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 Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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REPLY BRIEF

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I. THE CONFLICT BETWEEN THE FIRST CIRCUIT AND THE ADMINISTRATIVE REVIEW BOARD WARRANTS REVIEW BY THIS COURT

There is no dispute that the First Circuit's interpretation of section 1514A in the instant case squarely conflicts with the decision of the Administrative Review Board in *Spinner v. David Landau & Associates, LLC*, 2012 WL 1999677 (ARB May 31, 2012). Respondents do not deny that any claimant may elect to proceed in the administrative process, rather than file suit in district court, and that the resolution of any such claim in the administrative process (except a claim arising in the First Circuit) will be governed by the ARB decision in *Spinner.* Because of the exceptional importance of section 1514A to the financial markets and to the interests of individual investors, the conflict between the First Circuit and the ARB warrants review by this Court.

(1) This Court has repeatedly granted certiorari to resolve an important conflict between a court of appeals and an administrative agency regarding the interpretation of the statute administered by that agency. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services,* 545 U.S. 967 (2005), this Court granted review after the Ninth Circuit rejected the Federal Communications Commission's conclusion that the sale of broadband Internet service is not a "telecommunications service" under the Communications Act. In *National Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co.,* 534

U.S. 327 (2002), the Court granted certiorari because the Eleventh Circuit had rejected the FCC's conclusion that a cable that provides broadband Internet service is a "pole connection" under the Pole Attachments Act. In *Food and Drug Administration v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120 (2000), review was granted because the Fourth Circuit had overturned the FDA's conclusion that tobacco is a "drug" within the meaning of the Food, Drug and Cosmetic Act.

The parties agree that this Court does grant review when "[a]n issue ... assume[s] importance because the lower court decision is at war with a well-established construction given the statute by the administrative agency charged with its enforcement." (Br.Opp. 19) (quoting Eugene Gressman, et al., *Supreme Court Practice*, 268 (9th ed. 2007)). Respondents suggest that the interpretation of section 1514A unanimously adopted by the Administrative Review Board in *Spinner* is not "well-established" because several years earlier an administrative law judge construed section 1514A differently. (Br.Opp. 19). But it is the Administrative Review Board, not individual administrative law judges, which exercises the authority delegated by the Secretary of Labor to make the final administrative determination regarding both individual claims and the interpretation of section 1514A. The decision in *Spinner* was not a departure from previous ARB interpretations of section 1514A; the ARB noted in *Spinner* that four pre-*Spinner* ARB decisions had already held that

section 1514A applies to contractors of public companies. (Pet.App. 143a and n.8). The administrative interpretation of section 1514A in *Spinner* is deeply entrenched and will be binding on all administrative law judges in the future.

Respondents suggest that it is the position of the Solicitor General that review by this Court is never warranted by a conflict between a court of appeals and the administrative agency responsible for administering a statute, citing a footnote in the government's Brief in Opposition in *Platone v. U.S. Dep't of Labor,* 130 S.Ct. 622 (2009) (Br.Opp. 19). But that footnote asserted only that review was not warranted merely by the existence of a conflict between the ARB and "the decisions of two *district* courts." Brief for Respondent in Opposition, *Platone v. U.S. Dep't of Labor*, No. 09-55 at 12 n.4 (Oct. 16, 2009) (emphasis added). In the instant case, unlike *Platone*, the agency's interpretation of the statute in question was rejected by a court of appeals. In each of the cases cited above, moreover, it was the Solicitor General who urged that a court of appeals' rejection of an agency's position on an important question of law warranted review by this Court.

(2) The various statutes cited by respondents fall far short of solving the serious problems created by the First Circuit's narrow construction of section 1514A.

Unlike section 1514A, none of the statutes referred to by respondents provide any protection to

employees, such as the petitioners in the instant case, who bring to the attention of their own supervisors or other company officials information about misconduct forbidden by federal law. To the limited extent that any of those statutes provide protection for complaints to federal officials, the absence of protection for internal complaints under the First Circuit decision would have the highly undesirable consequence of forcing employees to go directly to the federal government without first giving their employers an opportunity to resolve a problem.

Respondents rely on section 1107 of Sarbanes-Oxley, 18 U.S.C. § 1513, which they describe as criminalizing retaliation against any person who provides information about a federal offense "to government officials." (Br.Opp. 31). But section 1513 applies only to providing information "to a law enforcement officer," and is used to prosecute individuals who threaten or injure informants cooperating with FBI agents, DEA agents, and the like.[1] The section 1515(a)(4) definition of "law enforcement officer" excludes employees of the SEC and other federal regulatory agencies, whose responsibilities are expressly limited to investigating and prosecuting civil actions. The SEC's Enforcement Manual stresses that

[1] E.g., *U.S. v. Gaither*, 533 F.Supp.2d 540, 541 (W.D.Pa. 2008) (information provided to FBI agent); *U.S. v. Lopez-De LaCruz,* 431 F.Supp.2d 200, 201 (D.P.R. 2006) (information provided to DEA agent).

"[t]he SEC has authority to bring civil, not criminal actions."[2]

The monetary reward system created by the Dodd-Frank Act, on which respondents also rely, does not apply to (or provide an incentive for) individuals who provide information to agencies other than the SEC. For example, it would not cover individuals who assist the Commodities Futures Trading Corporation (which is investigating the scandal regarding the London Inter-Bank Offering Rate), the Federal Reserve Board (which was attempting to understand and respond to events at Lehman Brothers in the months before its collapse), or the Comptroller of the Currency (which oversees problems in the nation's banks).

That monetary reward system also provides no incentives to provide information even to the SEC in cases where it is unlikely the SEC will recover penalties or other monetary relief from the institution involved. Often information is important to the SEC, not because it will lead to a particular enforcement action, but because it enables the Commission to understand growing systemic problems, such as the practices that led to the 2007 financial crisis. In addition, the SEC as a practical matter is unlikely to seek monetary relief from a firm whose misconduct

[2] Securities and Exchange Commission, Division of Enforcement, Enforcement Manual, part 5.2 (March 9, 2012).

consisted of efforts to hide its imminent collapse.[3] Thus the incentive system has little effect in cases in which the information an employee might provide concerns the financial instability of the firm at issue.

The anti-retaliation provision in section 922 of Dodd-Frank, 15 U.S.C. § 78u-6(h), is far narrower than section 1514A. Section 922 (like the Dodd-Frank incentives) does not apply to any federal agency other than the SEC; only section 1514A can protect individuals who provide information, for example, to the Commodities Futures Trading Corporation, the Federal Reserve Board, or the Comptroller of the Currency, or to the members and committees of Congress. Even with regard to the SEC, section 922 of Dodd-Frank is narrower than section 1514A. Section 922, for example, applies only to those who "provid[e] information" to the SEC; section 1514A, on the other hand, more broadly protects those who "cause information to be provided"[4] or who "otherwise assist in an investigation." Section 922 is limited, as section 1514A is not, to those who provide information "under this section."

(3) It is not the case, as respondents suggest, that the courts of appeals are in any meaningful sense "fully capable of resolving" the conflict that

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[3] The SEC does not ordinarily seek penalties against institutions which are bankrupt; doing so would merely penalize creditors.

[4] In the instant case Lawson "caused information to be provided" by asking her attorney to write to the SEC.

exists between the First Circuit and the ARB. (Br.Opp. 19). Because a circuit court decision resolving an appeal from the ARB would not be binding on the ARB in administrative proceedings involving other parties, future circuit court decisions regarding the scope of section 1514A could only deepen the conflict by disagreeing with either the ARB or the First Circuit. Respondents argue that *Spinner* "may yet be overturned on appeal" (Br.Opp. 20). But an appellate decision in the *Spinner* litigation itself would not compel the ARB to abandon its construction of section 1514A; it would merely mean that the ARB would no longer apply that interpretation to administrative cases arising in the particular circuit to which the appeal in *Spinner* had been taken. The ARB will continue to enforce *Spinner* with regard to claims arising in any circuit that has not rejected that decision, and the conflict with the First Circuit will continue until and unless *all* twelve geographical courts of appeals have addressed this issue (and have rejected *Spinner*), an eventuality unlikely ever to occur.

In light of the exceptionally detailed analyses of the issues in the four exhaustive opinions in the instant case and in *Spinner*, respondents do not contend that further judicial consideration of this dispute is likely to add significantly to this Court's understanding of the underlying textual and other issues. Respondents suggest that if this Court delays addressing the question presented, the lower courts could consider that question in "other contexts." (Br.Opp. 21). But neither respondents, petitioners, nor any lower court or administrative tribunal has

suggested that whether section 1514A applies to retaliation against employees of non-public companies would depend in any way on the context in which that question arises. This is a simple question of statutory construction to which, litigants and lower courts agree, there are only two possible answers: "yes" or "no."

Because of the critical role that section 1514A plays in federal efforts to protect the markets, the national economy, and individual investors, delay in the resolution of the question presented would entail an unacceptable risk of injury to the public. The inability of federal officials to prevent the financial crisis of 2007 derived in significant measure from a lack of information.

> [T]he Treasury Department, the Federal Reserve Board, ... the Federal Reserve Bank of New York ... and ... [o]ther agencies ... were hampered because they did not have a clear grasp of the financial system they were charged with overseeing, particularly as it had evolved in the years leading up to the crisis. This was in no small measure due to the lack of transparency in key markets.

National Commission on the Causes of the Financial and Economic Crisis in the United States, *The Financial Crisis Inquiry Report,* xxi (2011). In the wake of the First Circuit decision, employees of non-public companies could not have confidence that they would be protected by section 1514A if they were to provide needed information to federal officials. That decision's

"very existence may cause others not before the court to refrain from ... speech." *Broadrick v. Oklahoma,* 413 U.S. 601, 612 (1973). The painfully learned lesson of financial scandals and crises from Enron to the present day is that for want of timely warning to federal officials (or, in some instances, to higher company officials) a problem at a single major institution can grow to the point that it causes billions of dollars in damage and the loss of tens of thousands of jobs. Nothing that could be gained by postponing resolution by this Court of the question presented would warrant taking such a risk.

II. THE DECISION OF THE FIRST CIRCUIT IS CLEARLY INCORRECT

Respondents' defense of the First Circuit decision illustrates the flaws in that opinion. Respondents repeatedly insist that the "plain language" of section 1514A is "expressly" inapplicable to employees of non-public companies. (Br.Opp. 17, 23, 25, 27). Respondent bases that argument on

> the title of Section 806 [of Sarbanes Oxley] – "Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud" – and the caption of the whistleblower-protection provision [(subsection 1514A(a))] – "Whistleblower protection for employees of publicly traded companies...."

(Br.Opp. 6; see *id*. at 5 ("the title and caption"), 7 (same)). But respondents' argument, relying on the

title of section 806 of Sarbanes Oxley and the caption of subsection 1514A(a), ignores a critical third heading, the caption of section 1514A itself. The caption of section 1514A contains no reference or limitation to publicly traded companies; rather, it reads "Civil action to protect against retaliation in fraud cases." The caption of section 1514A clearly would encompass employees of non-public companies, and its existence is fatal to respondents' contention that the text of section 1514A expressly excludes employees of non-publicly traded companies.

Respondents insist that the title of section 806 and the caption of section 1514A(a) are meant to be a specific and exclusive description of the substance of the law, not merely "shorthand" referring to a part of that prohibition. (Br.Opp. 7). Because that title and caption refer to employees of publicly traded companies, respondents reason, employees of all other companies must be excluded. But, as we explained in the petition (and respondents do not dispute), "publicly traded" refers to companies whose stock is bought and sold on the national exchanges and whose securities are registered under section 12 of the Securities Exchange Act. (Pet. 12). Section 1514A, however, is not limited to section 12 publicly traded companies, but also applies to companies (such as mutual funds) whose securities are not traded[5] but which are required to file reports under section 15(d).

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[5] Stock in mutual funds are sold and redeemed by the Fund, but not traded on exchanges.

Thus the references to "employees of publicly traded companies" in the title of section 806 and the caption of subsection 1514A(a) cannot have been intended as an all-inclusive description of the workers protected by the law.

The First Circuit decision also fails to provide a plausible account of the significance of the inclusion of "contractor[s]" and "subcontractor[s]" in section 1514A. If, as the First Circuit held, section 1514A does not forbid contractors and subcontractors to retaliate against their own workers, the inclusion of these two categories of employers would be meaningless, because (as the ARB noted) it would rarely be possible for a contractor or subcontractor to retaliate against *someone else's* employee. Respondents attempt to solve this problem by suggesting that contractors and subcontractors were included in section 1514A so that a covered firm could not "retaliate against whistleblowers by contracting with an ax-wielding specialist (such as the character George Clooney played in 'Up in the Air')." (Br.Opp. 14) (quoting *Fleszar v. U.S. Dep't of Labor,* 598 F.3d 912, 915 (7th Cir. 2010)). But this account makes no sense. If a covered employer is itself selecting (for a retaliatory reason) the individual to be fired, section 1514A would already apply, regardless of whether the pink slip was delivered by the employer itself, by an intermediary such as Mr. Clooney's character, or by the United States Postal Service. And if (as was true in "Up in the Air") the intermediary is merely announcing a dismissal decision made by the covered

employer, without having had any personal role in that choice, that intermediary could no more be said to have "discriminate[d]" against the employee than a United States Postal Service worker who delivered a letter with the bad news.

III. THE VIEWS OF THE ARB AND THE DEPARTMENT OF LABOR ARE ENTITLED TO WEIGHT

This Court made clear in *Kasten v. Saint-Gobain Performance Plastics Corp.,* 131 S.Ct. 1325, 1335 (2011) that significant weight should be given to the consistent construction of a statute by the agency responsible for its implementation. The Labor Department has long adhered to the interpretation of section 1514A spelled out in *Spinner.* That construction was adopted by the Department in its 2004 regulations (Pet.App. 143a n.7, 170a n.22), was reaffirmed in four pre-*Spinner* ARB decisions, was again set out by the Department in its appellate brief in the instant case, and most recently was elaborately explained in *Spinner*. The Department's interpretation clearly is the result of "careful consideration, not '*post hoc* rationalization[n].'" *Kasten*, 131 S.Ct. at 1335 (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 50 (1983)).

More importantly at this juncture, in their amicus briefs in the court below both the Department of Labor and the SEC expressed their emphatic belief

that adoption of the narrow construction of section 1514A that has now been embraced by the First Circuit would deter employees from alerting federal officials and even their own employers about the types of misconduct at which section 1514A is directed, thus interfering with federal efforts to protect investors, the markets, and the national economy. (Pet. 22-26). Those same agency concerns weigh heavily in favor of granting review to put to rest the problems that have been created by the First Circuit decision. If it is not sufficiently clear whether the government regards the question presented as of such pressing importance as to warrant review by this Court, the Court should invite the Solicitor General to file a brief expressing the views of the United States.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the First Circuit. In the alternative, the Court should invite the Solicitor General to file a brief expressing the views of the United States.

Respectfully submitted,

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