**No. 20-1066**

# UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOHN R. BORZILLERI, MD, Relator
*Plaintiff-Appellant*,
UNITED STATES, ex rel. JOHN R. BORZILLERI, MD
*Plaintiff-Appellee*,
STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF INDIANA; STATE OF IOWA; STATE OF LOUISIANA; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; STATE OF MICHIGAN; STATE OF MINNESOTA; STATE OF MONTANA; STATE OF NEVADA; STATE OF NEW HAMPSHIRE; STATE OF NEW JERSEY; STATE OF NEW MEXICO; STATE OF NEW YORK; STATE OF NORTH CAROLINA; STATE OF OKLAHOMA; STATE OF RHODE ISLAND; STATE OF TENNESSEE; STATE OF TEXAS; STATE OF VIRGINIA; STATE OF WASHINGTON; STATE OF WISCONSIN; DISTRICT OF COLUMBIA,
*Plaintiffs*,
v.
BAYER HEALTHCARE PHARMACEUTICALS, INC.; BIOGEN, INC.; PFIZER, INC.; EMD SERONO, INC.; EXPRESS SCRIPTS HOLDING CO.; CVS HEALTH CORP.; UNITEDHEALTH GROUP, INC.; HUMANA, INC.; CIGNA CORP.; AETNA, INC.; TEVA NEUROSCIENCE, INC.;

(Caption continued on inside cover)

On Appeal from the United States District Court for the District of Rhode Island, No. 14-cv-00031, Hon. William E. Smith

# CONSENT MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE UNITED STATES OF AMERICA

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*Counsel for Amicus Curiae the Chamber of Commerce of the United States of America*

August 12, 2020

TEVA PHARMACEUTICALS USA, INC.; NOVARTIS PHARMACEUTICALS CORP.,
*Defendants-Appellees.*

CATAMARAN CORP.; WELLPOINT INC.; WELLCARE HEALTH PLANS, INC.;
WERNER BAUMANN, CEO, BAYER AG
*Defendants.*

## 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.

/s/ *Jeffrey S. Bucholtz*
Jeffrey S. Bucholtz

*Counsel for Amicus Curiae*

Pursuant to Federal Rule of Appellate Procedure 29, the Chamber of Commerce of the United States of America ("Chamber") respectfully moves for leave to file the accompanying *amicus curiae* brief in support of Appellee United States of America.

All parties to this appeal have consented to the filing of this amicus brief. Through counsel, the Plaintiff-Appellant, John R. Borzilleri, consented to the filing of the *amicus* brief. Through counsel, the United States of America and all the Defendants-Appellees also consented to the filing of the *amicus* brief.

The Court should grant this motion because the Chamber has a keen interest in False Claims Act *qui tam* cases like this one and because the proposed amicus brief will aid the Court's consideration of the issues presented. The Chamber of Commerce of the United States of America represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry, 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. This appeal is important to Chamber

members because meritless *qui tam* lawsuits pose potentially devastating risks to businesses, forcing them to divert scarce resources from their core missions. Members of the Chamber are frequent targets in lawsuits brought by putative whistleblowers under the False Claims Act, as many are heavily regulated and operate complex organizations that contract with the government. It is thus critically important to the members of the Chamber that courts correctly recognize the governments broad authority to dismiss *qui tams*. The attached brief provides additional arguments and insights for the Court to provide the business community's perspective on False Claims Act litigation and the burdens meritless cases—such as this one and many others—impose upon businesses and the broader economy.

For these reasons, this Court should grant the motion for leave to file an amicus brief and allow undersigned counsel to enter notices of appearance.

Respectfully submitted,

*/s/ Jeffrey S. Bucholtz*

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Dated: August 12, 2020

## CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this motion contains 340 words.

Dated: August 12, 2020

*/s/ Jeffrey S. Bucholtz*
Jeffrey S. Bucholtz

*Counsel for Amicus Curiae*

**CERTIFICATE OF SERVICE**

I hereby certify that on August 12, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the CM/ECF system. All participants in this appeal are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

*/s/ Jeffrey S. Bucholtz*
Jeffrey S. Bucholtz

*Counsel for Amicus Curiae*

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/s/ *Jeffrey S. Bucholtz*
Jeffrey S. Bucholtz

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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 have consented 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).

## 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 United Seniors Ass'n v. Philip Morris*, 500 F.3d 19, 25 n.8 (1st Cir. 2007) (noting that the government "can choose to dismiss or settle the complaint (even over the relator's objection)"). 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). 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.

John Borzilleri, who brought this action in the name of and on behalf of the United States, demands the right to pursue the action despite the United States's considered decision to dismiss it. Borzilleri asks this Court to remand so he can engage in discovery and elicit sworn testimony to investigate the government's investigation of his allegations. Borzilleri Br. at 33.

The Act's language does not support such extensive judicial scrutiny of the government's dismissal authority, and Borzilleri's suggested approach is inconsistent with the structure and purpose of the False Claims Act as well as unsupported by its legislative history. The Act allows private individuals like Borzilleri 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.

Courts asked to decide the scope of judicial review of the government's dismissal authority in *qui tam* actions often decline to reach a definitive answer, choosing instead to assume the appropriateness of the Ninth Circuit's standard in *U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998), and find it has been satisfied.[2] Here, the District Court did just that. Addendum to Appellant Brief ("ADD") at ADD004. The District Court was correct that the government's motion was amply supported even if

[2] *See, e.g.*, *U.S. ex rel. Chang v. Children's Advocacy Ctr. of Del.*, 938 F.3d 384, 387 (3d Cir. 2019); *Polansky v. Exec. Health Res., Inc.*, 422 F. Supp. 3d 916, 926 (E.D. Pa. 2019), *appeal docketed*, No. 19-3810 (3d Cir. Dec. 13, 2019); *U.S. ex rel. Graves v. Internet Corp. for Assigned Names & Nos., Inc.*, 398 F. Supp. 3d 1307, 1311–12 (N.D. Ga. 2019); *U.S. ex rel. NHCA-TEV, LCC v. Teva Pharm. Prods. Ltd.*, No. 2:17-cv-02040, 2019 WL 6327207, at *3 (E.D. Pa. Nov. 26, 2019); *U.S. ex rel. Borzilleri v. Abbvie, Inc.*, No. 15-cv-7881, (JMF), 2019 WL 3203000, at *2 (S.D.N.Y. July 16, 2019), *appeal docketed*, No. 19-2947 (2d Cir. Sept. 13, 2019); *U.S. ex rel. Brutus Trading, LLC v. Standard Chartered Bank*, No. 18 Civ. 11117 (PAE), 2020 WL 3619050, at *5 (S.D.N.Y. July 2, 2020); *U.S. ex rel. Nasuti v. Savage Farms, Inc.*, No. 12-30121-GAO, 2014 WL 1327015, at *1 (D. Mass. Mar. 27, 2014) (stating that the court found the "*Swift* rationale more persuasive," but ultimately declining to pick between *Swift* and *Sequoia Orange*).

*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—as demanded by Borzilleri—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 that it has determined should not go forward; having to devote resources to litigate the dismissal authority 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). Those two express conditions for dismissal were satisfied in the Rhode Island District Court. The government notified Borzilleri of its motion to dismiss, and Borzilleri was provided with a hearing before the District Court on the government's motion to dismiss. Borzilleri Br. at 18. In such a circumstance, dismissal is "a decision generally committed to [the 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. After all, 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.

Borzilleri asks this Court to remand so he can take discovery, conduct an evidentiary hearing on whether the government "fully investigated" his allegations, and explore the reasons underlying the government's dismissal decision in light of Borzilleri's allegation that the government's investigation was fraudulent. Borzilleri Br. at 21, 25, 27, 33. Setting aside the fact that the record does not support Borzilleri's characterization of the government's investigation,[3] his proposed

[3] The government's investigation included:

> [T]he issuance of over twenty-five administrative subpoenas, the review of thousands of documents, the retention of expert consultants, regular consultations with regulatory experts within the U.S. Department of Health and Human Services, and interviews of more than thirty witnesses conducted or reviewed by the U.S. Attorney's Office's investigative team. . . . [T]he government engaged the services of a nationally prominent firm of expert consultants and ultimately paid $44,000 between 2014 and 2017 for the

evidentiary inquiry 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 authorize a searching evidentiary inquiry into the government's investigation. Only § 3730(c)(2)(A)'s reference to a "hearing" suggests any kind of judicial involvement in the government's dismissal process. 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,*

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> consulting firm to engage in 190 hours of consultation, analysis and data modeling.

Gov't Br. at 37; Appendix to Appellant Brief ("APP") at APP269–72, APP400–02.

*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 engage in a searching review of what is meant to be the government's sole discretionary decision.

Moreover, where Congress intends for the Judiciary to have any 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 False Claims Act—which was 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 Borzilleri 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 Borzilleri, 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 Borzilleri to force the government to pursue 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 U.S. ex rel. Ridenour v. Kaiser-Hill Co.,* 397 F.3d 925, 934–35 (10th Cir. 2005) (courts should construe the Act consistently with the Take Care Clause, which requires that the Executive maintain sufficient control over *qui tam* actions).

### 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 district court's 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 31 U.S.C. § 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 NOT "ARBITRARY."

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

In making its dismissal decision, the government properly relied on its concern that Borzilleri's *qui tam* action would "impose a significant burden on several federal agencies and take resources away from the administration of parts of the Medicare program." ADD005. The

government also explained that it "concluded that many of Borzilleri's core contentions were 'unsupported or incorrect, and unlikely to result in a recovery,'" and that the government had concerns about his tactics. *See* Gov't Br. at 32–33 (quoting APP272). In light of these circumstances, the District Court correctly concluded that the government's dismissal decision satisfied even the *Sequoia Orange* standard. ADD009; *see Sequoia Orange*, 151 F.3d at 1145.

Borzilleri claims that the District Court should have required the government to conduct a cost-benefit analysis and allowed discovery. Borzilleri Br. at 22–23. But Borzilleri's proffered legal inquiry goes far beyond what even *Sequoia Orange* requires or permits. The standard the Ninth Circuit adopted in *Sequoia Orange*—even though it is unmoored from the text of the False Claims Act as discussed *supra*—attempted to draw from the Constitution's minimum requirements for rational government action. *See Sequoia Orange*, 151 F.3d at 1145. Nothing in *Sequoia Orange*—and certainly nothing in the False Claims Act itself—suggests that the government must conduct a cost-benefit analysis that weighs the cost of permitting a case to proceed against the potential

financial recovery if the relator were to secure a judgment against a defendant.

The District Court thus properly rejected Borzilleri's invitation "to second-guess the Government's investigation and conclusions when that is clearly not the Court's role under § 3730(c)(2)(A)." ADD008. Indeed, the judicial inquiry contemplated by Borzilleri 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 by reducing the burdens of meritless *qui tam* actions on defendants, the courts, and the government itself.

### B. Borzilleri's 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.

Although the District Court did not address all of the government's justifications for dismissing this suit, the government's briefing indicates that Borzilleri appears to have engaged in tactics inconsistent with the proper role of a relator. As the government explained, Borzilleri was uncooperative with requests by the government to consolidate his two cases to reduce the burden on the government. Gov't Br. at 32. The cases, one in the Southern District of New York and the other in the District of Rhode Island, were duplicative and the government did not want to waste resources. *Id*. By refusing to cooperate with a simple procedural request, "Borzilleri[] manifest[ed his] reluctance to pursue this litigation efficiently." *Id*. Even more troubling are revelations that Borzilleri's prior employer fired him and is alleging that he engaged in abusive trades related to his *qui tam* actions. *See Borzilleri v. Shepherd Kaplan Krochuk, LLC*, No. 18-cv-04654-RJS (S.D.N.Y. filed May 25, 2018). The government noted that Borzilleri allegedly shorted the stock of one or

more of the defendants he had sued in his *qui tam* actions. Gov't Br. at 33, APP272–74. Moreover, "after both cases were unsealed, Bozilleri sent an email advisory to dozens of news outlets and financial analysts, "making lurid (and, based on the government's investigation) unsubstantiated claims that [m]any vulnerable patients have lost their lives, as a result of the scheme he allege[d] in his *qui tam* suits." Gov't Br. at 33 (quoting APP274). In short, the government was eminently justified in choosing to dismiss the case given these actions.

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 a total of 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 Borzilleri'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.

Borzilleri'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.[4] 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 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

[4] *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").

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 requirements, 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. Loughren v. Unum Grp.*, 613 F.3d 300, 312 (1st Cir. 2010); *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 False Claims 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 motion to dismiss 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); *accord* 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 turns on the legal question whether "the Government would have the *option* to decline to pay if it knew of the defendant's noncompliance." *Id*. at 2003 (emphasis added).

Thousands of *qui tam* actions are regularly pending under seal awaiting the government's decision as to whether to intervene;[5] the government nearly always obtains an extension of the statutory 60-day deadline to make that decision, and often many years' worth of

[5] *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).

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."[6]

Moreover, the simple reality is that most declined *qui tam* actions are meritless. The government intervenes in a small minority of *qui tam* actions—about 20 percent over the last several years.[7] 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.[8] In stark

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[6] *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.

[7] 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.

[8] *See* DOJ Fraud Statistics.

contrast, the much larger universe of thousands of declined cases has produced less than $2.8 billion in recovery.[9]

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 it "does not believe . . . is in the public interest to pursue," ADD005, and perhaps 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 justice has been done."[10] 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

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[9] *See id.*

[10] *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.

relator to be heard in an attempt to persuade the government not to dismiss—a process that helps ensure that dismissals are carefully considered. But the elaborate procedure Borzilleri champions to litigate the government's reasons and their strength, including full-fledged discovery, would make dismissal impractical. The very resources the government sought to save for worthier uses would be diverted to litigating whether the government may exercise its dismissal authority in a particular case. That perverse approach to section 3730(c)(2)(A) is contrary to the public interest as well as contrary to the statutory text and the separation of powers.

## CONCLUSION

The Court should affirm the District Court's order granting the government's motion to dismiss and adopt the standard outlined in *Swift*.

Respectfully submitted,

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Dated: August 12, 2020

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because this brief contains 6,380 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Century Schoolbook size 14-point font with Microsoft Word ProPlus 365.

Dated: August 12, 2020

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 12, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the CM/ECF system. All participants in this appeal are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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