IN THE SUPREME COURT OF THE STATE OF IDAHO

BRANDON ELLER,

Plaintiff/Respondent,

vs.

IDAHO STATE POLICE, an Executive Department of the State of Idaho,

Defendant/Appellant.

Docket No. 45699-2018
Docket No. 45698-2018
District Court No. CV-OC-2015-127

BRIEF OF AMICUS CURIAE

The National Whistleblower Center

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE NANCY A. BASKIN, DISTRICT JUDGE PRESIDING

Stephen M. Kohn
DCB No. 41153
Kohn, Kohn & Colapinto
3233 P Street, NW
Washington, DC 20007
Attorneys for Amici Curiae for the National Whistleblower Center

Marty Durand
ISB No. 5111
Herzfeld & Piotrowski
PO Box 2864
Boise, ID 83701
Attorneys for Amici Curiae for the National Whistleblower Center

T. Guy Hallam
ISB No. 6101
Strindberg & Scholnick, LLC
1516 W. Hays St.
Boise, ID 83702
Attorneys for Brandon Eller

Erika Birch
ISB No. 7831
Strindberg & Scholnick, LLC
1516 W. Hays St.
Boise, ID 83702
Attorneys for Brandon Eller

Andrew Brassey
ISB No. 2128
Brassey Crawford, PLLC
345 Bobwhite Court, Ste. 215
Boise, ID 83702
Attorneys for Idaho State Police

Jason Murray
ISB No. 7623
Brassey Crawford, PLLC
345 Bobwhite Court, Ste. 215
Boise, ID 83702
Attorneys for Idaho State Police

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INTRODUCTION

Amicus Curiae National Whistleblower Center submits this brief in support of appellant Brandon Eller and against respondent Idaho State Police ("ISP") on the issue of whether emotional distress damages are recoverable as damages by Eller (and other plaintiffs) under the Idaho Protection of Public Employees Act ("Whistleblower Act" or "Act"). As more fully discussed below, emotional distress damages are recoverable under the Whistleblower Act, and District Judge Baskin erred in refusing to allow Eller to seek recovery of such non-economic damages from the jury under the Act.

First, under the Whistleblower Act's unambiguous terms and well-settled principles of statutory interpretation, emotional distress damages are recoverable as actual damages under Section 6-2105 of the Act. Second, even assuming the Whistleblower Act is ambiguous on this issue, well-settled principles of statutory construction – including looking to decisions of this Court interpreting similar or identical damage provisions in other Idaho statutes and construing the Act broadly because of its remedial nature – lead to the same result. Third, expert testimony in other litigated cases and academic studies in medical and social science journals bolster the need to recognize that (a) plaintiffs like Eller will suffer emotional distress as a result of both their whistleblowing and retaliation by public sector employers, and (b) remedies under the Whistleblower Act should and must be interpreted broadly to fully compensate plaintiffs and thereby enhance responsible whistleblowing activity directed toward ensuring integrity in the operation of the public sector workplace.

For these reasons, non-economic damages, including emotional damages, are recoverable under the remedies provision of Idaho's Whistleblower Act. This Court should so hold.

INTEREST OF THE *AMICUS CURIAE*

The National Whistleblower Center ("NWC") is a nonprofit, tax-exempt organization dedicated to the protection of employees who lawfully report illegal conduct. See www.whistleblowers.org. The NWC has filed *amicus curiae* briefs in the United States Supreme Court, the U.S Court of Appeals for the Third Circuit, the U.S. Court of Appeals for the Tenth Circuit, the U.S. Court of Appeals for the Eleventh Circuit, and the U.S. Court of Appeals for the Federal Circuit.

Before the U.S. Supreme Court, the NWC has participated as *amicus curiae* in *English v. General Electric*, 496 U.S. 72 (1990); *Haddle v. Garrison*, 525 U.S. 121 (1999); *Vermont Agency of Natural Resources v. United States. ex rel. Stevens,* 529 U.S. 765 (2000); *Beck v. Prupis*, 529 U.S. 494 (2000); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Doe v. Chao*, 540 U.S. v 614 (2004); *Lawson v. FMR LLC*, 134 S. Ct 1158 (2014); *Lane v. Franks*, 134 S. Ct. 2369 (2014); *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015); *Universal Health Svcs. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016); and *Digital Reality Trust, Inc. v. Somers* 583 U.S. _ (2018).

The directors and staff of the NWC are nationally-recognized advocates for whistleblowers, and as part of their work have represented whistleblowers, advocated for whistleblowers in the public discourse, taught law school courses on whistleblowing, and authored

numerous books and articles on this subject. The NWC is led by Executive Director Stephen M. Kohn, President Michael Kohn, and General Counsel David Colapinto. They significant experience representing law enforcement whistleblowers including Fred Whitehurst (who uncovered fraudulent practices at the FBI crime lab), Aaron Westrick (a former police offer who blew the whistle on defective bulletproof vests), and Jane Turner (blew the whistle on FBI's failure to investigate child rapes).

Stephen M. Kohn, attorney for amicus in this brief, serves *pro bono* as the Executive Director of the National Whistleblower Center. He has represented whistleblowers since 1984, successfully setting numerous precedents that have helped define modern whistleblower law and obtained the largest reward ever paid to an individual whistleblower ($104 million for exposing illegal offshore bank accounts). He is widely recognized as a leading U.S. authority on whistleblower laws, is regularly consulted by Congressional committees, and helped draft whistleblower provisions in the Sarbanes-Oxley, Dodd-Frank, and Whistleblower Protection Enhancement Acts. He teaches a seminar on whistleblower law at Northeastern Law School, and has published numerous books on whistleblower law, including *The New Whistleblower's Handbook*, the seminal guide to the practical use of whistleblower law.

In 2016, the NWC was named a Grand Prize winner of USAID's Wildlife Crime Tech Challenge for its innovative solution to use whistleblowers to combat wildlife crime. This international competition was sponsored by the U.S. Agency for International Development, in partnership with the Smithsonian Institution, National Geographic, and TRAFFIC.

Amicus curiae affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or their counsel made any monetary contributions intended to find the preparation or submission of this brief.

The issue raised in this appeal is of pressing interest to the NWC. The organization has long emphasized the importance of making whistleblowers whole, which includes accounting for the incredible emotional distress whistleblowers undergo when they speak out against fraud and wrongdoing.

ISSUE PRESENTED ON APPEAL

Amicus Curiae National Whistleblower Center will address the following question:

Whether non-economic damages, including emotional damages, are recoverable under the remedies provision of Idaho's Whistleblower Act.

STATEMENT OF THE CASE

Title 6, Chapter 21 of the Idaho Statutory Code is "known as the 'Idaho Protection of Public Employees Act.'" Section 6-2102. Section 6-2101 expressly identifies the intent of the Idaho legislature in enacting the Whistleblower Act,[1] stating as follows:

> The legislature hereby finds, determines and declares that government constitutes a large proportion of the Idaho work force and that it is beneficial to the citizens of

[1] This Court has repeatedly referred to the provisions of the Idaho Protection of Public Employees Act as the "Whistleblower Act." *See, e.g., Wright v. Ada County*, 376 P.3d 58, 61 (2016); *Curlee v. Kootenai County Fire and Rescue*, 204 P.3d 458, 462 (2008).

> this state to protect the integrity of government by providing a legal cause of action for public employees who experience adverse action from their employer as a result of reporting waste and violations of a law, rule or regulation.

The Statement of Purpose underlying the Whistleblower Act likewise delineates the legislature's purpose in enacting the statute, providing that:

> This legislation commonly known as the Whistleblower's Act provides for the protection of an employee, or a person authorized to act on behalf of the employee because the employee came forth in good faith and exposed the existence of any waste of public funds, property or manpower, or a violation or suspected violation of a law, rule or regulation adopted under the laws of the State of Idaho, a political subdivision of this state, or of the United States.
>
> Statement of Purpose ("SOP"), RS 03021C1, H.B. No. 616 (1994).

The liability provisions of the Whistleblower Act essentially mirror the above-quoted intent and purpose language, providing at Section 6-2104(1)(a) as follows:

> An employer may not take adverse action against an employee because the employee, or a person authorized to act on behalf of the employee, communicates in good faith the existence of any waste of public funds, property or manpower, or a violation or suspected violation of a law, rule or regulation adopted under the law of this state, a political subdivision of this state or the United States. …

Section 6-2105 is entitled "Remedies for Employee Bringing Action -- Proof Required," and provides that "(1) …'*damages' means damages for injury or loss* caused by each violation of this chapter … [and] (2) [a]n employee who alleges a violation of this chapter may bring a civil action for appropriate injunctive relief or *actual damages*, or both …" (*emphasis added*).

In turn, Section 6-2106 is entitled "Court Orders for Violation of Chapter" and provides that:

A court, in rendering a judgment brought under this chapter, *may* order any or all of the following:

(1) An injunction to restrain continued violation of the provisions of this act;
(2) The reinstatement of the employee to the same position held before the adverse action, or to an equivalent position;
(3) The reinstatement of full fringe benefits and seniority rights;
(4) The compensation for lost wages, benefits and other remuneration;
(5) The payment of reasonable attorneys' fees;
(6) An assessment of a civil fine of not more than five hundred dollars ($500), which shall be submitted to the state treasurer for deposit in the general fund.

(*emphasis added*).

Eller brought Whistleblower Act and negligent infliction of emotional distress claims against the ISP, seeking, among other remedies, emotional distress damages against it. (Clerk's Record ("CR"), pp. 20-26 and pp. 372-381). Interpreting Sections 6-2105 and 6-2106 in a pretrial ruling, District Judge Baskin ruled as a matter of law that Eller (and other Whistleblower Act plaintiffs) could not recover emotional distress damages under the Act and could only seek such damages under his negligent infliction of emotional distress claim. (Reporter's Transcript ("RT"), pp. 768-774; CR, pp. 1830-1836).

During trial, Eller and his wife, Kristi Eller, testified about the emotional toll that his treatment at the hands of ISP officials had taken on him. Prior to Eller's involvement in the investigation and preliminary hearing regarding Payette County Sheriff Deputy Scott Sloan, Eller loved doing Collision Reconstructionist work (RT, pp. 949-950) and was "very proud to be an Idaho state trooper." (*Id.*, pp. 948 and 949). Ultimately his goal was to become the manager of the ISP crash reconstruction program. (*Id.*, pp. 949-951). After ISP officials retaliated against him

because of his testimony at Deputy Sloan's preliminary hearing, Eller "shut down … he lost the skill to communicate about" his children (*Id*., p. 955) and all he wanted to do was watch television (*Id*., p. 956). Eller also stopped interacting with his kids, stopped cooking for them, lost 15 to 20 pounds, and quit working out. (Id., pp. 955-957).

In addition, after the ISP reassigned Eller from the Collision Reconstruction Unit to regular patrol, he was "devastated." (*Id*., p. 386). Eller testified that "you have your whole career path, your whole direction you want to go, and all of the sudden, it's gone." (*Id*.). After his reassignment, he had trouble sleeping, had headaches, developed skin problems, and started getting sick more often. (*Id*., pp. 415-416). Kristi Eller testified that it was "heartbreaking" to see her husband pushed out of reconstruction. (*Id*., p. 961). To cope with the issues related to his whistleblowing and the ISP's retaliation, Eller participated in a number of counseling sessions. (*Id*., pp. 475-476 and 484; Exhibit ("Ex.") 139).

After the Idaho Statesman published an article about Eller's lawsuit in June 2015, ISP then-Colonel Ralph Powell sent out emails to all personnel at ISP concerning Eller's action. (RT, 469-472; Exs. 118 and 119). One of the emails stated "as we all know, anyone can sue for anything." (RT, pp. 470, Ex. 117). Eller felt that the email was an attack on his character, was embarrassing, and was an attempt to "mislead the guys and gals that I work with." (*Id*., p 471; Ex. 117). The second email made Eller "feel like they were trying to sway officers' opinions within the agency" about his lawsuit. (*Id*., p. 473; Ex. 118). Eller felt the second email was an attack on his reputation. (*Id*., p. 473). Addressing how his treatment at the hands of the ISP had impacted his character and reputation, Eller testified as follows:

> Law enforcement is a close-knit, tight group of people. And one of the decisions that I struggled with before bringing this against the agency, against ISP, was how would I be viewed within the department from the people that I work with.
>
> And I struggle with that still because there's those that I think believe that you should just go with the flow and not stand up for something you believe could potentially be wrong. So I worry quite often what the ramifications are going to be, you know, each day that I come to work. Is there going to be something new that pops up?
>
> And I don't think that -- that's going to take a long time for that to go away, if it ever does go away for me with this agency, and probably well after I leave, because there's a trust; or, better yet, there's a bond that you build with the people that you work with. And I think that's -- that potentially could be compromised with some of the folks I work with because I chose to stand up and say this is not right.
>
> (RT, pp. 474-475).

At the close of evidence and argument, the case went to the jury. As a result of Judge Baskin's pretrial ruling on the Whistleblower Act emotional distress damages issue, the Special Verdict form submitted to the jury permitted it to award economic damages to Eller on his Whistleblower Act claim, but only permitted the jury to award non-economic damages under Eller's claim for negligent infliction of emotional distress. (CR, pp. 1827-1829). The jury returned a verdict and Judge Baskin entered judgment on Eller's Whistleblower Act claim, awarding Eller economic damages in the amount of $30,528.97 (*Id.*, p. 1997). The jury awarded Eller $1,500,000 in emotional distress damages on his negligent infliction of emotional distress claim; however, Judge Baskin reduced that amount to $1,000,000 under Idaho's damages cap law (*Id.*, 1993) and entered both a Judgment and an Amended Judgment. (Id., pp. 1997 and 2069-2070).

ARGUMENT

A. Under the Free/De Novo Standard of Review Governing Interpretation of Statutes, this Court Should Reverse the Trial Court's Determination Precluding the Jury from Awarding Eller Emotional Distress Damages under his Whistleblower Act Claim

The interpretation of a statute is a question of law over which this Court exercises free, i.e. de novo, review. *PHH Mortgage v. Nickerson*, 423 P.3d 454, 461 (August 1, 2018); *Davison v. Debest Plumbing, Inc.*, 416 P.3d 943, 950 (2018).[2] This Court has stated that "[a] de novo review means 'a trying of the matter anew – the same as if it had never been heard before,'" *Marcia T. Turner, L.L.C. v. City of Twin Falls*, 159 P.3d 840, 848 (2007) [*quoting Gilbert v. Moore*, 108 Idaho 165, 168, 697 P.2d 1179, 1182 (1985)], and has further made clear that, in conducting free review, the Court does not defer to the trial court's determinations on questions of law. *Ada County Assessor v. Roman Catholic Diocese of Boise, 123 Idaho 425, 428 (Idaho 1993)* [*citing Linn v. North Idaho Dist. Med. Services Bureau, Inc*., 102 Idaho 679, 688, 638 P.2d 876,885 (1981)].

Applying the free or de novo standard of review, and as more fully discussed below, this Court should reverse Judge Baskin's determination precluding the jury from awarding Eller emotional distress damages under his Whistleblower Act claim.

B. Under Well-Settled Principles of Statutory Interpretation and Construction, Eller and Other Plaintiffs who Prove a Violation of the Whistleblower Act are Entitled to Recover Emotional Distress Damages under the Act

1. Applying Well-Settled Principles of Statutory Interpretation, this Court Should Conclude that Emotional Distress Damages are Recoverable under the Whistleblower Act's Unambiguous and Legislatively Defined Terms

[2] This Court has used the terms "de novo" and "free" review interchangeably. *See, e.g. Rincover v. State Dept. of Finance, Securities Bureau*, 976 P.2d 473, 475 (1999).

In determining the meaning of a statute, this Court's primary function is to determine and give effect to legislative intent. *Kaseburg v. State, Board of Commissioners*, 300 P.3d 1058, 1065 (2013). "Because 'the best guide to legislative intent is the words of the statute itself,' the interpretation of a statute must begin with the literal words of the statute." *Mayer v. TPC Holdings, Inc.*, 370 P.3d 738, 741 (2016) [*quoting In re Permit No. 36-7200*, 121 Idaho 819, 824, 828 P.2d 848, 853 (1992)]. In the absence of a statutory definition, statutory language is given its plain, usual and ordinary meaning. *Johnson v. State*, 395 P.3d 1246, 1251 (2017). However, this Court has recently reiterated that "[s]tatutory interpretation that turns on '[l]egislative definitions of terms included within a statute' presents a straight-forward analysis, as those definitions 'control and dictate the meaning of those terms as used in the statute.'" *In re Decision on Joint Motion to Certify Question of Law to Idaho Supreme Court*, ___ Idaho ___, ___ P.3d ___, 2018 WL 472145, *18 (January 17, 2018) [*quoting State v. Yzaguirre*, 144 Idaho 471, 477, 163 P.3d 1183, 1189 (2007)]. On this point, the United States Supreme Court has made clear that, when a legislative body uses the word "'means'[,] … an exclusive definition is intended," *Groman v. Commissioner*, 302 U.S. 82, 86 (1937), and has further stated that "'[a]s a rule, [a] definition which declares what a term 'means' ... excludes any meaning that is not stated.'" *Burgess v. United States,* 553 U.S. 124, 130 (2008) [*quoting Collauti v. Franklin*, 439 U.S. 379, 392-393 n. 10 (1979)]; *see also* 2A N. Singer & J. Singer, Sutherland on Statutory Construction ("Sutherland") § 47:7, p. 306, and n. 20 (7th Ed. 2007). Ultimately, the Court considers the statute as a whole, *Salinas v. Bridgeview Estates*, 394 P.3d 793, 795 (2017), and must give effect to all provisions and words of the statute,

so that none will be void, superfluous or redundant. *Melton v. Alt*, 408 P.3d 913, 918 (2018). And, where statutory language is unambiguous, i.e. not capable of more than one reasonable construction, the Court need not consider rules of statutory construction. *Id*.

As quoted above, Section 6-2105 defines the "Remedies for Employee Bringing Action …" and provides that "(1) "'*damages' means damages for injury or loss* caused by each violation of this chapter … [and] (2) [a]n employee who alleges a violation of this chapter may bring a civil action for appropriate injunctive relief or *actual damages*, or both …" (*emphasis added*). Based on this Court's and the United States Supreme Court's above-discussed rules of statutory interpretation, the Legislature's use of the word "means" in defining "damages" as "damages for injury or loss" and permitting recovery of "actual damages" caused by a violation of the Whistleblower Act makes for a "straightforward analysis," "control[s] and dictate[s]" the meaning of the terms, and provides the "exclusive definition" of "damages" under the Act. As such, Judge Baskins' reliance on another statutory provision -- Section 6-2106's list of items that "may" be ordered by a district court when it renders judgment in a Whistleblower Act case to preclude the award of emotional distress damages under the Act -- contravened the above-discussed fundamental rules of statutory interpretation and was, therefore, erroneous.

Once this Court properly focuses on Section 6-2105's exclusive definition of damages and actual damages, the resolution of the meaning of those terms comes down to gleaning their plain, usual and ordinary meaning. As a legal term, "damages" has been defined as "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury." Black's Law Dictionary (10th Ed. 2014) at p. 471. Similarly, Black's has defined "actual damages" as "[a]n amount

awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses. *Id*.; *see also Damages*, MERRIAM-WEBSTER'S LAW DICTIONARY (last accessed Oct. 2, 2018), https://www.merriam-webster.com/dictionary/damage#legalDictionary (actual damages defined as "damages deemed to compensate the injured party for losses sustained as a direct result of the injury suffered – called also *compensatory damages*.").[3] Likewise, Webster's Third New International Dictionary (2002) defines damages as "the estimated reparation in money for detriment or injury sustained: compensation or satisfaction imposed by the law for a wrong or injury caused by a violation of law." *Id*. at 571; *see also* Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) at p. 314 ("damages" defined as "compensation in money imposed by law for loss or injury").[4]

Based on the above dictionary definitions, the terms "damages" and "actual damages" encompass compensation for all injuries and losses suffered by Eller and other plaintiffs who prove violations of the Whistleblower Act. All injuries and losses, of course, encompass non-economic losses, including emotional distress damages. Having exclusively defined those terms in Section 6-2105, the Idaho legislature, had it intended to limit plaintiffs' recovery to economic losses, could easily have added words of limitation excluding non-economic loss or emotional distress damages from Section 6-2105's definitional provision. However, the Legislature did not do so and this

[3] This Court, in determining the plain, usual and ordinary meaning of a statutory term, has for many years utilized legal dictionaries, including Black's Law Dictionary. *See, e.g. Hayes v. City of Plummer*, 357 P.3d 1276, 1278-79 (2015); *Striebeck v. Employment Sec. Agency*, 366 P.2d 589, 591 (1961).

[4] This Court also has determined the ordinary meaning of statutory terms by utilizing definitions from collegiate dictionaries and the like. *See, e.g., Johnson*, 384 P.3d at 980; *Marek v. Hecla, Ltd.,* 384 P.3d 975, 980 (2016).

Court should decline defendants' invitation to rewrite the exclusive definitional provisions of the Whistleblower Act.[5]

In reaching this conclusion, this Court would not ignore or render superfluous other provisions of the Whistleblower Act, including, notably, Section 6-2106. As discussed previously, the Legislature, by enacting Section 6-2106 and the list of remedies that a court "may" wish to order in its final judgment in a Whistleblower Act case, has given trial courts permission and discretion to shape relief based on its assessment of the evidence in the case.[6] In this regard, the items of relief listed in Section 6-2106 mostly include remedies – such as injunctions, reinstatement of the employee and germane benefits, attorneys' fees and costs, and civil fines -- that a trial court may order as part of a judgment after a jury returns a damages verdict in favor of a Whistleblower Act plaintiff. Applied in this manner, Section 6-2106 will be given its plain meaning and avoid being rendered superfluous under the terms of the Whistleblower Act as a whole.

Conversely, given Section 6-2105's exclusive, yet broad, definition of "damages" and "actual damages" available to plaintiffs based on a defendant's violation of the Whistleblower Act, nothing about Section 6-2106's discretionary and non-mandatory list of remedies requires, let alone permits, a trial court to order any of the remedies listed in that provision and certainly does

[5] This Court "has been unwilling to insert words into a statute that the Court believes the legislature left out, be it intentionally or inadvertently." *Wright*, 376 P.3d at 65.

[6] The legislature's use of the permissive term "may" signals that the determination whether to grant relief is not mandatory but, rather, is within the trial court's discretion. *State v. Harbaugh*, 123 Idaho 835, 837, 853 P.2d 580, 582 (1993); *Rife v. Long*, 127 Idaho 841, 848, 908 P.2d 143, 150 (1995).

not allow that same court to avoid awarding proven emotional distress damages as "actual damages" under Section 6-2105. Indeed, as pointed out by Judge Winmill, in determining and concluding that non-economic emotional distress damages are recoverable by plaintiffs under the Whistleblower Act, *Brown v. City of Caldwell,* 2012 WL 4522728, ** 1-3 (D. Idaho 2012), a ruling (such as Judge Baskin's in this case) allowing Section 6-2106 to preclude a jury from awarding emotional distress damages under Section 6-2105's "actual damages" provision would render Section 6-2105 a "nullity." *Id*. at *2. In contrast, a ruling by this Court allowing Eller and other plaintiffs to recover emotional distress damages under Section 6-2105 would be consistent with the decisions of numerous courts permitting recovery of non-economic or emotional distress damages under other state and federal whistleblower statutes, *see., e.g., Bailets v. Pennsylvania Turnpike Commission,* 181 A.3d 324, 329-35 (Pa. S. Ct. 2018); *Hudson v. O'Brien*, 449 S.W.3d 87, 97 (Mo. Ct. App. 2014); *Aery v. Wallace Lincoln-Mercury, LLC,* 118 So.3d 904, 913 (Fla. Dist. Ct. App. 2013); *Overton v. Shell Oil Co*., 937 So.2d 404, 417-18 (La. Ct. App. 2006); *Nardello v. Township of Voorhees,* 873 A.2d 577, 582 (2005); *Adams v. Uno Restaurants*, 794 A.2d 489, 490 and 492-94 (R. I. S. Ct. 2002); *Phinney v. Perlmutter*, 464 N.W.2d 532, 557 (1997); *Baufield v. Safelite Glass Corp*., 831 F. Supp. 713, 719-20 (D. Minn. 1993); *Jones v. Southpeak Interactive Corp., of Delaware,* 777 F.3d 658, 671-72 (4th Cir. 2015); *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30, electronic slip op. at 31-35 (ARB Feb. 9, 2001), *aff'd sub. nom. Georgia Power Co. v. U.S. Dep't of Labor*, No. 01-10916, 52 Fed. Appx. 490 (11th Cir. 2002) (not published). Specifically, such a ruling would be consistent with Judge Winmill's decision in *Brown* and the decisions of other courts allowing recovery of those same noneconomic

or emotional distress damages under the "actual damages" provisions of Idaho's and other state's whistleblower statutes. *Brown*, 2012 WL 4522728 at ** 1-3; *Bailets*, 181 A.2d at 329-35; *Hudson*, 449 S.W.3d at 97; *Phinney*, 564 N.W.2d at 557.

For these reasons, the Whistleblower Act unambiguously allows plaintiffs to recover emotional distress damages as actual damages under Section 6-2105 and Judge Baskin erred in ruling otherwise.

2. Assuming, for the Sake of Argument, the Whistleblower Act is Ambiguous, Well-Settled Principles Governing the Construction of Statutes Lead to the Same Result

As discussed above, based on the definition of damages expressly set forth in the Whistleblower Act, and on the ordinary meaning of the Act's unambiguous terms, Eller and other plaintiffs are entitled to recover emotional distress damages under the Act. Even assuming the Whistleblower Act is ambiguous and must be construed by this Court, the result should be the same.

a. Because This Court Has Held that the Terms "Damages" or "Actual Damages" Include Recovery of Emotional Distress Damages under other Statutes, Eller and Other Plaintiffs Should be Able to Recover Emotional Distress Damages Under the Whistleblower Act

If a statute is ambiguous, this Court looks to rules of statutory construction for guidance. *Pioneer Irrigation Dist. v. City of Caldwell*, 288 P.3d 810, 814 (2012). Under those rules, the Court looks to "outside sources" beyond the literal words of the statute. *City of Sun Valley v. Sun Valley Co.*, 851 P.2d 961, 963 (1993). Thus, this Court, in determining and giving effect to legislative intent, considers other statutes on the same subject matter and contemporaneous judicial construction of similar or identical terms. *Local 1494 of Intern. Ass'n of Firefighters v. City of*

Coeur d'Alene, 586 P.2d 1346, 1355 (1978); *In re Gem State Academy Bakery*, 224 P.2d 529, 535 (1950).[7] Indeed, this Court "construe[s] statutes under the assumption that the legislature knew of all legal precedent and other statutes in existence at the time the statues were passed." *City of Idaho Falls v. H-K Construction, Inc.*, 416 P.3d 951, 956 (2018); *Saint Alphonsus Regional Med. Center v. Gooding County*, 356 P.3d 377, 380 (2015). Applying these principles, the Court has interpreted statutory terms consistent with case law interpreting similar or identical terms in other statutes. *See, e.g., City of Idaho Falls,* 163 Idaho at 583-584, 416 P.2d at 955-956 ("we will apply this Court's interpretation of the term 'state' in Idaho Code Section 5-225 to the analysis of [the same term in] Idaho Code section 5-216"); *Saint Alphonsus Regional Med. Center*, 356 P.3d at 380 and 383 (in interpreting the term "within" in medical indigency statute, district court reached correct result by adopting this Court's interpretation of same term in other statutes).

The Whistleblower Act – and specifically, Section 6-2105 and its terms "damages" and "actual damages" -- was enacted by the Idaho Legislature in 1994. (Ch. 100, sec. 1, p. 227). The Idaho Human Rights Act, § 67-5908(3) ("IHRA") was in existence when the Whistleblower Act became law, having been enacted by the Idaho Legislature in 1980. The IHRA contains an "actual damages" provision at Section 67-5908(3) which provides as follows:

> In a civil action filed by the commission or filed directly by the person alleging unlawful discrimination, if the court finds that unlawful discrimination has occurred, its judgment shall specify an appropriate remedy or remedies therefor. Such remedies may include, but are not limited to:

[7] These legal principles were originally articulated by Justice Givens (joined by Justice Porter) in his dissent in *Gem State Academy Bakery;* however, on rehearing, Justice Givens' dissent was joined by two more justices (Justice Keeton and District Judge McDougall, sitting by designation) and thereby became this Court's majority opinion. 70 Idaho at 551, 224 P.2d at 542.

***

> (c) An order for *actual damages* including lost wages and benefits, provided that such back pay liability shall not accrue from a date more than two (2) years prior to the filing of the complaint …
>
> (*emphasis added*)

This Court interpreted the IHRA damages provision broadly in 1991, holding that "actual damages" include both back pay *and front pay*, based on its view that (1) "lost wages are to be awarded as an element of 'actual damages,' which are commonly understood as those actual losses caused by the conduct at issue," and which include front pay, and (2) the term "lost wages" includes both forms of compensation without differentiation, and (3) notwithstanding that Section 67-5908(3) makes no specific reference to front pay. *O'Dell v. Basabe*, 810 P.2d 1082, 1097 (1991). Both this Court and the federal District of Idaho, again interpreting the IHRA broadly, have subsequently held that emotional distress damages are recoverable as actual damages under the IHRA. *Paterson v. State of Idaho*, 915 P.2d 724, 733 (1996); *Garcia v. PSI Environmental Systems*, 2012 WL 2359496, **7-9 (D. Idaho 2012). In so holding, this Court stated that although "Paterson's claim may not have risen to the level necessary to meet the legal elements required for an intentional infliction of emotional distress cause of action," that fact "does not block her recovery [under the IHRA] for the embarrassment and humiliation she suffered as a result of her work environment," *Paterson*, 915 P.2d at 733. Likewise, the federal district court rejected defendants' argument that "emotional distress … evidence should be excluded because emotional distress damages are not expressly permitted under the [IHRA]." *Garcia*, 2012 WL 2359496 at *7.

Applying the rules of construction discussed above, and based on this Court's interpretation of the term "actual damages" as including emotional distress damages under Section 67-5908(3) of the IHRA, this Court should interpret the similar or identical terms "damages" and "actual damages" under Section 6-2105 of the Whistleblower Act to include recovery of emotional distress damages as well.

b. Because the Whistleblower Act is Remedial Legislation, this Court Should Construe the Act Broadly so as to Allow Eller and Other Plaintiffs to Recover Emotional Distress Damages under its Provisions

i. The Whistleblower Act and its Damages Provisions Constitute Remedial Legislation

As discussed above, when a statute is ambiguous, this Court, in addition to examining the words of the statute, looks at legislative history, other extrinsic evidence, and the public policy underlying the statute to ascertain legislative intent. *Regan v. Owen*, 413 P.3d 759, 765 (2018). Thus, the Court, in determining legislative intent, has considered statements of intent or purpose included in a statute by the legislature, *Northcutt v. Sun Valley Co*., 787 P.2d 1159, 1162 (1990), as well as Statements of Purpose accompanying legislation submitted by the bill's sponsor. *Farmers Nat'l Bank v. Green River Dairy*, LLC, 318 P.2d 622, 629 & n. 4 (2014).

Ascertaining the purpose of an ambiguous statute is critical, since statutes enacted for a remedial purpose are subject to specific rules of statutory construction. "[R]emedial statutes are those that provide a remedy, or improve or facilitate remedies already existing, for the enforcement of rights or redress of injuries." 3 Sutherland, § 60.2 (7th Ed. 2007). Consistent with this definition, this Court has held that where a statute is designed to remedy a social or safety problem affecting

the citizens or residents of Idaho, it is considered remedial legislation. *Hill v. American Fidelity Mutual Ins.*, 249 P.3d 812, 818 (2011) ("Because [the uninsured and underinsured motorist statute] is designed to remedy the public-safety problem created by underinsured drivers, it is a remedial statute."); *Page v. McCain Foods, Inc.*, 109 P.3d 1084, 1088 (2005) ("Idaho's workers compensation law is remedial legislation … [because] [t]he intent of the Idaho Legislature in enacting the workers' compensation law was to provide 'sure and certain relief for injured workmen …'"); *Branchflower v. State, Dept. of Employment, 917 P.2d 750, 753-54 (Idaho 1996)* [*quoting Johns v. S. H. Kress & Co.*, 307 P.2d 217, 219 (1957) ("Idaho's Employment Security Law is remedial social legislation designed to alleviate 'the hardships resulting from involuntary unemployment.'")].

Likewise, courts in other jurisdictions have recently and repeatedly held that whistleblower statutes constitute remedial legislation. *Bailets,* 181 A.3d at 333; *Donlon v. Montgomery County Public Schools,* 188 A.3d 949, 967 (Ct. App. Md. 2018); *Lippman v. Ethicon*, 222 N.J. 362, 376, 119 A.3d 215, 224 (N.J. S.Ct. 2015), cited in *Tonkinson v. Byrd*, 2018 WL 1919829, *3 (D. N. J. 2018); *County of El Paso v. Latimer*, 431 S.W.3d 844, 848 (Tex. App. 2014); *Leskinsky v. Telvent GIT, S.A.* 873 F.Supp.2d 582, 597-98 (S.D.N.Y. 2012); *Nasuti v. Merit Systems Protection Bd*., 376 Fed. Appx. 29, 34 (Fed. Cir. 2010); *International Games Technology, Inc. v. Second Judicial Dist. Court ex rel. County of Washoe,* 179 P.3d 556, 560-61 (Nev. S. Ct. 2008); *Irven v. Dept. of Health and Rehabilitative Services*, 790 So.2d 403, 406 (Fl. S. Ct. 2001); *Shallal v. Catholic Social Services of Wayne County*, 566 N.W.2d 571, 575 (Mich. S. Ct. 1997); *Williams v. St. Paul Ramsey Medical Center, Inc.*, 551 N.W.2d 483, 485 (Minn. S. Ct. 1996); *Crosby v. State Dep't of Budget*

& Fin., 76 Haw. 32, 876 P.2d 1300, 1309-10 (Haw. S. Ct. 1994); *Spencer v. Barnwell County Hosp.*, 444 S.E.2d 538, 540 (Ct. App. 1994). Specifically, courts evaluating whistleblower statutes similar to Idaho's Whistleblower Act have determined that those statutes constitute remedial legislation based on the underlying legislative intent or purpose to "'enhance openness in government and compel the government's compliance with the law *by protecting* those who inform authorities of wrongdoing,'" *Bailets*, 181 A.3d at 333 [*quoting O'Rourke v. Dept. of Corrections*, 566 Pa. 161, 778 A.2d 1194, 1202 (2001) (emphasis in *Bailets,* not in the original)] or "(1) … protect public employees from retaliation by their employer when, in good faith, employees report a violation of law; and (2) in consequence, to secure lawful conduct on the part of those who direct and conduct the affairs of public bodies." *Upton County, Tex. v. Brown*, 960 S.W.2d 808, 813 (Tex. Ct. App. 1997).

Applying the above-discussed case law, Idaho's Whistleblower Act is clearly a remedial statute. As discussed above, the Legislature expressly stated in the Act's intent provision, "government constitutes a large proportion of the Idaho work force and … it is beneficial to the citizens of this state to protect the integrity of government by providing a legal cause of action for public employees who experience adverse action from their employer as a result of reporting waste and violations of a law, rule or regulation." Section 6-2101. The Statement of Purpose which accompany the Whistleblower Act expresses similar sentiment, stating that the Act "provides for the protection of an employee, or a person authorized to act on behalf of the employee because the employee came forth in good faith and exposed the existence of any waste of public funds, property or manpower, or a violation or suspected violation of a law, rule or

regulation adopted under the laws of the State of Idaho, a political subdivision of this state, or of the United States." SOP, RS 03021C1, H.B. No. 616 (1994).

In sum, Idaho's Whistleblower Act has the dual purpose of protecting public employees from adverse employment action caused by their whistleblowing activity and, in so doing, enhance integrity in government. As such, it constitutes remedial legislation subject to the rules of construction discussed immediately below.

ii. As Remedial Legislation, the Whistleblower Act and its Damages Provision should be Broadly Construed to Support their Remedial Purpose

Remedial legislation must be liberally and broadly construed to give effect to the intent of the legislature. *Eastman v. Farmers Insurance Company*, 423 P.2d 431, 435 (2018); *H20 Environmental Inc. v. Proimtu MMI, LLC*, 397 P.3d 398, 401 (2017). Further articulating this principle, courts have universally construed remedial statutes in favor of the remedy provided by law or those entitled to the benefits of the statute. *Hansen v. Robert Half Intern., Inc.,* 813 S.W.2d 906, 916 (Minn. S. Ct. 2012); *Vasquez v. Karjanis & Sons Motors, LLC*, 2012 WL 6965392, *2 (Conn. Super Ct. 2012); *Ky. Ins. Guar. Ass'n v. Jeffers ex rel. Jeffers*, 13 S.W.3d 601, 611 (Ky. S. Ct. 2000); *Hart by Hart v. Fox*, 499 A.2d 553, 556 (N. J. Super Ct. 1985). Specifically, courts have applied these rules of construction to whistleblower statutes. *Bailets*, 181 A.3d at 333; *Donlon*, 188 A.3d 967-68; *Lippman*, 222 N.J. at 378 and 381, 119 A.3d at 224 and 227; *Latimer*,

431 S.W.3d at 848; *Barber v. Louisville and Jefferson County Metropolitan Sewer Dist.*, 2007 WL 121353, 82 (W.D. Ky. 2007); *Golf Channel v. Jenkins*, 752 So.2d 561, 565-66 (Fla. S. Ct. 2000).[8]

As demonstrated above, and based on the Whistleblower Act's unambiguous terms, Eller and other plaintiffs are entitled to recover non-economic and/or emotional distress damages as actual damages under the Act's remedies provisions. Likewise, assuming arguendo, this Court's interpretation of essentially identical damages provisions under the IHRA leads to the same result. Finally, again assuming ambiguity, because the Whistleblower Act has a remedial purpose, this Court must construe its damages provision broadly in favor of recognizing more, rather than less, expansive damages and thereby benefit whistleblowers like Eller and plaintiffs like him under the Act. For this additional reason, non-economic and/or emotional distress damages should be recoverable under the Whistleblower Act.

C. Allowing Eller (and Other Plaintiffs) to Recover Emotional Distress Damages under the Whistleblower Act is Supported by Experts, as well as the Scientific and Academic Community, and Would Support the Purposes of the Act

Both expert testimony in litigation and highly regarded academic literature confirm the negative emotional and other consequences that await whistleblowers in the workplace and thereafter.

In *Hobby v. Georgia Power Company*, 90-ERA-30 (ALJ Sept. 17,1998), Complainant Marvin Hobby filed an administrative complaint with the U.S. Department of Labor alleging that

[8] As stated by one preeminent commentator, "liberal construction is ordinarily one which makes the statutory rule or principle apply to more things or in more situations than would be the case under a strict construction." 3 Sutherland, § 60:1 at n.12. Stated another way, "[r]remedial statutes are liberally construed to suppress the evil and advance the remedy." *Id*. at § 60:1 at n. 1.

his employer Georgia Power Company retaliated against him in violation of the whistleblower provisions of the *Energy Reorganization Act*, 42 U.S.C. § 5851, when he (1) raised strong objections to the outline of his proposed testimony as a company witness prepared by Georgia Power's attorneys, on the grounds that such testimony would be false, in a whistleblower action brought by another Georgia Power employee and (2) prepared a memorandum raising concerns within Georgia Power about whether the organizational structure created by Georgia Power's parent company complied with the Nuclear Regulatory Commission's legal requirements for nuclear plant operators. *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30, electronic slip op. at 31-35 (ARB Feb. 9, 2001), *aff'd sub. nom. Georgia Power Co. v. U.S. Dep't of Labor*, No. 01-10916, 52 Fed. Appx. 490 (11th Cir. 2002) (not published). After Hobby's immediate supervisor recommended to Georgia Power's senior management that Hobby's position be eliminated, Hobby filed a complaint with Department of Labor alleging that Georgia Power eliminated his position in retaliation for his whistleblower activities. *Id*.

The Department of Labor eventually ruled in Hobby's favor as to liability, finding and concluding that Georgia Pacific had retaliated against him due to his whistleblower activities. *Id*. In addition to awarding Hobby back pay and reinstatement, Hobby was awarded compensatory damages, including damages for emotional pain and suffering, embarrassment, and humiliation, in the amount of $250,000. *Hobby v. Georgia Power Co*., 90-ERA-30 at 66-69. In justifying this award, the ALJ stated as follows:

> In the context of arguing that reinstatement was not viable, witnesses for GPC testified that Complainant would face significant hostility and lack of professional respect upon his return. This is evidence that Complainant's

> reputation has been damaged by Respondent's unlawful action. … Evans testified that he lost respect for Complainant because of this lawsuit. It is necessary to this argument to assume that the executives within GPC are aware of Complainant's lawsuit and whistleblowing status and have formed negative opinions based on this.
>
> I find ADM Wilkinson's testimony on this issue particularly compelling. He testified that the general attitude toward whistleblowers is negative. He observed that whistleblowers are seen as covering their own inadequacies with reports of wrongdoing. …
>
> In light of Complainant's high level position, his unemployment and underemployment for over eight years, his inability to find any work within the nuclear community, and the detrimental effect his protected activity has had on any chances of future promotion and future salary increases, *and in light of the emotional distress endured due to his termination and inability to find comparable employment*, I find that an order of compensatory damages in the amount of $250,000 is reasonable.

Id. at 68-69 (*emphasis added*).[9]

The adverse consequences faced by whistleblowers have also been documented in the academic and medical literature. Thus, Reuben and Stephenson, in their study *Nobody Likes a Rat: On the Willingness to Report Lies and The Consequences Thereof,* conclude by stating that,

> Our work … highlights that reporting or sanctioning others for being dishonest is not behavior that is always well received or sought after even by individuals who act honestly. This is an important finding because it implies that reporting dishonest actions is very costly as reporters can be ostracized even if most organizations are in fact honest. This helps explain the dismal career prospects of

[9] This portion of the ALJ's decision was adopted and affirmed by the Department of Labor Administrative Review Board ("ARB"), with the ARB stating "that Georgia Power shall pay Hobby $250,000 in compensatory damages for emotional distress, humiliation, and loss of reputation." *In the Matter of Marvin B. Hobby, Complainant v. Georgia Power Company, Respondent*, 2001 WL 868898, **24-26 and *31 (2001). The Eleventh Circuit affirmed the ARB's decision and award of damages, holding that "the damages determined by the ALJ and affirmed by the ARB did not constitute an abuse of discretion." *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30, electronic slip op. at 31-35 (ARB Feb. 9, 2001), *aff'd sub. nom. Georgia Power Co. v. U.S. Dep't of Labor*, No. 01-10916, 52 Fed. Appx. 490 (11th Cir. 2002) (not published).

> employees who blow the whistle … and calls for caution when it comes to policies or action that reveal the identity of whistleblowers.
>
> Ernesto Reuben & Matt Stephenson, *Nobody Likes a Rat: On the Willingness to Report Lies and The Consequences Thereof*, J. OF ECON. BEHAV. & ORG. 384, 391 (2013).

Id. at p. 25.

Also, in the report authored by Kesselheim et al., *Whistle-Blowers' Experiences in Fraud Litigation Against Pharmaceutical Companies*, the authors conducted interviews with a number of whistleblowers who had been involved in federal qui tam cases against pharmaceutical manufactures under the federal False Claims Act, 31 U.S.C. § 3729 ("FCA"). [10] Kesselheim et al., *Whistle-Blowers' Experiences in Fraud Litigation Against Pharmaceutical Companies*, N. ENGL. OF MED. 1832 (2010), *available at* https://www.nejm.org/doi/full/10.1056/NEJMsr0912039. In the Policy Implications section of their study, the authors provided "a number of useful insights into the qui tam mechanism as a tool for addressing health care fraud." *Id*. at 1837. Thus, the authors stated:

> First, the strain the process places on individuals' professional and personal lived may make prospective whistle-blowers with legitimate evidence of fraud reluctant to come forward. …
>
> Second, in many of the personal stories we heard, the financial recovery appeared to be quite disproportionate (in both positive and negative directions) to the whistle-blower's personal investment in the case. More sophisticated approaches to determining relators' recoveries could be used to promote both equity and more responsible whistle-blowing. For example, the FCA does not distinguish between relators outside and inside the defendant company, whereas we found that

[10] A qui tam action is defined as "an action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive." Black's Law Dictionary (10th Ed. 2014) at p. 1444.

> insiders tended to contribute much more to the Justice Department investigation and *suffered more for their involvement.* Such factors should be taken into account in determining compensation.
>
> Third, whereas retaliation is clearly proscribed by the FCA, our report suggests that the protections are not fully effective, particularly for insiders. … Ensuring responsible whistle-blowing in health care institutions may require broadening the scope, or strengthening the penalties, of antiretaliation provisions.

Id. at 1837-1839. (*Emphasis added*.)

As discussed above, Eller, as an insider reporting ISP's unlawful conduct, suffered serious emotional harm as a result of his whistleblowing and ISP's retaliatory conduct. The harm not only affected him personally and in his relation with his wife and children, but also tore at the bonds between he and ISP co-workers. Allowing the award of emotional distress damages under the Whistleblower Act to Eller (and other plaintiffs) facing the consequences which Eller has faced will more fully compensate for the actual damages suffered. It will also constitute an important step toward ensuring that responsible whistleblowers come forward with legitimate evidence of wrongdoing by government officials, notwithstanding the very real risk of receiving adverse treatment from those same and other government officials for doing so.

CONCLUSION

For all of the reasons stated above, Judge Baskin erred in failing to allow Eller to recover emotional distress damages from the ISP upon proving that it violated his rights under the Whistleblower Act. This Court should reverse Judge Baskin's ruling by holding that emotional

distress damages are recoverable by plaintiffs as actual damages under the remedies provision set forth in Section 6-2105 of Act.

/s/ Stephen M. Kohn
Attorney for Amicus
Executive Director
National Whistleblower Center
3238 P Street, N.W.
Washington, D.C. 20007

Dated: October 3, 2018

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of October 2018, I caused a true and correct copy of the foregoing **BRIEF OF AMICUS CURIAE FOR THE NATIONAL WHISTLEBLOWER CENTER** to be served upon The Idaho Supreme Court, which will subsequently deliver an electronic copy upon the following individuals in the manner indicated below:

Erika Birch Strindberg &Scholnick, LLC 1516 W. Hays St. Boise, ID 83702	( ) Via U.S. Mail ( ) Via Facsimile ( ) Via Email (x) iCourt
Jason Murray Andrew Brassey Brassey Crawford PLLC 345 Bobwhite Court Ste. 215 Boise, ID 83706	( ) Via U.S. Mail ( ) Via Facsimile ( ) Via Email (x) iCourt
T. Guy Hallam Strindberg & Scholnick, LLC 1516 W. Hays St. Boise, ID 83702	( ) Via U.S. Mail ( ) Via Facsimile ( ) Via Email (x) iCourt
Marty Durand Herzfeld & Piotrowski PO Box 2864 Boise, ID 83701	( ) Via U.S. Mail ( ) Via Facsimile ( ) Via Email (x) iCourt

*/s/*_____
Marty Durand
Attorneys for Amici Curiae for the National Whistleblower Center