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Comment

DOJ BLOWS THE WHISTLE ON PROFESSIONAL WHISTLEBLOWERS: BUT THE CIRCUITS ARE SPLIT ON WHETHER DISMISSALS WILL BE *SWIFT*

Jennifer Harchut*

"Referees are the law. They are law in action. They have a whistle. They blow it. And that whistle is the articulation of God's justice."[1]

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).[2] 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

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1. Harold Pinter, Moonlight 68 (Grove Press ed., 1994).

2. *See* False Claims Act, 31 U.S.C. §§ 3729–3733 (2018). For a discussion of the recent cases in which the DOJ has more aggressively asserted its authority to dismiss FCA actions, see *infra* Section II.F.

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.").

act in the public's best interest, can convince the Judicial Branch to second-guess the DOJ's decisions to dismiss.[4]

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.[9] The courts are

4. For a critical analysis of the constitutional concerns raised by the Judicial Branch potentially usurping the Executive Branch's authority, see *infra* Section IV.A.

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://www.jdsupra.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/Fixing_The_FCA_Pages_Web.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").

9. *See* Health Choice All., LLC *ex rel.* United States v. Eli Lilly & Co., No. 5:17-CV-123-RWS-CMC, 2019 WL 2520165, at *4–10 (E.D. Tex. May 16, 2019), *opinion amended and superseded by* No. 5:17-CV-123-RWS-CMC, 2019 WL 5691988 (E.D. Tex.

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*,[10] 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.*[11] 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.[12] 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.[13] In his memo, Granston pointed out that "[o]ver the last several years, the Department has seen record increases in *qui tam* actions."[14] 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.[15]

June 20, 2019), *report and recommendation adopted as modified*, No. 5:17-CV-123-RWS-CMC, 2019 WL 4727422 (E.D. Tex. Sept. 27, 2019) (detailing the split between the circuits that began in 2003 when the D.C. Circuit rejected the approach of the Ninth Circuit), *appeal docketed*, No. 19-40906 (5th Cir. Oct. 29, 2019).

10. 318 F.3d 250, 252 (D.C. Cir. 2003) (finding an unfettered right of government to unilaterally dismiss qui tam actions based on statutory interpretation, prior precedent, and the Federal Rules of Civil Procedure).

11. 151 F.3d 1139, 1145 (9th Cir. 1998) (adopting a two-step rational relation standard). For a discussion of the different approaches articulated by *Sequoia* and *Swift*, see *infra* Sections II.D–E.

12. *See* Stephen Cox, Deputy Assoc. Attorney General, Remarks at the 2019 Advanced Forum on False Claims and Qui Tam Enforcement (Jan. 28, 2019), https://www.justice.gov/opa/speech/deputy-associate-attorney-general-stephen-cox-delivers-remarks-2019-advanced-forum-false [https://perma.cc/DSM3-MGSW] (noting that in the past the DOJ used its dismissal authority "sparingly").

13. *See* Granston Memo, *supra* note 7, at 3–7 (setting forth seven non-exhaustive factors that the DOJ should consider as bases for dismissal); *see also* Douglas Baruch, John Boese & Jennifer Wollenberg, *How FCA Circuit Split Is Playing out in District Court*, LAW360 (Apr. 12, 2019, 4:23 PM), https://www.law360.com/articles/1149626/how-fca-circuit-split-is-playing-out-in-district-court [https://perma.cc/26A9-VYT7] (stating that, following the Granston Memo, the DOJ "now appears to be flexing its dismissal authority muscle . . . [which] has caused more lower courts to assess the standards").

14. Granston Memo, *supra* note 7, at 1 (noting that annual totals of qui tam cases were "approaching or exceeding 600 new matters").

15. *Id.* at 1 ("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."). For a discussion of when the DOJ would consider dismissal to be appropriate, see *infra* note 107.

Spurred on by Granston's encouragement, the DOJ significantly increased its filings of motions to dismiss qui tam actions in 2018 and 2019.[16] 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.[17] 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

16. *See* Lydia Wheeler, *Government Tosses out More Whistleblower Cases After 2018 Memo*, BLOOMBERG L. (June 24, 2019), https://news.bloomberglaw.com/health-law-and-business/government-tosses-out-more-whistleblower-cases-after-2018-memo [https://perma.cc/G48K-Y636] (reporting that, since the issuance of the Granston Memo on January 10, 2018, "the DOJ has moved to dismiss a larger number of cases than in the past" with at least thirty cases dismissed since the Granston guidance was adopted (internal quotation marks omitted)).

17. *See* Jason Crawford, John Brennan & Keith Harrison, *Limits of DOJ's Qui Tam Dismissal Authority Are Unsettled*, LAW360 (July 2, 2019, 2:04 PM), https://www.law360.com/articles/1174816/limits-of-doj-s-qui-tam-dismissal-authority-are-unsettled [https://perma.cc/5WC3-QG3H] (explaining that district court decisions on the applicable standard of review for government motions to dismiss "continue to percolate up through the courts of appeals, [and] the Supreme Court may eventually need to weigh in on the contours of the government's dismissal authority"). For a discussion of the district court decisions, see *infra* notes 101–103 and accompanying text.

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.

dismissal serves a valid government purpose, then serious constitutional and public policy issues will be at stake.[19]

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"[20] 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.[21] 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.[22] 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.[23] 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.[24]

19. For a discussion of the constitutional and public policy issues at stake, see *infra* Section IV.

20. Swift v. United States, 318 F.3d 250, 253 (D.C. Cir. 2003). For a discussion of the constitutional issue, see *infra* Section IV.A.

21. For a discussion of why the DOJ should be allowed to exercise its discretion to rein in overreach by professional relators, see *infra* Section IV.B.

22. For a discussion of the relevant history of qui tam enforcement in England and of the FCA in the United States, see *infra* Sections II.A–B.

23. For an explanation of how the FCA works today, see *infra* Section II.C. For a discussion of the circuit court split concerning the standard of review for DOJ dismissals, see *infra* Sections II.D–E.

24. For a discussion of the effects of the Granston Memo, see *infra* Section II.F.

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."[26] Initially, English courts allowed for qui tam actions through common law, but later included the right in statutory provisions.[27] "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."[28] 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.[29] 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."[30] Consequently, in 1951, Parliament passed the Common Informers Act and abolished qui tam actions in England entirely.[31]

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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 parte sequitur*, 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).

26. *Id.* at 774 (citing Prior of Lewes v. De Holt (1300), *reprinted in* 48 SELDEN SOCIETY 198 (1931)).

27. *See id.* at 774–75 (providing a history of qui tam actions).

28. Laura Leigh Fox, Note, *Getting Schooled: The United States Court of Appeals for the Eleventh Circuit Holds That the Federal Government Need Not Show "Good Cause" Before Settling and Dismissing a Pending Qui Tam Action Against College*, 69 MERCER L. REV. 1285, 1292 (2018) (citing *Vt. Agency of Nat. Res.*, 529 U.S. at 775).

29. *See id.* (citing *Vt. Agency of Nat. Res.*, 529 U.S. at 775; Jonathan T. Brollier, *Mutiny of the Bounty: A Moderate Change in the Incentive Structure of Qui Tam Actions Brought Under the False Claims Act*, 67 OHIO ST. L.J. 693, 998 (2006)) (providing a detailed history of qui tam actions); *see also* J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 553–608 (2000) (explaining the history of qui tam actions in England and the United States). Beck argued that the "conflict of interests" inherent in qui tam statutes that led to their abolition in England is also present in the FCA. *Id.* at 608–09, 642.

30. William Y. Culbertson, *Whistleblowers and Prosecutors Achieving the Best Interests of the Public*, BUS. L. TODAY, May/June 2008, at 32 (providing a brief history of qui tam enforcement).

31. *See* Beck, *supra* note 29, at 603–08 (describing English Parliament members' dislike for informers and the debate over the abolition bill). Specifically, Beck details the language used by members of Parliament when discussing the bill: "Members of Parliament described the informer as an 'unnatural creature of statute,' 'a parasite who is legally empowered to sue for money for which he has not worked,' a 'frightful beast,' a 'malodorous type.'" *Id.* at 606 (quoting 483 Parl. Deb., H.C. (5th ser.) (1951) 2079, 2106, 2097, 2110, 2112)).

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."[32] 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."[33] 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 gunpowder.[34] 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.[35]

The FCA qui tam provisions were rarely used until World War II, when relators began abusing the statute after "someone discovered a loophole that allowed an individual to bring a *qui tam* action based on information the government already had and was actively prosecuting."[36] With the emerging prominence of these "parasitic" cases, Congress amended

32. *Id.* at 553–55 (providing examples of other qui tam provisions in the U.S. Code). One such example being that "[a] *qui tam* action . . . may be filed when a person falsely marks an item to suggest patent protection or to imply consent of a patentee." *Id.* (citing 35 U.S.C. § 292 (1994)).

33. *Id.* at 555 (distinguishing the FCA from less frequently used qui tam statutes in the U.S. Code). Between the passage of the 1986 FCA amendments and September 1999, 2,959 qui tam actions were filed. *See id.* at 542.

34. *See* Stephen Cox, Deputy Assoc. Attorney Gen., Remarks to the Cleveland, Tennessee Rotary Club 3 (Mar. 12, 2019), https://www.justice.gov/opa/speech/deputy-associate-attorney-general-stephen-cox-gives-remarks-cleveland-tennessee-rotary [https://perma.cc/6YMD-MPDV] (describing the history of the FCA and the important role it plays in fighting fraud on the taxpayer); *see also Vt. Agency of Nat. Res.*, 529 U.S. at 781 (stating that "the FCA was enacted in 1863 with the principal goal of 'stopping the massive frauds perpetrated by large [private] contractors during the Civil War'" (quoting United States v. Bornstein, 423 U.S. 303, 309 (1976))); Evan J. Ballan, Note, *Protecting Whistleblowing (and Not Just Whistleblowers)*, 116 MICH. L. REV. 475, 479–80 (2017) (explaining Michigan Senator Jacob Howard's characterization of the qui tam legislation when he first introduced the bill: "[I]ts effect was to 'hold out to a confederate a strong temptation to betray his coconspirator' based upon the 'old-fashioned idea of . . . '"setting a rouge to catch a rouge,'" which is the safest and most expeditious way I have ever discovered of bringing rogues to justice." (quoting CONG. GLOBE, 37th Cong., 3d Sess. 952 (1863) (statement of Sen. Howard))).

35. *See* 31 U.S.C. §§ 3729–3733 (2018); *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, 641 (2007) (detailing the history of the FCA).

36. Culbertson, *supra* note 30, at 32 (describing the loophole in the FCA and explaining that the Supreme Court's decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), which affirmed the lower court decision that an informer could sue under the FCA based on information in public criminal indictments, led to Congress amending the statute to prohibit such qui tam actions); *see also* Finegan, *supra* note 35 (explaining that, in the 1940s, relators realized the profitability

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.[38]

The 1943 amendments produced a chilling effect on qui tam litigation that would last for the next forty years.[39] In 1986, however, Congress again amended the FCA to strengthen qui tam enforcement incentives because of a "growing . . . concern about defense-procurement fraud."[40] 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.[41] In addition, the amendments significantly increased the government's control over qui tam actions.[42]

Since the 1986 amendments, qui tam filings have increased dramatically and now account for a large percentage of all FCA cases.[43] More-

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of qui tam suits and, as nothing in the FCA prohibited it, brought cases based on information publicly available in criminal indictments).

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"); Finegan, *supra* note 35, at 642 ("Following these amendments, fewer actions were brought under the FCA and its qui tam provisions were used infrequently until 1986.").

38. *See* 31 U.S.C. § 3491(E)(1)–(2) (2018); *see also* Brooker, *supra* note 37, at 378 (explaining that after the 1943 amendments, relators were "no longer guaranteed half of the award in *qui tam* suits," but instead "could receive only 'fair and reasonable compensation' if the government chose to intervene . . . and prosecute it itself").

39. *See* Ni Qian, Note, *Necessary Evils: How to Stop Worrying and Love Qui Tam*, 2013 COLUM. BUS. L. REV. 594, 606 (2013) ("The 1943 amendment achieved its intended purpose and chilled qui tam actions for the next four decades . . . .").

40. David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1943 (2014) (describing the modern version of the FCA that emerged because of "public concern about defense-procurement fraud"); *see also* Qian, *supra* note 39, at 606–07 (explaining that when the media reported that the government was purchasing "$435 hammers and $7,622 coffee pots . . . Congress was pressured to crack down on false claims and to amend the FCA").

41. *See* Qian, *supra* note 39, at 607–08 (detailing increased penalties and rewards).

42. For a discussion of how the 1986 amendments increased the government's control over qui tam cases, see *infra* note 65 and accompanying text.

43. *See* Press Release, Dep't of Justice, *supra* note 3 (reporting that "whistleblower, or *qui tam*, actions comprise a significant percentage of the False Claims Act cases that are filed"). "The number of lawsuits filed under the *qui tam*

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 re-

provisions of the Act has grown significantly since 1986, with 645 *qui tam* suits filed this past year—an average of more than 12 new cases every week." *Id.* (discussing the increase in qui tam lawsuits).

44. *See* Cox, *supra* note 34, at 1 (reporting the amount of money recovered by the government from FCA cases filed by relators since 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.").

ceive 25%–30% of any award.[51] Nevertheless, even when the government declines to intervene, the DOJ retains significant rights in the litigation.[52]

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.[55] The Ninth Circuit and the Tenth Circuit, along with numerous district

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 reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs." *Id.* §§ 3730(d)(1), (d)(2) (describing possible awards for qui tam plaintiffs).

52. *See* United States *ex rel.* Panzey Belgium Harris v. EMD Serono, Inc., 370 F. Supp. 3d 483, 487 (2019) (summarizing some of the rights retained by the government when it declines to intervene). For example, even if the government declines to intervene, "[t]he relator cannot dismiss the action without the written consent of the Attorney General." *Id.* at 487; *see also* Granston Memo, *supra* note 7, at 3 n.2 (noting that 31 U.S.C. § 3730(c)(2)(A) "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 generally* Transcript of Oral Argument at 48, Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1986 (2016) (No. 15-7), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/15-7_6537.pdf [https://perma.cc/9EGH-WF5H] (providing statement of Deputy Solicitor General Malcolm Steward noting various reasons why the DOJ might decline to intervene: "[W]e don't typically give public explanations of why we don't intervene. Sometimes it's because the dollar amount is small. Sometimes it's because . . . we think that the relator is capable of handling the case himself, or the relator's counsel. Sometimes . . . [it's] because we're skeptical of the merits of a case. But even in those situations, it could be that we agree with the relator's theory and simply don't know whether the facts could be proved.")

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.").

54. *See* Granston Memo, *supra* note 7, at 3 (explaining that the FCA does not specify either a standard of review to be used by courts or provide "specific grounds for dismissal").

55. *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 qui tam actions). There are also cases that declined to adopt either *Swift* or *Sequoia* but that found dismissal appropriate under either standard. *See, e.g.*, United States *ex rel.* Johnson v. Raytheon Co., 395 F. Supp. 3d 791 (N.D. Tex. 2019); United States *ex rel.* Borzilleri v. AbbVie, Inc., 15-CV-7881 (JMF), 2019 WL 3203000 (S.D.N.Y. July 16, 2019); United States *ex rel.* Nicholson v. Spigelman, No. 10 C 3361, 2011 WL 2683161 (N.D. Ill. July 8, 2011).

courts, have adopted a rational relation test.[56] 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.[57]

D. *DOJ Whistles Do Not Necessarily Stop the Game: The Ninth and Tenth Circuits' Rational Relation Test*

In 1998, the Ninth Circuit became the first circuit court to announce a standard of review for government dismissals of qui tam cases.[58] In *Sequoia*, an orange processor and an orange grower brought qui tam actions against other citrus companies for allegedly violating "the orange and lemon marketing orders promulgated by the Secretary of Agriculture."[59] "The government intervened several years [into] the litigation . . . and sought dismissal under 31 U.S.C. § 3730(c)(2)(A)" after the Secretary of

56. *See* Ridenour v. Kaiser-Hill Co., 397 F.3d 925, 936 (10th Cir. 2005) (adopting the *Sequoia* rational relation approach); *Sequoia*, 151 F.3d at 1145 (applying rational relation test). A number of district court cases recently applied the *Sequoia* standard. *See, e.g.*, United States *ex rel.* Campie v. Gilead Scis., Inc., No. 3:11-cv-00941-EMC, 2019 WL 5722618 (N.D. Cal. Nov. 5, 2019) (granting the government's motion to dismiss in a district court within the Ninth Circuit); *EMD Serono*, 370 F. Supp. at 498–91 (granting the DOJ's motion to dismiss in a district court within the Third Circuit); United States *ex rel.* CIMZNHCA v. UCB, Inc., No. 17-CV-765-SMY-MAB, 2019 WL 1598109, at *4 (S.D. Ill. Apr. 15, 2019), *appeal docketed*, No. 19-2273 (7th Cir. July 8, 2019) (denying the DOJ's motion to dismiss in a district court within the Seventh Circuit); United States *ex rel.* Toomer v. TerraPower, LLC, No. 4:16-cv-00226-DCN, 2018 WL 4934070, at *8 (D. Idaho Oct. 10, 2018) (granting the DOJ's motion to dismiss in a district court within the Ninth Circuit); United States *ex rel.* Thrower v. Acad. Mortg. Corp., No. 16-cv-02120-EMC, 2018 WL 3208157, at *3 (N.D. Cal. June 29, 2018), *appeal docketed*, No. 18-16408 (9th Cir. July 27, 2018) (denying the government's motion to dismiss in a district court within the Ninth Circuit).

57. *See Swift*, 318 F.3d at 252 (holding that "[n]othing in [31 U.S.C.] § 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"). Many courts have adopted the *Swift* standard. *See, e.g.*, 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, at *8 (E.D. Tex. Sept. 27, 2019), *appeal docketed*, No. 19-40906 (5th Cir. Oct. 29, 2019) (granting the DOJ's motion to dismiss in a district court within the Fifth Circuit); United States *ex rel.* De Sessa v. Dallas Cty. Hosp. Dist., No. 3:17-CV-1782-K, 2019 WL 2225072 (N.D. Tex. May 23, 2019) (same); United States *ex rel.* Sibley v. Delta Reg'l Med. Ctr., No. 4:17-cv-000053-GHD-RP, 2019 WL 1305069 (N.D. Miss. Mar. 21, 2019) (same); United States *ex rel.* Davis v. Hennepin County, No. 18-cv-01551 (ECT/HB), 2019 WL 608848 (D. Minn. Feb. 13, 2019) (granting the DOJ's motion to dismiss in a district court within the Eighth Circuit); United States *ex rel.* Maldonado v. Ball Homes, LLC, No. 5: 17-379-DCR, 2018 WL 3213614 (E.D. Ky. June 29, 2018) (granting the DOJ's motion to dismiss in a district court within the Sixth Circuit); United States *ex rel.* Levine v. Avnet, Inc., No. 2:14-cv-17 (WOB-CJS), 2015 WL 1499519 (E.D. Ky. Apr. 1, 2015) (same).

58. *See Eli Lilly*, 2019 WL 2520165, at *4 ("In 1998, the Ninth Circuit Court of Appeals first considered the issue." (citing *Sequoia*, 151 F.3d 1139)).

59. *See Sequoia*, 151 F.3d at 1141.

Agriculture decided to abandon the marketing program.[60] The district court granted the government's motion to dismiss on the grounds that the government's reasons for dismissal were rationally related to legitimate government purposes and dismissal was not arbitrary or capricious.[61] On appeal, the relators argued "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," and that such an interpretation "is inconsistent with the general framework of the False Claims Amendments Act of 1986 which was intended to provide relators with 'increased involvement in suits brought by the relator but litigated by the Government.'"[62]

The Ninth Circuit in *Sequoia* began its discussion by pointing out that the FCA does not set forth the circumstances under which the government can dismiss a qui tam action.[63] The court noted, however, that the Ninth Circuit has previously likened the government's ability to dismiss to the government's ability to exercise prosecutorial discretion.[64] Responding to the relator's argument that the legislative history of the 1986 amendments does not support allowing the government to dismiss meritorious qui tam cases, the court explained that while the 1986 amendments did increase the relator's role in FCA cases, the government continued to possess "'primary responsibility' for the case and now enjoys supervisory powers over the relator."[65] Citing the legislative history of the 1986 amendments, the

60. *See id.*

61. *See id.* (citing United States *ex rel.* Sequoia Orange Co. v. Sunland Packing House Co., 912 F. Supp. 1325 (E.D. Cal. 1995)).

62. *Id.* at 1143–44 (citation omitted) (quoting S. REP. NO. 99-345, at 13 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5278).

63. *See id.*

64. *Id.* at 1145 (citing United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 756 (9th Cir. 1993); United States *ex rel.* Killingsworth v. Northrop Corp., 25 F.3d 715, 724 (9th Cir. 1994)) (recognizing that the FCA does not curtail the government's ability to exercise its prosecutorial discretion).

65. *Sequoia*, 151 F.3d at 1144 (explaining the government's supervisory powers in qui tam cases).

> 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).

Id.

In fact, the *Sequoia* court concluded that the 1986 amendments "actually increased, rather than decreased, executive control over qui tam lawsuits," and explained that "the government's power to dismiss or settle an action is broad." *Id.* (discussing the impact of the 1986 amendments on the government's power over qui tam cases). In support of its proposition that the 1986 amendments increased the government's control of qui tam cases, the court pointed to the government's power

Ninth Circuit found support for the district court's conclusion that even a meritorious case could be dismissed because Congress intended for the FCA to "create only a limited check on prosecutorial discretion to ensure suits are not dropped without legitimate governmental purpose."[66]

Turning to the issue of the standard of review governing a motion to dismiss, the *Sequoia* court first noted that the FCA itself does not create a particular standard.[67] The court then found that the district court acted reasonably by utilizing the following two-part rational relation standard to assess "the justification for dismissal: (1) identification of a valid government purpose; and (2) a rational relation between dismissal and accomplishment of the purpose."[68] The Ninth Circuit then stated that "[i]f the government satisfies the two-step test, the burden switches to the relator 'to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal.'"[69] The court cited the Senate report to the 1986 amendments, "which explained that the relators may object if the government moves to dismiss without reason."[70] With regard to whether the rational relation standard would impermissibly grant the judiciary approval authority over the government's exercise of prosecutorial discretion, the *Sequoia* court held that there is no separation of powers issue because the rational relation test "require[s] no greater justification of the dismissal motion than is mandated by the Constitution."[71] Finally, the Ninth Circuit reviewed the application of the rational relation standard to the case and concluded that the government had met its burden of showing that dismissal was rationally related to a legitimate government interest.[72]

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to intervene, its supervisory power over the relator, and its power to stay the relator's discovery. *Id.* (discussing factors that support the government's control over qui tam cases).

66. *Id.* at 1144–45 (noting that the Senate report to the 1986 amendments states that qui tam plaintiffs act "as a check that the Government does not neglect evidence, cause undue delay, or drop the false claims case without legitimate reason." (quoting S. REP. NO. 99-345, at 25–26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291)).

67. *See id.* at 1145 (noting that the FCA does not specify a standard of review and rejecting relators' argument that the applicable standard is Rule 41(a)(2) of the Federal Rules of Civil Procedure).

68. *Id.* (internal quotation marks omitted) (quoting United States *ex rel.* Sequoia Orange v. Sunland Packing House Co., 912 F. Supp. 1325, 1341 (E.D. Cal. 1995)).

69. *Id.* (quoting *Sequoia Orange*, 912 F. Supp. at 1347).

70. *Id.* at 1145 (citing S. REP. NO. 99-345, at 26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291).

71. *Id.* at 1146 (citing United States v. Redondo-Lemos, 955 F.2d 1296, 1298–99 (9th Cir. 1992)) (relying on the Ninth Circuit's previous decision in *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), in which the court opined that giving the judiciary authority to approve government decisions to dismiss qui tam actions does not significantly diminish the Executive Branch's prosecutorial authority).

72. *See id.* at 1146–47 (rejecting relators' various arguments that the government's reasons for dismissal were not rationally related to a legitimate government interest).

In *Ridenour v. Kaiser-Hill Co.*,[73] the Tenth Circuit weighed in on the appropriate standard of review for DOJ dismissals of qui tam actions and adopted the *Sequoia* approach.[74] The *Ridenour* court concluded that this standard "recognizes the constitutional prerogative of the Government under the Take Care Clause, comports with legislative history, and protects the rights of relators to judicial review of a government motion to dismiss."[75] The court explained that the *Sequoia* standard does not establish a high bar for dismissals because "it is enough that there are plausible, or arguable, reasons supporting the agency decision."[76] The *Ridenour*

73. 397 F.3d 925 (10th Cir. 2005). The case involved the Rocky Flats nuclear weapons manufacturing facility in Colorado that was in operation from 1953 through 1992. *Id.* at 929. In 1989, the facility was designated by the Environmental Protection Agency (EPA) as a Superfund site under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). *Id.* The site was to be decontaminated and closed by 2006. *Id.* During the decontamination efforts, relators voiced concerns about weak security and together they filed a qui tam suit under the FCA, alleging that the contractors responsible for security on the site "were paid for security measures they either did not provide or provided below acceptable levels." *Id.* at 929–30. After investigating the suit for over two years, the government filed a motion to dismiss arguing that "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." *Id.* at 930. "After a five-day evidentiary hearing . . . 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." *Id.* The district court adopted the magistrate's recommendation and the relators appealed to the Tenth Circuit. *Id.*

74. *See id.* at 935 (noting that the FCA is silent as to the standard of review for a government motion to dismiss a qui tam action). Before addressing the standard of review for government motions to dismiss, the court first explained that prior intervention is not necessary for the government to file a motion to dismiss. *Id.* at 932–35.

75. *Id.* at 936. In deciding not to adopt *Swift*, the *Ridenour* court highlighted the distinguishing fact that in *Swift* the defendant had not been served, unlike the situation in *Ridenour*, stating:

> We do not decide at this time whether § 3730(c)(2)(A) gives the judiciary the right to pass judgment on the Government's decision to dismiss an action where the defendant has not been served and where the Government did not intervene in the action, facts of the sort presented in *Swift*.

Id. at 936 n.17. Subsequently, when presented with a defendant who had not been served, like in *Swift*, the Tenth Circuit did not adopt either *Swift* or *Sequoia* in that situation, concluding: "We need not resolve this question because even under the greater judicial scrutiny imposed by the *Sequoia* standard, the government's motion to dismiss passes muster in this case." United States *ex rel.* Wickliffe v. EMC Corp., 473 F. App'x 849, 853 (10th Cir. 2012).

76. *Ridenour*, 397 F.3d at 937 (quoting United States *ex rel.* Sequoia Orange Co. v. Sunland Packing House Co., 912 F. Supp. 1325, 1341 (E.D. Ca. 1995)). In the *Ridenour* court's view, the government advanced a "plausible or arguable" reason for dismissal because in addition to the risk of inadvertent disclosure of classified information, the government demonstrated that

> the litigation would delay 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

court found that the government satisfied the test by providing a "plausible or arguable" reason for dismissal.[77]

In addition to the Ninth and Tenth Circuits, district courts within the Third and Seventh Circuits have also followed the *Sequoia* rational relation test.[78] The D.C. Circuit, however, did not agree with this approach and

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funds from clean-up to litigation.

Id. at 937. The government presented to the district court a cost–benefit analysis that established "the benefits that might be obtained by successful prosecution of the *qui tam* action were outweighed by the risk the litigation would divert resources from the clean-up effort and delay closure of Rocky Flats." *Id.* at 937 n.20.

77. *Id.* at 936–37. The government argued and the court agreed 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." *Id.* at 936 (footnote omitted). In reaching its result, the court considered the magistrate judge's finding that "the risk of inadvertent disclosure, even if theoretically minimal, as the Relators argued, was sufficient to justify dismissal of the action." *Id.* at 937.

78. *See* United States *ex rel.* Panzey Belgium Harris v. EMD Serono, Inc., 370 F. Supp. 3d 483, 488 (E.D. Pa. 2019) (adopting the *Sequoia* rational relation standard after finding it more persuasive than the *Swift* standard). The *EMD Serono* court, within the Third Circuit, found that "[t]he rational relationship standard accords with statutory interpretation and fosters transparency. It is consistent with the constitutional scheme of checks and balances." *Id.* at 488. Further, the court explained that if the government had an "unfettered" right to dismiss, then the hearing required by the statute would be superfluous. *Id.* In applying the *Sequoia* test, the court found that the government "has a valid interest in avoiding litigation costs in a case that lacks sufficient factual and legal support" and where "the relators' allegations 'conflict with important policy and enforcement prerogatives of the federal government's healthcare programs.'" *Id.* at 489 (citation omitted). Thus, the court ruled that the government had satisfied the rational relationship test, and that the relators failed to show that the government's decision was arbitrary or capricious. *Id.* at 489–90. The court concluded by stating that "[t]he reasons given by the government are not a cover for an illegitimate reason and do not mask an animus toward the corporate relator . . . . The government is entitled to do a cost/benefit analysis to decide whether to pursue a case, even a meritorious one." *Id.* at 491; *see also* United States *ex rel.* Chang v. Children's Advocacy Ctr. of Del., 938 F.3d 384, 387 (3d Cir. 2019) (declining to "take a side in [the] circuit split because [the relator] fails even the more restrictive [*Sequoia*] standard").

Within the Seventh Circuit, the U.S. District Court for the Southern District of Illinois recently followed *Sequoia* and found that the government did not adequately investigate the relator's claim in order to support the purported government purpose. *See* United States *ex rel.* CIMZNHCA, LLC v. UCB, Inc., No. 17-CV-765-SMY-MAB, 2019 WL 1598109, at *3 (S.D. Ill. Apr. 15, 2019), *appeal docketed*, No.19-2273 (7th Cir. July 8, 2019). The court stated that "[u]nder the circumstances, one could reasonably conclude that the proffered reasons for the decision to dismiss are pretextual and the Government's true motivation is animus toward the relator." *Id.* at *4. Within the Ninth Circuit, two recent district court cases applying the *Sequoia* standard have garnered a great deal of attention because in one case, the judge took the previously unprecedented step of permitting continuation of a qui tam action that the government sought to dismiss. *See* United States *ex rel.* Thrower v. Acad. Mortg. Corp., No. 16-CV-02120-EMC, 2018 WL 3208157 (N.D. Cal. June 29, 2018), *appeal docketed*, No. 18-16408 (9th Cir. July 27, 2018). The same judge who decided *Thrower* subsequently granted a DOJ motion to dismiss under the *Sequoia* standard finding that the government had meaningfully considered the costs and benefits of proceeding with the case, thereby demonstrat-

rejected the *Sequoia* standard.[79]

E. *When the DOJ Blows the Whistle, the Game Is over: The D.C. Circuit's "Unfettered Right" Standard*

Five years after the Ninth Circuit's decision in *Sequoia*, the D.C. Circuit considered the appropriate standard governing DOJ dismissals of qui tam actions in *Swift v. United States*,[80] decided in 2003.[81] In *Swift*, the relator brought a qui tam action against one current and two former employees of the Justice Department's Office of Legal Counsel, claiming that they had conspired to defraud the government in violation of the FCA.[82] Without intervening, the government filed a motion to dismiss the case because the amount of money at stake ($6,169.20) did not outweigh the expense of the litigation, even if the allegations proved to have merit.[83] The district court applied the *Sequoia* rational relation test and granted the government's motion to dismiss.[84] On appeal, the relator argued that the government could not dismiss without first intervening and that "the government did not justify its decision to dismiss."[85]

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ing a rational basis for its decision to seek dismissal. *See* United States *ex rel.* Campie v. Gilead Scis., Inc., No. 3:11-cv-00941, 2019 WL 5722618 (N.D. Cal. Nov. 5, 2019). The DOJ's motion to dismiss *Gilead* was highlighted in a September 4, 2019, letter that Senator Charles Grassley, Chair of the Senate Finance Committee, sent to U.S. Attorney General William Barr challenging the DOJ's increased use of its dismissal authority after issuance of the Granston Memo. *See* Letter from Charles Grassley, Senator, U.S. Senate, to William Barr, Attorney Gen. (Sept. 4, 2019), https://www.grassley.senate.gov/sites/default/files/documents/2019-09-04%20CEG%20to%20DOJ%20%28FCA%20dismissals%29.pdf [https://perma.cc/AML4-GUFC]. The DOJ responded to Senator Grassley in December 2019, reporting that from January 1, 2018 to December 19, 2019, the DOJ had filed forty-five motions to dismiss qui tam cases out of more than 1,170 whistleblower actions that were filed during that period. *See* Letter from Stephen E. Boyd, Assistant Attorney Gen., to Charles Grassley, Senator, U.S. Senate (Dec. 19, 2019), https://www.arnoldporter.com/en/-/media/files/perspectives/publications/2020/01/doj-response-to-senator-grassley.pdf [https://perma.cc/FT4X-U4FB]. "The fact that we have sought to dismiss fewer than 4% of cases reflects our serious commitment to allow appropriate *qui tam* matters to proceed." *Id.* at 3.

79. *See Swift*, 318 F.3d at 252–53 (rejecting the *Sequoia* standard).

80. 318 F.3d 250 (D.C. Cir. 2003).

81. *See* Health Choice All., LLC *ex rel.* United States v. Eli Lilly & Co., No. 5:17-CV-123-RWS-CMC, 2019 WL 2520165, at *5 (E.D. Tex. May 16, 2019) (citing *Swift*, 318 F.3d 250) (noting that, subsequent to the *Sequoia* decision in 1998, the next circuit court to consider whether a lower court was correct to apply the *Sequoia* rational relation test was the D.C. Circuit in *Swift*).

82. *See Swift*, 318 F.3d at 250.

83. *See id.* at 251.

84. *See id.* (noting that the district court found "that the government had demonstrated that dismissal was rationally related to a valid governmental purpose").

85. *Id.* (listing the relator's arguments on appeal). The relator in *Swift* also argued that dismissal was improper because the government did not investigate her claims and "that the district court erred in denying her discovery and in refusing to unseal the record." *Id.* (reviewing the relator's arguments). The D.C. Cir-

In its opinion, the D.C. Circuit first concluded that the government need not intervene before dismissing the action and noted that, even if there were such a requirement, the government's motion to dismiss could be construed as a motion to intervene.[86] The *Swift* court then proceeded to reject the *Sequoia* test because it did not believe that section 3730(c)(2)(A) of the FCA gave the Judicial Branch general oversight of the Executive Branch's judgment.[87] Noting that the government's decision to dismiss a case amounts to a determination not to prosecute, the court cited U.S. Supreme Court and D.C. Circuit precedent establishing the presumption that such decisions are unreviewable.[88] Finally, the court stated that giving the government "an unfettered right to dismiss an action" is consistent with Federal Rule of Civil Procedure 41(a)(1)(a), which allows for dismissal "without order of the court" and not subject to judicial review.[89]

The *Swift* court viewed the relator's right to a hearing under section 3730(c)(2)(A) as the only indication that the courts have a role in deciding whether a qui tam case can proceed in spite of the government's decision to dismiss it.[90] In analyzing the judiciary's role, the D.C. Circuit explained that "[t]he Constitution entrusts the Executive with duty to 'take Care that the Laws be faithfully executed.' 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.'"[91] As additional support for its "unfettered right" approach, the *Swift* court found that "[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."[92] Therefore, according to the D.C. Circuit, the function of the court hearing "is simply to give the relator a formal opportunity to convince the government not to end the case."[93]

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cuit rejected these arguments as well. *See id.* at 254.

86. *See id.* at 252 (concluding that "the question whether the False Claims Act requires the government to intervene before dismissing an action is largely academic").

87. *See id.* (explaining section 3730(c)(2)(A) provides that "'[t]he Government'—meaning the Executive Branch, not the Judicial—'may dismiss the action,' which at least suggests the absence of judicial constraint" (quoting 31 U.S.C. § 3730(c)(2) (2010))).

88. *See id.* at 252 (citing Heckler v. Chaney, 470 U.S. 821, 831–33 (1985); Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1987)).

89. *Id.* (citing Randall v. Merrill Lynch, 820 F.2d 1317, 1320 (D.C. Cir. 1987)).

90. *Id.* at 253.

91. *Id.* (quoting U.S. CONST., art. II, § 3; *Heckler*, 470 U.S. at 831).

92. *See id.* at 252 (stating that section 3730(c)(2)(A) of the FCA "neither sets 'substantive priorities' nor circumscribes the government's 'power to discriminate among issues or cases it will pursue'" (quoting *Heckler*, 470 U.S. at 833)).

93. *Id.* at 253 (rejecting the *Sequoia* court's rationale). The *Swift* court noted the government's concession at oral argument that there may be an exception for "fraud on the court," but found no evidence of fraudulent conduct toward the court had been presented. *Id.* Therefore, the court bypassed the question of "whether this type of exception, or any other, might be consistent with our reading

The D.C. Circuit disregarded the Senate report that the *Sequoia* court referenced in support of its rational relation standard.[94] The *Swift* court explained that the portion of the Senate report cited in *Sequoia* related to an unenacted version of the 1986 amendments.[95] The D.C. Circuit concluded that, even if the *Sequoia* test was the proper standard, the government satisfied it because dismissal achieved the government's legitimate objective of minimizing expenses.[96] Moreover, the *Swift* court found that the relator had not established "that the government's prosecutorial judgment was arbitrary and capricious, illegal, or fraudulent."[97]

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of § 3730(c)(2)(A)." *Id.* In a later case, the D.C. Circuit mentioned that "fraud on the court" is a possible exception to the government's unfettered right to dismiss qui tam actions. *See* Hoyte v. Am. Nat'l Red Cross, 518 F.3d 61, 65 (D.C. Cir. 2008).

94. *See Swift*, 318 F.3d at 253 (discussing the *Sequoia* court's reliance on a Senate committee report, which stated a relator may object if the government moved to dismiss without legitimate reasons).

95. *See id.* (stating that the unenacted version of the Senate report 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" (internal quotation marks omitted) (quoting S. REP. NO. 99-345, at 42 (1986))). The court explained that even if the Senate version had been enacted, the Senate report would still not support the *Sequoia* standard because the government had not elected to proceed but rather elected to dismiss the case. *Id.*

96. *See id.* at 254 (noting the government's argument that if relator proceeded with the action, the government would still need to expend resources monitoring the case and complying with discovery requests).

97. *Id.* (explaining that the relator offered nothing to support the assertation that the government's reasons for dismissal were pretextual). The defendants in *Swift* had not been served with the complaint. *Id.* at 251. The D.C. Circuit subsequently held that its "unfettered right" interpretation of 31 U.S.C. § 3730(c)(2)(A) also applied in cases where the defendant had been served. *See Hoyte*, 518 F.3d at 65. In *Hoyte*, the D.C. Circuit further explained its *Swift* decision, noting that "[i]t is clear from *Swift* that any exception to section 3730(c)(2)(A)—if there are any—must be like 'fraud on the court' and Hoyte's proposed 'manifest public interest' exception is not." *Id.* The *Hoyte* court held that the government's "decision to dismiss the case, based on its own assessment, is not reviewable in the district court or this court." *Id.* The D.C. Circuit also applied the *Swift* "unfettered discretion" standard to dismiss a qui tam action in *United States ex rel. Schneider v. J.P. Morgan Chase Bank, N.A.*, No. 19-7025, 2019 WL 4566462, at *1 (D.C. Cir. Aug. 22, 2019) (per curiam), *cert. denied*, No. 19-678, 2020 WL 1668623 (U.S. Apr. 6, 2020). In denying certiorari, the Supreme Court recently declined to rule on the *Sequoia* versus *Swift* circuit split, perhaps because the different standards have not yet been outcome-determinative in appellate courts. *See* Allon Kedem, Paula Ramer & David Russell, *Supreme Court Declines to Hear Dispute over Proper Review Standard in Government FCA Dismissals*, ARNOLD & PORTER (Apr. 15, 2020), https://www.arnoldporter.com/en/perspectives/blogs/fca-qui-notes/posts/2020/04/supreme-court-declines-to-hear-dispute-over [https://perma.cc/Z2TH-25PP].

> [N]o circuit has yet overturned a district court's grant of . . . [a DOJ motion to dismiss a qui tam case], nor upheld a denial. Until that happens, the Court may be content to sit on the sidelines. For that reason, we will be watching with particular interest two cases in which the government has appealed from decisions denying motions under § 3730(c)(2)(A): *United States ex rel. Thrower v. Academy Mortgage Corp.*, No. 18-16408 (9th Cir.), and *United States v. CIMZNHCA, LLC,* No. 19-2273

Except for the Tenth Circuit in *Ridenour*, no other circuit court has expressly weighed in on the *Sequoia* versus *Swift* controversy.[98] Nevertheless, in *Riley v. St. Luke's Episcopal Hospital*,[99] the Fifth Circuit "all but explicitly stated that the government's decision to dismiss a *qui tam* false claim case is its choice alone."[100] Following the *Riley* court's strong indication that it would adopt the *Swift* standard, a number of district courts within the Fifth Circuit recently adopted the *Swift* unfettered right approach.[101] In addition, several district courts within the Sixth and Eighth Circuits adopted the *Swift* standard.[102] Many of these cases, as well as nu-

(7th Cir.). Should either circuit affirm, the likelihood of Supreme Court intervention could increase substantially.

Id.

98. *See* Health Choice All., LLC *ex rel.* United States v. Eli Lilly & Co., No. 5:17-CV-123-RWS-CMC, 2019 WL 2520165, at *6 (E.D. Tex. May 16, 2019) (citing Nasuti *ex rel.* United States v. Savage Farms, Inc., No. CIV.A. 12-30121-GAO, 2014 WL 1327015, at *10 (D. Mass. Mar. 27, 2014), *aff'd*, No. 14-1362, 2015 WL 9598315 (1st Cir. Mar. 12, 2015)) (noting that as of May 16, 2019, "[t]he only other circuit to weigh in on the controversy, the Tenth Circuit Court of Appeals, has sided with the Ninth Circuit").

99. 252 F.3d 749 (5th Cir. 2001) (en banc). Sitting en banc, the *Riley* court considered whether the FCA's provision permitting relators to proceed with qui tam litigation after the government declined to intervene unconstitutionally infringed on the Executive's power to conduct litigation on behalf of the United States. *Id.* at 752 (discussing the importance of qui tam actions in American and English history). In holding that the qui tam provisions of the FCA did not violate the U.S. Constitution, the court used language similar to the D.C. Circuit in *Swift*, acknowledging the Executive Branch's "extraordinarily wide discretion in deciding whether to prosecute," *id.* at 756, and highlighting the government's "unliteral power to dismiss an action 'notwithstanding the objection of the [relator].'" *Id.* at 753 (quoting Searcy v. Phillips Elecs. N. Am. Corp., 117 F.3d 154, 160 (5th Cir. 1997)).

100. United States *ex rel.* Sibley v. Delta Reg'l Med. Ctr., No. 4:17-cv-000053-GHD-RP, 2019 WL 1305069, at *5 (N.D. Miss. Mar. 21, 2019) (rejecting the relator's argument that the Fifth Circuit would follow the *Sequoia* approach).

101. *See id.* (citing *Searcy*, 117 F.3d at 155, 159; *Riley*, 252 F.3d at 744–45) (adopting *Swift*, the district court in *Sibley* found that Fifth Circuit precedent strongly supported following the "unfettered discretion" approach). The *Sibley* court went on to state that dismissal is warranted even under the *Sequoia* standard. *Id.* at *8 (concluding that the government satisfied both steps of the *Sequoia* standard); *see also* United States *ex rel.* De Sessa v. Dallas Cty. Hosp. Dist., No. 3:17-CV-1782-K, 2019 WL 2225072, at *2 (N.D. Tex. May 23, 2019) (citing *Riley*, 252 F.3d at 753) (adopting the *Swift* standard and concluding that, even under the *Sequoia* approach, the government satisfied that test and the relator did not demonstrate that the dismissal was "fraudulent, arbitrary and capricious, or illegal"); *Eli Lilly*, 2019 WL 2520165, at *4 (citing *Sibley*, 2019 WL 1305069, at *5) (stating that Fifth Circuit caselaw "establishes that the government possesses virtually 'unfettered discretion' to dismiss a *qui tam* False Claims Act action").

102. *See* United States *ex rel.* Maldonado v. Ball Homes, LLC, No. CV. 5: 17-379-DCR, 2018 WL 3213614 (E.D. Ky. June 29, 2018) (applying the *Swift* standard in a district court within the Sixth Circuit); United States *ex. rel.* Levine v. Avnet, Inc., No. 2:14-CV017 (WOB-CJS), 2015 WL 1499519 (E.D. Ky. Apr. 1, 2015) (same). The court in *Levine* agreed with the D.C. Circuit that the government has a "virtually unfettered right" to dismiss the case, explaining that "[t]he statute's plain language says nothing about the Government needing to make any sort of

merous district court cases that recently followed the *Sequoia* approach, were decided subsequent to the issuance of the Granston Memo, demonstrating that courts are increasingly grappling with the effects of the DOJ's more aggressive posture in moving to dismiss qui tam actions.[103]

F. *The Refs Reassert Their Authority: The Granston Memo and Its Effects*

On January 10, 2018, Michael Granston issued his memorandum that generated increased focus on the *Sequoia* versus *Swift* circuit split.[104] The

showing to support its decision to dismiss." *Levine*, 2015 WL 1499519, at *4. The court found that, even if the stricter *Sequoia* standard were applied, the government met that standard by asserting its interest in preserving scarce resources. *Id.* at *5. Thus, the court granted the government's motion to dismiss. *Id.* In *Maldonado*, the court followed *Levine*, emphasizing that "the plain language of the statute says nothing about the government being required to make any sort of showing in support of its motion to dismiss." *Maldonado*, 2018 WL 3213614, at *3 (citing *Levine*, 2015 WL 1499519, at *4). The court found that, even if it applied the more stringent *Sequoia* standard, the government's motion would be granted because the government would still be required to participate if the case went forward, and also, "the government has a valid interest in reining in weak *qui tam* actions." *Id.* One court in the Eighth Circuit adopted this standard as well. *See* United States *ex rel.* Davis v. Hennepin County, No. 18-CV-01551 (ECT/HB), 2019 WL 608848 (D. Minn. Feb. 13, 2019) (supporting the *Swift* approach). In *Davis*, the court stated that the *Swift* standard is more consistent with the text of the statute and the U.S. Constitution, but found that dismissal was warranted under either standard. *Id.* at *5–8. The court explained that, under the statute, all that is required is that the relators be notified of the motion and that they receive the opportunity for a hearing. *Id.* at *6. The court found that, if it applied *Sequoia*, the government's cost–benefit analysis is a legitimate government reason and dismissal is rationally related to that objective. *Id.* Further, the relators did not show that dismissal was "fraudulent, arbitrary and capricious, or illegal." *Id.* at *7.

103. *See, e.g.*, United States *ex rel.* Campie v. Gilead Scis., Inc., No. 11-CV-00941-EMC, 2019 WL5722618 (N.D. Cal. Nov. 5, 2019) (following *Sequoia* and granting the DOJ's motion to dismiss post-Granston Memo); *Eli Lilly*, 2019 WL 2520165 (adopting the *Swift* standard and granting the DOJ's motion to dismiss post-Granston Memo); United States *ex rel.* CIMZNHCA v. UCB, Inc., No. 17-CV-765-SMY-MAB, 2019 WL 1598109 (S.D. Ill. Apr. 15, 2019), *appeal docketed*, No. 19-2273 (7th Cir. July 8, 2019) (following *Sequoia* and denying the DOJ's motion to dismiss post-Granston Memo); United States *ex rel.* Panzey Belgium Harris v. EMD Serono, Inc., 370 F. Supp. 3d 483 (E.D. Pa. 2019) (following *Sequoia* and granting the DOJ's motion to dismiss post-Granston Memo); *Sibley*, 2019 WL 1305069 (adopting the *Swift* standard and granting the DOJ's motion to dismiss post-Granston Memo); *Davis*, 2019 WL 608848 (supporting the *Swift* approach and granting the DOJ's motion to dismiss post-Granston Memo); *Maldonado*, 2018 WL 3213614 (adopting the *Swift* standard and granting the DOJ's motion to dismiss post-Granston Memo); United States *ex rel.* Thrower v. Acad. Mortg. Corp., No 16-CV-02120-EMC, 2018 WL 3208157 (N.D. Cal. June 29, 2018), *appeal docketed*, No. 18-16408 (9th Cir. July 27, 2018) (following *Sequoia* and denying the DOJ's motion to dismiss post-Granston Memo).

104. *See* Granston Memo, *supra* note 7, at 1 (providing factors for evaluating DOJ dismissals pursuant to 31 U.S.C. § 3730(c)(2)(A)). In September 2018, the Justice Department "formally incorporated Granston memo criteria into the Justice Manual." Jonathan Cedarbaum, *Disputes Heating up over Gov't Qui Tam Dismissal Authority*, LAW360 (Feb. 15, 2019, 4:48 PM), https://www.law360.com/articles/1129837/disputes-heating-up-over-gov-t-qui-tam-dismissal-authority [https://

memo first noted the record increases in qui tam actions filed over the last several years.[105] Because the government is forced to expend substantial resources on these actions even in cases where it does not intervene, the Granston Memo advocates for DOJ attorneys to consider whether the government's interests would be better served by dismissing qui tam cases.[106] Granston pointed out that the DOJ "plays an important gatekeeper role in protecting the False Claims Act."[107]

Speaking at the American Health Lawyers Association Annual Meeting on June 24, 2019, Granston stated that at least thirty FCA cases had been dismissed since the DOJ adopted the guidance in his memo encouraging government lawyers to seek dismissal of non-intervened qui tam actions when appropriate.[108] Reporting on Granston's speech, commen-

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perma.cc/8VEA-5TRK] (noting that the *Justice Manual* was formerly known as the *U.S. Attorney Manual*).

105. *See* Granston Memo, *supra* note 7, at 1 (noting that annual totals of qui tam actions under the FCA approached or exceeded 600 new matters).

106. *See id.* ("Even in non-intervened cases, the government expends significant resources in monitoring the cases and sometimes must produce discovery or otherwise participate."); *see also* Brief of the Chamber of Commerce of the U.S. as Amicus Curiae in Support of Appellant at 26, United States v. United States *ex rel.* Thrower, No. 18-16408 (9th Cir. Mar. 22, 2019) (citing Brief of the Chamber of Commerce of the U.S. as Amicus Curiae in Support of Petitioner at 13, Gilead Sciences, Inc. v. United States *ex rel.* Campie, No. 17-936 (U.S. Feb 1, 2018)) (explaining that "of the 2,086 cases in which the government declined to intervene between 2004 and 2013 and that ended with zero recovery, 278 of them lasted for more than three years after the government declined and 110 of those extended for more than five years after declination").

107. Granston Memo, *supra* note 7 (explaining that, because the relators largely stand in the shoes of the Attorney General when the DOJ declines to intervene, the government should consider using 31 U.S.C. § 3730(c)(2)(A) to protect the FCA). The Granston Memo sets forth the following seven factors that the DOJ should considering in evaluating whether to seek dismissals of a qui tam action (noting that the factors are not mutually exclusive, and the department relies on multiple grounds for dismissal):

(1) "Curbing Meritless Qui Tams" that facially lack merit either because of a defective legal theory or frivolous factual allegations. *Id.* at 3;
(2) "Preventing Parasitic or Opportunistic Qui Tam Actions" that duplicate pre-existing government investigations and provide no additional useful information to the investigation. *Id.* at 4;
(3) "Preventing Interference with Agency Policies and Programs." *Id.* at 4–5;
(4) "Controlling Litigation Brought on Behalf of the United States" in order to protect the DOJ's litigation prerogatives. *Id.* at 5;
(5) "Safeguarding Classified Information and National Security Interests." *Id.* at 6;
(6) "Preserving Government Resources" especially when the government's costs (e.g., for monitoring ongoing litigation or responding to discovery requests) are likely to exceed any expected gain. *Id.* at 6; and
(7) "Addressing Egregious Procedural Errors" that could frustrate the DOJ's efforts to conduct a proper investigation. *Id.* at 7.

108. *See* Crawford, *supra* note 17 (reporting on Michael Granston's speech on June 24, 2019, which discussed the current split in the courts regarding the standards for dismissal and described the impact of the NHCA lawsuits in exacerbating that split).

tators pointed out that "[t]his uptick in the number of dismissals granted under . . . Section 3730(c)(2)(A) authority is a notable departure from the past when this provision was used in less than 1% of all cases."[109] As the DOJ has moved to dismiss more FCA cases, including many filed by professional relators, the circuit split over *Sequoia* versus *Swift* has significantly widened.[110]

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.[111] Thus, in the past, the standard that courts applied did not particularly matter because the government's motions to dismiss were always granted.[112] The DOJ's winning streak ended, however, in the 2018

109. *Id.* (citing Steven Schooner, *False Claims Act: Greater DOJ Scrutiny of Frivolous Qui Tam Actions?*, 32 NASH & CIBINIC REPORT ¶ 20 (2018)). In addition to initiating a DOJ policy change, the Granston Memo also had the effect of changing the strategy of defendants in qui tam actions. *See Positive FCA Enforcement Trend for Defense Contractors: DOJ Reaffirms Commitment to Exercise Statutory Authority to Dismiss*, MCGUIREWOODS (Feb. 7, 2019), https://www.mcguirewoods.com/client-resources/Alerts/2019/2/positive-fca-enforcement-trend-defense-contractors [https://perma.cc/5BEG-3HK9] (stating that "defendants should analyze the application of the Granston Memo factors in any new matter to determine whether there is a possibility of terminating litigation at a stage that would avoid costly discovery and litigation"); *see also* Brian Tully McLaughlin, Jason M. Crawford, Sarah Hill & Payal Nanavati, *Feature Comment: The Top FCA Developments of 2018*, 61 GOV'T CONTRACTOR ¶ 15 (2019) ("[A] year ago, few defendants would have considered asking the Government to move to dismiss—rather, persuading DOJ to decline to intervene was commensurate to winning the brass ring. But the current trend suggests that requests for § 3730(c)(2)(A) motions may be a new tool in the defendant's toolbox in certain situations, including cases where the Government will bear significant discovery costs . . . ."). Speaking at a conference staged by the Federal Bar Association in Washington, D.C., in February 2019, Granston warned defendants against unduly increasing the government's burden, stating that "pursuing undue or excessive discovery will not constitute a successful strategy for getting the government to exercise its dismissal authority." *See* Jeff Overley, *DOJ Atty Warns FCA Targets on Discovery Tactics*, LAW360 (Mar. 1, 2019, 10:39 PM), https://www.law360.com/articles/1134479/doj-atty-warns-fca-targets-on-discovery-tactics [https://perma.cc/5MRB-PGG9] (discussing Michael Granston's speech at an FCA conference put on by the Federal Bar Association in Washington, D.C., explaining that the message was that "defendants shouldn't necessarily feel that they can scare the government into dismissing cases," and reporting that Granston "made clear that his memo has real teeth for FCA whistleblowers").

110. For a discussion of recent cases highlighting the significance of resolving the *Sequoia* versus *Swift* split, see *infra* notes 118–134 and accompanying text.

111. *See* Ridenour v. Kaiser-Hill Co., 397 F.3d 925, 937 (10th Cir. 2005) (noting that "to establish a rational relationship to a valid government purpose, '[t]here need not be a tight fitting relationship between the two; it is enough that there are plausible, or arguable, reasons supporting the agency decision'" (quoting United States *ex rel.* Sequoia Orange Co. v. Sunland Packing House Co., 912 F. Supp. 1325, 1341 (E.D. Cal. 1995))).

112. *See* Reply Brief for the United States at 2, United States v. United States *ex rel.* Thrower, No. 18-16408 (9th Cir. July 27, 2018) ("Before the order on appeal, no court had ever permitted the continuation of a qui tam action in the United

Northern District of California case *United States ex rel. Thrower v. Academy Mortgage Corp.*,[113] 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.*,[115] district courts second-guessed DOJ decisions to seek dismissal of qui tam actions.[116] 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.[117]

A. *The Cases that Changed the Game*—Thrower *and* CIMZNHCA

In *Thrower*, one of the two recent decisions in which the court denied the DOJ's motion to dismiss a qui tam case, the relator alleged that Academy Mortgage violated the FCA by falsely certifying loans for government insurance.[118] The government moved to dismiss, arguing that dismissal would allow it to achieve a valid government purpose of conserving resources that the litigation would otherwise consume.[119] The relator responded by claiming that the government failed to conduct a sufficient cost-benefit analysis to satisfy the first step of the *Sequoia* test.[120] Judge Chen agreed with the relator and found that the government failed to comply with the first step of the *Sequoia* test because it did not conduct "a minimally adequate investigation."[121] The government has appealed the decision, contending that "courts have no license to second-guess the de-

States' name that the United States sought to end.").

113. No. 16-cv-02120-EMC, 2018 WL 3208157 (N.D. Cal. June 29, 2018), *appeal docketed*, No. 18-16408 (9th Cir. July 27, 2018).

114. *See id.* at *3 (finding that the government did not fully investigate the relator's amended complaint).

115. No. 17-CV-765-SMY-MAB, 2019 WL 1598109 (S.D. Ill. Apr. 15, 2019), *appeal docketed*, No. 19-2273 (7th Cir. July 8, 2019).

116. For a discussion of these two recent cases, see *infra* notes 118–125 and accompanying text.

117. For a discussion of the recent cases filed by professional relators, see *infra* notes 126–134 and accompanying text.

118. *See* United States *ex. rel.* Thrower v. Acad. Mortg. Corp., 2018 WL 3208157, at *1 (N.D. Cal. June 29, 2018), *appeal docketed*, No. 18-16408 (9th Cir. July 27, 2018). The government declined to intervene in the initial complaint, and after the relator amended the complaint, the government moved to dismiss without investigating the amended complaint at all. *Id.*

119. *See id.* at *3.

120. *See id.* ("In particular, [relator] argues that the Government failed to consider and meaningfully assess the potential proceeds from the suit, *i.e.*, the 'benefit' of the cost-benefit analysis.").

121. *Id.* (finding that, even if the government had prevailed on the first *Sequoia* step, the relator met the burden-shifting requirement to show that the dismissal was "fraudulent, arbitrary and capricious, or illegal" because the amended complaint had not been fully investigated).

gree of investigation the United States makes before it exercises its statutory right to dismiss."[122]

In *CIMZNHCA*, an FCA case brought by a professional relator against pharmaceutical defendants, a federal judge sitting in the Southern District of Illinois followed Judge Chen's lead and denied the DOJ's motion to dismiss because the government did not perform a cost-benefit analysis of the likely costs versus the potential recovery.[123] Despite the DOJ's contention that the professional relator's allegations conflicted with important policy and enforcement prerogatives of government healthcare programs, the court concluded that the DOJ's decision to dismiss was arbitrary and capricious, observing that "one could reasonably conclude" that the government's true motivation was "animus toward the relator."[124] As it did with *Thrower*, the DOJ promptly appealed the *CIMZNHCA* decision.[125]

B. *Alleged Flagrant Fouls by Professional Relators: The NHCA Cases*

The *CIMZNHCA* case was one of twelve qui tam lawsuits filed by entities affiliated with National Health Care Analysis Group (NHCA), alleging essentially the same conduct in "cloned complaints."[126] NHCA is a "pseudonym for a partnership comprised of limited liability companies set up by investors and former Wall Street investment bankers."[127] As evidence of NHCA's professional relator status, the DOJ pointed to a description of the group provided by its managing agent who explained that NHCA was created to finance "an experienced healthcare fraud management team seeking to uncover, investigate, develop and file high value whistleblower

122. Reply Brief for the United States, *supra* note 112, at 2. In its reply brief, the DOJ further argued that the government's "invocation of Section 3730(c)(2)(A) is an exercise of the Executive Branch's constitutional responsibility to take care that federal law is faithfully executed by carefully choosing the cases through which federal law is enforced." *Id.* at 8 (citing Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 879 (1994)). In its opening brief, the DOJ contended that the *Sequoia* approach was improperly applied by the district court and noted that the government is "preserv[ing] for further review a challenge to this Court's holding in *Sequoia Orange* regarding the appropriate standard of review of Section 3730(c)(2)(A) motions." Opening Brief for the United States at 21–22 n.4, United States v. United States *ex rel.* Thrower, No. 16-cv-02120 (9th Cir. Mar. 15, 2019) (No. 18-16408), 2019 WL 1512922.

123. *See* United States *ex rel.* CIMZNHCA v. UCB, Inc., No. 17-CV-765-SMY-MAB, 2019 WL 1598109, at *3–4 (S.D. Ill. Apr. 15, 2019) (ruling that the government fell "short of a minimally adequate investigation to support the claimed governmental purpose"), *appeal docketed*, No. 19-2273 (7th Cir. July 8, 2019).

124. *Id.* at *4 (noting that the government's counsel maintained that disapproval of "professional relators" is a valid governmental purpose for dismissal).

125. *See* Reply Brief for the United States, *supra* note 112, at 2 n.1 (noting that the government has appealed to the Seventh Circuit in *United States v. United States ex rel. CIMZNHCA*, No. 19-2273 (7th Cir. July 8, 2019)).

126. *See* United States' Motion to Dismiss Relator's Second Amended Complaint, *supra* note 18, at 3 ("In preparing its numerous complaints, NHCA Group appears to have utilized the same model or template, resulting in what are essentially cloned complaints.").

127. *Id.*

lawsuits. Applying a proven and reproducible method, management intends to build a portfolio of cases that can generate substantial investor returns over 5 to 10 years."[128]

According to the DOJ, NHCA used false pretenses to obtain evidence for its qui tam litigation business by purporting to conduct a research study of the pharmaceutical industry to gather information from paid participants in the study.[129] Per the DOJ, NHCA on its website made no mention of its role in filing numerous qui tam cases, but instead held itself out to the public as a "healthcare research company that engages in qualitative research of pharmaceutical and other healthcare-related industries."[130] The DOJ expressed concern regarding the false pretenses that NHCA used to obtain information from witnesses, citing a Massachusetts qui tam case that the court dismissed as a sanction after it concluded that misconduct by relator's attorneys involving a fictitious "research study" violated several rules of professional conduct.[131]

In December 2018, the DOJ moved to dismiss all of the pending NHCA cases on grounds consistent with the factors set forth in the Granston Memo, such as ensuring that the cases did not interfere with common industry practices that the government deemed beneficial to federal healthcare beneficiaries.[132] Subsequent to the government's motions, sev-

128. *See* Reply Memorandum in Support of the United States' Motion to Dismiss Relator's Second Amended Complaint at 3, United States *ex rel.* Health Choice Grp., LLC v. Bayer Corp., No. 5:17-CV-126-RWS-CMC (E.D. Tex. Feb. 19, 2019) (quoting Declaration of Colin M. Huntley, ¶ 24, Exhibit 2).

129. *See* United States' Motion to Dismiss Relator's Second Amended Complaint, *supra* note 18, at 5 (stating that NHCA offered to pay individuals "to participate in what it calls a 'qualitative research study;' however, the information is actually being collected for use in *qui tam* complaints filed by the NHCA Group through its pseudonymous limited liability companies" (footnote omitted)).

130. *Id.* at 5–6 (quoting NAT'L HEALTHCARE ANALYSIS GROUP, http://www.nhcagroup.com [https://perma.cc/YG8T-WMKY] (last visited June 5, 2020)).

131. *See id.* at 6 (discussing United States *ex rel.* Leysock v. Forest Labs., No. CV 12-11354-FDS, 2017 WL 1591833 (D. Mass. Apr. 28, 2017). According to the DOJ, in *Forest Labs*, "relator's counsel interviewed witnesses as part of a fictitious 'research study' that the court found to be part of 'an elaborate scheme of deceptive conduct' designed to obtain specific details to satisfy *qui tam* pleading requirements." *Id.* at 6 n.4 (citing *Forest Labs*, 2017 WL 1591833, at *1). In another example of the DOJ's concern regarding professional relator misconduct, the government successfully moved to dismiss a qui tam case in which a hedge fund portfolio manager allegedly engaged in unlawful securities trading by short-selling shares of companies he sued while his FCA allegations were still under seal. *See* United States *ex rel.* Borzilleri v. AbbVie, Inc., No. 15-CV-07881 (JMF), 2019 WL 3203000, at *3 (S.D.N.Y. July 16, 2019) (granting the DOJ's motion to dismiss); United States' Motion to Dismiss and Memorandum of Law in Support of Motion, United States *ex rel.* Borzilleri v. AbbVie, Inc., No. 15-CV-07881-JMF (S.D.N.Y. Dec. 21, 2018) (arguing for dismissal).

132. *See* Crawford, *supra* note 17 (explaining the DOJ's arguments in favor of dismissal including (1) "allowing the relators to go forward would impose costs and burdens on the government and waste judicial and government resources"; (2) "the time needed to monitor nonintervened cases and facilitate discovery requests would divert DOJ resources from meritorious matters"; and (3) "dismissal

eral NHCA cases were voluntarily dismissed.[133] In others, however, the relators contested dismissal and widened the split among district courts grappling with whether to follow *Swift* or *Sequoia*.[134]

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.[135] 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."[136] 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.[137]

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 constitu-

was appropriate so as not to undermine common industry practices that HHS-OIG has determined are beneficial to federal health care beneficiaries"); *see also* United States Motion to Dismiss Relator's Second Amended Complaint, *supra* note 18, at 16 ("These relators should not be permitted to indiscriminately advance claims on behalf of the government against an entire industry that would undermine common industry practices the federal government has determined are, in this particular case, appropriate and beneficial to federal healthcare programs and their beneficiaries.").

133. *See* Crawford, *supra* note 17 (reporting that several NHCA cases were voluntarily dismissed following DOJ's motions to dismiss).

134. *See id.* (summarizing *EMD Serono* where the court followed *Sequoia* and upheld the DOJ's dismissal, *Eli Lilly* where the magistrate judge followed *Swift* and recommended that the court grant the DOJ's request to dismiss, and *CIMZNHCA* where the court followed *Sequoia* and denied DOJ's motion to dismiss). For a discussion of *EMD Serono*, see *supra* note 78. For discussion of *Eli Lilly*, see *supra* notes 9, 18, 58, 81, and 98. For a discussion of *CIMZNHCA*, see *supra* notes 123–125 and accompanying text.

135. For a discussion of recent cases where the courts have required the DOJ to make this additional showing, see *supra* notes 118–125 and accompanying text.

136. U.S. CONST. art II, § 3; *see* Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749, 760 (5th Cir. 2001) (en banc) (Smith, J., dissenting) ("The Take Care Clause was designed as a crucial bulwark to the separations of powers and is far from a dead letter or obsolete relic.").

137. For a discussion of the public policy considerations that support using the *Swift* unfettered right approach, see *infra* Section IV.B.

tionally assigned duties.'"[138] 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."[139] 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."[140] 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.[141] 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."[142] Consistent with the *Riley* dis-

138. Bret Boyce, *The Constitutionality of the Qui Tam Provisions of the False Claims Act Under Article II*, 24 FALSE CL. & QUI TAM Q. REV. 10 (2001) (quoting United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 751 (9th Cir. 1993)) (discussing the cases in which the Fifth, Sixth, Ninth, and Tenth Circuits rejected Article II challenges to qui tam provisions in the FCA—i.e., *United States ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787 (10th Cir. 2002); *Riley v. St. Luke's Episcopal Hospital*, 196 F.3d 514 (5th Cir. 1999), *vacated*, 196 F.3d 561 (5th Cir. 1999), *rev'd en banc*, 252 F.3d 749 (5th Cir. 2001); *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032 (6th Cir. 1994); and *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993)). In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, the U.S. Supreme Court expressly disclaimed any view with regard to Article II challenges, reasoning that the petitioner did not argue such a challenge, nor did it rise to a jurisdictional issue that the court had to resolve sua sponte. 529 U.S. 765, 778 n.8 (2000).

139. Brief of the Chamber of Commerce of the U.S. as Amicus Curiae in Support of Appellant at 11, United States v. United States *ex rel.* Thrower, No. 18-16408 (9th Cir. Mar. 22, 2019) (citing *Riley*, 252 F.3d at 753); *see also* Boyce, *supra* note 138.

140. *Riley*, 252 F.3d at 753 (discussing how the government retains "a significant amount of control over the litigation" even when it does not intervene). In finding that the FCA's qui tam provisions did not violate Article II of the Constitution, the Fifth Circuit also relied upon the principle that "the government retains unilateral power to dismiss an action 'notwithstanding the objections of the [relator].'" *Id.* (citing Searcy v. Philips Elecs. N. Am. Corp., 117 F.3d 154, 160 (5th Cir. 1997); 31 U.S.C. § 3730(c)(2)(A)).

141. *See* United States *ex rel.* CIMZNHCA v. UCB, Inc., No. 17-CV-765 SMY-MAB, 2019 WL 1598109 (S.D. Ill. Apr. 15, 2019) (denying the government's motion to dismiss), *appeal docketed*, No. 19-2273 (7th Cir. July 8, 2019); United States *ex rel.* Thrower v. Acad. Mortg. Corp., No. 16-CV-02120-EMC, 2018 WL 3208157 (N.D. Cal. June 29, 2018) (denying the government's motion to dismiss), *appeal docketed*, No. 18-16408 (9th Cir. July 27, 2018). For a discussion of how the district courts in *Thrower* and *CIMZNHCA* thwarted the government's ability to exercise its dismissal authority, see *supra* notes 118–125 and accompanying text.

142. *Riley*, 252 F.3d at 763 n.17 (Smith, J., dissenting) (citing *In re International*

sent's 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.[143]

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."[144] For many reasons, courts have found that executive agency decisions are generally unsuitable for judicial review.[145] 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."[146] 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.[147]

Business Machines Corp., in which the Second Circuit stated: "The district court's involvement in the Executive Branch's decision to abandon litigation might impinge upon the doctrine of separation of powers." 687 F.2d 591, 602 (2d Cir. 1982)).

143. *Id.* at 766 (Smith, J., dissenting) (arguing for the unconstitutionality of the FCA's qui tam provisions, Judge Smith explained that "[t]he FCA's most severe violations of the separation of powers principles embedded in the Take Care Clause include the fact that unaccountable, self-interested relators are put in charge of vindicating government rights and that the transparency and controls of the constitutional system are not in place to influence the outcome of such litigation").

144. Heckler v. Chaney, 470 U.S. 821, 831 (1985) (citing United States v. Batchelder, 442 U.S. 114, 123–24 (1979); United States v. Nixon, 418 U.S. 683, 693 (1974); Vaca v. Sipes, 386 U.S. 171, 182 (1967); Confiscation Cases, 7 Wall. 454 (1869)).

145. *See id.* (stating that such decisions "often involve[] a complicated balancing of a number of factors which are peculiarly within [the executive agency's] expertise," and require the agency to assess "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether . . . [the action] best fits the agency's overall polices, and, indeed, whether the agency has enough resources to undertake the action at all").

146. *Id.* at 831–32 (discussing several reasons why enforcement decisions should be left to agencies).

147. *See* Swift v. United States, 318 F.3d 250, 253 (D.C. Cir. 2003) (holding that the government has an "unfettered right" to dismiss FCA cases). Note that, even under the *Swift* "unfettered right" approach, the government's power to dismiss may still be limited for "fraud on the court" or due process violations such as discrimination based on race. *See* Hoyte v. Am. Nat'l Red Cross, 518 F.3d 60, 65 (D.C. Cir. 2008) (noting that "fraud on the court" is a possible exception to the government's unfettered right to dismiss qui tam cases); Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749, 756 (5th Cir. 2001) (en banc) (stating that the Executive Branch's prosecutorial discretion "is checked only by other constitutional provisions such as the prohibition against racial discrimination and a narrow doctrine of selective prosecution").

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.[148] Qui tam litigation is fundamentally flawed because it is rife with inherent conflicts of interest.[149] 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."[150] 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.[151] To avoid compounding the conflict of interest inherent in qui tam litigation by permitting 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.[152]

148. *See* Mary Kreiner Ramirez, *Whistling Past the Graveyard: Dodd-Frank Whistleblower Programs Dodge Bullets Fighting Financial Crime*, 50 LOY. U. CHI. L.J. 617, 666 (2019) (noting that "[c]ritics of private rights of action under the FCA complain that such cases attract 'unscrupulous bounty hunters' who will not consider whether such an action is a true benefit to the government and consistent with agency regulatory goals" (citing SEC, OFFICE OF THE INSPECTOR GEN., REP. NO 511, EVALUATION OF THE SEC'S WHISTLEBLOWER PROGRAM 28–30 (2013) (Question 7))). "The FCA addresses these concerns in some respects by shifting authority over the case to the government if it decides to step in to pursue the action or by dismissing the action while it remains under seal . . . ." *Id.* (citing 31 U.S.C. § 3730(c)(2)). For a discussion of recent overreaching lawsuits brought by professional relators, see *supra* notes 126–134 and accompanying text.

149. *See* Beck, *supra* note 29, at 608–09 (detailing the conflicts of interests inherent in qui tam litigation).

150. *Id.* at 608. Beck explained that

> [t]his conflict of interest in the law enforcement process causes informers to initiate, conduct, and terminate enforcement actions in ways that are harmful to the broader community. A public prosecutor, by contrast, lacks a direct financial interest in the outcome of a case and is, therefore, more likely to take into consideration and to act upon a broader range of public interests than a qui tam informer.

Id. at 608–09.

151. *See* Reply Memorandum in Support of the United States' Motion to Dismiss Relator's Second Amended Complaint, *supra* note 128, at 3 (explaining the investment goals of professional relator, NHCA); United States' Motion to Dismiss Relator's Second Amended Complaint, *supra* note 18, at 5–6 (detailing the alleged false pretenses used by professional relator, NHCA, to obtain information from witnesses); *see also* Cox, *supra* note 12 ("Bad cases that result in bad case law inhibit our ability to enforce the False Claims Act in good and meritorious cases. And from a resource perspective, when the Department's resources are consumed for other things, we have less time to fulfill our priorities.").

152. *See, e.g.*, United States' Motion to Dismiss Relator's Second Amended Complaint, *supra* note 18, at 16 (insisting that "[t]hese relators should not be permitted to indiscriminately advance claims on behalf of the government against an entire industry that would undermine common industry practices the federal government has determined are, in this particular case, appropriate and beneficial to

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 consequences for the government, the courts, and defendants.[153] 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.[154] This in turn could lead to financially ruinous results for defendants.[155]

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.[156] 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.[157] With

federal healthcare programs and their beneficiaries").

153. *See* Brief of the Chamber of Commerce of the U.S. as Amicus Curiae in Support of Appellant, *supra* note 139, at 5 ("Meritless FCA cases exact enormous public costs. And letting meritless or inappropriate cases go forward burdens defendants, the courts, and the government itself."); *see also* Dayna Bowen Matthew, *The Moral Hazard Problem with Privatization of Public Enforcement: The Case of Pharmaceutical Fraud*, 40 U. MICH. J.L. REFORM 281, 331 (2007) ("[Q]ui tam-directed litigation hinders the development of good law, and costs companies, individuals, and taxpayers hundreds of millions of dollars.").

154. *See* Cedarbaum, *supra* note 104 (predicting that, even if most judges rule in favor of the government when applying the rational relation test, "if they do so only after demanding a substantial evidentiary showing, the burden of making that showing itself may discourage the government from exercising its dismissal authority"); *see also* Opening Brief for the U.S., *supra* note 122, at 36 (arguing that "in a case where a stated ground for dismissal is the desire to prevent inefficient use of government resources, it would be perverse to require the government to conduct an investigation more extensive than it deems appropriate before exercising its dismissal authority").

155. *See* Jesse D.H. Snyder, *Staying True to the False Claims Act: Why the Government Is an Unexplored Prime Vehicle to Dismiss Cases*, 48 U. MEM. L. REV. 257, 279 (2017) (citing United States *ex rel.* Harman v. Trinity Indus., 166 F. Supp. 3d 737, 764 (E.D. Tex. 2015)) ("When confronted with a relator brandishing a lawsuit alleging violations under the FCA, the scope of liability can be ruinous."). In *Trinity Indus.*, the court ordered the defendants to pay $464,352,525.00 to the government and $218,021,090.75 to the relator. *Trinity Indus.*, 166 F. Supp. 3d at 764.

156. *See* U.S. Chamber Institute for Legal Reform, *supra* note 7, at 2 (explaining that "certain aspects of FCA . . . incentivize the filing of frivolous lawsuits and impose irrationally excessive penalties, sometimes for technical violations that occur despite businesses' good faith efforts to comply with contracts or regulations. These aspects of the FCA practice generate unnecessary litigation costs for government and businesses and coerce businesses that may have done nothing wrong to pay enormous out-of-court settlements based on untested and questionable legal theories.").

157. *See id.* (pointing out that the costs of defending and settling FCA lawsuits

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.[158] 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.[159]

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can be enormous, even when businesses may have done nothing wrong); Brief of the Chamber of Commerce of the U.S. as Amicus Curiae in Support of Appellant, *supra* note 139, at 26 ("It is not surprising . . . that '[p]harmaceutical, medical devices, and health care companies' alone 'spend billions each year' dealing with FCA litigation." (quoting Bentivoglio et al., *False Claims Act Investigations: Time for a New Approach?*, 3 FIN. FRAUD L. REP. 801, 801 (2011))).

158. *See* Eric Alexander, *Putting the False in False Claims Act Cases*, DRUG & DEVICE L. BLOG (Nov. 11, 2016), https://www.druganddevicelawblog.com/2016/11/putting-the-false-in-false-claims-act-cases.html [https://perma.cc/D52C-AHU2] (discussing the drastic consequences that can result when unscrupulous relators exploit the flaws in the qui tam bounty system, noting that the FCA "creates extraordinary financial incentives for relators and counsel alike to burden defendants' and courts' resources with meritless FCA claims. Due to the risk of enormous litigation exposure and the burdens of litigating complex cases of alleged fraud, numerous defendants have settled FCA cases because they could not justify the potential costs to litigate the case and roll the dice at trial. Thus, a relator or relator's counsel has an enormous incentive to obtain sufficient information to survive a motion to dismiss an FCA complaint, which they may well be able to leverage into a settlement." (citations omitted)).

159. For a discussion of how the *Swift* approach supports the constitutionality of the FCA by recognizing the government's prosecutorial discretion, see *supra* Section IV.A. For a discussion of recent cases filed by bounty-hunting professional relators that the government deemed to be not in the public interest, see *supra* notes 126–134 and accompanying text.