NO. 21-1052

In the
Supreme Court of the United States

UNITED STATES OF AMERICA, ex rel.
JESSE POLANSKY, M.D., M.P.H.,
Petitioner,

v.

EXECUTIVE HEALTH RESOURCES, INC., *et al.*,
Respondents.

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN HEALTH CARE ASSOCIATION, AND THE AMERICAN HOSPITAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The **Chamber of Commerce of the United States of America** is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the executive branch, and the courts. To that end, the Chamber regularly participates as *amicus curiae* in cases, like this one, that raise issues of concern to the nation's business community.

False Claims Act cases touch on nearly every sector of the economy, including defense, education, banking, technology, and healthcare. And meritless cases exact a substantial economic toll. Companies can spend millions of dollars fielding discovery demands and defending a case that will end without recovery. Given the combination of punitive potential liability and enormous litigation costs, meritless cases can be used to extract settlements. As a result, cases involving the proper application of the False Claims Act are of particular concern to the Chamber and its

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Petitioner consented to this filing in a letter on file with the Clerk's office. Respondents consented to this filing in writing to undersigned counsel.

members, and the Chamber has frequently participated as *amicus* in such cases.

The **American Health Care Association (AHCA)** serves as the national representative of more than 14,000 facilities dedicated to improving the lives of more than 1.5 million Americans who live in Medicare-participating skilled nursing facilities, Medicaid-participating nursing facilities, assisted living communities, and other settings throughout the United States. AHCA's members have a keen interest in ensuring the proper application of the False Claims Act.

The **American Hospital Association (AHA)** represents nearly 5,000 hospitals, healthcare systems, and other healthcare organizations. AHA members are committed to improving the health of the communities they serve and to helping ensure that care is available to and affordable for all Americans. The AHA educates its members on healthcare issues and advocates on their behalf so that their perspectives are considered in formulating health policy. One way in which the AHA promotes the interests of its members is by participating as amicus curiae in cases with important and far-ranging consequences for their members, including cases arising under the False Claims Act (FCA). *E.g.*, *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989 (2016); *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401 (2011); *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007).

INTRODUCTION AND SUMMARY OF ARGUMENT

Reading the False Claims Act in a way that impinges on the executive branch's discretion to decide when to pursue enforcement action would further bring into question the constitutionality of the Act. The Act should be read to avoid constitutional landmines by allowing the government to dismiss a *qui tam* action after initially declining to intervene in the case. And by its own terms, the Act contains few limits on the discretion that the government possesses in making dismissal decisions.

Jesse Polansky, who brought this action in the name of and on behalf of the United States, demands reversal so that he can pursue the action despite the government's considered decision to dismiss it. The government's studied judgment was that it had "doubts about petitioner's ability to prove an FCA violation"; that it had "concerns about petitioner's credibility, including those arising from litigation conduct for which the district court had sanctioned petitioner"; and that there were non-economic reasons to dismiss, such as avoiding the disclosure of documents the government believed to be privileged. U.S. Gov't Br. 6 (internal alterations and citations omitted). The Act's language does not support second-guessing the government's reasons for dismissal. The Act allows private individuals like Polansky to sue on behalf of the United States as a way to further the government's interests, not to frustrate them. To ensure that the government's interests take precedence and that the government can do the job that the Take Care Clause assigns it, the Act allows

the government to retain control over the suit brought in its name by, *inter alia*, settling an action over the relator's objections, or, as relevant here, dismissing the action over the relator's objections. 31 U.S.C. § 3730(c).

The Third Circuit was correct to affirm the dismissal of this case, but the Third Circuit's analysis went astray. In holding that the government must intervene before it can dismiss and that courts should apply Rule 41(a) to such intervention motions, the decision below failed to recognize the constitutional concerns raised by those holdings. The Court should affirm by adopting the D.C. Circuit's analysis in *Swift v. United States*, 318 F.3d 250 (D.C. Cir. 2003), which does not require the government to intervene to dismiss and applies a properly deferential standard of review. *Swift* recognizes the government's right to avail itself of an important tool specifically provided by Congress and necessary to the constitutionality of the *qui tam* mechanism to ensure that the government's larger litigation interests and the public's interests are served. The *Swift* standard correctly declines to insert the Judiciary into a decision assigned by Congress and by the Constitution itself to the Executive.

Validating the government's discretion to dismiss False Claims Act cases brought in its name is good policy, even apart from being constitutionally required. The robust exercise of the government's dismissal power serves the public interest. The enormous number of meritless *qui tam* cases that now clog the federal courts exact enormous costs—as this case illustrates. When the government investigates

the allegations in a *qui tam* action and concludes that they lack legal or factual merit, the government serves the public interest by dismissing that action. The government should be free to exercise this important check on the *qui tam* mechanism—not be deterred from doing so by the threat of mini-trials second-guessing its reasons for dismissal.

ARGUMENT

I. Limiting the Government's Dismissal Authority Raises Serious Constitutional Concerns.

A. Polansky's reading of the False Claims Act violates the Constitution by impinging on the executive branch's exclusive responsibility to "take Care that the Laws be faithfully executed . . . ." U.S. Const. art. II, § 3. As explained by Executive Health Resources, the text of the Act does not support Polansky's extreme argument that the government may never dismiss after initially declining to intervene. EHR Br. 15–20. Polansky errs at the outset by contending that the government lacked authority to dismiss this "private FCA case." Polansky Br. 10. But "private FCA case" is an oxymoron.

While respondents have the better of the textual argument, EHR Br. 15–20; U.S. Gov't Br. 15–37, Polansky's reading would not be constitutionally viable even if it were plausible as a textual matter. As the Court has admonished countless times, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are

avoided, [a court's] duty is to adopt the latter." *Jones v. United States*, 529 U.S. 848, 857 (2000) (internal quotation marks omitted). Construing the Act to give a private citizen like Polansky the authority to take care that federal law be executed, while relegating the government to observer status, would violate the Constitution.

Polansky emphasizes that *qui tam* actions have existed for a long time, Polansky Br. 26–27, but that highly generalized assertion obscures the important truth that *qui tam* actions as they exist today are a recent innovation. Congress's 1986 amendments revolutionized the FCA by increasing the rewards offered to relators, expanding the scope of the Act, and constricting the limitations on *qui tam* actions. *See Cook County v. U.S. ex rel. Chandler*, 538 U.S. 119, 133 (2003) (noting that the amendments "allowed private parties to sue even based on information already in the Government's possession; increased the Government's measure of recovery; and enhanced the incentives for relators to bring suit" (citation omitted)). The 1986 amendments ushered in a new era, as *qui tam* actions exploded in popularity. *See, e.g.*, *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 753 (5th Cir. 2001) (en banc); *Ridenour v. Kaiser-Hill Co.*, 397 F.3d 935, 934–35 (10th Cir. 2005).

This tremendous expansion in the power of relators and the number of private citizens bringing suits on behalf of the government threatens the Executive's authority in a way that the more limited original False Claims Act did not. The inquiry focuses on whether the *qui tam* provisions "disrupt[] the proper balance between coordinate branches [by]

prevent[ing] the executive branch from accomplishing its constitutionally assigned functions." *Morrison v. Olson*, 487 U.S. 654, 695 (1988) (quoting *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977)). That the Executive's "constitutionally assigned functions" remained intact when only a couple of more limited *qui tam* actions were filed each year does not speak to whether the modern FCA—as construed by Polansky—would interfere with the Executive's functions. Now that the FCA reaches into nearly every industry, with expanded penalties and substantive scope, and with multiple *qui tam* actions filed every day, the Take Care Clause concern is far more acute.

Moreover, contrary to Polansky's suggestion that the constitutionality of the FCA's *qui tam* provisions was settled centuries ago, the 1986 amendments were widely viewed as resting on shaky constitutional ground. The government itself concluded that they unconstitutionally impinged on its authority. *Constitutionality of Qui Tam Provisions of the False Claims Act* 209–10 (Op. O.L.C. July 18, 1989). And while most courts have upheld the modern *qui tam* provisions against challenges brought in the wake of the 1986 amendments, they have done so precisely because they have read those provisions in such a way as to avoid impinging on the government's ultimate discretion to take control of a case from a relator and to prosecute the case on its own or, as here, to dismiss the case. *See, e.g.*, *Riley*, 252 F.3d at 753; *U.S. ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 754 (9th Cir. 1993), *as amended* (Nov. 5, 1993); *U.S. ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994).

A crucial premise of the decisions rejecting Take Care Clause challenges is that the government retains sufficient control of the litigation, even after declination. *Ridenour*, 397 F.3d at 934–35; *Riley*, 252 F.3d at 754. If Polansky is correct that so-called "private FCA suits" lock the Executive out cases post-declination, that premise would no longer hold. The Court thus should reject Polansky's extreme position that the government has no ability whatsoever to dismiss post-declination; instead, the Court should adopt a reading of the Act's dismissal provisions that preserves the government's final say over FCA cases, which at least mitigates concerns about the Act's constitutionality.[2]

B. The Third Circuit's decision to uphold the government's dismissal here was appropriate under any standard. But the correct standard—true both to the language and structure of the FCA and to the underlying constitutional principles—is the one adopted by the D.C. Circuit in *Swift*. The Court should hold that (1) the government does not need to intervene before it can dismiss a *qui tam* suit; and (2) the government has nearly unfettered discretion to dismiss an action brought in its name.

The Third Circuit properly held that the government may dismiss a *qui tam* action after initially declining to intervene during the seal period. Pet. App. 30a. But the court went on to hold that the

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[2] To be clear, the constitutionality of the FCA's *qui tam* provisions is an open question even on EHR's interpretation. EHR Br. 7–8. But on Polansky's interpretation, that constitutional question is open-and-shut. EHR Br. 31.

government must move to intervene in order to exercise its dismissal authority and to hold that Rule 41 applies to the dismissal motion. As the government notes, there is no textual requirement that the government intervene before it can dismiss an action, U.S. Gov't Br. 19–27, and background constitutional principles counsel against inferring such a requirement. EHR Br. 33–34; *Swift*, 318 F.3d at 251.

EHR's brief also explains why the Act's text does not authorize judicial review of the reasonableness of the government's dismissal decisions. EHR Br. 43–46. Even if the statutory text were ambiguous, the Third Circuit's interpretation should be rejected because it inserts the Judiciary into the executive function of deciding which enforcement actions should be pursued. The Executive has wide discretion in making prosecutorial decisions. The Court has "recognized on several occasions over many years that an [executive] agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to [the executive] agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (citing *United States v. Batchelder*, 442 U.S. 114, 123–24 (1979)); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 459–60 (1868)). "[T]he choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys)." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021). "Private plaintiffs are not accountable to the people and are not charged with pursuing the public

interest in enforcing a defendant's general compliance with regulatory law." *Id.* And the "government['s] decision not to institute an enforcement action [is] a decision roughly analogous to the government's decision to dismiss a *qui tam* suit[,] where the government is entitled to the greatest discretion." *Borzilleri v. Bayer Healthcare Pharms., Inc.*, 24 F.4th 32, 42 (1st Cir. 2022). Such discretion has been recognized time and again given the "unsuitability for judicial review of [executive] agency decisions to refuse enforcement." *Chaney*, 470 U.S. at 831. And the decision not to prosecute or enforce "has long been regarded as the special province of the Executive Branch." *Id.* at 832.

Perhaps a *prima facie* showing that the government's dismissal request somehow is a fraud on the court or is a product of invidious discrimination could justify some degree of court inquiry into the government's reasons for dismissal. *See Swift*, 318 F.3d at 253–54; EHR Br. 42–46 & nn.13–14. Short of something truly extraordinary, however, the government is entitled to decide not to pursue an action to execute federal law, regardless of whether a private citizen like Polansky wishes to do so. The *Swift* standard best respects the executive power and avoids inserting the Judiciary into core executive decision-making.

II. Robust Government Dismissal Authority Is Consistent with the Statutory Purpose of the Act and the Public Interest.

A practically unfettered right by the government to dismiss would-be enforcement actions brought in its name by private citizens is not only required for the

FCA's *qui tam* provisions to be even debatably constitutional—it is also consistent with the purposes of the Act, which contemplates allowing private citizens to bring suits in the government's interests, but not to perpetuate suits that are counter to those interests. Meritless *qui tam* actions impose enormous costs on courts, entities that do business with the government, and the government itself. When the government dismisses such an action, it furthers the interests of justice and reduces those costs.

A. The number of *qui tam* actions has exploded, and most declined *qui tam* actions are meritless.

In the wake of the 1986 amendments to the False Claims Act, *qui tam* actions have undergone a "surge of popularity." *Riley*, 252 F.3d at 752. More than 14,000 *qui tam* actions have been filed since 1986, with 598 filed in 2021 alone.[3] Before 1986, an entire year might see only a few *qui tam* actions filed; now, more than that may be filed in a single day.

The simple reality is that most *qui tam* actions are meritless. The government intervenes in a small minority of *qui tam* actions—about 20% over the last several years.[4] Yet $44.7 billion of the $48.2 billion

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[3] *See* U.S. Dep't of Justice, Fraud Statistics–Overview (1986–2021), https://www.justice.gov/opa/press-release/file/1467811/download ("DOJ Fraud Statistics").

[4] Press Release, U.S. Dep't of Justice, Deputy Associate Attorney General Stephen Cox Provides Keynote Remarks at the 2020 Advanced Forum on False Claims and Qui Tam Enforcement (Jan. 27, 2020), https://www.justice.gov/opa/speech/

obtained by the government in *qui tam* actions since 1986—nearly 93%—has come from that small subset of intervened cases.[5] In stark contrast, the much larger universe of thousands of declined cases (about 80% of the total number of cases) has produced less than $3.5 billion in recovery—less than 7%.[6] With 80% of the cases producing only 7% of the recovery, the conclusion is inescapable that the universe of declined *qui tam* actions is largely one of cases that lack merit. At the same time, these meritless suits exact an enormous cost.

B. Meritless *qui tam* actions exact enormous costs on entities that provide the government with goods and services.

False Claims Act litigation is time-consuming and costly. With the government involved in some manner in nearly every sector of the economy, FCA actions run from fields that have long been the subject of FCA litigation—such as defense and health care—to industries like financial services, technology, and education. The burdens of FCA litigation thus weigh on our economy as a whole. "Pharmaceutical, medical devices, and health care companies" alone "spend billions each year" dealing with False Claims Act litigation. John T. Bentivoglio et al., *False Claims Act Investigations: Time for a New Approach?*, 3 Fin. Fraud L. Rep. 801, 801 (2011). Healthcare professionals and organizations, including *Amici*'s

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deputy-associate-attorney-general-stephen-cox-provides-keynote-remarks-2020-advanced.

[5] *See* DOJ Fraud Statistics.

[6] *See id.*

members, are "particularly susceptible to actions under the False Claims Act due to the many [claim] forms [they] must sign in order to receive compensation from federal health care programs." Patricia Meador & Elizabeth S. Warren, *The False Claims Act: A Civil War Relic Evolves into a Modern Weapon*, 65 Tenn. L. Rev. 455, 456 (1998). Put simply, "[t]o say that participation in the Government health care programs has become a high-risk endeavor would be an understatement." Timothy P. Blanchard, *Medicare Medical Necessity Determinations Revisited: Abuse of Discretion and Abuse of Process in the War Against Medicare Fraud and Abuse*, 43 St. Louis U. L.J. 91, 134 (1999).

Discovery costs in FCA cases are notoriously high because many (perhaps most) cases turn on complex allegations of reckless violations of technical regulations or contract terms. As a result, if these cases get past the pleading stage, they often require discovery about (among other things) falsity, knowledge, materiality, and damages as they relate to those requirements.

In one recent case involving a defense contract, for example, the defendant "produced over two million pages of documents" before the relator's claims were dismissed on summary judgment nine years after the relator filed the suit. *U.S. ex rel. McBride v. Halliburton Co.*, 848 F.3d 1027, 1029–30 (D.C. Cir. 2017); *see also U.S. ex rel. Barko v. Halliburton Co.*, 954 F.3d 307, 309 (D.C. Cir. 2020). In another case that dragged on for 10 years, the case was dismissed for relator misconduct only after years of discovery. *U.S. ex rel. Nargol v. Depuy Orthopaedics, Inc.*, No. CV

12-10896-MPK, 2021 WL 5831626, at *12 (D. Mass. Dec. 8, 2021), *appeal docketed*, No. 22-1182 (1st Cir. Mar. 15, 2022). And in *Trinity Industries*, a dispute about highway guardrails, a declined *qui tam* action was filed in 2012 and did not finally end until 2019 when this Court denied certiorari. Along the way, the case generated 746 docket entries and a jury verdict of $682 million—before the court of appeals reversed and rendered because the government agency that supposedly was defrauded had made clear that it disagreed with the relator's allegations. *U.S. ex rel. Harman v. Trinity Indus. Inc.*, 872 F.3d 645, 670 (5th Cir. 2017).

Despite the fact that the overwhelming majority of non-intervened cases are meritless, defendants nonetheless face tremendous pressures to settle because the costs of litigating are so high and the potential downside is so great in light of the unusually draconian nature of the FCA's current remedies—treble damages plus per-claim penalties, plus attorney's fees. *See Chandler,* 538 U.S. at 130–31 (noting that the 1986 amendments "raised the fine from $2,000 to the current range of $5,000 to $10,000, and raised the ceiling on damages recoverable under § 3729(a) from double to treble," "turning what had been a 'remedial' provision into an 'essentially punitive' one" (quoting *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 784–85 (2000))*; Int'l Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 153 (4th Cir. 1987) ("danger" of settling vexatious nuisance suits "increased . . . by the presence of a treble damages provision").

And the burden on businesses that provide the government with necessary goods or services is not limited to litigation costs or direct monetary liability. "[A] public accusation of fraud can do great damage to a firm." *U.S. ex rel. Grenadyor v. Ukrainian Vill. Pharmacy, Inc.*, 772 F.3d 1102, 1105–06 (7th Cir. 2014); *see* Sean Elameto, *Guarding the Guardians: Accountability in Qui Tam Litigation Under the Civil False Claims Act*, 41 Pub. Cont. L.J. 813, 824 (2012). Accordingly, having the executive branch exercise its discretion to dismiss meritless *qui tam* actions benefits the private sector and could further eliminate wasteful spending on cases that will not lead to recovery for the government. And because the taxpayers ultimately pay more when it costs more for the government to obtain needed goods and services, reducing the costs imposed by meritless FCA litigation is in everyone's interest.

C. Meritless cases also strain executive branch and judicial resources, underscoring the need for a robust dismissal power.

Defendants are not the only ones who pay the price for meritless *qui tam* cases. Judicial time and attention are finite, so every meritless case detracts from a court's ability to focus on the rest of its docket. Executive branch resources are finite too, and every declined *qui tam* action requires government monitoring and often, if a case gets past the pleading stage, government involvement in discovery.

Thousands of *qui tam* actions are regularly pending under seal awaiting the government's decision as to whether to intervene; the government

nearly always obtains an extension of the statutory 60-day deadline to make that decision, and often many years' worth of extensions. The more resources the government must devote against its will to a case like this, the fewer resources are available to investigate other *qui tam* actions—and the backlog will grow, taxing the Judiciary's resources (and patience with repeated government requests for extensions of the seal). *See, e.g.*, *U.S. ex rel. Brasher v. Pentec Health, Inc.*, 338 F. Supp. 3d 396, 403–04 (E.D. Pa. 2018) (denying government's motion to extend the seal after 10 extensions over five years); *U.S. ex rel. Martin v. Life Care Ctrs. of Am., Inc.*, 912 F. Supp. 2d 618, 623 (E.D. Tenn. 2012) ("The length of time this case has remained under seal [4 years] borders on the absurd.").

It is also important for the Executive to retain its dismissal authority post-declination, because often the reasons for dismissal will not become apparent until after an initial declination. For example, relators may behave badly in litigation, as Polansky did here. *See infra* at 19. And as cases develop, they may involve discovery from the government that the government views as problematic or as not worth the expenditure of its resources in light of its view of the likely recovery.

1. Policing relator misconduct.

The government has every reason to be concerned that some relators may not be appropriate representatives of the United States and that continued litigation of their *qui tam* actions may be contrary to the public interest. Gamesmanship and misconduct by relators are, unfortunately, not

uncommon. Sometimes that misconduct occurs during the seal period,[7] but in many cases it occurs or comes to light only after the government declines to intervene.

In 2016 and 2017, a "professional relator" entity called NHCA Group filed 11 cases against 38 pharmaceutical manufacturers. *See* Gov't Mot. to Dismiss at 1–2, *U.S. ex rel. Health Choice Grp., LLC v. Bayer Corp.*, No. 5:17-CV-126-RWS-CMC (E.D. Tex. 2018) (ECF 116). The government expressed understandable concern about NHCA Group's tactics: NHCA Group sought to develop contacts and inside information "under the guise of conducting a 'research study' of the pharmaceutical industry"; it sought to elicit information without revealing its true purpose of preparing *qui tam* actions; and its website held it out as a healthcare research company and made no mention of its vocation as a relator. *Id.* at 2, 5, 6. The government responded to this conduct by its would-be representative by moving to dismiss those cases, emphasizing the "false pretenses" used by NHCA Group. *Id.* at 6.

In another example, in *United States ex rel. Surdovel v. Digirad Imaging Solutions*, No. 07-0458, 2013 WL 6178987, at *4 (E.D. Pa. 2013), the "relator's counsel's egregious errors completely frustrated the government's ability to investigate the relator's claims." The relator did not provide the government with a copy of the complaint or disclosures for over six

[7] *See, e.g.*, *State Farm Fire & Cas. Co. v. U.S. ex rel. Rigsby*, 137 S. Ct. 436, 441 (2016) (relator's counsel violated the seal by sending sealed information to the press).

years, making it impossible for the government to conduct an investigation. *Id.* Accordingly, the government moved to dismiss.

In yet another example, a relator used his sealed *qui tam* action—which only he knew about—in a short-selling scheme. The government's concern that the relator "used the qui tam process to leverage his financial interests through securities trading . . . convince[d] the government that he [was] not an appropriate advocate of the United States' interests." *Borzilleri*, 24 F.4th at 38 (internal quotation marks omitted).

In other cases, relators have been disqualified for unethical behavior after the government declined to intervene. For example, the Second Circuit affirmed the disqualification of the relator for legal ethics violations in *United States v. Quest Diagnostics Inc.*, 734 F.3d 154, 168–69 (2d Cir. 2013). There, the former general counsel of the defendant violated the rule of professional conduct prohibiting side-switching when he used confidential information from his former client to file a *qui tam* action against his former client. *Id.* The Fifth Circuit similarly disqualified a relator and dismissed a *qui tam* action in *United States ex rel. Holmes v. Northrop Grumman Corp.*, 642 F. App'x 373, 378 (5th Cir. 2016) (per curiam). There, the relator was a lawyer who represented an insurer against a defense contractor in an insurance coverage arbitration. He violated legal ethics rules and a protective order in the arbitration by taking information that belonged to his client in the arbitration and using it to file a *qui tam* action against the defense contractor seeking a bounty for himself.

Id. These abusive *qui tam* actions were dismissed on motions by the defendants, but the government certainly could (and should) have exercised its authority to dismiss them.

Polansky also appears to have engaged in tactics that understandably caused the government concern after the government declined to intervene. As the district court explained, Polansky very belatedly revealed that he had located a DVD in his personal possession containing 14,000 documents, a number of which were relevant to the litigation. Pet. App. 35a–36a. The court did not find Polansky's testimony regarding this episode to be entirely credible and ordered sanctions. *Id.* The court also took issue with Polansky's "unilaterally purport[ing] to change the settled method for selection of claims that had been painstakingly arrived at after several pretrial conferences without offering any explanation as to why he failed to seek court approval." Pet. App. 36a. The court noted that Polansky's actions were "never satisfactorily explained" and left open the possibility of dismissing all or part of Polansky's claims based on misconduct. *Id.* In fact, credibility concerns were a key reason why the United States sought dismissal. U.S. Gov't Br. 6.

Finally, the district court noted that Polansky failed to live up to commitments he made to the government. The government considered not moving to dismiss Polansky's case if he substantially narrowed his claims. Pet. App. 37a. Polansky agreed, but then filed an amended complaint that did not honor that commitment, which reinforced the government's decision to move to dismiss. Pet.

App. 38a. Polansky's conduct makes clear why Congress was wise to allow the government to move to dismiss cases after previously declining to intervene. *See Hoyte v. Am. Nat'l Red Cross*, 518 F.3d 61, 65 (D.C. Cir. 2008); *Ridenour*, 397 F.3d at 932–33.

2. The burden of discovery.

Discovery in declined *qui tam* actions poses a significant burden on the government as well as on defendants. A more robust exercise of the government's dismissal powers would reduce the burden. Discovery from the government has become even more crucial to defendants in the wake of *Universal Health Services, Inc. v. U.S. ex rel. Escobar*, where the Court clarified that the Act's materiality requirement turns on "the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." 579 U.S. at 193 (internal quotation marks omitted). As the Court explained, when discovery regarding materiality is needed, the relevant evidence can include evidence that "the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated" or that "the Government regularly pays a particular *type* of claim in full despite actual knowledge that certain requirements were violated." *Id.* at 195 (emphasis added). Although the Court explicitly noted that cases could be dismissed for lack of materiality at the pleading stage, *id.* at 195 n.6, meritless suits all too often survive defendants' motions to dismiss, leading to expensive discovery.

Obtaining such evidence often requires discovery from the allegedly defrauded government agency to ascertain whether it likely would have denied

payment had it known of the alleged violation. And the Court underscored the fact-intensive nature of the materiality inquiry by specifically rejecting the argument that materiality requires only that, as a legal matter, "the Government would have the option to decline to pay if it knew of the defendant's noncompliance." *Id.* at 194. This case powerfully illustrates the reality that the government may be forced to devote extensive resources to discovery in a case it has declined.

As the Third Circuit recognized, it is entirely rational for the government to use the dismissal authority that Congress conferred to enable it to end a case because of "the litigation costs that [the relator's] suit imposed on the Government, including 'internal staff obligations,' 'anticipated . . . document production,' and the need to expend attorney time preparing and defending depositions of CMS personnel," Pet. App. 29a (quoting Pet. App. 53a–54a), and to focus on cases that the government believes are more worthy.

Sometimes the government tries to avoid discovery burdens in declined *qui tam* actions by refusing to provide discovery sought by the relator or the defendant. Because the government is nominally a non-party in a declined case, the government often invokes *Touhy* regulations to seek to deny or limit discovery. *See U.S. ex rel. Touhy v. Ragen*, 340 U.S. 462, 463, 470 (1951) (upholding "the right of a subordinate official of the Department of Justice of the United States to refuse to obey a subpoena duces tecum ordering production of papers of the Department in his possession . . . based upon a

regulation issued by the Attorney General" (footnote omitted)). Of course, the government is the real party in interest in every *qui tam* action—and must be, for *qui tam* actions to have a hope of being constitutional—and will get the lion's share of any recovery. So *Touhy* regulations intended to enable the government to limit its involvement in third-party litigation are at best a poor fit for FCA cases. It would be fundamentally unfair for the government agency that supposedly was defrauded to claim "discretion" under *Touhy* regulations to decline to provide discovery into the precise issues that *Escobar* makes critical. Where the government believes that a *qui tam* action threatens to occupy substantial government resources with discovery proceedings, the proper course instead is for the government to exercise its dismissal authority.

This case illustrates this dynamic. The government attempted to rely on *Touhy* regulations to resist discovery from the defendant. *See* United States Opposition to Defendant's Motion to Compel, E.D. Pa. (ECF 302). The district court largely overruled the government, finding that the discovery sought was "relevant to the issues." Order Re: Discovery Disputes (ECF 325). And, as discussed above, Polansky's litigation decisions heightened the discovery burden on the government. Ultimately, the government determined that the discovery necessary to the case imposed too great a burden in light of the government's view of the likely payoff (or lack thereof) from the case.

Dismissing a *qui tam* action to avoid discovery burdens is entirely appropriate. The government has

an interest in conserving its own resources, and denying discovery that the relator or the defendant needs is not a viable option. The just course, in a case where the discovery burden is not worthwhile from the government's perspective, is to dismiss. After all, the government's interest is to see that justice is done, not to maximize the number of dollars obtained under the False Claims Act no matter the merits.[8] That is all the more true in the False Claims Act context, where the government is obligated to decide whether a *qui tam* action brought in its name is worthy of being "its case."

D. The government should be incentivized to use its dismissal authority more often.

By enlisting relators to sue on the government's behalf, Congress intended to help the government—to improve the government's information and to expand its reach beyond its own resources. Congress did not intend—and could not constitutionally have intended—to subordinate the government's interests to relators' interests. Relators, in short, are a means to the government's ends. *See Ridenour*, 397 F.3d at 934–35. Accordingly, when relators are not serving the public interest, the government should be more aggressive in dismissing *qui tam* actions. Unfortunately, the government does not use its dismissal authority frequently enough. By one count, "[b]etween 2008 and 2016, there were a total of 5,486

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[8] *See* Robert H. Jackson, U.S. Att'y Gen., Address Delivered at The Second Annual Conference of United States Attorneys: The Federal Prosecutor 3 (Apr. 1, 1940), https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf ("Although the government technically loses its case, it has really won if justice has been done.").

qui tam actions brought [and] the government filed a motion to dismiss only in approximately 62 of those cases."[9]

The Judiciary should not discourage the Executive from exercising its dismissal authority by placing burdensome strictures on that authority. Under *Swift*, the hearing required by the statute is an opportunity for the relator to try to convince the government not to dismiss; it thus helps ensure that a government dismissal decision is carefully considered. 318 F.3d at 253; *see also Borzilleri*, 24 F.4th at 42 ("We agree with the D.C. Circuit that one purpose of the hearing is to provide the relator a 'formal opportunity to convince the government not to end the case.'" (quoting *Swift*, 318 F.3d at 253)). On Polansky's view, in contrast, the dismissal hearing will turn into a "mini-trial" about (1) whether the government can show that the dismissal is rationally related to a valid purpose, and (2) once the government satisfies this burden, whether the relator can show that the decision to dismiss was fraudulent, illegal, or arbitrary and capricious. Polansky Br. 35. It would be counterproductive to require the government to expend substantial resources in such a mini-trial when the government is dismissing the action in order to save resources.

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[9] Brian F. McEvoy, *What the DOJ's Potential Policy Shift on Qui Tam Actions May Mean for Businesses*, Nat'l L. Rev. (Nov. 15, 2017), https://www.natlawreview.com/article/what-doj-s-potential-policy-shift-qui-tam-actions-may-mean-businesses (footnote omitted).

The government thus should be able to make quick work of dismissing *qui tam* actions in its discretion. The Court should make clear that the very resources that the government seeks to save for worthier uses are not to be diverted to litigating whether the government may exercise its dismissal authority in a particular case. That perverse approach to Section 3730(c)(2)(A) is contrary to the public interest, the statutory text, and the separation of powers.

CONCLUSION

The Court should affirm the dismissal of this suit.

Respectfully submitted,

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