Appeal No. 12-60122

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WILLIAM VILLANUEVA,
Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR,
Respondent;

CORE LABORATORIES NV
Intervenor.

On review from the Administrative Review Board of the U.S. Department of Labor, ARB Case No. 09-108

BRIEF OF *AMICUS CURIAE* NATIONAL WHISTLEBLOWERS CENTER URGING REVERSAL

In Support of Petitioner

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STATEMENT OF INTEREST[1]

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); *Ver-*

1 All parties, through counsel, have consented to NWC filing a brief as *amicus curiae*.

mont 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); *Schroeder v. Greater New Orleans Federal Credit Union*, 664 F.3d 1016 (5th Cir. 2011). The Department of Labor 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;[2] *Sylvester v. Parexel International LLC*, ARB No. 07-123, ALJ NO. 2007-SOX-39, 42.[3]

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 principal 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. …

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

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

> 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].

The role of whistleblowers in detecting and preventing fraud is now well recognized. Organizations as diverse as PricewaterhouseCoopers,[4] the Ethics Resource Center and the Association of Certified Fraud Auditors,[5] 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

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

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

concluded that building strong internal compliance programs – in which employees were encouraged to report potential frauds internally – was key to the detection of fraud.[6]

Whistleblowers are a bulwark of accountability against those who would corrupt government or corporations. Aggressive defense of whistleblowers 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.

Employees who take an ethical stand against and report 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 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 criminal proceedings initiated by government regulators. As set forth in this brief, and as fully sup-

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

ported 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 1974, courts recognized that general whistleblower protections clearly intended that internal reports would be fully protected. *Phillips v. Interior Bd. of Mine Operations Appeals*, 500 F.2d 772 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 938 (1975). The NWC has an interest in ensuring that the scope of these legal protections are consistently applied under the various federal employee protection statutes, including SOX.

STANDARD OF REVIEW

Whether Congress has intended extraterritorial application is a question of statutory interpretation. *See Foley Bros. v. Filardo,* 336 U.S. 281, 284, 69 S.Ct. 575, 577, 93 L.Ed. 680 (1949); *United States v. Bowman,* 260 U.S. 94, 97, 43 S.Ct. 39, 41, 67 L.Ed. 149 (1922). Statutory interpretation is subject to plenary review. *See United States v. Kay,* 359 F.3d 738, 742 (5th Cir. 2004). This Court also reviews summary judgments *de novo*. *Holt v. State Farm Fire & Cas. Co*., 627 F.3d 188, 191 (5th Cir. 2010)

SUMMARY OF THE ARGUMENT

Core Labs accepted the duty to comply with SOX when it continued its SEC registration as a publicly traded company (NYSE:CLB) after SOX's 2002 enactment. This duty includes responsibility to maintain correct records, make honest public reports to the SEC, establish internal channels for raising concerns and protect whistleblowers from retaliation.

SOX created these duties to enhance public confidence in our financial markets. The Senate considered the whistleblower protection to be a "crucial" component to encourage employees to assist in fraud detection. This purpose utterly fails if the whistleblower protection stops at our nation's boundaries.

Villanueva's disclosures about Core Labs' obligation to pay Columbian taxes is also a disclosure that its officers planned to file a false report to the SEC about its liabilities. Villanueva's superiors intended to evade the Columbian taxes by concealing its income. As such, they could not report the known Columbian tax liability to the SEC. Doing so would make the income known to the whole world, including Columbia. The fraud on the SEC

was essential to the overall scheme. As Villanueva was raising a concern about this scheme, his actions are protected by SOX.

In 2002, Congress was well aware of the way Enron abused international transactions to conceal its true liabilities. Congress enacted SOX as part of the 1934 Securities Exchange Act (SEA), cognizant of that Act's world-wide reach in prohibiting frauds that affect U.S. Securities markets. Congress intended SOX to have a broad sweep to rid our financial markets of fraud in part through the protection of whistleblowers. Congress thereby intended that the whistleblower protection would apply extra-territorially. Otherwise, it would be ineffective in protecting our domestic market from some frauds.

SOX made internal compliance 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). The Securities Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC) have lauded 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 see these pro-

grams as crucial to assure that all operations are conducted lawfully and in compliance with policy. Raising concerns through internal channels has 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. Villanueva's disclosures to his supervisors in Houston are precisely the types of disclosures SOX sought to encourage and are therefore protected by SOX Section 806.

ARGUMENT

I. SOX PROTECTS VILLANUEVA'S DISCLOSURES.

A. Congress enacted SOX in the wake of Enron's fraudulent abuses of international transactions.

Section 806 of SOX applies to all companies with a class of securities registered under Section 12 of the Securities and Exchange Act (SEA), or that must file reports under Section 15(d), including subsidiaries and affiliates of such companies. See 18 U.S.C. § 1514A(a). This coverage includes so-called "foreign private issuers"—foreign companies who voluntarily submit to U.S. securities regulations in order to gain access to investors in U.S. capital markets. SOX does not distinguish between U.S. and foreign companies listed on domestic securities exchanges.

By doing so, Congress chose to define the statute's scope by using a precise and highly technical specification that unambiguously includes foreign companies. Congress certainly knew that its technical specification of the statute's scope would include foreign companies, since the SEC has regulated such foreign companies for decades. By choosing to define the statute's scope in this manner, Congress expressed its intent for the statute to apply extra-territorially. Because foreign subsidiaries' operations contribute

significantly to the financial performance of their parent companies listed on U.S. securities exchanges, a restrictive interpretation would frustrate the clear purpose of SOX. Moreover, Congress did not intend to induce companies to delegate more questionable activities from their domestic headquarters to their foreign subsidiaries abroad, which would be the effect if these protections were only afforded to the domestic workforce.

Enron's use of off-shore subsidiaries to generate false financial statements was central to Congress' motivation for enacting SOX. If the reason for the enactment of SOX had to be distilled to a single word, that word would be "Enron." The Congressional record is replete with references to Enron being the catalyst for this Act. Ironically, attached to the last 10-K Enron filed with the SEC before it imploded in 2001 was a 56-page list of hundreds of subsidiaries and limited partnerships based throughout the world.[7] The various frauds that caused Enron's downfall occurred at these subsidiaries and limited partnerships. Enron's S-4 registration statement, filed with the SEC on October 9, 1996, states: "Essentially all of Enron's operations

7 See http://www.sec.gov/Archives/edgar/data/1024401/000102440101500010/exh21.txt

are conducted through its subsidiaries and affiliates…."[8] When Senator Leahy reported on the whistleblower provision, he described it in the context of Enron:

> Look what they were doing on this chart. There is no way we could have known about this without that kind of a whistleblower. ... The fact is, they were hiding hundreds of millions of dollars of stockholders' money in their pension funds. The provisions Senator Grassley and I worked out in Judiciary Committee make sure whistleblowers are protected. …
>
> As the Andersen case showed, instead of just incorporating the loopholes from existing crimes and raising the penalties, we need tough new provisions that will make sure key documents do not get shredded in the first place.
>
> It only takes a minute to warm up the shredder, but it can take years for prosecutors and victims to prove a case.

Congressional Record, S7358, July 25, 2002.

Congress wanted to make life easier for prosecutors and the victims of fraud. The pre-existing law was not strong enough, and Congress wanted to strengthen it. It enacted the whistleblower protection to help prosecutors and investors find the witnesses and documents that would reveal fraudulent in-

8 See http://www.sec.gov/Archives/edgar/data/1024401/0000950129-96-002433.txt

formation filed with the SEC.[9] The House Committee Report, 107-414, explained the purpose of SOX:

> H.R. 3763, the Corporate and Auditing Accountability, Responsibility, and Transparency Act of 2002, will protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws.[10]

The Senate Report, 107-205, stated the purpose as follows:

> The purpose of the bill is to address the systemic and structural weaknesses affecting our capital markets which were revealed by repeated failures of audit effectiveness and corporate financial and broker-dealer responsibility in recent months and years.

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). After the enact-

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9 Accordingly, it is appropriate to look at the scope of the preexisting SEA and apply the new Section 806 to at least the scope of the SEA as it was enforced in 2002.

10 See, http://www.thomas.gov/cgi-bin/cpquery/?&dbname=cp107&sid=cp107wSLP0&refer=&r_n=hr414.107&item=&sel=TOC_77099&

ment of SOX, Senator Leahy stated, "[t]he law was intentionally written to sweep broadly, protecting any employee of a publicly traded company who took such reasonable action to try to protect investors and the market."[11]

ARB Judge Royce captured the importance of applying Section 806 to Villanueva's case in page 16 of her dissent:

> Congress adopted SOX against a backdrop of corporate misconduct conducted on a global arena and was well aware that sustaining market integrity would require more than a purely domestic focus. The SOX's legislative history contains repeated references to the interconnectedness and internationalization of national markets. To quote just one such reference, Senator Bayh stated:
>
> > We exist in a global economy today and transparency and reliability of financial data is critically important to the functioning of the global economy. This has significant effects upon the United States. . . . We are affected by the reliability – or lack thereof – of financial accounting standards abroad. And our country, as we have seen several times in the last decade, can be affected by financial shocks abroad, occasionally brought on by a lack of financial transparency in some other markets.[12]

With the passage of SOX, Congress sought to regulate

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11 Congressional Record S1725, January 28, 2003

12 This is a quote that the First Circuit failed to consider in *Carnero v. Boston Scientific Corp*., 433 F.3d 1, 8 (1st Cir. 2006) when it said, "the statute's legislative history indicates that Congress gave no consideration to either the possibility or the problems of overseas application."

> the U.S. financial market in the second millennium – a market heavily globalized and complicated with vast foreign markets and substantial foreign ownership, not to mention outsourcing, off-shoring, and instantaneous cross-border electronic securities transactions in cyberspace. Limiting Section 806, a critical weapon in SOX's arsenal of combating financial misconduct, to domestic activity would severely undercut Congress' remedial purpose. Congress could not have intended a mechanism so anachronistic and ill-suited to modern market conditions. [Footnotes omitted.]

Senator Sarbanes stated at S. Rep. 107-205, at 11 (July 3, 2002):

> Companies that sell shares to U.S. investors, and are subject to the federal securities laws, can be organized and operate in any part of the world. Their financial statements are not necessarily audited by U.S. accounting firms, and the Committee believes that there should be no difference in treatment of a public company's auditors under the bill simply because of a particular auditor's place of operation. Otherwise, a significant loophole in the protection offered U.S. investors would be built into the statutory system.

Denying international employees protection under Section 806 would create a similar loophole in the protection offered to investors in our stock market.

In Villanueva's case, the application of SOX is obvious in the context of the purpose of assuring the integrity of SEC filings. Villanueva alleged that Core Labs was concealing known tax liabilities owed to Columbia. When Core Labs filed its reports with the SEC, it was filing false reports as

it would not show these known liabilities. Naturally, if they are defrauding the Columbian government, they are not going to disclose that fact in a public SEC filing. A necessary component of their scheme is concealment. Yet, the SEC requires disclosure. SOX made it a crime to make a false entry in any document with the intent to impede any investigation by U.S. agencies. SOX Section 801, 18 U.S.C. 1519; 17 C.F.R. § 240.13b2-1. The relevant crime, therefore, is committed here in the US with the filing of the financial report that omits the known Columbian taxes. Section 806 of SOX is broadly written to protect anyone who raises a concern about that crime. This is the point the ARB missed at page 11 of the majority opinion.

Investors around the world rely on the SEC to enforce the SOX reporting requirements to assure that the financial reports on file with the SEC are trustworthy.[13] The ARB's majority erred at p. 13 in saying, "Villanueva did not point to a U.S. law or domestic financial statement that was fraudulent." Villanueva had a reasonable basis to believe that Corp Labs was not going to report the Columbian tax liability to the SEC because his superiors

13 SOX's focus on the integrity of financial records and reports distinguishes this case from *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). Title VII's focus is on civil rights within American workplaces. Extra-territorial effect is not essential for this purpose. It is essential to accomplish SOX's goal of enhancing public confidence in our financial markets.

were telling him to transfer the profits to another country and not pay the Columbian taxes.

When Core Labs chose to list its securities on the NYSE, it accepted the duty to comply with SOX throughout all its operations, wherever in the world they might be. The integrity of the US stock markets depend on this worldwide duty to maintain proper internal controls that assure the accuracy of the financial reports filed with the SEC. Enron's off-shore abuses made this heightened worldwide standard necessary.

Congress considered the whistleblower protection to be a "crucial"component of SOX for "restoring trust in the financial markets by ensuring that corporate fraud and greed may be better detected, prevented and prosecuted." S. Rep. 107-146 at 2. This component utterly fails if a publicly traded company can evade it by transferring all compliance-sensitive work overseas. Under the ARB's holding, as long as the witnesses are overseas, the company is free to fire them. Congress did not enact SOX to encourage companies to transfer work overseas. It enacted SOX to restore public confidence in U.S. securities markets, and the whistleblower protection, as a "crucial" component of this restoration, naturally flows to those em-

ployees with knowledge of the violations. This is the legal analysis that was missing from *Carnero v. Boston Scientific Corp.*, 433 F.3d 1 (1st Cir. 2006).

B. The law in effect when Congress enacted SOX applied U.S. securities law to any activity that had "conduct" or effects" in the U.S.

Congress enacted SOX in 2002 in the context of the 1934 Securities Exchange Act (SEA). By 2002, it was well-established that U.S. law applied to any unlawful activities that had "conduct" or "effects" in the U.S.

The Second Circuit first adopted the "effects" test in 1945 in *U.S. v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) ("*Alcoa*"). The *Alcoa* court found the domestic effects of the foreign conduct, rather than the loci of the offensive conduct, were controlling when the defendant organized a Canadian corporation through which it joined a Swiss aluminum cartel that controlled, in violation of the Sherman Act, the amount of aluminum delivered to the U.S. *See Id*. at 443-44. The specific test articulated is that if the conduct has "intended and actual" or "substantial and foreseeable" effects within the country, then domestic jurisdiction applies. *Id*. Later, with regard to the SEA, the Second Circuit held that subject matter jurisdiction

exists over any case where fraudulent extraterritorial conduct has a substantial impact on the investors or markets of the U.S. *Schoenbaum v. Firstbrook*. 405 F.2d 200, 206 (2d Cir. 1968), *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1969). The court reasoned that the language of the SEA indicates Congress' intention that it protects both domestic investors and markets from fraudulent foreign transactions. Courts have applied the "effects" test in all areas of law, including antitrust law,[14] the Commodity Exchange Act,[15] the Lanham Act,[16] labor and employment law,[17] RICO,[18] and securities laws.[19]

The Securities and Exchange Commission (SEC) has clearly enunciated its policy that U.S. securities laws to have extraterritorial effect when such effect is necessary to accomplish compliance with reports made here in

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14 *See, e.g., Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796-97 (1993).

15 *See, e.g.*, *Tamari v. Bache & Co. (Lebanon) S.A.L.,* 730 F.2d 1103, 1107-08 (7th Cir.1984).

16 *See, e.g.*, *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952).

17 *See, e.g.*, *Dowd v. Int'l Longshoremen's Ass'n*, 975 F.2d 779, 789 (11th Cir. 1992) (on NLRB application for injunction); Stephen B. Moldof, *The Application of U.S. Labor Laws to Activities and Employees Outside the United States*, 17 Lab. Law. 417 (2002).

18 *See, e.g.*, *Alfadda v. Fenn*, 935 F.2d 475 (2d Cir. 1991).

19 *See, e.g., Itoba Ltd. v. Lep Group, Inc.,* 54 F.3d 118, 122 (2d Cir. 1995).

the US. For example, the SEC used this policy, and the *Schoenbaum* decision, to support its regulation of Internet web sites that solicit securities transactions.[20] The SEC explained as follows:

> The courts have recognized U.S. jurisdiction over fraudulent conduct where substantial conduct or effects occur in the United States. See generally *Itoba Ltd. v. LEP Group PLC*, 54 F.3d 118 (2d Cir. 1995), cert. denied, 516 U.S. 1044 (1996) and *Robinson v. TCI/US West Communications Inc*., 117 F.3d 900 (5th Cir. 1997) (citing *Schoenbaum v. Firstbrook* , 405 F.2d 200 (2d Cir.), rev'd on other grounds on rehrg. en banc , 405 F.2d 215 (2d Cir. 1968), cert. denied, 395 U.S. 906 (1969) (effects test)); *Bersch v. Drexel Firestone Inc*., 519 F.2d 974 (2d Cir.), cert. denied , 423 U.S. 1018 (1975) (conduct test); *Leasco Data Processing Equipment Corp. v. Maxwell* , 468 F.2d 1326 (2d Cir. 1972) (conduct test).

The general rule is that a conspiracy to violate the criminal laws of the United States, in which one conspirator commits an overt act in furtherance of that conspiracy within the United States, is subject to prosecution here. *See Ford v. United States,* 273 U.S. 593, 620 , 47 S.Ct. 531, 540, 71 L.Ed. 793 (1927) ("[T]he conspiring was directed to violation of the United States law within the United States, by men within and without it, and everything

20 Interpretation: Re: Use of Internet Web Sites To Offer Securities, Solicit Securities Transactions, or Advertise Investment Services Offshore. 17 CFR Parts 231, 241, 271, 276; (Release Nos. 33-7516, 34-39779, IA-1710, IC-23071); International Series Release No. 1125. March 23, 1998. http://www.sec.gov/rules/interp/33-7516.htm

done was at the procuration and by the agency of each for the other in pursuance of the conspiracy and the intended illegal importation. In such a case all are guilty of the offense of conspiring to violate the United States law *whether they are in or out of the country."*) (emphasis added); *Rivard v. United States,* 375 F.2d 882, 886 (5th Cir.1967) ("There is thus no doubt that the object of the conspiracy was to violate the narcotics laws of the United States; that the conspiracy was carried on partly in and partly out of this country; and that overt acts were committed within the United States by co-conspirators."); *United States v. Winter,* 509 F.2d 975, 982 (5th Cir.1975) ("[T]he District Court has jurisdiction over a conspiracy and all those proved to be conspirators if the conspiracy is designed to have criminal effects within the United States and if there is sufficient proof that at least one of the conspirators committed an overt act in furtherance of the conspiracy within the territorial jurisdiction of the District Court.")

Logic dictates that Congress would not have passed a drug conspiracy statute that prohibits international drug smuggling activities, while simultaneously undermining the statute by limiting its extraterritorial application. *See United States v. Vasquez-Velasco,* 15 F.3d 833, 839 n. 4 (9th Cir.1994).

Similarly, enacting the criminal and whistleblower provisions of SOX, but limiting their effect to our territorial boundaries, would severely undermine their scope and effective operation.

As this was the clear state of the law in 2002, it is appropriate to consider this law in determining the congressional intent for SOX. As part of SOX, Congress required covered companies to establish internal reporting channels for employees who observe violations. Congress made clear that it wanted all employees, anywhere in the company, to be free to raise their concerns:

> These examples further expose a culture, supported by law, that discourage employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally. 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.

S.Rep. 107-146, p. 5. Continuing on page 11, the Senate Report makes clear that Congress intended SOX to be effective in preventing Enron-style conspiracies:

> Accountability and transparency help our markets work as they should, in ways that benefit investors, employees, consumers and our national economy. The Enron debacle has arrived on our doorstep, and our job is to make sure that there are adequate doses of accountability in our legal system to prevent such occurrences in the future, and to offer a constructive remedy and decisive punishment should they occur. The time has come for Congress to rethink and reform our laws in order to prevent corporate deceit, to protect investors and to restore full confidence in the capital markets.

These objectives require that SOX's full set of reforms apply world-wide.

C. *Morrison* does not alter the the congressional intent of SOX.

The Supreme Court did not consider SOX's whistleblower provision in *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010). The respondent in *Morrison*, National Australia Bank Limited ("National"), during the relevant time, did not list its stock on any exchange in the U.S. *See Morrison*, 130 S. Ct. at 2875. This is a material difference as Core Labs is registered with the SEC and trades on the NYSE. The discussion in *Morrison* consistently sites to this lack of any nexus to U.S. securities markets as the basis for its dismissal of the petitioner's complaint.

Moreover, *Morrison* restates the current state of case law on the extra-territorial application of U.S. statutes. The Supreme Court confirms that

there is only a presumption against extraterritorial application when there is no otherwise clear intent from Congress. That presumption is not self-evidently dispositive. *Id*. at 2884. The transactional test *Morrison* ultimately adopts — whether a purchase or sale is made in the U.S., or involves a security listed on a domestic exchange — rephrases the "conducts and effects" tests espoused in the Second Circuit. *Id*. at 2886; *see also S.E.C. v. Berger*, 322 F.3d 187, 192-193 (2nd Cir. 2003). Villanueva's situation fully meets the new "transactional" test *Morrison* espouses since he raised concerns about Core Labs transactions with the mails, wires and SEC filings here in the U.S.

D. Section 929A of the Dodd-Frank Act further emphasizes the congressional intent to protect all employees throughout the full organization of publicly traded companies.

Section 929A of the Dodd-Frank Wall Street Reform and Consumer Protection Act amended Section 806 of SOX by inserting within subsection (a) the following provision: "including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company." Pub. L. No. 111-203, 124 Stat. 1376 (enacted on July 21, 2010) ("Dodd-Frank Act"). With this clarification, SOX protects employees

of any subsidiary of a company with a class of securities registered under Section 12 of SEA that the company includes in its consolidated financial statements. *Johnson v. Siemens*, ARB No. 08-032, ALJ No. 2005-SOX-015 (ARB Mar. 31, 2011). Core Laboratories NV ("Core Labs"), the intervenor in this case, is a publicly-traded company with a class of securities registered under Section 12(b). Pursuant to Exhibit 21.1 of Core Labs's Form 10-K filed with the Securities and Exchange Commission ("SEC"), Respondent Saybolt de Colombia Limitada ("Saybolt") is a 95%-owned subsidiary of Core Labs and includes Saybolt in its consolidated financial statements. Consequently, SOX applies to both Core Labs and Saybolt and protects Villanueva from retaliation.

Section 929A does not alter the scope of coverage under SOX Section 806. 18 U.S.C. § 1514A. Instead, it clarifies Congress' original intent in enacting Section 806 of SOX in July 2002. Accordingly, applying section 929A to the instant action does not create an issue of retroactivity. In *Willy v. Administrative Review Bd*. 423 F.3d 483, 489, n. 11 (5th Cir. 2005), this Court gave effect to a similar legislative action on the basis that the legislative history and indicated that such an amendment is intended to "make

clear" the original intent: "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." (Emphasis added). Accord, *Kansas Gas & Elec. Co. v. Brock,* 780 F.2d 1505, 1512 (10th Cir. 1985) (applying amendment to law as indication of Congress' original intent).

As Congress undertook the effort to clarify that SOX Section 806 applies to all the employees of all the subsidiaries of publicly traded companies, it added no limitation for those employees outside the United States.

E. Villanueva's internal disclosures are a recognized means by which employees can request that information be provided or that proceedings commence.

Long before Congress considered creating an employee protection in SOX, 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, such as Villanueva's reports to Houston. 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 *Phillips* holding. 595 F.2d at 741.

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. See also, 42 U.S.C. § 7622 (1977), the Clean Air Act; the "Superfund" Law, 42 U.S.C. § 9610; 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. 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,[21] 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).

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).

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21 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.

SOX protects disclosure of wrongdoing that assists in an investigation conducted by a member of Congress or of law enforcement. SOX also 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 primary 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 strengthened the policy in 2004 and 2010. This change has had a profound effect on the motivation of corporate officials to maintain internal reporting programs and to assist government enforcement. Section 8B2.1(b)(5)(C) of the 2010 Sentencing Guidelines requires that employees must be free to make reports "without fear of retaliation." 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.[22] 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.[23]

On March 17, 2010, the Association of Corporate Counsel (ACC) submitted a letter to the Sentencing Commission.[24] 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 recog-

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22 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.

23 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).

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

nize that the Sentencing Commission "has tremendous relevance and impact outside the context of sentencing[.]" P. 2.

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 potential 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.[25]

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 in-

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

centivized 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[26] committed to a strong ethical culture. On December 17, 2010, ERC stated the following in comments[27] to the SEC:

> We note the concern of other commentators that the proposed 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*.[28] At p. 5, the report finds that:

> For the largest number of employees (46 percent), the

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

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

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

> 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.

Internal reporting is now the preferred means of raising concerns about illegality and suspicious activity. 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.

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 enforce-

ment.[29] By forcing potential whistleblowers to choose between their careers and the truth, a narrow reading of Section 806 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 culture of cooperation, trust, and respect for the law.[30]
>
> 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 em-

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

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

> ployees 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 international whistleblowers, they 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.

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 also*, *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).[31]

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."

31 In *Pettway*, this Court held that protections for participation apply regardless of the merits of the underlying proceeding.

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 Villanueva's disclosures are protected by SOX. *Amicus* ask this Court to grant the petition for review, reverse the ARB's final order and remand this matter for further proceedings.

Respectfully Submitted by:

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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, such as the statement of interest and certificates) contain 6,898 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 June 26, 2012, I caused the foregoing Brief of *Amicus Curiae* National Whistleblowers Center Urging Reversal, in Support of Petitioner, to be served through this Court's electronic filing system on all counsel of record.

/s/ Richard R. Renner
Richard R. Renner

APPENDIX

The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 801, et seq. (1970), Section 110(b)(1) [succeeded by 30 U.S.C. § 815(c)] 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.

Sarbanes-Oxley Act of 2002, 18 U.S.C. §1514A(a)

(a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES- 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. 78o(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 regula-

tion 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.