

1 And those are the types of interest that
2 Congress was trying to deal with in 1986, because in
3 1986 it was clear that there was a tidal wave of fraud
4 against the government, more than the government could
5 possibly hope to address using its own resources. And
6 relators were marshaled as force multipliers to help
7 with that effort. And every time the government has to
8 take over for a relator, those resources come from
9 somewhere. Even if the government gets a bigger
10 recovery on the back end, those resources come from
11 somewhere. And they take attention away from other
12 frauds that the government could be pursuing, and they
13 undermine Congress's objectives.

14 And so when -- in the rare case where the
15 government steps in and says, dismiss this case, because
16 they have already intervened or some other innocent
17 credit factors where they decide it's important to send
18 a message, we think courts should really listen.

19 In this case, where the government has done
20 the opposite, we think they should listen, too.

21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 Mr. Bash.

24 ORAL ARGUMENT OF JOHN F. BASH

25 FOR UNITED STATES, AS AMICUS CURIAE,

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SUPPORTING THE RESPONDENTS

MR. BASH: Mr. Chief Justice, and may it please the Court:

Given the focus of the earlier portion of the argument, I will -- I'm happy to answer questions about why the automatic dismissal rule is wrong, but I will jump right to what we think the standard should be, how we think the Court ought to write the opinion, and then how we think the Court ought to dispose of this case.

We think the standard for how to remedy a seal violation incorporates the basic background flexibility that district courts have always had to remedy violations of protective orders and sealing orders as informed by the basic purpose of this provision, which I think, as everyone has acknowledged now, is to protect the government by making sure that potential targets of criminal and civil investigations are not tipped off.

And the reason you need that in the FCA is because the filing of the complaint does something very special. It triggers the duty of the government to come in and say whether it's going to intervene.

So that's why, Justice Sotomayor, it's not the factual allegations of fraud. It's actually the

1 filing of the complaint because that is what triggers a
2 duty on behalf of the government to investigate and then
3 tell the Court whether it's going to intervene.

4 As far as the standard in the way this
5 Court --

6 JUSTICE KENNEDY: And -- and -- and why does
7 the government need that latitude?

8 MR. BASH: It needs that latitude because
9 defendants could potentially take steps to stymie an
10 investigation if they know that there's an actual
11 government attorney looking at this right now because
12 they have to look at it under the statute. That was, I
13 think, Congress's thinking in 1986, and I don't even
14 really take Petitioner to disagree with that at this
15 point.

16 In -- in terms of how to write the
17 opinion --

18 JUSTICE SOTOMAYOR: So -- well, let's get to
19 that, okay, because do we look at the situation as it
20 existed at the time of the violation and the risk it
21 created? Or do we look at it ex post facto and decide
22 it didn't, in fact, happen, so there is no harm?
23 Shouldn't the severity be determined at the time it
24 occurred?

25 Giving a complaint to a news media is

1 probably the best way to tip off a defendant. It's
2 actually more likely to do it than failing to serve the
3 government on time for which many circuits automatically
4 dismiss the complaint, even though that could be
5 considered harmless if the government is served late and
6 comes in and asks for an extension.

7 MR. BASH: Well, let me take --

8 JUSTICE SOTOMAYOR: There is a disparity on
9 how courts are treating those situations, but that's not
10 necessarily at issue here.

11 But what is at issue is, what do we measure
12 the appropriate sanction to be and based on what
13 evaluation?

14 MR. BASH: Well, let me take the general
15 question and bring it to the facts here, and then talk
16 about that question of the disparity about how courts
17 are treating the different kinds of violations.

18 The answer on the general question is they
19 are both relevant. Under the standard articulated below
20 and the standard we've advocated, you look at both the
21 actual harm to the government, just like often attempt
22 crimes are not punished as strongly as crimes that
23 actually result in harm, but you also look at the
24 severity of the violation, and we think there's a direct
25 correlation between the severity and the potential harm.

1 If you actually give the complaint to the defendant, the
2 harm -- the potential harm is enormous. If you tell one
3 person who is not affiliated with the defendant, the
4 potential harm is less. So it's relevant in that way.
5 And, of course, there is intent and bad faith.

6 And we don't discount that other factors
7 could be relevant in idiosyncratic cases. We think in
8 the mine run cases, those are the key factors. Let me
9 just take it to the facts here.

10 It's true --

11 JUSTICE BREYER: Before you get to the facts
12 here, I have this thought in my mind, which is that this
13 is a court order. People don't normally take it on
14 themselves to decide whether to follow it or not. If
15 you don't like it, lift it. But while it's there,
16 follow it.

17 And this court order does have a possible
18 consequence in some case that if it is violated, it will
19 cause harm to a defendant who learns for the first time
20 that he is being sued by reading The New York Times.

21 Okay?

22 Now, that may or may not hurt some. It may
23 hurt some a lot. Now, can that be taken into account?
24 I would say in an appropriate case, absolutely. The
25 Court has to be concerned in working out a sanction, the

1 overall fairness of the situation, and that's part of
2 it.

3 What do you think of that?

4 MR. BASH: I didn't disagree with anything
5 you said. I think the Court could take that into
6 account. It couldn't have made a difference here
7 because those three journalists did not leak the suit to
8 the public. So the -- State Farm couldn't have read
9 about it in The New York Times.

10 And what we think -- while these violations
11 were certainly in bad faith, what we think mitigates it
12 and at least makes the district court -- means that the
13 district court did not abuse its discretion here is that
14 it doesn't appear -- as Mr. Singh was saying earlier, it
15 doesn't appear this was designed to publicize this suit.

16 Scruggs was representing a lot of clients
17 bringing non-FCA suits. He did not, for example, leak
18 this complaint to the media members. He leaked the
19 evidentiary disclosures. And to be sure, they said that
20 there was a lawsuit. But it seems designed to have been
21 background for the general allegations of fraud for
22 those three journalists. So if it was intentional, it
23 was in bad faith.

24 But if the question was, did this District
25 Court abuse its discretion in declining to dismiss these

1 relators with prejudice who had already secured new
2 counsel because the counsel would respond to this --

3 JUSTICE GINSBURG: When would the government
4 be hurt by a sealing violation?

5 MR. BASH: I think what Congress had in mind
6 is defendants taking steps to thwart the government
7 investigation; for example, destroying evidence,
8 declining to cooperate once they know that there is a
9 formal investigation of them. I think that's what
10 Congress had in mind.

11 I'll note, though, that the Senate Report,
12 for those who look at that kind of thing, said that they
13 expected -- that the Senate expected that there would
14 not be many instances where a seal violation would harm
15 the government. So I don't think it's surprising that
16 this hasn't happened often.

17 And Mr. Singh referred to the appendix in
18 the petition that lists 48 cases that supposedly
19 involved seal violations. Petitioner put that together
20 obviously at the cert stage. Some of those don't even
21 involve seal violations. I think they said they relate
22 to the seal requirement.

23 JUSTICE GINSBURG: In your brief, you did
24 say -- on page 27 of your brief, you said that
25 reputational harm to the defendant could be relevant to

1 determining a sanction for seal violation.

2 MR. BASH: That's right, Justice Ginsburg,
3 in an idiosyncratic case. And the reason I say
4 idiosyncratic is, as we discussed, lower courts have
5 held and we agree that merely disclosing the allegations
6 of fraud does not violate the seal. So the sort of
7 reputational harm you'd be talking about is the
8 incremental harm from the disclosure that a suit has
9 been filed.

10 JUSTICE KENNEDY: You were going to tell us
11 how to write the ideal platonic opinion?

12 MR. BASH: I wouldn't presume to say the
13 platonic opinion. But to the extent the Court seeks our
14 recommendation in how to write the opinion, we think
15 that the overall focus should be courts should remedy
16 these seal orders like they always remedy protective
17 orders and seal orders, with a healthy dose of
18 discretion, but, in light of the purpose of this
19 provision, to protect the government.

20 More specifically, the three factors
21 identified by the courts below: actual harm to the
22 government; severity of the violation, which I think
23 correlates with potential harm; and intent or bad faith
24 are the three key factors in a mine run case. But we
25 don't think the Court should exclude that in an

1 idiosyncratic case. Defendant's reputation or other
2 factors could be relevant.

3 We also think -- Justice Alito, I think this
4 responds to your questions about making sure to send a
5 strong message that these violations will not be
6 tolerated. We think the Court could have dismissed this
7 case here. We don't say that it would have been an
8 abuse of discretion to dismiss the case here. And I
9 think if the Court's worried about sending the signal
10 that intentional violations don't matter, it could say
11 the district court would have been perfectly within its
12 discretion to dismiss here. If State Farm had sought
13 additional sanctions, the Court would have been in its
14 discretion to refer counsel to the bar or to impose
15 other sanctions, but they didn't seek that here.

16 And the abuse of discretion standard, we
17 think, should be particularly robust in this context
18 because the government relies on the relator. The
19 suit's not dismissed. The government doesn't intervene.
20 There is a trial of however many days, as Mr. Singh
21 said. And to unwind that all after the fact, I mean, I
22 think it shows why the abuse of discretion standard
23 should be particularly robust in this context.

24 Mr. Chief Justice, I just wanted to raise a
25 response --

1 JUSTICE KAGAN: Do you think deference ought
2 to be given to the government? And if so, as to what
3 parts of the test?

4 MR. BASH: Well, what we say in the brief is
5 deference ought to be given to the government's
6 statement that it's been harmed. So we use the phrase
7 "substantial weight," and we're not weighted to that
8 phraseology. But if the government comes in and says
9 yes or no on harm, we think that should be given
10 deferential --

11 JUSTICE KAGAN: On actual harm?

12 MR. BASH: Yeah. Well, we didn't come in
13 here and say either that or whether the suit should be
14 dismissed. We just didn't say anything. And we think,
15 as I said, that the Court would have been within its
16 discretion to dismiss this case. We just think this
17 Court ought to say, this is a classic area for
18 discretion.

19 Mr. Chief Justice, Ms. Sullivan said she
20 raised the question of the application -- her client
21 raised the question of misapplication all the way
22 through. We sure don't read the petition to raise that
23 question. It wouldn't be out of the ordinary for the
24 Court to go on and say, this is how the abuse of
25 discretion standard ought to be applied.

1 But they cited pages 17 through 19 and 26
2 through 28 of the petition. We don't read those to
3 preserve an application argument. Those are making
4 arguments like the multifactor standard is difficult to
5 apply. I think there is one sentence on page 28 that
6 maybe you could read that way. We don't read that to
7 have fairly preserved the application argument.

8 And then just to -- and the waiver question.
9 There is a whole other set of arguments they've made in
10 their briefs that haven't come up in argument today
11 about other violations that they think occurred that the
12 lower courts held not to be violations. That is
13 extremely far outside the scope of the question
14 presented, and they haven't raised it at oral argument.
15 But I just -- that point is clearly waived, I think.

16 JUSTICE ALITO: On the issue of harm to the
17 government, did I understand you to say that the
18 question is actual harm and not likelihood of harm at
19 the time of the disclosure?

20 MR. BASH: We think on that factor, it's
21 actual harm, but we think the second factor, severity,
22 correlates with potential harm. So if you issue a press
23 release saying we brought a suit, the potential for harm
24 there is enormous.

25 JUSTICE KAGAN: And do you think it might be

1 helpful for this Court to clarify that when we're
2 talking about the severity of the violation, part of
3 what we are talking about is the likelihood that the
4 violation might cause harm?

5 MR. BASH: I think it would be helpful for
6 the opinion to say that. I don't think the courts below
7 were under a misapprehension about that. I mean, they
8 talked about the most severe violation being, like I
9 say, just a blatant -- oh, I'm sorry. I see my red
10 light is on.

11 CHIEF JUSTICE ROBERTS: You can finish your
12 sentence.

13 MR. BASH: They talked about the most severe
14 violation being just a blatant filing of the complaint
15 publicly. And that is what correlates with potential
16 harm versus selective disclosures to people that are not
17 affiliated with the defendant.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Ms. Sullivan, four minutes.

20 REBUTTAL ARGUMENT OF KATHLEEN M. SULLIVAN

21 ON BEHALF OF THE PETITIONER

22 MS. SULLIVAN: When you write the opinion
23 reversing or vacating, we trust that you will clarify
24 that actual harm to the government is not a requirement
25 for dismissal.

1 And let me just remind you, in answer to
2 your question, Justice Ginsburg, when will the
3 government concede actual harm, it's not dispositive.
4 It's dispositive if the government says there's actual
5 harm, yes, or heavily weighted and possibly dispositive
6 if they say it.

7 But to remind you, as we point out on
8 page 20 of our reply brief, the government hasn't
9 admitted it was actually harmed, except in one case, the
10 Le Blanc-ITT case, in 30 years. So you should not
11 require actual harm. We agree with the government that
12 potential harm, which is important, is captured by the
13 severity factor, but that the lower courts misapplied
14 the severity factor by looking to what risk transpired
15 rather than what risk occurred at the time of the
16 disclosure.

17 As to whether that was a serious risk, I
18 must respectfully disagree that there was no possible
19 tip-off here from the news statements. Mr. Singh
20 referred you to page JA67, and he suggested that State
21 Farm wasn't tipped off at all. With respect, you can
22 look for yourself and see State Farm's lawyers saying, I
23 can't say that we didn't have suspicion. We heard
24 Congressman Taylor talking about his meeting with the
25 Rigsbys. So there was a potential for tip-off here.

1 And as to whether there was harm to the
2 judicial system, as Justice Breyer pointed out, in
3 addition to harm to the government, this is a case where
4 a Gulfport jury found fraud against an insurer in the
5 wake of horrible losses from Hurricane Katrina, but the
6 government, whose delegated power the relators are
7 seeking to assert, found after three years of copious
8 investigation -- you can look for yourself on JA214 --
9 the government found that there -- in the words of the
10 Inspector General of the Department of Homeland Security
11 at JA14, we find no indication that wind damage was
12 attributed to flooding, or that flood insurance paid for
13 wind damages.

14 If you're concerned nonetheless about any
15 windfall to the defendants, it won't happen, because the
16 government can come in and pick this case and relate the
17 complaint back to the time of the relator's filing

18 And finally, as to the Rigsbys involvement,
19 if you have any factual questions about imputation, of
20 course that can be handled on remand for the application
21 of a proper test that makes willfulness primary,
22 severity assessed, ex-anti not ex-post, and that does
23 consider, as the government conceded it should, the
24 defendant's reputational harm. The government concedes
25 that on page 27, and you should adopt that in your test

1 as the Second Circuit did in Pilon.

2 But as to the Rigsbys' involvement, first we
3 think, as a matter of law, there should be imputation
4 for lawyers' conduct to their clients in most cases, but
5 certainly in qui tam cases where the relators cannot
6 represent themselves pro se.

7 No one can represent the government; that --
8 you can't be a pro se lawyer representing the
9 government. The lower courts are clear. You must have
10 a lawyer.

11 Hallstrom said a trained lawyer who made an
12 inadvertent mistake still bound his client to the
13 failure of the pre-filing notice requirement.

14 And we think imputation here is easy as a
15 matter of law, but if you think it's a question of fact,
16 then if you look to Mr. Singh's cite to Justice Breyer
17 to Petition Appendix 67A, it's actually Petition
18 Appendix 68A where you'll find the key evidence about
19 the relator's relationship to Scruggs. And I commend
20 that page to you because it did not find them not
21 culpable.

22 At 68A of the Petition Appendix, it didn't
23 find the relators not culpable; it found them to have
24 not approved, authorized, or initiated the disclosures.
25 That's not the same as not being intimately involved

1 with those disclosures.

2 And I refer you to the district court's
3 findings here in disqualifying prior plaintiff's counsel
4 at JA16 and 20 that there was a suite -- there was a
5 sham contract. I don't know many lawyers who pay their
6 clients, but this time Scruggs paid the Rigsbys to be
7 their material witnesses, their employees, their joint
8 venturers.

9 You can look either to the Northern District
10 of Alabama docket where Judge Acker found them
11 conjoined, Scruggs and the Rigsbys, and to be joint
12 venturers, or you can look to Judge Senter's decisions
13 in this docket where he finds that the relationship was
14 a sham. And you can say that it would be inappropriate
15 and abuse of discretion not to find imputation here.

16 With respect, we ask that you reverse or
17 remand for decision on a proper balancing test that
18 doesn't give carte blanche to these kinds of bad faith
19 violations, which harm not just the government in the
20 long run, but our system of justice.

21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 The case is submitted.

24 (Whereupon, at 11:00 a.m., the case in the
25 above-entitled matter was submitted.)

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