No. 16-3577

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ABDUL JALUDI,

Plaintiff-Appellant,

v.

CITIGROUP, *et al*.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

The Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of plaintiff-appellant Abdul Jaludi. Mr. Jaludi's appeal contests the district court's order compelling arbitration of his Sarbanes-Oxley Act ("SOX") whistleblower claim. Because the order relied on an incorrect interpretation of section 1514A(e)(2) of SOX, which invalidates predispute agreements to arbitrate SOX whistleblower claims, the Secretary requests reversal.

INTEREST OF THE SECRETARY AND AUTHORITY TO FILE

Congress has assigned to the Secretary the responsibility to investigate and adjudicate whistleblower retaliation complaints under SOX. *See* 18 U.S.C. 1514A; *see also* 29 C.F.R. 1980.100 *et seq*. Complaints alleging violations of SOX's whistleblower provision must be filed with the Department of Labor ("Department"), and the Department's Administrative Review Board ("ARB") issues final decisions on the Secretary's behalf. *See* 18 U.S.C. 1514A(b)(1)-(2); 29 C.F.R. 1980.103-.110.[1] Section 1514A(e)(2) of SOX provides that "[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section." 18 U.S.C. 1514A(e)(2). The Secretary has previously ruled that section 1514A(e)(2) "constitutes a jurisdictional provision, and that it may be retroactively applied to conduct arising prior to its enactment in appropriate cases." *Abhyankar v. Countrywide Fin. Corp.*, ARB No. 11-043, 2013 WL 1494457, at *5 (ARB Mar. 29, 2013). The Secretary has a substantial interest in ensuring that federal courts interpret the temporal scope of SOX's antiarbitration provision in a manner consistent with the *Abhyankar* decision. The Secretary has a particular interest in

[1] If a final decision is not issued within 180 days of the filing of the complaint, and the delay is not due to bad faith on the complainant's part, a complainant may bring a de novo action in federal district court. *See* 18 U.S.C. 1514A(b)(1)(B).

presenting his views to this Court because this is the first Circuit Court of Appeals to address this issue.[2]

Federal Rule of Appellate Procedure 29(a) authorizes the filing of this amicus brief.

STATEMENT OF THE ISSUE

Effective July 22, 2010, Congress amended SOX's whistleblower protection provision to provide that "no predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration" of a SOX whistleblower dispute.

[2] Congress added section 1514A(e)(2) to SOX as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank Act"). District courts have disagreed on whether it is proper to apply section 1514A(e)(2) to matters in which the parties had entered into arbitration agreements prior to the provision's effective date. *Compare Taylor v. Fannie Mae*, 839 F. Supp. 2d 259 (D.D.C. 2012) (finding SOX whistleblower claim subject to arbitration agreement); *Blackwell v. Bank of Am. Corp.*, No. 11-2475, 2012 WL 1229673 (D.S.C. Mar. 22, 2012) (Mag. J., same); *Henderson v. Masco Framing Corp.*, No. 11-00088, 2011 WL 3022535 (D. Nev. July 22, 2011) (same) *with Pezza v. Inv'rs Capital Corp.*, 767 F. Supp. 2d 225 (D. Mass. 2011) (finding SOX whistleblower claim not subject to arbitration agreement); *Wong v. CKX, Inc.*, 890 F. Supp. 2d 411 (S.D.N.Y. 2012) (same); *Wiggins v. ING U.S., Inc.*, No. 14-1089, 2015 WL 3771646 (D. Conn. June 17, 2015) (same). The Dodd-Frank Act also included a provision that prohibited residential mortgage loans and certain extensions of credit secured by the consumer's principal dwelling from containing terms that would require arbitration to resolve any controversy or claims arising out of the transaction. *See* 15 U.S.C. 1639c(e)(1). District courts have consistently concluded that it is improper to apply section 1639c(e)(1) to matters in which the parties had entered into arbitration agreements prior to the provision's effective date. *See, e.g., Davies v. Green Tree Servicing, LLC*, No. 14-1711, 2015 WL 3795621, at *5 (M.D. Pa. June 18, 2015) (listing cases). *See also Beckwith v. Caliber Home Loans, Inc.*, No. 15-00581, 2015 WL 3767187 (N.D. Ala. June 17, 2015).

18 U.S.C. 1514A(e)(2). Mr. Jaludi formerly worked for appellee Citigroup. In December 2008, Mr. Jaludi acknowledged receipt of a Citigroup arbitration policy ("2009 arbitration policy") which expressly compelled arbitration of SOX claims. Mr. Jaludi filed a pro se lawsuit in October 2015 asserting Citigroup terminated him in violation of SOX in April 2013 based on protected activity that occurred in 2010 and again in 2012. The issue is whether section 1514A(e)(2) invalidates application of the 2009 arbitration policy to Mr. Jaludi's SOX claim.

STATEMENT OF THE CASE

A. The SOX Whistleblower Provision.

Congress enacted SOX to protect investors in public companies and restore trust in the financial markets in the aftermath of the collapse of Enron Corporation. *Lawson v. FMR, LLC*, 134 S.Ct. 1158, 1161 (2014); S. Rep. No. 107-146, at 2-5 (2002). To further that purpose, Congress enacted section 1514A to protect employees who report fraudulent activity and violations of Securities Exchange Commission rules and regulations that can harm investors in publicly traded companies. Procedures for the Handling of Retaliation Complaints Under Section 806 of the Sarbanes-Oxley Act of 2002, as Amended, 80 Fed. Reg. 11,865-02 (Mar. 5, 2015).

Section 1514A prohibits publicly traded companies and other covered persons from retaliating against an employee because the employee engaged in

protected activity. *See* 18 U.S.C. 1514(A)(a)(1). Protected activity includes providing information regarding any conduct that the complainant "reasonably believes constitutes a violation" of: laws prohibiting mail fraud, wire, radio, or television fraud, bank fraud, or securities fraud; any SEC rule or regulation; "or any provision of Federal law relating to fraud against shareholders." *Id.* To prevail on a SOX whistleblower claim, a complainant must prove by a preponderance of the evidence that: (1) he/she engaged in protected activity; (2) the employer took an adverse personnel action against him/her; and (3) the protected activity was a contributing factor in the adverse personnel action. *See Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, 2011 WL 2165854, at *7 (ARB May 25, 2011).

In July 2010, as part of its effort "[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system . . ."[3] through the Dodd Frank Act, Congress amended SOX's whistleblower provision to add section 1514A(e), which states:

> **(**e) Nonenforceability of Certain Provisions Waiving Rights and Remedies or Requiring Arbitration of Disputes.—
>
> **(1)Waiver of rights and remedies.—**

[3] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

> The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement.
>
> **(2)Predispute arbitration agreements.—**
>
> No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.

18 U.S.C. 1514A(e).

B. Factual Background[4]

Citigroup employed Mr. Jaludi in its data center operations for approximately 25 years. Complaint ("Cmpl."), Docket ("Doc.") 1, ¶8. Mr. Jaludi began work with Citigroup as an entry level tape operator in 1985, *id*.; Citigroup promoted Mr. Jaludi to a Senior Vice President position in 2009. *Id*., ¶9. In early 2010, Mr. Jaludi's duties included heading Enterprise Systems Management for North America. *Id*., ¶10. This role required Mr. Jaludi to ensure Citigroup created "trouble tickets" for system- and application-related problems that might affect customers. *Id*.

Citigroup classified trouble tickets by severity. Cmpl., ¶¶10-11. Citigroup sent all "severity one" tickets to the federal Office of the Comptroller of Currency

[4] The factual background herein is derived principally from Mr. Jaludi's complaint. In reviewing the district court's dismissal of this case, the Court must "assume all [these] factual allegations to be true, construe those truths in the light most favorable to [Mr. Jaludi], and then draw all reasonable inferences from them." *Connelly v. Lane Construction Corp*., 809 F.3d 780, 790 (3d Cir. 2016).

("OCC"). *Id*., ¶11-12.[5] Mr. Jaludi discovered that Citigroup was failing to designate hundreds of tickets as severity one, thereby avoiding the need to report such tickets to OCC. *Id*., ¶12. Mr. Jaludi reported this, and other issues, to his management. *Id*., ¶13.

Citigroup moved Mr. Jaludi "down one level" in the second quarter of 2010. Cmpl., ¶18. In the early third quarter of 2010, Citigroup took away Mr. Jaludi's oversight of the North America event management and the command center automation teams. *Id*., ¶20. In late fourth quarter 2010, Citigroup transferred Mr. Jaludi from the Citigroup Technology Infrastructure ("CTI") division where he had worked for 22 years to the Infrastructure Tools and Data Center automation group of the Citi Architecture Technology Engineering ("CATE") division. *Id*., ¶21. In May 2011, Citigroup demoted Mr. Jaludi to an entry level Unix Administrator position within CATE. *Id.*

While working on a project in the third quarter of 2012, Mr. Jaludi again identified a Citigroup failure to designate trouble tickets as severity one. Cmpl., ¶34. Mr. Jaludi informed a Citigroup manager of this problem. *Id*. He then

[5] Mr. Jaludi's complaint asserted that "[a]s a result of the financial crisis and the continual tests to ensure the safety and soundness of Citigroup and company or one or more of its direct or indirect subsidiaries, all severity one tickets had been required to be sent to the [OCC], the federal agency that regulates large financial organizations." Cmpl., ¶12.

informed the applicable division's Chief Information Officer of this problem. *Id*., ¶35. Citigroup terminated Mr. Jaludi's employment on April 21, 2013. *Id*., ¶38.

While Citigroup employed him, Mr. Jaludi received at least two employee handbooks that contained provisions requiring arbitration of disputes. Citigroup's 2009 Employee Handbook contained the 2009 arbitration policy, which stated in pertinent part that:

> The Policy makes arbitration the required and exclusive forum for the resolution of all disputes arising out of or in any way related to employment based on legally protected rights (i.e., statutory, regulatory, contractual, or common-law rights) that may arise between an employee or former employee and Citi or its current and former parents, subsidiaries, and affiliates and its and their current and former officers, directors, employees, and agents . . . including, without limitation, claims, demands, or actions under . . . [SOX].

See Declaration of Maureen J. O'Brien in Support of Defendant's Motion to Compel Arbitration and Dismiss or Stay Plaintiff's Complaint ("O'Brien Dec."), Doc. 16, Exhibit ("Ex.") 1, p. 44. The company's 2011 Employee Handbook also contained an employment arbitration policy ("2011 arbitration policy"), which stated in pertinent part that:

> The Policy makes arbitration the required and exclusive forum for the resolution of all disputes (other than disputes which by statute are not arbitrable) arising out of or in any way related to employment based on legally protected rights (i.e., statutory, regulatory, contractual, or common-law rights) that may arise between an employee or former employee and Citi, its predecessors, successors, and assigns, its current and former parents, subsidiaries, and affiliates, and its and their current and former officers, directors, employees, and agents . . .

> including without limitation, claims, demands or actions under Title VII of the Civil Rights Act of 1964.

O'Brien Dec., Ex. 2, p. 48. The 2011 policy removes the reference to SOX from the list of federal statutory claims that is expressly subject to the policy, and adds an express exception from arbitration for "disputes which by statute are not arbitrable." *Compare* O'Brien Dec., Ex. 1, p. 44 *with* O'Brien Dec., Ex. 2., p. 48. The 2011 Handbook also states that "[t]his Handbook supersedes any Employee Handbooks or Human Resources policies, practices or procedures that may have applied to you and that are inconsistent with and prior to this Handbook's distribution." O'Brien Dec., Ex. 2, p. 4.

C. Procedural History And The District Court's Decision

1. Mr. Jaludi filed a pro se lawsuit against Citigroup on October 27, 2015. Cmpl., Doc. 1. The suit alleged in pertinent part that Citigroup terminated Mr. Jaludi in retaliation for SOX-protected whistleblowing, i.e., "due to his continued escalation of the [Citigroup] practice of withholding data from executive management and federal officials showing failures within the technology division." *Id.*, ¶51. On January 22, 2016, Citigroup filed a motion to compel arbitration and dismiss or stay Mr. Jaludi's SOX claim. Doc. 15. Citigroup contended that the claim was arbitrable under the 2009 arbitration policy, Doc. 16, p. 13, and that the 2011 arbitration policy "preserve[d]" Mr. Jaludi's agreement in the 2009 policy to arbitrate SOX disputes. *Id*., p. 14.

2. On June 21, 2016, a magistrate judge issued a report and recommendation denying Citigroup's motion to compel arbitration of the SOX claim. Doc. 33. He opined that the 2009 arbitration policy "expressly covers SOX claims while the 2011 Policy does not expressly cover them." Doc. 33, p. 11. However, he rejected Mr. Jaludi's argument that the latter-in-time policy had superseded the former, instead concluding that the policies were "mutually exclusive." *Id*., pp. 10-11. Thus, the magistrate judge viewed the question before him as "whether the [SOX claim] falls within the scope of either Policy or both." *Id.*, p. 11.

The magistrate judge concluded that the claim was not arbitrable under either the 2009 arbitration policy or 2011 arbitration policy. Doc. 33, p. 13. He found that Mr. Jaludi's "cause of action accrued as of the date of discharge on April 21, 2013." *Id*. He ruled that because the "SOX amendment invalidating predispute arbitration agreements was in effect at that time, Jaludi's SOX claim [wa]s not subject to arbitration." *Id.*

3. Citigroup objected to the portion of the magistrate judge's report and recommendation that concluded Mr. Jaludi's SOX claim was not subject to arbitration. Doc. 34, 39. Citigroup contended the claim was arbitrable under the 2009 policy regardless of when the claim arose because the SOX antiarbitration provision does not apply retroactively. Doc. 34, p. 5. The district court sustained this objection, relying primarily on an earlier decision within the same district

court that had concluded that 15 U.S.C. 1639c(e)(1), another antiarbitration provision included in the Dodd-Frank Act, did not apply to arbitration agreements entered into before the provision's effective date. Doc. 40, pp. 6-8 (citing *Davies v. Green Tree Servicing, LLC*, No. 14-1711, 2015 WL 3795621 (M.D. Pa. June 18, 2015)). The district court accordingly granted Citigroup's motion to compel arbitration and dismiss the SOX claim.

4. Mr. Jaludi objected to the magistrate judge's conclusion that the 2011 arbitration policy did not supersede the 2009 arbitration policy. Doc. 35. The district court denied this objection. Doc. 40, p. 10. It concluded the magistrate judge had properly determined that the latter did not supersede the former, and that the policies were mutually exclusive. *Id*.[6]

[6] In addition to arguing that section 1514A(e)(2) applies to this case, Mr. Jaludi's appeal contends the district court erred when it concluded the 2011 arbitration policy did not supersede the 2009 arbitration policy. If Mr. Jaludi is correct, Citigroup lacks a basis to make a retroactivity defense because the 2011 arbitration policy was executed after enactment of section 1514A(e)(2). The Secretary takes no position on this argument. He does note, however, that the 2009 arbitration policy is an appendix to the 2009 Handbook, and the 2011 arbitration policy is an appendix to the 2011 Handbook. And that, as noted above, the 2011 Handbook states that "[t]his Handbook supersedes any Employee Handbooks or Human Resources policies, practices, or procedures that may have applied to you and that are inconsistent with and prior to this Handbook's distribution." O'Brien Declaration, Ex. 2, p. 4.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT APPLYING SECTION 1514A(e)(2) TO JALUDI'S SOX CLAIM RESULTS IN A RETROACTIVE APPLICATION OF THE PROVISION.

Section 1514A(e)(2) precludes arbitration of Mr. Jaludi's SOX claim, and the district court erred when it compelled arbitration under the 2009 arbitration policy. Section 1514A(e)(2) applies to arbitration agreements entered into before the provision's 2010 enactment because the provision has no retroactive effect, i.e., it impairs no rights, increases no liability, and imposes no new duties in the manner contemplated by the Supreme Court. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). Specifically, section 1514A(e)(2) ousts arbitral jurisdiction over SOX whistleblower claims, and the Supreme Court has regularly applied federal statutes that confer or oust jurisdiction regardless of whether jurisdiction existed when the underlying conduct occurred or when the suit was filed because such jurisdictional statutes govern the power of an adjudicator without altering the rights or obligations of the parties. *Id.* at 275. Moreover, even if section 1514A(e)(2) cannot be characterized as a jurisdictional provision, it is appropriate to apply it here because the provision merely changes the tribunal to hear the case without taking away substantive rights. *Id.* (quoting *Hallowell v. Commons*, 239 U.S 506, 508 (1916)). Furthermore, application of section 1514A(e)(2) in this case is proper

because 1514A(e)(2) governs the conduct of SOX litigation rather than the conduct of parties whose employment relationship SOX regulates.

a. The Supreme Court applies a two-part test to determine the temporal scope of a statute. *See Landgraf*, 511 U.S. at 280. It initially asks "whether Congress has expressly prescribed the statute's proper reach." *Id*. If Congress has not, "the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.*

In evaluating whether Congress has prescribed the statute's temporal reach, courts consider whether the application of normal rules of statutory construction demonstrates a congressional intent to apply a provision retroactively. *See Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006) ("we first look to whether Congress has expressly prescribed the statute's proper reach, and in the absence of language as helpful as that we try to draw a comparably firm conclusion about the temporal reach specifically intended by applying our normal rules of statutory construction") (quotes and citations omitted); *Monoson v. United States*, 516 F.3d 163, 166 (3d Cir. 2008). Citigroup did not expressly contend to the district court that applying normal rules of statutory construction to section 1514A(e)(2) indicated a congressional intent to apply the statute only to future cases, nor did the

district court decision apply normal rules of construction to interpret section 1514A(e)(2).

Applying normal rules of statutory construction, section 1514A(e)(2) may be read as addressing its temporal scope. The provision states, in pertinent part, that "[n]o predispute arbitration agreement shall be valid or enforceable." The reference to an arbitration agreement's enforcement suggests that Congress intended the statute to apply when a party seeks to enforce the arbitration agreement, regardless of when the parties entered into the agreement. In other words, Congress intended that the relevant point for determining whether section 1514A(e)(2) applies is when a party seeks to enforce an arbitration agreement, rather than the time the parties entered into the agreement. This reading, in effect, was the reading the magistrate judge in this case employed without analyzing in detail the statutory text of section 1514A. *See* Doc. 33, p. 13. It is also consistent with Congress' desire in amending SOX as part of the Dodd-Frank Act to improve financial transparency and protect investors by ensuring that whistleblowers who report corporate fraud and securities violations can litigate disputes in public administrative and judicial proceedings rather than private arbitration.

This reading additionally ensures employers such as Citigroup do not effectively have an open-ended exemption from section 1514A(e)(2) for long-term employees hired before 2010. Under Citigroup's reading, it or any other SOX-

covered employer, could compel employees who executed a predispute arbitration agreement prior to the 2010 amendment of SOX to arbitrate a SOX whistleblower claim far into the future. For example, a worker employed by Citigroup from 2005 through 2025 who filed a SOX whistleblower claim in 2025 would be compelled to arbitrate the claim, provided the worker had executed the 2009 arbitration policy. Furthermore, employees protected by SOX who are similarly situated save for their start date would be subject to differing arbitration regimes far into the future. Such results do not seem consistent with Congress's intent, in July 2010, to invalidate predispute agreements to arbitrate SOX whistleblower claims, as it would effectively permit Citigroup to have excepted itself, by contract, from the operation of a federal statute long after that law became effective. *See, e.g., Blair v. Scott Specialty Gases*, 283 F.3d 595 (3d Cir. 2002) (party to arbitration agreement may not include terms that preclude another party from vindicating her federal statutory right).

This reading, however, is not the one applied by the courts to date. The district court in *Pezza*, the only court to have extensively applied normal rules of statutory construction to section 1514A(e)(2), concluded that section 1514A(e)(2) is silent on its temporal reach. *See Pezza v. Inv'rs Capital Corp*., 767 F. Supp. 2d 225, 228-32 (D. Mass.). It reasoned that while the Dodd-Frank Act contains other antiarbitration provisions that apply solely to "any future dispute", the presence of

these provisions in the Act is insufficient to draw an inference as to whether Congress intended, or did not intend, section 1514A(e)(2) to apply retroactively. *Id.* at 228-30, 232 ("The mere fact that Congress expressly vested the [Consumer Financial Protection Bureau] and the [Securities Exchange Commission] with the authority to restrict pre-dispute arbitration with respect to *future disputes* as opposed [to] *existing* disputes or arbitration agreements . . . is insufficient to show that Congress intended [section 1514A(e)(2)] to be applied retroactively."); *see also Landgraf*, 511 U.S. at 259 (rejecting argument that Court "should infer" from two statutory provisions which specifically prohibited their retroactive application that Congress "intended the opposite for the remainder of the statute"). The ARB in *Abhyankar* agreed with *Pezza*'s conclusion that section 1514A(e)(2) contained no express congressional intent regarding retroactivity. *See Abhyankar*, 2013 WL 1494457, at *4. Thus, if the Court agrees with *Pezza* and *Abhyankhar's* construction of section 1514A(e)(2), the operative question is whether section 1514A(e)(2) has a retroactive effect, i.e., whether it impairs rights, increases liability, or imposes new duties in the manner contemplated by *Landgraf*.

b. In *Landgraf*, the Supreme Court recognized that a "presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." 511 U.S. at 265. The Court also observed, however, that "[a] statute does not operate 'retrospectively' merely

because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law." *Id.* at 269. The Court noted, for example, that it had "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Id.* at 274; *see also United Indus., Serv., Transp., Prof. & Gov't Workers v. Gov't of the V.I.*, 767 F.3d 193, 204 (3d Cir. 2014) (noting that "the presumption against retroactivity does not apply to legislation that merely alters jurisdiction" but finding statute does not apply to pre-enactment conduct based on use of normal rules of statutory construction). The Court explained that "[p]resent law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'" *Id.* (citation omitted).

Section 1514A(e)(2) speaks to the power of an adjudicator, i.e., a private arbitrator, to resolve a SOX whistleblower dispute rather than to the rights or obligations of the parties to such a dispute. When Congress ousted arbitral authority to adjudicate SOX whistleblower claims in July 2010, it did not alter parties' rights or obligations vis-a-vis SOX claims. Complainants like Mr. Jaludi retained the whistleblower rights they possessed under section 1514A as well as the obligation to satisfy the legal burdens identified in section 1514A(b)(2)(C) in order to succeed on their claims. SOX defendants like Citigroup similarly retained

both the rights they possessed under section 1514A, e.g., the statute of limitations defense in 1514A(b)(2)(D), and the general obligation not to retaliate against a whistleblower under 1514A(a). Application of section 1514A(e)(2) to the instant suit is accordingly consistent with the Supreme Court's recognition that it is appropriate to apply statutes that confer or oust jurisdiction even when the underlying suit arises from conduct that preceded the new statute's enactment. *See Bruner v. United States*, 343 U.S. 112, 116-17 (1952) (dismissing a suit brought in federal district court based on Congress's repeal of district court jurisdiction over such suits *when the Supreme Court appeal was pending*).

c. Even were section 1514A(e)(2) determined, as a technical matter, not to be a jurisdictional statute because it ousts arbitral rather than federal court jurisdiction, it is still appropriate to apply that provision to the dispute between Citigroup and Mr. Jaludi. That new jurisdictional statutes apply to matters involving pre-statute conduct does not constitute an exception from the presumption against statutory retroactivity. *See Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 951 (1997) ("The fact that courts often apply newly enacted jurisdiction-allocating statutes to pending cases merely evidences certain limited circumstances failing to meet the conditions for our generally applicable presumption against retroactivity, not an exception to the rule itself . . . ."). Rather, the application of a new jurisdictional statute to pre-statute conduct typically

produces no retroactive effect because it solely changes the tribunal hearing the case without taking away substantive rights. *Hamdan v. Rumsfeld*, 548 U.S. 557, 576-77 (2006) (if all a statute does is change the tribunal that is to hear the case without taking away any substantive rights, the statute's new rule has no retroactive effect) (citing *Hallowell*, 239 U.S. at 508). Section 1514A(e)(2) changes the tribunal that can hear SOX whistleblower claims without depriving parties of any substantive rights. Thus, whether or not it is proper to characterize 1514A(e)(2) as a jurisdictional rule, it has no retroactive effect and it is appropriate to apply it in the instant suit. *Hamdan*, 548 U.S. at 576-77.

d. The Supreme Court's approach to jurisdictional statutes reflects a general recognition that a statute governing the conduct of litigation rather than the primary conduct of regulated parties may be applied prospectively to future litigation arising out of pre-statute activities. Cf. *Landgraf*, 511 U.S. at 275 ("Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive."); *Hughes Aircraft Corp.*, 520 U.S. at 951 (observing that "[s]tatutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties [because] [s]uch statutes affect only *where* a suit

may be brought, not *whether* it may be brought at all"). Regardless of whether it is proper to characterize section 1514A(e)(2) as a jurisdictional provision, it addresses the secondary conduct of SOX whistleblower litigation rather than the primary conduct of persons like Mr. Jaludi and Citigroup that SOX protects and regulates, respectively. For this additional reason, application of section 1514A(e)(2) to this matter does not constitute retroactive application of the provision.

II. APPLYING SECTION 1514A(e)(2) IN THIS CASE DOES NOT AFFECT THE PARTIES' SUBSTANTIVE RIGHTS, DUTIES OR LIABILITIES UNDER SOX.

The district court incorrectly concluded that application of section 1514A(e)(2) under the facts here would be inconsistent with the general prohibition on the application of statutes to contracts that pre-date the statute's enactment. *See Jaludi v. Citigroup*, No. 15-2076, 2016 WL 4528352, at *4 (M.D. Pa. Aug. 30, 2016); *see also Landgraf*, 511 U.S. at 271 (noting that the "largest category of cases in which [the Supreme Court] ha[s] applied the presumption against statutory retroactivity has involved new provisions affecting *contractual* or property rights, matters in which predictability and stability are of prime importance") (emphasis added). The purpose of the general prohibition on the application of statutes to contracts that pre-date the statutes' enactment is to ensure statutes do not retroactively deprive parties of *substantive* contractual rights,

liabilities, and duties. Because arbitration is merely an alternative forum in which parties have agreed to resolve their substantive rights, liabilities, and duties, section 1514A(e)(2)'s jurisdictional ouster does not impair substantive contractual rights. Rather, it solely compels parties to litigate differences regarding such substantive rights, liabilities and duties before a federal instead of arbitral tribunal.

a. Application of the presumption against retroactivity in matters affecting contractual rights is only necessary when it serves the retroactivity principle's purpose to avoid "applying statutes affecting substantive rights, liabilities, or duties to conduct arising before the[] [statute's] enactment." *Landgraf*, 511 U.S. at 278. Here, application of the presumption would not serve the retroactivity principle's purpose because section 1514A(e)(2) does not affect the substantive rights, liabilities, or duties of Citigroup or Mr. Jaludi under SOX; it merely compels them to resolve differences regarding such rights, liabilities or duties in a non-arbitral forum. Indeed, as the Supreme Court has repeatedly confirmed, parties typically retain the substantive rights afforded by a statute whether the underlying claim is litigated in a judicial, or arbitral, forum. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 229 (1987)

(same); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) (same); *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 26 (1991) (same); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (same); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 266 (2009) (same).[7]

Therefore, that federal courts had interpreted the Federal Arbitration Act ("FAA"), 9 U.S.C. 1 *et seq*., to have codified a power to agree to arbitrate a SOX whistleblower claim before the enactment of section 1514A(e)(2) in 2010 is immaterial. *See, e.g., Guyden v. Aetna, Inc.*, 544 F.3d 376 (2d Cir. 2008) (finding SOX claim arbitrable). The FAA renders valid and enforceable certain agreements to arbitrate. *See* 9 U.S.C. 2. However, an agreement to arbitrate a dispute merely substitutes the arbitral forum for otherwise available dispute-resolution forums. The resulting forum substitution does not affect the substantive rights, liabilities, or duties of the parties. *See Guyden*, 544 F.3d at 384 ("Guyden's ability to 'vindicate

[7] The Supreme Court recognizes at least one exception applies to this principle. If the rules governing how an arbitration will proceed preclude a party from effectively vindicating his or her statutory rights, the arbitration agreement does not maintain the substantive rights afforded by the statute and is accordingly, at least in part, not enforceable. *Am. Express v. Italian Colors Rest.*, 133 S.Ct. 2304, 2310-11 (2013) (noting that if the expense of "filing and administrative fees attached to arbitration" render "access to the [arbitration] forum impracticable[,]" such expenses may not be enforceable) (citing *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000) (quotation omitted)). *See also Blair*, 283 F.3d at 610 (3d Cir. 2002) (ordering remand to allow plaintiff to conduct limited discovery on the costs she would incur to arbitrate her claim so that the district court can determine whether such costs would "deny [plaintiff] a forum to vindicate her statutory rights").

[her] statutory cause of action in the arbitral forum,' ensures that SOX 'will continue to serve both its remedial and deterrent function.'") (quoting *Mitsubishi*, 473 U.S. at 637).

Moreover, case law articulating the presumption in favor of arbitration under the FAA and deferring to congressional intent in the FAA to place arbitration agreements "on an equal footing with other contracts" is not controlling. *See, e.g.*, *Richards v. Gibson*, No. 15-7, 2015 WL 926594, at *3 (S.D. Miss. Mar. 4, 2015) (quoting *AT&T Mobility, LCC v. Concepcion*, 563 U.S. 333, 339 (2011). The FAA arbitration mandate, "[l]ike any statutory directive . . . [,] may be overridden by a contrary congressional command." *Shearson/American Express, Inc.*, 482 U.S. at 226; *Khazin v. TD Ameritrade Holding Corp*., 773 F.3d 488, 493 (3d Cir. 2014) (noting that federal statutory claims are generally arbitrable "unless the FAA's mandate has been overridden by a contrary congressional command") (quotations and citations omitted). Section 1514A(e)(2) constitutes a congressional command to override the FAA's arbitration mandate. *See CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 672 (2012) (noting in dicta that Congress "restricted the use of arbitration" when it employed section 1514A(e)(2)'s language as it appears in 7 U.S.C. 26(n)(2)). Thus, the question this Court faces is whether applying that congressional command to the 2009 arbitration policy produces a retroactive effect, and the law that controls this question is *Landgraf* and those other matters in

which the Supreme Court has applied retroactivity analysis.[8]

In addition, because application of section 1514A(e)(2) here involves at most minimal interference with "settled expectations" or "reasonable reliance" interests, the importance of predictability and stability (that the presumption against retroactivity provides to contracting parties) is significantly diminished, if not altogether extinguished. *Landgraf*, 511 U.S. at 270 (stating that "familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance" to judges confronting a retroactivity question). Citigroup did not terminate Mr. Jaludi until April 2013, nearly three years after Congress enacted section 1514A(e)(2), and at least some of Mr. Jaludi's protected activity occurred after the enactment of section 1514A(e)(2) in July 2010. Mr. Jaludi has accordingly asserted that, after section 1514A(e)(2)'s enactment, he engaged in protected activity of which Citigroup was aware and for which Citigroup took adverse action against him, i.e., Mr. Jaludi has alleged a cause of action that arose

[8] Citigroup contended to the district court that the parties' dispute is one over arbitrability, i.e, whether the parties have agreed to arbitrate Mr. Jaludi's SOX claim. However, there is no dispute the parties agreed to arbitrate SOX claims in the 2009 arbitration policy. Therefore, the issue is not whether the parties have agreed to arbitrate Mr. Jaludi's SOX claim under that policy. Rather, the issue is whether section 1514A(e)(2) precludes enforcement of the 2009 arbitration policy with respect to Mr. Jaludi's SOX claim. Resolution of that issue solely requires application of *Landgraf* and other Supreme Court retroactivity precedent. It does not call for application of the FAA to make an arbitrability determination.

entirely after enactment of section 1514A(e)(2). Citigroup removed SOX from the list of federal statutory claims subject to arbitration under the 2011 arbitration policy over two years before Mr. Jaludi asserted his SOX claim, strongly suggesting it had actual notice of section 1514A(e)(2)'s existence in 2010. *See* Doc. 33, p. 12 (magistrate judge opining that "[a]pparently, as a consequence of th[e] amendment [of SOX adding 1514A(e)(2), Citigroup removed SOX claims subject to arbitration in its 2011 Policy"). Under these circumstances, Citigroup can assert little, if any, settled expectation or reliance interest in enforcement of the 2009 arbitration policy to cover Mr. Jaludi's SOX claim.

III. THE ARB'S *ABHYANKAR* DECISION CORRECTLY CONCLUDED THAT SECTION 1514A(e)(2) APPLIES TO PRE-ENACTMENT ARBITRATION AGREEMENTS.

After a thorough examination of whether it is proper to apply section 1514A(e)(2) to invalidate predispute arbitration agreements executed prior to the provision's enactment, the ARB's *Abhyankar* decision and the district court decisions in *Pezza, Wong* and *Wiggins* ("antiarbitration decisions") correctly concluded that such invalidation is appropriate under *Landgraf* because section 1514A(e)(2) is akin to an intervening statute conferring or ousting jurisdiction. *See Abhyankar*, 2013 WL 1494457, at *5 (concluding section 1514A(e)(2) "primarily affects the jurisdiction to hear the substantive claim"); *see also Pezza*, 767 F. Supp. 2d at 233 (1514A(e)(2) "principally concerns the type of jurisdictional statute

envisioned in *Landgraf*"); *Wong v. CKX, Inc.*, 890 F. Supp. 2d 411, 423 (S.D.N.Y 2012) (same). Conversely, the district court decisions finding the antiarbitration language in section 1514A(e)(2) does not apply to arbitration agreements executed prior to enactment of the statutory provision ("adverse decisions") concluded application of section 1514A(e)(2) to pre-enactment arbitration agreements would impair vested contractual rights without identifying the *substantive* right(s) such an application would impair consistent with *Landgraf*. Because section 1514A(e)(2) is akin to intervening jurisdictional statutes and its application to pre-enactment arbitration agreements does not impair substantive contractual rights, the antiarbitration decisions reached the proper conclusion.

a. The antiarbitration decisions recognized the contention that section 1514A(e)(2) should not invalidate predispute arbitration agreements executed prior to the provision's enactment "has some merit" because under *Landgraf* retroactive application of a statute that affects contractual rights is disfavored. *Abhyankar*, 2013 WL 1494457, at *5; *Wong*, 890 F. Supp. 2d at 422 ("The agreement to arbitrate in this case arises out of an employment contract between the parties, which perhaps lends support to the defendant's position that the statute should not be applied to this dispute."). As the *Wong* court opined, however, "the right to have a dispute heard in an arbitral forum is a procedural right that affects the forum that will decide the substantive rights of the parties." *Wong*, 890 F. Supp. 2d at

423; *see also Pezza*, 767 F.Supp.2d at 233-34. This view is consistent with longstanding, repeated Supreme Court rulings holding that parties' substantive statutory rights usually can be protected equally in a judicial or arbitral forum. *See supra* pp. 21-22; *see also Abhyankar*, 2013 WL 1494457, at *5. The presumption against retroactivity in matters affecting contractual rights accordingly does not apply here because its application is not necessary to avoid "applying statutes affecting substantive rights, liabilities, or duties to conduct arising before the[] [statute's] enactment." *Landgraf*, 511 U.S. at 278. Similarly, because parties can normally vindicate their substantive statutory rights fully in a judicial or arbitral forum, the antiarbitration decisions correctly concluded that section 1514A(e)(2) merely ousts arbitral jurisdiction over SOX whistleblower claim without depriving parties to such claims of any substantive rights under SOX. *See Abhyankar*, 2013 WL 1494457, at *6.

b. Conversely, the adverse decisions do not grapple extensively with the contention that section 1514A(e)(2) is akin to statutes that oust or confer jurisdiction. Instead, the decisions state that they do not understand how application of section 1514A(e)(2) to pre-statute arbitration agreements would "*not* 'impair rights [the] parties possessed when they acted,'" *Henderson v. Masco Framing Corp.*, No. 11-00088, 2011 WL 3022535, at *4 (D. Nev. July 22, 2011) (quoting *Landgraf*, 511 U.S. at 280); *Taylor v. Fannie Mae*, 839 F. Supp. 2d 259,

263 (D.D.C. 2012) (same); *Blackwell v. Bank of Am. Corp.*, No. 11-2475, 2012 WL 1229673, at *4 (D.S.C. Mar. 22, 2012) (same), and that application of section 1514A(e)(2) would interfere with contractual rights. *See Henderson*, 2011 WL 3022535, at *4; *Blackwell*, 2012 WL 1229673, at *4. These statements, however, do not address the core inquiry under *Landgraf*: will application of section 1514A(e)(2) to pre-enactment arbitration agreements impair *substantive* rights? Because section 1514A(e)(2) merely ousts arbitral jurisdiction over whistleblower claims without depriving parties of any substantive rights[9] under SOX, the adverse decisions incorrectly concluded section 1514A(e)(2) has an impermissible retroactive effect. Indeed, section 1514A(e)(2)'s application to pre-enactment arbitration agreements produces no retroactive effect, and the Department accordingly requests that the Court reverse the district court decision.

[9] When deciding whether parties have agreed to arbitrate a dispute, federal courts must apply the "'federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.'" *Mitsubishi*, 473 U.S. at 626 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (other citations omitted). As discussed above, however, the parties are not engaged in an arbitrability dispute. Moreover, that the FAA is a source of substantive law to issue arbitrability determinations does not render the statute one that confers substantive rights on parties for purposes of the materially distinct retroactivity analysis under *Landgraf*. Consistent with *Landgraf*, an agreement to arbitrate merely creates a procedural right to resolve a substantive dispute in an arbitral rather than judicial forum. And because the parties retain all their substantive rights under SOX whether they litigate Mr. Jaludi's claim in a judicial or arbitral forum, the application of section 1514A(e)(2) does not deprive the parties of any substantive rights.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's decision.

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