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Joshua Patrick Mahoney†

INTRODUCTION

The False Claims Act (FCA)1 allows a private citizen to file suit “for the person and for the United States government.”2 The citizen sues to recover damages for “false or fraudulent claim[s]” submitted to the government for payment.3 While the Attorney General is also authorized to bring claims under the FCA,4 private citizen suits, also called “qui tam”5 suits, comprise a significant majority of FCA claims filed.6 Qui tam suits account for the largest portion of funds recovered under the FCA.7 To bring a qui

† BA 2009, University of Northern Iowa; JD Candidate 2013, The University of Chicago Law School.
1 31 USC §§ 3729-33.
2 31 USC § 3730(b)(1).
3 31 USC § 3729(a).
4 31 USC § 3730(a).
5 “Qui tam” stems from the Latin phrase “qui tam pro domino rege quam pro se ipso in hac parte sequitur.” It translates as follows: “Who as well for the king as for himself sues in this matter.” Black’s Law Dictionary 1368 (West 9th ed 2009).
6 In 2010, qui tam actions comprised more than 80 percent of total claims filed under the FCA. See American Civil Liberties Union v Holder, 673 F3d 245, 251 n 4 (4th Cir 2011).
7 For a summary of the amounts recovered under the FCA, see Department of Justice, Fraud Statistics—Overview (Dec 2011), online at http://www.justice.gov/civil

299
tam suit, a private citizen—called a “relator”—first provides a copy of the complaint and “substantially all material evidence and information the person possesses” to the government.\(^8\) The complaint must then be filed in camera in federal court and placed “under seal for at least 60 days.”\(^9\) The seal provision may be extended for “good cause.”\(^10\) In practice, a qui tam FCA complaint typically remains under seal for an estimated thirteen months.\(^11\) As of January 2011, there were more than 1,300 FCA qui tam complaints under seal.\(^12\)

In *American Civil Liberties Union v Holder*,\(^13\) the Fourth Circuit considered whether the FCA sealing requirement violates the First Amendment’s “right of access” doctrine, which permits the public to access judicial proceedings.\(^14\) The Fourth Circuit held that the seal passed constitutional muster because the provision was “narrowly tailored” to serve a “compelling government interest.”\(^15\) The court determined that “the complex nature of modern fraud investigations, the government’s limited resources, and the unique nature of a qui tam action under the FCA” were compelling interests that outweighed the public’s right to access the FCA complaint.\(^16\)

\(^8\) 31 USC § 3730(b)(2).

\(^9\) 31 USC § 3703(b)(2).

\(^10\) 31 USC § 3730(b)(3).


> According to DOJ, as of July 2007, there were approximately 1,000 qui tam cases that were under seal pending the government’s decision whether to intervene. The average length of time between the filing of an FCA case and the government’s intervention notification is approximately 13 months. FCA cases, however, are usually sealed for much longer: typically for two to three years, and for as long as nine.


\(^13\) 673 F3d 245 (4th Cir 2011) (“ACLU v Holder”).

\(^14\) Id at 247. *ACLU v Holder* is the first case to consider whether the FCA sealing provision violates the First Amendment.

\(^15\) Id at 253.

\(^16\) Id.
This Comment argues that the Fourth Circuit in ACLU v Holder failed to consider the implications of two important antecedent questions in its disposition of the First Amendment challenge. First, what is the functional relationship between a qui tam relator and the government? And second, how does the relator-government relationship affect the First Amendment analysis of the sealing provision? Unlike both the majority and the dissenting opinions in ACLU v Holder, this Comment argues that the “right of access” doctrine was not the correct First Amendment test to apply to the seal provision. Instead, the court should have more fully considered the implications of Vermont Agency of Natural Resources v Stevens. In Vermont Agency, the Court accepted a partial assignment theory for the relator vis-à-vis the government. Under a partial assignment theory, the relator is not simply an ordinary citizen, but instead is a quasi-government employee—or at least an independent contractor—for the purposes of First Amendment analysis. Thus, the court in ACLU v Holder should have used the First Amendment’s public employment doctrine (and more specifically, the independent contractor line of cases within the public employment doctrine) to determine whether the seal provision violates First Amendment protections. The argument this Comment advances, then, is syllogistic: because qui tam relators are de facto government employees—or, at least, independent contractors—and because the public employment doctrine allows the government to place certain restrictions on government employee and contractor speech that the government may not restrict for private citizens, the sealing provision is constitutional.

Notably, the outcome of ACLU v Holder is likely the same under either line of analysis (right of access or public employment). But using the public employment doctrine more closely depicts the true nature of the relationship between the qui tam relator and the government. Correctly framing this unique relationship will lead to a better theorized understanding of the FCA’s qui tam provisions and similar qui tam provisions established elsewhere in the United States Code. It will also shift

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18 Id at 773–74.
20 See, for example, 25 USC § 81 (creating a cause of action and monetary reward for turning in persons who deal with Native Americans in an unlawful manner); 35 USC § 92(b) (establishing a cause of action against individuals who falsely market patent arti-
any debate about the sealing provision away from the constitutional adjudication arena and back to Congress.\textsuperscript{21}

Part I of this Comment explains the relevant background of the FCA and focuses on the qui tam and seal provisions that were challenged in \textit{ACLU v Holder}. Part II discusses the First Amendment "right of access" doctrine. Part III assesses the functional nature of a qui tam relator’s interest in an FCA action in light of the Supreme Court’s holding in \textit{Vermont Agency}. Part IV analyzes the sealing provision through the lens of the public employment doctrine as an independent rationale for the seal’s constitutionality. Part V offers a brief conclusion.

\textbf{I. OVERVIEW OF THE FCA}

This Part first provides a brief historical overview of the FCA and discusses its primary purposes. Next, the Part discusses the history of the sealing provision and highlights the Senate Report accompanying the sealing amendment to explore its intended design. The Part then discusses \textit{Vermont Agency} and its possible utility for defining the contours of the legal relationship between a relator and the government. The Part concludes by discussing the relator-government relationship from the perspective of established contract theory.

\textbf{A. Background}

The FCA was passed during the Civil War to combat pervasive and widespread fraud in Civil War defense contracts.\textsuperscript{22} While initially used to police illegal war profiteering, the FCA has become a critical component of the government’s antifraud strategy.\textsuperscript{23} The FCA enables either a private citizen or the Attorney General to file suit against anyone who submits a false claim for payment to the government.\textsuperscript{24} If a private citizen, called a “relator,” brings a claim, the claim must be served only on the government, along with a written disclosure of “substantially all”

\textsuperscript{21} For an article that discusses the difficulty in using First Amendment analysis to vindicate individual rights, see generally John Q. Mulligan, Note, Huppert, Reilly, and the Increasing Futility of Relying on the First Amendment to Protect Employee Speech, 19 Wm & Mary Bill Rts J 449, 456–57 (2010).
\textsuperscript{23} See \textit{ACLU v Holder}, 673 F3d at 258–59 (Gregory dissenting).
\textsuperscript{24} 31 USC § 3730(a)–(b).
the relator’s underlying evidence for the claim.\textsuperscript{25} The government then has at least sixty days to decide whether to intervene in the action.\textsuperscript{26} During this time, defendants have no notice that a cause of action has been filed. Indeed, defendants are not apprised of the suit until a court affirmatively orders the relator or government to do so.\textsuperscript{27} Importantly, the relator must refrain from speaking about the underlying complaint during the seal period.\textsuperscript{28} If the relator discloses the existence of the complaint, the complaint may be dismissed with prejudice.\textsuperscript{29}

If the government participates in a relator’s suit, it has the primary responsibility to prosecute the action.\textsuperscript{30} The relator, though, may continue to participate in the proceedings and may receive up to 25 percent of the amount recovered.\textsuperscript{31} If the government declines to intervene, the relator still has the option to pursue the claim and recover up to 30 percent of the damages.\textsuperscript{32} If the government decides to join a relator’s suit later in the litigation, it may do so only upon a showing of “good cause.”\textsuperscript{33} Finally, the government may dismiss the case entirely so long as the relator is allowed a chance to object before the court.\textsuperscript{34}

B. The 1986 Amendments to the FCA and the Mandatory Sealing Provision

Significantly, before 1986, there was no mandatory sealing provision in the FCA.\textsuperscript{35} The sealing provision was added in 1986 to address the Department of Justice’s concerns that qui tam complaints filed in open court may alert defendants to ongoing

\begin{itemize}
\item[\textsuperscript{25}] 31 USC § 3730(b)(2).
\item[\textsuperscript{26}] Id.
\item[\textsuperscript{27}] Id.
\item[\textsuperscript{28}] See, for example, \textit{Summers v LHC Group, Inc}, 623 F3d 287, 298–99 (6th Cir 2010) (affirming dismissal of a qui tam suit because the relator revealed the existence of the complaint to the public).
\item[\textsuperscript{29}] While some courts have held that disclosing the existence of a complaint vitiates the court’s jurisdiction over the case, other courts have dismissed the complaint without relying on a jurisdictional rationale. Compare id at 296 (holding that “violations of the procedural requirements imposed on qui tam plaintiffs under the False Claims Act preclude such plaintiffs from asserting qui tam status”), with \textit{Lujan v Hughes Aircraft Co}, 67 F3d 242, 246 (9th Cir 1995) (developing a three-part test for whether or not violating the seal provision warrants dismissal of the action with prejudice).
\item[\textsuperscript{30}] 31 USC § 3730(c)(1).
\item[\textsuperscript{31}] 31 USC § 3730(d)(1).
\item[\textsuperscript{32}] 31 USC § 3730(d)(2).
\item[\textsuperscript{33}] 31 USC § 3730(c)(3).
\item[\textsuperscript{34}] 31 USC § 3730(c)(2)(B).
\item[\textsuperscript{35}] See S Rep No 99-345 at 14 (cited in note 22).
\end{itemize}
criminal investigations. The Senate Judiciary Committee submitted a report accompanying the 1986 FCA amendments that recognized the important governmental interests in protecting its ongoing criminal investigations. The report explained:

[Courts [should] weigh carefully any extensions on the period of time in which the Government has to decide whether to intervene and take over the litigation. The Committee feels that with the vast majority of cases, 60 days is an adequate amount of time to allow Government coordination, review and decision. Consequently, "good cause" would not be established merely upon a showing that the Government was overburdened and had not had a chance to address the complaint. While a pending criminal investigation of the allegations contained in the qui tam complaint will often establish "good cause" for staying the civil action, the Committee does not intend that criminal investigations be considered an automatic bar to proceeding with a civil fraud suit.

The Committee believes that if an initial stay is granted based on the existence of a criminal investigation, the court should carefully scrutinize any additional Government requests for extensions by evaluating the Government's progress with its criminal inquiry. The Government should not, in any way, be allowed to unnecessarily delay lifting of the seal from the civil complaint or processing of the qui tam litigation.

The legislative history thus contemplates that the sealing requirement be closely connected to an ongoing criminal complaint. In addition, the report explicitly renounced any attempt to extend the sealing requirement simply because the government is "overburdened." Yet while the record clearly indicates that extensions should not be granted liberally, that has been the norm for FCA litigation.

36 Id at 24.
37 Id at 24–25.
38 Id at 25.
39 See Kimberly A. Lucia, United States v Baylor University Medical Center: Impact of FRCP 15(c)(2) on the False Claims Act's Seal Provision, 42 UC Davis L Rev 255, 265–66 n 71 (2008) (collecting cases and commentaries that illustrate common practices with the sealing provisions).
1. Case law interpreting the seal provision of the FCA: adjudication if the complaint is not filed under seal.

In *Pilon v Martin Marietta Corporation*, the Second Circuit reasoned that the failure to file the complaint under seal frustrated the legislative purposes of the sealing provision. The court also noted that other interests not laid out in the seal provision’s legislative history weighed in favor of dismissal—namely, protecting the defendant’s reputational interest and deterring coercive settlement practices. The court worried that relators may violate the seal provision and go public with the complaint to gain leverage in the litigation and coerce a more lucrative offer from the defendant. Other circuits have split on the consequences of violating the seal provisions.

One way to think about the different approaches courts have taken to relators who violate the seal provision is to analogize these decisions to remedies for contractual breach. On this view, the seal functions as part of the government’s interest as an employer: Uncle Sam has hired relators to help ferret out fraud in the public fisc. But if the relators (or “contractors”) do not abide by the seal’s (the “contract”) terms, courts will not jump in and mandate specific performance by the government.

2. Case law granting extensions to the sealing provision.

Courts have routinely allowed the government to extend the time a complaint may be kept under seal, applying the “good cause” standard in the statute liberally to approve extensions.

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40 60 F3d 995 (2d Cir 1995).
41 Id at 999.
42 See Part ID for a discussion of why these opinions may be better understood if read from a contract theory perspective. For instance, while not explicitly couching its reasoning in contract terms, it is at least arguable that the Second Circuit’s discussion of perverse incentives and moral hazards maps nicely onto the notion of “good faith” in carrying out obligations of contracts. Accord Restatement (Second) of Contracts § 205 (1981) (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”).
43 *Pilon*, 60 F3d at 999.
44 Compare *Lujan*, 67 F3d at 246 (developing a three-part test for deciding whether to dismiss a relator’s complaint after violating the seal provision), with *Summers*, 623 F3d at 296 (requiring automatic dismissal if the relator discloses the existence of the complaint). See also *Bogart v King Pharmaceuticals*, 414 F Supp 2d 540 (ED Pa 2006) (not requiring automatic dismissal of the action if the seal provision is violated).
45 For a discussion of contract theory and its relation to the qui tam provisions, see Part ID.
46 See Restatement (Second) of Contracts § 357 (discussing the availability of specific performance for certain contractual breaches).
Indeed, the average length of time an FCA complaint remains under seal is thirteen months. When courts refuse to allow extensions, it is typically after the courts have already granted numerous extensions to the initial sixty-day period. Aside from the complaint, the government has attempted to seal other documents accompanying an FCA action. Notably, the FCA does not contemplate whether the government’s motions for extensions of time and accompanying memoranda may remain under seal in perpetuity. Courts have typically assessed whether to keep these files under seal on a case-by-case basis. They rely on the right of access presumption in favor of disclosure and generally lift the seal to all documents once the government has decided whether to intervene, absent a significant countervailing interest.

C. Vermont Agency’s Endorsement of the Partial Assignment Theory

In Vermont Agency, the Court held that the relator receives a partial assignment of the government’s interest in a damages action against a defendant. The partial assignment theory is

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47 See note 11. But see Kalish v Desnick, 765 F Supp 1352, 1355–56 (ND Ill 1991) (declining to extend the seal because the government could not demonstrate good cause with sufficient specificity). See also Woods v North Arkansas Regional Medical Center, 2006 WL 2583662, *4 (WD Ark) (declining to allow more than three grants of extension).

48 See, for example, Costa v Baker & Taylor, Inc, 955 F Supp 1188, 1191–92 (ND Cal 1997) (declining to grant the government an additional extension of the sealing provision after eighteen months); Dekort v Integrated Coast Guard Systems, 705 F Supp 2d 519, 529 n 2 (ND Tex 2010) (declining to extend the seal provision beyond twenty-eight months).


50 See, for example, id (declining to keep motions to extend the seal and accompanying memoranda under seal); Yannacoplos v General Dynamics, 457 F Supp 2d 854, 858 (ND Ill 2006) (same); Coughlin v International Business Machines Corporation, 992 F Supp 137, 141 (NDNY 1998) (unsealing memoranda accompanying opposition to a settlement agreement because the documents requested did not “contain substantive details regarding the government’s methods of investigation” and refusing to acknowledge a reputational interest as sufficient to warrant indefinite sealing). See also Health Outcomes Technologies v Hallmark Health Systems, Inc, 349 F Supp 2d 170, 173 (D Mass 2004) (“Numerous courts have thus held that, by permitting in camera submissions, the statute necessarily invests the court with authority either to maintain the filings under seal or to make them available to the parties.”). But see O’Keefe v McDonnell Douglas Corp, 902 F Supp 189, 192 (ED Mo 1995) (declining to unseal motions and accompanying memoranda for extensions of time because the documents provided “substantive details regarding the government’s methods of investigation”).

51 529 US at 765–66 (reasoning that the FCA in effect creates a “partial assignment of the government’s damages claim”).
instructive for addressing the constitutional issues raised by the mandatory seal provision in the FCA.  

Justice Scalia, writing for the majority in Vermont Agency, described two separate governmental interests that are harmed by virtue of the defendant's fraud: the harm inflicted on the government in its sovereign capacity to administer laws, and the harm suffered by the government in its proprietary capacity because of theft from the public fisc. Justice Scalia then characterized the government as partially assigning a portion of its proprietary interest in an FCA action to the relator. In other words, the qui tam provisions allow the government to assign its interest in recovering the funds to the relator—even though the relator (the assignee) has not, in a sense, suffered any cognizable injury-in-fact.\textsuperscript{55}

In Vermont Agency, Justice Scalia discussed the assignment theory of the relator's interest for the purposes of Article III standing analysis only.\textsuperscript{56} By adopting the assignment theory, however, the Court raised new issues about the relator's position vis-à-vis the government.\textsuperscript{57} For instance, it may be legally unsatisfactory to reason that the government's separate interests as a sovereign and as a proprietor are severable.\textsuperscript{58}


\textsuperscript{53} See Vermont Agency, 529 US at 771 (“[The plaintiff] contends he is suing to remedy injury in fact suffered by the United States—both the injury to its sovereignty arising from violation of its laws and the proprietary injury resulting from the alleged fraud.”).

\textsuperscript{54} Id at 773.

\textsuperscript{55} Id at 772. See also 31 USC § 3730(b)(1) (“A person may bring a civil action for a violation of section 3729 for the person and for the United States government.”) (emphasis added).

\textsuperscript{56} See Gold, Note, 20 Georgetown J Legal Ethics at 639 (cited in note 52).

\textsuperscript{57} See, for example, id. See also Eric S. Askanase, Qui Tam and the False Claims Act: Criminal Punishment in Civil Disguise, 70 Def Couns J 472 (2003).

\textsuperscript{58} See Askanase, 70 Def Couns J at 477 (cited in note 57) (noting that it is incongruous not to allow standing for assigned rights of the government as sovereign but to allow relators to seek punitive damages designed to deter future conduct under the category of proprietary interests).
ment theory could be used to swallow all of Article III's standing requirement, which restricts jurisdiction of federal courts to "cases" or "controversies." While these arguments may have merit, it is unclear how far courts would be willing to extend the partial assignment theory in the context of standing beyond Vermont Agency's rationale.

D. Nature of the Relator's Interest in an FCA Suit

The partial assignment theory solves many of the problems associated with using common law agency or duty analyses to understand the relator-government relationship. It also provides a normatively attractive way to theorize the underlying relationship between the relator and the government. Characterizing the relationship between the relator and the government in contract terms is more than an academic exercise: it has important practical implications for identifying what legal relationships the FCA creates. Understanding the underlying legal relationships created by the FCA will produce more analytic coherency in assessing statutory and constitutional issues inherent in the FCA's qui tam provisions and may lead to a better understanding of the precise constitutional contours of qui tam provisions in general.

At least one commentator has noted that Vermont Agency's endorsement of the partial assignment theory is best understood in contract terms:

[T]he FCA's qui tam provision is an enforceable unilateral contract, the terms and conditions of which are accepted by the relator upon filing the qui tam suit. Because assignment is a matter of contract, the unusual terms of the FCA's assignment cannot affect its legal sufficiency.

Viewing the relator-government relationship through a contract lens yields several important insights. For instance, the relator and government can be said to have entered into a legally enforceable bargain: in consideration for receiving a certain percentage of the bounty recovered from the defendant, the relator

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60 See generally Gold, Note, 20 Georgetown J Legal Ethics 629 (cited in note 52); Park, Note, 43 Stan L Rev at 1068-69 (cited in note 52).
agrees to refrain from speaking publicly about the complaint. If the relator breaches this agreement by revealing the existence of the complaint, the government is no longer obligated to pay the relator a portion of the recovery. The terms of the contract are important because it is highly unlikely, if not impossible, for the government to mandate that a private citizen who has not entered into a contract with the government must refrain from speaking about the filing of a civil action.

II. THE FIRST AMENDMENT: RIGHT OF ACCESS JURISPRUDENCE

In *Globe Newspaper Co v Superior Court for County of Norfolk,* the Supreme Court held that the public has a First Amendment right to access criminal trials. In the case, the Massachusetts legislature had passed a law requiring trial judges to exclude the “general public” from the courtroom during the testimony of rape victims under the age of eighteen. The plaintiff, a newspaper, was denied access to a criminal trial involving such testimony. The newspaper filed suit, claiming the First Amendment allowed the press access to the courtroom during the proceedings.

The Supreme Court agreed with the newspaper, citing two compelling reasons for striking down the Massachusetts statute. First, the Court noted that criminal trials have historically been

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62 And, arguably, from discussing the existence of the underlying fraud to the general public while the complaint is under seal. See *ACLU v Holder,* 673 F3d at 262 (Gregory dissenting) (“Without relying on the complaint, other documents and affidavits, or any evidence contained therein, I am hard-pressed to see how any relator could still speak about fraud without violating the seal provisions or being chilled.”). See also Restatement (Second) of Contracts § 3 (“A bargain is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances.”).

63 See, for example, *Summers,* 623 F3d at 290 (affirming dismissal of a qui tam suit because the relator revealed the existence of the complaint to the public). There are a significant number of cases that deal with violations of the breach of the sealing agreement. While some circuits have developed a balancing test, see *Lujan,* 67 F3d at 246 (discussing the three-part test), others have held that revealing the existence of a sealed complaint warrants per se dismissal of the action with prejudice. See *Summers,* 623 F3d at 290. For this Comment, the important point is that courts typically bar recovery for relators if they violate the requirements of the seal provision—or in contract terms, breach the terms of their agreement with the government.

64 See US Const Amend I (“Congress shall make no law . . . abridging the freedom of speech.”) (emphasis added).


66 Id at 602.

67 Id at 598.

68 Id at 600–01.
open to the public, a social norm predating the Constitution. Second, public access to criminal trials "enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole." These two principles were subsequently characterized as the "experience and logic" test in a later Supreme Court opinion.

Finding that there is a right to attend criminal proceedings under the First Amendment, the Supreme Court in *Globe* established that a trial court may restrict access to judicial proceedings only if such a restriction is narrowly tailored to serve a compelling government interest. Applying that test to the facts in *Globe*, the Court reasoned that while protecting the "physical and psychological well-being of a minor" and incentivizing minors to testify qualify as compelling interests, they did not merit a categorical denial of access to the judicial proceedings. Instead, the Court opined that judges must determine on a case-by-case basis whether the interests of underage rape victims outweigh the interest of the public in attending the trial.

While Justice O'Connor's concurrence in *Globe* attempted to cabin the decision to criminal trials, district and circuit court decisions have extended the First Amendment right of access standard to civil trials under *Globe*'s reasoning as well. Yet

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69 *Globe*, 457 US at 605.
70 Id at 606.
71 See *Press-Enterprise Co v Superior Court*, 478 US 1, 8-9 (1986). Justice Brennan's "experience and logic" test, formulated in *Globe*, has been interpreted by lower federal courts as either conjunctive or disjunctive. That is, courts have at times granted a right of access only where both historical evidence suggests the place and proceedings have been open to the public and logic suggests that openness will lead to positive externalities, such as judicial transparency, for the proceedings at issue. For further discussion of the "experience and logic" test, see Nicole J. Dulude, Note, *Unlocking America's Courthouse Doors: Restoring A Presumption of First Amendment Access as a Means of Reviving Public Faith in the Judiciary*, 11 Roger Williams U L Rev 193, 196 (2005).
72 *Globe*, 457 US at 606-07.
73 Id at 607-09.
74 Id at 608-09.
75 Id at 611 (O'Connor concurring) (reasoning that the Court's decision does not "carry any implications outside the context of criminal trials").
76 See, for example, *Rushford v New Yorker Magazine, Inc*, 846 F2d 249, 253 (4th Cir 1988) (finding a First Amendment right of access to summary judgment motions filed in a civil suit); *In re Providence Journal Co*, 293 F3d 1, 13 n 5 (1st Cir 2002) (recognizing the First Amendment right of access in the context of criminal proceedings and applying the rule to civil cases); *Publicker Industries, Inc v Cohen*, 733 F2d 1059, 1070 (3rd Cir 1984) ("Public access to civil trials, no less than criminal trials, plays an important role in the participation and the free discussion of governmental affairs...[W]e hold that the First Amendment embraces a right of access to [civil] trials") (quotation marks omitted); *Westmoreland v Columbia Broadcast System, Inc*, 752 F2d 16, 23 (2d Cir 1984). The court in *Westmoreland* described the rationale underlying the application of the right of access...
whether the Supreme Court would apply the First Amendment to civil complaints remains an open question.\footnote{77} It seems unlikely, however, that civil complaints are somehow exempt from First Amendment analysis under the “experience and logic” test. Indeed, as Judge Gregory noted in his dissent in \textit{ACLU v Holder}, “complaints, it goes almost without saying, have a foundational function in civil trials.”\footnote{78} That \textit{foundational function} speaks to the benefits that inhere from having open records to fraudulent investigations to improve transparency in government as a whole.

\section*{III. Right of Access Applied: \textit{ACLU v Holder}}

\subsection*{A. Majority Analysis}

In \textit{ACLU v Holder}, the Fourth Circuit considered whether the mandatory sealing requirement of the FCA violates the First Amendment right of access to judicial proceedings.\footnote{79} The plaintiffs in the case sought declaratory and injunctive relief, claiming that the mandatory sealing provisions violated the First Amendment right of access to judicial proceedings.\footnote{80} The plaintiffs in the case were nonprofit entities that sought the right to

doctree to civil trials as follows:

\[\text{[The First Amendment does secure to the public and to the press a right of access to civil proceedings in accordance with the dicta of the Justices in \textit{Richmond Newspapers}, because public access to civil trials enhances the quality and safeguards the integrity of the factfinding process, fosters an appearance of fairness, and heightens public respect for the judicial process, while permitting the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self government.} \]

\textit{Id} (citations and quotation marks omitted). See also \textit{Richmond Newspapers, Inc v Virginia}, 448 US 555, 580 n 17 (1980) (Burger) (plurality) (noting that “historically both criminal and civil trials have been presumptively open”). But see \textit{In re Reporters Communication for Freedom of the Press}, 773 F2d 1325, 1331–36 (DC Cir 1985) (refusing to extend the First Amendment right of access to civil proceedings because the “history” prong of logic and experience test had not been satisfactorily proven).

\footnote{77} \textit{ACLU v Holder}, 673 F3d at 260 (Gregory dissenting).

\footnote{78} \textit{ACLU v Holder}, 673 F3d at 260 (Gregory dissenting).

\footnote{79} \textit{Id} (majority). For the purposes of the appeal, the court assumed, without deciding, that the First Amendment applied to the sealing provisions. See \textit{id} at 252.

\footnote{80} \textit{Id} at 247. In addition, the plaintiffs argued that the sealing provision was unconstitutional because (1) it gagged qui tam relators from speaking about the allegations of the complaint and (2) it violated separation of powers because it divested the court’s authority to determine on a case-by-case basis whether to seal a complaint. \textit{Id}.}
both give and receive information about the FCA complaint itself and the underlying fraud contained in the case.\textsuperscript{81}

The Fourth Circuit acknowledged that the Supreme Court has recognized that the First Amendment guarantees a right of access to certain criminal trials and proceedings.\textsuperscript{82} At the same time, the court reasoned that the First Amendment right is “not absolute” and that the Globe “experience and logic” test may be overcome by showing that the government action both furthers a compelling government interest and is narrowly tailored to serve that interest.\textsuperscript{83}

The court indicated that “protecting the integrity of ongoing fraud investigations” was a sufficiently compelling government interest, standing alone, for the government to interpose a mandatory sealing provision in the FCA.\textsuperscript{84} In addition, it cited the legislative history of the sealing provision as providing additional compelling justifications for the requirement.\textsuperscript{85}

Next, the court listed three features of the sealing requirement that in its view made the sealing provision narrowly tailored. First, the court reasoned that the FCA’s “detailed process” for filing a qui tam complaint, which includes the sixty-day period, accounts for the “complex nature of modern fraud investigations, the government’s limited resources, and the unique nature of a qui tam action under the FCA.”\textsuperscript{86} Second, the court emphasized that courts can extend the sealing period only if the government demonstrates “good cause.”\textsuperscript{87} The court analogized this provision to Federal Rule of Civil Procedure 26(c), which allows federal courts to determine whether to seal certain discovery requests.\textsuperscript{88} Third, the court noted that the seal provisions only pre-

\textsuperscript{81} Because the plaintiffs sought declaratory and injunctive relief, it is unclear whether the plaintiffs sought to remedy any of the underlying fraud.

\textsuperscript{82} ACLU v Holder, 673 F3d at 247.

\textsuperscript{83} Id.

\textsuperscript{84} Id at 253.

\textsuperscript{85} Id at 256, citing S Rep No 99-345 at 24–25 (cited in note 22) and Pilon, 60 F3d at 998–99 (listing the following justifications: (1) to permit the United States to determine whether it already was investigating the fraud allegations (either criminally or civilly); (2) to permit the United States to investigate the allegations to decide whether to intervene; (3) to prevent an alleged fraudster from being tipped off about an investigation; and (4) to protect the reputation of a defendant, in that the defendant is named in a fraud action brought in the name of the United States, but the United States has not yet decided whether to intervene).

\textsuperscript{86} ACLU v Holder, 673 F3d at 253.

\textsuperscript{87} Id at 254.

\textsuperscript{88} Id, citing FRCP 26(c) (“The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”) (emphasis added).
vented the relator from discussing the complaint, not from discussing the underlying fraud.\footnote{\textit{ACLU v Holder}, 673 F3d at 254.}

Lastly, the court reasoned that even if the default rule was that every complaint was filed publicly, courts would still find that some complaints may be filed in camera due to their sensitive nature.\footnote{Id. at 254. In addition, the court affirmed the district court’s dismissal of the “gag” claim for lack of standing. Specifically, the court could not find a “willing listener” with sufficient interest that would be willing to listen to the relator but for the seal’s provisions. Id. For a discussion of the “willing interest” standing doctrine, which applies only to First Amendment cases, see \textit{Virginia State Board of Pharmacy v Virginia Citizens Consumer Council}, 425 US 748, 756 (1976) (noting that if a willing speaker can be found, “the protection afforded [by the First Amendment] is to the communication, to its source and to its recipients”).} Therefore, the court declared, the counterfactual rule proffered by the plaintiff defeated the facial challenge to the statute.\footnote{Id. at 254.}

B. Judge Gregory’s Dissent

In \textit{ACLU v Holder}, Judge Gregory first took issue with the majority’s right of access analysis. In particular, he challenged the government’s asserted interests in keeping the complaint under seal as “generalized formulations” that should not be so “readily accepted.”\footnote{\textit{ACLU v Holder}, 673 F3d at 261 (Gregory dissenting).} He then juxtaposed the government’s asserted interests with the interests of the public. Specifically, he highlighted the importance of public dialogue in connection with fraud allegations, the need for transparency in FCA enforcement, and the public’s interest in compelling the government to make the decision whether to intervene, even if such a decision is politically challenging.\footnote{Id. at 262, citing John T. Boese, \textit{Civil False Claims and Qui tam Actions} § 4-215 (Aspen 4th ed 2011) (citations omitted).}

Next, Judge Gregory turned to the narrowly tailored prong of the \textit{Globe} test. He criticized the majority for passively accepting the government’s argument that the sealing provision only applied to the complaint. In reality, courts have typically construed the seal provisions to apply more broadly “to other documents filed prior to the government’s notice of intervention.”\footnote{Id. at 261, citing John T. Boese, \textit{Civil False Claims and Qui tam Actions} § 4-215 (Aspen 4th ed 2011) (citations omitted).} In addition, Judge Gregory noted that it was difficult to agree with the majority that the relator was not barred from speaking about the underlying fraud without “violating the seal provisions or
being chilled." He explained that "[u]nder [the majority’s] reading of the statute, the government could threaten criminal prosecution against anyone who discusses even the basic facts of fraud." In other words, the practical reach of the seal provision cut away from the government’s argument that the provision was narrowly tailored.

IV. FREE SPEECH AND THE FCA REDUX: THE PUBLIC EMPLOYMENT DOCTRINE IS THE CORRECT WAY TO ASSESS THE CONSTITUTIONALITY OF THE SEAL PROVISION

ACLU v Holder demonstrates the problems associated with assessing the seal provision through traditional “right of access” doctrine. Judge Gregory was correct to criticize the majority for passively relying on the government’s generalized formulations of its interests justifying the seal provision. Also, the majority’s acceptance of the purported distinction between discussing the complaint (which the seal prohibits) and discussing the underlying fraud (which the statute ostensibly does not prohibit) is tenuous. As Judge Gregory noted:

Without relying on the complaint, other documents and affidavits, or any evidence contained therein, I am hard-pressed to see how any relator could still speak about fraud without violating the seal provisions or being chilled. Under this reading of the statute, the Government could threaten criminal prosecution against anyone who discusses even the basic facts of fraud, as Appellant alleges happened when it disclosed fraud to a newspaper.

That the court read the statute in this manner in order to find it narrowly tailored may be consistent with the Supreme Court’s constitutional avoidance canon, but it is unconvincing.

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95 ACLU v Holder, 673 F3d at 262 (Gregory dissenting).
96 Id.
97 Id.
98 ACLU v Holder, 673 F3d at 262 (Gregory dissenting).
99 See 31 USC § 3730(b)(2). See also, for illustration, Davis v Prince, 766 F Supp 2d 679, 682 (ED Va 2011) (“The sealing requirement is mandatory; failure to file a complaint under seal requires dismissal of a qui tam complaint with prejudice.”).
100 ACLU v Holder, 673 F3d at 256.
101 Id at 262 (Gregory dissenting).
102 Constitutional avoidance is a bedrock principle of statutory interpretation. See, for example, United States v Jin Fuey Moy, 241 US 394, 401 (1916) (“A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional,
when considered from a functional perspective.\textsuperscript{103} It hardly seems appropriate to say the categorical seal in the FCA is narrowly tailored to facilitate fraud enforcement. After all, in Globe, the Supreme Court held that it was unconstitutional to categorically exclude citizens from hearing the testimony of underage rape victims. If constitutionally shielding from the public the testimony of rape victims requires case-by-case analysis, it seems incongruous to allow categorical exclusion of the public from judicial proceedings relating to fraud complaints.

This Part assesses the seal provision for the purposes of First Amendment analysis through the Vermont Agency partial assignment theory paradigm. Under this theory, the relator has entered into a contract with the federal government. This doctrinal approach has several advantages. First, it recognizes the functional relationship between the relator and the government. The fluid relationship suggests the Constitution is the wrong place to look for more open governance under the FCA. Such decisions about appropriate amounts of disclosure by government contractors (or quasi-government employees) are best left to the legislative process.

The issue in ACLU v Holder should not have been whether the seal provision violates the right of access doctrine. Instead, the issue should have been whether the relator-government contractual relationship is sufficient to deem a relator as approaching government employee status. Under traditional First Amendment analysis, the government could not punish an ordinary citizen for wanting to speak about the existence of a complaint. But, if the qui tam contract does in fact remove the relator from ordinary First Amendment protection, the provision does not likely transgress any First Amendment limitation on accessing a sealed complaint.

A. Public Employment Jurisprudence

For the purpose of First Amendment public employment analysis, the government’s separate interests as a sovereign and as an employer must be recognized.\textsuperscript{104} The First Amendment on-
ly prohibits the government from abridging the speech of government employees that relates to matters of "public concern."\footnote{Waters v Churchill, 511 US 661, 668 (1994) (plurality).} Speech relates to a matter of "public concern" if it implicates the government as a sovereign, and not as simply an employer.\footnote{See Connick v Myers, 461 US 138, 146 (1983) ("When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.").} In deciding what constitutes "public concern," the Court has "consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large."\footnote{Waters, 511 US at 673 (plurality).} Examples include restrictions on the political activity of government employees\footnote{See id, citing United Public Workers of America v Mitchell, 330 US 75, 98 (1947).} or disputes over government policy between government officials and their subordinates.\footnote{See Waters, 511 US at 673 (plurality), citing Connick, 461 US at 167 (Brennan dissenting).}

The salient point is that the Court allows deference to the government in deciding what types of speech may harm its capacity to function as an employer, even if such interests are somewhat enmeshed with the government's sovereign interests.\footnote{See Waters, 511 US at 673 (plurality) ("[W]e have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern, and even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential.").} Notwithstanding some overlap between employer and

\begin{thebibliography}{10}
\bibitem{Waters} Id.
\bibitem{Waters} Waters v Churchill, 511 US 661, 668 (1994) (plurality). The Court explained:
\begin{quote}
To be protected, the speech must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.
\end{quote}
\end{thebibliography}
sovereign interests, the government as an employer may limit the expression of its employees to facilitate more efficient governance.\footnote{See Pickering v Board of Education, 391 US 563, 568 (1968).}

In \textit{Pickering v Board of Education},\footnote{391 US 563 (1968).} the Supreme Court held that the First Amendment limits the extent to which the government can retaliate against employees who speak as citizens on “issues of public importance.”\footnote{Id at 568.} In the case, a teacher was fired for complaining to a local newspaper about the allocation of funds within the school district.\footnote{Id at 574.} The teacher filed suit, claiming that his First Amendment rights as a citizen to speak freely were abridged by the school district.\footnote{Id.} To address the First Amendment issue, the Court developed a balancing test to accommodate both the interests of the government as an employer and the speech interests of the private citizen. As Justice Marshall reasoned:

\begin{quote}
The theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected. . . . At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.\footnote{Pickering, 391 US at 568 (quotation marks and citations omitted).}

As the balancing test recognizes, there is more at stake than simply an employer-employee relationship. When the government acts as an employer, it may not “restrict speech in which society might be interested.”\footnote{Richard Moberly, \textit{The Supreme Court's Antiretaliation Principle}, 61 Case W Res L Rev 375, 394 (2010).} But before considering how to
apply *Pickering* to the FCA seal provision, a further wrinkle in the public employment doctrine must be discussed.

B. Extension of *Pickering* to Independent Contractors in *Umbehr*

The Supreme Court extended the *Pickering* balancing test to independent contractors in *Board of County Commissioners v Umbehr.*\(^{118}\) In *Umbehr*, an independent landfill servicer contractor spoke critically of the local government at Board meetings.\(^{119}\) He wrote letters and editorials in newspapers criticizing the county's landfill rates and charges.\(^{120}\) After the county declined to renew the contractor's trash hauling contract, the contractor filed a 42 USC § 1983 action against members of the board of county commissioners.\(^{121}\) He alleged First Amendment violations of his right to freedom of expression.\(^{122}\)

The Court first noted the obvious similarities between government employees and contractors—namely, that the government needs freedom to terminate relationships with both employees and contractors for "poor performance, to improve the efficiency, efficacy, and responsiveness of service to the public, and to prevent the appearance of corruption."\(^{123}\) At the same time, the Court noted that independent contractors may be chilled in their First Amendment rights from the threat of retaliation.\(^{124}\) The Court found this troubling because government employees (and by extension, independent contractors) "are often in the best position to know what ails the agencies for which they work."\(^{125}\)

The Court ultimately sided with the contractor, holding that the *Pickering* balancing test for government employees extends to independent contractors as well.\(^{126}\) In achieving the balance, the Court noted that the government’s interest in achieving its objectives is significantly elevated when it acts as an employer as compared to when it acts as a sovereign.\(^{127}\)

\(^{118}\) 518 US 668 (1996).
\(^{119}\) Id at 671.
\(^{120}\) Id.
\(^{121}\) Id at 668.
\(^{122}\) *Umbehr*, 518 US at 668.
\(^{123}\) Id at 674.
\(^{124}\) Id.
\(^{125}\) Id, citing *Waters*, 511 US at 674 (plurality).
\(^{126}\) *Umbehr*, 518 US at 676.
\(^{127}\) Id.
However, the Court separated independent contractors from government employees by placing them between ordinary citizens and full-fledged civil servants on a sort of governmental-relationship continuum.\textsuperscript{128} The government’s interests, according to the Court, may be somewhat “attenuated” when dealing with independent contractors because, “where the contractor does not work at the government’s workplace and does not interact daily with government officers and employees . . . any government concern that his political statements will be confused with the government’s political positions is mitigated.”\textsuperscript{129} The application of the \textit{Umbehr} principle, therefore, seems to require a contextual inquiry into the precise relationship between the contractor and the government in any individual case.

C. Relators Should Be Considered Independent Contractors

The balancing test in \textit{Pickering} and its extension in \textit{Umbehr} is the best fit for considering whether the seal provision abridges a relator’s First Amendment interests. That being said, it is overly formalistic to classify the relator as a citizen who is being “gagged” from speaking about the complaint or the underlying fraud. The relator has filed the complaint in this manner, after all, because, among other reasons, she wants the opportunity to obtain a potentially lucrative recovery. While the government may not place unconstitutional conditions on the receipt of government funds for ordinary citizens, the government may restrict employee or contractor speech if doing so protects the interests of the government \textit{qua} employer. From this vantage point, the asserted employer interests favor restricting a relator’s speech.\textsuperscript{130} Otherwise, the FCA would lose its efficacy as the primary tool to combat fraud against the government.

A recent law review article has demonstrated that the government has used the sealing time period to “outsource” its investigatory duties to plaintiff’s attorneys.\textsuperscript{131} Setting aside the due process concerns that this practice implicates,\textsuperscript{132} the reality of

\textsuperscript{128} Id at 680.
\textsuperscript{129} Id at 677.
\textsuperscript{130} See \textit{ACLU v Holder}, 673 F3d at 252.
“outsourcing” is that the government is not using the sealing period for the reasons envisioned by Congress when it added the requirement in 1986. But, when viewed through the public employment doctrine of the First Amendment, the plaintiff’s attorneys’ work only makes more pronounced the conclusion that relators are not citizens at all, but hired hands of the government. And if they are indeed contractors in a functional sense, then the restrictions on the sealing provision do not offend the First Amendment.

V. CONCLUSION

ACLU v Holder is the first case to consider whether the seal provision of the FCA violates the First Amendment. However, the court selected the right of access paradigm to assess the seal’s constitutionality. This decision was unfortunate. The right of access doctrine assures the general citizenry a right of access to judicial proceedings. As Judge Gregory in his dissent pointed out, the right of access doctrine does not easily sanction the seal’s blanket constitutionality. Indeed, the majority’s analysis relies heavily on a bit of neoformalism—that is, eschewing an unconstitutional holding by distinguishing between discussing the complaint and the underlying fraud—when in practice such distinction is likely illusory.

That is not to say that the majority ultimately reached a legally incorrect result. Instead, this Comment has argued that the majority lost an important opportunity to expound more clearly on the Supreme Court’s acceptance in Vermont Agency of the partial assignment theory of the relator in an FCA action. Under Vermont Agency principles, the relator is something more than an ordinary citizen for First Amendment analysis, and yet something less than a full-fledged government employee. The implication is that the relator accepts a certain amount of abridgment of

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133 See Keith D. Barber, et al, Prolific Plaintiffs or Rabid Relators? Recent Developments in False Claims Act Litigation, 1 Ind Health L Rev 131, 151–52 (2004). The authors argue:

The seal provision, as described by Congress and in the legislative history, has a legitimate government purpose. The practical use of the seal, however, has in many cases crossed the line that separates legitimate from illegitimate purposes. By using the seal in a manner contrary to law, the government erodes the legitimacy of the seal itself.

Id.

134 See note 103.
speech in exchange for a potentially lucrative payout. Such a scheme does not offend the Constitution, and indeed, leads to more effective governance. And by correctly theorizing the relator-government relationship, courts can leave to the legislative process the delicate process of balancing constitutional interests and efficient business practices—even when the business practices are carried out by the federal government.