No. 19-2

IN THE
# Supreme Court of the United States

JACKIE HOSANG LAWSON,

*Petitioner*,

v.

FMR LLC, ET AL.,

*Respondents*.

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the district court did not abuse its discretion in excluding the testimony of petitioner's expert because his proposed testimony, which focused on the meaning of statutes and regulations, would not be helpful to the jury.

2. Whether the court of appeals correctly held that the district court did not abuse its discretion in denying petitioner's application for attorneys' fees because, having lost the jury verdict, she is not a "prevailing" party.

## RULE 29.6 STATEMENT

Counsel for respondents certifies as follows:

FMR LLC is not a public company. No publicly held corporation owns 10% or more of FMR LLC.

FMR Corp. was merged into a limited liability company prior to the filing of the complaint in this action. FMR LLC is the surviving entity; FMR Corp. no longer exists.

Fidelity Brokerage Services LLC is a wholly owned subsidiary of Fidelity Global Brokerage Group, Inc.

Fidelity Global Brokerage Group, Inc. is not a public company. No publicly traded company owns 10% or more of Fidelity Global Brokerage Group, Inc.

## RULE 14.1(b)(iii) STATEMENT

Counsel for respondents is not aware of any proceedings directly related to the case in this Court.

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## BRIEF IN OPPOSITION

Respondents respectfully submit that the petition for a writ of certiorari should be denied.

## OPINIONS BELOW

The March 18, 2019 judgment of the court of appeals is unreported. Pet. App. 1a–5a. The July 12, 2018 opinion of the district court is reported at 320 F. Supp. 3d 249. Pet. App. 15a–19a. The judgment of the district court is unreported. Pet. App. 6a.

## STATEMENT

Petitioner is a former employee of respondent Fidelity Brokerage Services LLC, which provides services to the Fidelity family of mutual funds. She alleged that respondents violated the whistleblower protections of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, by constructively terminating her after she reported supposed violations of federal law to her superiors.

This Court granted certiorari earlier in this litigation to decide whether an employee of a privately held contractor that performs work for a public company may bring suit under the Sarbanes-Oxley Act. *See Lawson* v. *FMR LLC*, 571 U.S. 429, 433 (2014). This Court answered that question in the affirmative, meaning that petitioner's case could proceed past a motion to dismiss, and remanded the case for further proceedings. *See id.* at 459.

On remand, petitioner's claim proceeded to a trial on the merits. Before trial, the district court excluded the proposed testimony of petitioner's "legal" expert. At trial, petitioner lost. Pet. App. 7a. As predicates

to her whistleblower claim, petitioner bore the burden of proving that she had both a subjective and an objectively reasonable belief that the conduct she reported to her superiors constituted a violation of federal law. *See, e.g.*, *Wadler* v. *Bio-Rad Labs., Inc.*, 916 F.3d 1176, 1188 (9th Cir. 2019); *Day* v. *Staples, Inc.*, 555 F.3d 42, 54 (1st Cir. 2009). On the basis of the evidence before it, the jury concluded that petitioner had failed to prove *either* of those predicates and reached no other questions on the verdict form. Pet. App. 7a–14a. After trial, the district court denied petitioner's request for an award of attorneys' fees on the ground that she is not a "prevailing" party. Pet. App. 15a–19a; *see* 18 U.S.C. § 1514A(c).

On appeal, the First Circuit affirmed both the judgment and the denial of attorneys' fees. Pet. App. 1a–5a.

In her petition for a writ of certiorari, petitioner does not dispute that the evidence at trial permitted the jury to find that she failed to prove the essential predicates of her whistleblower claim under the Sarbanes-Oxley Act. Instead, she challenges only two discrete rulings by the district court, both of which were reviewed and affirmed by the First Circuit under an abuse-of-discretion standard:

*First*, petitioner argues that the First Circuit erred in affirming the district court's order precluding her expert, Professor Mercer E. Bullard, from testifying to the jury about "the Securities Exchange and Commission 15(c) Process, and the regulation [sic] applicability of Rule 12b-1." Pet. 6–7. Respondents moved in the district court to exclude Professor Bullard's testimony on the ground that it would "intrude on the province of the Court to instruct the jury

on applicable legal standards," and was otherwise unsupported by the record. Dist. Ct. D.E. 249, at 1. The district court agreed and explained its reasoning in detail:

> I see nothing [in the proffered testimony] that I can't do and a good deal there that is problematic.
>
> . . .
>
> It brings in an oracular voice to the case in a way that is, as I've said, I think, distorting to the jury's understanding of who does what in a courtroom. My view is that this can be—to the degree relevant, it can be presented by me here. [Professor Bullard] doesn't add anything. He's not in a position to testify with respect to Fidelity practices.
>
> . . .
>
> The opportunities for misunderstanding are just rife here, and at the risk of deploying the bumper-sticker response that Fidelity has provided here, there's only one Judge in the Courtroom, and I don't mean for people to be misled regarding that.
>
> . . .
>
> I don't mean to leave the jury at sea about what a '40 Act company or is what the obligations of a '40 Act company or what the obligations of those involved with 1940 Act companies are. But we've long since reached that point at which an expert is someone who testifies 50 miles from home, and that's about what this amounts to, and I'm not going to ac-

> cept it. It simply trenches on the legal responsibilities—the responsibilities of the Court to instruct the jury with respect to the law.

Dist. Ct. D.E. 283, at 11–15.

The First Circuit concluded that the district court had not abused its discretion in excluding Professor Bullard's proposed testimony:

> Lawson's claim that the district court erred by excluding the testimony of her expert witness, which is reviewed for abuse of discretion, *see Rodriguez v. SmithKline Beecham*, 224 F.3d 1, 8–9 (1st Cir. 2000), is unconvincing. The district court supportably found that the proffered testimony, where not irrelevant to the issues presented by the case improperly impinged upon the role of the court in instructing jurors on the applicable legal standards.

Pet. App. 2a.

*Second*, petitioner argues that she is entitled to attorneys' fees because this Court decided in 2014 (at the motion-to-dismiss stage) that she could maintain a whistleblower suit under the Sarbanes-Oxley Act—even though she ultimately lost her suit on the merits. Pet. i. The theory she advanced below was that because she sought a declaratory judgment that respondents are covered by the Sarbanes-Oxley Act and because she prevailed on that issue in this Court, she is a "prevailing" party within the meaning of Section 1514A(c). After the adverse jury verdict, petitioner asked the district court to amend the judgment to reflect a victory on the claim for declaratory judgment.

The district court "decline[d] to engage in [a] sleight of hand" by granting petitioner's request for

declaratory relief. Pet. App. 17a. As the court explained, the question whether the Sarbanes-Oxley Act applies to respondents was not "a standalone claim," but rather "a procedural dimension to the substantive claim [petitioner] unsuccessfully pursued." *Ibid.* For that reason, the court concluded that "[a]rtificially restyling the basis for pursuing the claim as a separate declaratory judgment does not transform ultimate lack of success into a partial victory entitled to recognition as a basis for establishing prevailing party status under the law of attorney fees." Pet. App. 18a–19a.

The First Circuit agreed that petitioner is not a "prevailing" party for purposes of federal fee-shifting law:

> [W]e discern no error or abuse of discretion in the district court's determination that [petitioner] was not a "prevailing party" for purposes of recovering an award of attorney's fees. [Petitioner] has failed to demonstrate that obtaining an interlocutory ruling permitting her to move forward with her case in the face of a dismissal motion qualifies her as a "prevailing party" for fee-shifting purposes. *See Hewitt v. Helms*, 482 U.S. 755, 760 (1987) (holding that a plaintiff's "interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim" is "not the stuff of which legal victories are made" and, therefore, could not ground prevailing party status for fee-shifting purposes).

Pet. App. 4a.

## ARGUMENT

As to each of the questions presented by petitioner, the First Circuit correctly ruled that the district court had not abused its discretion. Both courts below applied the correct legal standards to the facts of this particular case, and petitioner does not even try to assert a conflict with any decision of this Court or any other court of appeals. The petition for a writ of certiorari should be denied.

### I. THE EXCLUSION OF PETITIONER'S LEGAL EXPERT DOES NOT WARRANT REVIEW

A district court's decision to admit or exclude expert testimony is reviewed for abuse of discretion. *Gen. Elec Co.* v. *Joiner*, 522 U.S. 136, 142–43 (1997). The First Circuit applied this deferential standard of review and concluded that the district court had not abused its discretion in excluding Professor Bullard's proposed testimony. Pet. App. 2a. Petitioner does not argue that the First Circuit misstated the applicable legal standard, and this Court will "rarely" grant a petition for a writ of certiorari "when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10. The fact-bound conclusion that petitioner's proposed expert was properly excluded raises no legal or other issue of general importance; indeed, it is unlikely to affect any litigant but her. This Court does not "sit for the benefit of the particular litigants." *Rice* v. *Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955).

The decisions below are correct. To be admissible, expert testimony must "help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). This Court has held that Rule 702 imposes on district courts a "gatekeeping role" to

ensure that "any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589, 597 (1993); *see also Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 147 (1999) (holding that the "basic gatekeeping obligation" of *Daubert* applies to "all expert testimony").

Pursuant to this "gatekeeping role" and the requirements of Rule 702, the First Circuit has held that "it is not for witnesses to instruct the jury as to applicable principles of law, but for the judge." *Nieves-Villanueva* v. *Soto-Rivera*, 133 F.3d 92, 99 (1st Cir. 1997) (alteration and internal quotation marks omitted). Accordingly, "expert testimony on . . . purely legal issues is rarely admissible," with a limited exception for questions of foreign law. *Ibid.* That is because construing and instructing the jury on the law is the role of the district judge, not an expert witness.

The First Circuit is far from alone in imposing this limitation: Nearly every other federal court of appeals has adopted a similar rule. *See Marx & Co.* v. *Diners' Club Inc.*, 550 F.2d 505, 509 (2d Cir. 1977) (holding inadmissible expert "opinion as to the legal standards which [the expert witness] believed to be derived from the contract"); *Cottillion* v. *United Ref. Co.*, 781 F.3d 47, 59 (3d Cir. 2015) (noting the "problem of considering expert testimony on the interpretation of a pension plan, which is a purely legal question and not properly the subject of expert testimony"); *United States* v. *Barile*, 286 F.3d 749, 760 (4th Cir. 2002) ("Expert testimony that merely states a legal conclusion is less likely to assist the jury in its determination"); *Snap-Drape, Inc.* v. *Comm'r*, 98 F.3d 194, 198 (5th Cir. 1996) ("We have repeatedly held that [Rule 704(a)] does not allow an expert to render conclusions

of law"); *Berry* v. *City of Detroit*, 25 F.3d 1342, 1353 (6th Cir. 1994) ("Although an expert's opinion may embrace an ultimate issue to be decided by the trier of fact, the issue embraced must be a factual one" (alterations, citation, and internal quotation marks omitted)); *Aguilar* v. *Int'l Longshoremen's Union Local No. 10*, 966 F.2d 443, 447 (9th Cir. 1992) ("[T]he reasonableness and foreseeability of the casual workers' reliance were matters of law for the court's determination. As such, they were inappropriate subjects for expert testimony."); *Burkhart* v. *Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1212–13 (D.C. Cir. 1997) ("In other words, an expert may offer his opinion as to facts that, if found, would support a conclusion that the legal standard at issue was satisfied, but he may not testify as to whether the legal standard has been satisfied").

Here, Professor Bullard proposed to testify on the law—specifically, in petitioner's own words, "on securities rules and regulations governing the mutual fund industry." Pet. 4. While petitioner avers that Professor Bullard's testimony "would not have tread on the province of the Sarbanes-Oxley Act, and how this statute should be applied to Lawson's claims," she admits in the very next sentence that the testimony would have addressed "the Securities Exchange and Commission 15(c) Process, and the regulation [sic] applicability of Rule 12b-1, in relation to Lawson's claims of securities fraud." Pet. 6–7. Petitioner cites no case from this Court or any other court holding that a district court abuses its discretion in excluding expert testimony about the "regulat[ory] applicability" of a federal agency's rule to a defendant's alleged conduct. The district court is in the best position to determine whether such testimony will be useful to the jury in a particular case, and the First Circuit here

decided that the district court did not abuse its discretion in answering that question in the negative.

The only cases petitioner cites stand for the proposition that there may be no "*blanket* prohibition on expert testimony concerning the law." *Adams* v. *New England Scaffolding, Inc.*, No. 13-CV-12629, 2015 WL 9412518, at *5 (D. Mass. Dec. 22, 2015) (emphasis added) (cited at Pet. 5); *see also Gomez* v. *Rivera Rodriguez*, 344 F.3d 103, 114 (1st Cir. 2003) (rebutting the suggestion that there is "a general evidentiary rule to the effect that legal opinion testimony is per se inadmissible"). Even assuming the validity of that proposition, neither the cited cases nor any others of which we are aware establish that the district court here *abused its discretion* in excluding Professor Bullard's testimony—the absence of a "blanket prohibition" does not undermine the fundamental rule that expert testimony regarding issues of law is disfavored and often unhelpful to the jury. Nor do these cases establish that the First Circuit misinterpreted or misapplied the law in reviewing the district court's ruling for abuse of discretion. The district court here found that Professor Bullard's proposed testimony would not assist the trier of fact, the First Circuit affirmed that decision under the correct standard of review, and petitioner makes no serious effort to dispute the correctness of that conclusion.

The First Circuit's decision does not conflict with any decision of this Court or of any other court of appeals, which is itself sufficient to deny certiorari. *See Bunting* v. *Mellen*, 541 U.S. 1019, 1021 (2004) (opinion respecting the denial of certiorari) (noting the "absence of a direct conflict among the Circuits" as a ground for denying certiorari). Indeed, the only purported "conflict" petitioner identifies is between the

decision below and other decisions of the First Circuit. Pet. 4–5. Even were there such a conflict (there is not), it is well settled that an intracircuit conflict "should not be the occasion for invoking so exceptional a jurisdiction of this Court as that on certification." *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). That reasoning applies with equal force to petitions for writs of certiorari. *See, e.g.*, *Davis* v. *United States*, 417 U.S. 333, 340 (1974) (noting prior denial of certiorari where there existed only an intracircuit conflict). The First Circuit—which consists of only six active judges—is capable of resolving any intracircuit conflict on this issue, perceived or real, without intervention from this Court.

At bottom, petitioner's first question presents nothing of interest to anyone besides the parties to this case. The district court, applying the correct legal standard, excluded petitioner's expert. The First Circuit, also applying the correct legal standard, affirmed. Petitioner disagrees with those decisions, but she has had her appeal as of right, and further review on this fact-bound, splitless, and correct conclusion is unnecessary.

## II. THE DENIAL OF ATTORNEYS' FEES TO A LOSING PARTY DOES NOT WARRANT REVIEW

The Sarbanes-Oxley Act provides that "[a]n employee prevailing in any action" under the anti-retaliation provisions of the Sarbanes-Oxley Act "shall be entitled to all relief necessary to make the employee whole," including "reasonable attorney fees." 18 U.S.C. § 1514A(c). Petitioner did not "prevail[ ]" in this "action." Rather, she tried her case before a jury and lost.

A number of federal statutes permit an award of attorneys' fees to a "prevailing party" in a litigation. *See, e.g.*, 42 U.S.C. § 1988(b); *id.* § 2000a-3(b); *id.* § 2000e-5(k); 52 U.S.C. § 10310(e). This Court has held that in such statutes, "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 (1983) (some internal quotation marks omitted). The "touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties." *Tex. State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93 (1989). This standard applies "in a consistent manner" across various fee-shifting statutes. *CRST Van Expedited, Inc.* v. *EEOC*, 136 S. Ct. 1642, 1646 (2016).

This Court has squarely rejected the notion that a plaintiff "prevail[s]" in a litigation by obtaining "an interlocutory ruling that his complaint should not have been dismissed for failure to state a . . . claim. That is not the stuff of which legal victories are made." *Hewitt* v. *Helms*, 482 U.S. 755, 760 (1987). In *Hewitt*, the Court dismissed the plaintiff's argument that he was a "prevailing party" within the meaning of 42 U.S.C. § 1988 simply because an appellate court had ruled that his constitutional rights had been violated, even though the district court ruled on remand that the defendants were entitled to qualified immunity and that the plaintiff therefore would receive no relief. 482 U.S. at 758–60. As this Court explained, "the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces." *Id.* at 761. "[A] judicial statement that does not affect the relationship between the

plaintiff and the defendant"—such as, in *Hewitt*, a declaration of a constitutional violation—"is *not* an equivalent [of a judgment on the merits]." *Ibid.*

Petitioner's case is indistinguishable from *Hewitt*. She prevailed on an interlocutory issue before this Court and obtained a "ruling that [her] complaint should not have been dismissed." *Hewitt*, 482 U.S. at 760. But that "is not the stuff of which legal victories are made." *Ibid.* Before a jury, petitioner's claim failed on the merits. She obtained no redress from respondents, and nothing in the judgment altered the legal relationship between petitioner and respondents. She is not a "prevailing" party.

The First Circuit properly cited this Court's decision in *Hewitt* and concluded that petitioner is not a prevailing party. Petitioner makes no attempt to dispute that *Hewitt* is correct and apposite; nor does she argue that *Hewitt* should be reconsidered and overruled. And any such argument would be futile, since *Hewitt*'s fundamental principles have been reiterated by this Court numerous times. *See, e.g.*, *Sole* v. *Wyner*, 551 U.S. 74, 86 (2007); *Buckhannon Bd. & Care Home, Inc.* v. *W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001); *Rhodes* v. *Stewart*, 488 U.S. 1, 3 (per curiam). There is no basis for review of the First Circuit's decision.

Notably, petitioner does not argue that the district court abused its discretion in denying her request for a declaratory judgment (and has therefore waived any such argument). Moreover, even if the district court could have exercised its equitable discretion to issue a declaratory judgment regarding the applicability of the Sarbanes-Oxley Act to respondents, petitioner does not advance any argument as to why she was *entitled* to such a judgment. *See Pub. Affairs Assocs.,*

*Inc.* v. *Rickover*, 369 U.S. 111, 112 (1962) ("A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest" (internal quotation marks omitted)). And in any event, this Court has made clear that even a declaratory judgment may not render a plaintiff a "prevailing party" unless "it affects the behavior of the defendant toward the plaintiff." *Rhodes*, 488 U.S. at 3. Any declaratory judgment petitioner could have obtained (but did not) would not have altered the behavior of respondents or the legal relationship between the parties, and thus would not have rendered petitioner a "prevailing" party.

The text of the Sarbanes-Oxley Act confirms that petitioner may not recover attorneys' fees. Section 1514A(c) provides that an "employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole," including reasonable attorneys' fees. 18 U.S.C. § 1514A(c)(1). An action under Section 1514A(b)(1), in turn, is a private action by a person "alleg[ing] discharge or other discrimination by any person in violation of subsection (a)." *Id.* § 1514A(b)(1). And Section 1514A(a) prohibits covered employers from discharging an employee in retaliation for that employee providing information "assist[ing] in an investigation regarding any conduct which the employee reasonably believes constitutes a violation" of the federal securities laws. *Id.* § 1514A(a)(1). Simply put, petitioner did not "prevail[ ]" in an action for unlawful retaliation—at best, she prevailed on one predicate to that action. And even if that predicate could fairly be described as a standalone claim (it cannot), recovery is available only for a prevailing party in an "action" under Section 1514A(b)(1). *Cf. Nolan* v. *Boeing Co.*, 919

F.2d 1058, 1066 (5th Cir. 1990) ("In federal practice, the terms 'case' and 'action' refer to the same thing, *i.e.*, the entirety of a civil proceeding"). Petitioner's "action" under Section 1514A(b)(1) failed on the merits, and she cannot recover attorneys' fees.

Petitioner does not argue that the decision below conflicts with any other decision of any appellate court on "prevailing" party status under any federal fee-shifting law. She complains that her fee request was denied, but does not dispute that both lower courts applied the correct legal standard in denying her request. The case-specific application of those standards here presents no issue warranting this Court's review.

Indeed, the discussion of attorneys' fees in the body of the petition is largely divorced from the decisions below, focusing instead on allegations of misconduct by counsel for respondents. Pet. 8–12. Such case-specific (indeed, unique) accusations would not warrant further review even if they had merit—which they do not. That is doubly true in this case, since the factual and legal points presented in this part of the petition were not made by petitioner in either the district court or the court of appeals. She therefore forfeited them. *See United States* v. *Olano*, 507 U.S. 725, 731 (1993). And none of her unproven (and unpreserved) allegations could render her a "prevailing" party in any event for the simple—yet dispositive—reason that a jury rejected her claim on the merits. It is time for this litigation to come to an end.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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July 29, 2019