No. 16-1276

In the Supreme Court of the United States

DIGITAL REALTY TRUST, INC., PETITIONER

v.

PAUL SOMERS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Section 922(a) of the Dodd-Frank Act defines "whistleblower," for purposes of "this section," as an "individual who provides * * * information relating to a violation of the securities laws to the [Securities and Exchange] Commission." Ignoring that plain language, respondent contends that "whistleblower" has *two* definitions in Section 922(a): the actual statutory definition, which applies only for purposes of the section's award provision, and a second "ordinary sense" definition, which applies for purposes of the section's anti-retaliation provision. According to respondent, the first requires reporting to the SEC, and the second does not.

Respondent makes no serious effort to defend the court of appeals' conclusion that his is the correct textual interpretation of Section 922(a). Instead, from the very first sentence of his summary, he contends that "[t]his is a *Chevron* case." Br. 17. But an agency is not entitled to deference when its interpretation is contrary to the unambiguous language of the underlying statute.

This may be a *Chevron* case, then, but it is a *Chevron* step-one case. And at step one, the question is not close. Section 922(a) does two things: it creates a reward program to encourage individuals to report securities-law violations to the SEC, and it protects those same individuals from retaliation. The statutory definition of "whistleblower" unambiguously applies throughout "this section" to achieve Congress's goal of promoting reporting to the SEC.

There is nothing absurd about giving effect to the statutory text. Respondent contends that the SEC's contrary interpretation better "advances Congress's objectives," Br. 17, and comports with the sobering "realities of lawmaking," Br. 20. But that is insufficient to justify deference in the face of such plain text even under the most steroidal understanding of *Chevron*—especially given the existing protections under the Sarbanes-Oxley Act for employees who report internally.

For its part, the government, perhaps recognizing the defects in the SEC's rule, devotes almost its entire brief to arguing that this is *not* a *Chevron* case, on the theory that its interpretation is compelled by the text of the statute. See U.S. Br. 14-32. In the government's view, when Congress said that the definition of "whistleblower" "shall apply" "[i]n this section," 15 U.S.C. 78u-6(a), it unambiguously meant that the definition shall apply in some subsections of "this section," but not the one at issue in this case. That is a preposterous interpretation of which Humpty

Dumpty would be proud. And it rests on a misleading rendition of the legislative history.

All the Court need do in this case is to reaffirm the familiar principle that, where the language of a statute is plain and does not produce absurd results, the plain language should be given effect. Because the Ninth Circuit deviated from that principle, its judgment should be reversed.

A. The Dodd-Frank Act Unambiguously Requires Reporting A Securities-Law Violation To The SEC

Section 922(a) of the Dodd-Frank Act defines a "whistleblower" as "any individual who provides * * * information relating to a violation of the securities laws to the [Securities and Exchange] Commission." 15 U.S.C. 78u-6(a)(6). That definition, Congress instructed, "*shall* apply" "[i]n this section." 15 U.S.C. 78u-6(a) (emphasis added). "[T]his section" indisputably includes the Act's anti-retaliation provision, which prohibits retaliation against "whistleblower[s]." 15 U.S.C. 78u-6(h)(1)(A). The plain text of the Dodd-Frank Act thus extends anti-retaliation protection only to a particular category of defined individuals: "whistleblowers."

Respondent acknowledges that the Court ordinarily must apply definitional provisions according to their terms. See Br. 25. He nevertheless contends that this is one of the "admittedly rare" cases where the Court should deviate from an unambiguous statutory definition. *Ibid.* That contention lacks merit.

1. A Court Must Apply An Unambiguous Statutory Definition, Like Any Other Unambiguous Statutory Provision, Unless Doing So Would Produce Absurd Results

a. A court construing a statute "must follow" an explicit statutory definition, "even if it varies from th[e]

term's ordinary meaning." *Stenberg* v. *Carhart*, 530 U.S. 914, 942 (2000); see *Fox* v. *Standard Oil Co. of New Jersey*, 294 U.S. 87, 95-96 (1935). It is "axiomatic," moreover, that "the statutory definition of [a] term excludes unstated meanings." *Meese* v. *Keene*, 481 U.S. 465, 484 (1987). To be sure, a court may depart from that "virtually conclusive" axiom in "very rare" circumstances. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 228 (2012) (Scalia & Garner). As with other unambiguous statutory language, however, a court may refuse to apply an unambiguous statutory definition only where its application would produce absurd results.

b. The cases respondent cites prove the point. For example, in *Lawson* v. *Suwannee Fruit & Steamship Co.*, 336 U.S. 198 (1949), the Court considered whether the definition of "disability" in the Longshoremen's and Harbor Workers' Compensation Act should apply to a provision stating that, "[i]f an employee receives an injury which of itself would only cause permanent partial disability but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury." *Id.* at 200 (citation and footnote omitted). The Act defined "disability" as "incapacity because of injury," and it defined "injury" as "accidental injury or death *arising out of and in the course of employment*." *Ibid.* (emphasis added; citation omitted). Applying that definition would have led to an "obvious incongruit[y]": the employer would have been liable for the *entire* disability if the previous disability had occurred while the employee was *not* on the job, thus defeating the Act's goal of preventing employers from discriminating against individuals with existing disabilities. *Id.* at 201.

Philko Aviation, Inc. v. *Shacket*, 462 U.S. 406 (1983), is of a piece. There, the Court considered whether to apply the statutory definition of "conveyance" in the Federal Aviation Act. See *id.* at 411-412. By its terms, that definition was "expressly not applicable 'if the context otherwise require[d].'" *Ibid.* (citation omitted). Another provision of the Act stated that "[n]o conveyance or instrument" would be valid "against any person * * * until such conveyance or other instrument is filed for recordation in the office of the Secretary of Transportation." *Id.* at 409 (citation omitted). The Court observed that, if it applied the statutory definition of "conveyance" literally, the Act "would not require every transfer to be documented and recorded; it would only invalidate unrecorded title *instruments*, rather than unrecorded title *transfers*." *Ibid.* That would be absurd, given Congress's expressly stated intent to require "the recordation of every transfer * * * of any interest in a civil aircraft." *Id.* at 410 (internal quotation marks and citation omitted).

So too in *Utility Air Regulatory Group* v. *EPA*, 134 S. Ct. 2427 (2014). There, the Court construed the Clean Air Act, which required major emitters of "air pollutants" to acquire certain permits. *Id.* at 2439. The Act defined "air pollutant" as "any air pollution agent or combination of such agents, including any * * * substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. 7602(g). In *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), the Court had construed the definition of "air pollutant" to "embrace[] all airborne compounds of whatever stripe." *Id.* at 529. Based on that broad definition, the Environmental Protection Agency argued in *Utility Air* that major emitters of greenhouse gases had to obtain the permits required for major emitters of air pollutants. See 134 S. Ct. at 2439.

This Court rejected that argument. It explained that applying the *Massachusetts* construction of "air pollutant" throughout the statute was "obviously untenable." 134 S. Ct. at 2439. EPA had applied narrower definitions of "air pollutant" in various specific contexts since the 1970s, and "*Massachusetts* did not invalidate all these longstanding constructions." *Id.* at 2439-2441. For example, EPA's interpretation of the statute would have required "an elaborate, burdensome permitting process for major emitters of steam, oxygen, or other harmless airborne substances." *Id.* at 2440. Avoiding such absurdity, the Court explained that the Act-wide definition of "air pollutant" was "not a command to regulate, but a description of the universe of substances EPA may *consider* regulating under the Act's operative provisions." *Id.* at 2441.

These cases illustrate the problem with respondent's approach here. The rule that a court must apply a statutory definition according to its terms is more than a thumb on the scale; it is a binding "axiom[]," except in the unusual situation in which applying the plain text would be absurd. See *Keene*, 481 U.S. at 484. That is particularly true where (as here) not just the definition, but also the reach of that definition, is unambiguous: the definitional provision commands that its definitions "*shall* apply" "[i]n this section." 15 U.S.C. 78u-6(a) (emphasis added). Such mandatory language is "normally * * * impervious to judicial discretion." *Lexecon, Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998).

2. The Plain-Text Interpretation Does Not Produce Absurd Results

Respondent cannot show that applying the statutory definition of "whistleblower" to the anti-retaliation provi-

sion would lead to absurdity. To the contrary, only petitioner's interpretation is faithful to the structure and history of the Dodd-Frank Act.

a. As a preliminary matter, respondent does not contend that applying the statutory definition of "whistleblower" would "contradict another provision" of the Dodd-Frank Act, thus requiring the Court to harmonize those provisions. Scalia & Garner 228. At most, respondent cites the supposed "tension" between the "whistleblower" definition and the third clause of the anti-retaliation provision. The former, he observes, requires the reporting of a securities-law violation to the SEC; the latter prohibits retaliation because of "disclosures that are required or protected" under the Sarbanes-Oxley Act and other laws, without requiring reporting to the SEC. 15 U.S.C. 78u-6(h)(1)(A)(iii). According to respondent, the differences between those two provisions produce "tension" that gives rise to statutory ambiguity. See Br. 28-30.

This Court's decision in *Lamie* v. *United States Trustee*, 540 U.S. 526 (2004), which petitioner discussed at length in its opening brief, gives the lie to that argument. There, the Court construed a provision of the Bankruptcy Code that gave enumerated persons—"a trustee, an examiner, [or] a professional person employed under section 327 or 1103"—the right to "reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person." *Id.* at 530 (quoting 11 U.S.C. 330(a)(1)).

The petitioner in *Lamie*, like respondent here, argued that the statute was ambiguous because of a tension between the individuals the statute covered and the right the statute afforded. See 540 U.S. at 535. But the Court dis-

agreed, noting that the first provision at issue "authorize[d] an award of compensation to one of three types of persons" and the second "define[d] what type of compensation may be awarded." *Id.* at 534. The type of compensation awarded, the Court explained, was "irrelevant" to the threshold question of which individuals were covered. See *ibid.*

That logic applies equally here. The anti-retaliation provision identifies a particular type of individual entitled to protection, a "whistleblower." See 15 U.S.C. 78u-6(h)(1)(A). It then protects a whistleblower from retaliation that occurs because of certain types of conduct by the whistleblower. See *ibid.* But unless an individual falls within the protected class in the first place—namely, "whistleblower[s]"—the type of protection afforded is "irrelevant." See *Lamie*, 540 U.S. at 534.

Remarkably, respondent ignores *Lamie* altogether. The government does little better, attempting to distinguish *Lamie* in a footnote on the formalistic ground that it did not involve an explicit statutory definition. See U.S. Br. 27 n.13. But that is a distinction without a difference: *Lamie* is on point because it illustrates how the Court should analyze a provision *structured* like the anti-retaliation provision. On that point, neither respondent nor the government has anything to say.

b. Respondent fails to identify any substantial anomalies that would result from the plain-text interpretation of the anti-retaliation provision.

i. Tracking the court of appeals, respondent first contends that applying the statutory definition of "whistleblower" to the anti-retaliation provision would render the third clause of the provision absurdly narrow, because it would apply only when an individual reported both to the SEC and internally (or to another entity). See Br. 35-37. Even if respondent is correct and the provision has

only "modest" "effect[s]" under that interpretation, however, it hardly renders the interpretation absurd. *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247, 270 (2010). An interpretation is absurd only if it results in statutory language having "*no* operative effect." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (emphasis added).

For its part, the government hypothesizes that cases in which an individual reports both to the SEC and internally (or to another entity) "are likely to be few in number." U.S. Br. 23 (internal quotation marks and citation omitted). But even if that hypothesis were true (and the government offers no empirical support for it), a statute that protects even a "few" individuals still has "operative effect." *Duncan*, 533 U.S. at 174. This Court's role is to "apply the text," not to "improve upon it." *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U.S. 120, 126 (1989).

ii. In a related vein, respondent asserts that petitioner's interpretation is absurd because it "would entirely cut out protections for lawyers and auditors," who, he contends, must typically report internally before reporting to the SEC. Br. 35. But there is no evidence in the text or history of the Dodd-Frank Act that Congress had lawyers and auditors in mind when it enacted the anti-retaliation provision. See Pet. Br. 34. By contrast, the Congress that enacted the Sarbanes-Oxley Act was focused specifically on lawyers, auditors, and other employees of outside companies, as this Court has recognized. See *Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1169-1170 (2014).

Respondent thus overreaches when he asserts that the Dodd-Frank Act "strip[s] away" whistleblower protections for lawyers and auditors. Br. 36. As respondent concedes in a footnote, "lawyers and accountants * * * would still be able to take advantage of Sarbanes-Oxley's

remedies under Section 1514A." *Id.* at 36 n.10. Respondent asserts, again without empirical support, that "those remedies have proven ineffective." *Ibid.* But fewer than two pages later, in an effort to explain why his interpretation does not render the Sarbanes-Oxley Act's anti-retaliation protection effectively obsolete, he argues that the Sarbanes-Oxley Act's remedies "may be more attractive" than those available under the Dodd-Frank Act. *Id.* at 38-39 (citation omitted).

Respondent cannot have it both ways. Whatever the relative merits of the Sarbanes-Oxley Act's remedy, the continuing availability of that remedy underscores that interpreting the Dodd-Frank Act's anti-retaliation provision not to reach certain lawyers and auditors would not be "so bizarre that Congress could not have intended it." *Department of Revenue* v. *ACF Industries, Inc.*, 510 U.S. 332, 347 (1994) (internal quotation marks and citation omitted).

iii. Respondent next contends that, under the plain-text interpretation, whether an individual has a remedy under the anti-retaliation provision will depend on when the individual suffers retaliation, and that employers committing retaliatory acts will not necessarily know that employees have a cause of action under the anti-retaliation provision. See Br. 37-38. The government similarly contends that two individuals who make the same internal disclosure will have different remedies if one reports to the SEC but the other does not. See U.S. Br. 24.

Those observations are correct—and that is precisely what Congress intended. As this Court has explained, the purpose of the Dodd-Frank Act was to incentivize "reporting to federal authorities." *Lawson*, 134 S. Ct. at 1175. Given the substantial evidence that Congress intended to protect employees who report their employers'

misconduct to the SEC, see Pet. Br. 24-26, there is nothing out of the ordinary, much less absurd, about conditioning the availability of the anti-retaliation remedy on such reporting—regardless of whether an employer is aware of the reporting at the time of the retaliatory act.

In a related vein, respondent and the government contend that the plain-text interpretation would lead to odd outcomes because the whistleblower provisions do not specify a substantive or temporal connection between the report to the SEC that qualifies an individual as a "whistleblower" and the disclosure that triggers the retaliation underlying the individual's claim. Specifically, the disclosure protected under the third clause of the anti-retaliation provision need not relate to the securities laws, as long as the whistleblower has made a separate report of a securities-law violation to the SEC. See Br. 38 n.13; U.S. Br. 25-26.

Again, those contentions are valid—but there is no resulting absurdity that would justify ignoring Congress's unambiguous command to apply the "whistleblower" definition "[i]n this section." Congress could reasonably have made the policy judgment that individuals who report securities-law violations to the SEC should receive broad protection over time against retaliation for a variety of disclosures. That would be consistent with the Act's broader goal of promoting reporting to the SEC.

In any event, respondent's alternative interpretation leads to a far more substantial oddity. Under that interpretation, an individual can have a cause of action under the anti-retaliation provision solely for making a disclosure that bears no relation to the securities laws. Consider, for instance, petitioner's hypotheticals involving employees fired for reporting drug dealing to the Federal Bureau of Investigation or mail fraud to a supervisor. See Pet. Br. 38. Other than calling those hypotheticals "far-

fetched," Br. 40 n.15, respondent offers no answer to them. Nor does respondent offer any reason to believe that Congress thought it was enacting a whistleblower provision for conduct unrelated to the securities laws when it enacted the Dodd-Frank Act.

Indeed, the SEC's rule underscores the absurdity of respondent's interpretation. In an evident effort to eliminate that absurdity, the SEC retained a remnant of the requirement from the "whistleblower" definition that the reported misconduct relate to a "violation of the securities laws" at the same time that it (impermissibly) dispensed with the remainder of the statutory definition. See 17 C.F.R. 240.21F-2(b)(1)(i). The plain-text interpretation is superior to respondent's because it requires at least some nexus to a securities-law violation without any of the jujutsu of the SEC's rule.

c. Respondent's and the government's remaining textual criticisms of the plain-text interpretation lack merit and certainly do not give rise to absurdity.

The government contends that, because the *other* defined terms in Section 78u-6(a) do not appear in the anti-retaliation provision, the definition of "whistleblower" should not be applied to that provision either. See U.S. Br. 19-20. But that is an extremely dubious inference. It is directly contrary to Congress's command that the "whistleblower" definition "shall apply" "[i]n this section." 15 U.S.C. 78u-6(a). And it overlooks the fact that Congress expressly cross-referenced the anti-retaliation regime in the definitions provision. See 15 U.S.C. 78u-6(a)(5) (citing 15 U.S.C. 78u-6(h)(2)(D)(i)). The government provides no affirmative reason to believe that Congress intended the "whistleblower" definition to apply only in subsections (b), (c), (d), (e), (g), and (i), but not in subsection (h).

The government's argument that "numerous federal statutes use 'whistleblower' in its ordinary sense," U.S. Br. 16 n.6, is simply misleading. The only support the government musters for that proposition is a series of citations to the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16. But that Act *defines* "whistleblowers" as "individuals who make disclosures described" in another provision, *id.* § 2(a)(3), and it does not even use the term "whistleblower" in its operative provisions.[1] In fact, statutory definitions of "whistleblower" appear to be the rule, not the exception. See, *e.g.*, 7 U.S.C. 26(a)(7); 38 U.S.C. 323(g)(2)-(3); 49 U.S.C. 30172(a)(6).

Respondent notes that Congress used not just "whistleblower," but also "employee" and "individual," in the anti-retaliation provision. See Br. 26. But that does not suggest that the terms are coterminous; it merely reflects the reality that all whistleblowers are also employees and individuals. Congress's use of other terms in the anti-retaliation provision does not override the express limitation of anti-retaliation protection to "whistleblower[s]"—especially because that limitation replaced an earlier version of the provision that reached all "employee[s]." See Pet. Br. 25.

Respondent further contends that applying the statutory definition of "whistleblower" to the anti-retaliation provision would "arguably" render surplusage the references to the SEC in the first and second clauses of that provision. See Br. 31. As a preliminary matter, respondent's contention cannot easily be reconciled with the history of the anti-retaliation provision: Congress amended an earlier version of the provision to include the defined

[1] Puzzlingly, the government cites two subsections of the Act, Section 4(a) and Section 4(b), that do not even use the term "whistleblower." See U.S. Br. 16 n.6.

term "whistleblower" at a time when the phrases "to the Commission" and "of the Commission" already appeared in what are now the first two clauses. See Pet. Br. 25.

More broadly, there is no surplusage sufficient to render the plain-text interpretation absurd. The references to the SEC in the first and second clauses merely define (and limit) the conduct protected by those clauses. They do not duplicate the "whistleblower" definition, which establishes the category of individuals entitled to protection. And language that clarifies or "remove[s] any doubt" about an issue does not constitute impermissible surplusage. *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 226 (2008) (citation omitted).

Finally on this score, respondent simply invents a new canon of statutory interpretation: the canon of the lowercase letter. See Br. 25, 35. But there is no such canon. While the contagion of Defined Terms has spread from contracts into legal briefs, it has not yet infected the United States Code: Congress does not usually capitalize otherwise uncapitalized terms to signal that they bear a statutorily defined meaning. See, *e.g.*, 1 U.S.C. 1-8. Congress's failure to capitalize "whistleblower" is thus of no import.

Respondent's desperate efforts to find a foothold for ambiguity in the statutory text are telling. Because there is no valid reason to deviate from the plain text of the statute, respondent's contrary interpretation should be rejected.

3. The Legislative History Does Not Support Respondent's Interpretation

Not only is respondent's interpretation of the anti-retaliation provision contrary to the text, but it also finds no support in the legislative history.

a. As respondent seemingly concedes (Br. 42), the purpose of Section 922(a) was to create a "new, robust whistleblower program designed to motivate people who know of securities law violations to tell the SEC." S. Rep. No. 176, 111th Cong., 2d Sess. 38 (2010). Because the statute was intended to channel information about securities-law violations to the SEC, Congress limited both the reward and the anti-retaliation provisions to whistleblowers who reported such information in a manner satisfactory to the SEC. The legislative history is thus consistent with the plain text.

Respondent's efforts to put a different spin on the legislative history are unavailing. Respondent oddly begins by devoting two pages to describing the purpose of the *Sarbanes-Oxley Act's* anti-retaliation provision, contending that the plain-text interpretation of the Dodd-Frank Act "frustrat[es] Sarbanes-Oxley's key framework." Br. 33-34. This case, however, involves the Dodd-Frank Act, not the Sarbanes-Oxley Act, which was enacted eight years earlier. And limiting anti-retaliation protection under the Dodd-Frank Act to "whistleblower[s]" in no way interferes with the Sarbanes-Oxley Act's regime. Rather, it gives independent effect to that Act's anti-retaliation provision and leaves it to serve its intended purpose of protecting whistleblowers who report fraudulent activity more broadly. See Pet. Br. 26-30.

When it comes to the Dodd-Frank Act itself, respondent flails. As discussed above, Congress initially defined the persons protected by the anti-retaliation provision to include all "employee[s]" and later limited the protected persons to "whistleblower[s]." See p. 13. Respondent contends that the change did "nothing to modify the scope of the statute," because the protected *conduct* focused on providing information to the SEC both immediately before and immediately after the change. Br. 41-42. But

even if that is correct—and it is far from clear that it is—it misses the point: Congress specifically abandoned broader language in favor of narrower language in describing the protected *category of individuals*.

Respondent primarily focuses on the fact that the third clause of the anti-retaliation provision was a last-minute addition, thereby suggesting that Congress failed to notice that the third clause was incorporating the definition of "whistleblower." See Br. 40-41. Like the government, however, respondent seemingly takes the position that the definition of "whistleblower" does not apply to the *entire* anti-retaliation provision, including the first and second clauses—which long predated the third clause. See Br. 24; U.S. Br. 14-17. Respondent thus cannot argue that the incorporation of the definition in the anti-retaliation provision was some sort of last-minute drafting error. And applying the definition of "whistleblower" to the third clause, like the first and second, is entirely consistent with Congress's broader goal of promoting reporting to the SEC.

b. The government goes a step further than respondent, suggesting that Congress added the third clause in order to address shortcomings in the Sarbanes-Oxley Act's anti-retaliation regime. See U.S. Br. 2, 27-28. That theory is based on three excerpts from the legislative history, all referencing whistleblowers at Lehman Brothers who reported internally and then suffered retaliation. Two of the excerpts, however, come from the congressional investigation into Lehman Brothers in the wake of the financial crisis. See 156 Cong. Rec. 7083-7084 (2010); *Public Policy Issues Raised by the Report of the Lehman Bankruptcy Examiner: Hearing Before the House Committee on Financial Services*, 111th Cong. 68, 75-77, 128, 175-178 (2010). Nothing in the legislative history connects

those references to Congress's consideration of the anti-retaliation provision of the Dodd-Frank Act.

In fact, the third excerpt affirmatively refutes such a connection. The government cites comments by Senator Menendez concerning retaliation against Lehman Brothers employees. See U.S. Br. 2. But Senator Menendez offered those comments while proposing an amendment to the anti-retaliation provision of the *Sarbanes-Oxley Act*. See 156 Cong. Rec. 7236 (2010).

Senator Menendez's proposed amendment, moreover, bore no resemblance to what would eventually become the anti-retaliation provision of the Dodd-Frank Act. It did not suggest that whistleblowers covered by the Sarbanes-Oxley Act should have a direct cause of action in federal court, double backpay, or a six-year statute of limitations. Instead, it sought to ensure that, *inter alia*, those whistleblowers had the right to a jury trial; 180 days, instead of 90, to file a claim; and protection from pre-dispute arbitration agreements. See S. Amend. 3841 to S. Amend. 3739 to Restoring American Financial Stability Act of 2010, S. 3217, 111th Cong. S. 3268 (2010).

Congress ultimately *adopted* those improvements to the Sarbanes-Oxley Act's anti-retaliation regime in Section 922(c) of the Dodd-Frank Act. Congress's decision in Section 922(c) to bolster the remedy provided to whistleblowers under the Sarbanes-Oxley Act negates any inference that Congress intended to extend the protections of *Section 922(a)* to such persons when it added the third clause to the Dodd-Frank Act's anti-retaliation provision.

B. The SEC's Contrary Interpretation Is Not Entitled To Deference

Respondent and the government (in its fallback argument) contend that this Court should defer to the SEC's interpretation of the Dodd-Frank Act's anti-retaliation

provision. See Br. 21-23, 42-54; U.S. Br. 32-35. That contention lacks merit for two reasons.

1. Despite his best efforts, respondent has failed to identify any relevant ambiguity in the Dodd-Frank Act's whistleblower provisions. The plain text compels the conclusion that the anti-retaliation provision applies only to a "whistleblower," as the statute defines the term. Where, as here, Congress has "directly spoken to the precise question at issue," the Court should not proceed past the first step of the *Chevron* inquiry. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

2. Even if the Court were to reach *Chevron*'s second step, the SEC's interpretation would warrant no deference because the SEC "fail[ed] to follow the correct procedures in issuing the regulation." *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2125 (2016). The SEC initially proposed a rule consistent with the statutory definition of "whistleblower." See 75 Fed. Reg. 70,488, 70,489, 70,519 (Nov. 17, 2010). In its final rule, however, the SEC announced an alternative definition of "whistleblower" for purposes of the anti-retaliation provision that abandoned the statutory requirement of reporting to the SEC. See 76 Fed. Reg. 34,300, 34,301-34,304, 34,363 (June 13, 2011). As a result, the proposed rule failed to give fair notice of the contents of the final rule, thereby violating a basic requirement of notice-and-comment rulemaking. See *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 174 (2007).

a. Neither respondent nor the government seriously disputes that this about-face occurred. Instead, they try to salvage the SEC's interpretation by raising two threshold objections. Neither withstands scrutiny.

i. Respondent and the government first contend that petitioner's argument that *Chevron* deference is not warranted because the SEC's rule was procedurally defective was forfeited below and is not fairly included in the question presented. See Br. 43-45; U.S. Br. 35. That contention lacks merit.

As to the lower courts: petitioner argued below, in response to respondent's argument, that the SEC's interpretation was not entitled to *Chevron* deference. See Pet. C.A. Br. 21-27. The rule's procedural defects are simply an additional reason why deference is not warranted—or a "new argument to support what has been [petitioner's] consistent claim," which this Court has long permitted. *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995); see generally Stephen Shapiro et al., *Supreme Court Practice* § 6.26(b), at 466 (10th ed. 2013).

As to this Court: petitioner's petition presented the question "[w]hether the anti-retaliation provision for 'whistleblowers' in the Dodd-Frank [Act] extends to individuals who have not reported alleged misconduct to the [SEC] and thus fall outside the Act's definition of a 'whistleblower.'" Pet. i. Respondent's proposed answer to that question primarily rests on the doctrine of *Chevron* deference. See, *e.g.*, Br. 21-25. Having invoked (and relied so heavily on) that doctrine, respondent cannot fairly argue that petitioner is barred from offering a particular reason why *Chevron* deference is not warranted—an issue that is plainly bound up in the question presented. See, *e.g.*, *Vance* v. *Terrazas*, 444 U.S. 252, 258-259 n.5 (1980).

ii. Respondent (but not the government) next contends that petitioner's argument that *Chevron* deference is not warranted because the SEC's rule was procedurally defective is time-barred under the Administrative Procedure Act (APA). See Br. 45-46. But that misapprehends the nature of petitioner's argument. Petitioner is not

bringing an affirmative claim under the APA to invalidate the SEC's rule or otherwise to take action against the SEC. Instead, petitioner is merely arguing, as part of its defense against a private lawsuit, that the rule's procedural deficiencies preclude deference. It would be passing strange if the question whether an agency interpretation is entitled to *Chevron* deference turned on the timing of litigation implicating the interpretation—particularly because parties will often have no incentive affirmatively to challenge a procedurally defective rule during the APA's limitations period.

b. Respondent and the government offer only the feeblest defense of the SEC's facially deficient rulemaking process.

i. Respondent plucks excerpts out of the SEC's notice of proposed rulemaking in an effort to show that the SEC was concerned about internal reporting. See Br. 47-48. But respondent fails to identify any indication in the notice that the SEC was considering expanding the anti-retaliation provision to cover those who only report internally. Respondent is left to fill in the gaps himself, postulating that "one obvious difficulty with balancing [the whistleblower program and internal reporting] is that an employee might fear retaliation if she reports internally" and that "[a]n obvious solution is to protect internal reporters from retaliation." Br. 48. But the SEC did not suggest that possibility in its notice.

Respondent fares no better when he addresses the comments submitted in response to the notice. He cites three out of the 240 submitted comments, but those comments do little to show that interested parties were generally on notice of the potential expansion of the definition

of "whistleblower." See Br. 48-49.[2] And the SEC did not cite those comments in unexpectedly adopting its expanded definition. See 76 Fed. Reg. at 34,301-34,304.

Not only did the SEC fail to provide fair notice, but it also gave no "adequate reasons for its decision[]" to abandon the "whistleblower" definition for part of the rule. *Encino Motorcars*, 136 S. Ct. at 2125. Respondent cites one reference to internal reporting in the final rule, but that reference occurred in the context of discussing eligibility under the award provisions. See Br. 50 (citing 76 Fed. Reg. at 34,325); see also U.S. Br. 8 (citing similar additional references). The reference does not *explain* the SEC's expansion of the definition of "whistleblower" for purposes of the anti-retaliation provision. The SEC's explanation was as deficient as its notice, and the interpretation in the final rule is invalid for that reason as well.

ii. As a last-ditch effort to defend the SEC's rule, respondent (but not the government) contends that the SEC's initial rule, and the SEC's subsequent interpretive guidance, were valid interpretive rules that did not require notice and comment and that warrant *Chevron* deference. See Br. 51-54. That contention lacks merit.

As to the SEC's initial rule: the SEC did not issue an interpretive rule in the first instance. It chose to proceed through notice-and-comment rulemaking, and the question now is whether the interpretation in the resulting

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[2] One of respondent's amici suggests that members of the business community previously supported internal reporting but have now abandoned that position. See Sen. Grassley Br. 13-14. That is incorrect. The Chamber of Commerce, for example, supported making award eligibility *contingent* on an employee's use of an internal reporting system where available—a position the SEC rejected in its final rule. The Chamber never proposed providing anti-retaliation protection to those who *only* report internally. See Chamber Br. 21-22.

rule is entitled to *Chevron* deference. For the reasons already discussed, it is not. The mere possibility that the agency *could* have proceeded with an interpretive rule cannot excuse the actual rule's procedural defects. Otherwise, an agency could sidestep the requirements of notice-and-comment rulemaking after the fact by repackaging a defective rule as an interpretive rule. In any event, it is doubtful that the SEC would have opted for an interpretive rule in the first place, because such a rule would have lacked the "force and effect of law." *Perez* v. *Mortgage Bankers Association*, 135 S. Ct. 1199, 1204 (2015) (citation omitted).

As to the SEC's interpretive guidance: that guidance merely purported to "clarify the meaning and application" of parts of the initial rule and attempted to provide the explanation absent in the initial rule for the expansion of the "whistleblower" definition. 80 Fed. Reg. 47,829 (Aug. 10, 2015). As petitioner has explained, however, a *post hoc* interpretation of a procedurally defective rule cannot cure its deficiencies. See Pet. Br. 44.

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The SEC's rulemaking process was highly irregular. But even if it were otherwise, respondent cannot resolve the fundamental inconsistency between the statutory text, which provides one definition of "whistleblower" for purposes of the Dodd-Frank Act's whistleblower provisions, and the SEC's rule, which provides two. Because the statutory text is unambiguous, the Court need not even consider the SEC's rule.[3] Instead, the Court need

[3] Should the Court somehow conclude both that the statutory text is ambiguous and that the procedural defects in the SEC's rulemaking can be excused, it should order supplemental briefing to consider whether *Chevron* should be overruled.

only hold, consistent with the plain text of the statute, that an individual must report a securities-law violation to the SEC in order to bring a claim under the Dodd-Frank Act's anti-retaliation provision. The Ninth Circuit's contrary interpretation of the statute is unsustainable, and its judgment should therefore be reversed.

Respectfully submitted.

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