1   IN THE SUPREME COURT OF THE UNITED STATES

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3   JACKIE HOSANG LAWSON   :

4   AND JONATHAN M. ZANG,   :

5   Petitioners   :   No. 12-3

6   v.   :

7   FMR LLC, ET AL.   :

8   - - - - - - - - - - - - - - - - - x

9   Washington, D.C.

10   Tuesday, November 12, 2013

11

12   The above-entitled matter came on for oral

13   argument before the Supreme Court of the United States

14   at 1:00 p.m.

15   APPEARANCES:

16   ERIC SCHNAPPER, ESQ., Seattle, Washington; on behalf of

17   Petitioners.

18   NICOLE A. SAHARSKY, ESQ., Assistant to the Solicitor

19   General, Department of Justice, Washington, D.C.; for

20   United States, as amicus curiae, supporting

21   Petitioners.

22   MARK A. PERRY, ESQ., Washington, D.C.; on behalf of

23   Respondents.

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1   C O N T E N T S

2 ORAL ARGUMENT OF   PAGE

3 ERIC SCHNAPPER, ESQ.

5 ORAL ARGUMENT OF

6 NICOLE A. SAHARSKY, ESQ.,

9 ORAL ARGUMENT OF

10 MARK A. PERRY, ESQ.

12 REBUTTAL ARGUMENT OF

13 ERIC SCHNAPPER, ESQ.

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1   P R O C E E D I N G S

2   (1:00 p.m.)

3   CHIEF JUSTICE ROBERTS: We will hear

4   argument next in Case 12-3, Lawson and Zang v. FMR LLC.

5   Mr. Schnapper.

6   ORAL ARGUMENT OF ERIC SCHNAPPER

7   ON BEHALF OF THE PETITIONERS

8   MR. SCHNAPPER: Mr. Chief Justice, and may

9   it please the Court:

10   Section 1514A is written in the classic

11 language which Congress utilizes to regulate

12 relationships between employees and their employers.

13 Legislation regarding how an entity is to treat an

14 employee is understood to refer to the entity's own

15 employees. And that is particularly true here where the

16 phrase "terms and conditions" of employment is used in

17 the statute.

18   If Section 1514A forbade only contractors to

19 retaliate against employees under the terms and

20 conditions of their employment, I don't think there'd be

21 any question that the courts would understand it was

22 referring to the contractor's own employees. The

23 statute has the same -- that language has the same

24 meaning, even though it's combined in this instance with

25 prohibitions against retaliation by other types of

1   actors.

2   The First Circuit's decision interpreting

3   1514A to permit a contractor to retaliate against its

4   own employees is inconsistent with its general usage and

5   it leads to four implausible consequences. First, it

6   renders the statutory language regarding contractors

7   virtually meaningless. Secondly, it renders that

8   language with regard to contractors in the mutual fund

9   industry literally meaningless.

10   Third, it has the implausible consequence of

11   permitting the very type of retaliation that we know

12   Congress was concerned about. Retaliation by an

13   accountant such as Arthur Andersen. And finally, it

14   renders incoherent the provisions in 1514A and the

15   related remedial provision regarding scienter, the

16   burden of proof and an affirmative defense.

17   JUSTICE ALITO: Is it your position that

18   employees of any officer, employee, contractor,

19   subcontractor or agent of a public company are covered?

20   They're all covered?

21   MR. SCHNAPPER: I'm not -- it's our position

22   that employees of contractors and subcontractors are

23   covered.

24   JUSTICE GINSBURG: All employees or would

25   you limit it --

1   MR. SCHNAPPER: We --

2   JUSTICE GINSBURG: -- to the ones that had a

3   hand in executing the contract?

4   MR. SCHNAPPER: We -- if I understand the

5   question correctly, we -- we have not taken a position

6   and the standard we advanced does not address the

7   question of a -- of a personal employee of an employer,

8   such as Ken Lay --

9   JUSTICE ALITO: Well, if doesn't --

10   MR. SCHNAPPER: It doesn't raise distinct

11   issues --

12   JUSTICE ALITO: If it doesn't include that,

13   then -- then how do you avoid that with your reading of

14   the text?

15   MR. SCHNAPPER: Your Honor, our view of this

16   is that the -- the meaning of the term "employee"

17   depends on the context in which it's used and it ought

18   to be assessed separately for each of the actors. So

19   when it says no publicly-traded company may retaliate

20   against an employee, it means an employee of the

21   publicly-traded company. But -- and the same thing with

22   contractor and subcontractor.

23   But if we had a statute which by itself said

24   no employee of -- personal -- no employee of an officer

25   shall do something, the -- the normal reading of that

1   would be to refer to an employee of the officer's

2   company. And we have statutes that impose personal

3   liability on officials for things they're doing in their

4   companies and that's the way they read. So I --

5   JUSTICE SCALIA: Well, that's sort of

6   peculiar. I mean, really, I don't see how you can piece

7   it out like that, that it includes employees of

8   contractors, subcontractors, but not -- not of any

9   officer.

10   But let me ask you this: If it does include

11   employees of -- of an officer, is it -- is it as much of

12   a disaster as -- as your opponent suggests? That is to

13   say, would -- would a firing for something that had

14   nothing to do with the securities laws be swept in?

15   MR. SCHNAPPER: The -- the statute forbids

16   retaliation for protected activity related either to the

17   securities law or to certain criminal fraud provisions.

18   And that's quite deliberate. The statute --

19   Sarbanes-Oxley is not limited to corporate misdeeds and

20   related things. Title VIII and Title IX also deal

21   specifically -- deal much more broadly with criminal

22   fraud.

23   Title IX increases the penalty for wire

24   fraud and mail fraud without regard to whether it has --

25   it was by a corporation or an individual.

1   JUSTICE SCALIA: But it is --

2   MR. SCHNAPPER: So this is also an antifraud

3   statute.

4   JUSTICE SCALIA: It is limited to those

5   subjects. And is -- is the personal employee of an

6   officer likely to be involved with any of those

7   subjects?

8   MR. SCHNAPPER: No, Your Honor. They're

9   unlikely to know of such things. But -- but the

10   Congress deliberately wrote the statute to deal with

11   ordinary wire and mail fraud, not just corporate public

12   company related fraud. The statute is broader in that

13   regard.

14   JUSTICE BREYER: So what's the limitation?

15   That is, if the argument against throwing the

16   contractors in the way you want, I think is, well, then

17   there is no limitation. So a company that let's say is

18   a publicly traded company, they have a building and they

19   hire a gardener.

20   And the gardener is a gardening company and

21   it has three employees and it works one day a week

22   cutting their lawn and it works four days a week cutting

23   somebody else's lawn. Is the mail fraud -- and then

24   they fire one of the three employees, or two.

25   And he gets annoyed and says it was because

1   of fraud. Now, the fraud has nothing to do with the

2   company that they're cutting the lawn for. It has to do

3   with some other customers. All right.

4   So what -- how -- I don't think the statute

5   intends to get that. Does it want to make every mom and

6   pop shop in the country, when they have one employee,

7   suddenly subject to the whistleblower protection for any

8   fraud, even those frauds that have nothing to do with

9   any publicly traded company? This is not really this

10   case.

11   MR. SCHNAPPER: Yes, I understand, I

12   understand.

13   JUSTICE BREYER: But I'm trying to foresee

14   is are you arguing for no limitation or --

15   MR. SCHNAPPER: I think there are two

16   relevant limitations here, one of them statutory and one

17   of them practical. The statutory one is that, although

18   it wouldn't deal with, I think, the situation you

19   hypothesized, that the counterparty, so to speak, of the

20   public company is described as a contractor. And we

21   think that is not anyone who has ever had a contract

22   with a public company.

23   "Contractor" in the ordinary parlance refers

24   to an ongoing relationship. The paradigm is someone

25   providing services on an ongoing basis, which of course

1   fits lawyers and accountants perfectly.

2   JUSTICE BREYER: Yes.

3   MR. SCHNAPPER: And so if someone from a

4   private firm goes down to Walmart, buys a box of rubber

5   bands, that in ordinary parlance wouldn't be referred to

6   as a contractor. So we think that as a practical matter

7   that rules out most mom and pop stores. They don't have

8   that kind of relationship.

9   JUSTICE SCALIA: Of course, it also rules

10   out the accounting firm that is only used once, right?

11   MR. SCHNAPPER: Well, it would have to be

12   very fast. I mean, I think an audit takes some time.

13   But if you have someone come in for --

14   JUSTICE SCALIA: Well, you just hire them

15   for this one audit; are they a contractor?

16   MR. SCHNAPPER: I think an audit takes long

17   enough that they would be. It's not like the moment

18   that it takes to buy something at the gift shop

19   downstairs. I think it typically takes weeks if not

20   months, and I think in ordinary parlance you would call

21   someone a contractor in those circumstances.

22   JUSTICE BREYER: Could you limit it as also

23   ruling out frauds by companies that are not publicly

24   traded themselves of course, but where the fraud has

25   nothing to do with the contract? That is, the whole

1   activity just has nothing to do with the contract. It's

2   just chance that they happen to have a contract.

3   MR. SCHNAPPER: That's the way the Congress

4   wrote the statute, and we think for two kinds of

5   reasons. First of all, that -- the statute is also

6   about, as you put it, garden variety fraud. It's

7   increased the penalty for wire fraud, for mail fraud.

8   For the first time there is a provision for attempts and

9   conspiracy. It is an antifraud statute in addition to

10   dealing with the Enron issues. So we think that's

11   deliberate.

12   Secondly, Your Honor, although --

13   JUSTICE SCALIA: I'm not sure. Does that

14   mean yes or no to his question?

15   MR. SCHNAPPER: I'd have to remember the

16   exact question.

17   JUSTICE BREYER: Can you rule out frauds

18   where the fraud at issue --

19   MR. SCHNAPPER: No.

20   JUSTICE BREYER: -- has absolutely nothing

21   to do with the contract?

22   MR. SCHNAPPER: The statute isn't written

23   that way.

24   JUSTICE BREYER: It isn't written that way.

25   JUSTICE KAGAN: Mr. Schnapper, that's the

1   position that the SEC took in its amicus brief to the

2   First Circuit. It said Section 806 applies where

3   employees of the contractor are reporting possible

4   violations of law by the public company for which the

5   contractor is performing work.

6   So it did put a limitation on the kinds that

7   Justice Breyer has suggested. In other words, yes,

8   employees of the contractor, but only when the employees

9   are engaged, you know, only when the violations of law

10   that the employee is reporting relates to the work that

11   the contractor is doing for the publicly held company.

12   Do you think that that's a possible reading of the

13   statute or not?

14   MR. SCHNAPPER: Well, it's certainly

15   possible. We think it's not the correct reading. And

16   there's a --

17   JUSTICE SOTOMAYOR: I didn't hear you.

18   MR. SCHNAPPER: It's a possible reading, but

19   we think it's not the correct reading.

20   JUSTICE SOTOMAYOR: So you are rejecting the

21   district court's limitation as well.

22   MR. SCHNAPPER: Yes. Yes, we are.

23   JUSTICE SCALIA: Why? Why is it a possible

24   reading? It makes a lot of sense, I agree with that.

25   MR. SCHNAPPER: I'm not sure I want to go

1   down the road. That's not -- that's not our view. I

2   don't want to pick a fight with the government.

3   JUSTICE SOTOMAYOR: Suppose that the -- I

4   suppose the --

5   CHIEF JUSTICE ROBERTS: Justice Breyer.

6   JUSTICE BREYER: The road is when you see a

7   statute that says "any policeman," they don't mean a

8   policeman on Mars, nor are they likely to mean a

9   policeman in Europe. The "any policeman" is likely,

10   although it says "any policeman," to mean a policeman in

11   the United States.

12   And similarly where they talk about this,

13   the contractors, they don't mean frauds related to --

14   you have to use some kind of scope for the word -- for

15   the kinds of frauds that are included in the statute,

16   and you have to read that into language that says

17   nothing about it.

18   And that's -- I don't say that that is

19   necessarily easy to do and that's why I started with my

20   first question.

21   MR. SCHNAPPER: As I said, we think

22   that's -- we think that's not the correct reading of the

23   statute, for a couple of reasons. Another one that we

24   think it unlikely, over and above the fact that Congress

25   was concerned with fraud generally, was that I think

1   Congress would have been reluctant to try to define what

2   was sufficiently related to the corporation.

3   JUSTICE ALITO: Well, to go back to

4   Justice Breyer's hypothetical which gets at this point

5   where you have the gardening -- the gardening company,

6   privately held, that's working for a public company, and

7   there's some kind of employee of the contractor is fired

8   and claims that the company is engaging in some kind of

9   fraud that has nothing to do with the public company.

10   So you have that situation.

11   Now you have the identical, another

12   privately held gardening company, exactly the same thing

13   is going on, except they don't have a contract with a

14   public company. Why would Congress have wanted to cover

15   the former and not the latter?

16   MR. SCHNAPPER: Justice Alito, I think

17   that's just the way they wrote the statute. They were

18   concerned with all fraud, but they didn't extend the

19   whistleblowers to all fraud.

20   JUSTICE ALITO: But why? If they are

21   concerned with all fraud, why not cover them both?

22   MR. SCHNAPPER: Well, this is sort of a

23   hybrid piece of legislation dealing with corporate

24   problems and fraud, and they kind of melded the two

25   here.

1   But I think there are -- it's also important

2   in this situation to bear in mind the following: I

3   think Congress would have -- was reluctant -- it didn't

4   itself draw a line because the experience of the Enron

5   scandal was that all sorts of terribly complicated

6   arrangements had been drawn up between Enron and these

7   hundreds of off-the-books entities, Jedi, Raptors, LJM,

8   and the like.

9   I think Congress correctly concluded that if

10   it tried to write out a description of what else it was

11   covering, someone would think of a way to get around it.

12   And I think it certainly wouldn't have contemplated that

13   Federal courts were to try to untangle these

14   relationships to the point where they could figure out

15   whether, for example, if Andrew Fastow was skimming off

16   money from Chewco, whether that would be sufficiently

17   related to Enron. It's just, it's enormously

18   complicated and I think Congress didn't mean to open the

19   door to that.

20   And that's brought home by the fact that the

21   statute is written more broadly than AIR-21. It's

22   essentially modeled on AIR-21, which is a statute

23   adopted a couple years earlier about whistleblowing in

24   the airline industry, particularly with regard to safety

25   work. In that statute, "contractor" is specifically

1   defined to mean an airline contractor dealing with

2   safety. They did not put that kind of limitation here,

3   and I think it, in part, because it simply would have

4   been very difficult to do. And I don't think they meant

5   to give the courts a commission to try to sort that sort

6   of thing out.

7   The core problem with the interpretation of

8   the court of appeals is that it really renders almost

9   meaningless the decision of Congress to prohibit

10   retaliation by contractors and subcontractors.

11   Contractors and subcontractors would rarely be in a

12   position to engage in retaliation, but particularly to

13   engage in the very specific kind of retaliation

14   specified in the statute, retaliation in the terms and

15   conditions of employment.

16   JUSTICE KENNEDY: Is one of the limitations

17   in the statute where it says, in sub (1), "to provide

18   information relating to fraud against shareholders"? Do

19   you think "shareholders" means just the shareholders of

20   the public company or does it mean shareholders of the

21   -- suppose you have an accountant which has shareholders

22   in it. And there is a fraud with the accounting firm

23   and it hurts the shareholders of the accounting firm,

24   but not the company that's registered. Does the --

25   MR. SCHNAPPER: It's a --

1   JUSTICE KENNEDY: The shareholders -- in

2   other words, does "shareholder" apply just to the

3   publicly registered company?

4   MR. SCHNAPPER: I would think so, Your

5   Honor, but that --

6   JUSTICE KENNEDY: You would think so.

7   MR. SCHNAPPER: I think so. But this clause

8   in the alternative, it -- it's -- a report would be

9   protected if it involves a violation of 1341 or 1334 and

10 8, which aren't limited to shareholders. The words --

11   JUSTICE KENNEDY: So "fraud against

12 shareholders" just modifies the last clause or any

13 provision of Federal law?

14   MR. SCHNAPPER: Yes, it modifies the last

15 clause, exactly.

16   With the Court's permission, I'd like to

17 reserve the balance of my time.

18   CHIEF JUSTICE ROBERTS: Thank you, counsel.

19   Ms. Saharsky.

20   ORAL ARGUMENT OF NICOLE A. SAHARSKY,

21   FOR UNITED STATES, AS AMICUS CURIAE,

22   SUPPORTING THE PETITIONERS

23   MS. SAHARSKY: Mr. Chief Justice, and may it

24 please the Court:

25   The statute protects an employee of a

1 contractor from retaliation. That's what the text says.

2 That's what Congress intended to cover, these

3 accountants, lawyers, and outside auditors who were so

4 central to the fall of Enron. I'd like to go right to

5 some of the questions that the Court had about the

6 limits of the statute and how it would be applied.

7 Now, of course, what we're talking about

8 here is really the core of the statute, a contractor

9 retaliating against its own employees. And we think

10 that when the First Circuit said that that is

11 unambiguously not covered by the statute, that it's

12 wrong. But moving beyond that, assuming that that is

13 covered and asking some of these -- or answering some of

14 these questions about the limit.

15 First of all, as Justice Scalia suggested,

16 the statute applies to individuals who are in a position

17 who have information about fraud or securities law

18 violations are in a position to report it. So it is

19 very unlikely that that would be the gardener. It's

20 incredibly likely that it would be an accountant or

21 auditor, like a person who worked for Arthur Andersen.

22 Another --

23 JUSTICE ALITO: It's not -- it's not

24 unlikely that an employee of a subcontractor will have

25 information about something that can be -- that can be

1   alleged to be mail fraud by that -- by the contractor,

2   that's not at all unlikely. If you see -- you know, if

3   you see some civil RICO complaints, you see the kind of

4   things that are alleged as mail fraud.

5   MS. SAHARSKY: Right.

6   JUSTICE ALITO: Do you disagree with that?

7   MS. SAHARSKY: No. But I think it raises --

8   your question raises a -- another limitation on the

9   statute, which is when the statute talks about

10   contractors and subcontractors, it's contractor of a

11   public company. So that it's talking about the

12   contractor working in its capacity for the public

13   company, not the contractor doing some other type of

14   work.

15   So if the contractor's work is for the

16   public company and there is fraud being committed by the

17   contractor, yes, that is something that Congress was

18   concerned about. It was concerned about the fact that

19   Arthur Andersen was committing fraud, not against Enron.

20   JUSTICE ALITO: Yes. But you think this is

21   limited to -- to fraud by the contractor relating to the

22   public company, not -- not fraud that has nothing to do

23   with the public company.

24   MS. SAHARSKY: I think that it can be fraud

25   by the contractor while the contractor is fulfilling its

1 role as a contractor for the public company, not the

2 contractor in some other capacity.

3   JUSTICE ALITO: What do you mean while?

4 Temporal -- during the same period of time or in

5 relation to?

6   MS. SAHARSKY: In that capacity. In that

7 capacity.

8   JUSTICE ALITO: And where do you see that in

9 the statute?

10   MS. SAHARSKY: "Of such company." The words

11 "contractor and subcontractor of such company."

12   Now, it says --

13   JUSTICE ALITO: It says, "The contractor of

14 such company," not "the fraud of such company."

15   MS. SAHARSKY: Right. But we think that

16 when you're reading the statute holistically, that

17 that's the most natural reading.

18   Now, I point out here that these are not

19 questions that the courts of appeals or the Board, which

20 is entitled --

21   JUSTICE BREYER: The argument about this,

22 the reason that we're -- that I've brought this up is --

23 is because I think that the strongest argument in those

24 courts of appeals that kind of held against you is that

25 they fear that otherwise this statute would create any

1   fraud by any gardener, any cook, anybody that had one

2   employee in the entire United States and engaged in any

3   alleged fraud would be covered. But it seems to me

4   there are many ways to skin that cat.

5   And -- and one way that I suggested and now

6   Mr. Schnapper said, no, that's -- that kind of thing

7   related to the contract isn't going to work very well

8   because it's too complicated to try to figure out. So

9   maybe we don't have to figure it out in this case. I

10   mean that's possible. I -- I just wanted a universe of

11   possibilities.

12   MS. SAHARSKY: Yes. I think this is a

13   completely understandable concern that was raised by the

14   First Circuit. I have several responses to it. First

15   of all, I don't think you don't need to decide it in

16   this case. It's -- this is a fairly mainstream

17   application.

18   Second of all, this is the kind of thing

19   that the expert agency should consider in the first

20   instance. There have not been cases, except for the

21   Spinner case, that really has -- that really have

22   considered these questions about contractors and

23   subcontractors. In the history of this statute, there

24   are only about 20 published cases that have ever reached

25   the courts of appeals.

1   JUSTICE KENNEDY: Well, you say -- you say

2   this is -- this is a mainstream application. We still

3   have to give a rule. Do we write in the opinion, this

4   is a mainstream application case and therefore it is so

5   confined? That -- that doesn't make any sense.

6   MS. SAHARSKY: No, Justice Kennedy. My

7   suggestion was, because the Court doesn't have to decide

8   some of these more far-fetched applications of the

9   statute in this case, that it should leave it to the

10   expert agency in the first instance. The rule that we

11   would --

12   JUSTICE KENNEDY: Well, that -- that was

13   your second point. Your first point was just talk about

14   the mainstream in this case and leave other cases. But

15   I don't see how you can do that and interpret the

16   statute. That's what I'm asking. Your statutory

17   interpretation rule to keep this the mainstream is what?

18   MS. SAHARSKY: I'm sorry. I should be more

19   clear. What we think that this Court should say is that

20   the natural reading of this provision covers, protects

21   employees of contractors. The First Circuit said that

22   employees of contractors are not protected at all from

23   retaliation. And we think that that is wrong. So that

24   would be step one.

25   JUSTICE KENNEDY: I understand that and I --

1   I think that's a plausible reading. I don't see how

2   it's confined to so-called mainstream, which is what we

3   were talking about.

4   MS. SAHARSKY: What I was trying to suggest,

5   Justice Kennedy, is that this is a contractor

6   retaliating against its own employees and it's within

7   the work that the contractor is doing for the mutual

8   fund. This is investment advising. This is the heart

9   of what contractors of mutual funds do for mutual funds.

10   JUSTICE SCALIA: I understand that, but --

11   but I think you're -- I don't agree with you that --

12   that we don't have to get into these -- these other

13   situations, because to my mind, the principal argument

14   made by the Respondent is if you read the statute

15   literally the way you like, it covers a wide range of

16   things that -- that one would have no reason to believe

17   Congress wanted to cover. And unless you come up with

18   some -- with some limiting principle that -- that

19   eliminates that argument, I'm not inclined to go along

20   with your -- your broad interpretation of the statute.

21   So, I at least do have to grapple with --

22   with whether there are limitations, with -- with what is

23   -- what is the central mainstream of the statute and --

24   and what is outside the statute.

25   MS. SAHARSKY: Right. And what we're saying

1   is that there are -- there are several limitations. The

2   first is that it has to be a person who is in a position

3   to detect and report the types of fraud and securities

4   violations that are included in the statute.

5   Second, we think that "the contractor of

6   such company" refers to the contractor in that role,

7   working for the public company.

8   Third, the expert agency that has considered

9   this question has looked at whether there would be a

10   floodgates open and has concluded -- and this is on page

11   166 of the petition appendix -- that there are built-in

12   limits so that there would not be those floodgates.

13   And fourth, I can tell you as an empirical

14   matter, that no floodgates have been opened. The

15   Department of Labor has consistently interpreted the

16   statute this way since the beginning of SOX and you'll

17   find on OSHA's website that it's only 150 or maybe 200

18   complaints per year that are filed with the agency.

19   JUSTICE KAGAN: Ms. Saharsky, if I could

20   take you back to second. "Contractor of such company,"

21   you're saying we can read that to impose a limitation,

22   that it's -- it's not anything that the contractor does

23   in any capacity for anybody, whether relating to the

24   contract or not. We could instead read it as, you know,

25   "the contractor" means the -- the entity doing a

1   particular contract for a particular public company; is

2   that correct? Do I get that?

3   MS. SAHARSKY: Yes.

4   JUSTICE KAGAN: In other words, inherent in

5   the -- in the word "contractor" or in the phrase

6   "contractor of such company" is a sort of status of a

7   company, and that one should not read this statute as

8   applying outside that particular status.

9   MS. SAHARSKY: I think that that's right.

10   And the only thing that I would add to that is that it

11   could be fraud that's being reported that the contractor

12   is engaging in fraud in that contract or that the public

13   company is engaging in fraud. But Congress would have

14   wanted both those covered. It was Arthur Andersen and

15   Enron that were involved in the fraud that led --

16   JUSTICE SCALIA: This is not the

17   Petitioner's position, however. The Petitioner takes a

18   broader -- a broader interpretation as I understood him.

19   MS. SAHARSKY: That -- that is my

20   understanding as well. But I think on the main question

21   that's raised by this case, which is whether contractors

22   can ever be covered, and the First Circuit said that

23   they can't, we're in complete agreement.

24   I also want to point this Court to the

25   Board's opinion in this case, which we think is entitled

1   to Chevron deference. It's an exceptionally thorough

2   opinion when the Board went --

3   JUSTICE GINSBURG: But it came up. I mean,

4   we are reviewing a decision of the Court of Appeals for

5   the Fourth Circuit. And this Spinner case from the ARB

6   postdates. We have a district court, a court of

7   appeals. Chevron didn't raise its head until after the

8   First Circuit was through with the case. So how does

9   Chevron come into this particular case?

10   MS. SAHARSKY: It's because the agency has

11   been given this authority. And the Court has faced

12   cases before where it has afforded Chevron deference

13   even though that was not an issue considered by the

14   court of appeals. I point the Court to INS v. Agere.

15   It's the -- Congress has entrusted this expert agency

16   with making decisions through formal adjudication.

17   CHIEF JUSTICE ROBERTS: Well, even though it

18   delegated rulemaking authority to a different agency,

19   right?

20   MS. SAHARSKY: No. There is no rulemaking

21   authority for this provision under 1514A delegated to a

22   different --

23   JUSTICE BREYER: Then why isn't the SEC --

24   sorry.

25   CHIEF JUSTICE ROBERTS: And the SEC has no

1   rulemaking authority that would cover this provision?

2   MS. SAHARSKY: Not for this provision. For

3   other parts of SOX, yes. But the anti-retaliation

4   provision in SOX, like about 20 other anti-retaliation

5   provisions, is entirely handled by the Department of

6   Labor and it's entirely handled through formal

7   adjudication.

8   CHIEF JUSTICE ROBERTS: As I understand the

9   ARB's decisions, they said that they were bound by

10   OSHA's interpretation, right?

11   MS. SAHARSKY: They said that, but then they

12   also cited several of their --

13   CHIEF JUSTICE ROBERTS: And OSHA made it

14   quite clear in its interpretation that it -- and its

15   rule that it had no authority to issue statutory

16   interpretations.

17   MS. SAHARSKY: It said that it was not

18   providing an interpretation, but I want to make sure the

19   Court realizes that there are many other things that the

20   Spinner decision relied on. I point the Court to

21   footnote 8 at page 143 of the board's decision where it

22   says: "In addition to this regulation, we're relying on

23   several of our prior decisions" -- many of which do not

24   even cite the regulation -- "and our decades of

25   experience in looking at similar statutes like AIR-21."

1   So to think that --

2   CHIEF JUSTICE ROBERTS: So we should ignore

3   the part where it said it's bound by OSHA's

4   interpretation?

5   MS. SAHARSKY: I don't think that the

6   agency -- may I finish?

7   CHIEF JUSTICE ROBERTS: Go ahead.

8   MS. SAHARSKY: -- should be worse off

9   because everyone who has considered this question within

10   the agency has come to the same conclusion over a period

11   of a decade.

12   CHIEF JUSTICE ROBERTS: Thank you, counsel.

13   Mr. Perry.

14   ORAL ARGUMENT OF MARK A. PERRY

15   ON BEHALF OF THE RESPONDENTS

16   MR. PERRY: Mr. Chief Justice, and may it

17   please the Court:

18   Justice Alito asked why didn't Congress say

19   all employers or no employers? There are approximate 40

20   whistleblower statutes on the books as of today, Your

21   Honors. And more than 30 of them, in fact, 36 of them,

22   are phrased exactly that way. They say "No employer may

23   retaliate" or "Any employer is prohibited from

24   retaliating."

25   This statute is not phrased that way. This

1   statute, which Congress could have written that way, and

2   Dodd-Frank 922 is written that way, this statute is

3   written quite differently. This statute says, "No

4   public company may retaliate," and then it has a

5   subordinate clause and the subordinate clause is what's

6   at issue here, that references officers, employees,

7   contractors, subcontractors and agents.

8   Justice Alito also asked my friend,

9   Mr. Schnapper, do you contend that the same construction

10   should be given to officers and to contractors, and he

11   acknowledged they have to say no, because the ARB has

12   also said no. In other words, an employee, the phrase

13   that we are construing at the bottom of all of this,

14   these turtles, is different they say for officers and

15   employees and agents, presumably, than for contractors

16   and subcontractors.

17   But that doesn't fit with the statute. It

18   doesn't fit with the tools of statutory construction,

19   and it doesn't fit with what Congress was trying to do

20   here.

21   This was the -- the failure of Enron. This

22   was a bankruptcy situation. Congress was acutely aware

23   that corporate bankruptcies, failures, left victims high

24   and dry. One of the other provisions in this title,

25   Section 803, specifically deals with the

1   dischargeability of shareholder fraud debts in

2   bankruptcy.

3   And what these sub -- the subordinate clause

4   that added these corporate representatives does is make

5   sure that if the employer, the public company, goes out

6   of business, the way Enron had just done, somebody is on

7   the hook for the money damages that Congress authorized

8   for these employees like Sharon Watkins. It's a very

9   simple regime to make sure that the victim, the

10   whistleblower, is not left high and dry if the company

11   that is, by hypothesis, riddled with fraud goes out of

12   business.

13   JUSTICE ALITO: What happens if another

14   Enron situation comes along and the corporation's

15   accounting firm retaliates against an employee of the

16   accounting firm because that employee wants to report

17   illegal activity by the corporation?

18   MR. PERRY: Justice Alito, the accounting

19   firms are not covered by 806, and let me explain that.

20   Accountants, accounting firms, and auditors are

21   referenced by name 153 times in the Sarbanes-Oxley Act,

22   including in Section 802 in this title. It says, "No

23   accountant shall shred documents." 806 doesn't refer to

24   accountants anywhere. It refers to contractors. And

25   nowhere --

1   JUSTICE GINSBURG: Can an accountant be a

2   contractor?

3   MR. PERRY: No, Your Honor, because the --

4   the contractor that's being referred to here -- there's

5   nothing in the statute, nothing in the legislative

6   history, that suggests that an accountant is a

7   contractor. And more importantly, the reason for

8   this is --

9   JUSTICE GINSBURG: But then -- but the

10 bottom line of your argument Mr. Perry, is that the

11 whistleblower who is working for the accountant -- you

12 say there are separate provisions that deal with the

13 accounting firm and the law firm. But the whistleblower

14 who wants to disclose what nefarious thing is going on

15 would have no protection against retaliation by the

16 accounting firm or, if it's a law firm, the law firm?

17   MR. PERRY: Justice Ginsburg, that is the

18 matter that the Congress left to the expert agencies.

19 The accounting firms are regulation by Section 105 and

20 the PCAOB.

21   JUSTICE GINSBURG: But the answer to my

22 question is right, they wouldn't have --

23   MR. PERRY: Your Honor, if the --

24   JUSTICE GINSBURG: -- a whistleblower claim

25 against the accounting firm or the law firm?

1   MR. PERRY: To this day, the agencies have

2   not written rules requiring that. They could. And --

3   and I would refer the Court respectfully to Section 501

4   dealing with securities analysts, where Congress

5   required the SEC to write a rule protecting

6   whistleblowers at the investment banks that are

7   securities analysts. So when Congress wanted to protect

8   those people --

9   What Congress did for the accountants and

10 lawyers was not to protect whistleblowers. It imposed a

11 mandate. Section 10(a) --

12   JUSTICE GINSBURG: I'm sorry. You told me

13 that Congress didn't provide for the whistleblower, but

14 it allowed the agency to do so.

15   MR. PERRY: Correct, Your Honor.

16   JUSTICE GINSBURG: Which agency?

17   MR. PERRY: The SEC for the lawyers. That's

18 Section 307. And the PCAOB for the accountants. That's

19 Section 105. And Section 10(a) of the Exchange Act,

20 which is incorporated by reference, Your Honor.

21   CHIEF JUSTICE ROBERTS: What about the ARB?

22   MR. PERRY: The ARB is nowhere involved with

23 lawyers or accountants, as this Court made clear in

24 the -- in the PCAOB case. The Congress decided to put

25 the entire accounting profession under the thumb of that

1   new board. That is a -- a purpose-built regulatory

2   agency that regulates birth to death of the accounting

3   industry. And if they want to protect whistleblowers or

4   not protect whistleblowers, that is the board's

5   business.

6   Congress didn't do anything there. What

7   Congress did in 806 was regulate the public companies

8   and their employees. But we can see this. This -- this

9   tracks very clearly through the legislative history.

10   JUSTICE BREYER: When you're ready to go

11   through this, I'd appreciate your telling in your

12   opinion -- what the statute says, taking the extraneous

13   words out, is that no contractor of a publicly-traded

14   company may discharge, demote, et cetera, any employee

15   because of his lawful act in reporting a fraud. That's

16   what it says.

17   So, what did they have in mind if they

18   didn't have in mind forbidding any contractor of a

19   publicly-traded company from a contractor -- and, you

20   know, maybe there are limitations there -- but a

21   contractor from demoting an employee because of his

22   lawful act reporting a fraud?

23   MR. PERRY: Let me answer that in two steps,

24   Justice Breyer. First, with due respect, the Court

25   inverted the statute. It actually says, "No public

1   company," comma, "or" --

2   JUSTICE BREYER: Or any -- I just eliminated

3   the extraneous words and instead of the not the word

4   "such," I put in what "such" refers.

5   MR. PERRY: It's not extraneous here because

6   it is -- it is subordinating the contractors to the

7   public employees. And what -- more importantly, second,

8   what Congress is doing -- and this is in response to my

9   friend's question was this a meaningless act? If I

10   could point the Court to the Kalkunte case. The

11   Kalkunte case is an ARB decision from 2009. It's cited

12   at page 16 of the government's brief.

13   Here is a bankrupt company and the estate

14   brings in a workout firm, a privately-held contractor to

15   wind down the affairs of the company. And this private

16   contractor decides that there's a squeaky wheel employee

17   within the legal department and fires her. And she sues

18   under Section 806 both the estate of the bankrupt

19   company, that is the public company employer in the

20   first primary clause of this statute, and the workout

21   firm, the contractor.

22   JUSTICE BREYER: All right. So all they're

23   interested in here, you say, is this workout contractor,

24   but not for example where you have a fund which has

25   virtually no employees and does all its work really

1　through investment advisors such as here, and you think

2　Congress didn't want to include the investment advisor

3　firing its whistleblower even if it's directly related

4　to the fraud, hot fund and everything else, but it did

5　just want to include the people who -- who are there

6　because the contractor is a workout firm, and -- and not

7　the investment advisor.

8　　　　　　　MR. PERRY: Your Honor --

9　　　　　　　JUSTICE BREYER: Now, all that's a

10　conceivable reading, I agree.

11　　　　　　　MR. PERRY: We --

12　　　　　　　JUSTICE BREYER: But what is it that leads

13　you to that conclusion other than --

14　　　　　　　MR. PERRY: Three points here, Your Honor.

15　First, when Congress wishes to reach investment

16　advisors, in SOX and elsewhere it amends the Investment

17　Company Act of 1940 and the Investment Advisors Act of

18　1940. And for this I can point you to Dodd-Frank 922,

19　the parallel whistleblower's provision that my friends

20　haven't talked about, but is very important here because

21　it does cover all employers.

22　　　　　　　And when Congress covered all employers in

23　Dodd-Frank, it amended the 1940 Acts to make clear that

24　investment advisors were included. And the SEC has

25　issued its Form TCR that applies to investment advisors.

1   Congress didn't do any of that in Sarbanes-Oxley.

2   Second, we know the very next Congress after

3   Sarbanes-Oxley, took up the Mutual Reform -- Mutual Fund

4   Reform Act, which would have amended Section 806 to

5   include investment advisors, to do exactly what the

6   Petitioners in this case say the statute did. Why would

7   Congress have taken up, the very next Congress -- all

8   the same members are still there; Senator Sarbanes was

9   still there -- taken up a bill to do that?

10   JUSTICE SCALIA: It's sort of

11 post-legislative history, which we usually don't pay

12 attention to. The -- the problem that I have is if --

13 if the statute does not cover contractors',

14 subcontractors', firing of their own people, what --

15 what coverage does it have? A subcontractor usually

16 cannot fire somebody from the principal company that's

17 traded on the exchange.

18   MR. PERRY: Justice Scalia, it's not just

19 firing. It's also harassing. It's also threatening.

20 These are contractors who may be working --

21   JUSTICE SCALIA: I don't -- I don't see how

22 it can harass or threaten either if it's -- if it's an

23 employee of another company --

24   MR. PERRY: Sure, Your Honor.

25   JUSTICE SCALIA: -- that it has no power to

1   fire.

2   MR. PERRY: Your Honor, it can -- there have

3   contractors that are in the operation, management

4   consultants and others that are working side by side

5   with public company employees who can make their lives

6   difficult, who can make their lives intolerable, who can

7   lead to a constructive discharge if it's bad enough.

8   And this Court has said in the Title VII

9   context, that that kind of discrimination does not

10 require a supervisory relationship, and these

11 contractors, just like agents and officers, employees,

12 may have that ability to affect the terms and conditions

13 of the public company's employees.

14   JUSTICE SCALIA: But you -- you're -- you're

15 eliminating the -- the principal contractors who might

16 have that kind of power. You say they're not covered.

17   MR. PERRY: The accountants and lawyers.

18   JUSTICE SCALIA: Yes, yes, yes.

19   MR. PERRY: Absolutely. But, you know, if

20 there are -- I mean, they are not covered by -- for

21 their own employees. If they were to discriminate

22 against a public company employee -- the public

23 company's employees are always protected. That is the

24 subject of this statute, the employees of the public

25 company.

1   Let's look at the title. We know Congress

2   didn't leave a big mystery about who they were

3   protecting here: Whistleblower protection for employees

4   of publicly-traded companies. That's what the Congress

5   told us --

6   JUSTICE SCALIA: Including by accountants

7   and lawyers.

8   MR. PERRY: Against the public company's

9   employees, I -- I absolutely agree.

10   JUSTICE SCALIA: How so if -- if accountants

11   and lawyers are not -- are not contractors?

12   MR. PERRY: If I said that, I -- I misspoke,

13   Your Honor. I didn't say they weren't contractors. I

14   said they weren't regulated as contractors here because

15   they were specifically regulated as accountants

16   elsewhere. If they fit within the statute --

17   JUSTICE SCALIA: What does it mean that

18   they're not regulated as contractors here? Unless it

19   means that contractor here does not include them.

20   MR. PERRY: Let me -- let me try to be much

21   clearer. The government makes the point that this

22   statute is written to cover Arthur Andersen. I can't

23   agree with that. Arthur Andersen appears all over this

24   statute, and there's two titles of this statute that

25   deal with accountants.

1   Arthur Andersen might be included here if

2   it -- if it discriminates against a client, an audit

3   client's employee. That -- that's just a normal

4   contracting or agency relationship. That's what

5   Congress was dealing with. What's not covered is Arthur

6   Andersen retaliating against its own employees. That is

7   what Congress gave to the Board to decide or for the

8   lawyers to the SEC to decide.

9   And, again, I would have to point the Court

10   to Section 501, which ordered the SEC to make a rule

11   protecting securities analysts.

12   JUSTICE GINSBURG: Apparently, that's not

13   the view of the SEC because I think they are -- they are

14   represented by the government. And the SEC apparently

15   takes the view that this provision does cover

16   contractors. It covers lawyers who couldn't be

17   contractors and accountants.

18   MR. PERRY: Your Honor, they -- they are

19   defending the ARB's decision. I agree with that. The

20   ARB's decision, however, is -- all comes back to this

21   procedural regulation that OSHA promulgated that they

22   agree is not entitled to deference. So it's not a

23   reasoned articulation of the government's position. It

24   is, rather, a post hoc rationalization of what the OSHA

25   said a long time ago.

1   JUSTICE GINSBURG: It's a lot like the

2   dissent in the First Circuit.

3   MR. PERRY: Your Honor, the dissent in the

4   First Circuit, like the ARB, I agree, disassociates the

5   statute, the language "an employee" from its context,

6   from its grammar, from its syntax, from the title of the

7   statute, from the legislative history. I mean, the

8   Senate report, Your Honor, goes through six times to

9   explain what is the problem being addressed. And

10 Congress says, "There is no current protection for

11 employees of publicly-traded companies." That's at page

12 18.

13   So what does this legislation do, Section

14 806? It provides protection for employees of

15 publicly-traded companies. That's at page 19.

16   JUSTICE BREYER: You're right on that. I

17 mean, it is correct that that's what they talk about.

18 And so that sends us on a search for limitation. You

19 have one limitation. Your limitation says the person

20 who is dismissed has to be an employee of the

21 publicly-traded company.

22   Now, the government, and -- and even your --

23 Mr. Schnapper has come up with accepting some

24 limitations. There are possibly others. One would be

25 on the nature of the contractor, which you want to do,

 1   but it would be somewhat broader than yours. Another,

 2   possibly, is on the nature of the fraud. Is it related

 3   to the contract? Another might be the one the district

 4   court proposed, and there could be others.

 5   So I think if you want to say anything about

 6   this, it seems to me that taking as given -- I will for

 7   argument's sake anyway -- say all the legislative

 8   history is about publicly-traded companies. And I do

 9   look at it. But nonetheless, they did use this language

10   in their other possible limitations that would serve the

11   same purpose.

12   Then you say to that, saying yours is the

13   best, what?

14   MR. PERRY: Your Honor, first, the very need

15   for this discussion about limitations, which is found

16   nowhere in the statute and nowhere in the legislative

17   history, is eliminated if the Court were to construe the

18   statute as Chief Judge Lynch and the majority did below

19   for --

20   JUSTICE BREYER: Oh, that itself is a big

21   limitation. Huge.

22   MR. PERRY: That's exactly right. Well,

23   it's the limitation that Congress put in the statute,

24   Your Honor. If we go beyond that, it seems to me

25   universally accepted by my friends on this side that

1   some limitation is needed. It can't be every company

2   with a contract to the public company, except that is

3   what the ARB said a contractor is. Okay? And it can't

4   be every kind of misconduct, except that's what the ARB

5   has said this statute covers.

6   And I point to the Lockheed case, which has

7   nothing to do with fraud against shareholders. This is

8   a run-of-the-mill adulterous affair by a -- by a

9   gossip -- by an office gossip and a supervisor that the

10   person brings a lawsuit under Section 806 saying that is

11   fraud because she submitted her expense accounts. So

12   what we have is --

13   JUSTICE KENNEDY: That was fraud under 1343?

14   MR. PERRY: As wire fraud, Your Honor,

15   correct.

16   JUSTICE KENNEDY: Well, was that what the

17   fraud was in this --

18   MR. PERRY: In the Lockheed case, correct.

19   So, Justice Breyer, your gardener, your

20   three-person gardener, there's a couple of problems with

21   it. First, if the same gardening company works for Ken

22   Lay and for Enron -- this goes back to Justice Alito's

23   question -- my friend's argument is they're covered when

24   they work for Enron but not covered when they work for

25   Ken Lay. That's a bizarre reading of the statute.

1   Okay?

2   Second, they're covered under the -- all of

3   the so-called limitations they've been offered if the

4   junior gardener thinks -- hears gossip that the senior

5   gardener is having an affair and submitting false

6   expense reports regarding the hotel receipts -- that's

7   the facts of the Lockheed case -- and reports that to

8   the middle gardener, and nothing happens, and then the

9   junior gardener gets fired because the economy downturns

10   or something.

11   CHIEF JUSTICE ROBERTS: Well, those --

12   that's an easy hypothetical. What about the butler who

13   does, in fact, hear all this information about a

14   conspiracy and wire fraud?

15   MR. PERRY: Your Honor, there are still the

16   state law protections, of course, for public policy and

17   other protections. There is the Dodd-Frank Act. We

18   haven't talked about it enough. Dodd-Frank 922 came in

19   eight years later and said -- Congress said we think we

20   need to do more. We think we need to cover all

21   employers, but we're going to provide more limitations.

22   We're going to require a written submission to the SEC

23   under penalty of perjury, and we're going to limit it to

24   securities fraud.

25   So if the butler learns that the boss is

1   doing something untoward, the butler then can go to the

2   SEC and make a complaint. If it pans out, he can even

3   get a bounty under that program. And if he gets fired,

4   he's completely protected and has reinstatement and back

5   pay.

6   Congress dealt with that. There -- there is

7   a gap of eight years. We definitely acknowledge that.

8   But Congress moves incrementally in this area. The --

9   the Sarbanes-Oxley Act was the first major widespread

10   corporate governance reform at the Federal level, and

11   Congress didn't purport to do everything at once. It

12   went a long way. It subjected every public company to

13   these new things.

14   But for my friends to suggest that they

15   covered not just the 5,000 public companies, but all 6

16   million private companies without ever mentioning the

17   fact, without ever discussing it, without debating it,

18   without acknowledging that that would be the consequence

19   is a dramatic -- a dramatic expansion of this statute

20   that was already pretty dramatic to begin with, that

21   barely passed, as the Court may remember.

22   JUSTICE SOTOMAYOR: So doesn't that drama

23   reduce itself if we accept the government's limitation

24   that it has to do only with the fraud related to the

25   public company?

1   MR. PERRY: Your Honor --

2   JUSTICE SOTOMAYOR: Because that was the

3   center of this bill -- what motivated this bill.

4   MR. PERRY: Your Honor, I agree that would

5   be a -- a limitation. I don't agree that it's found in

6   the language of the statute. I mean, as a -- as a

7   defense lawyer, I would like that down the road. But --

8   and the ARB in the Lockheed case didn't seem to suggest

9   that there is any such limitation. The ARB simply said

10   fraud. And Mr. Schnapper, Petitioners here certainly

11   took that position today. So it's every fraud of any

12   sort by any company that has a contract --

13   JUSTICE SOTOMAYOR: But we're not being

14   asked to give deference to the Petitioner. We're being

15   asked to give deference to the government.

16   MR. PERRY: That's why I pointed to the

17   ARB's decision in Lockheed, Your Honor. And the

18   language there is exceedingly sweeping. It rejected all

19   limitations that were offered in that case. The

20   government's so-called limitation is no limitation at

21   all. It is simply anything that is fraudulent is

22   covered according --

23   JUSTICE BREYER: They didn't say that today.

24   And -- and if, in fact, the fraud is related to the

25   contract or by certain kinds of contractors who do

1   investment work, who do all kinds of important work for

2   the company, why shouldn't it be covered? I mean, and

3   the language, of course, does say what I read, as you

4   agreed. It says a contractor.

5   MR. PERRY: Justice -- Justice Breyer, if I

6   could return to the point of this discussion of

7   limitations, which is fascinating, but we are having it

8   for the first time in the Supreme Court of the United

9   States. Congress never had this discussion. Congress

10   never discussed limitations because Congress never

11   contemplated covering private companies.

12   JUSTICE ALITO: What the statute says is

13   "any conduct," "any conduct which the employee

14   reasonably believes constitutes a violation of Section

15   1341, '43, '44, or '48." Do you see in there any

16   limitation that says that the conduct has to be

17   fraudulent conduct relating to the activities of a

18   publicly held company.

19   MR. PERRY: It is not in the terms of the

20   statute, Your Honor, and, as I just said, that was the

21   holding of the Lockheed case in ARB.

22   JUSTICE SCALIA: It's a very sensible

23   limitation. Unfortunately, it's not there.

24   MR. PERRY: Your Honor, that's the danger of

25   moving beyond the text of the statute. They won't

1 admit, my friends won't admit, that every contractor and

2 every fraud is covered. But that is the import of their

3 argument. We submit that that's not right, or at least

4 that that decision, if it is right, should be made by

5 the Congress or by an agency with rulemaking authority

6 on the public record to take public responsibility for

7 it. No --

8   JUSTICE BREYER: So it may be that you have

9 a good point, that it's the SEC we should defer to and

10 not the Labor Department. But then, as was pointed out,

11 fine, then you're going to have that rulemaking and

12 given their position here, it looks as if they will hold

13 something you don't like. But -- so what are we

14 supposed to do about that, in your opinion?

15   MR. PERRY: Your Honor, they have not had

16 that rulemaking since this statute was enacted in 2002,

17 and we don't know whether they will have that

18 rulemaking. The Court's opportunity and I would submit

19 obligation, respectfully, is to read the statute as it

20 was passed by Congress.

21   JUSTICE SCALIA: I assume you would say that

22 that rulemaking would be ultra vires, if it took the

23 position that the government's taking here, right?

24   MR. PERRY: Your Honor, Ms. Saharsky said

25 that the SEC has no power to make rules under Section

1   806. I -- I am not going to quarrel with her on that.

2   JUSTICE SCALIA: But even if they did and

3   they came out with a rule that reads just the way the

4   government presented it today, you would say that that

5   is an unreasonable reading of the statute, wouldn't you?

6   MR. PERRY: We would, but we would also have

7   a rulemaking record and a cost-benefit analysis of the

8   impact on private companies and the impact on employment

9   and all of the things that agencies have to take into

10   account when they make these determinations, none of

11   which exists on this record. We simply have the ARB

12   deciding 5,000, 6 million, good enough, let's move

13   forward. And that is not, we submit, what Congress

14   intended here.

15   Congress did not intend for the ARB to be

16   able to make that decision. Both of my friends here

17   agree that our reading, the First Circuit's reading, is

18   a plausible construction of the statute. There is no

19   argument that it is unambiguous on their side. Okay?

20   So their argument must be that Congress intended not to

21   be able to answer this question, not to know whether

22   it's 5,000 public companies or 6 million private

23   companies, and so they punted that to an unelected board

24   of lawyers within the Labor Department. That is not

25   plausible.

1   JUSTICE BREYER: Why is it -- we may have to

2   get to this. I thought Section 3(a) of

3   Sarbanes-Oxley -- that's what we found here. Quote,

4   "The Securities and Exchange Commission shall promulgate

5   such rules and regulations as may be necessary and

6   appropriate in the public interest or for the protection

7   of investors and in furtherance of this Act."

8   So why doesn't that delegate right to the

9   SEC the power to interpret the general provisions of the

10   Section 802?

11   MR. PERRY: To be quite blunt,

12   Justice Breyer, before the government's concession

13   20 minutes ago, I would have thought the same thing.

14   JUSTICE BREYER: Well, so I mean, I don't

15   know that we should interpret that provision since no

16   one has briefed, given -- on that basis.

17   MR. PERRY: We can certainly say this,

18   though. What we know is the SEC has not exercised its

19   power under 3(a) or under 307 or under 501, also dealing

20   with contractors of sorts, to provide for whistleblower

21   protections. If it chooses to do so in the future, then

22   we would have a different lawsuit.

23   What we have now, however, is the unadorned

24   statute passed by Congress, which deals with public

25   companies. We have the First Circuit in an exhaustive

1   opinion construing it, again using all the ordinary

2   tools of statutory construction, which this Court has

3   directed the lower courts to do, to determine plausibly,

4   as everyone agrees, plausibly that it only covers public

5   companies.

6   We have a reading, then, that gives meaning

7   to every single meaning to every single word in the

8   statute, that is comprehensible, that fits the purpose

9   of the statute. Remember the overall purpose of the

10   statute is disclosure by public companies. It is not

11   protection of investors, as some at times have said. It

12   is disclosures by public companies.

13   Private companies make no disclosures. They

14   are not governed by the securities laws. So excluding

15   private company employees makes perfect sense in that

16   respect. Mutual funds, Mr. Schnapper at page 13 of his

17   reply brief says: Well, the advisors make all the

18   disclosures for the mutual funds. We had that argument,

19   Your Honor, two years ago. Justice Thomas wrote the

20   opinion for the Court in the Janus case, which rejected

21   that very argument and said the mutual fund and the

22   advisor are separate companies; the mutual fund makes

23   the disclosures. Congress has set up the mutual fund

24   industry that way.

25   The ICI's brief in this case explains very

1 cogently, I believe, all of the separate protections,

2 including the independent board of directors and the

3 chief compliance officer mandated by the SEC's '40 Act

4 recommendations, that protect the investors in mutual

5 funds.

6   So we have a coherent, on the First Circuit

7 side, a coherent reading of the statute that my friends

8 admit is plausible, that gives meaning to every word in

9 the statute, that fits exactly the title that Congress

10 used. And the title is legislative language passed by

11 Congress signed by the President. It fits every word of

12 the legislative history. It makes perfect sense and it

13 doesn't have any untoward results. We submit that --

14   JUSTICE ALITO: It gives the reference to

15 the subcontractors or to contractors and the

16 subcontractors such a narrow meaning. And except for

17 this concept of the axe-wielding specialist, those

18 provisions mean nothing under that. That's what gives

19 me pause about your interpretation.

20   MR. PERRY: Justice Alito, it gives

21 employees two things. They give another defendant,

22 which means another insurance policy. So for example,

23 if you sue the company you get the E&O policy. If you

24 sue the president at the same time, you get the D&O

25 policy. So you get two separate insurance companies,

1   which is more money, more availability. You get the

2   personal liability. Officers hate to be sued; so do

3   contractors. And if the public company goes out of

4   business, you get that protection of monetary relief.

5   JUSTICE ALITO: My question wasn't clear.

6   If you say that the employees, only the employee of the

7   publicly held company and not the employee of the

8   private -- privately held subcontractor, then that --

9   the only situation is covered with respect to the

10   contractor is this so-called axe-wielding specialist.

11   MR. PERRY: You have the axe-wielding

12   specialist. The real world is Kalkunte. I gave you

13   that case where that actually happened.

14   JUSTICE ALITO: Yes, it can happen, but it's

15   really very small, isn't it?

16   MR. PERRY: Well, Your Honor, that was one

17   of six cases the ARB decided under this statute in 2009.

18   So that year that was one-sixth of the cases. That's

19   not -- I mean, it happens, okay?

20   And it is a -- it is a conceivable scenario

21   in many more things because, again, it's not limited to

22   discharge. It's also threats and harassment, and we

23   certainly can see situations where contractors,

24   particularly those kinds of contractors like management

25   consultants, photocopy vendors, and so forth, are in the

1   facility with the public company employees, can make

2   their life miserable.

3   And remember, I am going to agree with my

4   friend Mr. Schnapper on something. Congress recognized

5   that Enron was structured in a way to try to get the

6   liability out of headquarters. They had all these

7   subsidiaries, they had Chewco and Ponderosa and all

8   this. And Congress recognized that corporations might

9   try to avoid their liability, so that by picking up

10   officers, employees, contractors, subcontractors and

11   agents, they were trying to make sure that if the

12   company tried to lay off the responsibility on somebody

13   else, they would still get captured because their

14   employees were doing it.

15   They could have done that just under agency.

16   Many employment laws, of course, speak only of officers,

17   employees, and agents. But many contracts disclaim

18   agency, disclaim --

19   JUSTICE BREYER: Where did it come from?

20   That is, where did the words "contractor"? Some human

21   being wrote them for the first time. You probably know

22   who did and where and under what circumstances. What?

23   What, you know?

24   MR. PERRY: Justice Breyer --

25   JUSTICE SCALIA: Who was it, counsel?

1   (Laughter.)

2   JUSTICE BREYER: Some of us are interested

3   in that. At least I am.

4   MR. PERRY: Justice Breyer, it appears --

5   that formulation appears for the first time in the

6   history of the United States Code in this law.

7   JUSTICE BREYER: I know. So who is the

8   human being who wrote them and what did he have in mind,

9   or she?

10   (Laughter.)

11   MR. PERRY: We know -- we don't know the --

12 I don't know the individual. We know, however, that

13 there is a Senate report that accompanied that language

14 when it was introduced.

15   JUSTICE BREYER: Let's go back to the

16 hearings. I mean, there might have been hearings.

17   MR. PERRY: The only hearing testimony was,

18 for example, the National Whistleblowers Center, one of

19 the amici here, said corporate insiders, publicly traded

20 companies. There is nothing -- the word "contractor"

21 specifically appears nowhere in the legislative history.

22 In the entire legislative history of the Sarbanes-Oxley

23 Act, every hearing, every floor statement, every report,

24 it nowhere appears.

25   It came, the word "contractor" came from the

1   AIR-21 Act, but, of course, the AIR-21 Act doesn't have

2   "officers, employees or agents." That is language from

3   Title VII.

4   JUSTICE KENNEDY: But the language did talk

5   about Arthur Andersen and Enron.

6   MR. PERRY: It did, Your Honor. And as I

7   said, 150 times "accountants" appear.

8   If I could just finish with this point. The

9   Senate report lists four examples of the so-called

10   corporate code of silence: The Andersen partner, the

11   Vinson and Elkins lawyers, the UBS securities analyst,

12   and Sharon Watkins at Enron.

13   Congress dealt with them in four different

14   provisions: Section 105 for the accountants, section

15   307 for the lawyers, Section 501 for the securities

16   analysts, and Section 806 for the public company

17   employee. And then -- we haven't talked about this yet,

18   either -- it added, for good measure, Section 1107,

19   which says whoever shall retaliate against anybody who

20   provides information to a law enforcement officer, which

21   includes the SEC, is subject to a criminal offense under

22   Title 18.

23   So we have this interlocking, connected,

24   nested series of provisions that deals with each of the

25   concerns identified by Congress in an industry-specific

1   fashion. And at no point did Congress suggest,

2   intimate, hint, that, oh, by regulating these things,

3   the lawyers, the accountants, the securities analysts

4   and the public companies, that they also were going to

5   sweep in 6 million private employers.

6   And if a member of Congress, I would submit,

7   had stood up on the floor and suggested that, it would

8   have been met with debate, derision, and defeat.

9   The First Circuit's judgment, Your Honors,

10 should be affirmed. Thank you.

11   CHIEF JUSTICE ROBERTS: Thank you, counsel.

12   Mr. Schnapper, you have five minutes left.

13   REBUTTAL ARGUMENT OF ERIC SCHNAPPER

14   ON BEHALF OF THE PETITIONERS

15   MR. SCHNAPPER: Thank you, Your Honor.

16   Let me begin by just referring the Court to

17 some materials that might be relevant to some of the

18 questions you asked. With regard to the SEC's view

19 prior to this case coming to this Court, those views

20 were expressed in a separate brief the SEC filed in the

21 First Circuit, which is consistent with the government's

22 approach here.

23   CHIEF JUSTICE ROBERTS: But we know they

24 don't have rulemaking authority in this area.

25   MR. SCHNAPPER: I agree with that, but --

1   but the question came up about what their views were.

2   With regard to the suggestion earlier that

3   the ARB has taken the position that every contract --

4   every firm that has a contract with a public company is

5   a contractor. Actually, in the Fleszar case, which is

6   mentioned in both the Respondent's brief and our yellow

7   brief, the -- the ARB is for the opposite position

8   and -- and took a position, I think, consistent with

9   the view we've advanced, which is not every contract

10   renders you a contractor.

11   With regard to Arthur Andersen, the

12   discussion in the Senate Report about why there's a need

13   to deal with retaliation is repeatedly about Arthur

14   Andersen. Many of the people who actually understood

15   what was going on at -- at Enron were Arthur Andersen

16   employees, not most of the run-of-the-mill employees at

17   Enron, and they were the ones who remained silent in the

18   face of this very, very serious problem.

19   With regard to the origins of this phrase

20   contractor, my brother, Mr. Perry, was right, it comes

21   from AIR-21. The preliminary AIR-21 regulations

22   regarding what it means were issued prior to the

23   adoption of SOX and they said it included employers --

24   employees of employers, which has remained the view of

25   the agency throughout.

1   My colleague -- with regard to AIR-21, the

2   history here is, I think, important. This statute

3   referred to air carriers and contractors and

4   subcontractors, and the court below assumed that that

5   meant that employees of subcontractors and contractors

6   were covered.

7   The First Circuit's theory was that Congress

8   meant to narrow the meaning of contractor employees

9   because it added retaliation by officers and employees.

10 And it seems to me that that is precisely the wrong

11 conclusion.

12   When Congress added to the entities that

13 could not retaliate, when it rewrote AIR-21 to add some

14 other people that couldn't retaliate, it didn't mean to

15 tacitly then eliminate the employees of contractors who

16 were governed under AIR-21.

17   Finally, with regard to the question the

18 Court has raised about whether it should explore the

19 possibility of a limitation based on whether a

20 contractor was acting as a contractor, we think it would

21 probably not be prudent to take that on at this time for

22 a couple of reasons.

23   First of all, a fair amount of work that was

24 done by Arthur Andersen was not -- that was relevant

25 wasn't done for Enron. It was done for the

1   off-the-books enterprises. They did $5.7 million of

2   accounting work for Jedi, where the debts -- one of the

3   places where the debts were being hidden. So you --

4   you'd get into that problem.

5   Secondly, this provision is adopted against

6   the background of a series of executive orders, most

7   important which is Executive Order 11246, about racial

8   discrimination by Federal contractors.

9   That executive order has always been

10   understood to cover all the employees of the contractor,

11   not just the employees who are working on the government

12   project. And I think that's an important part of the

13   background. Congress has not tried to -- the Executive

14   Branch hasn't limited it to that.

15   And in the Civil Rights Restoration Act of

16   about 1986, Congress rewrote Title 6 and Title 9 to have

17   institution-wide application rather than to do little

18   parts of it.

19   This issue about what a contractor might be

20   doing as a contractor hasn't been vetted in lower courts

21   and we think it would be not prudent to try to -- to

22   take that on here.

23   Thank you very much.

24   CHIEF JUSTICE ROBERTS: Thank you, counsel.

25   The case is submitted.

1   (Whereupon, at 2:00 p.m., the case in the

2   above-entitled matter was submitted.)

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