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ARTICLES

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ABSTRACT

Recently, a circuit split has arisen with regard to the Dodd-Frank Wall Street Reform and Consumer Protection Act. The circuit split concerns the question of what it takes for an individual to qualify as a "whistleblower" under the terms of the statute. This circuit split is surprising, as the Dodd-Frank Act purports to answer this question itself by providing a definition of this term, a definition which the Fifth Circuit has treated as being conclusive. Nonetheless, the Second and the Ninth Circuits have held that with respect to some, but not all, of the Dodd-Frank Act, this statutory "whistleblower" definition does not apply. Shortly, the Supreme Court will have the opportunity to resolve the matter when it hears an appeal of the Ninth Circuit's decision in *Somers v. Digital Realty Trust Inc.* This article provides three broad reasons why the Supreme Court should reject the Second and Ninth Circuits' interpretations. First, the interpretation endorsed by the Second and Ninth Circuits is the result of a flawed exercise in statutory interpretation that incorrectly applies principles recently set down by the Supreme Court in *King v. Burwell*, and *Utility Air Regulatory Group v. EPA*. Secondly, while the Second and Ninth Circuits rejected the Fifth Circuits' interpretation on the basis that it withholds the protection of the Dodd-Frank Act from auditors and attorneys, the Second and Ninth Circuits' preferred interpretations also fail to protect auditors and attorneys. Finally, the policy reasons in favor of extending the Dodd-Frank Act's whistleblower

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protections to auditors and attorneys are insufficiently strong to warrant departing from the natural meaning of the statutory language at issue.

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I. INTRODUCTION

Suppose an employee discovers that members of his or her organization have been engaging in securities law violations. If the employee disapproves of the misconduct, he or she will be placed in an awkward position. On the one hand, the employee will want to report the illegal activity to someone in a position of sufficient authority to put a stop to it. On the other hand, the employee may be reluctant to report the misconduct as doing so could result in retaliation by those individuals who are complicit in it.

Part of the solution to this conundrum is provided by the Dodd-Frank Wall Street Reform and Consumer Protection Act (The "Dodd-Frank Act").[1] The Dodd-Frank Act is a financial regulatory statute conceived by the Obama Administration and enacted in 2010 which, among other things, implemented a system of rights and protections for whistleblowers of securities law violations.[2] The Dodd-Frank Act's whistleblower scheme has two broad limbs. The first limb, which this article does not discuss in any detail, rewards whistleblowers whose information leads to successful enforcement action by the Securities Exchange Commission ("SEC"), by giving them a portion of the amount collected by the SEC in monetary sanctions (in certain circumstances).[3] The second limb of the Dodd-Frank Act's whistleblower system, which is the subject of this article, prohibits employers from retaliating against whistleblowers ("Dodd-Frank Retaliation Regime").[4] If an employer retaliates against a whistleblower "in the terms and conditions of employment" (for example, by demoting the whistleblower or terminating the whistleblower's employment), then the whistleblower can bring federal court proceedings against the employer to enforce their rights under the Dodd-Frank Retaliation Regime.[5] If successful, the whistleblower will be

[1] 15 U.S.C.A. § 78u-6 (West 2010).

[2] *Id.*

[3] 15 U.S.C.A. § 78u-6(b)(1) (West 2010). A whistleblower will not be entitled to an award if he or she was acting in a regulatory or law enforcement capacity when he or she acquired the information, or if he or she has been convicted of a criminal offense in relation to the subject matter of the whistleblowing (*see* 15 U.S.C.A. § 78u-6(c)(2) (West 2010)).

[4] 15 U.S.C.A. § 78u-6(h)(1)(B)(i) (West 2010).

[5] *Id.*

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entitled to reinstatement to his or her job, twice the amount of back pay owed, and compensation for litigation costs.[6]

The Dodd-Frank Retaliation Regime does not protect all of those who tattle though—only those who satisfy the Dodd-Frank Act's statutory criteria are eligible for relief. This article is concerned with the question of what those statutory criteria are. Looking at the wording of the Dodd-Frank Act in isolation, one could be forgiven for thinking that this is a straightforward question to answer. As the Dodd-Frank Retaliation Regime purports only to protect "whistleblowers," a term which is comprehensively defined in the Dodd-Frank Act,[7] one would expect that someone will only be eligible for protection if he or she fits within the whistleblower definition.

Contrary to this expectation, a circuit split, or difference of judicial opinion, has developed. While the Fifth Circuit has affirmed the intuitive view that the Dodd-Frank Retaliation Regime applies only to those who satisfy the Dodd-Frank Act's definition of "whistleblower," the Second and Ninth Circuits have declared that the ambit of the Dodd-Frank Retaliation Regime stretches beyond the confines of this statutory term. This circuit split will soon be resolved when the Supreme Court hears the case of *Digital Realty Trust, Inc. v. Somers*, which is due to be heard in the 2017–2018 term.[8] The aim of this article is to explain why the Second and Ninth Circuits' approach is not only unorthodox, but also incorrect as a matter of both law and policy, and that the Supreme Court should therefore reject it and adopt the Fifth Circuit's interpretation instead.

This article proceeds as follows. First, Section II sets out the competing interpretations and the reasons provided by the various circuit courts in support of them. Next, Section III critiques the Second and Ninth Circuits' statutory interpretation. This analysis will focus on the proper application of two recent Supreme Court decisions which held that a statutory word or term can have multiple and inconsistent meanings within the same piece of legislation. Finally, Section IV concludes the article by analyzing the two main policy arguments supporting the Second and Ninth Circuits' interpretation.

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[6] 15 U.S.C.A. § 78u-6(h)(1)(C) (West 2010).

[7] 15 U.S.C.A. § 78u-6(a)(6) (West 2010).

[8] Somers v. Digital Realty Trust, Inc., 850 F.3d 1045 (9th Cir. 2017), *cert. granted*, 85 U.S.L.W. 3600 (U.S. June 26, 2017) (No. 16-1276).

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II. "WHISTLEBLOWER": TWO COMPETING INTERPRETATIONS

A circuit split has arisen out of an apparent inconsistency between two provisions in the Dodd-Frank Act: its statutory definition of "whistleblower," and the types of conduct that the Dodd-Frank Retaliation Regime states that it applies to. Starting first with the definition of "whistleblower," the Dodd-Frank Act explicitly defines this term as: "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the [SEC],[9] in a manner established, by rule or regulation, by the [SEC]."[10] Viewed in isolation, the effect of this definition appears to be clear—to qualify for protection from the Dodd-Frank Retaliation Regime, an individual must report a securities law violation directly to the SEC, and in the manner dictated by the SEC.

Next, the Dodd-Frank Retaliation Regime prohibits employers from retaliating against whistleblowers in response to three categories of conduct:

> (i) providing information to the [SEC] in accordance with [15 U.S.C.A. § 78u-6];
>
> (ii) initiating, testifying in, or assisting in any investigation or judicial or administrative action of the [SEC] based upon or related to such information; or
>
> (iii) making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 . . . [Chapter 2B], including section 78j-1(m) of [Title 15], section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the [SEC].[11]

The source of the circuit split is the third category of conduct in the quoted passage above, which will henceforth be referred to as "subdivision (iii)." While subdivisions (i) and (ii) fall in line with the Dodd-Frank Act's whistleblower definition, by referring to individuals who provide information to the SEC, several of the types of conduct described in subdivision (iii) involve disclosures to entities other than the SEC. For example, subdivision (iii) refers to "disclosures . . . protected under the Sarbanes-Oxley Act," a statute which, among other things, protects

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[9] The Securities and Exchange Commission is referred to as the "Commission" throughout the Dodd-Frank Act; *see* 15 U.S.C.A. § 78d(a) (West 2016).

[10] 15 U.S.C.A. § 78u-6(a)(6) (West 2010).

[11] 15 U.S.C.A. § 78u-6(h)(1)(A)(i)–(iii) (West 2010).

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employees of publicly traded companies who report illegal activity to their supervisors.[12] It therefore appears that subdivision (iii) was intended to protect such individuals. However, as employees who make this type of disclosure will not have made the disclosure to the SEC, they will not qualify as "whistleblowers," and will fall outside the Dodd-Frank Retaliation Regime's ambit.[13]

Accordingly, a tension exists within the Dodd-Frank Retaliation Regime. While, the Dodd-Frank Act restricts the "whistleblower" definition to include only people who have made disclosures to the SEC, subdivision (iii) then appears to attempt to extend protection to individuals who have not made such a disclosure. The circuit courts have formulated two competing solutions to this tension. The first interpretation, which has been adopted by the Fifth Circuit, reads the text of the Dodd-Frank Act literally by treating its whistleblower definition as all-defining, and necessarily restricting subdivision (iii)'s ambit ("Literal Interpretation").[14] The upshot is that individuals who do not report to the SEC are ineligible for protection from the Dodd-Frank Retaliation Regime. The alternative interpretation, which was originally created by the SEC using its rule-making powers under the Dodd-Frank Act,[15] and which subsequently found favor in the Second and Ninth Circuits, takes a more expansive approach ("Expansive Interpretation"). The expansive interpretation views the Dodd-Frank Act's core whistleblower definition as irreconcilable with the wording of subdivision (iii). That being so, the expansive interpretation effectively redefines the word "whistleblower" in subdivision (iii) to include individuals who have not reported to the SEC, thereby expanding the breadth of the Dodd-Frank Retaliation Regime.

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[12] 18 U.S.C.A. § 1514A(a)(1)(C); *see* Connolly v. Remkes, 2014 WL 5473144 at *4 (N.D. Cal. Oct. 28, 2014).

[13] It is also worth noting that if the reported illegal activity was something other than a securities law violation, then the individual would also not fit within the Dodd-Frank Act's whistleblower definition, as they would not have provided "information relating to a violation of securities law." *See* 15 U.S.C.A. § 78u-6(a)(6) (West 2010).

[14] Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620 (5th Cir. 2013).

[15] U.S.C.A. § 78u-6(j) (West 2010).

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A. The Fifth Circuit's Literal Interpretation

The first circuit court to tackle this issue was the Fifth Circuit in the 2013 decision of *Asadi v. G.E. Energy (USA), L.L.C.* ("*Asadi*").[16] Shortly after reporting suspicious activity to his supervisor, the plaintiff received a negative performance review and was asked to accept a demotion.[17] The plaintiff refused the demotion and was subsequently fired.[18] As the plaintiff had only reported the issue internally, and not to the SEC, he did not satisfy the Dodd-Frank Act's definition of "whistleblower." In response, the plaintiff argued that the Fifth Circuit should adopt the expansive interpretation.[19] The primary reason given by the plaintiff in support of this argument was that strictly applying the Dodd-Frank Act's whistleblower definition would effectively render subdivision (iii) insignificant, as most of the types of conduct described in subdivision (iii) involve reporting to entities other than the SEC.[20] The Fifth Circuit rejected this argument and adopted the literal interpretation for three primary reasons.

First, and most obviously, the expansive interpretation ignores the Dodd-Frank Act's whistleblower definition. In doing so, the Expansive Interpretation violates two core canons of statutory interpretation: specifically, that the courts should "give effect, if possible, to every word and every provision Congress used,"[21] and must "interpret provisions of a statute in a manner that renders them compatible, not contradictory."[22]

Secondly, and in response to the plaintiff's submission that the literal interpretation renders subdivision (iii) insignificant, the Fifth Circuit held that subdivision (iii) does in fact have a role to play under the literal interpretation. Specifically, subdivision (iii) will apply where an individual engages in a type of reporting described in subdivision (iii), and also discloses the problem to the SEC, but the employer only takes retributory

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[16] 720 F.3d at 621.

[17] *Id.* at 620.

[18] *Id.* at 621.

[19] *Id.*

[20] *Id.* at 626. *See also* Egan v. TradingScreen, Inc., 2011 WL 1672066 at *4 (cited in *Asadi*, 720 F.3d at 624 n.6).

[21] *Asadi*, 720 F.3d at 622, 628 (citing Duncan v. Walker, 533 U.S. 167, 174 (2001)).

[22] *Id.* at 622 (citing Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (U.S. 2000)).

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action with respect to the subdivision (iii) report.[23] For example, suppose that an employee reports a securities law violation to both the employer's CEO (a type of disclosure protected by the Sarbanes-Oxley Act and therefore canvassed by subdivision (iii)),[24] and to the SEC. In response, the employer, who is unaware that the employee reported the issue to the SEC, fires the employee. In these circumstances the employer retaliated against the employee's internal report, not against the employee's report to the SEC (as it is not possible to retaliate against something of which you are unaware). Accordingly, subdivisions (i) and (iii) of the Dodd-Frank Retaliation Regime, which prohibit employers from retaliating against employees for providing information to the SEC,[25] or assisting an SEC investigation,[26] will not apply. Instead, the employee will be protected by subdivision (iii). Therefore, subdivision (iii) serves a real and valuable function by protecting the employee from types of retaliation not covered by the other provisions of the Dodd-Frank Retaliation Regime.[27]

The third and final reason given by the Fifth Circuit for rejecting the expansive interpretation was that it effectively renders the Sarbanes-Oxley Act's retaliation provisions redundant in a securities law setting.[28] As Subdivision (iii) includes "disclosures required or protected by the Sarbanes-Oxley Act," under the expansive interpretation any individual who makes a securities law violation disclosure covered by that statute will automatically receive protection from the Dodd-Frank Retaliation Regime.[29] The Fifth Circuit opined that while there is a great deal of overlap between the whistleblower schemes set out in the Dodd-Frank Act and the Sarbanes-Oxley Act, the Dodd-Frank Retaliation Regime's protections are consistently superior.[30] Principally, claims under the Dodd-Frank Retaliation Regime are

[23] 15 U.S.C.A. § 78u-6(h)(1)(A)(i)–(iii) (West 2010).
[24] 18 U.S.C.A. § 1514A(a)(1)(C) (2012).
[25] 15 U.S.C.A. § 78u-6(h)(1)(A)(i) (2012).
[26] 15 U.S.C.A. § 78u-6(h)(1)(A)(ii) (2012).
[27] *Asadi*, 720 F.3d at 627–29.
[28] 720 F.3d at 626.
[29] *Id.*
[30] For example, the Dodd-Frank regime allows for the whistleblower to receive twice the amount of any pay lost due to the retaliation, whereas the Sarbanes-Oxley regime only allows recovery of the back pay, and the Dodd-Frank regime has longer limitation periods than the Sarbanes-Oxley regime.

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subject to a longer limitation period,[31] and are eligible for a larger back pay award,[32] than claims under the Sarbanes-Oxley Act's whistleblower scheme. Accordingly, individuals who qualify for protection under the Sarbanes-Oxley Act, and by implication are also entitled to protection from subdivision (iii), would consistently bring their legal claims under the Dodd-Frank Retaliation Regime rather than invoke their Sarbanes-Oxley rights.[33]

B. The Second and Ninth Circuits' Expansive Interpretation

Two years after *Asadi* was decided, the same issue was brought before the Second Circuit in *Berman v. Neo@Ogilvy LLC* ("*Berman*").[34] Rather than following the lead of the Fifth Circuit, the Second Circuit created a circuit split by ruling that reporting to the SEC is not a prerequisite to receiving protection from the Dodd-Frank Retaliation Regime.[35] More recently, in *Somers v. Digital Realty Trust Inc.*,[36] the Ninth Circuit also endorsed the expansive interpretation, albeit the methodology it applied to reach that outcome was slightly different from that used by the Second Circuit. In short, while both Circuits began by rejecting *Asadi*, the Second Circuit concluded its judgment by declining to interpret subdivision (iii) itself and applying *Chevron* deference to the SEC's rule instead.[37] The Ninth Circuit, on the other hand, did engage in a process of substantively interpreting subdivision (iii), a process which led to the same outcome as that reached by the SEC and the Second Circuit.[38] Nonetheless, as will be seen, the differences between

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[31] The limitation period for whistleblower claims under the Sarbanes-Oxley Act expires 180 days after the date of the violation, or 180 days after the date on which the whistleblower becomes aware of the violation. *See* 18 U.S.C.A. § 1514A(b)(2)(D) (2012). Depending on the circumstances, the limitation period for claims under the Dodd-Frank Retaliation Regime can range from three to ten years. *See generally* 15 U.S.C.A. § 78u-6(h)(1)(B)(iii) (2012).

[32] Claimants under the Dodd-Frank Retaliation Regime are eligible for an award equivalent to twice the amount of back pay owing. *See* 15 U.S.C.A. § 78-6(h)(1)(C)(ii) (2012). However, a claimant under the Sarbanes-Oxley Act may only receive the exact amount of back pay owing with interest. 18 U.S.C.A. § 1514A(c)(2)(B) (2012).

[33] *Asadi*, 720 F.3d at 628–29.

[34] Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 146 (2d Cir. 2015).

[35] *Id.*

[36] Somers v. Digital Realty Tr. Inc., 850 F.3d 1045 (9th Cir. 2017).

[37] *Berman*, 801 F.3d at 157.

[38] *Somers*, 850 F.3d at 1050. However, the Ninth Circuit did note at 1051 that if it had been unable to resolve the ambiguity in the statute itself then it would have reached the same overall result by deferring to the SEC's interpretation.

the Second and Ninth Circuit's judgments are ultimately not as great as they first appear, with each court largely endorsing the same arguments in favor of the expansive interpretation, and against the literal interpretation.

Both the Second and Ninth Circuits began by conceding that there is no "absolute conflict" between the statutory whistleblower definition and subdivision (iii), as they can be reconciled in the manner envisaged in *Asadi*.[39] However, the two circuit courts asserted that the scope of subdivision (iii), under the literal interpretation, is significantly narrower than the Fifth Circuit had acknowledged.[40] There are two reasons for this. First, and more practically, an individual deciding whether to disclose wrongdoing to the SEC at the same time he or she reports it internally may be reluctant to do so as: "[he or she] will surely feel that reporting only to their employer offers the prospect of having the wrongdoing ended, with little chance of retaliation, whereas reporting to a government agency creates a substantial risk of retaliation."[41]

Secondly, and more fundamentally, two types of reporting described in subdivision (iii) relate to individuals who are unable legally to disclose an issue to the SEC at the same time they disclose it internally: auditors and attorneys. In the case of auditors, Chapter 2B of Title 15 requires auditors of securities issuers to report any illegal activity they discover to the issuer's management,[42] and prohibits auditors from reporting to the SEC until the issuer has had the opportunity to take remedial action (and has failed to do so).[43] The upshot is that auditors are essentially left unprotected by subdivision (iii) under the literal interpretation, as in most cases, the issuer will retaliate before it becomes apparent to the auditor that remedial action has not occurred.[44] With respect to attorneys, the cumulative effect of the Sarbanes-Oxley Act and the SEC's Standards of Professional Conduct is that an issuer's attorney who discovers a material violation of securities law must first report it to the issuer's chief legal counsel or CEO.[45] If the chief legal counsel or CEO does not respond appropriately, then the attorney must report

[39] *Berman*, 801 F.3d at 150.
[40] *Id.* at 151; *Somers*, 850 F.3d at 1049.
[41] *Berman*, 801 F.3d at 151. *See also Somers*, 850 F.3d at 1049–50.
[42] 15 U.S.C.A. § 78j-1(b)(1)(B) (West 2017) ("Issuer" is defined in § 78c(a)(8)).
[43] 15 U.S.C.A. § 78j-1(b)(2)–(3) (West 2017).
[44] 15 U.S.C.A. § 78j-1(b)(1)(B) (West 2017).
[45] 17 C.F.R. § 205.3(b)(1) (2017).

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the issue to the issuer's audit committee or board of directors.[46] Only after this has occurred can the attorney then report the violation to the SEC, and even then only in "limited instances,"[47] specifically where doing so will rectify a serious violation of securities law that occurred through the use of the attorney's services, or will prevent the issuer from committing perjury or a serious violation of securities law.[48] Again, the consequence is that attorneys receive little to no protection from subdivision (iii) under the literal interpretation.[49]

After finding that the literal interpretation narrows subdivision (iii) to a greater extent than recognized in *Asadi*, the Second and Ninth Circuits turned to the question of whether the expansive interpretation is correct.[50] It was at this stage that the two circuit courts diverged to some extent. Starting first with the Second Circuit, rather than deliver a judicial interpretation of subdivision (iii), the Court held that the tension between this provision and the core whistleblower definition in the statute created a sufficient ambiguity to warrant the granting of *Chevron* deference to the SEC's interpretation.[51] The Second Circuit did note, though, that if ever required to interpret subdivision (iii) itself, it "might well favor" the expansive interpretation, as it thought it was "doubtful" that Congress intended subdivision (iii) to have the "extremely limited scope" that it would have under the literal interpretation.[52] At the same time, the Second Circuit acknowledged that it was difficult to know what Congress's intentions were when it created subdivision (iii), as the provision was inserted into the Dodd-Frank Act at a late stage in the legislative process, and was not accompanied by any congressional guidance as to its purpose.[53]

The Ninth Circuit, however, did not shy away from stamping subdivision (iii) with its own interpretation, albeit it noted that if it had not felt able to do so it would have nonetheless granted *Chevron* deference to the

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[46] *Id.*
[47] *Somers*, 850 F.3d at 1049.
[48] 17 C.F.R. § 205.3(d)(2)(i)–(iii) (2017).
[49] *Berman*, 801 F.3d at 151–52.
[50] *Somers*, 850 F.3d at 1050; *Berman*, 801 F.3d at 151.
[51] *Berman*, 801 F.3d at 151.
[52] *Id.* at 155.
[53] *Id.* at 152–53.

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SEC's interpretation.[54] While the Ninth Circuit conceded that the legislative history of the provision reveals nothing about its purpose, it found that the language of the provision itself sufficiently "illuminates congressional intent."[55] As far as the Ninth Circuit was concerned, Congress's inclusion in subdivision (iii) of types of reporting that are impossible to perform, simultaneously with a report to the SEC, demonstrated that it did not intend for subdivision (iii) to be constrained by the statutory "whistleblower" definition.[56]

In comparison, and for the same reasons articulated by the Second Circuit, excluding from the protection of subdivision (iii) those people who had not made a report to the SEC, would narrow the provision "to the point of absurdity."[57] Furthermore, and in response to one of the Fifth Circuit's primary critiques of the expansive interpretation, the Ninth Circuit denied that the expansive interpretation rendered the Sarbanes-Oxley Act's whistleblower provisions redundant.[58] On the contrary, the Ninth Circuit considered that the Sarbanes-Oxley Act's whistleblower regime had several unique features which meant that some whistleblowers would find it more attractive than the Dodd-Frank Retaliation Regime.[59] For example, while the Dodd-Frank Retaliation Regime only compensates whistleblowers for lost wages, the Sarbanes Oxley Act allows for special damages to compensate for other types of injuries, such as emotional distress.[60] Additionally, while a claim brought under the Dodd-Frank Retaliation Regime must be prosecuted by the whistleblower personally in a Federal Court, a whistleblower's claim under the Sarbanes-Oxley Act can be dealt with through an administrative review by the Secretary of Labor.[61] This procedure spares the whistleblower

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[54] *Somers*, 850 F.3d at 1050–51.

[55] *Id.* at 1049.

[56] To be clear, the expansive interpretation does not appear to negate the requirement that the report was about a securities law violation, rather than other types of illegal conduct.

[57] *Somers*, 850 F.3d at 1049.

[58] *Id.*

[59] *Id.*

[60] *Id.* at 1050 (citing Jones v. South Peak Interactive Corp., 777 F.3d 658, 672 (4th Cir. 2015)).

[61] *Id.* (citing 18 U.S.C.A. § 1514A(b)(1)(A)). However, the whistleblower may commence court proceedings if the Secretary of Labor fails to issue a decision on the matter within 180 days of the filing of the whistleblower's complaint. *See* 18 U.S.C.A. § 1514A(b)(1)(B). As the Fifth Circuit pointed out, though, a whistleblower who would prefer to have their claim dealt with through the courts would consider this to be a negative attribute of the Sarbanes-Oxley Act's whistleblower scheme. *See Asadi*, 720 F.3d at 629.

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much of the stress and financial risk associated with court litigation.[62] Therefore, according to the Ninth Circuit, rather than usurping the Sarbanes-Oxley Act, the expansive interpretation merely increases the number of legal avenues available for whistleblowers to choose from.[63]

III. IS THE EXPANSIVE INTERPRETATION CORRECT AS A MATTER OF STATUTORY INTERPRETATION?

This article will now consider the merits of the expansive approach as a matter of statutory interpretation. The article's analysis will focus on the reasons cited by the Second and Ninth Circuits in defense of the expansive interpretation, and in opposition to the literal interpretation. This critique is relevant to both the question of whether the Second Circuit should have deemed the SEC's interpretation to be reasonable (and therefore entitled to *Chevron* deference), and the question of whether the Ninth Circuit should have directly endorsed the expansive interpretation itself.

The obvious issue with the expansive interpretation is that it creates two distinct definitions of the term "whistleblower," thereby rendering the Dodd-Frank Act internally inconsistent. While the definitions section of the Dodd-Frank Act states that one of the primary defining characteristics of a "whistleblower" is that he or she made a disclosure to the SEC,[64] the expansive interpretation does not require an individual to have reported to the SEC to qualify as a subdivision (iii) "whistleblower." This is contrary to the fundamental canon of statutory interpretation that words should have consistent meanings throughout the same statute.[65] In defense of this incongruity, the Second and Ninth Circuits cited the Supreme Court decision of *King v. Burwell* ("*King*"),[66] which is authority for the proposition that a term of art can have different meanings in different parts of the same statute.[67]

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[62] *Id.* Although a whistleblower will be compensated for their legal fees if their claim under the Dodd-Frank Retaliation Regime is successful they are nonetheless exposed to the risk of financial loss as they will not be compensated if their claim is unsuccessful. *See* 15 U.S.C.A. § 78u-6(h)(1)(C).

[63] *Somers*, 850 F.3d at 1050.

[64] 15 U.S.C.A. § 78u-6(a)(6) (West 2010).

[65] *Asadi*, 720 F.3d at 622.

[66] King v. Burwell, 135 S. Ct. 2480 (2015).

[67] *Berman*, 801 F.3d at 150; *Somers*, 850 F.3d at 1049.

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But does the rule the Supreme Court described in *King* really support the expansive interpretation? It appears not.

A. Supreme Court Authority

The key part of *King* relied on by the Second and Ninth Circuits is the Supreme Court's statement that: "the presumption of consistent usage readily yields to context, and a statutory term may mean different things in different places . . . This is particularly true when, as here, the Act is far from a *chef d'oeuvre* [a masterpiece] of legislative draftsmanship."[68] In support of that statement, the Supreme Court in *King*, in turn, referred to its prior declaration in *Utility Air Regulatory Group v. Environmental Protection Agency* ("*Utility Air*"), where the court explained that:

> One ordinarily assumes that identical words used in different parts of the same act are intended to have the same meaning. . . . [But] the presumption of consistent usage readily yields to context, and a statutory term—even one defined in the statute—may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.[69]

Although the principle set down in *King* and *Utility Air*—that the meaning of a term can "shapeshift" across a statute—is controversial,[70] the Second and Ninth Courts can hardly be criticized for attempting to follow principles laid down by the Supreme Court. The real issue with the expansive interpretation, however, is not that it relies on a controversial Supreme Court principle, but rather that it misapplies that principle. Specifically, the expansive interpretation sets too low a threshold for the circumstances in which the courts can apply the principle from *King* and *Utility Air*. Properly understood, *King* and *Utility Air* should be treated as supporting the legal principle that the courts may only depart from the plain meaning of statutory language, and adopt an internally inconsistent interpretation where the statutory context *clearly and unequivocally* requires this.[71] In other words, a

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[68] *King*, 135 S. Ct. at 2493 n.3 (internal quotation marks omitted) (cited in *Somers*, 850 F.3d at 1049).

[69] Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427, 2441 (2014) (internal quotation marks omitted).

[70] *See Somers*, 850 F.3d at 1051 (Owens, J., dissenting).

[71] Anton Metlitsky, *The Roberts Court and the New Textualism*, 38 CARDOZO L. REV. 671, 686 (2016).

high threshold must be overcome before the principle can be invoked.[72] That this is the case should be apparent not only from looking at how the Supreme Court applied its own principle in *King* and *Utility Air*, but also from its warning that: "Reliance on context and structure in statutory interpretation is a subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself."[73]

With that warning in mind, this article will now briefly sketch out the details of the Supreme Court's treatment of the legislation at issue in *King* and *Utility Air*.[74] The purpose of this analysis is to understand the types of circumstances in which the Supreme Court considered it appropriate to adopt a statutory interpretation that is inconsistent with the language of the statute and other provisions within it. This analysis will demonstrate that the expansive interpretation is, ironically, the result of the Second and Ninth Circuits taking the Supreme Court's statement in *King* at face value, rather than assessing it against the context in which it was made.[75]

1. King v. Burwell

Starting first with *King*, the primary issue in that case was whether individuals who purchase health insurance from insurance exchanges established by the Federal government are entitled to tax credits under the Patient Protection and Affordable Care Act ("Affordable Care Act").[76] This issue turned on whether the phrase "an Exchange established by the State under [42 USC § 18031]" in 26 U.S.C.A. § 36B included federal exchanges.[77] Although the black letter wording of the phrase appeared to only encapsulate exchanges established by State governments, the Supreme Court held that the Affordable Care Act's tax credit provisions do apply to federal

[72] *Id.*

[73] *King*, 135 S. Ct. at 2495–96 (internal quotation marks omitted) (citing Palmer v. Massachusetts, 308 U.S. 79, 83 (2004)).

[74] King v. Burwell, 135 S. Ct. 2480 (2015); Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427, 2441 (2014).

[75] *King*, 135 S. Ct. at 2496.

[76] 42 U.S.C.A. § 18091 (2010).

[77] 135 S. Ct. at 2487.

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exchanges.[78] This was because the entire purpose of the Affordable Care Act is to avoid economic "death spirals" in the health insurance market—a phenomenon whereby the number of people purchasing insurance decreases, resulting in higher premiums, leading to further decreases in the number of people purchasing insurance, and so on.[79] The Affordable Care Act sought to avoid death spirals by both making health insurance more affordable (through granting tax credits to people who purchase health insurance on an "Exchange") and making it compulsory for individuals to purchase health insurance, unless the cost of insurance would exceed 8% of the individual's income, as calculated after applying their tax credit.[80] This objective was explicitly articulated in the text of the Affordable Care Act.[81] Furthermore, the Supreme Court had the benefit of a brief that the congressmen involved in the drafting of the statute had filed as *aimici curiae*;[82] and the Court also deduced how the statute was intended to operate from the fact that it was based on a health insurance regime implemented in Massachusetts.[83]

Taking into account this purpose, the Supreme Court concluded that interpreting the phrase "an Exchange established by the State under [42 USC § 18031]," so that it excludes federal exchanges, would mean that many residents of states with a federal rather than state exchange would not receive tax credits.[84] This would reduce the total number of people obligated to purchase health insurance in these states, and without the tax credits many residents' incomes would be low enough to place the cost of health insurance above the 8% threshold.[85] Health insurance would then become more expensive, which would in turn place more residents above the 8% threshold.[86] The end result would be the very type of death spiral Congress had sought to avoid by passing the Affordable Care Act with health insurance premiums rising by as much as 47%, and enrollments decreasing by as much

[78] 42 U.S.C.A. § 18091 (2010).
[79] *Id.*
[80] 135 S. Ct. at 2486.
[81] 42 U.S.C.A. § 18091 (2010).
[82] Brief of Members of Congress and State Legislators as *Amici Curiae* in Support of Respondents, King v. Burwell, 135 S. Ct. 2480 (2015).
[83] *King*, 135 S. Ct. at 2486.
[84] 42 U.S.C. § 18031.
[85] *Id.*
[86] *Id.*

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as 70%.[87] In order to avoid this outcome, the Supreme Court held that the phrase "an Exchange established by the State" in the Affordable Health Care Act's tax credit provision included both state and federal exchanges.[88] This interpretation departed significantly from the natural meaning of the statutory wording.[89]

In his dissent, Justice Scalia noted that the statutory phrase at issue appeared in several segments of the Affordable Care Act, not just the tax credit provision.[90] Therefore, the effect of the Court's decision would be that those other usages of the phrase also constitute references to federal exchanges. The Court's response, which was later invoked by the Ninth Circuit in *Somers*, is that this is not necessarily the case, as the Court had previously set down the principle in *Utility Air* that a term of art can have different meanings in different parts of the same statute.[91] However, the Court did not issue a definitive ruling on the question of whether its interpretation of the phrase at issue was limited solely to the phrase's usage in the tax credit provision, as it was not necessary to do so to dispose of the case.[92]

2. Utility Air Regulatory Group v. Environmental Protection Agency

Turning to *Utility Air*, that case was concerned with the meaning of the term "air pollutant" in the Clean Air Act, which had a statutory definition of: "any air pollution agent or combination of such agents, including any physical, chemical, biological [or] radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air."[93] The Supreme Court previously held in *Massachusetts v. EPA* that the Environmental Protection Agency ("EPA"), has authority to regulate new motor vehicles under Title II of the Clean Air Act, as motor vehicles emit greenhouse gases, which qualify as "air pollutants."[94] Following the *Massachusetts* decision, the EPA formed

[87] *King*, 135 S. Ct. at 2492–94.
[88] *Id.* at 2494.
[89] *Id.* at 2495.
[90] *Id.* at 2498–99 (Scalia, J., dissenting).
[91] *King*, 135 S. Ct. at 2494.
[92] *Id.* at 2493 n.3.
[93] 42 U.S.C.A. § 7602(g) (1955).
[94] Massachusetts v. EPA, 127 S. Ct. 1438, 1459–62 (2007).

the view that as Title II of the Clean Air Act applied to new motor vehicles, this meant that Title V and the Prevention of Significant Deterioration ("PSD") program sections of the Clean Air Act (both of which also regulate sources of "air pollutants"), likewise applied to motor vehicles.[95] The Supreme Court disagreed.[96]

If the Supreme Court had blindly applied the *Massachusetts* interpretation of "air pollutants" to Title V and the PSD program, then it would have reached a conclusion in favor of the EPA's viewpoint.[97] However, the Court eschewed this approach. Instead, the Court performed a robust analysis of whether it was appropriate to extend the *Massachusetts* interpretation to Title V and the PSD program.[98] In construing the term "air pollutants" within the context of Title V and the PSD program the Court focused primarily on the consequences of the EPA's interpretation.[99] The conclusion reached was that these consequences would be dire.[100] Specifically, the Court found that adopting the EPA's proposed interpretation would cause the number of PSD program permit applications per annum to increase from 800 to 82,000, and the number of annual Title V permit applications to increase from 15,000 to 6.1 billion.[101] This would impose significant administrative burdens on the EPA, as the PSD program permit application procedure was "complicated, resource-intensive, time-consuming and sometimes contentious,"[102] while the Title V application procedure was "finely crafted for thousands, not millions of sources."[103] For example, under both the PSD program and Title V, it is necessary to hold a public hearing on each application. This would in turn most likely cause the PSD program's administrative costs to increase from $12 million to over $1.5 billion, while Title V administrative costs would increase from $62 million to $21 billion.[104] Furthermore, most of the additional entities that would be pulled under the umbrellas of Title V and the PSD program would be small-

[95] *Utility Air Regulatory Group*, 134 S. Ct. at 2436–37.
[96] *Id.* at 2437.
[97] *Id.*
[98] *Id.* at 2337–45.
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.* at 2443.
[103] *Id.* at 2444.
[104] *Id.* at 2442–43.

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scale polluters, who would collectively face costs of $147 billion as a result.[105]

In light of this context, the Supreme Court held that for the purposes of Title V and the PSD program, the term "air pollutant" excludes greenhouse gases.[106] The Court acknowledged that as it had previously declared under Title II of the Clean Air Act, "air pollutants" included greenhouse gases.[107] The effect of its decision was that the meaning of this term changes from section to section of the Clean Air Act. However, in its defense, the Supreme Court laid down the rule that it would later cite in *King*: "a statutory term—even one defined in the statute—may take on distinct characters from association with distinct statutory objects calling for different implementation strategies."[108]

3. Reassessing the Expansive Interpretation's Application of King v. Burwell

The above examination of *King* and *Utility Air* demonstrates how different the legislative provisions at issue in those cases were from subdivision (iii), and why those decisions therefore do not support the expansive interpretation. Specifically, there are two crucial differences between *King* and *Utility Air* on one hand, and subdivision (iii) on the other: the existence of evidence of actual and imputed congressional intent.[109]

Starting with actual intent, as outlined above, in *King* the Supreme Court had access to substantial information as to Congress's actual intentions when it created the statutory provision at issue.[110] This information gave the Court the confidence to interpret the statutory provisions at issue in a manner that departed from the natural meaning of the language used.[111] In stark contrast, subdivision (iii) was inserted into the Dodd-Frank Act at a late stage in the

[105] *Id.* at 2443. For example, under the Prevention of Significant Deterioration regime the EPA is required to consider each polluter's application for a permit within one year, during which it must hold a public hearing on the application.

[106] 127 S. Ct. at 2444.

[107] *Id.*

[108] *Utility Air Regulatory Group*, 134 S. Ct. at 2441 (internal quotation marks omitted).

[109] *King*, 135 S. Ct. at 2480 (2015); *Utility Air Regulatory Group*, 134 S. Ct. at 2427.

[110] 135 S. Ct. at 2480.

[111] *Id.*

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legislative process, and was not accompanied by any explanation of its purpose. Accordingly, and as the Second and Ninth Circuits acknowledged, no extrinsic evidence whatsoever exists as to what Congress hoped to achieve with subdivision (iii).[112] Therefore, it is not possible to justify the expansive interpretation, or any interpretation for that matter, by reference to what Congress's actual intentions were when enacting subdivision (iii).

In considering imputed intent, a factor supporting the interpretations the Supreme Court adopted in *King* and *Utility Air*, was that the consequences of adhering to the plain meanings of the statutory language would be so unpalatable that it could be inferred that Congress had not intended those results. In *King* the evidence before the Court demonstrated that adopting a literal interpretation of the statutory provision at issue would have caused health insurance costs to skyrocket and enrolments to nose-dive.[113] In *Utility Air*, adopting a literal interpretation would have brought billions of small-scale sources of greenhouse gases into the domain of the Clean Air Act and, in turn, imposed tens of billions of dollars in costs on the EPA and third parties.[114] Therefore, in the absence of an explicit statement of Congress's objective, it could be inferred that Congress had not intended these extreme outcomes.

In comparison, while the consequences of adopting the literal interpretation of subdivision (iii) may be viewed as suboptimal by some, those consequences could hardly be described as so disastrous that Congress cannot possibly have intended them. Although the literal interpretation grants the protection of the Dodd-Frank Retaliation Regime to a smaller class of individuals than the expansive interpretation, most of those excluded will nonetheless continue to receive protection from the Sarbanes-Oxley Act's whistleblower protection regime,[115] and § 1513(e) of Title 18.[116] Accordingly, while the narrow interpretation deprives many individuals of the benefits of the Dodd-Frank Retaliation Regime, those individuals will not

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[112] *Berman*, 801 F.3d at 152–23; *Somers*, 850 F.3d at 1049.
[113] *King*, 135 S. Ct. at 2493–94.
[114] *Utility Air Regulatory Group*, 134 S. Ct. at 2444.
[115] 18 U.S.C.A. § 1514A (2015).
[116] 18 U.S.C.A. § 1513(e) (2015) (indirectly protects informants by making it a federal offense to retaliate against someone who provides "information relating to the commission or possible commission of any Federal offense" to a law enforcement officer—thereby creating a deterrent effect).

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usually be left without recourse.[117] In fact, and as noted above,[118] in many ways the Sarbanes-Oxley Act's whistleblower protections are superior to the Dodd-Frank Retaliation Regime, and one would expect that many whistleblowers may prefer the former over the latter if given a choice.

For example, whistleblowers who suffered significant emotional distress due to the retaliatory conduct will be more likely to be made whole by the Sarbanes-Oxley Act's whistleblower provisions than the Dodd-Frank Retaliation Regime.[119] Similarly, many whistleblowers may balk at the prospect of litigating their case under the Dodd-Frank Retaliation Regime in a federal court, and instead prefer the administrative procedure set out in the Sarbanes-Oxley Act.[120] That being so, it can hardly be said that the literal interpretation produces sufficiently bad outcomes that it can be inferred that Congress did not intend this result. This is an argument that the Ninth Circuit unwittingly and implicitly accepted when, as noted above, it identified that the Sarbanes-Oxley Act's whistleblower provisions are in many ways superior to the Dodd-Frank Retaliation Regime.[121] Ironically, in its attempt to rebut the argument that the Expansive Interpretation renders the Sarbanes-Oxley Act's whistleblower protections redundant, the Ninth Circuit has served only to highlight the extent to which the Dodd-Frank Retaliation Regime is distinct from the statutory regimes at issue in *King* and *Utility Air*.[122]

B. Auditors and Attorneys

Of course, defenders of the expansive interpretation would disagree that the negative consequences of the literal interpretation are as trivial as suggested above. In fact, in support of their predictions of adverse consequences, the Second and Ninth Circuits have identified two key casualties of the literal interpretation: auditors and attorneys.[123] As discussed

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[117] *Berman*, 801 F.3d at 159 (Jacobs, J., dissenting).
[118] *See* discussion *infra* Section 2.2.
[119] *Somers*, 850 F.3d at 1050 (9th Cir. 2017) (citing Jones v. SouthPeak Interactive Corp., 777 F.3d 658, 672 (4th Cir. 2015)).
[120] *Id.*
[121] *Id.*
[122] *King*, 135 S. Ct. at 2480 (2015); *Utility Air Regulatory Group*, 134 S. Ct. at 2427.
[123] *Id.*

above,[124] according to those courts, the literal interpretation denies auditors and attorneys access to the Dodd-Frank Retaliation Regime, as they cannot legally blow the whistle to the SEC without first reporting internally (meaning that retaliation will most likely occur before they can secure the Dodd-Frank Retaliation Regime's protection).[125]

On its face this appears to be a compelling argument. If the literal interpretation fails to protect two categories of individual that are indirectly mentioned by subdivision (iii), then this would suggest that this interpretation is inconsistent with congressional intent. The problem with this argument, though, it lacks self-awareness. In portraying auditors and attorneys as victims of the literal interpretation, champions of the expansive interpretation have overlooked an important detail—their preferred interpretation does not bring attorneys and auditors under the Dodd-Frank Retaliation Regime either. This is because the Dodd-Frank Retaliation Regime does not cover all forms of retaliation.[126] Instead, the statutory text provides that: "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*."[127] The emphasized words—"employer" and "terms and conditions of employment"—clearly limit the Dodd-Frank Retaliation Regime to retaliatory conduct that occurs in the context of an employment relationship.[128] An entity that retaliates against a non-employee will not fit within the wording of the retaliation provision as it will not be retaliating in its capacity as an "employer," nor will it have retaliated against the non-employee "in the terms and conditions of employment."[129] This notion that the Dodd-Frank Retaliation Regime is limited to employment relationships is further confirmed by the remedies it provides. The Dodd-Frank Retaliation Regime awards successful plaintiffs with "back pay,"[130] which is typically understood to mean "The wages or salary that an *employee*

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[124] *Id.*

[125] *See also* Thomas J. McCormac IV, *Circuit Split: How Far Does Whistleblower Protection Extend Under Dodd-Frank?*, 165 U. PA. L. REV. 475, 494–96 (2017).

[126] *Id.*

[127] 15 U.S.C.A. § 78u-6(h)(1)(A) (2015) (emphasis added).

[128] *Id.*

[129] *Id.*

[130] 15 U.S.C.A. § 78u-6(h)(1)(C)(ii) (2015).

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should have received but did not because of an *employer's* unlawful action in setting or paying the wages or salary."[131]

Similarly, plaintiffs are entitled to "reinstatement with the same seniority status,"[132] a phrase that must surely refer to reinstatement to a position of employment, as it is difficult to envision what it would mean for an independent contractor to have "seniority status."[133] As the Dodd-Frank Retaliation Regime only applies where an employer retaliates against an employee, it follows that even under the expansive interpretation subdivision (iii), attorneys and auditors will not be protected. This is because all auditors, and most attorneys, do not and cannot form employment relationships with their clients. Starting first with auditors, Chapter 2B requires audits to be performed by a "registered public accounting firm," which is defined as: "a proprietorship, partnership, incorporated association, corporation, limited liability company, limited liability partnership, or other legal entity that is engaged in the practice of public accounting or preparing or issuing audit reports"[134] It is trite law that only a natural person can be an employee. Accordingly, the absence of a "natural person" (or similar language) from the list of types of entities described in the "registered public accounting firm" definition precludes one from becoming an employee.[135] Admittedly, Chapter 2B also provides that "any associated person" of a public accounting firm will also qualify as a public accounting firm, albeit only "to the extent so designated by the rules of the [Public Company Accounting Oversight] Board."[136] In turn, the rules adopted by the Public Company Accounting Oversight Board define an "auditor" as being both a public accounting firm registered with the Board and "associated persons thereof."[137] However, it is unlikely that an individual could simultaneously be an employee of an

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[131] *Backpay*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[132] 15 U.S.C.A. § 78u-6(h)(1)(C)(i) (2015).

[133] *Id.*

[134] 15 U.S.C.A. § 7201(11)(A) (2015).

[135] *Id.*; *see generally* 17 C.F.R. § 240.2F-2 (stating the SEC definition that "a whistleblower must be an individual. A company or another entity is not eligible to be a whistleblower." It is also worth noting that the SEC's rule concerning the definition of a whistleblower states that "A whistleblower must be an individual. A company or another entity is not eligible to be a whistleblower."). 17 C.F.R. § 240.21F-2.

[136] 15 U.S.C.A. § 7201(11)(B) (2018).

[137] PUB. CO. ACCOUNTING OVERSIGHT BD., *Bylaw and Rules of the Public Company Accounting Oversight Board* r. 1001(a)(xii) (Jan. 31, 2017), https://pcaobus.org/Rules/Documents/PCAOB-Rules.pdf (https://pcaobus.org/Rules/Documents/PCAOB-Rules-Table-of-Contents.pdf).

audited entity while also having a sufficiently close association with a public accounting company to trigger the above definition. Even if it were theoretically possible, such occurrences would be rare in practice.

Even if the above analysis were incorrect, there would still be little doubt that Chapter 2B auditors cannot be employees of the companies they audit.[138] Under rules promulgated by the Public Company Accounting Oversight Board, which is empowered by the Sarbanes-Oxley Act to create rules relating to auditors' independence,[139] auditors must "be independent of the firm's audit client,"[140] and SEC rules further state that an auditor will not be independent if he or she has an employment relationship with the issuer.[141] That being so, it follows that an auditor is legally unable to establish the employment relationship necessary to trigger the Dodd-Frank Retaliation Regime. This is reinforced by several other provisions in Chapter 2B, including: prohibitions on the non-auditory services that a public accounting firm can provide to an issuer it has been commissioned to audit,[142] a limitation on the number of occasions on which a particular member of a registered public accounting firm can act as the lead person for audits of the same entity[143] which fetters on the ability of a public accounting firm to audit entities who previously employed senior employees of the firm.[144]

A similar logic applies to attorneys. While in-house attorneys are employees and would therefore be protected under the expansive interpretation, external counsel work under retainer contracts, rather than employment contracts, with their clients. Therefore, although the expansive interpretation protects in-house attorneys from retaliation, external counsel will remain unprotected. This conclusion is again reinforced by the remedies available under the Dodd-Frank Retaliation Regime. As noted above, one of the primary remedies available to a successful subdivision (iii) plaintiff is reinstatement to his or her previous position.[145] This remedy would be

[138] 15 U.S.C. § 7213(a)(2)(B)(i) (2018).

[139] 15 U.S.C. § 7213(a)(2)(B)(i) (2018); 15 U.S.C. § 7211 (2018) (creating the Public Company Accounting Oversight Board).

[140] PUB. CO. ACCOUNTING OVERSIGHT BD., *supra* note 137. *See* Pub. Co. Accounting Oversight Bd., *AS 1005 Independence*, https://pcaobus.org/Standards/Auditing/Pages/AS1005.aspx.

[141] 17 C.F.R. § 210.2-01(c)(2) (2018).

[142] 15 U.S.C.A. § 78j-1(g)–(i) (2018).

[143] 15 U.S.C.A. § 78j-1(j) (2018).

[144] *Id.*

[145] 15 U.S.C.A. § 78u-6(h)(1)(A)(i)–(iii) (West 2010).

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meaningless for external counsel in most states as the American Bar Association Model Rules of Professional Conduct allow a client to discharge his or her lawyer "at any time, with or without cause."[146] Similarly, as external counsel generally perform work, and therefore accrue fees as and when required by their clients, it is hard to imagine how their back pay would be calculated. Accordingly, one of the Second and Ninth Circuit's main rationales for adopting the expansive interpretation is weak. As the expansive interpretation does not bring auditors and external counsel under the protection of the Dodd-Frank Retaliation Regime, the argument that the literal interpretation should be rejected because it fails to protect auditors and attorneys and thus, is illogical.[147] Perhaps, there are other entities who are unable to report an issue internally at the same time as they make a report to the SEC, and who would be protected by the expansive interpretation but unprotected by the literal interpretation. But if such entities do exist, then, the Second and Ninth Circuits, and other defenders of the expansive interpretation,[148] have failed to identify them.

A determined defender of the expansive interpretation could perhaps make one last attempt to save it by arguing that the words "employer" and "employment" should be given a relaxed interpretation that is not limited solely to the generally understood legal meaning of the term. Such an argument would collapse under its own weight. As the primary justification for the expansive interpretation is that the context in which the word "whistleblower" appears requires that it be given an unorthodox interpretation for the purposes of subdivision (iii), it would be nonsensical to further argue that the contextual wording must itself be reinterpreted.

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[146] MODEL RULES OF PROF'L CONDUCT r. 1.16, cmt. 4 (AM. BAR ASS'N 1983); the ABA Model Rules of Professional Conduct have been largely adopted in all states except California. *See* Am. Bar Ass'n, *Model Rules of Professional Conduct*, AMERICANBAR.ORG, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited Apr. 18, 2017).

[147] This paper has not considered whether it would be possible for a junior employee within a legal services or auditing organization to receive Dodd-Frank Retaliation Regime protection against retaliation from their own employer.

[148] *See, e.g.*, McCormac, *supra* note 125, at 494–95.

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C. Statutory Interpretation—Conclusion

In his dissent in *King*, Justice Scalia stated that "the more unnatural the proposed interpretation of a law, the more compelling the contextual evidence must be to show it is correct."[149] As the expansive interpretation is a significant departure from the natural meaning of the language used in the Dodd-Frank Act, one would expect it to be supported by contextual factors as potent as those in *King* and *Utility Air*.[150] The above analysis demonstrates that this is not the case.

IV. IS THE EXPANSIVE INTERPRETATION DESIRABLE FROM A POLICY PERSPECTIVE?

This paper will now critique the two main policy reasons that have been provided in support of the Expansive Interpretation. The first is the argument that whistleblower laws should incentivize employees to report issues internally rather than notifying the SEC immediately upon discovering illegalities. The second policy argument concerns a topic already discussed in this paper: the plight of auditors and attorneys.

A. Employee Incentives

One of the purported advantages of the expansive interpretation is that it incentivizes employees to report illegal conduct internally rather than to the SEC.[151] Put briefly, the argument made is that as the Dodd-Frank Retaliation Regime provides protections regardless of whether employees report internally or to the SEC, they will be free to decide to whom they report. Many employees will therefore report internally rather than to the SEC, as internal reporting carries a lower risk of triggering retaliation.[152] To the extent that the expansive interpretation incentivizes employees to report internally before approaching the SEC, it is then, an advantageous outcome for all stakeholders, and therefore a reason to favor the expansive interpretation. Employers benefit from internal reporting as it gives them the

[149] *King*, 135 S. Ct. at 2497.
[150] *Id.* at 2480; *Utility Air Regulatory Group*, 134 S. Ct. at 2427.
[151] McCormac, *supra* note 125, at 493–94.
[152] *See Berman*, 801 F.3d at 151.

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opportunity to assess whether a problem in fact exists, and if necessary correct and self-report the problem to the SEC, thereby potentially mitigating the consequences of the illegal activity. The SEC will also benefit, as it is likely to be more efficient for the employer itself to investigate and remedy the illegal activity. Furthermore, internal reporting also helps ensure that the SEC's time is not wasted with baseless allegations, as "the subject company may at times be better able to distinguish between meritorious and frivolous claims."[153] Finally, if internal reporting does in fact carry a lower risk of retaliation, then employees also benefit because even though they would have recourse under the Dodd-Frank Retaliation Regime, most employees would prefer to avoid the retaliation altogether rather than undergo the ordeal of bringing legal proceedings. Additionally, employees who have a degree of loyalty to their employers are likely to consider internal reporting to be preferable, as it will give the employers the opportunity to obtain leniency from the SEC.[154]

The problem with this argument is not its premise, but rather its conclusion. Having claimed that it is preferable if employees initially report illegal activity internally, advocates for the expansive interpretation then argue that the literal interpretation is flawed, as it will cause a significant number of employees to report to the SEC rather than solely whistleblowing internally.[155] This argument has two key defects. First, many of the types of disclosures described in subdivision (iii) are, by definition, external disclosures. For example, § 1513(e) of Title 18 protects disclosures made to "law enforcement officer[s]."[156] Accordingly, the expansive interpretation cannot encourage exclusively internal reporting for such disclosures.

Secondly, the main category of internal reporting brought under the Dodd-Frank Retaliation Regime by the expansive interpretation is securities law violation disclosures protected by the Sarbanes-Oxley Act.[157] However, individuals who engage in such reporting already enjoy the whistleblower

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[153] McCormac, *supra* note 125, at 493.

[154] Of course, these advantages need to be balanced against the primary disadvantage, which is that if an employee reports an issue internally first then the company will have an opportunity to cover up the indiscretion, for example, by destroying evidence or using non-retaliatory tactics to convince the employee to keep quiet.

[155] McCormac, *supra* note 125, at 494.

[156] 18 U.S.C. § 1513(e) (2012).

[157] 18 U.S.C. § 1514(a) (2012).

protections provided by the Sarbanes-Oxley Act.[158] These protections are, according to the Ninth Circuit, in many ways preferable to the Dodd-Frank Retaliation Regime.[159] It is therefore unlikely that the literal interpretation would incentivize significant numbers of employees to report to the SEC in addition to reporting internally, as most internal reporters would be content with their Sarbanes-Oxley Act protections. Perhaps defenders of the expansive interpretation could respond to this point by conceding that the Ninth Circuit was incorrect when it said many employees prefer the Sarbanes-Oxley whistleblower protections to the Dodd-Frank Retaliation Regime.[160] However, this response would also be a tacit admission that one of the Fifth Circuit's primary criticisms of the Expansive Interpretation—that it renders the Sarbanes-Oxley whistleblower protections redundant—is correct (as if all whistleblowers who make disclosures protected by the Sarbanes-Oxley Act are entitled to use the Dodd-Frank Retaliation Regime, and if the Dodd-Frank Retaliation Regime is objectively superior to the Sarbanes-Oxley regime, the Sarbanes-Oxley regime will become redundant in a securities law context).[161]

B. Are Auditors and Attorneys Worthy of Protection?

The second policy argument made in support of the expansive interpretation is that auditors and attorneys deserve protection from the Dodd-Frank Retaliation Regime. This is largely a moot question as, for the reasons outlined above, even the expansive interpretation does not produce this outcome.[162] Nonetheless, for the sake of completeness it is worth pointing out that there are two reasons to doubt that auditors and attorneys are deserving of the concern exhibited by the Second and Ninth Circuits,[163] as well as non-judicial commentators.[164]

First, as auditors and most attorneys are not employees of their clients, the consequences of retaliation are less severe. Employees who suffer a

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[158] *Id.*
[159] *Somers*, 850 F.3d at 1050.
[160] 18 U.S.C. § 1514(a) (2012).
[161] *Asadi*, 720 F.3d at 628–29.
[162] *See* discussion *infra* Section 2.2.
[163] *Berman*, 801 F.3d at 151–52. *See also Somers*, 850 F.3d at 1049.
[164] McCormac, *supra* note 125, at 495.

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retaliatory dismissal lose their primary source of income, and may also suffer damage to their personal well-being.[165] Auditors and external counsel on the other hand, usually have a portfolio of clients, meaning that the financial and psychological consequences of retaliation are comparatively minor.

The second distinction is the presence, or lack thereof, of professional obligations. As employees who report illegal activity within their organization are essentially going beyond the call of duty, it is therefore fair and just that the law protects them from retaliation. In comparison, auditors and attorneys who engage in whistleblowing are merely fulfilling the obligations they voluntarily undertook when they entered their professions. By definition, an auditor's role is to discover and report issues within their clients' businesses. There therefore seems to be less need to create incentives for auditors to participate in whistleblowing as it is a core component of the career they have chosen to pursue. Similarly, to join the legal profession, and enjoy the various privileges attached to it, an individual must agree to various quasi-whistleblower obligations. The American Bar Association Model Rules of Professional Conduct expect attorneys employed or retained by a corporation to internally report illegal activity being performed, or about to be performed, by members of that organization.[166]

Attorneys are also expected to make disclosures necessary to prevent clients from committing crimes likely to result in substantial financial harm,[167] or mitigate the financial harm caused by crimes their clients committed through the use of the attorneys' services.[168] These obligations are largely similar to those imposed on issuers' attorneys by the SEC's Standards of Professional Conduct.[169] That being said, there is little reason to demand that attorneys receive special protections for complying with SEC reporting obligations that are in substance, the same as the ethical obligations they undertook when they entered the legal profession. It is also hard to see why

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[165] Sarah A. Bugard et al., *Toward a Better Estimation of the Effect of Job Loss on Health*, 48 J. OF HEALTH & SOC. BEHAV. 369 (2007).

[166] MODEL RULES OF PROF'L CONDUCT r. 1.13(a)–(e) (AM. BAR ASS'N 1983). *See also* r. 1.6(b)(2)–(3) and Barry R. Temkin & Ben Moskovits, *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, 12–16 (2012).

[167] MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(2) (AM. BAR ASS'N 1983).

[168] MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(3) (AM. BAR ASS'N 1983).

[169] 17 C.F.R. § 205.3(b) (2017).

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attorneys acting for issuers should be protected from retaliation for reporting securities law violations,[170] when attorneys who report other types of illegal conduct performed by their clients are not protected.

V. CONCLUSION

The story of subdivision (iii)'s creation and interpretation is ultimately a tale of oversight. When drafting subdivision (iii) Congress erred by failing to understand the confusion that its casual use of the term "whistleblower" would cause. But one error does not justify another, and in their haste to formulate an interpretation that they considered palatable the Second and Ninth Circuits have made several oversights of their own. If the Second and Ninth Circuits had properly assessed the full scope of the statutory regime at issue, as well as the Supreme Court authority they invoked, then perhaps they would have reached different conclusions. As noted above, the Circuit Split should soon come to an end when the Supreme Court rules on the appeal of the Ninth Circuit's decision in *Somers*. Unless defenders of the expansive interpretation can provide the Supreme Court with fresh and persuasive reasons in favor of this approach, then the Supreme Court should overturn the Ninth Circuit's decision and adopt the literal interpretation instead.

[170] *See, e.g.*, McCormac, *supra* note 125, at 495.

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