatient services generally is appropriate "when the admitting physician expects the patient to require hospital care that crosses two midnights." 42 C.F.R. 412.3(d)(1); see Pet. App. 34a-35a. The court also ordered a bellwether trial on a sample of claims. Pet. App. 33a-34a.

Petitioner and EHR engaged in extensive discovery. Pet. App. 35a. In October 2018, EHR moved to compel the United States to produce documents and deposition testimony relating to "the Government's knowledge of EHR's activities, its knowledge of [petitioner's] allegations, and its own interpretation of the applicable law and guidance." D. Ct. Doc. 275, at 5 (Oct. 23, 2018). Over the United States' objections on privilege and other grounds, D. Ct. Doc. 302, at 3-4 (Nov. 27, 2018), the district court found EHR's requests to be "within the scope of discovery," D. Ct. Doc. 325, at 1 (Dec. 13, 2018).

Around the same time, petitioner "belatedly revealed" that he was in possession of a DVD containing approximately 14,000 documents that he had obtained during his employment at CMS. Pet. App. 35a; see

D. Ct. Doc. 326, at 1 (Dec. 13, 2018). The district court ordered petitioner to transmit the documents to EHR, D. Ct. Doc. 337, at 1 (Dec. 21, 2018); rejected the United States' assertion of deliberative-process privilege as to some of the documents, D. Ct. Doc. 354, at 1 (Jan. 16, 2019); and ordered an attorney in the Department of Health and Human Services' Office of General Counsel to testify about the circumstances surrounding the disclosure of the DVD's existence, *ibid.* Finding petitioner's own account of those circumstances not to be "completely credible," Pet. App. 35a, the court granted in part EHR's motion for sanctions, requiring petitioner to pay a portion of EHR's attorney's fees and costs, D. Ct. Doc. 400, at 1 (Feb. 21, 2019).

3. In February 2019, the United States informed the parties of its intent to move to dismiss the action under Section 3730(c)(2)(A). D. Ct. Doc. 403, at 2 (Feb. 25, 2019). The government emphasized, however, that it "remain[ed] willing to consider any additional information [the parties] wish[ed] to share," *id.*, Ex. A, at 1, and in the ensuing weeks it "received multiple written submissions and oral presentations from both parties pertaining to the bellwether claims," D. Ct. Doc. 430, at 4 (May 9, 2019).

At the end of that process, petitioner moved for leave to file a Third Amended Complaint that purported to "narrow the scope" of his claims. D. Ct. Doc. 428, at 5 (May 2, 2019). In light of that motion, the United States informed the district court that it had decided not to move to dismiss at that time. D. Ct. Doc. 430, at 1. The government "reserve[d] the right to evaluate whether dismissal is warranted in the future based on further developments, including arguments raised by the parties, further factual and evidentiary developments, and

associated discovery burdens." D. Ct. Doc. 454, at 4 (June 21, 2019).

Multiple developments subsequently caused the United States to reconsider whether the action should be dismissed. See Pet. App. 38a-39a. First, despite the filing of the Third Amended Complaint, the government concluded that petitioner had not narrowed his claims appropriately. See *id.* at 38a, 55a; J.A. 101. Second, the district court rejected the government's invocation of the deliberative-process privilege as to additional documents and ordered the United States to produce them in response to EHR's discovery requests. See Pet. App. 38a, 56a; J.A. 79, 102-105. Third, the government reviewed the deposition of petitioner, which provided new, material information bearing on the government's assessment of whether the action should go forward. See Pet. App. 38a-39a, 56a; J.A. 91, 102.

4. In August 2019, the United States moved to dismiss the action pursuant to Section 3730(c)(2)(A). J.A. 69-93. The government explained that, since its earlier decision not to seek dismissal, it had "continued to evaluate the matter" and had reached a different conclusion in light of the "additional developments" just described. J.A. 71. The United States provided multiple justifications for its dismissal motion: the "tremendous, ongoing burden on the government" if the litigation continued, including the time needed for federal attorneys to protect the United States' interests and for attorneys and other personnel to collect and produce documents; the need to protect privileged information; the government's doubts about petitioner's "ability to prove a[n] FCA violation"; and the United States' "concern[s] about [petitioner's] credibility," including those arising from litigation conduct for which the district court had sanc-

tioned petitioner. J.A. 88-92; see J.A. 71, 101-107, 116-120, 129-130.

In light of those factors, the government concluded that "the potential benefits of permitting [petitioner's] case to proceed are outweighed by both the actual and potential costs to the United States." J.A. 71. The government explained that dismissal was appropriate under any of the standards that courts of appeals have applied when considering Section 3730(c)(2)(A) motions to dismiss. J.A. 70.

5. The district court received briefs on the United States' motion to dismiss, held a hearing, and then granted the motion. See Pet. App. 39a-57a. The court stated that it "need not decide" precisely what standard applies to a government motion to dismiss under Section 3730(c)(2)(A) because the United States was "entitled to dismissal" of this suit under any standard that has been adopted by a court of appeals. *Id.* at 49a; see *id.* at 57a. The district court's review of the record left it "satisfied that the Government ha[d] thoroughly investigated the costs and benefits of allowing [petitioner's] case to proceed and ha[d] come to a valid conclusion based on the results of its investigation." *Id.* at 50a; see *id.* at 57a.

The district court explained that the United States had identified "legitimate burdens that it will face if this case is permitted to continue." Pet. App. 51a; see *id.* at 51a-54a. In opposing dismissal, petitioner had relied in part on "the potential financial recovery" if he prevailed; but the court noted that the government had identified "genuine concerns regarding the likelihood that [petitioner] will successfully establish FCA liability." *Id.* at 51a; see *id.* at 50a-51a. The court found no basis for concluding that the government's dismissal request was

"fraudulent, arbitrary and capricious, or illegal." *Id.* at 55a. Rather, the court found the government's "rationale" for the motion "to be well-reasoned and supported" by "the developments that occurred after" the United States had previously declined to seek dismissal. *Id.* at 56a; see *id.* at 54a-57a.

In the alternative, the district court further held that EHR was entitled to summary judgment on all of petitioner's Phase I FCA claims, and may be entitled to summary judgment on the Phase II claims as well. Pet. App. 57a-77a.

6. The court of appeals affirmed. Pet. App. 1a-30a.

a. The court of appeals first described when and how the government may move to dismiss an FCA action under Section 3730(c)(2)(A) after declining to intervene during the seal period. See Pet. App. 8a-19a. Citing decisions of the Sixth and Seventh Circuits, see *United States ex rel. Poteet* v. *Medtronic, Inc.*, 552 F.3d 503, 519-520 (6th Cir. 2009); *United States ex rel. CIMZNHCA, LLC* v. *UCB, Inc.*, 970 F.3d 835, 844 (7th Cir. 2020), cert. denied, 141 S. Ct. 2878 (2021), the court held that the government must intervene under Section 3730(c)(3) before moving to dismiss. See Pet. App. 11a n.8, 12a. The court observed that, while other circuits allow the United States to move to dismiss under Section 3730(c)(2)(A) without intervening, see *id.* at 11a n.8, requiring intervention would have only modest practical consequences, because "showing 'good cause' is neither a burdensome nor unfamiliar obligation," *id.* at 17a-18a, and because a district court considering an intervention request must take care to "'avoid[] offense to the separation of powers'" when the United States seeks to intervene in an FCA action "to vindicate the prerogatives of the Executive Branch," *id.* at 18a (citation omitted).

The court of appeals rejected petitioner's argument that the United States had irrevocably forfeited its ability to seek dismissal under Section 3730(c)(2)(A) by declining to intervene at the outset. See Pet. App. 15a-17a. The court explained that petitioner's "draconian" position has no support in this Court's precedents and is contrary to "the language of" Section 3730(c) "as a whole." *Id.* at 16a.

The court of appeals also held that, although the government had not "formally" moved to intervene in this suit, the court would "construe the Government's motion to dismiss [under Section 3730(c)(2)(A)] as including a motion to intervene." Pet. App. 28a. The court additionally held that the district court, in granting the government's motion to dismiss, had necessarily found the "good cause" for intervention that Section 3730(c)(3) requires. *Ibid.*

b. The court of appeals' conclusion that the United States must move to intervene before seeking dismissal under Section 3730(c)(2)(A) informed the court's view of the appropriate standard to evaluate such dismissal requests. Pet. App. 20a; see *id.* at 20a-27a. Like the Seventh Circuit in *CIMZNHCA*, the court concluded that a government motion to dismiss an FCA action should be governed by Federal Rule of Civil Procedure 41(a)—"which establishes different standards for a motion to dismiss depending on the procedural posture of the case," Pet. App. 21a—as modified by Section 3730(c)(2)(A)'s FCA-specific requirement that "the relator be given notice and an opportunity for a hearing before the case is dismissed," *id.* at 22a.

The court of appeals concluded that, when a government motion to dismiss a qui tam suit "is filed before the defendant files an answer or summary judgment mo-

tion," Pet. App. 21a, the case should be dismissed immediately so long as the relator receives "an opportunity * * * to be heard" and "subject only to the bedrock constitutional bar on arbitrary Government action," *id.* at 23a. If the defendant has filed a responsive pleading, by contrast, the relator must receive an opportunity for a hearing, and the case may be dismissed "only by court order, on terms [that] the court considers proper," consistent with Rule 41(a)(2). *Ibid.* (citation omitted). With respect to the latter scenario, the court of appeals noted that, even in ordinary civil litigation, dismissal following a defendant's responsive pleading "should be allowed unless the defendant will suffer some prejudice other than the mere prospect of a second lawsuit." *Id.* at 24a (citation omitted). The court observed that, in the context of the FCA, "that rule carries particular force, with constitutional implications," because the government is "seeking to dismiss a matter brought in its name." *Ibid.*

Applying its approach to the circumstances of this case, the court of appeals held that the district court had not abused its discretion in granting the United States' motion to dismiss under Section 3730(c)(2)(A). Pet. App. 28a-30a; see *id.* at 30a (observing that Rule 41(a)(2) provides a "'broad grant of discretion'" to a district court "to shape the 'proper' terms of dismissal") (citation omitted). In particular, the district court had considered the litigation costs that petitioner's suit would impose on the government, as well as the events that had occurred "in the run-up to the Government's motion that justified its interest in discontinuing the action." *Id.* at 29a; see p. 6, *supra*. The court of appeals found that the district court had "adequately considered the prejudice to the non-governmental parties," and had appropriately determined that petitioner's potential recovery did not

justify refusing dismissal, including "because the prospect of success was doubtful." Pet. App. 29a. The court of appeals further found that the district court, in granting the government's dismissal motion, had properly taken account of petitioner's "potentially sanctionable conduct during the course of discovery." *Id.* at 29a-30a.[1]

SUMMARY OF ARGUMENT

I. Under the FCA, the government may dismiss a qui tam action even after declining to intervene in the suit during the seal period.

A. Nothing in the FCA's text makes intervention a prerequisite to government dismissal of a qui tam suit. Section 3730(c)(2)(A) of Title 31 states that the government may dismiss a qui tam action so long as it has "notified" the relator of its motion and the court has given the relator "an opportunity for a hearing." 31 U.S.C. 3730(c)(2)(A). Neither of those statutory prerequisites depends on intervention. Consistent with that understanding, this Court has stated that, whether the government intervenes during the seal period or instead declines to do so, "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).

The FCA's structure reinforces that understanding. Under the Act, some rights are available to the government only if it assumes "full party status" by intervening in the suit, while the government enjoys other rights simply by virtue of its "status as a 'real party in inter-

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[1] In light of its affirmance of the district court's judgment of dismissal, the court of appeals vacated as unnecessary the district court's opinion "insofar as it addressed summary judgment" for EHR. Pet. App. 7a n.4; see p. 8, *supra*. That aspect of the court of appeals' decision is not at issue in this Court.

est.'" *United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928, 934 (2009). When Congress intended a particular right to be contingent on full party status, it used explicit language to that effect, such as references to the government "interven[ing]" or "proceed[ing] with the action." *E.g.*, 31 U.S.C. 3731(c)(1). The absence of similar language in Section 3730(c)(2)(A) confirms that intervention is not a prerequisite to dismissal of a qui tam suit.

B. Petitioner's contrary arguments are incorrect.

1. Contrary to petitioner's argument and the holding of the court of appeals, the government need not intervene in a qui tam suit in order to dismiss it. Petitioner substantially relies on purported negative inferences from other FCA provisions that define the respective rights of the government and the relator, both in qui tam suits where the government elects to intervene and in suits where it declines to do so. None of those provisions, however, provides any sound reason to reject the most natural reading of Section 3730(c)(2)(A) itself, which authorizes the government to dismiss a qui tam suit and contains no reference to government intervention.

Petitioner's proposed inferences are especially unwarranted because the government's attempt to dismiss a qui tam suit does not implicate the purposes of intervention. Under the FCA, intervention allows the government to "proceed with the action," 31 U.S.C. 3730(b)(2) and (4)(A), in which case the government "shall have the primary responsibility for prosecuting the action," 31 U.S.C. 3730(c)(1). When the government determines that a qui tam suit should be dismissed, however, it has no intention of "proceed[ing] with" or "prosecuting" the action, but instead seeks to terminate it. *Ibid.*

2. Even if intervention were a prerequisite to the government's dismissal of a qui tam suit, the government could satisfy that requirement by intervening pursuant to 31 U.S.C. 3730(c)(3) after the seal period expires. The government's determination that dismissal is appropriate will ordinarily satisfy that provision's "good cause" requirement. Under petitioner's reading of Section 3730(c)(3), by contrast, the government would irrevocably forfeit all of its rights under Section 3730(c)(2)—including the rights to settle the action and to request limitations on the relator's participation—whenever it declined to intervene during the seal period.

Before the FCA was amended in 1986, the Act gave the government no further opportunity to intervene in a qui tam suit once 60 days had elapsed from the filing of the relator's complaint. The 1986 FCA amendments, which authorized the government both to dismiss a qui tam suit under Section 3730(c)(2)(A) and to intervene after the seal period under Section 3730(c)(3), were intended in part to alleviate the severity of that threshold all-or-nothing choice. Acceptance of petitioner's position would subvert that statutory purpose and reduce the government's ability to respond to changed circumstances as qui tam litigation unfolds. Going forward, moreover, adopting petitioner's rule could disserve the interests of relators as a group by increasing the government's incentives to dismiss qui tam suits during the seal period.

II. The government's decision to dismiss a qui tam suit is subject to constitutional but not statutory constraints.

A. Under Section 3730(c)(2)(A), the government may dismiss a qui tam suit so long as the relator is given notice and an opportunity for a hearing. The provision

confers dismissal authority on the government, not on the court, and it establishes no substantive limitations that could constrain the government's discretion or provide a standard for judicial review. In those respects, Section 3730(c)(2)(A) differs from other FCA provisions that confer discretion on the district court or require a particular showing by the government or the defendant. In addition, government decisions not to undertake enforcement action are presumptively unreviewable, and the government's determination that a qui tam suit should be dismissed bears a close similarity to such decisions. Like government action generally, however, the decision to dismiss a qui tam suit under Section 3730(c)(2)(A) is subject to (and judicially reviewable for compliance with) constitutional constraints.

B. Neither the Constitution nor the FCA supports the standard for reviewing government dismissal decisions that the Ninth Circuit adopted in *United States ex rel. Sequoia Orange Co.* v. *Baird-Neece Packing Corp.*, 151 F.3d 1139 (1998), cert. denied, 525 U.S. 1067 (1999). That standard, which requires the government to identify a rational relation between dismissal and achievement of a valid government objective, is significantly less protective of the government's enforcement discretion than the shocks-the-conscience standard this Court has specified for substantive-due-process review of executive action. Given the absence of any substantive constraint on the government's dismissal right in Section 3730(c)(2)(A) itself, and the presumptive unreviewability of agency decisions not to pursue enforcement actions, there is no warrant for reading the *Sequoia Orange* framework into the FCA.

C. The court of appeals' reliance on Federal Rule of Civil Procedure 41(a) was misplaced. That approach

was premised on the court's mistaken view that the FCA makes intervention by the United States a prerequisite to government dismissal of a qui tam suit. Rule 41(a) applies to "voluntary dismissal[s]," Fed. R. Civ. P. 41(a) (capitalization omitted), but Section 3730(c)(2)(A) applies by its terms to a dismissal "notwithstanding the objections of the" relator, 31 U.S.C. 3730(c)(2)(A). And Section 3730(c)(2)(A), rather than the terms of a generally applicable Federal Rule, defines the balance between government and relator interests that Congress struck in addressing dismissal under the FCA.

III. The court of appeals upheld the district court's dismissal of petitioner's FCA action. This Court should affirm the Third Circuit's judgment. The Court should reach that conclusion even if it determines that intervention is a prerequisite to government dismissal of a qui tam suit, and even if it agrees with petitioner that *Sequoia Orange* provides the applicable standard for reviewing a government dismissal decision.

ARGUMENT

I. UNDER THE FCA, THE GOVERNMENT MAY DISMISS A QUI TAM ACTION AFTER DECLINING TO INTERVENE DURING THE SEAL PERIOD

When an FCA qui tam suit is filed, the relator's complaint remains under seal for an initial 60-day period, which the court may extend for good cause. 31 U.S.C. 3730(b)(2) and (3). During the seal period, the government may elect to intervene and proceed with the action or notify the court that it declines to do so. 31 U.S.C. 3730(b)(2) and (4). After petitioner filed his qui tam action, the government declined to intervene during the seal period, but later moved to dismiss the suit. The first question in this case is whether the government may dismiss a qui tam action after declin-

ing to intervene during the seal period. Under a straightforward application of the statutory text, the answer is yes.

A. Regardless Of Whether The Government Intervenes During The Seal Period, It Has A Right To Dismiss An Action

1. When construing a statute, this Court "start[s] with the specific statutory language in dispute." *Murphy* v. *Smith*, 138 S. Ct. 784, 787 (2018). The government's right to dismiss an FCA action appears in Section 3730(c)(2)(A). That provision states:

> The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

31 U.S.C. 3730(c)(2)(A).

Nothing in Section 3730(c)(2)(A)'s text makes the government's right to dismiss contingent on an initial decision to intervene and proceed with the action during the seal period. Rather, Section 3730(c)(2)(A) says that the government "may dismiss the action" if two conditions are satisfied: (1) the government has "notified" the relator of its motion to dismiss, and (2) the court has provided the relator with "an opportunity for a hearing on the motion." 31 U.S.C. 3730(c)(2)(A).

That reading of Section 3730(c)(2)(A) accords with this Court's description of the government's dismissal right in *Kellogg Brown & Root Services, Inc.* v. *United States ex rel. Carter*, 575 U.S. 650 (2015). In describing the statutory scheme, the Court explained that, during the seal period, the United States may "proceed with

the action" or "notify the court that it declines to take over the action." *Id.* at 653 (quoting 31 U.S.C. 3730(b)(4)). The Court continued: "Regardless of the option that the United States selects, it retains the right at any time to dismiss the action entirely, § 3730(c)(2)(A), or to settle the case, § 3730(c)(2)(B)." *Ibid.*

2. The FCA's structure reinforces that understanding. Under the FCA, the government's rights fall into two categories: (1) rights that the government enjoys only if it assumes "full party status," and (2) rights that the government enjoys simply by virtue of its "status as a 'real party in interest.'" *United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928, 934 (2009).

Rights in the first category depend on the government's formal intervention in the suit. The United States "is a 'party' to a privately filed FCA action only if it intervenes in accordance with the procedures established by federal law." *Eisenstein*, 556 U.S. at 933. Under those procedures, the government may "elect to intervene and proceed with the action" during the seal period, 31 U.S.C. 3730(b)(2), or it may "intervene at a later date upon a showing of good cause," 31 U.S.C. 3730(c)(3). Either way, intervention allows the government to enjoy "the rights" of a "full party." *Eisenstein*, 556 U.S. at 934. Those rights include "primary responsibility for prosecuting the action," 31 U.S.C. 3730(c)(1), which allows the government to "control" the presentation of evidence, the "examination of witnesses," the "briefing of legal arguments," and the "wording of jury instructions," *United States* v. *Whyte*, 918 F.3d 339, 348 (4th Cir. 2019).

Rights in the second category, in contrast, do not depend on the government's formal intervention. They instead are rights that the FCA grants to the government

simply by virtue of the government's "status as a 'real party in interest.'" *Eisenstein*, 556 U.S. at 934. Those rights include the right to be served with the complaint and written disclosure of material evidence, 31 U.S.C. 3730(b)(2); the right to move for extensions of the seal period, 31 U.S.C. 3730(b)(3); the right to veto a relator's decision to voluntarily dismiss the action, 31 U.S.C. 3730(b)(1); the right to appeal such a dismissal over the government's veto, *Eisenstein*, 556 U.S. at 931 n.2; the right to settle the action notwithstanding the relator's objections, 31 U.S.C. 3730(c)(2)(B); the right to receive pleadings and deposition transcripts, 31 U.S.C. 3730(c)(3); the right to stay discovery that would interfere with the government's investigation or prosecution of a related matter, 31 U.S.C. 3730(c)(4); and the right to a share of any monetary award, 31 U.S.C. 3730(d).

Viewed in the context of the overall statutory scheme, the government's dismissal right falls within the second category. When Congress wished to make a right contingent on the government's status as a full party, it used explicit language. In Section 3730(c)(1), for example, Congress specified: "If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action." 31 U.S.C. 3730(c)(1); see, *e.g.*, 31 U.S.C. 3730(b)(4)(A) (specifying that, if the government "proceed[s] with the action," "the action shall be conducted by the Government"); 31 U.S.C. 3731(c) (specifying that, "[i]f the government elects to intervene and proceed with an action * * * , the Government may file its own complaint or amend the complaint of" the relator). Such language makes clear that particular rights are contingent on the government's intervention as a full party.

Congress's omission of similar language from Section 3730(c)(2)(A) was presumably purposeful. See *State Farm Fire & Cas. Co.* v. *United States ex rel. Rigsby*, 137 S. Ct. 436, 442 (2016) ("Congress' use of 'explicit language' in one provision 'cautions against inferring' the same limitation in another provision.") (citation omitted); *Allison Engine Co.* v. *United States ex rel. Sanders*, 553 U.S. 662, 671 (2008) (similar). Indeed, similar language is also missing from other provisions conferring rights that are not contingent on the government's intervention, such as the government's right to settle the case. See, *e.g.*, 31 U.S.C. 3730(c)(2)(B); *Kellogg Brown*, 575 U.S. at 563. The broader statutory context thus indicates that the right to dismiss is one the government enjoys simply by virtue of its status as a real party in interest.

B. Petitioner's Contrary Arguments Are Incorrect

The court of appeals concluded that the government must formally intervene in a qui tam action in order to dismiss the suit under Section 3730(c)(2)(A). Pet. App. 8a-19a. The court further held, however, that the government could intervene for that purpose even after the initial seal period expired, and it construed the government's motion to dismiss as incorporating a request to intervene. *Id.* at 15a-17a, 28a. Petitioner does not contest the court of appeals' treatment of the government's dismissal motion as including an intervention request. Petitioner argues (Br. 23-26), however, that the government had already forfeited its right to dismiss this suit under Section 3730(c)(2)(A) by declining to intervene during the seal period.

Contrary to the court of appeals' understanding, the FCA does not require the government to intervene before dismissing a qui tam action. But even if the FCA

imposed that requirement, the government satisfied it in this case by "interven[ing] at a later date upon a showing of good cause." 31 U.S.C. 3730(c)(3). Contrary to petitioner's contention, the government had not forfeited its right to dismiss under Section 3730(c)(2)(A) by initially declining to intervene.

1. The FCA does not require the government to intervene before dismissing an action

The court of appeals concluded that "the Government must intervene before it can move to dismiss." Pet. App. 12a; see Pet. Br. 11. That view is contrary to the FCA's text and structure, and to the purpose of intervention under the statute.

a. The FCA's text does not make intervention a prerequisite to the government's dismissal of a qui tam suit

i. Section 3730(c)(2)(A) states that the government "may dismiss the action" if (1) the government has "notified" the relator of its motion to dismiss, and (2) the court has provided the relator with "an opportunity for a hearing on the motion." 31 U.S.C. 3730(c)(2)(A). Section 3730(c)(2)(A) does not say that the government may dismiss the action "if the government intervenes" or "if the government proceeds with the action." Congress included such language elsewhere in the FCA. See p. 18, *supra*. "When 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." *Allison Engine*, 553 U.S. at 671 (brackets and citation omitted).

Petitioner contends (Br. 17-20) that Congress did not include such language in Section 3730(c)(2)(A) because

Congress intended Section 3730(c)(2) (*i.e.*, paragraph (2)) to be limited by Section 3730(c)(1) (*i.e.*, paragraph (1)). Paragraph (1) states:

> *If the Government proceeds with the action*, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, *subject to the limitations set forth in paragraph (2)*.

31 U.S.C. 3730(c)(1) (emphases added). In petitioner's view, the italicized language means that paragraph (1) acts as a limit on paragraph (2), such that the government may exercise its rights specified in paragraph (2) only "[i]f the Government proceeds with the action." *Ibid.*; see Pet. Br. 17-19.

Petitioner misconstrues the relationship between the two paragraphs. The clause "subject to the limitations set forth in paragraph (2)" means that paragraph (2) acts as a limit on paragraph (1)—not the other way around. That clause therefore cannot be the basis for restricting the application of paragraph (2). See *Swift* v. *United States*, 318 F.3d 250, 252 (D.C. Cir.), cert. denied, 539 U.S. 944 (2003). And contrary to petitioner's contention, the clause "[i]f the Government proceeds with the action" applies only to paragraph (1). If Congress had wanted such language to apply to the government's dismissal right, Congress could have placed that dismissal right in a subparagraph of paragraph (1). It could have included such language at the start of paragraph (2). Or it could have included such language in Section 3730(c)(2)(A), alongside the two conditions that it actually specified. But Congress did none of those things.

Invoking the canon against surplusage, petitioner argues that, if the government may exercise the rights described in paragraph (2) without intervening, Congress would have had no need to specify in paragraph (1) that the relator's "right to continue as a party to the action" is "subject to the limitations set forth in paragraph (2)," 31 U.S.C. 3730(c)(1), because "everything would *always* be subject to paragraph (2)," Pet. Br. 22. But Congress sometimes includes language that could be viewed as "redundant" in order "to be doubly sure" that no statutory ambiguity exists. *Barton* v. *Barr*, 140 S. Ct. 1442, 1453 (2020). Here, the "subject to" language simply clarifies the scope of the relator's "right to continue as a party" in a situation where the government has intervened. 31 U.S.C. 3730(c)(1). Even if that language produces some redundancy, that would not be "license to rewrite" paragraph (2)'s plain text. *Barton*, 140 S. Ct. at 1453; see *Rimini St., Inc.* v. *Oracle USA, Inc.*, 139 S. Ct. 873, 881 (2019) ("Sometimes the better overall reading of the statute contains some redundancy.").

ii. Petitioner also invokes FCA language stating that, when the government declines to intervene, the relator acquires the "right to conduct the action." 31 U.S.C. 3730(b)(4)(B) and (c)(3); see Pet. Br. 15-16. Petitioner's reliance on that language is misplaced. The fact that the relator has the "'right to conduct the action'" does not mean that the government has no "rights" at all. *Eisenstein*, 556 U.S. at 932 (citation omitted). Rather, it means only that the relator has the responsibility for prosecuting the suit. Cf. 31 U.S.C. 3730(c)(1) (using similar terms to describe the government's role when the action shall be conducted by the government). The government still retains other rights, including the dismissal right—just as the relator retains other rights when the government

proceeds with the action. See *ibid.* (stating that the relator retains "the right to continue as a party" when the government proceeds with the action); *Eisenstein*, 556 U.S. at 932 (stating that the government retains "specific rights" when "'the right to conduct the action'" belongs to the relator) (citation omitted).[2]

Petitioner suggests (Br. 16) that, if the government were allowed to dismiss a qui tam suit without intervening, it would be usurping the relator's "right to conduct the action." But dismissing a qui tam suit is not "conduct[ing]" the action, 31 U.S.C. 3730(b)(4)(A); it is terminating it. Like the other rights that the government retains after declining to intervene—such as the right to veto a relator's decision to voluntarily dismiss the suit, 31 U.S.C. 3730(b)(1), and the right to settle the action notwithstanding the relator's objections, 31 U.S.C. 3730(c)(2)(B)—the right to dismiss is not a right to "conduct" the action. Even when the "right to conduct the action" belongs to the relator, the government therefore is not precluded from exercising its other rights.

This Court's decision in *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), is not to the contrary. In its "background explanation of the FCA's framework," Pet. App. 16a n.11, the Court in *Stevens* stated: "If the Government declines to intervene within the 60-day period, the relator has

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[2] In *Eisenstein*, the Court listed three examples of the "specific rights" that the United States retains. 556 U.S. at 932. Although the government's dismissal right was not one of the examples, the Court's list was not meant to be exhaustive. See *ibid.* (stating that the United States' rights "include" the three examples). Indeed, in a more recent decision, the Court identified the government's dismissal right as a "right" that the United States "retains," "[r]egardless of the option that the United States selects" during the seal period. *Kellogg Brown*, 135 S. Ct. at 1973.

the exclusive right to conduct the action, § 3730(b)(4), and the Government may subsequently intervene only on a showing of 'good cause,' § 3730(c)(3)." 529 U.S. at 769. Petitioner emphasizes (Br. 15 & n.2) the Court's use of the word "exclusive." But that word merely signifies that, when the government declines to intervene during the seal period, the right to conduct the action belongs *only* to the relator—at least so long as the government does not subsequently intervene. The Court did not say that the government is precluded from exercising *other* rights while the relator's right to conduct the action is exclusive. Indeed, in a more recent description of the FCA's framework, the Court suggested the opposite, stating that "[r]egardless of the option that the United States selects" during the seal period, the government "retains the right at any time to dismiss the action entirely." *Kellogg Brown*, 575 U.S. at 653.

b. The FCA's structure does not support an intervention requirement

i. Petitioner argues (Br. 18) that, if Congress had intended to allow the government to dismiss without intervening, Congress would have "at least repeated" that right in Section 3730(c)(3). But Congress did not intend for Section 3730(c)(3) to provide an exhaustive list of the rights that the government retains "[i]f the Government elects not to proceed with the action." 31 U.S.C. 3730(c)(3). After all, Section 3730(c)(3) does not mention the government's right to veto a relator's decision to voluntarily dismiss the action, 31 U.S.C. 3730(b)(1); the government's right to settle the action, 31 U.S.C. 3730(c)(2)(b); or the government's right to a share of any monetary award, 31 U.S.C. 3730(d)—other rights that the government retains even if it declines to intervene. See *Kellogg Brown*, 575 U.S. at 563; *Eisen-*

stein, 556 U.S. at 932; *United States* v. *Health Possibilities, P.S.C.*, 207 F.3d 335, 339 (6th Cir. 2000).

ii. Petitioner also argues that Section 3730(c)(4)'s introductory clause—*i.e.*, "[w]hether or not the Government proceeds with the action"—would be surplusage if intervention were not a prerequisite to dismissal under Section 3730(c)(2)(A). 31 U.S.C. 3730(c)(4); see Pet. Br. 21. But Section 3730(c)(4) authorizes the government to seek a "stay [of] discovery"—a right that might otherwise be thought to belong only to the full parties in the case. 31 U.S.C. 3730(c)(4). The introductory clause thus clarifies that the government may exercise that right even if it has not intervened. To the extent that the clause is a source of redundancy, it is the sort of redundancy that is "common in statutory drafting." *Barton*, 140 S. Ct. at 1453.

Petitioner further contends that Section 3730(c)(4)'s introductory clause shows that "[w]hen Congress actually wished to grant certain rights 'whether or not the government proceeds with the action,' it said so expressly." Pet. Br. 21 (brackets and citation omitted). But the FCA specifies numerous rights that the government enjoys simply by virtue of its status as a real party in interest, see p. 18, *supra*, and Congress did not uniformly include a "whether or not" clause in the provisions conferring those rights. For example, the government has a right to veto a relator's decision to voluntarily dismiss his suit, whether or not the government proceeds with the action. 31 U.S.C. 3730(b)(1); see *Eisenstein*, 556 U.S. at 932; *Health Possibilities*, 207 F.3d at 339. The government also has a right to settle the case, whether or not it proceeds with the action. 31 U.S.C. 3730(c)(2)(B); see *Kellogg Brown*, 575 U.S. at 563. Yet

Congress did not include a "whether or not" clause in either Section 3730(b)(1) or Section 3730(c)(2)(B).

c. The purpose of intervention is not implicated when the government seeks dismissal of a qui tam suit

Under the FCA, the purpose of intervention is to allow the government to "proceed with the action." 31 U.S.C. 3730(b)(4)(A); see 31 U.S.C. 3730(b)(2) (providing that, during the seal period, the government "may elect to intervene and proceed with the action"). The FCA further specifies that, "[i]f the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action." 31 U.S.C. 3730(c)(1).

Thus, when the government intervenes in a qui tam suit under the FCA, "the case will go forward with the government running the litigation." *Swift*, 318 F.3d at 251. By contrast, "[e]nding the case by dismissing it is not proceeding with the action." *Ibid.* Requiring the government to intervene in order to dismiss therefore would not serve the purposes of intervention under the FCA. It would make little sense to require the government to "proceed" with an action in one breath, 31 U.S.C. 3730(b)(4)(A) and (c)(1), only to "dismiss" it in the very next, 31 U.S.C. 3730(c)(2)(A).

Petitioner argues (Br. 20-21) that the statute contemplates the government proceeding with an action only to dismiss it. He contends that, when the government wishes to dismiss during the seal period, the government must proceed with the action before dismissing it because, in his view, Section 3730(b)(4) puts the government to a "binary choice," Pet. Br. 20: either "proceed with the action" or "decline[] to take over the action," 31 U.S.C. 3730(b)(4)(A) and (B). That is the choice the government faces if a live action still exists at the end of the seal period. But just as Section 3730(b)(4)

does not foreclose the relator from dismissing the action before the end of the seal period, 31 U.S.C. 3730(b)(1), it does not foreclose the government from doing so either. Section 3730(b)(4) therefore does not support petitioner's view that the statute requires proceeding with the action only to dismiss it.

Petitioner also contends that permitting the government to dismiss without intervening would create a "procedural anomaly" because, in his view, "non-parties typically are not allowed to file *anything* in another party's lawsuit—much less a dispositive motion." Pet. Br. 22; see *id.* at 14 (asserting that "*non*-parties cannot file motions"). But a qui tam action under the FCA is not "another party's lawsuit." *Id.* at 22. Rather, it is an action "brought in the name of the Government" to redress certain wrongs done to the United States. 31 U.S.C. 3730(b)(1). The government thus remains a "real party in interest" throughout the litigation. *Eisenstein*, 556 U.S. at 930 (citation omitted). As a function of that status, the FCA specifies numerous rights that the government retains regardless of whether it intervenes. See p. 18, *supra*. And contrary to petitioner's contention (Br. 22), the government can affect the disposition of a qui tam case even without intervening, as when the government consents (or declines to consent) to the relator's voluntary dismissal of the action, 31 U.S.C. 3730(b)(1), or seeks approval of a settlement, 31 U.S.C. 3730(c)(2)(B). Thus, far from being "at odds with procedural norms," Pet. Br. 22, the government's right to dismiss the case without intervening is in keeping with the overall statutory scheme.

2. Even if the FCA required the government to intervene before dismissing an action, the government satisfied that requirement here by intervening after the seal period expired

Even if the FCA required the government to intervene before dismissing an action, the court of appeals correctly rejected petitioner's contention that "the Government may seek dismissal *only* if it intervened at the first opportunity." Pet. App. 15a. Under the FCA, the government may intervene either during the seal period, 31 U.S.C. 3730(b)(2), or "at a later date upon a showing of good cause," 31 U.S.C. 3730(c)(3). No court of appeals has adopted petitioner's view that, by declining to intervene during the seal period, the government irrevocably forfeits its right to dismiss a qui tam suit. See, *e.g.*, Pet. App. 15a-17a; *United States ex rel. CIMZNHCA, LLC* v. *UCB, Inc.*, 970 F.3d 835, 853-854 (7th Cir. 2020), cert. denied, 141 S. Ct. 2878 (2021); *United States ex rel. Sequoia Orange Co.* v. *Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (1998), cert. denied, 525 U.S. 1067 (1999).

a. After declining to intervene during the seal period, the government may intervene at a later date and dismiss the action

The FCA provides two avenues for the government's intervention. First, during the seal period, the government "may elect to intervene and proceed with the action." 31 U.S.C. 3730(b)(2); see 31 U.S.C. 3730(b)(4)(A). Second, after the seal period expires, "the court, without limiting the status and rights of the person initiating the action, may * * * permit the Government to intervene at a later date upon a showing of good cause." 31 U.S.C. 3730(c)(3).

Whichever avenue the government takes, the government becomes a "full party," *Eisenstein*, 556 U.S. at

934, proceeding with the action alongside the relator. Section 3730(c)(1) addresses the rights of the parties when "the Government proceeds with the action." 31 U.S.C. 3730(c)(1). It provides that, "[i]f the government proceeds with the action," the relator "shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2)." *Ibid.* Among those limitations is the government's right to dismiss the suit. 31 U.S.C. 3730(c)(2)(A). Thus, even if intervention is a prerequisite to dismissal, the government does not forfeit its right to dismiss by declining to intervene during the seal period, but rather may exercise that right by "interven[ing] at a later date." 31 U.S.C. 3730(c)(3).

Whereas the government may simply "elect" to intervene during the seal period, 31 U.S.C. 3730(b)(2), it may intervene at a later date only "upon a showing of good cause," 31 U.S.C. 3730(c)(3). But the government's determination that a qui tam action should be dismissed will ordinarily provide the requisite good cause. Cf. *Swift*, 318 F.3d at 252 (describing "the question whether the False Claims Act requires the government to intervene before dismissing an action" as "largely academic"). Any concerns about the dismissal could then be aired during the "hearing on the motion" that Section 3730(c)(2)(A) requires. 31 U.S.C. 3730(c)(2)(A).

b. *The FCA's text, history, and purposes do not support petitioner's contrary view*

In petitioner's view (Br. 23-26), the government irrevocably forfeits its right to dismiss a qui tam suit by declining to intervene during the seal period. That "draconian" approach has no sound basis in the FCA's text, history, or purposes. Pet. App. 16a.

i. Petitioner offers two textual arguments (Br. 23-24) in support of his view that the government cannot exercise its dismissal right if it intervenes after the seal period expires. Neither argument has merit.

First, petitioner contends that the clause "without limiting the status and rights of the person initiating the action" in Section 3730(c)(3) means that the government may not exercise any of its rights specified in Sections 3730(c)(1) and (2) if the government intervenes "at a later date." 31 U.S.C. 3730(c)(3); see Pet. Br. 23. In petitioner's view, the government's exercise of those rights would "limit[]" the relator's right to conduct the action, in contravention of Section 3730(c)(3)'s "without" clause.

Petitioner's argument assumes that the "without" clause applies to "the Government." 31 U.S.C. 3730(c)(3). But Section 3730(c)(3) says that "*the court*, without limiting the status and rights of the person initiating the action, may * * * permit the Government to intervene at a later date upon a showing of good cause." *Ibid.* (emphasis added). The "without" clause thus prohibits "the court" from imposing its own "limit[ations]" in granting permission to intervene, *ibid.*, but it does not prohibit the government from exercising its rights under the statute after intervention has been granted. See *CIMZNHCA*, 970 F.3d at 854 (explaining that Section 3730(c)(3) merely "instructs the district court not to limit the relator's 'status and rights' as they are defined by §§ 3730(c)(1) and (2)").

If petitioner's contrary reading of the "without" clause were correct, the government would irrevocably lose all of its rights set forth in Section 3730(c)(2) by declining to intervene during the seal period. Those rights include not just the right to dismiss the action, but also

the rights to settle the action and to request limitations on the relator's participation. 30 U.S.C. 3730(c)(2)(A)-(C). It is unlikely that Congress intended a clause so "obscure[]" to produce "so draconian a consequence." Pet. App. 16a. It is also "unlikely that Congress meant to introduce a new configuration of the government-relator relationship" in a provision so "ancillary." *CIMZNHCA*, 970 F.3d at 853. A key purpose of Section 3730(c)(1) is to spell out the parties' respective rights, "subject to the limitations" in Section 3730(c)(2), when both the government and the relator proceed with the action. But under petitioner's reading of the Act, the contours of the government-relator relationship would be largely unspecified in cases where the government intervenes after the seal period.

Second, petitioner contends that, under Section 3730(c)(3), the court may permit the government to "intervene" after the seal period, but may not permit it to "proceed with the action." Pet. Br. 23 (quoting 31 U.S.C. 3730(c)(3)). In petitioner's view (Br. 23), the government's intervention under Section 3730(c)(3) therefore does not "activat[e] its rights under subsections (c)(1) and (2)."

Petitioner's attempt to distinguish "interven[ing]" from "proceed[ing] with the action" lacks merit. Pet. Br. 23 (citation omitted). By intervening, the government becomes a "party"—and, specifically, a plaintiff—in the case. *Eisenstein*, 556 U.S. at 933. The phrase "proceed[] with the action" simply captures the government's role as a plaintiff, "prosecuting the action." 31 U.S.C. 3730(c)(1). "Intervening" and "proceeding with the action" are thus two sides of the same coin. Petitioner points to two FCA provisions in which Congress used the phrase "intervene and proceed with the ac-

tion." Pet. Br. 23 (citation and emphasis omitted). But far from showing that "Congress drew a clear distinction between those two concepts," *ibid.*, those provisions demonstrate that Congress viewed them as a unit.

Petitioner also reads Section 3730(c)(3) to suggest that "the relator may 'proceed[] with the action' at the same time the government seeks to 'intervene.'" Pet. Br. 24 (brackets in original). But contrary to petitioner's contention (*ibid.*), that does not indicate "division between those two concepts." Both the government and the relator can be plaintiffs—and thus "proceed[] with the action"—at the same time. 31 U.S.C. 3730(c)(3). To be sure, Section 3730(c)(1) grants the government "the primary responsibility for prosecuting the action" when both the government and the relator are plaintiffs. 31 U.S.C. 3730(c)(1). But that grant of "primary responsibility" does not detract from the relator's status "as a party" or his right to proceed with the action unless and until the action is dismissed. *Ibid.* Petitioner's view that the government has no dismissal right if it intervenes under Section 3730(c)(3) thus has no sound textual basis.

ii. As originally enacted in 1863, the FCA did not authorize the government to intervene in qui tam actions. See Act of Mar. 2, 1863, ch. 67, §§ 4, 6-7, 12 Stat. 698. Congress first conferred that right when it amended the FCA in 1943. Act of Dec. 23, 1943, ch. 377, § 1, sec. 3491(C), 57 Stat. 608. And even then, the Act gave the government only 60 days after service of the relator's complaint to exercise that right. *Ibid.* If the government elected to intervene during that initial 60-day period, the suit would be "carried on solely by the United States." *Ibid.* But if the government did not intervene during that period, the suit would be "carr[ied] on" by

the relator, *ibid.*, and the government would have no further opportunity to "reenter[] the litigation," S. Rep. No. 345, 99th Cong., 2d Sess. 26 (1986) (Senate Report).

In the ensuing decades, Congress became concerned that the FCA "present[ed] an often times self-defeating 'all or nothing' proposition both for the person bringing the action and for the Government." Senate Report 25. In 1986, Congress amended the statute again. See False Claims Amendments Act of 1986 (Amendments Act), Pub. L. No. 99-562, 100 Stat. 3153. Among the purposes of those amendments was to grant the government a greater "opportunity for * * * involvement" in qui tam suits even when it initially declines to intervene. Senate Report 26. That purpose is reflected in the provisions of Section 3730(c) at issue here—including those authorizing the government to dismiss and to intervene after the seal period expires—which were enacted as part of the 1986 amendments. Amendments Act § 3, 100 Stat. 3155-3156. Petitioner's narrow view of the rights the government possesses when it initially declines to intervene would subvert Congress's effort to respond to perceived shortcomings in prior law by adjusting the balance struck in the FCA.

iii. Petitioner contends (Br. 28) that the government "lacks a longstanding pedigree of dismissing declined FCA actions." Relying on *Sequoia Orange*, 151 F.3d at 1142, petitioner asserts (Br. 27) that, even after 1986, "the government itself * * * understood the FCA" to prohibit it from dismissing a case after declining to intervene. But in *Sequoia Orange*, it was only the Department of Agriculture that initially took the position that the United States could not dismiss the relators' long-pending qui tam actions. *United States ex rel. Sequoia Orange Co.* v. *Sunland Packing House Co.*, 912 F. Supp.

1325, 1335 (E.D. Cal. 1995). And the Department of Agriculture took that position not because it thought the FCA "limit[ed] [the government's] dismissal rights to the outset" of a qui tam suit, Pet. Br. 27, but because it construed the FCA as authorizing the government to dismiss only for legal rather than policy reasons, *Sequoia Orange*, 912 F. Supp. at 1338.

After examining the issue, the Department of Justice reconsidered that view of the Act and moved to dismiss the *Sequoia Orange* relators' qui tam suits based on policy judgments, even though the government had previously declined to intervene in a number of the actions. See 912 F. Supp. at 1331-1332, 1337; U.S. Br. at 15-25, *Sequoia Orange*, *supra* (9th Cir.) (No. 96-15024). Since then, the government has continued to exercise its right to dismiss after declining to intervene. See, *e.g.*, *Ridenour* v. *Kaiser-Hill Co.*, 397 F.3d 925, 930 (10th Cir. 2005); *Hoyte* v. *American Nat'l Red Cross*, 518 F.3d 61, 64 (D.C. Cir. 2008); *United States ex rel. Stierli* v. *Shasta Servs. Inc.*, 440 F. Supp. 2d 1108, 1111 (E.D. Cal. 2006). That the government has done so sparingly does not cast doubt on the existence of the right, but simply reflects the government's prudent exercise of it.

iv. Petitioner contends (Br. 28) that his position is consistent with Congress's intent that significant consequences should follow from the government's "upfront choice" whether to intervene during the seal period. But as explained above, one of the purposes of the 1986 amendments was to lower the stakes of that initial choice by making it less of an "'all or nothing' proposition." Senate Report 25. By tying "all rights" to "the government's initial decision," Pet. Br. 29 n.7, petitioner's approach would subvert that statutory purpose.

Petitioner further argues (Br. 29-30) that his view of the statute would "not materially interfere with the government's prerogatives" and would "preserve[] proper incentives" for relators under the Act. But petitioner overstates the benefits, and understates the costs, of treating the government's initial decision not to intervene as a forfeiture of its rights under Section 3730(c)(2). As this case illustrates, circumstances can change after the seal period, shedding new light on the scope of the relator's claims, the relator's ability to substantiate them, and the costs of allowing the relator to continue to try to do so. See pp. 4-6, *supra*; see also *Sequoia Orange*, 912 F. Supp. at 1348 (discussing "changed circumstances" that warranted "the government's exercise of its statutory authority to dismiss"). Petitioner's approach would reduce the government's ability to respond to such changed circumstances as litigation proceeds.

Petitioner asserts (Br. 29, 31) that the government could protect its "interests" through means "available in all private litigation" to "resist burdensome discovery and avoid disclosing protected or sensitive materials." But the entire rationale for qui tam suits is to vindicate the *government's* interests by providing an additional mechanism to redress fraud done to the United States. See *Stevens*, 529 U.S. at 773. Section 3730(c)(2)(A) reflects Congress's determination that, when the government concludes that a particular qui tam suit disserves its "overall interests," Pet. Br. 29, the United States should be able to end the litigation rather than attempt to "resist" the relator's efforts, *id.* at 31.

Petitioner also contends (Br. 31) that, "[i]f the government concludes that defendants should win," it can simply ask the court to dismiss the case on the merits. But that contention ignores the many reasons unrelated

to the merits that may lead the government to seek dismissal. Petitioner also overlooks the potential burdens of litigating the merits themselves. Even if the government determines that the relator will ultimately be unable to persuade a trier of fact that the defendant violated the FCA, the relator's pleadings and evidence may be sufficient to survive a motion to dismiss or a motion for summary judgment. Thus, despite the government's assessment of the merits, the government will not necessarily be able to avoid the burdens of discovery and trial.

Petitioner asserts (Br. 30) that relators will be "reluctant to invest the time and resources necessary to prosecute an action if the government can dismiss the case at any time." But in the 1986 amendments, Congress increased the incentives for relators in other ways, including by authorizing larger monetary awards and allowing relators to receive a greater share of them. Amendments Act §§ 2-3, 100 Stat. 3153, 3156-3157. "The number of lawsuits filed under the *qui tam* provisions of the Act has grown significantly since 1986," leading to $1.6 billion in judgments and settlements, including $237 million paid out to relators, in fiscal year 2021. See Office of Pub. Affairs, U.S. Dep't of Justice, *Justice Department's False Claims Act Settlements and Judgments Exceed $5.6 Billion in Fiscal Year 2021* (Feb. 1, 2022). Given that this has occurred without any court of appeals accepting petitioner's view of the statute, petitioner's concerns (Br. 30) about "preserv[ing] proper incentives" for relators are misplaced.

It is far from clear, moreover, that adoption of petitioner's approach would benefit relators as a group going forward. If declining to dismiss during the seal period were treated as a permanent forfeiture of that stat-

utory right, the government might more often choose to dismiss at the outset to avoid the risk that the litigation will become unduly burdensome. Petitioner asserts (Br. 29 n.7) that, all else being equal, "early dismissals" save "everyone" "time and money." But adoption of petitioner's proposed rule would not simply induce the government to make earlier dismissal decisions in suits that it would ultimately have dismissed in any event. Rather, it could well lead the government to dismiss during the seal period some qui tam suits that it would otherwise have allowed to proceed to judgment.

II. THE GOVERNMENT'S DECISION TO DISMISS A QUI TAM ACTION IS SUBJECT TO CONSTITUTIONAL, BUT NOT STATUTORY, CONSTRAINTS

The second issue in this case concerns the extent to which a district court may review the government's decision to dismiss an FCA action over the relator's objection. Although the FCA does not impose any substantive constraint on the government's exercise of its dismissal right, the Constitution does. Thus, when a relator objects to the government's decision to dismiss a qui tam suit, the court's review is limited to determining whether the decision is consistent with the Constitution.

A. The FCA Does Not Restrict The Government's Discretion To Dismiss Qui Tam Suits, But The Dismissal Decision Is Subject To Constitutional Constraints

1. Nothing in the FCA's text or structure limits the government's authority to dismiss a qui tam action under Section 3730(c)(2)(A).

a. Section 3730(c)(2)(A) states that, if two conditions are satisfied—that the relator be given (1) notice and (2) an opportunity for a hearing—"[t]he Government may dismiss the action notwithstanding the objections

of the [relator]." 31 U.S.C. 3730(c)(2)(A). Neither of those conditions specifies a standard for dismissal. The text of Section 3730(c)(2)(A) thus does not constrain the government's dismissal authority or provide any standard a court could apply in reviewing the government's dismissal decision.

The main clause of Section 3730(c)(2)(A) authorizes "[t]he Government" itself to "dismiss the action," not simply to ask the court to do so. 31 U.S.C. 3730(c)(2)(A). The provision thus differs from one of the conditions that follows, which requires "the court" to "provide[] the [relator] with an opportunity for a hearing on the [government's] motion" to dismiss. *Ibid.* That the subject of the main clause is the government, not the court, further highlights the absence of any substantive statutory constraint on the government's dismissal authority and the absence of any statutory standard for judicial review.

b. Section 3730(c)(2)(A) stands in contrast to other FCA provisions that establish explicit criteria for courts to apply. Some FCA provisions, for example, expressly require a particular judicial finding or determination. See, *e.g.*, 31 U.S.C. 3730(c)(2)(B) (stating that the government may settle a case "if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances"); 31 U.S.C. 3729(a)(2) (stating that "the court may" reduce the award of damages "[i]f the court" makes certain "find[ings]"); 31 U.S.C. 3730(d)(1) (stating that "the court may award such sums as it considers appropriate" "[i]f the court" makes a certain "find[ing]"); 31 U.S.C. 3730(d)(2) (stating that the relator shall "receive an amount for reasonable expenses which the court finds to have been necessarily incurred"); 31 U.S.C. 3730(d)(3)

(stating that "the court may" reduce the relator's recovery "if the court" makes a certain "find[ing]"); 31 U.S.C. 3730(d)(4) (stating that "the court may award to the defendant its reasonable attorneys' fees and expenses" if "the court" makes a certain "find[ing]").

Other FCA provisions expressly require a particular showing by the government or the defendant. See, *e.g.*, 31 U.S.C. 3730(b)(3) (stating that "the court" may extend the seal period "for good cause shown" by "[t]he Government"); 31 U.S.C. 3730(c)(2)(C) (stating that "the court may" limit the relator's participation upon a particular "showing by the Government"); 31 U.S.C. 3730(c)(2)(D) (stating that "the court may" limit the relator's participation upon a particular "showing by the defendant"); 31 U.S.C. 3730(c)(3) (stating that "the court * * * may" permit the government to intervene at a later date "upon a showing of good cause"); 31 U.S.C. 3730(c)(4) (stating that "the court may" stay discovery upon a particular "showing by the Government"); *ibid.* (stating that "[t]he court may" extend the stay upon a particular "showing" by "the Government").

Many FCA provisions also direct the court to exercise its discretion or do what it deems to be appropriate or reasonable. See, *e.g.*, 31 U.S.C. 3730(c)(2)(C) (stating that "the court may, in its discretion, impose limitations on the [relator's] participation"); 31 U.S.C. 3730(d)(1) (stating that "the court may award such sums as it considers appropriate"); 31 U.S.C. 3730(d)(2) (stating that the relator "shall receive an amount which the court decides is reasonable"); 31 U.S.C. 3730(d)(3) (stating that "the court may, to the extent the court considers appropriate, reduce the share of the proceeds").

Section 3730(c)(2)(A), by contrast, does not require any particular finding by the court or any particular

showing by the government. Nor does it direct the court to exercise its discretion or to do what it deems to be reasonable or appropriate. It is therefore "proper to infer" that Congress did not intend to condition the government's dismissal of a qui tam action on any particular showing of fairness or reasonableness. *State Farm*, 137 S. Ct. at 443; see *Allison Engine*, 553 U.S. at 671 (explaining that Congress presumably "acts intentionally and purposely in the disparate inclusion" of "particular language") (citation omitted).

c. The "general presumption of unreviewability of decisions not to [take] enforce[ment]" action, *Heckler* v. *Chaney*, 470 U.S. 821, 834 (1985), strengthens that inference. A federal 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." *Id.* at 831. The "government's judgment" that an FCA action brought in the name of the United States should be dismissed under Section 3730(c)(2)(A) "amounts to" a similar exercise of enforcement discretion. *Swift*, 318 F.3d at 252.

Like an agency's decision not to enforce, the government's decision to dismiss under Section 3730(c)(2)(A) "often involves a complicated balancing of a number of factors which are peculiarly within [the government's] expertise." *Heckler*, 470 U.S. at 831. And like an agency's decision not to enforce, the government's decision to dismiss "shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'" *Id.* at 832 (quoting U.S. Const. Art. II, § 3). Thus, the gov-

ernment's decision to dismiss is similar to the type of decision that has traditionally been committed to the government's discretion. The FCA provides no indication that Congress intended to depart from that tradition in enacting Section 3730(c)(2)(A).

2. Although the FCA does not limit the government's discretion to dismiss a qui tam action, the government's dismissal decision is still subject to constitutional constraints. Accordingly, the government may not dismiss for a constitutionally impermissible reason, such as the relator's religion, race, or sex. Cf. *United States* v. *Armstrong*, 517 U.S. 456, 464, 465 (1996) (recognizing that equal-protection principles constrain the government's prosecutorial decisions, but requiring "'clear evidence'" to "dispel the presumption that a prosecutor has not violated equal protection") (citation omitted). Nor may the government engage in conduct so "egregious" that it "shocks the conscience"—the standard that this Court has held applicable to executive action under the Due Process Clause. *County of Sacramento* v. *Lewis*, 523 U.S. 833, 846 (1998). Unless the relator establishes a constitutional violation, however, a court has no substantive basis for setting aside the government's decision to dismiss an FCA action.

B. Neither The Constitution Nor The FCA Supports Adoption Of The Ninth Circuit's *Sequoia Orange* Framework

Petitioner contends (Br. 35) that the "appropriate standard" for judicial review of a government dismissal decision under Section 3730(c)(2)(A) is the standard first articulated by the Ninth Circuit in *Sequoia Orange*, 151 F.3d at 1145. Under *Sequoia Orange*, the United States must identify (1) "a valid government purpose" and (2) "a rational relation between dismissal and accomplishment of the purpose." *Ibid.* (citation omitted).

If the government satisfies that two-step test, the burden shifts to the relator "to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal." *Ibid.* (citation omitted). Neither the Constitution nor the FCA supports adoption of that framework.

1. The Ninth Circuit identified the Constitution, not the FCA, as the source of the *Sequoia Orange* framework. Acknowledging that the "statute itself does not create a particular standard for dismissal," the Ninth Circuit explained that the government's dismissal decision must comply with the Constitution. 151 F.3d at 1145. The Ninth Circuit viewed the framework described above to be the "same" as the "analysis" that "is applied to determine whether executive action violates substantive due process." *Ibid.*; see *id.* at 1146.

The burden-shifting approach that the Ninth Circuit adopted, however, is substantially different from the due-process standard that applies to executive action. One month before the Ninth Circuit decided *Sequoia Orange*, this Court held that, "[w]hile due process protection in the substantive sense limits what the government may do in both its legislative and its executive capacities, criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue." *Lewis*, 523 U.S. at 846 (citations omitted). The Court further held that "only the most egregious" executive action—namely, "that which shocks the conscience"—"can be said to be 'arbitrary in the constitutional sense.'" *Ibid.* (citation omitted). The *Sequoia Orange* framework, which imposes a more stringent, rational-relation test and places the burden on the government to satisfy it, cannot be squared with this Court's due-process precedent.

2. Petitioner does not dispute that the *Sequoia Orange* framework departs from "the 'shocks the conscience' standard." Pet. Br. 40 (citation omitted). He nevertheless argues (*id.* at 41) that "the statute itself imposes a *Sequoia*-based rationality review." That argument lacks merit.

At some points, petitioner suggests that the *Sequoia Orange* framework is appropriate because the FCA incorporates "baseline constitutional norms" applicable to executive action. Pet. Br. 40; see *id.* at 35 (arguing for the application of "minimum constitutional scrutiny"); *id.* at 37 (arguing that "[a]rbitrary and irrational actions are unconstitutional"). That argument fails for the reason stated above: The due-process standard that governs executive action is the shocks-the-conscience standard, not a rational-relation standard.

At other points, petitioner appears to contend that the FCA should be read to incorporate the *Sequoia Orange* framework because it would be "irrational" for "Congress" to "authoriz[e] the Executive to act irrationally" by adopting anything other than "an APA-like standard" of arbitrary-and-capricious review. Pet. Br. 13 (emphasis omitted); see *id.* at 35. But under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, "an agency's decision not to take enforcement action" is "presumed immune from judicial review." *Heckler*, 470 U.S. at 832; see 5 U.S.C. 701(a)(2) (excepting agency decisions "committed to agency discretion by law" from judicial review). And as explained above, the government's decision to dismiss a qui tam action resembles an agency's decision not to enforce. See pp. 40-41, *supra*. By committing the dismissal decision to the government's discretion, Congress has not authorized the Ex-

ecutive to act irrationally, but has simply declined to supply a standard for judicial review.

Petitioner's remaining arguments are similarly unavailing. Petitioner suggests (Br. 41) that, under the government's reading, Section 3730(c)(2)(A)'s hearing requirement would serve no useful purpose. But under the government's interpretation, "provid[ing] the [relator] with an opportunity for a hearing" serves two important functions. 31 U.S.C. 3730(c)(2)(A). First, a hearing gives the relator an "opportunity to convince the government not to end the case." *Swift*, 318 F.3d at 253. Here, for example, the government changed its mind at one point after hearing from petitioner. See p. 5, *supra*. Second, a hearing gives the relator an opportunity to persuade the district court that the government has chosen dismissal for a constitutionally impermissible reason. See p. 41, *supra*.

Petitioner is also wrong in arguing (Br. 41) that "the existence of an express standard for policing settlements" in Section 3730(c)(2)(B) "supports a comparable standard here." In fact, Congress's specification of a substantive standard a court should apply in reviewing a proposed settlement simply highlights the absence of any comparable statutory constraint on the government's dismissal right. See *Allison Engine*, 553 U.S. at 671. And contrary to petitioner's suggestion (Br. 41), Congress had good reason to treat differently a relator's challenge to the government's decision to settle, rather than dismiss, a qui tam suit. Whereas the government's decision to dismiss is akin to an agency's decision not to enforce, see pp. 40-41, *supra*, settlements are themselves a form of civil enforcement, and a court can evaluate whether a "proposed settlement is fair, adequate, and reasonable," 31 U.S.C. 3730(c)(2)(B), with-

out engaging in the "complicated balancing" that underlies a decision not to take enforcement action, *Heckler*, 470 U.S. at 832. Indeed, it is not uncommon for courts to assess the fairness, adequacy, and reasonableness of settlements in the face of objections by affected parties. See, *e.g.*, Fed. R. Civ. P. 23(e)(2) and (5) (providing for judicial review of the fairness, reasonableness, and adequacy of proposed class settlements in the face of class-member objections). Congress's decision to treat settlements differently simply reflects their greater suitability to judicial review.

Finally, petitioner contends (Br. 41) that the legislative history of the 1986 FCA amendments supports adoption of the *Sequoia Orange* framework. But when, as here, "the meaning of the FCA's text and structure is 'plain and unambiguous,'" resort to legislative history is unwarranted. *State Farm*, 137 S. Ct. at 444 (citation omitted). In any event, the passage from the Senate Report on which petitioner relies (Br. 41) relates to an "unenacted" provision in the Senate version of the 1986 amendments that would have allowed the relator to "'petition for an evidentiary hearing.'" *Swift*, 318 F.3d at 253 (quoting Senate Report 42).

C. Federal Rule Of Civil Procedure 41(a) Has No Application Here

Rejecting both the government's approach and the *Sequoia Orange* framework, the court of appeals held that the appropriate standards for considering a relator's objection to a Section 3730(c)(2)(A) dismissal are set forth in Federal Rule of Civil Procedure 41(a). Pet. App. 19a-27a. Petitioner does not defend (Br. 39-40) the court of appeals' invocation of Rule 41(a), and this Court should reject it.

First, the court of appeals viewed application of the Rule 41(a) standard as "follow[ing] logically from the FCA's request that the Government intervene before seeking dismissal." Pet. App. 20a. But since the FCA actually imposes no such requirement, see pp. 20-27, *supra*, the court's stated rationale for invoking Rule 41(a) was inapt. Second, Rule 41(a) applies only when a plaintiff seeks a "voluntary dismissal." Fed. R. Civ. P. 41(a) (capitalization omitted). When the government invokes its right under Section 3730(c)(2)(A), however, it seeks a dismissal "notwithstanding the objections of the person initiating the action." 31 U.S.C. 3730(c)(2)(A).

Third, and most fundamentally, the court of appeals erred in disregarding the clear import of Section 3730(c)(2)(A). That provision entitles the relator to notice and a hearing when the government chooses to dismiss a qui tam suit, but it imposes no substantive constraints on the government's right to dismiss over the relator's objections. Allowing the relator to invoke substantive restrictions on dismissal drawn from other sources of law would subvert the balance struck by Congress. The court's reliance on a generally applicable Federal Rule was especially misplaced given the sui generis character of the relationship between the government and the relator in an FCA qui tam suit.[3]

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[3] In cases where the government seeks to dismiss a qui tam suit before the defendant has filed an answer or moved for summary judgment, the court of appeals' approach appears to be substantially congruent to the government's. See Pet. App. 23a (explaining that in that circumstance, "the Government is entitled to dismissal, albeit with an opportunity for the relator to be heard, subject only to the bedrock constitutional bar on arbitrary Government action") (citations and footnote omitted). In cases where the government seeks to dismiss at a later stage, however, the court of appeals appears to contemplate a significantly greater role for the district court to

III. THE COURT OF APPEALS' JUDGMENT SHOULD BE AFFIRMED

The court of appeals upheld the district court's dismissal of petitioner's FCA action. Pet. App. 30a. Under the principles set forth above, the court's judgment should be affirmed. Although the government declined to intervene during the seal period, it retained the right to dismiss the action at a later date. And although dismissal under Section 3730(c)(2)(A) is subject to constitutional constraints, petitioner "has not come close to meeting the exceedingly high standard" for demonstrating a constitutional violation. *Id.* at 23a n.17.

This Court should likewise affirm even if it holds that intervention is a prerequisite to dismissal. The court of appeals "construe[d] the Government's motion to dismiss as including a motion to intervene" and concluded that the district court had "necessarily found" the requisite "good cause" for intervention. Pet. App. 28a. Petitioner does not challenge those aspects of the decision below.

Finally, this Court should affirm even if it holds that *Sequoia Orange* furnishes the appropriate standard for reviewing Section 3730(c)(2)(A) dismissals. The district court explained at length why that standard would require dismissal here. Pet. App. 49a-57a. The court of appeals in turn found that the district court had "exhaustively examined the interests of the parties [and] their conduct over the course of the litigation," and that the government had identified multiple legitimate "reasons for terminating th[is] action." *Id.* at 28a-29a. Thus, contrary to petitioner's suggestion (Br. 42), a remand would be unnecessary.

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make dismissal contingent "on terms [that] the court considers proper." *Ibid.* (quoting Fed. R. Civ. P. 41(a)(2)).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 2022

APPENDIX

1. 31 U.S.C. 3729 provides:

False claims

(a) LIABILITY FOR CERTAIN ACTS.—

(1) IN GENERAL.—Subject to paragraph (2), any person who—

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410[1]), plus 3 times the amount of damages which the Government sustains because of the act of that person.

(2) REDUCED DAMAGES.—If the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person

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[1] So in original. Probably should be "101-410".

did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

(3) COSTS OF CIVIL ACTIONS.—A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) DEFINITIONS.—For purposes of this section—

(1) the terms "knowing" and "knowingly"—

(A) mean that a person, with respect to information—

(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud;

(2) the term "claim"—

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government—

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

(3) the term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

(4) the term "material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(c) EXEMPTION FROM DISCLOSURE.—Any information furnished pursuant to subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

(d) EXCLUSION.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

2. 31 U.S.C. 3730 provides:

Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.—The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS.—(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4)[1] of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

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[1] So in original. Probably should be a reference to Rule 4(i).

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

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

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

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

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has pro-

vided the person with an opportunity for a hearing on the motion.

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

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have

the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For

purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF.—(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government[2] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attor-

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[2] So in original. Probably should be "General".

neys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the

action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED.—(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) 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—

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has[3] knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.—The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) FEES AND EXPENSES TO PREVAILING DEFENDANT.—In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

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[3] So in original. Probably should be "or (ii) has".

(h) RELIEF FROM RETALIATORY ACTIONS.—

(1) IN GENERAL.—Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

(2) RELIEF.—Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

(3) LIMITATION ON BRINGING CIVIL ACTION.—A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.

3. 31 U.S.C. 3731 provides:

False claims procedure

(a) A subpena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought—

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) If the Government elects to intervene and proceed with an action brought under 3730(b),[1] the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions,

[1] So in original. Probably should be preceded by "section".

or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

(d) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(e) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

4. 31 U.S.C. 3732 provides:

False claims jurisdiction

(a) ACTIONS UNDER SECTION 3730.—Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) Claims Under State Law.—The district courts shall have jurisdiction over any action brought under the

laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

(c) Service on State or Local Authorities.—With respect to any State or local government that is named as a co-plaintiff with the United States in an action brought under subsection (b), a seal on the action ordered by the court under section 3730(b) shall not preclude the Government or the person bringing the action from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed by the person bringing the action on the law enforcement authorities that are authorized under the law of that State or local government to investigate and prosecute such actions on behalf of such governments, except that such seal applies to the law enforcement authorities so served to the same extent as the seal applies to other parties in the action.