IN THE UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 09-2697

GREGORY M. PERIUS,
Plaintiff-Appellant,

v.

ABBOTT LABORATORIES
Defendant-Appellee.

On Appeal From The United States District Court
Northern District of Illinois, Eastern Division

Case No. 07 C 1251

Honorable David H. Coar, Presiding

# BRIEF OF AMICI CURIAE

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Dated: April 26, 2010

**CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Appellate Court No: 09-2697

Short Caption: Perius v. Abbott Laboratories

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

GOVERNMENT ACCOUNTABILITY PROJECT, TAXPAYERS AGAINST FRAUD EDUCATION FUND,

NATIONAL EMPLOYEMENT LAWYERS ASSOCIATION, AND NATIONAL WHISTLEBLOWERS CENTER

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Maduff & Maduff, LLC; Murphy Anderson PLLC

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

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Attorney's Signature: _____ Date: April 26, 2010

Attorney's Printed Name: Aaron B. Maduff

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** [X] **No** [ ]

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Attorney's Signature: _____ Date: April 26, 2010

Attorney's Printed Name: Michael T. Anderson

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None

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Attorney's Signature: _____ Date: April 26, 2010

Attorney's Printed Name: Ann Lugbill

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** [X] **No** [ ]

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**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

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| GREGORY M. PERIUS,<br>Plaintiff - Appellant<br><br>v.<br><br>ABBOTT LABORATORIES,<br>Defendant - Appellee | Case No. 09-2697<br><br>On Appeal from the<br>Honorable David Coar<br>United States District Court Northern<br>District of Illinois |

# BRIEF OF AMICI CURIAE GOVERNMENT ACCOUNTABILITY PROJECT, TAXPAYERS AGAINST FRAUD EDUCATION FUND, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AND NATIONAL WHISTLEBLOWERS CENTER IN SUPPORT OF APPELLANT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Cases

Statutes



Rules



Other

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| | |
|---|---|
| GREGORY M. PERIUS,<br>Plaintiff - Appellant<br><br>v.<br><br>ABBOTT LABORATORIES,<br>Defendant - Appellee | Case No. 09-2697<br><br>On Appeal from the<br>Honorable David Coar<br>United States District Court Northern<br>District of Illinois |

## I. STATEMENTS OF INTEREST

The issue here is whether the anti-retaliation provision of 31 U.S.C. § 3730(h), the False Claims Act protects employees witnesses who cooperate with a Government investigation of potential false claims. The District Court wrongly denied such protection where the employee-witness cooperated with the Government without making his own personal accusation of fraud. *Amici* urge that this subjective requirement has no basis in the statute. If the Government is investigating fraud, the False Claims Act requires that anyone assisting the Government be protected from retaliation.

Plaintiff-Appellant Gregory Perius filed an action pursuant to 31 U.S.C. § 3730(h), alleging that Defendant-Appellee Abbott Laboratories unlawfully terminated him in retaliation for giving information in the Government's investigation of Abbott's marketing practices. Mr. Perius' participation in the

Government's False Claims Act investigation was compelled by a Department of Justice subpoena *duces tecum*. The District Court granted summary judgment against Mr. Perius, on the ground he had not yet formed a subjective belief that his former employer was committing a fraud on the United States when he cooperated with the Department of Justice under subpoena.

*Amici* respectfully submit that the District Court's construction of the False Claims Act must be reversed. *Amici* have an interest in assuring that witnesses who cooperate with bona fide federal investigations will not be subjected to retaliation by their employers for their role in the Government's *qui tam* case investigation.

The policy interest at stake is the integrity of investigations by the Department of Justice and, ultimately, the integrity of the truth-finding process in the courts. This policy interest is not primarily to provide some additional reward for partisan whistleblowers. The primary policy interest, instead, is the Government's interest in uninhibited access to information about fraud from witnesses undeterred by fear of retaliation, job loss, and financial ruin. This legislative protection is most important for reluctant witnesses, who do not charge fraud against the employer on their own initiative. A witness who has no ax to grind will often be more valuable to a Government investigation and more credible

in a court proceeding than an employee who is already motivated to win a relator's bounty. The District Court's decision effectively removes statutory protection from such witnesses, solely because they do not subjectively wish to accuse their employers of fraud.

The District Court's decision significantly undermines the purposes of the False Claims Act. It limits the statute's protections only to those who initiate their own investigations of their employers' possible False Claims Act violations. The decision below effectively abandons those who provide assistance to the Government's fraud investigation, as in response to Government subpoenas, but who have not made a personal accusation that the defendant has committed fraud. The statute does not create such a distinction, but protects all employees who engage in lawful acts in furtherance of a Government investigation under the False Claims Act, regardless of the employee's own beliefs (if any) on the merits of the action.

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.

**A. Government Accountability Project (GAP)**

The Government Accountability Project (GAP) is a non-partisan, non-profit public interest law firm specializing in legal advocacy on behalf of government

and corporate employees who expose illegality, gross waste and mismanagement; abuse of authority; substantial or specific dangers to public health and safety; or other institutional misconduct undermining the public interest.

It is GAP's firm belief that the Government must operate in an open environment where truth and accountability are not only encouraged, but respected. Employees must not be forced to choose between their jobs and telling the truth. GAP's efforts on behalf of those who expose fraud schemes are based on the belief that protection for employee witnesses and whistleblowers are essential to an effective democracy. Honest employees are the foundation of a responsible, law-abiding, political and corporate system. However, when employees encounter retaliation, poor performance reviews, and even discharge for speaking truth to power, the integrity of our government and judicial systems is jeopardized.

GAP attorneys have testified before Congress over the last two decades concerning the effectiveness of existing statutory witness and employee retaliation protections, co-authored the model whistleblower protection laws to implement the Inter-American Convention Against Corruption, and led legislative campaigns for a broad range of relevant federal laws, including the Whistleblower Protection Act of 1989, P.L. No. 101-12, *103 Stat. 16* (April 10, 1989) and subsequent 1994

amendments and the Sarbanes-Oxley Act of 2002 employee rights provisions, 18 U.S.C. § 1514A.

### B. Taxpayers Against Fraud Education Fund

Taxpayers Against Fraud Education Fund (TAFEF) is the leading nonprofit public interest organization dedicated to combating fraud against the federal government through educating the public, the legal community, legislators, and others about the False Claims Act, 31 U.S.C. § 3729, *et seq.*, and its *qui tam* provisions. TAFEF supports vigorous enforcement of the False Claims Act by contributing its understanding of the Act's proper interpretation and application and working in partnership with *qui tam* plaintiffs, private attorneys, 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* plaintiffs in False Claims Act litigation. In the past few years, TAFEF has greatly expanded its efforts toward public awareness and education regarding the False Claims Act. TAFEF publishes the *False Claims Act and Qui 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 online at www.taf.org/quarterlypdf.htm. TAFEF also presents a yearly educational

conference for False Claims Act attorneys, typically attended by more than 200 practitioners.

Furthermore, 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 open to the public, and TAFEF has an educational presence on the Internet. TAFEF also has provided congressional testimony, conference presentations, and assisted with training programs. 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, 2009, and 2010 and has experience with its implementation. As such, its participation in this brief will assist the Court's consideration of the False Claims Act issues raised on appeal.

**C. National Employment Lawyers Association**

The National Employment Lawyers Association (NELA) advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Founded in 1985, NELA is the country's largest professional organization comprised exclusively of lawyers who represent

individual employees in cases involving labor, employment and civil rights disputes. NELA and its 68 state and local affiliates have more than 3,000 members nationwide. As part of its advocacy efforts, NELA supports precedent setting litigation and has filed dozens of *amicus curiae* briefs before this Court, the U.S. Supreme Court and other federal appellate courts to ensure that the goals of workplace statutes are fully realized.

**D. National Whistleblowers Center**

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. National Whistleblowers Center maintains a nationwide attorney referral service for whistleblowers, and provides publications and training for attorneys and other advocates for whistleblowers. National Whistleblowers Center has participated as *amicus curiae* in the following cases: *EEOC v. Waffle House*, 534 U.S. 279 (2002); *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000); *Beck v. Prupis*, 529 U.S. 494 (2000); *Haddle v. Garrison*, 525 U.S. 121 (1998); *English v. General Electric*, 496 U.S. 72 (1990), *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505 (8th Cir. 1985).

National Whistleblowers Center advocates on behalf of witnesses to fraud against the Government because these truth-tellers help uncover grave problems facing our federal government and our society at large. Such witnesses are the one hope of holding those responsible who would corrupt government or corporations. Therefore, aggressive defense of witnesses who produce documents and testify is crucial to any effective policy to address wrongdoing. Conscientious employees who cooperate with Government fraud investigations should not be forced to choose between their jobs and their conscience.

## ARGUMENT

### II. SECTION 3730(H) DOES NOT CONDITION PROTECTION FOR WITNESSES COOPERATING WITH A GOVERNMENT SUBPOENA ON THE WITNESS' SUBJECTIVE BELIEF IN FRAUD.

#### A. Section 3730(h) Does Not and Should Not Contain Any Requirement That The Employee Have a Subjective Belief In The Alleged Fraud.

On its face, 31 U.S.C. § 3730(h) does not incorporate any requirement that the employee subjectively subscribe to an accusation of fraud. At the times relevant to this case, 31 U.S.C. § 3730(h) provided[1] as follows:

[1] Effective May 2009, 31 U.S.C. § 3730(h) was broadened to add protection for employees who take actions to stop a violation of the False Claims Act.

> 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.

This statute serves a remedial purpose of encouraging employees to take actions that will further enforcement proceedings. One of the False Claims Act's primary purposes is to encourage individuals knowing of government-related fraud to come forward with that information. "[T]he [Senate] Committee believes protection should extend not only to actual qui tam litigants, but those who assist or testify for the litigant, as well as those who assist the Government in bringing a false claims action. Protected activity should therefore be interpreted broadly." S.Rep. No. 99-345, 99th Cong., 2d Sess. 2 (1986) at p. 34, 1986 U.S. Code Cong. & Admin. News 5266, 5299 (emphasis supplied.)

The "lawful acts" that form the basis of protection here consist of responding to a subpoena in official proceedings. These actions are classic forms of participation which receive the broadest protection. Requiring employees to have all the information a Government attorney might have about a defendant's fraud, and then reach a conclusion on the merits of that fraud claim before

responding to a subpoena, serves no legitimate public purpose. It is logical that Congress did not include any such requirement in 31 U.S.C. § 3730(h).

### B. The Subjective Requirement Has Been Imposed To Determine Whether There Is a Bona Fide Investigation, Where the "Investigation" Is *Privately* Initiated by the Employee.

Although 31 U.S.C. § 3730(h) does not impose any subjective requirement, courts have read a subjective element into the statute to determine whether there is a bona fide "investigation" in the first place.

This is a recurring problem, but only in cases where the "investigation" is of the employee's own making. In such cases, courts must distinguish legitimate private activity from baseless troublemaking. As the Court explained in *Neal v. Honeywell, Inc*., 33 F.3d 860, 865 (7th Cir. 1994) *abrogated on other grounds*, *Graham County Soil & Water Conservation District v. U.S. ex rel. Wilson*, 545 U.S. 409, 414 (2009):

> Some employees will cry "fraud" to make pests of themselves, in the hope of being bought off with higher salaries or more desirable assignments. Others will perceive the disappointments of daily life as "retaliation" and file suits that have some settlement value because of the high costs of litigation and the possibility of error. Careless cries of fraud are less culpable, but may be no less costly, than extortionate ones.

33 F.3d at 865. *Neal* added that the statute

> limits coverage to situations in which litigation could be filed legitimately--that is, consistently with Fed.R.Civ.P. 11. Then an employee who fabricates a tale of fraud to extract concessions from the employer, or who just imagines fraud but lacks proof, legitimately may be sacked. No action is 'to be filed' in either case, and employees who use reports of fraud to better their own position, or who behave like Chicken Little, impose costs on employers without advancing any of the goals of the False Claims Act.

*Neal*, 33 F.3d at 864.

This Circuit's cases that apply a subjective requirement have all involved employees who initiated the "investigation" for which they claim protection. *See Lang v. Northwestern University*, 472 F.3d 493, 494 (7th Cir. 2006) (no protectable "investigation" where employee made baseless fraud charges: "Lang might as well have reported that the Foundation was trying to deceive the United Federation of Planets so that it would dispatch the Starship Enterprise to assist the Foundation with a delivery of 23d Century quatloos. If this comes within 31 U.S.C. § 3730(h), then the statute has no bounds and protects tall tales as well as legitimate investigations."); *Fanslow v. Chicago Manufacturing Center*, 384 F.3d 469, 480-481 (7th Cir. 2004) (employee's private raising of concerns to supervisors, with no interaction with the government, created a triable issue as to employee's subjective intent); *Luckey v. Baxter Healthcare Corp.*, 183 F.3d 730, 733 (7th Cir. 1999) ("Saber-rattling is not protected conduct. Only investigation,

testimony, and litigation are protected, and none of these led to Luckey's discharge.").

In none of these cases was the employee responding to a Government subpoena in a Government investigation. If they had, the presence of legitimate "investigation for" or "testimony for" or "assistance in" an False Claims Act investigation would have been beyond dispute, regardless of the employee's state of mind.

### C. The Requirement that a *Subpoenaed* Witness Believe Subjectively in a Fraud Rewrites the Statute, Contrary to Its Purpose.

#### 1. When the Government has subpoenaed a witness, the requirement of an "investigation" or "testimony" is met as a matter of law.

This rationale for inserting a subjective requirement loses all force when the employee is only complying with a Government subpoena. In this case, there is no question whether there was a legitimate "investigation"or "testimony" in cooperation with the Government. Perius objectively furthered the action by testifying pursuant to the subpoena. It violates the plain language and the obvious purpose of 31 U.S.C. § 3730(h) to hold that a witness under government subpoena lacks False Claims Act protection unless he is a partisan motivated to accuse his employer of fraud.

Section 3730(h) is written in the disjunctive ("investigation for, initiation of, testimony for, or assistance in . . ."). It is not necessary that an employee investigate or initiate the fraud investigation herself, if he is testifying in cooperation with the Government.

**2. Section 3730(h) is intended to protect the Government's interest in obtaining testimony from fearful witnesses, not to reward whistleblowers for their zeal.**

As a matter of policy, anti-retaliation protection must be extended to involuntary witnesses. A witness who has no ax to grind, and does not subjectively wish to accuse her employer of fraud, will often be more valuable to a Government investigation than the self-motivated exaggerators, extortionists or lunatics discussed in *Lang* and *Luckey, supra*. The interest protected by 31 U.S.C. § 3730(h) is not to reward for private attorneys general for their zeal, but to protect the Government's interest in undeterred cooperation with its investigations. *See Neal*, 33 F.3d at 861 ("Section 3730(h) . . .is designed to protect persons who assist the discovery and prosecution of fraud and thus to improve the federal government's prospects of deterring and redressing crime.") (emphasis supplied.)

The case law cited in, and following *Neal*, makes this clear.

### a. *NLRB v. Scrivener*, 405 U.S. 117 (1972)

In *Neal*, 33 F.3d at 865, this Court drew an analogy to the anti-retaliation protection in the National Labor Relations Act[2] in *NLRB v. Scrivener*, 405 U.S. 117, 121-124 (1972). The *Neal* Court's citation to *Scrivener* didactic.

In *Scrivener*, the Eighth Circuit had held that the NLRA's anti-retaliation provision only protected employees who file charges and did not protect employees merely for giving investigatory statements to the government. *See* 405 U.S. at 121. The Supreme Court reversed, holding that where the retaliation victim was responding to a government subpoena, the victim's subjective intent to charge the employer with wrongdoing is irrelevant:

> Which employees receive statutory protection should not turn on the vagaries of the selection process or on other events that have no relation to the need for protection. It would make less than complete sense to protect the employee because he participates in the formal inception of the process (by filing a charge) or in the final, formal presentation, but not to protect his participation in the important developmental stages that fall between these two points in time. This would be unequal and inconsistent protection and is not the protection needed to preserve the integrity of the Board process in its entirety.

*NLRB v. Scrivener*, 405 U.S. at 123-124. The Court held that any employee who

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[2] The relevant provision in *Scrivener* made it unlawful "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." 29 U.S.C. §158(a)(4).

gives information under a government subpoena is protected, regardless of whether the employee has charged a violation:

> Once an employee has been subpoenaed he should be protected from retaliatory action regardless of whether he has filed a charge or has actually testified. Judge Lumbard pertinently described it:'It is, we think, a permissible inference that Congress intended the protection to be as broad as the (subpoena) power.' *Pedersen v. NLRB*, 234 F.2d 417, 420 (CA2 1956). Under this reasoning, if employees of Scrivener had been subpoenaed, they would have been protected.

*NLRB v. Scrivener*, 405 U.S. at 124.

The policy enforced in *Scrivener* is not Congress' desire to bestow a windfall only on zealous informants. The policy is to protect the Government's interest in undeterred cooperation with its subpoenas. "This complete freedom is necessary, it has been said, 'to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses.'" 405 U.S. at 122. It is the reluctant witness, who does not charge fraud on her own initiative, who is of greatest concern to this anti-retaliation policy.

Fraud is by nature a covert activity, and corporations camouflage with layers of deceit sophisticated schemes to bilk the United States. Unless Government fraud investigators can rely on employees who may have participated in the fraud, or who unknowingly contributed to it, the Government will find it much harder to secure cooperation from such witnesses in uncovering the fraud. If

the courts refuse to enforce the False Claims Act against corporate retaliation against such involuntary witnesses, these sources of information will be deterred from cooperating.

The District Court's construction of the False Claims Act inhibits the Government's access to essential sources of information in its False Claims Act and related fraud investigations. Protecting all employees who give information to the Government, regardless of their subjective belief whether fraud has been committed, is necessary to thaw that chill. Because this Court looks to *Scrivener* as instructive in False Claims Act cases, *see Neal*, 33 F.3d at 865, it should follow *Scrivener* to hold that False Claims Act protection from retaliation for subpoenaed witnesses should be "as broad as the subpoena power" itself.

**b. *Childree v. UAP/GA Chem*, 92 F.3d 1140 (11th Cir. 1996)**

We are aware of only one published case under 31 U.S.C. § 3730(h) in which the False Claims Act informant testified involuntarily under subpoena. *Childree v. UAP/GA Chem, Inc.*, 92 F.3d 1140, 1146 (11th Cir. 1996). *Childree* supports a broad interpretation of 31 U.S.C. § 3730(h) to protect Mr. Perius. *Childree* reversed a district court judgment identical to the District Court's judgment here.

In *Childree*, 92 F.3d at 1146, the Eleventh Circuit adopted the Seventh Circuit's reasoning in *Neal*. In *Childree*, a billing clerk was terminated after testifying under a Government subpoena at an administrative hearing. Childree's testimony was involuntary: "Childree was reluctant to testify at the hearing, because she feared she would lose her job if she did." 92 F.3d at 1143. Furthermore, Childree had no intent to accuse her employer of violating the False Claims Act. "Childree concedes that before her termination, she never considered bringing a False Claims Act action with regard to the Varner Bass re-billings, and that in fact, she had never heard of that Act." *Id*.

The district court granted summary judgment against Childree's 31 U.S.C. § 3730(h) claim, on the same grounds the District Court did in this case. The district court found it fatal that "Childree had 'never performed any affirmative act to expose any alleged fraud.' Instead, it found that she simply had responded to questions asked of her by the ASCS investigator and by the DOA during the NAD hearing. By Childree's own admission, she had only reluctantly participated in that hearing." *See* 92 F.3d at 1144.

On appeal, the Eleventh Circuit agreed with Childree and the *amicus* United States that "the district court lost sight of the central question in a 31 U.S.C. § 3730(h) claim, . . . whether the employer intended to retaliate against the employee

because of the false claims information that the employee provided to the government." 92 F.3d at 1144-45. It held that the retaliation victim's subjective intent to charge the employer with a violation of the False Claims Act is irrelevant:

> We recognize that there will be cases, such as this one, in which the employee was apparently unaware of the existence of the False Claim Act in general, and § 3730(h) in particular, at the time the employee acted. There is some force to the argument that a provision cannot encourage acts by offering to protect the actor where the actor is unaware of the provision and the offered protection. However, **nothing in the language of § 3730 suggests that its protections are limited to those who were motivated by it. The provision contains no knowledge requirement, and we will not read one into it.**

*Childree*, 92 F.3d at 1146 (emphasis supplied). In reaching this conclusion, the Eleventh Circuit relied on the Seventh Circuit in *Neal* as its primary authority:

> We agree with the *Neal* court that the "to be filed" language does not require that a False Claims Act action ever have been filed. We are bound to follow the plain language of a statute, [cit.om.] and there is nothing about the plain language of "to be filed" that suggests such a narrow interpretation. . . We join the Seventh Circuit in disbelieving that Congress intended such a result, and we join it in holding that § 3730(h) protection is available not only where a false claims action is actually filed, but also where the filing of such an action, by either the employee or the government, was 'a distinct possibility' at the time the assistance was rendered.

*Id*., 92 F.3d at 1146.

The District Court in this case attempted to distinguish *Childree* on the ground that Perius, unlike Childree, "did not believe that his employer had done

anything wrong when he responded to the subpoena. Perius, moreover, did not take any affirmative steps (beyond what he was legally obligated to do) to assist the government." District Court Opinion at 14. This is a complete misreading of *Childree.* The Eleventh Circuit did not rely on any conduct other than the fact that Childree involuntarily responded to the Government subpoena. 92 F.3d at 1143-46. Childree's suspicion of fraud was not relied upon by the Eleventh Circuit; indeed, its focus was on the employer's retaliatory intent and Childree's testimony under subpoena.

### D. The Legal Duty to Comply with a Subpoena is No Substitute for the Anti-Retaliation Protection Congress Mandated.

The District Court's elimination of compliance with a subpoena as protected conduct under the False Claims Act conflicts with the anti-retaliation purpose of 31 U.S.C. § 3730(h). The statute plainly protects "testimony for" a government investigation into fraud. Of course, Perius and Childree were both required to testify pursuant to a subpoena. If that obligation were enough to guarantee full cooperation with the Government, then no statute protecting witnesses for retaliation would ever be necessary. *Cf.* 18 U.S.C. §§ 1512-14 (witness intimidation); 29 U.S.C. § 158(a)(4) (NLRA); 29 U.S.C. § 215(a)(3) (FLSA); 29 U.S.C. § 660(c)(1) (OSHA); 42 U.S.C. § 2000e-3(a) (Title VII). These anti-

retaliation provisions are valuable to the Government, because they ensure that the witness's cooperation will not be inhibited by the threat of discharge. The witnesses in *Scrivener* and *Childree* were under a legal obligation to comply with a subpoena, but that did not deprive the anti-retaliation statute of its value to the Government.

It follows that the District Court's denial of 31 U.S.C. § 3730(h) protection to Mr. Perius violates the letter and frustrates the purpose of the statute. If witnesses lack § 3730(h) protection whenever they testify reluctantly pursuant to a subpoena, then such witnesses will be deterred from cooperating with the Government altogether to avoid retaliation.

### E. Witnesses Will Have Overwhelming Economic Motivation Not to Cooperate Fully Absent False Claims Act Protection.

Employees who are subpoenaed in a pending investigation know their employer will provide legal counsel to minimize full disclosure. Such employees will immediately notify their employer to secure that assistance. In today's economy, employees must fear losing their jobs if they are perceived as betraying their employers.

The obvious economic reality is that employees will not want to get involved in any way that might expose them as the source of problems for their

employer. However law-abiding or patriotic they are, employees realize that their jobs are necessary to support their families and that alternative employment is often scarce.

When employees seek advice on what protection they have from retaliation, the answer cannot depend on whether they are already self-identified whistleblowers accusing their employer of a crime. But if the District Court is not reversed, that is exactly the advice they will get– that their protection is conditional. They are protected only to the extent that they have already aligned themselves as zealous accusers against their employers.

The law does not require such a step. Employees will naturally resist taking such an adversary position, in the subjective belief that they personally had not participated in a fraud, or by identifying with their employer and its rectitude. In many cases, the witness lack sufficient knowledge about the entire picture to form such a belief. The Government's investigation does not need them to believe in subjectively in the overall picture, or to take over the Government's role of piecing together the entire fraud. What the Government needs them to do, in Sergeant Joe Friday's catchphrase is tell "just the facts."

To get those facts, Congress intended that the Government be able to assure fearful witnesses of legal protection in § 3730(h). The District Court should not have taken that protection away.

## CONCLUSION

The District Court's summary judgment against Perius should be reversed. This Court should hold that a witness who cooperates with a Government subpoena is within the anti-retaliation protection of 31 U.S.C. § 3730(h).

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Circuit Rule 32(a)(7)(C), the undersigned attorney certifies that this "Brief of Amici Curiaei" complies with the type and volume limitations of Circuit Rule 32(a)(7)(B)(i) as modified by Rule 29(d). The Breif contains 4,582 words (exclusive of the Cover Page, Certificate of Service, Table of Contents, Table of Authorities, and this Certificate.)

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the above and forgoing Brief of Aimci Cuiae was served upon all parties listed below by FIRST CLASS MAIL on this 26th day of April 2010, and addressed as follows:

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I, Aaron B. Maduff, an attorney, hereby certify that the foregoing is true and correct to the best of my knowledge and belief.

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