MEMORANDUM

To: 2022 Summer Writing Competition Participants

From: SETON HALL LAW REVIEW
SETON HALL LEGISLATIVE JOURNAL

Start Date: July 29, 2022

Re: 2022 Journal Write-On Competition

- The Summer Writing Competition consists of the Note, the Bluebook exercise, and the Style exercise. Membership to any journal requires completion of all components.

- The sources for the survey portion of the Write-On Competition are included in this packet:

1. **SOURCE 1: False Claims Act Statute**
2. **SOURCE 2: Civil Actions Statute**
3. **SOURCE 3: Federal Rule of Civ. Pro.**
4. **SOURCE 4: Legal Article**
5. **SOURCE 5: Fifth Circuit Decision**
6. **SOURCE 6: D.C. Circuit Decision**
7. **SOURCE 7: Seventh Circuit Decision**
8. **SOURCE 8: First Circuit Decision**
9. **SOURCE 9: Tenth Circuit Decision**
10. **SOURCE 10: Ninth Circuit Decision**
11. **SOURCE 11: Third Circuit Decision**
12. **SOURCE 12: Law Review Article**
13. **SOURCE 13: Memorandum**
14. **SOURCE 14: Law Review Comment**
15. **SOURCE 15: Law360 Article**

- **Additional research is neither necessary nor permitted.**

- The Bluebook exercise consists of **5** pages. Please see the exercise for instructions.

- The Style exercise consists of **4** pages. Please see the exercise for instructions.

- The entire packet consists of **103** pages.

- Read the attached instructions **VERY** carefully before beginning. The only information or instructions that you should reference or rely on are within this packet. Any other source of information (with the exception of the Write-On Blackboard Anonymous Discussion thread), whether it be substantive or instructive, is not to be relied upon or consulted.

- All participants will make one electronic submission. The website will allow you to submit either: (1) one file to ALL journals available (for students wanting to apply to Law Review and Legislative Journal), or (2) one file to Law Review only (for students wanting to apply to Law Review only) or (3) one file to Legislative Journal only (for students wanting to apply to Legislative Journal only). **Your electronic submission must consist of the following, in this order**:

1. Preference sheet listing your anonymous number, the journals that you are applying to **in order of preference**, and access affirmation statement;
2. Note;
3. Bluebooking exercise; and
4. Style exercise.

- Competition entries must be submitted **no later than <u>Friday, August 12, 2022, at 11:00 a.m.</u>** Submissions will only be accepted via the Journal Competition website (http://law.shu.edu/journalcompetition). **<u>Your competition entry must be submitted in Microsoft Word (.doc or .docx) format and all metadata must be removed from your document</u>. <u>Submissions received in a format other than Microsoft Word (.doc or .docx) format will not be graded</u>**. ***It is essential that you remove your metadata to ensure anonymity.*** To learn how to remove metadata from your document, please read the instructions available in the metadata information page at <u>https://law.shu.edu/technology/metadata.cfm</u>. Please practice how to remove metadata prior to submission. Do not wait until the last minute when trying to submit your file.

- Throughout the competition, a list of all submissions successfully received by each journal will be posted on the Journal Competition website. This list will update in real time. You must check this list to ensure that the journals successfully received your submissions. If you submitted your file through the website (and ultimately reached the pages confirming your submissions) but your anonymous number does not appear on the lists, you must contact Ana Santos (ana.santos@shu.edu or 201-407-0568) **<u>NO LATER THAN 11:00 A.M. ON FRIDAY, AUGUST 12</u>** to make arrangements to resend your files.

- Note that the IT department will check files resubmitted through Ana Santos to determine whether they were modified after the deadlines. The Honor Code regulates all conduct regarding the competition, and any violations of the Honor Code will be forwarded to the Associate Dean for possible disciplinary action, up to and including dismissal from the law school.

- The website has been tested without error, and we do not anticipate that any participants will need to contact Ana—the primary purpose of posting received submissions is to give you peace of mind that we received your submissions. Ana should be contacted only as a last resort on the deadline date if you are absolutely certain that you followed all of the submission instructions and you reached the page confirming submission, but your submission was still not received by the journals.

- If you have questions during the competition, submit them to the discussion board. **DO NOT speak to any journal members directly during the course of the competition**. To submit a question, you must use the Blackboard Anonymous Discussion thread. A member of the journal e-board will respond to your questions as soon as possible. Check the site frequently, whether you have questions or not, as it will contain important information. The steps for submitting a question are as follows:

  1. Log in to LawNet (lawnet.shu.edu).

2. Click the Blackboard button.
3. Select “Organizations” from left navigation.
4. Select “Journals Write-On Competition” from organization list.
5. Select “Discussions” from left navigation.
6. Click “2022 Journal Write-On Competition Q&A.”
7. Select the Reply button and change the Subject area to include your topic. Type your message in the Message box.

❖ If you experience issues with accessing the discussion board, please contact ana.santos@shu.edu for access.

GOOD LUCK!

INSTRUCTIONS, GUIDELINES, AND SUGGESTIONS FOR THE COMPETITION

1. Read these instructions very carefully **several times** before starting the competition. Read these instructions again very carefully several times before submitting your competition entry. This competition tests following instructions just as much as writing. Failure to follow all instructions exactly will likely result in substantial scoring deductions.

2. Make an original argument. You can argue for a position taken in one or more of the sources or a new position. Participants will not be graded on whether their argument falls on one side of an issue or the other.

3. Submit your typed Note in twelve-point Times New Roman font, double-spaced with one-inch margins. Footnotes should be in ten-point Times New Roman font, and single-spaced.

4. All Notes must be at least 10 pages in length and no more than 12 pages. The Bluebooking and Style exercises are not included in the Note page count and should be attached to your submission following the conclusion of your Note; beginning with the Bluebook exercise, followed by the Style exercise. The preference sheet does not count towards the page count and should be the first page of your submission.

5. Cite based on the bolded page numbers within a given source. Note: There may be gaps in pagination within a source and missing footnotes because non-pertinent information has been removed from some sources for purposes of the competition.

6. Your Note must include page numbers at the bottom middle of the page.

7. Your anonymous competition number must appear on each page of your Note in a centered header.

8. You may only ask questions through the Blackboard Anonymous Discussion thread. This was created specifically for the Write-On Competition. We will do our best to post answers to your questions as quickly as possible. Remember, nothing in your question should allow us to connect your name to your anonymous submission. Check this thread frequently, whether you have questions or not, to make sure that you benefit from all available information. While the Blackboard Anonymous Discussion thread will remain visible throughout the entire competition, **questions submitted after 11:00 a.m. on Thursday, August 11th will not be answered.**

9. Your competition entry must be submitted in Microsoft Word (.doc or .docx) format electronically at: http://law.shu.edu/journalcompetititon. Competition entries will only be accepted until **11:00 a.m. EST on Friday, August 12th**. **Be mindful of time zones if you are traveling!** Do not wait until the last minute to submit your entry. If you plan on waiting until the last day to submit, at least do so several hours before the deadline in order to avoid difficulties due to high traffic on the website. **The site will not accept files larger than 1000 kb, so make sure your file is small enough before you attempt to submit it.**

10. Submissions received in a format other than Microsoft Word (.doc or .docx) format will **not** be graded.

11. The name of your Microsoft Word (.doc or .docx) file must consist only of your anonymous number and the .docx extension. For example, if your anonymous number is 1234, your file must be named "1234.doc" or "1234.docx."

12. Learn how to convert a file into Microsoft Word (.doc or .docx) format as early as possible and practice converting a file at least once before the last day. Information on how to remove all metadata may be found at: https://law.shu.edu/technology/metadata.cfm.

13. If for some reason you submit more than one competition entry via the submission website, only the **first** submission will be graded. Please do **not** purposely send more than one submission—multiple submissions will serve only to frustrate the graders who will be grading your submission.

14. Remember the Five Word Rule. It is plagiarism to include five words in a row from a case without quotation marks. The journals retain the right to automatically disqualify any paper that violates this rule. All submissions containing egregious violations of this rule will be forwarded to the Associate Dean for possible disciplinary action, up to and including dismissal from the law school.

15. It is strongly encouraged that students read all sources three or four times before beginning your Note.

16. It is highly recommended that you outline your Note before attempting to write. However, this outline is only for your benefit and may not be submitted to the journals.

17. Endeavor to finish your final draft well before the deadline and allow yourself time away from the problem. Return to your Note before submission and perform a final comprehensive edit.

18. Work on your Note consistently, giving yourself enough time before the deadline to review your submission.

19. Check the journal competition website no later than **Friday, August 12th,** to ensure that your submission was received by the journals. See the cover page of the packet for more information.

20. Use as many of the sources as you can while retaining a clear, well-written argument.

21. Use correct Bluebook format for all footnotes.

DO NOT:

1. **Do not consult with or seek assistance from any other person once the competition period begins.** This rule prohibits any discussion (including discussions or comments on social media) of the cases, methods of writing the Note, and ideas for the conclusion. The rule also prohibits **ANY** assistance such as spelling, grammar, or punctuation editing by friends or family, whether associated with the law school or not. The journals retain the right to automatically disqualify any paper that violates this rule. Any person violating this rule will be forwarded to the Associate Dean for possible disciplinary action, up to and including dismissal from the law school. The Honor Code regulates all conduct regarding the competition.

2. **Do not use block quotes.** Keep other quotes to an absolute minimum. Many papers are summarily rejected because of an overabundance of quotations. As a general rule, paraphrase the language of the sources.

3. Do not simply restate an argument from one of the sources. This work should be your own; if someone else has already written what you intend to write, you are pre-empted. Use the sources collectively to make a new argument or critique existing arguments in a new light.

4. Do not address questions to any journal member. **All questions** concerning the competition must be submitted through the designated Journal Write-On Competition Blackboard Anonymous Discussion thread. See instruction eight in the section above.

5. Do not attempt to complete your conclusion on the last day. As you proceed, consider ideas for your conclusion to provide a framework for the final draft.

6. Do not assume anything you cannot verify in these sources. For example, blog comments might refer to a case, but do not assume that the case says what the blog comment claims without confirmation from another source within this packet.

7. **Do not consult outside sources.** If it is apparent that outside sources were used, your submission will be **disqualified**. The contents of your Note must come only from the sources included in this packet. In some circumstances, however, your citations will indicate authorities directly discussed by the court, such as statutes or treatises.

8. Do not give all sources, or all information in a source, equal weight.

9. Do not rely on only one source to make your argument.

NOTE WRITING GUIDELINES

A Note has four distinct parts. Each part should give a reader background information and should further your argument.

1. **Introduction:** A Note begins with a general introduction that presents the issue and your specific argument. Include only the facts necessary to introduce a deeper analysis that will come later in the Note. The introduction, however, should be sufficient to introduce a specific and concise argument. Your reader should know what side you are on before finishing your introduction. Use correct Bluebook citation to cite any quotes or inferences from the sources.
    - **a.** Begin this section with a heading that reads: "Part I: Introduction"

2. **An overview of the sources:** A Note's second section contains a concise overview of the relevant sources, particularly of the cases. In this section, highlight the court's holding and salient aspects of its reasoning. Be brief. Use caution to avoid including irrelevant or unimportant aspects of the case. The holding should be accurate, precise, and one sentence. Do not feel obligated to discuss all sources here—some are not appropriate for this section and serve only to bolster the analysis.
    - **a.** Next, in the same manner, analyze any concurring or dissenting opinions in the case. Identify the justice or judge authoring the opinion, as well as whether any of the panel's other members joined in the opinion.
    - **b.** The language of this section, while seeking to provide an objective overview of the sources, should also point out and emphasize points that are beneficial to the Note's overall argument.
    - **c.** You may label this section anything you want, as long as it is appropriate to the section's content and to the overall Note.
    - **d.** Begin this section with a heading that reads "Part II: [INSERT HEADING HERE]"

3. **Analysis:** Discuss your opinion of the issue, using the cases as discussion points. This section of the Note should be the most extensive section. Ask, among other things: (i) what did the court do right regarding this issue; (ii) where did the court err; (iii) what ramifications may the decision have; and (iv) what can be done to improve the law in this area?
    - **a.** Pay particular attention to the development of this section. It offers the opportunity to draft an original approach to the issues presented and to demonstrate that you considered this question at length, formed some interesting or unique insights, and are able to discuss them in a logical, reasoned, and articulate fashion.
    - **b.** Once again, you may label this section anything you want, but make sure the label indicates your stance on the argument and that it is an appropriate title to this section.
    - **c.** Begin this section with a heading that reads "Part III: [INSERT HEADING HERE]"

4. **Conclusion:** The conclusion is a small section that should bring the reader back to the big picture—it should reiterate that you are making a thorough, reasonable, and ultimately correct argument. The conclusion requires citation only when referring back to specific aspects of the court's reasoning or after a direct quotation. Do not make a new argument that you have not already made in the Analysis portion of the Note.
    - **a.** Begin this section with a heading that reads "Part IV: Conclusion"

The **only** sources you should refer to, besides those included here, are the Bluebook (21st edition) and The Chicago Manual of Style (17th edition). Instructions for accessing The Chicago Manual of Style can be found below, in one of two ways:

1. To access The Chicago Manual of Style:
    a. Navigate to https://shlawlibrary.on.worldcat.org/oclc/1003322871
    b. Select "View eBook" on the right side of the screen
    c. Sign in with your Seton Hall username and password

- OR -

2. Hard copies of The Chicago Manual of Style are available on reserve in the library.

STYLISTIC GUIDELINES

1. Never refer to a judge or justice as "he" or "she," and never refer to a court as "they."

2. Use direct voice, and avoid passive voice wherever possible:
e.g., In July, Professor Romberg gave the first semester grades to the Registrar.
NOT: The Registrar was given the first semester grades in July.

3. Never rely on a citation in a case for appropriate form—rely on the Bluebook.

4. When discussing dissenting and/or concurring opinions, you must indicate as such every time you use a cite other than *Id.*:
e.g., *Salerno*, 225 A.2d at 77 (Campbell, C.J., dissenting).
Id. at 18 (Ford, J., concurring in part and dissenting in part).
Id., 315 A.2d at 45 (Graham, J., concurring).
Id. **there was no page change here**
Note, however, that the citation accompanying your first sentence analyzing a dissenting or concurring opinion must indicate that it is a dissenting or concurring opinion, even if the cite would normally be just "*Id.*"

5. Refer to the court (including dissents and concurrences) in a variety of ways, e.g.:

The court noted	The majority noted
Justice Lee posited	The justice posited
Judge Bork, dissenting, articulated	The dissent articulated

6. Remember that the Bluebook contains a rule for virtually everything, including font style for sources, capitalization of certain words, and abbreviations. When in doubt, check the Bluebook. Even if you think you know the rule, check the Bluebook anyway.

PREFERENCE SHEET
Anonymous Number: _____

1._____

2. _____

ACCESS AFFIRMATION STATEMENT

If I am a Weekday student, I hereby certify that I have not accessed or otherwise seen this competition packet before it was available to me on the designated access date; I further certify that I have not shared or discussed this competition packet and writing problem with any Weekend students ahead of their access date.

If I am a Transfer student, I hereby certify that I have not accessed or otherwise seen this competition packet before it was available to me on the designated access date; I further certify that I have not discussed this competition packet and the writing problem with any Weekday or Weekend students ahead of my access date.

If I am a Weekend student, I hereby certify that I have not accessed or otherwise seen this competition packet before it was available to me on the designated access date; I further certify that I have not discussed this competition packet and the writing problem with any Weekday students ahead of my access date.

I am aware that if I have engaged in any of this prohibited conduct, I may be subject to disciplinary action pursuant to the Code of Student Conduct.

Anonymous Number: _____
*Type Your Number As Signature

SOURCE 1: §3729 FALSE CLAIMS STATUTE

Title 31: Money and Finance
United States Code Annotated
Westlaw
August 1, 2011

(a) Liability for certain acts.

(1) In general. Subject to paragraph (2), any person who

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-4101), plus 3 times the amount of damages which the Government sustains because of the act of that person.

(2) Reduced damages. If the court finds that

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

(3) Costs of civil actions. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Definitions. For purposes of this section

(1) the terms "knowing" and "knowingly"

(A) mean that a person, with respect to information

(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud;

(2) the term "claim"

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

(3) the term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

(4) the term "material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

. . .

SOURCE 2: §3730 CIVIL ACTIONS FOR FALSE CLAIMS STATUTE

Title 31: Money and Finance
United States Code Annotated
Westlaw
July 22, 2010

(a) Responsibilities of the Attorney General. The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons.

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

. . .

(c) Rights of the parties to *qui tam* actions.

(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. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)

(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person 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.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

. . .

(D)

. . .

(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. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

. . .

(d) Award to *qui tam* plaintiff.

. . .

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

. . .

SOURCE 3: FEDERAL RULE OF CIVIL PROCEDURE

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal.

(1) By the Plaintiff.

(A) Without a Court Order. Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) Effect. Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) By Court Order; Effect. Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

(c) Dismissing a Counterclaim, Crossclaim, or Third-Party Claim. This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:

(1) before a responsive pleading is served; or

(2) if there is no responsive pleading, before evidence is introduced at a hearing or trial.

(d) Costs of a Previously Dismissed Action. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs of that previous action; and

(2) may stay the proceedings until the plaintiff has complied.

SOURCE 4: Legal Article

Federal Law Enforcement Training Centers: Legal Articles: Civil Actions

An Overview of "*Qui Tam*" Actions
Bryan Lemons

http://www.fca.gov/sites/article/research/quitam.pdf

Last Accessed May 17, 2022, at 10:21 AM

Originally enacted in 1863, the False Claims Act[1] (FCA) was part of a concentrated effort by the Federal Government to combat defense contractor fraud during the Civil War.[2] Although the statute has undergone modifications throughout the years, its purpose remains the same: To prevent fraud against the United States. While there is little extraordinary about much of the FCA, the unusual enforcement mechanisms warrant examination. Within the FCA, two means of enforcement are outlined. Not surprisingly, the first vests primary authority for enforcement of the FCA in the hands of the Attorney General of the United States.[3] However, the second mode of enforcement is somewhat more remarkable. These provisions, referred to as "*qui tam*" provisions, vest additional authority for enforcement of the FCA in the hands of private citizens, who are authorized to bring suit on behalf of the United States, with the promise of a share of any monies recovered serving as incentive.[4] These suits, commonly known as "*qui tam*" actions, permit private individuals to sue on behalf of the United States to recover money that was fraudulently obtained by a person or corporation. The rationale behind sanctioning such suits was perhaps best expressed by the Supreme Court in *United States ex rel. Marcus v. Hess*: "... [O]ne of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain."

INITIATING A "*QUI TAM*" ACTION

To initiate the process, a private citizen, referred to as a "relator," files the complaint in the United States District Court. The complaint must be filed in camera and remain under seal for at least 60 days, during which time all information contained within the complaint must be kept confidential from outside parties, including the defendant.[6] The relator is also required by law to serve a copy of the complaint, as well as a written disclosure statement detailing all pertinent information in the relator's possession, upon the United States Government.[7] Once these steps have been taken, the United States is granted a mandatory 60-day period to investigate the relator's allegations and decide whether to intervene in the lawsuit and assume primary responsibility for the litigation.[8] This 60-day period may be extended upon a showing of "good cause" and, as a practical matter, extensions are often liberally granted.[9]

GOVERNMENT ACTION

…

B. Government Declines to Intervene

Following its investigation, the United States may decline to intervene in place of the relator.[15] In such cases, the relator has the right to conduct the action and has primary responsibility for the litigation. Nonetheless, the United States maintains a significant amount of leverage to influence the lawsuit. For example, although not a party to the action, the United States may require both parties, upon request, to provide copies of all pleadings filed in the action, as well as copies of all deposition transcripts.[16] Additionally, the court may, "without limiting the status and rights of the person initiating the action," allow the United States to intervene in a "*qui tam*" action after initially declining to do so, upon a showing of "good cause."[17] Finally, some courts have permitted the United States to veto the proposed settlement of a "*qui tam*" action, even though it has previously declined to intervene in the case and makes no attempt to do so at a later date.[18]

Regardless, in those cases where the Government declines to intervene, the relator's recovery amounts increase, as he or she bears the burden of financing the lawsuit. Specifically, when the relator pursues the action without United States intervention, the relator is entitled to receive an amount between 25% and 30% of the proceeds recovered in the action, as well as reasonable expenses and attorney's fees.[19]

PUBLIC DISCLOSURE BAR

Prior to 1943, relators were permitted to initiate suits based upon information that was already in the possession of the Government. Thus, relators who had contributed little or no relevant information to the Government in their fight against fraud were reaping the benefits of the FCA.[20] In response to these "parasitic" lawsuits, Congress amended the FCA in 1943 to prohibit "*qui tam*" actions based upon information in the possession of the United States or any of its employees. This effectively prohibited any employee of the United States from initiating a "*qui tam*" action. The result of this broad jurisdictional bar was a drastic reduction in the number of "*qui tam*" actions brought during the years 1943 to 1986. However, the 1986 amendments to the FCA revitalized the "*qui tam*" provisions of the FCA and broadened the right to pursue "*qui tam*" actions as a means of combating fraud against the United States. These amendments eliminated the ban against "*qui tam*" actions based upon information in the possession of the United States or its employees and, instead, authorized private citizens (including employees of the United States) to bring "*qui tam*" actions, subject to only four (4) exceptions. One notable exception is the "public disclosure" bar. The "public disclosure" bar forbids a court from hearing a "*qui tam*" action if the litigation is based upon previously, publicly disclosed allegations or transactions, unless the relator is an "original source" of the information.[21] Through this exception, "Congress was attempting to prevent parasitic lawsuits while, at the same time, not barring proper '*qui tam*' claims by individuals who provided new information to the Government."[22]

…

PROVING A VIOLATION OF THE FCA

…

Now, a relator may succeed if it can be shown that the defendant (1) had "actual" knowledge of the false nature of the claim; (2) acted in "deliberate ignorance" of the truth or falsity of the claim; or (3) acted in "reckless disregard" of the truth or falsity of the claim.[28] Thus, a relator may ultimately succeed without ever having to prove the defendant had knowledge of the claim's falsity. For example, a doctor who delegated billing authority to his wife and failed to review the claims for accuracy, was found guilty of a violation of the FCA based upon his "reckless disregard" for the truth or falsity of the billing records.[29]

A "claim" under the FCA is defined as:

"any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded."[30]

…

CONCLUSION

…

These actions provide the United States with a valuable tool in the fight against fraud. Further, through an understanding of these provisions, Federal law enforcement officers investigating fraud against the United States may likewise find the "*qui tam*" provisions to be a useful addition to their arsenal of weapons.

Footnotes

[1] 31 U.S.C.S. Sec. 3729 et. seq.

[2] Originally enacted in 1863 as the "Informer's Act."

[3] 31 U.S.C.S. Sec. 3730(a).

[4] *Id.* at Sec. 3730(b). The phrase "*qui tam*" is an abbreviation for "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," which, when translated, means "Who brings the action for the King as well as for himself." While "*qui tam*" actions originally developed in thirteenth-century England, the concept was first utilized in the United States by lawmakers of the First Congress, who included "*qui tam*" provisions in ten of the first fourteen American statutes imposing penalties. *See* Major John C. Kunich, USAF, "*Qui Tam*: White Knight or Trojan Horse," 33 A.F.L. REV. 31 (1990).

[5] 317 U.S. 57, 541 n.5 (1943).

[6] 31 U.S.C.S. Sec. 3730(b)(2).

[7] *Id.*

[8] *Id.*

[9] *Id.* at Sec. 3730(b)(3).

[15] *Id.* at Sec. 3730(b)(4)(B).

[16] *Id.* at Sec. 3730(c)(3).

[17] *Id.*

[18] *See Searcy v. Phillips Electronics North America Corp.*, 117 F.3d 154 (5th Cir. 1997) (holding that United States has an absolute right to veto any proposed settlement, even if it previously declined to intervene). *But see United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715 (9th Cir. 1994) (holding that United States may only veto a proposed settlement during the initial sixty days of the action, when it may still intervene as a matter of right).

[19] 31 U.S.C. Sec. 3730(d)(2).

[21] 31 U.S.C.S. Sec. 3730(e)(4).

[22] *See* Christopher C. Frieden, "Protecting the Government's Interests: *Qui Tam* Actions Under the False Claims Act and the Government's Right to Veto Settlements of Those Actions," 47 EMORY L.J. 1041, 1048 (1998).

[28] 31 U.S.C.S. Sec. 3729(b).

[29] *See United States v. Krizek*, 111 F.3d 934 (D.C. Cir. 1997).

[30] 31 U.S.C.S. Sec. 3729(c). Of note, pursuant to §3729(e), the FCA does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

SOURCE 5: FIFTH CIRCUIT DECISION

4 F.4th 255
United States Court of Appeals,
Fifth Circuit
Health Choice Alliance LLC ex rel. United States, Appellant
v.
Eli Lilly & Company, Incorporated, Appellee
No. 19-40906
Filed July 7, 2021

Opinion
[*259]

The appellants Health Choice Alliance and Health Choice Group brought *qui tam* actions under the False Claims Act on behalf of the United States alleging violations of the Anti-Kickback Statute by pharmaceutical companies. The United States moved to dismiss the actions, [**4] and the district court granted the motion. Because the actions were properly dismissed, we AFFIRM.

I.

Health Choice Alliance and Health Choice Group (collectively Health Choice) are both entities created by the National Health Care Analysis Group for the purpose of filing *qui tam* actions alleging instances of fraud in medicine and pharmaceuticals. Health Choice and affiliated entities brought eleven *qui tam* actions under the False Claims Act against a total of thirty-eight defendants alleging similar violations of the Anti-Kickback Statute. 31 U.S.C. § 3730(b); 42 U.S.C. § 1320a-7b(b). This appeal concerns two of those *qui tam* cases, against Eli Lilly and Company and Bayer Corporation. The complaints in both the Eli Lilly and Bayer cases allege that the defendants illegally provided patient-education services to providers before a prescription had been written in violation of the Anti-Kickback Statute and certain state laws.

Health Choice filed two similar complaints against Eli Lilly and (initially) four other defendants and against Bayer and four other defendants in the United States District Court for the Eastern District of Texas. Prior [**5] to filing these complaints, Health Choice submitted pre-filing notices to and met with attorneys from the United States Attorney's Office for the Eastern **[*260]** District of Texas. After filing the complaints, Health Choice met with officials at the Department of Justice Civil Division in Washington, D.C. The United States declined to intervene in either case.

Health Choice then amended each of its complaints. Shortly thereafter, Eli Lilly, Bayer, and the other defendants filed motions to dismiss for failure to state a claim. See Fed. R. Civ. P. 9(b), 12(b)(6). The magistrate judge held a consolidated hearing on the motions to dismiss in both cases. The magistrate judge recommended the motions be denied in part and granted in part, and the district court adopted these recommendations. Health Choice amended its complaints once more to address the pleading deficiencies identified by the district court.

In October of 2018, approximately a year after declining to intervene in the Eli Lilly and Bayer cases, the government sent notice to Health Choice that it intended to move to dismiss the complaints. See 31 U.S.C. § 3730(c)(2)(A). Over the next two-and-a-half months, Health Choice and the government conferred by meeting, letter, and teleconference [**6] to discuss the government's stated concerns about the case. During a teleconference with Health Choice, the government identified four specific concerns about the Eli Lilly and Bayer cases: "(1) whether there [was] sufficient factual and legal support to prove violations of the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b) (AKS); (2) the substantial costs and burdens for the United States if the *qui tam* actions were to continue; (3) certain policy interests of Medicare and other federal healthcare programs; and (4) the investigative methods employed by 'National Healthcare Analysis Group,'" Health Choice's parent organization.

On December 17, 2018, the government notified Health Choice that it intended to proceed with its motions to dismiss, and it filed those motions the same day. In its notice to Health Choice, the government cited to its own two-year investigation and the supplemental information provided by Health Choice—including documents purportedly supporting Health Choice's theory of the cases and letters from Health Choice concerning the merits and costs and benefits of the cases—as the basis of its decision to seek dismissal.

In response to the government's motions to dismiss, Health Choice first asserted [**7] that the government supported its motions primarily with "ad hominem attacks" against Health Choice. Health choice then argued that the district court should not afford the government unfettered discretion to dismiss and instead should hold that the government has not made the "proper showing" to warrant dismissal.

In reply, the government said it had "concluded that, not only do the allegations lack factual and legal support, but further litigation will impose burdens and costs on the government that are not justified and will undermine practices that benefit federal healthcare programs by providing patients with greater access to product education and support."

On May 14, 2018, the magistrate judge held a consolidated hearing on the government's motions to dismiss both cases. The magistrate judge recommended that the district court grant both motions. The district court adopted the recommendations and granted the government's motions to dismiss. Health Choice timely appealed.

. . . [*262]

Satisfied that we have appellate jurisdiction, we now turn to the merits of Health Choice's appeal.

Health Choice brought its Anti-Kickback claims against Eli Lilly and Bayer on behalf of the government under the False Claims Act. 31 U.S.C. § 3730(b); 42 U.S.C. § 1320a-7b(b). The False Claims Act states that "[a] person may bring a civil action for a violation of [31 U.S.C. §] 3729 for the person and for the United States Government. The action shall be brought in the name of the Government." 31 U.S.C. § 3730(b). This provision authorizes individuals—relators—to bring *qui tam* lawsuits alleging a "false or fraudulent claim" for payment from the United States. *Id.* §§ 3729(a), 3730(b); *United States ex rel. Spicer v. Westbrook*, 751 F.3d 354, 364 (5th Cir. 2014).

Relators are entitled to a [**11] portion of the proceeds from a successful *qui tam* lawsuit. 31 U.S.C. § 3730(d).

The Anti-Kickback Statute proscribes "offer[ing] or pay[ing] any remuneration (including any kickback, bribe, or rebate) . . . to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program." 42 U.S.C. § 1320a-7b(b)(2)(A). Health Choice alleges that Eli Lilly and Bayer illegally provided free product-education services from nurses in order to induce health care providers to prescribe Eli Lilly and Bayer products. The Anti-Kickback Statute makes such an allegation actionable by a *qui tam* relator by defining a violation of § 1320a-7b as a "false or fraudulent claim for purposes of" the False Claims Act. Id. § 1320a-7b(g). Thus, Health Choice's Anti-Kickback Statute claims are properly brought on behalf of the United States under the False Claims Act.

In this case, as with every False Claims Act *qui tam* lawsuit, the "real party in interest" is the United States. 31 U.S.C. § 3730(c)(2)(A); *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 930, 129 S. Ct. 2230, 173 L. Ed. 2d 1255 (2009) (describing the United States as the "real party in interest" in any False Claims Act lawsuit). The claims here ultimately belong to the United States, not Health Choice. See [**12] *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000) (regarding the False Claims Act as "effecting a partial assignment of the Government's damages claim"). The False Claims Act allows the government to assert control over *qui tam* litigation through a number of procedural mechanisms, such as intervention, settlement, and "[t]he power to veto voluntary settlements." *Searcy v. Philips Elecs. N. Am. Corp.*, 117 F.3d 154, 160 (5th Cir. 1997); accord 31 U.S.C. § 3730(c).

The government moved to dismiss Health Choice's claims in the Eli Lilly and Bayer cases, and the district court granted both motions. Health Choice challenges the dismissals on appeal. To address Health Choice's arguments, first, we lay out the tests other circuits have adopted to assess a motion by the government to dismiss a *qui tam* action. Second, we construe the term "hearing" in 31 U.S.C. § 3730(c)(2)(A) to require something more **[*263]** than a forum for a relator to convince the government not to dismiss. Third, we determine that Health Choice got a hearing as required by § 3730(c)(2)(A). And fourth, we conclude that dismissal of the Eli Lilly and Bayer cases was proper even under the test most favorable to Health Choice.

A.

At oral argument, Health Choice focused mainly on the hearing requirement attendant to the government's right to "dismiss the action notwithstanding the objections of the person initiating [**13] the action." 31 U.S.C. § 3730(c)(2)(A). The government may move to dismiss once two conditions have been met. *Id.* First, the government must give notice to the *qui tam* relator of the government's motion to dismiss; second, the court must provide the relator with "an opportunity for a hearing on the motion." *Id.*

Health Choice argues that the district court erred by not affording it an evidentiary hearing before dismissing both cases. Health Choice further contends that a hearing necessarily entails the

exercise of judicial power, and so the district court must engage is some meaningful review of the government's decision to dismiss.

We have not yet had an opportunity to determine what is required for the government to dismiss a case under § 3730. Four other circuits, however, have done so, and there is a deeply entrenched circuit split.

. . . [*264]

Health Choice urges us to adopt the rational-relation test from *Sequoia Orange* and argues that the district court erred in dismissing the *Eli Lilly* and *Bayer* cases. In doing so, however, it focuses on the relator's burden and insists that the *Sequoia Orange* test "marches under the banner of arbitrary and capricious review, a foundational limitation on government action." The government, conversely, urges us to adopt the unfettered discretion standard from *Swift* and argues that both the *Eli Lilly* and *Bayer* cases were properly dismissed. Alternatively, the government contends that the district court was correct in concluding that the government satisfied both the unfettered-discretion standard from *Swift* and the more burdensome *Sequoia Orange* standard.

B.

The meaning of the term "hearing" holds the key to the question of the court's role in assessing the government's decision to dismiss under § 3730(c)(2)(A). Because this is a question of statutory interpretation, our review is de novo. *See Dresser v. Meba Medical & Benefits Plan*, 628 F.3d 705, 708 (5th Cir. 2010). We are persuaded by Health [**17] Choice's argument that the term "hearing" means what is says. It includes judicial involvement and action.

Congress introduced the hearing requirement in § 3730(c)(2)(A) in 1986. False Claims Amendments Act of 1986, P.L. 99-562, 100 Stat. 3153. The fifth edition of Black's Law Dictionary gives the primary definition of "hearing" as a "[p]roceeding of relative formality . . . , generally public, with definite issues of fact or law to be tried, in which witnesses are heard and parties proceeded against have right to be heard, . . . and may terminate in final order.:" Hearing, Black's Law Dictionary (5th ed. 1979) (emphasis added). Similarly, the tenth edition of Merriam-Webster's **[*265]** Collegiate Dictionary defines "hearing" in the relevant legal sense as "a listening to arguments." Hearing, Merriam-Webster's Collegiate Dictionary (10th ed. 1993); *see also* Hearing Webster's Second International Dictionary (1934) ("A listening to arguments or proofs and arguments in interlocutory proceeding.").

The Black's definition hinges on the issues tried at the hearing, and the Webster's definition hinges on the argument or proofs presented at the hearing. Both definitions, then, necessarily involve something to [**18] be decided. These definitions cast doubt on the government's notion of a § 3730(c)(2)(A) hearing as merely an opportunity for the government to publicly broadcast its reasons for dismissal and for the relator to convince the government to change its mind. Such a limited notion of a hearing that leaves nothing for the court to decide or do is inconsistent with the notion that the function of federal courts is to decide actual cases and controversies. *Cf.* U.S. Const. art. III § 2; *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340-41, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006). Simply put, courts do not exist to provide a forum for press announcements.

While some type of actual hearing is required, we need not decide the precise bounds of the government's discretion to dismiss *qui tam* lawsuits. *Cf. United States v. Gonzales*, 520 U.S. 1, 11, 117 S. Ct. 1032, 137 L. Ed. 2d 132 (1997) ("We are hesitant to reach beyond the facts of this case to decide a question that is not squarely presented for our review."). For the reasons explained below, it is clear that Health Choice had a hearing and that dismissal was, in the very least, not arbitrary and capricious.

C.

At oral argument, counsel for Health Choice repeatedly stressed that there had been an absence of "an evidentiary hearing, as required by procedural due process" and § 3730(c)(2)(A). *See, e.g.*, Oral Argument at 1:45, 2:50. Health Choice thus states both statutory [**19] and constitutional bases for affording it an evidentiary hearing.

Health Choice's statutory argument fails because a review of the record demonstrates that Health Choice did get a hearing, and the magistrate judge did not prevent Health Choice from presenting evidence at that hearing.

. . . [*266]

Waiver is not at issue in this case. Rather, the oral argument aptly demonstrates why there was no error here. Health Choice had a hearing before the magistrate judge. It had a witness available to testify at that hearing, and the witness was not prohibited from testifying. Health Choice declined to call the witness to testify and the magistrate judge did not prevent Health Choice from presenting the witness. Health Choice's statements at oral argument suggest that it consciously and strategically chose not to offer evidence because it believed it had already won the motion. Oral Argument at 8:15-30. Even assuming that § 3730(c)(2)(A) requires the hearing to be an evidentiary hearing, there was no error because Health [**21] Choice declined to offer evidence at the hearing. *See Chang v. Child.'s Advoc. Ctr. of Del. Weih Steve Chang*, 938 F.3d 384, 387 (3d Cir. 2019) ("An 'opportunity for a hearing,' however, requires that relators avail themselves of the 'opportunity.'").

Health Choice's constitutional argument also fails. Health Choice argues that procedural due process entitled it to an evidentiary hearing, citing to *Hamdi v. Rumsfeld*, *Goldberg v. Kelly*, and *Thibodeaux v. Bordelon* for support. Oral Argument at 6:10; 56:04; 542 U.S. 507, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004); 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970); 740 F.2d 329 (5th Cir. 1984). In Health Choice's view—and in its own words—"a *qui tam* relator surely should enjoy the modicum of protections asserted by a welfare benefits recipient." *Cf. Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970). Health Choice quotes Vermont Agency of Natural Resources for the proposition that "the [Anti-Kickback Statute] gives the relator himself an interest in the lawsuit, and not merely the right to retain a fee out **[*267]** of the recovery." 529 U.S. at 772. Thus, on Health Choice's reasoning, the relator has a property interest in the lawsuit that is protected by procedural due process.

Even assuming that procedural due process requires an evidentiary hearing when the government seeks to terminate a *qui tam* lawsuit brought under the False Claims Act, Health Choice's procedural-due-process argument fails for the same reason that the statutory [**22] argument failed. Health Choice had a hearing. Health Choice brought a witness, John Mininno, to that hearing. Health Choice simply chose not to call the witness or offer any other evidence. To emphasize this point, it is worth repeating Health Choice's counsel's statement at oral argument: "[W]e felt, honestly . . . that there was no need for an evidentiary hearing because the government's affidavits and declarations had been thoroughly rebutted. But now that we are where we are we would like an evidentiary hearing." Oral Argument at 7:55-8:15. Assuming arguendo that Health Choice had a property interest in the Eli Lilly and Bayer *qui tam* lawsuits, its property interests were adequately protected by the procedures in the district court. There was no procedural-due-process error in this case.

D.

Finally, we consider Health Choice's argument that the government failed to satisfy its burden to dismiss under § 3730(c)(2)(A). Assuming, without deciding, that *Sequoia Orange's* more burdensome test applies, we hold that dismissal was proper.

. . .

1.

The government made its required showing.

The government offered two valid purposes to justify dismissal. First, "the allegations . . . lack sufficient merit to justify the cost of investigation and prosecution." Second, "further litigation . . . will undermine practices that benefit federal healthcare programs by providing patients with greater access to product education and support."

Health Choice alleged violations spanning a six-year period involving Medicare, Medicaid, and TRICARE. For Medicare Part D alone, the Eli Lilly allegations involve more than 32,000,000 prescriptions, from more than 400,000 physicians, for more than 1,000,000 Medicare beneficiaries. Similarly, the Bayer allegations involve **[*268]** nearly 500,000 prescriptions, from [**24] more than 10,000 physicians, for "tens of thousands" of Medicare beneficiaries. According to the government, the scope of these allegations would impose "substantial litigation burdens" on the United States as it monitors the cases, responds to discovery requests, prepares agency employees for depositions, et cetera. The government has stated a legitimate government purpose in considering litigation costs. *See Sequoia Orange*, 151 F.3d at 1146.

The government has shown a rational relation between dismissal and its cost-saving purpose. The government concluded that the litigation costs were not justified by the expected value of recovery against Eli Lilly and Bayer, particularly given the government's concerns about the merit of the underlying allegations. It reasoned that its litigation expenses would not be recouped by pursuing the case further. In that sense, dismissal is rationally related to the purpose of avoiding litigation costs.

The government also asserted in the district court that the product education services provided by Eli Lilly and Bayer "benefit[ed] federal healthcare programs" and were lawful. According to the government, federal healthcare programs have a strong interest in ensuring that benefits [**25] recipients have access to education about their prescriptions. Further, the government had previously concluded in a different context that patient-education services alone do not constitute illegal remuneration. Thus, the government concluded that the services provided by Eli Lilly and Bayer are not only beneficial but also lawful. Promoting beneficial and lawful programs is plainly a legitimate government interest. Dismissal is rationally related to that interest because it removes an impediment to providing those services. In short, the government has satisfied its burden of showing a rational relation between dismissal and legitimate government interests.

2.

Because the government made its required showing, the burden shifts to Health Choice to show that the government's motion to dismiss is "fraudulent, arbitrary and capricious, or illegal." *Sequoia Orange*, 151 F.3d at 1145 (quoting *Sequoia Orange Co.*, 912 F.Supp. at 1347 (E.D. Cal. 1995)). Health Choice does not meet this burden. Health Choice offers little more than unsupported allegations of animus against John Mininno and the National Health Care Analysis Group, Health Choice's parent organization, to support its assertion that dismissal is arbitrary and capricious. *See* Oral Argument at 9:30.

Health Choice devotes [**26] much of its opening brief to the government's interest in the National Health Care Analysis Group's corporate structure and its apparent misunderstanding of Health Choice's claims. The government's letter to Health Choice, its motion to dismiss, and its arguments before the magistrate judge, however, show that National Health Care Analysis Group's corporate structure played no part in the government's rationale for dismissal. Moreover, to support its claim of the government's apparent misunderstanding of its claims, Health Choice offers little more than a single question asked by a government attorney.

Health Choice further offers the conclusory assertion that the one-year time period between the government's declination notice and its notice of intent to dismiss amounted to arbitrary and capricious conduct. Health Choice cites to a Department of Justice document, referred to as the "Granston Memo," to bolster this point. The memo states that "if one waits until the close of discovery or trial [to move to **[*269]** dismiss a *qui tam* lawsuit], there is a risk that the court may be less receptive to the request given the expenditure of resources by the court and parties." This guidance speaks to [**27] the risk that the court will deny the government's motion to dismiss. We cannot say that the government did not follow its own guidance when it decided to take a risk contemplated by that guidance.

Finally, Health Choice insists that dismissal was arbitrary and capricious because the government failed to conduct a cost—benefit analysis. This argument, however, fails to acknowledge the government's position that Health Choice's allegations "lack sufficient merit to justify the cost of investigation and prosecution." This is a cost—benefit analysis of sorts. As explained above, the government considered the expected benefit of Health Choice's lawsuit given the government's assessment of the merits of the case.

Considering Health Choice's arguments and the record as a whole, we hold that Health Choice did not show that dismissal was "fraudulent, arbitrary and capricious, or illegal" under the strict *Sequoia Orange* standard. *Cf. Chang*, 938 F.3d at 387 (determining that relator failed to establish fraud, arbitrariness and caprice, or illegality); *Ridenour*, 397 F.3d at 937-38 ("The district court correctly concluded the Relators failed to meet their burden to show the Government's motion to dismiss was fraudulent, arbitrary and capricious, [**28] or illegal.").

* * *

For the reasons set forth above, the judgement of the district court is AFFIRMED.

SOURCE 6: DC CIRCUIT DECISION

318 F.3d 250
United States Court of Appeals,
District of Columbia Circuit
Swift, Appellant
v.
United States, Appellee
No. 01-5312
Argued December 5, 2002
Decided February 11, 2003

Opinion
[*250] On January 19, 1999, Susan Swift, a former Department of Justice attorney employee, brought a *qui tam* action against one employee and two former employees of the Justice Department's Office of Legal Counsel, claiming that in 1992 and thereafter they had conspired to defraud the government, in violation of the False Claims Act, 31 U.S.C. § 3729(a)(3). For reasons unnecessary to recount, one of the defendants was dropped from the case. Swift alleged that the remaining two defendants had also violated 31 U.S.C. § 3729(a)(1) and (2) by presenting a false claim to the government. The alleged fraud, which dealt with time sheets and leave slips, amounted to $6,169.20.

[*251] On April 2, 1999, without purporting to intervene, the government moved to dismiss the complaint, arguing that the amount of money involved did not justify the expense of litigation even if the allegations could be proven. Swift opposed dismissal and requested a hearing. She also sought leave to engage in discovery in order to learn the Justice Department's policy about dismissal of *qui tam* actions, and she moved to unseal the record, arguing that this would facilitate her efforts to gather information about the policy. The district court ordered a hearing, but denied Swift's motions for discovery and unsealing. After several delays and the hearing, the court dismissed the complaint, holding that the government had demonstrated that dismissal was rationally related to a valid governmental purpose. As a result, the complaint was never served on the defendants.

Swift's appeal is on the grounds that the government cannot move to dismiss without first intervening, that the government did not justify its decision to dismiss, that dismissal was improper since the government did not investigate her claims, and that the district court erred in denying her discovery and in refusing to unseal the record.

The section of the False Claims Act dealing with the government's dismissal of *qui tam* actions provides: "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 is evident from the quotation, the provision does not say that the government must intervene in order to seek dismissal. Swift concedes as much, but maintains that intervention is required in light of § 3730(b) and § 3730(c)(1).

Section 3730(b)(2) gives the government sixty days, plus any court-ordered extensions, "to elect to intervene and proceed with the action" after receiving the complaint and being informed of the material evidence. At the end of the sixty-day period (unless extended), the government "shall proceed with the action … or notify the court that it declines to take over the action." 31 U.S.C. § 3730(b)(4). Swift views § 3730(b)(4) as giving the government but two options: intervene or do not intervene. This is correct, but she misses the point that § 3730(b)(2) makes intervention necessary only if the government wishes to "proceed with the action." Ending the case by dismissing it is not proceeding with the action; to "proceed with the action" means, in the False Claims Act, that the case will go forward with the government running the litigation. *Cf. Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118, 19 L. Ed. 2d 936, 88 S. Ct. 733 (1968).

The other provision Swift cites, § 3730(c)(1), reads: "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 [relator]. [The relator] shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2)." Swift's position is that the phrase "subject to the limitations set forth in paragraph (2)" means that the government's dismissal power under § 3730(c)(2) exists only within the context of § 3730(c)(1). So viewed, the government could not move to dismiss unless it had complied with § 3730(c)(1) by intervening and proceeding with the action.

Her interpretation is unwarranted. The phrase "subject to the limitations set forth in paragraph (2)" can signify only that the **[*252]** relator's right to remain a party after the government has intervened is constrained by the government's right to dismiss the action pursuant to § 3730(c)(2). Swift's interpretation requires one to read "subject to" as also having the converse meaning--that § 3730(c)(1) acts as a limit on the operation of § 3730(c)(2). Nothing in § 3730(c)(1) justifies that reading. To support Swift's interpretation, either § 3730(c)(2) would have to be a subsection of § 3730(c)(1)--which it is not--or § 3730(c)(2) would have to contain language stating that it is applicable only in the context of § 3730(c)(1)--which it does not (as highlighted by the fact that § 3730(c)(2) contains two express constraints on the government's ability to dismiss, neither of which is related to § 3730(c)(1)). In other words, the second sentence of § 3730(c)(1) is limited by § 3730(c)(2), but § 3730(c)(2) is independent of § 3730(c)(1).

In any event, the question whether the False Claims Act requires the government to intervene before dismissing an action is largely academic. As Swift conceded at oral argument, if there were such a requirement, we could construe the government's motion to dismiss as including a motion to intervene, a motion the district court granted by ordering dismissal. *See United States ex rel. Neher v. NEC Corp.*, 53 F.3d 1284, slip op. at 30 (11th Cir. 1995).

Swift has a separate reason why the district court improperly dismissed the case. The district court applied the standard stated in United States ex rel. *Sequoia Orange Co. v. Sunland Packing House Co.*, 912 F. Supp. 1325, 1339 (E.D. Cal. 1995), aff'd sub nom. *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.,* 151 F.3d 1139 (9th Cir. 1998).

. . .

We hesitate to adopt the *Sequoia* test. It may be that despite separation of powers, there could be judicial review of the government's decision that an action brought in its name should be dismissed. *Cf. United States v. Cowan*, 524 F.2d 504, 513 (5th Cir. 1975). But we cannot see how § 3730(c)(2)(A) gives the judiciary general oversight of the Executive's judgment in this regard. The section states that "The Government" --meaning the Executive Branch, not the Judicial— "may dismiss the action," which at least suggests the absence of judicial constraint. To this must be added the presumption that decisions not to prosecute, which is what the government's judgment in this case amounts to, are unreviewable. *Cf. Heckler v. Chaney*, 470 U.S. 821, 831-33, 84 L. Ed. 2d 714, 105 S. Ct. 1649 (1985); *Newman v. United States*, 127 U.S. App. D.C. 263, 382 F.2d 479, 480 (D.C. Cir. 1967). Reading § 3730(c)(2)(A) to give the government an unfettered right to dismiss an action is also consistent with the Federal Rules of Civil Procedure. Rule 41(a)(1)(i) permits a plaintiff to dismiss a civil action "without order of the court" if the adverse party has not yet filed an answer or a motion for summary judgment. A dismissal pursuant to Rule 41(a)(1)(i) is not subject to judicial review. *See Randall v. Merrill Lynch*, 261 U.S. App. D.C. 138, 820 F.2d 1317, 1320 (D.C. Cir. 1987). In *qui tam* actions, the complaint remains under seal for "at least" sixty days; government dismissal within that period necessarily occurs before the defendant has answered. (If the government tried to have an action dismissed after the complaint had been **[*253]** served and the defendant answered, it might be subject to Rule 41(a)(2), which requires an order of the court "upon such terms and conditions as the court deems proper.")

The relator's right to a hearing, as set forth in § 3730(c)(2)(A), is all that points to a role for the courts in deciding whether the case must go forward despite the government's decision to end it. The *Sequoia* court viewed this provision as authorizing judicial review of the government's reasons for dismissal, 912 F. Supp. at 1338, explaining that this would not "place an additional burden on the executive's exercise of prosecutorial discretion, because the constitution itself prohibits arbitrary or irrational prosecutorial decisions." *Id.* at 1340. This is not an accurate statement of constitutional law with respect to the government's judgment not to prosecute. The Constitution entrusts the Executive with duty to "take Care that the Laws be faithfully executed." U.S. CONST., art. II, § 3. The decision whether to bring an action on behalf of the United States is therefore "a decision generally committed to [the government's] absolute discretion" for the reasons spelled out in *Heckler v. Chaney*, 470 U.S. at 831. The government's discretion to dismiss an action it has already brought may not be absolute, but even then courts presume the Executive is acting rationally and in good faith. *See, e.g.*, *Rinaldi v. United States*, 434 U.S. 22, 30, 54 L. Ed. 2d 207, 98 S. Ct. 81 (1977); *see also United States v. Armstrong*, 517 U.S. 456, 464-65, 134 L. Ed. 2d 687, 116 S. Ct. 1480 (1996). Nothing 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. The provision neither sets "substantive priorities" nor circumscribes the government's "power to discriminate among issues or cases it will pursue." *Heckler v. Chaney*, 470 U.S. at 833. 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. While the government conceded at oral argument that there may be an exception for "fraud on the court," no evidence of that sort was presented, and we therefore do not pass on whether this type of exception, or any other, might be consistent with our reading of § 3730(c)(2)(A).

The *Sequoia* court also justified its test on the basis of legislative history of the 1986 amendment to the False Claims Act. The Ninth Circuit quoted statements from a Senate committee report that

a relator may object to a government motion to dismiss in order to prevent the government from "dropping … false claims cases without legitimate reasons" and may petition for an evidentiary hearing, which the court should grant "if the relator presents a colorable claim that the … 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." S. REP. NO. 99-345, at 26 (1986). But this portion of the Senate report relates to an unenacted Senate version of the 1986 amendment. That version read: "If the Government proceeds with the 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." *Id.* at 42. The whole point here is that the government has not elected to proceed; it has elected to dismiss the case. Had the Senate version been enacted, the Senate report still would not support the Ninth Circuit's judgment.

[*254] Even if *Sequoia* set the proper standard, the government easily satisfied it. The asserted governmental interests were that the dollar recovery was not large enough to warrant expending resources monitoring the case, complying with discovery requests, and so forth, and that spending time and effort on this case would divert scarce resources from more significant cases. Although Swift believes that the costs would be relatively small, the government's goal of minimizing its expenses is still a legitimate objective, and dismissal of the suit furthered that objective. *See Heckler v. Chaney*, 470 U.S. at 831; *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 859 n.17, 82 L. Ed. 2d 632, 104 S. Ct. 3348 (1984). In addition, Swift failed to establish that the government's prosecutorial judgment was arbitrary and capricious, illegal, or fraudulent. While she asserted that the government's reasons for dismissal were pretextual, she offered nothing to support the charge.

Few words are needed to dispose of Swift's remaining arguments. Since the government conceded the truth of Swift's allegations when it sought to dismiss, the fact that the government did not investigate the validity of her charges is of no consequence. As to her claim that she was entitled to discovery, the Supreme Court has stated that a party is not entitled to discovery of information relating to prosecutorial decisions absent a substantial threshold showing. *See Armstrong*, 517 U.S. at 463. As we have said, Swift offered no evidence to support her allegations that the government acted improperly. Nor did the district court abuse its discretion in denying Swift's motion to unseal the case. Swift did not oppose the government's motion to keep the case sealed during the proceedings on dismissal, and although she had many months to file a motion to unseal, her motion came at the eleventh-hour; granting it would have delayed the hearing, which had already been postponed twice at Swift's request. *Cf. Ned Chartering & Trading, Inc. v. Republic of Pakistan*, 294 F.3d 148, 151 (D.C. Cir. 2002).

Affirmed.

SOURCE 7: SEVENTH CIRCUIT DECISION

970 F.3d 835
United States Court of Appeals,
Seventh Circuit
United States ex rel. CIMZNHCA, LLC
v.
UCB, Incorporated
No. 19-2273
Argued January 23, 2020
Decided August 17, 2020

[*838] The False Claims Act allows the United States government to dismiss a relator's *qui tam* suit over the relator's objection with notice and opportunity for a hearing. 31 U.S.C. § 3730(c)(2)(A). The Act does not indicate how, if at all, the district court is to review the government's decision to dismiss. The D.C. Circuit has said not at all; the Ninth Circuit has said for a rational basis. Compare *Swift v. United States*, 318 F.3d 250, 355 U.S. App. D.C. 59 (D.C. Cir. 2003), with *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998). In this case, the district court said it agreed with the Ninth Circuit but applied something closer to administrative law's "arbitrary and capricious" **[*839]** standard and denied dismissal. The government has appealed. The relator contends we should either dismiss for want of appellate jurisdiction or affirm.

We find that we have jurisdiction and reverse. First, we interpret the Act to require the government to intervene as a party before exercising its right to dismiss under § 3730(c)(2)(A). We think it best, however, to construe the government motion here as a motion to both intervene and dismiss. This solves the jurisdictional problem without needing to create a new category of collateral-order appeals. On the merits, we view the choice between the competing standards as a false [**3] one, based on a misunderstanding of the government's rights and obligations under the False Claims Act. And by treating the government as seeking to intervene, which it should have been allowed to do, we can apply a standard for dismissal informed by Federal Rule of Civil Procedure 41.

I. *Factual and Procedural Background*

In 1863, "a series of sensational congressional investigations" revealed that war-profiteering military contractors had billed the federal government for "nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed" the government's procurement efforts. *United States v. McNinch*, 356 U.S. 595, 599, 78 S. Ct. 950, 2 L. Ed. 2d 1001 (1958). In response, Congress passed the False Claims Act, now codified at 31 U.S.C. §§ 3729-3733. The Act authorizes a private person, called a relator, to enforce its terms by filing suit "for the person and for the United States Government." § 3730(b)(1). Suits of this type were once so common that "[a]lmost every" penal statute could be enforced by them. *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 341, 2 L. Ed. 297 (1805). Such suits are called "*qui tam*" suits, from a Latin tag meaning, "who as well for the lord king as for himself sues in this matter." If the relator's *qui tam* action is successful, she receives a portion of the recovery as a bounty; the lion's share goes to the government. § 3730(d).

The False Claims Act [**4] prohibits, among other acts, presenting to the government "a false or fraudulent claim for payment or approval." § 3729(a)(1)(A). One way to present a false claim is to present to a federal healthcare program a claim for payment that violates the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b), which prohibits giving or receiving "remuneration" in return for such programs' business. See 42 U.S.C. § 1320a-7b(g) (violations of the Anti-Kickback Statute also violate the False Claims Act). For a limited liability company called Venari Partners, doing business as the "National Health Care Analysis Group," this law presented a business opportunity. Venari Partners has four members (Sweetbriar Capital, LLC; 101 Partners, LLC; Min-Fam-Holding, LLC; and Uptown Investors, LP), themselves composed of one or two individual investors, six in total. Venari Partners formed eleven daughter companies, each for the single purpose of prosecuting a separate *qui tam* action. All eleven actions allege essentially identical violations of the False Claims Act via the Anti-Kickback Statute by dozens of defendants in the pharmaceutical and related industries across the country.

The relator in this case is CIMZNHCA, LLC, one of those Venari companies. Its complaint, filed [**5] in 2017 in the Southern District of Illinois, alleges that defendants illegally paid physicians for prescribing or recommending Cimzia, a drug manufactured by defendant UCB, Inc. to treat Crohn's disease, to patients who received benefits under federal healthcare programs. **[*840]** The relator alleges that the illegal kickbacks took the form of free education services provided by nurses to physicians and their patients and free reimbursement support services, that is, assistance with insurance paperwork.

Once the relator filed this action, the government had the right "to intervene and proceed" as the plaintiff with the "primary responsibility" for prosecuting it. 31 U.S.C. §§ 3730(b)(2), 3730(c)(1). The government chose not to exercise that right. The False Claims Act also gives the government the right to dismiss the action over the relator's objection if the relator is provided notice and an opportunity for a hearing. § 3730(c)(2)(A). This right the government has sought to exercise. On December 17, 2018, the government filed a motion to dismiss, representing that it had investigated the Venari companies' claims, including CIMZNHCA's, and found them "to lack sufficient merit to justify the cost of investigation and prosecution and otherwise [**6] to be contrary to the public interest." The district court held a hearing on the government's motion and issued an opinion denying it.

The court considered first what standard of review applied to the government's motion under § 3730(c)(2)(A), which itself supplies none. The government urged adoption of the standard announced in *Swift v. United States*, 318 F.3d 250, 253, 355 U.S. App. D.C. 59 (D.C. Cir. 2003), which gives the government "unfettered" discretion to dismiss. Relator argued for the more demanding burden-shifting test announced in *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998). Under that test, the government must first identify a "valid government purpose" and then show "a rational relation between dismissal and accomplishment of the purpose." *Id.* at 1145. If the government does so, the burden shifts to the relator to show that "dismissal is fraudulent, arbitrary and capricious, or illegal." *Id.*

Reasoning that Congress would not command the hollow ritual of convening a hearing on a preordained outcome (no one deliberates about the fall of Troy, as Aristotle said), the district court

concluded that *Sequoia Orange* supplied the proper standard. Deeming the government's general evaluation of the Venari companies' claims to be insufficient as to CIMZNHCA in particular, and hearing notes of mere "animus towards the relator" in [**7] the government's arguments, the court concluded further that the government's decision to dismiss was "arbitrary and capricious" and "not rationally related to a valid governmental purpose."

After the district court denied its motion to reconsider, the government took this appeal, pending which the district court proceedings have been stayed. Our jurisdiction is contested. On the merits, the government argues that *Swift*, not *Sequoia Orange*, supplies the proper standard and that it satisfied the Ninth Circuit's test in any event. Relator argues that *Swift* should be rejected and that the district court correctly applied *Sequoia Orange*. We conclude first that we have jurisdiction and second that the choice presented to us on the merits is a false one, though the correct answer lies much nearer to *Swift* than *Sequoia Orange*. We reverse and remand with instructions to dismiss this action.

II. *Analysis*

A. *The False Claims Act*

We begin with an overview of the False Claims Act's most relevant provisions. A **[*841]** *qui tam* action under the Act is brought "for the person and for the United States Government" and must be filed "in the name of the Government." 31 U.S.C. § 3730(b)(1). The relator may voluntarily dismiss the action [**8] "only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." *Id.*

The relator's complaint must be filed under seal and may not be served on the defendants until the court so orders. § 3730(b)(2). Upon filing, the relator must serve the government with a copy of the complaint and a "written disclosure of substantially all material evidence" in the relator's possession. *Id.* The government then has sixty days, *id.*, extendable for "good cause shown," § 3730(b)(3), to decide whether "to intervene and proceed with the action" while the complaint remains under seal. § 3730(b)(2). At the end of the seal period, "the Government shall (A) proceed with the action, in which case the action shall be conducted by the Government; or (B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action." § 3730(b)(4).

Before 1986, if the government intervened in the action, the relator's participation was at an end. In 1986, however, Congress amended the False Claims Act to allow for the relator's continued participation even after the government intervenes. Allowing two plaintiffs has given rise to a new set of [**9] tensions that the provisions at the heart of this case were designed to manage. *See Sequoia Orange*, 151 F.3d at 1143-44, citing *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 745 (9th Cir. 1993), among others. "If the Government proceeds with the action," it assumes "primary responsibility" for prosecuting it. § 3730(c)(1). The relator retains "the right to continue as a party to the action," but critically for our purposes, that right is "subject to the limitations set forth in paragraph (2)." *Id.*

The most relevant of these limits is the government's right to dismiss the action:

> The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person 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.

§ 3730(c)(2)(A). The other limits are the government's right to settle the action "notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances," § 3730(c)(2)(B); the government's right to seek a court order restraining the relator's abusive litigation conduct, § 3730(c)(2)(C); and the defendant's right to do the same. § 3730(c)(2)(D).

"If the Government elects not to proceed with the action," [**10] the relator "shall have the right to conduct the action." § 3730(c)(3). The relator's sole obligations to the government thereafter are to supply it on request with copies of all pleadings and, at the government's expense, copies of all deposition transcripts. *Id.* The court may "nevertheless permit the Government to intervene at a later date upon a showing of good cause." *Id.* "Whether or not the Government proceeds with the action," the government may seek a stay of discovery if it would interfere with an ongoing investigation into the same facts. § 3730(c)(4). Finally, if the government elects to pursue "any alternate remedy" for the challenged conduct, the relator may not be cut out; she has "the same rights" in the alternate proceeding as in the *qui tam* action. § 3730(c)(5).

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C. Merits: The Government Was Entitled to Dismissal

Treating the government as having sought to intervene solves the jurisdictional problem and offers a standard on the merits of dismissal, in the absence of a specific standard in 31 U.S.C. § 3730(c)(2)(A). The standard is that provided [**29] by the Federal Rules of Civil Procedure, as limited by any more specific provision of the False Claims Act and any applicable background constraints on executive conduct in general. In this case, no such substantive limits apply, so the Rules are the beginning and the end of our analysis.

Federal Rule of Civil Procedure 41(a)(1)(A)(i) provides that "the plaintiff may dismiss an action" by serving a notice of dismissal any time "before the opposing party serves either an answer or a motion for summary judgment." Dismissal is without prejudice unless the notice states otherwise. Fed. R. Civ. P. 41(a)(1)(B). This right is "absolute." *Marques v. Federal Reserve Bank of Chi.*, 286 F.3d 1014, 1017 (7th Cir. 2002). "[O]ne doesn't need a good reason, or even a sane or any reason" to serve notice under the Rule, *id.*, and the notice is self-executing and case-terminating. *Id.* at 1018; *Smith v. Potter*, 513 F.3d 781, 782-83 (7th Cir. 2008). In other words, once a valid Rule 41(a) notice has been served, "the case [is] gone; no action remain[s] for the district judge to take," and her further orders are void. *Smith*, 513 F.3d at 782-83. Here, the government filed its "motion to dismiss" before the defendants had answered or **[*850]** moved for summary judgment, seeking dismissal without prejudice as to it and with prejudice as to the relator. It does not matter

that the paper was labeled a "motion" rather than a "notice." *Id.* at 782. That looks like the end of [**30] the case, on terms of the government's choosing.

Actually, that was almost the end of the case because the provisions of Rule 41(a) are "[s]ubject to ... any applicable federal statute." Fed. R. Civ. P. 41(a)(1)(A). By itself, Rule 41(a) provides that "the plaintiff may dismiss an action," *id.*, which obviously does not authorize an intervenor-plaintiff to effect involuntary dismissal of the original plaintiff's claims. *See Washington Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990). But § 3730(c)(2)(A) provides otherwise. Picking up the language of Rule 41, the statute provides: "The Government may dismiss the action" without the relator's consent if the relator receives notice and opportunity to be heard. § 3730(c)(2)(A). This procedural limit is the only authorized statutory deviation from Rule 41. *Cf.* § 3730(c)(2)(B) (authorizing settlement without relator's consent only "if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances"). Nor, because § 3730(c)(2)(A) twice refers to the government's "motion," should the statute be construed to eliminate the right to dismiss under the first half of Rule 41(a), whose language it mirrors. *See Adams v. Woods*, 6 U.S. (2 Cranch) 336, 337, 341, 2 L. Ed. 297 (1805) (Marshall, C.J.) (where statute of limitations provided that no person shall be "prosecuted, tried or punished ... for any fine or forfeiture ..., unless the indictment [**31] or information" was filed within two years, statute was construed to bar actions of debt *qui tam*: otherwise "a distinct member of the sentence ... would be rendered almost totally useless"). Here, the relator received notice and took its opportunity to be heard. Once these had been accomplished, that should have been the end of the case.

This conclusion may seem counterintuitive. The law does not require the doing of a useless thing. *Mashi v. I.N.S.*, 585 F.2d 1309, 1314 (5th Cir. 1978). What, then, is the purpose of the statute's additional process if the government's litigation right is absolute and there is no substantive standard to apply? Congress sometimes demands that parties to a nascent legal dispute simply "communicate in some way" to attempt to resolve the dispute without court action, and there the judicial role is confined to ensuring that the communication has in fact taken place on the terms specified by statute. *Mach Mining, LLC v. E.E.O.C.*, 575 U.S. 480, 494, 135 S. Ct. 1645, 191 L. Ed. 2d 607 (2015) (Title VII conciliation); *cf.* Fed. R. Civ. P. 26(c)(1) (parties must confer or attempt to confer before seeking court order on discovery dispute); Fed. R. Civ. P. 37(a)(1) (same). In such cases, however, the court is not called upon to serve as a mere convening authority—"and perhaps," as the district judge put it here, "serve you some donuts and coffee"—while [**32] the parties carry on an essentially private conversation in its presence. Like the district court, we find unpersuasive *Swift's* suggestion 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." 318 F.3d at 253.

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[851]

In this light, *Sequoia Orange* may be read to hold no more than that the government's § 3730(c)(2)(A) dismissal may not violate the substantive component of the Due Process Clause. Demanding "no greater justification ... than is mandated by the Constitution itself," *Sequoia*

Orange equated its rational-relation test to the test used to determine "whether executive action violates substantive due process." 151 F.3d at 1145, 1146. *Swift* rejected as contrary to *Heckler* the *Sequoia Orange* point that "arbitrary or irrational" decisions not to prosecute could violate due process, 318 F.3d at 253, but *Heckler* does not warrant such a strong statement. *See Yick Wo*, 118 U.S. at 370 (no room "for the play and action of purely personal and arbitrary power"). In arguing a similar **[*852]** case before the Ninth Circuit, the government suggested that its § 3730(c)(2)(A) dismissal may not violate the Equal Protection Clause. *See Oyler v. Boles*, 368 U.S. 448, 456, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962). Before this court, the government suggested, and even *Swift* entertained the possibility of, review [**35] for fraud on the court. *See* 318 F.3d at 253. We agree in principle with both suggestions, though we hope that these generous limits would be breached rarely if ever. We say only that in exceptional cases they could supply grist for the hearing under § 3730(c)(2)(A).

Not in this case, though. Wherever the limits of the government's power lie, this case is not close to them. At bottom, the district court faulted the government for having failed to make a particularized dollar-figure estimate of the potential costs and benefits of CIMZNHCA's lawsuit, as opposed to the more general review of the Venari companies' activities undertaken and described by the government. No constitutional or statutory directive imposes such a requirement. None is found in the False Claims Act. The government is not required to justify its litigation decisions in this way, as though it had to show "reasoned decision making" as a matter of administrative law, as in, for example, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51-52, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983).

We must disagree with the suggestion that the government's decision here fell short of the bare rationality standard borrowed by *Sequoia Orange* from substantive due process cases. "[T]he Due Process Clause was intended to prevent government officials from abusing their power, or employing [**36] it as an instrument of oppression," and "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) (internal quotation marks and alterations omitted); *see also Yick Wo*, 118 U.S. at 369-70 ("[O]ur institutions of government ... do not mean to leave room for the play and action of purely personal and arbitrary power."). Executive action is not due process of law when it "shocks the conscience;" when it "offend[s] even hardened sensibilities;" or when it is "too close to the rack and the screw to permit of constitutional differentiation." *Rochin v. California*, 342 U.S. 165, 172, 72 S. Ct. 205, 96 L. Ed. 183 (1952).

The government proposed to terminate this suit in part because, across nine cited agency guidances, advisory opinions, and final rulemakings, it has consistently held that the conduct complained of is probably lawful. Not only lawful, but beneficial to patients and the public. As the government argued in the district court, "[t]hese relators"—created as investment vehicles for financial speculators—"should not be permitted to indiscriminately advance claims on behalf of the government against an entire industry that would undermine ... practices the federal government has determined are ... appropriate and beneficial to federal healthcare [**37] programs and their beneficiaries." This is not government irrationality. It oppresses no one and shocks no one's conscience.

[*853] Accordingly, where the government's conduct does not bump up against the Rules, the statute, or the Constitution, the notice and hearing under § 3730(c)(2)(A) serve no great purpose. But that will not be true in every case. Our reading of § 3730(c)(2)(A) does not render its process futile as a general matter. Rather, this particular relator simply had no substantive case to make at the hearing to which the statute entitled it. Whenever a party has the right to invoke the court's aid, it has the obligation to do so with at least a non-frivolous expectation of relief under the governing substantive law. Fed. R. Civ. P. 11(b). That is not always possible, but that does not make the right meaningless.

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SOURCE 8: FIRST CIRCUIT DECISION

24 F.4th 32
United States Court of Appeals,
First Circuit
Borzilleri, Appellee
v.
Bayer Healthcare Pharmaceuticals, Incorporated, Appellant
No. 20-1066
Decided January 21, 2022

Opinion
[*35] In this case of first impression for our circuit, we consider the function of the hearing that is provided by statute when the government moves to dismiss a relator's *qui tam* action brought under the False Claims Act ("FCA") over the relator's objections. *See* 31 U.S.C. § 3730(c)(2)(A). The statute is silent as to the nature of that hearing, the government's burden in seeking dismissal, and the factors the district court should consider in evaluating the motion to dismiss. After considering the FCA as a whole and the various approaches that have been adopted by other circuits, we conclude that (i) although the government does not bear the burden of justifying its motion to the court, the government must provide its reasons for seeking dismissal so that the relator can attempt to convince the government to withdraw its motion at the hearing; and (ii) if the government does not agree to withdraw its motion, the district court should grant it unless the relator can show that, in seeking dismissal, the government is transgressing constitutional limitations or perpetrating a fraud on the court.

Applying these conclusions to the facts of this case, we determine that the district court did not err in dismissing the action and affirm. **[*36]**

I.

A. Legal Background

The FCA imposes civil liability on any person who "knowingly presents," "causes to be presented," or conspires to present "a false or fraudulent claim for payment or approval" to the United States government. 31 U.S.C. § 3729(a)(1)(A), (C). The Act not only authorizes the government to bring a civil action against anyone who violates the statute, *id.* § 3730(a), but also allows a private party -- a "relator" -- to bring what is known as a *qui tam* action "for the person and for the United States [g]overnment . . . in the name of the [g]overnment," *id.* § 3730(b)(1). *See Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 575 U.S. 650, 653, 135 S. Ct. 1970, 191 L. Ed. 2d 899 (2015).

When a relator brings a *qui tam* action, he must serve the government with a copy of the complaint and "written disclosure of substantially all material evidence and information" he possesses. 31 U.S.C. § 3730(b)(2). The complaint is filed under seal for at least sixty days (the government may seek extensions for good cause), and it may not be served on the defendant until the court so orders. *Id.* § 3730(b)(2), (3). Before the complaint is unsealed, the government has two options. It may

"intervene and proceed with the action" itself, in which case it has "the primary responsibility for prosecuting" it, although the relator has "the right to continue as a party to the action"; or the government may notify the court that it declines to "take over the action," in which case the relator "shall have the right to conduct the action." *Id.* § 3730(b)(2), (b)(4), (c)(1).

Even if the government initially declines to intervene, the court "may nevertheless permit the [g]overnment to intervene at a later date upon a showing of good cause." *Id.* § 3730(c)(3). If the government conducts the action, the relator may receive up to twenty-five percent of any proceeds recovered, plus reasonable expenses, attorneys' fees, and costs. *Id.* § 3730(d)(1). If the relator conducts the action, his potential maximum recovery increases to thirty percent. *Id.* § 3730(d)(2).

The *qui tam* provision is "designed to set up incentives to supplement government enforcement" of the FCA. *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649, 304 U.S. App. D.C. 347 (D.C. Cir. 1994). The Supreme Court has explained that the "for the person and for the United States [g]overnment" language in the statute "gives the relator himself an interest in the lawsuit, and not merely the right to retain a fee out of the recovery." *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000). The statute thus "entitles the relator to a hearing before the [g]overnment's voluntary dismissal of the suit" when the relator and the government disagree about whether, or when, to pursue the FCA action. *Id.* (citing 31 U.S.C. § 3730(c)(2)(A)).

Specifically, the FCA states: "The [g]overnment may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the [g]overnment 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). The statute is silent, however, **[*37]** as to the nature of that hearing, the government's burden, and the factors the district court should consider in evaluating the government's motion to dismiss.

Courts have attempted to fill this statutory lacuna, with divergent approaches by the Ninth Circuit and the D.C. Circuit attracting the most discussion.

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B. Facts & Procedural Background

Relator-appellant John R. Borzilleri, a physician and professional healthcare investment fund manager, alleges that several pharmaceutical companies ("Manufacturer Defendants") and Pharmacy Benefit Managers ("PBM Defendants") colluded to defraud Medicare Part D, a federal prescription drug program, in violation of the FCA, the common law, and various state-law analogues to the FCA. In brief, he contends that the Manufacturer Defendants (which set drug prices) and the PBM Defendants (which administer access to **[*38]** the drugs for most Americans) colluded to drive up the price of multiple sclerosis therapeutics through "service fee" contracts.

Borzilleri filed a *qui tam* complaint under seal in the District of Rhode Island in 2014. In 2018, the government declined to intervene (apparently after being granted a number of extensions to make its decision pursuant to 31 U.S.C. § 3730(b)(3)) and the complaint was unsealed. Eventually, the

Manufacturer Defendants and the PBM Defendants moved to dismiss the case. Shortly thereafter, the government moved to dismiss under 31 U.S.C. § 3730(c)(2)(A), stating, inter alia, that (1) "the continued litigation of [Borzilleri's suit] . . . is likely to require substantial expenditure of government resources . . . both to monitor the progress of the [suit] and as a third-party participant in discovery . . . [and] will tax the federal agency component that oversees the Part D program"; (2) the government "has carefully investigated Relator's claims . . . and has concluded that many key aspects of his allegations are not supported"; and (3) Borzilleri's actions, including "allegations that he has used the *qui tam* process to leverage his financial interests through securities trading," have "convince[d] the [g]overnment that he is not an appropriate advocate of the United States' interests in this action."

Borzilleri objected to the dismissal and filed a declaration asserting, inter alia, that the government had failed to investigate key aspects of his allegations. The district court subsequently held a hearing, at which it pressed Borzilleri's counsel to

> come forward with some kind of showing that the government's decision [to dismiss the suit] is fraudulent or arbitrary, capricious or illegal in some fashion. Not just that you disagree with it and not just that you think that Dr. Borzilleri's argument had merit that the government, for whatever reason, failed to see, but you've got to come up with something pretty powerful that shows me that the government is acting in a fraudulent or illegal manner here.

In response, Borzilleri's counsel argued that the government had not performed an adequate investigation of the alleged fraud and had determined that the suit did not allege FCA violations only "because [the government] didn't look in the right place."

In a post-hearing minute order, followed by a written decision, the district court dismissed Borzilleri's FCA claims with prejudice as to Borzilleri and without prejudice as to the government. The district **[*39]** court recognized that the standard for considering a motion to dismiss by the government at a § 3730(c)(2)(A) hearing is a subject of debate among the circuit courts and that the First Circuit had not yet addressed the issue. *See United States ex rel. Borzilleri v. Bayer HealthCare Pharms., Inc.*, C.A. No. 14-031 WES, 2019 U.S. Dist. LEXIS 181418, 2019 WL 5310209, at *1 (D.R.I. Oct. 21, 2019). The court concluded, however, that it did not need to choose from among the different approaches because it determined that dismissal was appropriate even under the "stricter standard" adopted by the Ninth Circuit. 2019 U.S. Dist. LEXIS 181418, [WL] at *2. The court noted that the government had provided a rational reason for dismissal – "the burden this continuing litigation would place on the [g]overnment's resources" and Borzilleri had not shown that dismissal would be "fraudulent, arbitrary and capricious, or illegal." 2019 U.S. Dist. LEXIS 181418, [WL] at *2-3 (internal quotation marks omitted). The court also denied his request for discovery and an evidentiary hearing. Borzilleri timely appealed.

II.

Although Borzilleri contends that the standard articulated by the Ninth Circuit for a court's review of a government motion to dismiss a *qui tam* suit should apply in this case, he also asserts that the district court's decision fails under any of the standards that courts have applied. Given the need

to clarify for the district courts their role when an objecting relator invokes the "opportunity for a hearing" provided by § 3730(c)(2)(A), we address that issue before addressing Borzilleri's specific contentions about the dismissal of his suit.

As noted above, although the FCA mandates a hearing at the behest of an objecting relator before a court may grant a government motion to dismiss a *qui tam* suit, the statute does not specify the nature of the hearing, the government's burden, or the factors a court should consider in evaluating the motion. Nevertheless, we agree with Borzilleri's premise that the statute plainly anticipates the exercise of some form of judicial discretion. Obtaining an impartial adjudicator's decision after parties air their competing views is, after all, the ordinary purpose of a "hearing." *See* Hearing, Black's Law Dictionary (11th ed. 2019) (defining a "hearing" as a "judicial session . . . held for the purpose of deciding issues of fact or of law"). We are confident that Congress would not mandate an opportunity for a hearing so that the court could only "serve . . . donuts and coffee" while the relator and the government debate the merits of dismissal. *CIMZNHCA*, 970 F.3d at 850 (internal quotation marks omitted).

Further, the statute by its terms indicates that the hearing requirement is intended, at least in part, to protect the relator's interests. The provision focuses on the relator, stating that the government may dismiss the action "if the [*qui tam* relator] has been notified by the [g]overnment 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). Hence, we conclude that the statute **[*40]** contemplates a judicial judgment of some kind, providing a level of protection for the relator's interest in the suit. *See Stevens*, 529 U.S. at 772 (stating that the FCA "gives the relator himself an interest in the lawsuit, and not merely the right to retain a fee out of the recovery").

The nature of that judicial judgment is the more difficult question. Because § 3730(c)(2)(A) itself does not provide further guidance, we turn to the surrounding statutory provisions for interpretive assistance. *See City of Providence v. Barr*, 954 F.3d 23, 31 (1st Cir. 2020) ("The context surrounding a statutory provision and the structure of the statutory scheme as a whole often provide useful indicators of congressional intent.").

The FCA provision that immediately follows § 3730(c)(2)(A) -- § 3730(c)(2)(B) -- authorizes the government to settle a *qui tam* action over the objections of the relator so long as the court "determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances." The absence of such detailed language in § 3730(c)(2)(A) strongly suggests that Congress did not intend to condition the granting of the government's motion to dismiss on a judicial determination of fairness or reasonableness. *See State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436, 442, 196 L. Ed. 2d 340 (2016) ("This Court adheres to the general principle that Congress' use of 'explicit language' in one provision 'cautions against inferring' the same limitation in another provision." (quoting *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 384, 133 S. Ct. 1166, 185 L. Ed. 2d 242 (2013))). Indeed, it makes sense that Congress would provide for more stringent review of a settlement than of a motion to dismiss. A dismissal often allows for a new action to be brought later -- if the dismissal is without prejudice -- while a settlement ordinarily bars subsequently filed claims. *See RFF Fam. P'ship, LP v. Ross*, 814 F.3d 520, 532 (1st Cir. 2016). For this reason, then, any standard pursuant to which the district court

performs a searching inquiry into the fairness or reasonableness of the government's motion to dismiss is inapt for § 3730(c)(2)(A).

Nor do we consider the Ninth Circuit's *Sequoia Orange* standard to be appropriate.

. . .

[*41] In puzzling out the meaning of the § 3730(c)(2)(A) hearing requirement, some courts have turned for guidance to Federal Rule of Civil Procedure 41, which generally governs the voluntary dismissal of civil suits. *See CIMZNHCA*, 970 F.3d at 849-50; *Polansky v. Exec. Health Res. Inc.*, 17 F.4th 376, 387-90 (3d Cir. 2021) (adopting the Seventh Circuit's approach). Rule 41(a)(1)(A) provides that, "[s]ubject to . . . any applicable federal statute," a plaintiff may dismiss an action without a court order either where all parties who have appeared have signed a stipulation of dismissal or where the opposing party has not yet filed an answer or a motion for summary judgment. Fed. R. Civ. P. 41(a)(1)(A). Absent a federal law to the contrary, a district court has "no power to condition" a dismissal of this kind. *Universidad Cent. Del Caribe, Inc. v. Liaison Comm. on Med. Educ.*, 760 F.2d 14, 19 (1st Cir. 1985). If there is no stipulation of dismissal and the defendant has already filed a responsive pleading, Rule 41(a)(2) provides that the suit may only be dismissed "by court order, on terms that the court considers proper." *See* Fed. R. Civ. P. 41(a)(2).

. . .

We are unpersuaded by this application of Rule 41 [in the Seventh Circuit] to the unique context of a *qui tam* action. Section 3730(c)(2)(A) on its face creates a specific notice and hearing requirement that operates in addition to the requirements of Rule 41 regardless of whether the defendant has responded to the *qui tam* suit. *See id.* at 850 (discussing § 3730(c)(2)(A) as an "applicable federal statute" that adds a hearing requirement to the Rule 41 framework); *see also* Fed. R. Civ. P. 41 advisory committee's note to 1937 adoption (noting that Rule 41 preserves the FCA's "[p]rovisions regarding dismissal"). Further, the Rule 41 "terms that the court considers proper" standard is inapt in the context of § 3730(c)(2)(A). The overriding concern behind the "proper terms" standard is the potential prejudice to the defendant from a voluntary dismissal by the plaintiff. *See, e.g., Doe v. Urohealth Sys., Inc.*, 216 F.3d 157, 160-61 (1st Cir. 2000). This standard is inapposite to the *qui tam* relator's unique situation as, in effect, an objecting co-plaintiff. *See Sequoia Orange*, 151 F.3d at 1145 (concluding that Rule 41 is inapplicable because it "protects defendants from vexatious plaintiffs" while, in the context of § 3730(c)(2)(A), "the plaintiffs, or relators, seek protection from the dismissal decision of the real party in interest, the government, under a specific statute establishing unique relationships among the parties"). Rule 41 is therefore not an appropriate guide for interpreting the distinct requirements of § 3730(c)(2)(A).

We thus find limited insight into the role of the court at the § 3730(c)(2)(A) hearing **[*42]** -- and the related question of the government's burden -- in either the FCA itself or in the federal rule governing motions for voluntary dismissal. The few clues we have found, however, counsel against the wholesale adoption of the primary approaches used by other courts -- in particular, the Ninth Circuit's burden allocation approach, *see Sequoia Orange*, 151 F.3d at 1145; or the Seventh

and Third Circuits' Rule-41-based approach, *see CIMZNHCA*, 970 F.3d at 849-50; *Polansky*, 17 F.4th at 387-90. Instead, we take a different approach consistent with the statutory language and well-established principles of law.

III.

As we have indicated, we reject placing an initial burden on the government to justify its motion because the statutory language does not support the imposition of such a burden. That said, the government is not obligation-free when it moves to dismiss a *qui tam* suit -- it must provide its reasons for its decision. The need for an explanation is implicit in the statute's requirement that, before dismissal is granted, the relator be given an "opportunity" for a hearing on the motion. *See* 31 U.S.C. § 3730(c)(2)(A). We agree with the D.C. Circuit

. . .

That purpose cannot be achieved if the relator is unaware of the government's reasons for dismissal and, thus, is unable to challenge them. Therefore, we conclude that the government must always provide its reasons for seeking dismissal when it so moves.

The question then becomes, what is the role of the court at a § 3730(c)(2)(A) hearing if the relator fails to convince the government to withdraw its motion? Congress's silence on this issue, and the absence of analogous contexts from which to draw guidance, lead us to conclude that the court's role is to apply commonly recognized principles for assessing government conduct -- the well-established "background constraints on executive action." *CIMZNHCA*, 970 F.3d at 851. That is, the district court at a § 3730(c)(2)(A) hearing should grant the government's motion to dismiss unless the relator, having failed to persuade the government to withdraw its motion, can show that the government's decision to seek dismissal of the *qui tam* action transgresses constitutional limitations or that, in moving to dismiss, the government is perpetrating a fraud on the court.

It is axiomatic that constitutional limitations attend any exercise of executive authority. *See United States v. Armstrong*, 517 U.S. 456, 464, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996). This is the case even for a government decision not to institute an enforcement action -- a decision roughly analogous to the government's decision to dismiss a *qui tam* suit -- where the government is entitled to the greatest discretion. *See Heckler v. Chaney*, 470 U.S. 821, 838, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985) (holding that agency decisions not to institute enforcement proceedings are unreviewable under the APA but reserving the question of the reviewability of a claim that an agency decision not to institute proceedings "violated any constitutional rights"); *see also CIMZNHCA*, 970 F.3d at 851 ("[T]here are always background constraints on executive action, even in the quasi-prosecutorial context of *qui tam* actions and the decisions to dismiss them."). For example, we think it beyond debate that the government could not dismiss a *qui tam* action if its decision to seek dismissal is "based on 'an unjustifiable standard such as race, religion, **[*43]** or other arbitrary classification'" in violation of equal protection principles. *Armstrong*, 517 U.S. at 464 (quoting *Oyler v. Boles*, 368 U.S. 448, 456, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962)).

The limitations on the government's right to dismiss a *qui tam* suit also would include instances in which the dismissal would be "arbitrary in the constitutional sense." *Cnty. of Sacramento v.*

Lewis, 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 129, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992)). Government action is "arbitrary in the constitutional sense" when it "violate[s] a right otherwise protected by the substantive Due Process Clause" and "shock[s] the conscience," *Martínez v. Cui*, 608 F.3d 54, 64 (1st Cir. 2010), or when government officials abuse their power and "employ[] it as an instrument of oppression" to the extent that it "shocks the conscience," *Lewis*, 523 U.S. at 846 (quoting *Collins*, 503 U.S. at 126).

The district court should also deny the government's motion if the relator can show that, in moving to dismiss the *qui tam* action, the government is attempting to perpetrate a fraud on the court. *See CIMZNHCA*, 970 F.3d at 852; *Swift*, 318 F.3d at 253 (entertaining, but not deciding, that possibility). Courts always "possess[] the inherent power to deny the court's processes to one who defiles the judicial system by committing a fraud on the court." *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989). Generally, "fraud on the court" describes a party's "unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense." *Id.* (finding "fraud on the court" where a party knowingly submitted a fabricated document with its pleadings). Simply put, "fraud on the court" is egregious conduct that is more serious than the mere making of "[i]naccurate assertions in lawsuits." *Torres v. Bella Vista Hosp., Inc.*, 914 F.3d 15, 19 (1st Cir. 2019).

Borzilleri points to the FCA provision stating that "[t]he Attorney General diligently shall investigate a violation" of the FCA, 31 U.S.C. § 3730(a), to argue that the district court should assess the government's "diligence" before dismissing a *qui tam* suit. However, using § 3730(a)'s general statutory directive to the government to create a "diligence" standard in § 3730(c)(2)(A) is problematic for several reasons.

First, and most importantly, a "diligence" inquiry is not even hinted at in the text of § 3730(c)(2)(A). Second, a searching "diligence" inquiry would necessarily require the court to review investigatory decisions over which the government ordinarily retains wide discretion. *See Chaney*, 470 U.S. at 831-32. It would be odd to have courts micromanage government investigations when the statute also provides that the government ultimately has discretion whether to pursue any false claims that it identifies through those investigations. *See* 31 U.S.C. § 3730(a) ("If the Attorney General finds that a person has violated or is violating [the FCA], the Attorney General may bring a civil action under this section against the person." (emphasis added)). Indeed, we cannot identify any reported cases -- and Borzilleri has not pointed to any -- in which the "diligent investigation" language has been used as a substantive standard constraining government action. Third, assessing the government's diligence concerning a complex FCA suit like **[*44]** Borzilleri's could result in a time-consuming mini-trial -- a process that would be especially inappropriate where, as here, the government is claiming that the relator's suit will be a drain on government resources and is unlikely to result in recovery. Fourth, the FCA does not necessarily prevent the government from later filing suit to pursue the substance of the claims in a dismissed *qui tam* action if the government later determines that such a suit is appropriate. *See, e.g.*, *United States v. L-3 Commc'ns EOTech, Inc.*, 921 F.3d 11, 14-16 (2d Cir. 2019) (describing a dispute over recovery that arose when the government filed and settled an FCA suit after the dismissal of a *qui tam* action based on the same allegations). A deep dive into the government's investigatory

strategy at a § 3730(c)(2)(A) hearing -- including the question of why the government believes the pending *qui tam* suit is not the best vehicle for addressing potential FCA violations -- could prematurely reveal sensitive details of the government's investigation to the defendants, thus ultimately hampering FCA enforcement. We see no reason to adopt an extra-textual standard that would not necessarily advance, and may hinder, the purposes of the FCA.

We emphasize again that the burden is always on the relator to demonstrate that the government is transgressing constitutional limits or perpetrating a fraud on the court. Moreover, if the relator seeks discovery to establish such improprieties, the court may grant that request only if the relator makes a substantial threshold showing to support his claims. *See Swift*, 318 F.3d at 254 (describing the standard for demonstrating "entitle[ment] to discovery of information relating to prosecutorial decisions"); *see also United States v. Everglades Coll., Inc.*, 855 F.3d 1279, 1290 (11th Cir. 2017) (discussing discovery in the context of 31 U.S.C. § 3730(c)(2)(B)). Where the relator cannot make that showing -- and cannot otherwise support his claim of impropriety by the government -- the district court should grant the government's motion to dismiss.

In summary, the § 3730(c)(2)(A) hearing has two purposes: (1) providing an opportunity for the relator to attempt to convince the government to withdraw its motion to dismiss; (2) allowing the court to assess any claim by the relator that, in seeking dismissal, the government is transgressing constitutional limitations or perpetrating a fraud on the court. If the relator seeks discovery to support his claim of impropriety by the government, the court may grant the request only if the relator makes the substantial threshold showing noted above. Because the circumstances leading to a finding that the government is transgressing constitutional limits or committing a fraud on the court are necessarily case-specific, we leave further elaboration of these concepts to future cases. Such circumstances may only **[*45]** rarely be presented when the government moves to dismiss a *qui tam* suit. Nonetheless, the § 3730(c)(2)(A) hearing is a meaningful opportunity for the relator to challenge the government's motion on the grounds we have identified. *See CIMZNHCA*, 970 F.3d at 853 ("Whenever a party has the right to invoke the court's aid, it has the obligation to do so with at least a non-frivolous expectation of relief under the governing substantive law. That is not always possible, but that does not make the right meaningless." (citation omitted)).

IV.

Turning at last to the merits of the appeal, we review de novo Borzilleri's contention that the district court erred in dismissing his suit because he raised deficiencies in the government's investigation, cognizant that we may affirm on any basis apparent in the record. *Chiang v. Verizon New Eng., Inc.*, 595 F.3d 26, 34 (1st Cir. 2010).

Borzilleri details several interactions he had with government officials that he claims reveal a failure by the government to thoroughly investigate his allegations. He further argues that these interactions show "a high likelihood of investigative fraud" by the government, although he offers no details about that potential fraud. Hence, we understand his fraud argument to be a reiteration of his claim of investigative inadequacy and a reflection of his belief that the government should have further pursued, rather than dismissed, what he saw as a promising *qui tam* action potentially worth billions of dollars. Finally, Borzilleri maintains that the alleged investigative deficiencies reflect arbitrariness in the government's decision to dismiss the action. Taken together, these

arguments echo Borzilleri's overarching theme that the government failed to pursue his FCA claims to the extent or in the manner he would have liked.

The government represented that it conducted a multi-year investigation of Borzilleri's allegations, including a review of tens of thousands of documents, interviews with more than thirty witnesses, consultations with regulatory experts within the U.S. Department of Health and Human Services, and the retention of expert consultants. In this light, we agree **[*46]** with the district court that Borzilleri's arguments ultimately constitute no more than disagreements with the government's judgment about the contours of the investigation and its potential for success. *See Borzilleri*, 2019 U.S. Dist. LEXIS 181418, 2019 WL 5310209, at *2-3. Borzilleri therefore failed to demonstrate the transgression of constitutional limits or fraud on the court, and the district court properly granted the government's motion to dismiss.

Affirmed.

SOURCE 9: TENTH CIRCUIT DECISION

397 F.3d 925
Ridenour, Appellant
v.
Kaiser-Hill Company, LLC, Appellee
No. 01-1510
Filed February 9, 2005

Opinion
[*928] This is a *qui tam* action, filed under the False Claims Act (FCA), 31 U.S.C. § 3729. David E. Ridenour, Jeffrey B. Peters, and Mark Graf (Relators) contend Appellees, security providers at Rocky Flats Nuclear Weapons Plant (Rocky Flats), conspired to present for payment, knowingly presented, and were paid for, false claims for deficient, defective, or non-existent security measures, in violation of 31 U.S.C. § 3729(a)(1), (a)(2) and (a)(3). After declining **[*929]** to intervene, the Government [**3] filed a motion to dismiss the action, which the district court granted. *United States ex rel. Ridenour v. Kaiser-Hill Co.*, L.L.C., 174 F. Supp. 2d 1147 (D. Colo. 2001). Relators appeal.

Relators present several issues on appeal: (1) whether the district court applied the correct standard of review in granting the Government's motion to dismiss; (2) whether it erred in finding the Government met its burdens under the applied standard; (3) whether it erred in denying Relators' request to conduct certain discovery in preparation for hearing on the Government's motion to dismiss, their request to subpoena the Government's person most knowledgeable about the decision to seek dismissal, [**4] and their request to inquire at the hearing into the reasons underlying the dismissal decision; and (4) whether it erred in allowing the Government to present evidence refuting certain of the Relators' allegations where the parties had stipulated Relators' claim had merit. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

FACTUAL BACKGROUND

The Department of Energy (DOE) [**5] operated Rocky Flats [**6] as a nuclear weapons manufacturing facility from 1953 through 1992. Rocky Flats is located near Golden, Colorado. In 1989, the Environmental Protection Agency (EPA) designated the by-then radiologically-contaminated facility a CERCLA Superfund. The site is to be decontaminated and closed by 2006.

Between 1989 and 1995, EG&G Rocky Flats, Inc., was the primary contractor with DOE for management and operations at Rocky Flats, which included security. During these same years, Wackenhut Services, L.L.C., contracted directly with the DOE to provide security at the site. In 1995, the DOE awarded Kaiser-Hill Co., L.L.C., the environmental cleanup contract at Rocky Flats. Since 1995, Kaiser-Hill has subcontracted the security portion of its contract to Wackenhut.

Relators performed security work at Rocky Flats, and each Relator independently voiced his concern about what he perceived as weak security. They ultimately filed suit as *qui tam* relators under **[*930]** the FCA on October 8, 1997, alleging EG&G, Wackenhut, and [**7] Kaiser-Hill were paid for security measures they either did not provide or provided below acceptable levels.

At the time of the filing, Rocky Flats housed more than fourteen tons of weapons grade plutonium and six tons of highly enriched uranium. The Government requested and received several time extensions from the district court, totaling two years, in which it investigated the merits of the *qui tam* action. Pursuant to 31 U.S.C. § 3730(b)(2) and (b)(3), the case remained under seal during this investigation. Ultimately, the Government declined to intervene and the case was unsealed on December 14, 1999.

On April 13, 2000, the Government requested the DOE be added to the certificate of service to be kept aware of the progress of the suit. The Government became concerned about the handling of classified information and filed a status report concerning this issue on July 5, 2000. At a hearing on Defendants-Appellees' motion to stay proceedings pending the Government's resolution of classified information, the Government announced it would file a motion to dismiss, which it did on August 21, 2000.

The Government argued its motion to dismiss should be granted [**8] because the lawsuit would delay the cleanup and closure of Rocky Flats, as well as compromise national security interests by risking inadvertent disclosure of classified information. Relators opposed dismissal, claiming the Government was seeking dismissal for fraudulent and arbitrary and capricious reasons and the reasons for dismissal were not rationally related to a legitimate government purpose. They also argued the Government could not seek to dismiss the action without first intervening under 31 U.S.C. § 3730(c)(3). Relators sought discovery regarding the Government's stated reasons for dismissal and endeavored to subpoena the "most knowledgeable" government witness regarding the Government's reasons for dismissal. (Appellants' Br. at 2.) The district court denied these requests. After a five-day evidentiary hearing conducted pursuant to 31 U.S.C. § 3730(c)(2)(A), in which the Government stipulated for purposes of the hearing that the Relators' claims were meritorious, the magistrate recommended the Government's motion to dismiss be granted. The district court adopted the recommendation and dismissed with prejudice the claims considered [**9] in this appeal.

DISCUSSION

I. FCA Claims

We review de novo the district court's interpretation of the FCA and its determination of what standard to apply to the Government when it moves to dismiss a *qui tam* action. *See Foutz v. United States*, 72 F.3d 802, 804 (10th Cir. 1995) (construction of federal statutes reviewed de novo). We review the district court's dismissal of a *qui tam* action with prejudice for abuse of discretion. Stone, 282 F.3d at 809.

A. The FCA's Purposes and Provisions

The purpose of the FCA "is to enhance the Government's ability to recover losses sustained as a result of fraud against the Government." S. Rep. No. 99-345, at 1 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5266. It empowers a private individual (a relator) to bring a civil claim on his or her own behalf, and on behalf of the Government, against a person or company who knowingly

presents a false claim to the Government for payment. 31 U.S.C. §§ 3729(a), 3730(a) and (b)(1). The relator can only dismiss the action upon written consent of the court **[*931]** and the Attorney General. [**12] § 3730(b)(1). Amended in 1986, [**10] the most substantial modifications to the FCA created an increased incentive for private individuals to bring *qui tam* suits and granted the Government greater control over these privately brought actions. Congress increased the relator's incentive to bring *qui tam* actions by guaranteeing them a percentage of the recovery if the action is successful, and slightly increasing their maximum potential recovery. S. Rep. No. 99-345, at 27 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5292. Relators are entitled to fifteen to twenty-five percent of the proceeds of the action or settlement of the claim if the Government intervenes. § 3730(d)(1). If the Government declines intervention, relators receive twenty-five to thirty percent. § 3730(d)(2). Relators are also given certain guarantees of involvement: if the Government proceeds with the action, the relators have the right to continue as a party, § 3730(c)(1); if the Government moves to dismiss the claim over relators' objections, they are entitled to a hearing, § 3730(c)(2)(A); and if the Government settles the claim, relators are entitled to judicial determination, via a hearing, that the Government's proposed settlement [**11] is fair, adequate, and reasonable, § 3730(c)(2)(B). S. Rep. 99-345, at 25-26 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5290-91. *See also Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772, 146 L. Ed. 2d 836, 120 S. Ct. 1858 (2000) (Stevens, J., dissenting). These hearings, however, are only to be granted if relators can show a "substantial and particularized need for a hearing." S. Rep. 99-345, at 26 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5291.

[**13] Through the 1986 amendments, Congress granted the Government additional opportunities to intervene and increased its power to control *qui tam* actions. Under the old Act, the Government only had the initial sixty days in which to decide to intervene. The 1986 amendments allow the Government to obtain extensions beyond **[*932]** the initial sixty days in which to investigate the claims, and even if the Government initially declines to intervene, it can intervene later, at any time, upon a showing of good cause. S. Rep. 99-345 at 26-27 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5291-92; 31 U.S.C. § 3730(b)(3) and (c)(3).

The FCA prescribes the process for a *qui tam* action. After the relator files, the complaint remains under seal for at least sixty days, plus any extensions, during which time the Government has the opportunity to investigate the claim and determine whether it wants to intervene. § 3730(b)(2) and (3). After the Government intervenes or declines to intervene, the complaint is unsealed and served on the defendant. § 3730(b)(3). If the Government intervenes, whether initially or later under § 3730(c)(3), it takes over the primary responsibility [**14] of prosecuting the action and is not bound by the relator's acts. § 3730(c)(1). If the Government intervenes, the relator retains the right to continue as a party, subject to certain limitations. Id. Not only may the Government limit a relator's involvement, it may also stay discovery, or pursue alternate remedies against the defendant. § 3730(c)(2)(C), (c)(2)(D), (c)(4), and (c)(5). If the Government declines to intervene in the action, the relators have the right to conduct the action, subject, however, to possible future intervention by the Government upon a showing of good cause. § 3730(c)(3). The Government can dismiss or settle the action despite the relator's objections. § 3730(c)(2)(A) and (c)(2)(B).

B. Intervention

At the outset, we consider Relators' argument that the Government must intervene under § 3730(c)(3) before moving to dismiss under § 3730(c)(2)(A). [**16] The magistrate determined the FCA did not contain this requirement. The district court disagreed. Nonetheless, it construed the Government's motion to dismiss as including an implied motion to intervene, and identified as good cause for the motion the intent of the Government to dismiss the case. [**15] We decline to construe the FCA as requiring intervention for cause before dismissal because a plain reading of the statute does not require it, canons of statutory construction do not support such a result, and in our view, such a reading would render the FCA constitutionally infirm.

The FCA provides "the Government may dismiss the action notwithstanding the objections of the person initiating the action if the person 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 **[*933]** on the motion." 31 U.S.C. § 3730(c)(2)(A). In interpreting this provision, we rely on a longstanding canon of statutory construction which we recently revisited in *NISH v. Rumsfeld:*

> As a general rule, statutory language is to be interpreted according to the common meaning of the terms employed. Our analysis of statutory construction must begin with the language of the statute itself, and [absent] a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

348 F.3d 1263, 1268 (10th Cir. 2003) [**17] (quotation marks, citations and alteration omitted). Applying this canon, we identify nothing in the language of § 3730(c)(2)(A) to suggest the authority of the Government to dismiss a *qui tam* action is dependent upon prior intervention in the case. Nor can we identify legislative intent to the contrary. In fact, the Senate report incident to passage of the measure spelled out the purpose of late intervention.

> Under current law, the Government is barred from reentering the litigation once it has declined to intervene during this initial period. The Committee recognizes that this limited opportunity for Government involvement could in some cases work to the detriment of the Government's interests. Conceivably, new evidence discovered after the first 60 days of the litigation could escalate the magnitude or complexity of the fraud, causing the Government to reevaluate its initial assessment or making it difficult for the *qui tam* relator to litigate alone. In those situations where new and significant evidence is found and the Government can show 'good cause' for intervening, paragraph (2) provides that the court may allow the Government to take over the suit.

S. [**18] Rep. 99-345, at 26-27 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5291-92. This language clearly suggests the purpose of late intervention is to pursue litigation, not dismiss it. The D.C. Circuit has recently held the Government need not first intervene in a *qui tam* action before moving to dismiss it. Although the case concerned a government motion to dismiss during the seal period, the court's reasoning applies with equal force to a motion to dismiss filed after the seal period:

> [Section] 3730(b)(2) makes intervention necessary only if the government wishes to "proceed with the action." Ending the case by dismissing it is not proceeding with the action; to "proceed with the action" means, in the False Claims Act, that the case will go forward with the government running the litigation.

Swift v. United States, 355 U.S. App. D.C. 59, 318 F.3d 250, 251 (D.C. Cir.), cert. denied, 539 U.S. 944, 156 L. Ed. 2d 630, 123 S. Ct. 2622 (2003). As we just noted, the purpose of late intervention, as with intervention in the seal period, is to proceed with the action. Other courts have agreed in dicta that prior intervention is not necessary to enable [**19] a government motion to dismiss. *See Juliano v. Fed. Asset Disposition Ass'n*, 736 F. Supp. 348, 351 (D. D.C. 1990), aff'd, 295 U.S. App. D.C. 97, 959 F.2d 1101 (D.C. Cir. 1992); *Kelly*, 9 F.3d at 753 n.10; *United States ex rel. Sequoia* **[*934]** *Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998); *United States ex rel. Friedman v. Rite Aid Corp.*, 152 F. Supp. 2d 766, 772 (E.D. Pa. 2001).

Our [**20] holding comports with constitutional concerns as well. As the Supreme Court has instructed, "it is a cardinal principle of statutory interpretation . . . that when an Act of Congress raises a serious doubt as to its constitutionality, [we] will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Zadvydas v. Davis*, 533 U.S. 678, 689, 150 L. Ed. 2d 653, 121 S. Ct. 2491 (2001) (quotation marks omitted). The constitutionality of the FCA has been challenged several times under the claim it violates the separation of powers doctrine inherent in the Take Care Clause. In this case, we examine whether the Government would be unconstitutionally hamstrung by a requirement, as urged by Relators, to intervene with a showing of good cause before moving to dismiss a *qui tam* action.

In a case where the Government successfully [**21] intervened upon a showing of good cause, we have previously held the *qui tam* provisions are constitutional under the Take Care Clause. *Stone*, 282 F.3d at 807. We expressly reserved the question of whether the *qui tam* provisions would pass constitutional muster if the Government was denied intervention for cause. Id. at 806 n.6. Stone cited favorably to decisions of other circuits that have uniformly held the FCA is constitutionally sound as long as it is interpreted as vesting in the Executive Branch sufficient control over *qui tam* actions so there is no violation of its duty to enforce the laws of the land. The Fifth Circuit has stated the Government retains sufficient control of a *qui tam* action to save the FCA from being unconstitutional because the Government can veto settlements without intervening, and it "retains the unilateral power to dismiss an action notwithstanding the objections of the person." *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 753 (5th Cir. 2001) (en banc) (quotation marks omitted). The Ninth Circuit has concluded the FCA does not violate the doctrine of separation of powers because [**22] the Government retains sufficient control over *qui tam* actions, including the power "albeit somewhat qualified, to end *qui tam* litigation." *Kelly*, 9 F.3d at 754. These limitations to which the Kelly court refers are the FCA requirements to give the relator notice and a hearing. Id. at 753. The Sixth Circuit has also concluded the FCA scheme embraces sufficient provisions to assure the freedom of the Government to control a *qui tam* action. *United States ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994). *See also Stevens*, 529 U.S. at 801 (history of *qui tam* action in England and America sufficient to establish it does not implicate Take Care Clause).

Although the *qui tam* provisions have thus far withstood constitutional challenge, we conclude that to condition the Government's right to move to dismiss an action in which it did not initially intervene upon a requirement of late intervention tied to a showing of good cause would place the FCA on constitutionally unsteady ground. Because we are to interpret statutes in a manner that renders them constitutionally [**23] valid, *Zadvydas*, 533 U.S. at 689, we should avoid an interpretation that unnecessarily binds the Government. Therefore, we conclude that the **[*935]** Government, in a case in which it has declined to intervene in the seal period, is not required to intervene with a showing of good cause under § 3730(c)(3) before moving to dismiss the action under § 3730(c)(2)(A). Nor do we engraft a good cause requirement on a government motion to dismiss.

C. Dismissal

We turn now to the correct standard of review of a government motion to dismiss a *qui tam* action under 31 U.S.C. § 3730(c)(2)(A). Although the Act itself is silent as to the standard of review of a motion to dismiss, the Senate Report incident to passage of this section explained its purpose:

> When the Government takes over a privately initiated action, the individual who brought the suit will be served, upon request, with copies of all pleadings filed as well as deposition transcripts. Additionally, the person who brought the action may formally object to any motions to dismiss or proposed settlements between the Government and the defendant.
>
> Any objections filed by the *qui tam* [**24] plaintiff may be accompanied by a petition for an evidentiary hearing on those objections. The Committee does not intend, however, that evidentiary hearings be granted as a matter of right. We recognize that an automatic right could provoke unnecessary litigation delays. Rather, evidentiary hearings should be granted when the *qui tam* relator shows a 'substantial and particularized need' for a hearing. Such a showing could be made 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 and improper considerations.

S. Rep. 99-345, at 26 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5291.

. . .

Because the case we review is one in which the defendants were served, and because under these circumstances we construe the hearing language of § 3730(c)(2)(A) to impart more substantive rights for a relator, we look to the Ninth Circuit for guidance.

. . . [*936]

[**28] We next examine whether the district court erred in finding the Government met the standard set in *Sequoia v. Baird-Neece*, and in dismissing with prejudice the Relators' action.

After an exhaustive review of the record, we conclude the court did not abuse its discretion in dismissing the *qui tam* action.

1. Rational Relation to Valid Government Purpose

The Government argues that protecting classified information from disclosure and the timely closing of the contaminated Rocky Flats facility are valid governmental purposes supporting its motion to dismiss the *qui tam* action. Relators agree. Where the parties part company, however, is on the question of whether dismissal of the action bears a rational relation to the stated objectives. Based on evidence adduced at the five-day evidentiary hearing, the district court, adopting the recommendation of the magistrate, concluded that it does. We concur.

[**29] The Government demonstrated that classified documents required in the litigation would present a risk of inadvertent **[*937]** disclosure, implicating national security. The degree to which classified documents could be declassified or redacted was unknown. However, anyone handling classified information would need a security clearance. The magistrate judge found that the risk of inadvertent disclosure of classified information was greatest where much classified information was involved in the litigation; the risk lessened where classified information could be declassified or redacted. In the court's view, the risk of inadvertent disclosure, even if theoretically minimal, as the Relators argued, was sufficient to justify dismissal of the action. As the *Sequoia* test instructs, to establish a rational relation to a valid governmental purpose, "there need not be a tight fitting relationship between the two; it is enough that there are plausible, or arguable, reasons supporting the agency decision." *United States ex. rel. Sequoia Orange Co. v. Sunland Packing House Co.*, 912 F. Supp. 1325, 1341 (E.D. Ca. 1995) (quotation marks omitted). The Government met the test here. [**30]

The Government also demonstrated the litigation would delay the clean-up and closure of Rocky Flats by diverting the focus of security planners and management from the clean-up effort, by requiring the reassignment of personnel from the project to a review of classified documents for declassification or redaction in aid of litigation, and by placing an added financial burden on the project through a requirement to shift funds from clean-up to litigation. The Relators argued that many of their claims could have been determined without a significant diversion of resources by the Government. The magistrate concluded that while the evidence of diversion of resources from the clean-up effort to litigation was not "concrete" (Appellants' Br., Tab I at 21), it sufficiently established the likelihood of some diversion of resources, and "any diversion of personnel attention [**31] away from the closure project would negatively impact the closure schedule." (*Id*. at 22) Once again, the Government satisfied the *Sequoia* test by advancing a "plausible, or arguable" reason for the dismissal. *Id.*

2. Arbitrary and Capricious

Once the Government meets its burden of establishing a rational relationship between dismissal of a *qui tam* action and a valid government purpose, the "burden switches to the relator to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal." *Sequoia v. Baird-Neece*, 151 F.3d at 1145 (quotation marks omitted). Relators' principal argument is that the Government's motion [**32] to dismiss was fraudulent because it was motivated by a desire to spare DOE

embarrassment over security lapses at Rocky Flats. They contend a revolving door of employment between the DOE and its contractors at Rocky Flats fostered a climate of cover-up of security violations at the facility, including misuse of classification of **[*938]** documents in aid of the cover-up, and inspired both the DOE and its contractors to prevail upon the Department of Justice to dismiss the *qui tam* action. The district court found that while there was evidence of innocent cross-employment between the DOE and its contractors, there was no evidence that either the DOE or any of its contractors prevailed upon the Department of Justice to dismiss the action for improper purposes. In fact, there was no evidence the Department of Justice exercised anything other than its independent judgment in deciding to dismiss the case. While the evidence suggested vigorous disagreement over security at Rocky Flats, the court declined to construe this as evidence that the Government's decision to dismiss was in aid of a cover-up. In fact, as the court noted, the alleged security deficiencies were reported to the Secretary [**33] of Energy, Congress and the press, and led to an investigation by the DOE Inspector General. In all of this heat, the district court found no light. Neither do we. The district court correctly concluded the Relators failed to meet their burden to show the Government's motion to dismiss was fraudulent, arbitrary and capricious, or illegal.

. . . [*940]

CONCLUSION

We hold the FCA does not require the Government to intervene prior to moving to dismiss a *qui tam* action, we adopt the *Sequoia* standard for reviewing the Government's motion to dismiss, and we find it has met its burden under *Sequoia v. Baird-Neece*. We also hold the district court did not abuse its discretion in its rulings [**40] in discovery or in limine. We AFFIRM the decision of the district court.

SOURCE 10: NINTH CIRCUIT DECISION

151 F.3d 1139
United States ex rel. Sequoia Orange Company, Appellant
v.
Baird-Neece Packing Corporation
No. 96-15024
Filed June 19, 1998

Opinion
[*1141] This is a *qui tam* case under the False Claims Act (FCA). One citrus company seeks damages from other [**2] citrus companies, claiming that they made false statements to the government in connection with a citrus marketing program. The government intervened several years after the litigation began and sought dismissal under 31 U.S.C. § 3730(c)(2)(A) because it had decided to abandon the entire marketing program. The case must be seen against the background of a war in the citrus industry related to the administration of that program. The district court granted the government's motion to dismiss, finding that the government's decision to end that war on all fronts, including dismissal of the *qui tam* claims, was rationally related to a legitimate governmental purpose. *See United States ex rel. Sequoia Orange Co. v. Sunland Packing House Co.*, 912 F. Supp. 1325 (E.D. Cal. 1995).

The *qui tam* relators appeal contending that because the false claims actions had some merit, the government cannot seek dismissal. The appeal thus requires us to consider what standard a court should apply when considering the government's motion to dismiss a *qui tam* action that otherwise would not be dismissed before the litigation was fully resolved. We affirm.

BACKGROUND

Sequoia Orange Company (an orange processor) [**3] and Lisle Babcock (an orange grower) filed 34 *qui tam* actions against a number of citrus industry growers and packinghouses alleging violations of the orange and lemon marketing orders promulgated by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. §§ 601-626. The relators began filing the actions in 1988.

The AMAA "authorizes the Secretary of Agriculture to issue marketing orders limiting **[*1142]** the quantity of commodities shipped into markets identified by the Secretary, thus protecting prices for producers and maintaining orderly marketing conditions." *Cecelia Packing Corp. v. USDA*, 10 F.3d 616, 618 (9th Cir. 1993). The Secretary in 1984 had issued orange and lemon marketing orders that regulated the quantity of oranges and lemons shipped to market by citrus handlers in Arizona and California. See 7 U.S.C. § 608c; 7 C.F.R. §§ 907.1, 908.1, 910.1 (1994). Citrus handlers who ship oranges and lemons in excess of their allotment ("prorate") are subject to criminal fines and civil penalties. See 7 U.S.C. §§ 608a(5), 608c(14).

The *qui tam* relators alleged that the defendants had, over the course of approximately ten years, violated [**4] the prorate provisions of the orange and lemon marketing orders by overshipping citrus and failing accurately to report, account and pay assessments for those overshipments. Prior

to the expiration of the 60-day seal period, see 31 U.S.C. § 3730(b)(2), the government elected to intervene in 10 of the *qui tam* cases.

As the relators were filing their *qui tam* complaints, the government was also filing prorate violation claims under the AMAA against citrus industry growers and packinghouses, including Sequoia Orange Company. After discovering growing evidence of widespread prorate violations in the industry, the Secretary concluded that the prorate cheating reflected dissatisfaction with the citrus marketing orders, and that the orders had become divisive. In June 1993 the Secretary formally suspended orange and lemon prorate regulation and invited the citrus industry to propose amendments to the marketing orders.

Simultaneously, the government proposed a settlement of all AMAA and FCA cases alleging prorate violations in order to end industry turmoil. To facilitate the settlement, the government moved to intervene in the remaining 24 *qui tam* cases pursuant to 31 U.S.C. § 3730(c)(3), [**5] which permits the government to intervene in a *qui tam* action at any time "upon a showing of good cause." The district court granted the motion, over the relators' objections, on the basis of the government's representations that it would litigate the *qui tam* actions, in conjunction with the AMAA cases, if a settlement could not be reached.

While the settlement negotiations were proceeding, the district court ruled in April 1994 that the 1984 orange marketing orders were unlawfully promulgated and that the prorate provisions of the orange marketing orders were therefore invalid. *See United States v. Sunny Cove Citrus Ass'n*, 854 F. Supp. 669, 697 (E.D. Cal. 1994). The *Sunny Cove* case involved the government prosecution of another citrus handler, Sunny Cove, for violations of orange prorate regulations. Sunny Cove successfully defended the prosecution on the ground that the Secretary's reinstatement of prior marketing orders was invalid. That decision made settlement less likely in these *qui tam* cases because the overwhelming majority of *qui tam* and AMAA actions were based on the invalidated prorate regulations.

In May 1994, the Secretary announced his decision to terminate [**6] the citrus marketing orders, dismiss all pending AMAA actions, and withdraw from the FCA cases. The Secretary justified this decision on the failure of the settlement negotiations, the prospect of more litigation after the *Sunny Cove* decision, and the desire to end the divisiveness in the citrus industry caused by over ten years of litigation. The Secretary concluded that the best way to advance the interests of the industry was to "clean the slate."

At the time of the Secretary's announcement, the government apparently did not believe it had the authority to dismiss the *qui tam* actions over the relators' objections. After soliciting advice from all parties on the government's authority to dismiss under 31 U.S.C. § 3730(c)(2)(A), the government moved for dismissal in August, 1994, citing six reasons: (1) to end the divisiveness in the citrus industry; (2) to facilitate a new marketing order; (3) to terminate protracted and burdensome litigation; (4) to protect the United States' taxpayers from continuing and escalating litigation expenses; (5) to curtail the drain on private resources resulting from the litigation; and (6) to allow the growers, agricultural cooperatives, handlers [**7] and others **[*1143]** to work together in shaping new marketing tools.

After a four-day evidentiary hearing, the district court granted the government's motion to dismiss the *qui tam* actions, ruling that the government sought dismissal for legitimate government purposes; that the reasons offered by the government were rationally related to these legitimate government purposes; and that the dismissal was not arbitrary or capricious. *See* 912 F. Supp. at 1353. The relators appeal, contending that the district court could not dismiss on the government's motion unless the court found the cases lacked merit.

DISCUSSION

The legal issues turn on the provisions of the False Claims Act as it was amended in 1986. Under the *qui tam* provisions of the FCA, a private individual, referred to as a relator, may file an action on behalf of the federal government against any individual or company who has knowingly presented a false claim to the government for payment. See 31 U.S.C. §§ 3729(a), 3730(b). A successful relator will generally receive a share of the civil fines imposed and be eligible for attorneys' fees and costs. See 31 U.S.C. § 3730(d); *United States ex rel. Hall v. Teledyne Wah Chang* [**8] Albany, 104 F.3d 230, 233 (9th Cir. 1997).

To proceed with a *qui tam* action, the relator must serve a copy of the complaint on the government 60 days before it is served on the defendant. See 31 U.S.C. § 3730(b)(2). During the 60-day period, the government can investigate the complaint's allegations and elect to intervene in the action, in which case the action is conducted by the government. 31 U.S.C. § 3730(b)(4)(A).

When the government chooses not to take over a *qui tam* action, the relator has the right to conduct the action. 31 U.S.C. § 3730(c)(3). However, even in cases where the government initially elects not to take over the action, the court "may nevertheless permit the Government to intervene at a later date upon a showing of good cause." 31 U.S.C. § 3730(c)(3); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 746 (9th Cir. 1993). The government may dismiss the action "notwithstanding the objections of the person initiating the action if the person 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); *Kelly*, 9 F.3d at 746. [**9]

I. Dismissal of a *Qui Tam* Action

The relators' primary contention is that the district court erred by interpreting 31 U.S.C. § 3730(c)(2)(A) to allow the government to dismiss a meritorious *qui tam* action. The government conceded, for purposes of its motion to dismiss, that the FCA claims against the defendants were meritorious. The issue is one of statutory interpretation which we review de novo. *See United States ex rel. Lujan Hughes Aircraft Co.*, 67 F.3d 242, 245 (9th Cir. 1995).

Although the statute is silent regarding the circumstances under which the government may dismiss a *qui tam* action, the decision to dismiss has been likened to a matter within the government's prosecutorial discretion in enforcing federal laws. *See Kelly*, 9 F.3d at 756 (rejecting *qui tam* defendant's contention that 31 U.S.C. § 3730(c)(2)(A) impermissibly grants the judiciary approval authority over government decisions to dismiss *qui tam* suits in the exercise of its prosecutorial authority); *see also United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d

715, 724 (9th Cir. 1994) ("The Court will not assume that the *qui tam* provisions of the False Claims Act were intended [**10] to curtail the prosecutorial discretion of the Attorney General.") (quoting *Juliano v. Federal Asset Disposition Ass'n*, 736 F. Supp. 348, 351 (D.D.C. 1990), aff'd, 295 U.S. App. D.C. 97, 959 F.2d 1101 (D.C. Cir. 1992)).

The relators argue that interpreting 31 U.S.C. § 3730(c)(2)(A) to give the government authority to dismiss a meritorious *qui tam* action is inconsistent with the general framework of the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3154, which was intended to provide relators with "increased involvement in suits brought **[*1144]** by the relator but litigated by the Government." S. Rep. No. 99-345, at 13 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5278; *see also Kelly*, 9 F.3d at 745 ("Congress amended the FCA in 1986 to . . . enlist the aid of the citizenry in combatting the rising problem of 'sophisticated and widespread fraud.'") (citation omitted).

Before the 1986 amendments, when the government elected to intervene in a *qui tam* action, the suit was conducted solely by the government. The 1986 amendments allow the relator to continue as a party to the action after the government's intervention. *See* 31 U.S.C. § 3730(c)(1). Although [**11] the amendments increased the relator's role in such a case, the government still has "primary responsibility" for the case and now enjoys supervisory powers over the relator. *Id.* The government can limit the relator's participation by restricting the number of the relator's witnesses or the length of their testimony. *See* 31 U.S.C. § 3730(c)(2)(C). The government may also stay the relator's discovery requests if they are likely to interfere with the government's criminal or civil investigation of related matters. *See* 31 U.S.C. § 3730(c)(4). The amended statute allows the government to settle an action, notwithstanding the objections of the relator, as long as the court determines that the proposed settlement is fair. *See* 31 U.S.C. § 3730(c)(2)(B). Most relevant to the present suit, the government has the right to dismiss the action, notwithstanding the relator's objection, if the relator is afforded notice and a hearing. *See* 31 U.S.C. § 3730(c)(2)(A).

The 1986 amendments have also expanded the government's ability to intervene in a *qui tam* action. The government may move for an extension of the original 60-day period for deciding whether to intervene. *See* [**12] 31 U.S.C. § 3730(b)(3). Even after that period has expired, the government now has the right to track the litigation and to intervene at a later date upon a showing of good cause. See 31 U.S.C. § 3730(c)(3).

Thus, while we have observed that the False Claims Amendments Act of 1986 provided "increased incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government," *Killingsworth*, 25 F.3d 715 at 721, the Act actually increased, rather than decreased, executive control over *qui tam* lawsuits. This has been accomplished by broadening the government's powers of intervention, and by giving the government the ability to supervise the relator's participation in a *qui tam* action when the government elects to intervene. Certain of the government's supervisory powers, such as the power to stay the relator's discovery, apply even if the government decides not to intervene. As one court has concluded, "the 1986 version of the False Claims Act continues the evolution of greater executive control over *qui tam* lawsuits." *See United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1090 (C.D. Cal. 1989).

Although the amendments [**13] give the relator the right to remain a party after government intervention, the government's power to dismiss or settle an action is broad. The amended statute grants the relators an opportunity for a hearing on the motion to dismiss, but does not specify any conditions under which the relator may block the motion. This court has previously noted that "it is not clear whether in practice this notice and hearing requirement has amounted to much of a hurdle for the government." *Kelly*, 9 F.3d at 753 n.11.

The relators point to the statement in *Kelly* that 31 U.S.C. § 3730(c)(2)(A) allows the government to "move for dismissal of a case which it believes has no merit." *See id.* at 753. They suggest that this statement means that lack of merit is the exclusive ground upon which the government may seek dismissal. *Kelly* does not so hold.

The legislative history of the 1986 Amendments supports the district court's conclusion that a meritorious suit may be dismissed upon a proper showing. The Senate Report states that the False Claims Amendments Act of 1986 "provides *qui tam* plaintiffs with a more direct role . . . in acting as a check that the Government does not neglect evidence, [**14] cause undue delay, or drop the false claims case without legitimate reason." S. Rep. No. 99-345, at 25-26 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5291. This statement **[*1145]** reflects congressional intent that the *qui tam* statute create only a limited check on prosecutorial discretion to ensure suits are not dropped without legitimate governmental purpose.

The relators next contend that even if the government could have dismissed the cases had it intervened initially, it could not move for dismissal after it later intervened for good cause pursuant to 31 U.S.C. § 3730(c)(3). We rejected a similar contention in *Kelly*: "When the government intervenes late in the action, a fair interpretation of the statute is that the government has a similar degree of control over the litigation as if it had intervened at the start." *Kelly*, 9 F.3d at 752. Nothing in § 3730(c)(2)(A) purports to limit the government's dismissal authority based upon the manner of intervention. This court has noted that § 3730(c)(2)(A) may permit the government to dismiss a *qui tam* action without actually intervening in the case at all. *See Kelly*, 9 F.3d at 753 n.10 (citing *Juliano v. Federal Asset Disposition [**15]Ass'n*, 736 F. Supp. 348 (D.D.C. 1990), aff'd, 295 U.S. App. D.C. 97, 959 F.2d 1101 (D.C. Cir. 1992)).

II. Standard Governing a Motion to Dismiss

Under 31 U.S.C. § 3730(c)(2)(A)

The relators next challenge the district court's choice of standard governing dismissal under 31 U.S.C. § 3730(c)(2)(A). The relators contend that, if the government does have the authority to dismiss a meritorious *qui tam* action under 31 U.S.C. § 3730(c)(2)(A), the applicable standard is Rule 41(a)(2) of the Federal Rules of Civil Procedure. That rule allows the court to grant a plaintiff's dismissal motion only with appropriate terms and conditions to protect the defendant from prejudice. In this case, because dismissal prejudiced the relators by precluding a *qui tam* award, the relators claim that dismissal should not have been permitted.

Rule 41 protects defendants from vexatious plaintiffs. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 397, 110 L. Ed. 2d 359, 110 S. Ct. 2447 (1990). In this case, the plaintiffs, or relators, seek protection from the dismissal decision of the real party in interest, the government, under a specific statute establishing unique relationships among [**16] the parties. The district court correctly ruled that Rule 41 did not apply.

The *qui tam* statute itself does not create a particular standard for dismissal. The district court acted reasonably in adopting the following 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." 912 F. Supp. at 1341. 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 1347. The same analysis is applied to determine whether executive action violates substantive due process. *See e.g.*, *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990).

This standard also draws significant support from the Senate Report to the False Claims Amendments Act of 1986, which explained that the relators may object if the government moves to dismiss without reason. S. Rep. No. 99-345, at 26 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5291. A hearing is appropriate "if the relator presents a colorable claim that the settlement or dismissal [**17] 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.

Moreover, such a rational relation test avoids any separation of powers concerns that this court addressed in *Kelly*. There, we rejected a *qui tam* defendant's contention that 31 U.S.C. § 3730(c)(2)(A) impermissibly grants the judiciary approval authority over government decisions to dismiss *qui tam* suits in the exercise of its prosecutorial authority. *See United States ex rel. Kelly*, 9 F.3d at 756. We said:

> We conclude that the judicial involvement which the FCA authorizes does not contravene the separation of powers principle. First, in the absence of any meaningful **[*1146]** indication that [the notice and hearing] requirements pose significant barriers to the Executive Branch's exercise of its prosecutorial authority, we see no reason to construe them as such and thereby heighten constitutional concerns. See note 8. Second, as we noted earlier, ample precedent exists for judicial oversight of the government's decision to dismiss a *qui tam* action. See note 12.

Id.

[**18] Here, the district court has respected the Executive Branch's prosecutorial authority by requiring no greater justification of the dismissal motion than is mandated by the Constitution itself. *See United States v. Redondo-Lemos*, 955 F.2d 1296, 1298-99 (9th Cir. 1992) (due process prohibits arbitrary or irrational prosecutorial decisions).

III. Application of the Rational Relation Standard

The relators contend that the district court misapplied the rational relation standard and that the reasons offered by the government for dismissal were not rationally related to a legitimate government interest. We conclude that the government met its burden.

The relators first argue that elimination of legal battles in the citrus industry is not a legitimate government interest under the AMAA. The statute directs the Secretary to oversee orderly marketing processes. See 7 U.S.C. § 602(1). Peace among competitors and regulators facilitates orderly marketing. This is especially true under a statute, which as the Supreme Court has noted, "contemplates a cooperative venture among the Secretary, handlers, and producers." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 346, [**19] 81 L. Ed. 2d 270, 104 S. Ct. 2450 (1984) (emphasis added).

The relators next assert that the government's dismissal motion was based on improper factors, such as political pressure from the defendants and members of Congress. However, as noted by the district court, citizens are entitled to advocate the passage or enforcement of laws, *see, e.g., Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961) ("It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors."), and members of Congress may seek to influence agency action, *see, e.g., Radio Ass'n on Defending Airwave Rights, Inc. v. United States Dep't of Transp.*, 47 F.3d 794, 808 (6th Cir. 1995) ("Americans rightly expect their elected representatives to voice their grievances and preferences concerning the administration of our laws."). There was no evidence that the defendants engaged in bribery, fraud, or coercion, or otherwise conspired with the government to dismiss the *qui tam* actions for improper reasons.

Third, the relators contend that [**20] the government sought dismissal because Sequoia Orange Company itself was a prorate cheater. The record shows, however, that the government deemed further FCA litigation over prorate violations harmful to the industry as a whole. Dismissal enabled the government to treat all alleged prorate violators equally by dismissing all enforcement actions, including the Secretary's AMAA enforcement action against Sequoia.

Next, the relators contend that the government's concern with litigation costs was irrelevant in light of the fact that the FCA contemplates reliance on private financing for anti-fraud enforcement. The district court, however, properly noted that the government can legitimately consider the burden imposed on the taxpayers by its litigation, and that, even if the relators were to litigate the FCA claims, the government would continue to incur enormous internal staff costs. See 912 F. Supp. at 1346.

The relators finally contend that the district court erred by granting the government's motion to dismiss the *qui tam* actions relating to lemon marketing because the lemon order, unlike the orange order, had not been invalidated by the *Sunny Cove* decision. The government [**21] presented evidence that (1) various lemon handlers were under investigation for prorate violations and (2) the lemon **[*1147]** prorate violations were comparable to prorate cheating in the orange industry

and potentially as pervasive. The dismissal of the lemon cases was therefore rationally related to the legitimate government interest in preserving the financial stability of the lemon industry.

V. Judicial Estoppel

The relators contend that the doctrine of judicial estoppel bars the government from dismissing the *qui tam* actions in light of the government's earlier declarations, in support of its motion to intervene in the orange *qui tam* actions, that it would diligently prosecute the FCA claims. The doctrine of judicial estoppel is an equitable doctrine invoked by the district court at its discretion. *See Morris v. California*, 966 F.2d 448, 453 (9th Cir. 1992). This court reviews for an abuse of discretion. *See United States v. Ruiz*, 73 F.3d 949, 953 (9th Cir. 1996).

Judicial estoppel bars a party from taking inconsistent positions in the same litigation. *See Morris*, 966 F.2d at 452. In support of its motion to intervene in the *qui tam* actions, the government represented [**22] to the district court that it would litigate the FCA claims if no settlement was reached. The relators contend that this representation is inconsistent with the government's later decision to dismiss. In moving to dismiss, however, the government was motivated by events that transpired after its intervention, most notably the decision in *Sunny Cove*, which declared the orange marketing orders invalid. There is no indication that the government acted in bad faith by representing that it would litigate the FCA claims if settlement negotiations fell through. *See Helfand v. Gerson*, 105 F.3d 530, 534 (9th Cir. 1997). Rather, the government changed course when it determined that settlement was no longer a reasonable possibility after *Sunny Cove*. This was a rational policy decision that the government was entitled to make under the *qui tam* provisions. Accordingly, the district court did not abuse its discretion in concluding that there was no equitable reason to apply judicial estoppel.

V. Amendment of *Qui Tam* Complaints

This court reviews for an abuse of discretion the district court's denial of a motion for leave to amend a complaint. *See United States v. County* [**23] of San Diego, 53 F.3d 965, 969 n.6 (9th Cir. 1995).

After the district court granted the government's motion to dismiss the *qui tam* actions, the relators informally requested leave to file amended complaints alleging non-FCA claims. The court denied the relators' request on the ground that they had failed to provide reasonable notice and an opportunity for hearing on the request, in violation of Rule 15 of the Federal Rules of Civil Procedure and the Local Rules of the Eastern District of California. Given the extremely late date at which the relators first requested leave to amend, the district court did not abuse its discretion in denying the request. See Fed. R. Civ. P. 15(a); *Moore v. Kayport Package Express*, 885 F.2d 531, 538 (9th Cir. 1989) (court may consider delay and prejudice when ruling on motion for leave to amend).

CONCLUSION

We conclude that 31 U.S.C. § 3730(c)(2)(A) permits the government to dismiss a meritorious *qui tam* action over a relator's objections. Where, as here, the government offers reasons for dismissal that are rationally related to a legitimate government interest, the *qui tam* action may be dismissed.

[**24] AFFIRMED.

SOURCE 11: THIRD CIRCUIT DECISION

938 F.3d 384
Chang, Appellant
v.
Children's Advocacy Center
No. 18-2311
Argued July 2, 2019
Decided September 12, 2019

Opinion
[*386] Weih Chang appeals the District Court's orders dismissing his complaint under the False Claims Act ("FCA") and its Delaware counterpart. He argues that the District Court was obliged under those statutes to hold an in-person hearing before dismissing his claims. We disagree, so we will affirm.

I.

A.

The FCA prohibits the submission of false claims for payment to the United States. See 31 U.S.C. § 3729(a)(1); *United States ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481, 486 (3d Cir. 2017). To incentivize its own enforcement, [**2] the FCA allows private individuals to sue for alleged violations—called *qui tam* suits—and offers them a percentage of an eventual recovery. See 31 U.S.C. § 3730(d).

In a typical *qui tam* action, a private party (called a "relator") sues a defendant on behalf of the government for alleged FCA violations. The United States then has 60 days (plus any granted extensions) to review the claim and decide whether it will "elect to intervene and proceed with the action." § 3730(b)(2). If the government intervenes, the relator has the right to continue as a party, but the government assumes the "primary responsibility for prosecuting the action." § 3730(c)(1). If the government chooses not to intervene, the relator may still "conduct the action." § 3730(c)(3).

Yet even under the latter scenario, the government may still "dismiss the action notwithstanding the objections of the person initiating the action if the person 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." § 3730(c)(2)(A).

B.

Chang filed a *qui tam* action against the Children's Advocacy Center of Delaware, asserting claims on behalf of the United States and the State of Delaware under the FCA and the Delaware False Claims Act ("DFCA"). [**3] In short, Chang alleged that the Center had applied for and received funding from the state and federal governments by misrepresenting certain material information.

Both governments declined to intervene as plaintiffs, so Chang filed an amended complaint and the Center answered.

Nearly three years after Chang had filed his original complaint, the United States and Delaware each moved to dismiss the case. The governments asserted that they had investigated Chang's allegations and discovered them to be "factually incorrect and legally insufficient." App. 114. Chang filed a consolidated opposition to the motions, contending that the Court should await summary judgment rather than dismiss the case, but did not request oral argument or a hearing.

The District Court granted the governments' motions without conducting an in-person hearing or issuing a supporting opinion. Chang timely appealed.

II.

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1367, and 31 U.S.C. § 3732. We have appellate jurisdiction under 28 U.S.C. § 1291. We review the District Court's grant of the governments' motions to dismiss de novo. *See* **[*387]** *Fowler v. UPMC Shadyside*, 578 F.3d 203, 206 (3d Cir. 2009).

III.

The issue presented is whether the District Court erred by granting the government's [**4] motions to dismiss Chang's *qui tam* action without first conducting an in-person hearing. Put another way, since Chang never requested a hearing, does the FCA guarantee an automatic in-person hearing to relators before their cases may be dismissed? Chang says that it does. We disagree.

The parties presented this appeal as an opportunity for us to take a side in a putative circuit split.

. . .

We need not take a side in this circuit split because Chang fails even the more restrictive standard.

The government has an interest in minimizing unnecessary or burdensome litigation costs. *See Sequoia*, 151 F.3d at 1146 ("[T]he government can legitimately consider the burden imposed on the taxpayers by its litigation[;] ... even if the relators were to litigate the FCA claims, the government would continue to incur enormous internal staff costs."); *Swift*, 318 F.3d at 254 ("[T]he government's goal of minimizing its expenses is ... a legitimate objective, and dismissal of the suit furthered that objective."). The United States and Delaware both cited this goal in their motions to dismiss. And dismissing a case is, of course, the easiest way to achieve that objective.

Once the governments moved to dismiss, the burden then shifted to Chang "to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal." *Sequoia*, 151 F.3d at 1145. He failed to do so, but says that this is beside the point because the FCA guarantees him an automatic in-person hearing at which he should have been allowed to introduce evidence to satisfy his burden.

The plain language of both the FCA and the DFCA provides relators an "opportunity for [**6] a hearing" when the government moves to dismiss. 31 U.S.C. § 3730(c)(2)(A); Del. Code tit. 6, § 1204. Chang would have us hold that the District Court erred by not sua sponte scheduling and conducting an in-person hearing, even though Chang never requested one. An "opportunity for a hearing," however, requires that relators avail themselves of the "opportunity." Indeed, most courts that **[*388]** have considered this language have held that an in-person hearing is unnecessary unless the relator expressly requests a hearing or makes a colorable threshold showing of arbitrary government action. *See, e.g.*, *Sequoia Orange*, 151 F.3d at 1145 ("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.'" (quoting S. Judiciary Comm., False Claims Amendments Act of 1986, S. Rep. No. 99-345, at 26 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5291)); cf. *Swift*, 318 F.3d at 251 (noting that the district court held a hearing when the relator "opposed dismissal and requested a hearing."). We find these decisions persuasive. We thus hold that the dismissal provisions in the FCA and DFCA do not guarantee an automatic in-person [**7] hearing in every instance.

Chang never requested a hearing. Nor did his opposition demonstrate that the governments' motions were arbitrary or capricious. So the District Court did not err in granting the governments' motions **[*389]** to dismiss his *qui tam* action without holding an in-person hearing. We will affirm the orders of the District Court.

SOURCE 12: LAW REVIEW ARTICLE

19 Indiana Health Law Review 1
2022

Two Roads Converged in a Legal Wood: The Intersection of Litigation Funding and the False Claims Act

Erik Fuqua

[*1]

I. Introduction

In Robert Frost's famous poem, *The Road Not Taken,* a traveler encounters a fork in the road and chooses "the one less traveled by," which "made all the difference." Today's False Claims Act ("FCA") traveler encounters the opposite: the convergence of the well-worn roads of litigation funding and the FCA. This development has created new concerns in the FCA community. Will litigation funding alter the path of the FCA road? Must the FCA road be cleansed of litigation funding to remain stable? Or is it possible that the convergence, though initially bumpy, can continue smoothly into the horizon? The following hypothetical scenario illustrates how this convergence often occurs in practice:

Leslie is an LPN who works at a nursing home in a small town. She is twenty-four, single, and has two young children. She makes $40,000 a year and depends on her employment to provide for her family. She has lived in her small town her entire life, and most of her extended family lives there as well. Lately, she has become concerned with the level of care the nursing home has been providing to residents. Also, Leslie's friend who works in accounting tells her that the nursing home overbilled Medicare by $300,000 last year. She told Leslie that the administrator, who is close friends with the owner, hired an accountant friend to falsify records and prepare cost reports to avoid reimbursing Medicare for the overbilled amount. Leslie's friend suspects this practice has been going on for a few years and that the owner engages in similar practices with the other nursing homes he owns. Leslie is deeply troubled by this information, but she **[*2]** does not know how to respond. A short time later, this issue comes up during a home visit with her pastor and a deacon from her local church. The deacon, who is also a local attorney, puts her in touch with a friend who is a relator's counsel. Leslie calls the relator's counsel, and he informs her of the False Claims Act's *qui tam* provisions. The relator's counsel believes that Leslie has a good *qui tam* case with a reasonable likelihood of obtaining a significant recovery if she pursues the case. However, Leslie is uncomfortable with the fact that the case may take years to resolve, and she is concerned with the broader reputational consequences of pursuing the case. She is also concerned with the costs of litigation for which she may be liable. The relator's counsel informs her that companies exist that will provide her a degree of financial support in exchange for a percentage of her recovery. She contacts one of these companies and decides that their financial support will alleviate most of her concerns. She signs a litigation funding agreement with the company, and her relator's counsel soon files her *qui tam* case. Shortly thereafter, while discussing her decision with her mother, she

mentions that she would have walked away from the case had the financial support not been available.

The service Leslie used is commonly known today as third-party litigation funding. This funding has existed for years, but it recently received attention in the FCA community in *Ruckh v. Salus Rehab., LLC.* In *Ruckh,* the Eleventh Circuit held that a relator's assignment of a portion of the *qui tam* bounty did not negate her standing or violate the FCA.[1] *Ruckh* quickly prompted concerns that its support for litigation funding would lead to a surge in FCA cases and otherwise threatened the structure of the FCA.[2]

. . . [*3]

II. Long and Winding Roads

A. History of the False Claims Act's Qui Tam Provisions

Congress passed the FCA in 1863 during the Civil War. Though it has evolved over the years, it remains the United States primary fraud-fighting tool. The FCA tasks the Attorney General with pursuing FCA violations, but *qui tam* actions have been central to the Act since its inception. *A qui tam* action is simply a lawsuit brought by a private citizen, commonly called a "whistleblower," on behalf of the government in exchange for a share of the proceeds, or a "bounty." The FCA uses its *qui tam* provisions "to deputize an army of insiders to uncover, inform, and pursue those government contractors who knowingly cheat in their agreements with the government."

. . . [*4]

Congress amended the FCA in 1943, depriving courts of jurisdiction in cases where the government had prior knowledge of the conduct at issue and reducing the relator's bounty. Once again, *qui tam* actions became dormant until Congress revived them in 1986.

By 1986, the government's inability to effectively fight fraud solo was in the spotlight. For several years, members of Congress and the President had grown increasingly concerned with widespread fraud related to government spending. In a 1981 report to Congress, the Government Accountability Office ("GAO") analyzed over 77,000 known fraud and related cases from twenty-one federal agencies spanning a two-and-a-half-year period. It found that fraud against the government was a widespread problem that impacted every agency and every type of agency activity. GAO emphasized how widespread fraud threatens "confidence in the Government's ability to efficiently and effectively manage its programs," threatens the integrity of government programs, and can even threaten public health and safety. Agencies had weak internal controls, and managers generally lacked concern for fraud. Further, the DOJ had limited resources and "had not emphasized the civil aspects of fraud cases" in recent years. The Senate Judiciary Committee's report on the 1986 amendments echoed these concerns. As a result, Congress amended the FCA by guaranteeing the relator a role in the case even if the government intervenes, increasing the relator's bounty, guaranteeing the relator some portion of the recovery, and adding anti-retaliation provisions. Congress also modified the prior knowledge limitation, permitting *qui tam* suits based on publicly disclosed information when the relator is an original source of the information.

Congress amended the FCA two more times after 1986, first in 2009 and again in 2010. The Fraud Enforcement and Recovery Act of 2009 ("FERA") amendments broadened the scope of the FCA's anti-retaliation protections, yet left the *qui tam* provisions mostly unchanged. Two pieces of legislation **[*5]** amended the FCA in 2010: the Affordable Care Act ("ACA") and the Dodd- Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). The ACA added new limitations to the public disclosure bar for *qui tam* actions and expanded the original source exception, broadening the pool of potential relators. The Dodd-Frank Act restored an earlier definition of protected conduct in the anti-retaliation provisions and added a statute of limitations for retaliation.

Over the years, *qui tam* actions have solidified their place in FCA enforcement. The number of *qui tam* cases steadily grew beginning in 1987, and the *qui tam* share of total FCA cases surpassed the *non-qui tam* cases in 1995. *Qui tam* cases have continued to account for the majority of FCA cases since *1995* and have not dropped below 70% of total cases since 1997.29 Total recoveries show a similar trend. Since 2000, *qui tam* recoveries average 75% of total FCA recoveries, accounting for $43.7 billion of the *$58.2* billion recovered from 2000 through 2020.

. . . [*8]

III. Two Roads Converge

A. *Litigation Funding in FCA Cases*

Litigation funding recently gained the FCA spotlight in *Ruckh v. Salus Rehab., LLC.* The *Ruckh* relator had assigned a small percentage of her bounty to a third-party funder. The appellee argued that the funding arrangement was a partial reassignment of the relator's interest that violated the Constitution and the FCA and which ultimately forfeited her standing. The Eleventh Circuit disagreed, finding that the agreement did not affect the relator's standing and was not proscribed by the FCA. The court explained that *qui tam* relators are partial assignees of the United States and that a relator has standing as long as she remains an assignee of the United States and the United States has in fact suffered an injury. The *Ruckh* relator had retained a sufficient interest in the claim to maintain standing since she had assigned less than **4%** of the bounty and had retained sole authority over the litigation.

. . . [*9]

B. *Policy Perspectives*

The best approach to litigation funding agreements generally is to ask whether they are "opposed to any rule of law or public policy," and the FCA itself must provide the primary guidance on how this funding fits within FCA cases. However, contemporary treatment of champerty and maintenance can assist with the analysis insofar as it demonstrates how this funding fits within current public policy. While a full discussion of the pros and cons of litigation funding is beyond the scope of this Article, a brief survey of the various perspectives will assist the analysis by illustrating the pertinent policy considerations.

Some proponents of litigation funding point to its ability to level the playing field between often cash-strapped plaintiffs and wealthy, corporate defendants. It helps ensure "that justice, although blind, is not also a beggar." Others point to broader concepts such as duties owed by a defendant to a plaintiff and the nature of a plaintiff's right to seek redress. For example, as one scholar explained,

> "The right to seek redress was a product of the wrongdoing, and it is not clear why the right-holder cannot do what she wants with that right- destroy it, ignore it, or give it to someone else. The normative fact that gave rise to the right will not be undermined, and it is not clear why the courts should not respect the sovereignty of the right-holder to exercise unlimited control over that right."

. . .

Opponents to litigation funding continue to voice the same concerns that champerty and maintenance opponents have voiced for centuries. Yet, as discussed above, courts and scholars have recognized for at least the past hundred **[*10]** years or more that these concerns are misplaced in American society or have been adequately neutralized through other means. One common concern is that litigation funding will flood the courts with frivolous lawsuits, but sufficient checks exist today to neutralize this threat. Senator William Langer's comments from the 1943 amendment debates still apply: "I submit that before any man can recover anything for himself he must go before a court and jury. How can that be a racket?" Further, modern laws governing conduct such as abuse of process and malicious prosecution also address these concerns. Finally, from a practical economic perspective, it is unlikely that funding companies would habitually waste money on frivolous lawsuits. As with any investment, funders would likely look for cases that provide a reasonably likely return on investment. Thus, if the concern really is frivolous lawsuits, these funders play a role in ensuring that only the meritorious cases are filed.

. . . [*13]

3. FCA Principles Applied to Litigation Funding

The FCA's *qui tam* provisions are built upon the general concepts of a broad relator pool and monetary incentives. The Act began with no restrictions on who could serve as a relator. After *Marcus v. Hess,* Congress added the prior knowledge limitation. But when faced with pervasive fraud and the government's inability to fight it alone, Congress revitalized the *qui tam* provisions in 1986 and expanded the pool of relators. In 2010, Congress expanded the pool further. Since 1986, Congress has consistently sought to only further incentivize relators to come forward through increased bounties and stronger whistleblower protections. This is the FCA path into which the litigation funding path has merged.

These FCA principles are consistent with the broader principles that have motivated courts to abolish or reject laws prohibiting champerty and maintenance. Congress wants more relators to come forward, and it continues to incentivize relators to do so. Litigation funding supports that goal by mitigating the initial risks and barriers average citizens often face. Nothing in the Act suggests that **[*14]** Congress is concerned with what the relator does with the bounty. Unless facts

exist to indicate the funding agreement is somehow unscrupulous, courts should not be concerned either. To the extent questionable agreements may exist, the DOJ can assess the impact of them in the context of its existing *qui tam* case review process.
. . . [*19]

IV. Conclusion: The Roads Go Ever On

Though third-party litigation funding and the False Claims Act each have their own, unique histories and jurisprudence, they can merge smoothly. Opponents to litigation funding have reasonable concerns about the practice, but the American legal system has developed protections that already address those concerns. The FCA also has its own unique protections against FCA-specific concerns. Further, litigation funding supports Congress's goals for the FCA's *qui tam* provisions such as incentivizing whistleblowers to expose fraud against the government. To the extent concerns for litigation funding remain, the DOJ can use this article's proposed review framework to identify concerning cases and respond to them appropriately, and Congress can amend the FCA to facilitate the DOJ's review. These actions will maximize the benefits litigation funding provides to the FCA while neutralizing any residual concerns.

Footnotes

[1] Ruckh v. Salus Rehab., LLC, 963 F.3d 1089, 1101-03 (11th Cir. 2020).

[2] *See, e.g.*, Daniel Wilson, *3rd-PartyFundingRuling Opens Doorfor FCA Case Flood,* LAW360 (July 27, 2020, 10:10 PM), https://www.law360.com/articles/1295611/3rd-party-funding- ruling-opens-door-for-fca-case-flood [https://perma.cc/57ZC-FP5F]; David Jochnowitz Stephen Hasegawa, *Litigation Funding Attacks Pose Threat to FCA,* LAw360 (Aug. 21, 2020, 6:47 PM), https://www.law360.com/articles/1302641/litigation-funding-attacks-pose-threat-to-fca [https://perma.cc/EMY5-BNHR].

SOURCE 13: THE GRANSTON MEMORANDUM

January 10, 2018

TO: Attorneys
Commercial Litigation Branch, Fraud Section

FROM: Michael D. Granston
Director
Commercial Litigation Branch, Fraud Section

SUBJECT: Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)

Introduction

[*1] Over the last several years, the Department has seen record increases in *qui tam* actions filed under the False Claims Act (FCA), 31 U.S.C. 3729 et seq., with annual totals approaching or exceeding 600 new matters. Although the number of filings has increased substantially over time, the rate of intervention has remained relatively static. Even in non-intervened cases, the government expends significant resources in monitoring these cases and sometimes must produce discovery or otherwise participate. If the cases lack substantial merit, they can generate adverse decisions that affect the government's ability to enforce the FCA. Thus, when evaluating a recommendation to decline intervention in a *qui tam* action, attorneys should also consider whether the government's interests are served, in addition, by seeking dismissal pursuant to 31 U.S.C. §3730.

Historically, the Department has utilized section 3730(c)(2)(A) sparingly, in large part because the statutory text makes clear that relators can proceed with certain *qui tam* actions following the government's declination. Moreover, a decision not to intervene in a particular case may be based on factors other than merit, particularly in light of the government's limited resources.

[*2] Accordingly, we have been circumspect with the use of this tool to avoid precluding relators from pursuing potentially worthwhile matters, and to ensure that dismissal is utilized only where truly warranted.

While it is important to be judicious in utilizing section 3730(c)(2)(A), it remains an important tool to advance the government's interests, preserve limited resources, and avoid adverse precedent. The Department plays an important gatekeeper role in protecting the False Claims Act, because in *qui tam* cases where we decline to intervene, the relators largely stand in the shoes of the Attorney General. That is why the FCA provides us with the authority to dismiss cases. This memo is intended to provide a general framework for evaluating when to seek dismissal under section 3730(c)(2)(A) and to ensure a consistent approach to this issue across the Department. We reviewed those cases in which the government moved to dismiss relators pursuant to this statutory provision since 1986, when this provision was added to the FCA. As discussed below, we identified approximately seven factors that the government has relied upon in seeking to dismiss

a *qui tam* action pursuant to section 3730(c)(2)(A). To ensure consistency across the Department, these factors should serve as a basis for evaluating whether to seek to dismiss future matters, though they are not intended to constitute an exhaustive list, and there may be other reasons for concluding that the government's interests are best served by the dismissal of a *qui tam* action.[1]

Finally, as noted below, when the Department is considering dismissal, relators should be advised of this possibility since it will inform their judgment regarding whether to voluntarily dismiss their actions.

Discussion

The False Claims Act authorizes the Attorney General to dismiss a *qui tam* action over the relator's objection:

> The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the **[*3]** 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).[2] The FCA does not, however, provide a standard of review for evaluating such a request for dismissal. As a result, courts have developed two differing standards. *Compare United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998) (holding that the United States must identify a "valid government purpose" that is rationally related to dismissal) with *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003) (holding that the United States has an "unfettered right" to dismiss a *qui tam* action).

Moreover, the FCA does not set forth specific grounds for dismissal under section 3730(c)(2)(A). However, below is a non-exhaustive list of factors that the Department can use as a basis for dismissal, along with citations to cases where the government has previously sought dismissal based on these factors.

1. *Curbing Meritless Qui Tams*

The Department should consider moving to dismiss where a *qui tam* complaint is facially lacking in merit—either because relator's legal theory is inherently defective, or the relator's factual allegations are frivolous. Examples of inherent legal defects include *qui tam* actions where the relator failed to allege an actionable obligation to support a reverse false claim violation, *see, e.g.*, *United States ex rel. Hoyte v. American National Red Cross*, 518 F.3d 61 (D.C. Cir. 2008); *United States ex rel. Wright*, No. 5:03-264 (E.D. Tex. Feb. 3, 2005), or to allege a non-federal defendant that is not covered by sovereign immunity. *See, e.g., United States ex rel. Carter v. Board of Governors of the Federal Reserve, et al.*, No. 12-0129-cv-W-HFS (W.D. Mo. May 1, 2013); *United States ex rel. Casey v. Blevins*, No. 4:02-CV-60 (E.D. Ark. July 5, 2002); *Braswell v. Unger*, No. 4:14-cv-02574-JAB (D. AZ. August 11, 2015). Factually frivolous cases can take a number of forms. *See, e.g., United States ex rel. Roach v. Obama*, No. 14-0470 (D.D.C. December

18, 2014); *United States ex rel. May v. City of Dallas*, 2014 WL 5454819, at *5 (N.D. Tex. Oct. 27, 2014); *United States ex rel. Berg v. Obama*, 383 F. App'x 7 (D.C. Cir. 2010) (per curiam); *United States ex rel. Lachkovich v. Ashcroft, et al.*, No. 08-cv-00066-WYD-BNB (D. Colo. March 13, 2008).

In certain cases, even if the relator's allegations are not facially deficient, the government may conclude after completing its investigation of the relator's allegations that the case lacks merit. In such a case, the Department should consider dismissing the matter. *See United States ex rel. Nasuti v. Savage Farms, Inc.*, 2014 WL 1327015, at (D. Mass. Mar. 27, 2014), affd, 2015 **[*4]** WL 9598315 (1st Cir. 2015) (dismissing *qui tam* claims that government concluded were. "factually incorrect and without foundation."); *United States ex rel. Dreyfuse v. Farrell, et al.*, 3: 16-cv-5273 (S.D. W.Va. March 28, 2017) (granting government's motion to dismiss claims that were submitted to state agency and which did not implicate any federal programs or funds); *United States ex rel. Stierli v. Shasta Services, Inc.*, 440 F. supp. 2d 1108, 1 113 (E.D. Cal. 2006) (granting government's motion to dismiss because, among other things, there was not any false or fraudulent claim paid or approved by the federal government); *United States v. Fiske*, 968 F. Supp. 1347, 1353 (E.D. Ark. 1997) (holding that relator's allegations, even if true, do not involve the submission of any false or fraudulent claim to the federal government). These cases may be rare, in part, because to maximize its resources the government typically will investigate a *qui tam* action only to the point where it concludes that a declination is warranted. This may not equate to a conclusion that no fraud occurred. If the Department is concerned that a case lacks any merit, but elects to afford the relator an opportunity to further develop the case, the Department attorney may consider advising the relator that dismissal will be considered if the relator is unable to obtain additional support for the relator's claims by a specified date.

2. Preventing Parasitic or Opportunistic Qui Tam Actions

The Department should consider moving to dismiss a *qui tam* action that duplicates a preexisting government investigation and adds no useful information to the investigation. In these cases, the government should consider whether the relator would receive an unwarranted windfall at the expense of the public because Congress intended for the relator share to incentivize and award the provision of meaningful information and assistance instead of merely providing duplicative information already known to the government. *See* 132 Cong. Rec. 29, 322 (1986) (citing S. Rep. No. 99-345, at 28 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5293) (discussing factors relevant to awarding a relator share, including "the significance of the information provided" and whether the government was already aware of the information prior to relator providing it). For example, in *United States ex rel. Amico, et al. v. Citi Group, Inc.*, et al., No. 14-cv-4370 (CS) (S.D.N.Y. August 7, 2015), relators filed a *qui tam* action against Citi Group and its subsidiaries alleging fraud in connection with the marketing and sale of residential mortgage backed securities; however, the Department of Justice had been investigating the same conduct for several years prior to the filing and had engaged in extensive settlement negotiations before relators filed their complaint. The government successfully moved to dismiss the action under section 3730(c)(2)(A) because, among other factors, relators' belated complaint provided no assistance to the government in its pre-existing investigation. *See also United States ex rel. Piacentile v. Amgen Inc.*, No. 04-cv-3983-SJ-RML, 2013 WL 5460640, at *4 (E.D.N.Y. Sept. 30, 2013) (granting government's

motion to dismiss *qui tam* complaint filed by serial relator who filed one of ten qui tams alleging similar wrongdoing by the same defendant).

3. Preventing Interference with Agency Policies and Programs

Dismissal should be considered where an agency has determined that a *qui tam* action threatens to interfere with an agency's policies or the administration of its programs and has recommended dismissal to avoid these effects. For example, in *United States ex rel. Ridenour v. Kaiser-Hill Co., LLC*, 397 F.3d 925 (10th Cir. 2005), relator alleged that a security contractor submitted false claims to the Department of Energy for deficient security services at Rocky Flats, a **[*5]** radiologically-contaminated nuclear weapons manufacturing facility that was slated to undergo decontamination and closure. The government successfully moved to dismiss the action because, among other things, litigation would delay the clean-up and closure of the facility by diverting agency personnel and resources away from the project. 397 F.3d at 937; *see also United States ex rel. Sequoia Orange Co.*, 151 F.3d at 1146 (concluding that valid government interests supporting dismissal included the Department of Agriculture's desire to "end the divisiveness in the citrus industry" by promulgating new citrus marketing regulations to replace invalidated regulations upon which the relator based its claims); *United States ex rel. Toomer v. TerraPower*, No. 4:16-cv-00226-BLW (D. Idaho) (Under Seal) (seeking dismissal of allegation that defendant's invention constituted government property, based in part on the concern that this allegation would hinder the Energy Department's ability to collaborate with private sector partners). Finally, there may be instances where an action is both lacking in merit and raises the risk of significant economic harm that could cause a critical supplier to exit the government program or industry. *Cf. United States ex rel. Harmon v. Trinity Indus., Inc.*, 872 F.3d 645 (5th Cir. 2017) (reversing $680 million judgment against highway guardrail manufacturer based on alleged manufacturing defects that agency concluded did not affect eligibility of defendant's claims).

4. Controlling Litigation Brought on Behalf of the United States

Relatedly, the Department should consider dismissing cases when necessary to protect the Department's litigation prerogatives. For example, in *In Re Natural Gas Royalties Qui Tam Litigation*, MDL Docket No. 1293 (D. Wyo. October 9, 2002), relator filed separate *qui tam* actions in various districts against more than 300 defendants accused of underpaying royalties owed to the United States in connection with natural gas produced from federal lands. After intervening as to a limited number of defendants, the government sought to dismiss certain declined claims to, among other things, avoid interference with the government's ability to litigate the intervened claims. The court agreed, finding that the interest in avoiding interference with ongoing litigation warranted dismissal of the declined claims. *See also Lion Raisins v. Kagawa, et al.*, No. CV-F-02-5665-REC-LJO (E.D. Cal. Nov. 3, 2003) (granting government's motion to dismiss, concluding that government's desire to avoid interference with pending Federal Torts Claims Act action involving the same parties was a valid government purpose that was rationally related to dismissal). In addition, in *United States ex rel. Wright v. Agip Petroleum Co.*, No. 5:03-264 (E.D. Tex. Feb. 3, 2005), the government moved to dismiss, in part, to avoid the risk of

unfavorable precedent. *See id.* Finally, in *United States ex rel. Piacentile*, 2013 WL 5460640, the government moved to dismiss a declined claim that was serving as an obstacle to the settlement of the government's intervened claims. *But cf United States ex rel. Schweizer v. Oce*, 677 F.3d 1228 (D.C. Cir. 2012) (once the government reaches a settlement with defendant of relator's claims, the dismissal of those claims is governed by section 3730(c)(2)(B), requiring a showing that the settlement is fair, adequate, and reasonable, rather than by section 3730(c)(2)(A)).
[*6]

5. Safeguarding Classified Information and National Security Interests

In certain cases, particularly those involving intelligence agencies or military procurement contracts, we should seek dismissal to safeguard classified information. For example, in *United States ex rel. Fay v. Northrup Grumman corp.*, No. 06-cv-00581-EWN-MJW, 2008 WL 877180 (D. Colo. Mar. 27, 2008), the relator alleged that a defense contractor defrauded the United States in connection with work performed on a classified contract. After declining to intervene, the Department moved to dismiss the action under section 3730(c)(2)(A), asserting that continued litigation would pose "an unacceptable risk to national security" due to the potential for disclosure of classified information. Applying the *Sequoia Orang*e standard, the Court agreed, concluding that the claims and defenses were inextricably tied to classified information and dismissal was rationally related to the valid government interest of preventing the disclosure of such information. *Id.* at * 6-7. *See also United States ex rel. Matseki v. Raytheon Co.*, 634 F. App'x 192 (9th Cir. 2015) (per curiam) (holding that government interest in avoiding disclosure of classified information was sufficient basis for dismissal); *United States ex rel. Schwartz v. Raytheon Co.*, 150 F. App'x 627 (9th Cir. 2005) (holding that "federal interest in protecting military and state secrets" was valid basis for dismissal); *United States ex rel. Ridenour*, 397 F.3d at 936-37 ("The Government demonstrated that classified documents required in the litigation would present a risk of inadvertent disclosure, implicating national security."). Finally, it should be noted that the government need not demonstrate that continued litigation will result in the disclosure of classified information. In jurisdictions that apply the "rational basis" basis test, the government has a strong argument that the risk of disclosure, alone, justifies dismissal. *See United States ex rel. Ridenour*, 397 F.3d at 937 (finding risk of inadvertent disclosure of classified information, "even if theoretically minimal," sufficed to justify dismissal). (In jurisdictions that apply the "unfettered right" standard, no showing by the government is required.)

6. Preserving Government Resources

The Department should also consider dismissal under section 3730(c)(2)(A) when the government's expected costs are likely to exceed any expected gain.[3] *See, e.g., Swift v. United States*, 318 F.3d 250, 251 (D.C. Cir. 2003) (the government moved to dismiss the complaint, arguing that the amount of money involved did not justify the expense of litigation even if the allegations could be proven); *United States ex rel. Nicholson v. Spigelman, et al.*, No. 1:10 cv03361, 2011 WL 2683161, at *2 (N.D. Ill. July 8, 2011) (explaining that the estimated government losses, even with statutory penalties and damages multiplier, were less than the costs of monitoring the litigation and responding to discovery requests) Examples of potential costs may include, among other things, the need to monitor or participate in ongoing litigation, including

responding to discovery requests. *See, e.g., United States ex rel. Sequoia Orange Co.*, 151 F.3d at 1146 (holding that district court "properly noted that the government can legitimately consider the burden imposed on taxpayers by its litigation, and that, even if the relators were to litigate the FCA claims, the government would continue to incur enormous internal staff costs"); *United States ex rel. Levine v. Avnet, Inc.*, No. 2: 14-cv-17-WOB-CJS, 2015 WL 42359 (E.D. Ky. **[*7]** Apr. 1, 2015) (holding that dismissal of *qui tam* complaint "will further [the government's] interest in preserving scare resources" that would otherwise be spent "monitoring [relator' s] action"). In some cases, the government may also be liable for the defendant's litigation costs if the defendant prevails in the action. *See, e.g.*, FAR {31.205-47(c).

7. *Addressing Egregious Procedural Errors*

The Department may also seek dismissal of a *qui tam* action pursuant to section 3730(c)(2)(A) based on problems with the relator's action that frustrate the government's efforts to conduct a proper investigation. For example, in *United States ex rel. Surdovel v. Digirad Imaging Solutions*, No. 07-cv-0458, 2013 WL 6178987 (E.D. Pa. Nov. 25, 2013), the relator ignored repeated requests from the Office of the U.S. Attorney to serve the *qui tam* complaint and disclose material facts as required by 31 U.S.C. 3730(b). The Court granted the government's motion to dismiss the action because the "egregious procedural errors completely frustrated the government's ability to investigate the relator's claims." *Id.* at *4. *But State Farm Fire and Cas. Co. v. United States ex rel. Rigsby*, — U.S. —, 137 S.Ct. 436, 440 (2016) (holding that relators' violation of FCA's seal requirement did not mandate automatic dismissal of relators' complaint).

Several additional points are in order with respect to the use of the government's dismissal authority under section 3730(c)(2)(A). First, while the Department's position has been that the appropriate standard for dismissal under section 3730(c)(2)(A) is the "unfettered" discretion standard adopted by the D.C. Circuit rather than the "rational basis" test adopted by the 9th and 10th Circuits, we should argue that even the latter standard was intended to be a highly deferential one. Moreover, in those jurisdictions where the standard remains unresolved, in many cases the prudent course may be to identify the government's basis for dismissal and to argue that it satisfies any potential standard for dismissal under section 3730(c)(2)(A).

Second, the factors identified above are not mutually exclusive, and the Department has often relied on multiple grounds for dismissal (for example, lack of merit and need to safeguard classified information). Nor, as noted above, are the factors identified in this memorandum intended to constitute an exhaustive list—there may be other reasons for concluding that the government's interests are best served by the dismissal of a *qui tam* action.

Third, in some cases there may be alternative grounds for seeking dismissal other than section 3730(c)(2)(A), such as the first to file bar, the public disclosure bar, the tax bar, the bar on pro se relators, or Federal Rule of Civil Procedure 9(b). Although the Department has sometimes moved to dismiss on these grounds under section 3730(c)(2)(A), we believe the better approach is to assert these grounds separately since they can provide alternative, independent legal bases for dismissal. It may sometimes be appropriate, however, to move for dismissal under section 3730(c)(2)(A) in the alternative based on one or more for the factors listed above.

[*8] Fourth, section 3730(c)(2)(A) does not require the government "to proceed in an all or nothing manner." *See Juliano v. Fed. Asset Disposition Ass'n*, 736 F. Supp. 348, 351—53 (D.D.C. 1990) ("The [FCA] nowhere states that federal prosecutors are confined to proceed in an all or nothing manner, being forced to take or leave the *qui tam* plaintiffs charges wholesale."). In certain situations, it may be appropriate to seek only partial dismissal of some defendants or claims. *See id.* (granting motion for partial dismissal under 3730(c)(2)(A)); *United States ex rel. Grober v. Summit Medical Group, Inc.*, No. 02-177-C (W.D. Ky. July 9, 2004).

Fifth, where a *qui tam* case is a potential candidate for dismissal, Department attorneys should consult closely with the affected agency as to whether dismissal is warranted under any of the factors set forth in this guidance. The agency's recommendation should be obtained in advance of the filing of any request to dismiss. In cases where dismissal under section 3730(c)(2)(A) is opposed by the agency (because, for example, it would require the government to disclose sensitive information or could result in other collateral consequences), there may be alternative ways to address the deficiencies while accommodating the agency's desire to forego seeking dismissal. For example, if the agency views the alleged falsity as immaterial, the United States can provide an agency declaration to that effect. *See Trinity*, 872 F.3d at 664 (holding that district court erred in concluding alleged falsity was material to agency despite agency memorandum stating that there was "an unbroken chain of eligibility for Federal reimbursement" for the allegedly defective product at issue).

Sixth, although a motion to dismiss under section 3730(c)(2)(A) will often be filed at or near the time of declination, there may be cases where dismissal is warranted at a later stage, particularly when there has been a significant intervening change in the law or evidentiary record. However, if one waits until the close of discovery or trial, there is a risk that the court may be less receptive to the request given the expenditure of resources by the court and parties. The court may also be less receptive to a motion filed at a later stage when doing so undercuts a claimed desire to avoid or reduce costs associated with discovery or safeguard information in discovery. Attorneys considering dismissal should therefore allow for sufficient time to consult with the affected agency and, in delegated cases, to provide appropriate notice to the Fraud Section

Finally, attorneys planning to recommend declination or dismissal should, to the extent possible, consider advising relators of perceived deficiencies in their cases as well as the prospect of dismissal so that relators may make an informed decision regarding whether to proceed with the action. In many cases, relators may choose to voluntarily dismiss their actions, particularly if the government has advised the relator that it is considering seeking dismissal under section 3730(c)(2)(A).[4]

Footnotes

[1] In jointly handled and monitored cases, the prior approval of the Assistant Attorney General is required for a motion to dismiss a *qui tam* action, including under section 3730(c)(2)(A). In delegated cases, the authority for dismissing a *qui tam* complaint will generally be vested in the U.S. Attorney unless dismissal would present a novel issue of law or policy, or for any other reason raises issues that should receive the personal attention of the Assistant Attorney General. *See* Civil Division Directive 1-15, Subpart 1 (e). In order to maintain consistency and evaluate the appropriateness of Assistant Attorney General approval, U.S. Attorneys' Offices should provide notice to the assigned Fraud Section attorney at least 10 days prior to filing any motion to dismiss in a delegated matter. In addition, for reporting purposes, the Department will collect information on an annual basis regarding the number of *qui tam*

complaints dismissed upon motion by the United States. The Fraud Section will work with the Executive Office of United States Attorneys to formulate a reporting mechanism.

[2] This is just one of several mechanisms contained in the FCA to ensure that the United States retains substantial control over lawsuits brought on its behalf. *See also* 31 U.S.C. § 3730(c)(1) (providing government with "the primary responsibility for prosecuting the action" when it intervenes); 31 U.S.C. 3730(c)(2)(B) (allowing government to settle actions over relator's objections); 31 U.S.C. 3730(c)(2)(C) (providing government with mechanism to restrict relator's participation in the case); 31 US.C. 3730(b)(1) (requiring relator to obtain government consent prior to any dismissal of the action).

[3] Cost to the government includes the opportunity cost of expending resources on other matters with a higher and/or more certain recovery.

[4] Since January 1, 2012, more than 700 *qui tam* actions have been dismissed by relators after the government elected not to intervene. The frequency with which relators voluntarily dismiss declined *qui tam* actions has significantly reduced the number of cases where the government might otherwise have considered seeking dismissal pursuant to section 3730(c)(2)(A).

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Jennifer Harchut

DOJ Blows the Whistle on Professional Whistleblowers: But the Circuits Are Split on Whether Dismissal Will be *Swift*

[*419]

I. WHEN THE DOJ BLOWS THE WHISTLE, WILL ITS CALL BE SUBJECT TO FURTHER REVIEW?: INTRODUCTION

In 2018, the United States Department of Justice (DOJ) began to more aggressively assert itself as the ultimate referee for articulating justice in cases brought by whistleblowers under the federal False Claims Act (FCA). This development has drastic implications for the enforcement of the FCA, pursuant to which the DOJ recovered over $2.8 billion in 2018 alone and over $59 billion since 1986 when Congress significantly strengthened the FCA.[3] At stake is whether the Executive Branch can exercise its historical prerogative to decide which cases to take forward in the name of the United States, or whether whistleblowers, who may not always **[*420]** act in the public's best interest, can convince the Judicial Branch to second-guess the DOJ's decisions to dismiss.

The FCA imposes penalties for the submission of false claims to the United States government and allows private parties, called relators (i.e., whistleblowers), to sue for violations of the FCA on behalf of the government.[5] In an FCA case filed by a relator-known as a *qui tam* action-the government can choose to take over the litigation by intervening.[6] If the government declines to intervene in the case, the relator can proceed with the action on behalf of the United States.[7] Nonetheless, under section 3730(c) (2) (A) of the FCA, the government has statutory authority to dismiss the *qui tam* action, even if the relator objects.[8]

There remains a long-standing federal circuit split with regard to the standard governing DOJ requests to dismiss FCA cases. The courts are **[*421]** divided over whether the statute gives the government an "unfettered right" to unilaterally dismiss *qui tam* actions, as the D.C. Circuit found in *Swift v. United States,* or whether the DOJ must show that dismissal serves a valid government purpose, as the Ninth Circuit required in *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.* In the fifteen years following the emergence of the circuit split in 2003, the issue of which standard to apply received little attention because, until recently, the DOJ rarely used its authority to dismiss a *qui tam* case if the relator objected. In 2018, however, the issue took on much greater significance when Michael Granston, Director of the DOJ's Commercial Litigation Branch, Fraud Section, issued a memorandum (the Granston Memo) suggesting that, when deciding whether to decline intervention in *qui tam* cases, DOJ attorneys should also evaluate whether to seek dismissal. In his memo, Granston pointed out that "[o]ver the last several years, the Department has seen record increases in *qui tam* actions." In order to reduce the burdens

imposed on the government by so many new cases and to guard against adverse decisions that could hinder the DOJ's ability to enforce the FCA, Granston encouraged DOJ attorneys to consider whether the government's interests would be better served by seeking dismissal of FCA cases over relators' objections, when appropriate.

[*422] Spurred on by Granston's encouragement, the DOJ significantly increased its filings of motions to dismiss *qui tam* actions in 2018 and 2019. Several recent district court decisions, which have reached divergent results, demonstrate that the post-Granston Memo dismissals are magnifying the long-standing split and will soon force federal circuit courts or the U.S. Supreme Court to clarify the controlling standard. In numerous cases that the DOJ recently moved to dismiss, billions of dollars were at stake as healthcare company defendants faced off against "professional relators" represented by some of the most prominent attorneys in the United States.[18] If professional relators can persuade courts to second-guess DOJ decisions to dismiss by requiring the DOJ to prove that a **[*423]** dismissal serves a valid government purpose, then serious constitutional and public policy issues will be at stake.

This Comment advocates for courts to follow the approach taken by the D.C. Circuit in *Swift,* which provides the DOJ an "unfettered right" to dismiss FCA actions, because (1) in order to uphold the constitutionality of the FCA's *qui tam* provisions, courts must not interfere with the Executive Branch's "historical prerogative to decide which cases should go forward in the name of the United States" and (2) for public policy reasons, the DOJ should be allowed to exercise its discretion to dismiss FCA claims in order to rein in overreach by professional relators. Part II of this Comment reviews the relevant history of *qui tam* enforcement and the FCA, explains how the FCA works today, details the split between courts following the standards set forth in the *Sequoia* and *Swift* decisions, and explores the effects of the Granston Memo. Part III discusses the recent wave of cases that exacerbated the split between the circuits, pointing out that many of these cases have been brought by professional relators backed by investors and former Wall Street investment bankers. Part IV analyzes the problems with the *Sequoia* standard and advocates for courts to adopt the Swift standard instead in order to uphold the constitutionality of the FCA and further public policy interests. Finally, Part V discusses the adverse impact that will result if courts do not follow the Swift standard for DOJ dismissals.

II. THE RULES, THE PARTICIPANTS AND PRIOR GAMES: BACKGROUND ON *QUI TAM* ENFORCEMENT

The history of *qui tam* enforcement in England and of the FCA in the United States provides valuable lessons for understanding how *qui tam* litigation has evolved to become so significant today. After discussing that history and explaining how the current FCA statute works, this Part then examines the circuit court split regarding what standard courts should apply when reviewing DOJ motions to dismiss. That split has taken on much greater importance since 2018 when the DOJ began dismissing more and more *qui tam* cases in the wake of the Granston Memo. **[*424]**

A. Players Helping the Referees: A Brief History of Qui Tam Enforcement in England

Qui tam enforcement originated in English law around the end of the thirteenth century.[25] *Qui tam* actions allowed private individuals to bring suits "in the royal courts on both their own and the

Crown's behalf." Initially, English courts allowed for *qui tam* actions through common law, but later included the right in statutory provisions. "One type of statute, appropriately named informer statutes, allowed informers to obtain a portion of the penalty dealt as a reward for [providing] their information, even if they themselves suffered no injury." Eventually, on account of rampant abuse of the statutes by predatory and professional relators, informer statutes as a basis for *qui tam* actions generated significant opposition. Members of the English Parliament were disturbed by the pernicious effects of *qui tam* enforcement, "including extortion of secret settlements, fraudulent accusations, and unrestrained pursuit of defendants for minor offenses." Consequently, in 1951, Parliament passed the Common Informers Act and abolished *qui tam* actions in England entirely.

[*425]

B. *The Playing Field Then and Now: A Brief History of the FCA in the United States*

While *qui tam* enforcement was never as widespread in the United States as it once was in England, "[e]arly American Congresses continued the English practice by enacting a few *qui tam* statutes." Although a few *qui tam* provisions have survived to this day, "only the False Claims Act has generated a large number of federal *qui tam* cases." Congress enacted the FCA-sometimes referred to as Lincoln's Law-during the Civil War in 1863 to prevent private contractors from defrauding the Union Army through practices such as selling sawdust instead of gun powder. To counter such fraudulent activities, the FCA prohibits the submission of false claims to the government and allows private individuals-also known as relators-to bring *qui tam* actions to enforce the law.

The FCA *qui tam* provisions were rarely used until World War II, when relators began abusing the statute after "someone discovered a loop- hole that allowed an individual to bring a *qui tam* action based on information the government already had and was actively prosecuting." With the emerging prominence of these "parasitic" cases, Congress amended **[*426]** the FCA in 1943 to prevent such suits by prohibiting *qui tam* actions brought on the basis of publicly available information.[37] Additionally, the amended FCA reduced the potential reward that relators could receive and allowed the government to choose to intervene and take over *qui tam* suits.

The 1943 amendments produced a chilling effect on *qui tam* litigation that would last for the next forty years. In 1986, however, Congress again amended the FCA to strengthen *qui tam* enforcement incentives because of a "growing ... concern about defense-procurement fraud." The 1986 amendments enhanced the rewards for relators by increasing penalties on defendants and by raising the relators' percentage share in the ultimate settlement or judgment. In addition, the amendments significantly increased the government's control over *qui tam* actions.

Since the 1986 amendments, *qui tam* filings have increased dramatically and now account for a large percentage of all FCA cases. More- **[*427]** over, following the 1986 amendments, $42 billion of the $59 billion recovered under the FCA resulted from *qui tam* actions filed by whistleblowers. 44 In 2018 alone, relators filed 645 *qui tam* actions and the DOJ "recovered over $2.1 billion in these and earlier filed suits."[45]

C. *Playing by the Rules: How the FCA Works*

Under 31 U.S.C. § 3730, an FCA action may be commenced by either: (1) the government itself bringing a civil action[46] or (2) a relator bringing a *qui tam* action.[47] If a relator initiates the FCA case, the complaint is not immediately served on the defendant.[48] Instead, the relator's complaint is under seal for at least sixty days, which allows the government to investigate the claim and determine whether to intervene.[49] If the government intervenes, the relator can receive 15%-25% of the proceeds of the litigation or settlement.[50] If the government declines to intervene, the relator may proceed with the prosecution on behalf of the United States and receive **[*428]** 25%-30% of any award.[51] Nevertheless, even when the government declines to intervene, the DOJ retains significant rights in the litigation.

Notably, pursuant to 31 U.S.C. § 3730(c) (2) (A), the DOJ has the right to dismiss a *qui tam* case even if the relator objects, as long as the government notifies the relator of the filing of its motion to dismiss and the court provides the relator with an opportunity for a hearing on the motion.[53] Unfortunately, the FCA does not provide a standard of review for evaluating government dismissals.[54] In the absence of specific statutory guidance, courts have adopted two different standards for review. The Ninth Circuit and the Tenth Circuit, along with numerous district **[*429]** courts, have adopted a rational relation test. On the other hand, the D.C. Circuit and several district courts have held that the DOJ has an "unfettered right" to dismiss *qui tam* actions.

. . . [*440]

III. OVERRULING THE REFS: NARRATIVE ANALYSIS OF RECENT, UNPRECEDENTED CASES CHALLENGING DOJ DISMISSALS

As illustrated by *Ridenour,* the *Sequoia* rational relation test is not a high bar. Thus, in the past, the standard that courts applied did not particularly matter because the government's motions to dismiss were al- ways gran ted. The DOJ's winning streak ended, however, in the 2018 **[*441]** Northern District of California case *United States ex rel. Thrower v. Academy Mortgage Corp.,* in which Judge Edward Chen denied the government's motion to dismiss.114 In *Thrower,* as well as in a recent case filed by a professional relator, *United States ex rel. CIMZNHCA v. UCB, Inc.,* district courts second-guessed DOJ decisions to seek dismissal of *qui tam* actions. These unprecedented court challenges to DOJ dismissal authority are particularly significant in light of numerous cases recently filed by professional relators, including *CIMZNHCA,* which severely test the government's ability to rein in *qui tam* cases that may not be in the public's best interest.

. . . [*444]

IV. RETAINING THE REF'S POWER: *SWIFT* SHOULD BE APPLIED TO UPHOLD THE FCA'S CONSTITUTIONALITY AND FURTHER PUBLIC POLICY INTERESTS

As demonstrated by the courts in *Thrower* and *CIMZNHCA,* some federal judges have interpreted *Sequoia* to expand judicial scrutiny of the DOJ's dismissal authority by requiring the government to show that it "fully investigated" the relator's allegations and conducted an adequate cost-benefit analysis. Such an interpretation is unconstitutional because it violates the separation of powers

principles embedded in Article II of the Constitution, which provides that *the Executive Branch,* not the Judicial Branch, "shall take Care that the Laws be faithfully executed." Moreover, allowing courts to second-guess DOJ decisions to dismiss would undermine the government's ability to terminate *qui tam* cases that are not in the public's best interest.

A. Constitutional Analysis

Throughout the years, federal circuit courts have upheld the constitutionality of *qui tam* provisions against Article II challenges because the provisions "accord the executive 'sufficient control' over the independent litigants ... to 'ensure that the President is able to perform his constitutionally **[*445]** assigned duties.'" Specifically, these cases have pointed to the provisions in the FCA that provide the government with the "ultimate discretion to take control of the case from a relator and prosecute the case on its own, or ... to dismiss the case entirely." For example, in finding that the FCA's *qui tam* provisions did not unconstitutionally infringe upon the Executive Branch's power to conduct litigation on behalf of the United States, the Fifth Circuit in *Riley* relied upon the fact that the record in the case was "devoid of any showing that the government's ability to exercise its authority has been thwarted in cases where it was not an intervenor." The recent cases permitting courts to second-guess DOJ decisions to dismiss *qui tam* actions have clearly taken away the government's "ultimate discretion" to dismiss, and in at least two cases so far, thwarted the government's ability to exercise its authority. The dissent in *Riley* opined that Article II is violated even when a relator is allowed to proceed after the government has merely declined intervention, noting that "[t]he requirement that the government obtain court permission to dismiss a *qui tam* suit raises serious questions regarding the balance of power between the Executive and Judicial Branches." Consistent with the *Riley* dissent's **[*446]** separation-of-powers concerns, the recent cases denying the government's motions to dismiss allow "unaccountable, self-interested relators [to be] ... put in charge of vindicating government rights," thereby undermining the Executive Branch's ability to perform its constitutional duties.

Moreover, 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." For many reasons, courts have found that executive agency decisions are generally unsuitable for judicial review. Consequently, the Supreme Court has emphasized that the Executive Branch is "far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." Therefore, in order to avoid infringing upon the Executive Branch's prerogative to decide which cases to take forward in the name of the United States, courts should follow the *Swift* unfettered right approach. **[*447]**

B. Public Policy Considerations

The *Swift* approach should also be followed for public policy reasons because it enables the DOJ to exercise its discretion in order to rein in overreach by professional relators. *Qui tam* litigation is fundamentally flawed because it is rife with inherent conflicts of interest. As one commentator notes, "[b]y offering the successful informer a bounty, *qui tam* legislation provides a personal financial interest in the law enforcement process that often conflicts with other public interests at stake in the litigation." The conflict of interest present for relators generally will be greatly

exacerbated if FCA cases can be litigated by well-financed professional relators who promise substantial investor returns and who use false pretenses to obtain information from witnesses. To avoid compounding the conflict of interest inherent in *qui tam* litigation by permit- ting professional relators to prosecute cases in the name of the United States, the DOJ should be permitted "unfettered discretion" to dismiss the lawsuits it deems not to serve the public interest. **[*448]**

V. The Game Isn't Over Till The Final Whistle Blows: The Impact of Not Allowing DOJ Dismissals to be *Swift*

Allowing relators to proceed over the DOJ's objection has severe con- sequences for the government, the courts, and defendants. In particular, if professional relators backed by Wall Street investors can challenge every DOJ decision to dismiss, the burden of thoroughly investigating each case, preparing a detailed cost/benefit analysis, and convincing a judge that the dismissal decision is rationally related to a valid government purpose may discourage the DOJ from exercising its dismissal authority in non-meritorious cases that are not in the public interest. This in turn could lead to financially ruinous results for defendants.

Further, broad public policy concerns arise if professional relators are permitted to proceed alone in targeting healthcare providers and other defendants to extract huge settlements under threat of enormous FCA liability. For example, access to healthcare and medically necessary drugs could be curtailed if providers are financially ruined by the costs associated with defending and settling non-meritorious FCA lawsuits. With **[*449]** the increase in the number of *qui tam* cases filed, particularly those by professional relators, the importance of the DOJ being able to use its section 3730(c)(2)(A) authority and dismiss cases not in the public interest is greatly amplified. In order to avoid violating the Take Care Clause of the Constitution, to uphold the prosecutorial discretion afforded to the Executive Branch, and to prevent self-interested professional relators from proceeding with cases that are not in the public interest, the *Swift* unfettered right approach should be the uniform standard for courts to use when reviewing DOJ motions to dismiss.

Footnotes

[3] *See* Press Release, Dep't of Justice, Justice Dep't Recovers over $2.8 Billion from False Claims Act Cases in Fiscal Year 2018 (Dec. 21, 2018), https:// www.justice.gov/opa/pr/justice-department-recovers-over-28-billion-false-claims- act-cases-fiscal-year-2018 [https://perma.cc/ZQL9-Q2W3] ("Of the $2.8 billion in settlements and judgments recovered by the Department of Justice this past fiscal year, $2.5 billion involved the health care industry, including drug and medical device manufacturers, managed care providers, hospitals, pharmacies, hospice organizations, laboratories, and physicians.").

[5] *See* 31 U.S.C. § 3730(b) (1) (2018) (granting authority to private persons to bring civil actions for false claims "in the name of the Government").

[6] *See id.* § 3730(b) (2) (granting the government authority to take over the case and explaining that the complaint remains under seal for at least sixty days while the government considers whether to intervene).

[7] *See id.* § 3730(c) (3) (providing that the government, upon its request, "shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense)"); *see*

also Memorandum from Michael Granston, U.S. Dep't of Justice, Dir. Commercial Litig. Branch, Fraud Section, to Attorneys, Commercial Litig. Branch, Fraud Section & Assistant U.S. Attorneys Handling False Claims Act Cases, Offices of the U.S. Attorneys, *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)*, at 8 n.5 (Jan. 10, 2018), https://assets.documentcloud.org/documents/4358602/Memo- for-Evaluating-Dismissal-Pursuant-to-31-U-S.pdf [https://perma.cc/NH8Q-WN8C] [hereinafter Granston Memo] (noting that since January 1, 2012, *qui tam* relators have voluntarily dismissed more than 700 cases after the government declined to intervene). "The frequency with which relators voluntarily dismiss declined *qui tam* actions has significantly reduced the number of cases where the government might otherwise have considered seeking dismissal pursuant to section 3730(c) (2) (A)." *Id.*; *see also* Michael Volkov, *False Claims Act 2018 Year in Review Making Sense of the DOJ Fraud Statistics*, JDSUPRA (Jan. 21, 2019), https:// wwwjdsupra.com/legalnews/false-claims-act-2018-year-in-review-62368/ [https:// perma.cc/2GVQ-AKJK] ("In 2018, recoveries from *qui tam* actions in which the government declined intervention constituted only 4% of total recoveries, which is more consistent with prior years."); U.S. CHAMBER INST. FOR LEGAL REFORM, FIXING THE FALSE CLAIMS ACT: THE CASE FOR COMPLIANCE-FOCUSED REFORMS 7 (2013), https://www.instituteforlegalreform.com/uploads/sites/1/Fix-ingTheFCAPagesWeb.pdf [https://perma.cc/3YML-F8BS] (explaining that "DOJ intervention is almost always an accurate predictor of the ultimate success of the case").

[8] *See* 31 U.S.C. § 3730(c) (2) (A) (2018) (providing that the government may dismiss the *qui tam* case if the government has notified the relator of the filing of its motion to dismiss and "the court has provided the [relator] with an opportunity for a hearing on the motion").

[18] *See* P. David Yates, *DOJ: A Company Created to File Lawsuits Has Wasted 1,500 Hours of the Government's Time,* FORBES (Dec. 19, 2018, 6:02 AM), https:// www.forbes.com/sites/legalnewsline/2018/12/19/doj-a-company-created-to-file- lawsuits-has-wasted-1500-hours-of-the-governments-time/ [https://perma.cc/ X7DP-VYXJ] (discussing prominent lawyers representing professional relators- i.e., limited liability companies that were created to file FCA *qui tam* claims); Health Choice All., LLC *ex rel.* United States v. Eli Lilly & Co., No. 5:17-CV-123- RWS-CMC, 2019 WL 2520165 (E.D. Tex. May 16, 2019), *report and recommendation adopted as modified,* No. 5:17-CV-00123-RWS-CMC, 2019 WL 4727422 (E.D. Tex. Sept. 27, 2019), *appeal docketed,* No. 19-40906 (5th Cir. Oct. 29, 2019) (*qui tam* case filed against pharmaceutical companies by prominent attorneys representing limited liability company). Health Choice Group, LLC, is a limited liability company established by National Health Care Analysis Group (NHCA), which is "a pseudonym for a partnership comprised of limited liability companies set up by investors and former Wall Street investment bankers." *See* United States' Motion to Dismiss Relator's Second Amended Complaint at 2, United States *ex rel.* Health Choice Group, LLC v. Bayer Corp., No. 5:17-CV-126-RWS-CMC (E.D. Tex. Dec. 17, 2018). In addition to the *Bayer and Eli Lilly* cases, NHCA also filed eleven complaints against a total of thirty-eight different defendants. *See id.* (listing ten complaints filed by NHCA entities); *see also* Reply Memorandum of Law in Support of United States' Motion to Dismiss Relator's First Amended Complaint at 1 n.1, United States *ex rel.* NHCA-TEX, LLC v. TEVA Pharma. Prods. Ltd., No. 17-2040 (E.D. Pa. Feb. 18, 2019) (citing an additional complaint filed by NHCA). For a discussion of the recent cases filed by professional relator NHCA, see *infra* notes 123-124 and
accompanying text.

[25] *See* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 774 (2000) (explaining the origination, form, and purpose of *qui tam* actions in England). The Latin phrase *qui tam* is an abbreviation for *"qui tam pro domino rege quam pro se ipso in hac partesequitur,* which means 'who pursues this action on our Lord the King's behalf as well as his own."' *Id.* at 768 n.1 (quoting 3 W. BLACKSTONE, COMMENTARIES *160).

[37] *See* 31 U.S.C. § 3730(e)(4)(A) (2018) ("No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative or Government Accounting Office report, hearing, audit or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information."); *see also* Richard A. Bales, *A Constitutional Defense of Qui Tam,* 2001 Wis. L. REV. 381, 389-90 (2001) (stating that the 1943 amendments "all but eliminated the use of the FCA *qui tam*"); Gregory G. Brooker, *The False Claims Act: Congress Giveth and the Courts Taketh Away,* 25 HAMLINE L. REV. 373, 378 (2002) (explaining that "Congress came close . . . to barring all *qui tam* actions under the FCA"); *see also* Sharon Finegan, *The False Claims Act and Corporate Criminal Liability: Qui Tam Actions, Corporate Integrity Agreements and the Overlap of Criminal and Civil Law,* 111 PENN ST. L. REV. 625, 642 (2007) ("Following these amendments, fewer actions were brought under the FCA and its *qui tam* provisions were used infrequently until 1986.").

[45] Press Release, Dep't of Justice, *supra* note 3 (discussing the increase in *qui tam* lawsuits filed after the 1986 FCA amendments).

[46] *See* 31 U.S.C. § 3730(a) (2018) ("The Attorney General diligently shall investigate a violation under [the FCA]. If the Attorney General finds that a person has violated or is violating [the FCA], the Attorney General may bring a civil action under this section against the person.").

[47] *See id.* § 3730(b) (1) ("A person may bring a civil action for a violation of [the FCA] for the person and for the United States Government. The action shall be brought in the name of the Government.").

[48] *See id.* § 3730(b) (2) ("A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d) (4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.").

[49] *See id.* (explaining the steps that must occur before the defendant can be served with a complaint). Determining whether to intervene means deciding whether the government will "proceed with the action, in which case the action shall be conducted by the Government; or . . . decline[] to take over the action, in which case the person bringing the action shall have the right to conduct the action." *Id.* § 3730(b) (4) (A)-(B).

[50] *See id.* § 3730(d) (1) (providing that the percentage the relator receives "depend[s] upon the extent to which the [relator] substantially contributed to the prosecution of the action"). *See generally* Cox, *supra* note 34 ("The Department takes over-or 'intervenes' in-about 20% of the cases that are filed.").

[51] *See 31* U.S.C. §§ 3730(b)(2), (b)(4) (B) (2018) (stating that, if the government declines to intervene, then the relator may proceed with the action); *Id.* § 3730(d) (2) (stating the percentage amount the relator shall receive if the action is settled or a judgment is returned against the defendant). Under both sections 3730(d) (1) and 3730(d) (2), the relator can also "receive an amount for reason- able expenses which the court finds to have been necessarily incurred, plus reason- able attorneys' fees and costs." *Id.* §§ 3730(d) (1), (d) (2) (describing possible awards for *qui tam* plaintiffs).

[53] *See* 31 U.S.C. § 3730(c) (2) (A) (2018) ("The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person 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.").

SOURCE 15: Law360 Article

July 28, 2021, 5:21PM EDT

Tide Is Turning Against FCA Case Dismissals

Michael Podberesky, John Moran, and Cassandra Burns
http://www.articles360/law360/tide-is-turning-against-fca-case-dismissals

Last Accessed May 17, 2022, at 9:42 AM

[1] Near the end of its recent term, the U.S. Supreme Court declined to review the U.S. Court of Appeals for the Seventh Circuit's decision in *U.S. ex rel. CIMZNHCA v. UCB, Inc.*, involving a hot issue in False Claims Act litigation over the last several years — the standard governing a government motion to dismiss a whistleblower's non-intervened *qui tam* case.

The Supreme Court's denial of certiorari leaves in place the Seventh Circuit's opinion, which held that the district court should have granted the government's motion to dismiss a *qui tam* suit over the relator's objection.

On the surface, this appears to be a pro-defendant outcome that government contractors and health care providers alike should welcome. But the court's inaction also leaves in place a three-way circuit split, and even the Seventh Circuit victory may be a pyrrhic one. For potential subjects of *qui tam* suits, the latest judicial pronouncements on this issue are less important than the recent change in the administration and bipartisan pressure in the U.S. Senate to reign in the use of such motions.

The FCA authorizes private parties called relators to sue for violations on behalf of the government in what is known as a *qui tam* action. The act further provides that the government may dismiss a *qui tam* action notwithstanding the relator's objections, if the court has provided the relator with an opportunity for a hearing on the government's motion to dismiss. **[2]**

These government dismissals are commonly referred to as "(c)(2)(A) dismissals" in reference to the relevant provision of the FCA. The act, however, does not provide a substantive standard for evaluating the government's motion for a (c)(2)(A) dismissal.

The need for clarity arises from a recent U.S. Department of Justice effort to pursue more (c)(2)(A) dismissals. Where the government elects not to intervene in an FCA case, "the person who initiated the action shall have the right to conduct the action." **[3]** Historically the DOJ has been reluctant to seek dismissal of these actions and has instead, in almost all cases, allowed relators to pursue these claims on their own. As such, for several decades, §3730(c)(2)(A) was almost a dead-letter provision.

That changed in January 2018, when Michael Granston, former director of the DOJ Civil Division's fraud section, issued a memorandum noting the importance of (c)(2)(A) dismissals to

weed out nonmeritorious cases and those that run counter to the government's policy or litigation interests. **[4]**

The Granston memo had its intended effect: In June 2019, about 18 months after the guidance in his memo was adopted, Granston told an audience at the American Health Law Association that he was aware of at least 30 cases that had been dismissed since the memo was published. **[5]**

Still, these (c)(2)(A) motions required courts to determine what substantive standard to apply in deciding whether to grant dismissal. Three different standards have emerged.

…

[9]

Specifically, the Seventh Circuit decision explained that Rule 41 provides a plaintiff with the absolute right to dismiss an action "by serving a notice of dismissal any time 'before the opposing party services either an answer or a motion for summary judgment.'" **[10]** Applying the deferential Rule 41(a) voluntary dismissal standard, the court reversed. **[11]**

On June 28, the Supreme Court announced that it would not review whether the Seventh Circuit properly dismissed the whistleblower's FCA claim in *CIMZNHCA*. While this leaves in place a three-way circuit split regarding the appropriate standard for evaluating (c)(2)(A) dismissals, the Supreme Court's decision is not surprising given — as the government pointed out in its opposition brief to the petition for a writ of certiorari — at least one judge on the Seventh Circuit panel believed that the suit would be dismissed under any standard. **[12]**

While the Supreme Court's decision to decline review in *CIMZNHCA* might seem to be a victory for those supporting (c)(2)(A) dismissals, current political realities may soon overtake what is transpiring in the courts.

The Biden administration is likely to be more pro-whistleblower and pro-enforcement than the prior administration. This is suggested by (1) the pro-enforcement tilt of President Joe Biden's nominees to head the DOJ components and agencies that prosecute corporations; (2) the increases in funding for those enforcement entities in Biden's budget for Fiscal Year 2022; and (3) Biden's campaign and administration pronouncements, such as the White House's June 3 "Memorandum on Establishing the Fight Against Corruption as a Core National Security Interest." **[13]**

These inclinations will likely lead to more scrutiny of requests by defendants for prosecutors to exercise their (c)(2)(A) dismissal authority, and, ultimately, the government filing fewer (c)(2)(A) motions to dismiss.

This is especially so since Title 4 of the Justice Manual requires prosecutors to attain approval from a political appointee, either the assistant attorney general or the relevant U.S. attorney, in order to file a (c)(2)(A) motion to dismiss.

The increased skepticism of these dismissals has bipartisan support. On July 26, Senators Chuck Grassley, R-Iowa, Dick Durbin, D-Ill., John Kennedy, R-La., Patrick Leahy, D-Vt., and Roger Wicker, R-Miss. introduced legislation to amend the FCA to, among other things, "clarify ambiguities created by the courts and [reign] in the DOJ's use of dismissal power in a manner that undermines the 1986 amendments intended to empower whistleblowers." **[14]**

More specifically, the proposed legislation would modify Section 3730(c)(2)(A) to clarify that "the Government shall have the burden of demonstrating reasons for dismissal, and the *qui tam* plaintiff shall have the opportunity to show that the reasons are fraudulent, arbitrary and capricious, or contrary to law."

Of note, Grassley was one of the sponsors of the 1986 FCA amendments and is considered the godfather of the modern FCA. He previously has expressed concerns about the Granston Memo.

…

That said, until the Granston memo is formally superseded, (c)(2)(A) dismissals remain a potentially helpful tool for defendants in FCA cases. Requests for prosecutors to utilize their dismissal authority in appropriate cases at appropriate times will likely receive a fair hearing at the DOJ.

Defendants and their counsel should be thoughtful and strategic in their approach to requesting the government to exercise its dismissal authority, raising such a request only when there is a persuasive argument that some or all of a relator's claims are not merely wrong or unfounded, but are frivolous or clearly contrary to the government's interest.

…

2022 BLUEBOOK EXERCISE

The following are the first **TEN** footnotes appearing in a **hypothetical law review article**. The prompts below provide all of the information needed to craft a proper citation, yet some information may be unnecessary to create a proper citation. **Please assume that: (1)** all Bluebook abbreviations will be completely unambiguous; **(2)** all quotations have been properly attributed for substance and textual form (e.g., the capitalization within quotations are exactly as they appear in the cited text); **and (3)** all authorities are **not** of equal importance. The Bluebook is the only source required to complete this exercise. Note, however, that you may reference any external rule which is expressly referenced for the Bluebook as a source of further information to determine the proper manner for citation. The use of outside sources or collaboration with others (whether involved in the competition or not) is **prohibited** by the Code of Student Conduct and will result in referral to the Associate Dean.

1. Cite to page 4 of a report released by the Marvel Actors' Equity Association called Fighting for Pay Equity in the Marvel Universe. The report was released in 2022 and can only be found at https://www.actorsequityformarvel.org/. The authors of the report are Wanda Maximoff, Monica Rambeau, and Agatha Harkness. Specifically, you'd like to include a quote from Season 1, Episode 2 of a television show called "The Marvel Superheroes." The episode was called "Behind The Cape" and was first aired on July 19, 2021. The episode was produced by "Thomas Holland Production" and was directed by Zendaya. You also want to cite to a source that directly supports your proposition on page 418 of the 1981 case entitled Pepper Potts versus Anthony Stark, argued in Unit C of the Fifth Circuit. The docket number is 02-76291, was argued on June 30, 2012, and was decided on November 17, 2012. The case begins on the 409th page of volume 14 of the third edition of the Federal Reporter. The case cites a quote from page 38 of a 2011 case in the Third Circuit entitled The Black Widow Foundation versus United States, where the court stated that "[m]arvel women are paid significantly less than other Marvel heroes," which you would like to include in a parenthetical. The cited-to case begins on page 35 of volume 36 of the Federal Appendix. You further want to cite to a fan Instagram account run by Colin Jost for Scarlett Johansson, called @scarjoblackwidow, which directly contradicts the proposition that Marvel women are paid less than Marvel men, because the post was celebrating Scarlett being the highest paid actress in Hollywood for the fifteenth year in a row. The post is dated December 31, 2021, but you last saw it on January 19, 2022, at the URL: https://instagram.com/scarjoblackwidow.

2. You are writing a law review article about COVID-19 and homelessness. You want to cite to a 2020 ebook written by Kim Kardashian and Pete Davidson, entitled "Did COVID-19 Shed Light on America's Homelessness Crisis?" This source is comparable to the proposition but should be further explained to the reader to show how this different authority still supports the proposition. The portion of the text that helps your proposition discusses how local governments use more resources to help the homeless population to combat COVID-19, and this text can be found on location number 4101. Assume there is no physical book. To strengthen your proposition that COVID-19 has increased anxiety amongst the homelessness population in America, you next want to cite a documentary and

a podcast. The documentary is entitled "America is Facing Two Epidemics" and was posted onto YouTube by Kylie Jenner on March 7, 2021. The documentary can be found at https://youtube.com/watch!dxuc=v#dn. The lead actor in the documentary states "COVID-19 has exacerbated the homelessness crisis in America, and data shows that America's homeless population is facing more anxiety given shelters have closed down and the lack of sanitary living spaces." You then want to cite a popular podcast hosted by Paris Hilton. The episode you want to cite to was recorded on December 27, 2020, and is available on the Overcast app. The title of the podcast is Psychology with Friends, and this episode called "Homelessness Across America: Boston, Chicago, and San Francisco" discusses the tiny-house village that Los Angeles city officials created in the midst of the COVID-19 pandemic, which decreased COVID deaths amongst the homeless population. The podcast is produced by Hilton Hotel Publication. Lastly, you want to cite a source you already cited in your law review article. You want to cite footnote 15 on page 89 of a 2017, 9th Circuit case where Scott Disick sued the City of Los Angeles. The case is published in volume 540 of the second edition of the federal reporter. The case starts on page 40.

3. In an article about proper athletic training for the Olympics, you want to cite to a documentary from 2008 about Michael Phelps entitled "America's Golden Boy" produced by Team USA Olympic Society that directly supports your proposition. You also want to cite to a book called The Olympic Doping Problem. This work was originally written by Tara Lipinski and published in Russian by Trusova Publishing in 2014, but you are citing the translated and edited edition by Johnny Weir in 2015. You want to cite to page 16, where the author emphasizes how important it is for young athletes to have adults around them to help them make good decisions. In addition, you want to cite an interview with Simone Biles that directly contradicts the documentary and the book by stating that mental health is more important than physical health when training for the Olympics. The interview was conducted by Hoda Kotb on July 31, 2021, at the Ariake Gymnastics Centre in Tokyo, Japan. At the time of the interview, Simone was a member of the United States gymnastics team. To support the statements in this interview, you want to cite to an official rule of the International Olympic Committee, which, as of 2021, now requires that athletes have a sports psychologist as part of their training team. The rule is called Regulation for Mental Health of Elite Athletes and has a serial number of RBF-05-1995. You also want to cite to Olympics-bound Athletes Funding in section 4, a bill that, while unenacted, would have given American athletes funding to hire sports psychologists onto their teams. This bill originated in the House of Representatives in 2021, was part of the one hundred and eighteenth Congress, and is bill number 23. In support of this bill, you want to cite to a student written note regarding the importance of mental health in sports, called The Mental Games of the Olympics, written by Mikayla Skinner in 2015, which was published in the rocky mountain mineral law institute in volume 13, which starts on page 1403, but you'd like to cite pages 1415 through 1418.

4. Cite to a dissenting opinion by Judge Susan Bunch, in a case where Richard Burke sued The Chandler Bing Advertising Statistics Corporation, where she explained that the purpose of the company was unclear in its articles of incorporation. The 2015 Ohio Court of Appeals case was published in the Ohio Appellate Reporter volume 19 and begins on page 36. You want to cite to footnote 4 on page 38 through 39. This case was so popular

that it was also published in the North Eastern Reporter volume 15 and begins on page 49. You want to cite to footnote 4 on pages 51 through 52. This case was later overruled in 2017 by an opinion written by Judge Janice Hosenstein, in a case where Joseph Tribiani sued Joey Loves Food Incorporated for copyright infringement. That case went all the way up to the Supreme Court and was published in volume 501 of the United States Reporter, starting on page 504. Cite to a tiktok made by the user Rachel Greene that directly supports this proposition. The tiktok was made on the profile @rachelgreene1994 at https://tiktok.com/rachelgreene1994/video/35981015. There is no date displaying when the video was posted, but you last saw it on February 28, 2021. Further support for this proposition is found in an article written by Phoebe Buffay in the Central Perk Magazine entitled "What Are They Feeding You, Smelly Cat?" that was published on March 6, 2021. The article starts on page A4. Then, cite an April 17, 2021 Tweet by the account Ross Geller @dinosaursrule at 3:30 am, which states a contrary proposition that "We were on a break!" The Tweet can be found at https://twitter.com/dinosaursrule/status/3924582. You also want to cite to an unpublished working paper that directly supports the tiktok made by Rachel Greene. The working paper is entitled The Confusion of Romantic Relationships by Marta Kauffman, David Crane, and Bradley Pitt, and was published in 2010. You want to cite pages 142 through 146, which explains how the fight between Rachel and Ross was unintentionally made into a pivotal point of their relationship. The working paper was sponsored by National Media System and its designation number is 313.

5. Cite to a controversial comment published in volume 668 of King's Landing Public Policy Law Journal. The comment starts on page 35 and is entitled "Why Ramsay Bolton Would Have Brought Peace to the Seven Kingdoms." The excerpt you are citing spans from page 42 to page 44. The author of the comment is Grann Tollett, a student at Night's Watch College, and the date of publication is June 8th of the year 2013. But this source was more conveniently reprinted as the epilogue to the second edition of a book written by J. Kevin Jonas called Game Of Thrones For Dummies. The book was published in 2019. You also want to cite to page 4 of Jon Snow's article called L'hiver arrive? Les effets du changement climatique à Westeros [Is Winter Coming? The Effects of Climate Change in Westeros], which was published on May 19, 2019, in Vanity Fair France. This article supports the proposition you intend to state but is slightly different. You also want to cite to a contradictory position on page seven of a brief written by Cersei Lannister on behalf of the Justice Partnership Organization, filed on July 30, 2018, as amici curiae in support of appellant in Cornelius Stark versus Kingdom of Westeros, with the case number No. 14 CR 720, in the United States Eastern District Court of Texas. The case is available on Lexis and its data base number is 572419 and you want to cite to pages seventeen and eighteen.

6. You are writing a blog post about the prevalence of copyright infringement in the music industry. See, for example, one case (of a number of such cases) from the United States District Court for the Western District of Wisconsin. This opinion was for The Los Angeles Artistic Digital Sound Machine Company versus Dua Lipa, which was published on the fourth day of April in 2022. The case number is No. 16-CR-526. You want to cite pages fifty and fifty-one. The case is available on Lexis and its data base identifier is 1989101. In addition, there are many sources that support your proposition, but you choose only to a newspaper opinion piece called "Does Central New Jersey Exist? (No): The Battle

Between Rockstars," that detailed the historic case that divided New Jersey between Jon Bon Jovi and Bruce Springsteen in 1980. The piece starts on page 11, but you'd like to cite to page 12. The piece was published on November 29, 2021, in the New Jersey Herald and was written by Marshall Bruce Mathers III. You want to demonstrate this similarity by comparing Bruce Springsteen's "Born in the USA" with Jon Bon Jovi's "Born To Be My Baby." Like many artists, Bruce Springsteen has decided to remove his music from spotify, so you only have his original album to make this comparison. "Born in the USA" was released in 1976 by New Jersey Business Record, and the title of the album was "New Jersey Is Home." The song "Born To Be My Baby" is still on spotify, and you downloaded the song from there. The album was called "My Love Is From New Jersey," which first was released on March 14, 1980. You also want to cite additional material that supports this proposition, but specifically, to an August 10, 2015, email from Katheryn Elizabeth Hudson, who is the director of American idol entertainment, to James K. Corden, a copyright attorney. The email was sent at 11:47am ET and is currently with the author.

7. You are writing an article about whether moving abroad can increase employee engagement. You want to cite to an article that readers can utilize to have a better understanding of your proposition. This article was written by Emily Cooper about how international employment stimulates employees' creativity. The article is titled Living and Working in Paris and was published on the law blog of the website: Employment and Travel. The Law Blog is titled International Report. It was published on December 4, 2021, at 9:35 PM and can be found at http://internationalreport.blog.ET.com/2021/04/12/living-and-working-in-paris. You want to cite to a book, which indirectly contradicts this article because it specifically says "employees who cannot speak the language of the country they have moved to are no help at all." The book is titled "No More Americans in Paris," was written by Sylvia Grateau, and edited by the French Way editors in 2016. The quote starts on the bottom of page thirteen and finishes on page fourteen, and you are using the third edition of the book. You also want to cite to a press release from December 17, 2019, by the European Union which further supports this proposition. The press release was called Avoiding Americans in Europe. You also want to cite to a beautiful photograph of the eiffel tower on a clear night with her lights dazzling, which was taken by Casey Neistat on June 9, 2016, and was published in The Washington Post on page four. Casey calls the photo "I Fell in Love in France," but you wish it was called "I Want To Be Employed in Paris."

8. See, for example, the language in the seventh article of chapter III of Protocol II of the peace treaty between Uruguay and Djibouti, governing the administration of the Pit of Despair. The agreement was signed on April 1, 2014, in Uruguay City. The agreement is known as the Disagreement is Inconceivable Agreement and should be referred to in later citations as "Disagreement Agreement." You downloaded the text of the agreement on March 8, 2022, from http://peaceaccords.nd.edu/wp-content/accords/Disagreement_Agreement12.pdf. The language you wish to cite is: "Uruguay shall be responsible for the administration of the Pit of Despair but shall make good faith efforts to afford Djibouti reasonable access to, and use of, said Pit upon timely receipt of notice of intent. Such notice shall be received at Central Turkey Processing not less than ten (10) business days prior to anticipated commencement of Pit-related activities by Djibouti officials." Also, cite to page 34 of a Third Circuit case entitled James Moriarty

versus Alliance of British Detectives & Sherlock Holmes. It is reported in the second series of the Federal Reporter. The case first appears on page 28 of the fortieth volume of the reporter and was decided on April 12, 1902. To support the same proposition, cite to a student written comment entitled Crimes on the English Moors by Irene Adler appearing in volume 6 of the Scotland Yard Law Review. The article appears on page 230 and the material cited appears on pages 236 to 238. The article was published on May 1, 1889. The proposition you are citing is not directly stated on the page you are citing but requires an inference.

9. You are writing an article about the peaks and valleys of the Italian National Soccer Team results during international competitions. You want to cite to an opinion piece in the Blue Sports Gazette newspaper that you have already cited to in footnote 56. This article does not directly state the proposition, but the proposition obviously follows from it. The piece, written by Angelo Grotti, is titled "why the azzurri cannot achieve consistent international success" and is dated September 20, 2021. This newspaper is published in Washington D.C., and the piece can be found on page 10. Both the newspaper and the piece are primarily circulated in paper print but can be found online without the publication date or page numbers. The URL for the online version is http://bluepsortsgazette.com/2020/03/04/why-the-azzurri-cannot-achieve-consistent-international-success. You also want to cite to an unpublished dissertation that indirectly contradicts this opinion. You want to cite to pages 192 through 195 of the dissertation, written by Lionel Messi, and entitled Don't Cry For Me Argentina. His doctorate was awarded on June 24, 2008 from Oxford University. The article is not published, but Lionel Messi has it in his possession. You also want to cite to a dissenting opinion by Judge Christian Rinaldo that directly supports the dissertation, where the Argentina national football team sued Paris Saint-Germain F.C. This 2015 Ohio Supreme Court case was published in the third series of the third North Eastern Reporter volume 19 and begins on page 41, but you want to cite pages 42 to 45. This controversial opinion was causing too many arguments among soccer fans, so the state of Ohio depublished the opinion.

10. Cite to a comment published in 2009 in the Thomas M. Cooley University Coalition of Transnational Maintenance titled "Keeping our oceans clean." The comment was written by a third-year law student named Phillip R. Dunphy. The comment was so enlightening that it was published in both the thirtieth and the thirty-first volume of the Thomas M. Cooley University Coalition of Transnational Maintenance. The first part starts on page 103 in the thirtieth volume, published in 2008, and the second part starts on page 989 in the thirty-first volume, published in 2009. The section of the article you'd like to cite appears on page 105 through 106 in the thirtieth volume and on page 991 through 992 in the thirty-first volume. This portion of the comment is quoting language from the 1985 code of federal regulations in section 901.8 and title 3. You also want to cite to an international treaty agreement, which supports your proposition, but a little less directly, called Resolve Global Warming and the Environmental Crisis, which was passed on January 4, 2010, and recorded by the United Nations in volume 57 on page 902. This agreement was also cited by the United States treaty source in volume 43 and on page 206.

2022 STYLE EXERCISE

The following is an excerpt from a law review article, which has been intentionally doctored to break rules of the Chicago Manual of Style. There are **FIFTEEN Chicago Manual of Style errors.** Your task is to identify and correct each of these mistakes. Make your corrections as clear as possible. The Chicago errors are **located solely in the above-the-line text**. You must avoid making changes to text that is already correct. If you incorrectly edit text, you will receive a penalty for that error. Submit your corrected version of the excerpt as the last part of your submission. As above, **please assume that:** all quotations have been properly attributed for substance and textual form (e.g., the capitalization and wording within quotations are exactly as they appear in the cited text). The Bluebook and the Chicago Manual of Style are the only sources required to complete this exercise. The use of outside sources or collaboration with others (whether involved in the competition or not) is **prohibited** by the Code of Student Conduct and will result in referral to the Associate Dean.

A. *A Primer on Zoning*

The 10th Amendment of the United States Constitution explicitly reserves those powers not so delegated for the States.[1] This reservation of powers enables states to regulate land use. As industrialization and urbanization sent people from rural to urban and suburban areas in the early 1900s, some centralized control over land use patterns became necessary.[2] To deal with these changes, local governments were best equipped.[3] By the late 1920s, the United States Department of Commerce created 2 standard enabling acts as guides for states to adopt when promulgating their own legislation.[4] The Standard Zoning Enabling Act—published in its final version in 1926–encouraged states to empower local governments to regulate zoning, including the power to

[1] U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.").
[2] *See* JOHN R. NOLON ET AL., LAND USE AND SUSTAINABLE DEVELOPMENT LAW: CASES AND MATERIALS 35 (9th ed. 2017) ("Increased congestion in streets, deplorable housing conditions, new high rise buildings . . . and changing land use patterns raised numerous conflicts among private land owners.").
[3] *See id.* at 2–4 ("Local governments were regarded . . . as creatures of the state, authorized by state law to exercise a wide variety of powers affecting the health, safety, and welfare of their citizens . . . . It is within [the] context of state reserved authority, that cities, through state constitutional and statutory delegations, regulate land use today.").
[4] *Standard State Zoning Enabling Act and Standard City Planning Enabling Act*, AMERICAN PLAN. ASS'N, https://www.planning.org/growingsmart/enablingacts (last visited Mar. 31, 2022).

regulate the height, size, use, and location of buildings, the size of lots, and population density.[5] In 1928, the Standard City Planning Enabling Act encouraged municipalities to develop comprehensive plans for 'harmonious development' in order to: "best promote health, safety, morals, order, convenience, prosperity, and general welfare[6] . . . ."

These standard acts were published shortly after the landmark case, Village of Euclid v. Ambler Realty, which held that zoning was a valid exercise of the states' police powers.[7] In *Euclid*, the court adopted a comprehensive zoning ordinance that regulated and restricted, "the location of industries, apartment houses, two-family houses, [and] single-family houses," including "the lot area to be built upon" and "the size and height of buildings."[8] Ambler Realty Company owned a tract of land in the village and argued that the ordinance fundamentally "reduce[d] the value of [their] land[] and destroy[ed] it's marketability for industrial, commercial[,] and residential uses" and constituted "a present invasion into [their] property rights" and was ultimately a violation of due process.[9]

The Court, however, upheld the ordinance as "a valid exercise of authority."[10] Yet, the Court cautioned that the zoning power is not without limit.

> The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public

[5] DEP'T COM., A STANDARD STATE ZONING ENABLING ACT § 1 (1926), https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/growingsmart/pdf/SZEnablingAct1926.pdf ("For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.").
[6] DEP'T COM., A STANDARD CITY PLANNING ENABLING ACT § 7 (1928), https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/growingsmart/pdf/CPEnabling%20Act1928.pdf.
[7] 272 U.S. 365, 397 (1926).
[8] *Id.* at 380.
[9] *Id.* at 386.
[10] *Id.* at 397.

> welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation.[11]

New Jersey has several coastal zoning statutes. The Municipal Land Use Law (MLUL) of 1976 is New Jersey's enabling legislation for municipal land use as well as development planning and zoning.[12] The state legislature also passed the Coastal Area Facility Review Act (CAFRA) in 1973 "to protect the unique and fragile coastal zones of the State."[13] This Act calls upon the State to assist "in the assessment of impacts, stemming from the future location and kinds of developments within the coastal area, [and] on the delicately balanced environment of that area" so as to avoid "continuing and ever-accelerating serious adverse economic, social[,] and aesthetic effects."[14] CAFRA requires that all coastal areas be dedicated to uses "which promote the public health, safety and welfare, protect public and private property, and are reasonably consistent and compatible with the natural laws governing the physical, chemical and biological environment of the coastal area."[15] The New Jersey legislature significantly expanded CAFRA in 1993 which included raising the threshold for issuance of DEP permits to provide greater protection to sensitive coastal areas.[16] At this time, however, a prior version of the CAFRA statute that directed the DEP to compose a long-term environmental management strategy for coastal areas was also repealed by the legislature.[17] Today, the NJDEP promulgates the Coastal Zone Management Rules, which establish the rules regarding the development of coastal resources and require a coastal permit for waterfront development.[18]

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[11] *Id.* at 387.
[12] Municipal Land Use Law, N.J. STAT. ANN. §§ 40:55D-25–52:27D-310 (West 2017).
[13] *In re Egg Harbor Assocs. (Bayshore Centre)*, 464 A.2d 1115 (1983).
[14] Coastal Area Review Act, N.J. STAT. ANN. § 13:19-2 (West 2016), https://www.nj.gov/dep/landuse/download/13_19.pdf.
[15] *Id.*
[16] Committee Statement, N.J. STAT. ANN. 13:19-2 (West Supp. 2002).
[17] N.J. STAT. ANN. § 13:19-16, *repealed by L.* 1993, *c*. 190, § 2 (effective July 19, 1994).
[18] N.J. ADMIN. CODE § 7:7-1.1; 7:7-2.1–2.5 (2021).

With respect to post-storm beach restoration, the NJDEP has enacted regulations applicable "to all beaches which are impacted by coastal storms with a recurrence interval equal to or exceeding a five-year storm event.'[19] These after-the-fact responses to storms, however, are inadequate to fight the full scope of the impending threat of climate change.

Environmental protection interests are often incompatible "with traditional landowner beliefs in the freedom to use legally owned land as they wish."[20] Despite the widespread acceptance of zoning and planning in the post–*Euclid* century, there remains a tension between governmental regulation and private ownership of land. This tension will escalate as the government increasingly regulates land use to mitigate the effect of climate change.

[19] N.J. ADMIN. CODE § 7:7-10.3 (2021).
[20] Jonathan E. Cohen, *A Constitutional Safety Valve: The Variance in Zoning and Land-Use Based Environmental Controls*, 22 B.C. ENV'T. AFF. L. REV. 307, 329 (1995).