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Whistling Loud and Clear: Applying *Chevron* to Subsection 21F of Dodd–Frank

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I. Introduction

In 2008, the United States financial system was brought to its knees, and many now regard the 2008 financial crisis as one of the worst, if not the worst, financial and economic crises in global history.[1] In September of that year, the federal government, in an attempt to stabilize the U.S. housing market, seized control of Fannie Mae and Freddie Mac.[2] At the time, Fannie Mae and Freddie Mac owned or guaranteed approximately half of the nation's twelve trillion dollar mortgage market,[3] and—according

1. *See* Jon Hilsenrath et al., *Worst Crisis Since '30s, With No End Yet in Sight*, WALL ST. J. (Sept. 18, 2008, 12:01 AM), http://www.wsj.com/articles/SB122169431617549947?mg=id-wsj (last visited Nov. 6, 2017) ("'This has been the worst financial crisis since the Great Depression. There is no question about it,' said Mark Gertler, a New York University economist . . . .") (on file with the Washington and Lee Law Review); *see also* Matt Egan, *2008: Worse than the Great Depression?*, CNN MONEY (Aug. 27, 2014, 5:34 PM), http://money.cnn.com/2014/08/27/news/economy/ben-bernanke-great-depression/index.html (last visited Nov. 6, 2017) ("Ben Bernanke, the former head of the Federal Reserve, said the 2008 financial crisis was the worst in global history, surpassing even the Great Depression.") (on file with the Washington and Lee Law Review).

2. *See* Reuters, *Government Takes Control of Fannie, Freddie*, CNBC (Aug. 5, 2010, 1:24 PM), http://www.cnbc.com/id/26590793/ (last visited Nov. 6, 2017) ("The Government on Sunday seized control of mortgage finance companies Fannie Mae and Freddie Mac, launching what could be its biggest federal bailout ever, in a bid to support the U.S. housing market and ward off more global financial market turbulence.") (on file with the Washington and Lee Law Review).

3. *See* Charles Duhigg, *Loan-Agency Woes Swell from a Trickle to a Torrent*, N.Y. TIMES (July 11, 2008), http://www.nytimes.com/2008/07/11/business/11

to then-Treasury Secretary Henry Paulson—"a failure of either of them would cause great turmoil in our financial markets here at home and around the globe."[4] In addition, Lehman Brothers, one of the largest and most prestigious financial firms in the world, filed for bankruptcy protection.[5] Further, financial services and wealth management giant Merrill Lynch agreed to sell itself to Bank of America for a fraction of its overall value.[6] As if these events were not enough to indicate an economic throttling, the U.S. government agreed to bail out insurance mammoth AIG at a price tag of $85 billion.[7] Ultimately, the economic tailspin prompted the government to enact the Emergency Economic Stabilization Act of 2008,[8] a $700 billion bailout of the financial services industry.[9]

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ripple.html?ex=1373515200&en=8ad220403fcfdf6e&ei=5124&partner=permalink&exprod=permalink (last visited Nov. 6, 2017) ("Fannie Mae and Freddie Mac are so big—they own or guarantee roughly half of the nation's $12 trillion mortgage market—that the thought that they might falter once seemed unimaginable.") (on file with the Washington and Lee Law Review).

4. Reuters, *supra* note 2.

5. *See* Graeme Weardon et al., *Banking Crisis: Lehman Brothers Files for Bankruptcy Protection*, GUARDIAN (Sept. 15, 2008, 7:45 AM), https://www.theguardian.com/business/2008/sep/15/lehmanbrothers.creditcrunch (last visited Nov. 6, 2017) ("Lehman Brothers, one of the most prestigious players on Wall Street, filed for bankruptcy protection this morning after a frenzied weekend of negotiations failed to find a way of saving the company.") (on file with the Washington and Lee Law Review).

6. *See* Matthew Karnitschnig et al., *Bank of America to Buy Merrill*, WALL ST. J. (Sept. 15, 2008, 12:01 AM), http://www.wsj.com/articles/SB122142278543033525 (last visited Nov. 6, 2017) ("The deal shows how the credit crisis has created opportunities for financially sound buyers. At $50 billion, Merrill is being sold at about two-thirds of its value of one year ago and half its all-time peak value of early 2007.") (on file with the Washington and Lee Law Review).

7. *See* Matthew Karnitschnig et al., *U.S. to Take Over AIG in $85 Billion Bailout; Central Banks Inject Cash as Credit Dries Up*, WALL ST. J. (Sept. 16, 2008, 11:59 PM), http://www.wsj.com/articles/SB122156561931242905 (last visited Nov. 6, 2017) ("The U.S. government seized control of American International Group Inc.—one of the world's biggest insurers—in an $85 billion deal that signaled the intensity of its concerns about the danger a collapse could pose to the financial system.") (on file with the Washington and Lee Law Review).

8. Pub. L. 110-343, 122 Stat. 3765 (2008).

9. *See* M. Alex Johnson, *Bush Signs $700 Billion Bailout Bill*, NBC NEWS (Oct. 3, 2008, 4:33 PM), http://www.nbcnews.com/id/26987291/ns/business-stocks_and_economy/t/bush-signs-billion-financial-bailout-bill/#.WAAcpoWcGM8 (last visited Nov. 6, 2017) ("President Bush signed into law Friday a historic $700 billion bailout of the financial services industry, promising to move swiftly to use his sweeping new authority to unlock frozen credit markets

With a purpose "[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail', to protect the American taxpayer by ending bailouts, [and] to protect consumers from abusive financial services practices," Congress enacted the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank).[10] Dodd–Frank amended the Securities Exchange Act of 1934[11] (Exchange Act) to include certain whistleblower protections against employer retaliation under subsection 21F.[12] Among these protections are prohibitions against discharge, demotion, suspension, harassment, threatening, and discrimination against whistleblowers.[13] For the purposes of Dodd–Frank, Congress unambiguously and expressly defined a "whistleblower" as "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws *to the Commission*, in a manner established, by rule or regulation, by the Commission."[14] The meaning of "Commission" is equally unambiguous under Dodd–Frank; it is defined as "the Securities and Exchange Commission."[15] Thus, it is necessary for a person or persons to report misconduct to the Securities and Exchange Commission (SEC) to receive whistleblower status and protections under Dodd–Frank.

This Note addresses a circuit court split arising from a portion of the anti-retaliation provisions. Subsection 21F's retaliation prohibitions apply to those employers whose employees make required or protected disclosures under the Sarbanes–Oxley Act of 2002[16] (SOX) or any other rule or regulation under the SEC's jurisdiction.[17] SOX provides anti-retaliation protections—similar

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to get the economy moving again.") (on file with the Washington and Lee Law Review).

10. Pub. L. No. 111-203, 124 Stat. 1376 (2010).

11. 15 U.S.C. § 78a–qq (2012).

12. Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841–49 (2010) (codified at 15 U.S.C. § 78u-6).

13. *See* 15 U.S.C. § 78u-6(h)(1)(A) (2012) (prohibiting various forms of retaliatory conduct against whistleblowers under the Dodd–Frank Act).

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

15. Pub. L. No. 111-203, § 2(3), 124 Stat. 1376, 1387 (2010).

16. Pub. L. No. 107-204, 116 Stat. 745.

17. *See* 15 U.S.C. § 78u-6(h)(1)(A)(iii) (2012)

to those available under Dodd–Frank—for employees of publicly traded companies who report misconduct.[18] However, SOX expressly affords protections to those who provide information to "a Federal regulatory or law enforcement agency; any Member of Congress or any committee of Congress; or a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)."[19] Thus, while Dodd–Frank's protections, by the Act's express terms, only apply to those who report to the SEC, SOX grants protections to those who report to a much broader array of persons and organizations. Some believe that subsection 21F's reference to SOX indicates that the definition of "whistleblower" under Dodd–Frank is much broader and more inclusive than its express definition would otherwise suggest.[20]

The SEC, in an effort to provide some guidance on subsection 21F, promulgated an interpretive rule to clarify the meaning of "whistleblower" under Dodd–Frank's anti-retaliation provisions. The interpretive rule states that, "[f]or purposes of the anti-retaliation protections afforded by Section 21F(h)(1) of the Exchange Act, you are a whistleblower if . . . you provide that information in a manner described in Section 21F(h)(1)(A) of the Exchange Act."[21] This rule, if the courts validate it, would effectively change the meaning of "whistleblower" under subsection 21F of the Exchange Act. As stated above, the term's express definition only includes those who report "to the Commission."[22] The SEC's interpretive rule, however, places no

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> No employer may . . . 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 the Sarbanes-Oxley Act of 2002 . . . and any other law, rule, or regulation subject to [the SEC's jurisdiction].

18. *See* 18 U.S.C. § 1514A(a) (2012) (prohibiting publicly traded companies, and officers and agents thereof, from discharging, demoting, or otherwise harassing employees of said companies on account of their whistleblower status).

19. *Id.*

20. *See* Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 155 (2d Cir. 2015) (concluding that the provisions of subsection 21F should be interpreted to incorporate and protect those who make SOX disclosures but who have not reported to the SEC).

21. 17 C.F.R. § 240.21F-2(b)(1)(ii) (2016).

22. 15 U.S.C. § 78u-6(a)(6) (2012).

such limitation on the term and, indeed, expands the statutory definition.[23]

Recently, three circuit courts of appeals have split on whether or not to grant deference to the SEC's interpretive rule. In 2013, the Fifth Circuit Court of Appeals found that the definition of "whistleblower" provided by subsection 21F is unambiguous, and that the SEC's interpretive rule should not receive deference.[24] Two years later, the Second Circuit Court of Appeals found the opposite, finding that subsection (h) of 21F, in conjunction with subsection (a), engenders sufficient statutory ambiguity to grant deference to the SEC's interpretation.[25] Both courts utilized the analysis set forth in *Chevron, U.S.A., Inc. v. Natural Resources*

23. Section 21F(h)(1)(A) of the Exchange Act—referenced by the SEC's interpretive rule—describes three reporting methods by which the retaliation prohibitions are triggered. First, a person may provide information to the Commission. *See id.* § 78u-6(h)(1)(A)(i) (prohibiting employer retaliation against employees who report to the SEC). Second, a person may initiate, testify in, or assist in an investigation or judicial or administrative action of the SEC based on information that person has provided. *See id.* § 78u-6(h)(1)(A)(ii) (prohibiting employer retaliation against those who assist in certain proceedings against the employer). Finally, a person may make disclosures which are required or protected by certain other laws, rules, and regulations. *See id.* § 78u-6(h)(1)(A)(iii) (prohibiting employer retaliation against those who "mak[e] disclosures that are required or protected under the Sarbanes–Oxley Act of 2002, this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission"). The SEC regulation would change the meaning of "whistleblower" from including only those who report to the SEC to include anyone who acts in any of these aforementioned ways.

24. *See* Asadi v. G.E. Energy (USA), LLC, 720 F.3d 620, 626–27 (5th Cir. 2013) ("[The] definition, standing alone, expressly and unambiguously requires that an individual provide information to the SEC to qualify as a 'whistleblower' for purposes of § 78u–6.").

25. *See* Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 147 (2d Cir. 2015) ("[T]he tension between the definition in subsection 21F(a)(6) and the limited protection provided by subdivision (iii) of subsection 21F(h)(1)(A) if it is subject to that definition renders section 21F as a whole sufficiently ambiguous to oblige us to give *Chevron* deference to the reasonable interpretation of the [SEC].").

Defense Council, Inc.,[26] but arrived at different results.[27] The Ninth Circuit weighed in on March 8, 2017, concluding that subsection 21F unambiguously affords Dodd–Frank protections to those who do not report to the SEC.[28]

This Note resolves the circuit split described above by arguing in favor of the Fifth Circuit's non-deferential approach. Part II examines subsection 21F and its role in the context of the overarching scheme of securities laws.[29] Part III examines the circuit split arising out of the SEC's interpretive rule. It will discuss the *Chevron* analysis in-depth and will explore the development of the circuit split since the Fifth and Second Circuit decisions, paying attention to federal district courts that have since weighed in on the issue and briefly discussing the Ninth Circuit's recent opinion.[30] Part IV proposes the legal solution to the split and explore the policy considerations in favor of and against that solution, and then will propose a legislative path forward.[31] Ultimately, this Note argues that no ambiguity exists with respect to subsection 21F's definition of whistleblower, that the Fifth

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26. 467 U.S. 837 (1984). The Court articulated the two-part framework in the following way:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, then that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . . Rather . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842–43.

27. *See Asadi*, 720 F.3d at 626–27 (finding no statutory ambiguity in subsection 21F of the Exchange Act, and thus finding that the SEC's interpretive rule should be afforded no *Chevron* deference); *see also Berman*, 801 F.3d at 147 (finding that subsection (a)'s definition of "whistleblower" and subsection (h)'s reference to SOX foster a statutory ambiguity, and finding that the SEC's interpretive rule is a permissible reading of subsection 21F).

28. *See* Somers v. Dig. Realty Tr., Inc., 850 F.3d 1045, 1049 (9th Cir. 2017) ("[Dodd–Frank]'s anti-retaliation provision unambiguously and expressly protects from retaliation all those who report to the SEC and who report internally.").

29. *Infra* Part II.

30. *Infra* Part III.

31. *Infra* Part IV.

Circuit Court of Appeals arrived at the proper legal conclusion, and that the courts should not grant deference to the SEC's interpretive ruling. This Note also posits that the scheme of the federal securities laws heavily incentivizes reporting misconduct to the SEC, and that Congress should amend SOX to make its anti-retaliation provisions more appealing and available.

II. Subsection 21F in the Scheme of Securities Laws

A. The Language of Subsection 21F

Subsection 21F defines a "whistleblower" as "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission."[32] Subsection 21F provides certain protections for these whistleblowers under subsection (h), entitled "Protection of Whistleblowers."[33] That section states that:

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, *a whistleblower* in the terms and conditions of employment because of any lawful act done by the *whistleblower* (i) in providing information to the Commission in accordance with this section; (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 *et seq.*), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.[34]

Taken together, the statute's definition of "whistleblower" and subsection (h)'s focus on protections for whistleblowers seem to stand for the proposition that the protections afforded by subsection (h) only attach to those who have reported misconduct to the SEC.

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32. 15 U.S.C. § 78u-6(a)(6) (2012).

33. *Id.* § 78u-6(h).

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

Dodd–Frank also provides a private cause of action for employees whose employers injure them through retaliatory action.[35] Three remedies become available if a plaintiff succeeds in his or her private action against the employer for violation of subsection 21F's anti-retaliation provisions.[36] These remedies include reinstatement of the whistleblower's employment with the company,[37] double any back pay owed to the wrongfully terminated employee,[38] and litigation costs.[39] The conditions necessary to trigger anti-retaliation provisions under Dodd–Frank differ from those needed to trigger similar provisions under SOX, and—as this Note observes below—the potential relief for violations of those provisions also differ between Dodd–Frank and SOX.[40]

B. Anti-Retaliation Protections Under Sarbanes–Oxley

Section 1514A of SOX prohibits publicly traded companies, or officers, managers, and agents of publicly traded companies, from taking retaliatory action against an employee for reporting his or her employer's misconduct.[41] Further, this section prohibits retaliation when the employee provides information to "a Federal regulatory or law enforcement agency; any Member of Congress or

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35. *See id.* § 78u-6(h)(1)(B)(i) ("An individual who alleges discharge or other discrimination in violation of subparagraph (A) may bring an action under this subsection in the appropriate district court of the United States for the relief provided in subparagraph (C).").

36. *Id.* § 78u-6(h)(1)(C).

37. *See id.* § 78u-6(h)(1)(C)(i) (stating that relief for a successful plaintiff shall include "reinstatement with the same seniority status that the individual would have had, but for the discrimination").

38. *See id.* § 78u-6(h)(1)(C)(ii) (stating that relief for a successful plaintiff shall include "[two] times the amount of back pay otherwise owed to the individual, with interest").

39. *See id.* § 78u-6(h)(1)(C)(iii) (stating that relief for a successful plaintiff shall include "compensation for litigation costs, expert witness fees, and reasonable attorneys' fees").

40. *See infra* Part II.C (outlining various distinctions between SOX and Dodd–Frank provisions).

41. *See* 18 U.S.C. § 1514A(a) (2012) ("No company with a class of securities registered under [the Exchange Act] . . . may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee [to report misconduct].").

any committee of Congress; or a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)."[42] Additionally, the retaliation prohibitions under SOX operate when an employee of a publicly traded company assists with a proceeding related to certain criminal violations.[43]

Once the retaliation protections attach under one of these broad provisions, Section 1514A—like subsection 21F of Dodd–Frank—allows for a private cause of action against an employer.[44] However, the would-be plaintiff must first file a complaint with the Secretary of Labor.[45] If the Secretary of Labor does not issue a final decision on the matter within 180 days after the employee files the complaint, and the delay is not caused by a bad faith effort, the claimant may then bring suit directly against their employer.[46] A successful claimant under the above-described procedure becomes eligible for three potential remedies, which the statute deems "necessary to make the employee whole."[47] These remedies include reinstatement of the wrongfully terminated employee,[48] payment of back pay owed to the employee,[49] and "special damages."[50]

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42. *Id.* § 1514A(a)(1).

43. *See id.* § 1514A(a)(2) (prohibiting retaliation against employees who "file, cause to be filed, testify, participate in, or otherwise assist in a proceeding . . . relating to an alleged violation of . . . any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders").

44. *See id.* § 1514A(b) ("A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c) . . . .").

45. *Id.* § 1514A(b)(1)(a).

46. *See id.* § 1514A(b)(1)(b) ("[I]f the Secretary has not issued a final decision within 180 days . . . and there is no showing that such delay is due to the bad faith of the claimant, [the claimant may bring an action] for de novo review in [a federal district court] . . . .").

47. *Id.* § 1514A(c)(1).

48. *See id.* § 1514A(c)(2)(i) (stating that relief shall include "reinstatement with the same seniority status that the employee would have had, but for the discrimination").

49. *See id.* § 1514A(c)(2)(ii) (stating that relief shall include "the amount of back pay, with interest").

50. *See id.* § 1514A(c)(2)(iii) (stating that relief shall include "compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees").

C. The Structure of Dodd–Frank's and SOX's Anti-Retaliation Protections Vary Significantly

The statutory language outlined above reveals some stark differences between the anti-retaliation regimes under Dodd–Frank and SOX. First, under the plain language of subsection 21F, Dodd–Frank's prohibition against employer retaliation only applies in the event an informant provides information to the SEC.[51] SOX's requirements are not so restrictive. SOX grants protections in the event an informant-employee reports to one of myriad authorities[52] or assists in an investigation.[53] The protections and remedies under SOX are more widely available than their Dodd–Frank counterparts by virtue of the fact that SOX does not limit its protections in the way that Dodd–Frank does. Informants under SOX may report to virtually anyone with an interest in the information they are willing to provide and enjoy the benefits of retaliation protection.[54] Under Dodd–Frank, by contrast, similar protections are only available to those who report "to the Commission."[55]

Second, there are procedural hurdles to the private cause of action under SOX that are not required for a private party to bring suit under Dodd–Frank. As stated above, a claimant under SOX must first file a complaint with the Secretary of Labor.[56] The

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51. *See* 15 U.S.C. § 78u-6(a)(6) (2012) ("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 to the Commission, in a manner established, by rule or regulation, by the Commission."); *see also id.* § 78u-6(h)(1)(A) ("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 . . . .").

52. *See* 18 U.S.C. § 1514A(a)(1) (stating that protections are available for those who report misconduct to "a Federal regulatory or law enforcement agency; any Member of Congress or any committee of Congress; or a person with supervisory authority over the employee").

53. *See id.* § 1514A(a)(2) (affording protections to those who "file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed . . . relating to an alleged violation of . . . any provision of Federal law relating to fraud against shareholders").

54. *See id.* § 1514A(a)(1) (affording protections to those who report to Federal agencies, Congress, or an internal supervisor).

55. 15 U.S.C. § 78u-6(a)(6).

56. *See* 18 U.S.C. § 1514A(b)(1) (2012) (requiring claimants to file a complaint with the Secretary of Labor prior to seeking relief from a federal district

claimant may only bring action in the federal courts if the Secretary fails to make a final determination within 180 days.[57] By contrast, claimants seeking relief under Dodd–Frank's anti-retaliation provisions may bring a cause of action directly to a federal district court.[58] As a result, it is much simpler to bring a private employer retaliation action to the federal courts under Dodd–Frank than under SOX.[59] Claimants under Dodd–Frank need not subject themselves to the Secretary of Labor, and this is a significant benefit that SOX claimants do not enjoy.[60]

Third, Dodd–Frank arguably affords greater remedies for those who bring successful claims against their employers.[61] Subsection 21F states that relief for claimants shall come in three forms: "(i) reinstatement with the same seniority status that the individual would have had, but for the discrimination; (ii) 2 times the amount of back pay otherwise owed to the individual, with interest; and (iii) compensation for litigation costs, expert witness fees, and reasonable attorneys' fees."[62] Remedies available under SOX are substantially the same, with one notable exception.

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court).

57. *See id.* § 1514A(b)(1)(b) ("[I]f the Secretary has not issued a final decision within 180 days of the filing of the complaint . . . [claimant may bring] an action at law or equity for de novo review in the appropriate district court of the United States . . . .").

58. *See* 15 U.S.C. § 78u-6(h)(1)(B)(i) ("An individual who alleges discharge or other discrimination in violation of subparagraph (A) may bring an action under this subsection in the appropriate district court of the United States for the relief provided in subparagraph (C).").

59. *See* Jill L. Rosenberg & Renée B. Phillips, *Whistleblower Claims Under the Dodd–Frank Wall Street Reform and Consumer Protection Act: The New Landscape*, N.Y. STATE BAR ASS'N, https://www.nysba.org/Sections/Labor_and_Employment/Labor_PDFs/LaborMeetingsAssets/Whistleblower_Claims_Under_Dodd_Frank.html (last visited Nov. 6, 2017) ("Unlike SOX, there is no requirement to first file a complaint with an agency and exhaust remedies prior to filing a district court action.") (on file with the Washington and Lee Law Review).

60. *Compare* 15 U.S.C. § 78u-6 (omitting any requirement for whistleblowers to submit complaints to an executive agency), *with* 18 U.S.C. § 1514A (requiring SOX claimants to submit their claims to the Secretary of Labor prior to bringing their claim to the courts).

61. *Compare* 15 U.S.C. § 78u-6(h)(1)(C) (outlining available remedies for employer retaliation under Dodd–Frank), *with* 18 U.S.C. § 1514A(c)(2) (outlining available remedies for employer retaliation under SOX).

62. 15 U.S.C. § 78u-6(h)(1)(C) (2012).

Dodd–Frank affords two-hundred percent back pay owed to a successful claimant.[63] SOX, however, only allows successful claimants to receive one-hundred percent back pay.[64]

Some scholars have noted that, despite these textual differences in available remedies, greater financial recompense may be available if an employee brings an employer retaliation claim under SOX.[65] This view of SOX's remedial structure stems primarily from *Rutherford v. Jones Lang Lasalle America, Inc.*[66] In that case, the magistrate judge considered whether SOX's remedies for employer retaliation permitted recovery of damages for emotional distress.[67] The plaintiff, Rutherford, was an employee of Jones Lang, and had made internal reports to company executives that another employee may have engaged in illegal conduct.[68] Rutherford was subsequently accused of framing the other employee,[69] and became the target of harassment and other hostile working conditions.[70] Rutherford eventually resigned from her position at Jones Lang and filed a complaint, in which she alleged employer retaliation under SOX.[71] Rutherford's complaint prayed for relief in the form of damages for "non-economic losses including emotional distress, mental anguish, humiliation and injury to her reputation."[72]

The magistrate's reasoning focused on specific language in SOX's remedy provisions,[73] which provide that remedies shall

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63. *See id.* § 78u-6(h)(1)(C)(ii) (stating that relief under Dodd–Frank shall include "2 times the amount of back pay otherwise owed to the individual, with interest").

64. *See* 18 U.S.C. § 1514A(c)(2)(B) (stating that relief under SOX shall include "the amount of back pay, with interest").

65. *See* Christina Pellino, Comment, *Don't Whistle While You Work—Unless You Whistle to the SEC*, 46 SETON HALL L. REV. 911, 932 (2016) ("Under certain circumstances, SOX can also provide for a greater financial reward than a claim under Dodd–Frank.").

66. Rutherford v. Jones Lang Lasalle Am., Inc., No. 12-14422, 2013 WL 4431269 (E.D. Mich. Jan. 29, 2013).

67. *Id.* at *1.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at *2.

73. *See id.* at *3 ("SOX's use of the terms 'all relief necessary to make the employee whole,' 'relief . . . shall include' and 'compensation for any special

include "all relief necessary to make the employee whole" and "compensation for any special damages."[74] The magistrate stated that SOX's remedy provisions mirror and are analogous to those of the False Claims Act,[75] which permit recovery for emotional damages.[76] Following the reasoning of other courts, the magistrate found that SOX's remedy provisions allow recovery for emotional damages.[77] Since the magistrate's finding in the *Rutherford* case, the Fourth, Fifth, and Tenth Circuit Courts of Appeals have each concluded that SOX permits recovery based on emotional distress and reputational damages.[78]

It seems settled, then, that the "special damages" contemplated under SOX include damages for emotional distress, reputational harm, and other noneconomic damages, and that these damages are ultimately couched in SOX's mandate that those harmed by employer retaliation should be made whole from their recovery in a private action.[79] Dodd–Frank's remedy

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damages . . . including . . .' do not support . . . a narrow a view of available damages.").

74. 18 U.S.C. § 1514A(c) (2012).

75. *See* Rutherford v. Jones Lang Lasalle Am., Inc., No. 12-14422, 2013 WL 4431269, at *4 (E.D. Mich. Jan. 29, 2013) ("SOX is more analogous to the whistleblower provision of the False Claims Act ('FCA'), 31 U.S.C. § 3730(h) . . . .").

76. *See id.* ("Other circuit and district courts allow recovery of damages for emotional distress, mental anguish, humiliation and injury to reputation under § 3730(h)." (citing Hammond v. Northland Counseling Ctr., Inc., 218 F.3d 886, 892–93 (8th Cir. 2000))).

77. *See id.* at *5 ("This Magistrate finds the language of SOX's remedy provision, analogous whistleblower statutes and decisions of the ARB support the recovery of damages under SOX for emotional distress, mental anguish, humiliation and injury to reputation.").

78. *See* Jones v. Southpeak Interactive Corp. of Del., 777 F.3d 658 (4th Cir. 2015) ("We therefore join . . . the Fifth and Tenth Circuits, in concluding that emotional distress damages are available under [SOX]."); Halliburton, Inc. v. Admin. Review Bd., 771 F.3d 254, 266 (5th Cir. 2014)

> It would be an odd result, to say the least, to construe a statute that prohibits certain 'threat[s]' and 'harass[ment]' against employees and purports to afford 'all relief necessary to make the employee[s] whole' to not offer a remedy for the most usual and predictable result of threats and harassment, emotional distress.

See also Lockheed Martin Corp. v. Admin. Review Bd., 717 F.3d 1121, 1138 (10th Cir. 2013) (finding that SOX's language permits recovery of emotional and noneconomic damages in employer retaliation actions).

79. *See supra* notes 65–78 and accompanying text (noting the potential for

provisions do not include similar language requiring that successful claimants be made whole.[80] Thus, the claim that greater remuneration may be available under SOX than Dodd–Frank has some grounding. Yet, even those who note this possibility recognize that greater opportunities for recompense under SOX are circumstantial[81] and that pursuing a claim under SOX would "be best for individuals who have suffered significant emotional harm."[82]

The anti-retaliation provisions under SOX and Dodd–Frank, therefore, vary greatly in both procedure and potential remedies for successful employer retaliation claims.[83] Questions remain, however, as to why Congress decided to craft Dodd–Frank's whistleblower protections in such a way that they vary so greatly from protections offered under SOX. Some have suggested that these variances intentionally provide differing options and avenues that depend on whether a claimant sues under Dodd–Frank or SOX.[84] They have also noted that these distinctions, and court holdings which differentiate Dodd–Frank whistleblowers from SOX informants, create incentives to report conduct to the SEC which previously did not exist under SOX.[85] At this point, it

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recovery of "special damages" for emotional or reputational harm under SOX's anti-retaliation provisions).

80. Dodd–Frank's remedy provision reads as follows:

> Relief for an individual prevailing in an [employer retaliation action] shall include—(i) reinstatement with the same seniority status that the individual would have had, but for the discrimination; (ii) 2 times the amount of back pay otherwise owed to the individual, with interest; and (iii) compensation for litigation costs, expert witness fees, and reasonable attorneys' fees.

15 U.S.C. § 78u-6(C) (2012).

81. *See* Pellino, *supra* note 65, at 932 ("*Under certain circumstances*, SOX can also provide for a greater financial reward than a claim under Dodd–Frank." (emphasis added)).

82. *Id.*

83. *See supra* Part II.C (outlining the various distinctions between SOX and Dodd–Frank provisions).

84. *See* Andrew Walker, Note, *Why Shouldn't We Protect Internal Whistleblowers? Exploring Justifications for the* Asadi *Decision*, 90 N.Y.U. L. REV. 1761, 1775 (2015) ("The bottom line is that SOX provides whistleblowers with options outside of Dodd–Frank.").

85. *See id.* at 1771 ("The incentives created by *Asadi* are clear—reporting to the SEC is encouraged and internal reporting is discouraged.").

is necessary to discuss how the courts have addressed the issue of Dodd–Frank whistleblowers and the SEC's rule interpreting subsection 21F.

III. Development of the Circuit Split

A. The SEC's Interpretive Rule

As mentioned above, the statutory definition of "whistleblower" under subsection 21F only includes those who report misconduct to the SEC.[86] Additionally, the language of subsection 21F indicates that each definition listed in subsection (a) applies to every other provision of subsection 21F, including its whistleblower protections under subsection (h).[87] By its own terms, the statute appears to say that, for purposes of every provision under subsection 21F, each instance of the term "whistleblower" refers to one or more persons who have reported misconduct to the SEC.[88]

In 2011, the SEC released an interpretive rule that attempted to clarify the statutory definition of whistleblower under subsection 21F, but only for purposes of 21F's anti-retaliation provisions.[89] The interpretive rule—in a benign and unassuming fashion—states that:

> *For purposes of the anti-retaliation protections* afforded by Section 21F(h)(1) of the Exchange Act (15 U.S.C. 78u–6(h)(1)), *you are a whistleblower if*: (i) You possess a reasonable belief that the information you are providing relates to a possible securities law violation (or, where applicable, to a possible violation of the provisions set forth in 18 U.S.C. 1514A(a)) that has occurred, is ongoing, or is about to occur, and; (ii) You provide that information in a manner described in Section

86. *See* 15 U.S.C. § 78u-6(a)(6) (2012) ("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 to the Commission, in a manner established, by rule or regulation, by the Commission.").

87. *See id.* § 78u-6(a) ("In this section the following definitions shall apply . . . .").

88. *Id.*

89. *See* 17 C.F.R. § 240.21F-2(b) (2011) ("*For purposes of the anti-retaliation protections afforded by Section 21F(h)(1)* of the Exchange Act (15 U.S.C. 78u-6(h)(1)), you are a whistleblower if . . . ." (emphasis added)).

> 21F(h)(1)(A) of the Exchange Act (15 U.S.C. 78u-6(h)(1)(A)). (iii) The anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award.[90]

Under careful review of the above-quoted language, it is apparent that the SEC has omitted any language requiring a person or persons to report misconduct to the Commission, as is required by the statutory definition of a "whistleblower."[91]

Further, the SEC's interpretive rule affords whistleblower status, and the anti-retaliation protections accompanying that status, to those who "provide . . . information in a manner described in Section 21F(h)(1)(A) of the Exchange Act."[92] As noted above, subsection 21F(h) states that whistleblowers receive protections for providing information in a manner protected under SOX or other securities laws and regulations.[93] Thus, by omitting the requirement to provide information "to the Commission," the SEC's interpretive rule attempts to afford Dodd–Frank whistleblower protections to those who do not meet the statutory definition of a "whistleblower" under subsection 21F(a), but who have made reports otherwise protected under SOX or other securities laws.[94] This change to the anti-retaliation rules prompted the Fifth Circuit Court of Appeals to analyze the meaning of "whistleblower" under Dodd–Frank and ultimately reject the SEC's interpretation.[95]

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90. *Id.* § 240.21F-2(b)(1) (emphasis added).

91. *Compare* 15 U.S.C. § 78u-6(a)(6) (requiring a person or persons to report "to the Commission" to qualify as a whistleblower for purposes of section 21F), *with* 17 C.F.R. § 240.21F-2(b) (offering a definition of "whistleblower", for purposes of 21F's anti-retaliation provisions, which does not require reporting to the SEC).

92. 17 C.F.R. § 240.21F-2(b)(ii).

93. *See* 15 U.S.C. § 78u-6(h)(1)(A)(iii) (2010) (stating that employers may not retaliate against whistleblowers for "making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 . . . and any other law, rule, or regulation subject to the jurisdiction of the Commission.").

94. *See* Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34304 (June 13, 2011) ("This change to the rule reflects the fact that the 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.").

95. *See infra* Part III.B (discussing the Fifth Circuit's approach to the "whistleblower" issue).

B. The Fifth Circuit Takes on the SEC: The Asadi *Case*

First, it is necessary to understand the facts of the *Asadi*[96] case. Khaled Asadi served as G.E.'s Iraq Country Executive[97] and, while working in that role, received information concerning company activities which potentially constituted violations of the Foreign Corrupt Practices Act (FCPA).[98] Instead of approaching the SEC, Asadi made internal reports to his superiors in the company.[99] Shortly thereafter, company employees pressured Asadi to step down from his position and he was ultimately fired.[100] Asadi brought an employer retaliation suit against GE under Dodd–Frank and subsection 21F.[101] The federal district court dismissed Asadi's claim,[102] prompting the Fifth Circuit to interpret subsection 21F on appeal.[103]

On appeal, Asadi conceded that he did not fall within subsection 21F's definition of "whistleblower,"[104] but that subsection 21F's whistleblower protections should nonetheless extend to his internal reports.[105] Asadi based this argument on a perceived ambiguity engendered by the interaction between subsection (a), the subsection defining "whistleblower", and subsection (h), which provides employer retaliation protections.[106] In essence, Asadi questioned how one can only become a whistleblower by reporting to the SEC, and simultaneously avail themselves of whistleblower protections under subsection 21F(h)(1)(A)(iii) by making internal reports.[107]

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96. Asadi v. G.E. Energy (USA), LLC, 720 F.3d 620 (5th Cir. 2013).

97. *Id.* at 621.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 622.

104. *Id.* at 624.

105. *Id.*

106. *Id.* at 626 ("[Asadi] maintains that [subsection (h)(1)(A)(iii)] conflicts with the definition of 'whistleblower.' The basis for his contention is that an individual can take actions falling within this category and, if he does not report information to the SEC, fail to qualify as a 'whistleblower' under § 78u-6(a)(6).").

107. *Id.*

The court's response was simply that any perceived conflict between subsection 21F(a)(6)'s "whistleblower" definition and subsection 21F(h)(1)(A)(iii)'s protection of whistleblowers who make internal reports is based in a misreading of the statute.[108] According to the Fifth Circuit, there is no conflict between these two subsections, which, the court stated, operate in the following way:

> Under Dodd–Frank's plain language and structure, there is only one category of whistleblowers: individuals who provide information relating to a securities law violation to the SEC. The three categories listed in subparagraph § 78u-6(h)(1)(A) represent the protected activity in a whistleblower-protection claim. They do not, however, define which individuals qualify as whistleblowers.[109]

The Fifth Circuit then went on to further explain the interplay between subsections (a) and (h) by providing a practical example of how they would operate in a real-world scenario:

> Assume a mid-level manager discovers a securities law violation. On the day he makes this discovery, he immediately reports this securities law violation (1) to his company's chief executive officer ("CEO") and (2) to the SEC. Unfortunately for the mid-level manager, the CEO, who is not yet aware of the disclosure to the SEC, immediately fires the mid-level manager. The mid-level manager, clearly a "whistleblower" as defined in Dodd–Frank because he provided information to the SEC relating to a securities law violation, would be unable to prove that he was retaliated against because of the report to the SEC. Accordingly, the first and second category of protected activity would not shield this whistleblower from retaliation. The third category of protected activity, however, protects the mid-level manager. In this scenario, the internal disclosure to the CEO, a person with supervisory authority over the mid-level manager, is protected under 18 U.S.C. § 1514A, the anti-retaliation provision enacted as part of the Sarbanes–Oxley Act of 2002 ("the SOX anti-retaliation provision"). Accordingly, even though the CEO was not aware of the report to the SEC at the time he terminated the mid-level manager, the mid-level manager can state a claim under the Dodd–Frank whistleblower-protection provision because he was a "whistleblower" and suffered

108. *Id.*
109. *Id.*

> retaliation based on his disclosure to the CEO, which was protected under SOX.[110]

This sketch is critical to the Fifth Circuit's analysis. It demonstrates exactly how—in the Fifth Circuit's view—subsections (a) and (h) operate simultaneously without fostering any conflict[111] or superfluousness[112] within subsection 21F.

Asadi also contended that the court should defer to the SEC interpretive rule.[113] The Fifth Circuit responded with some disdain for the SEC's rule; stating that "Congress specified that a 'whistleblower,' not merely any individual, is protected from employer retaliation on the basis of the whistleblower's protected activities. The statute, therefore, clearly expresses Congress's intention to require individuals to report information to the SEC to qualify as a whistleblower under Dodd–Frank."[114] The court went so far as to say that the SEC simply redefined the term "whistleblower" for purposes of the anti-retaliation provisions.[115]

Having concluded that section 21F's definition of "whistleblower" is unambiguous,[116] the Fifth Circuit only briefly employed the *Chevron* framework:

> Congress specified that a "whistleblower," not merely any individual, is protected from employer retaliation on the basis of the whistleblower's protected activities. The statute, therefore, clearly expresses Congress's intention to require individuals to report information to the SEC to qualify as a whistleblower under Dodd–Frank. Because Congress has directly addressed the precise question at issue, we must reject

110. *Id.* at 627–28.

111. *See id.* at 627 ("[T]he whistleblower-protection provision does not contain conflicting definitions of 'whistleblower.'").

112. *See id.* at 628 ("As this example demonstrates, under the plain text of Dodd–Frank, the third category of protected activity is not superfluous.").

113. *Id.* at 629.

114. *Id.* at 630.

115. *See id.* at 629 ("Simply put, this regulation, instead of using the statute's definition of 'whistleblower,' redefines 'whistleblower' more broadly by providing that an individual qualifies as a whistleblower even though he never reports any information to the SEC, so long as he has undertaken the protected activity listed in 15 U.S.C. § 78u-6(h)(1)(A).").

116. *Id.* at 630.

> the SEC's expansive interpretation of the term "whistleblower" for purposes of the whistleblower-protection provision.[117]

Later, this Note addresses *Chevron*'s two-step framework in greater detail, and specifically discusses how that framework was utilized in both *Asadi* and the Second Circuit's opinion in *Berman v. Neo@Ogilvy LLC*.[118] For now, it suffices to say that the first step in a *Chevron*-style analysis looks to "whether Congress has directly spoken to the precise question at issue."[119] If so, "that is the end of the matter" and the court must give effect to Congress's express intent.[120] The Fifth Circuit found that Congress spoke directly to this issue when it provided an unambiguous definition of "whistleblower,"[121] and so concluded that the SEC's interpretive rule does not deserve deferential treatment.[122]

It is noteworthy that Asadi could have, as an alternative to Dodd–Frank remedies, availed himself of SOX's anti-retaliation protections in this case, but did not. Under SOX, an employer may not retaliate against an employee who reports misconduct within the firm,[123] which is precisely the type of action Asadi claimed had precipitated his termination from G.E.[124] Instead, Asadi claimed damages under subsection 21F and sought remedies under Dodd–

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117. *Id.*

118. Part III.F explores the *Chevron* framework. Part IV.A discusses *Asadi*'s application of that framework. Part IV.B delineates the Second Circuit's analysis.

119. Chevron v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

120. *Id.* at 842–43.

121. *See* Asadi v. G.E. Energy (USA), LLC, 720 F.3d 620, 630 (5th Cir. 2013) ("The statute, therefore, clearly expresses Congress's intention to require individuals to report information to the SEC to qualify as a whistleblower under Dodd–Frank.").

122. *See id.* ("Because Congress has directly addressed the precise question at issue, we must reject the SEC's expansive interpretation of the term 'whistleblower' for purposes of the whistleblower-protection provision.").

123. *See* 18 U.S.C. § 1514A(a)(1)(C) (2012) (prohibiting retaliation against an employee for providing information related to misconduct to "a person with supervisory authority over the employee").

124. *See* Plaintiff's Original Complaint at 5, Asadi v. G.E. Energy (USA), LLC, 2012 WL 2522599 (S.D. Tex. June 28, 2012) (No. 4:12-cv-00345) (alleging that Asadi reported misconduct "to his immediate supervisor and to the Ombudsperson for G.E." and was subsequently pressured out of his position in the company).

Frank: reinstatement, two times back pay, and litigation costs and attorneys' fees.[125]

Given that G.E. fired Asadi on June 24, 2011 and that Asadi did not file his original complaint until February 3, 2012, it could be the case that Asadi simply did not submit his claim to the Secretary of Labor within SOX's 180 day statute of limitations.[126] Without more information, it is difficult to discern whether this was the only motivating factor behind Asadi's decision to pursue Dodd–Frank remedies. There could have been many factors motivating Asadi's decision to pursue Dodd–Frank remedies instead of following SOX procedures. For instance, Asadi could have been motivated by the prospect of two-hundred percent back pay under Dodd–Frank rather than one-hundred percent back pay under SOX.[127] Another possible factor could have simply been that Asadi wanted to avoid the procedural hurdles necessary to bring a SOX claim, such as filing his complaint with the Secretary of Labor in the hopes that the Secretary would act.[128] These are possible explanations for Asadi's decision not to seek relief under SOX, but are admittedly speculative.

One reason, however, makes itself clear upon examination of Asadi's filings at the trial level: his counsel relied on a misreading of subsection 21F. Asadi's memorandum in response to G.E.'s

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125. *See id.* at *6–7 (praying for relief in the form of reinstatement, two times back pay, and litigation costs and attorney's fees). These are the remedies expressly available for damages arising out of employer retaliation under subsection 21F. *See* 15 U.S.C. § 78u-6(h)(1)(C) (outlining the relief available for damages under subsection 21F's anti-retaliation provisions).

126. *See id.* at *1, 4 (stating that G.E. terminated Asadi's employment on June 24, 2011 and indicating that Asadi filed his original complaint with the district court on February 3, 2012); *see also* 18 U.S.C. § 1514A(b)(2)(D) ("An action . . . shall be commenced not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation.").

127. Dodd–Frank provides for "2 times the amount of back pay otherwise owed to the individual, with interest." 15 U.S.C. § 78u-6(h)(1)(C)(ii). SOX, on the other hand, merely allows for "the amount of back pay, with interest." 18 U.S.C. § 1514A(c)(2)(B).

128. SOX requires claimants to first submit their complaint to the Secretary of Labor, and provides that the claimant may only proceed independently to the courts if the Secretary has not taken action within 180 days of claimants initial filing. *See* 18 U.S.C. § 1514A(b)(1) (outlining the required procedure for bringing an employer retaliation claim under SOX).

motion to dismiss cites *Egan v. TradingScreen, Inc.*[129] as authority supporting its interpretation of Dodd–Frank.[130] In that case, the judge declared that the "contradictory" provisions of subsection 21F may be "harmonized" by reading subsection (h)(1)(A)(iii)'s protection of internal reports as a narrow exception to the "whistleblower" definition provided under subsection (a)(6).[131] It appears, from this reliance on *Egan*, that Asadi's counsel was confident enough in this reading of the statute to submit a Dodd–Frank claim. SOX remedies were available to Asadi, and remain available to those who may find themselves in his position in the future.[132] Part IV of this Note explores potential avenues by which SOX remedies may be made more accessible or enticing to future claimants, while preserving incentives to report to the SEC under Dodd–Frank.[133]

C. Criticism of the Asadi *Decision: Setting the Stage for the Second Circuit*

Asadi was received poorly, and most federal district courts rejected the Fifth Circuit's reasoning outright.[134] Often, these

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129. No. 10 Civ. 8202(LBS), 2011 WL 1672066 (S.D.N.Y. May 4, 2011).

130. *See* Plaintiff's Amended Memorandum in Response to Defendant's Motion to Dismiss for Failure to State a Claim at 8–9, Asadi v. G.E. Energy (USA), LLC, 2012 WL 2522599 (S.D. Tex. June 28, 2012) (No. 4:12 cv 00345) ("In this case, Mr. Asadi is a whistleblower under Dodd–Frank since his internal reports fall under the four categories of protected disclosures articulated by the court in *Egan*.").

131. *See* Egan v. TradingScreen, Inc., No. 4:12-cv-00345, 2011 WL 1672066, at *5 (S.D.N.Y. May 4, 2011) ("The contradictory provisions of the Dodd–Frank Act are best harmonized by reading 15 U.S.C. § 78u-6(h)(1)(A)(iii)'s protection of certain whistleblower disclosures not requiring reporting to the SEC as a narrow exception to 15 U.S.C. § 78u-6(a)(6)'s definition of a whistleblower as one who reports to the SEC.").

132. *See supra* notes 123–124 and accompanying text (demonstrating that SOX remedies were available to Asadi at the time he brought his complaint to the trial court).

133. *See infra* Part IV.C (proposing a legislative solution to the policy concerns surrounding the *Asadi* approach).

134. *See* Khazin v. TD Ameritrade Holding Corp., No. 13-4149, 2014 WL 940703, at *5 (D.N.J. Mar. 11, 2014) (dismissing the Fifth Circuit's reasoning as the minority opinion and granting deference to the SEC's interpretive rule); *see also* Yang v. Navigators Group, Inc., 18 F. Supp. 3d 519, 534 (S.D.N.Y. 2014) ("Considering the context of 15 U.S.C. § 78u–6, the Court finds that the statute

courts merely pointed out that a majority of other district courts found ambiguity in Dodd–Frank's whistleblower protections, parroted the reasoning of their fellow district courts, and concluded that deference to the SEC's interpretive rule was the proper approach.[135] Regardless of the analytical depth demonstrated by these decisions, the Second Circuit rightly noted in its *Berman* opinion that the majority "of district courts have deemed the statute ambiguous and deferred to the SEC's Rule."[136]

Three primary criticisms of the *Asadi* opinion arose from the federal district courts. First, district courts reasoned that the SEC's interpretive rule harmonizes subsection 21F's contradictory sections, preventing statutory superfluousness or mootness that would otherwise arise under the Fifth Circuit's interpretation.[137] Second, another court has argued that the Fifth Circuit's reasoning does not adequately comport with Congress's intent to provide whistleblowers with a private cause of action absent the burden of racing their employers to the SEC.[138] Third, district courts found that the Fifth Circuit's reasoning did not sufficiently account for the overall context of the statute, and, in so doing, failed to address subsection 21F's inherent ambiguity.[139]

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does not clearly and unambiguously limit whistleblower protection to individuals who report violations to the SEC where the anti-retaliation provision simultaneously incorporates SOX-protected reporting to supervisors."); Ellington v. Giacoumakis, 977 F. Supp. 2d 42, 45 (D. Mass. 2013) ("This court respectfully disagrees and instead adopts the SEC's interpretation of the relevant provisions of Dodd–Frank.").

135. *See Ellington*, 977 F. Supp. 2d at 45 ("This court also notes the numerous other district courts that have held that the § 78u-6(a)(6) definition of 'whistleblower' does not limit the reach of § 78u-6(h)(1)(A)(iii)."); *see also Yang*, 18 F. Supp. 3d at 533 ("[S]everal courts—including three in this district—have either declined to follow the Fifth Circuit or declined to rule on the issue.").

136. Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 153 (2d Cir. 2015).

137. *See Khazin*, 2014 WL 940703, at *6 ("The SEC's rule harmonizes the contradictory provisions of the Dodd–Frank Act while not rendering any word or section superfluous."); *see also Yang*, 18 F. Supp. 3d at 532 (positing that deference to the SEC's rule would construe the statute to give effect to every word in subsection 21F).

138. *See Ellington*, 977 F. Supp. 2d at 45 ("Congress intended that an employee terminated for reporting Sarbanes–Oxley violations . . . ha[s] a private right of action under Dodd–Frank whether or not the employer wins the race to the SEC's door with a termination notice.").

139. *See Yang*, 18 F. Supp. 3d at 534 ("[T]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as

Asadi could find no safe haven in the ivory tower, either. Legal scholars jumped at the opportunity to skewer the Fifth Circuit's reasoning as creating an illusory result,[140] incorrectly applying the *Chevron* test,[141] or failing to grasp the full scheme of the federal securities laws and creating poor public policy outcomes.[142] This Note will address these arguments later,[143] but will first provide a brief summary of *Asadi*'s reception in the courts and in the halls of academia prior to the Second Circuit's *Berman* opinion.

D. The Second Circuit Weighs in: The Berman *Case*

The Second Circuit tackled the Dodd–Frank "whistleblower" issue in 2015 after Berman appealed the district court's dismissal of his case.[144] According to Berman's factual allegations, Berman was employed as the finance director of Neo@Ogilvy LLC, and was responsible for generating Neo@Ogilvy's financial reports as well as internal auditing for Neo@Ogilvy's parent company.[145] Berman claimed that he discovered various violations of Generally Accepted Accounting Principles (GAAP), SOX, and Dodd–Frank,

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a whole." (quoting Virgilio v. City of New York, 407 F.3d 105, 112 (2d Cir. 2005))).

140. *See* Mystica M. Alexander, John O. Hayward & David Missirian, Asadi*: Renegade or Precursor of Who is a Whistleblower Under the Dodd–Frank Act?*, 35 PACE L. REV. 887, 916 (2015) ("Viewing the definition of whistleblower narrowly and in isolation, as was done in *Asadi*, creates the illusion of clarity.").

141. *See* Caroline E. Keen, *Clarifying What is "Clear": Reconsidering Whistleblower Protections Under Dodd–Frank*, 19 N.C. BANKING INST. 215, 226 (2015) ("*Asadi* did not follow the *Chevron* process, but instead used canons of statutory construction to avoid contradicting sections of the statute and surplusage."); *see also* Jennifer M. Pacella, *Inside or Out? The Dodd–Frank Whistleblower Program's Antiretaliation Protections for Internal Reporting*, 86 TEMP. L. REV. 721, 747 (2014) ("The decision in *Asadi* is flawed because it fails to acknowledge that the language of the statute is ambiguous on its face, thereby bypassing the need to grant *Chevron* deference to the SEC's reasonable construction of the statute, which protects internal whistleblowers.").

142. *See* Pellino, *supra* note 65, at 932 (arguing that the Fifth Circuit's reasoning fails to consider the role of other securities laws and whistleblower protections).

143. *See infra* Part IV (arguing that the legal result is clear, but that the resulting policy should change by legislative means).

144. *See* Berman v. Neo@Ogilvy, 801 F.3d 145, 149 (2d Cir. 2015) ("The District Court dismissed the Dodd–Frank claims because Berman had been terminated long before he reported alleged violations to the SEC.").

145. *Id.* at 148–49.

and that he reported these violations internally to senior employees of both Neo@Ogilvy and its parent company.[146] Berman claimed that he was subsequently fired as a result of his internal whistleblowing.[147] Berman did not report any of Neo@Ogilvy's alleged misconduct to the SEC until months after he was fired.[148]

The Second Circuit began its analysis by conceding that there is "no absolute conflict" between subsection 21F's definition of "whistleblower" and its anti-retaliation provisions.[149] Indeed, the court flatly admits at the outset of its analysis that the two provisions operate simultaneously and without conflict.[150] How, then, did the Second Circuit conclude that the SEC's interpretive rule should receive deference from the courts? The answer stems

146. *Id.* at 149.

147. *Id.*

148. *See id.* ("In October 2013, after the limitations period on one of his Sarbanes–Oxley claims had ended, he provided information to the Commission.").

149. *Id.* at 150.

150. *See id.* at 150–51

> An employee who suffers retaliation after reporting wrongdoing simultaneously to his employer and to the SEC is eligible for Dodd–Frank remedies and those provided by Sarbanes–Oxley. Subdivision (iii) assures him the latter remedies, and his simultaneous report to the SEC assures him that he will not have excluded himself from Dodd–Frank remedies.

from *King v. Burwell*,[151] a Supreme Court case from earlier in 2015.[152]

The Second Circuit took time to note the similarity between *King* and the case before it.[153] However, instead of foregoing the *Chevron* approach altogether—as the Supreme Court chose to do in *King*—the Second Circuit claimed that its analysis must root itself firmly in the *Chevron* framework.[154] It is critically important to understand exactly how the Second Circuit styled the issue in this case. The court set forth the issue as follows:

> In our case, the statutory provision relied on by the Appellees and our dissenting colleague contains the phrase "provide . . . to the Commission," but the issue is not whether that phrase means something other than what it literally says. Instead, the issue is whether the statutory provision applies to another provision of the statute, or, more precisely, whether the answer to that question is sufficiently unclear to warrant *Chevron* deference to the Commission's regulation.[155]

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151. 135 S. Ct. 2480 (2015). In *King*, the Court undertook the task of determining the correct interpretation of subsection 36B of the Patient Protection and Affordable Care Act. *Id.* at 2483. That section states that the Affordable Care Act's tax credits are available in amounts dependent upon whether the taxpayer's health insurance was purchased through "an Exchange established by the state." *Id.* at 2487. Effectively, the issue was the meaning of the word "state," and whether the Affordable Care Act's tax credits were available to taxpayers in States that have a Federal, rather than a State-created, exchange. *Id.* The Internal Revenue Service had released its own interpretation of subsection 36B, but the Court did not employ the *Chevron* test in this case, reasoning only that this was an extraordinary case in which Congress did not intend to delegate authority to the Internal Revenue Service. *Id.* at 2488–89. The Court reasoned that, although a plain reading of the statute would render tax credits inapplicable in States which did not establish health care exchanges, reading the statute so narrowly would defeat Congress's purpose in enacting the Affordable Care Act. *Id.* at 2492–94. The Court ultimately concluded that subsection 36B can only be read in a way which comports with that purpose. *Id.* at 2496. Thus, the Court found that subsection 36B's language—"Exchange established by the state"—applies to exchanges established by the States and the Federal government. *Id.*

152. *See infra* Part IV.B (explicating the Second Circuit's covert use of *King*'s analytical method).

153. *See* Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 150 (2d Cir. 2015) (noting that the issue presented in *King* also involved a statute without a clear conflict among its provisions).

154. *See id.* at 150 (stating that the *King* case was "far more problematic," and that the *Berman* case is one in which the *Chevron* test must apply).

155. *Id.*

The foregoing passage is critical because the Second Circuit did *not* employ the *Chevron* framework in the *Berman* case.[156] Rather, the court utilized a *King*-style analysis to sidestep the first prong of the *Chevron* analysis altogether.[157]

The Second Circuit acknowledged that the Fifth Circuit's *Asadi* analysis reconciles, to an extent, any perceived statutory conflict.[158] The court also stated, however, that *Asadi*'s "employer/Commission reporting example"—quoted above[159]—does not entirely eliminate what the court perceived to be the "tension" among subsection 21F's provisions.[160] In the end, the Second Circuit attacked the *Asadi* decision on the grounds that it severely limits the scope of Dodd–Frank whistleblower protections in two ways.[161] First, the court stated that the Fifth Circuit's application of plain language would require employees to report within their organization and to the SEC simultaneously to receive Dodd–Frank protections under § 78u-6(h)(1)(A)(iii), and that it would be extremely rare for an employee to choose to report in this fashion.[162] Second, the court noted that there are certain actors—such as auditors and lawyers—who, under SOX, are required to report internally prior to reporting misconduct to the SEC.[163] The Second Circuit concluded that, as a result of these provisions, "there would be virtually no situation where an SEC reporting requirement would leave subdivision (iii) with any scope."[164]

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156. *See infra* Part IV.B (describing the Second Circuit's use of a *King*-style analysis as the guidepost for its analytical method in *Berman*).

157. *Id.*

158. *Berman*, 801 F.3d at 151.

159. *See supra* note 110 and accompanying text (quoting the Fifth Circuit's illustration of subsection 21F's operation).

160. *Berman*, 801 F.3d at 151.

161. *Id.*

162. *See id.*

> First, although there may be some potential whistleblowers who will report wrongdoing simultaneously to their employer and the Commission, they are likely to be few in number. Some 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.

163. *Id.*

164. *Id.* at 152.

Having confronted the scope of § 78u-6(h)(1)(A)(iii) under a plain text analysis and found it dissatisfying, the Second Circuit then sought some clarity in subsection 21F's legislative history.[165] However, any appeal to legislative history in this instance is, as the Second Circuit correctly noted, futile.[166] This is simply because the legislative history of subsection 21F yields no set of Congressional records or committee notes from which to derive Congress's intentions behind § 78u-6(h)(1)(A)(iii).[167]

Finding no solace in the pertinent legislative history, the Second Circuit marched onward, ultimately opining that the court "think[s] it doubtful that the conferees who accepted the last-minute insertion of subdivision (iii) would have expected it to have the extremely limited scope it would have if it were restricted by the Commission reporting requirement in the 'whistleblower' definition in subsection 21F(a)(6)."[168] Given the court's skepticism, it should not come as a surprise that the Second Circuit concluded that the "tension" between subsection 21F's terms rendered it sufficiently ambiguous to grant deference to the SEC's interpretive rule.[169]

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165. *See id.*

> In light of these realities as to the sharply limiting effect of a Commission reporting requirement on all whistleblowers seeking the Sarbanes–Oxley remedies promised by Dodd–Frank for those who report wrongdoing internally, the question becomes whether Congress intended to add subdivision (iii) to subsection 21F(h)(1)(A) only to achieve such a limited result. To answer that question we would normally look to the legislative history of subdivision (iii) to learn what Congress, or the relevant committee, had sought to accomplish by adding subdivision (iii).

166. *See id.* ("Unfortunately [the legislative history] yields nothing. What became subdivision (iii) . . . was not in either version of Dodd–Frank that was passed by the House and the Senate prior to a conference.").

167. *See id.* at 153 ("Unfortunately, there is no mention of the addition of subdivision (iii), much less its meaning or intended purpose, in any legislative materials—not in the conference report nor the final passage debates on Dodd–Frank in either the House or the Senate.").

168. *Id.* at 155.

169. *See id.* ("[W]e need not definitively construe the statute, because, at a minimum, the tension between the definition in subsection 21F(a)(6) and the limited protection provided by subdivision (iii) of subsection 21F(h)(1)(A) if it is subject to that definition renders section 21F as a whole sufficiently ambiguous . . . .").

Before reaching its ultimate conclusion, the court took some more time to distinguish its analysis from *King*.[170] The Supreme Court in *King*, said the Second Circuit, determined that the IRS lacked the expertise to interpret the provision at issue in that case.[171] The SEC, by contrast, has the knowledge and expertise to resolve the perceived tension in subsection 21F, according to the Second Circuit.[172] Thus, the Second Circuit, unlike the Supreme Court in *King*, concluded that it did not need to resolve the ambiguity itself, and could rely on the agency's interpretive rule.[173] Having once again found the need to distinguish itself from the Supreme Court and *King*, the Second Circuit concluded that it should grant deference to the SEC interpretive rule, and that Berman was able to pursue private anti-retaliation claims under Dodd–Frank.[174] The Second Circuit's deference to the SEC created a circuit split regarding whether courts should grant *Chevron* deference to the SEC's interpretation of subsection 21F.

E. The Ninth Circuit's View: The Somers *Case*

In March of 2017, the Ninth Circuit handed down its take on subsection 21F.[175] *Somers* concerns Paul Somers, a former employee of Digital Realty Trust, Inc.[176] Digital Realty Trust terminated Somers's employment after "he made several reports to senior management regarding possible securities law violations by the company," but before Somers could issue a report to the SEC.[177] After noting that the district court adopted the Second Circuit's *Berman* approach,[178] the court explored the issue for itself.

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170. *See id.* (arguing that the analysis employed is notably distinct from the Supreme Court's analysis in the *King* case).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *See generally* Somers v. Dig. Realty Tr., Inc., 850 F.3d 1045 (9th Cir. 2017) (relying on *King* to conclude that subsection 21F unambiguously affords "whistleblower" protections to those who do not report to the SEC).

176. *Id.* at 1047.

177. *Id.*

178. *See id.* ("Having analyzed the tension between the definition and anti-

Much like the Second Circuit, the Ninth Circuit expressly acknowledges that subsection 21F defines the term "whistleblower" and that the definition only includes those who report to the SEC.[179] Additionally, like the Second Circuit, the court reviews this definition in the context of subsection (h)(1)(A)(iii) and concludes that applying the definition as written would narrow the scope of that subsection "to the point of absurdity."[180] *Somers* then diverges from the Second Circuit's line of reasoning—expressly utilizing *King* to argue that "[t]he use of a term in one part of a statute 'may mean [a] different thing[ ]' in a different part, depending on context," even where a statute has expressly defined that term.[181] The court then summarily concludes that "[Dodd–Frank]'s anti-retaliation provision unambiguously and expressly protects from retaliation all those who report to the SEC and who report internally."[182]

This conclusion required the Ninth Circuit to discard the statutory definition altogether. The court states that "[r]eading the use of the word 'whistleblower' in the anti-retaliation provision to incorporate the earlier, narrow definition would make little practical sense and undercut congressional intent."[183] This must be true, says the court, even though, as it explicitly admits, "Subdivision (iii) was added after the bill went through Committee. There is no legislative history explaining its purpose."[184] The Ninth Circuit concluded its opinion with this statement:

> For all these reasons, we conclude that subdivision (iii) of section 21F should be read to provide protections to those who report internally as well as to those who report to the SEC. *We also agree with the Second Circuit* that, even if the use of the word "whistleblower" in the anti-retaliation provision creates

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retaliation provisions, the district court deferred to the SEC's interpretation that individuals who report internally only are nonetheless protected from retaliation under [Dodd–Frank].").

179. *See id.* at 1048 (admitting that subsection (a)(6)'s "definition . . . describes only those who report information to the SEC").

180. *See id.* at 1049 ("[T]he only class of employees protected would be those who had reported possible securities violations both internally and to the SEC . . . .").

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

> uncertainty because of the earlier narrow definition of the term, the agency responsible for enforcing the securities laws has resolved any ambiguity and its regulation is entitled to deference.[185]

The Ninth Circuit has essentially stated that—even if its *King*-based analysis is incorrect—the statute *must* afford protection to those who do not report misconduct to the SEC.

F. The Chevron *Two-Step*

Both the Fifth Circuit and Second Circuit claimed to utilize the *Chevron* test in their examination of subsection 21F and the SEC's interpretive rule.[186] Given *Chevron*'s prevalence and centrality to the issue at hand, it is necessary to expound upon and understand this test, and also to understand what the test is designed to accomplish. The *Chevron* test is the last piece of the analytical puzzle.

In *Chevron*, the Supreme Court confronted the issue of whether or not to grant deference to a rule promulgated by the Environmental Protection Agency (EPA) purporting to interpret the Clean Air Act.[187] Justice Stevens, writing for the Court, articulated the test that has remained the most salient expression of judicial deference in the field of administrative law.[188] The first step, said the Court, is to ask whether Congress has "directly spoken to the precise question at issue."[189] If so, then the inquiry

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185. *Id.* at 1050 (emphasis added).

186. *See* Asadi v. G.E. Energy (USA), LLC, 720 F.3d 620, 630 (5th Cir. 2013) ("Congress defined 'whistleblower' in § 78u-6(a)(6), and did so unambiguously."); *see also* Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 150 (2d Cir. 2015) (stating that analysis of the SEC's interpretive rule requires application of the *Chevron* test).

187. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 840 (1984) ("The question presented by these cases is whether EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble' is based on a reasonable construction of the statutory term 'stationary source.'").

188. *See* Cass. R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 188 (2006) ("[T]he [*Chevron*] decision has become foundational, even a quasi-constitutional text—the undisputed starting point for any assessment of the allocation of authority between federal courts and administrative agencies.").

189. *Chevron*, 467 U.S. at 842.

ends because Congress has made its intent clear, and "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[190] If the statute at hand is ambiguous, however, the Court stated that a reviewing court should move to the second step, which asks whether or not the agency's interpretation of the statute is "permissible."[191] The Court further clarified this point, stating that an agency's interpretation must merely be a reasonable interpretation of the statute, and not necessarily the only possible interpretation or the best possible interpretation of the statute.[192]

The purpose undergirding the first step is plain and uncontroversial: the Constitution grants supreme legislative authority to the United States Congress,[193] and so if Congress's word—as written in properly enacted legislation—is clear and unambiguous on its own terms, then it is not within the province of the judicial or executive branches to change that word or its plain meaning.[194] The second step, however, requires more explanation because it appears to subvert the traditional power of the judiciary in favor of executive agencies.[195] Despite the Court's insistence to the contrary,[196] some have pointed out that *Chevron* operates to the detriment of the oldest, most critical precept of American judiciary authority—judicial review—by affording

190. *Id.* at 842–43.

191. *Id.* at 843.

192. *See id.* at 843 n.11 ("The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.").

193. *See* U.S. CONST. art. I, § 1 ("*All* legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." (emphasis added)).

194. *See Chevron*, 467 U.S. at 842–43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

195. *See* Sunstein, *supra* note 188, at 188–89 ("*Chevron* was quickly taken to establish a new approach to judicial review of agency interpretations of law, going so far as to create a kind of counter-*Marbury* for the administrative state.").

196. *See* U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

agencies the authority to say what the law is in certain instances.[197]

Why, then, should a court charged with "the province and duty . . . to say what the law is"[198] defer to an agency's reasonable interpretation of a statute? The *Chevron* Court devoted only a small portion of its opinion to answering this question, and rested its deferential posture on the notion that agency rule makers have greater expertise than judges in their respective fields.[199] As a result, said the Court, those rule makers are far better suited to implement the policy decisions of the incumbent executive administration,[200] and should receive deference unless they exceed the bounds of the authority delegated to their agency by Congress.[201]

In sum, the *Chevron* test operates as follows: a court must first determine whether Congress has clearly and unambiguously spoken to the issue which the agency's rule attempts to address.[202] If not, the reviewing court may proceed to the second step, but may only grant deference to the agency's rule if that rule is a reasonable interpretation of the statute at issue.[203]

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197. *See* Sunstein, *supra* note 163, at 190

> *Chevron* has signaled a substantial increase in agency discretion to make policy through statutory interpretation. For this reason, *Chevron* might well be seen not only as a kind of counter-*Marbury*, but even more fundamentally as the administrative state's very own *McCulloch v. Maryland*, permitting agencies to do as they wish so long as there is a reasonable connection between their choices and congressional instructions.

198. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

199. *See Chevron*, 467 U.S. at 865 (contrasting the relative expertise of judges in the minutia of administrative rules to that of agency rule makers).

200. *See id.* ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . .").

201. *See id.* ("Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the [Executive's policy views] to inform its judgments.").

202. *Id.* at 842–43.

203. *See id.* at 843 (calling for judicial deference to "permissible" agency interpretations of vague and ambiguous statutory provisions).

IV. The Path Forward

A. Dodd–Frank is Clear: Employing Chevron *to Resolve the Split*

The Fifth Circuit, in *Asadi*, and the Second Circuit, in *Berman*, both cited the *Chevron* test as their guidepost for determining whether to grant deference to the SEC's interpretive rule.[204] Both courts were correct to do so. *Chevron* is the central doctrine employed "[w]hen reviewing an administrative agency's construction of a statute."[205] The SEC has promulgated a rule that advances a particular interpretation of Dodd–Frank's whistleblower protections,[206] and the question is whether or not the judiciary should defer to that interpretation.

Following the *Chevron* framework, the analysis begins with whether or not Congress directly spoke to the issue at hand. In other words, did Congress define the term "whistleblower" in such a way that is clear and unambiguous, and in such a way that it does not conflict with other provisions of subsection 21F? The definition of whistleblower under subsection 21F is as follows: "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 to the Commission, in a manner established, by rule or regulation, by the Commission."[207]

By itself, this definition is clear, but the alleged ambiguity arises out of the application of this definition to subsection 21F's anti-retaliation provisions,[208] and so a court should examine this

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204. *See Berman*, 801 F.3d at 148 ("[T]he more precise issue in the pending appeal is whether the arguable tension between the definitional section of subsection 21F(a)(6) and subdivision (iii) of subsection 21(F)(h)(1)(A) creates sufficient ambiguity as to the coverage of subdivision (iii) to oblige us to give *Chevron* deference to the SEC's rule."); *see also* Asadi v. G.E. Energy (USA), LLC, 720 F.3d 620, 630 (5th Cir. 2013) (beginning and ending its *Chevron* analysis on the first step by determining that the statutory definition of "whistleblower" is unambiguous).

205. 2 AM. JUR. 2D *Administrative Law* § 470 (2016).

206. *See* 17 C.F.R. § 240.21F-2(b)(1)(ii) (2016) (interpreting subsection 21F's definition of "whistleblower" to include those employees who have made disclosures internally, and not to the SEC).

207. 15 U.S.C. § 78u-6(a)(6) (2012).

208. *See Berman*, 801 F.3d at 147 ("[The] arguable tension between the definitional subsection . . . which defines 'whistleblower' to mean an individual who reports violations to the Commission, and subdivision (iii) of subsection

definition in the context of those provisions.[209] The pertinent anti-retaliation section reads:

> 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—
>
> (iii) in making disclosures that are required or protected under the Sarbanes–Oxley Act of 2002 (15 U.S.C. 7201 *et seq*.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.[210]

Given that § 78u-6(a)(6) defines the term "whistleblower," it is appropriate to substitute every instance of that term with the statutory definition to determine whether a conflict exists between the above-quoted provisions.[211] After all, "[t]he thing about a

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21F(h)(1)(A), which, unlike subdivisions (i) and (ii), does not within its own terms limit its protection to those who report wrongdoing to the SEC."); *see also* Yang v. Navigators Group, Inc., 18 F. Supp. 3d 519, 534 (S.D.N.Y. 2014) ("Considering the context of 15 U.S.C. § 78u-6, the Court finds that the statute does not clearly and unambiguously limit whistleblower protection to individuals who report violations to the SEC where the anti-retaliation provision simultaneously incorporates SOX-protected reporting to supervisors."); Ellington v. Giacoumakis, 977 F. Supp. 2d 42, 45 (D. Mass. 2013) (deferring to the SEC's interpretation of subsection 21F's provisions).

209. As the Supreme Court has articulated, courts generally appeal first to the "plain meaning" canon of statutory interpretation, which requires that "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." Caminetti v. United States, 242 U.S. 470, 485 (1917); *see also* King v. Burwell, 135 S. Ct. 2480, 2497 (2015) (Scalia, J., dissenting) ("Any effort to understand rather than to rewrite a law must accept and apply the presumption that lawmakers use words in 'their natural and ordinary signification.'" (quoting Pensacola Telegraph Co. v. W. Union Telegraph Co., 96 U.S. 1, 12 (1878))). The Court has also indicated that, "where a word is capable of many meanings," a reviewing court should employ the canon *noscitur a sociis*, which permits interpreting the meaning of a term by examining it within its surrounding statutory provisions. McDonnell v. United States, 136 S. Ct. 2355, 2368 (2016).

210. 15 U.S.C. § 78u-6(h)(1)(A)(iii).

211. *See* King v. Burwell, 135 S. Ct. 2480, 2497 (2015) (Scalia, J., dissenting) ("[S]ound interpretation requires paying attention to the whole law, not homing in on isolated words or even isolated sections. Context always matters. Let us not forget, however, why context matters: It is a tool for understanding the terms of the law, not an excuse for rewriting them.").

definition is that it is, well, definitional."[212] If one took the crux of subsection (a)(6)'s definition and substituted every instance of "whistleblower" with that definition, subsection (h)(1)(a)(iii) would read:

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a [*person who reports misconduct to the Commission*] in the terms and conditions of employment because of any lawful act done by the [*person who reports misconduct to the Commission*]—
>
> (iii) in making disclosures that are required or protected under the Sarbanes–Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j 1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.[213]

When presented in this fashion, it becomes clear that subsection (h)(1)(a)(iii) and the definition of "whistleblower" under subsection (a)(6) are entirely compatible.[214] As the Fifth Circuit determined in 2013, the prohibition imposed by (h)(1)(A)(iii) operates to protect those who have made reports which are protected by SOX, but only if those persons have also reported misconduct to the SEC.[215] Not only is the meaning of the statutory definition under (a)(6) plain in its own right,[216] that subsection also fits into the general scheme of subsection 21F, such that subsection (h)(1)(A)(iii) is not rendered conflicting or superfluous by its operation.[217] As a result, a court's inquiry should end here, refuse

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212. Berman v. Neo@Ogilvy, LLC, 801 F.3d 145, 158 (2d Cir. 2015) (Jacobs, J., dissenting).

213. 15 U.S.C. § 78u-6(h)(1)(A) (2012); *accord id.* § 78u-6(a)(6) (defining a whistleblower as a person or persons who report misconduct "to the Commission").

214. In Part III.A, this Note quoted a portion of the *Asadi* opinion which serves to illustrate (h)(1)(A)(iii)'s operation in practice. *See supra* note 110 and accompanying text (operationalizing subsection 21F's anti-retaliation provisions).

215. *See* Asadi v. G.E. Energy (USA) LLC, 720 F.3d 620, 626 (5th Cir. 2013) ("While it is correct that individuals may take protected activity yet still not qualify as a whistleblower, that practical result does not render § 78u-6(h)(1)(A)(iii) conflicting or superfluous.").

216. *See id.* at 625 ("Under Dodd–Frank's plain language and structure, there is only one category of whistleblowers: individuals who provide information relating to a securities law violation to the SEC.").

217. *See id.* at 626 (reasoning that the provisions of subsection 21F do not

to advance to *Chevron*'s second step, and thereby reject the agency's interpretive rule as an undue exercise of power which Congress has reserved for itself. Whether this legal outcome makes for good policy, however, is a separate issue which this Note will address in Part IV.C.[218]

B. What Went Wrong? Explaining Berman*'s Reasoning*

Yet, if subsection 21F's language is so plain, how does one explain the Second Circuit's rejection of the Fifth Circuit's analysis? As alluded to above, the Second Circuit utilized an analytical method employed by the Supreme Court in *King v. Burwell*.[219] In that decision, the Supreme Court addressed whether a federal health insurance exchange is an exchange which is "established by the State" under the Affordable Care Act.[220] First, however, the Court addressed whether to grant *Chevron* deference to an IRS interpretation of that phrase.[221] Writing for the Court, Chief Justice Roberts concluded that the *Chevron* approach was not appropriate in *King* because "[t]he tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people."[222] The Court stated that any interpretation of "established by the State" was so central to the Affordable Care Act's statutory scheme that Congress could not have intended to delegate that interpretation to an executive agency without expressly doing so.[223]

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conflict with one another).

218. *See infra* Part IV.C (noting policy considerations and proposing a legislative path forward).

219. *See supra* notes 152–157 and accompanying text (claiming that the Second Circuit sidestepped *Chevron*'s first step via a *King*-style analysis).

220. *See* King v. Burwell, 135 S. Ct. 2480, 2490 (2015) ("[W]e must determine whether a Federal Exchange is 'established by the State' for purposes of Section 36B.").

221. *See id.* at 2488–89 (deciding that applying *Chevron* would be inappropriate in this case).

222. *Id.* at 2489.

223. *See id.* ("Whether those credits are available on Federal Exchanges is thus a question of deep 'economic and political significance' that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.").

The *King* decision marks a doctrinal shift which premises itself on the view that executive interpretation cannot resolve every statutory ambiguity.[224] Indeed, this shift indicates that ambiguities may arise out of a statutory provision's apparent conflict with what a court perceives to be the principal statutory scheme.[225] Yale Law Professor Abbe R. Gluck refers to this shift as the "plan" concept, in which a statutory provision is ambiguous when it is "fundamentally inconsistent with a statute's overarching plan."[226] Professor Gluck further notes that the *Berman* court used this plan concept as its method to analyze subsection 21F of the Dodd–Frank Act.[227] Yet, the Supreme Court expressly rejected using the *Chevron* approach,[228] while the Second Circuit's opinion in *Berman* claims to embrace *Chevron* as its analytical framework.[229] How could the Second Circuit have made use of *King*'s plan concept and *Chevron* simultaneously?

Recall that the first step in a *Chevron* analysis is to ask "whether Congress has directly spoken to the precise question at issue."[230] A court only moves on to the second step "if the statute is silent or ambiguous with respect to the specific issue."[231] Also

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224. *See* Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 96 (2015) ("One way to understand all of this is to view the Court's sidestepping of *Chevron* as actually a new doctrinal move: namely, that not every ambiguity in an imperfect and complicated statute creates interpretive space for the agency.").

225. *See id.* ("There might be a gap that implicates politics or policy, but it might be a question that Congress itself has clearly settled in the scheme as a whole.").

226. *See id.* (arguing that the Court's analysis in *King* suggests that such a fundamental inconsistency engenders a statutory ambiguity beyond any executive agency's interpretive competence).

227. *See id.* at 96 n.204 (noting that the Second Circuit employed the plan concept in its *Berman* opinion).

228. *See* King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015) (deciding not to utilize the *Chevron* approach because the IRS, in the Court's view, is not competent to interpret central, fundamental provisions of the Affordable Care Act).

229. *See* Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 155 (2d Cir. 2015) (concluding that subsection 21F is sufficiently ambiguous to warrant *Chevron* deference).

230. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue.").

231. *Id.* at 843.

remember that the central issue in *Berman* was whether or not Berman's internal reporting activities made him a whistleblower under subsection 21F.[232] The Second Circuit, however, did not seek to establish whether Congress spoke precisely to this issue.[233] Rather, the Second Circuit sought to establish "whether the *arguable tension* between the definitional section of subsection 21F(a)(6) and subdivision (iii) of subsection 21(F)(h)(1)(A) creates *sufficient* ambiguity as to the coverage of subdivision (iii) to oblige [the court] to give *Chevron* deference to the SEC's rule."[234] Styling the issue in this fashion presumes that Congress spoke ambiguously, and phrases the question as one of degree rather than kind. Once again, the proper inquiry is whether Congress clearly spoke to the issue,[235] and not whether a presupposed ambiguity is *sufficiently* ambiguous to warrant *Chevron* deference.

Ambiguity is a term which is commonly understood to mean "[t]he quality of being open to more than one interpretation" or "inexactness."[236] Ultimately, the Second Circuit's finding of an ambiguity in subsection 21F rests on the fact that a literal application of subsection 21F's whistleblower definition to subsection (h)(1)(A)(iii)'s protection for whistleblowers who make reports under SOX severely limits the scope of subsection (h)(1)(A)(iii).[237] This, says the Second Circuit, is likely not to have

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232. *See Berman*, 801 F.3d at 147 ("In operational terms, the issue is whether an employee who suffers retaliation because he reports wrongdoing internally, but not to the SEC, can obtain the retaliation remedies provided by Dodd–Frank.").

233. *See id.* at 148 ("So the more precise issue in the pending appeal is whether the arguable tension between the definitional section of subsection 21F(a)(6) and subdivision (iii) of subsection 21(F)(h)(1)(A) creates sufficient ambiguity as to the coverage of subdivision (iii) to oblige us to give Chevron deference to the SEC's rule.").

234. *Id.* (emphasis added).

235. *See Chevron*, 467 U.S. at 842 ("First, always, is the question whether Congress has directly spoken to the precise question at issue.").

236. *See Ambiguity*, OXFORD ENG. DICTIONARY, https://en.oxforddictionaries.com/definition/ambiguity (last visited February 23, 2017) (defining the word "ambiguity") (on file with the Washington and Lee Law Review).

237. *See* Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 155 (2d Cir. 2015) ("[W]e think it doubtful that the conferees who accepted the last-minute insertion of subdivision (iii) would have expected it to have the extremely limited scope it would have if it were restricted by the Commission reporting requirement in the 'whistleblower' definition in subsection 21F(a)(6).").

been what legislators intended to accomplish with subsection 21F,[238] despite the lack of legislative history to support its assertion.[239]

This is how the Second Circuit chose to employ *King*'s plan concept. Instead of searching the statute to determine whether Congress had directly and clearly spoken to the issue, the court chose to declare the existence of an ambiguity from the unsupported assertion that a literal application of subsection 21F's "whistleblower" definition limited the statute's application in direct contravention of the legislature's plan.[240] If the Second Circuit had adhered to *Chevron*, it would have been compelled to conclude that Congress clearly spoke to the issue of who qualifies as a whistleblower—even when applied to subsection 21F's anti-retaliation provisions.[241]

It is worth noting that the Ninth Circuit's *Somers* opinion did not even attempt to employ *Chevron*. Indeed, the Ninth Circuit only mentions *Chevron* in a brief comment on *Berman*.[242] The Ninth Circuit expressly rested its entire analysis on *King*, arguing that—because Congress could not have included subsection (h)(1)(A)(iii) without planning to protect informants who do not report to the SEC—the meaning of "whistleblower" in that subsection *must* include those who do not report to the SEC.[243] Thus, says the Ninth Circuit, the meaning of "whistleblower" in subsection (h)(1)(A)(iii) unambiguously protects those who fall

238. *See id.* (doubting that Congress intended the "whistleblower" definition to limit subsection 21F's retaliation protections to those who reported misconduct to the SEC).

239. *See id.* ("[N]o legislative history even hints at an answer.").

240. *See supra* notes 237–239 and accompanying text (describing the Second Circuit's method for finding ambiguity within subsection 21F of Dodd–Frank).

241. *See* Puffenbarger v. Engility Corp., 151 F. Supp. 3d 651, 664–65 (E.D. Va. 2015) ("Thus, because 'the intent of Congress is clear,' as the statute directly and unambiguously limits whistleblower protection to individuals who report to the SEC, it is necessary to 'give effect to the unambiguously expressed intent of Congress,' and . . . reject the SEC's more expansive interpretation of the term 'whistleblower.'").

242. *See* Somers v. Digital Trust Realty, Inc., 850 F.3d 1045, 1046 (9th Cir. 2017) ("The Second Circuit, viewing the statute itself as ambiguous, applied *Chevron* deference to the SEC's regulation.").

243. *See id.* at 1049 ("Reading the use of the word 'whistleblower' in the anti-retaliation provision to incorporate the earlier, narrow definition would make little practical sense and undercut congressional intent.").

outside of subsection (a)(6)'s express definition.[244] In an effort to hedge against reversal, the court merely incorporates *Berman*'s analysis as an argument in the alternative.[245]

Recall that the Supreme Court's analysis in *King* rested on the notion that the statutory provision at issue was so central to Congress's plan that it would be inappropriate to utilize the *Chevron* standard.[246] In *King*, the Court explained that:

> The tax credits are among the [Affordable Care Act]'s key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep "economic and political significance" that is central to this statutory scheme . . . .[247]

Subsection 21F is not central to Dodd–Frank's overall scheme in the same way that the tax credits at issue in *King* were central to the Affordable Care Act.[248] The Ninth Circuit's primary thrust for employing *King* repeats the Second Circuit's reasoning that certain individuals, such as auditors and lawyers, would be unable to avail themselves of Dodd–Frank remedies in most circumstances.[249] This outcome does not involve "billions of dollars in spending each

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244. *See id.* ("[Dodd–Frank]'s anti-retaliation provision unambiguously and expressly protects from retaliation all those who report to the SEC and who report internally.").

245. *See id.* at 1050

> [W]e conclude that subdivision (iii) of section 21F should be read to provide protections to those who report internally as well as to those who report to the SEC. We also agree with the Second Circuit that, even if the use of the word "whistleblower" in the anti-retaliation provision creates uncertainty because of the earlier narrow definition of the term, the agency responsible for enforcing the securities laws has resolved any ambiguity and its regulation is entitled to deference.

246. *See* King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015) (explaining the Court's refusal to utilize *Chevron* in the *King* case).

247. *Id.* at 2489.

248. Dodd–Frank's whistleblower protection scheme operates only when a whistleblower's employer retaliates against the whistleblower for undertaking certain protected actions. By contrast, "[w]ithout the federal subsidies . . . . the [healthcare] exchanges would not operate as Congress intended and may not operate at all." Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2674 (2012) (joint dissenting opinion of Scalia, Kennedy, Thomas, and Alito, JJ.).

249. *See Somers*, 850 F.3d at 1049 (noting that, under SOX, auditors and lawyers are required to report misconduct internally prior to reporting to any external entity).

year," does not affect "millions of people", and is not "a question of deep 'economic and political significance'" which determines the success or failure of the entirety of Dodd–Frank. Resorting to *King*, or even employing a *King*-style analysis, is an inappropriate method to determine the meaning of subsection 21F and is inappropriate to determine whether to defer to the SEC's interpretive rule.

To qualify as a whistleblower under Dodd–Frank, one must report misconduct "to the Commission."[250] This mandate is not open to more than one interpretation and is exact in its meaning.[251] Thus, the definition unambiguously excludes those who do not report to the SEC, and Congress clearly spoke to the issue at hand. This is true even when the definition is read in the context of subsection (h)(1)(A)(iii). As a result, *Asadi*'s non-deferential stance is the proper legal result to this circuit split.

C. Policy Considerations: What if the Correct Legal Answer is Bad Policy?

"What makes good law may not make good policy."[252] At the outset, it is noteworthy that *Asadi* does not leave those who report internally without recourse in the event of employer retaliation: these employees may avail themselves of SOX protections.[253] Such protections were available to Asadi, but he elected to pursue a Dodd–Frank claim instead.[254] "The righteous employee might still have some recourse."[255]

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250. 15 U.S.C. § 78u-6(a)(6) (2012).

251. *See* Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 157 (2d Cir. 2015) (Jacobs, J., dissenting) (stating that subsection 21F's definition of "whistleblower" is unambiguous).

252. Bernard James & Joanne E. K. Larson, *The Doctrine of Deference: Shifting Constitutional Presumptions and the Supreme Court's Restatement of Student Rights After* Board of Education v. Earls, 56 S.C. L. REV. 1, 4 (2004).

253. These protections, and the processes required to engage and enforce them, are found at 18 U.S.C. § 1514A (2012).

254. *See supra* notes 123–1132 and accompanying text (demonstrating that Asadi could have availed himself of SOX protections instead of Dodd–Frank protections).

255. Walker, *supra* note 84, at 1775.

This is not to say that pursuing a SOX claim is an attractive option. To the contrary, bringing a claim under SOX is a long, cumbersome procedure for the claimant. First, the claimant must file his or her claim with the Secretary of Labor.[256] Then, the claimant must wait 180 days for the Secretary to act and, if the Secretary does not act, may bring his or her claim to the federal courts only after the waiting period.[257] If a claim is successful, the claimant may obtain relief in the form of reinstatement, back pay with interest, and compensation for special damages including litigation costs.[258] This entire procedure, however, assumes that the claimant filed his or her claim with the Secretary of Labor within SOX's miserly statute of limitations, which requires a claimant to file a complaint with the Secretary within 180 days of their employer's retaliation.[259]

By contrast, Dodd–Frank claimants enjoy a relatively streamlined process. There is no administrative exhaustion requirement, meaning claimants may bring their complaints directly to the courts.[260] As previously noted, the potential for recovery in most cases is greater than recovery would be under SOX due to the availability of reinstatement, litigation costs, and two times back pay with interest.[261] In addition, the statute of limitations is far more generous under Dodd–Frank, which allows claimants to bring action up to six years after an alleged violation of subsection 21F's anti-retaliation provisions.[262] Finally, Dodd–

256. 18 U.S.C. § 1514A(b)(1)(A) (2012).

257. *See id.* § 1514A(b)(1)(B) (providing that a claimant may bring his or her action before a federal district court in the event the Secretary of Labor does not act within 180 days of the claimants filing of the complaint).

258. *Id.* § 1514A(c).

259. *See id.* § 1514A(b)(2)(D) ("An action . . . shall be commenced not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation.").

260. *See* Mark A. Srere & Kristin Robinson, *Split Circuits: Second Circuit Contradicts the Fifth by Supporting a Broad Interpretation of Dodd–Frank's Anti-Retaliation Provision*, BRYAN CAVE (Sept. 11, 2015), https://www.bryancave.com/en/thought-leadership/split-circuits-second-circuit-contradicts-the-fifth-by.html (last visited Nov. 6, 2017) ("Dodd–Frank has . . . no administrative exhaustion requirement.") (on file with the Washington and Lee Law Review).

261. *See* 15 U.S.C. § 78u-6(h)(1)(C) (outlining the remedies available under Dodd–Frank's anti-retaliation provisions).

262. *See id.* § 78u-6(h)(1)(B)(iii) (limiting when a whistleblower may bring an

Frank whistleblowers enjoy the potential for monetary awards from the SEC under subsection 21F's bounty provisions, which authorize the SEC to award between ten and thirty percent of any monetary sanction imposed as a result of the whistleblower's reporting to the SEC.[263]

It should be plain, even from this cursory overview of SOX and Dodd–Frank, which statute is preferable to employer retaliation claimants. From the provisions cited above and subsection 21F's definition of "whistleblower," it appears that Congress's intention was to incentivize reporting misconduct to the SEC.[264] In the wake of the 2008 financial crisis, this would have been a perfectly reasonable legislative objective. Indeed, the SEC is not shy or introverted with regard to advertising its whistleblower program, which the agency actively advertises on its website's home page.[265] Further, the Office of the Whistleblower's web page offers the latest news detailing bounties awarded under the whistleblower program, lists the top ten awards ever paid out to whistleblowers, and affords a detailed state-by-state breakdown of tips sent to the SEC under the program.[266]

There are legitimate concerns, however, that SOX's burdensome requirements, when considered alongside Dodd–Frank's generous treatment of whistleblowers, threaten to cause employees of public companies to bypass corporate reporting

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employer retaliation claim under Dodd–Frank).

263. *See id.* § 78u-6(b) (authorizing the SEC to pay awards to whistleblowers whose claims result in monetary sanctions imposed in actions related to their whistleblowing activities).

264. *See The Dodd–Frank Whistleblower Provisions: Considerations for Effectively Preparing for and Responding to Whistleblowers*, JDSUPRA BUS. ADVISOR (May 26, 2011), http://www.jdsupra.com/legalnews/the-dodd-frank-whistleblower-provisions-48377/ (last visited Nov. 6, 2017) ("As part of the Dodd–Frank Act, Congress created powerful incentives to encourage persons to report potential violations of the federal securities laws to the Securities and Exchange Commission . . . .") (on file with the Washington and Lee Law Review).

265. The SEC's website, https://www.sec.gov/index.htm, prominently features links to a database of investment professionals, market data and analysis, as well as the Office of the Whistleblower website.

266. *See Whistleblower Awards for Tips Resulting in Enforcement Actions*, U.S. SEC. & EXCHANGE COMMISSION, https://www.sec.gov/page/whistleblower-100million (last updated Jan. 23, 2017) (last visited Nov. 6, 2017) (displaying, prominently, varying types of information and data concerning the SEC's whistleblower program) (on file with the Washington and Lee Law Review).

systems altogether and preclude intrafirm resolution of potential issues.[267] Countering these concerns, some commentators have posited that, in response to Dodd–Frank, employers should work to develop internal reporting systems that shift incentives to offer greater benefit to those who report within their respective firms.[268] This is certainly a viable, market-based solution, but it also foists costs resulting from Dodd–Frank's reporting incentives onto the private sector.[269]

Instead of imposing costs onto the private sector, Congress should act to make internal reporting more attractive to private sector employees. To be clear, this is not a call to heighten the available remedies under SOX or to alter the Dodd–Frank scheme in any way. Rather, this Note proposes legislative action which removes the administrative exhaustion requirements and extends the statute of limitations under SOX's anti-retaliation provisions. As it currently stands, those who wish to report misconduct find themselves heavily incentivized to report to the SEC.[270] This proposed solution attempts to level the scales of choice, such that employees may more readily elect to report and resolve corporate issues internally. Imposing incentive structures from outside of the private sphere could alleviate the costs of realigning reporting incentive structures on public companies. Further, removal of the exhaustion requirement would return agency to the wrongfully terminated, harassed, or otherwise injured employee, who would

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267. *See* Deborah A. DeMott, *The Crucial but (Potentially) Precarious Position of the Chief Compliance Officer*, 8 BROOK. J. CORP. FIN. & COM. L. 56, 73 (2013) ("[T]he efficacy of internal compliance confronts a greater challenge because Dodd–Frank's anti-retaliation provision protects only individuals who report-out to the SEC, whether those individuals are compliance personnel or other employees. This appears to create an incentive to bypass internal compliance mechanisms altogether . . . .").

268. *See* Justin Blount & Spencer Markel, *The End of the Internal Compliance World as We Know It, or an Enhancement of the Effectiveness of Securities Law Enforcement? Bounty Hunting Under the Dodd–Frank Act's Whistleblower Provisions*, 17 FORDHAM J. CORP. & FIN. L. 1023, 1061 (2012) ("[T]he whistleblower provisions of Dodd–Frank have the potential to serve as an incentive for companies to more effectively implement and enforce their internal compliance programs and attempt to build more ethical cultures.").

269. *See* Walker, *supra* note 84, at 1780 ("Instead of relying on a statute or agency regulation, companies would take on the initiative, and the cost, of providing non-retaliation guarantees themselves.").

270. *See supra* notes 256–266 (describing the incentive structure resulting from the distinctions between SOX and Dodd–Frank).

no longer need to submit his or her claim to the whim of the Secretary of Labor. At the same time, this solution seeks to preserve the government's interest in incentivizing external reporting by retaining the heightened remedies available under subsection 21F without altering the external reporting requirement enshrined by subsection (a)(6).

This is merely one potential avenue Congress could take to resolve the issues arising out of an *Asadi*-style resolution to the circuit split, and it is a vague one at that. Given the time, one could write entire volumes detailing potential statutory structures and incentive schemes for employees who choose to report misconduct. Regardless of the approach taken, it is clear that the solution must originate in Congress. The provisions creating our current, disparate incentive structure are enshrined by statute,[271] and not by administrative action or court decision. Thus, only Congress holds the power to balance the scales and realign reporting incentives by amending those statutes. Given that the House of Representatives recently passed a Dodd–Frank reform—the Financial Choice Act—it is not outside the realm of plausibility to further amend the securities laws.[272]

V. Conclusion

"[S]ound interpretation requires paying attention to the whole law, not homing in on isolated words or even isolated sections. Context always matters. Let us not forget, however, *why* context matters: It is a tool for understanding the terms of the law, not an excuse for rewriting them."[273] The circuit split discussed here arose out of what one appellate court claimed to be a tension arising from

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271. *See* 18 U.S.C. § 1514A (2012) (providing anti-retaliation protections for employees under SOX); *see also* 15 U.S.C. § 78u-6 (providing anti-retaliation protections for whistleblowers under Dodd–Frank).

272. *See* Geoff Bennett, *House Passes Bill Aimed at Reversing Dodd–Frank Financial Regulations*, NPR (June 8, 2017, 4:54 PM), http://www.npr.org/2017/06/08/532036374/house-passes-bill-aimed-at-reversing-dodd-frank-financial-regulations (last visited Nov. 6, 2017) (stating that the House of Representatives passed the Financial Choice Act and explaining, in general terms, the goals and provisions of that legislation) (on file with the Washington and Lee Law Review).

273. King v. Burwell, 135 S. Ct. 2480, 2497 (2015) (Scalia, J., dissenting).

the term "whistleblower" within the context of its surrounding provisions.[274] The reality, however, reflects a court acting with a view to rewriting a plain statutory provision[275] to reach what, in that court's view, is a more preferable result.[276]

This form of results-oriented jurisprudence belies the judiciary's role of saying what the law is, in favor of saying what the law ought to be. The meaning of "whistleblower" under subsection 21F of Dodd–Frank is clear, as is its application to 21F's anti-retaliation provisions.[277] Congress spoke clearly and unambiguously in its definition of "whistleblower," and it is not the courts' role to subvert the express will of Congress.[278] That said, it is Congress's role to rectify any problems which may arise from proper application of its statutes, and this Note has proposed just one course of action that Congress could take to make internal reporting more appealing under SOX; extending SOX's statute of limitations and removing its administrative exhaustion requirement.[279] If you believe the *Asadi* approach leads to poor policy, blow the whistle loudly enough for Congress to hear it.

VI. Postscript: Chevron *in the Post-*Somers *Landscape*

On February 21, 2018, nearly one year after this Note was first written, the Supreme Court delivered its resolution to Dodd–Frank's whistleblower protection issue.[280] The Justices unanimously concurred

274. *See* Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 155 (2d Cir. 2015) (finding that an arguable ambiguity within subsection 21F is sufficient to grant *Chevron* deference to the SEC's interpretive rule).

275. *See id.* (Jacobs, J., dissenting) ("The majority and the Securities and Exchange Commission ('SEC') have altered a federal statute by deleting three words ('to the Commission') from the definition of 'whistleblower' in the Dodd–Frank Act.").

276. *See id.* (majority opinion) (declaring the majority's preference for the broader interpretation of subsection 21F endorsed by the SEC's interpretive rule).

277. *See* Asadi v. G.E. Energy (USA), LLC, 720 F.3d 620, 625 (5th Cir. 2013) ("[T]he perceived conflict between § 78u-6(a)(6) and § 78u-6(h)(1)(A)(iii) rests on a misreading of the operative provisions of § 78u-6.").

278. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("[T]he court . . . must give effect to the unambiguously expressed intent of Congress.").

279. *See infra* Part IV.C (proposing a potential course of action Congress could take to alleviate concerns surrounding the inefficacy of SOX protections relative to those under Dodd–Frank).

280. *See generally* Dig. Realty Tr., Inc. v. Somers, No. 16-1276 (U.S. Feb. 21,

with the result of Justice Ginsburg's opinion that "the statute's definition of 'whistleblower' [is] clear and conclusive."[281] Employing many of the arguments posited here, and finding no ambiguity in Dodd–Frank's whistleblower protection scheme, the Court refused to grant deference to the SEC's interpretive rule, stating that "the statute's unambiguous whistleblower definition . . . precludes the Commission from more expansively interpreting that term."[282]

Strangely, the Court's opinion lacks any detailed discussion of the Ninth Circuit's reasoning. Given that the Court unanimously decided to reverse the Ninth Circuit, one would think that the Justices would take this opportunity to expressly repudiate the Ninth Circuit's approach. Yet, the Court's opinion contains no discussion of *King*, the "plan" concept, or their place in a *Chevron* analysis. It would appear that the Court found this case straightforward enough to avoid these issues altogether. However, without an express rejection of the Ninth Circuit's analysis, are we left to presume that *King*-style arguments have *some* place in *Chevron* cases? The answer remains unclear, which leaves lower courts with the opportunity to further muddy the waters of *Chevron* in the future.

While the Justices were unanimous in the result, a few members of the Court took issue with some of the methods used to reach that conclusion. Justice Thomas's concurrence, with which Justices Alito and Gorsuch joined, voices disdain for the Court's use of legislative history—a Senate report, specifically—to bolster its analysis.[283] Justice Thomas plainly argued that courts should not resort to pontificating on legislative purpose where, as in *Somers*, a statute's language is so plain as to clearly express its meaning.[284]

2018).

281. *Id.* at 18.

282. *Id.* at 19.

283. *See id.* at 1 (Thomas, J., concurring) ("Even assuming a majority of Congress read the Senate Report, agreed with it, and voted for Dodd–Frank with the same intent, 'we are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended.'" (quoting Lawson v. FMR LLC, 134 S. Ct. 1158, 1176 (2014) (Scalia, J., concurring))).

284. *See id.* at 3 ("And 'it would be a strange canon of statutory construction that would require Congress to state in committee reports . . . that which is obvious on the face of a statute.'" (quoting Harrison v. PPG Indus., Inc., 446 U.S. 578, 592 (1980))).

These textualist notions prompted a second concurrence from Justice Sotomayor, with whom Justice Breyer joined. Justice Sotomayor summarized her disagreement by stating that:

> I write separately only to note my disagreement with the suggestion in my colleague's concurrence that a Senate Report is not an appropriate source for this Court to consider when interpreting a statute.
>
> Legislative history is of course not the law, but that does not mean it cannot aid us in our understanding of a law. Just as courts are capable of assessing the reliability and utility of evidence generally, they are capable of assessing the reliability and utility of legislative-history materials.[285]

After noting the utility of committee reports in the legislative process, Justice Sotomayor remarked that legislative history is *especially* useful to courts where a statute is ambiguous.[286] Justice Sotomayor went further, however, asserting that "even when, as here, a statute's meaning can clearly be discerned from its text, consulting reliable legislative history can still be useful, as it enables us to corroborate and fortify our understanding of the text."[287]

It is difficult to envision a serious contention that legislative history plays no role at all in a *Chevron* analysis. As noted above, Justice Stevens's articulation of the test in *Chevron* is split into two distinct questions. The first, "always, is the question whether Congress has directly spoken to the precise question at issue."[288] Congress—or its committees and subcommittees, at least—may speak to an issue in many ways, including through committee reports. Indeed, committee reports "have long been important means of informing the whole chamber about proposed legislation . . . ."[289] Further, Justice Stevens explicitly referred to legislative history in his articulation of *Chevron*'s first step. He stated that "'[i]f [an executive agency's] choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not

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285. *Id.* at 1 (Sotomayor, J., concurring).

286. *See id.* at 2–3 ("Legislative history can be particularly helpful when a statute is ambiguous or deals with especially complex matters.").

287. *Id.* at 3.

288. Chevron v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

289. Dig. Realty Tr., Inc. v. Somers, No. 16-1276, slip op. at 2 (U.S. Feb. 21, 2018) (Sotomayor, J., concurring) (internal citations and quotations omitted).

disturb it unless it appears *from the statute or its legislative history* that the accommodation is not one that Congress would have sanctioned.'"[290] Indeed, the *Chevron* Court itself resorted to legislative history as it grappled with divining Congress's intent with respect to the Clean Air Act Amendments of 1977.[291]

Taking all of these considerations into account, there can be no doubt that, as Justice Sotomayor argued, legislative history has some role to play in *Chevron* step one. Yet, contrary to Justice Sotomayor's characterization of his concurrence, Justice Thomas did not suggest that legislative history has no utility when interpreting a statute. Rather, his concurrence expresses "serious doubts" over whether to utilize, and, if so, how much weight to afford, legislative history and so-called congressional purpose in light of plain and unambiguous statutory text.[292]

The Court's decision in *Somers* is a step in the right direction. However, given the Court's unwillingness to expressly curtail the use of *King*-style analyses in *Chevron* cases, Justice Thomas's concerns are well-founded. Suppose, for instance, that an agency promulgates a rule which, while contradictory to the plain meaning of a statute's text, comports with that statute's legislative history. What is the proper result? In light of *King* and its "plan" concept, legislative history and intent may hold just as much weight, if not more, than unambiguous statutory text. The Second and Ninth Circuits' attempts to supersede Dodd–Frank's plain language failed in *Somers*, in significant part because a Senate Report aligned with and supported the statute's plain text.[293] One can only wonder whether the Justices would have reached

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290. *Chevron*, 467 U.S. at 845 (emphasis added) (quoting U.S. v. Shimer, 367 U.S. 374, 382–83 (1961)).

291. *See id.* at 851–54 (referring to a House Report, a Senate Report, and other portions of the Congressional Record).

292. *See Somers*, slip op. at 1 (Thomas, J., concurring in part and concurring in the judgment) ("As the Court observes, this statutory definition 'resolves the question before us.' The Court goes on, however, to discuss the supposed 'purpose' of the statute, which it primarily derives from a single Senate Report."); *see also id.* at 1–2 ("For what it is worth, I seriously doubt that a committee report is a '*particularly* reliable source' for discerning 'Congress' intended meaning.'" (emphasis added) (quoting *Somers*, slip op. at 1 (Sotomayor, J., concurring))).

293. *See id.* at 11–12 (majority opinion) ("Dodd–Frank's text *and purpose* leave no doubt that the term 'whistleblower' in § 78u–6(h) carries the meaning set forth in the section's definitional provision." (emphasis added)).

the same result if that Senate Report espoused a conflicting legislative purpose.