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UNITED STATES OF AMERICA EX REL. CIMZNHCA, LLC V. UCB, INC. AND THE NEED FOR A UNIFIED DISMISSAL STANDARD FOR WHISTLEBLOWER CLAIMS UNDER THE FCA

MICHAEL CASAS*

I. INTRODUCTION

On July 1, 2020, the United States Senate unanimously passed a resolution declaring July 30th as "National Whistleblower Appreciation Day."[1] This resolution demonstrates our society's

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1. *See* S. Res. 634, 116th Congress (as passed by Senate, July 1, 2020) ("It is the duty of all persons . . . to give their earlies information to Congress or any other proper authority of any misconduct, frauds, or misdemeanors.").

recognition of the importance of protecting whistleblowers and encouraging Americans to take action against illicit activity within public and private organizations.[2] Today, the relevance of whistleblower claims is more prominent than ever. The False Claims Act ("FCA"),[3] which enables whistleblowers to bring lawsuits against scammers who defraud the federal government, has seen an upward trend in claims over the past decade, with 801 new lawsuits filed in 2021.[4] FCA claims alone have resulted in over $5.6 billion in settlements for the Department of Justice ("DOJ") in 2021.[5] Approximately eighty-five percent of all FCA recoveries came from healthcare-related claims.[6]

The FCA has become even more relevant in 2022. In response to the COVID-19 pandemic, the Federal Government granted billions of dollars in funding to the healthcare industry to address the crisis.[7] This substantial increase in funding has given rise to countless opportunities to defraud the Government and steal a significant amount of taxpayer money. Thus, it is imperative that the Government treat every FCA claim with the utmost concern and provide a thorough examination into the validity and severity of each claim.

Since 2003, there has been a circuit court split over the standard of review applied to instances where the Government seeks to dismiss a whistleblower claim under the FCA.[8] The standards range from requiring the Government to show a rational

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2. Sen. Chuck Grassley, *Grassley Celebrating Whistleblower Appreciation Day* (July 30, 2020), www.grassley.senate.gov/news/news-releases/grassley-celebrating-whistleblower-appreciation-day [perma.cc/3DDX-83JR] (proclaiming,

> T]oday, Congress and the American people depend on whistleblowers to tell us about wrongdoing, just as much as our founding fathers did. In fact we depend on them more. Because as the government gets bigger, the potential for fraud and abuse gets bigger. So does the potential for cruel retaliation against the nation's brave truth-tellers.).

3. 31 U.S.C. §§ 3729–3733 (2022).

4. Michael L. Podberesky et al., *Analysis of DOJ's 2021 FCA Statistics and the Trends Therein*, SUBJECT TO INQUIRY. (Feb. 9, 2022), www.subjecttoinquiry.com/2022/02/analysis-of-dojs-2021-fca-statistics-and-the-trends-therein/ [perma.cc/6E4X-FF7T].

5, *Id.*

6. *Id.* ("The [eighty-five percent of all FCA recoveries] only includes federal losses, and does not count recoveries for state Medicaid programs where DOJ provided assistance").

7. Rachel Cohrs, *COVID-19 funding: Where the money goes*, MOD. HEALTHCARE (Mar. 07, 2020), www.modernhealthcare.com/politics-policy/covid-19-funding-where-money-goes [perma.cc/CR8H-76K7] ("$2.2 billion to the Centers for Disease Control and Prevention . . . Nearly $1 billion for drugs, medical supplies and training . . . $1 billion in loan subsidies . . . to help small businesses.").

8. 31 U.S.C. §§ 3729–3733 (2022).

connection between seeking dismissal and achieving a legitimate Government objective,[9] to giving the Government an unfettered right of dismissal without providing its justification to do so.[10] Following the publication of an internal DOJ memo directing its attorneys to increase their efforts in dismissing FCA claims, the whistleblower legal community is now concerned that lenient dismissal procedures will encourage the Government to dismiss legitimate claims without thoroughly investigating their merits.[11] As such, the competing dismissal standards have set the stage for contentious disputes between the Government and FCA litigants in jurisdictions that have not adopted a standard for dismissal. In August 2020, the Seventh Circuit's decision in *U.S. ex rel. CIMZNHCA, LLC v. UCB, Inc. et al.*[12] [hereinafter *CIMZNHCA v. UCB*] further deepened the split when the Court established a third standard for granting the Government's dismissal of FCA claims.[13]

This case note will discuss the Seventh Circuit's ruling in *CIMZNHCA v. UCB*[14] and will examine the utility of each existing standard of review for dismissing FCA claims in order to determine the best approach. Part II will first review the FCA and describe the procedural mechanism that enables whistleblowers to bring a lawsuit on behalf of the Government, known as a *qui tam*[15] action. The following two subsections will examine the *Swift*[16] and *Sequoia Orange*[17] standards of review for the Government's right to dismiss *qui tam* actions, followed by a discussion of the factual background and procedural history of *CIMZNHCA v. UCB*.[18] Part III will begin with a summary of the Seventh Circuit's solution to a jurisdictional issue common with FCA claims, followed by an analysis of the

9. U.S. ex rel., Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1145 (9th Cir. 1998) [hereinafter *Sequoia Orange*].

10. Swift v. United States, 318 F.3d 250, 252 (D.C. Cir. 2003).

11. Memorandum from Michael D. Granston, Director, Commercial Litigation Branch, Fraud Section, to Attorneys, Commercial Litigation Branch, Fraud Section and 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)*, 1-2. (Jan. 10, 2018), www.insidethefca.com/wp-content/uploads/sites/300/2018/12/Granston-Memo.pdf [perma.cc/HQ7M-D7P5] [hereinafter *Factors for Evaluating Dismissal*].

12. U.S. ex rel. CIMZNHCA v. UCB, Inc., 970 F.3d 835 (7th Cir. 2020) [hereinafter *CIMZNHCA II*].

13. *Id*. at 853.

14. *Id*.

15. *Qui Tam Action*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("*Qui tam*" is Latin for "*qui tam pro domino rege quam pro seipse*," which means "[he] who sues for the king as for himself."); *see also* Randee Fenner, *David Freeman Engstrom on Qui tam*, STANFORD L. SCH. (Nov. 12, 2012), www.law.stanford.edu/stanford-lawyer/articles/david-freemon-engstrom-on-qui-tam/ [perma.cc/N7DZ-ZCSZ] ("*Qui tam* (variously pronounced key tam; key tom; and kwee tom).").

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

17. *Sequoia Orange,* 151 F.3d at 1147.

18. *CIMZNHCA II*, 970 F.3d at 839.

court's reasoning behind creating a new standard for reviewing the Government's dismissal of FCA lawsuits. It will conclude with a discussion about the consequences of the court's decision.

Part IV will explore the issues created by the *CIMZNHCA* standard, followed by an analysis of how the current standards comport with the legislative intent behind the FCA. Part IV will conclude with a proposal for a new standard that involves amending the text of the FCA to clear the troublesome ambiguity of the statute that has riddled our court system with contentious litigation.

II. BACKGROUND

A. False Claims Act Overview

The FCA[19] was passed by Congress in 1863 as a response to a widespread fraud perpetrated against the Government during the Civil War.[20]

The act contains *qui tam* provisions, which allow private citizens to sue on behalf of the Federal Government against perpetrators who defraud the Government.[21] Private individuals who initiate the lawsuits are known as "relators"[22] and are incentivized[23] to bring these types of claims because they are entitled to a share of the money that the Government recovers.[24]

In 1943, Congress drastically altered the FCA.[25] The changes incorporated a significant reduction to the relator's compensation and created new restrictions to the type of claims that could be brought.[26] The FCA was sparsely used until the mid-1980s when

19. 31 U.S.C. §§ 3729–3733 (2022).

20. Roberto M. Braceras, *The False Claims Act and Universities: From Fraud to Compliance*, COLL. & UNIV. L. MANUAL § 8:1 (Robert W. Iuliano, 1st ed. Supp. 2012) (quoting Abraham Lincoln as saying, "Worse than traitors in arms are the men who pretend loyalty to the flag, feast and fatten on the misfortunes of the nation while patriotic blood is crimsoning the plains of the south and their countrymen are moldering in the dust.").

21. 31 U.S.C. § 3729(a)(1) (2022).

22. 78 Am. Jur. 3d, *Proof of Facts* 3d § 1 (2004).

23. 31 U.S.C. § 3730(c) (2022) ("If the Government proceeds with an action, the relator will receive at least [fifteen] percent but not more than [twenty-five] percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action.").

24. 78 Am. Jur. 3d *Proof of Facts* 3d § 1 (2004).

25. 78 Am. Jur. 3d *Proof of Facts* 3d § 3 (2004).

26. *Id*. (recounting,

> Whistleblowers could no longer bring claims that were based on evidence or information that was known to the government at the time the action was brought. This restriction was not contingent upon whether the government had any intention of bringing a claim and even if the

reports of rampant fraud against the Government committed by high-profile defense contractors became known.[27] Congress responded by passing a bipartisan supported bill that incorporated amendments to the FCA aimed to encourage whistleblowers to bring more *qui tam* actions to combat fraud. [28]

The objectives of the FCA amendments can be found in Senate Report Number 99-345, which explains the intent behind specific provisions within the statute.[29] One of the central goals of the bill was to expand relator participation in aiding the Government with combating fraud by increasing incentives and giving the relator a more prominent role in the litigation.[30] Specifically, the relator's more active role was meant to ensure the Government did not dismiss legitimate FCA claims without thoroughly investigating their merits. The report describes the relator's role as "a check that the Government does not neglect evidence, cause undue delay, or drop the false claims case without legitimate reason."[31] The amendments to the FCA proved to be remarkably effective. Since 1986, over 13,200 FCA claims have been filed, which has resulted in the Government recovering more than $55 billion in settlements and fines.[32]

B. The Government's Right to Dismiss Qui Tam Actions

The FCA is codified at 31 U.S.C §§ 3729–3733.[33] Section 3730 provides the relevant procedures and rights of the parties to an FCA lawsuit.[34] However, this section provides limited guidance for courts as to the extent of the Government and the relator's responsibilities

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whistleblower was the original source of the evidence or information.)

27. *False Claims Act*, PHILLIPS & COHEN, www.phillipsandcohen.com/false-claims-act-history/ [perma.cc/B5DQ-EYAU] (last visited Oct. 8, 2020) (recapitulating,

> [T]he Department of Defense reported that [forty-five] of the largest [one hundred] defense contractors — including nine of the top [ten] — were under investigation for multiple fraud offenses. Government enforcement agencies, meanwhile, complained that their efforts to investigate and stop fraud were hamstrung by insufficient resources, a lack of adequate legal tools and the difficulty of getting individuals with knowledge of fraud to speak up for fear they would lose their jobs.).

28. 78 Am. Jur. 3d *Proof of Facts* 3d § 3 (2004).

29. S. Rep. No. 99-345 (1986), *reprinted in* 1986 U.S.C.C.A.N. §§ 5266, 5291.

30. *Id.* ("The bill also allows a *qui tam*, or private citizen relator, increased involvement in suits brought by the relator but litigated by the Government. Additionally, the relator could receive up to [thirty] percent of any judgment arising from his suit and is afforded protection from retaliation for his actions.").

31. S.Rep. No. 99–345, at 25–6 (1986), *reprinted in* 1986 U.S.C.C.A.N. §§ 5266, 5291.

32. *False Claims Act*, *supra* note 27.

33. 31 U.S.C §§ 3729–3733 (2022).

34. 31 U.S.C § 3730 (2022).

in certain circumstances, which has led to dissimilar interpretations of the FCA's application.

When a relator brings a *qui tam* action, the Government must be served with a copy of the complaint that shall remain sealed for at least sixty days.[35] Before the expiration of the sixty days,[36] the Government may either proceed with the action,[37] or decline to take over the lawsuit, which allows the relator to proceed on its own.[38] If the Government elects to take on the action or decides to intervene at any point before the Defendant has responded or answered the complaint, the Government may dismiss the case over the relator's objections.[39] Pursuant to section 3730(c)(2)(A) of the FCA, once the Government files a motion to dismiss, the court must "provide[] the [relator] with an opportunity for a hearing on the motion."[40]

Aside from this plain language, the FCA is silent on any further instruction for courts as to what the relator is allowed to object to, or the standard courts should follow when reviewing these motions. Without clear guidance from Congress, courts have relied on two different common law standards for analyzing whether dismissal of an FCA claim is proper.

C. Competing Standards of Review for Dismissal of FCA Claims

Since 2003, two federal circuits have created different standards of review for determining whether the Government is entitled to dismiss an FCA action brought on its behalf by a relator. The Ninth Circuit's interpretation of the FCA requires the Government to show a legitimate reason for seeking dismissal[41] while the D.C. Circuit reads the FCA as giving the Government an unrestricted right to dismiss claims without providing justification.[42] Because the vast majority of federal jurisdictions have not adopted a standard of review for dismissal, the early stages of FCA litigation in these circuits often involve disputes over which rule should apply.

35. 31 U.S.C. § 3730(b)(2) (2022).

36. *See* State Farm Fire and Cas. Co. v. U.S. ex rel. Rigsby, 137 S. Ct. 436, 443 (2016) (confirming that the purpose of the seal provision is to allow the Government to conduct a potential criminal investigation without putting defendant(s) on notice).

37. 31 U.S.C. § 3730(b)(4)(A) (2022).

38. 31 U.S.C. § 3730(b)(4)(B) (2022).

39. 31 U.S.C. § 3730(c)(2)(A) (2022).

40. *Id.*

41. *Sequoia Orange*, 151 F.3d at 1145.

42. *Swift*, 318 F.3d at 250.

1. Sequoia Orange Standard

The first standard of review emerged in 1998 from the Ninth Circuit's decision *United States of America Ex Rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*[43] This standard interprets the hearing requirement of 31 U.S.C. § 3730(c)(2)(A)[44] to compel courts to review the dismissal of the action when a motion to dismiss is submitted.[45] Thus, the Ninth Circuit determined that in order to dismiss an FCA claim, the Government must show (1) "a valid Government purpose" and (2) a "rational relation between dismissal and accomplishment of the purpose" before dismissal may be granted.[46] If satisfied, the burden shifts "to the relator 'to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal.'"[47] This rational relation test has subsequently been adopted by the Tenth Circuit, following the court's decision in *Ridenour v. Kaiser-Hill Co.*[48]

2. Swift Standard

However, in the 2003 decision of *Swift v. United States*, the D.C. Circuit specifically rejected the standard set forth in *Sequoia Orange*.[49] The *Swift* court interpreted 31 U.S.C. § 3730(c)(2)(A) as giving the Executive Branch an "unfettered right"[50] to dismiss a *qui tam* action, which is not subject to judicial review.[51] The D.C. Circuit explained that this standard "is also consistent with Federal Rules of Civil Procedure. Rule 41(a)(1)(i) permits a plaintiff to dismiss a civil action 'without order of the court' if the adverse party has not yet filed an answer or a motion for summary judgment."[52] This

43. *Sequoia Orange*, 151 F.3d at 1145.

44. 31 U.S.C. § 3730(c)(2)(A) (2022) ("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.").

45. *Sequoia Orange*, 151 F.3d at 1144.

46. *Id.* at 1145.

47. *Id.*

48. Ridenour v. Kaiser-Hill Co., 397 F.3d 925, 936 (10th Cir. 2005) ("In our view, [the *Sequoia Orange* 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.").

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

50. *Id.*

51. *Id.* at 253 (quoting *Heckler v. Chaney,* 470 U.S. at 831, 105 S. Ct. at 1655 ("The Constitution entrusts the Executive with duty to 'take Care that the Laws be faithfully executed.' U.S. CONST., art. II, § 3. The decision whether to bring an action on behalf of the United States is therefore 'a decision generally committed to [the government's] absolute discretion.'")).

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

standard directly conflicts with *Sequoia Orange*[53] because it gives great latitude to the Government's decision to dismiss a case and does not require the Government to provide any justification for its reason in doing so.[54]

D. The Granston Memo

In the past several years, the frequency of FCA claims has been steadily increasing.[55] With a concern for the Government's time and resources, in January 2018, Michael Granston, the Director of the Civil Fraud Section of the Commerce Litigation Branch of the Department of Justice, published an internal memo that set out to encourage DOJ attorneys to pursue the dismissal of FCA claims much more frequently.[56] The purpose of Granston's memo was to "advance the government's interests, preserve limited resources, and avoid adverse precedent."[57] The memo lays out a list of seven factors that DOJ attorneys should take into consideration when moving to dismiss an FCA claim.[58]

The DOJ has pursued dismissal in fifty FCA cases since the publication of the memo in early 2018, which is more than it targeted for dismissal in the prior thirty years combined.[59] The factors most often cited to support the Government's Section 3730(c)(2)(A) motions to dismiss have been preservation of government resources, curbing meritless claims, and preventing the interference with agency policies.[60]

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53. *Sequoia Orange*, 151 F.3d at 1145.

54. *Swift*, 318 F.3d at 250.

55. *See 2019 Year-End False Claims Act Update*, GIBSON DUNN (Jan. 31, 2020), www.gibsondunn.com/2019-year-end-false-claims-act-update/ [perma.cc/ZXV4-V9Y7] (reporting 2019 marked the tenth consecutive year that over 700 new FCA matters were initiated).

56. *Factors for Evaluating Dismissal*, *supra* note 11, at 1-2.

57. *Id*. at 2.

58. *Id*. at 2-7 (listing the reasons that should be considered for seeking a dismissal in FCA claims, "1. Curbing Meritless Qui Tams . . . 2. Prevent parasitic or opportunistic qui tam actions . . . 3. Prevent interference with agency policies and programs . . . 4. Control litigation brought on behalf of the United States . . . 5. Safeguard classified information and national security interests . . . 6. Preserve Government resources . . . 7. Address egregious procedural errors").

59. Principal Deputy Assistant Attorney General Ethan P. Davis, Speech at the United States Chamber of Commerce's Institute for Legal Reform (June 26, 2020) (transcript available at www.justice.gov/civil/speech/principal-deputy-assistant-attorney-general-ethan-p-davis-delivers-remarks-false-claims [perma.cc/4AKE-U77R]).

60. Eric Christofferson et al., *INSIGHT: Consequences of DOJ'S Granston Memo – Dismissals Are Up, Circuits Split*, BLOOMBERG L. (Nov. 25, 2019), www.news.bloomberglaw.com/health-law-and-business/insight-consequences-of-dojs-granston-memo-dismissals-are-up-circuits-split [perma.cc/AN7E-YLJD] ("[T]he government has cited three of the Granston factors most often:

The repercussions of the Granston memo have presented both opportunities and risks for FCA litigants as they consider filing *qui tam* actions.[61] The exposure of the Government's checklist of factors for considering dismissal of FCA claims allows practitioners to address these factors head on, which helps them to make their case for why their claims hold merit. However, the memo clearly illustrates the DOJ's strong position to actively pursue the dismissal of FCA claims, with an emphasis on preserving Government resources.[62]

With the continual rise in FCA claims[63] and the Government's increased use of its dismissal authority,[64] the stage has been set for a battle in the courts over the validity of whistleblower claims. In the Granston Memo, the Government directs DOJ attorneys to encourage courts to apply the *Swift* standard of dismissal, which provides the Government an "unfettered right"[65] to dismiss *qui tam* actions.[66] In addition, the Granston Memo advises DOJ attorneys to argue the *Sequoia Orange*[67] standard adopted by the Ninth and Tenth circuits was intended to be highly deferential to the Government.[68] The opposing views of the Government and FCA practitioners have paved the way for many contentious disputes over the Government's right to dismiss FCA claims across the country, especially in jurisdictions that have not adopted one of the two competing standards.

E. Procedural History of CIMZNHCA v. UCB

1. Factual Background

This conflict over the interpretation of the FCA came to a head

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preservation of government resources (cited [one hundred percent] of the time); curbing meritless qui tams (cited about [eighty percent] of the time); and preventing interference with agency policies and programs (cited about [fifty percent] of the time.").

61. *Factors for Evaluating Dismissal*, *supra* note 11 at 1.

62. *Id*.

63. *See 2019 Year-End False Claims Act Update*, *supra* note 55 (reporting "[m]ore than 780 new FCA matters were initiated in 2019, marking the tenth year in a row in which over 700 new FCA cases were filed").

64. *See* Davis, *supra* note 59 ("[During the thirty years before the Granston Memo, the government moved to dismiss roughly 45 qui tam cases; in the two-plus years following the memo, the Department has moved to dismiss around 50 qui tams")

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

66. *See Factors for Evaluating Dismissal*, *supra* note 11, at 7 (espousing the opinion that *Swift* offers the correct standard of review for dismissal of FCA claims and encouraging DOJ attorneys to argue the Government's basis for dismissal "satisfies any potential standard for dismissal under [the FCA]").

67. *Sequoia Orange*, 151 F.3d at 1145.

68. *Factors for Evaluating Dismissal*, *supra* note 11, at 7.

in the 2020 case *CIMZNHCA v. UCB*,[69] where a disagreement over the dismissal of an FCA claim lead to a fight over which dismissal standard should be applied in the Southern District of Illinois since this jurisdiction had yet to adopt one.

Venari Partners, LLC (d/b/a The National Healthcare Analysis Group or "NHCA Group") was founded on a unique, lucrative idea: a data analytics company funded by private investors that's sole purpose was to expose healthcare fraud against the Government through FCA claims and profit off the company's share of recovered funds.[70] The rationale behind the company's inception was that lone whistleblowers tend to be reluctant to come forward and are often poorly equipped to build a winnable case.[71] With a large financial incentive[72] and a professional team of analysts, lawyers, and health industry insiders, the NHCA Group's business model showed great potential.

In 2017, the NHCA Group began a new strategy to find fraudsters in violation of the FCA.[73] By compiling a database consisting of publicly available resumes of healthcare workers, NHCA Group created a list of "potential informants" of which they hoped would aid it in uncovering a fraudulent scheme against the Government.[74] The NHCA Group then contacted these individuals offering to pay them to participate in a research study of the pharmaceutical industry.[75] Using information obtained through these interviews, the NHCA Group uncovered an alleged plot perpetrated by thirty-eight companies[76] in the pharmaceutical industry involving "remuneration in the form of free nursing and

69. U.S. ex rel. CIMZNHCA, LLC v. UCB, INC., 2019 WL 1598109, at *1 (S.D. Ill. Apr. 15, 2019*), rev'd and remanded sub nom*. U.S. v. UCB, Inc.*,* 970 F.3d 835 (7th Cir. 2020) [hereinafter *CIMZNHCA I*].

70. *See* J.C. Herz, *Medicare Scammers Steal $60 Billion a Year. This Man Is Hunting Them*, WIRED (Mar. 7, 2016), www.wired.com/2016/03/john-mininno-medicare/ [perma.cc/KYW2-FRP6] (reporting on the story of NHCA Group's inception and the methods the company uses to detect potential FCA claims).

71. *Id*.

72. Press Release, Department of Justice, Justice Department Recovers over $3 Billion from False Claims Act Cases in Fiscal Year 2019 (Jan. 9, 2020), www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019 [perma.cc/D54Y-TRNM] ("The Department of Justice obtained more than $3 billion in settlements and judgments from civil cases involving fraud and false claims against the government in the fiscal year ending Sept. 30, 2019.").

73. Herz, *supra* note 70.

74. Mot. to Dismiss at 5, *U.S., et al. ex rel. Healthcare Choice Group, LLC v. Bayer Corp*., 2018 WL 3637381 (E.D. Tex. 2018) (No. 5:17-CV-126-RWS-CMC).

75. *Id*.

76. Allison Frankel, *DOJ doubles down in brief to discredit 'Wall Street-backed' False Claims Act whistleblower*, REUTERS (Feb. 25, 2019), uk.reuters.com/article/us-otc-fca-idUKKCN1QE2IX [perma.cc/FN2A-3YFS].

reimbursement support services to prescribing providers."[77] In return, providers would recommend the various companies' drugs to patients.[78]

NHCA Group subsequently created eleven shell companies exclusively for the purpose of bringing eleven identical *qui tam* actions against several combinations of the thirty-eight companies accused of wrongdoing.[79] On July 20, 2017, CIMZNHCA, LLC, one of the eleven shell companies, filed this False Claims Act suit in the Southern District of Illinois against UCB, Inc. ("UCB") and other pharmaceutical companies alleging these companies used the aforementioned scheme to entice providers to recommend one of UCB's medications, Cimzia, to their patients.[80]

CIMZNHCA alleges that pharmacies across the country have engaged in this scheme and submitted false claims to Medicare and Medicaid, which have "caus[ed] these programs to pay tens of millions of dollars in improper reimbursements."[81] After a perfunctory investigation, the Government decided to submit a motion to dismiss the case.[82] The Government reasoned that NHCA Group's sweeping allegations of nationwide misconduct (which would implicate thousands of healthcare professionals and potentially millions of Medicare beneficiaries) was too "costly and contrary to governmental prerogatives."[83]

2. The District Court's Analysis of the Government's Motion to Dismiss

The District Court for the Southern District of Illinois first considered which standard of review to follow for analyzing the Government's motion to dismiss this FCA claim[84] since a dismissal standard had not yet been adopted in the Seventh Circuit.[85] After reviewing the standards set forth in *Swift*[86] and *Sequoia Orange*,[87] the district court chose to adopt the *Sequoia Orange*[88] standard. In

77. *CIMZNHCA I*, 2019 WL 1598109 at *1.
78. *Id*.
79. *Id*.
80. *Id*.
81. *Id*.
82. *Id*.
83. *Id*.
84. 31 U.S.C. § 3730(c)(2)(A) (2022).
85. *CIMZNHCA I*, 2019 WL 1598109, at *2.
86. *See Swift*, 318 F.3d at 252 (reading "[section] 3730(c)(2)(A) [as] giv[ing] the government an unfettered right to dismiss an action.").
87. *See Sequoia Orange*, 151 F.3d at 1145 (explaining that "two step analysis applies here to test the justification for dismissal: (1) identification of a valid government purpose; and (2) a rational relation between dismissal and accomplishment of the purpose").
88. *Sequoia Orange*, 151 F.3d at 1145.

the court's view, the *Sequoia Orange*[89] standard correctly gave effect to the hearing requirement of 31 U.S.C. § 3730(c)(2)(A),[90] which the court agreed, compels judicial review for the dismissal of FCA actions.[91] This hearing requirement remains one of the most heavily contested provisions of the FCA.[92]

Applying the *Sequoia Orange* "rational relation"[93] test to the Government's arguments, the district court agreed that avoiding litigation costs is a valid interest to support dismissal.[94] However, the court concluded that simply identifying an interest to satisfy *Sequoia Orange*[95] is not enough to warrant dismissal.[96] The court held that the decision to dismiss the action "must have been based on a minimally adequate investigation, including a meaningful cost-benefit analysis,"[97] to satisfy the rational relation test. Indeed, the court's finding is consistent with the provision of the FCA which requires the government to "diligently [ ] investigate" the relators claims.[98] Notably, this requirement is void from the *Swift*[99]

89. *Id*.

90. 31 U.S.C. § 3730(c)(2)(A) (2022).

91. *CIMZNHCA I*, 2019 WL 1598109, at *2 (citing Corley v. United States, 556 U.S. 303, 314 (2009) (quoting Hibbs v. Winn, 542 U.S. 88, 101 (2004) ("[T]he *Sequoia Orange* standard is consistent with a well-established principle of statutory construction: '[O]ne of the most basic interpretive canons [is] that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . .'")).

92. *See* U.S. ex rel. Borzilleri v. AbbVie, Inc., 2020 WL 7039048, at *2 (2d Cir. 2020) (rejecting the relator's argument that it was entitled to an evidentiary hearing because the relator "failed to make a colorable showing that the government's dismissal was fraudulent, arbitrary, capricious, or illegal."); *cf.* S.D. Miss. May 11, 2020); U.S. ex rel. Maldonado v. Ball Homes, LLC, No. CV 5:17-379-DCR, 2018 WL 3213614, at *4 (holding the hearing requirement of section 3730(c)(2)(A) does not require that the relator "be permitted to introduce evidence."); *see also* U.S. ex rel. May v. City of Dall., No. 3:13-CV-4194-N-BN, 2014 WL 5454819, at *4 (holding that providing the relator an opportunity to respond to the Government's motion to dismiss satisfies the hearing requirement; *see also* U.S. ex rel. Schneider v. JPMorgan Chase Bank, Natl. Assn., 140 S. Ct. 2660 (2020) (denying a petition for writ of certiorari that would determine whether the Government is entitled to an unfettered right of dismissal for *qui tam* actions under the FCA, or if the relator should be given an opportunity to persuade the court that the Government's decision to dismiss should denied).

93. *Sequoia Orange*, 151 F.3d at 1145.

94. *CIMZNHCA I*, 2019 WL 1598109, at *3; *see also Sequoia Orange*, 151 F.3d at 1146 (explaining that "the government can legitimately consider the burden imposed on the taxpayers by its litigation, and that, even if the relators were to litigate the FCA claims, the government would continue to incur enormous internal staff costs.").

95. *Sequoia Orange*, 151 F.3d at 1145.

96. *CIMZNHCA I*, 2019 WL 1598109, at *3.

97. *Id*. at *3.

98. 31 USC § 3730(a) (2022).

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

standard of review and is a significant issue that would be addressed by the Seventh Circuit on appeal.

After reviewing the record, the court found the Government's investigation inadequate "to support the claimed governmental purpose,"[100] a finding that the Seventh Circuit would subsequently disagree with.[101] Evaluating whether the Government has adequately considered, or even *should* consider, the relator's claim is the genesis of much debate around the FCA and will be discussed in depth in the following section. Ultimately, the district court held that the Government's express interest was not rationally related to its decision to dismiss the case.[102]

The court also took issue with the fact that the Government devoted 6.5 pages of its briefing and all of its exhibits to disparage the NHCA Group's business model and litigation activities.[103] The court found that "one could reasonably conclude that the proffered reasons for the decision to dismiss are pretextual and the Government's true motivation is animus towards the relator."[104] Again, this duty to thoroughly investigate FCA claims has been consistently shown to be a significant factor in courts' assessment of the dismissal of these claims and will become an important feature towards fixing the debate around the proper dismissal standard for FCA lawsuits.

Consequently, the Government's motion to dismiss was

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100. *CIMZNHCA*, 2019 WL 1598109, at *3 (recounting,

> During the evidentiary hearing, the Government acknowledged that, for the most part, it collectively investigated the eleven *qui tam* cases filed by the relator. As it relates to this specific case, the Government reviewed the Complaint and disclosure materials attached to the Complaint. It did not review any additional materials from the relator relevant to this case. Nor did the Government effort a cost-benefit analysis; it did not assess or analyze the costs it would likely incur versus the potential recovery that would flow to the Government if this case were to proceed. This falls short of a minimally adequate investigation to support the claimed governmental purpose. (internal citations omitted)).

101. *CIMZNHCA II*, 970 F.3d at 845.

102. *CIMZNHCA I*, 2019 WL 1598109, at *3-4 (opining,

> The relator alleges the in-kind remuneration the defendants provided to physicians was intended to skew their decision making and to incentivize them to prescribe Cimzia rather than competitors' medications. The Government's contention that these allegations – which they acknowledge assert a classic violation of the AKS – "conflict with important policy and enforcement prerogatives of the Government's healthcare programs" is curious at best. (internal citations omitted)).

103. *Id.* at *4.

104. *Id.*

denied.[105] Following the court's order, the Government appealed the decision arguing that *Swift*,[106] not *Sequoia Orange*,[107] is the appropriate standard and that it had satisfied its burden of justifying dismissal, irrespective of the court's standard of review.[108]

The following section will examine the Seventh Circuit's reversal of the district court's decision and explore why the Seventh Circuit decided to create a third standard of review for dismissing FCA claims in order to make its ruling.

III. ANALYSIS

Before the Seventh Circuit could address the issue of whether the Government was entitled to the dismissal of CIMZNHCA's *qui tam* suit, the court was first tasked with addressing whether it had jurisdiction to review the denial of a dismissal that came from a non-party to the suit.[109] To overcome this problem, the court interpreted 31 U.S.C. § 3730(c)(2)(A)[110] as requiring the Government to intervene in an FCA action before it may seek dismissal.[111] Once the Government has become a party to the suit, the court determined the Government's rights to dismiss the claim are governed by Federal Rule of Civil Procedure 41(a).[112] Thus, the court effectively created a new standard of review for the Government's dismissals of *qui tam* claims.[113] This new standard generally gives the Government an unrestricted right to dismissal, unless its conduct encroaches on the FCA statute, the Federal Rules, or the Constitution.[114] The following discussion of the Seventh Circuit's anfractuous twenty-one page opinion illustrates the problems arising out of another attempt to interpret the vague provisions of the FCA, and highlights the need for a simple unified standard of review that will streamline litigation and avoid arduous statutory interpretation.

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105. *Id.*

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

107. *Sequoia Orange*, 151 F.3d at 1145.

108. *CIMZNHCA II*, 970 F.3d at 840.

109. *Id.* at 842.

110. 31 U.S.C. § 3730(c)(2)(A) (2022).

111. *CIMZNHCA II*, 970 F.3d at 844.

112. *Id.* at 849; Fed. R. Civ. P. 41(a)(1)(A)(i) (2022) ("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 a motion for summary judgment"); *see also* Cone v. W. Virginia Pulp & Paper Co., 330 U.S. 212, 217 (1947) (explaining a plaintiff's unqualified right to dismissal is preserved by Rule 41(a)(1)).

113. *Id.* at 840.

114. *Id.* at 854.

A. Jurisdictional Issue

Before the Seventh Circuit addressed the merits of the case, the Court tasked itself with establishing proper appellate jurisdiction to review the DOJ's motion to dismiss.[115] The Court decided it had to solve the issue of how it could be authorized to review the denial of a non-party's motion to dismiss another's lawsuit.[116] Notably, this issue was not addressed nor contemplated by the *Swift*[117] or *Sequoia Orange*[118] courts. The Seventh Circuit's decision to take on an issue that only it perceived as necessary to solve, results in a novel statutory construction of the FCA that produces a third standard of review for dismissals.

The Seventh Circuit began its analysis by noting that appellate courts have "jurisdiction of the district courts' final judgements under [section] 1291 and several categories of interlocutory orders under [section] 1292."[119] Denials of a motion to dismiss are generally not considered final judgments and therefore are not appealable.[120] Despite that, the collateral order doctrine[121] provides "a circuit court may review certain orders as appealable final

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115. *Id.* at 842.

116. *CIMZNHCA I*, 2019 WL 1598109, at *1 (S.D. Ill. Apr. 15, 2019) ("The Government has declined to intervene and now moves to dismiss the case").

117. *See generally Swift*, 318 F.3d 250 (neglecting to address the Government's authority to dismiss a *qui tam* action as a non-party to the suit).

118. *See generally Sequoia Orange*, 151 F.3d 1139 (neglecting to address the Government's authority to dismiss a *qui tam* action as a non-party to the suit).

119. *CIMZNHCA II*, 970 F.3d at 842. *See also* 28 U.S.C. § 1291 (2022) (stating

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.)

See also In re Archdiocese of Milwaukee, 482 B.R. 792, 797 (E.D. Wis. 2012), *aff'd on other grounds sub nom*. Archdiocese of Milwaukee v. Doe, 743 F.3d 1101 (7th Cir. 2014) ("Interlocutory appeal is appropriate when it involves a controlling question of law over which there is a substantial ground for difference of opinion, and an immediate appeal from the order may materially advance the termination of the litigation.").

120. Jackson v. Curry, 888 F.3d 259, 262 (7th Cir. 2018); *accord* Chasser v. Achille Lauro Lines, 844 F.2d 50, 52 (2d Cir. 1988), *aff'd sub nom*. Lauro Lines s.r.l. v. Chasser, 490 U.S. 495 (1989) (explaining that a case is still pending after a denial of a motion to dismiss and is therefore not considered a final decision).

121. Gray v. Baker, 399 F.3d 1241, 1245 (10th Cir. 2005) ("To establish jurisdiction under the collateral order doctrine, defendants must establish that the district court's order (1) conclusively determined the disputed question, (2) resolved an important issue completely separate from the merits of the case, and (3) is effectively unreviewable on appeal from a final judgment.").

decisions within the meaning of 28 U.S.C. § 1291 even though the district court has not entered a final judgment."[122] However, the Supreme Court has ruled that the "class of [appealable collateral] orders must remain 'narrow and selective.'"[123]

Consequently, two weeks before this lawsuit, the Ninth Circuit in *United States ex rel. Thrower v. Academy Mortgage Corp*, determined that an order denying a motion to dismiss under section 3730(c)(2)(A)[124] of the FCA is not an appealable collateral order.[125] Therefore, rather than undermine the Ninth Circuit's decision, the Seventh Circuit in the present case tasked itself with finding new grounds for reviewing the order denying the Government's motion to dismiss.

The Government argued that the Supreme Court in *U.S. ex. rel. Eisenstein v. City of New York*[126] had already resolved this jurisdictional issue.[127] The Supreme Court in *Eisenstein* held the Government is not a "party to an FCA action for the purposes of the appellate filing deadline," unless it intervenes.[128] However, even if the Government has not intervened, it may appeal orders considered reviewable under the collateral-order doctrine.[129] The *Eisenstein* Court provided examples of appealable collateral orders in FCA actions, such as the Government's ability to appeal a denial to intervene as well as the dismissal of the FCA action over the Government's objections.[130] The Government argued that a court's order denying a motion to dismiss should not be distinguished from the examples in *Eisenstein*.[131] Although the Seventh Circuit found this argument unpersuasive, the Court felt that *Eisenstein*

122. Henderson v. Glanz, 813 F.3d 938, 947 (10th Cir. 2015); *see* Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 871 (1994)) (citing Abney v. U. S., 431 U.S. 651 (1977) ("[O]rders denying certain immunities are strong candidates" for interlocutory appeals)), Mitchell v. Forsyth, 472 U.S. 511 (1985)); *See also* Swint v. Chambers County Comm'n., 514 U.S. 35, 42 (1995) (noting the "small category" of interlocutory appeals "includes only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action.").

123. Mohawk Industries, Inc. v. Carpenter, 558 U.S. 100, 113 (2009) (quoting Will v. Hallock, 546 U.S. 345, 350 (2006)).

124. 31 U.S.C. § 3730(c)(2)(A) (2022).

125. United States ex rel. Thrower v. Academy Mortgage Corp., 968 F.3d 996, 1008 (9th Cir. 2020) (holding the Government's interest in dismissing an action for the purpose of "avoiding burdensome discovery expenses . . . [was] not an interest important enough to merit expanding narrow scope of collateral order doctrine").

126. U.S. ex. rel. Eisenstein v. City of New York, 556 U.S. 928 (2009).

127. *CIMZNHCA II*, 970 F.3d at 842.

128. *Eisenstein*, 556 U.S. at 931 (internal quotations omitted).

129. *Id.* at 931 n.2 (citing Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)).

130. *Eisenstein*, 556 U.S. at 931 n.2.

131. *CIMZNHCA II*, 970 F.3d at 842-43.

"indicate[s] the correct path to solving the jurisdictional problem: treat the government's motion to dismiss as a motion both to intervene and to dismiss."[132]

The Seventh Circuit explained, "[a]n intervenor comes between the original parties to ongoing litigation and interposes between them its claim, interest, or right, which may be adverse to either or both of them."[133] In effect, the Government's motion to dismiss was an attempt to assert its statutory right[134] to end a lawsuit that was initiated on its behalf. Therefore, the Seventh Circuit considered the district court's order denying "the motion to dismiss as an order denying a motion to intervene" and concluded that it had jurisdiction to review the order.[135] By choosing this route to rationalize its authority, the Seventh Circuit forced itself down a byzantine path of statutory construction for the purpose of analyzing the merits of this case, a path which strays from the existing authority from *Swift*[136] and *Sequoia Orange*.[137] Before the court could apply its novel interpretation of requiring Government intervention before dismissal, the court turned to the text of the FCA and the Federal Rules of Civil Procedure to legitimize its analysis and created a new dismissal standard along the way.

B. The Text of § 3730(c)(2) Requires Intervention Before the Government May Exercise its Rights.

The Seventh Circuit begins its path to a new standard of review with subsection (c) of Section 3730 titled, "Rights of the parties to *qui tam* actions."[138] As the Supreme Court ruled in *Eisenstein*, the Government becomes a party to a *qui tam* action when "it intervenes in accordance with the procedures established by federal law."[139] Paragraph (2)[140] is of primary relevance here at it gives the Government the right to dismiss the action.[141] However, unlike the rest of the paragraphs in this subsection, there is no procedural posture that signals when the Government may exercise

132. *Id.* at 843.

133. *Id.*

134. 31 U.S.C. § 3730(c)(2)(A) (2022) ("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.").

135. *CIMZNHCA II*, 970 F.3d at 842 ("In substance, the government appeals a denial of what should be deemed a motion to intervene and then to dismiss. It is well established that denials of motions to intervene are appealable.").

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

137. *Sequoia Orange*, 151 F.3d at 1147.

138. 31 U.S.C. § 3730(c)(1) (2022).

139. *Eisenstein*, 556 U.S. at 933.

140. 31 U.S.C. § 3730©(2) (2022).

141. *Id.*

this right.[142] In order to justify the court's authority to review an order against the Government's decision to dismiss an FCA claim, the Seventh Circuit proceeds to bend over backward to construct a novel interpretation of the FCA that comports with its conclusion that requires Government intervention before seeking dismissal.

The Court focuses on the subparagraphs of paragraph (2) which it argues, infers Government intervention before it may exercise its rights.[143] For example, "subparagraph (C) provides 'limitations' on the relator's participation where its 'unrestricted participation . . . would interfere with or unduly delay *the Government's prosecution* of the case.'"[144] The court reasoned this subparagraph explicitly requires the Government's participation, which naturally may only occur after the Government intervenes.[145]

Along these same lines, the Seventh Circuit took issue with the D.C. Circuit's analysis in *Swift*, which held paragraph (c)(2)—the paragraph that gives the Government an unqualified right to dismiss the action—"is not constrained by" the rest of subsection (C).[146] According to the Seventh Circuit, the *Swift* court's interpretation would render the following provisions under subsection (c) irrelevant. Specifically, paragraph (4) begins with "[w]hether or not the Government proceeds with the action."[147] If intervention is not required, the Court reasoned, it would not have made sense to qualify the provision in this way.[148] Additionally, the Seventh Circuit points out that if an intervention were not required under paragraph (c)(2), the stipulation of paragraph (c)(1) that the relator "shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2)," would be rendered inconsequential.[149] Accordingly, the Seventh Circuit concluded that the text of section 3730(c)(2)[150] supports the notion of requiring Government intervention before it seeks dismissal.[151]

The ambiguity of the FCA's text leads to a myriad of interpretations and takes the court on a lengthy and circuitous discussion about the text of the FCA as well as constitutional doubts

142. 31 U.S.C. § 3730(c)(2) (2022).
143. *CIMZNHCA II*, 970 F.3d at 845.
144. *Id.* (quoting, 28 U.S.C. § 3730(c)(2)(C)).
145. *CIMZNHCA II*, 970 F.3d at 845.
146. *Id.* at 844 (quoting *Swift*, 318 F.3d at 252).
147. 31 U.S.C § 3730(c)(4) (2022).
148. *CIMZNHCA II*, 970 F.3d at 845.
149. *Id.* at 844-45 (quoting 31 U.S.C § 3730(c)(1) (2022)).
150. 31 U.S.C § 3730(c)(2) (2022).
151. *CIMZNHCA II*, 970 F.3d at 849.

raised by the Tenth[152] and Ninth[153] Circuits which take up approximately five pages of the opinion.[154] This illustrates the inherent problem with the FCA, in that Congress' lack of procedural specificity has led to countless hours and resources debating the correct interpretation. One reading of this labyrinthine opinion invokes the reader to believe there must be an easier way to decide how to apply the FCA in these circumstances.

C. The Seventh Circuit's "CIMZNHCA" Standard

With the jurisdictional and constitutional issues put to rest, the Seventh Circuit moved on to adjudicating the real issue of this case: whether the Government was entitled to dismiss the *qui tam* action brought by CIMZNHCA, LLC.[155] Having interpreted the text of section 3730(c)(2)(A)[156] as requiring intervention before dismissal, the Seventh Circuit determined that the Federal Rules of Civil Procedure offer the proper standard for determining the merits of dismissal.[157]

Federal Rule of Civil Procedure 41(a)(1)(A)(i) enables a plaintiff to dismiss an action with "a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment."[158] The Government met this requirement in the case at hand by filing a timely motion to dismiss.[159] However, because Rule 41(a)[160] does not allow an intervenor-plaintiff to prevent dismissal of the original plaintiff's claims,[161] and because the Rule is "[s]ubject to . . . any applicable statute," the court turned to the text of section 3730(c)(2)(A)[162] itself for further guidance.[163]

This section provides "[t]he Government may dismiss the action, notwithstanding the objections of the [relator]" if the relator

152. *Ridenour*, 397 F.3d at 934 ("[T]o 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.").

153. U.S. ex rel. Kelly v. Boeing Co., 9 F.3d 743, 753 n.10 (9th Cir. 1993) (explaining that because the statute does not prohibit the Government dismissing an FCA claim without intervention, allowing it to do so is "entirely appropriate and provides an illustration of the meaningful control which the Executive Branch can exercise over qui tam actions").

154. *CIMZNHCA II*, 970 F.3d at 844-49.

155. *Id*. at 849.

156. 31 U.S.C § 3730(c)(2)(A) (2022).

157. *CIMZNHCA II*, 970 F.3d at 849.

158. Fed. R. Civ. P. 41(a)(1)(A)(i) (2022).

159. *CIMZNHCA II*, 970 F.3d at 849.

160. Fed. R. Civ. P. 41(a)(1)(A) (2022).

161. Washington Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co., 922 F.2d 92, 97 (2d Cir. 1990) ("[i]ntervention cannot be used as a means to inject collateral issues into an existing action").

162. 31 U.S.C § 3730(c)(2)(A) (2022).

163. *CIMZNHCA II*, 970 F.3d at 850.

has been notified and "the court has provided the [relator] with an opportunity for a hearing on the motion."[164] This hearing requirement lies at the crux of the disagreement over the court's role in reviewing the Government's efforts to dismiss an FCA claim.[165] While the *Swift* court construed this provision as simply providing the relator a "formal opportunity to convince the government not to end the case,"[166] the *Sequoia Orange* court interpreted this section as requiring the Government to justify its decision to seek dismissal.[167]

The Seventh Circuit offered another novel interpretation of the FCA by explaining the hearing requirement may only be invoked in "exceptional cases" that look for government misconduct and violations of Due Process.[168] The Court determined the hearing only applies in cases where the Government has missed its chance to dismiss the case,[169] and the relator has refused to agree to dismissal.[170] In that case, a hearing under section 3730(c)(2)(A)[171] would be used to decide what "terms" of dismissal are proper under Rule 41(a)(2).[172] In sum, the Seventh Circuit's new standard gives the Government great deference in dismissing the lawsuit, and the

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164. 31 U.S.C § 3730(c)(2)(A) (2022).

165. *Cf. Swift*, 318 F.3d at 253 (D.C. Cir. 2003) (ruling that the FCA's hearing requirement does not require judicial review of the Government's decision to dismiss a case, it instead "give[s] the relator a formal opportunity to convince the government not to end the case"); *cf. also* Sequoia Orange, 151 F.3d 1139, 1145 (9th Cir. 1998) (finding support for a rational-relation standard of review from S.Rep. No. 99–345, at 26 (1986), which describes the appropriate circumstances for invoking the hearing requirement of 31 U.S.C. § 3730(c)(2)(A)).

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

167. *Sequoia Orange,* 151 F.3d at 1147.

168. *UCB, Inc.*, 970 F.3d at 851-52*; see also* Sequoia Orange, 151 F.3d at 1146 (citing U.S. v. Redondo-Lemos, 955 F.2d 1296, 1298-99 (9th Cir. 1992) ("due process prohibits arbitrary or irrational prosecutorial decisions.")).

169. *See* Fed. R. Civ. P. 41(a)(1)(A)(i) (2022) ("The plaintiff may dismiss an action without a court order by filling . . . a notice of dismissal before the opposing party serves either an answer or a motion for summary judgement.").

170. *CIMZNHCA II*, 970 F.3d at 850; *see* Fed. R. Civ. P. 41(a)(1)(A)(ii) (2022) ("The plaintiff may dismiss an action without a court order by filling . . . a stipulation of dismissal signed by all parties who have appeared.").

171. 31 U.S.C § 3730(c)(2)(A) (2022) ("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.").

172. *CIMZNHCA II*, 970 F.3d at 850; *ssee* Fed. R. Civ. P. 41(a)(1)(A) (2022) ("an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper."); *cf. Swift*, 318 F.3d at 252-53 ("If the government tried to have an action dismissed after the complaint had been served and the defendant answered, it might be subject to Rule 41(a)(2), which requires an order of the court upon such terms and conditions as the court deems proper.") (internal quotations omitted).

Government's decision will only be questioned in "exceptional cases"[173] where the relator invokes the hearing requirement of section 3730(c)(2)(A).[174]

D. Merits of the Case

Before applying its newly constructed standard, the Seventh Circuit took another opportunity to criticize the reasoning of the *Sequoia Orange*[175] court. Contrary to *Sequoia Orange*,[176] the Seventh Circuit noted the Government in the present case did not exceed the limitations of its powers when moving to dismiss the lawsuit without articulating a cost/benefit analysis of CIMZNHCA's lawsuit.[177] The Court explained that "[n]o constitutional or statutory directive imposes such a requirement. None is found in the False Claims Act. The government is not required to justify its litigation decisions in this way."[178] Ironically, in a possible moment of self-realization, the Court hints towards a possible solution that would avoid this arduous statutory interpretation by stating: "If Congress wishes to require some extra-constitutional minimum of fairness, reasonableness, or adequacy of the government's decision . . . it will need to say so."[179]

Nevertheless, the Court disagreed with the idea that the Government's actions fell short of the "rationally related" standard of *Sequoia Orange*[180] as it relates to a substantive Due Process violation.[181] Accordingly, the Seventh Circuit held the Government's decision to dismiss the case was rational and constitutional.[182] Therefore, the decision of the district court was

173. *CIMZNHCA II*, 970 F.3d at 851-52.

174. 31 U.S.C § 3730(c)(2)(A) (2022).

175. *Sequoia Orange,* 151 F.3d at 1147.

176. *Id*.

177. *CIMZNHCA II*, 970 F.3d at 852 ("The district court faulted the government for having failed to make a particularized dollar-figure estimate of the potential costs and benefits of CIMZNHCA's lawsuit, as opposed to the more general review of the Venari companies' activities undertaken and described by the government.").

178. *CIMZNHCA II*, 970 F.3d at 852.

179. *Id*. at 853.

180. *Sequoia Orange*, 151 F.3d at 1147.

181. *CIMZNHCA II*, 970 F.3d at 852; *see* County of Sacramento v. Lewis, 523 U.S. 833, 847 (1998) (quoting Collins v. Harker Heights, 503 U.S. 115, 128 (1992) ("[T]he Due Process Clause is violated by executive action only when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.')); *see also* Rosales-Mireles v. U.S., 138 S. Ct. 1897, 1906 (2018) (quoting *Lewis*, 523 U.S. at 847 (explaining when a government interest intentionally causes an injury in an unjustifiable way, it is said to have "shock[ed] the conscience" and violated the Due Process Clause)).

182. *CIMZNHCA II*, 970 F.3d at 852 (explaining that the Government's decision to dismiss this lawsuit relied on the insight of "nine cited agency guidances, advisory opinions, and final rulemakings [that have] consistently held that the conduct complained of is probably lawful. Not only lawful, but

reversed, and the case was remanded with instructions to dismiss the claims "with prejudice as to the relator and without prejudice as to the government."[183]

E. Concurrence

Judge Scudder concurred in the judgment, writing that he did not see a need to delve into a sophisticated analysis as to what standard of review section 3730(c)(2)(A)[184] calls for when the Government moves to dismiss a case.[185] Rather, he felt "the Government's dismissal request easily satisfied rational basis review."[186] Judge Scudder preferred to address this issue in a case that would be determined on the outcome of "whether principles of constitutional avoidance should play any role in a question of statutory interpretation under the [FCA]."[187]

F. Effects of the Case

From now on In the Seventh Circuit, the Government's motion to dismiss a *qui tam* action under section 3730(c)(2)(A)[188] will first require a motion to intervene under section 3730(c)(3).[189] As for the process of review, the Seventh Circuit's ruling departs from the "unfettered discretion" standard of *Swift*[190] and the "rational relation test" of *Sequoia Orange*,[191] but nonetheless falls nearer to *Swift*. The Government maintains an unfettered right to dismiss an FCA claim, if it files a motion to dismiss before the defendant has "filed an answer or motion for summary judgment," pursuant to Rule 41(a)(1).[192] If the Government wishes to dismiss the case after the defendant has taken either of these two actions, it may only

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beneficial to patients and the public").

183. *CIMZNHCA II*, 970 F.3d at 854.

184. 31 U.S.C § 3730(c)(2)(A) (2022).

185. *CIMZNHCA II*, 970 F.3d at 856 (Scudder, J., concurring).

186. *Id.*; *see* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314-15 (1993) (underscoring that the rational basis standard requires "a paradigm of judicial restraint" and indeed ruling out "every conceivable basis" otherwise supporting the challenged measure).

187. *CIMZNHCA II*, 970 F.3d at 856 (Scudder, J., concurring).

188. 31 U.S.C § 3730(c)(2)(A) (2022).

189. 31 U.S.C. § 3730(c)(3) (2022).

190. *Swift*, 318 F.3d at 251.

191. *Sequoia Orange,* 151 F.3d at 1147.

192. *CIMZNHCA II*, 970 F.3d at 849 (quoting Smith v. Potter, 513 F.3d 781, 782–83 (7th Cir. 2008) (holding "once a valid Rule 41(a) notice has been served, 'the case [is] gone; no action remain[s] for the district judge to take,' and her further orders are void.")); *see also* Fed. R. Civ. P. 41(a) (2022) (allowing a plaintiff to unilaterally dismiss the case before a defendant files an answer or motion for summary judgement).

intervene for "good cause," pursuant to 31 U.S.C. § 3730(c)(3).[193] Ultimately, the Government's motion to dismiss under section 3730(c)(2)(A)[194] which precedes the Rule 41(a)(1)[195] requirement, will typically be granted unless "the Government's conduct . . . bump[s] up against the Rules, the statute, or the Constitution."[196]

With now three competing standards, future battles in the courts are imminent over which standard should apply in jurisdictions that have yet to adopt one. With multiple FCA attorneys across the country predicting this issue may reach the Supreme Court,[197] it is clear that changes to the procedural requirements of FCA dismissal review are needed. Rather than continue the debate over interpreting the existing text of the statute, in the following section, I will propose a simpler solution, amending the text of the FCA itself to create a unified standard of review.

IV. PERSONAL ANALYSIS

This section will cover a proposal for a new standard of review for the Government's dismissal of FCA claims that requires an amendment of the FCA statute to create a procedure that is consistent with the legislative intent and central objectives of the act. First, this section will examine the problems with the new standard created by the Seventh Circuit, followed by an analysis of how Congress' original intent behind the FCA's procedures is incompatible with the current circuit court split over the Government's responsibilities when dismissing FCA claims. This section will conclude with a proposal for a new standard for dismissing FCA claims which will require the Government to show the court it has conducted a thorough investigation into the claim,

193. *CIMZNHCA II*, 970 F.3d at 848; *see* 31 U.S.C. § 3730(c)(3) (2022) ("When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause").

194. 31 U.S.C § 3730(c)(2)(A) (2022).

195. Fed. R. Civ. P. 41(a) (2022).

196. *CIMZNCHA II*, 970 F.3d at 853.

197. Laurence Freedman et al., *Seventh Circuit Adds to Circuit Split Over Standard for DOJ Dismissals in FCA Cases*, MINTZ (Aug. 26, 2020), www.mintz.com/insights-center/viewpoints/2146/2020-08-25-seventh-circuit-adds-circuit-split-over-standard-doj [perma.cc/4TTE-4JK9] ("Due to the disputed standard for dismissal, the jurisdictional issue, and the Seventh Circuit's novel approach to both, there is an increasing chance that these issues might attract the attention of the Supreme Court"); *see also* Mike Theis & Stacey Hadeka, *The CIMNHCA decision: A third standard for DOJ dismissals*, HOGAN LOVELLS (last visited Mar. 3, 2022) fca-2021.hoganlovellsabc.com/2020-and-the-road-ahead/lessons-from-polansky-the-continuing-assault-on-sub-regulatory-guidance [perma.cc/L5TS-549G] ("there now exist three different approaches to DOJ dismissals under the FCA, and there is an opportunity for yet additional splits, or Supreme Court review").

as well as a cost-benefit analysis for deciding whether the claim is worth pursuing.

A. Problems with the "CIMZNCHA" Standard

The Seventh Circuit's new standard for dismissal creates an opportunity for unforeseen issues that will create more contentious disputes early on in FCA litigation. First, this standard now gives relators two instances to challenge the Government's decision, at the motion to intervene and the motion to dismiss, which will lead to extended litigation. More importantly, the "exceptional cases"[198] standard for invoking the hearing requirement of section 3730(c)(2)(A)[199] may still leave room for a violation of the relator's Due Process rights as a "partial assignee"[200] to the FCA action. It is foreseeable that relators will argue that their constitutional rights are violated when the Government fails to "diligently [ ] investigate"[201] their claims, as is required by the FCA.[202] The language in the Seventh Circuit's opinion does not describe when the Government has satisfied its investigative duties, which notably is something the district court and the appellate court in *CIMZNHCA v. UCB* disagreed on.[203]

198. *CIMZNCHA II*, 970 F.3d at 852.

199. 31 U.S.C. § 3730(c)(2)(A) (2022).

200. *See Assignment*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An *assignment* is a transfer . . . of property, or of some right or interest therein, from one person to another."); *cf. id.* ("partial assignment [is] [t]he immediate transfer of part but not all of the assignor's right"); *see* Vermont Agency of Nat. Resources v. U.S. ex rel. Stevens, 529 U.S. 765, 774 n.4 (2000) (concluding relators have standing to bring an FCA claim as "partial assignees" because the statute gives relators a right of partial assignment to the Government's damages claims.); *see also* 28 U.S.C. § 3730(d)(1) (2022) ("If the Government proceeds with an action brought by a [relator], such person shall . . . receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim.").

201. 31 U.S.C. § 3730(a) (2022).

202. Nathan T. Tschepik, *The Executive Judgment Rule: A New Standard of Dismissal for Qui Tam Suits Under the False Claims Act*, 87 U. CHI. L. REV, 1053, 1075-76 (2020) (arguing that as a partial assignee, the relator may claim its due process rights have been violated when the Government deprives the relator's property right by dismissing the case without adhering to the investigation requirements of the FCA).

203. *CIMZNHCA II*, 970 F.3d 835, 852 (7th Cir. 2020) ("We must disagree with the suggestion that the government's decision here fell short of the bare rationality standard borrowed by *Sequoia Orange* from substantive due process cases."); *contra CIMZNHCA I*, 2019 WL 1598109, at *3 (stating the Government's investigation into the FCA claim "falls short of a minimally adequate investigation to support the claimed governmental purpose").

B. The Standards Articulated in CIMZNCHA and Swift Do Not Comport with the Legislative Intent Behind the FCA

The main disagreement between the circuit courts is centered around how much deference the Government should receive when it seeks to dismiss a *qui tam* action. While *Swift*[204] and *CIMZNHCA*[205] give the Government a nearly "unfettered right" to dismiss these claims, *Sequoia Orange* requires the Government to provide a "rational relation" between dismissal and a valid government purpose.[206] The root cause of this three-way circuit court split can be attributed to varying interpretations of the FCA statute itself.[207] Therefore, in order to determine how courts should apply the statute when considering the government's motion to dismiss, it follows that the analysis should begin with Congress' objectives behind the FCA.

As discussed in Part II of this case note, Congress amended the FCA in 1986 to encourage relator participation in aiding the Government with combating fraud, by increasing incentives and giving the relator a more prominent role in the litigation.[208] Examining the legislative history of this amendment found in Senate Report Number 99–345 provides the necessary insight for resolving how courts should review dismissals of FCA claims. [209]

Adopting an "unfettered right"[210] standard or a standard derived from Fed. R. Civ. P. 41[211] for dismissal, as set forth in *Swift*[212] and *CIMZNHCA*,[213] would ignore Congress' intent that "only a coordinated effort of *both* the Government and the citizenry" can combat fraud.[214] Allowing the Government to dismiss a *qui tam* action over the objections of a relator defeats the purpose of the FCA

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

205. *CIMZNHCA II*, 970 F.3d at 845.

206. *Sequoia Orange,* 151 F.3d at 1147.

207. *See id.* at 1143 (determining, "the issue is one of statutory interpretation."); *contra CIMZNHCA II*, 970 F.3d at 838 (noting "[t]he Act does not indicate how, if at all, the district court is to review the government's decision to dismiss"); *see generally Swift,* 318 F.3d at 252, (rejecting the *Sequoia Orange* interpretation of the FCA and electing to adopt its own).

208. S. Rep. No. 99-345 (1986), *reprinted in* 1986 U.S.C.C.A.N. §§ 5266, 5291 ("The bill also allows a *qui tam*, or private citizen relator, increased involvement in suits brought by the relator but litigated by the Government. Additionally, the relator could receive up to 30 percent of any judgment arising from his suit and is afforded protection from retaliation for his actions.").

209. *Id.*

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

211. Fed. R. Civ. P. 41(a)(1)(A) (2022).

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

213. *CIMZNHCA II*, 970 F.3d at 853.

214. S. Rep. No. 99-345 at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291 (emphasis added).

amendments in that it completely undermines the relator's involvement in the suit. This is especially problematic when the relator has legitimate evidence of fraud, or the Government has failed to fully investigate the claims.

It is worth noting that unlike the *Swift*[215] standard, the *CIMZNHCA*[216] standard leaves room for a hearing pursuant to section 3730(c)(2)(A),[217] which allows the relator to raise its objections to dismissal.[218] However, under the *CIMZNHCA* standard, dismissal of a *qui tam* action will most likely be granted unless "the government's conduct bump[s] up against the Rules, the statute, or the Constitution."[219] Although the *CIMZNHCA*[220] standard provides more deference to relators as compared to the *Swift* standard,[221] this standard of review does not align with the legislative history of the FCA.

Senate Report Number 99–345 specifically addressed the hearing requirement of section 3730(c)(2)(A).[222] The report notes that a hearing is appropriate "if the relator presents a colorable claim that the . . . dismissal is unreasonable in light of existing evidence, that the Government has not fully investigated the allegations, or that the Government's decision was based on arbitrary or improper considerations."[223] Accordingly, the *CIMZNHCA*[224] standard of review falls short of Congress' intention behind the hearing requirement of section 3730(c)(2)(A)[225] because simply reserving a hearing for "exceptional cases"[226] is objectively vague and does not address instances of insufficient investigations.

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

216. *CIMZNHCA II,* 970 F.3d at 853.

217. 31 U.S.C. § 3730(c)(2)(A) (2022) ("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.").

218. *CIMZNHCA II*, 970 F.3d at 853.

219. *Id.*

220. *Id.*

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

222. 31 U.S.C. § 3730(c)(2)(A) (2022) ("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.").

223. S.Rep. No. 99–345, at 26 (1986), *reprinted in* 1986 U.S.C.C.A.N. §§ 5266, 5291.

224. *CIMZNHCA II*, 970 F.3d at 853.

225. 31 U.S.C. § 3730(c)(2)(A) (2022) ("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.").

226. *CIMZNHCA II*, 970 F.3d at 852.

Therefore, a standard that is consistent with the legislative intent of the FCA should require the Government to show that it has fully investigated the allegations and provide a rational basis for dismissal that is not arbitrary or insufficiently considered.

As mentioned in Part II, the Senate Report behind the 1986 amendments of the FCA specifically addressed the importance of the relator's involvement in *qui tam* actions. The report states that section 3730(c)(2)[227] "provides *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."[228] There is no question that Congress intended relators to exercise their statutory right of raising objections to the Government's dismissal by forcing the Government to consider legitimate evidence and state rational grounds for its decisions. Allowing the Government to prevent relators from exercising this right would undermine this fundamental objective of the FCA.

Furthermore, the text of the FCA itself reinforces Congress' intent of requiring the Government to show a rational reason for dismissing the action. Section 3730(a) states that the "Attorney General diligently shall investigate a violation under [the FCA]."[229] Clearly, allowing the Government to dismiss a *qui tam* action without a showing of a diligent investigation, as *CIMZNHCA*[230] and *Swift*[231] would suggest, does not comport with the express text of the FCA. Moreover, section 3730(b)(1) explicitly requires the Attorney General and the court to give written consent *and* their reasoning for doing so, before an FCA action may be dismissed.[232] If the Government were able to unilaterally dismiss an action without showing its reasoning, section 3730(b)(1) of the FCA would be rendered meaningless.

C. Proposal

The circuit court split over this issue attempts to interpret a standard of review for dismissal from a statute that is objectively unclear on the matter. The circuit courts' analysis is focused on constitutional concerns and case law regarding the Federal Rules of Civil Procedure, which must comport with the explicit text of the FCA.[233] However, it seems that the competing standards of review

227. 31 U.S.C. § 3730(c)(1) (2022).

228. S.Rep. No. 99–345, at 25–26 (1986), *reprinted in* 1986 U.S.C.C.A.N. §§ 5266, 5291.

229. 31 U.S.C. § 3730(c)(a) (2022).

230. *CIMZNHCA II*, 970 F.3d at 852.

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

232. 31 U.S.C. § 3730(b)(1) (2022) ("The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.").

233. *See generally Sequoia Orange*, 151 F.3d at 1145 (explaining that the

have fallen short of the standard that Congress originally intended when it passed the most recent version of the FCA.

Therefore, this issue can only be resolved by amending the statute to require courts to follow a clear standard that provides adequate due process to relators and is consistent with the objectives of the FCA.

The FCA should be amended to include a requirement that the Government must show that it has made a thorough investigation into an FCA claim before it moves to dismiss it. This requirement ensures that all relevant evidence and the merits of the claim are adequately considered, rather than allowing the Government to avoid this analysis by raising vague concerns about resources and Government prerogatives.

Support for requiring the Government to provide adequate reasoning for its decision to dismiss a claim can be found beyond the text of the FCA and the legislative history behind the act. Senator Chuck Grassley, the Congressman who spearheaded the 1986 amendments to the FCA,[234] has recently endorsed the idea of holding the Government responsible for showing its rationale for seeking dismissal in FCA actions.[235] As a result of the Granston Memo's directive[236] to increase the Government's pursuit of seeking dismissals of FCA claims,[237] Senator Grassley released a public memo directed at former Attorney General William Barr, in which Grassley expressed his concerns over the Government's dismissal power in FCA cases.[238]

Senator Grassley noted that the DOJ's reasons for seeking dismissals of FCA claims "appear primarily unrelated to the merits of individual cases" and that "[s]uch actions could undermine the purpose of the False Claims Act by discouraging whistleblowers and

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"rational relation test" will avoid separation of powers concerns); *Swift*, 318 F.3d at 252 (reasoning that its interpretation of the FCA that gives the Government an unfettered right to dismiss a claim is "consistent with the Federal Rules of Civil Procedure"); *CIMZNHCA II*, 970 F.3d at 846-49 (addressing constitutional concerns raised by several courts over conditioning the Government's right to dismiss an FCA claim by intervening upon a showing of good cause).

234. *A Brief History of the False Claims Act*, GOLDBERG KOHN LTD (Aug. 2, 2021), www.whistleblowersattorneys.com/blogs-whistleblowerblog,history-of-the-false-claims-act [perma.cc/F99K-WK5M].

235. Letter from Charles E. Grassley, United States Senator, to William Barr, Attorney General, U.S. Dept. of Justice (Sept. 4, 2019), www.grassley.senate.gov/news/news-releases/grassley-questions-use-doj-memo-limit-recovery-tax-dollars-lost-fraud [perma.cc/H2K3-JLHE].

236. *Factors for Evaluating Dismissal*, *supra* note 11 at 2.

237. *See* Davis, *supra* note 59 ("[During the thirty years before the Granston Memo, the government moved to dismiss roughly 45 qui tam cases; in the two-plus years following the memo, the Department has moved to dismiss around 50 qui tams")

238. Letter from Charles E. Grassley, *supra* note 235.

dismissing potentially serious fraud on the taxpayers."[239] Senator Grassley proceeded to express his concerns with Government's decision to dismiss recent FCA claims, including *CIMZNHCA v. UCB*,[240] where he noted that the "DOJ did not thoroughly investigate a case it argued lacked merit; argued for dismissal on policy grounds while admitting the claims present a classic violation of law; and finally, failed to do a cost-benefit analysis while arguing that litigation would be too costly."[241]

Senator Grassley's suggestion for a cost-benefit analysis should also be incorporated into the FCA in order to address all relevant issues as to whether the claim is worth pursuing. This requirement would work to serve the interests of both the Government and the relator. The relator will be provided with a comprehensive explanation of why its claim is not worth pursuing, and the Government will be able to sufficiently explain its decision to dismiss, without raising due process concerns for the relator. This proposed standard not only renders the *UCB*[242] and *Swift*[243] holdings obsolete but also goes a step past the *Sequoia Orange*[244] standard. The proposed amendment would require the Government to lay out a cost-benefit analysis for pursuing the claim and explain every detail of its reasoning behind seeking dismissal, rather than limiting its decision to finding a "rational relation" to a valid government purpose.

D. CIMZNHCA Outcome Under the Proposed Standard

Had the Seventh Circuit applied this proposed standard in *CIMZNHCA*, the Court almost certainly would have agreed with the district court, in that the Government failed to meet its burden to dismiss this FCA claim. Rather than investigate the specific merits of the case at hand, the Government admitted that it had instead collectively analyzed the eleven *qui tam* actions filed by the NHCA Group.[245] Although the Government acknowledged that the Medicare/Medicaid reimbursement scheme allegedly perpetrated by UCB, Inc. demonstrated a "classic violation"[246] of the Anti-Kickback Statute, [247] the Government instead devoted 6.5 pages of its briefing and all of its exhibits to attack NHCA Group's business model.[248] Further, the Government did not investigate any

239. *Id*.
240. *CIMZNHCA II*, 970 F.3d at 853.
241. Letter from Charles E. Grassley, *supra* note 235.
242. *CIMZNHCA II*, 970 F.3d at 853.
243. *Swift,* 318 F.3d at 252.
244. *Sequoia Orange,* 151 F.3d at 1147.
245. *CIMZNHCA I*, 2019 WL 1598109, at *3.
246. *CIMZNHCA I*, 2019 WL 1598109, at *4.
247. 42 U.S.C. § 1320a-7b(b).
248. *CIMZNHCA I*, 2019 WL 1598109, at *3.

additional materials that were not attached to the Complaint filed by CIMZNCHA, LLC. [249] Clearly, the Government's decision to dismiss this case was not based on the merits of the FCA claim, and the Government failed to adequately analyze whether these serious allegations were at all true.

The Government would have also fallen short of its burden under the proposed standard because it failed to conduct a meaningful cost-benefit analysis. The alleged kick-back scheme implicated thousands of healthcare professionals, and potentially involved tens of millions of dollars in taxpayer money stolen from the Government.[250] Here, the Government failed to analyze exactly how much it would cost to litigate these serious claims and did not even consider how much money it could have recovered.[251] With such a significant amount of money at stake, the Government's decision to dismiss the claim after conducting a perfunctory investigation flies in the face of the FCA's objective to seriously consider every claim and ensure that legitimate fraud is not overlooked.

V. CONCLUSION

The purpose of enacting the False Claims Act was not only to fight fraud against the Government but more importantly to empower American citizens to step out against fraud and allow their claims to be heard. The new standard for dismissal of FCA claims developed in *CIMZNCHA v. UCB*[252] as well as the existing standards from the Ninth[253] and D.C. circuits,[254] fail to adequately enable relators to have their claims sufficiently considered. Amending the FCA to require the Government to diligently investigate FCA claims and show the reasoning behind their decisions is consistent with the original objectives of the FCA and will prevent the Government from impeding relators' ability to bring serious fraud to light.

Requiring thorough consideration of FCA claims will prevent discouraging whistleblowers who have legitimate claims but require further investigation by the Government to uncover alleged scams and prevent serious fraud from being overlooked. Empowering whistleblowers is the key to preventing fraud against the Government. Once we take these steps to change our current system for evaluating whistleblower claims, our country will be

249. *Id.*
250. *Id.* at *1.
251. *Id.*
252. *CIMZNHCA II*, 970 F.3d at 853.
253. *Id.*
254. *Swift*, 318 F.3d 252.

adequately prepared to fight fraud, save millions of tax dollars, and protect the courageous men and women who risk their lives to eradicate crime against the Government.