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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 AMICI CURIAE NEW ENGLAND LEGAL FOUNDATION AND ASSOCIATED INDUSTRIES OF MASSACHUSETTS IN SUPPORT OF RESPONDENTS

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October 7, 2013

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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INTEREST OF AMICI CURIAE

Amici curiae New England Legal Foundation ("NELF") and Associated Industries of Massachusetts ("AIM") seek to present their views, and the views of their supporters, on the issue presented in this case, namely whether the whistleblower anti-retaliation provision of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A(a), applies solely to the employees of a public company, or whether that provision also protects the employees of a privately held company that contracts with the public company.[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

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[1] Pursuant to Supreme Court Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amici, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.3(a), amici also state that, on July 18 and on July 31, 2013, counsel for respondents and counsel for petitioners respectively filed with this Court a general written consent to the filing of amicus briefs, in support of either or neither party.

AIM is a 97-year-old nonprofit association, with over 5,000 employer members doing business in the Commonwealth. AIM's mission is to promote the well-being of its members and their employees, and the prosperity of the Commonwealth of Massachusetts, by improving the economic climate of Massachusetts, advocating fair and equitable public policy proactively, and by providing relevant and reliable information and excellent services.

NELF and AIM are committed to ensuring a reasonable interpretation of statutes regulating the business community, and to preserving the separation of powers that honors Congress's policy choices and limits a court's role to enforcing and not expanding those policy choices. Amici are particularly concerned about this case because the respondents are Massachusetts companies, and because the mutual fund industry has a strong presence in the Commonwealth. Therefore, a decision of this Court will have an immediate and widespread effect on amici's local business community.

Where, as here, a statute protects only the employees of a public company, courts should adhere to Congress's policy choice and should not expand the scope of the statute by applying the statute to employees of a privately held company. In this connection, NELF has filed many other amicus briefs before this Court, advocating successfully for the enforcement of federal statutory limits on a business's liability.[2]

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[2] *See, e.g.*, *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013) (standard of but-for causation, and not mixed-motive liability, applies to Title VII retaliation claims); *Vance v.*

For these and other reasons provided below, amici believe that their brief would provide an additional perspective to aid this Court in deciding the issue of statutory construction presented in this case.

SUMMARY OF ARGUMENT

The Sarbanes-Oxley ("SOX") whistleblower provision, 18 U.S.C. § 1514A(a), applies solely to employees of public companies. Private contractors and subcontractors are named in this provision solely in their capacity as *representatives* of the public company, and not as employers in their own right. Thus, while contractors and subcontractors cannot threaten or harass the whistleblowing employees of a public company, the provision does not protect the contractors' and subcontractors' *own* employees, such as petitioners here.

This interpretation is compelled by the clear context of those key statutory terms. Contractors and subcontractors are included in a list of a public company's traditional representatives and agents--

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Ball State, 133 S. Ct. 2434 (2013) (employer vicariously liable for hostile work environment under Title VII only when harassing employee is capable of taking tangible employment actions against victim); *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (Federal Arbitration Act requires enforcement of class action waivers in arbitration of federal statutory claims); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (FAA preempts State law effectively requiring class arbitration as condition of enforcing consumer arbitration agreements); *Watters v. Wachovia Bank, N.A.,* 550 U.S. 1 (2007) (National Bank Act, 12 U.S.C. §§ 21 *et seq.*, preempts state regulation of wholly-owned subsidiary of national bank).

"any *officer*, *employee*, contractor, subcontractor, or *agent* of such [public] company." 18 U.S.C. § 1514A(a) (emphasis added). Under the basic canon of statutory construction, *noscitur a sociis* ("it is known from its associates"), a statutory term should be limited to a meaning that is consistent with its neighboring terms, to achieve a unified list of terms sharing a common purpose. Conversely, the *noscitur a sociis* canon counsels against interpreting a statutory term broadly, in isolation from its accompanying terms. Contractors and subcontractors should therefore be interpreted solely as representatives of the public company, consistently with the function of their neighboring terms--officers, employees, and agents of a public company.

While contractors and subcontractors are indeed separate entities from the public company, they also resemble a public company's officers, employees, and agents because they are contractually bound to serve the public company's interests. In fact, SOX was enacted precisely to prevent the accounting and reporting abuses that apparently arose from the *contractual* relationship between certain prominent publicly traded companies and their accounting firms. Hence it is not surprising that Congress has protected a public company's whistleblowing employee from the potential adverse actions of both his employer *and* the employer's contractor.

In this connection, it should be noted that the SOX whistleblower provision is *not* limited to the employer's tangible employment actions and instead

covers all kinds of threats or harassment against the whistleblowing employee, actions that could be committed as much by a third-party contractor as by a representative of the employer.

It should have been no surprise to Congress that many employees of the mutual fund industry, i.e., the employees of private investment advisors, would effectively fall outside the scope of the SOX whistleblower provision. Congress knew for several decades that mutual funds, which are considered public companies under the whistleblower provision, typically have no employees of their own. Instead, mutual funds generally rely on the contractual services of their investment advisers, many of which are private companies, as in this case. In fact, the Investment Company Act of 1940 was enacted precisely to regulate and prevent the potential abuses arising from this unique *contractual* relationship between mutual funds and their investment advisers. Significantly, the 1940 Act defines an "investment adviser" as one "who *pursuant to contract with such [investment] company* regularly furnishes advice to such company . . . ." 15 U.S.C. § 80a-2(20) (emphasis added). And Congress is presumed to know the state of existing law when it enacts a new statute. Thus, the SOX whistleblower provision's effective omission of many employees of the mutual fund industry could hardly have been an oversight and may be interpreted as a deliberate policy choice.

Finally, it should be noted that, while the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") amended the

SOX whistleblower provision in certain respects, Dodd-Frank made no changes whatsoever to the provision's disputed "any officer" clause, which contains the only reference to contractors and subcontractors. Therefore, in amici's view, Congress has yet to include the employees of private investment advisers within the scope of the whistleblower provision. A decision in this case should therefore *not* be limited to claims arising under the SOX whistleblower provision before it was amended by Dodd-Frank in 2010. Instead, the Court's decision should apply equally to claims arising after Dodd-Frank's effective date, unless and until Congress provides otherwise.

ARGUMENT

I. THE SARBANES-OXLEY WHISTLE-BLOWER PROVISION DOES NOT PROTECT THE EMPLOYEES OF A PUBLIC COMPANY'S PRIVATE CONTRACTORS AND SUBCONTRACTORS, BECAUSE THOSE ENTITIES ARE INCLUDED SOLELY IN THEIR CAPACITY AS REPRESENTATIVES OF THE PUBLIC COMPANY, AND NOT AS EMPLOYERS IN THEIR OWN RIGHT.

At issue in this case is whether the whistleblower anti-retaliation provision of the Sarbanes-Oxley Act of 2002 ("SOX"), 18 U.S.C. § 1514A(a), applies solely to the employees of a public company, or whether that provision also protects the employees of a privately held company that contracts with the public company. The relevant language of the SOX whistleblower

provision reads: "No [public] company . . . , *or any officer, employee, contractor, subcontractor, or agent of such company*, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an *employee* [who engages in protected activity] . . . ." 18 U.S.C. § 1514A(a) (emphasis added).[3] The limited meaning of the word

[3] The SOX whistleblower provision applicable to the claims in this case provided in full:

> § 1514A. Civil action to protect against retaliation in fraud cases
>
> "(a) Whistleblower protection for employees of *publicly traded companies*.—No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78*l*), *or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d))*, or *any officer, employee, contractor, subcontractor, or agent of such company*, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against *an employee* in the terms and conditions of employment because of any lawful act done by *the employee*—
>
> (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 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities or commodities fraud], 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—

"employee" in this provision becomes clear when examined in the context of the entire provision. "Language, of course, cannot be interpreted apart from context. The meaning of a word that appears ambiguous if viewed in isolation may become clear when the word is analyzed in light of the terms that surround it." *Smith v. United States*, 508 U.S. 223, 230 (1993).

It is undisputed that the provision bars certain public companies from discriminating against their own employees for engaging in protected whistleblower activity. At issue is whether the provision, via its "any officer" clause quoted above, also applies to a public company's contractors in their capacity as employers, or whether the

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> (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.

18 U.S.C. **§** 1514A(a) (emphasis added).

provision applies to such contractors solely in their capacity as *representatives* of the public company. If the former were true, then the provision would bar a public company's contractors from threatening or harassing a public company's employees *and* their own employees. In the latter case, however, contractors would be barred solely from threatening or harassing a public company's employees.

Resolution of this issue of statutory construction turns on a commonsense reading of the "any officer" clause, which prohibits a public company's *officers*, *employees,* contractors, subcontractors, and *agents* from discriminating against an employee. The logical starting point for this inquiry is the basic rule of statutory construction that "a word is known by the company it keeps." *Gustafson v. Alloyd Co.,* 513 U.S. 561, 575 (1995). According to "the commonsense canon of *noscitur a sociis* ['it is known from its associates'] . . . a word is given more precise content by the *neighboring words* with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008) (emphasis added). Under this canon of construction, statutory terms that "are susceptible of multiple and wide-ranging meanings," *id.*, should be limited to a meaning that is consistent with their neighboring terms, to form a unified list of terms serving a common purpose. *See id.* After all, no statutory term is an island. "[I]t does not stand alone, but gathers meaning from the words around it." *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961).

Application of this basic rule of statutory construction makes it immediately apparent that the

words "contractor" and "subcontractor" are embedded in a list of terms--officers, employees, and agents--that identify a public company's *representatives* or agents. Officers, employees, and agents act *on behalf* of the public company, which is an artificial entity that cannot act on its own and instead must act through its representatives. *See Braswell v. United States*, 487 U.S. 99, 110 (1988) ("Artificial entities such as corporations may act only through their agents . . . ."). In fact, Congress has frequently used that same triumvirate of terms--officers, employees, and agents--in many other statutes when defining the power of a corporation to act through its representatives.[4] As with these other federal statutes, the "any officer" clause here merely reflects the basic principle of corporate law that a company must act through its officers, employees, and agents. And the whistleblower provision bars those corporate representatives from mistreating the company's whistleblowing employees.

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[4] *See, e.g.*, 12 U.S.C. § 2278b-4(a)(3) (Financial Assistance Corporation has power to "provide for such *officers, employees, and agents* . . . as may be necessary [and to] define their duties . . . .") (emphasis added); 12 U.S.C. § 1441(b)(6)(B) (Financing Corporation may "authorize the *officers, employees, or agents* of the Federal Home Loan Banks to act for and on behalf of the Financing Corporation in such manner as may be necessary to carry out the functions of the Financing Corporation.") (emphasis added); 12 U.S.C. § 1452(c)(9) (Federal Home Loan Mortgage Corporation may "appoint, employ, and fix and provide for the compensation and benefits of *officers, employees*, attorneys, and *agents*.") (emphasis added); 15 U.S.C. § 77dd (Corporation of Foreign Security Holders has power "to select, employ, and fix the compensation of *officers*, directors, members of committees, *employees*, attorneys, and *agents* of the Corporation . . . .") (emphasis added).

Accordingly, "the commonsense canon of *noscitur a sociis*," *United States v. Williams*, 553 U.S. at 294, instructs that the inclusion of contractors and subcontractors in this list of a public company's officers, agents, and employees should be interpreted consistently with the *representative* function of those surrounding terms. To harmonize all of the terms in this list, then, the Court should limit a public company's contractors and subcontractors to their capacity as representatives of the public company, and not as employers in their own right. As with the public company's officers, employees, and agents, which begin and end this statutory list of terms, contractors and subcontractors may not harass a public company's whistleblowing employees. However, the provision does not regulate the employment relationship between a private contractor or subcontractor and its *own* employees.

This contextually focused interpretation of the statutory terms contractor and subcontractor is supported by the Court's decisions applying the *noscitur a sociis* canon when interpreting similar statutory lists of terms. In those cases, the Court has refused to interpret a statutory term broadly, in isolation from its accompanying terms. Instead, the Court has narrowed the meaning of a term to fit its specific context. *See United States v. Williams*, 553 U.S. at 294-295 (applying *noscitur a sociis* canon to narrow meaning of terms "promotes" and "presents" to transactional context of accompanying terms "advertises," "presents," and "solicits" in list of forbidden actions in federal child pornography statute); *Gutierrez v. Ada,* 528 U.S. 250, 254–258

(2000) (applying *noscitur a sociis* canon to limit meaning of disputed statutory phrase "any election" to surrounding terms that refer specifically to gubernatorial elections); *Jarecki v. G. D. Searle & Co.*, 367 U.S. at 307-09 (applying *noscitur a sociis* principle to restrict statutory term "discoveries" to discoveries of mineral resources, where term occurs in list of words applying solely to oil, gas, and mining industries). In short, these decisions instruct that the terms "contractor" and "subcontractor" should be defined by their immediate statutory context in the SOX whistleblower provision. Therefore, contractors and subcontractors are regulated solely as representatives of the public company and are barred from mistreating the public company's whistleblowing employees.

While contractors and subcontractors are indeed separate entities from the public company, often with their own employees, they also resemble their neighboring terms--a public company's officers, employees, and agents--because they too are contractually bound to serve the public company's interests. In fact, SOX was enacted precisely to prevent the accounting and reporting abuses that apparently arose from the *contractual* relationship between certain prominent publicly traded companies, such as Enron, and their accounting firms, such as Arthur Andersen. As the Senate has explained:

> With the *assistance of [Arthur] Andersen and its other auditors*, Enron apparently successfully deceived the investing public and reaped millions for

> some select few insiders. To the outside world, *Enron and its auditors* were either not reporting their massive debt at all, or were making disclosures [that] were obtuse [and] did not communicate the essence of [Enron] transactions completely or clearly . . . . In short, through the use of sophisticated professional advice and complex financial structures, Enron *and Andersen* were able to paint for the investing public a very different picture of the company's financial health than the true picture revealed. . . .

S. Rep. No. 107-146, 2002 WL 863249, at *3 (2002) (emphasis added). *See also* Bradley Mark Nerderman, *Should Courts Apply Dodd-Frank's Prohibition on the Enforcement of Pre-Dispute Arbitration Agreements Retroactively?,* 98 Iowa L. Rev. 2141, 2149 (2013) ("Congress passed SOX, the precursor to Dodd-Frank, to prevent future *accounting* scandals similar to those at Enron and WorldCom . . . and to regulate the *financial and auditing processes* of publicly traded companies.") (emphasis added).

Hence it is not surprising, in light of the market scandals that precipitated SOX's passage, that Congress included contractors and subcontractors in its list of a public company's more traditional representatives--officers, employees, and agents. That is, Congress enacted the SOX whistleblower provision to protect an employee of a public company from the potential adverse actions of

both his employer and the employer's accounting firm, or any other such contractor, whenever the employee reports potential securities violations committed by either his employer, the employer's contractor, or both entities working in combination.

In this connection, it should be noted that the SOX whistleblower provision is *not* limited to the employer's tangible employment actions, such as termination or demotion--decisions that ordinarily exceed a contractor's powers. Instead, the whistleblower provision is worded broadly to include all kinds of threats or harassment against the whistleblowing employee--actions that could be committed as much by a third-party contractor as by a representative of the employer. In particular, SOX provides that an employer and its representatives "may [not] discharge, demote, suspend, *threaten, harass, or in any other manner discriminate against an employee* . . . ." 18 U.S.C. § 1514A(a) (emphasis added). Congress has even noted that the whistleblower provision "was intentionally written to *sweep broadly*, protecting any *employee of a publicly traded company* who took such reasonable action to try to protect investors and the market." 149 Cong. Rec. S1725 (daily ed. Jan. 29, 2003) (statement of Sen. Leahy) (post-enactment) (emphasis added). By contrast, a typical anti-retaliation provision, such as that found in Title VII, applies solely to an employer's retaliatory acts: "It shall be an unlawful employment practice for an *employer* to discriminate against any of his employees [for engaging in protected activity under Title VII] . . . ." 42 U.S.C. § 2000e-3(a) (emphasis added).

Clearly, the broad scope of forbidden retaliatory acts in Sox's whistleblower provision reflects the salient congressional concern that a public company might commit securities violations with the assistance or complicity of its accounting firm, or some such contractor, as the Enron scandal itself apparently illustrated. Therefore, Congress likely anticipated that a public company's employee who attempts to expose such potential securities violations could expect hostility or opposition from either or both his employer and the employer's contractor, acting on behalf of the employer.

In sum, a commonsense interpretation of the provision's key language, bolstered by its historical context, establishes that Congress intended to protect a *public* company's employees from all potential sources and kinds of retaliatory acts. Any possible doubt concerning the whistleblower provision's exclusive application to a public company's employees is dispelled by considering the title that Congress originally provided to the SOX section that contains the whistleblower provision, and to the provision's original caption, which is preserved in the provision's codified form. *See Brotherhood of R. R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 529 (1947) (statutory captions are useful "when they shed light on some ambiguous word or phrase"). Both the title and caption refer solely to protection for employees of publicly traded companies. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, § 806 ("Protection for Employees of *Publicly Traded* Companies Who Provide Evidence of Fraud" (emphasis added)); 18 U.S.C. **§** 1514A(a) **(**"Whistleblower protection for

employees of *publicly traded* companies") (emphasis added). The legislative history also shows that Congress focused exclusively on protecting employees of public companies.[5] Thus, Congress has, from the outset, defined the whistleblower provision as affording protection solely to the employees of public companies.

Congress could have chosen to extend whistleblower protection to the employees of a private entity that contracts with a public company in the preparation of SEC-related financial information. However, Congress has not provided any such protection in the SOX whistleblower provision. Any possible expansion of this provision to include the employees of a private contractor is purely a matter of policy for Congress to decide. As the Court has recently explained, "policy concerns cannot justify an interpretation of [a statute] that is inconsistent with [its] text . . . . If Congress' coverage decisions are mistaken as a matter of policy, it is for Congress to change them. We should not legislate for them." *Pacific Operators Offshore, LLP v. Valladolid,* 132 S. Ct. 680, 690 (2012).

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[5] *See, e.g.*, 148 Cong. Rec. S1787 (daily ed. Mar. 12, 2002) (statement of Sen. Leahy) (whistleblower provision "would provide whistleblower protection to *employees of publicly traded companies* who report acts of fraud[.]") (emphasis added). *See also id*. at S1788 ("[T]here is [currently] no . . . protection for *employees of publicly traded companies* who blow the whistle on fraud and protect investors.") (emphasis added); 156 Cong. Rec. S3349 (daily ed. May 6, 2010) (statement of Sen. Cardin) (post-enactment) ("The whistleblower provisions of the Sarbanes-Oxley Act protect *employees of the publicly traded companies* . . . .") (emphasis added).

It should also be noted that Congress has long been aware of the fact that, as in this case, mutual funds, which are considered public companies under the SOX whistleblower provision, typically have no employees of their own. Instead, mutual funds are generally managed by investment advisers, many of which are private companies, as in this case. Hence, it should have been no surprise to Congress, and in fact may have been a deliberate policy choice, that many employees of the mutual fund industry, i.e., the employees of private investment advisors, would effectively fall outside the scope of the SOX whistleblower provision. "Mutual funds, with rare exception, *are not operated by their own employees.* Most funds are formed, sold, and managed by external organizations [investment advisers], that are separately owned and operated." S. Rep. No. 91–184 (1969), *reprinted in* 1970 U.S.C.C.A.N 4897, 4901 (accompanying the 1970 amendments to the Investment Company Act of 1940, 15 USC. §§ 80a-1-64)).

In fact, the Investment Company Act of 1940, which regulates mutual funds and other such investment companies, defines an investment adviser as one "who *pursuant to contract with such [investment] company* regularly furnishes advice to such company with respect to the desirability of investing in, purchasing or selling securities . . . ." 15 U.S.C. § 80a-2(a)(20)(A) (emphasis added). And, as the Court has explained, Congress enacted the 1940 Act precisely to regulate the potential abuses that inhere in the *contractual* relationship between an investment adviser and the mutual funds that it creates and manages:

> Congress adopted the [Investment Company Act of 1940, and the 1970 amendments to that Act] because of its concern with *the potential for abuse inherent in the structure of investment companies*. . . . Recognizing that the relationship between a fund and its investment adviser was *fraught with potential conflicts of interest,* the Act created protections for mutual fund shareholders[, such as Board and shareholder approval requirements for advisor's fees, and Board neutrality requirements].

Jones v. Harris Assoc.'s L.P., 559 U.S. 335, 339 (2010) (citations and internal quotation marks omitted).[6]

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[6] The Senate has elaborated in even greater detail on the potential abuses arising from the fact that mutual funds have no employees of their own and are instead dependent on management by investment advisers. *See* S. Rep. No. 91–184, *reprinted in* 1970 U.S.C.C.A.N at 4901 ("Because of the *unique structure of this industry*[,] the relationship between mutual funds and their investment adviser is not the same as that usually existing between buyers and sellers or in conventional corporate relationships. Since a typical fund is organized by its investment adviser[,] which provides it with almost all management services[,] and because its shares are bought by investors who rely on that service, a mutual fund cannot, as a practical matter sever its relationship with the adviser. Therefore, the forces of arm's-length bargaining do not work in the mutual fund industry in the same manner as they do in other sectors of the American economy.") (emphasis added).

Therefore, it is not surprising, and perhaps no accident, that the SOX whistleblower provision does not protect many of the employees of the mutual fund industry, namely, the employees of private investment advisers. "We assume that Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.,* 498 U.S. 19, 32 (1990). *See also Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988) ("[It is a] well-settled presumption that Congress understands the state of existing law when it legislates . . . ."). Existing law, in the 1940 Act, defines investment advisers as *contracting parties* for mutual funds, and regulates this unique *contractual relationship* between mutual funds and their investment advisers in much detail. The power rests solely with Congress in its wisdom, and not with the courts by interpretive fiat, to change these clear policy decisions.

Finally, it should be noted that, while the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111–203, 124 Stat. 1376 ("Dodd-Frank"), has amended SOX's whistleblower provision to include, *inter alia*, employees of a public company's subsidiaries or affiliates, Dodd-Frank has *not* made any changes whatsoever with respect to contractors and subcontractors. 18 U.S.C. § 1514A(a) (as amended by §§ 922(b),(c), and 929A of Dodd-Frank, Pub. L. No. 111-203). That is, Dodd-Frank leaves intact the disputed "any officer" clause, which contains the only reference to contractors and subcontractors in the whistleblower provision. Therefore, in amici's view, Congress has yet to include private investment advisers within the scope of this provision.

Accordingly, a decision of the Court in this case should not be limited to claims, such as this one, that arise before Dodd-Frank's amendment of the SOX whistleblower provision. Instead, the Court's decision should apply equally to claims arising after Dodd-Frank's effective date of July 22, 2010. *See* note to 12 U.S.C. § 5301 ("Effective Date").

In sum, a commonsense reading of the SOX whistleblower provision clearly shows that private contractors and subcontractors are included solely in their capacity as a public company's representatives, consistently with the neighboring terms of a public company's officers, employees, and agents. As such, contractors and subcontractors cannot retaliate against the public company's employees. But the provision simply does not regulate the employment relationship between a private contractor or subcontractor and its *own* employees. Only Congress can change this policy choice.

CONCLUSION

For the reasons stated above, NELF and AIM respectfully request that this Court affirm the judgment of the First Circuit.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION AND ASSOCIATED INDUSTRIES OF MASSACHUSETTS

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October 7, 2013