No. 19-3810

In the United States Court of Appeals for the Third Circuit

JESSE POLANSKY, M.D., M.P.H., ET AL.
Plaintiff-Appellant,

v.

EXECUTIVE HEALTH RESOURCES INC., ET AL.
UNITED STATES OF AMERICA,
Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania (No. 2-12-cv-04239)

BRIEF OF TAXPAYERS AGAINST FRAUD EDUCATION FUND AS *AMICUS CURIAE* SUPPORTING APPELLANT AND REVERSAL

Jacklyn N. DeMar
TAXPAYERS AGAINST FRAUD
EDUCATION FUND
1220 19th Street, N.W.
Washington, DC 20036

Tejinder Singh
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Avenue
Suite 850
Bethesda, MD 20814
(202) 362-0636
tsingh@goldsteinrussell.com

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Taxpayers Against Fraud Education Fund ("TAFEF") states that it is a corporation organized under Section 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock owned by a publicly owned company. TAFEF represents no parties in this matter and has no pecuniary interest in its outcome. However, TAFEF has an institutional interest in the effectiveness and correct interpretation of the federal False Claims Act.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS 1

ARGUMENT 2

I. Belated Motions to Dismiss Risk Undermining the Purposes and Objectives of the False Claims Act. 3

II. Courts Should Review the Government's Reasoning to Ensure That Dismissal Is Reasonable in Light of the Circumstances of the Case. 11

III. The False Claims Act Does Not Permit the Government to Move to Dismiss a *Qui Tam* Action Without First Intervening. 16

CONCLUSION 27

CERTIFICATES OF COMPLIANCE

CERTIFICATION OF BAR MEMBERSHIP

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases

Allison Engine Co. v. United States ex rel. Sanders,
553 U.S. 662 (2008) 11

Chang v. Children's Advocacy Ctr. of Del.,
938 F.3d 384 (3d Cir. 2019) 11, 24

Hibbs v. Winn,
542 U.S. 88 (2004) 11

Nasuti ex rel. United States v. Savage Farms, Inc.,
2014 WL 1327015 (D. Mass. Mar. 27, 2014) 13

Ridenour v. Kaiser-Hill Co.,
397 F.3d 925 (10th Cir. 2005) 12, 25, 26

Swift v. United States,
318 F.3d 250 (D.C. Cir. 2003) 12, 25

United States ex rel. Bergman v. Abbott Labs.,
No. 09-cv-4264 (E.D. Pa.) 9

United States ex rel. Brown v. Celgene Corp.,
No. 10-cv-3165 (C.D. Cal.) 9

United States ex rel. CIMZNHCA, LLC v. UCB, Inc.,
2019 WL 1598109 (S.D. Ill. Apr. 15, 2019) 15

United States ex rel. Eisenstein v. City of New York,
556 U.S. 928 (2009) 22, 23

United States ex rel. Garbe v. Kmart Corp.,
No. 12-cv-881-NJR-RJD (S.D. Ill.) 9

United States ex rel. Vainer v. DaVita, Inc., No. 07-cv-2509-CAP (N.D. Ga.) 9

United States ex rel., Sequoia Orange Co. v. Baird-Neece Packing Corp.,
151 F.3d 1139 (9th Cir. 1998) 12, 25

United States v. Academy Mortgage Corp.,
2018 WL 3208157 (N.D. Cal. June 29, 2018) 16

United States v. EMD Serono, Inc.,
370 F. Supp. 3d 483 (E.D. Pa. Apr. 3, 2019) 13

Statutes

31 U.S.C. § 3730(b)(1)..... 14, 23
31 U.S.C. § 3730(b)(4).....26
31 U.S.C. § 3730(c) 18
31 U.S.C. § 3730(c)(1).....19
31 U.S.C. § 3730(c)(2)(A) 1, 5, 11, 17
31 U.S.C. § 3730(c)(2)(B) 14
31 U.S.C. § 3730(c)(2)(C) 19
31 U.S.C. § 3730(c)(3)..... passim
31 U.S.C. § 3730(c)(4)..... 20, 21, 23
31 U.S.C. § 3730(d) 21
31 U.S.C. § 3730(d)(2).....8

Other Authorities

Letter from Sen. Charles Grassley to Att'y Gen. William Barr (May 4, 2020), *available at* https://www.grassley.senate.gov/sites/default/files/2020-05-04%20CEG%20to%20DOJ%20%28FCA%20Dismissal%20authority%29.pdf..... 12, 13

Letter from Sen. Charles Grassley to Att'y Gen. William Barr (Sept. 4, 2019), *available at* https://www.grassley.senate.gov/sites/default/files/documents/2019-09-04%20CEG%20to%20DOJ%20%28FCA%20dismissals%29.pdf.....10

S. Rep. No. 99-345 (1986)..... passim

U.S. Dep't of Justice, Fraud Statistics – Overview (2020), https://www.justice.gov/opa/press-release/file/1233201/download.....5, 6

U.S. Dep't of Justice, Press Release, Justice Department 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.....6

U.S. Dep't of Justice, Press Release, Justice Department Recovers over $3 Billion from False Claims Act Cases in Fiscal Year 2019 (Jan. 9, 2020), https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019.....6

INTEREST OF THE AMICUS[1]

Amicus curiae Taxpayers Against Fraud Education Fund ("TAFEF") is a nonprofit public interest organization dedicated to combating fraud against the government and protecting public resources through public-private partnerships. TAFEF is committed to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to publicize the *qui tam* provisions of the False Claims Act ("FCA"), regularly participates in litigation as *amicus curiae*, and has provided testimony to Congress about ways to improve the FCA. TAFEF is supported by whistleblowers and their counsel, by membership dues and fees, and by private donations. TAFEF is the 501(c)(3) arm of Taxpayers Against Fraud, which was founded in 1986.

TAFEF has a strong interest in ensuring proper interpretation and application of the FCA. It files this brief to address the law governing the United States' motions to dismiss FCA cases under 31 U.S.C. § 3730(c)(2)(A).

---

[1] No party's counsel authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, and its counsel contributed money intended to fund preparing or submitting this brief. This brief is filed with the consent of all parties.

ARGUMENT

The FCA provides that when the government declines to intervene in a *qui tam* action, "the person who initiated the action shall have the right to conduct the action." 31 U.S.C. § 3730(c)(3). Consistent with that statutory language, *qui tam* relators and their counsel have taken declined cases forward at great personal and financial risk, with excellent results for the government. When, as here, the government belatedly moves to dismiss such cases years after declination, the effect is profoundly discouraging to relators and the bar. While Congress granted the government unusual powers to supervise FCA cases, it also contemplated that courts would exercise meaningful oversight to ensure fairness to relators. This Court should do so here.

In support, this brief makes three points. *First*, as a practical and policy matter, belated motions to dismiss declined *qui tam* cases threaten to undermine the purposes and objectives of the FCA by deterring whistleblowers from coming forward and deterring counsel from pursuing declined cases. *Second*, as a substantive matter, the government must show that dismissal is reasonable under the circumstances before its motion can be granted. A more deferential standard is inappropriate. *Third*, as a procedural matter, the government must intervene in a *qui tam* action before moving to dismiss it. When, as here, the government seeks to intervene belatedly, this means it must show good cause for the delay.

I. Belated Motions to Dismiss Risk Undermining the Purposes and Objectives of the False Claims Act.

No litigant wants his case dismissed. But for a *qui tam* relator, learning that the United States intends to dismiss his action is particularly devastating because the United States is not supposed to be adverse at all. The pain is even more acute when the government has declined to intervene, thus entrusting the action to the relator, and then allowed the action to proceed *for years* before flip-flopping to seek dismissal. Such belated motions harm the reliance interests of relators and their counsel, and send a chilling signal to potential relators and members of the bar.

This matters because the FCA is designed to encourage—not chill—private enforcement suits. Prior to 1986, the FCA's *qui tam* provisions were effectively defunct due to judicial decisions that had undermined the statute. Consequently, fraud against the government had become endemic. Congress sought to understand "why fraud in Government programs is so pervasive yet seldom detected and rarely prosecuted." S. Rep. No. 99-345, at 4 (1986). Congress determined that there were "serious roadblocks to obtaining information as well as weaknesses in both investigative and litigative tools." *Ibid*. People were unwilling to come forward—most frequently because they believed "that nothing would be done to correct the activity even if reported," and also because they feared reprisal. *Id*. at 4-5.

The problems were not limited, however, to fraud detection. Enforcement was anemic, too. In Congress's view, "the most serious problem plaguing effective

enforcement is a lack of resources on the part of Federal enforcement agencies." S. Rep. No. 99-345, at 7. Consequently, "[a]llegations that perhaps could develop into very significant cases are often left unaddressed at the outset due to a judgment that devoting scarce resources to a questionable case may not be efficient." *Ibid*. Then, when "large, profitable corporations" became "the subject of a fraud investigation," they were able "to devote many times the manpower and resources available to the Government"; the resulting "resource mismatch" disadvantaged taxpayers. *Id*. at 8.

Congress determined that "only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds." S. Rep. No. 99-345, at 2. It decided "to encourage more private enforcement suits." *Id*. at 23-24. Congress's goal was not only to encourage relators to come forward, but also to empower them to litigate if the government was unable or unwilling to do so.

The statutory provisions at issue here were part of these amendments. Recognizing that potential relators were frequently deterred due to "a lack of confidence in the Government's ability to remedy the problem," Congress gave relators increased rights even in cases in which the government intervenes. S. Rep. No. 99-345, at 25. These include the right to act "as a check that the Government does not . . . drop the false claims case without legitimate reason" by "formally object[ing] to any motions to dismiss or proposed settlements between the

Government and the defendant." *Id*. at 25-26. As the bill was originally drafted, Congress envisioned that such objections would receive a hearing "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." *Id*. at 26. Those were just examples. Congress contemplated that hearings would occur whenever "the *qui tam* relator shows a 'substantial and particularized need' for a hearing." *Ibid*. In the final statute, Congress made hearings mandatory, relieving relators of the need to justify a hearing at all. *See* 31 U.S.C. § 3730(c)(2)(A).

The 1986 amendments—as well as additional amendments in 2009 and 2010—succeeded in spurring more private enforcement suits. In 1987, 30 new *qui tam* suits were filed. Five years later, that number had risen to 114. Five years after that, it was 547. And in each of the last ten years, more than 500 suits have been filed. All in, a total of 13,281 *qui tam* actions were filed from October 1, 1986 to September 30, 2019.[2] These cases have recovered over $44 billion for the government (compared

[2] *See* U.S. Dep't of Justice, Fraud Statistics – Overview 1-3 (2020), https://www.justice.gov/opa/press-release/file/1233201/download.

to around $17 billion from government-initiated cases).[3] Cases in which the government declined to intervene account for almost $2.8 billion.[4]

The FCA's success is largely attributable to relators. As the Assistant Attorney General for the Civil Division, Jody Hunt, explained, relators "have played a vital role in unmasking fraudulent schemes that might otherwise evade detection. . . . The taxpayers owe a debt of gratitude to those who often put much on the line to expose such schemes."[5] Specifically, relators "continue to play a critical role identifying new and evolving fraud schemes that might otherwise remain undetected."[6] As a result, the FCA today is the government's primary civil tool to redress fraud on myriad programs. While the lion's share of enforcement relates to health care, the FCA reaches more broadly. It protects our military and first responders by ensuring that government contractors provide equipment that is safe, effective, and cost efficient; protects American businesses and workers by promoting compliance with

---

[3] *Id*. at 3.

[4] *Ibid*.

[5] U.S. Dep't of Justice, Press Release, Justice Department 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.

[6] U.S. Dep't of Justice, Press Release, Justice Department Recovers over $3 Billion from False Claims Act Cases in Fiscal Year 2019 (Jan. 9, 2020), https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019.

customs laws, trade agreements, visa requirements, and small business protections; and protects other critical government programs ranging from disaster relief to farming subsidies.

One important reason for the FCA's success is relators' ability to pursue a case after the government declines to intervene. Congress contemplated that such suits would proceed—which is why it provided that when the government declines, the relator "shall have the right to conduct the action." 31 U.S.C. § 3730(c)(3). Declined cases are important for at least three reasons. First, declined cases are valuable to taxpayers. As explained above, they have generated billions of dollars of recoveries without requiring any government litigation. Second, the fact that declined cases can be pursued incentivizes relators to step forward and reveal fraud. As Congress found, a major concern that deterred relators from coming forward was fear that the government would do nothing. Allowing relators to proceed when the government does not act allays that concern and therefore encourages whistleblowing. Third, the prospect of a declined case being litigated by relators gives defendants an incentive to settle with the government.

Taking a declined case forward is not easy. The elements of FCA liability can be challenging, expensive, and time-consuming to prove. Defendants are typically well-resourced and willing to litigate. And courts sometimes (wrongly) draw negative inferences about the merits of a case because of the government's

declination decision. Accordingly, relators and their counsel take substantial risk when litigating declined cases—and many decide not to. But the cases are no less important for the difficulty, and the relators who pursue them perform important work that Congress wanted done. That is why Congress provided for an increased share of the proceeds to relators in such cases. *See* 31 U.S.C. § 3730(d)(2).

Against that backdrop, government motions to dismiss—and especially belated motions like the one here—threaten to undermine Congress's objective of encouraging more private enforcement suits. That is because a belated dismissal motion thwarts the reliance interests of relators and their counsel, flushing away years of hard work and expense.

This case is illustrative. Here, the government declined to intervene on June 27, 2014. The case proceeded through active litigation for four and a half years, when on February 21, 2019, the government informed the parties that it intended to seek dismissal. The government then walked that back on May 9, 2019, and the case proceeded to the threshold of summary judgment. According to the relator, his counsel produced and reviewed hundreds of thousands of documents, submitted 10 expert reports, conducted 19 depositions, and spent over $20 million in attorney time and costs working the case before the United States sought dismissal. That is a lot of water under the bridge.

This case is by no means unique in terms of the amount of time and effort it has taken to litigate. Almost every successful declined case involves years of active litigation after declination. As just a few examples, in *United States ex rel. Brown v. Celgene Corp.*, No. 10-cv-3165 (C.D. Cal.), the government declined to intervene in 2013, and the case settled for $280 million in 2017 (at docket entry 500). In *United States ex rel. Vainer v. DaVita, Inc.*, No. 07-cv-2509-CAP (N.D. Ga.), the government declined in 2011 (docket entry 32); 1068 docket entries and four years later, the case settled for $450 million. In *United States ex rel. Garbe v. Kmart Corp.*, No. 12-cv-881-NJR-RJD (S.D. Ill.), the government declined in 2010 (entry 19), and the case settled in late 2017 for $42 million (entry 505). In *United States ex rel. Bergman v. Abbott Laboratories*, No. 09-cv-4264 (E.D. Pa.), the government declined in 2012 (entry 23), and the case settled in 2018 for $25 million (entry 206). Those cases involved thousands of hours of attorney time and considerable expense. They also were fraught with risk for relators (who often face retaliation that limits their opportunity to work) and their counsel (who must carry the litigation expenses and the contingency risk).

If the government can belatedly dismiss cases, potential relators and members of the bar will recognize that they face yet another layer of risk when pursuing a declined FCA action: they may jeopardize their livelihoods, or invest millions of dollars and years of effort, only for the government unilaterally to scuttle the case.

That risk is likely to chill the pursuit of declined cases even further, undermining Congress's goal of encouraging private suits, and allowing fraud to flourish.

The Court need not take our word for this. Senator Charles Grassley, the architect of the 1986 FCA amendments, has twice written to Attorney General Barr about government dismissal motions. On September 4, 2019, the Senator explained that when the government moves to dismiss cases based on a desire to avoid litigation costs, it "will send a clear message that bad actors can get away with fraud as long as they make litigating painful and sufficiently burdensome for the government." The Senator explained that "by opting to save resources without first conducting a sufficient cost-benefit analysis, DOJ is circumventing Congress and taking a shortsighted position that may end up costing taxpayers much more money in the future."[7]

There are at least two ways to partially address this concern, and the Court should adopt both of them. First, the Court should hold that the government motions to dismiss must be reviewed for reasonableness—not merely for whether they have a rational basis, and certainly not according to even more deferential standards. *See infra* Part II. Second, the Court should hold that, as a procedural matter, the

[7] Letter from Sen. Charles Grassley to Att'y Gen. William Barr, at 5 (Sept. 4, 2019), *available at* https://www.grassley.senate.gov/sites/default/files/documents/2019-09-04%20CEG%20to%20DOJ%20%28FCA%20dismissals%29.pdf.

government must intervene before moving to dismiss. In declined cases, this will require the government to establish good cause for the delay. *See infra* Part III.

II. Courts Should Review the Government's Reasoning to Ensure That Dismissal Is Reasonable in Light of the Circumstances of the Case.

The FCA provides that a motion to dismiss may be granted 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). This Court has not yet identified the substantive standard governing government motions to dismiss. *See Chang v. Children's Advocacy Ctr. of Del.*, 938 F.3d 384, 387 (3d Cir. 2019) (noting a circuit split, but not taking a side). This Court should hold that a district court should only grant the government's motion to dismiss if the court determines, after a hearing, that dismissal is reasonable.

"[W]e start, as always, with the language of the statute." *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 668 (2008). "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (citations and quotation marks omitted).

The text of Section 3730(c)(2)(A) requires the government to file a motion to dismiss, and for the objecting relator to have an opportunity for a hearing on the motion. The statute does not explicitly prescribe a substantive standard—which has prompted the government to argue that there is effectively no standard as long as the

relator had an opportunity to be heard. In the government's view, it has unfettered discretion to dismiss *qui tam* cases.

The D.C. Circuit has accepted this argument. *See Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003). Other courts, recognizing that the government's contention is inconsistent with the statutory text, have held that the government must articulate a legitimate government interest, and a rational relationship between dismissal and that interest. *See Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 935-36 (10th Cir. 2005); *United States ex rel., Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998). There are ways to apply this standard that make sense—but the government's interpretation of it, which is that the standard is as deferential as due process rational basis review—is inconsistent with the statute.

Senator Grassley explained in his second letter to Attorney General Barr that the government's principal argument "is erroneous and contrary to congressional intent."[8] That is because "[b]oth the ordinary meaning and technical meaning of the word 'hearing' denote a proceeding in which a judge makes a determination based on evidence and law."[9] Senator Grassley argued that the evidence is

---

[8] Letter from Sen. Charles Grassley to Att'y Gen. William Barr, at 2 (May 4, 2020), *available at* https://www.grassley.senate.gov/sites/default/files/2020-05-04%20CEG%20to%20DOJ%20%28FCA%20Dismissal%20authority%29.pdf.

[9] *Id*. at 3.

"overwhelming" that the word "'hearing' indicates Congress intended a substantive process in which a judge hears arguments and decides whether a case should proceed or not."[10] He also confirmed that "[h]aving unfettered dismissal authority will create a chilling effect on future whistleblowers that will ultimately end up costing the taxpayers,"[11] undermining Congress's objectives.

Senator Grassley is correct. The text of Section 3730(c)(2)(A) "mandates a hearing before a court may dismiss a *qui tam* action over a relator's objection." *United States v. EMD Serono, Inc.*, 370 F. Supp. 3d 483, 488 (E.D. Pa. Apr. 3, 2019). Giving the government unfettered discretion to dismiss would "[r]educ[e] the hearing requirement to insignificance" in violation of the basic canon of statutory construction that no provision of a statute should be rendered inoperative or superfluous. *Ibid*. "[I]t would be superfluous for Congress to require a hearing . . . if the court's only role were to sit idly by as the relator attempts to persuade the Government not to dismiss the action." *Nasuti ex rel. United States v. Savage Farms, Inc.*, 2014 WL 1327015, at *10 (D. Mass. Mar. 27, 2014).

Giving the government unfettered discretion to dismiss would also undermine at least three other provisions of the statute. First, it would conflict with 31 U.S.C.

---

[10] *Id*. at 5.

[11] *Id*. at 6.

§ 3730(b)(1), which provides that a *qui tam* action can only be dismissed "if the court and the Attorney General" consent. This provision establishes that even if the relator and the government both seek dismissal of an action, the court must also consent. It would be bizarre if the court had *less* authority when the government alone seeks dismissal. Second, the government's interpretation conflicts with 31 U.S.C. § 3730(c)(3), which provides that when the government declines to intervene, the relator "shall have the right to conduct the action." In that circumstance, the government can seek intervention later, but only "upon a showing of good cause," and only "without limiting the status and rights" of the relator. *Ibid*. It would be strange if the government faced restrictions on its ability to belatedly intervene (potentially reducing the relator's recovery if the case succeeds), but none on its ability to belatedly dismiss the case altogether (reducing the relator's recovery to zero). Third, the government's interpretation conflicts with 31 U.S.C. § 3730(c)(2)(B), which provides that if the government wishes to settle a case over the relator's objection, it can do so only if the court determines that the settlement is "fair, adequate, and reasonable under all the circumstances." It would be irrational if the government's power to dismiss a case was substantially greater than its power to settle one because a dismissal is effectively a settlement for zero dollars.

The legislative history confirms that a hearing is not intended to be a futile exercise. Instead, the court should require the government to explain itself and probe

any legitimate argument against dismissal, including but not limited to arguments that "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. No. 99-345, at 26.

Based on the foregoing, this Court should reject both the government's argument that it has unfettered discretion to dismiss, and also its backup contention that it can dismiss a case any time it identifies a legitimate interest that dismissal could serve. Indeed, the standard cannot be so loose because some government interests will *always* be present. For example, the government can always say that it prefers to avoid discovery or monitoring costs. If that alone were enough to support dismissal—regardless of the potential benefits of a case, or the relator's investment in the case—then a relator's right to conduct the action, as well as the relator's right to a hearing on the motion to dismiss, would be rendered meaningless.

Instead, courts should determine whether the government has actually shown that dismissal in a particular case is reasonable. For example, in *United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, 2019 WL 1598109, at *3-4 (S.D. Ill. Apr. 15, 2019), the court determined that the government's cost-benefit analysis was inadequate, and that the government's stated disapproval of the relator was insufficiently related to a valid government purpose, and belied a pretext for dismissal. Similarly, in *United States v. Academy Mortgage Corp.*, 2018 WL 3208157, at *1 (N.D. Cal. June 29,

2018), the court denied the government's motion to dismiss when "the Government did not perform a full investigation of the amended complaint" before moving to dismiss it.

To be clear, we are not arguing that the government must show that the case lacks all merit, or that its decision meets strict scrutiny—or anything like that. Instead, we think it clear that the government must show that dismissal is reasonable in light of all of the circumstances. It must, for example, explain why it concluded that dismissal is the best way to vindicate its interests in this particular case, spelling out its cost-benefit analysis. In cases like this one, the government also ought to explain why it waited so long, and what changed since the time it declined to intervene. When appropriate, the government should come forth with evidence, as opposed to mere attorney argument, substantiating its positions. On the other hand, it cannot be enough for the government merely to identify an abstract set of omnipresent interests, claim that it could rationally want to achieve those, and call it a day without considering the interests on the other side. Surely, Congress gave relators in declined cases more security than that.

III. The False Claims Act Does Not Permit the Government to Move to Dismiss a *Qui Tam* Action Without First Intervening.

Independently, this Court should hold that the FCA does not empower the government to move to dismiss a *qui tam* action without first intervening in that action. Appellant makes a similar argument, contending that unless the government

intervenes and dismisses the case at the outset, it cannot do so. Br. 22-29. Our proposed rule, by contrast, would permit the government to belatedly intervene and dismiss a declined case upon a showing of good cause. Under either rule, the government cannot do what it did here—*i.e.*, seek dismissal without first intervening or showing good cause at all.

Indeed, it would be very strange if the statute empowered the government to seek dismissal without intervening. In an ordinary civil action, a non-party—even the government—cannot simply show up and start filing dispositive motions whenever it pleases. It has to intervene and become a party first. The text, structure, and purpose of the FCA do not abrogate that ordinary rule; they confirm it.

The government's power to dismiss cases is enshrined in 31 U.S.C. § 3730(c)(2)(A). To understand how the statute works, it is important to place this subsection in context. The relevant paragraphs of Section 3730, subsection (c), entitled "Rights of the Parties to *Qui Tam* Actions," provide:

> **(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.
>
> **(C)** Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation . . . .
>
> **(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.

31 U.S.C. § 3730(c).[12]

---

[12] We omitted subparagraph (2)(D), which permits defendants to limit the relator's participation in certain cases, and paragraph (5), which permits the government to seek alternate remedies and grants relators rights in these alternate remedy proceedings.

Paragraph (1) of this subsection explains that if the government intervenes, *i.e.*, "proceeds with the action," then the *qui tam* relator "shall have the right to continue as a party," "subject to the limitations set forth in paragraph (2)." *Id*. § 3730(c)(1).

Paragraph (2), in turn, gives the government special powers that it would not otherwise have to control the relator's actions in a case governed by paragraph (1) (*i.e.*, an intervened case), including the dismissal power at issue here, which resides in subparagraph (2)(A). The key structural point for present purposes is that paragraph (2) serves only one purpose: it enumerates limitations on the relator's right to participate in cases in which the government has intervened. It has no application when, as here, the government has not intervened. That is evident both from the language of paragraph (1), which describes the purpose of paragraph (2) this way—and also from the language of paragraph (2) itself. Specifically, some of the provisions of paragraph (2) plainly *only* apply to intervened cases—while none of them clearly apply in declined cases. For example, subparagraph (2)(C) permits the government to limit a relator's participation if that participation "would interfere with or unduly delay the Government's prosecution of the case." 31 U.S.C. § 3730(c)(2)(C). The phrase "the case" clearly refers only to the *qui tam* action itself. If the government were not prosecuting that action, this provision plainly does not apply. The Court should accordingly read all of the subparagraphs in paragraph (2) *in pari materia* as applying only in intervened cases.

The rights of parties in cases in which the government has not intervened are described in paragraphs (3) and (4). Paragraph (3) provides that "[i]f the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action." 31 U.S.C. § 3730(c)(3). In that circumstance, the government has only limited rights, including a right to be served with the pleadings and with copies of deposition transcripts. Paragraph (3) further provides that "[w]hen 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*." *Ibid*. (emphasis added). The statute thus contemplates that if the government wants to exercise additional control over the case, it has to make a showing of good cause and come into the case as a party. Notably, the statute does *not* say that the relator "shall have the right to conduct the action *subject to the limitations set forth in paragraph (2)*," or otherwise reference paragraph (2) at all—strongly suggesting that the limitations in paragraph (2) do not apply in cases governed by paragraph (3).

Paragraph (4) supports this understanding. It provides that "[w]hether or not the Government proceeds with the action," the government shall have the ability to ask the court to stay discovery in a *qui tam* action if that discovery would interfere with the government's other investigations. 31 U.S.C. § 3730(c)(4). But even that right is qualified. Stays are limited to 60 days, with extensions conditioned on the

government's showing that it has proceeded diligently and explained the need for a stay. *Ibid*. This statutory language is significant for two reasons. First, it shows that Congress knew how to give the government rights that apply "whether or not" it intervenes—strongly suggesting that the powers in paragraph (2) are not available "whether or not" the government intervenes.[13] Second, it shows that Congress did not intend to give the government *carte blanche* in *qui tam* cases—but instead intended for courts to exercise meaningful oversight over the government's interference with those cases.

The order of the paragraphs also confirms that paragraph (2) only modifies paragraph (1), and does not create independent powers available in every *qui tam* case. If paragraph (2) enumerated powers that apply in declined cases governed by paragraph (3), it would make sense to put it after that paragraph—and indeed to consolidate it with the other generally available powers enumerated in paragraph (4). The fact that Congress did not do so is good evidence that paragraph (2)'s limitations only apply in cases governed by paragraph (1).

---

[13] Another provision of the FCA likewise applies "[w]hether or not" the government intervenes. The statute provides awards to *qui tam* relators in successful cases. The first paragraph provides a range of awards available "[i]f the Government proceeds with an action"; the second provides a range "[i]f the Government does not proceed with an action"; and the third imposes caveats that apply "[w]hether or not the Government proceeds with the action." 31 U.S.C. § 3730(d).

The legislative history detailed in Part I, *supra*, confirms this interpretation. The Senate Report explained that by allowing relators to participate in cases in which intervention had occurred, Congress wanted them to act "as a check that the Government does not neglect evidence, cause undu[e] delay, or drop the false claims case without legitimate reason." S. Rep. No. 99-345, at 26. "Specifically," the statute provides that "when the Government takes over a privately initiated action . . . the person who brought the action may formally object to any motions to dismiss or proposed settlement between the Government and the defendant." *Ibid*. Thus, the history recognizes that the government will only be moving to dismiss cases it has taken over. It never even discusses the possibility of the government seeking dismissal of a declined case.

None of this ought to be surprising because, as noted above, the ordinary rule in civil cases is that only parties can file dispositive motions. And Supreme Court precedent confirms that the United States is not a party to case unless it first intervenes. As the Supreme Court held in *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 931 (2009), the United States "is not a 'party' to an FCA action for purposes of the appellate filing deadline unless it has exercised its right to intervene in the case." In support, the Court explained that:

> If the United States declines to intervene, the relator retains "the right to conduct the action." § 3730(c)(3). The United States is thereafter limited to exercising only specific rights during the proceeding. These rights include requesting service of pleadings and deposition transcripts, § 3730(c)(3),

> seeking to stay discovery that "would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts," § 3730(c)(4), and vetoing a relator's decision to voluntarily dismiss the action, § 3730(b)(1).

Id. at 932. Notably, the Court did not identify the right to dismiss the action as one of the "specific rights" that the government is "limited to" after declination. The Court further emphasized that Congress "gave the United States discretion to intervene in FCA actions—a decision that requires consideration of the costs and benefits of party status. The Court cannot disregard that congressional assignment of discretion by designating the United States a 'party' even after it has declined to assume the rights and burdens attendant to full party status." *Id*. at 933-34 (citations omitted).

Indeed, in declined cases (including this case), the government routinely uses its non-party status to limit its discovery obligations. *See, e.g.*, United States' Response to Relator's Motion for Leave to File Third Amended Complaint, D. Ct. Doc. 430, at 2 ("[T]he United States does not intend to play an active role in the ongoing litigation and accordingly should be treated as a non-party for discovery purposes."). But as *Eisenstein* makes clear, the government must take the bitter with the sweet: if it is not a party for purposes of discovery, it is not a party capable of filing dispositive motions.

A rule requiring intervention before a motion to dismiss also does not impose an unreasonable burden on the government. The practical effect of such a rule would

be that if the government declines to intervene, thus granting the relator the right to conduct the action, and then later changes its mind, the government must show "good cause" for the change in position. This would not be a terribly high bar, but it would require the government to explain what changed between the time it entrusted the case to the relator and the time it moved to dismiss. If the government can point to new information or changed circumstances that justify its new approach (*e.g.*, the emergence of new exculpatory facts in discovery, or a legal ruling or development that materially alters the cost-benefit analysis of the case), it should be able to clear the bar. On the other hand, if the government can only identify considerations that it knew or should have known about at the outset (*e.g.*, the possibility that the government will face discovery, or a policy disagreement with the relator's legal theory), then the government may not be able to show the requisite good cause.

A rule requiring intervention on a showing of good cause also protects the reliance interests of relators and their counsel. Once the government declines intervention, a case will begin to seriously tax party and judicial resources. In light of the burdens that such litigation places on the parties and the courts, it is reasonable to either require the government to intervene and dismiss the case up front, or to show good cause for waiting.

Whether the government must intervene before seeking dismissal is an open question in this circuit. In *Chang*, the Court said in passing that even when the

government does not intervene, it can move to dismiss. *See* 938 F.3d at 386. But whether intervention was a prerequisite to that motion had not been raised and was not before the Court. To be sure, other courts have held that intervention is not a prerequisite to a dismissal motion. *See Ridenour*, 397 F.3d at 932; *Swift*, 318 F.3d at 251-52; *Sequoia Orange*, 151 F.3d at 1145. This Court, however, should reach the opposite result for the reasons given above.

We briefly address some of the arguments that courts have relied on to hold that the government need not intervene before moving to dismiss. First, some have reasoned that paragraph (1) applies only if "the government elects to proceed with the action," and have concluded that because the government does not intend to "proceed with the action" when it seeks dismissal, paragraph (2) cannot only be a limitation on paragraph (1). This is unpersuasive because paragraph (1) does not specify *how* the government must "proceed" with an action. Filing a motion or a stipulation to dismiss an action is one way to proceed, as is settling the action. Indeed, it is nonsensical to suggest that proceeding with an action and moving to dismiss it are mutually exclusive, because it is beyond dispute that when the government intervenes in an FCA case (thus "proceeding" as provided in paragraph (1)), it has the power to dismiss the case pursuant to paragraph (2).

Second, the Tenth Circuit has opined 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" under Article II. *Ridenour*, 397 F.3d at 934. The court did not, however, explain why Congress requiring a showing of "good cause" before belated intervention—a relatively mild requirement—would violate the Take Care Clause or otherwise interfere with the separation of powers. Indeed, we are aware of no authority holding that the Constitution prohibits Congress from preventing the Executive Branch from interfering with a private right of action this way, and that conclusion seems especially tenuous here because the "good cause" requirement only applies to *belated* intervention. The government is already free—categorically and without restriction—to intervene in every single *qui tam* case from the time it is filed to the time it comes out from under seal (a period that frequently lasts years). *See* 31 U.S.C. § 3730(b)(4). Thus, in the absence of changed circumstances, the government should never need to seek belated intervention power at all. Here, all we are saying is that when the government flip-flops, it should have a reasonable explanation for doing so. The Constitution does not prohibit Congress from imposing such a requirement, or courts from holding the government to it.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

Dated: May 22, 2020

/s/ Tejinder Singh

Jacklyn N. DeMar
TAXPAYERS AGAINST FRAUD
EDUCATION FUND
1220 19th Street, N.W.
Washington, DC 20036

Tejinder Singh
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Avenue
Suite 850
Bethesda, MD 20814
(202) 362-0636
tsingh@goldsteinrussell.com

CERTIFICATES OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), I hereby certify that this brief was produced in Microsoft Word 2016 Times New Roman 14-point type and contains 6494 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify pursuant to L.A.R. 31.1(c) that the electronic copy of this brief filed with the Court is identical in all respects to the hard copy that will be filed with the Court once the filing of paper copies resumes, and that a virus check was performed on the electronic version using ESET Endpoint Antivirus. No computer virus was found.

Dated: May 22, 2020

/s/ Tejinder Singh
Tejinder Singh

CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit and remain a member in good standing of the Bar of this Court.

Dated: May 22, 2020

/s/ Tejinder Singh
Tejinder Singh

CERTIFICATE OF SERVICE

I certify that on May 22, 2020, I filed the foregoing *amicus curiae* brief using the Court's CM/ECF system. All parties are represented by counsel who are registered ECF filers, and service was accomplished using the ECF system.

/s/ Tejinder Singh
Tejinder Singh