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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, forbids a public company or "any ... contractor [or] subcontractor ... of such company [to] ... discriminate against an employee in the terms and conditions of employment because of" certain protected activity. The question presented is:

> Is an employee of a privately-held contractor or subcontractor of a public company protected from retaliation by section 1514A?

PARTIES

The petitioners are Jackie Hosang Lawson and Jonathan M. Zang.

The respondents are FMR LLC, FMR Co. Inc., FMR Corp., Fidelity Brokerage Services, LLC, and Fidelity Management & Research Company. All of the respondents are privately-held companies.

No Fidelity mutual fund is a party to this action.

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The February 3, 2012 opinion of the Court of Appeals, which is reported at 670 F.3d 61 (1st Cir. 2012), is set out at pp. 1a-75a of the Petition Appendix. The April 6, 2012 order of the Court of Appeals denying rehearing and rehearing en banc, which is not reported, is set out at pp. 134a-135a of the Petition Appendix. The March 31, 2010 Memorandum and Order of the District Court for the District of Massachusetts, which is reported at 724 F.Supp.2d 141 (D.Mass. 2010), is set out at pp. 76a-133a of the Petition Appendix.[1]

JURISDICTION

The decision of the Court of Appeals was entered on February 3, 2012. A timely petition for rehearing and rehearing en banc was denied on April 6, 2012. This Court granted certiorari on May 20, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

[1] The District Court opinion certifying the question in this case for interlocutory appeal is reported at 724 F.Supp.2d 167 (D.Mass. 2010).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The statutory provisions and regulations involved are set out in the Appendix.

STATEMENT OF THE CASE

Eleven years ago, in the wake of the Enron collapse and other financial scandals, Congress enacted the Sarbanes-Oxley Act of 2002 ("SOX"), one section of which protects whistleblowers from retaliation. 18 U.S.C. § 1514A. This case presents an important question about the scope of that anti-retaliation provision.

The defendants are the privately-held parent company and several subsidiary companies that operate the Fidelity family of mutual funds, one of the largest mutual fund company in the United States, investing approximately $1.6 trillion on behalf of millions of fund investors. Each of the hundreds of Fidelity mutual funds is a separate registered investment company required to file reports with the Securities and Exchange Commission ("SEC") under section 15(d) of the Securities Exchange Act of 1934. 15 U.S.C. § 78o(d). At Fidelity, as is true of the mutual fund industry generally, a mutual fund itself has no employees of its own. Rather, the directors of the mutual funds contract with an "investment adviser," which in turn conducts all the activities of the funds, making day to day investment decisions, performing a range of management and administrative tasks,

and preparing reports for shareholders and filing reports with the SEC. Employees in the mutual fund industry ordinarily work for a mutual fund adviser or sub-advisers or other subcontractors, not for a mutual fund itself. The defendants in this case are investment advisers, or sub-advisers, or related subcontractors to Fidelity mutual funds. The defendants do business as Fidelity Investments; for convenience we refer to all the defendants as Fidelity Investments.

Jackie Hosang Lawson was a Fidelity Investments employee for fourteen years; at the time of the events giving rise to this action Lawson was a Senior Director of Finance. Beginning in 2005, Lawson raised a series of objections to the manner in which Fidelity Investments was calculating the expenses that it reported as having been incurred in carrying out their contractual obligations to operate those funds. The amount of those expenses affected the amount of profit reported by Fidelity Investments, which in turn was a measure used by the Mutual Fund Board in determining the fee to be paid to Fidelity Investments. By inflating its expenses, and thus understating its profits, Fidelity Investments could potentially increase the fees it would earn from the mutual funds, fees ultimately paid by the shareholders of those funds. Lawson objected both to the manner in which the expenses had been calculated and to the failure of Fidelity Investments to disclose the disputed methodology to the Trustees,

Directors or Audit Committee of the Fidelity Mutual Funds.[2] When Fidelity Investments officials persisted in this misallocation of expenses, Lawson wrote to Fidelity Investments' General Counsel, explaining the problem and expressing the concern that the scheme constituted fraud against the mutual funds' shareholders. Lawson reported a number of these matters to the SEC. Lawson also reported to both the SEC and Fidelity Investments' legal counsel that a group within Fidelity Investments had improperly retained $10 million in fees that belonged to third-parties and had done so without disclosing its actions to the Fidelity Funds' Board of Trustees. (Pet.App. 80a n.2). Lawson also reported to Fidelity Investments' counsel that one of the Fund's Annual Reports to shareholders, written by Fidelity Investments and filed with the SEC, was in several respects false and misleading.

In response to her repeated objections, Lawson was subjected to a series of adverse actions. Lawson filed complaints about this retaliation with the Occupational Safety and Health Administration ("OSHA") of the Department of Labor, the federal agency responsible for investigating claims of violations of section 1514A. 18 U.S.C. § 1514A. In July 2007, a

[2] The complaint alleged that approximately $100 million of expenses incurred by Fidelity Investments for providing advice to prospective customers was improperly allocated as a service expense for existing shareholders.

supervisor at Fidelity Investments advised Lawson that she should take a "sabbatical" because "it was impossible for her to continue working at Fidelity Investments because of the claims she had made to OSHA and the SEC."[3] In November 2007 Lawson resigned, contending that the defendants' campaign of harassment had made her working conditions intolerable.

Jonathan Zang worked for several of the defendants, most recently as an equity research analyst. Zang's complaint alleged that in early 2005 he objected to a draft Statement of Additional Information which Fidelity Investments filed with the SEC on behalf of a Fidelity fund. Zang pointed out that the Statement contained misleading information about the manner in which portfolio managers were compensated. After several emails and a meeting between Zang and higher officials, Fidelity Investments agreed to revise the Statement along the lines Zang had urged. During the same period Zang also objected that Fidelity Investments was operating several "veiled index funds," funds which are essentially unmanaged index funds but for which Fidelity Investments was improperly collecting a fee for active management that had not really occurred. In June 2005, two months after Fidelity Investments had submitted the revised Statement to the SEC, Fidelity

[3] Lawson Amended Complaint, ¶ 65.

Investments fired Zang. Zang, like Lawson, filed a complaint with OSHA.

Lawson and Zang ultimately commenced the instant actions in federal district court, asserting that they had been retaliated against by Fidelity Investments in violation of section 806 of the Sarbanes-Oxley Act. 18 U.S.C. § 1514A. Section 1514A prohibits certain public companies, including mutual funds, as well as contractors of such companies from retaliating against an "employee" who engages in protected activity. Fidelity Investments moved in each case to dismiss the complaint on the ground that Lawson and Zang were not "employee[s]" within the meaning of section 1514A. Fidelity Investments did not dispute that mutual funds are public companies subject to section 1514A, and that fund advisers are contractors of such companies. It argued, however, that the "employee[s]" protected from retaliation by section 1514A are limited to employees of public companies themselves, and do not include individuals who work for private contractors of a public company.

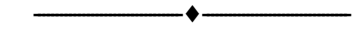
The District Court denied Fidelity Investments' motions to dismiss.[4] It concluded that section 1514A does protect employees of privately held companies that are contractors of public companies such as a

[4] Although the cases were not consolidated, the District Court considered and resolved both motions in a single decision. (Pet.App. 76a-77a).

mutual fund. (Pet.App. 96a-123a). The District Court certified for interlocutory appeal under 28 U.S.C. § 1292(b) the question of whether section 1514A protects employees of such contractors, and the court of appeals granted the petitions for interlocutory review. (Pet.App. 9a). The Department of Labor and the SEC filed amicus briefs urging the First Circuit to affirm the District Court opinion.

A divided panel of the First Circuit overturned the District Court decision and ordered the dismissal of the complaints. The majority held that an individual who works for a privately held company is not an "employee" within the meaning of section 1514A, even if that company is a contractor of a mutual fund or some other company that is covered by section 1514A. (Pet.App. 10a-51a). The First Circuit denied a timely petition for rehearing en banc. (Pet.App. 134a-35a). Two months later, in a different case, the Administrative Review Board of the Department of Labor reached the opposite conclusion, holding that employees of such contractors are protected by section 1514A. *Spinner v. David Landau and Associates, LLC*, 2012 WL 2073374 (ARB May 31, 2012) (Pet.App. 136a-99a).

This Court granted certiorari. 133 S.Ct. 2387 (2013).



SUMMARY OF ARGUMENT

Section 1514A provides that no contractor of a public company may "discriminate against an employee in the terms and conditions of employment" because the employee engaged in certain protected activity. When a statute imposes duties or restrictions on a company regarding the treatment of an "employee," the law ordinarily is referring to the company's own employees, not instead to the employees of some other firm. That meaning is especially clear here, because of the type of retaliation forbidden by section 1514A. The only "terms and conditions of employment" a contractor would normally control – and be able to modify to retaliate against a worker – are the terms and conditions of employment of its own employees.

The First Circuit erred in holding that under section 1514A a contractor is free to retaliate against its own employees, and is forbidden only to retaliate against an employee of a public company for which it works. The court of appeals interpreted section 1514A to forbid only retaliation "against an employee of such company," the words "of such company" referring to a public company. The words "of such company" are not used in the text to limit the employees protected from retaliation; that very restriction is, however, utilized earlier in the same sentence to delineate the individuals forbidden to retaliate – "any officer [or] employee ... of such company." Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally

presumed that Congress acts intentionally in the disparate inclusion or exclusion. That presumption applies with particular force to section 1514A, because the inclusion and exclusion of the phrase "of such company" appear only 22 words apart in the same sentence.

Section 1514A and the provision of the Sarbanes-Oxley Act of which it was part contain three differently worded headings. Those conflicting and abbreviated headings shed no light on the meaning of the term "employee" in section 1514A. Although two headings refer to employees of "publicly traded companies," the third heading does not refer to any particular type of employee. This reference in the first two headings cannot be an exclusive listing of the protected employees, because it omits a group of employees who unquestionably are protected – employees of public companies that are not publicly traded. As this Court has noted in the past, headings often do not and could not refer to all the matters which the framers of a section wrote into the text.

The anti-retaliation provision in section 1514A is a linchpin of the Sarbanes-Oxley Act, and its application to employees of outside firms is of central importance. Congress concluded that outside contractors – particularly accountants and lawyers – had played a major role in the Enron collapse. The accounting gimmicks utilized by Enron were approved and even devised by its auditor, Arthur Andersen. Enron's outside counsel, when informed of internal complaints about accounting irregularities, advised

the company how to legally get rid of the whistleblower, rather than attempting to do anything about the irregularities themselves. The Senate committee report observed that "[i]nstead of acting as gatekeepers who detect and deter fraud, it appears that Enron's accountants and lawyers brought all their skills and knowledge to bear in assisting the fraud to succeed and then in covering it up." The committee report noted that Arthur Andersen as well as Enron had engaged in retaliation against whistleblowing.

Under the First Circuit's narrow reading of section 1514A, if that provision had been in effect prior to the collapse of Enron, it would have been legal for Arthur Andersen to fire any employee who answered questions from the SEC or who had refused to participate in Andersen's shredding of large numbers of Enron-related documents. The framers of the Sarbanes-Oxley Act assuredly did not intend section 1514A to permit such retaliatory acts.

If the Court concludes that section 1514A is ambiguous, it should defer to the Administrative Review Board's interpretation of that provision in *Spinner v. David Landau and Associates, LLC*. *Chevron* deference is appropriate where an agency is authorized to engage in formal adjudication and its resolution of a legal issue is reasonable. Section 1514A provides such authorization. The Board's opinion in *Spinner* is exceptionally thorough and thoughtful, and is consistent with the Board's repeated prior decisions on this issue.

ARGUMENT

I. THE STATUTORY SCHEME

Section 1514A is an unusually multi-faceted anti-retaliation statute, whose complexities reflect the wide range of financial and professional institutions, individuals and practices that are governed by federal securities and anti-fraud law, and the inter-related problems and abuses which the Sarbanes-Oxley Act was enacted to address.

Under section 1514A(a)[5] there are seven categories of actors which are forbidden to engage in retaliation. The statute forbids retaliation by companies whose securities are registered under section 12 of the Securities Exchange Act of 1934. 15 U.S.C. § 78l. Section 12 deals primarily with the registration of companies that are traded on the national stock exchanges; these firms are generally referred to as publicly traded companies. Section 1514A(a) also prohibits retaliation by companies required to file reports under section 15(d) of the Securities Exchange Act. These are firms (primarily mutual funds) that issue securities which may be sold to the public, but that are not publicly traded companies subject to section 12. 15 U.S.C. § 78o(d). For convenience, we refer to these firms subject to section 15(d), but not to

[5] This summarizes the terms of section 1514A as originally enacted in 2002. In 2010 the language of the provision was amended and the text now lists two additional types of entities. Pub. L. 111-203, Title IX, § 929A, 124 Stat. 1376, 1852 (2010).

section 12, as report-filing companies. The lower courts use the phrase "public company," as do we, to encompass both firms that are publicly traded companies and report-filing companies. Section 1514A also prohibits retaliation against an employee by two other types of firms, "contractor[s]" and "subcontractors" of public companies. In addition, section 1514A forbids an "officer" or "employee" to engage in retaliation; this aspect of the statute imposes personal liability on an individual who engages in retaliation on behalf of a public company. Finally, section 1514A applies to retaliation by an "agent" of a public company; that might refer to a company or to an individual. All of these entities and individuals are forbidden to retaliate against an "employee"; the dispute in this case concerns who is a protected "employee."

To be protected from retaliation, an employee must have engaged in activity related to "conduct which the employee reasonably believes constitutes a violation of" certain specified federal prohibitions.[6] Section 1514A applies to a violation of "any rule or regulation of the Securities and Exchange Commission." Section 1514A also applies to violations of "any provision of Federal law relating to fraud against

[6] For simplicity we refer below simply to a "violation" of a covered provision. The statute makes clear that a plaintiff asserting a claim under section 1514A need not show that an actual violation occurred, but only that the employee reasonably believed that a violation had occurred or was likely to occur. See *Wiest v. Lynch*, 710 F.3d 121, 133 (3d Cir. 2013).

shareholders," and to violations of four provisions of the criminal code relating to fraud. 18 U.S.C. §§ 1341, 1343, 1344, 1348. Unlike these fraud-related provisions, proof of a violation of SEC rules and regulations does not necessarily require proof of fraud.

Section 1514A covers a number of different types of actions that might be taken by an employee that is related to a covered violation. An employee is protected, for example, if he or she provides information to a federal regulatory agency (such as the SEC), whether by contacting the agency with a tip about a violation, or by responding to questions from an agency official engaged in an investigation. 18 U.S.C. § 1514A(a)(1)(A). The statute also covers employees who provide such information to any Member of Congress or any congressional committee. 18 U.S.C. § 1514A(a)(1)(B). And the law protects employees who attempt to deal with the problem within their own firm by providing information about a violation to "a person with supervisory authority over the employee (or such person working for the employer who has the authority to investigate, discover, or terminate misconduct)." 18 U.S.C. § 1514A(a)(1)(C).[7]

An employee who has been retaliated against in violation of section 1514A must initially file a complaint with the Secretary of Labor. 18 U.S.C. § 1514A(b)(1)(A). The Secretary has delegated his

[7] Section 1514A applies as well to a number of other types of actions related to a covered violation.

authority to investigate such complaints to OSHA. OSHA also has the authority to make findings and issue an initial order. A party dissatisfied with OSHA's decision may obtain a hearing before an administrative law judge. Decisions by that judge are subject to review by the Administrative Review Board ("ARB"). 29 C.F.R. § 1980.110. Decisions by the ARB are subject to limited judicial review in the courts of appeals. A claimant is not required, however, to pursue an administrative complaint to a final adjudication. If the ARB has not issued a final decision 180 days after the filing of an administrative complaint, a claimant may file suit in federal district court, which will decide such a claim de novo. 18 U.S.C. § 1514A(b)(1)(B). Sections 1514A(b) and 1514A(c) establish a number of procedures and remedies, applicable to both administrative and judicial proceedings. In addition, several provisions of section 1514A incorporate by reference rules and procedures in 49 U.S.C. § 42121(b).

II. THE TEXT OF SECTION 1514A PROTECTS EMPLOYEES OF CONTRACTORS FROM RETALIATION BY THEIR EMPLOYER

The interpretation of section 1514A necessarily begins with the text of the statute itself. In this instance that text makes clear that employees of

contractors[8] of public companies are protected from retaliation by their own employers.

A. A Statute Governing How A Company Treats An "Employee" Applies To That Employer's Treatment Of Its Own Employees

(1) When a statute imposes duties or restrictions on a company regarding the treatment of an "employee," the law ordinarily is referring to the company's own employee, not instead[9] to the employee of some other firm.[10] The word "employee" refers to

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[8] The same standard governs employees of contractors and employees of subcontractors. For simplicity we refer simply to contractors.

[9] This case does not require the Court to decide whether section 1514A, in addition to forbidding covered contractors to retaliate against their own employees, also prohibits those contractors from retaliating against employees of other covered companies. Nor is there an issue in this case as to whether section 1514A covers former employees or prospective employees. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 342-49 (former employees), 343 n.3 (prospective employees) (1997).

[10] When a statute forbids an official who works for an entity to take certain actions against an "employee," the normal meaning of such a provision is that the official may not take the prohibited action against an employee of the entity for which the official works. That type of prohibition retains the same meaning when combined in a single sentence with a prohibition governing conduct by the entity itself. For example, section 948a of Title 33 forbids "any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee" engaged in certain protected activity. The employee against whom an

(Continued on following page)

a worker in a relationship to the particular firm (or sometimes the individual) by which he or she is employed.[11]

"Employee" is similar to other terms that refer to a relationship, such as "sister," "father," "husband," "wife," "friend," or "neighbor."[12] If a new homeowner is advised to "be nice to neighbors," the advice obviously is about the homeowner's own neighbors, not to those of someone else. When Mark Antony invited "friends" and "countrymen" to lend him their ears, he meant his own friends (not those of Brutus and Casca) and listeners whose country was his own (not Cleopatra's Egypt). If reminded that "friends don't let friends drive drunk," no one would ask, "This applies to me, since I am a friend to some people; but *whose* friends should I prevent from driving?" Political candidates who promise not to do favors for relatives are understood to mean favors for their own relatives. Similarly, statutes that address the manner in which a company is to treat an "employee" regulate how the firm deals with its own employees.

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individual agent may not retaliate is someone who works for the agent's employer.

[11] See *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 322 (1992) (employee refers to a "master-servant relationship"). The issue in *Darden* was whether the plaintiff was an employee at all. In the instant case there is no dispute that Lawson and Zang were employees of Fidelity Investments.

[12] Similarly, when Congress enacts a statute regarding how a labor union is to treat a "member," that refers to the union's own members.

For example, section 215(a)(3) of the Fair Labor Standards Act forbids "any person ... to discharge or in any other manner discriminate against any employee because such employee has filed any complaint." 29 U.S.C. § 215(a)(3).[13] The employee against whom a covered "person" may not retaliate assuredly includes the person's own employees. In *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S.Ct. 1325 (2011), the Court repeatedly assumed that a covered person could not retaliate against its own employees.[14] Among the lower courts there is some disagreement as to whether this prohibition is broad enough to forbid covered persons from retaliating against employees of other firms; but no court to our knowledge has held or suggested that section 215(a)(3) fails to protect that person's own employees.

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[13] Congress has enacted a number of statutes forbidding any "person" from retaliating against an "employee." See 29 U.S.C. § 660(c)(1) (OSHA); 30 U.S.C. § 1293(a) (surface mining); 33 U.S.C. § 1367(a) (water pollution); 42 U.S.C. §§ 6971(a) (solid waste disposal), 9610 (hazardous substances); 46 U.S.C. § 80507(a) (safe containers); 49 U.S.C. § 31105(a) (commercial motor vehicle safety).

[14] 131 S.Ct. at 1329 ("The Act contains an antiretaliation provision that forbids employers 'to discharge or in any other manner discriminate against any employee because such employee has filed any complaint' ") (quoting 29 U.S.C. § 215(a)(3) (emphasis added)), 1334 ("the employer must have fair notice that an employee is making a complaint that could subject the employer to a later claim of retaliation"; "the statutes prohibits employers from discriminating against an employee"), 1338 n.3 (Scalia, J., dissenting) ("when the employer takes its retaliatory action").

In one portion of its opinion the court of appeals recognized this common meaning of "employee." Section 1514A forbids retaliation against an "employee" by either a publicly traded company or a report-filing company. With regard to those two types of entities, the court below correctly thought it obvious that in this case "employee" meant an employee of the covered firm. It did not ask, for example, whether this aspect of section 1514A meant that a publicly traded company was only forbidden to retaliate against employees of a report-filing company, and was free to retaliate against its own employees. Similarly, the court of appeals concluded that section 1514A imposed no obligations on any Fidelity funds *because* those funds have no employees of their own. (Pet.App. 27a). That conclusion necessarily assumed that section 1514A, insofar as it forbids a Fidelity fund to retaliate against an "employee," meant – indeed, on the lower court's view meant only – an employee of the Fidelity fund itself.

If section 1514A forbade Fidelity Investments by name from retaliating against an "employee," there would be no doubt that the statute applied to and protected Fidelity Investments' own employees. Similarly, if section 1514A simply prohibited retaliation against an "employee" by any mutual fund adviser, it assuredly would cover Fidelity Investments' employees.

(2) The meaning of such a prohibition of retaliation against an "employee" is not narrowed by the inclusion in a single statute of prohibitions against

retaliation by two or more different types of entities. Certainly a prohibition of retaliation against an "employee" continues to refer to a covered entity's own employees even when a separate prohibition regarding a different entity is set out in another subsection of the same provision. See 12 U.S.C. §§ 1790b(a)(1) (forbidding retaliation against an employee by an insured credit union), 1790b(a)(2) (forbidding retaliation against an employee by the National Credit Union Administration).

"Employee" also refers to the employee of a covered entity when several categories of entities are included in the same sentence. For example, section 4018 of Title 20 provides that "[n]o State or local education agency ... may discharge any employee or otherwise discriminate against any employee" because he or she engaged in certain protected activity. This provision assuredly forbids a state agency from retaliating against its own employees and prohibits a local agency from retaliating against its employees. No one would seriously suggest that section 4018 allows a state agency to retaliate against its own employees, and only forbids a state agency from engaging in reprisals against employees of a local agency.

There are a number of other federal statutes that include several types of covered entities in a single

sentence.[15] For example, the whistleblower protection section of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121, provides that "[n]o air carrier or contractor or subcontractor of an air carrier may discharge an employee" for engaging in certain protected activity. 49 U.S.C. § 42121(a). The court below acknowledged that AIR 21 does forbid the covered contractors and subcontractors from retaliating against their own employees. (Pet.App. 30a-31a). Section 1514A was to a substantial degree modeled after AIR 21, and incorporates by reference subsection (b) of AIR 21. 18 U.S.C. § 1514A(b)(2).

If each of the four types of entities covered by section 1514A was subject to a distinct, but identically worded, prohibition in separate parts of the provision – with a separate subsection each for publicly traded companies, report-filing companies, contractors

[15] E.g., 12 U.S.C. §§ 1831j(a)(2) (forbidding retaliation against an "employee" by a "Federal banking agency, Federal home loan bank board, Federal reserve bank, or any person who is performing ... any function or service on behalf of the [Federal Deposit Insurance] Corporation"), 5567 (forbidding retaliation against an "employee" by a "covered person or service provider"); 15 U.S.C. § 2087 (forbidding retaliation against an "employee" by a "manufacturer, private labeler, distributor or retailer"); 20 U.S.C. § 3608 (forbidding retaliation against an "employee" by a "State or local educational agency"); 31 U.S.C. § 5328(a) (forbidding retaliation against an "employee" by a "financial institution or nonfinancial trade or business"); 49 U.S.C. § 30171 (forbidding retaliation against an employee by a "motor vehicle manufacturer, part supplier, or dealership").

of such companies, and subcontractors of such companies – there would be no question the term "employee" against whom a contractor may not retaliate meant at the least its own employees. The meaning of that prohibition is not narrowed[16] merely because in section 1514A, as in a number of other statutes, Congress accomplished the same thing by including several different types of covered entities in a single sentence, rather than covering them separately in different subsections.

B. A Statute That Forbids A Company To "Discriminate Against An Employee In The Terms and Conditions of Employment" Prohibits Discrimination In The Terms and Conditions of Employment At That Company

Any uncertainty as to the identity of the "employees" against whom a contractor is forbidden to retaliate is resolved by the portion of section 1514A delineating the *types* of retaliatory measures which a contractor is taking. Section 1514A(a) provides that a contractor may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment." The specific retaliatory acts listed

[16] The Court need not decide whether including these prohibitions in a single sentence had the effect of broadening their scope by forbidding one covered entity from retaliating against an employee of another covered entity.

are the types of actions that (except in highly unusual circumstances) a contractor would take against its own employees, not against individuals who work for third parties. The only "terms and conditions of employment" which a contractor normally controls are the terms and conditions of employment at that contractor itself. "[R]arely would a contractor or especially a subcontractor be able to adversely affect the terms and conditions of an individual's employment with a publicly traded company." *Spinner v. David Landau and Associates, LLC,* Pet.App. 150a.[17]

When Congress forbade a contractor to "discharge" an employee, it surely had in mind the dismissal by the contractor of its own employees. Even assuming that there is some imaginable circumstance in which a contractor could fire someone else's worker, without question in the overwhelming majority of cases the people fired by any company are its own workers. Few (if any) managers and personnel officials have ever dismissed someone who was employed by another company; since the onset of the 2007

[17] See Pet.App. 175a ("Because [contractors and subcontractors] have no authority over the 'terms and conditions' of a public company's employee's employment, an interpretation of Section [1514A] that identifies nonpublic entities such as contractors and subcontractors as entities prohibited from retaliating only against employees of public companies renders their inclusion surplusage") (concurring opinion), 101a-102a ("It is difficult to think of circumstances that would ... enable a subcontractor to discharge, demote, or suspend the employee of a public company, an entity with presumably no direct relationship to the very subcontractor executing the discharge.").

financial crisis, millions of workers have been fired or laid off, almost invariably by their own employers. When a company dismisses an employee, that necessarily involves a use of the company's own authority. The decision, of course, would be made by an individual, an officer, employee, or agent of the company where the fired worker was employed. But a contractor which was not empowered to act as an agent of some other company could not dismiss one of that other company's employees. "[A]n actual termination ... is *always* effected through an official act of the [employing] company." *Pennsylvania State Police v. Suders*, 542 U.S. 129, 148 (2004) (emphasis in original).

The first three types of retaliation listed in section 1514A – "discharge, demot[ion] [and] suspen[sion]" – are classic examples of what this Court in other contexts has described as tangible employment actions. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761-63 (1998).[18] These are actions which a contractor (unless it was also an agent of some other firm) could only take against its own employees. "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a

[18] Section 42121(b) of Title 49, which is incorporated by reference into section 1514A(b), repeatedly described the prohibited retaliatory methods as "unfavorable personnel action[s]." 49 U.S.C. §§ 42121(b)(2)(B)(i)-(iv).

decision causing a significant change in benefits." 524 U.S. at 761. "When [someone] makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation." *Id*. at 761-62. "Tangible employment actions are the means by which [someone] brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act." *Id.* at 762. "As a general proposition, only ... a person acting with the authority of the company, can cause this sort of injury." *Id.* A contractor could take such a tangible employment action against its own employees, but not do so against the employees of some other firm – unless the contractor were *also* an agent of that firm.

The retaliation forbidden by section 1514A is not limited to tangible employment actions; the statute more broadly forbids any "discriminat[ion] ... in the terms and conditions of employment." But this broader prohibition also refers (save in exceptional circumstances) to actions taken by the employer against its own employees. One company does not ordinarily control the terms and conditions of employment of a worker employed by someone else.[19] A contractor could, for example, call someone else's

[19] As we note below, sometimes an employee of a contractor actually works at the office or plant of the public company. In that circumstance the public company would control some of the terms and conditions of the employee's employment.

employee at work and threaten to burn down his house if he or she revealed a violation of the securities laws. But such a threat, without some complicity or acquiescence on the part of the victim's own employer, would not constitute discrimination in the terms or conditions of employment.

Fidelity Investments asserts that "it is not difficult to think of situations where a subcontractor could retaliate against the employee of a public company." (R.Suppl.Br. 5 n.1). This misapprehends in two important respects the relevant issue. First, the controlling question is what situations Congress had in mind when it prohibited a contractor from retaliating against an employee through the measures set out in section 1514A; if, as we urge, a contractor could and would *usually* direct such retaliatory measures against its own employees, it is fair to assume that those employees are protected by the law. It does not matter whether it would be possible to hypothesize some highly atypical circumstance in which a contractor could retaliate against someone else's employee. Such retaliation against the employee of another firm might fall within the scope of section 1514A, but not to the exclusion of the far more common practice of retaliating against one's own employees. Second, the focus of this inquiry must be types of retaliation that are covered by section 1514A itself: discrimination in the terms and conditions of employment. The possibility of retaliation outside the terms and conditions of employment – such as slashing the tires of a whistleblower's car – is irrelevant.

The court of appeals suggested that

> "[t]he idea behind" the provision listing contractors, subcontractors, and agents in § 1514A(a) as entities *by* whom retaliation cannot take place "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')."

670 F.3d at 69 n.11 (Pet.App. 19a, n.11) (Emphasis in original). This makes no sense for several reasons. First, if Clooney's character were authorized to select the workers to be laid off, and chose them because they had engaged in protected activity, the axe-wielding specialist would be personally liable under the provision of section 1514A forbidding retaliation by an "agent" of a public company. And the public company would be liable for the acts of its authorized agent. This variant of the "Up in the Air" hypothetical cannot account for the decision of Congress to forbid contractors and subcontractors, in addition to agents of public companies, to retaliate against employees.[20] Second, if a public company's own officials decided to fire a whistleblower because of the employee's protected activity, the company would be liable regardless of how or through whom it implemented or announced the decisions. Section 1514A flatly forbids

[20] "§ [1514A] specifically lists agents as covered entities, just like contractors. The word 'contractor,' therefore, must be doing something else." Pet.App. 56a (dissenting opinion).

a public company to discharge a worker for unlawful reasons; the "entit[y] *by* whom the retaliation ... take[s] place" is irrelevant. In this circumstance, including contractors would add nothing to the protection already provided by coverage of the public company. Third, in the movie Mr. Clooney's character does not select the workers to be laid off, he merely delivers the bad news; he may wield the axe, but he does not select the victims. In those circumstances, including contractors, subcontractors and agents would have no effect whatsoever; Clooney's character would not act with the intent forbidden by section 1514A, and he would no more face liability than the telephone carrier that transmitted to the whistleblower a text message announcing the dismissal.

The First Circuit attempted to explain the wording of section 1514A in yet another way. "Section 1514A(a)'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, contractors or subcontractors to the public company for reporting fraud in that public company." (Pet.App. 18a). But section 1514A does not apply to all harassment, but only harassment that involves discrimination in "the terms and conditions of employment." Absent some sort of involvement or acquiescence on the part of the employer, third party harassment of an employee by a contractor or anyone else would not usually constitute discrimination in "the terms and conditions of employment." Workers are sometimes harassed on

the job by an ex-boyfriend or ex-husband, who follows them to their workplace as part of a pattern of abuse. Although that type of harassment is intolerable, and in some circumstances a criminal offense, it does not (absent some involvement or negligence on the part of the employer) constitute employment discrimination.

It is difficult to believe that Congress applied section 1514A to contractors and subcontractors solely to deal with the highly implausible possibility that an employee of a contractor would harass a worker of a public company. In the context of that contractual relationship, the contractor or subcontractor is dependent on the business and payments it receives from the public company. Arthur Andersen was receiving millions in fees from Enron, and Enron officials were in a position to take their lucrative accounting business elsewhere. No outside accountant in full possession of his faculties would harass one of his client's employees; such a bizarre course of action (unless connived in by the client itself) would assuredly lead either to the dismissal of the harasser or the termination of the accounting firm's business with that client. The reality of this financial relationship is that individuals who work for contractors may hold their jobs, to some degree, at the pleasure of officials of the public company, not vice versa.[21] Even

[21] The actual dynamic of the relationship between public companies and their contractors was depicted in a New York Times story based on documents obtained by the Senate Permanent Subcommittee on Investigations.

(Continued on following page)

if there were some plausible circumstance in which a contractor might harass an employee of a public

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> In the summer of 1998, when it was eager to win more investment banking business from Enron, Merrill Lynch replaced a research analyst who had angered Enron executives by rating the company's stock "neutral" with an analyst who soon upgraded the rating, according to Congressional investigators.
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> The move by Merrill Lynch came after two Merrill executives wrote a memo that April to the firm's president, Herbert Allison, saying that Merrill had lost a lucrative stock underwriting deal because Enron executives had a "visceral" dislike of the research analyst, John Olson, and what he told investors about Enron stock, according to documents obtained by investigators for a Senate panel looking into the relationship among Enron and its banks. ...
>
> In the memo, the two investment bankers, Rick Goron and Schuyler Tilney, noted that "our research relationship with Enron has been strained for a long period of time." Mr. Olson, they said, "has not been a real supporter of the company.... "..... They also pointed out that all of the investment banks that had won a portion of the underwriting deal from Enron had "buy" ratings on Enron stock.
>
> In early 1999, after the new analyst took over, Mr. Tilney wrote to Mr. Allison to say that Enron's anger with Merrill's research had "dissipated" and that "to that end," Merrill had since won Enron business that would generate at least $45 million in fees....
>
> Last week, Merrill placed Mr. Tilney, now head of the firm's energy investment-banking practice, on paid administrative leave for refusing to testify to the Senate panel on Tuesday about the company's dealings with Enron.

Richard A. Oppel, Jr., "Merrill Replaced Research Analyst Who Upset Enron," New York Times, July 30, 2002.

company, and do so in a way that violated section 1514A, this surely cannot be the reason why Congress applied section 1514A to contractors; it offers no explanation of the statutory language forbidding contractors from firing, demoting, or suspending an employee for having engaged in protected activity.

Fidelity Investments offers yet a different explanation of the decision of Congress to include contractors and subcontractors in section 1514A. "A subcontractor could easily retaliate against an employee of a public company if there is a close relationship between the public company and the service provider, such as between an issuer of securities and its auditor." (R.Suppl.Br. 5 n.1.) It is unclear what scenario Fidelity Investments has in mind. Perhaps it is suggesting that a contractor might persuade a public company to fire a whistleblower, arguing that such retaliation would deter other possible whistleblowers. In that situation, however, the public company itself would be liable, and there would be no reason to cover contractors.

In sum, ordinarily the only employee whose terms and conditions of employment a contractor could alter would be the contractor's own employee; Congress could not have applied section 1514A to contractors and subcontractors simply to prohibit them from engaging in a type of retaliatory practice which would at least usually be entirely impracticable. The hypothetical explanations of the meaning and purpose of covering contractors and subcontractors are either implausible, duplicative of the prohibition

against retaliation by agents, or not violations of section 1514A at all.

The First Circuit's narrow interpretation of section 1514A has the perverse consequence of permitting the type of third party retaliation that is far more likely. Because on that court's view an employee of a contractor is not an "employee" protected by the statute, a public company would be free to retaliate against employees of its contractors. The risk of that type of retaliation is significant. Because the contractor itself is dependent on the public company's business, the public company may be able to dictate what the contractor will do, or tolerate, in order to maintain what may be a highly lucrative financial relationship. A contractor's employees sometimes work in the office or plant of the public company; accountants frequently do so when auditing a firm's books. In that situation the public company has substantial control of the conditions of the employee's employment. In some cases the working relationship between the public company and the contractor is so close that the public company directly controls the contractor's personnel decisions.[22]

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[22] See *Evans v. Miami Valley Hospital*, 2009 WL 1898238 at *6 (ARB June 30, 2009) (air carrier "exercised significant control over and directly influenced the terms and conditions of [contractor's employee's] employment").

C. Numerous Provisions of Section 1514A Support The Conclusion That The Statute Protects Employees of Contractors

A number of other provisions of section 1514A, and of the incorporated provisions of section 42121(b), make clear that contractors may not retaliate against their own employees.

The term "employee" appears twice in the first sentence of section 1514A(a). As discussed above, section 1514A(a) provides that "employees" are the individuals against whom retaliatory action may not be taken. The First Circuit insisted that this use of the term "employee" means "an employee *of such public company.*" (Pet.App. 15a) (Emphasis in original).[23] But section 1514A also uses the term "employee" a second time, in the same sentence, to delineate those who are forbidden to engage in retaliation: a publicly traded company, a report-filing company, or an "officer, employee, contractor, subcontractor, or agent

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[23] See Pet.App. 15a-16a ("the protected employee refers only to employees of public companies"; "only the employees of the defined public companies are covered"), 20a ("the use of the term 'employees' ... refers to 'employees of publicly traded companies' "), 21a ("the 'generic reference' to employee in the text 'should be read as a reference to' the 'employees of publicly traded companies' "), 25a ("Congress did not intended coverage to reach beyond employees of public companies"), 28a ("Congress's choice to limit whistleblower protection ... to the employee of ... 'publicly traded companies' "), 31a n.15 ("the text of § 1514A(a) is unambiguous in limiting whistleblower protection to employees of public companies").

of such company." (Emphasis added). The statute expressly imposes the limitation "of such company" on the "employee[s]" forbidden to engage in retaliation, and then omits any such limitation in providing that "employee[s]" are protected from retaliation. Only 22 words separate these two usages of "employee" – one expressly limited by the phrase "of such company," and one not – in the very same sentence. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Dean v. United States*, 556 U.S. 568, 573 (2009) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotations omitted)). That presumption applies with particular force when the inclusion and omission of limiting language occur in the very same sentence. The court below highlighted this problem when it observed that "Congress could have more clearly enacted defendants' interpretation of § 1514A by extending the provision's coverage only to 'an employee *of such company*.'" (Pet.App. 16a, n.9) (Emphasis in original). But that emphasized language is precisely the limitation that Congress clearly chose to not enact in section 1514A when it specified the individuals – "employees" – protected from retaliation.

Section 1514A(a)(2) delineates one of the types of activities protected from retaliation; it provides in part that an employee may not be retaliated against

for an act done by that employee "to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed, or about to be filed (*with any knowledge of the employer*) relating to an alleged violation [of certain provisions]." (Emphasis added). Under the First Circuit's view, because only employees of public companies are protected, this provision requires that the public company have knowledge of the impending filing even where the entity engaging in retaliation is a contractor or subcontractor. But that makes no sense. Thus, if a contractor well aware of an imminent filing retaliates against an employee of a public company, that retaliation is lawful so long as the public company itself does not know that a proceeding is about to be commenced. Surely Congress did not intend to permit the contractor to retaliate under those circumstances. Conversely, if the public company does know that a proceeding is about to be filed, but the contractor does not, the "with any knowledge" requirement is satisfied; but it is difficult to understand how a contractor could be said to have retaliated against an employee "because" he assisted a proceeding "about to be filed" if the contractor itself did not know that there was any such impending proceeding. The "with any knowledge" requirement, on the other hand, makes perfect sense if the "employee" against whom a contractor may not retaliate is its own employee.

Section 1514A(b)(2)(A) provides that an action to enforce section 1514A "shall be governed under the rules and procedures set forth in section 42121(b) of

Title 49." Those rules and procedures clearly contemplate that in an enforcement proceeding the claim will concern an action taken by the complainant's own employer, and that the respondent in the proceeding will be that employer. But the only sort of contractor retaliation actionable under the First Circuit standard – retaliation by a contractor against the employee of a public company – simply does not fit the provisions of section 42121(b). Section 42121(b)(2)(B)(ii) provides that the Secretary may not conduct an investigation of a complaint of unlawful retaliation "if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of th[e] [protected] behavior." Under section 42121(b)(2)(B)(iv) relief may not be ordered "if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior." These provisions would make no sense if the retaliatory action was taken by a contractor, not against its own employee, but instead against an employee of a public company. In that circumstance the employer (the public company) might never have "taken [an] unfavorable personnel action" at all; there would, for example, be no such adverse employer action if – as the First Circuit hypothesized – the retaliation took the form of harassment by the contractor. If a claimant who was (or had been) an employee of a public company sought monetary relief from a retaliating contractor, the claimant's own employer would have no stake in the outcome of that

dispute, and thus would have no reason to try to "demonstrate[ ] [anything] by clear and convincing evidence." If an employee of a public company sued a contractor for retaliatory harassment, there would be no reason even to name the employer as a party at all. On the other hand, these provisions make perfect sense if the adverse action at issue is retaliation by a contractor against its own employee.

Sections 1514A and 42121(b) expressly provide that the remedy for an unlawfully discharged employee will include reinstatement. Section 1514A(c)(2)(A) requires (in the case of an unlawful discharge or demotion) "reinstatement with the same seniority status that the employee would have had, but for the discrimination." Section 42121(b)(3)(B) directs that "the Secretary shall order the person who committed [a proven violation] to ... (ii) reinstate the complainant to his or her former position, ... and restore the terms, conditions, and privileges associated with his or her employment." Neither of these provisions would make any sense as applied to a contractor that retaliated against the employee of a public company. As explained above, it is difficult to imagine a common scenario in which a contractor could discharge or demote the employee of some other firm. Even in a hypothetical case in which a contractor somehow did that, the contractor itself ordinarily would be in no position to reinstate its victim, to provide the victim with the proper seniority status, or to restore all his or her pervious terms, conditions and privileges. Section 42121(b)(6)(A) authorizes a retaliation victim

to file suit "against the person to whom [an] order was issued [by the secretary] to require compliance with such order"; but a contractor to whom a reinstatement order was issued would have no ability to comply with such an order.

Consider, for example, the First Circuit's hypothetical from Up In The Air; assume (implausibly) that a public company gave to Mr. Clooney's character, a complete outsider, authority to decide whom to fire, and further assume that his character (without any prompting from the public company) decided to go on a personal vendetta against employees who had disclosed violations of the securities law to the SEC. An order from the Secretary, or a court, that Clooney's character reinstate his victims would be pointless. Mr. Clooney's character left town within hours of announcing the dismissals, and evidently had no further relationship with the firms that briefly retained him or his firm. He was only an axe-wielding specialist, and simply had no power to restore his victims to their previous positions. Similarly, in the hypothetical proposed by Fidelity Investments, if a public company's auditor somehow brought about the discharge of a company employee in a manner that violated section 1514A, the auditor would have no way of obeying an order to "reinstate" that worker.

Section 1514A(a)(2) identifies certain individuals to whom an employee with the protection of section 1514A may report actual or apparent violations. Anti-retaliation protection covers an employee when he or she reports such matters to any "person working for

the employer who has the authority to investigate, discover, or terminate misconduct." That language makes clear that a key purpose of section 1514A is to assure that company officials who do have the "authority to investigate, discover, or terminate misconduct" will have access to information from, or the assistance of, other employees. Officials of outside accountants and law firms, and of mutual fund advisers, have just such authority. A central reason that public companies retain outside accountants and attorneys is to assure that any possible misconduct at the company will be discovered and investigated. Identifying potential misconduct is precisely what auditors do when they check the books of a company, usually following up apparent discrepancies with further investigation. In light of this language in section 1415A(a)(2), it makes no sense to interpret section 1514A to exclude the very outside accountants and lawyers retained for the specific purpose of unearthing misconduct. Similarly, officials of mutual fund advisers are precisely the individuals in a position to terminate misconduct in the manner in which the adviser is operating a fund and or in the drafting of documents to be filed with the SEC and relied on by the public. The Fidelity Investments officials to whom Lawson and Zang complained, presented information about improprieties in the manner in which Fidelity Investments was acting, clearly had the authority to correct that misconduct. Limiting the employees protected by section 1514A to individuals who work for public companies is particularly inconsistent with the specific focus of section 1514A(a)(2),

because often *only* officials of outside contractors will have the independence to be willing even to look into the types of violations with which section 1514A is concerned.

The statutory language delineating the types of violations which a whistleblower may report provides further support for the conclusion that the protected whistleblowers include employees of contractors. Section 1514A protects whistleblowing about violations of SEC rules and regulations. Many of those SEC provisions govern, not public companies, but contractors of such companies. A series of regulations establish standards and requirements for accountants. 17 C.F.R. § 210.2-01 to -07. Part 205 of the SEC regulations govern attorneys who practice before the Commission, which would typically include securities lawyers at an outside law firm. Part 270 of those regulations govern mutual fund advisers, such as Fidelity Investments. There is no dispute that information about violations of these provisions is within the scope of section 1514A. But as a practical matter, often the only employees who would have information about violations of these particular SEC regulations would be employees of contractors, not employees of public companies. Only an employee of an accounting firm would usually know if the firm was failing to retain written audit records, as required by section 210.2-06(a). And where, as is common, a mutual fund itself has no employees at all, only the employees of the contractor mutual fund adviser would know if the adviser were in violation of SEC regulations.

In the instant case, although the Fidelity funds (the public company) and Fidelity Investments (the contractor) are subject to a wide range of important SEC regulations, only employees of Fidelity Investments, not employees of the Fidelity funds, would know if those regulations are being violated, because the funds have no employees. Section 1514A could only provide meaningful protection to the disclosure "of violations of regulations governing accountants, outside counsel, and mutual fund advisers if section 1514A protects employees of contractors (such as accounting firms, outside counsel, and mutual fund advisers), because ordinarily only employees of those contractors would have knowledge of that information.

Finally, because section 1514A clearly applies to the mutual fund industry, it would make no sense to construe "employee" in a manner would mean that in many instances, as in the instant case, no one would actually be protected from retaliation. A mutual fund itself is clearly covered by section 1514A(a); it is a "company ... required to file reports under section 15(d) of the Securities Exchange Act of 1936."[24] A mutual fund's adviser is also subject to section 1514A, because it is a "contractor ... of such company." Information about a violation by the fund or its adviser of "any rule or regulation of the Securities and

[24] Section 405 of SOX, 15 U.S.C. § 7263, expressly excludes investment companies from certain disclosure requirements. No such exclusion limits the scope of section 1514A.

Exchange Commission" would fall within the scope of section 1514A(a)(1). Those provisions reflected a decision by Congress that section 1514A should safeguard investors who purchase mutual fund shares as well as investors who purchase shares of publicly traded companies. Mutual funds hold more than $14 trillion in investor assets.[25] The First Circuit acknowledged that under its construction of section 1514A that provision usually would not protect anyone connected to a mutual fund. That interpretation is inconsistent with the terms of section 1514A, which unquestionably do apply to any fund, to any fund adviser, and to any misconduct on their part violating the statutes, rules or regulations listed in section 1514A(a)(1).

III. THE THREE HEADINGS IN SECTION 806 OF SARBANES-OXLEY DO NOT SUPPORT A NARROWER READING OF SECTION 1514A

The First Circuit's interpretation of section 1514A rests heavily on two of the three headings that appear in section 806 of SOX. The plain meaning of the text of section 1514A, however, cannot be overcome by reliance on the short headings, whatever interpretation the headings might suggest. In this case those headings are too inconsistent, and too

[25] See http://www.ici.org/pdf/2013_factbook.pdf, visited July 28, 2013.

abbreviated, to throw any light at all on the meaning of the text of section 1514A.

There are three relevant headings in this case. The heading of section 1514A reads: "Civil action to protect against retaliation in fraud cases." That is also the section title that the Sarbanes-Oxley Act adds to the table of sections at the beginning of chapter 73 of Title 18. Pub. L. 107-209, § 806(b), 116 Stat. 802 (2002). Subsection (a) of section 1514A is headed "Whistleblower protection for employees of publicly traded companies." Section 806 of the Sarbanes-Oxley Act, which contains what is now section 1514A as well as a related technical provision, is headed "Protection for employees of publicly traded companies who provide evidence of fraud."

These headings differ from one another in several ways. While the subsection (a) heading and the section 806 heading refer to "employees of publicly traded companies," the section 1514A heading does not. The section 1514A heading and the section 806 heading, but not the subsection (a) heading, refer to fraud. The section 806 heading alone refers to those who "provide evidence of fraud," only the subsection (a) heading refers to "whistleblower[s]," and the section 1514A heading unlike the others refers broadly to "fraud cases." The court of appeals insisted that this crazy-quilt pattern made the meaning of section 1514A crystal clear. (Pet.App. 19a-22a).

The court below believed that the reference in the section 806 heading and the subsection (a) heading to "employees of publicly traded companies" demonstrated that section 1514A does not apply to

employees of contractors and subcontractors. But the third caption – the section 1514A heading – , unlike the other two headings, includes no reference to any particular type of employee; it refers more broadly to banning retaliation in fraud cases, and does not mention any particular type of employees. The court of appeals simply dismissed the section 1514A heading as irrelevant, remarking only that "[i]t is unlikely Congress intended the [section heading] to be broader than the terms of the 'Protection' discussed in the title of section 806." (Pet.App. 19a). But the wording of the section 1514A heading obviously *is* broader than the section 806 heading; the section 1514A heading is not about any particular types of employees and, unlike section 806, it refers broadly to "retaliation in fraud cases," not only to cases where an employee "provides evidence." The courts may not simply disregard the broader language in the section 1514A heading on the ground that Congress likely did not intend to use it, as if the wording of the section 1514A heading was just a drafting error. Whether Congress intended section 1514A to extend beyond employees of public companies is the very issue in this case; to dismiss the more broadly worded section heading on the ground that such an intent is "unlikely" is to assume the answer and then infer from the answer which heading "likely" reveals what Congress really meant. The court of appeals also thought it significant that the section 806 heading's reference to "employees of publicly traded companies" is "repeated" in the subsection (a) heading, thus evincing a "double limitation." (Pet.App. 20a). But the inconsistencies among these headings surely cannot be

resolved based on majority rule; in any event, the broader section 1514A heading language is also repeated in the subsection (b) of section 806.

Where a given statute has two or more headings, a court is not free simply to rely on whichever heading or headings support its preferred interpretation of the law, and ignore the other. The First Circuit's treatment of the headings in this case is in marked contrast to its utilization of the headings in AIR 21, on which section 1514A was modeled. 49 U.S.C. § 42121. The section heading of section 42121, like the section heading of § 1514A is broad. In explaining why AIR 21 does cover contractor employees, the court of appeals pointed out that "[t]he pertinent section of AIR 21 is entitled: "Protection of employees providing air safety information." (Pet.App. 29a). The court below then chose to simply ignore the heading of subsection 42121(a), which in language similar to the heading of subsection 1514A(a) reads "Discrimination against airline employees." The heading of subsection 42121(a), like the heading of subsection 1514A(a), does not also mention contractors and subcontractors covered by the statute. It is impossible to understand why the First Circuit concluded that the omission was irrelevant to the interpretation of section 42121, and yet critical to the meaning of section 1514A.

Moreover, there is no dispute that both the section 806 heading and the subsection (a) heading make no mention of certain employees and activities that indisputably *are* protected under section 1514A.

Both headings refer only to employees of publicly traded companies, firms that are listed on one of the stock exchanges. Neither heading mentions employees of report-filing companies (such as mutual funds) required to file reports under 15 U.S.C. § 78o(d); but section 1514A undeniably covers employees of those omitted firms. The body of section 1514A(a) lists four types of covered entities: publicly traded companies, report-filing companies, contractors of either, and subcontractors of either.[26] The section 806 and subsection 1514A(a) headings refer only to employees of the first category of four listed entities. The First Circuit insists that the headings demonstrate that section 1514A applies to employees of publicly traded companies (who are mentioned) and to employees of report-filing companies (who are not), but excludes employees of the other two types of entities because they are not mentioned, even though in that regard they are no different than employees of report-filing companies. But the court of appeals offers no real explanation of this distinction among the non-mentioned categories of employees.

The court of appeals candidly acknowledged that the section 806 and subsection headings are only "shorthand," at least insofar as the use of "the term 'publicly traded companies' is a shorthand for" both publicly traded companies and report-filing companies. (Pet.App. 21a). The lower court insisted,

[26] An agent of a public company might also be a firm with employees of its own.

however, that "publicly traded companies" could not also be shorthand for the other covered entities. Coverage of employees of contractors and subcontractors, the court maintained, "is contradicted by the plain words of the title of section 806 and the caption of § 1514A(a)." (Pet.App. 22a). But that simply is not true. The "plain words" of those headings do not state that the protected employees mentioned are the *only* protected workers under the statute; clearly they are not, because the statute also protects people not mentioned in those two headings, employees of report-filing companies. Interpreting the section 806 heading and the subsection (a) heading as shorthand for employees of all of the covered entities would not, as the First Circuit objected, mean that those headings "do not mean what they say." (Pet.App. 21a). Those headings simply do not "say" that the employees mentioned are the only protected workers, and they do not "say" anything at all about employees who work for report-filing companies. The First Circuit insisted the section 806 heading and the subsection heading "are not ambiguous." (Pet.App. 22a). But those provisions do not state – even unambiguously or otherwise – that the employees referred to are the *sole* workers protected by the statute.

In addition, the section 806 heading refers only to employees "who provide evidence of fraud." In this regard as well the section 806 heading is shorthand. Section 1514A also protects employees who engage in other types of activities. It covers employees who provide information to federal officials, or certain company officials, about violations of any SEC rule or

regulation, which do not invariably require proof of fraud. The subsection (a) heading is about "whistleblow[ing]," but an employee could assist an investigation (within the scope of section 1514A(a)(1)) or a proceeding (under section 1514A(a)(2)) in ways that do not involve whistleblowing.[27] These distinctions confirm that Congress could not have intended either heading to be an exhaustive specification of every activity – or every type of employee – protected by the statute.

The First Circuit's analysis illustrates the danger of attempting to interpret a statute based solely (and in this case, selectively) on whether something is not mentioned in a heading.[28] In *Brotherhood of Railroad Trainmen v. Baltimore & O.R.Co.*, 331 U.S. 519 (1947), the parties disagreed about whether the

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[27] An employee might do so, for example, by refusing to shred documents which he or she knew were relevant to a pending SEC investigation.

[28] When this Court has relied on a heading to interpret a statute, those decisions have been based on the words that were actually included in that heading. Thus in *INS v. National Center for Immigrants' Rights, Inc.,* 502 U.S. 183 (1991), the Court held that the term "employment" in a provision of the Immigration and Nationality Act meant "unauthorized employment," because the more specific phrase "unauthorized employment" was actually used in the heading. 502 U.S. at 189-90. In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the Court held that a particular statute merely established the penalty for an existing crime, rather than creating a new offense; in doing so it relied on the fact that the heading of the section in question affirmatively referred to "criminal penalties," rather than to crimes. 523 U.S. at 229.

statutory right accorded to representatives of trainmen to intervene in "any proceeding arising under this Act" included judicial proceedings. The railroad argued that the right was limited to proceedings before the Interstate Commerce Commission, relying on the heading of the provision involved, which read "Commission procedure; delegation of duties; rehearing," and made no mention of judicial procedure or proceedings. 331 U.S. at 527. This Court refused to attach any significance to that omission.

> That the heading ... fails to refer to all the matters which the framers of that section wrote into the text is not an unusual fact. That heading is but a short-hand reference to the general subject matter involved.... [H]eadings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis. Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless. As a result, matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles.

331 U.S. at 528. In the instant case the most sensible reading of the section 806 heading and the subsection (a) heading is that the drafters, in attempting to capture in a few words a provision that applied to

employees of four types of firms, simply chose to refer to the first type of company mentioned in the body of the text.

IV. INTERPRETING SECTION 1514A TO FORBID RETALIATION AGAINST EMPLOYEES OF CONTRACTORS IS NECESSARY TO THE VIABILITY OF OTHER PROVISIONS OF SARBANES-OXLEY

Interpreting section 1514A to protect employees of contractors and subcontractors is essential to the vitality of other important provisions of SOX. SOX creates a number of substantive requirements and enforcement tools intended to prevent a recurrence of the financial collapses of Enron and other firms that led to the adoption of the act. "Congress also recognized that for *any* of these tools to work, the law had to protect whistleblowers from retaliation." *Bechtel v. Competitive Technologies,* 448 F.3d 469, 484-86 (2d Cir. 2006) (Straub, J., dissenting) (emphasis in original).

Section 307 of SOX requires the SEC to issue rules requiring any attorney practicing before the Commission "to report evidence of a material violation of securities law ... to the chief legal counsel or the chief executive officer of the company." 15 U.S.C. § 7245(1). If no appropriate action is taken in response to that report, the attorney must call the possible violation to the attention of certain designated members of the issuer's board of directors. 15

U.S.C. § 7245(2). Evidence of "a material violation of securities law" would almost always be information within the scope of section 1514A(a)(1). Section 307, and the implementing regulations issued in 2003 by the SEC, would often apply to attorneys at a law firm that is the outside counsel for an issuer and to attorneys who work for a mutual fund adviser. 17 C.F.R. part 205. Congress surely did not intend when it enacted SOX[29] that outside counsel who comply with the section 307 regulations would be subject to dismissal for obeying the law. Section 307 could not be fully effective if section 1514A permitted a law firm or mutual fund adviser to fire a lawyer because he or she obeyed the SEC regulations mandated by SOX itself. It would often be equally important to the effectiveness of section 307 and its implementing regulations that an employee of a law firm or of a mutual fund adviser be protected from retaliation for disclosing information about possible violations of securities laws *to* a lawyer at the law firm or fund adviser who was subject to the requirements of section 307. Absent such a protection, a firm or adviser could isolate attorneys from potentially inculpatory information, largely nullifying the section 307 regulations, by punishing any employee who provided such evidence to an attorney subject to the obligations of

[29] In 2010, as part of the Dodd-Frank Act, Congress amended the Securities Exchange Act of 1934 to protect whistleblowers from retaliation when they make disclosures required by SOX. Pub. L. 111-203, § 922(a), 124 Stat. 1376, 1841 (2010).

the section 307 regulations. Interpreting section 1514A to apply to all employees of contractors – not just lawyers – addresses that problem. In the instant case, Lawson had complained to Fidelity Investment's General Counsel about violations of SEC rules and regulations, and Zang reported his concerns to another Fidelity Investment's attorney; both lawyers were doubtless subject to the section 307 regulations.

Section 303 of SOX provides:

> It shall be unlawful, in contravention of such rules or regulations as the Commission shall prescribe ... , for any officer or director of an issuer, or any other person acting under the direction thereof, to take any action to fraudulently influence ... or mislead any independent public or certified accountant engaged in the performance of an audit of the financial statements of that issuer for the purpose of rendering such financial statements materially misleading.

15 U.S.C. § 7242. A false or misleading statement made to an accountant would violate the SEC's regulations implementing section 303, and information about such an inaccurate statement would fall within the scope of section 1514A(a)(1). Aside from the perpetrators themselves, however, the only individual likely to recognize the inaccuracy of a false statement to an accountant would be an employee of the accounting firm to which the statement in question was made. Section 303 would be exceedingly difficult to enforce if section 1514A did not protect the

very outside accountants who received and recognized those falsehoods. They could be fired for calling those inaccuracies to the attention of others in the accounting firm or for alerting federal regulators to those falsehoods.

Title I of SOX creates a detailed regulatory scheme for the accounting firms that audit public companies. 15 U.S.C. §§ 7701 *et seq.* It establishes a Public Company Accounting Oversight Board (PCAOB), whose rules must be approved by the SEC. 15 U.S.C. § 7217(b)(2). Section 101(c)(2) requires the PCAOB to adopt rules establishing "auditing, quality control, ethics, independence, and other standards relating to the preparation of audit reports for issuers." 15 U.S.C. § 7211(c)(2). Section 103 specifies in detail the types of auditor regulations that must be adopted. 15 U.S.C. § 7213. The PCAOB rules are treated for all purposes as violations of the rules and regulations issued under the Securities Exchange Act. 15 U.S.C. § 7202(b)(1). Thus a violation of any of the PCAOB rules implementing Title I would fall within the scope of section 1514A(a)(1). Section 802 requires the SEC to issue rules and regulations directing accountants who conduct audits of issuers to retain certain records. 18 U.S.C. § 1520(a)(2). These PCAOB and SEC rules regulate accounting firms, not publicly traded or report-filing companies. If section 1514A did not apply to employees of contractors and subcontractors, and therefore does not apply to employees of accounting firms, often no employee who would be aware of a potential violation of a Title I rule or a section 802

regulation would be protected from retaliation. Ordinarily no employee of a public company would know whether the company's accounting firm was in violation of a SOX regulation. Congress could not have intended that the only employees who would know about a violation of the accounting firm regulations issued under Title I of SOX, or under section 802, would be unprotected by section 1514A and thus subject to dismissal if they objected to those violations or reported them to the SEC.

V. PROTECTING EMPLOYEES OF CONTRACTORS FROM RETALIATION IS ESSENTIAL TO ACHIEVING THE PURPOSES OF SARBANES-OXLEY

The Sarbanes-Oxley Act was adopted in the wake of the collapse of Enron and several other major corporations. Enron had been the seventh largest corporation in the United States, and its bankruptcy was at the time the largest in American history. In the wake of that bankruptcy filing it quickly became clear that Enron had for years been losing vast sums of money. The company's public statements of its financial position were an elaborate hoax, based in part on a system of accounting gimmicks designed to hide its losses and create the appearance of continued profitability. "Enron ... used thousands of off-the-book entities to overstate corporate profits, understate corporate debts and inflate Enron's stock price.... [Those entities] were used essentially to cook the books and trick both the public and federal regulators

about how well Enron was doing financially." S.Rep. 107-146, pp. 2-3. Some of those schemes involved artificial transactions which not only deceived the public and regulators, but resulted in millions of dollars of profits for Enron officials. "Enron's sudden collapse left thousands of investors holding virtually worthless stock, and most Enron employees with a worthless retirement account. Pension funds nationwide ... literally lost billions on Enron-related investments.... Firefighters, teachers, garment workers, and police officers, who had no way of knowing or finding out about Enron's apparently deceitful conduct ahead of time lost millions in pension fund investments." *Id.*, pp. 3-4. The ensuing scandal riveted national attention for many months, as stories about the plight of those innocent victims combined with regular revelations of the accounting hoaxes that had been used.

Many of the things done by key Enron officials were already clearly crimes; the company's former president, CEO, and others were convicted of serious offenses. What particularly troubled Congress was the extent to which people outside of Enron who could and should have prevented that misconduct – particularly outside accountants and lawyers – had gone along with the schemes, either facilitating what Enron was doing or remaining silent in the face of evident misconduct.

Enron's accounting schemes were concocted with the assistance and approval of its outside accounting firm, Arthur Andersen.

> Much of this conduct occurred with 'extensive participation and structuring advice from [Arthur Andersen],' ... which was simultaneously serving as both consultant and 'independent' auditor for Enron. With the assistance of Anderson and its other auditors, Enron apparently successfully deceived the investing public and reaped millions for some select few insiders....
>
> [T]hrough the use of sophisticated processional advice and complex financial structures, Enron and Andersen were able to paint for the investing public a very different picture of the company's financial health than the true picture revealed.

Id., p. 3. "As investors and regulators attempted to ascertain both the extent and cause of their losses, employees from Andersen were allegedly shredding 'tons' of documents.... Andersen's lawyers issued ambiguous advice encouraging such document destruction...." *Id.*, p. 4.

Arthur Andersen was the most prominent outside firm implicated in the collapse of Enron, but it was far from the only one.

> Enron apparently, with the approval or advice of its accountants, auditors and lawyers, used thousands of off-the-book entities to overstate corporate profits, understate corporate debts and inflate Enron's stock price.... The actions of Enron's ... accountants, ... and lawyers exhibit a "Wild West" attitude which valued profit over honesty.... Much of this

> conduct occurred with "extensive participation and structuring advice from [the accounting firm of Arthur] Anderson, which was.... serving as ... "independent" auditor for Enron.

Id., pp. 2-3. "[P]rofessionals from accounting firms, law firms and business consulting firms, who were paid millions to advise Enron on these practices, assured others that Enron was a solid investment." *Id.*, p. 4.

Congress believed it was the responsibility of those accountants and lawyers, in particular, to stop improper and even criminal conduct, rather than to facilitate or ignore it. "Instead of acting as gatekeepers who detect and deter fraud, it appears that Enron's accountants and lawyers brought all their skills and knowledge to bear in assisting the fraud to succeed and then in covering it up. Congress must reconsider the incentive system that has been set up that encourages accountants and lawyers who come across fraud in their work *to remain silent*." *Id.,* pp. 20-21 (Emphasis added). See Collapse of the Enron Corporation, Hearing before the Senate Committee on Commerce, Science, and Transportation, 107th Cong., 2d Sess. (2002), pp. 2 ("external gatekeepers in the form of auditors and financial analysts failed") (remarks of Sen. Dorgan), 3 ("We also saw the collapse of controls outside the corporation, whether the rating agencies, the auditing firms, the law firms, [or] the analysts....") (remarks of Sen. Fitzgerald). At one hearing, Senator Dorgan asked rhetorically, "Where

were the accountants? Where was the law firm? Where were the security analysts?" *Id.*, p. 2. At another hearing, Senator Hatch commented, "In particular, I would like to know where the lawyers were when Andersen and Enron started shredding documents." Accountability Issues: Lessons Learned from Enron's Fall, Hearing before the Committee on the Judiciary of the United States Senate, 107th Cong., 2d Sess., p. 8 (2002).

The Committee concluded that the reticence of those employees of outside firms, and of Enron itself, was rooted in a culture in which retaliation was both endemic and legal. The financial chicanery had continued in part because those who were aware of the misconduct were deterred from reporting it.

> In a variety of instances when corporate employees at both Enron and Andersen attempted to report or "blow the whistle" on fraud ... they were discouraged at nearly every turn.... An Andersen partner was apparently removed from the Enron account when he expressed reservations about the firm's financial practices in 2000. These examples ... expose a culture, supported by law, that discourage[s] employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, 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. The consequences of this corporate code of silence

> for investors in publicly traded companies, in particular, and for the stock market, in general, are serious and adverse, and they must be remedied.

S.Rep. 107-146, pp. 4-5 (footnote omitted). Federal law prior to the enactment of Sarbanes-Oxley afforded no protection to those who might have reported these schemes.

> [C]orporate whistleblowers are left unprotected under current law. This is a significant deficiency because often, in complex fraud prosecutions, these insiders are the only firsthand witnesses to the fraud. They are the only people who can testify as to "who knew what, and when," crucial questions ... in all complex fraud investigations.

Id., p. 10. "[E]fforts to quiet whistleblowers and retaliate against them for being 'disloyal' or 'litigation risks' transcend state lines. This corporate culture must change, and the law can lead the way." *Id.*

The committee was particularly offended by the response of Enron's outside counsel to a question from Enron about reports of "accounting improprieties."

> [A] shocking e-mail from Enron's outside lawyers to an Enron official was uncovered. This e-mail responds to a request for legal advice after a senior Enron employee, Sherron Watkins, tried to report accounting irregularities at the highest levels of the company in late August 2001. The outside

lawyers counseled Enron, in pertinent part, as follows:

> You asked that I include in this communication a summary of the possible risks associated with discharging (or constructively discharging) employees who report allegations of improper accounting practices: ... Texas law does not currently protect corporate whistleblowers....
>
> ... Of course, Enron's lawyers would claim that they merely provided their client with accurate legal advice....

Id., p. 5. What Enron's counsel had not done was to ask what the improper accounting practices were or suggest that its client should not be engaging in such machinations. Instead, the outside law firm offered what was in effect guidance about how to continue those improprieties by getting rid of an inconvenient whistleblower without triggering a lawsuit. The Committee also noted that "[a]n Andersen partner was apparently removed from the Enron account when he expressed reservations about the firm's financial practices in 2000." *Id.*; see *id*. at 5-6 ("while Enron and Andersen were taking advantage of a system that allowed them to ... engage in ... retaliation against potential witnesses, ... the corporate whistleblowers were faced with daunting challenges.").

The anti-retaliation provision in section 1514A is a linchpin of the Sarbanes-Oxley Act, and its application to employees of outside firms is of central importance. In the years leading up to the collapse

of Enron, the firm's employees and outside accountants and lawyers remained silent, not because they invariably believed what the company was doing was proper, but because in general they were afraid to speak up about practices which they knew were wrong. Hundreds of people had to have been aware of some part of what was happening, or participated in the mass shredding of documents at Arthur Andersen; yet it appears that not one of them picked up the phone and called the SEC or Department of Justice at a time when they could have prevented the harm or impeded the cover-up that followed. Against that background, it is understandable that both the Senate Committee and one of the Senate authors of what became section 1514A characterized that provision as "the single most effective measure possible to prevent recurrences of the Enron debacle and similar threats to the nation's financial markets." *Id*., pp. 10, 19; 148 Cong. Rec. S1788 (remarks of Sen. Leahy), S6440 (remarks of Sen. Leahy) (2002).

The Administrative Review Board correctly observed in *Spinner* that "Congress plainly recognized that outside professionals – accountants, law firms, contractors, agents, and the like – were complicit in, if not integral to, the shareholder fraud and subsequent cover-up officers of the publicly traded Enron perpetrated. Construing Section [1514A] as only protecting employees of publicly traded companies would leave unprotected from retaliation outside accountants, auditors, and lawyers, who are most likely to uncover and comprehend evidence of potential wrongdoing." (Pet.App. 158a). Under the First

Circuit's crabbed reading of section 1514A, if that provision had been in effect prior to the collapse of Enron, it would have been lawful for Arthur Andersen to fire any employee who answered questions from an SEC investigator about the accuracy of Enron's accounting practices or who tried to assist that investigation by refusing to shred Enron-related documents. Enron's outside counsel could have dismissed any associate who pointed out to one of the firm's partners that Enron's letter about Sherron Watkins indicated that Enron was engaging in accounting improprieties that should be looked into. It is impossible to believe that the framers of the Sarbanes-Oxley Act could have intended section 1514A to permit such retaliatory acts.

VI. THE ADMINISTRATIVE REVIEW BOARD DECISION IN *SPINNER* IS ENTITLED TO *CHEVRON* DEFERENCE

If the Court concludes that section 1514A is ambiguous, the Administrative Review Board's interpretation of that provision in *Spinner* is entitled to deference under *Chevron U.S.A. Inc. v. NRDC,* 467 U.S. 837 (1984). This Court has repeatedly held such deference is appropriate where a statute authorizes an agency to engage in adjudication and the agency's decision is reasonable. *United States v. Mead Corp.*, 533 U.S. 218, 227-31 and n.12 (2001). This case easily fits within that rule.

The Secretary is responsible for enforcing section 1514A both through investigation and through formal adjudication. 18 U.S.C. § 1514A(b). Section 1514A(b)(A)

provides that claims under the statute shall be governed by the rules and procedures set forth in section 42121(b) of Title 49. Section 42121(b) in turn provides that, following an initial investigation and proposed findings by the Secretary or his designee, any party dissatisfied with those findings may request "a hearing on the record." 49 U.S.C. § 42121(b)(2)(A). That requirement of adjudication based on a record after opportunity for an agency hearing entitles the parties to the rights and procedures set out in section 554 of the Administrative Procedure Act. 5 U.S.C. § 554. Sections 1514A and 42121(b) establish a number of additional procedures. 18 U.S.C. § 1514A(b)(2); 49 U.S.C. § 42121(b). The Secretary has delegated final adjudicatory authority to the ARB. See 67 Fed. Reg. 64,272, 64,273 (2002). The lower courts have correctly concluded that decisions of the ARB are entitled to *Chevron* deference. *Lockheed Martin Corp. v. Admin. Review Bd., U.S. Dep't of Labor*, 717 F.3d 1121, 1128-29 (10th Cir. 2013); *Wiest v. Lynch*, 710 F.3d 121, 131 (3d Cir. 2013); *Welch v. Chao*, 536 U.S. 269, 276 n.2 (4th Cir. 2008).

As the analysis set out above makes clear, the ARB's interpretation of section 1514A is eminently reasonable. The Board's opinion rests on an exceptionally thoughtful and thorough analysis of the issues of interpretation posed by section 1514A, including a careful evaluation of the possible arguments for a different, narrower construction of the statute. The holding in *Spinner* is consistent with a long series of ARB decisions concluding that section

1514A protects employees of contractors of public companies. (Pet.App. 143a-45a and n.8, 170a-171a).

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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STATUTES AND REGULATIONS INVOLVED

Section 806 of the Sarbanes-Oxley Act of 2002, 116 Stat. 802, provides:

PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES WHO PROVIDE EVIDENCE OF FRAUD.

(a) IN GENERAL. – Chapter 73 of title 18, United States Code, is amended by inserting after section 1514 the following:

"Sec. 1514A. Civil action to protect against retaliation in fraud cases

"(a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES. – No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee –

> "(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange

Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by –

"(A) a Federal regulatory or law enforcement agency;

"(B) any Member of Congress or any committee of Congress; or

"(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

"(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

"(b) ENFORCEMENT ACTION. –

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

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

"(B) if the Secretary has not issued a final decision within 180 days of the filing of

the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

"(2) PROCEDURE. –

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

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

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

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

"(c) REMEDIES. –

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

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

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

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

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

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

(b) CLERICAL AMENDMENT. – The table of sections at the beginning of chapter 73 of title 18, United States Code, is amended by inserting after the item relating to section 1514 the following new item: "1514A. Civil action to protect against retaliation in fraud cases.".

Section 1514A of 18 U.S.C., as amended by the Dodd-Frank Act, 124 Stat. 1848, 1852, provides in pertinent part:

> **Civil action to protect against retaliation in fraud cases**
>
> **(a) Whistleblower protection for employees of publicly traded companies.** – No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c), or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee. . . .
>
> **(2) Procedure.** – . . .
>
> **(D) Statute of limitations.** – An action under paragraph (1) shall be commenced not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation.

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

Section 42121(b)(1)(B) of 49 U.S.C. provides:

(B) Requirements. –

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

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

(iii) Criteria for determination by Secretary. – The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor

in the unfavorable personnel action alleged in the complaint.

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

Section 1980.101 of 29 C.F.R. provides in pertinent part:

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

* * *

Employee means an individual presently or formerly working for a company or company representative, an individual applying to work for a company or company representative, or an individual whose employment could be affected by a company or company representative.

Section 1980.102(a) of 29 C.F.R. provides:

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

activities specified in paragraphs (b)(1) and (2) of this section.