1 IN THE SUPREME COURT OF THE UNITED STATES

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3 STATE FARM FIRE AND CASUALTY :

4 COMPANY, :

5 Petitioner : No. 15-513

6 v. :

7 UNITED STATES, EX REL. CORI :

8 RIGSBY, ET AL., :

9 Respondents. :

10 - x

11 Washington, D.C.

12 Tuesday, November 1, 2016

13

14 The above-entitled matter came on for oral

15 argument before the Supreme Court of the United States

16 at 10:03 a.m.

17 APPEARANCES:

18 KATHLEEN M. SULLIVAN, ESQ., New York, N.Y.; on behalf of

19 the Petitioner.

20 TEJINDER SINGH, ESQ., Bethesda, Md.; on behalf of the

21 Respondents.

22 JOHN F. BASH, ESQ., Assistant to the Solicitor General,

23 Department of Justice, Washington, D.C.; for United

24 States, as amicus curiae, supporting the Respondents.

25

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument

4 first this morning in Case No. 15-513, State Farm Fire

5 and Casualty Company v. United States, ex rel. Rigsby.

6 Ms. Sullivan.

7 ORAL ARGUMENT OF KATHLEEN M. SULLIVAN

8 ON BEHALF OF THE PETITIONER

9 MS. SULLIVAN: Mr. Chief Justice, and may it

10 please the Court:

11 The False Claims Act asks very little of a

12 private qui tam relator who would step into the

13 government's shoes, file under seal, serve only on the

14 government, and maintain the seal until it is lifted.

15 Respondents here violated that requirement.

16 They leaked the content and existence of

17 their suit to the Associated Press, ABC, and the New

18 York Times. And yet, under this rule adopted by the

19 court of appeals, they suffered no consequence whatever

20 for that violation. This Court should reverse or vacate

21 and hold that such bad-faith, willful, and severe

22 violations warrant dismissal under either -- any

23 appropriate test.

24 JUSTICE KENNEDY: Did you seek any sanction

25 of -- for the seal violations other than dismissal?

1 MS. SULLIVAN: We did not, Your Honor. We
2 sought dismissal repeatedly.
3 JUSTICE KENNEDY: Why not?
4 MS. SULLIVAN: Your Honor, we think
5 dismissal was the appropriate sanction and that any
6 alternative sanction would be toothless here for --
7 for -- just to begin --
8 JUSTICE GINSBURG: From -- from --
9 perhaps from the defendant's point of view, but I
10 thought the whole purpose of sealing the materials was
11 not to tip off the defendant. And if that's so, then
12 the defendant would benefit from being tipped off, and
13 the government -- who I think you agree is the primary
14 concern of Congress to be protected -- the government
15 then would be left with the choice of either drop --
16 dropping the suit or expending its own resources on it.
17 So the one that was really penalized, in
18 addition to the qui tam plaintiffs, is the government.
19 MS. SULLIVAN: Your Honor, we think that
20 Congress intended a statutory bargain that does not give
21 the government absolute discretion to decide whether the
22 seal has been violated.
23 And let me explain first what the statutory
24 bargain is. The statutory bargain set forth in
25 3730(b)(2) is, the relator gets the litigating authority

1 of the government. It gets to see -- share in any award
2 the government might obtain, but on condition -- on a
3 mandatory condition that it abide by the simple
4 requirements I mentioned, of keeping the -- the
5 complaint under seal.
6 JUSTICE GINSBURG: And if it's a condition
7 for the government's benefit, the government can waive
8 it.
9 MS. SULLIVAN: Your Honor, we don't agree
10 with that. We don't -- we think that Congress could
11 have said that the seal should be maintained at the
12 Attorney General's discretion. It did not say that; it
13 said the seal's --
14 JUSTICE KENNEDY: Well, just under
15 Justice Ginsburg's question, why -- why don't the
16 defendants have a stronger interest in having the seal
17 requirement followed than the government does?
18 MS. SULLIVAN: Respectfully, I disagree,
19 Your Honor.
20 JUSTICE KENNEDY: That's the point of the
21 question right now.
22 MS. SULLIVAN: Yes, but let me go back to
23 the question. The government does have an interest in
24 having the seal maintained. The seal is, under the '86
25 amendments, it -- it's required, in order that the

1 government may investigate the claims, decide whether
2 it -- to intervene, and also pursue any criminal
3 investigations that might have already commenced or be
4 commenced in light of the complaint.
5 But that doesn't just protect the
6 government's discretion; it protects the operation of
7 the statute. And the way it does that is it gives the
8 government a period of time in which it may decide to do
9 any of three things: Intervene and conduct the qui tam
10 case, decline to intervene, or, as in happen -- as
11 happens in very many cases, settle the case with the
12 defendants before the seal is lifted. And as the Second
13 Circuit said in Pilon, which we think gives the best
14 version of a discretionary test, the incentives for
15 settlement which benefits the taxpayers and the treasury
16 will often disappear if a potentially meritorious
17 complaint is filed and a defendant is willing to reach
18 a -- a -- a speedy and valuable settlement with the
19 government in order to avoid unsealing.
20 CHIEF JUSTICE ROBERTS: So you're arguing --
21 you're arguing the government's interests, but it -- it
22 rings a little hollow when we see that the government is
23 on the other side.
24 MS. SULLIVAN: Yes, Mr. Chief Justice. I'm
25 in a difficult position, arguing that we serve the

1 government's interests better than the government
2 suggests. But let me say why I think it's very
3 important not to see this as something that is the
4 government's seal to be maintained at the government's
5 discretion.
6 When Congress sets a mandatory precondition
7 to suit, this Court has always held that the requirement
8 merits dismissal -- Hallstrom is the case most clearly
9 on point -- because --
10 JUSTICE GINSBURG: But in Hallstrom --
11 Hallstrom, the plaintiff could re-file. It wasn't -- it
12 was -- it required notice. So the plaintiff could then
13 give the notice and bring the suit again. But on your
14 view, these plaintiffs are out irretrievably.
15 MS. SULLIVAN: Your Honor, if I make no
16 point clearer today, let me make this point clear: The
17 suit does not go away on our rule; the relators go away
18 on our rule. The government --
19 JUSTICE GINSBURG: Yes, but that puts the
20 government to the choice of not having the relator to go
21 forward for it, and it has to either take up the reins
22 itself or say, well, we have too many other things on
23 our plate; we have to let it go.
24 MS. SULLIVAN: Your Honor, the government
25 here is free to intervene even after the relators are

1 dismissed, no matter how late it is in the suit. The
2 provision of 3730 -- the provisions of 3730 allow the
3 government to intervene for good cause later. And 3731
4 allows the government to have its late-intervened suit
5 relate back to the time of the relator's complaint. So
6 there is no statute of limitations problem.
7 JUSTICE SOTOMAYOR: But the government
8 starts again.
9 MS. SULLIVAN: It does, Your Honor.
10 JUSTICE SOTOMAYOR: The judgment that was
11 entered here would be nullified.
12 MS. SULLIVAN: That's correct, Your Honor.
13 But the same thing happened in Hallstrom. Hallstrom
14 considered and rejected the argument that wiping out the
15 judgment in that case would waste the resources expended
16 and --
17 JUSTICE KAGAN: I -- please. Sorry.
18 MS. SULLIVAN: Sorry, Justice Kagan.
19 JUSTICE KAGAN: No, please.
20 MS. SULLIVAN: I just want to make the point
21 that if the government has already intervened, which it
22 didn't do in this case because three years of
23 investigations found no fraud, if the government has
24 already intervened, then Justice Ginsburg's dilemma will
25 never occur. The government is already conducting the

1 suit.

2 So the only cases we're talking about in the

3 small universe of cases that involve seal violations in

4 the first place are non-intervened cases in which the

5 government might not have intervened but want to do so

6 later. And my point is there is no prejudice to the

7 government or the treasury, because the government can

8 come in later, relate back, and re-conduct the suit if

9 it finds it's a meritorious case.

10 JUSTICE KAGAN: You mentioned Hallstrom a

11 couple of times --

12 MS. SULLIVAN: Yes, Your Honor.

13 JUSTICE KAGAN: -- and rely on it heavily in

14 the briefs. But Hallstrom has very different statutory

15 language. Hallstrom says no action may be commenced

16 unless a condition is met.

17 And, similarly, in 3730, the statute uses

18 language that makes it clear that dismissal is

19 appropriate when a mandatory requirement is not met. It

20 says, "the Court shall dismiss an action or claim." It

21 says, "in no event may a person bring an action." It

22 says the court -- "no court shall have jurisdiction."

23 All of that way of -- all of those phrasings indicate

24 what happens when a requirement isn't satisfied.

25 But there is no such language with respect

1 to this requirement. I mean, it's a mandatory
2 requirement, but it doesn't say what happens if the
3 requirement isn't satisfied. And that makes it very
4 different from Hallstrom and from the other language in
5 Section 3730.
6 MS. SULLIVAN: That is correct, Your Honor.
7 We do not have an express statement of what the remedial
8 sanction is for a violation of the seal. But RCRA was
9 silent, too, on the remedial sanction for a violation of
10 the pre-filing notice requirement, and yet this Court
11 nonetheless held the mandatory precondition not being
12 met, dismissal was the appropriate sanction, and also
13 stated expressly that the requirement was not
14 jurisdictional.
15 So, Your Honor, Hallstrom really was the
16 same exact case, functionally, as our case. Here's the
17 difference --
18 JUSTICE GINSBURG: But what about the point
19 that I made before with respect to Hallstrom? Hallstrom
20 didn't put the plaintiffs out of court. It said they
21 have to give the required notice. They have to give the
22 notice to the government, the alleged violator. And I
23 thought the purpose of that was to give the violator a
24 chance to clean things up so there wouldn't be any suit.
25 So those plaintiffs, if I understand Hallstrom right,

1 just give the notice, wait the necessary number of days,
2 and go forward with their suit again.
3 MS. SULLIVAN: Yes, Your Honor. And as I
4 said before, the government can come in under 3730(c)(3)
5 and have its complaint relate back to the relator. So
6 it's similar to the plaintiffs in Hallstrom.
7 But to answer Justice Kagan's question, the
8 only difference between our case and the Hallstrom-type
9 pre-filing waiting period comes from the peculiarities
10 of the qui tam statute, and in particular from the
11 peculiarities of the qui tam statute that benefit
12 relators.
13 And what I mean by that is, what was the
14 1986 bargain? Congress wanted to encourage relators to
15 come forward, and so it said, we're going to give you
16 new, larger bounties and financial incentives. But
17 we're worried that if we encourage you to come forward,
18 you might impair government investigations. But we
19 worry if we make you wait first before you file, you
20 might lose your right to sue. You might have some other
21 relator beat you to the post and file first, or the
22 government might file and then you'd be out of luck.
23 So in order to protect the relators, the qui
24 tam statute does it backwards from Hallstrom. It says
25 file -- sorry -- file first, wait second. Whereas in

1 Hallstrom, it accomplished the exact same purpose under
2 RCRA: Wait first, file second. It was in order to
3 protect relators that this statute, the '86 amendments
4 to the qui tam statute, say relator file first, but keep
5 it under seal to protect the government's right of first
6 refusal.
7 JUSTICE ALITO: Well, you have two
8 arguments: One is that dismissal is mandatory; the
9 other is that the district court and the court of
10 appeals applied the wrong standard in determining not to
11 dismiss here.
12 As to the first, what would you say about
13 the case where the disclosure is very limited, seen by
14 only one person, let's say; it was inadvertent, it was
15 not done in bad faith, and it causes no harm? You would
16 say dismissal is required even under those
17 circumstances?
18 MS. SULLIVAN: Not necessarily, Your Honor.
19 We think that dismissal is required where a disclosure
20 rises to the level of a violation. But as some district
21 courts in per se dismissal jurisdictions have held -- we
22 cite the Omnicare-Gale case that's in the Sixth Circuit,
23 which follows a per se dismissal rule -- the Court found
24 that a mere private disclosure to a spouse may not -- a
25 trivial disclosure may not rise to the level of a

1 violation. And, Your Honor, we think that the district
2 courts can find safety valves in a per se dismissal rule
3 by finding that such trivial disclosures don't rise to
4 the level of --
5 JUSTICE ALITO: But that doesn't --
6 JUSTICE BREYER: Well, that's not this
7 question. I had the same question.
8 JUSTICE ALITO: That doesn't sound like a
9 per se rule, then.
10 MS. SULLIVAN: A per se rule with de minimis
11 exceptions, Your Honor. But under our alternative
12 argument -- and, Justice Breyer, I definitely want to
13 get to your question.
14 Well, so let me try -- let me just answer --
15 finish the answer by saying, we argue in the alternative
16 that if there's going to be a discretionary standard
17 akin to equitable discretion, then bad faith should be
18 the primary factor and harm should be measured by --
19 sorry -- the severity of the violation should be
20 measured by what the relator did or the relator's
21 counsel did at the time of the disclosure, not the
22 consequences; its character, not its consequences;
23 ex-ante, not ex-post. And that actual harm to the
24 government should not be a requirement.
25 JUSTICE BREYER: Once you're there -- I

1 mean, my thought was the same as Justice Alito's: Vast
2 range of violations. Some don't hurt really at all.
3 Some are sort of accidental. Some are certainly not bad
4 faith and they didn't cause much trouble. Really, why
5 dismiss the case?
6 And once you begin to agree with that,
7 you're into argument 2. And once you're into argument
8 2, what do you think of the Lujan factors?
9 MS. SULLIVAN: Your Honor, we don't think
10 that the Lujan factors were properly articulated or
11 applied in this case. So what we think is the better
12 rule is the one that comes from the Second Circuit, not
13 the Ninth and Fifth Circuits. And that rule would look
14 to bad faith as an important factor, sometimes a
15 dispositive one, and there is no question that the
16 conduct here was in the utmost bad faith. You had
17 lawyers deliberately leaking to national news outlets in
18 haec verba the contents of the complaint and the
19 evidentiary --
20 JUSTICE BREYER: But the clients did not
21 know that.
22 MS. SULLIVAN: Your Honor, that's not -- not
23 correct on this record. The fifth --
24 JUSTICE BREYER: On the record, does it show
25 that they did know it or they didn't know it?

1 MS. SULLIVAN: Correct, Your Honor. And --
2 JUSTICE BREYER: Not correct. It was a
3 question. Either they did know it or they didn't know
4 it. What does the record say about that?
5 MS. SULLIVAN: The record -- the Fifth
6 Circuit assumed that the lawyer's conduct could be
7 imputed to the relators.
8 JUSTICE BREYER: But on the question of
9 whether they knew it or not.
10 MS. SULLIVAN: Your Honor, we think that
11 no --
12 JUSTICE BREYER: Why did you never ask them
13 or the lawyer?
14 MS. SULLIVAN: Well, Your Honor, we did ask
15 them whether they authorized the conduct. They said no.
16 So there's no --
17 JUSTICE BREYER: So here we have ambiguity
18 as respect to that. Could I write an opinion that said
19 the Lujan factors are some factors? Life is
20 complicated. There are all kinds of factors, and these
21 factors affect the basic fairness of the situation,
22 which is something that judges should look to as well.
23 Like many, many, many decisions, this is conferred upon
24 the Supreme -- upon the district court to make a fair
25 decision in say -- in terms of sanction, in light of the

1 circumstance, to be reviewed by abuse of discretion.

2 MS. SULLIVAN: Your Honor, in this case, it

3 was an abuse of discretion not to dismiss on the

4 underlying facts.

5 JUSTICE BREYER: I don't have to worry about

6 this case; you do.

7 MS. SULLIVAN: You are correct.

8 JUSTICE BREYER: And I -- I have to worry

9 about the right standard to write an opinion.

10 MS. SULLIVAN: Correct, Your Honor.

11 And let me suggest, respectfully, why you

12 should, at a minimum, vacate and remand for resolution

13 of any remaining fact questions about imputation or the

14 like, and that is because the articulation of the

15 standard by Lujan, the court below, and courts following

16 this toothless test basically have invited open season

17 on deliberate, bad-faith leaks to the press.

18 If you affirm and say this was good enough

19 for abuse of discretion, then further -- Mr. Chief

20 Justice?

21 CHIEF JUSTICE ROBERTS: I was just going to

22 ask: I thought your very -- the very first question was

23 that you didn't -- that your answer was that you didn't

24 seek any sanction other than dismissal. So I'm not

25 quite sure your fallback argument is before us.

1 MS. SULLIVAN: It is, Your Honor, because
2 dismissal should have been granted under a proper
3 discretionary test, if you reject our per se rule. And
4 we think with respect --
5 CHIEF JUSTICE ROBERTS: Right. Did you ask
6 for the application of any rule other than dismissal?
7 MS. SULLIVAN: We -- we asked for dismissal.
8 And we asked for dismissal urging, at a minimum, a test
9 that would take bad faith into account. If -- the most
10 important feature of the decision below is it gave the
11 back of its hand to deliberate, bad faith conduct.
12 CHIEF JUSTICE ROBERTS: So if we go back --
13 and I haven't done this -- and look at the way the case
14 was litigated, is there an argument from you that says,
15 okay, if you're not going to automatically dismiss this
16 case as we argue, you should do this as a second
17 alternative.
18 MS. SULLIVAN: Yes, there is, Your Honor.
19 We preserved at every stage the argument that if there
20 is no per se dismissal, there should be dismissal based
21 on a proper balancing test. We urge that a balancing
22 test should, number one, make bad faith primary.
23 JUSTICE KENNEDY: But again, you didn't ask
24 for any sanction other than dismissal.
25 MS. SULLIVAN: That is correct, Your Honor.

1 Attorney discipline would do no good in a case where
2 Mr. Scruggs had already been indicted and disbarred for
3 reasons having nothing to do with his deliberate seal
4 violations here. And monetary sanctions, with respect,
5 which are touted by the Respondents and the government
6 as the solution, are not going to have any deterrent
7 effect in a case --
8 JUSTICE SOTOMAYOR: So then I do have one
9 fundamental, factual question.
10 MS. SULLIVAN: Yes, Your Honor.
11 JUSTICE SOTOMAYOR: As I'm reading the
12 record below, the circuit, the Fifth Circuit, took the
13 position that the only disclosure that would violate the
14 seal requirement is the disclosure of the existence of
15 the lawsuit. It basically said that disclosing the
16 underlying facts is not a violation of the sealing
17 requirement. So how did the mere disclosure of the
18 lawsuit hurt you as opposed to what I think hurts
19 reputation is the nature of the allegations?
20 If the allegations were going to come out no
21 matter what, how and why and when was there an actual
22 disclosure of the existence of the lawsuit as opposed to
23 just sharing with others what I understood to be the
24 evidentiary affidavit which just sets forth allegations?
25 MS. SULLIVAN: So Your Honor, there is no

1 question here that the existence of the complaint under
2 the False Claims Act was literally revealed. The
3 evidentiary disclosures supporting the complaint which
4 mirrors the allegations of the complaint itself was
5 e-mailed to three national news media; to the AP with
6 the caption on the front, but in all instances with the
7 signature block saying, attorney for relators in this
8 False Claims Act, and with the certificate of service on
9 the Attorney General on the U.S. Attorney.
10 So this is the rare case where you do not
11 have to consider any factual ambiguity about whether the
12 complaint itself was distributed to the public. ABC,
13 the AP, and The New York Times are the public.
14 Second, Your Honor, there may be other cases
15 unlike this one in which it's a harder case, in which
16 maybe someone just talked about fraud in the air.
17 JUSTICE GINSBURG: And I thought the
18 question was suppose these plaintiffs didn't reveal the
19 complaint at all, but they described on a radio show, on
20 a TV show, what they understood to be State Farm's
21 practice. So the information came out, but not that
22 they had filed the complaint.
23 MS. SULLIVAN: Your Honor, that would be a
24 different case. You haven't reached it. You don't need
25 to reach it here. A divided panel of the Fourth

1 Circuit, with a very strong dissent by Judge Gregory,
2 said maybe there -- maybe there is a First Amendment
3 right to --
4 JUSTICE KENNEDY: Let's assume for the
5 moment that there is a First Amendment right to discuss
6 the actions that took place. How, then, do you answer
7 Justice Sotomayor's and Justice Ginsburg's question?
8 The harm here that you're talking about could have been
9 -- occurred with First Amendment protection.
10 Let's assume there is a First Amendment
11 protection. How then would you answer the question?
12 MS. SULLIVAN: Then, Your Honor, if fraud
13 was discussed without revealing the existence and
14 content of the complaint itself, then there would not be
15 a violation and the per se rule would apply, which is
16 why our per se rule is narrower and less absolute than
17 -- than my friends on the other side have portrayed it.
18 But Your Honor, there may be times when a
19 revelation of fraud and not the words "here is our False
20 Claims Act complaint," which was the case in this
21 record, in which the revelation of the fraud was the
22 functional equivalent of revealing the complaint.
23 If a lawyer goes up on the courthouse steps,
24 comes out on the courthouse steps and talks about fraud
25 and then points to his briefcase and says, well, I

1 can't, if somebody says, well, did you file a complaint,
2 no, I can't talk about, there might be instances in
3 which the exercise of First Amendment rights becomes the
4 functional equivalent of fraud, and the district courts
5 can work that out in deciding whether a disclosure rises
6 to the level of a violation.
7 But you don't have to face that here. What
8 you need to face here is a case where lawyers violating
9 every possible obligation under the statute, as well as
10 their ethical obligations, and whose conduct should be
11 imputed to the relators, as the Fifth Circuit assumed,
12 leaked the actual complaint in its legal content to
13 three national news media.
14 JUSTICE KAGAN: You said your test would
15 put -- would make bad faith primary. What exactly does
16 that mean? I mean, take a case where there was bad
17 faith, but in fact there was also a pretty minor breach
18 that was not likely to cause any harm, and in fact did
19 not cause any harm, and the government comes in to the
20 district court and says, it's not in our interests for
21 this case to be dismissed. Why should the Court
22 nonetheless dismiss the case?
23 MS. SULLIVAN: Your Honor, under our
24 balancing test, it might not on those facts. Bad faith
25 can't be dispositive if the other factors overwhelm it.

1 But here --

2 JUSTICE KAGAN: Well, then, what does it

3 mean for bad -- why do you say -- is it -- how is it

4 first among equals? Why isn't it just something that a

5 district court should take into account as this district

6 court took it into account?

7 MS. SULLIVAN: Your Honor, we don't think

8 the district court or the court of appeals did take bad

9 faith into account. And if you look at the government's

10 brief at page 28, you'll see that the United States

11 didn't seem to take bad faith seriously here either.

12 That is an -- is an error that -- as a matter of law in

13 the application of the balancing test, and we think bad

14 faith plus severe harm makes an easy case for dismissal

15 here.

16 Let me see why the severe harm should be

17 assessed differently less than the Fifth Circuit here.

18 The Fifth Circuit here took an ex-post

19 rather than an ex-ante approach. It said, as you just

20 suggested in your hypo, let's look at the consequences.

21 Did anything bad happen? The statute asks you to take

22 an ex-ante perspective. It says, don't violate the

23 seal. Let's deter you.

24 JUSTICE KAGAN: Well, but it did both. When

25 -- when one factor is the seriousness of the violation,

1 presumably one measures the seriousness of the violation
2 by asking whether the violation is likely to cause harm
3 ex-ante.
4 So it's really looking to both. It's
5 calling them different things, but it's saying, we're
6 going to check out the seriousness of the violation,
7 whether it's likely to produce harm, what the risk of
8 harm is, and we're going to ask in ways we ask in the
9 law all the time, did it in fact cause that harm?
10 MS. SULLIVAN: Your Honor, we don't tend to
11 let drug dealers off if the thing they think is
12 marijuana that they are selling turns out to be oregano.
13 We do care about state of mind at the time, and we don't
14 just look to the accident or happenstance that it didn't
15 cause harm in fact.
16 Here, the courts, by looking to the
17 consequences, failed to describe as severe -- and the
18 government actually calls this a minor violation -- to
19 leak the contents of the complaint to national news
20 media. If you affirm, you are sending a message to
21 every relator in the country in qui tam suits, and their
22 counsel, leak away with no consequence.
23 And Justice Sotomayor, monetary sanctions,
24 to complete the answer before, are not going to be
25 effective. The Bibby case, touted by the government at

1 pages 23 to 24 of the government's brief, was a case in
2 which the relator's share was reduced from $43 million
3 to $41.5 million as the monetary sanction. That will
4 not be an effective deterrent. So dismissal --
5 JUSTICE GINSBURG: Can you -- can you tell
6 me, just clarify what 3730(b) means when it says the
7 action may be dismissed only if the Court and the
8 Attorney General give written consent to the dismissal
9 and their reasons for consenting.
10 MS. SULLIVAN: I can, Your Honor. That
11 applies to voluntary dismissals, as has been settled by
12 an unbroken line of Court of Appeals decision. It does
13 not apply to dismissals ordered by a court. And we
14 think that if you adopt our per se rule under Hallstrom,
15 or a better version of the discretionary rule than the
16 toothless one adopted by the Court of Appeals below, a
17 court-ordered dismissal is the appropriate sanction for
18 a bad-faith leak to national news media.
19 And, Justice Kagan, to go back to your
20 question --
21 JUSTICE KAGAN: If there is a primary
22 factor, why shouldn't the primary factor just be what
23 the government wants? In other words, why shouldn't
24 this be -- given that the government is the beneficiary
25 of this provision, why shouldn't we give very

1 significant discretion to the government?
2 MS. SULLIVAN: Your Honor, this is a case of
3 pure statutory construction. There is no need to defer
4 to the government.
5 Second, actual harm is very hard to prove.
6 How can the government know if an unscrupulous defendant
7 has destroyed evidence or sent witnesses out of the
8 country?
9 And last and most important, Your Honor, the
10 government never says it has been harmed. It has no
11 incentive to do so. There is only one case that we
12 found in 30 years of qui tam cases in which the
13 government admitted there was actual harm, and that is
14 not a basis on which you should police this requirement.
15 I'd like to reserve the balance of my time,
16 Mr. Chief justice.
17 CHIEF JUSTICE ROBERTS: Thank you, counsel.
18 Mr. Singh?
19 ORAL ARGUMENT OF TEJINDER SINGH
20 ON BEHALF OF THE RESPONDENTS
21 MR. SINGH: Mr. Chief Justice, and may it
22 please the Court:
23 The question in this case is, as the first
24 half-hour illustrates, not really whether the courts
25 will punish and deter violations of the False Claims Act

1 seal requirement, but whether they will do so in a way
2 that is counterproductive to the government's interest,
3 or whether they will instead impose other sanctions that
4 would benefit the government, allow cases to go forward,
5 and simultaneously create an effective deterrent.
6 The message that you're hearing from State
7 Farm is that no other sanction will be effective; but
8 the rule will be toothless, it will be open season, but
9 history belies this claim. Since 1986, when the False
10 Claims Act amendments were enacted, there have been
11 10,593 qui tam actions filed. State Farm gave you an
12 appendix with their petition where they list all the
13 cases that they found that talk about the seal. That
14 appendix has 48 cases in them. Only 35 actually
15 involved seal violations. And of those, you know, an
16 even smaller fraction, only six, involved findings of
17 bad faith.
18 Our rule has been the rule in this country
19 since 1995. And in that time, we're talking about a
20 handful of violations. In fact, strangely enough, the
21 circuit that has the most seal violations in State
22 Farm's appendix is the Sixth Circuit. It had six cases
23 involving seal violations, four of which came up after
24 the per se rule that the other side wants you to focus
25 in on --

1 JUSTICE ALITO: Well, if we issue an
2 opinion -- when we issue an opinion in this case, it
3 will change the legal landscape.
4 And I would appreciate it if you would
5 respond to one of the arguments Ms. Sullivan made toward
6 the end, which is that if we issue an opinion that
7 affirms in this case where there were -- which involves
8 the type -- the greatest degree of bad faith in this --
9 in violating the seal requirement that is really
10 possible to imagine, that will stand for the principal
11 in future cases, that even if an instance in which there
12 was complete bad faith, dismissal is not appropriate.
13 Or a dismissal is -- can -- can properly be rejected.
14 MR. SINGH: Sure. So there are -- there are
15 two ways I'd like to answer the question. You know,
16 first I want to answer just directly on its own terms,
17 and then I do have some questions -- issues about the
18 premise.
19 You know, directly on its own terms, I think
20 it would be very easy for you to write an opinion to say
21 nothing in this opinion condones what Mr. Scruggs did in
22 this case. We think it would have been entirely
23 appropriate for him to have been referred to bar
24 counsel, for him to have been disqualified as the
25 relators' attorney, for a substantial monetary sanction

1 to be levied against him. In this case, there are
2 factual findings, right? It's not just us
3 hypothesizing. There's no ambiguity on this. Factual
4 findings that are not clearly erroneous, but the
5 relators themselves were not culpable, did not know
6 about these actions.
7 And the ordinary rule in cases where a
8 lawyer engages -- I'm sorry.
9 JUSTICE BREYER: Do you have, just on the
10 top of your head somewhere -- I -- I because I want to
11 read this.
12 MR. SINGH: Petition Appendix 67A is where
13 you'll find the district court's finding on this, I
14 believe.
15 JUSTICE BREYER: Okay.
16 MR. SINGH: You know, that the relators did
17 not know, and then that was affirmed on appeal.
18 JUSTICE BREYER: Okay. Okay.
19 JUSTICE ALITO: But parties are usually held
20 accountable for the actions of their attorneys.
21 MR. SINGH: To be sure, they are,
22 ordinarily, when the attorney is acting within the scope
23 of representation. So if an attorney shows up and --
24 doesn't show up to a hearing, if an attorney files or
25 doesn't file a document on the client's behalf, the

1 client has to live with what's in those documents or
2 with that nonappearance. But when attorneys engage in
3 this sort of extrajudicial chicanery, you know, without
4 their client's knowledge, the ordinary rule is you don't
5 dismiss a case with prejudice. That's true in the vast
6 majority of circuits, and this Court really hasn't
7 gotten into that. But that -- that is the ordinary
8 rule, and that makes sense.
9 And that condition is heightened, here,
10 right? Because as -- as the statute makes clear, as
11 Congress made clear in 1986, the government is also an
12 interested party in this case, and an innocent one that
13 will suffer if dismissal is done. So I think you can
14 check, you know, the potential that it will be open
15 season with some well works -- well-worded and
16 strongly-worded dictum in this opinion, no problem.
17 JUSTICE BREYER: You see, I -- I think this
18 is going to protect the government's investigations.
19 But the consequence of this is that there is a document
20 somewhere in the court that says Joe Smith is a
21 defendant in what could be a very harmful case to Joe
22 Smith. If Joe Smith is innocent, for example, it's
23 unjustified. Where does he read about that? In a
24 complaint? No. He reads about it in the national
25 press.

1 Now, that's a harmful thing. And -- and
2 seals are not just this case. They are national
3 security cases, privacy cases, trademark cases, all
4 kinds of business cases. So it is a serious thing when
5 someone deliberately breaks a court seal and reveals the
6 contents to the national press. Well, it's not just the
7 department that has an interest in this. It's the
8 United States judicial system that has an interest in
9 this. And that's what poses the problem. And your
10 opponent here is saying when you get to the bottom of
11 it, given the seriousness of what went on, this is too
12 light a sanction. At least that's how I'm seeing it.
13 And I would appreciate your comments on
14 that.
15 MR. SINGH: Absolutely. So, you know, we
16 don't diminish the seriousness of seal violations at
17 all. But I think all the examples you gave, Justice
18 Breyer, really illustrate that what we are talking about
19 here is a regime where district courts, for ages, have
20 applied discretionary inherent powers-type rules or
21 administrated the Federal Rules of Civil Procedure and
22 come up with case-specific appropriate circumstances --
23 appropriate sanctions based on the circumstances of each
24 case, which is exactly what the district court did in
25 this case.

1 The district court was not blind to
2 Mr. Scruggs' bad faith. Took it into account
3 completely, but understood that there were intervening
4 facts here.
5 And, you know, I think also, as we talk
6 about how to proceed forward with this case, you know,
7 it's worth just pausing for a moment on -- on what's
8 happened since, you know. This case now --
9 JUSTICE BREYER: And before you -- I want to
10 get a thorough answer of this because --
11 MR. SINGH: Sure.
12 JUSTICE BREYER: -- however this case got
13 here, it's here. And so viewed in your legal framework
14 that's most favorable, I can read to you. I can read
15 your opponent as saying, look, say something and do
16 something, like remand it, that realize -- that makes
17 people realize this is a very serious thing. Though, of
18 course, I think you are right in saying this is the kind
19 of thing that district courts do as part of their job,
20 weighing various factors. But what would you want to
21 add to say to me, no, he was not overly lenient here?
22 MR. SINGH: Sure. So -- so let me actually
23 go back to what would have been the second half of my
24 answer to Justice Alito. There are some issues with the
25 premise that this was consummate bad-faith conduct. I

1 think in 1986 Congress made it clear that what it was
2 trying to do is stop defendants from being tipped off
3 about False Claims Act lawsuits. That was the goal.
4 Consummate bad faith conduct would be a relator's lawyer
5 reaching out to the defendant.
6 Here, what Scruggs did was a little bit
7 different. Although he sent the evidentiary disclosure
8 to the press, he sent it as background for their pieces.
9 He informed them that it was under seal, and that's a
10 characterization that State Farm has used, the
11 background characterization, page 8 of their brief, and
12 in all their briefs below.
13 And so I think he was intimating to the
14 folks he sent it to that it was not for further
15 disclosure.
16 Now, those folks happened to be journalists,
17 and State Farm from this reads, oh, isn't it so bad
18 because journalists have a very large platform? Yes.
19 But journalists also have ethics, and the ethical rules
20 of journalism wouldn't allow them to quote or attribute
21 material that's given to them as background. And so I
22 think there is a real sense in which the disclosures
23 here were not intended to, you know, achieve the
24 objectives that Congress was trying to prohibit in the
25 seal requirement. So in that sense, I think this is not

1 the archetypical bad-faith conduct that Congress was
2 talking about.
3 Now, I am sensitive to your point about what
4 about defendants' reputations. We don't think Congress
5 cared about that in 1986, but even if it did, you
6 know -- and of course, that is important in cases
7 involving trade secrets and other kinds of seal orders.
8 You know, the right remedy in all of those cases is
9 damages to the defendant, right? It's not allow the
10 defendant to get away with fraud against the government,
11 and so that's why I started this part of the argument by
12 saying, you know, the question is really not do we deter
13 and punish; it's how. Are we going to do it in a way
14 that makes sense or are we going to do it in a way that
15 is counterproductive?
16 Now, State Farm is upset because there is
17 really not a great way to punish Mr. Scruggs anymore.
18 He's been disbarred. He went to jail for a while, and
19 he is no longer a part of the case. In fact,
20 Mr. Scruggs has not been part of this case for 3,148
21 days. That's how long ago he withdrew.
22 In the intervening periods, we have had
23 mountains of discovery, dozens of depositions, a jury
24 trial showing that State Farm defrauded the government,
25 a verdict affirmed on appeal, and now we are here. And,

1 you know, a lot of water has gone under the bridge since
2 then, and so, you know, to the extent, Justice Breyer,
3 that what you're really asking is what can we do about
4 this particular case, I think we ought to take that into
5 account, too.
6 You know, there has been no misconduct now
7 and no one accused of misconduct in this case for more
8 than 3,000 days, and State Farm, in the interim, has
9 been proven guilty.
10 Now, State Farm says consider it all
11 ex-ante, right, just ignore all of that, but that's not
12 really, I think, the proper application of a
13 discretionary test. You know, when you think about how
14 to apply discretion in a particular case, I think we can
15 be sensitive to reality. You know, we don't have to
16 blind ourselves to what's happening, and I think that's
17 the way that courts have always conducted these
18 inquiries.
19 The last thing that I want to -- I want to
20 point out, and then, you know, if there are no further
21 questions I'll rest, is that, you know, State Farm says
22 that the statute asks very little of relators. That is
23 just patently false.
24 My clients spent a decade in these careers
25 before they spotted a grievous fraud against the

1 government. They blew the whistle. They lost their
2 careers. They lost their jobs.
3 CHIEF JUSTICE ROBERTS: I think that it
4 honestly asks very little of them when it comes to the
5 seal requirement. Just don't disclose it.
6 MR. SINGH: So --
7 CHIEF JUSTICE ROBERTS: That's not asking a
8 lot.
9 MR. SINGH: So State Farm's position on this
10 has morphed a little bit over time. In the lower courts
11 they -- they were arguing that the disclosure of the
12 allegations or the substance of the fraud is itself, you
13 know, a violation of the seal. Now, they've come to --
14 they kept that in footnote 10 of their opening brief.
15 Now they have sort of pared it back, and I think now
16 finally it's clear that they are not taking that
17 position, and I think that that's true.
18 I think also, though, the fact that it's
19 very easy to comply with the seal takes a lot of wind
20 out of the sails of their deterrence argument, right?
21 As they understand the seal now, Mr. Scruggs or any
22 attorney can avoid violating the seal by, like, editing
23 the document for 20 minutes. Right? The evidentiary
24 disclosure that he sent to journalists, very easy to
25 just include the allegations and strip out the details

1 that reveal the existence of the lawsuit.

2 And so you don't need a particularly -- and,

3 you know, he doesn't get a lot of benefit in this case

4 out of disclosing the allegations -- the existence of

5 the lawsuit, because, as Justice Sotomayor pointed out,

6 the harm to the reputation, if your goal is to tar and

7 feather the defendant in the press, the way you do is by

8 disclosing the committed fraud, which --

9 CHIEF JUSTICE ROBERTS: Right. But I mean,

10 if -- if Mr. Scruggs stands on the courthouse steps and

11 discloses the underlying facts, I think people can put

12 two and two together and realize that he just might be

13 filing a lawsuit.

14 MR. SINGH: I think that's possible, Your

15 Honor, and so, you know, that gets back to the question

16 of what is and isn't a violation.

17 I don't understand them to be taking that

18 position in this case, and those kind of closed-case

19 situations, you know, they aren't really before you.

20 And, you know, as the summary of the history of False

21 Claims Act seal violations tells you, that kind of stuff

22 really is not happening. Right?

23 I think that we are talking about a handful

24 of cases, less than .3 percent of all False Claims Act

25 cases have ever involved an arguable seal violation, and

1 a vanishingly small fraction of those involve
2 allegations of bad faith, right?
3 To the extent that State Farm wants you to
4 adopt either a blanket rule of dismissal or even a rule
5 that is geared toward dismissal through application of
6 discretionary factors, you -- they are really trying to
7 throw the baby out with the bath water here. It is a --
8 you know, a dramatic overreaction, especially when, you
9 know, as here, the government, whose interests are
10 principally affected, is telling you that you don't need
11 to do that.
12 If there are no further questions --
13 JUSTICE ALITO: Well, what do you make of
14 the -- how much weight do you think should be given to
15 the fact that the government doesn't think that
16 dismissal is appropriate in this situation?
17 What -- what -- does the statute say that
18 the complaint shall be filed under seal and shall be
19 main -- maintained under seal unless the government
20 waives that?
21 MR. SINGH: -- not exactly. So for the
22 first 60 days, the government definitely can't waive the
23 seal. The seal can only be extended past 60 days of the
24 government's motion, so there is a certain amount of
25 discretion involved on whether the seal will continue.

1 We think it kind of makes sense to afford
2 the government more weight after that 60-day period.
3 Here, the first seal violation didn't happen until day
4 103, and so, you know, we are kind of in that zone. So
5 I think the government's -- should -- say should account
6 for a lot, especially in this case.
7 As a general proposition, you know, we are
8 not urging like blind deference to the government or
9 deference on the issue of statutory interpretation, but
10 we are saying it's very clear that Congress is
11 principally concerned with protecting the government.
12 And when the government tells you -- and, yeah, there
13 will always be a balance here, right? The government's
14 interest may have been harmed by a seal violation, but
15 they weren't in this case.
16 By the way, that's an important point. You
17 know, there is a finding about that. State Farm
18 admitted -- you'll find it at Joint Appendix page 67
19 that they didn't learn about the lawsuit before the seal
20 was lifted. And so, you know, there is no harm to the
21 government here, but there would be harm from -- for a
22 dismissal, right? They all have to pick up the laboring
23 oar in a massive discovery effort to carry the case
24 forward. It will cost a lot of money; it will prevent
25 them from pursuing other frauds.

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,

1 SUPPORTING THE RESPONDENTS

2 MR. BASH: Mr. Chief Justice, and may it

3 please the Court:

4 Given the focus of the earlier portion of

5 the argument, I will -- I'm happy to answer questions

6 about why the automatic dismissal rule is wrong, but I

7 will jump right to what we think the standard should be,

8 how we think the Court ought to write the opinion, and

9 then how we think the Court ought to dispose of this

10 case.

11 We think the standard for how to remedy a

12 seal violation incorporates the basic background

13 flexibility that district courts have always had to

14 remedy violations of protective orders and sealing

15 orders as informed by the basic purpose of this

16 provision, which I think, as everyone has acknowledged

17 now, is to protect the government by making sure that

18 potential targets of criminal and civil investigations

19 are not tipped off.

20 And the reason you need that in the FCA is

21 because the filing of the complaint does something very

22 special. It triggers the duty of the government to come

23 in and say whether it's going to intervene.

24 So that's why, Justice Sotomayor, it's not

25 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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