Appeal No. 10-31169

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARY SCHROEDER,
Plaintiff-Appellant,

v.

GREATER NEW ORLEANS FEDERAL CREDIT UNION, et al.
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Louisiana
District Court No. 09-3647

BRIEF OF *AMICUS CURIAE* NATIONAL WHISTLEBLOWERS CENTER URGING REVERSAL In Support of Appellant

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STATEMENT OF INTEREST

The **National Whistleblowers Center (NWC)** is a non-profit tax-exempt public interest organization. Since 1988, NWC has assisted corporate employees who suffer from illegal retribution for lawfully disclosing violations of federal law. The NWC was instrumental in urging Congress to enact Section 806 of the Sarbanes-Oxley Act (SOX) to encourage employees to come forward with information about potential frauds and other violations. S. Rep. 107-146, at 10. The NWC provides assistance to whistleblowers, helps them obtain legal counsel, provides representation for important precedent-setting cases and urges Congress and administrative agencies to enact laws, rules and regulations that will assist in helping employees report fraud both within their corporate compliance programs and directly to government agencies. The NWC's programs are set forth on its web page, located at www.whistleblowers.org.

The NWC has participated as amicus curiae in numerous court cases, including: *English v. General Electric*, 496 U.S. 72 (1990); *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*, 529

U.S. 765 (2000); *Beck v. Prupis*, 529 U.S. 494 (2000); *Stone v. Instrumentation Lab. Co*., 591 F.3d 239 (4th Cir. 2009). The Department of Labor recently asked the NWC and other groups to submit amicus briefs in two corporate finance whistleblower cases, *Johnson v. Siemens Building Technologies*, ARB No. 08-032, ALJ No. 2005-SOX-015;[1] *Sylvester v. Parexel International LLC*, ARB No. 07-123, ALJ NO. 2007-SOX-39, 42.[2]

The NWC has played an important role in working with Congress to ensure that Congress' intent to fully protect whistleblowers was fulfilled. For example, Senator Patrick Leahy, the principle sponsor of the whistleblower protection provisions contained in the Sarbanes-Oxley Act, recognized the role of the *amicus* in the enactment of SOX:

> This "corporate code of silence" not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity. The consequences of this corporate code of silence for investors in publicly traded companies, in particular, and for the stock market, in general, are serious and adverse, and they must be remedied. …
>
> Unfortunately, as demonstrated in the tobacco industry litigation and the Enron case, efforts to quiet whistleblowers and re-

[1] The NWC's amicus brief is available at http://www.dol.gov/arb/briefs/08-032/index.htm

[2] Available at: http://www.dol.gov/arb/briefs/07-123/index.htm

> taliate against them for being "disloyal" or "litigation risks" transcend state lines. This corporate culture must change, and the law can lead the way. That is why S. 2010 is supported by public interest advocates, such as the **National Whistleblower Center**, the Government Accountability Project, and Taxpayers Against Fraud, who have called this bill "the single most effective measure possible to prevent recurrences of the Enron debacle and similar threats to the nation's financial markets."

S. Rep. 107-146, at 10 [emphasis added].

The role of whistleblowers in detecting and preventing fraud is now well recognized. Organizations as diverse as PricewaterhouseCoopers,[3] the Ethics Resource Center and the Association of Certified Fraud Auditors,[4] have all released scientifically based studies pointing out the critical role employees play in detecting fraud, and the importance of organizations implementing internal whsitleblower programs in order to protect and encourage employee whistlebowing.

Most recently, the Ethics Resource Center, a corporate ethics organization founded in 1922, objectively studied employee reporting behaviors and concluded that building strong internal compliance programs – in which

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3 http://www.whistleblowers.org/storage/whistleblowers/documents/pwc_survey.pdf

4 http://www.whistleblowers.org/storage/whistleblowers/documents/acfe-fraudreport.pdf

employees were encouraged to report potential frauds internally – was key to the detection of fraud.[5]

Whistleblowers are a bulwark of accountability against those who would corrupt government or corporations. Aggressive defense of whistle-blowers is crucial to any effective policy to address wrongdoing or abuse of power. Conscientious employees who point out suspicious activity 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. The laws are intended to protect and applaud whistleblowers, because they are saving lives, preserving our health and safety, and protecting vital fiscal resources.

NWC's interest in the case is to reverse the district court's erroneous analysis of the scope of protection for whistleblowers, and ensure that the intent of Congress to protect employees who report waste, fraud and abuse are protected, from the very first steps employees take to report fraud up through and including the participation of such employees in formal civil or

5 Available at: http://www.ethics.org/whistleblower

criminal proceedings initiated by government regulators. As set forth in this brief, and as fully supported by numerous corporate-sponsored organizations, protecting employees who file their initial concerns within a corporate chain-of-command is absolutely essential for the proper workings of federal whistleblower protection laws. As far back as 1969, Congress clearly intended these internal report to be fully protected.

SUMMARY OF THE ARGUMENT

The district court, at p. 15 of its November 15, 2010, order, erred in holding that internal disclosures are unprotected by the Federal Credit Union Act, 12 U.S.C. § 1790b. Congress was aware of the case law developed under other federal whistleblower protections when it enacted the 1989 amendments that include 12 U.S.C. § 1790b. It is therefore appropriate for this Court to look at that same body of law arising from similar whistleblower statutes in interpreting 12 U.S.C. § 1790b.

Moreover, many American corporations have developed internal compliance programs that encourage their employees to raise concerns through their established channels. These internal programs were developed with the full support of the federal government, and were strongly encouraged by the Federal Sentencing Commission. After the collapses of corporate giants Enron and WorldCom, Congress made such programs mandatory for all publicly traded corporations. *See* 15 U.S.C. §§ 7241, 7262 (Sections 302 and 404 of SOX) (civil provisions); 18 U.S.C. § 1350 (Section 906) (criminal provision). They have also mandated such programs for all large corporations engaging in government contracting. Federal Acquisition

Regulation, FAR 52.203-13(b)(3)(i), 52.203-13(c)(2)(i) Code of Business Ethics and Conduct. Regulatory agencies, such as the Securities Exchange Commission and Commodity Futures Trading Commission, have recently stated on the official public record the importance of these internal corporate programs in advancing the public interest. 75 FR 70,493 (SEC), 75 FR 75,730, 75,733 (CFTC).

The nation's largest businesses also see these programs as crucial to assure that all operations are conducted lawfully and in compliance with organizational policy. These internal compliance programs have become the standard means through which employees report suspicious activity so that proper attention, including governmental attention, can be applied. Recognition of internal whistleblowing as a protected action would align with the goals of groups representing American corporations such as the United States Chamber of Commerce and the Association of Corporate Counsel.

The federal government even recognizes the development of internal programs as a mitigating factor when corporations face criminal liability. Section 8B2 of the Sentencing Guidelines. As such, employee reports

through internal channels are now the accepted means of commencing all levels of compliance proceedings.

Finally, as far back as 1969 Congress was addressed this issue, and at every juncture has clarified its intent that internal corporate whistleblowing must be fully protected, and that employees who contact their managers about potential wrongdoing are in fact engaging in a critical "first step" in reporting misconduct. The dispute over internal verus external whistleblowing was first adjudictated in cases arising under the 1969 Mine Health and Safety Act. That law, like the banking law at issue in this case, used langauge that appeared to only cover external whistleblowing to government agencies. However, the first court cases that reviewed that law found that internal whistleblowing was fully protected as the critical "first step" in what may ultimately become a formal complaint with a governmental regulatory authority. *Phillips v. Interior Bd. of Mine Operations Appeals*, 500 F.2d 772 (D.C. Cir. 1974); *Munsey v. Federal Mine Safety and Health Review Comm'n*, 595 F.2d 735 (D.C. Cir. 1978). These cases were explicitly endorsed by Congress in 1977, and have remained the controlling guidance on this issue, regardless of the precise language Congress has used in various

laws. S. Rep. No. 186, 36, 95th Cong. 1st Sess. 1977, U.S. Code Cong. 2nd Ad. News, 3436.

ARGUMENT

I. INTERNAL DISCLOSURES ARE WITHIN THE SCOPE OF PROTECTION.

A. Internal disclosures are a recognized means by which employees can request information to be provided or proceedings to commence.

The Federal Credit Union Act, 12 U.S.C. § 1790b ("FCUA"), sets out the scope of protected activity as follows:

> (a) In general.
> (1) Employees of credit unions. No insured credit union may discharge or otherwise discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to the request of the employee) provided information to the Board or the Attorney General regarding any possible violation of any law or regulation by the credit union or any director, officer, or employee of the credit union.

Congress added this section to the FCUA as Section 932 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). FIRREA and other banking laws were intended to "enhance the regulatory enforcement powers of the depository institution's regulatory agencies

to protect against fraud, waste and insider abuse." H.R. Rep. No. 101-54(I), at 308 (1989), reprinted in 1989 U.S.C.C.A.N. 86, 103-04; cited in *Simas v. First Citizens' Fed. Credit Union*, 170 F.3d 37, 43 (1st Cir. 1999). In the wake of the savings and loan scandal, FIRREA presaged how Congress would react to Enron and Worldcom (with SOX), and the present financial crisis (with the Dodd-Frank Wall Street Reform and Consumer Protection Act). In each response, Congress has included whistleblower protections to assure that government agencies, legislators and the public would have the information needed to discover and remedy frauds before they harm consumers, the market and our economy.

Long before Congress considered creating an employee protection in FCUA, Congress used sparse wording to encompass the full range of methods employees might use to raise concerns about a host of dangers to the public interest. It was readily understood that within this protection was the process of internal reporting by employees. The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 801, et seq. (1970), Section 110(b)(1) prohibited discrimination against a miner that:

> (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed,

> instituted, or caused to be filed or instituted any proceeding under this chapter, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

In this seminal case on the scope of this language, Judge Wilkey held that a miner's notification to a foreman of possible dangers was "an essential preliminary stage in both the notification to the Secretary (A) and the institution of proceedings (B), and consequently brings the protection of the Safety Act into play." *Phillips v. Interior Bd. of Mine Operations Appeals*, 500 F.2d 772 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 938 (1975). Judge Wilkey explained as follows:

> Safety costs money. The temptation to minimize compliance with safety regulations and thus shave costs is always present. The miners are . . . in the best position to observe the compliance or noncompliance with safety laws. Sporadic federal inspections can never be frequent or thorough enough to insure compliance. Miners who insist on health and safety rules being followed, even at the cost of slowing down production, are not likely to be popular with mine foreman or mine top management. Only if the miners are given a realistically effective channel of communication re health and safety, and protection from reprisal after making complaints, can the Mine Safety Act be effectively enforced.
>
> To hold that Phillips was not protected . . . would nullify not only the protection against discharge but also the fundamental purpose of the Act to compel safety in the mines. [Footnote omitted.]

In *Munsey v. Federal Mine Safety and Health Review Comm'n*, 595 F.2d 735 (D.C. Cir. 1978), the Court reinforced the holding in *Phillips*. 595 F.2d at 741. The *Munsey* Court then reviewed this legislative history.

> Senator Kennedy stated that the new section would give coal miners the same protection from reprisal that workers already had under other legislation. 115 Cong.Rec. 27948 (1969). Specifically, he referred to section 8(a)(4) of the National Labor Relations Act, 29 U.S.C. § 158(a)(4) (1976).[6] 595 F.2d at 742-43.

After these decisions made clear that whistleblower protection statutes would be construed broadly to protect employees making disclosures, Congress used similar wording to protect employees engaged in environmental or safety areas. In 1976, Congress enacted the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622, and protected an employee who, "commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter . . . ." See also, 42 U.S.C. § 7622 (1977), the Clean Air Act.

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6 29 U.S.C. § 158(a)(4) (1976) states: "It shall be an unfair labor practice for an employer . . . to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter."

When Congress amended the Federal Mine Safety and Health Act in 1978, it explicitly approved Judge Wilkey's interpretation of the Act. In 1978, Congress enacted the Energy Reorganization Act (ERA), 42 U.S.C. § 5851,[7] and protected an employee who, "caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter . . .." In *Kansas Gas & Elec. Co. v. Brock* 780 F.2d 1505, 1511-12 (10th Cir. 1985), the Court stated:

> [T]he legislative history of the FMSA amendment shows that Congress did, in fact, intend the older version of the amendment to afford protection to internal complaints and the older version of the amendment is what the ERA provision was modeled after. "The committee intends to insure the *continuing* vitality of various judicial interpretations of § 110 of the Coal Act which are consistent with the broad protections of the bill's provisions; *see e.g.*, *Phillips v. IBMA*, 163 U.S. App. D.C. 104, 500 F.2d 772 (D.C. Cir. 1974); *Munsey v. Morton*, 165 U.S. App. D.C. 379, 507 F.2d 1202 (D.C. Cir. 1974)." S. Rep. No. 186, 36, 95th Cong. 1st Sess. 1977, U.S. Code Cong. 2nd Ad. News, 3436. (Emphasis added).

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7 Congress amended the ERA in 1992 and clarified that the modes of engaging in protected activity include notifying one's employer, refusing to engage in illegal activity, and testifying before Congress or in a governmental proceeding. None of these additions could be construed as constricting the protection for disclosures made through other means.

In 1980, the "Superfund" Law, 42 U.S.C. § 9610, protected an employee or representative who, "has provided information to a State or to the Federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this chapter . . .." Congress used similar language in the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105, the 2000 Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121, and the Pipeline Safety Improvement Act of 2002 (PSIA), 49 U.S.C. § 60129. The pattern points to a congressional desire to draw upon the established body of law for a broad scope of protection, including internal disclosures. Accord, *Willy v. Administrative Review Bd*. 423 F.3d 483, 489, n. 11 (5th Cir. 2005).

In the wake of the Enron scandal, Congress saw that the enforcement of corporate accounting and disclosure rules was also important enough for a whistleblower protection provision. SOX protects disclosure of wrongdoing that assists in an investigation conducted by a member of Congress or of law enforcement. SOX requires publicly traded companies to maintain internal reporting programs. 15 U.S.C. §§ 7241, 7262 (Sections 302 and 404) (civil provisions); 18 U.S.C. § 1350 (Section 906) (criminal provision). The

growth of internal compliance programs now makes internal reporting the primarily means by which suspicious activity is recorded for purposes of transparency and accountability. An employee's chain-of-command is now a well-known means of raising concerns that eventually go to the government.

In 1991, the U.S. Sentencing Commission (USSC) issued the Federal Sentencing Guidelines for Organizations (FSGO) to recognize as a mitigating factor whether the organization has effective internal compliance programs. The USSC thereby enhanced the federal public policy enshrined by Congress. The USSC amended and strengthened the policy in 2004 and 2010. This change has had far reaching effects on the relationship between internal reporting and government enforcement.

The Introductory Commentary to Chapter 8 of the 2010 Sentencing Guidelines states that, "The two factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility." Section 8B2 of the Sentencing Guidelines, addresses an organization's Effective Compliance and Ethics Program. To be effective, the program must (1) exercise due diligence to prevent and detect criminal conduct,

and (2) promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law. Section 8B2.1(a). Section 8B2.1(b)(4) requires the organization to inform employees about the compliance program and how to make disclosures. Section 8B2.1(b)(5)(C) requires that employees must be free to make reports "without fear of retaliation." The organization's benefits for operating a compliance program will be wiped out, however, if the organization fails to report criminal activity to appropriate governmental entities. Section 8C2.5(f)(2). Thus, today's legal structure for corporate governance requires that every organization maintain an effective program, known to its employees, through which employees must be free to make disclosures, and which culminates in the organization's self-disclosures to the appropriate governmental authorities.[8]

The Federal Acquisition Council also sets standards for the internal compliance programs of companies contracting with the federal government. Federal Acquisition Regulation, FAR 52.203-13(b)(3)(i), 52.203-13(c)(2)(i) Code of Business Ethics and Conduct; see also Joseph D. West, *et al*., "Con-

8 If an employee's internal disclosures were not protected, then employees would be trapped when they are encouraged to make disclosures internally but find themselves without legal protection when they face retaliation.

tractor Business Ethics Compliance Program & Disclosure Requirements."[9] It is now the norm that all employees can use their established channels of internal reporting to make disclosures that must flow all the way to the government. Disclosures to the government may now be made through internal reporting.[10]

On March 17, 2010, the Association of Corporate Counsel (ACC) submitted a letter to the Sentencing Commission.[11] It represents the in-house counsel of over 10,000 businesses and believes that strong, effective and protected internal reporting mechanisms are critical in the fight against fraud and corruption. As in-house counsel, their perspective is, "their over-arching concern with compliance and preventive practice[.]" P. 1. The ACC recognize that the Sentencing Commission has a unique role in defining "effective

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9 Available at: http://www.gibsondunn.com/publications/Documents/WestRichardManosBrennan-ContractorBusinessEthics.pdf

10 While the Sentencing Guidelines provide a strong incentive for companies to operate internal compliance programs, SOX requires publicly traded companies to maintain such programs. 15 U.S.C. §§ 7241, 7262 (Sections 302 and 404) (civil provisions); 18 U.S.C. § 1350 (Section 906) (criminal provision).

11 Available at: http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20100317/ACC_Hackett_comments.pdf

corporate compliance programs," and that the Commission's definition "has tremendous relevance and impact outside the context of sentencing[.]" P. 2. Modern internal compliance programs are often adapted to the particular needs and operating environments of each organization. Thus, ACC notes that organizations "no longer feel limited to employing 'traditional' or uniform paths of activities that were previously implemented by the lawyers responsible for establishing and maintaining a compliance function[.]" P. 3. Companies "are more and more likely to think outside the box to craft unique compliance initiatives and internal controls[.]" *Id*.

The United States Chamber of Commerce recognizes internal reporting as its preferred method of whistleblowing and fraud detection. It made these comments to the SEC on implementation of section 21F the Securities Exchange Act in December of 2010 (pp. 3-4):

> Effective compliance programs rely heavily on internal reporting of potential violations of law and corporate policy to identify instances of non-compliance. These internal reporting mechanisms are cornerstones of effective compliance processes because they permit companies to discover instances of potential wrongdoing, to investigate the underlying facts, and to take remedial actions, including voluntary disclosures to relevant authorities, as the circumstances may warrant… Moreover, if the effectiveness of corporate compliance programs in identifying po-

> tential wrongdoing is undermined, their attendant benefits, such as promotion of a culture of compliance within corporations, as well as their value to enforcement efforts, will likewise be diminished.[12]

The Chamber went on to state that when it comes to malfeasance, companies are "dependent on internal reporting of such instances," and that these companies are "best positioned to quickly and effectively investigate potential wrongdoing …Thus, individuals with relevant information should be incentivized to utilize internal reporting mechanisms, rather than discouraged from doing so." *Id.,* at 5.

The Ethics Resource Center (ERC) is a private, nonprofit organization devoted to independent research and the advancement of high ethical standards and practices in public and private institutions. For 88 years, ERC has been a resource for corporations[13] committed to a strong ethical culture. On December 17, 2010, ERC stated the following in comments[14] to the SEC:

> We note the concern of other commentators that the pro-

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12 Full text of the Chamber's comments can be found at http://www.sec.gov/comments/s7-33-10/s73310-110.pdf

13 According to its web page, ERC sponsors include many of our leading corporations such as BP, Dow, Duke Energy, Lockheed, Merck, Raytheon, and Walmart.

14 Available at: http://www.ethics.org/news/erc-files-comment-letter-sec-whistleblower-provision

> posed rules may incentivize employees with knowledge of misconduct to ignore internal processes for addressing possible bad behavior. That's important because, in the long run, strong E&C [Ethics & Compliance] programs backed by senior leadership with a strong commitment to ethical conduct are the best way to prevent misconduct.

ERC wants to support E&C programs by "encouraging employees to initially work through their own institutions' processes." The importance of internal reporting is evident from ERC's December 2010 report, *Blowing the Whistle on Workplace Misconduct*.[15] At p. 5, the report finds that:

> For the largest number of employees (46 percent), the most likely place to report is an immediate supervisor. Higher management was the second favorite reporting location (29 percent) in 2009. Only three percent used company hotlines to report misconduct. A slightly larger number, four percent, took their suspicions outside the company as their initial action.

If employees are forced to file their reports with governmental agencies to receive protection, then all parties involved, the whistleblower, the company and the governmental agency will suffer for it. The Chamber made clear that rules forcing employees to make disclosures only to the government (the SEC, for example) would:

> not only place an unrealistic responsibility on companies, but it would also unduly burden the SEC, which would

15 Available at: http://www.ethics.org/whistleblower

> find itself inundated with and having to review and process a high volume of poor quality tips and frivolous or otherwise meritless allegations . . .. Requiring companies to disclose within a reasonable time only information concerning substantiated securities laws violations would better reflect the Commission's objectives and would substantially reduce the burden on SEC resources.
>
> Chamber letter at 10.

Internal reporting is now the preferred means of raising concerns about illegality and suspicious activity. Congress added § 1790b to the FCUA knowing that courts had applied prior whistleblower protections broadly to protect internal disclosures. The modern development of internal compliance programs, and the predominance of internal reports as the means used by almost all employees, makes their protection a practical imperative.

B. FCUA's remedial purpose supports a broad scope of protection.

In *Haley v. Retsinas*, 138 F.3d 1245, 1250 (8th Cir. 1998), the Court said:

> Laws protecting whistleblowers are meant to encourage employees to report illegal practices without fear of reprisal by their employers. These statutes generally use broad language and cover a variety of whistleblowing activities. Accordingly, when the meaning of the statute is unclear from its text, courts tend to construe it broadly, in favor of protecting the whistleblower. This is often the

> best way to avoid a nonsensical result and "to effectuate the underlying purposes of the law." *United States v. S.A.*, 129 F.3d 995, 998 (8th Cir. 1997).

The court found Haley was protected under 12 U.S.C. § 1831j(a)(2) when he asked a bank officer to make a disclosure even though the request did not identify the federal agency as a recipient. Courts have recognized that when reading statutory language, courts must avoid "unreasonable" or "absurd" results. *See Clark v. Riley*, 595 F.3d 1258, 1266 (11th Cir. 2010). A result can be considered unreasonable if it is so absurd as to be against the intent of Congress in enacting the provision. *See e.g. Dunn v. CTFC*, 519 U.S. 465, 480 (1997). It is "nonsensical" here to deny Mary Schroeder protection for actions that are the initial stages of raising compliance concerns.

Courts have traditionally given whistleblower protection laws a broad construction of the scope of protection in line with their remedial purposes. *English v. General Elec. Co.*, 496 U.S. 72 (1990); *Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 932 (11th Cir. 1995) (protecting informal nuclear safety complaints because "it is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws").

Remedial statutes, however, cannot be read literally when the result is contrary to the purpose of the law. Instead, courts must read it with an eye towards its remedial purpose. In *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 397 (1982), the Court stated:

> In *Love v. Pullman Co.,* 404 U. S. 522 (1972), we announced a guiding principle for construing the provisions of Title VII. Declining to read literally another filing provision of Title VII, we explained that a technical reading would be "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Id.* at 404 U. S. 527. That principle must be applied here as well.

Similarly, Judge Learned Hand once stated, "There is no surer way to mis-read any document than to read it literally[.]" *Guiseppi v. Walling*, 144 F.2d 608, 623-624 (2d Cir. 1944), concurring opinion.

The district court opinion takes Congress' language in § 1790b and turns congressional intent on its head by claiming that the text actually eliminates protection when it comes to using internal reports as a means of making disclosures. The district court errs in failing to see that the modes of disclosure can include all regular channels of employee communication. Mary Schroeder can reasonably believe that management communicates with NCUA. She can use the established channels of communication to dis-

close compliance concerns so long as her actions are reasonable in context. The district court ignored the developed case law and the remedial purpose. It adopted a *per se* exclusion of internal disclosures from FCUA's zone of protection.

Protecting internal disclosures of financial violations is consistent with FCUA's remedial purpose of assisting the NCUA and the public in understanding the true financial position of credit unions. It further assists in prompting government officials to act on disclosed violations. It is entirely consistent with the remedial purpose to protect disclosures made through the established channels of employee communications.

C. Because disclosures to management and other entities serve an essential function in uncovering financial fraud, it is unreasonable to read Section 1790b to exclude them from protection.

Justice Brandeis famously commented that "sunlight is the best disinfectant," recognizing that exposure, more than any regulation, is the best disincentive against fraud and abuse. Disclosures of fraud and waste increase transparency and prompt official investigations.

Empirical analyses of whistleblower cases note the importance of employee disclosures in prosecuting fraud. A study conducted at the Booth

School at the University of Chicago noted that 18.3% of corporate fraud is detected by the employees, compared to 14.1% detected by industry regulators, government agencies and self-regulatory organizations. Alexander Dyck, Adair Morse & Luigi Zingales, *Who Blows the Whistle on Corporate Fraud?*, 40 (University of Chicago 2009). The Association of Certified Fraud Examiners (ACFE) has conducted biennial reports on occupational fraud since 2002. Its *2010 Report to the Nations* finds that employee tips detected 40.2% of reported frauds, compared to 1.8% detected by law enforcement.[16] By forcing potential whistleblowers to choose between their careers and the truth, a narrow reading of Section 1790b risks losing the 40% of fraud cases disclosed by employees.

Businesses with robust internal reporting mechanisms function more smoothly according to the US Chamber of Commerce.

> Without voluntary reporting up the corporate hierarchy…it is unlikely that company decision-makers will be able to obtain the facts they need to take the necessary corrective action. … More generally, internal reporting improves corporate governance by affording employees an opportunity to participate in the compliance process, thus improving morale and efficiency and fostering a cul-

16 http://www.acfe.com/rttn/2010-highlights.asp

> ture of cooperation, trust, and respect for the law.[17]
>
> Comments to SEC, pp. 3-4.

The Chamber's sentiment shows that the vast majority of US businesses are moving towards an emphasis on protecting internal reports of suspicious activity.

> Most public companies have … develop[ed] well-publicized, effective, and secure internal reporting programs. … Indeed, two of the most prominent social science researchers of whistleblowing behavior contend that the best approach for encouraging whistleblowing is to 'set up internal complaint procedures where concerned employees could report, and make sure that those procedures provide for speedy and impartial review.
>
> *Id.,* pp. 7-8.

If a narrow reading is used to deny protection to internal reporting, employees would have less incentive to report fraud within the system, a result greatly at odds with the intent of whistleblower protection laws. The Chamber further clarified, "by undermining the incentives to use internal reporting programs, the proposed rule risks undermining trust and fostering an adversarial culture within many companies." *Id.,* pp. 10-11.

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17 Full text of the comments can be found at http://www.sec.gov/comments/s7-33-10/s73310-194.pdf

D. Other federal whistleblower provisions promote a consistent body of whistleblower law.

In *Simas v. First Citizens' Fed. Credit Union*, 170 F.3d 37, 43 (1st Cir. 1999), the Court stated:

> Since the case law interpreting section 1790b itself is extremely sparse, however, the courts have looked to case law construing comparably-phrased anti-retaliation provisions in other federal employment-discrimination statutes, such as Title VII, 42 U.S.C. § 2000e *et seq*., . . . as well as other federal whistleblower statutes . . ..

A wide variety of whistleblower protection laws are enforced by the Department of Labor (DOL). These laws are in areas as sensitive as nuclear power, aviation safety and transit system security. The Department's Administrative Review Board (ARB) recognizes that, "[a] complainant need not express a concern in every possible way or at every possible time in order to receive protection . . .." *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, ARB Case No. 04-149, 2004-SOX-11 (May 31, 2006), p. 17. A disclosure is within the "zone of protection" if it is "related to a general subject that was not clearly outside the realm covered . . .." *Id*.

In a nuclear whistleblower case, *Willy v. Administrative Review Bd*. 423 F.3d 483, 489, n. 11 (5th Cir. 2005), the Fifth Circuit recognized that

internal disclosures should be protected, notwithstanding prior case law of this Circuit:

> Neither party disputes that Willy's writing of the Belcher Report is protected conduct under the relevant statutes. Congress clarified by statute that *Brown & Root* [*v. Donovan*, 747 F.2d 1029 (5th Cir. 1984)] was incorrect in holding that complaints to employers were not protected under 42 U.S.C. § 5851. *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1576 (11th Cir. 1997) ("The legislative history of the 1992 Energy Policy Act, too, makes clear that Congress intended the amendments to codify what it thought the law to be already. Congress sought 'to *explicitly* provide whistleblower protection for nuclear industry employees [who] (1) notify their employer of an alleged violation rather than a federal regulator.'" (quoting H.R. No. 102-474(VIII), at 78, reprinted in 1992 U.S.C.C.A.N. 1953, 2282, 2296 (italic emphasis added by the Court)).

In *Kansas Gas & Elec. Co. v. Brock* 780 F.2d 1505, 1512 (10th Cir. 1985), the Court gave effect to the same legislative indication in an amendment to ERA to protect internal whistleblowing. The Court stated, "Congress was advocating the protection of internal action and changed the statutory language not because its intent had changed, but because this intent had been incorrectly perceived by certain courts."

In *Guttman v. Passaic Valley Sewerage Comm.*, 85-WPC-2, D&O of SOL, pp. 10-13 (March 13, 1992), *aff'd, Passaic Valley Sewerage Comm. v.*

U.S. Department of Labor, 992 F.2d 474, 478-79 (3rd Cir. 1993), the Secretary found that for raising concerns through official channels is protected. In affirming, 992 F.2d at 478-79, the Third Circuit said:

> protection would be largely hollow if it were restricted to the point of filing a formal complaint with the appropriate external law enforcement agency. Employees should not be discouraged from the normal route of pursuing internal remedies before going public with their good faith allegations. Indeed, it is most appropriate, both in terms of efficiency and economics, as well as congenial with inherent corporate structure, that employees notify management of their observations as to the corporation's failures before formal investigations and litigation are initiated . . ..

The Third Circuit concluded that Mr. Guttman's internal complaints constituted a "proceeding" and affirmed the finding that his activity was protected. 992 F.2d at 480.

In *DeFord v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983), the Court explained its concern about the chilling effect of denying protection under the ERA:

> Under this antidiscriminatory provision, as under the NLRA, the need for broad construction of the statutory purpose can be well characterized as "necessary 'to prevent the [investigating agency's] channels of information from being dried up by employer intimidation,'" *NLRB v. Scrivener*, 405 U.S. 117, 122, 92 S. Ct. 798, 31 L. Ed. 2d

> 79, 82-83 (1972), and the need to protect an employee who participates in agency investigations clearly exists even though "his contribution might be merely cumulative," *id*. at 123, 31 L. Ed. 2d at 84. *Cf. NLRB v. Retail Store Employees Union*, 570 F.2d 586 (6th Cir.), cert. denied, 439 U.S. 819, 99 S. Ct. 81, 58 L. Ed. 2d 109 (1978) (discrimination established under § 8(a) (4) of the NLRA although employee provided no information at all during agency proceeding).

The public policy against retaliation is so strong that the Supreme Court has found protection in laws that do not explicitly provide any remedy for retaliation. *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005) (Title IX); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 128 S. Ct. 1951 (2008) (42 U.S.C. § 1981); *Gomez-Perez v. Potter*, 553 U.S. 474 (2008) (ADEA). As participation clauses assure that all persons can initiate and participate in proceedings, its scope of protection is broader. "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). In *Pettway*, this Court held that protections for participation apply regardless of the merits of the underlying proceeding.

The Supreme Court recently addressed the distinction between the two forms of protection in *Crawford v. Metropolitan Government of Nashville and Davidson County*, 555 U.S. ___, 129 S.Ct. 846 (2009). Vicky Crawford participated in an internal investigation of sexual harassment. She reported conduct she felt was inappropriate, and she was later discharged. The Supreme Court held that her statements to the internal investigator constituted protected opposition. As such, it left for another day the question of whether it was also participation.

Congress enacted SOX because "corporate insiders are the key witnesses that need to be encouraged to report fraud," 148 Cong. Rec. S7358 (July 26, 2002) (Statements of Senator Leahy), and "whistleblowers in the private sector, like [Enron whistleblower] Sharron Watkins, should be afforded the same protections as government whistleblowers." 148 Cong. Rec. H5472 (July 25, 2002) (Statements of Representative Jackson-Lee).

Unequivocal protection of witnesses and complainants in an employer's internal processes is essential if those mechanisms are to be effective in detecting and correcting violations. The EEOC has concluded from many years of experience that protection of witnesses and complainants is critical. See *Enforcement Guidance on Vicarious Employee Liability for Unlawful Harassment by Supervisors*, 2 EEOC Compl. Man. (BNA) Pt. V(C)(1)(b) at 615-0108 n. 59 (Oct. 2002). In the absence of protection against retaliation, witnesses would be understandably reluctant to participate in compliance programs, which in turn would undermine the statutory purpose to spur employers' efforts to detect and deter illegality.

E. More recent rulings on the scope of the FCUA protection have failed to consider the full history of employee protections, including *Phillips* and *Munsey,* that better reflect the modern culture of the vast majority of American businesses.

When addressing internal reporting under whistleblower protections in banking laws, courts have done so in *dicta* or without considering the full history and purpose of such protections. In *Ridenour v. Andrews Fed'l Credit Union*, 897 F.2d 715, 721 n.5 (4th Cir. 1990), the operative facts predate enactment of FIRREA. In dicta, and without considering the history and purpose of whistleblower protections, the court recited the literal wording of Section 1790b. In *Bruns v. Nat'l Credit Union Admin.*, 122 F.3d 1251, 1254-55 (9th Cir. 1997), the plaintiff alleged retaliation by NCUA, a federal agency. He did not plead a Section 1790b claim against the credit union. He alleged retaliation on account of his pursuit of a bond claim. The court's discussion of Section 1790b is therefore *dicta*. It also failed to examine the Act's remedial purpose and the history of similar whistleblower protections.

Other cases, including *Wyrick v. TWA Credit Union* 804 F. Supp. 1176 (W.Mo. 1992), *Hill v. Mr. Money Finance Company & First Citizens Banc Co.* 309 Fed. Appx. 950 (6th Cir. 2009), and *Stephen v. Greater New Orleans Fed. Credit Union* 2009 U.S. Dist. LEXIS 106913 (E.La. 2009), all

said that disclosures to entities other than federal regulatory bodies are not protected. As explained above, these arguments have been repudiated. See *Munsey*, *Phillips*, *Kansas Gas & Electric*, cited above. Corporate culture emphasizes the use of internal whistleblowing as an accepted channel of taking such actions.

In proposing rules under the Dodd-Frank Act, the SEC recently stated that, "Compliance with the Federal securities laws is promoted when companies implement effective legal, audit, compliance, and similar functions." 75 FR 70,493. The SEC wants to avoid policies that, "discourage whistleblowers who work for companies that have robust compliance programs to first report the violation to appropriate company personnel . . .." 75 FR 70,488. In light of this change of priorities by both the United States Chamber of Commerce and the Association of Corporate Council, the appropriate rulings to let stand as precedent should be *Phillips* and *Munsey* as they reflect four decades of whistleblower protection precedent that better fit with the desires of the nation's foremost representatives of large businesses.

Such a policy would better reflect the Chamber of Commerce's assertion that "the past decade has been a time of tremendous improvement in the

area of corporate compliance." Chamber Comments to SEC, p. 10. Moving away from the decisions of the past decade to match this growth of internal compliance would further the interests of the nation's business community and potential whistleblowers. The Greater New Orleans Federal Credit Union's desires to not protect the internal disclosures of its employees stands greatly at odds with the stances of the Chamber, ACC, SEC, the Sentencing Commission, and a long line of cases from *Munsey* to *Willy*.

CONCLUSION

For the reasons mentioned above, *amicus* ask this court to hold that internal disclosures can be protected under Section 1790b of the FCUA. *Amicus* ask this Court to reverse and vacate the opinion of the district court and remand this matter for further proceedings consistent with the established law.

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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 NeoOffice.Org application, the contents of the Brief (exclusive of those parts permitted to be excluded under FRAP and the local rules of this court) contain 6,819 words.

Respectfully submitted by:

/s/ Richard R. Renner
Richard R. Renner

CERTIFICATION OF INTERESTED PARTIES

I HEREBY CERTIFY that the National Whistleblowers Center is a not-for-profit corporation based in Washington, DC, and that there are no corporations that own a 10% share or more of it.

Respectfully submitted by:

/s/ Richard R. Renner
Richard R. Renner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 22, 2011, I caused the foregoing Brief of *Amicus Curiae* National Whistleblowers Center Urging Reversal, in Support of Appellant, to be served through this Court's electronic filing system on all counsel of record.

/s/ Richard R. Renner
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