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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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I. THE QUESTION PRESENTED SHOULD BE RESOLVED WITHOUT FURTHER DELAY

The singular importance of the question presented weighs heavily in favor of review by this Court. In adopting section 1514A, Congress sought to assure employees with information about corporate fraud or securities violations that they could report that malfeasance without fear of reprisal. "[C]ongress understood that to effectively address corporate fraud, [section 1514A] needed to extend to entities related to public companies—accounting firms, law firms, and the like—which may themselves be involved in performing or disguising fraudulent activity." U.S. Br. 13-14 n. 4 (*quoting Funke v. Federal Express Corp.*, 2011 WL 3307574, at *5-*6 (ARB July 8, 2011)).

But with regard to "outside accountants, auditors, and lawyers, [those] who are most likely to uncover and comprehend evidence of potential wrongdoing" (U.S.. Br. 12) (*quoting* Pet. App. 158a), the congressional attempt to provide that vital assurance has so far largely been a failure. Eleven years after the adoption of Sarbanes Oxley, outside accountants, auditors and lawyers, and mutual fund employees who work for privately held fund advisers, still do not know if they are protected by section 1514A.

Today the Department of Labor website advises in equivocal terms that employees of a public company's "contractors, subcontractors, or agents *may* also be covered [by section 1514A]."[1] For an accountant or

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1 OSHA Fact Sheet, "Filing Whistleblower Complaints under the Sarbanes-Oxley Act," at 1 (emphasis added), available at http://www.osha-gov/publications/osha-factsheet-sox-act.pdf, visited April 21, 2013.

mutual fund adviser employee who could be putting his or her livelihood in jeopardy by making the types of disclosures which Congress intended to encourage, "may" is not good enough. The Solicitor General suggests that a definitive resolution of this issue should now be postponed, perpetuating the current state of uncertainty. The Securities and Exchange Commission, which filed a separate brief in the court below and which is responsible for enforcing the nation's securities laws, has not joined the Solicitor General's brief in this Court advocating that delay.

The government correctly describes the significance of the issue presented. "The question . . . is an important one. The court of appeals' decision creates a gap in whistleblower protection under the Sarbanes Oxley Act, contrary to Congress's purpose of protecting insiders from retaliation when they report fraud or violations of securities regulations." U.S.Br.16. "The frustration of congressional purpose . . . is particularly acute in the mutual fund industry." *Id.* at 12; see *id*. at 7 (the First Circuit "rule creates an unwarranted gap in whistleblower protection for many of the employees in the best position to discover and report corporate fraud"), 12 (the "gap in protection [is] especially troubling with respect to mutual fund companies").

That gap in protection is most serious in the First Circuit, where the Department of Labor's website statement that contractor employees "may . . . be covered" holds out hope of legal protection which today does not exist in that circuit. But the harm of the decision below is not limited to whistleblowers or others who live and work in the First Circuit. The First

Circuit's decision directly affects investors throughout the nation who own stock in mutual funds headquartered in the First Circuit, including funds issued by such major groups as Fidelity, John Hancock and Putnam Investments. Pet. 35 n. 27. Similarly at risk are investors in any circuit who own stock in public companies headquartered and audited by accountants in the First Circuit. Indeed, public companies anywhere in the United States, which in some instances have moved operations abroad to avoid the strictures of American law, could now respond to the First Circuit decision by asking that the auditing of some or all of their activities be done by accountants in Boston.

Outside the First Circuit, the very uncertainty as to whether section 1514A protects employees of accounting firms, mutual fund advisers, and other outside contractors is itself a major obstacle to the reporting of the malfeasance covered by the statute. Section 1514A can provide meaningful assurance to employees that their disclosures would be legally protected, and can effectively deter reprisals, only if it is clear that the law indeed applies to those workers. From the perspective of an employee deciding whether to incur the risks inherent in reporting corporate misconduct, the uncertainty that reigns outside the First Circuit is as powerful a deterrent to disclosure as the state of the law in the First Circuit itself. No prudent employee who understands the current state of the law would—or should be asked to–endanger his or her career in order to further the percolation of the question presented.

This is a longstanding problem. Prior to the First Circuit decision in the instant case, the leading case in this area of the law was the widely cited[2] decision in *Brady v. Calyon Securities(USA)*, 406 F.Supp. 2d 307, 318 (S.D.N.Y. 2005), which held that section 1514A does not protect employees of contractors. Major law firms throughout the United States, including Hogan and Hartson, advised their clients in light of *Brady* that employees of contractors were not protected by section 1514A.[3] The National Law Journal predicted that "the majority of courts will probably agree with . . . *Brady*."[4] In *Gabelli v. SEC*, 133 S.Ct. 1216 (2013), the Solicitor General argued that it was impossible for the SEC to discover until 2008, six years after the adoption of section 1514A, that the fund adviser in that case had violated federal securities law, and pointed out that the employees of the fund adviser had failed to disclose its improper activities even to the mutual fund's own board of directors.[5]

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2 E.g., *Thanedar v. Time Warner, Inc.*, 2008 WL 8886544 at *11 (S.D.Tex. Oct. 7, 2008); *Malin v. Siemens Medical Solutions Health Services*, 638 F.Supp. 2d 492, 502 (D.Md. 2008).

3 E.g., Hogan and Hartson, "Whistle While You Work: Protecting your company from whistleblower threats under Sarbanes-Oxley," at 2, 6 (Nov. 16, 2006), available at http://www.hoganlovells.com/files/Event/591fad52-3453-4bd8-b251-83f77ccfaf73/Presentation/EventAttachment/96002708-319c-4ac9-af89-51eb4c08dfd3/SarbanesOxley.pdf, visited April 22, 2013.

4 John Gamble, "Whistleblower Claims; Sarbanes-Oxley Act," National Law Journal, April 3, 2006.

5 Brief for Respondent, 5-6, 50-51.

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. U.S.Br. 8. Since the enactment of section 1514A, on the other hand, there have been a large number of retaliation complaints and lawsuits by individuals directly employed by public companies themselves. The difference in the willingness of these two groups to disclose corporate misconduct is important, because, as the government itself emphasizes, the employees of accounting firms, mutual fund advisers and other contractors are the individuals "*most* likely to uncover and comprehend evidence of potential wrongdoing." (U.S.Br. 12)(emphasis added). That employees of contractors would be less willing to report such malfeasance is not at all surprising; Congress enacted section 1514A precisely because it believed that workers would be more willing to disclose fraud and securities violations if they were guaranteed legal protection from retaliation. The quite understandable comparative reluctance of contractor employees to report such misconduct counsels in favor of, not against, granting review to hold that section 1514A does indeed apply to employees of contractors.

The Solicitor General notes that:

> [d]espite the court of appeals' erroneous decision, whistleblowers who work for privately held accounting firms, law firms, and investment advisers to public companies will still be able to file complaints with the

> Secretary, who will still adjudicate those complaints to determine whether unlawful retaliation occurred, and the ARB will continue apply its decision in *Spinner* to claims outside of the First Circuit.

U.S.Br. 17. But potential whistleblowers need, and are entitled to, more than mere access to a time-consuming and potentially expensive formal administrative adjudication process, after which a circuit court could still decide that retaliation is actually lawful. Section 1514A is not going to encourage disclosures by the individuals who have critical information about corporate wrongdoing until and unless this Court resolves the current uncertainty regarding the scope of that provision.

II. ADDITIONAL LOWER COURT LITIGATION OF THE QUESTION PRESENTED WOULD SERVE NO USEFUL PURPOSE

(1) The five opinions in this case and *Spinner* are unusually exhaustive, encompassing a significantly more thorough and reflective body of lower court analysis than is presented by the typical circuit conflict. The Solicitor General does not suggest that future lower court decisions are likely to add anything to the exceptionally detailed analyses already set out in those decisions. The government correctly describes the opinions in *Spinner* as "comprehensive[]" and "extensive" (U.S. Br. 7, 15, 18), and the First Circuit opinion is equally thorough. In this Court the government's own brief regarding the merits of the question presented presages what could be expected if

subsequent lower court decisions addressed whether section 1514A applies to employees of contractors; the government's eight page analysis of the merits of this question, encompassing at least that many distinct issues, is avowedly an annotated summary of the arguments already made by lower court opinions in this case and *Spinner*. U.S.Br. 8-16.

The Solicitor General suggests that review by this Court should be delayed to permit the lower courts to consider whether the ARB decision in *Spinner* is entitled to *Chevron* deference. U.S.Br. 17-18. But the lower courts—including in this very case the First Circuit—are already in agreement that *Chevron* deference can be given to a formal agency adjudicatory decision. See Pet. App. 50a (citing *Welch v. Chao*, 536 F. 3d 269, 276 n. 2 (4th Cir. 2008)). Here, as in any case in which a party argues for *Chevron* deference, the appropriateness of deference would turn on whether the statutory language at issue is ambiguous. Thus if, as the Solicitor General proposes, the lower courts were called upon to decide whether the ARB's decision in *Spinner* is entitled to *Chevron* deference, that determination would turn on a single question, whether the language of section 1514A(a) unambiguously excludes employees of contractors and subcontractors. But that is the very textual issue that has already been exhaustively addressed by the five opinions in this case and *Spinner*.

(2) The Solicitor General suggests that certiorari be denied so that "the First Circuit . . . [would] be permitted to consider whether the ARB's decision in *Spinner* is entitled to *Chevron* deference." U.S.Br. 18.

But the First Circuit has already announced that it would not reconsider its decision in light of a subsequent ARB decision—which has now occurred in *Spinner*—and it is unlikely the First Circuit will have an opportunity to address this issue in some future case if this Court denies certiorari in the instant case, rather than remanding it for further consideration.

The First Circuit, anticipating that the ARB might later issue a definitive decision regarding the meaning of section 1514A, specifically and preemptively held that any such future ARB decision would not be entitled to deference. "[I]f there were an on-point holding of the ARB, it might be entitled to some deference as to any ambiguity in the statute. The point is irrelevant . . . . [W]e find no ambiguity, so no deference is owed." Pet.App. 50a.; see Pet.App. 22a ("[w]e do not think there is any ambiguity left"), 31a n. 15 ("we conclude that the text of § 1514A(a) is unambiguous in limiting whistleblower protection to employees of public companies"), 46a ("Because the term 'employee' in § 1514A(a) is not ambiguous, we would not defer to an administrative agency's contrary determination, even had Congress delegated authority to the agency [to promulgate substantive regulations]").

The government suggests that the First Circuit might now be persuaded by the reasoning of the ARB decision in *Spinner*. But the ARB's holding that section 1514A(a) is ambiguous assuredly will not cause the First Circuit to reconsider its contrary conclusion, because the ARB's analysis rests on the very textual arguments that the First Circuit itself has already

expressly rejected. *Compare* Pet. App. 16a-22a *with id.* at 148a-52a.

If the Court wishes to "permit [the First Circuit] to consider whether the ARB's decision in *Spinner* is entitled to *Chevron* deference" (U.S.Br. 18), the Court should not deny certiorari. It is quite unlikely that, if certiorari were denied in the instant case, the First Circuit would in the future have an opportunity to address the issue in some other case. The panel decision below is binding on district courts and panels in the First Circuit. No employee who understood that situation would risk retaliatory dismissal on the remote chance that, after his or her claim had necessarily been rejected by a district court and appeals panel in that circuit, the First Circuit would grant rehearing en banc, a course of action that circuit has already rejected. Similarly, no prudent attorney would accept a case which could only succeed if rehearing en banc were granted. Denial of certiorari in the instant case will in all likelihood assure that the First Circuit will never again address the question presented.

If this Court believes that there is a reasonable probability that the First Circuit would now defer to the ARB decision in *Spinner*, and wishes to accord the First Circuit an opportunity to decide whether to do so, the Court should grant certiorari, vacate the decision of the court of appeals, and remand the case for further consideration in light of *Spinner*. See *Lawrence v. Chater*, 516 U.S. 163, 167 (1996)(per curiam). The May 2012 ARB decision in *Spinner* is an intervening event occurring subsequent to the February 2012 court of

appeals' decision and the April 2012 denial of rehearing en banc. See *id.* at 168; *Stutson v. United States,* 516 U.S. 163, 180 (Scalia, J., dissenting)(1996). This Court has GVR'd petitions in analogous situations in which the intervening development was persuasive although not necessarily controlling authority[6], on several occasions doing so at the recommendation of the Solicitor General.[7]

If, on the other hand, the Court concludes that there is no reasonable probability that the First Circuit would on remand defer to the ARB decision in *Spinner*, the Court should grant certiorari. Absent a change in the First Circuit's interpretation of section 1514A, decisions in other circuits can only deepen the split, conflicting either with the decision of the First Circuit or with the decision of ARB, while offering no greater development of the merits of the question presented.

(3) The Solicitor General—but not the SEC–argues that it would be "premature" for this Court to resolve whether section 1514A protects employees of

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6 See, e.g., *Mouelle v. Gonzales*, 548 U.S. 901 (2006)(case remanded "for further consideration in light of 71 Fed. Reg. 27,585"); *Long Island Care At Home, Ltd. v. Coke*, 546 U.S. 1147 (2006)(case remanded "for further consideration in light of the Department of Labor's Wage and Hour Advisory Memorandum No. 2005-1"); *Slekis v. Thomas*, 525 U.S. 1098 (1999)(case remanded "for further consideration in light of the interpretive guidance issued by the Health Care Financing Administration on September 4, 1998").

7 See, e.g., Brief for Respondent, *Mouelle v. Gonzales*, at 26; Brief for the United States as Amicus Curiae, *Long Island Care At Home, Ltd. v. Coke*, at 20.

accounting firms, law firms, and mutual fund advisers. (U.S.Br. 17). If this were 2006, that would be true. After all, back then it appeared that events such as the Enron collapse were isolated aberrations, that the financial markets were strong, that established investment banks like Lehman Brothers were expanding into promising areas, that up and coming banks such as Countrywide Financial were creative innovators, that Fannie Mae and Freddie Mac were backstopping the mortgage industry at no cost to the federal government, that new financial products like collateralized debt obligations and synthetic derivatives were opening exciting low-risk opportunities to investors, and that financial institutions could guard against any unforeseen problems by purchasing insurance from AIG. In 2006 it might not have been important to clarify whether accountants, auditors, lawyers and mutual fund analysts are protected by section 1514A because, after all, there were no serious problems that they could have disclosed. Or so it seemed at the time.

Today we know better. At the cost of millions of jobs, hundreds of billions of taxpayer dollars and enormous investment losses, we have relearned the importance of protecting disclosure of corporate fraud and securities violations. And yet more than a decade after the adoption of Sarbanes Oxley, hundreds of thousands of outside accountants, auditors, lawyers, and mutual fund employees—"many of the employees in the best position to discover and report corporate fraud" (U.S.Br. 7)—still do not know whether section 1514A protects *them* from retaliation for reporting such unlawful actions. At a time when the consequences of

the 2007 financial collapse still reverberate throughout the economy, when the discovery and reporting of corporate misconduct are matters of pressing national concern, resolution by this Court of that critical question would be not premature but exceptionally timely.

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, certiorari should be granted, the decision below should be vacated, and the case remanded to the First Circuit for reconsideration in light of the ARB decision in *Spinner v. David Landau and Associates*.

Respectfully submitted,

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