No. 15-513

IN THE
Supreme Court of the United States

STATE FARM FIRE AND CASUALTY COMPANY,
Petitioner,

v.

UNITED STATES EX REL. CORI RIGSBY, ET AL.,
Respondents.

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

BRIEF OF TAXPAYERS AGAINST FRAUD EDUCATION FUND AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Taxpayers Against Fraud Education Fund ("TAFEF") respectfully submits this brief as *amicus curiae*.

TAFEF is a nonprofit, tax-exempt organization dedicated to preserving effective anti-fraud legislation at the federal and state levels. TAFEF has worked to publicize the *qui tam* provisions of the False Claims Act ("FCA"), has provided testimony before Congress regarding each of the proposed amendments to the FCA since 1986, and has participated in litigation both as a *qui tam* relator and as *amicus curiae* regarding the proper interpretation of the FCA. TAFEF presents an annual educational conference for FCA attorneys, typically attended by more than 300 private and government attorneys from across the country. TAFEF's members regularly bring FCA actions on behalf of private citizens and the United States to protect public resources through public-private partnership.

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[1] No party's counsel authored this brief in whole or in part, and no persons or entities other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Cori and Kerri Rigsby, Respondents here, are sisters who were employed as insurance adjusters in the aftermath of Hurricane Katrina. They were ordered by Petitioner State Farm to falsely represent that homes of hurricane victims were damaged by flooding instead of Katrina's 174-mile-per-hour winds. The purpose of this deception was to shift insurance liability from State Farm to the National Flood Insurance Program and, in turn, to the taxpayers who fund the federal program. A Mississippi jury has since concluded that State Farm's conduct violated the False Claims Act.

A *qui tam* case was filed, by counsel, naming the Rigsby sisters as relators. Thereafter, their attorneys provided evidence from the *qui tam* filing to reporters without their knowledge. State Farm argues that the attorneys' actions breached the seal, though they did not disclose the existence of the *qui tam*. The sole question before this Court is whether not just these seal breaches, but *every* breach of the court's seal of a *qui tam* filing requires that the case be dismissed.

State Farm's position was squarely rejected by the district court and the Fifth Circuit affirmed. In so doing, those courts joined every court to have addressed a *qui tam* seal breach by imposing the balancing test adopted more than 25 years ago by the Ninth Circuit in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242 (9th Cir. 1995).[2] That test

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[2] There is one exception in the cases which, although it did not involve a breached seal, did reject the *Lujan* approach. The panel decision in *United States ex rel. Summers v. LHC Group, Inc.,*

asks three questions: Did the breach harm the investigative interests of the government? Was the seal breach serious? And, did it occur in bad faith?

In this brief, we address the profoundly-difficult life of whistleblowers and their role in the False Claims Act enforcement scheme, and we demonstrate that there is no reason whatever to depart from the *Lujan* test utilized in the district court and the Fifth Circuit.

The decision below should be affirmed and the case remanded for further proceedings.

ARGUMENT

The sole issue before the Court is whether all violations of a trial court's sealing order must as a matter of law result in dismissal of a *qui tam* relator's case, or instead whether, as nearly every court to consider the question over the past quarter-century has held, facts and circumstances must be balanced to determine what, if any, action should be taken.

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623 F.3d 287, 296 (6th Cir. 2010), held that any failure to file a *qui tam* complaint under seal requires dismissal with prejudice. The case did not involve a breached seal, but, rather, a complete, albeit negligent, failure to file under seal at all. *Id.* at 289. The case was poorly reasoned and wrongly decided, rejecting the *Lujan* balancing test for no sound reason, instead effectively presuming that any failure to file under seal harms the government and requires dismissal. That holding does not directly conflict with cases such as this, where a seal breach occurred after the filing and service mandates of the FCA were followed. But affirmance here will presumably remedy the injustice which inheres in the per se rule adopted in *Summers*.

"To aid the rooting out of fraud, the False Claims Act provides for civil suits brought by both the Attorney General and by private persons, termed relators, who serve as a posse of *ad hoc* deputies to uncover and prosecute frauds against the government." *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 184 (5th Cir. 2009) (internal quotation and citation omitted). In 1986, Congress faced a "growing pervasiveness of fraud" against the public fisc that "necessitate[d] modernization of the Government's primary litigative tool for combatting fraud." S. Rep. 99-345 at 2, 1986 U.S.C.C.A.N. 5266, 5266 (Jul. 28, 1986).

That same year Congress amended the False Claims Act to strengthen the *qui tam* provisions, expanding the ability of whistleblowers to bring suit on the United States' behalf and to share a portion of the recovery. P.L. 99-562, 100 Stat. 3153 (1986); *Lujan*, 67 F.3d at 245 ("The purpose of *qui tam* actions is to encourage more private false claims litigation"). These amendments enabled the modern renaissance of the False Claims Act's effectiveness.

The sureness of Congress's aim in amending the Act is evidenced by the $3.5 billion in FCA recoveries in fiscal 2015 alone. U.S. Dep't of Justice, Press release, Justice Department recovers over $3.5 billion from False Claims Act Cases in Fiscal Year 2015 (Dec. 3, 2015), *available at* http://www.justice.gov/opa/pr/justice-department-recovers-over-35-billion-false-claims-act-cases-fiscal-year-2015. A recent study by Taxpayers Against Fraud Education Fund found that over five years the government spent $575 million to

recover $14 billion in fraud settlements and judgements–a 20:1 reward.[3] The vast majority of that recovery resulted directly from *qui tam* filings. President Lincoln's wisdom in proposing the Act, and President Reagan's in endorsing its rebirth, is obvious on the basis of these recoveries alone.

A second such measure is the undeniable, although less-easily-quantified, savings to the taxpayers through deterrence: In 1996 William L. Stringer, former chief economist for the U.S. Senate Committee on Budget, was commissioned by Taxpayers Against Fraud to calculate these savings. He found that for every dollar recovered under the FCA in its first ten years following the 1986 Amendments, the deterrence value was in excess of $295 billion, or more than $20 of deterrence for every dollar in FCA recoveries collected.[4] A third is the adoption by thirty states of their own *qui tam* laws, and the creation at the federal level of whistleblower programs for the Internal Revenue Service, the Securities and Exchange Commission, and the Commodity Futures Trading Commission.

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[3] Jack A. Meyer, *Fighting Medicare & Medicaid Fraud: The Return on Investment from False Claims Act Partnerships* (Health Management Associates, prepared for Taxpayers Against Fraud Education Fund Oct. 2013), *available at* http://www.taf.org/public/drupal/publications/reports/TAF-ROI-report-October-2013.pdf.

[4] William L. Stringer, *The 1986 False Claims Act Amendments: An Assessment of Economic Impact* (Kalorama Consulting Group, Inc., Washington D.C., commissioned by Taxpayers Against Fraud, The False Claims Act Legal Center 1996).

This case proves the premise. Petitioner has been determined by the Jury to have used fiduciary authority granted it by Congress as, literally, license to steal from the National Flood Insurance Program. Along the way, it victimized countless Americans whose homes and lives were devastated by Hurricane Katrina. Nothing in Petitioner's briefs to the Court acknowledges this serious misconduct, and the record shows that it fought tooth and nail to avoid being brought to justice in the trial court.

Rather than accept responsibility for its fraud, Petitioner points to the fact that the Rigsbys' former counsel breached the seal imposed by the trial judge after the case was properly filed under seal and asserts that this Court should fashion, from whole cloth, a rule requiring that anytime that seal is breached, the *qui tam* case must be dismissed.

This would be an undeserved windfall for State Farm. It faces liability for thousands more fraudulent Katrina adjustments following the Fifth Circuit's remand. *United States ex rel. Rigsby v. State Farm Fire & Cas. Co.*, 794 F.3d 457, 480-81 (5th Cir. 2015) (clearing Relators' path to apply the Jury's verdict to additional claims). Elimination of the Rigsbys and their suc-cessful trial team would result in Petitioner's fraud going without remedy. And to hold that every seal breach requires dismissal would turn every *qui tam* case into a breach-hunt; depositions of friends and family, and discovery of new employers and old co-workers would be both inexorable and a profound distraction from the central concerns of the Act.

But even were this result somehow avoided, the message to potential relators and potential *qui tam* counsel would be profound: Color ever-so-slightly outside the lines (even if harmlessly) and face obliteration.

Thus, this Court's resolution of the issue will have effects well beyond the very few cases in which seal breach issues actually come up, potentially deterring would-be whistleblowers who already face an uphill battle.

A. ***The Nature and Purpose of the Seal***

Congress intended that the file-under-seal provision "allow the Government an adequate opportunity to fully evaluate the private enforcement suit and determine both if that suit involves matters the Government is already investigating and whether it is in the Government's interest to intervene and take over the civil action." S. Rep. 99-345 at 24, 1986 U.S.C.C.A.N. at 5289.

In practice, however, *qui tam* complaints are typically under seal for far longer than the 60 days contemplated by 31 U.S.C. § 3730(b)(2). Statistics for average seal duration are not publicly available, but the cases note seals lasting, for example, 2,732 days (*United States ex rel. Howard v. Lockheed Martin Corp.*, 2007 U.S. Dist. LEXIS 37289, at *4-5 (S.D. Ohio May 22, 2007)); 2,596 days (*United States ex rel. Yannacopolous v. Gen. Dynamics*, 315 F. Supp. 2d 939, 944 (N.D. Ill. 2004)); 2,036 days (*United States ex rel. Bibby v. Wells Fargo Bank,* 76 F. Supp. 3d 1399,

1401-02 (N.D. Ga. 2015)); 1,686 days (*United States ex rel. Madany v. Petre*, 2015 U.S. Dist. LEXIS 147853, at *4 (E.D. Mich. November 2, 2015)); and 785 days (*United States ex rel. Hutcheson v. Blackstone Med., Inc.*, 647 F.3d 377, 380 (1st Cir. 2011)).

Nor is the seal an on-off switch. In many cases–and, we believe, in the vast majority of cases in which the government intervenes–there has been a "partial unsealing." This is an extra-statutory device created by the Department of Justice to advise defendants of fraud allegations against them for negotiation or fact-finding purposes, or to address the management of related cases. *E.g.*, *United States ex rel. Grant v. Rush-Presbyterian/St. Luke's Med. Ctr.*, 2000 U.S. Dist. LEXIS 19249, at *4-5 (N.D. Ill., Aug. 24, 2000). The partial-unsealing device was used in this case, with the complaint being partially unsealed on January 10, 2007, to facilitate informing another district court of this case's existence. J.A. 5.

These facts certainly do not justify breaching a court-ordered seal. But they highlight the fact that a seal on day 30, when the government is just beginning to assemble investigative resources and assess whether it has other investigations open, is different from a seal on day 300, when the defendant is aware of the investigation and is producing documents in response to a Civil Investigative Demand. And a seal on day 1,000, when the government has made its decision and the parties have engaged in settlement discussions, is different yet. At no time is breaching a court seal appropriate. But every case, and every stage of a case, is different and courts should be given

discretion to decide what effects a seal-breach has had and what, if any, remedies or sanctions are warranted by the facts.

Against this nuanced background, it is hardly surprising that an unbroken line of judicial opinions recognizes that any breach of the court's seal is *sui generis*. The simple inquiry articulated in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242, 245-46 (9th Cir. 1995), which courts have applied without issue in these situations, focuses on the harm suffered by the government, the relative severity of the seal violation, and whether there is evidence of bad faith or willfulness.

Lujan got it right, and the courts below applied its test appropriately.

B. ***Blowing the Whistle***

Being a whistle-blower is hard and risky. Studies have found that 82% of whistleblowers are fired and 90% experience negative workplace repercussions after blowing the whistle on fraud. Geoffrey Christopher Rapp, *Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act*, 2012 BYU L. REV. 73, 113 (2012). A commentator noted that "it is difficult to find a rational reason for the employee to talk, especially in light of the very high emotional costs paid by whistleblowers" as a consequence. Alexander Dyck, Adair Morse & Luigi Zingales, *Who Blows the Whistle on Corporate Fraud?* 31-32 (Nat'l

Bureau of Econ. Research, Working Paper No. 12882, 2007), available at http://www.nber.org/papers/ w12882.

Among myriad stories of the profound difficulties faced by whistleblowers, relator Tina Gonter's experience is a poignant example of the toll taken on those who step forward to assist the government in rooting out fraud. Ms. Gonter was a nuclear quality assurance specialist whose employer delivered failed and defective valves which General Dynamics installed in nuclear submarines. Ms. Gonter and her husband filed a *qui tam* case in March 2001, and she made daily tape recordings of events in the factory for many months as a confidential government informant. The case was kept under seal until March of 2005–1,464 days–although the complaint was partially unsealed in early 2004 and provided to the defendants. *United States ex rel. Gonter v. Hunt Valve Co., Inc.*, No. 4:01-cv-634 (N.D. Ohio) (*cf.* Complaint and Unsealing Order (Dkt. 1, 37)).

Testifying before the Senate Judiciary Committee in 2009, Ms. Gonter described her existence during the seal period:[5]

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[5] The False Claims Act Correction Act (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century, Hearing Before the S. Comm. on the Judiciary, 110th Cong. 167 (2008) (testimony of Tina M. Gonter, *Relator in United States ex rel. Hunt Valve Co., Inc.* (N.D. Ohio)), *available at* https://www.gpo.gov/fdsys/pkg/ CHRG-110shrg42809/pdf/ CHRG-110shrg42809.pdf.

> In order to help the agents make sense of the huge volume of records they seized, we moved to Columbus, where we had no family or friends. Because our qui tam case was under seal, we couldn't tell anyone--not even our friends and family--what we were doing. Our lawyers became like family as I spent the next two years working almost full-time going through those files with the help of my lawyers and their staff, and answering question after question about what the documents showed. The government did not have enough people assigned to the case to review the files.
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> * * *
>
> After we exhausted the money from selling our house, Bill got a quality assurance job with the Defense Logistics Agency. I continued working on the investigation. Our income was well below half what it would have been if, like everybody else, we had decided to just keep our mouths shut about what was going on at Hunt Valve Company.

The government required four years to investigate the Gonters' case. The defendants knew of it long before it was unsealed. But according to Petitioner and its phalanx of *amici*, had Ms. Gonter, or for that matter an employee of the law firm she hired, revealed to *anyone* during the four years the case was sealed that a *qui tam* case was filed, Ms. Gonter and her husband would have been stripped of their right to participate in any recovery by the government. Not

only that, the Gonters would have experienced the isolation, fear, and real personal risk associated with filing a *qui tam* action and working with the government under cover to bring the defendants to justice, without compensation for those hardships.

Such an outcome and the message it would send to potential whistleblowers cannot possibly be what the Senate Judiciary Committee intended when it said that its "overall intent in amending the qui tam section of the False Claims Act is to encourage more private enforcement suits." S. Rep. 99-345 at 23-24, U.S.C.C.A.N. at 5288-89. *Lujan*, 67 F.3d at 245 (instructing that the "balance" between incentivizing private enforcement suits and law enforcement needs "cannot be disregarded" in fashioning a remedy for a seal breach).

Ms. Gonter's experience is a sobering reminder of the Judiciary Committee's observation in 1986 that although fraud seriously undermines confidence in government contractors, "[a] more dangerous scenario exists where . . . [a] part is defective and causes not only a serious threat to human life, but also to national security." S. Rep. 99-345 at 3, 1986 U.S.C.C.A.N. at 5268. But whether a *qui tam* case involves (instead of submarine safety) the use of bribes to induce doctors to prescribe unproven medications, fraudulent use of billing codes to increase medical billings, overpricing food for the troops in Afghanistan, or, as here, bilking a federal insurance program that protects victims of flooding, *qui tam* relators take enormous risks.

TAFEF respectfully submits that it is within the context of the human stories of whistleblowers that this Court should evaluate the argument advanced by Petitioner and its *amici* that any breach of the seal, no matter how slight or harmless, mandates dismissal of a *qui tam* case. The Gonters' experience underscores just how inappropriate such a rule would be. But the human context of whistleblowing also is uniquely appropriate in a case such as this, where the relators brought forward information which unequivocally revealed serious fraud on the part of the Nation's largest insurance company.

C. ***Courts Have All the Tools They Need to Respond to Seal Breaches***

The False Claims Act is silent regarding any particular consequence of any particular class of seal-breach, and that silence has persisted through two major rounds of amendment. Congress wisely left the details to the courts, which are the authors and guardians of the seal. But decision-making regarding seal breaches should include—and nearly always has included—consideration of the essential purpose of the 1986 Amendments: "to encourage more private enforcement suits." S. Rep. No. 99-345 at 23-24, 1986 U.S.C.C.A.N. at 5288-89.

TAFEF does not urge that *qui tam* relators or their attorneys who breach *qui tam* seals be treated differently than those who breach seals in other contexts. But the FCA is a remedial statute, and we certainly contend that the issues raised by a breach

are uniquely within the trial court's discretion, rather than a blunt trigger to a cataclysm.

There are non-FCA cases addressing judicial discretion in the context of seal breaches. *E.g. Toon v. Wackenhut Corr. Corp.*, 250 F.3d 950, 953-54 (5th Cir. 2001) (motion, required to be filed under seal, was not; fine imposed on counsel, who acted in bad faith). But the clearest and most complete exploration of these issues is that in *Bibby*, 76 F. Supp. 3d at 1406-11. In that case, *qui tam* relators violated the seal, and then lied about it. These events did not surface until after the case was litigated and the defendants paid a settlement resulting in a relator's share of $46 million, subject to fees and taxes. The court conducted a detailed review and concluded that it had inherent authority to impose the full range of sanctions, but that the appropriate sanction was a large monetary fine.

Other courts examining allegations that a relator breached an existing seal have rejected calls for dismissal or other sanctions after considering the relevant facts of each individual case and breach. *E.g.*, *United States ex rel. Betteroads Asphalt, LLC v. R&F Asphalt Unlimited, Inc.*, 2016 U.S. Dist. LEXIS 29584, at *2-4, *7-8 (D.P.R. Mar. 7, 2016) (relator's alleged discussion of fraud with media did not breach seal); *Nasuti v. Savage Farms, Inc.*, 2014 U.S. Dist. LEXIS 40939, at *44-45 (D. Mass. Mar. 7, 2014) (relator's alleged article about underlying fraud did not breach seal); *United States ex rel. Gale v. Omnicare, Inc.*, 2013 U.S. Dist. LEXIS 80436, at *10 (N.D. Ohio June 7, 2013) (relator allegedly told his

wife about *qui tam* and defendant's employees of his lawsuit against the defendant, but no seal breach occurred where *qui tam* filing was not "publicly discussed"); *United States ex rel. Kusner v. Osteopathic Med. Ctr. of Philadelphia*, 1996 U.S. Dist. LEXIS 7389, at *5 (E.D. Pa. May 30, 1996) (relator served defendants and subpoenaed a third party before unsealing order had been issued, but these actions "did not frustrate the purposes" of the seal); *United States ex rel. Windsor v. Dyncorp, Inc.*, 895 F. Supp. 844, 849 (M.D. Fl. 1995) (relator allegedly shared "details of the *qui tam* complaint" with defendant's employees; court held determination of seal-breach remedy, if any, depends on facts, because "not every technical or minor, remediable violation of the seal requires automatic dismissal").

No sanction was imposed in these cases, where the courts found no harm to the Government from the relators' alleged seal breaches. *Lujan*, 67 F.3d at 245 ("The mere possibility that the Government *might* have been harmed by disclosure is not alone enough reason to justify dismissal of the entire action").

The same is true of cases where related procedural requirements of the False Claims Act with respect to filing under seal are violated, but there is no evidence of harm to the Government. *E.g., United States ex rel. Smith v. Clark/Smoot/Russel*, 796 F.3d 424, 430 (4th Cir. 2015) (no sanction where relator's counsel notified defendant of sealed action's existence the day after filing it under seal); *United States ex rel. Bernat v. Boeing Co., Inc.*, 2011 U.S. Dist. LEXIS 142553, at *7 (D. Mo. Dec. 12, 2011) (no sanction where motion

to file *in camera* was publicly filed on docket, revealing case's existence, but complaint was later filed under seal).[6] Even *Summers*, which alone has concluded that every failure to file under seal requires dismissal with prejudice, reached that conclusion for prudential concerns, not because it was required by statute or by jurisdiction. 623 F.3d at 296-97.

Both because it is what courts do, and because the False Claims Act demands that whistleblowers not be savaged, these holdings are completely appropriate. Courts police their own seals exercising informed discretion and using well-established analytical guideposts.[7]

That no court has remotely approached the lengths advocated by Petitioner is not surprising, since the

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[6] There are cases where a complete failure to file under seal or maintain the seal can completely frustrate the Government's interest, resulting in dismissal, but these atypical cases involve a complete disregard *ab initio* of the sealing and service requirements. *E.g., Andre v. Bank of America*, 2016 U.S. Dist. LEXIS 1354, at *15-16 (N.D. Cal. Jan. 6, 2016) (applying *Lujan* and finding relator "incurably frustrated" the seal's purpose, where he failed to file under seal or serve the Government, depriving the Government of its opportunity to intervene). *Summers* falls within this limited group of cases.

[7] There also is at least one case in which sanctions, but not dismissal, have been imposed by a court whose seal order was violated by relators. *Bibby*, 76 F. Supp. 3d 1412-16 (while case was under seal for more than six years, relators communicated with reporters, but the defendants were not tipped off; $1.6 million sanction against relators who acted in bad faith and received a net $41.5 million share of litigation proceeds).

False Claims Act says not a word about what should happen when a seal is breached.

Nor did it need to. The seal requirement is not jurisdictional: Congress would have said so if it was.[8] *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006); *Henderson ex rel. Henderson v. Shinseki,* 562 U.S. 428, 435 (2011). And Congress knew that courts have long dealt with seals and knew how to police them on their own. Seals are, after all, court orders, and it is the province of courts to assess whether they have been breached and what consequences should adhere when they have been. Judge Totenberg clearly and succinctly set forth the guiding principles in *Bibby*, noting that the issue was at bottom one of contempt of court, not statutory mandate, and fashioned a remedy which, though harsh, fell far short of the *in terrorem* approach advocated by Petitioner. 76 F. Supp. 3d at 1411 (the discretion Congress granted a court to decide when the seal should be extended beyond 60 days supports the conclusion that a court is "vest[ed] . . . with the discretion to impose an appropriate

[8] The daisy-chain argument against Article III standing for a *qui tam* relator who breaches the seal set out in the brief of *amicus* American Tort Reform Association is uniquely untenable. The argument is that while this Court held, in *Vermont Agency of Natural Resources v. Stevens*, 529 U.S. 765, 771 (2000), that *qui tam* relators *do* have standing to sue as the partial assignee of the United States, that holding becomes inapplicable when a relator fails to hit the middle of all the squares in what *amici* apparently view as a game of litigation hopscotch. Were the seal requirement jurisdictional, perhaps this argument would at least merit pause. Because it is not, nothing in this case remotely changes the result in *Stevens*, and the standing challenge fails at inception.

sanction for a breach of its own order extending the seal").

And *Bibby*, in turn, followed the approach of all but the merest handful of cases addressing FCA seal-breach issues. The seminal decision is *Lujan*, 67 F.3d at 24-47, and the simple, equitable balancing test set out in that decision has been adopted with little pause by the Fifth Circuit in this case: Was the governmental interest hurt? Was the breach serious? Did the relator act in bad faith? The courts below followed *Lujan*, as has nearly every other court to examine seal-breach issues over the past 20 years.

There is one point, apparently unaddressed by all the briefing in this Court and the lower courts, which highlights both the necessity of a balancing test and the absurdity of having none. What happens when a party other than the relator breaches the seal? Papers mistakenly get filed on the public record, or left on a table in a prosecutor's or clerk's office. An investigator interviewing a witness accidently tells the witness that there is a lawsuit pending. Defendants provided with copies of a complaint following a partial unsealing may put too much information in an SEC filing or say something at an industry conference. A lawyer may make a mistake.

Such things happen. But State Farm and its *amici* do not even acknowledge these possibilities, so focused are they on punishing and discouraging relators in any way possible: Absent an answer to these possibilities, Petitioner's proposed rule, positing as it

does that only relators breach the seal, is mere gamesmanship.

We respectfully address one additional point: The claim by State Farm and its *amici* that the seal requirement is intended to protect defendants from harmful publicity. If the universe of potential False Claims Act defendants really wishes to avoid reputational harm, of course, they might choose not to defraud the United States; but failing that, their issue here lies with Congress, rather than this Court.

There is "no evidence Congress intended any particular interest of the defendant's to be protected," except for an arcane service-of-process issue.[9] *Summers*, 623 F.3d at 293 n.5; *id.* at 301 (Keith, J., concurring in result); *Lujan*, 67 F.3d at 247 ("Never did the [Senate] Committee discuss, let alone imply that it sought to protect, the types of potential unfairness relied on by [Petitioner and its *amici*] . . . . [P]rotecting the rights of defendants is not an appropriate consideration when evaluating the appropriate sanction for a violation of the seal provision").[10] This assertion might be more persua-

[9] The specific and solitary pitfall the Committee identified was obviated by inserting a clause to clarify that defendants are not required to respond to a *qui tam* complaint until 20 days after it is served on them per Rule 4, Fed. R. Civ. P. S. Rep. No. 99-345 at 24, 1986 U.S.C.C.A.N. at 5289; 31 U.S.C. § 3730(b)(3) ("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").

[10] NACDL also asserts that *qui tam* relators have "powerful incentives to violate the seal" so as to generate a "favorable

sive coming from a defendant which the jury had not determined to have committed fraud, but the end point is the same: Congress did not intend the seal to "to affect defendants' rights in any way." S. Rep. 99-345 at 24, 1986 U.S.C.C.A.N. at 5289; *Lujan*, 67 F.3d at 247 (rejecting contention that the seal had been intended to bestow rights upon defendants).

The Senate wrote, and the cases recognize, that the sealing mechanism was inserted by the 1986 Amendments to allow a relator to "protect his own litigative rights" by initiating his case at the same time he provides his information to the government. S. Rep. 99-345 at 24, 1986 U.S.C.C.A.N. at 5289. It would be the height of irony were this Court to decree that the slightest seal breach would wrest those very rights from the relator and deprive the government of his services.[11]

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media climate" and somehow gain the upper hand in settlement negotiations. Br. of NACDL at 12. This is, politely put, implausible. Under *Lujan*, relators and their counsel are at risk for sanctions and dismissal for violating the seal, and the suggestion that relators are scheming strategic seal violations is both entirely unsupported and offensive. And as to the settlement suggestion, the NACDL (as wells as *amicus* CGP, Br. of CGP at 12-13) unwittingly highlights one of the most difficult aspects of the practice of keeping *qui tam* cases under essentially-indefinite seal—the fact that they routinely conduct and complete settlement discussions regarding frauds against the taxpayers in complete secrecy, with no judicial, legislative, or public scrutiny.

[11] *Lujan*, 67 F.3d at 245 ("the seal provision [allows] the *qui tam* relator to start the judicial wheels in motion and protect his litigative rights"); *United States v. Johnson Controls*, Inc., 457 F.3d 1009, 1016 (9th Cir. 2006) ("submissions to the government

The *Lujan* test appropriately focuses on the knowledge and intent of the person violating the trial-court sealing order: There is no way to predict the consequences to a defendant, and there certainly is no way to underestimate the ability of a motivated behemoth and its counsel to gin up *post hoc* assessments of harm.

The Coalition for Government Procurement[12] asserts that seal violations put defendants at a "competitive disadvantage." Br. CGP at 9-12. CGP suggests that seal violations inform the government of FCA claims against its members. But the government, of course, already knows of such cases by virtue of service of the complaint on the United States. 31 U.S.C. § 3730(b)(2). CGP also asserts that violations of the seal expose their members to liability for failure to self-disclose their fraud. Br. CGP at 12-14. Apparently, the concern is that a seal breach would put the defendant on notice of its fraud before the

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at the same time the lawsuit is filed under seal under § 3730(b) protect the relator's right to a bounty").

[12] CGP includes among its members GlaxoSmithKline, Johnson & Johnson, Pfizer, and Abbott, which rank #1, #2, #3, and #6 in largest False Claims Act recoveries, as well as Boeing (#15), Eli Lilly, Genentech, General Dynamics, Northrop Grumman, Genentech, L3, McKesson, Raytheon and Stryker, all of which have paid substantial amounts to the United States after *qui tam* complaints. Some things never change: In 1986, the Judiciary Committee noted that "[i]n 1985, the Department of Defense Inspector General . . . testified that 45 of the 100 largest defense contractors, including 9 of the top 10, were under investigation for multiple fraud offenses." S. Rep. 99-345 at 2, 1986 U.S.C.C.A.N. at 5267.

government did, and it would have to report its fraud to the government before the government reported the fraud to the defendant. With due respect, if this is the way government contractors view their responsibilities to the United States, then Taxpayers Against Fraud will be around for many years.

There is one more answer to the frustrations expressed in these briefs: The relief they seek–imposition of the litigation death penalty in the event of each and every seal-breach–would not alleviate the concerns they profess. It is now beyond credible debate (despite State Farm's position, *e.g.*, Pt'r Br. at 54 n.10) that the seal does not prevent a relator, or her lawyers, from discussing the *facts* of a defendant's fraud. Rather, the seal protects the existence of the pending *qui tam* case. *Am. Civil Lib. Union v. Holder*, 673 F.3d 245, 254 (4th Cir. 2011) ("[T]he seal provisions limit the relator only from publicly discussing the filing of the qui tam complaint. Nothing in the FCA prevents the qui tam relator from disclosing the existence of the fraud").

In fact, it would not violate the seal for a relator to say that she had been interviewed by the Justice Department. This does not make it wise, or usual, to publicly discuss the underlying facts; but it is entirely legal to do so, as the district court recognized. *United States ex rel. Rigsby v. State Farm Fire & Cas. Co.*, 2011 U.S. Dist. LEXIS 7535, at *21 (S.D. Miss. Jan. 24, 2011) ("a disclosure of the facts underlying the qui tam action alone, without the disclosure that those allegations had led to the filing of a qui tam, does not necessarily constitute a violation of a seal order").

In a case such as this one, where the subject matter of the *qui tam* had been a matter of pitched public debate for several years, State Farm's argument simply strains credulity.[13] As Judge Senter noted, "[w]here the information is already a matter of heated and substantial public discussion before the qui tam complaint is filed, the information itself cannot be concealed–nor public discussion curtailed–no matter how strictly the seal provision is enforced and observed." *Id.* at *21. This is yet another reason why seal breaches and their effects must be evaluated on a case-by-case basis, rather than a per se rule applied to bluntly quash meritorious cases.

Given that government contractors universally say that FCA cases against them are "entirely without merit," the facts of the underlying fraud (which are open to discussion at any time) are far more damaging to them than the existence of a *qui tam* case.

In sum, Congress did not feel the need to elaborate on the seal. The courts have found all the tools necessary to handle violations of their orders, as well as violations of the sealing requirement of the Act.

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[13] During oral argument on its original motion to dismiss based on seal breaches, counsel for State Farm directed the trial court's attention to a non-FCA complaint that "alleged directly that the insurer's conduct created inflated and false flood insurance claims under the National Flood Insurance Program." *United States ex rel. Rigsby v. State Farm Fire & Cas. Co.*, 2011 U.S. Dist. LEXIS 7535, at *24-25 (S.D. Miss. Jan. 24, 2011). As the trial court observed: "The pleadings making these allegations were a matter of public record long before the Relators' FCA action was filed." *Id.*

Nothing about the process employed by the courts below is broken, and no repairs are needed.

Conclusion

The decision of the United States Court of Appeals for the Fifth Circuit should be affirmed, and the case remanded for further adjudication of State Farm's fraud.

Respectfully submitted,

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