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United States Supreme Court Surveys: 2017 Term: Digital Realty Trust v. Somers: Whistleblowers and Corporate Retaliation

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Digital Realty Trust v. Somers: Whistleblowers and Corporate Retaliation

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INTRODUCTION

Consider the following sequence of events. Paul Somers is a Vice President of Portfolio Management at Digital Realty Trust, Inc. ("Digital Realty"), a real estate investment trust that owns, develops, and manages technology to make real estate transactions more efficient.[1] While working in Singapore, he reported to Kris Kumar, a Senior Vice President, who developed the Asian Pacific Region for Digital Realty.[2] Somers believed that Kumar had committed a number of securities violations, including hiding millions of dollars in cost overruns on a Hong Kong development.[3] He also believed Kumar eliminated certain internal controls in violation of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act).[4]

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1. Somers v. Dig. Realty Tr., Inc., 119 F. Supp. 3d 1088, 1092 (N.D. Cal. 2015), *aff'd*, 850 F.3d 1045 (9th Cir. 2017), *rev'd*, 138 S. Ct. 767 (2018).
2. *Id.*
3. *Id.*
4. *Id.*; *see* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

Rather than ignoring these suspicions of misconduct, Somers reported his concerns to Digital Realty's officers, directors, and/or managing agents.[5] It is undisputed that Somers never reported his concerns of misconduct to the Securities and Exchange Commission (SEC).[6] Shortly after making these internal reports, and despite his record of superior achievements, Somers was terminated from Digital Realty.[7]

Somers brought various claims against Digital Realty in federal court for his allegedly wrongful termination, including a whistleblower retaliation claim under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act).[8] Digital Realty moved to dismiss the retaliation claim arguing that Somers could not seek protection under the Dodd-Frank Act because he did not report the alleged violations to the SEC.[9] The district court denied the motion finding that the Dodd-Frank Act "does not necessitate recourse to the SEC prior to gaining 'whistleblower' status . . . ."[10] Finding the term "whistleblower" ambiguous, the court applied the doctrine established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, and accorded deference to the SEC's definition of whistleblower.[11] The SEC interpreted the term whistleblower expansively to include employees who internally report to their supervisors without also reporting to the SEC.[12] The Ninth Circuit affirmed the decision.[13] The Supreme Court unanimously reversed the decision holding that *Chevron* deference should not be given to the SEC

5. *Somers*, 119 F. Supp. 3d at 1092.

6. *See* Plaintiff's Opposition to Defendant's Motion to Dismiss at 2, Somers v. Dig. Realty Tr., Inc., No. 14-CV-05180-EMC, 2015 WL 13677868 (N.D. Cal. Feb. 19, 2015).

7. Complaint at 3, *Somers*, 119 F. Supp. 3d 1088 (No. 3:14 CV-05180).

8. *Id.* at 8–9. In addition to the whistleblower retaliation claim, Somers brought claims for disparate treatment and retaliation under Title VII of the Civil Rights Act of 1964, wrongful termination in violation of public policy, breach of contract, and defamation. *See id.*

9. *Somers*, 119 F. Supp. 3d at 1091–92.

10. Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 776 (2018) (citing *Somers*, 119 F. Supp. 3d at 1095–96).

11. *Id.* (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)).

12. *Id.* For a discussion of the SEC rule, see *infra* section I.B.

13. Somers v. Dig. Realty Tr., Inc., 850 F.3d 1045, 1045 (9th Cir. 2017), *rev'd*, 138 S. Ct. 767 (2018).

interpretation.[14] Under a textualist approach, the Court concluded that the plain language of the statute narrowly defined "whistleblower" to include only individuals who report their suspicions of misconduct directly to the SEC.[15]

Most whistleblowers report internally to their superiors, as Somers did, and many never reveal their suspicions of misconduct to the SEC.[16] These internal reporters can no longer bring claims in federal court under the Dodd-Frank Act and will instead have to file administrative complaints as required by the Sarbanes-Oxley Act, or in state court under various state statutes or common law.

Consequently, the case of *Digital Realty Trust, Inc. v. Somers* is likely to have a significant impact on corporate compliance programs.[17] Limiting whistleblower status under the Dodd-Frank Act undermines the protections available to attorneys and others who have mandatory reporting obligations but may be limited by state ethics rules from disclosing externally to the SEC. Further, employees and others who do not have mandatory reporting obligations may bypass corporate internal reporting protocols and report directly to the SEC. Although the *Digital Realty* Court suggested that Congress intended this result, it may have some unintended consequences, such as delaying corrective action, curtailing internal investigations, and draining government resources. Without protection under the Dodd-Frank Act, some employees may decide not to report suspicions of wrongdoing in order to retain their jobs and preserve their reputations.[18] Retaliatory measures can have devastating emotional and financial effects on whistleblowers and their families, which create a huge disincentive to reporting.[19]

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14. *Dig. Realty Tr.*, 138 S. Ct. at 781–82.

15. *See id.* at 776.

16. Jennifer M. Pacella, *Conflicted Counselors: Retaliation Protections*, 33 YALE J. ON REG. 491, 493 (2016) (citing a survey of the Ethics Resource Center finding that only two percent of employee-whistleblowers reported externally without also reporting internally).

17. *See infra* section II for a discussion of how the narrow definition may impact compliance programs.

18. Christina Pellino, *Don't Whistle While You Work – Unless You Whistle to the SEC*, 46 SETON HALL L. REV. 911, 912 (2015) (discussing how deference should be given to the SEC's interpretation of "whistleblower").

19. Pacella, *supra* note 16, at 493. In addition to being terminated from employment, whistleblowers may be blacklisted from entire industries, or ostracized and alienated from colleagues and friends. *See id.*

This Survey is intended to provide a summary of the *Digital Realty* case and discuss some of the consequences of the Court's narrow definition of whistleblower. Part I will discuss various protections offered to whistleblowers under the Sarbanes-Oxley Act, the Dodd-Frank Act, and various state statutes, and will discuss the *Digital Realty* decision. Then, Part II will discuss the impact that the decision may have on corporate compliance programs and some of the unintended consequences that may result from the Court's narrow interpretation. Finally, Part III will discuss how the Court's refusal to afford *Chevron* deference to the SEC interpretation may be a sign of the Court's willingness to reconsider the doctrine under the right circumstances.

I. SUPREME COURT ADOPTS NARROW DEFINITION OF WHISTLEBLOWER

A. Whistleblower Protection Under the Sarbanes-Oxley Act, the Dodd-Frank Act, and State Statutes

There are three sources of whistleblower protection: state statutes, common law wrongful discharge claims, and federal statutes (including the Sarbanes-Oxley Act and the Dodd-Frank Act).

1. State Statutes and Common Law

Traditionally most jurisdictions strictly adhered to the employment at-will doctrine, meaning that employers could terminate employees, and employees could resign, for any reason or for no reason at all.[20] As common law developed, some states adopted public policy exceptions to the at-will doctrine and restricted the ability of employers to terminate employees for certain reasons, such as refusing to violate the law or reporting such a violation.[21] Other courts began recognizing causes of action

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20. HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 133, at 272 (2d ed. Albany, N.Y., John D. Parsons, Jr. 1886).

21. *See, e.g.*, Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 387, 389 (Conn. 1980).

> It would be difficult to maintain that the right to discharge an employee hired at will is so fundamentally different from other contract rights that its exercise is never subject to judicial scrutiny regardless of how outrageous, how violative of public policy, the

for retaliatory discharge by implying a duty of good faith and fair dealing into the employment relationship.[22] In these tort actions, aggrieved employees were often awarded punitive damages for the employer's egregious conduct.[23] While most states afford some protection to whistleblowers, such protection is not adequate as employees are often required to identify a well-established law that is being violated in order to receive protection.[24]

In an attempt to provide additional protection, each state has adopted some form of whistleblower statute that protects employees from retaliation.[25] These laws were all passed with the same objective—"to expose, deter, and curtail wrongdoing."[26] However, the requirements that reporters must meet in order to be protected vary considerably.[27] Whether an employee is entitled to bring a claim often depends on the applicable state law. For instance, some statutes only protect external reporters,[28] some only protect certain classes of employees,[29] some only protect employees

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> employer's conduct may be........... [P]ublic policy imposes some limits on unbridled discretion to terminate the employment of someone hired at will.

Id. at 387.

22. Lord v. Souder, 748 A.2d 393, 400 (Del. 2000) (citing E.I. DuPont de Nemours & Co. v. Pressman, 679 A.2d 436, 442–44 (Del. 1996)) ("Delaware law has evolved, however, through recognition of a limited implied covenant of good faith and fair dealing as an exception to the harshness of the employment at-will doctrine.").

23. Jane P. Mallor, *Punitive Damages for Wrongful Discharge of At Will Employees*, 26 WM. & MARY L. REV. 449, 453 (1985) (analyzing the public policy of awarding punitive damages for wrongful discharge claims).

24. *See, e.g.*, Bohatch v. Binion, 977 S.W.2d 543, 543 (Tex. 1998) (holding that a law firm partner could be expelled from the partnership for accusing another partner of overbilling without exposing the partnership to a tort claim).

25. *See* Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L. J. 99, 108 (2000).

26. *Id.* at 100.

27. Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, at App. A (2004) (providing summaries of each state's whistleblower statute and listing relevant case law from each jurisdiction).

28. A few states only provide protection to employees who report misconduct to public bodies or to public officers with authority to act. *See* Callahan & Dworkin, *supra* note 25, at App. A.

29. Twenty-three states offer general protection to both private and public employees, while twenty-four states provide general protection to only public

after making a good faith attempt to determine accuracy of the report,[30] and some only protect reports of certain types of activity.[31] Further, the remedies available to aggrieved employees vary considerably.[32] Accordingly, state whistleblower protection has been described by several scholars as "murky, piecemeal, [and] disorganized."[33]

To highlight the disparate treatment of whistleblowers under state law, consider two prominent and respected whistleblowers: Sherron Watkins, Enron's Chief Financial Officer, and Cynthia Cooper, the head of internal auditing at WorldCom.[34] Each of these women played instrumental roles in exposing widespread corruption at corporations by raising concerns of accounting fraud to high-level executives. Neither of these employees reported their suspicions to a government agency. While there is no principled distinction in their respective situations, Cooper's whistleblowing would have been protected under Mississippi law,[35] while Watkins' whistleblowing would not have been protected under Texas law.[36] Neither Texas nor Mississippi have adopted broad whistleblower

employees. *See* Cherry, *supra* note 27, at App. A.

30. *See* Callahan & Dworkin, *supra* note 25, at 121 (explaining that Ohio only protects employees who make reasonable and good faith efforts to confirm accuracy of report before disclosure).

31. For example, the New York statute only provides protection to employees who report concerns relating to "a substantial and specific danger to the public health or safety." *See* N.Y. LAB. LAW § 740(2)(a) (McKinney 2002). New York courts interpreting this statute have held that financial fraud is not a danger to the public welfare and reporters of such misconduct are not protected under the statute. *See* Leibowitz v. Bank Leumi Trust Co. of N.Y., 152 A.D.2d 169, 180–81 (N.Y. App. Div. 1989) (holding that an employee who reported suspicions of fraudulent loan practices as not protected by the statute).

32. Callahan & Dworkin, *supra* note 25, at 129–30 (explaining that the majority of courts have not allowed punitive damages under the relevant whistleblower statute and a few courts have not allowed actual damages in the absence of express statutory language).

33. Cherry, *supra* note 27, at 1049.

34. *Id*. at 1035, 1039.

35. McArn v. Allied Bruce-Terminix Co., 626 So. 2d 603, 604 (Miss. 1993) (holding that "employee was not barred [by the employment at will doctrine] from [bringing] tort actions for damages if employee refused to participate in illegal act or if employee was discharged for reporting illegal acts of employer to employer or anyone else").

36. Austin v. Health Trust, Inc., 967 S.W.2d 400, 403 (Tex. 1998) (holding that "Texas does not recognize common law cause of action for retaliatory discharge of employee who reports illegal activities of others in workplace").

statutes to protect private employees such as Watkins and Cooper.[37] However, the Mississippi Supreme Court created a public policy exception to the at-will employment doctrine that restricts an employer from retaliating against an employee whistleblower.[38] To the contrary, Texas has not provided for such a general common law exception.[39]

2. *Federal Statutes*

The federal protection available to whistleblowers before the Sarbanes-Oxley Act has also been described as "piecemeal."[40] Federal whistleblower protection originated in the Civil Service Reform Act of 1978 (CSRA), which extended whistleblower protection to federal employees "who disclose government illegality, waste, and corruption."[41] This protection was seen as a necessary step toward achieving a more effective civil service.[42] A decade later, Congress passed the Whistleblower Protection Act of 1989 (WPA), which established a private cause of action for federal government employees.[43] The stated purpose of the WPA was to "strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government."[44] Many scholars have commented that the CSRA and WPA provide "illusory legal protections" and are

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37. The public employee whistleblower statute would not have protected Watkins. *See, e.g.*, TEX. GOV'T CODE ANN. § 554.001 (West 1994). Nor would the area specific whistleblower statutes. *See, e.g.*, TEX. AGRIC. CODE ANN. § 125.013 (West 1995) (protecting reporters of agricultural hazards); TEX. FAM. CODE ANN. § 261.110 (West 2002) (protecting reporters of child abuse and neglect).

38. *McArn*, 626 So. 2d at 607.

39. City of Midland v. O'Bryant, 18 S.W.3d 209, 210, 216 (Tex. 2000) (refusing "to impose a duty of good faith and fair dealing on employers in light of the variety of statutes that the Legislature has already enacted to regulate employment relationships"). *But see* Winters v. Houston Chronicle Publ'g Co., 795 S.W.2d 723, 723–25 (Tex. 1990) (creating a narrow exception to the employment at will doctrine, which requires a plaintiff to prove by a preponderance of the evidence that the discharge was based only on the plaintiff's refusal to perform an illegal act).

40. Cherry, *supra* note 27, at 1049.

41. Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended at various sections of 5 U.S.C.).

42. S. Rep. 95-969 (1978 U.S.C.C.A.N. 2723, 2746).

43. Pub. L. No. 101-12, 103 Stat 16 (codified in various sections of 5 U.S.C.).

44. Whistleblower Protection Act, 5 U.S.C. § 1201 (2006).

ineffective. Further, these statutes only extend protection to federal employees.

Many other federal statutes include whistleblower protections for specific types of disclosures.[45] Accordingly, a whistleblower would be protected if he or she reported a violation of a federal statute that included an anti-retaliation provision.[46] For example, if an employee reported an unfair labor practice violation, he or she would be protected under federal law.[47] On the other hand, if an employee reported a different type of violation, which did not include a retaliation provision, he or she would not be protected. However, this stark distinction has been relaxed by recent Supreme Court decisions. For example, the Court has held that several anti-discrimination statutes, including Title IX, that do not expressly provide for anti-retaliation claims afford an implied cause of action for retaliation and, therefore, provide federal whistleblower protection.[48]

Congress passed the Sarbanes-Oxley Act in response to the corporate and accounting scandals at the turn of the century. The Sarbanes-Oxley Act was intended to promote corporate accountability, protect investors, and protect employees who report misconduct.[49] It ameliorates some of the uneven treatment of whistleblowers under various federal statutes, state statutes, and common law exceptions to the traditional at-will doctrine.[50]

45. *See* Robert McCarthy, *Blowing in the Wind: Answers for Federal Whistleblowers*, 3 WM. & MARY POL'Y REV. 184, 186 n.10 (2012).

46. For a summary of the federal statutes that include whistleblower protections, see Cherry, *supra* note 27, at App. B.

47. 29 U.S.C. § 158(a)(4) (2000).

48. *See* Kasteu v. Saint-Gobain Performance Plastics, 563 U.S. 1, 4 (2011) (ruling that the anti-retaliation provision of the Federal Fair Labor Standards Act prohibits retaliation against employees who file complaints, including oral complaints); Gomez-Perez v. Potter, 553 U.S. 474, 477 (2007) (extending whistleblower protection to employees who assert claims under the Age Discrimination in Employment Act); Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 171 (2005) (extending whistleblower protection to employee who protested the discrimination of a girls basketball team under Title IX of the Civil Rights Act).

49. Several scholars have questioned the ultimate impact of the Sarbanes-Oxley Act, as it makes "no direct effort to exhort, encourage or command superior accounting or corporate governance." Lawrence Cunningham, *The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (And it Just Might Work)*, 35 CONN. L. REV. 915, 920 (2003).

50. *See* Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514(a) (2012).

Specifically, section 806 provides protections for employees of publicly traded companies who report fraud internally to a person with supervisory authority, to a member of Congress, or to a government agency, such as the SEC.[51]

Despite this seemingly broad protection offered to employees of publicly traded corporations, the Act imposes significant restrictions on employee suits. For example, before commencing a private cause of action, the Act requires an employee to exhaust all administrative remedies by filing with the Occupational Safety and Health Administration (OSHA).[52] Such a complaint must be filed within 180 days of the date of the violation or the date on which the employee became aware of the violation.[53] The employee may only bring an action in federal court if OSHA does not issue a final decision within 180 days of the filing of the complaint and the delay is not attributable to the bad faith of the employee.[54]

Another limitation of the Sarbanes-Oxley Act is that the remedy available to an aggrieved employee is compensatory—the goal is to make the aggrieved partly whole.[55] Such relief includes reinstatement with the same seniority, back pay with interest, and compensation for any special damages sustained as a result of

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51. 18 U.S.C. § 1514A(a)(1)(C).

> No [public company] or any officer, employee, contractor, subcontractor, or agent of such company . . . may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee . . . because of any lawful act done by the employee—(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes [certain enumerated violations] . . . when the information or assistance is provided to or the investigation is conducted by—(A) a Federal regulatory or law enforcement agency; (B) any member of Congress . . . or (C) a person with supervisory authority over the employee . . . .

Id. §§ 1514A(a)(1)(A)–(C).

52. *Id.* § 1514A(b)(1)(A). Congress delegated the administration of the Sarbanes-Oxley Act whistleblower claims to the Department of Labor, who further delegated to the OSHA. *See* Secretary's Order 5-2002, Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 67 Fed. Reg. 65,008 (Oct. 22, 2002) (assigning authority of 18 U.S.C. § 1514A to OSHA).

53. *Id.* § 1514A(b)(2)(D).

54. *Id.* § 1514A(b)(1)(B).

55. *Id.* § 1514A(c)(1).

discrimination, such as litigation costs and attorney fees.[56] Relief does not include recovery of punitive damages that were available under some statutes.[57]

Many scholars questioned whether the ostensibly broad reforms included in the Sarbanes-Oxley Act were mere rhetoric or legislative "silver bullets" that would effect change.[58] Many of the protections offered have been described as more "illusory than real."[59] Despite the additional protections offered to whistleblowers under the Act, the percentage of reporters dropped from 18.4% to 13.2% after its enactment.[60] This decrease in reporters has been attributed to the unavailability of punitive damages, the short statute of limitations, and not being entitled to a jury trial under the Act.[61]

To respond to shortcomings in financial regulation, Congress passed the Dodd-Frank Act. One shortcoming was the SEC's ability to identify securities law violations.[62] The Act therefore included "a new, robust whistleblower program designed to motivate people who know of securities law violations to tell the SEC."[63] Congress recognized that whistleblowers often face the difficult choice of remaining silent or reporting and committing "career suicide."[64] Therefore, the new program includes both incentives and protections.[65] The incentives, which are outside the scope of this

56. *Id.* § 1514A(2).

57. *Id.* §§ 1514A(c)(1)–(2).

58. Cunningham, *supra* note 49, at 919.

59. Deborah L. Seifert et al., *The Influence of Organizational Justice on Accountant Whistleblowing*, 35 ACCT. ORGS. & SOC'Y, 707, 709 (2010).

60. *See* Samuel C. Leifer, *Protecting Whistleblower Protections in the Dodd-Frank Act*, 113 MICH. L. REV. 121, 128 (2014).

61. Isaac Halverson, Note, *For Whom the Whistle Blows: Who Qualifies as a Dodd-Frank Whistleblower?*, 18 WAKE FOREST J. BUS. & INTELL. PROP. L. 505, 511 (2018).

62. Although Congress attempted to fill some gaps left open by the Sarbanes-Oxley Act, some scholars have noted that the "piecemeal evolution of whistleblower legislation . . . created regulatory and enforcement failures that ultimately diminish whistleblower protections, and in turn, thwart corporate governance." Meera Kahn, Comment, *Whistling in the Wind: Why Federal Whistleblower Protections Fall Short of Their Corporate Governance Goals*, 26 U. MIAMI BUS. L. REV. 57, 57 (2018).

63. S. REP. NO. 111-176, at 38 (2010).

64. *Id.* at 111.

65. On May 25, 2011, the SEC released a set of finalized rules to implement the whistleblower incentives and protections contained in section 922 of the Dodd-Frank Act. *See* 15 U.S.C. § 78u-6 (2012).

Survey, include a requirement for the SEC to pay significant monetary awards to individuals who provide information to the SEC, which leads to a successful enforcement action.[66] The protections include the creation of a private cause of action for certain individuals (including attorneys and employees) against corporations.

The Dodd-Frank Act expanded several protections offered to whistleblowers under the Sarbanes-Oxley Act by: (1) creating a cause of action for all employees, not only those of publicly traded companies, to immediately sue in federal court; (2) extending the statute of limitations; and (3) increasing the potential remedy available. Unlike the Sarbanes-Oxley Act, the Dodd-Frank Act does not include an administrative exhaustion requirement or 180-day statute of limitations. Instead, a whistleblower may bring a private cause of action against a current or former employer directly in federal court within six years of the alleged violation.[67] Further, the Dodd-Frank Act extends the remedies available to aggrieved employees to include not only back-pay, but also double back pay with interest.[68]

B. *Defining "Whistleblower" Under the Sarbanes-Oxley Act and the Dodd-Frank Act*

The Sarbanes-Oxley Act expressly extends whistleblower protection to any employee of a publically traded company who reports misconduct to a federal agency (including the SEC), any member of Congress, or anyone with supervisory authority.[69] Most relevant here, the Act prohibits certain companies from:

> Discriminat[ing] against an employee in the terms and conditions of employment because of any lawful act done by the employee—(1) to provide information, cause information to be provided, or otherwise assist in an

66. *See* 15 U.S.C. §§ 78u-6(b)(1)(A)–(B) ("[The SEC shall] pay an aggregate amount equal to—(A) not less that 10 percent, in total of what has been collected of the monetary sanctions imposed in the action or related actions; and (B) not more than 30 percent.").

67. *Id.* §§ 78u-6(h)(1)(B)(i), (h)(1)(B)(iii)(I)–(II). The default limitation period is six years, but in some cases the limitation period may be as long as ten years. *Id.*

68. *Id.* § 78u-6(h)(1)(C)(ii).

69. 18 U.S.C. §§ 1514A(a)(1)(A)–(C).

> investigation regarding any conduct which the employee reasonably believes constitutes a violation of [certain criminal statutes], any rule or regulation of the [SEC], or any provision of Federal law relating to fraud against shareholders.[70]

This protection would apply even if the information is only provided internally to a person with supervisory authority over the employee.[71]

Unlike the Sarbanes-Oxley Act, the Dodd-Frank Act's anti-retaliation provision does not include an express definition of whistleblower. Instead, the provision extends protection to any individual who makes a disclosure that is "required or protected under the Sarbanes-Oxley Act."[72] As explained, the Sarbanes-Oxley Act defines whistleblower as an employee who provides information to "a person with supervisory authority over the employee."[73] However, the definition section of the Dodd-Frank Act, section 21F, includes a definition of whistleblower.[74] This definition is narrower than the Sarbanes-Oxley definition, as it only includes individuals 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."[75]

Given these varying references to whistleblower under the Dodd-Frank Act, the SEC believed it was imperative to provide guidance. In 2011, the SEC adopted regulations implementing the Dodd-Frank Act and provided that for purposes of the anti-retaliation provision, SEC reporting is not required.[76] The SEC

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70. *Id.* § 1514(a)(1).
71. *Id.* § 1514A(a)(1)(C).
72. 15 U.S.C. § 78u-6(h)(1)(A)(iii).
73. 18 U.S.C. § 1514A(a)(1)(C).
74. 15 U.S.C. § 78u-6(a)(6).
75. The statute states that the definition shall apply to § 78u-6.
76. 17 C.F.R. § 240.21F-2(b)(1)(i)–(iii). The rule provides that:

> (1) [F]or purposes of the anti-retaliation protections afforded [under the Dodd-Frank Act] you are a whistleblower if:
>
> (i) You possess a reasonable belief that the information you are providing relates to a possible securities law violation . . . and;
>
> (ii) You provide that information in a manner described in [the Dodd-Frank Act].
>
> (iii) The anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award.

interpreted the statute expansively to not only include protections for individuals who report to the SEC, but also to individuals who only report to their supervisors. For purposes of the award provision, however, the rule requires a whistleblower to report suspicions of an alleged securities law violation to the SEC.[77]

Some courts, however, declined to follow this SEC regulation. This resulted in a circuit split over whether Dodd-Frank's whistleblower protection only extends to employees who internally report information to supervisors as implied by the definition in the anti-retaliation section, or if whistleblowers must report to the SEC to receive protection as required in the definition section. The Second, Fifth, and Ninth Circuits resolved these claims in three distinct ways. The Second Circuit concluded that because the term whistleblower was sufficiently ambiguous, *Chevron* deference should apply to the SEC rule extending protection to internal reporters.[78] The Ninth Circuit did not defer to the SEC rule, but still concluded that protection extends to internal whistleblowers.[79] By contrast, the Fifth Circuit concluded that the plain language of the statute only provides protection to individuals who disclose to the SEC.[80]

The Supreme Court recently resolved this circuit split and unanimously adopted a narrow definition of "whistleblower."[81] In *Digital Realty Trust, Inc. v. Somers*, the Court held that the Dodd-Frank Act only protected individuals who reported securities violations directly to the SEC.[82] In adopting the narrow definition of the Fifth Circuit, the Court relied on: (1) the express definition of "whistleblower" under the Act; and (2) the purpose of the Dodd-

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Id.

77. *Id.* § 240.21F-2(a)(2).

78. Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 155 (2d Cir. 2015) (holding that the Dodd-Frank Act covers internal reporters because the statute is ambiguous and *Chevron* allows for deference to the SEC's interpretation of whistleblower), *abrogated by* Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767 (2018).

79. Somers v. Dig. Realty Tr., Inc., 850 F.3d 1045, 1047 (9th Cir. 2017), *rev'd*, 138 S. Ct. 767 (2018).

80. Asadi v. G.E. Energy (USA) LLC., 720 F.3d 620, 630 (5th Cir. 2013) (holding that the employee was not protected against retaliation under the Dodd-Frank Act because the plain language of the whistleblower provision only protects individuals who disclose to the SEC).

81. *See Dig. Realty Tr.*, 138 S. Ct. at 772–73.

82. *Id.*

Frank Act.[83]

The Court held that under a plain reading of this provision, an employee is required to provide information to the SEC in order to obtain protection against retaliation.[84] The Court reasoned that the condition must be satisfied because "[c]ourts are not at liberty to dispense with the condition—tell the SEC—Congress imposed."[85]

Further, Justice Ginsburg, writing for the majority, in which Justice Roberts, Kennedy, Breyer, Sotomayor, and Kagan joined, reasoned that this textual reading comports with the legislative purpose of the Act.[86] The Senate Report stated that the core purpose of the robust whistleblower protection is to "motivate people who know of securities violations to tell the SEC."[87] To achieve that goal, the Court explained, Congress heightened protection against retaliation to whistleblowers who provide actionable information to the SEC.[88]

In the first concurring opinion, Justice Thomas, joined by Justices Alito and Gorsuch, disagreed with the majority's reliance on the Senate Report to determine Congress' intent.[89] These Justices concurred with the majority opinion to the extent it relied on the text of the Dodd-Frank Act itself. They believe that a statute's purpose and interpretation should be derived solely from the plain text of the statute.[90]

By contrast, Justice Sotomayor, joined by Justice Breyer, wrote a second concurring opinion only to note their disagreement with Justice Thomas' suggestion that a Senate Report is not an appropriate interpretive tool for determining the meaning of a statute.[91]

II. INTERNAL REPORTING AND CORPORATE COMPLIANCE PROGRAMS

In response to the corporate scandals at the turn of the century,

83. *Id.* at 776–78.
84. *Id.* at 778.
85. *Id.* at 777.
86. *See id.* at 777–78.
87. *Id.* at 777.
88. *Id.* at 778.
89. *Id.* at 783 (Thomas, J., concurring).
90. *Id.*
91. *Id.* at 782 (Sotomayor, J., concurring).

Congress included in the Sarbanes-Oxley Act a requirement that public companies establish internal reporting systems for employees to report misconduct to management.[92] Such reports allow corporations to remedy problems internally without negative publicity.[93] In order to encourage employees to report, the Sarbanes-Oxley Act provides protection against retaliation to any employee who reports misconduct to a supervisor.[94] Jane Norberg, the chief of the SEC's Whistleblowing Office, explained that protecting internal whistleblowers from retaliation is critical to the SEC's enforcement efforts: "Put simply, if individuals are not assured that they will be protected from retaliation if they report internally, they will be less likely to report internally, which could undermine the important role that internal compliance programs play in helping the Commission prevent, detect, and stop securities law violations."[95]

One of the arguments made by Somers, the Solicitor General, and the SEC in the *Digital Realty* case was that limiting whistleblower status under the Dodd-Frank Act to include only individuals who report to the SEC would undermine the protections available to auditors, attorneys, and other employees subject to internal reporting requirements.[96] For example, under the Sarbanes-Oxley Act, attorneys who appear or practice before the SEC are required to report internally and may later report to the SEC only under certain circumstances.[97] Specifically, attorneys are

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92. *See* 15 U.S.C. § 78j-l(m)(4) (2012) (requiring covered companies to establish internal reporting procedures for questionable conduct and for the anonymous submission of complaints).

93. *See* 15 U.S.C. § 7262 (2012).

94. *See* 18 U.S.C. § 1514A(a)(1)(C).

95. Jane Norberg, *Keynote Address*, 23 FORDHAM J. CORP. & FIN. L. 386, 397 (2018).

96. Brief for Respondent at 35, *Dig. Realty Tr.*, 138 S. Ct. 767 (No. 16-1276); Brief for the United States as Amici Curiae Supporting Respondent at 21, *Dig. Realty Tr.*, 138 S. Ct. 767 (No. 16-1276).

97. 17 C.F.R. § 205.3(d)(2) (2014).

> An attorney may report a violation externally without the consent of the client if the attorney reasonably believes it necessary:
>
> (i) To prevent the issuer from committing a material violation likely to cause substantial financial injury to the financial interests or property of the issuer or investors;
>
> (ii) To prevent the issuer . . . from committing any act . . . that is likely to perpetrate a fraud upon the Commission; or

required to report "evidence of a material violation of securities law or breach of fiduciary duty or similar violation" up the ladder to the general counsel of the company or the CEO.[98] If the response is inadequate, the lawyer must disclose it to the audit committee or any other committee comprised of independent directors. However, an attorney may only ignore ordinary privilege rules and report to the SEC under limited circumstances under the SEC rules,[99] and under even fewer circumstances under some state ethics rules.[100] For instance, the ethics rules in a few jurisdictions limit an attorney's ability to make external reports of some financial crimes or non-criminal frauds.[101] Accordingly, an attorney who improperly reports a violation may be at risk of professional disciplinary investigation or action for violating the privilege.[102]

The SEC and some scholars have claimed that rules encouraging attorney disclosure under the Sarbanes-Oxley Act or Dodd-Frank Act should preempt state ethics rules.[103] However,

> (iii) To rectify the consequences of a material violation by the issuer that caused . . . substantial injury to the financial interest property of the issuer or investors in furtherance of which the attorney's services were used or illegal act in which the attorney's services have been used.

Id.

98. *Id.*

99. *Id. See also* Implementation of Standards of Professional Conduct for Attorneys (Final Rule), Securities Act Release No. 33-8185, Exchange Act Release No. 34-47276 (Jan. 29, 2003). Section 205 applies to attorneys appearing and practicing before the SEC, which is broadly defined to include merely advising on a securities law issue that the lawyer has notice will be incorporated in a document filed with the SEC.

100. *See generally* Dennis J. Ventry, Jr., *Stitches for Snitches: Lawyers as Whistleblowers*, 50 U.C. DAVIS L. REV. 1455, 1548 (2017) (providing a state-by-state chart of ethics rules).

101. *See, e.g.*, CAL. RULES OF PROF'L CONDUCT r. 1.6 (2018) (permitting attorneys to reveal confidential client information only when necessary to prevent a criminal act likely to result in death or substantial bodily injury).

102. Naseem Faqihi, *Choosing Which Law to Break First: An In-House Attorney Whistleblower's Choices After Discovering a Possible Federal Securities Law Violation*, 82 FORDHAM L. REV. 3341, 3341 (2014) (proposing that in-house attorneys should be permitted to report federal securities violations externally if their internal report does not resolve the violation).

103. *See* Pacella, *supra* note 16, at 527–45 (proposing amendments to the Sarbanes-Oxley Act to clarify when external reporting is permissible, and modifications to Model Rule of Professional Conduct 1.13 to allow attorneys to externally report misconduct).

several scholars[104] and respected state bar associations, including Washington, California, and New York disagree with this approach.[105] These states question the SEC's preemption rule, which provides that an attorney who makes a report to the SEC in good faith, under circumstances permitted by the SEC but not applicable state law "shall not be subject to discipline or otherwise liable under inconsistent standards."[106] For example, the Washington State Bar Association issued an interim opinion disagreeing with the SEC's claim that the Sarbanes-Oxley Act preempted state ethics rules.[107] The SEC responded with a comment letter explaining that the Supreme Court has consistently "upheld the authority of federal agencies to implement rules of conduct that diverge from and supersede state laws that address the same conduct."[108] Despite this comment letter, the bar association adopted the interim opinion.[109] The preemption issue has not been decided by the courts and many attorneys may not be willing to take the risk of disciplinary action when deciding whether to report their client's misconduct.[110]

The Solicitor General argued that the narrow definition of

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104. *See, e.g.*, Barry R. Temkin & Ben Moskovitz, *Lawyers as Whistleblowers Under the Dodd-Frank Wall Street Reform Act: Ethical Conflicts Under the Rules of Professional Conduct and SEC Rules*, 84 NYSBA J. 10, 19 (July/Aug. 2012) ("It feels disquieting, and is perhaps unconstitutional, for the federal government to arrogate itself the power to purport to regulate state attorney ethics.").

105. *See* Ventry, Jr., *supra* note 100.

106. 17 C.F.R. § 205.6(c) (2003).

107. *See* Ventry, Jr., *supra* note 100.

108. Letter from Giovanni P. Prezioso, SEC Gen. Counsel, to J. Richard Manning, President, Wash. State Bar Ass'n, and David W. Savage, President-Elect, Wash. State Bar Ass'n (July 23, 2003) (available at www.sec.gov/news/speech/spch072303gpp.htm) [https://perma.cc/5RGM-U3TX].

109. *See* Ventry, Jr., *supra* note 100.

110. Lawrence A. West, Eric R. Swibel & Jenny Allen, *Will Award-Seeking Whistleblower Lawyers Be Caught Between Conflicting SEC and State Ethics Rules?*, LATHAM & WATKINS LITIG. DEP'T 1, 6 (Oct. 21, 2013), https://www.lw.com/thoughtLeadership/SEC-whistleblower-ethics-conflict [https://perma.cc/N3TW-C5NZ] (demonstrating that lawyers who report wrongdoing to the SEC may be subject to discipline for breaching the attorney-client privilege under inconsistent state ethics standards); *see also* Swidler & Berlin v. United States, 524 U.S. 399 (1998) (limiting the ability of thefederal government to interfere with attorney-client confidential communications, protected by state law).

whistleblower would leave attorneys and other employees "vulnerable to discharge or other retaliatory action for complying with" their reporting obligations.[111] The Court responded to this argument by explaining that even under the narrow definition, the individual would be protected against retaliation as soon as he or she also discloses the information to the SEC.[112] Although the individual would not be protected if the retaliation occurs before the attorney has a chance to report to the SEC, the Court reasoned that such a result is consistent with the legislative intent to encourage SEC disclosure.[113] Also, such an individual would still be protected by the Sarbanes-Oxley Act and other anti-retaliation statutes.[114]

The *Digital Realty* holding deprives attorney whistleblowers who comply with their reporting obligations under the Sarbanes-Oxley Act by reporting up the ladder, but not disclosing confidential information to the SEC, from any recourse for retaliation under the Dodd-Frank Act. Although, as the Court mentions, attorneys may have recourse under state tort law and other federal statutes, these sources provide relatively weak remedies and have proven ineffective at offering adequate protection.[115] For example, whistleblowers seeking protection under the Sarbanes-Oxley Act would need to file within shorter statutory periods and would have restrictions on where they can bring their claim.[116]

This leaves lawyers subject to the attorney-client privilege in a precarious situation. They can either forego the additional protections available under the Dodd-Frank Act or they can report violations to the SEC and possibly subject themselves to state disciplinary action for breaching their duty of confidentiality.[117] The concerns are even worse for in-house counsel who depend on a

111. Brief for the United States as Amici Curiae Supporting Respondent at 21, Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767 (2018) (No. 16-1276).

112. *Dig. Realty Tr.*, 138 S. Ct. at 780.

113. *Id.* (citing S. Rep. No. 111-176 at 38).

114. *Id.* (citing Lawson v. FMR LLC, 571 U.S. 429, 468–69 (2014)).

115. Pacella, *supra* note 16, at 492–93.

116. To the extent that state ethics rules require reporting to supervisors and supervisors fail to take action, it may be impossible to comply with the 180-day filing requirement, and in any event the lawyer would have much less than 180 days to file the complaint.

117. *See* Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 WASH. U. L. REV. 1033, 1035 (2007) (explaining that the duty of confidentiality is much broader than the attorney-client privilege).

single client for their livelihood.[118] This may lead to less reporting and undermine one of Congress' mandates in the Sarbanes-Oxley Act—that attorneys report up the corporate ladder "evidence of a material violation of securities law or breach of fiduciary duty or similar violation."[119] It would also undermine the Dodd-Frank Act which incorporated this reporting mandate.

Further, the narrow interpretation of whistleblower may incentivize corporations to terminate attorneys before they can report to the SEC. Lawyers are therefore uniquely vulnerable to retaliation between the time he or she internally reports misconduct and his or her determination that he or she may report externally to the SEC. After the lawyer is terminated it is unlikely that the lawyer can report to the wrongdoing without violating his or her duty of confidentiality.[120]

There are similar problems with respect to employees who do not have internal reporting obligations. Since the Court's decision does not extend whistleblower protection to employees who only internally report, it may encourage employees to bypass corporate internal reporting procedures and go directly to the SEC.[121] Although the Court suggests that this may be the outcome that Congress intended, the holding may have some unintended consequences. If employees report directly to the SEC, it will circumvent the corporation's internal controls.[122] It will also impact an employer's ability to internally resolve the problem without government involvement, or to self-report to the SEC and obtain credit for such disclosure.[123] Fewer internal reports to

118. Sung Hui Kim, *The Banality of Fraud: Resituating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1005 (2005) (explaining the importance of retaliation protection for in house attorneys). A terminated in-house attorney loses his or her entire income, insurance, pension, and stock options.

119. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296-01 (Feb. 6, 2003) (Release Nos. 33–8185; 34–47276).

120. MODEL RULES OF PROF'L CONDUCT r. 1.9(C) (AM. BAR. ASS'N 1983) ("A lawyer who has formerly represented a client in a matter . . . shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client "); *see generally* Sarah C. Haan, *Whistling Loud and Clear: Applying* Chevron *to Subsection 21F of Dodd-Frank*, 75 WASH. & LEE L. REV. 565 (2018).

121. *See generally* Halverson, *supra* note 61.

122. Hann, *supra* note 119, at 571.

123. Gerard Sinzdak, *An Analysis of Current Whistleblower Laws:*

management may also delay corrective action.[124] Further, internal reporting has the benefit of avoiding negative publicity, promoting employee loyalty, and maintaining the chain of command.[125]

In addition to the potential harm to a corporation caused by employees bypassing internal reporting procedures, there are also risks to the government. The decision may lead to over-reporting to the SEC of meritless claims which were previously screened out by internal compliance programs. Rather than corporations using their own resources to investigate potential wrongdoing in the first instance, external reporting will result in the government conducting more burdensome and costly investigations which could drain their limited resources. The SEC has recognized that a possible effect is "an overflow of noisy signals—that is, a large number of tips of varying quality—causing the Commission to incur costs to process and validate the information."[126] Internal reporting has the potential to allow corporations to remedy misconduct without draining government resources.[127]

Despite the concerns that the *Digital Realty* holding may undermine some corporate compliance programs, corporations should continue to ensure that they have a culture and process which encourages internal reporting. Such internal reports minimize the risk of damaging government investigations and increases the chances that the corporation will receive cooperation credit from the government.

III. STATUTORY INTERPRETATION AND *CHEVRON* DEFERENCE

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,*

Defending a More Flexible Approach to Reporting Requirements, 96 CAL. L. REV. 1633, 1634 (2008) (proposing that states adopt a more flexible approach that would protect internal and external reporters so long as the employee believed that the recipient could correct the misconduct).

124. Ronald H. Filler & Jerry W. Markham, *Whistleblowers – A Case Study in the Regulatory Cycle for Financial Services,* BROOKLYN J. COR. FIN. & COMM. L. 311, 318 (2018).

125. *Id.*

126. Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 75 Fed. Reg. 70, 4888, 70,516 (Nov. 17, 2010) (codified at 17 C.F.R. pts. 240, 249) (discussing the purpose of a reporting grace period of ninety days for the whistleblower award program).

127. *See* Bussing v. COR Clearing, LLC, 20 F. Supp. 3d 719, 733 (D. Neb. 2014).

Inc., the Supreme Court held that when a statute is ambiguous and the SEC's interpretation is reasonable, courts are required to give deference to the agency construction.[128] Before *Chevron,* deference was only mandatory when Congress explicitly delegated interpretative authority to the agency.[129] Rather than limiting deference in this way, the Court established a two–step test to determine when judicial deference to an agency construction of a statute is required:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[130]

The *Chevron* Court reasoned that when there is an express or implied delegation of power from Congress to an agency to fill a gap in a statute, the agency is authorized to clarify the provisions in the statute through regulation.[131] If the agency creates a rule, under an express delegation, the rule should be adjudged a "permissible construction of the statute" so long as it is not "arbitrary, capricious or manifestly contrary to the statute."[132] However, if the agency acts under implied delegation, the rule should be adjudged a permissible construction if it is reasonable in light of the enabling legislation.[133]

The rationale behind the *Chevron* doctrine is that ambiguities

128. 467 U.S. 837, 842–43 (1984) (stating that an agency's interpretation of a statute was entitled to mandatory deference even though it was not promulgated under an explicit delegation of authority).
129. *See id.* at 843–44.
130. *Id.* at 842–43 (footnotes omitted).
131. *Id.* at 843–44.
132. *Id.* at 844.
133. *Id.* at 844–45.

in statutes within an agency's jurisdiction to administer are implied delegations of authority to fill the statutory gap in a reasonable manner; filling these gaps, as the Court explained, involves difficult policy choices that agencies are better equipped to make than courts.[134] Between the two, agencies possess greater subject matter expertise and better understand policies implicated along with potential consequences of alternative resolutions to statutory ambiguities.[135]

In *Digital Realty*, Somers and the Solicitor General argued that the term "whistleblower" in the anti-retaliation section of the Dodd-Frank Act was ambiguous and the SEC rule defining whistleblower should apply under the *Chevron* doctrine.[136] The Dodd-Frank Act's definition section, section 21F, defined whistleblower as "any individual who provides . . . information relating to a violation of the securities laws to the Commission."[137] However, the anti-retaliation section expressly provides protection against retaliation when an individual makes "disclosures that are required or protected under the Sarbanes-Oxley Act."[138] The Sarbanes-Oxley Act protects both internal and external whistleblowers.[139] Accordingly, Somers and the Solicitor General argued that the term "whistleblower" is ambiguous and the Court should afford deference to the SEC interpretation under the *Chevron* doctrine.[140] The SEC rule provides that the term "whistleblower" for purposes of the anti-retaliation provision of the Dodd-Frank Act includes employees who only make internal reports of misconduct.[141] Finding this argument unpersuasive, the Court held that Dodd-Frank's definition of whistleblower was unambiguous and precluded the SEC from more expansively defining that term.[142] This meant that the Court was able to set aside the agency interpretation without disturbing the holding in *Chevron*.

Although the Court did not question the constitutionality of the *Chevron* doctrine, such an inquiry was suggested in defendant's

134. *Id.* at 865–66.
135. *Id.* (emphasizing that judges are not experts in every field).
136. *See* Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 776 (2018).
137. 15 U.S.C. § 78u-6(a)(6) (2012).
138. *Id.* § 78u-6(h)(1)(A)(iii).
139. 18 U.S.C. § 1514A(a)(1).
140. *Dig. Realty Tr.*, 138 S. Ct. at 776.
141. 17 C.F.R. §§ 240.21F-2(b)(i)–(iii) (2013).
142. *Dig. Realty Tr.*, 138 S. Ct. at 781–82.

reply brief. In its brief, Digital Realty argued that if the Court concluded that the statutory text was ambiguous and deference should be given to the SEC rule, it should "order supplemental briefing to consider whether *Chevron* should be overruled."[143] Digital Realty was inviting the Court to reconsider a three-decade-old basic premise of administrative law.

If the Court had reconsidered the *Chevron* decision as suggested by Digital Realty, it appears that at least two justices may have concluded that the doctrine is unconstitutional. While sitting on the Unites States Court of Appeals for the Tenth Circuit, Justice Neil Gorsuch wrote powerfully about how *Chevron* is an unconstitutional abdication of judicial and congressional power under the separation of powers doctrine.[144] Similarly, Justice Thomas in *Michigan v. EPA*, expressed concern that *Chevron* deference vests the executive branch with power the Constitution has granted only to Congress.[145] Although Chief Justice Roberts is not as extreme, he has advocated for a narrower, context-specific, expertise-driven application of the doctrine.[146] In *King v. Burwell*, Chief Justice Roberts, writing for the majority, adopted a "Step Zero" exception to the *Chevron* doctrine.[147] The Court held that *Chevron* deference was not applicable to certain major questions without a clear congressional intent to delegate beyond just mere ambiguity in the text.[148] In a concurring opinion in *Pereira v.*

143. Reply Brief for the Petitioner at 22 n.3, *Dig. Realty Tr.*, 138 S. Ct. 767 (No. 16-1276).

144. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1151–52 (10th Cir. 2016) (Gorsuch, J., concurring). Justice Gorsuch published both the majority opinion and a concurrence in the same case; in his concurrence, he criticized the doctrine as a "goliath of modern administrative law" that is "more than a little difficult to square with the Constitution of the framers' design." *Id.* at 1149, 1158.

145. 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring) ("Statutory ambiguity thus becomes an implicit delegation of rule-making authority, and that authority is used not to find the best meaning of the text, but to formulate legally binding rules to fill in gaps based on policy judgments made by the agency.").

146. City of Arlington v. FCC, 569 U.S. 290, 321–22 (2013) (Roberts, C.J., dissenting) ("An agency interpretation warrants such deference only if Congress has delegated authority to definitively interpret a particular ambiguity in a particular manner.").

147. *See* 135 S. Ct. 2480, 2488–89 (2015).

148. *Id.* The Court in *King* refused to give deference to the IRS' interpretation of the availability of tax credits under the Affordable Care Act because the question was one of "deep 'economic and political significance'" that

Sessions, Justice Kennedy noted the concerns raised by some members of the Court and explained that "it seems necessary and appropriate to reconsider . . . the premises that underlie *Chevron* and how courts have implemented that decision."[149]

The Supreme Court did not use the *Digital Realty* case as an opportunity to re-consider the scope of the *Chevron* doctrine. However, the holding demonstrates that courts can narrow the application of the doctrine by concluding that the text of the statute is not ambiguous. In *Pereira v. Sessions*, decided a few months after *Digital Realty*, the Court again concluded that a term was unambiguous.[150] The Court reached this conclusion despite the fact that it went through eight pages to explain the statute's plain-text meaning, and it disagreed with six appellate courts and the responsible agency over whether the term was ambiguous.[151] In his dissenting opinion, Justice Alito criticized the Court for ignoring *Chevron* and refusing to accord deference to the agency interpretation.[152] As he explained, "unless the Court has overruled *Chevron* in a secret decision that has somehow escaped my attention, it remains good law" and should be followed or openly reexamined.[153] He also expressed concern that the doctrine that was once "celebrated" has been "increasingly maligned."[154] *Digital*

is central to this statutory scheme, and Congress did not expressly delegate that question to the IRS to consider. *Id.* at 2489 (quoting Utility Air Regulatory Group v. EPA, 573 U.S. 302, 324 (2014)). Also, the Court found that it was unlikely that Congress would have delegated a major question to an agency with no expertise in the subject matter. *Id.* ("It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort."). Scholars have questioned whether this exception "has staying power to narrow *Chevron*'s domain, or whether it was just a one-off application based on extraordinary circumstances." Christopher Walker, *Toward a Context-Specific* Chevron *Deference*, 81 MO. L. REV. 1095, 1102 (2016).

149. 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring) (stating that the issuance of notice requirement in a federal immigration statute that does not state a time and place for removal hearing, but states that a hearing will be held at a time and place to be later specified, is not ambiguous and the BIA interpretation was not entitled to deference under the *Chevron* doctrine).

150. *Id.* at 2113 (majority opinion).

151. *Id.* at 2120 (Kennedy, J., concurring).

152. *Id.* at 2121 (Alito, J., dissenting) ("[A] straightforward application of *Chevron* requires us to accept the Government's construction . . . I can only conclude that the Court is simply ignoring *Chevron*.").

153. *Id.* at 2129.

154. *Id.* at 2121.

Realty, *Pereira*, and several other recent decisions may be signposts that the Court is waiting for a good case to reexamine *Chevron* deference.[155]

Although the SEC rule defining whistleblower was not entitled to deference, scholars have suggested that the SEC may be able to protect internal whistleblowers by exempting individuals from external reporting requirements.[156] Congress explicitly granted the SEC general authority to exempt any class or person from Dodd-Frank requirements.[157] It is unclear whether the Court would give deference to such an exemption under the *Chevron* doctrine since it has already decided that the definition of whistleblower is unambiguous.[158] However, some lower courts and the Third Circuit have concluded that an agency may exercise its exemptive authority even if a statute is clear because, in granting agencies broad exemptive power, Congress intended to provide them the ability to deal with unforeseeable problems that may arise under the statutes.[159]

CONCLUSION

Whistleblowers protect corporations, shareholders, and society at large by preventing or reducing corporate wrongdoing and forcing information up the ladder or into the public domain. However, whistleblowers such as Paul Somers, Sherron Watkins, and Cynthia Cooper subject themselves to devastating consequences for reporting suspicions of misconduct. Recognizing

155. Several recent cases seem to suggest the Court's willingness to reconsider *Chevron*. For example, in *Epic Systems Corp. v. Lewis*, the Court mentioned that "[n]o party to these cases has asked us to reconsider *Chevron*," which suggests that such a request may have been considered. *See* 138 S. Ct. 1612, 1629 (2018) (holding that *Chevron* does not apply where two federal agencies formally disagree over statute's meaning).

156. Lesley Chen, Comment, *The SEC's Forgotten Power of Exemption: How the SEC Can Receive Deference in Favor of Internal Whistleblowers Even When the Text is Clear*, 67 EMORY L. J. 1043, 1049 (2018).

157. 15 U.S.C. § 78mm(a)(1) (2012).

158. *See supra* note 147 and accompanying text.

159. *See* AARP v. Equal Emp't Opp. Comm'n, 489 F.3d 558, 565 (3d Cir. 2007) (holding that the EEOC may exercise its exemptive authority even if there is no ambiguity in the Age Discrimination in Employment Act); *see also* Kornfeld v. Eaton, 217 F. Supp. 671, 679 (S.D.N.Y. 1963) (holding that the SEC exempts long-term profits realized by officers and major stockholders by exercise of an option from forfeiture to their corporation because Congress explicitly granted them this exemptive authority).

that these whistleblowers deserve protection and existing federal, state. and local law was inadequate, Congress adopted the anti-retaliation provisions in the Dodd-Frank Act.

The Dodd-Frank Act expanded several of the protections available to whistleblowers under the Sarbanes-Oxley Act and prior federal statutes, such as the ability to bring a cause of action directly into federal court and to recover more than compensatory damages. In determining which reporters would be considered whistleblowers under the anti-retaliation section of the Act, the *Digital Realty* Court relied on a plain reading approach and applied the definition of whistleblower provided in the definition section of the Act. The definition of whistleblower was narrow and only included individuals who reported to the SEC—reporters unlike Paul Somers. The Court explained that the plain meaning approach comports with the legislative intent of the Act—to encourage individuals to report directly to the SEC. Since the Court concluded that the statute was clear and unambiguous, it did not defer to the SEC rule defining whistleblower more expansively. Although the narrow definition of whistleblower may encourage external reporting, the decision may have some unintended consequences on corporate compliance programs, forum shopping, and the strength of the *Chevron* doctrine.