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

BRIEF OF RESPONDENT EXECUTIVE HEALTH RESOURCES, INC. IN OPPOSITION

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QUESTIONS PRESENTED

The False Claims Act, 31 U.S.C. § 3729 *et seq.* ("FCA"), authorizes a private person (the relator) to sue on behalf of the United States over fraud committed against the Government. The Act provides that "[t]he Government may dismiss" the lawsuit over the relator's objection so long as the relator is notified of the motion and receives the opportunity for a hearing on it. *Id.* § 3730(c)(2)(A). At the outset of this case, the Government declined to pursue the action itself. After Petitioner pressed forward, the Government moved to dismiss the suit, citing the "tremendous, ongoing burden" the litigation imposed on it and "concern[s] about relator's ability to prove a FCA violation." The District Court granted the motion, and the Third Circuit—like every court of appeals to address the propriety of a Government motion to dismiss an FCA action the Government previously declined to take over—affirmed.

1. May the Government, after declining to prosecute a *qui tam* action itself, move to dismiss the action?

2. What standard should a court apply to review the Government's decision to dismiss a *qui tam* action brought in its name and seeking redress of injuries allegedly suffered by the United States?

CORPORATE DISCLOSURE STATEMENT

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

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INTRODUCTION

Petitioner asks this Court to decide two questions: whether the Government can move to dismiss a False Claims Act ("FCA") suit in which the Government declined to intervene at the outset of the case, and if it can, what standard should courts apply to review such a motion. Neither question warrants this Court's review.

No court of appeals has ever held that the FCA forces the Government, before a *qui tam* complaint is served on the defendant, to make an irrevocable election between conducting the action itself and ceding total control over the litigation to a private party. Nor is it remotely surprising that the courts that have addressed Petitioner's argument have, without exception, expressly or implicitly rejected it. The Constitution vests the President—not private whistleblowers and their attorneys—with "tak[ing] Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. As several courts of appeals have observed, interpreting the FCA to strip the Executive Branch of the prerogative of directing litigation in which the United States is the real party in interest (and which often has significant implications for the administration of federal programs) would raise grave constitutional concerns.

Nor does this Court need to review the judgment below so that it can prescribe a uniform standard for reviewing Government motions to dismiss *qui tam* actions. Although courts have articulated slightly different standards, the differences are academic. All circuits that have addressed the issue are highly deferential to the Government's dismissal decisions.

Indeed, no court of appeals has ever rejected on the merits a Government attempt to dismiss a *qui tam* suit. There is no reason to think that the outcome of a case has ever, or will ever, turn on minor differences in the formulation of the standard for reviewing such a motion to dismiss. It is therefore unsurprising that this Court has denied in recent Terms at least two petitions seeking review of the same issue.

Finally, even if the Court were inclined to resolve the academic disagreement on the standard for reviewing the Government's authority to dismiss an FCA action under 31 U.S.C. § 3730(c)(2)(A), this petition presents a poor vehicle for addressing that question. Petitioner does not ask the Court to adopt any of the tests the courts of appeals have articulated for analyzing a Government motion to dismiss under Section 3730(c)(2)(A). Instead, he invokes that split solely to obtain this Court's review of his idiosyncratic theory—which no court of appeals has ever adopted—that the Government lacks authority to dismiss an FCA action in which it declined to intervene at the beginning of the case. Nor would Petitioner benefit from a decision by this Court, because dismissal of his case was appropriate under any plausible formulation of the standard. The Government's reasons for dismissing Petitioner's suit are legitimate and reasonable, the District Court did not treat the Government's entitlement to dismiss the action as a close question even under a more relator-friendly standard, and nothing in the Third Circuit's decision suggests that application of a different standard would have yielded a different result. The petition should be denied.

STATEMENT

1. The FCA authorizes the U.S. Government to recover treble damages and civil penalties from anyone who (among other things) "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" to the Government. 31 U.S.C. § 3729(a)(1)(A). Additionally, the FCA remains "the most frequently used of a handful of extant laws creating a form of civil action known as *qui tam*," under which "a private person (the relator) may bring a . . . civil action 'for the person and for the United States Government' against the alleged false claimant." *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 769 (2000). If successful, the relator may obtain a bounty of up to 30 percent of the recovery from the action, plus expenses and reasonable attorney's fees. 31 U.S.C. § 3730(d).

The Government retains broad authority, however, over *qui tam* actions brought in its name and in which it is the "real party in interest." *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 934 (2009). Upon instituting an FCA action, the relator must provide the Government with the complaint and "substantially all material evidence and information" in his or her possession so that the Government may decide whether to "proceed with the action" and conduct the litigation itself, or instead to "decline[] to take over the action, in which case the person bringing the action shall have the right to conduct the action." 31 U.S.C. § 3730(b)(2), (4).

Even when the Government declines to pursue the action itself, it retains significant control over the litigation. The relator may not dismiss the action

without the Attorney General's approval. *Id.* § 3730(b)(1). When the Government declines to take over the case at the outset, it may nevertheless intervene at a later date on a showing of good cause. *Id.* § 3730(c)(3). The Government may limit the relator's participation in the action or settle the action over the relator's objections. *Id.* § 3730(c)(2)(B), (C). And, of particular relevance here, "[t]he Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion." *Id.* § 3730(c)(2)(A).

2.a. When a Medicare patient is admitted to a hospital, the treating physician designates the patient as either an "inpatient" or "outpatient." Because of how the Medicare program is structured, the decision whether to designate a patient as an inpatient or outpatient has implications for how much the patient and Medicare will pay for the patient's hospital stay. Hospitals have different processes for reviewing these designation decisions, with some providers hiring third-party doctors to conduct "concurrent review" of these decisions. Executive Health Resources ("EHR") is one company that provides such concurrent review services. *See* Pet. App. 4a; 3d Am. Compl. ¶ 82, DC Dkt. 428-3 (filed May 2, 2019).[1]

[1] All citations to "DC Dkt." refer to the docket of proceedings in the District Court below, No. 12-cv-4239 (E.D. Pa.).

While working as a consultant for EHR, Petitioner allegedly grew to suspect that EHR was recommending that its hospital clients designate as "inpatient" some patients that Petitioner contends should have been classified as "outpatient." Pet. App. 4a, 33a n.4. As a result, Petitioner alleged that hospitals were billing Medicare for inpatient stays that supposedly were not "reasonable and necessary for the diagnosis or treatment of illness or injury," as the Medicare Act requires. 42 U.S.C. § 1395y(a)(1)(A).

In 2012, Petitioner filed a sealed action based on these allegations in the U.S. District Court for the Eastern District of Pennsylvania, asserting claims under the FCA and state law. Pet. App. 5a. After investigating these allegations for two years, the Government declined to intervene in and take over the action under 31 U.S.C. § 3730(b)(2) and (4). *Id.*

The District Court dismissed Petitioner's state-law claims and all claims he asserted against other defendants. Mem. & Order, DC Dkts. 93–94 (May 10, 2016). With discovery ongoing in connection with Petitioner's sole remaining claim—his FCA claim against EHR—the Government notified Petitioner and EHR on February 2, 2019, that it intended to dismiss the case. Pet. App. 37a; Gov't Resp. to Feb. 26, 2019, Order, DC Dkt. 408 (Feb. 26, 2019). In early May, Petitioner amended his complaint in an effort to stave off dismissal. Pet. App. 37a; 3d Am. Compl., DC Dkt. 428-3 (filed May 2, 2019). That amendment failed to address the Government's concerns about the case. In August 2019, the Government moved to dismiss Petitioner's complaint under 31 U.S.C. § 3730(c)(2)(A). Gov't Mot. to Dismiss, DC Dkt. 526 (Aug. 20, 2019) ("Gov't MTD").

The Government explained that it was moving for dismissal because "the potential benefits of permitting relator's case to proceed are outweighed by both the actual and potential costs to the United States." Gov't MTD at 3. Petitioner's discovery demands had "imposed a tremendous, ongoing burden on the government," necessitating the full-time attention of one HHS attorney and "frequent assistance" from other attorneys and staffers. *Id.* at 18–19. That burden was likely to increase due to the parties' demands for additional document discovery from the Government and to depose "multiple current and former CMS employees"—efforts that threatened to reveal information protected by the deliberative-process privilege. *Id.* at 18–20. Moreover, Petitioner indicated that he intended to reopen issues relating to his prior employment at CMS if a settlement agreement resolving those issues were produced in discovery. *Id.* at 20. To protect federal interests if the litigation were to proceed, the Government anticipated that it would "need to continue devoting considerable resources to monitoring the case," including "a considerable amount of time" from four different attorneys in the Department of Justice's Civil Division and U.S. Attorney's Office. *Id.*[2]

Although the Government viewed these burdens alone as reason enough to dismiss the action, it also

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

noted that they were not justified by the potential benefits of maintaining the litigation. *Id.* at 20–21. Specifically, the Government stated that it "remain[ed] concerned about relator's ability to prove a FCA violation," because he "lack[ed] medical records to determine whether all of the narrowed bellwether claims are false," could not obtain further records because he did not timely seek them in discovery, and "failed to identify to the United States evidence that EHR caused the submission of false claims to CMS following implementation of the Two-Midnight Rule." *Id.*[3]

The Government also observed that it was "concerned about relator's credibility in light of relator's actions in this case." *Id.* This concern presumably arose from Petitioner's failure to produce before the close of discovery a DVD in his possession containing 14,000 CMS records. Order at 1, DC Dkt. 400 (Feb. 21, 2019) (granting in part EHR's motion for sanctions).[4] Accordingly, after "appropriately consider[ing] the potential costs and benefits," the Government "concluded that dismissal of this case best serves the public interest," "based on its assessment of the claims

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[3] The Centers for Medicare and Medicaid Services' "Two-Midnight Rule" codified requirements for inpatient classification previously set forth only in nonbinding agency guidance. *See* 78 Fed. Reg. 50,496 (Aug. 19, 2013).

[4] The District Court also noted that Petitioner had attempted unilaterally to alter, in contravention of a court order, the population of reimbursement claims from which claims would be selected for a bellwether trial, and noted that this gambit "may have significance in future Court rulings in this case." Mem. & Order re Modification of Procedures at 1–2, DC Dkt. 460 (June 26, 2019).

and its interest in conserving federal resources for more meritorious matters and in preserving important government privileges." Reply in Supp. of Gov't MTD at 4, 11–12, DC Dkt. 543 (Sept. 17, 2019).

b. Following briefing and a hearing on the Government's motion to dismiss, the District Court granted the motion and dismissed the case. The District Court observed that courts have applied different standards for reviewing motions to dismiss under § 3730(c)(2)(A). Pet. App. 44a. But the District Court did not decide which standard should apply, because the Government was entitled to dismiss the case even under the Ninth Circuit's comparatively relator-friendly standard, which Petitioner urged the court to apply. Pet. App. 48a–49a. The District Court concluded that the Government had a legitimate interest in avoiding litigation burdens and that, in light of the circumstances of the case, its reasons for dismissing the action were not only not "arbitrary," but "[t]o the contrary, . . . appear[] to be well-reasoned and supported." Pet. App. 56a.

The District Court also ruled that, even if the Government had not moved to dismiss the action, EHR would be entitled to partial summary judgment on Petitioner's claim insofar as it was premised on claims for reimbursement submitted before CMS adopted its Two-Midnight Rule. Pet. App. 66a–70a. With respect to claims submitted after adoption of the Two-Midnight Rule, the District Court did not grant summary judgment; the District Court noted, however, that the Government's motion to dismiss the action and its decision not to take other action against EHR strongly implied that, even assuming for the sake of argument

that EHR agreed with its clients' classification as inpatients of some individuals who should have been classified as outpatients, any such errors were immaterial and thus not a proper basis for FCA liability. Pet. App. 72a–77a.

c. The Third Circuit affirmed. Pet. App. 3a. The court addressed an argument that Petitioner raised for the first time on appeal: That the Government forfeits its right to dismiss a case if it initially declines to pursue the case itself. The Court of Appeals rejected the argument because it read too much into language from this Court's decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), and was at odds with the text and structure of Section 3730. Pet. App. 8a–19a. Although the Court of Appeals also held that the Government must intervene before moving to dismiss an FCA suit, that holding was rendered academic by the court's decision to "construe the Government's motion to dismiss as including a motion to intervene," Pet. App. 28a, a decision Petitioner does not ask this Court to review.

The Court of Appeals then held that a motion by the Government to dismiss an FCA action under Section 3730 should be reviewed using a standard based on Federal Rule of Civil Procedure 41. Pet. App. 21a. Under that standard, dismissal should be nearly automatic if requested before an answer or motion for summary judgment is filed, but thereafter should be granted on "proper" terms to avoid prejudice to the defendant. Pet. App. 22a–24a. The court made clear that these "proper" terms are easily satisfied. *See* Pet. App. 24a (noting that the presumption in favor of allowing dismissal "carries particular force, with constitutional implications in an FCA case").

Applying that standard, the Court of Appeals concluded that the District Court did not abuse its discretion by granting the Government's motion to dismiss. The Court of Appeals observed that the District Court had "exhaustively examined the interests of the parties, their conduct over the course of the litigation, and the Government's reasons for terminating the action." Pet. App. 29a. In particular, the District Court had weighed the considerable "litigation costs that Polansky'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" against the minimal risk of prejudice to the nongovernmental parties, who either supported the motion (EHR) or faced a "doubtful" prospect of success even on significantly narrowed claims and had already "engaged in potentially sanctionable conduct." Pet. App. 29a–30a. "In light of this thorough examination and weighing of the interests of all the parties, and Rule 41(a)(2)'s broad grant of discretion to shape the proper terms of dismissal," the Court of Appeals concluded that the District Court did not abuse its discretion by granting the Government's motion to dismiss. Pet. App. 30a (quotation marks omitted).

REASONS FOR DENYING THE PETITION

This case does not warrant this Court's review. Petitioner contends that the Government cannot move to dismiss an FCA action it declined to pursue at the case's outset, but he fails to identify any decision adopting his cramped understanding of the Government's authority over litigation brought in the United States' name. True, some courts of appeals have

adopted slightly divergent standards for reviewing Government motions to dismiss FCA suits. But the minor distinctions in how these standards are formulated have been immaterial in practice: No court of appeals has *ever* rejected on the merits the Government's attempt to dismiss an FCA action under Section 3730(c)(2)(A). Indeed, this Court has in recent years denied at least two petitions asking it to reconcile this alleged circuit split. Finally, this case presents a poor vehicle for addressing the alleged split because Petitioner does not defend the standard adopted by any court of appeals, and affirmance of the dismissal of Petitioner's action would be appropriate no matter which of those standards were adopted.

I. No Circuit Has Held That the Government May Not Move to Dismiss a *Qui Tam* Suit in Which It Declined to Intervene at the Outset of the Case.

Petitioner contends that the Government may not move to dismiss an FCA action unless, at the case's outset and while it remains under seal, the Government elects to "proceed with the action." Pet. 19–21; 31 U.S.C. § 3730(b)(4)(A). In Petitioner's view, by "declin[ing] to take over the action" at the outset, *cf. id.* § 3730(b)(4)(A), the Government irrevocably waives the authority to direct or to cease litigation being brought in the name of the United States, including the right to dismiss the action over the relator's objections pursuant to Section 3730(c)(2)(A).

Despite failing to raise this argument in the District Court, Petitioner advanced it as his lead argument in the Court of Appeals. Corrected Opening Br. 22–29, ECF No. 35, No. 19-3810 (3d Cir. May 16,

2020). That argument now constitutes the first half of Petitioner's compound question presented. *See* Pet. I ("*Whether the government has authority to dismiss an FCA suit after initially declining to proceed with the action*, and what standard applies if the government has that authority." (emphasis added)).

There is, however, no conflict between or among the courts of appeals on this question. *See* S. Ct. R. 10(a). At least nine courts of appeals have addressed challenges to Government motions to dismiss under Section 3730(c)(2)(A). None has ever held that the Government must intervene at the outset of a *qui tam* action or else sacrifice the authority to move for its dismissal. Rather, "[t]he Government, even after initially declining to intervene, may dismiss the suit over the Relator's objection with notice and an opportunity for a hearing." *United States v. Republic of Honduras*, 21 F.4th 1353, 1355 (11th Cir. 2021); *see also* Pet. App. 15a (3d Cir.); *United States ex rel. Schweizer v. Oce N.V.*, 677 F.3d 1228, 1233 (D.C. Cir. 2012); *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 752 & n.8 (9th Cir. 1993). Although certain courts of appeals have parted ways over the standard for reviewing a Government motion to dismiss, *see* Part II.A, *infra*, those decisions share a common premise: the Government *can* move for dismissal later in the case despite having initially declined to take over the litigation.

Petitioner implicitly concedes that there is no circuit split on this question. *Cf.* Pet. 21–22. Even if this argument had been "suggested by language in Sixth Circuit opinions," "favorably referenced" in one circuit-court dissent, or "advanced by multiple

corporations" as part of an argument that the FCA is unconstitutional, Pet. 19, 21, none of these isolated and decades-old references establishes that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," S. Ct. R. 10(a).[5]

The courts of appeals' unanimous rejection of this argument stands to reason. Section 3730(a)(2)(A) expressly authorizes "[t]he Government [to] dismiss the action" over the relator's objection so long as the relator receives notice of the motion and an opportunity for a hearing. And Section 3730(c)(3) recognizes that the Government, having initially declined to take over the case, "may nevertheless . . . intervene at a later date upon a showing of good cause." It would make little sense if the Government, having so intervened, would nevertheless be powerless to resolve the action, including through compromise or dismissal. *See, e.g.*, *United States ex rel. Christiansen v. Everglades Coll., Inc.*, 855 F.3d 1279, 1285–86 (11th Cir. 2017) (Government, after initially declining to take over case, was entitled to intervene to settle the matter). Rather,

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[5] Petitioner cites Judge Smith's dissenting opinion in *Riley v. St. Luke's Episcopal Hospital*, 252 F.3d 749 (5th Cir. 2001) (en banc), but that dissent attributed the argument to the observations of "[o]ne commentator," citing a law-review student note and acknowledging that the argument was at odds with Judge Hall's opinion for the Ninth Circuit in *Boeing*, 9 F.3d at 752 & n.8. *Riley*, 252 F.3d at 763 n.19. Moreover, Judge Smith invoked these purported restrictions on the Government's authority to dismiss as grounds for holding that the FCA's *qui tam* provisions are unconstitutional—a conclusion that would hardly help Petitioner here.

"when the government intervenes late in the action, a fair interpretation of the statute is that the government has a similar degree of control over the litigation as if it had intervened at the start." *Boeing*, 9 F.3d at 752.

Petitioner's interpretation of the FCA would raise serious doubts about the statute's constitutionality. Article II's Vesting Clause requires that the President of the United States "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. As several courts of appeals have recognized, allowing a private individual to prosecute a civil action on behalf of the United States while denying the Executive Branch the ability to control the action would seriously risk depriving the Executive Branch of the ability to ensure faithful execution of the laws. *See, e.g.*, *United States ex rel. Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 934 (10th Cir. 2005) (avoiding Take Care Clause questions by holding that Government need not demonstrate good cause to intervene before filing motion to dismiss); *see also* Pet. App. 17a–18a (requiring Government to intervene before moving to dismiss did not create Take Care Clause issue given ease of demonstrating "good cause" for intervention); *United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, 970 F.3d 835, 848–49 (7th Cir. 2020) (same), *cert. denied*, 141 S. Ct. 2878 (2021); *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994) (Government's continuing ability to intervene is one of several provisions giving Executive Branch constitutionally adequate control over *qui tam* suits); *Boeing*, 9 F.3d at 752 & n.8 (FCA provides Government "same authority to dismiss or settle [a *qui*

tam] suit regardless of when it intervenes"); *cf. Stevens*, 529 U.S. at 778 n.8 ("express[ing] no view on the question whether *qui tam* suits violate Article II").

Given that no court of appeals has ever adopted Petitioner's crabbed reading of the FCA, this Court's review is not warranted.

II. The Circuits Have Uniformly Affirmed the Government's Authority to Dismiss *Qui Tam* Suits.

Nor should this Court grant certiorari to consider "what standard applies if the government has th[e] authority" to dismiss a *qui tam* suit it initially declined to prosecute itself. Pet. I. Courts of appeals may articulate their standards differently, but "the ultimate results seem to be the same" regardless of the standard applied: the *qui tam* action is dismissed. *United States ex rel. Farmer v. Republic of Honduras*, 21 F.4th 1353, 1356 (11th Cir. 2021). Because these standards are uniformly deferential to the Government, no court of appeals has *ever* held that a *qui tam* suit should proceed where the Government has sought dismissal under Section 3730(c)(2)(A). Absent a reason to believe that technical distinctions among the standards articulated by various courts of appeals are ever outcome-determinative, this question does not warrant the Court's review.

A. All Courts of Appeals Give Broad Deference to the Government's Decision to Dismiss a *Qui Tam* Suit.

A review of the standards articulated by different courts demonstrates that the standards are overwhelmingly similar: All are extremely deferential to the Government. Any differences among these standards are so minor that they are unlikely ever to affect the outcome of any case.

More than twenty years ago, the Ninth Circuit became the first court of appeals to adopt a standard for reviewing the Government's decision to dismiss a *qui tam* suit under Section 3730. *See Sequoia Orange,* 151 F.3d at 1145. The Ninth Circuit acknowledged that "the government's power to dismiss or settle an action is broad," and that the 1986 Amendments to the False Claims Act—which included Section 3730(c)(2)(A)—had "actually increased, rather than decreased, executive control over qui tam lawsuits." *Id.* at 1144. Recognizing the "respect" afforded to "the Executive Branch's prosecutorial authority," the Ninth Circuit saw "no reason to construe" Section 3730(c)(2)(A) as "pos[ing] significant barriers" to Government dismissals. *Id.* at 1146 (quoting *Boeing*, 9 F.3d at 746). Accordingly, under the Ninth Circuit's approach, the Government's dismissal decision "requires no greater justification than that required by the Constitution itself." *Id.*; *see also id.* (standard incorporates the Constitution's prohibition on "arbitrary or irrational prosecutorial decisions"). This Court's decisions emphasize just how narrow this constitutional review should be: "only the most egregious official conduct can be said to be 'arbitrary' in the constitutional

sense." *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 198 (2003).[6]

The D.C. Circuit has concluded that the Government's dismissal decisions warrant even more deference than the Ninth Circuit provided in *Sequoia Orange*. *See, e.g.*, *Hoyte v. Am. Nat'l Red Cross*, 518 F.3d 61, 65 (D.C. Cir. 2008); *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003). Consistent with the statutory text and the historical practice of treating exercises of prosecutorial discretion as unreviewable, *see Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985), D.C. Circuit precedent holds that the Government has "virtually 'unfettered' discretion to dismiss [a] qui tam claim." *Hoyte*, 518 F.3d at 65. The D.C. Circuit also leaves open the possibility, however, that judicial review might be available in cases involving "'fraud on the court'" or a "similar exceptional circumstance." *Id.*; *see also Swift*, 318 F.3d at 253.

In this case, the Third Circuit took a middle-ground approach similar to approaches recently adopted by the Seventh and (arguably) Eleventh Circuits. That standard is grounded in the Constitution and adapted from Rule 41 of the Federal Rules of Civil Procedure. Under that standard, "[i]f the defendant has yet to answer or move for summary judgment, the Government is entitled to dismissal" unless its action is unconstitutionally arbitrary; otherwise, the district

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[6] The Tenth Circuit has adopted the same approach, at least in cases in which the defendant has been served. *See Ridenour*, 397 F.3d at 937 (adopting *Sequoia Orange* where defendant was served); *United States ex rel. Wickliffe v. EMC Corp.*, 473 F. App'x 849, 853 (10th Cir. 2012) (questioning whether this standard applies when the defendant has not been served).

court may condition dismissal on "proper" terms to protect the defendant from prejudice. Pet. App. 23a–24a (3d Cir.); *CIMZNHCA*, 970 F.3d at 850–51 (7th Cir.); *see also Honduras*, 21 F.4th at 1357 (11th Cir.) (decision to dismiss is exercise of prosecutorial discretion by the Executive Branch, though it must accord with the Constitution, other statutes, and Rules 11 and 41 of the Federal Rules of Civil Procedure). This test may differ in its formulation, but the courts applying it have acknowledged that it, too, is highly deferential to the Government's dismissal decision. *See* Pet. App. 23a–25a (dismissal should be granted early in case absent "[o]nly the most egregious official conduct" and is presumptively appropriate even in later stages in light of the Executive Branch's constitutional role); *CIMZNHCA*, 970 F.3d at 852 (standard establishes "generous limits" for the Government that "would be breached rarely if ever").

The First Circuit has held that the Government must state its reasons for dismissal but that the motion should be granted unless the relator "can show that the government's decision to seek dismissal . . . transgresses constitutional limitations"—for example, if it is "based on an unjustifiable standard such as race, religion, or other arbitrary classification" or is "arbitrary in the constitutional sense"—"or that, in moving to dismiss, the government is perpetrating a fraud on the court." *United States ex rel. Borzilleri v. Bayer Healthcare Pharms., Inc.*, 24 F.4th 32, 42 (1st Cir. 2022) (quotation marks omitted); *see also id.* (Rule 41 does not bear on the appropriate standard of review).

In short, courts have articulated the appropriate standard for reviewing the Government's decision to

dismiss a *qui tam* action in slightly different ways, but they all share one common, and critical, characteristic: they all give great deference to the Government's decision to dismiss a *qui tam* suit. Indeed, as discussed below, all circuits apply a standard that is so deferential to the Government that no court of appeals has ever held that a *qui tam* suit should proceed when the Government has moved to dismiss the case.

B. Minor Differences in How Courts Articulate the Deference Owed to the Government Do Not Warrant This Court's Review.

In light of the uniformly deferential standard of review, it is unsurprising that no court of appeals has ever held that the Government was not entitled to dismiss a *qui tam* suit under Section 3730(c)(2)(A). In fact, only two *district* courts have ever denied a Government motion to dismiss under Section 3730, and one of those decisions was reversed, *see United States ex rel. CIMZNHCA, LLC v. UCB Inc.*, No. 17-cv-765, 2019 WL 1598109 (S.D. Ill. Apr. 15, 2019), *rev'd & remanded*, 970 F.3d 835 (7th Cir. 2020), while the Government's interlocutory appeal from the other was dismissed on procedural grounds, *United States ex rel. Thrower v. Academy Mortg. Corp.*, No. 16-cv-2120, 2018 WL 3208157 (N.D. Cal. June 29, 2018), *appeal dismissed*, 968 F.3d 996 (9th Cir. 2020).

Perhaps because variations in the wording of the standard used to review Section 3730(c)(2)(A) motions do not appear ever to be outcome-determinative, it is unsurprising that this Court has recently denied at least two petitions for certiorari asking it to resolve

the same purely academic circuit split. *See CIM-ZNHCA, LLC v. United States*, 141 S. Ct. 2878 (2021) (No. 20-1138); *United States ex rel. Schneider v. JPMorgan Chase Bank, N.A.*, 140 S. Ct. 2660 (2020) (No. 19-678).

Petitioner identifies no persuasive reason why the Court should choose to address this nominal split now. He complains that uncertainty about the applicable standard poses problems for "relators who are investing millions of dollars in litigation that could disappear out from under them." Pet. 11. But the risk that a *qui tam* action could "disappear out from under" a relator, inflicting losses on the relator's financial backers, does not result from the precise formulation of the always-deferential standard governing the Government's exercise of its longstanding authority to dismiss *qui tam* actions. Instead, that risk results from the prospect that the Executive Branch will determine, for example, that a *qui tam* suit "facially lack[s] merit" or threatens "interference with an agency's policies or the administration of its programs." U.S. Dep't of Just., Just. Manual § 4-4.111 (2021). Petitioner's grievance lies not with the court of appeals but with the Executive Branch's assessment of cases brought on the United States' behalf.

Nor is the "present situation" "untenable" because parties in those circuits that have yet to take a side in the circuit split "must . . . waste time and resources briefing" which standard applies and how their case should come out under each standard. Pet. 10. Because the Government is practically always entitled to dismissal regardless of the precise standard that applies, parties and courts can and routinely do conserve resources by assuming without deciding that the

Ninth Circuit's comparatively relator-friendly standard applies. *See, e.g.*, *United States ex rel. Health All. LLC v. Eli Lilly & Co.*, 4 F.4th 255, 267 (5th Cir. 2021); *United States ex rel. Borzilleri v. AbbVie, Inc.*, 837 F. App'x 813, 815–16 (2d Cir. 2020); *Wickliffe*, 473 F. App'x at 853 (10th Cir.); *Swift*, 318 F.3d at 254 (D.C. Cir.).[7] Although Petitioner complains that some courts have "throw[n] up their hands rather than tak[ing] sides in the conflict," Pet. 10, the fact that courts have so often found it unnecessary to take sides on the split because the outcome is the same under any standard underscores the absence of any need for this Court's intervention.

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[7] *See also* Pet. App. 49a (District Court decision below); *United States ex rel. Horsley v. Comfort Care Home Health, LLC*, No. 2:19-cv-229, 2020 WL 4002005, at *6 (N.D. Ala. July 15, 2020); *United States ex rel. Brutus Trading, LLC v. Standard Chartered Bank*, No. 18-cv-11117, 2020 WL 3619050, at *3 (S.D.N.Y. July 2, 2020); *United States ex rel. Borzilleri v. AbbVie, Inc.*, No. 15-cv-7881, 2019 WL 3203000, at *2 (S.D.N.Y. July 16, 2019), *aff'd*, 837 F. App'x 813 (2d Cir. 2020): *United States ex rel. Davis v. Hennepin County*, No. 18-cv-1551, 2019 WL 608848, at *7 (D. Minn. Feb. 13, 2019) (approvingly discussing *Swift* but outcome same under *Sequoia Orange*); *United States ex rel. Stovall v. Webster Univ.*, No. 3:15-cv-3530, 2018 WL 3756888, at *3 (D.S.C. Aug. 8, 2018); *United States ex rel. Amico v. Citigroup, Inc.*, No. 14-cv-4370, 2015 WL 13814187, at *4 (S.D.N.Y. Aug. 7, 2015) (*Swift* more persuasive but outcome same under *Sequoia Orange*); *Nasuti ex rel. United States v. Savage Farms, Inc.*, No. 12-cv-30121, 2014 WL 1327015, at *1 (D. Mass. Mar. 27, 2014) (same); *United States ex rel. Piacentile v. Amgen Inc.*, No. 04-cv-3983, 2013 WL 5460640, at *3 (E.D.N.Y. Sept. 30, 2013) (same); *United States ex rel. Nicholson v. Spigelman*, No. 10-cv-3361, 2011 WL 2683161, at *1 (N.D. Ill. July 8, 2011).

III. This Petition Is a Poor Vehicle for Resolving the Alleged Split Because Relator's Case Was Properly Dismissed Under Any Circuit's Test.

Even if the Court were inclined to resolve the nominal disagreement on the standard for reviewing the Government's decision to dismiss a *qui tam* suit, this case is not a good vehicle for doing so. Despite alleging a four-way split on the substantive standard for reviewing a Government motion to dismiss a *qui tam* action, Petitioner does not defend any of those interpretations, but instead proposes a *fifth* standard that no court of appeals has adopted: that "post-declination, the government lacks the unilateral authority to dismiss the relator's FCA case under Section 3730(c)(2)(A)." Pet. 20. Petitioner's divergence from all the courts of appeals to have addressed the question is reason enough to view this case as inappropriate for reviewing the split regarding the precise standard for reviewing a Government motion to dismiss under Section 3730(c)(2)(A).

Petitioner's decision not to defend squarely any of the existing standards for reviewing Section 3730(c)(2)(A) dismissals stands to reason: Under any of them, his case should be dismissed. The Government moved to dismiss based on its judgment that "the potential benefits of permitting relator's case to proceed are outweighed by both the actual and potential costs to the United States." Gov't MTD at 3. In particular, the Government anticipated that discovery in the case would continue to "impose[] a tremendous, ongoing burden on the government," by (among other things) placing significant demands on government

attorneys' time, requiring depositions of CMS officials, and threatening the production of privileged information. *Id.* at 18–20. Those burdens appeared unjustifiable in light of the Government's "concern[s] about [Petitioner's] ability to prove a FCA violation"—in particular, his failure to obtain evidence that would allow him to prove his claims—as well as concerns about Petitioner's credibility given his conduct in the case. *Id.* at 20–21; *see supra*, at 6–8.

The Government's explanation for moving to dismiss this case is sufficient under any Circuit's test, and Petitioner does not argue otherwise. The District Court held that the Government's explanation was sufficient under the Ninth Circuit's *Sequoia Orange* test, because the Government had a legitimate interest in "minimizing unnecessary or burdensome litigation costs," Pet. App. 54a, and "cite[d] genuine concerns regarding the likelihood that Relator will successfully establish FCA liability," Pet. App. 51a. As a result, that decision "appear[ed] to be well-reasoned and supported." Pet. App. 56a. The Third Circuit held that the District Court did not abuse its discretion in dismissing Petitioner's action "[i]n light of [the court's] thorough examination and weighing of the interests of all the parties, and Rule 41(a)(2)'s broad grant of discretion to shape the proper terms of dismissal." Pet. App. 30a (quotation marks omitted). Petitioner has not argued that the dismissal "transgresse[d] constitutional limitations," which would be necessary to prevail in the First Circuit. *Borzilleri*, 24 F.4th at 42. Nor can there be any doubt that the dismissal was proper under the D.C. Circuit's test, which gives the broadest discretion to the Government. *See Swift*, 318 F.3d at 254.

Petitioner contends that this case presents an "excellent vehicle" for addressing the question presented because the Court of Appeals resolved the question presented solely under its Rule 41-derived standard. Pet. 24. But nothing in the opinion below suggests that the Court of Appeals' affirmance depended on the standard of review it applied. The Court of Appeals praised the District Court's "exhaustive[] examin[ation of] the interests of the parties, their conduct over the course of the litigation, and the Government's reasons for terminating the action" and its "thorough examination and weighing of the interests of all the parties." Pet. App. 28a–29a. It is implausible that the Court of Appeals might have reached a different result had it only applied the very same *Sequoia Orange* standard that it praised the District Court for applying so "exhaustively" and "thorough[ly]." Because the Government was entitled to dismiss Petitioner's *qui tam* action under any standard, this Court should at a minimum await a case in which there is some realistic chance the standard actually matters.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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May 3, 2022

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