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 AMICUS CURIAE NATIONAL WHISTLEBLOWER CENTER IN SUPPORT OF THE PETITIONERS

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

The National Whistleblower Center (NWC)[1] is a nonprofit, non-partisan, tax-exempt, charitable, and educational organization dedicated to the protection of employees who report misconduct in the workplace. *See,* Web Site of the National Whistleblowers Center hosted at www.whistleblowers.org.

As part of its core mission, the NWC regularly monitors major legal developments in whistleblower law, and files "Friend of the Court" briefs in federal and state courts and administrative agencies. Since 1990, the Center has participated before this Court as *amicus curiae* in cases that directly impact the rights of whistleblowers, including, *English v. General Electric,* 496 U.S. 72 (1990); *Haddle v. Garrison,* 525 U.S. 121 (1999); *Vermont Agency of Nat. Resources v. U.S. ex rel. Stevens,* 529 U.S. 765 (2000); *Beck v. Prupis,* 529 U.S. 494 (2000); *EEOC v. Waffle House, Inc.,* 534 U.S. 279 (2002), and *Doe v. Chao,* 540 U.S. 614 (2004).

Persons assisted by the NWC have a direct interest in the outcome of this case. The Sarbanes-

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[1]Pursuant to Rule 37.6, the Center states that counsel of record for all parties received over ten (10) days notice of intention to file this brief, and gave consent to the filing of this brief. Those consents are lodged herewith. No monetary contributions were accepted for the preparation or submission of this amicus curiae brief, and that the NWC's counsel authored this brief in its entirety.

Oxley Act's whistleblower protection provisions ("SOX") legislation that ensures our financial markets are stable and that financial reports filed with the Securities and Exchange Commission ("SEC") are reliable. The NWC played an important role in working with Congress, on a bi-partisan basis, to ensure that whistleblower protections were incorporated into the SOX. S. REP. NO. 107-146, at 10 (2002). As the Senate recognized when enacting section 806 of the Sarbanes-Oxley Act, whistleblower protections are key to effective enforcement of our nation's securities laws. ("…often, in complex fraud prosecutions, [whistleblowers] are the only firsthand witnesses to fraud"). S. REP. NO. 107-146, at 10 (2002).

SUMMARY OF THE ARGUMENT

Congress did not draft the substantive provisions of the Sarbanes-Oxley Act's whistleblower provisions in a vacuum. They were modeled on the 1971 Federal Water Pollution Control Act, the 1978 Energy Reorganization Act and other similar laws based on these precedents, including the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"). The meaning of the term "employee" as used by Congress in the SOX should be consistent with the use of that term in laws upon which the SOX was modeled.

Congress vested exclusive authority in the Secretary of Labor ("SOL") to administer these whistleblower provisions. Employees cannot file a claim in federal court under SOX unless the SOL fails to comply with Congress' statutory deadline for

issuing final decisions. Within the context of this authority, the Secretary has consistently interpreted the term "employee" broadly in order to encompass contractors and sub-contractors. This interpretation has been in place for decades, and has not once been challenged by Congress or overturned by any court. Under the principle of deference to the determinations of administrative agencies outlined in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, this Court must give due deference to the Secretary of Labor's determination that the term "employee," applies contractors and sub-contractors.

If the Court were to do otherwise, and decide that Sarbanes-Oxley's whistleblower provisions do not extend protections to contractors and sub-contractors in the financial services industry, it would create a massive loophole that was not intended by Congress when SOX was passed. Such a holding would create dubious incentives for corporations engaged in misconduct to hire contractors and sub-contractors to handle some of their more legally questionable work. This is what Enron did back in the early 2000s, and it was the Enron debacle that sparked the enactment of SOX and its anti-retaliation provision. S. REP. NO. 107-146, at 4, 5 (2002).

ARGUMENT

UNDER *CHEVRON* THE COURT MUST DEFER TTHE SECRETARY OF LABOR'S FINDING THAT THE TERM "EMPLOYEE" APPLIES BROADLY TO INCLUDE CONTRACTORS AND SUB-CONTRACTORS

SOX was modeled on a series of whistleblower laws that created a statutory remedy prohibiting retaliation on an industry-by-industry basis. The substantive and procedural framework of SOX mirrors these prior laws. *See, e.g.,* the Water Pollution Control Act, 33 U.S.C. §1367, the Energy Reorganization Act of 1974, *as amended* ("ERA"), 42 U.S.C. § 5851, the AIR21 49 U.S.C. §42121, and the Clean Air Act 42 U.S.C. §7622. Congress incorporated by reference numerous provisions of AIR21 directly into the SOX whistleblower law, and in its legislative history pointed to case precedent from the Federal Water Pollution Control Act as a guide to interpreting a key provision of the Act. S. REP. NO. 107-146, at 19 (2002).

Like SOX, these numerous laws also included the term "employee" in the definition of who was covered under the Act, and also like SOX, these laws failed to define the term "employee."

Under the laws upon which SOX was based, the Department of Labor's interpretation of the term "employee" has been consistent for over twenty-five years, and has not been challenged by a Court or questioned in Congress. The Secretary has consistently interpreted the term "employee" to include contractors and sub-contractors in order to ensure that the anti-retaliation provisions enacted by Congress were not thwarted by an employer's classification of persons it utilized to provide services for which it needed. *See*, *e.g. Hill et al. v. Tennessee Valley Authority*, 87-ERA-23/24 (July 24, 1991) ("Section 5851(a) of the ERA provides that '[n]o

employer…may discharge any employee or otherwise discriminate against any employee…' (Emphasis added). It is not limited in terms to discharges or discrimination against any specific employer's employees"). *St. Laurent v. Britz, Inc.*, 89-ERA-15 (Oct. 26, 1992).

Following the passage of the Sarbanes-Oxley Act, several Department of Labor cases concerned with coverage of employees of contractors came before the Secretary of Labor. In *Welch v. Cardinal Bankshares Corporation*, the Secretary of Labor ruled that the Sarbanes-Oxley's whistleblower provisions are similar to those of other whistleblower protections, and as Section 806 of the Sarbanes-Oxley Act is a new provision, precedent from cases arising under previous federal whistleblower statutes should be incorporated in examining the situation at hand. The Secretary of Labor also draws attention to an interim final rule stating that the Sarbanes-Oxley Act should be implemented in the same manner as previous whistleblower protection provisions, most notably the ERA and AIR21. 2003-SOX-15, footnote 91 (Jan. 28, 2004).

The Secretary of Labor, through the Administrative Review Board, applied its long-standing law on this issue to a case arising under the SOX. *Spinner v. David Landau & Assocs. LLC,* 2010-SOX-029 (May 31, 2012), In that decision, the majority and concurring opinions set forth an extremely well reasoned and detailed analysis of the Secretary's longstanding interpretation of the term "employee" as used in the whistleblower laws administered by the Labor Department. The holding

in, *Spinner,* finding that contractors are covered under SOX, is entitled to *Chevron* deference.[2]

It was clearly Congress' intent to vest *Chevron* deference with the Secretary of Labor. First, like the laws upon which SOX was based, all complaints must be filed with the Secretary, and cannot be filed directly in federal court. Second, the Secretary is required to conduct an investigation that can lead to a final enforceable order. Third, if the results of an investigation are appealed, the Department of Labor is required to conduct a hearing and issue a final enforceable order. This structure is nearly identical to the investigatory and adjudicatory structure of SOX's sister laws.

SOX carved out one narrow exception to the exclusive jurisdiction of the Department of Labor. If the DOL failed to issue a final enforceable order within 180 days, an employee could remove his or her case to federal court for a *de novo* hearing. This optional right may only be exercised by an employee, and only if the Department of Labor fails to issue a timely final order. 18 U.S.C. §1514A(b)(1)(B).[3]

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[2] The rule in *Chevron* is well settled. Courts are required to give deference to interpretations of law by administrative agencies in situations where "the statute is silent or ambiguous with respect to the specific issue," and in such a case "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. NRDC, Inc.,* 467 U.S. 837, 843 (1984).

[3] The early versions of the DOL-administered anti-retaliation laws vested exclusive jurisdiction in the Department of Labor to adjudicate the claims and issue final determinations. *See* 29 C.F.R. Part 24 (1990). Under these laws the DOL was required to issue final orders within 90 days. However, the DOL rarely

CONCLUSION

Under *Chevron,* the Secretary's holding that contractors and subcontractors are covered under the term "employee" in SOX and the related whistleblower laws is entitled to deference.

Respectfully submitted,

/s/

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followed this requirement, and many cases languished for years. To remedy this procedural problem, Congress, in the SOX, created a hybrid adjudication process. Congress doubled the amount of time it required the DOL to issue final orders (increasing the time limit from 90 to 180 days), but also included a remedy for employees, if the DOL failed to meet this deadline. If a case languished for over 180 days with the administrative agency, the employee could opt out of the DOL, and file a claim *de novo* in federal court. This process was not designed to strip the DOL of exclusive jurisdiction over SOX cases. Indeed, cases were required to be filed within the DOL, and if the DOL completed the case within the statutory time-frame, an employee could not file a claim in federal district court.

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