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 *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENTS

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The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae*.[1] The brief supports the position of Respondents before this Court and thus urges affirmance of the decision below.

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes nearly 300 major U.S. corporations collectively employing close to twenty million people. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, implications of fair employment laws and policies. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Most of EEAC's member companies are publicly traded companies subject to Section 806 of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C. § 1514A, and thus are potential respondents to whistleblower complaints filed under the Act. Some are not covered by Section 806 but do business with covered companies and thus would be covered were the decision below to be reversed.

Moreover, all of EEAC's member companies are subject to varying levels of regulation and enforcement by myriad federal agencies. For instance, all of EEAC's member companies are employers subject to the federal employment nondiscrimination statutes enforced by the U.S. Equal Employment Opportunity Commission (EEOC): Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*; the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*; the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*; the Equal Pay Act (EPA), 29 U.S.C. § 206(d); and the Genetic Information

Nondiscrimination Act (GINA), 42 U.S.C. §§ 2000ff *et seq.* They are also covered by the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, and the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 *et seq.*, both of which are enforced by the U.S. Department of Labor's Wage and Hour Division. Most EEAC members also are federal government contractors subject to the affirmative action requirements of Executive Order 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965), as amended, and the implementing regulations under 41 C.F.R. ch. 60; Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793; and the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), 38 U.S.C. §§ 4211 *et seq.* Those requirements are enforced by the U.S. Department of Labor's Office of Federal Contract Compliance Programs.

Accordingly, the issue presented in this case is extremely important to the nationwide constituency that EEAC represents. The U.S. Court of Appeals for the First Circuit ruled correctly that under the plain language of the statute, Section 806 covers only employees of public companies, and thus does not provide a cause of action to employees of a private firm merely because that firm does business with a public company. Petitioners and the United States as *amicus curiae* contend, incorrectly, that because the U.S. Department of Labor's Administrative Review Board (ARB) opined in *Spinner v. David Landau and Associates, LLC*, ARB Nos. 10-111, 10-115 (ARB May 31, 2012), that Section 806 does cover employees of private firms, courts must defer to that pronouncement. This Court's ruling on the issue of whether and when a court must defer categorically to statutory misinterpretations by federal agencies therefore will have a substantial impact on EEAC's members.

Because of its significant experience in these matters, EEAC is uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Petitioners were employed by private companies that provide investment advisory and other services to the Fidelity family of mutual funds. Pet. App. 4a. The Fidelity mutual funds, in turn, are separate investment companies that are required to file reports under section 15(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(d), and thus are covered by Section 806 of the Sarbanes-Oxley Act of 2002 (SOX), codified at 18 U.S.C. § 1514A. *Id.* They are owned by their shareholders and are not affiliated with Petitioners' employers except by contract. *Id.*

Petitioners claim that their employers retaliated against them for allegedly "blowing the whistle" in violation of Section 806. Pet. App. 183a. Both sued their employers and the common parent company, FMR, LLC, in federal court. Pet. App. 77a. Respondents asked the trial court to dismiss their claims on the ground, among others, that Petitioners were not covered employees under Section 806 because FMR, LLC, and its subsidiaries were private companies. Pet. App. 83a, 87a. The trial court denied the motions to dismiss, holding that the SOX whistleblower protection provisions extend to employees of private agents, contractors, and subcontractors of public companies. Pet. App. 8a. FMR sought and was granted interlocutory review by the First Circuit. Pet. App. 8a–9a.

The First Circuit reversed, holding that the SOX whistleblower retaliation provisions protect only the

employees of public companies. Pet. App. 51a-52a. In contrast, the U.S. Department of Labor (DOL) Administrative Review Board (ARB), overruling an administrative law judge, read the statute as covering employees of private companies. *Spinner v. David Landau and Assocs., LLC*, ARB Nos. 10-111, 10-115 (ARB May 31, 2012). Petitioners and the United States now contend that under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), decisions of the ARB interpreting Section 806, including *Spinner*, are entitled to deference from the courts. *Brief of the United States as Amicus Curiae Supporting Petitioners* at 9-11.

SUMMARY OF ARGUMENT

As the First Circuit correctly held, the plain language of Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, does not cover employees of private companies. The actual statutory language itself, as well as the titles and captions accompanying the original statute, all limit the coverage of the law to employees of public companies, *i.e.*, those with a class of securities registered under section 12 of the Securities Exchange Act of 1934 or those that file reports with the Securities and Exchange Commission pursuant to section 15(d) of the 1934 Act. 18 U.S.C. § 1514A.

Accordingly, the framework this Court established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, for analyzing agency interpretations where the underlying statute is silent or ambiguous simply does not apply to this case, since the statutory language is clear. 467 U.S. 837, 842-43 (1984). Moreover, even if the statutory language were ambiguous, Congress did not give the Department of

Labor the authority to create substantive law to fill the gap. Rather, Congress gave the Labor Department only enough authority to make an administrative determination as to whether or not the statute has been violated in a particular case; the agency must go to federal court to seek judicial enforcement of its decision. 18 U.S.C. § 1514A(b)(2)(A) (incorporating by reference 49 U.S.C. § 42121(b)).

This court should not afford unbridled deference to administrative rulings that broaden the scope of statutory coverage. *Chevron* does not go so far as to mandate that courts rubber-stamp an agency's statutory interpretation. Indeed, the absence of meaningful judicial review would leave the regulated community twisting in the ever-changing political winds.

ARGUMENT

I. UNDER THE PLAIN LANGUAGE OF THE STATUTE, EMPLOYEES OF PRIVATE COMPANIES ARE NOT COVERED BY SECTION 806 OF THE SARBANES-OXLEY ACT

As the First Circuit below correctly ruled, Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, does not cover employees of privately held companies. Accordingly, the decision below should be affirmed.

Congress enacted the Sarbanes-Oxley Act (SOX), Pub. L. No. 107-204, 116 Stat. 745 (2002), in the wake of several highly-publicized scandals involving fraud at publicly-traded companies. Among other things, the law imposes on publicly traded companies certain corporate responsibility and financial disclosure requirements. The law also established a Public

Company Accounting Oversight Board "to oversee the audit of companies that are subject to the securities laws ...." 15 U.S.C. § 7211(a).

Section 806(a) of SOX created 18 U.S.C. § 1514A, which in turn established a new cause of action prohibiting whistleblower retaliation by publicly traded companies against covered individuals who engage in one or more of the listed protected activities. As originally enacted, § 1514A provided:

> 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. [§] 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. [§] 78o(d)) ... , or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, 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—

with regard to any of the listed protected activities. 18 U.S.C. § 1514A(a). The protected activities are:

> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating

> to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—
>
> (A) a Federal regulatory or law enforcement agency;
>
> (B) any Member of Congress or any committee of Congress; or
>
> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
>
> (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

Id.

As part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Congress amended Section 806(a) in 2010 to also cover the employees of subsidiaries of publicly traded companies as follows:

> SEC. 929A. PROTECTION FOR EMPLOYEES OF SUBSIDIARIES AND AFFILIATES OF PUBLICLY TRADED COMPANIES.
>
> Section 1514A of title 18, United States Code, is amended by inserting "including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such

> company" after "the Securities Exchange Act of 1934 (15 U.S.C. [§] 78o(d))".

Pub. L. No. 111-203, § 929A, 124 Stat. 1376, 1852 (2010).

As the First Circuit correctly discerned, the plain language of Section 806 covers only employees of public companies[2] and not those that are privately held. The court below pointed out that:

> The text of § 1514A(a) 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. Such public companies may not retaliate against their own employees who engage in protected activity. Section 1514A(a) then enumerates a list of representatives of such employers, including those who are contractors or subcontractors, and they are also barred from retaliating against employees of the covered public-company employer who engage in protected activity.

Pet. App. 17a-18a (footnote omitted). It explained, "Section 1514A(a)'s list of company representatives serves ... to ensure an employee of a public company is covered under the provision if he or she were harassed by officers, other employees, or contractors or subcontractors to the public company for reporting fraud in that public company." Pet. App. 18a (footnote omitted).

---

[2] As did the First Circuit, we use the term "public companies" as shorthand for both categories of coverage under Section 806, *i.e.,* 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. Pet. App. 13a.

As the First Circuit observed further, Congress in describing both Section 806 and 18 U.S.C. § 1514A(a) made clear that those provisions were intended to extend only to employees of public, not privately held, companies. Section 806 is entitled, "Protection for Employees of *Publicly Traded* Companies Who Provide Evidence of Fraud." Pet. App. 19a (emphasis added). Similarly, § 1514A is captioned "Whistleblower protection for employees of *publicly traded* companies." Pet. App. 20a (emphasis added). The manner in which Congress elected to describe these provisions strongly suggests that it intended to cover only employees of public companies and never contemplated covering those of private companies. Indeed, as the First Circuit concluded, given this language, it would be genuinely "odd to read § 1514A(a) as covering employees of private companies." Pet. App. 19a. Thus, the title of Section 806 and the caption of § 1514A further underscore the plain meaning of the actual statutory language.

Moreover, as the First Circuit observed, where Congress wanted to extend broader coverage in SOX, it did so, using broader language. Pet. App. 22a-25a. Elsewhere in SOX, Congress explicitly created broader whistleblower protection, making the language of Section 806 "conspicuously narrow" in comparison. *Id*. at 24a. For example, Section 1107, entitled "Retaliation Against Informants," adds language to 18 U.S.C. § 1513 providing that

> (e) *Whoever* knowingly, with the intent to retaliate, takes *any action* harmful to *any person*, including interference with the lawful employment or livelihood of *any person*, for providing to

> a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

SOX § 1107, 116 Stat. at 810 (emphasis added). Pet. App. 23a-24a. As the First Circuit pointed out, "This language requires neither a public company, nor an employment relationship, nor a securities law violation to trigger coverage." Pet. App. 24a.

In addition, the First Circuit related the many instances in which the legislative history both of Section 806 and the Dodd-Frank amendment further confirms that all along, Congress has intended Section 806 to cover only employees of public companies. Pet. App. 37a-42a. One example is the Senate Judiciary Committee report on the Corporate and Criminal Fraud Accountability Act of 2002, S. 2010, 107th Cong. (2002), which contained the provision that would become § 1514A. Pet. App. 38a (citation omitted). That report states that the future § 1514A "would provide whistleblower protection to employees of publicly traded companies," and that it would "provide whistleblower protection to employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company." *Id.* (citations omitted).

Further, in remarks introducing that legislation, Senator Leahy stated that "Section 7 of the bill would provide whistleblower protection to employees of *publicly traded* companies who report acts of fraud to Federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company." 148 Cong. Rec.

S1787-88 (daily ed. Mar. 12, 2002) (Statement of Sen. Leahy). He continued that "[a]lthough current law protects many government employees who act in the public interest by reporting wrongdoing, there is no similar protection for employees of publicly traded companies who blow the whistle on fraud and protect investors." *Id*. at S1788.

As the Seventh Circuit has observed, it simply cannot be that the phrase "'contractor, subcontractor, or agent' means anyone who has *any* contract with an issuer of securities. Nothing in § 1514A implies that, if the [employer] buys a box of rubber bands from Wal-Mart, a company with traded securities, the [employer] becomes covered by § 1514A.'" *Fleszar v. U.S. Dep't of Labor*, 598 F.3d 912, 915 (7th Cir. 2010).

Therefore, as the First Circuit correctly found, the plain language of Section 806 covers only employees of public companies.

II. THE DEPARTMENT OF LABOR'S FLAWED INTERPRETATION OF THE SCOPE OF SECTION 806 IS NOT ENTITLED TO DEFERENCE

A. *Chevron* Deference Does Not Apply When The Statute Is Clear

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court established the fundamental framework for analyzing certain situations in which a party challenges a federal agency's construction of a statute. Notably, the *Chevron* framework does not apply to judicial review of all agency actions, but only to those for which "it appears that Congress delegated authority to the agency generally to make rules carrying the force of

law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Where such is not the case, the *Chevron* framework does not apply, and the agency's view is, at most, "eligible to claim respect according to its persuasiveness." *Id.* at 221 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

Where the *Chevron* framework does apply, there are, the Court explained, "two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43 (footnote omitted). However, "if the statute is silent or ambiguous with respect to the specific issue," then "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843 (footnote omitted).

Congress has spoken directly to the precise question at issue, both in the statutory text and in the title and caption of Section 806 and § 1514A. Congress left no "gap" for the agency to fill. *Cf. Chevron*, 467 U.S. at 843. Thus, there is no room whatsoever for agency interpretation. "Where Congress has established a clear line, the agency cannot go beyond it ...." *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1874 (2013). *See also Dole v. United Steelworkers*, 494 U.S. 26, 42 (1990) (concluding that "[b]ecause we find that the statute, as a whole, clearly expresses Congress' intention, we decline to defer to OMB's interpretation") (footnote omitted). Rather, as the Court said in *Chevron*, "that is the end of the matter." 467 U.S. at

842. The agency's interpretation is due no deference under *Chevron*.

B. Even If The Statute Were Unclear, Congress Did Not Authorize The Department Of Labor To Make Substantive Law Under Section 806 To Fill The Gap

Moreover, even if the statutory language were ambiguous, Congress did not give the Department of Labor (DOL) the rulemaking authority to fill the gap. *Cf. Immigration & Naturalization Serv. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (affording *Chevron* deference to the Immigration and Naturalization Service because the statute in question specifically charged the Attorney General "with the administration and enforcement of the statute" and stated that "the determination and ruling by the Attorney General with respect to all questions of law shall be controlling") (quoting 8 U.S.C. § 1103(a)(1) (1994 ed., Supp. III)). Unlike, for example, the exemptions provision of the Fair Labor Standards Act, 29 U.S.C. § 213, Congress in Section 806 did not give the Department of Labor "broad authority to 'defin[e] and delimi[t]' the scope of the" statutory language in question. *Auer v. Robbins*, 519 U.S. 452, 456 (1997) (quoting 29 U.S.C. § 213(a)(1), which refers to certain statutory terms "as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor]").

In the court below, the Department of Labor conceded that it did not have substantive rulemaking authority with respect to Section 806. Pet. App. 49a. Quite appropriately, then, in promulgating procedural regulations governing the complaint process, it stated

that "[t]hese rules are not intended to provide [statutory] interpretations ...." 69 Fed. Reg. 52,104, 52,105 (Aug. 24, 2004).

Nevertheless, the Government now claims that the Labor Department *does* have the authority to make law under Section 806, and in particular that the decision of the Department of Labor's Administrative Review Board (ARB) in *Spinner v. David Landau and Associates, LLC*, ARB Nos. 10-111, 10-115 (ARB May 31, 2012), holding that Section 806 covers employees of private companies, is due *Chevron* deference from this and every other federal court. *Brief of the United States as Amicus Curiae Supporting Petitioners* at 9-11. In the Government's view, Section 806 is actually ambiguous, and because Congress gave the Secretary of Labor the authority to determine whether a violation has occurred, which authority the Secretary has delegated to the Administrative Review Board (ARB), the decisions of the ARB are due *Chevron* deference. *Id.*

Section 806 does provide for use of the DOL administrative process by an individual who claims that he or she has been retaliated against for whistleblowing in violation of the law, but with resort to the federal courts for de novo review if the agency has not issued a final decision within 180 days of the complaint. 18 U.S.C. § 1514A(b). And Section 806 also provides for judicial review by the U.S. courts of appeals on petition of any person adversely affected or aggrieved by the agency's order. 18 U.S.C. § 1514A(b)(2)(A) (incorporating by reference 49 U.S.C. § 42121(b)). Indeed, Section 806 does not even provide DOL with full enforcement authority. Rather, DOL must take its order to federal court in an enforcement action. Section 806 states that actions shall be

governed under the rules and procedures set forth in 49 U.S.C. § 42121(b). 18 U.S.C. § 1514A(b)(2)(A). Under that provision, "Whenever any person has failed to comply with [the Secretary's] order ... the Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order." 49 U.S.C. § 42121(b)(5).

Thus, the ARB's interpretation that Section 806 covers employees of private companies is not due any deference from this or any Court.[3]

III. THIS COURT SHOULD NOT DEFER TO ADMINISTRATIVE RULINGS BROADENING THE SCOPE OF STATUTORY COVERAGE ABSENT CLEAR DIRECTION FROM CONGRESS

The Government's position in this case is profoundly disturbing. If an agency that Congress has provided with only limited enforcement authority nevertheless can make substantive statutory interpretations in individual cases that are essentially unreviewable because a reviewing court must defer to the agency's *ipse dixit*, then judicial review in such cases is meaningless. The Government's position appears to be that where an agency such as DOL is tasked with the responsibility of handling individual complaints under an individual rights statute, any pronouncement of the administrative appeals board that hears appeals from an administrative law judge as to the

[3] Nor is the ARB's decision in *Spinner* entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Skidmore* deference is appropriate only if the agency action has the "power to persuade," *id.* at 140, which *Spinner* does not, since it is contrary to the plain language of the statute.

scope of statutory coverage is unassailable, and a reviewing court has no option but to rubber-stamp the outcome.

The instant case is a prime example of why the Government's position must be rejected. Despite clear statutory language to the contrary, the Government contends that this Court must defer to the decision of the ARB in *Spinner*, which extends Section 806 well beyond the parameters established by Congress, to cover the employees of hundreds if not thousands of private companies who are not within the scope of the law. And in the Government's view, this Court's hands are tied by its own prior decisions and it can do nothing but defer to the ARB's erroneous interpretation.

The Government's position comes perilously close to maintaining that this Court has delegated all issues of statutory interpretation to the administrative branch, leaving the federal courts with no real review authority. If the Government is correct, then all an agency has to do is to declare that it has found silence or ambiguity in the statutory language, perhaps because the statute does not say what the agency wants it to say. Then it can announce its own vision, however fanciful, argue that it is a plausible construction of the statute, and claim *Chevron* deference.

The Government is simply incorrect as to how the *Chevron* framework works. Even if the *Chevron* framework applies, and even if the answer to the first *Chevron* question is that the statute is silent or ambiguous, then the second *Chevron* question still demands a response: "whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843 (footnote omitted). This too is a meaningful inquiry. Where the agency's construction is unreasonable, *Chevron* authorizes courts to

reject it. *Dep't of the Treasury, Internal Revenue Serv. v. Fed. Labor Relations Auth.*, 494 U.S. 922, 928 (1990) (applying *Chevron* framework and rejecting agency interpretation as "not reasonable"). "[D]eference is not equivalent to acquiescence ...." *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998). *See NLRB v. Brown*, 380 U.S. 278, 291-92 (1965) ("Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions"); *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965) ("The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress"), *quoted in Holly Farms Corp. v. NLRB*, 517 U.S. 392, 410 (1996) (O'Connor, J., concurring in the judgment in part and dissenting in part).

If the Government's position were to prevail in this case, then agencies would be free to invent, misconstrue, imagine and implement statutory construction that exceeds, perhaps even intentionally, the boundaries imposed by Congress when it enacted the statute, and judicial review would be merely a check-off rather than a check.

The field of employment law at the moment is rife with examples of agency overreach. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, which prohibits discrimination in employment on the basis of race, color, religion, sex or national origin,

does not bar employers from conducting criminal background checks or credit history checks of prospective employees. Nevertheless, the Equal Employment Opportunity Commission (EEOC), which lacks the authority to promulgate substantive regulations interpreting Title VII,[4] has of late been on a mission to ban criminal background checks and credit history checks from the private sector employment process in all but a few very limited circumstances. EEOC Enforcement Guidance, *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (EEOC Apr. 25, 2012).[5] So far, two EEOC lawsuits attempting to push this agenda by contending that company policies of conducting criminal and/or credit background checks produce an unlawful disparate impact on protected classes have been thrown out by federal judges, in part because the agency's purported statistical evidence was so badly flawed. *EEOC v. Freeman*, 2013 BL 210284, at *1, *11 (D. Md. Aug. 9, 2013) (finding that the EEOC's expert had engaged in "cherry-pick[ing]" of data to arrive at the results he sought, and that his database contained a "mind-boggling number of errors," and noting that "[f]or many employers, conducting a criminal history or credit record background check on a potential employee is a rational and legitimate component of a reasonable hiring process. The reasons for conducting such checks are obvious," and that "even the EEOC conducts criminal background investigations as a condition of employment for

[4] The EEOC does have limited authority "to issue, amend, or rescind suitable procedural regulations" as required to administer Title VII. 42 U.S.C. § 2000e-12(a).

[5] *Available at* http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm

all employees, and conducts credit background checks on approximately 90 percent of its positions") (citation omitted); *EEOC v. Kaplan Higher Learning Educ. Corp.*, 2013 BL 21834, at *5 (N.D. Ohio Jan. 28, 2013) (rejecting as "unsound" and "unreliable" the EEOC's expert's use of "'race-raters,'" individuals who guessed applicants' race by looking at driver's license photos and the individuals' names, in lieu of actual data).

Similarly, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has been filing enforcement actions based on purported statistically significant disparities in the hiring, not of a particular protected group vis-à-vis another, allegedly favored group, but of applicants who are *not* members of a particular protected group. Not surprisingly, an administrative law judge recently granted summary judgment for the contractor in an OFCCP enforcement action accusing the contractor of discriminating against what the judge described as a "custom-designed" group called "Non-Asians." *OFCCP v. VF Jeanswear, L.P.*, No. 2011-OFC-00006, at 7 (OALJ Aug. 5, 2013) (noting that "The 'non-Asian' category upon which the Plaintiff has proceeded is neither a race nor an ethnic group, either by regulatory definition or as used in common parlance"). Shortly thereafter, another administrative law judge rejected an OFCCP discovery request for the same reason. *OFCCP v. Cargill Meat Solutions*, No. 2012-OFC-00001, at 2 (OALJ Aug. 15, 2013) (noting that the relevant section of the implementing regulations "defines five races or ethnic groups, and 'Non-Asian' is not among them").

No fewer than three federal courts of appeals have rejected the National Labor Relations Board's conclusion in *D.R. Horton*, 357 N.L.R.B. No. 184 (Jan.

3, 2012), that the National Labor Relations Act prohibits class action waivers. *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Richards v. Ernst & Young, LLP*, 2013 BL 222217 (9th Cir. Aug. 21, 2013) (*per curiam*); *Sutherland v. Ernst & Young, LLP*, 2013 BL 211217 (2d Cir. Aug. 9, 2013). These are just a few examples of the ways in which federal agencies with authority to enforce employment-related laws in the private sector arguably have abused the privilege.

The Government's position in this case would allow agencies unfettered, unreviewable discretion to rewrite their statutory underpinnings in any way they wish. Unbridled deferral to agency pronouncements by the judicial branch would, as a practical matter, place employers utterly at the mercy of the executive agencies' every whim, without the important second opinion provided by judicial review. As Chief Justice Roberts observed in his dissenting opinion in *City of Arlington v. FCC*:

> The administrative state "wields vast power and touches almost every aspect of daily life." The Framers could hardly have envisioned today's "vast and varied federal bureaucracy" and the authority administrative agencies now hold over our economic, social, and political activities. "[T]he administrative state with its reams of regulations would leave them rubbing their eyes."

133 S. Ct. at 1878 (Roberts, C.J., dissenting) (citations omitted). The judicial branch cannot have abdicated so much of its role in the delicate check and balance system established by the Framers.

CONCLUSION

For the reasons set forth above, the *amicus curiae* Equal Employment Advisory Council respectfully submits that the decision below should be affirmed.

Respectfully submitted,

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