

# UP IN THE AIR: *LAWSON V. FMR LLC* & THE SCOPE OF SARBANES-OXLEY WHISTLEBLOWER PROTECTION

RYAN MCCARTHY\*

## I. INTRODUCTION

The first few years of the twenty-first century saw numerous public scandals and the precipitous collapses of major financial institutions, the most notable being the fall of Enron Corporation.<sup>1</sup> One troubling aspect of these scandals was that they occurred despite oversight from the corporations themselves and from outside advisers such as law firms, accounting firms, and other contractors.<sup>2</sup> In fact, misconduct within these third-party advising firms significantly contributed to the downfall of these corporations.<sup>3</sup> In response, Congress enacted the Sarbanes-Oxley Act of 2002 (SOX, or the Act),<sup>4</sup> Section 806 of which prohibits public reporting companies from firing employees for blowing the whistle on wrongdoings within the corporation.<sup>5</sup>

The question presented in *Lawson v. FMR LLC*<sup>6</sup> is whether Section 806's whistleblower protection extends to the employees of private contractors and subcontractors of these reporting companies.<sup>7</sup>

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\* J.D. Candidate, 2015, Duke University School of Law.

1. See Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 2 (2002) (detailing several large corporate frauds that occurred during this timeframe). For a more thorough account of the Enron collapse, see William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275 (2002).

2. Ribstein, *supra* note 1, at 3.

3. Spinner, 2010-SOX-029, 2012 WL 1999677, at \*9 (Dep't of Labor May 31, 2012).

4. S. REP. NO. 107-146, at 4 (2002).

5. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 806, 116 Stat. 745, 802 (codified at 18 U.S.C. § 1514A).

6. 133 S. Ct. 2387 (2013).

7. Petition for a Writ of Certiorari at 1, *Lawson v. FMR LLC*, No. 12-3 (U.S. June 28, 2012).

It is uncontested that contractors and subcontractors may not retaliate against employees of the public company itself; the dispute is over whether, under the Act, “an employee,” includes an individual employed by the contractor or subcontractor.<sup>8</sup> The Court should hold that employees of privately held companies, such as employees of private contractors that are in turn hired by reporting companies, are not covered by Section 806. Although the plain language of Section 806 would allow for a more expansive reading, there is no indication that Congress intended to encompass within this provision employees of private companies; in addition, public policy concerns favor a narrower interpretation.

## II. FACTUAL & PROCEDURAL BACKGROUND

### A. *Facts of the Case*

Two plaintiffs, Jackie Lawson and Jonathon Zang, filed separate unlawful retaliation suits against their employers.<sup>9</sup> Lawson was employed by Fidelity Brokerage Services, LLC, which, together with its parent, FMR LLC, is known as Fidelity Investments.<sup>10</sup> Beginning in 2005, Lawson raised objections to the manner in which Fidelity Investments calculated expenses incurred in serving as investment advisor to the Fidelity family of mutual funds; inflated expenses led to increased fees for Fidelity Investments, which were ultimately paid by shareholders of the funds.<sup>11</sup> Lawson explained her concerns to the General Counsel of Fidelity Investments and reported these issues to the SEC.<sup>12</sup> Lawson claimed that her employer retaliated against her because of her reporting,<sup>13</sup> and as a result Lawson filed complaints with the Occupational Safety and Health Administration (OSHA).<sup>14</sup> In July 2007, a supervisor advised Lawson to take a “sabbatical,” because of the distraction of the OSHA claim.<sup>15</sup> Later that year, Lawson resigned, claiming that her working conditions were

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8. *Id.*

9. *Lawson v. FMR LLC*, 724 F. Supp. 2d 141, 143–44 (D. Mass. 2010).

10. *Id.* at 144.

11. Petition for a Writ of Certiorari, *supra* note 7, at 4.

12. *Id.* at 5.

13. *Id.*

14. *Lawson*, 724 F. Supp. 2d at 146. OSHA has authority to enforce Section 806, and the Administrative Review Board (ARB) has adjudicatory authority over Section 806 claims. *Lawson v. FMR LLC*, 670 F.3d 61, 81 n.23 (2012). Both agencies fall under the Department of Labor (DOL).

15. Petition for a Writ of Certiorari, *supra* note 7, at 5.

intolerable as her supervisor perpetually harassed her and that she had been constructively discharged.<sup>16</sup>

Plaintiff Jonathon Zang worked for Fidelity Management & Research Co.—the registered investment advisor to the Fidelity family of mutual funds—also a subsidiary of FMR LLC.<sup>17</sup> He raised objections to his employers operation of “veiled index funds” and to a misleading statement his employer wanted to include in an SEC filing regarding manager compensation; in June 2005, Zang was allegedly fired because of these objections.<sup>18</sup> Like Lawson, Zang filed a complaint with OSHA.<sup>19</sup> Lawson and Zang filed separate actions in federal district court in Massachusetts against their employers, Fidelity Brokerage Services and Fidelity Management & Research Co. respectively, and against the parent company, FMR LLC. Collectively, these defendants will be referred to as Fidelity Investments.

The defendants are private companies that contracted with the Fidelity family of mutual funds to provide investment advice.<sup>20</sup> The funds are reporting companies subject to Section 806 of SOX,<sup>21</sup> yet the funds are not a party to either suit and are not owned or controlled by any of the defendant companies.<sup>22</sup> The funds have no employees of their own, a trait that is quite common in the mutual fund industry.<sup>23</sup> The directors of the funds contract with private investment advisors, such as Fidelity Investments, who conduct the day-to-day activities of the funds.<sup>24</sup> The plaintiffs are pursuing claims for unlawful retaliation under 18 U.S.C. § 1514A.<sup>25</sup>

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16. *Lawson v. FMR LLC*, 670 F.3d 61, 64 (1st Cir. 2012).

17. *Lawson*, 724 F. Supp. 2d at 144.

18. Petition for a Writ of Certiorari, *supra* note 7, at 6. A veiled index fund is an unmanaged index fund for which an investment advisor nonetheless collects a fee for active management. *Id.*

19. *Lawson*, 724 F. Supp. 2d at 147.

20. *Lawson*, 670 F.3d at 61–62.

21. *Id.*

22. *Id.* at 63.

23. *Id.*

24. Petition for a Writ of Certiorari, *supra* note 7, at 3–4.

25. *Lawson*, 670 F.3d at 64.

### *B. District Court Holding*

Fidelity Investments filed motions to dismiss both complaints on the ground that Lawson and Zang, as employees of privately held companies, are not protected from retaliation by Section 806.<sup>26</sup> Given that the two cases raise the same question of law and have a common defendant, the district court elected to address both cases in a single order.<sup>27</sup> After finding the language of the statute to be ambiguous and lamenting the unhelpfulness of the legislative history,<sup>28</sup> the court ultimately found that Congress favored a broader interpretation of the statute than that being offered by the defendants. The court found that Congress intended to protect employees of both public and private companies “who attempt to report [fraudulent] activity.”<sup>29</sup> To avoid an overly broad interpretation, the court limited the protection of employees of privately held companies to situations “relat[ing] to fraud against the shareholders.”<sup>30</sup> Applying this interpretation, the court denied the defendants’ motions to dismiss and ruled that the plaintiffs were protected under Section 806.<sup>31</sup> The district court then certified for interlocutory appeal the question of whether Section 806 covers employees of private companies, noting that “the ambiguities inherent in this not altogether carefully crafted legislation have led others to a different conclusion.”<sup>32</sup>

### *C. First Circuit Holding*

The Court of Appeals for the First Circuit granted the defendants’ petition for interlocutory review.<sup>33</sup> A divided panel overturned the district court and held that employees of private contractors do not fall within the scope of Section 806’s employee protection.<sup>34</sup> The First

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26. *Lawson v. FMR LLC*, 724 F. Supp. 2d 141, 152 (D. Mass. 2010).

27. *Id.* at 144.

28. *Id.* at 157 (“[T]he legislative history on this provision of SOX is notably unhelpful in answering the particular question before me because the congressional debates do not speak directly to whether employees of privately held companies can be covered by the whistleblower provision.”).

29. *Id.* at 159–60 (citing S. REP. NO. 107-146, at 2 (2002)). The court characterized Fidelity Investments’ interpretation as an “excessively forced and formalistic reading.” *Id.* at 160.

30. *Id.* The court uncovered a limiting principle from the text of § 1514A, which identifies certain protected activity, namely, the reporting of an activity that “constitutes a violation of [certain sections], any rule or regulation of the [SEC], or any provision of Federal law relating to fraud against shareholders.” *Id.* at 158 (quoting 18 U.S.C. § 1514A(a)(1) (2006)).

31. *Id.* at 160.

32. *Lawson v. FMR LLC*, 724 F. Supp. 2d 167, 169 (D. Mass. 2010).

33. *Lawson v. FMR LLC*, 670 F.3d 61, 65 (1st Cir. 2012).

34. *Id.* at 68.

Circuit found that the defendants' interpretation of the statute was "the more natural reading," focusing primarily on the statutory framework and the title and caption of the provision, each of which expressly identifies only "employees of publicly traded companies."<sup>35</sup> The court said these factors removed any ambiguity from the statute,<sup>36</sup> but cited legislative history and purpose as further support for its decision.<sup>37</sup> Specifically, the court looked to the report of the Senate Judiciary Committee, in which "[o]nly employees of publicly traded companies are mentioned; employees of private companies are not."<sup>38</sup>

Finally, the court rebutted the plaintiffs' argument that deference should be given to federal agency interpretations of the statute.<sup>39</sup> OSHA issued regulations that stated that the whistleblower protection extends to employees of privately held contractors.<sup>40</sup> However, the court concluded that the agency did not have substantive rulemaking authority over SOX such that its regulations should be given deference, as OSHA's regulations are merely "procedural in nature and are not intended to provide interpretations of the Act."<sup>41</sup> The court further noted, "if there were an on-point holding of the [Administrative Review Board], it might be entitled to some deference as to any ambiguity in the statute."<sup>42</sup> But, the court continued, "we find no ambiguity, so no deference is owed."<sup>43</sup>

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35. *Id.* at 66. (citing 18 U.S.C. § 1514A(a) (2006)).

36. *Id.* at 70.

37. *See id.* at 73 ("The broader reading of § 1514A(a) offered by plaintiffs would provide an impermissible end run around Congress's choice to limit whistleblower protection in that subsection.").

38. *Id.* at 77.

39. *Id.* at 81.

40. *See* 29 C.F.R. § 1980.101 (2014) (defining "employee" as an individual working for a "covered person," which includes contractors and subcontractors).

41. *Lawson*, 670 F.3d, at 82. (citing Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 69 Fed. Reg. 52104, 52105 (Aug. 24, 2004)).

42. *Id.* at 82.

43. *Id.*

### III. LEGAL BACKGROUND

#### A. *Enron, Sarbanes-Oxley, and Whistleblower Protection*

Congress enacted SOX in the wake of the Enron collapse in the hopes that such fraudulent activities could be avoided if there were greater protection for those who sought to expose unlawful business practices.<sup>44</sup> For example, Enron was greatly aided in its misconduct by its outside accounting firm, Arthur Anderson, which, among other things, engaged in a large-scale cover up by destroying records and discouraging whistleblowing.<sup>45</sup> Under Section 806 of SOX, titled “Protection for employees of publicly traded companies who provide evidence of fraud,” Congress afforded whistleblowers protection against employer retaliation:

No [reporting] company<sup>46</sup> . . . or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of [certain sections of the U.S.C. relating to fraud, rules promulgated by the SEC,] or any provision of Federal law relating to fraud against shareholders. . . .<sup>47</sup>

Section 806 is codified under 18 U.S.C. § 1514A.

Under the Act, a whistleblower seeking relief from retaliation must file a complaint with the Secretary of Labor.<sup>48</sup> If the Secretary does not issue “a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad

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44. See S. REP. NO. 107-146, at 4–5 (2002) (discussing efforts made by Enron to dismiss a whistleblower).

45. *Id.* at 3–5. The Committee on the Judiciary lamented: “Instead of acting as gatekeepers who detect and deter fraud, it appears that Enron’s accountants and lawyers brought all their skills and knowledge to bear in assisting the fraud to succeed and then in covering it up.” *Id.* at 4–5.

46. A reporting 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)).” Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 806, 116 Stat. 745, 802 (2002) (codified at 18 U.S.C. § 1514A).

47. *Id.*

48. 18 U.S.C.A. § 1514A(b)(1)(A) (West 2013).

faith of the claimant,” the whistleblower may file “for de novo review in the appropriate district court of the United States.”<sup>49</sup> The Secretary of Labor has delegated its authority over whistleblower retaliation claims to the Administrative Review Board (ARB),<sup>50</sup> and its authority to enforce Section 806 to OSHA.<sup>51</sup>

### *B. Agency Interpretations of “Employee”*

OSHA has promulgated regulations regarding procedures for handling Section 806 retaliation complaints.<sup>52</sup> In the context of Section 806, the regulations define “employee” as “an individual presently or formerly working for a covered person, an individual applying to work for a covered person, or an individual whose employment could be affected by a covered person”; and “covered person” includes contractors and subcontractors.<sup>53</sup> Yet, Congress only endowed the Secretary of Labor with adjudicatory authority over whistleblower retaliation claims, and the Secretary explicitly stated that these regulations are “not intended to provide statutory interpretations.”<sup>54</sup> Nonetheless, several courts have deferred to the Department of Labor’s (DOL) interpretation of Section 806<sup>55</sup> under *Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel*.<sup>56</sup>

Additionally, a few months after the First Circuit decided *Lawson*, the ARB analyzed Section 806 in *Spinner v. David Landau & Associates, LLC*.<sup>57</sup> There, the employee of a private consulting service reported internal control and reconciliation problems of a publicly traded company with which his employer had contracted, and was thereafter fired.<sup>58</sup> The ARB found that the employee was protected by

49. *Id.* § 1514A(b)(1)(B).

50. Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 67 Fed. Reg. 64272-01, 64272-01(4)(c)(43) (Oct. 17, 2002).

51. Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 67 Fed. Reg. 65008-01, 65008-01(4)(s) (Oct. 22, 2002).

52. 29 C.F.R. § 1980.100 (2014).

53. *Id.* § 1980.101.

54. Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 69 Fed. Reg. 52104-01, 52105, 52112 (Aug. 24, 2004) (codified at 29 C.F.R. pt. 1980).

55. *See Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1131 (10th Cir. 2013); *Wiest v. Lynch*, 710 F.3d 121, 131 (3d Cir. 2013); *Welch v. Chao*, 536 F.3d 269, 276 (4th Cir. 2008).

56. 467 U.S. 837, 843 (1984) (discussing the level of deference owed to agency interpretations in varying circumstances).

57. *Spinner*, 2010-SOX-029, 2012 WL 1999677, at \*1 (Dep’t of Labor May 31, 2012).

58. *Id.* at \*1.

Section 806, explicitly rejecting the First Circuit's holding in *Lawson*, and claimed that *Lawson* was not controlling.<sup>59</sup> The ARB noted that it is "obliged to follow" DOL regulations "implementing Section 806."<sup>60</sup> Further, the ARB found that the legislative history and statutory framework indicated that § 1514A was meant to cover employees of private contractors and subcontractors.<sup>61</sup>

### C. Deference to Agency Interpretation

Under *Chevron*, a court performs a two-part test<sup>62</sup> to determine whether an agency's interpretation of a statute it is charged with administering is entitled to deference, and if so, the level of deference that is appropriate. First, the court considers "whether Congress has directly spoken to the precise question at issue."<sup>63</sup> An affirmative answer results in the court giving effect to Congress's intent, and a negative answer brings the court to its second inquiry: "whether the agency's [interpretation] is based on a permissible construction of the statute."<sup>64</sup> Once the court reaches the second question, it applies a highly deferential standard of review to the agency's interpretation.<sup>65</sup>

The Supreme Court has found *Chevron* deference appropriate in cases involving administrative adjudication<sup>66</sup> and several circuit courts have extended deference to the ARB's interpretation of Section 806.<sup>67</sup> One particularly notable case, *Day v. Staples, Inc.*,<sup>68</sup> was decided by the same First Circuit that elected not to follow the DOL's interpretation in *Lawson*.<sup>69</sup> In *Day*, the court had affirmatively stated: "Both the

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59. *See id.* at \*4, \*6.

60. *Id.* at \*3.

61. *Id.* at \*10–11.

62. Some commentators refer to the *Chevron* test as a three-part inquiry, beginning with step zero, which concerns whether *Chevron* applies at all. *See, e.g.*, Cass R. Sunstein, *Chevron Step Zero* 3, 5 (Univ. of Chicago Law Sch. Public Law and Legal Theory, Working Paper No. 91, 2005) ("A trilogy of cases, unambiguously directed to Step Zero, has suggested that when agencies have not exercised delegated power to act with the force of law, *Chevron* may not provide the governing framework.").

63. *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council*, 476 U.S. 837, 843 (1984).

64. *Id.* (noting that if Congress "has not directly addressed the precise question at issue," i.e., if the statute is silent or ambiguous with respect to the specific issue, then the court proceeds to the second inquiry).

65. *See id.* at 844 ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.").

66. *See United States v. Mead Corp.*, 533 U.S. 218, 230 & n.12 (2001).

67. *See, e.g.*, *Wiest v. Lynch*, 710 F.3d 121, 130–31 (3d Cir. 2013) (granting *Chevron* deference to the ARB's interpretation of Section 806).

68. 555 F.3d 42 (2009).

69. *Lawson v. FMR LLC*, 670 F.3d 61, 91–92 (1st Cir. 2012) (Thompson, J., dissenting).



DOL regulations, which are entitled to *Chevron* deference, and the caselaw establish that the term ‘reasonable belief’ has both a subjective and objective component. We agree.”<sup>70</sup> In *Lawson*, the First Circuit insisted that this language from *Day* was merely dictum.<sup>71</sup>

If a court determines that *Chevron* deference is not warranted, it still may defer to an agency’s interpretation under the doctrine laid out in *Skidmore v. Swift*.<sup>72</sup> Under *Skidmore*, an agency’s interpretation is not controlling on the courts, but can provide “guidance.”<sup>73</sup> In determining how much weight to give an agency’s interpretation, a court may consider “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.”<sup>74</sup>

#### IV. ARGUMENTS

##### A. Arguments for Petitioners, Lawson and Zang

Petitioners assert that they are “employees” within the meaning of Section 806 and are therefore protected from retaliation under that statute.<sup>75</sup> The statute is without ambiguity in simply providing, as Judge Thompson indicated in her dissent, “that ‘no . . . contractor . . . may discharge . . . an employee.’”<sup>76</sup> Petitioners also assert that this interpretation is consistent with the legislative purpose of SOX.<sup>77</sup> Finally, if the statute is ambiguous, they argue that the DOL’s interpretation is reasonable and thus is entitled to deference.<sup>78</sup>

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70. *Day*, 555 F.3d at 54 (footnotes omitted) (discussing § 1514A(a)(1)).

71. *Lawson*, 670 F.3d at 81 n.22.

72. 323 U.S. 134 (1944).

73. *Id.* at 140.

74. *Id.*; see also *Gonzales v. Oregon*, 546 U.S. 243, 244 (2006) (noting that a court “is ‘entitled to respect’ [the agency’s interpretation] only to the extent it has the ‘power to persuade’” (quoting *Skidmore*, 323 U.S. at 140)).

75. Brief for Petitioners at 8, *Lawson v. FMR LLC*, No. 12-3 (U.S. July 31, 2013).

76. *Lawson v. FMR LLC*, 670 F.3d 61, 84 (2012) (Thompson, J., dissenting) (quoting 18 U.S.C. § 1514A(a) (2006)).

77. Brief for Petitioners, *supra* note 75, at 61.

78. *Id.* at 61–62.

## 1. Plain Text

In arguing that the word “employee” refers to those employed by the retaliating party, Petitioners liken the term “employee” to other terms used to indicate a relationship.<sup>79</sup> A person advised to treat neighbors well would understand that this refers to *his own* neighbors. Similarly, a statute addressing “the manner in which a company is to treat an ‘employee’ regulate[s] how the firm deals with its own employees.”<sup>80</sup> This interpretation is further supported by the fact that the forms of retaliation forbidden by Section 806 are not ones likely to be used by contractors against employees of the company with which they have contracted.<sup>81</sup> Namely, the statute forbids contractors from “discharg[ing], demot[ing], [or] suspend[ing] . . . an employee in the terms and conditions of employment because of any lawful act done by the employee.”<sup>82</sup> A contractor could only take these “tangible employment actions” against its own employees, not those of some other firm, “unless the contractor were *also* an agent of that firm,” a distinction that would render the word “contractor” meaningless.<sup>83</sup>

On the other hand, “[b]ecause the contractor itself is dependent on the public company’s business, the public company may be able to dictate what the contractor will do, or tolerate” with respect to its own employees.<sup>84</sup> Petitioners claim that if the First Circuit’s interpretation is upheld, this type of retaliation will be unchecked and could become even more prevalent.<sup>85</sup>

In addition, Petitioners note that Congress used the phrase “of such company” to describe the specific individuals forbidden from retaliating, but no such phrase was used to limit the employees to whom protection is extended.<sup>86</sup> And when Congress uses certain language in one section of a statute and omits it in another, it is

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79. *Id.* at 15–16.

80. *Id.* at 16.

81. *Id.* at 22.

82. 18 U.S.C.A. § 1514A (West 2013).

83. Brief for Petitioners, *supra* note 75, at 24 (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762 (1998)). Petitioners also note that in the unlikely event a contractor discharged an employee of a public company, that contractor would almost certainly lack the authority to reinstate said employee with the same seniority status, which is the remedy provided under § 1514A(c)(2)(A). *Id.* at 36.

84. *Id.*

85. *Id.*

86. *Id.*

presumed that it did so intentionally.<sup>87</sup>

Although Respondents claim that the title of Section 806 and the heading of § 1514A(a) favor a narrower interpretation because they expressly identify “employees of publicly traded companies” as falling under their protection, the heading of § 1514A uses the broader language “to protect against retaliation in fraud cases.”<sup>88</sup> Additionally, the headings of Section 806 and subsection (a) do not refer to certain employees that both parties agree are covered by the statute, such as those who work for companies required to file reports under 15 U.S.C. § 78o(d).<sup>89</sup> Because it is uncontested that at least some section headings do not detail every type of employee that falls within their protection, it does not follow that employees of private contractors are necessarily excluded from SOX’s whistleblower protection simply because they are not named in the heading title of § 1514A(a).<sup>90</sup>

## 2. Legislative History and Purpose

Next, Petitioners argue that the framers of SOX must have intended for the bill to provide protection to employees of outside firms, considering the extent to which independent companies were complicit in the Enron scandal.<sup>91</sup> If the First Circuit’s interpretation were applied to the Enron case, “it would have been lawful for Arthur Anderson to fire any employee who answered questions from an SEC investigator . . . or who tried to assist that investigation.”<sup>92</sup> Given Congress’s desire to “prevent recurrences of the Enron debacle and similar threats to the nation’s financial markets,”<sup>93</sup> Congress did not intend to exclude employees of private contractors from whistleblower protection.<sup>94</sup>

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87. Brief for Petitioners, *supra* note 75, at 8–9. Petitioners also note that “the inclusion and exclusion of the phrase ‘of such company’ appear only 22 words apart in the same sentence.” *Id.* at 9.

88. *Id.* at 42–43 (citing 18 U.S.C. §§ 1514A, 1514A(a) (2006)). Respondents’ argument regarding the titles is discussed further *infra* Part IV.B.1.

89. *Id.* at 44–45.

90. *See id.* at 45–46.

91. *Id.* at 59, 61.

92. *Id.* at 61.

93. *See* S. REP. NO. 107-146, at 10 (2002) (noting comments from various parties supporting the Act).

94. Brief for Petitioners, *supra* note 75, at 38. Judge Thompson agreed, noting that the statute “expressly creates a broad right of action for employee-whistleblowers who suffer retaliation at their employers’ hands.” *See* Lawson v. FMR LLC, 670 F.3d 61, 90 (1st Cir. 2012) (Thompson, J., dissenting).

### 3. Administrative Position

Petitioners claim that the ARB's decision in *Spinner* provides further support for their reading of "employee."<sup>95</sup> There, the ARB held that employees of private companies that contracted with publicly traded companies "are covered as employees of contractors, subcontractors, or agents."<sup>96</sup> Although Congress did not endow the DOL with substantive rulemaking authority in this area, Petitioners argue that "the ARB's interpretation of [Section 806] is eminently reasonable," and that it is entitled to *Chevron* deference.<sup>97</sup>

#### *B. Arguments for Respondents, Fidelity Investments*

Respondents support the First Circuit's conclusion that employees of privately held contractors are not covered by Section 806.<sup>98</sup> Congress intentionally limited the provision's protection to employees of public companies and chose to address investment advisors, such as Respondents, in other areas of SOX.<sup>99</sup> Respondents state that a reversal by the Supreme Court would amount to a judicial amendment of Section 806, improperly "extend[ing] its coverage from the employees of a few thousand public companies to those of the millions of private employers that contract with public companies."<sup>100</sup>

#### 1. Plain Text

Respondents argue that Petitioners overemphasize the definition of the word "employee" and lose sight of the bigger picture.<sup>101</sup> The provision, taken as a whole, clearly limits its protection only to employees of public companies.<sup>102</sup> The title of Section 806 reads, "Protection for employees of publicly traded companies who provide evidence of fraud," and the caption of § 1514A(a) states, "Whistleblower protection for employees of publicly traded companies."<sup>103</sup> Respondents believe these titles indicate Congress's clear intent to establish the statute's scope.<sup>104</sup> The First Circuit viewed

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95. Brief for Petitioners, *supra* note 75, at 62.

96. *Spinner*, 2010-SOX-029, 2012 WL 1999677, at \*13 (Dep't of Labor May 31, 2012).

97. Brief for Petitioners, *supra* note 75, at 62.

98. Brief for Respondents at 10, *Lawson v. FMR LLC*, No. 12-3 (U.S. Sept. 30, 2013).

99. *Id.*

100. *Id.*

101. *Id.* at 13.

102. *Id.*

103. 18 U.S.C.A. § 1514A(a) (West 2013); Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 806, 116 Stat. 745, 802 (codified at 18 U.S.C. § 1514A).

104. Brief for Respondents, *supra* note 98, at 15.

these titles as “statements of congressional intent” that cut against Petitioners’ interpretation.<sup>105</sup> And the Supreme Court has held that the title of a statute may shed light on the meaning of the text or aid in construing ambiguities.<sup>106</sup>

Concerning the text of § 1514A(a), Respondents view the phrase “or any officer, employee, contractor, subcontractor or agent of such company,” as a “subordinate clause regarding company representatives [that] does not modify the term ‘an employee’ in the principal clause.”<sup>107</sup> Respondents also counter Petitioners’ example of being kind to neighbors, noting that language such as “no homeowner, or guest or visitor of such homeowner, shall be rude to a neighbor”—makes clear that the protected persons remain the homeowners’ neighbors, not neighbors of the guests or visitors.”<sup>108</sup>

As to circumstances under which a contractor would retaliate against a public company’s employee, Respondents raise the example of a corporate “ax-wielding specialist,” who contracts with a company to aid in downsizing.<sup>109</sup> The ax-wielding contractor could be held secondarily liable for the unlawful discharge of a corporation employee.<sup>110</sup> Thus, under Respondents’ reading, Section 806 “prohibits the public company employer from retaliating against its own employee, either directly or through a representative; and if this prohibition is violated, the public company employee may sue both the employer (as the primary violator) and the representative (as a secondary actor).”<sup>111</sup>

105. *Lawson v. FMR LLC*, 670 F.3d 61, 68 (1st Cir. 2012).

106. *See, e.g., Immigration and Naturalization Serv. v. Nat’l Ctr. for Immigrants’ Rights, Inc.*, 502 U.S. 183, 190–92 (1991); *Bhd. of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 529 (1947).

107. Brief for Respondents, *supra* note 98, at 16.

108. *Id.* To reinforce this reading, Respondents contend that the word “employee” must be construed in the same manner with respect to each of the terms, “officer, employee, contractor, subcontractor, or agent.” They note that Petitioners simultaneously express that Section 806 extends coverage to employees of contractors and subcontractors and that it imposes liability on officers or employees for engaging in retaliation on behalf of the public company, which they argue is a contradiction, rendering Petitioners’ interpretation unacceptable. *Id.* at 20–21.

109. *Id.* at 24–25 (citing *Fleszar v. U.S. Dep’t of Labor*, 598 F.3d 912, 915 (7th Cir. 2010) (using the example of George Clooney’s character in the 2009 film “Up in the Air”).

110. *Id.* at 25. *But see* Brief for Petitioners, *supra* note 75, at 26 n.20 (countering that such an ax-wielder would be held liable as an agent, and that the word “contractor” in Section 806 cannot be meaningless).

111. *Id.* at 25–26.

## 2. Legislative History

Respondents assert that the legislative history of SOX indicates that it was not meant to cover employees of privately held companies.<sup>112</sup> They highlight a statement made by a co-author of the bill, Senator Sarbanes: “[SOX] applies exclusively to public companies—that is, to companies registered with the Securities and Exchange Commission. It is not applicable to [private] companies, who make up the vast majority of companies across the country.”<sup>113</sup> If Congress had intended to expose millions of private companies to civil liability under Section 806, there would have been much more deliberation on the subject.<sup>114</sup> It would have been far too monumental an action for Congress to take without doing so expressly. “Congress does not ‘hide elephants in mouseholes.’”<sup>115</sup>

Respondents further support their interpretation by highlighting the fundamental distinction between public and private companies.<sup>116</sup> “By accepting money from private citizens, these corporations bear a special responsibility to their investors and need to be held accountable.”<sup>117</sup> Because private companies do not issue securities to the public at large, they are relieved of many of these stringent internal reporting requirements.<sup>118</sup>

## 3. Legislative Purpose

Respondents also contend that their interpretation of Section 806 falls squarely within the stated purpose of the Act.<sup>119</sup> SOX states that it is “[a]n Act [t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws.”<sup>120</sup> Because “[p]rivate companies are not required to make such disclosures,” Petitioners’ interpretation does not truly promote the

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112. *Id.* at 30.

113. 148 CONG. REC. S7350-04 (daily ed. July 25, 2002) (statement of Sen. Sarbanes). Fidelity believes Senator Sarbanes’s comments are particularly notable because of the “deafening silence of the legislative record on this question.” Brief for Respondents, *supra* note 98, at 32.

114. Brief for Respondents, *supra* note 98, at 32.

115. *Id.* (quoting *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001)).

116. *Id.* at 12, 31.

117. *Id.* at 32 (quoting 148 CONG. REC. H5462-02 (daily ed. July 25, 2002) (statement of Rep. Etheridge)).

118. *See id.*

119. *See id.* at 37 (arguing that the basic principle that “private companies are not required to make such disclosures” destroys Petitioners’ argument of furthering SOX’s purpose).

120. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

purpose of SOX.<sup>121</sup> Noting the exceedingly large proportion of privately held companies, Respondents insist that Congress intended to limit SOX to public companies that have subjected themselves to these reporting requirements.<sup>122</sup>

Further, Respondents deny that the First Circuit’s interpretation would not have provided protection to those involved in the Enron scandal.<sup>123</sup> They note that other provisions of SOX regulate the behavior of lawyers and accountants, the two outside parties about whom Congress expressed the most concern.<sup>124</sup> Sections 105 and 307 of SOX increase penalties for auditors and lawyers, respectively, for failing to report suspected fraud.<sup>125</sup> These heightened penalties include a permanent ban from practicing before the SEC.<sup>126</sup> Respondents argue that such strict regulations essentially make lawyers and accountants “whistleblower[s] by statute.”<sup>127</sup> Therefore, these sections of SOX already perform the function that Petitioners argue Section 806 must perform.<sup>128</sup>

#### 4. No Deference to Administrative Agencies

Finally, Respondents deny that OSHA’s regulations and the ARB decision in *Spinner* are entitled to *Chevron* deference.<sup>129</sup> Respondents contend that Congress’s intent was clear as to the scope of the protection and that the interpretation of the term “employee” does not require any special administrative expertise.<sup>130</sup> They argue that Congress’s decision not to provide the DOL with any rulemaking authority indicates that the DOL should not receive deference even if the Court were to find some ambiguity in the statute.<sup>131</sup> They note that the Court has previously held that “agency adjudication is a permissible mode of policymaking *only* where the agency also has

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121. Brief for Respondents, *supra* note 98, at 37.

122. *Id.* at 38.

123. *Id.* at 33, 42.

124. *Id.* at 40–41.

125. Sarbanes-Oxley Act §§ 105, 307 (codified at 15 U.S.C. §§ 7215(c)(4), 7245).

126. 15 U.S.C.A. § 78d-3(a) (West 2013).

127. Brief for Respondents, *supra* note 98, at 41 (internal quotation marks omitted).

128. *Id.*

129. *Id.* at 46.

130. *Id.* at 48.

131. *Id.* at 46, 48–49. This argument was strongly supported by the First Circuit, which stated, “[b]ecause the term ‘employee’ in § 1514A(a) is not ambiguous, we would not defer to an administrative agency’s contrary determination, even had Congress delegated authority to the agency.” *Lawson v. FMR LLC*, 670 F.3d 61, 81 (1st Cir. 2012).

been delegated ‘the power to make law or policy by other means.’”<sup>132</sup>

## V. ANALYSIS & LIKELY DISPOSITION

Both parties have significant support behind their interpretation of Section 806, including a decision by a court below. But on its face, the text of the provision is ambiguous.<sup>133</sup> As the district court stated, “the challenged draftsmanship of the Sarbanes-Oxley Act has provided substantial ground within which to stake out different opinions regarding statutory intent.”<sup>134</sup>

The Supreme Court should hold that Section 806 does not apply to employees of privately held companies. Although the legislative history is inconclusive, the absence of any evidence indicating such a broad extent of protection favors Respondents’ interpretation. Additionally, the purpose for which SOX was enacted can still be achieved with the more limited reading advocated by Respondents. Finally, the interpretations of the DOL should not be extended deference.

### A. Legislative History Weighs in Favor of Respondents

Though both parties claim that legislative history supports their respective interpretations of “employee,” in the congressional debates Congress did not examine the specific question of whether employees of private contractors were covered under Section 806.<sup>135</sup> This lack of clarity, like that of the text itself, is likely a result of the haste with which SOX was passed.<sup>136</sup> None of the statements cited by the parties is determinative.<sup>137</sup> The most compelling argument with respect to the

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132. Brief for Respondents, *supra* note 98, at 46 (quoting *Martin v. Occupational Safety and Health Review Comm’n*, 499 U.S. 144, 154 (1991)).

133. “Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses.” Norman J. Singer & J.D. Shambie Singer, 2A STATUTES AND STATUTORY CONSTRUCTION § 45:2 n.4 (7th ed. 2007) (citing *Lawson* specifically as an example of this definition).

134. *Lawson v. FMR LLC*, 724 F. Supp. 2d 167, 169 (D. Mass. 2010).

135. *Id.* at 157.

136. See Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1549, 1552 (2005) (describing the narrow timeframe of the debates and diagramming the number of speakers addressing various issues with the bill, none of which are related to the scope of individuals to whom it extends protection).

137. Respondents cite multiple occasions on which members of Congress differentiated between public and private companies. See Brief for Respondents, *supra* note 98, at 31 (noting statements made by Senator Sarbanes and Representative Etheridge). *But see Lawson*, 670 F.3d at 87 (Thompson, J., dissenting) (noting that “none of the legislative history . . . actually evidences any congressional intent to *limit* the scope of § 806’s whistleblower protection”).



legislative history of SOX is Respondents' contention that "[i]t is unfathomable that Congress meant to authorize civil lawsuits by employees of *millions* of private employers with nary a word to that effect."<sup>138</sup>

Admittedly, Petitioners' argument that the protection of employees of private companies is essential to the overall purpose of SOX is cogent, given the Act's genesis in the wake of the Enron scandal.<sup>139</sup> However, as Respondents note, the misconduct of lawyers and accountants about which Congress expressed concern is covered by other sections of SOX.<sup>140</sup> Petitioners' understanding of the legislative purpose is flawed because Congress made no indication that it intended to protect *all* whistleblowers, and in fact included language in Section 806 that seems to cabin whistleblower protection.

### *B. No Deference to the DOL*

Because of the uncertainty with respect to the other factors, the Supreme Court's decision could feasibly come down to the amount of weight it is willing to afford the DOL's interpretations. The regulations promulgated by OSHA identify an employee as "an individual presently or formerly working for a covered person."<sup>141</sup> The phrase "covered person" includes contractors and subcontractors of the public companies identified in Section 806.<sup>142</sup> However, the Secretary conceded that these regulations are "not intended to provide statutory interpretations," and that "the statute [does not] delegate authority to the Secretary to regulate litigation in the Federal district courts."<sup>143</sup> This admission by the head of the agency should be enough to demonstrate that the Supreme Court need not defer to the definition of employee as set out in OSHA's regulations.

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138. Brief for Respondents, *supra* note 98, at 7.

139. See Brief for Petitioners, *supra* note 75, at 59–60. It is clear from the congressional record that SOX was meant to combat the "corporate code of silence," which includes employees employed by both the public company itself and those companies with which it does business. See S. REP. NO. 107-146, at 5 (2002).

140. Brief for Respondents, *supra* note 98, at 41.

141. 29 C.F.R. § 1980.101(g) (2014).

142. *Id.* § 1980.101(f).

143. Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 69 Fed. Reg. 52104-01, 52105, 52112 (Aug. 24, 2004) (codified at 29 C.F.R. pt. 1980).

Similarly, the ARB's decision in *Spinner* need not be given deference, as the question of how to define "employee" is a purely legal one.<sup>144</sup> The ARB has only been given adjudicatory authority with respect to SOX, and it has not determined that Petitioners are covered by the Act, as none of the parties in the present case were parties to the decision in *Spinner*.<sup>145</sup> Given that the ARB, like OSHA, lacks policymaking authority, its interpretation of Section 806 in *Spinner* should not be given deference.

### C. Public Policy Considerations

In trying to uphold the purpose envisioned by Congress, the Court will have to consider the possible consequences of its decision: increased liability for many large private organizations or a lack of protection for the employees of these organizations. Admittedly, the demographics of the financial industry support Petitioners' interpretation. The SEC has noted that mutual funds employ nearly 157,000 investment advisors and manage over \$12 trillion on behalf of investors.<sup>146</sup> Moreover, mutual funds often have no employees of their own.<sup>147</sup> Under Respondents' definition of "employee," neither the investment advisors nor the funds would be subject to Section 806 liability.<sup>148</sup>

Yet these policy concerns are outweighed in light of the likely consequences of such a broad reading of "employee." As Respondents note, only 4584 of the more than six million employer firms in the United States in 2007 were listed on a United States stock exchange as publicly traded companies; the vast majority of firms are privately held.<sup>149</sup> Because so many private employers contract with public companies, extending Section 806 liability to private employers would have severe implications. In light of this, the Court should not hold that private companies are also subject to this liability without express direction from Congress.

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144. Brief for Respondents, *supra* note 98, at 46.

145. *Id.*

146. Brief for the Securities and Exchange Commission as Amicus Curiae in Support of Plaintiff-Appellees/Cross-Appellants at 20–21, *Lawson v. FMR LLC*, 670 F.3d 61 (2012) (No. 10-2240) (citation omitted).

147. Brief for Petitioners, *supra* note 75, at 2.

148. *Id.* at 18.

149. Brief for Respondents, *supra* note 98, at 37 (citing Mary Ellen Biery, *Public Companies Out-Invested by Private Firms*, FORBES (Sept. 21, 2012), <http://www.forbes.com/sites/sageworks/2012/09/21/private-companies-invest-more-than-publicly-traded-firms/>).

*D. Likely Disposition*

The Court should not extend deference to DOL interpretations of SOX, as Congress did not provide the agency with any policymaking authority and the Secretary of Labor conceded that in promulgating regulations under Section 806, OSHA was not engaging in statutory interpretation. Still, given the haziness of both the text of Section 806 and the legislative history, there is “substantial ground within which to stake out different opinions regarding statutory intent.”<sup>150</sup> It is therefore difficult to forecast which interpretation the Court will find more compelling. However, because the legislative record gives no express indication that Congress intended to protect employees of private companies, and because public policy favors a narrower interpretation, the Court should adopt a reading of Section 806 that limits whistleblower protection to employees of public companies.

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150. *Lawson v. FMR LLC*, 724 F. Supp. 2d 167, 169 (D. Mass. 2010)