No. 19-2947

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ABC, State of Maryland ex rel. John R. Borzilleri, M.D., State of New Hampshire ex rel. John R. Borzilleri, M.D., State of Virginia ex rel. John R. Borzilleri, M.D., State of Massachusetts ex rel. John R. Borzilleri, M.D.,

Plaintiffs,

United States of America ex rel. John R. Borzilleri, M.D., District of Columbia ex rel. John R. Borzilleri, M.D.,

(Caption continued on inside cover)

On Appeal from the United States District Court for the Southern District of New York, No. 15-cv-7881

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

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April 20, 2020

State of Maryland ex rel. John R. Borzilleri, M.D., State of Tennessee ex rel. John R. Borzilleri, M.D., State of North Carolina ex rel. John R. Borzilleri, M.D., State of Washington ex rel. John R. Borzilleri, State of Hawaii ex rel. John R. Borzilleri, State of Rhode Island ex rel. John R. Borzillieri, M.D., State of Montana ex rel. John R. Borzilleri, M.D., State of Connecticut ex rel. John R. Borzilleri, M.D., State of Oklahoma ex rel. John R. Borzilleri, State of Minnesota ex rel. John R. Borzilleri, M.D., State of Colorado ex rel. John R. Borzilleri, State of Texas ex rel. John R. Borzilleri, M.D., State of Wisconsin ex rel. John R. Borzilleri, M.D., State of New York ex rel. John R. Borzilleri, M.D., State of New Mexico ex rel. John R. Borzilleri, State of Virginia ex rel. John R. Borzilleri, M.D., State of Michigan ex rel. John R. Borzilleri, M.D., State of New Hampshire ex rel. John R. Borzilleri, M.D., State of Massachusetts ex rel. John R. Borzilleri, M.D., State of Nevada ex rel. John R. Borzilleri, M.D., State of Iowa ex rel. John R. Borzilleri, M.D., State of Delaware ex rel. John R. Borzilleri, M.D., State of California ex rel. John R. Borzilleri, M.D., State of Indiana ex rel. John R. Borzilleri, M.D., State of Illinois ex rel. John R. Borzilleri, M.D., State of Louisiana ex rel. John R. Borzilleri, M.D., State of New Jersey ex rel. John R. Borzilleri, M.D., State of Georgia ex rel. John R. Borzilleri, M.D., State of Florida ex rel. John R. Borzilleri, M.D., Commonwealth of Massachusetts ex rel. John R. Borzilleri, M.D., Commonwealth of Virginia ex rel. John R. Borzilleri, M.D.,

Plaintiffs-Appellants,

v.

Abbvie Inc., Amgen, Inc., Bristol-Myers Squibb Company, Pfizer, Inc., Express Scripts Holding Company, UnitedHealth Group, Inc., Humana Inc., Aetna Inc., CVS Health Corporation, Sanofi-Aventis U.S. LLC, Novartis Pharmaceuticals Corporation, Cigna Corporation, Eli Lilly & Company,

Defendants-Appellees,

v.

United States of America,

Interested Third Party-Appellee,

DEF, Johnson & Johnson, Sanofi S.A., UCD Group S.A., CVS Caremark, Anthem, Inc., formerly Wellpoint, WellCare Health Plans, Inc., Novartis 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

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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. And given the combination of punitive potential liability and enormous

[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.

litigation 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. 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 Appellee, *United States 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. United States 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). 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 *United States 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 depose "a small number of DOJ staff" to investigate the government's investigation of his allegations. Borzilleri Br. at 8–9.

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, as well as 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. THE 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 *United States 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. SA3. The District Court was correct that the government's motion was amply supported even if *Sequoia Orange* were correct. But *Sequoia Orange* is not correct, and assuming that it is imposes significant costs.

The government should be able to know, when it is considering whether to exercise its dismissal authority, what standard it will be held to. 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

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[2] *See, e.g.*, *United States 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); *United States ex rel. Graves v. Internet Corp. for Assigned Names & Nos., 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 Pharm., Inc.*, No. 1:14-cv-00031, 2019 WL 5310209, at *2 (D.R.I. Oct. 21, 2019), *appeal docketed*, No. 20-1066 (1st Cir. Jan. 30, 2020).

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 MOTIONS TO DISMISS *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 District Court. The government notified Borzilleri of its motion to dismiss, and Borzilleri was provided with an opportunity to be heard when the District Court considered his brief in opposition to the government's motion.[3] In such a circumstance, dismissal is a "a decision generally committed to [the government's] absolute discretion." *Swift*, 318 F.3d at 253 (D.C. Cir. 2003) (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).

A. *Swift* Sets Forth the Correct Standard.

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. Borzilleri Br. at 8–9, 12. Borzilleri's proposed evidentiary inquiry cannot be reconciled with the plain

[3] *Greene v. IRS*, No. 1:08-CV-0280 (LEK/DRH), 2008 WL 5378120, at *2 (N.D.N.Y. Dec. 23, 2008) ("This Court's consideration of the arguments raised in the Plaintiffs' opposition has provided them with an opportunity to be heard on the Government's Motion."), *aff'd*, 348 F. App'x 625 (2d Cir. 2009).

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, 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))); *United States 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).[4]

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

[4] 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).

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 (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. 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 United States ex rel. Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 934–35 (10th Cir. 2005) (courts should construe the Act consistently with 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. 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).

III. IN ANY EVENT, THE GOVERNMENT'S DECISION TO DISMISS THIS CASE WAS NOT "ARBITRARY."

As the District Court concluded, the government properly relied on its concern that Borzilleri's *qui tam* action "would impose substantial burdens on government resources." SA3–SA4. The government also explained that its dismissal decision was based on other valid justifications, including the government's doubts about the viability of

Borzilleri's theory and its concerns about his tactics. *See* A597–99; Gov't Br. 23–24. The government's reasoning deserves the utmost deference, for it implicates considerations committed to the discretion of the Executive Branch when making non-enforcement decisions, 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"). Allowing the government discretion to weigh these 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.

A. 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. A597–98. 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. A597–98. By refusing to cooperate with a simple procedural request, Borzilleri gave "the Government scant confidence that he will serve the sole interest that the False Claims Act exists to vindicate—those of the United States, rather than his own—as this case proceeds further into litigation." A598. 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. A598; *see Borzilleri v. Shepherd Kaplan Krochuk, LLC*, No. 18-cv-04654-RJS Civ. 4654 (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 in his *qui tam* actions and then made public statements about the unsealing of his *qui tam* cases designed to manipulate the defendants' stock. A598–59. 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, *United States 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, this Court affirmed the disqualification of the relator for legal ethics violations in *United States v. Quest Diagnostics Inc.*, 734 F.3d 154, 168–69 (2013), and the Fifth Circuit did the same in *United States 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 encouraging the proper use of the *qui tam* provisions and discouraging their misuse. 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.

B. 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.[5] 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

[5] *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. 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).

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. *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 United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 287–91 (D.C. Cir. 2015); *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. United States 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). As the 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 False Claims Act 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.*[6]

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").

[6] Damages present another source of costly discovery.

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, 1105–06 (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 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. at 2002 (internal quotation marks omitted). Answering that fact 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. 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 pending under seal awaiting the government's decision as to whether to intervene;[7] the government nearly always obtains an extension of the statutory 60-day deadline to make that decision, and often many years' worth of extensions. The more resources the government must devote against its will to a case like this, the fewer resources are available to investigate other *qui tam* actions—and the backlog will keep growing.

[7] *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).

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.[8] 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.[9] In stark contrast, the much larger universe of thousands of declined cases has produced less than $2.8 billion in recovery.[10]

As the District Court recognized, it is entirely rational for the government to use the dismissal authority that Congress conferred to enable it to "expend its finite resources elsewhere," SA4, and perhaps focus on 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 interest is to see that justice be done, not to maximize the number of dollars obtained under the False Claims Act no

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[8] 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.

[9] *See* DOJ Fraud Statistics.

[10] *See id.*

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

The government thus should be able to make quick work of dismissing *qui tam* actions in its discretion. The statute entitles the relator to be heard in an attempt to persuade the government not to dismiss—a process that helps ensure that dismissals are carefully considered. But the elaborate procedure Borzilleri champions to litigate the government's reasons and their strength, including full-fledged discovery into the government's investigation, would make dismissal impractical. The very resources the government sought to save for worthier uses would be diverted to litigating whether the government could do so. That perverse approach to section 3730(c)(2)(A) is contrary

[11] *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.

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*.

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CERTIFICATE OF COMPLIANCE UNDER RULE 30(g)(1)

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Second Circuit Local Rule 32.1(a)(4) because this brief contains 5,675 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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 proportionately spaced typeface using Microsoft Word Century Schoolbook 14-point font.

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Dated: April 20, 2020

CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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