NWC | NATIONAL WHISTLEBLOWERS CENTER
3238 P STREET, N.W. WASHINGTON, DC 20007 | 202-342-1902 (tel) 202-342-1904 (fax) | WWW.WHISTLEBLOWERS.ORG

April 5, 2011

Christopher A. Hansen, Ben Wizner & Benjamin Sahl
American Civil Liberties Union Foundation
125 Broad Street, 18th FL
New York, New York 10004-2400
chansen@aclu.org
bwizner@aclu.org
bsahl@aclu.org

Rebecca K. Glenberg
American Civil Liberties Union of Virginia Foundation, Inc.
530 E. Main Street, Suite 310
Richmond, Virginia 23219
rglenberg@acluva.org

RE: *ACLU v. Holder*, 4th Circuit Case No. 09-2086

Dear Counsel:

We are writing in regards to the *ACLU v. Holder case* filed by your three clients, the American Civil Liberties Union (ACLU), Government Accountability Project (GAP) and OMB Watch. On March 28, 2011 the U.S. Court of Appeals for the Fourth Circuit issued a decision dismissing this case. As explained below, we strongly believe that this dismissal should not be appealed.

We would like to open a dialogue about issues dear to us all that directly relate to the *ACLU v. Holder* ruling. To this end we ask that you share this letter with the Boards of the plaintiff-organizations you represent and express our willingness to meet in person with each Board in order to fully explore the wisdom in seeking further judicial review of this case.[1]

The critical factors leading our organization to urge in the strongest terms that your clients not seek further review are set out below.

[1] We would like to meet the official decision making body responsible for deciding whether each plaintiff will authorize an appeal, including the relevant legal committee established for that purpose.

A. The FCA's seal provisions encourage whistleblowers to come forward and thus advances free speech, the detection of fraud, and the public interest.

Many whistleblowers need to protect their confidentiality, especially in their initial steps toward exposing the wrongdoing of their superiors. Most whistleblowers are afraid of retaliation. The sooner they have to expose their identity, the sooner they will suffer termination of their employment, isolation from their friends and co-workers, or even other more serious forms of retaliation.

The seal provisions of the False Claims Act (FCA), 31 U.S.C. § 3730(b)(2) and (3), encourage whistleblowers to come forward by assuring them they their identities will not be disclosed to their adversaries during the initial phase of the case. During this initial phase, the whistleblower will have the opportunity to work with government investigators on any necessary plans to obtain and preserve evidence of the alleged wrongdoing. The whistleblower can also use this time to observe further wrongdoing, seek other employment, or simply prolong the current employment free of the stigma of isolation and retaliation. The FCA seal also protects the public interest by delaying the time when wrongdoers will start destroying evidence.

Today the FCA is used for a wide variety of whistleblower claims that further the public interest. While defense contracting and health care frauds remain core FCA applications, whistleblowers have also used the FCA to expose and correct substandard care for elderly and disabled Medicare and Medicaid recipients, abusive conditions in animal control facilities, grossly negligent care of veterans' corpses, mislabeling of imported goods, and unsafe food. When cases come out of seal, they can have more impact than any other whistleblower case. The FCA is a model law. States and other countries have adopted laws modeled on the FCA. Congress used the FCA as a model for portions of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

If your litigation proceeds and obtains any orders against the seal provisions, then FCA whistleblowers will risk forced disclosure of their identities to the public and their adversaries., before the government has the chance to investigate and intervene in the action. Such disclosure would subject the whistleblowers to the full range of retaliation that corporate giants, government officials or local thugs might deliver.

For the millions of American workers who must sign confidentiality agreements, the risk of disclosure is also a risk of counterclaims and personal liability for their whistleblowing. Courts have been uneven in their protection of whistleblowers subject to duties of confidentiality. *Compare Niswander v. The Cincinnati Ins. Co*., 529 F.3d 714, 728 (6th Cir. 2008); *Quinlan v. Curtiss-Wright Corp*., 204 N.J. 239 (2010). The FCA's seal offers whistleblowers protection from counterclaims based on the agreements and policies most large companies foist on all their employees.

The FCA seal allows whistleblowers to seek new employment before they are publicly identified as whistleblowers that subjected their employers to massive fraud liability. This opportunity is particularly important to those whistleblowers who are petrified of being blacklisted. The FCA seal is effective at the most important time for the prospective whistleblower – at the beginning of the process. When the whistleblower is at the highest level of risk in raising concerns about misconduct, the whistleblower can look forward to the time of protected confidentiality until a government investigation is completed.

Indeed, the mere existence of your lawsuit has a present deterrent effect on whistleblowers. Whistleblowers with claims under seal now are in jeopardy of having their identities disclosed

before the government completes its investigation. In many parts of the world, a whistleblower's disclosure of an official's misconduct can subject the whistleblower to extrajudicial execution.

Confidentiality is a protection that is important to many whistleblowers. GAP's *Courage without Martyrdom: The Whistleblower's Survival Guide*, p. 3, states, "You may want to remain anonymous or you may choose to go public."[2] At page 7, the *Guide* states, "You almost surely will suffer some level of retribution or harassment for living the values of a public servant." On pages 10-11,the *Guide* applies this idea to the FCA:

> Realistically, the odds of cashing in from a whistleblower suit are akin to winning the lottery. The odds of painful and protracted reprisal, on the other hand, are a good bet. It would be wiser to invest in the lottery: you will not get fired for losing, or risk being blacklisted in your profession even if you win.

Page 11 continues, "The positive side of being anonymous is that you may protect your career. . . . it can allow you to maintain your insider's position, and to witness how the bureaucracy attempts to cover up the fraud." Finally, "Once public whistleblowers are exposed they usually are isolated from the bureaucracy and the evidence." GAP's own web page for intakes assures whistleblowers of their confidentiality.[3] If lawyers had to advise whistleblowers that their identities might become known as soon as they file an FCA qui tam lawsuit, the public would lose the disclosures of all the whistleblowers deterred from ever filing.

B. The FCA's seal provisions assist both the whistleblower and the government in proving the existence of massive frauds and collecting full remedies.

There are two main reasons why prospective whistleblowers choose not to come forward: (1) fear of retaliation, and (2) belief that the government will do nothing. The FCA seal provisions not only ameliorate the fear of retaliation, as discussed above, but they also assuage concerns about government inaction.

Whistleblowers are more likely to win their cases when the government decides to intervene. Government intervention is more likely when the government has the time to complete a thorough and confidential investigation. Impediments on the government's ability to complete its investigation will harm the whistleblower's odds of success, and thus the law's success as well.

There is widespread agreement about the success of the FCA. As the Fourth Circuit noted, the U.S. government recovered over $3.1 billion last year as a result of FCA claims filed by whistleblowers under this law. Since 1986, the government has recovered more than $27 billion. Whistleblowers have filed 63% of FCA cases since 1987. While whistleblowers filed only 8% of FCA matters in 1987, they filed 80% of FCA matters in 2010. These outcomes are much better than "invest[ing] in the lottery."

A key component of the FCA's strength is the seal. It allows the whistleblower and the government time to collect and preserve evidence before the perpetrators can destroy that evidence. The government has more time to meet with the whistleblower, analyze the allegations, compare those allegations with other available evidence, and plan for the acquisition of additional evidence

---

2 http://www.whistleblower.org/storage/documents/Courage_without_Martyrdom_1.pdf

3 http://www.whistleblower.org/component/content/article/70

through the means most likely to be successful. When government officials feel rushed, they will be more prone to make mistakes or decline taking these cases.

How would a government investigation of organized crime fare if the government were required to publish in the local newspaper every allegation it was investigating? The notice to the perpetrators would immediately prompt measures to suppress or destroy evidence and intimidate witnesses. The largest fraudsters are organizations that can engage in precisely the same campaigns of intimidation and destruction of evidence.

The FCA defense firm, Gibson Dunn, issued its 2010 report on the FCA last January and explained that:

> often, a defendant named in a *qui tam* action may be unaware of the action for a lengthy period of time, during which time whistleblowers may be surreptitiously collecting evidence of wrongdoing, all the while allowing potentially fraudulent practices to continue and potential damages to mount (when, for example, a corporate defendant is unaware of improper conduct secretly carried out by an agent or employee).[4]

Each victory under the FCA vindicates free speech. Through each victory, a whistleblower's allegation of fraud is validated, and others are encouraged to come forward. If ACLU v. Holder proceeds and limits the protections of the FCA seal, it will do irreparable harm to the success of the FCA. In turn, it will further discourage whistleblowers from coming forward.

C. The nature of free speech issues has changed since adoption of the First Amendment and with respect to the workplace, the public interest is on the side of protecting speakers from modern forms of intimidation.

When the states ratified the First Amendment in 1791, ninety (90%) of Americans derived their sustenance from agriculture. Today nearly all Americans are dependent on an employer for their income. Whereas the major threat to free speech in 1791 was government, today the biggest threat is the boss who can fire the employee for any reason except an illegal reason. Laws protecting whistleblowers are uneven, and non-existent in many industries. Even where laws exist, they are only as good at the people who decide on whether they were violated.

To be clear, government remains a threat to free speech in a number of areas. We are certainly familiar with the ACLU's work in protecting unpopular political activity. The principles protecting political speech equally apply in the context of corporate whistleblowers who face retaliation for engaging in speech.

One line of particularly relevant landmark cases held that an important component of free speech is the right to engage in speech without having one's identity disclosed. *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (holding that "compelled disclosure" could expose members to "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."); *NAACP v. Button*, 371 U.S. 415 (1963); *Management Information Technologies, Inc. v. Alyeska Pipeline Service, Co.*, 151 F.R.D. 478 (D.D.C. 1993) ("The Court is unwilling to subject non-parties who work for Alyeska or its owner companies to the possible retaliation that frequently results when a whistleblower is identified."). In another case, GAP itself intervened to argue that that

[4] http://www.gibsondunn.com/publications/pages/2010YearEndFalseClaimsActUpdate.aspx

disclosure of the identities of the whistleblowers would chill GAP's and the whistleblowers' "First Amendment associational rights" in their promotion of nuclear safety. *United States v. Garde*, 673 F.Supp. 604, 607 (D.D.C.1987), appeal dismissed 848 F.2d 1307 (D.C.Cir. 1988).

Statutory protections for whistleblowers came about in order encourage whistleblowers to come forward with information about fraud and illegality. The purpose of the employee protections, therefore, is to afford protection for those who help to protect the environment, assist the government in obtaining compliance, and participate in other activities that promote the statutory objectives. *Devereux v. Wyoming Association of Rural Water,* 93-ERA-18 (Sec'y, October 1, 1993); *Tyndall v. U.S. Environmental Protection Agency,* 93-CAA-6, 95-CAA-5 (ARB, June 14, 1998). The whistleblower protection laws were passed in order to "encourage" employees to report safety violations and protect their reporting activity. *English v. General Electric Co.*, 496 U.S. 72, 110 S.Ct. 2270, 2277 (1990); *Wagoner v. Technical Products, Inc.*, 87-TSC-4, D&O of SOL, p. 6 (November 20, 1990)(the "paramount purpose" behind the whistleblower statutes is the "protection of employees"). In *Passaic Valley Sewerage Comm. v. Department of Labor*, 992 F.2d 474, 479 (3rd Cir. 1993), the Third Circuit stated:

> . . . from the legislative history and the court and agency precedents . . . it is clear that Congress intended the 'whistleblower' statutes to be broadly interpreted to achieve the legislative purpose of encouraging employees to report hazards to the public and protect the environment by offering them protection in their employment.

In the modern context, the FCA seal can act as a bulwark of a whistleblower's First Amendment protection to speak up about misconduct of his or her employer while minimizing the chilling effect of retaliation. Without the added protection of the seal, individuals who might otherwise come forward with information will remain silent. If you proceed with your claims in *ACLU v. Holder*, you could dry up an important safe harbor for many whistleblowers.

D. The balance of costs and benefits weighs heavily in favor of the FCA seal provisions.

As the Fourth Circuit noted in the majority opinion, FCA plaintiffs remain free to disclose their concerns about fraud and illegality even while an FCA seal is in place. Some whistleblowers choose to make disclosures before or while their *qui tam* claim is under seal, but most do not. Surely we agree that the First Amendment includes both a right to speak and a right not to speak. *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796-97, 108 S.Ct. 2667, 2677-78, 101 L.Ed.2d 669 (1988).

Every automatic seal is limited to 60 days. A judge reviews any extension of the seal in order to assure that the extension is in the public interest. The whistleblower has a right to fully brief the court on any reason why the seal should be lifted in whole or in part. Every seal is temporary and will eventually expire. The public's right to know what claim was asserted and how their government and court's responded will eventually be satisfied in every case.

We share your frustration with how long a seal might remain in place. We can join together in urging Congress to invest in hiring more attorneys and investigators for the Department of Justice's Civil Frauds Section. The public interest can be served by applying the resources needed to complete investigations without delay. As FCA investigations more than pay for themselves through the funds recovered, this policy option should be attractive.

Against the minimal cost to the public from the delay caused by the seal, weigh the number of whistleblowers who will never file at all due to concern about the effects of immediate disclosure of

their claims. Our experience in actually representing whistleblowers with *qui tam* claims informs us about the importance of the seal in their decisions to initiate whistleblower actions. We contend that the seal does more good by encouraging whistleblowers to file their claims. No whistleblower is ever prevented from disclosing their substantive concerns if they want to, and the public will eventually learn about all FCA claims.

Conclusion

A challenge to the FCA risks undermining America's most effective whistleblower law. In order to address the significant public interest related issues raised by this case, and any potential appeal, we ask for a face-to-face meeting with the client-decision makers. Such a meeting will be the most effective way to exchange the views and information on this critical issue. Your client's decision makers would benefit from the unfiltered background and perspective we can offer. We ask to meet before any client pursues further review of *ACLU v. Holder*. We await your prompt reply.

Thank you in advance for your careful attention to these matters.

Sincerely yours,

Stephen M. Kohn, Executive Director, sk@whistleblowers.org
Michael D. Kohn, President mk@whistleblowers.org
David Colapinto, General Counsel, dc@whistleblowers.org
Richard R. Renner, Legal Director, rr@whistleblowers.org
Lindsey M. Williams, Director of Advocacy & Development, lmw@whistleblowers.org
National Whistleblowers Center
3238 P Street, NW
Washington, DC 20007
(202) 342-1903
(202) 342-1904 (Fax)