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

REPLY BRIEF FOR PETITIONER

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Dated: August 08, 2019

BATEMAN & SLADE, INC. STONEHAM, MASSACHUSETTS

RULE 14.1(b)(iii) STATEMENT

A LIST OF ALL PROCEEDINGS IN FEDERAL COURT, THAT ARE DIRECTLY RELATED TO THE CASE IN THIS COURT

RICO CLASS ACTION COMPLAINT – Filed on MAY 31, 2019, in The United States District Court – District of Massachusetts.

CASE DOCKET NO. 1:19-cv-11222-DPW

CASE CAPTION – JACKIE HOSANG LAWSON, on behalf of herself and all others similarly situated, Plaintiff v. FMR LLC, dba FIDELITY INVESTMENTS, FMR CORP., dba FIDELITY INVESTMENTS, and FIDELITY BROKERAGE SERVICES LLC, dba FIDELITY INVESTMENTS, Defendants.

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I. THE LOWER COURTS' JUDGMENT IF ALLOWED TO STAND UNDERMINES THE COURT'S HOLDING IN LAWSON -THIS APPEAL PRESENTS AN IMPORTANT OPPORTUNITY FOR LAW CORRECTION

Fidelity errs in their insistence that "Both courts below applied the correct legal standards to the facts of this particular case." Opp. Page 6. This misstatement is discordant with the Court's ruling in *Lawson v. FMR LLC*, 571 U.S. 429 (2014); there is a disconnection between the wide latitude given by the Court in *Lawson*, and the construction of the two deciding questions on the jury slip.

The construction of section 806 of Sarbanes-Oxley in *Lawson*; the late Justice Scalia in particular, held:

> "So long as an employee works for one of the actors enumerated in § 1514A(a) and ***reports a covered form of fraud*** in a manner identified in § 1514(a)(1)-(2), the employee is protected from retaliation."

Lawson at 461. Emphasis added.

Fidelity does not dispute that Ms. Lawson reported claims of securities fraud first to her supervisors, then Fidelity's General Counsel, and ultimately to the Department of Labor, and The Securities Exchange and Commission. Fidelity also, does not dispute that they retaliated against Ms. Lawson.

Fidelity, instead, asserts that "as predicates to her whistleblower claim, petitioner bore the burden

of proving that she had both a subjective and an objective reasonable belief that the conduct she reported to her superiors ***constituted a violation of federal law***." Opp. Page 2. Emphasis added.

Consistent with Fidelity's assertion in their opposition, the two deciding questions to the lay jury "Has Ms. Lawson proven by a preponderance of the evidence she had (1) an actual subjective belief, and (2) an objectively reasonable belief, that Fidelity's conduct could constitute violation of Federal law relating to fraud against Fidelity's Mutual Fund shareholders," place emphasis on ***proving the fraud*** as the major determinant of the merits of the case, versus the ***reporting of the fraud***, and the ensuing retaliation; the gravamen of *Lawson*'s section 806 Sarbanes-Oxley complaint.

Exhaustive debates on the applicable legal standards of Sarbanes-Oxley after the Court's ruling on *Lawson* in 2014, dominated the *Lawson* litigation process, and tainted the trial. Considering the significant amount of resources expended on this contentious issue, this appeal poses an important opportunity for law correction, since this issue most likely will impact all future litigation of Sarbanes-Oxley section 806 cases.

The issue at hand, and a matter of great importance to all future whistleblower claimants under section 806 of SOX, is whether the fraud issue in a Sarbanes-Oxley claim, ***must be a reported*** "covered form of fraud," as held by Justice Scalia, or ***must be a proven*** "covered form of fraud" as demanded by the two deciding questions on the jury slip, in order for any whistleblower; not just Ms. Lawson, to prevail on the merits of their cases.

Highlighting the "egregious error" of the lower courts; If this Court accepts the postulate that the District Court and the First Circuit Court of Appeals applied the correct legal standard that the "covered form of fraud" that Ms. Lawson reported, ***must be proven***, instead of merely ***reported***, then clearly it is apparent that the lay jury should have received guidance regarding what constitutes violation of securities laws governing the mutual fund industry, either by her expert witness, Professor Mercer E. Bullard, or the District Court, so that the jury could intelligently, and accurately, answer questions on what "**conduct could constitute violation of Federal law relating to fraud against Fidelity's Mutual Fund shareholders.**"

II. THIS CASE DEEMED IN 2014 TO BE OF GREAT IMPORTANCE TO THE GENERAL PUBLIC IS THE IDEAL VEHICLE FOR CORRECTING AN EGREGIOUS ERROR THAT IMPACTS MILLIONS OF MUTUAL FUND SHAREHOLDERS

Fidelity also errs that "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" Opp. Page 6, and that: "At bottom, petitioner's first question presents nothing of interest to anyone besides the parties to this case." Opp. Page 10.

Contrary to Fidelity's assertions, millions of Fidelity Mutual Fund shareholders are related parties, and will be greatly affected by the decision of the Court.

Fidelity would have the Court believe that this case applies only to one litigant, when in fact it applies to millions of Fidelity Investments' mutual fund shareholders defrauded by Fidelity through the operation of a Mass-Marketing Fraud.

Fidelity admitted to this wrong-doing. Fidelity acknowledged the impact of charging excessive account servicing fees in a May 07, 2008, "MEMORANDUM IN SUPPORT OF MOTION TO DISMISS BY DEFENDANTS FMR LLC AND FIDELITY BROKERAGE SERVICES LLC."

> "Sarbanes-Oxley was intended to address fraud by public companies against their shareholders. In this case, there is no allegation of fraud by a public company. On the contrary, what Lawson evidently intends to allege is, at most, that a subcontractor exaggerated its costs in a manner that caused a public company – the Funds – to overpay for the subcontractor's services. Self-evidently, however, "shareholder fraud" does not include overcharging a public company on a contract, **even if that overcharge ultimately affects the value of shareholders' holding.**" Emphasis added.

Ms. Lawson, in her claims, promulgated Fidelity's surface offense; charging excessive servicing fees. Fidelity, by fleshing out the impact of charging excessive service fees, acknowledges Fidelity's knowing duplicity towards their shareholders, which is a well acknowledged fact in the mutual fund industry; the adverse impact of excessive fees on long-term investor returns.

Fidelity's lack of concern in acknowledging the alleged fraud on their shareholders occurred because Fidelity's primary objective in 2008 was evading coverage under SOX, using their status as a privately-held subcontractor company to "the Funds" as a shield for impunity.

Six years later, the Court's 2014 *Lawson* ruling of SOX coverage to the privately-held Fidelity companies, removed the shield, and paved the path for the Petitioner to file a RICO Class Action Complaint against Fidelity on May 31, 2019. See Rule 14.1 (b) (iii) Statement, page i.

On July 12, 2019, Fidelity filed a Rule 12(b)(6) motion to dismiss the RICO Class Action Complaint, stating as grounds, *inter alia,* "the doctrine of claim preclusion" citing the *Lawson* case currently on appeal in this Court.

Lawson's appeal to the Court is of great importance to the viability of the RICO Class Action Complaint, which *inter alia*, asks for injunctive relief to stop Fidelity's ***admitted*** wrong-doing, and provide restitution to the millions of Fidelity mutual funds shareholder injured by Fidelity's fraudulent business practices.

III. THIS COURT IS THE BEST FORUM TO ADDRESS THE DEGRADATION OF THE UNITED STATES DEMOCRACY AND THE VIOLATION OF CONSTITUTIONAL RIGHTS THAT TRIGGERED THIS CASE

Shockingly, Fidelity attempts to deceive the Court, and in a continued pattern of lack of candor, makes untruthful and incorrect statements regarding "the discussion of attorneys' fees in the

body of the petition." Opp. Page 14. Fidelity states that Ms. Lawson forfeited her attorney fees "**since the factual and legal points presented in this part of the petition were not made by the petitioner in either the district court or the court of appeals.**"

First, Fidelity's interference into a scheduled government investigation was included in the Amended Complaint filed on September 19, 2008, as complaint numbers 20 and 21.

Complaint Number 20 states:

> "On or about November 26, 2007, Ms. Lawson's counsel received notice from the Associate Solicitor, Division of Fair Labor Standards, United States Department of Labor, that Fidelity Investments had been in contact with the office regarding Ms. Lawson's Sarbanes-Oxley complaint. Ms. Lawson's counsel subsequently was provided copies of two letters submitted on Fidelity Investments behalf by its outside counsel in an effort to stop OSHA's investigation of Ms. Lawson's complaint. The first letter, dated September 13, 2007, was addressed to the head of the Office of the Whistleblower Protection Program of the Occupational Safety and Health Administration, and references an August 30, 2007 telephone conversation between Fidelity Investments' outside counsel and the Head of the Office of the Whistleblower Protection Program. The second letter, dated November 1, 2007, was addressed to the head of the Office of the Whistleblower Protection Program at the Occupational Safety and Health Administration, the Associate Solicitor, Fair

Labor Standards, Office of the Solicitor of Labor, and the Counsel for Whistleblower Programs, and referenced an October 19, 2007 meeting between the addresses and Fidelity Investments' outside counsel.

Complaint Number 21 states:

On December 20, 2007, Ms. Lawson submitted to the Associate Solicitor, Division of Fair Labor Standards, United States Department of Labor, her response to Fidelity's letter. Ms. Lawson's response is attached hereto as Exhibit 5."

Exhibit 5 in the amended complaint is a twelve-page letter to the Associate Solicitor in which Jackie Hosang Lawson, Eugene Scalia, Esq. and others were copied. The letter points out that ***"Fidelity Investments' lack of candor – particularly in an ex parte communication – is stunning."***

The Letter's "Conclusion" states:

Ms. Lawson attempted here what Congress hoped for in passing Sarbanes-Oxley. As an insider with information concerning possible fraud against shareholders of Fidelity Investments, she attempted to bring her concerns to her supervisors, Fidelity's General Counsel and to the Securities and Exchange Commission. She had an unblemished record of over a decade of service to Fidelity Investments when she took these steps. When Fidelity Investments began retaliating, she sought help from OSHA. A year later, however, she has been forced out of her position, and Fidelity Investments has

successfully avoided any substantive investigation of her claim. At this juncture, on her behalf, I respectfully request that OSHA continue its investigation and afford her the protection promised by Congress."

Second, Ms. Lawson requested a *de novo* review that was ignored by the First Circuit. Her Reply Brief's "STATEMENT OF FACTS:"

i. "On September 20, 2007, OSHA contacted Fidelity's counsel regarding interviews with various people associated with Lawson's Claims."

ii. "Fidelity's external counsel, and insiders, had ex-parte communications with the Department of Labor in Washington, D.C."

iii. "Shortly after, *supra*, the OSHA scheduled investigation was put on hold indefinitely."

Ms. Lawson provided substantive supporting documents in her Appendix and Supplemental Appendix to the First Circuit.

Remarkably, Fidelity laboriously argues that Ms. Lawson is not a prevailing party, hoping to divert the Court's attention from the argument in the body of the petition.

Contrary to Fidelity's recounting, Ms. Lawson in addition to making factual points to the courts below, presented three strong legal arguments to the First Circuit for attorney fees, under the appropriate legal standards. "***Whether attorney fees should be awarded warrants review by this Appellate Court***

under three standards: The Abuse of Discretion standard, the Plain Error standard, and the underlying legal analysis warrants a De Novo Review standard."

The First Circuit turned a blind eye to the factual points, and legal grounds presented in *Lawson*'s Opening and Reply briefs for a *De Novo* Review of attorney fees, and the court's opinion on the topic was conspicuously absent in their judgment.

Fidelity's corruption of the Department of Labor is an important and serious threat to the democratic process of the United States, because Fidelity's intervention fundamentally affected the administration of justice. The seriousness of Fidelity's section 1512(c)(2) violation qualifies as an egregious act of corruption, and this perversion of justice should not be swept under the rug, as Fidelity hopes will be the outcome in this appeal.

The *Lawson* case, where this incident occurred, is an appropriate vehicle for a ruling that can proactively service future whistleblowers who file legitimate claims with the government that are then illegally circumvented.

The commission of this act, cost Ms. Lawson her career, her life savings, and twelve years later she is still seeking justice. However, the importance of the Court addressing this particular issue, is not that one employee constitutional right was violated, but more importantly that the act did indeed happen, and can happen again in the future, and, similar to Ms. Lawson's circumstances, have deleterious effects on employees who report serious legitimate fraud to government authorities.

FOIA documents received by Ms. Lawson in November 2018, provided substantive and substantial evidence proving beyond a reasonable doubt that Fidelity corrupted the Department of Labor in 2007. These documents show that the Department of Labor decided coverage of SOX for Fidelity, and scheduled an investigation into Ms. Lawson's claims, yet Fidelity was able to avoid any investigation into Ms. Lawson's claims because of their direct intervention.

An OSHA investigation could have ended the Mass-Marketing Fraud described in the current RICO Class Action Complaint. Therefore, Fidelity's intervention not only impacted one individual, it impacted millions of shareholders.

Fidelity's corruptive behavior is a deterrent for any future Fidelity whistleblower because it eliminates the recourse for whistleblowing protection promised by Congress. Furthermore, it sends a message that Fidelity whistleblowers will be severely punished, which is evidenced by Fidelity's declaration that Ms. Lawson "threw away her career" by becoming a whistleblower; a steep price for any employee to pay.

Fidelity neither deny nor dispute the political corruption claim which is a listed predicate offense in the RICO Class Action Complaint as a violation of 1512(c)(2) of title 18 of the U.S. Code. Fidelity instead argues that the complaint is barred by *res judicata* and Statute of Limitations.

The Seventh Circuit Court of Appeals in *DeGuelle v. Camilli*, 664 F.3d 192 (2011), in circumstances similar to Lawson, stated: "When an employer retaliates against an employee, there is

always an underlying motivation" and "Retaliatory acts are inherently connected to the underlying wrongdoing exposed by the whistleblower." *Deguelle* at 201.

In *Lawson*'s case the motivation that caused Fidelity to corrupt a government agency is the billions of dollars stolen from millions of shareholders through the Mass-Marketing Fraud that Fidelity still continues to operate under concealment.

Fidelity went to great lengths to shut this case down, and cover-up fraud. In addition to perversion of justice, Fidelity's 99 pages, 2,417 entries Privilege Log for *Lawson* litigation lists ***forty*** internal and external attorneys' "***Reflection of attorney's mental impressions of Lawson's internal complaints***."

Only this Court, at this opportune time, can redress the miscarriage of justice depicted in the two questions posited to the Court, which are important, not only to one individual; Ms. Lawson, but to all potential whistleblowers, and millions of mutual fund shareholders. As such, the two questions presented warrant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 08, 2019