

# SCOTUS to Address Government's Authority to Dismiss FCA Cases

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by Chris DeLong

The United States Supreme Court recently granted review of a decision from the Third Circuit that affirmed the dismissal of an FCA case at the government's request. *Polansky v. Exec. Health Res.*, 17 F.4th 376, 393 (3d Cir. 2021); *Polansky v. Exec. Health Res.*, [21-1052 \(June 21, 2022\)](#). Polansky resisted the government's request to dismiss his case, arguing that the government had no authority to dismiss without intervention and that it lacked a basis for seeking dismissal. 17 F.4th 376 at 382. Although the Third Circuit held the government must intervene to be able to dismiss a case and the government did not file a motion to intervene, the Third Circuit held that the government's motion to dismiss could be read as including an implicit request to intervene in the case. *Id.* at 392. Next, on the government's authority to seek dismissal, the Third Circuit held that the standard was the same as applied in every civil case: "[A]n action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2).

The standard to apply when the government moves to dismiss has received renewed attention in recent years. That attention is likely traceable to the [Granston Memo](#), authored in January 2018, and since adopted as formal DOJ policy. The Granston Memo encourages prosecutors to dismiss declined *qui tam* actions, pointing to a waste of government resources and the risk of bad cases making bad law. The Memo explains: "Even in non-intervened cases, the government expends significant resources in monitoring these cases and sometimes must produce discovery or otherwise participate. In cases that lack substantial merit, they can generate adverse decisions that affect the government's ability to enforce the FCA."

Until recently, there were generally two standards—an unfettered right to dismiss or a rational-basis framework. See *Swift v. United States*, 318 F.3d 250, 253 (D.C. Cir. 2003) (holding the government has an unfettered right to dismiss under the FCA); *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998) (requiring the government to identify a valid governmental purpose and relationship between the purpose and dismissal, and allowing a relator to resist the

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dismissal by demonstrating dismissal is arbitrary and capricious); *Ridenour v. Kaiser-Hill Co., Ltd. Liab. Co.*, 397 F.3d 925 (10th Cir. 2005) (same). But in recent years the circuits have split in other ways on what standard applies to government requests to dismiss FCA cases.

The Second Circuit recently noted the split between the Ninth and D.C. Circuits, but declined to adopt either standard. *United States ex rel. Borzilleri v. Abbvie, Inc.*, 837 F. App'x 813, 816 (2d. Cir. 2020). Last year, as we reported previously, the United States Supreme Court denied review of a Seventh Circuit decision reversing a district court's denial of DOJ's request to dismiss. See *Cimznhca LLC v. United States*, No. 20-1138, 141 S. Ct. 2878 (June 28, 2021); *Cimznhca, LLC v. UCB, Inc.*, 970 F.3d 835, 839-40 (7th Cir. 2020). The Seventh Circuit declined to adopt either *Sequoia Orange* or *Swift*, applying instead Rule 41(a). *Id.* The Third Circuit had previously declined to adopt either the *Sequoia Orange* or *Swift* standard. See, e.g., *Chang v. Children's Advocacy Ctr.*, 938 F.3d 384 (3d Cir. 2019). But in *Polansky*, the Third Circuit followed the Seventh Circuit's decision in *Cimznhca*, concluding that the government's request to dismiss must simply follow Rule 41(a).

Notably, the appellate standard of review on dismissals can shift dramatically based on the test applied. Under *Sequoia Orange*, appellate courts often review *de novo*. *Schwartz v. Raytheon Co.*, 150 Fed. Appx. 627, 628 (9th Cir. 2005). If the dismissal authority is based on Rule 41(a), an appellate court would review the dismissal for abuse of discretion. *Polansky*, 17 F.4th at 392.

Uniformity in the standard will bring welcome clarity to the government and relators. But there is reason for both to be concerned with the outcome. For relators, the Supreme Court may decide that the D.C. Circuit's unfettered-right standard is appropriate, which is what the government asked the Third Circuit to apply. For the government, the Supreme Court may decide that dismissal requests require a rational-basis, formal intervention, and/or that dismissal was inappropriate in this particular case.