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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 & KERRI RIGSBY,

Respondents.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

CORY L. ANDREWS
Counsel of Record
MARK S. CHENOWETH
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org

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QUESTION PRESENTED

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

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INTERESTS OF *AMICI CURIAE*[1]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF has frequently appeared in this and other federal courts in cases concerning the appropriate scope and application of the False Claims Act (FCA), 31 U.S.C. § 3729 *et seq*. *See, e.g., Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016); *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280 (2010); *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008).

Allied Educational Foundation (AEF) is a nonprofit charitable foundation based in Tenafly, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

In recent decades, excessive FCA liability has spawned abusive litigation against businesses, both

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties to this dispute have consented to the filing of this brief, and global letters of consent are on file with the Court's docket.

large and small, to the detriment of free enterprise, employees, shareholders, and consumers. *Amici* fear that the test applied by the court below, by not requiring dismissal of FCA claims in the face of deliberate and repeated bad-faith *qui tam* seal violations, further incentivizes such seal abuses by relators who seek to damage a defendant's public reputation in an effort to force that defendant to settle even the most frivolous of FCA claims.

STATEMENT OF THE CASE

The FCA's *qui tam* provisions allow private individuals with knowledge of fraud perpetrated against the United States Treasury to bring suit "in the name of the Government." 31 U.S.C. § 3730(b)(1). To incentivize *qui tam* relators to come forward and expose such fraud, the Government pays a bounty of up to 30% on all recoveries. In authorizing that private right of action, the FCA requires that a relator's complaint, including a written evidentiary disclosure, "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 Government may, for good cause, obtain additional extensions of the 60-day seal period. 31 U.S.C. § 3730(b)(3).

Petitioner State Farm Fire and Casualty Company (State Farm) is a leading provider of property insurance to homeowners throughout the United States. Respondents Cori and Kerri Rigsby are former independent claims adjusters who provided third-party adjustment services to State Farm's policyholders in the wake of Hurricane

Katrina in 2005. In April 2006, respondents filed suit against State Farm under the FCA, alleging that the company defrauded the federal government by instructing claims adjusters to mischaracterize wind damage caused by Hurricane Katrina (and covered under State Farm's homeowner policies) as flood damage (covered by the federal government under the National Flood Insurance Program). Pet. App. 113a-114a.

After filing their FCA complaint under seal with the district court, respondents and their then-counsel, Dickie Scruggs, repeatedly violated the seal provision by notifying news organizations and others about the existence and nature of the *qui tam* suit. Long before the seal was lifted, respondents and Scruggs hired a prominent public relations firm and disclosed the details of their suit to national media outlets, including ABC, CBS, the Associated Press, and the *New York Times*, resulting in nationwide print and television coverage. Pet. App. 45a-50a. In September 2006, respondents met with then-U.S. Congressman Gene Taylor of Mississippi, who publicly excoriated State Farm from the well of the House of Representatives for "violat[ing] the False Claims Act by manipulating damage assessments to bill the federal government instead of the companies." *Id.* at 49a-50a. In February 2007, Congressman Taylor publicly disclosed to the House Oversight and Investigations Subcommittee that "[t]he Scruggs Law Firm represents the [Rigsby] sisters in a False Claims Act filing against State Farm and [E.A. Renfroe & Company, Inc.]." J.A. 548. After granting several extensions of the seal period at the Government's behest, the district court lifted the seal on August 1, 2007. *Id.* at 62a.

Based on respondents' willful violations of the FCA seal requirement, State Farm moved to dismiss the suit and for judgment as a matter of law. Pet. App. 44a-69a; 72a-77a. In denying those motions, the district court concluded that State Farm had not shown that respondents' disclosures either "hampered the government's investigation or otherwise compromised the government's ability to make its investigation." *Id.* at 67a.

Although the operative complaint alleged a "wholesale scheme to shift wind claims to water claims," respondents proceeded to trial based on a single flood claim for damage to Thomas and Pamela McIntosh's waterfront home in Biloxi, Mississippi. Pet. App. 7a. Specifically, respondents contended at trial that the McIntosh claim was false not because there was no flood damage, but because there was no *covered* flood damage, as the house was purportedly rendered a "total loss" by wind before the floodwaters arrived. *Id.*

At trial, however, State Farm introduced overwhelming video, photographic, and testimonial evidence showing that the McIntosh house was overrun with water from Hurricane Katrina, which produced the largest storm surge ever recorded in the United States. That evidence revealed extensive structural damage to the house below the five-foot flood line; yet, above the flood line, chandeliers hung undisturbed, windows remained intact, and items stayed in place in cabinets and on shelves. The jury ultimately ignored this evidence, finding that the McIntosh house sustained *no* flood damage and that State Farm's submission of a claim for the $250,000 flood policy limits was fraudulent. *Id.* at 7a.

On appeal, the Fifth Circuit affirmed. Recognizing that a circuit split existed on whether dismissal is always the appropriate sanction for willful *qui tam* seal violations, the panel purportedly adopted and applied the balancing test articulated by the Ninth Circuit in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242 (9th Cir. 1995). Pet. App. 19a-21a. Conceding that respondents repeatedly and willfully violated the seal requirement, the Fifth Circuit nonetheless concluded that such violations did not warrant dismissal of respondents' FCA suit. *Id.* at 22a-23a. Even presuming bad faith on the part of the respondents, the panel concluded that the Government was not harmed and therefore "a fundamental purpose of the seal requirement" was "not imperiled." *Id.* at 22a.

SUMMARY OF ARGUMENT

Although it is undisputed that respondents in this case repeatedly and flagrantly violated the FCA's seal provision by informing news organizations and others about the existence and nature of their *qui tam* suit, the Fifth Circuit panel affirmed the district court's refusal to dismiss respondents' suit for those egregious violations. That holding is not only inconsistent with the plain language and structure of the FCA, but it creates perverse incentives for unscrupulous relators to routinely flout the FCA's seal requirement.

As the Sixth Circuit has recognized, 31 U.S.C. § 3730(b)(2)'s seal requirement is no mere procedural formality—it is a mandatory prerequisite to filing and maintaining a *qui tam* suit. That understanding flows from Congress's repeated and unambiguous

use of the word "shall" in § 3730(b)(2)'s seal provision. It also follows from the fact that Congress enacted the *qui tam* seal requirement as part of the private right of action, thereby making the seal a "mandatory, not optional condition precedent" to the private right of action. Accordingly, a relator's failure to comply with the FCA's seal requirement is a fatal deficiency that warrants dismissal with prejudice of a *qui tam* suit.

Even if district courts enjoy broad discretion to fashion the appropriate remedy for *qui tam* seal violations in any given case, that discretion is surely not boundless. Despite presuming bad faith on the part of the respondents, the Fifth Circuit concluded that because the Government was not actually harmed, "a fundamental purpose of the seal requirement" was "not imperiled" and dismissal was not warranted. Pet. App. 22a. But such a "balancing test" is not only unreasonable, it is unfair. At a bare minimum, the appropriate test should not require a *qui tam* defendant to prove that which it does not have the capacity to prove—actual harm to the Government. Making proof of Government harm the dispositive factor in a balancing test not only deprives the test of "balance," but undoubtedly has resulted in under-enforcement of the seal requirement.

Moreover, by placing undue weight on actual harm to the Government, the Fifth Circuit's balancing test invites further gamesmanship by *qui tam* relators and their counsel. Not only would dismissal in this case punish the Rigsbys for violating the seal, but it would remove any incentive for other relators in other cases to engage in similar

behavior. Yet the Fifth Circuit's approach invites a misalignment of the relator's interests with the Government's, while improperly discounting the very real reputational harm and settlement pressure that relators are able to exact on defendants through calculated violations of the *qui tam* seal requirement. For that reason, any test the Court adopts should discourage such bad behavior and include reputational harm to the defendant as a relevant consideration.

ARGUMENT

I. THE HOLDING BELOW IS INCONSISTENT WITH THE PLAIN LANGUAGE AND STATUTORY STRUCTURE OF THE FCA

By withholding the sanction of dismissal unless the defendant can prove actual harm to the Government, the holding below contravenes the FCA's plain language and structure. Congress's unambiguous requirement that a *qui tam* relator's complaint and evidentiary disclosure "shall" remain under seal underscores the mandatory nature of the seal as a precondition for filing and maintaining the suit. And the fact that Congress enacted the *qui tam* seal requirement in the very same subsection of the statute in which it created the private right of action reinforces the understanding that a relator's full compliance with the seal requirement is an absolute prerequisite for a *qui tam* suit.

The FCA's *qui tam* provision requires that a relator's complaint, including a written evidentiary disclosure, "*shall* be filed in camera" and "*shall* remain under seal for at least 60 days." 31 U.S.C.

§ 3730(b)(2) (emphasis added). Congress's choice of words is both unmistakable and dispositive, and federal courts are not free to rewrite the statutory language. Through its repeated and unambiguous use of the word "shall," Congress enacted § 3730(b)(2)'s seal provision as a "mandatory, not precatory" requirement. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015); *see United States v. Monsanto*, 491 U.S. 600, 607 (1989) ("Congress could not have chosen [a] stronger wor[d] [than 'shall'] to express its intent that forfeiture be mandatory.").

Similarly, a statutory provision is optional or conditional where the statute states that the parties "may" take such action. Indeed, the juxtaposition of "shall" and "may" in § 3730(b) only reinforces the ordinary meaning of "shall." *See, e.g.,* § 3730(b)(1) ("A person *may* bring a civil action for a violation …"); § 3730(b)(2) ("The Government *may* elect to intervene …"); § 3730(b)(3) ("The Government *may*, for good cause shown, move the court for extensions of time during which the complaint remains under seal …") (emphases added). As this Court has recognized, "when the same [statutory 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." *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947); *see United States ex rel. Siegel v. Thoman*, 156 U.S. 353, 359-60 (1895) (explaining that 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").

Further, it is "a fundamental canon of statutory construction … that the words of a statute must be read … with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Here, the "overall statutory scheme" reinforces what the plain text makes clear: a relator's compliance with the seal requirement is a mandatory prerequisite to suit. Indeed, Congress inserted both the grant of a private right of action *and* the seal requirement into § 3730(b), entitled "Actions by private persons."

As this Court has held, when Congress enacts a procedural requirement at the same time it creates a private right of action, it is a "mandatory, not optional condition precedent" to the private right of action. *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 26 (1989) (holding that because the Resource Conservation and Recovery Act's 60-day notice was "expressly incorporated by reference" into the statute's right of action, "it acts as a specific limitation on a citizen's right to bring suit").

In line with these precedents, the Sixth Circuit has adopted a bright-line rule requiring dismissal for any violation of the FCA's seal provision. *See United States ex rel. Summers v. LHC Grp., Inc.*, 623 F.3d 287, 296 (6th Cir. 2010). In doing so, the Sixth Circuit explained that the Ninth Circuit's "*Lujan*-style balancing test"—which the panel adopted in this case—impermissibly recalibrates factors that Congress has already balanced and constitutes "a form of judicial overreach." *Id.* at 296.

And because a *qui tam* relator, who has suffered no injury, is deemed to satisfy Article III standing under the FCA only as "the assignee of a claim" on behalf of the Government, strict adherence to the FCA's pre-suit requirements is especially warranted. *See Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000) ("The FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim."). Chief among the FCA's statutory preconditions for such an assignment is § 3730(b)(2), which requires that a relator's complaint and written evidentiary disclosure "shall remain under seal for at least 60 days … [or] until the court so orders." 31 U.S.C. § 3730(b)(2).

If the Government itself were bringing an FCA suit, it would do everything in its power to keep secret the very existence of the case until the last possible moment. It therefore follows that if a relator is truly standing in the shoes of the Government, he or she must accept both the statutory benefits *and the statutory burdens* of acting in the Government's best interests. That didn't happen in this case, where respondents repeatedly violated the FCA's seal provision by informing news organizations and others about the existence and nature of their *qui tam* suit.

In sum, because mandatory dismissal for *qui tam* seal violations is the remedy most faithful to the statute's plain language and overall structure, the Court should reverse the panel's holding below.

II. EVEN IF DISMISSAL IS DISCRETIONARY, THE COURT SHOULD REJECT THE TEST USED IN THIS CASE

A. Proving Actual Harm to the Government Should Not Be Required for Dismissal

The Fifth Circuit held that, without a showing by the defendant of actual harm to the Government, dismissal is not an appropriate remedy for even repeated, bad-faith FCA seal violations. In doing so, the Fifth Circuit expressly adopted the Ninth Circuit's balancing test. *See Lujan*, 67 F.3d at 245; Pet. App. 22a. But that short-sighted test not only imposes a burden on FCA defendants that the statute does not, it ignores the enormous difficulties that defendants face in showing actual harm to the Government—an insurmountable burden that, as here, necessarily results in an under-enforcement of the *qui tam* seal requirement.

As a practical matter, it is nearly impossible for a *qui tam* defendant to prove that the Government has been *actually* harmed by a seal violation. Any effort by defense counsel to depose the Government's investigators would almost certainly be resisted on grounds of privilege and/or under so-called *Touhy* regulations. *See United States ex rel. Touhy v. Regan*, 340 U.S. 462 (1951). Under *Touhy*, the law affords special treatment to federal agencies that object to such subpoenas on the ground that they impose an undue burden on the Government's operations. *See, e.g., Watts v. SEC*, 482 F.3d 501, 509 (D.C. Cir. 2007) (recognizing the "government's interest in not being used as a speakers' bureau for

private litigants"); *Exxon Shipping Co. v. United States Dep't of the Interior*, 34 F.3d 774, 779 (9th Cir. 1994) (recognizing that the federal government has a "serious and legitimate concern that its employee resources not be commandeered into service by private litigants to the detriment of the smooth functioning of government operations").

In most cases, the Government itself is unable to offer any more proof of harm than it does when it moves to extend the seal period. Here, for example, the Government repeatedly and successfully sought to keep the proceedings under seal on the good-cause basis that lifting the seal would "likely prejudice" the Government's investigation. *See* United States' Memorandum of Points & Authorities in Support of Its Ex Parte Application for a Stay of Civil Proceedings, *United States ex rel. Rigsby v. State Farm Insurance Co.*, No. 06-cv-433, ECF Dkt. 13 at ¶4 (S.D. Miss. May 9, 2007); *see also Lujan*, 67 F.3d at 246 (quoting the Government's statement that it "could not claim in this case that it was prejudiced by the public disclosure of the *qui tam* allegations prior to the lifting of the seal," nor could it assert, "as a factual matter, that it was *not* prejudiced"). It is therefore unreasonable to require an FCA defendant to prove that which even the Government cannot prove. Indeed, "the rules are in place precisely because Congress understood" that "the extent to which the Government might be harmed by disclosure is impossible to evaluate *a priori*." *Summers*, 623 F.3d at 298.

B. Any Test the Court Adopts Should Discourage Further Gamesmanship by *Qui Tam* Relators and their Counsel

However well-intentioned Congress may have been when it enacted the FCA, the statute's *qui tam* provision has been transformed into a lucrative vehicle for enterprising plaintiffs' attorneys. Congress did not enact the FCA's seal provision "to provide an extra bargaining chip in settlement negotiations," *United States ex rel. Costa v. Baker & Taylor, Inc.*, 955 F. Supp. 1188, 1191 (N.D. Cal. 1997). Yet the Fifth Circuit's undue emphasis on actual harm to the Government altogether ignores the reality that, "[a]s a class of plaintiffs, *qui tam* relators are different in kind than the Government" because they "are motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997). Allowing dismissal as a sanction *only* upon a showing of actual harm to the Government not only misaligns the relator's and the Government's interests, but it also results in under-enforcement of the *qui tam* seal requirement. Such under-enforcement further incentivizes future seal violations by *qui tam* relators (and their counsel), who will be perfectly free to publicly demonize FCA defendants in an effort to gain added settlement leverage before trial.

As the Sixth Circuit has explained, the *Lujan* test allows *qui tam* relators to comply with the FCA's 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 of an FCA claim." *Summers*, 623 F.3d at 298. But if, as here, the threshold for dismissal is nearly impossible to satisfy, willful seal violations are virtually guaranteed to increase in frequency—without consequence. And the more incentives that *qui tam* relators have to violate the seal, the greater the likelihood that actual harm to the Government ultimately will result. Indeed, willful violations of the FCA's seal requirement have become much more common in recent years. *See, e.g., Smith v. Clark/Smoot/Russell*, 796 F.3d 424 (4th Cir. 2015); *United States ex rel. Betteroads Asphalt, LLC v. R & F Asphalt Unlimited, Inc.*, No. 14-cv-1855, 2016 WL 861244 (D.P.R. Mar. 7, 2016); *United States ex rel. Ruscher v. Omnicare, Inc.*, No. 08-cv-3396, 2015 WL 4389644 (S.D. Tex. July 15, 2015); *United States ex rel. Bibby v. Wells Fargo Home Mortg. Inc.*, 76 F. Supp. 3d 1399 (N.D. Ga. 2015).

If this Court were to adopt the Fifth Circuit's test, "it would be the plaintiff's, not the Government's, interests that [are] paramount." *Summers*, 623 F.3d at 298. Because *qui tam* relators and their counsel are in no position to judge the harm that violating the seal might do to the Government's investigation, the consequence for violating the seal must be severe enough to discourage *all* willful violations. Otherwise, if policing the seal requirement is reduced simply to evaluating whether the Government was *actually* harmed, no meaningful deterrent remains for even reckless disclosures of information that *may have* harmed the Government.

Here, as in other areas of the law, "the most severe in the spectrum of sanctions provided by

statute or rule must be available … not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such detriment." *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976). Yet, under the Fifth Circuit's misguided approach, a *qui tam* relator's compliance with the FCA's seal requirement would be "subject to the same risk analysis as any other litigation tactic." *Summers*, 623 F.3d at 298. That is precisely what happened in this case.

Contrary to the contention of the United States as *amicus curiae*, dismissal of a *qui tam* suit does not automatically guarantee a "windfall" for an FCA defendant. Rather, the Government always retains the right to intervene at any time in the case upon a showing of "good cause." 31 U.S.C. § 3730(c)(3). While the dismissed relator forfeits her right to participate in the suit and claim any portion of the recovery, dismissal of the relators' claims does not affect the ability of the United States to pursue a valid claim against the defendant. The Government thus always retains a key role in the sound development of the law, and the Government's decision to intervene in such cases provides a critical check against not only the defendants' misconduct, if any, but against the possible distortion of the FCA's purpose by financially motivated relators who would otherwise seek to violate the seal provision in order to extract a settlement. Indeed, if anyone is maneuvering for a windfall in such cases, it is the relator, whose singular quest for a payoff is so great that he is willing to publicize the existence of the case before the Government has even had an

opportunity to decide whether it is worth pursuing.

C. The Appropriate Test Should Consider Reputational Harm to the Defendant

According to *Lujan*, when determining whether an FCA lawsuit should be dismissed following a seal violation, "protecting the rights of defendants is not an appropriate consideration." *Lujan*, 67 F.3d at 247. But that misguided approach ignores the very real stigma that accompanies allegations of fraud, coupled with the threat of treble damages and substantial per-claim penalties, which often lead many FCA defendants to conclude that settlement is the only viable option—even for frivolous claims. And because the seal itself operates to prevent the defendant from knowing the detailed allegations of the *qui tam* complaint, FCA defendants are often caught flat-footed and unable to respond effectively to hostile media coverage.

By placing undue weight on whether the Government suffered actual harm, the Fifth Circuit's balancing test improperly discounts the very real reputational harm and unfair prejudice that defendants suffer through calculated violations of the *qui tam* seal requirement. Nonetheless, the legitimate interest in "'protect[ing] defendants from harm to their goodwill and reputation'" is "as applicable in cases brought under the [False Claims] Act as … in other cases." *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 456 (4th Cir. 2013) (quoting *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999)).

Although the Fifth and Ninth Circuits fail even to take into account the interests of defendants, the FCA's legislative history makes clear that Congress believed that "sealing the initial private civil false claims complaint protects both the Government *and the defendant's* interests." S. Rep. No. 345, 99th Cong., 2d Sess. 24 (1986) (emphasis added). Indeed, as the Senate Report further confirms: "By providing for sealed complaints, the Committee does not intend to affect defendants' rights *in any way*." *Id.* at 24 (emphasis added).

Accordingly, Congress's purposes in enacting the *qui tam* seal requirement can most faithfully be advanced by a test that takes seriously FCA defendants' reputational interests. That is why both the Second and the Fourth Circuits apply a test that explicitly accounts for those interests. *See, e.g., Smith*, 796 F.3d at 430 (recognizing that one of the "purposes" of the "seal provision" is "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"); *United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995, (2d Cir. 1995) (recognizing that "a defendant's reputation is protected to some degree" by the statutory "sealing period"); *see also Erickson ex rel. United States v. Am. Inst. of Biological Sciences*, 716 F. Supp. 908, 912 (E.D. Va. 1989) (noting that Congress enacted the FCA's seal provision, in part, "to protect the defendant's reputation from unfounded public accusations").

The Government itself has recognized that the FCA's seal requirement protects an FCA defendant's

interests as well as the Government's:

> Beyond serving these governmental interests, the sealing requirement protects a defendant's interests as well. Specifically, it "prevent[s] defendants from having to answer the complaints without knowing whether the government or relators would pursue the litigation"; and it insulates a defendants reputation from meritless suits in which the Government ultimately declines to intervene, "because the public will know that the government had an opportunity to review the claims but elected not to pursue them."

Statement of the United States of America in Support of the Defendants' Motion to Dismiss, *United States ex rel. LeBlanc v. ITT Indus., Inc.*, No. 07-cv-401 (SHS), ECF Dkt. 28 at 5 (S.D.N.Y. June 20, 2007) (quoting *Pilon*, 60 F.3d at 999).

The substantial risk of harm to a defendant's reputation is vividly illustrated by this case, where the respondents' calculated media campaign to vilify State Farm resulted in an avalanche of unfavorable publicity that was undeniably damaging to State Farm's reputation. Any publicly traded company, facing downward pressure on shareholder stock price resulting from negative media coverage, would likely have been forced into a settlement. Unlike State Farm, most *qui tam* defendants do not have the luxury or the resources to litigate their case all the way up to the U.S. Supreme Court.

Since the Court granted *certiorari* in this case, the financial incentive for relators to violate the mandatory seal to add settlement leverage has increased dramatically, as the Department of Justice has recently implemented higher FCA penalties. *See* 81 Fed. Reg. 42,501 (June 30, 2016). As of August 1, 2016, minimum per-claim FCA penalties rose to $10,781 (from $5,500) and maximum per-claim FCA penalties rose to $21,563 (from $11,000). *Ibid.* Because per-claim penalties constitute such a large percentage of overall FCA recoveries, this sharp spike in penalties portends an exponential rise in settlement value for even the most baseless FCA claims.

Even in cases where FCA defendants believe they have legally compelling defenses on the merits, the risk of astronomical liability, no matter how remote, provides a strong motivation to settle FCA claims. At the same time, "indifference to social cost may lead profit-motivated private enforcers to initiate so-called *in terrorem* lawsuits, using the threat of massive discovery costs or bad publicity to extract settlements." David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence From Qui Tam Litigation*, 112 Colum. L. Rev. 1244, 1254 (2012). Allowing *qui tam* relators to violate the FCA's mandatory seal with impunity only invites further abuses.

The Court should therefore reject the lopsided approach to FCA seal violations adopted by the Fifth and Ninth Circuits. Under such a rule, as Judge Boggs has observed, plaintiffs are "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." *Summers*, 623 F.3d at 298.

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In sum, because the Fifth Circuit's requirement of actual harm to the Government results in under-enforcement of the seal provision and invites a misalignment of the relator's and the Government's interests, the Court should reverse the panel's holding below.

III. THE PANEL IMPROPERLY IGNORED THE EXTENT OF RESPONDENTS' EGREGIOUS, BAD-FAITH VIOLATIONS OF THE FCA'S SEAL PROVISION

In affirming the district court's decision not to dismiss respondents as *qui tam* relators for violating the FCA seal provision, the panel below concluded that "there is no indication that the Rigsbys themselves communicated the existence of the suit in the relevant interviews" and that any resulting leaks were "in the context of allegations about State Farm misleading policyholders, not the federal government." Pet. App. 23a. The appeals court is wrong on both counts.

After their counsel, Dickie Scruggs, e-mailed a copy of the FCA complaint's sealed evidentiary disclosure to ABC News for use as background, respondents agreed to be interviewed on camera for "Blowing in the Wind," a *20/20* investigative report that aired on August 25, 2006—nearly a full year

before the seal was lifted in this case.[2] Along with Scruggs, respondents "spoke publicly for the very first time" by levelling on-air allegations against State Farm virtually identical to those contained in the sealed FCA complaint and evidentiary disclosure. Among other things, viewers learned that "Dickie Scruggs, the lawyer who took on the big tobacco companies, is now taking on State Farm. And the Rigsby sisters' allegations are a big part of his lawsuit." J.A. 377.

Scruggs also e-mailed a copy of the sealed evidentiary disclosure to the Associated Press (AP). The Rigsbys later invited an AP correspondent into their home to conduct an on-the-record interview. On August 26, 2006, the AP published an article entitled "Sisters Blew Whistle on Katrina Claims," which contained quotations from both Cori and Kerri Rigsby (but none from Scruggs) alleging misconduct on the part of State Farm identical to that alleged in the sealed evidentiary disclosure. The article stated that "the first of Scruggs' cases against State Farm is scheduled to be tried early next year" and that "the Rigsbys' cooperation has been invaluable in building [that] case." J.A. 246.

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[2] The sealed evidentiary disclosure expressly stated that it was made pursuant to 31 U.S.C. § 3730 and alleged that State Farm was "engaging in wholesale fraud both on policy holders *and on the federal government*" in "[t]his False Claims Act case" (emphasis added). J.A. 336. The disclosure also included a signature block that read "Attorneys for Relators" and contained a certificate of service for the United States Attorney and Attorney General. J.A. 368-69.

On September 16, 2006, respondents met with then-U.S. Congressman Gene Taylor of Mississippi. Only five days later, in remarks published in the *Congressional Record*, Congressman Taylor recalled his meeting with respondents and announced—on the floor of the House of Representatives—that State Farm had not only misled policyholders, but had "stole[n] from the taxpayers" because "[f]lood insurance is paid through you, the taxpayers." J.A. 539. Accusing State Farm of "commit[ing] fraud against the United States Government," Congressman Taylor explained that State Farm's conduct in attributing wind damage to flood waters "broke the law, because under the False Claims Act, when you ask your Nation to pay a bill that it should not pay, you are liable for triple damages and a $10,000-per-incident fine." *Ibid*. Contrary to the Fifth Circuit's opinion below, respondents' seal violations were patently *not* limited to "the context of allegations about State Farm misleading policyholders, not the federal government." Pet. App. 23a. As Congressman Taylor's comments demonstrate, respondents revealed that they were alleging fraud "against the United States Government."

On September 18, 2006, respondents' counsel e-mailed the sealed evidentiary disclosure to the *New York Times*. On March 16, 2007, the *New York Times* published an article entitled "A Lawyer Like a Hurricane," which repeated details concerning State Farm's handling of Hurricane Katrina claims identical to those contained in the sealed evidentiary disclosure. J.A. 484.

In February 2007, Congressman Taylor publicly disclosed to the House Oversight and Investigations Subcommittee that "[t]he Scruggs Law Firm represents the [Rigsby] sisters in a False Claims Act filing against State Farm and [E.A. Renfroe & Company, Inc.]." J.A. 548. Yet the relators' First Amended Complaint (FAC), which named Renfroe as a defendant in the suit for the first time, was not filed until May 2007. Thus, Congressman Taylor apparently learned the details of the FAC from the relators or their counsel months before the district court did.[3] Each of the foregoing seal violations occurred before the district court lifted the seal on August 1, 2007.

These uncontroverted facts underscore the egregious nature of the seal violations committed in this case. Even if respondents had no personal involvement in violating the seal—and they clearly did—the actions of respondents' attorney are imputed to them. *See, e.g., Pioneer Inv. Services Co. v. Brunswick Associates 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.") (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34 (1962)); *Powell v. Davis*, 415 F.3d 722, 727 (7th Cir. 2005) ("[A]ttorney misconduct,

[3] At the time of his public statements in 2006 and 2007, Congressman Taylor was represented by Dickie Scruggs, in the same district court, in a lawsuit against State Farm; the suit arose from claims under Taylor's homeowner's policy for alleged damage by Hurricane Katrina. *See Taylor v. State Farm Fire & Casualty Co.*, No. 06-cv-9-LTS-RHW (S.D. Miss., compl. filed Jan. 6, 2006).

whether labeled negligent, grossly negligent, or willful, is attributable to the client."). As this Court has consistently recognized, "any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer agent." *Pioneer Inv. Services*, 507 U.S. at 397 (citing *Link*, 370 U.S. at 633-34).

The relators' seal violations in this case are especially troubling because the Rigsbys and their counsel actively participated in a larger pattern of unethical misconduct. For example, as the district court found in this case, the Rigsbys improperly accepted hundreds of thousands of dollars in "consulting fees" from Scruggs. *See* J.A. 16 (finding that "Scruggs paid each of the Rigsby sisters an annual salary of $150,000 to act as 'consultants' for his law firm in connection with hurricane damage claims"). After a thorough review of the evidence, the district court concluded that because the Rigsbys were neither "required to perform any regular duties" nor "to keep any regularly scheduled hours," their "'consulting' arrangement was a sham." *Ibid.* While the district court correctly found that this misconduct disqualified the Rigsbys from testifying in other cases, it nonetheless allowed them (over State Farm's objections) to serve as relators in this case. J.A. 32-33.

In sum, the seal violations at issue here are direct affronts to the federal courts and the integrity of the judicial process. *Amici* are aware of no reported decision under the FCA that involves seal violations as widespread and calculated as those in this case. If these willful, bad-faith violations do not

merit the sanction of dismissal, then the FCA's seal provision will have been rendered a nullity.

CONCLUSION

For the foregoing reasons, *amici curiae* Washington Legal Foundation and Allied Educational Foundation respectfully request that the Court reverse the decision below.

Respectfully submitted,

CORY L. ANDREWS
Counsel of Record
MARK S. CHENOWETH
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org

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