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.*,
Respondents.

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

BRIEF FOR *AMICI CURIAE* THE AMERICAN TORT REFORM ASSOCIATION AND THE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES IN SUPPORT OF PETITIONER

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The American Tort Reform Association and the National Association of Mutual Insurance Companies respectfully submit this brief as *amici curiae* in support of petitioner.[1]

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or any person other than *amici curiae*, their members, and their counsel made any monetary contribution intended to fund the brief's preparation

INTEREST OF *AMICI CURIAE*

The American Tort Reform Association (ATRA) is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus curiae* briefs in cases before this Court and other federal and state courts addressing important liability issues. *See, e.g.*, *Am. Elec. Power Co.* v. *Connecticut*, 564 U.S. 410 (2011); *Williamson* v. *Mazda Motor of Am., Inc.*, 562 U.S. 323 (2011).

The National Association of Mutual Insurance Companies (NAMIC) is the largest property/casualty insurance trade association in the country, with more than 1,400 member companies representing 39 percent of the total market. NAMIC supports regional and local mutual insurance companies on main streets across America and many of the country's largest national insurers. NAMIC member companies serve more than 170 million policyholders and write more than $230 billion in annual premiums. Its members account for 54 percent of the homeowners, 43 percent of the automobile, and 32 percent of the business insurance markets.

The False Claims Act and its *qui tam* provisions authorize private citizens to pursue a unique, burdensome, and costly form of high-stakes statutory tort action when the citizens themselves have not suffered any injury. *Amici* have a significant inter-

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or submission. The parties have filed letters granting blanket consent to *amicus* briefs.

est in ensuring that courts protect the integrity of the manner in which the Government and private plaintiffs wield this extremely potent weapon, and that the cases they pursue promote the public fisc over self-interest. The statute's generous reward and attorney's fee provisions encourage citizens and contingent-fee counsel to pursue claims in the name of the United States, even after the actual victim, the Government, investigates the plaintiff's allegations and declines to pursue litigation itself. A recent doubling of the statutory penalties associated with violations of the statute (a consequence purely of budget policy, not law enforcement policy) increases the risk defendants face in litigation and the leverage plaintiffs can apply to demand large settlements and bounties. *Amici*'s interest is no small matter: *Qui tam* litigation has been on a dramatic rise over the past decade. Indeed, while the United States itself has filed about a hundred FCA cases in each of the last two years, *qui tam* relators have filed more than six times as many—714 in 2014 and 632 in 2015. *See* U.S. Dep't of Justice, *Fraud Statistics—Overview: Oct. 1, 1987-Sept. 30, 2015*, at 2 (2015).[2]

The issue in this case is central to *amici*'s mission of seeking to ensure that civil litigation is conducted in a manner fair to all parties, including defendants, and that enforcement of the statute remains true to its unique purpose. Toward these ends, ATRA has filed *amicus* briefs in this case at the certiorari stage and in numerous other FCA cases, including recently in *Universal Health Services, Inc.* v. *United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), and *United*

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[2] *Available at* https://goo.gl/jVXD0R.

States ex rel. Harman v. *Trinity Industries, Inc.*, No. 15-41172 (5th Cir. Mar. 28, 2016). NAMIC filed an *amicus* brief in this case before the Court of Appeals.

A relator's obligation to comply with the FCA's seal requirement has relevance to every one of the hundreds of *qui tam* actions filed each year. In each of those cases, relators are required to file their complaint under seal; but some are tempted to violate that seal so as to gain unfair advantage in the litigation. That is precisely what the relators did here: Even before the defendant State Farm Fire & Casualty Co. was permitted to see their complaint and know the precise content of their accusations, the relators took to the public airwaves in an effort to tarnish the company's reputation, garner the interest of the public and the Federal Government, and pressure State Farm to settle. Whether relators may engage in such conduct without losing their authorization to litigate in the name of the Government is an issue that goes to the fundamental fairness of our civil justice system—and is thus an issue of critical concern to *amici*.

SUMMARY OF ARGUMENT

The FCA imposes a few specific conditions on the right of a citizen to invoke the name of the United States as a victim of fraud and pursue potentially catastrophic penalties against an individual or corporate defendant. This case presents a question of significant importance: What is the consequence for a relator who violates one of those few requirements—the requirement that her complaint "remain under seal for at least 60 days"? 31 U.S.C. § 3730(b)(2). Here, the relators blatantly and repeatedly violated the statute by conducting an extensive media campaign to publicize their FCA suit while the complaint was under seal. Pet. App. 21a. The Fifth Circuit nevertheless held that they could still proceed with their suit, without even considering whether the violation had unfairly prejudiced the defendant.

That decision should be reversed. As this Court has held, the *qui tam* provisions pass constitutional muster only because they confer upon a qualified relator a partial assignment of the right to pursue claims for injury suffered by the United States. Compliance with the seal is a condition of that assignment, and those who fail to comply forfeit the assignment. Thus, violation of the seal should result in automatic dismissal of the relator's suit for lack of Article III standing. At the very least, in deciding whether dismissal is appropriate, a court should consider whether the defendant was harmed. Any contrary holding would risk exposing the hundreds of defendants facing *qui tam* suits every year to unfair prejudice.

ARGUMENT

I. A SEAL VIOLATION REQUIRES AUTOMATIC DISMISSAL BECAUSE IT DEPRIVES THE RELATOR OF ARTICLE III STANDING.

1. The purpose of the FCA is to protect the federal fisc. It imposes civil liability on any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," or who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(A)-

(B). Under the FCA, a "claim" "includes direct requests to the Government for payment as well as reimbursement requests made to the recipients of federal funds under federal benefits programs." *Escobar*, 136 S. Ct. at 1996; *see* 31 U.S.C. § 3729(b)(2)(A). Thus, as this Court has explained, what the FCA seeks to remedy is "injury to the United States." *Vt. Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 771 (2000). And indeed, "the Attorney General may bring a civil action" against any person who has violated the statute. 31 U.S.C. § 3730(a).

The United States, however, is not the only party that may sue to enforce the FCA. The FCA also authorizes a private person (known as a relator) to bring a civil action (known as a *qui tam* action) "'for the person and for the United States Government' against the alleged false claimant." *Stevens*, 529 U.S. at 769 (quoting 31 U.S.C. § 3730(b)(1)). The FCA provides that the "action shall be brought in the name of the Government." 31 U.S.C. § 3730(b)(1).

Although the FCA authorizes suits by both the United States and relators, "a relator's interests and the Government's do not necessarily coincide." *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 949 n.5 (1997). "As a class of plaintiffs," this Court has emphasized, "*qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good." *Id.* at 949. The source of that motivation is the FCA itself. A defendant found liable must pay treble damages and civil penalties, penalties set in 1986 at $5,000 to $10,000 per claim. 31 U.S.C. § 3729(a)(1). Acting at the direction of Congress, the Department of Justice recently adjusted those penalty amounts, increasing the minimum to $10,781 and the maximum to $21,563. 81 Fed. Reg. 42,491, 42,494 (June 30, 2016). Thus, a judgment or settlement in an FCA action can be substantial, especially given that the suit can encompass six years' worth of alleged violations. 31 U.S.C. § 3731(b)(1). And by statute, a *qui tam* relator is entitled to "a share" of the judgment or settlement—up to 30 percent in some cases—"plus attorney's fees and costs." *Stevens*, 529 U.S. at 769-770; *see* 31 U.S.C. § 3730(d)(1)-(2).

Given the possibility of an extremely lucrative "bounty" under the FCA, *Stevens*, 529 U.S. at 772, *qui tam* relators will often be motivated by "opportunism rather than legitimate whistle-blowing." *Sanderson* v. *HCA-The Healthcare Co.*, 447 F.3d 873, 876 (6th Cir. 2006). Too often, given the availability of attorney's fees under the statute, their lawyers will be motivated by profits, too. *See False Claims Correction Act of 2007: Hearing on H.R. 4854 Before the Subcomm. on Courts, the Internet, and Intellectual Prop. and the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 21 (June 19, 2008), 2008 WL 2471750 (statement of Rep. Lamar Smith) (acknowledging criticism that the FCA "is counterproductive and has devolved into a lottery for plaintiffs attorneys who can't resist the lure of a big payoff"); Todd J. Canni, *Who's Making False Claims, the Qui Tam Plaintiff or the Government Contractor? A Proposal To Amend the FCA To Require That All Qui Tam Plaintiffs Possess Direct Knowledge*, 37 Pub. Cont. L.J. 1, 21 n.118 (2007) ("Many of these attorneys are not heavily concerned with whether these [False Claims Act] actions will ultimately prevail. They know that if they file a certain number of them, at least one will result in some recovery. And even if they do not prevail, nuisance value settlements are always a possibility."). It should come as no surprise, then, that over 70 percent of all *qui tam* suits brought under the FCA are meritless. *See* Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 Colum. L. Rev. 949, 975 (2007) ("[A] substantial number of qui tam actions, 72%, are frivolous.").

2. In *Stevens*, this Court considered whether *qui tam* relators have Article III standing to maintain actions under the FCA. The Court acknowledged that "[t]he Art. III judicial power exists only to redress or otherwise to protect against injury *to the complaining party*." *Stevens*, 529 U.S. at 771 (internal quotation marks omitted). The complaining party in a *qui tam* FCA suit, however, is a relator who herself has suffered no injury. *See id.* at 772-773. The only injury from an FCA violation is "injury *to the United States*—both the injury to its sovereignty arising from violation of its laws * * * and the proprietary injury resulting from the alleged fraud." *Id.* at 771 (emphasis added).

The Court nevertheless held that "a *qui tam* relator under the FCA has Article III standing." *Id.* at 778. That holding rested on "the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor." *Id.* at 773. As the Court explained, "[t]he FCA can reasonably be regarded as effecting a *partial assignment* of the Government's damages claim" from the United States to the relator. *Id.* at 773 & n.4. It is only by virtue of that assignment that the relator has Article III standing to assert "the United States' injury in fact." *Id.* at

774. Under *Stevens*, therefore, a relator's Article III standing depends entirely on her status "as a partial assignee of the United States." *Id.* at 773 n.4 (emphasis omitted); *see also In re Schimmels*, 127 F.3d 875, 884 (9th Cir. 1997) ("[U]nder the Act, the relator is, in effect, a partial, limited, and conditional assignee of the government's fraud claim * * * .").

The question, then, is under what circumstances the FCA can be understood as effecting such a partial assignment to a *qui tam* relator. The text, structure, and history of the FCA all point in the same direction: For the FCA to effect such a partial assignment, a relator must comply with the statute's seal requirement. *See* State Farm Br. 28-30, 47-48 (arguing that the seal requirement is a condition of the partial assignment under the statute).

Start with the text of the FCA. *See Escobar*, 136 S. Ct. at 1999. Section 3730(b)(2) provides that "[a] copy of the complaint and written disclosure of substantially all material evidence and information * * * shall be served on the Government." 31 U.S.C. § 3730(b)(2). It further provides that the 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." *Id.* There is a reason Congress grouped all of these requirements in the same subsection, under the heading "Actions by private persons": They are all conditions of assignment—things the relator "*shall*" and therefore *must* do in order to proceed with the action as a private person. *Id.* (emphasis added); *see also Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015) (explaining that the word "shall" means that something is "mandatory, not precatory").

Take, for example, the requirement that the relator serve a copy of the complaint on the Government. 31 U.S.C. § 3730(b)(2). It would be impossible for the Government to partially assign its damages claim to someone whose suit it did not even know about. Service of the complaint is thus naturally understood as a condition of assignment. So, too, is the provision at issue here: the requirement that the complaint "remain under seal for at least 60 days." *Id.* That it appears in the very next sentence is no coincidence; Congress intended it to be understood in the same way, as a condition of assignment. *See Neal* v. *Clark*, 95 U.S. 704, 708 (1877) ("It is a familiar rule in the interpretation of written instruments and statutes that a passage will be best interpreted by reference to that which precedes and follows it." (internal quotation marks omitted)).

And indeed, Congress enacted the seal requirement, as it did the service requirement, in part "to protect the Government's interest." S. Rep. No. 99-345, at 24 (1986).[3] In particular, Congress was concerned that "false claims allegations in civil suits might overlap with allegations already under criminal investigation." *Id.* As the Justice Department warned, a "public filing of overlapping false claims allegations could potentially 'tip off' investigation targets when the criminal inquiry is at a sensitive stage." *Id.* Requiring that the relator's complaint remain under seal would avoid that problem, and give the Government 60 days to wrap up the criminal investigation or move for an extension of time during

[3] As explained below on pp. 15-16, Congress also enacted the seal requirement to "protect[] * * * the *defendant's* interest." S. Rep. No. 99-345, at 24 (emphasis added).

which the complaint remains under seal. *Id.* at 24-25; *see* 31 U.S.C. § 3730(b)(3).

A relator who violates the seal requirement thus acts contrary to "the Government's interest in criminal matters." S. Rep. No. 99-345, at 24. And why would Congress wish to assign part of its damages claim to someone who did *that*? The answer is that it would not. A relator who defies the Government's interest—regardless of whether the Government is ultimately harmed—is not a proper assignee of the Government's damages claim in Congress's eyes.[4]

That is all the more true given the crippling financial penalties Congress has authorized a relator to impose on a defendant in a *qui tam* action. As noted, the FCA imposes treble damages and a civil penalty of up to $21,563 per violation. *See* 31 U.S.C. § 3729(a)(1); 81 Fed. Reg. at 42,494.[5] Those amounts are so large that they are "essentially punitive in nature." *Stevens*, 529 U.S. at 784. And a relator's

[4] Because *Congress* has decided that the seal requirement should be a condition of assignment, the *Department of Justice* has no authority to waive the requirement on a case-by-case basis. Congress was no doubt "aware of the various policy interests that might be affected by an *in camera* requirement, and chose a sixty-day requirement accordingly." *United States ex rel. Summers* v. *LHC Grp., Inc.*, 623 F.3d 287, 297 (6th Cir. 2010). Neither the Department of Justice nor courts should be able to "second-guess" the balance that Congress struck in making that requirement a condition of assignment. *Id.* at 299.

[5] Many states have parallel statutes to the False Claims Act. As a result, for programs that are jointly administered by the federal and state governments, a false claim may trigger two penalties. Thus, for example, a $10 false Medicaid claim relating to a single doctor's visit or a single prescription could result in *over $43,000 in penalties*.

share of those proceeds can be a serious windfall. *See* 31 U.S.C. § 3730(d)(1)-(2). In 2015 alone, for instance, relators in FCA actions were awarded over $597 million. *See* U.S. Dep't of Justice, *supra*, at 2. Congress could not have possibly intended to give relators who had violated the seal requirement—and thus disregarded the Government's interest—the right to enjoy such an enormous bounty.

Thus, the seal requirement is naturally understood as imposing a condition of assignment, just like the other requirements of § 3730(b)(2). When a relator satisfies these simple conditions, the FCA effects a partial assignment of the Government's damages claim. But should a relator fail to satisfy any one of them, no assignment is effected. *See* 6 Am. Jur. 2d *Assignments* § 112 ("Conditional assignments cannot be considered legally binding absent the happening of the condition."). In that situation, the relator "has no more right to bring suit in the Government's name than any other private person." *United States ex rel. Summers* v. *LHC Grp., Inc.*, 623 F.3d 287, 296 (6th Cir. 2010). And in the absence of any assignment, the relator has no Article III standing to proceed; her suit must be dismissed. *See id.* at 298 ("An FCA plaintiff who cannot satisfy those conditions * * * cannot bring suit in the name of the Government and has no basis for recovery."). That would not mean the alleged false claimant could never be sued. Because the dismissal would be with prejudice only as to the relator, it would not affect the United States' ability to pursue a valid claim itself. *See United States ex rel. Pilon* v. *Martin Marietta Corp.*, 60 F.3d 995, 1000 & n.6 (2d Cir. 1995). Only the relator would lose her litigating authority and right to claim a portion of any recovery for violating the seal requirement.

3. Each of the potential counterarguments to this understanding of the seal requirement lacks merit.

It is true, as the Fifth Circuit noted, that the text of the FCA does not expressly say that a *qui tam* action should be dismissed when a relator violates the seal. Pet. App. 20a. But the absence of such language is of no moment, because dismissal of the action flows naturally from the fact that the seal requirement is a condition of assignment. Absent assignment, a relator, who has suffered no injury of her own, lacks Article III standing to maintain the action.

To be sure, the FCA does not expressly label the seal requirement a condition of assignment. But in fact, the statute says nothing about assignment at all, and the Court in *Stevens* held that the statute "can reasonably be regarded" as reflecting a theory of assignment anyway. 529 U.S. at 773 & n.4. The same is true here. Although the seal requirement is not explicitly designated as a condition of assignment, the text, structure, and history of the statute demonstrate that it is.

The Fifth Circuit also suggested that requiring dismissal in all instances of a seal violation—even when "the government suffers minimal or no harm from the violation"—would "frustrate" the FCA's purposes. Pet. App. 20a. But at the time a relator violates the seal requirement, she has no idea whether the violation will harm the Government or not. The relator does not know, for instance, whether there is an ongoing criminal investigation of the same defendants. In violating the seal, the relator thus acts in utter disregard of "the Government's interest in criminal matters," risking serious harm to the Government. S. Rep. No. 99-345, at 24. Even if the Government is not ultimately harmed, the would-be relator is not someone whom Congress intended to be an assignee and maintain a suit "in the name of the Government." 31 U.S.C. § 3730(b)(1). A relator who defies that mandate forfeits the standing to assert the Government's interest in court.

Nor is there anything exceptional about the fact that events *after* filing of the suit may affect a relator's assignment. Under § 3730(d), for example, the scope of the relator's assignment may vary depending on whether the Government decides to intervene. If the Government intervenes, the assignment is limited and the bounty is capped at 25 percent of the proceeds from the action; by contrast, if the Government does not, the assignment is greater—the potential bounty increases to between 25 percent and 30 percent. *Id.* § 3730(d)(1)-(2). Similarly here, the scope of the relator's assignment depends on whether the relator complies with the seal requirement. The fact that a relator is a proper assignee on the day she files her complaint does not mean she is still a proper assignee later on, when she violates the seal requirement.

Of course, seal violations in other contexts might not automatically require dismissal of the complaint. But that is because seal requirements in other contexts generally are not conditions of assignment. *See, e.g.*, *Greiner* v. *City of Champlin*, 152 F.3d 787, 788 (8th Cir. 1998) (involving violation of a protective order concerning a psychological report); *Coleman* v. *Am. Red Cross*, 23 F.3d 1091, 1094 (6th Cir. 1994) (involving violation of a protective order concerning a blood donor's information). What makes the FCA context different is that the plaintiff's standing is premised not on her own injury, but on an assignment from the Government—which, in turn, is conditioned on compliance with the seal requirement.

4. In this case, the Fifth Circuit was therefore wrong to hold that "a seal violation does not automatically mandate dismissal." Pet. App. 20a. Because a seal violation means that the relator is not a proper assignee, it also means that the relator lacks Article III standing to assert the United States' injury. And because Article III standing is a jurisdictional necessity, dismissal is *always* required when a relator commits a seal violation. The contrary decision of the Fifth Circuit should be reversed.

II. AT THE VERY LEAST, A SEAL VIOLATION WARRANTS DISMISSAL WHEN IT PREJUDICES THE DEFENDANT.

Even if dismissal is not required in every case, the decision below should still be reversed. That is because the Fifth Circuit determined whether dismissal was appropriate by applying a balancing test that did not account for the defendant's interests at all. Pet. App. 19a-20a; *see* State Farm Br. 55-57.

1. In enacting the seal requirement, Congress intended to "protect the Government's interest in criminal matters" by, among other things, preventing the filing of a *qui tam* action from tipping off the subjects of an ongoing criminal investigation. S. Rep. No. 99-345, at 24. At the same time, the seal requirement was not supposed to give relators any litigation advantage over defendants. The Senate Report made that much clear: "By providing for

sealed complaints, the Committee does not intend to affect defendants' rights in any way." *Id.* Indeed, Congress did not intend the seal requirement to unfairly prejudice anyone; in the words of the Senate Report, the requirement was meant to "protect[] both the Government and the defendant's interests without harming those of the private relator." *Id.*

To serve Congress's purposes, therefore, any balancing test should account for the defendant's interests as well as the Government's. When a relator violates the seal, a court should consider whether that violation has "affect[ed] defendants' rights in any way." *Id.* If the seal violation has prejudiced "the defendant's interests," the *qui tam* complaint should be dismissed.

Accounting for the defendant's interests is crucial because a seal violation could harm the defendant in any number of ways. For example, when a relator reveals prematurely that "the defendant is named in a fraud action brought in the name of the United States," that information risks misinforming the public about the nature of the suit. *Smith* v. *Clark/Smoot/Russell*, 796 F.3d 424, 430 (4th Cir. 2015) (internal quotation marks omitted). At that point in time, "the United States has not yet decided whether to intervene," and so the public may be misled to believe that the defendant is the target of a suit by the Federal Government. *Id.* (internal quotation marks omitted). A seal violation could also harm defendants by presenting the public with a biased, one-sided view of the case, seen through the financially motivated eyes of the relator. By breaking the seal, relators are often able to "expos[e] a defendant to immediate and hostile media coverage." *Summers*, 623 F.3d at 298. Importantly, the statute obligates the Attorney General to investigate *every qui tam* allegation and to abide herself by the seal, so a relator who violates the seal gains the advantage of controlling a powerful message by speaking while the floor is the relator's alone. And because the seal prevents the defendant from learning the allegations under investigation, the defendant is often in a poor position to respond. The public is left with a negative impression of the defendant, even when the defendant has done nothing wrong. That reputational blow might give a relator enough "leverage to demand that [the] defendant come to terms quickly." *Id.* It might also cause long-lasting damage to the defendant's operations, stigmatizing its business in the eyes of the public for years to come. *See Erickson ex rel. United States* v. *Am. Inst. of Biological Scis.*, 716 F. Supp. 908, 912 (E.D. Va. 1989) (discussing the need "to protect the defendant's reputation from unfounded public accusations").

The Court's recent decision in *Escobar* makes accounting for the defendant's interest all the more important. The Court in *Escobar* rendered two holdings. First, it held that "'false or fraudulent claims' include more than just claims containing *express* falsehoods." *Escobar*, 136 S. Ct. at 1999 (emphasis added). Rather, certain misrepresentations *by omission* can also be the basis for FCA liability. *Id.* Second, the Court held that the failure to "disclose the violation of a contractual, statutory, or regulatory provision" can be an actionable misrepresentation under the FCA, even if compliance with that provision was not "*expressly* designated a condition of payment." *Id.* at 2001 (emphasis added). Under *Escobar*, the key is whether compliance with a statutory, regulatory, or contractual provision was "*material* to the Government's payment decision," *id.* at 2002 (emphasis added), not whether it was "labeled" a condition of payment. *Id.* at 2001.

In short, a falsehood need not be express, and a condition of payment need not be expressly designated as such, for liability to lie under the FCA. Instead, liability will depend on a court's application of broad concepts, like what counts as a misrepresentation "by omission," and what counts as a "material" misrepresentation. A court's rulings on those matters will not always be easy to predict. And that uncertainty could give relators even more incentive to violate the seal requirement. A relator might think, for example, that she can exploit that uncertainty early on, by airing her complaint in public and pressuring the defendant to settle while the defendant is least able to respond. A relator might also think that a concerted public relations campaign could put pressure on, and influence, the Government's evaluation of whether an omission was "material."

Moreover, in light of *Escobar*'s second holding, relators might feel further emboldened to accuse defendants of violating statutory and regulatory provisions that nowhere appear as conditions of payment. And allegations of violations of statutory and regulatory provisions can be especially stigmatizing, because they portray the defendant as even more of a lawbreaker. The prejudicial effect of such allegations makes it all the more important that the relator be deterred from violating the seal, so that the public does not get a one-sided view of the allegations and is not led to believe that the suit has the imprimatur of the United States.

3. The facts of this case illustrate how prejudicial a seal violation can be. Here, the relators and their counsel opted—while their case was under seal—to stage an extensive and relentless media campaign against State Farm. Among other things, they disclosed the existence and content of their sealed filings to ABC News, the Associated Press, and the *New York Times*. State Farm Br. 8-9. Each of those media outlets then ran stories with information from that disclosure. *Id.* The relators and their attorneys also provided sealed information to CBS News and a Congressman. *Id.* at 9, 11-12. These repeated violations of the seal requirement, which the relators "conceded" had occurred, Pet. App. 22a, allowed the relators to litigate their case in the court of public opinion before State Farm could even view the *qui tam* complaint. And the damage to State Farm's reputation resulted in precisely the sort of unfair advantage that Congress never intended relators to enjoy.

The test embraced by the Fifth Circuit ignores the interests of defendants like State Farm altogether—and thus encourages relators to ignore them, too. Relators are already motivated to violate the seal, if only to attract enough media attention to get the United States interested in the case; from 1987 to 2014, relators have recovered nearly nine times more money in cases in which the Government is involved than in cases in which the Government declines to intervene. *See* U.S. Dep't of Justice, *supra*, at 2. If allowed to stand, the decision below will give relators an added reason to violate the seal: to gain an unfair advantage over FCA defendants by, among other things, improperly influencing and inhibiting the deliberations and prosecutorial discretion of the

Attorney General. Only by weighing defendants' interests in the balance can courts guard against that incentive. And when a seal violation "affect[s]" those interests "in any way," S. Rep. No. 99-345, at 24, courts should simply dismiss the relator's complaint. Because the multiple seal violations in this case did prejudice State Farm, the relators' complaint should have been dismissed.

CONCLUSION

The judgment of the Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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