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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 OF *AMICUS CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND GOVERNMENT ACCOUNTABILITY PROJECT IN SUPPORT OF PETITIONERS

R. Scott Oswald
Counsel of Record
THE EMPLOYMENT LAW GROUP, PC
888 17th Street, NW, Suite 900
Washington, DC 20006
(202) 331-3911
soswald@employmentgroup.com

Tom Devine
GOVERNMENT ACCOUNTABILITY PROJECT
1612 K Street, NW, Suite 1100
Washington, DC 20006
(202) 457-0034
tomd@whistleblower.org

Richard R. Renner
KALIJARVI, CHUZI, NEWMAN & FITCH, P.C.
1901 L Street, NW, Suite 610
Washington, DC 20036
(202) 331-9260
rrenner@kcnlaw.com

Rebecca Hamburg Cappy
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
417 Montgomery Street, Fourth Floor
San Francisco, California 94104
(415) 296-7629
rcappy@nelahq.org

Michael T. Anderson
MURPHYANDERSON PLLC
111 Devonshire Street, 5th Floor
Boston, Massachusetts 02109
(617) 227-5720
manderson@murphypllc.com

Counsel for Amicus Curiae

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THE LEX GROUP[DC] ♦ 1825 K Street, N.W. ♦ Suite 103 ♦ Washington, D.C. 20006
(202) 955-0001 ♦ (800) 856-4419 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

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INTEREST OF *AMICI CURIAE*[1]

The National Employment Lawyers Association (NELA) advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Founded in 1985, NELA is the country's largest professional organization comprised exclusively of lawyers who represent individual employees in cases involving labor, employment, and civil rights disputes. NELA and its 68 circuit, state, and local Affiliates have more than 3,000 members nationwide committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the workplace rights of individuals.

The Government Accountability Project (GAP) is a non-partisan, non-profit organization specializing in legal and other advocacy on behalf of whistleblowers. GAP has a 30-year history of working on behalf of government and corporate employees who expose illegality, gross waste and mismanagement, abuse of authority, substantial or

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[1] Pursuant to S. Ct. R. 37.6, *Amici* submit that no counsel for any party participated in the authoring of this document, in whole or in part. In addition, no other person or entity, other than *Amici*, has made any monetary contribution to the preparation and submission of this document. Pursuant to S. Ct. R. 37.2, letters consenting to the filing of this Brief have been filed with the Clerk of the Court.

specific dangers to public health and safety, or other institutional misconduct undermining the public interest. GAP led the citizen campaign for passage of the whistleblower provisions of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley or SOX), 18 U.S.C. § 1514A, and is cited in its legislative history. *See* 148 CONG. REC. 6439-6440, 107th Congress, 2d Session (2002). It also has led the campaigns for passage of eleven other corporate whistleblower laws since 2002 that are based on the SOX model.

SUMMARY OF ARGUMENT

The First Circuit erred in excluding the employees of private contractors and subcontractors from the antiretaliation provision of the Sarbanes-Oxley Act. The most natural reading of this provision and the legislative history of the Act demonstrate that Congress intended to cover these employees. Further, the United States Department of Labor's implementing regulations, which warrant deference, support the Sarbanes-Oxley Act's application in the case of private contractors and subcontractors. Finally, the Sarbanes-Oxley Act must be read broadly in order to accomplish its remedial purpose.

ARGUMENT

The Sarbanes-Oxley Act was enacted in the aftermath of the Enron debacle. Yet Enron had virtually no direct employees. Enron fragmented its critical functions among non-public affiliates and its non-public accounting firm Arthur Andersen. The First Circuit's cramped reading of the Sarbanes-

Oxley Act would deny whistleblower protection to the employees of these non-public affiliates, even though these were the very employees that Congress intended to protect.

The remedial nature of Sarbanes-Oxley calls for broad and inclusive application. An interpretation of "employee" that limits coverage to employees of public companies would undermine Sarbanes-Oxley's basic purpose. Publicly traded companies increasingly use a variety of contractual relationships to separate functions into organizations focused on those functions. Many of these functions, such as accounting, compliance testing and investigations, naturally touch on compliance issues. An interpretation of the term "employee" to cover employees of private contractors and subcontractors is consistent with the plain text of the statute, the legislative history, the remedial purpose, and Department of Labor procedural regulations and policy implementing Section 806. A contrary interpretation would leave a significant number of employees unprotected. These employees are in a position to expose corporate fraud. In the context of the mutual fund industry, all the employees would be without whistleblower protection under Section 806. Broad and inclusive application of Sarbanes-Oxley is necessary to prevent a crisis in the mutual fund industry, such as the one that occurred in the banking sector in 2008.

I. Congress Expressly Included Employees of Non-Public Contractors in the Statutory Language.

Interpretation of the statute begins with the plain text. "It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Tr.*, 540 U.S. 526, 534, 124 S. Ct. 1023, 1030, 157 L. Ed. 2d 1024 (2004) (internal quotes omitted).

Under Section 806 of Sarbanes-Oxley, 18 U.S.C. § 1514A(a) (2010), a covered company is a "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." Congress did not qualify or limit this definition. The most natural reading of this provision is that the statute's protections cover "an employee" of any of the categories listed, including contractors and subcontractors. The court below complains that the personal employees of an officer would not be likely whistleblowers, but the scandal at Tyco exemplifies how an officer's personal employees may have information that could be helpful in securities enforcement cases. *See Wiest v. Lynch*, 710 F.3d 121, 124-25 (3d Cir. 2013). The issue of whether a particular employee can provide information that reasonably relates to securities violations addresses the scope of protected activity, not coverage.

Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally. *See Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983). If it was Congress's intention to restrict Section 806's protections to employees of public companies, it would have used the phrase "an employee of such company," rather than "an employee," just as Congress limited the entities who are prohibited from discriminating to public companies or "any . . . contractor, subcontractor, or agent of such company[.]" By using the specific phrase "of such company" in identifying those who are prohibited from engaging in retaliation, while omitting similar language in identifying those employees who are protected from retaliation, Congress indicated it was not limiting protections of Section 806 to employees of public companies.

The First Circuit incorrectly held that the 2010 amendment of Section 806, as part of the Dodd-Frank Act, demonstrates that Section 806 only covers employees of publicly-traded companies. As amended, Section 806 now reads:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)) including any subsidiary or affiliate whose financial information is included in the

> consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c)), 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—

18 U.S.C. § 1514A(a), as amended by Pub. L. No. 111–203 §§ 922(b), 929A, 124 Stat. 1376, 1848, 1852 (2010).

The First Circuit's reading guts the statutory language. If Section 806 protects only the employees of public companies, then "contractors, subcontractors and agents" are liable under Section 806 only if they themselves are publicly-traded, or if they are alleged to have engaged in retaliation against the employees of their publicly-traded client. The most logical reading of Section 806 is that "an employee" (protected from retaliation) includes employees of the non-public "contractor, subcontractor, or agent" enumerated above for reporting violations concerning the public company for which they are performing work.

II. The First Circuit's Decision Ignores the Historical Purpose of the Act.

Congress enacted Sarbanes-Oxley in the wake of the Enron scandal to restore investor confidence in the nation's financial markets. *See* S. Rep. No. 107-146 (2002). The legislative history demonstrates that Congress was concerned not only with the fraud committed by Enron, a publicly traded company, but also with the actions of its contractor, Arthur Andersen LLP, a privately held firm and its proliferation of non-public affiliates,. *See id.* at 2 ("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."). In describing the "corporate code of silence," which "not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity," Congress enumerated examples of employees who faced retaliation for raising concerns about the companies' practices. *See id.* at 5. These examples included retaliation by Arthur Andersen, a private company, against one of its own partners. *See id.*

Enron's S-4 registration statement, filed with the SEC on October 9, 1996, states: "Essentially all of Enron's operations are conducted through its subsidiaries and affiliates…" When Senator Leahy reported on the whistleblower provision, he described it in the context of Enron:

> Look what they were doing on this chart. There is no way we could have known about this without that kind of a whistleblower. Look at this. They had all these hidden corporations-Jedi, Kenobi, Chewco, Big Doe-I guess they must have had "little doe"-Yosemite, Cactus, Ponderosa, Raptor, Braveheart, Ahluwalia, . . . The fact is, they were hiding hundreds of millions of dollars of stockholders' money in their pension funds. The provisions Senator Grassley and I worked out in Judiciary Committee make sure whistleblowers are protected.

Congressional Record, S7358, July 25, 2002 (emphasis added.)

Yet under the First Circuit's standard, the employees of Enron's non-public accounting firm that Congress meant to protect would not be protected, simply because they were not directly employed by the publicly-traded parent.

Senator Durbin said that Section 806 "creates protections for corporate whistleblowers. We need them. If insiders don't come forward, many times you don't know what is happening in large corporations." Senate Banking Committee Legis. History, Vol. III, at 1294. These goals would be completely frustrated if international companies simply moved their fraudulent activities to non-public contractors. It flouts the obvious purpose of Congress to hold that, notwithstanding its central

concern with Enron's "hidden corporations," it did not intend to protect the very whistleblowers at the subsidiary who would be in a position to blow the whistle on that fraud.

The few direct employees of the parent Enron would not have been in the same position. If the securities laws are designed to reach the conduct of "controlled" non-public contractors, then it follows that SOX whistleblower protection was intended to reach their employees as well. As Judge Levin correctly held in *Walters v. Deutsche Bank AG*, 2008-SOX-70, at 8 (ALJ Mar. 23, 2009):

> [T]he legislative history of Sarbanes-Oxley would seem to confirm that Section 806 was meant to include an agent or contractor like the accounting firm of Arthur Andersen, not because there was any evidence that Andersen implemented Enron's personnel actions, but because Congress hoped an insider in an Arthur Andersen situation would blow the whistle on the type of fraud Arthur Andersen helped to conceal. Yet, application of the labor agency test probably would have been fatal to the claim of an Andersen whistleblower, and has been fatal to claims of whistleblowers in wholly owned subsidiaries . . . Under such circumstances, simply to state the labor law test in the context of Sarbanes-Oxley seems sufficient to refute it, because it leaves essentially

unchanged conditions Congress passionately wanted to reform.

III. The Department Of Labor's Regulations Warrant Deference.

The Department of Labor's regulations implementing Section 806 support its application in the case of contractors and subcontractors. The implementing regulations apply to both "company" and/or "company representative[s]." 29 C.F.R. § 1980.101. The implementing regulations further define a "company representative" as "any officer, employee, contractor, subcontractor, or agent of a [public] company." *Id.* Thus, under the implementing regulations, both (i) public companies and (ii) any "contractor, subcontractor, [and] agent" of a public company, are covered under Sarbanes-Oxley. The implementing regulations make no distinction between public and private companies. *Id.*

This court affords deference to the Department of Labor's interpretation of the Act as expressed in formal regulations under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

IV. Sarbanes-Oxley Incorporates Language From AIR21, Further Supporting This Interpretation.

Sarbanes-Oxley's burden of proof scheme is drawn from the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century,

also known as AIR21.[2] Sarbanes-Oxley provides that whistleblower actions "shall be governed by the legal burdens of proof set forth in § 42121(b) of title 49, United States Code," citing to AIR21. *See* 18 U.S.C. § 1514A(b)(2)(C).

AIR21's prohibition against retaliation states, "No air carrier ***or contractor or subcontractor*** of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)" engaged in protected conduct as defined under the act. 49 U.S.C.A. § 42121(a) (emphasis added).

In applying AIR21, the ARB has correctly stated that the statute does not require that the air carrier employ the claimant for the statute to cover the claimant. *See*, *e.g.*, *Evans v. Miami Valley Hospital*, ARB Nos. 07-118, -121, ALJ No. 2006-AIR-22 (ARB June 30, 2009); *Peck v. Safe Air International*, *Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). It is logical to conclude, given the importation of AIR21's burden of proof scheme, that Congress intended to protect employees of contractors and subcontractors as these employees are protected under AIR21.

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[2] Pub. L. No. 106-181, § 519(a), 114 Stat. 61, 146-47 (codified in various sections of 49 U.S.C.).

V. Remedial Statutes Like Sarbanes-Oxley Must Be Read Broadly.

This Court has "repeatedly recognized that securities laws combating fraud should be construed 'not technically and restrictively, but flexibly to effectuate [their] remedial purposes.'" *Herman & MacLean v. Huddleston*, 459 U.S. 375, 386–87, 103 S. Ct. 683, 689, 74 L. Ed. 2d 548 (1983) (quoting *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195, 84 S. Ct. 275, 284, 11 L. Ed. 2d 237 (1963)). The legislative history described above demonstrates that Sarbanes-Oxley, in particular, was enacted to remedy the issue of retaliation against whistleblowers such as those at Enron and Arthur Andersen.

The Court and the Courts of Appeal have also routinely held that whistleblower provisions must be given broad scope to accomplish their remedial purposes. *NLRB v. Scrivener* (1972), 405 U.S. 117, 121-26; *English v. General Elec. Co.*, 496 U.S. 72, 82 (1990) (to "encourage" employees to report safety violations and protect their reporting activity); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985) ("Narrow" or "hypertechnical" interpretations are to be avoided as undermining Congressional purposes.); *Passaic Valley Sewerage Comm. v. Dep't of Labor*, 992 F.2d 474, 479 (3d Cir. 1993). This Court similarly construes Title VII to further its remedial purpose. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982).

The First Circuit panel majority dismissed the broad remedial purpose of Sarbanes-Oxley, stating

that it would not apply the "rule of lenity." "[T]he rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal." *Liparota v. United States*, 471 U.S. 419, 427, 105 S. Ct. 2084, 2089, 85 L. Ed. 2d 434 (1985).

The First Circuit confuses rules that protect criminal defendants from the rules for civil remedial statutes. In so doing, the First Circuit turns the construction of Sarbanes-Oxley from the policy of preventing corporate fraud into a policy of protecting employers who retaliate against those who report it. Broad construction of employee protections is not dependent on the rule of lenity used in criminal cases. Because the rule of lenity does not apply, the First Circuit should have, as Judge Thompson stated in his dissent, "default[ed] to breadth and reject[ed] narrowness." *Lawson v. FMR LLC*, 670 F.3d 61, 89 (1st Cir. 2012), *cert. granted*, 133 S. Ct. 2387 (U.S. 2013). Instead, the First Circuit construed the statute narrowly, defeating its remedial purpose.

a. ARB Adjudications Should Be Afforded *Chevron* Deference To The Extent That The Department of Labor Is Clarifying The Statute Through Its Active Adjudication Of Cases Under SOX And Where The Department of Labor Is Explaining How Its Decision Is Furthering The Law's Remedial Purpose.

The Department of Labor's Administrative Review Board ("ARB") has ruled that Section 806's protections extend to employees of a public

company's private contractors, subcontractors, and agents. In doing so, the Department of Labor is fulfilling its congressionally intended role of adjudicating administrative complaints of whistleblower retaliation. 18 U.S.C. § 1514A(b).

For example, the ARB exercised appropriate adjudicative authority in *Spinner v. David Landau and Associates*, LLC, 2012 WL 2073374 (ARB May 31, 2012), where it rejected the First Circuit's holding below. The ARB stated:

> First, we are obliged to interpret Section 806 broadly both because it is a remedial statute and the legislative history encourages us to do so. Second, we note that although the theoretical coverage of employees of any contractors, subcontractors, or agents of public companies might be broad, Section 806 contains built-in limitations including (1) its specific criteria for employees to have a reasonable belief of violations of specific anti-fraud laws or SEC regulations and (2) its requirement that the protected activity was a causal factor in the alleged retaliation.

Id. at 13 (internal citation omitted).

In *Spinner*, the ARB also noted that it has "repeatedly interpreted Section 806 as affording whistleblower protection to employees of contractors, subcontractors, or agents of publicly traded

companies, regardless of the fact that the contractor, subcontractor, or agent was not itself a publicly traded company. *See Charles v. Profit Inv. Mgmt.*, ARB No. 10-071, ALJ No. 2009-SOX-040 (ARB Dec. 16, 2011); *Funke v. Federal Express Corp*, ARB No. 09-004, ALJ No. 2007-SOX-043 (ARB July 8, 2011); *Johnson v. Siemens Building Techs.*, ARB No. 08-032, ALJ No. 2005-SOX-015 (ARB Mar. 31, 2011)."

This Court affords deference to agency interpretations as expressed in formal adjudications. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Under *Chevron*, when faced with an ambiguous statute which Congress has vested an agency with the power to interpret, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* At 843; *see also*, *FCC v. Fox Television*, 556 U.S. 502, 514-15, 129 S. Ct. 1800, 1810-11 (2009) (no heightened standard for agencies when changing policy).

In *United States v. Mead Corp.*, 533 U.S. 218, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001), the Supreme Court recognized that "express congressional authorizations to engage in the process of ... adjudication that produces ... rulings for which deference is claimed," is "a very good indicator of delegation meriting *Chevron* treatment...." *Id.* at 229, 121 S. Ct. 2164. The Court further explained that "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal

administrative procedure," including formal adjudication. *Id.* at 230 & n. 12, 121 S. Ct. 2164.

Courts of appeals have also recognized the appropriateness of affording the Department of Labor deference. Applying *Mead*, the Fourth Circuit held that the ARB's interpretation of Section 806 warranted *Chevron* deference based on this statutory and administrative delegation. *See Welch v. Chao*, 536 F.3d 269, 276 & n. 2 (4th Cir. 2008). The Third and Tenth Circuits recently reached the same conclusions. *See Wiest v. Lynch*, 710 F.3d 121, 131 (3d Cir. 2013); *Lockheed Martin Corp. v. Admin. Review Bd., U.S. Dep't of Labor*, 11-9524, 2013 WL 2398691 (10th Cir. June 4, 2013).

Thus, it is appropriate for this Court to defer to the Department of Labor in extending Section 806 protections to employees of a public company's private contractors, subcontractors, and agents.

b. The Cramped Interpretation of Sarbanes-Oxley In The Pre-2008 Period, Contributed To The Economic Crisis of 2008.

In his May 21, 2012 article, *Sarbanes-Oxley's Whistleblower Provisions—Ten Years Later*[3], Professor Richard Moberly explores the effectiveness of Sarbanes-Oxley as a deterrent to unethical behavior in the corporate world. Professor Moberly posits that in the early 2000s, the Department of Labor and federal court system resisted enforcing

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[3] Richard Moberly, *Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. Rev. 1 (2012).

Sarbanes-Oxley, leading to the "Great Recession" of the late 2000s. He specifically points to the Occupational Safety and Health Administration's ("OSHA") "inability to effectively enforce Sarbanes-Oxley's antiretaliation provision and…***narrow and restrictive interpretations***" of Sarbanes-Oxley as potential causes for the economic crisis.[4]

The recent economic crisis began when banks and other lenders made subprime mortgages to borrowers who were unlikely to repay them. Lenders then bundled the mortgages and sold them as "mortgage backed securities." Lenders used fraudulent practices to sell subprime loans and persuade regulators that the borrowers were qualified for these loans. As the borrowers, unsurprisingly, began to default, the value of the mortgage backed securities dropped, bankrupting companies that invested in or guaranteed them.

In his May 2012 article, Professor Moberly explains that whistleblowers did not play a significant role in exposing the behavior that led to the financial crisis in 2008. He states, "[t]he financial crisis in 2008 provides the most vivid case study of [Sarbanes-Oxley's] failure, as corporate officers, government regulators, and law enforcement agencies ignored the warnings of employees to who tried to report problems in the sub-prime mortgage industry."[5] Professor Moberly postulates that although whistleblowers had greater

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[4] *Id.* at 32 (emphasis added).

[5] *Id.* at 4.

protection than ever before, they lacked any confidence that the protections would actually work.

This lack of confidence in the ability of Sarbanes-Oxley was a result the failure of the Department of Labor and court system to enforce Sarbanes-Oxley. Professor Moberly states, "Unfortunately, even if Sarbanes-Oxley encouraged employees to report more frequently, the Act often failed to protect them from reprisals and failed to compensate them consistently from the retaliation they suffered."[6]

In spite of Sarbanes-Oxley's favorable burden of proof, OSHA refused to apply that burden in the claimants' favor in the years immediately preceding the "Great Recession." In fact, in 2007, OSHA's Investigative Manual did not even reflect the burden shifting framework in an accurate manner.[7]

Professor Moberly's 2007 study also reviewed the OALJ and ARB's application of Sarbanes-Oxley.

> ALJs often narrowed the scope of Sarbanes-Oxley's "protected conduct" to the detriment of employees. The ARB later enshrined the ALJs' restrictive approach by determining that whistleblowers had to "definitively and specifically" connect

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[6] *Id.* at 27.

[7] Richard Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 Wm. & Mary L. Rev. 65, 125 (2007).

> their disclosure to one of the six listed illegalities. Additionally, instead of protecting whistleblowers who disclose any of six different types of fraud, as listed in the statute, the ARB determined that the fraud reported must be fraud "related to shareholders" and "of the type that would be adverse to investors' interests." Further, the fraud had to be "material," as defined by securities laws to mean "information that a reasonable investor would consider important in deciding how to vote."[8]

This resistance by the Department of Labor and the federal court system has led potential whistleblowers to believe that they will have no recourse against retaliation by their employers. Without this confidence, Sarbanes-Oxley cannot fulfill its intended role of fraud prevention. Situations like Enron and the "Great Recession" are the natural consequence.

c. A Broad Application Of Sarbanes-Oxley to Contractors And Subcontractors Of Mutual Fund Holding Companies Will Help To Prevent A Similar Catastrophe In Mutual Fund Industry.

Excluding the employees of contractors and subcontractors of public companies from Section 806's protections could result in a disaster in the

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[8] Moberly, *Ten Years Later*, *supra* note 3 at 32-33 (internal citations omitted).

mutual fund industry, similar to that in the banking industry in 2008. Investment companies, including all mutual funds, are covered by Section 806. However, mutual funds typically do not have employees, relying instead on third party contractors, such as investment advisers. *See Jones v. Harris Associates L.P.*, 559 U.S. 335, 338, 130 S. Ct. 1418, 1422, 176 L. Ed. 2d 265 (2010) ("A separate entity called an investment adviser creates the mutual fund, which may have no employees of its own.") (citations omitted); *Daily Income Fund*, *Inc. v. Fox*, 464 U.S. 523, 536, 104 S. Ct. 831, 838, 78 L. Ed. 2d 645 (1984) ("Unlike most corporations, [a mutual fund] is typically created and managed by a pre-existing external organization known as an investment adviser.") (citation omitted).

The employees of a mutual fund's contractors therefore have knowledge about the publicly-traded mutual fund's operations. These employees are particularly well-situated to recognize fraud and have direct knowledge of whether the funds they manage are complying with SEC requirements designed to prevent violations and shareholder fraud. Outside accountants and auditors, such as those at Arthur Andersen during the Enron scandal, also fall into this category. Leaving these employees without the protections of Section 806 violates the clear Congressional intent to address the wrongs brought to light from Enron and Arthur Anderson and could lead to a similar disaster in the mutual fund industry.

One avenue to avoiding such a catastrophe in the mutual fund industry is to protect internal

reporting. The United States Chamber of Commerce publicly recognized internal reporting as its preferred method of whistleblowing and fraud detection. The Chamber made these comments to the U.S. Securities and Exchange Commission on implementation of section 21F of the Securities Exchange Act in December of 2010 (pp. 3-4):

> Effective compliance programs rely heavily on internal reporting of potential violations of law and corporate policy to identify instances of non-compliance. These internal reporting mechanisms are cornerstones of effective compliance processes because they permit companies to discover instances of potential wrongdoing, to investigate the underlying facts, and to take remedial actions, including voluntary disclosures to relevant authorities, as the circumstances may warrant… Moreover, if the effectiveness of corporate compliance programs in identifying potential wrongdoing is undermined, their attendant benefits, such as promotion of a culture of compliance within corporations, as well as their value to enforcement efforts, will likewise be diminished.[9]

However, under the First Circuit's decision, such reporting by contractors and subcontractors

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

would fall outside of Sarbanes-Oxley's scope of protection. The financial crisis of 2008 serves as a stark example of the consequences of withholding this protection.

CONCLUSION

The plain text and legislative history of Section 806 of the Sarbanes-Oxley Act demonstrates that it protects employees of a public company's private contractor, subcontractor, or agent from retaliation. The Department of Labor has statutory responsibility to adjudicate such claims, and its holdings are entitled to *Chevron* deference. Further, the remedial nature of Sarbanes-Oxley calls for a broad and inclusive application of the term "employee." A narrow construction would undermine the act and leave many employees who are in a position to expose corporate fraud without whistleblower protection.

Respectfully submitted,

/s/ R. Scott Oswald
R. Scott Oswald
Counsel of Record
THE EMPLOYMENT LAW GROUP, PC
888 17th Street, NW, Suite 900
Washington, DC 20006
(202) 331-3911
soswald@employmentgroup.com

/s/ Richard R. Renner
Richard R. Renner
KALIJARVI. CHUZI, NEWMAN & FITCH P.C.
1901 L Street, NW, Suite 610
Washington, DC 20036
(202) 331-9260
rrenner@kcnlaw.com

/s/ Michael T. Anderson
MURPHYANDERSON PLLC
111 Devonshire Street, 5th Floor
Boston, Massachusetts 02109
(617) 227-5720
manderson@murphypllc.com

/s/ Tom Devine
Tom Devine
GOVERNMENT ACCOUNTABILITY PROJECT
1612 K Street, NW, Suite 1100
Washington, DC 20006
(202) 457-0034
tomd@whistleblower.org

/s/ Rebecca Hamburg Cappy
Rebecca Hamburg Cappy
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
417 Montgomery Street, Fourth Floor
San Francisco, California 94104
(415) 296-7629
rcappy@nelahq.org

Counsel for Amicus Curiae