2016 WL 4072807 (U.S.) (Appellate Brief)
Supreme Court of the United States.

STATE FARM FIRE AND CASUALTY COMPANY, Petitioner,
v.
UNITED STATES, ex rel. Cori Rigsby, et al., Respondents.

No. 15-513.
July 29, 2016.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief for Petitioner

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*i QUESTION PRESENTED

What standard governs the decision whether to dismiss a relator's claim for violation of the False Claims Act's seal requirement, 31 U.S.C. § 3730(b)(2)?

*ii PARTIES TO THE PROCEEDINGS AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner State Farm Fire and Casualty Company ("State Farm") is a wholly owned subsidiary of State Farm Mutual Automobile Insurance Company, a mutual company incorporated in the State of Illinois, with its principal place of business in Bloomington, Illinois. State Farm Mutual Automobile Insurance Company has no parent company. It is a mutual automobile insurance company and as such does not have any shareholders. No publicly traded companies have any ownership interest in State Farm Mutual Automobile Insurance Company.

Respondents are Cori Rigsby and Kerri Rigsby, relators below.

West Headnotes (1)

United States Dismissal or settlement

What standard governs the decision whether to dismiss a relator's claim for violation of the False Claims Act's (FCA) seal requirement? 31 U.S.C.A. § 3730(b)(2).

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***1** PRELIMINARY STATEMENT

This case involves a private *qui tam* action under the False Claims Act ("FCA"), 31 U.S.C. 3729 *et seq.,* in which the private relators, respondents Cori and Kerri Rigsby, filed their complaint in camera as the Act requires, but then repeatedly and willfully violated the Act's requirement that the complaint remain under seal. They disclosed their sealed filings to various national news organizations, including ABC, CBS, the Associated Press, and the *New York Times.* They disclosed their sealed filings to a Mississippi congressman who proceeded to divulge the existence and contents of the sealed filings in remarks recorded in the Congressional Record and in subsequent congressional testimony. And they disclosed their sealed filings to a public relations firm they hired to arrange further media publicity for their allegations. This matter presents an unprecedented, flagrant disregard for the seal provision - all aimed at generating hostile media coverage as a litigation tactic against petitioner State Farm.

The district court and court of appeals below nonetheless refused to dismiss respondents' claims despite their many undisputed, intentional violations of the seal. The lower courts refused to do so even though the text of the FCA is mandatory, providing that a private *qui tam* complaint "shall be filed in camera" and "shall remain under seal for at least 60 days" (extendable, as here, by court order), 31 U.S.C. 3730(b)(2), and even though the structure and history of the seal provision make clear that compliance with it is a mandatory precondition to serving as a private relator.

***2** Instead, adopting and purporting to apply a three-factor balancing test devised by the Ninth Circuit, the district court and court of appeals rendered the seal requirement effectively meaningless. Refusing to give any weight to respondents' willfulness and insisting on a showing of actual harm to the government, the court of appeals held that, "[e]ven presuming bad faith," the so-called "balancing test" favored respondents. Pet. App. 19a-21a, 23a.

This Court should reverse and hold that the text, structure, history, and purpose of the FCA's seal provision support a bright-line rule that a seal violation merits dismissal of a private relator from an FCA case. Such a rule will leave the *government* free to pursue any meritorious FCA case if it chooses to do so, even if the private relator is dismissed. Alternatively, the Court should vacate and remand, holding that district courts, in exercising any discretion to sanction seal violations, should give great weight to a relator's bad faith or willfulness, and that bad faith and willful violations of the seal should generally result in dismissal. An affirmance here would invite *qui tam* relators in the future to *intentionally* disclose sealed FCA filings in order to gain a litigation advantage and to inflict reputational damage on defendants as part of a negotiating or litigation strategy. Nothing in the FCA's goals of deterring and compensating fraud on the government contemplates such unscrupulous disregard for statutory rules, court orders, and fundamental principles of fair play.

***3 OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 794 F.3d 457. The opinion of the district court denying State Farm's motion to dismiss (Pet. App. 44a-69a) is not reported but is available at 2011 WL 8107251.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on July 13, 2015. Pet. App. 1a. A petition for rehearing was denied on August 11, 2015. Pet. App. 42a-43a. The petition for a writ of certiorari was filed on October 20, 2015, and granted on May 31, 2016, limited to the first question presented. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the False Claims Act, 31 U.S.C. 3729-3733, are reproduced at Pet. App. 146a-161a.

STATEMENT

A. Statutory Background

The FCA imposes civil liability on "any person who … knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" by the government. 31 U.S.C. 3729(a)(1)(A). [1] The ***4** FCA allows private persons (*i.e.*, relators) to bring civil actions for violations of section 3729 on behalf of themselves and the government and "in the name of the Government." *Id.* § 3730(b)(1). Serving as a relator is conditioned on a series of mandatory statutory prerequisites, including compliance with the seal requirement. Section 3730(b) - the same section that creates the private right of action - also provides that "[a] copy of the complaint and written disclosure of substantially all material evidence and information the person possesses *shall* be served on the Government" and that "[t]he complaint *shall* be filed in camera, *shall* remain under seal for at least 60 days, and *shall* not be served on the defendant until the court so orders." *Id.* § 3730(b)(2) (emphases added).

The Act's seal, service, and evidentiary-disclosure requirements are intended to afford the government the opportunity to investigate the allegations and to evaluate whether to intervene before the suit's existence becomes public. *See* S. Rep. No. 99-345, at 24 (1986) ("Senate Report"). The government may, "for good cause shown, move the court for extensions of the time during which the complaint remains under seal." 31 U.S.C. 3730(b)(3). But "[b]efore the expiration of the 60-day period or any extensions," the government must either "proceed with the action, in which case the action shall be conducted by the Government," or "notify the court that it declines to take over the action, in which case the person ***5** bringing the action shall have the right to conduct the action." *Id.* § 3730(b)(4).

If the government proceeds with the action, the relator is entitled to "receive at least 15 percent but not more than 25 percent" of any eventual recovery. *Id.* § 3730(d)(1). If instead the government declines to take over the action, the relator is entitled to "not less than 25 percent and not more than 30 percent" of any recovery. *Id.* § 3730(d)(2). The government may independently proceed with FCA claims even if a private *qui tam* action is dismissed. *See United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995, 1000 n.6 (2d Cir. 1995).

B. Factual Background

1. Respondents' *Qui Tam* Action

This case arises from the aftermath of Hurricane Katrina in August 2005. Respondents Cori and Kerri Rigsby were claims adjusters hired by E.A. Renfroe & Co. ("Renfroe"), which in turn had been hired by petitioner State Farm to inspect homeowners' properties along the Mississippi coast and to adjust their insurance claims. In February 2006, respondents

met with Richard ("Dickie") Scruggs, a lawyer in Mississippi who had filed a number of Katrina-related lawsuits against insurance companies, including State Farm. J. A. 17,82. Respondents retained Scruggs as their lawyer, although he later withdrew after he was indicted in November 2007 for conspiring to bribe a Mississippi state judge. J.A.17.

***6** Respondents took confidential documents from State Farm's claims files and gave them to Scruggs. J.A. 15-16,69-70,84. They then left their positions as claims adjusters, and Scruggs hired them as "consultants." Scruggs paid respondents annual salaries of $150,000 each. J.A. 16,20. The district court found that this relationship was not only "clearly improper" because respondents "were obviously material witnesses" and "relators in this action," but also "a sham" since respondents "were not required to perform any regular duties … nor were they required to keep any regularly scheduled hours." J.A. 16,20. In an action Renfroe brought against respondents for their document theft, the District Court for the Northern District of Alabama found that "Scruggs was the *alter ego* of the Rigsbys, and the Rigsbys were the *alter egos* of Scruggs. They could not have been any more closely 'identified' without obtaining a marriage license." J.A.82.

On April 26, 2006, represented by Scruggs and his law firm, respondents filed a *qui tam* complaint in the U.S. District Court for the Southern District of Mississippi. J.A.13. They alleged that State Farm had submitted false claims by classifying Katrina-related wind damage (which was covered by State Farm's homeowners policies) as flood damage (which was covered by federal flood policies issued under the National Flood Insurance Program). J.A. 14-15. Government officials investigated similar charges against State Farm and other insurance companies and examined claims-adjusting practices after Hurricane Katrina. J.A.209-33,241-42. None of those investigations concluded that State Farm or other insurance companies were intentionally shifting wind ***7** damage to flood policies or otherwise defrauding the government. J.A.209-33.

Respondents filed their *qui tam* complaint under seal and served on the government a copy of the complaint and an evidentiary disclosure that mirrored the complaint. *Rigsby* ECF No. 2; J.A. 33369. On the day the complaint was filed, the magistrate judge entered an order directing that the complaint remain under seal "until further order." J.A.1-2. The government later moved to extend the seal, arguing that it was continuing to evaluate the claims, collect documents, and interview witnesses, and that there was a "continuing need to keep the complaint in this action under seal pending the Government's completion of the additional investigation and analysis necessary in this case." J.A.102. Respondents "concur[red]" in the government's motion. J.A.98,100. The district court granted the motion and extended the seal through February 5, 2007. J.A.3-4. Through subsequent motions and orders, the seal was ultimately extended until August 1, 2007. J.A.7-12.

2. Respondents' Intentional Seal Violations From August 2006 To The Partial Lifting Of The Seal In January 2007

Despite the court's sealing orders, respondents and their counsel proceeded to use their sealed filings as the lynchpin of a nationwide media campaign vilifying petitioner for purposes of gaining a strategic litigation advantage. Respondents' counsel disclosed the existence and contents of their sealed filings to ***8** multiple national news organizations, each time in a format that revealed the existence of the sealed complaint.

For example, on August 7, 2006, respondents' counsel emailed the sealed evidentiary disclosure to a producer at ABC News to use as background for an upcoming *20/20* story. J.A.332-69. The sealed disclosure sent to ABC made clear that it was based on the sealed filings: the cover page of the disclosure was titled "Relator's Evidentiary Disclosure Pursuant to 31 USC § 3730," set forth the case caption identifying the parties and the court, and stated that it was "To Be Filed In Camera And Under Seal Pursuant To 31 [U.S.C.] § 3731." J.A.333. The first page asserted that State Farm had committed fraud on the federal government and referred to "[t]his False Claims Act case." J.A.336. The disclosure also contained a signature block denominated "Attorneys for Relators" and a certificate of service for the United States Attorney and Attorney General. J.A.368-69.

That respondents' counsel knew this disclosure was wrongful is shown by another email the same day that sent other information to ABC News and stated: "Mr. Scruggs wanted me to let you know that this information is not the information that is under seal." J.A.331. On August 25, 2006, ABC News featured respondents' claim as its top story on the *20/20* program, airing allegations against State Farm substantively identical to those in respondents' sealed *qui tam* filings. J.A.377-90.

On August 14, 2006, Scruggs emailed the sealed evidentiary disclosure to a reporter at the Associated ***9** Press ("AP"), who interviewed respondents. J.A. 414-48. On August 27, 2006, the AP published an article entitled "Sisters Blew Whistle on Katrina Claims," which discussed information matching details in the sealed evidentiary disclosure. J.A.246-48. And on September 18, 2006, Scruggs emailed the sealed evidentiary disclosure to a *New York Times* reporter. J.A.449-83. On March 16, 2007, the *Times* ran a story called "A Lawyer Like a Hurricane," which contains details matching those in the evidentiary disclosure. J.A.484-87.

On September 16, 2006, respondents met with Representative Gene Taylor, a U.S. Congressman for Mississippi. J.A.539. [2] Five days later, on September 21, Representative Taylor recounted the meeting in the Congressional Record, repeating the gist of the sealed allegations and asserting that State Farm had "violated the False Claims Act by manipulating damage assessments to bill the federal government instead of the companies" and "defrauded federal taxpayers by assigning damages to the federal flood program that should have [been] paid by the insurers' wind policies." J.A.541.

***10 3. The Partial Lifting Of The Seal In January 2007**

Respondents moved on January 9, 2007, for a partial lifting of the seal. At the time, respondents were facing suit in the Northern District of Alabama from their former employer, Renfroe, for their misappropriation of documents from State Farm. Respondents requested leave to inform the presiding judge in that suit about their *qui tam* action against State Farm. J.A.105-10. Respondents' motion stated that they sought a partial lifting of the seal "for the express purpose of disclosing the existence of the sealed False Claims Act case *only* to [the Alabama district court judge] and any other judicial or court officer who is or may be assigned to the case." J.A. 108 (emphasis in original). Although they had already disclosed the existence of the FCA suit to numerous third parties, respondents averred that they "neither [sought] nor desire[d] authority to disclose the existence of the case to any other person or entity" and that the disclosure was intended to be made in camera on an *ex parte* basis. J.A. 108. The next day, the magistrate judge "partially lift[ed] the seal of this sealed case" for the limited purpose of informing the Alabama district judge. J.A.5. The Alabama district judge, however, denied the request for an *ex parte* conference, *see E.A. Renfroe & Co. v. Rigsby,* No. 2:06-cv-01752, ECF No. 86 (N.D. Ala. Jan. 19, 2007), and subsequently stated that he did not learn of the existence of this suit until after the seal was lifted in August 2007. J.A.69.

After partially lifting the seal, the magistrate judge in this case made clear that the seal otherwise ***11** remained in place: On January 19, 2007, he granted the government's motion to further extend the seal by six months from January 3, 2007, expressly ordering that "the complaint and all other filings shall remain under seal until and including July 3, 2007, unless the United States requests that the seal be lifted prior to that date." J.A.7-8,111-18. And in May 2007, the magistrate judge granted the government's request for a stay of the *qui tam* action pending the conclusion of the government's criminal investigation into respondents' allegations, again directing that "[t]he Complaint and all other filings shall remain under seal during the duration of this stay." J.A.9-10, 119-28.

4. Respondents' Intentional Seal Violations From January 2007 To The Lifting Of The Seal In August 2007

Despite the January 2007 seal extension, respondents continued to disclose the existence and contents of their sealed FCA filings. For example, on January 24, 2007, respondents' counsel disclosed the existence of the action to a strategist

at The Rendon Group, a public relations firm hired to assist respondents and their counsel with their media campaign. J.A.57,569-70.

On February 28, 2007, Representative Taylor provided the House Oversight and Investigations Subcommittee with written testimony that "[t]he Scruggs Law Firm represents the [Rigsby] sisters in a *False Claims Act* filing against State Farm and Renfroe." J.A.548. The day *before* the subcommittee ***12** hearing, respondents' counsel forwarded an email to The Rendon Group regarding "Gene Taylor's testimony for [the Oversight and Investigations Subcommittee] hearing 2-28-07." J.A.553.

Respondents filed their First Amended Complaint on May 22, 2007, again under seal. J.A. 129-79. Despite the seal, they soon after gave a copy of the amended complaint to The Rendon Group. J.A. 604-47; Pet. App. 56a. On June 6, 2007, respondents' counsel emailed a copy of the sealed First Amended Complaint to CBS News. J.A.489-534. The email stated: "THIS IS OFF THE RECORD." J.A.489.

Respondents filed an emergency motion to lift the seal on May 29, 2007, acknowledging that the seal remained in place, claiming that they "have at all times complied with the seal provisions," and asserting that they were being harmed "because [they] cannot even discuss their case with [other] counsel." J.A.181,177. The government opposed the motion, J.A. 187-92, later stating that lifting the seal "would compromise the Government's ability to conduct an adequate civil investigation of this case." J.A. 197. On August 1, 2007, over the government's opposition, the magistrate judge lifted the seal. J.A. 11-12.

The government filed a notice on January 31, 2008, declining to intervene in respondents' *qui tam* action. *Rigsby* ECF No. 56. The government also declined to bring any criminal charges against State Farm.

***13 C. The District Court Proceedings**

Based on respondents' repeated violations of the FCA seal requirement, State Farm moved to dismiss the complaint with prejudice as to respondents but without prejudice as to the government. *Rigsby* ECF No. 739. In opposing the motion, respondents argued "that of all the 33" asserted seal violations, they had personally "only been involved in six." J.A.68.

The district court denied the motion to dismiss. Pet. App. 44a-69a. The district court rejected the rule that had been adopted by the Sixth Circuit in *United States ex rel. Summers v. LHC Group, Inc.*, 623 F.3d 287 (6th Cir. 2010), under which "failure to follow the sealing requirements of the FCA requires dismissal of the complaint." Pet. App. 58a. Instead, the district court adopted the three-factor balancing test devised by the Ninth Circuit in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242 (9th Cir. 1995), which purports to balance the harm to the government from the violations, the severity of the violations, and evidence of willfulness or bad faith. Pet. App. 59a-60a.

The district court restricted its consideration only to seal violations that predated the January 2007 partial lifting of the seal. Pet. App. 63a. The court reasoned that the partial-lifting order did not expressly require disclosures to the Alabama district judge in the *Renfroe* action to remain under seal, allowing their possible further distribution and thus "effectively mak[ing] the original seal of the *qui tam* case moot." *Id.* In proceeding to apply the *Lujan* test, the district court *first* found no actual harm to the ***14** government's investigation, concluding that there was no evidence that respondents' disclosures to media organizations had "led to a public disclosure in the news media that this action had been filed." *Id.* at 67a. *Second*, the court determined that the violations were not severe for the same reason: the violations had not led to public disclosure in the news media. *Id.* at 68a. *Third*, the court found that respondents had not acted intentionally, because there was no evidence that they "approved, authorized, or initiated" their counsel's disclosures. *Id.*

The case proceeded to trial, limited to a single flood claim administered by State Farm for damage to the waterfront house of Thomas and Pamela MacIntosh in Biloxi, Mississippi. Respondent Kerri Rigsby was one of the adjusters who

inspected the MacIntosh house in September 2005 and recommended payment of flood policy limits. *See* Pet. C.A. Br. at 8,51. Video, photographs and other evidence showed that Hurricane Katrina had inundated the Macintosh house with approximately five feet of flood water. J.A.29,41. The photographs showed extensive, severe damage below the flood line, while above the flood line, light fixtures, cabinets, and items sitting on shelves were intact and undisturbed. *See* Pet. C.A. Br. at 9-11,36-37,48-49. It was unrefuted that John Conser, the State Farm supervisor who approved the payment of the McIntosh flood claim, did so in good faith after conducting an independent review of the claim file, photographs and other evidence. *See id.* at 51-52.

***15** The trial resulted in a verdict against State Farm, with the jury rinding that the Mcintosh property sustained no covered flood damage and that State Farm's submission of a claim for the Mclntoshs' $250,000 flood policy limits was false. Pet. App. 33a, 117a. The district court denied State Farm's trial and post-trial motions for judgment as a matter of law, which incorporated State Farm's earlier arguments seeking dismissal on the ground of respondents' seal violations. Pet. App. 109a-145a.

D. The Court Of Appeals Decision

The U.S. Court of Appeals for the Fifth Circuit affirmed in relevant part. Pet. App. 1a-41a. Like the district court, the court of appeals restricted the scope of its analysis to disclosures that preceded the partial lifting of the seal on January 10, 2007. Pet. App. 21a. The court of appeals relied on a different rationale than the district court, suggesting that the seal had been "effectively mooted" by a public filing by Renfroe in the Alabama litigation, which purportedly revealed "the existence of this *qui tam* litigation." Pet. App. 21a. In fact, Renfroe's filing merely speculated as to "[t]he *likelihood* of a *qui tam* suit brought by the Defendants [the Rigsbys] with Scruggs as their attorney." *E.A. Renfroe,* No. 2:06-cv-01752, ECF No. 85, at 2 (N.D. Ala. Jan. 18, 2007) (emphasis added).

Also like the district court, the court of appeals embraced the Ninth Circuit's three-factor *Lujan* balancing test. Pet. App. 20a-22a. Applying that test, the court determined that respondents' repeated intentional violations of the seal did not warrant dismissal. Id. at 23a. The court "conclude[d] first that ***16** the government was not likely harmed," because "none of the disclosures appear[s] to have resulted in the publication of the existence of this suit before the seal was partially lifted." *Id.* at 22a. The court next opined that respondents' post-filing violations of the seal were "considerably less severe" than a "complete failure to file under seal or serve the government." *Id.* at 22a-23a. With respect to bad faith, the court stated that, "[w]ere we to impute their former attorneys' disclosures to the [] [Rigsbys], … we would conclude that they acted in bad faith." *Id.* at 23a. Nonetheless, the court ruled that, "[e]ven presuming bad faith, the *Lujan* factors favor the Rigsbys." *Id.* Accordingly, the court concluded that "[a]lthough they violated the seal requirement, the Rigsbys' breaches do not merit dismissal." *Id.*

SUMMARY OF ARGUMENT

The FCA creates a private right of action for *qui tam* plaintiffs to pursue claims in the name of the government for fraud committed against the government. Congress placed specific conditions on the exercise of this right, including that a relator's complaint "shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." 31 U.S.C. 3730(b)(2). The court of appeals held that violations of the seal requirements do not require mandatory dismissal of a *qui tam* action. In doing so, the court construed the statute in a manner that is contrary to its text, structure, history, and purpose. This Court should reverse or vacate.

***17** I. A. The plain language of the seal requirement makes clear that compliance is a mandatory prerequisite to pursuing a private *qui tam* action under the FCA. Section 3730(b)(2) repeatedly uses the mandatory word "shall." The complaint "*shall* be filed in camera, *shall* remain under seal for at least 60 days, and *shall* not be served on the defendant until the court so orders." 31 U.S.C. 3730(b)(2) (emphases added).

B. The structure of the FCA confirms that the seal requirement is a mandatory prerequisite to suit. *First*, the seal provision is part and parcel of the statutory provision creating a private right of action. Where a provision both creates a private right of action and incorporates specific requirements therein, the clear implication is that compliance with those requirements is a "mandatory, not optional, condition precedent for suit." *Hallstrom v. Tillamook Cnty.,* 493 U.S. 20, 26 (1989).

Second, the *qui tam* provisions "effect[] a partial assignment of the Government's damages claim," *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765, 773 (2000), in which the relator brings claims based upon injury to the government for itself and "for the United States Government" and "in the name of the Government." 31 U.S.C. 3730(b)(1). That assignment is conditioned on the relator's compliance with the terms of the assignment, including the seal requirement. Failure to satisfy the conditions of the assignment warrants dismissal.

***18** C. The purposes and history of the statute also establish that the FCA seal requirements are mandatory preconditions to proceeding with a private FCA action. The FCA's legislative history indicates that Congress enacted the seal requirement as an alternative to a statutory 60-day notice provision. If anything, a seal provides stronger protection than a 60-day notice provision for the government's ability to investigate and intervene. The two types of provisions thus should both require dismissal for noncompliance.

D. Section 3730's mandatory requirements embody Congress's balancing of the interests at stake and leave no further balancing to the courts. Congress balanced the goals of encouraging *qui tam* actions and protecting the government's interest in investigating and evaluating *qui tam* claims. The seal requirement should not be subject to case-by-case judicial rebalancing of interests already balanced by Congress.

Such judicial rebalancing also has adverse practical consequences. It results in uneven enforcement, under-deterrence, and encouragement of deliberate noncompliance by relators. By contrast, a bright-line rule of mandatory dismissal will not impede the statutory scheme. The filing and seal requirements impose only minimal burden on relators, and any dismissal of the relator's action still allows the *government* to proceed with the claims.

For all these reasons, this Court should adopt a bright-line rule of mandatory dismissal for FCA seal violations.

***19** II. Even if the Court decides that dismissal is not mandatory, but rests with the district courts' discretion, it should nonetheless reverse or vacate the judgment below.

A. The court of appeals treated the willfulness and bad faith of respondents' seal violations as largely insignificant, allowing even egregious violations of the seal requirement to survive dismissal. That approach departs from the traditional exercise of district courts' equitable powers, which routinely treats willful disregard of rules and court orders as grounds for dismissal. This Court should, at a minimum, vacate and remand with instruction to the lower courts to consider willfulness as a factor weighing heavily in any balancing test. Under any appropriate discretionary test, dismissal would be required in this case because of respondents' repeated and egregious seal violations.

B. Upon any such remand, the Court should also clarify that any discretionary test for sealing violations should assess the severity of the nature and timing of seal violations even if a complaint was originally filed under seal; that actual harm to the government should not be required as a predicate for dismissal; and that harm to the defendant (such as the reputational harm from a campaign of media vilification) is an additional factor to be balanced.

C. Finally, a separate and independent ground for reversal is provided by the lower courts' plain legal error in treating an order partially lifting the seal - to allow disclosure of the existence of this case "only" to another district court judge -

as if it had fully lifted ***20** the seal. As a result, the lower courts refused to consider some of respondents' most egregious seal violations, which further tip any balance in favor of dismissal.

For all these reasons, if the Court declines to reverse and hold dismissal mandatory, it should vacate and remand.

ARGUMENT

This case involves deliberate and flagrant violations of the seal requirement imposed on private *qui tam* litigants by the FCA, 31 U.S.C. 3730(b)(2). Respondents here filed their FCA complaint under seal but then disclosed the existence and contents of their filings to a host of national news organizations (including ABC, CBS, the Associated Press, and the *New York Times*) as well as to a Mississippi congressman who made it the subject of remarks published in the Congressional Record and in further congressional testimony - all as a litigation tactic designed to vilify and place settlement pressure on State Farm.

Respondents' case warrants dismissal as a result of those seal violations. The text, structure, history, and purpose of the FCA show that compliance with the seal requirement is a mandatory precondition of serving as a private *qui tam* litigant, and that violations of that precondition necessitate dismissal. But even if dismissal here is not deemed mandatory, respondents' willful and repeated seal violations warrant dismissal under any appropriate ***21** discretionary test. The decision below thus should be reversed or vacated.

I. THE TEXT, STRUCTURE, HISTORY, AND PURPOSE OF THE FCA SHOW THAT FAILURE TO COMPLY WITH THE SEAL REQUIREMENT WARRANTS DISMISSAL OF A PRIVATE *QUI TAM* CLAIM

The FCA grants a private right of action, but by its plain terms requires a private litigant to take certain minimal steps before being entitled to litigate a claim on behalf of the government. Among them, the relator must file a complaint under seal and respect that seal until it is lifted by the district court. When a relator violates the seal, the relator fails to comply with one of the mandatory preconditions for a private right of action under the FCA and thus forfeits the authority to conduct or continue as a party to the action. The seal requirement is not a mere procedural rule that may be enforced by a district court at its discretion, but rather a statutory precondition whose violation should trigger a bright-line rule of mandatory dismissal.

A. Section 3730's Plain Text Makes The Seal Requirement A Mandatory Precondition To Serving As A *Qui Tam* Relator

To " 'start, as always, with the language of the statute,' " *Universal Health Services, Inc. v. United States ex rel. Escobar,* 136 S. Ct. 1989, 1999 (2016), the FCA sets forth the seal requirement in ***22** unambiguously mandatory terms. Section 3730(b) provides that a relator's "complaint and written disclosure of substantially all material evidence and information the person possesses *shall* be served on. the Government" and that a private FCA complaint "*shall* be filed in camera, *shall* remain under seal for at least 60 days, and *shall* not be served on the defendant until the court so orders." 31 U.S.C. 3730(b)(2) (emphases added).

Each of the "shalls" in that section sets forth a mandatory precondition to a private relator proceeding with an FCA suit. "Congress could not have chosen [a] stronger word[] [than 'shall'] to express its intent that [the requirement] be mandatory." *United States v. Monsanto,* 491 U.S. 600, 607 (1989). Far from inviting case-by-case inquiry under a balancing test, "the mandatory 'shall' … normally creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26, 35 (1998). [3]

***23** Other plain language in the FCA confirms that Congress's use of the term "shall" in connection with the FCA seal requirement makes that requirement a mandatory precondition to pursuing a private *qui tam* action.

First, Congress used "shall" in the seal requirement in contradistinction to the term "may" used elsewhere to denote optional rather than mandatory actions. Section 3730(b) provides that "[a] person *may* bring a civil action for a violation," 31 U.S.C. 3730(b)(1), that "[t]he Government *may* elect to intervene, *id.* § 3730(b)(2), and that "[t]he Government *may*, for good cause shown, move the court for extensions of the time during which the complaint remains under seal," *id.* § 3730(b)(3) (all emphases added). "When a statute distinguishes between 'may' and 'shall,' it is generally clear that 'shall' imposes a mandatory duty." *Kingdomware Techs., Inc. v. United States,* 136 S. Ct. 1969, 1977 (2016) (citing *United States ex rel. Siegel v. Thoman,* 156 U.S. 353, 359-60 (1895) (when Congress uses the "special contradistinction" of "shall" and "may," no "liberty can be taken with the plain words of the statute, which indicate[] command in the one and permission in the other")); *see also Anderson v. Yungkau,* 329 U.S. 482, 485 (1947) ("[W]hen the same [provision] uses both 'may' and 'shall,' the normal inference is that each is used in its usual sense - the one being permissive, the other mandatory.").

Second, Congress elsewhere in the FCA explicitly conferred judicial discretion in the conduct of *qui tam* proceedings. Section 3730(c), for example, expressly provides that, upon a showing by the government that ***24** a private litigant's participation "would interfere with, or unduly delay the Government's prosecution of the case," a court "may, *in its discretion*, impose limitations on the person's participation." 31 U.S.C. 3730(c)(2)(C) (emphasis added). Congress conferred no similar express discretion on courts to relax the mandatory notice, in camera filing, and sealing requirements of section 3730(b)(2). The natural reading of the text of the section is therefore that any such implied discretion is precluded.

B. Section 3730's Structure Makes Clear That The Seal Requirement Is A Mandatory Precondition To Serving As A *Qui Tam* Relator

Apart from the expressly mandatory language of the FCA's seal provision, the broader structure and context in which that provision appears in the FCA confirms that a relator's compliance with the seal requirement of section 3730(b)(2) is a mandatory precondition to pursuing a private FCA claim.

1. Section 3730 Makes The Seal Requirement Part And Parcel Of The Private Right Of Action

By placing the seal requirement within the same statutory provision that grants a private right of action under the FCA in the first place, the structure of section 3730 as a whole makes the seal requirement a mandatory precondition to suit rather than a procedural rule subject to district court discretion. As amended in 1986, section 3730(b) both creates the private *qui tam* right of action, *see* ***25** 31 U.S.C. 3730(b)(1), and prescribes the mandatory steps a private person must undertake to pursue such an action - namely, serving the government with a copy of the complaint and evidentiary disclosure, filing the complaint in camera, and maintaining the action only under seal for at least 60 days, *see id.* § 3730(b)(2).

Where, as here, a statutory mandate governing the manner and conditions for filing a suit is enacted as part and parcel of the grant of a private right of action, it is a "mandatory, not an optional, condition precedent" to the private right of action. *Hallstrom,* 493 U.S. at 26. In *Hallstrom,* the Court considered the citizen-suit provision of the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. 6972, which permits private parties to sue to enforce waste disposal regulations promulgated under the Act, on *condition* that " '[n]o action may be commenced' " unless the plaintiff has given at least 60 days' notice to the alleged violator and relevant agencies. *Hallstrom,* 493 U.S. 20 (citing 42 U.S.C. 6972(b)(1)). The plaintiffs in *Hallstrom* gave such notice only after filing suit, but the agencies declined to act and the parties proceeded to litigate for years. *See id.* at 24. This Court nevertheless held that RCRA's 60-day notice provision is "a mandatory precondition to suit," and accordingly that "the district court [had to] dismiss the action as barred

by the terms of the statute." *Id.* at 23, 33. The Court reasoned that, because the 60-day notice provision is "expressly incorporated by reference" into the section of RCRA that authorizes private actions, "it acts as a specific limitation on a citizen's right to bring suit" and compliance "is a mandatory, not optional, condition precedent for suit." *Id.* at 26.

***26** The Court has reasoned similarly in cases both predating and postdating *Hallstrom.* For example, in *United States ex rel. Texas Portland Cement Co. v., McCord,* 233 U.S. 157 (1914), the Court considered a federal statute that authorized creditors of government contractors to bring suit in the name of the United States " 'if no suit should be brought by the United States within six months from the completion and final settlement of said contract.' " *Id.* at 161 (quoting Act of February 24, 1905, 33 Stat. 811). As the Court noted, "[t]he right of action given to creditors is specifically *conditioned* upon the fact that no suit shall be brought by the United States within the six months named, for it is only in that event that the creditors shall have a right of action and may bring suit in the manner provided." *Id.* at 162 (emphasis added). The Court treated the condition protecting the government's exclusive litigating authority for six months as part and parcel of the private right of action itself. As the Court explained, when a statute "creates a new liability and gives a special remedy for it, … the limitations upon such liability become a part of the right conferred, and compliance with them is made essential to the assertion and benefit of the liability itself." *Id.* The Court thus held it appropriate to dismiss a creditor's suit filed within the six-month period, *id.* at 163, despite evidence that the government did not intend to sue, *see id.* at 158.

Similarly, in *McNeil v. United States,* 508 U.S. 106 (1993), the Court interpreted a provision of the Federal Tort Claims Act, 28 U.S.C. 2675(a), that provided that "[a]n action shall not be instituted upon a claim against the United States for money damages ***27** … unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing." The Court unanimously held dismissal proper because the plaintiff had "failed to heed this clear statutory command." *McNeil,* 508 U.S. at 113.

Here as in *Hallstrom, McCord,* and *McNeil,* the seal requirement is a precondition to pursuing a private action that is incorporated within the same provision that authorizes the private right of action. The structure of the statute reinforces the mandatory nature of the plain text and the appropriateness of dismissal for noncompliance.

Notably, Congress did *not* place the sealing provision in other, separate procedural provisions of the FCA of a type traditionally held susceptible to judicial modification or discretion. For example, 31 U.S.C. 3731, entitled "False claims procedure," sets forth the statute of limitations for private FCA actions. Statutes of limitations may be subject to equitable tolling by the district courts. But the seal requirement, like the 60-day notice requirement at issue in *Hallstrom,* is not a limitations provision. *See Hallstrom,* 493 U.S. at 27. Nor are the FCA filing, service, and seal requirements mere "claims-processing rules," which, like statutes of limitation, may be subject to the district courts' case-management discretion, *see Bowles v. Russell,* 551 U.S. 205, 210-11 (2007) (citation omitted). Section 3730(b)'s notice, filing, and seal requirements do not govern a *court's* transaction of business but rather serve principally to ensure that *the executive branch* has the opportunity to investigate and evaluate the ***28** relators' claims and to ensure that publicity of those claims does not jeopardize that evaluation or any ongoing criminal investigations.

2. Section 3730 Makes The Seal Requirement A Necessary Condition Of The Partial Assignment Of The Government's Claim

The structure of section 3730 further shows the mandatory nature of the seal requirement because the section as a whole "can reasonably be regarded as effecting a partial assignment of the Government's damages claim" to the relator, giving the relator Article III standing to sue as the government's assignee. *Stevens,* 529 U.S. at 773. The FCA provides that a private person may bring a civil *qui tam* action "for the person and for the United States Government" to recover for a false claim. 31 U.S.C. 3730(b)(1).

But that partial assignment is not complete unless the relator adheres to the necessary statutory conditions. *Cf., e.g., In re Schimmels,* 127 F.3d 875, 884 (9th Cir. 1997) ("[T]he relator is, in effect, a partial, limited, and *conditional* assignee of the government's fraud claim against the defendant.") (emphasis added); *United States ex rel. Kelly v. Boeing Co.,* 9 F.3d 743, 748 (9th Cir. 1993) (treating the relator's right as an assignment of the government's claim and noting that "[a]ssignments can be made *conditional* on the occurrence of a future event") (emphasis added). A relator is not assigned the government's claim or litigating authority merely ***29** upon filing a *qui tam* complaint. The relator instead can receive litigating authority, and the right to a share of the government's damages claim, if and only if the relator adheres to the filing and seal requirements: a private FCA complaint "*shall* be filed in camera, *shall* remain under seal for at least 60 days, and *shall* not be served on the defendant until the court so orders." 31 U.S.C. 3730(b)(2) (emphases added). The filing and seal requirements protect the government's ability to investigate and evaluate a relator's claims, ensuring that the government can make an informed decision whether to exercise its prerogative to intervene. Only *after* a relator has complied with these mandatory conditions and the government decides whether to intervene does the FCA grant the relator certain "[r]ights" to participate in the litigation, 31 U.S.C. 3730(c), and a fixed share of the "[a]ward," 31 U.S.C. 3730(d). [4]

Under this conditional, partial assignment structure, compliance with the preconditions for Congress's assignment of the government's claim is not a mere matter of procedural etiquette; it is ***30** necessary to give the relator Article III standing to proceed. As *Stevens* held, a relator has standing insofar as the relator is "suing as a partial assignee of the United States." 529 U.S. at 773 n.4 (emphasis omitted). When a would-be relator fails to meet section 3730's mandatory conditions, no assignment is effected, and the relator "has no more right" to proceed with a *qui tam* action "than any other private person." *Summers,* 623 F.3d at 299. Because a seal violation thus prevents the relator from being assigned the government's claim, dismissal should always be required when a relator commits a seal violation.

The broader structure of the FCA *qui tam* provisions thus confirms that seal compliance is a mandatory condition of pursuing a private action, subject to dismissal for noncompliance.

C. Section 3730's Legislative History And Purpose Confirm That The Seal Requirement Is A Mandatory Precondition To Serving As A *Qui Tam* Relator

Congress adopted the in camera filing and sealing requirements as part of the 1986 amendments to the FCA. Those amendments aimed at striking a balance that would "protect[] both the Government and the defendant's interests without harming those of the private relator." S. Rep. No. 99-345, at 24 (1986). In particular, Congress intended the 1986 amendments to strike a balance between encouraging *qui tam* suits by increasing the chance for the relator to receive meaningful recoveries, *see id.* at 23-24, 28-29, and at ***31** the same time preventing any interference with government investigations that might result from the anticipated increase in *qui tam* actions, *see id.* at 24 (noting Justice Department's concerns that "false claim allegations in civil suits might overlap with allegations already under criminal investigation"). Enactment of the in camera filing and sealing requirements was a direct response to the latter concern.

The legislative history of the 1986 amendments is illuminated by the 1943 amendments; together, they make clear Congress's understanding that the FCA's 60-day post-filing sealing requirement is just as much a mandatory precondition as a 60-day notice provision.

1. The 1943 FCA Amendments

Prior to 1943, the FCA private right of action did not require notice to the government and did not give the government the right to intervene or take over the action. The 1943 amendments required a person bringing a private FCA action to provide the government with notice of the action and a copy of the complaint and evidentiary disclosure, and gave

the government 60 days thereafter to enter an appearance in the suit. Act of Dec. 23, 1943, Pub. L. No. 78-213, 57 Stat. 608, 609.

The 1943 amendments were a response to this Court's holding, in *United States ex rel. Marcus v. Hess,* 317 U.S. 537, 548 (1943), that a private action under the FCA could be based on information contained in an earlier indictment. In the wake of ***32** *Hess,* Attorney General Francis Biddle wrote Congress to request "prompt enactment of remedial legislation." 89 Cong. Rec. 7,571 (1943). He recommended either repealing the private right of action or enacting "a provision that a private person, as a prerequisite to bringing suit, must notify the Attorney General of his purpose, giving in full the information in his possession, after which the Attorney General would be allowed a reasonable time in which to determine whether this Department would institute suit for the Government." *Id.*

A House bill would have eliminated the Act's *qui tam* cause of action altogether, but the Senate bill adopted Attorney General Biddle's alternative approach - making pre-filing disclosure to the government and a six-month waiting period jurisdictional prerequisites to a private suit. *Id.* at 7,570. The Senate bill also would have barred suits based on certain categories of information already in the possession of the government, namely, information obtained by the government in the course of grand jury investigations, congressional investigations and other government investigations. *See id.*; H.R. Rep. No. 78-933, at 4 (1943).

The bills proceeded to conference, and the conference committee determined that private suits should be permitted, but "followed to some extent the pattern of the Senate amendments," which "would have limited such suits and specified the conditions under which they could be maintained." H.R. Rep. No. 78-933, at 4. In contrast to the Senate bill, however, the conference version required a relator to give *post-filing* notice to the government of the ***33** pendency of the suit. *Id.* at 1-2. The conference version also broadened the bar on suits based on evidence known to the government, to cover suits based on "evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time the suit was brought." *Id.* at 2.

As discussed in the Senate deliberations, such a bar, based on *all* information already in the government's possession at the time the suit was brought would have created a Catch-22 for the relator if combined with a requirement that the relator make a *pre-filing* disclosure to the government. *See* 89 Cong. Rec. at 7,614 (1943) (statement of Sen. Murray). A relator then would be barred from bringing suit by virtue of their own pre-filing disclosures to the government. *Id.* The conference committee amendments avoided this potential Catch22 by requiring *post-filing* disclosure instead. *See* H.R. Rep. No. 78-933, at 1-2, 6; *see also* 31 U.S.C. 232(C) (1943).

The inference is unmistakable from the legislative history that the provision for post-filing disclosure followed by a 60-day waiting period was enacted with the purpose of eliminating the potential Catch-22, and that both the Senate and House understood the requirement to be a "condition[] under which [*qui tam* suits] could be maintained." H.R. Rep. No. 78-933, at 4. Accordingly, while the precursor to what is now section 3730(b) was not ultimately phrased in terms of jurisdiction or the commencement of an action, both houses of Congress understood that the requirement of notice to the government, albeit ***34** post-filing, was a mandatory prerequisite to maintaining a private FCA suit.

2. The 1986 FCA Amendments

The 1986 FCA amendments similarly evince Congress's understanding of compliance with the notice, in camera filing, and seal requirements now reflected in section 3730(b) as a mandatory precondition to pursuit of private FCA suits. Those requirements are functionally equivalent to the 60-day RCRA notice provision at issue in *Hallstrom,* except that the FCA provisions provide stronger protection for government investigations and enforcement.

As the 1986 legislative history makes clear, Congress saw no functional difference between RCRA's 60-day notice provision ("No action shall be filed …") and the FCA's 60-day seal provision ("The complaint shall be filed in camera,

shall remain under seal for at least 60 days …"). As the Senate Report on the 1986 FCA amendments stated, "[t]he initial 60-day sealing of the allegations [under the FCA] has the same effect as if the *qui tam* relator had brought his information to the Government and notified the Government of his intent to sue." S. Rep. No. 99-345, at 24. Likewise, Congress saw no difference between mandatory pre-filing and post-filing conditions in terms of consequences for noncompliance.

To the contrary, far from making one a mandatory precondition to suit and the other not, the FCA's use of the 60-day post-filing sealing mechanism rather ***35** than a 60-day pre-filing delay is simply a consequence of two particular aspects of FCA litigation:

First, Congress perceived a need to preserve the relator's incentives to litigate while simultaneously ensuring divulgence of information to the government. Pre-filing notice might defeat those incentives. As the Senate Report explains, "[i]f the individual who planned to bring a *qui tam* action did not file an action before bringing his information to the Government, nothing would preclude the Government from bringing suit first and the individual would no longer be considered a proper *qui tam* relator." S. Rep. No. 99-345, at 24. Thus, Congress required the filing of the complaint before the 60-day period rather than after it.

Second, Congress perceived a need for especially strong protection of "sensitive" government investigations in the FCA context. *See id.* The mechanism chosen to serve that goal, a 60-day seal with extensions, requires district court involvement, albeit minimal and ministerial, to oversee the seal and to rule on extensions. But the use of this mechanism, instead of a 60-day delay in filing, does not change the mandatory nature of the seal requirement or its essential similarity to a mandatory 60-day pre-filing notice provision.

***36 D. Because The FCA's Seal Requirement Is A Mandatory Precondition To Pursuit Of A Private *Qui Tam* Claim, Its Violation Requires Dismissal Rather Than Judicial Balancing**

1. In *Hallstrom,* the Court rejected the notion that statutory preconditions on private causes of action are subject to judicial balancing on a case-by-case basis, as the court of appeals treated the seal provision here. As the Court explained in *Hallstrom,* a statutory precondition embodies the balance that Congress struck in encouraging private actions but subjecting them to certain limitations. *See* 493 U.S. at 29 ("Giving full effect to the words of the statute preserves the compromise struck by Congress."). [5] Leaving dismissal to district court discretion effectively undoes Congress's compromise. The very ***37** purpose of a "mandatory" condition is not to be "flexible or pragmatic," *id.* at 26, but to demand strict compliance.

Like the 60-day notice provision enforced in *Hallstrom,* section 3730(b)(2)'s seal, filing and evidentiary-disclosure requirements already "reflect the compromise between competing interests in the manner intended by Congress, and thus condition the plaintiffs cause of action." *Summers,* 623 F.3d at 298. They therefore demand strict compliance rather than case-by-case judicial balancing. Congress already made the decision in 1943 to preserve the *qui tam* cause of action, but only if the relator provided adequate notice to the government of such an action; and in 1986, Congress added that the relator must provide such notice while filing the complaint in camera and under seal. A relator must comply with those requirements, on pain of surrendering the right to serve as a *qui tam* relator. As the Court recognized in *Hallstrom:* " '[I]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.' " 493 U.S. at 31 (quoting *Mohasco Corp. v. Silver,* 447 U.S. 807, 826 (1980)) (alteration in original).

It makes no difference to this conclusion that Congress did not expressly specify the consequence of a seal violation in the text of section 3730(b)(2). To the contrary, the various provisions that this Court has held are "mandatory, not optional, condition[s] precedent for suit," including the 60-day notice provision at issue in *Hallstrom,* also do not specify dismissal as the penalty for non-compliance. ***38** *See* 493 U.S. at 26. Indeed, the two dissenting Justices in *Hallstrom,* who took the position that compliance with the RCRA 60-day notice provision was not a mandatory prerequisite to

suit, stressed that "the statute specifies no sanction." 493 U.S. at 35 (Marshall, J., joined by Brennan, J., dissenting). In holding that dismissal was mandated anyway, the *Hallstrom* majority necessarily (and correctly) rejected the dissenters' view that, where a statute does not require a specific remedy for violating a statutory condition, "factors extrinsic to statutory language enter into the decision as to what sanction is appropriate." *See id.*

Moreover, the text, structure, and history of the FCA sealing provision make clear that dismissal is simply the necessary consequence of a failure to comply with a statutory prerequisite to suit. A seal violation thus is not ordinary litigation misconduct that might otherwise be subject to the district courts' inherent and flexible discretion to fashion a range of appropriate sanctions.[6] As this Court has stated, "while a federal court 'may within limits, formulate procedural rules not specifically required by the Constitution or the Congress,' … it is well established that '[e]ven a sensible and efficient use of the ***39** supervisory power … is invalid if it conflicts with constitutional or statutory provisions.' " *Bank of Nova Scotia v. United States,* 487 U.S. 250, 254 (1988) (citations omitted); *see also Dietz v. Bouldin,* 136 S. Ct. 1885, 1892 (2016) ("[T]he exercise of an inherent power cannot be contrary to any express grant of or limitation on the district court's power contained in a rule or statute."). And under the FCA, a district court in any event has little supervisory authority before a seal is lifted, but is confined to the "ministerial" act of sealing the docket and ruling on any requests by the government to extend the seal. *See ACLU v. Holder,* 673 F.3d 245, 254 (4th Cir. 2011).

2. As this Court has recognized, "policy arguments cannot supersede the clear statutory text" of the FCA. *Escobar,* 136 S. Ct. at 2002. But if policy arguments and practical consequences are taken into account, they favor a rule of automatic dismissal for seal violations.

Allowing FCA seal enforcement at the district courts' case-by-case discretion undermines the FCA's goals by producing uneven results and systematic under-deterrence. It encourages prospective relators "to comply with the FCA's under-seal requirement only to the point the costs of compliance are outweighed by the risk that any given violation would turn out to be severe enough to require dismissal." *Summers,* 623 F.3d at 298. And, as discussed *infra* at 45-47, it leads to the anomalous result that the district courts regularly dismiss *qui tam* suits involving *inadvertent* failures to file FCA complaints under seal while allowing *deliberate* and unscrupulous post-filing gamesmanship like that ***40** exemplified in the record here to occur without consequences.

By contrast, a rule of automatic dismissal for seal violations will have no adverse practical consequences for the FCA's statutory scheme. *First,* it is "not unfair to require strict compliance" with the seal requirement. *Hallstrom,* 493 U.S. at 28. To preserve his rights, the relator has only to take the " 'minimal steps' " of filing under seal and not disclosing the lawsuit to anyone for a limited period. *Id.* at 27-28 (quoting *Johnson v. Ry. Express Agency, Inc.,* 421 U.S. 454, 466 (1975)). "[G]iven the clarity of the statutory text," the seal requirement "is certainly not a 'trap for the unwary," *McNeil,* 508 U.S. at 113, particularly since (as lower courts have held) relators must be represented by counsel, *see, e.g., Nasuti ex rel. United States v. Savage Farms, Inc.,* 2014 WL 1327015, at *7 (D. Mass. 2014) (collecting cases), *aff'd,* 2015 WL 9598315 (1st Cir. Mar. 12, 2015).

Second, dismissal of a *relator's* suit with prejudice to the relator does not affect the *government*'s ability to pursue a valid FCA claim on its own. *See Pilon,* 60 F.3d at 1000 n.6. While a court might be reluctant to dismiss an ordinary plaintiff, for whom dismissal means an end to any relief, a *qui tam* relator is not an ordinary plaintiff. To the contrary, a relator suffers no injury and sues only as a partial, conditional assignee of the government. The government can proceed with any meritorious FCA claims if it chooses to do so, even if the relator is dismissed from the case.

In sum, a violation of the clear statutory mandate of section 3730(b)(2) should not be determined by ***41** application of a judicial balancing test, but instead should result in dismissal. This Court should reverse the judgment below with directions to dismiss respondents' claims with prejudice.

II. EVEN IF THIS COURT REJECTS A RULE OF MANDATORY DISMISSAL FOR FCA SEAL VIOLATIONS, THE DECISION BELOW SHOULD BE REVERSED OR VACATED IN LIGHT OF THE EGREGIOUS CONDUCT AT ISSUE HERE

Under any appropriate standard, respondents' deliberate, systematic and extended seal violations in this case warrant dismissal of their claims, even if the Court holds that FCA seal violations do not warrant automatic dismissal. Where a statute does not specify a standard for a discretionary sanction, "a district court's 'discretion should be exercised in light of the considerations' underlying the grant of that discretion." *Halo Elecs., Inc. v. Pulse Elecs., Inc.,* 136 S. Ct. 1923, 1932 (2016) (quoting *Octane Fitness, LLC v. ICON Health & Fitness, Inc.,* 134 S. Ct. 1749, 1756 (2014)); *see also Indep. Fed'n of Flight Attendants v. Zipes,* 491 U.S. 754, 758-59 (1989) ("[I]n the case of discretion regarding appropriate remedies, we have found limits in the 'large objectives' of the relevant Act …." (citation omitted)). Here, the mandatory language of the sealing requirement and its structure as a mandatory precondition to an assignment of the government's claim demonstrate clear congressional intent that the seal requirement be rigorously enforced.

***42** The court of appeals recognized (Pet. App. 22a-23a) that respondents and their counsel made repeated willful seal violations in bad faith, but nonetheless ruled that, "[e]ven presuming bad faith," the balancing test it applied favored respondents. Pet. App. 23a. The bad-faith nature of the conduct here is sufficient by itself to warrant dismissal under any appropriate balancing test. Moreover, the court of appeals also undervalued or disregarded additional factors that should be relevant in any such balance: (i) the severity of the relators' conduct, (ii) the potential for harm to the government, and (iii) reputational and other harm to the defendant. Finally, the court of appeals also erroneously restricted its review (Pet. App. 21a) to conduct predating the January 10, 2007 partial lifting of the seal, thus declining to consider a number of respondents' most egregious seal violations.

For any or all of these reasons, the court of appeals' judgment at a minimum warrants vacatur and remand. On any such remand, the Court should direct the lower courts to give appropriate weight to the relators' willfulness and bad faith; to consider the additional factors of the severity of the relators' seal violations, the potential harm to the government, and the harm to the defendant; and to consider all respondents' seal violations prior to the lifting of the seal on August 1, 2007. Under any proper application of those factors, dismissal would be required in this case.

***43** A. Any Discretionary Test For Determining The Sanctions For Seal Violations Should Consider The Extent Of Relators' Willfulness And Bad Faith

Ample evidence showed that respondents and their attorneys engaged in a systematic campaign of bad-faith disclosures to multiple media organizations and a U.S. congressman of the existence and nature of this FCA suit. *See supra* at 7-9, 11-12. Under any proper discretionary test for seal violations, such bad faith alone would merit dismissal, even absent the other factors discussed below.

In holding that the seal violations here did not merit dismissal, the court of appeals ignored the basic principle that "the category of willful misconduct" warrants "the severest sanction." *Taylor v. Illinois,* 484 U.S. 400, 417 (1988); *see also, e.g., Eastway Constr. Corp. v. City of New York,* 637 F. Supp. 558, 573 (E.D.N.Y. 1985) ("It is widely agreed that the 'wilfulness' of the violation is of major importance" in determining sanctions). Based on that principle, dismissal of an action is warranted for the worst types of litigation misconduct: acts of bad faith or contumacious violations of court orders. *See, e.g., Salmeron v. Enterprise Recovery Systems, Inc.,* 579 F.3d 787, 797 n.4 (7th Cir. 2009) (" 'Dismissal is appropriate where a party has displayed fault, bad faith, or willfulness.' " (citation omitted)); *Knoll v. Am. Tel. & Tel. Co.,* 176 F.3d 359, 363 (6th Cir. 1999) ("[A] case is properly dismissed by the district court where there is a clear record of delay or contumacious conduct."); *Marrocco v. Gen. Motors Corp.,* 966 F.2d 220, 223-24 (7th Cir. 1992) (upholding dismissal for ***44** "contumacious conduct" violating a pretrial protective order); *Halaco Eng'g Co. v. Costle,* 843 F.2d

376, 380 (9th Cir. 1988) (where dismissal is ordered as a sanction, the "losing party's non-compliance must be due to willfulness, fault, or bad faith").

Respondents and Scruggs purposefully and willfully violated the court orders sealing this case to advance their cause in litigation. They sent their sealed evidentiary disclosure, which indisputably referred to respondents' FCA action, to ABC News, the AP, and the *New York Times;* they discussed their lawsuit with U.S. Representative Taylor, who was Scruggs's client in his own Katrina-related suit against State Farm; they sent their sealed First Amended Complaint to CBS News and shared it with their public relations firm; and all the while, they misled the court and the government, claiming to be injured by adhering to the seal that they were flagrantly violating. In short, respondents and Scruggs engaged in a series of strategic leaks meant to poison public opinion against State Farm and to bring litigation pressure against the company. Under the principles that guide district courts' "discretion … to fashion an appropriate sanction for conduct which abuses the judicial process," *Chambers v. NASCO, Inc.,* 501 U.S. 32, 44-45 (1991), there could be few *qui tam* actions more ripe for dismissal.

The court of appeals devoted only two sentences of analysis to respondents' and their counsel's misconduct. *First*, the court hedged on whether respondents should be held accountable for Scruggs's misconduct, stating that, "[w]ere we to impute their former attorneys' disclosures to them, we would ***45** conclude that they acted in bad faith." Pet. App. 23a. But it is black-letter law that both respondents' own conduct and the conduct of their chosen counsel are relevant to the evaluation of bad faith. *See, e.g., Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd.,* 507 U.S. 380, 397 (1993) (" 'Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts … of this freely selected agent' ") (quoting *Link v. Wabash R.R. Co.,* 370 U.S. 626, 633-34 (1962)); *Taylor,* 484 U.S. at 418 (a "client must accept the consequences of the lawyer's decision"); *Salmeron,* 579 F.3d at 797 n.4 (" '[T]he rule is that *all* of the attorney's misconduct … becomes the problem of the client.' " (citation omitted)).

Second, the court of appeals held that, "[e]ven presuming bad faith, the *Lujan* factors favor the Rigsbys." Pet. App. 23a. The court did not evaluate the egregiousness of that misconduct, let alone explain how respondents' lengthy series of deliberate seal violations could be outweighed by other factors. Bad faith appears to have played no real role in the weighing.

The failure to consider bad faith in this case exemplifies a perverse trend in FCA cases whereby district courts impose harsher consequences on inadvertent derelictions under the FCA seal requirement than on deliberate and willful ones. Since Congress enacted the seal requirement 30 years ago, district courts have consistently dismissed *qui tam* actions where the relator inadvertently failed to file under seal, failed to serve the government, or mistakenly served the defendant, even if the relator ***46** tried to correct the error. [7] Courts have done so on the theory that a relator who puts a defendant on actual or constructive notice of her lawsuit, either by filing her complaint publicly or serving it on the defendant, defeats the purposes of the seal requirement. [8]

In contrast to the seemingly routine dismissal of *qui tam* suits where *negligence* or *inadvertence* results in a failure to file in camera or serve the government, there is no uniform practice of dismissal for *willful* post-filing violations of the seal. Indeed, in most such cases, courts have declined to dismiss. *See, e.g., Smith v. Clark/Smoot/Russell,* 796 F.3d 424, 427 (4th Cir. 2015) (declining to require dismissal even though relator's counsel called the defendant one day after sealing); *Lujan,* 67 F.3d at 244 (declining to require dismissal although relator "clearly violated" the seal provision by disclosing the existence and ***47** nature of her *qui tam* suit to "a major newspaper"); *United States ex rel. Ruscher v. Omnicare, Inc.,* 2015 WL 4389644, *1-3 (S.D. Tex. July 15, 2015) (declining to dismiss even though the relator told numerous people, including defendant's outside counsel, about the suit); *United States ex rel. Bibby v. Wells Fargo Bank, N.A.,* 76 F. Supp. 3d 1399, 1401-04, 1410-11 (N.D. Ga. 2015) (declining to dismiss although relators repeatedly divulged details of the suit and government investigation). The current regime is thus the opposite of what traditional equity requires: a bad-faith

relator who violates the seal has a *better* chance of proceeding with his claim than a good-faith relator who inadvertently fails to file in camera. [9]

The significance of bad faith is magnified by the fact that the relator is acting on behalf of the government. As discussed above (*see supra* at 28-30), the Court in *Stevens,* 529 U.S. at 773-74, has likened the relationship between the government and the relator to that between the assignor of a claim and the assignee. It is thus appropriate that *qui tam* status carry with it an obligation to observe the mandates of the statute. Moreover, relators and their counsel have a heightened obligation to act in good faith because they are acting in the name of the ***48** government. The court of appeals' willingness to overlook respondents' and their counsel's bad-faith seal violations (Pet. App. 23a) is incompatible with the nature of the FCA cause of action and a relator's privileged role in bringing suit on behalf of the government. Just as litigants "must turn square corners when they deal with the Government," *Rock Island, A. & L.R. Co. v. United States,* 254 U.S. 141, 143 (1920) (Holmes, J.), so too must they turn square corners when they deal *on behalf of* the government.

In an ordinary civil case, there is a strong interest in allowing plaintiffs to pursue their claims because (assuming their claims have merit) they have been injured and are entitled to some remedy. But the same consideration of doing justice to the plaintiffs does not apply in an FCA case. Respondents have not been injured; they have been conditionally assigned a part of the government's claim for the government's injury. *See Stevens,* 529 U.S. at 773-74. The purpose of this assignment is to incentivize private parties to come forward when they believe the government has been defrauded. And this incentive is not diminished by dismissal for bad-faith violations of the sealing rule since (by its terms) it would *only* disincentivize those who choose to act in bad faith. Moreover, if relators are dismissed from a case for bad-faith seal violations, the government's interest in the litigation remain protected because the government can take over and pursue the case itself if it believes the claims have merit. *See Pilon,* 60 F.3d at 1000 n.6. In short, there is no benefit to the government or to the public interest generally in allowing relators to proceed with claims despite willful and bad-faith violations of federal law.

***49** Accordingly, a relator's bad faith or willfulness should weigh heavily in favor of dismissal for a seal violation. Respondents' egregious, bad-faith seal violations merited dismissal on that ground alone.

B. Any Discretionary Test For Seal Violations Should Also Balance Other Relevant Factors

1. The Severity Of The Violation

The "relative severity" of a relator's seal violation is an appropriate factor to consider if dismissal for seal violations is found discretionary. *Lujan,* 67 F.3d at 246. The court of appeals here wrongly assumed that only initial failures to file under seal could be severe enough to warrant dismissal. Pet. App. 18a-19a (holding that respondents' violations were "considerably less severe" than a "complete failure to file under seal or serve the government"). Because the FCA treats the 60-day seal period as important for a host of requirements extending beyond filing, post-filing violations of the seal should likewise qualify as severe enough to warrant dismissal - especially where, as here, they are repeated and egregious.

There is no reasoned basis under the FCA for holding that a post-filing breach cannot be severe. The statute does not distinguish between a breach of the filing and service requirements and a post-filing breach. Rather, it states that the complaint must be filed under seal *and* that it must "remain under seal." 31 U.S.C. 3730(b)(2). Thus, the distinction between filing and post-filing violations is an artificial one, not ***50** supported by the statute. *See Summers,* 623 F.3d at 294-96. As the Sixth Circuit explained, the provision for extending the seal period, as well as the lack of any provision for shortening it at the request of a relator, indicates Congress's intent that the relators must maintain the seal throughout the seal period. *See id.* at 297.

Furthermore, as a practical matter, if a relator files a complaint under seal and subsequently, as here, widely discloses the sealed material, the initial seal is rendered meaningless. The initial filing under seal therefore should not be treated as establishing that any violation was not severe.

Instead, if a discretionary test is to be employed, severity should be judged based on the character of the violations, including the extent and nature of the disclosure and whether the violations are repeated. Because a primary goal of the FCA seal requirement is to prevent public disclosure, more extensive and numerous disclosures to more people are a more serious affront to the statute. And, as a logical matter, it makes sense to treat a single inadvertent violation differently than repeated and intentional disclosures of the sealed materials to third parties, such as national media outlets, politicians, and public relations agencies.

Under any proper measure, respondents' seal violations here were unquestionably severe. As discussed above (*see supra* at 7-9, 11-12), their disclosures of both the existence of the suit and the allegations therein were extensive and repeated during the time when the complaint was under seal. ***51** The severity factor, properly considered, supports dismissal of respondents' FCA claim in this case.

2. The Risk Of Harm To The Government

This Court also should reject the requirement of the Ninth Circuit's *Lujan* test, as adopted by the court of appeals below (Pet. App. 20a), that a showing of actual harm to the government is a necessary predicate for dismissal. *See Lujan,* 67 F.3d at 245 ("The mere possibility that the Government *might* have been harmed by disclosure is not alone enough reason to justify dismissal of the entire action."). A requirement of actual harm would undermine the seal requirement by ensuring at best infrequent and arbitrary enforcement and would not deter the kind of willful misconduct that occurred here. *Cf. Salmeron,* 579 F.3d at 797 (rejecting "grafting a requirement of prejudice onto a district court's ability to dismiss … as a sanction under its inherent power," which is "permissibly exercised" not merely to remedy harm or prejudice, "but also to reprimand the offender and 'to deter future parties from trampling upon the integrity of the court' " (citation omitted)).

In the vast majority of cases, there will be no way to prove or disprove actual harm to the government, as *Lujan* illustrates. In *Lujan,* the government acknowledged the difficulties of establishing actual harm, stating that, while it " 'ha[d] not claimed … that it was prejudiced by the public disclosure of the *qui tam* allegations prior to the lifting of the seal, it is not in a position to state[,] as a factual matter, that it was not prejudiced by such disclosure.' " ***52** *Lujan,* 67 F.3d at 246 (quoting Statement of the United States). The government further acknowledged that it was " 'difficult, if not impossible, to determine what actions may have been taken by the defendant based upon its knowledge of the investigation.' " *Id.*

The difficulties of proving actual harm to the government from a sealing violation mean that few, if any, violations would result in dismissal under the *Lujan* test, undermining the FCA's seal requirement by making it largely toothless. That could not have been what Congress intended when it stated that a relator's complaint "shall be filed in camera, *shall* remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." 31 U.S.C. 3730(b)(2) (emphasis added).

Accordingly, any discretionary calculus for sealing violations should take into consideration *potential* harm to the government, as do the Second and Fourth Circuits. *See Pilon,* 60 F.3d at 999 (Because government "was not notified that a *qui tam* complaint had been filed," it "could not determine whether the complaint *might* interfere with any ongoing investigation …. Any settlement value that *might* have arisen from the complaint's sealed status was eliminated.") (emphasis added); *Smith,* 796 F.3d at 430 (rejecting Ninth Circuit's " 'no harm, no foul' balancing test"). Taking into consideration potential harm to the government would give appropriate weight to protecting the government's interests *ex ante* rather than just *ex post* as does an actual harm test, thus deterring violations of the seal provision.

***53** In addition, harm to the government should simply be a factor in the analysis, not a prerequisite for dismissal. As this Court recently explained, when a district court exercises discretion in determining a particular remedy for a statutory violation, its discretion cannot be artificially cabined by an " 'unduly rigid' " test. *Halo,* 136 S. Ct. at 1932 (quoting *Octane Fitness,* 134 S. Ct. at 1755). In addition, a rigid requirement of harm to the government improperly treats the government's interest as the only interest that matters. As shown *infra* at 55-57, the statutory purpose and basic principles of fairness also require consideration of the interests of the defendant.

The record amply demonstrates potential harm to the government in this case. While the presence or absence of actual harm was effectively impossible to determine, the same is not true for potential harm. Indeed, the government itself made clear the potential for harm in its repeated motions for extension of the seal period. *See supra* at 7, 11. As the government explained in those motions, there was a "continuing need to keep the complaint in this action under seal pending the Government's completion of the additional investigation and analysis necessary in this case." J.A.102,116. Given that the seal was necessary for the government's investigation, respondents' disclosure to various news media, a congressman and a public relations firm (among others) plainly had the potential to harm the interests of the government. For instance, it could have alerted witnesses or others to information about the investigation, which in turn could have affected their willingness to cooperate with the government.

***54** Contrary to the court of appeals' assumption here (Pet. App. 23a), leaking the existence and contents of the sealed filings to several major news outlets created a serious risk that the information would spread even if the existence of the suit was not publicized in the media. *Cf. Lujan,* 67 F.3d at 244 ("Any suggestion that [Lujan's] disclosure to a major newspaper is not a violation of the seal provision cannot be taken seriously."). Moreover, those news agencies did, in fact, disclose the sum and substance of the suit. *See supra* at 8-9. [10] Representative Taylor, to whom respondents and/or their counsel leaked information about the suit, publicly disclosed the allegations of the suit and its existence. *See supra* at 9, 11-12.

***55** Where such willful, repeated, and egregious violations of a statutory command can go unpunished, the result is a loss of respect and trust for the public institutions that enact, enforce, and interpret the law. Rewarding a lawyer and clients who (as here) show utter disdain for the FCA seal requirement and permitting them to represent the government in a *qui tam* suit causes harm to all, undermining the Department of Justice, Congress, and the Judiciary, while encouraging others to flout the law. *Cf. Gompers v. Buck's Stove & Range Co.,* 221 U.S. 418, 450 (1911) ("If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United Sates' would be a mere mockery.").

3. The Harm To The Defendant

Additionally, any discretionary test for deciding whether seal violations warrant dismissal should incorporate consideration of harm to the defendant. There is nothing in the FCA to suggest that the interests of the government are the only interests that matter. As the Senate Report states, the seal requirement was meant to "protect[] both the Government *and the defendant's interests* without harming those of the private relator." S. Rep. No. 99-345, at 24 (emphasis added).

Defendants have a strong and well-justified interest in having the complaint remain sealed. When a relator reveals prematurely that the defendant is named in a fraud action brought in the ***56** name of the United States, the public may think that the suit is brought by or has the approval of the government, even though the government has not yet intervened in the suit and may never do so. The violation of the seal requirement can therefore cause substantial harm to the defendant's business and reputation. As the Second Circuit explained, "a defendant's reputation is protected to some degree when a meritless *qui tam* action is filed, because the public will know that the government had an opportunity to review the claims but elected not to pursue them." *Pilon,* 60 F.3d at 999. As the Fourth Circuit has likewise recognized, the seal provision serves several purposes, including "to protect the reputation of a defendant in that the defendant is

named in a fraud action brought in the name of the United States, but the United States has not yet decided whether to intervene." *Smith,* 796 F.3d at 430 (citation and internal quotation marks omitted). Thus, to serve Congress's purposes, any discretionary test should account for the defendant's interests as well as the government's.

Moreover, even though the seal requirement is primarily intended to protect the government, the deleterious effect of a seal violation on defendants should not be ignored. When the seal is violated, a defendant has no adequate way to defend itself against a relator's assertions of fraud because the defendant has no access to the sealed complaint. A seal violation may present the public with a biased, one-sided view of the case, exposing the defendant to hostile media coverage. Indeed, the reputational damage to defendants may be (as here) the very purpose of the seal violation. *See* ***57** *Summers,* 623 F.3d at 298 ("Under such a regime, plaintiffs would be encouraged to make disclosures in circumstances when doing so might particularly strengthen their own position, such as those in which exposing a defendant to immediate and hostile media coverage might provide a plaintiff with the leverage to demand that a defendant come to terms quickly.").

Barring any consideration of harm to the defendant conflicts with basic principles of fairness. In providing guidance for the exercise of district court discretion, the Court should include this impact on the fairness of the proceedings as one of the factors for district courts to consider. Only by weighing the defendant's interest in the balance can the lower courts guard against the incentive for *qui tam* relators to seek an unfair litigation advantage over defendants.

Here, respondents' repeated, intentional violations of the seal resulted in an avalanche of unfavorable publicity that was undeniably damaging to State Farm's reputation. *See* J.A.57. Under any proper discretionary standard, the courts below should have considered this significant harm to the defendant as a factor weighing in favor of dismissal.

In sum, if this Court does not adopt a mandatory dismissal rule, the Court should nonetheless vacate and remand for reconsideration of the above factors, all of which here support dismissal.

***58 C. The Courts Below Committed Plain Error In Failing To Consider Respondents' Intentional Seal Violations After The January 2007 Partial Lifting Of The Seal**

Beyond disregarding willfulness and bad faith and failing to consider all the other relevant factors discussed above, the court of appeals plainly erred in confining its review (as did the district court) to seal violations prior to January 10, 2007, when the district court partially lifted the seal. *See* Pet. App. 21a, 63a. This error provides a separate and independent ground for vacatur and remand. *See, e.g., Fisher v. Univ. of Texas at Austin,* 133 S. Ct. 2411, 2421 (2013) (remanding where lower courts invoked the correct legal standard but "confined the … inquiry in too narrow a way"); *Pullman-Standard v. Swint,* 456 U.S. 273, 290-291 (1982) (remanding where court of appeals correctly stated the controlling standard but erred in its application).

The magistrate judge did not lift the seal when he allowed partial lifting of the seal for the limited purpose of apprising another federal judge of the existence of this *qui tam* suit in a separate contract action in Alabama district court between respondents and their former employer Renfroe. Pet. App. 21a. The order partially lifting the seal itself clarifies as much. J.A.5. The magistrate judge also twice issued orders after the partial lifting of the seal making clear to the parties that the case otherwise remained under seal. *See supra* at 10-11. Respondents'post-January 2007 filing of motions to vacate the seal and the government's responsive papers make clear that all ***59** involved understood that the court's seal order was in full force and effect. J.A. 174-87. Moreover, the proposed disclosure to the Alabama district judge never occurred, because he denied the request for an *ex parte* conference, *see Renfroe,* ECF No. 86 (N.D. Ala. Jan. 19, 2007), and he subsequently stated that he did not learn of the existence of this case until after the seal was finally lifted on August 1, 2007. J.A.69. Thus, the seal in this case cannot be deemed to have been rendered "moot" by the district court's January 10, 2007 order.

Nor was the seal "effectively mooted" on January 18, 2007, by a party's public filing in the *Renfroe* case. *See* Pet. App. 21a. Contrary to the court of appeals' description of that filing (*id.*), that filing did not reveal "the existence of this *qui tam* litigation." Rather, it merely included a speculative statement by plaintiff Renfroe as to "[t]he *likelihood* of a *qui tam* suit brought by the Defendants [the Rigsbys] with Scruggs as their attorney." *Renfroe,* ECF No. 85, at 2 (emphasis added).

The court of appeals' error greatly prejudiced petitioner by preventing consideration of some of respondents' most egregious disclosures, including (i) respondents' disclosures to Representative Taylor that enabled him to publicize the pendency of this FCA suit in his February 2007 written testimony to Congress, and (ii) respondents' violation of the seal in June 2007 when their counsel emailed their sealed First Amended Complaint to CBS News. *See supra* at 11-12. Moreover, the lower courts' refusal to consider these willful seal violations undoubtedly affected their decisions. Both courts held that dismissal was ***60** not appropriate in large part because there had been no disclosure by the media to the general public of the existence of respondents' lawsuit. Pet. App. 22a, 67a. But it is undisputed that Representative Taylor publicly disclosed the existence of the lawsuit in February 2007, while the seal was still in place and the government's investigations were ongoing. The lower courts declined to hold respondents responsible for that violation only because it occurred after the partial unsealing order - a fact that should have been wholly irrelevant.

Moreover, the lower courts' errors, if uncorrected, would have deleterious effects in other cases. Until now, partial unsealing orders, such as the one in this case, have been routine and uncontroversial in FCA cases. Holding that an order permitting a disclosure *only to another federal judge* moots a seal jeopardizes that useful and necessary practice. In addition, if a non-party's speculation that a *qui tam* case might have been filed can retroactively moot a seal, *qui tam* relators will be able to moot any seal simply by encouraging such speculation. All of this only encourages disrespect for judicial sealing orders and gamesmanship by unscrupulous relators and their counsel. *See Ruscher,* 2015 WL 4389644, *1 n.1 (interpreting court of appeals' decision below to require ignoring seal violations that took "place after the partial lift of the seal").

Given the lower courts' plain error concerning the force of the partial-lifting order and the prejudice to petitioner that resulted, this Court (if it does not reverse or otherwise vacate) should, at minimum, vacate and remand for consideration of all of ***61** respondents' willful violations from the filing of the complaint in April 2006 to the lifting of the seal in August 2007.

CONCLUSION

The judgment of the court of appeals below should be reversed or, at a minimum, vacated and remanded.

Footnotes

1 ... In 2009, while this case was pending, Congress amended the FCA. *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4(a), 123 Stat. 1617, 1621. The change to section 3729(a)(1), now section 3729(a)(1)(A), does not affect the issues presented herein.

2 ... The Scruggs law firm also represented Congressman Taylor in his suit against State Farm seeking to recover under his homeowners' insurance policy for alleged property damage from Hurricane Katrina. *See Taylor v. State Farm Fire & Cas. Co.,* 2006 WL 2466138 (S.D. Miss. Aug. 24, 2006).

3 ... *See also, e.g., Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 109 (2002) (the word "shall" admits of no discretion); *Ross v. Blake,* 136 S. Ct. 1850, 1857 (2016) (pointing to the term "shall" in rejecting "unwritten limits" to the "mandatory exhaustion regime" established by the Prison Litigation Reform Act) (citing, *inter alia, Miller v. French,* 530 U.S. 327, 337 (2000)); *Mach Mining, LLC v. E.E.O.C.,* 135 S. Ct. 1645, 1651 (2015) (holding "mandatory, not precatory," the statutory requirement that the EEOC "shall endeavor to eliminate [an] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion").

4 ... As with any conditional assignment, by failing to satisfy the requisite conditions, the relator surrenders the property right and litigating authority that would otherwise have been assigned. *See McKenzie v. Irving Trust Co.,* 323 U.S. 365, 368 (1945) ("[A]ssignment was approved by the Secretary of War, and on that date the conditions of a valid assignment, prescribed by the statute, had been fully satisfied."); *MindGames, Inc. v. W. Publ'g Co.,* 218 F.3d 652, 654 (7th Cir. 2000) ("A conditional right … does not become an enforceable right until the condition occurs ….").

5 ... See *also McNeil,* 508 U.S. at 112-13; *Milner v. Dep't of Navy,* 562 U.S. 562, 571 n.5 (2011) ("The judicial role is to enforce th[e] congressionally determined balance."); *Am. Textile Mfrs. Inst., Inc. v. Donovan,* 452 U.S. 490, 509 (1981) ("Any standard based on a balancing of costs and benefits by the Secretary that strikes a different balance than that struck by Congress would be inconsistent with the command set forth in [statute]."); *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project,* 454 U.S. 139, 145 (1981) (in enacting the Freedom of Information Act, Congress "effected a balance" between the needs of the public and the necessity of nondisclosure or secrecy; the court of appeals "should have accepted the balance struck by Congress," rather than "engrafting" onto the statutory language "unique concepts of its own making").

6 ... For example, section 3730(c)(3) requires that, "[i]f the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts …." This provision governs litigation procedures and is not part of subsection (b), which creates the *qui tam* right of action. Hence, it is a procedural rule, and a sanction for a relator's failure to comply might well be subject to judicial discretion.

7 ... *See, e.g., Foster v. Savannah Common,* 140 Fed. App'x 905, 908 (11th Cir. 2005) (affirming dismissal where relator failed to comply because she "had no knowledge of sealing a case"); *United States ex rel. Le Blanc v. ITT Indus., Inc.,* 492 F. Supp. 2d 303, 305, 308 (S.D.N.Y. 2007) (dismissing although relator immediately moved to seal complaint); *Andre v. Bank of Am., NA,* 2016 WL 69914, at *5-6 (N.D. Cal. Jan. 6, 2016) (dismissing claim of relator who was lawyer and failed to file under seal); *Lariviere v. Lariviere,* 2012 WL 1853833, *1-2 (D. Mass. May 18, 2012) (dismissing where counsel for relators failed to file under seal); *Segelstrom v. Citibank, N.A.,* 76 F. Supp. 3d 1, 14 (D.D.C. 2014) (dismissing for failure to file under seal).

8 ... District courts have generally treated dismissal for a failure to file under seal as consistent with the Ninth Circuit's balancing test in *Lujan. See* Point II.B. 1 *infra.*

9 ... The Second and Fourth Circuits do not apply the *Lujan* three-factor test, asking instead whether the seal violations "incurably frustrated" the Act's purposes. *Pilon,* 60 F.3d at 998-99; *see Smith,* 796 F.3d at 430. But that standard gives no more weight to bad faith than the *Lujan* test. *See, e.g., Le Blanc,* 492 F. Supp. 2d at 307 (stating that "*Pilon* did not turn on whether there was bad faith on the part of the relators").

10 ... Citing *ACLU v. Holder,* 673 F.3d 245 (4th Cir. 2011), the court of appeals suggested that disclosure of the allegations is irrelevant because only the existence of the suit matters. Pet. App. 21a-22a. In *Holder,* the Fourth Circuit opined without analysis that "the seal provisions limit the relator only from publicly discussing the *filing* of the qui tam complaint" and that "[n]othing in the FCA prevents the qui tam relator from disclosing the existence of the fraud." *Id.* at 254 (emphasis added). The language of the FCA does not limit the seal to the "filing" of the complaint; to the contrary, the complaint itself must be kept under seal. *See* 31 U.S.C. 3730(b)(2). In any event, respondents here did disclose the existence of the suit, and the news agencies' publication of the allegations of the suit are therefore part and parcel of the undisputed seal violations. More generally, a disclosure of the substance of a relator's claims might well alert a defendant to the existence of an FCA lawsuit and interfere with the government's investigation.

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