

Record Nos. 08-1970 (L) and 08-2196

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UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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DAVID STONE,  
Plaintiff-Appellant,

v.

INSTRUMENTATION LABORATORY COMPANY;  
BRIAN DURKIN; ANN DEFRONZO; RAMON BENET  
Defendants-Appellees.

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On Appeal from the United States District Court  
for the District of Maryland  
District Court No. 1:07-cv-03191-WDQ

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BRIEF OF AMICI CURIAE URGING REVERSAL

In Support of Appellant

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#### Interest of the Amici and Source of Authority to File

The Government Accountability Project (GAP) and the National Whistleblower Center (NWC) played important roles in securing the enactment of Section 806 of the Sarbanes-Oxley Act (SOX), 18 U.S.C. §1514A, and the passage of other whistleblower statutes administered by the U.S. Department of Labor upon which Section 806 was modeled. Given this involvement, as well as the amici's extensive experience litigating whistleblower claims, amici are particularly well-placed both to explain the intent of Congress in connection with the SOX whistleblower provisions and to comment upon the law and facts of the case at bar.

GAP is a non-partisan, non-profit organization specializing in legal and other advocacy on behalf of whistleblowers. GAP has a 30-year history of working on behalf of government and corporate employees who expose illegality, gross waste and mismanagement, abuse of authority, substantial or specific dangers to public health and safety, or other institutional misconduct undermining the public interest. GAP has substantial expertise in protecting employees' free speech and whistleblower rights. GAP is often called upon to comment on proposed laws, regulations, policies, and reforms, and GAP attorneys have testified before Congress

over the last two decades concerning the effectiveness of existing statutory protection, submitted formal comments on Department of Labor whistleblower regulations and filed numerous amicus curiae briefs on constitutional and statutory issues relevant to whistleblowers. GAP played a leading role in advocating for the Whistleblower Protection Act of 1989, P.L. 101-12, 103 Stat. 16 (April 10, 1989) (WPA), as well as the WPA's 1994 amendments. Gap was instrumental in passage of the 1992 amendments to the whistleblower provisions of the Energy Reorganization Act, 42 U.S.C. §5851. More recently, GAP played a role in the passage of the whistleblower provisions of the Sarbanes-Oxley Act of 2002, 18 U.S.C. §1514A, and is cited in its legislative history. See 148 Cong. Rec. §6439-6440, 107th Congress, 2d Session (2002).

Established in 1988, the National Whistleblower Center is a non-profit tax-exempt public interest organization. The Center regularly assists corporate employees throughout the United States who suffer from illegal retribution for lawfully disclosing violations of federal law. In 2002, the Center worked closely with the Senate Judiciary Committee and strongly endorsed its efforts to "prevent recurrences of the Enron debacle and make similar threats to the nation's financial markets." 148 Cong. Rec. .S. 7420 (daily ed. July 26, 2002) (remarks of Senator Leahy, quoting from letter signed by the Center as well as the Government Accountability Project).

Senator Leahy recognized the role of these amici 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.

The amici advocate on behalf of whistleblowers because these truth-tellers uncover and rectify grave problems facing our securities markets and our society at large. Whistleblowers are a bulwark against those who would corrupt government or corporations. Therefore aggressive defense of whistleblowers is 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 silence.

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

Amici respectfully submit this brief to assist the Circuit Court in the resolution of this case. Amici's interest in the case is to reverse the District Court's erroneous analysis of the standard of review for cases removed to federal court under Section 806 of SOX. Amici have an interest in assuring that the de novo standard established by Section 806 is applied as written so that whistleblowers will have a standard civil process to adjudicate their claims in cases where the Department of Labor's administrative process exceeds the time limit set by Congress. Amici seek application of Section 806 that is consistent with its plain meaning and intent.

Pursuant to Fed. R. App. P. 29 (a) and (b), amici are contemporaneously filing with this Court a motion for leave to file this brief.

#### Summary of the Argument

Contrary to the district court's ruling, the right to review de novo in federal district court if the Secretary does not issue a final decision within 180 days of the complaint is clearly and unambiguously stated in 18 U.S.C. §1514A. Congress' intent in passing this provision is identified plainly in the Congressional Record. The choice not to include any language that would preclude litigation of issues that had been decided by the Administrative Review Board (ARB) or Administrative Law Judge (ALJ) also shows an intent to allow full de novo review. This interpretation is consistent with discrimination cases heard before the Equal Employment Opportunity Commission (EEOC) in which plaintiffs are permitted to bring the claim to district court as if the EEOC proceedings never took place.

Because of the clarity of both the statute and the legislative intent, the district court erred in using *Allen v. Stewart Enterprises, Inc.*, No. 05-4033 (E.D.La. Apr. 6, 2006), as the sole basis for its ruling, particularly because the facts in this matter would not have yielded an "absurd result." The *Allen* decision not only goes against numerous precedential cases, but elevates a Secretary's gratuitous, supplemental comment to a Department of Labor regulation to a level of deference higher than that of a Congressionally-passed statute. If *Allen* remains precedential in the Fourth Circuit, the Department's executive officers would have unprecedented authority to erase

unequivocal statutory language. Untold numbers of whistleblowers will be deprived of their statutorily-conferred right to a full and fair de novo adjudication of their claims because of institutional limits on the claims process within DOL.

## ARGUMENT

1. The Plain and Clear Language of SOX Unequivocally States that the Proceedings in Federal District Court are De Novo.

The plain meaning of 18 U.S.C. §1514A could not be clearer. If an individual files a complaint pursuant to the Sarbanes-Oxley Act of 2002, and no final decision is issued by the Secretary within 180 days, the complainant is entitled to file his case in federal district court for de novo proceedings. SOX provides at 18 U.S.C. §1514A(b)(1) as follows:

(1) IN GENERAL- A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by--

(A) filing a complaint with the Secretary of Labor; or

(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. [Emphasis added.]

Statutory analysis begins with the plain language of the statute, “the language used by Congress.” *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979)). To best give effect to the intent of Congress, those words must be given their “ordinary meaning.” *Am. Tobacco Co.*, 456 U.S. at 68 (quoting *United States v. Am. Trucking Ass’n*, 310 U.S. 534, 542 (1940)). “By reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole,” a court can

determine whether a statute is plain and unambiguous. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

The meaning of Section 1514A has been identified clearly by two other courts. See, e.g. *JDS Uniphase Corp. v. Jennings*, 473 F.Supp.2d 705, 710 (E.D. Va. 2007) (“This much is uncontroversial...[the complainant] must allow the agency at least 180 days to investigate and issue a decision on the merits. At that point, if no decision is issued, the claimant may file a civil action for de novo review in the district court.”); *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1374 (N.D. Ga. 2004) (“When a plaintiff files suit in federal court under Sarbanes-Oxley, the court conducts a de novo review of the plaintiff’s claim.”).

This is not the first time that a statutory scheme has given plaintiffs a “second bite at the apple.” The Equal Employment Opportunity Act of 1972 gives plaintiffs the right to appeal an agency decision to federal district court even after a final decision has been issued by the EEOC. The Fourth Circuit has relied on the plain language of the EEOA and noted that de novo review “makes clear” that the trial in district court “proceeds as if no earlier proceedings had been completed at all.” *Laber v. Harvey*, 438 F.3d 404, 421 (4th Cir. 2006). In fact, as this Court recognized in *Laber*, it has been long-established that employees “not only had the right to a de novo judicial consideration of their discrimination claims without regard to the EEOC’s finding of reasonable cause, but also that they were unable to use the EEOC’s finding to compel a finding of discrimination in the district court. (Internal citations omitted)” *Laber*, 438 F.3d at 421 (citing *Chandler*, 425 U.S. at 844-45). Congress understood well what its language in SOX means.

1. The Legislative History of SOX Clearly Shows that Congress Intended for De Novo Review in Federal Cases for Whistleblowers After 180 Days have Elapsed with no Final Ruling.

While legislative history is not the conclusive source for judicial interpretation, courts are authorized to look to the legislative history when questions of statutory construction arise. Despite the apparent clarity of the whistleblower provision of SOX, if this Court were to find that there is any ambiguity in the statute, it is appropriate to refer to the legislative history. See, e.g., *Toibb v. Radloff*, 501 U.S. 157, 162, 111 S.Ct. 2197 (1991) (“...although a court appropriately may refer to a statute's legislative history to resolve statutory ambiguity, there is no need to do so here [because the statute is not unclear.]”); *United States v. Gonzales*, 520 U.S. 1, 6,

117 S.Ct. 1032, 1035, 137 L.Ed.2d 132 (1997); *Blum v. Stevenson*, 465 U.S. 886, 896, 104 S.Ct. 1541, 1548 (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.”); *United States v. Rast*, 293 F.3d 735, 737 (4th Cir. 2002) (“When the language of a statute is unclear, [we] may look to the legislative history for guidance in interpreting the statute.”). Legislative history is not enough to “override the ‘plain meaning’ rule.” *In re Sunterra Corp.*, 361 F.3d 257, 265 (4th Cir. 2004). However, when legislative history is in agreement with the plain meaning of the statute, it furthers supports the legislative mandate from the unambiguous statutory language.

1. Congress Affirmatively Stated its Intent to Give Employees the Right to Removal De Novo.

Congress’ intent in passing and enacting Section 806 of SOX is clear from the legislative history, and the history is consistent with the plain meaning of the statute. During debate over SOX in the Senate, Senator Patrick Leahy stated “Only if there is not a final decision within 180 days of the complaint (and such delay is not shown to be due to the bad faith of the claimant) may he or she bring a de novo case in federal court with a jury trial available. Should such a case be brought in federal court, it is intended that the same burdens of proof which would have governed in the Department of Labor will continue to govern the action.” Legislative History of Title VIII of HR 2673, the Sarbanes-Oxley Act of 2002, Section 806, 148 Cong. Rec. S7418, S7420 (July 26, 2002) (internal citations omitted). Senator Leahy expressed concern over the administrative process and wanted to give complainants the opportunity to litigate their cases fully and fairly in light of the poor record for plaintiffs at DOL. See *id.* Congress could see DOL’s record of long delays, deferential consideration of employer claims and administrative determinations, and conclude that the interests at stake deserve full civil trials before juries or Article III judges. For these reasons, Congress intended for complainants to be entitled to a trial in federal court that was not limited by the “record” below.

1. By Electing Not to Include Preclusive, Estoppel, Record-Limiting, or Language Establishing a Standard for Appellate Review, Congress Underscored its Desire for Review De Novo.

By failing to include language to limit the record that could be reviewed by the federal court or language that would preclude argument of issues “decided” by OSHA or dismissed primarily by ARB, Congress underscored its desire for a full review de novo. In *Chandler v. Roudebush*, the Supreme Court noted, “In most instances, of course, where Congress intends review to be confined to the administrative record, it so indicates, either expressly or by use of a term like ‘substantial evidence,’ which has ‘become a term of art to describe the basis on which an administrative record is to be judged by a reviewing court.’” *Chandler v. Roudebush*, 425 U.S. 840, 862 n.37 (1976).

With SOX, Congress chose not to indicate that de novo review should be confined to the administrative record, therefore allowing federal courts to conduct a full review of the issues without regard for the preliminary decisions reached at the administrative level. See Jarod S. Gonzales, “SOX, Statutory Interpretation, and the Seventh Amendment: Sarbanes-Oxley Act Whistleblower Claims and Jury Trials,” 9 U.Pa. J. Lab. & Emp. L. 25, 38 (2006).

1. The “second bite at the apple” dilemma does not negate either the intent of Congress or the plain wording of the statute.

The district court opinion rests heavily on the unreported, fatally flawed decision in *Allen v. Stewart Enterprises, Inc.*, No. 05-4033 (E.D.La. Apr. 6, 2006). In the *Allen* case, the judge ruled that “re-litigating” a case where there was no agency or Secretary decision within 180 days would “lead to absurd results.” *Allen* at 7. According to the court in *Allen*, it is necessary in the interest of judicial economy not to litigate the case de novo; instead, the whistleblower’s statutorily-conferred right to remove the case to federal district court if the agency has not issued a ruling within 180 days should be interpreted as a right of the district court to issue a writ of mandamus to force the agency to issue a ruling within a particular timeframe. Not only does this interpretation run contrary to the plain meaning of the statutory language, it goes against the clear and express intent of Congress. It also grants a District Court judge authority to erase language that for decades has controlled significant litigation options, such as EEOC rights, based on a subjective judgment (contrary to that of every other court considering the issue) that the congressional model was “absurd.” Any more than the Secretary of Labor, the *Allen* judge had no authority to cancel statutory language on non-constitutional grounds. This view of the law cannot coexist with longstanding canons of statutory interpretation.



1. The District Court Judge Erred in Relying on a Comment to an Agency Regulation Rather than the Text of the Statute.

SOX states that, for any claim brought under the whistleblower protection provision, a final decision by DOL shall be made within 180 days of the complaint being filed; if a final decision is not issued within that time, the employee may remove the claim to federal district court for a trial de novo provided there is no showing of “bad faith of the claimant” that caused the delay. 18 U.S.C. §1514(A)(b)(1)(B). DOL has issued regulations that guide parties and DOL staff in processing SOX cases. 29 C.F.R. Part 1980. <sup>[1]</sup>

However, in this case, the district court judge erroneously relied on comments submitted as part of the promulgation process for DOL’s regulations rather than the clear and plain language of the statute. While DOL has the authority to create procedural regulations for the administration of a statute, it does not have the authority to alter the substantive provisions of a statute unless specifically authorized to do so. Compare 29 U.S.C. § 213(a) (authorizing Secretary to define and delimit terms under the Fair Labor Standards Act); 42 U.S.C. § 2000e-16 (conferring upon EEOC the power to issue rules and regulations under Title VII to prevent discrimination against federal employees). Congress elected not to grant DOL such authority in SOX, choosing instead that whistleblower complaints “shall be governed under the rules and procedures set forth in section 42121(b) of Title 49, United States Code (the Aviation Investment and Reform Act for the 21st Century or ‘AIR21’).” AIR21 specifies the burdens of proof for complaints based on whistleblower discrimination and sets forth procedural and temporal requirements, but it does not authorize OSHA or DOL to modify the statute through substantive regulations.

Even if DOL had the authority to create regulations dealing with the substance of SOX, a comment to an agency regulation does not trump a statute when the two are in conflict. Particularly when the statute is clear and unambiguous and is not contradicted by the legislative history, there is no basis to reach for contrary authority. Where regulations conflict with the plain meaning of a statute, the Court must refer to the statute as passed by Congress rather than the agency-promulgated regulation. See, e.g. *Ragsdale v. Wolverine Worldwide, Inc.*, 535 U.S. 81, 92, 122 S.Ct. 1155 (2002) , citing *FDA v. Brown and Williamson Tobacco Corp.*, 529 U.S. 120, 125, 120 S.Ct. 1291 (2000)(“Regardless of how serious the problem and administrative agency seeks to address, it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into

law.”). Therefore, the district court erred in using a regulatory comment over a clear statute.

#### B. The Allen Case is Fatally Flawed, Goes Against Precedent, and is not Analogous to the Instant Case.

The only precedent relied upon by the district court in the instant matter was the Allen case. In Allen, as discussed above, the District Court for the Eastern District of Louisiana declared that litigating cases under 18 U.S.C. §1514A in district court would be “needless duplicitous litigation” and “lead to an absurd result.” JA at 112, 115. Accordingly, the court declined to follow the plain language of SOX and several years of precedent, opting instead to dismiss Allen’s federal claim in the interest of “judicial economy.” The case was decided without regard for precedent, the clear and unambiguous intent of Congress, or even the plain meaning of the statute, and is therefore fatally flawed.

The district court below also erred in relying on Allen because it was not applicable to this case. In Allen, the plaintiff had an actual, meaningful opportunity to litigate his case before an administrative law judge (ALJ), including an evidentiary hearing lasting six days. Stone, however, never had the opportunity to conduct discovery and fully present his case to an ALJ. The ALJ assigned by DOL to Stone’s case issued a summary decision, before discovery. This case, therefore, is more closely analogous to the Hanna case. In *Hanna v. WCI Communities, Inc.*, 348 F.Supp.2d 1322, 1324 (S.D. Fla, 2004), the plaintiff gave notice of intent to file in district court while his initial complaint was still pending with OSHA.<sup>[2]</sup> Hanna had not conducted discovery, and had not appeared before an ALJ to present his case. The court in that case followed the clear language of the statute and ruled that Hanna had a right to bring his case in district court as he had not received a final ruling from DOL within 180 days of filing his complaint. See *id.* at 1328. Addressing the DOL regulation on which Allen relies, the court in Hanna stated:

Mr. Hanna’s case [did] not present the egregious factual scenario contemplated by the DOL [in the regulation]... Therefore, the court holds, as a matter of law, that the plain language of 18 U.S.C. §1514A(b)(1)(B) allows Mr. Hanna to bring his whistleblower complaint in this court because the DOL had not issued a final decision within 180 days of the filing of the complaint.

*Ibid*, internal citations omitted.

The instant matter is more analogous to that in *Hanna*. The amici urge this Court to reject application of the severely flawed *Allen* precedent.

### C. Other Employee Protection Statutes give Plaintiffs a “Second Bite at the Apple.”

In the *Allen* case, the judge voiced concern that issues could be relitigated in federal district court after being all but decided below. Congress was well aware of this possibility when it enacted SOX.

It does not agree with the Secretary of Labor or District Court’s judgment about whistleblowers’ due process rights. It has repeated the *de novo* “second bite” court access model five times since 2002 when it enacted SOX. It since reaffirmed its decision to rely on the “second bite” model in the following statutes: Energy Reorganization Act, 42 USC 5851(b)(4); Surface Transportation Assistance Act, 49 USC 31105(c); National Transit Systems Security Act of 2007, 6 USC 1142(c)(7); Federal Rail Safety Act, 49 USC 20109(d)(3); Defense Authorization Act, 10 USC 2409(c)(2); and Consumer Product Safety Improvement Act, 49 USC 2087(b)(4). If allowed to stand, the decision below will allow a court to trump its subjective assessments and Congress’ authority to legislate a judgment about whistleblower rights it has enacted six times in the last six years.

### D. The decision below cannot coexist with the constitution’s separation of powers.

The Secretary did not have constitutional authority to legislate on any grounds, and the district court had none to reject the statutory language on non-constitutional grounds. It is the proper role of Congress to set out national policy and express that policy in law. By assuring that subordinate courts uphold the law as written, this Court honors the separation of powers established in our Constitution. The Constitution confers on Congress the responsibility to decide the jurisdiction of the district courts. U.S. Constitution, Art. I, Section 8, Clause 9 (“To constitute Tribunals inferior to the supreme Court”). Federal courts have a “virtually unflagging” obligation to adjudicate claims within their jurisdiction. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 1246-47 (1976); accord *Quakenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716, 116 S.Ct. 1712, 1720-21 (1996); *New Orleans Pub. Serv., Inc. (NOPSI) v. Council of New Orleans*, 491 U.S. 350, 368, 109 S.Ct. 2506, 2518 (1989) (abstention cases). As one observer has noted, “Democracy is the theory that the common people know what they want, and deserve to get it good and hard.” *Reich v. Miss Paula's Day Care Center, Inc.*, 37 F.3d 1191 (6th Cir. 1994), quoting Henry Louis Mencken, *A Book of Burlesques* (3d ed. 1920).

In the absence of unconstitutional provisions in the statute, the court did not have the authority under the Constitution to erase unequivocal statutory language giving plaintiffs a second opportunity to “litigate” their claims. It is not “absurd” to follow the law as Congress wrote it.

## CONCLUSION

If the district court decision is allowed to stand, Section 806 will lose a crucial element and discourage employees from coming forward to speak up against fraud, abuse, mismanagement, and waste of finances. Accordingly, the amici respectfully request that the Court reverse the district court’s erroneous decision.

Respectfully Submitted by:

/s/ Richard R. Renner \_\_\_\_\_

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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 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 4,060 words.

Respectfully submitted by:

/s/ Richard R. Renner \_\_\_\_\_

Richard R. Renner

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 17, 2008, I caused two copies (eight to the Clerk) of the foregoing Brief of Amici Curiae Urging Reversal, in Support of

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[1] In one curious regulation, the employee must also file a notice of complaint with the administrative law judge or ARB 15 days before he or she files the case in federal district court, thereby giving the administrative reviewing authority an opportunity to close out the case and issue a final decision prior to the employee's removal. 29 C.F.R. §1980.114(b). There is no statutory basis for adding this hurdle to access relief in district courts.

[2] Thirteen days after Hanna gave OSHA notice of his intent to file in district court, OSHA issued a preliminary determination on his SOX complaint.