RECORD NUMBER: 09-2086

United States Court of Appeals

for the

Fourth Circuit

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

Plaintiffs/Appellants,

– v. –

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

Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA

BRIEF FOR AMICUS CURIAE TAXPAYERS AGAINST FRAUD EDUCATION FUND IN SUPPORT OF THE DEFENDANTS/ APPELLEES AND SEEKING AFFIRMANCE OF THE DISTRICT COURT'S ORDER

J. MARK VEZINA
VEZINA & GATTUSO, LLC
401 Weyer Street
PO Box 461
Gretna, Louisiana 70054
(504) 368-5223

ZACHARY A. KITTS
COOK & KITTS, PLLC
3554 Chain Bridge Road, Suite 402
Fairfax, Virginia 22030
(703) 865-7601
Counsel for *Amicus Curiae* TAFEF

JOSEPH E. B. WHITE
CLEVELAND LAWRENCE, III
TAXPAYERS AGAINST FRAUD EDUCATION FUND
1220 19th Street, NW
Washington, DC 20036
(202) 296-4826

COUNSEL PRESS • VA – (800) 275-0668

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 09-2086 Caption: ACLU et al. v. Eric Holder, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

TAFEF (name of party/amicus) who is Amicus (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
   If yes, identify all such owners:

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
   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
   If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

****

I certify that on Dec. 30, 2009 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Zachary A. Kitts /s/ (signature) 12/30/2009 (date)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules, Statutes and Other Authorities

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Curiae Taxpayers Against Fraud Education Fund ("TAFEF") is a nonprofit, tax exempt organization dedicated to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to publicize the *qui tam* provisions of the Federal False Claims Act (the "Act"), has participated in litigation as a *qui tam* plaintiff ("relator") and as *amicus curiae*, and has provided congressional testimony regarding ways to improve the Act. TAFEF has a profound interest in ensuring that the Act is appropriately interpreted and applied. TAFEF strongly supports vigorous enforcement of the Act based on its many years of work focused on the proper interpretation of the Act.

TAFEF is the leading nonprofit public interest organization dedicated to combating fraud against the federal and state governments through its education of the public, the legal community, legislators, and others about the False Claims Act and its *qui tam* provisions. TAFEF supports vigorous enforcement of the Act by contributing its understanding of the Act's proper interpretation and application and by working in partnership with *qui tam* relators, private attorneys representing relators, and the Government to effectively prosecute meritorious *qui tam* suits.

TAFEF, which is based in Washington, D.C., works with a network of more than 300 attorneys nationwide who represent *qui tam* relators in False Claims Act

litigation. In the past few years, TAFEF has greatly expanded its efforts towards public awareness and education regarding the False Claims Act.

TAFEF publishes the False Claims Act and Q*ui Tam* Quarterly Review, a quarterly publication that provides an overview of case decisions, settlements, and other developments under the Act. Past issues of the publication are available on line at www.TAF.org/quarterlypdf.htm.

TAFEF has produced and makes available a variety of other resources regarding the False Claims Act, including: *Advising the* Qui Tam *Whistleblower: From Identifying a Case to Filing Under the False Claims Act; Reducing Health Care Fraud, An Assessment of the Impact of the False Claims Act*; *Fighting Medicare Fraud: More Bang for the Federal Buck*; *Reducing Medicaid Fraud: The Potential of the False Claims Act*; and *Reducing Medicare and Medicaid Fraud by Drug Manufacturers*. Most of these publications are available on line at www.TAF.org/publications.htm

TAFEF presents a yearly educational conference for False Claims Act attorneys, typically attended by more than 300 practitioners from around the nation.

TAFEF collects and disseminates information concerning the False Claims Act and its *qui tam* provisions. TAFEF regularly responds to inquiries from a variety of sources, including the general public, the legal community, the media,

and government officials. TAFEF maintains a comprehensive False Claims Act library, which is open to the public, and TAFEF has an educational presence on the internet. TAFEF also has provided congressional testimony, conference presentations, and training programs on the False Claims Act. TAFEF and its sister nonprofit, the False Claims Act Legal Center, have filed *amicus* briefs on important legal and policy issues in False Claims Act cases before numerous federal courts, including the United States Supreme Court. TAFEF possesses extensive knowledge about the origin and purposes of the False Claims Act amendments of 1986 and has experience with its implementation. As such, TAFEF hopes this Brief as Amicus Curiae in support of the Government's argument and in support of the District Court's correct judgment will assist the Court's consideration of the False Claims Act issues raised by ACLU, *et al.* in this case.

AMICUS BRIEF FILED WITH THE CONSENT OF ALL PARTIES

Prior to filing this brief, TAFEF sought and received the consent of counsel for all parties to the filing of this amicus brief.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court was correct when it determined that the provisions of the False Claims Act do not violate the First Amendment regarding access to a complaint or its related docket before intervention and unsealing of the matter;
2. Whether the district court was correct when it held that the Plaintiffs lack of standing to challenge the False Claims Act's effect on a relator's ability to disclose the existence of their sealed *qui tam* suits;
3. Whether the District Court was correct when it held that False Claims Act's temporary and limited sealing provisions are consistent with the First Amendment; and
4. Whether the district court correctly rejected the Plaintiffs' claim that the False Claims Act's sealing provisions violate Separation of Powers principles.

SUMMARY OF THE ARGUMENT

Amicus Curiae Taxpayers Against Fraud Education Fund ("TAFEF") respectfully submits this Brief in support of the position of the Appellees. TAFEF hereby adopts and incorporates the factual and legal arguments submitted by the Government in its original Brief. TAFEF submits that the judgment of the District Court was correct, and should be affirmed by this Court.

First, the District Court correctly held that the False Claims Act does not violate any First Amendment right of access to the pleadings in a case, and alternatively, that the seal provisions of the False Claims Act are narrowly tailored to achieve a compelling governmental interest.

Second, the District Court correctly held that Appellants do not have standing to challenge the provisions of the False Claims Act in the name of any real or hypothetical Relator in this action. The District Court also correctly held that filing a relator's complaint under seal is a voluntary act, done in the face of numerous alternatives to disclose fraud, and is necessary to effect the assignment for the relator to receive a bounty or award from the Government's recovery.

Third, the District Court correctly held that the initial limited seal period, as mandated by the False Claims Act, does not infringe or invade the province of an Article III Court and therefore does not violate the Separation of Powers principle.

ARGUMENT

A. The District Court Correctly Dismissed the Appellants' Challenge on a Right-Of-Access Theory and Correctly Held that the Plaintiffs Do Not Have Standing to Assert the Claims they have Pled

The District Court correctly rejected the Appellants' claims that the False Claims Act offends any right of access that exists inherent in the First Amendment. A relator's complaint and required disclosure of evidence do not adjudicate the rights of the parties, as that adjudicative process doesn't begin until an intervention decision is made by the Government. **App.41**. (See also **31 USC §3730(b)(3)**, noting that a "defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.") This cannot happen until the Government elects whether to intervene, and until AFTER the seal has expired or been lifted. The Government correctly argues and the District Court correctly ruled that the seal doesn't implicate any First Amendment right of access to filed pleadings under seal in an FCA case. The Appellants' argument for a common law right of access to the records of the District Court is equally inapplicable to the extent it has not been waived. **App. 49 n.6. and Appellants' Brief p. 22**.

Prior to the unsealing of a relator's complaint, the Government engages in an investigation of the allegations of the complaint to allow it to make an informed

decision whether to intervene. During this time, the relator's complaint is maintained under seal to protect the Government's investigation.

B. The District Court correctly held that the Appellants do not have Standing to Assert the Relief nor the Harm Complained of in their Complaint

On the face of their Complaint, the Appellants have conceded that they never have and do not currently represent the interest of relators in False Claims Act litigation. One of the Appellants, GAP, even urges prospective relators "not to file suit under the FCA unless financial recovery is their only goal." **App. 16 at ¶38**. The District Court was correct in refusing to confer standing on these Appellants to challenge the provisions of the False Claims Act. **Pl. Br. 46**.[1]

TAFEF therefore contends that the Appellants have no standing to challenge the FCA on behalf of theoretical or "hypothetical" arguments. **App. 51**. A remedy exists for relators to challenge the seal, in the action the Relator filed before the district judge assigned to the matter.[2]

C. The District Court was Correct in Holding that the Seal Provisions of the False Claims Act are Consistent with the First Amendment

A relator's right and Article III standing to bring a *qui tam* suit and share in the Government's recovery is a result of the relator's status as a partial assignee of

---

[1] See also **App. 50** ("As the *amicus curiae* have pointed out, plaintiffs have not identified any specific FCA case in which the ACLU, OMB Watch, or GAP has participated.")

[2] **App. 50** ("Any relator who believes his speech is gagged by the seal provisions is free to assert his own rights in the district court where he filed the *qui tam* action.")

the Government's claim. As the Supreme Court stated, an "adequate basis for the Relator's suit for his bounty is to be found in a doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor. The FCA can reasonably be regarded as effecting a partial assignment of the government's damages claimed…[M]ore precisely, we are asserting that a *qui tam* Relator is, in effect, suing as a partial assignee of the United States." ***Vermont Agency of Natural Res. v. U.S. ex rel. Stevens***, 529 U.S. 765, 773-774, 120 S. Ct. 1858, 1864 (2000).

The Appellants fail to acknowledge that, although the provisions of the False Claims Act provide for a monetary incentive for relators to file *qui tam* lawsuits, those provisions are not the exclusive means by which a Relator can bring information to the Government in order to protect the public fisc or advance some compelling public interest.[3]

Importantly, Congress felt that "an effective vehicle for private individuals to disclose fraud is necessary both for meaningful fraud deterrence and for breaking the current 'conspiracy of silence' among Government contractor employees." S. Rep. No. 345, 99th Cong., 2d Sess. (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5279**.** Indeed, since the 1986 amendments to the Act, more

[3] See App 52 ("The statute does not directly 'gag' or suppress speech – the seal merely prevents the existence of a *qui tam* suit from being disclosed. No language in the FCA restricts what the Relator may say, much less restricts any specific content.")

than $24 Billion Dollars have been recovered and, to date, more than 80% of cases prosecuted by the Government have been filed by relators.[4] The False Claims Act's requirement that relators file their complaints under seal serves several important functions that benefit relators as well as the Government. **App 50 n.8**.

As an incentive to relators to file meritorious *qui tam* actions, **31 USC §3730(d)** of the False Claims Act confers an award or bounty, but requires compliance with certain statutory requirements, including the seal provisions, as a condition to receipt of that award. Compliance with conditions to receive monies from the Government is a *sine qua non* to receipt of those monies. **Government Br. p. 33-34**. Relators who bring actions under the False Claims Act always do so **voluntarily** and it is they who invoke the seal.[5] Should a relator choose to violate the FCA's seal provision, the penalty is forfeiture or reduction of any monetary award the Relator would have been entitled to receive, had the procedures of the False Claims Act been followed. See ***U.S. ex rel. Pilon v. Martin Marietta Corp***., 60 F.3d 995, 997 (2nd Cir. 1995).[6] **App 53-54**.

---

[4] See DOJ statistics which can be found at http://www.taf.org/FCA-stats-DoJ-2008.pdf.

[5] The Government correctly notes in its brief at p. 35 that a relator may speak publicly about the underlying facts of a case without violating the seal. *See also* **App. 53**.

[6] *See also* ***U.S. ex rel. Lujan v. Hughes Aircraft,* 67 F.3d 242 (9th Cir 1995)**; ***U.S. ex rel. Windsor v. Dyncorp***, 895 F.Supp. 844, 848 (E.D. Va. 1995); ***U.S. ex rel. Erickson v. American Inst. of Biological Sci.***, 716 F. Supp. 908, 912 (E.D. Va. 1989).

Those requirements of a relator, as the District Court correctly noted, do not violate the First Amendment, but merely set the conditions upon which the partial assignment takes place. By voluntarily invoking the provisions of the False Claims Act and filing a complaint pursuant to the Act, relators agree to maintain the integrity of the seal during the pendency of the Government's investigation in exchange for a share of any recovery the Government receives. **App. 54**.

D. The False Claims Act's Temporary and Limited Seal Provision Does Not Violate the Separation of Powers Doctrine

As the False Claims Act explicitly provides, the initial seal period is not one of unlimited duration. **31 USC §3730(b)(2)** clearly states that the initial seal period is only 60 days.[7] **31 USC §3730(b)(3)** provides that the U. S. Government may, upon a finding of 'good cause,' move the court for extensions of the time period during which the relator's complaint remains under seal. Thus the act itself places the extent or duration of the seal under the DIRECT supervision and auspices of an Article III court.

The Appellants' Separation of Powers argument is flawed. The legislative history of the False Claims Act clearly demonstrates congressional intent to confer upon an Article III judge the discretion, on a case-by-case basis, to determine whether to extend the seal, stating:

[7] The District Court correctly characterizes this initial seal period as a "ministerial act." **App. 55**.

> Subsection (b)(3) of §3730 establishes that the government may petition the Court for extensions of both the 60-day evaluatory period and the time during which the Complaint remains under seal. Extensions will be granted, however, only upon a showing of 'good cause'. **The Committee intends the Court weigh carefully any extensions on the period of time in which the Government has to decide whether to intervene and take over the litigation.**

1986 U.S.C.C.A.N. 5266, 5289 (emphasis added). Since the False Claims Act already specifically provides for the "individualized basis" relief that Appellants complain is lacking, their Separation of Powers argument is misplaced and should be rejected by this Court.

CONCLUSION

WHEREFORE, TAFEF respectfully submits this *amicus curiae* memorandum in support of the District Court's correct opinion, and in support of the Government's assertions and arguments. The judgment of the District Court should be affirmed. As a strong proponent of the Act itself and relators who bring *qui tam* suits, TAFEF respectfully urges this Honorable Court to reject the Appellants' baseless challenge to the most effective tool in the Government's arsenal to combat fraud on the public fisc.

Date: February 3, 2010

Respectfully submitted,

/s/ Zachary A. Kitts
Zachary A. Kitts
Virginia Bar # 47052
Counsel for Amicus Curiae Taxpayers Against Fraud Education Fund
Cook Kitts & Francuzenko, PLLC
3554 Chain Bridge Road
Suite 402
Fairfax, Virginia 22030
Phone: 703-865-7480
Fax: 703-434-3510
Email: zkitts@cookkitts.com

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-2086 **Caption:** ACLU, et al. v. Eric Holder, et al.

CERTIFICATE OF COMPLIANCE UNDER FED. R. APP. P. 32(A)(7)

COUNSEL MUST COMPLETE AND INCLUDE THIS CERTIFICATE IMMEDIATELY BEFORE THE CERTIFICATE OF SERVICE FOR ALL BRIEFS FILED IN THIS COURT.

1. This brief has been prepared using (SELECT AND COMPLETE ONLY ONE):

☑ Fourteen point, proportionally spaced, serif typeface (such as CG Times or Times New Roman). Do NOT use sans serif typeface such as Arial or any font which does not have the small horizontal or vertical strokes at the ends of letters). Specify software name and version, typeface name, and point size below (for example, WordPerfect 8, CG Times, 14 point):

MS Word 2007, Times New Roman, 14 point

☐ Twelve point, monospaced typeface (such as Courier or Courier New). Specify software name and version, typeface name, and point size below (for example, WordPerfect 8, Courier, 12 point):

_____

2. EXCLUSIVE of the corporate disclosure statement; table of contents; table of citations; statement with respect to oral argument; any addendum containing statutes, rules, or regulations; and the certificate of service, the brief contains (SELECT AND COMPLETE ONLY ONE):

☐ _____ Pages (give specific number of pages; may not exceed 30 pages for opening or answering brief or 15 pages for reply brief); OR

☐ 2,491 Words (give specific number of words; may not exceed 14,000 words for opening or answering brief or 7,000 for reply brief)--*Some word processing programs, including certain versions of Microsoft Word, do not automatically count words in footnotes, making it necessary to manually add the word count from footnotes to obtain the total word count*; OR

☐ _____ Lines of Monospaced Type (give specific number of lines; may not exceed 1,300 lines for opening or answering brief or 650 for reply brief; may be used ONLY for briefs prepared in monospaced type such as Courier or Courier New).

I understand that a material misrepresentation may result in the Court's striking the brief and imposing sanctions. If the Court so requests, I will provide an electronic version of the brief.

/s/ Catherine B. Simpson — 2/3/10

Signature of Filing Party — Date

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Benjamin Elihu Wizner
Christopher A. Hansen
Jameel Jaffer
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street
New York, NY 10004-2400

Eric Fleisig-Greene
U. S. DEPARTMENT OF JUSTICE
Civil Division, Appellate Section
Main Building
10th & Pennsylvania Avenue, NW
Washington, DC 20530-0000

Rebecca Kim Glenberg
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF VIRGINIA
530 East Main Street
Richmond, VA 23219-0000

Richard W. Sponseller
OFFICE OF THE UNITED STATES ATTORNEY
2100 Jamieson Avenue
Alexandria, VA 22314-5194

/s/ Catherine B. Simpson
Counsel Press LLC
1011 East Main Street
Suite LL-50
Richmond, Virginia 23219
(804)648-3664

Filing and service were performed by direction of counsel