

CASE NO. 11-9524

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

LOCKHEED MARTIN CORP.

Petitioner,

v.

DEPARTMENT OF LABOR, Respondent,
and ANDREA BROWN, Intervenor in Support of Respondent.

On Petition for Review from the Administrative Review Board
of the United States Department of Labor

ARB Case No. 10-050 (Igasaki, C.J. Corchado and Royce, JJ.)
ALJ Case No. 2008-SOX-00049 (Pulver, J.)

**BRIEF OF *AMICUS CURIAE*
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
IN SUPPORT OF RESPONDENT URGING DENIAL OF REVIEW**

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[Rule 26.1]

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STATEMENT OF AMICUS CURIAE
[FRAP 29(c)]

A. Interest of Amicus Curiae

The National Employment Lawyers Association (NELA) advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Founded in 1985, NELA is the country's largest professional organization comprised exclusively of lawyers who represent individual employees in cases involving labor, employment and civil rights disputes. NELA and its 68 state and local affiliates have more than 3,000 members nationwide. NELA has filed dozens of *amicus curiae* briefs before this Court, the U.S. Supreme Court and other federal appellate courts to ensure that the goals of workplace statutes are fully realized.

B. Authority to File

Counsel for Petitioner Lockheed Martin Corp. ("Lockheed"), Respondent Department of Labor and Intervenor Andrea Brown have courteously consented to the filing of this brief. *See* Fed.R.App.P. 29(a).

C. Statement of Amicus Counsel [FRAP 29(c)(5)]

This brief was wholly authored by the undersigned counsel for *amicus curiae*. No part of this brief was authored by any party or counsel for any party.

No party contributed money to fund preparing or submitting this brief.

No person, other than the *amici curiae*, contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

We adopt the arguments of Respondent Department of Labor and Intervenor Andrea Brown. This *amicus curiae* brief focuses on two issues of law:

1) whether the five corporate violations enumerated in 18 U.S.C. §1514A (mail fraud, wire fraud, bank fraud, securities fraud, or violations of any SEC rules) are limited to fraud against shareholders, and

2) whether a whistleblower must recite the relevant statute and prove up all of its elements in order to enjoy §1514A protection.

The answer in both cases is no.

1. The Sixth Term of the Statute (“Fraud Against Shareholders”) Does Not Govern the Five Prior Terms of §1514A.

Section 1514A protects whistleblowing about corporate crimes. Congress enumerated five corporate violations (mail fraud, wire fraud, bank fraud, securities fraud, or violations of any SEC rules) without requiring that these violations also involve fraud against shareholders. Nevertheless, Lockheed and its *amicus* Chamber of Commerce complain that the final term in §1514A’s statutory list, “or

any provision of Federal law relating to fraud against shareholders,” ought to be read to impose the “fraud against shareholders” condition on all previous terms in the list. Under Lockheed’s reading, whistleblowing about any of the first five violations is not protected unless it is also related to the sixth.

Lockheed makes the first five terms in §1514A meaningless. Mail fraud against shareholders is already encompassed in the final term “any provision of Federal law relating to fraud against shareholders.” If whistleblowing about “mail fraud” is protected only if it is also “fraud against shareholders,” then Congress’ enumeration of mail fraud and four other violations add nothing to the statute.

Moreover, the Administrative Review Board thoroughly examined §1514A and explained its rejection of the company's present argument in *Sylvester v. Parexel International LLC*, ARB No. 07-123, 2011 WL 2165854 (ARB May 25, 2011), a case Lockheed ignores in its brief.

In Part I.A. of the Argument, we show that the Administrative Law Board (ARB)’s construction of 18 U.S.C. §1514A properly refuses to disregard Congress’ enumeration as surplusage. The Supreme Court and the Tenth Circuit have repeatedly refused to disregard Congressional terms as superfluous.

In Part I.B. of the Argument, we show that the ARB’s construction is more faithful to the legislative purpose. Since the Great Depression, securities regulation

has required disclosure of corporate wrongdoing, regardless of whether it is a direct fraud on shareholders. Corporate fraud may benefit shareholders in the short-term, but it implicates the securities laws because it undermines the long-term confidence of investors in the market. Even before Sarbanes-Oxley, SEC Regulation S-K, 17 C.F.R. §229.401(f), required disclosure of corporate fraud and SEC Rules violations generally, not merely when it is directed at shareholders.

In Part I.C., we show that the ARB's construction is entitled to *Chevron* deference. The construction of §1514A would be clear enough even if this case were before the Court on plenary review. The case is even clearer here, because the Court must defer to the ARB's construction under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

2. Section 1514A protects activity that furthers the Act's remedial purposes and protected activity does not have to be definite or specific as to the statute or rule that might be violated.

In Part II, we address Lockheed's argument that whistleblowers do not enjoy §1514A protection unless they plead the name of the statute, and all of its elements, with specificity.

This argument would impose the requirements of Fed.R.Civ.P. 9(b), as well as the code-pleading requirements of the pre-1938 Rules, on whistleblowers. That is not what Congress intended in protecting those who "provide information, cause

information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation . . .” This provision does not require whistleblowers to be lawyers, nor to memorize the U.S. Code, nor to prove up every element of the offense. It is enough, as here, for a whistleblower to provide information about activity she reasonably believes may be wrongful or fraudulent, whether or not she uses legal terms of art. In *Sylvester*, 2011 WL 2165854 at *13-15, the ARB explained how the public interest would suffer if protection were lost whenever the disclosure was not sufficiently specific about the legal elements of the violation uncovered.

STATUTORY LANGUAGE

18 U.S.C. §1514A provides in relevant part:

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)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c), or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, 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 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by--

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

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

ARGUMENT

I. THE ARB PROPERLY CONSTRUED “FRAUD AGAINST SHAREHOLDERS” IN 18 U.S.C. §1514A TO MODIFY THE SIXTH TERM, NOT THE ENTIRE LIST OF VIOLATIONS.

In construing §1514A, the Administrative Review Board followed *Reyna v. ConAgra Foods, Inc.*, 506 F.Supp.2d 1363, 1381 (M.D.Ga. 2007) and *O’Mahony v. Accenture Ltd.*, 537 F.Supp.2d 506, 516-517 (S.D.N.Y. 2008). These courts correctly held that the “rule of the last antecedent” counsels that the qualifier “against shareholders” should be read as modifying only the last phrase “any

provision of Federal law relating to fraud,” not each of the previous five terms. *Reyna* and *O’Mahony* both followed *Barnhart v. Thomas*, 540 U.S. 20, 26-27 (2003), which articulated this rule “according to which a limiting clause or phrase ... should ordinarily be read as modifying only the noun or phrase that it immediately follows.” *Reyna*, 506 F.Supp.2d at 1381; *O’Mahony*, 537 F.Supp.2d at 516-517.

Lockheed argues that these cases were wrongly decided. Lockheed Opening Brief at 29-31. Lockheed argues that the rule of the last antecedent is not absolute, and may be overcome by other indicia of meaning, *see Barnhart*, 540 U.S. at 26.

The problem with Lockheed’s position is that here, all other indicia of meaning confirm that Congress did not intend “fraud against shareholders” to be a universal limitation on all of the prior terms in the statutory list.

A. Lockheed’s Construction Reduces the Prior List of Five Violations to Meaningless Surplusage.

- 1. If whistleblowing is only protected if it relates to “fraud against shareholders,” the first five terms are surplusage in light of the sixth.**

Lockheed’s reading makes the first five terms in §1514A meaningless. If mail fraud is relevant only insofar as it is mail fraud against shareholders, it is already encompassed in the final term “any provision of Federal law relating to

fraud against shareholders.” In that case, Congress’ enumeration of mail fraud, wire fraud, bank fraud, securities fraud and SEC rules violations adds nothing to the statute. Under Lockheed’s reading, the first five terms are surplusage, since they express nothing that is not already expressed in the final term “any provision of Federal law relating to fraud against shareholders.”

If Lockheed is right, Congress would have achieved the same result by omitting the first five terms altogether, and simply legislating protection only as to “any provision of Federal law relating to fraud against shareholders.”

2. Courts must construe statutory language to avoid attributing surplusage to Congress.

The rule of the last antecedent has much more force here, where it is also necessary to avoid surplusage in the construction of §1514A. “Judges should hesitate ... to treat [as surplusage] statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense.” *Ratzlaf v. United States*, 510 U.S. 135, 140-141 (1994).

This is not a novel issue. The federal courts frequently confront interpretive disputes where one reading would give meaning to all terms Congress chose, while the competing reading would minimize some terms as redundant, with no meaning independent from what is already expressed in others. In such cases, the Court

must choose the former interpretation to avoid nullifying Congressional language. As in this case, a sequence of enumerated terms in a statute (*i.e.*, “A, B, C, or D”) should not be read so that A, B and C mean nothing more than D.

The Supreme Court has repeatedly insisted on this canon. *See Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 342-343 (2005) (rejecting argument that a condition in the seventh clause of the statute should import the condition to the previous six clauses); *Bailey v. U.S.*, 516 U.S. 137, 145-146 (1995) (*superseded by statute*, 112 Stat. 3469 (1998) (statute specifies two kinds of conduct – to “use” or “carry” a firearm. The Government argued that “use” should be read to encompass the same meaning as “carry,” but the Court rejected that reading as surplusage: “Nothing here indicates that Congress, when it provided these two terms, intended that they be understood to be redundant. We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.”); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 697-698 (1995) (landowners argued that the term “harm” in the list of actions establishing a “take” of animals in the Endangered Species Act, 16 U.S.C. § 1532(19), had to mean direct injury, synonymous with other terms in the list, like “pursue, hunt, shoot, wound, kill, [or] trap.” The Court rejected this reading, since it gave no meaning to the word “harm” separate from

the other terms: “unless the statutory term ‘harm’ encompasses indirect as well as direct injuries, the word has no meaning that does not duplicate the meaning of other words that §3 uses to define ‘take.’ A reluctance to treat statutory terms as surplusage supports the reasonableness of the Secretary’s interpretation.”); *U.S. v. Wells*, 519 U.S. 482, 493 n.14 (1987) (rejecting argument that materiality is an element of all criminal fraud, where 42 sections of the Code mention “materiality” as an element and 54 do not; inclusion of materiality in some sections but not others cannot be dismissed as surplusage.)

The Court enforced this canon several times in the past two Terms. In *Board of Trustees of Leland Stanford Junior University v. Roche Molecular Systems, Inc.*, ___ U.S. ___, 131 S.Ct. 2188, 2196 (2011), the parties disputed whether federal contractors like Stanford automatically retained title in inventions developed under federal grants. Stanford argued that the phrase “invention of the contractor” in the Bayh-Dole Act, 35 U.S.C. §201(e), should be read to include all inventions made pursuant to federal grants, and not merely the inventions that Stanford owned. The Court rejected Stanford’s reading, because it “renders the phrase ‘of the contractor’ superfluous. . . . Reading ‘of the contractor’ to mean ‘all inventions made by the contractor’s employees with the aid of federal funding,’ as Stanford would, adds nothing that is not already in the definition, since the definition already covers

inventions made under the funding agreement. That is contrary to our general ‘reluctan[ce] to treat statutory terms as surplusage.’” *Stanford*, 131 S.Ct. at 2196, quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

In *Corley v. United States*, ___ U.S. ___, 129 S.Ct. 1558, 1566 (2009), the Government argued that under the exclusionary rule of 18 U.S.C. §3501(a), all voluntary confessions are admissible, despite another provision in §3501(c) that a confession “shall not be inadmissible solely because of delay” if the confession is “made voluntarily and ... within six hours [of arrest].” The Court rejected this reading because “it renders §3501(c) nonsensical and superfluous. . . . If (a) really meant that any voluntary confession was admissible, as the Government contends, then (c) would add nothing.”. . . The Government’s reading is thus at odds with one of the most basic interpretive canons, that ‘[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant’ *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting 2A N. Singer, *Statutes and Statutory Construction* §46.06, pp.181–186 (rev. 6th ed.2000)).” *Corley*, 129 S.Ct. at 1566.

The Tenth Circuit follows this rule. See *In re Dawes*, ___ F.3d ___, 2011 WL 2450930 *5 (10th Cir., June 21, 2011) (“[T]he Daweses’ handiwork raises an even more troubling question: what is § 1305(a)(1) doing on the books at all? If

post-petition taxes are automatically included in the bankruptcy plan as taxes ‘incurred by the estate,’ then §1305(a)(1)’s optional inclusion of these same claims is left loitering around the U.S. Code with no apparent purpose.”); *Hackwell v. U.S.*, 491 F.3d 1229, 1236-37 (10th Cir. 2007) (“Applying the Defendants’ interpretation of the RECA would require a finding that the above statutes unnecessarily address ‘expenses’ and ‘services rendered’ separately. Put differently, if ‘services rendered’ includes expenses, then it would appear that Congress used redundant language when enacting the several provisions that clearly distinguish between compensation for services rendered and reimbursement for expenses incurred. Since ‘words will be interpreted as taking their ordinary, contemporary, common meaning’ at the time Congress enacted the statute, *Perrin v. United States*, 444 U.S. 37, 42 (1979), and since ‘we should give effect, if possible, to [a statute’s] every clause and word,’ *Toomer v. City Cab*, 443 F.3d 1191, 1194 (10th Cir.2006), we find that ‘services rendered’ plainly excludes ‘costs incurred.’”).

Lockheed’s argument is not persuasive. If Congress had intended to protect only whistleblowing related to “any provision of Federal law relating to fraud against shareholders,” Congress’ express enumeration of mail fraud, wire fraud, bank fraud, securities fraud and SEC rules violations would, as in *Dawes*, _____

F.3d ____, 2011 WL 2450930 at *5, be “left loitering around the U.S. Code with no apparent purpose.”

3. Lockheed rewrites §1514A to insert the phrase “or other provision of Federal law relating to fraud against shareholders.”

According to Lockheed, what Congress really meant was that mail fraud, wire fraud, bank fraud, securities fraud and SEC Rule violations are implicitly limited by the “fraud against shareholders” condition, and that the final term acts as a catch-all, a general phrase for which each of the prior five terms were merely illustrations. Congress could have expressed this sense by inserting the word “other” into the final phrase, to read “a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any other provision of Federal law relating to fraud against shareholders.” If Congress had used such a construction, it might have signaled that the first five terms were only illustrations of a general description “fraud against shareholders.”

That is not the way Congress wrote the statute. The absence of a word like “other” in qualifying the last term is especially striking, because Congress used such a formulation earlier in the same sentence. In describing the activity that §1514A protects, Congress listed “to provide information, cause information to be provided, or otherwise assist in an investigation.” This formulation indicates that

the first two terms on the list (“to provide information, cause information to be provided”) are illustrative examples of the assistance described by the final, general catch-all (“or otherwise assist in an investigation.”)

Congress knew how to use the words “other” and “otherwise,” but it did not use them to qualify the sixth term in the list of covered violations. While Congress wrote “or otherwise assist in an investigation” earlier in the sentence, it did not write “or any other provision of Federal law relating to fraud against shareholders.”

This is a significant contrast. For example, in *Bloate v. U.S.*, ___ U.S. ___, 130 S.Ct. 1345, 1353 (2010), the Court found it decisive that, while an earlier term in a statute contained the illustrative “including” (signifying that the term was a catch-all for which other enumerated terms were only examples), the absence of such a term in a later part of the statute indicated that Congress did not intend the later part to be subject to the same construction.

The absence of such language (which is conspicuously present earlier in the same sentence to modify “or otherwise assist in an investigation) shows that Lockheed’s reading is wishful thinking.

4. Congress’ use of the disjunctive may not be disregarded.

Absent a qualifier like “or other provision,” Congress’ use of the disjunctive “or” means that each term has an independent meaning. Whistleblowing is

protected as to corporate mail fraud or wire fraud or bank fraud or securities fraud or SEC Rules violations or fraud against shareholders.

The use of the disjunctive defeats an argument that the separate terms linked by “or” mean the same thing. For example, in *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-339 (1978), the Court held that the Clayton Act’s reference to “business or property” precluded a reading that held that the two terms meant the same thing. *See also Knutzen v. Eben Ezer Lutheran Housing Center*, 815 F.2d 1343, 1348-49 (10th Cir. 1987). The same construction must apply here.

B. The ARB’s Construction Is Faithful to the Legislative Purpose of Sarbanes-Oxley.

Lockheed and its *amicus* Chamber of Commerce argue that “fraud against shareholders” must be read as a universal condition, because they claim corporate crime is irrelevant to the Sarbanes-Oxley Act unless that crime is intended to victimize shareholders directly. According to this argument, a corporation may commit mail fraud, wire fraud, bank fraud, securities fraud and SEC Rules violations, without any whistleblower protection for its employees, so long as the violation does not directly defraud shareholders.

This argument ignores the history of federal securities law, as well as the history of the Enron, Worldcom, and Arthur Andersen catastrophes that motivated

the Sarbanes-Oxley Act. In each of these cases, corporate fraud and violations of law began as a way of ostensibly increasing shareholder value. A corporation that successfully defrauds the government, or banks, or the public, will in the short term improve the corporation's return for shareholders.

This does not mean that federal securities law is indifferent to Enron-like activity until it results in concrete harm to its shareholders. The premise of securities regulation is that the integrity of publicly traded companies is essential to the long-term stability of the investing market. Violations of corporate integrity implicate the securities laws even before they result in direct losses to shareholders.

1. Many provisions of Sarbanes-Oxley address corporate crimes against victims other than shareholders.

The Department of Labor correctly cites *Sylvester v. Parexel Int'l*, No. 07-123, 2011 WL 2165854 (ARB May 25, 2011) to show that the Sarbanes-Oxley Act includes multiple provisions that address corporate misconduct separate from direct shareholder fraud. As the ARB explained at length in *Sylvester*, the Act addresses not only securities fraud (in the aftermath of Enron, Worldcom, and Arthur Andersen), but also corporate misconduct that does not involve fraud. See S. Rep. No. 107-146, at 2 (May 2, 2002). Section 802 assesses criminal penalties

upon persons who alter, destroy, conceal, or falsify records “with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States.”

18 U.S.C.A. § 1519. Section 805 instructs the United States Sentencing Commission to review sentencing guidelines to ensure that they include enhancements “for cases . . . in which the solvency or financial security of a substantial number of victims is endangered,” and ensure that those enhancements are “sufficient to punish and deter criminal misconduct by corporations.” S. Rep. No. 107-146, at 12-13.

Lockheed is therefore wrong to claim that Sarbanes-Oxley is unconcerned with mail fraud, wire fraud, bank fraud, securities fraud or SEC Rules violations unless its immediate target is the violating company’s shareholders.

2. Federal securities law assumes that fraudulent corporate behavior harms the market, even when it is intended to benefit shareholders in the short run.

When Sarbanes-Oxley was enacted, federal securities regulation was already concerned with corporate lawbreaking generally, not merely direct shareholder fraud. The disclosure and accounting standards of the Act must be enforced to protect public confidence in the market, even though violations of those standards may not always constitute provable fraud.

By its terms, §1514A applies to publicly traded corporations registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. §78l), or required to file reports under section 15(d), 15 U.S.C. §78o(d)). These provisions already require disclosure of many corporate crimes and violations that do not directly involve fraud on shareholders. SEC Regulation S-K, 17 C.F.R. §229.401, requires corporate officers to disclose any bankruptcy filing, 17 C.F.R. §229.401(f)(1), any criminal conviction, 17 C.F.R. §229.401(f)(2), any order restricting the officer's ability to do business, 17 C.F.R. §229.401(f)(3), any order finding any violation of SEC Rules, 17 C.F.R. §229.401(f)(3)(iii) and specifically any violation of any SEC regulation or commission of mail or wire fraud, whether or not it was directly targeted on shareholders, 17 C.F.R. §229.401(f)(7).

Indeed, some securities law violations require no showing of fraud at all. Section 13(b)(2)(A) of the Securities Exchange Act, 15 U.S.C. §78m(b)(2)(A), requires issuers to “make and keep books, records and accounts which accurately reflect the transactions and disposition of the assets of the issuer.” This provision requires that “[e]very issuer . . . shall . . . devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that . . . the recorded accountability for assets is compared with the existing assets at reasonable intervals and *appropriate action is taken with respect to any*

differences.” 15 U.S.C. §78m(b)(2)(B)(iv)(emphasis added). These bedrock accounting requirements are necessary for government and outside auditors. They need the company's books to be maintained. A corporate official can violate these requirements by mere negligence, and SOX must protect the whistleblower who raises a concern about that neglect.

It is no defense for a public corporation to argue, as Lockheed and the Chamber of Commerce do here, that such violations are irrelevant to securities law unless they directly defraud shareholders. Even where shareholders are the short-term beneficiaries of illegal corporate conduct, the long-term erosion of integrity in publicly traded companies is a matter of concern to securities law. “It cannot be disputed that a reasonable investor would want to know whether the person they are sending their money to in order to purchase a stock has been previously found to have violated the securities laws.” *S.E.C. v. Levine*, 671 F.Supp.2d 14, 27-28 (D.D.C. 2009); *see also S.E.C. v. Huff*, 758 F.Supp.2d 1288, 1347 (S.D.Fla.2010) (SEC 10-K filings failed to disclose prior indictment and conviction for wire fraud relating to insurance companies); *Commodity Futures Trading Com'n v. Wall Street Underground, Inc.*, 281 F.Supp.2d 1260, 1269-70 (D.Kan.2003) *affd.* 128 Fed.Appx. 726 (10th Cir.2005), *citing SEC v. TLC Invs. and Trade Co.*, 179 F.Supp.2d 1149, 1153 (C.D.Cal.2001) (granting summary judgment for the SEC

where defendant failed to disclose a prior conviction for tax fraud). Fraudulent behavior is material to investor confidence, whether or not the specific fraud was aimed at shareholders or other parties.

Lockheed's argument (that whistleblowing on corporate fraud is not protected by Sarbanes-Oxley unless it is "fraud on the shareholders") ignores the history and the policy of the securities laws.

C. The ARB Is Entitled to *Chevron* Deference.

This case is particularly clear, because the Court does not sit to review the ARB's construction *de novo*. The ARB is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

1. The ARB is charged with interpreting §1514A in formal adjudications.

This Court has repeatedly applied *Chevron* deference to adjudications by the ARB under other whistleblower statutes. *Anderson v. Department of Labor*, 422 F.3d 1155, 1173-74 (10th Cir. 2005); *Trimmer v. Department of Labor*, 174 F.3d 1098, 1102 (10th Cir.1999).

The sister circuits agree that the ARB is entitled to *Chevron* deference in construing §1514A of SOX. *Day v. Staples, Inc.*, 555 F.3d 42, 54 n.7 (1st Cir. 2009); *Welch v. Chao*, 536 F.3d 269, 276 n.2 (4th Cir. 2008).

As the First Circuit explained:

Chevron deference is appropriate when it appears from the “statutory circumstances that Congress would expect the agency to be able to speak with the force of law.” *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); *see also Rucker v. Lee Holding Co.*, 471 F.3d 6, 11–12 (1st Cir.2006). The Supreme Court has instructed that “Congress[‘s] contemplat[ion] [of] administrative action with the effect of law [can be assumed] when it provides for a relatively formal administrative procedure” such as formal adjudication. *Mead*, 533 U.S. at 230 & n. 12. Congress explicitly delegated to the Secretary of Labor authority to enforce §1514A by formal adjudication, *see* 18 U.S.C. §1514A(b)(1)(A), and the Secretary has delegated her enforcement authority to the ARB, *see* Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 67 Fed.Reg. 64,272 (Oct. 17, 2002).

Day v. Staples, Inc., 555 F.3d at 54 n.7; *see also Welch*, 536 F.3d at 276 n.2.

The First and Fourth Circuits are correct. The ARB is entitled to *Chevron* deference in construing §1514A.

2. Under *Chevron*, the ARB’s construction must be upheld if it is a permissible construction, whether or not the Court would have chosen the same construction *de novo*.

Under *Chevron*, the ARB need only show that its construction of §1514A is reasonable, not that it is the only possible construction. Nor does the agency need to have chosen the construction that the Court would have chosen:

The court need not conclude the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.” [*Chevron*]. at 843 n. 11. “[I]f the

implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecomms. Ass'n v. Brand X*, 545 U.S. 967, 980 (2005).

Salman Ranch, Ltd. v. C.I.R., ___ F.3d ___, 2011 WL 2120044 at *5 (10th Cir.2011).

3. An alleged change in ARB policy does not affect *Chevron* deference: *Fox Television Stations*

Lockheed argues that the ARB is not entitled to deference, supposedly because it had construed the statute in a more limited way in *Platone v. FLYi, Inc.*, ARB Case No. 04-154 *aff'd* 548 F.3d 322 (4th Cir. 2008).

This argument is futile after *FCC v. Fox Television Stations, Inc.*, ___ U.S. ___, 129 S.Ct. 1800, 1811 (2009). In *Fox Television*, the Supreme Court overruled contrary circuit law, to hold that agency action is not subject to less deference just because it reflects a change in policy. After *Fox Television*, Board decisions will not be subject to stricter review because they change the agency's prior law. The Board is free to modify or overrule existing precedent. So long as it gives a reasoned explanation for the change, the Courts may not disturb the Board's political decision to change policy. *See also Wyoming v. U.S. Dept. of Interior*, 587 F.3d 1245, 1254 (10th Cir. 2009) ("After all, 'flexibility in reconsidering and

reforming of policy,' including the opportunity to choose between temporary and permanent rulemaking, is 'one of the signal attributes of the administrative process,' [cit.om.], and courts will not lightly interfere with it.")

Nor does it matter whether courts had approved a prior agency construction. Prior case law, including appellate decisions approving a contrary prior rule, are not good authority after the agency changes its rule. The new rule is also entitled to *Chevron* deference, making it a material change in the law. *Salman Ranch*, ___ F.3d ___, 2011 WL 2120044 at *10. Court decisions approving the agency's prior rule are not conclusive, unless the Court has held that the prior construction is the only permissible one, with no option for agency discretion. *Nat'l Cable & Telecomms. Ass'n v. Brand X*, 545 U.S. 967, 982-983 (2005).

Lockheed cites *Salazar v. Butterball, LLC*, 644 F.3d 1130, 1139 (10th Cir. 2011) for the proposition that repeated changes on agency position are not entitled to deference. *Salazar* does not support its position. *Salazar* rejected inconsistent positions in agency opinion letters because they were poorly reasoned, 644 F.3d at 1139. The informal opinion letters in *Salazar* did not constitute formal adjudications of the kind Congress delegated here to the ARB - they only had persuasive value rather than the force of an agency adjudication. The *Salazar* Court did not purport to repudiate *Fox Television Stations*.

In this case, the ARB thoroughly explained its change in position, both by adopting the court decisions in *Reyna* and *O'Mahony* in this case, and in the ARB's decision in *Sylvester*, a case Lockheed fails to discuss.

4. The ARB's construction is, at a minimum, reasonable because it follows settled rules of statutory construction and adopts opinions of at least two federal courts.

Against this background, the ARB's construction cannot be called unreasonable. Whether or not §1514A could be construed differently, the ARB's reading applies well-settled rules of construction like the rule of the last antecedent and the rule against imputing surplusage. An agency that applies these rules of construction cannot be said to forfeit *Chevron* deference. *See Barnhart*, 540 U.S. at 26-27 (Social Security Administration's construction entitled to *Chevron* deference because it applied the rule of the last antecedent); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. at 697-698 (agency's construction entitled to *Chevron* deference because it avoided surplusage).

The ARB's construction is all the stronger because it adopted the views of two federal courts in *Reyna v. ConAgra Foods, Inc.*, 506 F.Supp.2d 1363, 1381 (M.D.Ga. 2007) and *O'Mahony v. Accenture Ltd.*, 537 F.Supp.2d 506, 516-517 (S.D.N.Y. 2008). Where an agency adopts an existing judicial construction of a statute, its choice cannot normally be held unreasonable. *See U.S. Telecom Ass'n v.*

F.C.C., 295 F.3d 1326, 1332 (D.C. Cir. 2002).

It follows that the ARB acted well within its delegated role by reading §1514A according to its plain terms. As a matter of statutory construction, legislative policy, and administrative discretion, whistleblowers are properly protected under §1514A where they report corporate mail fraud, wire fraud, bank fraud, securities fraud, or SEC Rules violations, regardless of whether these violations also fit within the sixth disjunctive term “fraud against shareholders.”

II. PROTECTED ACTIVITY IS ANY ACTIVITY THAT FURTHERS THE PURPOSES OF THE ACT AND DOES NOT HAVE TO CITE THE ACT OR DESCRIBE A VIOLATION WITH SPECIFICITY.

Lockheed also argues that Andrea Brown was not entitled to §1514A protection, because her complaint did not “definitively and specifically relate” to the violations listed in the statute. Lockheed Opening Brief at 32-33.

The Department of Labor and Brown each set forth the factual nexus of her complaint. It is clear that Brown reported the salient elements of the fraud - reasonably believing the conduct to be wrongful and illegal. The consideration of this factual question is a matter for the ARB’s discretion.

However, Lockheed and the Chamber of Commerce seem to argue for a bright-line rule under §1514A, which would withhold protection from any whistleblower who did not expressly name the relevant section of the U.S. Code,

or satisfy the pleading standards of Fed.R.Civ.P. 9(b). This approach would require whistleblowers to have legal training before they could claim protection. It would also saddle them with the pre-1938 standards of code pleading as a condition for protection.

This is plainly not what the law requires. As long as a whistleblower reasonably believes that the conduct she reports constitutes a covered violation, it makes no difference whether she uses a legal term of art, or cites a Code section. *See Van Asdale v. International Game Technology*, 577 F.3d 989, 997 (9th Cir. 2009) (“To be sure, Brown testified that she did not believe Shawn used the words ‘fraud,’ ‘fraud on shareholders,’ or ‘stock fraud’ and she could only say that Shawn ‘may have’ used the term ‘Sarbanes–Oxley’ or ‘SOX’; the record similarly contains no evidence that Shawn used any such language in his conversation with Pennington. However, as the Fourth Circuit has recognized, ‘[a]n employee need not cite a code section he believes was violated’ to trigger the protections of §1514A. *Welch*, 536 F.3d at 276. It is clear to us that . . . Shawn’s statements to both Brown and Pennington reported conduct that definitively and specifically related to shareholder fraud. That is all that § 1514A requires.”) *See also Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st Cir. 2009) (“The employee is not required to provide the employer with the citation to the precise code provision in question.”);

Welch v. Chao, 536 F.3d 269, 276-277 (4th Cir. 2008); *Fraser v. Fiduciary Trust Co. Int'l*, 417 F.Supp.2d 310, 322 (S.D.N.Y.2006).

This rule is critical if non-lawyers are to enjoy whistleblower protection. In comments to the final regulations implementing the whistleblower provision, the Department of Labor explained:

it would be overly restrictive to require a complaint to include detailed analyses when the purpose of the complaint is to trigger an investigation to determine whether evidence of discrimination exists.... Although the [SOX] complainant often is highly educated, not all employees have the sophistication or legal expertise to specifically aver the elements of a prima facie case and/or supply evidence in support thereof.

Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 69 Fed.Reg. 52104-01 (Aug. 24, 2004).

In this case, the ARB had ample discretion to judge that Andrea Brown's disclosures were sufficiently related to fraud to qualify for protection. Whether Brown used the legal term "mail fraud," or cited the correct section of the U.S. Code, or met a judicial standard of proof, is not material to Congress' intent that she be protected from retaliation. As the ARB explained in *Sylvester*, 2011 WL 2165854 at *13-15, a stringent requirement that protected activity be specific as to the legal basis for the violation would frustrate the purpose of the Act.

CONCLUSION

The Court should deny Lockheed's petition for review.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 29 and 32(a)(7)(B), I, Joan M. Bechtold, hereby certify this AMICUS CURIAE BRIEF OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION in Case No. 11-9524 is in 14 point, proportionally spaced, roman type face and contains less than 6,500 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii), on the basis of a word count made by Microsoft Word software that counts words in both text and footnotes.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing brief submitted in digital form via the Court's ECF system is an exact copy of the written document being filed with the Clerk and has been scanned for viruses by AVG Internet Security 9.0 and according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

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CERTIFICATE OF SERVICE

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