No. 16-15426

In the United States Court of Appeals for the Eleventh Circuit

SPENCER DUKE,

Plaintiff-Appellant,

v.

PRESTIGE CRUISES INTERNATIONAL, INC., ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida
Case No. 14-cv-23017 – Hon. James Lawrence King

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANTS-APPELLEES

Kate Comerford Todd
Steve Lehotsky
Janet Galeria
U.S. CHAMBER
LITIGATION CENTER, INC.
1615 H St., N.W.
Washington, D.C. 20062
(202) 463-5337

Eugene Scalia
Counsel of Record
Christopher J. Baum
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
(202) 955-8500

Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Duke v. Prestige Cruises International, Inc., No. 16-15426

The Chamber of Commerce of the United States of America, *amicus curiae*, is not a publicly traded corporation. It has no parent corporation, and there is no public corporation that owns 10% or more of its stock.

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, counsel for The Chamber of Commerce of the United States of America, *amicus* curiae, certifies that the following persons and entities have or may have an interest in the outcome of this appeal.

1. Akerman LLP, attorneys for defendants-appellees

2. Apollo Global Management LLC ("Apollo"), defendant below

3. Atherton, Scott W., attorney for Apollo (defendant below)

4. Atherton Law Group, P.A., attorney for Apollo (defendant below)

5. Baum, Christopher J., attorney for the *amicus curiae* Chamber of Commerce of the United States

6. Behren, Scott M., attorney for plaintiff-appellant

7. Behren Law Firm, attorneys for plaintiff-appellant

8. Bulsara, Sanket J., attorney for the *amicus curiae* Securities and Exchange Commission ("SEC")

9. Celtic Pacific (UK) Limited, defendant below

10. Celtic Pacific (UK) Two Limited, defendant below

11. Classic Cruises, LLC, defendant below

12. Classic Cruises II, LLC, defendant below

13. Conley, Michael A., attorney for the *amicus curiae* SEC

14. Duke, Spencer, plaintiff-appellant

15. Explorer New Build, LLC, defendant below

16. Fiore, Kristen M., attorney for defendants-appellees

17. Galeria, Janet, attorney for *amicus curiae* Chamber of Commerce of the United States

18. Gibson, Dunn & Crutcher, LLP, attorneys for *amicus curiae* Chamber of Commerce of the United States

19. Karr, Thomas J., attorney for the *amicus curiae* SEC

20. King, Hon. James Lawrence, U.S. District Judge

21. Kline, Arlene K., attorney for defendants-appellees

22. Lehotsky, Steve, attorney for amicus curiae Chamber of Commerce of the United States

23. Marina New Build, LLC, defendant below

24. Mariner, LLC, defendant below

25. Moss, Edward, attorney for Apollo (defendant below)

26. Mullen, Terence M., attorney for Apollo (defendant below)

27. Navigator Vessel Company, LLC, defendant below

28. NCL (Bahamas) Ltd. (a wholly-owned subsidiary of NCL International, Ltd., a Bermuda company, which in turn is a wholly-owned subsidiary of Arrasas Limited, an Isle of Man company, which in turn is a wholly-owned subsidiary of NCLC. NCLC is a subsidiary of Norwegian Cruise Line Holdings Ltd., a Bermuda company publicly traded on NASDAQ exchange under the symbol ("NCLH"). NCLH in turn is owned by: Star NCLC Holdings Ltd., a Bermuda company ("Genting HK"); one or more of AIF VI NCL (AIV), L.P., AIF VI NCL (AIV II), L.P., AIF VI NCL (AIV III), L.P., AIF VI NCL (AIV IV), L.P., AAA Guarantor-Co-Invest VI (B), L.P., Apollo Overseas Partners (Delaware) VI, L.P., Apollo Overseas Partners (Delaware 892) VI, L.P., Apollo Overseas Partners VI, L.P., Apollo Overseas Partners (Germany) VI, L.P., AAA Guarantor - Co-Invest VII, L.P., AIF VI Euro Holdings, L.P., AIF VII Euro Holdings, L.P., Apollo Alternative Assets, L.P., Apollo Management VI, L.P. and Apollo Management VII, L.P. (collectively, the "Apollo Funds"); one or more of TPG Viking, L.P., TPG Viking AIV I, L.P., TPG Viking AIV II, L.P., and TPG Viking AIV III, L.P. (collectively, the "TPG Viking Funds"); and public shareholders. As of December 31, 2015, the relative ownership percentages of NCLH's ordinary shares were approximately: Genting HK (11.1%), Apollo Funds (15.8%), TPG Viking Funds (2.3%), and public shareholders (70.8%). Genting HK has a primary listing on the

Main Board of the Stock Exchange of Hong Kong Limited and a secondary listing on the Main Board of the Singapore Exchange Securities Trading Limited. Apollo Global Management LLC is an affiliate of the above listed Apollo entities and is traded on the New York Stock Exchange.)

29. NCL Corporation Ltd. (parent company of defendant-appellee Prestige Cruises International, Inc. and subsidiary of Norwegian Cruise Line Holdings Ltd.)

30. Norwegian Cruise Line Holdings Ltd. (parent company of NCL Corporation Ltd.) (NASDAQ Stock Symbol – NCLH)

31. Oceana Cruises Inc., defendant-appellee (also a wholly-owned subsidiary of Prestige Cruise Holdings, Inc., a Panama company, which in turn is a wholly-owned subsidiary of Prestige Cruises International, Inc. a Panama company, which in turn is a wholly-owned subsidiary of NCL Corporation Ltd., a Bermuda company)

32. OCI Finance Corp., defendant below

33. O'Melveny & Myers LLP, attorneys for Apollo (defendant below)

34. Prestige Cruise Holdings, Inc., defendant-appellee (also a wholly-owned subsidiary of Prestige Cruises International, Inc., a Panama company, which is in turn a wholly-owned subsidiary of NCL Corporation Ltd., a Bermuda company)

35. Prestige Cruise Services, LLC, defendant-appellee (also a wholly-owned subsidiary of Oceania Cruises, Inc., a Panama company, which in turn is a

wholly-owned subsidiary of Prestige Cruise Holdings, Inc., a Panama company, which in turn is a wholly-owned subsidiary of Prestige Cruises International, Inc. a Panama company, which in turn is a wholly-owned subsidiary of NCL Corporation Ltd., a Bermuda company)

36. Prestige Cruise Services (Europe) Limited UK, defendant below

37. Prestige Cruises International, Inc., defendant-appellee (also a wholly-owned subsidiary of defendant NCL Corporation Ltd., a Bermuda company ("NCLC"))

38. Regent Seven Seas Cruises, defendant below

39. Regent Seven Seas Cruises UK Limited, defendant below

40. Riviera New Build, LLC, defendant below

41. Rosenberg, Jonathan, attorney for Apollo (defendant below)

42. Scalia, Eugene, attorney for the *amicus curiae* Chamber of Commerce of the United States

43. Securities and Exchange Commission, *amicus curiae*

44. Seven Seas Cruises S. de R.L., LLC, defendant-appellee (also a jointly held subsidiary of Classic Cruises, LLC, a Delaware limited liability company and Classic Cruises II, LLC, also a Delaware limited liability company, each holding a 50% interest in Seven Seas Cruises S. de R.L. and each of which are in turn wholly-owned subsidiaries of Oceania Vessel Finance, Ltd., a Cayman Islands company,

which in turn is a wholly-owned subsidiary of Prestige Cruises International, Inc. a Panama company, which in turn is a wholly-owned subsidiary of NCL Corporation Ltd., a Bermuda company)

45. Small, Anne K., attorney for the *amicus curiae* SEC

46. SSC (France), LLC, defendant below

47. SSC Finance Corp, defendant below

48. Supplystill Limited, defendant below

49. Todd, Kate Comerford, attorney for the *amicus curiae* Chamber of Commerce of the United States

50. Voyager Vessel Company, LLC, defendant below

51. Waldon, Shayla N., attorney for defendants-appellees

52. Yoder, Stephen G., attorney for the *amicus curiae* SEC

53. Zinkil, Melissa S., attorney for defendants-appellees

Pursuant to Federal Rule of Appellate Procedure 29(a)(3) and Eleventh Circuit Rule 29-1, the Chamber of Commerce of the United States of America (the "Chamber") respectfully moves for leave to file a brief as *amicus curiae* in support of defendants-appellees Prestige Cruises International, Inc.; Prestige Cruise Holdings, Inc.; Oceania Cruises Inc.; Prestige Cruise Services, LLC; and Seven Seas Cruises S. de R.L. LLC ("Appellees"). The proposed brief accompanies this motion. Appellees consent to the filing of this brief; Appellant does not consent.

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.

The Chamber's members have a strong interest in the application of the "whistleblower" provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank" or the "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. Here, the interpretation of the Dodd-Frank Act espoused by Appellant and *amicus curiae* Securities and Exchange Commission ("SEC" or the "Commission") would greatly expand both 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 Appellant's interpretation, depriving Chamber members of the limitations and protections furnished under that earlier law.

This case presents an issue of first impression in this Circuit, and one with profound ramifications for employers across the country: Whether an individual who does not meet the definition of "whistleblower" in the Dodd-Frank Act can bring a cause of action under the Act's anti-retaliation provisions. The language of Dodd-Frank is clear that only a "whistleblower"—defined in the statute as an individual who provides information "to the Commission"—is protected by the anti-retaliation provisions of the Act. 15 U.S.C. § 78u-6(a)(6), (h)(1)(A). The district court properly dismissed the Dodd-Frank whistleblower retaliation claim in this case, because at the time Appellant'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. Reversal would affect the Chamber's many members who must defend themselves against Dodd-Frank whistleblower claims.

Appellant and the SEC urge this Court to adopt an interpretation that expands the meaning of "whistleblower" as used in the anti-retaliation provision beyond the statute's definition of the term. The Chamber's proposed *amicus* brief addresses the proper interpretation of the relevant statutory provisions, and the legal error and adverse practical consequences of Appellant's and the SEC's interpretation. Their proposed interpretation is inconsistent with the primary purpose of the Dodd-Frank whistleblower provisions—to alert the Commission about potential securities law violations—and accepting it would undercut the anti-retaliation provisions and procedures of the Sarbanes-Oxley Act of 2002. It would also deepen a circuit split with the Fifth Circuit, and would open the door to countless lawsuits that were not contemplated by the whistleblower framework established by Congress in Dodd-Frank and Sarbanes-Oxley.

The Second Circuit previously granted the Chamber leave to file an *amicus* brief on this very issue. Mot. Order, *Berman v. Neo@Ogilvy LLC*, No. 14-4626, Dkt. No. 100 (2d Cir. Apr. 22, 2015). Indeed, *amicus* briefs of the Chamber have regularly been accepted by the federal courts of appeals and the United States Supreme Court, including in cases concerning the Dodd-Frank Act and the Sarbanes-Oxley Act. *See*, *e.g.*, *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014); Mot. Order, *In*

re Facebook, Inc., IPO Sec. & Derivative Litig., No. 14-457, Dkt. No. 169 (2d Cir. Mar. 13, 2015); *Villanueva v. U.S. Dept. of Labor*, 743 F.3d 103 (5th Cir. 2014); Mot. Order, *In re Am. Express Merchants' Litig. (III)*, No. 06-1871 (2d Cir. Mar. 6, 2012). This Court has previously acknowledged the Chamber's assistance as *amicus curiae*. *See EEOC v. Catastrophe Mgmt. Sols.*, No. 14-13482, 2016 WL 7210059, at *4 (11th Cir. Dec. 13, 2016) (citing the Chamber's *amicus* brief). The Chamber respectfully submits that its proposed brief would an appropriate counter-weight to the *amicus* brief submitted by the SEC in this case.

For all these reasons, the Chamber requests that this Court grant its motion and permit the filing of the accompanying *amicus curiae* brief in support of Appellees.

Dated: March 17, 2017

Respectfully submitted,

/s/ Eugene Scalia

Eugene Scalia
Counsel of Record
Christopher J. Baum
GIBSON, DUNN & CRUTCHER, LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
(202) 955-8500

Kate Comerford Todd
Steve Lehotsky
Janet Galeria
U.S. CHAMBER
LITIGATION CENTER, INC.
1615 H St., N.W.
Washington, DC 20062
(202) 463-5337

Counsel for Amicus Curiae United States Chamber of Commerce

CERTIFICATE OF SERVICE

I certify that on the 17th day of March 2017, I filed the foregoing brief using this Court's Appellate CM/ECF system, which effected service on all parties.

/s/ Eugene Scalia

Eugene Scalia
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
escalia@gibsondunn.com
(202) 955-8500

No. 16-15426

In the United States Court of Appeals for the Eleventh Circuit

SPENCER DUKE,

Plaintiff-Appellant,

v.

PRESTIGE CRUISES INTERNATIONAL, INC., ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida
Case No. 14-cv-23017 – Hon. James Lawrence King

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

Kate Comerford Todd
Steve Lehotsky
Janet Galeria
U.S. CHAMBER
LITIGATION CENTER, INC.
1615 H St., N.W.
Washington, D.C. 20062
(202) 463-5337

Eugene Scalia
Counsel of Record
Christopher J. Baum
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
(202) 955-8500

Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Duke v. Prestige Cruises International, Inc., No. 16-15426

The Chamber of Commerce of the United States of America, *amicus curiae*, is not a publicly traded corporation. It has no parent corporation, and there is no public corporation that owns 10% or more of its stock.

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, counsel for The Chamber of Commerce of the United States of America, *amicus curiae*, certifies that the following persons and entities have or may have an interest in the outcome of this appeal.

1. Akerman LLP, attorneys for defendants-appellees

2. Apollo Global Management LLC ("Apollo"), defendant below

3. Atherton, Scott W., attorney for Apollo (defendant below)

4. Atherton Law Group, P.A., attorney for Apollo (defendant below)

5. Baum, Christopher J., attorney for the *amicus curiae* Chamber of Commerce of the United States

6. Behren, Scott M., attorney for plaintiff-appellant

7. Behren Law Firm, attorneys for plaintiff-appellant

8. Bulsara, Sanket J., attorney for the *amicus curiae* Securities and Exchange Commission ("SEC")

9. Celtic Pacific (UK) Limited, defendant below

10. Celtic Pacific (UK) Two Limited, defendant below

11. Classic Cruises, LLC, defendant below

12. Classic Cruises II, LLC, defendant below

13. Conley, Michael A., attorney for the *amicus curiae* SEC

14. Duke, Spencer, plaintiff-appellant

15. Explorer New Build, LLC, defendant below

16. Fiore, Kristen M., attorney for defendants-appellees

17. Galeria, Janet, attorney for *amicus curiae* Chamber of Commerce of the United States

18. Gibson, Dunn & Crutcher, LLP, attorneys for *amicus curiae* Chamber of Commerce of the United States

19. Karr, Thomas J., attorney for the *amicus curiae* SEC

20. King, Hon. James Lawrence, U.S. District Judge

21. Kline, Arlene K., attorney for defendants-appellees

22. Lehotsky, Steve, attorney for *amicus curiae* Chamber of Commerce of the United States

23. Marina New Build, LLC, defendant below

24. Mariner, LLC, defendant below

25. Moss, Edward, attorney for Apollo (defendant below)

26. Mullen, Terence M., attorney for Apollo (defendant below)

27. Navigator Vessel Company, LLC, defendant below

28. NCL (Bahamas) Ltd. (a wholly-owned subsidiary of NCL International, Ltd., a Bermuda company, which in turn is a wholly-owned subsidiary of Arrasas Limited, an Isle of Man company, which in turn is a wholly-owned subsidiary of NCLC. NCLC is a subsidiary of Norwegian Cruise Line Holdings Ltd., a Bermuda company publicly traded on NASDAQ exchange under the symbol ("NCLH"). NCLH in turn is owned by: Star NCLC Holdings Ltd., a Bermuda company ("Genting HK"); one or more of AIF VI NCL (AIV), L.P., AIF VI NCL (AIV II), L.P., AIF VI NCL (AIV III), L.P., AIF VI NCL (AIV IV), L.P., AAA Guarantor-Co-Invest VI (B), L.P., Apollo Overseas Partners (Delaware) VI, L.P., Apollo Overseas Partners (Delaware 892) VI, L.P., Apollo Overseas Partners VI, L.P., Apollo Overseas Partners (Germany) VI, L.P., AAA Guarantor - Co-Invest VII, L.P., AIF VI Euro Holdings, L.P., AIF VII Euro Holdings, L.P., Apollo Alternative Assets, L.P., Apollo Management VI, L.P. and Apollo Management VII, L.P. (collectively, the "Apollo Funds"); one or more of TPG Viking, L.P., TPG Viking AIV I, L.P., TPG Viking AIV II, L.P., and TPG Viking AIV III, L.P. (collectively, the "TPG Viking Funds"); and public shareholders. As of December 31, 2015, the relative ownership percentages of NCLH's ordinary shares were approximately: Genting HK (11.1%), Apollo Funds (15.8%), TPG Viking Funds (2.3%), and public shareholders (70.8%). Genting HK has a primary listing on the

Main Board of the Stock Exchange of Hong Kong Limited and a secondary listing on the Main Board of the Singapore Exchange Securities Trading Limited. Apollo Global Management LLC is an affiliate of the above listed Apollo entities and is traded on the New York Stock Exchange.)

29. NCL Corporation Ltd. (parent company of defendant-appellee Prestige Cruises International, Inc. and subsidiary of Norwegian Cruise Line Holdings Ltd.)

30. Norwegian Cruise Line Holdings Ltd. (parent company of NCL Corporation Ltd.) (NASDAQ Stock Symbol – NCLH)

31. Oceana Cruises Inc., defendant-appellee (also a wholly-owned subsidiary of Prestige Cruise Holdings, Inc., a Panama company, which in turn is a wholly-owned subsidiary of Prestige Cruises International, Inc. a Panama company, which in turn is a wholly-owned subsidiary of NCL Corporation Ltd., a Bermuda company)

32. OCI Finance Corp., defendant below

33. O'Melveny & Myers LLP, attorneys for Apollo (defendant below)

34. Prestige Cruise Holdings, Inc., defendant-appellee (also a wholly-owned subsidiary of Prestige Cruises International, Inc., a Panama company, which is in turn a wholly-owned subsidiary of NCL Corporation Ltd., a Bermuda company)

35. Prestige Cruise Services, LLC, defendant-appellee (also a wholly-owned subsidiary of Oceania Cruises, Inc., a Panama company, which in turn is a wholly owned subsidiary of Prestige Cruise Holdings, Inc., a Panama company, which in turn is a wholly-owned subsidiary of Prestige Cruises International, Inc. a Panama company, which in turn is a wholly-owned subsidiary of NCL Corporation Ltd., a Bermuda company)

36. Prestige Cruise Services (Europe) Limited UK, defendant below

37. Prestige Cruises International, Inc., defendant-appellee (also a wholly-owned subsidiary of defendant NCL Corporation Ltd., a Bermuda company ("NCLC"))

38. Regent Seven Seas Cruises, defendant below

39. Regent Seven Seas Cruises UK Limited, defendant below

40. Riviera New Build, LLC, defendant below

41. Rosenberg, Jonathan, attorney for Apollo (defendant below)

42. Scalia, Eugene, attorney for the *amicus curiae* Chamber of Commerce of the United States

43. Securities and Exchange Commission, *amicus curiae*

44. Seven Seas Cruises S. de R.L., LLC, defendant-appellee (also a jointly held subsidiary of Classic Cruises, LLC, a Delaware limited liability company and Classic Cruises II, LLC, also a Delaware limited liability company,

each holding a 50% interest in Seven Seas Cruises S. de R.L. and each of which are in turn wholly-owned subsidiaries of Oceania Vessel Finance, Ltd., a Cayman Islands company, which in turn is a wholly-owned subsidiary of Prestige Cruises International, Inc. a Panama company, which in turn is a wholly-owned subsidiary of NCL Corporation Ltd., a Bermuda company)

45. Small, Anne K., attorney for the *amicus curiae* SEC

46. SSC (France), LLC, defendant below

47. SSC Finance Corp, defendant below

48. Supplystill Limited, defendant below

49. Todd, Kate Comerford, attorney for the *amicus curiae* Chamber of Commerce of the United States

50. Voyager Vessel Company, LLC, defendant below

51. Waldon, Shayla N., attorney for defendants-appellees

52. Yoder, Stephen G., attorney for the *amicus curiae* SEC

53. Zinkil, Melissa S., attorney for defendants-appellees

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF THE ISSUE 2

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Dodd-Frank Unambiguously Requires That A Claimant Have Reported To The Commission To Qualify As A Whistleblower Protected By Section 78u-6's Anti-Retaliation Provision. 4

A. The Plain Language Of Section 78u-6 Extends Protection From Retaliation Only To Individuals Who Report To The Commission. 5

B. The Context Of The Dodd-Frank Whistleblower Provision Confirms The Plain Meaning Of The Statutory Language. 8

II. The SEC's Rule Is Due No Deference, And The Arguments Advanced In Support Of That Rule Are Flawed. 9

A. *Chevron* Does Not Apply Because Section 78u-6 Is Unambiguous. 9

B. Even If The Statute Were Ambiguous, The SEC's Rule Is Owed No Deference. 23

III. Broadening Section 78u-6 Beyond Its Statutorily Prescribed Limits Would Undermine The Anti-Retaliation Provisions Of The Sarbanes-Oxley Act And Impose Unwarranted Costs On Employers. 24

CONCLUSION 28

TABLE OF AUTHORITIES

Page(s)

Cases

Arizona v. Thompson,
281 F.3d 248 (D.C. Cir. 2002)....23

**Asadi v. G.E. Energy (USA), LLC*,
720 F.3d 620 (5th Cir. 2013) 7, 8, 9, 12, 14, 22

Baker Botts LLP v. ASARCO LLC,
135 S. Ct. 2158 (2015)....17

Barnhart v. Sigmon Coal Co.,
534 U.S. 438 (2002)....5

Bilski v. Kappos,
561 U.S. 593 (2010)....26

Brown v. Lockheed Martin Corp.,
2008-SOX-00049, 2010 WL 2054426 (ALJ Jan. 15, 2010) 27

Burgess v. United States,
553 U.S. 124 (2008)....7

CBS Inc. v. PrimeTime 24 Joint Venture,
245 F.3d 1217 (11th Cir. 2001) 10

**Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*,
467 U.S. 837 (1984)....3, 9, 10, 18, 24

Colautti v. Franklin,
439 U.S. 379 (1979)....7

Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.,
554 U.S. 33 (2008)....8

Hardt v. Reliance Standard Life Ins. Co.,
560 U.S. 242 (2010)....8

TABLE OF AUTHORITIES *(continued)*

Page(s)

Harry v. Marchant,
291 F.3d 767 (11th Cir. 2002) 7, 18

Johnson v. Breeden,
280 F.3d 1308 (11th Cir. 2002) 7, 20

Kalkunte v. DVI Fin. Servs., Inc.,
Nos. 05-139, 05-140, 2009 WL 564738 (ARB Feb. 27, 2009) 27

King v. Burwell,
135 S. Ct. 2480 (2015) 4, 21, 22

Koch Foods, Inc. v. Sec'y, U.S. Dep't of Labor,
712 F.3d 476 (11th Cir. 2013) 8

Lawson v. Suwannee Fruit & S.S. Co.,
336 U.S. 198 (1949) 22

Morrison v. Nat'l Australia Bank Ltd.,
561 U.S. 247 (2010) 17

Northwest Austin Municipal Utility District Number One v. Holder,
557 U.S. 193 (2009) 22

Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.,
471 F.3d 1350 (D.C. Cir. 2006) 23

Philko Aviation, Inc. v. Shacket,
462 U.S. 406 (1983) 22

Polycarpe v. E&S Landscaping Serv., Inc.,
616 F.3d 1217 (11th Cir. 2010) 7

Stansell v. Revolutionary Armed Forces of Colombia,
704 F.3d 910 (11th Cir. 2013) 7

Stenberg v. Carhart,
530 U.S. 914 (2000) 7, 20

TABLE OF AUTHORITIES *(continued)*

Page(s)

United States v. Nix,
438 F.3d 1284 (11th Cir. 2006) 10

United States v. Rush,
874 F.2d 1513 (11th Cir. 1989) 18

United States v. Weaver,
275 F.3d 1320 (11th Cir. 2001) 10

United States v. Wilson,
503 U.S. 329 (1992) 10, 11

Statutes

15 U.S.C. § 78u-6(a) 2, 5, 8, 9, 10, 20, 22

15 U.S.C. § 78u-6(b) 5, 9

15 U.S.C. § 78u-6(c) 9

15 U.S.C. § 78u-6(d) 9

15 U.S.C. § 78u-6(e) 9

15 U.S.C. § 78u-6(g) 9

15 U.S.C. § 78u-6(h) 2, 3, 6, 8, 9, 11, 13, 22, 26

15 U.S.C. § 78u-6(i) 9

18 U.S.C. § 1514A(a) 25

18 U.S.C. § 1514A(b) 25

18 U.S.C. § 1514A(c) 25

Other Authorities

H.R. 4173, 111th Cong. § 7203(a) (2009) 18

TABLE OF AUTHORITIES *(continued)*

Page(s)

H.R. 4173, 111th Cong. § 922(a) (2010) 18

S. Rep. No. 111-176 (2010) 4, 11

Jessica Fink, *Unintended Consequences: How Antidiscrimination Litigation Increases Group Bias in Employer-Defendants*, 38 N.M. L. Rev. 333, 340 (2008) 28

Regulations

17 C.F.R. § 240.21F-2(b)(1) 24

76 Fed. Reg. 34,300 (June 13, 2011) 5, 13, 24

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 Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank" or the "Act") in accordance with the terms of the statute, and in the speedy dismissal of whistleblower retaliation claims that fall outside the Act's scope. Meritless claims and expanding litigation have a direct impact on the viability, growth, and survival of businesses nationwide.

---

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E) and this Court's Rule 29-2, 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.

Here, the interpretation of the Act espoused by *amicus curiae* Securities and Exchange Commission ("SEC" or the "Commission") would greatly expand both 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.

STATEMENT OF THE ISSUE

1. Whether the statutory definition of the term "whistleblower" in 15 U.S.C. § 78u-6(a)(6), which Congress expressly commanded "shall apply" in Section 78u-6, applies to paragraph (h)(1)(A)(iii) of Section 78u-6.

SUMMARY OF ARGUMENT

The district court properly dismissed the Dodd-Frank whistleblower retaliation claim in this case: Appellant was not a "whistleblower" under the Act because he had not made a complaint to the SEC when he was terminated.

I. Section 78u-6 unambiguously provides a cause of action only to "whistleblowers," which subsection 78u-6(a)(6) defines as individuals who have provided information "to the Commission." In turn, subsection 78u-6(h)(1)(A) lists the actions taken by such "whistleblowers" for which employers may not retaliate. When he was fired, Appellant was not a "whistleblower" because he did

not report "to the Commission," so he is not protected against retaliation for taking the actions listed in paragraph 78u-6(h)(1)(A)(iii).

II. Because the statutory language here is clear, "that is the end of the matter." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). There is no ambiguity in Section 78u-6 that justifies substituting the SEC's preferred definition of "whistleblower" for that enacted by Congress. Nor can the SEC manufacture ambiguity by arguing that applying the statute according to its plain terms produces results that conflict with the SEC's own (erroneous) understanding of Dodd-Frank's purpose. Even if the statute were ambiguous, the SEC's rule would not be owed deference because the SEC did not exercise discretion in issuing it and it is an unreasonable interpretation of the statute.

The unreasonableness of the SEC's interpretation is confirmed by the two leading court of appeals decisions that purport to follow it. Both the Second Circuit, in *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015), and the Ninth Circuit, in *Somers v. Digital Realty Trust Inc.*, --- F.3d ---, 2017 WL 908245 (9th Cir. Mar. 8, 2017), spurn the rationale offered by the SEC and proffer their own, equally mistaken explanations for arriving at the same interpretation. But there is no justification, as the Second Circuit suggests, for deviating from the plain meaning of a statute on the basis of when in the legislative process particular language was added. And neither the SEC nor, evidently, any prior court to

address the issue has gone so far as the Ninth Circuit, which concluded that the Dodd-Frank Act unambiguously compels the interpretation adopted by the Commission, a contention that stretches the Supreme Court's decision in *King v. Burwell*, 135 S. Ct. 2480 (2015), well past the breaking point.

III. Failing to read Section 78u-6 according to its plain terms would undermine the anti-retaliation provisions of the Sarbanes-Oxley Act ("SOX"), giving claimants who never reported to the SEC discretion and incentives to bypass Sarbanes-Oxley's procedures. This would render SOX's anti-retaliation provisions largely superfluous and disrupt the carefully constructed anti-retaliation programs established by Congress.

For all of these reasons, this Court should affirm.

ARGUMENT

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

Dodd-Frank amended the Securities Exchange Act of 1934 by adding 15 U.S.C. § 78u-6, which 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 leading to successful enforcement actions. 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. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300 (June 13, 2011).

The question before this Court is who counts as a "whistleblower" under Section 78u-6. The plain meaning of the statute supplies the answer.

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 to be a "whistleblower" under Section 78u-6.

Section 78u-6 begins by stating that "[i]n this section the following definitions shall apply." 15 U.S.C. § 78u-6(a). Subsection 78u-6(a)(6) defines "whistleblower" to "mea[n] 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). To be a "whistleblower" under Section 78u-6, then, one must provide information "to the Commission."

Under subsection 78u-6(h)(1)(A), "whistleblowers" receive "[protection]" against certain adverse employment actions taken in "retaliation" for enumerated "lawful act[s] done by the whistleblower." *Id.* § 78u-6(h)(1)(A). That subsection provides in full:

> **(h) Protection of whistleblowers**
>
> * * *
>
> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, 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 78j-1(m), section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

Together, these provisions recognize that employees who "whistleblow" to the SEC may engage in other, related actions for which they will also be protected: An employee who has made a report to the Commission may be called to testify or assist an investigation related to that information, or may raise the same issue with her employer or exercise other related rights or responsibilities. That employee is

protected from retaliation for all these activities, not merely in connection with her initial report.

That employee, however, must be a Dodd-Frank "whistleblower." The "statute includes an explicit definition" of "whistleblower"—one who provides information "to the Commission"—and this Court "must follow that definition." *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000); *see also Burgess v. United States*, 553 U.S. 124, 129 (2008) ("Statutory definitions control the meaning of statutory words." (internal quotation marks omitted)). And because the "statutory definition [here] declares what [the] term ['whistleblower'] 'means' rather than 'includes,' any meaning not stated is excluded." *Stansell v. Revolutionary Armed Forces of Colombia*, 704 F.3d 910, 915 (11th Cir. 2013) (citing *Colautti v. Franklin*, 439 U.S. 379, 392-93 & n.10 (1979)). That is true "even if it differs from the term's ordinary meaning." *Johnson v. Breeden*, 280 F.3d 1308, 1325 (11th Cir. 2002); *Harry v. Marchant*, 291 F.3d 767, 771 (11th Cir. 2002) (en banc) (same); *see also Polycarpe v. E&S Landscaping Serv., Inc.*, 616 F.3d 1217, 1222-23 (11th Cir. 2010) ("[W]here Congress has provided a specific statutory definition . . . we may not ignore it: it is our obligation to give meaning to all of the statutory language that Congress enacted.").

The Fifth Circuit applied the statute according to its plain terms in *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620 (5th Cir. 2013). There, the court explained

that the "whistleblower" definition in Section 78u-6(a)(6) establishes "who is protected," while the anti-retaliation provision in Section 78u-6(h)(1)(A) specifies "what actions" taken by that person are protected. *Id.* at 624-26. Any other reading of Section 78u-6 "would read the words 'to the Commission' out of the definition of 'whistleblower' for purposes of the whistleblower-protection provision." *Id.* at 628. The court therefore declined to defer to the SEC's regulation because the statute is "unambiguous[]," and because the regulation "redefines 'whistleblower' more broadly" than the statute. *Id.* at 629-30.

The Fifth Circuit's conclusion was correct, and this Court, too, should enforce Dodd-Frank's "plain and unambiguous statutory language according to its terms." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010).

B. The Context Of The Dodd-Frank Whistleblower Provision Confirms The Plain Meaning Of The Statutory Language.

The surrounding context of Section 78u-6 confirms that its definition of "whistleblower" applies throughout the section.

Although "titles and section headings 'cannot substitute for the operative text of the statute,' they 'are tools available for the resolution of a doubt about the meaning of a statute.'" *Koch Foods, Inc. v. Sec'y, U.S. Dep't of Labor*, 712 F.3d 476, 485 (11th Cir. 2013) (quoting *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008)). The Section here is titled "Securities whistleblower incentives and protection," and the subsection is titled "Protection of

whistleblowers." 15 U.S.C. § 78u-6(h). "Congress . . . used the term 'whistleblower' throughout subsection (h) and, therefore, [courts] must give that language effect." *Asadi*, 720 F.3d at 627. Congress did not use "whistleblower" in subsection 78u-6(h)(1) in some broader or different sense than it did everywhere else in Section 78u-6: Every mention of the word "whistleblower" in Section 78u-6 confirms that the individuals covered and thus protected by the anti-retaliation provisions 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).

II. The SEC's Rule Is Due No Deference, And The Arguments Advanced In Support Of That Rule Are Flawed.

Despite Section 78u-6's straightforward text, the SEC contends that under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), this Court should defer to the interpretation of the statute set forth in the Commission's "bounty" rule. But *Chevron* does not apply because the statute is not ambiguous. And even if it were ambiguous, no deference is owed because the rule was not an exercise of the SEC's discretion and is an unreasonable interpretation of the statute.

A. *Chevron* Does Not Apply Because Section 78u-6 Is Unambiguous.

The SEC's rule is due no deference because "Congress has directly spoken to the precise question at issue," so this Court "must give effect to the

unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. The SEC's arguments that Section 78u-6 is "ambiguous" are meritless.

As illustrated above, the plain meaning of the Dodd-Frank Act is that to be a "whistleblower" protected from retaliation for the disclosures listed in paragraph (iii), one must report a violation "to the Commission." § 78u-6(a)(6). In this Circuit, "there is only 'one recognized exception to the plain meaning rule—absurdity of results.'" *United States v. Weaver*, 275 F.3d 1320, 1331 (11th Cir. 2001) (quoting *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1228 (11th Cir. 2001)). This is a "very narrow exception" that applies only where "adhering to the plain meaning rule is not just unwise but is clearly absurd, is truly absurd, and results in an absurdity that is so gross as to shock the general moral or common sense." *United States v. Nix*, 438 F.3d 1284, 1286 (11th Cir. 2006) (citations and internal quotation marks omitted). That high hurdle is not met here. Indeed, the Second Circuit in *Berman* "properly disclaim[ed] reliance on the absurdity canon," 801 F.3d at 158 n.1 (Jacobs, J., dissenting); *see id.* at 150, and the SEC does not seriously advance that exception here.[2] Under this Court's precedents, that should be "the end of the matter." *Chevron*, 467 U.S. at 842.

---

[2] Citing *United States v. Wilson*, 503 U.S. 329, 334 (1992), the SEC states that "an interpretation that produces an 'arbitrary' or 'absurd' result should be avoided"

[Footnote continued on next page]

The SEC nonetheless argues that it is unclear whether the definition of "whistleblower" applies to paragraph 78u-6(h)(1)(A)(iii) because, if the statute is applied according to its plain terms, "the disclosures protected under clause (iii) would be significantly restricted," undermining Congress's purported goal of fostering internal complaints. SEC Br. 18, 20. The SEC is wrong on all counts.

1. The SEC errs by suggesting that Dodd-Frank's purpose was to encourage internal reports of securities violations. SEC Br. 31; *see Somers*, 2017 WL 908245, at *1. To be sure, internal reporting is to be encouraged, the Sarbanes-Oxley Act placed considerable weight on it, and the SEC—in implementing the Dodd-Frank bounty program—took certain steps to foster internal reporting. But Congress was pursuing something different than internal reporting when it adopted the "whistleblower" provisions of the Dodd-Frank "bounty" program: it was incentivizing reports *to the Commission*. *See* S. Rep. No. 111-176, at 100. Evidently, eight years after Sarbanes-Oxley's emphasis on internal reporting, Congress decided that stronger medicine was needed to curtail financial fraud and corporate misconduct. Dodd-Frank is thus carefully constructed to increase the number and quality of complaints provided to the SEC by providing financial

---

[Footnote continued from previous page]

(SEC Br. 35), but *Wilson* did not involve a statutorily-defined term, let alone set one aside under the absurdity canon.

incentives and added protections to those who follow Dodd-Frank procedures. *See id.*; *Asadi*, 720 F.3d at 623.

The SEC repeatedly errs when it mistakes its *own* avowed purpose "in crafting rules to implement the award program" (SEC Br. 10) for Congress's purpose in enacting the Dodd-Frank whistleblower provision. *See also* SEC Br. at 2-4, 10-12, 16, 29-30. An agency's purpose in adopting a rule does not trump Congress's purpose in enacting the statute—much less the plain language that Congress enacted. Thus, for example, while the SEC may prefer "parity between individuals who first report to the Commission and those who first report internally," *id.* at 30, Congress saw it differently, electing to reward those who report to the Commission with potentially millions of dollars in bounty money. Moreover, at the time of the bounty rulemaking, the SEC's avowed concern for fostering internal complaints was but one of numerous considerations it cited—and at critical points, it decided that consideration must yield to the language of the bounty provision and its central purpose: "promot[ing] 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." 76 Fed. Reg. at 34,308. "[P]roviding information to persons conducting an internal investigation," the Commission said, "may not . . . achieve the statutory purpose of

getting high-quality, original information about securities violations directly into the hands of Commission staff." *Id.*

2. Even if the purpose of Section 78u-6 had been to promote internal reporting, the SEC is wrong that applying the statutory definition according to its terms would impair that purpose. Rather, the reading adopted by the court below would protect and foster external *and* internal reporting. The Dodd-Frank anti-retaliation provision recognizes that someone who has "whistleblown" to the SEC is likely to engage in other actions that may attract retaliatory animus—testifying in a subsequent SEC proceeding, or raising the issue internally. The whistleblower who reports to the SEC knows that she has enhanced Dodd-Frank remedies for her internal reports as well.

The SEC's suggestion that an employer might not be liable for firing a Dodd-Frank whistleblower for an internal complaint, because the employer "would appear to lack the requisite retaliatory intent," is incorrect and fails again to adhere to the plain statutory language. SEC Br. 23. If an employer "discriminate[s] against" an employee "because of any lawful act done" by the employee pursuant to paragraph (iii), that supplies the requisite retaliatory intent. § 78u-6(h)(1)(A). And if that employee is a protected whistleblower because of a prior (or simultaneous) report to the SEC, she is entitled to Dodd-Frank's enhanced remedies for that retaliatory action. The SEC cannot *read out* the requirement that

the employee be a "whistleblower," by *reading in* a requirement that the employer be retaliating specifically for the act that made her a whistleblower in the first instance, rather than for "any lawful act" within the meaning of subsection (h)(1).

For these and other reasons, reading the statute according to its terms does not "significantly restrict" the disclosures protected under paragraph (iii), nor require that reporting under that subsection be "simultaneous" with the reporting to the SEC, as *Berman* assumed without explanation. 801 F.3d at 151. Under the statute's plain terms, a whistleblower is protected for making the disclosures in paragraph (iii) when she:

- Reports to the SEC, then reports internally and is fired for the internal reporting;
- Simultaneously reports both to the SEC and internally and is fired for either disclosure (the situation contemplated in *Asadi*, 720 F.3d at 627-28); or
- Reports internally, then reports to the SEC, then is fired for the internal reporting (the situation contemplated in *Berman*, 801 F.3d at 151 n.5).

The coverage provided by Dodd-Frank's plain language in these circumstances cannot be dispelled by *Berman*'s and *Somers*'s armchair speculation that "[e]mployees are not likely to report in both ways." *Somers*, 2017 WL 908245, at *4; *see Berman*, 801 F.3d at 151. In fact, people who complain to one person are likely to complain to others. *Berman*, 801 F.3d at 158 (Jacobs, J., dissenting). In the experience of the Chamber's members, employees often advance complaints through multiple internal avenues—such as to their manager,

human resources, and a "hotline"—while also advising authorities outside the company, such as legislators or the SEC.[3] *Somers* itself identifies a case where an employee might report "in both ways," in the very same paragraph where the court speculated that employees would not do so. *See* 2017 WL 908245 (explaining that lawyers and auditors cannot "repor[t] to the SEC until after they have reported internally"). Another case—which Chamber members have experienced—is the employee who complains to the SEC, and then complains internally when instructed by managers to continue a practice that she considers improper and reported to the government. In these and similar circumstances, Dodd-Frank spares courts the trouble of divining whether it was the report to the SEC or the internal complaint that prompted any retaliatory action—if the employee is a statutory "whistleblower," she is protected regardless which specific complaint prompted the action.

---

[3] Although employees can and do advance complaints through both internal and external avenues, it is best when employees report internally first. Reporting to the SEC before giving companies the opportunity to take immediate remedial action undermines the effective functioning of corporate compliance programs, including by depriving corporations of information they need to investigate and address misconduct quickly and effectively. *See*, *e.g.*, Cmt. Letter from Chamber et al. to Secretary Murphy, at 4-5, 13-16 (Dec. 17, 2010), *available at* https://www.sec.gov/comments/s7-33-10/s73310-189.pdf.

Only employees who report a violation only internally, and then are retaliated against (as Appellant alleged), would obtain no additional benefits under Dodd-Frank. It was entirely reasonable for Congress to withhold Dodd-Frank's stepped-up benefits in such cases, given Dodd-Frank's purpose of encouraging reports to the SEC. Individuals who report only internally still retain the protections of Sarbanes-Oxley.

3. In opining that applying the statute's plain terms would leave paragraph (iii) with an "extremely limited scope," 801 F.3d at 151, *Berman* relied heavily on the fact that some lawyers and auditors "cannot report wrongdoing to the Commission until after they have reported the wrongdoing to their employer." 801 F.3d at 151. *Accord Somers,* 2017 WL 908245, at *4. But lawyers and auditors are not—as *Somers* asserted—left "without protection" for internal reporting (2017 WL 908245, at *3); they are protected by Sarbanes-Oxley. As Judge Jacobs observed, "Congress may well have considered that additional incentives should not be offered to get lawyers and auditors to fulfill existing professional duties, for the same reason reward posters often specify that the police are ineligible." *Berman*, 801 F.3d at 159 (Jacobs, J., dissenting). Lawyers and auditors account for a small portion of SOX "whistleblower" cases; it is the tail-wagging-the-dog to seize on those small classes of claimants to justify the broad, counter-textual reading advocated by the Commission.

For all of these reasons, the SEC, *Berman*, and *Somers* err in supposing that Dodd-Frank's plain language "significantly restricts" paragraph (iii). And even if they were correct, the statute would not somehow become ambiguous as a result. A judge's "job is to follow the text even if doing so will supposedly undercut a basic objective of the statute." *Baker Botts LLP v. ASARCO LLC*, 135 S. Ct. 2158, 2169 (2015) (internal quotation marks omitted); *see Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 270 (2010) (The 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.").

4. In reaching the conclusions they did, the courts in *Berman* and *Somers* committed other interpretive errors as well. Those courts' conflicting rationales confirm the merit of adhering to the plain statutory definition of whistleblower.

Although it purported to give *Chevron* deference to the SEC's statutory interpretation, the court in *Berman* pronounced itself "not persuaded" by one of the Commission's principal textual arguments. That argument, the court said—and "all" the textual arguments by the parties and *amici*—"ignore the realities of the legislative process" and the interpretative "issue" that *Berman* saw at the heart of the case: "[W]hether the [statutory] definition should apply to a late added subdivision of a subsection that uses the defined term." 801 F.3d at 154.

The answer is plainly "yes." There is no "late-added subdivision" exception

to the plain meaning rule. Congress commanded that the "whistlebower" definition "shall apply" to the Section in which it is located. That is "the end of the matter." *Chevron*, 467 U.S. at 842. Courts may not "use the legislative history to *create* ambiguity." *United States v. Rush*, 874 F.2d 1513, 1514 (11th Cir. 1989); *Marchant*, 291 F.3d at 772 ("[w]here the language of [the] statute is unambiguous," the court "need not, and ought not, consider legislative history"). And when "no legislative history even hints at an answer," *Berman*, 801 F.3d at 155, it is especially inappropriate to nonetheless use that history to impeach plain statutory language, citing the perceived "hast[e]" with which Congress acted, and the judges' own "doubt[s]" about what "the conferees . . . expected." *Id. See also id.* at 153 (inquiry into legislative history "yields nothing").[4]

Berman's exception to the plain-meaning rule for "late-added subdivisions" has a particularly perverse result in the case of the "subdivision" here. Because of

---

[4] Although legislative history should not be consulted here because the statutory language is clear, in fact the history confirms that Congress used the term "whistleblower" in paragraph (iii) to have the same meaning and scope as the rest of Section 78u-6. The versions of the bill passed by the House and Senate both defined "whistleblower" as someone who provides information "to the Commission," but the House bill broadly prohibited retaliation against an "employee, contractor, or agent." This broad language 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).

cases like *Berman*, paragraph (iii) is far and away the most frequently deployed provision of the Dodd-Frank anti-retaliation protections, resulting in many more federal court cases than paragraphs (i) and (ii). The upshot of *Berman*'s reasoning, then, is that paragraph (iii) must be given the broad reading that makes it the dominant provision of the Dodd-Frank anti-retaliation section *precisely because* it was "hastily" added "at the last minute" by busy legislators, with "no one notic[ing]" the consequence of what they were doing. That makes no sense. If anything, *Berman*'s characterization of paragraph (iii)'s adoption is further reason to eschew an expansive, counter-textual interpretation that makes *internal* complaints the most frequently-litigated circumstance under a section meant to promote *external* reporting.

Just as *Berman* was "not persuaded" by the SEC's explanation for its interpretation, 801 F.3d at 154, so the Ninth Circuit took a different path than the SEC (and *Berman*) in arriving at its decision. The Act's "anti-retaliation provision unambiguously and expressly protects from retaliation all those who report to the SEC and who report internally," that court concluded. *Somers*, 2017 WL 908245,

at *3.[5]

The Ninth Circuit may well be the first court to read Dodd-Frank's plain meaning to compel this conclusion. Not coincidentally, the court did not quote or address subsection 78u-6(a)(6)'s explicit command that "[i]n this section the following definitions," including that of "whistleblower," "shall apply." Nor did it cite any authority for ignoring such an express Congressional command.[6] That is because the definition controls: Where "[t]he plain language of [a] definition provision is clear, and where the statutory language provides an explicit definition," this Court must "apply it even if it differs from the term's ordinary meaning." *Johnson*, 280 F.3d at 1325 (citing *Stenberg*, 530 U.S. at 942).

---

[5] The court also stated that even if the statute were ambiguous, the SEC "has resolved any ambiguity and its regulation is entitled to deference." *Somers*, 2017 WL 908245, at *4.

[6] *Somers* quotes Reading Law for the proposition that statutory definitions "can be contradicted by other indications." 2017 WL 908245, at *3 (citing Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 228 (2012)). But Scalia and Garner explain in the very same paragraph that "[i]t is very rare that a defined meaning can be replaced with another permissible meaning of the word on the basis of other textual indications; the definition is virtually conclusive," and that it is only "where the artificial or limited meaning would cause a provision to contradict another provision" that "the normal meaning should be applied." *Id.* Here, applying the definition of "whistleblower" does not cause any provisions to conflict, as *Berman* conceded, and the SEC does not suggest any "normal meaning" of "whistleblower" that should apply instead. 801 F.3d at 150.

To overcome Congress's command that the definition "shall apply," the court relied solely on *King v. Burwell*, 135 S. Ct. 2480 (2015). But *King* is inapposite.[7]

Somers relied on *King* for the proposition that "[t]he use of a term in one part of a statute 'may mean [a] different thing[]' in a different part, depending on context." 2017 WL 908245, at *3 (quoting *King*, 135 S. Ct. at 2493 n.3). For one thing, the quoted statement in *King* was *dicta*. 135 S. Ct. at 2493 n.3 ("Because the other provisions . . . are not at issue here, we do not address them."). For another, the question here is not whether one "part" of a statute means the same thing "in a different part" or a "later . . . provision"; it is whether a definitional provision that Congress said "shall apply" in a short, concise section applies to a provision falling squarely in that section. 2017 WL 908245, at *3.[8] Moreover, in *King* the Court cited "extraordinary" circumstances that justified departing from the "most natural meaning" of the statutory language, 135 S. Ct. at 2488, 2495; "to avoid what it considered the upending of a ramified, hugely consequential enactment." *Berman*,

---

[7] *Berman* also flirted with the notion that *King* justified ignoring the statutory definition. Ultimately, however, *Berman* properly distinguished *King*. 801 F.3d at 150 (conceding that "[t]he interpretation issue" in *King* was "far more problematic" and that unlike in *King*, here "there is no absolute conflict" between provisions). (The SEC does not rely on *King*.)

[8] *Berman* made a similar mistake, framing the question as "whether the statutory provision applies to another provision of the statute." 801 F.3d at 150.

801 F.3d at 159 (Jacobs, J., dissenting); *King*, 135 S. Ct. at 2496 (explaining that petitioners' interpretation would "destroy" insurance markets). By contrast, applying the plain meaning here would have no such effect—its only consequence is that those who report securities violations only to their employer will "enjoy the same protection every securities whistleblower had before the passage of Dodd-Frank." *Berman*, 801 F.3d at 159 (Jacobs, J., dissenting). Unlike the Court's suggestion in *King*, "[n]o markets collapse, no castles fall." *Id.*[9]

*   *   *

The Dodd-Frank whistleblower section has a simple structure: The "whistleblower" "definition" in subsection 78u-6(a)(6) determines "who is protected," and the anti-retaliation provision in subsection 78u-6(h)(1)(A) specifies "what actions" taken by those persons are protected. *Asadi*, 720 F.3d at 624-26.

---

[9] For the same reason, the SEC's reliance (SEC Br. 21, 28) on *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949) is misplaced—this is not one of the "unusual case[s]" where applying the statute's plain terms would "destroy" the purpose of the Dodd-Frank Act.

The other two cases cited by the SEC on this point are different in kind. *See* SEC Br. 28. In *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009)—an "unusual case," by the Court's own admission—the Court declined to apply a definition contained in one section of a statute to a different section of the same Act. *Id.* at 207. 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.'" No such proviso exists here, nor does the context "require" a different meaning.

The SEC, *Berman*, and *Somers* all misapprehend this, as reflected in *Somers*' observation that the SEC rule "says that anyone who does any of the things described in subsections (i), (ii), and (iii) of the anti-retaliation provision is entitled to protection . . . [t]hey are all whistleblowers." *Somers*, 2017 WL 908245, at *4. That is indeed what the SEC rule says, but it turns the statute upside down: It makes *what the retaliation was for* determinative of *who is protected*, whereas the statute extends protections against retaliation only to "whistleblower[s]" who report "to the Commission." The "whistleblower" definition governs paragraph (iii), not vice versa.

B. Even If The Statute Were Ambiguous, The SEC's Rule Is Owed No Deference.

Even if the statute were ambiguous—and it is not—the Court should not give *Chevron* deference to the interpretation in the SEC's "bounty" rule.

First, 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. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006); *see also Arizona v. Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002). But in promulgating the "bounty" rule, the SEC never purported to exercise its discretion to resolve a statutory ambiguity. Instead, 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.

Second, an agency interpretation receives *Chevron* deference only when it is "reasonable." *Chevron*, 467 U.S. at 845. Here, the SEC's rule is unreasonable because, by its own admission, the Commission substituted Congress's definition of "whistleblower" with a different definition of the Commission's own design. SEC Br. 27 (admitting that the "bounty" rule "specif[ies] what persons are whistleblowers"). "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), *reprinted in* SEC Br. 15. Congress has already defined "whistleblower," however, and the SEC had no authority to give that statutory term a different meaning.

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

Congress has already established a comprehensive regime to protect the "internal" whistleblowers that the SEC seeks to cover with its counter-textual reading of Dodd-Frank. In Sarbanes-Oxley, employees who have experienced

retaliation for internally reporting securities violations may file a complaint with the U.S. Department of Labor ("DOL"). 18 U.S.C. § 1514A(a)(1). The Occupational Safety and Health Administration ("OSHA") investigates the complaint, and may order reinstatement of the employee. Either party may appeal OSHA's findings to an Administrative Law Judge ("ALJ"), and then to the Department's Administrative Review Board and, in certain circumstances, the employee can commence 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 in certain circumstances. 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 may 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 undermined. Extending the limitations period from 180 days to as long as 10 years will significantly increase the number of cases brought, as claimants who are timed-barred under Sarbanes-Oxley proceed under Dodd-Frank instead. Even claimants who are not time-barred will often prefer the double damages uniquely available under Dodd-Frank.

That 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 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 subsection 78u-6(h)(1). *See Bilski v. Kappos*, 561 U.S. 593, 607-08 (2010) ("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." (citation omitted)).

The SEC and *Somers* assert that the Sarbanes-Oxley regime will remain attractive for claimants because it "would likely be significantly less costly and stressful." *Somers*, 2017 WL 908245, at *4; *see* SEC Br. 25-26. This assertion reflects a misunderstanding of the SOX regime—it is not true that DOL "prepar[es] the evidence for an administrative law judge's review," SEC Br. 26, or

that DOL "tak[es] responsibility for asserting the claim on the whistleblower's behalf." *Somers*, 2017 WL 908245, at *4. OSHA does conduct an investigation and may order relief, but its findings are routinely appealed to an ALJ, after which the matter proceeds as private litigation in which DOL gives no assistance to the claimant. This DOL process is protracted and therefore often less attractive than going directly to court for claimants, who must proceed before the 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.

Even if the costs are lower for Sarbanes-Oxley claims, claimants have a powerful incentive to proceed under Dodd-Frank—double damages. The SEC and *Somers* argue that plaintiffs with "minimal" monetary claims may prefer the opportunity for emotional-distress damages under Sarbanes-Oxley. SEC Br. 26; *Somers*, 2017 WL 908245, at *4. But 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.[10] If emotional-distress damages did loom

---

[10] *E.g.*, *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).

large in a case, a claimant would likely pursue Sarbanes-Oxley *and* Dodd-Frank claims, rather than abandon the chance at double damages under Dodd-Frank—further reason to reject an interpretation under which the two statutes routinely cover the same 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."). 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 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 17, 2017

Respectfully submitted,

/s/ Eugene Scalia

Eugene Scalia
Counsel of Record
Christopher J. Baum
GIBSON, DUNN & CRUTCHER, LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
(202) 955-8500

Counsel for Amicus Curiae United States Chamber of Commerce

Kate Comerford Todd
Steve Lehotsky
Janet Galeria
U.S. CHAMBER
LITIGATION CENTER, INC.
1615 H St., N.W.
Washington, DC 20062
(202) 463-5337

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,500 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(f).

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.

Dated: March 17, 2017

/s/ Eugene Scalia

Eugene Scalia
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
escalia@gibsondunn.com
(202) 955-8500

CERTIFICATE OF SERVICE

I certify that on the 17th day of March 2017, I filed the foregoing brief using this Court's Appellate CM/ECF system, which effected service on all parties.

/s/ Eugene Scalia

Eugene Scalia
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
escalia@gibsondunn.com
(202) 955-8500