No. 19-678

In the Supreme Court of the United States

UNITED STATES, EX REL. LAURENCE SCHNEIDER,
PETITIONER

v.

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, authorizes a private party (known as a "relator") to file a civil action "in the name of the Government" to recover for certain legal wrongs done to the United States. 31 U.S.C. 3730(b)(1). The FCA provides that "[t]he Government may dismiss the action notwithstanding the objections of the [relator] if the [relator] has been notified by the Government of the filing of the motion and the court has provided the [relator] with an opportunity for a hearing on the motion." 31 U.S.C. 3730(c)(2)(A). The question presented is as follows:

Whether the United States' decision to dismiss a relator's FCA claim under Section 3730(c)(2)(A) is subject to judicial review where the relator does not allege that the government's dismissal decision was a fraud on the court.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter but is available at 2019 WL 4566462. The opinion of the district court granting the United States' motion to dismiss (Pet. App. 3a-9a) is not published in the Federal Supplement, but is available at 2019 WL 1060876. A prior opinion of the court of appeals is reported at 878 F.3d 309 (Kavanaugh, J., participating). A prior opinion of the district court is reported at 224 F. Supp. 3d 48.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2019. The petition for a writ of certiorari was filed on November 20, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. The False Claims Act (FCA or Act), 31 U.S.C. 3729 *et seq.*, imposes civil liability for a variety of deceptive practices involving government funds and property. Among other things, the Act imposes liability on any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," 31 U.S.C. 3729(a)(1)(A); or who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim," 31 U.S.C. 3729(a)(1)(B). A person who violates the FCA is liable to the United States for civil penalties plus three times the amount of the government's damages. 31 U.S.C. 3729(a)(1).

The FCA authorizes private parties, known as relators, to bring suit "in the name of the Government" against persons who have violated the Act. 31 U.S.C. 3730(b)(1). When such a "*qui tam*" action is filed, the government may intervene in the case and litigate it. See 31 U.S.C. 3730(b)(2). If the government declines to intervene, the relator may conduct the litigation, although the United States remains a "real party in interest" in the case. *United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928, 930 (2009) (citation omitted); see 31 U.S.C. 3730(b)(4)(B). In either event, the relator receives a share of any proceeds recovered through the litigation. 31 U.S.C. 3730(d). Every FCA action is premised on an allegation that legal wrongs were done to the United States, and the Act can "be regarded as effecting a partial assignment of the Government's damages claim" to the relator. *Vermont Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 773 (2000).

The FCA provides several mechanisms for the government to maintain control over an FCA suit that is

litigated in the United States' name, even if the government initially declines to intervene in the action. The government may intervene later "upon a showing of good cause." 31 U.S.C. 3730(c)(3). The government may prevent a relator from dismissing the action, 31 U.S.C. 3730(b)(1), and it may "settle the action with the defendant notwithstanding the objections" of a relator "if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances," 31 U.S.C. 3730(c)(2)(B). As relevant here, the FCA also provides that "[t]he 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).

2. "Following the burst of the housing bubble in 2008, the Federal Government began to institute measures designed to stabilize the housing and credit markets." 224 F. Supp. 3d at 50. Among those measures was the Home Affordable Modification Program (HAMP), in which the U.S. Department of the Treasury "provide[d] incentive payments to mortgage servicers in exchange for modifying eligible mortgage loans." *Id.* at 52 (footnote omitted). Servicers participating in the program were subject to various requirements, and they were obligated to provide the government with annual certificates "report[ing] any instances of noncompliance that had 'a material effect on [their] ability to comply with . . . program requirements.'" *Id.* at 53 (citation omitted). HAMP expired on December 31, 2016. See U.S. Dep't of the Treasury, *Making Home Affordable* (Jan. 30, 2017), https://www.treasury.gov/

initiatives/financial-stability/TARP-Programs/housing/mha/Pages/overview.aspx.

In March 2012, the United States, 49 States, and the District of Columbia filed a complaint against several mortgage servicers, including some entities that are respondents here, alleging misconduct in their home-mortgage practices. See *United States* v. *Bank of Am. Corp.*, 753 F.3d 1335, 1336 (D.C. Cir. 2014) (per curiam). Shortly thereafter, the district court overseeing that case entered a consent judgment that memorialized a settlement among the parties. See *ibid.* Under the settlement, servicers agreed to pay penalties, provide various forms of consumer relief, and comply with certain business-practice requirements. Consent Judgment at ¶¶ 3, 5, *United States* v. *Bank of Am. Corp.*, No. 12-cv-361 (D.D.C. Apr. 4, 2012) (Consent Judgment); see 224 F. Supp. 3d at 50-52. The consent judgment also provides for monitoring servicers' compliance and establishes remedies for breaches of its terms. See Consent Judgment ¶¶ 6-8, 12-13; *id.* Exs. D and E; 224 F. Supp. 3d at 51-52.

3. In 2013, petitioner Laurence Schneider filed this *qui tam* action against J.P. Morgan Chase Bank, N.A., J.P. Morgan Chase & Co., and Chase Home Finance LLC (collectively, Chase). See Pet. App. 3a-4a. Petitioner alleged that Chase had falsely claimed compliance with the 2012 settlement in order to avoid additional payments and penalties that it owed to the government. See 224 F. Supp. 3d at 50, 56. Petitioner also alleged that Chase had obtained HAMP incentive payments by falsely certifying compliance with that program's requirements. See *id.* at 57-58.

Petitioner initially filed suit in the United States District Court for the District of South Carolina. Pet. App.

4a. After the United States declined to intervene, see 31 U.S.C. 3730(b)(2)-(4), the case was transferred at petitioner's request to the United States District Court for the District of Columbia, where petitioner twice amended his complaint. Pet. App. 4a.

The district court granted Chase's motion to dismiss the second amended complaint. 224 F. Supp. 3d 48. The court dismissed with prejudice petitioner's claim that Chase had violated the 2012 settlement, holding that petitioner could not pursue that claim without exhausting the settlement's dispute-resolution procedures. *Id.* at 56-57, 61; see *id.* at 56 n.6, 60-61 (dismissing state-law claims for the same reason). The court dismissed without prejudice petitioner's claim that Chase had falsely certified compliance with HAMP requirements and had thereby fraudulently obtained HAMP incentive payments, finding that petitioner had not adequately alleged any material violation of the rules of the HAMP program. See *id.* at 57-60.

The court of appeals affirmed. 878 F.3d 309 (Kavanaugh, J., participating). Although the court of appeals disagreed with the district court's rationale for dismissing petitioner's claim arising from the 2012 settlement, the court held that the claim should be dismissed on the alternative ground that the monitor who had been appointed under the consent judgment "was aware of the practices [challenged by petitioner] and concluded that Chase was in compliance." *Id.* at 314.[1]

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[1] The court of appeals found "an additional fatal flaw" in petitioner's FCA claim based on Chase's alleged non-compliance with the 2012 settlement: "Chase's potential exposure to penalties for noncompliance with the Settlement's servicing standards [was] nothing more than a contingent possibility" that the court believed

The court of appeals agreed with the district court that petitioner had not stated a claim regarding Chase's alleged non-compliance with the HAMP requirements, because petitioner "d[id] not allege, with factual allegations in support," that Chase had submitted HAMP certifications that "were materially false." *Id.* at 315.

4. On remand, petitioner sought leave to file a third amended complaint asserting claims arising from Chase's participation in HAMP. D. Ct. Doc. 124 (Mar. 27, 2018). The United States then informed the district court that it was considering whether to exercise its authority to dismiss the suit under 31 U.S.C. 3730(c)(2)(A). See D. Ct. Doc. 130 (July 2, 2018). In November 2018, the United States moved to dismiss the action. Pet. App. 50a-56a. The government's motion explained that, "[a]mong other case-specific reasons * * * , the United States believes that [petitioner's] specific HAMP [c]laims lack substantial merit" and that "litigation of them would require further unnecessary expenditures of scarce Government resources." *Id.* at 55a.

At petitioner's request, the district court held a hearing on the United States' motion to dismiss. Pet. App. 25a-49a. Counsel for the government explained at the hearing that the United States had determined, after "consider[ing] all of [petitioner's] evidence" and "weigh[ing] [his] arguments," that petitioner's claims lacked merit. *Id.* at 40a. Government counsel also observed that the litigation had already consumed substantial resources of the Department of Justice, *ibid.*, and that, if the suit proceeded further, the Department of the Treasury might be required to provide "large

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did "not qualify as an 'obligation'" under the FCA. 878 F.3d at 314-315.

amounts of discovery," *id.* at 48a. In opposing the government's motion, petitioner did not allege that the government's decision was based on any fraudulent purpose. Rather, petitioner simply disagreed with the government's assessment of the strength of his claims, contending that he "ha[d] a well founded case" that "should go forward." *Id.* at 47a; see *id.* at 31a ("[W]e really do believe that this is a strong case going forward and the government should not seek to dismiss the case * * * and it truly is arbitrary and capricious to suggest that we do not have a good case.").

After the hearing, the district court dismissed petitioner's suit. Pet. App. 3a-9a. The court applied D.C. Circuit precedent holding that Section 3730(c)(2)(A) gives the United States an "'unfettered right to dismiss' a *qui tam* action." *Id.* at 7a (quoting *Swift* v. *United States*, 318 F.3d 250, 252 (D.C. Cir.), cert. denied, 539 U.S. 944 (2003)). The court noted that there was "no evidence * * * to suggest any fraud or any other 'exceptional circumstance to warrant departure from the usual deference [courts] owe the Government's determination whether an action should proceed in the Government's name.'" *Id.* at 8a n.3 (quoting *Hoyte* v. *American Nat'l Red Cross*, 518 F.3d 61, 65 (D.C. Cir. 2008)). The court further explained that, by exercising his statutory right to request a hearing, petitioner had received "an opportunity to be heard and to attempt to convince the United States why it should allow the case to continue," but "[h]aving not been persuaded, the United States reaffirmed its desire to dismiss this action." *Id.* at 9a.

The court of appeals summarily affirmed in an unpublished, per curiam order. Pet. App. 1a-2a. Like the district court, the court of appeals applied circuit precedent holding that "[t]he False Claims Act 'give[s]

the government an unfettered right to dismiss [a *qui tam*] action.'" *Id.* at 2a (quoting *Swift*, 318 F.3d at 252) (second and third set of brackets in original). The court also agreed with the district court that petitioner had "presented no evidence of 'fraud on the court or any similar exceptional circumstance.'" *Ibid.* (quoting *Hoyte*, 518 F.3d at 65).

ARGUMENT

Petitioner contends (Pet. 6-22) that the court of appeals erred by affirming the dismissal of his FCA complaint under 31 U.S.C. 3730(c)(2)(A). The court's decision is correct. Every FCA case is brought in the name of the United States, and the Act does not limit the government's traditional prerogative to decline to prosecute or pursue a claim alleging legal wrongs done to the government itself. Although the Ninth and Tenth Circuits have instructed district courts to conduct a highly deferential review before granting a government motion to dismiss under Section 3730(c)(2)(A), the slight differences between the standards applied by the various courts of appeals should very rarely if ever be outcome-determinative. And this case would be an unsuitable vehicle to clarify the standard that a court should apply when considering a government motion to dismiss under Section 3730(c)(2)(A), because petitioner's suit would be dismissed even under the approach taken by the Ninth and Tenth Circuits. Further review is not warranted.

1. The FCA provides that "[t]he Government may dismiss" a *qui tam* action "notwithstanding the objections" of a relator who initiated the lawsuit if two conditions are fulfilled: (1) the relator "has been notified by the Government of the filing of the motion" and (2) "the court has provided the [relator] with an opportunity for

a hearing on the motion." 31 U.S.C. 3730(c)(2)(A). That text is best read to preserve the Executive Branch's usual unfettered discretion to dismiss an action that is brought in the name of the United States to remedy a wrong done to the United States—at least absent extraordinary circumstances that are not alleged here. See *Swift* v. *United States*, 318 F.3d 250, 252 (D.C. Cir.), cert. denied, 539 U.S. 944 (2003); Pet. App. 2a.

a. Congress's specification in 31 U.S.C. 3730(c)(2)(A) that "'[t]he *Government*'" may dismiss an FCA case—"meaning the Executive Branch, not the Judicial"—"suggests the absence of judicial constraint." *Swift*, 318 F.3d at 252 (emphasis added). That reading of the statute is strengthened by this Court's longstanding recognition that a decision not to prosecute is within "the special province of the Executive Branch," which is assigned responsibility by the Constitution to take care that the laws be faithfully executed. *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985). A federal agency's "decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Id.* at 831. The "government's judgment" that a particular FCA claim alleging a wrong done to the United States should be dismissed under Section 3730(c)(2)(A) "amounts to" a similarly "unreviewable" exercise of prosecutorial decision, because "[n]othing in § 3730(c)(2)(A) purports to deprive the Executive Branch of its historical prerogative to decide which cases should go forward in the name of the United States." *Swift*, 318 F.3d at 252-253. The FCA "neither sets 'substantive priorities' nor circumscribes the government's 'power to discriminate among issues or cases it will pursue.'" *Id.* at 253 (quoting *Heckler*, 470 U.S. at 833). The statutory text thus indicates that

Congress intended the Executive Branch to exercise its traditional prerogative to choose which enforcement actions will move forward in its name to recover for wrongs done to it.

Other FCA provisions reinforce the D.C. Circuit's conclusion that the government's decision to dismiss an FCA case under Section 3730(c)(2)(A) is not subject to judicial review. In contrast to Section 3730(c)(2)(A), the next subsection of the statute specifies particular criteria for courts to apply when reviewing the government's attempt to settle a *qui tam* suit. See 31 U.S.C. 3730(c)(2)(B). Both subsections authorize the United States to exercise control over declined *qui tam* suits "notwithstanding the objections of the" relator. 31 U.S.C. 3730(c)(2)(A) and (B). Under Section 3730(c)(2)(B), however, the government may *settle* a case only if "the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances." 31 U.S.C. 3730(c)(2)(B). Section 3730(c)(2)(A) places no similar limitations on the government's authority to *dismiss* a case, and it does not articulate any substantive standards for a court to use to evaluate the government's dismissal decision. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (brackets and citation omitted).

Several other FCA provisions similarly indicate that, when Congress intends that particular disputes between the government and *qui tam* relators be subject to judicial review, Congress identifies the standards that courts should apply in resolving those disputes. The

FCA specifies, for example, that a "court may, in its discretion, impose limitations on the [relator's] participation" after a "showing by the Government" that the relator's unrestricted participation would "interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment." 31 U.S.C. 3730(c)(2)(C). The FCA also states that, if the government initially declines to intervene in a *qui tam* suit, "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). And the statute provides that, "upon a showing by the Government that certain actions of discovery by the [relator] would interfere with" a related investigation or prosecution, "the court may stay such discovery." 31 U.S.C. 3730(c)(4); see *ibid.* (permitting extensions of the stay "upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence" and that proposed discovery would interfere with other ongoing matters). The FCA even specifies the showing that the government must make in order to obtain certain types of extensions. See 31 U.S.C. 3730(b)(3) ("The Government may, for good cause shown, move the court for" extensions of the sealing period.). Congress's careful specification of the standards that the government must satisfy to exercise those rights in *qui tam* suits underscores the significance of Congress's failure to articulate analogous substantive standards in Section 3730(c)(2)(A). See, *e.g.*, *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005) (Courts "do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply," and this "reluctance is even greater when Congress has shown

elsewhere in the same statute that it knows how to make such a requirement manifest.").

b. Petitioner contends (Pet. 7-8) that Congress must have intended courts to review the government's decision to dismiss an FCA case under Section 3730(c)(2)(A), because the statute "mandates a hearing before a court may dismiss a *qui tam* action over a relator's objection." Pet. 8 (citation omitted). But the requirements that a relator receive notice of the government's dismissal motion, and "an opportunity for a hearing on the motion," 31 U.S.C. 3730(c)(2)(A), do not impose any substantive limitations on the government's dismissal authority. Petitioner indisputably received both the notice and the opportunity for a hearing that the statute requires. See pp. 6-7, *supra*.

The hearing that Section 3730(c)(2)(A) mandates serves useful functions even if the court cannot review the substantive reasonableness of the government's dismissal decision. The hearing provides "a formal opportunity [for the relator] to convince the government not to end the case." *Swift*, 318 F.3d at 253. The hearing is also an official proceeding in which the government frequently makes representations to the court, see, *e.g.*, Pet. App. 40a, thereby increasing public confidence in the dismissal decision and providing a means for the court to assure itself that the case does not raise any extraordinary circumstances that might warrant further inquiry. See *Swift*, 318 F.3d at 253 (reserving the question whether "an exception for 'fraud on the court'" or the like "might be consistent with" Section 3730(c)(2)(A)); see also Pet. App. 2a (observing that petitioner had "presented no evidence of 'fraud on the court or any similar exceptional circumstance'") (citation omitted); cf. *United States* v. *Armstrong*, 517 U.S. 456, 464-465

(1996) (explaining the presumption that prosecutors "'properly discharge[] their official duties'" in deciding "'whether or not to prosecute, and what charge to file,'" but indicating that defendants may "dispel the presumption" by presenting "'clear evidence to the contrary'") (citations omitted).

Statutory requirements that the government explain particular decisions can serve useful purposes, even when those laws do not authorize substantive judicial review of the decisions. The National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, for example, "guarantees that [certain] relevant information will be made available" without "mandat[ing] particular results." *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 349-350 (1989). The Freedom of Information Act, 5 U.S.C. 552, and the Government in the Sunshine Act, 5 U.S.C. 552b, likewise require the government to make various disclosures without authorizing judicial scrutiny of the matters disclosed. Such statutes reflect the understanding that public-disclosure requirements can encourage reasoned decisionmaking even without mandating particular substantive outcomes. See *Robertson*, 490 U.S. at 350 ("[A] set of 'action-forcing' procedures" can ensure "that agencies take a 'hard look' at [issues].") (citation omitted); see generally Frederick Schauer, *Giving Reasons*, 47 Stan. L. Rev. 633, 657-658 (1995).

c. Petitioner contends (Pet. 6-7, 9-11) that the district court should have resolved the government's motion to dismiss by applying the standard endorsed by the Ninth and Tenth Circuits, which have instructed district courts to conduct a limited and highly deferential substantive review before granting the government's motion to dismiss a *qui tam* suit under Section 3730(c)(2)(A). In *United States ex rel. Sequoia Orange*

Co. v. *Baird-Neece Packing Corp.*, 151 F.3d 1139 (1998), cert. denied, 525 U.S. 1067 (1999), the Ninth Circuit held that dismissal is justified if the government "(1) identifi[es] * * * a valid government purpose" and "(2) [shows] a rational relation between dismissal and accomplishment of the purpose." *Id.* at 1145 (citation omitted). "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." *Ibid.* (citation and internal quotation marks omitted). The Ninth Circuit has equated that inquiry to the standard for "determin[ing] whether executive action violates substantive due process." *Ibid.* The Ninth Circuit also found "support" for that standard in "the Senate Report to the False Claims Amendments Act of 1986." *Ibid.* The Tenth Circuit has adopted the Ninth Circuit's approach, at least where the defendant has been served with the complaint. See *Ridenour* v. *Kaiser-Hill Co.*, 397 F.3d 925, 936 (2005), cert. denied, 546 U.S. 816 (2005).[2]

Although the Ninth Circuit has compared the government's dismissal of an FCA case brought in its own name to the determination "whether executive action violates substantive due process," *Sequoia Orange*, 151 F.3d at 1145, that analogy is flawed. The Constitution may sometimes protect a citizen's right not to be subjected to irrational, arbitrary executive action. But petitioner has no constitutional right to pursue a claim for monetary relief that is premised on legal wrongs done to the federal government. Although Congress

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[2] The Tenth Circuit has reserved judgment on what standard applies when the government moves to dismiss an FCA case before the defendant has been served. See *United States ex rel. Wickliffe* v. *EMC Corp.*, 473 Fed. Appx. 849, 852-853 (2012).

has authorized relators to pursue such claims as partial assignees of the United States, relators' prerogatives under the FCA are subject to the limitations that Congress has chosen to impose, among which is the government's unreviewable right to dismiss a *qui tam* suit so long as notice and an opportunity for a hearing are provided. Treating the dismissal decision as unreviewable is consistent with the FCA's text, with the Constitution, and with the general rule that the decision whether to bring an action on behalf of the United States is committed to the Executive Branch's "absolute discretion." *Swift*, 318 F.3d at 253 (quoting *Heckler*, 470 U.S. at 831).

Petitioner's invocation of the Senate Report related to the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153, is also mistaken. Pet. 9-10; see *Sequoia Orange*, 151 F.3d at 1145. That report concerns a proposed version of the 1986 amendments that was not enacted, and which neither gave the United States a freestanding right to dismiss an FCA case nor distinguished between a relator's objections to a settlement and objections to dismissal. See S. Rep. No. 345, 99th Cong., 2d Sess. 26 (1986) (Senate Report); see also *Swift*, 318 F.3d at 253. In any event, the language that petitioner quotes addresses instances in which "the Government takes over a privately initiated action" and pursues it, Pet. 10 (quoting Senate Report 26), not cases like this one in which the United States has not intervened and has decided that the case should be dismissed. "The whole point here is that the government has not elected to proceed; it has elected to dismiss the case." *Swift*, 318 F.3d at 253.

2. Contrary to petitioner's contention (Pet. 2-3, 7), the slight difference between the legal standards articulated by the D.C. Circuit, on the one hand, and the

Ninth and Tenth Circuits, on the other, does not warrant the Court's review at this time. As the decisions cited in the petition show, all the courts of appeals that have considered the issue agree that the court should give substantial deference to the government's dismissal decision; the only difference concerns the degree of that deference. When the standards are properly applied, the slight difference between the courts' approaches will very rarely if ever be outcome-determinative; and the government's motion to dismiss in this case was properly granted under either standard.

a. Like the D.C. Circuit's *Swift* standard, the Ninth Circuit's standard for Section 3730(c)(2)(A) motions gives wide latitude to the government to dismiss an FCA case, mirroring the limited review that courts apply to substantive due process challenges to executive action. See *Sequoia Orange*, 151 F.3d at 1145. A proper application of *Sequoia Orange* thus requires a court to grant the government's Section 3730(c)(2)(A) motion unless the court cannot find any rational basis to justify the government's decision. See, *e.g.*, *City of Cuyahoga Falls* v. *Buckeye Cmty. Hope Found.*, 538 U.S. 188, 198 (2003) ("[I]n our evaluations of abusive executive action, we have held that only the most egregious official conduct can be said to be arbitrary in the constitutional sense.") (citation and internal quotation marks omitted).

Multiple courts ruling on Section 3730(c)(2)(A) motions have declined to choose between the competing standards because the government would prevail under either one in the particular circumstances involved. The Third Circuit recently declined to decide whether *Swift* or *Sequoia Orange* supplies the proper standard, explaining that, in the case before it, dismissal would be warranted "even [under] the more restrictive standard."

Chang v. *Children's Advocacy Ctr. of Del. Weih Steve Chang*, 938 F.3d 384, 387 (2019). A number of district courts have recently issued similar decisions. See, *e.g.*, *United States ex rel. Graves* v. *Internet Corp. for Assigned Names & Numbers, Inc.*, 398 F. Supp. 3d 1307, 1310-1311 (N.D. Ga. 2019); *United States ex rel. Johnson* v. *Raytheon Co.*, 395 F. Supp. 3d 791, 794 (N.D. Tex. 2019); *United States ex rel. Stovall* v. *Webster Univ.*, No. 15-cv-3530, 2018 WL 3756888, at *3 (D.S.C. Aug. 8, 2018). In *Swift* itself, the D.C. Circuit held in the alternative that, "[e]ven if [*Sequoia Orange*] set the proper standard, the government easily satisfied it." 318 F.3d at 254.

As petitioner notes (Pet. 11), two district courts have recently denied the United States' motions to dismiss *qui tam* suits under Section 3730(c)(2)(A). See *United States ex rel. CIMZNHCA, LLC* v. *UCB, Inc.*, No. 17-cv-765, 2019 WL 1598109 (S.D. Ill. Apr. 15, 2019); *United States* v. *Academy Mortg. Corp.*, No. 16-cv-2120, 2018 WL 3208157 (N.D. Cal. June 29, 2018). Those are the first such decisions of which the government is aware, and they reflect misapplications of Section 3730(c)(2)(A) even under the *Sequoia Orange* standard. The United States has appealed both decisions under the collateral-order doctrine. See *United States* v. *CIMZNHCA, LLC*, No. 19-2273 (7th Cir.) (argued Jan. 23, 2020); *United States* v. *United States ex rel. Thrower*, No. 18-16408 (9th Cir.) (argued Nov. 14, 2019). Petitioner does not identify any case in which a court of appeals has concluded that the government's motion to dismiss an FCA suit under Section 3730(c)(2)(A) should have been denied. Absent any instance in which the slightly varying standards applied by different courts of

appeals have proved to be outcome-determinative, the issue does not warrant this Court's review.

b. Even if the question presented warranted resolution by this Court, this case would be an unsuitable vehicle, because dismissal of petitioner's FCA claims was plainly warranted even under the *Sequoia Orange* standard that petitioner advocates. The United States' motion to dismiss explained that petitioner's claims "lack substantial merit" and that "litigation of them would require further unnecessary expenditures of scarce Government resources." Pet. App. 55a. Those are indisputably "valid government purpose[s]," and the government's conclusions were "rational." *Sequoia Orange*, 151 F.3d at 1145 (citation omitted). The government noted, for example, that while petitioner's theory of liability is that Chase falsely claimed entitlement to incentive payments under HAMP, petitioner "d[id] not allege that Chase received HAMP incentive payments on" any of the loans that were the subject of his claims. Pet. App. 53a; see Pet. 14 (conceding that petitioner "did not allege any specific loan that did not qualify for an incentive payment under the HAMP"). At the hearing on the motion, government counsel further explained that proceeding with the litigation could require the United States to deal with "large amounts of discovery," a commitment of resources that would be unwarranted given the unlikelihood that petitioner's current allegations have identified a provable FCA violation. Pet. App. 48a.

Courts applying the *Sequoia Orange* standard have granted motions to dismiss under Section 3730(c)(2)(A) on similar grounds. In *Sequoia Orange* itself, the Ninth Circuit recognized that "the government can legitimately consider the burden imposed on the taxpayers

by its litigation," and that "the government would continue to incur enormous internal staff costs" if the case proceeded. 151 F.3d at 1146. In *Chang*, the Third Circuit likewise recognized that "[t]he government has an interest in minimizing unnecessary or burdensome litigation costs," and that "dismissing a case is, of course, the easiest way to achieve that objective." 938 F.3d at 387. District courts applying *Sequoia Orange* routinely defer to similar government judgments. See, *e.g.*, *United States ex rel. Harris* v. *EMD Serono, Inc.*, 370 F. Supp. 3d 483, 489 (E.D. Pa. 2019) ("The government, after having already expended substantial time and resources, has concluded that it is better to use its resources pursuing other claims."); *United States ex rel. Nicholson* v. *Spigelman*, No. 10-cv-3361, 2011 WL 2683161, at *2 (N.D. Ill. July 8, 2011) (accepting the government's judgment that any potential for recovery was likely outweighed by the costs of "monitoring the case, filing briefs to clarify its position on questions of law, responding to discovery requests, and preparing government officials for depositions").

Petitioner has not shown that the government's decision to dismiss this litigation was "arbitrary in the constitutional sense," *City of Cuyahoga Falls*, 538 U.S. at 198 (citation omitted)—the only permissible inquiry under a proper application of the *Sequoia Orange* standard. Petitioner instead contends (Pet. 11-21) that his HAMP claim has substantial merit. But that contention is inconsistent with the judgments of the Executive Branch, which administered HAMP. Petitioner's contention (Pet. 22) that the "cost to the Government of submitting to discovery or reading the filings in this case is infinitesimal compared to the millions it will receive if [he] prevails" is likewise inconsistent with the

government's judgments about the likely costs and benefits if this case were to proceed. And even if the Court assumes "that the Government *could* recover more in damages than it expends in resources, *if* [petitioner] were to eventually prevail" in this litigation, that "does not mean that avoiding resource expenditures now is not a valid government purpose." *United States ex rel. Borzilleri* v. *AbbVie, Inc.*, No. 15-cv-7881, 2019 WL 3203000, at *2 (S.D.N.Y. July 16, 2019) (internal quotation marks omitted). Petitioner's arguments provide no basis for a court to conclude that dismissal of his case was fraudulent, arbitrary and capricious, or illegal. See, *e.g.*, *Nicholson*, 2011 WL 2683161, at *2-*3 (rejecting a relator's claim that the government "seriously underestimated the financial upside of the litigation" and explaining that, regardless of whether the government's "cost-benefit analysis" is "sound" or "short-sighted," "it cannot be deemed arbitrary and capricious"); *Harris*, 370 F. Supp. 3d at 490 ("Preserving litigation costs is a valid interest even where the claims may have merit.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2020