No. 12-3

IN THE

Supreme Court of the United States

JACKIE HOSANG LAWSON AND JONATHAN M. ZANG,
Petitioners,
v.
FMR LLC, ET AL.,
Respondents.

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

BRIEF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE* [1]

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and to be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

The National Federation of Independent Business ("NFIB") is the nation's leading small business association, with offices in Washington, D.C. and all 50 State capitals. Founded in 1943 as a nonprofit, non-partisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate, and grow their businesses. NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member has fewer than 10 employees and reports gross sales of about $500,000 a year.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases involving issues that affect small businesses. The NFIB Legal Center is filing a brief in this case to apprise the Court of the consequences—for small businesses in particular—of construing the scope of the whistleblower provisions of Section 806 of the

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[1] This amicus brief is filed with the parties' consent. The parties filed their consents with the Clerk of Court in July 2013. No counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by such counsel or any party.

Sarbanes-Oxley Act of 2002 to cover employees of private companies.

SUMMARY OF ARGUMENT

The Court of Appeals properly applied the tools of statutory interpretation to construe Section 806 according to its plain language and structure. It rejected an alternative construction, advanced by Petitioners, which is neither warranted by the plain language of the statute nor justified by any expression of Congressional intent. Petitioners seek reversal of the Court of Appeals' construction, but in doing so limit their focus to the mutual fund industry and fail to address the consequences that their reading of Section 806 would have on other private businesses, including some six million small business employers operating in this country.[2] Expanding the reach of Section 806 would have a significant impact on small businesses and do nothing to advance the goals of the Sarbanes-Oxley Act.

The plain language of Section 806 expressly limits its whistleblower protections to employees of certain enumerated public and reporting companies. To stretch that text to reach the employees of private companies would significantly derogate the common law principle of at-will employment. Because Congress has not explicitly expressed any intent to alter that historic employer-employee relationship for private companies, there is no basis for imputing that meaning to the text.

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[2] *See* U.S. Census Bureau, Statistics of U.S. Businesses, Table 1 (2007), *available at* http://www.census.gov/econ/smallbus.html (last visited Sept. 23, 2013).

Moreover, the construction of Section 806 advanced by Petitioners is simply unworkable for the vast majority of American companies. Small businesses in particular are unlikely to have the expertise properly to evaluate complaints regarding financial improprieties by their clients. In addition, small businesses would face prohibitive cost constraints were they required to institute the sophisticated internal financial controls that public companies are required to implement, or to retain the separate staff that larger companies employ to handle employment-related claims from their workforce. In a small business, the same person who investigates the fraud-related complaints is often responsible for supervising the employee, increasing the likelihood of false retaliation allegations.

Finally, consistent with other Federal whistleblower laws, Section 806 should be interpreted to apply only so far as is necessary to promote the goals of the Sarbanes-Oxley Act. Because applying Section 806 to small businesses does nothing to promote those goals, Petitioners' construction should be rejected.

Given the significant burdens Section 806 would impose on small businesses, reading Section 806 expansively is unwarranted. The Court of Appeals' construction recognizes this burden and avoids exposing millions of small businesses—regardless of their size or the nature or extent of their relationship to the public company—to an unexpected and complex form of civil liability.

ARGUMENT

I. CONGRESS DID NOT INTEND TO CREATE A NEW FEDERAL RETALIATION CAUSE OF ACTION FOR THE MILLIONS OF EMPLOYEES OF PRIVATE COMPANIES.

As of 2008, there were more than 27 million small businesses in the United States and nearly 6 million small business employers.[3] NFIB counts 350,000 small businesses as members, approximately 74 percent of which employ 10 or fewer people. These businesses operate in various industries, including retail, wholesale, services, construction, finance, insurance, technology, and real estate. Accordingly, there are a number of different capacities in which these small businesses may find themselves working with publicly-traded companies. Examples include the software developer that helps the public company meet its technology needs; the local advertising company or public relations firm that handles the company's communications needs; the local catering company that services the public company's cafeteria; or the cleaning service that comes in at the end of the day. The Court of Appeals' construction appropriately rejected a result under which every employee of each of these small private businesses would be covered by Section 806 and potentially immunized from any performance-related discipline or non-performance-related downsizing by their employers simply by raising a complaint about broadly-covered misconduct.

It is well settled that courts undertake to give effect to the plain meaning of the text of a statute. *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004). Respondents have

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[3] *See* U.S. Census Bureau, *supra* note 2, at Table 2a.

demonstrated why the plain language of the statute supports the Court of Appeals' construction of Section 806. Resp'ts' Br. at 13-24. On its face, the text confirms that Congress was referring to employees of public and reporting companies when it used the term "an employee"; both the words and the headings in Section 806 support this conclusion.

It is also well settled that, when necessary, courts will consider the practical implications of alternative constructions. *See Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. ___, 133 S. Ct. 1351, 1358, 1364-67 (2013) (determining first-sale doctrine under copyright laws was not subject to geographical restriction, noting "[w]e also doubt that Congress would have intended to create the practical copyright-related harms with which a geographical interpretation would threaten ordinary scholarly, artistic, commercial, and consumer activities"). Here, the Court of Appeals quite properly rejected a construction of Section 806 that would "produce a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989); *see also Public Citizens v. U.S. Dep't of Justice*, 491 U.S. 440, 452-54 (1989) (finding literal reading of statute would catch far more groups and arrangements than Congress conceivably could have intended).

Congress made its intent clear: Section 806 "would provide whistleblower protection to employees of *publicly traded companies*." S. Rep. No. 107-146, at 13 (2002) (emphasis added); *see also* 148 Cong. Rec. S7350, S7351 (daily ed. July 25, 2002) (statement of Sen. Sarbanes); *id.* at S7358 (statement of Sen. Leahy); 18 U.S.C. § 1514A(a), title ("Whistleblower protection for employees of *publicly traded companies*."

(emphasis added)).[4] There is simply no evidence that when Congress was enacting a statutory scheme entirely directed at preventing fraud at publicly traded companies, it intended to include private companies—and in particular small businesses—in the anti-retaliation provisions of that statutory scheme.

A. The Common Law Principle of At-Will Employment Should be Respected in the Absence of Clear Congressional Repudiation.

Extending the scope of Section 806 to protect the employees of private companies would invade the common law principle of at-will employment. *See, e.g., Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 606 (2008) (acknowledging basic principle of at-will employment—an employee may be terminated for a good reason, bad reason, or no reason at all—and recognizing that statutory protections are acts of legislative grace). For many years, the relationship between employers and employees was based on the principle that either could terminate the relationship at any time and for any or no reason. Courts and legislatures developed protections for whistleblowers through limited public policy exceptions,

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[4] The language at issue here, "protection to employees of publicly traded companies," stands in contrast to the legislative history relied on in *Hill v. Tennessee Valley Authority*, Nos. 87-ERA-023 and 024, Secretary's Decision and Order of Remand (Dep't of Labor May 24, 1989), which confirmed that the anti-retaliation provision in the Energy Reorganization Act "provide[s] protection to *employees of* commission licensees, applicants, *contractors, or subcontractors*," *see* H.R. Rep. No. 95-1796, pt. 10, at 16 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7304, 7309 (emphasis added).

engaging in piecemeal efforts that respected the traditional underpinnings of the common law. *See* Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 Wash. L. Rev. 1029, 1044-45, 1049 (2004).

For this reason, it makes sense to read Section 806 in light of the presumption that Congress intended to retain the substance of the common law, *i.e.* that Congress intended to retain at-will employment principles, with respect to private employees. *See Kirtsaeng*, 133 S. Ct. at 1363.

To abrogate a common law principle, a statute must speak directly to the question addressed by the common law and must be clear. *See Samantar v. Yousef*, 560 U.S. 305, 130 S. Ct. 2278, 2290-91, 2292 (2010); *United States v. Texas*, 507 U.S. 529, 534 (1993). And where the proposed statutory interpretation would be more onerous than the common law, it is logical to conclude that the common law remains applicable. *See Texas*, 507 U.S. at 536. Here, construing Section 806 to apply to private company employees would be more onerous because it would create the risk of potential liability for millions of small businesses that otherwise would have very little exposure from whistleblower claims arising from the discovery and reporting by their employees of complex financial fraud.

In the absence of any affirmative expression of Congressional intent to impose liability upon private businesses, and in particular, small businesses, there is no basis for reading Section 806 in the way Petitioners suggest. *Cf. Foremost-McKesson, Inc. v. Provident*, 423 U.S. 232, 252 (1976) (declining to adopt "construction that best serves the statute's purposes"

where doing so would impose harsh liability on the basis of unclear language). This reasoning is particularly apt in cases such as this, where other means exist to protect whistleblowers. *See id*. at 255; Nancy M. Modesitt, *The* Garcetti *Virus*, 80 U. Cin. L. Rev. 137, 141-42 (2011) (identifying claims available to dismissed employees pursuant to public policy and State and Federal law); Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection Law*, 38 Am. Bus. L.J. 99 (2000) (surveying varied State-law protections for whistleblowers); Sara A. Corello, Note, *In-House Counsel's Right to Sue for Retaliatory Discharge*, 92 Colum. L. Rev. 389, 390-95 (1992) (recognizing development of retaliatory discharge claims, as exception to at-will doctrine, for whistleblowers reporting employer's wrongdoing); *see, e.g., Shea v. Emmanuel Coll.*, 682 N.E.2d 1348, 1350 (Mass. 1997) (recognizing retaliatory discharge claim for Massachusetts employees). Indeed, it is not unusual for Congress to limit the scope of whistleblower protections. *See* Part II, *infra*.

B. Applying Section 806 to Private Companies Will Have a Deleterious Effect on Small Businesses.

The consequences of engrafting liability that runs contrary to existing common-law principles are apparent in the likely practical effect on small businesses that contract with public companies. *Cf. Kirtsaeng*, 133 S. Ct. at 1364-67. Consider an employee who is one of five employees of a small business who wonders if she has discovered financial indiscretions at a public company customer. This employee might be habitually late to work, disruptive, or might even have recently caused the business to

lose a different customer. Alternatively, the employee may be a model employee, but changes in economic circumstances may require the small business to let her go. In either case, retaining the employee could significantly hinder the business going forward. Yet, under Petitioners' preferred reading of the statute, a decision to terminate the employee could expose the business to a fact-intensive retaliation claim that, even if unfounded, must be defended. That is an expense with which small businesses are all too familiar.[5]

The specter of litigation is a constant cause for worry among small businesses. Creating new forms of lawsuits in an area where employers are traditionally free to make unhindered personnel decisions increases exposure to frivolous and abusive litigation by disgruntled employees and increases costs by fostering litigation of retaliation claims. This is particularly true when the supervisor is both the person to whom the complaint about the publicly-traded company was reported and the person responsible for any subsequent adverse employment decision. Retaining an underperforming employee for fear of litigation has a greater impact on a small business than on a company employing hundreds or thousands.

Even those businesses that encounter no such problems are likely to incur significant costs if subjected to liability under Section 806. Small business

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[5] Small businesses bear a disproportionate burden of tort litigation costs. In 2008, small businesses accounted for 81 percent of tort liability costs (excluding medical malpractice), but earned only 22 percent of total revenue. *Tort Liability Costs for Small Business* at 1, 9, A-8 Exhibit 3 (2010), http://www.instituteforlegalreform.com/sites/default/files/ilr_small_business_2010_0.pdf.

owners generally are responsible for all aspects of their business—they typically do not employ human resource specialists, compliance officers, or in-house counsel. To minimize their exposure to liability under Section 806, small businesses that provide services to public companies will need to allocate resources to learning about the regulations and implementing compliance protocols that do not relate to the nature of their business. Small businesses already pay approximately 36 percent ($2,830 per employee) more than large businesses for compliance-related expenses alone.[6] The burden imposed by Petitioners' construction of the whistleblower protections of Section 806 is thus proportionately greater on smaller companies. This disparity will only increase if small businesses are subjected to regulations not previously applied to them.

Expanding Section 806 to protect private company employees would do more than subject small businesses to new forms of litigation; it could stifle fledgling businesses and impede growth by requiring them to divert time and resources from running their business to investigating complaints and preventing or defending lawsuits. Even if terminated or disciplined employees do not pursue retaliation claims, the attendant risks are too serious, too extensive, and too predictable to dismiss them as insignificant, especially in this litigation-happy era. *Cf. Kirtsaeng*, 133 S. Ct. at 1366-67; *see also Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. ___, 133 S. Ct. 2517, 2531-32 (2013).

Moreover, the uncertainty created by expanding Section 806 could result in lost business with public

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[6] Nicole V. Crain & W. Mark Crain, Small Bus. Admin., *The Impact of Regulatory Costs on Small Firms* 7, Table 1 (2010).

companies. Respondents argue that Section 806 imposes secondary liability on officers, employees, contractors, subcontractors, and agents. *See* Resp'ts' Br. at 13, 16 & n.3, 24. If Petitioners' construction is adopted, the same argument could be made that public companies may be secondarily liable for their contractors' personnel decisions with regard to the contractors' own employees. If public companies are concerned that they could be exposed to this liability, they may become less willing to contract with private companies and instead hire employees of their own. Small business owners would feel the impact acutely, as the services they perform move in-house.

Notwithstanding these significant implications, Petitioners contend that it is not sensible to limit Section 806 protections to employees of publicly-traded or reporting companies because a contractor or subcontractor cannot engage in prohibited retaliation, *i.e*. "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions or employment," against the public company's employees, only its own. *See* 18 U.S.C. § 1514A(a). This argument is baseless. Section 806 is stated in the disjunctive, meaning that the retaliating party need not be able to engage in each type of prohibited conduct to be subject to the statute's provisions. For instance, so long as the actor can threaten, harass, or discriminate against the public company's employee, it can violate the provision. *See, e.g., Reiter v. Sonotone Corp*., 442 U.S. 330, 339 (1979) (finding statutory disjunctive means not all elements need be satisfied; for instance, a person may be injured in his property and eligible to sue under the Clayton Act even though he has no business that was harmed). Certainly contractors or subcontractors can discharge *or* harass (or threaten or discriminate against); the

latter three terms all have meaning when applied to contractors and subcontractors.

More importantly, contractors and subcontractors can engage in each kind of the employment actions proscribed by Section 806. Consider a consulting company under contract to conduct an internal investigation. If it learns that an employee of the public company has been selling secrets to a competitor while at the same time blowing the whistle on financial improprieties, the consultant could recommend terminating the employee, and if the company follows the consultant's advice, the consultant would have come within the statute, even without having discharged the employee.

* * *

Congress has taken care in crafting detailed regulatory regimes for entities in the securities and financial industries. Congress has also employed deliberate language when protecting employees from retaliation. It is thus counter-intuitive to suggest that—without any clear statement in support—Congress eschewed careful statutory drafting in favor of a broad, indiscriminate, and far-reaching change in existing law. *Cf. Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. ___, 131 S. Ct. 2296, 2303, 2304 (2011) (concluding Congress is responsible for reapportioning liability among entities "in the securities industry in light of the close relationship between investment advisers and mutual funds," and that the Court must give narrow dimensions to an implied cause of action, much as the Court should narrowly construe statutes that change the common law); *Engquist*, 553 U.S. at 607 (determining that proposed claim would undo careful statutory work in other contexts).

This Court should not unleash the consequences that would flow from Petitioners' construction when Congress clearly did not do so. "If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. It is beyond [the Court's] province to rescue Congress from its drafting errors, and to provide for what [the Court] might think . . . is the preferred result." *Lamie*, 540 U.S. at 542 (internal quotations and citation omitted). Congress could have exposed every small business that contracts with a public company to the risk of retaliation claims under Section 806 if that was its preferred result. It did not do so. The Court of Appeals' construction of Section 806 is logical, reasonable, consistent with the statute's plain language and Congress's expressed intent, and respectful of the common law foundation for employer-employee relationships. This Court should affirm.

II. THE COURT OF APPEALS' CONSTRUCTION OF SECTION 806 RESPECTS THE FULL CONTEXT OF THE SARBANES-OXLEY ACT.

A. Anti-retaliation Provisions Further the Goals of the Statutes they Support.

Federal whistleblower statutes are enacted to enhance enforcement of broad legislative schemes. Examples of statutes containing whistleblower provisions include Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act of 1967 ("ADEA"), the Americans with Disabilities Act of 1990 ("ADA"), the Aviation and Reform Act for the 21st Century, the Clean Air Act, the False Claims Act, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), the

Federal Credit Union Act, and the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"). The provisions of these statutes differ with regard to the individuals covered, the conduct protected, and the prerequisites for making a retaliation claim. These differences support the inference that Congress takes care to enact whistleblower provisions in order to further the specific underlying statutory scheme, while minimizing the negative cost impact on employers.

In all of these statutes, Congress has tailored whistleblower provisions to fit the perceived breadth of the harm. FIRREA, for example, was enacted in the wake of the savings and loan scandals of the 1980s, in part, "to enhance the regulatory and enforcement powers of Federal financial institutions regulatory agencies." Pub. L. No. 101-73, preamble, 103 Stat. 183 (1989). Accordingly, the statute provides whistleblower protections to those depository bank employees who make disclosures regarding illegality or gross mismanagement to one of the Federal banking agencies or the attorney general.[7] 12 U.S.C. § 1831j(a)(1). The provision does not protect all reporters of violations. Congress determined that it could achieve its regulatory goals of enhancing financial industry enforcement with specific protections directed to bank employees who report potential violations to the government—the entity best suited to investigate and address the concerns. In that regard, Congress drafted a provision with a defined scope (much like the provisions at issue here). *See Lippert*

[7] A separate provision applies to employees of any Federal banking agency, Federal home loan bank, Federal reserve bank, or someone performing services on behalf of the Federal Deposit Insurance Corporation. 12 U.S.C. § 1831j(a)(2).

v. Cmty. Bank, Inc., 438 F.3d 1275, 1279-80 (11th Cir. 2006) ("[G]ranting protected status to bank employees who complain internally poses increased risks of interfering with normal workplace relations within a bank and substantially expands the notion of 'whistleblowing,' beyond that apparently contemplated by the instant statute.").

Other banking whistleblower provisions are similarly targeted to achieving the overarching regulatory goals. *See Schroeder v. Greater New Orleans Fed. Credit Union*, 664 F.3d 1016, 1023 (5th Cir. 2011) (citing cases limiting the scope of the whistleblower protections of the Fair Credit Union Act, 12 U.S.C. § 1790b); *Hill v. Mr. Money Fin. Co. & First Citizens Banc Corp.*, 309 F. App'x 950, 960 (6th Cir. 2009) (recognizing limitations of the whistleblower protections afforded by the Federal Deposit Insurance Act, 31 U.S.C. § 5328).

In contrast, environmental protection laws, the violation of which threatens public health and safety, offer considerably broader whistleblower coverage. The protections extend to employees of any company and cover not only those who disclose violations, but also those who assist in halting and prosecuting such violations. *See, e.g.*, Clean Air Act § 312, 42 U.S.C. § 7622; Water Pollution Control Act § 2, 33 U.S.C. § 1367; CERCLA § 110, 42 U.S.C. § 9610; Safe Drinking Water Act § 1450, 42 U.S.C. § 300j-9(i); Toxic Substance Control Act § 23, 15 U.S.C. § 2622; Solid Waste Disposal Act § 7001, 42 U.S.C. § 6971. With respect to nuclear safety, the anti-retaliation provision goes even further, protecting those individuals who report violations internally. Energy Reorganization Act § 211, 42 U.S.C. § 5851. These more comprehensive provisions reflect recognition of the seriousness of

the potential harm and the need to "encourage employees to aid in the enforcement of these statutes by raising substantiated claims through protected procedural channels." *Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor*, 992 F.2d 474, 478 (3d Cir. 1993).

Even the statutes providing broader whistleblower protection are not all-encompassing, however. For example, the Court of Appeals for the Sixth Circuit held that a contractor at a nuclear power plant could not be liable under the Energy Reorganization Act whistleblower provision for terminating an employee who complained about the practices of another contractor at the same plant. *Am. Nuclear Res., Inc. v. U.S. Dep't of Labor*, 134 F.3d 1292, 1296 (6th Cir. 1998). The decision reflected an implicit recognition that such complaints do little to advance the goals of the underlying statute. *Id*. ("Nothing in the record indicates how [the employee]'s conduct could force [the employer] to change its procedures or incur extra costs.").

The landmark antidiscrimination statutes contain the broadest whistleblower provisions. Title VII, the ADEA, and the ADA all prohibit discriminatory employment and labor practices across virtually every industry. Each of these laws also includes expansive protections for persons who complain of such discriminatory practices or participate in a discrimination investigation or lawsuit. *See* Title VII, 42 U.S.C. § 2000e-3; ADEA, 29 U.S.C. § 623(d); ADA, 42 U.S.C. § 12203. These protections are broad in that they extend not just to employees, but also to prospective employees, and they cover all manner of conduct meant to protect those who oppose the illegal conduct. *See* Title VII, 42 U.S.C. § 2000e-3; ADEA, 29

U.S.C. § 623(d); ADA, 42 U.S.C. § 12203. The antidiscrimination provisions work only if employees and prospective employees are able to report such actions without fear of retribution.

Yet even in connection with those statutes, where the anti-retaliation provisions were drafted so as to have the broadest reach, Congress drafted carve-outs to protect small businesses. *See Clackamas Gastroenterology Assocs., P. C. v. Wells*, 538 U.S. 440, 446-47 (2003); *U.S. E.E.O.C. v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1281 (7th Cir. 1995); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510 (4th Cir. 1994). Congress recognized the need to shield vulnerable businesses from the impact of these otherwise broad provisions by excluding very small businesses from the scope of these laws. *See* 29 U.S.C. § 630(b) (defining "employer" under the ADEA as a firm having twenty or more employees); 42 U.S.C. § 2000e(b) (defining "employer" under Title VII as a firm having fifteen or more employees); 42 U.S.C. § 12111(5) (same).[8] The fact that Sarbanes-Oxley did not require such exclusions is further evidence that it was not intended to reach privately-held companies; by limiting the scope to public companies, Congress did not need to be concerned with employers of fewer than twenty (or fifteen) employees.

[8] A fourth antidiscrimination statute, the Equal Pay Act, 29 U.S.C. § 206(d), does not exclude small businesses from its reach, but it protects a very discrete form of discrimination: disparate pay based on sex. In that sense, it is much more limited than its antidiscrimination counterparts.

B. Expanding Section 806 to Protect Private Company Employees Goes Well Beyond the Purposes of the Sarbanes-Oxley Act.

On the spectrum of whistleblower protection statutes, Section 806 lies much closer to the banking laws than to environmental or antidiscrimination provisions. The Sarbanes-Oxley Act of 2002 was enacted for the purpose of "protect[ing] investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws." Pub. L. No. 107-204, preamble, 116 Stat. 745 (2002). It established a public company accounting oversight board and strengthened audit requirements for public companies; increased public disclosures; and imposed new rules to hold officers and directors accountable for the benefit of shareholders of public companies.

As both sides in this case repeatedly acknowledge, Sarbanes-Oxley was enacted "in the wake of the Enron collapse," Pet'rs' Br. at 2; *see also* Resp'ts' Br. at 11, which, like the scandals involving Adelphia, Tyco, and WorldCom, affected investors in these public companies. It is, put simply, a statute intended to regulate *public* companies. *See Carnero v. Boston Scientific Corp*., 433 F.3d 1, 9 (1st Cir. 2006) ("The Sarbanes–Oxley Act itself is a major piece of legislation bundling together a large number of diverse and independent statutes, all designed to improve the quality of and transparency in financial reporting and auditing of public companies."); *see also* 148 Cong. Rec. H5462, H5474 (daily ed. July 25, 2002) (statement of Rep. Etheridge) (Sarbanes-Oxley "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").

The Court of Appeals' construction honors this intention and avoids the significant negative impact on small businesses that would result from an alternative interpretation proffered by Petitioners. Section 806 is triggered anytime an employee reports "any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities and commodities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." Sarbanes-Oxley Act of 2002, § 806(a)(1), Pub. L. No. 107-204, 116 Stat. 745. This reference to the mail fraud and wire fraud statutes renders the provision particularly broad and applicable to virtually any suspicion of financial misconduct. *See* Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771, 772 (1980) ("First enacted in 1872, the mail fraud statute, together with its lineal descendant, the wire fraud statute, has been characterized as the 'first line of defense' against virtually every new area of fraud to develop in the United States . . . . During the past century, both Congress and the Supreme Court have repeatedly placed their stamps of approval on expansive use of the mail fraud statute." (footnote omitted)). Moreover, an employee need merely "provide information" regarding a perceived fraud to "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)" to invoke the protections of the statute. Sarbanes-Oxley Act, § 806(a)(1).

Under Petitioners' argument, a Section 806 claim by an employee of a private company would not even require a nexus between the financial impropriety and a public company. Instead, such a construction would extend protection to any employee at any company (including the contractor itself) so long as the contractor has at least one public company client. An employee who even hints at financial improprieties by either the employer or the employer's clients (regardless of whether those clients are public or private) could trigger a "retaliation claim" that would subject a small business to an unacceptable risk of liability. There is no basis to conclude that Congress intended to extend the reach of the statute beyond the general intent of Sarbanes-Oxley to protect against fraud at *public* companies.

Imposing on small businesses regulations that are intended to ensure financial transparency at public companies is a misalignment of the means and the ends. Adopting the alternative construction properly rejected by the Court of Appeals would not produce the results intended under Sarbanes-Oxley but instead would impose an unreasonable burden on the resources of small businesses.

CONCLUSION

Section 806 is part of a comprehensive statutory scheme intended to increase transparency and strengthen controls by public companies. Imposing the Sarbanes-Oxley whistleblower protections on *private* companies does nothing to promote those goals. On the other hand, the potential costs to small businesses are tremendous. The NFIB Legal Center respectfully submits that the Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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