No. 18-16408

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

UNITED STATES EX REL. THROWER,

Plaintiff-Appellee,

ACADEMY MORTGAGE CORP.,

Defendant.

Appeal from the U.S. District Court for the
Northern District of California,
No. 16-cv-02120-EMC

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

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CORPORATE DISCLOSURE STATEMENT

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

/s/ *Jeffrey S. Bucholtz*
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provision

Legislative Material

Other Authorities

STATEMENT OF COMPLIANCE WITH FED. R. APP. P. 29(A)

No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except *amicus curiae*, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

Appellee Gwen Thrower and Appellant the United States of America have consented to the filing of this brief.

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 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 FCA 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 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* https://www.chamberlitigation.com/false-claims-act.

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 courts have held, that language leaves very limited room for judicial review of government dismissal decisions. But the district court here expanded the scope of permissible inquiry to require the government to show to the court's satisfaction that it "fully investigated" the relator's allegations and its dismissal decision was not "arbitrary."

The FCA's language does not support such extensive judicial scrutiny of the government's dismissal authority, and the district court's approach is inconsistent with the structure and purpose of the FCA as well as unsupported by its legislative history. The FCA allows private individuals to sue on behalf of the United States as a way to further the government's interests, not frustrate them. Under the statute—and in accordance with the Constitution—relators are simply a means to the end of detecting and deterring fraud on the government. 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).

The district court's decision improperly limits the government's ability to avail itself of an important mechanism 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. And it inappropriately inserts the Judiciary into a decision assigned by Congress, as well as the Constitution itself, to the Executive.

Finally, the robust exercise of the government's dismissal power serves the public interest. Meritless FCA cases exact enormous public costs. And letting meritless or inappropriate cases go forward burdens defendants, the courts, and the government itself. This Court should reverse the district court's order.

ARGUMENT

The district court's decision denying the government's motion to dismiss was wrong for two reasons. First, the court's expansive interpretation of its role in reviewing a government dismissal decision under *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998), is not supported by the FCA's statutory language, its legislative history, or *Sequoia Orange* itself. Second, even if the district court's interpretation were correct, the government's decision to dismiss this case was not fraudulent or "arbitrary." The government is—and must be—entitled to decide whether a private citizen like Ms. Thrower should be allowed to pursue a civil suit against a private business in the government's name and on its behalf.

I. THE DISTRICT COURT MISREAD *SEQUOIA ORANGE* TO IMPROPERLY LIMIT THE GOVERNMENT'S "UNFETTERED DISCRETION" TO DISMISS *QUI TAM* ACTIONS.

The FCA, 31 U.S.C. § 3730(c)(2)(A), gives the government broad discretion over prosecutorial decisions made in its name and on its behalf and leaves little room for judicial review of those Executive Branch decisions; only truly exceptional circumstances like unconstitutional

racial discrimination or fraud on the court could warrant such review. *See Hoyte v. Am. Nat'l Red Cross,* 518 F.3d 61, 64–65 (D.C. Cir. 2008); *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 756 (5th Cir. 2001) (en banc). But the district court here relied on dicta in *Sequoia Orange* to place a much heavier burden on the government to justify the use of its dismissal authority—namely, to show that its decision was not "arbitrary" and that it had "fully investigated" the allegations. *See* Excerpts of Record ("ER") 5.

Such a crabbed interpretation of the government's dismissal authority—and correspondingly expansive interpretation of the court's power—are not supported by the FCA's statutory language or its legislative history. Moreover, it risks infringing the Executive's duty to "take Care that the Laws be faithfully executed," U.S. Const., art. II, § 3. Given that constitutional allocation of responsibility and authority, "[t]he decision whether to bring an action on behalf of the United States is therefore 'a decision generally committed to [the government's] absolute discretion.'" *Swift v. United States*, 318 F.3d 250, 253 (D.C. Cir. 2003).

Properly read, *Sequoia Orange* is not in conflict with *Swift*: both courts recognized the government's "broad" dismissal authority, *Sequoia*

Orange, 151 F.3d at 1144; both upheld government dismissal decisions; and neither's analysis supports the district court's ruling here. But if this Court determines that the district court correctly interpreted *Sequoia Orange*—such that it is genuinely in conflict with *Swift*—then the Court should take this case en banc, overrule *Sequoia Orange*, and recognize the government's wide discretion to dismiss *qui tam* actions.

A. The Plain Statutory Language Does Not Limit The Government's Dismissal Authority.

As noted above, the FCA provides that the government may dismiss a *qui tam* action notwithstanding the relator's objections if the relator has been notified of the filing of the motion and given an opportunity for a hearing. 31 U.S.C. § 3730(c)(2)(A). Nothing in this provision suggests that the government's dismissal authority is subject to judicial review. This provision contains no standard to guide courts in exercising any such review. To the contrary, it provides that "[t]he Government may dismiss" the action, rather than providing for dismissal by the court, which strongly suggests "the absence of judicial constraint." *Swift*, 318 F.3d at 252. And the background "presumption" is that "decisions not to prosecute, which is what the government's judgment in this case amounts to, are unreviewable." *Id.* (citing *Heckler v. Chaney*, 470 U.S.

821, 831–33 (1985); *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967)).

Only the section's reference to a hearing suggests any kind of judicial involvement in the government's dismissal process. But courts construing this language have concluded that Congress only intended to provide 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. *See 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.'"); *Swift*, 318 F.3d at 253 ("We therefore conclude that the function of a hearing when the relator requests one is simply to give the relator a formal opportunity to convince the government not to end the case."); *Riley,* 252 F.3d at 753 ("the government retains the unilateral power to dismiss an action 'notwithstanding the objections of the person'"); *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."); *United States ex rel. Levine v. Avnet, Inc.*, No. 2:14-CV-17-WOB, 2015 WL 1499519, *4 (E.D. Ky. Apr. 1, 2015) (same). But giving the relator an opportunity to be heard is not at all the same thing as giving the court the authority to engage in searching review of what is meant to be the government's decision.

B. The Doctrine Of Constitutional Avoidance Mandates Resolving Any Statutory Ambiguity To Give The Government Unfettered Dismissal Authority.

Relying on dicta from *Sequoia Orange*, the district court held that § 3730(c)(2)(A) permitted judicial review of whether the government's dismissal decision was reasonable. ER 4–5. The district court's interpretation raises serious constitutional concerns and thus should be avoided unless the plain language used by Congress makes it unavoidable. As the Supreme Court has admonished:

> [T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality. This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (internal quotation marks removed).

The district court's interpretation of § 3730(c)(2)(A) raises serious constitutional problems because it infringes upon the Executive's authority to "take Care that the Laws be faithfully executed." U.S. Const., art. II, § 3. Courts generally have upheld the FCA's *qui tam* provisions under the Take Care Clause, but 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 entirely. *See, e.g., Riley*, 252 F.3d at 753.

But if a private citizen could pursue a suit in the name of and on behalf of the government over the government's explicit and considered objection, that would interfere with the Constitution's assignment of responsibility and authority to the Executive. The Executive has "extraordinarily wide discretion" in making prosecutorial decisions, and that discretion is checked only by the constraints imposed by the Constitution itself, such as the protection against racial discrimination, *id.*, or congressional statute.

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." *Heckler*, 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,* 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; *see also In re Aiken Cnty.*, 725 F.3d 255, 263–64 (D.C. Cir. 2013) ("One of the greatest unilateral powers a President possesses under the Constitution, at least in the domestic sphere, is the power to protect individual liberty by essentially under-enforcing federal statutes regulating private behavior—more precisely, the power [] not to seek charges against violators of a federal law."). To interpret the FCA 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., L.L.C.,* 397 F.3d 925, 934–35 (10th Cir. 2005) (courts

should construe FCA consistently with Take Care Clause, which requires that the Executive maintain sufficient control over *qui tam* actions).

The district court's reliance on legislative history is doubly erroneous. As an initial matter, legislative history could not overcome these serious constitutional concerns counseling avoidance of the district court's interpretation. *DeBartolo Corp.*, 485 U.S. at 575 ("[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.").

And in any event, the district court's reliance on legislative history was erroneous on its own terms. The court relied on dicta in *Sequoia Orange* describing Senate Report No. 99-345, issued during discussions about amending the FCA in 1986. *See* 151 F.3d at 1145. But that report was tied to a *different* and *unenacted* provision. The Court quoted the report's statement that a hearing on the relator's objections would be warranted if "dismissal is unreasonable in light of existing evidence, []

the Government has not fully investigated the allegations, or [] the Government's decision was based on arbitrary or improper considerations." *Id.* That statement in the report addressed a proposal to amend section 3730(c)(1) to permit relators "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. Rep. No. 99-345, at 41–42 (1986).[1] That proposal was not enacted; instead, section 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."

Sequoia Orange never acknowledged that this Senate Report related to an unenacted, and quite different, provision. The Court should not follow that unexamined dicta and should reject the district court's holding, in reliance on that dicta, that courts have authority to determine whether a government dismissal is "arbitrary" and even whether the government's investigation is "adequate." *See* ER 5.

[1] Available at: https://www.justice.gov/sites/default/files/jmd/legacy/2013/10/31/senaterept-99-345-1986.pdf.

C. Properly Construed, *Sequoia Orange* Is Consistent With These Principles.

Nor does *Sequoia Orange* force this Court to confront the constitutional concerns subsequently highlighted in *Swift*. *Sequoia Orange* is not necessarily in conflict with *Swift*. Both cases acknowledged the government's "broad" dismissal authority. *Sequoia Orange*, 151 F.3d at 1144; *see also Swift*, 318 F.3d at 252. Both upheld government dismissal decisions. And although certain dicta in *Sequoia Orange* could be read differently, that decision's reference to "arbitrary" government dismissals can and should be read to refer to dismissals that are "'arbitrary in the constitutional sense,'" meaning that they violate the Due Process Clause. *See Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 198 (2003) ("only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense,'" given substantive due process standards) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)).

That constitutional standard does not permit the court to decide whether the government's dismissal decision is reasonable in light of the evidence or to review whether the government "fully investigated the allegations." *See* ER 5. Rather, it requires the district court to defer to

the Executive's non-prosecution decision absent "the most egregious" circumstances. *Cuyahoga Falls*, 538 U.S. at 198; *see Hoyte*, 518 F.3d at 64–65 (holding that the government has "unfettered discretion" to dismiss absent exceptional circumstances such as fraud on the court). There is no hint in the record here that the government's dismissal decision is itself unconstitutional.

If, however, the Court were to conclude that *Sequoia Orange* held, in a binding manner, that district courts should review whether government dismissal decisions are "rational" or "arbitrary and capricious," then the Court should take this case en banc and overrule *Sequoia Orange*. As *Swift* pointed out, while *Sequoia Orange* upheld the dismissal, it arguably used the wrong analysis to reach the right conclusion. *See* 318 F.3d at 252. Specifically, *Sequoia Orange* suggested that courts should apply a "rational relation" standard in reviewing the government's reasons for dismissal because the Constitution "prohibits arbitrary or irrational prosecutorial decisions." 151 F.3d at 1146. But as *Swift* explained, "[t]his is not an accurate statement of constitutional law with respect to the government's judgment not to prosecute." 318 F.3d

at 253. To the contrary, whether to bring an action is "a decision generally committed to [the government's] absolute discretion." *Id.*

Giving private individuals the right to thwart government non-prosecution decisions—and courts the authority to superintend the government's reasons for deciding not to prosecute—would pull the constitutional rug out from under the FCA's *qui tam* provisions. Rather than adopt an interpretation of section 3730(c)(2)(A) that is not compelled or even supported by its text and that would raise, at the very least, difficult constitutional questions, the Court should adopt *Swift*'s interpretation of the government's dismissal authority. *See also Riley*, 252 F.3d at 753 (stating that "the government retains the unilateral power to dismiss an action 'notwithstanding the objections of the [relator]'"; *id.* at 756 ("The powers of a *qui tam* relator to interfere in the Executive's overarching power to prosecute and to control litigation are seen to be slim indeed when the *qui tam* provisions of the FCA are examined in the broad scheme of the American judicial system.").

II. THE GOVERNMENT'S DECISION TO DISMISS THIS CASE WAS NOT "ARBITRARY."

A. The Relator'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.

In this case, the relator and her counsel appear to have engaged in tactics inconsistent with the proper role of a relator. As explained in the government's briefing below, the relator presented the government with a very different case from the case she presented to the court—and the defendant—in her amended complaint. The relator's original complaint was strikingly thin and, as confirmed by the government's interview of the relator, based on very little personal knowledge. Indeed, her allegations were "copied almost entirely from prior complaints" filed by the government. *See* Clerk's Record ("CR") 94 at 6 (government response

to relator's evidentiary submission). When the government learned that only three loans from the defendant had resulted in a claim against government insurance programs during the short time of relator's employment, the government not surprisingly decided to decline to intervene.

Given that background, the government likely believed that the relator would not pursue the case on her own after the declination. After all, there was hardly anything to the case. And if the relator or her counsel had had more information to offer, they would have given the government that good news in an effort to persuade the government to intervene, or at least not to decline before doing additional investigation.

But the relator and her counsel appear to have had a different plan. They waited until after the government had declined to intervene and the action then had been unsealed, something that normally occurs promptly once the government files its notice of declination. *See* CR 10 (government notice of declination and court's order to unseal) (unsealing occurring on the same day as the government's declination). It was only at that point that the relator and her counsel pursued any additional investigation, gathering information from 17 other employees.

See CR 92 at 28 (relator's evidentiary submission). Then, only days before an amended complaint was due, the relator's counsel gave the government a few scraps of information about their contemplated amended complaint—while refusing to share a draft of the amended complaint with the government until the very day it was due to the court. *See* CR 94, Ex. E, F, H. And the relator then filed the amended complaint publicly, rather than under seal.

Through these tactics, the relator deprived the government of the ability to investigate the allegations in her amended complaint. She contended below that she could not be blamed for filing her amended complaint publicly once the action had been unsealed. It may be true that the relator had no valid basis to file the amended complaint under seal, but that misses the point. If the relator had wanted the government to investigate the allegations in her amended complaint, she would have shared those allegations with the government before the government made and formalized its declination decision and the action was unsealed. Even if the relator did not yet have the information later contained in her amended complaint, she could have asked the government to wait to make its intervention decision to give her more

time to gather information. At the very least, if the relator had wanted to help the government, she would not have waited to share a draft of her amended complaint with the government until mere *hours* before it was due. *See* CR 94, Ex. H.

It is no mystery why a relator would proceed in this manner. A relator pockets a higher share in a case the government has declined. *See* 31 U.S.C. § 3730(d). Equally importantly, a relator gets to control the litigation in a declined case, as opposed to taking a back seat to the government in an intervened case. *Compare* 31 U.S.C. § 3730(c)(1) ("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.") *with* 31 U.S.C. § 3730(c)(3) ("If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action."). And by limiting the information she shares with the government while the case is under seal, the relator can hasten the government's declination decision and thus the case's unsealing. It took the government little time to investigate the thin allegations of the original complaint here, but it could have taken the government much longer to investigate the more

detailed and extensive allegations of the amended complaint. And while the government investigates a sealed *qui tam* complaint, the relator must wait.

But a *qui tam* action isn't the relator's case. The case belongs to the government, and the statutory scheme requires the relator to cooperate with the government—not to maximize her own potential recovery.

If the government decided to dismiss this action because of the relator's tactics, that would be entirely appropriate, even under the district court's test. The district court held that the government must show "a valid government purpose and demonstrate a rational relation between dismissal and that purpose" and that the burden then shifts to the relator "to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal." ER 5 (citing *Sequoia Orange*, 151 F.3d at 1145). The district court held that the government's dismissal was "arbitrary and capricious" because the government "failed to conduct a full investigation of the amended complaint." ER 3.

Even if such judicial second-guessing were permitted (and it is not), the government had a good reason for not having more fully investigated the amended complaint: the relator's actions frustrated the

government's ability to do so. Asserting governmental control over *qui tam* actions as intended by Congress would be a perfectly valid reason for dismissal. As explained above, the government has a strong interest in protecting its duty to "take Care that the Laws be faithfully executed." U.S. Const., art. II, § 3. If a relator tries to block the government from doing so, the government *should* respond by dismissing the action.

Moreover, 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, just last year, a "professional relator" entity called NHCA Group filed 11 cases against 38 pharmaceutical manufacturers. *See* Gov't Motion to Dismiss, *United States ex rel. Health Choice Grp., LLC v. Bayer Corp., et al.*, No. 5:17-CV-126-RWS-CMC, Doc. No. 116 at 1–2 (E.D. Tex. 2018). NHCA Group sought to develop contacts and inside information "under the guise of conducting a research study of the pharmaceutical industry." *Id.* at 2, 5. NHCA Group sought to elicit information by saying it was conducting a research study with no bias

one way or the other about the industry and did not inform individuals of the true purpose of the information collection, and its website held NHCA Group out as a healthcare research company and made no mention of its vocation as a relator. *Id.* at 5, 6. The government recently 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 another example, a relator tried to leverage the *qui tam* mechanism for personal profit by short-selling the shares of companies he sued under seal. *See* Gov't Motion to Dismiss, *United States ex rel. Borzilleri v. AbbVie, Inc., et al.*, No. 1:15-cv-07881-JMF, Doc. Nos. 274, 275 (S.D.N.Y. 2018). The government quite properly has moved to dismiss that misuse of the FCA as well. *See id.*, Doc. No. 275 at 5, 17–18.

In other cases, relators have been disqualified for unethical behavior. For example, in *United States ex rel. Holmes v. Northrop Grumman Corp.*, 642 F. App'x 373 (5th Cir. 2016), the Fifth Circuit affirmed the disqualification of the relator for legal ethics violations. *See id.* at 377–78. The Second Circuit did the same in *United States v.*

Quest Diagnostics Inc., 734 F.3d 154 (2d Cir. 2013). 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. If the government decided to dismiss this action because the relator's tactics frustrated the government's ability to investigate and participate in the case, that would satisfy even the district court's standard.

B. Robust Exercise Of The Government's Dismissal Authority Is In The Public Interest.

The district court's approach in this case 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—645 new cases were filed in fiscal year 2018 alone.[2] Letting meritless or inappropriate

[2] *See* U.S. Dep't of Justice, Civil Division, Fraud Statistics – Overview (Oct. 1986– Sept. 2018), available at https://www.justice.gov/civil/page/file/1080696/download?utm_medium=email&utm_source=govdelivery ("DOJ Fraud Statistics").

cases go forward burdens defendants, the courts, and the government itself.

FCA litigation is time-consuming, lengthy, and costly. FCA actions touch on nearly every sector of the economy, including defense, education, banking, technology, and healthcare. As the Chamber noted in a recent amicus brief, of the 2,086 cases in which the government declined to intervene between 2004 and 2013 and that ended with zero recovery, 278 of them lasted for more than three years after the government declined and 110 of those extended for more than five years after declination. Chamber of Commerce of the United States of America et al. Amicus Br. 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 FCA litigation. 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 FCA cases are particularly high because many (perhaps most) FCA 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 FCA'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) (quotation 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 FCA 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.*[3]

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)

[3] Damages present another source of costly discovery.

(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." *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 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 FCA'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 (quotation 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 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,[4] and 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,

[4] *See* David 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).

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. The government intervenes in a small minority of *qui tam* actions—about 25 percent over the last several years.[5] Yet the vast majority of the $59 billion obtained under the FCA since 1986 has come from that small subset of intervened cases.[6] In stark contrast, the much larger universe of declined cases has produced less than $2.5 billion in recovery.[7]

It is entirely "rational" (ER 5) for the government to use the dismissal authority that Congress conferred to enable it 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 interest is that justice be done,

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[5] Julie Rose O'Sullivan, "Private Justice" and FCPA Enforcement: Should the SEC Whistleblower Program Include A *Qui Tam* Provision?, 53 Am. Crim. L. Rev. 67, 92 (2016) ("It is clear that the government intervenes in only (roughly) twenty to twenty-five percent of the cases brought to it by qui tam relators.").

[6] *See* DOJ Fraud Statistics.

[7] *See id.*

not to maximize the number of dollars obtained under the FCA 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."[8] That is all the more true in the FCA 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 she can attempt to persuade the government not to dismiss—a process that helps ensure that dismissals are carefully considered. But the elaborate procedure that the district court employed below to litigate the government's reasons and their strength—and the court's ultimate rejection of the government's decision—would make dismissal impractical. The very resources the government sought to save for worthier uses had to be devoted to litigating whether the government could do so. That perverse approach to section 3730(c)(2)(A) is contrary

[8] *See* Robert H. Jackson, United States Attorney General, Address Delivered at The Second Annual Conference of United States Attorneys: "The Federal Prosecutor" at 3 (April 1, 1940), available at 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 reverse the district court's denial of the government's motion to dismiss.

Respectfully submitted,

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Dated: March 22, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Ninth Circuit Rule 32-1 and Fed. R. App. 29(a)(5) because this brief contains 6,076 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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CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth 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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