

**THE BEGINNING AND END OF OUR ANALYSIS:
THE SEVENTH CIRCUIT’S APPROACH TO
THE THREE-WAY CIRCUIT SPLIT OF
DISMISSAL AUTHORITY IN *QUI TAM* CLAIMS***

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I. INTRODUCTION

A. The Issue: The Three-Way Circuit Split Over the Government’s Authority to Dismiss Whistleblower Claims Under the False Claims Act

When the United States government introduces massive spending packages in response to a crisis, fraudsters are inevitably lurking in the wings to avail themselves of the taxpayer’s money. Recognizing this, Congress reinvigorated the provisions of the False Claims Act (“FCA”) during the late 1980s to allow the federal government broader authority to pursue entities guilty of fraudulent acts. The sums of money claimed by fraudsters and subsequently reclaimed by the federal government and the whistleblowers who come forward with information are staggering. In fact, in 2019 alone the federal government recovered approximately \$3 billion from fraudulent claims, more than \$2.1 billion of which were under the *qui tam* provisions of the FCA. Of that \$2.1 billion, whistleblowers who exposed the fraudulent payments received \$265 million.

The massive government expenditures in response to the COVID-19 pandemic present another opportunity for rampant fraud. Over the course of the pandemic, Congress has provided for about \$6 trillion in economic relief.¹ Most recently, President Biden signed the American Rescue Plan Act, which provided \$1.9 trillion. This is in addition to the \$2.2 trillion of relief provided when President Trump signed the Coronavirus Aid, Relief, and Economic Security (CARES) Act.² As of August 2020, more than 5.2 million loans valued at \$525 billion were approved by the Small Business Administration.³ This represents a massive pool of federal funds ripe for fraudulent behavior and for whistleblowers

* This Note was completed in March 2021.

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1. Garrett Watson & Erica York, *The American Rescue Plan Act Greatly Expands Benefits Through the Tax Code in 2021*, TAX FOUND. (Mar. 12, 2021), <https://taxfoundation.org/american-rescue-plan-covid-relief/> [https://perma.cc/X8K4-XBUD].

2. Sean Bosack & Nina Beck, *Qui Tam Actions: Managing Risk in the Wake of COVID-19*, A.B.A. (Sept. 1, 2020), <https://www.americanbar.org/groups/litigation/committees/corporate-counsel/articles/2020/summer2020-qui-tam-actions-managing-risk-in-the-wake-of-covid-19> [https://perma.cc/3DXM-P3H2].

3. Press Release, Acting Assistant Att’y Gen. Brian Rabbitt, Acting Assistant Att’y Gen. Brian Rabbitt Delivers Remarks at the PPP Criminal Fraud Enf’t Action Press Conference (Sept. 10, 2020), <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-brian-rabbitt-delivers-remarks-ppp-criminal-fraud> [https://perma.cc/RX54-T8EN].

to share in recovering under the *qui tam* provisions of the FCA. Such provisions create opportunities for massive windfalls for whistleblowers and ample opportunity for federal regulators to recover enormous sums of taxpayer money.

The FCA is a critical tool in the United States government's ongoing effort to combat fraud. The FCA provides that any person who knowingly submits a false claim for payment is liable to the federal government for civil penalties plus treble damages.⁴ To assist the government in ferreting out fraudsters, the FCA empowers private citizen whistleblowers, referred to as "relators," to file suit "for the person and for the United States Government" and awards them part of the recovery as an incentive to come forward.⁵ But, like all good things, there is a catch: while the relator may initiate the suit, the government retains the authority to dismiss the claim.⁶ The proper standard for dismissal by the government, however, is unclear.

Three United States Circuit Courts of Appeal have adopted three separate standards for determining the scope of federal regulators' authority to dismiss claims initially filed by whistleblowers per the *qui tam* provisions of the FCA. The differing approaches arise from the lack of an *explicit* statutory standard of dismissal.

The FCA was most recently amended in 1986, when Senator Chuck Grassley pushed to strengthen the *qui tam* provisions in response to rampant fraud.⁷ The amendments have increased the number of *qui tam* suits filed, as Senator Grassley intended, but have also given rise to three separate circuit interpretations of the proper standard for dismissal.

The first attempt to articulate a standard came from the Ninth Circuit in 1998 in *Sequoia Orange Co. v. Baird Neece Packing Corp.*⁸ In *Sequoia Orange*, the Ninth Circuit required the government to demonstrate a 'rational basis' for its motion to dismiss a relator's claim.⁹ Five years later, the District of Columbia Circuit adopted a standard granting greater discretion to government regulators in *Swift v. United States*.¹⁰ There, the D.C. Circuit held the government had an "unfettered right" to dismiss such claims, since whistleblowers brought them on behalf of the government to begin with.¹¹ This two-way circuit split persisted for nearly 20 years until 2020, when the Seventh Circuit adopted its own standard. In *United States ex rel. CIMZNHCA, LLC, v. UCB, Inc.*, the Seventh Circuit came up with a third standard based on the Federal Rules of Civil Procedure.¹²

4. False Claims Act, 31 U.S.C. §§ 3729–3733.

5. 31 U.S.C. § 3730(d).

6. 31 U.S.C. § 3730(c)(2)(A).

7. S. REP. NO. 99-345, at 13 (1986).

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

9. *See id.*

10. *See* Swift v. United States, 318 F.3d 250 (D.C. Cir. 2003).

11. *Id.* at 252.

12. *See* United States *ex rel.* CIMZNHCA, LLC, v. UCB, Inc., 970 F.3d 835 (7th Cir. 2020).

In the following pages, this Note will discuss each of these standards and assert that the Supreme Court should settle the circuit split by adopting the recent Seventh Circuit standard. This Note will be divided into three major sections. The first section will provide historical background on *qui tam* actions and the FCA, an explanation of the FCA statutory provisions, and insights into the legislative history. The second section will provide an overview and analysis of each circuit's decision and key reasoning. Finally, the third section will provide a critical analysis of the varying standards and a justification as to why the Supreme Court should adopt the Seventh Circuit's holding in *CIMZNHCA*.

II. BACKGROUND

A. History of the False Claims Act

A “*qui tam*” action is one brought by a private party on behalf of the government. The term is shorthand for a Latin phrase meaning “who as well for the lord king as for himself sues in this matter.”¹³ The concept of *qui tam* actions has been around since the days of the Roman empire.¹⁴ Interestingly, one of the earliest cited examples of a *qui tam* provision is found in English law. In the year 695, a declaration of King Wihtrud of Kent stated that “[i]f a freeman works during the forbidden time [i.e., the Sabbath], he shall forfeit his *healsfang*, and the man who informs against him shall have half the fine, and [the profits arising] from the labour.”¹⁵ *Qui tam* provisions were also codified by several American colonies prior to the American Revolution.¹⁶ Colonial courts heard *qui tam* cases arising under both colonial and English statutes.¹⁷

The FCA itself was originally codified in 1863 in response to rampant fraud by defense contractors during the Civil War against the Union Army.¹⁸ As enacted, civilian offenders could be imprisoned or fined between \$1,000 and \$5,000, and faced civil liability in the amount of \$2,000, double the damages sustained by the government, plus costs.¹⁹ Recognizing public officials were often parties to the corruption and unlikely to diligently pursue war contractors engaged in fraud, Congress sought to incentivize private citizens who possessed knowledge of fraud to come forward.²⁰ The original law, reminiscent of the modern statute, entitled whistleblowers to one-half of the damages awarded from a successful suit as an incentive to collaborate with the federal government.²¹

13. *Id.* at 839.

14. Richard A. Bales, *A Constitutional Defense of Qui Tam*, 2001 WIS. L. REV. 381, 387.

15. Charles Doyle, *Qui Tam: The False Claims Act and Related Federal Statutes*, CONG. RSCH. SERV., Apr. 2021, at 1, 2.

16. Bales, *supra* note 14, at 387.

17. Doyle, *supra* note 15, at 3.

18. Bales, *supra* note 14, at 388.

19. Doyle, *supra* note 15, at 5.

20. Bales, *supra* note 14, at 388.

21. *Id.*

However, the *qui tam* provisions of the law were not widely used until the 1930s when federal expenditures increased as a result of massive domestic and wartime spending.²²

The New Deal and World War II expanded the federal government's role in the economy, creating opportunity for contractors to defraud the government and for savvy whistleblowers to file opportunistic "parasitic" suits, which contravened the public policy motives behind *qui tam* actions.²³ Seeking to curtail this practice, Congress amended the FCA in 1943 to bar *qui tam* suits based on public information and significantly reduced the reward amount for whistleblowers.²⁴ As amended in 1943, the law required relators to provide the government with evidence underlying the claim and allow the government sixty days to intervene.²⁵ It also precluded suits based on evidence already known to the government and reduced the relator's share of the recovery from 50% to no more than 25%.²⁶ While successful at reducing the number of lawsuits, these changes effectively eliminated the use of FCA *qui tam* actions.²⁷

The FCA remained dormant until increased government spending arising from the Cold War in the 1980s saw increased reports of systematic fraud. In 1986, the U.S. Department of Justice ("DOJ") estimated that fraud drained "1 to 10 percent of the entire Federal Budget," placing the potential fraud against the government between \$10 to \$100 billion annually.²⁸ In response to these reports, Senator Chuck Grassley and federal lawmakers introduced and later codified the False Claims Reform Act in 1986 (referred to hereafter as the 1986 Amendments).²⁹ Among the goals of the legislation was to once again foster private citizen involvement in whistleblower suits as relators, as well as to increase the percentage of the judgment the relator may be entitled to receive.³⁰

B. How Qui Tam Works

The current version of the FCA, reinvigorated by the 1986 Amendments, provides that any person who knowingly presents a false or fraudulent claim for payment or approval to the United States government is liable for a civil penalty of up to \$10,000 plus "3 times the amount of damages which the Government sustains because of the act of that person."³¹ More importantly, the *qui tam*

22. Bales, *supra* note 14, at 389.

23. *Id.* Prior to 1943, the FCA allowed "parasitic" *qui tam* suits based on public information. This permitted "informers" to abuse the statute by filing *qui tam* claims based on the information in public criminal indictments. These suits undermined the purpose of the FCA.

24. *Id.*

25. 57 Stat. at 608, 31 U.S.C. ch. 232(C) (1946).

26. *Id.*

27. Bales, *supra* note 14, at 389.

28. S. REP. NO. 99-345, at 3 (1986).

29. *Id.* at 13.

30. *Id.* at 8.

31. 31 U.S.C. § 3729(a).

provisions of the FCA allow a private individual, called a “relator,” to file an action on behalf of themselves and the federal government against an individual or company who has knowingly submitted a false claim to the government for payment.³² Relators may file an action under seal and serve a copy of the complaint on the government sixty days before it is served on the defendant.³³ During that sixty-day period, which may be extended by motion, the government can investigate the allegations and either: (A) “proceed with the action, in which case the action shall be conducted by the Government”; or (B) decline to take over the action.³⁴ If the government declines to take over the action, the relator retains the right to proceed with the lawsuit.³⁵ In exchange for coming forward, a successful relator will generally receive a share of the recovery.³⁶ The amount of recovery varies between 15 to 25 percent for actions in which the government is involved, and 25 to 30 percent if the government declines to become involved.³⁷

The two most important provisions of the FCA for purposes of this Note are 31 U.S.C. § 3730(c)(2)(A) and 31 U.S.C. § 3730(c)(3). Section 3730(c)(2)(A) allows the government to “dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government” and if the court provides the person with “an opportunity for a hearing on the motion.”³⁸ The latter section, § 3730(c)(3), permits the government—which may have initially declined to take over the case—to intervene at a later date upon a showing of good cause.³⁹ As will be discussed in greater detail below, the now three-way circuit court split arises out of the standard for dismissal in § 3730(c)(2)(A).

III. DISMISSAL STANDARDS

A. *The Sequoia Orange “Rational Relation” Test*

Although the updated version of the statute had been in effect for more than five years, the proper standard for the government’s motion to dismiss under 31 U.S.C. § 3730(c)(2)(A) was a case of first impression for the United States District Court for the Eastern District of California.⁴⁰ In *Sequoia Orange*, the corporate relator filed *qui tam* actions against thirty-four other companies in the citrus industry alleging violations of a particular marketing order promulgated by

32. 31 U.S.C. § 3730(b).

33. 31 U.S.C. § 3730(b)(2).

34. 31 U.S.C. § 3730(b)(4).

35. 31 U.S.C. § 3730(b)(4)(B).

36. 31 U.S.C. § 3730(d).

37. *Id.*

38. 31 U.S.C. § 3730(c)(2)(A).

39. 31 U.S.C. § 3730(c)(3).

40. *United States ex rel. Sequoia Orange Co. v. Sunland Packing House Co.*, 912 F. Supp. 1325, 1328 (E.D. Cal. 1995).

the Secretary of Agriculture.⁴¹ The marketing order was promulgated under the Agricultural Marketing Agreement Act (“AMAA”) of 1937, which was enacted “to establish and maintain [. . .] orderly marketing conditions for agricultural commodities in interstate commerce.”⁴² The goal of the legislation is to create a “cooperative venture among the Secretary, handlers, and producers [. . .] to establish an orderly system for marketing [fruits and vegetables].”⁴³ The AMAA does not require the Secretary to promulgate any marketing orders unless the industry participants request assistance obtaining one.⁴⁴ Furthermore, marketing orders must be approved and implemented by the industry stakeholders unless the Secretary waives the necessary approval.⁴⁵

Sunkist, an agricultural cooperative, used its large market share to perpetuate weekly volume caps for the entire industry.⁴⁶ Meanwhile, Sunkist and the rest of the industry, including Sequoia Orange Co., allegedly violated the weekly caps as a matter of course.⁴⁷ When Sequoia Orange Co. was sanctioned by the United States Department of Agriculture (“USDA”) for violation of the AMAA, it filed numerous FCA suits against Sunkist and other independent growers.⁴⁸

The government initially only intervened in ten of the cases, but later sought to intervene in the remaining twenty-four as part of an effort to settle years of negotiations with the citrus industry regarding the marketing order, which was ultimately invalidated in a separate suit.⁴⁹ After the marketing order was invalidated, the government wanted to “wipe the slate clean” with members of the citrus industry, but apparently did not believe it had the authority to dismiss *qui tam* actions over the objection of the relator.⁵⁰ In fact, the Associate General Counsel to the USDA at the time, John Golden, testified during evidentiary proceedings that “the Department was of the view that some independent legal basis had to be adduced in order to seek dismissal of these cases and that [§ 3730] (c)(2)(A) provided an opportunity for the government to seek to dismiss the cases if there was some other independent legal basis to do so.”⁵¹ However, it moved to do so after seeking advice from the defendant corporation.⁵²

41. United States *ex rel.* Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1142 (9th Cir. 1998).

42. *Sunland Packing House*, 912 F. Supp. at 1329.

43. *Id.* (citing *Block v. Community Nutrition Inst.* 467 U.S. 340, 346 (1984)).

44. *Id.*

45. *Id.*

46. *Id.* at 1330.

47. *Id.*

48. *Id.* at 1331.

49. *Id.* See also *United States v. Sunny Cove Citrus Ass’n*, 854 F. Supp. 669, 697 (E.D. Cal. 1994).

50. *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1142 (9th Cir. 1998).

51. *Sunland Packing House Co.*, 912 F. Supp. at 1338.

52. *Sequoia Orange Co.*, 151 F.3d at 1142; see also *Sunland Packing House Co.*, 912 F. Supp. at 1352. As Golden stated, the USDA was simply unaware of its ability to dismiss *qui tam*

The district court granted the government's motion to dismiss all thirty-four actions on a finding that the government sought dismissal "for legitimate government purposes; that the reasons offered by the government were rationally related to these legitimate government purposes; and that the dismissal was not arbitrary or capricious."⁵³ On appeal, the relator argued that allowing the government to dismiss meritorious *qui tam* claims was inconsistent with the general framework of the FCA.⁵⁴ The Ninth Circuit ultimately disagreed, citing the relatively new dismissal authority under 31 U.S.C. § 3730(c)(2)(A), which allowed the government to dismiss actions "notwithstanding the objections of the relator."⁵⁵

The Ninth Circuit went on to consider the legislative history of the 1986 Amendments to the FCA. Relying on the Senate Report as evidence of congressional intent, the court believed the 1986 Amendments provide "*qui tam* plaintiffs with a more direct role [. . .] in acting as a check that the Government does not neglect evidence, cause undue delay, or drop the false claims case without legitimate reason."⁵⁶ These statements were evidence of congressional intent that the *qui tam* statute permitted a limited check on prosecutorial discretion. Thus, the Ninth Circuit continued, the district court's two-step test of "rationally related to a legitimate government interest" satisfies congressional intent with regard to relators, while respecting the government's prosecutorial authority by requiring the same justification for dismissal motions as mandated by the Constitution itself.⁵⁷

The relators in *Sequoia Orange* also argued that, even if the government could dismiss the action, it could not do so after intervening later for good cause under 31 U.S.C. § 3730(c)(3). The Ninth Circuit also dismissed this contention, citing precedent in *United States ex rel. Kelly v. Boeing Co.*, that nothing in § 3739(c)(2)(A) purported to limit the government's dismissal authority based on the manner of intervention.⁵⁸ In fact, *Kelly* also permitted the government to dismiss *qui tam* actions without actually intervening.⁵⁹ Recognizing the government's ability to dismiss the action without intervening, the court quickly

actions under 31 U.S.C. § 3730(c)(2)(A) until attorneys for defendant fruit company, Sunkist, informed them of the provision. Once the USDA became aware of this provision, they no longer desired to simply remove themselves from the case, but rather to "dismiss all of the litigation that [the USDA] possibly could." *Id.* The USDA believed this was the most effective way to advance settlement negotiations related to a decade long dispute in the citrus industry over a burdensome marketing order that was regularly violated by those subject to it.

53. *Sequoia Orange Co.*, 151 F.3d at 1139 (citing *Sunland Packing House Co.*, 912 F. Supp. at 1325).

54. *Id.* at 1143.

55. *Id.* at 1144.

56. *Id.* (citing S. REP. NO. 99-345, at 25-26 (1986)).

57. *Id.* at 1146 (citing *United States v. Redondo-Lemos*, 955 F.2d 1296, 1298-99 (9th Cir. 1992)) (holding due process prohibits arbitrary or irrational prosecutorial decisions).

58. *Id.* at 1145 (citing *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993)).

59. *Id.*

dispensed with the relator's contention that the applicable standard governing the motion to dismiss was Federal Rule of Civil Procedure 41(a)(2).⁶⁰ Rule 41(a)(2) allows courts to grant a plaintiff's motion to dismiss only by court order on terms the court considers proper and grants the dismissal without prejudice unless the court states otherwise.⁶¹ Under this theory, the relator in *Sequoia Orange* sought protection from prejudice resulting from the government's motion to dismiss.⁶² However, the Ninth Circuit agreed with the lower court's determination that since voluntary dismissal by the government is explicitly authorized by the FCA, the specific language of the act controlled where the two were inconsistent.⁶³

In summary, the Ninth Circuit in *Sequoia Orange* concluded that 31 U.S.C. § 3730(c)(2)(A) permits the government to dismiss a meritorious *qui tam* action where the government offers reasons for dismissal that are "rationally related to a legitimate government interest."⁶⁴ It also rejected the plaintiff's contention that the government could not move to dismiss the action without first moving to intervene.⁶⁵

B. Swift's "Unfettered Discretion"

In *Swift v. United States*, a former DOJ employee brought a *qui tam* action against other employees of the DOJ for submitting allegedly fraudulent time sheets.⁶⁶ The government moved to dismiss the complaint without purporting to intervene, arguing the amount of money involved did not justify the expense of litigation.⁶⁷ After the lower court granted the motion to dismiss, the relator appealed on the grounds that, among other reasons, the government cannot move to dismiss without first intervening and that it did not justify its decision to dismiss the claim.⁶⁸

The D.C. Circuit noted the language of 31 U.S.C. § 3730(c)(2)(A) does not explicitly require the government to intervene to seek dismissal.⁶⁹ Rather, the FCA allows the government the binary option to intervene or not intervene, and makes intervention necessary only if the government "proceed[s] with the action."⁷⁰ In other words, intervention is necessarily only when the case goes forward with the government running the litigation.⁷¹ Thus, ending the action by

60. *Id.*

61. FED R. CIV. P. 41(a)(2).

62. *Sequoia Orange Co.*, 151 F.3d at 1145.

63. *United States ex rel. Sequoia v. Sunland Packing House Co.*, 912 F. Supp. 1325, 1338 (E.D. Cal. 1995).

64. *Sequoia Orange Co.*, 151 F.3d at 1147.

65. *Sunland Packing House Co.*, 912 F. Supp. at 1338.

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

67. *Id.* at 251.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

dismissal under section 3730(c)(2)(A) is not *proceeding* with the action and, therefore, does not require intervention. The court also pointed out that, even if intervention were required, the court would “construe the government’s motion to dismiss as including a motion to intervene.”⁷²

Ultimately, the D.C. Circuit declined to adopt the Ninth Circuit’s standard in *Sequoia Orange*, holding instead that the government possesses the “unfettered right” to dismiss *qui tam* claims and that such decisions are not subject to judicial review.⁷³ The D.C. Circuit departed from the Ninth Circuit’s approach for several reasons. First, the absence of affirmative language granting judicial oversight of the decisions to dismiss “at least suggests the absence of judicial constraint.”⁷⁴ Additionally, since the government’s decision to dismiss the case is, in essence, a decision not to prosecute, United States Supreme Court precedent in *Heckler v. Chaney*, maintains that executive branch decisions not to prosecute are unreviewable.⁷⁵ Finally, Federal Rule of Civil Procedure 41(a)(1)(i) permits a plaintiff to dismiss an action “without order of the court” if the adverse party has not filed an answer or motion for summary judgment. Since *qui tam* actions remain under seal for at least sixty days as a matter of procedure, government dismissal in that period necessarily occurs before the defendant can file an answer.⁷⁶ Therefore, because dismissals under Rule 41(a)(1)(i) are not subject to judicial review, neither should government motions to dismiss filed during the same period.⁷⁷

It also disagreed with the Ninth Circuit’s position that the relator’s right to a hearing provided by 31 U.S.C § 3730(c)(2)(A) justified its rational relation test. Relying on *Heckler v. Chaney* and the “Take Care Clause” of the Constitution, the D.C. Circuit reiterated that the decision whether to bring an action on behalf of the government is “generally committed to [its] absolute discretion.”⁷⁸ While its ability to dismiss a claim may not be expressly absolute, there is a presumption that the government acts rationally and in good faith.⁷⁹ Since there is no language in the statute that explicitly limits its “historical prerogative” to decide what cases to pursue, it follows that the hearing provided for in the statute is simply a formal opportunity for the relator to convince the government not to dismiss the case.⁸⁰

The D.C. Circuit concluded their analysis by applying the rational basis test it declined to adopt, finding that, even under the Ninth Circuit’s approach, the relator’s claim failed to show the government’s motion to dismiss was arbitrary

72. *Id.* (citing United States *ex rel.* Neher v. NEC Corp., No. 92-2854, slip op. at 30 (11th Cir. Apr. 28, 1995)).

73. *Id.* at 252.

74. *Id.*

75. *Id.* (citing *Heckler v. Chaney*, 470 U.S. 821, 831-33 (1985)).

76. *Id.* at 253.

77. *Id.*; see also *Randall v. Merrill Lynch*, 820 F.2d 1317, 1320 (D.C. Cir. 1987).

78. *Swift*, 318 F.3d at 252 (citing *Heckler*, 470 U.S. at 831-33).

79. *Id.* at 253. See, e.g., *Rinaldi v. United States*, 434 U.S. 22, 30 (1977)).

80. *Swift*, 318 F.3d at 253.

and capricious.⁸¹ The government asserted the dollar recovery was not large enough to cover the resources necessary to monitor the case, comply with discovery requests, and that the case would divert resources from more significant cases.⁸² The D.C. Circuit reasoned that under the Ninth Circuit's standard, the government's goal of minimizing expenses was a legitimate objective and that dismissal furthered that objective.⁸³ This final exercise is worth noting because subsequent cases have followed a similar model: parties arguing for and against dismissal in *qui tam* suits apply the holdings of both the Ninth and D.C. Circuits in the absence of a clear holding from United States Supreme Court.

C. CIMZNHCA, the Seventh Circuit's Standard

In *CIMZNHCA*, Venari Partners, a four-member partnership of corporate investors, formed eleven daughter companies for the purpose of prosecuting eleven separate *qui tam* actions.⁸⁴ The relator in this case, CIMZNHCA, LLC, alleged that defendants illegally paid physicians to prescribe a drug it manufactured to patients who received benefits under federal healthcare programs.⁸⁵ The alleged illegal payments came in the form of free education services by nurses to physicians and patients and free insurance reimbursement support services.⁸⁶ The government chose not to intervene, but moved to dismiss the case using its authority under 31 U.S.C. § 3730(c)(2)(A), representing that it investigated the claims and found them “to lack sufficient merit to justify the cost of investigation and prosecution and otherwise to be contrary to the public interest.”⁸⁷ The district court denied the government's motion to dismiss.⁸⁸

In doing so, “the court considered first what standard of review to apply to the government's motion under 31 U.S.C. § 3730(c)(2)(A),” which is not explicitly provided for in the statute. The government, seeking broad authority to dismiss *qui tam* suits for the reasons discussed in both the Granston Memo and *Swift*, urged the court to adopt the “unfettered discretion” standard espoused in *Swift*.⁸⁹ The relator, on the other hand, urged the court to apply the more relator-friendly “rational relation” burden-shifting test from *Sequoia Orange*. Reasoning that Congress would not legislate the hearing requirement in 31 U.S.C. § 3730(c)(2)(A) to discuss a “preordained outcome,” the district court decided the standard applied by *Sequoia Orange* was the proper one and found the government's decision was “arbitrary and capricious” and “not rationally related

81. *Id.* at 254.

82. *Id.*

83. *Id.*

84. *United States ex rel. CIMZNHCA, LLC, v. UCB, Inc.*, 970 F.3d 835, 839 (7th Cir. 2020).

85. *Id.* at 840.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

to a valid government purpose.”⁹⁰

The government appealed the lower court’s decision. However, before considering the appeal, the court had to wrestle with a jurisdictional dilemma: while courts ordinarily have appellate jurisdiction over final judgments and a few categories of interlocutory orders, denials of motions to dismiss rarely fit into these categories.⁹¹ The government argued denial of the motion to dismiss under 31 U.S.C. § 3730(c)(2)(A) was a “collateral order” and by “practical construction” under 28 U.S.C. § 1291, was a final judgment and thus immediately appealable.⁹² However, the Seventh Circuit noted the government’s argument would necessitate creating a new category of collateral orders and require a ruling on “the entire category” of orders, not just the order in question here.⁹³ This is to avoid creating a new category of collateral order, which the Supreme Court has firmly discouraged.⁹⁴ The Seventh Circuit overcame the jurisdictional question by construing the government’s motion to dismiss as a motion to intervene *and* a motion to dismiss, a procedural interpretation that is critical to its ultimate holding.

The court reasoned the government’s dismissal authority under 31 U.S.C. § 3730(c)(2)(A) was, in substance and form, both a motion to intervene and a motion to dismiss.⁹⁵ In substance, an intervenor comes between the original parties and asserts some claim, interest, or right, which may be adverse to either or both parties.⁹⁶ In form, the government sought to exercise its authority under a section of the FCA that bears the heading “Rights of the parties to *qui tam* actions.”⁹⁷ It follows that the government cannot exercise this authority under 31 U.S.C. § 3730(c), “unless and until it intervenes.”⁹⁸ Note that this reading undermines the D.C. Circuit’s interpretation in *Swift* that “proceeding” with the action means that “the case will go forward with the government running the litigation.”⁹⁹

Treating the government’s motion as one to intervene enabled the Seventh Circuit to apply Federal Rule of Civil Procedure 41 in the absence of an explicit standard in 31 U.S.C. § 3730(c)(2)(A). Normally, Rule 41(a)(1) permits the plaintiff absolute dismissal authority if the motion is filed prior to defendant filing an answer or motion for summary judgment, but it does not authorize an intervenor-plaintiff to dismiss the original plaintiff’s claim.¹⁰⁰ However, the rule

90. *Id.*

91. *Id.* at 842.

92. *d.*(citing *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 103 (2009)).

93. *Id.*

94. *See Mohawk*, 558 U.S. at 103.

95. *CIMZNHCA*, 970 F.3d at 843.

96. *See United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009).

97. *CIMZNHCA*, 970 F.3d at 844.

98. *Id.*

99. *Swift v. United States*, 318 F.3d 250, 251 (D.C. Cir. 2003).

100. *See Washington Elec. Co-op., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990).

is also subject to “any applicable federal statute.”¹⁰¹ Here, the applicable statute is 31 U.S.C. § 3730(c)(2)(A), which allows the government to dismiss the action without the plaintiff’s consent if the relator receives notice of the motion and the opportunity to be heard.¹⁰²

The court went on to address the purpose of the hearing required by 31 U.S.C. § 3730(c)(2)(A). Noting that “[t]he law does not require the doing of a useless thing,”¹⁰³ it recognized that the value of the mandatory hearing is case-specific. While the government has the authority to dismiss the action under the combination of Federal Rule of Civil Procedure 41(a)(1) and 31 U.S.C. § 3730(c)(2)(A) in cases where the motion is filed prior to the defendant’s answer, motions to do so after the defendant has filed an answer would fall under Federal Rule of Civil Procedure 41(a)(2) and may require a hearing to negotiate the terms of what is “proper” under a court-ordered dismissal.¹⁰⁴

After dispensing with the jurisdictional question and clarifying the purpose of the hearing requirement in 31 U.S.C. 3730(c)(2)(a), the Seventh Circuit ultimately reversed the district court’s decision, holding that “in the absence of a specific standard in 31 U.S.C. § 3730(c)(2)(A),” Federal Rule of Civil Procedure 41(a) was the “beginning and the end of its analysis.”¹⁰⁵ Rule 41(a)(1)(A)(i) provides that subject to “any applicable federal statute, the plaintiff may dismiss an action without a court order by filing a notice of dismissal before the opposing party serves either an answer or motion for summary judgment.”¹⁰⁶ In so holding, the Seventh Circuit created the now three-circuit split, toeing the line between “unfettered authority” from the D.C. Circuit and the “rational relation” test in the Ninth Circuit.

D. The Granston Memorandum

After the 1986 Amendments, the number of whistleblower claims continued to increase, as did the costs for monitoring and litigating cases. The DOJ needed to reign in the human and financial resources it expended on *qui tam* actions. In 2018, Michael Granston, Director of the Fraud Section of the Commercial Litigation Branch at the DOJ, issued a confidential internal memorandum encouraging its attorneys to consider exercising more judiciously its dismissal authority under 31 U.S.C. § 3730 (c)(2)(A) when doing so would best serve the interests of the United States government.¹⁰⁷ The memo justified this proposed

101. FED. R. CIV. P. 41(a)(1).

102. 31 U.S.C. § 3730(c)(2)(A).

103. *CIMZNHCA*, 970 F.3d at 850 (citing *Mashi v. I.N.S.*, 585 F.2d 1309, 1314 (5th Cir. 1978)).

104. *Id.* FED R. CIV. P. 41(a)(2) provides, in relevant part, “Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff’s request only by court order, on terms that the court considers proper.”

105. *CIMZNHCA*, 970 F.3d at 849.

106. FED. R. CIV. P. 41.

107. *See* Memorandum from Michael D. Granston, Dir., Com. Litig. Branch, Fraud Section,

heightened consideration of dismissal on the grounds that “record” annual totals of *qui tam* actions—approaching or exceeding 600 new cases annually—requires significant resources, even when the government declines to intervene.¹⁰⁸ In cases where the government does not intervene, it must still expend significant resources and staff hours monitoring the action.¹⁰⁹ The memo lays out seven factors for evaluating whether to seek dismissal of a relator’s claim.¹¹⁰ For the sake of brevity, they can be summarized as follows:

1. Where the complaint is “facially lacking in merit”—either because the relator’s legal theory is inherently defective, or the factual allegations are frivolous.¹¹¹
2. Where the action “duplicates a pre-existing government investigation and adds no useful information to the investigation,” also known as a parasitic suit.¹¹²
3. Where the action “threatens to interfere with an agency’s policies of the administration of its programs and has recommended dismissal to avoid these effects.”¹¹³
4. Where the dismissal is “necessary to protect the department’s litigation prerogatives.”¹¹⁴
5. Where dismissal would “safeguard classified information.”¹¹⁵
6. Where “the government’s expected costs are likely to exceed expected gain.”¹¹⁶
7. Where the action would “frustrate the government’s efforts to conduct a proper investigation.”¹¹⁷

The memo also advises DOJ attorneys that its position has been that the appropriate standard of dismissal is the “unfettered” discretion standard adopted in *Swift*, but that the prudent course of action may be to identify and support the government’s basis for dismissal in jurisdictions where the standard remains unresolved.¹¹⁸ These factors for dismissal and the DOJ’s position that *Swift* is the appropriate standard are relevant to the public policy merits of the different standards adopted by the several circuits. The public policy impact of these standards will be discussed in detail below.

to Att’y’s, Com. Lit. Branch, Fraud Section & Assistant U.S. Att’y’s Handling False Claims Act Cases, Offices of the U.S. Att’y’s (Jan. 10, 2018) (on file with author).

108. *Id.* at 1.

109. *Id.*

110. *Id.* at 3-8.

111. *Id.* at 3-4.

112. *Id.* at 4.

113. *Id.* at 4-5.

114. *Id.* at 5.

115. *Id.* at 6.

116. *Id.* at 6-7.

117. *Id.*

118. *Id.*

IV. ANALYSIS

A. SCOTUS Should Adopt the Seventh Circuit Standard

As pointed out by the Granston Memo, the DOJ is experiencing record numbers of *qui tam* lawsuits but lacks adequate resources to pursue them.¹¹⁹ If historical trends of increased fraud in the wake of massive government spending persist, the ever-increasing stimulus packages and grant funding appropriated in response to the COVID-19 pandemic will certainly be followed by a tidal wave of *qui tam* actions. The influx of relator claims presents a massive expenditure of DOJ time and resources, even for those where they simply monitor rather than intervene. Although the Supreme Court has declined to settle the circuit split for almost twenty years, the potential for high numbers of *qui tam* claims related to the COVID-19 spending packages places the Supreme Court in a timely position to settle the split.

Of the three standards, the Supreme Court should adopt the interpretation offered by the Seventh Circuit in *CIMZNHNA* because it captures the intent of the other circuits without creating a standard not provided for in the statute or granting the government overly-broad authority to dismiss actions at the expense of *qui tam* relators.

The Seventh Circuit in *CIMZNHCA* provides a solution to the “false choice” between the standards in *Sequoia Orange* and *Swift*.¹²⁰ By interpreting the government’s motion to dismiss as a motion to intervene *and* dismiss—as the court did when overcoming its jurisdictional hurdle—Federal Rule of Civil Procedure 41, in combination with 31 U.S.C. § 3730(c)(2)(A), adopts a procedurally sound standard with similar deference to the government’s discretion in the standard used by the D.C. Circuit in *Swift*, without exceeding the bounds of the explicit language in either the rule or the statute.

Adopting the Seventh Circuit rule would allow the government to intervene, with or without a “legitimate” purpose, and exercise only its *explicit* authority under 31 U.S.C. § 3730(c)(2)(A) to dismiss a claim—if it does so before the defendant files an answer or motion for summary judgment.¹²¹ This grants the government substantially similar authority as allowed by the D.C. Circuit in *Swift* for cases in which it moves to intervene and dismiss during the sixty day seal period. Furthermore, it provides a clear procedural footing for government motions to dismiss in cases where, after declining to intervene initially, it moves to do so under 31 U.S.C. 3730(c)(3) after the relator proceeds with the action on its own.

This Note advocates for adopting the *CIMZNHCA* standard from several viewpoints, including the interpretations of congressional intent by each circuit, the two theories of statutory construction, the constitutionality of the FCA, and the consideration of public policy.

119. *Id.*

120. *United States ex rel. CIMZNHCA, LLC, v. UCB, Inc.*, 970 F.3d 835, 840 (7th Cir. 2020).

121. FED. R. CIV. P. 41(a)(1)(A).

B. Congressional Intent

Central to the disagreement among the circuits is whether Congress intended some form of judicial review and to what extent it is provided for in the statute. The Ninth Circuit, looking to the Senate Report on the 1986 Amendments for indications of legislative intent, adopted a standard based on Senator Chuck Grassley's committee testimony that the amendments would prevent the government from dismissing allegations of false claims "without legitimate reason."¹²² Senator Grassley recently reiterated those intentions during a speech on the Senate floor commemorating Whistleblower Appreciation Day.¹²³ While not persuasive authority, his comments were critical of the DOJ "dismissing charges [. . .] without [the government] stating its reasons" and opined that "the Attorney General should have to state the legitimate reasons for deciding not to pursue [the actions]."¹²⁴ These comments provide at least tacit support for a standard similar to the one adopted by the Ninth Circuit in *Sequoia Orange*.¹²⁵ Senator Grassley also recently penned a letter to then-United States Attorney General Barr that criticized the DOJ because it "did not thoroughly investigate [cases] it argued lacked merit; argued for dismissal on policy grounds while admitting the claims present[ed] a classic violation of law; and finally, failed to do a cost-benefit analysis while arguing that litigation would be too costly."¹²⁶ The consistent advocacy by Senator Grassley is, while not persuasive for judicial purposes, arguably evidence of congressional intent for some limitation on the government's dismissal authority.

Senator Grassley recently announced plans to amend the FCA further to "clarif[y]" purported "ambiguities created by the courts" on the proper interpretation of the FCA.¹²⁷ Coupled with the lengthy discussion of congressional intent from the Senate Report in *Sequoia Orange*, it is evident why the Ninth Circuit was insistent the government state its reasons for seeking dismissal and that those reasons be rationally related to a legitimate government purpose.

However, as the D.C. Circuit pointed out in *Swift* and the Seventh Circuit in *CIMZNHCA*, the comments relied upon in the Senate Report were from an

122. S. REP. NO. 99-345, at 25-26 (1986).

123. Press Release, Sen. Chuck Grassley, Grassley Celebrating Whistleblower Appreciation Day (July 30, 2020), <https://www.grassley.senate.gov/news/news-releases/grassley-celebrating-whistleblower-appreciation-day> [<https://perma.cc/ZS6P-KJSE>].

124. *Id.*

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

126. Letter from Charles E. Grassley, Chairman, Sen. Comm. Fin., to Hon. William Barr, Att'y Gen., U.S. Dep't Just. (Sept. 4, 2019), <https://www.grassley.senate.gov/news/news-releases/grassley-questions-use-doj-memo-limit-recovery-tax-dollars-lost-fraud> [<https://perma.cc/JSC3-BCF3>].

127. Press Release, Sen. Chuck Grassley, *supra* note 123.

unenacted version of the 1986 Amendments and related to provisions which were not ultimately included in the final language.¹²⁸ Thus, the D.C. Circuit maintained, the only indication of congressional intent to permit judicial review of dismissal motions was the hearing requirement under 31 U.S.C. § 3730(c)(2)(A).¹²⁹ However, the court points out that Supreme Court precedent establishing a presumption of rationality and good faith on the part of the Executive Branch in carrying out its duties under the Take Care Clause of the Constitution renders hearings simply a formal opportunity for the relator to convince the government not to end the case.¹³⁰ It does not, as the *Swift* court says, “[set] ‘substantive priorities’ nor [circumscribe] the government’s ‘power to discriminate among issues or cases it will pursue.’”¹³¹ Without the inference of congressional intent from the Senate Report or hearing requirement, the D.C. Circuit dispensed with the notion of judicial review and adopted its “unfettered right” standard.¹³²

The Seventh Circuit agreed with *Swift*’s dismissal of congressional intent. Consistent with its adherence to the actual text of the statute, as discussed in the next section, the Seventh Circuit declined to premise a standard of dismissal merely on a Senate report.¹³³ Like the D.C. Circuit, the Seventh Circuit stated that “[i]f Congress wishes to require some extra-constitutional minimum of fairness, reasonableness, or adequacy of the government’s decision under 3730(c)(2)(A), it will need to say so.”¹³⁴ For example, the very next subsection of the statute provides that the government may settle an action “if the court determines, after a hearing, that the proposed settlement is *fair, adequate, and reasonable under all the circumstances*” (emphasis added).¹³⁵ This emphasis on the text of the act as written indicates the broader reliance on the textual interpretation by the Seventh Circuit in crafting its standard. We now turn to further examination of that approach.

C. Textual Interpretation

Two of the primary canons of statutory interpretation are “textualism” and “purposivism.” As textualism is treated more directly by *CIMZNHCA*, this theory of statutory construction is discussed first. The next section will discuss the purposive theory of construction.

Without a closer review of the textual interpretation of the *CIMZNHCA* standard, it is tempting to simply accept the “unfettered” *Swift* standard rather

128. *Swift v. United States*, 318 F. 3d 250, 253 (D.C. Cir. 2003) (citing S. REP. NO. 99-345, at 42 (1986)).

129. *Id.*

130. *Id. See, e.g., Rinaldi v. United States*, 434 U.S. 22, 30 (1977).

131. *Swift*, 318 F. 3d at 253.

132. *Id.* at 252.

133. *United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, 970 F.3d 835, 853 (7th Cir. 2020).

134. *Id. See* 31 U.S.C. § 3730(c)(2)(B).

135. 31 U.S.C. § 3730(c)(2)(B).

than jumping through the “largely academic”¹³⁶ textual interpretation differences articulated in *CIMZNHCA*.

The breadth of the *Swift* standard is, in part, based on its textual interpretation of the phrase “subject to the limitations set forth in paragraph (2)” in 31 U.S.C § 3730(c)(1).¹³⁷ Here, the court engages in a discussion of the relevance of the type setting and placement of the text of the FCA to explain the scope of the government’s authority to dismiss claims. The relevant part of 31 U.S.C § 3730 appears as follows:

(c) Rights of the Parties to Qui Tam Actions. —

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)

(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.¹³⁸

According to the relator in *Swift*, the phrase “subject to the limitations set forth in paragraph (2)” limits the government’s dismissal power only within the context of 31 U.S.C § 3730(c)(1), which would require the government to first intervene and “proceed” with the action.¹³⁹ The court, however, sided with the government and took the opposite perspective: that the language acts only to limit the ability of the relator to continue as a party to the action, thus applying the dismissal authority in section (c)(2) to the entirety of section (c).¹⁴⁰ Stated differently, “the second sentence of § 3730(c)(1) is limited by § 3730(c)(2), but § 3730(c)(2) is independent of § 3730(c)(1).”¹⁴¹ This broad applicability of section (c)(2) is a partial basis for the *Swift* standard’s “unfettered” ability to dismiss *qui tam* claims.

Contrast this interpretation with the textual interpretation from *CIMZNHCA*. The Seventh Circuit opens its textual interpretation by pointing out that the heading of section (c)—“Rights of the parties to qui tam actions”—implies that the proceeding sections apply to *parties* to the action.¹⁴² The court notes this would seem to require the government to intervene before taking advantage of its

136. *Swift*, 318 F.3d at 252.

137. *Id.* at 251.

138. 31 U.S.C. § 3730(c)(2)(A).

139. *See Swift*, 318 F.3d at 251.

140. *Id.* at 251-52.

141. *Id.* at 252.

142. *United States ex rel. CIMZNHCA, LLC, v. UCB, Inc.*, 970 F.3d 835, 845 (7th Cir. 2020).

dismissal authority.¹⁴³ Stated differently, the government must become a party to the action before exercising its authority under 31 U.S.C. § 3730(c)(2)(A). The court goes on to criticize the reading in *Swift* that “paragraph (2) is entirely free floating,” for several reasons.¹⁴⁴

First, it points out that the surrounding paragraphs in subsection (c) announce the procedural posture to which they apply.¹⁴⁵ Thus, reading paragraph (2) as “free-floating” makes surplusage of those procedural posture provisions, notably the provision in paragraph (1) that a relator may continue as a party “subject to the limitations set forth in paragraph (2)” after the government intervenes.¹⁴⁶ Put differently, if in fact paragraph (2) applies in every circumstance under subsection (c), the relator’s continued participation as a party is subject to that paragraph.¹⁴⁷ The anti-surplusage canon of statutory construction points toward interpreting the language as limited to subsection (c)(1) rather than a free-floating standard as suggested in *Swift*. The court also points out the inherent contradiction of the *Swift* approach, which places an across-the-board “qualified right to conduct the action” on the relator when several other subparagraphs bestow a “nearly unqualified” right where the government does not wish to dismiss the action.¹⁴⁸ It is for these reasons that the Seventh Circuit ultimately limits the applicability of paragraph (2) to those situations in which the government intervenes.¹⁴⁹

This limited interpretation, as discussed in previous sections, is the foundation upon which the Seventh Circuit’s deference to Federal Rule of Civil Procedure 41 is built. By limiting the dismissal authority in 31 U.S.C. § 3730(c)(2)(A) to only situations in which the government intervenes during the sixty day seal period, it provides additional support for the *explicit* dismissal authority by placing the motions to dismiss within the framework of the well-established Federal Rules of Civil Procedure. In so doing, it also places the later sections of 31 U.S.C. § 3730—to which the now-limited “unfettered” authority would no longer apply—within the same well-established framework. As briefly discussed above, motions to dismiss filed after the sixty day seal period has ended, where the government declines to intervene, and the relator “conducts the action” independently, fall under Federal Rule of Civil Procedure 41(a)(2).¹⁵⁰

Taken with 31 U.S.C. § 3730(c)(3), the Federal Rules of Civil Procedure build in two layers of protection for relators. First, statute permits the government “to

143. *Id.* at 844 (citing *Ortega v. Holder*, 592 F.3d 738, 743 (7th Cir. 2010)) (“[W]e must consider not only the words of the statute, but also the statute’s structure.”).

144. *CIMZNHCA*, 970 F.3d at 844.

145. *Id.*; see, e.g., 31 U.S.C. § 3730(c).

146. *CIMZNHCA*, 970 F.3d at 844 (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)) (explaining the anti-surplusage canon); see also ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 156 (2012) (“Material within an indented subpart relates only to that subpart.”).

147. *CIMZNHCA*, 970 F.3d at 844.

148. *Id.* at 845.

149. *Id.*

150. 31 U.S.C. § 3730(c)(3).

intervene at a later date upon a showing of good cause.”¹⁵¹ Second, if the government is permitted to intervene and moves to dismiss, the motion is subject to Federal Rule of Civil Procedure 41(a)(2), which gives the court discretion to order dismissal only on terms it considers proper.¹⁵²

As pointed out in *CIMZNHCA*, this interpretation would provide a hearing that is beyond a “mere formality,” another criticism of the D.C. Circuit’s textual interpretation. It is also worth pointing out that providing for a meaningful hearing gives credence to the Ninth Circuit’s stance in *Sequoia Orange* that the absence of a standard contemplates some form of judicial review for relators who have proceeded with a case on their own. The plain language of Federal Rule of Civil Procedure 41(a)(2) permits dismissal only under circumstances the court deems proper.¹⁵³ While review under this rule may not amount to the same scrutiny as the Ninth Circuit’s rational relation test, it does give purpose to the hearing requirement from 31 U.S.C. § 3730(c)(2)(A) and ensures the relator additional certainty of due process.

D. Purposive Interpretation

The purposive theory of statutory construction assumes “that legislation is a purposive act, and judges should construe statutes to execute that legislative purpose.”¹⁵⁴ Under this theory, courts are encouraged to interpret statutes “in a way that is faithful to Congress’s purposes” by examining the legislative process.¹⁵⁵ The Ninth Circuit in *Sequoia Orange* demonstrated this interpretation when it sought guidance from the Senate Reports on the 1986 Amendments.

For as long as *qui tam* statutes have been in place, their purpose has been to compel private citizens with knowledge of wrongdoing to bring that information forward. As was the case in prior iterations of the statute, the goal of the 1986 Amendments was to once again incentivize citizen relators to assist the government in recovering fraudulent payments.¹⁵⁶

The opening sentence of the Senate Report on the 1986 Amendments states: “The purpose of S. 1526, the False Claims Reform Act, is to enhance the Government’s ability to recover losses sustained as a result of fraud against the government.”¹⁵⁷ The committee believed the amendments to the *qui tam* provisions would alleviate the lack of enforcement capabilities by inviting private

151. *Id.*

152. *CIMZNHCA*, 970 F.3d at 850; FED. R. CIV. P. 41(a)(2) provides, in relevant part, “Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff’s request only by court order, on terms that the court considers proper.”

153. FED. R. CIV. P. 41(a)(2).

154. *Statutory Interpretation: Theories, Tools, and Trends*, EVERYCRSREPORT.COM, (Apr. 5, 2018), <https://www.everycrsreport.com/reports/R45153.html#fn17> [<https://perma.cc/2UNA-KEH8>] (citing ROBERT A. KATZMANN, *JUDGING STATUTES* 31 (2014)).

155. *Id.*

156. S. REP. NO. 99-345, at 13 (1986).

157. *Id.* at 1.

citizens to bolster the government's fraud enforcement effort.¹⁵⁸ It also made clear that the "Committee's overall intent in amending the *qui tam* section of the False Claims Act is to encourage more private enforcement suits."¹⁵⁹ As the current circuit split demonstrates, the interests of the government and private relators are not always aligned, and the courts are split as to who Congress intended to benefit.

Relying on the Senate Report, the Ninth Circuit in *Sequoia Orange* determined Congress' intent was that *qui tam* relators "[act] as a check that the Government does not neglect evidence, cause undue delay, or drop the false claims case without legitimate reason."¹⁶⁰ However, as pointed out in *Swift*, the section of the Senate Report that *Sequoia Orange* relies upon is from an unenacted version of the bill.¹⁶¹ While the *Swift* court dismissed the legislative intent in this section of the Senate Report by focusing instead on the text of the statute, the Senate Report does also offer some support for the "unfettered discretion" standard of dismissal adopted in *Swift* and the more well-structured approach in *CIMZNHCA*.

The *CIMZNHCA* standard construes the government's motion to dismiss a relator's *qui tam* claim under 31 U.S.C. § 3730(c)(2)(A) as a motion to intervene and dismiss. While the *Swift* court does not believe this is necessary based on the plain language of the statute, there is some support for the *CIMZNHCA* standard in the Senate Report.

The 1986 Amendments added the sixty day seal requirement to the FCA.¹⁶² The Committee stated the seal period is "intended to allow the Government an adequate opportunity to fully evaluate the private enforcement suit and determine [...] whether it is in the Government's interest to *intervene and take over the civil action*" (emphasis added).¹⁶³ It goes on to say that "nothing in the statute, however, precludes the government from *intervening* before the 60-day period expires" (emphasis added).¹⁶⁴ This intent is clearly reflected in the text of the FCA in 31 U.S.C. § 3730 (b)(2), which provides: "[t]he 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" (emphasis added).¹⁶⁵ It is logical, therefore, to infer Congress conceptualized the rights of relators and the government within the context of the Federal Rules of Civil Procedure, which would require the government to intervene in the suit, like any other intervenor plaintiff, before proceeding with the action. It follows, then, that although the

158. *Id.* at 7-8.

159. *Id.* at 23-24.

160. *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1144 (9th Cir. 1998) (citing S. REP. NO. 99-345, at 25-26 (1986)).

161. *Swift v. United States*, 318 F.3d 250, 253 (D.C. Cir. 2003) (citing S. REP. NO. 99-345, at 42 (1986)).

162. S. REP. NO. 99-345, at 23 (1986).

163. *Id.* at 24.

164. *Id.*

165. 31 U.S.C. § 3730(b)(2).

dismissal authority in 31 U.S.C. § 3730(c)(2)(A) lacks explicit language requiring the government to intervene, members of the committee arguably conceptualized motions to dismiss filed in accordance with this section within the rules of civil procedure. Additionally, if the committee did intend the government to have “unfettered authority” to do so, the ability to dismiss a suit without order of the court permitted already provided for by Federal Rule of Civil Procedure 41(a)(1)(i) is effectuated by the more specific language in § 3070(c)(2)(A), which grants the government the authority to dismiss the suit “notwithstanding the objections of the person initiating the action.”¹⁶⁶

E. Constitutional Underpinnings

Several other courts reject the *CIMZNHCA* interpretation that 31 U.S.C. § 3730(c)(2)(A) requires the government to intervene prior to dismissing the action on the grounds that the intervention requirement is a violation of the Take Care Clause of Article II § 3 of the Constitution. One such court is the Tenth Circuit, which concluded in *Ridenour v. Kaiser-Hill Co.* that “to condition the Government’s right to move to dismiss an action in which it did not initially intervene upon a requirement of late intervention tied to a showing of good cause would place the FCA on constitutionally unsteady ground.”¹⁶⁷

In *Ridenour*, the government initially declined to intervene in a *qui tam* action brought against a security contractor, but eight months later moved to dismiss the action when it determined allowing the action to continue may compromise national security interests.¹⁶⁸ It sought this dismissal without purporting to intervene, as doing so would implicate the requirement that the government show “good cause” for doing so under 31 U.S.C. § 3730(c)(3).¹⁶⁹ The court agreed with the government’s assertion that it was not required to intervene, citing to the D.C. Circuit’s interpretation in *Swift* that intervention is “necessary only if the government wishes to ‘proceed with the action’” (emphasis added), and in accordance with the constitutional-doubt canon of statutory interpretation.¹⁷⁰ The canon, according to the Tenth Circuit, obligates the court “to interpret statutes in a manner that renders them constitutionally valid” and requires it to “avoid an interpretation that unnecessarily binds the Government.”¹⁷¹ In function, this holding meant the government was not required to show good cause before moving to intervene after the sixty day seal period for the purpose of *dismissing* an action under 31 U.S.C. § 3730(c)(2)(A).¹⁷²

The Seventh Circuit in *CIMZNHCA* characterizes the *Ridenour* reasoning as

166. 31 U.S.C. § 3730(c)(2)(A).

167. *Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 934 (10th Cir. 2005).

168. *Id.* at 929-30.

169. *Id.* at 932.

170. *Id.* at 933-34 (citing *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003)).

171. *Id.* at 934 (citing *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001)).

172. *Id.* at 935.

“misguided.”¹⁷³ As articulated in *CIMZNHCA*, “[t]he canon of constitutional doubt teaches that when two interpretations of a statute are ‘fairly possible,’ one of which raises a ‘serious doubt’ as to the statute’s constitutionality and the other does not, a court should choose the interpretation ‘by which the question may be avoided.’”¹⁷⁴ The Seventh Circuit cites two flaws in the Tenth Circuit’s application of this canon. First, the court “inverted the constitutional-doubt canon.”¹⁷⁵ By failing to articulate what constitutes “good cause” for purposes of 31 U.S.C. § 3730(c)(3)—which is itself a “flexible and capacious concept”—the Tenth Circuit simply assumed any “good cause” requirement would be unconstitutional rather than consider the possibility that the very risk of separation of powers may itself be part of a judicial “good cause” determination.¹⁷⁶ Second, the historical foundation of the concept of *qui tam* actions in both English and American legal systems, and the Supreme Court’s decision to reserve judgment on the FCA’s constitutionality under Article II, do not indicate a serious possibility that the constitutionality of the FCA “will stand or fall” on a good cause requirement to intervene and dismiss a *qui tam* action.¹⁷⁷

F. Public Policy Considerations

For the reasons detailed in the Granston Memo, there are legitimate public policy considerations for adopting a standard that gives substantial deference to the government. As briefly discussed in the opening sentences of this Note, the massive government spending in response to the COVID-19 pandemic, coupled with a high volume of relator claims, presents a looming burden on the DOJ. Adopting a standard that is deferential to federal regulators, especially one similar to that which it maintains is the appropriate standard, could be critical to the efficient operation of the DOJ.¹⁷⁸

As mentioned previously, the CARES Act provided \$2.2 trillion for government aid to mitigate the economic impact of COVID-19 through programs with the Small Business Administration loan program, the Paycheck Protection Program, and the health-care specific Provider Relief Fund.¹⁷⁹ A follow-up package in late December 2020 provided an additional \$900 billion toward relief efforts. At the time of writing, the U.S. House of Representatives and Senate each passed budget resolutions that included funding for President Biden’s \$1.9 trillion COVID-19 relief package.¹⁸⁰ As the funding continues to increase, so too do the

173. United States *ex rel.* *CIMZNHCA, LLC, v. UCB, Inc.*, 970 F.3d 835, 836 (7th Cir. 2020) (citing *Zadvydus*, 533 U.S. at 689).

174. *Id.* at 846 (citing *Zadvydus*, 533 U.S. at 689).

175. *Id.*

176. *Id.* at 847.

177. *Id.* at 848.

178. Memorandum from Michael D. Granston, *supra* note 107.

179. Bosack & Beck, *supra* note 2.

180. Andrew Duehren, *Senate Moves Forward with Biden’s \$1.9 Trillion Covid-19 Relief Plan*, WALL ST. J. (Feb 5. 2021, 10:12 AM), <https://www.wsj.com/articles/gop-puts-minimum->

opportunities for fraudulent claims. This is especially true in the health care sector. In the last four years, 80% of all FCA recoveries have been related to health care or health care-related sectors.¹⁸¹ Of the more than \$2.2 billion recovered by the DOJ in fiscal year 2020, \$1.8 billion relates to the health care industry.¹⁸² This figure does not include the billions in settlements, such as the multi-billion dollar settlement between the DOJ and Purdue Pharma in October 2020.¹⁸³ Suffice it to say, the continuous dedication of additional funding to the health care and health care-related sectors in response to COVID-19 is all but certain to see this trend increase exponentially.

Prior to the pandemic, the Granston Memo cited concerns about the growing number of *qui tam* claims, the burden they place upon federal attorneys, and the “static” rate of government interventions.¹⁸⁴ In fact, during the last five years, an average of approximately 800 new FCA cases were filed each year, with approximately 660 cases filed by *qui tam* relators.¹⁸⁵ In the last year alone, *qui tam* relators filed 672 suits.¹⁸⁶ Interestingly, the federal government itself filed 250 cases last year, which arose from a variety of sources, including referrals from other agencies and by mining government spending data.¹⁸⁷

Despite Senator Grassley’s promise to file legislation to clarify the standard of dismissal for *qui tam* actions, no such bill has been filed as of the time of writing this Note.¹⁸⁸ Thus, for at least the foreseeable future, the prevailing public policy will be the one outlined in the Granston Memo: the interests of the government are best served by judiciously exercising authority under 31 U.S.C. § 3730 (c)(2)(A) to dismiss *qui tam* suits which satisfy the factors laid out in the memo.

wage-school-reopenings-in-covid-aid-spotlight-11612467876 [https://perma.cc/7CZ5-5TM2].

181. *2020 Year-End False Claims Act Update*, GIBSON DUNN 1, 5 (2021), <https://www.gibsondunn.com/wp-content/uploads/2021/01/2020-year-end-false-claims-act-update.pdf> [https://perma.cc/75WJ-3HDV].

182. Press Release, U.S. Dep’t Just., Justice Department Recovers Over \$2.2 Billion From False Claims Act Cases in Fiscal Year 2020 (Jan. 14, 2021), <https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020> [https://perma.cc/6SKT-2YJQ]; Press Release, U.S. Dep’t Just., Justice Department Announces Global Resolution of Criminal and Civil Investigations with Opioid Manufacturer Purdue Pharma and Civil Settlement with Members of the Sackler Family (Oct. 21, 2020), <https://www.justice.gov/opa/pr/justice-department-announces-global-resolution-criminal-and-civil-investigations-opioid> [https://perma.cc/86L9-EREZ].

183. *Id.*

184. Memorandum from Michael D. Granston, *supra* note 107, at 1.

185. *2020 Year-End False Claims Act Update*, *supra* note 181, at 2.

186. Justice Department Recovers Over \$2.2 Billion from False Claims Act Cases in Fiscal Year 2020, *supra* note 182.

187. *2020 Year-End False Claims Act Update*, *supra* note 181, at 2.

188. *Sponsored Legislation*, CHUCK GRASSLEY U.S. SEN. IOWA, <https://www.grassley.senate.gov/issues-legislation/sponsored-legislation> [https://perma.cc/U8B9-Y2RU] (last visited Feb. 17, 2021).

The statistics reported by the DOJ suggest a need to maximize prosecutorial discretion in deciding which cases to pursue. Recall the rise of parasitic suits which led to the FCA being gutted in the 1940s. The increased number of cases filed by the government in 2020 and subsequent years will certainly yield duplicative, overlapping claims filed by relators with knowledge of the same underlying fraudulent acts. The DOJ's ability to invoke the second factor from the Granston Memo, where a *qui tam* action "duplicates a pre-existing government investigation and adds no useful information to the investigation," would be critical to the efficient use of DOJ resources.¹⁸⁹ Similarly, there will certainly be *qui tam* claims which simply lack merit, either facially or because the underlying theory would lead to bad precedent. As the federal agency charged with carrying out the enforcement of the FCA, the DOJ should have significant authority to dismiss such claims, so long as dismissal complies with due process rights of relators. Perhaps most significant to this discussion is the ability to dismiss claims where "the government's expected costs are likely to exceed expected gain."¹⁹⁰ The unprecedented amount of money appropriated by Congress in response to COVID-19 will require the DOJ to operate as efficiently as possible in recovering fraudulent claims. Even if the DOJ is afforded additional resources to pursue them, the sheer volume of claims certain to result from the pandemic response will require careful use of DOJ staff time and resources.

V. CONCLUSION

Without amendments to the FCA that clarify the standard of dismissal under 31 U.S.C § 3730 (c)(2)(A) or how its dismissal provisions interact with the other paragraphs of the section, the Supreme Court should consider stepping in to settle the now three-way circuit split. The importance of a settled standard will only increase as the DOJ's enforcement ramps up efforts and relators begin filing increasing numbers of *qui tam* actions in response to the massive government spending associated with COVID-19. Furthermore, with such enormous sums of money on the line for corporations, relators, and the DOJ, the uncertainty created by the lack of a definite standard leaves the door open for FCA precedent to swerve in unpredictable directions.

Prior to adoption of the *CIMZNHCA* standard, parties to *qui tam* actions—as encouraged in the DOJ Justice Manual—make arguments under two separate standards. At the time of this writing, it is unclear how much more work parties will be subjected to when drafting briefs advocating for dismissal and intervention now that there is a third standard to consider. Regardless, there is certainly an argument to be made from a judicial resource standpoint regarding the length and complexity of adjudicating appeals of motions to dismiss and intervene.

Furthermore, the textual and purposive canons of statutory interpretation support providing the DOJ adequate prosecutorial discretion to carry out its

189. Memorandum from Michael D. Granston, *supra* note 107, at 4.

190. *Id.* at 6.

enforcement duties while providing some recourse for the relator who has risked its reputation and livelihood to bring a *qui tam* case forward. Even during committee discussion, legislators contemplated the procedural steps that would require the government to intervene and proceed with the action prior to acting on its motion to dismiss. It also explicitly recognized the financial and human resource limitations of the DOJ and its concerns that the influx of *qui tam* claims would stress its resources and could potentially interfere ongoing criminal investigations.¹⁹¹ Congress acknowledged and explicitly addressed these concerns in the final version of 31 U.S.C § 3730 (c)(2)(A).

The Seventh Circuit's standard in *CIMZNHCA* provides a procedurally structured solution to the three-way split over the scope of the government's dismissal authority under 31 U.S.C § 3730 (c)(2)(A). By limiting the applicability of paragraph (2), as the Seventh Circuit's textual interpretation suggests, the government will continue to enjoy broad dismissal authority similar to that which it enjoys under the *Swift* standard. This limitation on the otherwise "unfettered" authority allowed by *Swift* may ultimately lead to more expeditious decisions on the part of DOJ regulators who, under the *CIMZHNCA* standard, would be required to seek the court's permission to intervene for "good cause" if they initially decline to intervene and dismiss and later seek to do so under 31 U.S.C § 3730 (c)(3). In addition to the judicious use of government resources, decisions on whether to intervene earlier in the course of a *qui tam* action provide a cue to relators on the merits of their claim, as contemplated in the Granston Memo.¹⁹² Furthermore, the Seventh Circuit standard places the procedural aspects of litigating *qui tam* dismissal and intervention claims on sound constitutional and procedural footing by couching the entire analysis within the framework of the Federal Rules of Civil Procedure.

191. S. REP. NO. 99-345, at 24 (1986).

192. See generally Memorandum from Michael D. Granston, *supra* note 107.