14-4626

In the United States Court of Appeals for the Second Circuit

DANIEL BERMAN,

Plaintiff-Appellant,

-v.-

NEO@OGILVY LLC AND WPP GROUP USA, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.[1]

The Chamber's members have a strong interest in the application of the "whistleblower" provisions of the Dodd-Frank Act in accordance with the terms of the statute and the purposes of the Act, and in the speedy dismissal of whistleblower retaliation claims that fall outside the Act's scope. Meritless claims and expanding litigation costs have a direct impact on the viability, growth, and survival of businesses nationwide. In this case, the interpretation of the Dodd-

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and this Court's Rule 29.1, the Chamber certifies that: (a) no party's counsel authored this brief in whole or in part; (b) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (c) no person, other than the Chamber, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

Frank Act espoused by plaintiff and *amicus curiae* Securities and Exchange Commission ("SEC" or the "Commission") would greatly expand the number of employees authorized to pursue the enhanced remedies of the Dodd-Frank Act, and the period of time in which they may sue for alleged retaliation, without yielding the law enforcement benefits Congress intended when it enacted a "bounty" and heightened protections for persons who complain to the SEC. The carefully-delineated procedures established just a few years earlier in the Sarbanes-Oxley Act would become largely moot under plaintiff's interpretation, depriving Chamber members of the limitations and protections furnished under that earlier law.

SUMMARY OF ARGUMENT

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank" or the "Act") sought to further enforcement of the securities laws by establishing a "bounty" for "whistleblowers" who provide information to the SEC that leads to successful enforcement actions. 15 U.S.C. § 78u-6. A "whistleblower" is defined in the Act as:

> [A]ny individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws *to the Commission*, in a manner established, by rule or regulation, by the Commission.

Id. § 78u-6(a)(6) (emphasis added). Whistleblowers who assist in successful enforcement actions are entitled to recover 10-30% of "what has been collected of the monetary sanctions imposed in th[at] action." *Id.* § 78u-6(b)(1).

In addition to granting this bounty to "whistleblowers," the Act also protects them from retaliation, providing:

> **(h) Protection of whistleblowers**
>
> * * *
>
> No employer may discharge, demote, suspend, threaten, harass . . . or in any other manner discriminate against[] a *whistleblower* in the terms and conditions of employment because of any lawful act done by the *whistleblower*—
>
> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. § 7201 et seq.), this chapter, including section 78j-1(m) of this title [the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.)], including section 10A(m) of such Act (15 U.S.C. 78(m)), section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

Id. § 78u-6(h)(1)(A) (emphases added). Whistleblowers who experience retaliation in violation of this provision may sue directly in federal district court as many as ten years after the retaliatory action. *Id.* § 78u-6(h)(1)(B)(i), (h)(1)(B)(iii). Monetary damages are doubled. *Id.* § 78u-6(h)(1)(C)(ii).

These procedures differ markedly from those enacted just a few years earlier in the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"), 18 U.S.C. § 1514A, under which, the parties agree, there is no requirement that a claimant have made a report to the SEC. Sarbanes-Oxley retaliation claims are initially filed with and investigated by the U.S. Department of Labor. *Id.* § 1514A(b)(1). The limitations period is 180 days; monetary damages are not doubled. *Id.* § 1514A(b)(2)(D), (c)(2)(B). The Dodd-Frank Act made certain changes to the Sarbanes-Oxley whistleblower provision—including extending the limitations period from 90 to 180 days, Dodd-Frank Wall Street Report and Consumer Protection Act, H.R. 4173, 111th Cong. § 922(c)—but did not provide the other enhancements that were extended to Dodd-Frank "whistleblowers."

The court below properly dismissed the Dodd-Frank whistleblower retaliation claim in this case, because at the time plaintiff's employment was terminated he had not made a complaint to the SEC and therefore was not a "whistleblower" within the meaning of the Act.

I. The language of Section 78u-6 unambiguously provides a cause of action only to individuals who have provided information to the Commission. The statute explicitly defines "whistleblowers" as those who "provide[ ] information relating to a violation of the securities laws to the Commission, in a manner established" by the Commission's whistleblower "bounty" rules. 15 U.S.C. § 78u-6(a)(6). Then,

in addition to guaranteeing these "whistleblowers" a bounty in the case of successful prosecutions, the Act gives them heightened remedies in the event of retaliation: If they experience retaliation for their complaint to the SEC—or for certain other actions that are protected by the Sarbanes-Oxley Act also—Dodd-Frank whistleblowers may proceed directly to federal court for a period as long as ten years after the violation, and may obtain double damages.

This Court's role is to apply this statute's unambiguous meaning, *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 270 (2010), and under the plain terms of the Act, the remedies for Dodd-Frank "whistleblowers" are limited to those who meet the Act's definition of "whistleblower." That was the conclusion of the sole court of appeals to consider the question. "Under Dodd-Frank's plain language and structure, there is only one category of whistleblowers: individuals who provide information relating to a securities law violation to the SEC." *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 625 (5th Cir. 2013).

Dodd-Frank's provision of heightened protections and remedies for employees who complain to the SEC is also consistent with the Act's purpose of incentivizing reports to the government. Employees who report to the SEC stand to gain not only the statutory bounty, but also additional protections against retaliation that they may otherwise experience. This understanding is supported by the overall context of Section 78u-6 and by its drafting history.

II. Because the statutory language in this case is clear and plaintiff was not a Dodd-Frank whistleblower at the time his employment was terminated, "that is the end of the matter" and the arguments of plaintiff and *amicus curiae* SEC must be rejected. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). There is no warrant for a judge-made "exception" to the language written by Congress, as the SEC contends and some lower courts erroneously have concluded. Nor is there a statutory "ambiguity" that justifies the SEC regulation which states that employees who complain internally at their companies—but not to the SEC—receive the benefit of Dodd-Frank's enhanced whistleblower protections. And when Congress sets forth a definition that "shall" govern application of a statutory section, it is plainly inappropriate for a regulatory agency to supplant that definition with a different, contrary definition for one part of the statutory section.

III. The interpretation proffered by plaintiff and the SEC would deeply undermine the anti-retaliation provisions and procedures of the Sarbanes-Oxley Act, which were preserved and modestly amended in the Dodd-Frank Act itself. Plaintiff's interpretation would give claimants who never reported to the SEC plenary discretion and powerful incentives to bypass Sarbanes-Oxley's procedures. That would render the Sarbanes-Oxley anti-retaliation provisions largely

superfluous and severely disrupt the carefully-constructed anti-retaliation programs established by Congress.

For all of these reasons, this Court should affirm the court's decision below.

ARGUMENT

I. Dodd-Frank Unambiguously Requires That A Claimant Have Reported To The Commission In Order To Qualify As A Whistleblower And Be Protected Under Section 78u-6's Anti-Retaliation Provision

Dodd-Frank amended the Securities Exchange Act of 1934 by adding Section 21F, 15 U.S.C. § 78u-6, a new provision entitled "Securities whistleblower incentives and protection" that seeks to further enforcement of the securities laws by "motivat[ing] those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated securities laws and recover money for victims of financial fraud," S. Rep. No. 111-176, at 110 (2010). The provision offers a "bounty" to "whistleblowers" who provide information to the SEC that leads to successful enforcement actions by the government. The relevant section establishes a special fund for bounty awards and directs the Commission to pay the bounties to eligible whistleblowers "under regulations prescribed by the Commission." 15 U.S.C. § 78u-6(b).

The Commission adopted those regulations in 2011, setting forth procedures and standards for submitting whistleblower complaints and applying for and awarding the bounties. Securities Whistleblower Incentives and Protections, 76

Fed. Reg. 34,300 (June 13, 2011). Since the inception of the Dodd-Frank whistleblower program, the SEC has issued awards to fifteen whistleblowers in amounts totaling nearly $50 million. Press Release, SEC, No. 2015-45, Former Company Officer Earns Half-Million Dollar Whistleblower Award for Reporting Fraud Case to SEC (Mar. 2, 2015), *available at* http://www.sec.gov/news/pressrelease/2015-45.html#.VQRbto54pcQ. The SEC received 3,620 whistleblower complaints in 2014 alone, and has recently awarded bounties in amounts ranging from $300,000 to $30 million. SEC, 2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program 1, 3, 20 (Nov. 17, 2014), *available at* http://www.sec.gov/about/offices/owb/annual-report-2014.pdf.

The question before this Court is who counts as a "whistleblower" under Section 78u-6, and particularly who is a "whistleblower" protected from retaliation under Section 78u-6(h)(1). As the district court held, it is clear that the defined term "whistleblower" as used in Section 78u-6, including Section 78u-6(h)(1), applies only to an individual who provides information relating to a violation of the securities laws *to the Commission*.

A. The Plain Language Of Section 78u-6 Extends Protection From Retaliation Only To Individuals Who Report To The Commission

"As in all statutory construction cases, we begin with the language of the statute." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). Here, the

statutory text unambiguously requires that an individual report to the SEC in order to be a "whistleblower" under Section 78u-6, including Section 78u-6(h)(1).

Section 78u-6 begins by stating that "[i]n this section the following definitions shall apply." 15 U.S.C. § 78u-6(a). One of those definitions is "whistleblower," which "means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws *to the Commission*, in a manner established, by rule or regulation, by the Commission." *Id.* § 78u-6(a)(6) (emphasis added). Section 78u-6(h)(1)(A), in turn, provides that once someone becomes such a "whistleblower," she is "[p]rotect[ed]" against certain adverse employment actions taken in "retaliation" because of enumerated "lawful act[s] done by the whistleblower." *Id.* § 78u-6(h)(1)(A). Those acts are: (i) providing "information to the Commission in accordance with this section"; (ii) participating in "any investigation or judicial or administrative action of the Commission" that is "related to such information"; and (iii) "making disclosures" that are "protected" or "required" by other laws, rules, or regulations administered by the Commission. *Id.* § 78u-6(h)(1)(A)(i)-(iii). Only people who have provided information to the Commission—"whistleblowers," as defined in that section—are subject to the protections afforded by Section 78u-6(h)(1)(A).

This straightforward reading was adopted by the Fifth Circuit in the only court of appeals decision to address the issue. *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013). There, the court explained that the "whistleblower" definition in Section 78u-6(a)(6) and the anti-retaliation provision in Section 78u-6(h)(1)(A) work in tandem, with the definition establishing "who is protected" and the anti-retaliation provision specifying "what actions" taken by that person are protected against certain adverse actions by an employer. *Id.* at 624-26. This "plain language" of Section 78u-6, the Fifth Circuit concluded, "limits protection under the Dodd-Frank whistleblower-protection provision to those individuals who provide 'information relating to a violation of the securities laws' to the SEC." *Id.* at 630. The court therefore declined to defer to the SEC regulation interpreting the anti-retaliation provision because the statute is "unambiguous[]," and because the regulation "redefines 'whistleblower' more broadly" than the statutory definition. *Id.* at 629-30.

The Fifth Circuit's conclusion was correct, and this Court should not accept the invitation of plaintiff and the Commission to create a circuit split on the issue.

B. The Context And Drafting History Of The Dodd-Frank Whistleblower Provision Confirm The "Plain Meaning" Interpretation Of The District Court

The entire context of Section 78u-6, including its title and caption, confirm that the term "whistleblower" retains its defined meaning throughout the statutory section.

The title and caption of the relevant section and subsection confirm the provisions' limitation to statutorily-defined "whistleblowers." The section is titled "Securities whistleblower incentives and protection," and the subsection, "Protection of whistleblowers." 15 U.S.C. § 78u-6(h). "It is well established that the title of a statute or section is an indication of its meaning." *Bell v. Reno*, 218 F.3d 86, 91 (2d Cir. 2000); *see also Yates v. United States*, 135 S. Ct. 1074, 1083 (2015) (plurality op.) (relying in part on the title and caption of Sarbanes-Oxley provisions, which "supply cues" of the law's meaning); *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute.") (internal quotation marks omitted). Moreover, every mention of the word "whistleblower" in the other provisions of Section 78u-6 confirms that the individuals covered and thus protected by the anti-retaliation provisions in subsection (h) are those who provide information *to the Commission*. *See* 15 U.S.C. § 78u-6(a)(3)(A)-(C), (a)(5), (b)(1), (c)(1)(B)(i)(I)-(III), (c)(2)(A)-(D),

(d)(1), (d)(2)(A)-(B), (e), (g)(2)(A), (g)(5)(A) & (E), (h)(2)(A), (h)(3), & (i). Congress did not, as plaintiff and the SEC would have it, use "whistleblower" in Section 78u-6(h)(1) in some broader or different sense than it did everywhere else in Section 78u-6.

The drafting history further confirms that Congress used the term "whistleblower" to have the same meaning and scope as the rest of Section 78u-6. Although the versions of the bill passed by the House and Senate both defined "whistleblower" as someone who provides information "to the Commission," the House bill prohibited retaliation against an "employee, contractor, or agent"; this later was replaced with the narrower prohibition on retaliation against "a whistleblower" that now appears in the Act. *Compare* Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 7203(a) (2009) (emphasis added), *with* Restoring American Financial Stability Act of 2010, H.R. 4173, 111th Cong. § 922(a) (2010). This confirms that the use of the statutory defined term "whistleblower" was a considered, purposeful element of the Act's drafting.

II. The Court Should Reject The Arguments Advanced By Plaintiff And The SEC, And Should Not Afford Deference To The SEC's Rule

Despite the straightforward text of the Dodd-Frank whistleblower provision, plaintiff and the SEC maintain that the statute is "inconsistent," in "tension" with itself, and "contradictory," necessitating a judge-made "exception" to the Act's

language, or deference to an SEC rule that resolves a supposed statutory "ambiguity." Berman Br. 11; SEC Br. 18. For multiple reasons, those arguments are mistaken.

1. Plaintiff and the SEC overlook the statutorily defined term "whistleblower." (Indeed, their briefs repeatedly displace "whistleblower" with another word, such as "employee," "person," or "individual." *See* Berman Br. 7, 10, 13, 15, 16, and SEC Br. 13, 15.) And in arguing that the protections of clause (iii) of the anti-retaliation provision extend coverage to a wider class of persons than the Act's definition of "whistleblower" (Berman Br. 9-10, 13; SEC Br. 18-19), plaintiff and the SEC flip the statute's language on its head: Their approach makes *what the retaliation was for* determinative of *who* is protected, rather than first determining *who* is protected under the statutory definition of "whistleblower." The "whistleblower" definition governs clause (iii), not *vice versa*, as both plaintiff and the SEC suppose.[2]

In short, "[s]tatutory definitions control the meaning of statutory words." *Burgess v. United States*, 553 U.S. 124, 129 (2008) (internal quotation marks

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[2] Plaintiff argues that his reading of the statute is "no less plausible" than the district court's reading because Section 78u-6(h)(1)(A) "incorporat[es] [Sarbanes-Oxley] by reference, without further limitation." Berman Br. 15. But that provision *does* incorporate a "limitation"—it applies only to statutorily defined "whistleblowers."

omitted); *see also Meese v. Keene*, 481 U.S. 465, 484 (1987) ("It is axiomatic that the statutory definition of [a] term excludes unstated meanings of that term."). The approach of plaintiff and the SEC violates that basic precept—as reflected in the SEC's statement that its 2011 rule "specif[ies] what persons are whistleblowers for purposes of the anti-retaliation provisions," SEC Br. 27, even though the United States Congress had defined that exact term, stating that it "shall" apply for the entire "section," 15 U.S.C. § 78u-6. In the words of the Fifth Circuit, "Congress . . . used the term 'whistleblower' throughout subsection (h) and, therefore, [a court] must give that language effect." *Asadi*, 720 F.3d at 627.[3]

2. Plaintiff and the SEC claim that their departure from the plain statutory language is necessary because otherwise clause (iii) of the anti-retaliation provision would be rendered "superfluous," or at least "significantly restricted." Berman Br. 15; SEC Br. 20. That is wrong. Clause (iii) applies when an employee

[3] The SEC cites two Supreme Court decisions as supposed illustration that the definition of "whistleblower" for Section 78u-6 need not apply to subsection (h)(1)(A) of that very section. SEC Br. 27-28. Both cases are unavailing. In *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193, 206-07 (2009)—which the Court recognized to be an "unusual case"—the Justices declined to apply a definition contained in Section 14(c)(2) of the Voting Rights Act to a *different section* of the same Act. And in *Philko Aviation, Inc. v. Shacket*, 462 U.S. 406, 411-12 (1983), the statute itself provided that the statutory definition was "not applicable if 'the context otherwise requires.'" There is no such proviso here, and the context does not "require" a different meaning.

has reported internally *and* to the Commission, and the employer fires the employee for the internal report, perhaps unaware that the employee also reported to the SEC. *Asadi*, 720 F.3d at 627-28. It is reasonable to expect that, to the extent retaliation against Dodd-Frank whistleblowers occurs, it may often arise in this way, in part for reasons identified in the SEC's *amicus* brief: Reports made to the SEC are intended to be confidential and therefore may not be known to the company, SEC Br. 22-24 & n.19, but people who complain to the SEC often complain internally at the company as well, indeed, they are encouraged to do so, *id.* at 11-13. *See also* 15 U.S.C. § 78u-6(h)(2)(A) (barring the Commission and its officers and employees from disclosing information that "could reasonably be expect to reveal the identity of a whistleblower"). The employee who complains internally *and* to the SEC gains a chance at a bounty and additional protections in the event of workplace retaliation, both of which further Dodd-Frank's purpose of "motivat[ing] those with inside knowledge to come forward and assist the Government." S. Rep. No. 111-176, at 110. It is entirely consistent with the purposes of the Act to give a Dodd-Frank "whistleblower" the Act's enhanced protections for other steps she has taken to further compliance with the securities

laws, in part because it will often be the whistleblower's internal complaint that first becomes known to the company.[4]

And while the SEC may regard the scope of clause (iii) as "significantly restricted" by the statute's definition of whistleblower (SEC Br. 20), that policy judgment does not justify excising Congress's definition of "whistleblower" from the subsection (h)(1) and replacing it with a definition more to the Commission's liking. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant" (internal quotation marks omitted)).

3. The SEC urges that clause (iii) of the anti-retaliation provision is "best read as an implied exception" to the Act's definition of "whistleblower." SEC Br. 27. In so arguing, the Commission follows the lead of several district courts. *See, e.g.*, *Egan v. Tradingscreen, Inc.*, 2011 WL 1672066, at *5 (S.D.N.Y. May 4,

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[4] The SEC suggests (SEC Br. 23-24) that if the Act's coverage is limited to statutorily defined "whistleblowers," then an employer might not be liable for firing an employee for an internal complaint because the employer "would appear to lack the requisite retaliatory intent." But an employer who fires an employee in retaliation for internally reporting a suspected violation of the securities laws runs the risk that the employee also has complained to the SEC as well and therefore enjoys Dodd-Frank's enhanced protections. Plainly that was *Asadi*'s understanding.

2011) (treating the subparagraph as a "narrow exception to 15 U.S.C. § 78u-6(a)(6)'s definition of a whistleblower as one who reports to the SEC"). But there cannot be an "implied exception" from a statutory definition in a section that states at the very outset: "*In this section* the following definitions *shall* apply." 15 U.S.C. § 78u-6(a) (emphases added). Moreover, clause (iii) of the anti-retaliation provision is not presented or phrased as an exception at all; rather, it delineates one of three circumstances where "whistleblowers" are specifically protected against "retaliation." To read that delineation as removing the requirement that the individual who suffers an adverse action be a statutorily defined "whistleblower" is not an "exception"; it is an evisceration. To be sure, applying the statutory definition may result in some individuals engaging in disclosures delineated in clause (iii) without qualifying as Dodd-Frank "whistleblowers." "[T]hat practical result," however, is demanded by the statute Congress wrote, *see Asadi*, 720 F.3d at 626, and, as the district court recognized, is preferable to "the judicial creation of a 'narrow exception' to an unambiguous text," JA0015. This Court's "function [is] to give [a] statute the effect its language suggests, however modest that may be; not to extend it to admirable purposes it might be used to achieve." *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 270 (2010).[5]

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[5] The SEC suggests (SEC Br. 31) that the interpretation adopted by the district

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4. Plaintiff and the SEC assert that the lower court's decision is inconsistent with the purported purpose of Dodd-Frank, which they claim is to encourage internal reporting of securities law violations. Berman Br. 15-16; SEC Br. 29. The Chamber certainly agrees that internal reporting of potential securities violations should be encouraged. But promoting internal reporting was not Congress's purpose in enacting Dodd-Frank's whistleblower provision.[6]

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court "arbitrarily and irrationally" denies Dodd-Frank's retaliation protections to individuals who happen to "first report" violations to entities other than the Commission. That argument is mistaken for two reasons. First, to the extent the Commission is suggesting here and elsewhere in its brief that whistleblowers must *eventually* report to the SEC to receive Dodd-Frank anti-retaliation protections, they merely must not report to the Commission "first" (*see also* SEC Br. 29), that plainly is neither what the Commission's rule provides nor what is stated elsewhere in the SEC's brief. Second, nothing in Dodd-Frank imposes a "sequence" in which a whistleblower must report the securities law violations; the Act merely requires that a plaintiff must have reported to the Commission—and thereby become a "whistleblower"—before the adverse action occurs. Although individuals who report to other entities and experience retaliation before reporting to the Commission will not be entitled to protection under Dodd-Frank, they will still have the protections of Sarbanes-Oxley. Moreover, firing an employee for providing information to any "law enforcement officer" is a felony under 18 U.S.C. § 1513(e).

[6] The SEC claims (SEC Br. 11-13) that in writing its Dodd-Frank "bounty" rule, it crafted a number of provisions to encourage internal reporting of securities violations. This confirms that internal reporting can be encouraged without resort to an artificial, judge-made "exception" to the statutory text.

As the district court recognized, the purpose of Dodd-Frank was "to encourage employees to report information related to potential violations of the securities laws to the Commission." JA0012 (citing S. Rep. No. 111-176, at 100). The Dodd-Frank whistleblower provision is a carefully constructed attempt to increase the number and quality of complaints provided to the SEC by giving financial incentives and added protections to those who follow Dodd-Frank procedures. *See id.*; *Asadi*, 720 F.3d at 623. Thus, during its whistleblower rulemaking, the SEC rebuffed numerous suggestions by commenters that would have resulted in more complaints being handled internally rather than qualifying for the "whistleblower" bounty. *See*, *e.g.*, 76 Fed. Reg. at 34,308; 34,317; 34,325-26. In doing so, the Commission explained that a "principal purpose" of the whistleblower provision "is to promote effective enforcement of the Federal securities laws by providing incentives for persons with knowledge of misconduct to come forward and share their information with the Commission"; "providing information to persons conducting an internal investigation," it said, "may not . . . achieve the statutory purpose of getting high-quality, original information about securities violations directly into the hands of Commission staff." 76 Fed. Reg. at 34,308 (emphases added).[7]

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[7] *See also* 156 Cong. Rec. S5929 (daily ed. July 15, 2010) (statement of Sen.

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In any event, the supposed "broad remedial goals" of a statute are no justification "for interpreting a specific provision more broadly than its language and the statutory scheme reasonably permit." *Pinter v. Dahl*, 486 U.S. 622, 653 (1988) (internal quotation marks omitted); *see also Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994) ("Policy considerations cannot override . . . the text and structure of the Act . . . ."). "Though the rule once may have been otherwise," courts may not expand "who can seek a remedy" absent "congressional direction." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164-65 (2008). As these decisions reflect, it is under the securities laws that the Supreme Court has most emphatically rejected the interpretive approach that plaintiff and the SEC champion here, citing "widespread recognition" that securities litigation "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 80 (2006) (internal quotation marks omitted).

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Chris Dodd) ("The Congress intends that the SEC make awards that are sufficiently robust to motivate potential whistleblowers to share their information and to overcome the fear of risk of the loss of their positions. Unless the whistleblowers come forward, the Federal Government will not know about the frauds and misconduct.").

5. Plaintiff and the SEC argue that this Court should reverse the lower court's decision in deference to the interpretation expressed in the SEC's "bounty" rule. This "*Chevron* deference" argument fails for multiple reasons.

First, where "Congress has directly spoken to the precise question at issue," any license for agency interpretation is foreclosed, and this Court "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).[8] That is the case here, for reasons given above.

Second, courts defer to an agency's interpretive discretion only "when an agency recognizes that the Congress's intent is not plain from the statute's face," and therefore purports to *exercise* interpretative discretion. *Peter Pan Bus Lines, Inc. v. FMCSA*, 471 F.3d 1350, 1354 (D.C. Cir. 2006); *see also Arizona v. Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002) ("Deference to an agency's statutory interpretation is only appropriate when the agency has exercised its *own* judgment, not when it believes that interpretation is compelled by Congress.") (internal quotation marks omitted). But in promulgating the rule to which it now

[8] *See also Lutwin v. Thompson*, 361 F.3d 146, 156 (2d Cir. 2004) ("Because we find the statutory language to be clear and unambiguous, deference to the Secretary's interpretation under *Chevron* is not appropriate."); *Yerdon v. Henry*, 91 F.3d 370, 376 (2d Cir. 1996) ("deference is not warranted" to EEOC's statutory interpretation because "the language of the statute [is] unambiguous").

seeks deference, the SEC never purported to be exercising discretion to resolve a statutory ambiguity. On the contrary, it justified its action by stating that the Dodd-Frank anti-retaliation provision "expressly protec[ts]" internal whistleblowing. 76 Fed. Reg. at 34,304 n.38. *See also id.* (referring to "*the fact* that . . . [clause (iii)] includes individuals who report to persons or governmental authorities other than the Commission") (emphasis added). The SEC cannot claim deference to interpretative discretion that it never exercised. The SEC premised its rule on the Act's supposed plain meaning, and it is on the basis of that plain meaning that this appeal must be decided.

Third, an agency interpretation receives *Chevron* deference only when it is "reasonable." *Chevron*, 467 U.S. at 845. Here, the SEC's rule is patently unreasonable because by its own admission, the Commission supplanted Congress's definition of "whistleblower" with a different definition of the Commission's own design. "*For purposes of the anti-retaliation protections*" of Dodd-Frank, the Commission's rule states, "you are a whistleblower if . . . [y]ou provide information in a manner described" in the anti-retaliation provision itself. 17 C.F.R. § 240.21F-2(b)(1) (emphasis added), *reprinted in* SEC Br. 15. The SEC had no authority to give a statutory term a different meaning than Congress gave it and than it bears elsewhere in the same statutory section. *See Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 n.4 (2009) ("[I]f Congress has directly spoken

to an issue[,] then any agency interpretation contradicting what Congress has said would be unreasonable.").[9]

With neither ambiguity nor the exercise of discretion to support it, and given the clear unreasonableness of its interpretation, the SEC's *Chevron* argument must be rejected.

III. Broadening Section 78u-6 Beyond Its Statutorily Prescribed Limits Would Undermine The Anti-Retaliation Provisions Of Sarbanes-Oxley And Impose Unwarranted Costs On Employers

Less than 10 years before enacting Dodd-Frank, Congress established a comprehensive regime to protect, among others, the "internal" whistleblowers that the SEC seeks to cover with its counter-textual reading of Dodd-Frank. In the Sarbanes-Oxley Act of 2002, Congress authorized employees to file a complaint with the U.S. Department of Labor ("DOL") if they believe they have experienced retaliation for giving information regarding perceived securities violations to, among others, their supervisor or others in the company in a position to address the matter. 18 U.S.C. § 1514A(a)(1). The complaint is investigated by the

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[9] *See also N.Y.C. Health & Hosps. Corp. v. Perales*, 954 F.2d 854, 858 (2d Cir. 1992) (declining to defer to agency's interpretation because "[r]egulation is at odds with the clear intent of the statutes"); *N.Y. State Dep't of Social Servs. v. Bowen*, 846 F.2d 129, 134 (2d Cir. 1988) ("The deference ordinarily due the federal agency charged with interpreting a statute is unnecessary and inappropriate here where [the agency's] interpretation is not only inconsistent with the language of the Medicaid statute and its purpose, . . . but also in defiance of common sense." (citation omitted)).

Occupational Safety and Health Administration ("OSHA"), which renders findings and may order reinstatement of an employee who has been improperly removed from her position. Either party may appeal OSHA's decision to a Labor Department Administrative Law Judge ("ALJ"), who will permit discovery, conduct a bench trial, and issue a decision that may be appealed to the Department's Administrative Review Board. If a final Labor Department decision does not issue within 180 days of the employee's initial complaint, the complainant has the option of commencing the case *de novo* in federal district court. *Id.* § 1514A(b)(1)(B).

The Sarbanes-Oxley regime imposes important constraints. It provides for initial investigation by the DOL, which can lead to the prompt termination of baseless claims. Resolution within the Department is the preferred outcome, although complainants may "kick-out" the case to federal court if they feel the Department is proceeding too slowly. The limitations period is short—Sarbanes-Oxley prescribed a 90-day limitation period, which Dodd-Frank extended to 180 days. 18 U.S.C. § 1514A(b)(2)(D). Monetary relief is limited to compensatory damages, *id.* § 1514A(c)(2), which may include back pay, litigation costs, and reasonable attorneys' fees, *id.* § 1514A(c)(2)(C).

If claimants have the unfettered ability that plaintiff and the SEC describe to proceed under Dodd-Frank's whistleblower provision even when they do not meet

its definition of "whistleblower," there will be a proliferation of whistleblower litigation under Dodd-Frank, and the reticulated Sarbanes-Oxley scheme will be sharply undermined. Extending the limitations period from 180 days to as long as 10 years will significantly increase the number of cases brought, as claimants—like plaintiff here—who are timed-barred under Sarbanes-Oxley proceed under Dodd-Frank instead. And even claimants whose claims are not time-barred will seldom have reason to invoke Sarbanes-Oxley—and the DOL procedures—at the expense of the double damages that are uniquely available under Dodd-Frank.

That plainly is not what Congress intended when it narrowly defined "whistleblower" in Dodd-Frank and simultaneously amended several features of the more capacious Sarbanes-Oxley regime. It would make no sense, for instance, for Congress to retain a confined limitations period for Sarbanes-Oxley claims, while simultaneously giving those same claimants, on the same facts, as many as 10 years to sue for the more generous relief available under Section 78u-6(h)(1). *See Yates*, 135 S. Ct. at 1085 ("We resist a reading of [a statute] that would render superfluous an entire provision passed in proximity as part of the same Act."). Moreover, "the canon against interpreting any statutory provision in a manner that would render another provision superfluous . . . applies to interpreting any two provisions in the U.S. Code, even when Congress enacted the provisions at different times." *Bilski v. Kappos*, 561 U.S. 593, 607-08 (2010) (citation omitted).

Here, the result threatened by plaintiff's interpretation is that an entire regulatory program largely falls into desuetude.

The SEC argues that the Sarbanes-Oxley regime would remain attractive for some claimants because litigation costs would be lower before DOL. SEC Br. 25-26. But it provides no support for that assertion, and it simply errs in stating that DOL "prepar[es] the evidence for an administrative law judge's review." SEC Br. 26. In fact the ALJ conducts a full hearing, after discovery, and makes a *de novo* determination. 29 C.F.R. § 1980.107. Moreover, within DOL a claimant must proceed before OSHA, the ALJ, and the Administrative Review Board, from which appeal lies to the federal courts of appeals. By contrast, a Dodd-Frank claimant makes one stop, not three, before arriving at the court of appeals—there is every reason to expect that litigation costs will be lower.

Even if the costs are lower for Sarbanes-Oxley claims, the double-damages available under Dodd-Frank are an even more powerful incentive for plaintiffs to pursue Dodd-Frank claims. The SEC argues (SEC Br. 26) that plaintiffs with "minimal" monetary claims may prefer the opportunity for emotional distress damages available under Sarbanes-Oxley. But of course, plaintiffs with small monetary claims can have them doubled under Dodd-Frank. And damage awards for emotional distress tend to be low under Sarbanes-Oxley in any event. *See Brown v. Lockheed Martin Corp.*, 2008-SOX-00049, 2010 WL 2054426, at *59

(ALJ Jan. 15, 2010) ($75,000), *aff'd*, No. 10-050, 2011 WL 729644 (ARB Feb. 28, 2011); *Kalkunte v. DVI Fin. Servs., Inc.*, Nos. 05-139, 05-140, 2009 WL 564738, at *13 (ARB Feb. 27, 2009) ($22,000). Perhaps most important, if there were a case where emotional distress damages loomed large, that would be a reason to pursue Sarbanes-Oxley *and* Dodd-Frank claims, rather than to abandon the opportunity to recover double-damages under Dodd-Frank. The prospect that plaintiffs would simultaneously pursue relief before the DOL under Sarbanes-Oxley and in federal court under Dodd-Frank is further reason to reject an interpretation under which the two statutes routinely cover the same broad class of cases.

Litigation is costly, time-intensive, and burdensome for American business. *See* Jessica Fink, *Unintended Consequences: How Antidiscrimination Litigation Increases Group Bias in Employer-Defendants*, 38 N.M. L. Rev. 333, 340 (2008) ("[A]n employer may spend close to $100,000 to defend against an individual claim of discrimination."); David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1579 (2005) ("[I]t costs employers . . . at least $75,000 to take a case to summary judgment [and] at least $125,000 and possibly over $500,000 to defend a case at trial.") (footnote omitted). This Court should reject plaintiff's counter-textual interpretation under which all Sarbanes-Oxley claimants would have vastly

more time to sue under Dodd-Frank, and ample reason to bypass the expert agency charged with administering the anti-retaliation provisions of Sarbanes-Oxley in pursuit of the double-damages available under Dodd-Frank.

CONCLUSION

For the foregoing reasons, this Court should affirm the final judgment dismissing plaintiff's claims.

Dated: March 16, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) because it contains 6,243 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that on the 16th day of March 2015, I filed the foregoing brief using this Court's Appellate CM/ECF system, which effected service on all parties.

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