

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

AMERICAN CIVIL LIBERTIES UNION;  
OMB WATCH; and GOVERNMENT  
ACCOUNTABILITY PROJECT,  
Plaintiffs,

v.

ERIC HOLDER, in his official capacity  
as Attorney General of the United States; and  
FERNANDO GALINDO, in his official capacity  
as Clerk of the Court in the United States District  
Court, Eastern District of Virginia,  
Defendants.

Civil No. 1:09CV42 (LOG/TRJ)

**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO  
DISMISS PURSUANT TO FED R. CIV. P. 12(B)(1) AND 12(B)(6)**

**PRELIMINARY STATEMENT**

Defendants Eric Holder, in his official capacity as Attorney General of the United States, and Fernando Galindo, in his official capacity as Clerk of the Court for the United States District Court for the Eastern District of Virginia, respectfully submit this Memorandum in Support of Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Plaintiffs, the American Civil Liberties Union (ACLU), OMB Watch and Government Accountability Project (collectively, "plaintiffs") have filed this action for declaratory and injunctive relief challenging the constitutionality of the seal provisions of the False Claims Act (the FCA or the Act), 31 U.S.C. § 3729 *et seq.*

The seal provisions are triggered when a complaint is filed by a whistle-blower (called a "relator") under the *qui tam* provisions of the FCA. *See* 31 U.S.C. §§ 3729-3733. Under the

FCA, a *qui tam* complaint must be filed *in camera* and under seal for a statutory minimum of 60 days, to allow the Government time to evaluate the relator's allegations and determine whether to intervene and take over the case. After the initial 60-day seal period, the seal may be extended upon a request by the Government and upon a finding of "good cause" by the Court. After completion of the Government's investigation and notice of the Government's intervention decision, the seal is lifted and the allegations become public.

Plaintiffs contend that these temporary and limited sealing provisions are "unconstitutional on their face" because "they violate the *public's* First Amendment rights" of access to information. *See* Complaint for Declaratory and Injunctive Relief (Complaint) ¶ 6 (emphasis added). Plaintiffs further assert that the seal provisions are "content-based restrictions that gag the relator" from speaking about the case in violation of the relator's First Amendment rights. *See* Complaint ¶¶ 22, 28, 32, 37, 43. Finally, plaintiffs maintain that the seal provisions of the FCA violate the constitutional principle of separation of powers as they "infringe[] on a court's inherent power to determine on an individualized basis whether a complaint should be sealed." *Id.* ¶ 7.

As explained in detail below, plaintiffs' complaint is fatally flawed for a number of reasons and should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). As a threshold matter, plaintiffs' facial challenge to the constitutionality of the seal provisions of the FCA is foreclosed by *Los Angeles Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32, 34 (1999), which holds that a facial First Amendment challenge cannot be made based upon a claimed right of access to information. Plaintiffs also lack standing to invoke the rights of relators who are not before the Court. Not only do plaintiffs fall outside the narrow

circumstances when third party standing is permitted, but their interests in full and immediate disclosure likely conflict with at least some relators who favor the seal provisions.

If the Court were to reach beyond these threshold issues and address the merits of plaintiffs' claims, it should find under Fed. R. Civ. P. 12(b)(6) that those claims fail to state a claim upon which relief may be granted. The Supreme Court has rejected a general First Amendment right of access to Government information. While courts have recognized a limited First Amendment right of access to "particular judicial records and documents," a sealed *qui tam* complaint is not the type of document to which the right attaches. Moreover, the temporary restrictions of the seal are facially constitutional because they serve compelling governmental interests – to allow the Government to investigate allegations of fraud in government contracts and programs – and are narrowly tailored to serve those interests, since they are limited to the duration of the Government's investigation. Therefore, plaintiffs cannot meet their "heavy burden" in a facial challenge – to establish no set of circumstances under which the statute would operate constitutionally.

Plaintiffs' contention that the temporary seal provisions impermissibly "gag" the First Amendment rights of relators is equally unavailing. The temporary seal provisions are triggered only after a whistle-blower first voluntarily and formally invokes the procedures for seeking a monetary award under the *qui tam* provisions of the FCA. The Supreme Court has repeatedly upheld the constitutionality of limitations upon the exercise of constitutional rights when such limitations are imposed as a condition to the receipt of federal monies. Moreover, as noted above, the temporary seal provisions serve compelling governmental interests and are narrowly tailored to serve those interests.

Finally, plaintiffs' separation of powers claim is untenable as a matter of law because the temporary sealing provisions do not prevent the judiciary from "accomplishing its constitutionally assigned functions." For the foregoing reasons, as elaborated below, defendants respectfully request that the Court dismiss plaintiffs' complaint in its entirety under Fed. R. Civ. P. 12(b)(1), and 12(b)(6).

### **STATUTORY BACKGROUND**

The FCA is the Government's primary litigative tool in combating fraud in Government programs. The FCA was originally acted in 1863 in response to rampant fraud in contracts awarded during the Civil War. The FCA imposes liability upon "any person" who, *inter alia*, "knowingly presents, or causes to be presented," to the Government "a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a). A defendant is liable for treble damages and a civil penalty of up to \$11,000 per claim. *Id.*

An FCA action may be brought in one of two ways. First, the Government may itself bring a civil action against a person who allegedly submitted or caused to be submitted a false claim. *See* 31 U.S.C. § 3730(a). Second, a private person, known as a relator, may bring an action in federal court against the alleged false claimant under the *qui tam*<sup>1</sup> provisions of the Act, alleging a violation of the Act for himself and for the Government. *See* 31 U.S.C. § 3730(b)(1).

If a relator initiates the action, the relator's complaint must be filed *in camera* and under seal. *See* 31 U.S.C. § 3730(b)(2). The Act requires the relator to serve "[a] copy of the

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<sup>1</sup> *Qui tam* is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means "who pursues this action on our Lord the King's behalf as well as his own." *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 769, n.1 (2000).

complaint and written disclosure of substantially all material evidence and information the person possesses” on the Government. *See* 31 U.S.C. § 3730(b)(2). The Government then has 60 days to investigate the relator’s allegations, determine whether the allegations involve matters the Government is already investigating, and decide whether to intervene in the action. *See* S. Rep. No. 345, 99<sup>th</sup> Cong., 2d Sess. (S. Rep.) at 2 (1986), *reprinted in*, 1986 Code Cong. & Admin. News 5266, 5289. The Act further provides that the complaint “shall not be served on the defendant until the court so orders.” *Id.* These filing and service requirements are “mandatory” and non-compliance can result in dismissal of the action. *See United States ex rel. Windsor v. Dyncorp*, 895 F.Supp. 844, 848 (E.D. Va. 1995); *Erickson ex rel. United States v. American Institute of Biological Sciences*, 716 F.Supp. 908, 912 (E.D. Va. 1989); *United States ex rel. Anderson v. ITT Industries Corp.*, 2006 WL 4117030, \*3 (E.D. Va. 2006) (Unreported Memorandum Order). The Government may seek an extension of the 60-day investigatory period, during which the complaint remains under seal, if it demonstrates to the Court in *in camera* filings that there is “good cause” for an extension. *See* 31 U.S.C. 3730(b)(3).

The primary purpose of the seal provisions is to allow the Government to investigate the relator’s allegations without the alleged wrongdoers being “tipped off” about the investigation. *See Dyncorp*, 895 F.Supp. at 848; *Erickson*, 716 F.Supp. at 912. Thus, the seal provisions put the Government in the same position it would be in if it began investigating the alleged fraud in the absence of a *qui tam* action, and ensure that the Government’s ability to investigate is not compromised by the filing of the *qui tam*.

Once the investigation is complete, the Government notifies the Court either that it is intervening and will proceed with the action, or alternatively, that it is declining to take over the

action. *See* 31 U.S. C. § 3730(b)(4)(A)-(B).<sup>2</sup> After the notice of intervention or declination is filed, the Court typically unseals the relator's *qui tam* complaint, the defendant is served,<sup>3</sup> and the case proceeds.

If there is any financial recovery under the FCA, a proper relator is entitled to a share of those proceeds. *See* 31 U.S.C. § 3730(d)(1)-(2). If the Government intervenes, the relator's share ranges from between 15% and 25% depending upon the relator's contribution to the action. In declined cases, the relator's share ranges from 25% to 30%.

### **PROCEDURAL BACKGROUND**

On January 15, 2009, plaintiffs, the ACLU, OMB Watch, and GAP, filed this action for declaratory and injunctive relief challenging the constitutionality of the seal provisions of the FCA. Plaintiffs name as defendants in their respective official capacities the Attorney General of the United States, Eric Holder, and the Clerk of the Court for the Eastern District of Virginia, Fernando Galindo.<sup>4</sup> Plaintiffs do not identify themselves as relators in any particular case, but describe themselves variously as organizations seeking the dissemination of information to the public, *see* Complaint ¶ 9, seeking greater government transparency and accountability, *see id.* ¶

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<sup>2</sup> If the Government intervenes, it assumes primary responsibility for prosecuting the action, *see* 31 U.S.C. § 3730(c)(1), although the relator may continue to participate in the litigation. *See* 31 U.S.C. § 3730(c)(2). If the Government declines to intervene, the relator has a right to conduct the action, although the Government may subsequently intervene upon a showing of "good cause." *See* 31 U.S.C. § 3730(b)(4), (c)(3).

<sup>3</sup> The Defendant may be served with either the relator's complaint or, if Government files its own superceding complaint, the Government's complaint.

<sup>4</sup> Defendant Galindo sought and has obtained representation in this action by the Department of Justice pursuant to 28 C.F.R. § 50.15.

10, and defending whistle-blowers and empowering citizen activists.<sup>5</sup> *See id.* ¶ 11. Plaintiffs assert that serious allegations of fraud in federal government programs and contracts are being hidden from the press and the public, including fraud on the military and health care programs, and which involves threats to the public welfare. *See* Complaint ¶ 4. Plaintiffs complain about the length of time it takes from when an FCA complaint is filed until the Government notifies the Court of its intervention decision, noting that cases can remain sealed for 2 to 3 years, and have been sealed as long as 9 years. Complaint ¶ 29. In particular, plaintiffs cite various instances of alleged Iraqi contractor fraud, which were kept under seal for between 1 and 2 years and then became public after DOJ decided not to intervene. *Id.* ¶¶ 33-36.

Plaintiffs challenge the seal provisions of the FCA on three distinct grounds. First, plaintiffs contend that “[t]he FCA secrecy provisions are unconstitutional on their face” as they “deny access to information of paramount public interest” and thus “violate the public’s First Amendment rights.” *See* Complaint ¶ 6, 48. Second, plaintiffs assert that the seal provisions are “content-based restrictions that gag the relator” from speaking about the case, in violation of the relator’s First Amendment rights. *See* Complaint ¶¶ 22, 28, 32, 37, 43. Finally, plaintiffs maintain that “the FCA’s secrecy scheme infringes on a court’s inherent authority to decide on a

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<sup>5</sup> Plaintiff, the ACLU, describes itself as a “nationwide, non-profit, non-partisan organization with over 550,000 members dedicated to the constitutional principle of liberty and equality.” It states that “[d]issemination of information to the public is a critical and substantial component of the ACLU’s mission and work.” It brings suit “on its own behalf and on behalf of its members.” *See* Complaint ¶ 9. Plaintiff OMB Watch (OMBW) was formed in 1983 and states that its “mission is to increase government transparency and accountability; to ensure sound, equitable regulatory and budgetary processes and policies; and to protect and promote active citizen participation in democracy.” *Id.* ¶ 10. Plaintiff Government Accountability Project (GAP) describes itself as a “30 year-old nonprofit public interest group that promotes government and corporate accountability by advancing occupational free speech, defending whistle blowers, and empowering citizen activists.” *Id.* ¶ 11.

case-by-case basis whether a particular FCA action should be hidden from public scrutiny and thus violates the separation of powers.” *See id.* ¶ 52, 7.

Accordingly, plaintiffs ask the Court to declare the seal provisions unconstitutional and to “[p]ermanently enjoin defendants from enforcing” the seal provisions. Complaint at 14. For the reasons set forth below, defendants respectfully ask this Court to dismiss this case pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

### **ARGUMENT**

#### **A. Standards for Motions under Rule 12(b)(1) and 12(b)(6).**

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) challenges a court’s jurisdiction over the subject matter of the suit. *See* Fed. R. Civ. P. 12(b)(1). One way to attack subject matter jurisdiction through a Rule 12(b)(1) motion is by asserting that “a complaint simply fails to allege facts upon which subject matter jurisdiction can be based.” *See Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir.1982). Under these circumstances, “the facts alleged in the complaint are assumed to be true and the plaintiff . . . is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration.” *Id.*

Federal Rule of Civil Procedure 12(b)(6) provides that a defendant may move to dismiss a complaint for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). When reviewing a complaint pursuant to Rule 12(b)(6), the court must accept well-pleaded allegations as true and must construe the factual allegations in favor of the plaintiff. *See Randall v. United States*, 30 F.3d 518, 522 (4th Cir. 1994). The court is not, however, required to accept as true allegations that are legal conclusions. *Id.* The issue on a Rule 12(b)(6) motion is not “whether a plaintiff will ultimately prevail but whether the claimant is entitled to

offer evidence to support the claims.” *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). To satisfy Rule 12(b)(6), the plaintiff must allege specific, non-conclusory facts that plausibly state a claim upon which relief could be granted. *See Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1968-69 (2007).

B. The Limited Duration of the Seal and the Drastic Relief Requested by Plaintiffs

At the outset, it is important to note that limitations upon access to information, such as those occasioned by the seal provisions at issue in this case, are routine and arise in different types of proceedings. For example, “the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.” *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979); *United States v. Proctor & Gamble Co.*, 356 U.S. 677 (1958).<sup>6</sup> Among the reasons for the “strict secrecy” of grand jury proceedings is to prevent those about to be indicted from fleeing and to encourage witnesses to come forward and testify fully and frankly. *See Douglas Oil*, 441 U.S. at 219. It is a “settled proposition” that “there is no First Amendment right of access to grand jury proceedings.” *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 499 (D.C. Cir. 1998); *In re Grand Jury Subpoena*, 494 F.3d at 154.

Another limitation upon access routinely arises in the context of protective orders issued during pre-trial discovery in civil cases under Fed. R. Civ. P. 26(c). As discussed in greater detail below, in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984), the Supreme Court held

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<sup>6</sup> Federal Rule of Criminal Procedure 6(e) “prohibits disclosure of ‘matter[s] occurring before the grand jury . . . and thus requires that ‘[r]ecords, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.’” *In re Grand Jury Subpoena, Judith Miller*, 493 F.3d 152, 154-55 (D.C. Cir. 2007) (quoting *Fed. R. Crim. P. 6(e)(6)*).

that when “a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.” *Id.* at 37; *accord, Anderson v. Cryovac, Inc.*, 805 F.2d 1, 11 (1<sup>st</sup> Cir. 1986) (no right of public access to documents considered in civil discovery motions);

Unlike the permanent seal imposed in the grand jury context or under Fed. R. Civ. P. 26(c), this case is not about a challenge to the imposition of a permanent seal or the permanent denial of access to information. Rather, at issue in this case is the constitutionality of two statutory seal provisions of limited scope and duration. The seal only prohibits a relator from disclosing information that would reveal the existence of the *qui tam* action or the Government’s *qui tam* investigation. The seal does not prohibit a relator from disclosing the facts underlying the alleged fraud.<sup>7</sup> Moreover, the prohibitions imposed by the seal are temporary. The initial seal provision, 31 U.S.C. § 3730(b)(2), governs the filing of a *qui tam* complaint and is limited to 60 days. Subsequent extensions of the seal are explicitly authorized under 31 U.S.C. § 3730(b)(3), and considered by a court on a case-by-case basis and granted upon a finding of “good cause.” Seal extensions under Section 3730(b)(3) are usually limited in term and contemporaneous with the length of the Government’s investigation, when the Government’s interests in preserving the integrity of its investigation are compelling. *See Virginia Dep’t of State Police v. Washington Post*, 386 F.3d 567, 579 (4<sup>th</sup> Cir. 2004) (*VDSP*).

Once the Government’s investigation is complete and an intervention decision has been

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<sup>7</sup> The Government may nevertheless have concerns about a relator disclosing information about the alleged fraud in a particular case, because of its potential to compromise the Government’s ongoing investigative activities.

made, the seal is usually lifted and the allegations in a *qui tam* complaint are made available to the public. Therefore, as tacitly acknowledged in plaintiffs' complaint by the examples of alleged contractor fraud, which were disclosed to the public after the Government declined, *see* Complaint ¶¶ 34-36, this case is not about the ***permanent denial*** of access to information, but rather the ***temporary*** and limited restrictions of a statutorily authorized seal that Congress deemed necessary to protect the integrity and secrecy of Government fraud investigations.

Also worthy of note is the nature of the relief plaintiffs request in this case. The declaratory and injunctive relief sought by the plaintiffs would be drastic and force the premature disclosure of every ongoing Government *qui tam* investigation. Such a disclosure would immediately "tip off" every defendant about the existence of the investigation, including the nature and scope of the underlying allegations, thereby irreparably harming numerous sensitive ongoing investigations. It would also intrude on the ability of every other district court with a sealed *qui tam* action to determine on a case-by-case basis whether "good cause" exists to extend the seal under 31 U.S.C. § 3730(b)(3). Even assuming the plaintiffs' claims are properly alleged – which they are not – the plaintiffs have failed to identify any cognizable interest sufficient to justify such a drastic result.

C. Plaintiffs' Assertion of the Public's First Amendment Rights

Plaintiffs contend that the seal provisions of the FCA are "unconstitutional on their face" because they "violate the ***public's*** First Amendment rights" of access to information. Plaintiffs' facial challenge must be dismissed for two reasons. First, as a threshold matter, plaintiffs' facial challenge to the constitutionality of a statute based upon a claimed right of access is foreclosed by *Los Angeles Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32 (1999) ("*United*

*Reporting*”) and *Fisher v. King*, 232 F.3d 391 (4th Cir. 2000). Second, on the merits, plaintiffs cannot meet their heavy burden of establishing, as they must in a facial challenge, that “no set of circumstances exists under which the” seal provisions of the FCA would be valid.

1. Plaintiffs’ Facial Challenge Based Upon a Right of Access is Foreclosed by the Supreme Court’s Decision in *United Reporting*

In *United Reporting*, the Supreme Court held that a First Amendment facial challenge could not be mounted against a state statute that simply regulated access to information. *United Reporting*, 528 U.S at 37, 41. At issue in *United Reporting* was a state statute that denied access to the addresses of arrestees to those who declined to certify that the addresses would not be used directly or indirectly to sell a product or service. *Id.* at 34. A private publishing company brought a facial challenge to the constitutionality of the state statute, contending that the statute burdened commercial speech in violation of the First Amendment. *Id.* at 37.

The Supreme Court rejected this contention, holding “that the statutory section in question was not subject to a ‘facial’ challenge.” *Id.* at 34. The Court noted that “the allowance of a facial overbreadth challenge to a statute is an exception to the traditional rule that ‘a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court.’” *Id.* at 39. The Court observed that the overbreadth doctrine is “strong medicine,” which courts have employed with hesitation and “only as a last resort” *Id.* (citations omitted).

For purposes of assessing the propriety of “facial invalidation,” the Court deemed it significant that the statute at issue did not “prohibit a speaker from conveying information that the speaker already possesses.” *Id.* at 40. Instead, the Court characterized the case as “nothing more than a governmental denial of access to information in its possession,” which the state

could deny in its entirety, without violating the First Amendment. *Id.*

The Court also rejected the efforts of the publishing company to rely on the effect of the statute on parties not before the Court, emphasizing that such a “claim does not fit within the case law allowing courts to entertain facial challenges.” As to those other parties, “[n]o threat of prosecution . . . or cutoff of funds . . . hangs over their heads.” The Court explained that:

[t]hey may seek access under the statute on their own just as respondent did, without incurring any burden other than the prospect that their request will be denied. Resort to a facial challenge here is not warranted because there is ‘[n]o possibility that protected speech will be muted.’

*Id.* at 40-41 (citations omitted). Thus, *United Reporting* stands squarely for the proposition that a First Amendment facial challenge may not be mounted against a statute that simply restricts access to information.

Subsequently, the Fourth Circuit applied *United Reporting* to reject as a matter of law a facial challenge to the constitutionality of a Virginia state statute that denied a prisoner access to the original tape recording of his 911 call entered into evidence during his criminal trial. *See Fisher v. King*, 232 F.3d 391 (4<sup>th</sup> Cir. 2000). The prisoner, Fisher, who was convicted of second degree murder, submitted a written request under the Virginia Freedom of Information Act (VFOIA) to the Clerk of the Gloucester County Circuit Court (the Clerk) for access to the tape recording of his 911 call, which had been introduced into evidence at his criminal trial. *Id.* at 394. The Clerk denied the request, citing VFOIA’s Prisoner Exclusion Provision, which imposed restrictions upon incarcerated persons from accessing information under the VFOIA. *See id.* Fisher filed an action against the Clerk under 42 U.S.C. § 1983, alleging, *inter alia*, that VFOIA’s Prisoner Exclusion Provision was facially unconstitutional and violated his First Amendment rights. *See id.* The district court granted summary judgment for the Clerk, and the

Fourth Circuit affirmed, holding that “VFOIA is an access statute, and therefore, Fisher cannot maintain a facial overbreadth challenge under the First Amendment.” *Id.* at 395. Analyzing *United Reporting*, the Fourth Circuit found no material differences between the VFOIA’s Prisoner Exclusion Provision and the California statute at issue in *United Reporting*, as both statutes simply regulated access to information:

Based on the reasoning set forth in *United Reporting*, the VFOIA’s Prisoner Exclusion Provision is similarly not subject to a facial overbreadth challenge because it does not carry the threat of prosecution for violating the statute and it does not restrict expressive speech, but simply regulates access to information in the possession of Virginia state agencies. In this regard, we find no material differences between the VFOIA’s Prisoner Exclusion Program and the California statute at issue in *United Reporting*. Accordingly, Fisher’s facial overbreadth challenge under the First Amendment fails.

*Id.* at 388-89 (emphasis added).

Similarly, under *United Reporting and King*, plaintiffs’ facial challenge to the constitutionality of the seal provisions fails as a matter of law. As to the general public, on whose behalf the plaintiffs assert their facial challenge, the seal provisions of the FCA do not in any way prohibit expressive speech or carry the threat of prosecution. The seal provisions simply operate to restrict access, for a limited duration, to the *qui tam* complaint. Once the investigation is complete and the Government’s intervention or declination decision has been made, the seal is lifted and the *qui tam* complaint is made available to the public. Indeed, because the seal provisions merely regulate the *timing* of access to information, they are less onerous than the access statutes at issue in *United Reporting* and *King*, which denied access altogether. Thus, plaintiffs’ facial challenge must fail as a matter of law under the controlling authority of *United Reporting* and *King*. See also *Amelkin v. McClure*, 205 F.3d 293, 296 (6<sup>th</sup> Cir. 2000) (applying *United Reporting* to reject a facial challenge to a state statute that “simply regulates access to the

state’s accident reports”); *see also* *Center for National Security Studies v. U.S. Dep’t of Justice*, 331 F.3d 918, 935-936 (D.C. Cir. 2003).

2. Plaintiffs’ Facial Challenge to the Constitutionality of the Seal Provisions of the FCA Fails as a Matter of Law Because the Seal Provisions Clearly Have Constitutional Applications

Plaintiffs’ facial challenge to the seal provisions of the FCA also fails as a matter of law because they cannot meet their heavy burden of demonstrating that the temporary seal provisions are unconstitutional in every application. Notably, plaintiffs do not come before this Court challenging a specific application of the seal. Rather, they argue that “[t]he FCA secrecy provisions are unconstitutional on their face” as they “deny access to information of paramount public interest” and thus “violate the public’s First Amendment rights.” *See* Complaint ¶ 6, 48.

A decision to declare an act of Congress unconstitutional “is the gravest and most delicate duty” that a court is called upon to perform. *See Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980) (*citing Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.)). Thus, only “for the most compelling constitutional reasons[.]” should a statute be found to be unconstitutional. *See Mistretta v. United States*, 488 U.S. 361, 384 (1989) (quoting *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (Stevens, J., concurring in judgment)).

Furthermore, a litigant faces a “heavy burden” in seeking to have a statute invalidated as facially unconstitutional. *See Rust*, 500 U.S. at 183. “Facial invalidation ‘is, manifestly, strong medicine’ that ‘has been employed by the Court sparingly and only as a last resort.’” *National Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) (*quoting Broadrick v. Oklahoma*, 413 U.S. 601, 613)). “A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since *the challenger must establish that no set of circumstances*

*exists under which the Act would be valid.” Rust, 500 U.S. at 183 (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)). “The fact that [the Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [the Act] wholly invalid.” Rust, 500 U.S. at 183.*

In their complaint, plaintiffs argue that “there is a presumption of open access to civil and criminal proceedings, the accompanying documents, and other information relating to cases filed in federal court.” Complaint ¶ 46. Plaintiffs assert that “[u]nder the First Amendment, an individual who wishes to file cases under seal and hidden from the public must demonstrate that there is a compelling interest, and further, that filing the case under seal is the least restrictive means of advancing the compelling interest.” *Id.* ¶ 47.

Plaintiffs misapprehend the nature of the First Amendment right of access and its application to plaintiffs’ facial challenge in the instant case. The Government does not contest the general notion that there is a qualified right of access to attend criminal and civil trials. *See Press-Enterprise Co., v. Superior Court of California*, 478 U.S. 1, 8-10 (1986); *Richmond Newspapers, Inc., v. Virginia*, 448 U.S. 555, 580 (1980). However, the Fourth Circuit has repeatedly held that “the First Amendment guarantee of access has been extended only to *particular judicial records and documents.*” *VDSP*, 386 F.3d at 575 (emphasis added); *In re Policy Management Systems*, 67 F.3d 296, 1995 WL 541623, at \*3 (4<sup>th</sup> Cir. Sept. 13, 1995) (UNPUBLISHED DISPOSITION); *Stone v. University of Md.*, 855 F.2d 178, 180 (4<sup>th</sup> Cir. 1988). As reiterated by the Fourth Circuit, “[n]either the Supreme Court nor this Court has ever held that the *mere filing of a document triggers the First Amendment guarantee of access.*” *In re Management Systems Corp.*, 1995 WL 541623, at \*3 (emphasis added). Rather, the First

Amendment right of access applies when a document is used in a judicial proceeding that “adjudicates substantive rights” and which “serves as a substitute for trial.” *Rushford v. New Yorker Magazine*, 846 F.2d 249, 253 (4<sup>th</sup> Cir. 1988); *In re Washington Post*, 807 F.2d 383, 390 (4<sup>th</sup> Cir. 1986).

Thus, in *In re Management Systems*, the Fourth Circuit held “that the First Amendment guarantee of access should not be extended to documents filed in connection with a motion to dismiss.” *Id.* The Fourth Circuit distinguished its prior decision in *Rushford*, where the right of access had attached to documents filed in connection with a summary judgment motion. A summary judgment motion, explained the Court, “adjudicates substantive rights,” “serves as a substitute for trial,” and “requires the district court to examine the entire record.” *Id.* A motion to dismiss, by contrast, “tests only the facial sufficiency of the complaint” and a court may not consider any materials outside the pleadings. “[B]ecause documents filed with a motion to dismiss that are excluded by the court *do not play any role in the adjudicative process*, we find that the documents essentially retain their status as discovery materials and therefore *are not subject to the First Amendment guarantee of access.*”<sup>8</sup> *Id.* (emphasis added).

The Fourth Circuit’s reasoning in *In re Management Systems* is compelling and mandates the conclusion that *qui tam* complaints, placed and maintained under seal pursuant to 31 U.S.C. §§ 3730(b)(2) and (b)(3), simply do not trigger any First Amendment right of access. While it

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<sup>8</sup> The Fourth Circuit also rejected a common law right of access, explicitly “hold[ing] that the mere filing of a document with the court does not render the document judicial.” *In re Management Systems*, 1995 WL 541623, \*3-4, Agreeing with the Second Circuit’s decision in *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995), the Fourth Circuit declared that “a document becomes a judicial document when a court uses it in determining litigants’ substantive rights.” *Id.*

remains under seal, a *qui tam* complaint plays no role in the “adjudicative process” of the Court. A sealed *qui tam* complaint is not used in any way to address any “substantive rights” of the defendant or the relator. Nor does it formally commence the adversarial litigation process, because the complaint cannot be served upon the defendant until the case is unsealed and the court orders service. *See* 31 U.S.C. § 3730(b)(2). Rather, a *qui tam* complaint triggers an investigation by DOJ into the relator’s allegations of fraud and an evaluation as to whether the Government will intervene or decline to take over the case - a process that involves a complicated balancing of factors that are uniquely executive in nature and presumptively immune from judicial review. *Cf. Heckler v. Chaney*, 470 U.S. 821, 831-32 (1986) (agency decision not to take enforcement action presumed to be immune from judicial review).<sup>9</sup> Because a sealed *qui tam* complaint does not play any role in the “adjudicative process” of the Court, does not address the “substantive rights” of the litigants, and does not serve as a “substitute for trial,” the First Amendment right of access does not attach to a *qui tam* complaint during the period that it is temporarily under seal and under investigation by the Government. Moreover, once the investigation is complete and the seal is lifted, the *qui tam* complaint is made available to the public.

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<sup>9</sup> Moreover, the Government’s pre-intervention investigation and evaluation of the relator’s allegations in a sealed *qui tam* complaint manifestly are not the type of processes that have historically been open to the press and the public; nor are they the kind of processes in which the public plays a significant and positive role. *See Baltimore Sun v. Goetz*, 886 F.2d 60, 64 (4<sup>th</sup> Cir. 1989). Indeed, if the Government’s investigation had been commenced through some means other than the filing of a *qui tam*, the public clearly would not be entitled to learn about the allegations under investigation. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978) (“[t]his Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control”); *Center for National Security Studies*, 331 F.3d at 934-935. The *qui tam* seal provisions are designed merely to ensure that the Government is no worse off when it learns about alleged fraud through the filing of a *qui tam* case.

D. Plaintiffs' Assertion of Relators' First Amendment Rights

Plaintiffs also claim that the seal provisions of the FCA are content based restrictions that “gag the relator” and violate the First Amendment. *See* Complaint ¶ 43. This claim fails because plaintiffs lack standing to assert the rights of relators and, in any event, because the temporary seal does not violate relators' First Amendment rights.

1. Plaintiffs Lack Standing to Assert the Rights of Relators Who Are Subject to the Seal Provisions of the FCA.

Plaintiffs do not state that they are relators in any ongoing *qui tam* action, but rather assert the rights of relators as a class. The plaintiffs, however, lack standing to assert the rights of third parties not before the Court. *See Kowalski v. Tesmer*, 543 U.S. 125, 134 (2004); *Warth v. Seldin*, 422 U.S. 490, 498 (1975)

“The doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance.” *Kowalski*, 543 U.S. at 128. “This inquiry involves ‘both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.’” *Id.* at 129 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). The Supreme Court has insisted that a party “generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.” *Warth*, 422 U.S. at 499. This rule reflects a “healthy concern that if the claim is brought by someone other than one at whom the constitutional protection is aimed,” *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 955, n.5 (1984), the courts might be “called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be necessary to protect individual rights.” *Warth*, 422 U.S. at 500.

Although the rule against third party standing is not absolute, a party seeking to assert the rights of third parties must make two showings. *See Kowalski*, 543 U.S. at 130. First, the party seeking third party standing must demonstrate a “close relationship” with the person possessing the right; second, there must be a “hindrance” that prevents the third party from protecting its own interests. *Id.*<sup>10</sup> Neither of these conditions apply in the current case and a straightforward application of the principles enunciated in *Kowalski* precludes plaintiffs’ attempt to assert the rights of relators in this case.

In *Kowalski*, the Supreme Court declined to find the requisite “close relationship” between attorneys and future criminal defendants, based upon a hypothetical and future attorney client relationship. At issue in *Kowalski* was a state statute that denied the appointment of appellate counsel to indigent criminal defendants in certain circumstances. A challenge to the constitutionality of the statute was brought by attorneys who invoked third party standing on behalf of future indigent criminal defendants they would represent. The attorneys attempted to demonstrate a “close relationship” by invoking a “future attorney-client relationship.” *Kowalski*, 543 U.S. at 130. The *Kowalski* Court rejected this argument, concluding that a hypothetical or future attorney-client relationship is “no relationship at all” much less a “close relationship” for purposes of third party standing. *Id.* at 131. The *Kowalski* Court also rejected the attorneys’ “hindrance” argument, noting that an indigent denied appellate counsel “has open avenues to

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<sup>10</sup> The limitations on prudential standing are somewhat relaxed in the First Amendment context, and standing to litigate the rights of third parties has been permitted “when enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third party rights.” *Warth*, 422 U.S. at 510 (emphasis in original). This permissive exception, however, does not apply in the instant case because the limitations upon the public’s access to information about which the plaintiffs in this case complain do not in any conceivable way “result indirectly in the violation of [relator’s] rights.”

argue that denial deprives him of constitutional rights.” *Id.* at 131-32.

Similarly, the plaintiffs in this case cannot establish the “close relationship” or “hindrance” elements necessary to establish third party standing on behalf of relators. None of the plaintiffs have alleged any type of relationship, much less a “close relationship,” with relators. Indeed, the interests of the plaintiffs in full and immediate disclosure of *qui tam* complaints, which would include disclosure of the identities of relators, is most likely at odds with the interests of at least *some* relators who favor the seal provisions because it aids the Government’s investigation of their allegations. Given the potential opposition of at least some relators to the stated interests and goals of the plaintiffs in this litigation, it is difficult to see how plaintiffs can establish the necessary “close relationship” for third party standing.

Nor can plaintiffs establish the “hindrance” element necessary for third party standing because of the availability to relators of avenues to claim the denial of their constitutional rights. To the extent a relator deems itself “gagged” by the seal provisions in a particular case, nothing prevents that relator from challenging the constitutionality of the seal provisions as applied to that relator. Moreover, any such ruling would be subject to appellate review just as the rulings in other sealed proceedings are subject to such review. The availability to an aggrieved relator of a forum to litigate the constitutionality of the seal provisions precludes plaintiffs from demonstrating the “hindrance” necessary to allow plaintiffs third party standing on behalf of relators generally.

2. The Temporary Seal Restrictions of the FCA do Not Infringe on Relators’ First Amendment Rights as Relators Voluntarily Invoke the Benefits and Protections of the Act.

Even if plaintiffs had standing to assert claims on behalf of relators who are not presently

parties in this case, plaintiffs' contention that the seal restrictions impermissibly "gag" relators in violation of their First Amendment rights is incorrect as a matter of law because a whistle-blower has the option of foregoing any claim to a bounty or share of the Government's recovery by simply not filing a *qui tam* action. "Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives." *United States v. American Library Ass'n*, 539 U.S. 194, 203 (2003) (citing *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)). As stated by the Supreme Court in *United States ex rel. Texas Portland Cement v. McCord*, 233 U.S. 157, 162 (1913), if a statute "creates a new liability and gives a special remedy for it, . . . upon well settled principles the limitations upon such liability become a part of the right conferred, and compliance with them is made essential to the assertion and benefit of the liability itself." See *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47, 59 (2006); *United States v. American Library Ass'n*, 539 U.S. 194, 212 (2003); *Rust v. Sullivan*, 500 U.S. 173, 199, n.5 (1991); *Grove City College v. Bell*, 465 U.S. 555, 575 (1984).

In *Grove City*, the Supreme Court rejected after only "brief consideration" the argument that conditioning federal assistance to a college upon compliance with requirements of a federal program infringed upon the college's First Amendment rights. The Court noted that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept." *Id.* at 575. Without even reviewing the substance of the college's underlying First Amendment claim, the Supreme Court concluded that there was no First Amendment violation because the college could simply decline the Government's funds and, thereby, avoid the requirements of the program. *Id.*; accord *Rust*, 500 U.S. at 199, n.5.

Similarly, in *Rust*, the Supreme Court upheld restrictions upon abortion counseling imposed as a condition upon the receipt of certain federal funds. The Supreme Court made the following relevant observation:

By accepting Title X funds, a recipient *voluntarily consents* to any restrictions placed on any matching funds or grant-related income. Potential grant recipients can choose between accepting Title X funds - subject to the Government's conditions that they provide matching funds and forego abortion counseling and referral in the Title X project - or declining the subsidy and financing their own unsubsidized program. We have never held that the Government violates the First Amendment simply by offering that choice.

500 U.S. at 199, n.5 (emphasis added).

In similar fashion, the FCA imposes certain conditions upon whistle-blowers who seek a share of the Government's recovery in a *qui tam* action. A whistle-blower who invokes the benefits and protections of the FCA is obligated to comply with its statutory requirements. *See Erickson*, 716 F. Supp. at 911.<sup>11</sup> Relators who fail to follow the mandatory provisions of the FCA or who breach the seal risk dismissal of their complaints, and forfeiture to any share of a recovery under the Act. *See, e.g., United States ex rel. Pilon v. Martin Marietta*, 60 F.3d 995, 997 (2d Cir. 1995); *Dyncorp*, 895 F. Supp. at 848; *Erickson*, 716 F. Supp. at 911. A whistle-blower who files a *qui tam* action thus "voluntarily consents" to the restrictions contained within the FCA, including the temporary restrictions imposed by the seal provisions. A whistle-blower may avoid these restrictions through the simple expedient of not filing such an action and foregoing any claim to the bounty or share of the Government's recovery. The availability of that choice, as noted by the Supreme Court, does not violate the First Amendment. *Id. American*

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<sup>11</sup> The Supreme Court has held that the "FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim." *Vermont Agency*, 529 U.S. at 773.

*Library Ass'n*, 539 U.S. at 212 (“a refusal to fund protected activity, without more, cannot be equated with the imposition of a penalty on that activity”) (internal quotations and citations omitted).

3. The Temporary Seal Restrictions are No Greater than Necessary to Serve Substantial Governmental Interests Unrelated to the Suppression of Expression

The seal restrictions also do not violate relators’ First Amendment rights because they are limited in scope and temporary in duration. The FCA does not impose any restrictions on the ability of whistle-blowers to speak openly and publicly about their allegations before a whistle-blower becomes a relator and files an action under the *qui tam* provisions of the Act. Once a relator files a *qui tam* action, the seal only prohibits a relator from disclosing information that would reveal the existence of the *qui tam* action or the Government’s *qui tam* investigation. The seal does not prohibit a relator from disclosing the facts underlying the alleged fraud.

Moreover, during the course of the investigation, the Government often solicits the position of the relator on a proposed request by the Government to extend the seal. In many, if not most instances, relators affirmatively consent to the extension of the seal, thus further undermining any argument that the seal provisions impermissibly gag the First Amendment rights of relators. Because the seal restrictions are limited in scope and duration, and no greater than necessary to serve substantial governmental interests unrelated to the suppression of expression, they pass constitutional muster under *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984).

In *Seattle Times*, the Supreme Court rejected a First Amendment challenge to a protective order entered by a court on a showing of good cause under Rule 26(c) that restricted a litigant’s

ability to disseminate information obtained through pre-trial discovery. In rejecting the challenge, the Court noted that “[j]udicial limitations on a party’s ability to disseminate information discovered in advance of trial *implicates the First Amendment rights of the restricted party to a far lesser extent* than would restraints on dissemination of information in a different context.” *Id.* at 34 (emphasis added). Because of this diminished First Amendment interest, the Court analyzed whether Rule 26(c) “furthers a substantial governmental interest unrelated to the suppression of expression.” Liberal discovery rules, explained the Court, entail “a significant potential for abuse” that “could seriously implicate the privacy interests of litigants and third parties.” The Court declared that “[t]he Government clearly has a substantial interest in preventing this sort of abuse of its processes.” Accordingly, it held that “where, as in this case, a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.” *Id.* at 37.

The analysis in *Seattle Times* is instructive and compels a similar conclusion here: that the temporary and limited restrictions of the seal serve substantial government interests and do not offend the First Amendment. Like the protective order at issue in *Seattle Times*, the FCA’s seal provisions only restrict a relators ability to disclose information that would reveal the existence of the *qui tam* suit or the Government’s *qui tam* investigation. Moreover, like protective orders under Rule 26(c), an extension of the seal under 31 U.S.C. § 3730(b)(3) requires the Government to make a showing of “good cause.” That showing will frequently require the Government to reveal to the Court certain details about the scope and progress of its investigation, including the investigative steps taken, the impressions and preliminary

conclusions of counsel and agents, and additional investigative avenues that may be pursued should the extension be granted.

Finally, the temporary seal provisions of the FCA serve substantial, indeed compelling, governmental interests, unrelated to the suppression of expression. The temporary seal prevents alleged wrongdoers from being “tipped off” about the Government’s investigation, hiding or destroying critical documents, and/or influencing the testimony of potential witnesses. In so doing, the seal preserves the integrity and secrecy of an ongoing law enforcement investigation – a governmental interest that is “compelling.” *VDSP*, 386 F.3d at 579. And, the seal restrictions are no greater than is necessary or essential to serve this important purpose. Once the Government has completed its investigation and made an intervention decision, the seal is lifted. Therefore, the FCA’s seal restrictions, which are limited in scope and duration, extended on a showing of good cause, and serve substantial government interests simply “do[] not offend the First Amendment.” *Seattle Times*, 467 U.S. at 37.

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In summary, plaintiffs’ claim that the seal provisions of the FCA impermissibly “gag” relators in violation of their First Amendment rights must be dismissed as a matter of law. Plaintiffs lack third party standing to assert the rights of relators, whose interest in protecting their identities during the course of the investigation are potentially at odds with those of the plaintiffs in full disclosure. On the merits, the seal provisions of the FCA do not violate the First Amendment interests of relators, because relators “voluntarily consent” to those provisions by invoking the benefits and protections of the Act, and because the seal provisions are no greater than necessary to serve a substantial governmental interest unrelated to the suppression of

expression.

E. The Seal Provisions Do Not Violate the Constitutional Principle of Separation of Powers

Finally, plaintiffs maintain that “the FCA’s secrecy scheme infringes on a court’s inherent authority to decide on a case-by-case basis whether a particular FCA action should be hidden from public scrutiny and thus violates the separation of powers.” *See id.* ¶ 52, 7. The temporary sealing provisions of the FCA, however, do not implicate, much less violate, the constitutional principle of separation of powers. *See Morrison v. Olson*, 487 U.S. 654, 680 (1987); *Pequignot v. Solo Cup Co.*, 2009 WL 874488, Slip Op. \*8 (E.D. Va. Mar. 27, 2009).

The principle of separation of powers can be violated in two basic ways. *See id.* One way “involves the ‘aggrandizement of one branch at the expense of the other. . . such as when Congress impermissibly retains the power to control the removal of Executive Branch officials.’” *Id.* (citing *Myers v. United States*, 272 U.S. 52 (1925)). Another way “occurs when a law, despite no inter-branch aggrandizement, ‘disrupts the proper balance between the coordinate branches’ by prevent[ing] [one of the branches] from accomplishing its constitutionally assigned functions.” *Id.* (citing *Nixon v. Adm’r Gen. Servs.*, 433 U.S. 425, 433 (1977)).

Plaintiffs’ separation of powers claim appears to rest on the second ground - that the FCA precludes a “case-by-case determination” whether the case should be hidden from public scrutiny, thus preventing the judiciary from accomplishing its “constitutionally assigned functions.” This argument is unavailing since only the initial 60-day sealing period is mandatory and dictated by statute. *See* 31 U.S.C. § 3730(b)(2). The filing of a *qui tam* complaint under seal pursuant to the FCA, however, is a clerical or ministerial act, not a judicial act. *See In re United States ex rel. Navarette*, 661 F. Supp. 506, 507 (D. Colo. 1987). In *Morrison*, the Supreme Court

held that various ministerial powers granted to a Special Division of the D.C. Circuit, under the Ethics in Government Act, with respect to investigations performed by an independent counsel, did not violate the Article III's "broad prohibition upon the courts' exercise of 'executive or administrative duties of a nonjudicial nature.'"

Moreover, the initial sealing period is temporary and lasts only 60 days. Extensions of the seal, beyond the initial 60-day period, are subject to judicial oversight and scrutiny on a case-by-case basis and granted upon a finding of "good cause." *See* 31 U.S.C. § 3730(b)(3). Thus, the FCA requires the very type of case-by-case determination and finding of "good cause" for extensions of the seal that courts routinely perform and which do not implicate any separation of powers concerns. *See Morrison*, 487 U.S. at 681, n.19 (noting that Special Division of the D.C. Circuit must determine whether the Attorney General has shown "good cause" for a request for an extension of time to conduct a preliminary investigation). Plaintiffs' separation of powers argument is therefore limited to the initial 60-day sealing period mandated by the FCA. Given the limited duration of this period and minimal intrusion into the Court's process, this provision simply does not prevent the judiciary from "accomplishing its constitutionally assigned functions." Therefore, plaintiffs' separation of powers claim should be dismissed as a matter of law.<sup>12</sup>

### CONCLUSION

For the foregoing reasons defendants respectfully request that the Court grant their

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<sup>12</sup> The flaw in the plaintiffs' claim is highlighted by the existence of other statutory provisions providing for the sealing of judicial proceedings or documents. For example, as noted above, grand jury proceedings are sealed pursuant to Fed. R. Crim. P. 6(e), yet have not raised separation of powers concerns. *See also* 50 U.S.C. § 1806(f) (providing for *in camera* and *ex parte* review of certain matters arising under Foreign Intelligence Surveillance Act).

motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

Dated: April 17, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 17<sup>th</sup> day of April, 2009, I will electronically file the foregoing “Memorandum in Support of Defendants’ Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6)” with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (Notice of Electronic Filing “NEF”) to the following:

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And I hereby certify that I will serve by U.S. Mail, Postage Paid, true and correct copies of the foregoing “Memorandum in Support of Defendants’ Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6),” and the NEF of the same document to the following non-filing users at the physical address indicated and will also serve copies of the same documents, in portable document format (pdf) files, by electronic mail to the indicated email addresses of the following non-filing users:

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