

“clarifying” amendment to the existing Whistleblower Protection Act of 1989 (“WPA”), 5 U.S.C. §2302(b)(8).

As approved by Congress, P.L. 112-199 contains a separate section specifically dedicated to clarifying the meaning of the term “any disclosure” in the WPA. *Id.*, §101. In the WPEA, Congress did not alter the existing term “any disclosure,” that is contained in the existing law, but instead clarified what types of disclosures fell within the gambit of the term “any.” Congress, in the statute itself, titled §101 as a clarifying amendment: “CLARIFICATION OF DISCLOSURES COVERED.” P.L. 112-199, §101. The WPEA contained twenty separate sections, but only *two* of these sections were classified in the text of the law as “clarifying” amendments.

The precise language clarifying the scope of a protected disclosure was originally introduced (and approved) by the Senate in §101 of S. 743. The Senate Report explicitly confirmed that §101 was intended to be a clarifying amendment. S. Rep. 122-155, p. 2 (“S. 743 would ... clarify the broad meaning of ‘any’ disclosure of wrongdoing”). Significantly, when the Senate Homeland Security Committee discussed the various provisions in the WPEA it was very clear that some provisions in the WPEA created “new protections” while others “strengthened” existing protections. *Id.* However, when discussing §101 the Committee differentiated §101 from other proposed changes to the WPA, and stated that §101 was designed to “*restore[] the original congressional intent of the WPA.*” *Id.* (emphasis added).

The specific section of the Senate Report dedicated to explaining the Congressional intent behind §101 was titled “Clarification of what constitutes a protected disclosure.” *Id.* p. 4. Congress’ intent to ensure that §101 was treated as a clarifying amendment, was reiterated in numerous others statements contained in the Report. *See, e.g.*, S. Rep. 122-155, p. 4 (clarify the

meaning of the WPA’s “plain language” covering “any disclosure); *id.* (intent of Congress to restore the “intended meaning” of protected disclosures); *id.*, p. 5 (§101 intended to “make clear” the scope of a protected disclosure); *id.* (§101 intended to “overturn” decisions that had “narrowed” Congress’ original view of a protected disclosure); *id.* (§101 was needed to correct prior court holdings “contrary to congressional intent”), and; *id.* (§101 “clarifies” Congressional intent).

The bill that unanimously passed the U.S. Senate contained §101, and the Senate titled that section “Clarification of Disclosures Covered.” S. 743.

The House adopted, verbatim, the language contained in §101 of S. 743. Like the Senate, when introduced in the House as H.R. 3289, the WPEA also contained a §101. This section in the House bill was identical to the Senate version, and was entitled “Clarification of Disclosures Covered.” The House Committee on Oversight and Government Reform’s Report on the WPEA, H. Rep. 112-508 (May 30, 2012), confirmed that it was also the intent of the House that §101 of its bill be considered a clarifying amendment. The Report stated that H.R. 3289 would “provide clarification relating to disclosures of information protected from prohibited personnel practices.” H. Rep. 112-508, p.1. Like its Senate counterpart, the House Committee on Oversight and Government Reform expressed concern that prior court rulings had “eroded” the protections Congress had intended to give whistleblowers as part of the original WPA, and stated that §101 of the House bill was intended to “reestablish[]” protections. *Id.*, p. 6.

The WPEA was unanimously passed by the House, with §101 of the bill explicitly entitled, “Clarification of disclosures covered.” H.R. 3289.

After the relevant House and Senate committees unanimously approved §101 as a clarifying amendment and the committee language was thereafter approved by both houses of

Congress, the Public Law approved by Congress titled §101 of the engrossed act as a “clarification of disclosures protected.” *See*, P.L. 112-199, §101. The bill unanimously passed by Congress and signed by President Obama was explicitly titled, “CLARIFICATION OF DISCLOSURES COVERED.” *Id.*

ARGUMENT

I. WPEA §101 IS A CLARIFYING AMENDMENT AND MUST BE APPLIED TO PENDING CASES

It is well established that when an amendment merely clarifies existing law, rather than effecting a substantive change to the law, retroactivity does not come into play. Courts apply the clarifying amendment to current proceedings “because the amendment accurately restates the prior law.” *Piamba Cortes v. Am. Airlines*, 177 F.3d 1272, 1284 (11th Cir. 1999). Courts look at the “title of the Act” and “Senate and House Committee Reports” in determining whether or not a statute is clarifying and thus applicable to pending cases. *Beverly Community Hosp. Aoss’n v. Belshe*, 132 F.3d 1259, 1265 (9th Cir. 1997).¹ *Accord.*, *Levy v. Sterling Holding*, 544 F.3d 493, 506-08 (3rd Cir. 2008) (citing decisions “finding retroactivity to be a non-issue with respect to new laws that clarify existing law”); *Cookeville v. Leavitt*, 531 F.3d 844, 849 (D.C. Cir. 2008)(finding “no problem of retroactivity” when statute “clarified an ambiguity in existing legislation”); *Pope v. Shalala*, 998 F.2d 473, 483 (7th Cir. 1993) (“A rule simply clarifying an unsettled or confusing area of law ... is no more retroactive in its operation than a judicial determination construing and applying a statute to a case at hand”).²

¹ “Because Congress thus has the power to *change* the law as to pending cases, its power to *clarify* the law-to confirm what the law has always meant-follows *a fortiori*.” *Beverly Community Hosp. Aoss’n v. Belshe*, 132 F.3d 1259, 1265 (9th Cir. 1997).

² Most recently, the U.S. Department of Labor’s Administrative Review Board, a federal agency similar to the MSPB that has administrative-appellate jurisdiction over a number of other federal whistleblower laws, concluded that a “clarifying” amendment contained in the Dodd-Frank Act

In this case, the legislative history and statutory language confirm, without any question, that §101 of the WPEA constituted a clarifying amendment and was thus fully applicable to pending cases. Congress explained that the WPA explicitly protected “any disclosure,” and the amendment was intended to clarify what Congress meant by the term “any.” S. Rep. 112-155, p. 4. As a clarification of Congress’ original “intended meaning” of the scope of a protected disclosure, §101 must be applied to all pending cases.³

II. FEDERAL CIRCUIT JURISPRUDENCE COMPELS GRANTING §101 RETROACTIVITY.

It is well settled in the Federal Circuit “that Congress can unambiguously specify the retroactive effect of legislation if it decides to do so.” *Caddell v. Dept. of Justice*, 96 F.3d 1367, 1371 (Fed. Cir. 1996). The *Caddell* court examined two factors to determine whether retroactivity was applicable: the language of the statute and the statute’s legislative history. *Id.* In this case, §101 of the WPEA meets both prongs of this test.

As a threshold matter, §101 is completely distinguishable from the statutory provision at issue in *Caddell* where the court was asked to decide whether a new statutorily created right was retroactive. Given the complete lack of any congressional intent to the contrary, and the undisputed fact that the statutory clause in question created a new substantive right that did not exist prior to the amendments in question, the outcome in *Caddell* was consistent with well settled principles governing retroactivity. *Caddell*, at 1371 (“The legislative history of the statute does not elaborate on the statutory language.”).

served to “correct a misinterpretation” of prior law, and thus applied to “pending cases.” *Gladitsch v. Neo@Ogilvy*, 2012 WL 1003513 (S.D.N.Y.), citing to *Johnson v. Siemens Building Technologies*, ARB Case No. 08-032, ALJ Case No. 2005-SOX-15 (Dept. of Labor ARB Mar. 31, 2011).

³ In addition to the WPEA’s clarifying amendment, the U.S. Supreme Court, in recent cases, has also clarified the meaning of the term “any” when used in a statute: “Of course the word ‘any’ ... has an ‘expansive meaning.’” *Republic of Iraq v. Beaty*, 556 U.S. 848, 856 (2009).

However, the court in *Caddell* was careful to point out the types of evidence needed to overcome the presumption against retroactivity. The Court identified two such sources: language in the statute and language in the congressional history. *Id.* In regard to §101 both sources of authority exist, and both compel a holding that §101 of the WPEA is retroactive. First, it is indisputable that both the House and Senate reports, and the House and Senate bills themselves, demonstrate that the sponsors of the original bills understood that §101 of the WPEA was clarifying in nature and was intended to correct prior court decisions that had improperly interpreted Congress' intent behind the meaning of "any disclosure" contained in the WPA.

Second, the bill that actually passed both houses of Congress and signed by the President, titled §101 as a "clarification." P.L. 112-199, §101. The titles used by Congress to designate different sections of the WEPA are very significant. *Beverly Community Hospital*, 132 F.3d at 1265 (relying on the "title of the Act" to establish Congressional intent that amendment was clarifying). Congress only used the term "clarification" in the title of two of the twenty sections enacted into law in the WPEA. It is a well established principle of statutory construction that "where Congress includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that Congress acted intentionally and purposely in the disparate inclusion or exclusion." *U.S. v. Gonzales*, 520 U.S. 1, 5 (1997). This principle is applicable in interpreting the WEPA. Congress used the "particular language" signifying that §101 was a clarifying amendment, and did not use that term of art to identify the other sections of the Act which added new substantive rights or obligations, and were not simply clarifying amendments.

In this context, consistent with *Cadell* and other precedent, it is well established "that

when an amendment is deemed clarifying rather than substantive, it is applied retroactively.” *U.S. v. Donaghe*, 50 F.3d 608, 612 (9th Cir. 1994). Also consistent with *Cadell* two factors upon which courts have in the past relied to conclude that a statute constitutes a “clarifying” amendment are the “titles of the relevant subsection” of a law and Senate and House Committee Reports. *Brown v. Thompson*, 374 F.3d 253, 259 (4th Cir. 2004). *Accord.*, *ABKCO Music v. LaVere*, 217 F.3d 684, 689 (9th Cir. 2000) (“Normally, when an amendment is deemed clarifying” it is “applied retroactively”); *Beverly Community Hospital, supra*.

In this case, both the title of the relevant subsection of the law, along with the House and Senate Committee Reports unequivocally stating that §101 of the WPEA is a clarifying amendment, are consistent with *Cadell*, *ABKCO*, and *Brown*, and should be given retroactive effect.

III. BECAUSE §101 IS A CLARIFYING STATUTE, IT MUST BE GIVEN GREAT WEIGHT BY THE MSPB EVEN IF THE BOARD WERE TO CONCLUDE THAT THE WPEA DOES NOT HAVE RETROACTIVE EFFECT.

It is well settled that courts grant substantial weight to congressional amendments that clarify legislative intent, even if the rule regarding retroactivity is not applicable. This principle of statutory construction is extremely well settled. *See, e.g., Stockdale v. Atlantic Ins. Co.*, 87 U.S. 323, 331 (1873) (it may be taken to be established, that a legislative body may by statute declare the construction of previous statutes so as to bind the courts in reference to all transactions occurring after the passage of the law, and may in many cases thus furnish the rule to govern the courts in transactions which are past); *Fed. Hous. Admin. v. Darlington, Inc.*, 358 U.S. 84, 90 (1958) (“[s]ubsequent legislation which declares the intent of an earlier law is ... entitled to weight when it comes to the problem of construction”); *Glidden Co. v. Zdanok*, 370 U.S. 530, 541 (1962) (“the later law is entitled to weight when it comes to the problem of

construction,” quoting *Fed. Hous. Admin. v. Darlington, Inc.* “Especially this is so when the Congress has been stimulated by decisions of this Court to investigate the historical materials involved and has drawn from them a contrary conclusion”).

The Supreme Court reiterated this principle in *Red Lion*, stating that “[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction.” *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 380-381 (1969). The Court has continued to uphold this principle granting substantial weight to subsequent legislation. *See, e.g., N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 275 (1974) (“We have also recognized that subsequent legislation declaring the intent of an earlier statute is entitled to significant weight.”); *South Carolina v. Regan*, 465 U.S. 367, 392 (1984) (“These subsequently enacted provisions and the legislative understanding of them are entitled to ‘great weight’ in construing earlier, related legislation”); *Loving v. United States*, 517 U.S. 748, 770 (1996) (“subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction)(internal citations and quotation omitted); *United States v. Winstar Corp.*, 518 U.S. 839, 891 (1996). *Also see, Beverly Community Hosp. Ass’n*, 132 F.3d at 1265 (“It has been established law since nearly the beginning of the republic ... that congressional legislation that thus expresses the intent of an earlier statute must be accorded great weight.”).

Significantly, two different U.S. Court of Appeals have applied this principle when interpreting the meaning of a protected whistleblower disclosure under other federal whistleblower laws. In these cases, the Fifth Circuit and Tenth Circuit were, like the MSPB today, asked to interpret whether a whistleblower law covered internal/official duty disclosures made to a supervisor. In both cases, the appellate courts looked toward congressional statements made in reference to amendments to other whistleblower laws and concluded that Congress

intended the scope of protected activity to be broadly construed to cover the types of disclosures set forth in §101.

In *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985), the Tenth Circuit looked to the legislative history of the Federal Mining Safety Act (“FMSA”) as an interpretive guide to the Energy Reorganization Act (“ERA”) in the context of determining whether internal whistleblowers are protected and held that “the 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.” *Id.* at 1511. The Tenth Circuit further held that Congress changed the statutory language of the FMSA “not because its intent had changed, but because this intent had been incorrectly perceived by certain courts.” *Id.* at 1512.

Likewise, in *Willy v. Admin. Review Bd.*, 423 F.3d 483 (5th Cir. 2005), the Fifth Circuit relied upon an amendment to the ERA to clarify its holding regarding internal protected activity under the Clean Air Act. The Fifth Circuit had originally issued a ruling under the ERA, consistent with the Federal Circuit holding in *Willis*, denying coverage to an employee who raised concerns to supervisors as part of his job. *Id.*, at 501 n. 11, citing *Brown & Root v. Donovan*, 747 F.2d 1029 (5th Cir. 1984). However, after the *Brown & Root* ruling Congress amended the ERA to explicitly cover internal whistleblower disclosures. *Id.* Based on this amendment the Court effectively reversed its prior holding, admitting that Congress’ clarification had demonstrated that the prior court ruling was “incorrect.” *Id.* (“Congress clarified by statute that *Brown & Root* was incorrect in holding that complaints to employers were not protected under 42 U.S.C. § 5851.”). Notably, in *Willy*, the Fifth Circuit relied upon the congressional clarification to repudiate its own prior decision that had narrowly construed protected

disclosures. *Id.*

Even if the MSPB were to decide that the WPEA should not be granted retroactive effect, the Board is still required to give “substantial weight” to Congress’ intent, as expressed in the WPEA, when interpreting the scope of protected activity under the WPA. Based on this new authority, and the undisputable fact that Congress intended to clarify the meaning of a protected disclosure in the original WPA, this Board should interpret the definition of a protected disclosure in § 2302(b)(8) consistent with the clarification provided by Congress in the WPEA.

REQUEST TO PARTICIPATE IN ORAL ARGUMENT

The Amici request leave to participate in the oral argument in this matter. Dr. Chaturvedi is a former employee of the Department of Veterans Affairs whose WPA case may turn on the outcome of this Court’s ruling. *See*, MSPB Docket No. DA-1221-11-0471-W-3. He has a direct and personal stake in the outcome of this Board’s ruling in *Day*. The National Whistleblower Center has provided charitable assistance to federal employee whistleblowers since 1988, has been admitted to participate as an *amicus curie* in numerous whistleblower cases, and provided testimony before the Senate Homeland Security Committee regarding what would eventually be enacted as §101 of the WPEA, along with other non-clarifying reforms contained in the WPEA. *See* “S. 1358—The Federal Employee Protection of Disclosures Act,” Hearing on S. 1358 before the Senate Committee on Governmental Affairs, S. Hrg. 108–414 (2003), pp. 18, 132 and 203 (Testimony of the NWC) and NWC testimony cited in S. Rep. 112-155 at p. 11.

CONCLUSION

For the reasons set forth above, §101(b) of the Act must be applied to cases pending before the MSPB and the OSC as of the effective date of that statute.

Respectfully submitted,

March 1, 2013

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CERTIFICATE OF SERVICE

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