No. 12-3

IN THE
Supreme Court of the United States

JACKIE HOSANG LAWSON AND JONATHAN M. ZANG,

Petitioners,

V.

FMR LLC, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the First Circuit

BRIEF OF FORMER SEC OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTEREST OF THE *AMICI CURIAE*[1]

Amici Curiae include a former Chairman of, Commissioners of, and a General Counsel to, the Securities and Exchange Commission ("SEC") (the "*Amici*"). *Amici* submit this brief to respond to Petitioners' brief and the *amici* briefs submitted in support thereof. In particular, *Amici* address the impact that Congress's adoption of an expanded statutory anti-retaliation scheme in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841-49 (2010) ("Dodd-Frank")) should have on the Court's interpretation of Section 806 of the Sarbanes-Oxley Act of 2002 (Pub. L. No. 107-204, § 806, 116 Stat. 745, 802-04 (2002) ("Sarbanes-Oxley")).

The *Amici*, listed alphabetically, are:[2]

Paul Atkins, a former Commissioner of the SEC, presently the Chief Executive Officer of Patomak Global Partners, LLC.

Brian G. Cartwright, a former General Counsel of the SEC, presently Scholar in Residence at the Marshall School of Business at the University of

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici* or their counsel made a monetary contribution intended to fund its preparation or submission. Petitioners and Respondents have consented to the filing of *amicus* briefs in support of either party or of neither party and their consents have been filed with the Court.

[2] *Amici* participate solely as individuals and not on behalf of the institutions or entities with which they are affiliated.

Southern California and a Senior Advisor at Patomak Global Partners, LLC.[3]

Charles C. Cox, a former Commissioner of the SEC, presently Executive Vice President at Compass Lexecon.

Christopher Cox, a former Chairman of the SEC, presently President of Bingham Consulting LLC and a Partner at Bingham McCutchen LLP.

Joseph A. Grundfest, a former Commissioner of the SEC, presently William A. Franke Professor of Law and Business, Stanford Law School, and Senior Faculty of the Arthur and Toni Rembe Rock Center on Corporate Governance.

This brief reflects the consensus view of *Amici*, each of whom believes that the decision below should be affirmed, and in so doing, the Court should refuse Petitioners' urged expansion of Section 806 of Sarbanes-Oxley because the Dodd-Frank anti-retaliation regime sufficiently ensures that all employees are protected from retaliation for reporting potential violations of the securities laws.[4]

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[3] Patomak Global Partners, LLC ("Patomak") has been retained by Respondent FMR, LLC since April 1, 2013 to serve as a general advisor regarding regulatory issues. None of Mr. Atkins, Mr. Cartwright, nor Patomak has received any compensation in connection with the preparation of this brief.

[4] All *Amici* share this consensus view and believe that the Court should affirm the judgment of the court of appeals, though each individual *amicus* may not endorse every argument presented in this brief.

SUMMARY OF ARGUMENT

Petitioners argue that extending Section 806 of Sarbanes-Oxley to cover employees of private companies is the only way to protect those employees from retaliation for reporting violations of the securities laws. This argument ignores the recently enacted whistleblower incentives and accompanying anti-retaliation protections in Section 922 of Dodd-Frank, which cover employees of private companies and offer them greater anti-retaliation protections than those provided by Sarbanes-Oxley. The enhanced protections in Section 922 include potential damages in the form of double back pay, direct access to federal courts following an alleged retaliatory act, and a longer statute of limitations. Congress has thus already significantly expanded the federal anti-retaliation protections for employees reporting securities law violations, rendering unnecessary the extra-textual reading of Section 806 urged by Petitioners.

Congress purposely designed Dodd-Frank Section 922's whistleblower reward program and its anti-retaliation protections so that reports of potential securities law violations would be channeled to the SEC, the regulatory agency best positioned to investigate potential violations of the securities laws. As this Court has recognized, the SEC possesses the necessary experience, knowledge, and expertise to distinguish between actions that violate the securities laws and those that do not. For similar reasons, Congress created parallel whistleblower programs covering the commodities market and the consumer finance market, which are

administered by the Commodity Futures Trading Commission ("CFTC") and the Consumer Financial Protection Bureau, respectively.

Although Congress plainly intended that violations be reported to the federal agency with primary expertise, Section 922 of Dodd-Frank does not deter employees who opt to report violations internally at their companies. To the contrary, Dodd-Frank allows potential whistleblowers to utilize an employer's internal audit and reporting structures, if any, prior to providing information about securities law violations to the SEC. Acting pursuant to the authority delegated to it by Congress, the SEC has adopted rules permitting employees to first report alleged violations internally without waiving their eligibility for Dodd-Frank's whistleblower reward program. In fact, the SEC has recognized that a whistleblower's attempt to report violations internally, prior to reporting to the SEC, may support the enhancement of a subsequent whistleblower award.

Section 922 and the SEC's implementing regulations therefore alleviate the concern raised by the Petitioners that the First Circuit's decision in this case creates a gap in whistleblower protections. This Court should not adopt a strained reading of Section 806 of Sarbanes-Oxley when Congress has already acted to extend whistleblower protections to private company employees. The First Circuit's decision below should be affirmed.

ARGUMENT

I. THE EXPANDED ANTI-RETALIATION PROTECTIONS IN DODD-FRANK RENDER UNNECESSARY THE BROAD READING OF SARBANES-OXLEY SECTION 806 URGED BY PETITIONERS

Petitioners and their *amici* advocate a reading of Sarbanes-Oxley Section 806 inconsistent with its plain language by arguing that private company employees will otherwise be unprotected from retaliation for reporting alleged violations of the securities laws.[5] Petitioners' policy argument is moot because with passage of Dodd-Frank, Congress has expanded federal anti-retaliation coverage to private company employees. Dodd-Frank's anti-retaliation provisions supplement those contained in Section 806 of Sarbanes-Oxley, and there is no policy

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[5] Specifically, Petitioners argue that under the First Circuit's interpretation of Section 806 of Sarbanes-Oxley, "no one" in the mutual fund industry "would actually be protected from retaliation." Pet'rs' Br. at 40. Petitioners' *amicus* National Whistleblower Center likewise warns of a "massive loophole" if Sarbanes-Oxley's protection of whistleblowers does not extend to contractors and subcontractors. Nat'l Whistleblower Ctr. Am. Br. at 3. Yet another *amicus* brief maintains that the First Circuit's ruling left "a significant number of employees unprotected" and that a broader interpretation of the statute is "necessary to prevent a crisis in the mutual fund industry . . . ." Nat'l Emp't Lawyers Ass'n & Gov't Accountability Project Am. Br. at 3. In a similar vein, the United States contends that the First Circuit's ruling left "significant and unwarranted gaps in whistleblower protection for many of the employees in the best position to discover and report corporate fraud." U.S. Am. Br. at 8.

reason for the Court to ignore settled rules of statutory construction.

With Dodd-Frank, Congress sought to incentivize employees to "blow the whistle" on potential securities law violations. Dodd-Frank thus amended the Securities Exchange Act of 1934 and established a reward program, administered by the SEC, to provide financial compensation for any original information voluntarily provided to the SEC that results in monetary sanctions of more than $1 million. *See* 15 U.S.C. § 78u-6(a)(1) (defining covered administrative or judicial proceedings). Whistleblowers bringing new information to the SEC are eligible to receive between 10 and 30 percent of any monetary sanctions greater than $1 million. *See* 15 U.S.C. § 78u-6(b)(1)(A)-(B). The incentive program is open to "any individual who provides . . . information relating to a violation of the securities laws to the Commission" without regard to whether an individual is employed by a public or private company. 15 U.S.C. § 78u-6(a)(6).

To protect employees reporting potential violations of the securities laws, Section 922 also provides robust federal anti-retaliation protections, without regard to whether an employee works for a public or private company:

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistle-blower in the terms and conditions of employment because of any lawful act done by the whistleblower—
>
> (i) in providing information to the Commission in accordance with this section;

> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

15 U.S.C. § 78u-6(h)(1)(A) (emphasis added).

Dodd-Frank thus provides anti-retaliation protections to all employees—*i.e.*, those of private companies as well as those of public companies—who report potential violations of the securities laws to the SEC. Section 922 therefore extends anti-retaliation protections to private contractors and subcontractors, investment advisers, broker-dealers, and all other market participants.

Dodd-Frank's anti-retaliation protections apply to employees reporting the broad range of potential securities law violations falling within the expansive jurisdiction of the SEC. *See* 15 U.S.C. § 78u-6(a)(6) (defining "whistleblower" to include "any individual who provides . . . information relating to a violation of the securities laws to the Commission . . . ."); 17 C.F.R. § 240.21F-2(b)(1)(i) (extending anti-retaliation protections to individuals reporting "a possible securities law violation . . . that has occurred, is ongoing, or is about to occur."). Therefore, complaints like those made by Petitioners regarding Respondents fall within the SEC's comprehensive jurisdiction to enforce the federal securities laws,

including claims under the Securities Act of 1933 and the Investment Company Act of 1940, and would qualify for Dodd-Frank anti-retaliation protections if brought today.

Section 922 of Dodd-Frank provides anti-retaliation protections broader than those contained in Sarbanes-Oxley. Among the key differences:

- Dodd-Frank provides employees with an extended statute of limitations, ranging from three to ten years. *See* 15 U.S.C. § 78u-6(h)(1)(B)(iii). Before Dodd-Frank, claims for retaliation under Sarbanes-Oxley had to be brought within 90 days.[6]
- Dodd-Frank provides employees with anti-retaliation claims a direct route to federal court, rather than to administrative proceeding before the Department of Labor as required by Sarbanes-Oxley. *Compare* 15 U.S.C. § 78u-6(h)(1)(B)(i) *with* Sarbanes-Oxley § 806(a), 18 U.S.C. § 1514A(b) *and* 49 U.S.C. § 42121(b).
- Dodd-Frank also provides greater potential remedies for anti-retaliation claimants, including double back pay. *Compare* 15 U.S.C. § 78u-6(h)(1)(C) *with* Sarbanes-Oxley § 806(a), 18 U.S.C. § 1514A(c)(2)(B) (providing for "the amount of back pay, with interest").

[6] Section 922(c) of Dodd-Frank also amended the statute of limitations for Sarbanes-Oxley anti-retaliation claims from 90 days to 180 days. *See* 18 U.S.C. § 1514A(b)(2)(D).

The SEC has interpreted Dodd-Frank's anti-retaliation provisions to apply to employees reporting potential violations of the securities laws, regardless of whether a whistleblower's tips lead to a successful enforcement action and an award under the incentive program. *See* 17 C.F.R. § 240.21F-2(b)(1)(i) (defining whistleblower to include employees "with a reasonable belief that the information [they] are providing relates to a possible securities law violation . . . .") (emphasis added); *see also* Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of Securities Exchange Act of 1934, 75 Fed. Reg. 70,488, 70,489 (Nov. 17, 2010) ("[T]he statute extends the protections against employment retaliation in Section 21F(h)(1) to any individual who provides information to the Commission about potential violations of the securities laws regardless of whether the whistleblower fails to satisfy all of the requirements for award consideration set forth in the Commission's rules."). To further encourage employees to report potential misconduct, Dodd-Frank also protects whistleblower anonymity. *See* 15 U.S.C. § 78u-6(h)(2) (prohibiting the SEC from publicly disclosing any information that could reveal the identity of any whistleblower until such disclosure is required in connection with an administrative or judicial proceeding).

The expansive anti-retaliation regime Congress enacted in Dodd-Frank thus renders unnecessary the expansive (and unsustainable) judicial reading of Sarbanes-Oxley Section 806 urged by Petitioners and their *amici* to protect employees of private companies. With passage of Dodd-Frank, Congress expanded federal anti-retaliation protections relating to reporting of securities fraud to bring within the

fold the types of claims brought by persons similarly-situated to Petitioners. They are covered by Section 922 of Dodd-Frank, which provides them with greater anti-retaliation protections than Sarbanes-Oxley provided when Petitioners initiated their claims in 2005 and 2006. Congress thus has purposely and meaningfully responded to any concerns about the protection of employees of privately-held contractors or subcontractors (including those who work in the mutual fund industry) from retaliation for reporting potential securities violations.

II. CONGRESS CHOSE TO HAVE DODD-FRANK WHISTLEBLOWERS REPORT POTENTIAL VIOLATIONS OF THE SECURITIES LAWS TO THE SEC, THE AGENCY WITH THE EXPERTISE TO INVESTIGATE SUCH ALLEGED VIOLATIONS

Senator Dodd's Senate Report on Dodd-Frank stated that its whistleblower provisions were "designed to motivate people who know of securities law violations to tell the SEC." S. Rep. No. 111-176, at 38 (2010) (emphasis added). The text and structure of the Act confirm this intent, by requiring whistleblowers to report potential securities laws violations to the SEC before they may be eligible to receive an incentive award. *See* 15 U.S.C. § 78u-6(b)(1).

Since its creation by the Securities Exchange Act of 1934, the SEC has been the primary agency tasked with regulating the securities industry in the United States, and with enforcing the securities laws. Congress has charged the SEC with protecting

investors and with promoting "efficiency, competition, and capital formation." Securities Exchange Act of 1934, 15 U.S.C. § 78c(f).

The SEC's jurisdiction includes anyone who has potentially violated the securities laws, including public issuers, securities exchanges, broker-dealers, investment advisers, and, particularly relevant here, mutual funds. *See* The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation.[7] The SEC brings hundreds of enforcement actions each year to enforce the securities laws. *Id*.

The Court has long recognized the unique role of the SEC in policing the nation's securities markets. *See*, *e.g.*, *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 277 (2007) (noting "SEC power to define and prevent through rules and regulations acts and practices that are fraudulent, deceptive, or manipulative") (citing 15 U.S.C. § 78o(c)(2)(D)); *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 689-90 (1975) (noting "the expertise of the SEC" and "the confidence the Congress has placed in the agency" to administer the Securities Exchange Act); *Am. Power & Light Co. v. SEC,* 329 U.S. 90, 112 (1946) (Because of the SEC's "accumulated experience and knowledge[,] . . . [i]ts judgment is entitled to the greatest weight."). Given its experience and expertise, it is entirely appropriate that Congress determined that the SEC should handle complaints from all types of employees relating to potential violations of the securities laws.

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[7] http://www.sec.gov/about/whatwedo.shtml (last visited Oct. 7, 2013).

In Dodd-Frank, Congress also slightly expanded the scope of Section 806 of Sarbanes-Oxley, to cover employees of non-public subsidiaries of public companies, as well as employees of rating agencies. Dodd-Frank §§ 922(b) and 929A; 18 U.S.C. § 1514A(a). Congress did not, however, expand Section 806 to include employees of all private companies, as it easily could have done. Rather, Congress set a new course with Dodd-Frank: potential violations of the securities laws were to be reported to the SEC, which has both the power and expertise to investigate such allegations. This intent appears to have been fulfilled; the SEC received 3001 whistleblower tips, complaints, and referrals in 2012, the first full year of the program. *See* SEC, *Annual Report on the Dodd-Frank Whistleblower Program Fiscal Year 2012*, at 4 (Nov. 2012).

As to the operation of the SEC's whistleblower program so far, SEC officials have publicly noted an increase in the quality of tips following enactment of Dodd-Frank's whistleblowing program. *See* Thomson Reuters Westlaw, Interview with Robert Khuzami (Apr. 25, 2012) (then-Enforcement Division Director Robert Khuzami noted that the amount and "quality of [whistleblower] tips has increased with more detail and greater supporting documentation").[8] The SEC has announced at least three successful enforcement actions prompted by whistleblowers who each received substantial incentive awards.[9]

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[8] http://currents.westlawbusiness.com/MarketMover.aspx ?id=c361a936-685e-4efd-b2d1-76d714302539&cid=&src=&sp=

[9] *See* SEC Issues First Whistleblower Program Award, SEC.gov (Aug. 21, 2012), http://www.sec.gov/News/Press Release/Detail/PressRelease/1365171483972; SEC Announces Whistleblower Action, SEC.gov (June 12, 2013), http://www.sec.

Finally, Congress's emphasis on directing employee reporting of alleged misconduct to regulators best suited to address the complaints is further confirmed by the similar whistleblower and anti-retaliation provisions in Dodd-Frank relating to the commodities market and the consumer financial products and services market. In Section 748 of Dodd-Frank, Congress amended the Commodity Exchange Act to create an incentive program administered by the CFTC similar to the SEC program enacted by Section 922. *See* 7 U.S.C. § 26. Dodd-Frank Section 1057 separately provides anti-retaliation protections for employees in the financial services industry who disclose fraudulent or unlawful conduct in connection with the provision of consumer financial products or services. *See* 12 U.S.C. § 5567. These parallel provisions confirm Congress's purposeful intent in Dodd-Frank to delegate investigative responsibility to the agencies with relevant expertise, a marked departure from the former approach under Sarbanes-Oxley.

III. DODD-FRANK AND ITS IMPLEMENTING RULES PERMIT WHISTLEBLOWERS TO REPORT POTENTIAL VIOLATIONS INTERNALLY BEFORE OR SIMULTANEOUS WITH ANY REPORTING TO THE SEC

In Dodd-Frank, Congress made clear its desire that whistleblowers bring serious allegations of

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gov/news/press/2013/2013-06-announcement.htm; SEC Awards More Than $14 Million to Whistleblower, SEC.gov (Oct. 1, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539854258.

wrongdoing relating to securities, commodities and consumer financial products to the attention of appropriate regulators for investigation. But Dodd-Frank does not exclude employees who decide first to report suspected violations to their employers.

In implementing Dodd-Frank's whistleblower protections and in response to criticism that proposed rules would undermine internal compliance and reporting systems, the SEC in its final rule took some steps to tailor the whistleblowing framework to avoid completely undermining employer procedures for internal reporting of potential securities law violations. The Dodd-Frank implementing regulations provide that a whistleblower may become eligible for the incentive program by either reporting immediately and exclusively to the SEC, or by reporting "through an entity's internal whistleblower, legal, or compliance procedures for reporting allegations of possible violations of law before or at the same time [the employee] reported them to the Commission" if "the entity later provided [the employee's] information to the Commission, or provided results of an audit or investigation initiated in whole or in part in response to information [the employee] reported to the entity . . . ." 17 C.F.R. § 240.21F-4(c)(3); *see also* Securities Whistleblower Incentives & Protections, 76 Fed. Reg. 34,300, 34,325 (June 13, 2011) ("[W]hen the employer[-]provided information 'led to' a successful enforcement action, the whistleblower will be eligible for an award, even if the information the whistleblower originally provided to the employer would not have satisfied the 'led to' requirements."). Employees may also "submit the same information to the Commission . . . within 120 days of providing it to the entity" and remain eligible for the incentive program. 76 Fed.

Reg. 34,300, 34,365; *see also* 17 C.F.R. § 240.21F-4(c)(3).[10] The SEC also identified participation in internal compliance reporting systems as a "[f]actor that may increase the amount of a whistleblower's award." 17 C.F.R. § 240.21F-6(a)(4). Dodd-Frank, therefore, permits whistleblowers to report potential violations of the securities laws internally before or simultaneous with any reporting to the SEC, and employees are in fact incentivized to do so.

[10] The SEC has interpreted Dodd-Frank's extension of its anti-retaliation protections to whistleblowers "making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002," 15 U.S.C. § 78u-6(h)(1)(A)(iii), to include employees who only report internally (and not to the SEC) pursuant to Sarbanes-Oxley. *See* 17 C.F.R. § 240.21F-2(b)(1). The Fifth Circuit recently rejected this interpretation. *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620, 623 (5th Cir. 2013) (holding Dodd-Frank provides a "private cause of action only for individuals who provide information relating to a violation of the securities laws to the SEC"). This issue, regarding which there is a split in the district courts and upon which *Asadi* is the only Court of Appeals to pass, is not before the Court in this case. In any event, there is no dispute that all employees who report to the SEC, or who report internally and to the SEC, can invoke Dodd-Frank's anti-retaliation provisions.

CONCLUSION

The Court should refuse Petitioners' urged expansion of Section 806 of Sarbanes-Oxley. The Dodd-Frank anti-retaliation regime ensures all employees—including those of privately-held companies—are protected from retaliation for reporting potential violations of the securities laws. For the foregoing reasons and the reasons in the brief of Respondents, *Amici* respectfully urge this Court to affirm the judgment of the First Circuit.

Respectfully submitted,

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October 7, 2013