18-16408

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,
v.
UNITED STATES *ex rel.* THROWER,
Plaintiff-Appellee,

ACADEMY MORTGAGE CORP.,
Defendant.

On appeal from the United States District Court for the
Northern District of California, No. 16-cv-02120-EMC

BRIEF FOR *AMICUS CURIAE*
TAXPAYERS AGAINST FRAUD EDUCATION FUND
IN SUPPORT OF APPELLEE AND AFFIRMANCE

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Federal Rule of Appellate Procedure 26.1, Taxpayers Against Fraud Education Fund ("TAFEF") states that it is a corporation organized under § 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock owned by a publicly owned company. TAFEF represents no parties in this matter and has no pecuniary interest in its outcome. However, TAFEF has an institutional interest in the effectiveness and correct interpretation of the federal False Claims Act.

TO THE HONORABLE UNITED STATES COURT OF APPEALS:

Pursuant to Fed. R. App. P. 29, Taxpayers Against Fraud Education Fund ("TAFEF") respectfully submits this brief as *Amicus Curiae* in support of Appellee Gwen Thrower. All parties have consented to the filing of this brief pursuant to Circuit Rule 29-2(a). TAFEF supports affirmance of the district court's decision for the reasons set forth below.

I. INTEREST OF AMICUS CURIAE[1]

TAFEF is a nonprofit public interest organization dedicated to combating fraud against the government and protecting public resources through public-private partnerships. TAFEF is committed to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to publicize the *qui tam* provisions of the False Claims Act ("FCA"), regularly participates in litigation as *amicus curiae*, and has provided testimony to Congress about ways to improve the FCA. TAFEF is supported by whistleblowers and their counsel, by membership dues and fees, and by private donations. TAFEF is the 501(c)(3) arm of Taxpayers Against Fraud, which was founded in 1986. TAFEF has a strong interest in ensuring proper interpretation and application of the FCA.

TAFEF files this brief on the appropriate standard governing dismissals of

[1] No party's counsel authored this brief in whole or in in part and no person other than amicus curiae TAFEF, its members, or its counsel made a monetary contribution that was intended to fund preparing or submitting this brief.

FCA cases under 31 U.S.C. § 3730(c)(2). TAFEF leaves any other disputed issues to the parties.

II. ARGUMENT

A. This Court's Decision in *Sequoia Orange* Correctly Interpreted 31 U.S.C. § 3730(c)(2)(A) to Require Meaningful Judicial Review.

The False Claims Act provides that the government may dismiss an FCA action notwithstanding the objections of the person initiating the action if: (1) the person has been notified by the government of the filing of the motion; and (2) the court has provided the person with an opportunity for a hearing on the motion. 31 U.S.C. § 3730(c)(2)(A). While the statute does not specify a standard for judicial review of the government's motion to dismiss filed under this subsection, this Court has held that a two-step analysis applies to test the government's justification for dismissal:

> (1) identification of a valid government purpose; and
>
> (2) a rational relation between dismissal and accomplishment of that purpose.

United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1145 (9th Cir. 1998). Once the government satisfies this two-step test, the burden then shifts to the relator to show that the dismissal is "fraudulent, arbitrary and capricious, or illegal." *Id.*

While the parties agree that this Court's holding in *Sequoia Orange*

governs,[2] they disagree on what that decision requires a court to do when evaluating the government's stated purpose for dismissal. The government argues that *Sequoia Orange* sets out "an exceedingly deferential standard" for reviewing the government's requests to dismiss *qui tam* suits, and only "egregious government misconduct" should preclude dismissal due to the latitude given the government's prosecutorial authority. Dkt. 22 at pp. 23-24. But as the Relator argues, neither the statute nor this Court's interpretation of the statute compels that reading. As *Sequoia Orange* discusses, the statute and its legislative history make plain that the FCA was structured to provide a check, albeit limited, on the government to ensure suits are "not dropped without [a] legitimate governmental purpose." 151 F.3d at 1145.

1. The *Sequoia Orange* Standard Faithfully Implements the False Claims Act

In interpreting a law enacted by Congress, "we start, as always, with the language of the statute." *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 668 (2008). And, "[a] statute should be construed so that effect is given

[2] The United States preserved for further review a challenge to the Court's holding in *Sequoia Orange* in favor of the D.C. Circuit's holding in *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003) that the government has "nearly complete discretion" whether to dismiss under Section 3730(c)(2)(A). Dkt. 22 at pp. 22, n.4. As set forth in this brief, TAFEF maintains that the Ninth Circuit's standard better aligns with the statute and poses no constitutional concerns.

to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . " *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (citations and quotations omitted).

Section 3730(c)(2)(A) provides:

> 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."

Section 3730(c)(2)(A) thus "mandates a hearing before a court may dismiss a *qui tam* action over a relator's objection." *United States v. EMD Serono, Inc.*, 370 F. Supp. 3d 483, 488 (E.D. Pa. Apr. 3, 2019). Section (c)(2) provides no express standard for evaluating a motion to dismiss, leaving that question to the courts. Although the government argues that it must have nearly unfettered discretion to dismiss, "[r]educing the hearing requirement to insignificance" would violate "a basic canon of statutory construction." *Id*. "[I]t would be superfluous for Congress to require a hearing … if the court's only role were to sit idly by as the relator attempts to persuade the Government not to dismiss the action." *United States ex rel. Nasuti v. Savage Farms*, 2014 U.S. Dist. LEXIS 40939, *30 (D. Mass. Mar. 7, 2014).

To determine the appropriate standard for judicial review of government motions to dismiss *qui tam* actions, this Court in *Sequoia Orange* looked to the

structure of the statute, which supports a meaningful role for *qui tam* relators. The FCA provides that *qui tam* relators have all the rights of a party in intervened actions: the right to conduct actions after the government declines; the right to object to the fairness, adequacy, and reasonableness of settlements; and the right to a hearing on dismissals initiated over their objection. 31 U.S.C. § 3730, *et seq*. Together, these provisions reflect a significant role for relators in enforcing the FCA that is inconsistent with the absence of any meaningful review of a government motion to dismiss a *qui tam* case.

The Senate Report accompanying the 1986 Amendments to the FCA also supports this Court's *Sequoia Orange* test. The report describes the check on the government's ability to dismiss a case as something more than a stopgap for egregious abuse by individual government officials. The report reflects the congressional intent to "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." *Sequoia Orange,* 151 F.3d at 1144-45, *quoting* S. Rep. No. 99-345 at 25-26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291.

The United States and the Chamber of Commerce argue incorrectly that the comments in the Senate Report do not support a meaningful role for the court because those remarks addressed a prior version of Section 3730 that required a

threshold showing for hearings on proposed dismissals. In fact, this language was part of the introductory paragraph about Section 3730 generally, including the relator's right to object to dismissal. S. Rep. 99-345 at 25-26. The full passage reads:

> Subsection (c)(1) provides *qui tam* plaintiffs with a more direct role not only in keeping abreast of the Government's efforts and protecting his financial stake, but also in acting as a check that the Government does not neglect evidence, cause unduly delay, or drop the false claims case without legitimate reason. Specifically, paragraph (1) provides that when the Government takes over a privately initiated action, the individual who brought the suit will be served, upon request, with copies of all pleadings filed as well as deposition transcripts. Additionally, the person who brought the action may formally object to any motions to dismiss or proposed settlements between the Government and the defendant.

Although the Report goes on to address a standard for a petition by a relator for an evidentiary hearing (*id.* at 26, "evidentiary hearings should be granted … if the relator presents a colorable claim that the settlement or 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 and improper considerations"), that Congress ultimately made the hearing mandatory does not obviate the legislative concerns reflected in the Senate Report. If anything, the decision to make the hearing mandatory suggests that Congress decided not to impose the burden on relators of establishing those facts before being entitled to a hearing, not that the hearing itself should not involve consideration of those

congressional concerns.

For section 3730(c)(2) to have meaning, the government must do more than merely identify a governmental interest. *United States v. UCB, Inc.*, 2019 U.S. LEXIS 64267 (S.D. Ill. Apr. 15, 2019). This Court's two-step analysis requires that the government also identify a rational *relationship* between a valid governmental purpose and dismissal in a particular case. *Id* at 9. The failure of the government to make a meaningful cost-benefit analysis by "assess[ing] or analyz[ing] the costs it would likely incur versus the potential recovery that would flow to the Government if [the] case were to proceed…falls short of a minimally adequate investigation to support the claimed government purpose" as it relates to that specific case. *Id.* at 10. In *UCB*, for example, the district court in the Southern District of Illinois determined there was a lack of cost-benefit analysis as relates to that specific case, as well as a lack of a rational relationship to the government's expressed policy interests and the requested dismissal. *Id.* That court also determined that a stated disapproval of the relator in that case was insufficiently related to a valid government purpose, and belied a pretext for dismissal. *Id*.

Merely identifying a government interest without its relationship to the facts of a particular case, cannot be sufficient because some government interests will in the abstract always be present. For example, although this Court has recognized that reducing litigation costs may serve a valid government purpose (151 F.3d at

1146), dismissing a declined action proceeding into litigation could always serve to reduce the cost of monitoring that litigation. But if identifying that purpose alone were sufficient to support dismissal, a relator's right under Section 3730 to conduct the action after the government declines to intervene would be rendered largely meaningless because that governmental interest always exists and, in the abstract, will always be related to dismissal. 31 U.S.C. § 3730(c)(3). If the government could, as a matter of course, cursorily cite reduced litigation costs to dismiss declined cases, this would essentially render "inoperative or superfluous, void or insignificant"[3] both § 3730(c)(3), which permits relators to litigate once the government declines, and § 3730(c)(2)(A), which provides a court hearing on a government motion to dismiss.

Although the government implies that the court in *Sequoia Orange* held that the government's mere assertion of an interest in reducing litigation costs was sufficient to support dismissal, that interest was only one of six governmental interests the government urged in *Sequoia Orange*, including efforts to ensure peace in an important agricultural industry that had been embroiled in a decade of litigation, not limited to the FCA cases at issue. 151 F.3d at 1146-47. The Court did not hold that an interest in reducing litigation costs, without more, would warrant dismissal. *See also United States ex rel. Mateski v. Mateski*, 634 Fed.

[3] *Hibbs,* 542 U.S. at 101, *supra.*

Appx. 192 (9th Cir. 2015) (declining to reach question where finding interest in protecting classified information in particular case was sufficient to meet the test).

TAFEF does not suggest that the *Sequoia Orange* test provides a searching review of the government's decision-making. It does not, for example, require that the government demonstrate that a case it seeks to dismiss lacks merit, or cannot be won, or has been exhaustively investigated. But it does require more than mere notice to the court of the government's reason.[4] This Court's two-step analysis necessarily contemplates that the government identify its bases for dismissal with enough specificity for the relator and the court to meaningfully assess whether it serves a valid government purpose with a rational relationship to dismissal in a particular case. If the hearing meant less than that, it would reduce Section 3730(c)(2)(A) to an insignificance, and reduce the court's role in a hearing to a perfunctory rubber stamp.

The district court below concluded that the government had not met even that minimal requirement identified by *Sequoia Orange* by not engaging in a cost-benefit analysis rationally related to this specific case. The district court is not alone it its approach. *See, e.g., UCB*, 2019 U.S. Dist. LEXIS 64267. Putting the

[4] The government suggests that the proper approach should be that used for voluntary dismissals under Fed. R. Civ. P. 41(a)(1)(A) for which no court involvement is required. But voluntary dismissals under that rule do not require a hearing, and section 3730(c)(2)(A) does.

government to the burden of justifying to a court the reasons for dismissal in the context of a particular case will ensure that cases are not dropped without good reason, as Congress intended in requiring a hearing.

2. The *Sequoia Orange* Test Respects Principles of Constitutional Separation of Powers

Requiring the government to meet the rational relationship test this Court articulated in *Sequoia Orange* is also consistent with constitutional principles, and "strikes a balance among the branches of government." *United States v. EMD Serono, Inc.*, 370 F. Supp. 3d 483, 489 (E.D. Pa. 2019):

> It does not give unlimited power to the Executive to dismiss a legitimate action the Legislature created. Nor does it give the Judicial Branch unrestrained power to stop the Executive from acting to dismiss an action in the government's interest.

Id. As the Tenth Circuit described in adopting this Court's holding, the standard set forth in *Sequoia Orange* "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." *Ridenour v. Kaiser-Hill Co., LLC*, 397 F.3d 925, 936 (10th Cir. 2005).

Limitations on the government's ability to dismiss a case are not *per se* unconstitutional. *United States ex rel. Schweizer v. Oce N.V.*, 677 F.3d 1228, 1236 (D.C. Cir. 2012). As this Court has recognized, there is ample authority for judicial review of government dismissal decisions. For example, Fed. R. Civ. P.

41(a)(2) authorizes a court to condition dismissal of any civil action, including those initiated by the government, upon such terms and conditions as a court deems proper. Likewise, Fed. R. Crim. P. 48(a) limits the government's ability to dismiss criminal cases. Fed. R. Crim. P. 48(a)("The government may, with leave of court, dismiss an indictment, information or complaint"). *See Sequoia Orange*, 151 F.3d at 1145-46 (citing *United States ex rel. Kelly v. Boeing*, 9 F.3d 743, 754, n.12 (9th Cir. 1993)).

While circumstances could arise in which the Executive Branch's authority is impermissibly undermined by the conduct of another branch, requiring the government to justify its reasons for dismissal of a case does not go that far. In evaluating whether a statute violates separation of powers by impermissibly intruding upon Executive Branch functions, courts look to the statute as a whole. *See United States v. Morrison*, 487 U.S. 654, 696 (1988); *Kelly*, 9 F.3d at 752. And while courts have noted that the FCA provision authorizing the government to dismiss cases is an important component of this balance, as this Court recognized in *Sequoia Orange*, the Constitution does not require that the Executive's discretion to dismiss be unfettered. 151 F.3d at 1145-46.[5]

[5] In *Morrison*, for example, the Supreme Court upheld the appointment of an independent counsel under the Ethics in Government Act, even though the Attorney General had no authority to terminate a particular investigation until the investigation was complete and, as a practical matter, had limited ability to prevent the initiation of an investigation of the President's most senior advisors. 487 U.S.

"[T]he Supreme Court did not intend the analysis in *Morrison* to serve as an unalterable list of the minimum control elements necessary for sustaining all acts implicating the Take Care Clause." *United States ex rel. Phillips v. Pediatric Servs. of Am., Inc.*, 123 F. Supp. 2d 990, 992 (W.D.N.C. 2000). Rather, "the proper inquiry was to take the act 'as whole.'" *Id.* The lack of unfettered discretion to dismiss *qui tam* actions would not unduly intrude on the Executive's functions given the myriad other controls the government has under the False Claims Act. In addition to the right to seek dismissal, the government may intervene and assume primary responsibility for the case, control the role of the relator, and settle the case over the relator's objections. The government may file statements of interest to express its views on litigation and may feel free to seek alternative remedies. *Kelly*, 9 F.3d at 753.

The minimal requirement–of articulating a legitimate governmental interest and the relationship of that interest to a particular case—does not unduly impose upon the government's enforcement prerogatives. The government has overseen thousands of *qui tam* cases since 1986, moved to dismiss relatively few,[6] and its

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at 695-696.

[6] Memorandum from Michael Granston, Director United States Department of Justice, Commercial Litigation, Civil Fraud Section, to Commercial Litigation Branch, Fraud Section (January 10, 2018), *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. § 3730(c)(2)(A)*, at p.1 ("the Department has utilized section 3730(c)(2)(A) sparingly" and describing collected cases).

requests to dismiss cases have often been granted. The careful but limited assessment by district courts of reasons proffered in individual cases has not demonstrably undermined the Executive Branch's powers to enforce the law.

B. The Chamber of Commerce's Attack on Relators Generally and Non-Intervened *Qui Tam* Cases in Particular is Both Irrelevant and Contrary to the Demonstrated Success of the Public-Private Partnership Congress Envisioned

The Chamber of Commerce ("Chamber") submitted a brief as *amicus curiae* in support of the United States. However, unlike the United States, the Chamber does not recognize the governing authority of this Court's decision in *Sequoia Orange* nor the plain language of the FCA in encouraging private citizens to come forward on behalf of the United States. Rather, the Chamber impugns those citizens, asserting that "[g]amesmanship and misconduct by relators are unfortunately not uncommon" (Dkt. 27 at 23)[7] and that "most declined *qui tam* actions are meritless." *Id.* at 38. The Chamber argues that its anecdotal observations demonstrate that the government should have unfettered discretion for dismissal, particularly for declined litigation. *Id.* at 39 ("The government thus should be able to make quick work of dismissing *qui tam* actions in its discretion").

[7] The Chamber dubiously cites 3 examples from 2015 forward that it believes demonstrate misconduct among the several thousand *qui tam* cases pending in that same time frame. Yet, in that same time frame, *qui tam* cases resulted in more than $10.7 billion in fraud recovery. *See infra* n. 10.

The Chambers' arguments are both irrelevant to the question on appeal and contradicted by the facts. The question presented in this case is whether the mandatory hearing required by section 3730(c)(2) was intended to allow the court a meaningful role or is an empty notice requirement. The Chambers' contention that problems with *qui tam* relators mean the government must have unfettered discretion is an argument "directed solely at what [it] thinks Congress should have done rather than at what it did." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 546-547 (1943)(rejecting argument that dislike of relators warranted reading the False Claims Act to provide a check on relators that it did not).

Moreover, the Chamber does a great disservice to the private citizens who have put their livelihood at risk to report fraud upon the public fisc, including those who have taken the even greater risk of pursuing declined litigation to recover *billions* of dollars in public funds as the FCA authorizes. The Chamber ignores the critical importance private citizens play in policing fraud and in the success of fraud litigation as Congress intended in enacting and subsequently amending the FCA to allow relators even greater involvement. The legislative history leading up to the adoption of the 1986 amendments reflects the central role that relators and their counsel were to have in the public-private partnership of pursuing fraud against the government. The FCA clearly expresses the value Congress places on relator-driven cases, and Congress has repeatedly reinforced the importance of the

FCA's public-private partnership. *E.g.*, 132 Cong. Rec. S15036 (daily ed. Oct. 3, 1986) (statement of Sen. Grassley)("Primary in the original 'Lincoln Law' as well as this legislation is the concept of private citizen assistance in guarding taxpayer dollars"); 145 Cong. Rec. E1546 (daily ed. July 14, 1999) (statement of Rep. Berman) (with the 1986 amendments, "Congress wanted to encourage those with knowledge of fraud to come forward…[and] we wanted relators and their counsel to contribute additional resources to the government's battle against fraud"). As Congress recognized, pursuing FCA litigation is a significant undertaking. *E.g.,* S. Rep. No. 99-345, at 28 (acknowledging the "risks and sacrifices of the private relator"). The decision to file a *qui tam* case very often involves great personal risks to career, income, savings, family, friendship, and in some cases, even personal safety.[8]

The growth in *qui tam* suits has led to increased recoveries for the public fisc

[8] The False Claims Act Correction Act (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century: Hearing Before the S. Com. on the Judiciary, 110th Cong. 167-85 (2008) (statement of Tina M. Gonter, Relator), available at https://www.judiciary.senate.gov/download/testimony-of-tina-m-gonter-pdf. *See also, e.g.,* Alexander Dyck, et al., *Who Blows the Whistle on Corporate Fraud?*, 65 J.Fin. 2213, 2240-45 (2010); Yuval Feldman & Orly Lobel, *The Incentive Matrix: The Comparative Benefits of Rewards, Liabilities, Duties, Protections for Reporting Illegality*, 88 Tex.L. Rev. 1151 (2010); James Moorman, *The Whistleblower Experience: The High Cost of Integrity*, 42 False Claims Act and Qui Tam Quarterly Review 73 (2006).

since the *qui tam* provisions of the FCA were strengthened in 1986.[9] Of the $2.8 billion in settlements and judgments reported by the government in fiscal year 2018, over $2.1 billion arose from lawsuits filed under the *qui tam* provisions of the False Claims Act.[10] In the fraud statistics published by the Department of Justice, declined cases have resulted in the recovery of over 2.47 billion dollars for the United States since the enactments of the 1986 Amendments.[11]

The Chambers' contention that *qui tam* cases the government does not join are meritless ignores that Congress intended such cases to proceed by specifically authorizing them and authorizing greater rewards for successful non-intervened cases. In addition, the FCA authorizes the government for good cause to join later after having initially declined. 31 U.S.C. § 3730(c)(3). As numerous courts have held, the government's decision not to intervene in a *qui tam* case cannot be assumed to be a decision on the merits. *See, e.g.*, *United States ex rel. Williams v. Bell Helicopter Textron, Inc.*, 417 F.3d 450, 455 (5th Cir. 2005)("The statute, however, does not require the government to proceed if its investigation yields a meritorious claim. Indeed, absent any obligation to the contrary, it may opt out for

[9] U.S. Dep't of Justice, Fraud Statistics Overview: October 1, 1987 –September 30, 2018, available at https://www.justice.gov/civil/page/file/1080696/download.

[10] *Id.*

[11] *Id.*

any number of reasons."); *United States ex rel. Spay v. CVS Caremark Corp*., 913 F. Supp. 2d 125 (E.D. Pa. 2012)(following "overwhelming weight of authority from other circuits to find that no such presumption [of lack of merit based on government's not to intervene] should be imposed").

Thus, while the Chambers' arguments are irrelevant to the statutory construction question presented, they are also contradicted by the demonstrated success of the public-private partnership Congress envisioned when it enacted and amended the False Claims Act.

III. CONCLUSION

TAFEF respectfully urges that the district court be affirmed.

June 24, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FRAP 29(d) AND FRAP 32(a)

The undersigned, counsel for Taxpayers Against Fraud Education Fund, *Amicus Curiae*, hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(5) because it contains 4,007 words as reported by the word count function of Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(7) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font, 14-point type for both text and footnotes.

Dated: June 24, 2019 *__/s/ Claire M. Sylvia__*

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June, 2019, I caused a copy of the foregoing brief to be filed electronically with the Court's CM/ECF system, and that all counsel will be served by the CM/ECF system.

/s/ Claire M. Sylvia