No. 12-3

In the Supreme Court of the United States

JACKIE HOSANG LAWSON AND JONATHAN M. ZANG,
PETITIONERS

v.

FMR LLC, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether an employee of a privately held contractor or subcontractor of a public company is protected from retaliation by Section 806 of the Sarbanes-Oxley Act of 2002, 18 U.S.C. 1514A.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Congress enacted the Sarbanes-Oxley Act of 2002 to protect investors in public companies "[a]fter a series of celebrated accounting debacles." *Free Enterprise Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3147 (2010); see Pub. L. No. 107-204, 116 Stat. 745 (title). In Section 806 of the Act, Congress created a new cause of action for persons who suffer retaliation when they report fraud or violation of securities regulations to their supervisors or to the government. See

116 Stat. 802 (enacting 18 U.S.C. 1514A). That provision states:

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

when the employee provides information to a federal agency, Congress, or a supervisor regarding any conduct the employee reasonably believes violates certain federal fraud statutes or a regulation of the Securities and Exchange Commission (SEC). 18 U.S.C. 1514A(a)(1) (2002).[1] Put more simply, the statute prohibits retaliation by a public company[2]—or an officer, employee, contractor, subcontractor, or agent of a public

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[1] Following the events in this case, Congress amended Section 1514A expressly to include certain subsidiaries of public companies and nationally recognized statistical rating organizations. See Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, §§ 922(b) and (c), 929A, 124 Stat. 1848, 1852 (2010). Those changes do not apply to this case, see Pet. App. 12a n.6, and therefore all citations to Section 1514A are to the unamended text in the 2006 edition.

[2] Like the courts below, this brief uses the term "public company" to refer to a company with a class of securities registered under Section 12 of the Securities Exchange Act and those required to file reports under Section 15(d) of the Securities Exchange Act, and "publicly traded companies" to refer only to companies with securities registered under Section 12 of the Securities Exchange Act. See Pet. App. 13a.

company—against "an employee" who reports fraud or a violation of securities regulations. The question in this case is whether the phrase "an employee" includes an employee of a contractor or subcontractor of a public company, or refers only to an employee of the public company itself.

The Secretary of Labor is responsible for enforcing this whistleblower-protection provision. A person who alleges retaliation or discrimination under this provision may file a complaint with the Secretary. 18 U.S.C. 1514A(b)(1)(A). The Secretary is authorized to investigate complaints of retaliation and issue a final decision following an investigation and hearing. See 18 U.S.C. 1514A(b)(1)(A) and (2)(A); 49 U.S.C. 42121(b). The Secretary has delegated investigatory responsibility to the Assistant Secretary of Labor for Occupational Safety and Health and adjudicatory authority to the Department of Labor's Administrative Review Board (ARB). See Secretary's Order No. 1-2012, 77 Fed. Reg. 3912 (Jan. 25, 2012); Secretary's Order No. 1-2010, 75 Fed. Reg. 3924 (Jan. 25, 2010); Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); see also 29 C.F.R. 1980.110(a).

Final decisions of the ARB are reviewable in the federal courts of appeals under the Administrative Procedure Act. See 18 U.S.C. 1514A(b)(1) and (2)(A); 49 U.S.C. 42121(b)(4)(A); see also 5 U.S.C. 706(2)(A) and (E). If the ARB does not issue a final decision within 180 days of the filing of the administrative complaint, and there is no bad faith on the part of the person alleging retaliation, that person may file suit directly in federal district court. See 18 U.S.C. 1514A(b)(1)(B). An employee who makes out a claim of retaliation is "entitled to all relief necessary to make the employee whole,"

including reinstatement, back pay with interest, and fees and costs. 18 U.S.C. 1514A(c).

2. Petitioners are two former employees of respondents who allege that respondents retaliated against them for reporting fraud. Pet. App. 3a-5a, 7a. Respondents are privately held companies that provide investment advice and management services to the Fidelity mutual funds. *Id.* at 3a-4a, 7a, 13a. The Fidelity mutual funds are public companies with no employees of their own; their day-to-day operations are carried out by employees of investment advisers like respondents, under contracts approved by the mutual funds' board of trustees. *Id.* at 3a-4a, 78a-79a; see *id.* at 26a (noting that "investment companies like the Fidelity mutual funds often do not have their own employees, but only a Board of Trustees, and are often advised and managed by private entities, like [respondents]").

Petitioners each filed a whistleblower complaint with the Department of Labor. Pet. App. 5a, 7a. Lawson, a former finance director for Fidelity Brokerage, alleged that she had been constructively discharged in retaliation for reporting allegedly wrongful accounting and fee practices. *Id.* at 7a, 79a-82a. Zang, a former research analyst and portfolio manager for several Fidelity mutual funds, contended that respondents terminated his employment because he informed Fidelity management about conflicts of interests and alleged errors in SEC-required disclosures. *Id.* at 5a, 84a-86a.

3. Petitioners each filed suit in federal district court after the Department of Labor had not issued a final decision within 180 days of either complaint. Pet. App. 6a-8a, 82a-83a, 87a; see 18 U.S.C. 1514A(b)(1)(B). Respondents filed motions to dismiss both complaints on the ground that employees of contractors and subcon-

tractors of a public company are not protected by the whistleblower-protection provision. Pet. App. 8a.

The district court denied the motions to dismiss. Pet. App. 76a-133a. As relevant here, the court held that an employee of a contractor or subcontractor of a public company is protected from retaliation under 18 U.S.C. 1514A when the employee reports fraud against the public company's shareholders. Pet. App. 96a-123a. The court noted that "[t]he statute protects 'an employee,' but does not directly state at which entity the individual must be employed." *Id.* at 98a-99a. The court concluded that limiting the statute to only employees of public companies would be "an excessively forced and formalistic reading" that would be inconsistent with Congress's goal of encouraging insiders to report fraud against shareholders. *Id.* at 115a. The Court observed that Congress was particularly concerned "with failures to report instances of fraud against shareholders" by "employees of those institutions working with" public companies, such as the accountants, auditors, and lawyers who failed to report the accounting fraud that led to the collapse of Enron Corporation. *Id.* at 115a-116a.

The district court certified the question of Section 1514A(a)'s application to petitioners to the court of appeals for interlocutory review under 28 U.S.C. 1292(b). Pet. App. 9a.

4. The court of appeals reversed. Pet. App. 1a-75a. The court held that only an employee of a public company is protected by 18 U.S.C. 1514A. Pet. App. 17a. The court acknowledged that "different readings may be given" to the term "employee" in the statute, but concluded that the "more natural" reading is that "only the employees of the defined public companies are covered." *Id.* at 15a-17a. The court based that conclusion on the

statute's title and caption, both of which refer to "employees of publicly traded companies," *id.* at 19a-22a; other statutes in which Congress used specific language to regulate private companies, *id.* at 22a-33a; and general statements in congressional reports and by individual legislators about protecting "employees of publicly traded companies," *id.* at 37a-40a. The court declined to defer to the Department of Labor's interpretation of the statute on the grounds that its regulation addressing this question is procedural, rather than substantive, and because there is "no ARB holding on point." *Id.* at 46a-51a.

Judge Thompson dissented. Pet. App. 52a-75a. In her view, the court "impose[d] an unwarranted restriction on the intentionally broad language of the Sarbanes-Oxley Act" that "bar[s] a significant class of potential securities-fraud whistleblowers from any legal protection." *Id.* at 52a. Judge Thompson noted that the whistleblower-protection provision "by its terms applies" because petitioners allege that a "contractor" of a public company "discharge[d] * * * an employee," and there is "no restriction limiting the statute's application to employees of publicly held companies." *Id.* at 53a, 55a. Judge Thompson further explained that "Congress was explicit" in other portions of the Sarbanes-Oxley Act "where it intended to regulate public entities only." *Id.* at 56a-59a. Judge Thompson placed little weight on the provision's title and caption, because they "do[] not purport to apply any explicit limitations." *Id.* at 59a-60a. Finally, Judge Thompson afforded deference to the Department of Labor's view that the whistleblower-protection provision applies to employees of contractors of public companies. *Id.* at 62a-63a, 70a-73a (citing 29 C.F.R. 1980.101 (2011)).

Petitioners filed a petition for rehearing en banc, which was denied, with two judges dissenting. Pet. App. 134a-135a.

5. After the court of appeals' decision in this case, the ARB addressed the question whether 18 U.S.C. 1514A applies to employees of contractors and subcontractors in *Spinner* v. *David Landau & Associates, LLC*, Nos. 10-111, 10-115, 2012 WL 1999677, at *2 (May 31, 2012). Pet. App. 136a-199a. After an extensive analysis of the statute's text, broader statutory framework, legislative history, and purpose, the ARB concluded that the whistleblower-protection provision applies to an auditor at a privately held firm that contracted with a public company. *Id.* at 166a. The ARB specifically considered, but ultimately declined to adopt, the court of appeals' reasoning in this case. *Id.* at 144a-145a.

DISCUSSION

The court of appeals erred in holding that employees of contractors and subcontractors of public companies are not protected from retaliation by 18 U.S.C. 1514A. The statute states that a "contractor" or "subcontractor" of a public company may not retaliate against "an employee" who reports fraud. The text does not limit this protection to employees of public companies, and the legislative record supports the conclusion that Congress intended to reach employees of private contractors of public companies who report fraud against shareholders. This understanding of the statute is reflected in a regulation issued by the Department of Labor as well as in decisions of the ARB. The court of appeals' rule creates an unwarranted gap in whistleblower protection for many of the employees in the best position to discover and report corporate fraud.

However, review of the question presented would be premature at this time. There is no disagreement in the circuits on that question, the issue has arisen infrequently, and no circuit has had the opportunity to consider the ARB's recent decision in *Spinner* v. *David Landau & Associates, LLC*, Nos. 10-111, 10-115, 2012 WL 1999677 (May 31, 2012), which is entitled to *Chevron* deference. The petition for a writ of certiorari therefore should be denied.

A. The First Circuit Erred In Holding That 18 U.S.C. 1514A Is Inapplicable To Petitioners

1. a. The statutory provision at issue prohibits retaliation by any "company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)), or any officer, employee, contractor, subcontractor, or agent of such company, * * * against *an employee*." 18 U.S.C. 1514A(a) (emphasis added). The statutory text identifies a broad range of entities and persons who are prohibited from engaging in retaliation—a public company or "any officer, employee, contractor, subcontractor, or agent" of such a company. See *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("any" is a term of "breadth"). The statute then defines the object of the impermissible retaliation—"an employee." By its plain terms, the statute does not limit its protection to employees of public companies. See Pet. App. 55a (Thompson, J., dissenting). Congress's use of the broad term "an employee," rather than a narrower term like "an employee of such company," evidences Congress's intent to protect from retaliation employees of each of the listed persons and entities who

report fraud, rather than only employees of the public company itself. See *id.* at 148a.

Other text in the provision reinforces the conclusion that "an employee" includes an employee of a contractor or subcontractor. Section 1514A(a) provides that the specified persons and entities may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment." 18 U.S.C. 1514A(a). As the district court noted, if the statute were limited to employees of public companies, the prohibitions on contractors and subcontractors would have little force, because it would be "difficult to think of circumstances that would * * * enable a subcontractor to discharge, demote, or suspend the employee of a public company." Pet. App. 101a-102a. It also would be difficult to apply the statutory remedies in such circumstances, because a contractor or subcontractor would not be able to reinstate an employee of a public company to his former position following a successful lawsuit. *Id.* at 150a (ARB's decision in *Spinner*). By contrast, reading the phrase "an employee" to include an employee of a contractor or subcontractor gives meaning to the prohibition against retaliation by contractors and subcontractors. See *id.* at 54a-55a (Thompson, J., dissenting).

b. The court of appeals erred in finding that the whistleblower-protection provision's title and caption were dispositive. A statute's title or caption may be a helpful aid in interpreting "some ambiguous word or phrase," but it "cannot limit the plain meaning of the text." *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 528-529 (1947). That is particularly true where the title and caption simply provide "a

short-hand reference to the general subject matter involved." *Id.* at 528.

Here, both the title of this section in the relevant public law—"Protection For Employees of Publicly Traded Companies Who Provide Evidence of Fraud," § 806, 116 Stat. 802—and Section 1514A(a)'s caption—"Whistleblower Protection for Employees of Publicly Traded Companies"—provide such a short-hand reference. The title and caption plainly do not define the whole scope of the whistleblower-protection provision. For example, although the title and caption refer to "publicly traded companies," the provision by its text applies both to those companies and to companies that are not publicly traded but are required to file reports under Section 15(d) of the Securities Exchange Act. See 18 U.S.C. 1514A(a). As the district court explained, it is "reasonable" to use the quoted caption and title as a short-hand description of a provision that covers both employees of public companies and "employees of their related entities" because "all protected employees would have some connection to public companies, even if indirectly," and because a title and caption that included all of the "complicated clauses and concepts" in the statute's text would be cumbersome. Pet. App. 107a-108a. That is confirmed by the title of 18 U.S.C. 1514A as a whole—"Civil action to protect against retaliation in fraud cases"—which plainly does not limit the protection against retaliation to employees of public companies. See Pet. Reply 10.

c. The legislative record also supports the conclusion that Congress intended to protect employees of contractors and subcontractors. One of Congress's key goals was to restore investor confidence in the Nation's financial markets in the wake of various financial accounting

scandals. See S. Rep. No. 146, 107th Cong., 2d Sess. 2 (2002) (*Senate Report*). "[N]othing in the legislative history" shows a congressional intent to "limit whistleblower protection to employees of public companies"; instead, the legislative record "refers positively to extending whistleblower protection in order to encourage the reporting of securities fraud." Pet. App. 60a-61a (Thompson, J., dissenting).

Congress enacted the whistleblower-protection provision "in the wake of the continuing Enron Corporation * * * debacle," in which, "[w]ith the assistance of [Arthur] Andersen and its other auditors, Enron apparently successfully deceived the investing public and reaped millions." *Senate Report* 2-3; *id.* at 2 (noting that Enron perpetuated its fraud "with the approval or advice of its accountants, auditors and lawyers"). The *Senate Report* specifically noted that "employees at both Enron and Andersen attempted to report or 'blow the whistle' on fraud, but they were discouraged at nearly every turn." *Id.* at 5. The *Senate Report* recounted specific instances of retaliation against employees of both Enron and Arthur Anderson, including when an "Andersen partner was apparently removed from the Enron account when he expressed reservations about the firm's financial practices." *Ibid.* This discussion reinforces the conclusion that in the specific provision of the Sarbanes-Oxley Act affording protection to whistleblowers, Congress intended to protect both employees of public companies and employees of their contractors from retaliation. Construing the whistleblower-protection provision to protect employees of contractors of public companies addresses this congressional concern, whereas construing the statute to protect only employees of public companies would leave unprotected "outside accountants,

auditors, and lawyers, who are most likely to uncover and comprehend evidence of potential wrongdoing." Pet. App. 158a (ARB decision in *Spinner*).

The resulting gap in protection would be especially troubling with respect to mutual fund companies. "[T]he Fidelity funds have no employees of their own," and (as is typical in the industry) they depend on contractors and subcontractors like respondents for their day-to-day operations. Pet. App. 4a, 26a-27a. Yet under respondents' view, those individuals would have no protection whatsoever under 18 U.S.C. 1514A. See Pet. App. 121a ("If [18 U.S.C. 1514A] only protected employees of public companies, then any reporting of fraud involving a mutual fund's shareholders would go unprotected, for the very simple reason that no 'employee' exists for this particular type of public company."). The frustration of congressional purpose resulting from the court of appeals' interpretation therefore is particularly acute in the mutual fund industry.[3]

2. To the extent 18 U.S.C. 1514A(a) is ambiguous, the Department of Labor has provided an interpretation of it that is entitled to deference. Congress has charged the Secretary of Labor with enforcing the

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[3] Respondents contend (Br. in Opp. 28-32) that exempting employees of contractors and subcontractors from 18 U.S.C. 1514A is unproblematic because other statutes protect them from retaliation. But those statutes do not fill the void left by the court of appeals' erroneous construction of the whistleblower-protection provision. Most of the cited provisions do not remedy retaliation. For example, Section 1107 of Sarbanes-Oxley, 18 U.S.C. 1513(e), which respondents characterize as criminalizing retaliation, is available to prosecute those who engage in criminal obstruction of justice, but provides no remedies to employees who are retaliated against for reporting fraud or violations of SEC rules to their employers or the SEC. See Pet. Reply 3-6.

whistleblower-protection provision, both through investigation and through formal adjudication, see 18 U.S.C. 1514A(b), and the Secretary has delegated adjudicatory authority to the ARB, see 67 Fed. Reg. at 64,272, 64,273. Agency views expressed through formal adjudication by the ARB are entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). See, *e.g.*, *Wiest* v. *Lynch*, No. 11-4257, 2013 WL 1111784, at *8 (3d Cir. Mar. 19, 2013); *Welch* v. *Chao*, 536 F.3d 269, 276 n.2 (4th Cir. 2008), cert. denied, 556 U.S. 1181 (2009). See also *SEC* v. *Zandford*, 535 U.S. 813, 819-820 (2002) (an interpretation of ambiguous statutory text, rendered "in the context of formal adjudication, is entitled to deference if it is reasonable"); *United States* v. *Mead Corp.*, 533 U.S. 218, 229-230 (2001) (recognizing that "express congressional authorizations to engage in the process of * * * adjudication that produces * * * rulings for which deference is claimed" is "a very good indicator of delegation meriting *Chevron* treatment"). Accordingly, the ARB's resolution of any ambiguity in the phrase "an employee" is "controlling" as long as it is reasonable.

Even before the court of appeals' decision in this case, the ARB had consistently viewed the whistleblower-protection provision as not limited to employees of public companies. See Pet. App. 143a-144a.[4] The ARB based that view in part on a Depart-

[4] See, *e.g.*, *Charles* v. *Profit Inv. Mgmt.*, No. 10-071, 2011 WL 6981992, at *4-*5 (ARB Dec. 16, 2011) (rejecting the conclusion that an employee of a private company is not covered by the whistleblower-protection provision because that provision "covers only employees of publicly traded companies"); *Funke* v. *Federal Express Corp.*, No. 09-004, 2011 WL 3307574, at *5-*6 (ARB July 8, 2011) (holding that the statute covers disclosure of third-party fraud and noting that "Congress understood that to effectively address corporate fraud, the law needed to extend to entities related to public

ment of Labor regulation that applies the whistleblower-protection provision to employees of contractors and subcontractors. See 29 C.F.R. 1980.101 (2011) (defining "employee" as including "an individual presently or formerly working for a company or company representative" and defining a "company representative" as including "any officer, employee, contractor, subcontractor, or agent of a [public] company"), 1980.102(a) (prohibition on retaliation against "any employee"); 69 Fed. Reg. 52,104, 52,105-52,106 (Aug. 24, 2004) (stating in preamble that "[t]he statute * * * protects the employees of publicly traded companies as well as the employees of contractors, subcontractors, and agents of those publicly traded companies").[5] Although the ARB's prior decisions did not expressly hold that an employee of a contractor or subcontractor of a public company is covered by the whistleblower-protection provision, and the Secretary had deemed the regulation "procedural," see Pet. App. 45a n.21, the court of appeals erred in

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companies—accounting firms, law firms, and the like—which may themselves be involved in performing or disguising fraudulent activity"); *Johnson* v. *Siemens Bldg. Techs., Inc.*, No. 08-032, 2011 WL 1247202, at *12 (ARB Mar. 31, 2011) (holding that an employee of a subsidiary of a public company is covered by the statute and explaining that the statute reaches "more than employees of publicly traded companies").

[5] The district court (Pet. App. 116a-117a) and the court of appeals (*id.* at 47a-48a) both referred to the 2011 version of the regulation. Although the regulation has been amended and the terminology has changed, the regulation continues to prohibit retaliation against an employee of a contractor or subcontractor. See 29 C.F.R. 1980.101(f) and (g) (current version) (defining "employee" as including "an individual presently or formerly working for a covered person," and defining a "covered person" as including "any officer, employee, contractor, subcontractor, or agent of [a public] company"), 1980.102(a) (prohibition on retaliation against "any employee").

giving these statements of the expert agency's views no weight at all. At a minimum, the Department's consistent and reasonable position should have been afforded deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

In any event, the ARB has recently and comprehensively addressed the question presented, and its view that the whistleblower-protection provision applies to employees of contractors and subcontractors is entitled to *Chevron* deference. See Pet. App. 136a-199a (*Spinner*, *supra*); pp. 12-13, *supra*. In *Spinner*, the ARB explained that although there is "some ambiguity" in the statute's text, the better view is that "an employee" is not limited to an employee of a public company, because "the statute does not restrict its application to [such] employees" by its plain terms and the prohibition on retaliation by contractors and subcontractors would have little meaning if their employees were not covered. Pet. App. 148a, 150a-151a. The ARB considered the provision's title and caption, but declined to find them "controlling," because "[n]either * * * describes the full scope or complexity of [18 U.S.C. 1514A's] provisions." Pet. App. 151a-152a.

The ARB found "[n]othing" in the legislative history showing that "Congress intended to limit whistleblower protection * * * to only employees of publicly traded companies," and it observed that "denying coverage to employees of contractors, subcontractors, or agents runs counter to [Congress's] goals." Pet. App. 154a. The ARB also noted that the provision at issue was patterned on other whistleblower-protection statutes and those statutes cover employees of contractors. *Id.* at 161a-165a. Finally, the ARB found support in the "decades of Department of Labor precedent extending

coverage under analogous whistleblower statutes to employees of contractors." *Id.* at 143a n.7.

The ARB's decision in *Spinner* is entitled to deference. As the court of appeals recognized, "different readings may be given to the term 'employee'" in 18 U.S.C. 1514A. Pet. App. 15a. As explained above and in the ARB's decision in *Spinner*, it is reasonable to read the broad and inclusive term "an employee" to include employees of contractors and subcontractors. The court of appeals therefore erred in excluding those employees from the statute's reach.

B. The Question Presented Does Not Warrant Review At This Time

The question whether employees of contractors and subcontractors of public companies are covered by the whistleblower-protection provision in 18 U.S.C. 1514A is an important one. The court of appeals' decision creates a gap in whistleblower protection under the Sarbanes-Oxley Act, contrary to Congress's purpose of protecting insiders from retaliation when they report fraud or violations of securities regulations. Nonetheless, further review of the question presented is unwarranted at this time.

1. The court of appeals' decision does not conflict with the decision of any other court of appeals on the question presented. As the First Circuit recognized in this case (Pet. App. 14a), no other court of appeals has addressed whether employees of contractors and subcontractors of public companies are protected by 18 U.S.C. 1514A.[6] The lack of a circuit conflict and the

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[6] In *Carnero* v. *Boston Scientific Corp.*, 433 F.3d 1 (1st Cir.), cert. denied, 548 U.S. 906 (2006), the court of appeals considered a retaliation claim by an employee of a private subsidiary of a public

infrequency with which federal courts have faced this question, cf. Br. in Opp. 12-14, counsel against this Court's review at this time.

Although the question presented is significant, it would be premature for this Court to grant review before other courts have the opportunity to consider the issue. Despite the court of appeals' erroneous decision, whistleblowers who work for privately held accounting firms, law firms, and investment advisers to public companies will still be able to file complaints with the Secretary, who will still adjudicate those complaints to determine whether unlawful retaliation occurred, and the ARB will continue to apply its decision in *Spinner* to claims outside of the First Circuit. See Pet. App. 145a n.10. In all circuits but one, whether an employee of a contractor or subcontractor of a public company is covered by the whistleblower-protection provision is an open question. This Court would benefit substantially by permitting the other courts of appeals to consider the question presented before the Court intervenes.

2. Further percolation in the circuits is especially appropriate because no circuit—including the First Circuit—has considered the ARB's recent decision in

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company. *Id.* at 2. But the issue before the court was whether the whistleblower-protection provision had extraterritorial effect; the court did not address whether the provision applies to employees of contractors and subcontractors of public companies. *Id.* at 5-6.

In *Fleszar* v. *United States Department of Labor*, 598 F.3d 912 (7th Cir.), cert. denied, 131 S. Ct. 423 (2010), the court of appeals affirmed the ARB's dismissal of a case against the American Medical Association because that organization is not a public company. *Id.* at 913. The court suggested in dicta that employees of contractors of public companies might not be protected, but it did not need to resolve that question because there was no claim of retaliation against an employee of a contractor in the case. *Id.* at 915.

Spinner. Although prior ARB decisions stated the agency's longstanding view that employees of contractors and subcontractors are protected by 18 U.S.C. 1514A, they did not expressly address the question presented. See Pet. App. 105a (district court's statement that "[t]he ARB of DOL has yet to provide the ALJs with definitive clarification on these matters"). But in *Spinner*, the ARB directly and comprehensively addressed that legal question, and it concluded that the better reading of the statute is that "an employee" includes an employee of a contractor or subcontractor. *Id.* at 146a-166a. The ARB also specifically considered the reasoning of the First Circuit in this case, and it explained why it declined to adopt that reasoning. *Id.* at 144a-146a. Both the First Circuit and the other courts of appeals should be permitted to consider whether the ARB's decision in *Spinner* is entitled to *Chevron* deference.[7] For that reason as well, further review is unwarranted at this time.

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[7] The First Circuit may decline to defer to the agency's analysis in *Spinner*, because the court stated in its opinion that it found the statute "unambiguous." Pet. App. 31a n.15; see *id.* at 22a, 46a, 51a. But at the same time, the court acknowledged that "different readings may be given to the term 'employee,'" *id.* at 15a, and stated that its reading was "the more natural reading," *id.* at 16a, as opposed to the only possible reading. *Spinner* simply was not before the court of appeals, and thus it is uncertain how the court of appeals would address the government's claim for deference to that decision in light of the decision's analysis, which demonstrated at the very least that the term "an employee" is ambiguous and that the ARB's interpretation is reasonable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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