No. 16-1276

IN THE

Supreme Court of the United States

DIGITAL REALTY TRUST, INC.,

Petitioner,

v.

PAUL SOMERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

KATE COMERFORD TODD
STEVE P. LEHOTSKY
JANET GALERIA
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

STEVEN J. PEARLMAN
Counsel of Record
EDWARD C. YOUNG
PROSKAUER ROSE LLP
70 W. Madison, Suite 3800
Chicago, IL 60602
(312) 962-3550
spearlman@proskauer.com

Counsel for Amicus Curiae

May 25, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

Page

Page

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

The Chamber's members have a strong interest in the application of the "whistleblower" provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act" or "Act") in accordance with the terms of the statute and the purposes of the Act, and in the speedy dismissal of whistleblower retaliation claims that fall outside the Act's scope. Meritless claims and expanding litigation costs have a direct impact on the viability, growth, and survival of businesses nationwide.

---

1. Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *Amicus Curiae*'s intention to file this brief. Pursuant to Rule 37.6, *Amicus Curiae* affirms that no party or party's counsel authored this brief in whole or in part. And no party, party's counsel, or other person other than *Amicus Curiae*, its counsel, and its members made a monetary contribution intended to fund this brief's preparation or submission.

The interpretation of the Dodd-Frank Act espoused by the Ninth Circuit in this case would greatly expand the number of employees authorized to pursue the enhanced remedies of the Act, and the period of time in which they may sue for alleged retaliation, without yielding the law enforcement benefits Congress intended when it enacted a "bounty" and heightened protections for persons who complain to the Securities and Exchange Commission. The carefully crafted procedures established in 2002 in the Sarbanes-Oxley Act would become largely moot and obsolete under the Ninth Circuit's interpretation, depriving Chamber members of the limitations and protections established by that earlier law.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Dodd-Frank Act defines "whistleblower" to mean "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws *to the Commission*." 15 U.S.C. § 78u-6(a)(6) (emphasis added). This case presents the question whether an individual who does not satisfy the express statutory definition of "whistleblower" may nevertheless seek relief under the Act's anti-retaliation protections for whistleblowers.

This issue is important, frequently recurring, and the subject of a split among the federal courts of appeals. The Fifth Circuit has correctly held that the Dodd-Frank Act's anti-retaliation provision protects only "whistleblowers"—*i.e.*, individuals who provide information relating to a violation of the securities laws to the Securities and Exchange Commission ("SEC" or the "Commission").

See Asadi v. G.E. Energy (USA), LLC, 720 F.3d 620 (5th Cir. 2013). By contrast, divided panels of the Ninth and Second Circuits have held that the Dodd-Frank Act's anti-retaliation provision protects all those who report to the SEC and those who report internally. *See Somers v. Digital Realty Trust, Inc.*, 850 F.3d 1045 (9th Cir. 2016); *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015).

The interpretation of the Dodd-Frank Act espoused by the Ninth and Second Circuits has profound implications for employers across the country and in every industry. If allowed to stand, it would severely disrupt the carefully constructed anti-retaliation programs established by Congress, and open the door to countless lawsuits that Congress never intended Dodd-Frank to cover.

For these and additional reasons discussed below, this Court should grant the petition for certiorari and reverse the decision below.

ARGUMENT

I. The Ninth Circuit's Decision Is Incorrect and Deepens A Conflict Among The Circuits

The Dodd-Frank Act sought to further enforcement of the securities laws by establishing a "bounty" for "whistleblowers" who provide information to the SEC that leads to successful enforcement actions. 15 U.S.C. § 78u-6; *see* S. Rep. No. 111-176, at 110 (2010) ("The Whistleblower Program aims to motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated securities laws and recover money for victims of financial fraud.").

A "whistleblower" is defined in the Act as:

> [A]ny individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws *to the Commission*, in a manner established, by rule or regulation, by the Commission.

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

Whistleblowers who assist in successful enforcement actions are entitled to recover 10-30% of "what has been collected of the monetary sanctions imposed in th[at] action." § 78u-6(b)(1).[2]

In addition to granting this bounty to "whistleblowers," the Act also protects them from retaliation, providing:

> No employer may discharge, demote, suspend, threaten, harass . . . or in any other manner discriminate against[] a *whistleblower* in the terms and conditions of employment because of any lawful act done by the *whistleblower*—
>
> (i) in providing information to the Commission in accordance with this section;

2. *See* 156 Cong. Rec. S5929 (daily ed. July 15, 2010) (statement of Sen. Chris Dodd) ("The Congress intends that the SEC make awards that are sufficiently robust to motivate potential whistleblowers to share their information and to overcome the fear of risk of the loss of their positions. Unless the whistleblowers come forward, the Federal Government will not know about the frauds and misconduct.").

> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. § 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

§ 78u-6(h)(1)(A) (emphasis added). Whistleblowers who experience retaliation in violation of this provision may sue directly in federal district court as many as 10 years after the retaliatory action, and monetary damages are doubled. § 78u-6(h)(1)(B)(i), (h)(1)(B)(iii), (h)(1)(C)(ii).

The language of Section 78u-6 unambiguously provides a cause of action only to individuals who have provided information to the SEC. The statute clearly defines "whistleblowers" as those who "provide[] information relating to a violation of the securities laws to the Commission, in a manner established" by the Commission's whistleblower "bounty" rules. § 78u-6(a)(6).

And the Fifth Circuit correctly applied the statute according to its plain terms in *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620 (5th Cir. 2013).

In *Asadi*, an employee made an internal report regarding a potential violation of securities laws, but did not report the potential violation to the SEC. *Id.* at 621. The employee was later discharged and filed a complaint

in district court, alleging a violation of Dodd-Frank's anti-retaliation provision. *Id.* The district court dismissed the complaint, but did not reach the issue regarding the scope of Dodd-Frank's anti-retaliation provision. *Id.*

The Fifth Circuit affirmed, holding that Dodd-Frank's anti-retaliation provision protects only individuals who report information to the SEC. The court explained that the "whistleblower" definition in Section 78u-6(a)(6) establishes "who is protected," while the anti-retaliation provision in Section 78u-6(h)(1)(A) specifies "what actions" taken by that person are protected. *Id.* at 624-26. The court stressed that any other reading of Section 78u-6 "would read the words 'to the Commission' out of the definition of 'whistleblower' for purposes of the whistleblower-protection provision." *Id.* at 628. The court declined to defer to the SEC's regulation because the statute is "unambiguous[]," and because the regulation "redefines 'whistleblower' more broadly" than the statute. *Id.* at 629-30.[3]

---

3. At least twelve district courts have followed the Fifth Circuit's interpretation. *See Olekanma v. Wolfe*, No. 15-cv-0984, 2017 WL 784121, at *3 (D. Md. Mar. 1, 2017); *Deykes v. Cooper-Standard Auto., Inc.*, No. 16-cv-11828, 2016 WL 6873395, at *2-4 (E.D. Mich. Nov. 22, 2016); *Lamb v. Rockwell Automation, Inc.*, No. 15-cv-1415, 2016 WL 4273210, at *3-4 (E.D. Wis. Aug. 12, 2016); *Puffenbarger v. Engility Corp.*, 151 F. Supp. 3d 651, 663-65 (E.D. Va. 2015); *Verble v. Morgan Stanley Smith Barney, LLC*, 148 F. Supp. 3d 644, 650 (E.D. Tenn. 2015), *aff'd on other grounds,* No. 15-cv-6397, 2017 WL 129040 (6th Cir. Jan. 13, 2017), *cert. denied,* No. 16-cv-946, 2017 WL 434012 (U.S. Mar. 20, 2017); *Davies v. Broadcom Corp.*, 130 F. Supp. 3d 1343, 1348-49 (C.D. Cal. 2015); *Duke v. Prestige Cruises Int'l, Inc.*, No. 14-cv-23017, 2015 WL 4886088, at *3 (S.D. Fla. Aug. 14, 2015), *appeal filed*, No. 16-cv-15426, 2015 WL 4886088 (11th Cir. Aug 11, 2016); *Verfuerth v.*

The Second and Ninth Circuits have expressly rejected *Asadi*, deviating from the plain terms of the statute. In *Berman v. Neo@Ogilvy LLC*, a divided panel of the Second Circuit held that Section 78u-6 is ambiguous and deferred to the SEC's regulation extending protection to anyone who makes a report, whether the report is made internally or to the SEC. 801 F.3d at 146 (concluding that "the pertinent provisions of Dodd-Frank create a sufficient ambiguity to warrant our deference to the SEC's interpretive rule"). In the decision below, a divided panel of the Ninth Circuit went even further and held that Dodd-Frank unambiguously compels the interpretation adopted by the SEC. *Somers*, 850 F.3d at 1047 (concluding that "the SEC regulation correctly reflects congressional intent to provide protection for those who make internal disclosures as well as to those who make disclosures to the SEC").[4]

Orion Energy Sys., Inc., 65 F. Supp. 3d 640, 643-46 (E.D. Wis. 2014); *Sarkisov v. Stonemor Partners L.P.*, No. 13-cv-04834, 2014 WL 12644016, at *3-4 (N.D. Cal. June 25, 2014); *Englehart v. Career Educ. Corp.*, No. 14-cv-444, 2014 WL 2619501, at *9 (M.D. Fla. May 12, 2014); *Banko v. Apple Inc.*, 20 F. Supp. 3d 749, 755-57 (N.D. Cal. 2013); *Wagner v. Bank of Am. Corp.*, No. 12-cv-00381, 2013 WL 3786643, at *4-6 (D. Colo. July 19, 2013), *aff'd on other grounds,* 571 F. App'x 698, (10th Cir. 2014).

4. At least eighteen district courts have followed the Second and Ninth Circuits. *See Kuhns v. Ledger*, 202 F. Supp. 3d 433, 438 n.1 (S.D.N.Y. 2016); *Wiggins v. ING U.S., Inc.*, No. 14-cv-01089, 2015 WL 8779559, at *1 (D. Conn. Dec. 15, 2015); *Lutzeier v. Citigroup Inc.*, No. 14-cv-183, 2015 WL 7306443, at *2 (E.D. Mo. Nov. 19, 2015); *Wadler v. Bio-Rad Labs., Inc.*, 141 F. Supp. 3d 1005, 1024-27 (N.D. Cal. 2015), *motion to certify appeal denied,* No. 15-cv-02356, 2015 WL 8753292 (N.D. Cal. Dec. 15, 2015); *Dressler v. Lime Energy*, No. 14-cv-07060, 2015 WL 4773326, at *6-16 (D.N.J. Aug. 13, 2015); *Connolly v. Remkes*, No. 14-cv-01344, 2014 WL

The SEC and these Circuits misapprehend the structure of the statute. In finding that the protections of clause (iii) of the anti-retaliation provision extend coverage to a wider class of persons than the Act's definition of "whistleblower," they flip the statute's language: their approach makes *what the retaliation was for* determinative of *who* is protected, rather than first determining *who* is protected under the statutory definition of "whistleblower." The "whistleblower" definition governs clause (iii), not *vice versa*.

This circuit split should be resolved as speedily as possible. The conflict between the Fifth Circuit on the one hand, and the Second and Ninth Circuits on the other, creates an uneven playing field for employers, subjecting them to vastly different risks based on their geographic

---

5473144, at *4-6 (N.D. Cal. Oct. 28, 2014); *Peters v. LifeLock Inc.*, No. 14-cv-00576, 2014 WL 12544495, at *3-7 (D. Ariz. Sept. 19, 2014); *Bussing v. COR Clearing, LLC*, 20 F. Supp. 3d 719, 727-33 (D. Neb. 2014); *Yang v. Navigators Grp., Inc.*, 18 F. Supp. 3d 519, 531-34 (S.D.N.Y. 2014); *Khazin v. TD Ameritrade Holding Corp.*, No. 13-cv-4149, 2014 WL 940703, at *3-6 (D.N.J. Mar. 11, 2014), *aff'd on other grounds*, 773 F.3d 488 (3d Cir. 2014); *Ahmad v. Morgan Stanley & Co.,* 2 F. Supp. 3d 491, 496 n.5 (S.D.N.Y 2014); *Rosenblum v. Thomson Reuters (Mkts.) LLC,* 984 F. Supp. 2d 141, 146-48 (S.D.N.Y. 2013); *Ellington v. Giacoumakis*, 977 F. Supp. 2d 42, 44-46 (D. Mass. 2013); *Murray v. UBS Sec., LLC,* No. 12-cv-5914, 2013 WL 2190084, at *3-7 (S.D.N.Y. May 21, 2013); *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1106-07 (D. Colo. 2013), *aff'd in part on other grounds and dismissed in part,* 566 Fed. App'x. 719 (10th Cir. 2014); *Kramer v. Trans–Lux Corp.*, No. 11-cv-1424, 2012 WL 4444820, at *4 (D. Conn. Sept. 25, 2012); *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 992-95 (M.D. Tenn. 2012); *Egan v. TradingScreen, Inc.,* No. 10-cv-8202, 2011 WL 1672066, at *3-5 (S.D.N.Y. May 4, 2011).

location alone. *See Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754, 1761 (2013) ("[I]t is important to have a uniform interpretation of federal law"); *Kansas v. Marsh,* 548 U.S. 163, 183 (2006) (Scalia, J., concurring) ("Our principal responsibility . . . is to ensure the integrity and uniformity of federal law")). So long as the decision below is left uncorrected, employers in the Second and Ninth Circuits face the threat of liability for claims that Congress never intended.

II. The Ninth Circuit's Decision Presents An Issue of Exceptional Importance

The Ninth Circuit's counter-textual interpretation of the Dodd-Frank Act, if left to stand, will result in a number of harmful consequences. Among them, it will undermine the carefully constructed anti-retaliation provisions and procedures of the Sarbanes-Oxley Act, and impose unwarranted litigation costs on employers.

Less than 10 years before enacting the Dodd-Frank Act, Congress established a comprehensive regime to protect, among others, the "internal" whistleblowers that the Ninth Circuit sought to cover with its reading of Dodd-Frank. In the Sarbanes-Oxley Act, Congress authorized employees to file a complaint with the U.S. Department of Labor ("DOL") if they believe they have suffered retaliation for reporting, internally or externally, mail fraud, wire fraud, bank fraud, securities fraud, a violation of any rule or regulation of the SEC, or any provision of federal law relating to fraud against shareholders. 18 U.S.C. § 1514A(a)-(b). The complaint is investigated by the Occupational Safety and Health Administration ("OSHA"), which renders findings and may order reinstatement of

an employee who has been improperly removed from his or her position. 18 U.S.C. §§ 1514A(b)(2)(A), (c)(2)(A); 29 C.F.R. Part 1980.104.

Either party may appeal OSHA's decision to an Administrative Law Judge ("ALJ"), who will permit discovery, conduct a bench trial, and issue a decision that may be appealed to the Administrative Review Board ("ARB"). 29 C.F.R. Parts 1980.106, 107, 109, 110. An ARB decision may be appealed to a federal court of appeals. 18 U.S.C. § 1514A(b)(2)(A); 49 U.S.C. § 42121(b)(4). If a final DOL decision does not issue within 180 days of the employee's initial complaint, the complainant has the option of removing the case to a federal district court, where they may proceed *de novo*. 18 U.S.C § 1514A(b)(1)(B).

The Sarbanes-Oxley regime imposes important constraints. It provides for initial investigation by the DOL, which can lead to the prompt termination of baseless claims. Resolution within the Department is the preferred outcome, although complainants may "kick-out" the case to federal court in certain circumstances. The limitations period is short—the Sarbanes-Oxley Act prescribed a 90-day limitation period, which the Dodd-Frank Act extended to 180 days. 18 U.S.C. § 1514A(b)(2)(D); *see* H.R. 4173, 111th Cong. § 922(c)(1) (2010). Monetary relief is limited to compensatory damages, which may include back pay, litigation costs, and reasonable attorneys' fees, § 1514A(c)(2)(B)-(C).

If claimants may proceed under the Dodd-Frank Act's whistleblower provision even when they do not meet its definition of "whistleblower," there will be a proliferation

of whistleblower litigation under the Dodd-Frank Act, and the strictly circumscribed scheme of the Sarbanes-Oxley Act will be undermined. *See* Mark J. Oberti, *Employment Law: Recent Developments in Retaliation and Whistleblowing Law*, 69 The Advocate 31, 38 (2014) ("Depending on how this conflict is resolved in various jurisdictions, it could result in a dramatic reduction of OSHA charges of SOX retaliation and a significant increase in federal court SOX litigation brought through Dodd-Frank."). Extending the statute of limitations period to bring whistleblower-retaliation claims to 10 years from 180 days will significantly increase the number of stale cases brought, as claimants who are timed-barred under the Sarbanes-Oxley Act proceed under the Dodd-Frank Act instead. Furthermore, even claimants who are not otherwise time-barred will often prefer the double damages available under the Dodd-Frank Act; certainly, the plaintiffs' bar will feel the inexorable pull of a greater recovery.

That plainly is not what Congress intended when it narrowly defined "whistleblower" in the Dodd-Frank Act and simultaneously amended several features of the more capacious Sarbanes-Oxley Act's regime. It would make no sense for Congress to retain a confined limitations period for Sarbanes-Oxley Act claims, while simultaneously giving those same claimants—on the same facts—as many as 10 years to sue for the more generous relief available under subsection 78u-6(h)(1). *See Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) ("We resist a reading of [a statute] that would render superfluous an entire provision passed in proximity as part of the same Act."); *Bilski v. Kappos*, 561 U.S. 593, 607-08 (2010) ("[T]he canon against interpreting any statutory provision in a manner that

would render another provision superfluous . . . applies to interpreting any two provisions in the U.S. Code, even when Congress enacted the provisions at different times." (citation omitted)).

What is more, construing the Dodd-Frank Act to provide a cause of action for a violation of the Sarbanes-Oxley Act without a requirement to exhaust administrative remedies deprives employers of the considerable benefits that the Sarbanes-Oxley Act's administrative scheme provides, as proceeding through the DOL's OSHA fosters early settlements and dismissals. *See* Occupational Safety and Health Administration, CPL 02-03-007, *Whistleblower Investigations Manual* 6-12 to -13 (2016) ("Voluntary resolution of disputes is often desirable, and investigators are encouraged to actively assist the parties in reaching an agreement, where appropriate. It is OSHA policy to seek settlement of all cases determined to be meritorious prior to referring the case for litigation. Furthermore, at any point prior to the completion of the investigation, OSHA will make every effort to accommodate an early resolution of complaints in which both parties seek it.").

CONCLUSION

For the foregoing reasons, the Chamber respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

KATE COMERFORD TODD
STEVE P. LEHOTSKY
JANET GALERIA
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

STEVEN J. PEARLMAN
Counsel of Record
EDWARD C. YOUNG
PROSKAUER ROSE LLP
70 W. Madison, Suite 3800
Chicago, IL 60602
(312) 962-3550
spearlman@proskauer.com

Counsel for Amicus Curiae

May 25, 2017