No. 19-40906

IN THE
United States Court of Appeals for the Fifth Circuit

UNITED STATES OF AMERICA, EX REL, HEALTH CHOICE ALLIANCE, L.L.C., ON BEHALF OF UNITED STATES OF AMERICA AND 31 STATES (AR; CA; CO; CT; DE; DC; FL; GA; HI; IL; IN; IA; LA; MD; MA; MI; MN; MT; NV; NH; NJ; NM; NY; NC; OK; RI; TN; TX; VT; VA; WA),
Plaintiffs-Appellants,

v.

ELI LILLY AND COMPANY, INCORPORATED; VMS BIOMARKETING; COVANCE, INCORPORATED; UNITED BIOSOURCE CORPORATION; HEALTHSTAR CLINICAL EDUCATION SOLUTIONS, L.L.C.; COVANCE MARKET ACCESS SERVICES, INCORPORATED,
Defendants-Appellees,

UNITED STATES OF AMERICA,
Appellee.

UNITED STATES OF AMERICA, EX REL, HEALTH CHOICE GROUP, L.L.C., ON BEHALF OF UNITED STATES OF AMERICA AND 31 STATES (AR; CA; CO; CT; DE; DC; FL; GA; HI; IL; IN; IA; LA; MD; MA; MI; MN; MT; NV; NH; NJ; NM; NY; NC; OK; RI; TN; TX; VT; VA; WA),
Plaintiffs-Appellants,

v.

BAYER CORPORATION; AMGEN, INCORPORATED; ONYX PHARMACEUTICALS, INCORPORATED; AMERISOURCEBERGEN CORPORATION; LASH GROUP,
Defendants-Appellees,

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING APPELLEE UNITED STATES OF AMERICA SEEKING AFFIRMANCE

[*Counsel Listed on Inside Cover*]

Steven P. Lehotsky
Tara S. Morrissey
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

James F. Segroves
David A. Bender
Taylor F. Grant
REED SMITH LLP
1301 K Street, NW
Suite 1000 - East Tower
Washington, DC 20005
(202) 414-9200
jsegroves@reedsmith.com

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

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Defendants-Appellees,

UNITED STATES OF AMERICA,
Appellee.

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

The undersigned counsel of record certifies that, in addition to the persons and entities identified in Appellants' Certificate of Interested Persons, the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

Amicus Curiae

Chamber of Commerce of the United States of America

Counsel to *Amicus Curiae*

James F. Segroves
David A. Bender
Taylor F. Grant
REED SMITH LLP
1301 K Street, NW
Suite 1000 - East Tower
Washington, DC 20005

Steven P. Lehotsky
Tara S. Morrissey
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

s/James F. Segroves
James F. Segroves

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

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STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America (Chamber) 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 important matters before Congress, the Executive Branch, and the courts. To that end, the Chamber participates regularly as an *amicus curiae* in cases raising issues of concern to America's business community.[1]

The False Claims Act, 31 U.S.C. §§ 3729–3733, touches nearly every sector of the American economy, including health care, defense, education, banking, and technology. In its current form, the Act combines the threat of treble damages and per-payment-claim penalties exceeding $22,000. *See* 31 U.S.C. § 3729(a)(1); 28 C.F.R. § 85.5. As a result, the Supreme Court of the United States has explained that liability under the Act is "essentially punitive in nature." *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 1996 (2016) (*Escobar*) (internal quotation marks and citation omitted).

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[1] The undersigned certifies that the parties have consented to the filing of this brief, no counsel for a party authored this brief in whole or in part, no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief, and no person or entity other than the Chamber, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

The False Claims Act is a tool ripe for abuse by *qui tam* relators who are "motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997). Meritless *qui tam* cases exact a substantial toll on American businesses—a toll that goes largely unseen by the general public. Such businesses can spend hundreds of thousands or even several million dollars fielding pre-unsealing civil investigative demands under the Act, *see* 31 U.S.C. § 3733, as well as post-unsealing discovery requests in cases that typically end without any financial recovery. Given the combination of potential punitive liability, enormous litigation costs, and potential exclusion from future participation in federal programs in the event of an adverse judgment, marginal or even meritless cases can and are used to extract settlements. As a result, cases involving the proper application of the Act are of particular concern to the Chamber and its members, and the Chamber has participated frequently as an *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. United States 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 Appellant, *United States v. CIM-ZNHCA, 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. United States ex rel. Thrower*, No. 18-16408 (9th Cir. Mar. 22, 2019).

INTRODUCTION

This appeal presents a legal question this Court has not squarely answered: namely, what standard governs a motion filed by the United States of America (the Government) seeking to dismiss a False Claims Act suit brought in the Government's name by a *qui tam* relator. In relevant part, the Act instructs that "[t]he 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 [relator] with an opportunity for a hearing on the motion." 31 U.S.C. § 3730(c)(2)(A). Courts outside this Circuit have expressed different views regarding what role, if any, the Judicial Branch should play when the relator objects to dismissal. *Compare, e.g.*, *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998) (concluding the Government must identify a valid governmental purpose for dismissal, as well as a rational relation between dismissal and accomplishment of that purpose), *with Swift v. United States*, 318 F.3d 250, 253 (D.C. Cir. 2003) (rejecting *Sequoia Orange*'s standard and concluding "[n]othing in § 3730(c)(2)(A) purports to deprive the Executive Branch of its historical prerogative to decide which cases should go forward in the name of the United States").

In the two cases giving rise to this consolidated appeal, the district court declined to decide between the *Swift* and *Sequoia Orange* standards after finding that the Government satisfied the more burdensome standard established by *Sequoia Orange*.

See ROA.2244 (*Eli Lilly*), ROA.6568 (*Bayer*). The relators, both of which are affiliates of National Health Care Analysis Group (collectively, NHCA Group), have appealed.

The legal question presented in this appeal is of substantial importance to the American business community generally, vast portions of which are subjected to burdensome *qui tam* suits filed under the False Claims Act that result in no money being paid to the Federal Treasury. The Government's discretionary right to dismiss *qui tam* actions provides an essential—and constitutionally required—safeguard respecting the fact that the Framers assigned to the Executive Branch and the Executive Branch alone the authority to "take Care that the Laws be faithfully executed . . . ." U.S. Const. art. II, § 3 (Take Care Clause).

ARGUMENT

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

Courts asked to decide the question presented here often decline to reach a definitive answer, choosing instead to assume the appropriateness of the Ninth Circuit's *Sequoia Orange* standard and find it has been satisfied.[2] Here, the district court

[2] *See, e.g.*, *Chang ex rel. United States v. Children's Advocacy Ctr. of Del.*, 938 F.3d 384, 387 (3d Cir. 2019); *Polansky v. Exec. Health Res., Inc.*, --- F. Supp. 3d ---, No. 2:12-cv-04239, 2019 WL 5790061, at *8 (E.D. Pa. Nov. 5, 2019), *appeal docketed*, No. 19-3810 (3d Cir. Dec. 13, 2019); *United States ex rel. Graves v. Internet Corp. for Assigned Names & Numbers, Inc.*, 398 F. Supp. 3d 1307, 1311–12 (N.D. Ga. 2019); *United States 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); *United States ex rel. Borzilleri v. Bayer Healthcare Pharms., Inc.*, No. 1:14-cv-00031, 2019 WL 5310209, at *2 (D.R.I. Oct. 21, 2019), *appeal docketed*, No. 20-1066 (1st (continued)

did just that after the magistrate judge recommended adopting the D.C. Circuit's *Swift* standard. *See* ROA.2244 (*Eli Lilly*), ROA.6568 (*Bayer*).

An indefinite approach should be avoided here because it imposes significant costs on businesses named as defendants in False Claims Act suits. Legal uncertainty on the question presented imposes a significant burden on businesses facing the prospect of lengthy and costly discovery at the hands of *qui tam* relators most concerned about how to make litigation as unpleasant, disruptive, and costly as possible to drive defendants into settlement. Uncertainty regarding what standard governs motions under § 3730(c)(2)(A) makes it even more difficult for defendants to convince the Government to exercise its dismissal discretion when the facts and circumstances warrant. This Court should thus decide what role, if any, district courts in this Circuit must play when the Government invokes its dismissal discretion under § 3730(c)(2)(A).

II. THE COURT SHOULD ADOPT THE D.C. CIRCUIT STANDARD FOR GOVERNMENT MOTIONS TO DISMISS *QUI TAM* ACTIONS

A. The Government Has Virtually Unfettered Discretion To Dismiss *Qui Tam* Actions

The False Claims Act provides that the Government may dismiss a *qui tam* action "notwithstanding the objections of" the relator if (1) the relator "has been

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Cir. Jan. 16, 2020); *United States ex rel. Borzilleri v. AbbVie, Inc.*, No. 1:15-cv-07881, 2019 WL 3203000, at *2 (S.D.N.Y. July 16, 2019), *appeal docketed*, No. 19-2947 (2d Cir. Sept. 13, 2019).

notified by the Government of the filing of the motion" and (2) "the court has provided the [relator] with an opportunity for a hearing on the motion." 31 U.S.C. § 3730(c)(2)(A). Those two express conditions for dismissal were unquestionably satisfied in the district court below. The Government notified NHCA Group of the Government's motions to dismiss, and NHCA Group was provided with an opportunity for a hearing on those motions.

On appeal, NHCA Group invites this Court to adopt an arbitrary-and-capricious standard that also requires the Government to conduct a formal cost-benefit analysis before it moves to dismiss a False Claims Act suit over a relator's objection. *See* Blue Br. at x, 33, 35, 41–42.[3] However, NHCA Group's proffered standard cannot be reconciled with the plain language of § 3730(c)(2)(A). The statute does not supply *any* standard for judicial review of the Government's discretionary decision to dismiss a *qui tam* action. 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.

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[3] The Southern District of Illinois recently applied a similar standard in a case involving an NHCA Group affiliate, and an appeal is pending in the Seventh Circuit. *See United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, No. 3:17-cv-00765, 2019 WL 1598109, at *3 (S.D. Ill. Apr. 15, 2019), *appeal docketed sub nom. United States v. CIMZNHCA, LLC*, No. 19-2273 (7th Cir. July 8, 2019) (oral argument held Jan. 23, 2020).

The D.C. Circuit standard is consistent with this Court's jurisprudence, particularly *Riley v. St. Luke's Episcopal Hospital*, 252 F.3d 749 (5th Cir. 2001) (en banc). In finding that the *qui tam* provisions of the False Claims Act pass constitutional muster, this Court cited § 3730(c)(2)(A) and observed that the Government "retains the unilateral power to dismiss an action notwithstanding the objections of the [relator]." *Id.* at 754 (internal quotation marks and citations omitted).

Other 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.'") (alterations supplied by *Everglades*); *United States ex rel. Maldonado v. Ball Homes, LLC*, No. 5:17-cv-00379, 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 thing 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, when 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 that enacted § 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)) (emphasis added). 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 and citation 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 moves to dismiss a *qui tam* action.

In any event, the Government does not haphazardly move to dismiss False Claims Act suits under § 3730(c)(2)(A). The Department of Justice follows formalized policies and procedures when considering whether to file such a motion. *See* Dep't of

Justice, *Justice Manual* § 4-4.111 (Sept. 2018).[4] The non-exhaustive list of factors the Department considers includes "[c]urbing meritless *qui tams* that facially lack merit (either because the relator's legal theory is inherently defective, or the relator's factual allegations are frivolous)," as well as "[p]reventing interference with an agency's policies or the administration of its programs . . . ." *Id.* Nothing in § 3730(c)(2)(A) permits the Judiciary to second-guess the Government's evaluation of these numerous factors.[5]

B. The D.C. Circuit Standard Properly Avoids Serious Constitutional Concerns

NHCA Group's proffered legal standard raises serious constitutional concerns and thus should be avoided unless the plain statutory language enacted by Congress makes it unavoidable. 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

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[4] *Available at* https://www.justice.gov/jm/jm-4-4000-commercial-litigation#4-4.111.

[5] Recall, too, that the relevant congressional committees of jurisdiction—the Judiciary Committees of the House and the Senate, respectively—also have appropriate oversight authority to ensure that the Executive Branch is properly balancing protection of the public fisc and the administration of justice (including protecting the continued functioning of government programs). *Cf.* Letter from Charles E. Grassley, Chairman, S. Comm. on Fin., to William P. Barr, U.S. Att'y Gen. (Sept. 4, 2019) (inquiring regarding the Department of Justice's efforts to dismiss *qui tam* suits under the False Claims Act), *available at* https://www.grassley.senate.gov/sites/default/files/documents/2019-09-04%20CEG%20to%20DOJ%20%28FCA%20dismissals%29.pdf.

is to adopt the latter." *Jones v. United States*, 529 U.S. 848, 857 (2000) (internal quotation marks and citation omitted).

NHCA Group's construction of § 3730(c)(2)(A) raises serious constitutional problems because it infringes upon the Executive Branch's exclusive responsibility to "take Care that the Laws be faithfully executed . . . ." U.S. Const., art. II, § 3. 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 outright. *See, e.g.*, *Riley*, 252 F.3d at 753.[6]

But if a private entity such as NHCA Group 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 Executive has wide discretion in making prosecutorial decisions. The Supreme Court has "recognized on several occasions over many years that an [executive] agency's

[6] Section 3730(c)(2)(B)'s "fair, adequate, and reasonable" standard for judicial approval of a Government settlement over the relator's objection presents its own separation-of-powers concerns that are beyond the scope of this appeal. *See, e.g.*, *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. O.L.C. 207, 219 (1989) ("Perhaps the most important interference comes if we seek to settle a case. If we negotiate a settlement but the relator objects, the *court* must determine whether the arrangement is [fair, adequate, and reasonable] under the circumstances—a judicial role that to our knowledge is unique."), *superseded by The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 124 n.* (1996).

decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to [the executive] agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (citing *United States v. Batchelder*, 442 U.S. 114 (1979); *United States v. Nixon*, 418 U.S. 683 (1974); *Vaca v. Sipes*, 386 U.S. 171 (1967); *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868)). Such discretion has been recognized time and again given the "unsuitability for judicial review of [executive] agency decisions to refuse enforcement." *Id.* And the decision not to prosecute or enforce "has long been regarded as the special province of the Executive Branch." *Id.* at 832.

This Court faced an analogous separation-of-powers problem in *United States v. Hamm*, 659 F.2d 624 (5th Cir. Unit A Oct. 1981) (en banc). The district court in *Hamm* imposed terms of imprisonment after denying the Government's motion to dismiss indictments under Rule 48(a) of the Federal Rules of Criminal Procedure, which provides that the Government "may, with leave of court, dismiss an indictment, information, or complaint." *See id.* at 627–28.

This Court reversed. "In deciding in what situations that leave can be denied," the Court explained, "we must balance the constitutional duty of government prosecutors, as members of the Executive Branch, to 'take care that the laws [are] faithfully executed' with the constitutional powers of the federal courts, most particularly the sentencing power of trial judges." *Id.* at 628 (bracketed text supplied by *Hamm*). "In balancing the rights and powers of the Executive Branch with those of

the Judiciary, we must keep in mind that the exercise of prosecutorial discretion is to be given great deference by the courts." *Id.* at 628 n.13.

Balancing those rights and powers, this Court held that a "district court may not deny a government motion to dismiss a prosecution, consented to by the defendant, except in those extraordinary cases where it appears the prosecutor is motivated by considerations clearly contrary to the manifest public interest." *Id.* at 628. Such extraordinary cases would include instances in which a prosecutor is "motivated to dismiss because he has accepted a bribe or because he desires to attend a social event instead of attend upon the court in the trial of the case or because he personally dislikes the victim of the crime . . . ." *Id.* at 630 (internal quotation marks and citation omitted). The Court cautioned that "[n]either this court on appeal nor the trial court may properly reassess the prosecutor's evaluation of the public interest. As long as it is not apparent that the prosecutor was motivated by considerations clearly contrary to the public interest, his motion must be granted." *Id.* at 631. The Court also found it was error to place the burden on the Government to show that dismissal would be in the public interest. *Id.*

NHCA Group's proposed legal standard, which would subject Government motions to dismiss *qui tam* actions to arbitrary-and-capricious review and require the preparation and submission of cost-benefit analyses by the Government, invites judicial scrutiny of the type expressly rejected by *Hamm* even though, unlike the criminal rule at issue in *Hamm*, § 3730(c)(2)(A) does not even contain a "leave of

court" requirement. Perhaps anticipating that decisions such as *Hamm* would be cited in support of this Court adopting a legal standard deferential to the Government, NHCA Group affirmatively argues that "analogies to the exercise of prosecutorial discretion are woefully misplaced." Blue Br. at 35. That is incorrect for three reasons.

First, although the False Claims Act is not a criminal statute, the Supreme Court has instructed that the same principles that protect the Government's prosecutorial discretion in the criminal context apply in the civil context as well. *See Chaney*, 470 U.S. at 831 ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."). Second, in light of the Act's imposition of treble damages and enormous per-payment-claim penalties, the Supreme Court has confirmed that the Act in its current form is "essentially punitive in nature." *Escobar*, 136 S. Ct. at 1996 (internal quotation marks and citation omitted).

Third, as it has done in numerous similar suits filed throughout the United States, *see NHCA-TEV*, 2019 WL 6327207, at *1 n.1 (collecting cases), NHCA Group predicates False Claims Act liability in these cases on alleged violations of a *criminal* statute. The Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b), "is a criminal statute prohibiting the knowing or willful offering to pay, or soliciting, any remuneration to induce the referral of an individual for items or services that may be paid for by a federal health care program." *United States ex rel. Nunnally v. W. Calcasieu Hosp.*, 519 F.

App'x 890, 893 (5th Cir. 2013) (per curiam). A payment claim that includes items or services resulting from a violation of the Anti-Kickback Statute "constitutes a false or fraudulent claim for purposes of [the False Claims Act]." 42 U.S.C. § 1320a-7b(g). "There is no [Anti-Kickback Statute] violation, however, where the defendant merely hopes or expects referrals from benefits that were designed wholly for other purposes." *United States ex rel. Ruscher v. Omnicare, Inc.*, 663 F. App'x 368, 374 (5th Cir. 2016) (per curiam).

For these reasons, the same core legal principles that animated this Court's decision in *Hamm* should be applied here to affirm the district court's judgments.

C. The Ninth Circuit 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 in affirming a district court's decision granting a Government motion to dismiss a *qui tam* action, *Sequoia Orange* held 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 concluded, drew "significant support" from a single 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), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291).

There are at least two defects in the Ninth Circuit's reliance on the committee report. First, legislative history cannot overcome the serious constitutional concerns counseling avoidance of the Ninth Circuit's interpretation. *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.") (emphasis added); *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012) ("[T]he best evidence of Congress's intent is the statutory text.").

Second, as the D.C. Circuit later emphasized in *Swift*, the committee report language quoted by the Ninth Circuit "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 (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, Supreme Court precedent teaches that the committee report language cited by the Ninth Circuit should not be relied upon. *See, e.g.*, *Graham Cnty. Soil & Water Conservation Dist. v. United States 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). And although NHCA Group quotes the Senate Report's language twice, *see* Blue Br. at 29–30, 34, NHCA Group expressly disclaims reliance on the Senate Report, *see id.* at 30 ("[W]e simply bring the Senate Report to the Court's attention.").

D. NHCA Group's Proffered Legal Standard Is Especially Flawed

NHCA Group insists that in moving to dismiss *qui tam* actions over the objection of relators, the Government must perform and disclose a cost-benefit analysis that is then subject to judicial review. "The glaring absence of a two-sided cost-benefit analysis," according to NHCA Group, "is fatal to the government's call for abject deference." Blue Br. at 41. However, NHCA Group's proffered legal standard goes far beyond what even *Sequoia Orange* requires or permits.

As the Government has explained, *see* Red Br. at 38, the standard the Ninth Circuit adopted in *Sequoia Orange* drew from the Constitution's minimum requirements

for rational government action. "The same analysis," the Ninth Circuit reasoned, "is applied to determine whether executive action violates substantive due process." *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 secures a judgment against a defendant.

Moreover, the judicial inquiry contemplated by NHCA Group implicates considerations that are committed to the discretion of the Executive Branch, such as "whether agency resources are best spent on this 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"). As the Seventh Circuit has explained, a "judicial effort to supervise the process of [the Government in] reaching a [prosecutorial] decision intrudes impermissibly into the activities of the Executive Branch of government." *In re United States (Heath)*, 503 F.3d 638, 641 (7th Cir. 2007). NHCA Group invites this Court to do just that.

III. ROBUST EXERCISE OF THE GOVERNMENT'S DISMISSAL DISCRETION IS IN THE PUBLIC INTEREST

NHCA Group's proposed approach suggests that courts should be suspicious of Government dismissals of *qui tam* actions. No such suspicion is warranted. To the contrary, the robust exercise of the Government's dismissal discretion furthers the public interest in multiple ways.

In recent years, there has been an explosion in *qui tam* litigation. For example, according to the Government, relators filed a total of approximately 1,274 complaints under the False Claims Act in federal fiscal years 2018 and 2019 alone. 3d Decl. of Edward Crooke ¶ 4, *United States ex rel. Campie v. Gilead Scis., Inc.*, No. 3:11-cv-00941 (N.D. Cal. Oct. 8, 2019), ECF No. 241. During those two years, the Government intervened in just 218 cases. *Id.* Allowing meritless or inappropriate cases to go forward imposes burdens on defendants, the Judicial Branch, and the Executive Branch.

False Claims Act litigation is time-consuming, lengthy, and extremely costly. Litigation under the Act touches nearly every sector of the American economy. 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 recovery, 278 of them lasted for more than three years after the Government declined to intervene and 110 of those extended for more than five years after declination. Br. for Chamber of Commerce of U.S. et al. as *Amici Curiae* in Supp. of Pet'r at 13, *Gilead Scis., Inc. v.*

United States 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).

The discovery process creates much of 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 nearly a decade after the relator filed suit. *See United States 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) cases turn on complex allegations of reckless violations of highly technical regulations or contract terms. As a result, these cases 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* 31 U.S.C. § 3729(b)(1)(A)(iii); *see also Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 69–70 & n.20 (2007); *United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 287–91 (D.C. Cir. 2015).

Moreover, in *Escobar*, the Supreme Court recently 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 and citation omitted). As the Supreme Court explained, 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, many cases demand 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.*

Despite the fact that the overwhelming majority of non-intervened cases are meritless, defendants nonetheless face tremendous pressure to settle because the costs of defense are so high and the potential downside is so great. *See, e.g.*, *Smith v. Duffey*, 576 F.3d 336, 340 (7th Cir. 2009) (explaining 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"); *United States ex rel. Drakeford v. Tuomey*, 792 F.3d 364, 390 (4th Cir.

2015) (Wynn, J., concurring) (noting the "likely death sentence" resulting from a $237 million False Claims Act judgment entered against a community hospital). 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 . . . ." *United States ex rel. Grenadyor v. Ukrainian Vill. Pharmacy, Inc.*, 772 F.3d 1102, 1105 (7th Cir. 2014).

Defendants are not the only ones that pay the price for meritless *qui tam* cases. Judicial time and attention is 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 and citation omitted). Answering that factual question requires discovery from the allegedly defrauded government agency to ascertain whether it would likely have denied payment had it known of the alleged violation. That evidence can come only from the government agency.[7] And the

[7] Such discovery could be especially burdensome in these cases. For example, counsel for the Government explained that in deciding to invoke § 3730(c)(2)(A) in a similar case brought by an (continued)

Supreme Court underscored the fact-intensive nature of the materiality inquiry by specifically rejecting the argument that falsity is material so long as "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 pending under seal awaiting the Government's decision as to whether to intervene; 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 cases such as these, the fewer resources are available to investigate other *qui tam* actions—and the backlog will keep growing.

Moreover, the simple reality is that most declined *qui tam* actions are meritless. As noted above, the Government intervenes in a small minority of *qui tam* actions. 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. *See* Civ. Div., Dep't of Justice, *Fraud Statistics – Overview* (Jan. 9, 2020).[8] In stark contrast, the much larger

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NHCA Group affiliate, the Government considered nine different advisory opinions issued by the Office of Inspector General of the Department of Health and Human Services, the earliest of which was issued in 1991. *See* Hr'g Tr. 47:14 to 48:22, *United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, No. 3:17-cv-00765 (S.D. Ill. Mar. 29, 2019), ECF No. 81. The defendants here would be entitled to discovery regarding the circumstances of each advisory opinion and the Government's understanding of each advisory opinion's meaning.

[8] *Available at* https://www.justice.gov/opa/press-release/file/1233201/download.

universe of declined cases has produced less than $2.8 billion in recoveries since 1986. *Id.*

It is entirely rational for the Government to use the dismissal discretion Congress recognized in § 3730(c)(2)(A) to enable the Government to devote more resources to cases it believes are more promising and to reduce the resources it is forced to devote to cases it believes are meritless or inappropriate. After all, the Government's primary 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 Robert Jackson "admonished prosecutors: 'Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done.'" *Jackson v. City of Cleveland*, 925 F.3d 793, 837 (6th Cir. 2019) (quoting Robert H. Jackson, U.S. Att'y Gen., Address at the Second Annual Conference of United States Attorneys: The Federal Prosecutor 3 (Apr. 1, 1940)).

That is all the more true in this 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 a hearing where it can attempt to persuade the Government not to dismiss—a process that helps ensure that dismissals are carefully considered and made a matter of judicial record. But the elaborate

procedure that NHCA Group advocates to litigate the Government's reasons and their strength would make dismissal impractical. The very resources the Government sought to save for worthier uses would have to be devoted to litigating whether the Government could exercise its discretion.

That misguided approach to § 3730(c)(2)(A) is contrary to the public interest, contrary to the statutory text, and contrary to the separation of powers.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's judgments.

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Respectfully submitted,

s/James F. Segroves
James F. Segroves
David A. Bender
Taylor F. Grant
REED SMITH LLP
1301 K Street, NW
Suite 1000 - East Tower
Washington, DC 20005
(202) 414-9200
jsegroves@reedsmith.com

Steven P. Lehotsky
Tara S. Morrissey
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

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

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d), the undersigned certifies that on this twelfth day of March, 2020, he caused the Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Appellee United States of America Seeking Affirmance to be filed electronically with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. Lead counsel listed below are registered CM/ECF users and service will be accomplished on this twelfth day of March, 2020, by the CM/ECF system via electronic mail delivered to the addresses listed below:

Kenneth W. Starr, Esq.
THE LANIER LAW FIRM
10940 W. Sam Houston Parkway N., Suite 100
Houston, TX 77064
ken.starr@lanierlawfirm.com

Charles W. Scarborough, Esq.
Civil Division, Appellate Section
U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, NW, Room 7244
Washington, DC 20530
charles.scarborough@usdoj.gov

s/James F. Segroves
James F. Segroves

CERTIFICATE OF COMPLIANCE

On this twelfth day of March, 2020, the undersigned certifies that:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) because this brief contains 5,595 words, as determined by the word-count function of Microsoft Word and excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2; and

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because the body of the brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond font. The brief's footnotes comply with Fifth Circuit Rule 32.1 because they have been prepared in a proportionally spaced typeface using Microsoft Word in 12-point Garamond font.

s/James F. Segroves
James F. Segroves