UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

In the Matter of:	
Ms. CARRI JOHNSON, *Complainant*,	ARB Case No. 08-032
v.	ALJ Case No. 2005-SOX-15
SIEMENS BUILDING TECHNOLOGIES, INC., and SIEMENS AG, *Respondents*.	

JOINT SUPPLEMENTAL REPLY BRIEF OF RESPONDENTS SIEMENS BUILDING TECHNOLOGIES, INC. AND SIEMENS AG IN RESPONSE TO THE BOARD'S APRIL 15, 2010 ORDER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Respondents Siemens Building Technologies, Inc. and Siemens AG respectfully submit this joint reply brief to aid the Administrative Review Board ("ARB" or "Board") in its consideration of the issues in this appeal.

As respondents explained in their opening brief, the version of section 806 of the Sarbanes-Oxley Act ("SOX" or "the Act") in effect at the time of the events underlying Ms. Johnson's lawsuit extends whistleblower protection only to "employees of publicly traded companies." 18 U.S.C. § 1514A(a).[1] This language unambiguously forecloses an application of whistleblower protections to employees of privately held companies—including privately held companies that are owned in whole or in part by publicly traded companies. Background principles of corporate law—against which Congress is presumed to enact federal statutes such as SOX—establish that a provision's reference to a "company" does not, absent an express textual indication, include the company's subsidiaries. The majority of courts and ALJs, not surprisingly, have adopted this reasoning.

It is no wonder, then, that both the Securities and Exchange Commission and the Assistant Secretary of Labor for Occupational Safety and Health concede (as they must) that "subsidiaries are not expressly listed as covered entities" under section 806. Brief of the Securities and Exchange Commission as *Amicus Curiae* ("SEC Brief") at 10; *see* Brief of Assistant Secretary of Labor for Occupational Safety and Health as *Amicus Curiae* ("OSHA Brief") at 10 ("Section 806 neither expressly includes nor excludes subsidiaries of publicly traded companies."). Yet they, along with Ms. Johnson, nonetheless argue that the

[1] Unless otherwise noted, respondents refer in this brief to the version of section 806 that was in effect, and thereby governed, at the time when the events that form the basis of Ms. Johnson's complaint occurred. Respondents will address the recent amendment to section 806 in Part II below.

whistleblower protections of Section 806 apply not only to employees of "public traded companies" but also to employees of their non-public subsidiaries whose results are required to be included in their parent's consolidated financial statements pursuant to sections 12 and 15(d) of the Securities Exchange Act of 1934. *See* Johnson Br. at 14; SEC Br at 1-2; OSHA Brief at 2; *see also* Brief of *Amici Curiae* Government Accountability Project, National Employment Lawyers' Association and National Whistleblowers Center ("GAP Brief") at 6-7. Ms. Johnson (and *amici* supporting her) make a host of decidedly atextual, policy-based arguments in their various briefs. But none of these policy arguments can overcome the simple, plain-language interpretation that the actual text, structure, and history of the statute compel.

Perhaps because they recognize they cannot prevail under the controlling version of section 806, Ms. Johnson and *amici* now ask the Board to apply a provision enacted six years ***after*** Ms. Johnson's discharge—section 929a of the recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act ("Reform Act"), Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010)—to conduct that occurred six years ***before*** Congress amended the law. But it is well-established that a statutory amendment that affects the parties' substantive rights (as section 929a indisputably does) cannot retroactively be applied in the absence of an express textual provision authorizing such a retroactive application. Here, of course, there is no such language in the Reform Act—which, to the contrary, provides that the Reform Act would become effective ***only after its enactment unless otherwise specified.***

Nonetheless, Ms. Johnson and her *amici* attempt to overcome the statute's express declaration of ***non-retroactivity*** by relying on the Reform Act's legislative history—and, in particular, on a snippet from a Committee Report that (according to them) indicates that section 929a was intended merely to "clarify" preexisting law. There are two problems with that approach. First, a snippet of legislative history that no member of Congress voted on cannot trump what the statute itself says. And second, the Eighth Circuit—whose law would govern any appeal from the Board's order in this case—has expressly held that statements just like the one Ms. Johnson and her *amici* rely upon here cannot overcome the presumption against retroactively applying new legislation. As a result, an order purporting to apply section 929a retroactively to this case would be reversed on appeal.

Accordingly, the ARB should affirm the ALJ's decision dismissing Ms. Johnson's claims against respondents.

ARGUMENT

I. Section 806 Applies Exclusively To Employees Of Publicly Traded Companies.

Section 806's title makes clear that the Act's whistleblower protections extend only to "employees ***of publicly traded companies***." 18 U.S.C. § 1514A(a) (emphasis added). To that end, section 806 prohibits any "company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934," or any "officer, employee, contractor, subcontractor, or agent of such company," from retaliating against any of the publicly traded company's "employee[s]" who engages in certain protected activities. *Id.* By its plain terms, section 806 thus does not extend its protections to employees ***of privately held subsidiaries*** in which a covered, publicly traded company has an ownership interest, and the remainder of SOX's structure and the background principles against which the statute was adopted only underscore that straightforward point.

Neither Ms. Johnson nor her *amici* provide any persuasive basis for departing from the plain text of section 806, the structure of the statute as a whole, or the background legal principles against which section 806 was adopted. Instead, they argue that (1) the Board should not use the title to interpret the meaning of section 806; (2) the term "publicly traded company" has a technical and peculiar meaning in the context of SOX that includes those subsidiaries that are included on the consolidated financial statements of a publicly traded company; and (3) the Board may depart from section 806's statutory text for various policy-oriented reasons. These arguments are meritless.

A. The Title Of Section 806 Should Be Used To Interpret Its Text.

In the face of the clear text of section 806's title, it is no surprise that Ms. Johnson and the SEC argue that the ARB should simply ignore the statute's explicit reference to "employees of publicly traded companies" because the "phrase is not found in the text of Section 806 itself, but only in the title." SEC Br. at 14-15; Johnson Br. at 15-16. Contrary to their arguments, section 806's title governs under these circumstances because—at the very least—it is consistent with both the operative provisions of section 806 itself and the remainder of the statutory scheme.

To that end, it is well-settled that "the title of a statute or section can aid in resolving an ambiguity in the legislation's text." *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991); *see also United States v. May*, 535 F.3d 912, 918-19 (8th Cir. 2008). In *National Center for Immigrants' Rights*, the Supreme Court addressed a provision entitled "Condition against unauthorized employment" where the provision's text referred more broadly to a "condition barring employment." 502 U.S. at 185. The Court unanimously held that "[t]he text's generic reference to 'employment' should be read as a reference to the '***unauthorized*** employment' identified in the paragraph's title." *Id.* at 189. The same is true here—section 806 contains a generic reference to "employees" that "should be read as a reference to" the "employees of publicly traded companies" that are identified in section 806's title.

None of this is to dispute the proposition that, as both the SEC and Ms. Johnson point out, a statute's title may not "'take the place of the detailed provisions of the text.'" SEC Br. at 14-15 (quoting *Bhd. of R.R. Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528 (1947), and citing *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 483 (2001)); Johnson Br. at 15-16. But that principle has no relevance here. Respondents are not suggesting that the title should "take the place" of any of section 806's provisions, but rather seek to use the title precisely as it may be used—as an interpretive tool that sheds significant light on the statute's meaning. Indeed, the cases Ms. Johnson and the SEC cite confirm that such use of a title is perfectly appropriate. *See Bhd. of R.R. Trainmen*, 331 U.S. at 528-29 (although "the heading of a section cannot limit the plain meaning of the text" where the heading and the text "deviate," it is appropriate to use a heading to "shed light on some ambiguous word or phrase"); *Whitman*, 531 U.S. at 483 (title may be used to "she[d] light on some ambiguous word or phrase in the statute itself"); *see also* 2A Sutherland on Statutory Construction § 47:3 ("Since the title of an act is essentially a part of the act and is itself a legislative expression of the general scope of the bill, it is proper to consider it in arriving at the intent of the legislature.").

B. Under Background Interpretive Principles, Section 806's Reference To "Publicly Traded Companies" Establishes That The Whistleblower Protections In That Section Do Not Extend To Subsidiaries of Such Companies.

Reliance on section 806's title is especially appropriate here because it is consistent with the ***plain*** text and structure of the statute—and thus need not be used merely to resolve ***ambiguity*** in the statutory scheme. In particular, where a federal statute refers generically to a "company" or "corporation," courts apply the familiar common-law rules of limited liability and cannot extend the statute to cover the company's subsidiaries.

The controlling case on this point is *United States v. Bestfoods*, 524 U.S. 51 (1998), where the Supreme Court addressed "whether a parent corporation that actively participated in, and exercised control over, the operations of a subsidiary may, without more, be held liable as an operator of a polluting facility owned or operated by the subsidiary." *Id.* at 55. The Court unanimously "answer[ed] no, unless the corporate veil may be pierced." *Id.* As the Court explained, the corporate-law principle that a "parent corporation . . . is not liable for the acts of its subsidiaries" is "deeply ingrained in our economic and legal systems." *Id.* at 61 (quotation marks omitted); *see also id.* ("'Limited liability is the rule, not the exception.'") (quoting *Anderson v. Abbott*, 321 U.S. 349, 362 (1944)). Accordingly, where the statute itself does not expressly "purport[] to reject this bedrock principle,... the congressional silence is audible." *Id.* at 62.

Contrary to the claims of Ms. Johnson and her *amici*, this simple rule of construction is not limited to the particular statute *Bestfoods* was interpreting (the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)). To the contrary, *Bestfoods* made clear that its rule was universal:

> CERCLA [is] ***like many another congressional enactment*** in giving no indication that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute, and the failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of ***the rule that in order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.***

Id. at 63 (quotation marks, alterations, and citations omitted; emphasis added). Not surprisingly, then, numerous courts—notably including the Eighth Circuit, whose law governs this case—have applied the *Bestfoods* clear statement rule to an array of different statutes. *See Hok Sport, Inc. v. FC Des Moines, L.C.*, 495 F.3d 927, 936-37 (8th Cir. 2007) (citing *Bestfoods* and reasoning, in interpreting an Iowa statute, that "[u]nless the language of a statute directly negates the common law, the statute must be interpreted in conformity with the common law"); *see also, e.g.*, *Pugh v. Tribune Co.*, 521 F.3d 686, 698 (7th Cir. 2008) (citing *Bestfoods* and applying rule in context of section 10b-5 securities fraud claim); *Bright v. Hill's Pet Nutrition, Inc.*, 510 F.3d 766, 771-72 (7th Cir. 2007) (same in the context of Title VII).

This generally applicable rule is controlling here. Nothing in section 806 remotely purports to abrogate the venerable common-law rules of corporate liability, and the remainder of the statute makes clear that where Congress intended to cover subsidiaries, it did so—as *Bestfoods* requires—expressly. *See, e.g.*, 15 U.S.C. § 7241(a)(4)(B); 15 U.S.C. § 78m(k)(1). Thus, as many courts and ALJs have reasoned, "Congress only listed employees of public companies as protected individuals under § 1514A, and it is not the job of this Court to rewrite clear statutory text." *Rao v. Daimler Chrysler Corp.*, No. 06-13723, 2007 WL 1424220, at *4 (E.D. Mich. May 14, 2007); *see Malin v. Siemens Med. Solutions Health Servs.*, 638 F. Supp. 2d 492, 500 (D. Md. 2008) (similarly relying on "the general principle of corporate law that a parent is not automatically liable for the actions of a subsidiary, absent a clear intent from Congress to the contrary"); *Lowe v. Terminix Int'l Co., LP.*, ALJ No. 2006-SOX-0089, at 7-8 (Sept. 15, 2006); *Bothwell v. Am. Income Life*, ALJ No. 2005-SOX-57 (Sept. 19, 2005); *Teutsch v. ING Groep N.V.*, ALJ No. 2005-SOX-101, -102, -103, at 4 (Sept. 25, 2006); *see also* Brief of Chamber of Commerce of the United States of America as *Amicus Curiae* at 5-6 (collecting cases).[2]

The sole textual response that Ms. Johnson and her *amici* make to this analysis is to urge

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[2] Ms. Johnson and *amici* cite only one court and one ALJ that have held otherwise. *See Lawson v. FMR, LLC*, Nos. 08-10466 & 08-10758, 2010 WL 1345153 (D. Mass. Mar. 31, 2010), *interlocutory appeal granted*, 2010 WL 3001185 (D. Mass. July 28, 2010); *Morefield v. Exelon Servs., Inc.*, ALJ No. 2004-SOX-00002 (Jan. 28, 2004); *Walters v. Deutsche Bank AG*, ALJ No. 2008-SOX-70 (Mar. 23, 2009). But neither Ms. Johnson nor *amici* embrace *Lawson*'s remarkable holding that the "employees of any related entity of a public company" are protected under section 806, 2010 WL 1345153, at *17, and therefore all but concede that the holding of that case is wrong. Moreover, as explained in the text, the reasoning of *Lawson*, *Morefield*, and *Walters* on which Ms. Johnson and *amici* rely is unpersuasive.

the Board to adopt a definition of the term "publicly traded company" that is peculiar to SOX.[3] According to them, because section 806 defines a publicly traded company as a company that registers securities or files reports under sections 12 and 15(d) of the Securities Exchange Act, and because those two provisions in turn require publicly traded companies to file consolidated financial statements that include information regarding certain subsidiaries, the term "publicly traded company" in section 806 necessarily includes such subsidiaries. *See* SEC Br. at 6-9; OSHA Br. at 13-18; GAP Br. at 6-17; *see also* AFL-CIO Br. at 3-4, 6.

But this argument gets things precisely backwards. As sections 12 and 15(d) of the Securities Exchange Act make clear, it is the publicly traded parent company ***alone*** that is obligated to register securities and file reports under sections 12 and 15(d), not any of the publicly traded parent company's subsidiaries. *See* 15 U.S.C. § 78l(g) (providing that the "issuer ... shall ... register such security"); *id.* § 78o(d) (providing that an "issuer . . . shall file . . . such supplementary and periodic information, documents, and reports as may be required"). It makes no difference that ***the publicly traded parent company*** (*i.e.*, the "issuer") must include information relating to its subsidiaries in those reports; the subsidiaries themselves unambiguously are not "compan[ies] with a class of securities registered under section 12 of the Securities Exchange Act of 1934 or that [are] required to file reports under section 15(d) of the Securities Exchange Act of 1934," 18 U.S.C. § 1514A(a), and thus fall outside the plain terms of

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[3] In a footnote, the Assistant Secretary for OSHA fleetingly suggests that definitions of the term "company" found in the Investment Company Act of 1940, *see* 15 U.S.C. § 80a-2(a)(8), or in Black's Law Dictionary encompass subsidiaries. *See* OSHA Br. at 13 n.6. But the Assistant Secretary nowhere argues that SOX generally or section 806 in particular incorporates those definitions. And, indeed, the breadth of the definitions indicates that they do not apply in the context of SOX. The Investment Company Act defines a "company" to include "a partnership, an association, a joint-stock company, a trust, a fund, or any organized group of persons whether incorporated or not." 15 U.S.C. § 80a-2(a)(8); *see also* 15 U.S.C. § 78c(a)(19) (incorporating definition for Exchange Act); Black's Law Dictionary (9th ed. 2009) (similar). But section 806 applies only to "***publicly traded*** companies," and if the definitions in these sources were applied here, then the statute would be so broad that it would cover any "organized group of persons." Suffice it to say, there is not a shred of evidence that Congress intended section 806 to establish a rule of blanket liability that would cover every single "organized group of persons" in the country.

section 806.

In any event, the remainder of the statute makes clear that Congress did not intend to include subsidiaries within the scope of section 806. Where Congress in SOX wished to treat publicly traded companies and their subsidiaries together, it did so expressly (and as *Bestfoods* requires given the background principles of corporate law against which Congress legislates). *See, e.g.*, 15 U.S.C. § 7241(a)(4)(B); 15 U.S.C. § 78m(k)(1). SOX thus provides that officers of a parent corporation are "responsible for establishing and maintaining internal controls" sufficient "to ensure that material information relating to the [parent public corporation] and its consolidated subsidiaries is made known to [the] officers by others within these entities," 15 U.S.C. § 7241(a)(4)(A)-(B), or that personal loans to executives are prohibited "including through any subsidiary," 15 U.S.C. § 78m(k)(1). But, in direct contrast to these provisions, Congress made no such reference to subsidiaries in section 806.

Incredibly, the SEC's brief nonetheless asserts that "these provisions actually support [its] interpretation, because the inclusion of subsidiaries [in these separate provisions] supports the argument that the drafters of Section 806 ***similarly*** intended employees of non-public subsidiaries to be covered by the whistleblower protections." SEC Br. at 16 (emphasis added). But that turns the most basic principle of statutory interpretation upside down. As respondents explained in their opening brief, the relevant canon of statutory interpretation provides that "'where Congress include[s] particular language in one section of a statute but omits it in another section of the same Act . . . Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello v. United States*, 464 U.S. 16, 23 (1983). In short, then, the fact that Congress failed to include references to subsidiaries in section 806 but did include such references elsewhere in the statute is a powerful reason to read the two provisions ***differently***, not as the SEC remarkably argues, "similarly."[4]

C. Policy Reasons Cannot Support A Departure From the Plain Text Of Section 806.

In the absence of any sound textual basis for their preferred interpretation, Ms. Johnson and her *amici* resort to an array of policy-based arguments. While these arguments take different forms, they all boil down to a single proposition: that the Board should replace section 806's plain text with what it believes to be sound policy. There is no credible basis for that approach.

Accordingly, it is no response to the statute's plain text and structure to point out that Congress sought through section 806 to encourage whistleblowers to report on inaccurate or misleading financial statements. *See* SEC Br. at 10. That no doubt explains the reasons behind the adoption of section 806, but it does not provide insight into the scope of the provision. Nor could it plausibly be argued that construing the statute not to cover consolidated subsidiaries would lead to an "absurd" result because it "would mean that whether a whistleblower was protected would turn on whether he worked for the parent or an unincorporated division rather than for a subsidiary." SEC Br. at 10-11. Far from an absurdity, that is a simple reflection of the general rule respecting the corporate form. Indeed, if anything, it would be extraordinary for the Board to determine that an interpretation that the majority of courts embraced is "absurd" because it reflects bedrock principles of corporate law that are "deeply ingrained in our economic and legal systems." *Bestfoods*, 524 U.S. at 61.

Nor is there any basis for displacing section 806's plain text and structure based on the

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[4] Ms. Johnson's argument that the Board should, for purposes of interpreting section 806, adopt the "control person" test in section 20 of the Securities Exchange Act is similarly mistaken. *See* Johnson Br. at 16-22; 15 U.S.C. § 78t(a) (providing that liability under the Securities Exchange Act extends to "[e]very person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder"). Congress could have, but did not, use the same "control person" language in section 806, and this Board cannot disregard the language that Congress actually enacted in favor of language that it did not. Moreover, even in the securities context, "misconduct of employees at a corporate subsidiary is not normally attributed to its corporate parent, absent grounds for piercing the corporate veil." *Pugh*, 521 F.3d at 698.

Act's legislative history. As an initial matter, the only part of the legislative history (of which respondents are aware) that directly addresses the corporate form is Senator Sarbanes's statement that he wanted to make it "very clear that [the Act] applies ***exclusively to public companies***—that is, to companies registered with the Securities and Exchange Commission." 148 Cong. Rec. S7351 (daily ed. July 25, 2002) (emphasis added). Although Ms. Johnson and her *amici* argue that Senator Sarbanes intended only to make clear that SOX does not apply to privately held companies that are not subsidiaries of publicly traded companies, *see, e.g.*, SEC Br. at 18-20 & n.7, their argument by itself lays bare why this sort of wrangling over legislative history is disfavored. This kind of textual parsing is reserved for actual statutes, not legislative history, and shows clearly why legislative history should not be used for more than what it is.

And to the extent Ms. Johnson and her *amici* seek to trumpet their own hand-selected snippets of the Act's legislative history, none helps their cause. Instead, these vague statements fall in two general categories. First, Ms. Johnson's *amici* rely on broad pronouncements about the importance of whistleblower protections. *See* OSHA Br. at 22-23; SEC Br. at 12-13. But the importance of section 806 is not in dispute in this appeal. The ***scope*** of section 806 is in dispute, and nothing in the cited pronouncements indicates that the statute was intended to cover the employees of subsidiaries as well as publicly traded corporations. And second, Ms. Johnson and *amici* rely on particular cases that Congress had in mind when it enacted SOX, such as the case of Sherron Watkins, an employee of Enron Corporation. *See* SEC Br. at 13; OSHA Br. at 23-24. But that shows nothing. Ms. Watkins was an employee of Enron Corporation—the registered parent, not a subsidiary. *See* 148 Cong. Rec. S7350-04, 7358 (July 25, 2002). Congress' focus on her, to the extent it has any relevance at all, cannot be used to show that section 806's scope sweeps broader than its plain language. Indeed, the SEC's reliance on the example of Ms.

Watkins illustrates the pitfalls of relying on ambiguous legislative history, and why such history (as here) cannot displace the text that Congress in fact enacted.

II. Section 929a of the Reform Act Does Not Apply Retroactively.

Congress's recent enactment of section 929a of the Reform Act does not alter this analysis. The Act contains an effective date provision expressly providing that "***[e]xcept as otherwise specifically provided*** in this Act or the amendments made by this Act, this Act and such amendments shall take effect 1 day ***after the date of enactment of this Act***." Reform Act § 4 (emphasis added). The Act, however, does not "specifically provide" that section 929a governs conduct that occurred prior to its enactment, and thus cannot be lawfully interpreted to apply retroactively—as though it somehow took effect ***six years before*** Congress passed the statute and the President signed it into law.

There is thus no basis for applying the Reform Act in this case. To the contrary, it is well-settled that where a statute "would, if applied in cases arising before the Act's effective date, undoubtedly impose on employers found liable a 'new disability' in respect to past events," the "traditional presumption teaches that [a statute] does not govern [retroactively] absent ***clear*** congressional intent favoring such a result." *Landgraf v. USI Fild Prods.*, 511 U.S. 244, 280, 283-84 (1994) (emphasis added). Indeed, the Supreme Court in *Landgraf* stressed that, in the absence of an express statement providing for retroactive application, it has never "read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment." *Id.* at 284. Under this well-established law, section 929a thus cannot be applied retroactively to this case: Ms. Johnson's suit arose before the provision's enactment, and Congress did not expressly provide that the statute should apply to conduct arising prior to the Reform Act's passage. To the contrary, Congress specifically directed that section 929a would not take effect until ***after*** its enactment.

Notwithstanding this clear law, Ms. Johnson and her *amici* urge the Board to apply section 929a retroactively based not on any aspect of the statute itself, but rather on a Senate Report that accompanied the bill that ultimately became the Reform Act. According to Ms. Johnson and her *amici*, this legislative history—which, of course, was ***not*** voted on by the Congress, was ***not*** signed into law by the President, and squarely conflicts with the effective-date provision that Congress ***did*** vote on and the President ***did*** sign—purports to show that section 929a was intended as a "clarification" of preexisting law in order "to make clear that subsidiaries and affiliates of issuers may not retaliate against whistleblowers, eliminating a defense often raised by issuers in actions brought by whistleblowers." S. Rep. No. 111-176 (2010). In other words, they argue, this snippet of legislative history somehow converts section 929a from a substantive change that could not be given retroactive effect under *Landgraf* into "a clarifying amendment" that somehow falls outside of *Landgraf*'s scope. SEC Br. at 4.

That assertion is meritless. First and foremost, the Eighth Circuit—to which this case will be appealed from the Board's decision—specifically rejected this precise argument just last year. In *Zarcon, Inc. v. NLRB*, 578 F.3d 892 (8th Cir. 2009), a FOIA complainant sought to retroactively apply a fee-shifting statute based on a "committee report on the bill" stating that it was intended "'to clarify that a complainant has substantially prevailed in a FOIA lawsuit, and is eligible to recover attorney fees . . . if the pursuit of a claim was the catalyst for the voluntary or unilateral change in position by the opposing party.'" *Id.* at 896 (quoting S. Rep. No. 110-59, at 6 (2007)). The complainant also relied on a floor statement by a sponsor of the legislation explaining that "[t]he bill clarifies that" certain Supreme Court precedents do not apply to FOIA cases. *Id.* (quoting 153 Cong. Rec. S15701-04 (statement of Senator Leahy)). As the Eighth Circuit explained, however, these statements in the legislative history—which are indistinguishable from the one Ms. Johnson and her *amici* rely on here—"are insufficient to overcome the default rule announced in *Landgraf* that when the statute contains no express command regarding its effective date, it is not to be applied retroactively." *Id.* (internal quotation marks and alterations omitted).

That holding is not only controlling, but correct. In our system of government, laws are made after both chambers of Congress pass them and the President signs them—not by a staff-written report that was not voted on by either chamber of Congress or presented to the President. *See* U.S. Const. art. I, § 7. For that reason, legislative history that conflicts with the plain text of a statute—here, the Reform Act's effective date provision—is entitled to no weight. *See, e.g.*, *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456, 1465 n.6 (2009) (explaining that where "the legislative history ... would create a direct conflict with the statutory text,... the text must prevail").

Even if it generally were appropriate to consult the legislative history under these circumstances, however, this kind of legislative history is particularly unreliable. The statement in the Senate Report does not merely purport to describe section 929a of the Reform Act; instead, it purports ***in 2010*** to interpret what a different Congress meant when it passed section 806 of the SOX ***in 2002***. Yet it is well-settled that such "subsequent legislative history" is a "hazardous basis for inferring the meaning of a [prior] congressional enactment," and thus is entitled to virtually no deference even on its own terms. *See, e.g.*, *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980) ("[E]ven when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment."); *see also Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979) ("Senate Report No. 95-493 was written 11 years after the ADEA was passed in 1967, and such '[l]egislative observations ... are in no sense part of the legislative history.' *United Airlines, Inc. v. McMann*, 434 U.S. 192, 200 n.7 (1977). 'It is the intent of the Congress that enacted [the section] ... that controls.' *Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977).") (alteration in original).

Finally, reliance on this sort of legislative history raises serious constitutional questions in this context. As *Landgraf* explained, the requirement that Congress expressly manifest its intent to apply the law retroactively is rooted in the fact that retroactive application of the law threatens constitutional Due Process "interests in fair notice and repose." 511 U.S. at 266. For that reason, "a requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Id.* at 268. Needless to say, and as the Eighth Circuit's decision in *Zarcon* makes clear, stray comments in the legislative history are not sufficient to discharge that obligation or demonstrate that Congress itself considered the implications of its actions and actually determined—by voting—to trigger the consequences.

Given the Eighth Circuit's correct and controlling decision in *Zarcon*, little needs to be said about the allegedly contrary authorities cited in the opposing *amici* briefs. But for what it is worth, those cases are wholly inapposite. *United States v. Sepulveda*, 115 F.3d 882 (11th Cir. 1997), and *United States v. Montgomery County, Md.*, 761 F.2d 998 (4th Cir. 1985), did not rely on legislative history at all. They merely held that passage of a legislative amendment does not necessarily mean that the prior statute had a different meaning. *Sepulveda*, 115 F.3d at 885 n.5; *Montgomery County*, 761 F.2d at 1003; *see also Stone & Webber Eng'g Corp. v. Herman*, 115 F.3d 1568, 1575-76 (11th Cir. 1997). Unlike the Reform Act at issue in this case, the statute at issue in *Cefalu v. East Baton Rouge Parish School Board*, 117 F.3d 231 (5th Cir. 1997), lacked an "effective date" provision that expressly mandated prospective application unless otherwise "specifically provided in the Act." *See id.* (interpreting the IDEA Amendments Act of 1997, Pub. L. No. 105-17, 111 Stat. 37 (June 4, 1997)); *see also Liquilux Gas Corp. v. Martin Gas Sales*, 979 F.2d 887 (1st Cir. 1992). The law in *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684 (9th Cir. 2000), "explicitly applie[d] to conduct occurring before" its effective date. *Id.* at 691. *Piamba Cortes v. American Airlines, Inc.*, 177 F.3d 1272 (11th Cir. 1999), arose in the context of interpreting an international treaty—where the bicameralism and presentment requirements that caution against reliance on Congressional legislative history have no force. And in *Willy v. Administrative Review Board*, 423 F.3d 483 (5th Cir. 2005), "[n]either party dispute[d]" that plaintiff had engaged in "protected conduct under the relevant statutes," thus rendering the court's passing remarks on a provision's retroactivity *dictum*. *Id.* at 489 n.11.

Finally, and perhaps most notably, the Fourth Circuit's decision in *Brown v. Thompson*, 374 F.3d 253 (4th Cir. 2004), is doubly fatal to the opposing *amici*'s claims. In that case, the court relied on the fact that "Congress formally declared ***in the titles of the relevant subsections***" that the amendments "were 'clarifying' and 'technical.'" *Id.* at 259. Needless to say, the court's reliance on section headings substantially undermines any claim that it would be inappropriate to rely on the title of section 806 here. Moreover, *Brown* then went on to "emphasize"—in language ***not*** quoted by the SEC—"that Congress clarified the meaning of [the act] ***in actual legislation*** rather than only in the 'less formal types of subsequent legislative history,' which constitute a 'hazardous basis for inferring the meaning of a [prior] congressional enactment.'" *Id.* at 260 n.3 (quoting *GTE Sylvania, Inc.*, 447 U.S. at 118 n.13).

Ms. Johnson and her *amici* thus do not cite a single case that stands for the extraordinary proposition that a statute that is expressly given an effective date following enactment—unless "specifically provided in th[e] Act" itself—nevertheless can be given retroactive effect on the basis of a stray statement in the legislative history. The Board should not be the first to take such a step.

III. THE "INTEGRATED EMPLOYER TEST" IS NOT AN APPROPRIATE BASIS FOR EXTENDING THE PROTECTIONS OF SECTION 806.

As respondents explained in their opening supplemental brief, the Board should not import the "integrated employer test" into section 806 in order to expand that section's coverage beyond its plain terms. On this issue, there is overwhelming agreement, *see, e.g.*, SEC Br. at 23-25; OSHA Br. at 10-11; Johnson Br. at 27, and even the Assistant Secretary for OSHA has now abandoned its prior position that the "integrated employer" test is an appropriate interpretation of section 806, *see* OSHA Br. at 10-11 & n.3. Accordingly, and for the reasons set forth in their opening brief, respondents respectfully submit that the Board should not adopt the "integrated employer test" to interpret section 806.

CONCLUSION

For these reasons and those given in respondents' opening supplemental brief, the Board should affirm the dismissal of Ms. Johnson's claims. Moreover, if the Board adopts a veil-piercing, agency, or integrated employer test, it should affirm for the reasons given in respondents' opening supplemental brief and its merits brief on appeal in this case.

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Respectfully submitted,

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