No. 12-3

IN THE
Supreme Court of the United States

JACKIE HOSANG LAWSON AND JONATHAN M. ZANG,

Petitioners,

v.

FMR LLC, *et al.*,

Respondents.

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

BRIEF OF SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

This *amicus curiae* brief is filed on behalf of the Securities Industry and Financial Markets Association (SIFMA).[1] SIFMA is a securities industry trade association representing the interests of hundreds of securities firms, banks, and asset managers across the country. It regularly files *amicus curiae* briefs in cases that raise issues of vital concern to participants in the securities industry, like the present one.

SIFMA's members have a direct interest in the proper interpretation of the whistleblower protections set forth in Section 806 of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act or Act). 18 U.S.C. § 1514A. As participants in the securities industry, SIFMA's members are subject to a vast and complicated regulatory structure that aims to strengthen corporate governance, improve risk management, and foster trust and confidence in the financial markets, while promoting investor opportunity, capital formation, job creation, and economic growth.

SIFMA's members share these objectives. Achieving them requires a careful balance. Congress struck that balance in Section 806, creating whistleblower protections for employees of public companies

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[1] The parties have consented to the filing of this brief by filing letters with the Clerk of the Court granting blanket consent to the filing of *amicus curiae* briefs. No counsel for any party authored this brief in whole or in part and no party or counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than SIFMA, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

who report alleged wrongdoing occurring under their employers' roofs. The construction of Section 806 advocated by Petitioners and the Government before this Court would dramatically expand Section 806 liability far beyond the outer boundaries established by Congress. Even the most conscientious public and private companies—including, potentially, many of SIFMA's members—would suddenly be exposed to a new and unjustified wave of civil litigation that does nothing to advance the shareholder protection goals underlying Sarbanes-Oxley. Due to their many variegated and unique relationships with public companies, the consequences for SIFMA's members would be particularly severe.

SUMMARY OF ARGUMENT

Section 806 of Sarbanes-Oxley provides that no public company[2]—"or any officer, employee, contractor, subcontractor, or agent of such public company"—may retaliate against "an employee" of such public company for engaging in protected whistleblowing activity. 18 U.S.C. § 1514A(a). The language is clear: Section 806's protections against retaliation extend only to the employees of those public companies, and do not reach the employees of their contractors, subcontractors, or agents. *See* Resp'ts' Br. at 13-24.

Petitioners and the Government nonetheless contend that this Court should defer to the contrary

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[2] The term "public company" is used here to refer to any company that is required to register or file reports under the Securities Exchange Act of 1934. *See* 15 U.S.C. §§ 78l, 78o(d).

construction of Section 806 adopted by the Administrative Review Board (ARB) of the U.S. Department of Labor (DOL) in *Spinner v. David Landau & Associates, LLC*, ARB Nos. 10-111, -115 (ARB May 31, 2012).[3] In *Spinner*, an interlocutory decision issued after the opinion of the Court of Appeals currently under review, the ARB adopted the position that Section 806 protects, in addition to all employees of public companies, all employees of any contractors, subcontractors, or agents of those companies. Pet. App. 136a-167a.

I. The construction of the statute adopted by the ARB would dramatically expand Section 806 liability far beyond anything Congress could have possibly intended. Through Section 806, Congress crafted a discrete remedy carefully tailored to a particular problem. The ARB's interpretation would upset that delicate congressional balance while doing nothing to advance the shareholder protection goals animating Sarbanes-Oxley.

First, placed in the context of the ARB's broader approach to Section 806, it is clear that the ARB's interpretation would result in the proliferation of litigation completely divorced from the Act's shareholder protection subject matter. Despite acknowledging the breadth of potential coverage, the ARB has failed to articulate a workable limiting principle that would cabin the astonishing reach of its construction. Instead, the ARB relies on Section 806's "built-in limitations"—most notably, the re-

[3] ARB decisions are available at http://www.oalj.dol.gov/public/arb/references/caselists/arbindex.htm.

quirement that an employee have a reasonable belief that one of six categories of enumerated violations has occurred. But because two of those six categories—mail and wire fraud—can reach almost any type of fraudulent conduct, the limitations are illusory. Absent meaningful constraints, the ARB's approach eviscerates Section 806's subject matter limits. Doing so will have wide-ranging, unintended, and deleterious effects on public and private companies.

Second, the ARB's reading of Section 806 in *Spinner* would compound those effects by extending whistleblower protections to all of the potentially *tens of millions* of employees of private contractors, subcontractors, or agents of public companies. Congress deliberately placed the burdens attendant to Section 806 litigation on the shoulders of public companies. Congress purposely stopped short of imposing the same burdens on private companies. Sarbanes-Oxley was a sweeping piece of legislation touching on all manner of issues pertaining to corporate governance, accounting reform, and shareholder protection. Congress never intended Section 806 to be a panacea for all the ills contributing to Enron's collapse.

II. The ARB's sweeping construction of Section 806 is not entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The legitimacy of the *Chevron* doctrine rests on a presumption that Congress, when it leaves an ambiguity in a statute, expects the implementing agency to resolve the ambiguity. But when circumstances suggest that

Congress had no such expectation, the presumption falls away. This is just such a case, for several reasons.

First, in crafting Sarbanes-Oxley, Congress eschewed the singular delegation typically required for *Chevron* deference. Instead, it fashioned a uniquely fractured model of administrative authority. Congress divided regulatory responsibilities between two Executive agencies—namely, the DOL, through the Secretary of Labor (Secretary), and the Securities and Exchange Commission (SEC). Congress also allocated the overwhelming majority of authority under the Act—including substantive rulemaking authority—to the SEC, leaving the DOL with a narrow sliver of authority to act as a neutral arbiter of fact in individual Section 806 complaints. Finally, Congress further divided adjudicatory responsibilities under Section 806 between the Executive and the Judiciary, creating a scheme under which the Judiciary will often exercise independent interpretive authority as the sole adjudicator of Section 806 complaints.

Second, the Secretary has failed to allocate authority within the DOL itself in such a way that would vest interpretive authority in the ARB. While the Secretary has sub-delegated to the ARB the authority to act on his behalf in adjudicating Section 806 complaints on a case-by-case basis, he has affirmatively withheld from the ARB any interpretive authority over any matter governed by DOL regulations. In this case, the DOL's Occupational Safety and Health Administration (OSHA)—not the ARB—has issued procedural regulations claiming to speak

directly to the issue of whether Section 806's protections extend to employees of contractors, subcontractors, and agents of public companies. The Secretary has disclaimed any entitlement to *Chevron* deference based on OSHA's procedural regulations, but the Secretary's *post hoc* disclaimer does not change the fact that those regulations purport to answer the interpretive question in *Spinner*. The ARB thus has no authority to offer an authoritative construction of the statute on that same issue.

Third, *Chevron* deference is rooted in an acknowledgment that the Executive almost always has greater expertise than the Judiciary when it comes to matters of policy. Where a court is called upon to engage in an exercise of pure statutory interpretation, it avoids intruding upon the Executive's domain. In *Spinner*, the ARB did not bring any special expertise to bear in support of its reading of Section 806. Instead, it purported to rely on ordinary tools of statutory construction, drawing on the statute's language, structure, legislative history, and relationship to other statutory schemes. Such an effort does not reflect an agency's exercise of policymaking expertise, making *Chevron* deference inappropriate.

Fourth, whether Congress intended to delegate a matter to an Executive agency is informed in part by the nature of the matter at issue. Congress does not "hide elephants in mouseholes." Petitioners and the Government cannot credibly claim that, in enacting Section 806, Congress intended to obliquely and silently delegate away the fundamental question of whether to protect potentially *tens of millions* of employees of private companies and, by extension, im-

pose a new and profound risk of civil liability on potentially *millions* of private companies. The Act's structure and legislative history confirm that Congress did not intend to give the DOL, let alone the ARB, the authority to make such a transformative decision.

ARGUMENT

I. THE ARB'S CONSTRUCTION WOULD DRAMATICALLY EXPAND SECTION 806 LIABILITY WITHOUT ANY POLICY JUSTIFICATION

The negative policy consequences of deferring to the ARB's expansive construction of Section 806 would be vast and severe. Congress determined that reforms were needed after the collapse of Enron "to restore confidence in the integrity of the public markets." S. Rep. No. 107-146, at 11 (2002). Congress responded, in part, with Section 806 of Sarbanes-Oxley. But Congress did not act willy-nilly in creating this new and entirely unprecedented whistleblower program; it fashioned a discrete remedy carefully tailored to a particular problem. The astonishingly expansive construction of Section 806 adopted by the ARB in *Spinner* would overturn the delicate balance struck by Congress more than a decade earlier while doing nothing to advance the shareholder protection goals animating the Act.

To understand the extraordinary reach of the ARB's construction, one must begin with the ARB's extraordinary notion of what constitutes protected activity. To do so, consider the following facts from a

recent case: A public company employee is told by a coworker that her boss has developed sexual relationships with U.S. soldiers stationed overseas and has taken purported "business" trips to rendezvous with those soldiers using company funds. The employee discusses what she heard with one of the company's human resources specialists, who writes an e-mail to the office ethics director identifying the employee as one of several possible sources of information about the episodes. Nine months later, the employer restructures, bringing new personnel into the employee's group. Three more months pass, and the employee, finding the restructuring intolerable, claims to have an emotional breakdown. She then files a Section 806 complaint with the DOL, asserting that she has been constructively—not actually—discharged on the basis of the conversation she had with the human resources specialist a full year earlier about rumors of her boss's misbehavior.

The ARB's view is that this case falls squarely within Section 806. *See Brown v. Lockheed Martin Corp.*, ARB No. 10-050 (ARB Feb. 28, 2011). This is so despite the fact that the employee's secondhand information has no relationship whatsoever to shareholder fraud, a violation of the securities laws, or other core shareholder protection concerns that motivated enactment of that section and Sarbanes-Oxley. In the ARB's judgment, the employee engaged in protected activity under Section 806 because she "reasonably believed that [her boss] engaged in mail and wire fraud." *Id.*, slip op. at 9.[4]

[4] The decision was later challenged in the Tenth Circuit, with the Court of Appeals ultimately deferring to the ARB's

The facts of *Lockheed* might seem unique, but, in the ARB's world, its approach to Section 806 is not.

Indeed, under the ARB's approach, there are no meaningful subject matter limits to Section 806 litigation. The ARB could not be clearer on this point. It has stated point-blank that "a complainant may be afforded protection for complaining about infractions *that do not relate to shareholder fraud*." *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, slip op. at 20 (ARB May 25, 2011) (emphasis added). This is a troubling notion even for the public companies that are indisputably covered by the statute. Earlier in this case, the District Court acknowledged the consequence of such an expansive approach when addressing Petitioners' parallel construction:

> [Petitioners'] reading might permit [Section 806] to have a notably expansive scope untethered to the purpose of the statute. Any employee of an entity that acts as an officer, employee, contractor, subcontractor or agent of a public company, who involves himself in the reporting of fraud by his own employer, would be a covered employee. This reading suggests that an employee could be protected even when his whistleblowing does not directly involve fraud against public shareholders.

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construction of Section 806. *See Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1130-31 (10th Cir. 2013). The Court of Appeals did not offer any real analysis as to why it believed deference was appropriate.

Pet. App. 111a. Confronted with this consequence, the District Court sought to articulate a "limiting principle" to cabin the reach of Section 806—in the end, concluding that "the statute protects only that whistleblowing activity that relates to fraud against shareholders." *Id.* at 116a. In *Spinner*, the ARB acknowledged that the "theoretical coverage" of its construction "might be broad." *Id.* at 166a. Nonetheless, citing what it saw as Section 806's "built-in limitations," the ARB declined to adopt the District Court's limiting principle, *id.*—or, for that matter, any limiting principle.[5]

The "built-in limitations" are illusory. The ARB cited two: Section 806's "specific criteria for employees to have a reasonable belief of violations of specific anti-fraud laws or SEC regulations" and "its requirement that the protected activity [be] a causal factor in the alleged retaliation." *Id.* However, the ARB's reference to "specific anti-fraud laws" is misleading. Of the six categories enumerated in Section 806(a)(1), two of them—violations of the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343—

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[5] Before the Court of Appeals, the DOL advocated in passing for its own limiting principle—namely, that private companies "have a specified relationship with a public company." C.A. DOL *Amicus* Br. at 27 n.11. Petitioners, for their part, have proffered a constellation of proposals of their own. *See* C.A. Lawson Br. at 15 (arguing that private companies must perform "core professional services" for public companies); C.A. Zang Br. at 11 (suggesting that private companies must have "intimate relationships" with public companies); C.A. Lawson Reply Br. at 2 (contending that the statute reaches private companies that "perform functions regulated by the securities laws").

can reach almost any type of fraud. And, at least under the ARB's jurisprudence, *see, e.g.*, *Lockheed*, *supra*, they require no relationship to shareholder fraud, a violation of the securities laws, or other core shareholder protection concerns.

The upshot of the ARB's approach to Section 806 is that, even with the separate check of the causation requirement, the kind of disclosures that would be eligible for protection under Section 806 needn't have any connection whatsoever to those concerns, either. *See* C.A. Lawson Reply Br. at 6 (conceding that "extending the terms [of Section 806] to include unknowing subcontractors with no ties to a public company's securities law related obligations serves no investor-protection goals"). By unmooring the statute from shareholder protection concerns, the ARB's construction would guarantee the proliferation of Section 806 litigation completely divorced from relevant shareholder protection subject matter.

From there, Section 806 would give rise to mind-boggling permutations of civil liability. Some of the more problematic scenarios—plainly beyond the outer boundaries of anything contemplated by Congress—are outlined by Respondents and other *amici*. But if the Court were to accept the ARB's expansive construction of Section 806, the implications for the hundreds of firms, banks, and asset managers that comprise SIFMA's membership would be especially profound. For example, under the ARB's virtually limitless framework, Section 806 could extend whistleblower protections to an employee of a public company who reports alleged wrongdoing occurring not at her public company employer, but rather at

her employer's *customers or clients*—public or private.

Broker-dealers, for instance, have a legal obligation to "know their customer." FINRA Rule 2090 (2012). This requires broker-dealers to learn all the "essential facts concerning every customer." *Id.* Virtually anything can be relevant to servicing a customer's account, including the customer's personal characteristics, income and net worth, investment objectives, and life goals. As a result, broker-dealers routinely cultivate intimate and trusting relationships with customers that can last years, even decades. Consider a scenario in which a broker-dealer employed by a public company is on the phone with his customer discussing the customer's current financial situation. During the call, the customer reveals that he has lost his job after being caught submitting a false expense report by e-mail, and fears that he will not be able to provide for his family. At the water cooler, the broker-dealer recounts the broad strokes of the customer's story in a casual conversation with his supervisor. Later that week, the broker-dealer is notified of his termination as part of a broad-based reduction-in-force. He invokes Section 806, claiming that he is an "employee" of a public company; his disclosure touches upon a "violation" of the federal wire fraud statute; and his disclosure was made to "a person with supervisory authority" over him.

Similarly, consider an investment banker employed by a public company who is tasked with doing due diligence on a financial transaction. She comes across information that she personally believes evi-

dences mail or wire fraud at a private customer involved in the transaction, but which has no nexus to the transaction itself. She then reports her personal belief to her manager in passing. Under the ARB's approach, she would be free to invoke Section 806 in an effort to evade a looming employment action, wielding the threat of dragging her employer through the costly process of litigating a whistleblower claim despite the fact that her disclosure has no relationship at all to anything that occurred under her employer's own roof. Such a scenario would put the company's legal and compliance departments in an impossible position: they would lack the information or authority to investigate or remediate the customer's alleged wrongdoing, but the company would still be subject to the risk of liability under Section 806. The potential scope of the problem is staggering. A public investment bank could be at risk for the acts of the hundreds of companies with which it deals on a daily basis. The deleterious and unintended effects for public companies would be profound.

The ARB proposes to multiply these effects exponentially by extending Section 806's protections to the employees of certain private companies as well. Specifically, the statutory construction adopted by the ARB would extend whistleblower protections to all of the potentially *tens of millions* of employees of private contractors, subcontractors, or agents of public companies. Pet. App. 141a-166a. Such a construction would yield a radical expansion of Section 806 coverage, far beyond anything Congress could have possibly intended. Congress deliberately placed the great weight of the burdens attendant to

Section 806 litigation squarely on the shoulders of public companies in recognition that special regulatory responsibilities flow from their acceptance of the benefits of public capital. But Congress purposely stopped short of imposing the same burdens on private companies—which, by definition, are not covered by the securities laws.

In this regard, Section 806 cannot be viewed in isolation. Sarbanes-Oxley was a sweeping piece of legislation touching on all manner of issues pertaining to corporate governance, accounting reform, and shareholder protection. The varied and multifaceted reforms enacted by Congress confirm the limited scope of Section 806 and reveal why Petitioners and the Government are wrong to intimate that the "accounting firms, law firms and business consulting firms" that were implicated in the Enron scandal would somehow escape scrutiny if Section 806 is not extended to reach all employees of certain private companies. S. Rep. No. 107-146, at 4. To the contrary, these groups were expressly and meticulously addressed by Congress elsewhere in Sarbanes-Oxley.

For example, Section 105 of the Act subjects outside accountants to sanctions for failing to report suspected fraud to an issuer of securities or, in some instances, to the SEC. *See* 15 U.S.C. § 7215(c)(4). Section 307 requires the SEC to issue rules requiring outside attorneys to report and escalate wrongdoing at public company clients. *Id.* § 7245. And Section 501 requires the SEC to adopt rules to protect the objectivity of securities analysts by prohibiting retaliation for reporting adverse research potentially affecting a client relationship. *Id.* § 78o-6. In each

instance, Congress enacted the carefully tailored reforms that it believed were needed by providing regulation and oversight of many private company employees that serve public companies in connection with core shareholder concerns, like accountants, lawyers, and securities professionals. Congress never intended Section 806 to be a panacea for all the ills contributing to Enron's collapse. *See Sylvester*, ARB No. 07-123, slip op. at 9 (noting that Section 806 "is but one part of a comprehensive law ensuring corporate responsibility").

Section 806 complaints operate at the intersection of securities and employment litigation. They present a series of especially complex and difficult issues, coupling the highly fact-intensive inquiries attendant to employment retaliation claims with thorny questions about securities and other fraud. Given its druthers, the ARB would subject a great number of private U.S. employers to this costly and burdensome form of litigation simply on the basis that they happen to contract with a public company or subcontract with a company that, in turn, contracts with a public company, irrespective of the nature of their business with the public company and the connection, if any, to shareholder concerns.[6]

SIFMA's members actively encourage the internal reporting of good faith and reasonable concerns about wrongdoing affecting or potentially affecting shareholder interests; such reports are motivated by

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[6] The costs and burdens will be borne in part by the Judiciary, which will be tasked with managing the proliferation of Section 806 complaints.

what SIFMA sees as part of its core mission. Nonetheless, the dramatic expansion of Section 806 liability that would follow from the ARB's construction of the statute would expose even the most diligent companies, public and private, to an unprecedented wave of civil litigation while in no way meaningfully furthering the underlying shareholder protection goals of Sarbanes-Oxley.

II. THE ARB'S CONSTRUCTION IS NOT ENTITLED TO *CHEVRON* DEFERENCE

The *Chevron* doctrine, at its core, "is rooted in a background presumption of congressional intent." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013). Specifically, courts "accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left [an] ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996). However, the presumption is far from absolute. "[C]ircumstances implying such an expectation [must] exist," *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001), and "[d]eference . . . is warranted only 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority,'" *Gonzales v. Oregon*, 546 U.S. 243, 255-56 (2006) (quoting *Mead*, 533 U.S. at 226-27).

Those conditions are not satisfied here.

A. Section 806's Fractured Administrative Model Dictates That *Chevron* Deference Is Inappropriate

Chevron deference "is warranted only when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law." *Gonzales*, 546 U.S. at 255-56 (internal quotation marks omitted). "Delegation of such authority may be shown in a variety of ways," *Mead*, 533 U.S. at 227, but "*Chevron* deference . . . is not accorded merely because [a] statute is ambiguous and an administrative official is involved," *Gonzales*, 546 U.S. at 258. Instead, courts must consider the "great variety" of administrative models created by Congress, and then "tailor deference to variety." *Mead*, 533 U.S. at 236. In this case, the Court is faced with a fractured model of regulatory and adjudicatory authority that is "unique" among its peers. Procedures for Handling Section 806 Complaints, 69 Fed. Reg. 52,104, 52,111 (Aug. 24, 2004). This unique structure, which unfolds on two separate axes, dictates that *Chevron* deference is inappropriate.

1. On one axis, Congress divided regulatory responsibilities between different Executive agencies—namely, the DOL and the SEC. Courts recognize that the justification for *Chevron* deference "begin[s] to fall when an agency interprets a statute administered by multiple agencies." *DeNaples v. OCC*, 706 F.3d 481, 487 (D.C. Cir. 2013); *see, e.g.*, *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 478 (1999) (observing that the authority to issue regulations under

the Americans with Disabilities Act of 1990 "is split primarily among three Government agencies" and declining to defer to a single agency's interpretation of generally applicable provisions); *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 642 n.30 (1986) (plurality opinion) (holding that because Section 504 of the Rehabilitation Act of 1973 is administered by multiple agencies, "[t]here is . . . not the same basis for deference predicated on expertise"). Because Congress charged multiple agencies with the task of administering Sarbanes-Oxley, deference to the DOL—and, by extension, the ARB—is unwarranted.

Congress' lopsided allocation of responsibilities under the Act to the SEC further weakens the case for *Chevron* deference. In enacting Sarbanes-Oxley, Congress was well aware of the historical experience the SEC has in enforcing the securities laws and monitoring public companies. *See, e.g.*, 148 Cong. Rec. S7350, S7356 (2002) (statement of Sen. Michael Enzi) (taking account of the SEC's "longstanding" interpretations concerning relevant "technical matters"). When it came time to divvy up responsibilities under the Act, Congress allocated the overwhelming majority of regulatory responsibilities and rulemaking authority to the SEC, leaving the DOL, through the Secretary, only a narrow sliver of authority to investigate and adjudicate Section 806 complaints on a case-by-case basis. *See* 18 U.S.C. § 1514A(b). If multiple agencies are charged with administering a statute, courts presume that Congress "intended to invest interpretive power in the administrative actor in the best position to develop" "historical familiarity and policymaking expertise" in the statute's underlying subject matter. *Martin v.*

OSHRC, 499 U.S. 144, 153 (1991). Here, that actor is, if anyone, the SEC, not the DOL and its components.

Further, the justification for *Chevron* deference is largely absent where, as here, Congress has withheld substantive rulemaking authority from the agency claiming a right to deference. As this Court explained in *Martin*, "agency adjudication is a generally permissible mode of lawmaking and policymaking only because . . . unitary agencies . . . also ha[ve] been delegated the power to make law and policy through rulemaking." *Id.* at 154. In this case, the DOL readily concedes that it "does not have substantive rulemaking authority with respect to [Section 806]." C.A. DOL *Amicus* Br. at 18 n.8. The mere fact that the DOL, acting through the ARB, must on occasion apply Section 806 on a case-by-case basis when adjudicating individual complaints does not entitle it to claim *Chevron* deference. *Cf. Gonzales*, 546 U.S. at 264 ("[T]he Attorney General must . . . evaluate compliance with federal law in deciding whether to prosecute; but this does not entitle him to *Chevron* deference."). Rather, "the more plausible inference is that Congress intended to delegate to the [agency] the type of nonpolicymaking adjudicatory powers typically exercised by a *court* in the agency-review context." *Martin*, 499 U.S. at 154. Quite simply, Congress intended the DOL to perform the discrete function of acting as a "neutral arbiter" of fact in individual disputes under Section 806, *id.* at 155 (internal quotation marks omitted), nothing more and nothing less.

2. Even as a neutral arbiter of fact, the DOL's role is limited. That is because, on the second axis, Congress further divided adjudicative responsibilities under Section 806 between the Executive and the Judiciary. Under administrative law's traditional division of authority between courts and agencies, a right to judicial review arises only upon "final agency action." 5 U.S.C. § 704; *see, e.g.*, 28 U.S.C. §§ 2342, 2344; 29 U.S.C. §§ 160, 660. With Section 806, however, Congress consciously fashioned a scheme under which the Judiciary would be the sole adjudicator of Section 806 complaints in the absence of a final agency order. On the one hand, in cases in which the DOL's administrative process comes to completion and the ARB issues a final order,[7] either

[7] The DOL's administrative process is divided into four stages. At the first stage, OSHA conducts an investigation into a newly filed Section 806 complaint and issues a preliminary order. 29 C.F.R. §§ 1980.104(a), 1980.105(a) (2013). If the parties do not object to OSHA's preliminary order, that order becomes binding and is not subject to further review, including judicial review. *Id.* § 1980.106(b). At the second stage, if the parties object to OSHA's preliminary order, an Administrative Law Judge (ALJ) holds a formal hearing and issues a new order. *Id.* §§ 1980.106(a), 1980.107(b), 1980.109(a). If the parties do not petition for review of the ALJ's order, that order becomes binding and is not subject to further review, including judicial review. *Id.* § 1980.110(a). At the third stage, if the parties petition for review, the ARB decides whether to grant or deny discretionary review. If the ARB denies the petition, the ALJ's order becomes the final order of the agency, *id.* § 1980.110(b), and is subject to judicial review in the Courts of Appeals just as if it were an order of the ARB, *id.* § 1980.112(a). At the fourth and final stage, if the ARB grants the petition, it issues a final order in its own name. *Id.* § 1980.110(c). That order is similarly subject to judicial review in the Courts of Appeals. *Id.* § 1980.112(a). As a practical matter, the ARB

side may seek judicial review of the ARB's determination in the Courts of Appeals in accordance with the Administrative Procedure Act. 18 U.S.C. § 1514A(b)(2)(A); 49 U.S.C. § 42121(b)(4)(A). On the other hand, in cases in which the ARB fails to issue a final decision within 180 days of the filing of the complaint—which, as a practical matter, is virtually all of the Section 806 complaints filed with the DOL—the complainant may proceed directly to District Court with a new complaint. 18 U.S.C. § 1514A(b)(1)(B); *see also* 29 C.F.R. § 1980.114(a).

By the DOL's own account, this split adjudicative model is *sui generis*:

> This provision authorizing a Federal court complaint is unique among the whistleblower statutes administered by the Secretary. This statutory structure creates the possibility that a complainant will have litigated a claim before the agency, will receive a decision from an administrative law judge, and will then file a complaint in Federal court while the case is pending on review by the Board. The Act might even be interpreted to allow a complainant to bring an action in Federal Court after receiving a final decision from the Board, if that decision was issued more than 180 days after the filing of the complaint.

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rarely denies discretionary review of ALJ decisions, meaning that most orders reviewed by the Judiciary will have been issued by the ARB itself.

Procedures for Handling Section 806 Complaints, 69 Fed. Reg. at 52,111. Because Section 806 complaints are unlikely to run the full administrative gauntlet in 180 days, many cases will be decided *de novo* by the Judiciary, which will thus be charged with construing the statute in the first instance. By allocating independent and parallel adjudicative authority to the Judiciary, Congress made it clear that it did not intend the DOL, let alone the ARB, to exercise interpretive authority over Section 806. *Cf. Mead*, 533 U.S. at 232 (noting that "any precedential claim of a classification is counterbalanced by the provision for independent review . . . by the [Court of International Trade]").

It is also worth pausing to note that the Secretary—the congressional delegatee—has not reserved any authority to review, modify, or reverse the ARB's decisions. *See* Secretary's Order 1-2010, 75 Fed. Reg. 3,924, 3,924 (Jan. 25, 2010); *see also* David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 204 (2001) ("If the congressional delegatee of the relevant statutory grant of authority takes personal responsibility for the decision, then the agency should command obeisance, within the broad bounds of reasonableness, in resolving statutory ambiguity; if she does not, then the judiciary should render the ultimate interpretive decision."). Indeed, the internal agency framework adopted by the Secretary actually inverts the kind of agency structure that theoretically could command *Chevron* deference. Under that framework, the preliminary decisions of the Assistant Secretary of Occupational Safety and Health, who is appointed by the President with the advice and consent of the

Senate, 29 U.S.C. § 553, are subject to review by the ARB, which is an adjudicatory board comprised of up to five politically unaccountable members appointed by the Secretary for terms of two years or less, Secretary's Order 1-2010, 75 Fed. Reg. at 3,924-25. *See* 29 C.F.R. §§ 1980.105(a), 1980.110(a).[8] Under such circumstances, the Court should decline to defer to the ARB.[9]

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[8] As the case comes before this Court, the question of whether the Secretary's sub-delegation of his adjudicatory authority under Section 806 to the ARB complies with the Appointments Clause, U.S. Const. Art. II, § 2, cl. 2, is not at issue.

[9] Recently, the ARB's lack of political accountability has erupted in a series of outcome-oriented decisions eviscerating nearly a decade of administrative rulings—as well as an established body of law carefully cultivated by the federal courts—and inventing entirely new whistleblower protections that simply have no basis in the statutory text. *See, e.g.*, *Sylvester*, ARB No. 07-123 (departing from prior administrative rulings or judicial precedent on at least five points, including the requirement that complainants show that their internal reports "definitively and specifically" relate to shareholder fraud); *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, -003 (ARB Sept. 13, 2011) (concluding that the inclusion of a complainant's identity in a litigation hold memorandum constituted a *per se* adverse action by violating the whistleblower's "right to confidentiality" under Section 301 of the Act, 15 U.S.C. § 78j-1(m), when that section creates no right of confidentiality); *Vannoy v. Celenese Corp.*, ARB No. 09-118 (ARB Sept. 28, 2011) (holding that a complainant who misappropriated confidential personal employee information for hundreds of employees and then provided that information to a third party could still be protected if his misappropriation was part of an effort to make a complaint to authorities).

In the final analysis, Congress simply did not confer interpretive authority on the DOL or its sub-delegatees, including the ARB. Instead, it envisioned a discrete function for the agency—investigating and adjudicating Section 806 complaints as a neutral arbiter of fact and applying the law as developed by the Article III courts. By fashioning a unique and fractured approach to regulatory and adjudicatory authority under Sarbanes-Oxley, Congress eschewed the singular delegation required for *Chevron* deference.

B. The Secretary Has Withheld Interpretive Authority From The ARB

Further compounding the fractured administrative model crafted by Congress is the way in which the Secretary has elected to allocate his authority under Section 806 within the DOL itself. *See* 18 U.S.C. § 1514A(b)(1) (authorizing the Secretary to adjudicate disputes under Section 806). As explained below, even assuming, *arguendo*, that the Secretary has some interpretive authority under Section 806, he has failed to allocate that authority internally in such a way that would allow the ARB to plausibly claim an entitlement to *Chevron* deference here.

Since 2002, the Secretary has delegated to the ARB the authority to act on his behalf "in review or on appeal" in connection with Section 806 complaints. Secretary's Order 1-2010, 75 Fed. Reg. at 3,924; *see also* Secretary's Order 02-2012, 77 Fed. Reg. 69,378, 69,378-79 (Nov. 16, 2012). But at the same time, the Secretary has explicitly withheld

from the ARB any interpretive authority over any matter governed by DOL regulations. *See* Secretary's Order 1-2010, 75 Fed. Reg. at 3,925 ("The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions."). Instead, in the case of Section 806, the Secretary has tried to lay that authority, if anywhere, at OSHA's feet. *See* Secretary's Order 5-2002, 67 Fed. Reg. 65,008, 65,008 (Oct. 22, 2002) (delegating "authority and assigned responsibility for administering" the Section 806 whistleblower program to the Assistant Secretary for Occupational Safety and Health); *see also* Secretary's Order 1-2012, 77 Fed. Reg. 3,912, 3,912 (Jan. 25, 2012).

OSHA—not the ARB—has already issued procedural regulations claiming to speak to the scope of protections under Section 806. *See* Procedures for Handling Section 806 Complaints, 69 Fed. Reg. 52,104; 29 C.F.R. § 1980.101 (2011).[10] These procedural regulations reflect OSHA's own view that Section 806 "protects the employees of publicly traded companies as well as the employees of contractors,

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[10] Citations here are to the regulations in effect at the time *Spinner* was decided. Subsequent to the ARB's decision, OSHA issued revised regulations to implement changes required by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, §§ 922(b) & (c), 929A, 124 Stat. 1376, 1848, 1852 (2010). *See* Procedures for Handling Section 806 Complaints, 76 Fed. Reg. 68,084 (Nov. 3, 2011); Procedures for Handling Section 806 Complaints, 76 Fed. Reg. 78,150 (Dec. 16, 2011).

subcontractors, and agents of those publicly traded companies." Procedures for Handling Section 806 Complaints, 69 Fed. Reg. at 52,106. Although OSHA's view of the ambit of Section 806 is plainly erroneous, the Court need not pass on that issue here because the Secretary has already disclaimed any entitlement to *Chevron* deference based on OSHA's concededly "procedural" regulations. C.A. DOL *Amicus* Br. at 18 n.8; *see also* Procedures for Handling Section 806 Complaints, 69 Fed. Reg. at 52,105 (characterizing the regulations as "procedural in nature"). Rather, what is significant for present purposes is that OSHA has promulgated regulations that purport to speak directly to the issue of whether Section 806's protections extend to employees of contractors, subcontractors, and agents of public companies—the same interpretive question that lies at the heart of *Spinner*. The ARB acknowledged this very fact when deciding *Spinner*, recognizing that it was "obliged to follow" the regulations delineating the scope of Section 806. Pet. App. 142a; *see also id.* at 153a ("[T]he ARB is bound by the DOL regulations."). By operation of the Secretary's allocation of responsibilities within the DOL, the ARB was without authority to pass judgment on, or depart from, the interpretation proffered in OSHA's procedural regulations. *See* Secretary's Order 1-2010, 75 Fed. Reg. at 3,924-25. Or, put differently, because the ARB's construction of Section 806 was controlled by OSHA's procedural regulations, it cannot be considered an authoritative construction of the statute.

C. The ARB's Interpretation Of Section 806 Does Not Call Upon Agency Expertise

"[H]istorical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency." *Martin*, 499 U.S. at 153; *see, e.g.*, *Chevron*, 467 U.S. at 865 (addressing an agency's "reasonable accommodation of manifestly competing interests" in the context of a "technical and complex" regulatory scheme). But in construing Section 806, the ARB made no attempt to bring any special expertise to bear in support of its reading of the statute. Instead, the ARB ostensibly relied on ordinary tools of statutory construction, drawing on the statute's language, structure, legislative history, and relationship to other statutory schemes. Pet. App. 141a-167a. Such an effort simply does not reflect an agency's exercise of its institutional competence to make policy by giving statutory language "concrete meaning through a process of case-by-case adjudication." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987); *see also Iavorski v. INS*, 232 F.3d 124, 133 (2d Cir. 2000) (Sotomayor, J.) ("When, as here, [a court is] called upon to engage only in an exercise of statutory interpretation, [it] avoid[s] the danger of venturing into areas of special agency expertise, concerning which courts owe special deference under the *Chevron* doctrine.").

Because the proper reading of Section 806 "is not one that implicates agency expertise in a meaningful way," *Sandoval v. Reno*, 166 F.3d 225, 239 (3d Cir. 1999), but rather presents "a pure question of statutory construction for the courts to decide,"

Cardoza-Fonseca, 480 U.S. at 446, deference under *Chevron* is not warranted.

D. Congress Did Not Delegate A Question Of This Magnitude

Whether Congress intended to delegate a matter to an Executive agency "is shaped, at least in some measure, by the nature of the question presented." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). In particular, it is well established that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). In this case, Petitioners and the Government cannot credibly claim that, in enacting Section 806, Congress intended to silently delegate away the fundamental question of whether to protect potentially *tens of millions* of employees of private companies and, by extension, impose a new and profound risk of civil liability on potentially *millions* of private companies. "When Congress chooses to delegate a power of this extent," *Gonzales*, 546 U.S. at 265, it does so explicitly, not through implication and innuendo. Particularly where the agency's proffered interpretation would have far-reaching consequences, this Court has consistently refused to find *Chevron* deference appropriate based on "oblique" and "cryptic" statutory language. *See, e.g.*, *id.* at 258, 267, 284 n.3 (citing "[t]he importance of the issue of physician-assisted suicide" as "mak[ing] the oblique form of the claimed delegation all the more suspect" even though there was no dispute that the statutory language at issue

was "open to varying constructions, and thus ambiguous in the relevant sense" or that the agency actor had the power to promulgate rules with the force of law); *Brown & Williamson*, 529 U.S. at 159-60 (concluding that Congress would not "cryptic[ally]" delegate a question of "economic and political importance" affecting "an industry constituting a significant portion of the American economy").

MCI Telecommunications Corp. v. American Telephone & Telegraph Co., 512 U.S. 218 (1994), is illustrative. There, the Court faced the question of whether the Federal Communications Commission's authority to "modify" any requirement of a tariff-filing provision of the Federal Communications Act of 1934 encompassed the power to make tariff-filing optional for all non-dominant long-distance carriers. *Id.* at 220. The Court concluded that it was "highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements." *Id.* at 231. Such a "fundamental revision of the statute," the Court wrote, "may be a good idea, but it was not the idea Congress enacted into law." *Id.* at 231-32.

Similarly, in crafting Sarbanes-Oxley, Congress was well aware of the dangerous sweep the Act would have if extended to private companies—a recurring theme in the congressional debates. As of 2010, nearly all of the 5,734,538 employers in the United States were privately held; only 3,716, or

0.06%, were listed on a U.S. stock exchange.[11] *See* John Asker *et al.*, *Corporate Investment and Stock Market Listing: A Puzzle?* 3, 6 (Apr. 22, 2013), *available at* SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1603484. Congress openly acknowledged that "private companies . . . make up the vast majority of companies across the country." 148 Cong. Rec. S7350, S7351 (daily ed. July 25, 2002). It would not have resorted to silence or "seemingly irreconcilable complexity," Pet. App. 174a, to delegate the basic question of whether to cover the potentially millions of private companies that contract with public companies, subcontract with private companies that, in turn, contract with public companies, or serve as agents of public companies. Absent explicit congressional intent to the contrary, "major policy decisions" of this kind are reserved for Congress, not for an administrative tribunal like the ARB. *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965).

The Act's structure and legislative history confirm that Congress never intended to delegate the major policy decision of whether Section 806 should be applied to private companies. Senator Sarbanes, the Act's principal sponsor in the Senate, was "very clear that [Sarbanes-Oxley] applies exclusively to public companies—that is, to companies registered with the Securities and Exchange Commission." 148 Cong. Rec. S7350, S7351 (2002); *see also* 148 Cong. Rec. H1544, 1544 (2002) (statement of Rep. Michael

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[11] Even among companies with five hundred or more employees, private firms still accounted for 86.4% of all companies and 68.7% of all non-government employment.

Oxley). Likewise, the Senate Judiciary Committee Report, in discussing the provision that would become Section 806, used the phrase "employees of publicly traded companies" no less than half a dozen times. *See* S. Rep. No. 107-146, at 10, 13, 18, 19, 30. Consistent with this common understanding, Congress twice reiterated that Section 806 is limited to "employees of publicly traded companies" in the Act itself—once in the title of Section 806 and once in the caption in the first line of text in 18 U.S.C. § 1514A(a). And, notably, Congress elected to make the mirror image of Section 806's enforcement provision—namely, the new obligation to maintain internal compliance systems for reviewing and responding to internal employee complaints—applicable only to public companies. 15 U.S.C. § 78j-1(m)(4). Meanwhile, when Congress actually intended to create broader whistleblower protections or to regulate private companies, it made its intent clear. *See* Resp'ts' Br. at 35-36. All this is potent evidence that Congress did not intend to leave the question of Section 806's impact on private companies unanswered.

Nor can Petitioners or the Government conjure a basis for deference by citing Sarbanes-Oxley's purportedly "broad remedial purpose." Pet. App. 165a. In *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89 (1983), the Federal Labor Relations Authority (FLRA)—an independent body vested with both formal rulemaking and adjudicatory authority—defended its reading of a provision of the Civil Service Reform Act of 1978 requiring the authorization of "official time" for an employee's participation in collective bargaining

negotiations as also mandating the payment of a per diem allowance and travel expenses by pointing to what it viewed as the "policies underlying the Act," including "a new vision of collective bargaining." *Id.* at 99. Despite statutory "silence" on the precise interpretive question, *id.*, this Court declined to defer to the FLRA based on its invocation of the statute's remedial purpose, *id.* at 107-08. The Court stated that although "Congress unquestionably intended to . . . make the collective-bargaining process a more effective instrument," *id.* at 107, Congress did not "confer on the FLRA an unconstrained authority to equalize the economic positions of union and management," *id.* at 108. Here too, while there is no doubt that Congress intended Sarbanes-Oxley to create a new regime of accountability for public companies, it did not employ silence to cryptically authorize the DOL to impose unprecedented compliance obligations on a substantial component of the U.S. economy.

For the foregoing reasons, whether considered independently or collectively, the ARB's decision in *Spinner* is not entitled to *Chevron* deference.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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