

No. 25-271

In the Supreme Court of the United States

UNITED STATES OF AMERICA EX REL.
MARK J. O'CONNOR AND SARA F. LEIBMAN,
Petitioners,

v.

USCC WIRELESS INVESTMENT, INC.; TELEPHONE AND
DATA SYSTEMS, INC.; KING STREET WIRELESS, LP;
ALLISON CRYOR DINARDO; UNITED STATES CELLULAR
CORPORATION; KING STREET WIRELESS, INC.; CARROLL
WIRELESS, LP; CARROLL PCS, INC.; BARAT WIRELESS,
LP; BARAT WIRELESS, INC.

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the D.C. Circuit

REPLY BRIEF FOR PETITIONERS

Sara M. Lord
ARNALL GOLDEN
GREGORY, LLP
2100 Pennsylvania
Avenue NW, Suite 350S
Washington, DC 20006
(202) 677-4054
sara.lord@agg.com

Daniel Woofter
Counsel of Record
Kevin K. Russell
RUSSELL & WOOFER LLC
1701 Pennsylvania
Avenue NW, Suite 200
Washington, DC 20006
(202) 240-8433
dw@russellwoofter.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

INTRODUCTION..... 1

ARGUMENT3

 I. Respondents concede the governing standard
 but fail to show that the panel applied it.....3

 II. The panel did not dispute that petitioners
 could easily rebut the affirmative defense.7

 III. The *Advantage* decision demonstrates that
 intervention is warranted.8

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

<i>Cunningham v. Cornell University</i> , 604 U.S. 693 (2025)	1, 2, 3, 4, 6, 7, 8, 10, 11
<i>de Csepel v. Republic of Hungary</i> , 714 F.3d 591 (D.C. Cir. 2013)	3
<i>Jones v. Bock</i> , 549 U.S. 199 (2007)	4, 5
<i>Perry v. Merit Sys. Prot. Bd.</i> , 582 U.S. 420 (2017)	1
<i>Richards v. Mitcheff</i> , 696 F.3d 635 (7th Cir. 2012)	4
<i>United States ex rel. Maur v. Hage-Korban</i> , 981 F.3d 516 (6th Cir. 2020)	10
<i>United States ex rel. Moore & Co. v. Majestic Blue Fisheries, LLC</i> , 812 F.3d 294 (3d Cir. 2016)	10
<i>United States ex rel. O'Connor v. U.S. Cellular Corp.</i> , 153 F.4th 1272 (D.C. Cir. 2025).....	2, 8, 9, 10
<i>Vasquez Arroyo v. Starks</i> , 589 F.3d 1091 (10th Cir. 2009)	5

Other Authorities

Complaint, <i>Lampert & O'Connor, P.C. v. Carroll Wireless, LP</i> , No. 1:07-cv-00800-JDB (D.D.C.) (May 2, 2007)	5
--	---

INTRODUCTION

The Brief in Opposition confirms this case turns on a pure question of law that *Cunningham v. Cornell University*, 604 U.S. 693 (2025), resolved in petitioners' favor: Whether a plaintiff must anticipate and negate an affirmative defense at the pleading stage, or whether dismissal is proper only when the plaintiff's potential rejoinder is "foreclosed" by the complaint's allegations. *See* BIO 1-3.

Respondents claim that petitioners "pleaded themselves out of court" by addressing original-source status in their complaint. BIO 15. But petitioners did not put themselves in checkmate when they moved the first pawn. The panel acknowledged that O'Connor "was a partner at the law firm and involved in filing the complaint" that forms the basis of respondents' opening defense. Pet. App. 16a. Petitioners' ability to prove O'Connor an original source of the information underlying his prior *qui tam* suit is not "foreclosed" by their complaint. *Contra* BIO 1.

The panel's error is straightforward. It is undisputed that the public-disclosure defense is an affirmative defense. *See* Pet. App. 9a. As *Cunningham* teaches, plaintiffs need not "negate" affirmative defenses in their complaints. 604 U.S. at 702 (quoting *Perry v. Merit Sys. Prot. Bd.*, 582 U.S. 420, 435 n.9 (2017)). Respondents agree. *See* BIO 15 (quoting *Cunningham*, 604 U.S. at 694). But respondents eventually concede that the panel did not apply *Cunningham's* rule. *See* BIO 19 (arguing that *Cunningham* does not apply in "uniquely" FCA context). Instead, the panel created a new procedure for FCA cases, holding that in the D.C. Circuit,

“relators will generally bear the burden of demonstrating” their rebuttal to this affirmative defense at the pleading stage. Pet. App. 15a. That is not what *Cunningham* requires. Whether petitioners’ allegations “negate” respondents’ public-disclosure defense asks whether petitioners’ rejoinder remains *possible*, not whether they have *proven* it.

The panel justified this departure on two policy grounds that respondents embrace (*see* BIO 18-19): Original-source status “benefits relators,” and relators are “best situated to know the facts.” Pet. App. 15a. The panel’s reasoning is indistinguishable from Cornell’s argument in *Cunningham* that ERISA plaintiffs should bear the pleading burden on exemptions because they “have access to the relevant information” and could easily address the exemptions. Resp. Br. 43, *Cunningham*, 604 U.S. at 693. The Court did not accept the argument; even “serious concerns” that “an avalanche of meritless litigation” would ensue, this Court held, “cannot overcome” statutory structure. *Cunningham*, 604 U.S. at 707-08.

The post-petition decision in *Advantage* further reveals the panel’s manifest error. Applying the same “materially adds” standard to similar allegations, the same panel reversed and remanded for further proceedings, holding that petitioners’ independent allegations materially contributed to what was already publicly disclosed about respondents’ frauds. *See infra* Part III. The inconsistent outcomes underscore the need for this Court to intervene.

The Court should either grant review or summarily reverse. At a minimum, a GVR on the first Question is warranted in light of *Cunningham*.

ARGUMENT**I. Respondents Concede The Governing Standard But Fail To Show That The Panel Applied It.**

Respondents' lead argument against a GVR is that petitioners "already presented the substance of their argument to the Court of Appeals twice, based on binding Circuit precedent." BIO 21. That argument refutes itself. True, petitioners argued below that black-letter law required reversal, but the panel disagreed—not by applying the foundational procedures that govern affirmative defenses, but by creating a new exception to those established pleading burdens "uniquely" tailored to the FCA's affirmative public-disclosure defense. *See* BIO 19.

The panel began by holding that a defendant may raise an affirmative defense when the facts supporting the defense are "clear from the face of the complaint." Pet. App. 12a (quoting *de Csepel v. Republic of Hungary*, 714 F.3d 591, 608 (D.C. Cir. 2013)). So far, so good. From there, *Cunningham's* teaching is plain: Plaintiffs need not address, much less "negate," affirmative defenses in their complaints. *See* 604 U.S. 693, 702 (2025). Respondents agree that this means the negation must be "foreclosed" by the face of the complaint, accepting all the allegations as true. *See* BIO 1. But the panel expressly departed from that hornbook procedure because rebutting the FCA's affirmative defense "benefits relators" who are "best situated to know the facts." Pet. App. 15a. Thus, in the D.C. Circuit, the panel held that "relators will generally bear the

burden of *demonstrating*” their original-source rebuttal at the pleading stage. *Ibid.* (emphasis added).

Cornell marshalled similar policy arguments in *Cunningham*, claiming that because plaintiffs “have access to the relevant information” and are well positioned to address ERISA’s exemptions, the pleading burden should lie with plaintiffs. *See* Resp. Br. 43, *Cunningham*, 604 U.S. at 693. Rather than accept the argument, the Court held that even “serious concerns” that “an avalanche of meritless litigation” would ensue if the exemptions were treated as affirmative defenses could not “overcome the statutory text and structure.” *Cunningham*, 604 U.S. at 707-08.

Respondents cannot have it both ways. They cannot claim the panel “followed” established procedure (*see* BIO 21) while defending the panel’s policy-based departure from it (*see* BIO 18-19). And they cannot argue that *Cunningham* adds nothing when *Cunningham* forecloses the only rationales the panel invoked to justify its departure.

The BIO’s invocation of *Jones v. Bock*, 549 U.S. 199 (2007), for the “plead themselves out of court” concept doesn’t save respondents. *See* BIO 3. *Jones* holds that plaintiffs can defeat their own claims by pleading facts that *establish* an affirmative defense. *See* 549 U.S. at 215. In other words, *Jones*, like *Cunningham*, only bars claims when the complaint itself establishes all elements of an affirmative defense. It does not authorize dismissal when a plaintiff nods at such a defense but does not prove it inapplicable. *See* *Cunningham*, 604 U.S. at 700; *Richards v. Mitcheff*, 696 F.3d 635, 637 (7th Cir. 2012)

(Easterbrook, C.J.) (pleading stage dismissal based on an affirmative defense is proper only when the plaintiff's allegations show "the defense is airtight"); see, e.g., *Vasquez Arroyo v. Starks*, 589 F.3d 1091, 1096-97 (10th Cir. 2009) (reversing dismissal even though prisoner's allegations facially suggested his claims were untimely, because plaintiffs, even under the PLRA, do "not have to anticipate affirmative defenses," "a statute of limitations is subject to tolling[,] and nothing in [the] complaint indicates that [the plaintiff] would have no meritorious tolling argument" (citing *Jones*, 549 U.S. at 212-13)).

Respondents do not even try to claim the complaint establishes that O'Connor cannot be an original source of the complaint in *Lampert & O'Connor, P.C. v. Carroll Wireless, LP*, No. 1:07-cv-00800-JDB (D.D.C.) (May 2, 2007). How could they? The only paragraph in the complaint that addresses the affirmative defense does not mention *Lampert & O'Connor*. It provides in full: "To the extent there has been a public disclosure unknown to the Relators, the Relators are the 'original source' under 31 U.S.C. § 3730(e)(4)(B)," because they "have independent material knowledge of the information on which the allegations are based and have voluntarily provided the information to the Government before filing this *qui tam* action based on that information." SAC ¶ 37. By its terms, that paragraph covers the information underlying the fraud claims in *Lampert & O'Connor*. See *infra* p.7.

To be clear, petitioners were not attempting to surreptitiously plead around the affirmative defense. *Contra* BIO 1. It seemed obvious to petitioners that the filing in *Lampert & O'Connor* was not a public

disclosure that could bar their complaint. Even now, respondents do not argue that petitioners' allegations *preclude* them from showing that O'Connor was personally involved in his prior firm's filing. *See* BIO 7 (acknowledging that "one of [the petitioners] represented the law firm in its prior action, and additionally was a member of the law firm at the time"). Instead, the most respondents can say is that the District Court did not err in dismissing with prejudice over petitioners' request to dismiss without prejudice so they could add the necessary allegations. *See* BIO 21-22.

This is what a GVR is for: To require the lower court to reconsider a decision that rests on reasoning an intervening Supreme Court decision repudiates. *Cunningham*, handed down the day after en banc review was denied, confirms the panel was not free to invent procedural hurdles for *qui tam* plaintiffs just because the panel believed there were sound reasons for requiring relators to disprove the affirmative defense at the outset of the case. *Cf. Cunningham*, 604 U.S. at 708 ("These are serious [policy] concerns but they cannot overcome the statutory text and structure."); *id.* at 711 (Alito, J., joined by Thomas and Kavanaugh, JJ., concurring) ("[T]he Second Circuit tried to formulate a rule that would weed out plainly unmeritorious suits at the pleading stage. The court attempted to achieve an admirable goal, but established pleading rules do not allow that workaround.").

II. The Panel Did Not Dispute That Petitioners Could Easily Rebut The Affirmative Defense.

Far from foreclosing original-source status, the complaint on its face supports it. O'Connor's *name* appears in the caption of the 2008 filing. The Second Amended Complaint alleges he is the "original source" of those allegations and "voluntarily provided the information to the Government before filing this *qui tam* action based on that information." See SAC ¶ 37. The panel acknowledged these facts. It even recognized that O'Connor "was a partner at the law firm and involved in filing the [prior] complaint." Pet. App. 16a. When a relator's name appears in the caption of the filing that forms the basis of the public-disclosure defense, his comeback is not foreclosed. It is corroborated.

The panel did not doubt that petitioners could have rebutted the defense at later stages. Petitioners argued that respondents failed to meet their burden because "plaintiffs could easily amend the complaint to allege and ultimately prove that O'Connor was in regular, voluntary communication with the Government as early as 2007 regarding the allegations underlying the 2008 Complaint." See Petr. C.A. Reply Br. 9-10. At this stage, that should have been more than enough. See *supra* pp.4-5. And if there were any real doubt about it—for example, if nothing about the prior filing looked like it might be O'Connor's own—the "district court" could have "insist[ed] that [petitioners] file a reply to an answer that raises [the public-disclosure] affirmative defense." See *Cunningham*, 604 U.S. at 711 (Alito, J., joined by Thomas and Kavanaugh, JJ., concurring)

(footnote omitted). Petitioners were never given the chance.

The procedural history of this case thus illustrates why *Cunningham*'s burden-allocation rule matters. Petitioners raised O'Connor's original-source status in the District Court based on his involvement in the 2008 filing and were ignored. They raised it again on appeal and were told they failed to *prove* it. They requested that "any dismissal should be without prejudice" so they could "correct any defects" the court might identify. *See* JA900. The District Court instead dismissed with prejudice without explanation. *See* Pet. App. C. The panel affirmed, holding it was "not an abuse of discretion ... not to grant ... leave [to amend] sua sponte." Pet. App. 22a n.9 (quotation marks omitted). But petitioners did not ask for leave to amend "sua sponte"—they requested that denial be without prejudice. This all occurred before petitioners had the opportunity to plead their obvious rebuttal, let alone develop the factual record on an affirmative defense that defendants bear the burden of proving.

III. The *Advantage* Decision Demonstrates That Intervention Is Warranted.

The petition argued that the "materially adds" standard announced in this case is "impossible to meet in declined cases." Pet. 30. The post-petition decision in the related "*Advantage*" case, *United States ex rel. O'Connor v. U.S. Cellular Corp.*, 153 F.4th 1272 (D.C. Cir. 2025), shows that is not literally true. The same panel, applying the same standard, found these same relators satisfied the "materially adds" standard in that companion case against many of the same respondents. *Id.* at 1281.

But *Advantage* does not vindicate the panel's approach to the second Question Presented *because* these two cases involve the same relators, the same fraud scheme with many of the same defendants, and the same legal standard, with opposite results. The D.C. Circuit's "materially adds" standard may not be impossible to meet, but it is unpredictable and too demanding for real relators uncovering real fraud.

This case proves the point. Petitioners are telecommunications attorneys with specialized expertise who uncovered that U.S. Cellular committed *per se* violations of federal law. Petitioners commissioned independent engineering analyses revealing that U.S. Cellular had integrated King Street's entire spectrum into its own network, violating the 25% leasing cap. *See* Pet. App. 6a-7a. Respondents have never disputed that these discoveries prompted DOJ to reopen a closed investigation and vigorously reinvestigate for nearly five years. *See id.* 21a. Working with petitioners, DOJ investigators forced respondents to produce the 2011 Network Sharing Agreement that respondents had concealed and never disclosed. *See ibid.* The 2011 NSA *proved* that King Street had leased its spectrum in 90 license areas to U.S. Cellular, violating the bright-line rule 90 times over. *See* Pet. 15-16. A single violation disqualified King Street from keeping any of the \$100 million in bid credits granted by the FCC. *See ibid.*

Most tellingly, DOJ then shared the 2011 NSA with petitioners while the case remained under seal. *See* Pet. 16. That act alone shows that petitioners' contributions were material. The government is not prompted to investigate and then share smoking-gun evidence with relators whose information adds

nothing. Yet the panel dismissed their materiality allegations as implausible, concluding that the information petitioners volunteered to DOJ gave only “a few more breadcrumbs.” Pet. App. 21a (quotation marks omitted).

The panel claimed its standard is “consistent” with other circuits. Pet. App. 19a n.8; *see* BIO 4. It is not. The Third Circuit holds that relators need only “contribute significant additional information ... so as to improve its quality.” *United States ex rel. Moore & Co. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 306 (3d Cir. 2016). The Sixth Circuit asks whether the information “might actually affect the government’s decision-making,” which is anything that “would add value.” *United States ex rel. Maur v. Hage-Korban*, 981 F.3d 516, 525, 527 (6th Cir. 2020) (cleaned up). Petitioners easily satisfy those articulations of the standard. The panel’s application of the “materially adds” provision here and in *Advantage* shows its standard is considerably more demanding in practice, whatever the panel’s claims of consistency.

Any standard that produces the divergent results in these related cases is broken. “Congress expanded the definition of ‘original source’” in 2010 to “lower the bar for relators.” *See Moore*, 812 F.3d at 298-99. The panel’s contrary assertion that Congress “narrowed” the provision, Pet. App. 14a, is unsupported and wrong. Given the strength of petitioners’ allegations, summary reversal would be appropriate under the second Question Presented as well as the first.

That said, the Court need not reach QP2 to resolve this case. If the Court GVRs on QP1 and the D.C. Circuit faithfully applies *Cunningham* on

remand, that would resolve the dispute. Summary reversal on QP1 alone would require the same result.

CONCLUSION

The Court should grant review, summarily reverse, or GVR for reconsideration of the first Question Presented under *Cunningham v. Cornell University*, 604 U.S. 693 (2025).

Respectfully submitted,

Daniel Woofter

Counsel of Record

Kevin K. Russell

RUSSELL & WOOFTER LLC

1701 Pennsylvania

Avenue NW, Suite 200

Washington, DC 20006

(202) 240-8433

dw@russellwoofter.com

Sara M. Lord

ARNALL GOLDEN

GREGORY, LLP

2100 Pennsylvania

Avenue NW, Suite 350S

Washington, DC 20006

(202) 677-4054

sara.lord@agg.com

December 10, 2025