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Supreme Court, U.S.
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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 Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF

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Although the Sarbanes-Oxley Act was adopted in response to the collapse of Enron, respondents' interpretation has the inexplicable consequence of leaving outside the scope of section 1514A accountants at Arthur Andersen, whose deep involvement in Enron's machinations was central to the entire scheme. That interpretation also denies whistleblower protection to employees of entities such as Chewco, Jedi, and JLM, that Enron created for the express purpose of hiding its precarious economic position. And although the text of section 1514A expressly applies to mutual funds, respondents' narrow interpretation would often deny protection to the only employees who would understand problems in mutual funds' public disclosure statements. The language of the statute does not support these implausible results.

Section 1514A expressly applies to contractors or subcontractors of a public company. The dispute in this case is not about which firms are covered, but about what actions those firms are forbidden to take. Respondents defend their narrow interpretation as necessary to assure that not too many contractors will be under any legal obligations. But their interpretation is so narrow that it would render meaningless the language of section 1514A prohibiting retaliation by contractors and subcontractors.

I. THE TEXT OF SECTION 1514A DOES NOT SUPPORT FMR'S NARROW INTERPRETATION

When a statute forbids an entity to retaliate against an "employee," the normal meaning of that prohibition is to bar retaliation against the entity's own employees.[1] Nothing in section 1514A warrants departure from that ordinary meaning.

(1) Respondents assert that section 1514A(a) "defines 'employee' to mean 'employee ... of such company.'" (R.Br. 6; see R.Br. 17). That is not correct. No provision of section 1514A defines "employee"; indeed, the section has no definitions at all.

"Employee" in section 1514A has the ordinary meaning of that term, "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 448 (2003) (quoting Restatement (Second) of Agency, §220(1) (1957)). "Employee" has the same meaning throughout section 1514A, although in several instances is subject to varying limiting language.

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[1] Respondents argue that the prohibition in section 1514A is similar to the admonition "no homeowner, or guest or visitor of such homeowner, shall be rude to a neighbor." (R.Br. 16). But in respondents' example, the "guest or visitor" is physically in the homeowner's house, and thus would be in no position to be rude to his or her own neighbor.

First, the statute prohibits retaliation by a public company or "an employee ... of such company." Rather than defining "employee," the phrase "of such company" in section 1514A serves to designate from the larger group who are "employees" (however defined) the particular employees (employees of public companies) who may not retaliate. A limiting phrase such as "of such company" is not a definition; rather, it modifies the word (e.g., employee) whose *un*modified meaning remains the same. "Of such company" is no more a definition of "employee" than a definition of the other four nouns it limits: contractor, subcontractor, officer and agent. In the sentence "The junior Associate Justice opens the door," the adjective "junior" does not define "Associate Justice," but instead indicates who among the Associate Justices has that responsibility.

Second, the statute forbids retaliation against "an employee," without any limiting language; as a practical matter, however, it will usually be the case that the only individuals against whom an entity (or another employee of that entity) will be able to retaliate will be the entity's own employees.

Third, the covered actors are forbidden to retaliate because of protected activity by "the employee." Here the article "the" refers back to the particular individual who is the target of the retaliation; retaliation is forbidden only if in reprisal for whistleblowing by the targeted employee, not if in reprisal for whistleblowing by some other employee. The fourth and fifth references to "employee" are subject to the

same limitation ("the"), again referring to the specific employee who is the target of the retaliation.

(2) Respondents repeatedly characterize section 1514A as forbidding retaliation by a public company or a "representative" of a public company. "The statutory *text* provides that no public company, or representative of such company, may retaliate...." (R.Br. 6 (emphasis added)). In describing the actors (other than a public company) forbidden to retaliate, respondents use the term "representative" 21 times.[2] Because section 1514A forbids retaliation by a public company or its "representative," respondents reason, it follows that the individuals protected from retaliation must be employees of a public company.

But the term "representative" is not used in section 1514A at all; the actual words whose meaning matters are "contractor" and "subcontractor." Most contractors would not be described as "representatives"; they lack authority to sign contracts or to make commitments on behalf of the entity whose contractor they may be. And few if any contractors would have any authority to discriminate in the terms and conditions of employment against an employee of their counterparty. To support an inference that "employee" means only "employee of a public company," "contractor" would have to mean "contractual representative

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[2] R.Br. 5, 6 (three references), 7 (two references), 13, 15, 16 (two references), 19 (two references), 20 (two references), 24, 25, 26 (two references), 28, 29, 57.

authorized to take personnel actions against the employees of the public company." That idiosyncratically narrow interpretation is assuredly not the meaning of the broad phrase "*any* ... contractor ... of [a public company]." (Emphasis added).

(3) Respondents rely on the headings of section 806 and subsection 1514A(a), which refer to "protection of employees of publicly traded company." But respondents do not explain why the Court should disregard the heading of section 1514A – "Civil action to protect against retaliation in fraud cases" – which contains no such language. Respondents assert that *all* three headings support their view (R.Br. 6, 24), but they offer no explanation of how the section 1514A heading supports that interpretation.

The reference in the headings of section 806 and subsection 1514A(a) to "publicly traded companies" is necessarily shorthand; respondents acknowledge in footnote 5 of their brief that section 1514A also applies to report-filing companies that are *not* publicly traded. Respondents describe the body of section 1514A as "defining" the meaning of the phrase "publicly traded companies" (R.Br. 15), as if section 1514A defined "publicly traded company" to mean "publicly traded companies as well as non-publicly traded companies that are report-filing companies." But the text of section 1514A contains no such definition.

Respondents insist that the references in two headings to publicly traded companies "cannot be characterized as 'short-hand' for the 99% of companies

in America that are *not* publicly traded." (R.Br. 23) (emphasis in original). But we do not contend that "publicly traded companies" is shorthand for *all* privately held companies in the United States; we urge only that this phrase in the headings is shorthand for those particular entities that are expressly listed in the statute itself: publicly traded companies, report-filing companies and "contractor[s], subcontractor[s], [and] agent[s] of [public companies]."

II. RESPONDENTS' INTERPRETATION WOULD RENDER MEANINGLESS THE STATUTORY PROHIBITION AGAINST RETALIATION BY CONTRACTORS AND SUBCONTRACTORS

The ARB emphasized in *Spinner v. David Landau & Assocs., LLC*, 2012 WL 2073374 (DOL ARB May 31, 2012), that limiting "employee" to employees of public companies would render meaningless the prohibition against retaliation by contractors or subcontractors. (Pet.App. 150a). Respondents are unable to identify substantial real-world circumstances in which a contractor or subcontractor would be able to retaliate against a whistleblower employed by a different firm, the public company.

Respondents contend that under their interpretation section 1514A would at least apply in the circumstances depicted in the 2009 movie "Up in the Air." (R.Br. 24-25). In that film, employers seeking to lay off employees retain a fictional contractor, Career

Transitions Corporation, to deliver the news; one of that contractor's employees is portrayed by George Clooney, whom respondents describe as an "axe-wielding specialist." (R.Br. 24, 26). But section 1514A would not apply to this contractor because neither that firm nor Mr. Clooney had any role in selecting the workers to be dismissed, or any idea why those particular workers were losing their jobs. (Pet. 26).

To fit within section 1514A's prohibition, a contractor (or its axe-wielding specialist) would have to act with an intent to further the public company's retaliatory purpose. But no prudent public company would disclose to a contractor the retaliatory purpose of a termination. And there would be no reason for a retaliatory public company to use that circuitous route, because the company could simply fire the whistleblower itself. In addition, a contractor which acted with such an unlawful purpose would already be covered by section 1514A's prohibition against retaliation by an "agent" of a public company, rendering redundant the separate prohibitions against retaliation by "contractor[s]" and "subcontractor[s]." Respondents suggest that the "agent" provision of section 1514A could be rendered inapplicable (thus giving significance to the provision regarding contractors) if the public company and the contractor simply stipulated in their contract that the contractor "shall not be an agent." (R.Br. 27). But whether a firm is an agent within the meaning of section 1514A would be governed by section 1514A and principles of agency law, not by a contractual limitation.

Respondents suggest that the provision regarding retaliation by contractors could have meaning if a contractor retained by a public company, and accorded the power to select which of that company's workers would be fired, decided on its own to retaliate against a company whistleblower. (R.Br. 27). But no sensible public company would give an outside firm the authority to decide which of that company's own workers should be dismissed,[3] and such an outside firm would be unlikely to have any reason to retaliate against a public company's worker. A firm authorized by a public company to select and dismiss public company employees would be an "agent" of that company.

Respondents do not even attempt to explain how, under its narrow interpretation of section 1514A, a *sub*contractor could retaliate against the employee of a public company and thus violate that provision.

Even if there were a remote possibility that a uniquely situated contractor could somehow retaliate against an employee of a public company, virtually all contractors and subcontractors would lack the ability to do so and thus fall outside the scope of section 1514A. Respondents' narrow interpretation would change the application of section 1514A from "*any* ...

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[3] In *Tides v. Boeing Co.*, 644 F.3d 809, 811 (9th Cir.), *cert. denied*, 132 S.Ct. 518 (2011), the plaintiffs were retaliated against by their public company employer, not by a contractor.

contractor [or] subcontractor" (emphasis added) to "few if any contractors or subcontractors."

III. THE LEGISLATIVE HISTORY OF SECTION 1514A DOES NOT SUPPORT RESPONDENTS' NARROW INTERPRETATION

(1) The Senate Report's explanation of section 1514A expressed particular disapproval of Arthur Andersen's retaliation against a partner who objected to Enron's accounting gimmicks. Respondents argue that this reprisal is irrelevant, because "the Arthur Andersen *partner* would likely not be protected as 'an employee' even if Section 806 applied to private firms. *See, e.g.*, *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 449-50 (2003)." (R.Br. 33) (emphasis in original). But *Clackamas* expressly rejected the suggestion that an individual could not be an employee within the meaning of a statute if his or her job title was "partner." 538 U.S. at 446, 450. More fundamentally, the Committee's concern was not limited to retaliation against a particular individual; it objected to enforcement by accounting firms of a code of silence, regardless of who the victim might be.

The Senate Report also criticized the manner in which Enron's outside law firm had responded when Enron asked for advice about the legality of retaliating against an employee who had complained about accounting fraud. (Pet.Br. 59). Respondents dismiss the Report's reference to the law firm's action as misguided, reasoning that "Enron's outside lawyer

did not retaliate against any employee." (R.Br. 33). But the point was not about whether the firm had retaliated against anyone, but that the attorneys at the law firm had failed to act as "watchdogs" by raising questions about the accounting fraud suggested by Enron's query.

Respondents contend that Congress did not want to protect whistleblowers at Arthur Andersen because "the Senate report ... reveals that Congress was actually concerned with the protection of corporate '*insiders*,' not outside service providers. S.Rep. No. 107-146, at 10 (emphasis added)." (R.Br. 34). But while the accountants at Arthur Andersen worked for an outside service provider, they were assuredly "insiders." The accountants knew the critical facts about Enron's accounting schemes that eluded Enron's directors. In the instant case, the "insiders" who would know about any misconduct in the management of the Fidelity funds are employees of FMR; the funds themselves have no employee "insiders" of their own.

(2) The legislative history provides no support for respondents' contention that the purpose of prohibiting retaliation by contractors and subcontractors in section 1514A was to deal with retaliation by contractors against employees of public companies; in every instance in the legislative history describing the retaliating entity, that entity is the employee's own employer. S.Rep. 107-146, at 1, 2, 13, 19 (2002); 148 Cong.Rec. S1788, S1790 (March 12, 2002, remarks of

Senator Leahy); S. 2010, 107th Cong., 2002.[4] Similarly, the legislative history contains no suggestion that contractors and subcontractors were included merely to assure some form of secondary liability if a retaliatory public company went bankrupt.

Respondents rely on portions of the legislative history that refer to public companies. (R.Br. 7, 31-32). But those passages, including Senator Leahy's statement, are not references to section 1514A, but descriptions of the entire Act. Yet SOX clearly *does* apply to and regulate private companies, such as accounting firms that perform functions for public companies. Indeed, under section 1514A privately-held contractors and subcontractors are undeniably covered; the dispute in this case is about which employees those private firms are forbidden to retaliate against. Respondents point to references to "employees of publicly traded companies," as if to suggest that section 1514A must therefore be limited to such employees. But respondents acknowledge in footnote 5 of their brief that section 1514A expressly applies to employees of report-filing companies that are not publicly traded (R.Br. 23), so these portions of the legislative history are necessarily shorthand.

(3) Respondents rely heavily on bills introduced two years after the enactment of SOX that included a provision which would have expressly applied section

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[4] The language which eventually became section 806 of SOX was originally contained in S. 2010.

1514A to mutual fund advisers. (R.Br. 7, 34-35). But this Court has expressly warned against drawing any conclusions from such post-enactment events. *United States v. Craft*, 535 U.S. 274, 287 (2002). The proposed amendment was only a single, 6-line section of lengthy 51 page bills. The bills in question cannot fairly be described as having been "taken up," "considered," and "rejected" by Congress. (R.Br. 7, 10, 34, 35). Rather, these bills, like many thousands of other proposals, were simply referred to committee and died without any further action.

Respondents also rely on the 2010 Dodd-Frank Act provision that amended section 1514A to expressly apply it to nationally recognized statistical rating organizations (NRSROs). (R.Br. 7-8, 35-36; see 124 Stat. 1376 at 1848, 1852 (2010)). But no inference as to the intent of one Congress can be drawn from the actions of a different Congress eight years later. In 2002 NRSROs, because of their unique independent status, probably would not have been regarded as contractors within the meaning of section 1514A.

IV. RESPONDENTS' NARROW INTERPRETATION IS INCONSISTENT WITH THE INTENT OF CONGRESS TO INSURE THE ACCURACY OF MUTUAL FUND DISCLOSURES

Congress enacted section 1514A to assure the reliability of financial disclosures by public companies,

including mutual funds; respondent's crabbed interpretation would substantially frustrate that intent.

An express purpose of the Sarbanes-Oxley Act is "to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities law." 116 Stat. 745 (2002). FMR insists that section 1514A does not apply to most mutual fund advisers, which are privately held, because, unlike the mutual funds themselves "[*p*]*rivate companies are not required to make such disclosures.*" (R.Br. 37 (emphasis in original)).

But at Fidelity, as at most mutual funds, the "corporate disclosures made pursuant to the securities laws" are actually written by the mutual fund adviser, not by the mutual fund itself. Each year several thousand disclosure statements regarding Fidelity funds are filed with the SEC, totaling tens, if not hundreds of thousands, of pages. Those disclosures are not composed by anyone at a Fidelity fund, which have no employees. Rather, they are all written by FMR employees, and ordinarily only those FMR employees would know whether the disclosures are accurate and reliable. If section 1514A does not apply to FMR's employees, it could not as Congress intended improve the accuracy and reliability of those documents. Under FMR's proposed interpretation of section 1514A, FMR could dismiss any FMR employee who disclosed to the directors of or lawyers for the Fidelity funds that there were material falsehoods in the documents being filed by FMR with the SEC in the name of those funds. There is no reason to think

that Congress intended to leave this significant gap in the statutory scheme for assuring the reliability of those disclosures.

V. RESPONDENTS' NARROW DEFINITION IS INCONSISTENT WITH OTHER PROVISIONS OF THE SARBANES-OXLEY ACT

Under respondents' interpretation, section 1514A would permit a law firm to dismiss an attorney who complied with his or her obligations under SOX to report certain violations. (Pet.Br. 49-51). Respondents contend that under section 602 of SOX, "a law firm ... that engages in retaliation against such whistleblowing can be banned from further practice before the SEC. ... , a ... potent deterrent." (R.Br. 41). But section 602 does not forbid retaliation against whistleblowers. Although it does authorize the imposition of sanctions against lawyers who violate securities laws or regulations, 15 U.S.C. §78d-3(a), none of those provisions forbade retaliation when SOX was enacted. Similarly, section 105 of SOX authorizes sanctions against an accountant who violates SOX, certain securities laws, or the rules of the Public Company Accounting Oversight Board; but none of those provisions forbade retaliation against an accountant who engages in whistleblowing. 15 U.S.C. §7215(c)(4)(A)-(B).

Section 301 of SOX requires that the audit committee of every issuer establish procedures for "the receipt ... and treatment of complaints received by the issuer regarding accounting, internal accounting

controls, or auditing matters." 15 U.S.C. §78j-1(m)(4)(A). The section 301 complaint process would be emasculated if complainants could be fired for using it. Respondents describe section 301 as requiring the creation of a complaint process to entertain "employee complaints," and assures the Court that this complaint process and the section 1514A anti-retaliation protections "are ... both complementary and coextensive." (R.Br. 12). That account, however, assumes that section 301 is limited to complaints from the employees of the issuer. But the complaint process is not limited in that manner. See 15 U.S.C. §78j-1(m)(4)(A).

Respondents assert that it does not matter whether section 1514A forbids retaliation against employees of contractors and subcontractors who complain to the SEC, because section 1107 of SOX provides just such protection. (R.Br. 42). But as we explained earlier, section 1107 does not apply to individuals who provide information to the SEC. (Pet. Reply 4-5).

VI. PROTECTING EMPLOYEES OF CONTRACTORS AND SUBCONTRACTORS WOULD NOT DRAMATICALLY EXPAND THE STATUTE'S SCOPE

Respondents suggest that interpreting "employee" to include employees of a contractor would result in application of section 1514A to "employees of every mom-and-pop shop, partnership, and privately held

entity in America that does business with a public company." (R.Br. 45). At the least, they insist, there are "millions of private employers that contract with public companies" (R.Br. 10). "Many private companies have contracts or subcontracts of some sort with public companies...." (R.Br. 38).

(1) These arguments ignore the fact that most employees of contractors would not have access to the type of information that would be the basis of a section 1514A claim. Companies that violate securities laws or regulations or engage in criminal fraud are likely to seek to keep those practices secret from their own employees and from employees of contractors. Aside from lawyers, accountants and other financial services professionals, few contractor employees would know of such serious forms of misconduct.

(2) The language of section 1514A does not apply broadly to retaliation by any firm that "does business," "h[as] a contract," or "contracts" with a public company. Rather, the statute is limited to firms that are "contractors" of public companies, a significantly narrower category. In common parlance "contractor" is in two important ways narrower than an "entity that does business with [another firm]." First, "contractor" refers to a party whose performance of a contract will take place over a significant period of time.[5]

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[5] Section 1514A applies to contractors, not former contractors. Thus even if such a fleeting contract were deemed to render one of the parties a contractor, it would rarely, if ever, be the

(Continued on following page)

If the Supreme Court gift store sells a souvenir to a tourist, there is briefly a contract between the Court and the tourist; but no one would say that the Court is a "contractor" in that situation. Second, "contractor" refers to the party which provides the goods and services, but not to the party which buys them. The construction firm building a new house would not refer to its client as a contractor.

Thus most of the ways in which a mom-and-pop firm "does business with a public company" would not be a relationship in which that small firm is a "contractor." The owner of a small firm is not a "contractor of a public company" when he or she buys a box of paper clips at the local Wal-Mart store. A Wal-Mart "contractor" would be a firm that had some type of ongoing contract to provide goods or services *to* Wal-Mart. The number of such long term suppliers is assuredly far smaller than the number of private firms that buy paper clips or other items from Wal-Mart.

Those suppliers, moreover, are now subject to the anti-retaliation provision of the Dodd-Frank Act. Section 922 of that Act forbids *all* private employers, not just contractors of public companies, to retaliate against whistleblowers who report securities violations to the SEC. 15 U.S.C. §78u-6(h)(1)(A)(i)-(iii). Thus the primary impact today of applying section

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case that retaliation by such a party would occur during the few seconds it was covered by the statute.

1514A to employees of private contractors of public companies will be to protect *internal* whistleblowing, including complaints by outside accountants or lawyers to the officials of public companies.[6] Both the SEC[7] and the United States Chamber of Commerce[8] have recognized that companies benefit from such internal reporting of financial irregularities.

VII. THE ADMINISTRATIVE REVIEW BOARD'S DECISION IN *SPINNER* IS ENTITLED TO *CHEVRON* DEFERENCE

(1) The ARB's interpretation of section 1514A should be accorded deference under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). This Court has long "recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of ... adjudication that produces ... rulings for which deference is claimed." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). Deference is appropriate because where, as here, Congress "provides for a relatively formal deliberative procedure" that "foster[s] fairness and deliberation," it is "fair to assume" that Congress

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[6] The lower courts are divided regarding whether section 922 in at least some circumstances also protects internal whistleblowing. *Compare Murray v. UBS Securities, LLC*, 2013 WL 2190084 at *3-*4 (S.D.N.Y. May 21, 2013) *with Asadi v. G.E. Energy*, 720 F.3d 620 (5th Cir.2013).

[7] 76 Fed. Reg. 34300 (June 13, 2011).

[8] http://www.sec.gov/comments/s7-33-10/s73310-194.pdf

"contemplate[d] administrative action with the force of law." *Id.* at 230.[9] That inference has greater force with regard to statutes, such as SOX, adopted after the practice of according *Chevron* deference to adjudicative determinations was well established; Congress can fairly be assumed to have understood the significance that courts would attach to statutes providing for formal adjudication when it provided for such determinations in the resolution of administrative claims under section 1514A.[10] Accordingly, if the Court concludes that the statute is ambiguous, it should defer to the ARB decision in *Spinner*.

The ARB hears all administrative appeals regarding claims under section 1514A, and its decisions are informed by that substantial body of experience. In *Spinner* the ARB, which is familiar with the circumstances of a range of cases under section 1514A (and the similarly worded provisions of AIR 21), reasonably concluded that a contractor would rarely if ever be in a position to retaliate against an employee of a

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[9] See Secretary's Order 02-2012, 77 Fed. Reg. 69378, 69379 (Nov. 16, 2002)(ARB decisions binding).

[10] Prior to the enactment of SOX the lower courts had repeatedly accorded *Chevron* deference to adjudicatory decisions of the Secretary of Labor or the ARB interpreting federal anti-retaliation statutes. *Coupar v. United States Dep't of Labor*, 105 F.3d 1263, 1265 (9th Cir.1997) (meaning of the term "employee" in the Clean Air Act and the Toxic Substances Control Act); *Connecticut Light & Power Co. v. Secretary of the Department of Labor*, 85 F.3d 89, 94 (2d Cir.1996) (meaning of the term "employee" in the Energy Reorganization Act).

public company. (Pet.App. 150a, 175a-76a). Similarly, the ARB, in light of the knowledge of the number and types of administrative claims filed by employees of contractors, concluded that its interpretation of section 1514A was unlikely to result in a large number of such claims. (Pet.App. 166a).

(2) Relying on *Martin v. OSHRC*, 499 U.S. 144 (1991), FMR argues that deference to a statutory interpretation arrived at through formal adjudication is permissible only if the adjudicatory agency also had rulemaking authority. (R.Br. 46, 50-51). But this Court has never held that *Chevron* deference is owed to an agency's formal adjudications only if the agency also has rulemaking authority. To the contrary, in decisions since *Martin*, this Court has made clear that *Chevron* deference is generally warranted where Congress has authorized an agency to engage in formal adjudication *or* rulemaking. *Yellow Transportation, Inc. v. Michigan*, 537 U.S. 36, 45 (2002)(quoting *Martin*); *Mead*, 533 U.S. at 229 ("the process of rulemaking or adjudication"), 230 ("the fruits of notice-and-comment rulemaking or formal adjudication").

Martin involved an unusual division of agency authority that is not present here. The question was whether, when rulemaking and adjudicatory authority are divided between two different agencies, and the agencies adopt conflicting interpretations of a regulation, *Chevron* deference should be given to the rulemaking agency or to the adjudicatory agency. The Court concluded that, in the case of that "unusual regulatory structure," the rulemaking agency was

entitled to deference concerning the meaning of its own regulation. *Id.* at 152-53. In analyzing that issue, the Court stated that, *if* a single agency were given both types of authority (so-called "unitary agencies"), deference would be accorded to decisions made by the agency in the exercise of its adjudicatory powers. The Court did not hold that in *all* cases the existence of rulemaking authority is the basis for deference to adjudicatory decisions; rather, the Court explained that the existence of dual authority was the basis of such deference "in these cases," i.e., cases in which an agency enjoyed both types of authority. *Id.* at 154. The Court did not say that an agency that has expressly been granted only formal adjudicatory authority cannot issue decisions that are entitled to *Chevron* deference. And in *Mead*, the Court made clear that when an agency acts though formal rulemaking *or* adjudication, *Chevron* deference is appropriate. 533 U.S. at 229.

FMR argues that some form of policymaking or rulemaking authority existed in all of the cases in which this Court has approved deference to an adjudicatory decision. (R.Br. 50). That may be true, but the Court did not say in those decisions that it was only affording *Chevron* deference to the agency's adjudication *because* the agency had other, unexercised rulemaking authority. Whatever the non-adjudicatory authority of the agency in question may have been, it simply was not part of the basis of the decision to apply *Chevron* deference in those cases. Instead, the

Court focused on the authority that had been granted and exercised by the agency – adjudicatory authority.

(3) FMR's advances other reasons for declining to accord *Chevron* deference, none of which is persuasive. It does not matter that the ARB decision was not handed down in Lawson and Zang's own cases. *Chevron* deference, where appropriate, applies in any case presenting the legal issue previously adjudicated by the agency in question. E.g., *SEC v. Zandford*, 535 U.S. 813, 819-20 (2002). Plaintiffs did not waive their right to rely on a subsequent ARB's interpretation of section 1514A when they withdrew their administrative claims and filed suit in district court. The issue of deference to *Spinner* was not raised below only because *Spinner* was not decided until after the First Circuit's decision. The Secretary has delegated his authority to the ARB, and the exercise of such delegated adjudicatory authority is entitled to deference. E.g., *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999). It is not the case, as FMR contends, that the ARB had held prior to *Spinner* that section 1514A does not apply to employees of private contractors of public companies.[11] To the contrary, the ARB had previously

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[11] *Fleszar v. Am. Med. Ass'n*, 2009 WL 891347 at *3-*4 (DOL ARB Mar. 31, 1999), held only that section 1514A requires more than proof that a defendant firm "does business with" a public company and that liability cannot be based on the fact that a defendant firm once had a contractual relationship with a public company which ended years before the alleged retaliation. (See pp. 16-17, *supra*) In *Field v. BKD, LLP*, 2011 WL 2165860

(Continued on following page)

concluded that the statute *does* apply to employees of contractors and subcontractors of public companies. (Pet.App. 143a; U.S. Br. 31 & n.6).

FMR asserts that "[t]he vast majority of Section 806 cases are ... decided *de novo* in federal court, further indicating that Congress saw no need for DOL adjudicators to play an interpretive role." (R.Br. 9). Respondents point to no basis for its assertion that "the vast majority" of administrative claims are withdrawn prior to final agency action. The frequency or infrequency with which claimants today exercise their right to file suit without awaiting a final agency decision throws no light on the intent of Congress when it enacted section 1514A in 2002. The decision of Congress to permit claimants to file suit in district court without awaiting a final agency decision does not reflect any denigration of the weight to be accorded such final decisions, but merely gives claimants the option of proceeding directly to court rather than incur additional delay in the administrative process. The judicial assessment of actions commenced in district court under section 1514A(b)(1)(A) is *de novo* simply because in those cases there is no final decision to which to defer.

Although the ARB in *Spinner* referred to section 1514A's procedural regulations, the ARB made an

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at *3 (DOL ARB May 27, 2011), the claimant's employer was not a contractor of a public company.

independent evaluation of the proper interpretation of the statute. The ARB's opinion expresses its own conclusions about the meaning of the law. E.g., Pet.App. 148a ("[t]he statute contains no ... limitation [to employees of public companies]"), 161a ("[t]he overall statutory framework and purpose demonstrate, indeed require, that Section 806 protects whistleblowing by employees of contractors and subcontractors to the public company"). The ARB's opinion also contains repeated statements about what "we" – the Board – conclude. See Pet.App. 151a ("we ... turn to other rules of statutory interpretation"), 154a ("we conclude that Congress did not intend for the content of the caption to limit coverage"), 165a ("[w]e find that Congress intended to cover employees of contractors under Section 806"). The references to the procedural regulations are only a few phrases in an exhaustive, 10,000 word substantive analysis. The ARB's own assessment of the statute and its legislative history is assuredly an independent basis of its decision.

Even if *Chevron* deference were not appropriate in this case, the exceptionally well-reasoned ARB decision in *Spinner* would certainly warrant deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

Events subsequent to the enactment of SOX have confirmed the importance of the whistleblowing protection in section 1514A. Following the collapse

of a series of seemingly-sound major financial institutions, former officials and directors of those companies have insisted that they did not fully understand the complex transactions and instruments – drafted by lawyers and approved by accountants – which contributed to those failures. Mutual funds, whose analysts relied on Enron's misleading public financial statements and lost billions when Enron collapsed in 2002, again relied on those types of statements and lost billions more in 2008. Outside law and accounting firms which understood the complexities and risks of what proved to be toxic arrangements did not invariably communicate that information to high corporate officials. Complaints to management or the SEC by employees of those firms could have saved investors billions of dollars. During the dark days of autumn 2008, at least a few corporate officials may have wished that they, or even the government, had been told more before things got so out of hand.

The briefs filed in this case by FMR and its amici, however, reflect no concern that such problems could occur yet again. Associations representing the nation's financial institutions evince no interest in being warned by their lawyers or accountants of securities violations or fraud. An association of mutual fund directors, whose immunity from individual liability rests on their personal ignorance of securities violations, urges the Court to legalize dismissal of any fund adviser employee who discloses problems to the directors themselves. FMR has apparently concluded that its own interests would now best be

served by limiting the protections of section 1514A to employees of public companies, even though doing so will deny whistleblower protection to the accounting and law firm employees who would know about financial irregularities at the very companies in which FMR is investing trillions of its clients' dollars.

It is earnestly to be hoped that the financial abuses and frauds of recent decades have ended, and that in the years ahead there will be little misconduct for a whistleblower to report. But Congress did not frame the section 1514A prohibition against retaliation by contractors to expire whenever confidence – however justified – returned to the financial markets.

CONCLUSION

For the above reasons, the decision of the First Circuit should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

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