

No. 12-3

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In the Supreme Court of the United States

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JACKIE HOSANG LAWSON AND JONATHAN M. ZANG,  
PETITIONERS

v.

FMR, LLC, ET AL.

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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE  
SUPPORTING PETITIONERS

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### **QUESTION PRESENTED**

Whether an employee of a privately held contractor or subcontractor of a public company is protected from retaliation by 18 U.S.C. 1514A.

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE  
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## **INTEREST OF THE UNITED STATES**

This case presents the question whether an employee of a contractor or subcontractor of a public company is protected from retaliation by 18 U.S.C. 1514A. The Department of Labor is charged with interpreting and enforcing this anti-retaliation provision through administrative adjudication, see 18 U.S.C. 1514A(b), and its Administrative Review Board has issued a precedential decision addressing the question presented, see *Spinner v. David Landau & Assocs., LLC*, Nos. 10-111 & 10-115, 2012 WL 1999677, at \*2 (May 31, 2012) (Pet. App. 136a-199a). The Securities and Exchange Commission (SEC) is responsible for enforcing the federal securities laws and has an interest in ensuring that persons report potential violations of those laws. Accordingly, the United States has a substantial interest in the disposi-

tion of this case. At the invitation of this Court, the United States filed an amicus brief at the petition stage of this case.

#### STATEMENT

1. Congress enacted the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (Sarbanes-Oxley Act or Act), to protect investors in public companies and restore trust in the financial markets in the aftermath of the collapse of Enron Corporation. *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3147 (2010); S. Rep. No. 146, 107th Cong., 2d Sess. 2-5 (2002) (Senate Report). One particular issue Congress addressed was the lack of legal protection for persons who report corporate fraud.

To address that concern, Congress enacted 18 U.S.C. 1514A. As applicable to the events in this case, Section 1514A provides:

No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), 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

in providing information to a federal agency, Congress, or a supervisor regarding any conduct the employee reasonably believes violates certain federal fraud statutes or an SEC rule or regulation. 18 U.S.C. 1514A(a);

see Sarbanes-Oxley Act § 806, 116 Stat. 802 (enacting Section 1514A).<sup>1</sup>

Put more simply, the statute prohibits retaliation by a public company<sup>2</sup>—or an officer, employee, contractor, subcontractor, or agent of a public company—against “an employee” who reports fraud or a violation of securities regulations. The question in this case is whether “an employee” includes an employee of a contractor or subcontractor of a public company, or refers only to an employee of the public company itself.

2. Congress has granted the Secretary of Labor the authority to enforce Section 1514A through administrative adjudication. See 18 U.S.C. 1514A(b)(1)(A) and (2)(A) (incorporating 49 U.S.C. 42121(b)). A person who alleges retaliation because he or she reported fraud or violation of SEC rules may file a complaint with the Secretary. 18 U.S.C. 1514A(b)(1)(A); 29 C.F.R. 1980.103. The Occupational Safety and Health Administration (OSHA) then undertakes an investigation, makes findings, and enters an initial order. 49 U.S.C. 42121(b)(2)(A) (made applicable by 18 U.S.C. 1514A(b)(2)); 29 C.F.R. 1980.104, .105; see 77 Fed. Reg. 3912 (Jan. 25, 2012). If no party objects to that order, it becomes the agency’s final decision. 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1980.105(c). If there is an

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<sup>1</sup> Following the events in this case, Congress amended Section 1514A to add other entities as covered employers. See pp. 30-31, *infra*. Unless otherwise noted, all citations to Section 1514A are to the unamended text in the 2006 edition of the United States Code.

<sup>2</sup> This brief uses the term “public company” to refer to a company with a class of securities registered under Section 12 of the Securities Exchange Act and those required to file reports under Section 15(d) of the Securities Exchange Act, and “publicly traded company” to refer only to a company with securities registered under Section 12 of the Securities Exchange Act. See Pet. App. 13a.

objection, an administrative law judge (ALJ) holds a hearing and issues a decision. 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1980.106, .107, .109. The ALJ's decision may be appealed to the agency's Administrative Review Board (ARB). See 29 C.F.R. 1980.110; see 77 Fed. Reg. 69,378 (Nov. 16, 2012).

Final decisions of the ARB are reviewable in the federal courts of appeals under the Administrative Procedure Act. See 18 U.S.C. 1514A(b)(1) and (2)(A); 49 U.S.C. 42121(b)(4)(A); see also 5 U.S.C. 706(2)(A) and (E). If the ARB does not issue a final decision within 180 days of the filing of the administrative complaint, and the delay is not due to the bad faith on the part of the complainant, that person may file suit in federal district court. See 18 U.S.C. 1514A(b)(1)(B). An employee who makes out a claim of retaliation is "entitled to all relief necessary to make the employee whole," including reinstatement, back pay with interest, and fees and costs. 18 U.S.C. 1514A(c).

3. Petitioners are two former employees of respondents who allege that respondents retaliated against them for reporting fraud affecting Fidelity mutual funds. Pet. App. 3a-5a, 7a. Respondents are privately held companies that provide investment advice and management services to the Fidelity mutual funds. *Id.* at 3a-4a, 7a, 13a. The Fidelity mutual funds are public companies with no employees of their own; their day-to-day operations are carried out by employees of investment advisers like respondents, under contracts approved by the mutual funds' board of trustees. *Id.* at 3a-4a, 26a, 78a-79a.

Petitioners each filed a whistleblower complaint with the Department of Labor. Pet. App. 5a, 7a. Lawson, a former finance director for Fidelity Brokerage, alleged

that she had been constructively discharged in retaliation for reporting allegedly wrongful accounting and fee practices for certain Fidelity mutual funds. *Id.* at 7a, 79a-82a. Zang, a former research analyst and portfolio manager for several Fidelity mutual funds, contended that his employment was terminated because he informed his supervisors about conflicts of interests and alleged errors in a draft SEC-required disclosure. *Id.* at 5a, 84a-86a.

4. Petitioners filed suit in federal district court after the Department of Labor had not issued a final decision within 180 days of either complaint. Pet. App. 6a-8a, 82a-83a, 87a. Respondents sought to dismiss both complaints on the ground that employees of contractors and subcontractors of public companies are not protected by Section 1514A. *Id.* at 8a.

The district court denied the motions to dismiss, holding that an employee of a contractor or subcontractor of a public company is protected from retaliation under 18 U.S.C. 1514A when he or she reports fraud against shareholders. Pet. App. 96a-123a. The court explained that limiting protection to only employees of the public company itself would be “an excessively forced and formalistic reading” of the statute that is not mandated by its text and would undermine its purpose of encouraging insiders to report corporate fraud. *Id.* at 98a-99a, 115a-116a.

5. a. The court of appeals reversed. Pet. App. 1a-75a. The court concluded that the “more natural” reading of Section 1514A is that “only the employees of the defined public companies are covered.” *Id.* at 15a-17a. The court based that conclusion on the section’s heading, which refers to “employees of publicly traded companies,” *id.* at 19a-22a; on other statutes in which Con-

gress used what the court regarded as more specific language to regulate private companies, *id.* at 22a-33a; and on general statements in a congressional report and by individual legislators about protecting “employees of publicly traded companies,” *id.* at 37a-40a. The court declined to defer to the position of the Department of Labor because the regulations embodying that position are procedural, because the court believed Section 1514A to be unambiguous, and because there was “no ARB holding on point.” *Id.* at 46a-51a.

b. Judge Thompson dissented, explaining that the majority’s view “impose[s] an unwarranted restriction on the intentionally broad language of” Section 1514A and “bar[s] a significant class of potential securities-fraud whistleblowers from any legal protection.” Pet. App. 52a.

6. After the court of appeals’ decision in this case, the ARB issued its precedential decision in *Spinner v. David Landau & Associates, LLC*, *supra*. In *Spinner*, the ARB conducted an extensive analysis of the text, statutory framework, legislative history, and statutory purposes, and concluded that Section 1514A applies to an employee of a privately held firm that contracts with a public company. Pet. App. 145a-146a, 166a.

#### SUMMARY OF ARGUMENT

Employees of contractors and subcontractors of public companies are protected from retaliation under 18 U.S.C. 1514A when they report fraud or violation of SEC rules.

A. Congress has charged the Secretary of Labor with enforcing Section 1514A through administrative adjudication. The Department of Labor’s Administrative Review Board (ARB) has concluded that Section 1514A protects employees of contractors and subcon-

tractors of public companies from retaliation. See *Spinner v. David Landau & Assocs., LLC*, Nos. 10-111 & 10-115, 2012 WL 1999677, at \*2 (May 31, 2012) (Pet. App. 136a-199a). The ARB’s decision is entitled to deference under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), so long as it is a reasonable reading of the statute. The ARB’s conclusion that Section 1514A reaches employees of contractors and subcontractors is not only reasonable but correct.

B. Section 1514A’s text encompasses employees of contractors and subcontractors of public companies. It provides that no public company “or any officer, employee, contractor, subcontractor, or agent of such company” may retaliate against “an employee.” 18 U.S.C. 1514A(a). In context, it is clear that an “employee” is a person employed by one of the listed employers to which the prohibition on retaliation applies. There is no limiting language that confines Section 1514A to an employee of a public company.

Further, Section 1514A provides that a listed entity or individual may not “discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment,” 18 U.S.C. 1514A(a), and that a successful complainant is entitled to “reinstatement with the same seniority status” and “back pay,” 18 U.S.C. 1514A(c)(2). A contractor or subcontractor typically would not have the authority to take those actions with respect to an employee of a public company.

The court of appeals limited Section 1514A’s reach based on the statute’s headings, but they are merely short-hand descriptions of the statute and cannot override the statute’s text.



C. Interpreting Section 1514A to protect employees of contractors and subcontractors of public companies is necessary to further the statutory purposes. Congress enacted the Sarbanes-Oxley Act in the wake of the collapse of Enron Corporation. One particular concern was that contractors and subcontractors, such as Arthur Andersen, were active participants in Enron's fraud and its cover-up. When employees of those contractors attempted to report fraud, they were retaliated against.

Congress enacted Section 1514A so that these insiders would be willing to report fraud and violation of SEC rules. For the statute's protection to be effective, it must apply not only to employees of public companies, but also to contractor and subcontractor employees. That approach is consistent with the Sarbanes-Oxley Act generally; the Act contains numerous provisions that regulate accountants, auditors, and lawyers who work with public companies.

D. The court of appeals' rule creates significant and unwarranted gaps in whistleblower protection for many of the employees in the best position to discover and report corporate fraud. The employees of contractors that Congress clearly intended to reach—employees of Arthur Andersen—would not be covered. Mutual funds also would not be covered by Section 1514A, because they typically have no employees of their own and rely entirely on investment advisers. Lawyers, too, would be in a precarious position, because another part of the Sarbanes-Oxley Act requires them to report violations of securities laws internally, yet they would have no protection against retaliation under Section 1514A for making those reports.

E. Respondents' arguments against deference lack merit. Even before the decision in *Spinner*, the ARB

had not limited Section 1514A to employees of public companies, and the agency had stated this understanding in its procedural regulations. Congress has charged the Department of Labor with enforcing more than two dozen anti-retaliation statutes, recognizing the agency's substantial expertise. *Chevron* deference is appropriate here.

## ARGUMENT

### EMPLOYEES OF CONTRACTORS AND SUBCONTRACTORS OF PUBLIC COMPANIES ARE PROTECTED FROM RETALIATION BY 18 U.S.C. 1514A

The Department of Labor, through the Administrative Review Board, has issued a precedential decision in *Spinner v. David Landau & Associates, LLC, supra*, holding that employees of a contractor or subcontractor of a public company are protected by Section 1514A. That interpretation is entitled to *Chevron* deference. It is not only a permissible interpretation of the statute, but it is the better one.

#### A. The Administrative Review Board's Decision In *Spinner* Is Entitled To *Chevron* Deference

1. Under the rule of agency deference set out in *Chevron U.S.A. Inc. v. NRDC, supra*, “[w]hen a court reviews an agency’s construction of the statute which it administers,” it asks “whether Congress has directly spoken to the precise question at issue.” *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013) (quoting *Chevron*, 467 U.S. at 842-843). If Congress has not, then the “agency’s answer” is controlling so long as it is “based on a permissible construction of the statute.” *Ibid.*

This rule of deference is based on the principle that when Congress has “left ambiguity in a statute meant for implementation by an agency,” it “understood that

the ambiguity would be resolved, first and foremost, by the agency” and “desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.” *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740-741 (1996). In light of this longstanding rule, “Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency.” *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999).

2. The Secretary of Labor is charged with enforcing Section 1514A through administrative adjudication. Congress granted the Secretary authority to investigate and adjudicate whistleblower complaints, which necessarily includes the authority to interpret the statute in the course of those activities. 18 U.S.C. 1514A(b) (incorporating procedures in 49 U.S.C. 42121(b)); see, e.g., *SEC v. Zandford*, 535 U.S. 813, 819-210 (2002) (agency’s authority to administer statute through adjudication includes authority to interpret statute). The Secretary has delegated the authority to issue final agency decisions on Section 1514A claims to the ARB. See 77 Fed. Reg. at 69,378 (Nov. 16, 2012); see also 29 C.F.R. 1980.110(a).

The ARB’s interpretation of ambiguous statutory text, rendered “in the context of formal adjudication,” is “entitled to deference if it is reasonable.” *Zandford*, 535 U.S. at 819-820; see *United States v. Mead Corp.*, 533 U.S. 218, 229-230 & n.12 (2001). The courts of appeals have routinely applied the *Chevron* framework and accorded deference to the ARB’s interpretations of Section 1514A. See, e.g., *Lockheed Martin Corp. v. Administrative Review Bd.*, 717 F.3d 1121, 1131 (10th Cir. 2013); *Wiest v. Lynch*, 710 F.3d 121, 131 (3d Cir. 2013);

*Welch v. Chao*, 536 F.3d 269, 276 & n.2 (4th Cir. 2008), cert. denied, 556 U.S. 1181 (2009).

3. The ARB in *Spinner* set out its considered position on the question presented in this case, holding that employees of contractors and subcontractors of public companies are protected from retaliation by 18 U.S.C. 1514A. Pet. App. 166a. The ARB conducted a comprehensive analysis of Section 1514A, which began with the statute’s text and context, *id.* at 146a-154a, then considered its purposes, *id.* at 154a-160a, the broader statutory framework, *id.* at 160a-161a, and the interpretations of analogous whistleblower statutes, *id.* at 161a-166a. The ARB also noted that the Department had taken the view (in prior ARB decisions and in regulations) that Section 1514A’s protection is not limited to employees of public companies. *Id.* at 142a-143a.

The ARB’s comprehensive analysis in *Spinner* provides an authoritative interpretation of the statute. That authoritative interpretation is correct.

**B. Section 1514A’s Plain Text Encompasses Employees Of Contractors And Subcontractors Of Public Companies**

1. The ARB began its analysis with “the language of the statute itself.” Pet. App. 148a (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990)). By its plain text, Section 1514A protects employees of contractors and subcontractors from retaliation when they report fraud or violation of SEC regulations.

Section 1514A provides that “[n]o company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), 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*” who reports fraud or violation of SEC rules. 18 U.S.C. 1514A(a) (emphasis added). The statute first names a broad range of entities and individuals who are prohibited from engaging in retaliation—a public company or “any officer, employee, contractor, subcontractor, or agent” of “such company.” The statute then defines the prohibited conduct—“discharge, demote, suspend, threaten, harass, or in any other manner discriminate.” And then it identifies the person protected from such impermissible retaliation—“an employee.”

The statute does not define the term “an employee,” thereby creating some initial ambiguity about whose employees Congress meant to protect. But in context, the meaning is clear: the “employee[s]” protected by Section 1514A are employees of the employers identified in the preceding part of the sentence. The statute’s text “does not restrict its application to employees of publicly held companies.” Pet. App. 148a. Rather, it protects from retaliation “an employee” of any of the covered employers. Those are the people the covered employers would have the motivation and means to retaliate against.

2. The court of appeals read “an employee” to refer only to an employee of a public company. Pet. App. 15a-16a. But if Congress had intended the term “an employee” to be limited to certain employees, it easily could have said so. For example, Congress could have “statutorily defin[ed] the term ‘employee’” to include only some employees of the covered employers. *Id.* at 148a. Or Congress could have added limiting language after “an employee,” such as “an employee of a company reg-

istered under Section 12 or required to file under Section 15(d) of the Exchange Act”—or, more simply, “an employee of such company.” See *id.* at 148a, 150a. But Congress did neither of these things.

Congress’s omission of limiting language is particularly significant because Congress included limiting language earlier in the same sentence. Congress specified the entities and individuals to which the prohibition on retaliation applies: a public company, or “any officer, employee, contractor, subcontractor, or agent *of such company*.” 18 U.S.C. 1514A(a) (emphasis added). But then in defining the employees protected from retaliation, Congress simply said “an employee,” rather than “an employee *of such company*.” That omission must be presumed intentional. See, e.g., *Pacific Operators Offshore, LLP v. Valladolid*, 132 S. Ct. 680, 688 (2012).

The absence of that limitation is consistent with Congress’s use of broad language throughout Section 1514A to provide expansive protection for persons who report corporate fraud or violation of SEC rules. Section 1514A lists a wide variety of entities and individuals whose conduct is governed by the statute and provides an exhaustive list of the prohibited means of retaliation. The statute applies to “any” specified entity or individual who discriminates in any of the listed ways or “in any other manner” in response to “any” lawful act done by the employee to report “any” conduct that constitutes fraud or violation of SEC rules. See *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (“any” is a term of “breadth”); see also Pet. App. 52a (Thompson, J., dissenting) (noting the statute’s “intentionally broad language”). If Congress had intended to narrow Section 1514A’s reach so that it applied only to a subset of em-

employees who experienced retaliation, Congress could be expected to have made its intention clear.

3. Other text in Section 1514A reinforces the conclusion that “an employee” includes an employee of a contractor or subcontractor. Section 1514A(a) provides that a covered entity or individual may not “discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment.” 18 U.S.C. 1514A(a). If a contractor or subcontractor were taking such action, the most likely target would be its own employees, and the most natural reading of the quoted text is that it focuses on that very conduct by the contractor or subcontractor as the employer of the affected “employee.”

Further, Section 1514A specifies that the protected conduct of an “employee” includes furnishing information not only to a federal agency, or a Member or committee of Congress, but also to “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).” 18 U.S.C. 1514A(a)(1)(C) (emphases added); see also 18 U.S.C. 1514A(a)(2) (similarly referring to the “employer” in specifying other protected conduct). The complaint procedure set out in the statute likewise refers to “the employer” of an employee. See 18 U.S.C. 1514A(b)(2) (notice of complaint must be given to “the employer”); 49 U.S.C. 42121(b)(2)(B)(ii) and (iv) (“the employer” may demonstrate, by clear and convincing evidence, that it would have taken the same personnel action despite the employee’s protected behavior) (incorporated by 18 U.S.C. 1514A(b)(2)). The statute thus plainly is addressed to retaliation in the “employee”-“employer” relationship, and accordingly, applies to

contractors and subcontractors who retaliate against their own employees.

In the court of appeals' view (Pet. App. 17a), however, Congress intended to regulate contractors and subcontractors only when they retaliate against employees of a public company, not against their own employees. Aside from ignoring the natural import of the language Congress chose, that approach renders the statute's references to "contractors" and "subcontractors" largely superfluous. That is because it is "difficult to think of circumstances that would \* \* \* enable a [contractor or] subcontractor to discharge, demote, or suspend the employee of a public company." Pet. App. 101a-102a. It also is difficult to imagine how a contractor or subcontractor could "in any other manner discriminate" against an employee of a public company in that employee's "terms and conditions of employment" with the public company. *Id.* at 150a. The court of appeals hypothesized a situation in which a public company might "contract[] with an ax-wielding specialist" to fire employees. *Id.* at 19a n.11. But in those circumstances, the specialist would be an "agent" of the public company—and an "agent" is separately listed in Section 1514A. See *id.* at 150a-151a.

Further, as the ARB noted in *Spinner*, Section 1514A provides that a successful complainant is entitled to "all relief necessary to make the employee whole," including "reinstatement with the same seniority status" and "back pay." See Pet. App. 150a. It is difficult, if not impossible, to see how a contractor or subcontractor could provide those remedies to an employee of a public company, because a contractor or subcontractor generally would not have the authority to reinstate an employee of a public company to his or her former position



following a successful lawsuit. See *ibid.* And if a contractor or subcontractor had such authority, it likely would be acting as the public company’s “agent.” See *ibid.*

Respondents contend (Supp. Br. in Opp. 5) that the ARB’s interpretation creates the anomaly that a household employee of an officer or employee of a public company would be protected from retaliation by Section 1514A. The ARB has considered and rejected that contention, explaining that the prohibition against an “officer” or “employee” retaliating against “an employee” is meant to impose personal liability on corporate officers and employees who are involved in retaliation against other employees of their employer. Pet. App. 149a (citing 69 Fed. Reg. 52,104, 52,105 (Aug. 24, 2004)); see also, e.g., *Kalkunte v. DVI Fin. Servs., Inc.*, Nos. 05-139 & 05-140, 2009 WL 564738, at \*8 (ARB Feb. 27, 2009). In such a case, the “employee” who is the victim of retaliation would be an employee of the public company. But that does not mean that employees of public companies are the only ones protected by Section 1514A, because such a reading would make no sense with respect to contractors and subcontractors.

4. Section 1514A’s prohibition against retaliation and its administrative enforcement procedures were borrowed from the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. 42121. See S. Rep. No. 146, 107th Cong., 2d Sess. 13, 19, 30 (2002) (Senate Report); Pet. App. 28a-29a. AIR 21 provides that “[n]o air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment” when the employee provides

information to his or her employer or federal authorities about an air safety violation. 49 U.S.C. 42121(a). AIR 21 and Section 1514A use the same framework to prohibit retaliation against whistleblowers, both prohibiting a type of company and any “contractor or subcontractor” of such a company from retaliating against “an employee” who reports wrongdoing. The ARB has consistently construed AIR 21 to cover employees of contractors and subcontractors, see *Evans v. Miami Valley Hosp.*, Nos. 07-118 & 07-121, 2009 WL 1898238, at \*5-\*6 (June 30, 2009); see also Pet. App. 161a-166a, and the Department of Labor has embodied that interpretation in regulations implementing AIR 21 since April 1, 2002—before Section 1514A was enacted, see 67 Fed. Reg. 15,454, 15,458 (2002).

The court of appeals acknowledged that the AIR 21 anti-retaliation provision protects employees of contractors and subcontractors, but found AIR 21 distinguishable because it specifically defines the term “contractor” and does not include an “officer” and “employee” in the list of those against whom the prohibition runs. Pet. App. 29a-30a. Those textual differences are beside the point. What matters here is that both statutes provide that a “contractor” and “subcontractor” of certain companies cannot retaliate against “an employee,” and “employee” is naturally understood and has been authoritatively construed by the agency in both contexts to refer to an employee of the contractor or subcontractor. Section 1514A and the anti-retaliation provision in AIR 21 “should be interpreted consistently” because of their parallel statutory text and purposes. *Id.* at 165a.

5. The court of appeals also relied on the headings in Section 1514A to limit the statute’s reach. That was error. A statute’s heading may be a helpful aid in inter-

preting “some ambiguous word or phrase,” but it “cannot limit the plain meaning of the text.” *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 528-529 (1947). That is particularly true where the title and caption simply provide “a short-hand reference to the general subject matter involved.” *Id.* at 528. Here, the text of the statute itself shows that the headings are not meant to be comprehensive.

There are three headings of relevance: (1) the heading of Section 1514A itself—“Civil action to protect against retaliation in fraud cases,” 18 U.S.C. 1514A (heading); (2) the heading of subsection (a) of Section 1514A—“Whistleblower Protection for Employees of Publicly Traded Companies,” 18 U.S.C. 1514A(a) (heading); and (3) the heading of the relevant section in the public law in which Section 1514A was enacted—“Protection For Employees of Publicly Traded Companies Who Provide Evidence of Fraud,” Sarbanes-Oxley Act § 806, 116 Stat. 802. The court of appeals relied (Pet. App. 19a-22a) on the second and third of these to conclude that the statute protects only “employees of publicly traded companies.”

But the text of Section 1514A reaches beyond those headings. For example, Section 1514A plainly protects more than employees of “publicly traded companies”—even under the court of appeals’ interpretation, it also protects employees of companies that are not publicly traded but are “required to file reports under section 15(d) of the Securities Exchange Act of 1934.” 18 U.S.C. 1514A(a); see Pet. App. 13a. Also, Section 1514A is not limited to employees who report evidence of “fraud”; it also includes employees who report violations of “rule[s] or regulation[s] of the Securities and Exchange Commission.” 18 U.S.C. 1514A(a)(1). And of course, the

heading of Section 1514A as a whole—“Civil action to protect against retaliation in fraud cases”—is not limited to employees of public companies. 18 U.S.C. 1514A (heading).

The headings on which the court of appeals relied therefore are merely a “short-hand reference to the general subject matter involved.” Pet. App. 151a (quoting *Brotherhood of R.R. Trainmen*, 331 U.S. at 528-529). It was “reasonable” for Congress to use these headings for a provision that covers both employees of public companies and “employees of their related entities,” because “all protected employees would have some connection to public companies, even if indirectly,” and because a title and caption that included all of the “complicated clauses and concepts” in the statute’s text would be cumbersome. *Id.* at 107a-108a; see *Brotherhood of R.R. Trainmen*, 331 U.S. at 528 (“Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner.”). The court of appeals erred in finding the headings dispositive.

**C. Interpreting Section 1514A To Cover Employees Of Contractors And Subcontractors Furthers The Statutory Purposes**

1. Considering Section 1514A’s text “in conjunction with the purpose and context” makes clear that “only one interpretation is permissible,” *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1331 (2011)—the statute protects employees of contractors and subcontractors.

Section 1514A was enacted “as part of the comprehensive effort contained in the Sarbanes-Oxley Act \* \* \* to address corporate fraud.” Pet. App. 146a. The Senate Report explains that “[i]n the wake of the con-

tinuing Enron Corporation \* \* \* debacle, the trust of the United States' investors and pensioners in the nation's stock market has been seriously eroded." Senate Report 2. Congress sought to "close gaps in the securities laws" that the collapse of Enron had exposed. Pet. App. 189a (Brown, J., concurring); see Senate Report 6-8.

The Senate Report (at 3) recounts that Enron concocted a scheme to "cook the books" and "trick both the public and federal regulators about how well Enron was doing," and that Enron was able to commit that fraud because of the "extensive participation" of Arthur Andersen—an Enron contractor—"which was simultaneously serving as both consultant and 'independent' auditor for Enron." With "sophisticated professional advice" and using "complex financial structures," Enron and Arthur Andersen "paint[ed] for the investing public a very different picture of the company's financial health than the true picture revealed." *Ibid.* When investors and regulators started asking questions, Arthur Andersen orchestrated the cover-up, "shredding 'tons' of documents," "purg[ing] [its] hard drives" of Enron files, and "encouraging" Enron to destroy documents. *Id.* at 4.

Enron and Arthur Andersen also took steps to ensure that none of their employees would report the fraud. "In a variety of instances when corporate employees at both Enron and Andersen attempted to report or 'blow the whistle' on fraud, \* \* \* they were discouraged at nearly every turn." Senate Report 4-5. For example, a "senior Enron employee" attempted to report "accounting irregularities," and Enron sought advice from outside counsel whether it could be legally liable if it fired the employee. *Id.* at 5. (The answer was no. *Ibid.*) A

“top Enron risk management official” was “cut off from financial information and later resigned” because he had “repeatedly warn[ed] \* \* \* of improprieties in some of the company’s off-balance sheet partnerships.” *Ibid.*

An “Andersen partner” who “expressed reservations about the firm’s financial practices” was “removed from the Enron account” in retaliation for doing so. Senate Report 5. And a “financial adviser at UBS Paine Webber”—another Enron contractor—“was fired for e-mailing his clients to advise them to sell Enron stock.” *Ibid.* This “corporate code of silence” allowed “ongoing wrongdoing [to] occur with virtual impunity,” creating “serious and adverse” consequences for investors. *Ibid.*

2. Section 1514A must be interpreted to protect contractor and subcontractor employees to accomplish its purposes. As the ARB observed, “Congress plainly recognized that outside professionals—accountants, law firms, contractors, agents, and the like—were complicit in, if not integral to, the shareholder fraud and subsequent cover-up” perpetrated by Enron. Pet. App. 158a. The Senate Report specifically recounts the roles of several Enron contractors, including Arthur Andersen, UBS Paine Webber, and other outside auditors and lawyers. See Senate Report 2-5, 10-11, 18-21. The Senate Report expresses dismay that “[i]nstead of acting as gatekeepers who detect and deter fraud, it appears that Enron’s accountants and lawyers brought all their skills and knowledge to bear in assisting the fraud to succeed and then in covering it up.” *Id.* at 20-21.

Congress knew it must change “the incentive system” so that “accountants and lawyers who come across fraud in their work” will be willing to report it rather than “remain[ing] silent.” Senate Report 21. Congress recognized that employees of contractors—especially ac-

countants, auditors, and lawyers—are often in the best position to uncover fraud. See *id.* at 4-5; Pet. App. 156a. These are the “firsthand witnesses to the fraud” who can provide information about “who knew what, and when.” Senate Report 10.

3. The court of appeals relied on general statements in the legislative record about how Section 1514A “would provide whistleblower protection to employees of publicly traded companies” to conclude that Section 1514A protects *only* employees of public companies. See Pet. App. 38a (quoting Senate Report 13); see also *id.* at 18-19; 148 Cong. Rec. 2947 (2002) (statement of Sen. Leahy). That reliance was misplaced, because the cited statements are merely short-hand generalizations about the statute. None of them addresses the question whether Section 1514A applies only to employees of public companies. Pet. App. 152a.

“[N]othing in the legislative history” shows an affirmative congressional intent to “limit whistleblower protection to employees of public companies”; instead, the legislative record “refers positively to extending whistleblower protection in order to encourage the reporting of securities fraud.” Pet. App. 60a-61a (Thompson, J., dissenting). The Senate Report identified “protect[ing] whistleblowers who report fraud against retaliation *by their employers*” as one of the key purposes of the Sarbanes-Oxley Act, recognizing that the likely source of retaliation against an employee would be his or her own employer. Senate Report 2 (emphasis added). And in the one instance in which the legislative record specifically addresses the application of the anti-retaliation provision to employees of contractors, it reflects the view that employees of contractors such as

Arthur Andersen and UBS Paine Webber must be protected. See *id.* 4-5.

4. Respondents contend (Br. in Opp. 25-26) that applying Section 1514A to employees of contractors of public companies would extend the statute's coverage to "every employee of every privately held employer." They are mistaken. As the ARB explained, the statute "contains built-in limitations." Pet. App. 166a. Section 1514A applies not to all employees of all contractors of public companies, but only to those who have been retaliated against because they reported fraud against shareholders, violations of four federal anti-fraud laws, or violation of SEC rules and regulations to certain people (a supervisor or other person working for the employee's employer who can investigate misconduct, a Member or committee of Congress, or federal authorities), or participated in a proceeding concerning such a violation. 18 U.S.C. 1514A(a)(1)-(2); see Pet. App. 166a. That is precisely the protection against retaliation that Congress believed necessary to avoid another significant blow to the Nation's financial markets. Senate Report 5, 10, 19-21.

Nor is Section 1514A's application to contractors of public companies anomalous in the context of the Sarbanes-Oxley Act as a whole. "Throughout Sarbanes-Oxley, Congress consistently imposes regulations, obligations, and sanctions upon the contractors, subcontractors, and agents of such companies." Pet. App. 193a & n.73 (Brown, J., concurring). Title I of the Act expands oversight of accounting firms, their outside auditors, and associated persons in order to ensure that audit reports are accurate. See Act §§ 101-107, 116 Stat. 750-768; see also Act § 2(a)(9), (11) and (12), 116 Stat. 747-748. Title II places requirements on auditors to ensure



their independence, so that a company may not serve both as a consultant and outside auditor, as Arthur Andersen did for Enron. See Act §§ 201-206, 116 Stat. 771-775. Title III includes a provision directing the SEC to adopt rules requiring lawyers representing a public company before the SEC to report material securities law violations and breaches of fiduciary duty internally. Act § 307, 116 Stat. 784 (enacting 15 U.S.C. 7245); 17 C.F.R. Pt. 205; see also pp. 27-28, *infra*. Title V sets out rules for securities analysts to avoid conflicts of interest. See Act § 501, 116 Stat. 791-793. Title VI includes a provision codifying the authority of the SEC to discipline lawyers and employees of public accounting firms and their related entities who engage in professional misconduct. Act § 602, 116 Stat. 794. Title VIII, which includes the provision at issue here, also includes criminal penalties applicable to anyone who has committed destruction-of-evidence and fraud offenses. See Act §§ 802, 806, 807, 116 Stat. 800-801, 802-804. Titles IX and XI provide other criminal penalties applicable to any person who has committed the defined offenses. Act §§ 901-905, § 1107, 116 Stat. 804-806, 810.

Section 1514A's application to employees of contractors and subcontractors thus "fits both with [its] specific whistleblower-protection purpose" and with numerous other provisions of the Act that further its "broader anti-fraud purpose." Pet. App. 60a-61a (Thompson, J., dissenting).

**D. The Court Of Appeals' Reading Of Section 1514A Leaves Significant And Unwarranted Gaps In Protection Against Retaliation**

1. Limiting Section 1514A's protection against retaliation to employees of public companies would "bar a significant class of potential securities-fraud whistle-

blowers from any legal protection.” Pet. App. 52a (Thompson, J., dissenting). As the ARB explained, construing Section 1514A “as only protecting employees of publicly traded companies would leave unprotected from retaliation outside accountants, auditors, and lawyers”—the people “who are most likely to uncover and comprehend evidence of potential wrongdoing.” *Id.* at 158a. As the ARB explained, that significant gap in whistleblower protection would “sabotage the [statute’s] overriding purpose of protecting investors.” *Id.* at 161a.

Under the court of appeals’ view, the statute would not even apply to employees of Arthur Andersen. That narrow reading of the statute cannot be correct in light of Congress’s purpose to “prevent recurrences of the Enron debacle and similar threats to the nation’s financial markets,” and its recognition that contractors played a significant role in Enron’s fraud. Senate Report 2, 4-5, 10.

The court of appeals’ view would allow “ongoing wrongdoing [to] occur with virtual impunity,” because a public company could rely on its accountants and lawyers to perpetrate and cover up its fraud, knowing that if any employees of those firms started asking questions, they could be fired. Senate Report 4-5 (citing examples). This Court should reject respondents’ invitation to create such a statutory loophole. See, *e.g.*, *Kasten*, 131 S. Ct. at 1333; *United States v. Hayes*, 555 U.S. 415, 426-428 (2009).

2. The resulting gap in protection would be especially troubling with respect to mutual fund companies. All agree that Section 1514A applies to mutual funds.<sup>3</sup> Mu-

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<sup>3</sup> Most mutual funds are companies “that [are] required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)).” 18 U.S.C. 1514A(a); see Investment Co. Inst.,

tual fund investment advisers manage more than \$13 trillion on behalf of investors. Investment Co. Inst., *2013 Investment Company Fact Book* 9 (53d ed.), [http://www.icifactbook.org/pdf/2013\\_factbook.pdf](http://www.icifactbook.org/pdf/2013_factbook.pdf). “Nearly all mutual funds are structured such that they have no employees of their own, and instead contract with, and rely primarily upon, employees of privately-held investment advisors to function.” Pet. App. 186a (Brown, J., concurring); see also, *e.g.*, *Jones v. Harris Assocs. L.P.*, 559 U.S. 335, 338 (2010). The Fidelity funds follow this pattern: they “have no employees of their own” and instead depend on contractors like respondents for their day-to-day operations. Pet. App. 4a, 26a-27a. Under the court of appeals’ view, no person who works for such a mutual fund would be protected from retaliation under Section 1514A, because the mutual fund has no employees, and the people who run the mutual funds’ business are employees of contractors, who the court of appeals said would not be covered. Pet. App. 121a.

Respondents (Supp. Br. in Opp. 8) and the court of appeals (Pet. App. 26a-27a) acknowledge this result, but deem it acceptable because Congress has regulated investment advisers to mutual funds in the Investment Company Act of 1940, 15 U.S.C. 80a-1 *et seq.*, and the Investment Advisers Act of 1940, 15 U.S.C. 80b-1 *et seq.* See Pet. App. 26a-27a. That assurance is illusory, because neither of those statutes contains any anti-retaliation provision that would protect employees of investment advisers to mutual funds. The Investment

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*2013 Investment Company Fact Book* 9 (53d ed.), [http://www.icifactbook.org/pdf/2013\\_factbook.pdf](http://www.icifactbook.org/pdf/2013_factbook.pdf) 2013. A few funds are publicly traded companies. See *ibid.*; see also SEC, *Closed-end Fund*, [http://investor.gov/glossary/glossary\\_terms/closed-end-fund](http://investor.gov/glossary/glossary_terms/closed-end-fund).

Company Act is the foundational statute regulating the formation and operation of mutual funds and other investment companies and the conduct of advisers to those companies; it sets out guidelines for investment company structure and operations and requires certain disclosures to the public about fund operations and objectives. See, e.g., 6 Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* § 20.1 (2009). The Investment Advisers Act requires persons who provide investment advice for compensation (including advisers to mutual funds) to register with the SEC and follow certain rules. See, e.g., SEC, *General Information on the Regulation of Investment Advisers*, <http://www.sec.gov/divisions/investment/iaregulation/memoia.htm>.

The fact that investment advisers and mutual fund companies are regulated in other ways does not ensure that employees of mutual fund investment advisers can report fraud without fear of retaliation. And Congress's extensive regulation of mutual fund advisers reinforces the conclusion that Congress intended to protect their employees from retaliation because of the central role they play in investment markets.<sup>4</sup>

3. The court of appeals' interpretation of Section 1514A also creates a significant gap in protection for

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<sup>4</sup> Respondents contend (Supp. Br. in Opp. 8) that Section 1514A must not apply to employees of investment advisers because Congress failed to enact a 2004 bill that would have expressly added to Section 1514A coverage of investment advisers, principal underwriters, and significant service providers to registered investment companies. The bill was never reported out of committee; there was no debate or vote on it; and the record contains "no statement" of the "sponsors' understanding of [the bill] or of § 1514A(a)." Pet. App. 42a-43a. The failed bill therefore sheds no light on Section 1514A's reach at the time it was enacted. See, e.g., *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990).

outside lawyers who advise public companies on securities issues. At the same time it enacted Section 1514A, Congress enacted a provision directing the SEC to adopt rules placing reporting requirements on lawyers involved with a public company's financial disclosures. Sarbanes-Oxley Act § 307, 116 Stat. 784 (enacting 15 U.S.C. 7245). In particular, Congress required the rules to provide that any attorney who represents a publicly held company before the SEC must "report evidence of a material violation of securities law or breach of fiduciary duty" by that company to the company's general counsel or CEO; if the general counsel or CEO does not take appropriate remedial action, the attorney must report the conduct to the company's audit committee or board of directors. *Ibid.*; see 17 C.F.R. Pt. 205 (SEC regulations). As the ARB explained in *Spinner*, it is "difficult to imagine" that Congress would have enacted the broad protection against retaliation in Section 1514A but then "[l]eft unprotected outside counsel who are required under Section 307 of [the Sarbanes-Oxley Act] to report" securities law violations. Pet. App. 158a n.16.

4. Respondents and the court of appeals suggest that it is not necessary for Section 1514A to protect employees of contractors and subcontractors because other parts of the Sarbanes-Oxley Act regulate these entities. Supp. Br. in Opp. 8-9; Pet. App. 24a, 27a n.13, 40a. But none of the cited provisions protects against retaliation for reporting fraud or violation of SEC rules. For example, Congress's creation of the Public Company Accounting Oversight Board to regulate the conduct of accounting firms in auditing public companies' financial statements (see Pet. App. 24a) does nothing to protect an accountant who is retaliated against for reporting

fraud or violation of SEC rules. See 15 U.S.C. 7211(c)(1) (Supp. V 2011).

Likewise, 18 U.S.C. 1513 (2006 & Supp. V 2011) is a general obstruction of justice statute, not a provision specific to the securities industry. It criminalizes retaliation for reporting a “Federal offense” to a “law enforcement officer,” 18 U.S.C. 1513(e) (Supp. V 2011), but it does not contain a remedy for an employee who is retaliated against for reporting fraud or violation of SEC rules to his or her employer or the SEC.

5. a. Congress’s enactment of a new anti-retaliation provision in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (Dodd-Frank Act), does not make Section 1514A’s application to employees of contractors unnecessary. Section 922 of that Act establishes a “Whistleblower Program,” modeled on a 2006 Internal Revenue Service program, that offers financial incentives “to motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated securities laws and recover money for victims of financial fraud.” S. Rep. No. 176, 111th Cong., 2d Sess. 110-111 (2010) (Dodd-Frank Senate Report). To encourage participation, Congress provided that “[n]o employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment” because the whistleblower provided information to the SEC, participated in an SEC proceeding, or made disclosures required or protected under various federal securities laws, including the Sarbanes-Oxley Act. Dodd-Frank Act § 922(a), 124 Stat. 1845-1846.

Although this new provision and Section 1514A both protect against retaliation, Section 922 focuses on encouraging reporting to federal authorities, whereas Section 1514A covers both internal and external reporting. In the context of internal reporting, Section 922's protection extends no further than Section 1514A's protection, because Section 922 protects persons who make "disclosures that are required or protected under" the Sarbanes-Oxley Act. Dodd-Frank Act § 922(a), 124 Stat. 1846. So if employees of contractors of public companies are not protected under Section 1514A, they are not protected for making internal complaints under Section 922 of the Dodd-Frank Act.

b. In the Dodd-Frank Act, Congress also added nationally recognized statistical rating organizations (NRSROs) and certain subsidiaries of public companies to the list of covered entities and individuals in Section 1514A. See §§ 922(b), 929A, 124 Stat. 1848, 1852. The court of appeals believed that amendment would have been unnecessary if the statute already protected contractor employees. Pet. App. 43a-46a. That is mistaken. First, not all NRSROs are contractors of public companies.<sup>5</sup> Second, the amendment also added subsidiaries of public companies to Section 1514A in order to eliminate an attempted defense by public companies that blamed

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<sup>5</sup> An NRSRO is a credit rating agency—a company that assesses the creditworthiness of an issuer (such as a publicly held company) with respect to specific securities. See SEC, *Credit Rating Agencies and Nationally Recognized Statistical Rating Organizations*, <http://www.sec.gov/answers/nrsro.htm>. In 2010, three NRSROs were subsidiaries of public companies and two of the remaining seven were paid by subscribers, not by publicly held companies. See SEC, *Annual Report on Nationally Recognized Statistical Rating Organizations* 6-7 & n.12, 11-12 (Mar. 2012), <http://www.sec.gov/divisions/marketreg/ratingagency/nrsroannrep0312.pdf>.

retaliation on “subsidiaries and affiliates.” Dodd-Frank Senate Report 114; see Pet. App. 44a. There was no discussion about the question here—whether Section 1514A protects employees of contractors.

Tellingly, the court of appeals assumed that as a result of the amendments, Section 1514A now protects employees of NRSROs and subsidiaries. Pet. App. 43a-44a. Simply as a matter of grammar, the same should be true for employees of contractors and subcontractors. See *id.* at 62a-63a (Thompson, J., dissenting) (explaining that, in the structure of Section 1514A, “‘contractor’ and ‘rating organization’ are syntactic equivalents” and “should therefore be given equal effect”). That is especially true because, by the time of the Dodd-Frank Act’s enactment, the Department of Labor had issued regulations providing that Section 1514A protects employees of contractors and subcontractors. See *id.* at 63a; see also pp. 31-32, *infra*.

#### **E. Respondents’ Arguments Opposing Deference Lack Merit**

As the foregoing discussion demonstrates, the ARB’s conclusion in *Spinner* that contractor employees are protected is at the very least a reasonable interpretation of Section 1514A and therefore is entitled to *Chevron* deference. Even before its precedential and on-point decision in *Spinner*, the ARB had consistently viewed Section 1514A’s protection as not limited to employees of public companies. See Pet. App. 143a-144a.<sup>6</sup> OSHA

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<sup>6</sup> See, e.g., *Charles v. Profit Inv. Mgmt.*, No. 10-071, 2011 WL 6981992, at \*4-\*5 (ARB Dec. 16, 2011) (rejecting the conclusion that an employee of a private company was not covered because Section 1514A “covers only employees of publicly traded companies”); *Funke v. Federal Express Corp.*, No. 09-004, 2011 WL 3307574, at \*5-\*6 (ARB July 8, 2011) (holding that Section 1514A



also had taken the view, in its regulations setting out the procedures for filing and adjudicating complaints, that Section 1514A applies to employees of contractors and subcontractors of public companies. See 29 C.F.R. 1980.101, .102(a); 69 Fed. Reg. at 52,105-52,106 (stating in preamble that “[t]he statute \* \* \* protects the employees of publicly traded companies as well as the employees of contractors, subcontractors, and agents of those publicly traded companies”).<sup>7</sup>

Respondents contend (Supp. Br. in Opp. 10-12) that *Chevron* deference is unwarranted because the ARB’s decision in *Spinner* was controlled by the regulations, and the agency stated in the preamble to the regulations that it is intended to “provide procedures for the handling of Sarbanes-Oxley discrimination complaints” and not to “provide statutory interpretations.” 69 Fed. Reg. at 52,105. But the ARB did not rely solely on the regulations; it conducted an exceptionally thorough analysis of Section 1514A’s text and purposes and the broader statutory framework. See Pet. App. 139a-166a. The fact

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covers disclosure of third-party fraud and noting that “Congress understood that to effectively address corporate fraud, the law 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”); *Johnson v. Siemens Bldg. Techs., Inc.*, No. 08-032, 2011 WL 1247202, at \*12 (ARB Mar. 31, 2011) (holding that an employee of a subsidiary of a public company was covered by the statute and explaining that Section 1514A reaches “more than employees of publicly traded companies”).

<sup>7</sup> In discussing the regulations, the court of appeals (Pet. App. 47a-48a) referred to the 2004 final rule. The regulations have been amended since 2004 and some terminology has changed, but they continue to prohibit retaliation against an employee of a contractor or subcontractor of a public company. See 29 C.F.R. 1980.101(f) and (g), 1980.102(a); see also 76 Fed. Reg. 68,084 (Nov. 3, 2011).

that OSHA already had taken the same view of the statute in the procedural regulations reinforces, rather than undercuts, the ARB's conclusion.<sup>8</sup>

Respondents also contend (Br. in Opp. 18) that the Department of Labor “cannot claim any special expertise in resolving statutory ambiguities” because the statute includes a procedure under which a complainant can go to court if the agency has not acted within a certain time. Section 1514A requires any person seeking relief under the section to first “fil[e] a complaint with the Secretary of Labor.” 18 U.S.C. 1514A(b)(1)(A). The reason for that provision is that the Department has expertise in investigating and adjudicating complaints of retaliation. It is only if the Department has not rendered a final decision within 180 days that the complainant may proceed to court. 18 U.S.C. 1514A(b)(1)(B).<sup>9</sup> That provision reasonably balances the Department's need to manage its docket with the complainant's desire for a prompt decision on his or her claim. See 76 Fed. Reg. 68,084, 68,091 (Nov. 3, 2011) (“The purpose of the

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<sup>8</sup> Although the Department argued for deference to the regulations under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), in the court of appeals, it did not seek *Chevron* deference to the regulations, see Dep't of Labor C.A. Br. 18 n.8, and the United States does not seek *Chevron* deference to them before this Court. That is not to say, however, that the Secretary lacks the authority to issue regulations embodying interpretations to guide OSHA and the ARB in their enforcement of Section 1514A that would in turn warrant *Chevron* deference, especially if adopted through notice-and-comment rule-making. See, e.g., *Mead Corp.*, 533 U.S. at 229-231.

<sup>9</sup> Several other anti-retaliation statutes contain provisions like this. See, e.g., 6 U.S.C. 1142(c)(7); 12 U.S.C. 5567(c)(4)(D)(i) (Supp. V 2011); 15 U.S.C. 2087(b)(4) (Supp. V 2011); 21 U.S.C. 399d(b)(4) (Supp. V 2011); 42 U.S.C. 5851(b)(4); 49 U.S.C. 20109(d)(3) (Supp. V 2011); 49 U.S.C.A. 30171(b)(3)(E); 49 U.S.C. 31105(c) (Supp. V 2011).

‘kick-out’ provision is to aid the complainant in receiving a prompt decision.”). It was added to Section 1514A as part of a compromise on what damage awards would be available; nothing in the legislative record suggests any doubts about the Department’s expertise. See Senate Report 30, 36.

Congress has charged the Department of Labor with enforcing more than two dozen anti-retaliation provisions throughout the United States Code, see 77 Fed. Reg. at 3912 (Jan. 25, 2012) (listing examples), recognizing its substantial expertise on such matters. There is no reason to reject the ARB’s thorough and thoughtful resolution of the question presented here.

#### CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 2013

## APPENDIX

1. As enacted by the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 18 U.S.C. 1514A provided:

### **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. 78l), 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, 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, when the information or assistance is provided to or the investigation is conducted by—

(A) a Federal regulatory or law enforcement agency;

(1a)

(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.

(b) ENFORCEMENT ACTION.—

(1) IN GENERAL.—A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by—

(A) filing a complaint with the Secretary of Labor; or

(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

(2) PROCEDURE.—

(A) IN GENERAL.—An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.

(B) EXCEPTION.—Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

(C) BURDENS OF PROOF.—An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.

(D) STATUTE OF LIMITATIONS.—An action under paragraph (1) shall be commenced not later than 90 days after the date on which the violation occurs.

(c) REMEDIES.—

(1) IN GENERAL.—An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

(2) COMPENSATORY DAMAGES.—Relief for any action under paragraph (1) shall include—

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) the amount of back pay, with interest; and

(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

(d) RIGHTS RETAINED BY EMPLOYEE.—Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.

2. As amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376, 18 U.S.C. 1514A provides:

**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. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c),<sup>1</sup> or any officer, employee, contractor, subcontractor, or agent of such company or nationally recog-

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<sup>1</sup> So in original. Another closing parenthesis probably should precede the comma.

nized statistical rating organization, 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, 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, when the information or assistance is provided to or the investigation is conducted by—

(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.



(b) ENFORCEMENT ACTION.—

(1) IN GENERAL.—A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by—

(A) filing a complaint with the Secretary of Labor; or

(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

(2) PROCEDURE.—

(A) IN GENERAL.—An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.

(B) EXCEPTION.—Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

(C) BURDENS OF PROOF.—An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.

(D) STATUTE OF LIMITATIONS.—An action under paragraph (1) shall be commenced not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation.

(E) JURY TRIAL.—A party to an action brought under paragraph (1)(B) shall be entitled to trial by jury.

(c) REMEDIES.—

(1) IN GENERAL.—An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

(2) COMPENSATORY DAMAGES.—Relief for any action under paragraph (1) shall include—

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) the amount of back pay, with interest; and

(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

(d) RIGHTS RETAINED BY EMPLOYEE.—Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.

(e) NONENFORCEABILITY OF CERTAIN PROVISIONS WAIVING RIGHTS AND REMEDIES OR REQUIRING ARBITRATION OF DISPUTES.—

(1) WAIVER OF RIGHTS AND REMEDIES.—The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement.

(2) PREDISPUTE ARBITRATION AGREEMENTS.—No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.

3. 49 U.S.C. 42121 provides in pertinent part:

**Protection of employees providing air safety information**

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(b) DEPARTMENT OF LABOR COMPLAINT PROCEDURE.—

(1) FILING AND NOTIFICATION.—A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 90 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary of Labor shall notify, in writing, the person named in the complaint and the

Administrator of the Federal Aviation Administration of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person under paragraph (2).

(2) INVESTIGATION; PRELIMINARY ORDER.—

(A) IN GENERAL.—Not later than 60 days after the date of receipt of a complaint filed under paragraph (1) and after affording the person named in the complaint an opportunity to submit to the Secretary of Labor a written response to the complaint and an opportunity to meet with a representative of the Secretary to present statements from witnesses, the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the complainant and the person alleged to have committed a violation of subsection (a) of the Secretary's findings. If the Secretary of Labor concludes that there is a reasonable cause to believe that a violation of subsection (a) has occurred, the Secretary shall accompany the Secretary's findings with a preliminary order providing the relief prescribed by paragraph (3)(B). Not later than 30 days after the date of notification of findings under this paragraph, either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a

hearing on the record. The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Such hearings shall be conducted expeditiously. If a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review.

(B) REQUIREMENTS.—

(i) REQUIRED SHOWING BY COMPLAINANT.—The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(ii) SHOWING BY EMPLOYER.—Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(iii) CRITERIA FOR DETERMINATION BY SECRETARY.—The Secretary may determine that a violation of subsection (a) has occurred

only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(iv) PROHIBITION.—Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(3) FINAL ORDER.—

(A) DEADLINE FOR ISSUANCE; SETTLEMENT AGREEMENTS.—Not later than 120 days after the date of conclusion of a hearing under paragraph (2), the Secretary of Labor shall issue a final order providing the relief prescribed by this paragraph or denying the complaint. At any time before issuance of a final order, a proceeding under this subsection may be terminated on the basis of a settlement agreement entered into by the Secretary of Labor, the complainant, and the person alleged to have committed the violation.

(B) REMEDY.—If, in response to a complaint filed under paragraph (1), the Secretary of Labor determines that a violation of subsection (a) has occurred, the Secretary of Labor shall order the person who committed such violation to—

(i) take affirmative action to abate the violation;

(ii) reinstate the complainant to his or her former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and

(iii) provide compensatory damages to the complainant.

If such an order is issued under this paragraph, the Secretary of Labor, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary of Labor, by the complainant for, or in connection with, the bringing the complaint upon which the order was issued.

(C) FRIVOLOUS COMPLAINTS.—If the Secretary of Labor finds that a complaint under paragraph (1) is frivolous or has been brought in bad faith, the Secretary of Labor may award to the prevailing employer a reasonable attorney's fee not exceeding \$1,000.

(4) REVIEW.—

(A) APPEAL TO COURT OF APPEALS.—Any person adversely affected or aggrieved by an order issued under paragraph (3) may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, al-

legedly occurred or the circuit in which the complainant resided on the date of such violation. The petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary of Labor. Review shall conform to chapter 7 of title 5, United States Code. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the order.

(B) LIMITATION ON COLLATERAL ATTACK.—An order of the Secretary of Labor with respect to which review could have been obtained under subparagraph (A) shall not be subject to judicial review in any criminal or other civil proceeding.

(5) ENFORCEMENT OF ORDER BY SECRETARY OF LABOR.—Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief and compensatory damages.

(6) ENFORCEMENT OF ORDER BY PARTIES.—

(A) COMMENCEMENT OF ACTION.—A person on whose behalf an order was issued under paragraph (3) may commence a civil action against the person to whom such order was issued to require compliance with such order. The ap-



appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

(B) ATTORNEY FEES.—The court, in issuing any final order under this paragraph, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

\* \* \* \* \*

4. 29 C.F.R. 1980.101 (2005) provides in pertinent part:

**Definitions.**

\* \* \* \* \*

*Company* means any company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) and any company required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)).

*Company representative* means any officer, employee, contractor, subcontractor, or agent of a company.

\* \* \* \* \*

*Employee* means an individual presently or formerly working for a company or company representative, an individual applying to work for a company or company representative, or an individual whose em-

ployment could be affected by a company or company representative.

\* \* \* \* \*

5. 29 C.F.R. 1980.102 (2005) provides:

**Obligations and prohibited acts.**

(a) No company or company representative may discharge, demote, suspend, threaten, harass or in any other manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee's request, has engaged in any of the activities specified in paragraphs (b)(1) and (2) of this section.

(b) An employee is protected against discrimination (as described in paragraph (a) of this section) by a company or company representative for any lawful act:

(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 18 U.S.C. 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, when the information or assistance is provided to or the investigation is conducted by—

(i) A Federal regulatory or law enforcement agency;

(ii) Any Member of Congress or any committee of Congress; or

(ii) 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 18 U.S.C. 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.