

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, EX REL. JESSE)
POLANSKY, M.D., M.P.H.,)
 Petitioner,)
 v.) No. 21-1052
EXECUTIVE HEALTH RESOURCES, INC.,)
ET AL.,)
 Respondents.)
- - - - -

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Place: Washington, D.C.
Date: December 6, 2022

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11
12 Washington, D.C.
13 Tuesday, December 6, 2022

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15 The above-entitled matter came on for
16 oral argument before the Supreme Court of the
17 United States at 10:03 a.m.

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APPEARANCES:

DANIEL L. GEYSER, ESQUIRE, Dallas, Texas; on behalf of
the Petitioner.

FREDERICK LIU, Assistant to the Solicitor General,
Department of Justice, Washington, D.C.; on behalf
of Respondent United States.

MARK W. MOSIER, ESQUIRE, Washington, D.C.; on behalf
of Respondent Executive Health Resources, Inc.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 21-1052, United States ex rel. Polansky versus Executive Health Resources.

Mr. Geysler.

ORAL ARGUMENT OF DANIEL L. GEYSER

ON BEHALF OF THE PETITIONER

MR. GEYSER: Thank you, Mr. Chief Justice, and may it please the Court:

The government lacks the statutory authority to dismiss a False Claims Act case after declining to proceed with the action, and that conclusion follows directly from the Act's plain text, structure, history, and purpose.

Respondents' contrary view reads the Act's dismissal authority in isolation. It makes nonsense of the Act's deliberate structure. It renders key clauses superfluous, which Respondents concede. And it requires limiting the relator's status and rights where the Act unambiguously says the court may not limit the relator's status and rights.

When the FCA was enacted in 1863, the

1 government could not intervene at all. It was
2 not until 1943 that the government even had the
3 option to take over the case at the outset. If
4 Congress truly intended the government to have a
5 global right to dismiss a declined case at any
6 time, this is not remotely how the statute would
7 read.

8 Nor can Respondents escape their weak
9 textual position with a plea to constitutional
10 avoidance, especially one requiring an
11 unprecedented holding that an ancient practice
12 predating the founding by centuries is somehow
13 unconstitutional.

14 Because the government lacked the
15 power to dismiss, the judgment below should be
16 reversed.

17 I welcome the Court's questions.

18 JUSTICE THOMAS: Mr. Geyser, would you
19 spend just a few minutes on the constitutional
20 problems that we -- that could be anticipated
21 from your -- taking your approach on the
22 separation of powers problems that -- suggested
23 in the briefs on the other side?

24 MR. GEYSER: Sure, Your Honor. I -- I
25 don't think that there really is much of a

1 constitutional problem precisely because of
2 the strong historical pedigree of qui tam
3 actions. At the founding, qui tam actions were
4 commonplace. And this Court has said, when you
5 have an open and unchallenged practice that
6 predates to the founding, where the very framers
7 who crafted Article II didn't have any problem
8 with enacting these statutes, that effectively
9 fixes the constitutional meaning.

10 JUSTICE THOMAS: Beyond that, could
11 you point to a constitutional basis for it? The
12 -- the country was quite different then. You --
13 the Attorney General until the mid-19th century
14 did not -- was not really an institution, was
15 probably part time. So it was different. And I
16 understand that you would like to rely on that
17 history, but I think we need a little bit more.
18 You at least would need a constitutional hook, a
19 statute -- or a textual hook of some sort.

20 MR. GEYSER: Sure. Well, I'll provide
21 the textual hook. Just before I do, this Court
22 in Stevens said the history was "well nigh
23 conclusive" for Article III purposes. And it
24 would be very strange for it not to be well nigh
25 conclusive for Article II purposes as well.

1 JUSTICE THOMAS: And what was the
2 argument there? That was an assignment, though,
3 right?

4 MR. GEYSER: Well, the assignment is
5 what gave the relator an Article III interest in
6 the case. But the point was, was this
7 consistent with Article III? And the Court said
8 it was precisely because of the historical
9 foundation.

10 But this is the same foundation that
11 existed when the False Claims Act was enacted in
12 1863. It's the same False Claims Act when this
13 Court confronted it in United States versus
14 Hess, where the -- the Court confronted a series
15 of challenges that looked very much like the
16 constitutional claims raised by the Respondents,
17 and not a single member of the Court even paused
18 to suggest there was an Article II problem.

19 But, to look at the textual basis for
20 this, the -- the False Claims Act does not give
21 the relator exclusive control to do whatever
22 they'd like. No False Claims Act suit can
23 proceed without the government's permission.
24 The government has plenary authority at the
25 outset to take over the case, where it can step

1 in, proceed with the action, move to dismiss the
2 action. It can amend the complaint. It can add
3 claims. It can subtract claims. If a False
4 Claims Act case goes forward, it's precisely
5 because the executive has effectively said that
6 it can.

7 JUSTICE KAVANAUGH: But things can
8 change, as the other side points out. The
9 discovery could reveal new facts. There could
10 be a new administration that comes in. There
11 could be burdens on the agency that were not
12 apparent at the outset. So to bind the
13 government to its initial decision strikes me as
14 just increasing the Article II concerns that
15 Justice Thomas asked about with the statute.

16 First of all, do you agree that things
17 can change after the first 60 days?

18 MR. GEYSER: In theory, they can.
19 And, first, it's not just the first 60 days.
20 The government routinely gets extensions going
21 months or years into the process. So I think
22 it's -- it's mostly hypothetical. It's pretty
23 rare for the government if they've done their
24 job at the outset. Congress channeled the
25 government's decision to that critical initial

1 phase. It expected Congress -- or the
2 government to go forward and investigate the
3 case, vet the legal theories, vet the facts, and
4 decide whether this is an appropriate case to go
5 forward and whether it's an appropriate case for
6 the government to litigate or for the relator to
7 litigate.

8 JUSTICE KAVANAUGH: But do --

9 CHIEF JUSTICE ROBERTS: Well --

10 JUSTICE KAVANAUGH: -- related to the
11 -- go ahead, Chief.

12 CHIEF JUSTICE ROBERTS: I was just
13 going to say, however many times it comes up in
14 general, this was a specific case in which the
15 government makes a strong argument that the
16 facts did change and changed dramatically. The
17 United States jumped in when they -- when the
18 extent of the burden in terms of the documents
19 they would have to review became clear and when
20 also the -- at least some questionable conduct
21 of your client with respect to discovery came to
22 light.

23 MR. GEYSER: Well, Your Honor, I want
24 to answer the Article II question, but just to
25 get into the facts very briefly, the -- the

1 burden that the government quantified when they
2 were asked what is this litigating burden, it
3 was 32 hours to redact documents and about 300
4 hours to discover -- to deal with discovery.
5 This is a potential multibillion-dollar recovery
6 for the federal fisc, so I think 332 hours with
7 two government attorneys spending about a month
8 of time is really not much of a burden.

9 And my client's --

10 JUSTICE KAGAN: But the government was
11 also concerned about privilege, wasn't it?

12 MR. GEYSER: It was, Your Honor, but
13 it was mostly concerned about the chilling
14 effect that the court's order saying that the
15 government's documents were not privileged would
16 have on future agency discussions.

17 Now the only way to eliminate that
18 chilling effect is to challenge the order.
19 Dismissing the case, if the order is what's
20 causing the government's concern, is just
21 leaving that order on the books, as opposed to
22 taking an appeal to wipe the order out.

23 But, to get to the Article --

24 JUSTICE SOTOMAYOR: But didn't they
25 also think that there was not substance to the

1 claim, that there were real problems with the
2 claim?

3 MR. GEYSER: Your Honor, what -- what
4 they were concerned about in theory was that
5 there were certain elements of evidence that the
6 relator was not able to obtain. Now the
7 district court said that that evidence was not
8 necessary for the district court to prove -- for
9 the relator to prove the case. And the experts
10 quantified the evidence based on the -- or the
11 recovery based on the evidence that existed to
12 be over a billion dollars. So it --

13 JUSTICE KAGAN: Well, Mr. Geysler, I'm
14 sure there are two sides to this question, but
15 why isn't -- why shouldn't it be -- you know,
16 it's -- it's the government's action. Why
17 shouldn't the government have the ability to say
18 things have changed, we think the merits are
19 less strong, we think the discovery burdens are
20 greater than we initially did, and -- and so we
21 want to essentially reverse our prior decision?

22 MR. GEYSER: Well, a few things, Your
23 Honor. First, the question isn't really a
24 matter of policy. Could Congress say that the
25 government can dismiss at any point? Of course,

1 they have. Now that's not what the False Claims
2 Act looked like in 1863. It's not what it
3 looked like in 1943, where the government
4 couldn't even intervene in the case after
5 initially declining to proceed.

6 JUSTICE JACKSON: But I think that
7 actually cuts against you because you suggest
8 that the government -- or that Congress
9 channeled the government's authority to the
10 initial stage, and I'm wondering how you can say
11 that given the history. It seems as though the
12 history of the statute is pretty clear that
13 Congress only amended it to allow for later
14 intervention because it was concerned that the
15 government didn't have an opportunity to
16 intervene after the initial period. So this is
17 sort of in line with my colleagues suggesting
18 that they wanted the government to be able to
19 come back in and take over the case if things
20 had changed or the circumstances were such. And
21 it was also clear from the history that Congress
22 was concerned about the relator having no role
23 in the suit if the government came back later.

24 So how is that consistent with your
25 theory that the government has sort of an

1 all-or-nothing choice to be made at the
2 beginning of this and it can't intervene later
3 and then act to dismiss the suit or do whatever
4 else?

5 MR. GEYSER: Sure. Well, just to be
6 clear, it is not an all-or-nothing choice
7 anymore, and our theory is perfectly consistent
8 with what Congress did in 1986. Before 1986,
9 the government couldn't intervene in the case
10 after the fact. After 1986, the government can
11 intervene.

12 Now it can't intervene and proceed
13 with the action. Congress said only intervene
14 in (c)(3) and it said they can do it with good
15 cause. And they said, importantly, they can do
16 it without affecting, without limiting the
17 status and rights of the relator.

18 JUSTICE JACKSON: I'm sorry, so what's
19 the purpose of the intervention then if they
20 can't then take over the action and -- and
21 proceed?

22 MR. GEYSER: Oh, the purpose is very
23 important. It gives the government a chance to
24 litigate as a full party. Now what they can't
25 do is invoke the specific limitations, and

1 that -- that's how (c)(1) describes it in
2 paragraph 2.

3 Paragraph 2 sets out special
4 limitations on the relator's rights where the
5 government initially proceeds with the action.
6 And this is very clear from the structure of the
7 Act. The -- Congress put the government to an
8 initial choice under subsection (B) and it said
9 you can either proceed with the action or you
10 can decline, in which case the relator has the
11 right to conduct the action.

12 And then it marched through the
13 different rights to the parties to the action in
14 subsection (C).

15 JUSTICE BARRETT: But, Mr. Geysler,
16 specifically, Justice Jackson's point is the
17 same question that I have. I guess I'm not sure
18 what the government then is doing there. If you
19 let the government in and you're saying -- you
20 responded to Justice Jackson by saying, well,
21 the government can then be a full litigant.

22 Well, litigants can move to dismiss,
23 so what can the government do?

24 MR. GEYSER: Well, the -- the
25 government can litigate as a full party. Now

1 they can move to dismiss under the Federal Rules
2 of Civil Procedure, but what a litigant normally
3 can't do in a two-party case is you can dismiss
4 your own claims, you can't dismiss someone
5 else's claims.

6 JUSTICE JACKSON: But they're kind of
7 the same claim here.

8 MR. GEYSER: Well, sure they are, and
9 that's why Congress is very clear that if the
10 government wants to be able to dismiss the case
11 at the outset, it has to intervene and proceed
12 with the --

13 JUSTICE KAVANAUGH: But the -- the --
14 the text of the dismissal provision is the key,
15 right, (c)(2)(A), and that provision is
16 straightforward. It's unqualified. The
17 government may dismiss the action
18 notwithstanding the objections of the person
19 initiating the action if the person's been
20 notified and there's a hearing. Just full stop.

21 MR. GEYSER: Full -- full stop, Your
22 Honor, but you can't read that provision in
23 isolation, but --

24 JUSTICE KAVANAUGH: But in -- I --
25 just on its own, and that's the provision that

1 refers to dismissal, it doesn't qualify it in
2 any way other than the notice and hearing. It
3 doesn't say you have to meet the standards of
4 the federal rules.

5 It's -- and it reflects the backdrop,
6 again, as Justice Thomas alluded to, of the
7 Article II concern that would exist if the
8 government's power to control prosecution of a
9 case or pursuit of a civil action were somehow
10 removed from the government's power.

11 MR. GEYSER: Well --

12 JUSTICE KAVANAUGH: So why shouldn't
13 we read the statute, given the Article II
14 concern, read that provision for what it says?

15 MR. GEYSER: Your Honor, because I
16 think that doesn't work when you look at the
17 surrounding language and when you look what the
18 violence that would do to other parts of
19 the statute. It's effectively the argument that
20 paragraph 2 applies whether or not the
21 government proceeds with the action. That's
22 what Congress wrote in (c)(4). Yet the
23 dismissal rights are in (c)(2), not in (c)(4).

24 JUSTICE KAGAN: But why --

25 JUSTICE KAVANAUGH: But in (c) --

1 JUSTICE KAGAN: -- doesn't the
2 intervention kick you back to where the
3 government proceeds with the action under (1)
4 and then (2)(A)?

5 MR. GEYSER: I think for two reasons,
6 Your Honor, two key reasons. The first is that
7 the intervention cannot limit the status and
8 rights of the relator. Paragraph 2 is framed in
9 the statute as limitations, so that is, in fact,
10 in -- you're taking the relator, who has the
11 right to conduct the action. Before the
12 intervention, they are not subject to the
13 paragraph 2 limitations.

14 JUSTICE JACKSON: But why isn't that
15 part of the statute better read to reflect the
16 point that I made earlier, which is that
17 Congress was concerned that if the government
18 was conducting this action, the -- the relator
19 wouldn't have any role, so it's not so much
20 saying that the relator is not subject to the
21 government's determination when it is proceeding
22 with the action but that the relator still gets
23 notice, still gets to make his argument before
24 the court as to why the case should not be
25 dismissed, but it doesn't work in the way that

1 you've suggested?

2 MR. GEYSER: Well, Your Honor, again,
3 it does not say without limiting some of the
4 relator's rights. It says the relator has the
5 right to conduct the action. This is a
6 provision that applies when the government
7 elected not to proceed with the action. The
8 relator's in control. And it says the
9 government, upon a showing of good cause, can
10 intervene without limiting the relator's --

11 JUSTICE JACKSON: But what do you do
12 --

13 MR. GEYSER: -- status and rights.

14 JUSTICE JACKSON: -- what do you with
15 2 -- well, with 4? Sorry, with 4. So here's a
16 situation in which the government has determined
17 -- or it says whether or not the government
18 proceeds with the action, the government can
19 make a showing about the person initiating the
20 action's interference with the government's
21 investigation.

22 So we have a world in which Congress
23 has envisioned that the government is still
24 going to have some control and, you know, limit
25 the other person's right to conduct discovery or

1 whatever else, even though they haven't
2 intervened in that situation.

3 So how is that consistent with your
4 theory that once the person is taking over the
5 action, the government can't limit their
6 litigation tactics or whatever?

7 MR. GEYSER: Your Honor, I think
8 (c)(4) is a very strong point in our favor. It
9 shows that where Congress wanted to limit the
10 relator's rights, whether or not the government
11 proceeds with the action, it said so.

12 And the dismissal rights are not found
13 in (c)(4). In fact, the government concedes and
14 the private Respondent concedes that that
15 reading renders surplusage the introductory
16 phrase of (c)(4). It also renders superfluous
17 the final sentence of (c)(1), which says that
18 the relator can still participate where the
19 government does proceed with the case subject to
20 the limitations of paragraph 2. Congress had no
21 reason to put in that phrase that paragraph 2
22 applies in every situation.

23 JUSTICE KAVANAUGH: Now the -- on
24 (c)(4), the "whether or not" as I read it means,
25 if it hasn't been dismissed, there are two

1 tracks the case could be going down. The
2 government could be in control or the relator
3 could be in control.

4 And what (c)(4) is making clear, as I
5 read it, whether or not the government proceeds
6 with the action, whether the government's in
7 control or the relator is in control, the
8 government can still come in either way and say
9 the discovery is interfering with the government
10 investigation or prosecution.

11 To me, that doesn't detract at all
12 from the straightforward language of (c)(2)(A).

13 What am I missing there?

14 MR. GEYSER: Well, Your Honor, I think
15 what you're missing is look at the -- the clear
16 progression that Congress set out in subsection
17 (C). It's -- it's a division of rights based on
18 the government's initial choice under subsection
19 (B).

20 And, again, it's using the phrase
21 "proceed with the action." The "proceed with
22 the action" phrase is found in subsection (B).
23 It is not found anywhere in subsection (c)(3)
24 where the government has the right to intervene.

25 So Congress clearly said, if the

1 government wants to proceed with the action,
2 they have certain rights. The relator can still
3 participate subject to the rights in paragraph
4 2. Congress didn't set forth what those rights
5 are.

6 Then it proceeded to other situations,
7 situations where the government elects not to
8 proceed and situations whether or not the
9 government --

10 JUSTICE KAVANAUGH: Just --

11 MR. GEYSER: -- proceeds.

12 JUSTICE KAVANAUGH: -- slow down a
13 minute for me. On (c)(1), you said the last
14 clause of (c)(1) would be redundant?

15 MR. GEYSER: Yes.

16 JUSTICE KAVANAUGH: But I -- I guess
17 you could call it redundant. You could also
18 call it just making crystal clear that even if
19 the government takes over the action, the
20 relator's still a party. But just to be clear,
21 that "subject to" clause, let's just make
22 crystal clear, if it's dismissed, you're gone.
23 Like you can't continue it if it's dismissed.
24 That's what I read the "subject to" to -- to
25 kind of underscore so there would be no

1 confusion about that.

2 MR. GEYSER: Well, Your Honor, but,
3 again, but if paragraph 2 sets forth a set of
4 rights that applies in every single case,
5 whether the government proceeds, whether they
6 later intervene, whether they elect not to
7 intervene at all at any point in the case,
8 there's no reason to put that language in. And
9 --

10 JUSTICE KAGAN: So, Mr. Geyser, your
11 arguments are better for the government's first
12 argument. But, if you go to the government's
13 backup argument and say that they can only
14 dismiss once they're -- they've intervened, even
15 if that intervention follows an initial
16 declining of the opportunity, then most of your
17 arguments fall away.

18 On that theory, you know, it makes
19 perfect sense to, well, the intervention kicks
20 you back to (1), which gets you into (2)(A).

21 MR. GEYSER: Well, Your Honor, I -- I
22 do agree that a lot of our arguments are
23 designed to show the government at least has to
24 intervene first and satisfy that good cause
25 showing. But we still have, I think, at least

1 two or three important arguments even to show
2 that that sort of reset-the-case argument
3 doesn't work.

4 The first again is it says you can
5 intervene. It does not say intervene and
6 proceed with the action. Congress used that
7 different terminology in (b)(2).

8 And when Congress put the government
9 to the choice of taking over the case, not just
10 intervening and participating but taking it
11 over, they always use the phrase "proceed with
12 the action." It's a very distinctive phrase and
13 it's repeated throughout the False Claims Act.

14 The second point again is that this is
15 still limiting the relator's status and rights.
16 It says you can intervene, government, but you
17 cannot limit the relator's status and rights.

18 JUSTICE KAGAN: Well, it says the
19 court shouldn't limit the status and rights.
20 That's a different thing.

21 MR. GEYSER: Well, it -- it -- it
22 does, but I think, though, that in paragraph 2,
23 none of those rights are activated unless the
24 court is doing it.

25 So the court then is limiting the

1 relator's status and rights. And by -- just
2 right on the face of the statute, paragraph 2
3 again, if you look to (c)(1), Congress described
4 the rights in (c)(2), those restrictions, as
5 limitations on the relator's participation. So
6 that is quite clearly a limit on the relator's
7 status and rights.

8 And this is also inconsistent with the
9 broader structure of the Act. Look back to the
10 -- the initial choice that the government makes.
11 That's under subsection (B). That has to happen
12 at the outset of the case.

13 It says the government has to decide
14 whether to proceed with the action or not within
15 the first 60-day period extended, you know, by
16 months and often years. There's nothing in
17 subsection (C), and it would be a very odd way
18 for Congress to have written this, to say
19 subsection (C), when the government intervenes,
20 even though we're not saying intervene and
21 proceed with the action and even though we're
22 not saying just intervene, and without limiting
23 the relator's status and rights, we have that
24 qualifier in there, that Congress thought that
25 the government at that point could reset the

1 party's rights, effectively restart the
2 litigation. If you look to 3731(c), the
3 government has the right if they do intervene
4 and proceed with the action to file a new
5 complaint. They can basically start the case
6 over years down the road, which isn't good for
7 the relator and it's not good for the private
8 defendant either.

9 JUSTICE ALITO: Mr. Geysler, perhaps
10 you've said everything that you have to say on
11 this point, but just to be clear, what do you
12 think -- if the government intervenes belatedly,
13 what do you think it can do that would not
14 constitute a limitation of the debtor's status
15 and rights?

16 MR. GEYSER: I think the government
17 can do anything that any ordinary party can do
18 under any of the Federal Rules of Civil
19 Procedure. It can file a motion to dismiss
20 under 12(b). It can file a summary judgment
21 motion on either side. It can serve discovery.
22 It can participate in the hearings. It can
23 propose jury instructions.

24 All it can't do are invoke the
25 paragraph 2 rights, which are special rights

1 that are clearly activated only where the
2 government proceeds with the action. These are
3 rights that are found only in the False Claims
4 Act. And looking at the clear structure of the
5 Act, these are rights that only apply where the
6 government proceeds at the outset.

7 JUSTICE GORSUCH: Mr. Geysler, let --
8 let -- let's -- I just want to give you an
9 opportunity to discuss the standard. Suppose we
10 disagree with you and we think the government
11 can intervene at this stage and seek to dismiss
12 the case. There's a hearing that's called for
13 under (c)(2)(A). What's that supposed to look
14 like in your view?

15 MR. GEYSER: I think the -- the fact
16 that there is a hearing requirement shows that
17 the government does have to prove something. As
18 the Seventh Circuit said, courts don't have
19 hearings just to serve coffee and donuts while
20 the parties gather together.

21 JUSTICE GORSUCH: I've actually been
22 to one of those.

23 (Laughter.)

24 JUSTICE GORSUCH: So I know it can
25 happen.

1 (Laughter.)

2 JUSTICE GORSUCH: But I'd agree with
3 you it's exceedingly rare.

4 MR. GEYSER: Yeah.

5 JUSTICE GORSUCH: So -- so -- so what
6 -- what is the standard? Is it -- do we borrow
7 from 41? Your -- your -- your kind of net --
8 net benefit -- cost/benefit analysis argument, I
9 don't know where that comes from. Help me out.

10 MR. GEYSER: Sure. I -- I think that
11 you're dealing with the relator's assigned
12 property interests in the case, so I think, at a
13 minimum, the constitutional rationality standard
14 has to apply. The government has to come
15 forward with a rational nonarbitrary basis for
16 dismissing the case.

17 And, again, we're not saying that this
18 is a constitutional error in this case. We're
19 not saying that the -- the government violated
20 our constitutional rights. We're saying the
21 government misread the statutory standard.

22 I think it's clearly not Rule 41, as I
23 think all parties to the case agree. Rule 41 is
24 distinctly inapposite in this context. It
25 involves a voluntary dismissal of someone's own

1 action. In this case, you have two parties, and
2 one is opposing the dismissal. So -- and Rule
3 41, again, is usually activated without any sort
4 of hearing. Here, you have to have a hearing.

5 So the question is, what is a court
6 supposed to do at that hearing? And, again, I
7 think it's to put the government to the proof of
8 showing that they've asserted a rational basis
9 for dismissing the case and that it is actually
10 supported by the facts and record of the case.

11 JUSTICE KAVANAUGH: You're requiring
12 the government to prove to a court that it has
13 some basis for dismissing the government's own
14 case. That's -- I mean, that's -- the -- the
15 Article II starting point of all this seems in
16 great tension with your answer of how the
17 government should be held to the -- the proof.
18 The government controls the litigation. That's
19 part of Article II.

20 MR. GEYSER: Well, no, Your Honor, not
21 in an absolute way. And also, too, remember
22 this is not only the government's case.

23 JUSTICE KAVANAUGH: Maybe not in an
24 absolute way, maybe in an absolute way, but even
25 if not in an absolute way, doesn't it have to

1 inform how we think about the whole structure of
2 the proceeding that Justice Gorsuch describes?

3 MR. GEYSER: Well, Your Honor, again,
4 our contention is the government doesn't even
5 have the right to dismiss after the fact. But,
6 again, this is --

7 JUSTICE KAVANAUGH: But, if we get to
8 the hearing that Justice Gorsuch raised rightly
9 and what -- what has to happen at that hearing,
10 I think the court's interfering with the
11 government's ability to control -- the
12 executive's ability to control the suit.
13 That's -- that's an Article II concern, it seems
14 to me.

15 MR. GEYSER: Well, Your Honor, first,
16 just to be very clear, this is not only the
17 government's suit. Congress assigned a property
18 interest in the action to the relator. That's
19 why the relator has the relator's own Article
20 III standing. That's what this Court held in
21 Stevens. So the government is, in fact,
22 extinguishing not just their own claim; they're
23 extinguishing the property interest that's been
24 assigned to the relator in --

25 JUSTICE GORSUCH: And -- and, Mr.

1 Geyser, I accept -- I understand that point. I
2 mean, Blackstone talks about qui tam actions as
3 property interests, and maybe some bundle of
4 sticks have been given to you and some retained.
5 Whatever. Okay.

6 You argue for a rational basis review
7 near as I can tell in saying it's governmental
8 action and even executive governmental action
9 still has to be nonarbitrary. I mean, you know,
10 I got it. Okay.

11 But the way you argue for rational
12 basis is a pretty aggressive version of it and
13 saying that, you know, we got this
14 billion-dollar case and so your inconveniences
15 aren't good enough.

16 I -- you know, normally, when -- when
17 we invoke rational basis review, it's pretty
18 cursory, pretty quick, and the government always
19 wins. So tell me what I'm missing there.

20 MR. GEYSER: Well, that is typically
21 true, Your Honor. I think this is the rare
22 case where it could surmount that standard. The
23 rational basis standard -- this goes partly to
24 Justice Kavanaugh's question too -- it's not
25 imposing a very extreme burden on the

1 government, but I do think it is arbitrary and,
2 in fact, irrational to say, if I just stick this
3 out for one more month and do a couple of
4 redactions and answer a few more discovery
5 requests, I'm going to recover over a billion
6 dollars for the federal fisc, but you know what,
7 I'd rather not be bothered.

8 JUSTICE GORSUCH: Well, litigation's
9 always fraught with risk. I mean, I -- I -- I
10 always thought client -- every client I -- I had
11 as a plaintiff always thought they were going to
12 get a billion dollars at the end of the day for
13 sure. But that's not the way the system works,
14 right? So can't a government have a
15 cost/benefit analysis that differs from yours?

16 MR. GEYSER: Oh, absolutely, Your
17 Honor, but they have to run that cost/benefit
18 analysis. And this isn't just the -- our -- the
19 client saying, you know, wild pie-in-the-sky
20 theories. These are experts that looked at
21 this. They quantified the evidence.

22 JUSTICE GORSUCH: Yeah.

23 MR. GEYSER: They explained the
24 theory.

25 JUSTICE GORSUCH: Everybody's got an

1 expert. Okay.

2 JUSTICE BARRETT: It sounds more like
3 intermediate scrutiny really.

4 JUSTICE GORSUCH: Yeah.

5 MR. GEYSER: The -- well, Your Honor,
6 I -- I -- I don't think so in this case. We're
7 simply saying you just have to substantiate what
8 the -- what the government is saying.

9 So if I -- if I can just give one
10 example that I think proves what we're saying.
11 The government said one reason for dismissing
12 the case is that the relator promised that he
13 would narrow his claims, and then he failed to
14 do it. The relator cleared the precise
15 amendment with the government before filing it
16 with the court. The government signed off on
17 the amended complaint. And then the government,
18 after the fact, says you didn't do what we asked
19 you to do, when, in fact, they did exactly what
20 the government approved.

21 So is that arbitrary? That sounds
22 arbitrary to me. And under, I think, a
23 strict --

24 JUSTICE BARRETT: Oh, I -- sorry.
25 Finish.

1 MR. GEYSER: No, I was just saying
2 under a strict even just rationality standard.

3 JUSTICE BARRETT: You said before,
4 when I asked you what could the government do
5 when it was in the suit, and you said it could
6 make a motion under Rule 41 like any other
7 party, and this is if it chooses to proceed with
8 the action. The standard there would be then
9 the same?

10 MR. GEYSER: Well, under Rule 41, it
11 wouldn't apply here because, again, you have two
12 -- you have two plaintiffs. So --

13 JUSTICE BARRETT: No, no. I mean,
14 like, if it chooses to proceed with the action
15 during the initial seal period -- sealing
16 period.

17 MR. GEYSER: Oh, I'm sorry. If -- if
18 it chooses to proceed with the action, then it
19 can move to dismiss, and I presume it would
20 invoke its (c)(2)(A) authority as opposed to
21 Rule 41.

22 JUSTICE BARRETT: Okay.

23 MR. GEYSER: I think the (c)(2)(A)
24 authority here would probably displace Rule 41.

25 JUSTICE BARRETT: So there's no -- I

1 thought you had said something before about Rule
2 41. I must have misheard.

3 MR. GEYSER: No. I'm sorry, I --

4 JUSTICE JACKSON: Well, I think what
5 -- I think what -- what you might be referring
6 to, Justice Barrett, is the fact that you said,
7 if the government intervenes later, then it can
8 act under the Federal Rules of Civil Procedure
9 as any normal party would. So why wouldn't Rule
10 41 then be available to the government at that
11 point?

12 MR. GEYSER: May I answer?

13 CHIEF JUSTICE ROBERTS: Sure.

14 MR. GEYSER: The -- I don't think it
15 would be available precisely because of the
16 nature of the Act and its displacing of Rule 41.

17 Now what I -- what I was trying to say
18 earlier -- and I might have misspoke; if I did,
19 I apologize -- is that the government can invoke
20 other rules of federal procedure. They can
21 invoke Rule 12. They can invoke Rule 56. If
22 they think the defendant is, in fact, right and
23 that the case has no merit, they can say so, and
24 that -- there's nothing wrong with that. That's
25 not interfering with the relator's status and

1 rights.

2 What is interfering with the relator's
3 status and rights is putting specific
4 limitations from paragraph 2 on what the relator
5 can do when the relator's been vested with the
6 right to conduct the action.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Justice Thomas, any?

10 Justice Alito?

11 JUSTICE ALITO: The standard that
12 you're recommending for the hearing is the one
13 that's in use in the Ninth Circuit, is that
14 correct?

15 MR. GEYSER: The Ninth and Tenth
16 Circuits, yes.

17 JUSTICE ALITO: The Ninth and Tenth.
18 Are there examples of cases from those circuits
19 where the -- the court has found that the
20 standard was not met?

21 MR. GEYSER: There is a district court
22 case in the Ninth Circuit, I believe, that has.
23 And, again, this is exceedingly rare. This is
24 not putting the burden -- the burden on the
25 government in a very onerous way.

1 JUSTICE ALITO: Well, this is not new,
2 so I won't belabor it. It does seem like what
3 you're talking about is, in reality, either
4 nothing or a quagmire. Suppose the government
5 says we don't want this case to go forward
6 because we actually think the claim is not
7 meritorious and the defendant doesn't deserve to
8 -- to be sued. What's the court supposed to do
9 there?

10 MR. GEYSER: Well --

11 JUSTICE ALITO: Have a mini-trial on
12 the strength of the -- of the case?

13 MR. GEYSER: Well, ideally, Justice
14 Alito, what the government would have done is at
15 the initial period, where Congress channeled the
16 government's real decision-making in this in
17 giving them every tool to investigate the claim,
18 they would conclude at that point that the case
19 is not meritorious, they would intervene and
20 proceed with the action, and then they could
21 invoke the (c)(2)(A) authority to dismiss the
22 case.

23 JUSTICE ALITO: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice --

25 JUSTICE SOTOMAYOR: Mr. Geyser,

1 assuming, as did Justice Gorsuch, that I believe
2 the government can intervene and can dismiss, to
3 dismiss, because I think that's a form of
4 proceeding with the action. You can take
5 discovery. You can make a motion for summary
6 judgment. You can do all sorts of things,
7 including moving to dismiss. So assume I do
8 that.

9 Doesn't the good cause standard for
10 intervention provide you with the standard,
11 meaning, if you have to prove good cause to
12 intervene, you have to prove you have a reason,
13 and the reason just can't be arbitrary and
14 capricious. Isn't that -- the question that
15 simple and isn't that the question that would
16 happen in -- it's all one motion, as it was in
17 this case. It was one hearing. The government
18 came in and said we want to intervene because we
19 think we have to dismiss now. The court held a
20 hearing, listened to its reasons and said
21 they're rational. They're not arbitrary and
22 capricious.

23 So isn't that the standard?

24 MR. GEYSER: Well --

25 JUSTICE SOTOMAYOR: Are they arbitrary

1 and capricious?

2 MR. GEYSER: -- I -- I don't mean to
3 quibble with the premise, but just to be
4 complete about it, I think Your Honor said that
5 part of proceeding with the action is moving to
6 dismiss, and, of course, under (c)(3) --

7 JUSTICE SOTOMAYOR: I -- I accept that
8 you don't think it is.

9 MR. GEYSER: Okay.

10 JUSTICE SOTOMAYOR: But assume I do.

11 MR. GEYSER: I do think the good cause
12 standard provides an extra layer of protection
13 for the relator and that the government should
14 as a part of the good cause showing explain why
15 it didn't intervene earlier.

16 JUSTICE SOTOMAYOR: I don't disagree
17 with you, but that goes to the issue of whether
18 the choice they're making now is arbitrary and
19 capricious.

20 MR. GEYSER: I think it does, Your
21 Honor. I think that that -- that is another
22 layer of protection for the relator.

23 JUSTICE SOTOMAYOR: How do you see
24 arbitrary and capricious as different from the
25 rational relationship test of the Ninth and

1 Tenth Circuit or between that and Rule 41, where
2 it says a court has to consider whether
3 dismissal is proper?

4 MR. GEYSER: Well, I -- I think that
5 it is similar to the Ninth and Tenth Circuit
6 standards. I think it's very different than the
7 Rule 41 standard, where the court is considering
8 whether --

9 JUSTICE SOTOMAYOR: Similar, but how
10 different?

11 MR. GEYSER: Well, I think very
12 different. It's -- Rule 41 is looking to
13 prejudice to the defendant.

14 JUSTICE SOTOMAYOR: Putting that
15 aside, because it's the plaintiff's motion and I
16 agree with you it's what's proper for the
17 dismissal of the action, but assume that I think
18 proper has a meaning. What meaning would you
19 give it?

20 MR. GEYSER: If we are stuck with the
21 Rule 41 standard, I think proper still would
22 have to be something that is not arbitrary
23 because something that's arbitrary is improper
24 and not irrational because something that's
25 irrational is also improper.

1 JUSTICE SOTOMAYOR: Irrational is
2 different than capricious. Not arbitrary or
3 capricious is different than rational.

4 MR. GEYSER: I think -- I think that
5 could be true, Your Honor, and we'd be fine with
6 -- I think with either standard. I think, in
7 this case, we -- we could prevail under either
8 standard if it's applied in a meaningful way.

9 JUSTICE SOTOMAYOR: Okay. Thank you.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?
11 Justice Gorsuch?

12 JUSTICE KAVANAUGH: Just on the good
13 cause question, that's the standard for
14 intervention, correct --

15 MR. GEYSER: That's correct.

16 JUSTICE KAVANAUGH: -- in the statute,
17 and there is a separate question here whether
18 the government has to intervene in order to
19 dismiss if it's after the 60 days, correct?

20 MR. GEYSER: That -- that's correct.

21 JUSTICE KAVANAUGH: Okay. On the
22 question of the hearing that Justice Gorsuch
23 raised, the statute itself, the text of the
24 statute imposes no standard whatsoever, correct?

25 MR. GEYSER: The -- I'm sorry, the

1 statute?

2 JUSTICE KAVANAUGH: On -- on the
3 hearing on a dismissal, the text of the statute
4 imposes no standard whatsoever for the
5 government to be able to dismiss, correct?

6 MR. GEYSER: That is correct.

7 JUSTICE KAVANAUGH: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Barrett?

10 Justice Jackson?

11 JUSTICE JACKSON: So I'm still a
12 little stuck on your initial argument, which
13 seems to be that the subsequent intervention
14 does not permit the government to interfere with
15 the relator's status and rights, so the
16 government per the plain text of the statute can
17 come in, but you say at that point the relator
18 is still controlling the action, and, therefore,
19 the government can't move to dismiss or do
20 anything other that's sort of inconsistent with
21 the relator's control of the action.

22 Is that -- do I have right your
23 argument --

24 MR. GEYSER: Yes.

25 JUSTICE JACKSON: -- basically?

1 MR. GEYSER: But -- but it is -- just
2 to be very clear --

3 JUSTICE JACKSON: Yes.

4 MR. GEYSER: -- I'm not just making
5 this up.

6 JUSTICE JACKSON: Right.

7 MR. GEYSER: In (c)(3), it says
8 without limiting the relator's status and
9 rights.

10 JUSTICE JACKSON: Yes. No, I
11 understand the textual basis. What I'm
12 concerned about is that the most definitive
13 statement that we have related to Congress's
14 actual intent, which I know that we sometimes
15 don't look at or don't care about, but in this
16 case, the legislative history, the Senate report
17 on pages 26 and 27 say exactly something that is
18 totally inconsistent with what you've just said.

19 It talks about, as Justice Kavanaugh
20 brought up, a situation in which the government
21 has failed to intervene at the beginning and
22 they were concerned, they say, because, you
23 know, the government would be barred from
24 re-entering the litigation under a circumstance
25 in which "new evidence discovered after the

1 first 60 days of the litigation could escalate
2 the magnitude or complexity of the fraud,
3 causing the government to reevaluate its initial
4 assessment or making it difficult for the qui
5 tam relator to litigate alone."

6 And this is the key part. It says:
7 In those situations where new and significant
8 evidence is found and the government can show
9 good cause for intervening, paragraph 2 provides
10 that the court may allow the government to take
11 over the suit.

12 So it doesn't say that the government
13 can just intervene and act as another party. It
14 is contemplating clearly in the legislative
15 history of the Senate that the idea is that the
16 intervention is to allow the government to take
17 over the suit because we have good cause, there
18 are reasons why the relator exercising its
19 rights can't really do it. And so I don't
20 understand why under those circumstances you
21 would say the government can't act as the "owner
22 of the suit" once it re-intervenes.

23 MR. GEYSER: Your Honor, and the
24 sentence that you read, I'm glad you brought it
25 up --

1 JUSTICE JACKSON: Yes.

2 MR. GEYSER: -- we didn't stress it
3 precisely because the Court typically doesn't
4 look to legislative history.

5 JUSTICE JACKSON: Yes.

6 MR. GEYSER: But it's actually a
7 powerful point in our favor. Look at the Senate
8 version of the Act. The Senate version of the
9 Act is not the enacted version. It was changed
10 in two very critical ways.

11 JUSTICE JACKSON: Okay.

12 MR. GEYSER: The proposed language in
13 the Senate said "intervene and proceed with the
14 action."

15 JUSTICE JACKSON: Yes.

16 MR. GEYSER: The final version struck
17 "and proceed with the action," just "intervene."

18 The second change, which is also
19 critical, is the Senate version did not have the
20 qualifier without limiting the status and rights
21 of the relator. That was inserted in the
22 official version.

23 JUSTICE JACKSON: So do we have
24 legislative history that just explains the
25 changes that you're talking about? Do we know

1 why they struck those things?

2 MR. GEYSER: We -- unfortunately, we
3 do not know why. But what I do know is that
4 when the Senate is saying we think the
5 government should be able to intervene and take
6 over the case --

7 JUSTICE JACKSON: Yeah.

8 MR. GEYSER: -- and they have very
9 distinct language in the enacted version that
10 says I don't think so, you can't intervene and
11 proceed with the action.

12 JUSTICE JACKSON: So what do we do
13 about Section 5 that says the government may --
14 I'm talking about the statute -- may elect to
15 pursue its claim through any alternate remedy
16 available, including the administrative?

17 In the legislative history that I'm
18 reading, it goes on to talk about how, when the
19 government takes over the suit, it can also
20 decide to not continue to pursue it as a
21 litigated matter but can take it and put it into
22 the administrative course.

23 Is it your point that the government
24 can only do that in the beginning now based on
25 the way you read the statute?

1 MR. GEYSER: Oh, no, not at all,
2 because, again, look at the introductory
3 language to (c)(5). It says, "notwithstanding
4 the action under subsection (B)," so basically
5 notwithstanding the False Claims Act case, and
6 this is -- this is a good reason that also this
7 doesn't present any real Article II concern.

8 It's telling the executive, if you
9 would rather pursue this False Claims Act case,
10 at the start, later in the case, it doesn't
11 matter, through another proceeding, through an
12 administrative proceeding, through a different
13 judicial proceeding, you can do that, and
14 nothing about the filing of the action under
15 subsection (B), which is the private action by
16 the relator, can interfere with the government's
17 ability to pursue other forms of relief.

18 JUSTICE JACKSON: One last question.
19 Why does the government have a right to continue
20 to get information in the case if the property
21 right shifts completely to the relator once the
22 government declines to intervene initially? Is
23 it just so that they could possibly intervene
24 and come back and do something that is not
25 controlling the case?

1 MR. GEYSER: Well, I think it is, Your
2 Honor. First of all, the property isn't
3 assigned entirely to the relator.

4 JUSTICE JACKSON: Mm-hmm.

5 MR. GEYSER: You know, the government
6 obviously gets the bulk of any recovery. But it
7 is to give the government the opportunity to
8 say, you know what, we think the relator needs
9 help or we think that this proceeding actually
10 would benefit from our stepping in and
11 supporting the defendant. But it's given --

12 JUSTICE JACKSON: What's the point of
13 good cause? Why -- why -- why does the
14 government have to show good cause to intervene
15 unless there's some implication that the
16 government might be able to do something that
17 the relator doesn't want him to do?

18 MR. GEYSER: Well, I think that there
19 is good cause. It shows the respect for the
20 relator and the relator's right to conduct the
21 action. It shows that Congress really did
22 expect the government to make that initial
23 upfront choice or it would just say just come in
24 at will. Whenever you feel like it, you can
25 come back in.

1 But, again, when they can come back
2 in, they have to respect the relator's status
3 and rights, and you can't limit those rights.
4 And paragraph 2 is framed in the statute as
5 limitations on the relator's rights. So it
6 really is --

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Mr. Liu.

10 ORAL ARGUMENT OF FREDERICK LIU ON
11 BEHALF OF RESPONDENT UNITED STATES

12 MR. LIU: Thank you, Mr. Chief
13 Justice, and may it please the Court:

14 This case presents two issues, and the
15 plain text of the False Claims Act resolves them
16 both. The first issue is whether the government
17 may dismiss a qui tam action after electing not
18 to intervene during the seal period. The answer
19 is yes. The text of Section 3730(c)(2)(A) says
20 that the government may dismiss if the relator
21 is given notice and an opportunity to be heard.

22 Congress could have easily said that
23 the government may dismiss only "if the
24 government elects to intervene." Those are the
25 words that Congress used elsewhere in the

1 statute when it wanted to make a right
2 contingent on the government's election to
3 intervene. Yet Congress didn't include those
4 words or anything like them in Section
5 3730(c)(2)(A). Thus, regardless of the option
6 that the United States selects, it retains the
7 right to dismiss the action.

8 The second issue in this case concerns
9 the extent to which a court may review the
10 government's decision to dismiss. Unlike other
11 provisions of the statute, (c)(2)(A) does not
12 specify a substantive standard for a court to
13 apply. The statute thus commits to the
14 government's discretion the decision whether to
15 dismiss.

16 I welcome the Court's questions.

17 JUSTICE THOMAS: Mr. Liu, the
18 Petitioner argues that they have a property
19 interest in this suit, and I think that's
20 underscored by Stevens, which says that they
21 have a partial in -- stake in this. If you can
22 unilaterally dismiss, how can you square that
23 with the assignment that they have?

24 MR. LIU: Well, I think the -- we do
25 recognize that they are assigned a property

1 interest, and that is precisely why we think
2 there is a constitutional baseline that applies.
3 It's precisely because they have a property
4 interest under the Due Process Clause of the
5 Fifth Amendment that we think, even in the
6 absence of any standard specified in the
7 statute, the government still has to comply with
8 the govern -- with the constitutional baseline
9 in deciding whether to dismiss.

10 That's not a very rigorous baseline.
11 I think the Ninth Circuit got the baseline wrong
12 in Sequoia Orange when the Ninth Circuit looked
13 to the standard that applies to evaluating
14 legislative action. The relevant standard here
15 is a standard that applies to evaluating
16 executive action. And this Court in cases like
17 County of Sacramento versus Lewis has made clear
18 that that is a tough standard to meet. It
19 requires egregious, outrageous executive action
20 to satisfy it.

21 JUSTICE THOMAS: Does this baseline
22 exist at the initiation of the action, or does
23 it only exist later when you have to intervene
24 in order to dismiss, as you seek to do now?

25 MR. LIU: I think it exists throughout

1 the action. We -- we think we don't need to
2 intervene at all as a prerequisite to dismissal.
3 So, if we were to exercise our dismissal right
4 even without intervening, we think we would have
5 to -- at least we could not violate the
6 Constitution in doing so.

7 JUSTICE SOTOMAYOR: Mr. Liu, but you
8 wouldn't be violating a due process right. If
9 you come in before there has been an actual
10 assignment of the right, you can dismiss for any
11 reason because there hasn't been a property
12 interest created.

13 MR. LIU: Well, we understand --

14 JUSTICE SOTOMAYOR: You have 60 days
15 to decide whether to intervene, with whatever
16 exceptions -- extensions are granted, but until
17 that moment that the property right is created,
18 you don't have to give a reason because there's
19 no property right.

20 But assume that I believe that once
21 the property right is created, and we -- our
22 cases have recognized that, there has to be
23 something more than constitutional protection,
24 doesn't it?

25 MR. LIU: I don't think so, Your

1 Honor.

2 JUSTICE SOTOMAYOR: A prosecutor can
3 come in and take away somebody's property rights
4 for an arbitrary and capricious reason?

5 MR. LIU: Well, we think the --

6 JUSTICE SOTOMAYOR: Or for no reason
7 whatsoever?

8 MR. LIU: We think the Constitution --
9 the constitutional protection means that the
10 government couldn't dismiss a case if doing so
11 was arbitrary in the constitutional sense.

12 JUSTICE SOTOMAYOR: Well, that's my
13 problem, which is when is it ever proper to take
14 away a property right in the constitutional
15 sense, whether it's for a legislature or the
16 executive?

17 MR. LIU: Oh, I --

18 JUSTICE SOTOMAYOR: For an arbitrary
19 and capricious reason?

20 MR. LIU: Well, I think --

21 JUSTICE SOTOMAYOR: You have to give
22 some meaning to having a hearing.

23 MR. LIU: -- I -- I think -- I think
24 that's our -- our -- our point, is if -- if the
25 relator could show that our exercise of the --

1 of the dismissal right was arbitrary in the
2 constitutional sense --

3 JUSTICE SOTOMAYOR: That's the -- the
4 interest, that's the question that I'm asking.

5 The only thing our -- in a
6 constitutional sense would be an equal
7 protection violation, a dismissal based on sex,
8 et cetera, but that's not related to the
9 property right in any way.

10 MR. LIU: Well, I -- I -- I think it
11 is because there wouldn't even be that
12 protection without some property interest that
13 triggers the application of the Due Process
14 Clause. Now Congress could have layered on top
15 of the constitutional baseline an even more
16 rigorous standard of review.

17 JUSTICE SOTOMAYOR: Well, they did,
18 good cause. Good cause to intervene suggests
19 that there has to be a reason, and --

20 MR. LIU: Well, our primary argument
21 is that the government need not intervene as a
22 prerequisite for --

23 JUSTICE SOTOMAYOR: I --

24 JUSTICE JACKSON: But why is that, Mr.
25 Liu? That seems odd. I mean, the statute is

1 very clear that the government has a period of
2 time at the beginning to make a determination
3 about whether or not it's going to take -- take
4 over the action. If the government declines and
5 the property interest is created, the statute
6 suggests that the government can come back into
7 the action and, if you're like me and believe
8 perhaps that that means the government can take
9 it over, you know, they can definitely
10 intervene, but they have to show good cause.
11 And it would seem to me that good cause does the
12 work of ensuring that the property interest that
13 has been created is -- is taken into account and
14 understood and the government can't just come
15 back in willy-nilly.

16 So I'm curious as to the government's
17 repeated representations that they can do all
18 sorts of things related to this suit without
19 even intervening.

20 MR. LIU: Well, I think it goes to the
21 purpose of intervention under the structure of
22 the statute. The purpose of intervention under
23 the statute is for the government to become a
24 plaintiff in the case, and the point of becoming
25 a plaintiff in the -- in the case is so that the

1 government can assume the -- the rights and
2 burdens of being a full party in the case, the
3 rights being the ability to file motions, to
4 examine witnesses, to direct the presentation of
5 evidence, the burdens being the burdens under
6 the Federal Rules of Civil Procedure as they
7 pertain to discovery.

8 JUSTICE JACKSON: But not the right to
9 settle the claim? I mean, you say repeatedly
10 that the government doesn't have to intervene
11 and they can still settle this claim.

12 MR. LIU: Well, my point is none of
13 those rights or burdens matters if the whole
14 point of the government's motion is to end the
15 case. The only reason intervention matters is
16 if we want to proceed with the case, and it
17 matters what our rights are, what our burdens
18 are going forward. But, if the whole point of
19 our motion is to end the case, then there simply
20 is no reason to put us through the hurdle of
21 intervening beforehand.

22 JUSTICE KAGAN: Well, this actually
23 does --

24 CHIEF JUSTICE ROBERTS: Mr. Liu, it --
25 it -- your case would be easier for you, maybe

1 for us, if your client had a more robust view of
2 Article II. I was surprised it's cited only
3 once in your brief, on page 40. We're talking
4 about the government's ability to control a suit
5 with billions of dollars of money defrauded
6 against federal law according to the
7 allegations, and yet you're not arguing much
8 about the President's authority to enforce
9 that -- that statute at all.

10 MR. LIU: Well, let me be clear about
11 two things. Number one, of course, we think
12 that in a -- in a case of a suit brought in the
13 name of the United States that is to redress
14 injuries done to the United States, the United
15 States' own views of what's in its interests
16 should be paramount.

17 But, secondly, we do not think in this
18 case that there is a constitutional problem to
19 avoid, and the reason goes to the reasoning of
20 this Court's decision in Stevens, where the
21 Court made clear that the relator here is not
22 acting as an agent of the United States, rather
23 that the relator, by virtue of the assignment
24 theory, remains a private person.

25 And in our view, the -- the Article II

1 concerns aren't triggered by a private person
2 who's simply exercising private power. They
3 would be -- they would be triggered if the
4 relator were conceived of as an agent or
5 representative of the United States.

6 CHIEF JUSTICE ROBERTS: Well, that
7 depends upon your prevailing in -- in this case.
8 I mean, if you don't, then your authority to
9 control the action would be significantly
10 circumscribed.

11 MR. LIU: Well, I think the -- the
12 bright line I'm drawing is between private
13 persons who are seeking to enforce federal law
14 on the one hand, so not just like not just the
15 relator in this case but also the Title VII
16 plaintiff or the Sherman Act plaintiff. That's
17 on the one hand. And on the other side of the
18 very bright line, an agent or representative of
19 the United States who is actually exercising
20 governmental executive power.

21 Now we think this -- this relator
22 falls on this side of the line, but, if this
23 relator fell on the other side of the line, we
24 would not think the controls in the statute
25 would be sufficient. The idea that it would be

1 sufficient for Article II purposes that we could
2 simply file papers in court and try to get the
3 court to control an agent of the United States
4 really would stretch Article II very far.

5 The only reason why this scheme is
6 constitutional is for the reason the Court gave
7 in Stevens, which is that the relator is
8 conceived of as not exercising --

9 JUSTICE GORSUCH: So, counsel --

10 MR. LIU: -- governmental power.

11 JUSTICE GORSUCH: -- if -- if I
12 understand it -- and just -- I just want to make
13 sure I'm following the bouncing ball here -- the
14 Article II problem is solved by the fact that
15 exercising its Article I authority, Congress has
16 authorized property to be conveyed to a private
17 person, which -- that's right there in the text
18 of Article I. And that's kind of how
19 Blackstone conceived of qui tam actions, as a
20 property interest that's been conveyed.

21 MR. LIU: Right.

22 JUSTICE GORSUCH: Okay. Fine. But
23 the property -- now you want to come into the
24 case, okay? Question whether you have to come
25 into the case. If it's someone else's property,

1 you might think that before you extinguish it,
2 you might have to come in and be a party to the
3 case. So that's kind of where I'm stuck on
4 that.

5 And then, when we get to the question
6 of the standard, if there is a property interest
7 that someone else has, there's a due process
8 interest there, at a minimum, forget about the
9 takings clause for now.

10 And what's wrong with the rationality
11 standard, a true rationality standard? We can
12 quibble about whether the Ninth Circuit got it
13 right, but what's wrong with that?

14 Any executive action, forget about
15 property interest, would be subject to that, and
16 why is that much different than Rule 41, which
17 says proper cause when an answer has been filed?

18 All right. A lot there. Have at it.

19 MR. LIU: Well, to your -- to your
20 first point, we don't think there are two --
21 Article II concerns here, but it is still
22 central to the way this statute works that this
23 is a suit brought in the United States' -- in
24 the United States' name to redress wrongs done
25 to the United States. So this isn't -- this at

1 bottom is still an assignment of the
2 government's own damages claim.

3 JUSTICE GORSUCH: Sure.

4 MR. LIU: And so the government's own
5 view of whether the litigation proceeding or
6 being dismissed is in the United States'
7 interest is really something in the United
8 States' bailiwick, and -- and our view of that
9 should be controlling.

10 To your point about the -- the
11 constitutional baseline, I -- I -- I think this
12 is a situation where -- where Congress could
13 have imposed a -- a stricter standard if it had
14 wanted to.

15 JUSTICE GORSUCH: Well, it set a
16 hearing, and -- and, normally, there are not two
17 parties, right? Normally, something happens at
18 --

19 MR. LIU: Oh --

20 JUSTICE GORSUCH: -- at -- at
21 hearings. So what -- what -- what -- what
22 should happen in the hearing? Why -- is
23 something wrong with the rational basis test?
24 Is it different than Rule 41 after an answer,
25 proper cause is the standard there?

1 Those things are usually very easily
2 met, and I'm -- I'm just not sure I understand
3 the objection to them.

4 MR. LIU: Sure. Well, the rationality
5 standard that the Ninth Circuit has adopted
6 isn't your typical constitution --
7 constitutional rational basis.

8 JUSTICE GORSUCH: I'll spot you that.

9 MR. LIU: Yeah.

10 JUSTICE GORSUCH: Okay.

11 MR. LIU: Yeah.

12 JUSTICE GORSUCH: I'll spot you that.

13 MR. LIU: It's also not the
14 standard --

15 JUSTICE GORSUCH: But -- but put that
16 aside. Would a proper, in the government's
17 view, rational basis standard be objectionable
18 and would it be different than Rule 41? Last
19 time I'll ask the question, I promise.

20 MR. LIU: It would not be
21 objectionable if it reflected this Court's
22 decision in cases like County of Sacramento
23 versus Lewis. That's the applicable
24 constitutional test. We don't think the court
25 should invent some sort of new one -- you know,

1 one ticket only sort of test for this case.

2 Is it different from Rule 41? Yes.

3 Rule 41 governs the relationship between the
4 plaintiff and the defendant. And so what Rule
5 41 says is that when a plaintiff voluntarily
6 dismisses a case, the court can step in and
7 protect the defendant's interests by
8 dismissing --

9 JUSTICE GORSUCH: Well, it says proper
10 cause. It says a plaintiff can dismiss a case
11 for proper cause. You're now Plaintiff, Rule
12 41, you want to voluntarily dismiss. Answer's
13 been filed, summary judgment, whatever, proper
14 cause. There's no more definition of the
15 standard than that.

16 MR. LIU: Right, but the -- the -- the
17 -- the standard that I think the rule-makers
18 contemplated was one where a court would be in a
19 position of evaluating whether something the
20 government did, dismissal, how that affected the
21 defendant. And that kind of inquiry, prejudice
22 to the defendant, is pretty common in the law.

23 What's not common is what Petitioner
24 is asking the Court to do here, which is to
25 evaluate as between two litigants on the same

1 side of the V, the United States and the
2 relator, which one has the better view of the
3 United States' interest. That's not something
4 41 -- Rule 41 has ever contemplated.

5 JUSTICE BARRETT: But that's because a
6 qui tam action is unusual, and Justice Gorsuch
7 is right, right, if the proper cause standard --
8 and I agree with you that courts typically apply
9 that to account for prejudice to the defendant
10 if the plaintiff dismisses after the defendant
11 has filed an answer or a dispositive motion.

12 Why couldn't the proper cause standard
13 in this unique context take care of any
14 prejudice to the relator?

15 MR. LIU: I think it's because it
16 would run straight into the teeth of Congress's
17 decision in (c)(2)(A) to leave out a substantive
18 standard. And this wasn't an accident that
19 Congress made.

20 If you look up and down the FCA, there
21 are numerous provisions where Congress specified
22 a particular showing that -- that the government
23 would need to make or a particular showing --
24 finding that the court would need to make and
25 they left out any such standard in (c)(2)(A).

1 CHIEF JUSTICE ROBERTS: Justice
2 Thomas, anything further?

3 Justice Alito?

4 JUSTICE ALITO: I still don't have a
5 very concrete understanding of what you think is
6 supposed to happen at this hearing if there has
7 to be a hearing.

8 Is it enough if the government just
9 says, we think the claim isn't meritorious or we
10 think the -- the discovery going forward is
11 going to be too burdensome?

12 Does the court just say, okay, that's
13 a -- that reason is not arbitrary and capricious
14 and therefore dismiss?

15 MR. LIU: We --

16 JUSTICE ALITO: Does it inquire into
17 those things?

18 MR. LIU: If those are the reasons we
19 gave, they would not be anywhere close to being
20 arbitrary in the constitutional sense --

21 JUSTICE ALITO: Okay.

22 MR. LIU: -- and a sort of shocks the
23 conscience way. But we do think the hearing
24 serves two important purposes.

25 JUSTICE ALITO: But does it have to do

1 more -- does the government have to do more than
2 simply say those things?

3 MR. LIU: No.

4 JUSTICE ALITO: Does it have to make
5 -- okay.

6 MR. LIU: No. And if -- and if -- and
7 if Congress had wanted the government to say
8 more than those things, it would have used
9 language like it did elsewhere in the statute,
10 which is, upon a showing by the government, the
11 court may dismiss, or upon a particular finding,
12 the court in its discretion may dismiss.

13 But, instead, the -- the language of
14 (c)(2)(A) is written in terms of the government,
15 it says the government may dismiss, and then
16 it -- the Congress specified two conditions,
17 neither of which has to do with the standard.

18 JUSTICE ALITO: What would be
19 insufficient in your view? So the government
20 says, we move to dismiss because we feel like
21 it, or we move to dismiss because we consulted
22 an astrologist or there is political pressure to
23 dismiss this case. What would be insufficient?

24 MR. LIU: Well, I think consulting an
25 astrologer would seem arbitrary in the

1 constitutional sense, but we're not asking the
2 Court to disturb its existing precedents on what
3 is constitutional or not vis-à-vis executive
4 action. We're simply saying, take those as
5 given, and that's the constitutional baseline.

6 If in a future case the Court wants to
7 adjust the constitutional baseline, that's fine,
8 but all we're saying is that the way to think
9 about this is that the statute itself does not
10 supply a standard and so the only applicable
11 standard here has to come from the Constitution.

12 JUSTICE ALITO: What happens when the
13 government belatedly intervenes and moves to
14 dismiss or belatedly moves to dismiss and
15 doesn't really have a good reason for having
16 waited, but, by that time, the relator has spent
17 a ton of money litigating the case? It's just
18 too bad for the relator?

19 MR. LIU: It is too bad. The relator
20 brings the case knowing that a condition of his
21 assignment, in effect, is that the government
22 may exercise its dismissal right. No circuit
23 has adopted Petitioner's view that the
24 government loses forever the right to dismiss if
25 it doesn't intervene at the outset. And so

1 every relator brings these suits knowing that
2 that's a possibility.

3 On top of that, the government
4 provides as required under (c)(2)(A) notice that
5 we're going to exercise this right before we
6 exercise it.

7 And just look at the facts of this
8 case. We gave notice that we were going to
9 exercise that right the first time. The relator
10 came in and persuaded us not to exercise it.
11 And so, in fact, that's -- that's evidence not
12 only that the notice is a key component and that
13 the relator had notice of what we were doing but
14 also that the hearing serves a purpose because
15 it led us to decide not to dismiss at -- at one
16 point in the case.

17 CHIEF JUSTICE ROBERTS: Justice
18 Sotomayor?

19 JUSTICE SOTOMAYOR: Well, answer
20 Justice Alito's entire question. The astrologer
21 might not be good enough. I don't feel like it,
22 is that good enough?

23 MR. LIU: No. I think that would be
24 arbitrary in the Constitution.

25 JUSTICE SOTOMAYOR: So let's talk

1 about political pressure. There's no reason
2 related to the case. It's simply that the
3 senator of this defendant's home state doesn't
4 want this defendant to be sued.

5 Is that good enough?

6 MR. LIU: I think it would truly
7 depend on the circumstances of the case, and the
8 reason why is because the whole point that
9 Heckler versus Chaney says that these types of
10 decisions are presumptively immune from judicial
11 review.

12 JUSTICE SOTOMAYOR: They -- they are
13 if you're talking about something that's your
14 property right exclusively, but this is a very
15 different situation where the relator has a
16 property interest.

17 MR. LIU: Well, I think -- I think the
18 cost/benefit analysis, though, is still just as
19 judicially unmanageable regardless of the sort
20 of analytic source of it.

21 In other words, when the government
22 makes these sorts of decisions, what's going
23 into the decision-making is a consideration of
24 the government's policies across the board,
25 whether certain resources would be better

1 allocated here or there, concerns from
2 disclosing privileged information.

3 JUSTICE SOTOMAYOR: Those -- those are
4 related to the case. The question was the
5 senator of this defendant's state says don't do
6 it. He gives me money.

7 MR. LIU: I -- I --

8 JUSTICE SOTOMAYOR: This company feeds
9 me money, don't do it.

10 MR. LIU: -- I think it's -- it's hard
11 to say categorically whether that would be
12 impermissible simply because the way our system
13 works is through politics, and politics figure
14 into the sorts of policies and priorities that
15 administrations have. And --

16 JUSTICE SOTOMAYOR: So it's a fake
17 property interest the relator has?

18 MR. LIU: Oh, no --

19 JUSTICE SOTOMAYOR: Blackstone?

20 MR. LIU: It's protect -- it's
21 protected just like any other property interest
22 under the Constitution. And if Congress had
23 wanted to provide additional protections, it
24 could have done so, but it didn't.

25 JUSTICE SOTOMAYOR: Okay. Thank you.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?

2 JUSTICE KAGAN: When and how would it
3 make a difference to require the government to
4 intervene before moving to dismiss?

5 MR. LIU: Yeah. I think the practical
6 problem lies in subjecting the government's
7 dismissal decision to second-guessing by the
8 relator, and that in turn puts the Court in the
9 awfully strange position that I mentioned
10 earlier of having to decide, as between the
11 United States itself and the relator, who
12 actually has the better view of the United
13 States' interests in that case.

14 I think that runs right into the
15 problem that Heckler versus Chaney identified,
16 and I have to presume that's why Congress left
17 out any substantive standard in (c)(2)(A)
18 itself. To then read into the statute kind of
19 through the back door of (c)(3)'s intervention
20 provision a substantive standard to review that
21 decision I think gets both Congress's intent and
22 common sense wrong.

23 CHIEF JUSTICE ROBERTS: Justice
24 Gorsuch?

25 JUSTICE KAVANAUGH: Just to follow up

1 on Justice Alito's question, would it be okay to
2 come in and say we don't think it's the best use
3 of agency resources to proceed?

4 MR. LIU: Yes, that would be
5 absolutely okay.

6 JUSTICE KAVANAUGH: And it's not a
7 priority of the agency to proceed with this kind
8 of case?

9 MR. LIU: Correct.

10 JUSTICE KAVANAUGH: So all the kind of
11 Heckler versus Chaney reasons. And could a
12 district court order discovery into whether
13 those were really the government's reasons?

14 MR. LIU: No, not in a typical case.
15 I think, if a relator came in and made a
16 credible showing that there was a constitutional
17 violation such as this --

18 JUSTICE KAVANAUGH: Right. The equal
19 protection example.

20 MR. LIU: Sort of an equal
21 protection --

22 JUSTICE KAVANAUGH: What about
23 privilege? Could any of this -- proceeding with
24 this will raise too many privilege concerns when
25 moving?

1 MR. LIU: Yes, I think that is a
2 legitimate reason and not arbitrary, in the
3 constitutional sense, reason for the government
4 to seek to dismiss.

5 JUSTICE KAVANAUGH: Just a question on
6 the term "property interest" here. I mean, it's
7 an odd sort of property interest, right, when it
8 can be completely extinguished by the
9 government, the Executive Branch, at any time?

10 MR. LIU: Well, I think it is a
11 property interest that --

12 JUSTICE KAVANAUGH: So it's an odd --

13 MR. LIU: It -- it --

14 JUSTICE KAVANAUGH: -- it's an odd
15 thing?

16 MR. LIU: It's an odd thing, but it
17 is, I think, the -- the structure Congress
18 contemplated and the one that this Court
19 accepted in Stevens. And I -- and I think, if
20 we accept that theory, then a lot of parts of
21 the statute make sense from an Article III and
22 an Article II perspective.

23 JUSTICE KAVANAUGH: Last question.
24 This might be what Justice Kagan was asking, but
25 it might be something different. The -- if you

1 have to intervene before you move to dismiss --
2 and so, if this is repetitive, I apologize --
3 the D.C. Circuit said that would be largely
4 academic, that requirement, if you had to
5 intervene before moving to dismiss. Do you
6 agree with that? I mean, in other words, it
7 doesn't matter one way or the other.

8 MR. LIU: Yeah, I think it -- it -- it
9 depends entirely on what standard for good cause
10 a court adopts. It's largely academic if the
11 standard for good cause means that anytime the
12 government seeks to dismiss that's automatically
13 good cause.

14 JUSTICE KAVANAUGH: So, on the good
15 cause, the things I identified earlier about
16 reasons to dismiss, you would also say, if we
17 required you to intervene first, would also
18 satisfy good cause, prioritization, resources,
19 privilege?

20 MR. LIU: Right. I mean, we would go
21 even further and say that the intent to dismiss
22 is itself good cause to at least have the notice
23 and the opportunity.

24 JUSTICE KAVANAUGH: Then it really is
25 academic, which is fine, but I just -- that's

1 good to get clarity on that. Okay. Thank you.

2 MR. LIU: Thanks.

3 CHIEF JUSTICE ROBERTS: Justice
4 Barrett?

5 Justice Jackson?

6 JUSTICE JACKSON: Yes. So just
7 following up on Justice Kagan and Kavanaugh's
8 point about intervention. So you -- I thought
9 you said to Justice Kagan that intervention
10 would be problematic because it's subjecting the
11 government's dismissal decision to
12 second-guessing. But it's not the -- it's not
13 the intervention that is subjecting the motion
14 to dismiss. It's the fact that they -- you have
15 to have a hearing for a motion to dismiss,
16 right? I mean, regardless, even without
17 intervention, do you concede that the statute
18 says that the government's filing of a motion to
19 dismiss at least entitles the relator to an
20 opportunity for a hearing?

21 MR. LIU: Correct.

22 JUSTICE JACKSON: So that's the
23 hearing -- it's the hearing that creates the
24 opportunity for a second-guessing of the
25 government's determination --

1 MR. LIU: Well, but we --

2 JUSTICE JACKSON: -- about dismissal?

3 MR. LIU: -- but we think Congress in
4 (c)(2)(A) purposely left out any substantive
5 standard for a court to apply in evaluating the
6 government's dismissal decision. And to read
7 good cause as supplying that standard we don't
8 think makes sense under the -- the structure --

9 JUSTICE JACKSON: So what if we read
10 good cause as not so much -- as not so much
11 supplying a standard, but I notice in the
12 statute it says upon a showing of -- of good
13 cause such hearing may be held in camera.

14 So what if -- what if what's happening
15 there is the government, when it intervenes, has
16 the opportunity to present arguments to the
17 court about the nature of other investigations
18 or whatever it is that it does in camera, and
19 that kind of cuts against the -- the -- the
20 relator's, you know, open hearing scenario?

21 MR. LIU: Well, I -- I don't think our
22 concerns are fully addressed by moving the
23 reason -- the evaluation in camera. I -- I
24 think our problem with subjecting the
25 government's decision to a substantive standard

1 is, one, that's not what Congress intended, but,
2 two, it does create this practical problem where
3 the court is engaging in the sort of inquiry we
4 think Heckler versus Chaney recognized courts
5 are ill-equipped to conduct.

6 JUSTICE JACKSON: So this might be
7 repetitive. What inquiry is the court supposed
8 to be engaged in in the hearing --

9 MR. LIU: Right.

10 JUSTICE JACKSON: -- that you concede
11 the motion to dismiss goes along with?

12 MR. LIU: We think, at the hearing,
13 the -- the court can consider relator's
14 allegations that we have violated the
15 constitutional baseline that we think applies in
16 this case. The hearing also serves a second
17 purpose, which that -- is that it allows the
18 relator to convince the government not to
19 exercise the right to dismiss.

20 Now that is far from an empty
21 formality, as this case illustrates, because
22 the -- the -- when we initially wanted to
23 dismiss the case, we heard from the relator and
24 then changed our minds, giving the relator a
25 chance to put the case back on the right track.

1 It was only after the case fell off that track
2 that we then ultimately exercised our dismissal
3 right.

4 JUSTICE JACKSON: Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Mr. Mosier.

8 ORAL ARGUMENT OF MARK W. MOSIER
9 ON BEHALF OF RESPONDENT EXECUTIVE HEALTH
10 RESOURCES, INC.

11 MR. MOSIER: Mr. Chief Justice, and
12 may it please the Court:

13 No court has interpreted the False
14 Claims Act to prohibit the government from
15 dismissing a qui tam suit if the government
16 initially declined to intervene. That
17 interpretation would interfere with the
18 government's dismissal authority because the
19 government cannot always determine during the
20 seal period whether a suit should be dismissed.
21 Whether the claims lack merit or whether they
22 could interfere with other enforcement actions
23 may not be known before the litigation proceeds.

24 If the False Claims Act prevents the
25 government from ending litigation that no longer

1 serves the interests of the United States, then
2 the statute is unconstitutional. The
3 enforcement of federal law cannot be left solely
4 to private relators seeking financial gain.

5 I welcome the Court's questions.

6 CHIEF JUSTICE ROBERTS: Counsel, is it
7 consistent with the Congress's view of these
8 sorts of actions, going back to 1863, to
9 continue to leave the entire proceeding in the
10 hands of the government, which it would be under
11 your theory? In other words, the government
12 didn't have a statutory right to intervene until
13 1940-something. And yet, now you would join the
14 government and say basically that they can bring
15 the -- bring the suit to a halt at any time and,
16 given the looseness of the standard that's being
17 proposed, for pretty much any reason.

18 MR. MOSIER: Yeah, I mean, we think
19 that the government's right to step in and
20 dismiss a case, a case that is brought on behalf
21 of the government, to -- pursuing claims that
22 are owned by the government, we think that the
23 government's authority to step in and stop that
24 case derives from the Constitution itself and
25 Article II. And so the early statutes that

1 didn't expressly provide for a right of
2 dismissal, they also didn't foreclose the
3 government from dismissing, and we think that
4 the early statutes should be viewed as silent on
5 the issue of what authority does the executive
6 branch have to stop a qui tam suit that the
7 executive determines is not in the United
8 States' best interests.

9 JUSTICE JACKSON: Can -- can you point
10 --

11 CHIEF JUSTICE ROBERTS: So you have --
12 you have a stronger view of the President's
13 powers than the government?

14 MR. MOSIER: Yeah, I think that that
15 is the case. I will point out, in the -- in the
16 lower courts, the government did make a more
17 robust constitutional avoidance power. And --
18 and I want to be clear exactly the breadth of
19 our argument here. We have not argued that
20 every qui tam statute ever enacted is
21 unconstitutional. We haven't even challenged
22 the constitutionality of the False Claims Act as
23 interpreted by the Third Circuit in this case.

24 The only constitutional argument that
25 we have made is that if Petitioner is correct

1 that if Congress in this statute has prohibited
2 the government from dismissing or settling some
3 certain set of cases or in some circumstances,
4 that would push the statute past the break --
5 constitutional breaking port -- point and go too
6 far in interfering with the -- with the
7 President's Article II powers.

8 We know there have been a number of
9 court of appeals decisions that have upheld the
10 constitutionality of the qui tam suits, but they
11 have all first interpreted the dismissal power
12 to apply whether or not the government proceeds
13 with the action, whether or not the government
14 initially declines or comes into the case later,
15 and they have noted how that right is important
16 in their view to allow the executive to maintain
17 the necessary control over the suit.

18 It is a -- it's a very big incursion
19 into the President's authority to say that
20 somebody else gets to decide whether an
21 enforcement action is initiated in the first
22 instance. What the courts have said is, well,
23 that -- that incursion is not so substantial if
24 we interpret the statute to say that the
25 government can come in at any time and just

1 dismiss the suit.

2 But, if we're not in that circumstance
3 anymore, if it's -- we're in a circumstance when
4 the relator both can initiate the suit, and if
5 we reach a point where the government can no
6 longer come in and end the litigation, whether
7 through settlement or dismissal, then the
8 relator would have free rein to decide what
9 arguments to advance on behalf of the United
10 States, how to interpret the False Claims Act,
11 and we would say that would go too far.

12 We -- we've talked about how the --
13 the right to dismiss at the beginning of the
14 case doesn't take into account the changed
15 circumstances, but I think it also doesn't take
16 into account the Article II responsibilities of
17 the President. It's not just that the President
18 needs to appoint officials to execute the law.
19 The Court has made clear as recently as cases
20 like Arthrex that the President has an ongoing
21 obligation to actively supervise the exercise of
22 executive power.

23 JUSTICE ALITO: If this were an
24 ordinary property interest, so a plaintiff is
25 bringing a private claim to protect its own

1 property interest, the government could not
2 swoop into the case and say dismiss the claim,
3 and the court's inquiry would not be limited to
4 determining whether the government's
5 intervention in the non-technical sense of the
6 term shocked the conscience, right?

7 MR. MOSIER: I think that's right, but
8 the way that we read Stevens, the way that we
9 read Blackstone and the provisions that
10 Blackstone cited in Stevens, and also the way we
11 read cases like the confiscation cases is that a
12 property interest in a qui tam suit vests upon
13 the entry of final judgment.

14 The actual assignment of a chosen
15 action I think is probably more akin to an
16 assigned -- a contractual right or even perhaps
17 a trust. So we think that the property right --
18 this is how we read Stevens -- the property
19 right doesn't vest until there's a judgment, and
20 that's why we don't think that the review
21 necessarily needs to be treated as the deprivation
22 of -- of a property right.

23 We think, if you look at more of a
24 contractual assignment of a cause of action, the
25 terms of the assignment have to be set by the

1 contract -- the contract or the -- which is the
2 statute in this circumstance, and one of the
3 rights in the statute as we read it and as the
4 government reads it is that the government has
5 the authority to dismiss over the relator's
6 objection. And, you know, you've asked a lot
7 about the interpretation of how to get --

8 JUSTICE ALITO: Well, that -- that
9 sounds like it's purely statutory. So, if you
10 have a contract assigning a right, you look to
11 the terms of the contract, so here we have a
12 statute, you look to the terms of the statute.
13 And then it's just not clear to me how the --
14 how Article II then gets back into the case.
15 There's either an Article II problem or there
16 isn't an Article II problem with this whole
17 procedure.

18 MR. MOSIER: Well, regardless of
19 whether you view it more as a contractual
20 assignment or an assignment of a property right,
21 you still have the situation where a private
22 relator is litigating on behalf of the United
23 States to recover funds allegedly defrauded from
24 the United States. And we -- our position would
25 be that is still the exercise of executive

1 power, and that puts you in the position of
2 determining whether the President and the
3 Attorney General retain sufficient control over
4 the qui tam suit so as -- so as to not violate
5 the constitutional separation of powers.

6 When the courts of appeals have looked
7 at it, they've -- they've analyzed it in a
8 Morrison versus Olson framework to say does the
9 -- does the powers given to the relator -- is it
10 so sufficient that it deprives the Attorney
11 General of the ability to sufficiently control
12 the litigation to ensure that the laws are
13 faithfully executed? And all of those analysis
14 depend on the government's veto power
15 essentially to say this suit is no longer
16 serving the interests of the United States. We
17 need to bring it to an end.

18 JUSTICE KAGAN: And how far does that
19 go? Does -- does the constitutional argument
20 that you're making suggest that the government
21 needs to be able to bring it to an end even
22 without intervening, or are you perfectly fine
23 with a solution that says, well, first, the
24 government intervenes and then moves to dismiss?

25 MR. MOSIER: We're perfectly fine with

1 that approach. What the Third Circuit held in
2 this case is that the government needs to first
3 intervene. It found that on the facts of this
4 case there was clearly good cause to intervene.
5 The Petitioners have not challenged that -- that
6 part of the holding.

7 And so on the judgment before you is a
8 case in which the court of appeals found not
9 only that intervention was required, but it was
10 satisfied and good cause was there, and it does
11 deal with a lot of the textual issues regarding
12 the structure of the provisions and the
13 surplusage to say the government needs to
14 intervene, but then, once it intervenes under
15 (c)(3), it goes back into the -- the world of
16 (c)(1) and (c)(2), where it has the power to
17 dismiss.

18 We note the -- the court of appeals,
19 both the Third Circuit in this case and the
20 Seventh Circuit have required intervention, and
21 they've said it's usually going to be a low bar
22 for the government because good cause is a
23 flexible standard, and we can take into account
24 Article II separation of powers concerns when we
25 are apply -- when we are applying good cause.

1 And so we think that should go a long
2 ways to addressing the government's concern of
3 what would happen if good cause is too
4 heightened of a standard and would make it too
5 difficult for the government to intervene.

6 If I -- I could, I could respond to --
7 to the government's position that as I
8 understand on the constitutional position is
9 that the -- that the relator is not exercising
10 government power because it's a private
11 individual.

12 But we don't think that should be the
13 constitutional analysis. It's a -- it is maybe
14 a private person, but, in some ways, that may
15 become more problematic that it is a private
16 person who hasn't taken an oath to the
17 Constitution, who's not bound by DOJ guidelines,
18 who is able to litigate claims on behalf of the
19 United States.

20 And so we think it's even more
21 important that the Attorney General has
22 substantial oversight over a private person
23 litigating on behalf of the United States when
24 -- when we clearly know that the -- the interest
25 that the -- that the private relator is most

1 concerned about is the financial stake that he
2 may have in the case.

3 JUSTICE ALITO: Do you agree with the
4 government's understanding of what should and
5 should not occur at the hearing if there's going
6 to be a hearing?

7 MR. MOSIER: Yes. We -- we take a
8 similar position. I mean, some of the courts of
9 appeals have said that it does provide a useful
10 function of requiring the government to listen
11 to the relator and -- and hear -- hear the --
12 the evidence and the arguments against
13 dismissal.

14 It also -- you know, I think this
15 could be analogous to a situation the way the
16 Court addressed -- or the Court's decision in
17 Armstrong, where they recognized that usually
18 the decision -- the government's decision not to
19 prosecute in a criminal case is not subject to
20 judicial review.

21 JUSTICE ALITO: But what if the
22 government doesn't really have any good reason
23 for not intervening earlier? It just says,
24 well, gee, we're embarrassed, Your Honor, but
25 this kind of fell behind a filing cabinet in DOJ

1 and we only found it recently, and the relator
2 says, well, that's fine, but we've spent
3 \$500,000 litigating this case up to this point.
4 What does the court do then? Can the court say
5 that the defendant has to pay or the government
6 has to pay? I assume they can't say the
7 defendant has to.

8 MR. MOSIER: I certainly would not --

9 JUSTICE ALITO: But how about the
10 government?

11 MR. MOSIER: -- we certainly would not
12 say that. I mean, one thing I would say,
13 especially in a case or, here, where the
14 government has expressed its opinion that it is
15 concerned about the relator's ability to prove
16 its case, then I think the concerns on the
17 relator's side of how much money they have spent
18 and how long they've litigated the case to reach
19 a point where they haven't even been able to
20 convince the government that they have a chance
21 of success, the -- the real risk of prejudice
22 and of concern is on the defendant's side, who
23 has also paid -- spent large amounts of monies
24 defending itself against claims over a period of
25 years, and now it's the government whose claims

1 the case is brought on behalf, they have
2 expressed their view that the -- that the
3 relator is unlikely to be able to prove that the
4 case shouldn't --

5 JUSTICE ALITO: Yeah. So the -- the
6 government should foot the whole bill, right,
7 should pay the -- the relator and the defendant?

8 MR. MOSIER: The statute makes clear
9 that the government doesn't have to pay the
10 costs of the litigation, and it's -- it's the
11 deal that the relator knows when it files the
12 suit, is that, you know, this has been the
13 uniform interpretation of the statute by every
14 court of appeals that the government can come in
15 at any stage in the litigation and dismiss over
16 the relator's objection.

17 So there's -- there's not an instance
18 of unfair surprise or that there was a new
19 interpretation offered. There -- there hasn't
20 been a court that -- that has adopted the sort
21 of restriction that the relators want.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Anything further, Justice Alito?

25 Justice Sotomayor?

1 Justice Gorsuch?

2 Justice Barrett?

3 Justice Kagan, anything further?

4 Okay. Thank you.

5 Rebuttal, Mr. Geysler.

6 REBUTTAL ARGUMENT OF DANIEL L. GEYSER

7 ON BEHALF OF THE PETITIONER

8 MR. GEYSER: Thank you, Mr. Chief
9 Justice. Just a few quick points.

10 First, if the executive must be able
11 to dismiss at any time and for any reason, then
12 the founding-era qui tam statutes are
13 unconstitutional, the 1863 version of this Act
14 is unconstitutional, and the 1943 version of
15 this Act is also unconstitutional.

16 The -- the rule has never been in the
17 qui tam setting that the executive has to
18 control the private relator's action in
19 enforcing the property interests in that claim.

20 The second point. The government says
21 that its stated basis is not subject to
22 second-guessing if it can dismiss. Now, of
23 course, that question's, why is there a hearing?
24 The normal reason for having a hearing is to
25 second-guess what the government is saying.

1 And, in fact, it is equivalent to
2 saying that because I feel like it if the
3 government can come up with any reason at all
4 and not have to justify the reason, even if it's
5 clearly arbitrary and clearly incorrect.

6 The government has also said that --
7 that second-guessing would not be subject to
8 judicially manageable standards. Now, of
9 course, Congress thought it's perfectly capable
10 to have a court subject a settlement to very
11 similar standards, and I don't know why, if the
12 government can evaluate a settlement for its
13 reasonableness and its fairness, it can't
14 evaluate a basis for dismissal for irrationality
15 or arbitrariness.

16 The government says that the lack of
17 any standard -- oh, I'm sorry. The -- the
18 government says that there isn't a standard in
19 the statute. Now, under our reading, that makes
20 more sense. If Congress expected the government
21 to take over the case and proceed with the
22 action at the outset and that's when the
23 dismissal authority would kick in, it would make
24 more sense to see the lack of a standard. That
25 would be more like a Rule 41 dismissal.

1 Now, of course, once the relator has
2 invested all that money and you're years down
3 the road and the government has no good reason
4 really for changing its mind, it's very strange
5 not to see a more concrete standard in a statute
6 that says there has to be notice and a hearing.

7 The final point I'll make is that if
8 there is a hearing and if we're wrong on our
9 main theory -- and I -- I -- I hope the Court
10 reconsiders -- then I think the constitutional
11 standard is at least baked into that statute.
12 It's implicit in saying that the government has
13 to come up with some basis for dismiss that is
14 nonarbitrary and that is rational.

15 Congress could not extinguish a
16 property interest for irrational, arbitrary
17 reasons. And if that's true, Congress also
18 can't authorize the government to extinguish a
19 property interest for irrational or arbitrary
20 reasons.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel. The case is submitted.

23 (Whereupon, at 11:25 a.m., the case
24 was submitted.)

25

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