No. 19-3810

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JESSE POLANSKY, M.D., M.P.H.,

Appellant,

v.

EXECUTIVE HEALTH RESOURCES INC., *et al.*,

UNITED STATES OF AMERICA,

Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania, No. 12-cv-04239

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1, the Chamber of Commerce of the United States of America certifies that it is a non-profit membership organization with no parent company and no publicly traded stock.

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly participates as *amicus curiae* in cases that raise issues of concern to the nation's business community.

False Claims Act cases touch on nearly every sector of the economy, including defense, education, banking, technology, and healthcare. And meritless cases exact a substantial toll on the economy. Companies can spend hundreds of thousands or even several million dollars fielding discovery demands in a single case that will end without recovery. Given the combination of punitive potential liability and enormous litigation

[1] No party's counsel authored this brief. No party, party's counsel, or person other than *amicus curiae*, its members, or its counsel provided money for the brief's preparation or submission. All parties consent to the filing of this brief.

costs, marginal or even meritless cases can be used to extract settlements. As a result, cases involving the proper application of the False Claims Act are of particular concern to the Chamber and its members, and the Chamber has frequently participated as *amicus* in such cases. *See, e.g.*, Br. of Chamber of Commerce of U.S. et al. as *Amici Curiae* in Supp. of Pet'r, *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, No. 15-7 (U.S. Jan. 26, 2016); Br. of Chamber of Commerce of U.S. as *Amicus Curiae* in Supp. of Appellee, *U.S. ex rel. Health Choice Alliance, L.L.C., v. Eli Lilly & Co.*, No. 19-40906 (5th Cir. Mar. 12, 2020); Br. of Chamber of Commerce of U.S. as *Amicus Curiae* in Supp. of Appellant, *United States v. CIMZNHCA, LLC*, No. 19-2273 (7th Cir. Nov. 29, 2019); Br. of Chamber of Commerce of U.S. as *Amicus Curiae* in Supp. of Appellant, *United States v. U.S. ex rel. Thrower*, No. 18-16408 (9th Cir. Mar. 22, 2019); Br. of Chamber of Commerce of U.S. as Amicus Curiae in Supp. of Appellee, *U.S. ex rel. Borzilleri v. AbbVie*, No. 19-2947 (2d Cir. Apr. 20, 2020); Br. of Chamber of Commerce of U.S. as Amicus Curiae in Supp. of Appellee, *U.S. ex rel. Borzilleri v. Bayer*, No. 20-1066 (1st Cir. Aug. 12, 2020).

INTRODUCTION

The False Claims Act provides that: "The Government may dismiss [a *qui tam*] action notwithstanding the objections of the [relator] if the [relator] has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion." 31 U.S.C. § 3730(c)(2)(A); *see also U.S. ex rel. Chang v. Children's Advocacy Ctr. of Del.*, 938 F.3d 384, 386 (3d Cir. 2019) (noting that even after the government declines to intervene it can dismiss the action over the objection of the relator). As the D.C. Circuit recognized in *Swift v. United States*, 318 F.3d 250 (D.C. Cir. 2003), this language gives the government unfettered discretion to dismiss *qui tam* suits brought in its name. This Court should adopt the *Swift* standard, which respects the special province of the Executive Branch to bring actions in its own name and to take care that the laws are faithfully executed.

The District Court declined to decide which standard applies, concluding that the government satisfied even the more searching standard developed by the Ninth Circuit in *U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998). JA 18–19. The District Court's decision to grant the government's motion to

dismiss was correct under any standard. But the *Sequoia Orange* standard has no basis in the statutory text, mistakenly relies on irrelevant legislative history, and raises serious constitutional concerns.

Jesse Polansky, who brought this action in the name of and on behalf of the United States, demands reversal so he can pursue the action despite the government's considered decision to dismiss. Polansky takes issue with the District Court's decision to credit the government's reasons to dismiss because of his own exaggerated analysis of the potential recovery. Polansky Br. 34–45. The government's studied judgment, however, was that Polansky has a low chance of success, he overvalues his case, and there are non-economic reasons to dismiss, such as the disclosure of privileged government documents. Gov't Br. 42–45. Nor is the government bound by the rigid economic cost-benefit analysis that Polansky suggests; the government must weigh complex considerations, not all of which are economic, in coming to a dismissal decision. *See id.*

The Act's language does not support second-guessing the government's basis for dismissal. The Act allows private individuals like Polansky to sue on behalf of the United States as a way to further the government's interests, not frustrate them. To ensure that the

government's interests take precedence and that the government can do the job the Take Care Clause assigns it, the Act allows the government to retain control over the suit brought in its name by, *inter alia*, intervening, preventing a relator from dismissing the action, settling an action over the relator's objections, or, as relevant here, dismissing the action over the relator's objections. 31 U.S.C. § 3730(c).

Adopting the D.C. Circuit's standard in *Swift* would properly recognize the government's right to avail itself of an important tool specifically provided by Congress and necessary to the constitutionality of the *qui tam* mechanism to ensure that its larger litigation interests and the public's interests are served. The *Swift* standard declines to insert the Judiciary into a decision assigned by Congress and by the Constitution itself to the Executive.

Recognizing the government's discretion to dismiss False Claims Act cases brought in its name is good policy, even apart from being dictated by the terms of the statute and the Constitution. The robust exercise of the government's dismissal power serves the public interest. Meritless cases exact enormous public costs. And allowing meritless or

inappropriate cases to go forward imposes burdens on defendants, the courts, and the government itself—as this case illustrates.

ARGUMENT

I. THIS COURT SHOULD DECIDE WHAT ROLE, IF ANY, COURTS MUST PLAY WHEN THE GOVERNMENT DECIDES TO DISMISS *QUI TAM* ACTIONS.

When asked to decide the scope of judicial review of the government's dismissal authority in *qui tam* actions, this Court previously declined to reach a definitive answer, choosing instead to assume the appropriateness of the Ninth Circuit's standard in *Sequoia Orange* and finding that it was satisfied. *Chang*, 938 F.3d at 387. Here, the District Court followed suit. JA 18–19. The District Court was correct that the government's motion was amply supported even if *Sequoia Orange* were correct. But *Sequoia Orange* is not correct, and assuming that it is imposes significant costs.

The government should be able to know, when it is considering whether to exercise its dismissal authority, the standard to which it will be held. The prospect of being subjected to intrusive discovery about its deliberative process deters the government from the appropriate exercise of that authority. After all, one of the purposes of the government's unilateral dismissal authority is to spare the government from having to

devote resources to an action it has determined should not go forward; having to devote resources to litigate the dismissal question would defeat that purpose.

The current legal uncertainty on the question presented thus makes it even more difficult for defendants to convince the government to exercise its dismissal discretion when the facts and circumstances warrant. Businesses should not have to endure lengthy and costly discovery at the hands of *qui tam* relators—who have every incentive to make litigation as unpleasant, disruptive, and costly as possible to drive defendants into settlement—in cases the government would prefer to dismiss.

This Court therefore should adopt *Swift* and eliminate the uncertainty currently burdening businesses and the government's exercise of its dismissal authority.

II. THIS COURT SHOULD ADOPT THE D.C. CIRCUIT'S STANDARD FOR GOVERNMENT DISMISSAL OF *QUI TAM* ACTIONS.

The False Claims Act provides that "[t]he *Government may dismiss the action* notwithstanding the objections of the person initiating the action if [1] the person has been notified by the Government of the filing

of the motion and [2] the court has provided the person with an opportunity for a hearing on the motion." 31 U.S.C. § 3730(c)(2)(A) (emphasis added). The government can dismiss an action even after previously declining to intervene. *Chang*, 938 F.3d at 386; *Hoyte v. Am. Nat'l Red Cross*, 518 F.3d 61, 65 (D.C. Cir. 2008); *U.S. ex rel. Ridenour v. Kaiser-Hill Co., LLC*, 397 F.3d 925, 932 (10th Cir. 2005).[2]

The two express conditions for dismissal were satisfied here. The government notified Polansky of its motion to dismiss, and Polansky was provided with a hearing before the District Court on the government's motion to dismiss. Gov't Br. 10 (citing JA 11–25). In such a circumstance, dismissal is "a decision generally committed to [the

[2] The government and Executive Health Resources have explained why Polansky's contention that the government lacks any power to dismiss a declined action is unpreserved and incorrect. Gov't Br. 31–39; EHR Br. 19–27. Polansky neglected to inform the Court that it recognized recently in *Chang* that the government may dismiss a declined action. *See* Polansky Br. 21–22 (citing *Chang* only for the proposition that review of the District Court's judgment is *de novo*).

government's] absolute discretion." *Swift*, 318 F.3d at 253 (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).

A. *Swift* Sets Forth the Correct Standard.

In *Swift*, the D.C. Circuit explained that the False Claims Act gives the government an "unfettered right to dismiss" a *qui tam* action. 318 F.3d at 252. Because a *qui tam* action must "be brought in the name of the Government," 31 U.S.C. § 3730(b)(1), the decision to dismiss a case implicates "the Executive Branch['s] . . . historical prerogative to decide which cases should go forward in the name of the United States." *Swift*, 318 F.3d at 253.

Polansky asks this Court to reverse so he can litigate this case against the wishes of the government. He argues that the government failed to credit the true value of the case, while the government says his view is extremely exaggerated. The District Court was not required to credit the "10 figure" dollar signs in Polansky's eyes, Polansky Br. 39, but more fundamentally, Polansky's proposed rigid cost-benefit inquiry—which focuses only on a potential recovery offset by litigating costs and ignores all the other considerations the government invoked—cannot be reconciled with the plain language of § 3730(c)(2)(A). The statute

authorizes the government to dismiss the action; it supplies no standard for judicial review of the government's decision, nor does it require the government to be bound by an economic cost-benefit calculation. Only § 3730(c)(2)(A)'s reference to a "hearing" suggests any kind of judicial involvement in the government's dismissal process. And as the D.C. Circuit has correctly held, the "function of a hearing when the relator requests one [under § 3730(c)(2)(A)] is simply to give the relator a formal opportunity to convince the government not to end the case." *Swift*, 318 F.3d at 253. That opportunity was given here.

Courts construing § 3730(c)(2)(A) have observed that Congress merely provided for a hearing in which the relator could attempt to persuade the government not to dismiss—a sensible way to ensure that the government has carefully considered its decision and that there is accountability for that decision by making it one of judicial record. *See, e.g., United States v. Everglades Coll., Inc.*, 855 F.3d 1279, 1286 (11th Cir. 2017) ("In the context of dismissals, the court need only 'provide[] the [relator] with an opportunity for a hearing.'" (quoting 31 U.S.C. § 3730(c)(2)(A))); *U.S. ex rel. Maldonado v. Ball Homes, LLC*, No. 5:17-cv-379-DCR, 2018 WL 3213614, at *3 (E.D. Ky. June 29, 2018) ("[T]he plain

language of the statute says nothing about the government being required to make any sort of showing in support of its motion to dismiss."). Giving the relator an opportunity to be heard is not the same as giving the district court authority to enforce rigid, non-statutory requirements on what is meant to be the government's sole discretionary decision.

Moreover, where Congress intends for the Judiciary to have a role in evaluating the government's prosecutorial decisions in the False Claims Act context, Congress knows how to make its intention evident through the use of unambiguous statutory language. The very next subparagraph of the Act—enacted in the same legislation as § 3730(c)(2)(A)—states that the government "may settle the action with the defendant notwithstanding the objections of the [relator] if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances." False Claims Amendments Act of 1986 (1986 Amendments), Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3155 (codified at 31 U.S.C. § 3730(c)(2)(B)). And it is a "general principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another

section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (internal quotation marks omitted). That Congress declined to include § 3730(c)(2)(B)'s "fair, adequate, and reasonable" standard—or any other standard—in § 3730(c)(2)(A) underscores that no such standard applies when the government decides to dismiss a *qui tam* action.

B. Judicial Interference with the Government's Dismissal Authority Would Raise Serious Constitutional Concerns.

Adopting *Swift* will allow this Court to avoid serious constitutional problems raised by *Sequoia Orange*, which threatens to infringe upon the Executive Branch's exclusive responsibility to "take Care that the Laws be faithfully executed . . . ." U.S. Const. art. II, § 3. As the Supreme Court has admonished: "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court's] duty is to adopt the latter." *Jones v. United States*, 529 U.S. 848, 857 (2000) (internal quotation marks omitted). Although courts thus far have generally upheld the Act's *qui tam* provisions under the Take Care

Clause, they have done so precisely because those provisions do not impinge on the government's ultimate discretion to take control of a case from a relator and prosecute the case on its own or, as here, to dismiss the case. *See, e.g.*, *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 753 (5th Cir. 2001) (*en banc*).

But if a private party such as Polansky can pursue a suit on behalf of the government over the government's explicit objection, that would interfere with the Constitution's assignment of responsibility and authority to the Executive. The Framers gave the Executive—not private citizens like Polansky, and not the Judicial Branch—the responsibility and authority to take care that the laws be executed. The Executive thus has wide discretion in making prosecutorial decisions. The Supreme Court has "recognized on several occasions over many years that an [executive] agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to [the executive] agency's absolute discretion." *Chaney*, 470 U.S. at 831 (citing *United States v. Batchelder*, 442 U.S. 114, 123–24 (1979); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 459–60 (1868)). Such

discretion has been recognized time and again given the "unsuitability for judicial review of [executive] agency decisions to refuse enforcement." *Chaney*, 470 U.S. at 831. And the decision not to prosecute or enforce "has long been regarded as the special province of the Executive Branch." *Id.* at 832. To interpret the False Claims Act as authorizing a private citizen like Polansky to force pursuit of a case in the government's name—or as authorizing the district court to scrutinize the reasonableness of the government's decision to dismiss a *qui tam* action—would raise, at the very least, a serious constitutional question. *See Ridenour,* 397 F.3d at 934–35 (courts should construe the Act consistently with the Take Care Clause, which requires that the Executive maintain sufficient control over *qui tam* actions).

In short, Polansky goes astray at the outset by contending that the government lacked authority to dismiss "this private FCA case." Polansky Br. 22 (capitalization omitted). There is no such thing.

C. Unlike the Standard in *Swift*, the Ninth Circuit's Standard Has No Basis in the Statutory Text.

In *Sequoia Orange*, the Ninth Circuit acknowledged that § 3730(c)(2)(A) "itself does not create a particular standard for dismissal." 151 F.3d at 1145. But then it created one of its own. In affirming a

decision granting a government motion to dismiss a *qui tam* action, *Sequoia Orange* stated that the district court "acted reasonably" in adopting the following legal standard:

> A two[-]step analysis applies here to test the justification for dismissal: (1) identification of a valid government purpose; and (2) a rational relation between dismissal and accomplishment of the purpose. If the government satisfies the two-step test, the burden switches to the relator to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal.

Id. at 1145 (internal quotation marks and citations omitted). Such a standard, the Ninth Circuit declared, drew "significant support" from a committee report accompanying the 1986 Amendments. *Id.* The Ninth Circuit then quoted that report, stating: "A hearing is appropriate 'if the relator presents a colorable claim that the settlement or dismissal is unreasonable in light of existing evidence, that the Government has not fully investigated the allegations, or that the Government's decision was based on arbitrary or improper considerations.'" *Id.* (quoting S. Rep. No. 99-345, at 26 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5291).

There are at least two defects in the Ninth Circuit's reliance on this committee report. First, even clear and on-point legislative history could not overcome the serious constitutional concerns counseling avoidance of

the standard adopted by the Ninth Circuit. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."). And, of course, "the best evidence of Congress's intent is the statutory text," and any legislative history is at best secondary. *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012).

Second, as the D.C. Circuit later emphasized in *Swift*, the committee report language quoted by the Ninth Circuit is not even on point because it "relate[d] to an unenacted Senate version of the 1986 amendment." 318 F.3d at 253. The committee report language addressed a proposal to amend § 3730(c)(1) to provide that "[i]f the Government proceeds with [a False Claims Act] action . . . the [relator] shall be permitted to file objections with the court and [to] petition for an evidentiary hearing to object to . . . any motion to dismiss filed by the Government." S. 1562, 99th Cong. § 2 (as reported by S. Comm. on the Judiciary July 28, 1986). That proposal was not enacted; instead, § 3730(c)(1) as enacted confirms the government's primacy: "If the

Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action." As such, the committee report language cited by the Ninth Circuit should not be relied upon. *See, e.g., Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 297 (2010) (rejecting reliance on legislative history connected to legislative language that was not included in the enacted version of the 1986 Amendments).

III. IN ANY EVENT, THE GOVERNMENT'S DECISION TO DISMISS THIS CASE WAS RATIONAL.

A. The Government's Dismissal Decision Warrants the Utmost Deference.

In making its dismissal decision, the government properly relied on its concern that this action "will impose an unjustified burden on the DOJ, CMS, and HHS." JA 25. The government also explained that it had "genuine concerns regarding the likelihood that Relator will successfully establish FCA liability." Gov't Br. 44 (citing JA 20). Those concerns were based, in part, on Polansky's "inability to access medical records to determine whether all of the narrowed bellwether claims are false; and his failure to demonstrate that Defendant caused the submission of false claims to CMS following implementation of the Two

Midnight Rule." Gov't Br. 44 (quoting JA 20). In light of these circumstances, the District Court correctly concluded that the government's dismissal decision satisfied even the *Sequoia Orange* standard. JA 18–25.

Polansky claims that the District Court should have credited his cost-benefit analysis over the government's reasons for dismissal. Polansky Br. 34–45. But Polansky's rigid cost-benefit analysis, which ignores any non-economic factors the government may consider, goes far beyond what even *Sequoia Orange* requires or permits. In overturning a district court that adopted a similar cost-benefit requirement, the Seventh Circuit just this week observed that the government was not required to "make a particularized dollar-figure estimate of the potential costs and benefits of [the] lawsuit." *U.S. ex rel. CIMZNHCA, LLC v. UCB, Inc.*, No. 19-2273, slip op. at 28 (7th Cir. Aug. 17, 2020). "No constitutional or statutory directive imposes such a requirement. None is found in the False Claims Act." *Id.* The *Sequoia Orange* standard, the Seventh Circuit explained, does not contemplate a searching, administrative law-style arbitrariness review, but instead is more

analogous to the much more deferential constitutional arbitrariness review borrowed from substantive due process case law. *Id.* at 28–29.

The District Court here thus properly rejected Polansky's invitation to second-guess the government's conclusions. JA 24–25. Indeed, the judicial intervention contemplated by Polansky implicates considerations that are committed to the discretion of the Executive Branch, such as "whether agency resources are best spent on this [alleged] violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Chaney*, 470 U.S. at 831 (explaining that non-enforcement decisions involve a "complicated balancing of a number of factors which are peculiarly within [an agency's] expertise").

The Ninth Circuit recently underestimated such considerations when it refused to allow an immediate appeal of an order denying the government's motion to dismiss, reasoning that "the interests implicated by an erroneous denial of a Government motion to dismiss a False Claims Act case in which it has not intervened are insufficiently important to justify an immediate appeal." *U.S. ex rel. Thrower v. Academy Mortg.*

Corp., No. 18-16408, slip op. at 23 (9th Cir. Aug. 4, 2020). But that decision does not purport to adopt a more stringent test than *Sequoia Orange*, much less endorse discovery into the government's decisionmaking process; to the contrary, it decided only whether there is appellate jurisdiction over an appeal of the denial of a government motion to dismiss—a question not presented in this case—and did not address the merits of the district court's denial of the government's motion to dismiss in that case. In any event, as discussed above, the government's interests in deciding not to prosecute or enforce are critically important, for the decision "has long been regarded as the special province of the Executive Branch." *Chaney*, 470 U.S. at 832. Allowing the government discretion to weigh relevant factors and exercise its dismissal authority furthers the public interest.

B. Polansky's Litigation Tactics Justify the Government's Dismissal Decision.

By enlisting relators to sue on the government's behalf, Congress intended to help the government—to improve the government's information and to expand its reach beyond its own resources. Congress did not intend—and could not constitutionally have intended—to subordinate the government's interests to relators' interests. Relators,

in short, are a means to the government's ends. *See Ridenour,* 397 F.3d at 934–35.

Polansky appears to have engaged in tactics that understandably caused the government concern. As the District Court explained, Polansky very belatedly revealed he had located a DVD in his personal possession containing 14,000 documents, a number of which were relevant to the litigation. JA 8. The court did not find Polansky's testimony regarding this episode to be entirely credible and granted sanctions. *Id.* The District Court also took issue with Polansky "unilaterally purport[ing] to change the settled method for selection of claims that had been painstakingly arrived at after several pretrial conferences without offering any explanation as to why he failed to seek court approval." *Id.* The court noted that Polansky's actions were "never satisfactorily explained" and left open the possibility of an alternative ground for dismissing all or part of Polansky's claims based on misconduct. *Id.* at 8 & n.10.

Finally, the District Court noted that Polansky failed to live up to commitments he made to the government. The government initially agreed not to move to dismiss Polansky's case if he substantially

narrowed his claims. JA 9–11. Polansky agreed, but then filed an amended complaint that did not live up to that commitment, which spurred the government to move to dismiss. *Id.* The government was justified in choosing to dismiss the case given substantial concerns regarding Polansky's credibility and tactics. *See* Gov't Br. 47–48. Moreover, Polansky's conduct makes clear why Congress was wise to allow the government to move to dismiss cases even after previously declining to intervene. *See Hoyte*, 518 F.3d at 65; *Ridenour*, 397 F.3d at 932.

The government has every reason to be concerned that some relators may not be appropriate representatives of the United States and that continued litigation of their *qui tam* actions may be contrary to the public interest. Gamesmanship and misconduct by relators are unfortunately not uncommon.

For example, in 2016 and 2017, a "professional relator" entity called NHCA Group filed 11 cases against 38 pharmaceutical manufacturers. *See* Gov't Mot. to Dismiss at 1–2, *U.S. ex rel. Health Choice Grp., LLC v. Bayer Corp.*, No. 5:17-CV-126-RWS-CMC (E.D. Tex. 2018) (Doc. 116). The government expressed understandable concern about NHCA Group's

tactics: NHCA Group sought to develop contacts and inside information "under the guise of conducting a 'research study' of the pharmaceutical industry"; it sought to elicit information by saying it was conducting a research study with no bias one way or the other about the industry, without revealing its true purpose of preparing *qui tam* actions; and its website held it out as a healthcare research company and made no mention of its vocation as a relator. *Id.* at 2, 5, 6. The government responded to this conduct by its would-be representative by moving to dismiss those cases, emphasizing the "false pretenses" used by NHCA Group. *Id*. at 6.

In other cases, relators have been disqualified for unethical behavior. For example, the Second Circuit affirmed the disqualification of the relator for legal ethics violations in *United States v. Quest Diagnostics Inc.*, 734 F.3d 154, 168–69 (2d Cir. 2013), and the Fifth Circuit did the same in *U.S. ex rel. Holmes v. Northrop Grumman Corp.*, 642 F. App'x 373, 378 (5th Cir. 2016). These abusive actions were dismissed on motions by the defendants, but the government certainly could (and should) have exercised its authority to dismiss them.

In short, the government has a strong interest in discouraging misuse of the *qui tam* provisions. To the extent the government decided to dismiss this action because of discomfort with Polansky's tactics, that would be entirely appropriate even under the *Sequoia Orange* standard.

C. Robust Exercise of the Government's Dismissal Authority Is in the Public Interest.

Polansky's argument suggests a suspicion of government dismissals of *qui tam* actions. No such suspicion is warranted. To the contrary, the robust exercise of the government's dismissal authority furthers the public interest in multiple ways.

There has been an explosion in *qui tam* litigation—636 new cases were filed in fiscal year 2019 alone.[3] Letting meritless or inappropriate cases go forward burdens defendants, the courts, and the government itself.

False Claims Act litigation is time-consuming, lengthy, and costly. False Claims Act actions touch on nearly every sector of the economy, including defense, education, banking, technology, and healthcare. As

[3] *See* U.S. Dep't of Justice, Fraud Statistics – Overview (Oct. 1986–Sept. 2019), https://www.justice.gov/opa/press-release/file/1233201/download ("DOJ Fraud Statistics").

the Chamber has noted, of the 2,086 cases in which the government declined to intervene between 2004 and 2013 and that ended with zero recovery, 278 of them lasted for more than three years after the government declined and 110 of those extended for more than five years after declination. Br. of Chamber of Commerce of the United States of America et al. as *Amici Curiae* at 13*, Gilead Scis., Inc. v. U.S. ex rel. Campie*, No. 17-936 (U.S. Feb. 1, 2018). It is not surprising, then, that "[p]harmaceutical, medical devices, and health care companies" alone "spend billions each year" dealing with False Claims Act litigation. John T. Bentivoglio et al., *False Claims Act Investigations: Time for a New Approach?*, 3 Fin. Fraud L. Rep. 801, 801 (2011).

Discovery contributes to that financial burden. In one recent case involving a defense contract, for example, the defendant "produced over two million pages of documents" before the relator's claims were dismissed on summary judgment nine years after the relator filed the suit. *U.S. ex rel. McBride v. Halliburton Co.*, 848 F.3d 1027, 1029–30 (D.C. Cir. 2017). Discovery costs for long-running cases are particularly high because many (perhaps most) False Claims Act cases turn on complex allegations of reckless violations of highly technical regulations

or contract terms. As a result, if these cases get past the pleading stage, they require discovery about knowledge, materiality, and damages as they relate to those requirements.

The discovery required for any one of these elements, let alone all of them, can be extensive and expensive. To establish knowledge, relators must show at a minimum that the defendant recklessly disregarded its alleged violation of the relevant requirement. *See U.S. ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 287–91 (D.C. Cir. 2015); *U.S. ex rel. Hefner v. Hackensack Univ. Med. Ctr.*, 495 F.3d 103, 109 (3d Cir. 2007); *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 69–70 & n.20 (2007).

As for materiality, in *Universal Health Services, Inc. v. U.S. ex rel. Escobar*, the Supreme Court clarified that the Act's materiality requirement turns on "the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." 136 S. Ct. 1989, 2002 (2016) (internal quotation marks omitted). Although the Court explicitly noted that materiality could be dealt with at the pleading stage if a plaintiff does not satisfy the plausibility and particularity standards of Federal Rules of Civil Procedure 8 and 9(b), *id.* at 2004 n.6, meritless suits all too often survive defendants' motions to dismiss, leading to expensive

discovery. As the Court explained, when discovery regarding materiality is needed, the relevant evidence "can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement" or, conversely, that "the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated." *Id*. at 2003–04. As a result, False Claims Act cases can feature in-depth discovery to determine whether and when the government learned of the alleged misconduct, whether the government decided to withhold or rescind payment as a result, whether the government in the "mine run of cases" "consistently" and "routinely" "refuses to pay" where similar misconduct is alleged, and whether the defendant knew that the government refused to pay in other cases where there were violations. *Id.* Damages present another source of costly discovery.

Despite the fact that the overwhelming majority of non-intervened cases are meritless, defendants nonetheless face tremendous pressures to settle because the costs of litigating are so high and the potential

downside so great. *See Smith v. Duffey*, 576 F.3d 336, 340 (7th Cir. 2009) (discovery in "complex litigation can be so steep as to coerce a settlement on terms favorable to the plaintiff even when his claim is very weak"); *Int'l Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 153 (4th Cir. 1987) ("danger" of settling vexatious nuisance suits "increased . . . by the presence of a treble damages provision").

And the burden on businesses that provide the government with necessary goods or services is not limited to litigation costs or direct monetary liability. "[A] public accusation of fraud can do great damage to a firm." *U.S. ex rel. Grenadyor v. Ukrainian Vill. Pharmacy, Inc.*, 772 F.3d 1102, 1105–06 (7th Cir. 2014); *see* Sean Elameto, *Guarding the Guardians: Accountability in Qui Tam Litigation Under the Civil False Claims Act*, 41 Pub. Cont. L.J. 813, 824 (2012).

Defendants are not the only ones who pay the price for meritless *qui tam* cases. Judicial time and attention are finite, so every meritless case detracts from a court's ability to focus on the rest of its docket. Government resources are finite too, and every declined *qui tam* action requires government monitoring and, if it gets past the pleading stage, government involvement in discovery. Discovery in declined *qui tam*

actions poses a significant burden on the government as well as defendants. As noted above, *Escobar* clarified that the Act's materiality requirement turns on "the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." 136 S. Ct. at 2002 (internal quotation marks omitted). Answering that question may require discovery from the allegedly defrauded government agency to ascertain whether it likely would have denied payment had it known of the alleged violation. And the Court underscored the fact-intensive nature of the materiality inquiry by specifically rejecting the argument that materiality requires only that "the Government would have the *option* to decline to pay if it knew of the defendant's noncompliance." *Id*. at 2003 (emphasis added). This case powerfully illustrates the reality that the government may be forced to devote extensive resources to discovery in a case it has declined. Polansky dismisses that as "sunk costs," Polansky Br. 36, but he misses the point: if the government had known how resource-intensive this case would be—and how Polansky's litigation tactics would exacerbate that concern—the government likely would have dismissed the case earlier. *See* Gov't Br. 38–39, 45–47.

Thousands of *qui tam* actions are regularly pending under seal awaiting the government's decision as to whether to intervene;[4] the government nearly always obtains an extension of the statutory 60-day deadline to make that decision, and often many years' worth of extensions. The more resources the government must devote against its will to a case like this, the fewer resources are available to investigate other *qui tam* actions—and the backlog will keep growing. "By eliminating frivolous or unmeritorious qui tams, [DOJ] use[s its] dismissal authority to preserve [its] resources for cases of real fraud, and decrease the likelihood of bad case law that makes it more difficult for both the government and relators to pursue meritorious cases."[5]

Moreover, the simple reality is that most declined *qui tam* actions are meritless. The government intervenes in a small minority of *qui tam*

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[4] *See* David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 N.W. U. L. Rev. 1689, 1716 & n.86 (2013) (stating that approximately 3000 *qui tam* actions were pending under seal).

[5] *See* Ethan P. Davis, Principal Dep. Asst. Att'y Gen., Civil Division, U.S. Dep't of Justice, Remarks on the False Claims Act at the U.S. Chamber of Commerce's Institute for Legal Reform (June 26, 2020), https://www.justice.gov/civil/speech/principal-deputy-assistant-attorney-general-ethan-p-davis-delivers-remarks-false-claims.

actions—about 20 percent over the last several years.[6] Yet the vast majority of the over $62 billion obtained under the False Claims Act since 1986 has come from that small subset of intervened cases.[7] In stark contrast, the much larger universe of thousands of declined cases has produced less than $2.8 billion in recovery.[8]

As the District Court recognized, it is entirely rational for the government to use the dismissal authority that Congress conferred to enable it to end a case that "will impose an unjustified burden on the DOJ, CMS, and HHS," JA 25, and focus on cases it believes are more worthy. After all, the government's interest is to see that justice be done, not to maximize the number of dollars obtained under the False Claims Act no matter the merits. As then-Attorney General Jackson recognized, "[a]lthough the government technically loses its case, it has really won if

[6] Press Release, U.S. Dep't of Justice, Deputy Associate Attorney General Stephen Cox Provides Keynote Remarks at the 2020 Advanced Forum on False Claims and Qui Tam Enforcement (Jan. 27, 2020), https://www.justice.gov/opa/speech/deputy-associate-attorney-general-stephen-cox-provides-keynote-remarks-2020-advanced.

[7] *See* DOJ Fraud Statistics.

[8] *See id.*

justice has been done."[9] That is all the more true in the False Claims Act context, where the government is obligated to decide whether a *qui tam* action brought in its name is worthy of being "its case."

The government thus should be able to make quick work of dismissing *qui tam* actions in its discretion. The statute entitles the relator to be heard in an attempt to persuade the government not to dismiss—a process that helps ensure that dismissals are carefully considered. Courts should ensure that the very resources the government sought to save for worthier uses are not diverted to litigating whether the government may exercise its dismissal authority in a particular case. That perverse approach to § 3730(c)(2)(A) is contrary to the public interest as well as contrary to the statutory text and the separation of powers.

[9] *See* Robert H. Jackson, U.S. Att'y Gen., Address Delivered at The Second Annual Conference of United States Attorneys: The Federal Prosecutor 3 (Apr. 1, 1940), https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf.

CONCLUSION

The Court should affirm the District Court's dismissal and adopt the standard outlined in *Swift*.

Respectfully submitted,

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Dated: August 20, 2020

CERTIFICATE OF COMPLIANCE

1. Pursuant to Local Rule 28.3(d), I hereby certify that the attorneys whose names appear on this brief are members of the bar of this Court.

2. This brief complies with the type-volume requirements of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 6,401 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

3. The brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) and 3d Cir. L.A.R. 32.1(c) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 ProPlus in Century Schoolbook 14-point font.

4. Pursuant to Local Rule 31.1(c), I hereby certify that the text of the electronic brief is identical to the text in the paper copies, and that it has been scanned for viruses using McAfee Endpoint Security, Version 10.7.1, and no virus was detected.

Dated: August 20, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that all participants in the appeal are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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