No. 15-513

In the Supreme Court of the United States

STATE FARM FIRE AND CASUALTY COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA, EX REL. CORI RIGSBY,
ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the court of appeals erred in holding that, if a *qui tam* relator violates the False Claims Act's seal requirement, the district court need not automatically dismiss the relator's complaint but instead has discretion to fashion an appropriate alternative sanction.

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INTEREST OF THE UNITED STATES

This case presents the question whether a district court must dismiss a *qui tam* suit when the relator violates the False Claims Act's seal requirement, 31 U.S.C. 3730(b)(2). The United States, in whose name and on whose behalf *qui tam* actions are brought, has a substantial interest in the resolution of that question. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, imposes civil liability on any person who knowingly submits false or fraudulent claims to the federal government for payment or approval. 31 U.S.C. 3729.

The Attorney General may bring a civil action to enforce the FCA. 31 U.S.C. 3730(a). Alternatively, a private person (known as a "relator") may bring a *qui tam* action "for the person and for the United States Government," unless the same allegations have already been asserted in another *qui tam* suit or in a suit to which the government is a party. 31 U.S.C. 3730(b)(1), (5), and (e)(3). If a *qui tam* action results in civil penalties or the recovery of damages, the district court must divide the award between the government and the relator. 31 U.S.C. 3730(d).

As originally enacted in 1863, the FCA did not authorize the United States to intervene in *qui tam* suits. See Act of Mar. 2, 1863, ch. 67, §§ 4, 6-7, 12 Stat. 698. In 1943, Congress amended the FCA to require relators, after filing a complaint, to provide a copy of the complaint and material evidence to the United States, and to authorize the United States to intervene within 60 days to take over the suit. Act of Dec. 23, 1943, ch. 377, 57 Stat. 608; see 31 U.S.C. 232(C) (Supp. III 1943).

By 1986, Congress had concluded that too many frauds against the federal treasury were not being detected and redressed because of the government's limited enforcement resources. In the False Claims Amendments Act of 1986 (Amendments Act), Pub. L. No. 99-562, 100 Stat. 3153, Congress enacted a set of FCA reforms, such as establishing a minimum award share for relators, that were designed "to encourage more private enforcement suits." S. Rep. No. 345, 99th Cong., 2d Sess. 23-24 (1986) (1986 Senate Report); see 31 U.S.C. 3730(d)(1) and (2). During the legislative process, however, the Department of Justice expressed concern that the filing of *qui tam* suits

can tip off defendants about a pending federal criminal investigation. 1986 Senate Report 24. To address that problem, Congress required *qui tam* complaints to be filed under seal until the government decides whether to intervene. Amendments Act § 3, 100 Stat. 3154-3155.

The FCA currently provides 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 relator must serve the government with a copy of the complaint and "all material evidence and information the person possesses." *Ibid.* The FCA authorizes the government, "for good cause shown," to seek extensions of the initial 60-day sealing period. 31 U.S.C. 3730(b)(3). Once a complaint is unsealed and served on the defendant, the defendant has at least 20 days to respond. *Ibid.*

2. During the period relevant to this case, petitioner issued government-backed flood-insurance policies in addition to its own homeowner's insurance policies. Pet. App. 3a-4a. Many homeowners were covered by both types of policies. *Id.* at 2a. The flood policy covered flood damage but excluded wind damage, while the homeowner's policy covered wind damage but excluded flood damage. *Ibid.* Flood-damage claims therefore would be paid from the federal treasury, while wind-damage claims would be paid from petitioner's own funds. *Ibid.*

Respondents are claims adjusters whose employer provided disaster-claims-management services for petitioner following Hurricane Katrina. Pet. App. 3a. They allege a fraudulent scheme through which petitioner, in an effort to shift the costs of claims to the federal government, misclassified wind damage as flood dam-

age when processing claims for properties covered by both types of policies. *Id.* at 4a-7a.

3. In April 2006, respondents filed a *qui tam* complaint *in camera* in the Southern District of Mississippi. Pet. App. 1a. The district court ordered the complaint sealed. J.A. 1-2. On the government's motion, the court issued multiple orders extending the initial 60-day sealing period. J.A. 3-4, 7-8, 9-10. In January 2007, a magistrate judge partially lifted the seal to permit disclosure of the case's existence to judicial officers in related litigation, J.A. 5-6, and in August 2007 he fully lifted the seal, J.A. 11-12. The government ultimately declined to intervene in the suit. Pet. App. 7a.

Petitioner moved to dismiss the complaint on the ground that respondents had breached the seal requirement on numerous occasions before the seal was fully lifted in August 2007. Pet. App. 45a-57a. The district court denied that motion. *Id.* at 44a-69a. The court first concluded that most of the disclosures identified by petitioner had not breached the seal. The court explained that any disclosures that recounted only the underlying allegations that petitioner had misclassified wind damage as flood damage, without disclosing the existence of the FCA suit, were not barred by the seal. *Id.* at 66a-67a. The court also held that the seal had effectively become "moot" after the magistrate judge's partial-lifting order in January 2007, because that order had not specified that the disclosures to the judicial officers in the related litigation were required to be under seal. *Id.* at 63a.

In light of those determinations, the district court found that only three of the identified disclosures had violated the seal. Pet. App. 65a. In each instance, one

of respondents' former attorneys had sent an email to a journalist attaching the evidentiary disclosures that respondents had served on the government. *Id.* at 45a-48a, 65a; see J.A. 332-369, 414-483. The court held, however, that those three improper disclosures did not warrant dismissal of the suit. The court analyzed three factors—the presence or absence of harm to the government from the disclosures, the severity of the violations, and respondents' bad faith or willfulness—that other courts had identified in deciding whether to dismiss a *qui tam* suit for seal violations. Pet. App. 59a. The court emphasized that "no evidence" in the record established that the violations had "led to a public disclosure in the news media that this action had been filed" or had "hampered the government's investigation," and that respondents had not authorized their former attorneys' actions. *Id.* at 67a-68a.

The case proceeded to trial on a bellwether claim involving one insured property. The jury returned a unanimous verdict finding that petitioner had knowingly submitted a false claim and a false record with respect to that property by attributing the Hurricane Katrina damage to flood rather than wind. Pet. App. 1a-2a, 117a. The jury found that the fraud had caused the United States $250,000 in damages. *Id.* at 7a. Respondents moved for additional discovery on other allegedly fraudulent claims, but the district court denied the motion. *Id.* at 8a.

4. Respondents appealed, and petitioner cross-appealed. The court of appeals reversed the district court's discovery ruling but otherwise affirmed. Pet. App. 1a-41a.

As relevant here, the court of appeals rejected petitioner's argument that a seal violation always requires

a court to dismiss a relator's suit with prejudice. Pet. App. 18a-23a. The court explained that Congress's addition of the seal requirement in 1986 was "intended to encourage more, not fewer, private FCA actions," and that "[h]olding that any violation of the seal requirement mandates dismissal would frustrate that purpose, particularly when the government suffers minimal or no harm from the violation." *Id.* at 20a. The court agreed with the district court that a court should instead "evaluate three factors in determining whether dismissal" is the appropriate sanction for FCA seal violations: "1) the harm to the government from the violations; 2) the nature of the violations; and 3) whether the violations were made willfully or in bad faith." *Id.* at 19a-20a. The court further held that a district court's application of those factors should be reviewed for abuse of discretion. *Id.* at 20a-21a.

The court of appeals concluded that the district court had not abused its discretion in declining to dismiss this suit with prejudice. The court affirmed the district court's holding that the partial-lifting order had mooted the seal, noting that "the existence of this qui tam litigation was revealed [in the related litigation] in another party's public filings within days of the partial seal lift." Pet. App. 21a. And like the district court, the court of appeals "confine[d] [its] analysis to disclosures of the existence of the suit itself," explaining that "'[n]othing in the FCA prevents the qui tam relator from disclosing the existence of the fraud.'" *Id.* at 21a-22a (quoting *ACLU* v. *Holder*, 673 F.3d 245, 254 (4th Cir. 2011)).

"Having closely reviewed each of the [improper] disclosures," the court of appeals held that dismissal of the suit was not warranted under the three-factor

standard that it had adopted. Pet. App. 22a-23a. The court explained that, although respondents had violated the seal requirement, "none of the disclosures appear to have resulted in the publication of the existence of this suit before the seal was partially lifted." *Id.* at 22a. The court further explained that the violations were "considerably less severe" than in cases where the relator "complete[ly] fail[s] to file under seal or serve the government." *Id.* at 22a-23a. The court also concluded that, even if the attorneys' bad faith in making the improper disclosures were imputed to respondents, the overall balance of the relevant factors did not warrant reversal. *Id.* at 22a n.9, 23a.

SUMMARY OF ARGUMENT

The district court was not required to dismiss this suit with prejudice as a sanction for respondents' three adjudicated violations of the FCA's seal requirement.

A. The FCA does not require dismissal of a *qui tam* suit with prejudice as the mandatory sanction for every violation of the seal requirement. District courts have traditionally enjoyed broad discretion to devise appropriate sanctions for violations of procedural rules and court orders, including protective orders barring the disclosure of information. Nothing in the FCA suggests that Congress intended to depart from that established practice by requiring courts to punish every seal violation, however minor or inconsequential, through the extreme sanction of dismissal of the relator's suit with prejudice. The statutory text, in fact, reflects the opposite expectation. In several contemporaneously enacted provisions of Section 3730, Congress expressly mandated dismissal in particular

circumstances, but it declined to do so in the seal provision.

An automatic-dismissal rule would also undermine the governmental interests that the seal provision is meant to protect. The seal provision allows a citizen to secure his status as a proper relator by filing suit, while affording the government time to investigate the alleged fraud before alerting the defendant. When a relator violates the seal requirement, it is thus the government, not the defendant, who is injured. Yet the automatic-dismissal rule would exacerbate the government's injury by depriving the government of the potential recovery from the relator's suit, forcing the government either to devote resources to pursuing the claim itself, or to allow possible fraud to go unredressed. Rather than granting the defendant the windfall that dismissal with prejudice would entail, the better course will often be to impose other types of sanctions on the relator or her attorney, thus preserving the relator's ability to maintain the suit on the government's behalf.

The court of appeals correctly identified the three factors most relevant to a district court's discretionary decision whether to dismiss a relator's suit with prejudice for a seal violation: whether any harm was actually inflicted on the government, the severity of the violation, and the relator's willfulness or bad faith. Other factors may be relevant in particular cases, and a district court has ample discretion to impose sanctions short of dismissal, such as attorney disqualification or discipline or a reduction in the relator's share of any recovery.

B. If the Court reaches the question whether the district court misapplied the multi-factor discretion-

ary standard, it should hold that the court's application of that standard, and the court's ultimate decision not to dismiss this suit, did not constitute an abuse of that court's discretion. The three improper disclosures that the lower courts found to have occurred were relatively minor and had no apparent practical impact on the government's ability to investigate the allegations. Although respondents' former attorneys acted in bad faith, the lower courts reasonably concluded that the other relevant factors outweighed that consideration, particularly given that respondents themselves did not authorize the disclosures. Petitioner's contrary arguments rest almost entirely on disclosures that the lower courts held not to violate the seal. Those disclosures are not properly before this Court, and petitioner has advanced no specific argument that the three violations found by the courts below compelled the district court to dismiss the case with prejudice.

ARGUMENT

The district court acted well within its discretion in declining to dismiss this case with prejudice as a sanction for the decision of respondents' former attorneys to share their evidentiary disclosures with three journalists. This Court therefore should affirm the ensuing jury verdict finding that petitioner had defrauded the United States.

A. A District Court Has Discretion To Fashion An Appropriate Remedy For Violation Of The FCA's Seal Provision

The FCA does not require a district court to dismiss a *qui tam* complaint with prejudice whenever the relator violates the seal requirement. Rather, district

courts retain their traditional discretion to fashion appropriate remedies for violations of procedural rules or court orders, including non-disclosure orders. Permissible sanctions short of dismissal include monetary assessments, reductions in a relator's share of any recovery, and attorney disqualification or bar referral. The court may also conclude that a particular violation is sufficiently minor or inconsequential that it does not warrant a sanction. Petitioner's inflexible automatic-dismissal rule has no basis in the text or design of the FCA and would undermine the very governmental interests that the seal provision is meant to protect.

1. Petitioner's proposed automatic-dismissal rule is contrary to the text and legislative context of the FCA's seal requirement

The FCA requires that every *qui tam* suit must be filed under seal, but it does not prescribe any particular remedy for violation of that requirement. When a "statute does not specify" the "consequences" of violating a procedural rule, "this Court has looked to statutory language, to the relevant context, and to what they reveal about the purposes [the requirement] is designed to serve." *Dolan* v. *United States*, 560 U.S. 605, 610 (2010). Those three considerations—language, legal context, and purpose—refute petitioner's view that the mandatory remedy for every violation of the FCA's seal requirement, however minor or inconsequential, is the extreme sanction of dismissal with prejudice.

a. Section 3730(b)(2) provides that a *qui tam* 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 FCA's text thus unambiguously prescribes manda-

tory requirements. But while filing under seal is not optional, the statute does not specify the remedy for violating the seal requirement.

Although the statutory text does not conclusively answer the question, it strongly suggests that district courts retain discretion to fashion case-specific remedies for violations of FCA sealing orders. When Congress intends dismissal to be the exclusive remedy for a failure to satisfy a requirement, it has three straightforward ways to make that intent clear. It can expressly rank the requirement as jurisdictional. See, *e.g.*, 28 U.S.C. 1332(a) (amount-in-controversy requirement for diversity jurisdiction). It can state that an action may not be brought or maintained unless the requirement is met. See, *e.g.*, *Hallstrom* v. *Tillamook Cnty.*, 493 U.S. 20, 25-26 (1989). Or it can provide directly for mandatory dismissal. See, *e.g.*, 28 U.S.C. 1915(e)(2). Section 3730(b)(2) does not employ any of those standard formulations. The absence of such language in Section 3730(b)(2) is particularly significant because each of those three formulations appears elsewhere in Section 3730, and most of those contrasting provisions were enacted contemporaneously with the seal requirement.

Subsection (e) of Section 3730 is entitled "CERTAIN ACTIONS BARRED." It was added to the FCA in the same section of the Amendments Act as the seal provision. See § 3, 100 Stat. 3154-3155, 3157. Its first two subparagraphs provide that "[n]o court shall have jurisdiction" over certain "action[s] brought * * * under subsection (b) of this section" involving members of the armed forces or government officials. 31 U.S.C. 3730(e)(1) and (2)(A). Its third subparagraph states that "[i]n no event may a person bring an action

under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party." 31 U.S.C. 3730(e)(3). And its fourth subparagraph, as amended in 2010, states that "[t]he court shall dismiss an action or claim under this section, * * * if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed" in specified fora; as originally enacted, that provision was expressly jurisdictional. 31 U.S.C. 3730(e)(4)(A); see Amendments Act § 3, 100 Stat. 3157.

In addition to those Subsection (e) provisions, Section 3730(b)(5), also added by the Amendments Act, prohibits a relator from "bring[ing] a related action based on the facts underlying [a] pending [*qui tam*] action." 31 U.S.C. 3730(b)(5); see Amendments Act § 3, 100 Stat. 3155. And a provision added in 1988 states that, if a relator is criminally convicted based on his or her role in the underlying fraud, the relator "shall be dismissed from the civil action." 31 U.S.C. 3730(d)(3).

Those directives mandating dismissal of a relator's suit in other circumstances provide compelling textual evidence that Congress did not intend dismissal to be the required remedy for every violation of an FCA sealing order. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Sebelius* v. *Cloer*, 133 S. Ct. 1886, 1894 (2013) (quoting *Bates* v. *United States*, 522 U.S. 23, 29-30 (1997)). The most natural inference from the text of Section 3730 as a whole is

that Congress declined to mandate dismissal for all seal violations because it expected district courts to maintain flexibility to address them.

b. That inference is reinforced by the background legal context against which Congress legislated. Since long before the enactment of the seal requirement in 1986, district courts have had the authority to issue protective orders barring the disclosure of specified information, such as confidential or privileged information acquired in discovery, or the terms of a confidential settlement. See Fed. R. Civ. P. 26(c)(1)(F)-(G); see also *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 36 (1984) ("The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders."). Consistent with district courts' ordinary "discretion * * * to fashion an appropriate sanction for conduct which abuses the judicial process," *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 44-45 (1991), district courts possess wide discretion to fashion appropriate sanctions for violations of such orders. Thus, trial courts appropriately impose a range of sanctions for violation of sealing orders, from monetary assessments to dismissal with prejudice. See, *e.g.*, *Greiner* v. *City of Champlin*, 152 F.3d 787, 789-790 (8th Cir. 1998) (monetary sanctions); *Grove Fresh Distribs., Inc.* v. *John Labatt Ltd.*, 134 F.3d 374, 1998 WL 54676, at *3-*5 (7th Cir. Feb. 5, 1998) (Tbl.) (same), cert. denied, 525 U.S. 877 (1998); see also *Toon* v. *Wackenhut Corr. Corp.*, 250 F.3d 950, 952-954 (5th Cir. 2001). Courts also sometimes decline to impose any sanction at all. See, *e.g.*, *In re JP Morgan Chase Bank, N.A.*, 799 F.3d 36, 44-45 (1st Cir. 2015).

When Congress enacted the FCA's seal requirement, it presumably understood that judicial orders

prohibiting disclosure of sensitive information have long been enforced through courts' exercise of case-by-case discretion to fashion appropriate sanctions. Congress's choice not to specify dismissal as the exclusive remedy for seal violations—while mandating dismissal in other provisions of Section 3730—therefore likely reflects its expectation that courts would enforce the FCA seal requirement in the same way that they enforce other such requirements.

That inference is especially sound with respect to seal violations that, like the violation here, occur after the district court has issued an order under Section 3730(b)(3) extending the seal beyond the initial statutory 60-day period. Any violation of the seal requirement that occurs after the initial 60-day period necessarily violates the court's order as well. If Congress had intended to displace a district court's ordinary flexibility to address violations of its own orders, and to substitute a draconian automatic-dismissal rule, it presumably would have expressed that intent in the statutory text.

c. Petitioner's proposed mandatory-dismissal rule is also untethered to the basic legislative objectives of the Amendments Act. Congress enacted the seal requirement and the other 1986 reforms after concluding that "perhaps the most serious problem plaguing effective enforcement [of the FCA] is a lack of resources on the part of Federal enforcement agencies." 1986 Senate Report 7. "Allegations that perhaps could develop into very significant cases," the 1986 Senate Report explained, were "often left unaddressed at the outset due to a judgment that devoting scarce resources to a questionable case may not be efficient." *Ibid.* To address that problem, Congress amended

Section 3730 in a number of ways to "encourage assistance from the private citizenry." *Id.* at 8.

The Department of Justice, however, had "raised a concern * * * that a greater number of private suits could increase the chances that false claims allegations in civil suits might overlap with allegations already under criminal investigation." 1986 Senate Report 24. In particular, the Department had warned that "the public filing of overlapping false claims allegations could potentially 'tip off' investigation targets when the criminal inquiry is at a sensitive stage." *Ibid.* Congress therefore enacted the seal requirement "to allow the Government an adequate opportunity to fully evaluate the private enforcement suit." *Ibid.* The seal requirement strikes a "balance[]" between "the purposes of *qui tam* actions" and "law enforcement needs." *Ibid.* As the Senate Judiciary Committee explained, the seal requirement allows a citizen to secure his status as a proper relator under the FCA by filing suit before the government—thus encouraging whistleblowers to come forward and increasing the government's fraud recoveries—while affording the government time to investigate the alleged fraud before the defendant is made aware of the allegations. See *ibid.*; see also 31 U.S.C. 3730(e)(3) (barring *qui tam* suit if government is party to suit on same allegations).

Section 3730(b)(2)'s seal requirement was thus intended to protect the *government's* enforcement interests. Far from viewing FCA defendants as the victims of seal violations, Congress acted out of concern that defendants might exploit premature disclosures in order to thwart government investigations. Under petitioner's approach, however, every violation of the

seal requirement would result in dismissal of the complaint and a consequent windfall to the defendant, whether or not the district court viewed that remedy as likely to vindicate the government's interests, either in the case before the court or more generally. Because the seal requirement is intended to protect the government *from* potential evasive action by FCA defendants, it is particularly unlikely that Congress intended to divest district courts of their usual discretion to choose appropriate sanctions for violations of non-disclosure requirements, and to mandate dismissal even of FCA cases where the government has not requested that relief.

Although deterring seal violations is important and necessary, district courts have an array of remedial tools short of dismissal, including monetary sanctions, a reduction of a relator's share of damages, and attorney discipline. See pp. 23-24, 30-31, *infra*. Particularly if the government has intervened, dismissal of the relator may be appropriate in cases involving severe violations, serious harm to a government investigation, or extreme bad-faith tactics, in order to ensure maximum deterrence of the most significant type of breaches. But a rule that would require the district court to grant an unearned victory to the defendant at the government's expense, without regard to the case-specific factors that would ordinarily guide the court's exercise of remedial discretion, is no way to vindicate the government's interest in compliance with the seal requirement.

2. Petitioner identifies no convincing reason to adopt an automatic-dismissal rule

Petitioner argues (Br. 21) that the FCA's seal requirement is a "statutory precondition" to filing suit

"whose violation should trigger a bright-line rule of mandatory dismissal." Petitioner's arguments are largely unresponsive to the textual and historical indicia of congressional intent that are discussed above, and they are unpersuasive on their own terms.

a. Petitioner argues (Br. 21-24) that, because Section 3730(b)(1) uses the word "shall," the seal requirement is enforceable only through dismissal with prejudice of a relator's suit. That is a non sequitur. No one doubts that the seal requirement is mandatory; the court of appeals did not construe the provision to mean that a relator "may" file under seal. Rather, the question presented here is whether dismissal of a *qui tam* suit with prejudice is the only permissible remedy for a relator's violation of that mandatory requirement.

Congress's use of the word "shall" does not resolve that question. Cf. *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 717-719 (1990). Many procedural requirements are mandatory, yet a plaintiff's violation of such requirements does not invariably require dismissal of the suit with prejudice. For example, a plaintiff "must" serve a copy of the complaint and summons on the defendant, but the failure to do so does not require dismissal with prejudice. Fed. R. Civ. P. 4(c)(1) and (m). A party challenging the constitutionality of a federal statute "must" serve notice on the Attorney General (so she can decide whether to intervene), but the failure to do so "does not forfeit a constitutional claim." Fed. R. Civ. P. 5.1(a)(1) and (d). And a corporate plaintiff "must" file a corporate disclosure statement, Fed. R. Civ. P. 7.1, but petitioner could not colorably contend that the plaintiff's failure

to do so inevitably requires the suit to be dismissed with prejudice.

Petitioner's comparison (Br. 23) of the word "shall" in the seal provision with the word "may" in other provisions is therefore beside the point. The more revealing contrast is between the seal provision and the provisions of Section 3730 discussed above that either expressly rank a particular requirement as jurisdictional, expressly condition the bringing of a suit on satisfaction of the requirement, or specifically mandate dismissal in particular circumstances. See pp. 11-12, *supra*.

b. Petitioner argues (Br. 24-28) that, because Congress codified both the seal requirement and the private right of action in the same subsection, a violation of the seal requirement requires dismissal of the action with prejudice. That argument is not supported either by this Court's precedents or by common sense. The most likely reason that Congress grouped those provisions together is that Subsection (b) is entitled "ACTIONS BY PRIVATE PERSONS," and both the cause of action and the seal requirement are related to that topic. The seal requirement would not as naturally have fit under other subsections of Section 3730, which address such matters as the rights and obligations of the Attorney General, awards to relators, and the protection of relators from retaliation; or under Section 3731, which addresses procedures for FCA claims generally, not for *qui tam* claims specifically.

Petitioner relies principally on *Hallstrom*, *supra*, in which this Court held that a private action under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6972 (1982 & Supp. V 1987), must be dismissed if the plaintiff fails to comply with the

statutory requirement to notify certain entities 60 days before filing suit. 493 U.S. at 22-23, 31. As the Court explained, however, that statute authorized a private party to "commence a civil action * * * '[*except*] *as provided in subsection b*,'" and subsection (b) in turn read: "'*Actions prohibited. No action may be commenced* * * * prior to sixty days after the plaintiff has given notice of the violation'" to the relevant entities. *Id.* at 25 (emphasis added; brackets in original) (quoting 42 U.S.C. 6972(a)(1) and (b)(1) (1982)). The Court held that "[t]he language of this provision could not be clearer": "Actions commenced prior to 60 days after notice are 'prohibited.'" *Id.* at 26. The Court further observed that, through the "except" clause, the 60-day notice requirement had been "expressly incorporated by reference into" the provision creating the cause of action. *Ibid.*

Section 3730(b) bears no meaningful resemblance to the RCRA provisions at issue in *Hallstrom*. The cause-of-action provision (Subsection (b)(1)) does not state that the action may be brought "except as provided" in the seal provision (Subsection (b)(2)). The seal provision does not begin with a phrase like "No action may be commenced"—even though similar formulations appear in other parts of Section 3730. And the seal provision is not entitled "Actions prohibited"—in marked contrast to Subsection (e), which is entitled "CERTAIN ACTIONS BARRED." Accordingly, unlike in *Hallstrom*, permitting a suit to go forward despite a seal violation does not "flatly contradict[] the language of the statute," 493 U.S. at 26, but rather gives due weight to all of Congress's drafting choices.

Petitioner cites (Br. 26-27) two other decisions of this Court, but they are also irrelevant for the same

reason: The statutory text in each case expressly conditioned the right to sue on compliance with a particular condition. See *United States ex rel. Tex. Portland Cement Co.* v. *McCord*, 233 U.S. 157, 162 (1914) (explaining that the "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"); *McNeil* v. *United States*, 508 U.S. 106, 107 n.1, 111 (1993) (statute providing that an "action shall not be instituted . . . 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") (quoting 28 U.S.C. 2675(a)). Contrary to petitioner's characterization, neither decision turned on the mere fact that the condition at issue was imposed by the same statutory provision that conferred the right of action.

c. Petitioner also finds it significant (Br. 28-30) that, in articulating a "theoretical justification" for a relator's Article III standing to seek relief for an injury to the government, this Court explained that "[t]he FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim." *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 773, 778 (2000). According to petitioner (Br. 28), that "partial assignment is not complete unless the relator adheres to the necessary statutory conditions."

That argument begs the question whether compliance with the seal requirement is a "necessary statutory condition[]" to proceeding with a *qui tam* action. Although Congress may validly condition a partial assignment of a damages claim on compliance with a statutory requirement, it just as clearly has the au-

thority to establish procedural rules for pursuing the assigned claim that are enforceable in other ways, such as through monetary sanctions or attorney discipline. This Court's characterization of the FCA as partially assigning the government's claim provides no reason to view the seal requirement as the former type of rule.

d. Petitioner set outs a labyrinthine legislative-history argument (Br. 31-35) that ultimately rests on little more than a single sentence that described *unenacted* text and that was included in a conference report issued 43 years before the seal requirement was enacted.

In 1943, Congress amended the FCA to permit the government to intervene and to require relators to notify the government after filing a complaint. Act of Dec. 23, 1943, 57 Stat. 608-609; see 31 U.S.C. 232(C) (Supp. III 1943); p. 2, *supra*. During the legislative process, the Senate had proposed an amendment to the original House bill that, *inter alia*, would have required a relator to notify the government *before* bringing suit; but the conference committee settled on the post-filing-notice requirement. 89 Cong. Rec. 10,744-10,746 (1943); see *id.* at 7570-7580, 7596-7617. The conference report described the Senate amendment as having "specified the conditions under which [*qui tam* suits] could be maintained." H.R. Conf. Rep. No. 933, 78th Cong., 1st Sess. 4 (1943). Based on that sentence, petitioner argues (Br. 33-35) that (1) the 1943 Congress must have understood the Senate's proposed pre-filing-notice requirement to be a mandatory precondition to suit; (2) it is an "unmistakable" inference that the 1943 Congress would have had the same understanding of the *post*-filing-notice provision that

was actually enacted; and (3) the Congress that enacted the seal requirement four decades later therefore would have understood it to be a precondition to suit, since the seal requirement serves a purpose similar to that of the 1943 post-filing-notice requirement.

That argument is seriously flawed. Most significantly, the pertinent text of the 1943 unenacted Senate amendment that the report was describing stated: "[*N*]*o district court of the United States shall have power or jurisdiction* to hear, try, or determine [a *qui tam*] suit * * * unless prior to the commencement thereof * * * such person has made full disclosure in writing to the Attorney General of the grounds thereof." 89 Cong. Rec. at 10,744-10,745 (emphasis added); see *id.* at 7570. Because the Senate's pre-filing-notice requirement would have been jurisdictional, a violation of that requirement would have triggered mandatory dismissal of the suit. But when the conference committee replaced the Senate's pre-filing-notice requirement with a post-filing-notice requirement, it declined to adopt any such language: "Whenever any such suit shall be brought * * * notice of the pendency of such suit shall be given to the United States." Act of Dec. 23, 1943, 57 Stat. 608; see 89 Cong. Rec. at 10,745-10,746. The natural inference from the 1943 legislative process is that the conference committee did *not* intend dismissal of a suit to be the mandatory consequence of a relator's failure to provide the required post-filing notice.

In any event, nothing in the text or history of the Amendments Act suggests that the 1986 Congress believed that a violation of the 1943 post-filing-notice requirement invariably resulted in a dismissal with prejudice. Petitioner identifies no judicial decision that

had so held. Petitioner attaches significance (Br. 34) to the 1986 Senate Report's statement that the seal requirement would have the "same effect" as if the relator had notified the government before suing. But that statement was referring to the seal mechanism's role in ensuring that the defendant would not be forced to respond to the complaint until it knew whether the government would intervene, just as if the plaintiff had refrained from filing suit until the government made that decision. See 1986 Senate Report 24. It had nothing to do with the question whether violation of the seal requirement mandates the sanction of dismissal with prejudice.[1]

e. Petitioner predicts (Br. 39) that, without an automatic-dismissal rule, seal violations will not be sufficiently deterred. Petitioner has identified no evidence, however, that seal violations have been more prevalent in the four circuits that have rejected the automatic-dismissal rule. See U.S. Cert. Amicus Br. 14. And even if a district court concludes that dismissal is not warranted, it can achieve a strong measure of deterrence by imposing other sanctions, such as attorney discipline or disqualification or monetary sanctions, as courts have long done for breaches of protective orders outside the FCA context. See pp. 13-14, *supra*. If the *qui tam* suit is successful, the district court could also punish the relator by limiting him to the statutory minimum percentage of the government's recovery. See, *e.g.*, *United States ex rel. Bibby* v. *Wells Fargo Home Mortg., Inc.*, 76 F. Supp.

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[1] Petitioner also seems to suggest (Br. 34) that the 1986 Senate Report equated the seal requirement with the RCRA provisions at issue in *Hallstrom*. Those provisions were not mentioned in the report, however, and *Hallstrom* had not yet been decided.

3d 1399, 1414 (N.D. Ga. 2015), appeal dismissed, No. 15-10279 (11th Cir. Apr. 16, 2015). Such a penalty might be imposed in conjunction with discipline or disqualification of the attorney who committed the violation. In many cases, such targeted sanctions will better serve the statute's objectives than dismissal because they will effectively punish and deter seal violations while preserving the government's ability to recover for the alleged fraud through the relator's suit.

3. The courts below identified the most relevant factors for deciding whether to dismiss a case for a seal violation

a. The court of appeals held that district courts, in determining whether to dismiss a relator's suit for a seal violation, should consider (1) whether the government was harmed by the violation; (2) the severity of the violation; and (3) whether the relator acted willfully or in bad faith. Pet. App. 19a-20a. The district court identified the same three criteria as relevant to its decision whether to dismiss the suit. *Id.* at 59a. Those three factors have been articulated in some form by all four circuits that have adopted a discretionary standard. Because it is particularly important to deter harmful, egregious, and intentional violations of the seal requirement, those factors capture the most relevant criteria that a district court should consider in the mine-run case.

As with other discretionary decisions about an appropriate sanction for litigant or attorney misconduct, a district court may take account of other relevant considerations or circumstances as particular cases warrant. In all cases, however, the court's exercise of discretion should be guided primarily by the purpose of Section 3730(b)(2): protecting the government's in-

vestigatory interests while encouraging meritorious *qui tam* suits. For that reason, if the United States informs the court that its interests have not been prejudiced by the violation and that continued prosecution of the *qui tam* suit would further its own enforcement goals, the court should give that assessment substantial weight. Likewise, if the United States indicates that it *has* been injured by the disclosure, that should also carry substantial weight in the sanction decision.

b. Petitioner urges (Br. 51) the Court to "reject the requirement * * * that a showing of actual harm to the government is a necessary predicate for dismissal." Petitioner is correct that dismissal may sometimes be an appropriate sanction even for FCA seal violations that have caused no demonstrated harm to the government. Contrary to petitioner's suggestion (*ibid.*), however, the court of appeals did not treat the absence of demonstrated harm as dispositive here. Rather, after "conclud[ing] first that the government was not likely harmed," Pet. App. 22a, the court went on to consider and balance the other two factors that it had identified as relevant, see *id.* at 22a-23a. The district court likewise analyzed all three factors rather than treating the absence of demonstrated harm to the government as precluding dismissal. See *id.* at 58a-69a.[2]

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[2] In attributing to the court of appeals a per se rule that dismissal is appropriate only if the government was actually harmed, petitioner relies (Br. 51) on (1) the Ninth Circuit's statement that "[t]he mere possibility that the Government *might* have been harmed by disclosure is not alone enough reason to justify dismissal of the entire action," *United States ex rel. Lujan* v. *Hughes Aircraft Co.*, 67 F.3d 242, 245 (1995), and (2) the statement of the

Petitioner also contends (Br. 51-55) that the lower courts should have treated "*potential* harm to the government" as a relevant factor in determining whether dismissal of the complaint was warranted. Br. 52. That consideration, however, is already captured by the severity-of-the-violation factor. A more severe breach of the seal requirement—such as the public filing of a complaint—is more likely to tip off a defendant to a pending investigation than a less severe violation, such as the targeted disclosures in this case. The function of the actual-harm consideration is different: to identify and sanction conduct that has actually impeded a government investigation.

c. Petitioner argues (Br. 55-57) that courts in devising an appropriate sanction should consider whether the improper disclosure harmed the FCA defendant. Petitioner imagines (Br. 56) an unusual case in which a relator's disclosure makes it seem as if the suit was "brought by or has the approval of the government," tarnishing the defendant's reputation in some special way—*i.e.*, in some way beyond the bare allegations of fraud, which are not encompassed by a seal.

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court below that it "embrace[d] the *Lujan* test for addressing violations of § 3730(b)(2)," Pet. App. 20a. Contrary to petitioner's suggestion (Br. 51), however, the Ninth Circuit in *Lujan* did not hold "that a showing of actual harm to the government is a necessary predicate for dismissal." Read in context, the Ninth Circuit's statement that the "mere possibility" of harm to the government (which exists in every case where the seal is violated) "is not alone enough reason to justify dismissal" simply makes clear that the district court must *consider* whether actual harm occurred, along with the "nature of the violation" and the "presence or absence of bad faith or willfulness," before deciding whether dismissal is appropriate. See 67 F.3d at 245-246.

Nothing in the FCA's text, structure, or history, however, indicates that the seal requirement was enacted to prevent such reputational harm. Rather, the seal requirement reflects Congress's concern that premature disclosure of a *qui tam* suit may *benefit* the defendant, by signaling a possible government investigation into the alleged fraud and thereby enabling the defendant to thwart or impede the investigation. Although Congress did not intend the seal requirement to adversely "affect defendants' rights" by affording a defendant an inadequate opportunity to respond to a complaint, 1986 Senate Report 24, the seal requirement was not designed to protect a defendant's reputation. It is conceivable, however, that in an atypical case the reputational harm intentionally inflicted on the defendant through a seal violation could be relevant to the district court's determination of the appropriate sanction for the misconduct. But the present case presents no such concern, since the relevant seal violations did not actually alert the public to the existence of the *qui tam* suit, see Pet. App. 22a, 67a, let alone cause the sort of reputational harm that petitioner hypothesizes.

d. Petitioner perceives (Br. 45-47) a "perverse trend," in which district courts that apply a discretionary standard routinely dismiss FCA complaints that are negligently filed on the public docket, while declining to dismiss based on intentional violations of sealing orders. But see, *e.g.*, *Gray* v. *United States*, No. 11-cv-02024, 2012 WL 4359280, at *6 (D. Colo. Sept. 24, 2012). Such differential treatment, however, is generally sensible in light of the purpose of the seal requirement. Public filing of an FCA complaint amounts to a total failure to comply with Section 3730(b)(2). In

such a case, the full complaint has been made public and the defendant has likely been alerted to it, entirely defeating the purpose of the provision. See, *e.g.*, *United States ex rel. Le Blanc* v. *ITT Indus., Inc.*, 492 F. Supp. 2d 303, 305, 307 (S.D.N.Y. 2007) ("[D]efendants have now been 'tipped off' as to possible legal action against them, since relator filed the complaint publicly and [one defendant] was alerted to the existence of the lawsuit and its allegations from press reports and obtained a copy of the complaint.").

In contrast, selective disclosure of the existence of the suit to a single person who is not affiliated with the defendant is far less likely to interfere with a government investigation. While an intentional leak is more ethically blameworthy than the inadvertent public filing of an FCA complaint, the other relevant considerations—the presence or absence of harm to the government, and the severity of the violation—disfavor the sanction of dismissal with prejudice.

B. The District Court Did Not Abuse Its Discretion In Declining To Dismiss This Suit

Petitioner argues (Br. 41-57) that, even if the courts below articulated the correct legal standard for determining whether to dismiss a *qui tam* suit as a sanction for a seal violation, the jury verdict should nevertheless be vacated because the courts misapplied that standard to the circumstances presented here. That argument lacks merit.

1. As a threshold matter, petitioner did not argue in the petition for a writ of certiorari that the court of appeals had erred in affirming the district court's application of the multi-factor standard to the facts of this case. The question on which this Court granted review asks only "[w]hat standard" governs the deci-

sion whether to dismiss a *qui tam* suit for a seal violation (Pet. i), and the body of the petition did not argue that the lower courts had misapplied their articulated standard. See Sup. Ct. R. 24.1(a). Petitioner has therefore forfeited the misapplication argument.

2. If the Court reaches the question, it should hold that the district court did not abuse its discretion in declining to dismiss this case. The three seal violations that the district court found—dissemination of respondents' Section 3730(b)(2) evidentiary submissions to three journalists—were relatively minor and ultimately had no discernible practical impact. No record evidence indicates that the public was alerted to the suit while the seal was in effect or that the government's investigation into the fraud was impeded in any way by the disclosures.[3] The disclosures were not nearly as severe as publicly filing a *qui tam* complaint, mentioning the suit in a press release, or mailing the complaint to the defendant—actions that would entirely defeat the purpose of the seal requirement. And while petitioner contends (Br. 55-57) that the lower courts should have considered its supposed reputational harm from the disclosures, such harm was not logically possible because the disclosures did not reveal the suit to the public.

Given the limited nature of the disclosures and the lack of any resulting harm, the district court did not abuse its discretion in concluding, on balance, that the bad faith of respondents' former attorneys did not

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[3] The government's filings in the district court did not, as petitioner suggests (Br. 53), state that the limited disclosures at issue here would hinder its investigation. Instead, they indicated only that fully lifting the seal would potentially prejudice its investigation. J.A. 100-102, 114-117, 122-125, 187-190.

warrant dismissal with prejudice. Pet. App. 67a-69a. In making that decision, the district court permissibly took into account that respondents themselves had not "approved, authorized, or initiated [the improper] disclosures" made by their counsel. *Id.* at 68a. It is true, as the district court recognized, that "a party is responsible for the actions taken by his attorney." *Ibid.*; see *Link* v. *Wabash R.R.*, 370 U.S. 626, 633-634 (1962). But when deciding whether "to dismiss a complaint as a sanction," courts often consider "the extent of the party's personal responsibility." *Carter* v. *Albert Einstein Med. Ctr.*, 804 F.2d 805, 807 (3d Cir. 1986); see *Coleman* v. *American Red Cross*, 23 F.3d 1091, 1094 (6th Cir. 1994) ("[T]his court, like many others, has been extremely reluctant to uphold the dismissal of a case merely to discipline an attorney.").

When an attorney alone is responsible for violation of a rule or order, attorney discipline—such as disqualification from the case or referral to the state bar—may be more appropriate than penalizing the client by dismissing the case with prejudice. That is especially true with respect to violations of the FCA's seal requirement, where the party potentially injured by the attorney's misconduct—the government, whose investigation may be impeded by premature disclosure of a *qui tam* suit—often has a concrete interest in allowing the relator to proceed with the claim.

In this case, it might have been the better course for the district court to impose some sanction on the attorneys who had violated the seal. The court may have elected not to do so because those attorneys had already been disqualified from the case for other reasons. See Resps. Br. 16. But in any event, the district court did not abuse its discretion in declining to dis-

miss the suit with prejudice, which would have deprived the government of a recovery for petitioner's fraud unless it had decided to expend resources to pursue the suit itself, potentially handing petitioner an unjust windfall.

3. Petitioner argues (Br. 42-49) that "[t]he bad-faith nature of the conduct [of respondents' attorneys] here is sufficient by itself to warrant dismissal." But even if the conduct were "sufficient" to justify dismissal, that would not mean that the district court abused its discretion in declining to dismiss the suit. Indeed, although petitioner does not dispute the court of appeals' holding that the abuse-of-discretion standard of review applies, see Pet. App. 20a-21a; see also *Chambers*, 501 U.S. at 55, its merits brief fails to argue at any point that the district court abused its discretion.

Application of the properly deferential standard of review is particularly appropriate in this case, where petitioner's appeal to the Fifth Circuit was not resolved until years after the seal violations had occurred, and after the district court had held a trial that culminated in a jury verdict finding petitioner liable under the FCA. In deciding whether to devote its own resources to prosecution of the FCA claims set forth in respondents' complaint, the government justifiably relied on the district court's determination that respondents should be allowed to proceed as *qui tam* plaintiffs. To set aside the jury verdict at this late date would not place the parties in the same position they would have occupied if the district court had chosen dismissal as the remedy for the seal violations. Rather, it would give petitioner a windfall and deprive the government of its share of the statutory recovery—a particularly untoward result since the

purpose of the seal requirement is to protect the *government's* interests.

In any event, petitioner's argument rests almost exclusively on alleged disclosures that the lower courts held *not* to violate the seal. For example, petitioner states (Br. 44) that respondents "discussed their lawsuit with U.S. Representative [Gene] Taylor," referring to a meeting that respondents had with Representative Taylor five days before he publicly alleged that petitioner had violated the FCA, see Pet. Br. 9. The district court, however, found "no evidence in the record that Congressman Taylor reached his conclusions [that petitioner had violated the FCA] based on information he received from [respondents]." Pet. App. 65a. Petitioner likewise states (Br. 44) that respondents "sent their sealed First Amended Complaint to CBS News and shared it with their public relations firm." But those disclosures occurred in May and June 2007 (Pet. Br. 12), and the courts below held that the sealing order was mooted in January 2007. Pet. App. 48a-49a, 56a; see J.A. 489-534, 604-647.

In order to justify consideration of such further disclosures in the remedial analysis, petitioner raises two legal arguments that lie far afield from the question presented in the certiorari petition. First, petitioner suggests, without elaboration or supporting authority, that the "disclosure of the allegations" in an FCA complaint would violate the statutory seal requirement even if the existence of the suit is not revealed. Br. 54 n.10. Petitioner acknowledges the court of appeals' contrary holding, see *ibid.* (citing Pet. App. 21a-22a), but makes no meaningful effort to explain why it is wrong. Second, petitioner contends (Br. 58-

61) that the courts below committed "plain error" in concluding that the sealing order was moot after the magistrate judge partially lifted the seal in January 2007. See Pet. App. 21a, 63a. Neither of those arguments, which relate to *which* actions violated the seal, is even arguably encompassed by the question presented, which concerns the appropriate *sanction* for a seal violation once the violation has been identified.[4]

This Court therefore should not consider what sanction should or might have been imposed if the courts below had identified additional seal violations beyond the three they found to have occurred. And if this Court accepts the district court's determination that respondents' former counsel violated the seal on only three occasions, petitioner has made no specific argument that the district court abused its discretion in concluding that those violations did not warrant the sanction of dismissal with prejudice. Accordingly, petitioner has identified no sound basis for overturning

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[4] A district court's interpretation of its own order is entitled to particular deference. See, *e.g.*, *In re Asbestos Prods. Liab. Litig.*, 718 F.3d 236, 243 (3d Cir. 2013); see also *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 795 (1994) (Scalia, J., concurring in judgment in part and dissenting in part). Here, the district court did not commit "[p]lain [e]rror" (Pet. Br. 58) in holding that the partial-lifting order (J.A. 5-6) was "reasonably interpreted to authorize" unsealed disclosures to the litigants and attorneys in the related litigation, effectively mooting the seal. Pet. App. 63a. Likewise, the court of appeals did not commit plain error in concluding that respondents' former employer (and petitioner's contractor) had mooted the seal when, in a publicly available filing in the related litigation, it referred to the "known" "likelihood of a *qui tam* suit" brought by respondents. 06-cv-1752 Docket entry No. 85, at 2 (N.D. Ala. Jan. 18, 2007); see Pet. App. 21a.

the jury's verdict finding that petitioner defrauded the government.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

31 U.S.C. 3730 provides in pertinent part:

Civil action for false claims

* * * * *

(b) ACTIONS BY PRIVATE PERSONS.—(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. 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. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

* * * * *

(d) AWARD TO QUI TAM PLAINTIFF.—

* * * * *

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such

dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

* * * * *

(e) CERTAIN ACTIONS BARRED.—(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

* * * * *