Record No. 09-1847

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JASON MANN,
Plaintiff-Appellant,

v.

HECKLER & KOCH DEFENSE, INC.
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Virginia
District Court No. 1:08-CV-611 (JCC/TCB)

BRIEF OF *AMICI CURIAE* URGING REVERSAL

In Support of Appellant

Richard R. Renner
Attorney for *Amici Curiae*
National Whistleblower Legal
Defense and Education Fund
3233 P St., NW
Washington, DC 20007-2756
(202) 342-6980
(202) 342-6984 (FAX)
rr@kkc.com

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 09-1847 Caption: Mann v. Heckler & Koch Defense, Inc.

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4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
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No. 09-1847 Caption: Mann v. Heckler & Koch Defense, Inc.

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Richard M. Kime
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Rules

Other Authorities

Cases

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STATEMENT OF INTEREST OF THE AMICI AND SOURCE OF AUTHORITY TO FILE

The **Metropolitan Washington Lawyers Association (MWELA)** and the **National Whistleblowers Center (NWC)** have filed a separate motion pursuant to Rule 29 of the Federal Rules of Appellate Procedure (FRAP) for leave to file this, their brief of *amici curiae*. The *amici* are professional associations of attorneys with an inherent interest in assuring that their members' clients' are legally protected from retaliation when they file retaliation claims under the False Claims Act. Their statements of interest are set out below. As professional associations of attorneys, *amici* have experience helpful to this Court in adjudicating the matter at hand, as explained in the brief below.

The **Metropolitan Washington Lawyers Association (MWELA)** is a legal membership organization with over 220 members who represent employees in employment and civil rights litigation in the Washington area. MWELA was founded in 1991 as the local chapter of the National Employment Lawyers Association, a national organization of attorneys who specialize in employment law. MWELA conducts continuing legal education programs. MWELA also participates as amicus curiae in

important cases in the three jurisdictions in which its members primarily practice – the District of Columbia, Maryland and Virginia. MWELA has participated as *amicus curiae* in the following recent cases: *Manor Country Club v. Flaa.*, 387 Md. 297 (2005); *Towson Univ. v. Conte*, 376 Md. 543 (2003); *Friolo v. Frankel*, 373 Md. 501 (2003); *Barbour v. Wash. Metro. Area Transit Auth*., 374 F.3d 1161, 1163 (D.C. Cir. 2004); *Lively v. Flexible Packaging Ass'n*, 830 A.2d 874 (D.C. 2003); *Hollins v. Fed Nat'l Mortg. Ass'n*, 760 A.2d 563 (D.C. 2000); *MacIntosh v. Bldg. Owners and Managers Ass'n Int'l*, 355 F.Supp. 2d 223 (D.D.C. 2005); and *Lance v. United Mine Workers of Am. 1974 Pension Trust*, 400 F. Supp.2d 29 (D.D.C. 2005).

The outcome of this case will directly impact future client representation as MWELA members depend on the ability to bring legal action on behalf of their clients. This ability will be dramatically curtailed if employers could lawfully subject whistleblowers to retaliation on account of filing retaliation claims under the False Claims Act.

Established in 1988, the **National Whistleblowers Center (NWC)** is a non-profit tax-exempt public interest organization. The Center regularly assists corporate employees throughout the United States who suffer from illegal retribution for lawfully disclosing violations of federal law. NWC maintains a nationwide attorney referral service for whistleblowers, and

provides publications and training for attorneys and other advocates for whistleblowers. NWC has participated as amicus curiae in the following cases: *English v. General Electric*, 110 S.Ct. 2270 (1990), *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505 (1985); *EEOC v. Waffle House*, 534 U.S. 279 (2002); *Haddle v. Garrison*, 525 U.S. 121 (1998); *Vermont Agency Of Natural Resources v. United States ex rel. Stevens*, (98-1828) 529 U.S. 765 (2000); *Beck v. Prupis*, 529 U.S. 494 (2000).

The *amici* advocate on behalf of whistleblowers because these truth-tellers uncover and rectify grave problems facing our federal government and our society at large. Whistleblowers are a bulwark of accountability against those who would corrupt government or corporations. Therefore aggressive defense of whistleblowers is crucial to any effective policy to address wrongdoing or abuse of power. Conscientious employees who point out illegal or questionable practices should not be forced to choose between their jobs and their conscience.

Whistleblowers who take an ethical stand against wrongdoing often do so at great risk to their careers, financial stability, emotional well-being and familial relationships. Society should protect and applaud whistleblowers, because they are saving lives, preserving our health and safety, and protecting vital fiscal resources.

Amici respectfully submit this brief to assist the Circuit Court in the resolution of this case. *Amici*'s interest in the case is to reverse the District Court's erroneous analysis of the scope of protection for whistleblowers under the False Claims Act, 31 U.S.C. Sec. 3730(h). *Amici* have an interest in assuring that when they file retaliation claims on behalf of whistleblowers, they will not be subjecting those whistleblowers to further retaliation. *Amici* seek application of Section 3730(h) that is consistent with its plain meaning and intent.

Pursuant to Fed. R. App. P. 29 (a) and (b), *amici* are contemporaneously filing with this Court the above motion for leave to file this brief.

Summary of the Argument

Contrary to the district court's ruling, 31 U.S.C. § 3730(h) is clear on its face in protecting employees when they initiate any proceeding under the False Claims Act (FCA), including claims of retaliation under 31 U.S.C. § 3730(h). This holding is consistent with the legislative history, the FCA's remedial purpose, and with case law that will imply a cause of action for retaliation even in statutes that do not create it explicitly.

ARGUMENT

I. The plain and clear language of the False Claims Act protects those who file retaliation claims under that Act.

The plain meaning of 31 U.S.C. § 3730(h) could not be clearer. If an individual files a complaint pursuant to the False Claims Act, it is unlawful for an employer to retaliate on that basis. At the time this action arose, the FCA provided[1] at 31 U.S.C. § 3730(h) as follows:

> (h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer **because of lawful acts done by the employee on behalf of the employee** or others **in furtherance of an action under this section, including** investigation for, ***initiation of***, testimony for, or assistance in **an action filed** or to be filed **under this section**, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may

[1] Effective May 20, 2009, Congress amended this paragraph to broaden the scope of protection for employees who take action to stop a violation. The amended version protects all lawful acts, "in furtherance of other efforts to stop 1 or more violations of this subchapter." As filing a retaliation claim is a lawful act to stop a violation of 31 U.S.C. § 3730(h), and that is part of the subchapter, it is still protected activity under the amended version. The amendment does not affect this appeal. The amendment is not retroactive.

> bring an action in the appropriate district court of the United States for the relief provided in this subsection. [Emphasis added.]

The language in bold makes clear that Congress intended to protect employees from retaliation for filing legal actions under the False Claims Act. The statute's use of the word "initiation" makes it inescapable that filing a claim in a civil action is protected activity. The anti-retaliation paragraph is itself a part of Section 3730. Thus, filing a retaliation claim under Section 3730(h) is filing an action "under this section." The plain language of the statute therefore protects the filing of a retaliation claim under 31 U.S.C. § 3730(h). Indeed, this language is clear enough and broad enough to protect an employee merely for stating an intention to initiate proceedings in the future. *Eberhardt v. Integrated Design & Const., Inc*., 167 F.3d 861, 867 (4th Cir. 1999) (noting that FCA protects "initiation of . . . an action filed or to be filed under this section.").

The court below erred, therefore, in saying, "This language is ambiguous regarding whether 'action under this section' includes all actions brought under § 3730 or only those under §§ 3730(a) (Actions by the Attorney General) and (b) (Actions by private persons)." October 7, 2008, Memorandum Opinion, p. 13. The court below based its argument on *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545

U.S. 409, 417 (2005). In *Graham County*, the Supreme Court resolved a dispute about the statute of limitations for retaliation claims, holding that 31 U.S.C. § 3731(b)(1) does not apply to such claims. The Supreme Court looked at Congress' use of the phrase "action brought under section 3730" in 31 U.S.C. § 3731(c) [now designated 31 U.S.C. § 3731(d)] and concluded that Congress used the phrase imprecisely there as it could only apply to *qui tam* actions and not retaliation actions where the government would not be a party and therefore would have no burden of proof at all. In 31 U.S.C. §3730(h), there is no such ambiguity.

Statutory analysis begins with the plain language of the statute, "the language used by Congress." *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979)). To best give effect to the intent of Congress, those words must be given their "ordinary meaning." *Am. Tobacco Co.*, 456 U.S. at 68 (quoting *United States v. Am. Trucking Ass'n*, 310 U.S. 534, 542 (1940)). "By reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole," a court can determine whether a statute is plain and unambiguous. *See Robinson v. Shell Oil Co.,* 519 U.S. 337, 341 (1997).

As the plain language of this statute says the opposite of the order in

the trial court's October 7, 2008, Memorandum Opinion (pp. 13-14), the *amici* ask this Court to reverse that order.

II. The Legislative History of the FCA Clearly Shows that Congress Intended to Protect Whistleblowers from Retaliation.

While legislative history is not the conclusive source for judicial interpretation, courts are authorized to look to the legislative history when questions of statutory construction arise. Despite the apparent clarity of the whistleblower protection of FCA, if this Court were to find that there is any ambiguity in the statute, it is appropriate to refer to the legislative history. *See, e.g., Toibb v. Radloff*, 501 U.S. 157, 162, 111 S.Ct. 2197 (1991) ("…although a court appropriately may refer to a statute's legislative history to resolve statutory ambiguity, there is no need to do so here [because the statute is not unclear]."); *United States v. Gonzales,* 520 U.S. 1, 6, 117 S.Ct. 1032, 1035, 137 L.Ed.2d 132 (1997); *Blum v. Stevenson*, 465 U.S. 886, 896, 104 S.Ct. 1541, 1548 (1984) ("Where, as here, the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear."); *United States v. Rast*, 293 F.3d 735, 737 (4th Cir. 2002) ("When the language of a statute is unclear, [we] may look to the

legislative history for guidance in interpreting the statute."). Legislative history is not enough to "override the 'plain meaning' rule." *In re Sunterra Corp.*, 361 F.3d 257, 265 (4th Cir. 2004). However, when legislative history is in agreement with the plain meaning of the statute, it furthers supports the legislative mandate from the unambiguous statutory language.

Here, the Act's legislative history expressly states:

> The 'protected activity' under this section includes any 'good faith' exercise of an individual 'on behalf of himself or other of *any option offered by this Act*, including … *an action filed or to be filed under this act*.' S. Rep. 99-345, 34 (1986) (emphasis added).

This is broad language. As such, it reflects the broad scope that is appropriate to accomplish the remedial purpose of protecting those who speak up about violations of the law intended to protect the public fisc. Congress specifically stated that Section 3730(h) would "halt companies . . . from using the threat of economic retaliation to silence 'whistleblowers,' as well as assure those who may be considering exposing fraud that they are legally protected from retaliatory acts." *Id.* at 34. In the cause of bringing fraud to light, the federal government and whistleblowers are allies. Congress set our national policy to reward qualified whistleblowers with a financial *qui tam* award, and to protect all FCA whistleblowers from

retaliation. Certainly, allowing employers to retaliate against those to file claims in court under any provision of the FCA is contrary to the Congressional purpose of encouraging whistleblowers to come forward.

III. The public policy gives the broadest scope of protection to employees who participate in official proceedings to enforce the law.

The public policy against retaliation is so strong that the U.S. Supreme Court has found protection against retaliation in laws that do not explicitly provide a remedy for retaliation. *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005) (Title IX); *CBOCS West, Inc. v. Humphries,* 553 U.S. ___, 128 S. Ct. 1951 (2008) (42 U.S.C. § 1981); *Gomez-Perez v. Potter*, 553 U.S. ___ (2008) (ADEA for federal employees). Protected activity within the meaning of Title VII includes (1) opposing an unlawful employment practice or (2) participating in any manner in a Title VII investigation, proceeding, or hearing. *Kubicko v. Ogden Logistics Services*, 181 F.3d 544, 551 (4th Cir. 1999). As participation clauses serve the added purpose of assuring that all persons can initiate and participate in proceedings, its scope of protection is broader than for those laws that protect only opposition to unlawful conduct.

The caselaw for participation clause protection is most advanced under Title VII of the Civil Rights Act of 1964. "The participation clause is designed to ensure that Title VII protections are not undermined by retaliation against employees who use the Title VII process to protect their rights." *Brower v. Runyon*, 178 F.3d 1002, 1006 (8th Cir. 1999). See, *e.g., Deravin v. Kerik*, 335 F.3d 195, 203 (2d Cir.2003) ("[C]ourts have consistently recognized [that] the explicit language of § 704(a)'s participation clause is expansive and seemingly contains no limitations."); *Booker v. Brown & Williamson Tobacco Co*., 879 F.2d 1304, 1312 (6th Cir. 1989) (noting that "courts have generally granted less protection for opposition than for participation" and that the participation clause offers "exceptionally broad protection"); *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978) (stating that the opposition clause serves "a more limited purpose" and is narrower than the participation clause); *Pettway v. American Cast Iron Pipe Co*., 411 F.2d 998, 1006 n. 18 (5th Cir. 1969) (noting that the participation clause provides "exceptionally broad" protection for employees covered by Title VII). Protections for participation apply regardless of the merits of the underlying proceeding. *Id*; *Glover v. South Carolina Law Enforcement Div.*, 170 F.3d 411 (4th Cir. 1999). The court below, therefore, erred when it stated, "there is no explicit 'default

rule' for interpreting whistleblower protection provisions . . .." October 7, 2008, Memorandum Opinion, pp. 13-14. There is such a "default rule" that protects employees whenever they participate in enforcement proceedings "in any manner." That rule protects employees from retaliation even for initiating legal action against retaliation. *Johnson v. University of Cincinnati*, 215 F.3d 561, 582 (6th Cir. 2000).

The Supreme Court has recognized that the FCA serves a remedial purpose in deterring all types of fraud, without qualification, that might result in financial loss to the Government. *United States v. Neifert-White Co*., 390 U.S. 228, 232, 88 S.Ct. 959, 961-962, 19 L.Ed.2d 1061 (1968). In the various contexts in which questions of the proper construction of the Act have been presented, the Court has consistently refused to accept a rigid, restrictive reading. A participation clause serves the public interest by protecting the integrity of official proceedings to enforce this remedial law. If employers could use the power of the paycheck to direct if, when or how its employees might participate, then the truth-seeking process would be severely hampered.

CONCLUSION

If the district court decision is allowed to stand, Section 3730(h) will lose a crucial element and discourage employees from coming forward to

speak up against fraud, abuse, mismanagement, and waste of taxpayer funds. Accordingly, the *amici* respectfully request that the Court reverse the district court's erroneous decision.

Respectfully Submitted by:

_/s/Richard R. Renner_____
Richard R. Renner
Attorney for *Amici Curiae*
National Whistleblower Legal
Defense and Education Fund
3233 P St., NW
Washington, DC 20007-2756
(202) 342-6980
(202) 342-6984 (FAX)
rr@kkc.com

RULE 32(a)(7)(C) CERTIFICATE

I HEREBY CERTIFY that the foregoing Brief for *Amici Curiae* complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The Brief is composed in a 14-point proportional typeface, Times New Roman. As reported by the Microsoft Word 2008 for Mac application, the contents of the Brief (exclusive of those parts permitted to be excluded under FRAP and the local rules of this court) contain 2,573 words.

Respectfully submitted by:

_/s/Richard R. Renner_____
Richard R. Renner

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I HEREBY CERTIFY that on December 21, 2009, I caused two copies (eight to the Clerk) of the foregoing Brief of *Amici Curiae* Urging Reversal, in Support of Appellant, to be served by U.S. mail service or express delivery, postage prepaid, upon:

R. Scott Oswald
Jason Zuckerman
The Employment Law Group, P.C.
888 17th Street, NW, Suite 900
Washington, D.C. 20006

Robert P. Charrow, Esq.
Greenberg Traurig, LLP
2101 L Street, N.W., Suite 1000
Washington, D.C. 20037
Tel: (202) 533-2396
Fax: (202) 331-3101
charrowr@gtlaw.com

U.S. Court of Appeals for the Fourth Circuit
Patricia S. Connor, Clerk
1100 East Main Street, Suite 501
Richmond, Virginia 23219-3517

_/s/Richard R. Renner_____
Richard R. Renner

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 09-1847

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Metro Washington Employment Lawyers Association as the
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☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s)

/s/ Richard R. Renner
(signature)

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Richard R. Renner
Name (printed or typed)

202-342-6980
Voice Phone

National Whistleblowers LDEF
Firm Name (if applicable)

202-342-6984
Fax Number

3233 P St. NW

Washington, DC 20007
Address

rr@whistleblowers.org
E-mail address (print or type)

☐ I am not participating in this case. Appellate counsel is:

(Name) (Phone)

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Richard R. Renner
Name (printed or typed)

202-342-6980
Voice Phone

National Whistleblowers LDEF
Firm Name (if applicable)

202-342-6984
Fax Number

3233 P St. NW

Washington, DC 20007
Address

rr@whistleblowers.org
E-mail address (print or type)

☐ I am not participating in this case. Appellate counsel is:

(Name) (Phone)

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