No. 13-1444

IN THE

Supreme Court of the United States

October Term 2014

GURUMURTHY KALYANARAM,

Petitioner,

—v.—

NEW YORK INSTITUTE OF TECHNOLOGY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR *AMICI CURIAE* PROFESSORS ADAM LAMPARELLO & CHARLES E. MACLEAN AND THE NATIONAL WHISTLEBLOWERS CENTER IN SUPPORT OF PETITIONER

NATIONAL WHISTLEBLOWERS CENTER
3238 P Street NW
Washington, DC 20007
(202) 342-1903

JAMES J. BERLES
Counsel of Record for Amici Curiae
ADAM LAMPARELLO & CHARLES E. MACLEAN
Assistant Professors of Law
Indiana Tech Law School
1600 E. Washington Blvd.
Fort Wayne, Indiana 46803
1-855-TECHLAW
JJBerles@indianatech.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Cases

Statutes

INTEREST OF *AMICI CURIAE*

Amici Charles E. MacLean and Adam Lamparello are assistant professors at Indiana Tech Law School in Fort Wayne, Indiana.[1] *Amici* teach and write in the areas of criminal law, criminal procedure, and constitutional law, and have an interest in the sound development of the law in this area. Specifically, substantial confusion exists among litigants and the lower courts regarding the circumstances under which facts relating to a qui tam suit under the False Claims Act, 31 U.S.C. §3729 *et seq.* (the "Act") may be disclosed in an arbitration proceeding without violating the sealing provisions. Granting *certiorari* can provide litigants, their counsel, and the lower courts with a coherent doctrinal framework and therefore result in the Act's orderly, fair, and efficient administration.

Together or separately, *Amici* professors have written a number of articles in the criminal and constitutional law context, including: Adam Lamparello, *Unreasonable Doubt: Warren Hill, AEDPA, and the Unconstitutionality of Georgia's Reasonable Doubt Standard*, 51 CRIM. L. BULLETIN (forthcoming 2015); Adam Lamparello and Charles E. MacLean, *The Separate But Unequal Constitution*, DEPAUL L. REV. (forthcoming 2014); Adam Lamparello and Charles MacLean, *Paroline, Restitution, and Transferred Scienter: Child Pornography Possessors and Restitution Based on a*

[1] All parties have consented to the filing of this amicus brief. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. Counsel for Petitioner did, however, incur the costs associated with the printing and filing of this amicus brief.

Commerce Clause-Derived, Aggregate Proximate Cause Theory, 16 U. PA. J. CONST. L. HEIGHT. SCRUTINY 37 (2014); Charles E. MacLean, *But Your Honor, A Cell Phone is Not a Cigarette Pack: An Immodest Call for a Return to the Chimel Justifications for Searches of Cell Phone Memories Incident to Lawful Arrest*, 6 FED. CTS. L. REV. 37 (2012); Charles E. MacLean, *Katz on a Hot Tin Roof: The Reasonable Expectation of Privacy Doctrine is Rudderless in the Digital Age Unless Congress Continually Resets the Privacy Bar*, 24 ALB. L.J. SCI. & TECH. 47 (2014); Charles E. MacLean and Adam Lamparello, *Abidor v. Napolitano: Suspicionless Cell Phone and Laptop "Strip" Searches at the Border Compromise the Fourth and First Amendments*, 108 NW. U. L. REV. COLLOQUY 280 (2014).

In addition, *Amici* professors recently filed an amicus brief with this Court in *Riley v. California*, which involved the constitutionality of searches of an arrestee's cell phone incident to arrest,[2] *Heien v. North Carolina*,[3] concerning whether mistakes of law can form the basis for reasonable suspicion under the Fourth Amendment, and *Hall v. Florida*,[4] which involved the constitutionality of Florida's statutory scheme for determining intellectual disability.

The National Whistleblowers Center ("NWC") is a non-profit, non-partisan organization that is dedicated to protecting employees' disclosure of unlawful conduct by their employers. The NWC sponsors

[2] No. 13-132. (Argued April 29, 2014).

[3] No. 13-604 (Oct. Term 2014).

[4] 134 S.Ct. 1986 (2014).

a variety of programs that are designed to advocate, educate, and assist employees and the general public. The NWC's interest as amicus is to foster the sound development of the law in this area.

SUMMARY OF ARGUMENT

Whistleblowers should not be required to pick their poison.

They should not be penalized for following the law, particularly where, as here, the alleged "wrong" relied upon by the Second Circuit Court of Appeals was Petitioner's compliance with the Act's sealing provision. *See* 31 U.S.C. § 3730(b)(2). That provision expressly requires whistleblowers to maintain the confidentiality of qui tam lawsuits during the pendency of a government investigation.[5] Petitioner followed the Act's express mandate—and suffered the consequences.

Relying on the district court's partial unsealing order ("Order"), the Second Circuit held that Petitioner should have disclosed *and* answered questions about his qui tam suit at an arbitration hearing pursuant to the parties' collective bargaining agreement. *See Kalyanaram v. New York Institute of Technology*, 549 F. App'x. 11, 14 (2d Cir. 2013). In its opinion, the Second Circuit stated as follows:

[5] 31 U.S.C. § 3730(b)(2) "allow[s] the Government an adequate opportunity to fully evaluate the private enforcement suit and determine both if that suit involves matters the Government is already investigating and whether it is in the Government's interest to intervene and take over the civil action") (brackets added).

> Kalyanaram [Petitioner] *chose not to tell the arbitrator that he had filed a qui tam action* accusing NYIT of fraudulent business practices. Contrary to Kalyanaram's contention, his silence was not compelled by any court order. The district court had issued an order in 2007, soon after the filing of the qui tam suit, partially unsealing the case so that Kalyanaram could *"respon[d] to any questions" that he was "asked at any arbitration" that bore on the claims in his federal case.* J. App'x at 402.

Id. (emphasis added) (brackets added). What the Second Circuit did not acknowledge, however, was that Petitioner's silence was compelled by the Act's sealing provision and essential to ensure the confidentiality of the Government's investigation.

The Second Circuit's decision was contrary to the sealing provision's express language, frustrated the Act's broader purposes, and created uncertainty for future whistleblowers who find themselves torn between conflicting—and irreconcilable—legal obligations.

Moreover, the Order upon which the Second Circuit relied counseled in favor of silence, not disclosure. The Order directed Petitioner to state, if asked at arbitration hearing, that he was "involved in litigation that is currently under seal" and "*not authorized, by order of the court, to reveal any addi-*

tional information."[6] *See* Pet. App. E. at 31a (emphasis added). The Second Circuit erroneously interpreted the Order to require, or at least allow, precisely what the Act forbids, and placed Petitioner in the precarious position of having to pick his poison: comply with the Act and risk dismissal of his personal retaliation claim, or violate the Act and face sanctions that could include dismissal of his claim. *See ACLU v. Holder*, 673 F.3d 245, 254 (4th Cir. 2011) (the seal provision prohibits whistleblowers from "publicly disclosing the filing of a qui tam complaint"); *see also United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242, 245-46 (9th Cir. 2005) (in determining whether to dismiss the relator's complaint, courts consider the harm to the government as well as the nature of the violation).

Future whistleblowers who are faced with the same quandary—and look to the courts for guidance—will now find uncertainty. In fact, potential whistleblowers may hesitate before exposing wrongdoing by their employers to avoid being thrust into such a dilemma. That result is not surprising. No litigants, particularly whistleblowers, should be forced to make a Hobson's choice.

Ultimately, Petitioner made the right choice. He complied with the Act—yet had his personal retaliation claim dismissed with prejudice. The Second Circuit held that, by failing "to tell the arbitrator

[6] Petitioner filed suit under the Act on October 17, 2007. At the Government's request, the suit remained under seal for five years. The arbitration proceeding related to Petitioner's claims pursuant to the parties' collective bargaining agreement.

that he had filed a qui tam action accusing NYIT of fraudulent business practices," Petitioner had "only himself to blame." *Kalyanaram*, 549 F. App'x. at 14. In addition, the Second Circuit chastised Petitioner for his alleged bad-faith conduct at the arbitration proceeding, stating that he "presented an elaborate, fabricated defense," and "repeatedly lied under oath." *Id.* Even if true, the Second Circuit's findings do not change the fact that Petitioner was penalized for maintaining the confidentiality of his qui tam lawsuit. And that is precisely the problem.

Furthermore, it is no answer to say that Petitioner could have avoided this dilemma by arbitrating his personal retaliation claims. *See United States ex rel. Cassaday v. KBR, Inc.*, 590 F. Supp. 2d 850, 860 (S.D. Tex. 2011) (recognizing the "practical difficulties" with this strategy). First, the parties' collective bargaining agreement did not allow Petitioner to assert a personal retaliation claim, and provided that, if a separate lawsuit was filed, the arbitration proceeding would be dismissed with prejudice.

Second, if Petitioner had filed a separate retaliation claim during this time, the New York Institute of Technology would have been "tipped off" that a lawsuit under the Act was filed. *See United States ex rel. Windsor v. DynCorp., Inc.*, 895 F. Supp. 844, 848-49 (E.D. Va. 1995) (the sealing provision reflects "Congress' desire to permit the government to investigate the allegations without "tipping off" the alleged wrongdoers").

None of this would have been a problem *if* Petitioner would have been allowed to pursue his personal retaliation claim after the qui tam suit was unsealed. But the Second Circuit foreclosed this possibility by holding that Petitioner's refusal to disclose the qui tam lawsuit warranted dismissal of that claim under principles of collateral estoppel. In other words, whatever choice Petitioner made could have led to the dismissal of Petitioner's claims. *And one of those choices did*. That, too, is the problem.

At bottom, the Second Circuit's decision stands for a troubling proposition: whistleblowers that opt to maintain full confidentiality as required by the Act may be prevented from having a full and fair opportunity to pursue causes of action against their employers.

Amici respectfully submit that this result is unreasonable, unfair, and unjust. The Second Circuit's holding ushers confusion and conflict into and already complex jurisprudence, and widens, rather than bridges, the doctrinal void in this area Thus, the Court should grant certiorari to provide a sensible framework for qui tam plaintiffs who may be faced conflicting legal obligations. The best approach, *amici* submit, is to protect, not penalize, the whistleblower, and to ensure, not eviscerate, the confidentiality of Government investigations. Placing whistleblowers, who are faced with the difficult task of reporting wrongdoing by their employer, between a rock and a hard place is contrary to the very reason that they turn to the courts—to vindicate, not complicate their rights.

ARGUMENT

I. The Second Circuit's Decision Undermines the Act's Strict Confidentiality Requirement and Penalizes Whistleblowers for Complying with the Act's Sealing Provision.

The Second Circuit's holding places whistleblowers in a catch-22: disclose information relating to a qui tam lawsuit and face potentially harmful consequences, or maintain confidentiality and face potentially harmful consequences. Such a dilemma underscores the fundamental flaw in the Second Circuit's reasoning, reveals an unintended consequence of the Act's sealing provision, and underscores the doctrinal confusion that exists in this area.

Whistleblowers, or "relators" under the Act, should not be faulted, much less have their personal retaliation claims dismissed, for maintaining the confidentiality of the Government's investigation. *See United States ex rel. Gale v. Omnicare, Inc.*, No. 1:10–cv–127, 2013 WL 2476853 at *3 (N.D. Ohio 2013) ("violations of the procedural requirements imposed on *qui tam* plaintiffs under the False Claims Act preclude such plaintiffs from asserting *qui tam* status") (*quoting United States ex rel. Summers v. LHC Group, Inc.*, 623 F.3d. 287, 289 (6th Cir. 2010)).

In *United States ex rel. Rigsby v. State Farm Fire and Cas. Co.*, the district court held as follows:

> The sealing requirement of the FCA [False Claims Act] normally operates to prevent both the disclosure of the information in the complaint, i.e. of the information that indi-

> cates the facts and circumstances in which the false claims are generated, *and also the fact that a qui tam action has been filed and a potential government investigation triggered.*

No. 1:06CV433, 2011 WL 8107251 at *7 (S.D. Miss. 2007) (emphasis added) (brackets added).

Indeed, the Act is not simply designed to protect the secrecy of the Government's investigation; it is a promise to whistleblowers that the law will zealously protect their privacy. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000). If it were any other way, whistleblowers might think twice before reporting wrongdoing by their employers. That is precisely what will result if the Second Circuit's decision is affirmed, and precisely what the Act seeks to avoid. *See United States v. Johnson Controls, Inc.*, 457 F.3d 1009, 1018 (9th Cir. 2006) ("Congress meant 'to encourage private individuals who are aware of fraud being perpetrated against the Government to bring such information forward.'") (*quoting* H.R. Rep. No. 99–660, at 23 (1986)). Placing relators in a position where their own statements may alert employers to the existence of a qui tam suit does more than simply compromise the statutory obligations to which they are bound. It brings confusion, uncertainty, and conflict to a complex jurisprudence that demands doctrinal coherence.

To be sure, it does not matter if the relator's disclosure is broadly phrased or non-specific. Forcing relators into the murky waters between disclosure and secrecy places them on a very slippery slope without any knowledge of when seemingly innocu-

ous statements may inadvertently tip off the party under investigation and compromise the confidentiality of the Government's investigation. *See United States v. ex rel. Grupp v. DHS Express (USA), Inc.*, 742 F.3d 51 (2d Cir. 2014) (the sealing provision prevents a qui tam plaintiff from alerting a "putative defendant to possible investigations"); *Under Seal v. Under Seal*, 326 F.3d 479 (4th Cir. 2003) (the purposed of the sealing provision "is to allow the government to study and evaluate, out of public view, the relator's information for possible intervention or overlapping criminal investigation") (*citing Hughes Aircraft Co.*, 67 F.3d 242); *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002) ("it is appropriate to deny a motion to unseal a court file if unsealing would disclose confidential investigative techniques, reveal information that would jeopardize an ongoing investigation, or injure non-parties").

At least one court one court has implicitly recognized the danger in precisely the situation with which Petitioner was confronted. *See United States ex rel. McBride v. Halliburton Co.*, No. 05-00828m 2007 WL 1954441 at *5, fn. 10 (D.D.C. 2007). In *Halliburton Co.*, the district court recognized that the "only way by which a defendant would even arguably know if a *qui tam* suit was pending" would be where the relator is involved in a separate arbitration proceeding *prior* to the unsealing of a qui tam complaint. *Id.*

Of course, although the "pendency [of the qui tam complaint] would merely be inferred," the inference becomes more likely where the relator is required, as the Second Circuit held, to disclose the qui tam suit and respond "to any questions" at the

arbitration that "bore on the claims in his federal case." *Id.; see also Kalyanaram* 549 F. App'x. at 14.(emphasis added) (brackets added).

Put differently, the problem in this case is not with the district court's partial unsealing order, but with the Second Circuit's interpretation of that Order, and of what Petitioner *should* have disclosed at the arbitration proceeding. It is one thing, for example, to "provide only redacted copies of sealed documents to the defendant in order to protect sensitive information," but quite another to blame the relator for not "tell[ing] the arbitrator that he had filed a qui tam action" *United States ex rel. Yannacopolous v. General Dynamics*, 457 F. Supp. 2d 854, 859 (N.D. Ill. 2006); *Kalyanaram*, 549 F. App'x. at 14 (emphasis added) (brackets added).

Even worse is faulting the relator for complying with the Act's sealing provision. The Second Circuit did precisely that, stating that Petitioner had "only himself to blame" for the dismissal of his personal retaliation claim. *Kalyanaram*, 549 F. App'x. at 14.[7] A more sensible approach, when compelled disclosures conflict with statutory duties of confidentiality, is to err on the side of caution, not to place relators in untested waters where competing obligations

[7] A document may be unsealed if it "reveals only routine investigative procedures which anyone with rudimentary knowledge of investigative processes would assume would be utilized in the regular course of business ... [and] contains no information about specific techniques such as what items might be looked for in an audit, what types of employees of an entity should be contacted and how, what laboratory tests might be utilized, or the like."*United States ex rel. Rostholder v. Omnicare, Inc.*" 799 F. Supp. 2d 547, 549 (D. Md. 2011) (citation omitted) (brackets in original).

create conflicting interests and a circuit court's decision allows precisely what the Act forbids.

Ultimately, the Second Circuit's holding, places relators in the unenviable—and untenable—position of having to discern how much disclosure is too much, and to decide whether the choice to remain silent will prejudice, rather than preserve, the relator's rights.

II. Relators Should Not Be Forced to Wait Until the Seal is Lifted to Pursue Arbitration Under Collective Bargaining Agreements.

One court has already recognized the "quandary" that a case such as this presents. *See KBR, Inc.*, 590 F. Supp. 2d at 860. First, the relator cannot be expected to arbitrate a personal retaliation claim under the Act because it would violate the sealing provision and subject Petitioner to the same sanctions he would have faced by disclosing the qui tam suit. *See id.* (noting the "practical difficulties" of arbitrating a personal retaliation claim while the complaint is still under seal).

In *KBR, Inc.*, the district court's proposed solution to this problem invited more questions than it solved:

> Nevertheless, a plaintiff-relator can avoid ... [this] hypothetical quandary by filing a retaliation claim in the *qui tam* lawsuit and requesting or agreeing to arbitration after the *qui tam* lawsuit is unsealed. Alternatively, an individual can file an arbitration of the retaliation claim and request that the administrator stay the arbitration until such time

> as the *qui tam* lawsuit is unsealed. Under either scenario, the retaliation claim is timely asserted and the *qui tam* claim remains confidential and does not contravene the purpose of the seal requirement

Id. (emphasis added).

The court's solution is neither workable nor fair. First, it can delay adjudication of the relator's claims for years. Indeed, although the Act limits the sealing period to sixty days, that deadline is often—and repeatedly—extended. *See United States ex rel. Martin v. Life Care Centers of America, Inc.*, 912 F. Supp. 2d 618, 623 (E.D. Tenn. 2012) ("[u]nder certain circumstances, the Government may seek an extension of the sixty-day sealing period"); *see also* 31 U.S.C. § 3730(b)(3) ("[t]he Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal.... [a]ny such motions may be supported by affidavits or other submissions in camera").

In this case, for example, the sixty-day period was extended for five years. Petitioner would be forced, therefore, to wait indefinitely—and possibly for years—for the Government to complete its investigation, and therefore be prevented from adjudicating all claims that arose from the harm caused by an employer's misconduct. That result is neither reasonable nor just.

In addition, under the parties' collective bargaining agreement, Petitioner was not permitted to file a separate retaliation claim and stay the arbitration proceeding. Indeed, if Petitioner had done so, his claims in the arbitration proceeding would have been dismissed with prejudice. *See* Collective

Bargaining Agreement, pp. 66-67. And New York Institute of Technology would likely have been "tipped off" to the Government's investigation.

This underscores the problems that can result when relator's are uncertain about their obligations under the Act. The Second Circuit's opinion introduced more, not less, uncertainty, and will create similar problems for future whistleblowers.

The right result is to preserve the confidentiality of a qui tam suit so that a relator's claims under a collective bargaining agreement can be arbitrated without compromising the Government's investigation. The Second Circuit's opinion did the opposite, and caused Petitioner substantial, material, and permanent harm.[8]

[8] The exceptions to the sealing requirement do not support the result reached in this case. Specifically, in considering whether to unseal court documents, courts consider the following factors: (1) the need for public access to the documents at issue; (2) the extent of previous public access to the documents; (3) the fact that someone has objected to disclosure, and the identity of that person; (4) the strength of any property or privacy interests asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings. *United States ex rel. Schweizer v. Oce, N.V.*, 577 F. Supp. 2d 169 (D.D.C. 2008). The injury to Petitioner—and the Government's investigation—counsel in favor of confidentiality, not disclosure.

CONCLUSION

For the foregoing reasons, Professors Lamparello and MacLean, and the National Whistleblowers Center, respectfully submit that certiorari should be granted and the opinion of the Second Circuit reversed

Respectfully submitted,

James J. Berles
Counsel of Record
Adam Lamparello &
Charles E. MacLean
Assistant Professors of Law
Indiana Tech Law School
1600 E. Washington Blvd.
Fort Wayne, IN 46803
1-855-TECHLAW
JJBerles@IndianaTech.edu
AXLamparello@IndianaTech.edu
CEMacLean@IndianaTech.edu

National Whistleblowers Center
3238 P Street NW
Washington, DC 20007
(202) 342-1903

Dated: June 26, 2014