No. _____

In The
Supreme Court of the United States

GORDON SCOTT STROH,

Petitioner,

v.

SATURNA CAPITAL CORPORATION,
NICHOLAS KAISER AND JANE CARTEN,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

What is the appropriate standard of review when a trial court improperly grants a motion *in limine* that has the practical effect of dismissing an entire cause of action?

PARTIES TO THE PROCEEDING

Petitioner Gordon Scott Stroh was the plaintiff in the district court proceedings and appellant in the court of appeals proceedings. Respondents Saturna Capital Corporation, Nicholas Kaiser, and Jane Carten were the defendants in the district court proceedings and appellees in the court of appeals proceedings.

RELATED CASES

- *Stroh v. Saturna Capital Corp.*, No. 2:16-cv-00283, U.S. District Court for the Western District of Washington. Judgment entered June 16, 2017.
- *Stroh v. Saturna Capital Corp.*, No. 2:16-cv-00283, U.S. District Court for the Western District of Washington. Judgment entered June 19, 2017.
- *Stroh v. Saturna Capital Corp.*, No. 17-35607, U.S. Court of Appeals for the Ninth Circuit. Judgment entered Dec. 24, 2018.
- *Stroh v. Saturna Capital Corp.*, No. 17-35607, U.S. Court of Appeals for the Ninth Circuit. Judgment entered Feb. 1, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Gordon Scott Stroh petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at *Stroh v. Saturna Capital Corp.*, 746 F. App'x 639 (9th Cir. 2018) and reproduced at App. 1-4. The Ninth Circuit's denial of petitioner's motion for reconsideration and rehearing *en banc* is reproduced at App. 31. The opinions of the District Court for the Western District of Washington are reproduced at App. 16-27 and App. 9-15.

JURISDICTION

The Court of Appeals entered judgment on December 24, 2018. App. 1-4. The court denied a timely petition for rehearing *en banc* on February 1, 2019. App. 31. On April 18, 2019, Justice Kagan extended the time for filing this petition to July 1, 2019. Application No. 18A1065. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case does not involve interpretation of statutory or constitutional provisions.

INTRODUCTION AND STATEMENT OF THE CASE

The issue presented in this case involves a genuine and current conflict between the Courts of Appeals that is significant and substantially important because it will determine the standard of review courts use when reviewing the dismissal of an entire cause of action through an *in limine* motion. This case also raises issues of exceptional importance under the whistleblower protection provisions of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A ("SOX"), as well as in all litigation in which a motion *in limine* is used as the legal equivalent of a summary judgment motion. Furthermore, the Ninth Circuit opinion affirming the district court's *in limine* ruling created a circuit split regarding the proper standard of appellate review in such cases.

Petitioner Gordon Scott Stroh ("Stroh") worked at Saturna Capital Corporation ("Saturna"), an SEC-registered investment advisor, from 2006 to 2014. At the time of his termination, he served as Saturna's Chief Legal Officer with authority over, and direct responsibility for, compliance at Saturna. Saturna was founded and controlled by Nicholas Kaiser ("Kaiser"). Kaiser's daughter, Jane Carten ("Carten"), was the

Chief Executive Officer reporting directly to Kaiser. Carten was Stroh's immediate supervisor.

On June 12, 2014, Kaiser instructed Saturna's Information Technology ("IT") staff to build a secret, redundant computer system on his private yacht, in case the FBI raided Saturna in connection with potential securities violations and seized the company's computer system. App. 24-27. He further instructed the IT staff to lie to the FBI about this duplicative system. *Id*. After the meeting, members of the IT staff complained to Stroh, in his official capacity, about these instructions. *Id*. Stroh directed the IT staff to disregard the orders, and promptly reported his concerns about the illegal nature of the instructions to Carten. *Id.* at 14-15, 23-24.

When Carten informed Kaiser of Stroh's objections, Kaiser became irate. Kaiser's animus was extreme, and upon learning that Stroh had countermanded his instructions, he ordered Carten to fire the entire IT staff. App. 14-15. Although the IT staff was not fired, Saturna terminated Stroh on July 16, 2014, 21 working days later. *Id*. at 7, 26-27. This incident is referred to throughout as the "FBI computer issue."

Stroh filed a SOX case alleging that his termination was illegal. To establish liability under SOX,[1] Stroh only had to demonstrate that he engaged in a protected activity and suffered adverse employment

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[1] *See* 18 U.S.C. § 1514A(a)(1)(C); *Bechtel v. Admin. Review Bd., U.S. Dep't of Labor*, 710 F.3d 443, 445 (2d Cir. 2013); *see also infra* Section II; n.20.

action for which the protected disclosure was a "contributing factor."[2] The jury itself found adverse action (*i.e.*, that Saturna terminated Stroh), App. 7, and the FBI computer issue encompassed the remaining evidence required under SOX. Stroh's objection to the instruction to obstruct justice – by creating a secret dual computer system and lying to the FBI about it – was a protected disclosure. *Id*. at 2. Likewise, Kaiser's reaction upon hearing of Stroh's objections and the timing of Stroh's termination was evidence of a contributing factor.

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[2] The contributing factor test is an intentionally low standard, and one that is much easier to meet than the motivating factor test. *See Marano v. Dep't of Just.*, 2 F.3d 1137, 1140 (Fed. Cir. 1993). An employer can rebut this showing by presenting clear and convincing evidence that it would have taken the same adverse action absent the protected activity.

A contributing factor is "any factor, which alone or in combination with other factors, tends to affect *in any way* the outcome of the decision." *Lockheed Martin Corp. v. Admin. Review Bd., U.S. Dep't of Labor*, 717 F.3d 1121, 1136 (10th Cir. 2013) (internal quotations omitted); *see also Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 263 (5th Cir. 2014). The FBI computer issue indisputably meets this standard. The temporal proximity between Stroh's whistleblowing regarding the FBI computer issue and his termination, combined with Kaiser's threat to fire the IT staff after learning that Stroh had countermanded his order, are unquestionably sufficient to meet the low burden necessary to demonstrate a contributing factor. *See*, *e.g.*, *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1003 (9th Cir. 2009) (finding that "approximately two and a half months" between protected whistleblowing and termination "was sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action").

One month before trial, and 49 days after dispositive motions were due, Saturna filed a motion *in limine* to exclude all facts related to the FBI computer issue. Rulings on this motion were deferred until first day of trial, at which point Stroh made clear that if he was unable to present the FBI computer issue, "there[was] really not much left for [him]." This would have gutted the heart of his case. The judge again deferred his decision on the issue without any further instruction. App. 21, 27. Stroh's counsel was permitted to reference the FBI computer issue in his opening statement. However, during Stroh's direct examination, Saturna objected and requested the trial judge rule on its motion.

The district court then granted the motion and proscribed introduction of *all facts* related to the FBI computer issue. App. 11-15. The jury therefore did not hear any evidence concerning the FBI computer issue. Without the ability to present evidence regarding the FBI computer issue, Stroh could not demonstrate key components in his SOX retaliation claim, including: his best evidence of a major SOX-protected disclosure (the FBI computer issue); direct and circumstantial evidence of this "contributing factor"; timing of his disclosures in relation to his termination; animus and retaliation by Kaiser; and Kaiser/Saturna's extreme hostility toward regulatory requirements. Thus, the district court's error unmistakably prejudiced Stroh's substantial rights by throwing out an entire cause of action on an evidentiary motion. The court effectively

issued a *de facto* summary judgment ruling dismissing Stroh's SOX claim based on the FBI computer issues.

The remaining issues in the case went to trial. Although the jury found that Saturna terminated Stroh,[3] it ruled against Stroh on his SOX retaliatory discharge claim, of which the FBI computer issue was an indispensable element. App. 7-8.

On appeal, the Ninth Circuit found that the trial court erred in granting the motion *in limine* excluding all evidence on the FBI computer issue. App. 2-3. But instead of reversing the judgment, the Ninth Circuit applied the traditional legal standard for reviewing a motion *in limine*,[4] citing to the Ninth Circuit's standard for reviewing standard evidentiary *in limine* rulings. *Id*. Based on this precedent, the Ninth Circuit reviewed the trial record to determine whether there were any facts, viewed in the light most favorable to Saturna, that would sustain the jury's verdict. The Ninth Circuit cited to three facts it believed would

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[3] Saturna also did not contest that Stroh reasonably believed that Kaiser's instruction on the FBI computer issue was illegal under SOX.

[4] This standard is regularly applied to purely evidentiary rulings in evaluating erroneous *legal* interpretations, and allows appeals courts to affirm unless they find the error substantially prejudiced a party. It cannot be employed to review dispositive rulings. *See infra* Section II. The court's inquiry into whether Stroh was prejudiced saddled Stroh with a much higher burden than SOX permits, and discounted the role of the fact finder in making determinations under SOX.

sustain the verdict, but completely ignored the impact of the *de facto* grant of summary judgment regarding the FBI computer issue.[5]

Other Courts of Appeals, confronted with similar circumstances, have rejected applying the traditional standard of review applicable to evidentiary motions *in limine*. These courts recognize that a motion *in limine* can be inappropriately used to dismiss an entire cause of action. In these contexts, the circuit courts have developed multiple standards of review, none of which are consistent with the standard applied by the Ninth Circuit. Under any of these standards, the jury verdict in Stroh's case would have been reversed.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision added to an existing circuit split of exceptional importance regarding the proper standard of appellate review when a district court grants the legal equivalent of a partial summary judgment by excluding evidence through an *in limine* ruling. This Court should grant review to eliminate discrepancies among the circuits, and clarify a uniform standard.

When a district court grants a motion *in limine* that is in essence a motion for summary judgment, that grant must be reviewed by the appeals court under the standard used to review motions for summary

[5] *See infra* Section II; n.20.

judgment. The Ninth Circuit failed to do so, dismissing Petitioner's cause of action without proper grounds or procedure. This Court should grant review to prevent abusive uses of motions *in limine* and correct the Ninth Circuit's erroneous holding.

I. The Ninth Circuit's Decision Reflects an Existing Circuit Split Regarding Review of Improper Grants of Summary Judgment Through Motions *in Limine*.

The Ninth Circuit's application of the harmless error standard to review a motion *in limine* that has the practical effect of granting a partial summary judgment on a valid cause of action added to a circuit split of exceptional importance. This issue could impact any civil case and presents the opportunity for litigants to abuse court procedure – severely prejudicing the nonmovant – without an effective cure. Given the number of appeals court decisions addressing this issue, and the differing standards applied by these courts, it is evident that this abuse of the *in limine* procedure is not uncommon, and, as in this case, can have a devastating impact on an otherwise valid case.[6]

If this case had been filed in the other circuits that have addressed this issue, the district court's exclusion of all evidence related to the FBI computer issue through a motion *in limine* would have been reversed on appeal. When faced with similarly overbroad *in limine* rulings and *de facto*/*sua sponte* summary judgment motions, courts in these circuits have labeled such

[6] *See infra* Section II.

requests as improper. Consistently avoiding utilizing the heightened harmless error review applicable to evidentiary rulings, these courts either apply a variety of less stringent standard than harmless error, or simply reverse and remand.

As set forth below, including the Ninth Circuit position, there are now four separate standards applied to this issue.

A. Majority of Circuits Decline to Review Disguised Summary Judgment Motions, Choosing to Simply Reverse.

The Sixth, Seventh, and Federal Circuits do not apply the traditional "harmless error" standard when reviewing a judgment predicated on a motion *in limin*e that has the practical effect of dismissing a cause of action.[7] These Circuits unequivocally decline to review the merits of the underlying claim when it is dismissed by a disguised summary judgment motion, instead choosing to simply reverse and remand without substantive

[7] *See*, *e.g.*, *Louzon v. Ford Motor Co.*, 718 F.3d 556, 563 (6th Cir. 2013) ("Where, as here, the motion in limine is no more than a rephrased summary-judgment motion, the motion should not be considered."); *Mid-Am. Tablewares, Inc. v. Mogi Trading Co., Ltd.*, 100 F.3d 1353 (7th Cir. 1996) (upholding district court's refusal to look at the merits of an "argument that goes to the sufficiency" of evidence through a motion *in limine* when such an argument is proper for summary judgment or judgment as a matter of law); *Meyer Intellectual Properties Ltd. v. Bodum, Inc.*, 690 F.3d 1354 (Fed. Cir. 2012) (finding it improper that the "district court essentially converted Meyer's motion *in limine* into a motion for summary judgment" and refusing to review the decision despite both parties having fully briefed the merits of the argument on appeal).

review of the motion itself. In short, these Circuits not only reject the harmless error standard, they apply a standard that is in fact the exact opposite of that standard.[8]

For example, in *Louzon v. Ford Motor Co.*, the district court granted a motion *in limine* in which a party argued that its opponent could not make out a *prima facie* case where the evidence was "irrelevant and inadmissible." 718 F.3d 556, 562-63 (6th Cir. 2013). Instead of analyzing the district court's decision as a simple evidentiary ruling, the Sixth Circuit explained that because the motion "rest[ed] entirely on the presumption that Louzon would not be able to make out a prima facie case" – *i.e.*, a legal conclusion – the evidentiary ruling that followed would itself be "null." *Id*. at 563.

The court clarified the importance of rejecting the "harmless error" standard of review, warning that "if these tactics were sufficient, a litigant could raise any matter *in limine*, as long as he included the duplicative argument that the evidence relating to the matter at issue was irrelevant." *Id*. The Sixth Circuit concluded that "[w]here, as here, the motion *in limine* is no more than a rephrased summary-judgment motion, the motion should not be considered." *Id*.

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[8] Litigants often attempt to use motions *in limine* to circumvent procedural rules concerning dismissal of claims. *See*, *e.g.*, *Williams v. Rushmore Loan Mgmt. Servs. LLC*, No. 3:15CV673(RNC), 2017 WL 822793 (D. Conn. Mar. 2, 2017) (collecting cases and denying a "procedurally improper" motion *in limine* that sought "dispositive rulings on the merits of [plaintiff's] claims").

Other circuits have likewise strictly enforced the prohibition against using a motion *in limine* to achieve the equivalent of a summary judgment. In *Meyer Intellectual Properties Ltd. v. Bodum, Inc.*, the district court granted a motion *in limine* that prevented the defendant from "presenting evidence in support of its inequitable conduct defense." 690 F.3d 1354, 1378 (Fed. Cir. 2012). On appeal, the defendant argued that the district court had erred as it had essentially converted the plaintiff's motion into one of summary judgment. *Id*. The plaintiff argued that this error was harmless. *Id*.

Rejecting the plaintiff's contention, the Federal Circuit held that "the district court erred in addressing the sufficiency of [the defendant's] inequitable conduct defense on an evidentiary motion," observing that in doing so the court had transformed the motion into a motion for summary judgment. *Id*. Because the Federal Circuit found "that it was procedurally improper for the [district] court to dispose of [the defendant's] inequitable conduct defense on a motion *in limine*," it reversed and remanded, declining to review the decision despite both parties having fully briefed the merits of the argument on appeal. *Id*.

Significantly, these courts do not review district court decisions under the "substantial prejudice" harmless error standard employed by the Ninth Circuit in the instant case. The significant procedural defect of granting summary judgment on an evidentiary motion is on its own enough to warrant reversal.

B. Other Circuits Use Less Stringent Standards to Review Disguised Summary Judgment Motions.

The First, Third, Tenth, and Eleventh Circuits[9] review grants of disguised summary judgment motions either de novo or using other less stringent standards

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[9] *See*, *e.g.*, *Berkovitz v. Home Box Office, Inc.*, 89 F.3d 24, 30 (1st Cir. 1996) ("As with any other grant of summary judgment, the court of appeals affords plenary review to a decision granting sua sponte summary judgment, and reads the record in the light most hospitable to the targeted party."); *Stella v. Town of Tewksbury, Mass.*, 4 F.3d 53, 56 (1st Cir. 1993) (finding that the "notice requirement for *sua sponte* summary judgment demands at the very least that the parties (1) be made aware of the court's intention to mull such an approach, and (2) be afforded the benefit of the minimum 10-day period mandated by Rule 56"); *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064 (3d Cir.1990) (using a "no set of facts on which plaintiff could possibly recover" standard of review for dismissal of claims); *Brobst v. Columbus Servs. Int'l*, 761 F.2d 148, 154 (3d Cir. 1985), *cert. denied*, 484 U.S. 1043 (1988) (reversing where "the district court's procedure converted the *in limine* motion into one for summary judgment," and "effectively precluded plaintiffs from marshalling the record evidence that it had already accumulated"); *Givaudan Fragrances Corp. v. Krivda*, 639 F. App'x 840, 843 n.6 (3d Cir. 2016) (applying a de novo standard on motion *in limine* decision that had a "dispositive effect"); *Zokari v. Gates*, 561 F.3d 1076, 1082 (10th Cir. 2009) (providing analysis of motion *in limine* "to exclude from trial any evidence 'regarding the failure to pay [the plaintiff] for his last day of employment' " where it found grant of that motion "was not an evidentiary ruling but was a substantive ruling that he could not pursue a . . . wage-law claim"); *Massey v. Congress Life Ins. Co.*, 116 F.3d 1414, 1417-18 (11th Cir. 1997) (reversing and remanding grant of *sua sponte* summary judgment where the nonmoving party was not given "an opportunity to marshal their strongest evidence and legal arguments in opposition" in contravention of "both Rule 56 and Eleventh Circuit precedent").

than harmless error. These circuits also stress the importance of procedural safeguards and timeliness of such motions.

Considering a grant of summary judgment "following a hearing on motions *in limine*," the Third Circuit used a "no set of facts on which plaintiff could possibly recover" standard of review. *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1069 (3d Cir. 1990). Defendants in this case argued "that because the motions *in limine* essentially asked the district court to preclude all evidence that would support [the plaintiff's] claims, [the plaintiff] must have known that if the motions were granted all his claims would be effectively barred."[10] *Id*.

The appeals court disagreed, noting that "neither the parties nor the judge suggested that the trial, for which the jury had already been picked, would not go forward." *Id*. Further, "in the absence of a formal motion for summary judgment," the court found that "the plaintiff was under no formal compulsion to marshall [sic] all of the evidence in support of his claims." *Id*. The court therefore held that, because "the district court's procedure converted the *in limine* motion into one for summary judgment . . . without the procedural protections . . . require[d]," it would review the

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[10] Likewise, here, Stroh *informed* the trial judge that if Saturna's motion *in limine* were granted, his SOX claim "would be effectively barred." Nevertheless, the court failed to afford Stroh the procedural protections required under the Federal Rules of Civil Procedure, such as allowing an opportunity to submit evidentiary materials in opposition to Saturna's motion.

claims dismissed by the *sua sponte* summary judgment order "looking to . . . the allegations of the complaint and the state proceedings of which [the court] c[ould] take judicial notice." *Id*.

In *Berkovitz v. Home Box Office, Inc.*, the First Circuit reviewed de novo a *sua sponte* grant of summary judgment where the district court "did not reduce [its] orders to writing, but delivered them *ora sponte* at the pretrial conferences" and did not "invite[] [the plaintiff] to marshal and present" evidence. 89 F.3d 24, 30-31 (1st Cir. 1996). On appeal, the court noted that it was not "comfortable shifting the blame for the apparent miscommunication to the plaintiff." *Id*. at 31. The appeals court found that where "review [was] . . . unaffected by the spontaneous nature of the trial court's action," it would "afford[] plenary review to a decision granting sua sponte summary judgment, and read[] the record in the light most hospitable to the targeted party." *Id*. at 30. Because the district court did not give "the plaintiff a meaningful opportunity to cull the best evidence supporting his position, and to present that evidence," the First Circuit held that it "need go no further" in its review, vacating and remanding the case for further proceedings. *Id*. at 30-31.

Notably, these courts review motions improperly brought *in limine* to dismiss claims as though the motion and/or grant had actually been one of summary judgment, and, similar to the Sixth Circuit, focus on the procedural defects of these *de facto* summary judgment motions.

C. The Circuit Split Has Serious, Widespread Practical Ramifications on All Litigation.

Because this issue is broadly applicable in any civil case, the circuit split has serious, widespread practical ramifications impacting all litigation, not just cases filed under SOX. The instant case is an important example of how non-dispositive motions are used to exploit this uncertainty, but this is not an isolated incident. The error at issue is not unique, and in fact creates a procedural tool that could have significant adverse impacts.[11]

Moreover, because there is no clear standard of review applicable to cases such as Stroh's, the appellate courts utilize differing standards, creating at least a four-circuit split in the approach to this issue. While some courts follow the Sixth Circuit's standard of review, others take their lead from the Third, and many more do not specify an explicit standard at all. It is clear that the circuits are in conflict, and district courts

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[11] As illuminated by Footnotes 7-9, many litigants have attempted to use this ambiguity to end-run the Federal Rules of Civil Procedure. Additionally, even the Ninth Circuit appears uncertain how to correctly address this issue with consistency. *See*, *e.g.*, *U.S. v. Ross*, 206 F.3d 896 (9th Cir. 2000) (noting, in a criminal case, that while a "district court's ruling on a motion *in limine* [is generally reviewed] only for an abuse of discretion," it will be reviewed "de novo if the order precludes presentation of a defense").

in the Second, Fourth, Fifth, Eighth, and DC Circuits[12] are also in need of this Court's guidance in order to avoid even greater fracturing. Considering the morass of district and circuit court opinions on this issue, it is paramount that this Court clarify the proper standard of review for the transformation of evidentiary motions into summary judgment motions.

The Supreme Court should therefore grant this petition for writ of certiorari in order to articulate a uniform standard and eliminate the discrepancies among the circuits. Further, the approach adopted by the Ninth Circuit in *Stroh* should be specifically rejected. Clarifying the proper standard of review would also assist district courts in reviewing cloaked motions for summary judgment. We urge the Court to reject the Ninth Circuit's opinion and adopt the standard articulated by the Sixth Circuit. Adoption of this standard would prevent the future exploitation of motions *in limine* for dispositive means and divert such procedural concerns before irreparable harm occurs.

[12] Additionally, misuse is possible in the circuits that have yet to set a definitive standard. As such, a uniform standard would also prevent forum shopping.

II. The Ninth Circuit Applied the Incorrect Standard of Review When Evaluating the District Court's Grant of a Motion *in Limine* Dismissing Evidence of SOX-Protected Activity.

In the decision below, the Ninth Circuit acknowledged that the lower court's legal conclusion that Stroh had to prove an actual violation occurred in relation to his FBI computer issue was erroneous, and thus exclusion of that evidence was an abuse of discretion. App. 2. Stroh's actions concerning the FBI computer issue clearly constituted protected activity,[13] and the Ninth Circuit confirmed that disposing of this evidence was legal error because SOX "protects whistleblowing regardless of whether the reported securities violation actually occurred." App. 2. Likewise, the jury found that Saturna terminated Stroh. App. 7. Thus, to establish Saturna's liability under SOX, Stroh was only required to show that his protected activity – the FBI computer issue – was a contributing factor in his termination.[14]

Yet, the district court did not simply exclude a piece of evidence through grant of Saturna's motion *in limine*. Rather, it effectively dismissed an entire cause of action (*i.e.*, Stroh's SOX retaliation claim predicated on the FBI computer issue), preventing the jury from

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[13] Stroh "reasonably believed" that Kaiser's proposed plan to build a duplicative computer system on his yacht in order to deceive the FBI constituted violations of the securities laws. *See* 18 U.S.C. § 1514A(a)(1)(C).

[14] *See* n.2.

reviewing facts pertinent to Stroh's SOX claim, including the factual dispute regarding whether the FBI computer issue was a contributing factor under SOX; Stroh's best evidence of a protected disclosure; timing of disclosures in relation to his termination; animus and retaliation by Kaiser; and Kaiser/Saturna's extreme hostility toward regulatory requirements. The FBI computer issue consequently represented a fully cognizable SOX claim.

By allowing Saturna to dispose of issues that should rightly have been decided by the jury, the district court "deprived [Stroh] of an opportunity to present all pertinent material to defend against the dismissal of" his retaliation claim – including evidence relating to Stroh's *status as a whistleblower* under SOX.[15] *Meyer Intellectual Props. Ltd.*, 690 F.3d at 1378.

This effectively dismissed Stroh's SOX cause of action. Accordingly, the district court improperly granted Saturna's motion as, by excluding all evidence of a contributing factor, the court made a final dispositive decision on a non-dispositive motion. *See*, *e.g.*, *Givaudan Fragrances Corp. v. Krivda*, 639 F. App'x 840 (3d Cir. 2016) (finding motion *in limine* decision with "dispositive effect" was *sua sponte* entry of summary judgment); *Osunde v. Lewis*, 281 F.R.D. 250 (D. Md. 2012)

[15] The trial court, and subsequently the appeals court, were made aware by Stroh's counsel that excluding the FBI computer issue would mean Stroh could not demonstrate a key SOX claim. Stroh made this clear to the trial judge, noting that without the FBI computer issue, "there's really not much left for [Stroh]." App. 21.

(reviewing defendant's motion *in limine* as a motion for partial summary judgment where "practical effect of excluding . . . evidence [of child's death] would be to eliminate Plaintiff's wrongful death claim").

However, the means by which litigants may attempt to dismiss all or part of a case is a summary judgment motion, not an *in limine* motion. *See*, *e.g.*, *Louzon*, 718 F.3d at 561 ("[A] mechanism already exists in civil actions to resolve non-evidentiary matters prior to trial – the summary judgment motion."); *Gold Cross Ems, Inc. v. Children's Hospital of Alabama*, 309 F.R.D. 699, 702 (S.D. Ga. 2015) ("[T]he Federal Rules of Civil Procedure contain multiple rules allowing parties to dismiss claims; there is no need to disguise a motion for summary judgment in the clothing of a motion in limine."). To the contrary, *in limine* motions are designed only to facilitate case management. *See*, *e.g.*, *Louzon*, 718 F.3d at 561. Such motions "are not proper procedural devices for the wholesale disposition of theories or defenses." *Id*. at 562 (internal citations omitted).

Nevertheless, the Ninth Circuit reviewed the erroneous holding for "harmless error" and determined that the preclusion of *all evidence* relating to Stroh's most important protected disclosure, including his *status as a whistleblower*,[16] was not prejudicial. *See* App. 1-3. Because the district court's ruling essentially converted Saturna's motion into a *de facto* summary

[16] *See also supra* Introduction and Statement of the Case; nn.2, 5, 20. Stroh's best evidence of a protected disclosure, timing, animus, and a contributing factor – all crucial elements of Stroh's SOX claim – were all excluded from jury consideration.

judgment motion excluding all evidence related to a distinct claim, the Ninth Circuit erred in applying the harmless error standard.

Analysis under the harmless error standard is utilized when courts review a trial court decision for abuse of discretion and "conclude evidence has been improperly admitted." *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 464 (9th Cir. 2014); *see also Haddad v. Lockheed California Corp.*, 720 F.2d 1454, 1458-59 (9th Cir. 1983) ("The purpose of a harmless error standard is to enable an appellate court to gauge the probability that the trier of fact was affected by the error.") (internal citations omitted). This standard allows appeals courts to affirm unless they find the error prejudiced a party by substantially influencing the verdict or affecting a party's substantial rights. *See id.*; Fed. R. Civ. P. 61; Fed. R. Evid. 103(e).

However, courts cannot conduct a harmless error inquiry in reviewing blanket dismissal of claims, such as on summary judgment. *See*, *e.g.*, *Kyle Railways, Inc. v. Pac. Admin. Servs., Inc.*, 990 F.2d 513, 517 (9th Cir. 1993) ("We review de novo grants of partial summary judgment and motions to dismiss."). The court must apply to the appealed issue either the same standard as the district court should have, or simply reverse and remand. *See supra* Section I.

III. The Ninth Circuit Should Have Reviewed the District Court's *De Facto* Grant of Summary Judgment Under One of Several Less Severe Standards.

Outside of the Ninth Circuit, Courts of Appeals that have addressed this issue apply three separate standards to review motions *in limine* that dismiss entire claims. Under any of these alternative approaches, the district court's action in this matter would have been reversed and remanded.

The majority of circuits reject the dismissal of claims by motions in limine. *Louzon*, 718 F.3d at 562-63; *Mid-Am. Tablewares, Inc. v. Mogi Trading Co., Ltd.*, 100 F.3d 1353 (7th Cir. 1996); *Meyer Intellectual Properties Ltd.*, 690 F.3d at 1378. Once it was established that such "non-evidentiary matters[17] were raised and resolved in limine," these courts would have reversed and remanded for further proceedings, without any further substantive review. *Louzon*, 718 F.3d at 562-63.

Alternatively, a minority of circuits reverse and remand claims dismissed through *in limine* motions where the nonmoving party was not given notice and the opportunity to marshal evidence. *See*, *e.g.*, *Bradley*, 913 F.2d at 1070-71 (3d Cir. 1990) ("Most importantly, in the absence of a formal motion for summary judgment, plaintiff was under no formal compulsion to marshall [sic] all of the evidence in support of his claims."); *Brobst v. Columbus Servs. Int'l*, 761 F.2d 148

[17] *See* App. 2.

(3d Cir. 1985), *cert. denied*, 484 U.S. 1043 (1988); *Massey v. Congress Life Ins. Co.*, 116 F.3d 1414 (11th Cir. 1997).

Here, the district court did not give Stroh notice that it was converting Saturna's motion *in limine* into one of summary judgment. App. 18-27, 9-15. Moreover, Stroh was unable to marshal evidence opposing dismissal of his SOX claim. *Id*. Although Stroh made clear to the trial judge that without the FBI computer issue, "there[was] really not much left for [Stroh]," App. 21, the court did not give Stroh the opportunity to gather the evidence necessary to oppose the *de facto* summary judgment motion, instead simply granting Saturna's motion. *Id*. at 18-27, 9-15.

Further, the deadline for filing dispositive motions was long past, and the request was therefore untimely. *See* App. 29[18]; *see also Peterson v. Corrections Corporation of America*, 2015 WL 5672026 (N.D. Fla. 2015); *Gold Cross Ems, Inc.*, 309 F.R.D. at 701 (finding that party could not have been "on notice that the Court would *sua sponte* convert Plaintiff's motions in limine into a motion for summary-judgment even though Plaintiff filed its motions 503 days after the summary judgment deadline"). Upon consideration of the lack of these procedural safeguards, the Ninth Circuit should have reversed and remanded for further proceedings.

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[18] Dispositive motions in this case were due on March 30, 2017, but Saturna did not file its motion until May 18, 2017 – 49 days after the deadline.

Finally, some courts review *in limine* motions disguised as summary judgment motions de novo. *See*, *e.g.*, *Berkovitz*, 89 F.3d at 30-31; *Givaudan Fragrances Corp.*, 639 F. App'x at 843 n.6; *Zokari v. Gates*, 561 F.3d 1076 (10th Cir. 2009). Wholesale dismissal of claims via an evidentiary mechanism flaunts the process the Court has put in place to promote justice and fairness. *Compare* Fed. R. Civ. P. 56(a); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970) *with* Fed. R. Evid. 103(d), 104(a), (c).

Here, a de novo review of what was effectively a summary judgment motion should have viewed the evidence in the light most favorable to the nonmoving party (Stroh), and would only have been appropriate if the movant (Saturna) showed that there was no genuine issue of material fact and it was therefore entitled to judgment as a matter of law. *See*, *e.g.*, *Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830, 834 (9th Cir. 1997) (reviewing district court's grant of summary judgment de novo).

Unquestionably, Saturna would not have survived a review under this standard. Disputed issues of fact remained unresolved, and the district court's determination that the FBI computer issue could not be introduced was an erroneous legal conclusion.[19] Accordingly,

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[19] The Ninth Circuit relied on several facts to find harmless error. However, none of these arguments justify throwing out Stroh's FBI computer issue claim at the district court, nor do they justify affirming that ruling on appeal. In fact, these matters show both why the district court's grant of this motion *in limine* was improper, and why exclusion of the FBI computer issue

had the Ninth Circuit reviewed the district court's ruling under the de novo standard, it would have reversed and remanded for further proceedings. Instead, the court improperly applied the harmless error standard, combing the record for any evidence that would have supported the jury verdict.[20]

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substantially prejudiced Stroh. Likewise, these facts demonstrate why the Ninth Circuit should have reversed upon a de novo review of the district court's *de facto* summary judgment ruling. *See*, *e.g.*, n.20.

[20] First, the Ninth Circuit argued that because Stroh received a bonus after his protected activity and threatened to quit during salary negotiations, "it [was] highly unlikely that" admission of the FBI computer issue "would have changed the verdict." App. 1-3. However, bonuses were a standard part of most employees' compensation, and Stroh received an escalating bonus for seven years in a row. If anything, a denial of a bonus would have constituted another adverse employment action resulting in independent SOX liability. Similarly, Saturna did not believe Stroh's initial request for a 30% raise was unusual, and at the time of Stroh's termination, there was only a $10,000 difference between the two parties' positions. Further, while Saturna argued that Stroh quit because Saturna would not meet his salary demands, the jury found that Saturna had terminated Stroh, App. 7, making any salary negotiations immaterial to the question of retaliation.

Likewise, the Ninth Circuit claims that Stroh did not mention protected activity before leaving Saturna, but this position is not supported by the undisputed record. To the contrary, the FBI computer issue *was* Stroh's protected activity, and Saturna was well aware of his position on this issue. Twenty-one working days prior to his termination, Stroh raised the FBI computer issue with his direct supervisor, and instructed IT staff not to implement a clearly illegal order issued by the owner of the company. App. 7, 26-27. The record is clear that Carten and Kaiser were both fully aware of Stroh's regulatory concerns at the time he was terminated. Additionally, there is absolutely no requirement, and no

The Supreme Court should therefore grant this petition for writ of certiorari in order to clarify the standard of appellate review for motions *in limine* that effectively dismiss a cause of action, and correct the Ninth Circuit's erroneous holding in this case.

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adverse inference can be implied, if a whistleblower does not continuously repeat his protected activity.

The Ninth Circuit further relied upon after-acquired evidence. However, Circuit and Supreme Court precedent make clear that such evidence cannot be used in deciding liability under retaliation protection statutes such as SOX. *See*, *e.g.*, *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 759 (9th Cir. 1996). The court used evidence of Stroh's supposed "encouragement" of other employees to quit as grounds for finding that the FBI computer issue was not a contributing factor in his termination under SOX. But, the only evidence of such "encouragement" is the testimony of Saturna employee Jacob Stewart and text messages Stewart received from Stroh. Nothing on the record demonstrates that Saturna knew of this purported discussion at the time Saturna asserted that Stroh "quit." All evidence of the supposed "encouragement" is therefore after-acquired evidence, and it was legal error to apply it to the question of SOX liability.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari.

Respectfully submitted,

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