No. 12-60122

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WILLIAM VILLANUEVA,
Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR,
Respondent,

CORE LABORATORIES NV
Intervenor.

On Review from the Final Decision and Order of the
Department of Labor's Administrative Review Board
Case No. 09-108

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT AND INTERVENOR AND IN SUPPORT OF AFFIRMANCE

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August 29, 2012

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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FEDERAL RULE 29(c)(5) STATEMENT

No counsel for a party authored this brief in whole or in part;

No party or counsel for a party contributed money that was intended to fund the preparation or submission of this brief; and

No person other than *amici curiae*, their members or counsel, contributed money that was intended to fund the preparation or submission of this brief.

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The Equal Employment Advisory Council and the Chamber of Commerce of the United States of America respectfully submit this brief *amici curiae* with the consent of all parties. The brief urges the court to deny the Petition for Review and affirm the decision of the U.S. Department of Labor Administrative Review Board, and thus supports the position of Respondent U.S. Department of Labor and Intervenor Core Laboratories NV before this Court.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes roughly 300 major U.S. corporations. EEAC's directors and officers include many of the industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation, representing approximately 300,000 direct

members and an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

Many of the *amici's* members are public companies subject to the "whistleblower" provisions of the Sarbanes-Oxley Act (SOX) of 2002, 18 U.S.C. § 1514A. Many of these companies also have subsidiaries outside the United States, conducting business in other countries and employing foreign employees.

Accordingly, the issue presented in this case is extremely important to the nationwide constituency that EEAC and the Chamber represent. The U.S. Department of Labor Administrative Review Board (ARB) ruled correctly that the whistleblower retaliation provisions of SOX do not extend extraterritorially to cover a foreign employee working overseas for a foreign company conducting its business in a foreign company. *Cf. Morrison v. National Australia Bank*, ___ U.S. ___, 130 S. Ct. 2869 (2010).

Thus, EEAC and the Chamber have an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of their significant experience in these matters, EEAC and the Chamber are 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

Complainant William Villanueva, a Colombian national, was an employee of Saybolt Colombia, a Colombian limited liability company headquartered in Bogota. He served as the company's General Manager for the last sixteen years of his employment. Villanueva never worked in the United States during his employment by Saybolt Colombia. *Villanueva v. Core Labs. NV*, ARB Case No. 09-108 (Dec. 22, 2011) (*en banc*) (hereinafter "ARB Decision"), at 3.

Saybolt Latin America B.V., a Netherlands company, owns ninety-five percent of Saybolt Colombia. Intervenor Core Laboratories NV (Core Labs), also a Netherlands company, owns Saybolt Latin America. Core Labs and its affiliates provide services to the petroleum industry through seventy offices in more than fifty countries. Its U.S. office is located in Houston, Texas. Core Labs' securities are registered under Section 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 781. They are publicly traded on the New York Stock Exchange. ARB Decision at 3.

Villanueva contends that Saybolt Colombia and Core Labs were involved in two tax evasion schemes that resulted in the underpayment of taxes to the

Colombian government. He reported his opinion to various Saybolt Colombia and Core Labs representatives. *Id.* at 3-4. In response, Villanueva was provided with two written legal opinions concluding that the companies' transactions were lawful. Disagreeing, Villanueva refused to sign Saybolt Colombia's tax returns. *Id.* at 4.

Villanueva claims that he was first denied a pay raise, and then that his employment in Colombia was terminated in retaliation for his reports of alleged tax evasion. *Id.* He filed a complaint with the Occupational Safety and Health Administration (OSHA) under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (SOX). *Id.* at 5. OSHA dismissed the case for lack of subject matter jurisdiction. Villanueva appealed to an Administrative Law Judge (ALJ) of the Department of Labor. *Villanueva v. Core Labs. NV*, No. 2009-SOX-006 (OALJ June 10, 2009) (hereinafter "ALJ Decision"), at 1. The ALJ likewise dismissed the case for lack of subject matter jurisdiction. ALJ Decision at 1-2.

Villanueva appealed the ALJ's decision to the Department of Labor Administrative Review Board (ARB). ARB Decision at 6. The ARB heard the case *en banc* and affirmed the ALJ's dismissal of the case, holding that the

statutory language of SOX "does not allow for its extraterritorial application." *Id.* at 12. This appeal followed.

SUMMARY OF ARGUMENT

Under the Supreme Court's decision in *Morrison v. National Australia Bank, Ltd.*, ___ U.S. ___, 130 S. Ct. 2869 (2010), Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, does not have extraterritorial application. As both the First Circuit in *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 5 (1st Cir. 2006), and the Administrative Review Board in this case ruled correctly, the presumption against extraterritoriality of U.S. statutes applies absent an affirmative indication from Congress that it intended the statute to apply beyond American shores. The Court's decision in *Morrison* reaffirmed the presumption and rejected myriad "conduct" and "effects" tests that some courts of appeals had used in the past.

Accordingly, under *Morrison*, because Congress gave no affirmative indication that it intended Section 806 to apply extraterritorially, it does not. Likewise, because the amendment to Section 806 made by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, § 929A, 124 Stat. 1376 (2010), to add subsidiary coverage gives no such

affirmative indication, Section 806 still does not apply extraterritorially after Dodd-Frank.

Because Section 806 does not apply extraterritorially, no foreign national employed in a foreign country by a foreign corporation can have a cause of action under the statute. As noted above, the Supreme Court in *Morrison* rejected any form of "conduct" or "effects" test to extend the jurisdiction of a U.S. statute. 130 S. Ct. at 2878. Further, where the employment relationship exists in a foreign country, then as a practical matter, the necessary and critical elements of a Section 806 case occur there, not in the United States. Accordingly, this Court should not adopt an interpretation that improperly extends Section 806 coverage overseas.

In addition, extraterritorial application of Section 806 would be unreasonable absent clearer direction from Congress. As a practical matter, Section 806 is completely lacking in any mechanism for enforcement abroad, such as provisions for avoiding conflict with the laws of other nations, for protecting the rights of other workers under those laws, for conducting agency investigations in foreign countries, and the like.

For all of these reasons, this Court should rule that Section 806 does not apply extraterritorially.

ARGUMENT

I. SECTION 806 OF THE SARBANES-OXLEY ACT DOES NOT HAVE EXTRATERRITORIAL APPLICATION

Congress enacted the Sarbanes-Oxley Act (SOX), Pub. L. 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, codified at 18 U.S.C. § 1514A, created 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 part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Congress amended § 806(a) to add subsidiary coverage. Pub. Law No. 111-203, § 929A, 124 Stat. 1376 (2010).

As explained in more detail below, Section 806 does not have extraterritorial application, either as originally passed, *see Carnero v. Boston Scientific Corp.,* 433 F.3d 1, 5 (1st Cir. 2006), or as amended by Dodd-Frank.

A. Under the Supreme Court's *Morrison* Decision, U.S. Statutes Do Not Apply Extraterritorially Absent An Affirmative Indication From Congress

In *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010), the U.S. Supreme Court clarified the principles for determining whether a federal statute can be applied extraterritorially. Specifically, the Court ruled that Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), does not provide a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges. 130 S. Ct. at 2888. In so doing, the Court explained the proper analysis for making a similar determination with respect to federal statutes generally.

First, the Court reiterated the "'longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Id.* at 2877 (quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991)[1] (holding that Title VII of the Civil Rights Act of 1964, at the time, did not apply extraterritorially)). This principle, the Court observed, "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters." *Id.* (citation omitted). Accordingly, the Court explained, "'unless there is the affirmative intention of the

[1] *Superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074 (1991), *as recognized in Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

Congress clearly expressed' to give a statute extraterritorial effect, 'we must presume it is primarily concerned with domestic conditions.'" *Id.* (quoting *Aramco*, 499 U.S. at 248). The Court continued, "When a statute gives no clear indication of an extraterritorial application, it has none." *Id.* at 2878. Indeed, the Court specifically criticized decisions by several of the federal courts of appeals that had deviated from this principle by applying instead a "conducts test" and an "effects test." *Id.* at 2881.

The Court went on to examine the plain language of § 10(b), and concluded that nothing there provided any indication whatsoever that Congress intended it to apply abroad. *Id.* at 2881-82. The Court rejected the notion that the use of the phrase "foreign commerce" in the statute's definition of "commerce" signaled an intent to apply the statute extraterritorially. *Id.* at 2882. Likewise, the Court found that a "fleeting reference" in the Congressional statement of the statute's purpose "to the dissemination and quotation" abroad of domestic securities prices did not overcome the strong presumption against extraterritorial application. *Id.* Finally, the Court declined to infer an intent to create extraterritorial application from a different section of the Act that does appear to have some limited applicability to transactions in other countries. *Id.* Thus, finding no "affirmative indication in the

Exchange Act that § 10(b) applies extraterritorially," the Court "therefore conclude[d] that it does not." *Id.* at 2883.

Next, the Court proceeded to reject the notion that a federal statute can have extraterritorial reach despite the presumption as long as some of the conduct involved occurred in the United States. *Id.* at 2884. The Court pointed out that "it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States." *Id.* "But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *Id.* The Court went on to explain that conduct occurring in the United States does not override the presumption. Using *Aramco*, where the plaintiff was a U.S. citizen hired in the United States, as an example, the Court noted that "neither that territorial event nor that relationship was the 'focus' of congressional concern." *Id.* (quoting *Aramco*, 499 U.S. at 255).

Accordingly, the High Court's decision in *Morrison* establishes a strong presumption that a federal statute does not have extraterritorial application absent some affirmative indication that Congress intended otherwise.

B. There Is No Affirmative Indication That Congress Intended Section 806 To Have Extraterritorial Application

1. The plain language of SOX Section 806 does not provide for extraterritorial application

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. Nothing in the language of SOX Section 806 provides any affirmative indication that Congress intended it to apply extraterritorially.

2. No other indicia of congressional intent exists to extend the statute extraterritorially

Even looking beyond the plain language of the statute, no affirmative indication can be found that Congress intended to extend the reach of SOX Section 806 beyond U.S. boundaries. The legislative history of SOX Section 806 contains no relevant language. Rather, the focus was strictly on domestic employees. Indeed, one of the primary concerns underlying enactment of Section 806 was the "patchwork and vagaries of current state laws, even though most publicly traded companies do business nationwide," 148 Cong. Rec. S7420 (daily ed. July 26, 2002), although many of those companies do business in foreign countries as well. Senator Paul Sarbanes, then Chairman of the Senate Banking, Housing and Urban Affairs Committee, and one of the bill's primary sponsors, introduced the Conference Report on the bill on the Senate floor with no reference to any extraterritorial application. 148 Cong. Rec. S7350-52 (daily ed. July 25, 2002).

Indeed, in holding that Section 806 does not apply beyond America's shores, the U.S. Court of Appeals for the First Circuit noted, "Not only is the text of 18 U.S.C. § 1514A silent as to any intent to apply it abroad, the statute's legislative history indicates that Congress gave no consideration to either the possibility or the problems of overseas application." *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 8 (1st Cir. 2006). In *Carnero*, the First Circuit conducted an extensive review of the legislative history and found no indication whatsoever that Congress intended Section 806 to apply extraterritorially. Applying the presumption against extraterritoriality as the Supreme Court did in *Morrison*, the First Circuit ruled in *Carnero* that Section 806 of SOX "does not reflect the necessary clear expression of congressional intent to extend its reach beyond our nation's borders." *Id.* at 18 (footnote omitted).

As the First Circuit pointed out in *Carnero*, where Congress wanted to give SOX extraterritorial reach, it did. Section 1107 of SOX amended 18 U.S.C. § 1513, which makes it a crime to retaliate against a witness, victim or informant, by adding subsection (e), providing for criminal sanctions for retaliation against someone who provides information to a law enforcement officer. 18 U.S.C. § 1513(e). Subsection (d) of § 1513 expressly gives § 1513 extraterritorial effect, stating that "There is extraterritorial Federal jurisdiction over an offense under this

section." 18 U.S.C. § 1513(d). As the First Circuit concluded in *Carnero*, "That Congress provided for extraterritorial reach as to Section 1107 but did not do so as to Section 806 (the provision relevant here) conveys the implication that Congress did not mean Section 806 to have extraterritorial effect." 433 F.3d at 10.

Accordingly, there being no affirmative indication that Congress intended Section 806 to apply extraterritorially, this Court should rule that it does not.

C. Nothing In Section 929A Of Dodd-Frank Extends The Jurisdiction Of SOX Section 806 Extraterritorially

In the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Congress amended § 806(a) 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 (2010). Here too, the new language contains no affirmative indication that Congress intended the coverage of Section 806, as amended, to extend beyond the U.S. borders.

Congress was certainly aware that many publicly traded companies have foreign subsidiaries – and indeed, that some are foreign companies themselves. Moreover, "Congress is presumed to be aware of an administrative or judicial

interpretation of a statute . . . ." *Lorillard, Inc. v. Pons*, 434 U.S. 575, 580 (1978), and thus must be presumed to have known of both *Morrison* and *Carnero*.

Nevertheless, nothing in the Dodd-Frank amendment suggests that foreign employees of foreign companies, or U.S. citizens who are employed by foreign companies for that matter, are covered by Section 806. The language does not even include a "fleeting reference" to foreign commerce such as the Supreme Court rejected in *Morrison* as insufficient to overcome the presumption against extraterritoriality. 130 S. Ct. at 2882. Accordingly, the amendment language lacks the "affirmative indication" of Congressional intent required to overcome the strong presumption against extraterritorial application. *Id.* at 2883.

As the ALJ noted in this case, Congress knows how to give a statute extraterritorial application if it chooses to do so. After several courts ruled that the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, did not apply abroad, Congress in 1984 amended Section 11(f) of the ADEA by adding a new sentence to the definition of "employee" to provide that: "The term 'employee' includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country." 29 U.S.C. § 630(f). Similarly, after the Supreme Court decided *Aramco*, Congress amended Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as part of

the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), to extend coverage extraterritorially under that statute as well. Like the amendment to the ADEA, Congress added a sentence to the definition of "employee" in Title VII stating, "With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States." 42 U.S.C. § 2000e(f).

Accordingly, when Section 806 is compared with other employment-related statutes in which Congress has directly and unambiguously made clear its intention that the statute have extraterritorial effect, it is evident that, in enacting Section 806, as well as in amending Section 806 in Dodd-Frank, Congress had no such intent.

II. BECAUSE SOX SECTION 806 HAS NO EXTRA-TERRITORIAL APPLICATION, A FOREIGN NATIONAL CLAIMING A VIOLATION OF FOREIGN LAW BY A FOREIGN COMPANY IN A FOREIGN COUNTRY HAS NO CAUSE OF ACTION

A. Allowing A Foreign National To Bring A Section 806 Claim Based On A Report Of A Violation Of Foreign Law By A Foreign Company In A Foreign Country Would Amount To Extraterritorial Application

The ARB ruled correctly that allowing Petitioner's claim to go forward would require extraterritorial application of Section 806. The elements of a SOX Section 806 claim are that (1) the complainant engaged in activity or conduct that § 1514A protects; (2) the respondent took unfavorable personnel action against

him; and (3) the protected activity was a contributing factor in the adverse personnel action. *Reamer v. Ford Motor Co.*, ARB Case No. 09-053 (July 21, 2011), at 5.[2] The occurrence of any of these elements within the United States cannot convert an extraterritorial case into a territorial one. Rather, a rule extending Section 806 to cover cases involving employment in a foreign country merely because one or more elements of the claim allegedly occurred in the United States would impermissibly give Section 806 extraterritorial effect.

First, as the ARB correctly ruled, the activity which Petitioner asserts gives rise to his claim was his alleged report of an attempt by a foreign company to evade foreign tax law. ARB Decision at 12. Accordingly, as the ARB held, "the driving force of this case, the fraudulent activity being reported, was solely extraterritorial and takes the events outside Section 806's scope." *Id.* at 10 n.22.

Moreover, where, as here, the employment relationship in question exists in a foreign country, then as a practical matter, neither the second nor the third elements of a complainant's *prima facie* case under SOX can even arguably occur in the United States, even where, as the complainant alleges, the decision to take an adverse personnel action may have been initiated here. In *Foley Bros. v. Filardo*,

[2] The complainant must prove all three elements by a preponderance of the evidence. *Id.* Moreover, relief may not be granted if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected behavior. 29 C.F.R. § 1980.109(a).

the Supreme Court ruled that a federal law requiring federal contractors to agree not to require or permit employees to work more than eight hours per day did not apply to an American company employing an American worker overseas because, as later cases also held, there was no indication that Congress intended the law to apply extraterritorially. 336 U.S. 281, 285 (1949). The plaintiff in that case asserted that he had been required to work overtime, and sought overtime pay. Although not specifically addressed by the Court, it is likely that one or more of the elements of the overtime claim arguably occurred in the United States, yet the Court ruled categorically that the federal statute did not apply.

For this reason, the Supreme Court's decision in *Pasquantino v. United States*, 544 U.S. 349 (2005), is not applicable here. In *Pasquantino*, the Court addressed whether a scheme to avoid foreign excise taxes violated the federal wire fraud statute, 18 U.S.C. § 1343, which makes it unlawful to commit fraud by the use of interstate wires. The Court focused on the fact that, given the language of the wire fraud statute, the "[petitioners'] offense was complete the moment they executed the scheme inside the United States; the wire fraud statute punishes the scheme, not its success." 544 U.S. at 371 (citation omitted). In a Section 806 case, in contrast, the alleged offense is not complete unless and until the employer actually takes adverse action against a putative whistleblower because of his

protected activity. Where that action takes place outside the United States, Section 806 does not apply. *Cf. Asadi v. G.E. Energy (USA) LLC*, 2012 U.S. Dist. LEXIS 89746, at *21-*22 (S.D. Tex. June 28, 2012).

Moreover, applying Section 806 extraterritorially merely because one or more of the elements in the claim occurred in the United States would implicate labor conditions in other countries without any expressed intent of Congress to do so, a concern expressed by the Supreme Court in numerous cases. In *Foley Bros.*, for example, the Court pointed out that nothing in the statute in question differentiated between U.S. citizens and aliens. 336 U.S. at 286. Accordingly, extending the law extraterritorially would necessarily provide a cause of action to a foreign national who happened to be working for a United States company overseas, despite the dissimilarity between foreign working conditions and those in the United States. *Id.* "An intention to so regulate labor conditions which are the primary concern of a foreign country," the Court said, "should not be attributed to Congress in the absence of a clearly expressed purpose." *Id.*

Similarly, the Court observed in *Aramco* that, were Title VII to be applied extraterritorially, nothing in the statute differentiated U.S. employers from foreign ones, thus potentially subjecting foreign employers to U.S. anti-discrimination law. 499 U.S. at 255. The Court emphatically rejected such an outcome, stating

categorically that "[w]ithout clearer evidence of congressional intent to do so . . . , we are unwilling to ascribe to that body a policy which would raise difficult issues of international law by imposing this country's employment-discrimination regime upon foreign corporations operating in foreign commerce." *Id.*

Likewise, were the Court to adopt a rule that the occurrence of one or more elements of a Section 806 made a case "territorial," there is nothing in Section 806 to then restrict coverage either to U.S. citizens working abroad or to U.S. companies doing business in foreign lands. Rather, the rule would necessarily cover foreign workers, and foreign companies, without any such direction from Congress, a result that the Supreme Court has repeatedly rejected.

In contrast, when Congress provided for extraterritorial coverage in both the ADEA and Title VII, it specifically extended coverage only to U.S. citizens, not to foreign nationals. 29 U.S.C. § 630(f); 42 U.S.C. § 2000e(f). With respect to foreign companies, Congress in both statutes provided explicitly that the law does not cover foreign employers unless they are controlled by a U.S. employer, under a specific "control test" set out in each statute. 29 U.S.C. § 623(h) (ADEA); 42 U.S.C. § 2000e-1(c) (Title VII). Moreover, in both statutes, Congress explicitly included a "foreign laws" provision under which a covered employer will be excused from non-compliance with the Act where compliance would cause it to

violate a law of the foreign country in which it is located. 29 U.S.C. § 623(f)(1) (ADEA); 42 U.S.C. § 2000e-1(b) (Title VII).

Given that Congress, when it chooses to cover U.S. citizens employed by certain companies overseas under federal antidiscrimination laws, does so using carefully constructed rules that delineate the parameters of that coverage, the Court should not create even more expansive, coverage for Section 806 by judicial fiat.

B. *Morrison* Rejected The So-Called "Conduct Or Effects" Test

In essence, Petitioner in this case seeks to apply a version of the now-discredited "conduct or effects" test in order to argue that his claim actually is based in the United States. The Supreme Court in *Morrison* explicitly rejected the "conduct or effects" test then used by several of the federal courts of appeals in ruling on whether a statute had extraterritorial effect. Noting that the test had originated in "disregard of the presumption against extraterritoriality," 130 S. Ct. at 2878, the Court concluded that over time, the attempts of several courts of appeals to apply it had led to a "proliferation of vaguely related variations . . . ." *Id.* at 2880. Ultimately, the Court agreed with commentators who said that the test resulted in "unpredictable and inconsistent application of § 10(b) to transnational cases." *Id.* Rejecting the test outright, the Court said that the results engendered

by application of the test "demonstrate the wisdom of the presumption against extraterritoriality." *Id.* at 2881.

As the decision in *Morrison* indicates, the "conduct and effects" test is not a single, simple test, but an amorphous concept with a multitude of complex variations. In any event, the Court expressly rejected such a test in *Morrison* in favor of the presumption against extraterritoriality, in the Court's words, "preserving a stable background against which Congress can legislate with predictable effects." *Id.* (footnote omitted). Accordingly, the so-called "conduct and effects" test has no applicability whatsoever to Section 806.

III. EXTRATERRITORIAL APPLICATION OF SECTION 806 WOULD BE UNREASONABLE ABSENT CLEARER DIRECTION FROM CONGRESS

The unreasonableness of applying Section 806 overseas provides an additional reason why the Board should refrain from doing so without any expression of Congressional intent. Thus, even if, *arguendo*, the requisite expression of clear Congressional intent to apply Section 806 extraterritorially could be claimed to have been made in this case, so as to make the "reasonableness" of such jurisdiction a relevant inquiry, the extraterritorial application of Section 806 would be unreasonable from a practical standpoint.

Congress and the courts have been justifiably reluctant to extend the scope of employment statutes involving the personnel policies and practices of multinational corporations outside the United States for two reasons. First, extraterritorial application of United States employment laws would invade the sovereignty of the host country to establish employment standards for workers within its territories and its own citizens. Second, it would subject companies attempting to comply with United States laws to potentially conflicting standards. These policy considerations further support the conclusion that Section 806 should not be applied outside the territorial boundaries of the United States.

According to a paper presented at the National Autonomous University of Mexico ("UNAM") in 2006, as of that time approximately 30 countries had adopted whistleblower protections, and others had done so via labor laws or other rules. David Banisar, *Whistleblowing: International Standards and Developments* 39 (UNAM 2006).[3] These laws are not uniform and provide a wide variety of legal requirements. Moreover, many foreign countries have laws governing employment practices. Enforcement of Section 806 in these countries would

[3] *Available at* http://www.corrupcion.unam.mx/documentos/investigaciones/banisar_paper.pdf

clearly invade their sovereignty, since these laws protect employees within their borders.

It is difficult to conclude that Congress intended that a federal law have extraterritorial application when it did not concurrently provide any appropriate substantive or procedural mechanism for such unique applications. The legislature's failure to make any provision dealing with the practical consequences of extending Section 806 overseas is a further compelling reason the Board should refrain from applying it extraterritorially without a clearer mandate from Congress.

For example, the remedies available under Section 806 include "reinstatement with the same seniority status that the employee would have had, but for the discrimination." 18 U.S.C. § 1514A(c)(2)(A). In another country, other employees could lose seniority status or even jobs as a result – something that is accepted under U.S. law but could potentially conflict with the laws of another country. Even if SOX were read to apply only to U.S. citizens employed in a foreign country, affording U.S. citizens greater protections than other employees could have a serious adverse effect on the morale of foreign nationals in the workforce. Thus, as a practical matter, extraterritorial application of Section 806 would put U.S. companies under strong pressure to treat all employees as though

they were covered by Section 806, even if that meant violating the laws of the host country.

Nor did Congress provide procedures for enforcing Section 806 abroad. As the Court observed in *Aramco*, failure to provide any mechanism for overseas enforcement is one more reason to conclude that Congress did not intend the statute to have extraterritorial effect, as is the failure to consider potential conflicts of laws. 499 U.S. at 255-56.

Accordingly, lacking any direction from Congress on how to enforce Section 806 extraterritorially the practical realities make it manifestly unreasonable to attempt to do so.

CONCLUSION

For the foregoing reasons, *amici curiae* Equal Employment Advisory Council and the Chamber of Commerce of the United States of America respectfully submit that the Court should deny the petition and affirm the decision of the Administrative Review Board.

Respectfully submitted,

s/*Rae T. Vann*

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August 2012, the foregoing Brief *Amici Curiae* of the Equal Employment Advisory Council and Chamber of Commerce of the United States of America in Support of Respondent and Intervenor and in Support of Affirmance was electronically served on the counsel listed below via the Court's ECF Notice of Docket Activity system at their electronic addresses of record:

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