No. 21-_____

In the Supreme Court of the United States

ERIK LECKNER,

Petitioner,

v.

GENERAL DYNAMICS, INC., GENERAL DYNAMICS INFORMATION TECHNOLOGY, INC., CSRA, LLC, ASGN, INC., APEX SYSTEMS, LLC,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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APRIL 22, 2022

QUESTIONS PRESENTED

1. Whether the court of appeals failed to recognize that SOX whistleblower protections does extend to cybersecurity risks and breaches, especially those which were used by Russia to cyberattack Ukraine before the invasion.

2. Whether the court of appeals improperly denied Leckner's request to admit the same evidence that Leckner was submitted before the record closed but the Department of Labor failed to put it on record.

3. Whether the court of appeals improperly denied Leckner's motion to supplement the record with new and material evidence that had become available which could not have been discovered with reasonable diligence before the record closed.

4. Whether the court of appeals failed to recognize that good faith attempts to file documents must constitute filing.

5. Whether it was the Secretary of Labor's duty to ensure that Leckner's evidence was put on record.

6. Whether the date of the first complaints must be used if the complaints were filed within the whistleblower provision's filing period.

7. Whether equitable tolling doctrine applies where Petitioner is allowed whatever time remains under the applicable statute.

8. Whether Secretary of Labor (SOL) Scalia failed to recuse himself because he was General Dynamics' counsel when he was at Gibson, Dunn & Crutcher LLP, prior to becoming the SOL.

9. Whether the court of appeals improperly affirmed the dismissal as untimely of Leckner's retaliation claims under the CAA, CERCLA, SWDA, TSCA and FWPCA because Leckner raised a genuine dispute of material fact as to whether he filed his whistleblower complaint within 30 days of his employers alleged retaliatory decisions.

10. Whether the court of appeals improperly affirmed the dismissal of Leckner's retaliation claim under the SOX because Leckner raised a genuine dispute of material fact as to whether he engaged in protected activity under the SOX.

11. Whether the court of appeals improperly considered Leckner's contentions concerning his ERA claim, and his other arguments and allegations raised, as Leckner had raised these issues on the first time on appeal and in the ALJ proceeding.

12. Whether the court of appeals improperly denied protections to the whistleblower because these protections are mandated under the plain meaning of the SOX whistleblower protection statute and each of the other Acts.

13. Whether the court of appeals failed to recognize that a conflict between *Brown-Root-Willy* and the Ninth Circuit may future discourage whistleblowers.

14. Whether the court of appeals failed to recognize that context is a key factor of considerable importance.

15. Whether the court of appeals improperly allowed two employers to unlawfully discriminate against an employee because of lawful acts done by the employee.

16. Whether the court of appeals failed to recognize that it is well-established that employers cannot restrict the protected channels of raising concerns.

17. Whether the court of appeals failed to recognize that employers cannot restrict the protected channels of opposition.

18. Whether the court of appeals failed to resolve the conflict between *Hukman* and the Ninth Circuit which it must have—otherwise if left standing, future whistleblowers will become discouraged.

19. Whether the court of appeals failed to recognize that protected activity raised through un-official channels under SOX is defined by the *Passiac Valley* case and the authority upon which *Passiac Valley* was based.

20. Whether the court of appeals failed to recognize that the Department of Labor has not changed the *Sylvester-Munsey-Guttman-Passaic Valley* doctrines and that they remain binding.

21. Whether the court of appeals failed to recognize that the present case is covered under the *Munsey* standard.

22. Whether the court of appeals failed Leckner need not establish that the concern he raised relates to fraud on shareholders.

PARTIES TO THE PROCEEDINGS

Petitioner

- Erik Leckner

Respondents

- General Dynamics, Inc.
- General Dynamics Information Technology, Inc.

  General Dynamics Corporation (NYSE: GD) is the parent corporation of General Dynamics Information Technology (GDIT) (formerly known as CSRA, LLC).
- CSRA, LLC
- ASGN, Inc.
- Apex Systems, LLC

  ASGN Incorporated (NYSE: ASGN) is the parent corporation of Apex Systems (Apex).

LIST OF PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

Leckner. v. General Dynamics and Apex Systems, Inc., U.S. Department of Labor, ALJ Case No. 2019-SOX-00028, decided January 23, 2020.

Leckner. v. General Dynamics and Apex Systems, Inc., U.S. Department of Labor, Administrative Review Board, ARB Case No. 2020-0028, decided October 22, 2020, reconsideration denied December 15, 2020.

Leckner. v. General Dynamics and Apex Systems, Inc., U.S. Court of Appeals for the Ninth Circuit, No. 21-70284, decided October 18, 2021, rehearing denied January 25, 2022.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

REHEARING/RECONSIDERATION ORDERS

TABLE OF CONTENTS – Continued

Page

OTHER DOCUMENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

STATUTES

TABLE OF AUTHORITIES – Continued

STATE STATUTES

JUDICIAL RULES

REGULATIONS

TABLE OF AUTHORITIES – Continued

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

OPINIONS BELOW

The order of the United States Court of Appeals for the Ninth Circuit is attached in the Appendix ("App.") at App.1a. The decision and order of the U.S. Department of Labor Administrative Review Board is included at App.5a. The decision and order of the U.S. Department of Labor Administrative Law Judge is included at App.14a.

JURISDICTION

A timely petition for rehearing was denied by the United States Court of Appeals for the Ninth Circuit on January 25, 2022. (App.41a). The petition for a writ of certiorari was filed on April 22, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1514A (SOX)—Civil action to protect against retaliation in fraud cases.

> (a) Whistleblower Protection for Employees of Publicly Traded Companies. 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, 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, 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.

42 U.S.C. § 9610 (CERCLA)—Employee Protection.

(a) Activities of employee subject to protection. No person shall fire or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has provided information to a State or to the Federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

18 U.S.C. § 1519—Destruction, alteration, or falsification of records in Federal investigations and bankruptcy.

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object 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 or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

29 C.F.R. § 1980.103(d)—Filing of retaliation complaints.

Within 180 days after an alleged violation of the Act occurs or after the date on which the employee became aware of the alleged violation of the Act, any employee who believes that he or she has been retaliated against in violation of the Act may file, or have filed on the employee's behalf, a complaint alleging such retaliation. The date of the postmark, facsimile transmittal, electronic communication transmittal, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office will be considered the date of filing. The time for filing a complaint may be tolled for reasons warranted by applicable case law. For example, OSHA may consider the time for filing a complaint equitably tolled if a complainant mistakenly files a complaint with another agency instead of OSHA within 180 days after becoming aware of the alleged violation.

29 C.F.R. § 1980.105(b), Issuance of findings and preliminary orders.

The findings, and where appropriate, the preliminary order will be sent by means that allow OSHA to confirm delivery to all parties of record

(and each party's legal counsel if the party is represented by counsel). The findings, and where appropriate, the preliminary order will inform the parties of the right to object to the findings and/or order and to request a hearing, and of the right of the respondent to request an award of attorney fees not exceeding $1,000 from the administrative law judge (ALJ) regardless of whether the respondent has filed objections, if the complaint was frivolous or brought in bad faith. The findings, and where appropriate, the preliminary order, also will give the address of the Chief Administrative Law Judge, U.S. Department of Labor, or appropriate information regarding filing objections electronically with the Office of Administrative Law Judges. At the same time, the Assistant Secretary will file with the Chief Administrative Law Judge a copy of the original complaint and a copy of the findings and/or order.

STATEMENT OF THE CASE

A. Introduction

Never before has an ALJ issued a decision while excluding and misstating in its fact finding and analysis such vast amounts of information and not complying with its own rules, regulations, statutes, and policies. To an unprecedented extent, the ALJ withheld all of Complainant's facts, statements, information, and evidence, in order to justify its decision

flawed with errs, while fabricating facts and, instead, took what the respondents had written as facts.

Whistleblowers who report wrongdoing frequently are subject to reprisals. It cannot be over-stated how vital are the avenues of legal redress, including rights available under each of the acts. Even under the best of circumstances, whistleblowers run enormous risks and suffer retaliation for reporting wrongdoing. If these acts enacted by Congress do not provide adequate protections and remedies, and the Supreme Court does not fix the appellate court and the agency's errors, then whistleblowers face even greater disincentives to expose misconduct or violations of law.

B. Statement of Facts

This case arises under the employee protection ("whistleblower) provisions in the Sarbanes-Oxley Act ("SOX"), 18 U.S.C. § 1514A; the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851; the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. § 1367; the Clean Air Act ("CAA"), 42 U.S.C. § 7622; the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2622; the Solid Waste Disposal Act ("SWDA"), 42 U.S.C. § 6971; the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9610.1, the OSH Act ("OSH"), 29 U.S.C. § 660, and the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300j-9(i).

Complainant was hired as the lead engineer for the U.S. Environmental Protection Agency ("EPA") Emergency Management Portal ("EMP") on behalf of General Dynamics and ASGN. Complainant whistleblew that respondents committed economic theft and fraud, cybersecurity violations, and other serious

violations against the U.S. government. Respondents concealed their theft and violations by retaliating against the Complainant, threatened him with termination if he ever communicated directly with the EPA, and unlawfully imposed chain-of-command of restrictions.

Complainant's evidence never made it to record. Complainant's submissions of evidence prove, however, that the respondents conspired to alter, destroy, cover up, falsify, and makes false entries in official records, documents, and other tangible objects, with the intent to improperly influence the investigation and proper administration of this matter within the jurisdiction of the agency.

The ALJ's findings, conclusions, and decisions relied solely on evidence submitted by the respondents. Never before has an ALJ issued a decision while excluding and misstating such vast amounts of information and not complying with the agency's own policies. The agency itself, in violation of 18 U.S.C. § 1519, withheld all of Complainant's facts, evidence, and information on which all of the ALJ's decision's flawed conclusions depend, while fabricating its own facts and, instead, taking what respondents had written as facts.

C. Procedural History

1. The Department of Labor

On January 23, 2020, the ALJ improperly dismissed the complaint in a Decision and Order granting respondents' motions for summary decision. The ALJ incorrectly held that there is no genuine issue of material fact as to whether Leckner: timely filed his complaint under the environmental acts, worked for

an entity defined as an employer under the ERA, and engaged in protected activity under the SOX. Leckner filed timely formal complaints with OSHA and its federal partner agency, the EPA, beginning on May 31, 2018, alleging that respondents violated nine whistleblower laws by having discharged him from his employment. Leckner had engaged in protected activity under each of the relevant acts of this matter.

On October 22, 2020, the Administrative Review Board ("ARB") improperly affirmed, the ALJ's Decision and Order, denied Leckner's complaint, and refused to supplement the record with his submissions of evidence. The ARB then improperly denied the petition for rehearing on December 1, 2020.

2. The Appellate Court

On October 12, 2021, the panel improperly denied Leckner's pro se petition for review. The panel denied that any member of the panel be recused using the Code of Conduct for U.S. Judges Canon 3C(3)(c)(i), claiming that no judge so participates, even though they each had investments in General Dynamics.

The panel improperly affirmed the dismissal as untimely of Leckner's retaliation claims under the environmental acts even though Leckner raised a genuine dispute of material fact as to whether he had timely filed his whistleblower complaints within 30 days of his employers' retaliatory decisions, because he had timely filed.

The panel improperly affirmed the dismissal of Leckner's retaliation claim under the SOX. Leckner raised a genuine dispute of material fact as to whether he was engaged in protected activity. The panel improperly denied Leckner's request to admit

the evidence which Leckner's counsel had submitted to OSHA, the EPA, and the ALJ via a memory drive. Petition, Motion to Supplement the Record (Docket Entry No. 11-3), pp. 2-7. Leckner clearly demonstrated that the evidence was submitted to record before the record closed. *See* 29 C.F.R. § 18.90(b)(1). The panel improperly refused to consider Leckner's contentions concerning his ERA claim and all of his arguments and allegations raised. Leckner's contentions were raised during OSHA, ALJ, and appellate proceedings.

The panel judges improperly voted to deny the petition for panel rehearing. This voting occurred at the same time that the largest cyberattacks in the world gained international attention in the news. Leckner had reported numerous cybersecurity risks and attacks, which included the Log4j cyber vulnerabilities, which caused hundreds of millions of other cyberattacks across the globe four years later. The Log4j cyberattacks provided classified Ukraine defense ministry information to the Russian defense ministry, where Ukraine has been left in a bloody carnage of dead civilians and military personnel later buried in mass graves.

The full court was "advised" of the petition for rehearing en banc by the panel. No judge requested a vote on whether to rehear the matter en banc. As a result, Leckner's petition for panel rehearing and rehearing en banc were denied.

The panel refused to address the fact the Secretary of Labor Scalia, was required to have recused himself, as Scalia was previous counsel for General Dynamics, and it was under Scalia, that all of Leckner's exhibits, including his initial filings, disappeared.

SUMMARY OF ARGUMENT

The plain text of each of the Acts prohibit public companies and the subsidiaries of public companies from retaliating. For example, the plain text of the Sarbanes-Oxley Act ("SOX"), 18 U.S.C. § 1514A(a) states the following:

> No company...or any officer, employee, contractor, subcontractor, or agent of such company..., 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....

Congress enacted the employee protection in SOX as a "crucial" component of a comprehensive plan to protect our economy from crises caused by frauds. Senate Report No. (S. Rep.) 107-146 (2002) at 2.

Regardless of the specific whistleblower law at issue in this matter, the principles setting forth the appropriate interpretation of protected activity are aligned, whether those activities occurred in the context of safety protection, complex environmental protection or within the complex and highly regulated nuclear power industry. As explained by the Court of Appeals in *Passaic Valley Sewerage Comm. v. U.S. Department of Labor*, 992 F.2d 474 (3rd Cir. 1993):

> The whistleblower provision of the Clean Water Act mirrors that of other federal environmental, safety and energy statutes.

To deny protection to a whistleblower, the panel undermined well established principles of statutory interpretation to reach a result inconsistent with the plain meaning of the Acts, while protecting its own investments in General Dynamics.

REASONS FOR GRANTING THE PETITION

I. PROTECTING THE EMPLOYEES IS MANDATED UNDER THE PLAIN MEANING OF THE SOX WHISTLEBLOWER PROTECTION STATUTE.

Congress created the SOX whistleblower protection, 18 U.S.C. § 1514A(a), and the whistleblower protections to address

> a culture, supported by law, that discourage[s] employees from reporting fraudulent behavior not only to the proper authorities...but even internally. This 'corporate code of silence' not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity.

S. Rep. 107-146 (2002), at 5. Congress considered the whistleblower protection to be a "crucial" component of SOX for "restoring trust in the financial markets by ensuring that corporate fraud and greed may be better detected, prevented and prosecuted." S. Rep. 107-146 (2002) at 2.

The plain text of this statute includes "contractors" and "employers" among those prohibited from discharging employees on account of lawful disclosures

about frauds and other violations of securities rules. When an employer or contractor fires its own employee for engaging in protected activity, it has violated the text of SOX and the other relevant acts.

To reach its tortured construction of SOX and the other relevant acts, the panel had to reject the historic broad construction of whistleblower protections. Petition, Brief (Docket Entry No. 30-1), pp. 26, 56-61. Previously, courts have had no difficulty holding that whistle-blower provisions must be given broad scope to accomplish their remedial purposes. *NLRB v. Scrivener* (1972), 405 US 117, 121-26; *English v. General Elec. Co.*, 496 U.S. 72, 82 (1990) (to "encourage" employees to report safety violations and protect their reporting activity); *Passaic Valley Sewerage Comm. v. Dep't of Labor*, 992 F.2d 474, 479 (3rd Cir. 1993).

Indeed, the public interest in protecting employees from reprisals is so strong that this Court has imputed a protection into laws that have no words creating it. *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005) (Title IX); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 128 S. Ct. 1951 (2008) (42 U.S.C. § 1981); *Gomez-Perez v. Potter*, 553 U.S. 474 (2008) (ADEA).

The whistleblower provisions protect internal whistleblowing. As Congress recognized, these internal protections for whistleblowers are necessary both for direct corporate employees, and employees who provide those services through contractor-vendors. Employees need SOX's legal protection to feel safe as they submit concerns to these "cornerstone" internal compliance programs. If left standing, the decision below will

have a chilling effect detrimental to SOX's objective of increasing accountability.

The panel rejected the explicit policies of the Department and the SEC. Petition, Brief (Docket Entry No. 30-1), pp. 27-38, 67. This rejection invites further inconsistency and uncertainty that undermines the encouragement employees need to come forward.

II. SOX WHISTLEBLOWER PROTECTION DOES EXTEND TO CYBERSECURITY RISKS AND BREACHES.

The ALJ improperly concluded that "SOX whistleblower protection does not extend to cybersecurity risks." ALJ Decision, p.12. Counsel wrote,

- Leckner noted other cybersecurity issues....
- At each turn, Leckner attempted to report to his supervisors...that additional cybersecurity issues be addressed.
- Leckner continually made it known...that other cybersecurity issues....
- The EPA's contact, Rob Thomas, agreed access to the SCR was critical....

Opposition, pp. 4-5.

On October 6, 2021, Deputy Attorney General Monaco launched the DOJ's Civil Cyber-Fraud Initiative after flagging Leckner's FCA complaint, which combines the department's expertise in civil fraud enforcement, government procurement and cybersecurity to combat new and emerging cyber threats to the security of sensitive information and critical systems.

"For too long, companies have chosen silence under the mistaken belief that it is less risky to hide a breach than to bring it forward and to report it," said Deputy Attorney General Lisa Monaco. "Well that changes today. We are announcing today that we will use our civil enforcement tools to pursue companies, those who are government contractors who receive federal funds, when they fail to follow required cybersecurity standards—because we know that puts all of us at risk."

Based on Leckner's qui tam case, Monaco relied upon Leckner's outline of three cybersecurity related allegations, that the DOJ will now relentlessly pursue against federal contractors under the FCA: (1) knowingly providing deficient cybersecurity products or services; (2) knowingly misrepresenting their cybersecurity practices or protocols; or (3) knowingly violating obligations to monitor and report cybersecurity incidents and breaches. These allegations were made by Leckner in his OSHA/EPA complaints, filed on May 31, 2018. Petition, Motion to Supplement the Record (Docket Entry No. 11-6), p. 2.

On June 15, 2021, the SEC announced it settled charges against real estate services company First American Financial ("First American"), for alleged violations of Rule 13a-15(a) of the Exchange Act. *SEC v. First American Financial Corporation*, File No. 3-20367. The SEC charged First American with failure to maintain disclosure controls and procedures designed to ensure that all available, relevant information concerning a software vulnerability that led to a cybersecurity incident was filed with the Commission.

As a result of the conduct described above, First American violated Exchange Act Rule 13a-15(a) [17 C.F.R. § 240.13a-15], which requires every issuer of a security registered pursuant to Section 12 of the Exchange Act to maintain disclosure controls and procedures designed to ensure that information required to be disclosed by an issuer in reports it files or submits under the Exchange Act is recorded, processed, summarized, and reported within the time periods specified. First American agreed to cease and desist from committing and causing future violations of Exchange Act Rule 13a-15. By having violated Exchange Act Rule 13a-15, First American violated SOX.

In *United States ex rel. Markus v. Aerojet Rocketdyne Holdings, Inc.*, the relator alleged that the defendant falsely asserted its compliance with cybersecurity standards when entering into DOD contracts. The court refused to dismiss the FCA claims, holding that the relator had sufficiently pleaded that "defendants' alleged failure to fully disclose its noncompliance was material to the government's decision to enter into and pay on the relevant contracts." On February 1, 2022, the court also denied summary judgment on the relator's promissory fraud claim when "defendants made false statements regarding [its] cybersecurity status by not disclosing the full extent of [its] noncompliance with the DFARS and NASA FARS clauses." *Id.* at p. 10.

In *United States ex rel. Glenn v. Cisco Systems, Inc.*, Cisco sold equipment to government agencies knowing that the equipment was vulnerable to a cyberattack. Although no breach occurred, Cisco still paid $8.6 million to resolve FCA claims stemming from

alleged misrepresentations regarding cybersecurity risks. To mitigate FCA liability risks, government contractors must consider conducting a cybersecurity risk assessment of their products, services, and systems before and during contracting with the government.

Leckner reported critical security flaws including breaches and risks of our federal agencies which rely on General Dynamics' infrastructure and application hosting environments. Rather than being rewarded for his discoveries, his supervisors, the respondents promptly retaliated harshly against him. Whistleblower protections allow whistleblowers to report fraud and misconduct in federal contracting. But General Dynamics kept the vulnerability quiet for years, not issuing a security alert, and yet to acknowledge "multiple security vulnerabilities" in the software, services, and systems that they manage and operate.

Thus, the panel erred by failing to reject the ALJ's statement that SOX is not concerned with cybersecurity risks. General Dynamics IT segment includes contractually required monitoring and reporting of cybersecurity vulnerabilities, breaches, and risks. Their contract with the EPA states:

- The contractor shall provide updates, status and reports to the platform manager and EPA TPOC, as required.
- The contractor shall support EPA development and maintenance...complies with governing Federal security standards.
- Ad hoc compliance...reporting are also required as dictated by emergency situations, such as critical system patches and/or system security control changes....

- The contractor shall operate and maintain EPA's network security infrastructure devices ...This includes security operations oversight and monitoring, security management and reporting....

The panel refused to address the responsibility for reporting cybersecurity breaches and risks even though the company's key business includes providing services involving systems and data related to government transactions. Nevertheless, as of April 2018, the company didn't exercise disclosure controls and procedures related to cyber security, including incidents involving cyber breaches of systems and data.

Unbeknownst initially to senior executives at General Dynamics, the company's information security personnel had been made aware of the vulnerabilities, risks, and breaches for months and the company's information security personnel did not remediate it, leaving all of its Federal clients' systems, and billions of data records exposed to unauthorized access. The company's senior executives thus first lacked certain information to fully evaluate the company's cybersecurity responsiveness and the magnitude of the breaches and risk from the vulnerabilities caused by employees, at the time they approved the company's disclosures. As a result of the conduct described above, General Dynamics violated Exchange Act Rule 13a-15(a) [17 C.F.R. § 240.13a-15], which requires every issuer of a security registered pursuant to Section 12 of the Exchange Act to maintain proper disclosure controls and procedures designed to ensure that information required to be disclosed by an issuer in reports it files or submits under the Exchange Act is recorded, processed, summarized, and reported within

the time periods specified in the Commission's rules and forms.

As a result of having violated the Exchange Act, General Dynamics violated SOX. As directed by Section 404 of the SOX of 2002, the SEC adopted rules requiring companies subject to the reporting requirements of the Securities Exchange Act of 1934 to include in their annual reports a report of management on the company's internal control over reporting.

Therefore, SOX does extend to cybersecurity risks and the panel erred in its affirmation of the flawed agency decision and the decision must be vacated, reversed, and remanded for trial based on the merits of this case.

III. THE CONFLICT BETWEEN *BROWN-ROOT-WILLY* AND THE NINTH CIRCUIT WILL DISCOURAGE WHISTLEBLOWERS.

Whistleblower advocates have not seen such a conflict between a circuit court of appeals and the Department since the Fifth Circuit refused to protect nuclear whistleblowers raising safety concerns internally. *Brown & Root v. Donovan*, 747 F.2d 1029 (5th Cir. 1984). No other circuit followed this holding. In 1992, Congress amended the Energy Reorganization Act (ERA) to protect internal whistleblowing explicitly. In 2005, the Fifth Circuit finally conceded that its 1984 holding "was incorrect." *Willy v. Administrative Review Bd.*, 423 F.3d 483, 489, n. 11 (5th Cir. 2005).

The EPA's emergency management portal allows trusted agencies, including the DOE, to identify individuals with expertise to assist local responders in emergencies that may spring from natural or man-made disasters. Those disasters may relate to nuclear

incidents depending on whether or not the affect the environment. Opposition, p.2 (citing C.Ex.42 (Page Depo.), 25:1-14). Leckner's counsel wrote:

> "Such whistleblower provisions are intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes protecting the environment, such as...the nuclear safety statutes they are intended to encourage employees to aid in the enforcement of the statutes by raising substantial claims to protected procedural channels." *Passaic Valley Sewerage Commissioners v. U.S. Dept. of Labor*, 992 F.2d 474, 478 (3d Cir. 1993).

Opposition, p.6. The EMP covers current and former EPA employees and staff of other federal agencies, including the DOE, posted at the EPA who are members of the national emergency management and response community. Fed. Register Volume 80, Number 73 (April 17, 2015). There are separate response and radiation authorities related to nuclear incidents. Information on the EPA's authorities related to releases of radiological and nuclear material can be found at http://www.epa.gov/radiation/radiological-emergency-response-authorities. The website provides the history of EPA's authorities related to nuclear radiation protection in the Atomic Energy Act that were transferred to EPA through the Reorganization Plan No.4 of 1970 and the Energy Reorganization Act of 1974.

General Dynamics settled in *United States ex rel. Clem et al. v. CSC (GDIT)*, 16-cv-5160-LRS (E.D. Wash.) for FCA violations and lost in *Clem and Spencer*

v. CSC (GDIT), ARB No. 2020-0025, ALJ Nos. 2015-ERA-00003, 00004 under ERA. General Dynamics falsely argued before the ALJ that they are not an ERA employer. Therefore, General Dynamics is an ERA covered employer.

IV. GOOD FAITH ATTEMPTS TO FILE DOCUMENTS MUST CONSTITUTE FILING.

The main thrust of whistleblower protection laws is their remedial purpose, which "encourages" employees to report safety violations and protect their reporting activity. *English v. General Electric Co.*, 496 U.S. 72, 73, 110 S.Ct. 2270, 2277 (1990). Because a substantial number of whistleblower litigants are pro se or are represented by counsel who only appear before the OALJ infrequently, it is vitally important that the OALJ Rules of Practice clearly reflect Congress' intent that decisions be reached on the merits of the employees' claims, not on closely-parsed or restrictive procedural rulings that deprive whistleblowers of their "day in court."

The OALJ rules already recognize the need for flexibility through 29 C.F.R. § 18.10(c):

> (c) Waiver, modification, and suspension. Upon notice to all parties, the presiding judge may waive, modify, or suspend any rule under this subpart when doing so will not prejudice a party and will serve the ends of justice.

This court must order in whistleblower cases that unsuccessful attempts to submit evidence should be grounds for waiver, modification, and suspension of the rules. That is, if a **whistleblower** litigant attempts to submit evidence as counsel did via a process service which can't accept its enormous size and then

sends it on a drive, in opposition to a motion for summary decision, the agency must accept that evidence as filed on the date the litigant attempted submission. Otherwise, cases such as Leckner's will be decided on technicalities and not on the merits.

V. LECKNER TIMELY FILED HIS COMPLAINTS.

The Department of Labor concealed Leckner's EPA and OSHA complaints filed on May 31 and July 5, 2018, in the Ninth district when they transferred the case to the Fourth district. This was a violation of 18 U.S.C. § 1519, as the Department knowingly destroyed, concealed, covered up, and made false entries in the agency record with the intent to influence the proper administration within the jurisdiction of its own agency.

Thus, the agency also violated 29 C.F.R. § 1980. 103, as the first complaints and dates of filing are required, by law, to be put on record by the Secretary. Even if the ALJ failed to put the evidence from the drive on record, the ALJ was required to put the first complaints filed in the Ninth. Leckner made telephonic and written complaints to OSHA and the EPA starting on May 31, 2018. Leckner provided this evidence to OSHA and the ALJ. Reference Exhibit I (the "Initial Complaint") at App.47a; Exhibit IV (the "Date of Discharge") at App.72a. Leckner's counsel wrote,

> Additionally, Leckner reported to the... Occupational Health and Safety several times between May 31, 2018 and July 5, 201[8], well within the 30 days required under the EPA.

Opposition, p. 7. The agency also violated 29 C.F.R. § 1980.105(b), which states,

> [a]t the same time, the Assistant Secretary will file with the Administrative Law Judge a copy of the original complaint and a copy of the findings and/or order.

The agency even violated its *own* procedures with its Federal partner agencies. Reference Exhibit V ("Coordination with Federal Partner Agencies") at App.74a. The date the first complaint was filed with the EPA must be used as the complaint was filed within the whistleblower provision's filing period. Leckner filed his first complaints on May 31, fourteen days before his discharge on June 13, 2018. Reference Exhibit I (the "Initial Complaint") at App.47a; Exhibit IV (the "Date of Discharge") at App.72a. His signed employment contract was with Apex and so June 13, 2018 is the only official discharge date. Leckner also notified Apex and GDIT between May 31 and June 1 that he filed formal complaints.

VI. EQUITABLE TOLLING APPLIES.

Respondents deliberately concealed evidence and misled the complainant regarding the retaliatory grounds for the adverse actions in such a way as to prevent him from knowing and discovering the requisite elements of a prima facie case. Leckner did not discover Page's email until August 21, 2019. Leckner showed that subsequent and specific actions after the initial wrongdoings by the respondents prevented the commencement of the action in a timely manner.

The Supreme Court recognizes equitable tolling. In *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454,

459-60, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975), the Supreme Court held that,

> Consistent with the common understanding that tolling entails a suspension rather than an extension of a period of limitations, petitioner is allowed whatever time remains under the applicable statute....

The panel's erroneous holding squarely conflicts with the Supreme court's holding in *Johnson*. Therefore, this petition is absolutely necessary to secure and maintain uniformity of this court's decisions.

VII. CONTEXT IS A FACTOR OF CONSIDERABLE IMPORTANCE.

The ALJ incorrectly relied upon one excerpt, an email, taken out of its *context* from the request for hearing. But the Supreme Court recently addressed this type of issue in *Facebook Inc. v. Duguid*, 926 F. 3d 1146 (9th Cir. April 1, 2021), explaining, that context is "a factor of considerable importance." The Supreme Court reversed, remanded, and explained this principle by saying, "where a sentence contains several antecedents and several consequents," courts should "read them distributively and apply the words to the subjects which, by context, they seem most properly to relate."

Here, the ALJ improperly concluded that Leckner's protected activity first began on Apr. 13, 2018, by taking an email out of its *context* which had emails dating before April 13. In particular, in the same request for hearing, the April 13 email was a response to an April 5 email. Reference Exhibit II (the "Request") at App.53a. Leckner's protected activity began on Jan. 30, as Leckner's counsel asserted in opposition with supported with evidence on a memory drive.

To be consistent with the Supreme Court's decisions, the Supreme Court must apply the same principle in *Facebook Inc.* to this case, by concluding that

> where an email thread contains several antecedents and several consequents, courts must read them distributively and apply the emails to the subjects and dates which, by context, they seem most properly to relate.

It was certainly most inappropriate for the appellate court to not substitute its understanding for that of the agency on context as the appellate court should have been satisfied the agency was wrong.

VIII. No Company May Discriminate Against an Employee Because of Any Lawful Act Done by the Employee.

The plain text of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A(a) and each of the other Acts prohibit public companies and the subsidiaries of public companies from retaliating. Respondents retaliated by discharging, outing, demoting, suspending, threatening, harassing, defaming, withholding wages, per diem, and overtime compensation.

On the memory drive, Page's email to her supervisor proves retaliation:

> Just wanted to give you a heads up that we're looking to replace Christian Leckner—he's really gotten out of control with his communications and it's overflowing to the customer at this point.

Reference Exhibit III (the "Retaliation") at App.63a.

The assertions and evidence strongly indicate that Leckner had raised concerns in the form of repeated complaints about fraud, safety and health violations, and other violations. A *nexus* was established between Leckner's protected activity and the respondents' adverse actions. Respondents' defense should never have been believable as the evidence contradicts the false statements made by respondents, and is considered a *pretext* for retaliation.

The fact that Page sent an email with, "[j]ust a heads up", on April 16, 2018, to her supervisor, who was the only authorized decision maker, statements made by respondents should have never been believable that it was on April 9 that a decision was made to replace the complainant. Since Leckner asserted in opposition and his request for hearing, the ALJ erred in reaching its flawed decision. Respondents' counsel knowingly altered, falsified, and made a false entry in the record, by changing a calendar invite's subject to name Leckner, with the intent to influence the proper administration of this matter.

IX. IT IS WELL ESTABLISHED THAT EMPLOYERS CANNOT RESTRICT THE PROTECTED CHANNELS OF RAISING CONCERNS.

The panel decision squarely conflicts with Supreme Court and U.S. Courts of Appeals decisions. The error occurred when ALJ Berlin wrote:

> Campbell requested that Reed counsel Complainant about speaking directly with EPA. *Id.* Reed complied: she told Complainant to bring any project management concerns to Campbell and Reed. *Id.*

ALJ Decision, p. 8. Reed telling Leckner not to raise issues directly with the EPA is strong evidence of causation. In the whistleblower anti-retaliation arena, it is well established that employers cannot restrict the channels of raising protected concerns. A reprimand for failing to consult with a supervisor before blowing the whistle constitutes direct evidence of discriminatory motive. *McMahan v. Calif. Water Quality Control Bd.*, 90-WPC-1, D&O of SOL, p. 4 (July 16, 1993).

Once the law protects a disclosure, it does not permit a chain of command reporting requirement. In raising safety concerns, employees are under no obligation to report their concerns to their supervisors. *Fabricus v. Town of Braintree*, 97-CAA-14, D&O of ARB, at 4 (February 9, 1999) (collecting cases); *Talbert v. Washington Public Power Supply Sys.*, 93-ERA-35, D&O of ARB, at 8 (Sept. 27, 1996) ("chain of command" restrictions on reporting concerns would "seriously undermine the purpose of whistleblower law").

Accordingly, the Department has adopted the following rule: "an employer may not with impunity, discipline an employee for failing to follow the chain-of-command, failing to conform to established channels, or circumventing a superior, when the employee raises an environmental health or safety issue." *Leveille v. New York Air Nat'l Guard*, 94-TSC-3/4, D&O of Remand by SOL, at 16-17 (Dec. 11, 1995). Consequently, taking adverse action against an employee because the employee "circumvented the chain of command" constitutes a violation of the whistleblower protection statutes. *Dutkiewicz v. Clean Harbors Envtl. Servs.*, 95-STA-34, D&O of ARB, at 7 (Aug. 8, 1997), aff'd, *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12

(1st Cir. 1998); *Ellis Fischel State Cancer Hosp. v. Marshall*, 629 F.2d 563, 565 (8th Cir. 1980).

Even the Supreme Court has recognized violations of the whistleblower protection statutes. In *Department of Homeland Security v. MacLean*, 135 S. Ct. 913, 190 L. Ed. 2d 771 (2015), the Supreme Court even held that a federal air marshal was protected by the Whistleblower Protection Act when he leaked to the media an agency plan to stop air marshals from traveling due to a budget constraint. This was certainly a disclosure outside the chain of command. It even violated official agency regulations. Still, the Supreme Court held it was protected and MacLean was reinstated as an Air Marshal.

In this vein, as the Supreme Court decided in *Department of Homeland Security v. MacLean*, referenced above, employees are protected even if they go "around established channels" in bringing forward a safety complaint; go "over" their "supervisor's head" in raising a concern, *Nichols v. Bechtel Construction, Inc.*, 87-ERA-44, D&O of SOL, at 17 (Oct. 26, 1992); violate or fail to follow the workforce "chain of command" or normal procedure, *McMahan v. California Water Quality Control Board*, 90-WPC-1, D&O of SOL, at 4 (July 16, 1993); *Brockell v. Norton*, 732 F.2d 664, 668 (8th Cir. 1984); or refuse to disclose information they confidentially told the government. *Saporito v. Florida Power & Light Co.*, 89-ERA-7/17, SOL Remand Order, at 5, n. 4 (June 3, 1994).

Reviewing *Nichols*, the Eleventh Circuit explained:

> Even without *Chevron*, it is appropriate to give a broad construction to remedial statutes

> such as nondiscrimination provisions in federal labor laws. *See, e.g., Jones v. Metropolitan Atlanta Rapid Transit Auth.*, 681 F.2d 1376, 1380 (11th Cir. 1982).... The Secretary's interpretation promotes the remedial purposes of the statute and avoids the unwitting consequence of preemptive retaliation, which would allow the whistleblowers to be fired or otherwise discriminated against with impunity for internal complaints before they have a chance to bring them before an appropriate agency. *See, e.g., Macktal v. Secretary of Labor*, 923 F.2d 1150, 1152 (5th Cir. 1991).

Bechtel Const. Co. v. Sec'y of Labor, 50 F.3d 926, 932-33 (11th Cir. 1995). The ability of an employee to communicate directly with corporate, law enforcement or regulatory authorities is a critical component of employee whistleblowing.

X. IT IS WELL ESTABLISHED THAT EMPLOYERS CANNOT RESTRICT THE PROTECTED CHANNELS OF OPPOSITION.

The panel decision conflicts with the Supreme Court's decision in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 129 S.Ct. 846 (2009), construing an analogous anti-retaliation provision that suggests that an employee's disclosures are protected. The Supreme Court held in Crawford that

> when an employee communicates to her employer a belief that the employer has engaged in...a form of employment discrimination, that communication' virtually always

> 'constitutes the employee's opposition to the activity.' An example of protected activity in the form of opposition include complaining to management about discrimination against oneself.

Leckner complained to management about discrimination against himself from March to April 16, 2018 when his supervisors imposed unlawful chain-of-command restrictions on him, in violation of the whistleblower protection provisions.

The panel's erroneous holding conflicts with the Supreme court's holding in *Crawford*. Therefore, this petition is necessary to secure maintain uniformity of this court's decisions.

XI. THE CONFLICT BETWEEN *HUKMAN* AND THE NINTH CIRCUIT WILL DISCOURAGE WHISTLEBLOWERS.

In *Hukman v. US Airways Inc.*, ARB No. 2018-0048, ALJ No. 2015-AIR-00003 (ARB Jan. 16, 2020), Decision and Order, the Ninth Circuit's holding below squarely conflicts with the Department in *Hukman*. SOX gives the Department responsibility to adjudicate administrative complaints of whistleblower retaliation. 18 U.S.C. § 1514A(b).

The ALJ erred by placing limits as to the form of matters received from Leckner. In an apparent effort to regulate the course of the proceedings without using any evidence provided by Leckner, the ALJ issued its decision flawed with errors. ALJ Berlin wrote,

> Complainant offers no evidence and does not argue in his opposition to summary decision that he engaged in any other protected

> activity. Indeed, Complainant did not submit any evidence whatever with his opposition to summary decision.

Decision, p.13. the ALJ continued,

> In his brief, Complainant cites evidence which Respondents submitted. He also cites exhibits that neither he nor any other party put on the record. On summary decision, "[i]f a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact," the ALJ may "[g]rant summary decision if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it...." 29 C.F.R. § 18.72(e)(3).

Decision, p.13 fn16. But it was the ALJ who declined to credit any of Leckner's submissions except for one email taken out of *context*, and instead treated respondents' false assertions as unopposed. In *Hukman*, the Board held that this is legal error. *See Hukman*, p. 6.

The next error by the ALJ was his statements limiting the complainant's submissions in response to respondents' motions for summary decisions. The non-exhaustive list of permissible methods promulgated by the Secretary also includes "documents, electronically stored information, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or ***other materials***." The ARB in *Hukman* explained,

> An ALJ may modify the permissible means of proof listed or implied by the rule under the authority granted him by the Secretary at 29 C.F.R. § 18.10(c), but such limitation

> may only be ordered to serve the ends of justice and without prejudice to either party.

Hukman, pp. 6-7. The Board continued,

> Even if such a constraining decision were held to be lawful, the ALJ also erred in his legal analysis of Complainant's submissions. As a threshold matter, it is important to keep in mind that whenever a representative—or an unrepresented party...—presents to an ALJ "a written motion or other paper—whether by signing, filing, submitting, or later advocating it," the presenter implicitly certifies, *inter alia*, that the factual contentions in the document "have evidentiary support."

Hukman, p.7. The Assistant Secretary and the ALJ failed to put Leckner's submissions of evidence on record, nor credit any of his submissions. The Board explained in *Hukman*,

> For the purposes of summary decision, an ALJ must consider that the Complainant could testify on the stand at hearing to explain what he submitted and how it supports his case.

The Board in *Hukman* explained improper fact finding,

> The ALJ improperly made findings of fact in the course of summary decision in this matter. When the ALJ makes findings of fact in this context, the ALJ no longer is analyzing the record for summary decision, but is improperly making fact findings on

the record alone without having held a hearing on the merits.

A judge's task in considering a motion for summary decision is to view the submissions in the light most favorable to the non-moving party. In this case, the ALJ instead viewed the evidence submitted in favor of the moving party rather than the non-moving party to find and conclude that there was no protected activity, no contributing factor causation, the environmental complaints were not timely filed, GDIT was not an ERA covered employer, and that respondents proved their affirmative defense. All of these findings were adverse to the non-moving party despite Leckner's submissions as will be more fully explained below.

When Leckner alleged in his pleadings that he reported serious violations and submitted narrative reports about fraud, safety and health violations, cyber violations, nuclear violations, he succeeded in showing that a genuine issue of material fact existed as to whether he thereby raised a reasonable belief that he was reporting violations. The ALJ failed to properly analyze the issue of protected activity by having excluded all of Leckner's evidence.

Relevant to Leckner's burden to prove protected activity are the documents submitted by Leckner to the ALJ. What his submissions and assertions show is that Leckner has sufficiently alleged and supported with materials his allegations of protected activity to survive summary decision, that he was covered under ERA, and that he had timely filed under the environmental acts. All of the protected activities must be further developed on remand in a hearing on the merits.

When the ALJ analyzed whether Leckner's pleadings and submissions establish a genuine issue of material fact that Complainant was subject to multiple adverse actions to survive respondents' motion for summary decision, the ALJ also failed to see that Leckner suffered multiple adverse actions. The ALJ, in err, concluded that removal and termination adverse actions were the only adverse actions.

The ALJ erred by not viewing wage theft is an adverse action. In *Leckner v. Apex Systems, LLC, General Dynamics Information Technology, Inc., CSRC LLC*, Case No. WC-CM-648548 (Dec. 23, 2019), the Labor Commissioner found all defendants guilty of wage theft, another adverse action, before the ALJ issued its decision on Jan. 23, 2020. The ALJ did not use any evidence other than one email taken out of context with his decision granting summary decision.

The ALJ erred in its flawed fact-finding that the chain-of-command restriction did not constitute an adverse action. The ALJ failed to consider that the complainant showed how it had a tangible effect on his employment. Chain-of-command restriction and written discipline constitutes an adverse action, under SOX, even in the absence of tangible effect, as the ARB explained in *Williams v. American Airlines, Inc.*, ARB No. 2009-0018, ALJ No. 2007-AIR-00004, Slip op. at 10-11 (ARB Dec. 29, 2010):

> Fundamentals of statutory construction dictate that, in determining whether or not...[there is] adverse action within the meaning of [Act], the starting point "'is the language of the statute itself' and the implementing regulations construing the relevant statutory text, which we are duty bound

> to follow in the [Act] case. As previously discussed, [Act] prohibits "discrimination" against an employee with respect to the employee's "compensation, terms, conditions, or privileges of employment."...By implementing regulation, the Department of Labor has interpreted [Act] prohibition against discrimination to include efforts "to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee" because the employee has engaged in protected activity.

(emphasis added and citations omitted). Thus, under each act as applied to the circumstances of this case and in the instant procedural posture, the written discipline cited by the ALJ presents a genuine dispute of material fact as to whether it is an unfavorable personnel action.

The ALJ, in err, excluded respondents' other ten adverse actions. One question a fact-finder may ask in deciding whether an action is an adverse action under the whistleblower statutes is whether it would tend to dissuade a reasonable employee from engaging in protected activity. The Board in *Hukman* held that regardless of whether an action would dissuade a reasonable employee, and excluding "isolated trivial employment actions that ordinarily cause de minimus harm or none at all to reasonable employees, an employer should never be permitted to deliberately single out an employee for unfavorable employment action as retaliation for protected whistleblower activity."

Given their evident adverse and material effects on the complainant, a genuine issue of material fact

was established as to whether and how each of these adverse actions constituted unfavorable employment action, and much more than trivial, and/or would tend to dissuade a reasonable employee from engaging in protected activity.

The Supreme Court must conclude that there is a genuine issue of material fact as to whether respondents took multiple adverse actions against the complainant. Furthermore, a genuine issue of material fact has been established as to whether respondents took adverse action against complainant in requiring him to follow chain-of-command restrictions. Thus, the ALJ's conclusion that the complainant only established a genuine issue of material fact that the complainant was subject to *only* the adverse actions of removal and termination must be vacated.

To prevail against the respondents' motions, the complainant's counsel cited admissible evidence that established a genuine dispute as to whether he suffered an unfavorable personnel action by respondents that was caused, in whole or in part, by the complainant's protected communications. As such, this court must consider that the complainant's submissions, even if the Department lost his counsel's memory, established a genuine dispute as to whether his protected activity caused respondents to take the unfavorable personnel action against him.

Respondents avers that it did not know about any of the complainant's protected activity. To the contrary, Leckner averse that he engaged in protected activity and the employers had knowledge of his protected activity beginning in January 2018. Leckner's evidence proves that Page told her supervisor that she was looking to replace him due to his communi-

cations having overflowed to the EPA. Leckner's assertions and evidence are sufficient to show that respondents took multiple adverse actions.

Thus, if the April 16, 2018 statement was given to a supervisory employee, and which the agency must accept as true on summary decision, the documents show a temporal proximity of less than five minutes between respondents acknowledging the complainant's reports and adverse action taken against him on April 16. This temporal gap is far too close to ignore and therefore the complainant is entitled to defeating summary decision as a matter of law.

When an ALJ renders a summary decision, the ARB's review is *de novo*, and as such the analysis cannot be simply a matter of excluding the evidence and not comparing the length of the temporal gap of five minutes and deciding that there can be no causation. This is because the determination must be made in the *context* of the facts of the case. As the ARB explained in *Hukman*,

> determining what, if any, logical inference may be drawn from the temporal relationship between the protected activity and the unfavorable employment action is not a simple and exact science but requires a 'fact-intensive' analysis.

The panel failed to have been cautious in affirming summary decision against a complainant when the complainant has provided *prima facie* evidence of protected activity, numerous adverse actions, and perhaps the shortest temporal proximity in history.

XII. PROTECTED ACTIVITY RAISED THROUGH UNOFFICIAL CHANNELS UNDER SOX IS DEFINED BY THE *PASSAIC VALLEY* CASE AND THE AUTHORITY UPON WHICH *PASSAIC VALLEY* WAS BASED.

The controlling precedent for interpreting the scope of protected activity raised by an employee using unofficial channels (*i.e.* such as complaining to a supervisor) under SOX was established by Congress. This court must apply this precedent to this case.

Congress was fully cognizant of the case law when it enacted SOX, and by modeling SOX upon these prior laws, Congress expressed its intention that the Department follow this unbroken line of precedent. If there was any doubt whatsoever about the standard the DOL was required to apply in SOX cases under 18 U.S.C. § 1514A(a)(1), Congress explicitly re-affirmed the prior precedent of the DOL when it cited, with approval, to the case of *Passaic Valley Sewerage Comm. v. U.S. Department of Labor*, 992 F.2d 474, 478-79 (3rd Cir. 1993) in the legislative history of SOX. As long as an internal complaint made outside the formal reporting channels was made in good faith and not frivolous, it was protected, *period.*

XIII. EMPLOYEE DISCLOSURES TO APPROVED CHANNELS ARE ENTITLED TO A HIGHER LEVEL OF PROTECTION.

The *Guttman-Passaic Valley* standard was developed in the context of informal employee complaints to co-workers or supervisors. However, most whistleblower laws also, implicitly, or explicitly, identify channels of communication open to employees for raising complaints. Depending on the law, these official channels differ. In environmental protection,

the channels are the EPA project managers. SOX itself established various official lines of communication. § 806 explicitly identified supervisors and internal corporate concerns programs as an approved channel of communication (*i.e.* disclosures to persons with the "authority to investigate, discovery, or terminate misconduct"). 18 U.S.C. § 1514A(1)(C).

Case law concerning protected disclosures made through these official lines of communication is even broader than the informal disclosures protected under the *Guttman-Passaic Valley* standard. Communications made to these official reporting offices are very broad-and designed to ensure that persons can freely and without fear raise issues with the offices designed to review the veracity of a complaint. Reference 18 U.S.C. § 1514A(a)(2).

The *Munsey v. Federal Mine Safety and Health Review Comm'n*, 595 F.2d 735 (D.C. Cir. 1978) decision set forth the proper scope of protected activity in the context of an employee who raises concerns through an established line of communication. In *Munsey*, communications made through established channels—even those established informally by custom and usage, are near *absolute*. There are no heightened standards or materiality requirements. Indeed, issues raised through official channels are protected, *period*.

If complaints filed through proper channels could be subject to a restrictive content analysis, such an analysis would have a chilling effect on employee speech. Employees would have to second-guess themselves before raising concerns, even before organizations or structures that are explicitly designed to accept such complaints, and weed out the important complaints from the frivolous complaints. Thus, if an

employee utilizes an established line of communication to raise a concern, the ability of the ALJ to scrutinize the contents of that complaint is extremely limited.

In the context of the SOX, complaints covered under the *Munsey* Standard include not only complaints to the SEC, but also other internal complaints to officials designated by the company to investigate or correct misconduct, and supervisors, including the EPA.

XIV. THE DEPARTMENT OF LABOR HAS NOT CHANGED THE *SYLVESTER-MUNSEY-GUTTMAN-PASSAIC VALLEY* DOCTRINES AND THEY REMAIN BINDING TO THIS DAY.

Given the Congressional endorsement of the *Sylvester-Munsey-Guttman-Passaic Valley* standards in the *context* of the SOX, the panel cannot not overturn these standards.

In *Sylvester v. Parexel International LLC,* ARB No. 07-123, ALJ Nos. 2007-SOX-039, 042, the Board rejected the "definitively and specifically" standard and returned to the broad standard that better comports with the statute's remedial purpose. Not only was the "definitively and specifically" standard rejected, that standard undermined the purpose behind SOX. Congress passed § 806 in response to:

> a culture, supported by law, that discourage[s] employees from reporting fraudulent behavior not only to the proper authorities...but even internally. This "corporate code of silence" not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity.

S. Rep. No. 107-146, at 5 (2002).

XV. THE PRESENT CASE IS COVERED UNDER THE *MUNSEY* STANDARD.

In the present case, respondents have already set out the official channels for employees to use in raising compliance concerns. It has adopted and published the Code of Business Conduct and Ethics and referred to it in its 10-K to inform both its employees and its investors of the thoroughness of its internal controls. These rules declare this Code is intended to deter wrongdoing and to promote the conduct of the Company business in accordance with high standards of integrity and in compliance with applicable laws and regulations.

Thus, reporting suspected violations of law to one's supervisor is the official channel for employees to assure that the company is maintaining its internal controls as required by SOX. Reporting up the chain-of-command is the official proceeding to comply with SOX. The complainant raised his concerns pursuant to official channels, and thus the standard set forth in *Munsey* applied and cannot be overturned by ALJ Berlin nor the appellate court.

XVI. LECKNER DOES NOT NEED TO ESTABLISH THAT THE CONCERNS HE RAISED RELATES TO FRAUD ON SHAREHOLDERS.

While SOX clearly prohibits frauds on shareholders, it also protects employees who disclose suspicious activities that may indicate the existence of a potential fraud. Employees have the right to complain about improperly installed software because it could indicate that a problem may arise in the future. As explained by the Association of Certified

Fraud Examiners (ACFE), the heart of any statute of policy designed to detect fraud is the protection of early-warnings. Fraud is designed to be well hidden, and employees are the most likely source of disclosures that can lead to the detection of fraud. Consequently the ACFE mandates that employees be encouraged to report "suspicious activities." ACFE, 2010 Global Fraud Report, pp. 5, 17.

Leckner disclosed fraudulent activities that indicated the existence of fraud. The EPA in its early investigation uncovered fraud based on Leckner's EPA complaints. *See* https://www.epa.gov/sites/default/files/2019-05/documents/_epaoig_20190520-19-p-0157.pdf. General Dynamics employees admitted to billing the EPA for a transition that never occurred. Reference Leckner's FCA complaint: *United States ex rel. Leckner v. Gen. Dynamics Info. Tech., & Apex Sys.*, 21-cv-1109-BAS-BLM (S.D. Cal. June 14, 2021).

Additionally, SOX coverage is not limited to fraud. Far from it. SOX mandates cover every single requirement that the SEC imposes on regulated industry, whether these requirements are simply reporting mandates, internal corporate structural requirements or provisions of the securities laws designed to ultimately protect shareholders. Every rule, regulation and law administered by the SEC is covered under SOX, not just laws related to the protection of shareholders. SOX is a very broad statute. If a company is negligent in failing to establish or maintain its internal controls on cybersecurity, that is a violation of its legal duties under SEC regulations. There is no public purpose that is served by allowing company managers to punish employees who raise concerns about management's neglect in failing to

maintain required internal controls, even if no fraud is involved. Accord, *Smith v. Corning*, 496 F.Supp.2d 244, 248 (W.D. NY 2007).

In *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, ARB Case No. 04-149, 2004-SOX-11 (May 31, 2006), the ARB addressed the scope of protected activity under SOX. At p.17, the ARB explained:

> SOX protection applies to the provision of information regarding not just fraud, but also "violation of...any rule or regulation of the Securities and Exchange Commission." 18 U.S.C. § 1514A(a)(1).

Alleging fraud is not required for a SOX claim. Accord *Smith v. Corning*, 496 F.Supp.2d 244, 248 (W.D. NY 2007); *Deremer v. Gulfmark Offshore Inc.*, 2006-SOX-2 (ALJ June 29, 2007); *Hughart v. Raymond James & Associates, Inc.*, 2004-SOX-9 (ALJ Dec. 17, 2004); *Hendrix v. American Airlines, Inc.*, 2004-AIR-10, 2004-SOX-23 (ALJ Dec. 9, 2004). There is no requirement that protected activity include any "magic words" to invoke protection. *See U.S. ex rel. Elms v. Accenture LLP*, No. 07-1361, 2009 WL 2189795, at *4 (4th Cir. July 22, 2009) (finding plaintiff who alleged he "expressed his misgivings" and stated the company was "shortchanging the government" sufficiently pleaded that he took action in furtherance of a qui tam suit to survive a Rule 12(b)(6) (dismissal)).

According to the ALJ's decision, General Dynamics argued that the complainant's concerns were not protected. This argument is wrong. General Dynamics's entire business is predicated on compliance with the rules and regulations governing its practices. Its own Form 10-K in place during the time period relevant

to this case (its 2018 10-K) readily establishes the materiality of its practices. Not only are practices material to the company's stock prices, the entire corporate reputation and business plan is predicated on its reputation for demanding strict compliance with its practices. We request that this court take judicial notice of General Dynamics' 10-K forms filed with the SEC and provided to its investors, and carefully review these forms in light of the ALJ's ruling.

It is inconsistent for General Dynamics to inform investors that employees are required to report potential misconduct to their supervisors, and then for General Dynamics to inform the Department of Labor that such disclosures are not protected. In fact, General Dynamics' conduct toward the employee in this case also raises a regulatory issue for which the SEC must investigate.

CONCLUSION

For the foregoing reasons, the Petitioner asks this Court to grant this petition and reverse the flawed decision of the Ninth Circuit.

Respectfully submitted,

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