No. ________

In The
Supreme Court of the United States

KEVIN WALLACE,

Petitioner,

v.

ANDEAVOR CORPORATION,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The anti-retaliation provision of the Sarbanes-Oxley Act, 28 U.S.C. § 1514A(a), forbids retaliation against an employee because he or she disclosed to certain federal or company officials information about conduct which the employee "reasonably believe[d]" violated certain federal prohibitions. The employee's belief must have been objectively reasonable.

The question presented is:

> Should the determination under § 1514A(a) as to whether an employee's belief was objectively reasonable be made by the trier of fact, so long as reasonable minds could disagree, or by the court as a matter of law?

PARTIES

The parties to this action are set out on the cover. Andeavor Corporation was formerly known as the Tesoro Corporation. It is owned by the Marathon Petroleum Corporation.

LIST OF RELATED CASES

Wallace v. Tesoro Corp., No. SA-11-CA-099-FB, U.S. District Court for the Western District of Texas. Judgment entered September 27, 2013

Wallace v. Tesoro Corp., No. 13-51010, U.S. Court of Appeals for the Fifth Circuit. Judgment entered July 31, 2015

Wallace v. Tesoro Corp., No. SA-11-CA-099-FB, U.S. District Court for the Western District of Texas. Judgment entered September 28, 2017

Wallace v. Andeavor Corp., No. 17-50927, U.S. Court of Appeals for the Fifth Circuit. Judgment entered February 15, 2019

TABLE OF CONTENTS

	Page
Question Presented	i
Parties	ii
List of Related Cases	iii
Table of Contents	iv
Opinions Below	1
Jurisdiction	1
Statute Involved	2
Statement	3
Legal Background	3
Factual Background	6
Proceedings Below	10
Reasons for Granting the Writ	15
I. There Is An Important Conflict Among The Courts of Appeals, and Between Several Courts of Appeals and The Administrative Review Board, Regarding Whether Objective Reasonableness Is A Question of Law Or A Matter Ordinarily To Be Resolved by The Trier of Fact	16
II. The Rule In The Fourth and Fifth Circuits Is Clearly Incorrect	24
III. This Case Is An Excellent Vehicle for Resolving This Conflict	26
Conclusion	30

TABLE OF CONTENTS – Continued

Page

APPENDIX

Opinion of the Court of Appeals, February 15, 2019 .... 1a

Order of the District Court for the Western District of Texas, September 28, 2017 .... 12a

Memorandum and Recommendation of the Magistrate Judge, February 23, 2017 .... 15a

Opinion of the Court of Appeals, April 3, 2019 .... 44a

TABLE OF AUTHORITIES

Page

CASES

Beacom v. Oracle America, Inc., 825 F.3d 376 (8th Cir. 2016) 18, 22

Hana Financial, Inc. v. Hana Bank, 135 S.Ct. 907 (2015) 15, 24, 25, 26

Lawson v. FMR LLC, 571 U.S. 429 (2014) 4

Livingston v. Wyeth Inc., 520 F.3d 344 (4th Cir. 2008) 17, 18, 21

Lockheed Martin Corp. v. Administrative Review Bd., 717 F.3d 1121 (10th Cir. 2013) 19

Prioleau v. Sikorsky Aircraft Corp., 2011 WL 6122422 (ARB Nov. 9, 2011) 22

Rhinehimer v. U.S. Bancorp Investments, Inc., 787 F.3d 797 (6th Cir. 2015) 17, 18, 22

Sylvester v. Parexel Int'l LLC, 2011 WL 2517148 (ARB May 25, 2011) 21, 22

Wadler v. Bio-Rad Laboratories, Inc., 916 F.3d 1176 (9th Cir. 2019) 20

Wallace v. Tesoro Corp., 796 F.3d 468 (5th Cir. 2015) 11

Wiest v. Lynch, 710 F.3d 121 (3d Cir. 2013) 18, 19

Williams v. Dallas Ind. School Dist., 2012 WL 6930342 (ARB Dec. 28, 2012) 22

TABLE OF AUTHORITIES – Continued

Page

STATUTES

5 U.S.C. § 706 5

18 U.S.C. § 1514A...*passim*

18 U.S.C. § 1514A(a)(1) 4

18 U.S.C. § 1514A(a)(1)(B) 5

18 U.S.C. § 1514A(a)(1)(C) 4

18 U.S.C. § 1514A(b)(1)(B) 5

28 U.S.C. § 1254(1)...1

28 U.S.C.§ 1391(b)(2) 22

28 U.S.C. § 1391(c)(3)...23

Sarbanes-Oxley Act of 2002, 116 Stat. 745.................3

REGULATION

29 C.F.R. §§ 1980.104 to 1980.110...............................5

OTHER AUTHORITIES

S.Rep. No. 107-146 (2002)...4

Petitioner Kevin Wallace respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the court of appeals entered on February 15, 2019.

OPINIONS BELOW

The February 15, 2019 opinion of the court of appeals, which is reported at 916 F.3d 423, is set out at pp. 1a-11a of the Appendix. The April 3, 2019 opinion of the court of appeals, on petition for rehearing en banc, which is not reported, is set out at pp. 44a-46a of the Appendix. The September 28, 2017 order of the district court, which is unofficially reported at 2017 WL 6403117, is set out at pp. 12a-14a of the Appendix. The February 23, 2017 Memorandum and Recommendation of the magistrate judge, which is unofficially reported at 2017 WL 6403035, is set out at pp. 15a-43a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on February 15, 2019. A timely petition for rehearing en banc was denied on April 3, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1514A of 18 U.S.C. provides in pertinent part:

> **(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. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(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)....

STATEMENT

Legal Background

This action arises under the anti-retaliation provision of the Sarbanes-Oxley Act of 2002. 116 Stat. 745. The Act was adopted after the collapse of several major publicly-held companies, including the Enron Corporation. Congressional and criminal investigations revealed that those companies had engaged in massive misrepresentations of their financial condition, resulting in billions of dollars in losses for investors, employees, consumers and creditors.

Congress concluded that this fraud had succeeded

> in large part due to a "corporate code of silence." That code, Congress found, "discourage[d] employees from reporting fraudulent

> behavior not only to the proper authorities, such as the FBI and the SEC, but even internally."

Lawson v. FMR LLC, 571 U.S. 429, 435 (2014) (quoting S.Rep. No. 107-146, 4-5 (2002)). "Congress[] underst[oo]d[] that ... fear of retaliation was the primary deterrent to such reporting...." 571 U.S. at 448.

The anti-retaliation provision of Sarbanes-Oxley "addresses this concern." 571 U.S. at 435. § 1514A forbids certain companies from retaliating against an employee because he or she provided information, about a possible violation of certain statutes, rules, or regulations, to a federal agency, to Congress, to a supervisor of that employee or to any "other person working for the employer who has the authority to investigate, discover, or terminate misconduct." § 1514A(a)(1)(C). The protections of § 1514A are not limited to instances in which there is an actual violation of one of the relevant provisions. The employee is protected so long as he or she "reasonably believes [the activity at issue] constitutes a violation...." § 1514A(a)(1). Congress understood that employees would be unlikely to speak up, or contact federal authorities, if protection under § 1514A would be lost if their employers, in subsequent litigation, could through discovery and legal argument persuade a court that no violation had actually occurred.

The courts of appeals, including in this case the Fifth Circuit (App. 6a), have generally agreed that there are two distinct elements of reasonable belief under § 1514A. The whistleblower must have had a

subjective belief that a violation was occurring, and that belief must have been objectively reasonable. Whether a whistleblower's belief was objectively reasonable is one of the most common issues litigated in § 1514A cases.

A whistleblower must file a complaint with the Department of Labor (DOL). Such a complaint is first investigated by the DOL's Occupational Safety and Health Administration. (OSHA). OSHA's determination may be appealed to an administrative law judge, and then to DOL's Administrative Review Board (ARB). 29 C.F.R. §§ 1980.104 to 1980.110. The ARB's determination of a § 1514A claim constitutes the agency's final decision, and is reviewable in a court of appeals under the standards and procedures stated in the Administrative Procedure Act. 5 U.S.C. § 706. If, however, the ARB does not issue a final decision within 180 days of the filing of the complaint, the complainant may proceed to federal district court for *de novo* review. 18 U.S.C. § 1514A(b)(1)(B). The full three-step administrative process would rarely if ever be completed within 180 days. Thus § 1514A deliberately gives whistleblowers two distinct methods of enforcing their rights. The whistleblower can pursue a claim to completion under the administrative process, with only limited judicial review by a circuit court. Or the whistleblower may, after the end of the 180 exhaustion period, seek a *de novo* determination of the claim at issue from a federal district court.

Factual Background

This case arises out of the operations of the Tesoro Corporation,[1] a large publicly held company that refines, distributes and sells (both wholesale and retail) gasoline and diesel fuel. During the period of time at issue, plaintiff Kevin Wallace was the Vice President of Commercial Analysis and Pricing at the company headquarters in San Antonio, Texas.

In late 2009 or early 2010, Wallace was directed by the company's Chief Operating Officer "to investigate why the reported financial performance by the various [business units and regions] did not make sense in light of the known market conditions." ROA 2662 ¶ 4. Wallace and his subordinates reviewed company invoices and identified a number of problems, two of which are relevant to the instant appeal.

The first problem concerned federal and state motor vehicle fuel taxes. These are the taxes that are paid by the refiner or distributor of motor fuel, and are due when the fuel leaves storage facilities for sale by retailers. The taxes are included in the price that drivers pay when they purchase gasoline (or diesel fuel) at a filling station. At all Texas filling stations, and at filling stations in many other states, there is a ubiquitous written sign or notice disclosing the amount of the federal and state motor vehicle tax included in the price of the fuel. The tax is a fixed amount per gallon; currently the federal tax is 28.4 cents a gallon of gasoline, and the

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[1] After this case was filed, Tesoro changed its name to Andeavor, and then merged with Marathon, also a public company.

Texas tax is 20.0 cents a gallon of gasoline. The posted notices refer to the tax as being "included" because the tax had already been imposed on and paid by refiners or distributors before the fuel was sold to consumers.

Wallace discovered that some segments of Tesoro were classifying the motor vehicle fuel tax, because it was included in what consumers paid, as revenue. The effect of that classification, at least at times, was to artificially inflate the profits of particular segments of the company. Wallace concluded, however, that booking motor fuel taxes as revenues was not inflating the *company*'s overall profits. Because the taxes were actually paid to federal and state agencies, even if by a segment of Tesoro different than the unit that had received the payments from customers, and thus were eventually computed as costs, booking the taxes as revenues did not inflate Tesoro's net profits.

A second problem, the one which particularly gave rise to Wallace's Sarbanes-Oxley claim, was also unearthed. Wallace and his staff discovered that some Tesoro state retail units were also including sales taxes in their revenue totals.[2] Although some states, such as Texas, exempt gasoline and diesel fuel sales from their sales taxes, others (such as Hawai'i) do not. The amount of the sales tax depended (as all sales taxes do) on the retail price of the gasoline or diesel fuel. In a state where motor vehicle fuel is expensive, the amount of that tax (and thus the increase in retail revenue booked) would be high; in Hawai'i the

[2] ROA 2689, lines 9-19.

inclusion of sales tax increased the booked revenue by about 50 cents a gallon.[3]

Wallace met with the Vice President for Internal Audit, Tracy Jackson, and told her that sales taxes were being included in revenue figures from some states. Jackson was a CPA, and was responsible for actually preparing the 10-K and 10-Q forms that Tesoro filed with the SEC.[4] Each of those forms contained a footnote, footnote (b) to the firm's revenue table, that specifically disclosed the inclusion and the amount of "[f]ederal excise and state motor fuel taxes" included in both revenue and cost figures.

According to Wallace, Jackson indicated surprise that sales taxes had also been included in revenues, and advised Wallace that this presented a problem in light of the wording of footnote (b). "The conversation turned to our SEC reporting. And Tracy [Jackson] was, frankly, alarmed that – she – she – that that particular footnote was wrong and the disclosure was wrong...." ROA. 2683; see ROA. 2685 ("Tracy certainly conveyed that she was alarmed").

> A. We ... discovered that, indeed, ... revenues were including excise taxes, which was known and footnoted, and sales taxes.
>
> Q. ... What do you mean by "known and footnoted"?

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[3] ROA. 2664, ¶ 9.

[4] ROA. 2746.

> A. There's a footnote in ... the 10-Q that includes excise taxes, both state and federal, were included in ... retail segment revenues.
>
> Q. And had you reviewed that at that time?
>
> A. Yes. That was the footnote that Tracy Jackson ... brought up in the meeting that we were in.... The problem wasn't excise taxes. The problem was sales taxes.

ROA. 2689-ROA. 2690. In the absence of disclosure that the listed revenue actually included sales taxes, the SEC statements were inaccurate, and analysts and investors would have been misled as to Tesoro's actual financial position.

Having been told by Jackson that, in light of the booking of sales taxes as revenue, the key footnote (and thus the overall SEC disclosures) were "wrong," Wallace repeatedly brought this problem to the attention of other Tesoro officials, including Claude Moreau, Wallace's supervisor and the Senior Vice President of Marketing, through a series of emails and ultimately a meeting about the problem.

> During late February and early March 2010 timeframe, I sent and received multiple e-mails ... to and from my supervisor Claude Moreau discussing the implications of Tesoro's practice of booking sales taxes as revenue and its detrimental effect on the accuracy of reported segment earnings to the SEC....

ROA. 2799-ROA. 2800. According to Wallace, when the problem was reported to Moreau, "his first response

immediately was, 'This is a problem for the CEO.'" ROA. 2687, lines 11-12.

Wallace was fired in March 2010, within a week after he had met with Moreau about the asserted failure of the SEC filings to disclose that sales taxes were being booked as revenue. App. 21a. One of Wallace's responsibilities was to sub-certify the correctness of certain data in Tesoro's SEC filings, and in March 2010 it was time for Wallace to sub-certify certain figures in the company's 10-K for 2009, then in preparation. At this point Wallace had explained the problem to Jackson, who was preparing the new 10-K. Wallace was asked only to certify the data, not the accompanying narrative (including any footnote), and there is no suggestion in the record that the narrative or footnote had yet been drafted, or were disclosed at this time to Wallace. Wallace had only reviewed invoices for 2010, not for the period (2009) covered by the proposed form 10-K. On March 12, 2010, Wallace sub-certified the figures in the draft 10-K for 2009. Within *hours* of having done so, Wallace was summarily dismissed.

Proceedings Below

Wallace commenced this action in district court, alleging, inter alia, that he had been dismissed in retaliation for notifying company officials about the booking of sales taxes as revenue. The district court initially dismissed the complaint for failure to state a

claim on which relief could be granted. On appeal, the Fifth Circuit upheld the dismissal of several other counts of the complaint, but reinstated Wallace's claim regarding the sales tax issue. *Wallace v. Tesoro Corp.*, 796 F.3d 468, 475-80 (5th Cir. 2015).

On remand, following a period of discovery, the district court granted summary judgment on that remaining claim. Of relevance here, the district court itself "*found* ... that the plaintiff did not have an objectively reasonable belief that a violation of reporting requirements had occurred." App. 1a-2a (emphasis added). In doing so, the district court made two relevant findings regarding subsidiary issues. First, the court held that the language of footnote (b) in Tesoro's 10-K statements "indicates that Tesoro reported that it included sales taxes as revenue." App. 30a. If that were so, then no actual violation of SEC reporting requirements had occurred. Second, the court held that, despite what Wallace had learned about the booking of sales taxes as revenue, and despite Jackson's statements that Tesoro's SEC statements were "wrong," "a reasonable person in the same factual circumstances ... as Wallace would have made some effort to determine if Tesoro" had indeed acted improperly before mentioning the problem to any other company officials. App. 28a.

On appeal, Wallace urged that the district court had erred in itself deciding the ultimate issue of whether Wallace could have had an objectively reasonable belief there were reporting violations, and in resolving the factual subsidiary issues set out above. Instead, Wallace argued, a court, in addressing a

summary judgment motion regarding the existence of an objectively reasonable belief under section 1514A(a), should restrict itself to deciding whether "reasonable minds could disagree on this issue." Appellant's Br. 32; see *id.* 36-37. If reasonable minds could differ, Wallace contended, the determination of objective reasonableness should be made by the trier of fact. Tesoro, on the other hand, urged the court of appeals to itself determine, as had the district court, whether Wallace could have had an objectively reasonable belief that there was a violation of SEC reporting requirements. Brief for Appellee, pp. 27, 28-29.

The panel took the same approach as the district court, as advocated by Tesoro. The panel explained that its own decision answered the question of whether Wallace's belief was objectively reasonable. "If Wallace's belief was not objectively reasonable, his SOX retaliation claim fails.... In answering that question, *we* must also resolve an evidentiary dispute."[5] App. 7a (emphasis added). Like the district court, the court of appeals made two relevant subsidiary findings.

First, the panel concluded that the SEC reports had disclosed to the SEC and the public that Tesoro's revenue figures included sales taxes. "A brief look at the retail segment of the 10-K, which Wallace alleges was the source of the sales-taxes-as-revenues problem, would show that Tesoro disclosed that fuel sales taxes was included in revenues." App. 9a. The passage cited

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[5] The evidentiary dispute, concerning the exclusion of certain testimony, is not at issue here.

by the panel as clearly revealing to the SEC and to investors that revenue figures included sales taxes reads as follows: "[f]ederal and state motor fuel taxes *on sales* by our retail segment are included in both 'Revenues' and 'costs of sales and operating expenses.'" App. 8a (emphasis in opinion).

Second, the panel decided that Wallace, after having been told by Jackson that footnote (b) was "wrong," acted unreasonably in disclosing the problem to other Tesoro officials without first investigating further. "[A] reporting individual who is a sub-certifier with accounting oversight experience should conduct a reasonable investigation to ensure the reasonableness of his conclusion that the public disclosures contained a reporting violation." App. 9a. The panel pointedly objected that Wallace had failed to "conduct[] a limited investigation." App. 9a. The panel insisted that, whatever the content of footnote (b) (on page 92 of the 2009 10-K), which Jackson had said was "wrong," Wallace acted unreasonably when he did not review the entire 109 page SEC report, and thus unreasonably failed to identify and consider the sentence (quoted above) that appears on page 65 of that report. Doc. 121-12, pp. 5-6.

What the panel did *not* decide is equally important. The panel did not purport to consider or decide whether reasonable minds could disagree about the meaning of the quoted sentence or about the meaning of footnote (b). Nor did the panel decide whether jurors could disagree about whether a reasonable person, after being told by Jackson that footnote (b) was "wrong,"

would have inquired further before reporting the problem to other officials. The panel reasoned that there would only be a "dispute of fact" in the case if witnesses had offered conflicting testimony. App. 9a. In the absence of conflicting testimony, it was for the court to decide how a reasonable Tesoro employee would have understood the SEC submissions, and what a reasonable person in Wallace's position would have believed and would have done after talking with Jackson.

Wallace filed a timely petition for rehearing en banc. The petition asked that rehearing en banc be granted to decide "whether, in applying section 1514A(a) of the Sarbanes-Oxley Act, the determination as to whether a plaintiff's belief was objectively reasonable is a matter for the trier of fact so long as reasonable minds could disagree about that question." App. 44a-45a. The petition argued that the panel opinion, in determining itself whether Wallace's belief was objectively reasonable, conflicted with decisions in several other circuits that hold that question is ordinarily a matter for the trier of fact. Rehearing en banc was denied. In response to the petition, the panel issued a short supplemental opinion. "Wallace asserts that the panel's opinion conflicts with certain decisions from our sister circuits and the Administrative Review Board.... Even if that is so, and we do not so hold, we have determined that our analysis is consistent with . . . the controlling authority [in the Fifth Circuit]." App. 45a-46a.

REASONS FOR GRANTING THE WRIT

This is a case, like *Hana Financial, Inc. v. Hana Bank*, 135 S.Ct. 907 (2015), in which the administration of a statutory scheme is seriously obstructed by a conflict about whether a key, commonly arising question should be determined by the trier of fact, or by a judge as a matter of law. For reasons similar to those present in *Hana*, certiorari should be granted to resolve the conflict as to whether in a § 1514A action a judge, or a trier of fact, should decide if a whistleblower could have reasonably believed that a relevant violation of federal requirements was occurring.

The conflict in *Hana* was about a similar question, whether a judge or jury should decide if a reasonable consumer would consider two marks the same, a central issue in certain trademark cases. 135 S.Ct. at 910. In *Hana*, the conflict involved not only a split among the circuits, but a disagreement by some circuits with the standard applied by the federal agency which administered the law, the Trademark Trial and Appeal Board. Petition for Writ of Certiorari, 17 ("Hana Petition"), available at 2014 WL 1365466. In the instant case, the circuit split is also compounded by a difference between several circuits and the agency which administers the Sarbanes-Oxley Act, the Administrative Review Board. Here, as in *Hana*, the nature of the underlying claims means that parties will often be able to engage in forum shopping, choosing to litigate in the circuit where the law is most favorable. Hana Petition, 16-17; 22-24 *infra*. Here, as in *Hana*, the conflict between several circuits and the administering agency

skews the decisions of claimants about whether to pursue relief at that agency. Hana Petition, 17-18; 23 *infra*. And here, as in *Hana*, the fact that review of an agency decision is under the Administrative Procedure Act affords even more opportunity for undesirable gamesmanship. Hana Petition, 18-19; 23-24 *infra*.

I. There Is An Important Conflict Among The Courts of Appeals, and Between Several Courts of Appeals and The Administrative Review Board, Regarding Whether Objective Reasonableness Is A Question of Law Or A Matter Ordinarily To Be Resolved By The Trier of Fact

The Fifth Circuit decision in this case deepens a pre-existing circuit conflict regarding whether the objective reasonableness of a whistleblower's belief is a question of law to be resolved by a judge, or a question of fact to be determined by a jury so long as reasonable minds could disagree. The Fourth and Fifth Circuits hold that this key question should be decided by a judge. The Third, Sixth, Eighth, Ninth and Tenth Circuits hold, to the contrary, that this is an issue for the trier of fact. The ARB, which has administrative responsibility for adjudicating § 1514A claims, agrees that the trier of fact (in the administrative process, an administrative law judge) should determine this question only after an evidentiary hearing.

Well before the Fifth Circuit decision in the instant case, the Fourth Circuit had held that the objective reasonableness of a whistleblower's belief is a

question for the court. "[B]ecause this analysis for determining whether an employee reasonably believes a law is being violated is an objective one, we resolve the question as a matter of law." *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 353 n.2 (4th Cir. 2008). Judge Michael wrote a vigorous and influential dissent.

> The issue of objective reasonableness should be decided as a matter of law only when "[n]o reasonable person could have believed" that the facts amounted to a violation. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001) (per curiam). However, if reasonable minds could disagree about whether the employee's belief was objectively reasonable, the issue cannot be decided as a matter of law.

520 F.3d at 361. That dissent was expressly relied on in subsequent decisions rejecting the Fourth Circuit's rule.

In *Rhinehimer v. U.S. Bancorp Investments, Inc.*, 787 F.3d 797 (6th Cir. 2015), the Sixth Circuit held that objective reasonableness is ordinarily an issue for the jury, citing Judge Michael's dissenting opinion in the Fourth Circuit.

> [T]he inquiry into whether an employee had a reasonable belief is necessarily fact-dependent, varying with the circumstances of the case. For this reason, "[t]he issue of objective reasonableness should be decided as a matter of law only when no reasonable person could have believed that the facts [known to the employee] amounted to a violation" or otherwise

> justified the employee's belief that illegal conduct was occurring. *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 361 (4th Cir.2008) (Michael, J., dissenting).... If, on the other hand, "reasonable minds could disagree about whether the employee's belief was objectively reasonable, the issue cannot be decided as a matter of law." *Id.*

787 F.3d at 811-12.

In *Beacom v. Oracle America, Inc.*, 825 F.3d 376 (8th Cir. 2016), the Eighth Circuit followed the Sixth Circuit decision in *Rhinehimer*.

> Beacom must establish that a reasonable person in his position, with the same training and experience, would have believed Oracle was committing a securities violation. *Rhinehimer*, 787 F.3d at 811. This fact-dependent inquiry is typically inappropriate for summary judgment. *Id.* "[T]he issue of objective reasonableness should be decided as a matter of law only when no reasonable person could have believed that the facts [known to the employee] amounted to a violation or otherwise justified the employee's belief that illegal conduct was occurring." *Id.*

825 F.3d at 380-81 (quoting *Rhinehimer*, 787 F.3d at 811) (quoting Judge Michael's dissent).

The Third Circuit treated objective reasonableness as a jury issue in *Wiest v. Lynch*, 710 F.3d 121 (3d Cir. 2013). The facts alleged in that case, the court of appeals held, would "support an inference that [the

whistleblower's] belief was objectively reasonable." 710 F.3d at 135.

> [T]he issue is not whether the contemplated accounting treatment was or was not part of a scheme to defraud. The issue is whether such accounting treatment could reasonably be believed by Wiest to be fraudulent. Given the [firm's past] scandal, a jury could find that Wiest reasonably believed that the sins of [the past] were being repeated.

710 F.3d at 135 n.5.

In *Lockheed Martin Corp. v. Administrative Review Bd.*, 717 F.3d 1121, 1122 (10th Cir. 2013), the employer challenged a finding by an administrative law judge, and the ARB, that a whistleblower's belief that fraud was occurring was objectively reasonable. Had the existence of such a belief been a question of law, the court of appeals would have decided that issue de novo. Rather than itself determining whether that belief was reasonable, however, the Tenth Circuit limited its inquiry to whether the administrative finding was supported by substantial evidence. "Lockheed ... argues any belief [another official's] activities amounted to fraud is objectively unreasonable as a matter of law due to a lack of evidence.... There was . . . substantial evidence supporting the ALJ and Board's findings that Brown reasonably believed [a company official] had committed fraud and that she definitely and specifically communicated that belief to her superiors." 717 F.3d at 1133.

Most recently, in *Wadler v. Bio-Rad Laboratories, Inc.*, 916 F.3d 1176 (9th Cir. 2019), the plaintiff contended that he had been dismissed because he reported activity which he believed violated one of the statutes covered by section 1514A(a). A jury returned a verdict in favor of Wadler, but on appeal the Ninth Circuit held that the jury had been improperly instructed. 916 F.3d at 1185-87. The employer contended that Wadler could not reasonably have believed that the activity at issue was unlawful. Unlike the panel in this case, the Ninth Circuit in *Wadler* did not itself decide whether the plaintiff could reasonably have believed that such a violation had occurred. Instead, the Ninth Circuit limited its inquiry to whether a jury could conclude that Wadler's belief was reasonable.

> Evidence is insufficient only "if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250 (1986). Conversely, if "reasonable minds could differ as to the import of the evidence," the evidence is sufficient. *Id*. at 250-51.

916 F.3d at 1187. The Ninth Circuit applied this reasonable factfinder standard in holding that the dispute about the reasonableness of Wadler's belief would have to be resolved at trial, not by the appellate court. "[A] jury permissibly could find that Wadler satisfied that minimal requirement [of a reasonable belief]." *Id*., at 1187-88; see *id*. at 1188 ("a reasonable jury could find that Wadler reasonably believed that Bio-Rad had falsified books and records"; "a reasonable jury ... could

find that a[n] [employee] in Wadler's position reasonably believed that Bio-Rad was falsifying books and records as part of its alleged....").

The ARB, which has primary administrative responsibility for enforcing § 1514A, agrees that objective reasonableness is ordinarily a question for the trier of fact. In *Sylvester v. Parexel Int'l LLC*, 2011 WL 2517148 (ARB May 25, 2011), an administrative law judge had granted a motion to dismiss a retaliation claim, having concluded without a hearing that the complainants could not have reasonably believed that company officials were engaging in fraud. The ARB reversed, holding that the issue should be resolved after a hearing, and citing Judge Michael's dissent in *Livingston*.

> Often the issue of "objective reasonableness" involves factual issues and cannot be decided in the absence of an adjudicatory hearing. *See*, *e.g., ... Livingston v. Wyeth Inc*., 520 F.3d 344, 361 (4th Cir. 2008) (Judge Michael, dissenting) ("The issue of objective reasonableness should be decided as a matter of law only when 'no reasonable person could have believed' that the facts amounted to a violation.... However, if reasonable minds could disagree about whether the employee's belief was objectively reasonable, the issue cannot be decided as a matter of law" [citations omitted]). We believe that such a mistake has been made in this case.... [The fraud] accusations may be objectively reasonable to employees with the same training and experience as [the

> Complainants]. Because a determination regarding the reasonableness of the Complainants' alleged protected activities requires an examination of facts, it was inappropriate for the ALJ to rule on that activity pursuant to the Motions to Dismiss.

2011 WL 2517148 at *12-*13.[6] The ARB decision in *Sylvester* was relied on by the Sixth Circuit in *Rhinehimer*, 787 F.3d at 811, and the Eighth Circuit in *Beacom*, 825 F.3d at 380.

This multi-faceted conflict, as in *Hana*, entails complex opportunities for undesirable manipulative forum shopping and gamesmanship. For many litigants, whether a pivotal issue will be decided by a judge or a trier of fact (especially by a jury) is a matter of compelling practical importance. Because § 1514A claims involve publicly held companies, many of them large firms, it will often be the case that venue will lie in a number of different circuits, either because "a substantial part of the events or omissions giving rise to the claim occurred" in several places (28 U.S.C. § 1391(b)(2)), or because the defendant corporation would be subject to personal jurisdiction with

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[6] See *Williams v. Dallas Ind. School Dist.*, 2012 WL 6930342 at *10 n.9 (ARB Dec. 28, 2012) (quoting Sylvester); *Prioleau v. Sikorsky Aircraft Corp.*, 2011 WL 6122422 at *6 (ARB Nov. 9, 2011) ("whether Prioleau's concerns credibly involved a reasonable belief of a SOX violation implicates factual questions about his understanding of the implications of the litigation hold conflict and the automatic retention policy. Therefore, questions of material fact exist about whether Prioleau engaged in protected activity").

regard to the claim in several districts. 28 U.S.C. § 1391(c)(3). Claimants who prefer to have objective reasonableness resolved by a jury will have a substantial incentive, and often an opportunity, to file suit in the Third, Sixth, Eighth, Ninth or Tenth Circuits. In this instance, Tesoro does business in all fifty states. The particular dispute in this case focused on the way Tesoro officials in Hawai'i were treating sales taxes; a substantial part of the events giving rise to Wallace's claim thus occurred in the Ninth Circuit.

On the other hand, a whistleblower who prefers that objective reasonableness be resolved by a trier of fact, and but whose claim could only be brought in district court in the Fourth or the Fifth Circuit, can (and may conclude he or she needs to) avoid the rule in those circuits (at least initially) by remaining in the administrative process after the end of the mandatory 180-day exhaustion period, so that his or her claim can be tried before an administrative law judge. Claimants whose suits could be brought in other circuits, particularly the Third, Sixth, Eighth, Ninth and Tenth Circuits, will retain without adverse consequence the option of filing suit as soon as the 180-day exhaustion period has expired, without awaiting final action by the agency. The consequence of the circuit split is thus that only some claimants are now in a position to utilize the opportunity, expressly and deliberately provided by Congress, for a more direct and immediate resolution of their cases in an Article III court.

In a case in which the administrative law judge does decide objective reasonableness, the party which

lost before the ARB, and which seeks review under the Administrative Procedure Act, can select the circuit which has the more favorable standard regarding who is to resolve a dispute about objective reasonableness. If an employer loses this issue before the administrative law judge and the ARB, it would if possible seek review in the Fourth or Fifth Circuit or, failing that, in a circuit which has not yet decided whether this issue is for the trier of fact.

A claimant, in some circumstances, could have it both ways. The claimant could remain in the administrative process, in hopes of a favorable decision by an administrative law judge after a hearing. But if the claimant loses at that level and before the ARB, he or she could then seek review in the Fourth or Fifth Circuits, which do not regard this determination as a factual matter, and in the court of appeals argue that the issue is a question of law to be decided by the court de novo.

II. The Rule In The Fourth and Fifth Circuits Is Clearly Incorrect

The majority rule is clearly correct; objective reasonableness is ordinarily a matter for the trier of fact.

This Court's decision in *Hana* is highly instructive.

> [W]e have long recognized across a variety of doctrinal context that, when the relevant question is how an ordinary person ... would make an assessment, the jury is generally the

> decisionmaker that ought to provide the fact-intensive answer. See, *e.g.*, *United States v. Gaudin*, 515 U.S. 506, 512 (1995) (recognizing that "'delicate assessments of the inferences a "reasonable [decisionmaker]" would draw ... [are] peculiarly one[s] for the trier of fact'") ... *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450 [(1976)] ("observing the jury has a unique competence in applying the 'reasonable man' standard").

135 S.Ct. at 911. The determination of objective reasonableness under § 1514A does not turn on whether an employer was in fact violating some relevant federal prohibition, a determination that could involve assessment of a voluminous record and resolution of complex disputes of law. The issue, rather, is what "impression" the facts known to the complainant would have had on a reasonable person. That is "not 'one of those things judges often do' better than jurors." 135 S.Ct. at 912 n.2.

Disputes about the objective reasonableness of a complainant's belief will not often create, or be controlled by, legal precedents. These are highly individual-specific fact-bound disputes, which turn on the particular information known to the whistleblower in question, and on his or her own background, experience and training. App. 6a. It is entirely possible that a belief that a particular activity was unlawful would be objectively reasonable when held by one whistleblower, but not when held by another whistleblower with different knowledge or under distinct circumstances.

Practical experience demonstrates that disputes about the objective reasonableness of a complaint under § 1514A often turn on subsidiary factual disputes which, under any other circumstances, would be made by a trier of fact. In this instance, for example, Wallace testified that Jackson, upon learning about the sales tax problem, told him that Tesoro's SEC statements were "wrong." Jackson was a CPA, and the official responsible for preparing those statements. If a jury were to credit Wallace's account, it would almost assuredly conclude that Wallace could reasonably have believed that a violation of SEC rules had occurred. The dispute regarding the wording of Tesoro's SEC statements is not about how they should be authoritatively construed, the sort of task that sometimes falls to a judge, but about what impression that language in question would have on a reasonable reader. That is the same type of issue as the dispute about tacking in *Hana*, which was about whether two somewhat related marks (in that case, "Hana Financial" and "Hana Bank") would create the same commercial impression on consumers. 135 S.Ct. at 910. Such questions are "comfortably within the ken of a jury." 135 S.Ct. at 911.

III. This Case Is An Excellent Vehicle for Resolving This Conflict

This case is an ideal vehicle for resolving the question presented. The circumstances here present precisely the type of situation in which reasonable minds could differ about whether the whistleblower's belief was objectively reasonable. The defendant has never

contended that a rational jury would have to find that Wallace's belief was objectively unreasonable; it has only argued that the judges below should make that decision, and should do so in its favor.

The evidence on which the court of appeals relied in finding Wallace's belief unreasonable could easily have led a jury to the opposite conclusion. The panel asserted that a "brief look" at a particular passage in Tesoro's SEC statements would have revealed that Tesoro had disclosed to the SEC and investors that its revenue figures included sales taxes. That key passage reads:

> [f]ederal and state motor fuel taxes *on sales* by our retail segment are included in both "Revenues" and "costs of operating expenses."

App. 8a. The emphasis was supplied by the court of appeals. But to turn this into a reference to sales taxes, rather than to motor fuel taxes related to sales, a reader would have to overlook the adjective "federal" (there are no federal sales taxes) and the adjectival phrase "state motor fuel" (there are no special sales taxes on motor fuels.), so that the passage reads " ... state ... taxes on sales...." On the other hand, a jury might easily conclude that a reasonable reader could construe this sentence the opposite way. A reader (and jury) might plausibly believe that "motor fuel" defined the type of tax being paid (there are both federal and state motor fuel taxes), and that "on sales by our retail segment" meant that the motor fuel taxes were treated as revenue if the fuel was sold to consumers by Tesoro's

own retail stores, but not if the fuel was being sold to consumers by some independent service station to which Tesoro had sold the fuel wholesale. (That apparently is what Tesoro was doing at the time).

The panel also asserted that

> Jackson ... testified that Tesoro's SEC disclosures include sales taxes, not just excise taxes. Wallace ... does not offer any conflicting evidence on that point....

App. 9a. This phrase sentence has a double meaning. Everyone agrees that the dollar figures in the SEC disclosures were calculated by adding sales taxes to ordinary revenue. In that sense the *revenue totals* that were disclosed "include[d] sales taxes," even if, at the time, no one at Tesoro headquarters knew that. The question at issue, however, is whether the *text* accompanying those financial figures "disclose[d] [the] inclu[sion] [of] sales taxes," so that it would have been obvious to any reasonable reader that the "revenue" figures had been bulked up that way. Jackson's testimony about that is of limited importance. Jackson, after all, was not an expert on the meaning of ordinary English. In her statement, Jackson merely asserted that she personally interpreted the SEC statements to indicate that the figures included sales taxes.[7] And

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[7] Doc. 129-3, pp. 69-70:

> Q. ... Do you know where sales taxes are accounted for in any of the disclaimers?
>
> A. I would consider that a state motor fuels tax.

there was, of course, "conflicting evidence on that point": the actual words of the SEC statements themselves. A jury could find that a reasonable person might, or indeed would, interpret the language of the SEC statements in a manner different than Jackson claimed that she did several years after the fact. While such a jury finding would be fully supported by the words of those SEC statements alone, it would be further supported if the jury credited Wallace's testimony that Jackson, on learning that the totals included sales taxes, described the SEC statements (which Jackson herself had written) as "wrong."

This case, in short, presents precisely the circumstances in which the outcome of the summary judgment motion turned on whether a jury, rather than a judge, was to determine whether Wallace's belief was objectively reasonable. Had this case arisen in the Third, Sixth, Eighth, Ninth or Tenth Circuits,

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Q. So you're saying that the state motor fuel taxes includes all sales taxes?

A. This description "Federal excise and state motor fuel taxes," to me, encompasses all taxes that are collected on behalf of a governmental agency, period.

Q. So you're saying federal excise and state motor fuel tax income includes sales taxes?

A. That's how I read that.... It says: "These taxes, primarily related to the sales of gasoline and diesel fuel." To me those are sales taxes.

Q. To you as a CPA or to you as just an average –

A. As a reader of these financials.

summary judgment on this issue would assuredly have been denied.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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