**Appeal No. 10-35238**

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

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**NICHOLAS P. TIDES and MATTHEW CRAIG NEUMANN,**
**Plaintiffs-Appellants,**

**v.**

**THE BOEING COMPANY,**
**Defendant-Appellee.**

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**On Appeal from the United States District Court**
**for the Western District of Washington**
**District Court Nos. C08-1601-JCC, C08-1736-JCC**

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# BRIEF OF *AMICUS CURIAE* NATIONAL WHISTLEBLOWERS CENTER URGING REVERSAL

**In Support of Appellant**

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## STATEMENT OF INTEREST

Established in 1988, the **National Whistleblowers Center (NWC)** is a non-profit tax-exempt public interest organization. The NWC regularly assists corporate employees throughout the United States 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 has extensive litigation experience with the federal environmental laws on which SOX is modeled, and successfully urged Congress to use the process currently in place with the Department of Labor. The NWC maintains a nationwide attorney referral service for whistleblowers, and provides publications and training for whistleblowers' advocates.

The NWC has participated as amicus curiae in numerous cases including the following: *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) (a SOX case). The Department of Labor recently asked the NWC and other groups to submit amicus briefs on the application of SOX to the employees of subsidiaries. *Johnson v. Siemens Building Technologies*, ARB No. 08-032, ALJ No. 2005-SOX-015.[1]

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

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

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

Senator Leahy recognized the role of these *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 retaliate 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].

*Amicus*' interest in the case is to reverse the district court's erroneous analysis of the scope of protection for whistleblowers.

## SUMMARY OF THE ARGUMENT

The district court erred in creating a *per se* rule that disclosures to the media are in all circumstances unprotected by the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C. § 1514A. Media disclosures serve an important function in bringing fraud to light. The historical power of the media to influence government action against corruption rightly influenced case law under other whistleblower laws. Congress was experienced with the whistleblower protections laws enforced through the Department of Labor (DOL) when it passed SOX. The legislative history of SOX supports a broad scope of protection, broad enough to include media disclosures. *Amicus* asks this Court to find that SOX can protect media disclosures.

The media play an essential role in urging action against misconduct. The 1968 Supreme Court ruling in *Pickering,* the collapse of Enron and Bernie Madoff's Ponzi Scheme are examples. It is impossible to overstate the role that media exposure has played in fueling government intervention into fraud and in exposing abuse to public scrutiny. The media focus attention on problems requiring priority.

SOX's anti-fraud provisions serve public interests crucial to the security of our financial markets and the economy as a whole. The law is at

risk of losing its effectiveness by a district court decision that would allow fraudsters to intimidate their staff into choosing less effective means of making disclosures, or into making no disclosures at all. Reasonable media disclosures must be "protected activity." Under traditional rules of statutory interpretation, such protection is a natural application of the language and purpose of SOX.

This Court has adopted a balancing test to determine if media disclosures are protected under Title VII and the ADEA. This Court balances "the purpose of the Act to protect persons engaging reasonably in activities opposing . . . discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel." *Wrighten v. Metropolitan Hosp., Inc.*, 726 F.2d 1346, 1355 (9th Cir. 1984) (holding a press conference is protected). Amicus urges this Court to use the same balancing test for all whistleblower cases.

Congress was aware of the case law developed under other federal whistleblower protections, and chose to use similar language in the enactment of Sarbanes-Oxley. It is therefore appropriate for this Court to look at that same body of law arising from similar whistleblower statutes in interpreting Section 806. Courts have repeatedly drawn the conclusion that

media disclosures are essential components to revealing fraud and misconduct to the federal government. Consistent with this body of case law, this Court should find that media disclosures are protected.

Finally, in recognizing an interest in protecting whistleblowers under SOX, Senator Patrick Leahy intended that whistleblowers have protection when "they take lawful acts to disclose information." 148 Cong. Rec. S7418 (July 26, 2002) (Statements of Sen. Leahy). This protection is intended to ensure that whistleblowers can safely report waste, fraud and abuse without risking their careers. By forcing potential whistleblowers to choose between their careers and the truth, the district court decision risks losing the 15.5% of corporate fraud cases disclosed through the media.

Given that the intent of Congress in establishing whistleblower protection is clear from the legislative history, the best way to ensure accountability and protection for whistleblowers, and to serve the clear Congressional intent, is to recognize that media disclosures are within the scope of activities protected by SOX.

# ARGUMENT

## I. MEDIA DISCLOSURES ARE WITHIN SOX'S SCOPE OF PROTECTION

### A. Media disclosures are a recognized means by which employees can "cause" information to be provided or proceedings to commence.

Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A(a) ("SOX"), sets out the scope of protected activity as follows:

> (a) No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—
>
> (1) to provide information, **cause information to be provided, or otherwise assist in an investigation** regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by--
>
> (A) a Federal regulatory or law enforcement agency;
>
> (B) any Member of Congress or any committee of Congress; or
>
> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

> (2) to file, **cause to be filed**, testify, participate in, or otherwise assist in **a proceeding filed or about to be filed** (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

The key word in this statute for this case is "cause." Long before Congress considered creating SOX, Congress used this word to encompass the full range of methods employees might use to raise concerns about a host of dangers to the public interest. In turn, courts readily understood that to "cause" information to be disclosed or proceedings to be filed includes the act of disclosing information to the media.

Congress first used the word "cause" to describe a scope of protected activity in the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742, 30 U.S.C. §§ 801, et seq. (1970). Section 110(b)(1) prohibited discrimination against a miner because that miner, "(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 the 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. [fn 24] The miners are both the most interested in health and safety protection, and 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.
>
> n. 24 Responsible mine operators who comply with health and safety standards have an obvious interest in seeing uniform standards enforced throughout the industry: competitors who get away with cutting costs by cutting safety are really engaged in unfair competition; the temptation to meet it by engaging in similar tactics is ever-present.
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> ***

> To hold that Phillips was not protected against discharge because he took the first prescribed step under the Kencar procedure to invoke the Mine Safety Act, to hold that only a miner's discharge after he reaches the Bureau of Mines with his complaint is protected by the Safety Act, would nullify not only the protection against discharge but also the fundamental purpose of the Act to compel safety in the mines.

After Judge Wilkey made clear that "cause to" would be construed broadly to protect employees making disclosures, Congress used the same, or expanded, wording to protect employees engaged in sensitive 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 . . . ." In 1977, Congress used the same language when it added 42 U.S.C. § 7622 to the Clean Air Act.

When Congress enacted the Federal Mine Safety and Health Act of 1977, it preserved the phrasing Judge Wilkey relied upon and protected miners who, "instituted or caused to be instituted any proceeding under or related to this Act." In 1978, Congress enacted the Energy Reorganization Act (ERA), 42 U.S.C. § 5851,[2] and protected an employee who, "caused to

2 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

be commenced, or is about to commence or cause to be commenced a proceeding under this chapter . . . ." In 1980, Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or "Superfund" Law), 42 U.S.C. § 9610, and 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. For over three decades, whistleblowers enjoyed an unbroken line of precedent, and continued expansion of statutory protections, that recognized media disclosures as a means by which they might "cause" proceedings to be instituted.

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governmental proceeding. None of these additions could be construed as constricting the protection for disclosures made through the media.

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. Congress again turned to the "cause to" language thus assuring broad protection. Congress even increased the number of agencies to whom whistleblowers could "cause" disclosures to be made. Whereas earlier whistleblower law protected disclosures to law enforcement agencies, SOX Section 806 protections are triggered when a whistleblower causes information to be provided to a regulatory agency, a law enforcement agency, a member of Congress or a supervisor, or when the information assists an investigation conducted by these entities. Congress could not have intended to reduce the scope of protection when it increased the number of intended recipients to whom disclosures could be made. Under a reasonable reading of the language, disclosure of wrongdoing to the media that assists in an investigation conducted by a member of Congress or of law enforcement could be covered under the statute.

The phrase "provide information" makes clear that it is the act of disclosure that creates protection. The breadth of protection for disclosures is emphasized in the next phrase which protects any lawful action to "cause information to be provided." There is no limitation on how a complainant

might cause the information to be provided, other than that it must be a lawful act. This provision protects employees when they make disclosures through telephone calls, through written correspondence, through email, through a union safety official, public interest group, or through a newspaper or other media outlet.

The media are a well-known means of communicating concerns to government, and the media serve a historical function in prompting government officials to act. The very nature of the media – a means of communication in which the content is shared with the public – gives the media the power to influence government in a way that private forms of communication do not.

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

It is a commonly held rule of statutory interpretation that each line in a statute is read in conjunction with the whole. *See Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1352 (Fed. Cir. 2001) (citing *Crandon v. United States*, 494 U.S. 152, 158 (1990). In addition, courts must take into account the "design of the statute as a whole", its "object" and policy. *See id.* Thus, 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).

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.

What better way is there to call the attention of these decision-makers to potential securities law violations than to have them read it in a newspaper? Even as electronic media become more ubiquitous, the traditional media have remained an important means of communicating matters of public interest to inundated policy makers. Line workers who have no access to K Street lobbyists can still reach out to local journalists to

deliver a message that has impact. Disclosures to the media are a time-tested and accepted means of making disclosures effective.

One of the key purposes of SOX is to detect and prosecute fraud. The employee protections in Section 806, give life to this purpose by assuring employees that they will be protected from retaliation if they assist in the public purpose of detecting and eradicating frauds. This remedial purpose urges a construction of SOX in a way that will further this objective.

If this Court were to find that there is any ambiguity in the statute, it is appropriate to refer to the legislative history. *Blum v. Stevenson*, 465 U.S. 886, 896 (1984) ("Where, as here, the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear."). Legislative history is not enough to "override the 'plain meaning' rule." *In re Sunterra Corp.*, 361 F.3d 257, 265 (4th Cir. 2004). When legislative history is in agreement with the plain meaning of the statute, it furthers supports the legislative mandate from the unambiguous statutory language.

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) ("it is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws").

"[T]o encourage disclosure, Congress chose statutory language [for SOX] which ensures that an employee's reasonable but mistaken belief that an employer engaged in conduct that constitutes a violation of one of the six enumerated categories is protected." *Van Asdale v. Int'l Game Technology*, 577 F.3d 989 (9th Cir. 2009).

In *Klopfenstein v. PCC Flow Technologies Holdings, Inc*., ARB Case No. 04-149, 2004-SOX-11 (May 31, 2006), p. 17, the Department of Labor's Administrative Review Board (ARB) explained:

> SOX protection applies to the provision of information regarding not just fraud, but also "violation of … any rule or regulation of the Securities and Exchange Commission." 18 U.S.C.A. § 1514A(a)(1). . . . A complainant need not express a concern in every possible way or at every possible time in order to receive protection, so long as the complainant's actual communications "provide information, cause information to be provided, or otherwise assist in an investigation" regarding a covered violation. 18 U.S.C.A. § 1514A(a)(1).

The ARB further explained how the content of the disclosure drives the determination of whether it is protected as follows:

> It certainly is possible that Klopfenstein engaged in protected activity. The problems with PACO's in-transit inventory suggested, at a minimum, incompetence in Flow's internal controls that could affect the accuracy of its financial statements. *See* T. 716-717; RX 28. Klopfenstein's communications thus related to a general subject that was not clearly outside the realm covered by the SOX, and it certainly is possible that Klopfenstein could have believed that the problems were a deficiency amounting to a "violation" — within the *Collins* zone of SOX protection.

Legislative history is a tool for courts to gauge congressional intent, *see County of Wash. V. Gunther*, 452 U.S. 161, 182 (1981) (Rehnquist, J., dissenting). Legislative history that a court may rely upon includes language in committee reports, floor speeches or statements submitted in committee, although it is generally accepted that "subsequent legislative history" is not as persuasive as other forms of legislative history. *See Sullivan v. Finkelstein*, 496 U.S. 617, 631 (1990) (Scalia, J., concurring).

SOX Section 806 was passed to ensure that employees are protected when "they take lawful acts to disclose information or otherwise assist … in detecting and stopping fraud." 148 Cong. Rec. S7420 (July 26, 2002) (Statements of Sen. Leahy). Senator Leahy implicitly recognizes that some public disclosures should not be protected, "since the only acts protected are `'lawful' ones, the provision would not protect illegal actions, such as the improper public disclosure of trade secret information." *Id.*

Opponents of whistleblower protections may suggest that because the Act "protects employees when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, their supervisors (or other proper people within a corporation), or parties in a judicial proceeding," that media disclosures should not be protected under the Act, as they are not listed specifically. *Id*. Such a construction of the legislative history perverts the purpose of the Act. In regard to this portion of the legislative history, it should be noted that the word *or* creates a disjunction between "disclose information" and "otherwise assist in criminal investigation." In keeping with the purpose of the law, the Court should not read any limitation into which disclosures are protected, so long they are "lawful."

Sen. Leahy understood that corporations are consumed with denying whistleblowing protections to their employees, noting, "Unfortunately, companies with a corporate culture that punishes whistleblowers for being 'disloyal' and 'litigation risks' often transcend state lines, and most corporate employers, with help from their lawyers, know exactly what they can do to a whistleblowing employee under the law." *Id*. Therefore, Sen. Leahy noted, "U.S. laws need to encourage and protect those who report

fraudulent activity that can damage innocent investors in publicly traded companies." *Id.* By declaring disclosures to the media are protected activity under SOX, this Court will ensure that whistleblowers are encouraged, not forsaken, for courageous efforts to protect investors in publicly traded companies.

Rep. Jackson-Lee announced her support for SOX because it "extends whistleblower protections to corporate employees, thereby protecting them from retaliation in cases of fraud and other acts of corporate misconduct." 148 Cong. Rec. H5473 (July 25, 2002) (Statements of Rep. Jackson-Lee). Representative Jackson-Lee would not be content with limited protections for corporate whistleblowers, as she supported providing "whistleblowers in the private sector, like Sherron Watkins, the same protections as government whistleblowers." *Id.* Senator Leahy echoed Rep. Jackson-Lee's sentiments. As noted above, the Whistleblower Protection Act, the primary law providing protections to government whistleblowers, includes protections for employee disclosures to the media. *See Horton v. Dep't of the Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995). If private sector whistleblowers are to be afforded the same protections as government employee whistleblowers, then

it is evident that Congress intended the Sarbanes-Oxley Act to include protections for disclosures to the media.

The district court opinion takes Congress' expansion of the scope of recipients of information and turns congressional intent on its head by claiming that the list actually narrows the scope of protection when it comes to using the media as a means of making disclosures. The district court errs in failing to see that Congress made no change to the use of the word "cause" such that it would limit the means of disclosure. Tides can reasonably believe that Boeing management reads the newspaper, and can use the media to disclose compliance concerns so long as his actions are reasonable in context. Because the district court acted without consideration of the developed case law and the balancing of interests, but instead adopted a *per se* exclusion of disclosures to the media from SOX's zone of protection, this case must be remanded for an application of the correct law to the facts of this case.

Protecting disclosures of accounting violations through the media is consistent with SOX's remedial purpose of assisting the investing public in understanding the true financial position of publicly traded securities, and further assists in prompting government officials to act on disclosed

violations. It is entirely consistent with SOX's remedial purpose to protect disclosures made through the media.

### C. Because disclosures to the media serve an essential function in uncovering financial fraud, it is unreasonable to read Section 806 of the Sarbanes-Oxley Act to exclude protections for media disclosures.

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. It is for this reason that, throughout American history, whistleblowers have consistently and repeatedly relied on media disclosures to effectively disseminate information about fraud and waste, which resulted in increased transparency and investigation into fraud and abuse.

For example, the Securities and Exchange Commission (SEC) did not move to investigate the Enron Corporation's financial irregularities until newspapers broke the story. *See* Alex Berenson, "S.E.C Opens Investigation into Enron," *N.Y. Times*, Nov. 1, 2001.[3] Despite knowledge of Bernie Madoff's from whistleblower reports of Harry Markopolos, the SEC did not take enforcement actions until details of the Ponzi scheme were broken to

3 Available at http://www.nytimes.com/2001/11/01/business/sec-opens-investigation-into-enron.html

the press. See Assessing the Madoff Ponzi Scheme and Regulatory Failures: Hearing Before the Subcomm. On Capital Markets of the H. Comm. on Financial Services, 111th Congress (2009) (statement of Harry Markopolos, Certified Fraud Examiner).

Empirical analyses of whistleblower cases also note the importance of media disclosures in prosecuting fraud. A study conducted at the Booth School at the University of Chicago noted that 15.5% of corporate fraud is detected by the media, 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). By forcing potential whistleblowers to choose between their careers and the truth, a narrow reading of Section 806 risks losing the 15.5% of corporate fraud cases disclosed through the media.

Evidence suggests that SOX has not lived up to its congressional purpose. Of the 700 whistleblower cases filed with OSHA during the first three years after SOX, only 3.6 percent won relief at the initial administrative stage, and only 6.5 percent won on appeal, suggesting that SOX's employee protection has failed to protect employee whistleblowers as

intended. *See* Joyce Rothschild, *Freedom of Speech Denied, Dignity Assaulted: What the Whistleblowers Experience in the US,* Current Sociology (Virginia Polytechnic Institute and State University) 2008, 884 at 896 (citing Richard Mobley, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes–Oxley Whistleblowers Rarely Win*, 49 Wm. & Mary L. Rev. 65–155. As Mary Kreiner Ramirez stated in *Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power*, "unquestionably, precluding employees from raising significant concerns because of related confidential or sensitive information ignores critical opportunities to gain information to protect against serious criminal acts or threats to public safety." 76 U. Cin. L. Rev. 183 at 205 (2007).

The issue of protecting whistleblower disclosures to the media boils down to the question of whether or not Congress intended SOX to "to shine a bright light into the shadows of America's corporate board rooms so the public is not kept in the dark, and when they make an investment, that investment will be sound and based on truth and openness and honesty." *See* 148 Cong. Rec. H5466 (July 25, 2002) (Statements of Representative Kelly). Indeed, if SOX is intended to bring Brandeis's disinfectant of sunlight, then it must protect disclosures to the media.

Courts have recognized that media disclosures are often a method of disclosing information directly to the government. *See Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1351 (Fed. Cir. 2001) (citing *Horton*, 66 F.3d at 282 (holding that media disclosures are an indirect way of disclosing information of wrongdoing to a person in a position to provide a remedy)). The *Horton* court noted that the purpose of the Whistleblower Protection Act, to encourage the disclosure of wrongdoing, was best served by providing different avenues for the disclosure to take place. 66 F.3d at 282.

This Court cannot draw any negative conclusions from the fact that the statute does not spell out protection for media disclosures. While the statute's plain language is usually the best gauge of Congressional intent, *see Caminetti v. United States*, 242 U.S. 470, 490 (1917), it is not to be read too narrowly. A reasonable conclusion can be drawn as to why media disclosures were not spelled out. In the statute, Congress was listing agencies that commonly investigate financial fraud. Congress did not choose to list the modes of communication employees might use to make their disclosures. The statute does not distinguish between disclosures sent by mail, or those conveyed by telephone. Indeed, Congress could wisely

anticipate that future whistleblowers may use means that are not yet invented. Thus, it is reasonable to see why the media would have been left off, without necessarily leading to the conclusion that media disclosures were not intended to be protected.

In conclusion, it is unreasonable for this Court to read this statute in a manner that does not protect media disclosures. Given the statutory purpose of the law, excluding media disclosures from the scope of the protection would be contrary to the policy behind SOX. As such, the plain language of 1514A should be read to incorporate protections for media disclosures.

### D. Given the absence of case law interpreting 18 U.S.C. 1514A, this Court should look to other federal whistleblower provisions to gain an understanding of how to interpret Sarbanes-Oxley.

In the absence of case law interpreting 18 U.S.C. § 1514A ("Section 806"), courts "look to case law applying provisions of other federal whistleblower statutes for guidance," including the Energy Reorganization Act of 1974, 42 U.S.C. § 5851 ("ERA"). *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1374 (N.D Ga. 2004). At the time Congress enacted the Sarbanes-Oxley Act, a wide variety of laws enforced by DOL, in areas as sensitive as nuclear power, had protected public disclosures to the media. In

*Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 6 (ARB Nov. 13, 2002), Gutierrez was an employee "who communicated with newspapers, which quoted his health and safety concerns in articles." The ARB concluded that he engaged in protected activity under ERA. It would be an anomaly to find public disclosures of safety concerns in *Gutierrez* to be protected while declaring similar public disclosures of fraud or other illegal activity to the media not protected under SOX.

In *Wedderspoon v. City of Cedar Rapids, Iowa*, 80-WPC-1 (Dep't of Labor July 11, 1980), the Secretary of Labor adopted the ALJ's findings that an employee's disclosure to a reporter about unlawful sludge discharges prohibited under the Water Pollution Control Act (section 507 of 33 U.S.C. 1367) constituted protected activity. The Secretary agreed with the ALJ's observation that "while complainant did not himself ask either the cognizant federal authorities or DEQ for an investigation, the causal nexus between what he in fact did and the official action which resulted is so close as to the conclusion that complainant 'caused to be … initiated [a] proceeding under this chapter [i.e. the Act]'" *Id.* at p.11.

When Tides disclosed information to the Seattle P-I regarding Boeing's failure to comply with SOX, his disclosure should be protected because the publication of the information should meet the same "causal nexus" found to protect media disclosures under the Water Pollution Control Act in *Weddington*.[4] Therefore, an employee's disclosures to the media should be protected activity under SOX because such disclosures, when used in a media publication, "cause information to be provided" to Federal agencies.

In *Phillips v. Stanley Smith Security, Inc.,* ARB No. 98-020, ALJ No. 1996-ERA-30 (ARB Jan. 31, 2001), p. 14, the ARB noted that under the ERA disclosures to the media may be protected activity, even if they violate company policies regarding providing information to unauthorized persons, so long that the whistleblower made the disclosure in a good-faith effort to report security-related concerns. In *Phillips*, however, the employee who disclosed sensitive information to the media did so out of a selfish desire to

4 The whistleblower's protection should be no different even if the media disclosure results in no enforcement action, or even in no publication. An employee cannot know at the time of disclosure how others will respond to that disclosure. Yet, the public purpose requires that the employee know that he or she will have legal protection at the time the disclosure is made. Otherwise, the protection would fail in its purpose of encouraging the disclosure of potential violations.

protect his job, not to raise genuine security issues. Because the employee's disclosure was not motivated by concerns for safety, it was not found to be protected whistleblowing activity. Unlike *Phillips*, Tides and Neuman made their disclosures to the press in a good-faith effort to bring Boeing into compliance with SOX. Such good-faith disclosures to the media should be recognized as protected whistleblowing activity under SOX.

In another federal whistleblower case, the court held that disclosures to the media are protected activity under the Occupational Safety and Health Act. *Donovan v. R.D. Andersen Construction Company, Inc.,* 552 F. Supp. 249, 253 (D. Kan. 1982). The OSH Act cited in *Donovan* mirrors SOX. 29 U.S.C. § 661(c) (OSH Act, Section 11(c)). The Court in *Donovan* held that the "broad remedial purpose of [the Occupational Health and Safety] Act mandates that an employee's communication with the media regarding the conditions are protected by section 11(c)." 552 F. Supp. at 253. SOX, like the OSH Act, was enacted to afford employees in publicly traded companies "a broad remedial purpose" *Collins,* 334 F. Supp. 1377.

Case law under the federal employee whistleblower statute, the Whistleblower Protection Act, also supports protecting whistleblower disclosures to the media. In *Huffman*, cited above, the Court recognized that

employee disclosures to the media are protected by the Whistleblower Protection Act. In *Horton*, the Court noted that because the purpose of the WPA "is to encourage disclosure of wrongdoing to persons who may be in a position to act to remedy it, either directly by management authority, or indirectly as in disclosure to the press" 66 F.3d at 282.

Similarly, SOX was passed 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). SOX was passed because, "whistleblowers in the private sector, like Sharron Watkins, should be afforded the same protections as government whistleblowers." 148 Cong. Rec. H5472 (July 25, 2002) (Statements of Representative Jackson-Lee). Therefore, employee media disclosures should be viewed as protected whistleblowing activities under SOX, as they are under Whistleblower Protection Act.

### E. The First Amendment protects whistleblower disclosures to the media by public employees.

In the seminal case enforcing the First Amendment through a cause of action for public employees suffering retaliation for whistleblowing, the Supeme Court protected a public school teacher who disclosed through the

media that school management cared more about financing spectator sports than classroom education. *Pickering v. Board of Educ*., 391 U.S. 563, 568 (1968). Subsequent Supreme Court case law has led to a balancing test to determine if media disclosures by public employees are protected. *Connick v. Myers*, 461 U.S. 138, 146-54 (1983). The content, form, and context of the speech is considered and balanced with the government employer's reasonable belief that the protected speech would adversely affect agency operations. The district court below did not employ any balancing test, but made a blanket declaration that disclosures to the media are never protected. That is clearly incorrect.

Still, the balancing test under the First Amendment has no application to statutory whistleblower protections. The Supreme Court made clear in *Garcetti v. Ceballos*, 547 U.S. 410 (2006) that where its holdings about First Amendment protections are deemed too narrow, Congress is free, and even encouraged, to expand protection through whistleblower statutes. 547 U.S. at 425. The First Amendment sets a floor, not a ceiling, for whistleblower protection law.

**F. Protection under Title VII is determined from a balancing of the reasonableness of the disclosure and the employer interest at stake.**

The EEOC Compliance Manual, Section 8-II(B)(2)[5] lists the following as an example of protected opposition to unlawful discrimination:

> Complaining **to anyone** about alleged discrimination against oneself or others
>
> **A complaint or protest about alleged employment discrimination to** a manager, union official, co-worker, company EEO official, attorney, **newspaper reporter,** Congressperson, **or anyone else** constitutes opposition. Opposition may be nonverbal, such as picketing or engaging in a production slow-down. Furthermore, a complaint on behalf of another, or by an employee's representative, rather than by the employee herself, constitutes protected opposition by both the person who makes the complaint and the person on behalf of whom the complaint is made.

The EEOC adds that protection depends on a consideration of whether the employee's conduct is "reasonable":

> The manner in which an individual protests perceived employment discrimination must be reasonable in order for the anti- retaliation provisions to apply. In applying a "reasonableness" standard, courts and the Commission balance the right of individuals to oppose employment discrimination and the public's interest in enforcement of the EEO laws against an employer's need for a stable and productive work environment.

5 Available from: http://www.eeoc.gov/policy/docs/retal.html#IIpartB

Citing *Sumner v. United States Postal Service*, 899 F.2d 203 (2d Cir. 1990). This Court has made the balancing test explicit for determining whether an employee's conduct constitutes "protected activity" under Title VII and the ADEA. This Court balances "the purpose of the Act to protect persons engaging reasonably in activities opposing . . . discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel." *Wrighten v. Metropolitan Hosp., Inc.*, 726 F.2d 1346, 1355 (9th Cir. 1984) (quoting *Hochstadt v. Worcester Foundation*, 545 F.2d 222, 231 (1st Cir. 1976)); *O'Day v. McDonnell Douglas Helicopter Co*., 79 F.3d 756 (9th Cir. 1996) (applied to ADEA). An employee's opposition activity is protected only if it is "reasonable in view of the employer's interest in maintaining a harmonious and efficient operation." *Silver v. KCA, Inc*., 586 F.2d 138, 141 (9th Cir. 1978); accord *Jefferies v. Harris County Community Action Ass'n*, 615 F.2d 1025, 1036 (5th Cir. 1980) (activity must be "reasonable in light of the circumstances"). In the circumstances of the *Wrighten* case, this Court concluded that holding a press conference to oppose discrimination was protected.

*Amicus* here contends that the same balancing test should apply to protected activity under SOX and other whistleblower protection laws. Here, the information disclosed was damaging to the employer only to the extent that it revealed concerns about the employer's compliance. These circumstances weigh in favor of protection. In any event, the district court's *per se* exclusion is wrong and must be reversed.

## CONCLUSION

The National Whistleblowers Center asks this court to hold that media disclosures can be protected under Section 806 of the Sarbanes-Oxley Act. *Amicus* asks 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 *Amicus Curiae* complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The Brief is composed in a 14-point proportional typeface, Times New Roman. As reported by the Microsoft Word 2008 for Mac application, the contents of the Brief (exclusive of those parts permitted to be excluded under FRAP and the local rules of this court) contain 6,718 words.

Respectfully submitted by:

/s/ David Colapinto
David Colapinto

**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/ David Colapinto
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 22, 2010, 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 upon:

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