No. 98-473

In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA EX REL. SEQUOIA ORANGE COMPANY, ET AL., PETITIONERS

v.

SUNKIST GROWERS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below correctly held that the False Claims Act, 31 U.S.C. 3730, authorizes the government to dismiss an arguably meritorious *qui tam* action when dismissal is in the interests of the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 151 F.3d 1139. The opinion of the district court (Pet. App. 18a-84a) is reported at 912 F. Supp. 1325.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1998. The petition for a writ of certiorari was filed on September 17, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. 601 *et seq.*, authorizes restric-

tions, called prorate restrictions, on the amount of commodities that can enter a particular market. "The Act contemplates a cooperative venture among the Secretary [of Agriculture], handlers, and producers the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 346 (1984). When a handler exceeds a prorate restriction under the AMAA, the handler is subject to civil forfeiture of the value of the excess shipment. 7 U.S.C. 608a(5).

2. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, establishes substantial civil penalties for any person who commits any of a variety of fraudulent acts against the United States. 31 U.S.C. 3729(a)(1)-(7). Such a person "is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains." 31 U.S.C. 3729(a).

Suits to collect the statutory penalties may be brought by the Department of Justice. 31 U.S.C. 3730(a). Alternatively, a private person (known as a relator) may bring a *qui tam* action on behalf of the United States. 31 U.S.C. 3730(b)(1).[1] If a *qui tam* action is brought, the statute provides the government the opportunity to intervene in the suit "within 60 days after it receives both the complaint and the material evidence and information," 31 U.S.C. 3730(b)(2), in which case the government "shall have the primary responsibility for prosecuting the action, and shall not

[1] If a *qui tam* action results in the recovery of civil penalties, those penalties are divided between the government and the relator. 31 U.S.C. 3730(d)(1) and (2). The award to the relator may not exceed 30% of the total recovery. 31 U.S.C. 3730(d)(2).

be bound by an act of the person bringing the action," 31 U.S.C. 3730(c)(1). If the government does not intervene within the initial 60-day period, "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." 31 U.S.C. 3730(c)(3). The FCA further provides that 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." 31 U.S.C. 3730(c)(2)(A).

3. Petitioner Sequoia Orange Company is a citrus packinghouse. Petitioner Lisle Babcock is an orange grower. Respondent Sunkist Growers, Inc., is an agricultural cooperative, with affiliated packinghouses and member growers, many of which are also respondents here. During the 1980s, petitioners and respondents were subject to orange and lemon marketing orders issued by the Secretary pursuant to the AMAA. Pet. App. 3a. Beginning in 1988, petitioners filed a number of *qui tam* complaints against respondents alleging that respondents had violated the prorate provisions of those marketing orders. *Id.* at 2a-3a. During roughly the same period, the government filed numerous enforcement actions against petitioners and others alleging violations of the prorate provisions. *Id.* at 3a.

Because widespread violation of the prorate restrictions suggested industry-wide dissatisfaction with the existing marketing order regime, the government eventually suspended the prorate restrictions and sought a global settlement of all pending litigation in an attempt to end the wasteful legal feuding in the indus-

try. In order to facilitate its effort to obtain a global settlement, the government intervened in the instant actions under the FCA. Pet. App. 3a-4a.

Once growing divisiveness in the citrus industry and an intervening district court ruling made a global settlement unlikely, the government decided to terminate the citrus prorate restrictions, dismiss all pending enforcement actions, and dismiss the instant *qui tam* actions. Pet. App. 33a-35a. The government sought dismissal in order to end divisiveness in the citrus industry; to enable the development and implementation of new prorate restrictions and other marketing tools with the support of the citrus industry; and to end litigation costly to the citrus industry and taxpayers. *Id.* at 5a. The government conceded for purposes of its dismissal motion that the *qui tam* actions were meritorious. *Id.* at 7a. Petitioners objected to dismissal, arguing that the government's authority to obtain dismissal of a *qui tam* action pursuant to 31 U.S.C. 3730(c)(2)(A) does not extend to dismissal of a meritorious suit. Pet. App. 6a-7a.

4. The district court granted the government's motion to dismiss the pending *qui tam* suits. Pet. App. 18a-84a. The court stated that review of the government's decision to dismiss the suits pursuant to 31 U.S.C. 3730(c)(2)(A) "is limited to determining whether the government has a legitimate government interest that will be achieved by dismissal, which is not arbitrary or otherwise illegal." Pet. App. 51a. The court concluded that dismissal of the suits was rationally related to the government's legitimate interest in ending industry divisiveness, *id.* at 54a-57a; facilitating future voluntary industry regulation, *id.* at 57a-61a; conserving private and government resources, *id.* at 62a-66a; and providing equitable treatment to all

violators of the prorate restrictions, *id.* at 66a-67a. The court also held that the government's decision to dismiss the actions was not arbitrary or capricious and that the decision was not motivated by unlawful or improper considerations. *Id.* at 68a-81a.

5. The court of appeals affirmed. Pet. App. 1a-17a. The court of appeals agreed with the district court that the government's decision to dismiss the suits should be judged under a rational basis standard. *Id.* at 11a. The court held that the government had rationally determined that dismissal of the suits was in the interest of the government and of the citrus industry. *Id.* at 13a-15a. It noted in particular that "the government deemed further FCA litigation over prorate violations harmful to the industry as a whole," and that "[d]ismissal enabled the government to treat all alleged prorate violators equally by dismissing all enforcement actions." *Id.* at 14a.

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or of any other court of appeals. The petition for a writ of certiorari should therefore be denied.

1. Contrary to petitioners' contention (Pet. 20-21), the court of appeals' decision does not conflict with this Court's recent ruling in *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 117 S. Ct. 1871 (1997). The Court in *Hughes Aircraft* addressed the question whether a 1986 amendment to the FCA, which expanded the circumstances under which *qui tam* suits may be brought, was applicable to suits alleging misconduct that predated the 1986 amendment. The Court held that retroactive application was inappropriate

because the 1986 amendment "essentially create[d] a new cause of action." *Id.* at 1878.

In the course of its opinion, the Court observed that because *qui tam* relators "are motivated primarily by prospects of monetary reward rather than the public good," they "are less likely than is the Government to forego an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc." 117 S. Ct. at 1877. Contrary to petitioners' apparent contention (Pet. 20), however, the Court did not suggest that the FCA entitles a relator to pursue a *qui tam* action notwithstanding the government's determination that continued litigation will disserve the public interest. Indeed, the Court noted that "[t]he Government chose not to intervene * * * nor did it move to dismiss the action, *as it was likewise entitled to do*, see § 3730(c)(2)(A)." 117 S. Ct. at 1875 n.2 (emphasis added).[2]

2. Petitioners also contend (Pet. 11 n.6) that the decision of the court of appeals conflicts with prior decisions interpreting the pre-1986 version of the FCA. Because the pre-1986 version of the FCA contained no provision similar to current Section 3730(c)(2)(A), how-

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[2] Petitioners' reliance (Pet. 22) on *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 546-547 (1943), is misplaced. The portion of *Marcus* quoted by petitioners sets forth the unremarkable proposition that judicial construction of a statute should be governed by the statutory text rather than by the court's own assessment of sound public policy. The court of appeals' decision in the instant case is fully consistent with that principle. Section 3730(c)(2)(A) unambiguously authorizes the government to dismiss a *qui tam* action notwithstanding the relator's objection, and nothing in the statutory text suggests that the authority is limited to cases where the *qui tam* suit is shown not to be meritorious.

ever, the cited decisions are not instructive. Since the enactment of that provision in 1986, no court other than the courts below has specifically addressed the question whether the government may obtain the dismissal of a potentially meritorious *qui tam* suit over the relator's objection. The lower courts have consistently recognized, however, that under Section 3730 in its current form, the government retains broad authority to ensure that *qui tam* litigation is conducted in a manner that serves the public interest.[3]

3. Petitioners contend that the government may obtain dismissal of a *qui tam* action over the relator's objections only if (a) the action lacks merit and is subject to dismissal under Rule 12 or Rule 56 of the Federal Rules of Civil Procedure (Pet. 11-13), or (b) the district court finds, pursuant to Rule 41(a)(2) of the

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[3] See *United States ex rel. Rodgers* v. *Arkansas*, 154 F.3d 865, 868 (8th Cir. 1998) (recognizing that "[a] great deal of Section 3730 establishes as superior the role of the government in the prosecution of *qui tam* suits," including the provision that authorizes the government to dismiss "subject only to notice and a hearing for the *qui tam* relator"); *United States ex rel. Taxpayers Against Fraud* v. *General Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994) (Executive Branch retains primacy in *qui tam* actions because it "may move to have the relator's litigation role significantly restricted, even as it may conduct settlement talks or even decide that the case should be dismissed"); *Juliano* v. *Federal Asset Disposition Ass'n*, 736 F. Supp. 348, 351 (D.D.C. 1990) ("Under our federal scheme, the Attorney General * * * decides whom to prosecute for violations of federal law. The Court will not assume that the qui tam provisions of the False Claims Act were intended to curtail the prosecutorial discretion of the Attorney General."), aff'd, 959 F.2d 1101 (D.C. Cir. 1992) (Table); *United States ex rel. Stillwell* v. *Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1090 (C.D. Cal. 1989) ("If the suit threatens to compromise criminal law enforcement efforts, national security, or other interests, the government may move to dismiss the complaint or stay discovery at any time.").

Federal Rules of Civil Procedure, that dismissal of the suit will not prejudice the relator (Pet. 13-15). Those arguments lack merit.

a. Nothing in the text or history of Section 3730(c)(2)(A) suggests that the government's authority to dismiss a *qui tam* action is limited to suits that lack merit. The only textual limit on the government's power to dismiss is the requirement that the relator be "notified" and receive "an opportunity for a hearing." 31 U.S.C. 3730(c)(2)(A). Because the statute expressly provides more rigorous standards for terminating an action in other ways, see 31 U.S.C. 3730(c)(2)(B) (settlement must be "fair, adequate, and reasonable"), 3730(b)(1) (relator may dismiss suit only with consent of government), the absence of any standard in Section 3730(c)(2)(A) is telling. Petitioners' construction of Section 3730(c)(2)(A) would also render that Section largely superfluous, since the government's authority to move for dismissal of a meritless suit would be duplicative of the defendant's ability to seek the same result.

As this Court has recognized, federal law enforcement personnel typically possess broad prosecutorial discretion and are under no obligation to pursue an enforcement action in every case where they believe that a violation has occurred. See *Heckler* v. *Chaney*, 470 U.S. 821, 831-832 (1985); see also *United States* v. *Armstrong*, 517 U.S. 456, 465 (1996) (judicial deference to prosecution decisions "stems from a concern not to unnecessarily impair the performance of a core executive constitutional function"). The reasons advanced by the government in support of its decision to dismiss petitioners' *qui tam* actions (see p. 4, *supra*) are entirely appropriate bases for the exercise of prose-

cutorial discretion.[4] Because a *qui tam* action is brought on behalf of the United States and serves to redress fraud perpetrated upon the government, government officials should similarly be permitted to obtain dismissal of even a potentially meritorious *qui tam* suit if they determine that continued litigation will disserve the public interest.[5] Precisely because a private relator is "motivated primarily by prospects of monetary reward rather than the public good," *Hughes Aircraft*, 117 S. Ct. at 1877, Section 3730(c)(2)(A) enables the government to protect the public interest in cases where a potentially meritorious *qui tam* action entails costs that the government believes outweigh its benefits. Cf. *Confiscation Cases*, 74 U.S. (7 Wall.) 454,

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[4] Petitioners suggest (Pet. 16-18) that the government violated the Constitution when it declined to pursue enforcement actions against apparent violators of the prorate restriction. That claim is without foundation in the law. The government's dismissal here manifestly was not "an abdication of its statutory responsibilities," *Chaney*, 470 U.S. at 833 n.4; rather, dismissal wiped the slate clean so that the government could better fulfill its statutory responsibilities under the AMAA. As the court of appeals recognized, the government sought to end industry divisiveness in order to make possible the implementation of a new, consensus prorate restriction. See Pet. App. 13a.

[5] The Senate Report accompanying an earlier version of the 1986 FCA amendments explains that the relator is permitted to object to the settlement or dismissal of a *qui tam* suit "as a check that the Government does not neglect evidence, cause undu[e] delay, or drop the false claims case without legitimate reason." S. Rep. No. 345, 99th Cong., 2d Sess. 26 (1986). In the instant case, the government gave "legitimate reason[s]" for its decision to dismiss the suit, and both of the courts below found that the decision was rational. Nothing in the legislative history of the 1986 amendments suggests that the government's authority to dismiss *qui tam* litigation is limited to suits that are demonstrably without merit.

458 (1868) (government has the authority to dismiss a successful forfeiture action even though the dismissal deprives an informer of his statutorily established bounty). In sum, the court of appeals correctly ruled that dismissal is appropriate when it furthers a legitimate public interest.[6]

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[6] Contrary to petitioners' contention (Pet. 24 n.10), the approach taken by the government in this case does not constitute a reversal of a previously settled Department of Justice position. The Office of Legal Counsel (OLC) memorandum on which petitioners rely (see *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. Off. Legal Counsel 207 (1989)) does not address the specific question presented here. To the extent that the OLC memorandum construed the FCA as authorizing broad judicial oversight of government litigating decisions, it did so in the course of arguing that the FCA's *qui tam* provisions intrude on the President's executive prerogatives and are therefore unconstitutional. See *id.* at 228-232. As we have previously explained, the OLC memorandum was not a formal OLC opinion and has never reflected the official position of the Department of Justice. See 95-1340 U.S. Amicus Br. (On Petition for Writ of Certiorari) 16 n.10 *Hughes Aircraft*, *supra*. In *Hughes Aircraft*, the government argued (see Br. on Pet. for Writ of Cert. 16-20) that the *qui tam* provisions do not violate separation of powers principles and are otherwise constitutional, and the Court declined to grant certiorari on the petitioner's constitutional claim. See 117 S. Ct. 293 (1996) (limiting grant of certiorari). Finally, acceptance of the views expressed in the OLC memorandum would scarcely assist petitioners, since OLC deemed unconstitutional the very statutory provisions under which petitioners seek to recover.

The testimony of former Assistant Attorney General Stuart Gerson cited by petitioners (see Pet. 24 n.10) also does not address the question whether the FCA permits the government to dismiss a potentially meritorious *qui tam* suit based on countervailing public policy considerations. See *False Claims Act Technical Amendments of 1992: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 24-26 (1992).

b. Petitioners' reliance on Federal Rule of Civil Procedure 41(a)(2) is also misplaced. Rule 41(a)(2) serves to protect defendants from legal prejudice and requires a balancing of the equities between the defendant and the plaintiff. See, *e.g.*, *Ohlander* v. *Larson*, 114 F.3d 1531, 1537 (10th Cir. 1997) (citing cases), cert denied, 118 S. Ct. 702 (1998); cf. *Jones* v. *Securities & Exchange Comm'n*, 298 U.S. 1, 19 (1936). Rule 41(a)(2) does not address the respective interests of the United States and a relator in a *qui tam* action when the United States seeks dismissal. Section 3730, by contrast, specifically addresses the unique procedural problems that arise when a relator sues on behalf of the United States in a *qui tam* suit. The legal prejudice standard of Rule 41(a)(2) is therefore inapplicable.

4. Contrary to petitioners' argument (Pet. 18-20), the court of appeals correctly ruled that dismissal of this case was rational. The district court carefully considered the relevant facts, and its findings (Pet. App. 54a-81a), affirmed by the court of appeals, need not be reviewed. See *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980). The court of appeals also correctly concluded that ending the *qui tam* suit was rationally related to the government's legitimate interest in attempting to bring peace to the citrus industry, promoting potential future regulation, conserving taxpayer and private resources, and achieving equity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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