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 FOR *AMICUS CURIAE* THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF RESPONDENTS

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The Society for Human Resource Management ("SHRM") is the world's largest association devoted to human resource management. SHRM represents more than 250,000 members in over 140 countries. The purposes of the Society, as set forth in its bylaws, are to promote the use of sound and ethical human resource management practices in the profession, and (a) to be a recognized world leader in human resource management; (b) to provide high-quality, dynamic, and responsive programs and service to its customers with interests in human resource management; (c) to be the voice of the profession on human resource management issues; (d) to facilitate the development and guide the direction of the human resource profession; and (e) to establish, monitor, and update standards for the profession. As an influential voice, the Society advances the human resource profession to ensure that human resources is recognized as an essential partner in developing and executing organizational strategy.

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[1] Pursuant to Supreme Court Rule 37.2, the *Amicus* states that all parties have consented to the filing of this brief. SHRM expresses its appreciation to the parties for providing this consent. Pursuant to Supreme Court Rule 37.6, the *Amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amicus*, its members, or their counsel made a monetary contribution to this brief's preparation or submission.

SHRM offers this *Amicus* brief in support of Respondents because the issues raised in this appeal are of great importance to both SHRM's members and the business community at large. Reversing the decision below would expose millions of private companies, and their human resource professionals, to onerous investigations and litigation, contrary to Congress' express intent.

SUMMARY OF ARGUMENT

Section 806 of the Sarbanes-Oxley Act of 2002 ("SOX"), 18 U.S.C. § 1514A would impose substantial and unwarranted burdens if applied to millions of private employers and their human resource professionals. Along with their myriad other responsibilities, human resource professionals are called upon to conduct workplace investigations in areas that are familiar to them, including complaints involving workplace discrimination. If SOX were extended to employees of private companies, these human resource professionals would not only be faced with the need to learn unfamiliar securities laws, but they also would be further tasked with conducting complicated fraud investigations.

Section 806 also carries with it the significant danger of frustrated or disgruntled employees advancing contrived allegations of fraud to avoid otherwise legitimate job decisions. Such claims would require costly investigations by employers and effectively turn the at-will employment doctrine on its head. The Court addressed these concerns in the recent *Nassar* decision.

Furthermore, expanding the coverage of Section 806 from employees of about 4,500 publicly traded companies to those employed by some 6 million private entities in the United States inevitably would lead to an avalanche of litigation, clogging the administrative agencies and judiciary and costing small- and medium-sized businesses time and resources they can scarcely afford.

The plain text of Section 806 reveals that it applies solely to publicly traded companies. This conclusion is confirmed by the legislative history of Section 806, as well. Members of Congress uniformly stated that Section 806 applies to "employees of publicly traded companies" only. Likewise, Members of Congress, including Senator Sarbanes himself, confirmed that Section 806 would not reach employees of privately held companies.

The First Circuit's interpretation of Section 806 comports with both the legislative history and the interests of employers throughout the country. The Court should affirm the decision below.

ARGUMENT

I. APPLYING SECTION 806 TO EMPLOYEES OF PRIVATE ENTITIES WOULD UNDULY BURDEN HUMAN RESOURCE PROFESSIONALS AND THEIR COMPANIES

If Section 806 is construed with the tremendous breadth Petitioners suggest, private companies and their human resource professionals would face a rash of substantial burdens. Human

resource professionals would have to invest substantial time and resources in learning the basics of securities and corporate law. These professionals would also have to conduct complicated, far-reaching and expensive internal investigations, overwhelming HR professionals who are already busy with the demands of human capital strategy and workplace compliance. Disgruntled employees or those fearing an imminent adverse action could be tempted to assert contrived allegations of fraud to cloak themselves in the protections of Section 806, in an effort to dissuade their employer from taking lawful actions. Furthermore, an explosion in litigation would inexorably result from making more than six million private employers potentially liable under Section 806, which litigation would lead to excessive fees and costs, and flood the federal courts and agencies, which already are struggling to attend to the backlog of whistleblower retaliation claims. It is entirely "appropriate" for the Court to consider these "practical consequences of an expansion" of the scope of a private cause of action. *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 161, 163, 128 S. Ct. 761, 772 (2008). Based on these consequences, the Court should affirm the decision below.

A. The Application of Section 806 to Private Companies Will Swamp Human Resource Professionals With Time-Consuming Investigations

SHRM is first and foremost concerned about the direct toll that a massive increase in the number of lengthy and costly SOX investigations and

litigation involving private companies will have on its members, human resource professionals, who inevitably will be diverted from other important business initiatives. HR's main function is to align the organization's human capital with business objectives. As such, human resource has more on its plate today than ever before, with responsibility for matters such as recruiting, hiring, orientation, training, employee relations, performance evaluations, compensation, benefits, and employee engagement. Notably, this does not even account for the myriad requirements imposed by federal, state and local laws, such as creating and updating effective policies; administering leaves of absence; maintaining personnel records; addressing requests for accommodation; ensuring workplace diversity and equal employment opportunities; monitoring wage and hour compliance; and handling union relations and grievances. Further, the advent of the Patient Protection and Affordable Care Act carries with it an array of new benefits-related obligations, which will also fall on already strained HR departments.

On top of these regular duties, human resource professionals typically are the first responders to employee concerns and complaints, especially at small- or medium-sized companies. These professionals are trained (and often receive supplemental training) to recognize and respond to alleged violations of employment laws, such as discrimination or harassment complaints. Although such investigations are by no means effortless, human resource professionals have experience balancing the sensitivities of these incidents: managers and human resource professionals

interview witnesses, review personnel documents, and make a determination based on familiar legal standards. If the allegation is valid, human resources can recommend and administer necessary changes to the workplace to remedy the situation.

If private companies are exposed to liability under Section 806, these same human resource professionals will be forced to shoulder enormous new responsibilities. Private companies do not have SOX-mandated audit committees or trained compliance officers versed in corporate fraud and securities law. As such, if SOX is extended to private employers, these companies will turn to the best investigators they have, the human resource department. These professionals would therefore have to invest substantial time and effort to become trained on the complicated and evolving legal standards in this area. Further, once an issue arises, the human resource professionals will have to participate in the lengthy and involved SOX-related investigations. Most smaller businesses have very small human resource departments or may have an employee handling the human resource functions in addition to other duties.[2] Imposing an obligation to ferret out and investigate each and every nebulous allegation of wrongdoing at their company (or even, potentially at the publicly traded company with which they contract) would severely strain their resources and in many cases make it impossible for them to perform other core employee relations functions.

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[2] On average, small businesses have 1 human resource professional for every 100 employees. *See* SHRM HUMAN CAPITAL BENCHMARKING BOOK (2013), at 27-30.

B. An Expansive Reading of Section 806 Would Encourage Misuse by Employees to Avoid Adverse Employment Actions by Their Employers

SHRM is also concerned by the serious potential for abuse that would result from an extension of Section 806 to private employers. Expanding the reach of SOX to employees of six million employers would invite its misuse by frustrated or unscrupulous employees.

The Court recently discussed this very scenario in *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013). The *Nassar* Court rejected a proposal to lower the bar for establishing causation in a Title VII retaliation claim. In so doing, the Court expressly considered the potential for misuse of retaliation claims, which have been proliferating for years. Specifically, the Court imagined the case of "an employee who knows that he or she is about to be fired for poor performance, given a lower pay grade, or even just transferred to a different assignment or location." *Id.* at 2532. "To forestall that lawful action," the Court noted, the employee could "make an unfounded charge of racial, sexual, or religious discrimination; then, when the unrelated employment action comes, the employee could allege that it is retaliation." *Id.* Determined to avoid such wasteful deceit, the Court rejected the employee's proposed "lessened causation standard." *Id.*

While *Nassar* dealt with Title VII discrimination and harassment complaints, the Court's unease with the misuse of retaliation

protections applies with even greater force in the context of Section 806. The psychology of asserting a claim of discrimination or harassment is far different than asserting a claim of corporate fraud under SOX.

Consider an illustrative hypothetical: John Doe works as a salesperson for Alpha Systems Inc., a Pennsylvania software company with 100 employees. Alpha Systems is privately held, but sells software and services to several major S&P 500 companies. Mr. Doe has missed his sales quota for months, and fears he might be placed on a performance improvement plan, or worse. Desperate to avoid being taken to task for his inadequate performance, Mr. Doe considers lodging some kind of complaint, to stay his manager's hand.

Mr. Doe knows that assertions of discrimination or harassment are protected activity. However, such claims are deeply personal. At bottom, Mr. Doe would be accusing a colleague of being a bigot. Many employees would not contrive such an accusation, even to avoid an adverse employment action. On the other hand, a Section 806 allegation that a corporation has engaged in some financial wrongdoing is abstract and depersonalized. This becomes even more evident when the employee makes an allegation against a third party such as a customer or supplier. While Mr. Doe might not want to accuse his boss of being racist, ageist or sexist, he would have far less compunction in asserting that a customer was cooking its books.

Faced with the choice of either losing his job or convincing himself that a complex financial

transaction was mishandled by a faceless corporation, Mr. Doe may hesitate little in choosing the latter. All he need do is draft a short letter, accusing a customer of submitting false invoices, and deliver his letter to his boss, Vice President of Sales Jane Smith. After reading it, Ms. Smith is at a loss for what to do next. As noted above, private companies do not have internal auditing and compliance personnel trained to analyze allegations of corporate malfeasance. The only thing Alpha Systems can do is give the matter to its two-person human resource department to investigate.

Alpha Systems' human resource professionals, Bill Jones and Anne Brown, are experienced and well trained in recognizing and responding to most employment issues, and have established policies and procedures in place for investigating allegations such as harassment or discrimination. Mr. Jones and Ms. Brown work with managers to interview witnesses, review personnel documents, then make a determination based on familiar legal standards. Through these processes, Alpha Systems is able to separate frivolous claims from those that may have merit.

Mr. Doe's allegations are a horse of a completely different color. Mr. Jones and Ms. Brown understand the basics of retaliation law, but cannot begin to fathom whether Mr. Doe's letter constitutes activity protected by Section 806. They have neither the training nor the background, both because Alpha Systems is privately held and therefore not subject to SOX regulations, and because securities and fraud

issues are simply outside the purview of the typical human resource professional.

To make matters worse, recent pronouncements from the ARB and Courts of Appeals have made the inquiry as to what constitutes "protected activity" even more difficult. The ARB formerly held that to be protected, an employee's communications "must relate definitively and specifically to the subject matter of [the categories listed in Section 806]." *Platone v. FLYI, Inc., ARB* Case No. 04-154 (Sept. 29, 2006). Several Circuits subsequently adopted this relatively clear standard. *See, e.g., Riddle v. First Tenn. Bank*, 497 Fed. Appx. 588, 595, 2012 FED App. 0969N (6th Cir. 2012); *Van Asdale v. Int'l Game Tech.*, 577 F. 3d 989, 997 (9th Cir. 2009); *Day v. Staples, Inc.*, 555 F. 3d 42, 55 (1st Cir. 2009); *Welch v. Chao*, 536 F. 3d 269, 275 (4th Cir. 2008); *Allen v. Admin. Review Bd.*, 514 F. 3d 468, 476 (5th Cir. 2008).

However, the ARB recently reversed itself, rejecting the "definitively and specifically" requirement in favor of a more amorphous, "reasonable belief" standard. *Sylvester v. Parexel International, LLC*, ARB Case No. 07-123 (May 25, 2011). Under this standard, an employee need not show that any fraud actually occurred, only that the employee had a reasonable belief that some generalized notion of fraud or wrongdoing might have occurred.[3] *Id.* The Third Circuit has adopted

[3] This amorphous standard makes it possible for employees who have already received an adverse act to fabricate instances of "protected activity" *post hoc*. For instance, assume Mr. Doe had been terminated before he could manufacture an explicit

this approach, while the Sixth Circuit tacitly rejected it. *Compare Wiest v. Lynch*, 710 F. 3d 121, 140 (3d Cir. 2013) (embracing "reasonable belief" standard) *with Riddle*, 497 Fed. Appx. at 595 (following "definitively and specifically relate to" standard).

Unable to determine what standard to apply in analyzing Mr. Doe's conduct, Mr. Jones and Ms. Brown are forced to engage legal counsel, incurring significant fees and costs, and further delaying the investigation. Because Alpha Systems is in Pennsylvania, counsel advises that the Company use the "reasonable belief" rubric. Even then, Mr. Jones and Ms. Brown are left with the question of whether "the conduct implicated in [Mr. Doe's letter] could rise to the level of a violation of one of the enumerated provisions in Section 806." *Wiest*, 710 F. 3d at 132. The human resource professionals look into the allegations, but quickly become overwhelmed by reams of unfamiliar documents and obscure regulations. Mr. Jones and Ms. Brown soon recognize that despite their human resource knowledge, neither they nor anyone else at the privately-held Alpha Systems have the expertise to determine whether the conduct ascribed by Mr. Doe to the customer "constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." *Van Asdale*, 577 F.

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complaint of fraud. Mr. Doe could claim that an ambiguous and vague email he sent before his discharge evinces a "reasonable belief" that fraud may have occurred, allowing him to pursue a claim under Section 806.

3d at 996 (bracketed text in original). Alpha Systems' only recourse is to engage outside resources: lawyers, auditors, accountants. Needless to say, the costs of engaging these experts mount quickly.[4] And Alpha Systems is forced to bring its valued customer into the investigation, straining that relationship.

While this investigation proceeds, Alpha Systems finds itself paralyzed not only from holding Mr. Doe to account for his poor performance, but indeed from taking virtually any employment action against him. In *Menendez v. Halliburton, Inc.*, ARB Case No. 09-002 (ARB Sept. 13, 2011), the ARB adopted a fluid standard about what constitutes an "adverse action" under Section 806. In short, any action that is "more than trivial" might be considered an adverse act that would trigger Section 806 liability. *Id.* Alpha Systems cannot arguably even change Mr. Doe's desk, for fear of a retaliation claim.

C. Applying Section 806 to Private Companies Will Expose Them to Burdensome Litigation

SHRM is further concerned with Section 806's capacity to open the floodgates to new whistleblower cases – which have a success rate of only around one percent – and the attendant burdens that will impose on companies, their human resource personnel, government agencies and the judiciary. The Court

[4] In *Office Depot, Inc. v. National Union Fire Ins. Co.*, 734 F. Supp. 2d 1304 (S.D. Fla. 2010), the court noted that Office Depot incurred $23 million in attorneys' fees and expenses related to an internal investigation regarding securities issues.

shared this concern in *Nassar*. It noted that the growing glut of retaliation cases is adversely affecting "the fair and responsible allocation of resources in the judicial and litigation systems." *Nassar*, 133 S. Ct. at 2531. In the Title VII context, the Court found, "claims of retaliation are being made with ever-increasing frequency," with retaliation claims filed with the EEOC "nearly doubl[ing] in the past 15 years – from just over 16,000 in 1997 to over 31,000 in 2012." *Id.* The *Nassar* Court thus endorsed a narrow interpretation of Title VII's anti-retaliation provisions. *Id.* at 2531-32.

Similar concerns are at play here. From 2005-12, OSHA averaged 216 new SOX retaliation complaints per year – 216 cases that came from only 4,500 publicly traded companies.[5] If some six million privately held companies in the United States are exposed to Section 806 liability, it is plain that the number of SOX complaints filed will increase exponentially. To be sure, privately-held companies tend to be smaller than their publicly traded counterparts. If we assume conservatively that the rate of Section 806 complaints at private companies is only one-tenth that at publicly traded companies, the 216 complaints extrapolate to 28,800 SOX complaints per year. Such a massive increase in the caseload will surely overwhelm the already-overworked professionals at OSHA and the Department of Labor and "just reduce the resources

[5] Occupational Health & Safety Administration, WHISTLEBLOWER INVESTIGATION DATA: FY2005-FY2013 Q3, http://www.whistleblowers.gov/whistleblower/wb_data_FY05-13-Q3.pdf (2013), at 1.

available to investigate and vindicate claims by employees of publicly traded companies, the statute's main objects." *Fleszar v. U.S. Dep't of Labor*, 598 F. 3d 912, 917 (7th Cir. 2010).

This explosion in SOX litigation would be particularly problematic for private companies, because litigation under that statute imposes unjustifiably great costs. Returning to our hypothetical involving Mr. Doe, assume that after determining his assertions to be groundless and advanced in bad faith, Alpha Systems placed Mr. Doe on a performance plan, and terminated him when his sales numbers failed to improve. Mr. Doe retains an attorney, who proceeds to file a Section 806 complaint against Alpha Systems with OSHA (the agency charged with investigating SOX retaliation claims).[6] Alpha Systems soon discovers that Section 806's procedures allow Mr. Doe three bites at the apple. After receiving Mr. Doe's complaint, Alpha Systems engages legal counsel and submits a position statement. Within 60 days, an OSHA investigator issues a preliminary order,[7] finding that Mr. Doe cannot state a *prima facie* case under Section 806 and recommending dismissal. Nonetheless, Mr. Doe is entitled to ask for a *de novo* review by an administrative law judge.[8] The ALJ again finds for Alpha Systems. Still, because 180 days have not yet passed since the filing of the complaint, Mr. Doe can remove his case to district

[6] 29 C.F.R. § 1980.103(a).
[7] 29 C.F.R. § 1980.105(e).
[8] 29 C.F.R. § 1980.106(a).

court for yet another *de novo* review by an Article III judge, through full-blown litigation.[9]

Of course, where there is litigation there are legal fees, and other expenses. Section 806 lawsuits are particularly complicated and costly, because they present "a securities fraud claim wrapped inside a retaliation claim."[10] Litigation involving the standard issues in a retaliation case – causation, motive and intent, *see Clark County School Dist. v. Breeden*, 532 U.S. 268, 272 (2001) – can be involved. Adding in the attendant investigation, discovery and analysis of the securities piece of the claim can multiply the costs of litigation dramatically. *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164, 189 (1994) (noting the "large sums even for pretrial defense and the negotiation of settlements" of securities actions, in which companies "pay $8 in legal fees for every $1 paid in claims"). Further, since Mr. Doe's allegations were against the customer, that company would receive invasive and wide-ranging subpoenas as well, dragging an otherwise uninvolved third party into the litigation.

In *Stoneridge Investment Partners*, the Court acknowledged the danger of "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow[ing] plaintiffs with weak claims to extort settlements from innocent companies." 552

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[9] 18 U.S.C. § 1514A(b)(1)(B); 29 C.F.R. § 1980.114(a). Alternatively, an aggrieved party can have the Administrative Review Board address the ALJ's findings. 29 C.F.R. § 1980.110(a).

[10] Respondent's Br., at 39.

U.S. at 163. The Court there thus rejected a proposed expansion of a cause of action. *Id.* So too with Mr. Doe and Alpha Systems: even though his Section 806 claims are wholly groundless, Alpha Systems would be forced to seriously consider settling the case, to avoid high costs and fees connected with the onerous discovery and complicated legal analysis. The injustice of extracting settlements from Section 806 cases is particularly stark given claimants' extremely low success rate with Section 806 claims – out of 1,700 cases resolved by the Department of Labor from 2005-12, only 18 or 1.05 percent received merit findings.[11]

It is "inconsistent with the structure and operation of [Section 806] to so raise the costs, both financial and reputational," on a private employer "whose actions were not in fact the result of any discriminatory or retaliatory intent" – particularly given that there is no reason to believe that private employers are covered by Section 806 in the first place. *Nassar*, 133 S. Ct. at 2532; *see Stoneridge Investment Partners*, 552 U.S. at 163 (rejecting expansion of "[a]doption of petitioner's approach would expose a new class of defendants to these risks" attendant with litigation). The Court should therefore affirm the decision below.

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[11] Occupational Health & Safety Administration, WHISTLEBLOWER INVESTIGATION DATA: FY2005-FY2013 Q3, http://www.whistleblowers.gov/whistleblower/wb_data_FY05-13-Q3.pdf (2013), at 4-8. For the first three quarters of 2013, zero cases received a merit finding. *Id.*

II. THE LEGISLATIVE HISTORY UNEQUIVOCALLY DEMONSTRATES THAT CONGRESS DID NOT INTEND SECTION 806 TO APPLY TO EMPLOYEES OF PRIVATE COMPANIES

A reading of the legislative history further shows that the decision below must stand. SHRM adopts the extensive analysis offered by Respondents regarding the interpretation of Section 806 (Br. at 13 - 30), and agrees with Respondents and the court below that the plain text of the statute alone is dispositive of this matter. Nonetheless, if the Court finds any ambiguity in this Section, SHRM notes that the legislative history regarding SOX's whistleblower provisions uniformly supports Respondents' position. Congress made plain that Section 806 applies solely to employees of publicly traded companies, not private entities, even those that are "contractors or subcontractors" to public companies. The Senate Report discussing what would be enacted as Section 806 repeatedly notes that it would apply to employees of public companies only:

- The Report emphasizes, "[a]lthough current law protects many government employees who blow the whistle on fraud and protect investors, there is no similar protection for employees of publicly traded companies who blow the whistle on fraud and protect investors." S. Rep. no. 107-146, at 9 (emphasis supplied).
- "This section [enacted as Section 806] would provide whistleblower protection to employees of publicly traded companies. It

specifically protects them when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, supervisors (or other proper people within a corporation), or parties in a judicial proceeding in detecting and stopping fraud." S. Rep. no. 107-146, at 11.

- "Section 6 of the bill [enacted as Section 806] would provide whistleblower protection to employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company. Although current law protects many government employees who act in the public interest by reporting wrongdoing, there is no similar protection for employees of publicly traded companies who blow the whistle on fraud and protect investors." S. Rep. no. 107-146, at 15 (emphasis supplied).
- "The bill does not supplant or replace state law, but sets a national floor for employee protections in the context of publicly traded companies." S. Rep. no. 107-146, at 16 (emphasis supplied).

The Congressional Record similarly reveals that Senator Leahy, in discussing the whistleblower provisions, noted it "would provide whistleblower protection to employees of publicly traded companies who report acts of fraud," because "[a]lthough current law protects many government employees who act in the public interest by reporting wrongdoing, there is no similar protection for

publicly traded companies." 148 Cong. Rec. 1787-88 (daily ed. Mar. 12, 2002).

The government suggests, "'[N]othing in the legislative history' shows an affirmative congressional intent to 'limit whistleblower protection to employees of public companies.'" Gov't Br. at 22 (quoting Pet. App. 60a-61a (Thompson, J., dissenting)). It is clear this statement is at odds with the legislative record, and simply incorrect.

In their Briefs, Petitioners and the government likewise try to manufacture Congressional "intent" in support of their position through oblique implication: because Congress noted the involvement of private accountants and law firms in the Enron fraud, it therefore intended that all private employers would be covered by Section 806. Even if one were to indulge this dubious leap in logic, the actual legislative history is completely to the contrary. It shows that Congress intended to exclude private companies from the scope of this law. By way of example, in considering the conference report on SOX July 25, 2002, Senator Sarbanes himself made plain that SOX's coverage would be limited to publicly traded companies:

> Before addressing the major provisions of the legislation, let me make very clear that it applies exclusively to public companies – that is, to companies registered with the Securities and Exchange Commission. It is not applicable to pr[ivate] companies, who make up the vast majority of companies across the country.

148 Cong. Rec. S7351 (daily ed. July 25, 2002) (emphasis supplied). Representative Etheridge similarly stated that the bill "regulates public corporations, not privately-held companies [because] [b]y accepting money from private citizens, these corporations bear a special responsibility to their investors and need to be held accountable." 148 Cong. Rec. H5474 (daily ed. July 25, 2002). Senator Murray echoed this: "[f]irst, the bill limits its scope to publicly held companies." 148 Cong. Rec. S7351 (daily ed. July 5, 2002) (emphasis supplied).

Nowhere in the legislative history is there any statement by any Member of Congress that the SOX whistleblower protections should apply to employees of private companies, contractors, subcontractors or otherwise. Petitioners' and the governments' position thus relies solely on strained inference, which is directly and repeatedly rebutted by statements made by those legislators in Congress who commented on the limited application of SOX to publicly traded companies.

The legislative history is also bereft of any discussion of the significant burdens that Section 806 would impose on virtually every company in the United States, as well as the significant restrictions that it would place on employers' common law rights. "[W]here a common-law principle is well established … the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'" *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108, 111 S. Ct. 2166, 2170 (1991) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S.

779, 783, 72 S. Ct. 1011 (1952)). Thus, "when a statute covers an issue previously governed by the common law, [the Court will] interpret the statute with the presumption that Congress intended to retain the substance of the common law." *Samantar v. Yousuf*, 560 U.S. 305, 130 S. Ct. 2278, 2289 n.13 (2010). It is inconceivable that Congress would foist the substantial limitations and burdens discussed *supra* on nearly every business *sub silentio*, without any indication of such intent in either the statute or the legislative record.

Furthermore, when restricting the traditional, common-law rights of an employer, Congress has always taken pains to exclude from a statute's coverage entities that would be unduly encumbered by its requirements. For instance, Title VII and the Americans with Disabilities Act apply to employers with fifteen or more employees only;[12] the Age Discrimination in Employment Act, twenty or more;[13] and the Family and Medical Leave Act, fifty or more.[14] *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 504, 126 S. Ct. 1235, 1239 (2006). In both Section 806 and its legislative history, Congress limited SOX retaliation claims to publicly traded companies, alone. To read this limitation out of Section 806 would be contrary to both Congress's intent and the rights of millions of employers, regardless of their size. The decision below recognizes these issues, and therefore should be affirmed.

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[12] 42 U.S.C. § 2000e(b); 42 U.S.C. § 12111(5)(A).
[13] 29 U.S.C. § 630(b).
[14] 29 USC § 2611(4)(A)(i).

III. CONCLUSION

For the foregoing reasons, SHRM asks that the Court affirm the decision below.

Respectfully submitted,

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