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**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Section 806 of the Sarbanes-Oxley Act of 2002 provides "[w]histleblower protection for employees of publicly traded companies." 18 U.S.C. § 1514A. The question presented is whether the court of appeals correctly held that this provision applies only to employees of publicly traded companies.

LIST OF PARTIES

Respondents FMR LLC, Fidelity Management & Research Company, FMR Co., Inc., and Fidelity Brokerage Services LLC disclose the following information:

The named defendant FMR Corp. was merged into a limited liability company prior to the filing of the complaints in this action. FMR LLC is the surviving entity; FMR Corp. no longer exists.

FMR LLC is the parent of Fidelity Management & Research Company, FMR Co., Inc. and Fidelity Brokerage Services LLC. FMR LLC is not publicly held, and no publicly held corporation owns 10% or more of Fidelity Management & Research Company, FMR Co., Inc., or Fidelity Brokerage Services LLC.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

STATUTE INVOLVED 1

STATEMENT 2

ARGUMENT 12

I. THERE IS NO CONFLICT OF DECISION WARRANTING THIS COURT'S REVIEW 12

A. All Federal Courts Agree That Section 806 Does Not Apply To Employees Of Private Contractors 12

B. The Asserted Conflict With An Administrative Adjudication Is Not Certworthy 15

II. THE COURT OF APPEALS' DETERMINATION THAT SECTION 806 DOES NOT APPLY TO EMPLOYEES OF PRIVATE CONTRACTORS IS CORRECT 22

A. The Decision Below Implements The Statutory Text And Structure 22

B. The Decision Below Is Entirely Consistent With The Statutory Purpose 28

CONCLUSION 32

TABLE OF AUTHORITIES

Page(s)

CASES

62 Cases of Jam v. United States,
340 U.S. 593 (1951) 17

Associated Gen. Contractors of Cal., Inc., v. Cal. State Council of Carpenters,
459 U.S. 519 (1983) 26

Board of Governors of Federal Reserve System v. Dimension Financial Corp.,
474 U.S. 361 (1986) 24

Bowen v. Am. Hosp. Ass'n,
476 U.S. 610 (1986) 18

Brady v. Calyon Securities (USA),
406 F. Supp. 2d 307 (S.D.N.Y. 2005) 14, 24

Brown & Root, Inc. v. Donovan,
747 F.2d 1029 (5th Cir. 1984) 27

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,
511 U.S. 164 (1994) 17

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 10, 16, 17, 18

Christopher v. Smithkline Beecham Corp.,
132 S. Ct. 2156 (2012) 21

Ervin v. Nashville Peace & Justice Ctr.,
No. 3:07-0832, 2008 WL 4449920
(M.D. Tenn. Sept. 29, 2008) 14

Fleszar v. U.S. Dep't of Labor,
598 F.3d 912 (7th Cir.)..13

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,
130 S. Ct. 3138 (2010)..................................28, 29

In re Chapman,
166 U.S. 661 (1897)..24

INS v. National Center for Immigrants' Rights, Inc., 502 U.S. 183 (1991)....................6, 22

Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296 (2011)..........9, 21, 22, 26

Johnson v. United States,
529 U.S. 694 (2000)..24

Jones v. Harris Assocs. L.P.,
130 S. Ct. 1418 (2010)..30

Malin v. Siemens Med. Solutions Health Servs., 638 F. Supp. 2d 492 (D. Md. 2008)..........27

Martin v. Occupational Safety & Health Review Comm'n,
499 U.S. 144 (1991)..18

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71 (2006)................................25

Mohamad v. Palestinian Authority,
132 S. Ct. 1702 (2012)..24

Pegram v. Herdrich,
530 U.S. 211 (2000)..26

Pinter v. Dahl,
486 U.S. 622 (1988)..17

Samatar v. Yousuf,
130 S. Ct. 2278 (2010) 9

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) 11, 16

Spinner v. David Landau & Associates, LLC,
Nos. 10-111, 10-115, 2012 WL 2073374
(DOL ARB May 31, 2012) 15

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008) 8, 22, 26, 32

Tumban v. Biomerieux, Inc.,
No. 1:06-cv-00442, 2007 WL 778426
(M.D.N.C. Mar. 13, 2007) 14

Zang v. Fidelity Mgmt. & Research Co.,
2007-SOX-00027, 2008 WL 7835900
(DOL ALJ Mar. 27, 2008) 1, 3

STATUTES

15 U.S.C. § 77a *et seq.* 2

15 U.S.C. § 78u-6 31

15 U.S.C. § 80a-1 *et seq.* 2, 30

15 U.S.C. § 80a-15 3

15 U.S.C. § 80b-1 *et seq*. 30

15 U.S.C. § 80b-3 29

15 U.S.C. § 7213 29

18 U.S.C. § 1513 31

18 U.S.C. § 1514A .... *passim*

28 U.S.C. § 1254 1

42 U.S.C. § 5851 8

49 U.S.C. § 42121 ....8, 20, 21

49 U.S.C. § 60129 8

Dodd-Frank Wall Street Reform and
Consumer Protection Act, Pub. L. No.
111-203, 124 Stat. 1376 (2010)............................27

REGULATIONS

29 C.F.R. § 1980.106 20

29 C.F.R. § 1980.107 20

29 C.F.R. § 1980.110 20

29 C.F.R. § 1980.112 20

69 Fed. Reg. 52,104 (Aug. 24, 2004) 15

75 Fed. Reg. 3925 (Jan. 15, 2010)............................16

RULES

Sup. Ct. R. 10..15

OTHER AUTHORITIES

Eugene Gressman et al.,
Supreme Court Practice (9th ed. 2007) 18, 19

SEC Release for Proposed Rules
Implementing the Whistleblower
Provisions of § 21F of Securities
Exchange Act of 1934 (May 25, 2011) 31

Senate Judiciary Committee Report,
S. Rep. No. 107-146 (2002) 9

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-75a) is reported at 670 F.3d 61. The order granting interlocutory review (*see* Pet. App. 9a) is not reported. The memorandum and order of the district court (*id.* at 76a-133a) is reported at 724 F. Supp. 2d 141. The administrative decision dismissing petitioner Zang's original complaint is available at 2008 WL 7835900.

JURISDICTION

The decision of the court of appeals was entered on February 3, 2012. Rehearing was denied on April 6, 2012. Pet. App. 134a-135a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 806 of the Sarbanes-Oxley Act of 2002, entitled "[w]histeblower protection for employees of publicly traded companies," states in relevant part that "[n]o company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)), or any other 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 certain protected activity. 18 U.S.C. § 1514A (Pet. App. 200a).

STATEMENT

Petitioners, former employees of *private companies*, sued under Section 806 of the Sarbanes-Oxley Act of 2002, which creates a private right of action for employees of certain *public companies* who suffer retaliation for engaging in protected activity. 18 U.S.C. § 1514A. The court of appeals held that their claims must be dismissed on the ground that Section 806 is limited by its text and structure to employees of public companies. Pet. App. 10a-18a.

1. Respondents are privately held companies that provide specified services to the Fidelity family of mutual funds. Fidelity Management & Research Company and FMR Co., Inc. serve as the investment adviser and sub-adviser to certain Fidelity mutual funds pursuant to contracts with the funds. They are responsible for directing the investments of each mutual fund consistent with the objectives, policies, and limits established by each fund. Fidelity Brokerage Services LLC is a broker-dealer that transacts in mutual fund securities but does not have contracts directly with the mutual funds. FMR LLC is the holding company for the other entities. Each respondent is privately owned, none has securities registered under Section 12 of the Exchange Act, and none is required to file reports under Section 15(d).

The Fidelity family of mutual funds includes a number of public investment companies registered with the Securities and Exchange Commission (SEC) under the Securities Act of 1933 and the Investment Company Act of 1940, 15 U.S.C. §§ 77a *et seq*. and 80a-1 *et seq*., that are required to file reports under Section 15(d) of the Exchange Act. The funds, which are not parties to this case, are owned by their shareholders, governed by Boards of Trustees, and

required by law to engage investment advisers under written agreements approved annually. *See* 15 U.S.C. § 80a-15(c). Accordingly, the mutual funds are not owned or controlled by any of the respondent entities. Pet. App. 4a.

2. In July 2005, respondent FMR Co., Inc. terminated petitioner Jonathan Zang for inadequate performance of his responsibilities as a research analyst, including his failure to generate sufficient written research and to maintain appropriate communication with portfolio managers. Several months later, Zang filed a complaint with the Department of Labor (DOL), alleging that he had been retaliated against for raising concerns about supposed inaccuracies in a draft supplemental registration statement filed with the SEC by one of the mutual funds regarding its approach to compensating research analysts. Pet. App. 5a. Following an investigation, the DOL dismissed Zang's complaint, finding that he had not engaged in protected activity and was terminated for poor performance. Zang appealed to the DOL's Office of Administrative Law Judges, which dismissed Zang's appeal on the ground that he was not a covered employee under Section 806 because he was employed by a private company. *See id.* at 6a; *Zang v. Fidelity Mgmt. & Research Co.*, 2007-SOX-00027, 2008 WL 7835900 (DOL ALJ Mar. 27, 2008). Zang thereafter filed suit in federal district court. *See* 18 U.S.C. § 1514A(b)(1)(B) (providing that a complainant may bring an action for *de novo* review in federal district court if the DOL has not issued a final decision within 180 days).

Petitioner Jackie Lawson's complaint arose from respondent Fidelity Brokerage Services LLC's decision to promote a highly rated employee instead of Lawson, a lesser performer. Angered that she was

passed over and that a former peer was now her supervisor, Lawson became hostile toward her outgoing supervisor, neglected some of her job responsibilities, and openly defied her new supervisor. She also raised the first of the four complaints at issue in this case. Ultimately, Lawson resigned her employment in September 2007, claiming that she had been denied the promotion and constructively discharged for filing protected complaints concerning internal cost allocations used for fund profitability calculations relating to Fidelity's brokerage business. (Contrary to Lawson's contentions, *see* Pet. 4, this issue could not have affected the investment adviser's profits or the actual determination of fees paid by fund investors.) Before the DOL could complete its investigation of her complaint, Lawson filed suit in federal district court. *See* 18 U.S.C. § 1514A(b)(1)(B).

3. Respondents moved to dismiss both complaints on the ground, among others, that Lawson and Zang (as employees of private companies) were not "employees" within the meaning of the Sarbanes-Oxley whistleblower provision. The district court, addressing the two cases jointly, denied the motions, ruling that Section 806 encompasses employees of private companies that are contractors or subcontractors of public companies, but—according to a "limiting principle" created by that court (*see* note 2, *infra*)—only when such employees engage in whistleblowing relating to fraud against shareholders of those public companies. Pet. App. 96a-123a. The district court certified this ruling pursuant to 28 U.S.C. § 1292(b), and the court of appeals granted a petition for interlocutory review. *See* Pet. App. 9a (citing *Lawson v. FMR LLC*, No. 10-1944 (1st Cir. Oct. 25, 2010)).

4. The court of appeals reversed and ordered dismissal of the complaints. Based on a thorough review of the text of Section 806, the title and caption of the provision, other provisions of Sarbanes-Oxley, other whistleblower statutes, this Court's precedents, and pre- and post-enactment legislative history, the majority concluded that "only the employees of the defined public companies are covered" by the whistleblower provision. Pet. App. 17a.

a. *Text of Section 806*: The court of appeals held that the term "employee" in Section 806 refers only to employees of public companies. Pet. App. 17a. Although the parties disputed how broadly the term should be defined, the court determined that congressional intent was clear when the word "employee" was read in conjunction with the surrounding text. *See id*. at 16a-17a.

The court explained that Section 806 "first identifies covered employers: those with a class of securities registered under section 12 of the 1934 Act or those that file reports with the SEC pursuant to section 15(d) of the 1934 Act." Pet. App. 17a. Such public companies, the court explained, may not retaliate (*i.e.*, discharge, demote, threaten, harass, or in any other manner discriminate in the terms and conditions of employment) "against their own employees who engage in protected activity." *Ibid*. Section 806 further enumerates a list of representatives of such employers, including contractors and subcontractors, that "are also barred from retaliating against employees of the covered public-company employer who engage in protected activity." *Id*. at 18a.

The court of appeals rejected petitioners' contention that "employee" includes both the employees of public companies and employees of the public com-

panies' officers, employees, contractors, subcontractors, and agents. Pet. App. 15a. According to petitioners, "because [Section 806] forbids retaliation *by* 'any officer, employee, contractor, subcontractor, or agent,' of a public company, that provision must forbid retaliation *against* an employee of a contractor, subcontractor, or agent to a public company." *Id*. at 18a. The court noted that "[a]s a matter of logic, the conclusion does not follow from its premise." *Ibid*.

Moreover, "[a]s a matter of language," the court explained, "the argument ignores its implication: if an employee of 'any' contractor, subcontractor, or agent is protected, Congress must, by the same reasoning, have intended to protect the employee of 'any' officer or employee of a public company." Pet. App. 18a. That reading would create absurdities and provide sweeping coverage. *Ibid*. The court therefore concluded that "Section [806]'s list of company representatives serves . . . to ensure an employee of a public company is covered under the provision if he or she were harassed by officers, other employees, or contractors or subcontractors to the public company for reporting fraud in that public company." *Ibid*.

b. *Title and Caption*: The court of appeals further explained that the title of Section 806—"Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud"—and the caption of the whistleblower-protection provision—"Whistleblower protection for employees of publicly traded companies"—were "explicit guides" to the limited coverage of Section 806. Pet. App. 19a-20a.

Relying on the reasoning and principles of construction set forth in *INS v. National Center for Immigrants' Rights, Inc*., 502 U.S. 183 (1991), the court of appeals concluded that Section 806's generic refer-

ence to "employee" should be read as a reference to the "employees of publicly traded companies" identified specifically in the section's caption. Pet. App. 21a. The court rejected petitioners' contention that the reference to "employees of publicly traded companies" in the title and caption was simply "shorthand" that neglected to mention all employees covered by the provision. That reading, the court explained, "is contradicted by the plain words" of the title and caption, which were "not ambiguous" and were intended to clarify—"not to add to any ambiguity in the text." *Id*. at 22a.

c. *Other Statutory Provisions*: Based on the court of appeals' plain reading of the text, it did "not think there [was] any ambiguity left," but held that, even if there were, "other rules of statutory interpretation would lead [it] to the same result." Pet. App. 22a. The court held that other provisions of Sarbanes-Oxley, one providing broader whistleblower protection and others regulating nonpublic entities (including investment advisers, accountants, and lawyers) confirm the conclusion that Congress intended Section 806 to have limited coverage. *See id*. at 22a-28a. The court stated that petitioners' attempt to expand the private right of action to employees of nonpublic companies would be contrary to Congress's decision to implement different regulatory mechanisms for different entities (*id*. at 23a, 26a), and "would provide an impermissible end run around Congress's choice to limit whistleblower protection" in Section 806 to employees of publicly traded companies (*id*. at 28a).

d. *Other Federal Statutes*: The court of appeals also determined that the Sarbanes-Oxley Act's reference to the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21)

weighed against petitioners' broad construction. Pet. App. 28a-31a. The whistleblower provision in AIR 21 prevents air carriers—and a limited class of contractors and subcontractors (those that, by contract, perform safety-sensitive functions for an air carrier)—from retaliating against an employee for engaging in protected activity. *Id*. at 29a-30a (citing 49 U.S.C. § 42121(a)). The court held that AIR 21's textual limitation on the types of covered contractors, combined with its limitation on the subject matter of covered complaints, precluded the anomalous results and excessive breadth resulting from petitioners' strained reading of Section 806. *Id*. at 30a-31a.

Similarly, the court contrasted the whistleblower-protection provisions of other federal statutes that explicitly extend coverage to employees of contractors of the entities regulated by those statutes. *See* Pet. App. 32a-33a (citing 42 U.S.C. § 5851(a)(1) & 49 U.S.C. § 60129(a)(1)). The court of appeals "view[ed] the fact that Congress was not similarly explicit in extending coverage to the employees of contractors, subcontractors, and agents in [Section 806] as evidence that Congress did not intend such coverage to exist." *Id*. at 33a.

e. *Supreme Court Precedents*: The court of appeals found further confirmation for its ruling in opinions from this Court regarding the proper construction of securities laws and the relationship between investment companies and their advisers. Pet. App. 33a. Specifically, this Court has "admonished the lower federal courts not to give securities laws a scope greater than that allowed by their text." *Id*. at 34a (citing *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc*., 552 U.S. 148, 164 (2008)).

The court of appeals also rejected petitioners' contention that the close relationship between investment companies and their advisers warranted extending the private right of action to investment advisers. The court of appeals noted that this Court recently declined to construe SEC Rule 10b-5 to subject investment advisers to liability for statements made in a mutual fund's prospectus. Pet. App. 35a (citing *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011)). In so doing, this Court acknowledged that mutual funds and their advisers are "legally separate entities" and that "[a]ny reapportionment of liability in the securities industry in light of the close relationship between investment advisers and mutual funds is properly the responsibility of Congress and not the courts." *Ibid*. Relying on *Janus*, the court of appeals reasoned that "[h]ad Congress intended to ignore that separation and cover the employees of private investment advisers for whistleblower protections, it would have done so explicitly. . . ." *Id*. at 36a.

f. *Legislative History*: Although noting that resort to legislative history was unnecessary given the clarity of the statutory language and the governing principles of statutory construction, the court of appeals "confirm[ed] its understanding of the text by examining the legislative history." Pet. App. 37a (citing *Samatar v. Yousuf*, 130 S. Ct. 2278, 2287 & n.9 (2010)). Contemporaneous legislative history confirmed that Section 806 was intended to "provide whistleblower protection to employees of publicly traded companies." *Id*. at 37a-38a (citing Senate Judiciary Committee Report, S. Rep. No. 107-146, at 2-5 (2002)).

In addition, subsequent legislative developments confirm the whistleblower provision's narrow reach.

Pet. App. 37a-46a. A bill was introduced to amend Section 806 explicitly to cover employees of investment advisers to mutual funds, but it was unsuccessful. *Id*. at 40a-43a. In the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Congress amended Section 806 explicitly to include employees of public companies' *subsidiaries*, but did *not* amend the statute to include contractors and subcontractors of public companies. *Id*. at 43a-46a.

5. The DOL and the SEC filed *amicus curiae* briefs in the First Circuit urging affirmance of the district court's decision. The court of appeals considered the agencies' views, but held that they were not entitled to deference.

First, no deference was warranted under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984), because neither the DOL nor the SEC had been given the authority to interpret the term "employee" in Section 806. Pet. App. 46a.

Second, even if the agencies had been delegated interpretive authority, the court of appeals would not defer to an administrative agency's contrary construction of the term "employee" in Section 806 because it was not ambiguous. Pet. App. 46a.

Third, the court held that regulations adopted by the Occupational Safety and Health Administration (OSHA) within the DOL were not entitled to deference because the regulations are procedural and not intended to provide interpretations of the statute. Pet. App. 49a. Indeed, the Secretary of Labor expressly told the court of appeals that the agency "does not have substantive rulemaking authority with respect to section 1514A," and thus "the Secretary is not asking for deference under *Chevron*

. . . for her procedural regulations." Br. for the Sec. of Labor as *Amicus Curiae* Supporting Affirmance, No 10-2240 at 18 n.8 (Apr. 8, 2011).

Fourth, OSHA's regulations were not entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), because the DOL's notice of rulemaking advancing the interpretation lacked the "power to persuade." Pet. App. 50a. Furthermore, the court noted, neither the DOL nor the SEC claimed *Skidmore* deference for the OSHA regulations. *See ibid*.

Fifth, the court of appeals concluded that the textual arguments advanced by the DOL, which simply "mirror[ed] the textual arguments of the [petitioners] and [were] not based on the DOL's 'specialized experience,'" were not entitled to deference. Pet. App. 51a (quoting *Skidmore*, 323 U.S. at 139).

Sixth, because the SEC lacks rulemaking or enforcement authority as to Section 806, the court of appeals stated that the SEC's views regarding that provision, whatever their form, "would be owed no deference in any event." Pet. App. 51a.

6. Judge Thompson dissented. Pet. App. 52a. In her view, extending whistleblower protection to employees of contractors would fit within both the specific whistleblower-protection purpose of Sarbanes-Oxley and its broader remedial purposes. *Id*. at 60a-61a. She argued that Section 806 confers whistleblower protection upon employees of contractors and subcontractors doing business with public companies.

7. The First Circuit denied rehearing en banc. Pet. App. 134a-135a. Judge Thompson dissented for the reasons stated in her panel dissent. *Id*. at 135a.

ARGUMENT

Section 806 of the Sarbanes-Oxley Act of 2002 creates a private right of action for employees of publicly traded companies who engage in protected activity. 18 U.S.C. § 1514A. Petitioners were not employees of publicly traded companies; they were employed by private companies that provided or whose affiliates provided services to public companies. The court of appeals therefore concluded that petitioners are outside the ambit of the statutory provision under which they sued. That decision is correct, and does not conflict with any decision of this Court or of any other court of appeals. It does not warrant further review.

I. THERE IS NO CONFLICT OF DECISION WARRANTING THIS COURT'S REVIEW

Every federal circuit to have considered the question has concluded that Section 806 of Sarbanes-Oxley is limited to employees of public companies. Petitioners' asserted conflict between the decision below and a single decision from an administrative tribunal is not a basis for certiorari review.

A. All Federal Courts Agree That Section 806 Does Not Apply To Employees Of Private Contractors

1. The courts of appeals are in agreement that the text of Section 806 limits the private cause of action to employees of public companies. As noted above, the First Circuit held that only employees of the defined public companies, not employees of contractors and subcontractors, may pursue a private civil action under Section 806. Pet. App. 17a.

The Seventh Circuit also has recognized that Section 806 applies to contractors of a public compa-

ny only when the contractor participates in a retaliatory act against the public company's employee. *See Fleszar v. U.S. Dep't of Labor*, 598 F.3d 912 (7th Cir.) (Easterbrook, C.J.), *cert. denied*, 131 S. Ct. 423 (2010). In that case, the Secretary of Labor declined to investigate Fleszar's allegations, concluding that the American Medical Association (AMA)—a non-profit membership association that does not issue stock—was not a covered entity. *Id*. at 913. A DOL ALJ and the ARB affirmed. *Ibid*.

On appeal, Fleszar contended that the ALJ should have ordered the Secretary to conduct an investigation that might turn up facts showing that the AMA is a "contractor, subcontractor, or agent" of a covered public entity. 598 F.3d at 914.

The Seventh Circuit held that the Secretary of Labor was not legally obliged to assist Fleszar in investigating her claim. 598 F.3d. at 914-15. The court also rejected Fleszar's contention that Section 806 provides whistleblower protection to employees of any "contractor, subcontractor, or agent" of a public company. As Chief Judge Easterbrook explained:

> We don't share Fleszar's belief that the phrase "contractor, subcontractor, or agent" means anyone who has *any* contract with an issuer of securities. Nothing in [Section 806] implies that, if the AMA buys a box of rubber bands from Wal-Mart, a company with traded securities, the AMA becomes covered by [Section 806]. In context, "contractor, subcontractor, or agent" sounds like a reference to entities that participate in the issuer's activities. The idea behind such a provision is that a covered firm,

> such as IBM, can't retaliate against whistleblowers by contracting with an ax-wielding specialist (such as the character George Clooney played in "Up in the Air").

Id. at 915.

2. The federal district courts also are in agreement that, by its terms, Section 806 does not apply to employees of private contractors. *See Ervin v. Nashville Peace & Justice Ctr.*, No. 3:07-0832, 2008 WL 4449920, at *7 (M.D. Tenn. Sept. 29, 2008) ("[B]y its very terms, Section 806 applies only to employees of publicly traded companies"); *Tumban v. Biomerieux, Inc*., No. 1:06-cv-00442, 2007 WL 778426, at *2 (M.D.N.C. Mar. 13, 2007) ("The Sarbanes-Oxley Act only applies to publicly traded companies").

In *Brady v. Calyon Securities (USA)*, then-district Judge Gerard Lynch rejected the claim of an analyst, who contended that he could bring a claim under Section 806 against his privately held employer because it "acted as [an] agen[t] and/or underwrite[r] of numerous public companies." 406 F. Supp. 2d 307, 318 (S.D.N.Y. 2005) (internal quotation marks omitted). Judge Lynch explained that the mere fact that the defendants may have acted as an agent for certain public companies was insufficient to bring them within the employment protection provisions of the Sarbanes-Oxley Act. *See ibid*. "Nothing in the Act," Judge Lynch explained, "suggests that it is intended to provide general whistleblower protection" to employees of "any privately-held employer, such as a local realtor or law firm, that has ever had occasion, in the normal course of its business, to act as an agent of a publicly traded

company, even as to employees who had no relation whatsoever to the publicly traded company." *Ibid*.

B. The Asserted Conflict With An Administrative Adjudication Is Not Certworthy

Petitioners do not even try to argue that the First Circuit's decision in this case conflicts with any other judicial decision. Instead, they argue that it conflicts with a single decision of the DOL's Administrative Review Board. That conflict is not a basis for certiorari review. *See* Sup. Ct. R. 10.

In *Spinner v. David Landau & Associates, LLC*, Nos. 10-111, 10-115, 2012 WL 2073374 (DOL ARB May 31, 2012), the ARB erroneously concluded that the private cause of action in Section 806 extends to employees of contractors and subcontractors of public companies. Although *Spinner* reached a different result than the court of appeals did here, the conflict does not warrant review since the ARB's decision is not an authoritative or persuasive construction of the statute. The ARB's analysis was controlled by the DOL's procedural regulations and is contrary to this Court's repeated holdings that policy considerations cannot override the statutory text. The *Spinner* decision also has not yet received judicial review by an Article III court.

Although the ARB purported to analyze many of the same indicia of congressional intent in *Spinner* as the First Circuit did in this case (*cf*. Pet. 19), the ARB's analysis was controlled by the DOL's regulations, which "are procedural in nature and are not intended to provide interpretations of the Act." 69 Fed. Reg. 52,104, 52,105 (Aug. 24, 2004). For that reason, the Secretary of Labor "admit[ted]" before the court of appeals that the regulations were "enti-

tled to no deference" under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and she did not claim deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Pet. App. 47a, 49a. Thus, the First Circuit properly afforded the DOL's regulations no weight in reaching its decision. *Id*. at 46a-51.

The ARB, by contrast, was "obliged to follow" the DOL regulations. Pet. App. 142a & n.6 (citing 75 Fed. Reg. 3925 (Jan. 15, 2010)); *see also id*. at 153a ("As noted above, the ARB is bound by the DOL regulations"). Thus, the "starting point" of the ARB's statutory analysis was "the language of the statute itself *and the implementing regulations construing the relevant statutory text*." *Id*. at 148a (emphasis added and internal quotation marks omitted). In addition, the ARB rejected the court of appeals' statutory analysis in favor of "the commentary accompanying the DOL's regulations." *Id*. at 149a; *see also id*. at 153a (relying on the DOL's responses during the notice-and-comment phase of the rulemaking concerning the coverage of the provision).

Because the ARB's construction of the statutory text was controlled by the DOL's procedural regulations, it is not an authoritative construction of the statute. An ARB decision dictated by procedural regulations has no more authority or persuasive value than the underlying regulations themselves.

The ARB's decision in *Spinner* also lacks persuasive force because it is contrary to this Court's precedents cautioning against expansive construction of statutes based on a perceived remedial purpose. According to the ARB, Section 806 must be read to protect whistleblowing by employees of contractors and subcontractors to the public company in order to

promote the Sarbanes-Oxley Act's "overriding purpose of protecting investors." Pet. App. 161a; *see also id.* at 154a ("[D]enying coverage to employees of contractors, subcontractors, or agents runs counter to the goals of Section 806 and SOX generally"); *id*. at 166a ("[W]e are obliged to interpret Section 806 broadly both because it is a remedial statute and the legislative history encourages use to do so").

This Court repeatedly has warned against ignoring the statutory text in favor of an assessment of Congress's objectives and how best to implement them. The "broad remedial goals" of a statute are insufficient justification "for interpreting a specific provision more broadly than its language and the statutory scheme reasonably permit." *Pinter v. Dahl*, 486 U.S. 622, 653 (1988) (internal quotation marks omitted); *see also Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994) ("Policy considerations cannot override . . . the text and structure of the Act"); *62 Cases of Jam v. United States*, 340 U.S. 593, 600 (1951).

Congress definitively and expressly limited the private right of action created by Section 806 to employees of publicly traded companies. Neither the DOL's procedural regulations nor a perceived remedial purpose can justify expansion of the plain language of Section 806. Thus, the ARB's contrary construction is not entitled to any deference. Tellingly, petitioners do not contend otherwise.

Even if the text were ambiguous, the ARB's decision still would not be entitled to deference. Deference is not warranted where Congress has not given an agency primary responsibility over a statute. *See Chevron*, 467 U.S. at 845 (deference to an agency's construction of an ambiguous statute is warranted if

it "represents a reasonable accommodation of conflicting policies that *were committed to the agency's care*") (emphasis added and internal quotation marks omitted); *see also Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 642 n.30 (1986) (plurality opinion) (there is "not the same basis for deference predicated on expertise" where a statute is administered by multiple governmental agencies).

The DOL has neither primary responsibility for administering Sarbanes-Oxley nor substantive rulemaking authority to interpret Section 806. Although the DOL has authority to adjudicate complaints under Section 806, Sarbanes-Oxley provides for *de novo* judicial review of certain complaints *before* the agency issues a final order. *See* 18 U.S.C. § 1514A(b)(1)(B). Because the Act provides for overlapping adjudicative jurisdiction, the ARB cannot claim any special expertise in resolving statutory ambiguities (*see Chevron*, 467 U.S. at 843-45), or contend that Congress expected the ARB to use its adjudicatory power to play a policymaking role. *Cf. Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 154 (1991) ("Insofar as Congress did not invest the Commission with the power to make law or policy by other means, we cannot infer that Congress expected the Commission to use *its* adjudicatory power to play a policymaking role"). Thus, federal courts have independent authority to interpret Sarbanes-Oxley without deference to the ARB's interpretations.

Petitioners' sole authority for the notion that a conflict between an Article III appellate court and an administrative tribunal may warrant this Court's review is a practice treatise that does not support the proposition. *See* Pet. 19 (citing Eugene Gressman et al., *Supreme Court Practice*, 268 (9th ed. 2007)).

What the treatise actually says is that "[a]n issue may assume importance because the lower court decision is at war with *a well-established construction* given the statute by the administrative agency charged with its enforcement." *Supreme Court Practice*, *supra*, at 268 (emphasis added). That statement has no application here because the ARB's decision in *Spinner* falls far short of a well-established or authoritative administrative construction of the statute. Federal courts have unanimously rejected this open-ended reading. And, as demonstrated by the ALJ's dismissal of Zang's complaint, administrative tribunals have construed the statute the other way as well.

Moreover, petitioners have not cited a single case in which this Court has granted certiorari to review a conflict between a court of appeals decision and a decision of an administrative tribunal like the ARB, and we are aware of none. To the contrary, the Solicitor General has argued in analogous circumstances that conflicting judicial and administrative precedents do not warrant this Court's review: "The fact that the only conflict petitioner can identify is between the [ARB's] decision in this case on one hand and the decisions of two district courts on the other highlights why review by this Court is not warranted." Brief for Respondent in Opposition, *Platone v. U.S. Dep't of Labor*, No. 09-55, at 12 n.4 (Oct. 16, 2009).

ARB panel members, like other DOL decision makers, are part of the administrative process. The courts of appeals, which provide an independent review of the statutory scheme including its administrative implementation, are fully capable of resolving any inconsistencies created by an aberrant ARB decision. Indeed the *Spinner* decision itself has yet to

be reviewed by an Article III court. That divergent administrative determination, which is not entitled to deference, may yet be overturned on appeal.

Pursuant to statutes and procedural regulations governing the handling of whistleblower complaints, OSHA conducts an initial investigation and may either dismiss the complaint as meritless or make a finding of retaliation and order appropriate relief. 18 U.S.C. § 1514A(b)(2)(A); 49 U.S.C. § 42121(b)(2)(A). Either the complaining employee or the employer may seek *de novo* review of OSHA's initial decision before a DOL ALJ. 29 C.F.R. §§ 1980.106, 1980.107. Either party may seek discretionary review of the ALJ's decision by the ARB. 29 C.F.R. § 1980.110. If the ARB denies review, the ALJ's decision becomes the final agency action; if the ARB accepts review, the Board's decision becomes the final agency action. 29 C.F.R. § 1980.110(b).

Once the administrative process is complete, either party may seek review of the agency's final decision in a federal court of appeals. 49 U.S.C. § 42121(b)(4)(A); 29 C.F.R. § 1980.112(a). In addition, an employee may file a *de novo* action in federal district court 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." 18 U.S.C. § 1514A(b)(1)(B). There is therefore ample opportunity for judicial correction (or confirmation) of administrative determinations. Review by this Court is not warranted since no Article III court has yet considered the ARB's decision in *Spinner*.

Petitioners do not contend that the ARB's decision in *Spinner* is entitled to deference in any federal court or protected from reversal on appeal; instead,

they contend only that ALJs outside the First Circuit will be bound to apply *Spinner*, and thus the ARB's decision will result in forum shopping between administrative and judicial adjudication. *See* Pet. 3, 19. Whatever the complainant's initial choice of forum, either party may seek review of the final decision in a federal court of appeals for the circuit in which the alleged violation occurred. 49 U.S.C. § 42121(b)(4)(A). That court of appeals, exercising *de novo* review over questions of law, will have ample opportunity to consider the plain language of the whistleblower provision, the statutory scheme, the legislative history, analogous statutes, and any agency claims of deference.[1]

Further percolation among the courts is especially appropriate here to allow Article III judges to consider the various contexts in which this question could arise, if indeed it ever arises again. In the decade since enactment of the Sarbanes-Oxley Act, the question concerning coverage of employees of contractors and subcontractors has arisen quite infre-

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[1] Petitioners make repeated references to the *amicus* briefs filed in the court below by the SEC and the DOL, but they nowhere dispute the First Circuit's conclusion that the Judiciary owes no deference to the positions taken in those briefs. *See* Pet. App. 46a-51a. That is because the court of appeals' conclusion was correct. *See Christopher v. Smithkline Beecham Corp.*, 132 S. Ct. 2156, 2168-70 (2012) (according no deference to a DOL *amicus* brief); *Janus Capital Grp., Inc. v. First Derivative Traders,* 131 S. Ct. 2296, 2303-05 & n.8 (2011) (no deference due SEC's views on scope of private right of action). Because the agencies' views on the question presented are already known, are quoted in the petition, and concededly are entitled to no deference, there is no reason to delay resolution of this litigation by asking again for the views of the federal government.

quently, and this is the only such case involving mutual fund investment advisers and related entities. There are only a handful of pertinent court decisions construing Section 806, and they all point in the same direction. No conflict among judicial authorities has yet developed, and may never develop. Thus, there is no need for this Court's review.

II. THE COURT OF APPEALS' DETERMINATION THAT SECTION 806 DOES NOT APPLY TO EMPLOYEES OF PRIVATE CONTRACTORS IS CORRECT

The court of appeals correctly determined that Section 806's unadorned reference to "employees" should be understood in context as comprising employees of the same public companies identified as covered employers in the provision, as well as in the title and caption. Although resort to additional indicia of congressional intent is unnecessary where, as here, the text is clear, the court of appeals correctly concluded—in accordance with the rules of interpretation announced by this Court—that the statutory scheme, legislative history, and other interpretive indicia confirm the natural reading of the text.

A. The Decision Below Implements The Statutory Text And Structure

The petition glosses over the court of appeals' thorough statutory analysis. Petitioners' statement of the case contains only a single paragraph discussing the detailed decision below. *See* Pet. 7-8. Moreover, petitioners do not cite or acknowledge *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183 (1991), *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011), or other Supreme Court

precedents that were central to the court of appeals' analysis. The petition also fails to grapple with the absurdities that would result from petitioners' construction of the statute, as well as the adverse practical consequences of imposing massive liability and costs on private businesses that Congress expressly sought to avoid.

In marked contrast to the decision below, petitioners' effort to read Section 806 as conferring a private right of action to employees of private companies contorts the statutory language and violates basic principles of statutory construction.

Petitioners' *only* argument based on the plain text of the statute is the conclusory assertion that "Section [806] expressly applies to contractors and subcontractors of these public companies, as well as to the public companies themselves." Pet. 12. That is true as far as it goes; but it says nothing about whether the contractors' and subcontractors' *employees* are granted rights of action. As the court of appeals correctly noted, construing the term "employee" to include employees of a public company's officers, employees, contractors, subcontractors, and agents is not justified as a matter of logic or grammar. Pet. App. 18a. The fact that the statute prohibits retaliation *by* "any officer, employee, contractor, subcontractor, or agent" of a public company does not mean that the provision must forbid retaliation *against* an employee of an officer, employee, contractor, subcontractor, or agent. *Ibid*.

According to petitioners, the phrase "any officer, employee, contractor, subcontractor, or agent of such company" identifies entities that would be precluded from retaliating against their *own* employees. Although a contractor, subcontractor, or agent of a pub-

licly traded company might have their own employees, an officer or employee of a publicly traded company would not be expected to have their own employees. A proffered interpretation that produces such anomalies defies basic rules of statutory construction. *Johnson v. United States*, 529 U.S. 694, 707 n.9 (2000) ("[N]othing is better settled, than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion") (quoting *In re Chapman*, 166 U.S. 661, 667 (1897)).

By providing that "officers, employees, contractors, subcontractors, or agents" may not discriminate against employees of public companies, Congress did not "adop[t] a general whistleblower protection provision" covering every employee of every privately held employer. *Brady*, 406 F. Supp. 2d at 318; *see also* Pet. App. 111a-115a. Extending whistleblower protection to the employees of privately held companies doing business with public companies would extend protection far beyond the scope envisioned by Congress.

Unable to articulate a coherent textual or structural defense of their position, petitioners are left to contend that a broad interpretation of Section 806 would further the investor-protection objectives of the Sarbanes-Oxley Act. *See* Pet. 21-33. But the perceived *purposes* of a statutory provision cannot override the *text* of the *statute* that Congress enacted. *See Mohamad v. Palestinian Authority*, 132 S. Ct. 1702, 1710 (2012) (rejecting broad reading of cause of action because "petitioners' purposive argument simply cannot overcome the force of the plain text"); *Board of Governors of Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 375 (1986).

Congress expressly limited the private right of action created by Section 806 to employees of publicly traded companies. Section 806 creates a particularly complex kind of private civil litigation—allegations of securities violations wrapped inside an employment-discrimination claim—that is expensive and burdensome for employers to defend against. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 80 (2006) (noting "widespread recognition" that securities fraud litigation "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general") (internal quotation marks omitted). Congress decided that the benefits outweighed the costs in the case of employees of public companies. But Congress reasonably declined to impose these extraordinary costs on a broad range of private companies.

Allowing petitioners' suits to proceed would upset the balance struck by Congress by exposing thousands of private companies that do business with public companies to a new type of employment litigation—regardless of the size of their workforce, the volume of their business, the nature of their business or relationship with the public company, or their capacity to understand and address complex questions under securities laws that, by definition, do not apply to them. Congress imposed burdens on public companies that assume greater regulatory responsibilities by accessing the capital markets. Expanding coverage to private contractors, in contrast, would expose many partnerships and small businesses to a

particularly expensive and potentially destructive form of civil liability.[2]

Sensitive to the "practical consequences of an expansion" of the class of litigants entitled to sue under a statute (*Stoneridge*, 552 U.S. at 163), this Court repeatedly has rejected an expansive reading of both express and implied causes of action justified by reference to broad policy objectives that would open the floodgates of litigation. *See*, *e.g*., *Janus*, 131 S. Ct. 2296-99 (rejecting construction of private cause of action under SEC Rule 10b-5 that would permit investment adviser to be held liable for false statements included in mutual funds' prospectuses); *Stoneridge*, 552 U.S. at 164 (rejecting interpretation of Section 10(b) of the Securities Exchange Act that "would expose a new class of defendants to [litigation] risks"); *Pegram v. Herdrich*, 530 U.S. 211, 232-33 237 (2000) (refusing, given "doubt that Congress intended" a broad category of ERISA claims, to recognize a cause of action that would risk "upheaval" to businesses and "the efficiency of federal courts"); *Associated Gen. Contractors of Cal., Inc., v. Cal. State Council of Carpenters*, 459 U.S. 519, 530 (1983) (re-

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[2] Concerned about this massive expansion of liability, the district court adopted and applied a "limiting principle," under which Section 806 would apply only when an employee's complaint pertains to fraud against shareholders of a public company. Pet. App. 115a. That effort (which petitioners do not defend in this Court) addresses the scope of protected activity—not the scope of employee coverage—and therefore does not meaningfully limit the range of possible defendants. In any event, the imposition of such limits is a legislative function, not a judicial one, and the perceived need to create such a limitation only confirms that the sweeping expansion of liability advocated by petitioners is something Congress did not provide.

jecting "open-ended" construction of Section 4 of the Sherman Antitrust Act).

If Congress were persuaded that the First Circuit's adherence to the plain text and structure of Section 806, which excludes employees of privately held companies, was bad policy, then it is the Legislature's prerogative to adjust the statutory scheme to cover additional situations. This is illustrated by an example provided by petitioners' *amicus*: After the Fifth Circuit held that an employee's filing of purely internal reports did not constitute protected activity under the Energy Reorganization Act (*Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984)), Congress amended the ERA to protect internal whistleblowing explicitly. *See* NWC Br. 7.

Indeed, Congress has already amended the coverage of Section 806 once. Federal courts and DOL ALJs disagreed on whether Section 806 applied to wholly owned subsidiaries of public companies. *See*, *e.g.*, *Malin v. Siemens Med. Solutions Health Servs.*, 638 F. Supp. 2d 492, 501 (D. Md. 2008). The Dodd-Frank Act amended Section 806 to explicitly include certain subsidiaries of publicly traded companies and statistical rating organizations. Pet. App. 204a-205a (Pub. L. No. 111-203, §§ 922(b), 929A, 124 Stat. 1376, 1848, 1852 (2010)). While that amendment has no application here, it puts to rest the suggestion—made implicitly by petitioners and explicitly by their *amicus*—that this Court should "impute[] a protection into laws that have no words creating it." NWC Br. 4. The Sarbanes-Oxley Act has express words creating whistleblower protection; but they do not apply in the circumstances of this case.

B. The Decision Below Is Entirely Consistent With The Statutory Purpose

Petitioners contend that the First Circuit's construction of Section 806—itself a small part of a comprehensive financial reform package—is bad policy because, according to petitioners, it will (1) create a regulatory loophole for accounting firms and other professionals; (2) have detrimental consequences for the mutual fund industry; and (3) leave whistleblowers unprotected. Such policy determinations are for the Legislature to address, and petitioners' parade of horribles fails to account for the numerous other statutory and regulatory provisions that operate in these areas.

1. Petitioners' suggestion that the First Circuit's decision would create a regulatory loophole by rendering the anti-retaliation provision inapplicable to accounting firms ignores the broader context of Sarbanes-Oxley. In particular, petitioners fail to recognize that Congress *separately* and *comprehensively* addressed the conduct of outside accountants by creating a regulatory agency and adopting detailed provisions regulating corporate auditors in their representation of public companies.

As this Court recently acknowledged, Sarbanes-Oxley "introduced tighter regulation of the accounting industry under a new Public Company Accounting Oversight Board." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3147 (2010). The Board is charged with "regulat[ing] *every detail* of an accounting firm's practice, including hiring and professional development, promotion, supervision of audit work, the acceptance of new business and the continuation of old, internal inspection

procedures, professional ethics rules, and 'such other requirements as the Board may prescribe.'" *Id*. at 3148 (citing 15 U.S.C. § 7213(a)(2)(B)) (emphasis added). Because Congress explicitly addressed concerns about accountants in other provisions of the Sarbanes-Oxley Act, those concerns do not warrant judicial expansion of the civil cause of action in Section 806, and certainly not to mutual fund investment advisers.

Moreover, petitioners' effort to equate accounting firms with investment advisers is unfounded. Pet. 22. Sarbanes-Oxley primarily was enacted to address accounting scandals at publicly traded companies, not wrongdoing by mutual funds that may have held those companies' stock or investment advisers to those mutual funds. Accounting firms are engaged by public companies to conduct audits and render opinions about financial statements of their client companies, and their opinions form a portion of these companies' publicly filed financial statements. Prior to the Sarbanes-Oxley Act, however, there was no nationwide regulator of public accounting firms. Investment advisers, by contrast, are engaged by mutual funds and other clients to provide proprietary investment advice, which is generally not shared with the public. In addition, all investment advisers of mutual funds (as well as other large investment advisers) have long been regulated by the SEC under the Investment Advisers Act of 1940. 15 U.S.C. § 80b-3.

2. Because investment advisers and their affiliates are separately regulated, petitioners' contention that the First Circuit's construction would have detrimental consequences for the mutual fund industry is incorrect. Specifically, petitioners contend that Section 806 must extend to investment advisers be-

cause these entities have "significant financial incentive to withhold information." Pet. 33. In fact, mutual fund advisers (only about half of which are privately held) are motivated to discover wrongdoing occurring at public companies.

Once again, petitioners' theory fails to recognize that Congress has *separately* and *comprehensively* regulated the incentives and conduct of investment advisers and other participants in the mutual fund industry. Under legislation in force for more than seven decades, investment companies and investment advisers are separate and distinct entities. The Investment Company Act, 15 U.S.C. § 80a-1 *et seq*., and the Investment Advisers Act, 15 U.S.C. § 80b-1 *et seq*., subject both investment companies and investment advisers to significant regulatory controls to address any concerns about the "potential for abuse inherent in the structure of investment companies." *Jones v. Harris Assocs. L.P.*, 130 S. Ct. 1418, 1422 (2010) (internal quotation marks omitted). Congress was well-aware of this legal framework and the fact that many employees in the mutual fund industry work for separately owned investment advisers. *See ibid*.

Because investment companies and their advisers are subject to pervasive federal regulation, including SEC supervision and enforcement authority, under the 1940 Acts, there is no basis to stretch Section 806 of the Sarbanes-Oxley Act to reach privately held companies in this arena.

3. An unstated premise of petitioners' argument is that if a whistleblower cannot invoke the civil suit provision of Section 806, he or she is unprotected by federal law. That premise fails to recognize that Congress has *separately* provided anti-retaliation

protections for employees of private companies who report potential violations of the securities laws to government officials.

Section 1107 of Sarbanes-Oxley, entitled "Retaliation Against Informants," imposes *criminal liability* on anyone who retaliates against a person for providing information about *any* federal offense to government officials. 18 U.S.C. § 1513. Unlike Section 806 of Sarbanes-Oxley, Section 1107 applies to *all* employers, not just public companies.

In addition, the Dodd-Frank Act creates a civil cause of action and a monetary reward system for whistleblowers. Section 922 of Dodd-Frank creates a private cause of action for individuals who are discharged or discriminated against by their employers for providing information to the SEC relating to a potential violation of the securities laws. 15 U.S.C. § 78u-6. Section 922 further requires the SEC to award whistleblowers monetary compensation for providing certain tips about possible securities law violations that lead to successful enforcement actions. *See also* SEC Release for Proposed Rules Implementing the Whistleblower Provisions of § 21F of Securities Exchange Act of 1934, at 18 (May 25, 2011) (asserting SEC enforcement authority over employers who retaliate against Section 922 whistleblowers).

Thus, an employee who makes protected reports to the SEC has a civil cause of action against her employer under Section 922 of Dodd-Frank (plus the possibility of a lucrative reward) and the employer could be subject to criminal liability for retaliating against the employee under Section 1107 of Sarbanes-Oxley. Because federal law protects and encourages external reporting, employees of both public

and private companies have sufficient incentive to report possible violations of the securities law to the SEC or other federal law enforcement officers. The congressional decision that private companies should "be pursued by the SEC and not by private litigants" should be respected. *Stoneridge*, 552 U.S. at 163.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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