

**CAUTION, CURVES AHEAD: DOES THE FUTURE  
SIGNAL CHANGES FOR WHISTLEBLOWERS?**

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## I. INTRODUCTION

When is a whistleblower not a “whistleblower?” The Supreme Court will address this very question in *Digital Realty Trust, Inc. v. Somers*.<sup>1</sup> The Court will examine the issue of whether an employee who reports internally about violations of the securities laws, but does not report the violation to the Securities and Exchange Commission (“SEC”), qualifies as a whistleblower under the anti-retaliation provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”).<sup>2</sup> The Court granted certiorari in *Digital Realty Trust* to resolve a split between the federal Courts of Appeal concerning the proper application of the definition of “whistleblower” under Section 21F, “Whistleblower Incentives and Protection,” of Dodd-Frank to the statute’s anti-retaliation provisions. At issue is subsection 21F(a)(6), which defines whistleblower to mean any individual who provides information regarding securities violations to the Securities and Exchange Commission (“SEC”), and subsection 21F(h)(A)(iii) of the anti-retaliation provisions, which cross references the relevant provisions of the Sarbanes-Oxley Act of 2002 (“Sarbanes-Oxley”),<sup>3</sup> which does not require external reporting to the SEC.<sup>4</sup>

In *Digital Realty Trust*, Paul Somers, a vice president of portfolio management, filed suit under Dodd-Frank’s anti-retaliation provisions, against his employer, Digital Realty Trust, Inc., a publicly traded real-estate investment trust company, and a senior vice president for human resources.<sup>5</sup> Somers alleged that he was terminated in retaliation for reporting to Digital Realty’s senior management that his supervisor had engaged in certain corporate actions in violation of Sarbanes-Oxley. The district court denied Digital Realty’s motion to dismiss for failure to state a claim, rejecting Digital’s assertion that the anti-retaliation provision under Dodd-Frank did not apply to this case because Somers was not a whistleblower under the meaning of Dodd-Frank’s whistleblower provision since he did not report the alleged conduct to the SEC.<sup>6</sup> Recognizing a split in authority, the district court certified its order for interlocutory review.<sup>7</sup> After granting interlocutory review, a divided panel of the Court of Appeals for the Ninth Circuit affirmed the district

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<sup>1</sup> *Somers v. Dig. Realty Tr., Inc.*, 850 F.3d 1045, 1045 (9th Cir. 2017), *cert. granted*, 137 S. Ct. 2300 (mem.) (June 26, 2017) (No. 16-1276).

<sup>2</sup> 15 U.S.C. § 78u-6(21F).

<sup>3</sup> Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

<sup>4</sup> § 806, 18 U.S.C. § 1514A (2002).

<sup>5</sup> *Somers v. Dig. Realty Tr., Inc.*, 119 F. Supp. 3d 1088, 1091 (N.D. Cal. 2015).

<sup>6</sup> *Id.* at 1092.

<sup>7</sup> *Id.* at 1108.

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court's decision.<sup>8</sup> Concluding that the statutory definition of whistleblower under Dodd-Frank was not dispositive, the Ninth Circuit ultimately decided that Dodd-Frank's anti-retaliation provision provides protection to those employees who report to the SEC and who report internally under Sarbanes-Oxley and other federal laws.<sup>9</sup> The Supreme Court granted Digital Realty's petition for a writ of certiorari, to resolve what Digital Realty asserted was "a clear and intractable conflict on an important and recurring question of statutory interpretation."<sup>10</sup>

Until recently, the Supreme Court had not addressed the scope of the anti-retaliation provisions under Dodd-Frank. However, as discussed below, the circuit courts had dealt with this issue with varying results. The Fifth Circuit, in *Asadi v. G.E. Energy (USA)*, held that the anti-retaliation provision of Dodd-Frank creates a private cause of action only for those employees who make their disclosure to the SEC.<sup>11</sup> The plaintiff did not seek *certiorari* in that case. In *Berman v. Neo@Ogilvy*,<sup>12</sup> the Second Circuit, finding *Chevron* deference appropriate, held that the Dodd-Frank anti-retaliation provisions extended to employees who did not submit their complaint to the SEC, but instead reported violations internally or to another governmental authority. The defendant in *Berman* also declined to seek *certiorari*.<sup>13</sup> More recently, the Supreme Court denied *certiorari* in a Sixth Circuit case, *Verble v. Morgan Stanley Smith Barney*.<sup>14</sup> In that case, the Sixth Circuit granted the defendant's motion to dismiss an alleged retaliation claim on the grounds that the employee failed to state sufficient facts for a "plausible claim for relief" under Dodd-Frank.<sup>15</sup> The Sixth Circuit did not reach the interpretive question concerning the definition of whistleblower.<sup>16</sup> In *Digital Realty Trust*, the Supreme Court is expected to resolve the circuit split, and may ultimately provide clarity for whistleblowers and employers regarding the meaning of "whistleblower" under the definitional section of 21F of

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<sup>8</sup> *Somers v. Dig. Realty Tr., Inc.*, 850 F.3d 1045, 1045 (9th Cir. 2017).

<sup>9</sup> *Id.* at 1049.

<sup>10</sup> Brief for the Petitioner on petition for certiorari at 2, *Digital Realty Tr., Inc. v. Somers*, 16-1276, August 24, 2017.

<sup>11</sup> *Asadi v. G.E. Energy United States, LLC*, 720 F.3d 620, 620 (5th Cir. 2013).

<sup>12</sup> *Berman v. Neo@Ogilvy, LLC*, 801 F.3d 145, 145 (2d Cir. 2015).

<sup>13</sup> Aaron Vehling, *Dodd Frank Whistleblower Battle Won't Hit High Court*, LAW 360 (Nov. 12, 2015, 7:18 PM), <https://www.law360.com/articles/726167/dodd-frank-whistleblower-battle-won-t-hit-the-high-court>.

<sup>14</sup> *Verble v. Morgan Stanley Smith Barney, LLC*, 148 F. Supp. 3d 644, 644 (E.D. Tenn. 2015), *aff'd*, 676 F. App'x. 421 (6th Cir. 2017), *cert. denied*, 137 S. Ct. 1348 (mem.) (Mar. 20, 2017) (No. 16-946).

<sup>15</sup> *Verble v. Morgan Stanley Smith Barney, LLC*, 676 F. App'x. 421, 427 (6th Cir. 2017).

<sup>16</sup> *Id.*

Dodd-Frank<sup>17</sup> and its meaning within the anti-retaliation provision of that section.<sup>18</sup>

Whatever the Supreme Court ultimately decides in *Digital Realty Trust*,<sup>19</sup> the outcome may presage more changes to come for the whistleblower regulatory scheme and have broader implications for future judicial review of the interpretation of statutes made by federal agencies. Some legal commentators and scholars suggest that a decision in favor of Digital Realty could officially foreclose Dodd-Frank as an avenue of recovery for whistleblowers who only reported illegal activity internally to management, and not to the SEC.<sup>20</sup> Others predict that reaffirming the lower court decision in favor of Somers risks transforming the whistleblower protections under Sarbanes-Oxley, and other statutes under the jurisdiction of the SEC, into vestigial regulations, dwarfed by the more attractive legal and monetary incentives of Dodd-Frank.<sup>21</sup> Could the fear of a deluge of Dodd-Frank claims be an additional justification for ramping up the promulgation of regulatory limits to Dodd-Frank under the Congressional Review Act,<sup>22</sup> and encourage immediate action by the Senate on the Financial Choice Act (“FCA”),<sup>23</sup> currently pending in Congress and aimed at, among other things, reducing the number of whistleblower claims under Dodd-Frank?

Perhaps, more far reaching, is whether the Supreme Court’s forthcoming decision in *Digital Realty Trust* will be a further indication of a paradigm shift. The Supreme Court may use *Digital Realty Trust* to move away from using a decidedly textualist method of statutory interpretation and giving deference to agency interpretations of law, á la *Chevron*<sup>24</sup> and *Brand X*,<sup>25</sup> to resolve the perceived infirmities of Congressional statutes. In particular, the Supreme Court has frequently

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<sup>17</sup> 15 U.S.C. § 78u-6(a)(6).

<sup>18</sup> § 78u-6(h)(1)(A).

<sup>19</sup> *Somers v. Dig. Realty Tr., Inc.*, 850 F.3d 1045, 1045 (9th Cir. 2017).

<sup>20</sup> *See, e.g.*, Brief for Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioner, at 17, *Digital Realty v. Somers*, 850 F.3d 1045 (9th Cir. 2017) (No. 15-17352) 2017 WL 3913767.

<sup>21</sup> *See, e.g.*, Brief for the Voice of the Defense Bar as Amicus Curiae Supporting Respondent, at 5, *Digital Realty v. Somers*, 850 F.3d 1045 (9th Cir. 2017) (No. 15-17352) 2017 WL2391512.

<sup>22</sup> *Congressional Review Act: Congress Dusts Off Old Oversight Weapon*, NAT’LL REV. (Mar. 21, 2017), <https://www.natlawreview.com/article/congressional-review-act-congress-dusts-old-oversight-weapon>.

<sup>23</sup> Financial Choice Act, H.R. 10, 115th Cong. § 828 (2017).

<sup>24</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 837 (1984).

<sup>25</sup> *National Cable & Telecommunications Ass’n v. Brand X Internet Svcs.* 545 U.S. 967, 967 (2005).

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spurned the *Chevron* deference framework in several major cases involving agency statutory interpretations, with some justices adopting a more limited view of executive agency legislative powers. Indeed, Justice Neil Gorsuch, the newest addition to the Supreme Court, has criticized *Chevron*, as interpreted in *Brand X*, as “a judge made doctrine for the abdication of judicial duty.”<sup>26</sup>

This Article explores the possible impact of the Supreme Court’s forthcoming decision in *Digital Realty Trust*. Part II identifies the statutory provisions at issue and examines how courts have interpreted the term “whistleblower” under the anti-retaliation provisions of Dodd-Frank. Part III discusses the issues that will likely be squarely before the Court in *Digital Realty Trust* and surveys the broader implications of this case with respect to whistleblower protections and statutory interpretation. Part IV examines the potential ramifications of the *Digital Realty Trust* decision for whistleblowers and employers, taking into consideration the potential for future regulatory “reform” aimed at weakening or eliminating Dodd-Frank. Part V concludes.

## II. THE LOWER COURTS’ INTERPRETATIONS OF WHISTLEBLOWER PROTECTIONS UNDER DODD-FRANK

### A. *Whistleblower Protections under Sarbanes-Oxley and Dodd-Frank*

Several years before Dodd-Frank, Congress enacted the Sarbanes-Oxley Act of 2002<sup>27</sup> in response to a series of major corporate scandals. The corporate misdeeds of companies such as Enron and WorldCom arose primarily from the manipulation of financial statements and a lack of adequate regulatory oversight.<sup>28</sup> Sarbanes-Oxley sought to restore investor confidence and limit the possibility of fraudulent corporate financial reporting by implementing strict reforms establishing “internal controls” and mandating heightened financial disclosures.<sup>29</sup> The statute’s provisions also sought to empower whistleblowers to report employer misconduct internally, or externally to a “federal regulatory or law enforcement agency,”<sup>30</sup> by providing protections against retaliation.

A few years later, Congress was again motivated to pass additional

<sup>26</sup> *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016).

<sup>27</sup> Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

<sup>28</sup> Andrew Ceresney, Co-Director of the Division of Enforcement, U.S. Securities and Exchange Commission, Address at American Law Institute Continuing Legal Education: Financial Reporting and Accounting Fraud (Sept. 19, 2013).

<sup>29</sup> *Id.*

<sup>30</sup> 18 U.S.C. § 1514A(a)(1)(A).

legislation after the financial crisis of 2008. In 2010, Congress passed Dodd-Frank<sup>31</sup> in response to calls for greater transparency, accountability and reform in the financial crisis. Comprising 848 pages, Dodd-Frank's scope includes sixteen areas of reform, including the Volcker Rule, creation of the Consumer Financial Protection Bureau, and the Financial Stability and Oversight Council, revised capital and liquidity requirements for banks and other depository institutions, regulation of over-the-counter derivatives legislation, and liquidation and the provision of liquidation authority to the Federal Deposit Insurance Corporation.<sup>32</sup>

Dodd-Frank did not repeal Sarbanes-Oxley whistleblower protections, but instead added new incentives and protections for whistleblowers.<sup>33</sup> To expand regulatory oversight and increase market stability, Dodd-Frank amended the Securities Exchange Act of 1934 by, *inter alia*, adding Section 21F, entitled "Securities Whistleblower Incentives and Protection."<sup>34</sup> While Dodd-Frank and Sarbanes-Oxley each have whistleblower reporting and anti-retaliation provisions, Dodd-Frank goes beyond the inherent benefits of corporate virtue to incentivize compliance by providing substantial monetary rewards for individuals who come forward with original information regarding fraud, misconduct, or other illegal activity. Those awards are available if a successful enforcement action results in monetary sanctions exceeding \$1 million.<sup>35</sup>

Dodd-Frank and Sarbanes-Oxley seek to protect whistleblowers from various forms of employer retaliation, thereby encouraging such insiders to come forward with information regarding fraud and securities violations. However, although Dodd-Frank and Sarbanes-Oxley share essentially the same goal, the statutes differ, particularly with respect to the availability of a private cause of action for employer retaliation, the length of the statutes of limitations, available remedies and the definition of whistleblower.

Dodd-Frank provides a private cause of action for anti-retaliation claims whereby a whistleblower can file a claim directly in federal court, and allows the SEC to pursue a retaliation claim on behalf of the whistleblower.<sup>36</sup> On the other hand, under Sarbanes-Oxley, a

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<sup>31</sup> Pub. L. No. 111-203, 124 Stat. 1376 (2010).

<sup>32</sup> Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act, Securities and Exchange Commission, <https://www.sec.gov/spotlight/dodd-frank.shtml> (last visited Dec. 27, 2017).

<sup>33</sup> OFFICE OF THE WHISTLEBLOWER, U.S. SECURITIES AND EXCHANGE COMMISSION, 2017 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, at 4 (2017).

<sup>34</sup> *Id.*

<sup>35</sup> 15 U.S.C. § 78u-6 (b).

<sup>36</sup> OFFICE OF THE WHISTLEBLOWER, U.S. SECURITIES AND EXCHANGE COMMISSION, 2017

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whistleblower is required to exhaust administrative remedies, by filing an administrative complaint with the Department of Labor (“DOL”)<sup>37</sup> and may bring a suit in federal court only if the Secretary of Labor does not issue a decision within 180 days of filing.<sup>38</sup> In contrast to the 180-day statute of limitations of Sarbanes-Oxley,<sup>39</sup> a Dodd-Frank claim may be brought six years after the violation occurs, or even as long as ten years later, depending on the date of discovery of facts material to the claim.<sup>40</sup> Furthermore, whereas, Sarbanes-Oxley’s retaliation provision provides for remedies “necessary to make the employee whole” which includes reinstatement, back-pay, attorneys’ fees, and special damages for non-economic harm resulting from the retaliation,<sup>41</sup> generally, Dodd-Frank remedies are limited to compensatory damages. However, in contrast to Sarbanes-Oxley, Dodd-Frank remedies include double back-pay.<sup>42</sup>

Apart from the differences in procedure and remedies, there is a difference between Sarbanes-Oxley and Dodd-Frank regarding the scope of protection afforded to whistleblowers. That difference is the subject of current judicial debate and the focus of this Article. The anti-retaliation provision in Sarbanes-Oxley appears to define whistleblower more broadly than Dodd-Frank, by extending anti-retaliation protections to both internal and external reporters.<sup>43</sup> That is, protection is provided to an employee who reports or provides information to:

- (A) a Federal regulatory or law enforcement agency;
- (B) any Member of Congress or any committee of Congress;
- or
- (C) 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).<sup>44</sup>

By contrast, Dodd-Frank’s explicit language under subsection 21F(a)(6) defines whistleblower to mean “any individual who provides, or two or more individuals acting jointly who provide, information relating to a violation of the securities laws to *the Commission*. . .” (emphasis added).<sup>45</sup> However, subsection 21F(h)(A) prohibits retaliatory

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ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, at 19 (2017).

<sup>37</sup> Responsibility for Sarbanes-Oxley complaints was delegated to the Assistant Secretary for the Occupational Safety and Health Administration (“OSHA”) and thus the complaints are received and investigated by OSHA. 67 FR 64272 (Oct. 17, 2002).

<sup>38</sup> 18 U.S.C. § 1514A(b)(1).

<sup>39</sup> § 1514A(b)(2)(D).

<sup>40</sup> § 78u-6(h)(1)(B)(iii).

<sup>41</sup> § 1514A(c).

<sup>42</sup> 15 U.S.C. § 78u-6(h)(1)(C).

<sup>43</sup> 18 U.S.C. § 1514A(a)(1).

<sup>44</sup> § 1514A(a)(1).

<sup>45</sup> 15 U.S.C. § 78u-6(s)(6).

actions by employers

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.) the Securities Exchange Act of 1934 (15 U.S.C. 78a 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.<sup>46</sup>

Thus, the language in the definition of whistleblower, as set forth in subsection 21F(a)(6), requires external reporting of securities violations to the SEC, but the language of 21F(h)(A)(iii) suggests that an individual may be protected for making disclosures “required or protected” under Sarbanes-Oxley, the provisions of which extend protection to whistleblowers who only report internally. The SEC, in a regulation<sup>47</sup> and an interpretive release,<sup>48</sup> as well as numerous amicus curiae briefs, has taken the position that internal reporting is protected under Dodd-Frank’s anti-retaliation provisions. Nonetheless, as discussed below, there currently exists a divide in the district courts and a split among the Fifth, Second and Ninth Circuits on this question. The lack of clarity creates confusion for employers as to potential liability, and for employees as to the regulatory protections available to them. Whistleblowers who have only reported the misdeeds of their employers internally have experienced inconsistent results establishing their claims under Dodd-Frank.

### *B. The Circuit Split*

Since its enactment, the federal courts have focused on the inconsistency in Section 21F of Dodd-Frank, with several district courts pre-*Asadi*<sup>49</sup> attempting to interpret and reconcile the two sections of the Dodd-Frank whistleblower provisions. Many of those courts, albeit for reasons different than those ultimately rejected in *Asadi*, determined that plaintiffs who have only reported internally are protected under Dodd-

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<sup>46</sup> § 78u-6(h)(1)(A).

<sup>47</sup> 17 C.F.R. § 250.21F-2.

<sup>48</sup> See Interpretation of the SEC’s Whistleblower Rules Under Section 21F of the Securities Exchange Act of 1934, Release No. 34-75592 (Aug. 4, 2015).

<sup>49</sup> *Asadi v. G.E. Energy United States, LLC*, 720 F.3d 620, 620 (5th Cir. 2015).

Frank's anti-retaliation provisions.<sup>50</sup>

The district court's decision in *Egan v. Tradingscreen, Inc.*, was the first case that dealt with ambiguities in the Dodd-Frank whistleblower provisions. In *Egan*,<sup>51</sup> the district court for the Southern District of New York held that the whistleblower provisions could be harmonized by reading 15 U.S.C. § 78u-6(h)(A)(iii) "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."<sup>52</sup> Thus, a plaintiff could state a whistleblower claim under Dodd-Frank either by alleging that he reported to the SEC or "that his disclosures fell under the four categories of disclosures delineated by [subsection (iii)] that do not require such reporting: those under the Sarbanes-Oxley Act, the Securities Exchange Act, . . . 18 U.S.C. § 1213 (e), or other laws and regulations subject to the jurisdiction of the SEC."<sup>53</sup> Ultimately, the court held that Egan's disclosures did not fit under any of these categories, and in particular, not under Sarbanes-Oxley because his employer was not a publicly traded company.<sup>54</sup>

In 2011, the SEC attempted to harmonize the provisions of Section 21F of Dodd-Frank by enacting Rule 21F-2,<sup>55</sup> which provided separate definitions of "whistleblower" for the anti-retaliation and awards provisions. For purposes of Dodd-Frank's anti-retaliation provision, subsection (b) of the rule provides that an individual is a "whistleblower" if, *inter alia*, the individual provides information in a manner described in 15 U.S.C. § 78u-6 (h)(1)(A),<sup>56</sup> whether or not that individual "satisf[ies] the requirements, procedures and conditions to qualify for an award."<sup>57</sup> By contrast, the definition of a "whistleblower" who qualifies for an award requires reporting to the SEC in accordance with the procedures set forth in other parts of the rule.<sup>58</sup> Thus, the SEC clearly took the position that internal reporters were protected against retaliation under Dodd-Frank. Nevertheless, the courts remained split on the issue.

#### i. Asadi

In contrast to several earlier district court decisions, the Fifth Circuit,

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<sup>50</sup> See *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155 (2d Cir. 2015); see also *Securities Whistleblower Incentives and Protections*, 17 C.F.R. § 240.21F-2.

<sup>51</sup> *Egan v. Tradingscreen, Inc.*, No. 10 Civ. 8202 LBS, 2011 WL 1672066, at \*1 (S.D.N.Y. May 4, 2011).

<sup>52</sup> *Id.* at \*5.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at \*5-7.

<sup>55</sup> 17 C.F.R. § 240.21 F-2.

<sup>56</sup> § 240.21F-2(b)(ii).

<sup>57</sup> § 240.21F-2(b)(iii).

<sup>58</sup> § 240.21F-2(a).

in *Asadi v. G.E. Energy (USA)*,<sup>59</sup> held that an insider who only reported internally was not protected under the anti-retaliation provision of Dodd-Frank. Asadi, an executive at General Electric Energy, reported suspected bribery in violation of the Foreign Corrupt Practices Act internally, to his supervisor and the company ombudsman.<sup>60</sup> In alleged retaliation, Asadi subsequently received a negative performance review and was ultimately fired from his position.<sup>61</sup> The district court declined to address the definition of “whistleblower,” choosing instead to dismiss Asadi’s claim based on the lack of extraterritorial reach of the Dodd-Frank anti-retaliation provision.<sup>62</sup> However, the Fifth Circuit focused on interpreting the statute using its plain language, eschewing SEC guidance and the purpose behind the statute itself. The Fifth Circuit affirmed the lower court’s ruling that Asadi was not a whistleblower under Dodd-Frank, finding that the statutory provisions in question “clearly and unambiguously”<sup>63</sup> defined whistleblower. Accordingly, the Fifth Circuit held that the plain language of Dodd-Frank “creates a private cause of action only for individuals who provide information relating to a violation of the securities laws to the SEC.”<sup>64</sup>

In assessing the statutory language, the Fifth Circuit concluded that the statute as written only contemplated one category of whistleblower as set forth in the definitional section.<sup>65</sup> The other three categories refer to protected activity and did not “define which individuals qualify as whistleblowers.”<sup>66</sup> The Fifth Circuit suggested that this interpretation flows from the plain language as to prohibited employer activity pertaining to whistleblowers engaging in any of the three categories of protected actions.<sup>67</sup> Therefore, the statutory language of 15 U.S.C. § 78u-6(h)(1)(A), in the Fifth Circuit’s estimation, is clear and unambiguous insofar as it answers two questions “(1) who is protected and (2) what actions by protected individuals constitute protected activity.”<sup>68</sup>

The answer to the first question, the Fifth Circuit found, is that the section protects “whistleblowers,” as defined in the statute.<sup>69</sup> As to the

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<sup>59</sup> 730 F.3d 620 (5th Cir 2013)

<sup>60</sup> *Asadi v. G.E. Energy (USA), LLC*, No 12-20522, 2012 WL 2522599 at \*1 (S.D. Tex. June 28, 2012).

<sup>61</sup> *Id.* at \*2.

<sup>62</sup> *Id.* at \*4-6.

<sup>63</sup> *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620, 627 (5th Cir. 2013).

<sup>64</sup> *Id.* at 623.

<sup>65</sup> *Id.* at 625.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 625-26.

<sup>68</sup> *Id.* at 624.

<sup>69</sup> *Asadi*, 720 F.3d at 624.

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second question, subsections (i), (ii), and (iii) delineate the protected activities. That is, subsection (i) protects whistleblowers for the reason that makes them whistleblowers, i.e., that they have provided information to the SEC; subsection (ii) protects whistleblowers who participate in an investigation or proceeding; and subsection (iii) protects whistleblowers who make disclosures required or protected under any law, rule or regulation subject to the jurisdiction of the SEC, including Sarbanes-Oxley.<sup>70</sup>

The Fifth Circuit also rejected the position asserted by Asadi, that while subsection (iii), by itself, is not ambiguous, it conflicts with the definition of “whistleblower” by creating a situation where an individual could engage in the protected activity of the subsection, yet not qualify as a whistleblower. That result, according to the Fifth Circuit did “not render [subsection (iii)] conflicting or superfluous.”<sup>71</sup>

In terms of who is protected, the Fifth Circuit declined to read subsection (iii) as creating a conflicting definition of whistleblower under the plain language of subsection (iii). The plain text, according to the Fifth Circuit, did not demonstrate an intention by the drafters to create three additional categories of whistleblowers. The Fifth Circuit, in noting Congress’ use of the term whistleblower throughout the statute, suggested that, had Congress used the terms “individual” or “employee,” it might have been swayed otherwise.<sup>72</sup>

Turning to the canons of statutory construction, the linchpin of textualist statutory interpretation, the Fifth Circuit determined that the interaction between the subsections did not make subsection (iii) superfluous, as it is meant to protect whistleblowers from retaliation, not based on reporting to the SEC, but from reprisals by the employer arising from the whistleblower’s required or protected disclosures under Sarbanes-Oxley and other statutes within the SEC’s jurisdictional reach.<sup>73</sup> The Fifth Circuit posited a situation involving simultaneous reporting where the whistleblower reports internally and to the SEC. Retaliation occurs by the employer based on the internal reporting, of which the employer is aware, and not based on the external report to the SEC, of which the employer is not aware. In such a situation (which one might assume happens infrequently), the court suggested that subsection (iii) provides protection to the whistleblower, because he also reported externally to the SEC.<sup>74</sup>

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<sup>70</sup> *Id.* at 625-26.

<sup>71</sup> *Id.* at 626.

<sup>72</sup> *Id.* at 626-27.

<sup>73</sup> *Id.* at 627.

<sup>74</sup> *Id.* at 627-28.

In finding the relevant provisions unambiguous, the Fifth Circuit managed to sidestep the issue of *Chevron* deference.<sup>75</sup> Nonetheless, it examined the SEC regulations and concluded that those regulations were “inconsistent.”<sup>76</sup> The Fifth Circuit noted that the SEC had adopted a definition of “whistleblower” which included those who have only reported internally, while other regulations expressly required that the original information be reported to the SEC by one of the methods provided in the regulations.<sup>77</sup> The Fifth Circuit also suggested that extending the definition of whistleblower beyond the plain reading of the statute risked making the Sarbanes-Oxley anti-retaliation provision moot. A whistleblower might, observed the Fifth Circuit, choose Dodd-Frank over Sarbanes-Oxley, due to the latter’s larger monetary damages awards, longer statute of limitations and the absence of a requirement for federal administrative agency exhaustion prior to bringing a claim in court.<sup>78</sup>

The Fifth Circuit also criticized the SEC for administrative agency overreach for not actually clarifying or interpreting the plain text of the Dodd-Frank provisions in question, but rather, redefining and broadening the definition of whistleblower to essentially read “to the commission” out of the definition.<sup>79</sup> Thereby, the SEC sought to provide Dodd-Frank protection to an individual even if he “never reports any information to the SEC, so long as he has undertaken the activity listed,<sup>80</sup> and eliminated what the Fifth Circuit viewed as a significant distinction between Dodd-Frank and Sarbanes-Oxley anti-retaliation provisions.

ii. Berman

The Southern District of New York, in *Berman v. Neo@Ogilvy, LLC*, followed the Fifth Circuit’s decision in *Asadi*. In *Berman*, the Southern District of New York adhered to the Fifth Circuit’s plain meaning interpretation of the provision to dismiss the plaintiff’s claim for failure to “adequately allege that he is a whistleblower within the meaning of Dodd-Frank.”<sup>81</sup> Berman, an accountant, sued his employer for retaliation under Dodd-Frank and Sarbanes-Oxley, when he was fired after reporting improper accounting practices to his employer. On appeal, the Second Circuit, rejecting the lower court’s reasoning, determined that Berman was indeed a whistleblower entitled to protection under the anti-

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<sup>75</sup> *Asadi*, 720 F.3d at 630.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 629-30.

<sup>79</sup> *Id.* at 629.

<sup>80</sup> *Id.*

<sup>81</sup> *Berman v. Neo@Ogilvy LLC*, 72 F. Supp. 3d 404, 410 (S.D.N.Y. 2014).

retaliation provisions of Dodd-Frank. Consequently, the Second Circuit's decision on this issue created a circuit split.<sup>82</sup>

The Second Circuit, although largely relying on the Supreme Court's decision in *King v. Burwell*,<sup>83</sup> did not address the plain meaning of the statutory provisions, opting instead to frame the issue as whether “the arguable tension” between the definitional section and subsection (iii) of the anti-retaliation provision “creates sufficient ambiguity as to the coverage of subdivision (iii) to oblige us to give *Chevron* deference to the SEC rule.”<sup>84</sup>

Although finding no “direct” conflict between the SEC notification requirement in the definition of whistleblower and subsection (iii), the Second Circuit was still critical of the Fifth Circuit's harmonization of the provisions in *Asadi*. The Second Circuit found that the example in *Asadi*, of simultaneous reporting, even if plausible, failed to fully redress the issue, leaving an “unresolved tension” between the provisions.<sup>85</sup> Moreover, the Second Circuit found that the Fifth Circuit's interpretation would give subdivision (iii) a very limited scope since few whistleblowers would likely engage in simultaneous reporting and some potential whistleblowers—particularly auditors and attorneys who are expressly and impliedly referenced in (iii)—were bound by statute and ethical duties to make reports of employer misconduct internally in the first instance.<sup>86</sup>

The Second Circuit, similar to the Fifth Circuit, rejected the superfluous argument, but placed the blame on the process itself in which bills in Congress are sometimes hastily put together without proper reconciliation of all of the inherent parts.<sup>87</sup> According to the Second Circuit in *Berman*, under these circumstances, where the text is unclear and given the “tension” between the statute's provisions, *Chevron* deference to the SEC's interpretation of the statute is warranted.<sup>88</sup> Thus, *Berman* was entitled to pursue Dodd-Frank remedies despite not having reported to the SEC prior to his termination.

Not so, said Judge Jacobs, who in a scathing dissent to *Berman*'s majority opinion, sided with the Fifth Circuit in *Asadi*. Judge Jacobs found no support for the majority's application of *Chevron* deference simply because “a plain reading of a statutory provision gives it an

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<sup>82</sup> *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155 (2d Cir. 2015).

<sup>83</sup> *King v. Burwell* 135 S.Ct. 2480, 2480 (2015).

<sup>84</sup> *Berman*, 801 F.3d at 148.

<sup>85</sup> *Id.* at 151.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 154-55.

<sup>88</sup> *Id.* at 155.

extremely limited effect.”<sup>89</sup> The dissent admonished the majority for straying beyond their judicial authority and their obligation “to apply congressional statutes as written.”<sup>90</sup> The dissent noted that the majority opinion did very little to address the plain meaning of the statute. Judge Jacobs accused the majority of judicial overreaching by deferring to the SEC’s interpretation of the provision, which interpreted “to the commission” out of the statute<sup>91</sup> and inserted the more general term “employee,” where Dodd-Frank expressly refers to “whistleblowers.”<sup>92</sup> In finding that administrative deference was appropriate, the majority relied only on the first prong of *Chevron*, requiring a finding of ambiguity. The majority’s finding of “arguable tension” is based on the conclusion that the natural reading of the statutory text would leave 15 U.S.C. § 78u-6(h)(1)(A)(iii) with “extremely limited scope. In Judge Jacob’s view, however, a plain reading of the provisions together, which creates a limited scope of protection, does not, in and of itself, indicate ambiguity.”<sup>93</sup>

Judge Jacobs asserted that, beyond its finding of ambiguity, the majority failed to acknowledge that Congress could have intentionally placed limitations on the reach of Dodd-Frank, through the definitional section, one means for “limiting the meaning of statutory text.”<sup>94</sup> By implication, what appears to the majority to be statutory infirmity brought about by Congressional ineptitude in providing “little, if any” protections to lawyers and auditors who report violations, may have been an intentional determination by Congress to provide no additional incentives for such actors to meet their professional and ethical obligations.<sup>95</sup> Further, Judge Jacobs noted that the U.S. Code is replete with statutes and provisions that have an “extremely limited” effect.<sup>96</sup>

Lastly, and perhaps most relevant to the Supreme Court’s future decision in *Digital Realty*, is the dissent’s discussion of the majority’s overreliance on the Supreme Court’s decision in *King v. Burwell*<sup>97</sup> to incorrectly support the majority’s decision to eschew a textualist inquiry into the plain meaning in favor of a purposive interpretation. The dissent argued that *Baker Botts, L.L.P. v. ASARCO*,<sup>98</sup> which was decided ten days

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<sup>89</sup> *Id.* at 158.

<sup>90</sup> *Berman*, 801 F.3d at 155.

<sup>91</sup> *Id.* at 155.

<sup>92</sup> *Id.* at 157-58.

<sup>93</sup> *Id.* at 158.

<sup>94</sup> *Id.* at 156.

<sup>95</sup> *Id.* at 159.

<sup>96</sup> *Berman*, 801 F.3d at 158-59.

<sup>97</sup> *King v. Burwell* 135 S.Ct. 2480, 2480 (2015).

<sup>98</sup> *Baker Botts LLP, v. ASARCO LLC*, 135 S. Ct. 2158, 2158 (2015).

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before *King v. Burwell*, is a continuation of the Supreme Court's textualist statutory interpretation jurisprudence.<sup>99</sup> Thus, the dissent argued, the result in *King v. Burwell*, which resulted from the "unusual circumstances" of the case, does not support a paradigm shift away from an examination of the plain statutory text.<sup>100</sup> Although a plain reading of the text leads to the exclusion of whistleblowers who only report internally from Dodd-Frank anti-retaliation protection, according to Judge Jacobs, this is not an untenable result, because those very same whistleblowers would have Sarbanes-Oxley protection.<sup>101</sup> Further, the dissent points out the irony in *King v. Burwell*, in which the Supreme Court noted that, if Congress intended a limitation, they would have done so in the definitional section, suggesting that this is the case in *Berman*.<sup>102</sup>

After initially seeking a writ of certiorari from the Supreme Court, Neo@Ogilvy, LLC, decided that it would not pursue higher review.<sup>103</sup>

### iii. Digital Realty Trust

The Ninth Circuit's decision in *Somers v. Digital Realty Trust*<sup>104</sup> deepened the split between the circuit courts. On June 26, 2017, the Supreme Court granted *certiorari* in *Somers v. Digital Realty Trust*<sup>105</sup> in a move lauded by many because of the likelihood that the decision will provide much needed clarification on a significant issue under the Dodd-Frank whistleblower scheme.

Somers, employed as a Vice President by Digital Realty, alleged, among other claims, that he was dismissed from his position, in violation of the Dodd-Frank anti-retaliation provisions, for making internal reports of securities misdeeds by his employer. The Northern District of California denied Digital Realty's motion to dismiss Somers' Dodd-Frank whistleblower claim, on the ground that SEC Rule 21F-2(b)(1) was entitled to *Chevron* deference.<sup>106</sup>

The Northern District of California, adopting a textualist approach, found the statute was ambiguous by examining both the overall structure and the specific context in which the language of the subsections are used, paying particular attention to the application of the surplusage and

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<sup>99</sup> *Berman*, 801 F.3d at 159.

<sup>100</sup> *Id.* at 159-60.

<sup>101</sup> *Id.* at 159.

<sup>102</sup> *Id.* at 160.

<sup>103</sup> Aaron Vehling, *Dodd Frank Whistleblower Battle Won't Hit High Court*, LAW 360 (Nov. 12, 2015, 7:18 PM), <https://www.law360.com/articles/726167/dodd-frank-whistleblower-battle-won-t-hit-the-high-court>.

<sup>104</sup> *Somers v. Dig. Realty Tr., Inc.*, 850 F.3d 1045, 1045 (9th Cir. 2017).

<sup>105</sup> *Dig. Realty Tr., Inc. v. Somers*, 137 S. Ct. 2300, 2300 (2017).

<sup>106</sup> *Somers v. Dig. Realty Tr., Inc.*, 119 F. Supp. 3d 1088, 1088 (N.D. Cal. 2015).

harmonious-reading interpretive canons. The Northern District of California concluded the whistleblower definition would render subsection (iii) superfluous because portions of subsection (iii), such as those relevant to attorneys and auditors, contemplate internal reporting and exhaustion of internal compliance procedures before any external reporting.<sup>107</sup> Moreover, the application of the whistleblower definition to the anti-retaliation provision would also make the “to the commission” language in (i) and (ii) superfluous because, under a narrow reading, the only person who can be a whistleblower is someone who reports “to the commission.”<sup>108</sup>

The Northern District of California also supported the ambiguity of the provisions because “different usage can have different meanings,” to wit, (i) and (ii) make reference “to the commission,” whereas, the lack of such language in (iii) may be indicative of Congressional intent not to require SEC reporting in that particular subsection.<sup>109</sup> The Northern District of California, faced with what it determined to be two “reasonable” interpretations of the interplay between the statutes, found sufficient ambiguity to satisfy step one of *Chevron*.<sup>110</sup>

Moving on to step two of *Chevron*, the Northern District of California determined that the application of the SEC’s clarifying regulation was permissible. On the one hand, the lack of legislative history in connection with subsection (iii), combined with the fact that it was a last minute addition to the provision, according to the court, reflected Congressional intent to expand the scope of the section, which, prior to subsection (iii), unambiguously required external reporting to the SEC.<sup>111</sup> On the other hand, there was no indication of legislative history suggesting that Congress “purposefully” sought to limit the Dodd-Frank anti-retaliation protections to whistleblowers who only report externally to the SEC.<sup>112</sup> Not surprisingly, given the fact that most other courts that have reached this step of the test have concluded that SEC Rule 21-F-2(b)(i) was a “reasonable” construction of the statute, the district court found that step two of *Chevron* had been satisfied.

The Ninth Circuit, hearing the case on interlocutory appeal, ruled, in a 2-1 decision, that the term “whistleblower” extends protection to employees making internal disclosures of alleged unlawful activity, and does not limit protection under Dodd-Frank to employees reporting

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<sup>107</sup> *Id.* at 1100-02.

<sup>108</sup> *Id.* at 1102-03.

<sup>109</sup> *Id.* at 1103.

<sup>110</sup> *Id.* at 1104-05.

<sup>111</sup> *Id.* at 1103.

<sup>112</sup> *Somers*, 119 F. Supp. 3d at 1103.

potential violations to the SEC.<sup>113</sup> The Ninth Circuit relied heavily on the lower court's analysis and decision, ultimately agreeing that deference to the SEC's interpretation was warranted. While clearly noting a lack of legislative history concerning subsection (iii), the court nonetheless determined that the language of the provision "illuminate[d] Congressional intent" to bar retaliation under Dodd-Frank against employees reporting internally under Sarbanes-Oxley.<sup>114</sup> In the absence of such protection, brought about by a narrow reading of subsection (iii), the court concluded, employees who are required to report internally, such as attorneys and auditors, would have no protection between the period of internal reporting and reporting to the Commission.<sup>115</sup>

The Ninth Circuit shifted its attention to a broader question: the appropriate application of definitions to statutes. In other words, whether a definition imports its meaning to the entire statute or is subject to change based on the context. Drawing upon the Supreme Court's decision in *King v. Burwell*,<sup>116</sup> the Ninth Circuit, adopting reasoning similar to the Second Circuit, determined that the definitional subsection of Dodd-Frank was not dispositive of the statute's scope.<sup>117</sup> The Ninth Circuit cited *King v. Burwell* for the proposition that the use of a term in one part of a statute "may mean a different thing" in a different part of the statute depending on the context.<sup>118</sup> The Ninth Circuit further stated that a narrow reading of Dodd-Frank does not make "practical sense and undercut[s] Congressional intent."<sup>119</sup>

The Ninth Circuit, in agreement with the *Berman* court, implicitly rejected *Asadi's* simultaneous-reporting hypothetical.<sup>120</sup> The Ninth Circuit pointed out that such a reading would reduce subsection (iii) to the "point of absurdity," providing protection only to whistleblowers who simultaneously report possible securities violations both internally and externally, and the employer, without knowledge of the SEC report, fires the employee on the basis of the knowledge of the internal report.<sup>121</sup> According to the Ninth Circuit, without knowledge of the report to the SEC, the whistleblower would not be able to satisfy the causality required between knowledge of the SEC report and the alleged retaliation in

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<sup>113</sup> *Somers v. Digital Realty Trust Inc.*, 850 F.3d 1045 (9th Cir. 2017).

<sup>114</sup> *Id.* at 1049.

<sup>115</sup> *Id.*

<sup>116</sup> 135 S.Ct. 2480, 2480 (2015).

<sup>117</sup> *Somers*, 850 F. 3d at 1049.

<sup>118</sup> *Id.* In a terse dissenting opinion, Justice Owens rejects this view, distinguishing the Supreme Court's reasoning in *King v. Burwell*, from the case at bar. *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 1049-50.

<sup>121</sup> *Id.*

response. The Court also rejected the arguments made by Digital Realty Trust (and the court in *Asadi*) that a narrow reading of the provision would moot the anti-retaliation provision of Dodd-Frank.<sup>122</sup>

Having determined that the invocation of *Chevron* deference was appropriate, the Ninth Circuit then turned to the seventy-four page *amicus curiae* brief submitted by the SEC, which asserted, based on limited evidence, that some whistleblowers, who prefer a different process from Dodd-Frank, would still file claims under Sarbanes-Oxley.<sup>123</sup> The Ninth Circuit also suggested that the ease of adjudication with the DOL leading the investigation, as well as the availability of special damages, might make the enforcement mechanism under Sarbanes-Oxley preferable to that of Dodd-Frank.<sup>124</sup>

#### iv. Other Decisions

Subsequent to the split between the Fifth, Second, and Ninth Circuits, the issue of the statutory interpretation of the whistleblower provisions has arisen in other circuit courts. In *Verble v. Morgan Stanley Smith Barney LLC*, the district court held that the employee was not a whistleblower because he failed to report to the SEC.<sup>125</sup> The Sixth Circuit affirmed the lower court's dismissal of the Dodd-Frank whistleblower claim, but did so without reaching the question of the statutory ambiguity.<sup>126</sup> Instead, the Sixth Circuit dismissed the claim based on the failure to state a "plausible claim" for relief.<sup>127</sup> In March 2017, the Supreme Court denied *certiorari* to review the former Morgan Stanley employee's claims that he was entitled to whistleblower protection, despite his failure to report his complaints to the SEC.<sup>128</sup>

In 2015, in *Duke v. Prestige Cruises Int'l, Inc.*,<sup>129</sup> the district court ruled that an employee who was discharged after reporting fraud internally, but not to the SEC, did not have a valid claim under Dodd-Frank's anti-retaliation provision.<sup>130</sup> The district court dismissed the employee's Dodd-Frank claim with prejudice, but the Eleventh Circuit stayed the plaintiff's appeal pending the Supreme Court's decision in

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<sup>122</sup> *Id.* at 1050.

<sup>123</sup> Brief of the Securities and Exchange Commission, *Amicus Curiae* in Support of the Appellee, at 36, *Somers v. Digital Realty Tr. Inc.*, 850 F.3d 1045 (9th Cir. 2017) (No. 15-17352) 2017 WL 3088310.

<sup>124</sup> *Somers*, 850 F. 3d at 1050.

<sup>125</sup> 148 F. Supp. 3d 644, 656 (E.D. Tenn. 2015)

<sup>126</sup> *Verble v. Morgan Stanley Smith Barney, LLC*, 676 F. App'x. 421, 426 (6th Cir. 2017).

<sup>127</sup> *Id.* at 427.

<sup>128</sup> *Verble v. Morgan Stanley Smith Barney, LLC*, 137 S.Ct. 1348 (2017).

<sup>129</sup> No. 14-23017-Civ-King, 2015 WL 4886088 (S.D. Fla. Aug. 14, 2015).

<sup>130</sup> *Id.* at \*3.

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*Digital Realty*.<sup>131</sup>

In April 2017, the Third Circuit, in *Danon v. Vanguard Group*, took up the Dodd-Frank retaliation claim of a tax lawyer who reported various violations of tax and corporate laws to his employers.<sup>132</sup> The district court originally dismissed the case for failure to adequately plead sufficient facts indicating a causal connection between the employer's knowledge and the employee's termination.<sup>133</sup> The Third Circuit ultimately remanded the case, allowing the Dodd-Frank claim to go forward.<sup>134</sup> Before making its decision, the district court will likely wait for the Supreme Court's decision in the *Digital Realty* case.

### III. THE SUPREME COURT

The Supreme Court's decision in *Digital Realty* will likely depend on how it chooses to resolve the apparent tension between the Dodd-Frank provisions, given the lack of certainty with respect to the Court's preferred method of statutory interpretation and the future of *Chevron* deference. While petitioner *Digital Realty* asserts this case poses "a simple question of statutory interpretation,"<sup>135</sup> this is not necessarily the case as the Court must resolve once and for all, the complexities of its role as the "interpreter in chief" of Congressional legislation. More broadly, for the Court to reach a decision in *Digital Realty*, a renewed examination of the debate regarding the textualist versus purposivist theories of legislative interpretation is likely unavoidable.

Foregoing the "traditional" textualist statutory analysis, the Second and Ninth Circuits relied heavily on *King v. Burwell*, a case in which the Supreme Court justified giving Congressional purpose primacy over canonical statutory interpretation.<sup>136</sup> To reach its decision in *Digital Realty*, the Supreme Court will no doubt be forced to resolve some of the issues left open by *King v. Burwell*. Therefore, part of the Supreme Court's analysis of *Digital Realty* will opine on the scope of the doctrine of administrative deference under *Chevron*<sup>137</sup> and as modified by *Brand X*<sup>138</sup> which, while often cited, is applied inconsistently. For example, a

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<sup>131</sup> No. 16-15426-V (11th Cir. Aug. 23, 2017).

<sup>132</sup> No. 16-2881, 2016 WL 2988987, at \*2 (E.D. Pa. Jan. 26, 2017).

<sup>133</sup> *Id.* at \*3-6.

<sup>134</sup> *Danon v. Vanguard Group*, 686 F. App'x. 101, 104 (3d Cir. 2017).

<sup>135</sup> Brief for Petitioner at 3, *Digital Realty Tr. v. Somers*, No. 16-1276 (U.S. 2017) 2017 WL 3701187.

<sup>136</sup> 135 S. Ct. 2480, 2489-90 (2015).

<sup>137</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

<sup>138</sup> *Nat'l Cable & Telecoms. Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005) (holding that the agency's interpretation will be applied, even in the face of circuit precedent,

study conducted by Professor William Eskridge, Jr. revealed that the courts often do not apply deference in cases where *Chevron* should apply.<sup>139</sup> In addition, the justices will likely be compelled to assert (or reassert) the appropriate role that the Supreme Court should play with respect to statutory interpretation in the absence of a clear expression of Congressional intent. Until the case is heard, however, questions remain as to how the Court will decide *Digital Realty* and what potential impact this decision will have on future whistleblowers?

#### A. Textualism and the Roberts Court

Although reputedly textualist, the current Supreme Court led by Chief Justice John Roberts, has recently decided cases based on a line of reasoning that suggests a shift in its method of statutory interpretation. Arguably, in cases, such as *Bond v. United States*,<sup>140</sup> *Utility Air Regulatory Group v. EPA*,<sup>141</sup> *Yates v. United States*,<sup>142</sup> and *King v. Burwell*,<sup>143</sup> the Supreme Court's analysis focused on the *purpose* of the statute and Congress's overarching intent, in order to resolve issues concerning statutory meaning. This contrasts with the Supreme Court's former diligent parsing and application of canonical precepts to the statute's text. Notably, the courts in *Berman* and *Digital Realty* relied on *King v. Burwell* for this very sentiment—that Congressional purpose trumps plain meaning.<sup>144</sup>

In *King*, the Supreme Court grappled with an interpretive issue regarding whether, under the Affordable Care Act ("ACA"), tax credits are available in states that have a federal exchange rather than a state exchange.<sup>145</sup> The ACA requires the creation of an insurance "exchange" in each state and indicates that the exchange may be established by the state or, in the event the state chooses not to do so, by the federal government.<sup>146</sup> The ACA also provides, pursuant to the Internal Revenue Code, that tax credits be provided to certain individuals enrolled in "an

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unless prior precedent held the statute unambiguous).

<sup>139</sup> William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L. J. 1083, 1090 (2008); Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1740 (2010).

<sup>140</sup> See 134 S. Ct. 2077, 2088, 2090 (2014).

<sup>141</sup> See 134 S. Ct. 2427, 2441 (2014).

<sup>142</sup> See 135 S. Ct. 1074, 1081-82 (2015).

<sup>143</sup> See 135 S. Ct. 2480, 2489 (2015).

<sup>144</sup> *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 150 (2d Cir. 2015); *Somers v. Digital Realty Tr. Inc.*, 850 F.3d 1045, 1049 (9th Cir.), cert. granted, 137 S. Ct. 2300 (2017).

<sup>145</sup> *King*, 135 S. Ct. at 2487.

<sup>146</sup> 42 U.S.C. §§ 18031, 18041 (Westlaw through Pub. L. No. 115-90).

exchange established by the state to help subsidize the cost” of health insurance.<sup>147</sup> A subsequent Internal Revenue Service regulation interpreted “exchange established by the state” to mean that tax credits are available to individuals participating in exchanges in states that have either a state or federally established and operated exchange.<sup>148</sup>

In *King*, the Court conceded the plain meaning of the statute would in the “natural sense” indicate that an exchange created by the state does not include exchanges established by the federal government.<sup>149</sup> However, it declined to apply that meaning.<sup>150</sup> Moreover, the Court recognized ambiguity in the phrase “established by the state,” step one under a *Chevron* analysis, but refused to apply *Chevron*, deciding instead that it could not have been Congress’s intention to “assign a question of deep economic and political significance” to an agency, such as the IRS, which has no expertise in “crafting health care insurance.”<sup>151</sup> Further, the Court asserted that if Congress had in fact had this intention, it would have expressly stated so.<sup>152</sup> Ultimately, the Court’s decision in *King* rested not on an interpretation of the text or administrative agency deference, but on the legislative purpose of the statute.<sup>153</sup>

Not surprisingly, the decision in *King* is not without its critics. Dissenters in *King*, *Berman*, and *Digital Reality*, for their part, make decidedly similar arguments. Each point out the inadequacies of the majority’s statutory interpretation,<sup>154</sup> and, in the case of *Digital Realty*, warns the Ninth Circuit of the danger in relying too heavily on *King v. Burwell*.<sup>155</sup>

Justice Antonin Scalia delivered the dissenting opinion in *King*. In his unabashedly textualist and originalist fashion, Justice Scalia, joined by Justices Thomas and Alito, castigated the majority for attempting to save the Affordable Care Act at the expense of a “natural reading” of the statute.<sup>156</sup> Ultimately, Justice Scalia questioned whether the judicial branch should serve the role of assisting Congress in rewriting legislation

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<sup>147</sup> 26 U.S.C. § 36B(a) (Westlaw through Pub. L. No. 115-94).

<sup>148</sup> Definitions, 45 C.F.R. § 155.20 (2017), WL 45 CFR § 155.20.

<sup>149</sup> *King*, 135 S. Ct. at 2490.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 2489.

<sup>152</sup> *Id.* at 2483.

<sup>153</sup> *Id.* at 2495.

<sup>154</sup> *Id.* at 2497 (Scalia, J., dissenting); *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155-56 (2d Cir. 2015) (Jacobs, J., dissenting); *Somers v. Digital Realty Tr. Inc.*, 850 F.3d 1045, 1051 (9th Cir.), *cert. granted*, 137 S. Ct. 2300 (2017) (Owens, J., dissenting).

<sup>155</sup> *King*, 135 S. Ct. at 2497 (Scalia, J., dissenting); *Berman*, 801 F.3d at 155-56 (Jacobs, J., dissenting); *Somers* 850 F.3d at 1051 (Owens, J., dissenting).

<sup>156</sup> *King*, 135 S. Ct. at 2497.

when it encounters statutes that the courts themselves describe as examples of “inartful drafting”<sup>157</sup> and products of a lack of oversight.<sup>158</sup> In Justice Scalia’s view, if one is to perceive Congress as a competent branch of government that is capable of writing coherent legislation, the legislature should be taken at its word.<sup>159</sup> The judiciary can assume such legislation “means what it looks to mean” and to the extent it does not, it should be sent back to Congress for revision.<sup>160</sup> It is “not the Court’s “place to judge the quality of the care and deliberation” that goes into a law as it is binding on the court just the same.<sup>161</sup> Furthermore, “much less is it [the Court’s] place to make everything come out right when Congress does not do its job properly.”<sup>162</sup> However, if such statements are taken as true, then what role, if any, is there for the courts to play in fixing legislation that Congress has expressed imperfectly?

One solution is for Congress to pass legislation revising judicial opinions. In October 2017, in the latest attempt to reform the health-insurance market, President Donald Trump, through executive order, eliminated the subsidies on both state and federal exchanges, thereby mooted the key issue in *King v. Burwell*. Nonetheless, the issues of statutory interpretation presented in *King* remain relevant for the Supreme Court to address. To wit, it will need to clarify whether the *King* decision was intended to be a special case, a proverbial “one-off,” or an indication of an ideological shift.

To be sure, the Supreme Court’s broad application of its reasoning in *King* to *Digital Realty* would run counter to Digital Realty’s arguments. In its brief, Digital Realty argued that the Ninth Circuit’s decision was inconsistent with the plain text of the Dodd-Frank Act, as well as its structure and history.<sup>163</sup> Digital Realty asserted that the decision violated a foundational principle of statutory interpretation, that, “where a statute includes an express definition of a term, courts and agencies may not invent a different definition.”<sup>164</sup> However, in *King*, this is exactly what the Supreme Court did.<sup>165</sup> In support of Digital Realty, the amicus briefs coalesced around Digital Realty’s argument that the plain meaning of the anti-retaliation provision of Dodd-Frank only

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 2504-05.

<sup>159</sup> *Id.* at 2506.

<sup>160</sup> *Id.* at 2502, 2506.

<sup>161</sup> *Id.* at 2506.

<sup>162</sup> *King*, 135 S. Ct. at 2506.

<sup>163</sup> Brief for Petitioner at 4, *Digital Realty Trust, Inc. v. Somers*, No. 16-1276 (U.S. 2017) 2017 WL 3701187.

<sup>164</sup> *Id.* at 12.

<sup>165</sup> *King*, 135 S. Ct. at 2495-96.

protects whistleblowers who report externally to the SEC.<sup>166</sup>

On the other hand, the adoption of a purely textualist interpretation of the provision, similar to *Asadi*, would favor a narrow reading of Dodd-Frank's anti-retaliation provision. Such an interpretation would foreclose protections under Dodd-Frank for internal whistleblowers who do not report to the SEC and could signal a return to the Supreme Court's textualist roots. Either way, the Supreme Court in *Digital Reality* must consider, with respect to separation of powers, whether *Chevron* deference should give executive agencies the final say in the interpretation of legislation.

*B. Chevron is Dead! Long Live Chevron!*

*Digital Realty* provides yet another opportunity for the Supreme Court to address the elephant in the room,<sup>167</sup> administrative deference under *Chevron*. The Supreme Court will be compelled to address the scope and meaning of *Chevron's* framework. The 1984 decision might be ripe for reconsideration, especially in light of the Court's recent addition of Justice Neil Gorsuch, one of the doctrines most vocal and prolific critics. Is *Chevron* a judicial mandate or a precedent that serves as a justification for the abdication of judicial responsibility? Clearly, *Chevron* is "strong medicine . . . requir[ing] courts to accept any agency interpretation that is reasonable, even if it is not the interpretation that the court finds most plausible."<sup>168</sup> If *Chevron* was ever once considered a core principle of administrative law,<sup>169</sup> it is no longer settled judicial doctrine.

Under the modern judicial regime, a court may or may not invoke *Chevron* deference. The notion that a reviewing court must defer to a federal agency's reasonable interpretation of an ambiguous statute that an agency administers has been criticized as undermining judicial review.

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<sup>166</sup> See Brief of Amici Curiae New England Legal Foundation and Associated Industries of Massachusetts in Support of Petitioner at 14, 18, *Digital Realty Trust, Inc. v. Somers*, No. 16-1276 (U.S. 2017) 2017 WL 3725542; Brief Amicus Curiae of the Center for Workplace Compliance in Support of Petitioner at 3, *Digital Realty Trust, Inc. v. Somers*, No. 16-1276 (U.S. 2017) 2017 WL 3822693; Brief of the Cato Institute as Amicus Curiae Supporting Petitioner at 2, *Digital Realty Trust, Inc. v. Somers*, No. 16-1276 (U.S. 2017) 2017 WL 3913769; Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at 2-3, *Digital Realty Trust, Inc. v. Somers*, No. 16-1276 (U.S. 2017) 2017 WL 3913767; Brief of Amici Curiae Lime Energy Services Company and Prestige Cruises International in Support of Petitioner at 9-10, *Digital Realty Trust, Inc. v. Somers*, No. 16-1276 (U.S. 2017) 2017 WL 3913768.

<sup>167</sup> *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1143 (10th Cir. 2016).

<sup>168</sup> Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 859 (2001).

<sup>169</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

Such deference is said to deprive the courts of the role of the final arbiter of what a statute means and to threaten the separation of powers by allowing the executive branch to redraft and construe federal statutes, and promote the exercise of “delegated legislative policymaking authority in what looks like a judicial proceeding.”<sup>170</sup>

The Supreme Court, when facing an interpretive issue, has, in some cases, done an end run around *Chevron* either by creating an exception, finding no ambiguity or applying a purposive interpretive methodology. The Ninth Circuit, in reaching its decision in *Digital Realty*, relied on the SEC’s 2015 published interpretation of the anti-retaliation provisions, in which the SEC stated:

If read in isolation Rule 21F-9(a) could be construed to require that an individual must report to the Commission before he or she will qualify as a whistleblower eligible for the employment retaliation protections provided by Section 21F that construction is not consistent with Rule 21F-2 and would undermine our overall goals in implementing the whistleblower program.<sup>171</sup> We are issuing this interpretation to clarify that for purposes of Section 21F’s employment retaliation protections, an individual’s status as a whistleblower does not depend on adherence to the reporting procedures specified in Rule 21F-9(a).<sup>172</sup>

According to the SEC’s broader interpretation, whistleblowers can sue under the Dodd-Frank Act even if they did not report directly to the SEC.<sup>173</sup> Therefore, the application of *Chevron* deference would result in protection under subsection (iii) for both internal and external whistleblowers.

The Supreme Court’s composition will determine the future of *Chevron*. While Justice Roberts and Kennedy have acted as the swing votes in a number of major cases triggering *Chevron* deference, Justices Thomas and Alito have historically spurned the idea of *Chevron* deference.<sup>174</sup> At its inception, Justice Scalia defended the *Chevron* doctrine as an accurate reflection of Congressional intent, recognizing the need for deference to agency expertise.<sup>175</sup> However, Justice Scalia’s later opinions, such as *King v. Burwell*, suggest a recognition that the application of the *Chevron* doctrine can raise concerns as to the

<sup>170</sup> De Niz Robles v. Lynch, 803 F.3d 1165, 1167 (10th Cir. 2015).

<sup>171</sup> Interpretation Whistleblower Rules Under Section 21F, Exchange Act Release No. 75592, 2015 WL 4624264, at \*2 (Aug. 7, 2015).

<sup>172</sup> *Id.* at \*3.

<sup>173</sup> *Id.* at \*2.

<sup>174</sup> *The Rise of Purposivism and the Fall of Chevron: Major Statutory Cases in the Supreme Court*, 130 HARV. L. REV. 1227, 1242-43 (2017).

<sup>175</sup> Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 521 (1989).

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separation of powers. To this point, Justice Gorsuch, who was presumed to fill the textualist and Constitutionalist role left open by the death of Justice Scalia, is decidedly anti-*Chevron*.

Justice Gorsuch has made it clear that he is vehemently opposed to *Chevron*. In his confirmation hearings, when questioned about *Chevron* deference, Justice Gorsuch clearly expressed his due process and separation of powers concerns with respect to *Chevron* and expressed what he perceived as the dangers of placing bureaucracies above “neutral, dispassionate judges.”<sup>176</sup> Writing from the bench of the Tenth Circuit in *Guitierrez-Brizuela v. Lynch*, for example, Justice Gorsuch not only authored the majority opinion, but provided a nine-page concurrence in which he urged a reconsideration of *Chevron* and *Brand X* by the Supreme Court.<sup>177</sup> In his view, these decisions “permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design. Maybe the time has come to face the behemoth.”<sup>178</sup>

It is also unclear what Justice Gorsuch’s role will be on the Court, having aligned himself to the right of most of his colleagues and exhibiting a tendency to issue independent opinions, as opposed to joining with the Court, much to the dismay of Chief Justice Roberts.<sup>179</sup> Justice Gorsuch’s views regarding *Chevron* and the role he plays on the Roberts Court will likely have significant implications for the decision in *Digital Realty*. This is especially likely if Justice Gorsuch is able to sway the other Justices, some of whom are already questioning the continuing viability of *Chevron* deference.

The Regulatory Accountability Act (“RAA”)<sup>180</sup> that is on the floor of the House of Representatives and currently pending in the Senate, is another threat to *Chevron*. In as much as *Chevron* may be blamed for the creation of a large and expensive administrative state, antithetical to the Republican Party’s proposed goal of widespread national deregulation, the RAA could potentially eliminate *Chevron* deference. Under the RAA, courts are required to “decide de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions, and

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<sup>176</sup> See, e.g., Jennifer Rubin, *Gorsuch Deprives Democrats of Reasons to Oppose*, WASH. POST (Mar. 22, 2017), [https://www.washingtonpost.com/blogs/right-turn/wp/2017/03/22/gorsuch-deprives-democrats-of-reasons-to-oppose/?utm\\_term=.de40039ab0e7](https://www.washingtonpost.com/blogs/right-turn/wp/2017/03/22/gorsuch-deprives-democrats-of-reasons-to-oppose/?utm_term=.de40039ab0e7).

<sup>177</sup> 834 F.3d 1142, 1143, 1149-58 (10th Cir. 2016).

<sup>178</sup> *Id.* at 1149.

<sup>179</sup> Joan Biskupic, *Gorsuch v. Roberts: The Rookie Takes On the Chief*, CNN POLITICS (Oct. 8, 2017), <http://www.cnn.com/2017/10/08/politics/neil-gorsuch-john-roberts-rivalry/index.html>.

<sup>180</sup> Regulatory Accountability Act, H.R. 5, 115th Cong. § 202(1)(B) (2017).

rules made by agencies.”<sup>181</sup> In the event a court finds a gap or ambiguity in the statute, the court “shall not interpret or rely on that gap or ambiguity as: (1) an implicit delegation to the agency of legislative rulemaking authority, or (2) a justification for interpreting agency authority expansively or for deferring to the agency’s interpretation on the question of law.”<sup>182</sup>

#### IV. IMPACT ON EMPLOYERS AND FUTURE WHISTLEBLOWERS

The Court’s decision in *Digital Realty* will have significant implications for employers and potential whistleblowers. For employers, a decision by the Supreme Court to expand the definition of whistleblower under Dodd-Frank to include internal reporters could potentially leave them vulnerable to Dodd-Frank claims long after the employee has separated from the company due to Dodd-Frank’s longer six to ten-year statute of limitations. Unlike the Sarbanes-Oxley Act, which requires an exhaustion of administrative remedies before bringing a claim in federal court, Dodd-Frank’s private right of action allows claims that might not have otherwise gone to court to be brought in federal court. Of course, while this should mean increased protections under Dodd-Frank for whistleblowers who report internally, some suggest that this could also have a negative impact on the virility of corporate compliance programs, and in turn, the protections available to internal whistleblowers under those programs.

Corporate compliance programs, required for publicly traded companies under Sarbanes-Oxley, are an important part of a larger regulatory scheme, put in place to curb wrongdoing of employees, managers and officers by increasing oversight and accountability through the implementation of a series of internal controls. While there are obvious benefits for employees seeking Dodd-Frank anti-retaliation protections after choosing to report employer misconduct through corporate compliance programs, the refusal of companies to protect their internal whistleblowers from retaliation is essentially an attack on the legitimacy and authority of their own internal reporting systems, in an effort to stave off Dodd-Frank claims. Cases like *Asadi* and other legal precedents could further incentivize whistleblowers to skip the internal compliance program altogether and instead report directly to the SEC.

If the Supreme Court decides the Dodd-Frank anti-retaliation provisions do not extend protection to internal whistleblowers, it could have a devastating impact on those employees who have lost their jobs as

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

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a result of reporting misconduct to managers and relied on Dodd-Frank's longer statute of limitations. Whistleblowers with cases pending prior to the *Digital Realty* decision would likely be dismissed for failure to state a cause of action. However, regardless of the Supreme Court's determination concerning Dodd-Frank, potential whistleblowers who are either required to or choose to report internally may still have a viable claim against adverse employment actions under Sarbanes-Oxley's anti-retaliation provisions.

Finally, the expansion of the definition of whistleblower could impact the future of Dodd-Frank. Recently, the House of Representatives passed the Financial Choice Act ("FCA").<sup>183</sup> The FCA's provisions seek, among other things, a reduction in the number of whistleblowers eligible to receive awards for reporting employer misconduct to the SEC by preventing whistleblowers involved in any wrongdoing from collecting awards.<sup>184</sup> Dodd-Frank currently prevents whistleblowers convicted of criminal conduct related to the reported fraud from collecting whistleblower awards. Although, the FCA is still pending before the Senate Banking, Housing and Urban Affairs Committees, it has been viewed by some as the initial shot across the bow towards Dodd-Frank's repeal. And while the SEC has vowed to continue to implement the whistleblower incentive act, a veritable run on whistleblower claims could be just the impetus to spur additional immediate efforts towards the repeal of Dodd-Frank.

#### V. CONCLUSION

The complexities of *Digital Realty* will require the Supreme Court to revisit a number of issues that may have initially been thought of as firmly decided. The Supreme Court's forthcoming decision in *Digital Realty* will potentially provide guidance for employers and whistleblowers, but there could be much further reaching implications for both sides no matter how the Court rules. In addition, there is uncertainty surrounding how the current Republican administration, which has expressed a desire to eliminate Dodd-Frank, has committed to rolling back Obama era legislation, and has taken steps toward deregulation in a number of areas, will alter the Supreme Court's decision. Currently, it cannot be said with any degree of certainty how the Supreme Court will decide *Digital Realty* or what the potential effect of the decision will be on whistleblower provisions in other U.S. statutes or legislation in other countries. At least for the time being however, while Dodd-Frank may

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<sup>183</sup> Financial Choice Act, H.R. 10, 115th Cong. § 828 (2017).

<sup>184</sup> *Id.*

not be the picture of clarity, the most cogent advice for employers is simple—do not retaliate against whistleblowers!