

# The Objective Reasonableness of Employee Reporting: An Analysis of the Circuit Split Regarding the Whistleblower Provision of the Sarbanes-Oxley Act

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## ABSTRACT

Congress added the whistleblower provision of the Sarbanes-Oxley (“SOX”) Act in the wake of the Enron scandal to promote employee reporting of employers’ potentially fraudulent conduct. Five circuit courts disagree on how to interpret this provision. The provision employs a reasonable person standard, focusing on the objective and subjective elements of the standard. While the five courts agree on how the subjective element should be applied, they disagree on how to apply the objective element.

Until the Eleventh Circuit Court addressed *Ronnie v. Office Dept., LLC* in 2023, the circuit split was an even 2–2. In *Ronnie*, the Eleventh Circuit joined the Second and Fourth Circuits. Together, these three circuit courts agree that the objective element of the reasonable person standard should be evaluated using the “totality of the circumstances” test. This test requires employees to make a minimum showing of evidence that supports their report.

In contrast, the Third and Sixth Circuits do not think applying the totality of the circumstances test is necessary. These circuits hold that placing a higher burden on reporting employees will reduce reports and attempt to protect employee reports that are reasonable but mistaken. Employees need to have a clear understanding of what is required of them before they report potentially fraudulent activity. Without this understanding, the SOX Act may not protect employees as whistleblowers after reporting.

This Comment argues that the Third and Sixth Circuits are correct and that the legislative history of the SOX Act supports their reasoning.

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This Comment also highlights issues with the totality of the circumstances test and why it should not be used in these cases. Finally, this Comment offers two proposals to amend the whistleblower provision of the SOX Act that will allow Congress to strike a balance between the two sides.

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## I. INTRODUCTION

Imagine you are an employee of Target, and you have been working at the company for three years. Within the past two months, you have begun to hear rumors that one of the managers is creating fake reviews on the company's website and removing bad reviews to make the store's rating better. You also saw the same manager looking over reviews on one of the company computers and thought you saw her deleting one-star reviews and comments.<sup>1</sup> Feeling as though this activity is not right, you report what you heard and saw to your manager, and she tells you that she will look into the issue.<sup>2</sup>

Two weeks later, you are called into your manager's office and terminated, supposedly due to company "job cuts."<sup>3</sup> You have always done a great job at work and management has always praised your performance. You cannot help but wonder if your decision to report the suspicious conduct you saw was the reason you got terminated.<sup>4</sup> You begin doing some research on the Internet, and you find something called the Sarbanes-Oxley Act ("SOX Act" or the "Act"). This Act apparently contains a provision that protects employees from retaliation who report potentially fraudulent activity as "whistleblowers."<sup>5</sup> You are almost sure that suppressing consumer reviews and creating fake reviews is fraud and that reporting this activity would therefore protect you under the SOX Act.<sup>6</sup>

However, you are unsure how to move forward. There is a lot of conflicting information online about when reporting employees are protected and how much information a reporting employee must provide to obtain that protection. Was the information you provided enough, or should you have waited to get more concrete evidence? How would you

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1. *See* *Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 216–17 (2d Cir. 2014). This fact pattern is similar to the circumstances seen in *Nielsen*. *See id.* In that case, the Plaintiff learned of an employee's failure to review safety standards, in violation of the employee's duties. *See id.*

2. *See id.* at 217. In *Nielsen*, the Plaintiff "brought his concern[s] . . . to several managers." *Id.*

3. *See id.* In *Nielsen*, the Plaintiff was terminated within a few weeks after reporting his concerns. *See id.*

4. *See id.* In *Nielsen*, the Plaintiff's complaint alleged that his termination was "part of a 'continuing effort to coverup [] the false approval of safety [] [standards].'" *Id.*

5. *See* 18 U.S.C. § 1514A(a)(1); *Whistleblower Definition and Meaning*, MERRIAM-WEBSTER DICTIONARY, <https://perma.cc/5HWX-3ZPY> (last visited Feb. 23, 2026, at 18:25 ET) (defining "whistleblower" as "one who reveals something covert or who informs against another *especially* an employee who brings wrongdoing by an employer or by other employees to the attention of a government or law enforcement agency").

6. *See id.*; 16 C.F.R. pt. 465 (2024).

have even found that evidence? This dilemma reflects a real case that was heard before the Second Circuit Court of Appeals.<sup>7</sup>

Currently, there is a 3–2 circuit split on whether employees who report their employers’ potentially fraudulent activity are required to present sufficient evidence that a reasonable person in the same situation would have viewed the company’s actions as misconduct.<sup>8</sup> The SOX Act employs a reasonable person standard with both subjective and objective elements, which is followed by every circuit.<sup>9</sup> However, the current disagreement between circuits is whether there should be a stricter burden placed on reporting employees when attempting to prove the objective element of the reasonable person standard.<sup>10</sup> On one side, the Second, Fourth, and Eleventh Circuits established a stricter standard for reporting employees.<sup>11</sup> This standard employs a “totality of the circumstances” test when determining whether employees have sufficient evidence to form an objectively reasonable belief that their employer engaged in fraudulent activity.<sup>12</sup> In contrast, the Third and Sixth Circuits reject this approach, allowing reporting employees who have a reasonable but mistaken belief to be protected under the SOX Act.<sup>13</sup>

While applying the totality of the circumstances test appears to strike the appropriate balance between employer and employee protection, the vagueness of this test is problematic.<sup>14</sup> Additionally, because Congress enacted the whistleblower provision of the SOX Act to protect employee reporting, employee protection is the most important consideration here.<sup>15</sup> Without this added protection, employees must decide whether they

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7. See *Nielsen*, 762 F.3d at 214.

8. See Ufonobong Umanah, *Ex-Office Depot Analyst Failed to Make Sarbanes-Oxley Claim*, BL (Sep. 27, 2023, at 13:06 ET), <https://perma.cc/HR3B-AE6A>.

9. See 18 U.S.C. § 1514A(a)(1).

10. Compare *Nielsen*, 762 F.3d at 214 (2d Cir. 2014) (using the totality of the circumstances test to determine whether the employee had an objectively reasonable belief), with *Wiest v. Lynch*, 710 F.3d 121, 121 (3d Cir. 2013) (refusing to employ the totality of the circumstances test to determine whether the employee had an objectively reasonable belief).

11. See *Nielsen*, 762 F.3d at 224; *Northrop Grumman Sys. Corp. v. U.S. Dep’t of Labor*, 927 F.3d 226, 235 (4th Cir. 2019); *Ronnie v. Off. Depot, LLC*, 81 F.4th 1345, 1352 (11th Cir. 2023).

12. *Ronnie*, 81 F.4th at 1351.

13. See *Wiest*, 710 F.3d at 137 (3d Cir. 2013); *Rhinehimer v. U.S. Bancorp Invs., Inc.*, 787 F.3d 797, 812 (6th Cir. 2015).

14. See Margaret L. Begalle, *Eliminating the Totality of the Circumstances Test for the Public Use Bar Under Section 102(B) of the Patent Act*, 77 CHI.-KENT L. REV. 1359, 1370 (2002); see also Michele M. Glessner, *One Size Does Not Fit All: Keeping the “Totality of the Circumstances” Test for Public Use Cases After Pfaff and SmithKline*, 81 NOTRE DAME L. REV. 387, 399 (2005).

15. See S. REP. NO. 107-146, at 5 (2002); 148 CONG. REC. S7418 (daily ed. July 26, 2002) (statement of Sen. Patrick Leahy).

should report potentially fraudulent conduct and risk their jobs or stay silent.<sup>16</sup>

This Comment discusses the whistleblower provision of the SOX Act and how the provision should be interpreted. This discussion analyzes the 3–2 circuit split. Part II of this Comment focuses on the historical underpinnings of the whistleblower provision and why it was enacted.<sup>17</sup> Additionally, Part II describes the reasonable person standard and the totality of the circumstances test.<sup>18</sup> Lastly, Part II explores the current circuit split, discussing the arguments that each court has made.<sup>19</sup>

Part III will highlight the benefits and drawbacks of each court’s reasoning.<sup>20</sup> Part III argues that employing a totality of the circumstances test when evaluating an employee report is inequitable and unfair, noting the key issues with this test.<sup>21</sup> Finally, Part III proposes solutions to the circuit split, focusing on how the text of the whistleblower provision of the SOX Act can be adjusted to account for both sides.<sup>22</sup>

## II. BACKGROUND

In 2002, Congress enacted the SOX Act.<sup>23</sup> Congress enacted § 1514A(a)(1) to prevent fraudulent activity.<sup>24</sup> This section of the statute, also known as the “whistleblower provision,” requires a reporting employee of a publicly-traded company to “reasonably believe” that the company violated one of the enumerated provisions in the SOX Act.<sup>25</sup> This “reasonableness test” provided under subsection (a)(1) imposes a reasonable person standard with both subjective and objective elements.<sup>26</sup>

Currently, a circuit split exists regarding § 1514A(a)(1).<sup>27</sup> Pursuant to the Second, Fourth, and Eleventh Circuits, an employee must present information that, under the totality of the circumstances, shows an objectively reasonable belief that a company violated the SOX Act.<sup>28</sup> Only then will the employee be protected as a whistleblower under

16. See S. REP. NO. 107-146, at 3, 5.

17. See *infra* Section II.A.

18. See *infra* Section II.B–C.

19. See *infra* Section II.D.

20. See *infra* Section III.A–B.

21. See *infra* Section III.C.1–2.

22. See *infra* Section III.C.3.

23. See 148 CONG. REC. S7418 (daily ed. July 26, 2002) (statement of Sen. Patrick Leahy).

24. See 18 U.S.C. § 1514A(a)(1); 148 CONG. REC. S7418 (daily ed. July 26, 2002) (statement of Sen. Patrick Leahy).

25. 18 U.S.C. § 1514A(a)(1).

26. See *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 352 (4th Cir. 2008).

27. See *Ronnie v. Off. Depot, LLC*, 81 F.4th 1345, 1351 (11th Cir. 2023).

28. See *Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 224 (2d Cir. 2014); *Northrop Grumman Sys. Corp. v. U.S. Dep’t of Labor*, 927 F.3d 226, 235 (4th Cir. 2019); *Ronnie*, 81 F.4th at 1352.

§ 1514A(a)(1).<sup>29</sup> Although the Third and Sixth Circuits follow the reasonable person standard, these courts determined that using the totality of the circumstances test to show an objectively reasonable belief is not required.<sup>30</sup> The Supreme Court has not decided this issue, resulting in the continuance of the circuit split for over a decade.<sup>31</sup>

Section II.A provides a history of the Enron scandal and how that event led to the enactment of the SOX Act in 2002.<sup>32</sup> This section also gives a description of § 1514A(a)(1) and its purpose, as well as a brief description of other parts of the SOX Act. Sections II.B and II.C offer insight into the totality of the circumstances test and the reasonable person standard by analyzing how courts have applied them in other areas of law.<sup>33</sup> Finally, Section II.D discusses the 3–2 circuit split and the rationales of each court.<sup>34</sup>

#### A. *Enactment of the SOX Act in 2002*

As a result of the Enron scandal, Congress enacted Title VIII of the SOX Act of 2002.<sup>35</sup> Enron “used thousands of off-the-book entities” and reported unrealized gains to give the appearance of higher corporate profits, higher stock prices, and lower debt.<sup>36</sup> Enron used these tactics to deceive shareholders and the public and to falsely indicate that the company was in good financial standing.<sup>37</sup> In reality, Enron was less profitable than it claimed.<sup>38</sup>

Upper-level managers advised employees who attempted to reveal illegal activity against reporting.<sup>39</sup> Further, Enron’s downfall diminished the value of pension, stock, and retirement funds.<sup>40</sup> Employees’ silence in the Enron case adversely effected investors and the stock market.<sup>41</sup> As a result, Congress added the whistleblower provision to the Corporate and

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29. See *Nielsen*, 762 F.3d at 224; *Northrop Grumman*, 927 F.3d at 235; *Ronnie*, 81 F.4th at 1352.

30. See *Wiest v. Lynch*, 710 F.3d 121, 137 (3d Cir. 2013); *Rhinehimer v. U.S. Bancorp Invs., Inc.*, 787 F.3d 797, 812 (6th Cir. 2015).

31. See *Ronnie*, 81 F.4th at 1351.

32. See *infra* Section II.A.

33. See *infra* Sections II.B–C.

34. See *infra* Section II.D.

35. See S. REP. NO. 107-146, at 2 (2002).

36. *Id.*

37. See *id.* at 3.

38. See *id.*

39. See *id.*

40. See *id.* at 3, 5; 149 CONG. REC. S1725 (daily ed. Jan. 29, 2003) (statement of Sen. Patrick Leahy).

41. See S. REP. NO. 107-146, at 5.

Criminal Fraud Accountability Act to stop this “corporate code of silence.”<sup>42</sup> This provision is discussed in more detail below.<sup>43</sup>

### 1. Whistleblower Provision: Protection for Employees of Publicly-Traded Companies

The whistleblower provision of the SOX Act describes protected activity as a:

Lawful act of an employee . . . 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.<sup>44</sup>

This provision provides protection to employees of publicly-traded companies who “blow the whistle” in relation to any of the six categories of violations within the provision.<sup>45</sup> These six categories are: violation of (1) § 1341, which relates to mail fraud;<sup>46</sup> (2) § 1343, which relates to wire, radio, or television fraud;<sup>47</sup> (3) § 1344, which relates to bank fraud;<sup>48</sup> (4) § 1348, which relates to securities and commodities fraud;<sup>49</sup> (5) any SEC rules or regulations; and (6) any fraud against shareholders codified in federal law.<sup>50</sup> The whistleblower provision encourages reporting because many Americans invest in publicly-traded companies and trust companies to be transparent about their financial status.<sup>51</sup> Further, this provision protects employee actions that are reasonable and protect the public.<sup>52</sup>

An important consideration among these “larger public protections” is how halting fraudulent activity will positively impact the country’s financial markets.<sup>53</sup> If an employer illegally retaliates against an employee for reporting, this provision provides that the employee may file an administrative complaint with the Department of Labor.<sup>54</sup> The “reasonably

42. *Id.*

43. *See infra* Section II.A.1.

44. 18 U.S.C. § 1514A(a)(1).

45. *See id.*

46. *See* 18 U.S.C. § 1341.

47. *See* 18 U.S.C. § 1343.

48. *See* 18 U.S.C. § 1344.

49. *See* 18 U.S.C. § 1348.

50. *See* 18 U.S.C. § 1514A(a)(1).

51. *See* 148 CONG. REC. S7418 (daily ed. July 26, 2002) (statement of Sen. Patrick Leahy).

52. *See* 149 CONG. REC. S1725 (daily ed. Jan. 29, 2003) (statement of Sen. Patrick Leahy).

53. 148 CONG. REC. S7418 (daily ed. July 26, 2002) (statement of Sen. Patrick Leahy).

54. *See id.*

believes” language referenced in the statute requires that a reporting employee have a reasonable belief—both objective and subjective—that fraud occurred to be protected under the SOX Act from retaliation.<sup>55</sup> This standard, as applied to the whistleblower provision of the SOX Act, is discussed below.<sup>56</sup>

## 2. Other Relevant Provisions of the SOX Act

In addition to the whistleblower provision of the SOX Act, there are four other subsections within the Act worth noting.<sup>57</sup> Subsection (b) discusses both how a whistleblower who is wrongly terminated can bring an action for wrongful termination and what the procedure is for these actions.<sup>58</sup> Subsection (c) details what the general and monetary remedies for a prevailing whistleblower are in a wrongful termination action.<sup>59</sup> Subsection (d) asserts that any employees who bring wrongful termination actions under the SOX Act retain all of their “rights, privileges, [and] remedies,”<sup>60</sup> and subsection (e) states that any rights or remedies provided to a whistleblower under the Act cannot be waived, including within “predispute arbitration agreements.”<sup>61</sup> Subsection (e) will be discussed in more context below.<sup>62</sup>

### *B. The Reasonable Person Standard*

Under the whistleblower provision of the SOX Act, the reasonableness test analyzes what a normal person would do in the relevant context of each case.<sup>63</sup> The reasonableness standard is used in many legal fields.<sup>64</sup> Under the whistleblower provision, a “reasonable belief” is one that is “intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise, absent specific evidence.”<sup>65</sup> To provide a better understanding

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55. 18 U.S.C. § 1514A(a)(1).

56. *See infra* Section II.B.

57. *See* 18 U.S.C. § 1514A(b)–(e).

58. *See* 18 U.S.C. § 1514A(b).

59. *See* 18 U.S.C. § 1514A(c).

60. 18 U.S.C. § 1514A(d).

61. 18 U.S.C. § 1514A(e).

62. *See infra* Section II.D.1.b.

63. *See* 148 CONG. REC. S7418 (daily ed. July 26, 2002) (statement of Sen. Patrick Leahy); *see also* *Sylvester v. Parexel Int’l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, 2007-SOX-042, at 31 (ARB May 25, 2011).

64. *See* 148 CONG. REC. S7418 (daily ed. July 26, 2002) (statement of Sen. Patrick Leahy). The reasonableness test is used in torts to define reasonable care in determining whether the tortfeasor owes a duty of care to the victim and is also used in criminal law when determining criminal negligence. *See id.*

65. *Id.*; *see also* *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 1001 (9th Cir. 2009) (stating that the Van Asdales’ needed to show that they “reasonably believed” that there might have been fraud).

of the reasonableness standard, it is helpful to highlight two areas of law that use this standard: (1) torts and (2) criminal law.

### 1. Torts: The Case of *Bethel v. New York City Transit Authority*

In *Bethel v. New York City Transit Authority*, presented before the New York Court of Appeals, the court determined whether the New York City Transit Authority and similar common carriers owe a higher duty of care to the public.<sup>66</sup> The Plaintiff attempted to sit in the “wheelchair accessible seat” on a New York City Transit Authority bus when the seat collapsed on him, causing the Plaintiff to fall and injure his back.<sup>67</sup>

The New York Court of Appeals provided a brief discussion of the traditional standard in negligence cases, which is the “objective, reasonable person standard.”<sup>68</sup> In defining this standard, the court stated that courts “necessarily take[] into account the circumstances with which the actor was actually confronted when the accident occurred, including the reasonably perceivable risk and gravity of harm to others and any special relationship of dependency between the victim and the actor.”<sup>69</sup> The court determined that common carriers owe no duty of extraordinary care and are held to the same duty of care as regular individuals.<sup>70</sup> This standard is a broad and flexible standard of “reasonable care under all of the circumstances of the particular case.”<sup>71</sup>

### 2. Criminal Law: Section 2.02 of the Model Penal Code

Section 2.02 of the Model Penal Code outlines the general requirements of culpability, including whether a person acted purposely, knowingly, recklessly, or negligently.<sup>72</sup> Section 2.02(2)(d) states that an actor’s failure to perceive a risk from their actions must “involve[] a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation” for an actor’s action to be considered negligent.<sup>73</sup> While the Model Penal Code does not define the term “reasonable” or who a “reasonable person” is, the Code indicates that criminal and civil

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66. See *Bethel v. N.Y.C. Transit Auth.*, 703 N.E.2d 1214, 1215 (N.Y. 1998).

67. *Id.*

68. *Id.* at 1216.

69. *Id.*

70. See *id.*

71. *Id.* at 1217–18.

72. See MODEL PENAL CODE § 2.02. The Model Penal Code must be adopted by a state, in whole or in part, for it to be binding on that jurisdiction. See *Model Penal Code (MPC) – Criminal Law Basics*, UPCOUNSEL (Oct. 21, 2024), <https://perma.cc/RZF5-B829>. “As of 2007, thirty-seven states have adopted modified and partial versions of the Model Penal Code and several, including New York, New Jersey and Oregon, have enacted nearly all of its provisions.” *Id.*

73. MODEL PENAL CODE § 2.02(2)(d).

negligence reference the same broad and flexible “reasonable person standard.”<sup>74</sup>

Understanding the reasonable person standard is necessary to appreciate the implications of the circuit split discussed in this Comment.<sup>75</sup> Understanding the totality of the circumstances test is just as crucial.<sup>76</sup> The following section discusses this test in more detail.<sup>77</sup>

### C. *The Totality of the Circumstances Test*

The circuit split discussed throughout this Comment focuses on whether a totality of the circumstances test should apply.<sup>78</sup> This test requires a whistleblower to present sufficient evidence that a reasonable person in the same situation would view the company’s actions as misconduct in violation of the SOX Act.<sup>79</sup> Because the circuit split discussed throughout this Comment hinges on whether use of the totality of the circumstances test is necessary, insight into when, how, and why courts define and apply this test is extremely relevant.<sup>80</sup> This section highlights three areas of law that use the totality of the circumstances test: (1) criminal procedure, (2) contracts, and (3) torts.

#### 1. Criminal Procedure: The Case of *Illinois v. Gates*

In *Illinois v. Gates*, the Supreme Court answered whether there was probable cause to obtain a search warrant.<sup>81</sup> In *Gates*, the Bloomington Police Department received an anonymous letter informing the department that Sue and Lance Gates were selling drugs.<sup>82</sup> The letter provided a detailed description of the couples’ plan to pick up drugs from Florida.<sup>83</sup> The department followed up on the tip, confirming a number of details in the letter.<sup>84</sup> The department submitted an affidavit, along with the anonymous letter, to a judge of the Circuit Court of DuPage County.<sup>85</sup> The

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74. *Id.*; *Bethel*, 703 N.E.2d at 1217–18.

75. *See infra* Section II.D.

76. *See infra* Section II.C.

77. *See infra* Section II.C.

78. *Compare* *Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 214 (2d Cir. 2014) (employing the totality of the circumstances test to determine whether the employee had an objectively reasonable belief), *with* *Wiest v. Lynch*, 710 F.3d 121, 121 (3d Cir. 2013) (refusing to employ the totality of the circumstances test to determine whether the employee had an objectively reasonable belief).

79. *See* *Northrop Grumman Sys. Corp. v. U.S. Dep’t of Labor*, 927 F.3d 226, 235 (4th Cir. 2019).

80. *See infra* Section II.D.1.

81. *See* *Illinois v. Gates*, 462 U.S. 213, 225 (1983).

82. *See id.*

83. *See id.*

84. *See id.* at 226.

85. *See id.*

judge issued a search warrant for the Gateses' home and vehicle.<sup>86</sup> The police searched the trunk of the Gateses' vehicle and home and found weapons, marijuana, and other illegal goods.<sup>87</sup>

The Supreme Court agreed with the Illinois Supreme Court that the anonymous letter, by itself, did not meet the threshold of probable cause for the issuance of a warrant to search the Gateses' vehicle and home.<sup>88</sup> However, the Supreme Court emphasized that instead of evaluating an informant based on "independent requirements," a "totality-of-the-circumstances approach" should be applied when determining probable cause.<sup>89</sup> The Court stated that a totality of the circumstances approach allowed for a complete analysis and balancing of both reliable and unreliable factors related to an informant's tip.<sup>90</sup> However, the Court acknowledged that the totality of the circumstances test replaced the "more precise" rules from two previous cases regarding determinations of probable cause.<sup>91</sup>

## 2. Contracts: The Case of *Hanks v. Powder Ridge Rest. Corp.*

In *Hanks v. Powder Ridge Restaurant Corporation*, the Illinois Supreme Court addressed whether a signed waiver should be upheld against a public citizen to release a company from negligence liability.<sup>92</sup> Powder Ridge Restaurant Corporation ("Powder Ridge") maintained a facility where the public could ski, snowboard, and snow tube.<sup>93</sup> Specifically, members of the public who met certain age and height requirements could enjoy the company's snow tubing facility.<sup>94</sup> Powder Ridge required individuals to sign a waiver that released the corporation of liability before snow tubing.<sup>95</sup> The Plaintiff read and signed the agreement.<sup>96</sup> Then the Plaintiff injured his right foot while engaged in the activity.<sup>97</sup>

The Illinois Supreme Court concluded that the signed waiver was definite and specific enough to keep Powder Ridge from being held liable

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86. *See id.*

87. *See id.* at 227.

88. *See id.*

89. *Id.* at 230.

90. *See id.* at 234.

91. *Gates*, 462 U.S. at 252 (White, J., concurring) (implying the totality of the circumstances test is less precise than the test employed for probable cause from previous cases). *See Aguilar v. Texas*, 378 U.S. 108, 108 (1964); *Spinelli v. United States*, 393 U.S. 410, 410 (1969).

92. *See Hanks v. Powder Ridge Rest. Corp.*, 885 A.2d 734, 743 (Conn. 2005).

93. *See id.* at 736.

94. *See id.*

95. *See id.*

96. *See id.*

97. *See id.*

for negligence.<sup>98</sup> However, the court noted that the waiver violated public policy.<sup>99</sup> Therefore, the court held the liability waiver unenforceable by applying the standard that “the public interest must be [determined by] considering the totality of the circumstances . . . against . . . current societal expectations.”<sup>100</sup> Under the totality of the circumstances standard, the court found the “unrestricted access of the public to Power Ridge, . . . the societal expectation that family-oriented recreational activities will be reasonably safe,” and the uneven bargaining power between the parties was sufficient in rendering the waiver invalid as a violation of public policy.<sup>101</sup>

### 3. Torts: The Case of *Posecai v. Wal-Mart Stores*

In *Posecai v. Wal-Mart Stores*, the Supreme Court of Louisiana determined whether it is a store’s duty to protect an individual from a burglar in the store’s parking lot.<sup>102</sup> In *Posecai*, the Plaintiff purchased goods from Sam’s Club and walked to the parking lot with her purchases.<sup>103</sup> As the Plaintiff loaded her vehicle, someone robbed her at gunpoint.<sup>104</sup> The robber forced the Plaintiff to give up her jewelry and purse before being released.<sup>105</sup> The Plaintiff ran to the store and sought help from police officers.<sup>106</sup> However, the police never recovered the Plaintiff’s jewelry and purse and never found the robber.<sup>107</sup> The Plaintiff subsequently sued Sam’s Club, arguing Sam’s Club had a duty to protect the Plaintiff from the robber.<sup>108</sup>

The court determined that business owners have a duty to implement reasonable measures to protect patrons from foreseeable criminal acts.<sup>109</sup> With respect to foreseeability, the court considered four basic approaches, one of which was the totality of the circumstances approach.<sup>110</sup> However, the court declined to use the totality of the circumstances test, stating that it “has been criticized as being too broad a standard” and employed a balancing test instead.<sup>111</sup>

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98. *See id.* at 741.

99. *See id.* at 743.

100. *Id.* at 744.

101. *Id.* at 743–46.

102. *See Posecai v. Wal-Mart Stores*, 752 So. 2d 762, 765 (La. 1999).

103. *See id.* at 764.

104. *See id.*

105. *See id.*

106. *See id.*

107. *See id.*

108. *See id.* at 765.

109. *See id.* at 766.

110. *See id.* at 767.

111. *Id.* (citing *McClung v. Delta Square Ltd. P’ship*, 937 S.W.2d 891, 900 (Tenn. 1996)).

#### D. Description of the Circuit Split

The 3–2 circuit split discussed throughout this Comment focuses on the whistleblower provision of the SOX Act and how courts evaluate this provision when determining whether certain employee conduct is protected under the Act. This section is important for the reader to understand for two reasons: (1) it provides an in-depth description of how each of the circuit courts involved in the split analyze the issue and (2) it provides the reader with a proficient understanding of each circuit’s perspective before analyzing their arguments in the next Part of this Comment.<sup>112</sup> This section is broken into two subsections, with the arguments of the Second, Fourth, and Eleventh Circuits presented first and the arguments of the Third and Sixth Circuits presented second.

##### 1. Arguments of the Second, Fourth, and Eleventh Circuits

In 2014, a circuit split arose between the Second and Third Circuits regarding whether the totality of the circumstances test should be applied when analyzing the objective component of the reasonable belief requirement under the whistleblower provision of the SOX Act.<sup>113</sup> The Second Circuit created this split, deciding to impose the totality of the circumstances test, in contrast to the Third Circuit’s decision not to impose this test.<sup>114</sup> The Fourth Circuit sided with the Second Circuit on this issue in 2014.<sup>115</sup> Most recently, the Eleventh Circuit sided with the Second and Fourth Circuits in 2023, creating an uneven split and leaving the question open of whether employee reporting under the whistleblower provision should be subjected to the more stringent totality of the circumstances test.<sup>116</sup>

##### a. The Second Circuit: *Nielsen v. AECOM Tech. Corp.*

In 2014, the Second Circuit Court of Appeals addressed the question of whether an employee fired for reporting a failure to review fire safety standards was protected under § 1514A(a)(1) of the SOX Act.<sup>117</sup> *Nielsen*

112. See *infra* Part III.

113. Compare *Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 216–17 (2d Cir. 2014) (refusing to allow an employee to be protected under the SOX Act if the employee could not prove an objectively reasonable belief, in looking at all of the circumstances, that the employee’s company was engaged in fraudulent activity), with *Wiest v. Lynch*, 710 F.3d 121, 137 (3d Cir. 2013) (allowing for an employee to be protected under § 1514A(a)(1) of the SOX Act even though the elements of the alleged crime listed within the Act were not satisfied).

114. See *Nielsen*, 762 F.3d at 216–17.

115. See *Northrop Grumman Sys. Corp. v. U.S. Dep’t of Labor*, 927 F.3d 226, 235 (4th Cir. 2019).

116. See *Ronnie v. Off. Depot, LLC*, 81 F.4th 1345, 1352 (11th Cir. 2023).

117. See *Nielsen*, 762 F.3d at 220.

was a Fire Engineering Manager at AECOM.<sup>118</sup> Nielsen's job required him to ensure that employees' engineering plans complied with "applicable fire safety standards."<sup>119</sup> An employee under Nielsen did not review a set of fire safety designs, but the employee allowed the designs to be approved anyway.<sup>120</sup> Although Nielsen reported this to managers in his office on two separate occasions, the company did nothing about the issue.<sup>121</sup>

Nielsen was fired shortly after his second complaint, and AECOM's global compliance team conducted an investigation around the firing.<sup>122</sup> The global compliance team concluded that the termination was proper.<sup>123</sup> Nielsen filed a complaint in the Southern District of New York, claiming he was fired as an attempt to cover up "the false approval of fire safety designs."<sup>124</sup> The district court dismissed the claim, concluding that Nielsen's actions were not protected under the whistleblower provision of the SOX Act.<sup>125</sup>

Nielsen appealed to the Second Circuit Court, which stated that the whistleblower provision of the SOX Act "is intended to 'protect[] employees when they take lawful acts to disclose information or otherwise assist in detecting and stopping actions which they reasonably believe to be fraudulent.'"<sup>126</sup> The court determined that a whistleblower need not demonstrate "definitively and specifically" that the employer engaged in fraudulent activity to be protected under § 1514A(a)(1).<sup>127</sup> However, the court stated that whistleblowers are required to prove their reasonable belief was subjective.<sup>128</sup> The whistleblower would then be required to prove objective reasonableness—that "a reasonable person in [the employee's] position would have believed that the conduct constituted a violation."<sup>129</sup>

The court concluded that Nielsen failed to satisfy the objective component of the reasonable belief standard.<sup>130</sup> The court looked at the totality of the circumstances surrounding the report, stating that it was unreasonable for Nielsen to believe that inadequate review of the fire

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118. *Id.* at 216.

119. *Id.* at 216–17.

120. *See id.*

121. *See id.*

122. *See id.*

123. *See id.*

124. *Id.* at 217–18.

125. *See id.*

126. *Id.* (quoting *Bechtel v. Admin. Review Bd.*, 710 F.3d 443, 446 (2d Cir. 2013)).

127. *Nielsen*, 762 F.3d at 220; *see also* *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, 2007-SOX-042, 2011 WL 216854, at \*14–15 (Dep't of Lab. May 25, 2011).

128. *See Nielsen*, 762 F.3d at 221 (defining a subjective reasonable belief as an employee's own belief that their company's conduct violated the SOX Act).

129. *Id.* (quoting *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 352 (4th Cir. 2008)).

130. *See id.* at 222.

safety designs was an indication of shareholder fraud.<sup>131</sup> Factors that the court considered in its analysis were (1) no law requires fire safety review, (2) the subpar review of the fire safety designs did not “pose[] any specified safety hazard,” and (3) the designs were never sent outside of AECOM for approval.<sup>132</sup>

The court emphasized that there was little connection between Nielsen’s report and potential shareholder fraud.<sup>133</sup> The court contrasted the facts in this case with those in *Wiest v. Lynch*.<sup>134</sup> In *Wiest*, an employee was fired for challenging accounting misconduct after the company was involved in a fraud scandal.<sup>135</sup> The Third Circuit Court in *Wiest* held that the reporting employee had both a subjectively and objectively reasonable belief of fraud relating to two of the three company expenses he rejected.<sup>136</sup> However, the *Nielsen* court emphasized that, in contrast to the employee’s reporting in *Wiest*, Nielsen’s report did not closely relate to any of the six categories within § 1514A(a)(1).<sup>137</sup> Therefore, the court concluded that Nielsen was not protected by the whistleblower provision of the SOX Act because there was no objectively reasonable belief that AECOM’s actions violated the SOX Act.<sup>138</sup>

b. The Fourth Circuit: *Northrop Grumman Sys. Corp. v. U.S. Dep’t of Labor*

About five years after the Second Circuit announced its decision in *Nielsen*, the Fourth Circuit Court of Appeals made its decision on a similar question.<sup>139</sup> The parties asked the Fourth Circuit to determine whether a reporting employee’s complaints about an employer’s arbitration policy should be protected under the whistleblower provision of the SOX Act.<sup>140</sup> Crisell Seguin, an employee of Northrop Grumman Systems Corporation (“Northrop”), filed a defamation suit against Northrop, alleging that false statements were purposely made about her.<sup>141</sup> Northrop maintained an arbitration policy, attempting to compel arbitration of Seguin’s lawsuit.<sup>142</sup> Although the court granted Northrop’s motion to compel arbitration,

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131. *See id.*

132. *Id.*

133. *See id.*

134. *See id.* at 223.

135. *See id.*; *Wiest v. Lynch*, 710 F.3d 121, 124–25, 135–37 (3d Cir. 2013).

136. *See Wiest*, 710 F.3d at 135–37.

137. *See id.* at 125; *Nielsen*, 762 F.3d at 223–24.

138. *See Nielsen*, 762 F.3d at 223–24.

139. *See Northrop Grumman Sys. Corp. v. U.S. Dep’t of Labor*, 927 F.3d 226, 226 (4th Cir. 2019).

140. *See id.*

141. *See id.* at 230. Seguin alleged in her complaint that false statements were purposely made about her in a performance review. *See id.*

142. *See id.*

Seguin argued that the arbitration policy was nonbinding because she never consented to the policy.<sup>143</sup>

Additionally, Seguin objected to certain policies and procedures, including an annual ethics training that required a conflict of interest disclosure and a training module that “forged corporate records and tricked employees.”<sup>144</sup> Seguin stated that the ethics training and conflict of interest requirements “surreptitiously attempted to bind employees to Northrop’s arbitration policy.”<sup>145</sup> Seguin sent multiple emails to Northrop executives in January and February 2011 addressing her frustration with the new policies.<sup>146</sup>

In May 2011, Northrop terminated Seguin as a result of a workforce reduction.<sup>147</sup> In response to the termination, Seguin filed a complaint with the Occupational Safety and Health Administration (“OSHA”), alleging that her termination violated the SOX Act.<sup>148</sup> The complaint was dismissed, and Seguin appealed to a Department of Labor Administrative Law Judge (“ALJ”), who decided in favor of Seguin.<sup>149</sup> The ALJ found Seguin’s emails constituted protected activity under the whistleblower provision of the SOX Act, and Seguin had an objectively reasonable belief that Northrop was engaged in fraudulent activity.<sup>150</sup>

The Department of Labor Administrative Review Board (“The Review Board”) affirmed the ALJ’s decision.<sup>151</sup> The Review Board stated that Seguin’s actions were protected because Northrop’s arbitration policy violated § 1514A(e) of the SOX Act’s whistleblower provision.<sup>152</sup> Northrop then filed a petition for review of the decision to the Fourth Circuit.<sup>153</sup>

The Fourth Circuit held that violations of § 1514A(e) do not fall under the sixth category of § 1514A(a)(1), indicating that Seguin’s actions were not protected under the whistleblower provision.<sup>154</sup> Similar to *Nielsen*, the court emphasized that the protection of the SOX Act’s whistleblower provision only extends to individuals who satisfy the objective and subjective reasonableness requirements.<sup>155</sup> The court argued that Seguin’s belief regarding Northrop’s arbitration policy was not

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143. *See id.*

144. *Id.*

145. *Id.*

146. *See id.*

147. *See id.* at 231.

148. *See id.* at 230.

149. *See Northrop Grumman*, 927 F.3d at 230.

150. *See id.* at 231.

151. *See id.*

152. *See id.*

153. *See id.* at 232.

154. *See id.* at 233.

155. *See id.* at 234.

objectively reasonable because “a reasonable person could not believe that the Conflict of Interest form incorporated Northrop’s arbitration policy.”<sup>156</sup>

While the court mentioned that a reporting employee does not have to plead all the required elements of a cause of action, the court emphasized that “the reasonableness of an employee’s belief must be considered in the context of what is required to establish [] fraud.”<sup>157</sup> The court mentioned that other circuits have adopted this reading of the statute and concluded Seguin did not engage in activity protected under § 1514A(a)(1) of the SOX Act.<sup>158</sup>

c. The Eleventh Circuit: *Ronnie v. Off. Depot, LLC*

In 2023, the Eleventh Circuit Court of Appeals broke the even split between the circuit courts in *Ronnie v. Off. Depot, LLC*.<sup>159</sup> The Eleventh Circuit sided with the Second and Fourth Circuits on the issue of whether a totality of the circumstances test should be used when analyzing the objective component of the reasonable belief requirement under § 1514A(a)(1) of the SOX Act.<sup>160</sup>

Christian Ronnie worked at Office Depot as a senior financial analyst, tasked with data monitoring and calculating a “Sales Lift.”<sup>161</sup> With the help of a third-party analytics company, this Sales Lift calculated the cost benefits of closing unnecessary retail stores.<sup>162</sup> Through this process, Ronnie noticed two potential errors that he believed constituted securities fraud.<sup>163</sup> First, Office Depot used the wrong data set, which inflated the Sales Lift.<sup>164</sup> Second, Office Depot used two different data sets to calculate the Sales Lift, leading to an incorrect Sales Lift.<sup>165</sup>

Ronnie reported both issues to his supervisors.<sup>166</sup> The first issue was corrected, and Ronnie made a recommendation for correcting the second issue.<sup>167</sup> However, the supervisors stated they needed to conduct further

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156. *Id.*

157. *Id.*

158. *See id.* at 235 (stating that the Second Circuit in *Nielsen v. AECOM Tech. Corp.* adopted this statutory interpretation by holding that objective reasonableness requires a potential whistleblower’s belief be intertwined with the provisions laid out in § 1514A(a)(1)).

159. *See Ronnie v. Off. Depot, LLC*, 81 F.4th 1345, 1352 (11th Cir. 2023).

160. *See id.*

161. *Id.* at 1348.

162. *Id.*

163. *See id.*

164. *See id.*

165. *See id.*

166. *See id.*

167. *See id.*

research on the issue before they could correct anything.<sup>168</sup> Ronnie was tasked with investigating the initial cause of the issue, but his relationship with his boss became strained soon after.<sup>169</sup>

Although Ronnie attempted to discover the root cause of the issue, he was placed on a tight deadline and was terminated prior to reporting his results.<sup>170</sup> Ronnie subsequently filed a claim with OSHA, claiming he was unlawfully retaliated against in violation of § 1514A(a)(1) of the SOX Act.<sup>171</sup> OSHA dismissed his complaint, and Office Depot's motion for summary decision in a hearing before an ALJ was granted, with the ALJ stating that Ronnie had not shown an objectively reasonable belief of fraud.<sup>172</sup>

Ronnie appealed, and the Eleventh Circuit determined what evidence an employee must show to establish he had an objectively reasonable belief that the reported conduct violated one of the enumerated sections, rules, or regulations in § 1514A(a)(1).<sup>173</sup> The court highlighted that Ronnie believed that the conduct he reported violated the SOX Act and that a reasonable person in his position would believe that the conduct he reported violated the Act.<sup>174</sup> In determining what evidence is required to establish objective reasonableness, the court highlighted that "a balance between protecting employees from retaliation and protecting employers from baseless allegations" must be maintained.<sup>175</sup>

The court further differentiated between the approaches of the Third and Sixth Circuits and the Second and Fourth Circuits.<sup>176</sup> The court stated that while the former do not require reporting employees to provide "information sufficient to form an objectively reasonable belief" of fraud,<sup>177</sup> the latter apply a totality of the circumstances test where the reporting employee "must make some showing of scienter, materiality, reliance, or loss in order to enjoy SOX protection."<sup>178</sup> The Eleventh Circuit sided with the Second and Fourth Circuits, employing a totality of the circumstances test and holding that a reporting employee "must make more than a conclusory allegation" and cannot have a reasonable belief based on suspicion or speculation.<sup>179</sup>

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168. *See id.* at 1348–49.

169. *See Ronnie*, 81 F.4th at 1349.

170. *See id.*

171. *See id.*

172. *See id.* at 1349–50.

173. *See id.* at 1350.

174. *See id.* at 1351.

175. *Id.*

176. *See id.*

177. *Id.* at 1351 (citing *Wiest v. Lynch*, 710 F.3d 121, 132 (3rd Cir. 2013)).

178. *Id.*

179. *Ronnie*, 81 F.4th at 1351.

The court determined Ronnie did not establish an objectively reasonable belief.<sup>180</sup> Further, the court indicated Ronnie failed to allege any scienter and did not indicate the materiality of the data issue.<sup>181</sup>

## 2. Arguments of the Third and Sixth Circuits

The Third and Sixth Circuits determined that the use of a totality of the circumstances test when analyzing the objective component of the reasonable belief requirement under the whistleblower provision of the SOX Act was unnecessary.<sup>182</sup> This conclusion is different than the Second, Fourth, and Eleventh Circuits' determinations that a totality of the circumstances test should be used.<sup>183</sup> By rejecting the use of the totality of the circumstances test, the Third Circuit indicated that the burden of proof placed on reporting employees who are terminated and bring an action under the whistleblower provision should be lighter.<sup>184</sup> While the Third Circuit was the first to reject a totality of the circumstances test, the Sixth Circuit sided with the Third Circuit on this issue in 2015.<sup>185</sup>

### a. The Third Circuit: *Wiest v. Lynch*

In the 2013 case *Wiest v. Lynch*, the Third Circuit Court of Appeals decided what constitutes an objectively reasonable belief under the whistleblower provision of the SOX Act.<sup>186</sup> Jeffrey Wiest worked in Tyco Electronic Corporation's accounting department for 31 years.<sup>187</sup> In the last ten years of his employment, Wiest's office was scrutinized because of a recent scandal.<sup>188</sup> Wiest questioned and reported numerous expenses made to the company.<sup>189</sup> The first expense was for an event that was similar to a corporate party that was criticized in the previous scandal.<sup>190</sup> The second and third were for conferences, but both requests lacked the necessary documentation for tax purposes and did not receive approval.<sup>191</sup> Wiest

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180. *See id.*

181. *See id.* at 1352 (holding that Ronnie did not have the level of requisite knowledge nor did he show the significance of the allegations in order to establish an objectively reasonable belief that Office Depot had committed fraud).

182. *See Wiest v. Lynch*, 710 F.3d 121, 137 (3d Cir. 2013); *Rhinehimer v. U.S. Bancorp Invs., Inc.*, 787 F.3d 797, 812 (6th Cir. 2015).

183. *See Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 220 (2d Cir. 2014); *Northrop Grumman Sys. Corp. v. U.S. Dep't of Labor*, 927 F.3d 226, 226 (4th Cir. 2019); *Ronnie*, 81 F.4th at 1352.

184. *See Wiest*, 710 F.3d at 134.

185. *See id.* at 137; *Rhinehimer*, 787 F.3d at 812.

186. *See Wiest*, 710 F.3d at 137.

187. *See id.* at 124.

188. *See id.*

189. *See id.*

190. *See id.*

191. *See id.* at 124–25.

contended that him following proper accounting procedures frustrated the company and, as a result, he was terminated shortly after the third request's denial.<sup>192</sup> Wiest brought suit, alleging his termination was a form of retaliation in violation of § 806 of the SOX Act.<sup>193</sup>

The Third Circuit held that retaliation under § 806 is prohibited against an employee who reports information that he or she reasonably believes violates the SOX Act.<sup>194</sup> The court emphasized that this reasonable belief must be subjective and objective, “impos[ing] the normal reasonable person standard used and interpreted in a wide variety of legal contexts.”<sup>195</sup> The subjective element requires that the reporting employee believe that the questioned conduct violated the SOX Act.<sup>196</sup> Under the objective element, the reporting employee's belief is evaluated according to “the knowledge available to a reasonable person in the same factual circumstances with the same training and experience.”<sup>197</sup>

Most importantly, the court held that a reporting employee is protected under the whistleblower provision of the SOX Act if the whistleblower has a “reasonable but mistaken belief” that the conduct violated one of the six categories in § 806 of the SOX Act.<sup>198</sup> The court further stated that a reporting employee is not required to plead all the elements of fraud to be protected and can engage in protected activity even if the employee fails to prove “materiality, scienter, reliance, economic loss, or loss causation.”<sup>199</sup> The court reasoned that an employee may not be able to obtain information related to the elements of a general fraud claim but may retain enough facts and knowledge to notify their supervisor of fraudulent activities.<sup>200</sup>

In Wiest's case, the court found that he had an objectively and subjectively reasonable belief as to the first and third expenses he rejected but did not have an objectively reasonable belief as to the second expense he rejected.<sup>201</sup>

b. The Sixth Circuit: *Rhinehimer v. U.S. Bancorp Invs., Inc.*

The Sixth Circuit Court of Appeals sided with the *Wiest* court in the 2015 case *Rhinehimer v. U.S. Bancorp Investments, Inc.*, holding that the

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192. *See id.* at 125.

193. *See id.*

194. *See id.* at 130.

195. *Id.*

196. *See Wiest*, 710 F.3d at 130.

197. *Id.*

198. *Id.* at 132.

199. *Id.* at 134.

200. *See id.*

201. *See id.* at 135–37.

reporting employee in this case had an objectively reasonable belief that the actions he reported constituted fraud.<sup>202</sup> Michael Rhinehimer worked at U.S. Bancorp Investments, Inc. (“Bancorp”) as a certified financial planner, working on estate planning with Norbert Purcell.<sup>203</sup> Prior to Rhinehimer going on disability leave, Rhinehimer and Purcell set up a brokerage account for Purcell so that he would have assets distinct from his trust.<sup>204</sup>

While on disability leave, Rhinehimer spoke with financial advisor Patrick Harrigan about Purcell.<sup>205</sup> Rhinehimer told Harrigan not to conduct any transactions with Purcell.<sup>206</sup> However, Rhinehimer’s assistant contacted him with news that Harrigan made trades on Purcell’s account.<sup>207</sup> Rhinehimer contacted his direct supervisor and supervising principal about the situation and about a later trade that Harrigan made on the account.<sup>208</sup>

Three days after returning from disability leave, Rhinehimer received a written warning due to his reports.<sup>209</sup> Two months later, Rhinehimer’s new supervisor and division manager called Rhinehimer into a meeting.<sup>210</sup> During the meeting, the office door was locked, and Rhinehimer was questioned about the previous situation he reported.<sup>211</sup> The division manager told Rhinehimer that his career was over and that filing suit would destroy his career in the city.<sup>212</sup> The division manager placed Rhinehimer on “an aggressive performance plan,” and he was fired when he did not meet the plan’s goals.<sup>213</sup>

Rhinehimer subsequently filed suit, contending that his employers retaliated against him in violation of the SOX Act.<sup>214</sup> A jury returned a verdict in Rhinehimer’s favor and awarded him both economic loss and emotional damages.<sup>215</sup> On appeal, the Sixth Circuit determined that the applicable rule here is “that the employee’s reasonable belief is a simple factual question requiring no subset of findings that the employee had a justifiable belief as to each of the . . . elements . . . of fraud.”<sup>216</sup>

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202. *See Rhinehimer v. U.S. Bancorp Invs., Inc.*, 787 F.3d 797, 812 (6th Cir. 2015).

203. *See id.* at 801.

204. *See id.* at 802.

205. *See id.*

206. *See id.*

207. *See id.* at 803.

208. *See id.*

209. *See id.* at 804.

210. *See id.*

211. *See id.*

212. *See Rhinehimer*, 787 F.3d at 804.

213. *Id.*

214. *See id.* at 801.

215. *See id.*

216. *Id.* at 806.

The court reasoned that the purpose of the whistleblower provision of the SOX Act would be diminished if a reporting employee was required to prove each element of a specific category of fraud.<sup>217</sup> Additionally, the court stated that requiring “a rigidly segmented factual showing justifying the employee’s suspicion” conflicts with Congress’s intent for the SOX Act to provide broad protections to reporting employees.<sup>218</sup> Instead, the court emphasized that the Third Circuit’s employment of the reasonable belief standard, containing both objective and subjective elements, applied here.<sup>219</sup> The court agreed with the Third Circuit that “employees who reasonably but mistakenly believe that the conduct at issue constitutes a violation of relevant law” are still protected under the whistleblower provision of the SOX Act.<sup>220</sup>

Ultimately, the court affirmed the jury’s finding for Rhinehimer, stating that the evidence he provided was sufficient to conclude that he had an objectively reasonable belief that fraud occurred.<sup>221</sup> Further, the court stated that although Rhinehimer did not know whether Harrigan actually omitted or misrepresented information when speaking with Purcell, this determination was irrelevant to the court’s decision.<sup>222</sup>

### III. ANALYSIS

The 3–2 circuit split continues, with all five courts providing detailed arguments for, and against, the use of a totality of the circumstances test.<sup>223</sup> This Part analyzes the arguments between the conflicting courts and discusses which court’s argument should prevail.<sup>224</sup> This Part also discusses potential issues with the totality of the circumstances test and the reasonable person standard.<sup>225</sup> Finally, this Part concludes by providing a recommendation for Congress to amend the SOX Act.<sup>226</sup>

#### A. *Arguments For and Against the Second, Fourth, and Eleventh Circuits*

The Second, Fourth, and Eleventh Circuits employ a totality of the circumstances test in evaluating whether a reporting employee has an objectively reasonable belief that their employer committed fraud.<sup>227</sup> The

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217. *See id.* at 809.

218. *Id.* at 810.

219. *See id.*

220. *Id.* at 812; *see also* Wiest v. Lynch, 710 F.3d 121, 132 (3d Cir. 2013).

221. *See Rhinehimer*, 787 F.3d at 812.

222. *See id.*

223. *See supra* Section II.D.

224. *See infra* Sections III.A–B.

225. *See infra* Section III.C.1.

226. *See infra* Section III.C.3.

227. *See supra* Section II.D.1.

use of the totality of the circumstances test provides employers protection against inadequate allegations.<sup>228</sup> In addition, the totality of the circumstances test protects employees who report potentially fraudulent conduct.<sup>229</sup>

While this “balance-striking” is important, the primary purpose for adding the whistleblower provision to the SOX Act was to protect employees, to encourage employees to report fraudulent conduct, and to prevent another Enron scandal.<sup>230</sup> Therefore, the legislative intent of the whistleblower provision indicates that the need to encourage reporting from employees outweighs the need to protect employers.<sup>231</sup> This primary purpose weakens these circuits’ arguments that balancing weighs in favor of the totality of the circumstances test.<sup>232</sup>

Additionally, it is unclear what these courts consider a sufficient belief for a reasonable person in the totality of the circumstances.<sup>233</sup> The Second Circuit distinguished its decision in *Nielsen* from the Third Circuit’s decision in *Wiest*, providing insight into what constitutes an objectively reasonable belief.<sup>234</sup> However, the Second Circuit only stated that the previous fraud scandal that occurred in the facts of *Wiest* was not present in the *Nielsen* facts.<sup>235</sup> It is unclear whether the Second Circuit indicated that strong facts—such as the presence of a previous fraud scandal—must be present to find that an employee has an objectively reasonable belief.<sup>236</sup> The Second Circuit did not provide further reasoning and only stated that there was little connection between the employee’s report and potential fraud.<sup>237</sup> Therefore, the Second Circuit’s precise application of the totality of the circumstances test is ambiguous.<sup>238</sup>

The Fourth Circuit’s decision in *Northrop* does not provide additional assistance in clarifying the application of the totality of the circumstances

228. See *Ronnie v. Off. Depot, LLC*, 81 F.4th 1345, 1351 (11th Cir. 2023).

229. See *id.*

230. S. REP. NO. 107-146, at 5 (2002); 148 CONG. REC. S7418 (daily ed. July 26, 2002) (statement of Sen. Patrick Leahy).

231. See *Ronnie*, 81 F.4th at 1351; see also 148 CONG. REC. S7418 (daily ed. July 26, 2002) (statement of Sen. Patrick Leahy).

232. See *Ronnie*, 81 F.4th at 1351.

233. See *Northrop Grumman Sys. Corp. v. U.S. Dep’t of Labor*, 927 F.3d 226, 234 (4th Cir. 2019). The Fourth Circuit simply stated that an objective belief should be considered in the specific factual context of each case. See *id.*

234. See *Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 223 (2d Cir. 2014); *Wiest v. Lynch*, 710 F.3d 121, 124–25, 135–37 (3d Cir. 2013).

235. See *Nielsen*, 762 F.3d at 223.

236. See *id.*

237. See *id.*

238. See *id.*; Begalle, *supra* note 14 (stating that the totality of the circumstances test is vague and provides no “bright-line rule” in patent cases).

test.<sup>239</sup> However, the Eleventh Circuit's decision in *Ronnie* provides more insight into this test's inner workings.<sup>240</sup> The Eleventh Circuit provided two notable considerations when performing the totality of the circumstances test: (1) the reporting employee "must make some showing of scienter, materiality, reliance, or loss in order to enjoy SOX protection," and (2) the report must be more than a suspicion or "conclusory allegation."<sup>241</sup>

However, even with these considerations, courts may differ in their outcomes when determining whether an employee possesses an objectively reasonable belief.<sup>242</sup> For example, a showing of scienter indicates "a degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission."<sup>243</sup> However, whether a reporting employee has this requisite degree of knowledge is at the discretion of the courts and how different courts view the facts of each case.<sup>244</sup> This discretion suggests that whether a reporting employee satisfies the totality of the circumstances test depends on the judges who make up the court, rather than an objective standard.<sup>245</sup>

#### B. Arguments For and Against the Third and Sixth Circuits

The Third and Sixth Circuits declined to apply the totality of the circumstances test when evaluating whether an employee has an objectively reasonable belief that fraud occurred.<sup>246</sup> Without the totality of the circumstances test, employees may report what they believe to be fraud since they are not required to prove "materiality, scienter, reliance, economic loss, or loss causation."<sup>247</sup> Both circuits stated that employees' "reasonable but mistaken belief[s]" are protected, encouraging reporting in circumstances where an employee may suspect fraud.<sup>248</sup>

The protection for reasonable but mistaken beliefs aligns with the legislative intent of the whistleblower provision of the SOX Act, since the

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239. See *Northrop Grumman Sys. Corp. v. U.S. Dep't of Labor*, 927 F.3d 226, 234 (4th Cir. 2019).

240. See *Ronnie v. Off. Depot, LLC*, 81 F.4th 1345, 1351 (11th Cir. 2023).

241. *Id.*

242. See *Glessner*, *supra* note 14 (noting that courts do not establish clear guidelines when making a totality of the circumstances analysis).

243. *Scienter*, BLACK'S LAW DICTIONARY (12th ed. 2024).

244. See *Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 223 (2d Cir. 2014) (finding that an employee's belief of fraud was unreasonable when he relied on inadequate review of fire safety designs but the presence of a previous fraud scandal in *Wiest v. Lynch* was sufficient for a reasonable belief of subsequent fraud).

245. See *Glessner*, *supra* note 14.

246. See *supra* Section II.D.2.

247. *Wiest v. Lynch*, 710 F.3d 121, 134 (3d Cir. 2013).

248. *Id.* at 132; *Rhinehimer v. U.S. Bancorp Invs., Inc.*, 787 F.3d 797, 812 (6th Cir. 2015).

main purpose of this provision is to encourage and protect employee reporting.<sup>249</sup> If the provision's purpose was to only protect employees whose reports are concrete or definitive, many reporting employees would not be protected, since they often do not have access to information that would solidify or strengthen their reports.<sup>250</sup>

While this approach aligns with the legislative intent, employees within these jurisdictions are not required to provide additional information for whistleblower protection, which could lead to unsupported allegations.<sup>251</sup> However, the Third and Sixth Circuits combat this argument by stating that a mistaken belief can be protected, if the belief is reasonable.<sup>252</sup> Therefore, employees cannot make false or absurd allegations because these allegations would be deemed unreasonable.<sup>253</sup>

Additionally, disallowing protection for unreasonably mistaken beliefs enables courts to conclude that an employee does not have an objectively reasonable belief that fraud occurred.<sup>254</sup> Courts' abilities to make this conclusion indicates that even without the use of the totality of the circumstances test to protect employers from frivolous allegations, courts may rule in favor of employers when an employee's allegation is unreasonable.<sup>255</sup>

The Third Circuit noted that employees have limited evidence sufficient to show that an employer acted fraudulently but usually have enough evidence to report suspicious or potentially fraudulent activity.<sup>256</sup> To encourage reporting, employees need to be confident that they will not face repercussions and will be protected under the SOX Act.<sup>257</sup> Providing protections to employees who have at least basic knowledge of potential fraudulent actions, without requiring a showing of some additional

249. See *Wiest*, 710 F.3d at 137; *Rhinehimer*, 787 F.3d at 812; S. REP. NO. 107-146, at 5 (2002); 148 CONG. REC. S7418 (daily ed. July 26, 2002) (statement of Sen. Leahy).

250. See *Wiest*, 710 F.3d at 134.

251. See *Ronnie v. Off. Depot, LLC*, 81 F.4th 1345, 1351 (11th Cir. 2023). In agreeing with the Second and Fourth Circuits, the Eleventh Circuit highlighted that a "balance" must be struck between employee and employer protection, appearing to side with employers in applying the totality of the circumstances test. *Id.*

252. See *Wiest*, 710 F.3d at 132; *Rhinehimer*, 787 F.3d at 812.

253. See *Wiest*, 710 F.3d at 132; *Rhinehimer*, 787 F.3d at 812; *Ronnie*, 81 F.4th at 1351.

254. See *Wiest*, 710 F.3d at 135–37. Three expenses that employee *Wiest* had reported as fraudulent were at issue. See *id.* The Third Circuit found that *Wiest* had an objectively reasonable belief of fraud for only two of the expenses he reported. See *id.* This case shows that even under the Third and Sixth Circuits' approach, there is still discretion in determining objective reasonableness in these cases. See *id.*

255. See *id.*

256. See *id.* at 134.

257. See S. REP. NO. 107-146, at 5 (2002); 148 CONG. REC. S7418 (daily ed. July 26, 2002) (statement of Sen. Patrick Leahy).

information, will encourage reporting and fulfill Congress's intent for implementing the SOX Act.<sup>258</sup>

*C. Recommendations: Why the Third and Sixth Circuits Should Prevail and How to Amend the SOX Act*

The Third and Sixth Circuits' decision not to apply the totality of the circumstances test should prevail.<sup>259</sup> This section will discuss the reasons for this conclusion and highlight the issues with the totality of the circumstances and the reasonable person tests.<sup>260</sup> This section also highlights why the reasoning of the Third and Sixth Circuits encourages employees to report employers' potentially fraudulent conduct, which was the main purpose of the SOX Act.<sup>261</sup>

1. Issues with the Totality of the Circumstances Test and the Reasonable Person Standard

Understanding the reasonable person standard is imperative for recognizing when reporting employees enjoy whistleblower protection under the SOX Act.<sup>262</sup> The Second, Fourth, and Eleventh Circuits employ a totality of the circumstances test when determining whether an employee has an objectively reasonable belief that their employer engaged in fraudulent activity.<sup>263</sup> If the employee has an objectively reasonable belief that the employee's employer engaged in fraudulent activity, then the employee is protected under the whistleblower provision of the SOX Act.<sup>264</sup> However, the totality of the circumstances test muddies the waters of what an objectively reasonable belief in the circumstances is, causing some reporting employees to fall outside of whistleblower protection under the SOX Act.<sup>265</sup>

The three courts state that while employees are not required to prove every single element of fraud to have an objectively reasonable belief, employees must make more than a conclusory allegation.<sup>266</sup> These courts require that the reporting employee show some "scienter, materiality, reliance, or loss" to be protected under § 1514A(a)(1) of the SOX Act.<sup>267</sup>

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258. See 148 CONG. REC. S7418 (daily ed. July 26, 2002) (statement of Sen. Patrick Leahy); *Wiest*, 710 F.3d at 134.

259. See *supra* Sections III.A–B.

260. See *infra* Section III.C.1.

261. See *infra* Section III.C.2.

262. See *supra* Section II.B.

263. See *supra* Section II.D.1.

264. See *supra* Section II.D.1.

265. See Glessner, *supra* note 14; Begalle, *supra* note 14.

266. See *Ronnie v. Off. Depot, LLC*, 81 F.4th 1345, 1351 (11th Cir. 2023).

267. *Id.*

However, a Department of Labor Arbitration Review Board's ("ARB") decision in *Sylvester v. Parexel Int'l LLC* contradicts this requirement.<sup>268</sup> The ARB stated the following:

A complainant need not prove a violation of the substantive laws[. Therefore] we feel a complainant can have an objectively reasonable belief of a violation of the laws in Section 806 . . . even if the complainant fails to allege, prove, or approximate specific elements of fraud, which would be required under a fraud claim against the defrauder directly. In other words, a complainant can engage in protected activity under Section 806 even if he or she fails to allege or prove materiality, scienter, reliance, economic loss, or loss causation.<sup>269</sup>

All of the courts involved in the circuit split agree with the ARB's decision that a reporting employee need not prove all the elements of fraud to be protected under the whistleblower provision of the SOX Act.<sup>270</sup> However, the ARB's decision in *Sylvester* highlights something further.<sup>271</sup> By using the language "in other words,"<sup>272</sup> the ARB's decision concludes that reporting employees do not need to show "materiality, scienter, reliance, economic loss, or loss causation" to be protected under § 1514A(a)(1) of the SOX Act.<sup>273</sup> In fact, by using that language, the ARB indicated that requiring proof of "materiality, scienter, reliance, economic loss, or loss causation" is the same as requiring proof of "specific elements of fraud."<sup>274</sup> Therefore, the Second, Fourth, and Eleventh Circuits' decisions contradict the ARB's decision by requiring a showing of "scienter, materiality, reliance, or loss" for whistleblower protection, while maintaining that proving the elements of fraud is not required.<sup>275</sup>

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268. See *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, 2007-SOX-042, 2011 WL 216854, at \*54 (Dep't of Lab. May 25, 2011).

269. *Id.*

270. See *Northrop Grumman Sys. Corp. v. U.S. Dep't of Labor*, 927 F.3d 226, 234 (4th Cir. 2019); *Wiest v. Lynch*, 710 F.3d 121, 134 (3d Cir. 2013); *Rhinehimer v. U.S. Bancorp Invs., Inc.*, 787 F.3d 797, 806 (6th Cir. 2015).

271. See *Sylvester*, 2011 WL 216854, at \*54.

272. See *In Other Words Definition and Meaning*, MERRIAM-WEBSTER DICTIONARY, <https://perma.cc/55ZN-YDHA> (last visited Mar. 2, 2025, at 14:32 ET) (defining "in other words" as being "used to introduce a statement that repeats what has been said in a different and usually a simpler or more exact way").

273. *Sylvester*, 2011 WL 216854, at \*54.

274. *Id.*

275. *Ronnie v. Off. Depot, LLC*, 81 F.4th 1345, 1351 (11th Cir. 2023); see also *Sylvester*, 2011 WL 216854, at \*54. The Second, Fourth, and Eleventh Circuit's decisions regarding the whistleblower provision of the SOX Act were all made after the ARB's decision in *Sylvester*. See *Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 214 (2d Cir. 2014); *Northrop Grumman*, 927 F.3d at 226; *Ronnie*, 81 F.4th at 1345.

Additionally, there are inherent issues with the totality of the circumstances test, including its vagueness.<sup>276</sup> Justice Norcott's dissent in *Hanks v. Powder Ridge Restaurant Corporation* referred to the totality of the circumstances test as "amorphous."<sup>277</sup> He argued that the majority should have used definitive factors to determine whether the signed liability waiver violated public policy.<sup>278</sup> Justice Norcott also noted that there are "significant problems inherent in employing" the totality of the circumstances standard, although he did not identify what these problems are.<sup>279</sup> Justice Norcott is not the first to note concerns regarding the use of the totality of the circumstances test.<sup>280</sup> In fact, many justices have criticized the vagueness of the totality of the circumstances test.<sup>281</sup>

As noted above, the Second, Fourth, and Eleventh Circuits apply the totality of the circumstances test to evaluate the objective element of the reasonableness test provided under § 1514A(a)(1) of the SOX Act.<sup>282</sup> Because this test is vague, employees within these circuits' jurisdictions have no "bright-line rule" indicating when the employee is protected under the whistleblower provision of the SOX Act.<sup>283</sup> While employees do not have to prove every element of fraud, they must show something more than simple allegations.<sup>284</sup> This "middle ground" between simple allegations and proving every element of fraud has not been delineated.<sup>285</sup> Therefore, employees may be discouraged from reporting if the totality of the circumstances test is used, in fear that they may not be protected as whistleblowers.<sup>286</sup>

## 2. Encouraging Reporting from Whistleblowers

The language of the whistleblower provision in the SOX Act ensures broad employee protection, even if the reporting employee is incorrect in

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276. See Begalle, *supra* note 14.

277. *Hanks v. Powder Ridge Rest. Corp.*, 885 A.2d 734, 748 n.1 (Conn. 2005).

278. See *id.* at 750.

279. *Id.* at 748 n.1.

280. See *Lough v. Brunswick Corp.*, 103 F.3d 1517, 1519 (Fed. Cir. 1997) (Lourie, J., concurring); *Seal-Flex, Inc. v. Athletic Track & Court Constr.*, 98 F.3d 1318, 1323 n.2 (Fed. Cir. 1996).

281. See *Lough*, 103 F.3d at 1519 (Lourie, J., concurring) (stating that some have objected to the totality of the circumstances test as being "indefinite"); *Seal-Flex*, 98 F.3d at 1323 n.2 (stating that the totality of the circumstances test has been "criticized as unnecessarily vague").

282. See *supra* Section II.D.1.

283. Begalle, *supra* note 14.

284. See *id.*

285. See *id.*

286. See *id.*

their allegations.<sup>287</sup> In *Van Asdale v. Int'l Game Tech.*, the Ninth Circuit Court of Appeals evaluated the statutory language of the SOX whistleblower provision.<sup>288</sup> The court stated that Congress's selected language "ensures that 'an employee's reasonable but mistaken belief that an employer engaged in [violative] conduct . . . is protected.'"<sup>289</sup>

Additionally, Congress intended to give employees the power to report employer wrongdoings and do the right thing without having to fulfill a strict burden or face severe penalties.<sup>290</sup> Senator Leahy, a member of the Judiciary Committee who helped craft the whistleblower provision, stated that the "law was intentionally written to sweep broadly."<sup>291</sup> Further, Senator Leahy noted that there were many instances, prior to the enactment of the whistleblower provision of the SOX Act, where employees were heavily punished for their reporting.<sup>292</sup> These statements indicate that the whistleblower provision's primary purpose is to protect reporting employees, without causing difficulties in the process.<sup>293</sup> However, as indicated above, using the totality of the circumstances test to evaluate employee reports places an extra burden on employees contrary to the legislative intent of the whistleblower provision.<sup>294</sup>

In short, a narrower interpretation of the objectively reasonable belief standard through the use of the totality of the circumstances test contradicts the purpose of encouraging employees to report wrongdoing.<sup>295</sup> The whistleblower provision of the SOX Act provides protection to employees "when they take lawful acts to disclose information [that assists] in detecting and stopping fraud."<sup>296</sup> Because the legislative history of the whistleblower provision denotes broad protection, it follows that the provision should be interpreted broadly to protect any lawful employee reporting.<sup>297</sup>

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287. See S. REP. NO. 107-146, at 5 (2002); 149 CONG. REC. S1725 (daily ed. Jan. 29, 2003) (statement of Sen. Patrick Leahy); *Wiest v. Lynch*, 710 F.3d 121, 132 (3d Cir. 2013); *Rhinehimer v. U.S. Bancorp Invs., Inc.*, 787 F.3d 797, 810 (6th Cir. 2015).

288. See *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 989 (9th Cir. 2009).

289. *Id.* at 1001 (quoting *Allen v. Admin. Rev. Bd.*, 514 F.3d 468, 477 (5th Cir. 2008)).

290. See S. REP. NO. 107-146, at 5; 149 CONG. REC. S1725 (daily ed. Jan. 29, 2003) (statement of Sen. Patrick Leahy).

291. 149 CONG. REC. S1725 (daily ed. Jan. 29, 2003) (statement of Sen. Patrick Leahy).

292. See *id.*

293. See *id.*

294. See *supra* Section III.C.1.

295. See S. REP. NO. 107-146, at 5; 149 CONG. REC. S1725 (daily ed. Jan. 29, 2003) (statement of Sen. Leahy).

296. S. REP. NO. 107-146, at 13.

297. See *id.* at 19.

### 3. Amending the Whistleblower Provision

The use of the totality of the circumstances test contradicts the legislative intent of enacting the whistleblower provision of the SOX Act.<sup>298</sup> This test discourages employees from reporting their employers' potentially fraudulent conduct.<sup>299</sup> While the approach of the Third and Sixth Circuits is more rational for this reason, it is unclear whether a better solution can be found.<sup>300</sup> Congress is in the best position to resolve this issue between the circuits, having the power to revise the whistleblower provision to consider concerns from the courts on both sides of the circuit split.<sup>301</sup>

Congress should add clear and basic requirements to the whistleblower provision of the SOX Act for employees to reference before deciding to report their employers' potentially fraudulent conduct.<sup>302</sup> By providing clear requirements, employees can better understand when they will be protected as whistleblowers under the Act, without the vagueness and strictness associated with the totality of the circumstances test.<sup>303</sup>

Additionally, by adding these requirements, employees would be aware of the reporting requirements pre-report, instead of risking not being protected as a whistleblower when a court applies the totality of the circumstances test post-report.<sup>304</sup> Adding clear reporting requirements to the whistleblower provision of the SOX Act will allow reporting employees to keep all of the protections afforded to them under the whistleblower provision.<sup>305</sup> At the same time, adding these requirements will reduce the risks to employers who could face baseless allegations of fraud.<sup>306</sup>

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298. *See id.* at 5; 148 CONG. REC. S7418 (daily ed. July 26, 2002) (statement of Sen. Patrick Leahy).

299. *See* Glessner, *supra* note 14; Begalle, *supra* note 14.

300. *See* Wiest v. Lynch, 710 F.3d 121, 137 (3d Cir. 2013); Rhinehimer v. U.S. Bancorp Invs., Inc., 787 F.3d 797, 812 (6th Cir. 2015).

301. *See* Congressional Research Service, *Congressional Court Watcher: Circuit Splits from July 2024*, LEGAL SIDEBAR 1, 4 (July 31, 2024), <https://perma.cc/3WRR-ESNY> (stating that Congress responded to a circuit split between the Fifth and Sixth Circuits by amending the law at issue).

302. *See* 18 U.S.C. § 1514A(a)(1).

303. *See id.*; Glessner, *supra* note 14; Begalle, *supra* note 14.

304. *See* Nielsen v. AECOM Tech. Corp., 762 F.3d 214, 223 (2d Cir. 2014) (indicating an employee is not protected after reporting inadequate review of fire safety designs); Northrop Grumman Sys. Corp. v. U.S. Dep't of Labor, 927 F.3d 226, 230 (4th Cir. 2019) (stating an employee is not protected after objecting to a training module that appeared to trick employees); Ronnie v. Off. Depot, LLC, 81 F.4th 1345, 1348 (11th Cir. 2023) (indicating an employee is not protected after reporting two significant errors in a calculated 'Sales Lift').

305. *See* Ronnie, 81 F.4th at 1351.

306. *See id.*

Another alternative would be for Congress to add text to the whistleblower provision that provides protection to employers in instances where an employee makes an outrageous and unsupported allegation.<sup>307</sup> This provision could potentially cover any employee “negligence” or “recklessness” when reporting.<sup>308</sup> However, this provision should not be so broad as to encompass conduct that would otherwise be protected under the Act.<sup>309</sup>

#### IV. CONCLUSION

The 3–2 circuit split left a looming question of what evidence, if any, reporting employees need to provide to be protected under the whistleblower provision of the SOX Act.<sup>310</sup> The Second, Fourth, and Eleventh Circuits provide compelling arguments in support of applying a totality of the circumstances test to determine if a reporting employee possesses an objectively reasonable belief that their employer committed fraud.<sup>311</sup> However, this test is vague and its applicability among courts is subjective, failing to outline a clear standard for employees to follow.<sup>312</sup> As you saw in your potential case against Target for unlawful termination, application of the totality of the circumstances test would leave you uncertain as to whether you would be protected under the SOX Act.<sup>313</sup>

However, the Third and Sixth Circuits provide a better standard that allows employees to be protected under the whistleblower provision without being required to present a certain level of evidence.<sup>314</sup> These courts argue that employees who are mistaken in their beliefs should still be protected because they lack access to information that may strengthen or confirm their reports.<sup>315</sup> Therefore, you would almost certainly be protected under the whistleblower provision of the SOX Act in your case against Target, and your termination would be deemed unlawful.<sup>316</sup> In fact, you would still be protected even if your belief was mistaken that the removal of bad reviews from Target’s website constituted fraudulent activity.<sup>317</sup> While the reasoning of the Third and Sixth Circuits comports with the legislative intent of the whistleblower provision—to encourage

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307. See 18 U.S.C. § 1514A(a)(1).

308. See, e.g., MODEL PENAL CODE § 2.02 (using the terms “negligence” and “recklessness” to define prohibited conduct).

309. See 18 U.S.C. § 1514A(a)(1).

310. See Umanah, *supra* note 8.

311. See *supra* Sections II.D.1, III.A.

312. See *supra* Section III.C.1.

313. See *supra* Part I.

314. See *supra* Sections II.D.2, III.B.

315. See *supra* Sections II.D.2, III.B.

316. See *supra* Part I.

317. See *supra* Part I.

employees to report their employers' potentially illegal conduct—there remains the question of whether Congress should strike a balance between all of the circuit courts involved in this split.<sup>318</sup>

Ultimately, the power is in the hands of the legislature to determine whether the whistleblower provision should be amended to address the issues inherent in the circuit split.<sup>319</sup> While Congress has yet to acknowledge this issue, the importance of employee reporting in the wake of the Enron scandal should not be dismissed.<sup>320</sup>

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318. *See supra* Sections II.D.2, III.B, III.C.2–3.

319. *See supra* Section III.C.3.

320. *See supra* Sections II.A, III.A–C.