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## Whistle While You Work: Interpreting Retaliation Remedies Available to Whistleblowers in the Dodd-Frank Act

Max Birmingham

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# WHISTLE WHILE YOU WORK: INTERPRETING RETALIATION REMEDIES AVAILABLE TO WHISTLEBLOWERS IN THE DODD-FRANK ACT

*Max Birmingham\**

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## INTRODUCTION

Courts engage in judicial activism when they interpret laws without regards to a canon of construction. Black’s Law Dictionary defines judicial activism as a “philosophy of judicial decision-making whereby judges allow their personal views about public policy, among

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other factors, to guide their decisions.”<sup>1</sup> When courts engage in judicial activism they are not performing legal analysis but rather make law which is the function of the Legislative Branch. This is because courts are not interpreting what the law is, but instead state what they feel the law should be, which defeats the purpose of and usurps the power of lawmakers.

The Second Circuit,<sup>2</sup> the Ninth Circuit,<sup>3</sup> and several Federal District Courts<sup>4</sup> have engaged in judicial activism when they held that whistleblowers are entitled to retaliation remedies under the Dodd-Frank Act (DFA) when the wrongdoing is not reported to the Securities and Exchange Commission (SEC) by claiming that the plain and unambiguous statutory language, specifically a clearly defined term, is ambiguous, and proceeded to promote their views on how the statute should be written. The DFA clearly articulates that the wrongdoing must be reported “to the Commission,”<sup>5</sup> yet these courts have somehow interpreted this to be ambiguous.

The Second Circuit’s decision in *Berman* acknowledged that the DFA anti-retaliation whistleblower statute is plain on its face but held that such an interpretation renders the statute ambiguous when it proclaimed that a “‘mechanical use of a statutory definition’ is not always warranted.”<sup>6</sup> The court did not fully articulate how the statute is ambiguous. The dissenting opinion notes that the majority opinion uses circular reasoning in its analysis by claiming that by using a mechanical use the statute is ambiguous.<sup>7</sup> A “mechanical use” does not

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1. *Judicial Activism*, BLACK’S LAW DICTIONARY (10th ed. 2014).

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

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

4. *See, e.g., Yang v. Navigators Group, Inc.*, 18 F. Supp. 3d 519, 533-34 (S.D.N.Y. 2014); *see also Khazin v. TD Ameritrade Holding Corp.*, No. 13-4149 (SDWQ)(MCA), 2014 WL 940703, at \*3-6 (D.N.J. Mar. 11, 2014); *Arshad v. Tortoise Capital Advisors, LLC*, No. 13-2267-KHV, 2014 WL 707235, at \*2-3 (D. Kan. Feb. 24, 2014); *Ahmad v. Morgan Stanley & Co.*, 2 F. Supp. 3d 491, 495-97 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); *Murray v. UBS Secs., LLC*, No. 12-5914 (JMF), 2013 WL 2190084, at \*4 (S.D.N.Y. May 21, 2013); *Ellington v. Giacoumakis*, 977 F. Supp. 2d 42, 44-46 (D. Mass. 2013); *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1106-07 (D. Colo. 2013); *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 995 (M.D. Tenn. 2012); *Kramer v. Trans-Lux Corp.*, No. 3:11CV1424 (SRU), 2012 WL 4444820, at \*3-4 (D. Conn. Sept. 25, 2012); *Egan v. Tradingscreen, Inc.*, No. 10 Civ. 8202, 2011 WL 1672066, at \*4-7 (S.D.N.Y. May 4, 2011).

5. 15 U.S.C.A. § 78u-6(a)(6) (West, effective July 22, 2010).

6. *Berman*, 801 F.3d at 154.

7. *Id.* at 157 (Dennis, J., dissenting) (“The majority assumes its own conclusion, claiming that ‘subdivision (iii) [of 15 U.S.C. § 78u-6(h)(1)(A)] . . . purports to protect employees from retaliation for making reports required or protected by Sarbanes-Oxley’. Maj. Op. at 25 (emphasis added). That is a bad misreading, tantamount to a misquotation.”).

necessarily mean that the statute is ambiguous. Surprisingly, the majority bluntly admits “[i]f we had to choose between reading the statute literally or broadly to carry out its apparent purpose, we might well favor the latter course.”<sup>8</sup> The Supreme Court of the United States held that the instance in which it is apropos to depart from a mechanical use of a statutory definition throughout a statute is when it would create an “obvious incongruity” or frustrate an evident statutory purpose for a particular provision.<sup>9</sup>

The Ninth Circuit held that the term “whistleblower” can have different meanings in different contexts by misapplying the *in pari materia* canon of construction, as well as projecting its own interpretation of legislative and Congressional intent from the text of the statute instead of the actual legislative history.<sup>10</sup> The court first argued that the term “to the Commission” in DFA anti-retaliation whistleblower statute can have a different meaning by context,<sup>11</sup> but does not articulate how the context can otherwise be interpreted through a canon of construction. The court cites a treatise but fails to provide the full language of the treatise, which explains that when a word that defined is not clear, the meaning of the definition is almost always the ordinary meaning of the word.<sup>12</sup> Furthermore, the court explained that the legislative history suggests a broad interpretation of “to the Commission” but not by the legislative history itself, but rather by the language of the statute.<sup>13</sup> This is a statutory interpretation argument masked under a legislative argument in an attempt to obfuscate importing its views on how the statute should have been written.

In a unanimous decision, the Supreme Court of the United States reversed the Second and Ninth Circuits and held that the plain language of “to the Commission” in the SEC anti-retaliation whistle-

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8. *Id.* at 155.

9. *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

10. *See Somers v. Dig. Realty Tr., Inc.*, 850 F.3d 1045 (9th Cir. 2017) (“The case must be seen against the background of twenty-first century statutes to curb securities abuses. Congress enacted the Sarbanes-Oxley Act in 2002, following a major financial scandal. . . . It also provides protections to these and other ‘whistleblower’ employees in the event that companies retaliate against them. 18 U.S.C. § 1514A(a). Sarbanes-Oxley expressly protects those who lawfully provide information to federal agencies, Congress, or ‘a person with supervisory authority over the employee.’ *Id.*”).

11. *Id.* at 1049.

12. *Id.* (“The use of a term in one part of a statute ‘may mean [a] different thing[]’ in a different part, depending on context. (citation omitted). This is true even where, as here, the statute includes a definitional provision: ‘[Statutory d]efinitions are, after all, just one indication of meaning — a very strong indication, to be sure, but nonetheless one that can be contradicted by other indications.’ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 228 (2012).”).

13. *Id.* at 1049-50.

blower statute leaves no doubt as to its meaning.<sup>14</sup> In addition to relying on the plain meaning of the statute, the Court also acknowledged that an *in pari materia*<sup>15</sup> interpretation of the statute and the purpose of the statute support the position that “to the Commission” can only mean to the SEC.<sup>16</sup>

This Article asserts that judicial activism occurs when a court goes beyond the plain meaning of the text that is plain and unambiguous, to promulgate its politics. This Article does not make the argument nor infer that this is the sole definition of judicial activism. Rather, this Article is narrowing the scope by enumerating a specific act that falls within the category of judicial activism.

This argument proceeds as follows. Part I provides context of judicial activism. Part II analyzes how various courts have interpreted the statute, and whether the interpretation is consistent with canons of construction. Part III assesses ambiguity in statutes. Part IV examines the legislative history of the statute. Part V identifies public policy purposes as a reason for why courts have engaged in judicial activism. Part VI analogizes interpretations of other whistleblower statutes and whistleblower cases, to illustrate how the DFA whistleblower statutes should be interpreted. And Part VII makes *reductio ad absurdum* arguments which emphasize the absurd results of a broad interpretation of the statute.

## I. JUDICIAL ACTIVISM

Arthur Schlesinger, Jr. is credited with creating the term “judicial activism.”<sup>17</sup> In 1947, Schlesinger wrote an article on the nine Supreme Court Justices and detailed their differing views on the legislative interpretation and “the proper function of the judiciary in a

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14. *Dig. Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 777 (2018) (“Our charge in this review proceeding is to determine the meaning of “whistleblower” in §78u-6(h), Dodd-Frank’s anti-retaliation provision. The definition section of the statute supplies an unequivocal answer: A “whistleblower” is “any individual who provides . . . information relating to a violation of the securities laws to the Commission.” §78u-6(a)(6) (emphasis added). Leaving no doubt as to the definition’s reach, the statute instructs that the “definitio[n] shall apply” “[i]n this section,” that is, throughout §78u-6. §78u-6(a)(6).”).

15. *Id.* at 771 (“This reading is reinforced by another whistleblower protection provision in Dodd-Frank, see 12 U. S. C. §5567(b), which imposes no requirement that information be conveyed to a government agency.”).

16. *Id.* (“The Court’s understanding is corroborated by Dodd-Frank’s purpose and design. The core objective of Dodd-Frank’s whistleblower program is to aid the Commission’s enforcement efforts by ‘motiv[at]ing] people who know of securities law violations to tell the SEC.’”).

17. See Arthur Schlesinger, Jr., *The Supreme Court: 1947*, FORTUNE, Jan. 1947, at 202, 208.

democracy”<sup>18</sup> regarding the New Deal. Since then, proponents of judicial activism argue that it is “a way for a Court to live up to its obligation to serve as citadel of the public justice.”<sup>19</sup> While this characterization of judicial activism may purport to uphold justice, morality, and ethics, it fails to recognize the pragmatic view that judges may undertake constitutional interpretation based upon what they consider a favorable result,<sup>20</sup> which is often grounded in political ideology. In the *Turpin v. Mailet* dissenting opinion, the court explicated:

One need only skim through the all too numerous Supreme Court dissents to recognize that on occasion *judicial activism* has been checked with a very loose rein. Sometimes this has pleased the so-called conservatives; at other times it has gratified the so-called liberals. During the early decades of the twentieth century, those who are today’s staunchest supporters of *judicial activism* were the most vocal critics of the Supreme Court’s ‘usurpation’ of congressional powers in striking down social and welfare legislation. When the focus of the judiciary swung from property rights to personal rights, a new and different set of critics came to the fore. The issue, as these critics see it, is not one of liberalism versus conservatism, but one of representative democratic government versus judicial autocracy.<sup>21</sup>

Judge Frank Easterbrook blazons, “[e]veryone scorns judicial ‘activism,’ that notoriously slippery term.”<sup>22</sup> and further elaborates that judicial activism is “empty, a mask for a substantive position.”<sup>23</sup> Another commentator has held that a jurist may be classified into their political ideology and their view, and also whether they may be “committed to the rule of law and principled decision-making.”<sup>24</sup>

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18. *Id.*

19. Rebecca L. Brown, *Activism Is Not a Four-Letter Word*, 73 U. COLO. L. REV. 1257, 1273 (2002).

20. See William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1245–53 (2002); see also Wilson R. Huhn, *In Defense of the Roosevelt Court*, 2 FLA. AGRIC. & MECHANICAL U.L. REV. 1, 12-15 (2007) (discussing how Supreme Court Justices Hugo Black, Felix Frankfurter, William O. Douglas, and Robert Jackson employed different principles of interpretation which led to disagreements over the law, despite the fact that they each shared a common goal of human rights).

21. *Turpin v. Mailet*, 579 F.2d 152, 173 (2d Cir. 1978) (judgement vacated by *City of West Haven v. Turpin*, 439 U.S. 974 (1978)) (emphasis added).

22. Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1401 (2002).

23. *Id.*

24. David Boies, *Reflections on Bush v. Gore: The Role of the United States Supreme Court*, 1 FLA. AGRIC. & MECHANICAL U.L. REV. 105, 108 (2006) (asserting that jurists can be classified as a “conservative-liberal” category, a “judicial activism-judicial restraint” category: “A liberal judge can be an advocate of judicial activism, such as Earl Warren, or judicial restraint, such as Felix Frankfurter. The same is true for a conservative judge.”).

There are over 100 canons of construction, including policy canons.<sup>25</sup> If a judge cannot find one canon of construction to base their opinion, or are ignoring precedent, or the text of the Constitution, they are clearly imposing their own views on the court. One scholar who has denounced the term “judicial activism” as a talking point has, albeit in a genteel manner, conceded the argument that some judges are not properly basing their opinions in law but rather their own personal views.<sup>26</sup>

“The term ‘judicial activism’ has come under fire in the last two decades—primarily by politically conservative commentators who decry the methodological legitimacy of judges relying on policy preferences and contemporary societal norms, in addition to precedent and the history and text of the Constitution, to inform their opinions.”<sup>27</sup> Judges relying on their own views of the law rather than what the law is are activists. “The costs or risks of such constitutional activism are substantial, however.”<sup>28</sup> Judges that base opinions on *their* policy preferences, over the Constitution, create bias and prejudice and inflict harm on the adversely affected party.

There are three salient methods in which courts execute judicial activism: (1) rule that a law is unconstitutional; (2) the canon of constitutional doubt (use precedential opinions to find incompatibilities which create doubt); and (3) misconstrue the statute to claim it should be interpreted in a manner that is consistent with the judge’s personal policy preference.<sup>29</sup> When judges intentionally misconstrue statutes in order to impose their policy views, they can do so in a number of ways. One approach is when judges interpret the law in a way that is inconsistent with the policy of another provision.<sup>30</sup> Another approach, as in

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25. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 *STAN. L. REV.* 901, 940 (2013) (“There are more than 100 substantive canons, and they run the range from transsubstantive policy presumptions (e.g., ambiguous federal statutes will not be construed to intrude on traditional state functions); to subject-specific rules (e.g., ambiguous bankruptcy statutes shall be construed in favor of the debtor); to the dozen or so presumptions that concern delegation of interpretive authority to administrative agencies. These canons are infamously conflicting, overlapping, and manipulable, and have been described as everything from ‘judicial lawmaking’ to ‘democracy protective’ to ‘constitutional law.’”).

26. See generally Sudha Setty, *Preferential Judicial Activism*, 17 *BERKELEY J. AFR.-AM. L. & POL’Y* 151 (2015).

27. *Id.* at 151.

28. William N. Eskridge & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 *HARV. L. REV.* 26, 43 (1994).

29. Easterbrook, *supra* note 22, at 1404.

30. See, e.g., *United Sav. Ass’n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

the instance of the DFA whistleblower anti-retaliation statute, is when the courts engage in judicial activism by holding that a statute is ambiguous or that it is meant to be interpreted broadly.

The Second Circuit, Ninth Circuit, and Federal District Courts that have held that the DFA whistleblower anti-retaliation provision may be interpreted broadly by asserting that “to the Commission” does not necessarily imply the SEC. In *Egan v. Tradingscreen, Inc.*, the court observed that this broad “interpretation of the [DFA] would read the phrase ‘to the Commission’ in 15 U.S.C. § 78u-6(a)(6) out of the statute altogether.”<sup>31</sup> After acknowledging this, in a perplexing syllogism, the court then states “[t]he contradictory provisions of the Dodd-Frank Act are best harmonized by reading 15 U.S.C. § 78u-6(h)(1)(A)(iii)’s protection of certain whistleblower disclosures not requiring reporting to the SEC as a narrow exception to 15 U.S.C. § 78u-6(a)(6)’s definition of a whistleblower as one who reports to the SEC.”<sup>32</sup>

The narrow exception that the court talks about is not narrow at all. The court is expressing the notion that a whistleblower does not have to report to the SEC, despite the definition of whistleblower saying it does. The DFA defines the term “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, in a manner established, by rule or regulation, by the Commission.”<sup>33</sup> Broad interpretations of statutory provisions are allowed if Congress has specifically provided for the broader policy in more specific language elsewhere.<sup>34</sup> The *Egan* court acknowledged this and noted that “[t]he absence of similarly broad protections for whistleblowers alleging securities law violations indicates that Congress intended to encourage whistleblowers reporting such violations to report to the SEC.”<sup>35</sup> The dissent in *Berman*, stated that the majority construed the statute in order to spread abroad its views on how the statute should have been written rather than on how it is written:

The majority and the Securities and Exchange Commission (“SEC”) have altered a federal statute by deleting three words (“to the Commission”) from the definition of “whistleblower” in the Dodd-Frank

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31. *Egan v. Tradingscreen, Inc.*, No. 10 Civ. 8202 (LBS), 2011 WL 1672066, at \*5 (S.D.N.Y. May 4, 2011) (emphasis added).

32. *Id.*

33. 15 U.S.C. § 78u-6(a)(6) (effective July 22, 2010).

34. See *Custis v. United States*, 511 U.S. 485, 491 (1994); see also *John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank*, 510 U.S. 86, 95-96 (1993); *W. Va. Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 92 (1991) superseded by statute, 42 U.S.C. § 2000e-5 (k) (2009), as recognized in *Landgraf v. USI Film Prod.*, 511 U.S. 244, 251 (1994).

35. *Egan*, 2011 WL 1672066 at \*4.

*Act.* No doubt, my colleagues in the majority, assisted by the SEC or not, could improve many federal statutes by tightening them or loosening them, or recasting or rewriting them. I could try my hand at it. But our obligation is to apply congressional statutes as written. In this instance, the alteration creates a circuit split, and places us firmly on the wrong side of it.<sup>36</sup>

During the *Somers v. Dig. Realty Tr., Inc.* oral argument, Justice Neil Gorsuch relied on the plain meaning of the DFA whistleblower anti-retaliation provision, and pointedly asked “how much clearer could Congress have been than to say in this section the following definitions shall apply, and whistleblower is defined as including a report to the Commission.”<sup>37</sup> If Congress intended for the statute to be expanded, a broader term such as “government agency” could have been used instead of “Commission.”<sup>38</sup> Congress defined the term whistleblower using the term “Commission” twice.<sup>39</sup> In the statute, the term “Securities and Exchange Commission” is used before the term “Commission” is used throughout the rest of the statute.<sup>40</sup> There is no other mention, reference, or inference that the term “Commission” gives rise to a definition other than the Securities and Exchange Commission. To hold that this definition is to be expanded beyond its plain meaning without any justification grounded in a canon of construction is judicial activism.

In *Digital Realty Trust*, the Supreme Court opines that other laws protect whistleblowers who report wrongdoing to entities other than the SEC.<sup>41</sup> Some lower courts have held the opposite, and affirmed that the DFA anti-retaliation whistleblower statute needs to be interpreted broadly in order to protect persons who report to other entities besides the SEC.<sup>42</sup> The *Egan* court argued that there is tension between the definition of whistleblower and a subsection of the stat-

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36. *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015) (emphasis added).

37. Oral Argument at 31, *Somers v. Dig. Realty Tr., Inc.*, 138 S.Ct. 767 (2018) (No. 16-1276), 2017 WL 5730691 at \*30-1.

38. *Asadi v. G.E. Energy U.S., L.L.C.*, 720 F.3d 620, 626 (5th Cir. 2013).

39. 15 U.S.C.A. § 78u-6(a)(6) (effective July 22, 2010) (“The term ‘whistleblower’ means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the *Commission*, in a manner established, by rule or regulation, by the *Commission*.”) (emphasis added).

40. 15 U.S.C.A. § 78u-6(a)(2) (“The term ‘Fund’ means the Securities and Exchange Commission Investor Protection Fund.”).

41. *Somers*, 138 S.Ct. at 774 (“Clause (iii), by cross-referencing Sarbanes-Oxley and other laws, protects disclosures made to a variety of individuals and entities in addition to the SEC. For example, the clause shields an employee’s reports of wrongdoing to an internal supervisor if the reports are independently safeguarded from retaliation under Sarbanes-Oxley.”).

42. *See supra* note 4.

ute.<sup>43</sup> While the subsection does list other categories in which disclosures may be made, it does not state that disclosures may be made to one of these categories *in lieu of* reporting to the SEC.<sup>44</sup> If the DFA anti-retaliation whistleblower statute is properly interpreted, disclosures may be made to one of these categories *and* the SEC. In *Ellington v. Giacoumakis*, the court came to the same conclusion as *Egan* court when it reasoned: “Congress intended that an employee terminated for reporting Sarbanes-Oxley . . . violations to a supervisor or an outside compliance officer, and ultimately to the SEC, have a private right of action under Dodd-Frank whether or not the employer wins the race to the SEC’s door with a termination notice.”<sup>45</sup> The *Egan* and *Ellington* courts, as well as the other courts who ruled in a similar manner, failed to consider that notice may have been made concurrently or contemporaneously.

Over the course of oral arguments, Justice Gorsuch noted that if Sarbanes-Oxley whistleblower protections weren’t in effect, then there is a valid argument that the DFA anti-retaliation whistleblower statute could be interpreted to cover reporting to entities other than the SEC.<sup>46</sup> Justice Kagan bolstered this argument by asserting: “you have this definitional provision, and it says what it says. And it says that it applies to this section. And you have to have a really, really severe anomaly to get over that.”<sup>47</sup>

## II. CURRENT STATE OF THE LAW

### A. *Judicial Restraint Interpretation*

#### 1. Supreme Court of the United States

In a 9-0 decision the Supreme Court held that “to the Commission” is plain on its face and the statute must be interpreted so accordingly.<sup>48</sup> During an exchange in oral argument, Justice Gorsuch

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43. *Egan v. Tradingscreen, Inc.*, No. 10 Civ. 8202 (LBS), 2011 WL 1672066 at \*5 (S.D.N.Y. May 4, 2011) (“Therefore, Plaintiff must either allege that his information was reported to the SEC, or that his disclosures fell under the four categories of disclosures delineated by 15 U.S.C. § 78u-6(h)(1)(A)(iii) that do not require such reporting: those under the Sarbanes-Oxley Act, the Securities Exchange Act . . . or other laws and regulations subject to the jurisdiction of the SEC.”).

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

45. *Ellington v. Giacoumakis*, 977 F. Supp. 2d 42, 45 (D. Mass. 2013).

46. Oral Argument, *supra* note 37, at 52-54.

47. *Id.* at 48-49.

48. *Somers v. Dig. Realty Tr., Inc.*, 138 S.Ct. 767, 769 (2018) (“We next address these concerns and explain why they do not lead us to depart from the statutory text.”).

emphasized, “I’m just stuck on the plain language here, and maybe you can get me unstuck, but . . . how much clearer could Congress have been than to say in this section the following definitions shall apply, and whistleblower is defined as including a report to the Commission.”<sup>49</sup>

The Court acknowledges that even though the definition of “whistleblower” has changed through different stages, it accentuated the final definition of whistleblower.<sup>50</sup> The Court concedes that fewer persons will be protected by the statutory definition as compared with the definition suggested by Respondent-Somers, however it proclaims that in order to overcome a statutory definition there needs to be an absurd result.<sup>51</sup>

## 2. Federal Circuit Court of Appeals

In *Asadi*, the Fifth Circuit held that the plain meaning of the term whistleblower under the DFA is not in conflict with the SEC’s whistleblower statute.<sup>52</sup> The court explains that while there may be protected activity that is not within the scope of a whistleblower, this does not equate to conflicting or superfluous statutory language.<sup>53</sup> The court further clarifies that a conflict between the statutes would only exist if the three categories listed under § 78u-6(h)(1)(A)(iii)<sup>54</sup> were to be interpreted as additional categories.<sup>55</sup> The Fifth Circuit noted that since there is only one definition of whistleblower, “[t]herefore, the whistleblower-protection provision does not contain conflicting definitions of ‘whistleblower.’”<sup>56</sup>

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49. Oral Argument, *supra* note 37, at 30-31.

50. Somers, 138 S. Ct. at 775 (“The proposed rule, the agency noted, “tracks the statutory definition of a ‘whistleblower’” by requiring information reporting to the SEC itself. 75 Fed. Reg. 70489. In promulgating the final Rule, however, the agency changed course. Rule 21F-2, in finished form, contains two discrete “whistleblower” definitions. See 17 CFR §240.21F-2(a)-(b) (2017).”).

51. *Id.* at 779.

52. *Asadi v. G.E. Energy U.S., L.L.C.*, 720 F.3d 620, 626 (5th Cir. 2013).

53. *Id.*

54. 15 U.S.C.A. § 78u-6(h)(1)(A)(iii) (2010) (West, effective July 22, 2010).

55. *Asadi*, 720 F.3d at 626 (“First, the definition of ‘whistleblower’ and the third category of protected activity do not conflict. Conflict would exist between these statutory provisions only if we read the three categories of protected activity as additional definitions of three types of whistleblowers. Under that reading—which, as described above, the plain text of the statute does not support—individuals could take actions falling within the third category of protected activity yet fail to qualify under the more narrow definition of whistleblower.”).

56. *Id.* at 627.

The *Asadi* court meticulously discussed three important reasons why the DFA and the Sarbanes-Oxley (SOX) whistleblower statutes are to be interpreted independently instead of jointly.<sup>57</sup> First, the DFA statute (allowing two times back pay) provides for more monetary damages than the SOX whistleblower statute (only standard back pay).<sup>58</sup> Second, the DFA statute allows a claim to be filed immediately in a United States district court.<sup>59</sup> The SOX statute requires that a claim must first be filed with the Secretary of Labor.<sup>60</sup> Only if the Secretary of Labor fails to issue a final decision within 180 days can the claimant sue in a United States district court.<sup>61</sup> Third, the statute of limitations is longer under the DFA statute (between six to ten years after the violation occurs) than the SOX statute (between 180 days after the violation occurs and 180 days after the employee becomes aware of the violation).<sup>62</sup>

### 3. Federal District Courts

In *Banko v. Apple, Inc.*, the court utilized canons of construction to interpret the DFA whistleblower statute and found that the statute is unambiguous.<sup>63</sup> The court proclaimed that to find the statute ambiguous, “one would have to ignore several canons of statutory interpretation.”<sup>64</sup> The court lists several reasons as to why the statute is unambiguous. First, the court notes that the term whistleblower is statutorily defined, and the statute prohibits action from being taken against a whistleblower.<sup>65</sup> The syllogism is that if Congress intended to expand the protections beyond whistleblowers it would have done so, by using a different term.<sup>66</sup> Second, it is noted that in order to construe

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57. *Id.* at 629.

58. *Id.*

59. *Asadi*, 720 F.3d at 629; *See also* 15 U.S.C.A. §78u-6(h).

60. *Asadi*, 720 F.3d at 629.

61. *Id.* at 629; *See also* 18 U.S.C.A. §1514A(b)(1) (West, effective July 22, 2010).

62. *Asadi*, 720 F.3d at 629.

63. *Banko v. Apple Inc.*, 20 F. Supp. 3d 749 (N.D. Cal. 2013).

64. *Id.* at 756.

65. *Id.*

66. *Id.* (“Applying the rules of statutory interpretation set forth above, the statute is not ambiguous; the “whistleblower protection” provided by Section 78u-6(h) is only available to individuals who meet the Dodd-Frank definition of “whistleblower” found in Section 78u-6(a). To conclude to the contrary, one would have to ignore several canons of statutory interpretation. First, allowing individuals who did not report to the SEC to be designated a “whistleblower” under 78u-6(a) would ignore the plain language of that statute. As the Court held in *Chevron*, the first step of statutory interpretation is asking “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter.” 467 U.S. at 842-43, 104 S.Ct. 2778. Section 78u-6(h)(1)(A) states

that the statute as ambiguous, the phrase “to the Commission” would need to be interpreted as superfluous.<sup>67</sup> Yet that would contravene the rule against surplusage.<sup>68</sup> Third, the title of the section—“whistleblower protection”—lends credence to the fact that it is applicable to whistleblowers, which again, is defined in the statute.<sup>69</sup> Fourth, agency deference (in this instance, the SEC) should only be granted if the statute is ambiguous.<sup>70</sup> The court sagaciously opines that a whistleblower can make internal notifications as well as the statutorily required notifications.<sup>71</sup> This is a key point that courts who interpret the statute broadly fail to comprehend. The *Banko* court acknowledges that while properly interpreting the statute according to canons of construction “may sometimes lead to unfortunate results . . . this conclusion comes as the result of that individual’s own delay and does not bear upon the availability of [whistleblower protections under the DFA] relief.”<sup>72</sup>

### B. Judicial Activism Interpretation

#### 1. Federal Circuit Court of Appeals

In *Berman v. Neo@Ogilvy*, the Second Circuit confesses that it goes beyond the plain meaning of the statute in order to arrive at its

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“[n]o employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a *whistleblower* in the terms and conditions of employment because of any lawful act done by the *whistleblower*” (emphasis added). Thus, the statute specifies that an employer may not take the above actions against a *whistleblower*.”).

67. *Id.*

68. *Id.* at 757 (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)) (“It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”).

69. *Banko*, 20 F. Supp. 3d at 756.

70. *Id.*

71. *Id.* (“Finally, while the district court opinions are correct that the purpose of the Dodd-Frank Act is to ‘improve the accountability and transparency of the financial system,’ and create ‘new incentives and protections for whistleblowers,’ it is not the only protection available to individuals who believe they are being retaliated against for revealing securities fraud. These plaintiffs have other options. Here, the plaintiff could have filed a complaint with the Secretary of Labor under Sarbanes-Oxley within 180 days of the purported violation. 18 U.S.C. § 1514A(b)(2)(D). Indeed, as discussed above, Dodd-Frank doubled the amount of time an individual has available within which to file such a complaint. The plaintiff chose not to do so. While this forfeiture may sometimes lead to unfortunate results where individuals who take socially-desirable actions fail to be granted protection, this conclusion comes as the result of that individual’s own delay and does not bear upon the availability of Section 78u-6(h) relief.”).

72. *Id.*

definition of whistleblower.<sup>73</sup> The dissenting opinion in *Berman* notes that the majority rewrote the DFA by employing its own definition of whistleblower rather than the statute's definition.<sup>74</sup> While employed at Neo@Ogilvy, Daniel Berman alleged that he uncovered fraudulent accounting practices which violated Generally Accepted Accounting Principles, SOX, and the DFA.<sup>75</sup> Even though "Congress used the defined term 'whistleblower' not once but twice" as reporting to the SEC ("to the Commission"),<sup>76</sup> the majority held that the definition of whistleblower should be interpreted to mean reporting to other entities in lieu of the SEC.<sup>77</sup> In response, the dissent brilliantly articulates the following: "No doubt, my colleagues in the majority, assisted by the SEC or not, could improve many federal statutes by tightening them or loosening them, or recasting or rewriting them. I could try my hand at it. But our obligation is to apply congressional statutes as written."<sup>78</sup> The dissent's position is supported by well-established precedents holding that when determining if a term or a statute is ambiguous, the analysis begins with "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."<sup>79</sup>

The *Neo@Ogilvy* court surreptitiously admits it is engaging in judicial activism by acknowledging that is interpreting the statute beyond its plain meaning due to public policy concerns:

First, although there may be some potential whistleblowers who will report wrongdoing simultaneously to their employer and the Commission, they are likely to be few in number. Some will surely feel that reporting only to their employer offers the prospect of having the wrongdoing ended, with little chance of retaliation, whereas

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73. *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 154 (2d Cir. 2015) ("We recognize that the terms of a definitional subsection are usually to be taken literally, see Antonin Scalia and Bryan A. Garner, "Reading Law," Texts 227 (2012) [sic] ('Ordinarily, judges apply text-specific definitions with rigor.'). and, pertinent to this case, usually applied to all subdivisions literally covered by the definition, but we have also recognized that mechanical use of a statutory definition' is not always warranted.") (emphasis added).

74. *Id.* at 155-60 (Jacobs, J., dissenting).

75. *Id.* at 149.

76. *Verfuert v. Orion Energy Sys.*, 65 F. Supp. 3d 640, 645 (E.D. Wis. 2014).

77. *Berman*, 801 F.3d at 153-54 ("Like all these courts, we confront both the definition of 'whistleblower' in subsection 21F(a)(6), which extends whistleblower protection only to employees who report violations to the Commission, and the language of subdivision (iii), which purports to protect employees from retaliation for making reports required or protected by Sarbanes-Oxley, reports that are made internally, without notification to the Commission.").

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

79. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

reporting to a government agency creates a substantial risk of retaliation.<sup>80</sup>

This reasoning claims that since whistleblowers will report simultaneously to their employer and the Commission are “few in number,” that the statute should be interpreted to go beyond its plain meaning. However, the court is acknowledging that whistleblowers can report simultaneously to their employer and the Commission. Additionally, in *Neo@Ogilvy*, plaintiff-Berman alleges he was retaliated against before he reported to a government agency.<sup>81</sup> This is ironic as the court is saying the opposite of this in order to substantiate its position.

In an effort to support its weak statutory interpretation argument, the Second Circuit relies on *King v. Burwell*.<sup>82</sup> Several commentators have claimed that the *Burwell* decision is judicial activism.<sup>83</sup> The Second Circuit reasoned that since the *Burwell* Court held that the phrase “established by a state” includes the federal government, then in the instant case “to the Commission” includes other governmental agencies besides the SEC.<sup>84</sup> This is an extremely flawed analogy for several reasons. First, *Burwell* centered on interpreting a U.S. Treasury regulation (26 C.F.R. § 1.36B-2(a)(1)) as it pertains to regulating healthcare.<sup>85</sup> The Second Circuit should have looked to other cases interpreting SEC statutes since that is what the court is trying to determine with the phrase “to the Commission.” Also, the court could have looked at cases interpreting whistleblower statutes, which there is a voluminous number of.<sup>86</sup> Second, *Burwell* did not base

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

81. *Id.* at 149.

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

83. Charles Krauthammer, *Comey: A theory*, WASH. POST (July 7, 2016), [https://www.washingtonpost.com/opinions/comey-a-theory/2016/07/07/297f9bd0-4478-11e6-8856-f26de2537a9d\\_story.html?utm\\_term=.ed51e552d417](https://www.washingtonpost.com/opinions/comey-a-theory/2016/07/07/297f9bd0-4478-11e6-8856-f26de2537a9d_story.html?utm_term=.ed51e552d417) (“When Chief Justice John Roberts used a tortured, logic-defying argument to uphold Obamacare [*King v. Burwell*], he was subjected to similar accusations of bad faith.”); see also Michael Cannon, *After King v. Burwell*, CATO POLICY REPORT, Sept. – Oct. 2005, at 12, <https://www.cato.org/policy-report/septemberoctober-2015/after-king-v-burwell> (last visited Feb. 17, 2018).

84. *Berman*, 801 F.3d at 150.

85. *Burwell*, 135 S.Ct. at 2487 (“The IRS addressed the availability of tax credits by promulgating a rule that made them available on both State and Federal Exchanges. 77 Fed. Reg. 30378 (2012). As relevant here, the IRS Rule provides that a taxpayer is eligible for a tax credit if he enrolled in an insurance plan through “an Exchange,” . . . which is defined as “an Exchange serving the individual market . . . regardless of whether the Exchange is established and operated by a State . . . or by HHS,” 45 CFR §155.20 (2014). At this point, 16 States and the District of Columbia have established their own Exchanges; the other 34 States have elected to have HHS do so.”).

86. See, e.g., *Lane v. Franks*, 134 S.Ct. 2369 (2014); see also *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 7–8, 18 (1st Cir. 2006), cert. denied, 126 S. Ct. 2973 (2006); *Roulett v. Am. Capital Access (In re Roulett)*, 2004-SOX-78 (A.L.J. Aug. 30, 2005); *Stevenson v. Neigh-*

its support of the statute on a canon of construction.<sup>87</sup> The Second Circuit followed suit. If a court performs statutory interpretation without a canon of construction, it is admitting that there is no legal basis for its interpretation.<sup>88</sup> The majority in *Neo@Ogilvy* goes beyond the plain meaning of the statute, presents no canon of construction to support its interpretation, and relies on an analogy that has no similarity to the law or case at hand.

## 2. Federal District Courts

In *Somers v. Digital Realty Trust, Inc.*, the district court employs judicial activism by masquerading flawed reasoning in order to misinterpret “to the Commission” broadly for the purpose of promoting a public policy agenda.<sup>89</sup> The district court acknowledges that public policy is a central reason for finding ambiguity in the statute and thus providing *Chevron* deference.<sup>90</sup> The district court states that “reading subsection (iii) narrowly to require a report to the Commission — seems at odds with public policy underlying the DFA.”<sup>91</sup>

The *Somers* district court discloses that it is declining to interpret the statute according to its plain meaning, and cites two other cases, *Bond v. United States* and *Yates v. United States*, that engaged

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borhood House Charter Sch., 2005-SOX-87 (ALJ Sept. 7, 2005); Paz v. Mary’s Center for Maternal & Child Care, ARB No. 06-031, ALJ No. 2006-SOX-7 (ARB Nov. 30, 2007); Collins v. Beazer Homes USA, Inc., 334 F. Supp. 2d 1365 (N.D. Ga. 2004); Savastano v. WPP Group, PLC., 2007-SOX-34 (ALJ July 18, 2007); Bridges v. McDonalds Corp., 09-CV-1880, 2009 WL 5126962 (N.D. Ill. Dec. 21, 2009); Bozeman v. Per-Se Technologies, Inc., 456 F. Supp. 2d 1282, 1357 (N.D. Ga. 2006); Sharkey v. J.P. Morgan Chase & Co., No. 10 Civ. 3824, 2011 WL 135026 (S.D.N.Y. Jan. 14, 2011).

87. *Burwell*, 135 S.Ct. at 2497 (Scalia, J., dissenting) (“Words no longer have meaning if an Exchange that is *not* established by a State is ‘established by the State.’ It is hard to come up with a clearer way to limit tax credits to state Exchanges than to use the words ‘established by the State.’ And it is hard to come up with a reason to include the words ‘by the State’ other than the purpose of limiting credits to state Exchanges. . . . The Court interprets §36B to award tax credits on both federal and state Exchanges. It accepts that the ‘most natural sense’ of the phrase ‘Exchange established by the State’ is an Exchange established by a State.”).

88. Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 563 (2012) (“[E]very reasonable construction must be resorted to in order to save a statute from unconstitutionality.”).

89. *Somers v. Dig. Realty Tr., Inc.*, 119 F. Supp. 3d 1088 (N.D. Cal. 2015).

90. *Id.* at 1104. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court opinion increased the level of deference given by courts to administrative agencies in their interpretation of statutory language. 467 U.S. 867 (1984). In this instance, if *Chevron* deference was granted, the SEC would have been granted the deference to interpret “to the Commission” to mean entities other than the SEC.

91. *Somers*, 119 F. Supp. 3d at 1104.

in this as well.<sup>92</sup> The *Somers* district court failed to apply a canon of construction. Rather, it cites *Bond* and *Yates* as reasons for going beyond the plain language of the DFA anti-whistleblower statute.<sup>93</sup> The *Somers* court concedes that the statutory language is clear, so it creates a strawman argument in that the context is ambiguous to support its holding.<sup>94</sup> Part of the argument is the court's fallacious analogy with *Yates v. United States*<sup>95</sup> as a reason to disregard a plain meaning interpretation.<sup>96</sup> In *Yates v. United States*, a federal agent inspected a ship and discovered an undersized fish which violated federal conservation regulations.<sup>97</sup> Petitioner-Captain Yates instructed his crew to throw the fish overboard, which led to Yates being charged under 18 U.S.C. § 1519,<sup>98</sup> which states, in part:

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any *record, document, or tangible object* with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States. . . .<sup>99</sup>

When determining that a fish is not a tangible object, the *Yates* majority opinion uses two textual canons of construction: *ejusdem generis* (“of the same kinds, class, or nature”) and *noscitur a sociis* (“a word is known by the company it keeps”).<sup>100</sup> Scalia & Garner elucidate when *ejusdem generis* applies:

The *ejusdem generis* canon applies when a drafter has tacked on a catchall phrase at the end of an enumeration of specifics, as in *dogs, cats, horses, cattle, and other animals*. Does the phrase *and other animals* refer to wild animals as well as domesticated ones? What about a horsefly? What about protozoa? Are we to read *other ani-*

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92. *Id.* at 1099-1100 (“As both *Bond* and *Yates* demonstrate, a court may decline to strictly apply a definitional term in a statute, or otherwise adopt the plain and ordinary meaning of statutory language, where other tools of statutory interpretation strongly suggest such a result.”).

93. *Id.* at 1099-1100 (“Despite the statute’s clear definition of ‘chemical weapon,’ and despite the fact that the defendant had obviously used a ‘chemical weapon’ with the necessary *men rea*, the Court reversed the defendant’s conviction.”); *Id.* at 1099 (“In *Yates*, the defendant had been convicted of violating a provision of Sarbanes-Oxley that prohibited the destruction of a ‘tangible object’ with the intent to obstruct a law enforcement investigation. *Id.* at 1079. The Court noted that “although dictionary definitions” of terms such as ‘tangible object’ should ‘bear consideration, they are not dispositive.’”).

94. *Id.*

95. *Yates v. United States*, 135 S. Ct. 1074 (2015).

96. *Somers*, 119 F. Supp. 3d at 1099.

97. *Yates*, 135 S. Ct. at 1076.

98. *Id.* at 1078.

99. 18 U.S.C.A. § 1519 (West, effective July 30, 2002) (emphasis added).

100. *Yates*, 135 S. Ct. at 1097.

*mals* here as meaning *other similar animals*? The principle of *ejusdem generis* says just that: It implies the addition of *similar* after the word *other*.<sup>101</sup>

In *Yates*, the statute in question does not have a catchall: “any record, document, or tangible object.”<sup>102</sup> Similarly, the DFA does not have a catchall.<sup>103</sup> Thus, an *ejusdem generis* interpretation would be malapropos.

*Noscitur a sociis* is an associated-words canon that means that a word is defined by the words surrounding it.<sup>104</sup> The DFA defines “whistleblower” as, “any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the [Securities and Exchange] Commission, in a manner established, by rule or regulation, by the Commission.”<sup>105</sup> The Supreme Court has defined *noscitur a sociis* as meaning, a “word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.”<sup>106</sup> In *Yates*, the Court held that a fish is not a tangible object because it is grouped with “record” and “document” and the words preceding those; alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry.<sup>107</sup> Fish can be altered, destroyed, mutilated, concealed, covered up, or falsified.<sup>108</sup> Nothing in the dictionary definition of cover up or the other statutory terms suggests that “tangible object” is limited to a document.<sup>109</sup> In *Yates*, the Court inappropriately applied the

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101. ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 199 (2012).

102. 18 U.S.C. § 1519 (2012). (“Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in *any record, document, or tangible object* with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.”) (emphasis added).

103. See 15 U.S.C. §§ 78u-6(a)(6), (h)(1)(A)(iii) (effective July 22, 2010).

104. SCALIA & GARNER, *supra* note 101, at 195.

105. 15 U.S.C. § 78u-6(a)(6).

106. *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

107. *Yates v. United States*, 135 S. Ct. 1074, 1085-86 (2015).

108. *Id.* See generally Tillmann J. Benfey, *Use of Sterile Triploid Atlantic Salmon (Salmo Salar L.) for Aquaculture in New Brunswick, Canada*. 58 ICES J. OF MARINE SCI. 525 (2001) (discussing genetically altered salmon for mass production).

109. *Destroy*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“To kill (an animal) by reason of mercy, illness, or dangerousness <the dog had to be destroyed>”). A fish is an animal and it can be killed, so a fish can be destroyed. Additionally, *mutilate* means “[t]o severely and violently damage; esp., to cut off or cut out an essential part of; to maim or cripple.” *Id.* For an international perspective, New South Wales has regulations on mutilating fish, which holds that “[a] person must not mutilate any restricted species of fish in or on or adjacent to

*noscitur a sociis* canon to somehow surmise that the statute is not applicable to a tangible object.

There are no other words that are in the context of “the Commission” to give credence to the interpretation that it means any other entity besides the SEC, so a *noscitur a sociis* construction is inapplicable. Moreover, the *Somers* district court does not point to the specific language in the statute which would lead to its *ejusdem generis* or *noscitur a sociis* interpretations.<sup>110</sup> Rather, it broadly points at other cases that have employed these canons in order to conceal its judicial activism. The court does divulge it is reading the statute broadly, but it does so without the support of a canon of construction.<sup>111</sup> The court clandestinely confesses that it is doing so for its own policy reasons:

Because this Court believes that the language of the DFA whistleblower-protection provision is at least somewhat in conflict, it is relevant to observe that the Fifth Circuit’s resolution of that conflict — reading subsection (iii) narrowly to require a report to the Commission — seems at odds with public policy underlying the DFA.<sup>112</sup>

The court never delineates what the public policy of the DFA is, or how its interpretation furthers the public policy over a plain meaning interpretation of the statute.

### III. WHAT CONSTITUTES AN AMBIGUOUS TERM?

When courts are pondering if a statute has plain meaning or is clear and unambiguous, it examines the language on its face, the con-

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any waters in any manner other than by gutting or by removing the gills or scales.” *Fisheries Management (General) Regulation 2010 – REG 95*, NEW SOUTH WALES CONSOLIDATED REGULATIONS [http://www.austlii.edu.au/au/legis/nsw/consol\\_reg/fmr2010339/s95.html](http://www.austlii.edu.au/au/legis/nsw/consol_reg/fmr2010339/s95.html). (last visited Feb. 8, 2018). Lastly, cover-up is defined as “[a]n attempt to prevent authorities or the public from discovering the truth about something; esp., the concealment of wrongdoing by a conspiracy of deception, nondisclosure, and destruction of evidence, usu. combined with a refusal to cooperate with investigators.” *Cover-up*, BLACK’S LAW DICTIONARY (10th ed. 2014).

110. *Somers v. Dig. Realty Tr., Inc.*, 850 F.3d 1045, 1050 (9th Cir. 2017) (“A strict application of DFA’s definition of whistleblower would, in effect, all but read subdivision (iii) out of the statute. We should try to give effect to all statutory language. See *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (rejecting a statutory construction that would render a term “insignificant, if not wholly superfluous”).

111. *Id.* at 1048-49 (“Sarbanes-Oxley expressly protects those who lawfully provide information to federal agencies, Congress, or ‘a person with supervisory authority over the employee.’ Like Sarbanes-Oxley, DFA was passed in the wake of a financial scandal—the subprime mortgage bubble and subsequent market collapse of 2008. . . . That DFA’s definitional provision describes ‘whistleblowers’ as employees who report ‘to the Commission’ thus should not be dispositive of the scope of DFA’s later anti-retaliation provision. Terms can have different operative consequences in different contexts.”) (citations omitted).

112. *Somers v. Dig. Realty Tr., Inc.*, 119 F. Supp. 3d 1088, 1104 (N.D. Cal. 2015).

text of the language at issue, and the statute as a whole.<sup>113</sup> In *Asadi*, the Fifth Circuit examined the plain language of the DFA whistleblower statute and found that the definition of whistleblower is unambiguous.<sup>114</sup> Scholars have noted the appropriateness of this approach.<sup>115</sup> Withal, the Supreme Court unequivocally held that “[t]he statute’s unambiguous whistleblower definition, in short, precludes the Commission from more expansively interpreting that term.”<sup>116</sup>

Despite the word “whistleblower” being defined in the DFA, many of the courts that broadly interpreted the statute have argued that the word “whistleblower” is ambiguous.<sup>117</sup> These same courts base their argument in favor of ambiguity on the third category of § 78u-6(h)(1)(A) which states, “disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 [, the Exchange Act,] . . . and any other law, rule, or regulation subject to the jurisdiction of the Commission.”<sup>118</sup> The SOX whistleblower statute used the word “employee,” a more generic term than the word “whistleblower.”<sup>119</sup> It is presumed that the same word used in different parts of a statute have the same meaning.<sup>120</sup> Inversely, it is presumed that different words used in the same statute would have different meanings.<sup>121</sup> Thus, if a statute says weapon in the first provision and firearm in the second provision, the second provision is read to cover guns and types of guns (i.e., pistol, revolver, rifle, shotgun, *inter alia*) but no other types of weapons (i.e., knives, grenades, missiles, rockets, *inter alia*).

The courts that have interpreted DFA whistleblower statute broadly have failed to definitively encapsulate how the statute is am-

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113. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

114. *Asadi v. G.E. Energy U.S., L.L.C.*, 720 F.3d 620, 623 (5th Cir. 2013).

115. See Andrew Walker, *Why Shouldn't We Protect Internal Whistleblowers? Exploring Justifications for the Asadi Decision*, 90 N.Y.U. L. REV. 1761, 1770 (2015) (“Certainly, committed textualists might argue that the Fifth Circuit was justified in relying on the text alone.”).

116. *Somers*, 138 S.Ct. at 782.

117. See *Connolly v. Remkes*, No. 5:14-CV-01344-LHK, 2014 WL 5473144, at \*6 (N.D. Cal. Oct. 28, 2014); see also *Khazin v. TD Ameritrade Holding Corp.*, No. CIV.A. 13-4149 (SDW)(MCA), 2014 WL 940703, at \*6 (D.N.J. Mar. 11, 2014) *aff'd on other grounds*, 773 F.3d 488 (3d Cir. 2014); *Rosenblum v. Thomson Reuters (Mkts.) L.L.C.*, 984 F. Supp. 2d 141, 147-48 (S.D.N.Y. 2013); *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1106 (D. Colo. 2013) *aff'd in part, appeal dismissed in part*, 566 F. App'x 719 (10th Cir. 2014); *Murray v. UBS Sec., LLC*, No. 12 CIV. 5914 (JMF), 2013 WL 2190084, at \*4 (S.D.N.Y. May 21, 2013).

118. 15 U.S.C.A. § 78u-6(h)(1)(A)(iii) (West, effective July 22, 2010).

119. 18 U.S.C.A. § 1514(A) (West, effective Dec. 7, 2012).

120. *Atlantic Cleaners & Dryers, Inc. v. United States*, 286 U.S. 427, 433 (1932) (“[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.”).

121. See *id.*

biguous. These same courts have purposefully conflated their own interpretation of Congressional intent with statutory ambiguity. This is a completely unfounded application of statutory ambiguity. A statute is ambiguous if a natural reading of the text is elusive.<sup>122</sup> The text of the DFA whistleblower statute, as well as the statutory definition of whistleblower, has a clear meaning and is unambiguous.<sup>123</sup>

The courts that interpret the DFA anti-retaliation whistleblower statute as ambiguous are conducting judicial activism because they are well-aware that *Chevron* deference will give them confirmation bias by providing the interpretation they want. Courts are able to do this because “the determination of ambiguity by the judiciary is entirely standardless and discretionary.”<sup>124</sup> Justice Scalia expounded, “[c]ongress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known.”<sup>125</sup> Moreover, Justice Gorsuch took the Second and Fifth Circuits to task for granting *Chevron* deference due to an “ipsi dixit unreasoned opinion.”<sup>126</sup> Justice Gorsuch clarified that there is a procedural problem, as there was not a reasonable notice and comment opportunity which the SEC would then defer to its own interpretation.<sup>127</sup> Congress established notice and comment rules<sup>128</sup> to establish a minimum threshold of procedural requirements that agencies are required to adhere by in order to “to

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122. *In re Rogers*, 513 F.3d 212, 226 (5th Cir. 2008); *In re Phila. Newspapers, LLC*, 599 F.3d 298, 304 (3rd Cir. 2010), *as amended* (May 7, 2010) (quoting *Dobrek v. Phelan*, 419 F.3d 259, 264 (3d Cir. 2005)) (“A provision is ambiguous only where the disputed language is ‘reasonably susceptible of different interpretations.’”).

123. *Verfuert v. Orion Energy Sys., Inc.*, 65 F. Supp. 3d 640, 646 (E.D. Wis. 2014) (“[T]he belief that there is some kind of conflict in the statute is based on a flawed understanding of the concept of statutory ambiguity. No term or phrase in the statute is actually ambiguous. Instead, courts perceiving ambiguity appear flummoxed by the simple fact that the protections in the statute extend to activity beyond the activity that qualifies an employee for protection. But, as discussed above, there is nothing ‘ambiguous’ or conflicting about such a framework at all. Accordingly, the plain language Congress employed should be given full effect.”).

124. Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791, 794 (2010) (emphasis added).

125. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989).

126. Oral Argument, *supra* note 37, at 38.

127. *Id.* at 37-39.

128. 5 U.S.C. § 553(b)-(c) (1976).

afford parties affected by administrative [rulemaking] a means of knowing what their rights are and how they may be protected.”<sup>129</sup>

The *Berman* dissenting opinion reveals that the majority opinion agrees that the *Asadi* interpretation is the more natural statutory interpretation but masquerades their agenda by claiming that the statute is ambiguous.<sup>130</sup> Surprisingly, the majority’s opinion admits that it could not explain how the language of the statute is not ambiguous, but rather waxes poetic whether the plain language of the statutes is its intended meaning.<sup>131</sup> The reason for the broad interpretation is due to public policy concerns, and the courts that adopt this interpretation may feel that a narrow interpretation will discourage whistleblowers.<sup>132</sup> This is an understated confirmation that the majority was engaging in judicial activism since they are stating that the law should be interpreted a manner that is congenial with their policy views.

Holding that the word whistleblower in the DFA is ambiguous would render the entire definitional section of the statute superfluous. The *Verfuert v. Orion Energy Systems, Inc.* court concluded as such, and proceeded to call out another court for judicial activism in falsely claiming that broadly interpreting the DFA whistleblower statute would not render the law superfluous.<sup>133</sup> Under the canons of construc-

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129. S. REP. No. 752, 79th Cong., 1st Sess. 7 (1945), reprinted in LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, S. DOC. No. 248, 79th Cong., 2d Sess. 193 (1946).

130. *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 157 (2d Cir. 2015) (Jacobs, J., dissenting) (“The majority hardly disputes that my reading (and the reading given in *Asadi*) is the more natural reading of the statute.”).

131. *Id.* at 150 (“In our case, the statutory provision relied on by the Appellees and our dissenting colleague contains the phrase ‘provide . . . to the Commission,’ but the issue is not whether that phrase means something other than what it literally says.<sup>4</sup> Instead, the issue is whether the statutory provision applies to another provision of the statute, or, more precisely, whether the answer to that question is sufficiently unclear to warrant Chevron deference to the Commission’s regulation. (n.4: We do not doubt that “provide . . . to the Commission” means “provide . . . to the Commission.”)).

132. Thomas S. Markey, “Whistleblower” Redefined: Implications of the Recent Interpretative Split on the Dodd-Frank Whistleblower Anti-Retaliation Provision, 33 REV. BANKING & FIN. L. 441, 449 (2014) (“[T]he Fifth Circuit’s interpretation may discourage employees from reporting internally . . . .”); Nicole H. Sprinzen, *Asadi v. GE Energy (USA) L.L.C.: A Case Study of the Limits of Dodd-Frank Anti-Retaliation Protections and the Impact on Corporate Compliance Objectives*, 51 AM. CRIM. L. REV. 151, 193 (2014) (“[I]t is common sense that employees would be much less likely to raise concerns about possible legal violations internally when the employees do not believe that they will have employment protection if they raise these concerns.”).

133. *Verfuert v. Orion Energy Sys., Inc.*, 65 F. Supp. 3d 640, 645 (E.D. Wis. 2014) (quoting *Khazin v. TD Ameritrade Holding Corp.*, 2014 WL 940703, \*6 (D.N.J. Mar. 11, 2014) (“Ironically, one district court found that accepting the SEC’s broader interpretation of the rule would “harmonize” the supposed contradictions “while not rendering any word or section superfluous. . . . Yet the opposite is true. The SEC’s interpretation renders an entire section of the statute superfluous, namely, the definition of “whistleblower” itself. *Congress*

tion, when a court interprets a statute it must give reasonable meaning to the words without rendering any of the language superfluous.<sup>134</sup> A term or statute is ambiguous if the text is not clear, or if it can be reasonably interpreted in more than one way.<sup>135</sup> If a term is defined it does not necessarily make it unambiguous. A term may be defined, but the definition may be ambiguous. If a term is undefined, it is not necessarily ambiguous. An undefined term may be unambiguous.

Even if a court finds that the statutorily defined term “whistleblower” is ambiguous, the Supreme Court has held that ambiguous financial regulations must be construed narrowly. In *SEC v. Zandford*, the Court held that S.E.C. Rule 10b-5 is ambiguous.<sup>136</sup> While the Court did note that the ambiguous text of § 10(b), in the context of formal adjudication, is entitled to deference, it qualified the interpretation as such, “the statute *must not be construed broadly* as to convert every common-law fraud that happens to involve securities into a violation of § 10(b).”<sup>137</sup> The Court also noted that if the plain language is unambiguous, a statute may be expanded if there wasn’t sufficient legal protections of a class of persons.<sup>138</sup> Moreover, the Court found that there is a significant amount of whistleblower protection laws, and descried that one of the aforementioned laws criminalizes retaliation against whistleblowers who provide information to the SEC for “any federal offense.”<sup>139</sup> Notwithstanding the unambiguous plain language, with a large number of other whistleblower laws, including a broad law that protects whistleblowers including the scenario put forth by the Respondent, the Court was most likely reluctant to expand the law to capture every single whistleblower retaliation scenario.

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*could not have defined ‘whistleblower’ more clearly, and yet the SEC apparently believes that entire definition should be cast aside on the flimsy grounds that Congress really didn’t mean it.”* (emphasis added).

134. *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

135. *In re Price*, 370 F.3d 362, 369 (3d Cir. 2004) (“Rather, a provision is ambiguous when, despite a studied examination of the statutory context, the natural reading of a provision remains elusive. In such situations of unclarity, ‘where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived . . .’”) (quoting *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805)).

136. *SEC v. Zandford*, 535 U.S. 813, 819 (2002).

137. *Id.* at 820 (emphasis added).

138. *Somers v. Dig. Realty Tr., Inc.*, 138 S.Ct. 767, 781 (2018) (“Their view, which would not require an employee to provide information relating to a securities-law violation to the SEC, could afford Dodd-Frank protection to an employee who reports information bearing no relationship whatever to the securities laws. That prospect could be imagined based on the broad array of federal statutes and regulations cross-referenced by clause (iii) of the antiretaliation provision.”).

139. *Id.*

## IV. LEGISLATIVE HISTORY

The legislative history of the DFA whistleblower anti-retaliation provision does not reflect Congress's intent as to the central issue of whether whistleblowers are required to report to the SEC in order to avail themselves of the DFA's anti-retaliation provision. Most of the legislative history, as most of the parley, focuses on the bounty provisions.<sup>140</sup> Notwithstanding, there are several courts that claim otherwise in an attempt to masquerade their judicial activism under the façade of an original intent interpretation, doing so through the act's supposed legislative intent and legislative history.<sup>141</sup> Coming to a

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140. See, e.g., H.R. REP. NO. 111-517, at 870 (2010) ("The subtitle further enhances incentives and protections for whistleblowers providing information leading to successful SEC enforcement actions. Awards to whistleblowers will range from 10 percent to 30 percent of the amounts collected by the SEC in actions where the SEC obtained monetary sanctions exceeding \$1 million. The subtitle also works to protect the confidentiality of whistleblowers."); S. REP. NO. 111-176, at 38, 110 (2010) ("The Whistleblower Program, established and administered by the Securities and Exchange Commission, is intended to provide monetary rewards to those who contribute 'original information' that lead to recoveries of monetary sanctions of \$1,000,000 or more in criminal and civil proceedings . . . . 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."); 156 CONG. REC. S5916, S5929 (daily ed. Jul. 15, 2010) (statement of Sen. Reed and Sen. Dodd) ("I also support the establishment of a program to reward whistleblowers when the SEC brings significant enforcement actions based upon original information provided by the whistleblower, and I look forward to the SEC rules that will detail the framework for this program . . . . Title IX, subtitle B creates many new powers for the SEC. The SEC is expected to use these powers responsibly to better protect investors. Section 922 has been amended to eliminate the right of a whistleblower to appeal the amount of an award. While the whistleblower cannot appeal the SEC's monetary award determination, this provision is intended to limit the SEC's administrative burden and not to encourage making small awards. 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.").

141. *Kramer v. Trans-Lux Corp.*, No. 3:11CV1424 (SRU), 2012 WL 4444820, at \*5 (D. Conn. Sept. 25, 2012) ("Yet the Dodd-Frank Act *appears to have been intended to expand upon the protections of Sarbanes-Oxley*, and thus the claimed problem is no problem at all.") (emphasis added); *Murray v. UBS Secs., LLC*, No. 12-5914 (JMF), 2013 WL 2190084, at \*6 (S.D.N.Y. May 21, 2013) ("Defendants claim that this interpretation 'disrupt[s] the carefully-constructed anti-retaliation program established by Sarbanes-Oxley,' by providing a longer statute of limitations and providing 'more generous' protections that Congress intended . . . . But as the Court explained in *Kramer*, *considering the congressional intent to expand on the protections of Sarbanes-Oxley*, 'the claimed [statute of limitations] problem is no problem at all.'") (emphasis added) (internal citation omitted); *Rosenblum v. Thomson Reuters (Mkts.) LLC*, 984 F. Supp. 2d 141, 147 (S.D.N.Y. Oct. 25, 2013) ("Rosenblum, in turn, argues that several recent district court decisions, including some within the Second Circuit, *have found that Congress did not intend such a narrow interpretation of the DFA*. When considering the DFA as a whole, *it is plain that a narrow reading of the statute requir-*

similar outcome as the aforementioned courts, the Ninth Circuit does not explicitly point to where in the legislative history there is evidence to support their claim, but rather declares that this assumption may be inferred from the text of the statute.<sup>142</sup> In *Ellington*, the court doesn't even try to make this argument, but rather subjectively contends that the language of the statute itself shows Congressional intent: "It is apparent from the wording and positioning of § 78u-6(h)(1)(B)(i) that Congress intended that an employee terminated for reporting Sarbanes-Oxley violations to a supervisor or an outside compliance officer, and ultimately to the SEC, have a private right of action under Dodd-Frank. . . ."<sup>143</sup> Stating that legislative history indicates a certain perspective when there is no clear evidence that it does is indicative of a court manifesting its views rather than objectively interpreting the law.

During oral argument, Digital Realty Trust argued that there is no legislative history cited in the Respondent's brief except for an article from a legal commentary website.<sup>144</sup> This is revealing, as it encapsulates that Respondent-Somers subtly acknowledges that the legislative history is not strong enough to support its position. If the Respondent felt that there was sufficient support, the legislative history would have likely been cited in the brief. Rather, instead of relying on what the legislative history is, Somers relied on a third-party articles espousing its views on what it believes the legislative history is.<sup>145</sup>

In *Egan*, the court notes the flaw in relying upon the legislative history of the DFA to find the whistleblower provisions ambiguous: "The legislative history of the Act provides little evidence of Congress's purpose. The various committee reports and debates in Congress focus on the bounty provisions of the Act and contain very few substantive

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*ing a report to the SEC conflicts with the anti-retaliation provision, which does not have such a requirement. Thus, the governing statute is ambiguous.*") (emphasis added).

142. Somers v. Dig. Realty Tr., Inc., 850 F.3d 1045, 1049 (9th Cir. 2017) ("Subdivision (iii) was added after the bill went through Committee. *There is no legislative history explaining its purpose, but its language illuminates congressional intent. By broadly incorporating, through subdivision (iii), Sarbanes-Oxley's disclosure requirements and protections, DFA necessarily bars retaliation against an employee of a public company who reports violations to the boss, i.e., one who 'provide[s] information' regarding a securities law violation to 'a person with supervisory authority over the employee.'* 18 U.S.C. § 1514A(a).") (emphasis added).

143. Ellington v. Giacomakis, 977 F. Supp. 2d 42, 45 (D. Mass. 2013) (emphasis added).

144. Oral Argument, *supra* note 37, at 25.

145. Brief of Respondent at 5-6, Digital Realty Trust, Inc. v. Somers, 138 S.Ct. 767, 777 (2018).

discussions of its anti-retaliation provisions.”<sup>146</sup> Of those few reports and debates that do discuss the anti-retaliation provisions, none touch upon the issue of whether reporting to the SEC is required for whistleblowers to avail themselves of the Act’s anti-retaliation provisions.<sup>147</sup> Often the debates surrounding the DFA focused more on the allocation of the funds of the whistleblower payout as opposed to how it is to be interpreted in relation to the SEC’s rules.<sup>148</sup> Senator Menendez does mention that there are “inconsistencies with current law,” but does not address tensions with other statutes in relation to reporting requirements.<sup>149</sup> The inconsistencies that Senator Menendez spoke of are related to due process rights of whistleblowers. His viewpoint is that the legal protections of whistleblowers by updating the retaliation remedies under SOX (increasing the number of days to file a claim to 180 from 90; “clearer right to a jury trial”; and eliminating gag orders that are in employer contracts).<sup>150</sup> These Senators, along with the rest of Congress, were aware of possible tensions with other SEC rules, yet did not once mention a possible tension with the SEC whistleblower anti-retaliation provision.

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146. *Egan v. Tradingscreen, Inc.*, No. 10 Civ. 8202 (LBS), 2011 WL 1672066 at \*4 (S.D.N.Y. May 4, 2011) (emphasis added).

147. 156 Cong. Rec. S3975 (daily ed. May 19, 2010) (statement of Sen. Leahy) (focusing on the confidentiality aspect of the anti-retaliation provisions).

148. *See, e.g.*, H.R. REP. NO. 111-517, at 870 (2010); *see also* 156 CONG. REC. S4076 (daily ed. May, 20, 2010) (statement of Sen. Shelby) (“The whistleblower provisions are well-intentioned attempts to address the SEC’s failure during the Madoff scandal. However, the guaranteed massive minimum payouts and limited SEC flexibility ensure that a line of claimants will form at the SEC’s door hoping for some of the hundreds of millions in the whistleblower pot. The SEC will spend limited resources sorting through these claims that would have been better spent bringing enforcement cases.”).

149. 156 CONG. REC. S3153 (daily ed. May 5, 2010) (statement of Sen. Menendez) (“Lastly, I wish to talk about whistleblower protections. They are the first and most effective line of defense against corporate fraud and other misconduct, yet because of inadequate protections against retaliation, would-be corporate whistleblowers often keep quiet when they could be protecting the public from illegal activity. As we have seen in the emerging Lehman Brothers scandal, a whistleblower who tried to alert management to illegal accounting tricks was fired. Though the Sarbanes-Oxley Act of 2002 did much to expand protection of corporate whistleblowers from retaliation, it lacks several modern whistleblower protections that have been standard in every piece of legislation since 2006. My amendment updates Sarbanes-Oxley protections against retaliation by giving whistleblowers 180 days to file a claim instead of the 90 that exists right now; giving whistleblowers their day in court with a clearer right to a jury trial; clarifying that whistleblowers are entitled to compensatory damages; strengthening due process rights for whistleblowers by eliminating inconsistencies in current law; preventing employers from gagging whistleblowers by holding them to contractual obligations; ensuring that whistleblowers will be protected for all disclosures of material misconduct.”).

150. 156 CONG. REC. S3153 (daily ed. May 5, 2010) (statement of Sen. Menendez).

Senator Christopher Dodd, who co-authored the eponymous Dodd-Frank Act, made remarks about the whistleblower provision of the DFA in regard to how it should be interpreted in relation to the SEC's provision.<sup>151</sup> Senator Dodd explained that the provision "is intended to limit the SEC's administrative burden and not to encourage making small awards."<sup>152</sup> The statutory canon *expressio unius est exclusio alterius* is defined as "the inclusion of one thing excludes the other."<sup>153</sup> "It is a rule of negative implication: by including some things, the legislature intentionally left out others."<sup>154</sup> For example, if a lawyer says that her practice areas are banking & finance, capital markets, and mergers and acquisitions, it is ordinarily understood that she does not practice family law. Applying the statutory canon *expressio unius est exclusio alterius*, it can be inferred that Senator Dodd either did not think there was tension with the SEC's whistleblower anti-retaliation provision (and as such, courts should defer to the SEC's rule) or Congress did not consider it at all. If the former is true, this substantiates the notion that courts are engaging in judicial activism by stating that the legislative history and intent articulates a particular opinion, when it does not. If the latter is true, this also reinforces the notion that courts are engaging in judicial activism, since Congress did not consider a possible tension between the statutes at play yet courts are importing intent when blazoning that Congress did consider it.

Senator Patrick Leahy makes sustained comments on the anti-retaliation provisions of the DFA whistleblower statute, but the focus is on confidentiality.<sup>155</sup> Senator Leahy centered his argument on the notion that there is not sufficient privacy for whistleblowers under the then-proposed bill due to overbroad language.<sup>156</sup> Senator Leahy's remarks make no reference nor inference that there is tension with the SEC's whistleblower statute. Senator Leahy clearly examined the language of the anti-retaliation provisions of the DFA whistleblower

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151. 156 CONG. REC. S5929 (daily ed. July 15, 2010) (statement of Sen. Dodd).

152. *Id.*

153. LINDA D. JELLUM & DAVID CHARLES HRICK, MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES 165 (2006).

154. *Id.*

155. 156 CONG. REC. S3975 (daily ed. May 19, 2010) (statement of Sen. Leahy) ("My amendments addresses [sic] two key problems with the whistleblower provisions in the bill: First, the bill would prevent whistleblowers from obtaining information that they themselves have provided to government regulators under any circumstances. Second, the bill creates an unnecessary exemption to the Freedom of Information Act, FOIA, that would, in some cases, shield critical information about financial fraud from the public indefinitely.").

156. *Id.*

statute as he felt compelled to address aspects of it that he felt were not sufficient. If Senator Leahy believed that the language of the anti-retaliation provisions of the DFA whistleblower statute is at odds with the SEC's whistleblower statute, he would have made such remarks.

During oral argument, Justice Kagan noted that the statutory definition clearly states how the DFA anti-whistleblower statute should be interpreted, despite recognizing that subsection (iii) was added late, even granting “[i]t’s odd; it’s peculiar; probably not what Congress meant.”<sup>157</sup>

The *Somers* district court expresses a logical fallacy when it reasons that since “[s]ubsection (iii) was added to the DFA at the very last minute,”<sup>158</sup> a whistleblower does not have to report to the SEC since “this construction accords with the legislative history.”<sup>159</sup> To explain this incoherent argument, the court elaborates that “given the belated addition of subsection (iii), it is at least reasonable to assume that Congress intended for the scope of the DFA whistleblower-provisions to be broader than in earlier versions of the bill, which versions unambiguously required an external report to the Commission in order to be protected from employer retaliation.”<sup>160</sup> The statute clearly does require reporting to the Commission. The DFA whistleblower anti-retaliation provision states:

No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—

- (i) in providing information *to the Commission* in accordance with this section;
- (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action *of the Commission* based upon or related to such information; or
- (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1 (m) of this title, section 1513 (e) of title 18,

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157. Oral Argument, *supra* note 37, at 48-49.

158. *Somers v. Dig. Realty Tr., Inc.*, 119 F. Supp. 3d 1088, 1103 (N.D. Cal. 2015).

159. *Id.* But see Oral Argument, *supra* note 37, at 48 (“[I]t’s quite possible the way this provision gets in very late in the game, that they didn’t know that they’ll—they forgot about this definitional provision, and they were meaning it more in the ordinary-language sense. But there you are, you have this definitional provision, and it says what it says. And it says that it applies to this section.”).

160. *Somers*, 119 F. Supp. 3d at 1103.

and any other law, rule, or regulation subject to the jurisdiction of the Commission.<sup>161</sup>

The change in text the court is referring to is regarding the earlier version of the text read that read as follows: “[T]he Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), including section 10A(m) of such Act (15 U.S.C. 78f(m)). . . .”<sup>162</sup> However, both versions of subsection (iii) contained the key phrase, “to the Commission.”<sup>163</sup> In *Exxon v. Allapattah Servs.*, the Supreme Court expressed; “[a]s we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material.”<sup>164</sup> The *Somers* court has no statutory cannon in which to support its interpretation of the text, so it has subjectively determined how the statute should be read according to the timing of the text. Whether subsection (iii) was added in the very first draft or the very last draft, it should not figure into statutory interpretation. The statutory text, states, in part, “in making disclosures . . . and any other law, rule, or regulation subject to the jurisdiction of the Commission.”<sup>165</sup> It is clear, from both legislative history and the statutory text, that the DFA requires whistleblowers to report to the SEC in order to avail themselves to SEC protections.

After relying on legislative history to support its interpretation of subsection (iii) was added late to the DFA, the *Somers* district court admits that it “does [not] appear to have ever been discussed in the legislative record.”<sup>166</sup> Subverting their own argument that the lack of legislative history indicates a broad interpretation of “to the Commission” (i.e. to anyone other than the SEC), the *Somers* district court admits; “[c]ertainly, the legislative history contains no indication, apart from the definition of whistleblower itself, that Congress purposefully intended to limit whistleblower protections under (iii) solely to

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161. 15 U.S.C.A. § 78u-6(h)(1)(A)(i)-(iii) (West, effective July 22, 2010) (emphasis added).

162. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1846 (2010).

163. *See id.*

164. *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 568 (2005) (emphasis added) (“Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms. Not all extrinsic materials are reliable sources of insight into legislative understandings, however, and legislative history in particular is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal’s memorable phrase, an exercise in ‘looking over a crowd and picking out your friends.’”).

165. 15 U.S.C.A. § 78u-6(h)(1)(A)(i)-(iii) (West, effective July 22, 2010) (emphasis added).

166. *Somers v. Dig. Realty Tr., Inc.*, 119 F. Supp. 3d 1088, 1103 (N.D. Cal. 2015).

those making reports to the Commission.”<sup>167</sup> “Congress could not have defined ‘whistleblower’ more clearly, and yet the SEC apparently believes that entire definition should be cast aside on the flimsy grounds that Congress really didn’t mean it.”<sup>168</sup>

Moreover, the *Somers* district court utilizes a tortured argument on legislative history to justify its position that the DFA whistleblower statute is ambiguous.<sup>169</sup> The *Somers* court notes:

[S]ubsections (i) and (ii) expressly refer to providing information or testimony *to the Commission*, while (iii) makes no similar reference *to the Commission*. The difference in language, wherein the key qualification articulated in (i) and (ii) is omitted from (iii), *suggests a legislative intent that (iii) not be read to require SEC reporting*.<sup>170</sup>

The statutory canon *expressio unius est exclusio alterius*, “[p]roperly invoked . . . prevents expanding an enumerated list of items or exceptions; it does not create new substantive rights by negative inference.”<sup>171</sup> Here, the court’s reasoning is contrary to the statutory canon as it is holding that since language is omitted it does mean that a private cause of action is created. In contrast to the *Somers* district court, the *Asadi* court correctly notes that a whistleblower under § 78u-6(h) creates a private cause of action *only* for individuals who provided information *to the Commission* (SEC) relating to a securities law violation.<sup>172</sup> If the statute were to include reporting to persons other than to the Commission, the statute would have been authored in such a manner.

While legislative history may be used for statutory interpretation, courts should be cautious on overreliance of legislative history. Justice Thomas reckoned that the Court is “governed by what Congress enacted rather than by what it intended.”<sup>173</sup> To illustrate his point, Justice Thomas included an interesting colloquy between Senator Bill Armstrong and Senator Bob Dole, as well as provides a quote from a federal judge describing his experience as a Senate staffer: “[M]ost members of Congress . . . have no idea at all about what is in the legislative history for a particular bill.”<sup>174</sup> Scalia & Garner thoroughly explain that legislative history is unreliable as it easily

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167. *Id.* (emphasis added).

168. *Verfuert v. Orion Energy Sys., Inc.*, 65 F. Supp. 3d 640, 645 (E.D. Wis. 2014)

169. *See Somers*, 119 F. Supp. 3d at 1103.

170. *Id.* (emphasis added).

171. *See, e.g., Cruz v. TD Bank, N.A.*, 855 F. Supp. 2d 159, 171 (S.D.N.Y. 2012).

172. *Asadi v. G.E. Energy U.S., L.L.C.*, 720 F.3d 620, 623 (5th Cir. 2013).

173. *Somers v. Dig. Realty Tr., Inc.*, 138 S.Ct. 767, 783 (2018) (Thomas, J., concurring).

174. *Id.*

manipulated.<sup>175</sup> This is accentuated when the *Berman* court states that the lack of legislative history means “to the Commission” is to be interpreted broadly.<sup>176</sup> While reading the same legislative materials, and quite possibly sharing the same political preferences, the liberal Justices interpreted the statute differently from the Second and Ninth Circuits. In *Blanchard v. Bergeron*, Justice Scalia forewarned the use of relying on legislative history because it is susceptible to an array of interpretations due to the complexity and volume of materials.<sup>177</sup>

## V. PUBLIC POLICY

The political ideologies at play in defining “whistleblower” in the DFA are pro-business (narrow interpretation) and pro-consumer/employee or ‘little guy’ (broad interpretation). These political ideologies were pronounced during the Senate confirmation hearings of Justice Neil Gorsuch’s SCOTUS nomination.<sup>178</sup> The pro-business ideology is portrayed as ruling for corporations rather than individuals.<sup>179</sup>

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175. SCALIA & GARNER, *supra* note 101, at 376-77 (2012) (“Further, the use of legislative history to find ‘purpose’ in a statute is a legal fiction that provides great potential for manipulation and distortion. The more courts have relied on legislative history, the less reliable that legislative history has become. . . . Legislative history creates mischief both coming and going – not only when it is made but also when it is used. With major legislation, the legislative history has something for everyone.”).

176. *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155 (2d Cir. 2015) (“Ultimately, we think it doubtful that the conferees who accepted the last-minute insertion of subdivision (iii) would have expected it to have the extremely limited scope it would have if it were restricted by the Commission reporting requirement in the ‘whistleblower’ definition in subsection 21F(a)(6). If we had to choose between reading the statute literally or broadly to carry out its apparent purpose, we might well favor the latter course.”).

177. See *Blanchard v. Bergeron*, 489 U.S. 87, 98-100 (1989) (Scalia, J., concurring).

178. Jeffrey Rosen, *A Supreme Court Nominee Alert to the Dangers of Big Business*, THE ATLANTIC (Mar. 20, 2017), <https://www.theatlantic.com/politics/archive/2017/03/gorsuch-nuanced-record-on-business/520101/> (“The Center for American Progress argues that ‘if he becomes a justice, the Supreme Court would very likely continue its trend of ruling in favor of big business.’ The Constitutional Accountability Center warns that confirming Gorsuch on the Court ‘would further solidify the hold that big business has on the Court, as exemplified by the increasing success of the U.S. Chamber of Commerce before the Roberts Court.’ The Chamber of Commerce, by contrast, has celebrated his nomination as ‘fantastic’; Debra Cassens Weiss, *Gorsuch confirmation hearings, Day 4: He is portrayed as empathetic, yet bad for the little guy*, A.B.A. J. (Mar. 23, 2017, 3:44 PM), (“Representatives of liberal groups, on the other hand, portrayed Gorsuch as a judge who *rules against the little guy and relies on the Oxford English Dictionary rather than common sense in applying laws designed to protect workers.*”) (emphasis added) [http://www.abajournal.com/news/article/gorsuch\\_confirmation\\_hearings\\_day\\_4\\_aba\\_testimony\\_expected](http://www.abajournal.com/news/article/gorsuch_confirmation_hearings_day_4_aba_testimony_expected).

179. See *id.*

Relying on dictionary definitions of words is textualism, a canon of construction.<sup>180</sup> Interpreting law based upon ‘common sense’ is subjective. Common sense is not a canon of construction, but rather what a person perceives how things ought to be.

Courts that interpret the definition of “whistleblower” broadly are trying to protect employees, or the little guy, due to the backlash that whistleblowers experience. There is the practical notion that employees are already unwilling to come forward about misconduct and wrongdoing over fear of risking their careers:

Lower-level employees, particularly those in financial positions, may have information about the financial irregularities but are often unwilling to risk their careers by blowing the whistle. Without an insider providing information about the types of transactions that should be looked at, the accounting misconduct may not emerge for years, if ever.<sup>181</sup>

Justice Ruth Bader Ginsberg, whom is considered to have liberal views,<sup>182</sup> who penned the majority opinion professed “[t]he plain-text reading of the statute undoubtedly shields fewer individuals from retaliation than the alternative,”<sup>183</sup> and still held that the DFA anti-whistleblower retaliation statute does not extend to those who report wrongdoing to entities other than the SEC.

The perception that whistleblowers, particularly those in financial positions, have no bulwark is unfounded. In 2010, a Wells Fargo employee made an internal report about suspected illegal business practices, and he was subsequently fired.<sup>184</sup> The Occupational Safety and Health Administration (OSHA) held that he “lost his job after reporting suspected fraudulent behavior to superiors and a bank ethics hotline.”<sup>185</sup> OSHA ruled that the employee be awarded \$5.4 million and that Wells Fargo must rehire him.

In another instance, a bank executive was reprimanded for possibly attempting to retaliate against a whistleblower. James E. Staley, the Chief Executive Officer (C.E.O.) of Barclays, tried to uncover the identity of an anonymous employee who sent letters to company officials regarding the behavior of another executive, whom he worked

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180. See generally George H. Taylor, *Structural Textualism*, 75 B.U.L. REV. 321 (1995).

181. Peter J. Henning, *Come Blow Your Horn for the S.E.C.*, N.Y. TIMES (July 26, 2010 12:32 PM), <https://dealbook.nytimes.com/2010/07/26/come-blow-your-horn-to-the-s-e-c/>.

182. See *supra* note 180.

183. *Somers v. Dig. Realty Tr., Inc.*, 138 S.Ct. 767, 779 (2018).

184. Stacy Cowley, *Wells Fargo Whistle-Blower Wins \$5.4 Million and His Job Back*, N.Y. TIMES (Apr. 3, 2017), <https://www.nytimes.com/2017/04/03/business/04-wells-fargo-whistleblower-fired-osa.html>.

185. *Id.*

with previously at another company.<sup>186</sup> An independent investigation by a law firm found that Staley held a mistaken belief that he was allowed to identify the whistleblower.<sup>187</sup> Mr. Staley will face several repercussions for his actions; his bonus will be notably reduced, he made a number of public apologies, shareholders have asked him to step down as C.E.O., and a proxy advisor recommended that shareholders withhold their vote for his reelection to the board.<sup>188</sup>

Several politicians have acknowledged the adversity that a whistleblower will likely face<sup>189</sup>. Whistleblowers may be seen as disloyal not only by the employer they reported, but also by other potential employers.<sup>190</sup> Senator Dodd remarked: “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.”<sup>191</sup>

There are numerous federal statutory schemes providing whistleblowers protection from retaliation.<sup>192</sup> Whistleblowers have to operate within the confines of the law in order to avail themselves to the appurtenant protections.<sup>193</sup> If courts decide to expand the law be-

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186. Kate Kelly & Chad Bray, *Barclays C.E.O. Investigated Over Treatment of Whistle-Blower*, N.Y. TIMES (Apr. 10, 2017), <https://www.nytimes.com/2017/04/10/business/dealbook/barclays-jes-staley-whistleblower.html>.

187. *Id.*

188. Chad Bray, *Barclays C.E.O. Apologizes for Handling of Whistle-Blower Complaint*, N.Y. TIMES (May 10, 2017), [https://www.nytimes.com/2017/05/10/business/dealbook/barclays-james-staley-whistle-blower.html?\\_r=0](https://www.nytimes.com/2017/05/10/business/dealbook/barclays-james-staley-whistle-blower.html?_r=0).

189. S. REP. NO. 111-176, at 38, 110-12, 217-18 (2010) (“Recognizing that whistleblowers often face the difficult choice between telling the truth and the risk of committing ‘career suicide.’”).

190. See Debra Wroge, *Whistleblowers: Loyal Corporate Employee or Disloyal Employee?* 35 COMM. THEATER ASS’N MINN. J. 33 (2008). Jeffrey S. Wigand was a former tobacco executive who blew the whistle on his company, lost his job, and went from making \$300,000 per year plus stock options to making \$30,000 teaching at a high school when he was “cast as a turncoat for spilling company secrets.” Rick Lyman, *A Tobacco Whistle-Blower’s Life is Transformed*, N.Y. TIMES (Oct. 15, 1999), <http://www.nytimes.com/1999/10/15/us/a-tobacco-whistle-blower-s-life-is-transformed.html>.

191. 156 CONG. REC. S5929 (daily ed. July 15, 2010) (statement of Sen. Dodd) (emphasis added).

192. Clean Air Act, 42 U.S.C. § 7622(a) (1977); Commercial Motor Vehicle Safety Act, 49 U.S.C. § 31105(a) (2007); Comprehensive Environmental Response Compensation Liability Act (“CERCLA”), 42 U.S.C. § 9610(a) (1980); Energy Reorganization Act of 1974 42 U.S.C. § 5851(b) (2005); Fair Labor Standards Act of 1938, 29 U.S.C. § 215(a)(3) (1950).

193. See generally, an employee who alleges that he or she has been terminated or otherwise discriminated against in violation of CERCLA’s whistleblower provisions may, within thirty days, apply to the Secretary of Labor for review. 42 U.S.C. § 9610(a); An employee who alleges that he or she has been terminated or otherwise discriminated against in

yond its plain meaning in order to protect persons who exposed wrongdoing, then it undermines having whistleblower laws altogether.<sup>194</sup> Moreover, expanding the law beyond the statutory definition does not take into account the reasons for having said laws, and while the law is viewed broadly, the reasoning for the expansion is narrow-minded.<sup>195</sup>

Courts interpreting the DFA anti-whistleblower statute broadly do so by injecting their views on what the law should be, and clearly ignore the plain language of the statute. The *Somers* district court improperly reasoned that public policy favors a broad interpretation of the DFA anti-whistleblower statute.<sup>196</sup> The court questionably states that “[b]ecause this Court *believes* that the language of the DFA whistleblower-protection provision is at least somewhat in conflict . . .—reading subsection (iii) narrowly to require a report to the Commission—seems at odds with public policy underlying the DFA.”<sup>197</sup> The district court does not state how precisely the language is in conflict based on a canon of construction. Withal, the court does not show where the legislative intent states the public policy. The district court holds that a statutory definition may be expanded based on other materials, such as “historic origins and legislative purpose of the law.”<sup>198</sup> However, the district court does not cite any research, data, or evidence to support its claim. In a concurring opinion, Justice Sotomayor professed how legislative history is useful in interpreting law but declined to state that legislative history in this instance sup-

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violation of FDA Food Safety Modernization Act’s whistleblower provisions may file a complaint with the Secretary of Labor within 180 days after the date on which the violation occurs. 21 U.S.C. § 399d(b)(1) (2011); Any employee who alleges that he or she has been terminated or discriminated against in violation of the Federal Water Pollution Control Act of 1972 (“FWCPA”) whistleblower provisions may, within thirty days after such alleged violation occurs, apply to the Secretary of Labor for a review. 33 U.S.C. § 1367 (1984). These statutes specify the timeframe for which claims must be brought. If a person tries to bring a claim after the defined period of which the alleged violation occurs, they will not be able to avail themselves to a remedy under the respective law.

194. See *infra* § VIII, absurdity section.

195. *Somers*, 138 S.Ct. at 779 (“Moreover, even where the employer knows of the SEC reporting, the third clause may operate to dispel a proof problem: The employee can recover under the statute without having to demonstrate whether the retaliation was motivated by the internal report (thus yielding protection under clause (iii)) or by the SEC disclosure (thus gaining protection under clause (i))”).

196. *Somers*, 119 F. Supp. 3d at 1104 (“*v. Policy Reasons Support a Finding of Ambiguity*.” “Put simply, requiring SEC reporting adds nothing to the *policy* of deterring employer retaliation.”) (emphasis added).

197. *Id.*

198. *Id.* at 1099.

ported an interpretation that “to the Commission” means entities other than the SEC.<sup>199</sup>

One court broadly interpreted the DFA anti-whistleblower statute and decided to radically contort the law by applying it retroactively as well as holding that it provides a private right of action. In *Ellington v. Giacoumakis*, the court concedes that plaintiff-Ellington did not provide information to the SEC until after he was terminated., but held that a plaintiff has a “a private right of action under Dodd–Frank whether or not the employer wins the race to the SEC’s door with a termination notice.”<sup>200</sup> This reasoning is flawed for it goes against the plain language of the statute.<sup>201</sup> If Ellington had made the complaint and were then terminated, he would have been protected. However, Ellington was terminated and then he made the complaint,<sup>202</sup> and thus was outside the scope of the statute. There is a presumption against retroactivity.<sup>203</sup> Moreover, the court contends that there is an implied private right of action based on its assumption of Congressional intent on the “wording and positioning” of the statute.<sup>204</sup> No other court, even those that broadly interpreted the DFA anti-whistleblower statute, found it created an implied private right of action. Typically, a statute expressly provides a remedy for plaintiffs in the class whose benefit the statute was enacted.<sup>205</sup> As discussed *supra* in this Article, there is a

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199. *Somers*, 138 S.Ct. at 782 (Sotomayor, J., concurring) (“Legislative history is of course not the law, but that does not mean it cannot aid us in our understanding of a law. Just as courts are capable of assessing the reliability and utility of evidence generally, they are capable of assessing the reliability and utility of legislative-history materials.”).

200. *Ellington v. Giacoumakis*, 977 F. Supp. 2d 42, 46 (D. Mass. 2013) (“There is no dispute that after his termination, Ellington provided the SEC with a detailed report of NEINV’s alleged violations, assisted the SEC in its investigation of NEINV, and was the instigator of the SEC’s assessment of civil penalties against NEINV, all of which occurred after Dodd–Frank took effect.”).

201. *See* 15 U.S.C.A. § 78u-6(a)(6) (West, effective July 22, 2010).

202. *See supra* note 200.

203. *U. S. Fid. & Guar. Co. v. U. S. ex rel. Struthers Wells Co.*, 209 U.S. 306, 314 (1908) (“The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other.”).

204. *Ellington*, 977 F. Supp. 2d at 45 (“The SEC’s construction is the more persuasive. *It is apparent from the wording and positioning of § 78u-6(h)(1)(B)(i) that Congress intended that an employee terminated for reporting Sarbanes-Oxley violations to a supervisor or an outside compliance officer, and ultimately to the SEC, have a private right of action under Dodd-Frank whether or not the employer wins the race to the SEC’s door with a termination notice.*”) (emphasis added).

205. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 690-93 (1979) (The Court states that a female plaintiff has an implied private right of action because she is protected by discrimination that Congress had in mind when it enacted Title IX.) (“The language in these statutes—which expressly identifies the class Congress intended to benefit—contrasts sharply with statutory language customarily found in criminal statutes . . . and other laws enacted for the protection of the general public. There would be far less reason to infer a

lack of legislative intent regarding the DFA anti-whistleblower statute.<sup>206</sup>

Yet, inferring a private cause of action should seldom, if ever, be employed. In a dissenting opinion in *Cannon v. University of Chicago*, Justice Powell stated, “[a]bsent the most compelling evidence of affirmative congressional intent, a federal court should not infer a private cause of action.”<sup>207</sup> This set the table for how the Court would later view an implied private of right action, which is a strict constructionist test set forth in *Alexander v. Sandoval*.<sup>208</sup> Under *Sandoval*, contextual evidence of legislative intent is only relevant insofar as it clarifies the meaning of the text.<sup>209</sup> The *Ellington* court did not acknowledge the plain meaning of the text. Further, it did not cite any specific legislative intent in its analysis. Rather, the court utilized judicial activism to read an implied private of action existed in the statute in order to reinforce its view that there should be no time restriction in the statute.

A court has correctly held that the DFA whistleblower does not apply retroactively.<sup>210</sup> In *Ahmad v. Morgan Stanley & Co.*, the court held: Plaintiff “has not shown, or even purported to show, clear evidence of congressional intent that would rebut the presumption, § 78u-6(h) cannot apply retroactively. Plaintiff-Ahmad cannot, therefore, bring suit under § 78u-6(h) for conduct that occurred before Dodd-Frank’s effective date, July 22, 2010.”<sup>211</sup> Karl Llewellyn authored an article that identified the apparent conflict between the canon that “[a] statute imposing a new penalty or forfeiture, or a new liability or disability, or creating a new right of action will not be construed as having a retroactive effect.”<sup>212</sup> Nowhere in the SEC or DFA whistleblower anti-retaliation remedies does it state that the statute should be applied retroactively.

The Supreme Court has demarcated that public policy arguments are to be interpreted narrowly. In *Dep’t of Homeland Sec. v. MacLean*, the Court ruled that if there is a public policy argument, it is

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private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct. . . .”).

206. See *supra* Part V.

207. *Cannon*, 441 U.S. 677, 731 (Powell, J., dissenting).

208. 532 U.S. 275 (2001).

209. *Id.* at 291-93.

210. *Ahmad v. Morgan Stanley & Co.*, 2 F. Supp. 3d 491, 498 (S.D.N.Y. 2014).

211. *Id.*

212. Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 3 VAND. L. REV. 395, 402 (1950).

a matter for Congress or the President.<sup>213</sup> In *MacLean*, the Court further clarified that broadly interpreting the law would allow agencies to promulgate blanket whistleblower rules and regulations, which frustrates the purpose of whistleblower statutes.<sup>214</sup> Lower courts that are interpreting the whistleblower laws broadly are not considering the Supreme Court's point. For example, courts that allow persons who are no longer employees to be considered whistleblowers do not consider plausible scenarios. As occurred in both *Neo@Ogilvy* and *Ellington*, the plaintiffs made the report after they were terminated, and were thus outside the scope of the definition of a whistleblower.<sup>215</sup> Neither court stated how long after an employee is terminated are they allowed to be considered whistleblowers. If an employee is terminated, these broad interpretations allow for plaintiffs to bring forth a claim four weeks, six months, or ten years later.

Moreover, the *Neo@Ogilvy* and *Ellington* rulings that allow ex-employees to bring forth a claim open the door for persons who were never employees to bring forth claims. Another plausible situation could be that Employee A learns of wrongdoing. Instead of reporting the wrongdoing, Employee A leverages it for capital from Supervisor B to be quiet about it. Supervisor B later leaves for another position at a different company and hires Employee A at the new company. Before Supervisor B leaves, Employee A sends an email to Supervisor B about the suspicious activity. Employee A then reports the wrongdoing and brings forth a claim under the DFA. Employee A would be unjustly enriched, as he profited off illicit activity and only decided to exploit the law in order to further his economic gain. Courts that employ a broad interpretation of the retaliation remedies available to whistleblowers in the DFA are painting their public policies with too broad a brush. Whistleblower statutes that are interpreted broadly are vulnerable to exploitation, and thus defeat the purpose of the law.

## VI. INTERPRETATION OF SIMILAR STATUTES

### A. Sarbanes-Oxley Act

Unlike other courts, The Ninth Circuit did not go beyond the plain language of the SOX act in regard to whistleblower remedies

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213. Dep't of Homeland Sec. v. *MacLean*, 135 S. Ct. 913, 923-24 (2015).

214. *Id.*

215. *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 146-47 (2d Cir. 2015), *abrogated by* *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767 (2018); *Ellington v. Giacoumakis*, 977 F. Supp. 2d 42, 46 (D. Mass. 2013).

when interpreting its meaning in *Tides v. Boeing Co.*<sup>216</sup> There, Matthew Neumann and Nicholas Tides, two members of the company's SOX audit group, alleged that they were pressured by supervisors to provide reports giving favorable reviews to internal controls despite their concerns that the controls were vulnerable to manipulation by unauthorized users.<sup>217</sup> Notwithstanding a published company policy prohibiting employees from speaking to the press, both employees provided information about what occurred to a newspaper reporter who incorporated the information in a published article.<sup>218</sup> The Ninth Circuit held that the plaintiffs could not avail themselves to retaliation remedies in the SOX because “[l]eaks to the media are not protected.”<sup>219</sup> The court articulated that SOX applied only to “employees of publicly-traded companies who disclose certain types of information only to the three categories of recipients specifically enumerated in the Act—federal regulatory and law enforcement agencies, Congress, and employee supervisors.”<sup>220</sup> The *Tides* court read the three categories of the SOX statute according to their plain meaning. Courts interpreting the DFA should likewise interpret the three categories<sup>221</sup> according to the plain meaning statutory meaning.

The DFA and SOX are the two federal statutes that provide whistleblower protections for employees whose functions are business, economics, or finance. While SOX does allow for whistleblowers to make internal reports, the DFA does not contain such language.<sup>222</sup> The DFA has one category of recipient specifically enumerated—the SEC.<sup>223</sup> When a court reads a statute beyond its plain meaning, it is effectively making law.

### B. Whistleblower Protection Act

In *MacLean*,<sup>224</sup> the Supreme Court relied primarily on statutory construction when determining the scope of protections afforded to federal employees under the Whistleblower Protection Act (WPA).<sup>225</sup>

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216. *Tides v. Boeing Co.*, 644 F.3d 809 (9th Cir. 2011).

217. *Id.* at 811.

218. *Id.* at 811-12.

219. *Id.* at 811.

220. *Id.* at 810-11.

221. *See* 15 U.S.C.A. § 78u-6(h)(1)(A) (West, effective July 22, 2010).

222. *See id.*

223. *Id.*

224. *Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913 (2015).

225. Whistleblower Protection Act of 1989, P.L. 101-12, 103 Stat. 16 (1989); Act of Oct. 29, 1994, P.L. 103-424, 108 Stat. 4361 (1994); Whistleblower Protection Enhancement Act of

The WPA provides protections to federal employees who make disclosures if it is a “personnel action” that was taken because of a protected disclosure made by a “covered employee.”<sup>226</sup> The WPA provides an exception that states protections are not afforded from a personnel action if the information disclosed is “specifically prohibited by law.”<sup>227</sup> In *MacLean*, the primary issue presented to the Court was whether the WPA definition of “law” should be construed narrowly or broadly.<sup>228</sup>

The majority opinion<sup>229</sup> cited the *casus omissus pro omisso habendus est* canon, which holds that what a text does not provide is unprovided, thus narrowly construing the statute.<sup>230</sup> The dissenting opinion preferred a broader interpretation to extend the powers beyond that which is in the text of the statute.<sup>231</sup> The Transportation Security Administration (TSA) promulgated rules that placed limitations on disclosing “sensitive security information.”<sup>232</sup> In *Maclean*, a federal air marshal publicly disclosed that the TSA decided to cut costs by scaling back the number of federal air marshals on long-distance flights.<sup>233</sup> The federal air marshal revealed this to a reporter who subsequently published a story about it.<sup>234</sup>

Basing its decision on the text of the statute, the Court held that the numerous references to “law, rule, or regulation” in § 2302 manifest that a reference only to “law” should be interpreted to exclude “rule” or “regulation.”<sup>235</sup> Further, the Court elucidated that the Congress frequently mentions the phrase “law, rule, or regulation” throughout the statute.<sup>236</sup> The text at issue refers only to “law” and the Court adduced a fundamental concept of statutory interpretation, which is that when the Congress includes certain language in one part

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2012, P.L. 112-199, 126 Stat. 1465 (codified, as amended, in various sections of Title 5 U.S.C. (2012)).

226. 5 U.S.C. § 2302 (2017).

227. 5 U.S.C. § 2302(b)(8)(A).

228. *MacLean*, 135 S. Ct. at 916.

229. *Id.* at 919 (“The interpretive canon that Congress acts intentionally when it omits language included elsewhere applies with particular force here. . .”).

230. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533-34 (1947).

231. *MacLean*, 135 S. Ct. at 926 (Sotomayor, J., dissenting) (“Congress has required agency action that would preclude the release of information “detrimental to the security of transportation.” In so doing, Congress has expressed its clear intent to prohibit such disclosures. I would respect its intent, and hold that a disclosure contravening that mandate is “prohibited by law” within the meaning of the WPA.”).

232. *Id.* at 916.

233. *Id.* at 917.

234. *Id.*

235. *Id.* at 919.

236. *MacLean*, 135 S. Ct. at 919.

of a statute but excludes it from another part of the statute, it is intentional.<sup>237</sup> Thus, the Court concluded that since § 2302(b)(8)(A) only included “law” and the rest of the statute included “law, rule, or regulation,” the Congress intended statutes, not rules or regulations, to define exceptions to whistleblower protections.<sup>238</sup> The Court did not go beyond the plain meaning of the statute.

## VII. REDUCTIO AD ABSURDUM

The Second Circuit<sup>239</sup> relied on a *reductio ad absurdum* argument, which was roundly rejected by the Ninth Circuit<sup>240</sup> (although nonetheless adopting a broad interpretation of the DFA anti-whistleblower statute) and the Supreme Court.<sup>241</sup> While advocating for Respondent-Somers, the Solicitor General acknowledged that requiring whistleblowers to make disclosures only to the SEC would not yield absurd results.<sup>242</sup>

Ironically, the Second Circuit and Respondent-Somers broadly interpreted the DFA anti-whistleblower statute with a narrow point of view. The aforementioned do not account for plausible scenarios that would undermine their position and their interpretation. For example, Employee A and Supervisor B concoct a scheme to unjustly enrich themselves. Employee A and Supervisor B are aware that the Chief

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237. *Id.* at 919.

238. *Id.* at 919-20.

239. *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 149-50 (2d Cir. 2015) (“The statutory interpretation issue posed by this case is not as stark, and hence not as easily resolved, as that encountered in somewhat similar cases. . . . In *Church of the Holy Trinity* . . . *application of the express terms of a statute to the facts of a case yielded a result so unlikely to have been intended by Congress that the Supreme Court did not apply those terms.*) (emphasis added) (internal citation omitted).

240. *Somers v. Dig. Realty Tr., Inc.*, 850 F.3d 1045, 1049 (9th Cir. 2017). (“As the Second Circuit pointed out, subdivision (iii) would be narrowed to the point of *absurdity*; the only class of employees protected would be those who had reported possible securities violations both internally and to the SEC, when the employer—unaware of the report to the SEC—fires the employee solely on the basis of the employee’s internal report. . . . *This reading is illogical.*”) (emphasis added).

241. *Somers v. Dig. Realty Tr., Inc.*, 138 S.Ct. 767, 777 (2018) (“Our charge in this review proceeding is to determine the meaning of “whistleblower” in §78u–6(h), Dodd-Frank’s anti-retaliation provision. The definition section of the statute supplies an unequivocal answer: A ‘whistleblower’ is ‘any individual who provides . . . information relating to a violation of the securities laws to the Commission.’ . . . Leaving no doubt as to the definition’s reach, the statute instructs that the ‘definitio[n] shall apply’ ‘[i]n this section,’ that is, throughout §78u–6. §78u–6(a)(6).”).

242. *Id.* at 14 n. 6 (“The Solicitor General, unlike Somers, acknowledges that it would not be absurd to apply the “whistleblower” definition to the antiretaliation provision. *Tr. of Oral Arg.* 52.”).

Financial Officer is defrauding the company. Employee A sends an email to Supervisor B. Employee A and Employee B both short the company stock. When the fraud comes to light, Employee A touts the notification he sent to Supervisor B and collects the bounty, which he then splits with Supervisor B. Employee A and Supervisor B are both unjustly enriched as they shorted company stock, knowing what was happening, in addition to collecting a reward after not notifying the SEC. If Employee A and Supervisor B had both notified the SEC, they would not have had as much time to short the company's stock. The reason is because if the shorting occurs too close in time to the fraud being uncovered, Employee A and Supervisor B would draw attention as possibly committing insider trading. Additionally, if Employee A and Supervisor B notified the SEC, and the news became public, the stock would most likely have dropped and they would not be able to profit by shorting the stock. It is supercilious to think that Congress did not think of plausible scenarios when it decided not to expand the statute. Statutory interpretation is a "holistic" essay.<sup>243</sup> If a judge wants to assert their policy views, it should be within the confines of a canon of construction.

Congress had its reasons in not expanding this provision and requiring reporting to the SEC. In another example, Employee A and Employee B both work for the same company. Employee A uncovers wrongdoing and speaks with his colleague, Employee B. Employee B advises Employee A to alert the SEC, but to not make an internal notification. Employee B surreptitiously alerts a supervisor. When an investigation comes about, both Employee A and Employee B would be allowed to claim a bounty according to a broad interpretation even though Employee A is the one who followed the proper procedures and protocols. By not following the rules, Employee B would be allowed to game the system and become unjustly enriched. If Employee B were to alert the SEC, the SEC would be able to investigate and see how Employee A uncovered the information legitimately and most likely prevent Employee B from collecting a bounty since Employee B is merely acting as a free-rider.

The dissenting opinion in *Berman* astutely points out that "*there is nothing absurd about a plain reading of the whistleblower definition in Dodd-Frank.*"<sup>244</sup> The Fifth Circuit provides a great illustration as to why the statute should be interpreted to its plain language meaning:

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243. See *Smith v. United States*, 508 U.S. 223, 234 (1993); *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

244. *Berman*, 801 F.3d at 158 n. 1 (Jacobs, J., dissenting).

An example illustrates the effect of this third category of protected activity for whistleblowers:

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

As this example demonstrates, under the plain text of Dodd-Frank, the third category of protected activity is not superfluous. It protects those individuals who qualify as whistleblowers from retaliation on the basis of other required or protected disclosures. Accordingly, we decline to adopt Asadi's construction of the whistleblower-protection provision on the basis that § 78u-6(h)(1)(A)(iii) is superfluous.<sup>245</sup>

In oral argument Chief Justice Roberts stated that there must be an "absurd or anomalous" result for the Court to disregard a statutory definition.<sup>246</sup> The other Justices then discussed the bar that is required for an absurd result. Justice Alito asked Respondent-Somers if "the definition in the statute doesn't apply if it produces an anomaly. Is that the standard? That's all you need to get out of the definitional provision?"<sup>247</sup> Justice Kagan clarified that in order to make a successful *reductio ad absurdum* argument, an anomaly must be *severe* in

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245. *Asadi v. G.E. Energy U.S., L.L.C.*, 720 F.3d 620, 627-28 (5th Cir. 2013).

246. Oral Argument, *supra* note 37, at 52 ("I mean, if you get to a tiny little thing and you're saying, well, the definition doesn't work there, it's one thing to say, well, then we're not going to apply it to that provision. The cases where you're allowed to move beyond the defined term are when if you stick to it, it really makes a mess of the whole thing.").

247. Oral Argument, *supra* note 37, at 50-51.

order to overcome a statutory definition.<sup>248</sup> The Second Circuit and Respondent-Somers did not clearly articulate how there is an absurd result of narrowly interpreting the DFA anti-whistleblower retaliation statute.<sup>249</sup> This ruling reinforces the Court's preference for plain meaning interpretations.

#### CONCLUSION

Not one court that broadly interpreted the DFA whistleblower statute retaliation remedy cited a canon of construction for their public policy reasoning. These courts cite congressional intent, yet nowhere in the legislative intent is the term "whistleblower" discussed. In *Harris v. Commissioner*, Judge Learned Hand perspicaciously averred, "[i]t is always a dangerous business to fill in the text of a statute from its purposes. . . ."<sup>250</sup> When courts rely on nontextualism, interpretations are much more susceptible to manipulation as courts are enabled to foist their own subjective views on the law.<sup>251</sup>

The presumption of consistent usage holds that a word has the same meaning in different parts of an act.<sup>252</sup> The word "whistleblower" is statutorily defined and used twice in the DFA whistleblower statute. The courts interpreting the statute broadly allege that the context of the statute is ambiguous because it conflicts with congressional intent. This is circular reasoning. The context of a statute is ambiguous if there are multiple plausible interpretations of the text. It has not been

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248. Oral Argument, *supra* note 37, at 48-49 ("But there you are, you have this definitional provision, and it says what it says. And it says that it applies to this section. And you have to have a really, really severe anomaly to get over that. So what makes it rise to that level?"); see also *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S.Ct. 1431, 1446 n.13 (2010) ("The possible existence of a few outlier instances does not prove [that an] interpretation is absurd. Congress may well have accepted such anomalies as the price of a uniformed system of federal procedure."); Max Birmingham, *Strictly for the Birds: The Scope of Strict Liability Under the Migratory Bird Act*, 13 J. ANIMAL & NAT. RESOURCE L. 1, 14-15 (2017) (discussing how Fifth Circuit's ill-founded use of a *reductio ad absurdum* argument in regard to the Migratory Bird Treaty Act).

249. *Somers v. Dig. Realty Tr., Inc.*, 138 S.Ct. 767, 779 (2018) ("The plain-text reading of the statute undoubtedly shields fewer individuals from retaliation than the alternative proffered by Somers and the Solicitor General. But we do not agree that this consequence 'vitiate[s]' clause (iii)'s protection . . . or ranks as 'absur[d]. . . .').

250. *Harris v. Comm'r*, 178 F.2d 861, 864 (2d Cir. 1949), *rev'd*, 340 U.S. 106 (1950).

251. Robert H. Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says*, 34 A.B.A. J. 535, 537-38 (1948) ("I, like other opinion writers, have resorted not infrequently to legislative history as a guide to the meaning of statutes. I am coming to think it is a badly overdone practice, of dubious help to true interpretation and one which poses serious problems for large part of the legal profession.")

252. See HERBERT BROOM, A SELECTION OF LEGAL MAXIMS 443 (Joseph Gerald Pease & Herbert Chitty eds., 8th ed. 1911).

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previously determined that a statute is ambiguous if it does not reflect legislative intent. These courts are exerting judicial activism by imposing their personal views on how the statute should be written, instead of how the statute is actually written.

The Second Circuit has held that “‘judicial activism’ is better answered in the pages of a law review than in the context of a judicial opinion.”<sup>253</sup> The assertion of the Second Circuit is affirmed: The pages of a law review are the best place for a judicial activism colloquy.

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253. Turpin v. Mailet, 579 F.2d 152, 169 (2nd Cir. 1978).

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