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1 P R O C E E D I N G S

2 (1:00 p.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 12-3, Lawson and Zang v. FMR LLC.
5 Mr. Schnapper.

6 ORAL ARGUMENT OF ERIC SCHNAPPER

7 ON BEHALF OF THE PETITIONERS

8 MR. SCHNAPPER: Mr. Chief Justice, and may
9 it please the Court:

10 Section 1514A is written in the classic
11 language which Congress utilizes to regulate
12 relationships between employees and their employers.
13 Legislation regarding how an entity is to treat an
14 employee is understood to refer to the entity's own
15 employees. And that is particularly true here where the
16 phrase "terms and conditions" of employment is used in
17 the statute.

18 If Section 1514A forbade only contractors to
19 retaliate against employees under the terms and
20 conditions of their employment, I don't think there'd be
21 any question that the courts would understand it was
22 referring to the contractor's own employees. The
23 statute has the same -- that language has the same
24 meaning, even though it's combined in this instance with
25 prohibitions against retaliation by other types of

1 actors.

2 The First Circuit's decision interpreting
3 1514A to permit a contractor to retaliate against its
4 own employees is inconsistent with its general usage and
5 it leads to four implausible consequences. First, it
6 renders the statutory language regarding contractors
7 virtually meaningless. Secondly, it renders that
8 language with regard to contractors in the mutual fund
9 industry literally meaningless.

10 Third, it has the implausible consequence of
11 permitting the very type of retaliation that we know
12 Congress was concerned about. Retaliation by an
13 accountant such as Arthur Andersen. And finally, it
14 renders incoherent the provisions in 1514A and the
15 related remedial provision regarding scienter, the
16 burden of proof and an affirmative defense.

17 JUSTICE ALITO: Is it your position that
18 employees of any officer, employee, contractor,
19 subcontractor or agent of a public company are covered?
20 They're all covered?

21 MR. SCHNAPPER: I'm not -- it's our position
22 that employees of contractors and subcontractors are
23 covered.

24 JUSTICE GINSBURG: All employees or would
25 you limit it --

1 MR. SCHNAPPER: We --

2 JUSTICE GINSBURG: -- to the ones that had a
3 hand in executing the contract?

4 MR. SCHNAPPER: We -- if I understand the
5 question correctly, we -- we have not taken a position
6 and the standard we advanced does not address the
7 question of a -- of a personal employee of an employer,
8 such as Ken Lay --

9 JUSTICE ALITO: Well, if doesn't --

10 MR. SCHNAPPER: It doesn't raise distinct
11 issues --

12 JUSTICE ALITO: If it doesn't include that,
13 then -- then how do you avoid that with your reading of
14 the text?

15 MR. SCHNAPPER: Your Honor, our view of this
16 is that the -- the meaning of the term "employee"
17 depends on the context in which it's used and it ought
18 to be assessed separately for each of the actors. So
19 when it says no publicly-traded company may retaliate
20 against an employee, it means an employee of the
21 publicly-traded company. But -- and the same thing with
22 contractor and subcontractor.

23 But if we had a statute which by itself said
24 no employee of -- personal -- no employee of an officer
25 shall do something, the -- the normal reading of that

1 would be to refer to an employee of the officer's
2 company. And we have statutes that impose personal
3 liability on officials for things they're doing in their
4 companies and that's the way they read. So I --

5 JUSTICE SCALIA: Well, that's sort of
6 peculiar. I mean, really, I don't see how you can piece
7 it out like that, that it includes employees of
8 contractors, subcontractors, but not -- not of any
9 officer.

10 But let me ask you this: If it does include
11 employees of -- of an officer, is it -- is it as much of
12 a disaster as -- as your opponent suggests? That is to
13 say, would -- would a firing for something that had
14 nothing to do with the securities laws be swept in?

15 MR. SCHNAPPER: The -- the statute forbids
16 retaliation for protected activity related either to the
17 securities law or to certain criminal fraud provisions.
18 And that's quite deliberate. The statute --
19 Sarbanes-Oxley is not limited to corporate misdeeds and
20 related things. Title VIII and Title IX also deal
21 specifically -- deal much more broadly with criminal
22 fraud.

23 Title IX increases the penalty for wire
24 fraud and mail fraud without regard to whether it has --
25 it was by a corporation or an individual.

1 JUSTICE SCALIA: But it is --

2 MR. SCHNAPPER: So this is also an antifraud
3 statute.

4 JUSTICE SCALIA: It is limited to those
5 subjects. And is -- is the personal employee of an
6 officer likely to be involved with any of those
7 subjects?

8 MR. SCHNAPPER: No, Your Honor. They're
9 unlikely to know of such things. But -- but the
10 Congress deliberately wrote the statute to deal with
11 ordinary wire and mail fraud, not just corporate public
12 company related fraud. The statute is broader in that
13 regard.

14 JUSTICE BREYER: So what's the limitation?
15 That is, if the argument against throwing the
16 contractors in the way you want, I think is, well, then
17 there is no limitation. So a company that let's say is
18 a publicly traded company, they have a building and they
19 hire a gardener.

20 And the gardener is a gardening company and
21 it has three employees and it works one day a week
22 cutting their lawn and it works four days a week cutting
23 somebody else's lawn. Is the mail fraud -- and then
24 they fire one of the three employees, or two.

25 And he gets annoyed and says it was because

1 of fraud. Now, the fraud has nothing to do with the
2 company that they're cutting the lawn for. It has to do
3 with some other customers. All right.

4 So what -- how -- I don't think the statute
5 intends to get that. Does it want to make every mom and
6 pop shop in the country, when they have one employee,
7 suddenly subject to the whistleblower protection for any
8 fraud, even those frauds that have nothing to do with
9 any publicly traded company? This is not really this
10 case.

11 MR. SCHNAPPER: Yes, I understand, I
12 understand.

13 JUSTICE BREYER: But I'm trying to foresee
14 is are you arguing for no limitation or --

15 MR. SCHNAPPER: I think there are two
16 relevant limitations here, one of them statutory and one
17 of them practical. The statutory one is that, although
18 it wouldn't deal with, I think, the situation you
19 hypothesized, that the counterparty, so to speak, of the
20 public company is described as a contractor. And we
21 think that is not anyone who has ever had a contract
22 with a public company.

23 "Contractor" in the ordinary parlance refers
24 to an ongoing relationship. The paradigm is someone
25 providing services on an ongoing basis, which of course

1 fits lawyers and accountants perfectly.

2 JUSTICE BREYER: Yes.

3 MR. SCHNAPPER: And so if someone from a
4 private firm goes down to Walmart, buys a box of rubber
5 bands, that in ordinary parlance wouldn't be referred to
6 as a contractor. So we think that as a practical matter
7 that rules out most mom and pop stores. They don't have
8 that kind of relationship.

9 JUSTICE SCALIA: Of course, it also rules
10 out the accounting firm that is only used once, right?

11 MR. SCHNAPPER: Well, it would have to be
12 very fast. I mean, I think an audit takes some time.
13 But if you have someone come in for --

14 JUSTICE SCALIA: Well, you just hire them
15 for this one audit; are they a contractor?

16 MR. SCHNAPPER: I think an audit takes long
17 enough that they would be. It's not like the moment
18 that it takes to buy something at the gift shop
19 downstairs. I think it typically takes weeks if not
20 months, and I think in ordinary parlance you would call
21 someone a contractor in those circumstances.

22 JUSTICE BREYER: Could you limit it as also
23 ruling out frauds by companies that are not publicly
24 traded themselves of course, but where the fraud has
25 nothing to do with the contract? That is, the whole

1 activity just has nothing to do with the contract. It's
2 just chance that they happen to have a contract.

3 MR. SCHNAPPER: That's the way the Congress
4 wrote the statute, and we think for two kinds of
5 reasons. First of all, that -- the statute is also
6 about, as you put it, garden variety fraud. It's
7 increased the penalty for wire fraud, for mail fraud.
8 For the first time there is a provision for attempts and
9 conspiracy. It is an antifraud statute in addition to
10 dealing with the Enron issues. So we think that's
11 deliberate.

12 Secondly, Your Honor, although --

13 JUSTICE SCALIA: I'm not sure. Does that
14 mean yes or no to his question?

15 MR. SCHNAPPER: I'd have to remember the
16 exact question.

17 JUSTICE BREYER: Can you rule out frauds
18 where the fraud at issue --

19 MR. SCHNAPPER: No.

20 JUSTICE BREYER: -- has absolutely nothing
21 to do with the contract?

22 MR. SCHNAPPER: The statute isn't written
23 that way.

24 JUSTICE BREYER: It isn't written that way.

25 JUSTICE KAGAN: Mr. Schnapper, that's the

1 position that the SEC took in its amicus brief to the
2 First Circuit. It said Section 806 applies where
3 employees of the contractor are reporting possible
4 violations of law by the public company for which the
5 contractor is performing work.

6 So it did put a limitation on the kinds that
7 Justice Breyer has suggested. In other words, yes,
8 employees of the contractor, but only when the employees
9 are engaged, you know, only when the violations of law
10 that the employee is reporting relates to the work that
11 the contractor is doing for the publicly held company.
12 Do you think that that's a possible reading of the
13 statute or not?

14 MR. SCHNAPPER: Well, it's certainly
15 possible. We think it's not the correct reading. And
16 there's a --

17 JUSTICE SOTOMAYOR: I didn't hear you.

18 MR. SCHNAPPER: It's a possible reading, but
19 we think it's not the correct reading.

20 JUSTICE SOTOMAYOR: So you are rejecting the
21 district court's limitation as well.

22 MR. SCHNAPPER: Yes. Yes, we are.

23 JUSTICE SCALIA: Why? Why is it a possible
24 reading? It makes a lot of sense, I agree with that.

25 MR. SCHNAPPER: I'm not sure I want to go

1 down the road. That's not -- that's not our view. I
2 don't want to pick a fight with the government.

3 JUSTICE SOTOMAYOR: Suppose that the -- I
4 suppose the --

5 CHIEF JUSTICE ROBERTS: Justice Breyer.

6 JUSTICE BREYER: The road is when you see a
7 statute that says "any policeman," they don't mean a
8 policeman on Mars, nor are they likely to mean a
9 policeman in Europe. The "any policeman" is likely,
10 although it says "any policeman," to mean a policeman in
11 the United States.

12 And similarly where they talk about this,
13 the contractors, they don't mean frauds related to --
14 you have to use some kind of scope for the word -- for
15 the kinds of frauds that are included in the statute,
16 and you have to read that into language that says
17 nothing about it.

18 And that's -- I don't say that that is
19 necessarily easy to do and that's why I started with my
20 first question.

21 MR. SCHNAPPER: As I said, we think
22 that's -- we think that's not the correct reading of the
23 statute, for a couple of reasons. Another one that we
24 think it unlikely, over and above the fact that Congress
25 was concerned with fraud generally, was that I think

1 Congress would have been reluctant to try to define what
2 was sufficiently related to the corporation.

3 JUSTICE ALITO: Well, to go back to
4 Justice Breyer's hypothetical which gets at this point
5 where you have the gardening -- the gardening company,
6 privately held, that's working for a public company, and
7 there's some kind of employee of the contractor is fired
8 and claims that the company is engaging in some kind of
9 fraud that has nothing to do with the public company.
10 So you have that situation.

11 Now you have the identical, another
12 privately held gardening company, exactly the same thing
13 is going on, except they don't have a contract with a
14 public company. Why would Congress have wanted to cover
15 the former and not the latter?

16 MR. SCHNAPPER: Justice Alito, I think
17 that's just the way they wrote the statute. They were
18 concerned with all fraud, but they didn't extend the
19 whistleblowers to all fraud.

20 JUSTICE ALITO: But why? If they are
21 concerned with all fraud, why not cover them both?

22 MR. SCHNAPPER: Well, this is sort of a
23 hybrid piece of legislation dealing with corporate
24 problems and fraud, and they kind of melded the two
25 here.

1 But I think there are -- it's also important
2 in this situation to bear in mind the following: I
3 think Congress would have -- was reluctant -- it didn't
4 itself draw a line because the experience of the Enron
5 scandal was that all sorts of terribly complicated
6 arrangements had been drawn up between Enron and these
7 hundreds of off-the-books entities, Jedi, Raptors, LJM,
8 and the like.

9 I think Congress correctly concluded that if
10 it tried to write out a description of what else it was
11 covering, someone would think of a way to get around it.
12 And I think it certainly wouldn't have contemplated that
13 Federal courts were to try to untangle these
14 relationships to the point where they could figure out
15 whether, for example, if Andrew Fastow was skimming off
16 money from Chewco, whether that would be sufficiently
17 related to Enron. It's just, it's enormously
18 complicated and I think Congress didn't mean to open the
19 door to that.

20 And that's brought home by the fact that the
21 statute is written more broadly than AIR-21. It's
22 essentially modeled on AIR-21, which is a statute
23 adopted a couple years earlier about whistleblowing in
24 the airline industry, particularly with regard to safety
25 work. In that statute, "contractor" is specifically

1 defined to mean an airline contractor dealing with
2 safety. They did not put that kind of limitation here,
3 and I think it, in part, because it simply would have
4 been very difficult to do. And I don't think they meant
5 to give the courts a commission to try to sort that sort
6 of thing out.

7 The core problem with the interpretation of
8 the court of appeals is that it really renders almost
9 meaningless the decision of Congress to prohibit
10 retaliation by contractors and subcontractors.
11 Contractors and subcontractors would rarely be in a
12 position to engage in retaliation, but particularly to
13 engage in the very specific kind of retaliation
14 specified in the statute, retaliation in the terms and
15 conditions of employment.

16 JUSTICE KENNEDY: Is one of the limitations
17 in the statute where it says, in sub (1), "to provide
18 information relating to fraud against shareholders"? Do
19 you think "shareholders" means just the shareholders of
20 the public company or does it mean shareholders of the
21 -- suppose you have an accountant which has shareholders
22 in it. And there is a fraud with the accounting firm
23 and it hurts the shareholders of the accounting firm,
24 but not the company that's registered. Does the --

25 MR. SCHNAPPER: It's a --

1 JUSTICE KENNEDY: The shareholders -- in
2 other words, does "shareholder" apply just to the
3 publicly registered company?

4 MR. SCHNAPPER: I would think so, Your
5 Honor, but that --

6 JUSTICE KENNEDY: You would think so.

7 MR. SCHNAPPER: I think so. But this clause
8 in the alternative, it -- it's -- a report would be
9 protected if it involves a violation of 1341 or 1334 and
10 8, which aren't limited to shareholders. The words --

11 JUSTICE KENNEDY: So "fraud against
12 shareholders" just modifies the last clause or any
13 provision of Federal law?

14 MR. SCHNAPPER: Yes, it modifies the last
15 clause, exactly.

16 With the Court's permission, I'd like to
17 reserve the balance of my time.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Ms. Saharsky.

20 ORAL ARGUMENT OF NICOLE A. SAHARSKY,

21 FOR UNITED STATES, AS AMICUS CURIAE,

22 SUPPORTING THE PETITIONERS

23 MS. SAHARSKY: Mr. Chief Justice, and may it
24 please the Court:

25 The statute protects an employee of a

1 contractor from retaliation. That's what the text says.
2 That's what Congress intended to cover, these
3 accountants, lawyers, and outside auditors who were so
4 central to the fall of Enron. I'd like to go right to
5 some of the questions that the Court had about the
6 limits of the statute and how it would be applied.

7 Now, of course, what we're talking about
8 here is really the core of the statute, a contractor
9 retaliating against its own employees. And we think
10 that when the First Circuit said that that is
11 unambiguously not covered by the statute, that it's
12 wrong. But moving beyond that, assuming that that is
13 covered and asking some of these -- or answering some of
14 these questions about the limit.

15 First of all, as Justice Scalia suggested,
16 the statute applies to individuals who are in a position
17 who have information about fraud or securities law
18 violations are in a position to report it. So it is
19 very unlikely that that would be the gardener. It's
20 incredibly likely that it would be an accountant or
21 auditor, like a person who worked for Arthur Andersen.

22 Another --

23 JUSTICE ALITO: It's not -- it's not
24 unlikely that an employee of a subcontractor will have
25 information about something that can be -- that can be

1 alleged to be mail fraud by that -- by the contractor,
2 that's not at all unlikely. If you see -- you know, if
3 you see some civil RICO complaints, you see the kind of
4 things that are alleged as mail fraud.

5 MS. SAHARSKY: Right.

6 JUSTICE ALITO: Do you disagree with that?

7 MS. SAHARSKY: No. But I think it raises --
8 your question raises a -- another limitation on the
9 statute, which is when the statute talks about
10 contractors and subcontractors, it's contractor of a
11 public company. So that it's talking about the
12 contractor working in its capacity for the public
13 company, not the contractor doing some other type of
14 work.

15 So if the contractor's work is for the
16 public company and there is fraud being committed by the
17 contractor, yes, that is something that Congress was
18 concerned about. It was concerned about the fact that
19 Arthur Andersen was committing fraud, not against Enron.

20 JUSTICE ALITO: Yes. But you think this is
21 limited to -- to fraud by the contractor relating to the
22 public company, not -- not fraud that has nothing to do
23 with the public company.

24 MS. SAHARSKY: I think that it can be fraud
25 by the contractor while the contractor is fulfilling its

1 role as a contractor for the public company, not the
2 contractor in some other capacity.

3 JUSTICE ALITO: What do you mean while?
4 Temporal -- during the same period of time or in
5 relation to?

6 MS. SAHARSKY: In that capacity. In that
7 capacity.

8 JUSTICE ALITO: And where do you see that in
9 the statute?

10 MS. SAHARSKY: "Of such company." The words
11 "contractor and subcontractor of such company."

12 Now, it says --

13 JUSTICE ALITO: It says, "The contractor of
14 such company," not "the fraud of such company."

15 MS. SAHARSKY: Right. But we think that
16 when you're reading the statute holistically, that
17 that's the most natural reading.

18 Now, I point out here that these are not
19 questions that the courts of appeals or the Board, which
20 is entitled --

21 JUSTICE BREYER: The argument about this,
22 the reason that we're -- that I've brought this up is --
23 is because I think that the strongest argument in those
24 courts of appeals that kind of held against you is that
25 they fear that otherwise this statute would create any

1 fraud by any gardener, any cook, anybody that had one
2 employee in the entire United States and engaged in any
3 alleged fraud would be covered. But it seems to me
4 there are many ways to skin that cat.

5 And -- and one way that I suggested and now
6 Mr. Schnapper said, no, that's -- that kind of thing
7 related to the contract isn't going to work very well
8 because it's too complicated to try to figure out. So
9 maybe we don't have to figure it out in this case. I
10 mean that's possible. I -- I just wanted a universe of
11 possibilities.

12 MS. SAHARSKY: Yes. I think this is a
13 completely understandable concern that was raised by the
14 First Circuit. I have several responses to it. First
15 of all, I don't think you don't need to decide it in
16 this case. It's -- this is a fairly mainstream
17 application.

18 Second of all, this is the kind of thing
19 that the expert agency should consider in the first
20 instance. There have not been cases, except for the
21 Spinner case, that really has -- that really have
22 considered these questions about contractors and
23 subcontractors. In the history of this statute, there
24 are only about 20 published cases that have ever reached
25 the courts of appeals.

1 JUSTICE KENNEDY: Well, you say -- you say
2 this is -- this is a mainstream application. We still
3 have to give a rule. Do we write in the opinion, this
4 is a mainstream application case and therefore it is so
5 confined? That -- that doesn't make any sense.

6 MS. SAHARSKY: No, Justice Kennedy. My
7 suggestion was, because the Court doesn't have to decide
8 some of these more far-fetched applications of the
9 statute in this case, that it should leave it to the
10 expert agency in the first instance. The rule that we
11 would --

12 JUSTICE KENNEDY: Well, that -- that was
13 your second point. Your first point was just talk about
14 the mainstream in this case and leave other cases. But
15 I don't see how you can do that and interpret the
16 statute. That's what I'm asking. Your statutory
17 interpretation rule to keep this the mainstream is what?

18 MS. SAHARSKY: I'm sorry. I should be more
19 clear. What we think that this Court should say is that
20 the natural reading of this provision covers, protects
21 employees of contractors. The First Circuit said that
22 employees of contractors are not protected at all from
23 retaliation. And we think that that is wrong. So that
24 would be step one.

25 JUSTICE KENNEDY: I understand that and I --

1 I think that's a plausible reading. I don't see how
2 it's confined to so-called mainstream, which is what we
3 were talking about.

4 MS. SAHARSKY: What I was trying to suggest,
5 Justice Kennedy, is that this is a contractor
6 retaliating against its own employees and it's within
7 the work that the contractor is doing for the mutual
8 fund. This is investment advising. This is the heart
9 of what contractors of mutual funds do for mutual funds.

10 JUSTICE SCALIA: I understand that, but --
11 but I think you're -- I don't agree with you that --
12 that we don't have to get into these -- these other
13 situations, because to my mind, the principal argument
14 made by the Respondent is if you read the statute
15 literally the way you like, it covers a wide range of
16 things that -- that one would have no reason to believe
17 Congress wanted to cover. And unless you come up with
18 some -- with some limiting principle that -- that
19 eliminates that argument, I'm not inclined to go along
20 with your -- your broad interpretation of the statute.

21 So, I at least do have to grapple with --
22 with whether there are limitations, with -- with what is
23 -- what is the central mainstream of the statute and --
24 and what is outside the statute.

25 MS. SAHARSKY: Right. And what we're saying

1 is that there are -- there are several limitations. The
2 first is that it has to be a person who is in a position
3 to detect and report the types of fraud and securities
4 violations that are included in the statute.

5 Second, we think that "the contractor of
6 such company" refers to the contractor in that role,
7 working for the public company.

8 Third, the expert agency that has considered
9 this question has looked at whether there would be a
10 floodgates open and has concluded -- and this is on page
11 166 of the petition appendix -- that there are built-in
12 limits so that there would not be those floodgates.

13 And fourth, I can tell you as an empirical
14 matter, that no floodgates have been opened. The
15 Department of Labor has consistently interpreted the
16 statute this way since the beginning of SOX and you'll
17 find on OSHA's website that it's only 150 or maybe 200
18 complaints per year that are filed with the agency.

19 JUSTICE KAGAN: Ms. Saharsky, if I could
20 take you back to second. "Contractor of such company,"
21 you're saying we can read that to impose a limitation,
22 that it's -- it's not anything that the contractor does
23 in any capacity for anybody, whether relating to the
24 contract or not. We could instead read it as, you know,
25 "the contractor" means the -- the entity doing a

1 particular contract for a particular public company; is
2 that correct? Do I get that?

3 MS. SAHARSKY: Yes.

4 JUSTICE KAGAN: In other words, inherent in
5 the -- in the word "contractor" or in the phrase
6 "contractor of such company" is a sort of status of a
7 company, and that one should not read this statute as
8 applying outside that particular status.

9 MS. SAHARSKY: I think that that's right.
10 And the only thing that I would add to that is that it
11 could be fraud that's being reported that the contractor
12 is engaging in fraud in that contract or that the public
13 company is engaging in fraud. But Congress would have
14 wanted both those covered. It was Arthur Andersen and
15 Enron that were involved in the fraud that led --

16 JUSTICE SCALIA: This is not the
17 Petitioner's position, however. The Petitioner takes a
18 broader -- a broader interpretation as I understood him.

19 MS. SAHARSKY: That -- that is my
20 understanding as well. But I think on the main question
21 that's raised by this case, which is whether contractors
22 can ever be covered, and the First Circuit said that
23 they can't, we're in complete agreement.

24 I also want to point this Court to the
25 Board's opinion in this case, which we think is entitled

1 to Chevron deference. It's an exceptionally thorough
2 opinion when the Board went --

3 JUSTICE GINSBURG: But it came up. I mean,
4 we are reviewing a decision of the Court of Appeals for
5 the Fourth Circuit. And this Spinner case from the ARB
6 postdates. We have a district court, a court of
7 appeals. Chevron didn't raise its head until after the
8 First Circuit was through with the case. So how does
9 Chevron come into this particular case?

10 MS. SAHARSKY: It's because the agency has
11 been given this authority. And the Court has faced
12 cases before where it has afforded Chevron deference
13 even though that was not an issue considered by the
14 court of appeals. I point the Court to INS v. Agere.
15 It's the -- Congress has entrusted this expert agency
16 with making decisions through formal adjudication.

17 CHIEF JUSTICE ROBERTS: Well, even though it
18 delegated rulemaking authority to a different agency,
19 right?

20 MS. SAHARSKY: No. There is no rulemaking
21 authority for this provision under 1514A delegated to a
22 different --

23 JUSTICE BREYER: Then why isn't the SEC --
24 sorry.

25 CHIEF JUSTICE ROBERTS: And the SEC has no

1 rulemaking authority that would cover this provision?

2 MS. SAHARSKY: Not for this provision. For
3 other parts of SOX, yes. But the anti-retaliation
4 provision in SOX, like about 20 other anti-retaliation
5 provisions, is entirely handled by the Department of
6 Labor and it's entirely handled through formal
7 adjudication.

8 CHIEF JUSTICE ROBERTS: As I understand the
9 ARB's decisions, they said that they were bound by
10 OSHA's interpretation, right?

11 MS. SAHARSKY: They said that, but then they
12 also cited several of their --

13 CHIEF JUSTICE ROBERTS: And OSHA made it
14 quite clear in its interpretation that it -- and its
15 rule that it had no authority to issue statutory
16 interpretations.

17 MS. SAHARSKY: It said that it was not
18 providing an interpretation, but I want to make sure the
19 Court realizes that there are many other things that the
20 Spinner decision relied on. I point the Court to
21 footnote 8 at page 143 of the board's decision where it
22 says: "In addition to this regulation, we're relying on
23 several of our prior decisions" -- many of which do not
24 even cite the regulation -- "and our decades of
25 experience in looking at similar statutes like AIR-21."

1 So to think that --

2 CHIEF JUSTICE ROBERTS: So we should ignore
3 the part where it said it's bound by OSHA's
4 interpretation?

5 MS. SAHARSKY: I don't think that the
6 agency -- may I finish?

7 CHIEF JUSTICE ROBERTS: Go ahead.

8 MS. SAHARSKY: -- should be worse off
9 because everyone who has considered this question within
10 the agency has come to the same conclusion over a period
11 of a decade.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 Mr. Perry.

14 ORAL ARGUMENT OF MARK A. PERRY

15 ON BEHALF OF THE RESPONDENTS

16 MR. PERRY: Mr. Chief Justice, and may it
17 please the Court:

18 Justice Alito asked why didn't Congress say
19 all employers or no employers? There are approximate 40
20 whistleblower statutes on the books as of today, Your
21 Honors. And more than 30 of them, in fact, 36 of them,
22 are phrased exactly that way. They say "No employer may
23 retaliate" or "Any employer is prohibited from
24 retaliating."

25 This statute is not phrased that way. This

1 statute, which Congress could have written that way, and
2 Dodd-Frank 922 is written that way, this statute is
3 written quite differently. This statute says, "No
4 public company may retaliate," and then it has a
5 subordinate clause and the subordinate clause is what's
6 at issue here, that references officers, employees,
7 contractors, subcontractors and agents.

8 Justice Alito also asked my friend,
9 Mr. Schnapper, do you contend that the same construction
10 should be given to officers and to contractors, and he
11 acknowledged they have to say no, because the ARB has
12 also said no. In other words, an employee, the phrase
13 that we are construing at the bottom of all of this,
14 these turtles, is different they say for officers and
15 employees and agents, presumably, than for contractors
16 and subcontractors.

17 But that doesn't fit with the statute. It
18 doesn't fit with the tools of statutory construction,
19 and it doesn't fit with what Congress was trying to do
20 here.

21 This was the -- the failure of Enron. This
22 was a bankruptcy situation. Congress was acutely aware
23 that corporate bankruptcies, failures, left victims high
24 and dry. One of the other provisions in this title,
25 Section 803, specifically deals with the

1 dischargeability of shareholder fraud debts in
2 bankruptcy.

3 And what these sub -- the subordinate clause
4 that added these corporate representatives does is make
5 sure that if the employer, the public company, goes out
6 of business, the way Enron had just done, somebody is on
7 the hook for the money damages that Congress authorized
8 for these employees like Sharon Watkins. It's a very
9 simple regime to make sure that the victim, the
10 whistleblower, is not left high and dry if the company
11 that is, by hypothesis, riddled with fraud goes out of
12 business.

13 JUSTICE ALITO: What happens if another
14 Enron situation comes along and the corporation's
15 accounting firm retaliates against an employee of the
16 accounting firm because that employee wants to report
17 illegal activity by the corporation?

18 MR. PERRY: Justice Alito, the accounting
19 firms are not covered by 806, and let me explain that.
20 Accountants, accounting firms, and auditors are
21 referenced by name 153 times in the Sarbanes-Oxley Act,
22 including in Section 802 in this title. It says, "No
23 accountant shall shred documents." 806 doesn't refer to
24 accountants anywhere. It refers to contractors. And
25 nowhere --

1 JUSTICE GINSBURG: Can an accountant be a
2 contractor?

3 MR. PERRY: No, Your Honor, because the --
4 the contractor that's being referred to here -- there's
5 nothing in the statute, nothing in the legislative
6 history, that suggests that an accountant is a
7 contractor. And more importantly, the reason for
8 this is --

9 JUSTICE GINSBURG: But then -- but the
10 bottom line of your argument Mr. Perry, is that the
11 whistleblower who is working for the accountant -- you
12 say there are separate provisions that deal with the
13 accounting firm and the law firm. But the whistleblower
14 who wants to disclose what nefarious thing is going on
15 would have no protection against retaliation by the
16 accounting firm or, if it's a law firm, the law firm?

17 MR. PERRY: Justice Ginsburg, that is the
18 matter that the Congress left to the expert agencies.
19 The accounting firms are regulation by Section 105 and
20 the PCAOB.

21 JUSTICE GINSBURG: But the answer to my
22 question is right, they wouldn't have --

23 MR. PERRY: Your Honor, if the --

24 JUSTICE GINSBURG: -- a whistleblower claim
25 against the accounting firm or the law firm?

1 MR. PERRY: To this day, the agencies have
2 not written rules requiring that. They could. And --
3 and I would refer the Court respectfully to Section 501
4 dealing with securities analysts, where Congress
5 required the SEC to write a rule protecting
6 whistleblowers at the investment banks that are
7 securities analysts. So when Congress wanted to protect
8 those people --

9 What Congress did for the accountants and
10 lawyers was not to protect whistleblowers. It imposed a
11 mandate. Section 10(a) --

12 JUSTICE GINSBURG: I'm sorry. You told me
13 that Congress didn't provide for the whistleblower, but
14 it allowed the agency to do so.

15 MR. PERRY: Correct, Your Honor.

16 JUSTICE GINSBURG: Which agency?

17 MR. PERRY: The SEC for the lawyers. That's
18 Section 307. And the PCAOB for the accountants. That's
19 Section 105. And Section 10(a) of the Exchange Act,
20 which is incorporated by reference, Your Honor.

21 CHIEF JUSTICE ROBERTS: What about the ARB?

22 MR. PERRY: The ARB is nowhere involved with
23 lawyers or accountants, as this Court made clear in
24 the -- in the PCAOB case. The Congress decided to put
25 the entire accounting profession under the thumb of that

1 new board. That is a -- a purpose-built regulatory
2 agency that regulates birth to death of the accounting
3 industry. And if they want to protect whistleblowers or
4 not protect whistleblowers, that is the board's
5 business.

6 Congress didn't do anything there. What
7 Congress did in 806 was regulate the public companies
8 and their employees. But we can see this. This -- this
9 tracks very clearly through the legislative history.

10 JUSTICE BREYER: When you're ready to go
11 through this, I'd appreciate your telling in your
12 opinion -- what the statute says, taking the extraneous
13 words out, is that no contractor of a publicly-traded
14 company may discharge, demote, et cetera, any employee
15 because of his lawful act in reporting a fraud. That's
16 what it says.

17 So, what did they have in mind if they
18 didn't have in mind forbidding any contractor of a
19 publicly-traded company from a contractor -- and, you
20 know, maybe there are limitations there -- but a
21 contractor from demoting an employee because of his
22 lawful act reporting a fraud?

23 MR. PERRY: Let me answer that in two steps,
24 Justice Breyer. First, with due respect, the Court
25 inverted the statute. It actually says, "No public

1 company," comma, "or" --

2 JUSTICE BREYER: Or any -- I just eliminated
3 the extraneous words and instead of the not the word
4 "such," I put in what "such" refers.

5 MR. PERRY: It's not extraneous here because
6 it is -- it is subordinating the contractors to the
7 public employees. And what -- more importantly, second,
8 what Congress is doing -- and this is in response to my
9 friend's question was this a meaningless act? If I
10 could point the Court to the Kalkunte case. The
11 Kalkunte case is an ARB decision from 2009. It's cited
12 at page 16 of the government's brief.

13 Here is a bankrupt company and the estate
14 brings in a workout firm, a privately-held contractor to
15 wind down the affairs of the company. And this private
16 contractor decides that there's a squeaky wheel employee
17 within the legal department and fires her. And she sues
18 under Section 806 both the estate of the bankrupt
19 company, that is the public company employer in the
20 first primary clause of this statute, and the workout
21 firm, the contractor.

22 JUSTICE BREYER: All right. So all they're
23 interested in here, you say, is this workout contractor,
24 but not for example where you have a fund which has
25 virtually no employees and does all its work really

1 through investment advisors such as here, and you think
2 Congress didn't want to include the investment advisor
3 firing its whistleblower even if it's directly related
4 to the fraud, hot fund and everything else, but it did
5 just want to include the people who -- who are there
6 because the contractor is a workout firm, and -- and not
7 the investment advisor.

8 MR. PERRY: Your Honor --

9 JUSTICE BREYER: Now, all that's a
10 conceivable reading, I agree.

11 MR. PERRY: We --

12 JUSTICE BREYER: But what is it that leads
13 you to that conclusion other than --

14 MR. PERRY: Three points here, Your Honor.
15 First, when Congress wishes to reach investment
16 advisors, in SOX and elsewhere it amends the Investment
17 Company Act of 1940 and the Investment Advisors Act of
18 1940. And for this I can point you to Dodd-Frank 922,
19 the parallel whistleblower's provision that my friends
20 haven't talked about, but is very important here because
21 it does cover all employers.

22 And when Congress covered all employers in
23 Dodd-Frank, it amended the 1940 Acts to make clear that
24 investment advisors were included. And the SEC has
25 issued its Form TCR that applies to investment advisors.

1 Congress didn't do any of that in Sarbanes-Oxley.

2 Second, we know the very next Congress after
3 Sarbanes-Oxley, took up the Mutual Reform -- Mutual Fund
4 Reform Act, which would have amended Section 806 to
5 include investment advisors, to do exactly what the
6 Petitioners in this case say the statute did. Why would
7 Congress have taken up, the very next Congress -- all
8 the same members are still there; Senator Sarbanes was
9 still there -- taken up a bill to do that?

10 JUSTICE SCALIA: It's sort of
11 post-legislative history, which we usually don't pay
12 attention to. The -- the problem that I have is if --
13 if the statute does not cover contractors',
14 subcontractors', firing of their own people, what --
15 what coverage does it have? A subcontractor usually
16 cannot fire somebody from the principal company that's
17 traded on the exchange.

18 MR. PERRY: Justice Scalia, it's not just
19 firing. It's also harassing. It's also threatening.
20 These are contractors who may be working --

21 JUSTICE SCALIA: I don't -- I don't see how
22 it can harass or threaten either if it's -- if it's an
23 employee of another company --

24 MR. PERRY: Sure, Your Honor.

25 JUSTICE SCALIA: -- that it has no power to

1 fire.

2 MR. PERRY: Your Honor, it can -- there have
3 contractors that are in the operation, management
4 consultants and others that are working side by side
5 with public company employees who can make their lives
6 difficult, who can make their lives intolerable, who can
7 lead to a constructive discharge if it's bad enough.

8 And this Court has said in the Title VII
9 context, that that kind of discrimination does not
10 require a supervisory relationship, and these
11 contractors, just like agents and officers, employees,
12 may have that ability to affect the terms and conditions
13 of the public company's employees.

14 JUSTICE SCALIA: But you -- you're -- you're
15 eliminating the -- the principal contractors who might
16 have that kind of power. You say they're not covered.

17 MR. PERRY: The accountants and lawyers.

18 JUSTICE SCALIA: Yes, yes, yes.

19 MR. PERRY: Absolutely. But, you know, if
20 there are -- I mean, they are not covered by -- for
21 their own employees. If they were to discriminate
22 against a public company employee -- the public
23 company's employees are always protected. That is the
24 subject of this statute, the employees of the public
25 company.

1 Let's look at the title. We know Congress
2 didn't leave a big mystery about who they were
3 protecting here: Whistleblower protection for employees
4 of publicly-traded companies. That's what the Congress
5 told us --

6 JUSTICE SCALIA: Including by accountants
7 and lawyers.

8 MR. PERRY: Against the public company's
9 employees, I -- I absolutely agree.

10 JUSTICE SCALIA: How so if -- if accountants
11 and lawyers are not -- are not contractors?

12 MR. PERRY: If I said that, I -- I misspoke,
13 Your Honor. I didn't say they weren't contractors. I
14 said they weren't regulated as contractors here because
15 they were specifically regulated as accountants
16 elsewhere. If they fit within the statute --

17 JUSTICE SCALIA: What does it mean that
18 they're not regulated as contractors here? Unless it
19 means that contractor here does not include them.

20 MR. PERRY: Let me -- let me try to be much
21 clearer. The government makes the point that this
22 statute is written to cover Arthur Andersen. I can't
23 agree with that. Arthur Andersen appears all over this
24 statute, and there's two titles of this statute that
25 deal with accountants.

1 Arthur Andersen might be included here if
2 it -- if it discriminates against a client, an audit
3 client's employee. That -- that's just a normal
4 contracting or agency relationship. That's what
5 Congress was dealing with. What's not covered is Arthur
6 Andersen retaliating against its own employees. That is
7 what Congress gave to the Board to decide or for the
8 lawyers to the SEC to decide.

9 And, again, I would have to point the Court
10 to Section 501, which ordered the SEC to make a rule
11 protecting securities analysts.

12 JUSTICE GINSBURG: Apparently, that's not
13 the view of the SEC because I think they are -- they are
14 represented by the government. And the SEC apparently
15 takes the view that this provision does cover
16 contractors. It covers lawyers who couldn't be
17 contractors and accountants.

18 MR. PERRY: Your Honor, they -- they are
19 defending the ARB's decision. I agree with that. The
20 ARB's decision, however, is -- all comes back to this
21 procedural regulation that OSHA promulgated that they
22 agree is not entitled to deference. So it's not a
23 reasoned articulation of the government's position. It
24 is, rather, a post hoc rationalization of what the OSHA
25 said a long time ago.

1 JUSTICE GINSBURG: It's a lot like the
2 dissent in the First Circuit.

3 MR. PERRY: Your Honor, the dissent in the
4 First Circuit, like the ARB, I agree, disassociates the
5 statute, the language "an employee" from its context,
6 from its grammar, from its syntax, from the title of the
7 statute, from the legislative history. I mean, the
8 Senate report, Your Honor, goes through six times to
9 explain what is the problem being addressed. And
10 Congress says, "There is no current protection for
11 employees of publicly-traded companies." That's at page
12 18.

13 So what does this legislation do, Section
14 806? It provides protection for employees of
15 publicly-traded companies. That's at page 19.

16 JUSTICE BREYER: You're right on that. I
17 mean, it is correct that that's what they talk about.
18 And so that sends us on a search for limitation. You
19 have one limitation. Your limitation says the person
20 who is dismissed has to be an employee of the
21 publicly-traded company.

22 Now, the government, and -- and even your --
23 Mr. Schnapper has come up with accepting some
24 limitations. There are possibly others. One would be
25 on the nature of the contractor, which you want to do,

1 but it would be somewhat broader than yours. Another,
2 possibly, is on the nature of the fraud. Is it related
3 to the contract? Another might be the one the district
4 court proposed, and there could be others.

5 So I think if you want to say anything about
6 this, it seems to me that taking as given -- I will for
7 argument's sake anyway -- say all the legislative
8 history is about publicly-traded companies. And I do
9 look at it. But nonetheless, they did use this language
10 in their other possible limitations that would serve the
11 same purpose.

12 Then you say to that, saying yours is the
13 best, what?

14 MR. PERRY: Your Honor, first, the very need
15 for this discussion about limitations, which is found
16 nowhere in the statute and nowhere in the legislative
17 history, is eliminated if the Court were to construe the
18 statute as Chief Judge Lynch and the majority did below
19 for --

20 JUSTICE BREYER: Oh, that itself is a big
21 limitation. Huge.

22 MR. PERRY: That's exactly right. Well,
23 it's the limitation that Congress put in the statute,
24 Your Honor. If we go beyond that, it seems to me
25 universally accepted by my friends on this side that

1 some limitation is needed. It can't be every company
2 with a contract to the public company, except that is
3 what the ARB said a contractor is. Okay? And it can't
4 be every kind of misconduct, except that's what the ARB
5 has said this statute covers.

6 And I point to the Lockheed case, which has
7 nothing to do with fraud against shareholders. This is
8 a run-of-the-mill adulterous affair by a -- by a
9 gossip -- by an office gossip and a supervisor that the
10 person brings a lawsuit under Section 806 saying that is
11 fraud because she submitted her expense accounts. So
12 what we have is --

13 JUSTICE KENNEDY: That was fraud under 1343?

14 MR. PERRY: As wire fraud, Your Honor,
15 correct.

16 JUSTICE KENNEDY: Well, was that what the
17 fraud was in this --

18 MR. PERRY: In the Lockheed case, correct.

19 So, Justice Breyer, your gardener, your
20 three-person gardener, there's a couple of problems with
21 it. First, if the same gardening company works for Ken
22 Lay and for Enron -- this goes back to Justice Alito's
23 question -- my friend's argument is they're covered when
24 they work for Enron but not covered when they work for
25 Ken Lay. That's a bizarre reading of the statute.

1 Okay?

2 Second, they're covered under the -- all of
3 the so-called limitations they've been offered if the
4 junior gardener thinks -- hears gossip that the senior
5 gardener is having an affair and submitting false
6 expense reports regarding the hotel receipts -- that's
7 the facts of the Lockheed case -- and reports that to
8 the middle gardener, and nothing happens, and then the
9 junior gardener gets fired because the economy downturns
10 or something.

11 CHIEF JUSTICE ROBERTS: Well, those --
12 that's an easy hypothetical. What about the butler who
13 does, in fact, hear all this information about a
14 conspiracy and wire fraud?

15 MR. PERRY: Your Honor, there are still the
16 state law protections, of course, for public policy and
17 other protections. There is the Dodd-Frank Act. We
18 haven't talked about it enough. Dodd-Frank 922 came in
19 eight years later and said -- Congress said we think we
20 need to do more. We think we need to cover all
21 employers, but we're going to provide more limitations.
22 We're going to require a written submission to the SEC
23 under penalty of perjury, and we're going to limit it to
24 securities fraud.

25 So if the butler learns that the boss is

1 doing something untoward, the butler then can go to the
2 SEC and make a complaint. If it pans out, he can even
3 get a bounty under that program. And if he gets fired,
4 he's completely protected and has reinstatement and back
5 pay.

6 Congress dealt with that. There -- there is
7 a gap of eight years. We definitely acknowledge that.
8 But Congress moves incrementally in this area. The --
9 the Sarbanes-Oxley Act was the first major widespread
10 corporate governance reform at the Federal level, and
11 Congress didn't purport to do everything at once. It
12 went a long way. It subjected every public company to
13 these new things.

14 But for my friends to suggest that they
15 covered not just the 5,000 public companies, but all 6
16 million private companies without ever mentioning the
17 fact, without ever discussing it, without debating it,
18 without acknowledging that that would be the consequence
19 is a dramatic -- a dramatic expansion of this statute
20 that was already pretty dramatic to begin with, that
21 barely passed, as the Court may remember.

22 JUSTICE SOTOMAYOR: So doesn't that drama
23 reduce itself if we accept the government's limitation
24 that it has to do only with the fraud related to the
25 public company?

1 MR. PERRY: Your Honor --

2 JUSTICE SOTOMAYOR: Because that was the
3 center of this bill -- what motivated this bill.

4 MR. PERRY: Your Honor, I agree that would
5 be a -- a limitation. I don't agree that it's found in
6 the language of the statute. I mean, as a -- as a
7 defense lawyer, I would like that down the road. But --
8 and the ARB in the Lockheed case didn't seem to suggest
9 that there is any such limitation. The ARB simply said
10 fraud. And Mr. Schnapper, Petitioners here certainly
11 took that position today. So it's every fraud of any
12 sort by any company that has a contract --

13 JUSTICE SOTOMAYOR: But we're not being
14 asked to give deference to the Petitioner. We're being
15 asked to give deference to the government.

16 MR. PERRY: That's why I pointed to the
17 ARB's decision in Lockheed, Your Honor. And the
18 language there is exceedingly sweeping. It rejected all
19 limitations that were offered in that case. The
20 government's so-called limitation is no limitation at
21 all. It is simply anything that is fraudulent is
22 covered according --

23 JUSTICE BREYER: They didn't say that today.
24 And -- and if, in fact, the fraud is related to the
25 contract or by certain kinds of contractors who do

1 investment work, who do all kinds of important work for
2 the company, why shouldn't it be covered? I mean, and
3 the language, of course, does say what I read, as you
4 agreed. It says a contractor.

5 MR. PERRY: Justice -- Justice Breyer, if I
6 could return to the point of this discussion of
7 limitations, which is fascinating, but we are having it
8 for the first time in the Supreme Court of the United
9 States. Congress never had this discussion. Congress
10 never discussed limitations because Congress never
11 contemplated covering private companies.

12 JUSTICE ALITO: What the statute says is
13 "any conduct," "any conduct which the employee
14 reasonably believes constitutes a violation of Section
15 1341, '43, '44, or '48." Do you see in there any
16 limitation that says that the conduct has to be
17 fraudulent conduct relating to the activities of a
18 publicly held company.

19 MR. PERRY: It is not in the terms of the
20 statute, Your Honor, and, as I just said, that was the
21 holding of the Lockheed case in ARB.

22 JUSTICE SCALIA: It's a very sensible
23 limitation. Unfortunately, it's not there.

24 MR. PERRY: Your Honor, that's the danger of
25 moving beyond the text of the statute. They won't

1 admit, my friends won't admit, that every contractor and
2 every fraud is covered. But that is the import of their
3 argument. We submit that that's not right, or at least
4 that that decision, if it is right, should be made by
5 the Congress or by an agency with rulemaking authority
6 on the public record to take public responsibility for
7 it. No --

8 JUSTICE BREYER: So it may be that you have
9 a good point, that it's the SEC we should defer to and
10 not the Labor Department. But then, as was pointed out,
11 fine, then you're going to have that rulemaking and
12 given their position here, it looks as if they will hold
13 something you don't like. But -- so what are we
14 supposed to do about that, in your opinion?

15 MR. PERRY: Your Honor, they have not had
16 that rulemaking since this statute was enacted in 2002,
17 and we don't know whether they will have that
18 rulemaking. The Court's opportunity and I would submit
19 obligation, respectfully, is to read the statute as it
20 was passed by Congress.

21 JUSTICE SCALIA: I assume you would say that
22 that rulemaking would be ultra vires, if it took the
23 position that the government's taking here, right?

24 MR. PERRY: Your Honor, Ms. Saharsky said
25 that the SEC has no power to make rules under Section

1 806. I -- I am not going to quarrel with her on that.

2 JUSTICE SCALIA: But even if they did and
3 they came out with a rule that reads just the way the
4 government presented it today, you would say that that
5 is an unreasonable reading of the statute, wouldn't you?

6 MR. PERRY: We would, but we would also have
7 a rulemaking record and a cost-benefit analysis of the
8 impact on private companies and the impact on employment
9 and all of the things that agencies have to take into
10 account when they make these determinations, none of
11 which exists on this record. We simply have the ARB
12 deciding 5,000, 6 million, good enough, let's move
13 forward. And that is not, we submit, what Congress
14 intended here.

15 Congress did not intend for the ARB to be
16 able to make that decision. Both of my friends here
17 agree that our reading, the First Circuit's reading, is
18 a plausible construction of the statute. There is no
19 argument that it is unambiguous on their side. Okay?
20 So their argument must be that Congress intended not to
21 be able to answer this question, not to know whether
22 it's 5,000 public companies or 6 million private
23 companies, and so they punted that to an unelected board
24 of lawyers within the Labor Department. That is not
25 plausible.

1 JUSTICE BREYER: Why is it -- we may have to
2 get to this. I thought Section 3(a) of
3 Sarbanes-Oxley -- that's what we found here. Quote,
4 "The Securities and Exchange Commission shall promulgate
5 such rules and regulations as may be necessary and
6 appropriate in the public interest or for the protection
7 of investors and in furtherance of this Act."

8 So why doesn't that delegate right to the
9 SEC the power to interpret the general provisions of the
10 Section 802?

11 MR. PERRY: To be quite blunt,
12 Justice Breyer, before the government's concession
13 20 minutes ago, I would have thought the same thing.

14 JUSTICE BREYER: Well, so I mean, I don't
15 know that we should interpret that provision since no
16 one has briefed, given -- on that basis.

17 MR. PERRY: We can certainly say this,
18 though. What we know is the SEC has not exercised its
19 power under 3(a) or under 307 or under 501, also dealing
20 with contractors of sorts, to provide for whistleblower
21 protections. If it chooses to do so in the future, then
22 we would have a different lawsuit.

23 What we have now, however, is the unadorned
24 statute passed by Congress, which deals with public
25 companies. We have the First Circuit in an exhaustive

1 opinion construing it, again using all the ordinary
2 tools of statutory construction, which this Court has
3 directed the lower courts to do, to determine plausibly,
4 as everyone agrees, plausibly that it only covers public
5 companies.

6 We have a reading, then, that gives meaning
7 to every single meaning to every single word in the
8 statute, that is comprehensible, that fits the purpose
9 of the statute. Remember the overall purpose of the
10 statute is disclosure by public companies. It is not
11 protection of investors, as some at times have said. It
12 is disclosures by public companies.

13 Private companies make no disclosures. They
14 are not governed by the securities laws. So excluding
15 private company employees makes perfect sense in that
16 respect. Mutual funds, Mr. Schnapper at page 13 of his
17 reply brief says: Well, the advisors make all the
18 disclosures for the mutual funds. We had that argument,
19 Your Honor, two years ago. Justice Thomas wrote the
20 opinion for the Court in the Janus case, which rejected
21 that very argument and said the mutual fund and the
22 advisor are separate companies; the mutual fund makes
23 the disclosures. Congress has set up the mutual fund
24 industry that way.

25 The ICI's brief in this case explains very

1 cogently, I believe, all of the separate protections,
2 including the independent board of directors and the
3 chief compliance officer mandated by the SEC's '40 Act
4 recommendations, that protect the investors in mutual
5 funds.

6 So we have a coherent, on the First Circuit
7 side, a coherent reading of the statute that my friends
8 admit is plausible, that gives meaning to every word in
9 the statute, that fits exactly the title that Congress
10 used. And the title is legislative language passed by
11 Congress signed by the President. It fits every word of
12 the legislative history. It makes perfect sense and it
13 doesn't have any untoward results. We submit that --

14 JUSTICE ALITO: It gives the reference to
15 the subcontractors or to contractors and the
16 subcontractors such a narrow meaning. And except for
17 this concept of the axe-wielding specialist, those
18 provisions mean nothing under that. That's what gives
19 me pause about your interpretation.

20 MR. PERRY: Justice Alito, it gives
21 employees two things. They give another defendant,
22 which means another insurance policy. So for example,
23 if you sue the company you get the E&O policy. If you
24 sue the president at the same time, you get the D&O
25 policy. So you get two separate insurance companies,

1 which is more money, more availability. You get the
2 personal liability. Officers hate to be sued; so do
3 contractors. And if the public company goes out of
4 business, you get that protection of monetary relief.

5 JUSTICE ALITO: My question wasn't clear.
6 If you say that the employees, only the employee of the
7 publicly held company and not the employee of the
8 private -- privately held subcontractor, then that --
9 the only situation is covered with respect to the
10 contractor is this so-called axe-wielding specialist.

11 MR. PERRY: You have the axe-wielding
12 specialist. The real world is Kalkunte. I gave you
13 that case where that actually happened.

14 JUSTICE ALITO: Yes, it can happen, but it's
15 really very small, isn't it?

16 MR. PERRY: Well, Your Honor, that was one
17 of six cases the ARB decided under this statute in 2009.
18 So that year that was one-sixth of the cases. That's
19 not -- I mean, it happens, okay?

20 And it is a -- it is a conceivable scenario
21 in many more things because, again, it's not limited to
22 discharge. It's also threats and harassment, and we
23 certainly can see situations where contractors,
24 particularly those kinds of contractors like management
25 consultants, photocopy vendors, and so forth, are in the

1 facility with the public company employees, can make
2 their life miserable.

3 And remember, I am going to agree with my
4 friend Mr. Schnapper on something. Congress recognized
5 that Enron was structured in a way to try to get the
6 liability out of headquarters. They had all these
7 subsidiaries, they had Chewco and Ponderosa and all
8 this. And Congress recognized that corporations might
9 try to avoid their liability, so that by picking up
10 officers, employees, contractors, subcontractors and
11 agents, they were trying to make sure that if the
12 company tried to lay off the responsibility on somebody
13 else, they would still get captured because their
14 employees were doing it.

15 They could have done that just under agency.
16 Many employment laws, of course, speak only of officers,
17 employees, and agents. But many contracts disclaim
18 agency, disclaim --

19 JUSTICE BREYER: Where did it come from?
20 That is, where did the words "contractor"? Some human
21 being wrote them for the first time. You probably know
22 who did and where and under what circumstances. What?
23 What, you know?

24 MR. PERRY: Justice Breyer --

25 JUSTICE SCALIA: Who was it, counsel?

1 (Laughter.)

2 JUSTICE BREYER: Some of us are interested
3 in that. At least I am.

4 MR. PERRY: Justice Breyer, it appears --
5 that formulation appears for the first time in the
6 history of the United States Code in this law.

7 JUSTICE BREYER: I know. So who is the
8 human being who wrote them and what did he have in mind,
9 or she?

10 (Laughter.)

11 MR. PERRY: We know -- we don't know the --
12 I don't know the individual. We know, however, that
13 there is a Senate report that accompanied that language
14 when it was introduced.

15 JUSTICE BREYER: Let's go back to the
16 hearings. I mean, there might have been hearings.

17 MR. PERRY: The only hearing testimony was,
18 for example, the National Whistleblowers Center, one of
19 the amici here, said corporate insiders, publicly traded
20 companies. There is nothing -- the word "contractor"
21 specifically appears nowhere in the legislative history.
22 In the entire legislative history of the Sarbanes-Oxley
23 Act, every hearing, every floor statement, every report,
24 it nowhere appears.

25 It came, the word "contractor" came from the

1 AIR-21 Act, but, of course, the AIR-21 Act doesn't have
2 "officers, employees or agents." That is language from
3 Title VII.

4 JUSTICE KENNEDY: But the language did talk
5 about Arthur Andersen and Enron.

6 MR. PERRY: It did, Your Honor. And as I
7 said, 150 times "accountants" appear.

8 If I could just finish with this point. The
9 Senate report lists four examples of the so-called
10 corporate code of silence: The Andersen partner, the
11 Vinson and Elkins lawyers, the UBS securities analyst,
12 and Sharon Watkins at Enron.

13 Congress dealt with them in four different
14 provisions: Section 105 for the accountants, section
15 307 for the lawyers, Section 501 for the securities
16 analysts, and Section 806 for the public company
17 employee. And then -- we haven't talked about this yet,
18 either -- it added, for good measure, Section 1107,
19 which says whoever shall retaliate against anybody who
20 provides information to a law enforcement officer, which
21 includes the SEC, is subject to a criminal offense under
22 Title 18.

23 So we have this interlocking, connected,
24 nested series of provisions that deals with each of the
25 concerns identified by Congress in an industry-specific

1 fashion. And at no point did Congress suggest,
2 intimate, hint, that, oh, by regulating these things,
3 the lawyers, the accountants, the securities analysts
4 and the public companies, that they also were going to
5 sweep in 6 million private employers.

6 And if a member of Congress, I would submit,
7 had stood up on the floor and suggested that, it would
8 have been met with debate, derision, and defeat.

9 The First Circuit's judgment, Your Honors,
10 should be affirmed. Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 Mr. Schnapper, you have five minutes left.

13 REBUTTAL ARGUMENT OF ERIC SCHNAPPER

14 ON BEHALF OF THE PETITIONERS

15 MR. SCHNAPPER: Thank you, Your Honor.

16 Let me begin by just referring the Court to
17 some materials that might be relevant to some of the
18 questions you asked. With regard to the SEC's view
19 prior to this case coming to this Court, those views
20 were expressed in a separate brief the SEC filed in the
21 First Circuit, which is consistent with the government's
22 approach here.

23 CHIEF JUSTICE ROBERTS: But we know they
24 don't have rulemaking authority in this area.

25 MR. SCHNAPPER: I agree with that, but --

1 but the question came up about what their views were.

2 With regard to the suggestion earlier that
3 the ARB has taken the position that every contract --
4 every firm that has a contract with a public company is
5 a contractor. Actually, in the Fleszar case, which is
6 mentioned in both the Respondent's brief and our yellow
7 brief, the -- the ARB is for the opposite position
8 and -- and took a position, I think, consistent with
9 the view we've advanced, which is not every contract
10 renders you a contractor.

11 With regard to Arthur Andersen, the
12 discussion in the Senate Report about why there's a need
13 to deal with retaliation is repeatedly about Arthur
14 Andersen. Many of the people who actually understood
15 what was going on at -- at Enron were Arthur Andersen
16 employees, not most of the run-of-the-mill employees at
17 Enron, and they were the ones who remained silent in the
18 face of this very, very serious problem.

19 With regard to the origins of this phrase
20 contractor, my brother, Mr. Perry, was right, it comes
21 from AIR-21. The preliminary AIR-21 regulations
22 regarding what it means were issued prior to the
23 adoption of SOX and they said it included employers --
24 employees of employers, which has remained the view of
25 the agency throughout.

1 My colleague -- with regard to AIR-21, the
2 history here is, I think, important. This statute
3 referred to air carriers and contractors and
4 subcontractors, and the court below assumed that that
5 meant that employees of subcontractors and contractors
6 were covered.

7 The First Circuit's theory was that Congress
8 meant to narrow the meaning of contractor employees
9 because it added retaliation by officers and employees.
10 And it seems to me that that is precisely the wrong
11 conclusion.

12 When Congress added to the entities that
13 could not retaliate, when it rewrote AIR-21 to add some
14 other people that couldn't retaliate, it didn't mean to
15 tacitly then eliminate the employees of contractors who
16 were governed under AIR-21.

17 Finally, with regard to the question the
18 Court has raised about whether it should explore the
19 possibility of a limitation based on whether a
20 contractor was acting as a contractor, we think it would
21 probably not be prudent to take that on at this time for
22 a couple of reasons.

23 First of all, a fair amount of work that was
24 done by Arthur Andersen was not -- that was relevant
25 wasn't done for Enron. It was done for the

1 off-the-books enterprises. They did \$5.7 million of
2 accounting work for Jedi, where the debts -- one of the
3 places where the debts were being hidden. So you --
4 you'd get into that problem.

5 Secondly, this provision is adopted against
6 the background of a series of executive orders, most
7 important which is Executive Order 11246, about racial
8 discrimination by Federal contractors.

9 That executive order has always been
10 understood to cover all the employees of the contractor,
11 not just the employees who are working on the government
12 project. And I think that's an important part of the
13 background. Congress has not tried to -- the Executive
14 Branch hasn't limited it to that.

15 And in the Civil Rights Restoration Act of
16 about 1986, Congress rewrote Title 6 and Title 9 to have
17 institution-wide application rather than to do little
18 parts of it.

19 This issue about what a contractor might be
20 doing as a contractor hasn't been vetted in lower courts
21 and we think it would be not prudent to try to -- to
22 take that on here.

23 Thank you very much.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 The case is submitted.

1 (Whereupon, at 2:00 p.m., the case in the
2 above-entitled matter was submitted.)
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