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

REPLY BRIEF FOR THE PETITIONER

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I. POST-DECLINATION, THE GOVERNMENT LACKS THE UNILATERAL AUTHORITY TO DISMISS A RELATOR'S FCA CASE

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

According to the FCA's plain text and structure, the Act's dismissal authority is limited to cases where the government "proceed[s] with the action." 31 U.S.C. 3730(b)(4)(A). If the government "declines" that upfront choice, the FCA vests the relator, not the government, with "the right to conduct the action." 31 U.S.C. 3730(b)(4)(B). The government can later intervene, but any intervention must not "limit[] the [relator's] status and rights" (31 U.S.C. 3730(c)(3))—rights that Congress twice confirmed (including two sentences earlier) include "the right to conduct the action." 31 U.S.C. 3730(b)(4)(B), (c)(3).

Respondents nevertheless insist the government's FCA dismissal authority is both freestanding and unbounded. They say it applies whether or not the government initially "proceeds" with the case, initially "declines" but belatedly intervenes, or simply files a dispositive motion as a non-party. They claim Congress did not mean anything by its repeated use of the distinctive phrase "proceed with the action," its clear structure in Section 3730(c) (which links the parties' respective rights to the government's initial choice), or its facial distinction between two terms—"intervening" (which is permitted after the fact) and "proceed[s] with the action" (which is not). 31 U.S.C. 3730(b)(2), (c)(3). And respondents insist the government's belated dismissal—involuntarily terminating the relator's assigned FCA claims—somehow does not

"limit[] the [relator's] status and rights." 31 U.S.C. 3730(c)(3).

Respondents are mistaken. Under respondents' theory, two key clauses in the Act become surplusage (which respondents concede); multiple sentences do not mean what they say; the Act's deliberate structure becomes random (with rights apparently assigned by happenstance—not according to the introductory clause designating their actual statutory grouping); and the government's critical upfront choice—required by a statutory deadline—becomes subject to a full about-face at any point in the case.

Because respondents' theory is foreclosed by the Act's plain text and structure, this Court should reverse.[1]

1. According to respondents, the government's dismissal authority is "virtually unqualified": it is a standalone right that applies irrespective of the government's initial decision to "intervene during the initial 60-day sealing period." EHR Br. 16; U.S. Br. 11. This reading fails for multiple reasons.

a. Respondents' theory would render multiple clauses superfluous, "contradict[ing] well-established principles

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[1] Respondents overstate their case in suggesting that no court has accepted petitioner's theory. EHR Br. 15 n.4. Indeed, two courts—the Seventh Circuit and the Third Circuit below—have accepted the overwhelming majority of petitioner's argument while exhaustively refuting the core of respondents' position. *United States ex rel. CIMZNHCA, LLC* v. *UCB, Inc.*, 970 F.3d 835, 843-849 (7th Cir. 2020); Pet. App. 12a-15a. And while each court took a sharp turn before its final conclusion, each did so based on a theory that does not withstand scrutiny—the notion that a court does not "limit[] the [relator's] status and rights" (a categorical condition) by nevertheless reactivating the "limitations set forth in paragraph (2)" (31 U.S.C. 3730(c)(1))—which, by definition, "limit[] the [relator's] status and rights." Pet. App. 19a.

of statutory interpretation that require statutes to be construed in a manner that gives effect to all of their provisions." *United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928, 933 (2009) (so holding in FCA context); *UCB*, 970 F.3d at 844 (explaining how respondents' theory "makes surplusage" of Section 3730(c)'s surrounding language); Pet. App. 14a-15a (same); U.S. Br. 25 (so conceding); EHR Br. 18 (so conceding).

If respondents are correct that Section 3730(c)(2) applies "[w]hether or not the Government proceeds with the action," then Congress had no reason to include *that very language* in Section 3730(c)(4). That language would do no work—and Congress would not repeat that phrase for one set of rights that apply irrespective of the government's initial decision (paragraph (4)), while not including the same phrase for another set of rights that supposedly also apply irrespective of the government's initial decision (paragraph (2)). See Opening Br. 21-22. Respondents cannot overcome the default presumption that '"Congress acts intentionally and purposely in the disparate inclusion or exclusion."' *Salinas* v. *United States R.R. Ret. Bd.*, 141 S. Ct. 691, 698 (2021); see also *State Farm Fire & Cas. Co.* v. *United States ex rel. Rigsby*, 137 S. Ct. 436, 442 (2016).

In response, both respondents suggest this surplusage is acceptable because Section 3730 elsewhere grants *other* rights "whether or not the Government proceeds with the action," while likewise failing to include that same disclaimer. EHR Br. 18-19 n.6 (citing provisions in subsections (b), (e), and (f)); U.S. Br. 24. Yet respondents over-

look that all of these other rights *appear in other subsections*—not Section 3730(c).[2] Congress did not create a deliberate structure in subsection (c)—with each set of rights grouped by its introductory clause—in order to assign rights at random and ignore that introductory language. The fact that Congress did not feel the need to repeat the same introductory language in addressing *different* rights (which did not demand the same structure and were separated into different provisions) does not excuse respondents' attempt to judicially revise Section 3730(c)'s obvious design.

For its part, the government also suggests that Section 3730(c)(4) might employ an introductory disclaimer because it covers a discovery stay, which "might otherwise be thought to belong only to the full parties in the case." U.S. Br. 25. Yet the government did not explain why that same concern does not equally cover a non-party hoping to file a motion to dismiss—a right traditionally

[2] The one exception: as it does throughout its brief, the government also invokes the right to "settle" the action (31 U.S.C. 3730(c)(2)(B)) as an example of another right that supposedly exists "[w]hether or not the Government proceeds with the case." Br. 19. This is entirely question-begging: the settlement and dismissal provisions both appear in the same subsection (Section 3730(c)(2)), and they accordingly are subject to the same limits. Thus, if the government cannot invoke its dismissal authority without initially "proceed[ing] with the action," it cannot invoke its settlement authority—or any other "limitation[] set forth in paragraph (2)." 31 U.S.C. 3730(c)(1), (2). The government would find this conclusion less surprising had it acknowledged the remaining two rights in that paragraph—which are necessarily limited to situations where "the Government[is] prosecut[ing] the case" (31 U.S.C. 3730(c)(2)(C) (explicitly so stating)). See also *UCB*, 970 F.3d at 845 (each right in paragraph (2) makes sense only if the government is prosecuting the action); Pet. App. 13a-14a ("the other subparagraphs in § 3730(c)(2)" "only make sense if the Government is a party to the case").

exercised only by a case's *actual* parties, not its real-parties-in-interest. *E.g.*, *Eisenstein*, 556 U.S. at 933-934.

The government's concern also ignores the remaining structure of Section 3730(c), including Congress's enumeration of separate introductory clauses for each distinct scenario ("the Government proceeds with the action" (paragraph (1)), "the Government elects not to proceed with the action" (paragraph (3)), or "[w]hether or not the Government proceeds with the action" (paragraph (4)). Had Congress solely used the introductory language in paragraph (4), the government's argument would make more sense—as a freestanding attempt to clarify one set of rights. But the government's theory fails to explain Congress's decision to sort out *all* Section 3730(c) rights, via sequential introductory clauses, into separate buckets based on the government's initial election under Section 3730(b)(4).

Respondents' surplusage problems continue: their reading also renders useless the final independent clause in Section 3730(c)(1), declaring the relator can continue as a party (where "the Government proceeds" with the case) "subject to the limitations set forth in paragraph (2)." 31 U.S.C. 3730(c)(1). If respondents are correct that Section 3730(c)(2) applies "under all circumstances and in any posture," it becomes pointless to "specify that the relator's continued participation * * * is 'subject to' paragraph (2)"—as everything is *always* subject to paragraph (2). *UCB*, 970 F.3d at 844-845; accord Pet. App. 14a-15a.

The government admits that the final clause in paragraph (1) is superfluous under its view. U.S. Br. 22. It weakly says that paragraph (1)'s "subject to" language "simply clarifies" the relator's rights "where the government has intervened." *Ibid.* But if Congress actually thought Section 3730(c)(2) were a freestanding provision

(applicable whether or not the government intervened, rather than textually interlocked with paragraph (1)), it would have been pointless to make that clarification.

The better answer is apparent from a quick glance at Section 3730(c) as a whole: Congress outlined the parties' respective rights where the government takes over in paragraph (1), and it conditioned the relator's continued participation on the limitations in paragraph (2)—which it then immediately enumerated *before continuing to other scenarios*. That reading alone gives meaning to each critical clause in Section 3730(c).

Finally, according to respondents, Congress should have restated the introductory language from paragraph (1) if it also wished paragraph (2) to be subject to the same qualifications. While respondents may have identified an alternative way to write the Act, the existing version is perfectly clear. As noted above, paragraph (2) follows naturally from paragraph (1). The two provisions are textually interlocked and describe "limits" that only make sense where paragraph (1) is already activated. And Congress's decision to group those two paragraphs together—before addressing other scenarios—makes the provision unambiguous. The fact that Section 3730(c) could be rewritten other ways does not cloud the clarity of the existing version.

b. Respondents' theory likewise fails to account for the Act's unmistakable structure. Congress did not merely set out rights at random; it specified the parties' respective rights based on the government's initial decision, assigning different rights where "the Government proceeds with the action" (Section 3730(c)(1)), where "the Government elects not to proceed with the action" (Section 3730(c)(3)), and "[w]hether or not the Government proceeds with the action" (Section 3730(c)(4)). Congress marched through a clear progression in subsection (c),

and it inserted paragraph (2) right where it belongs: specifying the relevant conditions where the government is taking the lead, before addressing alternative scenarios. Opening Br. 17-20.

In response, respondents attempt to read Section 3730(c)(2) in isolation—artificially divorcing it both from Section 3730(c)'s overall structure and from Section 3730(c)(2)(A)'s own surrounding provisions. Pet. App. 8a-15a.

The government's primary response is that the FCA's "structure" in fact divides "the government's rights" 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."''" Br. 17. That certainly describes one theoretical way that Congress could have organized the parties' rights, but that structure appears nowhere in the Act itself. Indeed, the government's "structural" argument does not even account for the four rights in Section 3730(c)(2)—the last two indisputably requiring "full party status" ((C) and (D)), while the government insists the first two (dismissal (A) and settlement (B)) might not.

When looking at the *actual* structure—and not the government's effort to reorganize Section 3730(c)'s concrete provisions into separate buckets—the upshot is clear: the government's Section 3730(c)(2)(A) dismissal authority is indeed contingent on the government "proceeding" with the action under Section 3730(c)(1).

Nor do respondents have any genuine response for Section 3730(c)(2)(A)'s immediate surrounding provisions. As previously established (Opening Br. 18-19), Section 3730(c)(2)'s final two provisions are distinctly out of place *unless* the government is prosecuting the action. Section 3730(c)(2)(C) explicitly addresses problems aris-

ing from a relator's "unrestricted participation" frustrating "the Government's prosecution of the case." 31 U.S.C. 3730(c)(2)(C). That provision thus directly contemplates "the Government proceed[ing] with the action." 31 U.S.C. 3730(c)(1). And Section 3730(c)(2)(D) permits the *defendant* to "limit the [relator's] participation"—a tactic that only makes sense if the government is otherwise taking the lead. (A defendant typically cannot limit a plaintiff's ability to litigate the case against him.) Indeed, as the Seventh Circuit explained, this final paragraph is arguably the most telling of all: "subparagraph (C) makes the government's participation explicit while subparagraph (D) tacitly assumes it—suggesting that so too does the rest of paragraph (2)." *UCB*, 970 F.3d at 845.

These surrounding provisions confirm the obvious link between Sections 3730(c)(1) and (c)(2).

In addressing those key provisions, EHR's only attempt to account for Section 3730(c)(2)(C) is to dodge what that provision actually says. According to EHR, that provision allows the government "to address relator conduct that interferes with proceedings." Br. 18. But the actual provision addresses relator conduct that "would interfere with or unduly delay *the Government's prosecution of the case*" (31 U.S.C. 3730(C)(2)(C))—which necessarily applies where paragraph (1) applies and the government is "prosecuting the action" (31 U.S.C. 3730(c)(1)). EHR cannot explain why the FCA's dismissal authority was grouped together with this provision if one is freestanding and the other is not—and, indeed, the other is textually intertwined with Section 3730(c)(1).[3]

[3] Contrary to EHR's contention, nor does petitioner's reading leave the government defenseless against "improper conduct." Contra Br. 18. While the government, post-declination, cannot invoke the specific statutory restrictions in paragraph (2), it can always invoke general

Finally, it is certainly true that Congress could have placed the rights in paragraph (2) as a "subparagraph of paragraph (1)." U.S. Br. 21. But there is rarely one right way to draft a statute, and the structure here is unmistakable: the first two paragraphs operate together as a unit. Respondents' contrary position ignores the introductory language of the remaining paragraphs (which rotate through each scenario); the section's obvious structure (including that clear march through those different scenarios); and the context of the government's dismissal and settlement rights—grouped together with two neighboring provisions that make sense only if the government is proceeding with the action.[4]

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rules and protections to avoid burdensome discovery, protect state secrets, etc. The government does just fine in the mine run of cases outside the FCA context, whether as a willing participant or not. There is no reason it cannot protect its interests using traditional procedural rules in this parallel setting.

[4] Respondents highlight this Court's dicta in *Kellogg Brown & Root Servs., Inc.* v. *United States ex rel. Carter*, 575 U.S. 650, 653 (2015), which casually observed that the government "retains the right at any time to dismiss the action entirely." 575 U.S. at 653. But that single sentence appeared in the background section of the opinion; it was accompanied by no analysis of any kind; it did not grapple with any of the considerations presented here; and the decision was ultimately addressing an issue having nothing to do with this case. Anyhow, to the extent that single sentence carries any weight, it is counterbalanced by this Court's contrary statements in *Vermont Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), and *United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928 (2009). *Stevens* recognized the relator's "exclusive right to conduct the action" post-declination. 529 U.S. at 769. And *Eisenstein* noted that, upon declination, the government is not even a party, and is "thereafter limited to exercising only specific rights during the proceeding"—without any hint those rights covered Section 3730(c)(2). 556 U.S. at 932-933. At most, these statements are a wash.

2. Nor can respondents account for the Act's textual distinction between "interven[ing]" (31 U.S.C. 3730(c)(3)) and "interven[ing] *and proceed[ing] with the action*" (31 U.S.C. 3730(b)(2), (b)(4)(A); 31 U.S.C. 3731(c)). While Section 3730(c)(3) grants the government a belated right to "intervene," it does *not* grant the government the separate right "to proceed with the action." While the government, post-declination, can thus intervene and participate as a full litigant, it cannot turn back the clock and reactivate the government's rights under Section 3730(c)(1)-(2). Opening Br. 23-24.

Respondents reject this analysis, insisting that "intervening" and "proceeding with the action" are merely "two sides of the same coin." U.S. Br. 31-32. Yet "Congress presumably 'acts intentionally and purposely in the disparate inclusion' of 'particular language.'" U.S. Br. 40. And "proceed with the action" has a distinctive meaning under the Act. Congress conspicuously invoked that phrase throughout the statute, including in putting the government to its critical choice (under Section 3730(b)(4)) and again when specifying the parties' respective rights under Section 3730(c)(1)-(4). Nothing suggests the word choice was accidental. And despite using that phrase at other critical junctures, Congress did *not* say "intervene *and proceed with the action*" in outlining the government's intervention rights under Section 3730(c)(3). The government therefore cannot revive the dismissal authority it ceded with its initial declination. 31 U.S.C. 3730(b)(4)(B), 3730(c)(1).

3. Nor can respondents account for Section 3730(c)(3)'s unqualified protection for relators when the government belatedly intervenes: "When a person proceeds with the action, the court, without limiting the sta-

tus 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." 31 U.S.C. 3730(c)(3).

In response, respondents insist that "[t]he 'without' clause" merely "prohibits 'the court' from imposing its own 'limit[ations]' in granting permission to intervene"; it does not prohibit limiting the relator's "status and rights" via the Act itself. U.S. Br. 30. But the "without" clause is not textually directed at the court; it is a condition (in an indeterminate clause) that applies when the court grants intervention. If respondents were correct, the language would say "the court may not limit the [relator's] status and rights"—not "the court, *without limiting the [relator's] status and rights*," may grant intervention.

Nor is it plausible that Congress would reaffirm the relator's right to conduct the action, prohibit any interference with the relator's "status and rights," and then immediately permit the government's intervention to displace the relator's role and revive multiple limitations on the relator's rights. The FCA nowhere says that if the government intervenes, the relator *loses* the right to conduct the action. One would expect to see that kind of language (rather than a full reservation of the relator's "status and rights") if Section 3730(c)(3) intervention operated the way respondents imagine.

The government further says it is unlikely that Congress would have "intended a clause so 'obscure[]' to produce 'so draconian a consequence.'" Br. 31 (quoting Pet. App. 16a). Yet there is nothing "obscure" about this. Paragraph (3) dictates the rights of the parties where the government elects not to proceed. It explicitly grants the relator the right to conduct the action. It says the government can later intervene, but "without limiting the [relator's] status and rights." And it says nothing about permitting the government to "intervene *and proceed with*

the action." This explicit set of directives is not hard to understand.

The government's contrary view ignores all of these directives and the entire structure of the Act—including Section 3730(b)'s critical inflection point, where the government is instructed to make its key choice. And the government's position again ignores the FCA's history, where the government previously had no intervention rights post-declination; maintaining the same path that existed since the FCA's 1863 enactment is hardly a "draconian" or "extreme" outcome.

In short, if Congress intended to let the government reshuffle the entire litigation and reset the parties' existing rights, it presumably would have said so directly. It would not have said the government can intervene "without limiting the [relator's] status and rights."[5]

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[5] If the government's intervention restores the government's full rights under Sections 3730(c)(1) and (2), then the government could indeed reshape the entire litigation. Paragraph (1) says that the government "shall not be bound by an act of the person bringing the action"—so it presumably would be entitled to relitigate any decisions it disfavored. And Section 3731 says that if the government "elects to intervene and proceed with an action brought under 3730(b), the Government may file its own complaint or amend the [relator's] complaint," including with "additional claims." 31 U.S.C. 3731(c). Those provisions make perfectly good sense where the government "proceeds with the action" at the outset; they make far less sense under respondents' view, where the government can upend the case years into the litigation—a result bad for FCA defendants and relators alike.

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

Petitioner's plain-text reading is bolstered by historical practice and the statutory purpose. Opening Br. 26-31. Respondents' contrary contentions are meritless.

1. a. EHR repeatedly calls petitioner's statutory reading "unprecedented" (Br. 1)—which is an odd way to describe the same rule that has persisted since the FCA's 1863 adoption. As previously established, under the original version of the FCA, the government had no authority to intervene at all; the relator had full control. It was not until 1943 that the government even had the option to take over the case at the outset; but once the government declined, it was barred from participating. Opening Br. 26-27, 32. And while Congress granted the government post-declination intervention rights in 1986, it restricted those rights (as described above) and the government has rarely exercised its dismissal authority.

In response, EHR floats that maybe the government always had dismissal powers, faulting petitioner for not identifying any "past version of the FCA that affirmatively barred the Government from dismissing a qui tam action." Br. 40. This is bizarre. Petitioner's position is not merely grounded in "a fragment of a committee report." Contra EHR Br. 41. It was supported by the laws themselves, expert treatises, and judicial decisions. Opening Br. 26-27. The government itself has now confirmed petitioner's view of the history. U.S. Br. 32-33. And, indeed, on the rare occasion where the issue arose, courts did indeed reject EHR's position: "the rule of law is, and the practice always has been, that a qui tam action is the action of the party who brings it, and the sovereign, however much concerned in the result of it, has no right to interfere

with the conduct of it, except as specifically provided by statute." *United States* v. *Griswold*, 5 Sawy. 25, 44 (D. Or. 1877).

If EHR wishes to establish that the world is upside-down, it seems fair to place the burden on EHR to identify affirmative authority (rather than asking why the imaginary dog did not bark).

b. As petitioner explained, when the government first encountered the 1986 amendments, it apparently read the Act the same way as petitioner: "the government apparently did not believe it had the authority to dismiss the qui tam actions over the relators' objections." *United States ex rel. Sequoia Orange Co.* v. *Baird-Neece Packing Corp.*. 151 F.3d 1139, 1142 (9th Cir. 1998).

In response, the government now says that it was "only the Department of Agriculture" that expressed that view, and its position was grounded in the belief that the FCA "authoriz[ed] the government to dismiss only for legal rather than policy reasons." Br. 33-34. The fact that an executive agency read the statute to mean what it says is telling—even if it was "only" the Department of Agriculture. And suffice it to say that neither the Ninth Circuit nor the district court apparently recognized the government's new qualification. *United States ex rel. Sequoia Orange Co.* v. *Sunland Packing House Co.*, 912 F. Supp. 1325, 1335 (E.D. Cal. 1995) ("USDA believed it lacked authority to dismiss the FCA cases").

For over a century, the government lacked the dismissal authority that respondents now insist the FCA atextually provides. Yet there is no established pedigree of the government dismissing declined FCA actions, and the history cuts against departing from the careful balance Congress struck on the face of the statute.

2. Petitioner has already explained the Act's deliberate effort to channel the government's decision to the initial filing period. Opening Br. 28-31. The Act puts every tool at the government's disposal to exhaustively vet claims, develop and assess facts, and make an informed decision whether to proceed. And while EHR stresses the 60-day initial period (Br. 16), it ignores the liberal extensions (often extending for years) routinely authorized to ensure a proper assessment.

Respondents maintain this clear statutory design fails to address changed circumstances, unexpected developments, or new Administrations. Yet the government has little excuse not to anticipate potential issues at the initial stage, and the Act still empowers the government with multiple tools short of dismissal—including the right to pursue "alternative remed[ies]" (31 U.S.C. 3730(c)(5)), limit discovery interfering with related civil or criminal matters (31 U.S.C. 3730(c)(4)), and intervene to assist (or oppose) the relator's efforts (31 U.S.C. 3730(c)(3)). And this says nothing of the traditional tools available in all litigation (such as resisting burdensome discovery, protecting confidential material, etc.).

For over a century, the government could not intervene post-declination; respondents have failed to document any non-hypothetical showing of any concrete problems.[6]

Finally, EHR vastly overstates the "explo[sion]" of FCA cases and its burden on the government. Br. 6. Such

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[6] Respondents also overlook that new Administrations are often saddled with decisions, regulations, and policies from prior Administrations that cannot easily be overturned. A past decision to greenlight an FCA action—where the government is not even compelled to actively litigate—is surely low on the list of potential headaches for new Administrations.

claims have already been debunked by "the most comprehensive and rigorous empirical study of the FCA's workings," which "unmistakably" show "the growth of *qui tam* litigation in recent decades" "as a steady and stable process of maturation"—not "a 'skyrocketing' increase or the output of a litigation 'monster.'" Prof. Engstrom Amicus Br., *Universal Health Services, Inc.* v. *United States ex rel. Escobar*, No. 15-7, at 1-2 (filed Mar. 3, 2016). These studies further prove that "simple DOJ declination" is "a powerful tool of control," prompting "the overwhelming majority of relators" to drop their claims "after no or only very limited litigation." *Id.* at 2. And while "substantial post-declination litigation is the exception, not the rule," "when it does occur, [it] is often successful." *Id.* at 20-22 & n.23 (suggesting "one-third of [such] relators ultimately won a recovery, thus returning money to the federal fisc despite DOJ's absence").

Anyway, respondents' alarmist position rings hollow when considering the thousands of lawsuits the government files each year; the thousands of government attorneys available to handle those lawsuits; the protections against abusive and burdensome discovery; the equivalent work (in responding to things like FOIA requests) that government agencies handle every day; and the fact that the government is participating on the sidelines, not forced to actively litigate. The Act is calibrated to respect the interests of both the government and relators, and respondents have failed to justify a departure from that political calculus.

C. EHR's Constitutional Arguments Are Insubstantial And No Excuse For Rejecting A Proper Interpretation Of The Statute

EHR cannot escape its weak textual position with a plea to constitutional avoidance—especially one requiring

an unprecedented holding that an established practice dating back to the Founding is unconstitutional. The avoidance canon is not an excuse to rewrite the Act, and EHR's alternative plea to strike down the FCA is baseless, particularly in "a court of review, not of first view" (*Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)).

1. EHR's argument, first and foremost, cannot overcome centuries of practice. As a settled principle, "early congressional enactments 'provid[e] "contemporaneous and weighty evidence" of the Constitution's meaning'"; "[i]ndeed, such 'contemporaneous legislative exposition of the Constitution," "acquiesced in for a long term of years, *fixes the construction to be given its provisions*.'" *Printz* v. *United States*, 521 U.S. 898, 905 (1997) (emphasis added).

That principle is dispositive here. "*Qui tam* actions appear to have been as prevalent in America as in England, at least in the period immediately before and after the framing of the Constitution." *Stevens*, 529 U.S. at 776. And "immediately after the framing, the First Congress enacted a considerable number of informer statutes." *Ibid.*; see *Marvin* v. *Trout*, 199 U.S. 212, 225 (1905).

This Court already found that "history well nigh conclusive" regarding Article III (*Stevens*, 529 U.S. at 777), and nothing suggests it is any less "conclusive" here. *Riley* v. *St. Luke's Episcopal Hosp.*, 252 F.3d 749, 752 (5th Cir. 2001) (en banc).

EHR responds that "an incursion on the President's executive powers cannot be justified based on history alone." Br. 13. But this is not using history to *justify* an incursion, but to confirm *the lack of any incursion* in the first place. The fact that qui tam statutes have been an uncontroversial and accepted fixture in our Nation's laws for over two centuries suggests the FCA peacefully coexists with Article II. See *McCreary Cty.* v. *ACLU of Ky.*,

545 U.S. 844, 896-897 (2005) (Scalia, J., dissenting) ("What is more probative of the meaning of the Establishment Clause than the actions of the very Congress that proposed it, and of the first President charged with observing it?"). EHR cannot override the Founders who actually framed the Constitution. *The Laura*, 114 U.S. 411, 414-416 (1885).

As a last-ditch response, EHR insists the historical record is irrelevant given "the fundamental differences between qui tam suits today and those that predated the 1986 Amendments." Br. 13. This is baseless. According to EHR, the Executive alone can file lawsuits on behalf of the United States, and any such lawsuit must always be subject to dismissal at the Executive's discretion. The very *opposite* was true of the Founding-era qui tam statutes, the original version of the FCA, and even the 1943 amended version of the Act. The 1986 amendments now permit the Executive to intervene post-declination—an advancement that *increased* Executive oversight.

If EHR wishes to distinguish the current and past versions of the FCA, it has to identify *material* differences—those that bear directly on factors relevant to EHR's constitutional analysis. EHR's hand-waving cannot fill the obvious gaps in its theory. Nor can it shield the upshot of EHR's position: EHR can only prevail by establishing that the FCA (and its qui tam predecessors) were unconstitutional for centuries and no one noticed—not Washington, Lincoln, the Framers, or any Member of this Court. *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 541-542 (1943).[7]

[7] *Hess* confronted—and rejected—a series of concerns mirroring EHR's, though not cloaked in constitutional garb. 317 U.S. at 546-547 ("[i]t is said that effective law enforcement requires that control of litigation be left to the Attorney General"). The fact that the Court

2. In any event, EHR's theory is more slogan than substance, and it breaks down immediately under a non-cursory examination.

The FCA does not involve any "encroachment or aggrandizement of one branch at the expense of the other." *Morrison* v. *Olson*, 487 U.S. 654, 693 (1988). The FCA delegates authority *outside* Congress, which "retained for itself no powers of control or supervision" over FCA actions. *Id.* at 694. Indeed, the FCA specifically sets up the Executive as the gatekeeper, granting "'sufficient control' over the conduct of relators to 'ensure that the President is able to perform his constitutionally assigned duties.'" *United States ex rel. Kelly* v. *Boeing Co.*, 9 F.3d 743, 751 (9th Cir. 1993) (quoting *Morrison*, 487 U.S. at 696). To that end: the Executive has plenary control at the outset; if it wishes, it can "proceed with the action," amend the relator's complaint, add or subtract claims, or move to dismiss—thus effectively cutting off the action. 31 U.S.C. 3730(b)-(c), 3731(c).

Even if the Executive declines the case, it still has ample authority to supervise the litigation, limit discovery, pursue other remedies (via administrative or judicial procedures), veto dismissals, or intervene to participate directly. 31 U.S.C. 3730(c)(1)-(5). The fact that the FCA channels the Executive's dismissal decision to a specific phase of the proceedings is not materially distinct from other restrictions imposed on the Executive in litigation—including via procedural rules or statutes of limitations. Given the robust protections available, there is no genuine concern that the FCA "'impair[s] [the Executive] in the performance of its constitutional duties.'" *Clinton* v. *Jones*, 520 U.S. 681, 701 (1997); *Boeing*, 9 F.3d at 750-755.

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did not even pause to flag Article II is further confirmation that this ancient form of action is compatible with our constitutional structure.

In the end, an FCA action proceeds only with the Executive's permission. The Take Care Clause is framed in the passive voice; while it generally tasks the Executive with enforcing the laws, it does not restrict the *means* for the Executive to do that. Goldsmith & Manning, *The Protean Take Care Clause*, 164 U. Pa. L. Rev. 1835, 1836 & n.10 (2016). A decision to let an FCA suit play out (a decision made *by the Executive*) is indeed one "tak[ing] Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3.

Nor does EHR grapple with other key considerations: an FCA suit involves the assignment of a claim, leaving the relator partly litigating for itself (31 U.S.C. 3730(b)(1)); it arises in the civil context; it does not involve an agency promulgating regulations; it does not involve a prosecutor bringing criminal charges; it involves no policymaking or administrative functions; and it involves an individual with no salary, tenure, physical office, or public funding. It involves one-off litigation seeking redress (in a pseudo-proprietary way) for fraud, with a private party litigating to recover an assigned property interest in that claim. And the relator does this not under some novel or untested scheme (compare *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2191 (2020)), but via a legal construct that predated the country's founding by centuries.[8]

EHR's absolutist position is based on snippets of this Court's decisions plucked out of context. If adopted, it would endanger countless schemes where non-federal officers have a role in enforcing federal law. And it vastly

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[8] EHR's Appointments Clause challenge is similarly baseless. "[A] private relator is not an 'official of the United States' in the ordinary sense of that phrase. A relator is neither appointed as an officer of the United States, nor employed by the United States." *Cochise Consultancy, Inc.* v. *United States ex rel. Hunt*, 139 S. Ct. 1507, 1514 (2019).

overreads the demands of Article II—especially as applied to qui tam actions that coexisted with the Founding. This insubstantial challenge cannot save EHR's misreading of the statute.

II. AT A MINIMUM, THE FCA IMPOSES ORDINARY CONSTITUTIONAL BASELINES THAT PRECLUDE SEEKING DISMISSAL FOR IRRATIONAL OR ARBITRARY REASONS

If the government can invoke the FCA's dismissal power post-declination, it must at least satisfy rationality review before extinguishing petitioner's FCA claim.

1. All sides effectively agree that the Third Circuit's Rule 41 standard was incorrect. The question is the appropriate standard to insert in its place. EHR apparently believes there is effectively no standard, while the government concedes that "constitutional" restrictions apply, but believes the correct standard is "the shocks-the-conscience standard." Br. 14. Both are wrong.

Initially, this is a *statutory* question. The challenge is not that an executive actor unlawfully interfered with petitioner's property interest; it is that the courts failed to apply the implicit constitutional baseline baked into the statute itself. Petitioner's "cause of action is a species of [protected] property" (*Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982)), and Congress could not rationally authorize the government to dismiss his action for *irrational and arbitrary* reasons. If Congress wishes to extinguish that property interest, it must honor baseline constitutional norms. U.S. Br. 42 (agreeing the standard "'differ[s] depending on whether it is legislation or a specific act of a governmental officer that is at issue'").

2. If this Court adopts a rationality standard, it should remand for the Third Circuit to apply that standard in the first instance. Contrary to EHR's contention (Br. 50), the

Third Circuit did not already apply that analysis—it instead held, incorrectly, that the (different) shocks-the-conscience standard would otherwise apply. Pet. App. 23a n.17. Because that standard is potentially met even where a rationality standard is not, remand is appropriate to probe the government's (pretextual) basis for its dismissal.

Respectfully submitted.

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