RECENT DEVELOPMENTS

WHEN TEXT AND POLICY CONFLICT: INTERNAL WHISTLEBLOWING UNDER THE SHADOW OF DODD-FRANK

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This Article considers whether the text of the Dodd-Frank Act protects internal whistleblowers from retaliation, and if not, whether it should. After the economic meltdown following the 2008 financial crisis, Congress extended protections to corporate whistleblowers by enacting Dodd-Frank. Since then, numerous lower federal courts have disagreed over whether Dodd-Frank's whistleblower protections apply to employees who report their employer's securities violations internally, but not to the Securities and Exchange Commission (SEC). In Digital Realty Trust, Inc. v. Somers, *the Supreme Court resolved this division of authority by holding that Dodd-Frank's whistleblower protections only apply to employees who report their employer's securities violations to the SEC.*

After discussing current statutory and case law, this Article makes two claims. First, it argues that the Court's decision in Digital Realty *is correct as a matter of statutory interpretation and finds support in both textualism and purposivism. While those who may disagree with the Court's holding have advanced strong policy arguments to support their position, such arguments cannot trump the unambiguous meaning of Dodd-Frank's text. That meaning confirms that Dodd-Frank's whistleblower protections do not apply to internal whistleblowers. And even if Dodd-Frank's text initially appears ambiguous, its legislative history resolves this ambiguity by confirming that only whistleblowers who report misconduct to the SEC are protected.*

Nevertheless, this Article further argues that Congress should amend Dodd-Frank to protect from retaliation employees who only report their employer's securities violations in-

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ternally. The novel and easily-adoptable amendment that this Article proposes has the potential to reduce the vulnerability of certain classes of employees to employer retaliation, incentivize employees to make internal disclosures of securities violations, and reduce the costs of investigations by channeling them internally. Most importantly, the proposed amendment would align Dodd-Frank with the doctrinal foundation of whistleblower programs in the United States—the idea that regulatory compliance requires robust external and internal whistleblower protections.

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INTRODUCTION

After the economic meltdown following the 2008 financial crisis, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) on July 21, 2010.[1] Congress enacted Dodd-Frank

1. Dodd-Frank Wall Street Reform and Consumer Protection (Dodd-Frank) Act of

to, among other things, "promote the financial stability of the United States by improving accountability and transparency in the financial system."[2] A critical measure to ensure such accountability and transparency is Dodd-Frank's various whistleblower incentives and protections.[3] Section 21F of Dodd-Frank extends protections to whistleblowers by prohibiting employers from retaliating against employees who report their employer's securities violations.[4] Many have noted that Congress crafted this anti-retaliation provision to enhance the protections that previous remedial legislation—in particular, the Sarbanes-Oxley Act (SOX) of 2002[5]—granted to whistleblowers.[6] Congress did so to "build on existing legislation to remedy the aftermath of the 2008 financial crisis and provide strong compliance and reporting incentive structures to prevent future market failures."[7]

While many have found the mischief Congress sought to remedy in enacting Dodd-Frank's whistleblower protections perfectly clear, courts have found the language of those protections unclear. Such was the confusion that a circuit split developed over whether employees who report their employer's securities violations internally, but not to the Securities and Exchange Commission (SEC), may claim Dodd-Frank's whistleblower protections. On June 26, 2017, the Supreme Court agreed to resolve these conflicting interpretations of Dodd-Frank by granting a petition for a writ

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2010, Pub. L. No. 111-203, 124 Stat. 1376 (codified as amended in scattered sections of 7 and 15 U.S.C.).

2. *Id.* at 1376. Dodd-Frank's preamble also states that its purpose is "to end 'too big to fail,' to protect the American taxpayer by ending bailouts," and "to protect consumers from abusive financial services practices." *Id.*

3. Under Dodd-Frank's bounty program, the Securities and Exchange Commission (SEC) is required to "pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission." 15 U.S.C. § 78u-6(b)(1) (2012).

4. *Id.* § 78u–6(h). This anti-retaliation provision amended the Securities and Exchange Act of 1934 by adding whistleblower protections. *See* Somers v. Dig. Realty Tr., Inc., 850 F.3d 1045, 1046 (9th Cir. 2017), *rev'd and remanded sub nom.* 138 S. Ct. 767 (2018).

5. Sarbanes-Oxley (SOX) Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15, 18, 28 and 29 U.S.C.).

6. *See, e.g.*, Brent T. Murphy, Note, *A Textual Analysis of Whistleblower Protections Under the Dodd-Frank Act*, 92 NOTRE DAME L. REV. 2259, 2259 (2017) (explaining that "Dodd-Frank's whistleblower program followed in the footsteps of" SOX); *see also* Samuel C. Leifer, Note, *Protecting Whistleblower Protections in the Dodd-Frank Act*, 113 MICH. L. REV. 121, 123 (2014) (explaining that Congress's "introduction of stronger and more expansive whistleblower measures in Dodd-Frank reiterated [its] belief that whistleblowers play an important role in financial regulation").

7. *See* Zizi Petkova, Note, *Interpreting the Anti-Retaliation Provision of the Dodd-Frank Act,* 18 U. PA. J. BUS. L. 573, 574 (2016).

of certiorari in *Digital Realty Trust, Inc. v. Somers*.[8] And on February 21, 2018, the Court resolved this split by holding that Dodd-Frank's whistleblower protections are only available to employees who report their employer's securities violations to the SEC.[9]

The division of authority that led to the Supreme Court's decision in *Digital Realty* centered on the interplay between two subsections in § 21F of Dodd-Frank that appear to result in an "internal inconsistency."[10] Dodd-Frank amended the Securities and Exchange Act of 1934 by adding § 21F, which outlines incentives and protections available to securities whistleblowers.[11] One subsection of § 21F, subsection (a), explicitly defines the term "whistleblower" to mean "any individual who provides . . . information relating to a violation of the securities laws *to the Commission*."[12] However, another subsection of § 21F, subsection (h)(iii), provides individuals a cause of action against their employers if they make disclosures required or protected under SOX, which includes internal disclosures.[13]

Prior to the Supreme Court's decision in *Digital Realty*, three federal courts of appeals were divided over whether subsection (a)'s definition of "whistleblower" applies to subsection (h)(iii)'s anti-retaliation provision.[14] In *Asadi v. G.E. Energy (USA), LLC*,[15] the U.S. Court of Appeals for the Fifth Circuit held that subsection (a) applies to subsection (h)(iii).[16] Given the plain language of subsection (a), the Fifth Circuit concluded that Dodd-Frank protects only "those individuals who provide 'information relating to a violation of the securities laws' to the SEC."[17] Two courts of appeals subsequently disagreed with the Fifth Circuit, however. In *Berman v.*

8. *See* Petition for Writ of Certiorari, Digital Realty, Dig. Realty Tr., Inc. v. Somers, 137 S. Ct. 2300 (2017) (No. 16-1276).

9. Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 772–73 (2018).

10. *See* Leifer, *supra* note 6, at 123.

11. 15 U.S.C. § 78u-6 (2012); *see also* Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 146 (2d Cir. 2015).

12. 15 U.S.C. § 78u-6(a)(6) (emphasis added).

13. *See id.* § 78u-6(h)(1)(A) (providing that an employer may not "discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower . . . in making disclosures that are required or protected under" SOX).

14. As the U.S. Court of Appeals for the Ninth Circuit put it, if subsection (a) applies to subsection (h), "it would exclude those . . . who were fired after making internal disclosures of alleged unlawful activity." Somers v. Dig. Realty Tr., Inc., 850 F.3d 1045, 1046 (9th Cir. 2017), *rev'd and remanded sub nom.* 138 S. Ct. 767 (2018).

15. 720 F.3d 620 (5th Cir. 2013).

16. *Id.* at 627.

17. *Id.* at 629.

Neo@Ogilvy LLC,[18] the U.S. Court of Appeals for the Second Circuit held that the tension between subsections (a) and (h)(iii) "warrant[s] *Chevron* deference to the [SEC's] regulation" that subsection (a) does not apply to subsection (h)(iii).[19] And most recently, the U.S. Court of Appeals for the Ninth Circuit in *Somers v. Digital Realty Trust, Inc.*[20] agreed that subsection (h)(iii) "extend[s] protections to all those who make disclosures of suspected violations, whether the disclosures are made internally or to the SEC."[21] On appeal, however, the Supreme Court reversed the Ninth Circuit and held that subsection (a) applies to subsection (h)(iii).[22] To the Court, Dodd-Frank's whistleblower protections extend only to employees who report their employer's securities violations to the SEC.[23]

This Article makes two claims. First, it argues that the Supreme Court's holding in *Digital Realty* is correct as a matter of statutory interpretation and finds support in both textualism and purposivism. The plain language of Dodd-Frank's definition of "whistleblower" confirms that it only applies to whistleblowers who report securities violations to the SEC. And while certain policy arguments to the contrary are compelling, they do not supersede the plain language of, and legislative history behind, Dodd-Frank's clear definition of "whistleblower."

Nevertheless, this Article further argues that Congress should amend this definition to include employees who report their employer's securities violations internally, but not to the SEC. The novel and easily-adoptable amendment that this Article proposes could, among other things, reduce the vulnerability of certain classes of employees to retaliatory discharge, incentivize employees to make internal disclosures of securities violations, and reduce the costs of investigations. The amendment would also align Dodd-Frank with the key insight of the history and evolution of whistleblower programs in the United States, which is the idea that regulatory compliance requires robust external *and* internal whistleblower incentives and protec-

18. 801 F.3d 145 (2d Cir. 2015).

19. *Id.* at 150. *Chevron* deference refers to the deference regime the Supreme Court articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* instructs that when a court reviews an agency's interpretation of a statute, the court must engage in two steps. *Id.* at 842. First, the court must determine whether "the statute is silent or ambiguous with respect to the specific issue." *Id.* at 843. If the court determines that the statute is silent or ambiguous, it must defer to the agency's interpretation if it is "reasonable." *Id.* at 844.

20. 850 F.3d 1045 (9th Cir. 2017).

21. *Id.* at 1047.

22. Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 781–82 (2018).

23. *Id.* ("To sue under Dodd-Frank's anti-retaliation provision, a person must first provide . . . information relating to a violation of the securities laws to the Commission.") (internal quotations and citation omitted).

tions.

This Article proceeds in four parts. Part I briefly discusses the statutory background and text of SOX and Dodd-Frank, the centerpieces of modern corporate whistleblowing protections. Part II outlines the circuit split that existed between the Fifth, Ninth, and Second Circuits regarding whether Dodd-Frank's definition of "whistleblower" applies to the subsection that creates a private cause of action for employees who make internal disclosures under SOX. Part II concludes by briefly discussing the Supreme Court's resolution of this split in *Digital Realty*. Part III argues that the Court's decision in *Digital Realty* was correct as a matter of statutory interpretation. Finally, Part IV asserts that, notwithstanding the Court's correct decision in *Digital Realty*, Congress should amend Dodd-Frank to protect employees who are retaliated against for making internal disclosures. It concludes by proposing such an amendment.

I. THE STATUTORY AND REGULATORY BACKGROUND OF MODERN CORPORATE WHISTLEBLOWING

A. The Sarbanes-Oxley Act of 2002

Prompted by the accounting fraud and other corrupt business practices that large corporations such as Enron and WorldCom engaged in during the late 1990s and early 2000s, Congress enacted SOX in 2002.[24] In passing SOX, Congress sought to "safeguard investors in public companies and restore trust in the financial markets" following "a series of celebrated accounting debacles."[25] A primary purpose behind SOX was to create internal and external mechanisms that could both identify and correct potential securities violations.[26] To do so, SOX established a comprehensive whistleblower incentives and protections program.

The most significant of SOX's three whistleblowing sections is § 806, which outlines SOX's anti-retaliation provisions. This section provides that publicly traded companies may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee" for engaging in legal whistleblowing.[27] This protection extends not only to federal regulatory and law enforcement agencies, but also to "person[s] with supervisory authority over the employee."[28]

Section 806 is most significant for purposes of this Article because it, un-

24. *See* Yates v. United States, 135 S. Ct. 1074, 1081 (2015).

25. *Dig. Realty*, 138 S. Ct. at 733; Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 484 (2010).

26. *See* Leifer, *supra* note 6, at 126.

27. Sarbanes-Oxley Act of 2002 § 806(a), 18 U.S.C. § 1514A(a) (2012).

28. *Id.* §§ 1514A(a)(1)(A), (C).

like its statutory forbears,[29] extends whistleblowing protections to individuals who report internally. As one commentator has noted, "Section 806 is unusual in specifying internal whistleblowing as an appropriate channel."[30] Prior to its passage, "[m]ost state and federal statutes designate[d] only an external recipient."[31]

B. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010

Similar to the events leading to SOX's passage, Congress enacted Dodd-Frank in 2010 following the recognition that "financial institutions cannot be left to regulate themselves."[32] Dodd-Frank sought to avoid further economic meltdown resulting from the 2008 market collapse by establishing "clear rules, transparency, and accountability."[33] A key component of this strategy was Dodd-Frank's inclusion of significant whistleblower incentives and protections.

Subsection (a) of Dodd-Frank defines the term "whistleblower" to mean "any individual who provides . . . information relating to a violation of the securities laws *to the Commission*."[34] And subsection (h), Dodd-Frank's anti-retaliation provision, extends the following protections to whistleblowers:

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—
>
> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> (iii) *in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002* (15 U.S.C. 7201 et seq.), this chapter . . . and any other law, rule, or regulation subject to the jurisdiction of the Commission.[35]

The italicized text of Dodd-Frank's anti-retaliation provision, subsection (h)(iii), appears to conflict with Dodd-Frank's definition of "whistleblower" found in subsection (a). That is because subsection (h)(iii) seems to forbid employers from retaliating against individuals that make disclosures under

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29. *See* Leifer, *supra* note 6, at 127.

30. Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1760 (2007).

31. *Id.*

32. Michael S. Barr, *The Financial Crisis and the Path of Reform*, 29 YALE J. REG. 91, 92 (2012).

33. *Id.*

34. 18 U.S.C. § 78u-6(a)(6) (2012) (emphasis added).

35. *Id.* § 78u-6(h)(1)(A) (emphasis added).

SOX, which, under that provision, may be done internally. Yet subsection (a) clearly states that a whistleblower is an individual who reports securities violations directly to the SEC. This apparent textual conflict is what led to the circuit split regarding whether subsection (a)'s definition of "whistleblower" applies to subsection (h)(iii). If subsection (a) so applies, then subsection (h)(iii) does not protect employees who only report their employer's securities violations internally, and not to the SEC.

C. The SEC's Interpretation of Dodd-Frank's Anti-Retaliation Provision

Before much of the confusion arose in the lower courts regarding whether subsection (a)'s definition of "whistleblower" applies to subsection (h)(iii)'s anti-retaliation provision,[36] the SEC promulgated a rule in 2011 providing that an individual is a "whistleblower" if she provides "information in a manner described in" any of subsection (h)'s three subdivisions, which of course, includes subsection (h)(iii).[37] The SEC took the position that Dodd-Frank's "anti-retaliation protections apply whether or not" an individual satisfies "the requirements, procedures and conditions to qualify for an award" under Dodd-Frank's bounty program.[38] In doing so, the SEC stated its belief that subsections (a) and (h)(iii) are ambiguous.[39] To the SEC, subsection (a)'s "limited" definition of "whistleblower" conflicts with subsection (h)(iii)'s "broad catchall provision."[40] Thus, under the SEC's interpre-

36. More than five district courts have held that subsection (a)'s definition of "whistleblower" does not apply to subsection (h)(iii)'s anti-retaliation provision. *See, e.g.*, Yang v. Navigators Grp., Inc., 18 F. Supp. 3d 519, 533–34 (S.D.N.Y. 2014); Khazin v. TD Ameritrade Holding Corp., No. 13-4149, 2014 WL 940703, at *3–6 (D.N.J. Mar. 11, 2014); Azim v. Tortoise Capital Advisors, LLC, No. 13-2267-KHV, 2014 WL 707235, at *2–3 (D. Kan. Feb. 24, 2014); Ellington v. Giacoumakis, 977 F. Supp. 2d 42, 44–46 (D. Mass. 2013); Genberg v. Porter, 935 F. Supp. 2d 1094, 1106–07 (D. Colo. 2013); Nollner v. S. Baptist Convention, Inc., 852 F. Supp. 2d 986, 995 (M.D. Tenn. 2012); Kramer v. Trans–Lux Corp., No. 3:11CV1724 SRU, 2012 WL 4444820, at *4 (D. Conn. Sept. 25, 2012).

But at least five district courts have held to the contrary. *See, e.g.*, Verble v. Morgan Stanley Smith Barney, LLC, 148 F. Supp. 3d 644, 656 (E.D. Tenn. 2015); Wiggins v. ING U.S., Inc., 2015 WL 3771646, at *9–11 (D. Conn. June 17, 2015); Verfuerth v. Orion Energy Sys., Inc., 65 F. Supp. 3d 640, 642–46 (E.D. Wis. 2014); Banko v. Apple Inc., 20 F. Supp. 3d 749, 756–57 (N.D. Cal. 2013); Wagner v. Bank of Am. Corp., No. 12-cv-00381-RBJ, 2013 WL 3786643, at *4–6 (D. Colo. July 19, 2013).

37. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,363 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240, 249).

38. *Id.*

39. Interpretation of the SEC's Whistleblower Rules Under Section 21F of the Securities Exchange Act of 1934, 80 Fed. Reg. 47,829, 47,829 (Aug. 10, 2015) (to be codified at 17 C.F.R. pt. 241).

40. *Id.*

tation of Dodd-Frank—and prior to the Supreme Court's decision in *Digital Realty*—an employee could claim that statute's whistleblower protections even if the employee only reported her employer's securities violations internally, and not to the SEC.

II. RECENT CASE LAW REGARDING DODD-FRANK'S ANTI-RETALIATION PROVISION

Given the apparent tension between subsections (a) and (h)(iii) of Dodd-Frank—and the SEC's interpretation of those provisions—conflict soon arose regarding whether subsection (a)'s definition of "whistleblower" applies to subsection (h)(iii). Prior to the Supreme Court's recent decision in *Digital Realty*, three courts of appeals weighed in on the issue and produced a 2–1 circuit split.[41] While the Second and Ninth Circuits held that subsection (a) does not apply to subsection (h)(iii), the Fifth Circuit held to the contrary.[42] In *Digital Realty*, the Supreme Court found the Fifth Circuit's reasoning persuasive and held that subsection (a) applies to subsection (h)(iii).[43]

A. Asadi v. G.E. Energy *(5th Cir. 2013)*

Khaled Asadi worked for G.E. Energy as a G.E.–Iraq Country Executive from 2006 to 2011.[44] In that role, he was responsible for securing and managing energy contracts for G.E. Energy by coordinating with Iraq's government.[45] While on assignment in Amman, Jordan in 2010, Asadi alleged that he became aware of behavior by G.E. Energy officials that could violate the Foreign Corrupt Practices Act (FCPA).[46] In particular, Asadi alleged that an Iraqi official told him that G.E. Energy hired a person connected to Iraq's Senior Deputy Minister of Electricity "in order to curry favor in an upcoming negotiation."[47] Shortly after reporting this information to a supervisor and the G.E. Energy ombudsman, he received a negative performance review for the first time.[48] Asadi did not, however, report the

41. Asadi v. G.E. Energy (USA), LLC, No. CIV.A. 4:12-345, 2012 WL 2522599 (S.D. Tex. June 28, 2012), *aff'd sub nom.* 720 F.3d 620 (5th Cir. 2013); Berman v. Neo@Ogilvy LLC, No. 14-CV-00523 GHW SN, 2014 WL 6865718 (S.D.N.Y. Aug. 15, 2014), *adopted in part by* 72 F. Supp. 3d 404 (S.D.N.Y. 2014), *rev'd and remanded*, 801 F.3d 145 (2d Cir. 2015).

42. *Asadi*, 2012 WL 2522599, at *1-2; *Berman*, 2014 WL 6865718, at *7-10.

43. Somers v. Dig. Realty Tr., Inc., 850 F.3d 1045, 1051 (9th Cir.), *rev'd and remanded sub nom.* 138 S. Ct. 767 (2018).

44. Asadi v. G.E. Energy (USA), LLC, 2012 WL 2522599, at *1.

45. *Id.*

46. *Id.*

47. *Id.* (internal quotation marks omitted).

48. *See id.* at *2.

alleged FCPA violation to the SEC.[49] About one year after his initial report, G.E. Energy fired him.[50]

Asadi brought a whistleblower suit against G.E. Energy under Dodd-Frank.[51] He asserted that G.E. Energy illegally fired him in retaliation for reporting internally the company's alleged FCPA violation.[52] The district court granted G.E. Energy's motion to dismiss, holding that Asadi "does not fit within Dodd-Frank's definition of a whistleblower" because he failed to report G.E. Energy's alleged FCPA violation to the SEC.[53] In doing so, the court expressly declined to consider Asadi's argument that an internal whistleblower nevertheless qualifies for Dodd-Frank protection "because his disclosures were 'required' or 'protected' under" SOX.[54] To the court, resolving that argument was unnecessary because Dodd-Frank does not apply extraterritorially.[55] Asadi appealed.[56]

The Fifth Circuit—the first court of appeals to consider Dodd-Frank's whistleblower protections[57]—affirmed the district court in a 3–0 opinion.[58] In doing so, the Fifth Circuit dispensed with the district court's extraterritoriality holding. Unlike the district court, it directly considered and rejected Asadi's argument that internal whistleblowers are protected under Dodd-Frank's category of protected behavior, found in subsection (h)(iii).[59] Because Asadi did not report G.E. Energy's alleged FCPA violation to the SEC, Dodd-Frank did not protect him from G.E. Energy's alleged retaliation.[60]

The court first noted that if "the statutory text is plain and unambiguous," it "must apply the statute according to its terms."[61] The court thus sought to "start and end [its] analysis with the text of the relevant statute."[62] Because subsection (a) plainly defines "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws *to the Commission*,"[63] that subsection "expressly and unambiguously requires

49. *Id.* at *3.
50. *See id.* at *2.
51. *Id.* at *3.
52. *Id.* at *2.
53. *Id.* at *3.
54. *Id.* (quoting 15 U.S.C. § 78u–6(h)(1)(A) (2012)).
55. *Id.* at *4.
56. *See* Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620, 621 (5th Cir. 2013).
57. *See* Murphy, *supra* note 6, at 2263.
58. *See Asadi*, 720 F.3d at 621.
59. *See id.* at 625.
60. *Id.* at 623.
61. *Id.* at 622 (internal quotation marks and citations omitted).
62. *Id.* at 623.
63. 15 U.S.C. § 78u–6(a)(6) (2012) (emphasis added).

that an individual provide information to the SEC to qualify as a 'whistleblower.'"[64]

The court next found unpersuasive Asadi's argument that subsection (a)'s definition of whistleblower conflicted with, or rendered superfluous, the third category of protected behavior as outlined in subsection (h).[65] To the court, the two subsections could only conflict if one were to read subsection (h)'s "three categories of protected activity as additional definitions of three types of whistleblowers."[66] And the textual reading of subsection (a) did not render the third category of protected behavior in subsection (h) superfluous because "this category protects whistleblowers from retaliation, based not on the individual's disclosure of information to the SEC but, instead, on that individual's other possible required or protected disclosure(s)."[67]

The court finally addressed Asadi's argument that it should defer to the SEC's interpretation of subsections (a) and (h)(iii). It rejected this argument on two grounds. First, because the language of subsection (a) was unambiguous, Congress "directly addressed the precise question at issue."[68] As such, it found that Asadi could not pass step one of the test the Supreme Court articulated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[69] Second, even assuming that subsection (a) was ambiguous, the court held that the SEC's regulations interpreting that subsection were inconsistent.[70] Deference, then, was inappropriate.

B. Berman v. Neo@Ogilvy *(2d Cir. 2015)*

Daniel Berman worked for Neo@Ogilvy (Neo), a media company,[71] from 2010 to 2013.[72] Serving as Neo's finance director, Berman was responsible for ensuring the company's compliance with Generally Acceptable Accounting Principles (GAAP) and its parent company's accounting

64. *Asadi*, 720 F.3d at 623 (internal quotation marks omitted).

65. *See id.* at 626–28.

66. *Id.* at 626.

67. *Id.* at 627.

68. *Id.* at 630.

69. *See id.* Under *Chevron*'s first step, the court must determine whether Congress, in enacting the relevant statute, "has directly spoken to the precise question at issue." Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

70. *Id.*

71. *See We Make What's New Work Now*, NEO@OGILVY, https://www.neoogilvy.com/ (last visited July 28, 2018).

72. Berman v. Neo@Ogilvy LLC, No. 14-CV-00523 GHW SN, 2014 WL 6865718, at *1 (S.D.N.Y. Aug. 15, 2014), *adopted in part by* 72 F. Supp. 3d 404 (S.D.N.Y. 2014), *rev'd and remanded*, 801 F.3d 145 (2d Cir. 2015).

policies.[73] Berman alleged that he identified compliance failures, accounting fraud, and accounting irregularities he thought violated GAAP, SOX, Dodd-Frank, and other laws.[74] Several months after reporting this alleged misconduct to his supervisors, Neo fired him.[75] Berman also reported Neo's alleged conduct to the SEC, but not until six months after Neo fired him.[76]

Berman brought a whistleblower suit against Neo under Dodd-Frank, alleging that Neo retaliated against his internal disclosures by firing him.[77] The district court relied on the Fifth Circuit's decision in *Asadi* to grant Neo's motion to dismiss.[78] Its decision rested on "fundamentals of statutory construction," one such fundamental being the statutory canon that "the provisions of a statute should be read in a way that renders them compatible, not contradictory."[79] The district court explained that the two provisions at issue—subsections (a) and (h)(iii) of Dodd-Frank—could be read in such a way. In particular, the court noted that subsection (a) "describes who is protected," while subsection (h)(iii) "describes what actions by such an individual are protected."[80] Berman appealed.[81]

The Second Circuit reversed the district court in a 2–1 opinion.[82] It did so because of the "arguable tension" between subsections (a) and (h)(iii).[83] That tension, which the court said would leave subsection (h)(iii) "with an extremely limited scope," led it to reject the Fifth Circuit's textualist reasoning in *Asadi*.[84] Finding sufficient statutory ambiguity to defer under *Chevron* to the SEC's interpretation of Dodd-Frank, the court concluded that Berman was allowed to pursue remedies under Dodd-Frank "despite not having reported to the Commission before his termination."[85]

Central to the Second Circuit's interpretation of subsections (a) and (h)(iii) was the Supreme Court's 2015 decision in *King v. Burwell*.[86] Similar to the issue in *King*, the Second Circuit explained that the issue in the case

73. *Id.*

74. *Id.*

75. *See id.* at *2–3.

76. Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 149 (2d Cir. 2015).

77. *See* Berman v. Neo@Ogilvy LLC, 72 F. Supp. 3d 404, 406 (S.D.N.Y. 2014), *rev'd and remanded*, 801 F.3d 145 (2d Cir. 2015).

78. *See id.* at 409.

79. *Id.* at 408 (internal quotation marks and citations omitted).

80. *Id.* at 409 (internal quotation marks and citations omitted).

81. *See Berman*, 801 F.3d at 146.

82. *Id.*

83. *See id.* at 146–47.

84. *Id.* at 151.

85. *Id.* at 155.

86. *See id.* at 146.

before it was "whether the statutory provision applies to another provision of the statute" when tension exists between the two.[87] The Second Circuit reasoned that reading subsection (a)'s definition of "whistleblower" as applying to subsection (h)(iii) would give the latter subsection a limited scope, a reading it found problematic for two reasons.

First, the court found troubling a reading of Dodd-Frank that would require an aggrieved employee to report to both the SEC and their employer because "reporting to a government agency creates a substantial risk of retaliation."[88] Second, SOX prohibits certain categories of employees—attorneys and auditors, for example—from reporting employer securities violations to the SEC until after they report such violations to their employer.[89] Thus, reading subsection (a) as applying to subsection (h)(iii) would strip such employees of any relief under Dodd-Frank, leaving the latter subsection "with[out] any scope."[90]

The court next sought to determine whether Congress intended to leave subsection (h)(iii) with such a limited scope by looking to the legislative history of that provision. The court found that the legislative history "inquiry yield[ed] nothing."[91] Unable to determine whether subsection (a)'s definition of "whistleblower" applies to subsection (h)(iii), the court deferred to the SEC's interpretation of those provisions.[92]

Judge Dennis Jacobs dissented, arguing that the majority and the SEC's interpretation "altered a federal statute by deleting three words ('to the Commission') from the definition of 'whistleblower . . . .'"[93] Judge Jacobs reasoned that subsection (a)'s definition of "whistleblower" was unambiguous and explained that such a definition "is one of the 'prominent manner[s]' for limiting the meaning of statutory text."[94] Given the statute's unambiguity, he would have "enforce[d] it according to its terms."[95] The majority's refusal to do otherwise represented a "palpable" and "lurking" danger "that bureaucrats and federal judges assume and exercise power to redraft a statute to give it a more respectable reach."[96]

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87. *Id.* at 150.

88. *Id.* at 151.

89. *Id.* at 151–52.

90. *Id.* at 152.

91. *Id.* The court, for example, noted that "there is no mention of the addition of [subsection (h)(iii)], much less its meaning or intended purpose, in any legislative materials." *Id.* at 153.

92. *Id.* at 155.

93. *Id.* at 155 (Jacobs, J., dissenting).

94. *Id.* at 156 (quoting King v. Burwell, 135 S. Ct. 2480, 2495 (2015)).

95. *Id.* at 160 (quoting *King*, 135 S. Ct. at 2480) (internal quotation marks and citation omitted).

96. *Id.* at 159.

C. Somers v. Digital Realty Trust, Inc. *(9th Cir. 2017)*

Paul Somers worked for Digital Realty Trust, a real estate investment company,[97] from 2010 to 2014.[98] During his time as Digital Realty's Vice President of Portfolio Management, Somers alleged that he reported to Digital Realty's senior management that one of his supervisors had eliminated certain internal controls that violated SOX.[99] Somers did not, however, report Digital Realty's alleged misconduct to the SEC. Shortly after Somers reported such misconduct to Digital Realty, it fired him.[100]

Somers then brought a suit against Digital Realty claiming that it violated Dodd-Frank by firing him in retaliation for reporting his supervisor's alleged misconduct.[101] The district court denied Digital Realty's motion to dismiss, holding that Somers was entitled to Dodd-Frank protection.[102] In doing so, it concluded that because subsections (a) and (h)(iii) are ambiguous, the SEC's interpretation was entitled to deference.[103] In determining that subsections (a) and (h)(iii) were ambiguous, the district court found "two interpretive cannons [sic] . . . particularly germane" to its inquiry: (1) "the surplusage cannon, which holds that a court should give effect, if possible, to every word and every provision Congress used," and (2) "the harmonious-reading cannon, which provides that a court should interpret a statute as a symmetrical and coherent regulatory scheme."[104] Digital Realty appealed.[105]

The Ninth Circuit affirmed the district court in a 2–1 decision.[106] While the court agreed with the Second Circuit's conclusion, it did not expressly state that subsection (h)(iii) was ambiguous. Indeed, the Ninth Circuit stated that the language of that provision unambiguously reflects "Congress's overall purpose to protect those who report violations internally as well as those who report to the government."[107] Yet even finding subsection (h)(iii) unambiguous, the court also stated that the SEC's interpretation of that

97. *See Meet Digital Realty*, DIGITAL REALTY, https://www.digitalrealty.com/meet-digital-realty/ (last visited July 28, 2018).

98. 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 and remanded*, 138 S. Ct. 767 (2018).

99. *Id.* at 1091–92.

100. *Id.*

101. *Id.*

102. *Id.* at 1092.

103. *See id.*

104. *Id.* at 1097.

105. *See* Somers v. Dig. Realty Tr., Inc., 850 F.3d 1045, 1046 (9th Cir. 2017), *rev'd and remanded*, 138 S. Ct. 767 (2018).

106. *See id.*

107. *Id.* at 1047.

provision was entitled to deference.[108]

The Ninth Circuit began its analysis by examining the historical background of SOX and Dodd-Frank.[109] Starting with that background, rather than the text, the court highlighted that Congress enacted SOX "following a major financial scandal."[110] Similarly, the court noted that Congress enacted Dodd-Frank "in the wake of a financial scandal—the subprime mortgage bubble and subsequent market collapse of 2008."[111] This background established Congress's intent: "to provide protection for those who make internal disclosures as well as to those who make disclosures to the SEC."[112] The court next explained that while "[t]here is no legislative history explaining" subsection (h)(iii)'s purpose, "its language illuminates congressional intent."[113] That language, the court reasoned, "necessarily bars retaliation against an employee of a public company who reports violations to the boss."[114]

The Ninth Circuit then rejected the Fifth Circuit's contrary interpretation on two grounds. First, the court explained that the Fifth Circuit's interpretation "would make little practical sense" because it would narrow subsection (h)(iii) "to the point of absurdity."[115] As the Second Circuit noted in *Berman*, the Ninth Circuit also explained that reading subsection (a) as applying to subsection (h)(iii) would leave certain employees such as attorneys and auditors without a remedy under Dodd-Frank. Second, the court reasoned that such a reading would "undercut congressional intent," though it did not expressly state how that reading would do so.[116]

The court also disagreed with the Fifth Circuit that reading Dodd-Frank as protecting employees who fail to report to the SEC would render SOX's enforcement scheme superfluous.[117] This reading is compatible with SOX, the court reasoned, because SOX "offers a different process from" Dodd-Frank for two reasons.[118] First, unlike Dodd-Frank, SOX permits whistle-

108. *Id.* at 1050.

109. *Id.* at 1048.

110. *Id.*

111. *Id.*

112. *Id.* at 1047.

113. *Id.* at 1049.

114. *Id.*

115. *Id.*

116. *See id.* at 1049–50. The court appeared to suggest that reading subsection (h)(iii) as "do[ing] nothing to protect [auditors and attorneys] from immediate retaliation" would undermine congressional intent, but it explained that such a reading "would, in effect," all but read [subsection (h)(iii)] out of the statute," an argument couched in a statutory canon, rather than congressional intent. *See id.* at 1050.

117. *Id.*

118. *Id.*

blowers to adjudicate their claims through administrative review, a procedure likely to "be significantly less costly and stressful for whistleblowers" than Dodd-Frank's enforcement scheme.[119] Second, SOX differs from Dodd-Frank in allowing whistleblowers to recover compensation for special damages.[120] To the court, this meant that whistleblowers who suffer "more substantial emotional injury than financial harm would likely be better off" filing a claim under SOX.[121]

Judge John Owens authored a brief dissent explaining that he agreed with the Fifth Circuit's decision in *Asadi* and the dissent of Judge Jacobs in *Berman*.[122] To him, the majority's reliance on *King* portended a "jurisprudential disruption on a cellular level."[123]

The Supreme Court granted Somers' petition for a writ of certiorari on June 26, 2017[124] and heard oral arguments five months later.[125]

D. Digital Realty Trust, Inc. v. Somers *(2018)*

In *Digital Realty*, the Supreme Court unanimously reversed the Ninth Circuit by holding that Dodd-Frank's whistleblower protections extend only to employees who report their employer's securities violations directly to the SEC.[126] Unlike the Ninth Circuit, the Supreme Court began its analysis with the text of Dodd-Frank, rather than the law's legislative history.[127] Indeed, to the Court, its only "charge" in the case was "to determine the meaning of 'whistleblower'" in subsection (h).[128] Looking to subsection (a), the Court concluded that "the statute supplies an unequivocal answer: A 'whistleblower' is any individual who provides . . . information relating to a violation of the securities laws to the Commission."[129]

In so holding, the Court placed particular emphasis on the interpretive principle that "[w]hen a statute includes an explicit definition, [courts] must follow that definition."[130] Because Dodd-Frank explicitly defines the term "whistleblower," the Court noted that "[t]his principle resolves the

119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 1051 (Owens, J., dissenting).
123. *Id.*
124. *See* Dig. Realty Tr., Inc. v. Somers, 137 S. Ct. 2300 (2017).
125. *See* Transcript of Oral Argument, *Digital Realty*, 137 S. Ct. 2300 (No. 16-1276).
126. Digital Realty, 138 S. Ct. 767, 772–73 (2018).
127. *See id.* at 774–75.
128. *Id.* at 777.
129. *Id.* (internal quotation marks and citation omitted).
130. *Id.* at 776 (internal quotation marks and citation omitted).

question before us."[131] And the Court bolstered its interpretation by looking to the "core objective" of Dodd-Frank's whistleblower program, which, said the court, is "to motivate people who know of securities law violations to tell the SEC."[132] To read Dodd-Frank whistleblower protections as extending to internal whistleblowers would undermine this objective.[133]

The Supreme Court disagreed with the Ninth Circuit's reasoning that interpreting subsection (a) as applying to subsection (h)(iii) would narrow the latter subsection to the point of absurdity. According to the Court, subsection (h)(iii) still serves a purpose because it would "protect[] a whistleblower who reports misconduct *both* to the SEC and to another entity, but suffers retaliation because of the latter, non-SEC, disclosure."[134] The Court also disagreed that its own interpretation "would jettison protection for auditors, attorneys, and other employees subject to internal-reporting requirements."[135] Protection under Dodd-Frank would exist for such employees "as soon as they also provide relevant information to the Commission."[136]

"In sum," noted the Supreme Court, "Dodd-Frank's text and purpose leave no doubt that the term 'whistleblower'" in subsection (h) has the same meaning as that set forth in subsection (a).[137] Because Somers, the whistleblower, did not report his employer's securities violations to the SEC, he could not claim Dodd-Frank's whistleblower protections under subsection (h)(iii).[138]

III. THE SUPREME COURT'S HOLDING IN *DIGITAL REALTY* IS CORRECT

The Supreme Court was correct in holding that Dodd-Frank's whistleblower protections do not apply to internal whistleblowers. This holding is consistent with the plain language of Dodd-Frank, which protects only those who report directly to the SEC. And even if Dodd-Frank initially appears ambiguous, its legislative history resolves this ambiguity by confirming that internal whistleblowers are not protected under it. Policy arguments to the contrary, while compelling, cannot defeat this interpretation.

131. *Id.* at 777.
132. *Id.*
133. *See id.* at 780.
134. *Id.* at 779.
135. *Id.* at 780.
136. *Id.* (emphasis omitted).
137. *Id.* at 778.
138. *Id.*

A. Dodd-Frank's Plain Language

The plain language of Dodd-Frank's definition of "whistleblower" in subsection (a) supports the Supreme Court's decision in *Digital Realty*. That language clearly indicates that subsection (a) applies to subsection (h)(iii). It is axiomatic that when Congress provides a definition of a term in a statute, it intends for that definition to apply consistently throughout the statute. As the Court has repeatedly instructed, when "a statute includes an explicit definition," courts "must follow that definition, even if it varies from th[e] term's ordinary meaning."[139] That is because "[w]hen . . . a definitional section says that a word 'means' something, the clear import is that this is its only meaning."[140] Indeed, because a statute's definition section is Congress's "own glossary," there "would be little use in such a glossary if [courts] were free in despite of it to choose a meaning for [themselves]."[141]

As the petitioner in *Digital Realty* noted, "[t]he resulting syllogism is straightforward."[142] Subsection (h) provides that employers may not retaliate against one category of persons: "whistleblower[s]."[143] And subsection (a) defines a whistleblower as "any individual who provides . . . information relating to a violation of the securities laws *to the Commission*."[144] Therefore, an individual who does not provide information relating to securities violations to the SEC is not a whistleblower and is not protected under subsection (h)(iii).

Importantly, this interpretation squares with subsection (h)(iii)'s "place in the statutory scheme and, in particular, its relationship to the other protections that the Act affords . . . ."[145] One such protection that Dodd-Frank affords is its bounty program. For a whistleblower to qualify for an award under that program, she must "voluntarily provide . . . information to the Commission" that results in a "successful enforcement" action the "Commission [brings] under the securities laws."[146] By explicitly requiring a whistleblower to report to the SEC in order to obtain an award, Dodd-Frank clearly contemplates that a "whistleblower" is an individual who reports to the SEC, and not one who reports internally. A contrary interpretation of subsection (h)(iii) would permit an individual to claim whistleblow-

139. Stenberg v. Carhart, 530 U.S. 914, 942 (2000).

140. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 226 (2012).

141. Fox v. Standard Oil Co. of New Jersey, 294 U.S. 87, 95–96 (1935).

142. Brief for Petitioner at 18, *Digital Realty*, 138 S. Ct. 767 (No. 16-1276), 2017 WL 3701187 at *18.

143. 15 U.S.C. § 78u-6(h)(1)(A) (2012).

144. *Id.* § 78u-6(a)(6) (emphasis added).

145. Jones v. Harris Assocs. L.P., 559 U.S. 335, 348 (2010).

146. 15 U.S.C. § 78u-6(a)(5), (b)(1).

er protection under that subsection yet fail to qualify for an award under Dodd-Frank's bounty program. Such an interpretation could disrupt the interlocking nature of Dodd-Frank's incentives and protections provisions.[147]

Finally, the presumption in favor of consistent meaning confirms this interpretation. Under that presumption, courts "seeking to interpret" a statutory term "adopt the premise that the term should be construed, if possible, to give it a consistent meaning throughout the Act."[148] The presumption thus describes the "intuitive and familiar technique[] that we all use, sometimes unconsciously, in understanding language in context."[149] There is thus a strong presumption that Congress intended for "whistleblower" to have the same meaning in subsections (a) and (h).

The presumption may be overcome if one can show "that Congress clearly intended to use a term differently in different sections of a statute."[150] This was the *Digital Realty* respondent's and the SEC's argument: Congress clearly intended to use the term "whistleblower" differently in subsection (a) and (h).[151] But this reading, as one commentator has put it, is "entirely unreasonable."[152] That is because Dodd-Frank expressly defines what the term "whistleblower" means, and further provides that this definition "shall apply" to subsection (h).[153] It is thus of no moment that, as the Second Circuit in *Berman* noted, subsection (h)(iii) was a "last-minute addition" by Congress.[154]

B. Dodd-Frank's Legislative History

Courts must reject legislative history "at the very outset" when the statutory text is unambiguous.[155] Indeed, Justice Thomas's concurrence in *Digi-*

147. A broad definition of "whistleblower," however, would nevertheless fit within Dodd-Frank's overall incentives and protections regime. *See infra* notes 278–282 and accompanying text.

148. Gustafson v. Alloyd Co., 513 U.S. 561, 568 (1995).

149. JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 216 (2d ed. 2013).

150. Murphy, *supra* note 6, at 2271.

151. *See id.* ("Under the SEC's reading, Congress intended for the whistleblower definition provided in [subsection (a)] to apply to subsections (i) and (ii) in [subsection (h)] but meant for the whistleblowers under subsection (iii) to be a broader category of individuals.").

152. *Id.*

153. 15 U.S.C. § 78(a)(6)u–6(h)(1)(A) (2012).

154. Somers v. Dig. Realty Tr., Inc., 850 F.3d 1045, 1046–47 (9th Cir. 2017), *rev'd and remanded*, 138 S. Ct. 767 (2018).

155. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 567 (2005). And many textualists, of course, go further in their belief that courts must "forgo reliance on leg-

tal Realty reflected this very point and left him "unable to join the portions of the Court's opinion that venture beyond the statutory text."[156] As Justice Thomas, quoting Justice Scalia, put it, "we are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended."[157]

Putting aside this debate, and assuming that subsection (h)(iii) appears ambiguous,[158] its legislative history resolves that ambiguity, further bolstering the Supreme Court's decision in *Digital Realty* as a purposivist matter. In passing Dodd-Frank's whistleblower provisions, Congress sought to create a "new, robust whistleblower program designed to motivate people who know of securities law violations to tell the SEC."[159] Dodd-Frank's Senate Report indicates that Congress wanted whistleblowers to "assist the

islative history" even when the statutory text is ambiguous. *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 71 (2006) [hereinafter Manning, *What Divides Textualists*]; *see also* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 684 (1997) (identifying several noteworthy textualist scholars and judges and describing their objections "to the premise that legislative history supplies evidence of 'genuine' legislative intent").

156. Digital Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 784 (2018) (Thomas, J., concurring).

157. *Id.* at 783 (quoting Lawson v. FMR LLC, 571 U.S. 429, 459-60 (2014) (Scalia, J., concurring)).

158. This discussion assumes that subsection (h)(iii) is ambiguous for two reasons. First, "the 'letter' (text) of a statute" should not "yield to its 'spirit' (purpose) when the two conflict[]." *Cf.* Manning, *What Divides Textualists*, *supra* note 155, at 71. Second, the spirit of a statute should not confirm its clear letter. That is, when an interpreter determines that the meaning of statutory text is plain, she should not consult the statute's legislative history to confirm that plain meaning. Otherwise, legislative history would be relevant even if it contradicts the statutory text's plain meaning, which would permit the interpreter to "render[] what is plain ambiguous." *See* Zedner v. United States, 547 U.S. 489, 511 (2006) (Scalia, J., concurring). For a prominent, and widely criticized, example of such an approach, see Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 453–55 (1989) (relying on a statute's legislative history to determine the meaning of the statute's text that was otherwise "straightforward" and "clear").

This Article also assumes, without deciding, that Congress is an "it," and not a "they." *Cf.* Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992). For persuasive reasons catalogued at length elsewhere, this assumption may be unfounded. *See, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring) ("Trying to infer the intentions of an institution composed of 535 members is a notoriously doubtful business under the best of circumstances."). *See generally* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930). Nevertheless, a thorough defense of this assumption, if one indeed exists, is outside the scope of this Article.

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

[g]overnment to identify and prosecute persons who have violated securities laws," thereby "recover[ing] money for victims of financial fraud."[160]

While Senate Reports are not, on the whole, as reliable as Conference Committee Reports,[161] Dodd-Frank's Senate Report is the most reliable indicator of the core purpose of subsection (h)(iii). That is because, as Professor Victoria Nourse has noted, the most reliable "legislative history is the last, most specific decision related to the interpretive question prior to the textual decision."[162] A review of Dodd-Frank's voluminous legislative history indicates that the Senate Report is the legislative decision most specific to the interpretive question and most proximate to subsection (h)(iii)'s inclusion in Dodd-Frank. To interpret subsection (h)(iii) as applying to individuals who do not report securities violations to the SEC would thus run counter to the most reliable evidence of Congress's purpose in inserting that subsection in Dodd-Frank's anti-retaliation provision.

Legislative history also indicates that Congress specifically declined to define "whistleblower" to include individuals who do not report securities violations to the SEC. An earlier version of subsection (h) did not, as it now does, use subsection (a)'s definition of "whistleblower." Instead, that earlier version applied to "an employee, contractor, or agent."[163] Congress, however, ultimately rejected this earlier version by "replac[ing] the phrase 'employee, contractor, or agent' with the defined term 'whistleblower.'"[164] As the Supreme Court has explained, "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."[165] For these reasons, reliable legislative history resolves any initial ambiguity and supports a purposivist conclusion that subsection (h)(iii) only applies to individuals who report securities violations to the SEC, and not internally.

C. Countervailing Policy Arguments

To be sure, strong policy arguments exist that Dodd-Frank's whistleblower protections should apply to internal whistleblowers, and thus that the *Digital Realty* Court erred in holding otherwise. While these arguments

160. *Id.* at 110.

161. *See* Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 98 (2012).

162. *Id.* at 110.

163. Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 7203(g)(1)(A) (2009).

164. Brief for Petitioner at 25, Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767 (2018) (No. 16-1276), 2017 WL 3701187, at *25.

165. INS v. Cardoza-Fonseca, 480 U.S. 421, 442–43 (1987).

are persuasive, none can overcome the basic principle of statutory interpretation that when Congress has plainly spoken, courts must apply that clear language.[166] In short, "[r]esolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress."[167]

Three policy arguments in favor of a broad interpretation of subsection (h)(iii) stand out. First, some argue that interpreting Dodd-Frank to only apply to employees who report securities violations to the SEC will leave them "unacceptably vulnerable."[168] The idea is that such an interpretation is unjust because it "fails to protect those who are most vulnerable to retaliation."[169] Second, others argue that a textualist interpretation reduces "the amount of information about wrongdoing internally" by "de-incentivizing particular paths for whistleblowers to take."[170] A broader interpretation would increase the quality of information related to securities violations. Third, some have criticized a narrow interpretation on the grounds that it is not only harmful to whistleblowers, but to companies themselves.[171] Because "companies almost always prefer internal investigations to external investigations"—among other reasons, internal investigations are less costly and time consuming—a narrow interpretation harms companies.[172]

These policy arguments are persuasive. Yet, their persuasiveness cannot—and in *Digital Realty* did not—overcome the basic tenet of statutory interpretation that "the ultimate question is what . . . Congress commanded."[173] When that command is clear, as it is in subsection (a)'s definition of

166. *See, e.g.*, Conn. Nat. Bank v. Germain, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.") (internal quotation marks and citations omitted); United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242, (1989) ("The plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.") (internal quotation marks and citations omitted); Rubin v. United States, 449 U.S. 424, 430 (1981) ("When we find the terms of a statute unambiguous, judicial inquiry is complete . . . ."); United States v. Goldenberg, 168 U.S. 95, 102–03 (1897) ("The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used.").

167. United States v. Rodgers, 466 U.S. 475, 484 (1984).

168. *See, e.g.*, Andrew Walker, Note, *Why Shouldn't We Protect Internal Whistleblowers? Exploring Justifications for the* Asadi *Decision*, 90 N.Y.U. L. REV. 1761, 1772 (2015).

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

170. *See* Walker, *supra* note 168, at 1772.

171. *See, e.g.*, Jeff Vogt, Note, *Don't Tell Your Boss? Blowing the Whistle on the Fifth Circuit's Elimination of Anti-Retaliation Protection for Internal Whistleblowers Under Dodd-Frank*, 67 OKLA. L. REV. 353, 378–79 (2015) ("[T]he Fifth Circuit's decision [in *Asadi*] threatens to undermine all internal corporate compliance programs.").

172. *See* Walker, *supra* note 168, at 1773–74.

173. Addison v. Holly Hill Fruit Prods., 322 U.S. 607, 617–18 (1944).

"whistleblower," courts must not ignore it by incorporating policy arguments. As the Supreme Court has noted, "the federal lawmaking power is vested in the legislative, not the judicial, branch of government."[174] Basing an interpretation of Dodd-Frank on policy arguments would run counter to the Court's centuries-old mandate that it is "the exclusive province of the Congress . . . to formulate legislative policies."[175] While "judges [who] disagree with Congress's choice" are "perfectly entitled to say so," they "are not entitled to replace the statute Congress enacted with an alternative of [their] own design."[176] The Court's holding in *Digital Realty* respects this basic, though significantly important, understanding of the separation of powers.

IV. CONGRESS SHOULD AMEND DODD-FRANK TO PROTECT INTERNAL WHISTLEBLOWERS

The *Digital Realty* Court was correct in refusing to consider policy arguments in interpreting Dodd-Frank's whistleblower protections. Nevertheless, these policy arguments are sufficiently compelling to warrant Congressional intervention to amend Dodd-Frank's definition of "whistleblower" to include employees who report their employer's securities violations internally, but not to the SEC. Moreover, insights drawn from the history and evolution of whistleblower programs in the United States—in particular, that regulatory compliance requires robust internal whistleblower protections—strongly support such Congressional intervention. This Part first explains the benefits of an amendment to Dodd-Frank that would protect internal whistleblowers, and then proposes such an amendment.

A. Policy Arguments Support an Amendment

While "[t]he remedy for any dissatisfaction with the results in particular cases" lies not with the courts, such a remedy undoubtedly "lies with Congress."[177] The three policy arguments briefly identified above, and more fully developed below, strongly support Congressional action to amend Dodd-Frank's definition of "whistleblower" to include employees who only report their employer's securities violations internally.

First, a narrow definition of "whistleblower" leaves employees subject to SOX's internal-reporting requirements unacceptably vulnerable to retaliation. Recall that under SOX, certain classes of employees must report their employer's securities violations internally before reporting such violations to

174. Nw. Airlines, Inc. v. Transp. Workers Union, 451 U.S. 77, 95 (1981).

175. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194 (1978).

176. Yates v. United States, 135 S. Ct. 1074, 1101 (2015) (Kagan, J., dissenting).

177. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 576 (1982).

the SEC.[178] But under Dodd-Frank's current definition of "whistleblower," an employer may retaliate against such an employee before the employee has the opportunity to report the employer's misconduct to the SEC.[179] Such a definition is thus under-inclusive, because, as one district court has noted, it "fails to protect those who are most vulnerable to retaliation."[180]

Indeed, this under-inclusiveness is not limited to employees subject to SOX's internal-reporting requirements, because most employees first report their employer's securities violations internally, and not to the SEC.[181] The narrow definition of "whistleblower," then, "do[es] nothing to protect . . . employees from immediate retaliation in response to their initial internal report."[182] The SEC has directly addressed this problem, noting that such a definition means that employees "will be . . . less protected than an individual who comes immediately to the Commission."[183]

In *Digital Realty*, the Supreme Court rejected the idea that a narrow definition of "whistleblower" would "jettison" protection for employees subject to SOX's internal-reporting requirements.[184] Instead, said the Court, protection would be available to these employees once they report their employer's securities violations to the SEC.[185] This is, of course, true. But it is a non-starter. The fact remains that even after the Court's decision in *Digital Realty*, there are a number of reasons why employees may continue to only report their employer's securities violations internally and not to the SEC. As the SEC has recognized, a "sizable percentage" of employees are not incentivized by Dodd-Frank's bounty program.[186] Also, and for better

178. *See supra* text accompanying note 89.

179. *See* Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 151–52 (2d Cir. 2015).

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

181. Somers v. Dig. Realty Tr., Inc., 850 F.3d 1045, 1050 (9th Cir. 2017), *rev'd,* 138 S. Ct. 767 (2018).

182. *Id.*

183. Interpretation of the SEC's Whistleblower Rules Under Section 21F of the Securities Exchange Act of 1934, 80 Fed. Reg. 47,829, 47,830 (Aug. 10, 2015) (to be codified at 17 C.F.R. pt. 241).

184. Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 780 (2018)

185. *Id.*

186. *See* Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,300–01, 34,360 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240, 249); *see also* Bussing v. COR Clearing, LLC, 20 F. Supp. 3d 719, 733 (D. Neb. 2014) (noting that "[m]any whistleblowers are not motivated by financial gain, and so [Dodd-Frank's] bounty program simply may not factor into their decision"); Anthony Heyes & Sandeep Kapur, *An Economic Model of Whistle-Blower Policy*, 25 J. L. ECON. & ORG. 157, 162–64 (2009) (outlining the three predominant theories about whistleblower behavior, none centering on financial incentives); Aaron S. Kesselheim et al., *Whistle-Blower's Experience in Fraud Litigation Against Pharmaceutical Companies*, 362 NEW ENG. J. MED. 1832, 1834 (2010) (noting that every individual "we inter-

or worse, some employees may view an external disclosure as conflicting with their sense of company loyalty.[187] And, quite simply, some employees may not be "savvy enough to know that they" must report their employer's securities violations to the SEC to gain protection.[188] In the face of these and other reasons, the Court's confidence that a narrow definition of "whistleblower" will not reduce whistleblower protection strains credulity.

That a narrow definition leaves certain employees "unacceptably" vulnerable naturally gives rise to the question of what an acceptable level of vulnerability looks like. After all, no legislative protection can eliminate an employee's vulnerability to retaliation. True enough. Yet while Dodd-Frank cannot eliminate retaliatory vulnerability, amending its narrow definition of "whistleblower" can certainly reduce that vulnerability. The issue is by what degree Dodd-Frank should do so. And the resolution of that issue is, at least to some, clear when the purpose of Dodd-Frank is considered. A key purpose of Dodd-Frank was to "promote the financial stability of the United States . . . through multiple measures designed to improve accountability, resiliency, and transparency in the financial system."[189] A broad definition of "whistleblower" such as the one this Article proposes squares with this purpose.[190]

Second, a narrow definition of "whistleblower" reduces an employee's incentive to report their employer's securities violations internally. As one author has put it, "[t]he incentives" with such a definition "are clear—reporting to the SEC is encouraged and internal reporting is discouraged."[191] While employees should doubtless be encouraged to report their securities violations to the SEC, they should also be encouraged to report such violations internally. Dodd-Frank's current narrow definition of "whistleblower," however, threatens the viability of corporate compliance mechanisms altogether.[192] Without having reported their employer's secu-

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viewed stated that the financial bounty offered under the [False Claims Act] had not motivated" them to blow the whistle).

187. *Bussing*, 20 F. Supp. 3d at 732.

188. *Id.* at 732–33.

189. S. REP. NO. 111-176, at 2 (2010).

190. It must be noted, however, that a broad definition of "whistleblower" does not fit harmoniously with some of the goals Congress apparently had in mind when it enacted Dodd-Frank. *See supra* text accompanying notes 163–164.

191. Walker, *supra* note 168, at 1771.

192. *See Bussing*, 20 F. Supp. 3d at 733 ("Requiring employees to report first to the SEC would . . . risk frustrating companies' internal compliance programs . . . ."); *see also* Caroline E. Keen, *Clarifying What Is "Clear": Reconsidering Whistleblower Protections Under Dodd-Frank*, 19 N.C. BANKING INST. 215, 234 (2015) ("If internal reports and disclosures are not protected, employees may skip internal reports and go directly to the SEC for a potential monetary award and for the protection of the Dodd-Frank anti-retaliation provisions.").

rities violations to the SEC, one must wonder what incentive, if any, an employee has to report such misconduct internally.[193]

Incentivizing employees to make internal disclosures has many benefits. Consider two. First, it allows employees who are either fearful of, or unaware of the specific details regarding the SEC's disclosure system, to communicate valuable information. Currently, employees with the "specialized knowledge and expertise to find potential violations" must report any violations to the SEC to receive protection.[194] But if such employees are uncomfortable approaching the SEC, the valuable information in their possession is likely to remain undisclosed.[195] Second, internal disclosures can serve as an informational vetting process. If an employee internally reports what he or she views as a potential securities violation, the employer can determine whether such a violation has occurred before the alleged violation reaches the SEC. This vetting process can ensure that "that the SEC receives fewer and higher quality reports from whistleblowers."[196] In doing so, it has the potential to preserve the SEC's scarce resources and promote working relationships between companies and the SEC.[197] While skeptical readers may think that companies would intentionally withhold legitimate securities violations under such a process, the SEC itself has endorsed this reasoning.[198]

The third policy argument supporting an amendment to Dodd-Frank's narrow definition of "whistleblower" is that such a definition is particularly harmful to companies. In short, "it is always in a company's best interests to discover wrongdoing on its own, and then, if necessary, report it to the regulators."[199] Why? For at least three reasons.

First, internal investigations are less costly and time consuming than SEC investigations.[200] Unlike SEC investigations, for example, internal in-

193. *Cf.* Interpretation of the SEC's Whistleblower Rules Under Section 21F of the Securities Exchange Act of 1934, 80 Fed. Reg. 47,829, 47,830 (Aug. 10, 2015) (to be codified at 17 C.F.R. pt. 241) ("Providing equivalent employment retaliation protection for [internal and external whistleblowers] removes a potentially serious disincentive to internal reporting by employees in appropriate circumstances.").

194. Leifer, *supra* note 6, at 148.

195. *Cf.* Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 151 (2d Cir. 2015) (noting that some employees "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").

196. *Bussing*, 20 F. Supp. 3d at 733.

197. *See* Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,324 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240, 249).

198. *See id.*

199. Gregory A. Brower & Brett W. Johnson, *When Enough Is Not Enough: Two Court Rulings Complicate Corporate Compliance Efforts*, 28 LEGAL BACKGROUNDER 1, 3 (2013).

200. *See Bussing*, 20 F. Supp. 3d at 733; *see also* Walker, *supra* note 168, at 1773–74.

vestigations allow companies to quickly determine whether a violation has actually occurred, or whether the employee is simply mistaken.[201] If it is the latter, which it often is,[202] companies can resolve the matter internally without disclosing it to overburdened regulators. Second, internal investigations reduce corporate embarrassment by allowing companies to position themselves "in the best light possible" before an investigation begins.[203] By relying on its compliance department, a company facing an external investigation can gain a better sense of the underlying facts and any potential defenses to civil or criminal liability.[204] Finally, internal investigations provide companies with the option of remedying any improper conduct before an external investigation begins.[205] Without an option for internally investigating improper conduct, such conduct could continue until the SEC decides upon a course of action.[206]

B. The History and Evolution of Whistleblower Programs Support an Amendment

The lessons that can be drawn from the history and evolution of the corpus of whistleblowing law in the United States provide an additional reason why Congress should extend Dodd-Frank's whistleblower protections to cover employees who report their employer's securities violations internally, but not to the SEC. While many employees in the United States had extremely limited legal protections for whistleblowing as late as the 1970s[207]—and, indeed, still do—the country has a long history of both encouraging individuals to report wrongdoing and protecting them when they do. This history, which includes the enactment of the False Claims Act (FCA) in 1863, labor relations statutes in the early- to mid-1900s, and economic regulations of businesses in the 1960s and 1970s, has established a foundation that can guide Congress in the wake of the Supreme Court's decision in *Digital Realty*.

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201. *See* Nicole H. Sprinzen, Asadi v. GE Energy (USA) L.L.C.*: A Case Study of the Limits of Dodd-Frank Anti-Retaliation Protections and the Impact on Corporate Compliance Objectives*, 51 AM. CRIM. L. REV. 151, 192 (2014).

202. *See id.*

203. *See id.*

204. *Id.*

205. *See* Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,325 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240, 249).

206. Brower & Johnson, *supra* note 199, at 3.

207. DANIEL P. WESTMAN ET AL., WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE 1-3 (3d. ed. 2015).

1. Modest Beginnings: The False Claims Act of 1863

One of the earliest, and most comprehensive, statutes governing whistleblowing is the FCA, passed by Congress at the height of the Civil War.[208] Prior to the FCA's passage, contractors took advantage of labor and production shortages in 1861 and 1862 to obtain disproportionate premiums from the federal government.[209] To address this problem, Congress enacted the FCA to permit private citizens to sue contractors that engaged in fraud involving the federal government.[210] The FCA's whistleblowing provisions were relatively sophisticated by nineteenth-century standards. For example, the FCA permitted a private citizen to obtain a portion of the monetary total that an individual obtained from the government by fraudulent means.[211] The FCA also explicitly permitted employees to sue their own employers for similar reasons.[212] Importantly, these two features rendered the FCA "one of the first laws to encourage employees to challenge procurement fraud committed by their employers."[213] While the FCA as originally enacted therefore resembled modern whistleblowing statutes, it nevertheless did not prohibit employers from retaliating against their whistleblowing employees.[214]

The FCA thus failed to disturb the "at-will" employment rule—that an employee "could be discharged at any time, for any reason, at the will of

208. President Abraham Lincoln signed the False Claims Act (FCA) on March 2, 1863, just three days prior to the Battles of Fort McAllister and Thompson's Station, and seven weeks before General Robert E. Lee's decisive victory at the Battle of Chancellorsville. *See* Act of Mar. 2, 1863, ch. 67, 12 Stat. 696; THE CIVIL WAR BATTLEFIELD GUIDE xiii (Frances H. Kennedy ed., 2d ed. 1998).

209. *See* James B. Helmer, Jr., *False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites and Patriots*, 81 U. CIN. L. REV. 1261, 1264–65 (2013).

210. WESTMAN ET. AL., *supra* note 207, at 1-4. Massachusetts Senator Henry Wilson introduced the FCA "to prevent and punish frauds upon the Government of the United States" after finding that "the War Department says there is now no law adequate to meet these cases of fraud upon the Government." CONG. GLOBE, 37th Cong., 3d Sess. 348, 956 (1863).

211. *Cf.* WESTMAN ET. AL., *supra* note 207, at 1-5. Senator Jacob Howard, the FCA's principal sponsor, described this key feature as offering "a reward to the informer who comes into court and betrays his co-conspirator, if he be such." CONG. GLOBE, 37th Cong., 3d Sess. 348, 955 (1863). Senator Howard based this feature on "the old-fashioned idea of holding out a temptation, and 'setting a rogue to catch a rogue,' which is the safest and most expeditious way I have ever discovered of bringing rogues to justice." *Id.* at 956.

212. *Id.*

213. *Id.*

214. *Id.* Congress amended the FCA in 1986 "to prohibit retaliation against employees who sue under" it. *Id.*; *see* False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153; *see also* 31 U.S.C. § 3730(h) (2012).

the employer."[215] Indeed, in the 1914 case of *Coppage v. Kansas*,[216] the Supreme Court appeared to enshrine the at-will employment rule as a constitutional right.[217] Yet subsequent labor legislation that sought to place employees on the same footing as their employers eventually eroded the rule, which in turn led to the modern concept of anti-retaliation protection.[218]

2. A Doctrinal Shift: The Labor Relations Statutes of the Early- to Mid-Twentieth Century

The first legislative move toward "plac[ing] unions on an equal footing with employers" was Congress's passage of the Clayton Act in 1914.[219] Importantly, the Act exempted labor unions from federal antitrust laws, and prevented employers from obtaining injunctions to restrain labor union picketing "or from 'peacefully persuading any person to work or to abstain from working . . . .'"[220] The Act did not, however, prevent employers from retaliating against their employees for participating in labor unions.[221] Congress responded by enacting the Railway Labor Act (RLA) in 1926, the first legislation to prevent such retaliation.[222] While the RLA only applied to the common-carrier industry and did not create a private cause of action under which aggrieved employees could sue their employers,[223] its anti-

215. *See* WESTMAN ET AL., *supra* note 207, at 1-5. A well-known nineteenth-century employment law treatise explained that, under the rule, "the hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only after a rate fixed for whatever time the party may serve." H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (1877).

216. 236 U.S. 1 (1914).

217. *See id.* at 14 ("Included in the right of personal liberty and the right of private property . . . is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment . . . . If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense.").

218. *See* WESTMAN ET AL., *supra* note 207, at 1-8.

219. *Id.* at 1–6.

220. *Id.* (internal quotations marks and citation omitted).

221. *See id.*; s*ee also* Note, *Employee Bargaining Power Under the Norris-Laguardia Act: The Independent Contractor Problem*, 67 YALE L.J. 98, 98 n.2 (1957) ("[T]he Clayton Act did not materially improve labor's position in the courts.").

222. WESTMAN ET AL., *supra* note 207, at 1-6.

223. *Id.*; *see also* Lindsay v. Ass'n of Prof'l Flight Attendants, 581 F.3d 47, 51 (2d Cir. 2009) (noting that "the [Railway Labor Act (RLA)] does not explicitly provide a private civil cause of action"). Several courts of appeals, however, have held that certain provisions of the RLA contain implied private causes of action that permit employees to sue their employers. *See, e.g.*, Bensel v. Allied Pilots Ass'n, 387 F.3d 298, 318 (3d Cir. 2004) ("Implying a

retaliation provision was a watershed moment: Until 1926, Congress had yet to prohibit employer retaliation in the context of employee union activity.[224]

The 1930s brought with it a wave of additional labor legislation that "laid the doctrinal foundation for later anti-retaliation statutes."[225] The Norris-LaGuardia Act of 1932, for example, prohibited courts from enjoining employees "giving publicity to the existence of, or the facts involved in, any labor dispute."[226] And the National Labor Relations Act of 1935 declared it U.S. policy to encourage "the practice and procedure of collective bargaining" and to protect "the exercise by workers of full freedom of association."[227] Significantly, this policy favoring collective bargaining limited "an employer's right to discharge employees."[228]

3. Anti-Retaliatory Provisions Emerge: The Economic Regulations of the 1960s and Early 1970s

Wide-ranging, though piecemeal, whistleblower protections finally emerged in the 1960s and 1970s as a result of a regulatory deluge.[229] These regulations touched many spheres of business, including the environment,[230] safety,[231] consumers,[232] and civil rights.[233] The key shift in this era

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private cause of action for individual employees under 45 U.S.C. § 152, Third & Fourth is appropriate . . . ."). Moreover, only four years after the RLA's passage, the Supreme Court recognized an implied cause of action in the statute that permits unions to sue employers. *See* Texas & New Orleans R.R. Co. v. Bhd. of Ry. & S.S. Clerks, 281 U.S. 548, 567 (1930) (concluding that "Congress, in the legislation of 1926 . . . thought it necessary to impose, and did impose, certain definite obligations enforceable by judicial proceedings").

224. WESTMAN ET AL., *supra* note 207, at 1-7.

225. *Id.* at 1–8.

226. 29 U.S.C. § 104(e) (2012).

227. *Id.* § 151.

228. WESTMAN ET AL., *supra* note 207, at 1-7. The National Labor Relation Act's (NLRA's) anti-retaliation provisions were limited, however, because they only authorized employers to file "complaints within the administrative framework" of the National Labor Relations Board (NLRB). *Id.* at 1–8.

229. *See* Mary Kreiner Ramirez, *Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power*, 76 U. CIN. L. REV. 183, 193 (2007) (discussing the "proliferation of whistleblower protections" that emerged in the 1960s and 1970s as a result of a shift in national attention "from economic concerns to concern for civil rights, and public health and safety"); *see also* ALAN F. WESTIN, WHISTLE BLOWING! LOYALTY AND DISSENT IN THE CORPORATION 4 (1981) ("From the development of large corporate enterprise in the late 19th century until the middle 1960s, American law and public attitudes supported very broad powers of management in matters of both personnel administration and business policy.").

230. *See, e.g.*, National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat.

was Congress's apparent recognition that business compliance necessitated anti-retaliation protections.[234] As one commentator put it, "to encourage employees to assist in enforcing these statutes, it was necessary to prohibit businesses from discriminating against employees who aided in enforcement proceedings."[235] In short, compliance with comprehensive regulations required an equally comprehensive enforcement mechanism. Anti-retaliatory provisions were intended to serve as that mechanism.

Take the Occupational Safety and Health Act of 1970, for example.[236] In this Act, designed to promote workplace safety,[237] Congress included a provision to protect employees who provide testimony regarding employer safety violations.[238] Congress also added a similar, though broader, enforcement mechanism six years earlier when it enacted Title VII of the Civil Rights Act of 1964,[239] which prevents employers from retaliating against employees who participate in enforcement proceedings or who oppose their employer's unlawful conduct.[240]

Importantly, however, the regulatory statutes that Congress enacted during this period lacked uniformity.[241] While these statutes covered large

852 (codified as amended at 42 U.S.C. §§ 4331–70 (2012)).

231. *See, e.g.*, Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651–78 (2012)).

232. *See, e.g.*, Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (codified as amended at 15 U.S.C. §§ 1671–77 (2012)).

233. *See, e.g.*, Title VII Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e–2000e17 (2012)).

234. *See* Shawn Marie Boyne, *Whistleblowing*, 62 AM. J. COMP. L. 425, 428 (2014) (noting that "[o]ver the past three decades," Congress has increasingly "attempt[ed] to fight corporate fraud and government waste by gradually introducing more comprehensive whistleblower protections"); Eli Rosenberg, *Silence Is Golden: Excluding Internal Complaints from ERISA Section 510*, 59 U. KAN. L. REV. 1155, 1158 (2011) (arguing that the "ultimate ineffectiveness of statutes designed to curb illegal business practices helped further expand whistleblower protection" in the 1970s and 1980s).

235. WESTMAN ET AL., *supra* note 207, at 1-9.

236. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–78 (2012).

237. *Id.* § 651(b) (declaring that the purpose of the Occupational Safety and Health (OSH) Act of 1970 is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources").

238. *See id.* § 660(c)(1).

239. *See* Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (2012)).

240. *See* 42 U.S.C. § 2000e-3(a) (2012).

241. *See* ACUS Recommendation 87-2, Federal Protection of Private Sector Health and Safety Whistleblowers, 52 Fed. Reg. 23,629, 23,631 (June 24, 1987) (describing the "statutory incongruities" between federal whistleblowing laws and noting that "this lack of uniformity does not appeal to be reasoned"); *see also* Christopher Wiener, *Blowing the Whistle*

swaths of employer conduct, their whistleblower protections "existed only for employees who protested conduct regulated by statutes that happened to include anti-retaliation provisions."[242] The real value of these and other statutes, then, was their production of a climate—one that the labor legislation of the 1930s presaged—that favored whistleblowing. Against the backdrop of this new climate, Congress would dramatically expand whistleblower protections in the late-1970s and 1980s and thereby establish a uniform body of such protections. These protections included the Civil Service Reform Act of 1978[243] and the Whistleblower Protection Act of 1989.[244]

4. Comprehensive Whistleblower Protection: The Civil Service Reform Act of 1978 and the Whistleblower Protection Act of 1989

One of the first uniform whistleblower protection laws to prohibit employer retaliation was the Civil Service Reform Act (CSRA).[245] The CSRA, described by one commentator as "a significant step in the development of whistleblower protection law," applies to all federal employees.[246] Indeed, the CSRA's anti-retaliatory measures are what render the statute significant in the modern whistleblower landscape, particularly because these measures broadly apply to nearly all federal employees who disclose virtually any illegal government conduct.[247] The CSRA also created the Office of Special Counsel, which has the authority to petition the Merit Systems Protection Board "to stay retaliatory actions against whistleblowers, and to commence disciplinary proceedings against individuals who im-

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on Van Asdale*: Analysis and Recommendations*, 62 HASTINGS L.J. 531, 537 (2010) (explaining how "Congress has enacted whistleblower protections on a somewhat ad hoc basis as it has considered various regulatory schemes").

242. WESTMAN ET AL., *supra* note 207, at 1-11.

243. Civil Service Reform (CSRA) Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.).

244. Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified as amended at 5 U.S.C. §§ 1201–22 (2012)).

245. *Cf.* United States v. Fausto, 484 U.S. 439, 443 (1988) (noting that "the CSRA comprehensively overhauled the civil service system" and "creat[ed] an elaborate new framework for evaluating adverse personnel actions against federal employees") (internal quotation marks and citations omitted); Stephen L. Wood, *Federal Employees, Federal Unions, and Federal Courts: The Duty of Fair Representation in the Federal Sector*, 64 CHI. KENT L. REV. 271, 331 (1988) ("Uniform federal labor/management regulations was one of the primary purposes of the Civil Service Reform Act.").

246. WESTMAN ET AL., *supra* note 207, at 8-3.

247. *See* Patricia L. Bellia, *Wikileaks and the Institutional Framework for National Security Disclosures*, 121 YALE L.J. 1448, 1524–25 (2012).

properly discipline whistleblowers."[248] While the remedies the CSRA afforded to whistleblowers are modest by modern standards, the disciplinary sanctions against retaliating officials are severe.[249]

The CSRA, while a clear step toward whistleblower reform, was criticized over the next decade for two primary reasons.[250] First, federal employees complained that the CRSA-created Special Counsel repeatedly failed to both conduct timely investigations of their complaints[251] and prosecute meritorious cases.[252] Second, a handful of federal employees asserted that the Special Counsel did not protect their identities, which resulted in their employers retaliating against them.[253] These and other criticisms prompted Congress to pass the Whistleblower Protection Act (WPA) in 1989.[254]

The WPA addressed each of these criticisms.[255] Regarding the Special Counsel's lack of investigatory timeliness, the WPA required the Special Counsel to adhere to prosecutorial deadlines and provide whistleblowers with updates.[256] In a similar vein, the WPA clearly articulated the Special Counsel's subpoena powers and required it to submit annual reports to Congress.[257] The WPA also established several requirements to ensure the protection of the identities of whistleblowers, for example by prohibiting the Special Counsel from revealing those identities and allowing it to obtain

248. WESTMAN ET AL., *supra* note 207, at 8-3.

249. *See id.* at 8-3–8-4 ("Disciplinary actions range from reprimands to the severe sanction of dismissal and disbarment from the federal civil service for up to five years."); *see also* 5 U.S.C. § 7701(g) (2012).

250. *See* Sarah Wood Borak, *The Legacy of "Deep Throat": The Disclosure Process of the Whistleblower Protection Act Amendments of 1994 and the No Fear Act of 2002*, 59 U. MIAMI L. REV. 617, 632 (2005).

251. *See generally* ROBERTA ANN JOHNSON, WHISTLEBLOWING: WHEN IT WORKS—AND WHY 101 (2003).

252. Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 ADMIN. L. REV. 531, 534 (1999) (noting that "the Special Counsel conducted only one hearing to restore a whistleblower's job" between the passage of the CSRA and Whistleblower Protection Act (WPA)); *see also* WESTMAN ET AL., *supra* note 207, at 8-4.

253. *See* Devine, *supra* note 252, at 537; *see also* WESTMAN ET AL., *supra* note 207, at 8-4.

254. The WPA's Senate Report, for example, noted that "Congress' well-intentioned efforts to protect whistleblowers have thus far had little effect." S. REP. NO. 100-413, at 5 (1988).

255. For a thorough analysis of changes the WPA enacted, *see generally* Devine, *supra* note 252.

256. WESTMAN ET AL., *supra* note 207, at 8-4.

257. *Id.*

protective orders.[258] Congress would amend the WPA in 1994 and again in 2012 to further strengthen whistleblower protections.[259]

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Five distinct periods thus represent the history of whistleblowing protections in the United States. In the Civil War Era, Congress encouraged employees to report their employer's fraud by allowing employees to recover a portion of the value that resulted from that fraud. The second period, lasting from approximately 1914 to 1940, saw the passage of increasingly labor-friendly statutes that further encouraged employees to report employer misconduct. This period brought with it a doctrinal, though not statutory, shift regarding the concept of anti-retaliation. During the third period, characterized by increasing business regulations in the 1960s and early 1970s, anti-retaliation provisions covering employees in specific fields appeared. The fourth period is represented by the passage of the CSRA and the WPA in 1978 and 1989, respectively, when Congress broadened whistleblower protections to cover nearly all federal employees. Finally, as described in Part I, Congress responded to the failures of previous whistleblower laws in preventing massive corporate fraud and economic meltdown by passing SOX in 2002, and eventually Dodd-Frank in 2010.

5. How the History and Evolution of Whistleblowing Programs Support an Amendment

What insights, if any, can be drawn from this five-part history of whistleblowing programs, particularly regarding the state of Dodd-Frank whistleblower protections in the wake of the Supreme Court's decision in *Digital Realty*? At least four.

As an initial matter, the history demonstrates a lengthy and consistent statutory tradition of enlisting private citizens—"enterprising privateer[s]," as one court put it in 1885[260]—to combat regulatory violations. This statutory tradition formally began with Congress's passage of the FCA in 1863, which "deputiz[ed] an army of insiders" by authorizing qui tam actions.[261] But it has an even longer historical pedigree, given how the first Continental Congress itself recognized the value of private enforcement by enacting several statutes that authorized qui tam actions.[262] The First Congress similarly enacted statutes providing private citizens with a bounty and cause of

258. *Id.*

259. *See* Samantha Arrington Sliney, Department of Homeland Security v. Maclean*: The Supreme Court's Interpretation of the Application of Whistleblower Protection Laws to Disclosures Made Contrary to Transportation Security Administration Regulations*, 8 NE. U. L.J. 397, 400 (2016).

260. United States v. Griswold, 24 F. 361, 366 (D. Or. 1885).

261. Helmer, *supra* note 209, at 1262.

262. *Id.* at 1263.

action, and in 1790 alone enacted at least five such statutes.[263] The statutory tradition thus runs from the first to the current Congress.[264]

Second, the history shows that Congress has consistently responded to legislative failures in adequately incentivizing and protecting whistleblowers. That such failures have consistently provoked Congress to create or amend various whistleblower programs highlights the remedial nature of these laws.[265] In short, a problem begets a solution. That solution, in turn, is enhanced protection for whistleblowers, including those who report misconduct internally. In 1863, the problem was unscrupulous contractors.[266] In 1935, the problem was an avaricious labor industry.[267] In 1970, the problem was repeated violations of workplace safety.[268] In 2002, the problem was corporate accounting fraud.[269] In 2010, the problem was, among

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263. *See* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 777 n.6 (2000).

264. The most recent addition to the statutory body of whistleblower law is the Whistleblower Protection Act of 2017, which Congress enacted on October 26, 2017. *See* Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017, Pub. L. No. 115-73, 131 Stat. 1235 (to be codified at 5 U.S.C. §§ 2307, 7515)

265. *See, e.g.*, Thomas E. Egan, *Wrongful Discharge and Federal Preemption: Nuclear Whistleblower Protection Under State Law and Section 210 of the Energy Reorganization Act*, 17 B.C. ENVTL. AFFAIRS L. REV. 405, 428 (1990) ("The prevailing view . . . is that the purpose of whistleblower protection is primarily remedial, not regulatory."); Terry Morehead Dworkin & Elletta Sangrey Callahan, *Internal Whistleblowing: Protecting the Interests of the Employee, the Organization, and Society*, 29 AM. BUS. L.J. 267, 269 (1991) ("As the circuit courts have reasoned, Congress intended to protect internal disclosures because that form of whistleblowing 'share[s] a broad, remedial purpose of protecting workers from retaliation based on their concerns for safety and quality.'") (quoting Kansas Gas & Elec. Co. v. Brock, 780 F.2d 1505, 1512 (10th Cir. 1985)); Kimberly A. McCoy, *Litigating Under the Florida Private Sector Whistle-Blower's Act: Plaintiff Protection and Good Faith*, 52 U. MIAMI L. REV. 855, 869–70 (1998) ("Generally, whistleblower laws are construed broadly in light of their remedial purpose.").

266. *See* Helmer, *supra* note 209, at 1264–65 (noting how the FCA's original whistleblowing provisions were a direct response to Congress "receiving alarming reports of misappropriation of money supposedly spent to aid the [Civil] war effort.").

267. *See* Cynthia L. Estlund, *Wrongful Discharge Protections in an at-Will World*, 74 TEX. L. REV. 1655, 1658–59 (1996) (describing "[t]he logic of the" NLRA's anti-retaliation provision as "obvious," given the NLRA's purpose of protecting union activity and peaceful protests).

268. *See* Whirlpool Corp. v. Marshall, 445 U.S. 1, 9–10 (1980) (noting that the OSH Act's anti-retaliation provision "expressly accords to every employee" the "right to aid a court in determining whether or not a risk of imminent danger [in the workplace] in fact exists").

269. *See* Petkova, *supra* note 7, at 588 (describing SOX, including its anti-retaliation provision, as "a major piece of remedial legislation" that Congress enacted following "a multitude of improper business practices including unparalleled accounting fraud"); *see also* Tello

other things, underregulated financial institutions.[270] And so on. The takeaway is that much of the statutory whistleblowing legislation is appropriately viewed as remedial Congressional responses to failures in adequately incentivizing and protecting whistleblowers.

Third, the history demonstrates Congress's groping toward the enactment of a comprehensive body of whistleblower incentives and protections. As Congress has continually responded to legislative failures regarding whistleblower incentives and protections in the modern era, its reliance on a piecemeal approach has consistently declined.[271] Recognizing the problems with such an approach, Congress enacted the CSRA in 1978 and the WPA in 1989.[272] And while SOX and Dodd-Frank pertain to discrete industries, they stand in stark contrast to the piecemeal legislation Congress enacted during the regulatory wave of the 1960s and early 1970s.[273]

Taken together, these three insights reveal a fourth: the doctrinal foundation of federal whistleblower programs is the idea that regulatory compliance requires robust incentives and protections for external *and* internal whistleblowers. The repeated creation of, and amendments to, whistleblower programs demonstrates that Congress understands how best to make these programs effective: the protection of whistleblowers, both external and internal.

C. A Proposed Amendment

Both the aforementioned policy arguments and the insights drawn from the history and evolution of whistleblower programs cannot alter the statu-

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v. Dean Witter Reynolds, Inc., 494 F.3d 956, 968 (11th Cir. 2007) (explaining how SOX is a "[r]emedial securities law[] for combating fraud").

270. *See* Murphy, *supra* note 6, at 2259 (explaining that "Dodd-Frank's whistleblower program followed in the footsteps of previous remedial legislation" and sought to "accountability in the financial system"); *see also* Pruett v. BlueLinx Holdings, Inc., No. 1:13-CV-02607-JOF, 2013 WL 6335887, at *3 (N.D. Ga. Nov. 12, 2013) (describing how Congress, in enacting the "remedial scheme" of Dodd-Frank, "was considering and strengthening the entire whistleblower scheme for securities matters").

271. *See* 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, 1049 (2004) (describing "[t]he pre-Sarbanes-Oxley federal approach to whistleblower protection" as "piecemeal").

272. *See supra* text accompanying notes 245–259.

273. *Cf.* Alex B. Long, *Viva State Employment Law! State Law Retaliation Claims in A Post-*Crawford*/*Burlington Northern *World*, 77 TENN. L. REV. 253, 260 & n.30 (2010) (explaining that statutes such as the Clean Air Act, which provide "safeguards only in certain occupations or areas," demonstrate that "[w]here Congress has provided whistleblower protection, it has done so in something of a piecemeal fashion").

tory text as enacted.[274] But they do provide Congress with a sound basis for responding to the Supreme Court's decision in *Digital Realty*. Specifically, these arguments and insights strongly support amending Dodd-Frank's definition of "whistleblower" to include employees who only report their employer's securities violations internally, and not to the SEC. The following amendment to Dodd-Frank's definition of "whistleblower," with modifications in bold type, achieves this objective:

> The term "whistleblower" means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws **in a manner described in Section 21F(h)(1)(A) of the Exchange Act (15 U.S.C. 78u-6(h)(1)(A)).**

To understand which employees this proposed amendment would protect from retaliation, recall that Section 21F(h)(1)(A) of the Exchange Act,[275] which the proposed amendment cross-references, currently provides:

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—
>
> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.) . . . and any other law, rule, or regulation subject to the jurisdiction of the Commission.[276]

Applying the proposed amendment to § 21F(h)(1)(A) of the Exchange Act—or, if you like, subsection (h) of Dodd-Frank[277]—thus protects from retaliation an employee who: (1) provides information to the SEC regarding their employer's securities violations; (2) initiates, testifies in, or assists in a SEC investigation or judicial or administrative action; and, most important-

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274. *See* Todd W. Shaw, *Rationalizing Rational Basis Review*, 112 NW. U. L. REV. 487, 515–16 (2017) ("[T]he content, and thus the meaning, of the . . . [statutory] text is determined, or 'fixed,' at the time the portion of that text is framed and ratified."); *see also* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 459 (2013) ("the communicative content of the text is determined at the time of its origin").

275. Note again that § 21F(h)(1)(A) of the Exchange Act is the same provision as what this Article refers to as "subsection (h)" of Dodd-Frank.

276. 15 U.S.C. § 78u-6(h)(1)(A)(2012).

277. *See supra* note 275.

ly, (3) makes disclosures of their employer's securities violations that are required under SOX (or any other law that is within the SEC's jurisdiction).

There are at least five benefits of the proposed amendment. As an initial matter, it directly originates from the SEC's rule interpreting Dodd-Frank's definition of "whistleblower" that the SEC promulgated in 2011.[278] This is advantageous for two key reasons. First, the amendment comfortably fits into the overarching structure of Dodd-Frank's incentives and protections regime. Were Congress to adopt this amendment, then, it would not need to further amend other provisions of Dodd-Frank, because the SEC has already ensured that the amendment's language does not upset Dodd-Frank's other provisions.[279] And while the amendment would broaden Dodd-Frank's anti-retaliation protections, it would not, as some might worry, broaden Dodd-Frank's bounty program.[280] This program only applies to "covered judicial or administrative action[s], or related action[s]," which means that internal disclosures would not, on their own, trigger monetary awards.[281] In short, the amendment leaves settled the distinction between Dodd-Frank's bounty program on the one hand, and its anti-retaliation protections on the other.

Second, the amendment would not lead to regulatory uncertainty or the violation of reliance interests. Employees and employers have been living under the language of the proposed amendment since 2011, when the SEC first interpreted Dodd-Frank's definition of "whistleblower" to include employees who report their employer's securities violations internally.[282] Thus, employees and employers have presumably ordered their affairs around the language of the proposed amendment since then.

The second benefit of the proposed amendment is that it would reduce the vulnerability of certain classes of employees from employer retalia-

278. *See* Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,363 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240, 249) ("For purposes of the anti-retaliation protections afforded by [Dodd-Frank], you are a whistleblower if . . . [y]ou provide that information in a manner described in Section 21F(h)(1)(A) of the Exchange Act (15 U.S.C. 78u-6(h)(1)(A)).").

279. In 2011, for example, the SEC concluded that the language of the proposed amendment fits within Dodd-Frank's regulatory scheme. *Id.* at 34,301 ("[T]he anti-retaliation protections set forth in Section 21F(h)(1) of the Exchange Act would apply irrespective of whether a whistleblower satisfied all the procedures and conditions to qualify for an award under the Commission's whistleblower program.").

280. Thanks to Tejinder Singh for pointing this out.

281. 15 U.S.C. § 78u-6(b)(1).

282. *See* Securities Whistleblower Incentives and Protections, 76 Fed. Reg. at 34,304 ("[T]he statutory anti-retaliation protections apply to three different categories of whistleblowers, and the third category includes individuals who report to persons or governmental authorities *other than the Commission*.") (emphasis in original).

tion.[283] The amendment's definition of "whistleblower" includes employees—auditors and attorneys, for example—who are required to disclose their employer's securities violations internally before reporting such violations to the SEC.[284] Thus, the amendment cures the under-inclusiveness of Dodd-Frank's current definition of "whistleblower" by providing the same amount of protection for employees who report securities violations internally and for those who do so externally. A correlated benefit is that the amendment would protect any employee who, for whatever reason, only reports their employer's securities violations internally.

Third, the proposed amendment is likely to increase an employee's incentive to report their employer's securities violations internally.[285] In doing so, the amendment could encourage employees with specialized knowledge of securities violations, but who are uncomfortable approaching the SEC, to identify and disclose such violations. Furthermore, by reinforcing the informational vetting process that internal disclosures facilitate, the amendment has the real potential to both decrease the number of frivolous complaints that the SEC receives and increase the quality of information that it receives.

Fourth, the proposed amendment aligns with the fact that companies generally prefer internal investigations over external investigations.[286] By channeling disclosures internally, the amendment is likely to decrease the cost and length of investigations, reduce corporate embarrassment, and allow companies to remedy any improper conduct before an external investigation begins. Moreover, the amendment would not undermine internal compliance programs because employees would have an incentive to report securities violations internally.

The final, and perhaps most important, benefit of the proposed amendment is that it would bring Dodd-Frank into alignment with the key insights drawn from the history and evolution of whistleblower programs in the United States.[287] The amendment squares with this country's lengthy statutory tradition of enlisting private citizens to police regulatory violations. It

283. *See supra* notes 178–188 and accompanying text.

284. The proposed amendment includes such employees because it incorporates the anti-retaliation protections detailed in § 806 of SOX. Thus, assuming that Congress were to enact the proposed amendment, an individual could claim protection under subsection (h)(iii) of Dodd-Frank if she is an employee of a public company, a subsidiary "whose financial information is included in the consolidated financial statements of public companies," or a "nationally recognized statistical rating organization." *See* Securities Whistleblower Incentives and Protections, 76 Fed. Reg. at 34,304.

285. *See supra* notes 191–198 and accompanying text.

286. *See supra* notes 194–200 and accompanying text.

287. *See supra* Part I.

is consistent with Congress's repeated responses to legislative failures in adequately incentivizing and protecting whistleblowers. It would reflect the Congressional movement toward enacting a truly comprehensive body of whistleblower incentives and protections. And it would, most significantly, align with the central idea that regulatory compliance requires robust protections for external and internal whistleblowers.

CONCLUSION

Prior to the Supreme Court's recent decision in *Digital Realty*, the federal courts of appeals were divided over whether Dodd-Frank's whistleblower protections apply to employees who report their employer's securities violations internally, but not to the SEC. In *Digital Realty*, the Supreme Court correctly held that Dodd-Frank's whistleblower protections only apply to employees who report their employer's securities violations to the SEC. While those who may disagree with the Court's holding have advanced strong policy arguments to support their position, these arguments cannot trump the unambiguous meaning of Dodd-Frank's definition of "whistleblower." That meaning confirms that Dodd-Frank's whistleblower protections do not apply to internal whistleblowers. And even if Dodd-Frank's text initially appears ambiguous, its legislative history resolves this ambiguity by confirming that only whistleblowers who report misconduct to the SEC are protected.

While the Supreme Court's decision in *Digital Realty* is correct as a matter of statutory interpretation, Congress should nevertheless amend Dodd-Frank's definition of "whistleblower" to include employees who only report their employer's securities violations internally. The novel and easily-adoptable amendment that this Article proposes has the potential to, among other things, reduce the vulnerability of certain classes of employees to employer retaliation, incentivize employees to make internal disclosures of securities violations, and reduce the costs of investigations by channeling them internally. Most importantly, the proposed amendment would align Dodd-Frank with the doctrinal foundation of whistleblower programs in the United States—the idea that regulatory compliance requires robust whistleblower incentives and protections.