No. 09-55

In the Supreme Court of the United States

STACY PLATONE, PETITIONER

v.

UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CAROL A. DE DEO
Deputy Solicitor

STEVEN J. MANDEL
Associate Solicitor

ELLEN R. EDMOND
Counsel

RACHEL GOLDBERG
Attorney
Department of Labor
Washington, D.C.

ELENA KAGAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in holding that petitioner did not engage in protected activity within the meaning of Section 806(a) of the Sarbanes-Oxley Act of 2002, 18 U.S.C. 1514A.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 548 F.3d 322. The decision and order of the Administrative Review Board (Pet. App. 11a-45a), and the recommended decision and order of the administrative law judge (Pet. App. 46a-114a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 2008. A petition for rehearing was denied on February 2, 2009 (Pet. App. 115a-116a). The United States Bankruptcy Court for the District of Delaware granted petitioner relief from the automatic stay on April 13, 2009 (Pet. App. 117a-118a). The petition for a writ of certiorari was filed on July 13, 2009 (Monday).

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1254(1). As explained below (see pp. 12-15, *infra*), there is a question whether the certiorari petition was timely filed.

STATEMENT

1. In order to restore investor confidence in the wake of the Enron and Worldcom corporate accounting scandals, Congress enacted the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act), Pub. L. No. 107-204, 116 Stat. 745. See S. Rep. No. 205, 107th Cong., 2d Sess. 2 (2002); H.R. Rep. No. 414, 107th Cong., 2d Sess. 18-19 (2002). Congress included whistleblower protection for employees of covered companies in Section 806(a) of the Sarbanes-Oxley Act, 116 Stat. 802 (18 U.S.C. 1514A). Section 806(a) prohibits such companies from retaliating against an employee because such employee provides information to a federal agency, to Congress, or to his employer "regarding any conduct which the employee reasonably believes constitutes a violation" of 18 U.S.C. 1341 (prohibiting mail fraud), 1343 (prohibiting fraud by wire, radio, or television), 1344 (prohibiting bank fraud), or 1348 (prohibiting securities fraud); any rule or regulation of the Securities and Exchange Commission; or any provision of federal law relating to fraud against shareholders. 18 U.S.C. 1514A(a)(1).

Congress charged the Secretary of Labor with investigating complaints of retaliation under Section 806(a), see 18 U.S.C. 1514A(b); 49 U.S.C. 42121(b), and the Secretary delegated that responsibility to the Assistant Secretary for Occupational Safety and Health (OSHA), see Secretary of Labor's Order No. 5-2007, 72 Fed. Reg. 31,160 (2007). After investigating a whistleblower complaint, the Assistant Secretary may either dismiss it as

lacking merit or make a finding of retaliation and order appropriate relief. 18 U.S.C. 1514A(b)(2)(A); 49 U.S.C. 42121(b)(2)(A).

The statutory standards governing retaliation complaints under Section 806(a) require a complaining employee to demonstrate that his having engaged in the protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. 42121(b)(2)(B)(iii). Even when a complaining employee satisfies that evidentiary hurdle, the Assistant Secretary may not order relief on the employee's behalf "if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of" the employee's engaging in the protected activity. 49 U.S.C. 42121(b)(2)(B)(iv).

The Department of Labor has promulgated regulations to govern the handling of complaints under Section 806(a). 29 C.F.R. Pt. 1980. Those regulations permit either a complaining employee or her employer to seek de novo review before an administrative law judge (ALJ) of an initial decision by OSHA on the complaint. 29 C.F.R. 1980.106, 1980.107. Either party may then seek discretionary review of the ALJ's decision by the Administrative Review Board (Board) of the Department of Labor. 29 C.F.R. 1980.110. Finally, either party may seek review of the Agency's final decision—either the ALJ's decision or the Board's decision if the Board has reviewed the ALJ's decision—in a federal court of appeals. 49 U.S.C. 42121(b)(4)(A); 29 C.F.R. 1980.110(b), 1980.112(a).[1]

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[1] In addition, an employee may file a de novo action in federal district court if "the Secretary has not issued a final decision within 180 days

2. In 2002, petitioner was hired as a manager of labor relations at Atlantic Coast Airlines (ACA), a wholly owned subsidiary of Atlantic Coast Airlines Holdings, Inc. Pet. App. 2a. At the time, petitioner was in a relationship with Captain John Swigart, who worked as a pilot for ACA and was a senior official with the Air Line Pilots Association (ALPA), the airline pilots' union. *Ibid.* Swigart recommended petitioner for the job, though it is not clear whether Jeffrey Rodgers—who was ACA's Senior Director of Labor Relations and Planning, and was petitioner's immediate supervisor—knew of the relationship when petitioner was hired. *Ibid*.

After petitioner began working at ACA, she noticed some discrepancies regarding the procedures (known as "flight-loss") according to which the pilot's union reimbursed ACA for time pilots spent at union meetings when they would otherwise have been flying. Pet. App. 2a-3a. Petitioner noticed both that ACA had not billed ALPA for several months of flight-loss and that some ACA pilots were intentionally scheduling flights during times when they knew they would be attending union meetings so that they would be paid even though they did not fly. *Ibid.* ALPA's policy was not to reimburse ACA for pilots' missed flight time on days on which the pilots were originally not scheduled to fly. *Id.* at 3a. Petitioner informed her supervisor and a pilot who served as a union official of what she had discovered, and both reassured her that the union would reimburse ACA for appropriate flight-loss time. *Ibid.*

Petitioner was not satisfied and presented her supervisor with a draft letter she had prepared to send to the

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of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant." 18 U.S.C. 1514A(b)(1)(B).

union official. Pet. App. 3a. Petitioner's supervisor informed her that he would not send the letter. *Ibid.* Several days later, petitioner met with ACA's Director of Employment Services, and again mentioned the flight-loss problem she had identified. *Id.* at 3a-4a. The handwritten notes of a participant in that meeting noted that the issue was raised, but did not indicate that petitioner made any allegations of fraud. *Id.* at 4a. The following day, petitioner met with senior airline officials, who suspended her with pay due to an unspecified conflict of interest. *Ibid.* Several days after that, petitioner was fired, ostensibly because of her relationship with Swigart. *Ibid.*

3. On April 3, 2003, petitioner filed a complaint with the Department of Labor, alleging that she was retaliated against for protected whistleblowing activity, in violation of Section 806(a) of the Sarbanes-Oxley Act. Pet. App. 4a. In that complaint, petitioner alleged that fraud was occurring at ACA in relation to the flight-loss reimbursement procedure. *Id.* at 4a, 27a. OSHA denied petitioner's complaint, finding that she failed to establish that she had engaged in protected activity. *Id.* at 4a.

4. Petitioner requested a hearing before an ALJ, who concluded that petitioner had engaged in protected activity because she had a reasonable basis to suspect that fraud was being perpetrated on ACA and its holding company's shareholders. Pet. App. 4a, 94a-100a. The ALJ found that petitioner had a reasonable basis for her belief that ALPA was defrauding ACA in a scheme to compensate pilots improperly, that such a scheme would involve use of the mail and wires, and that petitioner's supervisor and others at ACA were complicit in the fraud. *Id.* at 4a, 99a. The ALJ imputed

knowledge of petitioner's complaints to the managers at ACA who were responsible for firing her and concluded that petitioner's complaints were a contributing factor to her being dismissed. *Id.* at 4a-5a, 100a-110a.

5. ACA filed an appeal with the Board, which reversed the ALJ's determination. Pet. App. 5a, 11a-45a. The Board concluded that the ALJ had erred in concluding that petitioner had engaged in protected activity under Section 806(a) of the Sarbanes-Oxley Act. *Id.* at 5a-6a, 35a-45a. The Board first held that allegations of mail or wire fraud must involve conduct that is "at least * * * of a type that would be adverse to investors' interests" in order to be protected under the Sarbanes-Oxley Act. *Id.* at 33a; see *id.* at 5a. In addition, the Board held that, in order to be protected, petitioner's allegations must definitively and specifically relate to the categories of fraud and securities violations listed in 18 U.S.C. 1514A(a)(1). Pet. App. 5a, 36a.

Applying those principles to petitioner's claims, the Board concluded that her communications to ACA management regarding the flight-loss procedure were not "protected activity" because they did not communicate information specific enough to indicate possible fraud against shareholders. Pet. App. 5a, 36a-45a.[2] The Board went on to conclude that the "real victim" of any impropriety alleged by petitioner was the union because petitioner had received reassurances that ALPA would reimburse ACA for the flight-loss amounts. *Id.* at 5a, 43a.

6. Petitioner sought review in the court of appeals, which affirmed the Board's finding of no violation of Section 806(a) of the Sarbanes-Oxley Act. Pet. App. 1a-10a.

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[2] Petitioner asserts that the Department of Labor has conceded that she reported an ongoing scheme of mail and wire fraud. Pet. 4. There is no support for her assertion.

The court of appeals explicitly declined to decide whether the Board correctly limited 18 U.S.C. 1514A to protecting complaints of mail or wire fraud only if the alleged fraud would be adverse to the interests of shareholders or investors. Pet. App. 8a n.3. Instead, the court agreed with the Board that, in order to constitute protected activity under that statute, complaints to a supervisor must include "definitive and specific information regarding the alleged fraud that was taking place," and that petitioner "failed to make a proper allegation of fraud" to her supervisors. *Id.* at 8a-9a. Although petitioner successfully alerted ACA management to a "billing discrepancy," the court found that such a discrepancy, "without more, does not equal fraud, and [petitioner] failed to identify to ACA why she believed the actions related to the discrepancies would violate securities laws and constitute a fraud." *Id.* at 9a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioner asks (Pet. i) this Court to grant the petition for a writ of certiorari to decide whether Section 806(a) of the Sarbanes-Oxley Act, 18 U.S.C. 1514A, extends whistleblower protection to employees who complain of suspected corporate fraud "when the scheme is designed to defraud another party and not the company's shareholders." That issue is not presented in this case because the court of appeals expressly declined to reach it, resting its decision on an entirely independent ground that petitioner does not ask this Court to review.

Congress enacted the Sarbanes-Oxley Act in 2002 in the wake of various financial accounting scandals. Con-

gress included in Section 806(a) of the Act protection for whistleblowers who report various types of fraud and securities violations to a federal agency, to Congress, or to their supervisors. 18 U.S.C. 1514A(a). Specifically, Section 806(a) prohibits publicly traded companies from retaliating against an employee who provides information "regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [fraud by wire, radio, or television], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." 18 U.S.C. 1514A(a)(1). In order to prevail on a claim of retaliation under Section 806(a), an employee must prove by a preponderance of the evidence that (1) she engaged in protected activity; (2) the employer was aware of the protected activity; (3) she suffered an adverse employment action; and (4) the protected activity was a contributing factor in the unfavorable action. 29 C.F.R. 1980.104(b)(1); 18 U.S.C. 1514A(b)(2)(C); 49 U.S.C. 42121(b)(2)(B); *Allen* v. *Administrative Review Bd.*, 514 F.3d 468, 475-476 (5th Cir. 2008).

Petitioner asks this Court to grant her petition for a writ of certiorari to correct reasoning relied on by the Board in concluding that she had not engaged in protected activity and was, therefore, not a victim of retaliation prohibited by Section 806(a). The Board reasoned that petitioner had not engaged in protected activity in part because she had not complained of fraud that would adversely affect shareholders of ACA. Pet. App. 33a. That reasoning was expressly *not* adopted by the court of appeals, *id.* at 8a n.3, which affirmed the Board's finding of no violation based on the fact that petitioner's

communications to her supervisors did not clearly allege fraud against anyone, *id.* at 8a-10a. Thus, even if this Court were to grant the petition and agree with petitioner that the Board erred in stating that Section 806(a) protection is limited to employees complaining about fraud against shareholders, such a decision would have no effect whatsoever on petitioner's case. The court of appeals' determination—which petitioner neither challenges nor asks this Court to review—that petitioner failed to clearly communicate any allegations of fraud to her supervisors would remain and would continue to support the determination that petitioner did not engage in any protected activity.

Thus, the review petitioner seeks is both unwarranted and unavailable. This Court reviews judgments, not the reasoning behind the judgments. See, *e.g.*, *Rutan* v. *Republican Party*, 497 U.S. 62, 76 (1990); *Smith* v. *Phillips*, 455 U.S. 209, 215 & n.6 (1982). The Court should decline to review certain reasoning in an agency decision below when that reasoning was not even adopted by the court of appeals that affirmed the agency's ultimate determination.

Although petitioner seems to acknowledge that it is the Board's reasoning she asks this Court to review rather than the court of appeals' reasoning, see Pet. 13-15 (discussing the Board's decision), she also claims that the court of appeals "impliedly adopted the [Labor] Department's *Platone* rule—that the statute protects the reporting only of frauds against shareholders." Pet. 11-12. That contention is directly contradicted by the court of appeals' opinion, which explicitly states that the decision does not reach the portion of the Board's opinion purporting to "require the complainant, when alleging mail or wire fraud, to demonstrate that the fraud would

be adverse to the interests of shareholders or investors," but rests instead on "alternate grounds." Pet. App. 8a n.3. Indeed, the court of appeals highlighted the limited nature of its ruling, stating that its holding "does not heighten the requirements for a complainant's prima facie showing or otherwise change the burden-shifting regime for Sarbanes-Oxley whistleblower actions." *Id.* at 9a; see also *id.* at 10a ("We hold only that a complainant must alert management to more than the fact that the company's near-term profits were affected by billing discrepancies in order to meet the standard of definitively and specifically alleging mail or wire fraud.")

2. Even if the issue petitioner asks this Court to decide were actually presented in this case, it would not merit the Court's review because there is no disagreement among the courts of appeals about whether Section 806(a) protects employees who report fraud against entities other than shareholders. Petitioner's contention (Pet. 16-20) that there is such a circuit split is misguided.

Petitioner asserts that three other courts of appeals have held that Section 806(a) of the Sarbanes-Oxley Act protects only whistleblowers who are complaining of fraud against shareholders.[3] She is mistaken. The First Circuit in *Day* v. *Staples, Inc.*, 555 F.3d 42 (2009), held that an employee who alleged retaliation for reporting suspicions of fraud against shareholders had not en-

[3] Petitioner also claims (Pet. 18) that the district court's decision in *Van Asdale* v. *International Game Technology*, 498 F. Supp. 2d 1321 (D. Nev. 2007), supports the Board's reasoning in this case. However, the Ninth Circuit reversed that decision after petitioner filed her petition. 577 F.3d 989 (2009). Neither the district court nor the court of appeals in that case specifically addressed the issue for which petitioner seeks review by this Court.

gaged in protected activity because he did not have a reasonable belief that the company or anyone it employed had engaged in fraud against shareholders. *Id.* at 56-58. But the court did not hold that Section 806(a) protects only allegations of fraud against shareholders; rather, the employee in that case happened to have been complaining about activity he claimed to believe was fraud against shareholders. *Id.* at 54-55. The court specifically expressed the view that Section 806(a) protects complaints of mail fraud and wire fraud independent of whether such fraud is against shareholders. *Ibid.*

Nor did the Fourth Circuit's decision in *Livingston* v. *Wyeth, Inc.*, 520 F.3d 344 (2008) (cited at Pet. 18), hold that protected activity under Section 806(a) is limited to complaints about fraud against shareholders. Rather, the employee in that case also alleged that he had complained about conduct that constituted fraud against shareholders. *Id.* at 350-351. The Fourth Circuit held that the employee did not have a reasonable basis to believe that any such fraud existed, and had, therefore, not engaged in any protected activity. *Id.* at 354-355. But the Fourth Circuit, like the First Circuit, did not purport to address whether the Sarbanes-Oxley Act's whistleblower protection would protect an allegation of mail or wire fraud against an outside third party, rather than against the company's shareholders.

Petitioner similarly errs in her characterization of the Seventh Circuit's decision in *Harp* v. *Charter Communications, Inc.*, 558 F.3d 722 (2009), which held that the employee did not engage in protected activity under Section 806(a) because she did not have a reasonable belief that fraud was being committed by her company. Although the employee in that case argued to the court of appeals that her company had engaged in activity that

may have constituted fraud against a municipality, the employee admitted that she had not known of such activity at the time of the events at issue in the case and had, therefore, not complained of such activity to her employer or to anyone else. *Id.* at 726. On that basis—that the employee neither knew of nor complained of any fraud against a municipality—the court of appeals characterized such fraud as not being "the basis for the Sarbanes-Oxley challenge." *Ibid.* (cited at Pet. 17-18 & n.22). But that statement was a factual description of the claims before the court in that case, not a legal description of the types of claims that could or could not be raised in other cases.[4]

In addition, the actual basis for the court of appeals' conclusion in this case—that, in order to constitute protected activity, an employee's communications must definitively and specifically relate to one of the categories of fraud or securities violations listed in 18 U.S.C. 1514A(a)(1)—is in accord with every other court of appeals to consider that issue. See *Van Asdale*, 577 F.3d at 996-997; *Day*, 555 F.3d at 56; *Allen*, 514 F.3d at 476-477.

3. Finally, there is a question whether petitioner's certiorari petition was timely filed. Supreme Court Rules 13.1 and 13.3 require that a petition for a writ of

[4] Petitioner points to two district court cases that have disagreed with the Board's reasoning below that allegations of fraud must be of fraud against shareholders in order to qualify as protected activity under Section 806(a). See Pet. 19-20 & nn.24, 25, 27 (citing *Reyna* v. *ConAgra Foods, Inc.*, 506 F. Supp. 2d 1363, 1382 (M.D. Ga. 2007), and *O'Mahony* v. *Accenture Ltd.*, 537 F. Supp. 2d 506, 517 (S.D.N.Y. 2008)). The fact that the only conflict petitioner can identify is between the Board's decision in this case on one hand and the decisions of two district courts on the other highlights why review by this Court is not warranted.

certiorari be filed within 90 days after a court of appeals denies a petition for rehearing en banc. Rule 13.5 allows a Justice of the Court to extend the period for filing a certiorari petition for up to 60 additional days, for good cause shown. In the absence of extraordinary circumstances, such an application must be filed at least 10 days prior to the date the petition is due. For civil cases, these time limits are set out by statute. 28 U.S.C. 2101(c). Rule 13.2 indicates that a failure to comply with the time limits in Section 2101(c) renders a petition "jurisdictionally out of time." And this Court has repeatedly held in civil cases that the statutory time limit is jurisdictional. See, *e.g.*, *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 90 (1994); *Department of Banking* v. *Pink*, 317 U.S. 264, 268 (1942).

In this case, the petition for rehearing en banc was denied on February 2, 2009. Petitioner requested that the bankruptcy court lift the automatic stay so that she could file a certiorari petition on February 6, 2009, and the bankruptcy court signed an order granting petitioner's motion on April 13, 2009. See No. 05-20011 Docket entry No. 2742 (Bankr. Del. Feb. 6, 2009) (request to lift stay to file petition for writ of certiorari docketed); *id.* No. 2763 (Apr. 13, 2009) (order lifting stay signed). At that point, 20 of the 90 days for filing a certiorari petition remained. In those 20 days, petitioner neither filed her petition for a writ of certiorari nor asked this Court for an extension of time within which to do so. She then filed her certiorari petition 91 days (on a Monday) after the bankruptcy court issued the order lifting the automatic stay for the purpose of allowing her to file a petition.

Section 108(c) of the Bankruptcy Code extends fixed time periods "for commencing or continuing a civil ac-

tion in a court other than a bankruptcy court on a claim against the debtor." 11 U.S.C. 108(c). The statute provides that such a time period shall not "expire until the later of—(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or (2) 30 days after notice of the termination or expiration of the [automatic] stay." *Ibid.* The weight of authority holds that the "suspension" mentioned in Subsection (1) does not refer to the automatic stay itself, but must result from a provision of state or federal law outside the bankruptcy code that suspends a fixed time period during the pendency of a bankruptcy proceeding. 2 *Collier on Bankruptcy* ¶ 108.04[2], at 108-15 to 108-16 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2006); *Rogers* v. *Corrosion Prods., Inc.*, 42 F.3d 292, 297 & nn.6-7 (5th Cir.) (collecting cases), cert. denied, 515 U.S. 1160 (1995). If that interpretation is correct, Subsection (1) has no bearing on the time for filing a petition for a writ of certiorari, and petitioner should have filed her petition within 30 days of the bankruptcy court's order lifting the stay for the purpose of filing the petition pursuant to Subsection (2). She did not. However, as this Court has noted, the lower courts are somewhat divided over whether Section 108(c)(1) contains a tolling provision. *Young* v. *United States*, 535 U.S. 43, 52 (2002).[5] If it does, petitioner's 90-day period of time in which to file a certiorari petition would not have commenced running until the bankruptcy court lifted the stay, and her peti-

[5] The United States argued in *Young* that "Section 108(c) tolls the limitations period for a nonbankruptcy cause of action that has not yet run at the time the debtor's petition is filed." U.S. Br. at 18, *Young, supra*, (No. 00-1567). The government's brief did not, however, distinguish between paragraphs (1) and (2) of Section 108(c).

tion would be timely. Rather than potentially "confront a procedural obstacle unrelated to the question presented," *DTD Enters., Inc.* v. *Wells*, No. 08-1407, 2009 WL 3255157, at *1 (Oct. 13, 2009) (Kennedy, J., concurring in denial of petition for writ of certiorari), this Court should deny the petition for this reason as well as the others stated above.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General

CAROL A. DE DEO
Deputy Solicitor

STEVEN J. MANDEL
Associate Solicitor

ELLEN R. EDMOND
Counsel

RACHEL GOLDBERG
Attorney
Department of Labor

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