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

RESPONDENTS' SUPPLEMENTAL BRIEF

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the brief in opposition remains accurate.

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ARGUMENT

The government correctly concludes that the decision below does not warrant review because there "is no disagreement in the circuits . . . , the issue has arisen infrequently, and no circuit has had the opportunity to consider the ARB's recent decision" in *Spinner v. David Landau & Associates, LLC*, Nos. 10-111, 10-115, 2012 WL 2073374 (DOL ARB May 31, 2012). U.S. Br. 8. Thus, notwithstanding the government's unfounded criticisms of the First Circuit's analysis, the Fidelity respondents agree with the government's recommendation that the petition for a writ of certiorari should be denied.

I. AS THE GOVERNMENT EXPLAINS, THIS CASE DOES NOT WARRANT REVIEW.

In the decision below, the First Circuit held that only employees of the defined public companies, not employees of private contractors and subcontractors, may pursue a civil action under Section 806. Pet. App. 17a. Similarly, in *Fleszar v. United States Department of Labor*, 598 F.3d 912 (7th Cir.) (Easterbrook, C.J.), *cert. denied*, 131 S. Ct. 423 (2010), the Seventh Circuit rejected the contention that Section 806 provides whistleblower protection to employees of any "contractor, subcontractor, or agent" of a public company. *Id*. at 915. The federal district courts are in accord. *See* Respondents' Brief in Opposition ("BIO") 14-15.

It is beyond dispute that the First Circuit's decision in this case "does not conflict with the decision of any other court of appeals on the question presented." U.S. Br. 16. Indeed, neither petitioners nor the government have identified *any* conflicting authority from any Article III court on the sole issue presented in the petition.

It is equally undisputed that "the issue has arisen infrequently" (U.S. Br. 8), and the government points to no cases not previously addressed by the parties. The government has thus confirmed our observation that there are no similar cases working their way through the system. And petitioners do not disagree: "The Solicitor General correctly observes that until now there have been few incidents in which employees of contractors have complained of being retaliated against for disclosing corporate malfeasance." Supp. Br. 5.

Notably, the government does not agree that a conflict between decisions of a court of appeals and the ARB warrants this Court's review. *See* U.S. Br. 16-19. As the government observes, no circuit—including the First Circuit—has yet had the opportunity to consider the ARB's decision in *Spinner*. *See* U.S. Br. 17-18 & n.7. Congress made ARB decisions reviewable in the courts of appeals so that the judiciary can provide an independent review of the statutory scheme administered by the Department of Labor. Petitioners' suggestion that this Court should grant, vacate, and remand for consideration in light of *Spinner* (Supp. Br. 9-10)—a suggestion not endorsed by the government—is frivolous. There will be ample opportunity for judicial consideration of *Spinner* on direct appeal.

In their supplemental brief, petitioners offer three reasons why the Court should not allow the issue to percolate. All are unavailing.

First, petitioners contend that the extant decisions are "unusually exhaustive" and thus future decisions are not "likely to add anything." Supp. Br. 6. That is a reason to deny review, not grant it. The issue has been vigorously litigated and the courts of

appeals are thus far unanimous in rejecting the strained interpretation of the statute proffered by petitioners. Unless and until a conflict among the courts of appeals develops, there is no need for this Court's review.

Second, petitioners disagree with the Solicitor General's conclusion that future litigation would give the courts the opportunity to consider the deference due to the Department of Labor's pronouncements in this area. *See* Supp. Br. 8. But the important point is not, as petitioners suggest (*ibid.*), that the First Circuit has "preemptively" resolved the deference question; this case is highly unusual because the Department of Labor *expressly disclaimed* deference to the Department's procedural regulation in the court below. Therefore no deference arguments are available to the government in *this* case.

Third, petitioners argue that in light of continued uncertainties in the financial markets, it is "important to clarify" whether employees of private contractors are covered by the Sarbanes-Oxley whistleblower provision. Supp. Br. 11. That argument is belied by the absence of similar cases and the unanimity of judicial approaches to the question, and ultimately is just a rehash of petitioners' contention that the decision below is wrong on the merits. We turn to that next.

II. THE DECISION BELOW IS CORRECT.

Although respondents agree with the government's ultimate conclusion that the petition for a writ of certiorari should be denied, the government's criticisms of the decision below are not well taken.

According to the government, the First Circuit's decision creates "an unwarranted gap in whistleblower protection." U.S. Br. 7, 16. Both the government and petitioners are of the view that Sarbanes-Oxley *must* protect employees of private contractors, including some mutual fund advisers, if they complain about violations of the securities laws by their public-company clients. U.S. Br. 7, 17; Supp. Br. 2-3.

The tautological construction advanced by petitioners and the government (*i.e.*, whistleblowers must be protected, so Sarbanes-Oxley must protect them) disregards the text and structure of Sarbanes-Oxley and numerous other statutes that protect whistleblowers, including the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank"). This Court has repeatedly rejected the argument that any asserted "loophole" must be corrected by expansive judicial interpretation. BIO 24-27. This is particularly so here because, as discussed below, Congress has separately covered persons in petitioners' position.

1. The government erroneously contends that the statute prohibits a "contractor" or "subcontractor" of a public company from retaliating against "an employee," without limiting that protection to employees of public companies. U.S. Br. 7, 8. The government's myopic focus on the words "an employee" disregards the long-standing maxims that statutory interpretation is a "holistic endeavor" and that words

must be construed in harmony with the rest of the language in a statutory provision. *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.").

The context makes clear that the private cause of action is available only to employees of public companies. By identifying the broad range of entities and persons who are prohibited from engaging in retaliation, Section 806 makes the point—basic to corporate law generally—that a corporate legal entity may not take forbidden action through any of its officers, employees, agents, or contractors. Contrary to the government's contention, that list does not identify entities that are forbidden from discriminating against their *own* personnel. U.S. Br. 8. Corporate officers and employees do not typically have their own employees, yet the government's and petitioners' reading yields the absurd result that the statute prohibits every officer and every employee from harassing or intimidating his or her own employees. This anomalous result confirms that the government's and petitioners' open-ended reading is not correct. *See* BIO 23-24.[1]

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[1] Contrary to the government's assertion, it is not difficult to think of situations where a subcontractor could retaliate against the employee of a public company. U.S. Br. 9. A subcontractor could easily retaliate against an employee of a public company if there is a close relationship between the public company and the service provider, such as between an issuer of securities and its auditor. That is far more plausible than peti-

Furthermore, in prohibiting an "employee" of "such company" from discriminating against an "employee," Congress used the word "employee" twice in the same sentence. 18 U.S.C. § 1514A(a). Applying the presumption of consistent usage, the natural reading of the term "employee" is that Congress meant to refer to employees of public companies in both instances. *See Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) ("In the end, we cannot accept respondent's position without unreasonably giving the word 'filed' two different meanings in the same section of the statute."). Thus, the text makes clear that Congress meant to preclude affiliated agents, contractors, subcontractors, officers, and employees from retaliating against a public company's employees.

The title and caption are not, as the government argues, "a short-hand description" Congress used for employees of any entity that conceivably could be covered by a broad construction of the term "employee." U.S. Br. 10. Far from a casual reference, both the title of Section 806 in the public law and the caption of the whistleblower provision are a summary of the statute's domain: public companies. Although Section 15(d) companies are not publicly *traded* on the stock exchange, they are publicly *owned*.

According to the government, it was reasonable to exclude related private companies from the title and caption because it would be too "cumbersome" to mention them. *See* U.S. Br. 10. To the contrary, if Congress had really meant to cover the employment

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[Footnote continued from previous page]

tioners' and the government's construction that would prevent an employee from retaliating against his or her own employee.

practices of all private contractors and subcontractors of public companies, it surely would have given a clearer indication of that sweeping intent. Instead, Congress focused on the public companies subject to the new obligations and liabilities under Sarbanes-Oxley.[2]

Of the more than 6 million U.S. employers in 2007, just 4,584 were listed on a U.S. stock exchange. *See* Mary Ellen Biery, *Public Companies Out-Invested by Private Firms*, Forbes, Sept. 21, 2012. It is simply implausible that Congress meant to regulate *millions* of private employers *sub silentio* because they have contracts with public companies. Such a reading would enormously expand civil liability in a manner that could burden employers, and thus the economy, with claims that Congress clearly did not authorize. *See* BIO 24-27.

That conclusion is confirmed by a later amendment to Section 806 that expressly includes employees of statistical rating agencies, some of which are private companies. 18 U.S.C. § 1514A(a), *as amended by* §§ 922(b), 929A, 124 Stat. at 1848, 1852. If the government and petitioners were correct that Section 806 includes private contractors of public companies, then rating agencies would already have been covered as contractors and there would have been no need for the amendment. Quite simply, Congress

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[2] Although the title of Section 1514A as a whole does not mention public companies, the titles, captions, and statutory text increasingly become more specific about the types of covered companies. It is unlikely that Congress intended the title of Section 1514A as a whole to *broaden* the title of Section 806, the caption of 1514A, and the actual text of Section 806, which all make clear that protection is intended for employees of *public companies*.

has never authorized suits by employees of all public companies' contractors and subcontractors, and the government is advancing a sweeping statutory construction that is refuted by the text.

The government's discussion of the legislative history ignores congressional intent to regulate *public* companies. Moreover, Sarbanes-Oxley was directed at accounting firms and lawyers, not investment advisers to mutual funds. *See* BIO 30-31. Congress addressed concerns about accountants and lawyers by creating a new regulatory agency (the Public Company Accounting Oversight Board) and adopting detailed provisions regulating corporate auditors and lawyers in their representation of public companies. *See* BIO 28-30. Congress, however, did *not* focus on mutual fund investment advisers, which are separately and comprehensively regulated by the Investment Company Act, 15 U.S.C. § 80a-1 *et seq*., and the Investment Advisers Act, 15 U.S.C. § 80b-1 *et seq*. Nothing in Sarbanes-Oxley was intended to supplant that well-established regulatory regime. In fact, a subsequent effort to extend Sarbanes-Oxley to investment advisers failed. Pet. App. 40a-43a. Neither petitioners nor the government dispute that their proposed construction of the statute is designed to do precisely what this failed amendment would have done. It is not the courts' job, however, to make such legislative decisions. *See* BIO 26, 32.

For these reasons, the government is simply mistaken in asserting that "[t]he frustration of congressional purpose resulting from the court of appeals' interpretation . . . is particularly acute in the mutual fund industry." U.S. Br. 12. Congress was well-aware that many employees in the mutual fund industry work for privately owned companies, while

others work for public companies. The policy decision to extend Sarbanes-Oxley protections to employees of public companies, rather than to employees of all investment advisers, should be respected. *See* BIO 30. Employees of private companies are still covered by a complementary regime of administrative, civil, and criminal remedies that protect whistleblowers, deter misconduct, and encourage reporting. Extending the civil cause of action in Sarbanes-Oxley to cover employees of all mutual fund investment advisers would upset the careful balance struck by Congress and would have serious policy ramifications for the financial markets, economy, and job creation.

2. In arguing that the decision below leaves certain whistleblowers unprotected, the government does not so much as mention Section 922 of Dodd-Frank and its express coverage for whistleblowers who report to the SEC, as petitioners did here. Section 922 of Dodd-Frank creates a private cause of action for individuals who are discharged or discriminated against by their employers for providing information to the SEC relating to a potential violation of the securities laws. 15 U.S.C. § 78u-6. Section 922 further requires the SEC to award whistleblowers monetary compensation for providing certain tips about possible securities law violations. Although the Section 922 program is relatively new, it has already yielded substantial benefits, as detailed in its annual report.[3]

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[3] *See generally* SEC, *Annual Report on the Dodd-Frank Whistleblower Program: Fiscal Year 2012*, *available at* www.sec.gov/about/offices/owb/annual-report-2012.pdf.

Importantly, the SEC, which is more expert than the Department of Labor in administering the securities laws, implements the protections provided in Section 922. The SEC did not sign the government's brief; although petitioners attribute this fact to the SEC's disagreement with the government's recommendation to deny certiorari (Supp. Br. 2), it is far more likely that the SEC does not agree that Sarbanes-Oxley should be stretched to cover conduct that falls within the express ambit of Dodd-Frank. Section 922 of Dodd-Frank provides a congressionally authorized alternative remedial scheme that makes the contortionist construction of Sarbanes-Oxley urged by petitioners (and echoed by the Labor Department) entirely unnecessary. *See* BIO 31-32. The government's brief does not contradict that fundamental, and irrefutable, point.

Petitioners do not address Section 922 in their supplemental brief, and their previous assertion that Section 922 "does not apply to any federal agency other than the SEC" (Pet. Reply 6) is not only irrelevant on the facts of this case—because petitioners brought their complaints to the SEC—but disregards other provisions of Dodd-Frank that extend equivalent protections to employees who report potential violations to the CFTC (7 U.S.C. § 26) or banking regulators (12 U.S.C. § 5567). The very existence of Dodd-Frank negates any need to expansively interpret Section 806 of Sarbanes-Oxley (and may explain why cases like this one are not recurring). Again the government's brief does not disagree.

3. Finally, the government's bid for deference to the Department of Labor's position is most notable for what it does not say. U.S. Br. 16. The government contends that "[a]t a minimum, the Department's consistent and reasonable position should

have been afforded deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)." U.S. Br. 15. Yet, in the court below the Secretary disclaimed *Chevron* deference for the Department of Labor's regulation and did not claim *Skidmore* deference. *See* Pet. App. 46a-50a.

In this Court, the government does not dispute that neither the Department of Labor nor the Securities and Exchange Commission has substantive rulemaking authority to interpret Section 806, and admits that the Department of Labor has deemed its regulation *procedural*. U.S. Br. 14. Nor does the government attempt to rebut respondents' showing that the statutory scheme providing for overlapping adjudicative authority in the federal district courts indicates that Congress did not intend either agency to have a policymaking role. *See* BIO 18. Such complex issues should not be raised for the first time in this Court, which is yet another reason to deny review.

Nevertheless, the government contends that the ARB's recent decision in *Spinner* is entitled to *Chevron* or *Skidmore* deference. *See* U.S. Br. 15. In making that claim, the government does not mention that the ARB's analysis in *Spinner* was controlled by the procedural regulation (BIO 15-16), much less attempt to explain how the ARB's application of a procedural regulation has more authority than the underlying regulation. Such arguments, which were not presented to or resolved by the First Circuit, should be considered by the lower courts in the first instance. *Cf. Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168-70 (2012) (according no deference to a DOL *amicus* brief); *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct.

2296, 2303-05 & n.8 (2011) (according no deference to SEC's views on scope of private right of action).

Petitioners open their supplemental brief by invoking "[t]he *singular* importance of the question presented." Supp. Br. 1 (emphasis added). Although they presumably mean to use the word in its sense of "remarkable" or "exceptional," its alternative meaning of "unique" better fits this case. This case is the first in which the applicability of the Sarbanes-Oxley whistleblower provision to employees of private contractors was squarely presented to a federal court of appeals; and the First Circuit's resolution of that question accords with all other judicial authority as well as the text and structure of the statute. Petitioners disagree with that decision, but that is no basis for this Court's review. As the Solicitor General correctly concludes, it would be "premature" for this Court to address the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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