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 OF *AMICUS CURIAE* NATIONAL WHISTLEBLOWER CENTER IN SUPPORT OF THE PETITIONERS

Richard R. Renner, *Counsel of Record*
Stephen M. Kohn
National Whistleblowers Center
3238 P St., NW
Washington, DC 20007
(202) 342-6980
rr@whistleblowers.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

STATEMENT OF INTEREST OF THE NATIONAL WHISTLEBLOWER CENTER

The National Whistleblower Center (Center)[1] is a nonprofit, tax-exempt, non-partisan, charitable, and educational organization dedicated to the protection of employees who "blow the whistle" and report misconduct in the workplace. The NWC lists its activities at www.whistleblowers.org.

As part of its core mission, the NWC regularly monitors major legal developments in whistleblower law, and files "Friend of the Court" briefs in federal and state courts and administrative agencies. Since 1990, the Center has participated before this Court as amicus curiae in cases that directly impact the rights of whistleblowers, including, *English v. General Electric,* 496 U.S. 72 (1990); *Haddle v. Garrison,* 525 U.S. 121 (1999); *Vermont Agency of Nat. Resources v. U.S. ex rel. Stevens,* 529 U.S. 765 (2000); *Beck v. Prupis,* 529 U.S. 494 (2000); *EEOC v. Waffle House, Inc.,* 534 U.S. 279 (2002), and *Doe v. Chao,* 540 U.S. 614 (2004).

Persons assisted by the Center have a direct interest in the outcome of this case. The Sarbanes-Oxley Act (SOX) is a key piece of legislation to ensure that our financial markets are stable and that financial reports filed with the Securities and

---

1 Pursuant to Rule 37.6, the Center states that counsel of record for all parties received over ten (10) days notice of intention to file this brief, and gave consent to the filing of this brief. Those consents are lodged herewith. No monetary contributions were accepted for the preparation or submission of this amicus curiae brief and that its counsel authored this brief in its entirety.

Exchange Commission (SEC) are reliable. The NWC played an important role in working with Congress, on a bi-partisan basis, to ensure that whistleblower protections were incorporated into the SOX. Ref. S. Rep. 107-146, at 10.

Whistleblowers who report wrongdoing by corporate officers frequently are subject to reprisals. It cannot be over-stated how vital are the avenues of legal redress, including rights available under SOX. Even under the best of circumstances, whistleblowers run enormous risks and suffer retaliation for reporting wrongdoing. If SOX does not provide adequate remedies, then whistleblowers face even greater disincentives to expose misconduct or violations of law.

SUMMARY OF ARGUMENT

The plain text of the Sarbanes-Oxley Act (SOX), 18 U.S.C. § 1514A(a), prohibits the contractors of public companies from retaliating:

> No company *** 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 ***.

Congress enacted the employee protection in SOX as a "crucial" component of a comprehensive plan to protect our economy from crises caused by

frauds. S. Rep. 107-146 at 2.

To deny protection to Jackie Lawson and Jonathan Zang, the First Circuit undermined established principals of statutory interpretation to reach a result inconsistent with the plain meaning of SOX.

REASONS FOR GRANTING THE PETITION

I. PROTECTING THE EMPLOYEES OF CONTRACTORS IS MANDATED UNDER THE PLAIN MEANING OF THE SOX WHISTLEBLOWER STATUTE.

Congress created the SOX whistleblower protection, 18 U.S.C. § 1514A(a), to address

> a culture, supported by law, that discourage[s] employees from reporting fraudulent behavior not only to the proper authorities . . . but even internally. This 'corporate code of silence' not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity.

S. Rep. No. 107-146, at 5 (2002). Congress considered the whistleblower protection to be a "crucial" component of SOX for "restoring trust in the financial markets by ensuring that corporate fraud and greed may be better detected, prevented and prosecuted." S. Rep. 107-146 at 2.

The plain text of this statute includes "contractors" among those prohibited from discharging emp-

loyees on account of lawful disclosures about frauds and other violations of securities rules. When a contractor fires its own employee for engaging in protected activity, it has violated the text of SOX. Publicly traded companies can now evade the employee protection simply by channeling compliance sensitive work to a contractor in the First Circuit.

To reach its tortured construction of SOX, the panel majority below had to reject the historic broad construction of whistleblower protections. Petition, pp. 34a-35a. Previously, courts have had no difficulty holding that whistleblower provisions must be given broad scope to accomplish their remedial purposes. *NLRB v. Scrivener* (1972), 405 US 117, 121-26; *English v. General Elec. Co.*, 496 U.S. 72, 82 (1990)(to "encourage" employees to report safety violations and protect their reporting activity); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985)("Narrow" or "hypertechnical" interpretations are to be avoided as undermining Congressional purposes.); *Passaic Valley Sewerage Comm. v. Dep't of Labor*, 992 F.2d 474, 479 (3rd Cir. 1993). This Court construes Title VII to further its remedial purpose. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982). Broad construction of employee protections is not dependent on the rule of lenity used in criminal cases. Ref. Petition, p. 36a

Indeed, the public interest in protecting employees from reprisals is so strong that this Court has imputed a protection into laws that have no words creating it. *Jackson v. Birmingham Board of Edu-*

cation, 544 U.S. 167 (2005) (Title IX); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 128 S. Ct. 1951 (2008) (42 U.S.C. § 1981); *Gomez-Perez v. Potter*, 553 U.S. 474 (2008) (ADEA).

The United States Chamber of Commerce recognizes internal reporting as its preferred method of whistleblowing and fraud detection. Such reporting is within SOX's scope of protection, and is denied to the employees of contractors in the First Circuit. The Chamber made these comments to the SEC on implementation of section 21F of the Securities Exchange Act in December of 2010 (pp. 3-4):

> Effective compliance programs rely heavily on internal reporting of potential violations of law and corporate policy to identify instances of non-compliance. These internal reporting mechanisms are cornerstones of effective compliance processes because they permit companies to discover instances of potential wrongdoing, to investigate the underlying facts, and to take remedial actions, including voluntary disclosures to relevant authorities, as the circumstances may warrant… Moreover, if the effectiveness of corporate compliance programs in identifying potential wrongdoing is undermined, their attendant benefits, such as promotion of a culture of compliance within corporations, as well as their value to enforcement efforts, will likewise be dimin-

ished.[2]

The SOX whistleblower provision explicitly protects internal whistleblowing. As Congress recognized, these internal protections for whistleblowers are necessary both for direct corporate employees, and employees who provide those services through contractor-vendors. Employees of contractors need SOX's legal protection to feel safe in their careers as they submit concerns to these "cornerstone" internal compliance programs. If left standing, the decision below will have a chilling effect detrimental to SOX's objective of increasing accountability.

The panel majority also rejected the explicit policies of the Department of Labor and SEC. Petition, pp. 46a-51a. This rejection invites further inconsistency and uncertainty that undermines the encouragement employees need to come forward.

II. THE CONFLICT BETWEEN *SPINNER* AND THE FIRST CIRCUIT WILL DISCOURAGE WHISTLEBLOWERS.

In *Spinner v. David Landau and Associates, LLC*, 2012 WL 2073374 (ARB May 31, 2012), Petition, pp. 161a-199a, the Department of Labor rejected the First Circuit's holding below. SOX gives the Department responsibility to adjudicate administrative complaints of whistleblower retaliation. 18 U.S.C. § 1514A(b).

2 Full text of the Chamber's comments can be found at http://www.sec.gov/comments/s7-33-10/s73310-110.pdf

Whistleblower advocates have not seen such a conflict between a circuit court of appeals and the Department since the Fifth Circuit refused to protect nuclear whistleblowers raising safety concerns internally. *Brown & Root v. Donovan*, 747 F.2d 1029 (5th Cir. 1984). No other circuit followed this holding. In 1992, Congress amended the Energy Reorganization Act (ERA) to protect internal whistleblowing explicitly. In 2005, the Fifth Circuit finally conceded that its 1984 holding "was incorrect." *Willy v. Administrative Review Bd.*, 423 F.3d 483, 489, n. 11 (5th Cir. 2005).

Twenty-one years is too long to wait for correction of the decision below. Untold financial scandals would grow unnecessarily large while employees were discouraged from raising concerns.

CONCLUSION

The National Whistleblowers Center asks this Court to grant this petition and reverse the decision of the First Circuit.

Respectfully submitted,

Richard R. Renner
Counsel of Record
Stephen M. Kohn
National Whistleblowers Center
3233 P St., NW
Washington, DC 20007
(202) 342-6980
rr@whistleblowers.org