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 FOR RESPONDENTS

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QUESTION PRESENTED

Section 806 of the Sarbanes-Oxley Act of 2002 provides "[w]histleblower protection for employees of publicly traded companies." 18 U.S.C. § 1514A(a). The question presented is whether this provision covers only employees of public companies.

LIST OF PARTIES

Respondents FMR LLC, Fidelity Management & Research Company, FMR Co., Inc., and Fidelity Brokerage Services LLC disclose the following information:

The named defendant FMR Corp. was merged into a limited liability company prior to the filing of the complaints in this action. FMR LLC is the surviving entity; FMR Corp. no longer exists.

FMR LLC is the parent of Fidelity Management & Research Company. FMR Co., Inc. and Fidelity Brokerage Services LLC are indirect subsidiaries of FMR LLC. FMR LLC is not publicly held, and no publicly held corporation owns 10% or more of Fidelity Management & Research Company, FMR Co., Inc., or Fidelity Brokerage Services LLC.

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STATEMENT

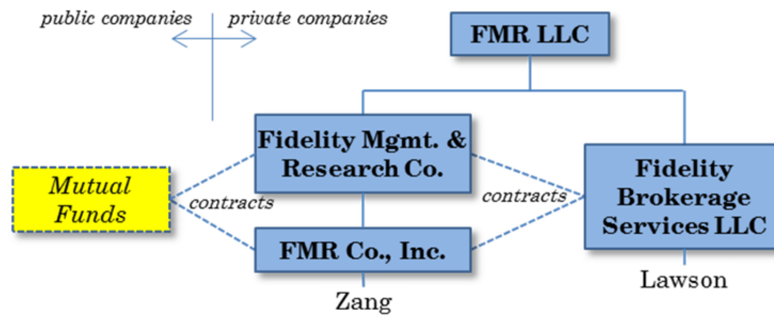
Petitioners are former employees of *private companies*. They filed this suit under Section 806 of the Sarbanes-Oxley Act of 2002 (SOX), which creates a private right of action for employees of certain *public companies* who suffer retaliation for engaging in protected "whistleblowing" activity. 18 U.S.C. § 1514A (Pet. App. 200a). The court of appeals ordered dismissal because Section 806 covers only employees of public companies. Pet. App. 10a-18a.

1. A mutual fund (or "investment company") is a public company whose business is to buy, sell, and hold securities for the benefit of its investor-shareholders. *See* U.S. Br. 25-26 n.3. Under the Investment Company Act of 1940, each mutual fund must retain an adviser to make investment recommendations or decisions pursuant to a written agreement approved annually by the fund's investors or trustees. 15 U.S.C. § 80a-15(c); *Jones* v. *Harris Assocs. L.P.*, 559 U.S. 335, 339 (2010). The adviser, in turn, is subject to extensive federal regulation and oversight under the Investment Advisers Act of 1940. 15 U.S.C. § 80b-1 *et seq.* A mutual fund and its adviser are different companies, with distinct ownership and governance, and the law recognizes and enforces this separateness. *See Janus Capital Grp., Inc.* v. *First Derivative Traders*, 131 S. Ct. 2296, 2299, 2304 (2011).

Two respondents, Fidelity Management & Research Company and FMR Co., Inc., advise certain mutual funds pursuant to contracts. A third respondent, Fidelity Brokerage Services LLC, is a broker-dealer that buys and sells securities but does not advise mutual funds. The fourth respondent is a holding company that does not contract directly with

any mutual funds. All respondents are privately held companies.

2. Petitioner Zang was an employee of FMR Co., Inc. and petitioner Lawson worked for Fidelity Brokerage Services LLC.



a. Zang's responsibilities included analyzing companies, managing the investments of several mutual funds, and preparing reports for fund investors. In July 2005, he was terminated for poor job performance.

Zang filed a Section 806 complaint with the Department of Labor (DOL), alleging that his termination was actually caused by an unsolicited 12-page, single-spaced memorandum he sent to about 100 colleagues. C.A. App. 71-78. Zang's "manifesto" criticized what he saw as failings in leadership, management, and compensation methods within FMR Co., Inc. Among many unrelated observations, Zang stated that a draft public filing he had reviewed as part of his ordinary duties, while "technically correct," "portray[ed] inaccurately the relative importance of compensation" of analysts (J.A. 112)—*i.e.*, employees in his own position. J.A. 117, 122-23.

DOL dismissed Zang's complaint based on its investigator's finding that the manifesto did not constitute protected activity because it did not report fraud

or violations of the securities laws. J.A. 146-49. The investigator further found that Zang's memorandum "focused attention on the fact that he was not doing his job." J.A. 148; *see also* J.A. 146 (one "core" allegation "lack[ed] credibility" and another was "completely without merit"). An Administrative Law Judge (ALJ) affirmed the dismissal on the alternative ground that Section 806 covers only employees of public companies. J.A. 198. Before the Administrative Review Board (ARB) had the opportunity to review that decision, Zang initiated a *de novo* action in district court. *See* J.A. 62-92. (Zang also filed a separate suit in state court alleging disability discrimination and retaliation. *Zang* v. *FMR LLC*, No. 08-02745 (Mass. Super. Ct. filed June 19, 2008).)

b. Lawson managed a team of analysts responsible for "cost allocation"—essentially, determining which brokerage costs were attributable to the sale and servicing of funds advised by Fidelity Management & Research Company and its affiliates, as distinguished from other products and services. Lawson was not selected for a promotion in September 2006, and she resigned in September 2007.

After she did not receive the promotion, Lawson filed a Section 806 complaint with DOL, which she supplemented over time with three additional administrative complaints. D.C. Dkt. No. 22, Exhibits 1-4. The thrust of her allegations was that her working conditions had deteriorated after she disagreed with certain cost allocation methods and outcomes. Pet. App. 80a-82a. Raising such disagreements was part of Lawson's job at the time, but in this instance (and others) she was overruled by those who had a different understanding of the underlying business.

Had DOL completed its investigation, it likely would have dismissed Lawson's administrative complaints because she engaged in no protected activity. The decisions with which she disagreed did not directly affect mutual fund shareholders, and none involved a violation of any federal securities law or constituted "fraud." Indeed, Lawson contemporaneously acknowledged that the issues she had raised in her initial complaint could be "chalked up to miscommunications, differences in understandings or professional opinions, or simply mistakes." D.C. Dkt. No. 22-3, at 13. Lawson pretermitted the administrative proceedings, however, by filing a *de novo* action in district court. *See* J.A. 11-61.

3. In the district court, respondents moved to dismiss both complaints on the ground that Lawson and Zang, as employees of private companies, could not bring a civil action under Section 806. Respondents also maintained that petitioners had engaged in no protected activity and that their allegations of misconduct were entirely meritless. The district court, addressing the two cases jointly, ruled that Section 806 covers employees of private companies that contract with public companies. Pet. App. 96a-123a. Recognizing that this gave Section 806 a "notably expansive scope untethered to the purpose of the statute" (*id.* at 111a), the district court also ruled that employees of private companies could invoke Section 806 only if their allegations of fraud involved shareholders of public companies. *Id.* at 115a.

4. The court of appeals reversed.

a. The majority concluded that "only the employees of the defined public companies are covered" by Section 806. Pet. App. 17a. The court explained that Section 806 "first identifies covered employers:

those with a class of securities registered under section 12 of the 1934 Act or those that file reports with the SEC pursuant to section 15(d) of the 1934 Act." *Ibid.* Those entities, which everyone agrees are "public companies" (*see* Pet. Br. 12; U.S. Br. 3 n.2), may not retaliate "against their own employees who engage in protected activity." Pet. App. 17a. Section 806 further identifies representatives of such employers, including officers and contractors, that "are also barred from retaliating against employees of the covered public-company employer who engage in protected activity." *Id.* at 18a (emphasis added). The court of appeals rejected, both "[a]s a matter of language" and "[a]s a matter of logic," petitioners' contention that "because [Section 806] forbids retaliation *by* 'any officer, employee, contractor, subcontractor, or agent,' of a public company, that provision must forbid retaliation *against*" those secondary actors' "own employee[s]." *Ibid.*

b. Judge Thompson dissented. Pet. App. 52a. In her view, making a private right of action available to employees of contractors to public companies would further the remedial "purposes" of SOX. *Id.* at 60a-61a.

SUMMARY OF ARGUMENT

Section 806 of the Sarbanes-Oxley Act creates a private right of action for employees of public companies who engage in protected activity; it does not cover individuals who are employed by privately held firms. Therefore the judgment below should be affirmed.

I. The text, structure, history, and purpose of SOX all confirm that Section 806 covers only public company employees.

A. The statutory text provides that no public company, or representative of such company, may retaliate against an employee because of protected activity by that employee.

1. By its terms, Section 806 applies to "employees of publicly traded companies." The protected "employees" are those of the public company that is the object of the entire statutory scheme. The subordinate clause listing company representatives does not enlarge the class of protected employees; it simply makes specified additional actors secondarily liable. The statutory prohibition—*no public company, or any representative of such company, may retaliate against an employee because of any protected activity by the employee*—can only be read as covering public company employees. Section 806 specifically defines "employee" to mean "employee … of such company." Giving this word the same meaning each time it appears in the same statutory subsection means that coverage extends only to public company employees. Petitioners and the government suggest that the single word "employee" should be given two (or more) meanings within the same sentence, but there is no intrinsic or extrinsic evidence supporting such a bizarre outcome.

2. The title and headings of Section 806 further demonstrate that the private right of action is available only to employees of public companies. Congress could not have spoken more clearly: Section 806 provides "protection for employees of publicly traded companies." Although petitioners and the government ask the Court to ignore this statutory language, it was passed by Congress and signed into law by the President; these summaries cannot be disregarded in construing the statutory provision they describe.

B. The structure of Section 806 confirms that the civil action created by SOX covers only employees of public companies. It allows such employees to sue the public company as a primary actor and designated representatives of the public company as secondary actors. Contrary to petitioners' suggestion, this is entirely consistent with the protected acts, defenses, and remedies under Section 806: Where the public company goes bankrupt (as Enron did), the statute provides additional protection by authorizing monetary recovery against specified company representatives. And allowing only public company employees to sue provides a readily administrable standard for determining whose claims can be adjudicated.

C. Evidence before and after SOX was enacted confirms that Section 806 is limited to public company employees.

1. Senator Sarbanes, the sponsor of the legislation, unequivocally stated that it "applies exclusively to public companies" and is "not applicable to private companies." Public companies and their employees are discussed throughout the legislative history, but private companies are not. It is unfathomable that Congress meant to authorize civil lawsuits by employees of *millions* of private employers with nary a word to that effect.

2. Just two years after SOX was enacted, Congress considered but rejected legislation that would have made investment advisers subject to Section 806. Petitioners and the government are thus asking this Court to amend Section 806 in precisely the way that Congress has already rejected. Moreover, the Dodd-Frank Act of 2010 amended Section 806 to cover employees of certain privately held contractors

(credit rating agencies); this is additional evidence that Section 806 as enacted in 2002 did *not* cover employees of private companies.

D. The Court should reject petitioners' policy-based plea to judicially amend Section 806 to extend the private right of action from the employees of about 4,500 publicly traded companies to those of more than 6 million private companies. Balancing the costs and burdens of regulation, including private civil litigation, is a legislative rather than a judicial task. The congressional decision to apply Section 806 only to employees of public companies is consonant with the objectives of SOX—to protect investors by enhancing disclosure under the securities laws—because only public companies must make such disclosures. Congress also imposed additional requirements on accountants and lawyers who provide services to public companies, without regulating other service providers such as investment advisers and their affiliates. SOX was a calibrated response to identified dysfunctions in the financial markets, not a catch-all.

II. Decisions of the Department of Labor's Administrative Review Board construing the terms of Section 806 are entitled to no deference.

1. Petitioners elected to bypass the ARB in favor of *de novo* proceedings in district court. Accordingly, there is no ARB decision in either petitioner's case to which the Court could "defer." Moreover, the Court need not decide whether ARB decisions in general are entitled to deference because that question was neither pressed nor passed upon below.

2. The ARB gets no deference in construing the statutory term "an employee" because there is no ambiguity to resolve. Even if there were, formal

agency adjudications warrant deference only where Congress has actually delegated policymaking power to an agency. Petitioners and the government have not cited a single case in which this Court has deferred to an adjudicative decision made by a tribunal within an agency that lacks policymaking authority. Nothing in SOX authorizes the Secretary of Labor to issue substantive rules interpreting SOX or otherwise to play a policymaking role. The ARB cannot exercise powers that DOL does not have. The vast majority of Section 806 cases are also decided *de novo* in federal court, further indicating that Congress saw no need for DOL adjudicators to play an interpretive role.

3. Moreover, the single ARB decision on which petitioners and the government rely is inconsistent with the statutory text, structure, history and purpose. The ARB's disagreement with the First Circuit was driven by DOL's procedural regulations, which were "not intended to provide interpretations of the Act." The Secretary conceded in the court below that the regulations are not entitled to deference. The ARB's decision also conflicts with every extant judicial decision and departs without reasoned analysis from previous administrative decisions. Indeed, the *post hoc* nature of the decision as applied to this case further undermines its legitimacy. It is entitled to no deference.

ARGUMENT

Section 806 of the Sarbanes-Oxley Act was enacted to provide "*protection for employees of publicly traded companies*." Pub. L. No. 107-204, 116 Stat. 745, 802 (2002) (emphasis added). Because petitioners were employed by *private* companies, the court of appeals correctly concluded that they cannot bring a

civil action under Section 806. To reverse, this Court would have to conclude that the statute does not mean what it says, and judicially amend Section 806 to extend its coverage from the employees of a few thousand public companies to those of the millions of private employers that contract with public companies.

Section 806 as enacted does not cover employees of privately held investment advisers to mutual funds. The unique structure of this industry is well known to Congress, and investment advisers are separately, and extensively, regulated. *See Jones* v. *Harris Assocs. L.P.*, 559 U.S. 335, 339-40 (2010). Where Congress intended to address investment advisers in SOX, it did so by amending the Investment Advisers Act of 1940 (SOX §§ 308, 604, 15 U.S.C. §§ 7246, 80b-3(e)). Indeed, just two years later, Congress *rejected* legislation that would have amended Section 806 to include privately held investment advisers and their affiliates (such as respondents). These and other indicia show that Congress did not regulate investment advisers indirectly through Section 806.

This Court has long held in this context that identifying the proper parties to sue or be sued for securities fraud is a job for Congress, not the judiciary. *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 164-65 (2008); *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187-88 (1994). That principle is of "particular significance" here "because claims of retaliation are being made with ever-increasing frequency." *Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, 133 S. Ct. 2517, 2531 (2013). And this Court has already repudiated the argument, exhumed by petitioners here, that different rules should apply to

the mutual fund industry. *See Janus Capital Grp., Inc.* v. *First Derivative Traders*, 131 S. Ct. 2296, 2304 (2011).

Section 806 as enacted authorizes employees of public companies to sue, but employees of private companies are not covered. Given the statute's clear language, "it would be improper to conclude that what Congress omitted from the statute is nevertheless within the scope." *Nassar*, 133 S. Ct. at 2528. Therefore the decision below should be affirmed.

I. THE PRIVATE RIGHT OF ACTION CREATED BY SECTION 806 COVERS ONLY EMPLOYEES OF PUBLIC COMPANIES

SOX was a legislative response to the collapse of Enron Corporation, a publicly traded company, which adversely affected investors, including mutual funds, who lacked knowledge of behind-the-scenes financial manipulation. In an extensive set of interlocking provisions, SOX established procedural and substantive reforms for public companies as well as the law and accounting firms that advise them. *See* 3 John T. Bostelman *et al.*, *Public Company Deskbook: Sarbanes-Oxley and Federal Governance Requirements*, at app. A-38 to A-44 (2d ed. & Supp. 2013).[1]

[1] Title I created the Public Company Accounting Oversight Board (PCAOB) to oversee accountants who audit public companies. Title II addressed auditor independence. Title III imposed limitations on public companies. Title IV required enhanced public company financial disclosures. Title V required the SEC to regulate conflicts of interest involving analysts who cover public companies. Title VI expanded the SEC's authority over public companies. Title VII required additional studies. Title VIII, among other things, created the private right of action at issue here. Title IX increased penalties for white-collar

These reforms include a new requirement for public companies to establish and maintain internal compliance systems for receiving, reviewing, and responding to employee complaints. *See* SOX § 301, 15 U.S.C. § 78j-1(m)(4). Congress imposed this costly requirement only on public companies—which choose to access the capital markets, and thus voluntarily assume greater regulatory responsibilities including compliance with the securities laws. Congress did not impose internal reporting requirements on private companies—which, by forgoing public funding, also avoid complex disclosure and other regulatory issues under the securities laws.

One of the enforcement mechanisms for the newly mandated compliance systems is a new private right of action for employees of public companies who suffer retaliation after reporting allegations of fraud, either internally or to specified external sources. SOX § 806, 18 U.S.C. § 1514A. The obligation and enforcement mechanisms (or, from the employee's perspective, right and remedy) are thus both complementary and coextensive.

The text, structure, history, and purpose of SOX all confirm that Section 806 covers only public company employees. *See Nassar*, 133 S. Ct. at 2524-35 (employing this mode of statutory construction in the context of a retaliation claim); *cf. Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1330-31 (2011) (similar).

[Footnote continued from previous page]

crimes. Title X required public company CEOs to sign tax returns. And Title XI created criminal liability for document destruction and retaliation.

A. Text

Section 806 provides that no public company—or any officer, employee, contractor, subcontractor, or agent of "such company"—may retaliate against "an employee" for engaging in protected whistleblowing activity. The statute thus imposes primary liability against public companies, and secondary liability against designated representatives of public companies, for retaliating against employees of public companies.

1. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n* v. *S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (internal quotation marks omitted); *see also*, *e.g.*, *Hui* v. *Castaneda*, 559 U.S. 799, 805 (2010) (inquiry "begins and ends with the text").

Petitioners and the government focus on the term "an employee." *See* Pet. Br. 15-21; U.S. Br. 12-14. But this Court must construe the entire provision. *Nassar*, 133 S. Ct. at 2530 ("Text may not be divorced from context"). The statutory provision enacted by Congress admits of just one conclusion: The private right of action created by Section 806 covers only employees of public companies.

Here is the statutory provision the Court must interpret—*tolle*, *lege*:

SEC. 806. PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES WHO PROVIDE EVIDENCE OF FRAUD.

> * * *
>
> § 1514A. Civil action to protect against retaliation in fraud cases
>
> (a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES.—No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee … to provide information … regarding any conduct which the employee reasonably believes constitutes a violation of [18 U.S.C. §§] 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders ….

Pub. L. No. 107-204, 116 Stat. at 802-03 (codified as amended at 18 U.S.C. § 1514A) (quotation marks omitted).[2]

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[2] As explained further below, Section 806 was amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 922(b), (c), 929A, 124 Stat. 1376, 1848, 1852 (2010).

a. The statute's domain is clear from the outset. It first states, twice, that the new civil action provides "protection for employees of publicly traded companies," and then defines with specificity which companies those are: companies "with a class of securities registered under section 12 of the Securities Exchange Act of 1934 or those that file reports with the SEC pursuant to section 15(d) of the 1934 Act." Pet. App. 17a. The statute itself thus establishes the metes and bounds of coverage.

Diagramming Section 806 makes clear that the protected "employee" is employed by the public company that is the primary object of the statute.

Text	Definition
No [public] **company**	Section 12 registrants or Section 15(d) reporters.
, or any [representative] **of such company,**	Officer, employee, contractor, subcontractor, or agent.
may [retaliate]	Discharge, demote, suspend, threaten, harass, or in any other manner discriminate … in the terms and conditions of employment.
against an employee	
because of any [protected activity] **by the employee**.	Lawfully providing information regarding conduct believed to violate specified laws and regulations relating to fraud against shareholders.

The principal prohibition is simple: "No [public] company … may [retaliate] against an employee." As petitioners acknowledge, this means the public company's *own* employees. Pet. Br. 15-16 n.10. The insertion of the subordinate clause regarding company representatives does not modify the term "an employee" in the principal clause; it simply extends the prohibition to specified secondary actors so that the public company may not do indirectly that which it is prohibited from doing directly.[3]

Petitioners unwittingly prove this point. "If a new homeowner is advised to 'be nice to neighbors,'" they say, "the advice obviously is about the homeowner's own neighbors, not to those of someone else." Pet. Br. 16. Extending the analogy to track Section 806—"no homeowner, or guest or visitor of such homeowner, shall be rude to a neighbor"—makes clear that the protected persons remain the homeowners' neighbors, not neighbors of the guests or visitors.

Section 806 protects the public company's employees: ***No public company, or any representative of such company, may retaliate against an employee because of any protected activity by the employee***. Even petitioners concede that this reading is *plausible* (Pet. Br. 34); and we respectfully submit that it goes well beyond plausibility—it is the

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[3] It was necessary for Congress to specify the "categories of defendants who may be liable" beyond the company itself, because the securities laws do not allow implied secondary liability in a private civil action. *Central Bank*, 511 U.S. at 179-80. Had Congress not specified the secondary actors subject to liability, a whistleblower could have sued only the public company employer, and not (for example) an officer or contractor who instigated or participated in the retaliation.

most coherent and sensible reading of the statutory language in context.

b. Subsection (a) uses the word "employee" three times in a single sentence. "A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007); *United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). Applying this principle here, and giving a uniform construction to the word "employee" in Section 806, leads inexorably to the conclusion that this provision covers only employees of the defined public companies, regardless of whether they are victims or perpetrators.

At its first appearance, "employee" is expressly defined to mean "employee … of such company," *i.e.*, public company. "Employee" then appears twice more in the same subsection, and it should be given the same meaning—"public company employee"—in each instance. Congress, having so defined "employee," did not have to repeat that definition each time it was used within the same sentence. It means "public company employee" throughout.

Petitioners' sole rejoinder is that Section 806 contains "two usages of 'employee'—one expressly limited by the phrase 'of such company,' and one not"; and they invoke the canon that "[w]here Congress includes particular language in *one section* of a statute but omits it in *another section* of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Pet. Br. 33 (emphases added; internal quotation omitted). But that canon comes into play in differentiating between differing phrases in *differ-*

ent statutory sections. *See Dean* v. *United States*, 556 U.S. 568, 573 (2009). It does not apply where, as here, the disputed term—"employee"—appears in the same section (indeed, in the same sentence).

The correct canon is that identical words in the same statutory section are presumed to share an identical meaning; and this presumption is "at its most vigorous when a term is repeated within a given sentence." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). Yet petitioners and the government do not even acknowledge this principle, much less attempt to overcome the vigorous presumption that the same words have the same meaning within the same statutory provision.

Importantly, petitioners and the government *agree* that "an employee" means "public company employee," at least with respect to claims against "officers." According to petitioners, when a statute prohibits a company official from harming an employee, "the normal meaning … is that the official may not take the prohibited action against an employee of the entity for which the official works." Pet. Br. 15 n.10; *see also id.* at 12 ("this aspect of the statute imposes personal liability on an individual who engages in retaliation on behalf of a public company"). Likewise, the government admits that "the prohibition against an 'officer' … retaliating against 'an employee' is meant to impose personal liability on corporate officers … who are involved in retaliation against other employees of their employer." U.S. Br. 16 (citing Pet. App. 149a). So far, so good.

Yet, when it comes to claims against "contractors," petitioners and the government change their tune. According to petitioners, "an employee" in this context means *the contractor*'s employee, rather

than—or, perhaps, in addition to—the public company's employee. Pet. Br. 14-15, 18. The government, similarly, suggests that "an employee" could be construed to cover any employee of the listed company representatives. U.S. Br. 12.

These efforts to broaden the statute's reach beyond public company employees cannot be reconciled with the fact that Congress elected to cover "*an* employee" (and later "*the* employee"), rather than "any employee." As the government notes (U.S. Br. 13), the expansive "any" is used throughout Section 806 in a variety of contexts. But it is conspicuously absent in connection with the protected "employee," thereby making clear that the law applies only to a subset of employees: the previously defined public company employees.

As the district court recognized, allowing any employee of any person or entity that acts as a contractor, subcontractor, or agent (or, for that matter, officer or employee) of a public company to sue under Section 806 would enlarge the private right of action beyond any conceivable congressional purpose. Pet. App. 111a. To avoid that absurd result, the district court adopted a "limiting principle" under which only employees who report securities fraud at their public company clients would be covered. *Id.* at 96a-123a. Neither petitioners nor their *amici*, however, embrace this limitation. As a result, their proposal is totally untethered from the statute.

Expanding Section 806 to create a private right of action for employees of the listed company representatives in a suit against their employers would also yield the illogical result that the statute prohibits every officer and every employee from harassing or intimidating his or her own employees, which they

typically do not even have. A proffered interpretation that produces such anomalies defies basic rules of statutory construction. *See*, *e.g.*, *Johnson* v. *United States*, 529 U.S. 694, 707 n.9 (2000) ("[N]othing is better settled, than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion") (quoting *In re Chapman*, 166 U.S. 661, 667 (1897)).

The government recognizes but fails to solve this problem. After arguing that "an employee" should be read to include any employee of all the listed company representatives (U.S. Br. 12), the government refuses to eat its own cooking: It *admits* that employees of "officers" are *not* covered. *Id.* at 16 (rejecting coverage for "household employee of an officer or employee of a public company"). Petitioners, too, disclaim coverage for officers' employees even while insisting that Section 806 reaches contractor's employees. Pet. Br. 12.

Neither petitioners nor the government offer any principled basis for reading "an employee" differently based on which of the statutorily identified public company representatives is named as a respondent—that is, to give it one meaning if the respondent is an "officer" and a different meaning if the respondent is a "contractor." It would be extraordinary for Congress to use the same word—"employee"—in different ways within a single sentence, or for this Court to so construe the word. *See Mohasco Corp.* v. *Silver*, 447 U.S. 807, 826 (1980) ("In the end, we cannot accept respondent's position without unreasonably giving the word 'filed' two different meanings in the same section of the statute"). There is no intrinsic or

extrinsic evidence supporting such a bizarre result here.[4]

The statutory phrase "an employee" must be given the same construction with respect to all five secondary actors ("officer, employee, contractor, subcontractor, or agent of such [public] company"), which are listed together, in the same clause, set off by commas from the rest of the sentence. The construction that applies to officers must be applied to contractors, and *vice versa*. Accordingly, just as Section 806 prohibits "officers" from retaliating against public company (as distinguished from their own) employees, it prohibits "contractors" from retaliating against public company (as distinguished from their own) employees.

2. The title and the headings eliminate any doubt that Section 806 provides a private right of action only to public company employees. *See Nassar*, 133 S. Ct. at 2529 (title of amendment to Title VII "indicates that Congress determined to address only claims of status-based discrimination, not retaliation"). Section 806 begins by stating its purview: "Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud." The next heading refers to a "[c]ivil action to protect against retaliation in fraud cases," and then the first part of the anti-retaliation provision itself reiterates that it

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[4] Likewise, the government may not create an "ambiguity" simply by announcing irreconcilable constructions of the same statutory language. *Compare* U.S. Br. 12 *with* Lewis Carroll, *Through the Looking-Glass* (1871), *reprinted in The Complete Works of Lewis Carroll* 138, 214 (Modern Library 1936) ("'When *I* use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less'").

provides "[w]histleblower protection for employees of publicly traded companies." Congress could not have made clearer that the "employees" with whom the provision is concerned are those of public companies. *See* Pet. App. 19a-20a.

Petitioners devote an entire section of their brief to the headings (Pet. Br. 41-49), yet protest that those same "headings shed *no* light" on the issue before the Court. *Id.* at 9 (emphasis added); *see also* U.S. Br. 17-19. The notion that statutory text, passed by Congress and signed by the President, sheds *no* light on the construction of that same statute blinks reality. These are Laws (U.S. Const. art. I, § 7, cl. 2), not inkblots.

Petitioners and the government ask the Court to ignore the title and headings because the statute *is not* ambiguous. Pet. Br. 47-49; U.S. Br. 18. But elsewhere they argue that Section 806 *is* ambiguous, because they want this Court to defer to the ARB's interpretation. Pet. Br. 61; U.S. Br. 9-10. Statutory interpretation is not a game of heads-I-win, tails-you-lose. *If* there is ambiguity, as they intermittently insist, petitioners' and the government's arguments against relying on the title and headings dissolve. *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 483 (2001) (statutory "title … may only shed light on some ambiguous word or phrase in the statute itself") (internal quotation marks and alteration omitted). The headings "cannot override the statute's text" (U.S. Br. 7); but they certainly can confirm the meaning of "generic" terms in the text. *INS* v. *Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189-90 (1991). The headings here confirm that "an employee" in the text means "public company employee."

In asking the Court to disregard the words that Congress used, petitioners and the government rely exclusively on *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio Railroad*, 331 U.S. 519 (1947). *See* U.S. Br. 17-18; Pet. Br. 47-48. But *Trainmen* and its antecedents establish the supremacy of the statutory text over titles and headings in cases of *conflict*. *See* 331 U.S. at 528-29; *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805). Those cases do not preclude a court from using titles and headings to confirm the apparent meaning of the text. And here there is no conflict between the statutory text and the headings under Section 806—one merely expounds upon the other. Under these circumstances, the headings and titles must "claim[] a degree of notice." *Fisher*, 6 U.S. (2 Cranch) at 386.

Petitioners also protest that the headings are "short-hand" for the statutory terms. Pet. Br. 46-48. Yet, while "whistleblower" might be short-hand for an employee who engages in protected activity, "employees of publicly traded companies" clearly defines those whistleblowers who may pursue a civil action under Section 806. The express and repeated reference to "publicly traded companies" cannot be characterized as "short-hand" for the 99% of companies in America that are *not* publicly traded.[5]

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[5] Petitioners and the government note that Section 15(d) report-filers are not "publicly traded." Pet. Br. 45; U.S. Br. 18. That is because their securities are offered directly to the public rather than on an exchange; but they are public companies that have accessed the capital markets, and as such they are subject to the internal reporting and other requirements of SOX. Moreover, not all Section 15(d) companies are mutual funds (Pet. Br. 11) and in any event some mutual funds have employees (*id.* at 39-40; U.S. Br. 26). Accordingly, the employees (if any) of a Section 15(d) company may sue under Section 806.

What the headings and titles conspicuously do *not* say is that Section 806 covers employees of private companies. Rather, it provides "PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES." There is no principled way to read "the words that were actually included in that heading" (Pet. Br. 47 n.28) as encompassing employees of privately held companies like respondents.

B. Structure

1. Section 806 protects "an employee" against retaliation by two categories of actors: public companies and their representatives. The former are primarily liable and the latter are secondarily liable for retaliating against the public company's employees because of protected activity.[6]

As Chief Judge Easterbrook has explained, Congress's inclusion of contractors in Section 806 covers the situation where, for example, a company contracts with an "ax-wielding specialist" to deal with nettlesome employees. *Fleszar* v. *U.S. Dep't of La-*

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[6] When Congress wants to prohibit retaliation by two distinct sets of primary actors against their respective employees, it devotes a subsection to each so there is no confusion. *See*, *e.g.*, 12 U.S.C. § 1790b(a)(1) & (2) (cited in Pet. Br. 19). For this reason (and others), petitioners' invocation of non-SOX whistleblower provisions—which vary widely in wording, structure, coverage, and purpose—is misplaced. *See* Pet. Br. 19-20 n.15. For example, no appellate court has ever held that the whistleblower provisions of the AIR 21 Act, 49 U.S.C. § 42121, apply to contractors' employees. The argument that Section 806 should be "conformed" to AIR 21 (Pet. Br. 20; U.S. Br. 16-17; NELA Br. 11) is thus entirely circular. Importantly, AIR 21 does not create a private right of action; in Section 806, Congress cross-referenced AIR 21 solely for its rules of "Procedure" (18 U.S.C. § 1514A(b)), and its differently worded substantive provisions were *not* adopted into SOX.

bor, 598 F.3d 912, 915 (7th Cir.), *cert. denied*, 131 S. Ct. 423 (2010); *see also* Pet. App. 18a-19a n.11 (adopting similar analysis). This scenario was depicted in the 2009 movie "Up in the Air," in which George Clooney's character works for a private company "whose contracts are in corporate downsizing. In other words, they fire people." http://www.imdb.com/title/tt1193138/plotsummary.

Everyone agrees that Section 806 prohibits an "officer," such as Enron CEO Jeff Skilling, from retaliating against an Enron employee, like whistleblower Sherron Watkins; and that "an employee" does not include Skilling's own employee, such as a housekeeper or gardener. Pet. Br. 15 n.10; U.S. Br. 16. So if Skilling fired Watkins she could sue both Enron (as the public company employer) and Skilling (as an officer) under Section 806. Now, suppose Enron had contracted with Clooney to terminate or harass Watkins. Enron would remain primarily liable as the public company employer; while Clooney would be secondarily liable as a contractor. If Enron went bankrupt (as it did), Watkins could still pursue her claims for monetary relief against Skilling in the first scenario, and Clooney in the second. On the other hand, Section 806 no more speaks to Clooney's employees than to Skilling's; and thus does not cover petitioners.

Again petitioners unwittingly prove why they are wrong. "[S]tatutes that address the manner in which a company is to treat an 'employee,'" they say, "regulate how the firm deals with its own employees." Pet. Br. 16. Precisely so: Section 806 prohibits the public company employer from retaliating against its own employee, either directly or through a representative; and if this prohibition is violated, the public company employee may sue both the employer (as

the primary violator) and the representative (as a secondary actor). *That is how Section 806 works*.

2. Petitioners identify nothing in the statute that affirmatively states, or even hints, that employees of private companies may bring a civil action under Section 806. Instead, they argue that suits against contractors by public company employees would create anomalies with respect to prohibited acts, defenses, and remedies available. Pet. Br. 25-28, 35-39. Each of these arguments, however, would apply equally to suits against *officers* by public company employees; yet as explained above there is no textual or structural basis for distinguishing between the listed company representatives. These arguments also fail on their own terms.

a. Petitioners speculate whether and how a contractor could engage in "tangible" discrimination against a public company's employee. Pet. Br. 22-31. That effort is wasted since Section 806 is not limited to "tangible" discrimination. *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 786 (1998) (under Title VII, "discriminat[ion] … with respect to … terms, conditions, or privileges of employment … is not limited to 'economic' or 'tangible' discrimination") (internal quotation marks omitted). Section 806 also prohibits "threatening" or "harassing" conduct. *Cf. Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 57 (2006) (Title VII's anti-retaliation provision prohibits employer's actions that could "dissuade a reasonable worker from making or supporting a charge of discrimination").

Indeed, petitioners eventually acknowledge that a contractor (such as Clooney's ax-wielding specialist) is prohibited from retaliating against a public company's employee. Pet. Br. 25; *id.* at 34 ("Surely

Congress did not intend to permit the contractor to retaliate" against "an employee of a public company"); U.S. Br. 12. Contrary to petitioners' assertion (Pet. Br. 25, 28), this situation is neither "highly atypical" nor "highly implausible." *See*, *e.g.*, *Tides* v. *Boeing Co.*, 644 F.3d 809, 811 (9th Cir.) ("Tides and Neumann repeatedly complained to management about the practice of giving the contractors managerial authority over Boeing employees"), *cert. denied*, 132 S. Ct. 518 (2011). And the statute as written accounts for it.

The government protests, however, that "the specialist would be an 'agent' of the public company—and an 'agent' is separately listed." U.S. Br. 15; *see also* Pet. Br. 26 ("the axe-wielding specialist would be personally liable … [as] an 'agent' of a public company"). But not all contractors are agents; in fact, FMR's advisory agreements state that the investment adviser is an "independent contractor" and "shall not be an agent" of its clients, the mutual funds. J.A. 177. An ax-wielding specialist's contract obviously could include such a clause too.

Petitioners also suggest that "the public company would be liable for the acts of its authorized agent." Pet. Br. 26. But the public company might *not* be liable for actions of a non-agent contractor—for example, if the employer has no knowledge of the prohibited activity. More importantly, any liability (for acts of contractors *or* agents—or, for that matter, officers) would attach only if the public company remains solvent; if the public company goes under, as Enron did, the statute provides its employees a cause of action against secondary actors.

b. The affirmative defenses authorized by Congress accord with this scheme of primary and sec-

ondary liability. Relief is not available under Section 806 if "the employer" can demonstrate that it would have taken the same action even in the absence of the protected conduct. Pet. Br. 35 (citing 49 U.S.C. § 42121(b)). Petitioners argue that this defense "would make no sense" if a public company employee were to sue a contractor, because the contractor would be unable to assert the defense. *Ibid.* Yet there is no requirement, in law or logic, that every defense be available to every respondent. The public company as primary violator may assert this defense directly; secondary actors may invoke it, if at all, only derivatively. That is entirely sensible.

c. Nor is anything in the SOX remedial scheme inconsistent with making secondary actors liable for retaliating against public company employees. A public company employee prevailing in a Section 806 suit is "entitled to all relief necessary to make the employee whole," including reinstatement, back pay, and special damages. 18 U.S.C. § 1514A(c)(1). To be sure, the *reinstatement* remedy will usually run against only the public company employer (Pet. Br. 36); but of course, the public company will usually be a respondent. The secondary actors, including officers and contractors, may be held liable for *monetary* relief.

Petitioners' objection that there is "no reason to cover contractors" (Pet. Br. 30) ignores the historical context from which SOX arose. Section 806 allows whistleblowers to pursue money damages against the listed secondary actors. If the public company remains solvent, secondary actors represent an additional source of funds (or separate insurance policies) to satisfy a judgment. If the public company is in bankruptcy—as Enron was—the ability to sue the company representatives takes on special value. In

the wake of Enron, Congress knew that a reinstatement remedy could be worthless to employees of bankrupt companies. A monetary remedy against secondary actors could be the only remedy available.

3. By authorizing civil actions only by employees of public companies, Section 806 provides a bright line that can be administered by both Article I tribunals and Article III courts without tying up the system in extensive litigation—like this very case—about the scope of coverage.

Difficult coverage questions would arise if the Court were to accept petitioners' and the government's invitations to judicially amend Section 806 to extend to employees of public company representatives. As the district court recognized, allowing such suits would enlarge the private right of action beyond any conceivable congressional purpose. Pet. App. 111a. To avoid that absurd result, the district court articulated a "limiting principle" under which only employees who report securities fraud at their public company clients would be covered. *Id.* at 96a-123a.

Petitioners make no mention of the nebulous coverage questions that would arise under their proposed approach—which would extend Section 806 "to employees who had *no* relation whatsoever to the publicly traded company." *Brady* v. *Calyon Sec. (USA)*, 406 F. Supp. 2d 307, 318 (S.D.N.Y. 2005) (emphasis added). The government recognizes the problem; but its "solution" merely restates the issue: "Section 1514A applies not to all employees of all contractors of public companies, but only to those who have been retaliated against because they reported fraud against shareholders, violations of four federal anti-fraud laws, or violation of SEC rules and

regulations to certain people." U.S. Br. 23. Since the government also takes the position that Section 806 covers employee complaints untethered to shareholder fraud (*see Lockheed Martin Corp.* v. *ARB*, 717 F.3d 1121, 1130-32 (10th Cir. 2013)), its "built-in limitation[]" (U.S. Br. 23 (internal quotation marks omitted)) is thus no constraint at all.

Any meaningful limits tied to the objectives of Sarbanes-Oxley—protecting those who invest in public companies—would require satellite litigation just to figure out which individuals (or allegations of fraud) might proceed under Section 806. This Court rightly avoids creating such hazy standards that could seldom be resolved before trial. *See Vance* v. *Ball State Univ.*, 133 S. Ct. 2434, 2450 (2013) (adopting definition of "supervisor" that "can very often be resolved as a matter of law before trial"); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 742-43 (1975) (approving rule that "can normally be established by the defendant either on a motion to dismiss or on a motion for summary judgment").

Those problems do not arise in applying Section 806 as written, only to employees of public companies: The SEC maintains comprehensive lists of Section 12 registrants and Section 15(d) reporters. The coverage question can be resolved early, and easily, in the proceeding. This provides further structural evidence that Congress included only public company employees within the scope of Section 806.

C. History

Events before and after the passage of SOX confirm that Section 806 does not apply to employees of private companies.

1. The initial Senate Judiciary Committee report on what became Section 806 explained that

"[c]orporate employees who report fraud are subject to the patchwork and vagaries of current state laws, … [such that] a whistleblowing employee in one state may be far more vulnerable to retaliation than a fellow employee in another state who takes the same actions." S. Rep. No. 107-146, at 10 (2002). Section 806 was therefore drafted to "provide whistleblower protection to *employees of publicly traded companies*." *Id.* at 13 (emphasis added).

The Senate report uses the phrase "employees of publicly traded companies" in discussing the whistleblower provision *six times*. S. Rep. No. 107-146, at 10, 13, 18, 19, 30. In sharp contrast, the Senate report makes no mention of employees of private companies, including investment advisers, or for that matter any contractors (other than accountants and lawyers, who are dealt with separately as explained below). Pet. App. 38a.

Senator Sarbanes, one of the legislation's co-authors, explicitly stated that it "*applies exclusively to public companies*" and that it was "*not applicable to pr*[*i*]*v*[*at*]*e companies, who make up the vast majority of companies across the country*." 148 Cong. Rec. S7351 (daily ed. July 25, 2002) (emphasis added). As this Court has recognized, the sponsor's comments on intended limits of statutory coverage are "clearly probative of legislative judgment." *Simpson* v. *United States*, 435 U.S. 6, 13 (1978). Yet both petitioners and the government fail to mention this clear statement of legislative intent.

Unlike petitioners and their *amici*, Congress recognized the fundamental distinction between public and private companies. SOX "regulates public corporations, not privately-held companies … [because] [b]y accepting money from private citizens, these

corporations bear a special responsibility to their investors and need to be held accountable." 148 Cong. Rec. H5474 (daily ed. July 25, 2002) (statement of Rep. Etheridge). Private companies do not access the capital markets and are not required to maintain the internal reporting systems required by SOX.

Moreover, it is simply unfathomable that Congress meant to authorize civil lawsuits by employees of *millions* of private companies "without a whisper of explanation." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 582 (1995). Had Congress contemplated that private companies could be subject to Section 806, it would have engendered debate, discussion, and dissension. *Gonzales* v. *Oregon*, 546 U.S. 243, 267 (2006); *see also FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 147 (2000) ("Given the economic and political significance of the [issue] at the time, it is extremely unlikely that Congress could have intended to place [private employees] within the ambit of [the statute] absent any discussion of the matter"). The deafening silence of the legislative record on this question refutes any suggestion that Congress "intended" to cover employees of private companies. Congress does not "hide elephants in mouseholes." *Whitman*, 531 U.S. at 468.

Unable to unearth any historical evidence whatsoever that Congress intended the result they now advocate, petitioners and their *amici* fall back on anecdotes involving Enron. But the scenarios actually considered by Congress do not support the extension of Section 806 to employees of private companies.

The Senate report identified four examples of the "corporate code of silence" that preceded Enron's failure:

- Enron asked outside attorneys whether employee Sherron Watkins could be terminated after reporting accounting irregularities; an outside attorney responded that there was no state law prohibition in Texas.
- An Enron employee was fired for internal complaints about the improprieties of Enron's off-balance-sheet entities.
- A UBS Paine Webber financial advisor was fired for recommending to his clients not to purchase shares in Enron.
- An Arthur Andersen partner was removed from the Enron account for expressing reservations about the firm's practices.

S. Rep. No. 107-146, at 4-5; *see* Pet. Br. 58-59; U.S. Br. 20-22.

Contrary to petitioners' unsupported suggestion (Pet. Br. 59-60), each of these examples would be entirely unaffected by the Court's resolution of this case. The two Enron employees were employees of a public company, and thus are protected under everyone's reading of Section 806. UBS Paine Webber was also a public company, and the financial advisor engaged in no protected activity. Enron's outside lawyer did not retaliate against any employee. And the Arthur Andersen *partner* would likely not be protected as "an employee" even if Section 806 applied to private firms. *See*, *e.g.*, *Clackamas Gastroenterology Assocs., P.C.* v. *Wells*, 538 U.S. 440, 449-50 (2003).

Moreover, SOX independently and directly addresses each example. Internal employees, like Sherron Watkins, are protected from retaliation for whistleblowing under Section 806. As explained further below, attorneys and accountants are subject to

detailed rules promulgated by the PCAOB and SEC, which include requirements for reporting allegations of unlawful activity. Importantly, Section 501 requires the SEC to adopt rules prohibiting retaliation against securities analysts who produce unfavorable research reports. SOX § 501, 15 U.S.C. § 78*o*-6(a). As this provision demonstrates, where Congress intended to protect employees of private companies from retaliation, it did so expressly; the corollary is that such persons are not covered by Section 806.

Undaunted, petitioners and the government argue that "outside professionals … are most likely to uncover and comprehend evidence of potential wrongdoing." Pet. Br. 60 (internal quotation marks omitted); U.S. Br. 25 (internal quotation marks omitted). This is far too general a proposition on which to extend Section 806 beyond congressional contemplation to employees of millions of private companies. In any event, the Senate report on which they rely for this proposition reveals that Congress was actually concerned with the protection of corporate "*insiders*," not outside service providers. S. Rep. No. 107-146, at 10 (emphasis added); U.S. Br. 21-22. And that is precisely who Section 806 protects.

2. Legislative adjustments to Section 806 since SOX's enactment in 2002 confirm that petitioners, employees of privately held investment advisers and their affiliates, are not covered by this statutory provision.

a. In 2004, both houses of Congress considered—but declined to enact—a bill entitled the Mutual Fund Reform Act (MFRA), which, among other things, would have extended Section 806's coverage to employees of investment advisers and affiliates. *See* S. 2059, 108th Cong. § 116(b); H.R. 4505, 108th

Cong. § 107(b). This proposed legislation would have expressly achieved the expanded coverage both petitioners and the government now say that Congress enacted in 2002. *See Brown & Williamson*, 529 U.S. at 143-59 (relying on Congress's rejection of legislative proposals); *N. Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 534 (1982) (same).

Petitioners do not cite the MFRA, much less try to explain how their current position could possibly be reconciled with Congress's express decision not to extend Section 806 to investment advisers. In yet another unwitting concession, however, they observe that "if section [806] simply prohibited retaliation against an 'employee' by any mutual fund adviser, it assuredly would cover [respondents'] employees." Pet. Br. 18. Presumably so; but that hypothetical statute is the same as the MFRA, which Congress *rejected*.

For its part, the government argues that because the "record contains no statement of the sponsors' understanding of [the MFRA] or of § 1514A(a)," the "failed bill … sheds no light on Section 1514A's reach at the time it was enacted." U.S. Br. 27 n.4 (internal quotation marks omitted). But if Section 806, as enacted, covered privately held investment advisers, why would the very next Congress take up legislation to extend Section 806 to investment advisers?

b. In 2010, the Dodd-Frank Act amended Section 806 to cover employees of non-public companies that are subsidiaries of public companies, as well as to employees of the major credit rating organizations (NRSROs). §§ 922(b), 929A, 124 Stat. at 1848, 1852. If Section 806 already covered every private company contracting with a public company, there would have been no need for Congress to extend Section 806 to

certain private companies. And the fact that Section 806 now covers *some* privately held contractors—the NRSROs—confirms that it does not cover others not mentioned—like respondents. *Expressio unius est exclusio alterius*.

Petitioners make no effort to reconcile their position with the Dodd-Frank amendments. *See* Pet. Br. 11 n.5. The government tries to downplay these amendments, baldly asserting that "not all NRSROs are contractors of public companies." U.S. Br. 30. But the SEC's own report shows that "[t]hree NRSROs … accounted for approximately 97% of all outstanding credit ratings" and that these three *are* contractors to public company issuers. SEC, *Annual Report on NRSROs* 11 & n.25 (Mar. 2012). And as the government recognizes, some 70% of NRSROs are privately held. U.S. Br. 30 n.5.

As the sponsor of these amendments explained, "[t]he whistleblower provisions of the Sarbanes-Oxley Act protect employees of the publicly traded companies" and Dodd-Frank "expands the provision to include employees of the rating companies." 156 Cong. Rec. S3349 (daily ed. May 6, 2010) (statement of Sen. Cardin). To accept petitioners' and the government's position in this case, the Court would have to conclude that this was a pointless act of legislation. *See* Pet. App. 43a-46a.

The continued legislative adjustments in the decade following SOX show that Congress did not address the problems facing all corporate whistleblowers in one fell swoop. In light of the MFRA (which failed) and Dodd-Frank (which passed), judicially amending Section 806 in the manner that petitioners and the government now suggest would "un-

dermine Congress' determination" of its appropriate scope. *Stoneridge*, 552 U.S. at 162-63.

D. Purpose

The Sarbanes-Oxley Act seeks to prevent future Enrons "by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws." 116 Stat. at 745. *Private companies are not required to make such disclosures.* This basic principle of federal securities regulation demolishes the argument that judicially extending Section 806 to employees of private companies would further the "purposes" of SOX. Yet petitioners and their *amici* nowhere address it.

1. "No legislation pursues its purpose at all costs." *Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (internal quotation marks and alteration omitted). "Congress may be unanimous in its intent to stamp out some vague social or economic evil" but the final language of the legislation reflects hard-fought compromise on the best means for effectuating that intent. *Bd. of Governors of Fed. Reserve Sys.* v. *Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986) ("[a]pplication of 'broad purposes' of legislation at the expense of specific provision ignores the complexity of the problems that Congress is called upon to address and the dynamics of legislative action").

Of the more than 6 million employer firms in the U.S. in 2007, just 4,584 were listed on a U.S. stock exchange. Mary Ellen Biery, *Public Companies Out-Invested by Private Firms*, Forbes (Sept. 21, 2012), http://www.forbes.com/sites/sageworks/2012/09/21/private-companies-invest-more-than-publicly-traded-firms. In other words, 99% of U.S. firms are privately held, and those privately held companies account

for more than 67% of non-government employment. *Ibid.* Many private companies have contracts or subcontracts of some sort with public companies, and thus would potentially be subject to liability on petitioners' reading.

The 2002 Congress, in enacting SOX, clearly made the new civil cause of action available to whistleblowing employees of the relatively few, and generally large, companies that have elected to access the capital markets and subject themselves to the securities laws—the same companies, not coincidentally, on whom Congress simultaneously imposed new internal reporting requirements. Congress did not, however, also authorize such lawsuits by the employees of millions of additional private companies that were not covered by SOX's reporting and other regulatory provisions.

"The choice between the costs" of too much and too little regulation "properly lies with the legislature." Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 552 (1983). The requirement of congressional authorization "reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violation of statutes." *Wilder* v. *Va. Hosp. Ass'n*, 496 U.S. 498, 509 n.9 (1990); *see also Alexander* v. *Sandoval*, 532 U.S. 275, 286-87 (2001). In addition, "[t]he determination of who can seek a remedy has significant consequences for the reach of federal power." *Stoneridge*, 552 U.S. at 165. Expansive construction of federal causes of action creates a "risk that the federal power would be used to invite litigation … in areas already governed by functioning and effective state-law guarantees." *Id.* at 161.

Just recently, for example, this Court rejected a plea for judicial expansion of the Torture Victims Protection Act. *Mohamad* v. *Palestinian Authority*, 132 S. Ct. 1702, 1710 (2012). The Court concluded that whether or not it would be good policy to extend the Act, "petitioners' purposive argument simply cannot overcome the force of the plain text." *Ibid.* Where "Congress has seen fit to proceed in more modest steps in the Act," this Court held, "it is not the province of this Branch to do otherwise." *Id.* at 1710-11; *see also, e.g.*, *Pegram* v. *Herdrich*, 530 U.S. 211, 232-33, 237 (2000); *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 263 (1993); *Associated Gen. Contractors of Cal., Inc.,* v. *Cal. State Council of Carpenters*, 459 U.S. 519, 530 (1983); *Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523, 535-36 (1975).

Concerns over judicial expansion of remedies are particularly acute in the securities context. Securities fraud litigation "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 80 (2006) (internal quotation marks omitted). This Court repeatedly has refused to expose a new class of defendants to securities litigation where Congress has refused to do so. *See Janus*, 131 S. Ct. at 2303; *Morrison* v. *Nat'l Austl. Bank*, 130 S. Ct. 2869, 2888 (2010); *Stoneridge*, 552 U.S. at 153; *Central Bank*, 511 U.S. at 191-92; *Blue Chip Stamps*, 421 U.S. at 732-33.

SOX whistleblower claims, which are akin to a securities fraud claim wrapped inside a retaliation claim, compound the complexities of both areas of law and therefore present a particularly burdensome and expensive form of civil litigation. Many if not most private companies will lack the internal sys-

tems necessary for receiving or processing whistleblower complaints, the authority necessary to investigate or terminate purported misconduct at public companies, and the knowledge of securities regulation necessary to independently assess the reasonableness of any such allegations. Therefore, while they could choose to blindly accuse their clients of committing fraud or go to the authorities with a similar accusation, they might also quite reasonably choose to do nothing. Nonetheless, they could be subject to expensive litigation by disgruntled employees who later lose their jobs for completely unrelated reasons.

As this Court recognized just last Term, retaliation claims are on the rise, and have significant potential for abuse. *Nassar*, 133 S. Ct. at 2531. Reflexively allowing more such claims would thus make for bad public policy in this context.

2. Section 806 is a single provision in a complex and reticulated overhaul of the regulatory system for public companies and certain service providers, and its scope must be viewed in light of the role it plays within that legislative scheme. *Brown & Williamson*, 529 U.S. at 132-33. In addition to whistleblower protection, Congress adopted discrete tools to prevent recurrence of specific aspects of the Enron scandal.

Congress was concerned that outside accountants and lawyers, who should have been "'acting as gatekeepers who detect and deter fraud,'" were instead complicit in Enron's wrongdoing. Pet. Br. 56 (quoting S. Rep. No. 107-146, at 20-21). To address this concern, SOX *directly* regulates accountants and lawyers. It establishes the *Public Company* Accounting Oversight Board, which "regulates *every detail* of

an accounting firm's practice, including hiring and professional development, promotion, supervision of audit work, the acceptance of new business and the continuation of old, internal inspection procedures, professional ethics rules, and 'such other requirements as the Board may prescribe.'" *Free Enter. Fund* v. *PCAOB*, 130 S. Ct. 3138, 3148 (2010) (emphasis added). And it requires the SEC to establish similar rules of professional conduct for attorneys appearing and practicing before it. SOX § 307, 15 U.S.C. § 7245.

SOX makes each of these gatekeepers effectively a "whistleblower by statute." Outside accountants and lawyers of public companies are subject to affirmative obligations to investigate and report misconduct at public companies. SOX § 105, 15 U.S.C. § 7215(c)(4) (increasing penalties for auditors who fail to report suspected fraud to the issuer and, in some circumstances, to the SEC under Section 10A of the Securities Exchange Act, 15 U.S.C. § 78j-1); SOX § 307, 15 U.S.C. § 7245 (requiring the SEC to issue similar reporting requirements for outside lawyers). Under these provisions, a law firm or public accounting firm that engages in retaliation against such whistleblowing can be banned from further practice before the SEC. *See* SOX §§ 105, 602, 15 U.S.C. §§ 7215(c)(4)(A)-(B), 78d-3(a). Imposition of this penalty functionally puts licensed professionals out of business, a far more potent deterrent than the civil action provided to public company employees in Section 806.

Moreover, the specific problems identified by Congress were addressed by specific SOX provisions. For example, Congress was concerned that Arthur Andersen "'was simultaneously serving as both consultant and 'independent' auditor for Enron.'" Pet.

Br. 55 (quoting S. Rep. No. 107-146, at 3). That concern was addressed by provisions requiring increased auditor independence. SOX §§ 201-203, 15 U.S.C. § 78j-1(g)-(j). To address the concern that "employees from Andersen were allegedly shredding 'tons' of documents" while "Andersen's lawyers issued ambiguous advice encouraging such document destruction" (Pet. Br. 55 (quoting S. Rep. No. 107-146, at 4)), Section 802 makes it a crime to shred or otherwise alter documents "with the intent to impede, obstruct, or influence" a federal investigation, and requires accountants to "maintain all audit or review workpapers for a period of 5 years." SOX § 802, 18 U.S.C. §§ 1519-20.

Petitioners' myopic focus on Section 806 does not account for these and other SOX provisions. For example, they assert that "[u]nder the First Circuit's narrow reading of section 1514A, … it would have been legal for Arthur Andersen to fire any employee who answered questions from the SEC." Pet. Br. 10. But Section 1107—which petitioners do not cite—makes it a criminal offense for *anyone* to retaliate against any person who provides information to the SEC and other federal law enforcement officers. SOX § 1107, 18 U.S.C. §§ 1513(e), 1515(a)(4). Congress's decision to use more limited language in authorizing civil lawsuits under Section 806 must be respected. *See Nassar*, 133 S. Ct. at 2528-31; *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 452 (2002).

3. Ultimately, petitioners' and the government's policy argument boils down to the contention that *all* whistleblowers should be protected, so SOX must protect them. *See* Pet. Br. 10, 22, 28-30, 34, 47, 50, 53, 61; U.S. Br. 28. This proposition is hardly self-evident; whistleblower protection is a relatively new phenomenon at the federal level and Congress works

both deliberately and incrementally. Moreover, this simplistic "catch-all" approach ignores numerous other legal protections for whistleblowers.

a. Dodd-Frank created a separate regime of whistleblower protection for employees who report allegations of misconduct to the SEC. Section 922 of Dodd-Frank creates a private cause of action for individuals who are discharged or discriminated against by their employers for providing information to the SEC relating to a potential violation of the securities laws. 15 U.S.C. § 78u-6. Unlike Section 806, Section 922 is broadly worded to cover *all* employers who retaliate against a whistleblower, and thus covers private companies (including investment advisers) who retaliate against their own employees.

Petitioners reported their allegations to the SEC, which declined to open an investigation or enforcement action (further underscoring the baselessness of their contentions). Accordingly, but for the date of enactment, petitioners could have proceeded under Section 922 of Dodd-Frank. *See Asadi* v. *G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 623 (5th Cir. 2013). Yet, petitioners make no attempt to reconcile the scope of Dodd-Frank Section 922 with their overbroad interpretation of SOX Section 806.

The government suggests that employees of private contractors must be covered under both provisions because "Section 922 focuses on encouraging reporting to federal authorities, whereas Section [806] covers both internal and external reporting." U.S. Br. 30. But the distinction between internal and external reporting actually points up the different scope of the two whistleblower protection regimes. Public companies, which have voluntarily subjected themselves to securities regulation, are re-

quired to have structures for internal reporting under SOX; their employees may use those structures and may bring a civil action under Section 806. Private companies, in contrast, are not required to have those internal reporting structures; Section 806 does not cover their employees. Meanwhile, employees of all companies, public or private, may report allegations of securities fraud to the SEC, which is equipped to evaluate such reports, and receive protection under Dodd-Frank Section 922.

There is no justification for stretching the statutory bounds of Section 806 to cover conduct that falls within the express ambit of Dodd-Frank's remedial scheme for whistleblowers. Any "gap" that might, *arguendo*, have existed for employees of private entities between 2002 and 2010 has now been closed.

b. In addition to federal anti-retaliation laws, there are numerous state laws that protect whistleblowers. *See* National Conference of State Legislatures, State Whistleblowers Laws (Nov. 2010), http://www.ncsl.org/issues-research/labor/state-whistle blower-laws.aspx. Many states also recognize the common-law tort of wrongful discharge in violation of public policy. *See*, *e.g.*, *Jie* v. *Liang Tai Knitwear Co.*, 89 Cal. App. 4th 654, 661-62 (2001).

c. Mutual funds and their investment advisers are separately and comprehensively regulated under the two 1940 Acts, which subject participants in the mutual fund industry to significant procedural and substantive controls to address concerns about the "potential for abuse inherent in the structure of investment companies." *Jones*, 559 U.S. at 339 (internal quotation marks omitted). Congress is well aware of the unique issues arising in the mutual fund arena and has frequently enacted or amended

legislation directed specifically at investment advisers. *See id.* at 339-41 (discussing amendments to the 1940 Acts). The fact that SOX amended the 1940 Acts in other respects is powerful evidence that Congress did not *sub silentio* include privately held investment advisers in Section 806. The failure of the MFRA, which would have done so expressly, just two years later confirms that privately held investment advisers and their affiliates are *not* covered by Section 806.

Petitioners and the government point out that mutual funds often have no employees of their own. Pet. Br. 39-40; U.S. Br. 25-26. But this is merely a consequence of the corporate structure approved (and in many respects required) by Congress in the 1940 Acts—it predates SOX by more than half a century, and has nothing to do with whistleblower protection or the avoidance of liability. In all events, there is no "mutual fund exception" to ordinary principles of securities law and statutory construction. *Janus*, 131 S. Ct. at 2304.

* * *

The private right of action created by Section 806 is for employees of public companies. It does not cover employees of every mom-and-pop shop, partnership, and privately held entity in America that does business with a public company. Adherence to the text, structure, history, and purpose of the statute requires affirmance of the decision below.

II. THE ADMINISTRATIVE REVIEW BOARD'S CONSTRUCTION OF STATUTORY TERMS IS ENTITLED TO NO DEFERENCE

The DOL's Administrative Review Board did not render a decision in either petitioner's case. Nonetheless, petitioners and the government now argue that this Court should "defer" to an interlocutory decision in a different case in which the ARB disagreed with the First Circuit on the purely legal question of how to construe the term "an employee" in Section 806. *Spinner* v. *David Landau & Assocs., LLC*, 2012 WL 2073374 (DOL ARB May 31, 2012); *see* Pet. Br. 61-63; U.S. Br. 9-11, 31-34.

Far from a routine invocation of *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), the government's bid for deference in this case is one of the most sweeping power-grabs in the annals of administrative law. This Court has concluded that agency adjudication is a permissible mode of policymaking *only* where the agency also has been delegated "the power to make law or policy by other means." *Martin* v. *OSHRC*, 499 U.S. 144, 154 (1991). Since Congress gave DOL no policymaking role under SOX, the ARB's decisions receive no deference. Petitioners and the government cite no case in which this Court has deferred to an adjudicative decision made by a tribunal within an agency that lacks policymaking authority, and we are aware of none. The Court should not break new ground here.

1. The ARB has *not* determined that Section 806 covers either petitioner. That is because they each elected to bypass the ARB and proceed directly to federal court for a *de novo* determination of their respective complaints. Indeed, in the only administrative ruling on the complaints filed by petitioners with

DOL, an ALJ dismissed Zang's case on the ground that he was *not* a covered employee under Section 806. J.A. 172-98. Having forgone ARB review in favor of *de novo* proceedings in federal court, petitioners should not now be heard to contend that an ARB decision in a different case has any bearing on the proper construction of Section 806 here.

Moreover, the question whether ARB constructions of statutory terms receive *Chevron* deference was neither presented to nor passed upon by the courts below in this case. *See* Pet. App. 50a. This is reason enough for this Court not to reach that question here. *See Nat'l Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999). And the argument is fully developed only in an *amicus* brief, another reason to leave it for another day. *See United Parcel Serv., Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981).

2. If the Court were to reach the question, it should hold that the ARB receives no deference in construing SOX's terms.[7]

a. The statute is clear—"an employee" in Section 806 means an employee of the public companies that are directly regulated by SOX. Where a "court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron,* 467 U.S. at 843 n.9; *see also Brown & Williamson*, 529 U.S. at 132

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[7] The lower court decisions affording deference to ARB decisions contain no meaningful analysis. *See Lockheed*, 717 F.3d at 1131; *Wiest* v. *Lynch*, 710 F.3d 121, 131 (3d Cir. 2013); *Welch* v. *Chao*, 536 F.3d 269, 276 & n.2 (4th Cir. 2008) (*Chevron* deference uncontested). For example, none so much as cited *Martin*.

("The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context"). No agency action may override the expressed intent of Congress. *See City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1868 (2013) ("'If the intent of Congress is clear, that is the end of the matter'"). This pure question of statutory interpretation does not call for any kind of administrative expertise or judgment.

The word "employee" is not an implicit delegation to bureaucrats within DOL to determine how much of the American economy should be subjected to a new and burdensome form of civil litigation. *See Brown & Williamson*, 529 U.S. at 160 ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion"). "'The implausibility of Congress's leaving a highly significant issue unaddressed (and thus 'delegating' its resolution to the administering agency) is assuredly one of the factors to be considered in determining whether there is ambiguity.'" *Whitman*, 531 U.S. at 468-69 (citation omitted).

The ARB's decision in *Spinner* is irreconcilable with the text, structure, history, and purpose of Section 806. As this Court has explained, courts "must reject administrative constructions of the statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981). That describes *Spinner* to a tee.

b. Even if the statutory phrase "an employee" were ambiguous (as the government inconstantly ar-

gues), the ARB's construction of that language would get no deference.

DOL may exercise only the regulatory authority conferred upon it by Congress. *City of Arlington*, 133 S. Ct. at 1869 ("Both [agencies'] power to act and how they are to act is authoritatively prescribed by Congress"). SOX confers exceedingly limited responsibilities on DOL. One provision has nothing to do with this case: The SEC must "consult[]" with the Secretary of Labor before issuing rules regarding insider trading. SOX § 306, 15 U.S.C. § 7244(a)(3). The only other SOX provision to even mention DOL is Section 806.

Section 806 tasks the Secretary of Labor with investigating and adjudicating whistleblower complaints. *See* 18 U.S.C. § 1514A. The Secretary, in turn, has delegated investigatory authority to the Occupational Safety and Health Administration (OSHA) and adjudicatory authority to the ARB. Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). OSHA conducts an investigation and makes an initial decision. 18 U.S.C. § 1514A(b)(2)(A); 49 U.S.C. § 42121(b)(2)(A). Either the complaining employee or the employer may seek *de novo* review of OSHA's initial decision before a DOL ALJ (29 C.F.R. §§ 1980.106, 1980.107), discretionary review of the ALJ's decision by the ARB (29 C.F.R. § 1980.110), and review of the agency's final decision in a federal court of appeals (49 U.S.C. § 42121(b)(4)(A); 29 C.F.R. § 1980.112(a)).

Nothing in this regime authorizes the Secretary of Labor or his designees to play a policymaking role. But *Chevron* deference is founded on the premise that Congress "committed to the agency's care by the statute" the choice between "conflicting *policies*."

467 U.S. at 845 (emphasis added, internal quotation omitted). For that reason, and others, courts owe no deference to ARB determinations.

c. The government suggests that formal agency adjudications are entitled to deference as a matter of course. U.S. Br. 10-11. That is incorrect. "[F]or *Chevron* deference to apply," this Court has explained, "the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted." *City of Arlington*, 133 S. Ct. at 1874; *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001) (courts must decide whether "the agency's generally conferred authority and other statutory circumstances" make it apparent "that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute").

In *every case* cited for the proposition that agency adjudications receive deference (Pet. Br. 61; U.S. Br. 10), the relevant agency possessed rulemaking or other express authority to interpret the statute in issue. *See SEC* v. *Zandford*, 535 U.S. 813, 820 (2002); *Mead*, 533 U.S. at 230 n.12 (collecting cases). As these cases illustrate, where Congress has conferred interpretive power on an agency, the agency may elect to exercise that power through adjudication rather than notice-and-comment rulemaking. *See SEC* v. *Chenery Corp*., 332 U.S. 194, 202 (1947).

The necessary corollary is that where the agency has no interpretive authority, neither do its adjudicatory tribunals. On this point, *Martin* is instructive if not dispositive. The Court explained that "agency adjudication is a generally permissible mode of lawmaking and policymaking *only* because the unitary agencies in question also had been delegated the

power to make law and policy through rulemaking." 499 U.S. at 154 (emphasis added). "Insofar as Congress did not invest the [Occupational Safety and Health Review] Commission with the power to make law or policy by other means," the Court could not "infer that Congress expected the Commission to use *its* adjudicatory power to play a policymaking role." *Ibid.* The *Martin* Court therefore concluded that "Congress intended to delegate to the Commission the type of nonpolicymaking adjudicatory powers typically exercised by a *court* in the agency-review context." *Ibid.* Under those circumstances, the "Commission need be viewed as possessing no more power than this in order to perform its statutory role as 'neutral arbiter.'" *Id.* at 155.

To our knowledge, this Court has never deferred to an adjudicative decision made by a tribunal within an agency that lacks policymaking authority. Rather than a routine case of deferring to agency adjudication, as the government pretends, giving deference to ARB decisions would break new and dangerous ground, and would allow agencies to claim deference even where Congress has withheld policymaking authority. This would raise substantial constitutional questions—under both the separation of powers and Article III—which are avoided by following *Martin*, the closest precedent. *See Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988). Yet neither petitioners nor the government address *Martin*.

d. The government begins its brief with the assertion that DOL "is charged with interpreting" Section 806. U.S. Br. 1. That is false: Congress delegated *no* substantive rulemaking authority to DOL, as the agency itself conceded in the court below. *See* Pet. App. 47a, 49a; C.A. DOL Amicus at 18 n.8. Alt-

hough the government tries to dance a fine line (U.S. Br. 33 n.8), DOL also conceded in the court below that its *procedural* regulations were not authoritative interpretations of the Act; "admit[ted]" that those procedural regulations were "entitled to no deference" under *Chevron*; and made no claim to deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). *See* C.A. DOL Amicus at 18 n.8; Pet. App. 47a, 49a.

DOL's sole function is to investigate and adjudicate complaints. As the government elsewhere concedes, Congress only "granted the Secretary of Labor the authority to *enforce* Section 1514A through administrative adjudication." U.S. Br. 3 (emphasis added); *see also id.* at 6, 10. DOL has no expertise regarding the securities laws, public companies, or the mutual fund industry. Like the Commission in *Martin*, DOL arbiters—the ALJs and the ARB—perform a decisional function, not a policymaking one. If this Court were to defer to the ARB's legal interpretations in this context, then it would be allowing an arrogation of policymaking authority that Congress manifestly did not grant.

The judiciary's role in adjudicating Section 806 complaints also saps any rationale for deferring to the ARB. Although an employee must file an administrative complaint with OSHA, agency adjudication is usually not mandatory. 18 U.S.C. § 1514A(b)(1)(B); *Day* v. *Staples, Inc.*, 555 F.3d 42, 52-53 & n.5 (1st Cir. 2009). If "the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant," the complaining employee may file a *de novo* action in federal district court. 18 U.S.C. § 1514A(b)(1)(B).

Accordingly, an Article III court will be called upon to interpret Section 806 in the first instance in most cases, since complainants—like both petitioners here—will frequently exercise their option to bypass the agency and proceed in federal district court. This is a clear indication that federal courts have independent authority to interpret the judicially enforceable remedy without deference to the ARB's interpretations. *See Mead*, 533 U.S. at 232. In other words, Congress's specification of *de novo* proceedings in federal court is an express opt-out of the *Chevron* regime. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 517 (describing *Chevron* as "a background rule of law against which Congress can legislate").[8]

3. No party or *amicus* has requested that the ARB's decision in *Spinner* be given *Skidmore* deference, and for good reason. The weight afforded an agency interpretation under *Skidmore* turns on the "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Skidmore*, 323 U.S. at 140; *Nassar*, 133 S. Ct. at 2533; *Vance*, 133

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[8] Even where the ARB does make a decision, it is not final: The aggrieved party may challenge the ruling in a federal court of appeals—a judicial check on the administrative process that has not yet occurred in *Spinner*. Moreover, Congress authorized only the "Secretary of Labor"—an Officer of the United States who holds political accountability for the Department's decisions—to make final adjudications under Section 806. There is no indication that the Secretary has adopted the interlocutory *Spinner* decision; and therefore it is not a statement of agency position entitled to deference. David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 204; *see also* Scalia, *supra*, at 519.

S. Ct. at 2443 n.4. The ARB's counter-textual construction of Section 806, which is neither consistent nor reasonable, is entitled to no deference.

a. The ARB in *Spinner* did not employ the tools of statutory construction as instructed by this Court, instead viewing itself as "obliged" to "interpret Section 806 broadly both because it is a remedial statute and the legislative history encourage[d] [it] to do so." Pet. App. 166a. *But see*, *e.g.*, *Pinter* v. *Dahl*, 486 U.S. 622, 653 (1988) ("broad remedial goals" of a statute are insufficient justification "for interpreting a specific provision more broadly than its language and the statutory scheme reasonably permit") (internal quotation marks omitted). *Spinner*'s methodological error led to an erroneous conclusion.

The ARB also considered itself "obliged to follow" DOL's procedural regulations in *Spinner*. Pet. App. 142a & n.6 (citing 75 Fed. Reg. 3,925 (Jan. 15, 2010)); *see also id.* at 153a ("the ARB is bound by the DOL regulations"). Those rules, however, expressly state that they are "*not intended to provide interpretations of the Act*." 69 Fed. Reg. 52,104, 52,105 (Aug. 24, 2004) (emphasis added). Before the court of appeals, the Secretary "admit[ted]" that these procedural regulations were "entitled to no deference" under *Chevron*, and (contrary to the government's unsupported assertion to this Court, *see* U.S. Br. 33 n.8) did not claim deference under *Skidmore*. *See* Pet. App. 47a, 49a; C.A. DOL Amicus at ii-iv.

Indeed, the "starting point" of the ARB's analysis in *Spinner* was "*the implementing regulations construing the relevant statutory text*." Pet. App. 148a (emphasis added); *see also id.* 142a, 149a, 153a. The ARB decision can get no more deference than the

procedural regulations on which it was premised—the ARB cannot spin straw into gold.

Furthermore, the *post hoc* nature of *Spinner*, as applied to this case, undermines its legitimacy. The ARB's decision was issued in direct response to the First Circuit's decision in this case, not as a neutral explanation of the applicability of Section 806 to private company employees. It should go without saying that administrative tribunals do not sit to review decisions of the federal courts of appeals in this fashion. The ARB's decision in *Spinner* simply adopts the position advanced, unsuccessfully, by DOL in its *amicus* brief in the First Circuit. As a "'convenient litigating position'" to shore up the government's case here after it lost in court (*Christopher* v. *SmithKline Beecham Corp*., 132 S. Ct. 2156, 2166 (2012) (citation omitted)), *Spinner* is due no more deference than the government's *amicus* brief.[9]

b. *Spinner* conflicts with every extant decision on the question presented by an Article III court. *See* Pet. App. 17a; *Fleszar*, 598 F.3d at 915 (rejecting argument that a non-public company may be covered by Section 806 because it once contracted with a mutual fund broker-dealer); *Ervin* v. *Nashville Peace & Justice Ctr.*, 2008 WL 4449920, at *7 (M.D. Tenn. Sept. 29, 2008) ("by its very terms, Section 806 ap-

[9] The First Circuit correctly concluded it "owe[d] no deference" to DOL's *amicus* brief. Pet. App. 51a; *see also Christopher*, 132 S. Ct. at 2168-70 (according no deference to a DOL amicus brief); *Janus*, 131 S. Ct. at 2303-05 & n.8 (no deference due to SEC's views on scope of private right of action). Neither petitioners nor the government contest that holding, and the government does not even ask for deference to the *amicus* brief it filed in this Court. *See Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988).

plies only to employees of publicly traded companies"); *Tumban* v. *Biomérieux, Inc.*, 2007 WL 778426, at *2 (M.D.N.C. Mar. 13, 2007) ("The Sarbanes-Oxley Act only applies to publicly traded companies"). As one court correctly explained: "Nothing in the Act suggests that it is intended to provide general whistle-blower protection" to employees of "any privately-held employer, such as a local realtor or law firm, that has ever had occasion, in the normal course of its business, to act as an agent of a publicly traded company, even as to employees who had no relation whatsoever to the publicly traded company." *Brady*, 406 F. Supp. at 318.

Moreover, before *Spinner*, the ARB and ALJs within DOL had held that Section 806 did *not* apply to private contractors and subcontractors of public companies. *Fleszar* v. *Am. Med. Ass'n*, 2009 WL 891347, at *3-4 (DOL ARB Mar. 31, 2009), *aff'd,* 598 F.3d 912; *Field* v. *BKD, LLP*, 2011 WL 2165860, at *3 (DOL ARB May 27, 2011). Indeed, as noted above, the ALJ *in this case* dismissed petitioner Zang's complaint on the ground that he was not a covered employee under Section 806. J.A. 198. That is the only administrative decision actually in the record of this case, yet no one proposes deferring to it.

Only *after* the First Circuit issued its decision in *this* case did the ARB change direction in *Spinner*. But neither *Spinner* nor the government's brief acknowledges—much less explains—the departure from DOL's own previous decisions on the same subject. "[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position." *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009). Instead of providing the re-

quired "'reasoned analysis'" for its change in position (*id.* at 1810), the ARB's decision in *Spinner* arbitrarily ignored that contrary administrative authority. *See* Pet. App. 143a.

In light of the ARB's about-face, applying *Spinner* here based on conduct that occurred well before that interpretation was announced would create "precisely the kind of 'unfair surprise'" against which this Court's cases have long warned. *Christopher*, 132 S. Ct. at 2167. It would be particularly startling to defer to the ARB's construction in a different adjudication (to which respondents were not parties) when the lack of an ARB decision on petitioners' complaints is the direct result of petitioners' own elections to proceed in federal district court. The absence of fair warning provides another compelling reason to reject the government's attempt to arrogate to the ARB interpretive authority that is reserved to the courts.

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Section 806 authorizes an employee of a public company to bring a civil action against the employer and designated representatives for retaliation. The role of this Court is not to rewrite the law, much less allow unaccountable administrators to do so. Because petitioners were employed by private companies, the court below correctly directed dismissal of their complaints.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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