No. 15-513

IN THE
Supreme Court of the United States

STATE FARM FIRE AND CASUALTY COMPANY,
Petitioner,

v.

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

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

BRIEF FOR *AMICUS CURIAE* NATIONAL WHISTLEBLOWER CENTER IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

The National Whistleblower Center is a nonprofit, non-partisan, tax-exempt organization dedicated to the protection of employees who lawfully report fraud or illegal conduct.[1] *See www.whistleblowers.org*. Since 1984, the Center's directors have represented whistleblowers, taught law school courses on whistleblowing, and authored numerous books and articles on this subject—including the first-ever published legal treatise on whistleblower law. In 2016, the Center was named a Grand Prize winner of USAID's Wildlife Crime Tech Challenge for its innovative solution that harnesses the power of whistleblowers to combat wildlife crime.[2]

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. The parties have filed letters granting blanket consent to the filing of *amicus* briefs with the clerk.

[2] This international competition, sponsored by the U.S. Agency for International Development, in partnership with the Smithsonian Institution and National Geographic, sought new methods to combat illegal wildlife trafficking. The Center's prize-winning solution is a worldwide reporting system that enables whistleblowers to disclose wildlife trafficking and obtain monetary rewards under U.S. law. It is modeled, in part, after the False Claims Act's success. *See* U.S. Agency for International Development, *USAID Announces Grand Prize Winners of the Wildlife Crime Tech Challenge* (Sept. 1, 2016), *available at* https://www.usaid.gov/news-information/press-releases/sep-1-2016-usaid-announces-grand-prize-winners-wildlife-crime-tech-challenge.

As part of its core mission, the Center files *amici* briefs to help courts understand complex issues raised in whistleblower cases. Since 1990, the Center has participated before this Court as *amicus curiae* in cases that directly impact the rights of whistleblowers, including *English v. General Electric,* 496 U.S. 72 (1990); *Haddle v. Garrison,* 525 U.S. 121 (1999); *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765 (2000); *Beck v. Prupis*, 529 U.S. 494 (2000); *EEOC v. Waffle House*, *Inc.,* 534 U.S. 279 (2002); *Doe v. Chao*, 540 U.S. 614 (2004); *Lawson v. FMR LLC*, 134 S. Ct 1158 (2014); *Lane v. Franks*, 134 S. Ct. 2369 (2014); *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015); and *Universal Health Svcs. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016).

The FCA is the most successful whistleblower law in the United States. Even its harshest critic, the U.S. Chamber Institute for Legal Reform, has conceded that the FCA is the Government's "most important tool to uncover and punish fraud against the United States." U.S. Chamber Institute for Legal Reform, *Fixing the False Claims Act* (Oct. 2013), *available at* http://www.instituteforlegalreform.com/research/fixing-the-false-claims-act-the-case-for-compliance-focused-reforms. Numerous whistleblowers assisted by the Center have used the FCA to effectively inform the Government of wrongdoing to protect the public fisc and hold fraudsters accountable. These cases have resulted in civil penalties and money restored to taxpayers, criminal convictions, settlement agreements that strengthen internal

compliance programs, and they have also offered relief to whistleblowers from the hardships caused by retaliation.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The question in this case is whether the most severe sanction available to a court to police its order sealing a case (i.e. dismissal) should be automatically applied, regardless of the intent of the party committing the infraction, harm caused to other parties, interest of the Government or nature of the violation itself. For the reasons argued herein, this Court should rule in favor of Respondent:

First, the FCA is America's most important—and successful—anti-fraud law, and its seal provision was designed for the exclusive benefit of the Government. Mandatory dismissal would undermine the FCA and hurt taxpayers—the intended beneficiaries of the False Claims Act.

Second, the text of the FCA demonstrates that Congress clearly considered whether to include a mandatory dismissal sanction for seal violations and answered that question in the negative. Congress set forth two specific provisions in the FCA governing dismissal of cases. Neither provision requires a dismissal based on a seal violation, and both are consistent with the legislative intent to strengthen the Department of Justice's ability to hold fraudsters accountable by obtaining the assistance of Relators.

Third, other statutes that require confidential court proceedings do not require mandatory dismissal. The False Claims Act's seal requirement can be analogized to the grand jury secrecy rule, as both types of proceedings impose a mandatory condition of confidentiality on certain parties. Grand jury confidentiality rules are deeply embedded in the Constitution and are rigidly applied. Despite its constitutional foundations and statutory requirements, even violation of the grand jury secrecy rule does not mandate automatic dismissal.

Fourth, this case demonstrates that mandatory dismissal would hinder the Government's interests. Once the relator's lawsuit is dismissed, the Government could easily run afoul of the statute of limitations if it attempted to file a new action. Requiring the Government to start litigation anew after the automatic dismissal of a *qui tam* complaint would render the Government effectively unable to bring suit.

Fifth, although Petitioner and its *amici* lament the impact of FCA disclosure has on the standing of publicly traded companies, Corporations routinely disclose sealed FCA actions in their SEC filings. When a company receives a Civil Investigative Demand (CID), or a request for information from the Government related to a potential false claim, the company notifies its shareholders of the investigation and normally reports that the investigation means an FCA case was filed.

Finally, the boundaries of FCA seals can be unclear, as the instant case illustrates, and

imposition of a mandatory dismissal rule for seal violations would be an unnecessarily severe approach to the flexible tool that Congress intended.

Argument

I. The FCA Is America's Most Important Anti-Fraud Law And The Dismissal Provision Must Be Interpreted In Light Of This Fact.

It is beyond doubt that since the 1986 amendments the False Claims Act has protected the taxpayer from fraudsters. Even the U.S. Chamber Institute for Legal Reform, the FCA's harshest critic, agrees that the False Claim Act is "the Government's most important tool to uncover and punish fraud against the United States." U.S. Chamber Institute for Legal Reform, *Fixing the False Claims Act* (Oct. 2013), *available at* http://www.instituteforlegalreform.com/research/fixing-the-false-claims-act-the-case-for-compliance-focused-reforms. The *qui tam* provision "has provided ordinary Americans with essential tools to combat fraud, to help recover damages, and to bring accountability to those who would take advantage of the United States government—and of the American taxpayers." *Remarks of Eric Holder, U.S. Att'y Gen.*, U.S. Dep't. of Justice (Jan. 31, 2012), *available at* https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-25th-anniversary-false-claims-act-amendments-1986. The Department of Justice's data on fraud recovery provides undeniable proof of the effectiveness of the FCA's *qui tam* provision. It has been called "the government's most potent civil weapon in addressing fraud against. . . .taxpayers."

Remarks of Stuart F. Delery, U.S. Acting Asst. Att'y Gen., U.S. Dep't. of Justice (June 7, 2012), *available at* https://www.justice.gov/opa/speech/acting-assistant-attorney-general-stuart-f-delery-speaks-american-bar-association-s-ninth. In fact, recoveries from lawsuits initiated by whistleblowers account for a significant percentage of the government's overall FCA recovery.

In Fiscal Year 2015, the Department of Justice obtained more than $3.5 billion in settlements and judgments from civil fraud and false claims cases. *See* U.S. Dep't of Justice, *Justice Department Recovers Over $3.5 Billion From False Claims Act Cases in Fiscal Year 2015* (Dec. 3, 2015), *available at* https://www.justice.gov/opa/pr/justice-department-recovers-over-35-billion-false-claims-act-cases-fiscal-year-2015. Of this amount, a staggering $2.8 billion was recovered from lawsuits filed under the FCA's *qui tam* provision. *Id.* Eighty percent of all FCA recovery in FY 2015 was a direct result of whistleblowers risking their professional lives by filing *qui tam* lawsuits. These figures also indicate the massive scale on which contractors attempt to defraud the U.S. government, and taxpayers, on a yearly basis. With these recovery rates, it should come as little surprise that Benjamin Mizer, the head of the Department of Justice's Civil Division, stated that the FCA has "proven to be the government's most effective civil tool to ferret out fraud and return billions to taxpayer-funded programs," adding that these recoveries "help preserve the integrity of vital government programs." *Id.*

Since the 1986 amendments, the United States recovered some $48 billion in fraud, of which $33 billion is directly attributable to whistleblower-led cases. *See* U.S. Dep't of Justice, *Fraud Statistics – Overview, Oct. 1, 1987 – Sept. 30, 2015, Civil Division, U.S. Dept. of Justice,* TAXPAYERS AGAINST FRAUD EDUCATION FUND, *available at* http://www.taf.org/DOJ-FCA-Statistics-2015.pdf (last updated September 30, 2015). This is a remarkable figure given the difficulty in proving fraud cases, and the fact that the numbers reported here do not reflect the criminal sanctions that often follow a successful FCA case, or the fact that many fraudsters are removed from the marketplace by successful prosecutions and that almost all companies who settle an FCA case also agree to enhanced compliance procedures.

Thus, it is not surprising that in the thirty years since the 1986 enactment of the False Claims Act, Congress has not invoked any action to make it easier for a defendant to seek or obtain dismissal of a case brought under the FCA. Instead, legislation since 1986 has only strengthened the limitations on defendant-initiated dismissals. Mandatory dismissal would frustrate the intended goals of the seal provision and reduce the efficacy of the FCA.

II. FCA Statute Text Demonstrates Congress Expressly Considered The Conditions Necessary For Dismissal And Did Not Afford That Sanction For Seal Violations.

The text of the FCA demonstrates that Congress confronted the question presented in this

case, *i.e.* under what circumstances should an FCA case be dismissed. The text of the statute itself affirmatively forecloses mandatory dismissal as a sanction when a relator violates the seal provision. Sections 3730(b)(2) and (c)(2)(A) of the FCA expressly state how cases may be dismissed, and only the Department of Justice is granted this authority. Congress made no provision for a defendant to have a claim automatically dismissed, although Congress did give defendants the right to seek sanctions from Relators whose conduct was found to be harassing or vexatious. *See* 31 U.S.C. § 3730(d)(4).

Once Congress has balanced competing interests of potentially affected individuals or entities, it is inappropriate to engage in judicial rebalancing of these carefully considered interests. *Milner v. Dep't of Navy*, 562 U.S. 562, 571 n.5 (2011); *see also* Pet'r's Br. at 36 (quoting *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 29 (1989) ("Giving full effect to the words of the statute preserves the compromise struck by Congress."). Two statutory provisions in the FCA, 31 U.S.C. §§ 3730(b)(2) and (c)(2)(A), expressly state how cases may be dismissed. State Farm has ignored these exclusive sections. Another statutory provision states how State Farm may obtain sanctions (which could include dismissal) of a Relator. Again, this section does not authorize the automatic dismissal of a claim for violations of the seal. 31 U.S.C. § 3730(d)(4).

State Farm focuses exclusively on the language of 3730(b)(2), but whistles blindly past §§ 3730(b)(1) and (c)(2)(A), which actually set forth the procedures

necessary for dismissal of an FCA case. By its request, Petitioner asks this Court to attach a drastic sanction to 3730(b)(2), while simultaneously taking an eraser to the express language of §§ 3730(b)(1), (c)(2)(A) and (d)(4).

Unlike most laws, the FCA provides specific statutory rules for case dismissal. Once a claim has been filed, "the action may be dismissed *only if* the court *and* the Attorney General give written consent . . . ." 31 U.S.C § 3730(b)(1) (emphasis added). It further provides that the "*Government* may dismiss the action notwithstanding the objections" of the relator, provided the court allows the relator to be heard on the motion. *Id.* § 3730(c)(2)(A) (emphasis added). These deliberate inclusions demonstrate that Congress directly considered the conditions necessary for dismissal of a relator's claim, and delineated specific boundaries. The Government *could* request dismissal for seal violations, but is not required to seek such dismissals.

Although mandatory dismissal is not one of the sanctions available to defendants who are, in fact, harmed by a seal violation, defendants have numerous other options to address such violations. For example, faced with a seal violation, they can ask the the Government to not intervene or dismiss the claim. If the relator pursues a claim without Government involvement, the defendant can pursue severe sanctions against a rogue relator at the court's discretion. 31 U.S.C. 3730(d)(4). There is also

an array of state common law claims,[3] including defamation actions, available to a defendant whose reputation is actually harmed by the violation.

III. Other Statutes That Require Confidential Court Proceedings Do Not Require Mandatory Dismissal.

The False Claims Act's seal requirement can perhaps best be analogized to the grand jury secrecy rule, as both types of proceedings impose a mandatory condition of confidentiality on certain parties. There is a "long-established policy" that proceedings before a grand jury will remain secret. *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959). The rule of secrecy is rigidly applied against disclosure, as the grand jury confidentiality rules are deeply embedded in the Constitution. James W. Diehm, *Impeachment of Jury Verdicts:* Tanner v. United States *and Beyond*, 65 ST. JOHN'S L. REV. 389, 400 n. 34 (1991). In fact, grand jury proceedings have been confidential since the 17th century. *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 218 n.9 (1979).

Despite its constitutional foundations and statutory requirements, violation of the grand jury secrecy rule does not mandate automatic dismissal. Rather, a criminal indictment stands—despite a prohibited disclosure of confidential grand jury

[3] "[C]ongressional silence often reflects an expectation that courts will look to the common law to fill gaps in the statutory text." *Clackamas Gastroenterology Assoc., P.C. v. Wells*, 538 U.S. 440, 447 (2003).

material—unless the errors in the grand jury proceedings prejudiced the defendant. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988). A court must determine whether the violation substantially influenced the grand jury's decision to indict, or if there was grave doubt that the decision to indict was free from the substantial influence of such violations. *Id*. at 256. Thus, the outright dismissal of the indictment is generally not an appropriate remedy for prohibited disclosures of grand jury material.

Congress unquestionably was aware of mandatory grand jury secrecy rules at the time it amended the FCA, and knew that dismissal was not an automatic sanction for violation of this extremely critical and well-established confidentiality rule. Furthermore, here, the sealing requirements of the FCA do not implicate constitutional rights, nor is there a "long-established policy" of confidentiality regarding FCA claims. *See Pittsburgh Plate Glass Co.*, 360 U.S. at 399. In drafting the FCA's seal provision, Congress could not have intended to create a rule more drastic than the deep-rooted precedent of grand jury secrecy.

Furthermore, the availability of alternative sanctions for confidentiality violations also undercuts the need for dismissal. *See* 31 U.S.C. 3730(d)(4); *see also, Grenier v. City of Champlin*, 152 F.3d 787, 789–90 (8th Cir. 1998) ("The court has inherent power to assess attorneys' fees as a sanction for willful disobedience of a [protective] court order."). Sanctions under the Federal Rules of Civil Procedure are a viable and effective means of

dealing with seal violations. *See* Brian C. Elmer et al., *Ethical and Legal Challenges in the Pre-Unsealing Stages of Qui Tam Litigation* (2012), *available* at https://www.crowell.com/files/Ethical-and-Legal-Challenges-in-the-Pre-Unsealing-Stages-of-Qui-Tam-Litigation.pdf.

IV. This Case Demonstrates That Mandatory Dismissal Would Hinder, Rather Than Advance, The Government's Interests.

The False Claims Act's statute of limitations restricts plaintiffs from bringing civil actions under section 3730 "more than 6 years after the date on which the violation of section 3729 is committed." 31 U.S.C. § 3731(b). State Farm's argument that automatic dismissal of a *qui tam* claim—for a seal violation—would not prejudice the Government is completely without merit. Once a relator's lawsuit is dismissed, the Government could face a major statute of limitations problem if it attempted filing a new action. In fact, defendants could easily run out the clock prior to seeking dismissal of a case for a seal violation. Moreover, defendants could engage in discovery to try to find a seal violation, and once uncovered, move to dismiss—all of which would have a severe impact on the United State's ability to timely file a new case, and also in the scope of damages the Government could seek to recover given the statute of limitations. Furthermore, instead of FCA litigation focusing on the fraud committed by defendants, it could turn into a witch-hunt where defendants engage in extensive, and potentially intrusive, discovery to attempt finding technical

violations of the seal by deposing relators' friends, lawyers and family members.

As a practical matter, requiring the Government to start litigation anew after the automatic dismissal of a *qui tam* complaint would render the Government effectively unable to bring suit. In the instant case, for example, State Farm violated the law beginning in 2005, after which the Rigsbys filed their *qui tam* complaint on April 26, 2006. The statute of limitations under 3731(b), therefore, has already run, precluding future claims arising out of the specific conduct alleged in this suit. If this *qui tam* complaint is dismissed, the Government would be barred from pursuing the claim independently, leaving no available remedy.

Finally, many False Claims Act cases remain sealed for several years after filing while the Government continues its investigation, during which time the statute of limitations continues to run. On average, it takes the Government three years to make an intervention decision after a *qui tam* complaint is filed. U.S. Gov't Accountability Office, GAO-06-320R, *Information on False Claims Litigation* 3, 31 (2006), *available at* http://www.gao.gov/assets/100/93999.pdf. This statute of limitations conundrum would present itself regularly if this Court imposes automatic dismissal for seal provision violations, and prevent the FCA from functioning effectively in its mandate to restore stolen Government funds.

V. Corporations Already Routinely Unveil Sealed FCA Actions In SEC Filings.

Petitioner and its *amici* supporters lament how a seal violation could impact the standing of publicly traded companies. *See, e.g.*, Br. of Washington Legal Found. at 18. Not only is this not a concern in the instant case (State Farm is not publicly traded) but, critically, publicly traded corporations regularly, publicly disclose the existence (or potential existence) of FCA cases while they are under seal.

When a company receives a Civil Investigative Demand (CID), or a request for information from the Government related to a potential false claim, *see* 31 U.S.C. § 3733, the company notifies its shareholders of the investigation and normally reports that the investigation means that a FCA case was filed. Through this notification process, companies disclose information regarding the Government's investigation of an FCA violation to their shareholder. Through these reports, the company reveals the fact that a FCA case is most likely pending against them, generally well before an investigation is unsealed. *See*, *e.g.*, *SEC Filing, Davita Healthcare Partners Inc., Current Report (Form 8-K)* (Nov. 10, 2015) and *SEC Filing Davita Healthcare Partners Inc., Quarterly Report (Form 10-Q)* (June 30, 2016) (company announced CID in November 2015; FCA investigation was not unsealed until May 2016); *SEC Filing, Cardiovascular Systems, Inc., Current Report (Form 8-K)* (May 8, 2014) and *SEC Filing, Cardiovascular Systems, Inc., Current Report (Form 8-K)* (July 8, 2015) (company announced CID in May 2014; FCA investigation was

not unsealed until July 2015); *SEC Filing, ITT Educational Services, Inc., Current Report (Form 8-K)* (Sept. 18, 2015) and *SEC Filing, ITT Educational Services, Inc., Annual Report (Form 10-K)* (Dec. 31, 2015) (company announced CID in September 2015; FCA investigation was unsealed in January 2016); *SEC Filing, HCP, Inc., Annual Report (Form 10-K)* (Dec. 31, 2014) and *SEC Filing, HCP, Inc., Current Report (Form 8-K)* (April 20, 2015) (company announced CID in December 2014; FCA investigation was not unsealed until April 2015); and *SEC Filing, Amedisys, Inc., Current Report (Form 8-K)* (Sept. 27, 2010) (company announced CID in September 2010; FCA investigation was classified as sealed).

Thus, companies regularly report potential FCA actions to their shareholders, even while the FCA case is under seal. There is no evidence that these disclosures, made by defendants, and not relators, have any legally cognizable impact on a company's reputation.

VI. As This Case Illustrates, The Boundaries Of FCA Seals Are Often Unclear, Which Would Make A Strict Rule Enforcing The Seal Requirement Deeply Flawed.

The boundaries of FCA seals are often unclear. Given that a standard, one-size-fits-all seal is not always imposed—which this case illustrates well—enforcing the seal requirement in a draconian fashion is unwarranted.

State Farm asserts that Respondents' prior counsel maliciously violated the court's seal orders to gain a "strategic litigation advantage." Pet'r's Br. 7. This is a gross exaggeration not supported by the record. In fact, although the Center does not condone or excuse the conduct of Relators' prior counsel, a careful review of the record below indicates that it could have been argued that no seal violation occurred. The record before the District Court, publicly available on *Pacer*, demonstrates that, at the time Relator's counsel communicated with the media, the only document explicitly covered under the seal was the complaint itself. The disclosure statement was not identified as a document covered under the existing sealing order at the time of the media disclosures.

On April 26, 2006, the United States District Court for the District of Mississippi issued an order that the complaint filed in this case be "received *In Camera* and under seal." The order made no reference to any disclosure statement filed with the Attorney General, and did not place the disclosure statement under seal. *Rigsby et al. v. State Farm Fire & Cas. Co. et al.*, No. 1:06-cv-00433-HSO-RHW, ECF No. 1 at 1, Order (4/26/06). This Order conformed to the requirements of the False Claims Act, which only requires that the complaint be filed *In Camera*, and under seal. *See* 31 U.S.C. § 3730(b)(2).[4]

[4] Additionally, the FCA permits whistleblowers to publicly disclose their evidence to the media, and their intent to file a FCA case, just prior to the formal filing of the claim. Not only are such disclosures allowed, Congress explicitly ensured that whistleblowers who disclose their evidence to the press, prior to

The United States did not seek to expand the scope of the seal to cover material evidence until July 5, 2006, when the Government filed its motion for a "Six Month Extension of Time to Consider Election to Intervene." *Rigsby et al. v. State Farm Fire & Cas. Co. et al.*, No. 1:06-cv-00433-HSO-RHW, ECF No. 3 at 1. In its motion, the Government sought to keep the complaint and "other related filings" under seal. *Id.* The motion itself made no reference to the disclosure statement or the Government's interest in keeping material evidence under seal. Furthermore, only the motion (ECF No. 3) was served on the Plaintiffs/Relators. *Id.* ECF No. 4 at 5 (certificate of service). The related memorandum, which was *not* served on Plaintiffs/Relators or their counsel, is the only place where the Government requested that "material evidence" be subject to the seal. *Id.* ECF No. 4 at 3.

Additionally, the Court never granted the Government's July 5th request to extend the seal. Instead, on December 7, 2006, the Court issued an "Order Granting Extension of Time to Consider Election to Intervene," which extended the Government's investigatory deadline, but made no

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filing, could still qualify as *qui tam* relators. *See* 31 U.S.C. § 3730(e)(4)(A)–(B). Congress understood whistleblowers often approach the press and publicly accuse their employers of fraud. If Congress intended for the sealing requirement to protect a defendant's reputational interest, one would expect the statute to reflect this purpose. Instead, the statute carves-out protections for whistleblowers who disclose their evidence to the press, and only requires a narrow seal covering the complaint itself.

mention of any extension of the seal and did not inform the Plaintiffs/Relators that the scope of the original seal order was extended to include "material evidence." *Id.* ECF. No. 6.

After filing its July 5th motion (and after Relators' counsel provided information to the media), the Government filed additional motions seeking to extend the seal, and expand the scope of the seal to cover material evidence. In these motions, the only reason the Government provided for the seal extension related to the integrity of its investigation. At no time did the Government seek to obtain a seal or extend the seal to protect any interests of State Farm or any of the other Defendants. *See* No. 1:06-cv-00433-HSO-RHW. Furthermore, when the case was taken out of seal and served on the Defendants, nothing in the record indicates that the Defendants sought to re-impose a seal on the Plaintiffs/Relators to protect their interests.

Given that the boundaries of FCA seals can be unclear, as the instant case illustrates, imposition of a mandatory dismissal rule for seal violations would be an unnecessarily severe approach to the flexible tool that Congress intended.

CONCLUSION

For the foregoing reasons the judgment of the U.S. Court of Appeals below should be affirmed.

Respectfully submitted,

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