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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

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

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

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OPINIONS BELOW

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

JURISDICTION

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

STATEMENT

1. The False Claims Act (FCA or Act), 31 U.S.C. 3729 *et seq.*, imposes civil liability for a variety of deceptive practices involving government funds and property. *Inter alia*, the Act imposes liability on any person

who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1)(A). A person who violates the FCA is liable to the United States for civil penalties plus three times the amount of the government's damages. 31 U.S.C. 3729(a)(1).

The FCA permits private parties (known as relators) to bring suit "in the name of the Government" against persons who have knowingly violated the Act, 31 U.S.C. 3730(b)(1), through a mechanism commonly known as a "qui tam" action. When a qui tam suit is filed, the government may "elect to intervene and proceed with the action" during an initial 60-day period (which the court may extend "for good cause shown") while the relator's complaint remains under seal. See 31 U.S.C. 3730(b)(2) and (3). If the government intervenes during the seal period, "the action shall be conducted by the Government." 31 U.S.C. 3730(b)(4)(A). If the government declines to intervene, the relator may proceed with the litigation, 31 U.S.C. 3730(b)(4)(B), but the United States remains a "real party in interest," *United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928, 930 (2009) (citation omitted). In either event, the relator may receive a share of any proceeds recovered through the suit. 31 U.S.C. 3730(d). Every FCA action is premised on an alleged legal wrong done to the United States, and the statute can "be regarded as effecting a partial assignment [to the relator] of the Government's damages claim." *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765, 773 (2000).

The Act establishes several mechanisms for the Executive Branch to maintain control over an FCA suit, even when the government initially declines to intervene. The government may intervene after the seal

period expires "upon a showing of good cause." 31 U.S.C. 3730(c)(3). The government may prevent a relator from dismissing the suit, 31 U.S.C. 3730(b)(1), and it may "settle the action with the defendant notwithstanding the objections" of a relator "if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances," 31 U.S.C. 3730(c)(2)(B). As most relevant here, the FCA also provides that "[t]he Government may dismiss the action notwithstanding the objections of the [relator] if the [relator] has been notified by the Government of the filing of the motion and the court has provided the [relator] with an opportunity for a hearing on the motion." 31 U.S.C. 3730(c)(2)(A).

2. Petitioner is a former consultant to respondent Executive Health Resources, Inc., a company that assists hospitals and physicians in submitting bills to the United States for covered services as part of federal healthcare programs such as Medicare. Pet. App. 4a. Petitioner filed this FCA qui tam action in 2012, alleging that Executive Health had caused its client hospitals to submit false claims for payment by billing Medicare for inpatient medical services that should have been billed at lower outpatient rates. *Id.* at 4a-5a. Specifically, petitioner claimed that Executive Health had advised hospitals to bill Medicare for inpatient care contrary to guidance from the Department of Health and Human Services (HHS) in its Medicare Benefit Policy Manual and an October 2013 regulation known as the "Two Midnight Rule." *Ibid.*; see *id.* at 34a-35a & nn.6-7. That regulation states that billing for inpatient services generally is appropriate "when the admitting physician expects the patient to require hospital care that crosses two midnights." 42 C.F.R. 412.3(d)(1).

Petitioner amended his complaint twice before the United States declined to intervene in 2014. Pet. App. 32a. In July 2016, the district court denied Executive Health's motion to dismiss the then-operative Second Amended Complaint. See *id.* at 5a. The court later bifurcated the case into two phases involving Medicare claims submitted before and after HHS's promulgation of the Two Midnight Rule, *ibid.*, and it ordered a bellwether trial for a sample of petitioner's Phase I, pre-Rule claims, *id.* at 5a-6a.

In February 2019, the United States informed the parties that it was considering moving to dismiss this action under 31 U.S.C. 3730(c)(2)(A). See Pet. App. 6a. The government then engaged in extensive discussions with the parties and evaluated the information that they provided. See *id.* at 37a; C.A. App. 210-211. In May 2019, after that process concluded, the United States informed the district court that it would not move to dismiss at that time, provided that petitioner substantially narrowed the scope of his claims. Pet. App. 37a, 55a. The government expressly reserved its right to file a motion to dismiss later if the circumstances of the litigation warranted. *Id.* at 37a, 56a.

3. a. In the ensuing months, multiple developments caused the United States to reconsider whether this case should be dismissed. See Pet. App. 38a-39a. First, petitioner filed a Third Amended Complaint that purported to narrow the scope of his claims but that, in the government's view, did not narrow them appropriately. See *id.* at 37a-38a, 55a. Second, after the Third Amended Complaint was filed, the district court rejected the government's invocation of the deliberative-process privilege and ordered the United States to produce withheld documents in response to Executive Health's discovery

requests. See *id.* at 38a, 56a. Third, the government reviewed the deposition of petitioner, which provided new, material information bearing on the government's assessment of whether this case should go forward. See *id.* at 38a-39a, 56a.

In August 2019, the United States moved to dismiss this FCA action pursuant to Section 3730(c)(2)(A). See Pet. App. 39a. The government explained that, since its earlier decision not to seek dismissal, it had "continued to evaluate the matter" and had come to a different conclusion in light of the "additional developments" just described. C.A. App. 600-601. The United States provided multiple justifications for its dismissal motion: the "tremendous, ongoing burden on the government" if the litigation continued, including the time needed for federal attorneys to protect the United States' interests and for attorneys and other personnel to collect and produce documents; the need to protect privileged information; the government's doubts about petitioner's "ability to prove a[n] FCA violation"; and the United States' "concern[s] about [petitioner's] credibility," including because of litigation conduct for which the district court had sanctioned petitioner. *Id.* at 616-619; see *id.* at 601. In light of those factors, the government concluded that "the potential benefits of permitting [petitioner's] case to proceed are outweighed by both the actual and potential costs to the United States and therefore that dismissal of this matter is appropriate." *Id.* at 601.

The government's motion to dismiss explained that, while courts of appeals have applied slightly different standards when considering Section 3730(c)(2)(A) motions to dismiss, dismissal of this case was appropriate under any of those standards. C.A. App. 599-600 (citing

Swift v. *United States*, 318 F.3d 250 (D.C. Cir.), cert. denied, 539 U.S. 944 and 539 U.S. 944 (2003); *United States ex rel. Ridenour* v. *Kaiser-Hill Co., L.L.C.*, 397 F.3d 925 (10th Cir.), cert. denied, 546 U.S. 816 (2005); and *United States ex rel. Sequoia Orange Co.* v. *Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998), cert. denied, 525 U.S. 1067 (1999)).

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

The district court explained that the United States had identified "legitimate burdens that it will face if this case is permitted to continue." Pet. App. 51a; see *id.* at 51a-54a. The court was unpersuaded by petitioner's argument that his case should not be dismissed in light of "the potential financial recovery" if he prevailed, because the government had identified "genuine concerns regarding the likelihood that [petitioner] will successfully establish FCA liability." *Id.* at 51a; see *id.* at 50a-51a. The court found that petitioner had identified nothing to suggest that the government's dismissal request was "fraudulent, arbitrary and capricious, or illegal." *Id.* at 55a. Rather, the court found the government's

"rationale" for the motion "to be well-reasoned and supported" by "the developments that occurred after" the United States had previously declined to seek dismissal. *Id.* at 56a; see *id.* at 54a-57a.

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

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

a. The court of appeals first described when and how the government may move to dismiss an FCA action under Section 3730(c)(2)(A) after declining to intervene at the outset of the case. See Pet. App. 8a-19a. Citing decisions of the Sixth and Seventh Circuits, see *United States ex rel. Poteet* v. *Medtronic, Inc.*, 552 F.3d 503, 519-520 (6th Cir. 2009); *United States ex rel. CIM-ZNHCA, LLC* v. *UCB, Inc.*, 970 F.3d 835, 844 (7th Cir. 2020), cert. denied, 141 S. Ct. 2878 (2021), the court of appeals held that the government must first intervene in the action under Section 3730(c)(3) before moving to dismiss in this context. See Pet. App. 11a n.8, 12a. The court observed that, while other circuits do not require the United States to intervene before moving to dismiss under Section 3730(c)(2)(A), see *id.* at 11a n.8, requiring intervention would have only modest practical consequences, because "showing 'good cause' is neither a burdensome nor unfamiliar obligation," *id.* at 17a-18a, and because a district court considering an intervention request must take care to "'avoid[] offense to the separation of powers'" when the United States seeks to intervene in an FCA action "to vindicate the prerogatives of the Executive Branch," *id.* at 18a (citation omitted).

The court of appeals further held that, even if the government initially declines to intervene in a qui tam suit while the relator's complaint is under seal, the government "can seek leave to intervene at any point in the litigation upon a showing of good cause" under Section 3730(c)(3). Pet. App. 12a; see *id.* at 12a-15a. The court rejected petitioner's argument that the United States had irrevocably forfeited its ability to seek dismissal under Section 3730(c)(2)(A) by declining to intervene at the outset. See *id.* at 15a-17a. The court explained that petitioner's "draconian" position has no support in this Court's precedents and is refuted by "the language of" Section 3730(c) "as a whole." *Id.* at 16a.

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

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

notice and an opportunity for a hearing before the case is dismissed," *id.* at 22a.

The court of appeals concluded that, when a government motion to dismiss a qui tam suit "is filed before the defendant files an answer or summary judgment motion," the case should be dismissed immediately and without the need for any district court order, consistent with Rule 41(a)(1), so long as the relator receives "an opportunity * * * to be heard" and "subject only to the bedrock constitutional bar on arbitrary Government action." Pet. App. 21a, 23a. If the defendant has filed a responsive pleading, by contrast, the relator must receive an opportunity for a hearing, and the case may be dismissed "only by court order, on terms that the court considers proper," consistent with Rule 41(a)(2). *Ibid.* (citation omitted). With respect to the latter scenario, the court of appeals noted that, even in ordinary civil litigation, dismissal following a defendant's responsive pleading "'should be allowed unless the defendant will suffer some prejudice other than the mere prospect of a second lawsuit.'" *Id.* at 24a (quoting *Estate of Ware* v. *Hospital of the Univ. of Pa.*, 871 F.3d 273, 285 (3d Cir. 2017), cert. denied, 138 S. Ct. 2018 (2018)). And the court observed that, in the present statutory context, "that rule carries particular force, with constitutional implications," because the government is "seeking to dismiss a matter brought in its name." *Ibid.*

Applying its approach to the circumstances of this case, the court of appeals held that the district court had not abused its discretion in granting the United States' motion to dismiss under Section 3730(c)(2)(A). Pet. App. 28a-30a; see *id.* at 30a (observing that Rule 41(a)(2) provides a "'broad grant of discretion'" to a district court "to shape the 'proper' terms of dismissal") (citation

omitted). 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." *Id.* at 28a-29a. In particular, the district court had considered the litigation costs that petitioner's suit would impose on the government, as well as the events that had occurred "in the run-up to the Government's motion that justified its interest in discontinuing the action." *Id.* at 29a; see pp. 4-5, *supra*. The court of appeals found that the district court had "adequately considered the prejudice to the non-governmental parties," and had appropriately determined that petitioner's potential recovery did not justify refusing dismissal, including "because the prospect of success was doubtful." Pet. App. 29a. The court of appeals further found that the district court had properly taken account of petitioner's "potentially sanctionable conduct during the course of discovery" in concluding that this case should be dismissed. *Id.* at 29a-30a.[1]

ARGUMENT

Petitioner contends (Pet. 10-24) that the court of appeals erred in affirming the district court's dismissal of this FCA action under Section 3730(c)(2)(A). That argument lacks merit. The court of appeals correctly held that the district court did not abuse its discretion in accepting the United States' multiple justifications for dismissing petitioner's FCA complaint—which was brought in the name of the United States, for wrongs

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

allegedly done to the United States. No court of appeals has accepted petitioner's construction of Section 3730. The modest differences among the standards by which various circuits have evaluated motions under Section 3730(c)(2)(A) should very rarely if ever be outcome-determinative, and petitioner's own suit would be dismissed under any court of appeals' standard. This Court recently denied petitions for writs of certiorari raising similar arguments, see *United States ex rel. CIMZNHCA, LLC* v. *UCB, Inc.*, 141 S. Ct. 2878 (2021) (No. 20-1138); *United States ex rel. Schneider* v. *JPMorgan Chase Bank*, 140 S. Ct. 2660 (2020) (No. 19-678), and the same result is appropriate here.

1. The court of appeals correctly affirmed the district court's order granting the United States' motion to dismiss petitioner's FCA complaint under Section 3730(c)(2)(A).

a. As the D.C. Circuit has long recognized, the FCA is best read to preserve the Executive Branch's virtually unfettered discretion to dismiss an action brought in the name of the United States to remedy a wrong done to the United States. See *Swift* v. *United States*, 318 F.3d 250, 252, cert. denied, 539 U.S. 944 (2003); *Hoyte* v. *American Nat'l Red Cross*, 518 F.3d 61, 65 (D.C. Cir. 2008) (reaffirming *Swift* where the government had initially declined to intervene).

Section 3730(c)(2)(A)'s specification that an FCA suit may be dismissed by "'[t]he Government'"—"meaning the Executive Branch, not the Judicial"—"suggests the absence of judicial constraint." *Swift*, 318 F.3d at 252. That inference is strengthened by this Court's recognition that a decision not to prosecute is within "the special province of the Executive Branch," to which the Constitution assigns the responsibility to take care that

the laws are faithfully executed. *Heckler* v. *Chaney*, 470 U.S. 821, 831-832 (1985). A federal agency's "decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Id.* at 831. The "government's judgment" that a particular FCA claim should be dismissed under Section 3730(c)(2)(A) "amounts to" a similarly "unreviewable" exercise of prosecutorial discretion, because "[n]othing in § 3730(c)(2)(A) purports to deprive the Executive Branch of its historical prerogative to decide which cases should go forward in the name of the United States." *Swift*, 318 F.3d at 252-253.

Other FCA provisions reinforce the D.C. Circuit's conclusion. In contrast to Section 3730(c)(2)(A), the next subsection of the Act specifies particular criteria for courts to apply when the United States seeks to exercise control over qui tam suits "notwithstanding the objections of the" relator. 31 U.S.C. 3730(c)(2)(A) and (B). Under Section 3730(c)(2)(B), the government may settle a case only if "the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances." 31 U.S.C. 3730(c)(2)(B). "The absence of such detailed language in § 3730(c)(2)(A) strongly suggests that Congress did not intend to condition the granting of the government's motion to dismiss on a judicial determination of fairness or reasonableness." *Borzilleri* v. *Bayer Healthcare Pharmaceuticals, Inc.*, 24 F.4th 32, 40 (1st Cir. 2022).

Several other FCA provisions likewise establish specific standards for courts to apply in resolving various types of government motions that may impact qui tam relators.[2] Section 3730(c)(2)(A) places no similar limi-

[2] See 31 U.S.C. 3730(c)(2)(C) (court may limit a relator's participation after a "showing by the Government" that unrestricted

tations on the government's authority to *dismiss* a case, and it does not articulate any substantive standards for a court to use to evaluate the government's dismissal decision. "Where Congress includes particular language in one section of a statute but omits it in another section * * * , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (brackets and citation omitted).

b. Rather than apply *Swift*, the court of appeals here joined the Seventh Circuit in *United States ex rel. CIM-ZNHCA, LLC* v. *UCB, Inc.*, 970 F.3d 835 (2020), cert. denied, 141 S. Ct. 2878 (2021), in holding that, when the government has initially declined to intervene in an FCA action, the government must first intervene "upon a showing of good cause" under Section 3730(c)(3) before moving to dismiss under Section 3730(c)(2)(A). Pet. App. 12a.[3] The court further held that, if the

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participation would "interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment"); 31 U.S.C. 3730(c)(4) (court may stay discovery "upon a showing by the Government that certain actions of discovery by the [relator] would interfere with" a related investigation or prosecution); *ibid.* (court may extend the stay "upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence" and that proposed discovery would interfere with other ongoing matters); 31 U.S.C. 3730(c)(3) (court may permit the government to intervene outside the seal period "upon a showing of good cause"); 31 U.S.C. 3730(b)(3) (court may extend the seal period "for good cause shown").

[3] The court of appeals viewed the Sixth Circuit as likewise having held that the United States must intervene before seeking dismissal under Section 3730(c)(2)(A). See Pet. App. 11a n.8, 12a (citing *United States ex rel. Poteet* v. *Medtronic, Inc.*, 552 F.3d 503, 519-520 (2009)). The Sixth Circuit's decision in *Poteet*, however, did not

defendant has filed a responsive pleading, the government must establish that dismissal is "proper" under Federal Rule of Civil Procedure 41(a)(2). See Pet. App. 20a-21a.

The court below erred in requiring the United States to intervene before moving to dismiss an FCA action under Section 3730(c)(2)(A), and in holding that the government must establish "good cause" and "proper" justification in order to obtain dismissal. See, *e.g.*, *Swift*, 318 F.3d at 252-253. But the analytical differences between the Third Circuit's approach and those of other courts of appeals had no practical effect on the disposition of this case. Although the court held that the government must intervene before seeking dismissal in this context, the court further held that the government "can seek leave to intervene at any point in the litigation," Pet. App. 12a, and it "construe[d] the Government's motion to dismiss as including a motion to intervene," *id.* at 28a. The court correctly determined that the United States had offered sufficient justification for seeking intervention and dismissal here, including the significant burden on government resources if this case continued, the need to protect privileged information, and the government's doubts about petitioner's credibility and his ability to prove any FCA violation. See *id.* at 28a-30a. Those multiple, independent bases for the Section 3730(c)(2)(A) motion—which both lower courts

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involve a motion to dismiss under Section 3730(c)(2)(A). Instead, the Sixth Circuit there considered—and rejected as "possibly frivolous"—a relator's argument that Section 3730(c)(2)(A)'s hearing requirement applies to a motion to dismiss under the FCA's first-to-file rule, 31 U.S.C. 3730(b)(5), and public-disclosure bar, 31 U.S.C. 3730(e)(4)(A). *Poteet*, 552 F.3d at 519-520. The Sixth Circuit had no occasion to address the prerequisites the government must satisfy before filing a Section 3730(c)(2)(A) motion to dismiss.

credited, and which are plainly rational—would have entitled the United States to dismissal of this FCA action under any standard that has been adopted by a court of appeals.

c. Petitioner contends that, once the government declines to intervene and take over an FCA case during the initial period while the complaint remains under seal, the United States irrevocably forfeits any "authority to dismiss the relator's FCA case under Section 3730(c)(2)(A)." Pet. 20; see Pet. 19-22. The court of appeals correctly rejected that "draconian" argument, Pet. App. 16a; see *id.* at 15a-17a, which petitioner raised for the first time on appeal, and which no circuit has accepted.

i. Petitioner observes (Pet. 20) that, when the government declines to take over an FCA qui tam suit at the outset, the relator "shall have the right to conduct the action." 31 U.S.C. 3730(b)(4)(B). He also invokes this Court's statement in *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), that when the United States declines to take over a qui tam suit, "the relator's 'control' [over the action] is 'exclusive.'" Pet. 20 (quoting *Stevens*, 529 U.S. at 769). Neither *Stevens* nor Section 3730(b)(4)(B) supports petitioner's argument.

The *Stevens* Court used the word "'exclusive'" only in its "background explanation of the FCA's framework," Pet. App. 15a n.11 (citation omitted), and only to mean that "the relator, as opposed to any other private individual, [can] proceed with an FCA action after the Government declines it," *id.* at 15a. The Court "nowhere suggest[ed] that the relator's right to control the action is exclusive vis-a-vis the Government." *Id.* at 16a. To the contrary, while the FCA "can reasonably be

regarded as effecting a partial assignment of the Government's damages claim" to the relator, *Stevens,* 529 U.S. at 773, the United States retains significant mechanisms to control qui tam litigation even when it initially declines to intervene. Those mechanisms include the rights (1) to intervene later "upon a showing of good cause," 31 U.S.C. 3730(c)(3); (2) to "settle the action with the defendant notwithstanding the objections" of the relator "if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances," 31 U.S.C. 3730(c)(2)(B); and (3) to prevent the relator from voluntarily settling or dismissing the action, 31 U.S.C. 3730(b)(1).

Petitioner also invokes (Pet. 20) an FCA provision that allows the government to intervene after the initial seal period "without limiting the status and rights of the person initiating the action." 31 U.S.C. 3730(c)(3). But to the extent that provision is relevant here at all, it "cuts the other way, for the statutory rights that the relator retains upon the Government's intervention can be no more or less than those originally vested by the FCA." Pet. App. 16a. The relator thus retains "the right to continue as a party to the action, *subject to the limitations* set forth in paragraph (2)," 31 U.S.C. 3730(c)(1) (emphasis added), including the government's entitlement to seek dismissal under subparagraph (c)(2)(A).

For similar reasons, petitioner is wrong in invoking (Pet. 20) this Court's observation that, when the government initially declines to intervene in an FCA action, it is "limited to exercising only specific rights during the proceeding." *United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928, 932-933 (2009). Among those

specific rights is the right to dismiss the action "notwithstanding the objections of the [relator]," so long as the relator receives notice and an opportunity for a hearing. 31 U.S.C. 3730(c)(2)(A).

Petitioner identifies no legal or practical justification for singling out the right to seek dismissal under Section 3730(c)(2)(A) as the one statutory right that the government irrevocably loses if it declines to intervene during the initial seal period. It is far from clear, moreover, that adoption of petitioner's approach would benefit relators as a group going forward. If declining to move for dismissal immediately were treated as a permanent waiver of that statutory prerogative, then the government might often seek dismissal during the seal period in circumstances where it would otherwise allow relators a further opportunity to establish that their suits have merit.

ii. Petitioner acknowledges (Pet. 21) that his proposed timing requirement for the United States to seek dismissal has expressly "been rejected by the Third, Seventh, and Ninth Circuits," and has "implicitly" been rejected "by others." Petitioner asserts (Pet. 19), however, that "language in Sixth Circuit opinions" supports his position. He principally invokes (Pet. 20) that court's statement in *United States ex rel. Poteet* v. *Medtronic, Inc.*, 552 F.3d 503 (2009), that "Section 3730(c)(2)(A) applies only when the government has decided to 'proceed[] with the action' and has assumed 'primary responsibility for prosecuting the action.'" *Id.* at 519 (citation omitted; brackets in original). But as explained above (see pp. 13 n.3, *supra*), *Poteet* did not involve a government motion to dismiss under Section 3730(c)(2)(A), and the Sixth Circuit made that statement to explain why Section 3730(c)(2)(A) did not

require a hearing for a motion to dismiss an FCA action on *other* grounds. See 552 F.3d at 519-520.

Petitioner also invokes (Pet. 21) the Sixth Circuit's observation in *United States* v. *Health Possibilities, P.S.C.*, 207 F.3d 335 (2000), that Congress's 1986 amendments to the FCA "limit[ed] the opportunity for the government to completely take over a *qui tam* action after the initial sixty-day period." *Id.* at 343. But the Sixth Circuit was merely noting that, when the United States initially declines to take over an FCA action, the Act requires it to establish "'good cause'" in order to assume control at a later date. *Ibid.* (quoting 31 U.S.C. 3730(c)(3)). The court did not suggest that the government's initial decision to allow the relator to conduct the suit effects a permanent waiver of other rights that the FCA specifically confers. To the contrary, the court's ultimate holding was that Section 3730(b)(1), which authorizes the government to veto a relator's proposed settlement of a qui tam suit, applies even after the government has declined to intervene during the initial seal period. See *id.* at 207 F.3d at 337, 339, 341, 343-344.

Finally, petitioner asserts (Pet. 21-22) that his approach has been endorsed by a footnote in a dissenting opinion in *Riley* v. *St. Luke's Episcopal Hospital*, 252 F.3d 749, 763 n.19 (5th Cir. 2001) (Smith, J., dissenting), and by "multiple corporations," in cases concerning the constitutionality of the FCA's qui tam provisions. Those sources provide no sound basis for this Court to grant review to consider an argument that no court of appeals has accepted. See Sup. Ct. R. 10. And Judge Smith's dissent in *Riley* invoked petitioner's interpretation as potential support for the conclusion that the FCA "violates the separation of powers embodied in the Take Care Clause in a number of ways," 252 F.3d at 761,

though he acknowledged that courts had rejected that interpretation in order to avoid constitutional concerns, *id.* at 763 n.19 (citing, *e.g.*, *United States ex rel. Kelly* v. *Boeing Co.,* 9 F.3d 743, 752 & n. 8 (9th Cir. 1993), cert. denied, 510 U.S. 1140 (1994)). To the extent his *Riley* dissent is relevant here, Judge Smith's apparent view that petitioner's proposed timing requirement would unconstitutionally impinge on the government's usual litigation prerogatives provides a further reason to reject that construction of the statute.

2. Petitioner contends (Pet. 22-23) that there is an urgent need to resolve the differences among the courts of appeals' approaches to reviewing Section 3730(c)(2)(A) motions to dismiss. That argument lacks merit. The conflict that petitioner identifies has had little practical significance across multiple cases over nearly two decades.

a. As explained above, the D.C. Circuit has held that the United States has virtually unfettered discretion to dismiss an FCA action under Section 3730(c)(2)(A). See *Swift*, 318 F.3d at 252.

The Ninth Circuit has applied a slightly more demanding standard, drawing on the test for "determin[ing] whether executive action violates substantive due process" and holding that the United States may dismiss a pending qui tam FCA action so long as there is a rational basis for that disposition. *United States ex rel. Sequoia Orange Co.* v. *Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (1998), cert. denied, 525 U.S. 1067 (1999). The Tenth Circuit has followed the Ninth Circuit's approach, at least where the defendant has been served with the complaint. See *United States ex rel.*

Ridenour v. *Kaiser-Hill Co., L.L.C.*, 397 F.3d 925, 936 (10th Cir.), cert. denied, 546 U.S. 816 (2005).[4]

In *CIMZNHCA*, the Seventh Circuit adopted another variant of the dismissal standard, drawing on the FCA's good-cause standard for intervention and Rule 41's provisions governing plaintiffs' dismissal motions in general civil litigation. See 970 F.3d at 850-852. The Third Circuit in this case adopted the Seventh Circuit's approach. Pet. App. 8a-25a.[5]

The First Circuit recently held that district courts should grant Section 3730(c)(2)(A) motions unless the relator establishes that the United States' decision to seek dismissal "transgresses constitutional limitations or that, in moving to dismiss, the government is perpetrating a fraud on the court." *Borzilleri*, 24 F.4th at 42. The court found that the FCA "contemplates a judicial judgment of some kind, providing a level of protection for the relator's interest in the suit," but it saw "no basis in the statutory language for requiring the government to make a prima facie showing that its motion is rational, reasonable, or otherwise proper." *Id.* at 40.

b. Contrary to petitioner's contention (Pet. 18-21), the modest variations among the courts of appeals' approaches to evaluating Section 3730(c)(2)(A) motions do

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[4] The Tenth Circuit has reserved judgment on what standard applies when the government moves to dismiss an FCA case before the defendant has been served. See *United States ex rel. Wickliffe* v. *EMC Corp.*, 473 Fed. Appx. 849, 852-853 (2012).

[5] A panel of the Eleventh Circuit agreed with the Third and Seventh Circuits that Rule 41(a) supplies the appropriate standard of review, though it held (based on circuit precedent) that the government need not intervene before seeking dismissal. See *United States* v. *Republic of Honduras*, 21 F.4th 1353, 1355-1357 (2021). On March 9, 2022, the Eleventh Circuit *sua sponte* granted rehearing en banc and vacated the panel decision. 26 F.4th 1252 (mem.).

not now (and may not ever) require this Court's standardization.

First, while the court below erred in holding that the government must intervene in an FCA action in order to seek dismissal under Section 3730(c)(2)(A), that holding had no practical impact on the disposition of this suit, see pp. 14-15, *supra*, and is unlikely to meaningfully affect future FCA suits. The court followed the Seventh Circuit by construing the government's motion to dismiss as a motion to intervene, and it held that, by satisfying the standard for dismissal, the United States necessarily established the requisite good cause to intervene. See Pet. App. 28a; *id.* at 17a-18a (holding that requirement to intervene should not be "burdensome" for the government); see also *CIMZNHCA*, 970 F.3d at 849. As a result, the question whether the FCA "requires the government to intervene before dismissing an [FCA] action is largely academic." *Swift*, 318 F.3d at 252; see *ibid.* (stating that, even if intervention were required, the court "could construe the government's motion to dismiss as including a motion to intervene"); *Borzilleri*, 24 F.4th at 38 n.7 (agreeing with the D.C. Circuit that the question is largely academic).

With respect to the substantive standard that governs Section 3730(c)(2)(A) dismissal motions, all the courts of appeals that have considered the issue agree that such motions should receive substantial deference. The Third Circuit here explained that dismissal in response to a Rule 41(a) motion is generally appropriate "even in a typical case between private parties," and that this "rule carries particular force, with constitutional implications in an FCA case, where it is the Government seeking to dismiss a matter brought in its name." Pet. App. 24a (footnote omitted). Properly

applied, the Ninth Circuit's standard for Section 3730(c)(2)(A) motions likewise gives the government wide latitude to dismiss an FCA case, comparable to the limited review that courts apply to substantive due process challenges to executive action. See *Sequoia Orange*, 151 F.3d at 1145. And while courts have debated the appropriate standard among themselves since the D.C. Circuit decided *Swift* in 2003, no court of appeals has ever held that any particular qui tam action should go forward over the United States' Section 3730(c)(2)(A) motion.

Indeed, precisely because the choice among the competing standards typically makes no practical difference, multiple courts of appeals have found that particular FCA complaints should be dismissed without deciding precisely what standard applies. Those courts have recognized that the various formulations are all highly deferential and have concluded, in the cases before them, that the government would prevail under any of the competing approaches. The Fifth Circuit, for example, recently held that it need not determine which standard applied because dismissal was warranted "even under the test most favorable" to the relators—*i.e.*, Ninth and Tenth Circuit's "rational-relation" test from *Sequoia Orange*. *Health Choice Alliance, L.L.C.* v. *Eli Lilly & Co.*, 4 F.4th 255, 267 (5th Cir. 2021). The Second Circuit similarly declined to specify the appropriate standard because the relator in the case before it had "fail[ed] even the more stringent [*Sequoia Orange*] standard." *United States ex rel. Borzilleri* v. *AbbVie, Inc.*, 837 Fed. Appx. 813, 816 (2020). A number of district courts have followed the same approach, including the district court in this case. See, *e.g.*, Pet. App. 49a-57a; *United States ex rel. Graves* v. *Internet Corp. for*

Assigned Names & Numbers, Inc., 398 F. Supp. 3d 1307, 1310-1311 (N.D. Ga. 2019); *United States ex rel. Johnson* v. *Raytheon Co.*, 395 F. Supp. 3d 791, 794 (N.D. Tex. 2019); *United States ex rel. Stovall* v. *Webster Univ.*, No. 15-cv-3530, 2018 WL 3756888, at *3 (D.S.C. Aug. 8, 2018). And in *Swift*, the D.C. Circuit similarly held in the alternative that, "[e]ven if [*Sequoia Orange*] set the proper standard, the government easily satisfied it." 318 F.3d at 254.

Unless and until a case arises in which a court of appeals' choice of the appropriate standard appears to have affected the outcome, this Court's review is not warranted.

3. Finally, petitioner contends (Pet. 24) that this case would be a suitable vehicle for addressing the Section 3730(c)(2)(A) dismissal standard because that issue "is outcome-determinative" here. Petitioner is incorrect.

The only interpretation of Section 3730 that would avoid dismissal of petitioner's FCA action is his extreme position that the United States irrevocably forfeits its right to invoke Section 3730(c)(2)(A) once it declines to intervene during the initial seal period. As explained above, however, no court of appeals has accepted that view, which is contrary to the FCA's text and structure, and which would severely impinge on the government's traditional, constitutionally grounded authority to control litigation brought in its name. See pp. 15-19, *supra*.

Under any of the approaches to Section 3730(c)(2)(A) motions that a court of appeals has actually adopted, petitioner's action would be dismissed. Petitioner suggests in a single sentence (Pet. 24) that his complaint could survive dismissal under the most relator-friendly *Sequoia Orange* standard. But the district court

explained at length why that standard would require dismissal here. Pet. App. 49a-57a. The court of appeals in turn found that the district court had "exhaustively examined the interests of the parties [and] their conduct over the course of the litigation," and that the government had identified multiple legitimate "reasons for terminating th[is] action." *Id.* at 28a-29a. The lower courts' opinions amply demonstrate that the choice among competing standards for evaluating Section 3730(c)(2)(A) motions did not affect the outcome of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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