No. 19-2273

IN THE

United States Court of Appeals for the Seventh Circuit

UNITED STATES OF AMERICA,
Appellant,

v.

CIMZNHCA, LLC,
Plaintiff-Appellee.

UCB, INC., *et al.*,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
NO. 3:17-CV-00765 (STACI M. YANDLE, J.)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING APPELLANT SEEKING REVERSAL

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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.[1] It represents

[1] The undersigned certifies that 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.

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.

The False Claims Act, 31 U.S.C. §§ 3729–3733, touches nearly every sector of the American economy, including defense, health care, education, banking, and technology. In its current form, the Act combines the threat of treble damages and per-payment-claim civil penalties exceeding $22,000. *See* 31 U.S.C. § 3729(a)(1); 28 C.F.R. § 85.5. As a result, 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).

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, *see* 31 U.S.C. § 3733, as well as post-unsealing discovery requests in a single case that will end without 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. United States ex rel. Thrower*, No. 18-16408 (9th Cir. Mar. 22, 2019); Br. of Chamber of Commerce of U.S. et al. as *Amici Curiae* in Supp. of Appellees, *United States ex rel. Ruckh v. CMC II, LLC*, No. 18-10500 (11th Cir. Sept. 18, 2018).

INTRODUCTION

This appeal presents a legal question of first impression in this Circuit: 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 this case, the district court took the nearly unprecedented step of denying the Government's motion to dismiss a *qui tam* action filed under the False Claims Act.[2] After noting this Court had not yet addressed what standard governs such motions, the district court concluded that the Ninth Circuit's *Sequoia Orange* standard was the only way to give meaning to § 3730(c)(2)(A)'s "hearing" requirement. *See* A4–5. In so ruling, the district court did not expressly address the defects in *Sequoia Orange*'s analysis that were subsequently identified by the D.C. Circuit in *Swift*. The court insisted that the Government must demonstrate to the court's satisfaction that the Government has conducted a "minimally adequate investigation" and a "meaningful cost-benefit analysis" that accounts for the "costs it would likely incur versus the potential recovery that would flow to the Government if [the] case were to proceed." A5–6.

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

[2] In the Act's 156-year history, the only other known instance in which a district court denied such a motion recently occurred in a case currently under review in the Ninth Circuit. *See United States v. Academy Mortg. Corp.*, No. 3:16-cv-02120, 2018 WL 3208157 (N.D. Cal. June 26, 2018), *appeal docketed sub nom. United States v. United States ex rel. Thrower*, No. 18-16408 (9th Cir. July 27, 2018).

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.[3] That approach should be avoided here because it

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[3] *See, e.g.*, *Chang ex rel. United States v. Children's Advocacy Ctr. of Del.*, 938 F.3d 384, 387 (3d Cir. 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); *Polansky v. Exec. Health Res., Inc.*, No. 2:12-cv-04239, 2019 WL 5790061, at *8 (E.D. Pa. Nov. 5, 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); *United States ex rel. Health Choice Alliance, LLC v. Eli Lilly & Co.*, No. 5:17-cv-00123, 2019 WL 4727422, at *6 (E.D. Tex. Sept. 27, 2019), *appeal docketed*, No. 19-40906 (5th Cir. Oct. 29, 2019); *United States ex rel. Borzilleri v. AbbVie, Inc.*, No. 1:15-cv-07881, 2019 WL 3203000, at (continued)

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 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 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

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*2 (S.D.N.Y. July 16, 2019), *appeal docketed*, No. 19-2947 (2d Cir. Sept. 13, 2019).

two express conditions for dismissal were unquestionably satisfied in this case. The Government notified the relator and its parent organization National Health Care Analysis Group (collectively, NHCA Group) of the Government's motion. NHCA Group was provided with an opportunity for a hearing on that motion. The district court nonetheless denied the Government's motion by effectively imposing a third, *implied* condition for dismissal: namely, that the Government demonstrate to the district court's satisfaction that the Government's decision is "based on a minimally adequate investigation, including a meaningful cost-benefit analysis." A5.

The district court's decision 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.

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 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*); *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 753 (5th Cir. 2001) (en banc) (noting that the Government "retains the unilateral power to dismiss an action" notwithstanding the objections of the relator); *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 the 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 Govern-

ment "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 of the Type This Court Recognized in *Bitsky*

The district court's interpretation 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

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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.

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 and citation omitted).

The district court'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]

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[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).

But if a private entity such as NHCA Group can pursue a suit 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 wide discretion in making prosecutorial decisions. The Supreme Court has "recognized on several occasions over many years that an [executive] agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to [the executive] agency's absolute discretion." *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 when resolving *In re United States (Bitsky)*, 345 F.3d 450 (2003). The defendant in *Bitsky* was a police officer charged with one count of depriving another of civil rights under color of law and two counts of obstruction of justice. *Id.* at 451. The Government entered a plea

agreement under which the defendant agreed to plead guilty to one of the obstruction counts while the Government agreed to dismiss the civil-rights count and the remaining obstruction count. *Id.* The district court, however, rejected the plea agreement on the ground that the count on which the defendant agreed to plead guilty would result in too short a sentence. *Id.*

After the defendant decided to go ahead and plead guilty without the protection of a plea agreement, the district court sentenced him to a top-of-the-guidelines sentence on the first obstruction count. *Id.* at 451–52. The Government then moved to dismiss the civil-rights count and the remaining obstruction count. *Id.* at 452. Although the district court granted the Government's motion on the remaining obstruction count, it refused to dismiss the civil-rights count and appointed a private attorney to prosecute it. *Id.*

This Court, in an opinion authored by Judge Posner, granted the Government's petition for a writ of mandamus. *Id.* at 454. It concluded that by "refusing to dismiss the civil rights count," the district judge "stepped outside the boundaries of his authorized powers." *Id.* at 452. As this Court explained, "in our system of criminal justice, unlike that of some foreign nations, the authorized powers of federal judges do not include the power to prosecute crimes." *Id.* at 452. Rather, "[t]he Constitution's 'take Care' clause . . . places the power to prosecute in

the executive branch." *Id.* at 453. This Court went on to explain that the "plenary prosecutorial power of the executive branch safeguards liberty, for, in conjunction with the plenary legislative power of Congress, it assures that no one can be convicted of a crime without the concurrence of all three branches . . . . When a judge assumes the power to prosecute, the number shrinks to two." *Id.* at 454. This Court therefore ordered the district court to grant the Government's motion to dismiss. *Id.*

This Court should reach a similar outcome here. True, the False Claims Act is not a criminal statute. But 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."). And in light of the Act's imposition of treble damages and enormous civil penalties, the Supreme Court has confirmed that the statute in its current form is "essentially punitive in nature." *Escobar*, 136 S. Ct. at 1996 (internal quotation marks and citation omitted). As a result, the same core legal principles that animated this Court's

decision in *Bitsky* should be applied here to reverse the district court's order denying the Government's motion to dismiss.

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 considera-

tions.'" *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 could not overcome the serious constitutional concerns counseling avoidance of the district court'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).

D. The District Court's Approach Is Especially Flawed

Although the district court purported to apply the Ninth Circuit's *Sequoia Orange* standard, *see* A5–7, it went far beyond what even *Sequoia Orange* requires or permits. The district court did not merely analyze whether the Government's dismissal rationally advanced a valid government purpose; instead, the court substituted its judgment for that of the Government and faulted the Government for purportedly failing to conduct a "minimally adequate investigation" and a "meaningful cost-benefit analysis." A5.

As the Government has explained, *see* U.S. Br. at 34–35, 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 statute—suggests that the Government must conduct a "meaningful cost-benefit analysis" that assesses the "costs it would likely incur versus the potential recovery that would flow to the Government if [the] case were to proceed." A5–6. The district court's approach effectively subjects the Government's dismissal decisions to a rigorous version of arbitrary-and-capricious review under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), in cases where that statute does not even apply.

Moreover, the analysis contemplated by the district court 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 this Court 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). In this case, for example, the district court substituted its views for those of the Executive Branch regarding the proper allocation of Government resources. *See* A27 (Government explaining that dismissal would further the "valid governmental purpose[] of preserving scarce government resources").

The district court chided the Government for having "collectively investigated" NHCA Group's wave of copycat *qui tam* suits filed throughout the United States, claiming that the Government supposedly "did not review any additional materials from the relator relevant to this case," nor did it "assess or analyze the costs it would likely incur versus the potential recovery that would flow to the Government if this case were to proceed." A6. But the court's criticism is factually unfounded. During the hearing on the Government's motion, NHCA Group's counsel conceded that the Government asked NHCA Group if it had any additional documents to share, and NHCA Group said there were none. *See* Hr'g Tr. 25:5–11, Mar. 29, 2019, ECF No. 81 (relator's counsel explaining that when the Government "told us they were going to dismiss," they "asked if we had any additional documents to provide at that time," and "we did not").

Moreover, the False Claims Act instructs that when a relator files its complaint under seal and serves it on the Government, the relator also has a duty to serve on the Government a "written disclosure of substantially all material evidence and information [the relator] possesses" in order that the Government can evaluate the relator's allegations. 31 U.S.C. § 3730(b)(2). The Act does not require the Government to request additional information before moving to dismiss the case.

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

The district court's approach 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 discretion furthers the public interest in multiple ways.

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 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 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 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 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).[7]

[7] Such discovery could be especially burdensome in this case, albeit completely justified. For example, counsel for the Government explained that in deciding to invoke § 3730(c)(2)(A), the Government (continued)

Thousands of *qui tam* actions are pending under seal awaiting the Government's decision as to whether to intervene, 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 one, 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 $59 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* (Dec. 21, 2018).[8] In stark contrast, the much larger universe of declined cases has produced less than $2.5 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

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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, Mar. 29, 2019, ECF No. 81. The defendants 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://go.usa.gov/xEHV4.

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 the district court employed

here to litigate the Government's reasons and their strength—and the district court's ultimate rejection of the Government's discretionary 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 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 reverse the order of the district court denying the Government's motion to dismiss.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

On this twenty-ninth day of November, 2019, the undersigned certifies that:

1. This brief complies with the type-volume limitation of Circuit Rule 29 because this brief contains 6,132 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) and Circuit Rule 32(b), as well as the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6), because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 12-point New Century Schoolbook font.

s/James F. Segroves
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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d) and Circuit Rule 25, the undersigned certifies that on this twenty-ninth day of November, 2019, he caused the Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* Supporting Appellant Seeking Reversal to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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