Appeal No. 07-1684
(2003 - SOX - 15)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DAVID E. WELCH, CPA,
Petitioner - Appellant,

v.

ELAINE L. CHAO,
SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent - Appellee,

and

CARDINAL BANKSHARES CORPORATION,
Intervenor.

On Appeal from the Administrative
Review Board, U.S. Department of Labor

BRIEF OF *AMICI CURIAE* THE GOVERNMENT ACCOUNTABILITY PROJECT, THE NATIONAL WHISTLEBLOWER CENTER, AND TAXPAYERS AGAINST FRAUD IN SUPPORT OF PLAINTIFF/APPELLANT AND IN SUPPORT OF REVERSAL

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Statement of Identify, Interest of *Amici Curiae* in the Case, and Source of Authority to File

The Government Accountability Project (GAP), the National Whistleblower Center (NWC) and Taxpayers Against Fraud Education Fund (TAFEF) 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 *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 public health and safety dangers; or other institutional misconduct undermining the public interest. GAP has substantial expertise on 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 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 also 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 USC §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 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, Taxpayers Against Fraud and the Government Accountablity Project).

Taxpayers Against Fraud Education Fund is a nonprofit public interest organization of nearly 400 attorney-members dedicated to protecting America's courageous whistleblowers and to combating fraud against federal and state governments through the education of the public, the legal community, legislators, and others about the statutory protections guarding the federal fisc and shielding whistleblowers. TAFEF has produced and makes available a variety of educational resources, including online and print publications. In addition, TAFEF has filed amicus briefs on important legal and policy issues before numerous federal courts, including the United States Supreme Court. TAFEF possesses

extensive knowledge about the origin and purposes of whistleblower laws and experience with their implementation.

Amici advocate on behalf of whistleblowers because of the contribution of whistleblowers to uncovering and rectifying grave problems facing society at large. Whistleblowers are a bulwark against those who would corrupt government or corporations and therefore aggressive defense of whistleblowers is crucial to any effective policy to address corporate 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 preserving 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 ARB's erroneous construction of the standard for protected conduct under Section 806 of SOX, a standard that is contrary to the plain meaning and intent of Section 806 and a standard that will essentially eviscerate the protection that Section 806 affords to whistleblowers.

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

Summary of the Argument

The SOX whistleblower provisions are unquestionably remedial in nature and Congress intended that they be interpreted broadly to encourage reporting and allow whistleblowers to help enforce securities laws. The ARB, however, has adopted an extraordinarily narrow interpretation of protected conduct that is contrary to both the plain meaning and intent of Section 806 of SOX. Despite unambiguous statutory language protecting an employee who provides information to management "regarding any conduct which the employee *reasonably believes* constitutes a violation of . . . any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders," 18 U.S.C. 1514A (emphasis added), the ARB in the decision under review has adopted a standard for protected conduct that requires employees to demonstrate that they disclosed an *actual* violation of securities law, and the ARB has limited the ambit of protected disclosures to complaints about *actual* harm to investors. This standard undermines the prophylactic purpose of the whistleblower retaliation provision of SOX by depriving employers of the opportunity to receive an early warning of potential violations of Securities and Exchange Commission ("SEC") rules that can ultimately result in shareholder

fraud. For example, protecting disclosures about deficient internal accounting controls or misleading financial reporting enables employers to correct these problems before investors are harmed. Moreover, by speculating about whether Welch's disclosures implicated securities laws, rather than consulting the pertinent SEC rules, the ARB has adopted an "I know it when I see it" standard that will chill employees from making the disclosures that Congress intended to protect and encourage.

When Congress debated the issue, *amici* explained that the SOX whistleblower protections were "the single most effective measure possible to prevent recurrences of the Enron debacle and similar threats to the nation's financial markets." *See* 148 Cong. Rec. § 6439-6440, 107th Congress, 2d Session (2002). If allowed to stand, the ARB's erroneous interpretation of protected conduct will undermine the clear intent of Congress and inevitably increase the risks of the very financial disasters that SOX was enacted to prevent.

Argument

I. Whistleblowers are the First Line of Defense Against Corporate Fraud.

In enacting the most comprehensive securities law and investor protection reform in more than half a century, Congress made whistleblower protection a central tool to improve the accuracy and reliability of corporate disclosures. To ensure that employees with first-hand knowledge of accounting fraud feel that they

can raise concerns without jeopardizing their livelihood, Congress enacted Section 806 of SOX, which was intended to provide broad and robust protection for whistleblowers. *See* 18 U.S.C. § 1514A. As stated in the legislative history, "U.S. laws need to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies." S. Rep. No. 107-146, as reprinted in 2002 WL 863249 at *19.[1]

II. Federal Whistleblower Statutes are Remedial in Nature and Play a Critical Role in Enforcing the Rule of Law

Congress has long recognized the vital role played by whistleblowers in government and industry. This recognition has been codified at the federal level in well over thirty federal statutes, each of which contains explicit provisions to encourage and protect whistleblowers. *See e.g.,* Clean Air Act, 49 U.S.C. § 42121; CERCLA, 42 U.S.C. § 9610; Energy Reorganization Act, 42 U.S.C. § 5851; Federal Water Pollution Control Act, 33 U.S.C. § 1367; Lloyd-LaFollette Act, 5 U.S.C. § 7211; Military Whistleblower Protection Act, 10 U.S.C. § 1034; Pipeline Safety Improvement Act, 49 U.S.C. § 60129; Occupational Safety and Health Act, 29 U.S.C. § 660(c); Safe Drinking Water Act, 42 U.S.C. § 300j-9; Sarbanes-Oxley

[1] Whistleblowers and potential whistleblowers should be able to find repose in whistleblower laws such as SOX. If the ARB is able to impose ever changing criteria for determining if an employee's complaints are "objectively reasonable" as Board membership changes, such changes will have a chilling effect on whistleblowing.

Act, 18 U.S.C. § 1514A; Solid Waste Disposal Act, 42 U.S.C. § 971; Surface Transportation Assistance Act, 49 U.S.C. § 3110; Toxic Substances Control Act, 15 U.S.C. § 2622; Wendell H. Ford Aviation Investment and Reform Act, 49 U.S.C. § 42121 and Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8). These numerous statutes reflect the importance placed by Congress on encouraging disclosure of wrongdoing through whistleblower protection.

The remedial intent of whistleblower statutes has also been recognized in the courts. See *Connecticut Light & Power Co. v. Sec'y of Labor*, 85 F.3d 89, 94 (2d Cir.1996) (upholding Secretary's broad interpretation of the term "employee" to cover an employee recently terminated); *Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 932 (11th Cir.1995) ("[I]t is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws."); *Deford v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983); see also *Kansas Gas & Electric Company v. Brock*, 780 F.2d 1505, 1511 (10th Cir. 1985). Further, these whistleblower statutes should be broadly interpreted in order to effectuate the legislative purpose of encouraging whistleblowers to report wrongdoing by offering them employment protection. *See Passiac Valley Sewerage Com'rs. v. Dept. of Labor*, 992 F.2d 474, 478 (3rd Cir. 1989). (Employee protection provisions are intended to encourage employees to aid in the enforcement of the substantive statute by raising substantiated claims through

protected procedural channels); *Faulkner v. Olin Corp.,* 85-SWD-3 at 5-6 (ALJ August 16, 1985), adopted by Sec'y (November 18, 1985).

The whistleblower provisions of SOX mirror those of several other federal whistleblower statutes and should therefore be interpreted in a "parallel manner." *See Goldstein v. EBASCO Constructors, Inc.,* 86-ERA-36 at 6 (Sec'y April 7, 1992). *See also Poulos v. Ambassador Fuel Oil Co., Inc.,* 1986-CAA-1, D&O of Remand by SOL, at 5 (April 27, 1987) (Because the federal laws creating employee protections share similar statutory language and legislative histories, case law under one of the acts is readily used for interpreting other acts.).

> It is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter. In the absence of any express repeal or amendment, the new provision is presumed in accord with the legislative policy embodied in those prior statutes. Thus, they all should be construed together. [footnotes omitted]

2B Sutherland Statutory Construction § 51:2 (6th ed.)

Thus, like other employee protection provisions administered by the Department of Labor, the SOX whistleblower provisions should be viewed as remedial and, as such should be broadly construed. *Collins v. Beazer Homes USA, Inc.,* 334 F.Supp.2d 1365, 1377, 1381 (N.D.Ga. 2004) (facts should be interpreted consistent with broad remedial purpose of Sarbanes-Oxley).

III. The Whistleblower Provisions of SOX Must Be Broadly Construed to Comport with the Remedial Objectives of SOX.

The legislative history of the Sarbanes-Oxley Act of 2002 (SOX) underscores the remedial nature of its whistleblower provisions. SOX was passed in the wake of corporate and accounting scandals that rocked the nation. The demise of Enron and other financial disasters shattered investor confidence. SOX was passed in an attempt to restore confidence in the markets by instituting additional protections for investors. S. Rep. 107-146, at 2, 107th Congress, 2d Session (2002).

The intent of Congress in passing the whistleblower provisions of SOX (Section 806) could not be clearer – the legislative history explicitly pronounces the remedial intent "to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies." Legislative History of Title VIII of HR 2673: the Sarbanes-Oxley Act of 2002, 148 Cong. Rec. S7418, 7420 (daily ed. July 26, 2002). Similarly, Congress intended to rectify the pervasive corporate culture that discouraged employees from reporting misconduct:

> 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. No. 107-146 at 5 (2002). In sum, the legislative history of Section 806 and well-established precedent construing analogous whistleblower protection statutes administered by DOL indicate that SOX should be broadly construed.

IV. The ARB's *Welch* Decision Establishes a Standard for Protected Conduct That is Contrary to the Plain Meaning and Intent of SOX

In order to protect a broad range of disclosures about potential accounting fraud, securities fraud, and violations of securities laws, Congress specifically included in the language of Section 806 a "reasonable belief" test under which a complainant can engage in protected conduct without disclosing an actual violation of law. The legislative history of SOX specifically states that the "reasonable belief" is "intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise, absent specific evidence." Legislative History of Title VIII of HR 2673: The Sarbanes-Oxley Act of 2002, Cong. Rec. S7418, S7420 (daily ed. July 26, 2002), 2002 WL 32054527 (*citing Passaic Valley*, 992 F.2d 474 (3rd Cir. 1993)). Contrary to the plain meaning and intent of SOX, the ARB is requiring complainants to prove that they disclosed unequivocal, actual violations of securities law and is requiring complainants to demonstrate that their disclosures pertained to actual investor fraud. This administrative amendment of SOX is plain error and should be reversed.

A. Welch Need Not Demonstrate an Actual Violation of Securities Law

To ensure that employees are able to disclose potential securities law violations without suffering reprisal, Congress specifically included in Section 806 a "reasonable belief" standard under which "the Complainant is not required to show that the reported conduct actually constituted a violation of the law, but only that she reasonably believed that the employer violated one of the enumerated statutes or regulations." *Jayaraj v. Pro-Pharmaceuticals, Inc.*, 2003-SOX-32 at 16-17 (ALJ Feb. 11, 2005).

Disregarding the plain meaning of Section 806, the ARB is requiring Welch to prove that he disclosed an actual violation of securities law. Although there is no dispute that Welch disclosed misclassification of loan recoveries as income (JA at 275) and although SEC rules require that financial statements included in SEC filings comply with Generally Accepted Accounting Principles, 17 C.F.R. § 210, the ARB found that Welch did not engage in protected conduct because his disclosure about Cardinal's non-compliance with GAAP did not unequivocally harm shareholders. In particular, the ARB concluded that because Cardinal received loan recoveries, investors could not have been misled about Cardinal's financial condition and therefore Welch could not have reasonably believed that Cardinal was violating any securities law. *Welch*, ARB No. 05-064 at 11. Setting aside the validity of the ARB's conclusion that misclassification of income cannot mislead investors and setting aside

the fact that the ARB opined on securities law without citing a single SEC rule, the ARB's holding severely undermines Section 806 by effectively deleting the "reasonable belief" standard that Congress intentionally included in Section 806 and replacing it with an "actual violation" standard.

The ARB's "actual violation" standard undermines Section 806 because it encourages employees to allow a securities law violation to occur before reporting it. *See Getman v. Southwest Securities, Inc.*, 2003-SOX-8, at 13 n.8 (DOL Feb. 2, 2004), *reversed on other grounds*, ARB No. 04-059 (ARB July 29, 2005) (explaining the purpose of the "reasonable belief" standard). This "actual violation" standard defeats the intent of the Act, which is to provide an early warning of securities law violations, thereby preventing shareholder fraud. *See, e.g.* 148 Cong. Rec. S7420 (daily ed. July 26, 2002) (statement by Senator Leahy) ("U.S. laws need to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies").

As the ALJ in *Morefield v. Exelon Services, Inc.*, 2004-SOX-2 at 5 (ALJ Jan. 28, 2004), noted:

> The value of the whistleblower resides in his or her insider status. These employees often find themselves uniquely positioned to head off the type of 'manipulations' that have a tendency or capacity to deceive or defraud the public. By blowing the whistle, they may anticipate the deception buried in a draft report or internal document, which if not corrected, could eventually taint the public disclosure. Beyond that, their reasonable concerns may, for example, address the inadequacy

> of internal controls promulgated in compliance with Sarbanes-Oxley mandates or SEC rules that impact on procedures throughout the organization, or the application of accounting principles, or the exposure of incipient problems which, if left unattended, could mature into violations of rules or regulations of the type an audit committee would hope to forestall.

Id. at 5. If allowed to stand, the ARB's *Welch* decision will eviscerate the prophylactic purpose of SOX by deterring employees from making disclosures to management until they have evidence of an actual violation of securities law.

B. Providing Information to Management About Deficient Internal Controls Constitutes Protected Conduct.

Without consulting any of the pertinent securities laws setting forth the SEC's internal accounting control standards, the ARB concluded that Welch's disclosures about Cardinal's internal control deficiencies do not relate to federal securities laws and hence cannot constitute protected conduct. *Welch,* ARB No. 05-064 at 13. The ARB's conjecture about SEC internal control rules is simply incorrect. More importantly, the ARB's erroneous holding that disclosures about internal controls do not constitute protected conduct substantially undermines Section 806 of SOX.

It is undisputed that Welch raised concerns about unqualified personnel making general ledger entries without Welch's review. (JA at _). Section 13(b)(2) of the Securities Exchange Act, and the SEC's implementing rules, prohibit any person from "knowingly circumvent[ing] or knowingly fail[ing] to implement a

system of internal accounting controls." 15 U.S.C. § 78m(b)(3)(B)(5). SEC rules implementing § 404 of SOX define "internal control over financial reporting" in part as "[a] process . . . to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles and includes those policies and procedures that . . . . (2) *Provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements* in accordance with generally accepted accounting principles, and that *receipts and expenditures of the registrant are being made only in accordance with authorizations of management and directors of the registrant.*" *See* Final Rule: Management's Reports on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports, June 5, 2003; Final Rule, Release Nos. 33-8238; 34-47986 ("SEC Internal Controls Rules") (emphasis added). By disclosing his concerns to management about unqualified personnel making entries in the general ledger without any supervision by Welch (Cardinal's Chief Financial Officer), Welch was complaining about the circumvention of internal controls, or at a minimum, was disclosing a significant weakness in Cardinal's internal controls. Accordingly, Welch's disclosures specifically related to a violation of SEC internal accounting rules, thereby constituting protected conduct under SOX. Without citing any of the SEC rules governing internal

controls, however, the ARB arbitrarily held that Welch's disclosures about internal control deficiencies are not protected under SOX. *Welch,* ARB No. 05-064 at 13.

Excluding disclosures about internal controls from the domain of protected conduct not only contravenes the plain meaning of Section 806, which by its plain language unequivocally protects disclosures about what an employee reasonably believes constitutes a violation "of *any* rule or regulation of the Securities and Exchange Commission," 18 U.S.C. § 1514A, but also undermines Congress' intent to strengthen internal controls as a principal tool to ensure accurate and honest financial reporting by publicly traded companies.

Section 404 of SOX and the SEC's implementing regulations impose rigorous internal control standards on publicly-traded companies, the purpose of which is to "help to identify potential weaknesses and deficiencies in advance of a system breakdown, thereby facilitating the continuous, orderly and timely flow of information . . . [i]mproved disclosure may help companies detect fraudulent, financial reporting earlier and perhaps thereby deter financial fraud or minimize its adverse effects." Management's Reports on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports, Release Nos. 33-8238; 34-47986; and IC-26068 (June 5, 2003). Although deficient internal accounting controls do not automatically result in harm to shareholders, Congress and the SEC have determined that weak internal controls

often lead to inaccurate financial reporting and therefore one of the primary focuses of SOX, the most comprehensive reform of securities law since 1934, was to require companies to strengthen their internal controls. *See Id.* Limiting protected disclosures under Section 806 to concerns about actual fraud on shareholders undermines the statutory scheme and deprives publicly-traded companies of an early warning of internal control deficiencies that can ultimately result in shareholder fraud. Moreover, "[i]f the drafters meant for section 806 to only protect employees who report fraud against shareholders, then they could have easily done so by inserting a comma before 'relating to fraud against shareholders.'" *Reyna v. Conagra Foods, Inc.*, 2007 WL 1704577, at *16 (M.D. Ga. June 11, 2007). Instead, the drafters chose to protect disclosures about reasonably perceived violations of "any rule or regulation of the Securities and Exchange Commission." 18 U.S.C. § 1514A.

Limiting protected conduct under SOX to actual shareholder fraud would limit the opportunity for companies and shareholders to learn about financial fraud before it is too late. Such an anomalous interpretation is contrary to the purpose of the statute and intent of Congress.

C. Providing Information to Management About Failure to Comply with Generally Accepted Accounting Principles Constitutes Protected Conduct.

According to the ARB, a disclosure about a publicly-traded company's failure to prepare financial statements in accordance with generally accepted accounting principles ("GAAP") cannot constitute protected conduct because GAAP is not a securities law. Had the ARB applied the relevant securities law, as opposed to engaging in speculation about the relationship between GAAP and federal securities law, the ARB would have reached a contrary conclusion.

Regulation S-X , 17 C.F.R. § 210, expressly requires publicly-traded companies to ensure that the financial statements they include in filings with the SEC comport with GAAP. *See* 17 C.F.R. § 210. Moreover, pursuant to SOX, the SEC has promulgated rules requiring issuers to disclose any information that is calculated on the basis of methodologies other than in accordance with GAAP. *See, e.g.,* Final Rule: Conditions for Use of Non-GAAP Financial Measures, 17 CFR PARTS 228, 229, 244 and 249, Release No. 33-8176; 34-47226; FR-65. In sum, providing financial statements to the SEC and to shareholders that are not in accordance with GAAP violates SEC rules.

Cardinal does not dispute the fact that Welch raised concerns to management about Cardinal misclassifying accounting entries, and it does not deny that these erroneous accounting errors might have violated GAAP. (JA 197-198, 234-237).

Had the ARB consulted the pertinent SEC rules to determine whether filing financial statements in accordance with GAAP is mandatory or permissive, it would have found that Cardinal was in fact required to prepare its financial statements consistent with GAAP. Instead, the ARB incorrectly assumed that disclosures about non-compliance with GAAP do not implicate any SEC rule and are therefore not protected. This ruling is especially pernicious because it permits publicly-traded companies to retaliate against employees who blow the whistle on unreliable or inaccurate financial statements. Protecting employees with first-hand knowledge of accounting fraud, however, was a primary purpose of Section 806.

In sum, the ARB's conclusion that Welch's disclosures about Cardinal's non-compliance with GAAP cannot constitute protected conduct is plain error and sets a dangerous precedent. Under *Welch*, Section 806 would provide no protection to an employee who suffered retaliation due to a disclosure about his employer's filing of misleading or inaccurate financial statements.

D. The ARB Has Effectively Adopted an "I know it When I See it" Standard for Protected Conduct.

Just one year prior to its decision in *Welch,* the ARB issued a decision reversing an ALJ's grant of summary decision, in part, because the ALJ failed to make sufficient findings concerning the complainant's protected conduct. *See Klopfenstein v. PCC Flow Technologies Holdings, Inc.,* ARB No. 04-419 at n. 20 (ARB May 31, 2006). In particular, the ARB directed the ALJ to examine the SEC

rules implicated by the complainant's disclosures about a material irregularity in the accounting for in-transit inventory. *Id.*

Ironically, the ARB has failed to heed its own admonition. Despite taking more than two years to review the ALJ's January 28, 2004 decision, the ARB failed to analyze whether Welch's disclosures relate to securities laws. Instead, the ARB incorrectly speculated about SEC rules. This is essentially an "I know it when I see it standard," one that ALJs are bound to follow. In other words, if a complainant's disclosures appear to relate to the ARB's conjecture about federal securities law, the complainant may have engaged in protected conduct, but if the disclosures do not seem to be related to the ARB's conjecture about securities law, the complainant did not engage in protected conduct.

This standard will create massive loopholes enabling employers to retaliate at will against employees who disclose reasonably perceived violations of SEC rules. In enacting SOX, however, Congress intended "to close the loopholes that have allowed for continued offenses in America's corporate community," not to create additional loopholes. *See* Corporate and Criminal Fraud Accountability Act of 2002 (July 16, 2002), at H4692 (statement of Congresswoman Roukema); *see also* 149 Cong. Rec. S1725-01, S1725, 2003 WL 193278 (Jan. 29, 2003) ("The 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."). Accordingly, this Court should reverse the ARB's erroneous and arbitrary standard for protected conduct under SOX.

V. Objective Reasonableness is Not Solely a Question of Law

When Congress chose to include the terms "reasonable belief" in Section 806, it presumably had in mind well-established DOL precedent under analogous whistleblower protection statutes holding that "reasonable belief" is a mixed question of law and fact, and broadly construing "reasonable belief." By redefining "reasonable belief," the ARB has substantially narrowed the scope of protected conduct under SOX.

In the decision under review, the ARB held that "[b]ecause the analysis for determining whether an employee reasonably believes a practice is unlawful is an objective one, the issue may be resolved as a matter of law." *Welch* slip op. at 10 *citing Jordan v. Alternative Res. Corp.*, 458 F.3d 332, 339 (4th Cir. 2006), *cert. denied*, 127 S.Ct. 2036, 167 L.Ed.2d 804 (2007). As a result of this holding, the ARB has relegated the ALJ to the status of a scrivener with respect to the issue of the reasonableness of an employee's belief that a practice is unlawful. By so doing, the ARB has departed, without explanation, from its longstanding policy in whistleblower cases of reserving for the province of the administrative law judges the determination of whether a complaint is based upon a reasonable perception of a violation of law.

Although SOX is a relatively new whistleblower statute, its employee protection provisions are analogous to a variety of other whistleblower statutes falling under the jurisdiction of the Department of Labor. Prior to the issuance of the decision under review, the Secretary of Labor and the ARB have consistently found that a whistleblower's complaint is protected if it is objectively reasonable. The Secretary and the ARB have consistently addressed the issue of objective reasonableness as a mixed question of law and fact. The ARB reviews the ALJ's factual findings as to reasonableness to determine if they are supported by substantial evidence in the record, contrary to law, or arbitrary and capricious. *See, e.g., Getman v. Southwest Securities, Inc.,* ARB No. 04-059 at 7, 2003-SOX-8 (July 29, 2005).

In *Minard v. Nerco Delamar Co.*, 1992-SWD-1 (Sec'y Jan. 25, 1994)[2], a case under the whistleblower provision of the Solid Waste Disposal Act, the Secretary found that an employee engaged in a protected activity when he complained to management about the dumping of antifreeze and an oil spill, even though neither antifreeze nor motor oil is classified as hazardous waste under the Solid Waste Disposal Act. The Secretary of Labor concluded that the employee engaged in protected activity because his belief of a violation was objectively

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[2] Decisions of the Administrative Review Board and the Secretary of Labor may be found online at the website for the Department of Labor's Office of Administrative Law Judges at www.oalj.gov.

reasonable "given Minard's training and experience" and the "maze" of regulations under the Solid Waste Disposal Act. *Minard*, slip op. at 4-5. In the opinion under review here, the ARB failed to assess whether Welch had an objectively reasonable basis to believe that Cardinal was failing to comply with SEC rules. Instead, the ARB found that whether a belief of a violation of a securities law is objectively reasonable can be determined as a question of law, with no deference to the ALJ's factual and credibility determinations, and without the benefit of observing witness testimony concerning the facts and circumstances of Welch's protected disclosures.

To be sure, the Secretary exercised his discretion in *Minard* to resolve a legal question, namely the parameters of a reasonableness standard. However, the Secretary also recognized that that there is a factual element to determining whether a whistleblower's disclosures are based upon a reasonable perception of a violation, noting that such a determination involves questions such as whether the employee is acting in good faith and whether the belief is reasonable in light of the employee's training and experience. *Minard*, slip op. at 13 n. 5 citing *Pensyl v. Catalytic, Inc.*, 1983-ERA-1, slip op. at 7 (Sec'y Jan. 13, 1984).

In *Melendez v. Exxon Chemicals Americas*, ARB No. 96-051 (July 14, 2000) a case under several environmental whistleblower statutes, the ARB held, consistent with the Secretary's holding in *Minard,* that "the reasonableness of a

whistleblower's belief regarding statutory violations by an employer is to be determined on the basis of 'the knowledge available to a reasonable [person] in the circumstances with the employee's training and experience.'" *Melendez* at 2,0 *citing Minard*, slip op. at 7 n.5 (quoting work refusal standard from *Pensyl v. Catalytic, Inc.*, Case No. 1983-ERA-1, slip op. at 7 (Sec'y Jan. 13, 1984)). The ARB remanded the case to the ALJ to determine which of Melendez's activities qualified for protection, stating:

> On remand, the ALJ should determine whether Melendez' failure to take work permits training by the December 31, 1991 deadline qualifies as a protected work refusal under *Pensyl v. Catalytic, Inc.*, Case No. 83-ERA-1, Sec'y Dec., Jan. 13, 1984, slip op. at 7. In determining *whether Melendez reasonably believed* that the work permits training would expose him to a health hazard, *the ALJ must consider the relevant testimony* of BOP managerial personnel concerning precautions that they believed were appropriate in response to Dr. Pruett's recommendation that Melendez be removed from the process unit area. *See Pensyl,* slip op. at 7. *The ALJ must also evaluate* the testimony pertinent to *the question of whether or not Melendez had reasonably misunderstood* that he was required to participate in the field demonstration at the time that he refused to engage in the work permits training.

Melendez, slip op. at 30 (emphasis added). Thus, the ARB clearly recognized that whether an employee's complaint is based on an objectively reasonable perception of a violation of law involves questions of fact to be resolved by an ALJ.

The Department of Labor has specifically adopted rules applying an appellate standard of review in whistleblower cases under the whistleblower provisions of the Surface Transportation Assistance Act, ("STAA"), 49 U.S.C. §

31105, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), 49 U.S.C. § 42121, and SOX. *See* 29 C.F.R. §§ 1978.10, 1979.110 and 1980.110(b). In cases involving the STAA and AIR21, the ARB has found that determination of objective reasonableness involves questions of fact.

For example, in *Rooks v. Planet Airway, Inc.*, 04-092 (June 29, 2006), an AIR21 case, the ARB first noted that protected activity under AIR21 requires two elements: "(1) the complaint itself must involve a purported violation of a regulation relating to air carrier safety, and (2) the complainant's belief must be objectively reasonable. *Rooks* slip op. at 6, citing *Melendez*, *supra*. In affirming the findings of the ALJ that Rooks engaged in protected activity, the ARB stated as follows:

> Rooks testified that he believed that flying with a fatigued crew was a hazard covered by FAR section 121.553. 14 C.F.R. § 121.553; TR at 422-24. The evidence supports the ALJ's findings that Rooks and the crew members who testified were credible witnesses. The crew members' testimony consistently supported that of Rooks concerning the events of August 29. Rooks's belief was reasonable under the circumstances. Three flight attendants had been up all night on August 27 tending to a sick colleague, they had flown all day on August 28, and then they wait around for almost 12 hours on August 29 because of delays caused by Planet. Accordingly, *because substantial evidence supports the ALJ's credibility determinations and his findings of fact regarding Rooks protected activity, we affirm them.*

Rooks, slip op at 8 (emphasis added). Similarly, in *Eash v. Roadway Express, Inc.*, ARB Case No. 02-008 & 02-064 (June 27, 2003), the ARB reviewed an ALJ's

decision under the STAA finding that a truck driver who refused to operate a commercial vehicle in a snowstorm engaged in protected activity because he had a reasonable apprehension of injury to himself or members of the public due to road conditions. The ARB affirmed the ALJ's finding that Eash reasonably believed that weather conditions rendered driving unsafe and that Eash engaged in a protected activity by refusing to drive. *Eash* at 6.

When Congress enacted a whistleblower provision in SOX modeled upon AIR21, it presumably was cognizant of the DOL's interpretation of AIR21 and analogous whistleblower protection statutes administered by DOL, and it chose not to enact a different statutory scheme. There is nothing in the plain meaning of Section 806 or in the legislative history indicating a Congressional intention to overturn longstanding DOL construction of whistleblower statutes. Accordingly, this Court should reject the ARB's deviation from precedent. *See,e.g., Square D Co. v. Niagara Frontier Tariff Bureau*, Inc., 476 U.S. 409, 424 (1986) ("We are especially reluctant to reject this presumption [of adherence to precedent] in an area that has seen careful, intense, and sustained congressional attention"); *accord California v. FERC*, 495 U.S. 490 (1990).[3]

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[3] In *Knox v. U. S. Dep't of Labor* 434 F.3d 721 (4th Cir. 2006) this Court overturned a decision of the Board wherein the Board "applied a different standard than formally announced and breached the requirement of reasoned decision-making under the APA." *Knox* at n. 4. Here too, the Board breached the requirement of reasoned decision-making in the same fashion.

CONCLUSION

If allowed to stand, the ARB's administrative amendment of Section 806 will discourage employees from disclosing securities law violations, thereby defeating the intent of the statute. Accordingly, *amici* request that the Court reverse the ARB's erroneous decision.

Respectfully submitted,

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This Brief of *Amicus Curiae* has been prepared using:

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Jason Zuckerman

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 7th day of November 2007, I filed the required number of copies of this Brief of *Amici Curiae* by overnight mail with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, and further certify that I served, via by United States Mail with sufficient postage the required number of copies of said brief upon:

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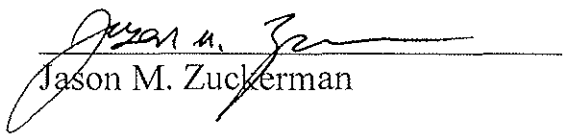

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