No. 15-513

In the Supreme Court of the United States

STATE FARM FIRE AND CASUALTY COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA, EX REL. CORI RIGSBY,
ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that, if a *qui tam* relator violates the False Claims Act's seal requirement, 31 U.S.C. 3730(b)(2), the district court need not automatically dismiss the relator's complaint but instead has discretion to fashion an appropriate alternative sanction.

2. Whether the court of appeals erred in holding that the evidence of scienter in this case was sufficient to support the jury's finding of liability.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The False Claims Act (FCA or Act), 31 U.S.C. 3729 *et seq.*, imposes civil liability on any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment" from the federal government, or "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C.

3729(a)(1)(A) and (B).[1] The FCA defines "knowingly" to mean that a person "(i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information." 31 U.S.C. 3729(b)(1).

The Attorney General may bring a civil action to enforce the FCA. 31 U.S.C. 3730(a). Alternatively, a private person (known as a "relator") may bring a *qui tam* action. 31 U.S.C. 3730(b)(1). The FCA requires that a *qui tam* complaint be served on the government along with written disclosures of "all material evidence and information" the relator possesses. 31 U.S.C. 3730(b)(2). The statute further provides that "[t]he complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." *Ibid.* Those procedural requirements are intended to afford the government an opportunity to investigate the allegations and make an informed decision whether to intervene in the action before the defendant becomes aware of the suit. S. Rep. No. 345, 99th Cong., 2d Sess. 24 (1986) (*Senate Report*).

2. During the period relevant to this case, petitioner issued government-backed flood insurance policies in addition to its own homeowner's insurance policies. Pet. App. 3a-4a. Many homeowners had both types of

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[1] Since this lawsuit was filed, Congress has twice amended the FCA. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, Tit. X, Subtit. A, § 10104(j)(2), 124 Stat. 901; Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4(a), 123 Stat. 1621; see also Pet. App. 7a n.4. Those amendments are not material to the questions presented here. This brief cites the current version of the FCA.

policies. *Id.* at 2a. The flood policy covered flood damage but excluded wind damage, while the homeowner's policy covered wind damage but excluded flood damage. *Ibid.* Flood claims therefore would be paid from the federal treasury, while wind claims would be paid from petitioner's own funds. *Ibid.*

Respondents are individuals who adjusted claims for petitioner following Hurricane Katrina. Pet. App. 3a. They allege a fraudulent scheme in which petitioner misclassified wind damage as flood damage for properties covered by both types of policies in order to shift the costs of those claims to the federal government. *Id.* at 4a-7a.

3. On April 26, 2006, respondents filed their *qui tam* complaint *in camera* and under seal, as Section 3730(b)(2) requires. Pet. App. 62a, 73a. The district court subsequently issued several orders extending the initial 60-day sealing period. *Id.* at 62a; see 31 U.S.C. 3730(b)(3). In January 2007, the court partially lifted the seal to permit disclosure of the case's existence to judicial officers in related litigation, and in August 2007 it fully lifted the seal. Pet. App. 62a. In January 2008, the government declined to intervene. *Id.* at 7a.

a. Petitioner moved to dismiss the complaint on the ground that respondents had breached the seal. The district court denied that motion. Pet. App. 44a-69a. The court found that the attorneys then representing respondents had violated the seal requirement on three occasions in August and September 2006 by disclosing the existence of the FCA action to several media outlets. *Id.* at 65a; see *id.* at 21a.[2] To deter-

[2] The district court rejected petitioner's other allegations of seal violations, finding that the conduct on which those allegations were

mine an appropriate sanction for those violations, the court applied the balancing test adopted in *United States ex rel. Lujan* v. *Hughes Aircraft Co.*, 67 F.3d 242 (9th Cir. 1995), which requires consideration of (1) the harm to the government, (2) the severity of the violations, and (3) the existence of bad faith. Pet. App. 59a. Because the court found "no evidence" that the improper disclosures had "led to a public disclosure in the news media that this action had been filed," it concluded that the breach had not "hampered the government's investigation" and was not "severe." *Id.* at 67a-68a. The court further found that respondents had not authorized their attorneys' violations and so had not "acted willfully or in bad faith." *Id.* at 68a. The court accordingly ruled that dismissal of the action would not be appropriate. *Id.* at 69a.

b. The case proceeded to trial on a bellwether claim involving one insured property (the McIntosh property). The jury returned a unanimous verdict finding that petitioner had knowingly submitted a false claim and a false record with respect to that property by attributing the Hurricane Katrina damage to flood rather than wind. Pet. App. 1a-2a, 117a.

4. The court of appeals affirmed in relevant part. Pet. App. 1a-41a.

a. The court of appeals rejected petitioner's argument that the seal violations required automatic dismissal of respondents' complaint. Pet. App. 18a-21a. The court instead adopted *Lujan*'s balancing test, finding that approach more consistent with the con-

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based either did not involve disclosure of the suit's existence or had occurred after the seal was partially lifted. Pet. App. 61a-67a; see *id.* at 21a-23a.

gressional purpose of encouraging *qui tam* actions. *Id.* at 20a.

The court of appeals held that the district court had not abused its discretion in declining to dismiss the complaint. Pet. App. 20a-23a. Because the suit's existence had not been publicized before the seal was partially lifted, the court of appeals found that "the government was not likely harmed" and that "a fundamental purpose of the seal requirement—allowing the government to determine whether to join the suit without tipping off a defendant—was not imperiled." *Id.* at 22a. The court further observed that the seal violations were "considerably less severe" than in other cases because they "did not involve a complete failure to file under seal or serve the government." *Id.* at 22a-23a. Finally, the court reasoned that even if the bad faith of respondents' attorneys were imputed to respondents themselves, the balance of factors still tilted in respondents' favor. *Id.* at 23a.

b. The court of appeals also rejected petitioner's contention that no reasonable jury could have found the scienter needed to support FCA liability. Pet. App. 36a-40a.

The court of appeals disagreed that the scienter evidence was insufficient because the adjusters who submitted the claim had a good-faith belief that it was accurate. Pet. App. 36a-37a. That "constricted theory of FCA liability," the court stated, "would enable managers at an organization to concoct a fraudulent scheme—leaving it to their unsuspecting subordinates to carry it out on the ground—without fear of reprisal." *Id.* at 37a. The court emphasized that the FCA's "plain text" imposes liability on those who knowingly "cause[]" a false claim or false record to be made.

Ibid. (citation omitted). The court additionally noted that several courts of appeals had rejected similar "ignorant certifier" defenses. *Ibid.*

The court of appeals further held that a reasonable jury could have found the requisite scienter based on the mental state of Lecky King, a supervisor who allegedly perpetrated the fraudulent scheme. Pet. App. 38a-39a. The court cited evidence that King had told adjusters "to presume flood damage instead of wind damage," had "concealed evidence of wind damage, and [had] strong-armed an engineering firm to change its reports," including with respect to the McIntosh property. *Ibid.*; see *id.* at 4a-6a. Although "King's alleged manipulation of the McIntosh engineering reports occurred *after* the McIntosh claim was paid," the court observed that the jury could "use post-payment evidence to evaluate [petitioner's] prepayment knowledge" because "[c]ircumstantial evidence is appropriate in determining scienter in an FCA case." *Id.* at 38a n.15. The court concluded that "the jury could have reasonably believed that King alone, 'act[ing] in reckless disregard of the truth or falsity' of the information," had caused a false claim and false record to be made. *Id.* at 39a (citation omitted; brackets in original).

DISCUSSION

Petitioner challenges the court of appeals' conclusions that (1) a district court need not apply an automatic rule of dismissal when a *qui tam* relator violates the FCA's seal requirement; and (2) sufficient evidence supported the jury's finding that the FCA's scienter requirement was satisfied. Further review is not warranted with respect to either question.

Consistent with the view of three other circuits, the court below correctly held that district courts have discretion to fashion appropriate sanctions for FCA seal violations. Although the Sixth Circuit has applied a rule of mandatory dismissal, that decision has become an outlier, raising the possibility that the court could revisit the issue en banc and eliminate the circuit split. In any event, it is not clear that the Sixth Circuit would require dismissal in a case like this, in which the seal violations occurred outside the initial 60-day sealing period.

The court of appeals also applied the correct legal standard in upholding the jury's scienter finding, and its factbound sufficiency-of-the-evidence ruling does not warrant this Court's review. Contrary to petitioner's contention, there is no circuit conflict concerning the "collective knowledge" theory of FCA liability, under which a corporate defendant may sometimes be held liable based on the aggregated mental states of several employees. In any event, this case is not an appropriate vehicle to consider that theory because the court below held that the evidence of scienter was sufficient "[e]ven if * * * one individual must have knowledge that a claim is false." Pet. App. 39a. The petition for a writ of certiorari should be denied.

I. THE COURT OF APPEALS' HOLDING THAT DISTRICT COURTS HAVE DISCRETION TO DETERMINE THE APPROPRIATE SANCTION FOR FCA SEAL VIOLATIONS DOES NOT WARRANT REVIEW

The court of appeals correctly held that a violation of the FCA's seal requirement does not compel dismissal of the complaint. The court's holding is consistent with Section 3730(b)(2)'s text and purpose, and with the background understanding that courts ordi-

narily possess broad discretion to determine the appropriate sanction for violations of similar procedural requirements.

A. Section 3730(b)(2) states that a *qui tam* complaint "shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." 31 U.S.C. 3730(b)(2). The FCA does not specify the consequences of a violation of those requirements. To determine the appropriate sanction, a court should accordingly look "to statutory language, to the relevant context, and to what they reveal about the purposes that [the rule] is designed to serve." *Dolan* v. *United States*, 560 U.S. 605, 610 (2010). Those sources support the conclusion that the FCA does not compel dismissal of a *qui tam* complaint if the seal is breached.

1. A relator's violation of the FCA's seal requirement does not strip the court of subject-matter jurisdiction over the suit. As a general matter, "when Congress does not rank a statutory limitation * * * as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 516 (2006). The FCA does not indicate that the seal requirement is jurisdictional, and compliance with sealing requirements in general is not typically treated as a prerequisite to a court's exercise of jurisdiction. See pp. 10-11, *infra*. The court below therefore correctly held that a seal violation does not affect a district court's jurisdiction over the relator's *qui tam* suit. Pet. App. 18a-19a. No court of appeals has held to the contrary.

Petitioner contends (Pet. 19-25) that, because the seal requirement "is a 'mandatory, not optional condition precedent' to the [FCA's] private right of action,"

any violation of that condition necessitates dismissal of the suit. Pet. 22 (quoting *Hallstrom* v. *Tillamook Cnty.*, 493 U.S. 20, 26 (1989)). The decisions on which petitioner relies, however, involved statutes that specifically stated that an action could not be instituted unless a procedural requirement was satisfied.[3] In *Hallstrom*, for example, the Court concluded that the plaintiff's failure to comply with a statutory 60-day notice requirement required dismissal because the statute stated that "[n]o action may be commenced" without the requisite notice. 493 U.S. at 25-26 (quoting 42 U.S.C. 6972(b)(1) (1982)). The Court reasoned that the suit could not proceed "[u]nder a literal reading of the statute." *Id.* at 26.

Similarly in *McNeil* v. *United States*, 508 U.S. 106 (1993), the Court held that a suit must be dismissed for failure to exhaust because the statute provided that an "action shall not be instituted" unless exhaustion had occurred. *Id.* at 111 (quoting 28 U.S.C. 2675(a)). And in *United States ex rel. Texas Portland Cement Co.* v. *McCord*, 233 U.S. 157 (1914), the Court held that a suit had been filed prematurely because the statute stated that individuals were "authorized to bring suit" only "if no suit" had been "brought by the United States within six months" from specified

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[3] Those decisions are also distinguishable because they focused on events that must occur *before* a suit is filed. Here, in contrast, respondents initially complied with the FCA's requirement that their complaint be filed under seal. Petitioner sought dismissal of the complaint based on seal violations that occurred several months *after* the suit was instituted.

events, and the six-month period had not yet elapsed when the suit was commenced. *Id.* at 161-162.[4]

Section 3730(b)(2) contains no comparable language, but simply states in relevant part that a *qui tam* complaint "shall be filed in camera" and "shall remain under seal for at least 60 days." 31 U.S.C. 3730(b)(2). The statutory text accordingly provides no support for petitioner's proposed rule of automatic dismissal. Cf. *Scarborough* v. *Principi*, 541 U.S. 401, 405-406 (2004) (holding that dismissal was not required despite plaintiff's initial failure to comply with statutory requirement that an applicant for attorney fees "allege that the position of the United States was not substantially justified").

2. In the absence of specific statutory direction, courts ordinarily have significant discretion to determine whether dismissal is an appropriate sanction for noncompliance with a procedural rule or statutory requirement. See, *e.g.*, *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 44-45 (1991) (recognizing a district court's "discretion * * * to fashion an appropriate sanction for conduct which abuses the judicial process," including but not limited to "outright dismissal").

With respect to violations of seal requirements in particular, trial courts regularly and appropriately

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[4] Petitioner also relies on this Court's decision in *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645 (2015), to argue (Pet. 22) that "court[s] will usually dismiss a complaint for failure to comply" with a statutory prerequisite to suit. But *Mach Mining* clarified that the "appropriate remedy" for the EEOC's failure to comply with a pre-suit conciliation requirement is to stay the litigation and order the EEOC to conciliate. 135 S. Ct. at 1656; see 42 U.S.C. 2000e-5(f)(1) (authorizing such a stay). *Mach Mining* thus illustrates that dismissal does not automatically follow even when a plaintiff fails to comply with a statutory precondition to suit.

impose sanctions other than dismissal of a complaint. See, *e.g.*, *Greiner* v. *City of Champlin*, 152 F.3d 787, 789-790 (8th Cir. 1998) (upholding award of monetary sanctions for violating seal); *Grove Fresh Distribs., Inc.* v. *John Labatt Ltd.*, No. 95-2603, 1998 WL 54676, at *3-*5 (7th Cir. Feb. 5, 1998) (same), cert. denied, 525 U.S. 877 (1998); *Coleman* v. *American Red Cross*, 23 F.3d 1091, 1094-1096 (6th Cir. 1994) (declining to order dismissal based on intentional violation of protective order). Courts ordinarily reserve dismissal for egregious or bad-faith violations. See, *e.g., Toon* v. *Wackenhut Corr. Corp.*, 250 F.3d 950, 952-953 (5th Cir. 2001) (finding dismissal appropriate for seal violation only if plaintiff acted in "bad faith"); *Marrocco* v. *General Motors Corp.*, 966 F.2d 220, 224 (7th Cir. 1992) (affirming dismissal of suit because plaintiff's violation of protective order constituted "contumacious conduct"). That background understanding reinforces the inference that, by establishing a seal requirement without specifying the consequences of a violation, Congress vested district courts in FCA cases with significant discretion to fashion appropriate remedies based on the facts of individual cases.

3. Petitioner's proposed per se rule of dismissal also runs counter to the purposes of the FCA seal requirement. Although dismissal will sometimes be an appropriate sanction for a violation, a rigid rule automatically requiring that penalty would disserve the goals of the statute and the interests of the United States.

The FCA was enacted to prevent and deter fraud arising out of Civil War defense contracts. See *United States* v. *McNinch*, 356 U.S. 595, 599 (1958). To promote vigorous FCA enforcement despite limited gov-

ernmental resources, Congress included *qui tam* provisions authorizing relators to bring suit on the government's behalf. See *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 540 (1943). Because relators who bring successful suits receive a portion of the proceeds, 31 U.S.C. 3730(d), private citizens have an incentive to uncover and prosecute fraud against the government. *ACLU* v. *Holder*, 673 F.3d 245, 248 (4th Cir. 2011).

In 1986, Congress amended the *qui tam* provisions with the "overall intent" of "encourag[ing] more private enforcement suits." *Senate Report* 23-24. Congress recognized, however, that a proliferation of *qui tam* suits could potentially hinder the government's own investigative and enforcement efforts. The Department of Justice had raised a concern that the public filing of *qui tam* suits containing allegations already under governmental investigation "could potentially 'tip off' investigation targets when the criminal inquiry is at a sensitive stage." *Id.* at 24. Congress enacted Section 3730(b)(2) to address that concern. The seal requirement was "intended to allow 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." *Ibid.*[5]

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[5] Neither the statutory text nor the legislative history suggests that Congress also intended the seal requirement to protect defendants. To the contrary, the Senate Report stated that "[b]y providing for sealed complaints, the Committee does not intend to affect defendants' rights in any way." *Senate Report* 24.

A mandatory dismissal rule would disturb the balance between encouraging *qui tam* litigation and protecting the government's investigative and enforcement interests. If a particular violation of the seal requirement causes no prejudice to the government, and no other factors lead the district court to conclude that such a severe sanction is warranted, dismissal would undermine the interests protected by the statute and grant a windfall to the defendant.

The statutory objectives are better served by a rule that permits district courts to "explore the facts underlying violations of the seal requirements before concluding that the extreme sanction of dismissal is warranted." *United States ex rel. Lujan* v. *Hughes Aircraft Co.*, 67 F.3d 242, 247 (9th Cir. 1995). Although cases could arise in which additional factors would be relevant, the three factors considered in *Lujan* and applied below capture the most pertinent criteria that a district court should consider. If the government informs the court that its interests have not been prejudiced by the violation and that continued prosecution of the *qui tam* suit would further its own enforcement interests, the court should give that assessment due weight in light of Section 3730(b)(2)'s government-protective purposes.

B. Four of the five courts of appeals to consider the appropriate sanction for an FCA seal violation have rejected a per se rule of dismissal. Pet. App. 19a-20a; see *Smith* v. *Clark/Smoot/Russell*, 796 F.3d 424, 429-430 (4th Cir. 2015); *Lujan*, 67 F.3d at 245-247; *United States ex rel. Pilon* v. *Martin Marietta Corp.*, 60 F.3d 995, 998-1000 (2d Cir. 1995). Only the Sixth Circuit has required automatic dismissal of a complaint when Section 3730(b)(2) is violated. *United*

States ex rel. Summers v. *LHC Grp., Inc.*, 623 F.3d 287, 296-298 (2010), cert. denied, 131 S. Ct. 3057 (2011). The lopsided circuit split does not warrant review at this time.

1. The court below "embrace[d] the *Lujan* test," which requires consideration of "1) the harm to the government from the violations; 2) the nature of the violations; and 3) whether the violations were made willfully or in bad faith." Pet. App. 19a-20a; see *Lujan*, 67 F.3d at 245-247. The Second and Fourth Circuits engage in a similar balancing inquiry. In *Pilon*, the Second Circuit held that dismissal of a complaint was appropriate where the government had been harmed by the relators' failure to file a complaint under seal, 60 F.3d at 999, the violations were "particularly egregious," *id.* at 998, and the record revealed "a considerable lack of good faith," *id.* at 999. The Fourth Circuit in *Smith* weighed similar factors and declined to dismiss a *qui tam* complaint where "the Government was still able to investigate" and "the seal violation involved disclosure between the parties rather than the public." 796 F.3d at 430.[6]

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[6] Because the decisions in *Pilon* and *Smith* refer to the frustration of congressional goals, petitioner suggests (Pet. 17) that the Second and Fourth Circuits "have adopted an altogether different standard" from the Fifth and Ninth Circuits. That is incorrect. All of those courts have rejected a rule of automatic dismissal in favor of a balancing test that permits consideration of the facts and circumstances of the violation and of the case as a whole. Indeed, *Lujan* relied on *Pilon* in formulating and applying its balancing test. See *Lujan*, 67 F.3d at 245-247. As petitioner observes (Pet. 18-19), the courts in *Pilon* and *Smith* treated possible harm to a defendant's reputation as a factor relevant to the choice of remedy, while the court in *Lujan* concluded that such harms are "not relevant" in fashioning an appropriate sanction, 67 F.3d at 247.

In contrast, the Sixth Circuit has held that a relator's failure to comply with Section 3730(b)(2) requires automatic dismissal of the suit. See *Summers*, 623 F.3d at 296. That court feared that "a *Lujan*-style balancing test would * * * represent a form of judicial overreach" because Congress had already "identified the factors it found relevant * * * and decided that a sixty-day *in camera* period was the correct length of time required to balance those factors." *Ibid.*

2. When the relator in *Summers* sought this Court's review, the United States advised the Court that the circuit conflict created by that decision "would warrant this Court's review in an appropriate case." U.S. Cert. Amicus. Br. at 18, *United States ex rel. Summers* v. *LHC Grp., Inc.*, 131 S. Ct. 3057 (2011) (No. 10-827); see *id.* at 18-20 (arguing that the Sixth Circuit had erred in adopting an automatic rule of dismissal, but urging the Court to deny the petition because the complaint was subject to dismissal on an alternative, jurisdictional ground). Since that time, however, two courts of appeals have expressly rejected *Summers*'s analysis. Pet. App. 20a; see *Smith*, 796 F.3d at 430. The Sixth Circuit has had no occasion to consider the issue in any subsequent case, and *Summers*'s increasing outlier status might prompt the

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But petitioner does not contend that consideration of reputational harm would have required dismissal here, where the seal violations did not result in public disclosure of the FCA suit. See Pet. App. 22a, 67a; see also *Smith*, 796 F.3d at 430 (concluding that the defendants' "reputation suffered no harm" when the seal violation did not involve public disclosure).

court to reconsider the decision en banc if the question arises again within that circuit.

It is also not apparent that the Sixth Circuit would apply *Summers* to violations like those at issue here, which occurred before the seal had been lifted but after the 60-day period prescribed by Section 3730(b)(2). See Pet. App. 65a (finding seal violations on August 7, 2006, August 14, 2006, and September 18, 2006, which were 103, 110, and 145 days after the filing of the complaint, respectively). In explaining its rule of mandatory dismissal, the court in *Summers* expressed the view that "Congress's selection of sixty days was intended to represent its own judgment as to how to balance th[e] interests." 623 F.3d at 297; see *id.* at 296 (Congress "decided that a sixty-day *in camera* period was the correct length of time.").

Because Congress authorized district courts to extend the initial 60-day sealing period, 31 U.S.C. 3730(b)(3), a breach of a seal that has been extended is properly viewed as a violation of Section 3730(b)(2). But because Congress granted courts discretion to decide whether and for how long to extend the seal after the initial 60-day period has passed, the Sixth Circuit might conclude that a court also has discretion to select an appropriate sanction for a breach of any such order. See *United States ex rel. Bibby* v. *Wells Fargo Home Mortg., Inc.*, 76 F. Supp. 3d 1399, 1411 (N.D. Ga. 2015) (noting this argument and distinguishing *Summers* because that decision "did not contemplate" seal violations occurring after the 60-day period). Further review of this issue would accordingly be premature until the Sixth Circuit has an opportunity to clarify the scope and continued vitality of the rule adopted in *Summers*.

II. THE COURT OF APPEALS' HOLDING THAT THERE WAS SUFFICIENT EVIDENCE OF SCIENTER TO SUPPORT THE JURY'S VERDICT DOES NOT WARRANT REVIEW

Petitioner also challenges (Pet. 28-36) the court of appeals' conclusion that a reasonable jury could find that petitioner possessed the scienter required for FCA liability. In rejecting that claim, the court applied the correct legal standard, and its factbound decision does not conflict with any decision of this Court or another court of appeals.

A. The FCA imposes liability if a defendant "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" or "knowingly makes, uses, or causes to be made or used a false record or statement material to a false or fraudulent claim." 31 U.S.C. 3729(a)(1)(A) and (B). A defendant acts "knowingly" if it has "actual knowledge" or "acts in deliberate ignorance" or in "reckless disregard of the truth or falsity of the information." 31 U.S.C. 3729(b)(1).

The court below found that a reasonable jury could conclude that supervisor Lecky King, "act[ing] in reckless disregard of the truth or falsity of the information," had caused a false claim to be presented and a false record to be made. Pet. App. 39a (citation and internal quotation marks omitted; brackets in original). The court cited evidence that King had told adjusters "to presume flood damage instead of wind damage," had "concealed evidence of wind damage, and [had] strong-armed an engineering firm to change its reports." *Id.* at 38a-39a; see *id.* at 4a, 6a. Although "King's alleged manipulation of the McIntosh engineering reports occurred *after* the McIntosh claim

was paid," the court observed that "the jury was entitled to use post-payment evidence to evaluate [petitioner's] pre-payment knowledge." *Id.* at 38a n.15. Thus, the court held that King's execution of a scheme that she knew would cause the submission of false claims sufficed to uphold the jury's verdict. *Id.* at 36a-40a.

Petitioner contends (Pet. 31-35) that respondents' proof of scienter was insufficient because the adjusters who submitted the McIntosh claim did not realize it was false. The court of appeals correctly rejected that "'ignorant certifier' defense[]." Pet. App. 37a. As the court emphasized, liability exists when a person "knowingly causes" the presentment of a false claim or the use of a false record. *Ibid.* (citation and internal quotation marks omitted); see *Hess*, 317 U.S. at 543-545 (extending FCA liability to "any person who knowingly assisted in causing the government to pay claims which were grounded in fraud"). That conduct violates the FCA even if the person who ultimately presents the claim is unaware of the fraud. See, *e.g.*, *United States* v. *Bornstein*, 423 U.S. 303, 309 (1976) (explaining that the FCA creates liability "against a subcontractor who causes a prime contractor to submit a false claim to the Government," whether or not the prime contractor is complicit in the fraud); *United States ex rel. Hutcheson* v. *Blackstone Med., Inc.*, 647 F.3d 377, 390 (1st Cir.) (rejecting contention that "a submitting entity's" truthful "representations concerning its own conduct" can "immunize a non-submitting entity from liability" if the non-submitting entity engaged in conduct knowing it would cause a false claim to be presented), cert. denied, 132 S. Ct. 815 (2011). If the jury concluded that King knowingly

caused the submission of the false McIntosh claim by setting up a fraudulent scheme designed to classify wind damage as flood damage, the jury could appropriately find petitioner liable on that basis, even if the adjusters who presented the claim were unaware of the unlawful scheme.

Petitioner further asserts (Pet. 32-33) that King's scheme to defraud the government cannot support FCA liability because King was not personally involved in the submission of the McIntosh claim. Courts have recognized, however, that the scienter requirement is satisfied when a person engages in misconduct with knowledge that it will result in the submission of false claims, even if the individual has no contemporaneous awareness of a particular false claim that is submitted under the scheme. See, *e.g.*, *United States ex rel. Schmidt* v. *Zimmer, Inc.*, 386 F.3d 235, 244 (3d Cir. 2004) (imposing liability where defendant had not participated in submitting the false claims but had "created and pursued a marketing scheme that it knew would, if successful, result in [others'] submission" of false certifications); *United States* v. *Krizek*, 111 F.3d 934, 936, 942 (D.C. Cir. 1997) (holding a physician liable for claims his wife submitted where billing practices ensured that the government routinely received fraudulent bills, without requiring knowledge of every claim when it was made).

To dispute that point, petitioner relies (Pet. 33) on *United States ex rel. Aflatooni* v. *Kitsap Physicians Service*, 314 F.3d 995, 1002 (9th Cir. 2002). That decision is inapposite, however, since the court there rejected FCA liability on the ground that no false claim was shown to have been made. See *id.* at 997. *Afla-*

tooni does not support petitioner's contention that a person who deliberately implements a fraudulent scheme, knowing that it will result in the submission of false claims, can shield herself from liability by remaining ignorant of the particular claims that the scheme generates. Cf. *Senate Report* 21 (observing that the "reckless disregard" standard encompasses "the 'ostrich' type situation where an individual has 'buried his head in the sand'" and thereby avoided learning that "false claims are being submitted").

Petitioner is also wrong to contend (Pet. 35-36) that the court of appeals erred by considering King's effort to alter the McIntosh engineering report after the false claim was submitted. Petitioner relies on cases in which an employee had no pre-submission awareness of a claim's falsity. Here, in contrast, the court found sufficient evidence to conclude that King knew in advance that the fraudulent scheme she had orchestrated would cause false claims to be submitted. Pet. App. 38a-39a. King's post-fraud conduct, the court explained, simply provided additional "[c]ircumstantial evidence" that she had "sufficient knowledge, before the claim or record was submitted, to impose liability." *Id.* at 38a n.15. The court's observation that post-offense conduct can be relevant to proving a defendant's pre-offense state of mind is correct and provides no ground for further review. See *McFadden* v. *United States*, 135 S. Ct. 2298, 2304 n.1 (2015) (noting that "the requisite mental state" can be proven through "circumstantial evidence," including "a defendant's concealment of his activities" or other subsequent "evasive behavior").

B. Petitioner contends (Pet. 31) that the Fifth Circuit's decision "exacerbates" an alleged circuit conflict

concerning the propriety of a "collective knowledge" approach to proving corporate scienter in FCA cases. No conflict exists, however, and this case does not in any event implicate the "collective knowledge" issue.

1. Although petitioner asserts (Pet. 29-30) a conflict between the Fourth and D.C. Circuits, both courts have expressed skepticism about the circumstances under which a corporate defendant may be found liable based on the aggregated states of mind of multiple employees. See *United States ex rel. Harrison* v. *Westinghouse Savannah River Co.*, 352 F.3d 908, 918 n.9 (4th Cir. 2003) (finding it unnecessary to adopt the theory that a plaintiff may "prove scienter by piecing together scraps of 'innocent' knowledge held by various corporate officials"); *United States* v. *Science Applications Int'l Corp.*, 626 F.3d 1257, 1275 (D.C. Cir. 2010) (*SAIC*) (relying on *Harrison* to reject an argument that a corporate defendant may be liable when one employee knows the company's representations to the government, another knows the company's actual practices, but neither is aware of the inconsistency between the two).

Petitioner contends (Pet. 30) that *SAIC* requires a single employee to have knowledge of facts that make a claim false and knowledge that the false claim is being submitted. *SAIC* held, however, that a corporation could be found liable where a single employee "knew or recklessly failed to know" that the corporation had violated a contractual requirement "that was material to the receipt of payment"; the court did not require knowledge of the submission of a specific false claim. 626 F.3d at 1276. Indeed, *SAIC* further recognized that a corporation acts with "reckless disregard" when it adopts a compartmentalized structure that

prevents employees who have knowledge of falsity from simultaneously knowing of the submission of particular claims. *Ibid.* In that respect, *SAIC* and *Harrison* are in accord. See *Harrison*, 352 F.3d at 919 (declining to adopt a rule encouraging corporations to "establish segregated 'certifying' offices" to "immuniz[e] themselves against FCA liability").

2. In any event, the decision below did not depend on the "collective knowledge" theory. The court of appeals held that, "[e]ven if * * * one individual must have knowledge that a claim is false, the jury could have reasonably believed that King alone, acting in reckless disregard of the truth or falsity of the information," caused a false claim and record to be made. Pet. App. 39a (brackets, citation, and internal quotation marks omitted).[7] Petitioner contends that the decision below "effectively attaches liability to a purported generalized scheme on the part of persons who did not approve the claim at issue *and were not shown to have influenced the decision to approve it*." Pet. 33

[7] Because the court of appeals did not apply a collective-knowledge theory, petitioner's second question presented—which asks whether scienter may be based on such a theory, Pet. ii—is misconceived. In any event, petitioner's critique (Pet. 31-32) of the collective-knowledge doctrine lacks merit. Corporate knowledge should be "the totality of what all of the employees know within the scope of employment." *United States* v. *Bank of New England*, 821 F.2d 844, 855 (1st Cir.), cert. denied, 484 U.S. 943 (1987). Contrary to the decisions in *Harrison* and *SAIC*, it is sometimes appropriate to hold a corporate FCA defendant liable even though no single employee acted with the scienter that the Act requires. At a minimum, it is appropriate to consider corporate officials' knowledge collectively when they work together to submit a false claim, a circumstance neither decision considered. For the reasons explained above, however, this case provides no opportunity to analyze the propriety of that approach.

(emphasis added). The italicized language suggests that petitioner views the evidence as insufficient to establish that King *caused* a false claim and false record to be submitted. But that factbound challenge has nothing to do with the "collective knowledge" theory, and it raises no issue of general importance warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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