No. 12-60122

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WILLIAM VILLANUEVA,

Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR,

Respondent.

On Petition for Review of the Final Decision and Order of the United States Department of Labor's Administrative Review Board

RESPONSE BRIEF FOR THE SECRETARY OF LABOR

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STATEMENT REGARDING ORAL ARGUMENT

Although Respondent Secretary of Labor will gladly participate in oral argument to answer any questions the Court might have, she believes that oral argument is not necessary because the issues presented on appeal may be resolved based on the parties' briefs.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Cases -- continued

Statutes:

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STATEMENT OF JURISDICTION

This case arises under the employee protection provision of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley" or "SOX"), 18 U.S.C. 1514A. Petitioner William Villanueva filed a complaint with the Secretary of Labor ("Secretary") pursuant to 18 U.S.C. 1514A(b)(1), which was resolved by the Department of Labor's Administrative Review Board ("ARB" or "Board") in an Order issued on December 22, 2011

("Order").[1] Villanueva filed a timely Petition for Review in this Court on February 20, 2012. *See* R. 1. Because Villanueva alleges that the SOX violation occurred in Houston, Texas, this Court has jurisdiction under 49 U.S.C. 42121(b)(4)(A). *See* Petitioner's Brief ("Pet. Br.") at 1, 30-35; 18 U.S.C. 1514A(b)(2)(A).

STATEMENT OF THE ISSUE

Whether the Administrative Review Board correctly determined that Villanueva's case should be dismissed because adjudication of his complaint would require an impermissible extraterritorial application of SOX Section 806.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

Section 806 of the Sarbanes-Oxley Act provides whistleblower protection to employees of publicly traded companies. Under Section 806, a covered entity is barred from retaliating against an employee who provides information to his employer or the federal government regarding conduct that the employee reasonably believes violates federal mail fraud, wire fraud, bank fraud, or securities fraud statutes; any rule or

[1] The Secretary of Labor has delegated authority to the Administrative Review Board to issue final agency decisions under the employee protection provision of Sarbanes-Oxley. *See* Secretary of Labor's Order No. 01-2010 (Jan. 15, 2010), 75 Fed. Reg. 3924 (Jan. 25, 2010); *see also* 29 C.F.R. 1980.110(a).

regulation of the Securities and Exchange Commission ("SEC"); or any other federal law related to fraud against shareholders. *See* 18 U.S.C. 1514A(a); *see also* 29 C.F.R. 1980.102(b).

Under Section 806, a person alleging discrimination may seek relief by filing a complaint with the Secretary of Labor. *See* 18 U.S.C. 1514A(b)(1)(A).[2] The Secretary has delegated responsibility for receiving and investigating SOX whistleblower complaints to the Occupational Safety and Health Administration ("OSHA"). *See* Secretary of Labor's Order No. 01-2012 (Jan. 18, 2012), 77 Fed. Reg. 3912 (Jan. 25, 2012); *see also* 29 C.F.R. 1980.104(a). Following an investigation, OSHA issues a determination either dismissing the complaint or finding reasonable cause to believe that retaliation occurred and ordering appropriate relief. *See* 18 U.S.C. 1514A(b)(2)(A); 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1980.105. Either the complainant or the respondent may file objections to OSHA's determination with an Administrative Law Judge ("ALJ"). *See* 18 U.S.C. 1514A(b)(2)(A); 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1980.106. The ALJ's decision is subject to discretionary review by the Board, which issues the final order of the Secretary.

[2] The procedures and burdens of proof in a SOX whistleblower action are governed by the rules of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21") whistleblower provision, 49 U.S.C. 42121(b). *See* 18 U.S.C. 1514A(b)(2).

See 29 C.F.R. 1980.110. Any person adversely affected or aggrieved by a final order of the Secretary "may obtain review of the order in the United States Court of Appeals for the circuit in which the violation . . . allegedly occurred or the circuit in which the complainant resided on the date of such violation." 49 U.S.C. 42121(b)(4)(A).

B. Statement of Facts[3]

William Villanueva worked in Bogota, Colombia for Saybolt de Colombia Limitada ("Saybolt Colombia") for more than 24 years. *See* Order at 3. Villanueva was employed as the company's General Manager for approximately 16 years. *Id.* Villanueva is not a United States citizen and has never worked in the United States while employed by Saybolt Colombia. *Id.*

Saybolt Colombia is a Colombian limited liability company with corporate headquarters in Bogota. *See* Order at 3. It does not register securities under Section 12 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78*l,* or file reports under Section 15(d) of the Exchange Act, 15 U.S.C. 78o(d). *Id.* Saybolt Colombia is 95% owned by Saybolt Latin America B.V. and 5% owned by a Colombian national. *Id.*; *see* ALJ's Decision and Order ("ALJ Decision") at 2. Saybolt Latin America B.V., in turn, is wholly owned by Saybolt International

[3] Unless otherwise indicated, this statement of facts is based on the facts as determined by the ARB in its Order.

B.V. *Id.* Saybolt International B.V. is wholly owned by Core Laboratories N.V. ("Core Labs"). *Id*.

Core Labs is a Netherlands limited liability company headquartered in Amsterdam. *See* Order at 3. Its securities are registered under Section 12 of the Exchange Act and it trades shares on the New York Stock Exchange. *Id.* Core Labs provides services to clients in the petroleum industry and has more than 70 offices in over 50 countries around the world. *Id.* One of these corporate offices is located in Houston, Texas. *Id.*

In January 2008, Villanueva raised concerns to several Core Labs and Saybolt Colombia employees that Core Labs was orchestrating a "transfer pricing scheme" and that Saybolt Colombia was wrongfully claiming certain tax exemptions, both of which would result in an underreporting of taxable revenue to the Colombian government. *See* Order at 3-4. Villanueva alleged that Core Labs established a policy by which it required Saybolt Colombia to use Core Laboratories Sales, N.V. ("Core Lab Sales"), which is domiciled in the Dutch Antilles, as the contracting party on contracts for inspection services that Saybolt Colombia performed for non-Colombian clients. *Id.* at 3. This policy required that 10% of any such contract revenues be paid to Core Lab Sales even though that entity allegedly did not procure the contracts or conduct the inspection services itself. *Id.* at 3-4. Villanueva also expressed concerns that Core Labs'

corporate accounting department in Colombia was wrongfully claiming Value Added Tax ("VAT") exemptions on work transferred to Core Lab Sales pursuant to the above policy. *Id.* at 4. According to Villanueva, as a result of this scheme, Saybolt Colombia could underreport its taxable revenue to the Colombian government. *Id.*

Villanueva expressed these concerns in emails to Fernando Padilla ("Padilla"), Controller for Saybolt Colombia, and Osiris Goenaga ("Goenaga"), Core Labs' accounting assistant for Colombia. *See* Order at 4. Villanueva also copied C. Brig Miller ("Miller"), the Chief Accounting Officer for Core Labs in Houston, on these emails. *Id.* Villanueva asked that Padilla correct the tax exemptions before closing the books for Saybolt Colombia on March 31, 2008. *Id.*

Between January and April 2008, two Colombian law firms provided Villanueva with legal opinion letters regarding the scheme described above. *See* Order at 4. Both of the law firms concluded that there was no impropriety in the transactions between Saybolt Colombia and Core Lab Sales nor with the VAT exemptions claimed. *Id.* Villanueva, an attorney himself, was dissatisfied with these legal findings and conducted his own review of Colombian tax law and the VAT exemptions. *Id.*

On April 3, 2008, Villanueva was passed over for a pay raise even though other Saybolt Colombia employees received such

raises. *See* Order at 4. The decision to deny a pay raise for Villanueva was allegedly made by Ivan Piedrahita ("Piedrahita"), the Regional Manager for Saybolt Latin America B.V., and Jan Heinsbroek ("Heinsbroek"), the President of Saybolt Latin America B.V. and a director of Saybolt International B.V. *Id.*[4]

Due to his concerns regarding the allegedly improper transfer price fixing scheme and VAT exemptions, Villanueva refused to certify and file Saybolt Colombia's tax returns, which were due to be filed with Colombian authorities by April 17, 2008. *See* Order at 4.

On April 29, 2008, Villanueva's employment was terminated. *See* Order at 4-5. He was notified of his discharge on that date in a letter that was signed by Heinsbroek and delivered personally to him in Bogota by Piedrahita. *Id.*

C. Procedural Background

Villanueva filed a complaint with OSHA on July 28, 2008, alleging that Saybolt Colombia and Core Labs violated Section 806 of SOX by retaliating against him for "blowing the whistle" on the scheme to violate Colombian tax laws. *See* Order at 5. OSHA dismissed the complaint on the ground that it lacked

[4] According to Villanueva, Piedrahita and Heinsbroeck are both based in Houston. *See* ALJ Decision at 3. Core Labs disputes this statement, but for purposes of this brief, the Secretary assumes that Villanueva's assertion is correct.

jurisdiction because the adverse actions alleged by Villanueva occurred outside the United States. *Id.*; *see* ALJ Decision at 1.

Villanueva sought review before an ALJ, who issued a Decision and Order dismissing Villanueva's complaint on the basis that applying SOX Section 806 to the case would require a prohibited extraterritorial application of the statute. *See* ALJ Decision at 2. The ALJ relied upon the only Circuit Court of Appeals decision addressing the issue, *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 7-18 (1st Cir. 2006), in which the First Circuit concluded that Congress did not intend Section 806 to apply extraterritorially. *See* ALJ Decision at 4. The ALJ reasoned that "[b]ecause Villanueva is a foreign national working at a foreign subsidiary of Core Labs . . . and because the alleged fraud as well as the termination occurred in Colombia," the Secretary lacked jurisdiction under SOX. *Id.* at 2.

Villanueva timely appealed the ALJ's decision to the Administrative Review Board, which affirmed the dismissal of his complaint on the basis that Section 806 of SOX does not apply extraterritorially. *See* Order at 2-3, 14.[5]

[5] In reaching its decision, the ARB had the benefit of two rounds of briefing by the parties, including supplemental briefs ordered by the ARB following the Supreme Court's decision in *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), and Congress's enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L. No. 111-203,

The Board determined that the "undisputed facts demonstrate that the fraudulent conduct Villanueva reported fell outside of the concerns of SOX and Section 806(a)(1) over domestic corporate financial and legal responsibility." *See* Order at 3. The Board concluded that "Villanueva's disclosures about alleged violations of foreign law" lacked "a sufficient connection to violations of domestic laws" to come within the scope of Section 806. *Id.*

The Board observed that Villanueva's disclosures concerned alleged violations of Colombian law "with no stated violation or impact on U.S. securities or financial disclosure laws," and that enforcing compliance with Colombian financial law necessarily implicates the doctrine of extraterritoriality. Order at 11. The Board explained that the plain text of Section 806(a)(1), which references six categories of domestic laws, suggests that it is limited to protecting disclosures relating to U.S. laws, not "extraterritorial securities and financial laws." *Id.*

The absence of any language in Section 806 concerning extraterritoriality was particularly significant, the Board

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124 Stat. 1376 (2010). In addition, the Assistant Secretary of Labor for Occupational Safety and Health, the Equal Employment Advisory Council, the Chamber of Commerce of the United States, the National Employment Lawyers Association, and the National Whistleblowers Center ("NWC") all filed briefs as *amicus curiae*.

observed, because the statute's criminal whistleblower provision contains explicit language regarding its extraterritorial reach. *See* Order at 12. Similarly, the Board noted, Congress has explicitly provided for extraterritorial application of certain other provisions of the federal securities laws. *Id.*

The Board explained that the petitioner's claims involved extraterritorial application of the statute notwithstanding his assertion that Core Labs executives in Houston allegedly controlled the fraudulent tax evasion scheme and made the decisions to refuse him a pay raise and to terminate him. *See* Order at 12-13. The ARB determined that the alleged fraud of which Villanueva complained involved "improper transactions between two foreign companies" (*i.e.* Saybolt Colombia and Core Labs Sales) and was based on his belief that Saybolt Colombia was underreporting its income to the Colombian government. *Id.* at 13; *see id.* at 10 n.21 (describing Villanueva's post-*Morrison* assertion that he complained about violations of foreign laws, not U.S. laws). The Board explained that the "onus of the alleged fraud involved actions affecting foreign companies doing business in a foreign country, and a failure to comply with foreign tax law." *Id.* at 13.[6]

[6] Although the ARB based its conclusion in this case on the fact that Villanueva's disclosures solely related to violations of foreign law, the Board acknowledged that other factors could also be relevant in determining whether a complainant's claims

SUMMARY OF ARGUMENT

Petitioner was discharged from his job in Colombia after informing his employer of an alleged scheme in violation of Colombian tax laws. On this basis, he seeks relief under the whistleblower protection provision of the Sarbanes-Oxley Act, Section 806, which extends to communications to the federal government or to an employer regarding suspected violations of certain categories of domestic law.

The Administrative Review Board correctly concluded that Section 806 does not apply to disclosures regarding a scheme in violation of Colombian law made in Colombia. The Supreme Court has repeatedly emphasized the presumption that statutes do not apply extraterritorially and nothing in the language or legislative history of Section 806 in any way overcomes that presumption here. As the First Circuit concluded in *Carnero*, there is no "indication that Congress contemplated extraterritoriality [and] a variety of indications that Congress thought the statute was limited to the territorial jurisdiction of the United States." 433 F.3d at 7.

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would require an extraterritorial application of SOX Section 806. *See* Order at 10. The Board stated that factors such as the location of the protected activity, retaliatory act, or the employment relationship itself, as well as the nationality of the laws allegedly violated, could all be relevant considerations in this analysis. *Id.* at 10 n.22.

STANDARD OF REVIEW

Judicial review of the ARB's Order is governed by the standards set out in the Administrative Procedure Act ("APA"), 5 U.S.C. 706(2). *See* 18 U.S.C. 1514A(b)(2)(A); 49 U.S.C. 42121(b)(4)(A); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 (5th Cir. 2008). This Court must affirm the agency's decision if it is supported by substantial evidence and is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A),(E); *see Allen*, 514 F.3d at 476. The ARB's factual findings must be upheld "if, considering all the evidence, a reasonable person could have reached the same conclusion as the ARB." *Allen*, 514 F.3d at 476 (quoting *Williams v. Admin. Review Bd.*, 376 F.3d 471, 476 (5th Cir. 2004)). The ARB's legal determinations are generally reviewed de novo. *See Allen*, 514 F.3d at 476; *Macktal v. U.S. Dep't of Labor*, 171 F.3d 323, 326 (5th Cir. 1999). However, the ARB's interpretation of Section 806 of SOX is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and must be upheld as long as it is a "permissible construction of the statute." *Id.* at 843; *see United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (explaining appropriateness of granting *Chevron* deference to agency's statutory interpretations made through formal adjudication); *Welch v. Chao*, 536 F.3d 269, 276 n.2 (4th Cir.

2008) (according ARB's interpretation of SOX Section 806 *Chevron* deference).

ARGUMENT

I. SECTION 806 OF THE SARBANES-OXLEY ACT DOES NOT HAVE EXTRATERRITORIAL APPLICATION

A. Congressional Enactments Are Presumed Not To Apply Extraterritorially.

"It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC v. Arabian Am. Oil Co. ("Aramco")*, 499 U.S. 244, 248 (1991) (citing *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). Congress drafts legislation "against the backdrop of the presumption against extraterritoriality," *Aramco*, 499 U.S. at 248, which is overcome only if Congress has "clearly expressed" its "affirmative intention" that the statute applies outside the United States. *Morrison*, 130 S. Ct. at 2877 (quoting *Aramco*, 499 U.S. at 248); *accord Smith v. United States*, 507 U.S. 197, 204 (1993). As the First Circuit noted in *Carnero*, "[t]he presumption serves at least two purposes. It protects against 'unintended clashes between our laws and those of other nations which could result in international discord,' and it reflects the notion that when Congress legislates, it 'is primarily concerned with domestic conditions.'" 433 F.3d at 7 (quoting *Aramco,* 499 U.S. at 248).

The Supreme Court's application of the presumption in *Morrison* is illustrative. In deciding that Section 10(b) of the Exchange Act did not provide a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges, the Supreme Court rejected the argument that, because the definition of "interstate commerce" contained in Section 10(b) includes trade "between any foreign country and any State," the provision applied extraterritorially. *See Morrison*, 130 S. Ct. at 2881-82. The Court determined that the general reference to "foreign" commerce in Section 10(b) was insufficient to defeat the presumption against extraterritoriality. *Id.* at 2882. The Court explained that, even if the statutory language could be interpreted in such a broad manner, "*possible* interpretations of statutory language do not override the presumption against extraterritoriality." *Id.* at 2883 (emphasis added). The Court applied similar reasoning in *Aramco* when it rejected the petitioners' argument that Title VII's definition of the term "employer" was sufficiently broad to include United States firms employing workers abroad. *See* 499 U.S. at 249-50. The Court found that, even if the petitioners' interpretation of the term was plausible, it failed to overcome the presumption against extraterritoriality. *Id.* at 250.

B. The Board Correctly Determined That the Text and History of Section 806 Do Not Reflect Clear Congressional Intent That the Provision Apply Extraterritorially.

1. Section 806 contains no indication that Congress meant its prohibitions to reach extraterritorially. The statute prohibits companies registered under Section 12 of the Exchange Act or required to file reports under Section 15(d) of the Exchange Act (as well as their subsidiaries) from retaliating against an employee who provides information to his employer, Congress, or the federal government regarding conduct that the employee reasonably believes violates one of six categories of domestic law: U.S. statutes prohibiting mail fraud, wire fraud, bank fraud, or securities fraud; any SEC rule or regulation; or any federal law relating to fraud against shareholders. *See* 18 U.S.C. 1514A(a)(1); *see also* 29 C.F.R. 1980.102. The statutory language contains no reference to foreign laws and, as petitioner concedes, the statute must be understood to "to refer only to the violation or implication of domestic securities laws, criminal laws, and financial regulation." Order at 11.[7]

[7] Villanueva agrees that "protected activity under SOX Section 806 is, by definition, limited to complaints about, and opposition to, the violation of six categories of U.S. laws and regulations." Pet. Br. at 33. Moreover, Villanueva concedes that "[c]omplaints about the violation of foreign laws do not constitute protected activity unless the whistleblower has a reasonable belief that one of these six categories of U.S. law is also being violated." *Id.* Villanueva expressly states that "complaints about the violation of foreign tax laws – or, for

The absence of any reference to foreign laws or extraterritorial application of the statute is particularly significant because the statute's *criminal* whistleblower provision expressly provides for extraterritorial reach, SOX Section 1107, 18 U.S.C. 1513(d),[8] and other provisions of the Sarbanes-Oxley Act also explicitly apply overseas. *See, e.g.*, SOX Section 106, 15 U.S.C. 7216(c) (requiring registration of foreign accounting firms if they audit public companies but providing that the SEC or the Public Company Accounting Oversight Board may exempt those accounting firms from Sarbanes-Oxley). As the Supreme Court held in *Morrison*, "when a statute provides for *some* extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." 130 S. Ct. at 2883 (explaining that Section 30(a)'s "explicit provision for a specific extraterritorial application would be quite superfluous if the rest of the Exchange Act already applied" extraterritorially) (emphasis added).

The venue and enforcement provisions of Section 806 similarly suggest that Congress did not contemplate complaints

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that matter, any foreign laws – can never, standing alone, provide grounds for a SOX whistleblower claim." *Id.*

[8] SOX Section 1107 amended 18 U.S.C. 1513, an obstruction of justice statute, to provide criminal penalties for retaliation against anyone providing truthful information to law enforcement about the commission of any federal offense.

or challenges to the Secretary's orders arising from violations occurring outside the United States or originating from complainants living outside the United States. A person adversely affected or aggrieved by a final order of the Secretary under Section 806 "may obtain review of the order in the United States Court of Appeals for the circuit in which the violation . . . allegedly occurred or the circuit in which the complainant resided on the date of such violation." 49 U.S.C. 42121(b)(4)(A). Similarly, the statute provides that agency orders may be enforced "in the United States district court for the district in which the violation was found to occur." 49 U.S.C. 42121(b)(5). The statute makes no provision for the enforcement of an order or judicial review when a violation occurs abroad. *See Carnero*, 433 F.3d at 16-17 (noting that the appellate review and venue provisions applicable to SOX Section 806 indicate that Congress did not contemplate the filing of complaints by foreign employees working abroad); *see also Aramco*, 499 U.S. at 256 (stating that Title VII's venue provisions, which established venue in the judicial district for the state where certain matters related to the employer occurred or were located, were "ill-suited for extraterritorial application" and suggested that Congress did not intend the statute to apply abroad); *Smith*, 507 U.S. at 202-03 (observing that Congress does not intentionally "create venue gaps" that

"take away with one hand what Congress has given by way of jurisdictional grant with the other" and concluding that it is "reasonable to prefer the [statutory] construction that avoids leaving such a gap") (internal quotation marks omitted).

The absence of any reference in Section 806 to potential conflicts with foreign laws further confirms that Congress did not anticipate extraterritorial applications of the statute. *See Morrison*, 130 S. Ct. at 2885 (rejecting the notion that Congress intended Section 10(b) of the Exchange Act to apply abroad based in part on Congress's failure to address the obvious potential for conflicts between Section 10(b) of the Exchange Act and foreign laws); *Aramco*, 499 U.S. at 256 ("It is also reasonable to conclude that had Congress intended Title VII to apply overseas, it would have addressed the subject of conflicts with foreign laws and procedures."). As the First Circuit noted in finding that SOX Section 806 lacked extraterritorial reach, in light of "the interest other countries would have in regulating these employment relationships," Congress's "complete silence" regarding extraterritorial reach in SOX Section 806 and its failure to provide "any mechanism for resolving potential conflicts with foreign labor laws and procedures" strongly suggest a lack of congressional intent to apply the whistleblower provision abroad. *Carnero*, 433 F.3d at 15.

The statutory amendments to SOX Section 806 made by Section 929A of the Dodd-Frank Act do not, as amicus NWC contends, indicate an intent to extend Section 806's protections to employees who report suspected violations of foreign laws by foreign companies abroad. *See* NWC Br. at 24-26. Dodd-Frank Section 929A amended SOX Section 806 by clarifying that an employee of "any subsidiary or affiliate whose financial information is included in the consolidated financial statements" of an otherwise covered company is protected against retaliation for engaging in protected activity. 18 U.S.C. 1514A(a). The legislative history explains that the amendment is intended to clarify "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 WL 1796592, at *114 (Apr. 30, 2010). The amendment makes no mention of extraterritoriality, although Congress was presumably aware of the First Circuit's decision in *Carnero* rejecting extraterritorial application. If anything, Congress's silence in the Dodd-Frank amendments about the extraterritorial scope of Section 806's whistleblower provision suggests that Congress did not intend for it to apply extraterritorially, given that Congress explicitly provided in Dodd-Frank that certain other securities enforcement actions should have extraterritorial

scope, effectively abrogating the Supreme Court's decision in *Morrison*. *See* Pub. L. No. 111-203, 124 Stat. 1376, 1862-65 (2010); *see also* 156 Cong. Rec. H5237 (daily ed. June 30, 2010) (statement of Rep. Kanjorski).

Finally, the fact that foreign companies may register under Section 12 or file reports under Section 15(d) of the Exchange Act, and thus may be covered employers under SOX Section 806, does not show that Section 806's whistleblower protections apply extraterritorially. *Cf.* Pet. Br. at 48. In *Carnero*, the First Circuit assumed without deciding that the complainant's employer was a covered entity under SOX Section 806 and that the complainant himself was a covered employee under the statute. *See* 433 F.3d at 5-7. The First Circuit concluded, however, that such coverage did not confer extraterritorial jurisdiction upon SOX Section 806 nor render the case territorial. *Id.* at 7-18.[9]

2. The legislative history of Sarbanes-Oxley similarly contains no evidence that Congress affirmatively intended the statute to apply extraterritorially. *See Carnero*, 433 F.3d at

[9] The district court in *Asadi v. G.E. Energy (USA), LLC*, applied a similar analysis in holding that Congress's use of the phrase "any individual" to define a covered whistleblower under 15 U.S.C. 78u–6(h)(1)(A), which provides a cause of action to certain whistleblowers who engage in activities protected by SOX Section 806, did not manifest an intent to include employees overseas. No. 4:12–345, 2012 WL 2522599, at *4 n.38 (S.D. Tex. June 28, 2012). Relying on *Morrison*, the court concluded that "broad definitional language is insufficient to rebut the presumption against extraterritoriality." *Id.*

8, 11-15. Sarbanes-Oxley was enacted in the wake of the Enron and WorldCom scandals to restore investor confidence in the nation's financial markets by ensuring corporate responsibility, enhancing public disclosure, and improving the quality and transparency of financial reporting and auditing. *See* Order at 10-11; *Carnero*, 433 F.3d at 9. The legislative history suggests that Congress's main concern in enacting Section 806, which provides whistleblower protection to employees of publicly traded companies who report corporate fraud or certain other violations of law, was to create *uniform national protections* against retaliation for employees who report corporate fraud to their employers, federal regulatory or law enforcement agencies, or Congress.

Thus, the relevant legislative history reflects that Congress believed that many states lacked adequate whistleblower protections for employees of private companies. *See Carnero*, 433 F.3d at 11-15 (examining relevant legislative history); 148 Cong. Rec. S7420 (daily ed. July 26, 2002) (statement of Sen. Leahy) (Section 806 was created to remedy the situation where "corporate employees who report fraud are subject to the patchwork and vagaries of current state laws, even though most publicly traded companies do business nationwide. Thus, a whistleblowing employee in one state (e.g., Texas . . .) may be far more vulnerable to retaliation than a fellow employee in

another state who takes the same actions."). Senator Leahy, the primary sponsor of SOX Section 806, further stated that the legislation thus "sets a *national* floor for employee protections in the context of publicly traded companies." S. Rep. No. 107-146, 2002 WL 863249, at *20 (May 6, 2002) (emphasis added). As the First Circuit concluded:

> Nowhere in the legislative history is there any indication that 18 U.S.C. § 1514A was drafted with the purpose of extending to foreign employees working in nations outside of the United States the right to seek administrative and judicial civil relief under the Act. While the legislative history contains repeated references to the "states," particularly Texas, there are no parallel references to foreign countries.

Carnero, 433 F.3d at 13.

Villanueva and the NWC argue that the legislative history reflects congressional recognition of the globalization of financial markets and the need to address corporate abuses of international transactions. As noted, several sections of the statute explicitly apply extraterritorially. The legislative history cited by Villanueva and the NWC relate to other sections of the Sarbanes-Oxley Act or to the statute generally, not to Section 806. *See Carnero*, 433 F.3d at 11-15.[10]

[10] This is not to say, however, that an employee working abroad is never entitled to protection under SOX Section 806. Each whistleblower complaint must necessarily be evaluated on its own set of facts. Both the ARB and the First Circuit, for example, left open the possibility that an employee based in the United States but temporarily on detail to a foreign nation could be

3. Even if the statute's extraterritorial application presented a far closer question, the Court should properly sustain the ARB's reasonable and consistent interpretation of the provision. The Board has consistently held that SOX Section 806 does not apply extraterritorially for the reasons explained above. *See Ahluwalia v. ABB, Inc.*, ARB No. 08-008, 2009 WL 6496920 (ARB June 30, 2009); *Pik v. Goldman Sachs Grp., Inc.*, ARB No. 08-062, 2009 WL 6496922 (ARB June 30, 2009); *Ede v. Swatch Group Ltd.*, ARB No. 05-053, 2007 WL 1935560 (ARB June 27, 2007).

Congress explicitly delegated to the Secretary of Labor authority to interpret SOX Section 806 by formal adjudication, and the Secretary, in turn, delegated this authority to the ARB. *See* 18 U.S.C. 1514A(b); Secretary of Labor's Order No. 01-2010 (Jan. 15, 2010), 75 Fed. Reg. 3924 (Jan. 25, 2010); *see also* 29 C.F.R. 1980.110(a). *See Mead*, 533 U.S. at 226-27 (granting *Chevron* deference to agency action through adjudication "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"); *see also Day v. Staples, Inc.*, 555 F.3d 42, 54 n.7 (1st Cir. 2009) (applying *Mead* to the ARB's

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protected by this provision. *See* Order at 10 n.22; *Carnero*, 433 F.3d at 18 n.17.

interpretation of SOX Section 806); *Welch*, 536 F.3d at 276 n.2 (same). Even if the ARB's interpretation that Section 806 does not apply extraterritorially were not entitled to *Chevron* deference, it would be accorded *Skidmore* deference because it is based on a persuasive reading of the statutory language and legislative history. *See Mead*, 533 U.S. at 234-35 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944)).

II. THE ARB PROPERLY CONCLUDED THAT ADJUDICATION OF VILLANUEVA'S COMPLAINT WOULD REQUIRE AN EXTRATERRITORIAL APPLICATION OF SECTION 806

The Board considered and rejected petitioner's contention that adjudication of his claim would not, in fact, involve a prohibited extraterritorial application of Section 806. *See* Order at 10-13. In both *Morrison* and *Aramco*, the Supreme Court evaluated whether the case would involve extraterritorial application of the law at issue by determining whether the conduct that was the "'focus' of congressional concern" in enacting the statutory provision occurred in the United States. *Morrison*, 130 S. Ct. at 2884 (quoting *Aramco*, 499 U.S. at 255). In *Aramco*, the Supreme Court determined that the focus of congressional concern in Title VII was on the domestic employment relationship, not on the location of the employee's hiring or the citizenship of the employee. *See* 499 U.S. at 255. Applying the same reasoning, the Court in *Morrison* determined that the focus of the Exchange Act was not on the location where

the deception originated, but rather on the "purchases and sales of securities in the United States." *Morrison*, 130 S. Ct. at 2884.[11]

Here, the ARB determined that the primary focus of the Sarbanes-Oxley Act generally "is to prevent and uncover corporate financial fraud, criminal conduct in corporate activity, and violations of securities and financial reporting laws." Order at 10-11. The Board also noted that Section 806 is focused on protecting employees who report such conduct allegedly committed by their employer. *Id.* at 10 n.22. The Board then examined whether Villanueva's complaints concerned domestic securities and financial disclosure laws and concluded that they did not. Accordingly, because Section 806 does not protect disclosures of foreign law violations, the Board held that Section 806 could not apply to Villanueva's complaint.

On appeal, petitioner argues for the first time that his protected activity involved not only complaints about the violation of Colombian tax law, but also complaints regarding his belief that Core Labs' conduct violated United States wire

[11] In *Morrison*, the Supreme Court thus rejected the petitioners' argument that their case only involved a territorial application of Section 10(b) because the defendants had engaged in the alleged deceptive conduct in Florida. *See* 130 S. Ct. at 2883-84. In denying this argument, the Court explained that "it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States." *Id.* at 2884.

and mail fraud statutes because its executives in Houston allegedly used mail, email, and telephone lines to coordinate and perpetuate the foreign tax fraud overseas. *See* Pet. Br. at 32-35. Villanueva also asserts that his protected activity involved complaints about fraudulent accounting practices that violate SEC rules and regulations. *Id.* at 35.[12]

Because petitioner failed to raise those arguments before the ALJ or the ARB, they are plainly waived. *See* Order at 10 n.21 ("Villanueva had ample opportunity to indicate that his concerns implicated domestic laws or concerns and, perhaps to his credit, he did not alter or amend his allegations."); *see also Gulf Restoration Network, Inc. v. Salazar*, 683 F.3d 158, 174-75 (5th Cir. 2012) ("Under ordinary principles of administrative law a reviewing court will not consider arguments that a party failed to raise in timely fashion before an administrative agency.") (internal quotation marks omitted); *Coal. for Gov't Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 461-62 (6th Cir. 2004) (explaining that "it is inappropriate for courts reviewing agency decisions to consider

[12] Villanueva now specifically argues for the first time on appeal that his disclosures regarding Colombian tax fraud implicate SEC Rule 13b2-1, 17 C.F.R. 240.13b2-1 (prohibiting the falsification of any "book, record or account subject to Section 13(b)(2)(A)" of the Exchange Act) because Saybolt Colombia's financial statements are incorporated into Core Labs' financial statements. *See* Pet. Br. at 35.

arguments not raised before the administrative agency involved") (citing *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)).

In any event, Villanueva's newly minted arguments fail to establish that his claims would involve territorial application of Section 806. For purposes of analyzing whether whistleblowing activity is protected by SOX Section 806, the relevant focus must be on the substance of the employee's complaints or information communicated to the employer.

18 U.S.C. 1514A(a)(1) protects employees who provide information to their employers "regarding any conduct which the employee reasonably believes constitutes a violation of" one of the six enumerated categories of law. *Id.* As this Court has explained, SOX Section 806 prohibits a covered entity from retaliating against an employee who "*reports information* to a supervisor" regarding his or her reasonable belief of such a violation. *See Allen*, 514 F.3d at 477 (emphasis added). Importantly, whether or not an *actual* violation of one of these laws has occurred is irrelevant; a reasonable yet mistaken belief regarding such a violation will be protected by the statute. *Id.* Section 806's "critical focus is on whether the employee *reported conduct* that he or she reasonably believes constituted a violation of federal law." *Sylvester v. Parexel Int'l LLC*, ARB Case No. 07-123, 2011 WL 2165854, at *15 (ARB May

25, 2011) (emphasis added). The determination of whether an employee's activity is protected under SOX Section 806 thus turns on *what the employee communicated to his employer*. *See Welch*, 536 F.3d at 277.

Villanueva's complaints to Core Labs and Saybolt Colombia officials in 2008 concerned Colombian tax fraud, not any of the six enumerated categories of domestic laws set forth in Section 806(a)(1). In evaluating whether protected activity has occurred, courts must focus on the substance of the employee's disclosures to his employer, not on the allegations raised in his complaint to OSHA or the arguments presented on appeal. *See Welch*, 536 F.3d at 277. Even if Villanueva *now* believes that the conduct of Core Labs and Saybolt Colombia violated United States law, there is little support in the record to establish that he relayed that concern to his employer at the time of his whistleblowing activity.[13]

In this case, the ARB correctly held that Villanueva complained to Core Labs officials regarding his belief that they were committing Colombian tax fraud, not United States wire, mail, or securities fraud. *See* Order at 10-13. In his 2008

[13] In order for whistleblowing activity to be protected by SOX Section 806, an "employee need not cite a code section he believes was violated in his communications to his employer, but the employee's communications must identify the specific conduct that the employee believes to be illegal." *Welch*, 536 F.3d at 276-77 (internal quotation marks omitted).

communications with employees and executives of Core Labs and Saybolt Colombia, Villanueva repeatedly mentioned his belief that Saybolt Colombia's accounting practices, as applied in Colombia, violated Colombian tax law. *See, e.g.*, Villanueva Declaration ("Decl.") Exhibit ("Exh.") A, Jan. 2, 2008 email from Villanueva to Padilla and Goenaga (stating that his concerns regarding the transactions at issue involve committing "*fraud to the Colombia financial statements*" and "avoiding a 'liability' to the company . . . as stated in the following *national [Colombian] regulations*") (emphasis added).[14] The record contains no allegations or evidence that Villanueva ever reported to Core Labs or Saybolt Colombia officials that he believed their conduct violated United States mail and wire fraud statutes.

The extraterritorial nature of Villanueva's disclosures is further confirmed by the fact that, in response to his belief that Core Labs had directed Saybolt Colombia to engage in an illegal transfer price fixing scheme and to wrongfully claim

[14] *See also* Villanueva Decl. Exh. B, Jan. 3, 2008 email from Villanueva to John Denson (stating that participation in the alleged transfer price fixing scheme is "unsuited to the *national [Colombian] regulations*" and explaining that "[o]ur first policy is the full compliance of the *local regulations*") (emphasis added); Villanueva Decl. Exh. A, Jan. 2, 2008 email from Villanueva to Padilla and Goenaga (raising concerns that transactions "represent[] an underestimation of revenues in [Saybolt Colombia's] financial statements, and it is also transferring taxable income out of Colombia").

certain Colombian tax exemptions, legal opinions regarding these transactions were sought and obtained from two different Colombian law firms. *See* Order at 4. Both of these opinions analyzed the transactions under Colombian tax law and neither contained any mention of United States laws or regulations. *Id.*; *see also* Villanueva Decl. Exhs. D, K (legal opinion letters). Moreover, while the relevant focus under SOX Section 806 is on the information that Villanueva provided to his employer, it is telling that Villanueva did not mention anything about domestic securities or financial disclosure laws in his complaint to OSHA, his personal declaration, or his briefs before the ALJ and ARB.[15] Core Labs and Saybolt Colombia lacked notice that Villanueva believed that their conduct violated U.S. law. *See* Order at 10.

[15] For example, in his OSHA complaint, Villanueva stated that he was terminated "as a result of his *complaints about, and investigation of, income tax and value added tax fraud that was being perpetuated by Saybolt Colombia in Colombia*." OSHA Complaint ("Compl.") at 1 (emphasis added). Similarly, in his declaration filed with the ALJ, Villanueva attested that he raised "concerns that the [Core Lab Sales] transaction violated *Colombia's tax laws*." Villanueva Decl. at 8 (emphasis added). The only passing references to wire and mail fraud are in Villanueva's OSHA complaint and his opening brief to the ARB in which he states that the tax fraud scheme was carried out by Core Lab officials "using mail, email, and telephones to accomplish the fraud." Compl. at 8; Pet.'s Initial Br. at 10. Notably, even in these references, Villanueva does not allege that he complained to Core Labs officials about the use of mail and wire fraud; rather, he merely asserts that these methods of communication were used to perpetuate the underlying foreign tax fraud of which he complained.

The ARB recognized in its decision that other factors, including the location of the alleged retaliation, may be relevant considerations in evaluating whether a complainant's allegations require an extraterritorial application of SOX Section 806. *See* Order at 10 n.22. As the ARB determined, however, these factors do not need to be addressed in examining the instant matter because the overwhelming weight of the evidence shows that Villanueva did not engage in conduct that was the focus of congressional concern in enacting SOX Section 806. Villanueva is a Colombian national who lived and worked exclusively in Colombia for a Colombian company, and who alleges that he reported alleged tax fraud carried out in Colombia by a Colombian company in violation of Colombian law. Although Villanueva alleges that the decision to discharge him was made by company officials in Houston, that decision was communicated to him in Colombia, the act of termination was completed in Colombia, and its impact upon the terms and conditions of his employment were exclusively felt in Colombia.[16] The

[16] For these reasons, this case also clearly differs from the circumstances presented in *O'Mahony v. Accenture Ltd.*, 537 F. Supp. 2d 506 (S.D.N.Y. 2008), on which Villanueva relies. *See* Pet. Br. at 37-39. As the ALJ correctly explained, the facts of Villanueva's case contrast starkly with those in *O'Mahony*, in which the plaintiff was employed and compensated by a U.S. subsidiary of a foreign corporation and worked in the U.S. for eight years before being stationed abroad. By contrast, Villanueva is a foreign citizen, who worked exclusively outside the United States for a foreign company and whose complaints

overwhelmingly foreign nature of the employment relationship in this case lends additional support to the ARB's conclusion that this case would require an impermissible extraterritorial application of SOX Section 806.

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related to alleged violations of foreign law. Villanueva's reliance on *Shekoyan v. Sibley Int'l Corp.*, 217 F. Supp. 2d 59 (D.D.C. 2002), is similarly misplaced. As previously discussed, unlike the fraud and the retaliation at issue in that case, both the alleged fraud and the alleged retaliation at issue here took place abroad.

CONCLUSION

For the foregoing reasons, the Administrative Review Board's decision to dismiss Villanueva's complaint should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of August, 2012, I electronically filed this Response Brief for the Secretary of Labor with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a), and Fifth Circuit Rule 32, the undersigned certifies that this brief complies with the applicable type volume limitation, typeface requirements, and type style requirements.

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 7,115 words, including footnotes but excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a monospaced typeface, Courier New, in 12 point font in text and 12 point font in footnotes. This brief was prepared using Microsoft Word.

_____
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