

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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DIGITAL REALTY TRUST, INC.,                             )  
  Petitioner,                             )  
  v.                             ) No. 16-1276  
PAUL SOMERS,   )  
  Respondent.                             )  
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Pages: 1 through 65

Place: Washington, D.C.

Date: November 28, 2017

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4                            Petitioner,           )  
5                            v.                    ) No. 16-1276  
6   PAUL SOMERS,                            )  
7                            Respondent.           )  
8   - - - - -

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10                           Washington, D.C.  
11                           Tuesday, November 28, 2017

12  
13                           The above-entitled matter came on for oral  
14   argument before the Supreme Court of the United States  
15   at 11:11 a.m.

16  
17   APPEARANCES:  
18   KANNON K. SHANMUGAM, Washington, D.C.; on behalf  
19           of the Petitioner  
20   DANIEL L. GEYSER, Dallas, Texas; on behalf of  
21           the Respondent  
22   CHRISTOPHER G. MICHEL, Assistant to the Solicitor  
23           General, Department of Justice, Washington, D.C.;  
24           pro hac vice; on behalf of the United States, as  
25           amicus curiae, supporting the Respondent

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P R O C E E D I N G S

(11:11 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 16-1276, Digital Realty Trust versus Somers.

Mr. Shanmugam.

ORAL ARGUMENT OF KANNON K. SHANMUGAM  
ON BEHALF OF THE PETITIONER

MR. SHANMUGAM: Thank you, Mr. Chief Justice, and may it please the Court:

The Dodd-Frank Act provides incentives to and protections for whistleblowers; that is, individuals who have reported securities law violations to the SEC.

The question presented in this case is whether the statutory definition of whistleblower applies to the subsection of the statute that protects whistleblowers from retaliation for engaging in certain types of conduct.

The answer to that question is yes. By its plain terms, the statutory definition applies to the entirety of the section, including the anti-retaliation provision. Far from being absurd, that plain text

1 interpretation is entirely consistent with the  
2 history and the structure of the whistleblower  
3 provisions and with Congress's overarching  
4 objective of promoting reporting to the SEC.

5 It also preserves the balance between  
6 the Dodd-Frank Act and the Sarbanes-Oxley Act,  
7 which already provides broad protections to  
8 whistleblowers who report internally. And even  
9 if the statute were somehow ambiguous, the  
10 SEC's interpretation is not entitled to  
11 deference because its rule-making was  
12 procedurally defective. This Court should  
13 reject the interpretation of the Ninth Circuit,  
14 and it should reverse the judgment of the Ninth  
15 Circuit in this case.

16 Now, by its terms, the Dodd-Frank  
17 Act's anti-retaliation provision prohibits  
18 retaliation only against a particular category  
19 of persons; namely, whistleblowers. And the  
20 statutory definition of whistleblower, again by  
21 its terms, applies in this section.

22 That section, of course, indisputably  
23 includes the anti-retaliation provision, as  
24 well as the award provisions. And, therefore,  
25 the anti-retaliation provision only applies to

1 individuals who meet the statutory definition  
2 of whistleblower; again, individuals who have  
3 reported securities law violations to the SEC.

4 Now, as I said at the outset, we  
5 believe that that's consistent with the  
6 history, structure, and objectives of the  
7 whistleblower provisions.

8 As to the history, perhaps the most  
9 telling fact is the fact that an earlier  
10 version of the anti-retaliation provision  
11 reached all employees. Congress then amended  
12 the provision to apply to a narrower set of  
13 individuals, whistleblowers.

14 As to the structure of these  
15 provisions, in our view, the anti-retaliation  
16 provision protects the very class of persons to  
17 whom the award provisions provide incentives,  
18 and, therefore, the anti-retaliation provision  
19 in a very real sense works hand-and-glove with  
20 the anti-retaliation -- with the award  
21 provisions.

22 JUSTICE GINSBURG: What about  
23 employees who must report internally before  
24 they can report to the SEC?

25 MR. SHANMUGAM: So, Justice Ginsburg,

1 where an employee reports internally and then  
2 suffers an adverse action in the immediate  
3 aftermath of doing so, the Sarbanes-Oxley Act  
4 will provide protection.

5 In our view, the Dodd-Frank Act's  
6 anti-retaliation provision only applies to  
7 individuals who report to the SEC. And, to be  
8 sure, it applies to those individuals really  
9 without regard to the reason for retaliation.

10 So just to make clear what our  
11 affirmative interpretation of the  
12 anti-retaliation provision and, in particular,  
13 the third clause is, the third clause, which  
14 was the last of the clauses to be added,  
15 reaches a situation in which an employee, in  
16 fact, reports to the SEC but is retaliated  
17 against because of an internal report or  
18 perhaps a report to another governmental  
19 entity.

20 And precisely because a report to the  
21 SEC will often be confidential, there may very  
22 well be cases in which the reason for the  
23 retaliation is not the report to the SEC, which  
24 is covered by the first clause, but is instead  
25 some other report, such as an internal report.

1           Now, the primary argument on the other  
2 side as to why our interpretation is somehow  
3 absurd or as to why this is one of those  
4 exceptional circumstances where the Court  
5 should not pay heed to the unambiguous language  
6 is that there are relatively few cases that  
7 would be covered by the third clause.

8           But I don't think that there's really  
9 any basis for that conclusion here. As the  
10 government recognizes in its brief, around  
11 80 percent of individuals who report to the SEC  
12 also report internally. And so contrary to the  
13 reasoning of really the leading case on the  
14 other side, the Second Circuit's decision in  
15 Berman, we know that there certainly is a  
16 category of employees who report in both ways.

17           So then the question becomes whether,  
18 in fact, there are very few cases in which an  
19 individual is able to get to the step of  
20 reporting to the SEC. The argument on the  
21 other side is that when an employee reports  
22 internally, retaliation will come so quickly  
23 that they will not be able also to report to  
24 the SEC.

25           JUSTICE SOTOMAYOR: So can you please



1 tell me, under your reading, what we make of  
2 subdivision (h) (1) (A) (ii)? It protects from  
3 discrimination an employee who's been fired for  
4 initiating, testifying in, or assisting in any  
5 investigation or judicial or administrative  
6 action of the Commission.

7 Under what law is the employee who's  
8 called by the SEC after another employee  
9 reports the violation and assists the SEC in  
10 its investigation, under your reading, that  
11 employee is not protected?

12 MR. SHANMUGAM: So --

13 JUSTICE SOTOMAYOR: And I -- and I  
14 don't know that that employee is protected  
15 under the Sarbanes-Oxley provision either. The  
16 only thing that would protect that particular  
17 employee is the government's reading.

18 MR. SHANMUGAM: So, Justice Sotomayor,  
19 I think you point up the reason why we actually  
20 think that our interpretation must be correct,  
21 and that is because the first and the second  
22 clauses in subsection (h) (1) (A) actually were  
23 already in the statute at the time that  
24 Congress made the judgment, to which I adverted  
25 a couple minutes ago, to replace the broader

1 term "employees, contractors, or agents" with  
2 the narrower term "whistleblower."

3 Now, it may very well be that an  
4 individual in your circumstance is not covered  
5 by the Sarbanes-Oxley Act, but the critical  
6 point is --

7 JUSTICE SOTOMAYOR: And they wouldn't  
8 be covered by this act either?

9 MR. SHANMUGAM: They wouldn't. But in  
10 our view, in that circumstance, the decision by  
11 Congress to replace "employees" with the  
12 narrower term "whistleblower," in fact, takes  
13 effect.

14 In other words, if you have a  
15 circumstance in which you have employee 1, who,  
16 in fact, reports the securities law violation  
17 to the SEC, and employee 2, who merely  
18 testifies in a subsequent SEC proceeding, the  
19 replacement of "employee" with "whistleblower,"  
20 in fact, knocks employee 2 out of the statute.  
21 But we know that that was a considered judgment  
22 made by Congress when the Senate replaced the  
23 term "employee" with "whistleblower."

24 The primary anomaly on which  
25 Respondent and the government relies, the

1     purported anomaly, relates not to the second  
2     clause but to the third clause.  Their argument  
3     is that because the third clause was added at  
4     the last minute, Congress somehow was not aware  
5     of the fact that it was adding that clause to a  
6     statute that already, by its terms, limited the  
7     protected classes --

8             JUSTICE SOTOMAYOR:  Well, the SC --  
9     SEC has always been arguing -- they'll speak  
10    for themselves, but they've always been arguing  
11    that "whistleblower" should be given a natural  
12    reading.  I'll question them on where they get  
13    that because I'm not sure there's a natural  
14    reading.

15            But assuming I accept that  
16    proposition, isn't the fact that a natural  
17    reading would cover that second employee and  
18    potentially the third employee who is required  
19    to report internally first, isn't that reason  
20    enough because there are two provisions that  
21    would be rendered partially nugatory?

22            MR. SHANMUGAM:  They would not be --

23            JUSTICE SOTOMAYOR:  To read it the  
24    government's way?

25            MR. SHANMUGAM:  They would not be so

1 rendered, Justice Sotomayor, and let me address  
2 that. And then I do also want to address the  
3 premise about there being some ordinary meaning  
4 of "whistleblower."

5 Under our interpretation, all three of  
6 these clauses have meaningful effect. In other  
7 words, our primary submission is that what  
8 Congress was trying to do in the  
9 anti-retaliation provision was to provide broad  
10 protection to individuals who report securities  
11 law violations to the SEC, whatever the reason  
12 for the retaliation.

13 And then Congress spoke quite broadly  
14 in these three clauses as to the reasons for  
15 the retaliation. Once you have reported a  
16 securities law violation to the SEC, if you're  
17 retaliated against for that report, you're  
18 covered. If you're retaliated against for your  
19 subsequent cooperation in SEC proceedings,  
20 you're covered. And if you're retaliated  
21 against for some internal report or some other  
22 report, you are covered.

23 And, again, I do think that it is  
24 critical to --

25 JUSTICE KAGAN: But isn't that

1 disjunction quite odd? Right? A typical  
2 anti-retaliation provision, you would think,  
3 well, if I report internally and I'm fired for  
4 it, then I get my protection.

5 But here you're saying they don't get  
6 protection, except if they do something  
7 completely unrelated, they might have made a  
8 report to the SEC about a completely different  
9 topic, they might have made it 10 years  
10 earlier, and that's going to give them  
11 protection even though they haven't been fired  
12 for anything remotely to do with that.

13 MR. SHANMUGAM: So, Justice Kagan, let  
14 me explain why I think that makes sense. And I  
15 do want to address this purported anomaly with  
16 our interpretation with regard to the lack of a  
17 nexus between the internal report and the SEC  
18 report.

19 I think more generally the reason why  
20 this regime makes sense is precisely because  
21 Congress adopted this more specific regime that  
22 provides heightened protection to, in the words  
23 of the title of the statute, securities  
24 whistleblowers, against the backdrop of a  
25 broader regime for whistleblowers more

1 generally in the Sarbanes-Oxley Act.

2           And we know that Congress wanted those  
3 two anti-retaliation regimes to coexist,  
4 because in the very same section of Dodd-Frank  
5 that added the Dodd-Frank anti-whistleblower  
6 provision, Section 922, Congress also amended,  
7 and to some extent expanded, the protection for  
8 whistleblowers more generally in the  
9 Sarbanes-Oxley Act. Those are subsections (a)  
10 and (c) of Section 922 more generally.

11           Now, what Respondent and the  
12 government are asking you to do, to use the  
13 metaphor from the last argument, is to view the  
14 third clause in particular of the  
15 anti-retaliation provision as the proverbial  
16 elephant in a mouse hole, to say that when  
17 Congress added the third clause, it was  
18 essentially adding an all-purpose  
19 anti-retaliation provision.

20           And I think that if that was what  
21 Congress was doing, it would, at a minimum,  
22 substantially diminish the role of the  
23 Sarbanes-Oxley Act anti-retaliation provision,  
24 if not render it effectively superfluous.

25           And, indeed --

1 JUSTICE KAGAN: But if I could just --  
2 I guess I just don't understand what the theory  
3 is. There are two employees, and they both  
4 internally report, and they're both fired.

5 And one of them, tough luck, but the  
6 other one is going to get protection because  
7 he's filed a report with the SEC about some  
8 different matter entirely 10 years earlier.

9 Why does he get extra protection?

10 MR. SHANMUGAM: So Congress was trying  
11 to create incentives for reporting to the SEC,  
12 and it did so by providing a carrot in the form  
13 of the incentives in the award provisions and a  
14 stick in the form of the anti-retaliation  
15 provision in cases where that employee,  
16 employee number 2, suffers retaliation, and,  
17 again, really without regard to whether the  
18 retaliation was because the employer happened  
19 to find out about the SEC report specifically  
20 and retaliated on that basis.

21 But you do raise the question of this  
22 purported anomaly because you could potentially  
23 have a case in which the employee makes a  
24 report to the SEC and then reports some  
25 entirely unconnected conduct internally. There

1       could be some gap of time between those two  
2       things.

3                 Now, in our view, it's entirely  
4       possible that Congress might very well have  
5       made the judgment that it wanted to provide  
6       protection, that it wanted to provide a broad  
7       incentive to employees who suffer retaliation  
8       over time and for a wide variety of  
9       disclosures.

10                But to the extent that the government,  
11       in particular, sort of cites this hypothetical  
12       where, say, five years has passed between the  
13       internal report and the report to the SEC, any  
14       incidental overbreadth with our interpretation  
15       pales in comparison to the wild overbreadth of  
16       Respondent and the government's interpretation,  
17       because Respondent and the government would  
18       concededly cover cases in which an employee  
19       makes a disclosure that bears no relation to a  
20       securities violation.

21                And, tellingly, the SEC itself, in the  
22       regulation at issue here, seemed to recognize  
23       that absurdity because at the same time that  
24       the SEC unexpectedly dispensed with the  
25       requirement of reporting to the SEC, it sought



1 implicitly to narrow the category of  
2 disclosures that are covered by the third  
3 clause to disclosures involving securities law  
4 violations or Section 1514(a) of  
5 Sarbanes-Oxley.

6           And I think that that was a  
7 recognition that there are many, many  
8 hypotheticals that one can posit under  
9 Respondent's and the government's  
10 interpretation that really have nothing to do  
11 with the securities laws at all.

12           And so, again, our core submission  
13 here, Justice Kagan, is that this is a very  
14 specific subset of cases that Congress was  
15 targeting in the Dodd -- in the Dodd-Frank Act  
16 and much more specific than the much broader  
17 protection that was provided under  
18 Sarbanes-Oxley.

19           JUSTICE BREYER: A question I would  
20 have for both sides really is, what do you  
21 think, is there any -- could the SEC here  
22 promulgate a regulation that would define the  
23 manner of reporting to the SEC, which manner  
24 would include the class of cases where the  
25 report or the information goes to an audit

1 committee under circumstances such that, were  
2 the audit committee and others to do nothing  
3 about it, it would likely end up at the SEC's  
4 window?

5 MR. SHANMUGAM: So I don't think that  
6 the SEC could do that.

7 JUSTICE BREYER: Why not?

8 MR. SHANMUGAM: Our core submission is  
9 that the SEC cannot dispense with the statutory  
10 requirement of reporting to the SEC. And --

11 JUSTICE BREYER: It doesn't. It  
12 doesn't. That's what I -- I worked this out,  
13 perhaps wrongly, but in a way that at least  
14 arguably doesn't. It is providing for -- it's  
15 defining a manner of reporting to the SEC.

16 And the manner includes just what I  
17 said, report to an Audit Committee under  
18 circumstances where, if no action is taken, it  
19 is likely to end up at the SEC.

20 MR. SHANMUGAM: I don't think --

21 JUSTICE BREYER: And it might not  
22 physically get there, but, nonetheless, this is  
23 a class of cases where quite likely it will get  
24 to the SEC. What's wrong with that?

25 MR. SHANMUGAM: Justice Breyer, I

1 think it has to get there. In other words, I  
2 think that --

3 JUSTICE BREYER: You mean it actually  
4 has to get there?

5 MR. SHANMUGAM: I -- I -- I think that  
6 the whistleblower --

7 JUSTICE BREYER: So, if they're caught  
8 on the way because they don't get there because  
9 there's a snowstorm, doesn't count?

10 MR. SHANMUGAM: Under the statutory  
11 language, and this is in the definition in  
12 subsection (a)(6), the whistleblower has to  
13 provide information to the Commission.

14 Now, you're right that it goes on to  
15 say, "in a manner, established by rule or  
16 regulation, by the Commission," and I would  
17 submit, Justice Breyer, that the Commission  
18 does have broad authority to issue a regulation  
19 concerning how that information has to be  
20 provided. And, indeed, the Commission has done  
21 just that in Rule 21(f)-9 with regard to the  
22 award provisions, and it says that you have to  
23 report either on-line or by using a particular  
24 form.

25 We have no quibble with that. But

1 what I don't think you can do, contrary to the  
2 submission in one of the amicus briefs, is to  
3 use the "in the manner" language to define away  
4 the separate requirement of reporting to the  
5 Commission.

6 That is a distinct statutory  
7 requirement, and, again, I don't think that the  
8 Commission really has any leeway in that  
9 regard.

10 I do think that the way that the  
11 Commission went about the rule-making here is  
12 telling. As the Court will be aware, in the  
13 proposed rule, the SEC issued a rule that  
14 merely tracked the statutory definition, and  
15 the SEC provided no indication in the notice of  
16 proposed rule-making that it was contemplating  
17 the possibility of dispensing with that  
18 requirement.

19 JUSTICE GINSBURG: But aren't there  
20 comments to that effect?

21 MR. SHANMUGAM: There were three  
22 comments out of the 240 or so that seemed to  
23 suggest that the Commission might want to do  
24 that.

25 But I don't think that the mere fact

1 that there were a small number of comments that  
2 suggested that is an indication that interested  
3 parties as a whole were on notice that this  
4 issue was potentially in play.

5           There were certainly some who thought  
6 that that would be desirable, but there is  
7 nothing in the notice of proposed rule-making,  
8 and to the extent that Respondent and the  
9 government cites some language that suggests  
10 that the Commission was considering broadening  
11 the application of the anti-retaliation  
12 provision and inviting comments to that effect,  
13 the very previous sentence in the notice of  
14 proposed rule-making indicates that the  
15 Commission intended to retain the requirement  
16 of reporting to the SEC.

17           So, again, there was no notice, until  
18 such a time as the Commission came out with its  
19 final rule and converted the one statutory  
20 definition of whistleblower into two.

21           And I think that there can be no  
22 better evidence of how nakedly atextual  
23 Respondent and the government's interpretation  
24 is than the final rule itself, which contains  
25 these two separate definitions, the one for

1 purposes of the award provisions, and the other  
2 for purposes of the --

3 JUSTICE BREYER: Some law on this --  
4 see, I don't know quite -- just as you put your  
5 finger on something I -- I don't know what to  
6 do with.

7 I thought the argument made below was  
8 a plausible argument, that they have made a  
9 rule like the one I was just suggesting, and  
10 then you come back and say: Well, the  
11 rule-making proceeding was no good, they didn't  
12 tell anybody they were going to do this, and  
13 this is way beyond, dah-dah-dah.

14 And then they say: But you should  
15 have raised this earlier. Now, there is some  
16 law on when you have to raise an attack on a --  
17 on a rule established by a Commission and there  
18 is some time limit.

19 And -- and I -- and then there's no  
20 answer that I've found, I don't know how that  
21 works, what am I supposed to do with that?  
22 Have they abandoned all that here or what?

23 MR. SHANMUGAM: Sure. Justice Breyer,  
24 let me address that. And I do, by the way,  
25 want to come back to Justice Sotomayor's

1 question about the ordinary meaning of  
2 whistleblower.

3 JUSTICE BREYER: You don't have to, if  
4 you don't want. I can look it up, you know.

5 MR. SHANMUGAM: Well, let me address  
6 your question first. Our submission, our core  
7 submission to the Court is this is a simple  
8 case that can be resolved at step 1 of Chevron,  
9 the terms and reach of the statutory definition  
10 are unambiguous and there's certainly no  
11 absurdity here.

12 If this Court were somehow to get to  
13 step 2 of Chevron, we have an argument under  
14 Encino Motorcars that this Court should not  
15 afford Chevron deference because the  
16 rule-making was procedurally defective for the  
17 reasons that I just mentioned.

18 The other side rightly points out that  
19 we did not make that argument below. We don't  
20 believe that it is necessary for us to have  
21 made that argument below, because this is just  
22 another argument in response to their claim  
23 that there should be Chevron deference here.

24 And, parenthetically, this Court's  
25 decision in Encino Motorcars came down while

1 the briefing was ongoing in the Ninth Circuit.

2 But as to the argument concerning  
3 timing, because there is an argument made by  
4 the Respondent, though not by the government,  
5 that we're somehow out of time here, let me  
6 explain why that's not true.

7 Respondent relies on section, I  
8 believe it's 2401, which is the general  
9 six-year limitations period for claims against  
10 the government. That is a limitations period  
11 that is applicable in ordinary APA actions.

12 We are not raising a free-standing APA  
13 claim here. Our argument, consistent with  
14 Encino Motorcars, is simply an argument that  
15 the rule should not be given Chevron deference.  
16 It's not even an argument that the rule is  
17 somehow invalid. It's an argument that, at  
18 most, the SEC is entitled to Skidmore deference  
19 here.

20 And so we don't think that it would be  
21 appropriate to apply the six-year limitations  
22 period here, and to the extent that Respondent  
23 relies on the D.C. Circuit's decision in a case  
24 called Gem Broadcasting, that was a case in  
25 which a regulated party was essentially arguing



1 for invalidity. They were not making the type  
2 of argument we're making here.

3 Now, with regard to the ordinary  
4 meaning of whistleblower because I do want to  
5 finish up my answer to Justice Sotomayor's  
6 question from now some time ago, I think we  
7 would concede that the term "whistleblower"  
8 naturally refers to an individual who reports  
9 misconduct, but I don't think that we would  
10 concede that there is an ordinary meaning as to  
11 the person to whom the misconduct is reported.

12 I think, if anything, if you look at  
13 sources like Black's Law Dictionary, they seem  
14 to suggest that you have to have reporting to a  
15 government authority. And so, you know, I  
16 think that it is telling that contrary to the  
17 Solicitor General's submission, Congress really  
18 is not using the unadorned term "whistleblower"  
19 very often in statutes.

20 It's either using a different term or  
21 it is providing a definition for whistleblower.  
22 And I think that that is, again, precisely what  
23 Congress was doing here.

24 Congress consciously made the decision  
25 to replace the term "employee" with the term

1 "whistleblower," and Congress added the third  
2 clause, which is concededly the broadest of the  
3 three clauses, to a statute that already used  
4 the term "whistleblower."

5           And this is just not one of those  
6 paradigmatic cases in which the text points in  
7 one direction but there's legislative history  
8 to the contrary. There's really no actual  
9 legislative history with regard to the third  
10 clause.

11           And it is quite telling that the  
12 government in its brief can muster no  
13 legislative history other than an article from  
14 Law 360 that it cites in Footnote 15.

15           And if you take a look at that article  
16 and you take a look at the underlying e-mails  
17 that are cited in that article, there's really  
18 no indication even that the individual who  
19 allegedly proposed the third clause thought  
20 that what he was doing was extending the  
21 statute beyond the statutorily-defined category  
22 of whistleblowers to individuals who merely  
23 report internally.

24           Unless the Court has any further  
25 questions, I think I'll reserve the balance of

1 my time for rebuttal if needed. Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 Mr. Geysler.

5 ORAL ARGUMENT OF DANIEL L. GEYSER

6 ON BEHALF OF THE RESPONDENT

7 MR. GEYSER: Thank you, Mr. Chief  
8 Justice, and may it please the Court:

9 The true elephant in the mouse hole  
10 here would be using the indirect use of the  
11 word whistleblower in subsection (h) to limit  
12 what is otherwise a broad and sweeping clause  
13 that aligns Dodd-Frank's amendment with the  
14 modern trend of major whistleblowing  
15 legislation.

16 Now, to start with Justice Kagan's  
17 point, it is -- actually, it is exactly true  
18 that Petitioner's reading does create a serious  
19 anomaly. If anyone reports to the SEC at any  
20 time, it could be half a decade or a decade  
21 earlier, on a completely unrelated issue,  
22 they're a whistleblower for life. So any  
23 report they make at a later time is protected,  
24 even if the information doesn't get to the SEC.

25 But I think there's actually an even

1 greater anomaly. My friend suggests that  
2 Congress, all they really were concerned about  
3 here was getting information to the government,  
4 to the SEC.

5 Take someone who reports internally,  
6 as they're often required to do under  
7 Sarbanes-Oxley, and they're immediately  
8 terminated. And then the second they walk out  
9 of that meeting they report to the SEC. They  
10 even use the right fax number and they use the  
11 right form. That way the SEC has exactly the  
12 information that Congress supposedly wanted it  
13 to obtain. That person isn't protected under  
14 this provision.

15 JUSTICE BREYER: Yeah, but he's  
16 protected under Sarbanes-Oxley, isn't he?

17 MR. GEYSER: Yes, Your Honor.

18 JUSTICE BREYER: So in all the  
19 differences that he has maybe a shorter statute  
20 of limitations and you have to go through an  
21 exhaustion procedure. So -- so what is the  
22 anomaly about saying, well, you're reporting  
23 directly to the SEC, you're going to have a --  
24 a shorter -- you're going to have a longer  
25 statute of limitations and you don't have to

1 exhaust, but if it's an indirect thing, you do.

2 Why is that anomalous?

3 MR. GEYSER: It is highly anomalous,  
4 Your Honor. The -- the entire reason that  
5 Congress added a clause (iii) is to strengthen  
6 the remedies in Sarbanes-Oxley. Sarbanes-Oxley  
7 prevents --

8 JUSTICE BREYER: It does. It  
9 strengthens them in the cases where they report  
10 to the SEC, which is what it says.

11 MR. GEYSER: Well, it reports --

12 JUSTICE BREYER: And strengthens it  
13 just means you don't have to exhaust. So  
14 what's the big deal?

15 MR. GEYSER: But -- but it would  
16 strengthen it in a way that would not protect  
17 people who occasionally do report to the SEC  
18 and protect people who later don't report to  
19 the SEC. That doesn't make any sense.

20 And so I -- I -- and the other thing  
21 it would do too is it puts the employer in a  
22 position of being entirely unaware of the  
23 critical factor that activates or takes away  
24 protection under clause (iii).

25 So it --

1 JUSTICE SOTOMAYOR: I'm sorry, the --  
2 the employer is rarely knowledgeable about the  
3 SEC filing. I believe the SEC rules require  
4 confidentiality of the filing.

5 MR. GEYSER: That -- that's -- exactly  
6 right.

7 JUSTICE SOTOMAYOR: So virtually  
8 always an employer is going to fire someone  
9 because of internal reporting, not because of  
10 SEC reporting.

11 MR. GEYSER: That -- that's right,  
12 Your Honor, but what that really shows is that  
13 this is a highly unusual form of an  
14 anti-retaliation statute. Anti-retaliation  
15 statutes are designed to deter specific  
16 conduct.

17 And here we know that Congress was  
18 focused on deterring specific conduct because  
19 subsection (h) is framed in terms of a  
20 prohibition on employers. It says employers  
21 shall not take certain acts against people  
22 engaged in certain conduct.

23 The use of whistleblower is entirely  
24 indirect. It would be highly unusual for  
25 Congress to think that they were trying to

1     bolster remedies in Sarbanes-Oxley because they  
2     did realize these were highly ineffective.

3             There is evidence in the record, we do  
4     cite studies in our brief, that show that  
5     Sarbanes-Oxley generally was providing relief  
6     in under 10 percent of cases.

7             JUSTICE GINSBURG:  What about this  
8     case?  Did -- did Somers avail himself of  
9     Sarbanes-Oxley or just Dodd-Frank?

10            MR. GEYSER:  Only Dodd-Frank, Your  
11     Honor.  He missed the limitations period for  
12     Sarbanes-Oxley, which will happen frequently  
13     because not everyone who's not a lawyer is  
14     aware of all their rights under federal law.

15            The entire point that Congress had  
16     made in this statute, and consistent again with  
17     every piece of modern, major whistleblowing  
18     legislation is to protect internal  
19     whistleblowing.

20            The -- the entire securities framework  
21     is -- is hinged on internal whistleblowing.  
22     Everyone thinks it is better to have people go  
23     first --

24            JUSTICE GORSUCH:  Well, I -- I'm just  
25     stuck on the plain language here, and maybe you

1 can get me unstuck, but --

2 MR. GEYSER: Sure.

3 JUSTICE GORSUCH: -- how much clearer  
4 could Congress have been than to say in this  
5 section the following definitions shall apply,  
6 and whistleblower is defined as including a  
7 report to the Commission.

8 What else would you have had Congress  
9 do if it had wanted to achieve that which your  
10 opponent says it achieved?

11 MR. GEYSER: Your Honor, this Court  
12 doesn't read language like that in isolation.  
13 It has to read it against a backdrop of --

14 JUSTICE GORSUCH: I'm asking what --  
15 what would you have had Congress do?

16 MR. GEYSER: Well, I think in this --  
17 what they could have done, and given all the  
18 anomalies that this would produce and how --  
19 and how contrary this is to the modern trend of  
20 legislation, they'd have to be a lot clearer  
21 than they were here, but let me give you --

22 JUSTICE GORSUCH: Clearer than in this  
23 section, the following definitions shall apply?

24 MR. GEYSER: Just as --

25 JUSTICE GORSUCH: How much clearer



1 could they have possibly been?

2 MR. GEYSER: That -- that is the same  
3 language in Utility Air where the definition of  
4 "air pollutant" was in this chapter. And in  
5 Duke Energy, it gets even worse. In that case  
6 --

7 JUSTICE GORSUCH: So "shall" just  
8 means maybe; sometimes?

9 MR. GEYSER: Not at all. Let -- let  
10 me give an example to, I think, prove the  
11 point. Suppose that in subsection (h) Congress  
12 included a parenthetical after the word  
13 "whistleblower" that said as this term is used  
14 in Sarbanes-Oxley or as this term is used in  
15 its ordinary idiomatic sense, no one at that  
16 point would think that the definition in  
17 subsection (a)(6) applies.

18 Our contention is that the clear  
19 meaning from the text, the context, the  
20 structure, the purpose, the history of this  
21 provision is tantamount to that kind of  
22 parenthetical.

23 JUSTICE GORSUCH: So -- so --

24 CHIEF JUSTICE ROBERTS: Well, but --  
25 this case, Utility Air, the difficulty of

1 applying the defined term in that case strikes  
2 me as so -- so much more insurmountable than in  
3 this case.

4 MR. GEYSER: I think it could be more  
5 or less, Your Honor, but I think the important  
6 point here is that having an incentive to skip  
7 over internal reporting would be disastrous to  
8 the modern scheme of securities regulation,  
9 which turns on internal reporting.

10 Under my friend's view --

11 JUSTICE BREYER: Well, yeah. That's  
12 -- that's exact -- sorry.

13 CHIEF JUSTICE ROBERTS: That's okay.

14 JUSTICE BREYER: That's exactly what's  
15 bothering me. You're using -- and that's why I  
16 think I'd like a little elaboration on my first  
17 question and -- because, see, I don't put as  
18 much -- I'll be perhaps a little bit more  
19 willing to go with your not clear language,  
20 maybe, but it seems to make sense what Congress  
21 was trying to do to follow the language.

22 Why? Because the ordinary  
23 whistleblower is protected under  
24 Sarbanes-Oxley. He just has to have some  
25 exhaustion. And it's a shorter statute of

1 limitations.

2           And if you want to make it tougher,  
3 which they do, it makes sense in a statute  
4 that's mostly about awards for reporting to the  
5 SEC to say it's where the SEC is directly  
6 involved that we cut out the need to exhaust,  
7 that we cut out the need, while if, in fact,  
8 you read it your way, we -- we've basically  
9 eliminated Sarbanes-Oxley because everybody  
10 would bring it under this provision.

11           Now, that's -- that's why, when you  
12 say, you know, this is totally anomalous, this  
13 is a disaster, et cetera, et cetera, I say:  
14 Well, you haven't shown me that yet. So maybe  
15 you want to spend one minute on doing that.

16           MR. GEYSER: Sure. I mean, first,  
17 Your Honor, this would not eliminate the  
18 Sarbanes-Oxley remedial scheme even though it  
19 was largely ineffective. There could be some  
20 people who would prefer it because they don't  
21 have a lawyer, they'd prefer to have the  
22 assistance of OSHA. But, more importantly, the  
23 Petitioner's reading would undermine not the  
24 remedial scheme but the entire regulatory  
25 scheme of Sarbanes-Oxley.

1 Sarbanes-Oxley requires people to --  
2 to disclose internally.

3 What Congress wanted was as -- this is  
4 the ordinary progression of getting information  
5 to the government. You first give the  
6 corporation a chance for self-governance. You  
7 give them the chance to swiftly and efficiently  
8 address the problem and to make sure that they  
9 remediate whatever the violation is.

10 If they refuse to do it, then you go  
11 to the government.

12 JUSTICE SOTOMAYOR: Is every employee  
13 obligated by law to report a violation or is it  
14 only certain employees, lawyers and accountants  
15 and others who are affirmatively obligated to  
16 report?

17 MR. GEYSER: The -- it's some  
18 employees like lawyers and auditors do have the  
19 affirmative obligation. Other employees may  
20 not have the legal or regulatory obligation,  
21 but they often do have a -- a corporate  
22 obligation under the corporation's code of  
23 conduct.

24 JUSTICE SOTOMAYOR: All right. So why  
25 would Congress want to treat lawyers and

1 accountants to the generous provisions of the  
2 whistleblower statute when they have an  
3 obligation anyway, they're basically being  
4 incentivized to do what they're already legally  
5 obligated to do.

6           They've got a protection,  
7 Sarbanes-Oxley. Why put them under the  
8 whistleblower statute as well?

9           MR. GEYSER: Because Congress saw  
10 examples, and they saw this in Enron, where  
11 people were deterred from fulfilling those  
12 roles and disclosing the information in  
13 whistleblowing because they didn't want to be  
14 terminated. And the threat of termination --

15           JUSTICE SOTOMAYOR: Well, that was  
16 Sarbanes-Oxley.

17           MR. GEYSER: And -- and Dodd-Frank --

18           JUSTICE SOTOMAYOR: And that's the  
19 statute Congress provided to incentivize them  
20 to do what they were legally obligated to do.

21           MR. GEYSER: Sure. And Congress  
22 specifically singled out the protections in  
23 Sarbanes-Oxley as something that needed to be  
24 bolstered in Dodd-Frank. So I -- I don't think  
25 it's fair to divorce the two from each other.

1 JUSTICE SOTOMAYOR: Well, I see  
2 Dodd-Frank as -- as expanding the category of  
3 people, not limiting or -- or expanding it to  
4 include people who are already included.

5 MR. GEYSER: Well, it -- it does  
6 expand people in some situations like with  
7 self-regulatory organizations who aren't  
8 covered under Sarbanes-Oxley. But notably then  
9 that doesn't apply for internal reporters in  
10 those groups under Petitioner's reading.

11 So even though Congress would have  
12 singled out those people and said these people  
13 should be protected from making internal  
14 disclosures, they would actually have no legal  
15 protection at all if they didn't first report  
16 to the SEC, which, again, is contrary to even  
17 the regulated stakeholder's interest in this  
18 very setting.

19 We know from the Chamber of Commerce,  
20 who submitted elaborate comments during the  
21 notice and comment process, that the policy  
22 touchstone of Dodd-Frank -- and I think this  
23 goes a little bit too to Justice Breyer's  
24 question -- should be preserving internal  
25 compliance systems. It's --

1 JUSTICE GORSUCH: I'd like to talk  
2 about that notice and comment period for just a  
3 moment. It seems to me you've got this plain  
4 language problem, so you've got to generate an  
5 ambiguity. That's the first step of your --  
6 your move.

7 Then the second step is that the SEC  
8 has reasonably resolved that ambiguity and that  
9 we should defer to it.

10 But here the notice and comment period  
11 provided notice that -- that we're going to  
12 issue a rule-making with respect to  
13 whistleblowers who report to the Commission.

14 Then -- then the rule comes out and  
15 says reporting to the Commission is not  
16 required, in an ipsi dixit unreasoned opinion,  
17 one line basically, and then we have two  
18 circuits that actually gave deference to that  
19 interpretation.

20 Now, that seems to me to put the whole  
21 administrative process on its head because  
22 you're providing no notice to people, no  
23 reasonable opportunity to comment, maybe a few  
24 people spot the issue, but most people don't.

25 The agency acts without the benefit of

1 the notice and comment and is unable to issue a  
2 reasoned decision-making, and then we're  
3 supposed to defer to that to resolve this  
4 ambiguity? Help me out with that scheme.

5 MR. GEYSER: Sure.

6 JUSTICE GORSUCH: That just doesn't  
7 quite hold together for me.

8 MR. GEYSER: Let me try to break it  
9 down into a number of steps. Now, first, to be  
10 clear, I think we win under act -- under the --  
11 the better reading of the statute. We don't  
12 even need any deference at all.

13 But to -- to go through the steps, on  
14 page 70,511 in the Federal Register, the agency  
15 specifically asked for comments about whether  
16 to broaden or change the definition of  
17 whistleblower for purposes of the  
18 anti-retaliation sentence.

19 JUSTICE GORSUCH: It said to the  
20 Commission, for reports to the Commission, that  
21 language is in there, too, right?

22 MR. GEYSER: Well, that -- that  
23 language is in the initial -- in the initial  
24 rule.

25 JUSTICE GORSUCH: Yeah.



1           MR. GEYSER: It also suggested,  
2           though, that you could qualify under the  
3           whistleblower protections without satisfying  
4           all the manners of reporting to the Commission.  
5           So I think there actually was some ambiguity  
6           there.

7           And, again, the SEC specifically  
8           requested comments on that exact issue. Three  
9           people did comment on it and suggested that it  
10          should make clear, the SEC should make clear  
11          that internal whistleblowers are covered.

12          The Association of Corporate Counsel  
13          implied that they just assumed that -- and this  
14          is a pretty big group -- they -- they assumed  
15          that internal whistleblowers were covered.

16          There's not a single comment out of  
17          the over 250 or so that were submitted that  
18          suggested that internal reporting would not be  
19          protected under Dodd-Frank, and I think that's  
20          telling, because I don't know any corporation,  
21          while they were strongly urging the Commission  
22          --

23          JUSTICE GORSUCH: Well, if it's not --  
24          if it's not -- if it's not fairly put to the  
25          notice, is it any surprise that many people

1 don't comment on it?

2 MR. GEYSER: Well, Your Honor, we  
3 disagree that it wasn't fairly put to the  
4 notice because they specifically requested  
5 comments on exactly this topic. That's  
6 generally considered enough.

7 But -- and for the reasoned  
8 explanation, we think they did provide a  
9 sufficient basis, certainly as -- as strong a  
10 basis as the agency provided in the Long Island  
11 case.

12 But I also want to make another point  
13 that I think goes back to the original  
14 definition of whistleblower, and I do think  
15 this is important, and it shows that what  
16 Congress really had in mind with (a)(6) had  
17 nothing to do with the anti-retaliation  
18 provision.

19 The sentence does not end --

20 JUSTICE GORSUCH: I'm looking at the  
21 notice, though. I'm sorry, I'm just still  
22 stuck there. Paragraph 42 I assume is what  
23 you're referring to, right?

24 MR. GEYSER: And -- and the language  
25 that precedes paragraph 42.

1 JUSTICE GORSUCH: Yeah, it's -- should  
2 -- should the anti-retaliation protections,  
3 yada, yada, yada, apply broadly to any person  
4 who provides information to the Commission  
5 concerning a potential violation, right?

6 MR. GEYSER: Your Honor, but, again,  
7 it's should we broaden it, should we change it.

8 JUSTICE GORSUCH: To the Commission,  
9 yeah, but to the Commission, right?

10 MR. GEYSER: Your Honor, part -- part  
11 of the logical outgrowth test, which -- which I  
12 think this Court has -- has effectively  
13 endorsed, but I think there's some lack of  
14 clarity there, too, it doesn't require that the  
15 exact proposal be endorsed.

16 JUSTICE BREYER: No, but his point  
17 really, I think, is that notice which says  
18 we're going to include who counts as providing  
19 information to the Commission does not put  
20 people on notice that they are including --  
21 going to apply it to people who don't provide  
22 information to the Commission.

23 I mean, that's English, I would think.  
24 Now, that's the question. That's why I  
25 actually found your argument below, perhaps --

1 but you've abandoned that, right?

2 Now we're just back at -- if I find  
3 this sort of interesting, your argument below,  
4 I'm out of luck, it's abandoned, gone, right?

5 MR. GEYSER: Your -- Your Honor, the  
6 -- I think the argument that was accepted by  
7 the Ninth Circuit below didn't suggest that the  
8 SEC was saying that if --

9 JUSTICE BREYER: No, no, but I mean I  
10 asked that -- first, I want you to answer  
11 Justice Gorsuch's question.

12 Second, I just wonder separately  
13 whether I am just bound by what seems to be  
14 your concession, I guess I am, that the  
15 argument below is abandoned.

16 MR. GEYSER: Your Honor, I think that  
17 you can affirm on any ground that's present in  
18 the record. So, if you think that that's the  
19 better reading of it, then -- then we would  
20 warmly embrace it.

21 (Laughter.)

22 MR. GEYSER: Justice Gorsuch, I think  
23 that -- I think, again, that the logical  
24 outgrowth test would assume that in a  
25 proceeding --

1 JUSTICE GORSUCH: But the logical  
2 outgrowth test, is -- is it anticipated that  
3 something is going to follow? Is it reasonable  
4 notice?

5 And, again, what's reasonable about  
6 saying X and then doing not X or the opposite  
7 of X, and then doing it in an ipsi dixit,  
8 one-line sentence, that's unreasoned and  
9 wouldn't normally get much deference from us in  
10 the first place.

11 MR. GEYSER: The --

12 JUSTICE GORSUCH: How does all that  
13 get you Chevron?

14 MR. GEYSER: The -- the key issue in  
15 the proceeding was how do you deal with the  
16 interaction between internal reporting and  
17 preserving internal compliance mechanisms and  
18 -- and the anti-retaliation provision and  
19 making sure that the award provision -- program  
20 makes sense.

21 So I think the -- the interaction of  
22 those things suggests that, while corporations  
23 thought we need to preserve internal  
24 compliance, so we need to make sure that people  
25 first report internally and give corporations a

1 chance to fix the problem, that the necessary  
2 counterpart to that is people have to be  
3 protected when they internally report.

4           It doesn't make any sense to say that  
5 people have to engage in internal reporting,  
6 yet they're unprotected when they do that.

7           I'd like to get to -- to the (a)(6).  
8 Again, the definition section does not end by  
9 saying the report has to go to the Commission.  
10 It says, "in a manner established by rule or  
11 regulation by the Commission."

12           And I think that's important because  
13 Congress realized that the Commission needed to  
14 -- to prevent the situation where the SEC has a  
15 big enforcement award and everyone comes out of  
16 the woodwork and they all claim an entitlement  
17 to part of that award.

18           The manner established by the  
19 Commission ensures that there is a -- a simple,  
20 easy way to track exactly who's eligible for  
21 award and who is not. Congress did not need to  
22 limit the anti-retaliation section to whether a  
23 whistleblower filled out the right form or  
24 faxed a form to the exact right number, even if  
25 they provided information to the SEC,

1     accomplishing the -- the core objective of the  
2     whistleblower litigation -- legislation in the  
3     very first place.

4             JUSTICE GINSBURG:   May I just ask  
5     whether Somers -- was there any reason he  
6     didn't report to the SEC?

7             MR. GEYSER:   He -- I think it just  
8     simply did not occur to him at the time.   And  
9     so -- and in the same way that he missed the  
10    limitations period for the Sarbanes-Oxley  
11    claim.

12            What he tried to do was do the right  
13    thing, and to honor the corporate Code of  
14    Conduct by calling the -- the misconduct to his  
15    supervisor's attention, which again is exactly  
16    what all the corporate stakeholders, you know,  
17    in this proceeding have said is their goal,  
18    too.

19            No one thinks it's better to have  
20    reports go directly to the SEC, unless the  
21    corporation is entirely unwilling to remediate  
22    and address the problem.   So, I -- again, it is  
23    consistent with the -- the natural, regulatory  
24    scheme in Sarbanes-Oxley; and Dodd-Frank is not  
25    passed in a vacuum.   Dodd-Frank is part -- and

1 Sarbanes-Oxley work together. They each amend  
2 provisions of the Exchange Act.

3 So I -- I don't think it -- I think  
4 it's highly odd to say that in Dodd-Frank,  
5 Congress wanted to create a heavy incentive not  
6 to report internally, but in Sarbanes-Oxley,  
7 Congress was focused intently on internal  
8 reporting and especially internal reporting of  
9 lawyers and auditors.

10 So, under my friend's reading,  
11 Dodd-Frank would leave those critical groups,  
12 the groups that this Court in Lawson versus FMR  
13 recognized were best equipped to spot and  
14 detect and prevent fraud, out of these critical  
15 protections after Congress recognized that  
16 Sarbanes-Oxley had been ineffective in getting  
17 lawyers and auditors and other employees to  
18 report internally.

19 This is critical whistleblower  
20 protections, and we don't see any basis for  
21 carving those groups out of the statute.

22 If the Court has no further questions.

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 counsel.

25 Mr. Michel.



1           ORAL ARGUMENT of CHRISTOPHER G. MICHEL  
2                   ON BEHALF OF THE UNITED STATES, AS  
3           AMICUS CURIAE, SUPPORTING THE RESPONDENT

4           MR. MICHEL: Mr. Chief Justice, and  
5 may it please the Court:

6           The statutory definition of  
7 whistleblower is tailor-made for the awards  
8 program, but it does not fit in the retaliation  
9 programs.

10           Giving the term its ordinary meaning  
11 in the retaliation context would harmonize the  
12 statute and avoid the anomalies that would  
13 result from woodenly applying the statutory  
14 definition.

15           Some of those anomalies have been  
16 discussed already by the Court. But I do think  
17 the most drastic one is that applying the  
18 statutory definition, which requires reporting  
19 to the Commission, into clause (iii) of the  
20 retaliation provisions, which protects internal  
21 reporting, would decouple retaliation liability  
22 from the Act that causes the retaliation, and  
23 moreover, would make employers liable for  
24 conduct that they don't know about. Now, that  
25 in our view would be a one of a kind

1 retaliation provision in the U.S. Code.

2 JUSTICE KAGAN: So, Mr. Michel, I do  
3 think that that's a real anomaly. And I -- I  
4 -- I also think if you really look at the way  
5 this statute came to be, it's quite possible  
6 the way this provision gets in very late in the  
7 game, that they didn't know that they'll --  
8 they forgot about this definitional provision,  
9 and they were meaning it more in the ordinary  
10 language sense.

11 But there you are, you have this  
12 definitional provision, and it says what it  
13 says. And it says it applies to this section.  
14 And you have to have a really, really severe  
15 anomaly to get over that.

16 So what makes it rise to that level?  
17 It's odd; it's peculiar; it's probably not what  
18 Congress meant. But what makes it the kind of  
19 thing where we can just say we're going to  
20 ignore it?

21 MR. MICHEL: So, Justice Kagan, I'd  
22 direct you to the Lawson versus Suwannee Fruit  
23 case, which I think is often cited as -- as a  
24 canonical case on statutory definitions. That  
25 was a worker's compensation case. And the

1 statute included the term "injury," which was  
2 defined understandably enough for a worker's  
3 compensation case as injury on the job.

4 But there was a provision in which the  
5 employer was relieved from liability if the  
6 employee had a preexisting injury. And the  
7 Court said if you apply the statutory  
8 definition to that preexisting injury and  
9 require that injury to be on the job, that  
10 would be anomalous, because it would unfairly  
11 assign liability to the employer, and it would  
12 deter the statutory purpose of keeping  
13 employers from retaliating against disabled  
14 employees.

15 So I think that decision is analogous  
16 here. You would deter employers from -- excuse  
17 me -- you would unfairly apportion liability to  
18 employers based on conduct that they don't know  
19 about, and you would take out the premise of  
20 the retaliation provision, because the very  
21 conduct that is an element in the retaliation  
22 claim -- reporting to the Commission -- is  
23 different from the conduct for which they  
24 retaliated against the employee. One --

25 JUSTICE ALITO: Now this sort of thing

1 will come up in other cases in which the  
2 government is involved. And do you want us to  
3 write an opinion that uses the terminology that  
4 you just used?

5           So, you have a statute with a -- that  
6 uses a particular term, and there's a  
7 definitional provision in the statute. And  
8 what we write is that the definition in the  
9 statute doesn't apply if it produces an  
10 anomaly.

11           Is that the standard? That's all you  
12 need to get out of the definitional provision?

13           MR. MICHEL: I -- I think, you know,  
14 if you look at *Suwannee Fruit*, for example, the  
15 Court talked about incongruities, it talked  
16 about undermining the purpose of the statute.

17           If you look at the -- the *Public*  
18 *Utilities* case, the Court talks about  
19 undermining the purpose of the statute.

20           JUSTICE GINSBURG: I thought -- I  
21 thought the stock phrase was absurd, that you  
22 -- if the statute gives a definition, you  
23 follow the definition in the statute unless it  
24 would lead, not merely to an anomaly, but to an  
25 absurd result.

1 MR. MICHEL: Justice Ginsburg, I -- I  
2 don't think that -- with respect, I don't think  
3 that's the standard the -- the Court has  
4 applied. In fact, in all of the cases we cite,  
5 starting with *Suwannee Fruit and Public*  
6 *Utilities* --

7 JUSTICE GORSUCH: And you'd -- and  
8 you'd agree you don't have an absurdity here.

9 I mean, the government concedes that  
10 subsection (iii) would cover a subset of cases  
11 -- maybe not as much as -- as the government  
12 would like, but -- but it's not an absurd  
13 reading, right?

14 MR. MICHEL: We're not arguing that  
15 it's absurd. That -- that's correct, Justice  
16 Gorsuch.

17 It would, however, I -- I do want to  
18 stress how narrow the meaning that would be  
19 left for clause (iii) is. That --

20 CHIEF JUSTICE ROBERTS: Well, but, I  
21 mean, it's not just that it's not absurd. It  
22 seems to me if you look at *Utility Air*, it has  
23 to be -- not absurd or anomalous, whatever you  
24 want to say -- it has to be cut very broadly.

25 I mean, if you get to a tiny little

1 thing and you're saying, well, the definition  
2 doesn't work there, it's one thing to say,  
3 well, then we're not going to apply it to that  
4 provision.

5 The cases where you're allowed to move  
6 beyond the defined term are when if you stick  
7 to it, it really makes a mess of the whole  
8 thing.

9 MR. MICHEL: I agree, Mr. Chief  
10 Justice, but I think it's a pretty big mess  
11 that -- that the Petitioner's reading is -- is  
12 making here. You know, in addition to the --  
13 to the anomalies we've already discussed, I do  
14 think a very important one is that Petitioner's  
15 reading would eviscerate the incentive for  
16 internal reporting.

17 Keep in mind, Petitioner wants to  
18 import the entire --

19 JUSTICE GORSUCH: Well, counsel, you  
20 might have an argument there if there weren't  
21 Sarbanes-Oxley as the backdrop, but there is.  
22 And so the Chief Justice's point and Justice  
23 Breyer's point is that if it were to make a  
24 hash of the entire statute, and there'd be  
25 meaning -- no meaning at all, maybe, maybe, but

1 you don't -- you don't -- you don't even allege  
2 that here.

3 MR. MICHEL: Well, let me try two  
4 responses, Justice Gorsuch.

5 First of all, I think it's quite clear  
6 that what Congress was trying to do in  
7 Dodd-Frank was bolster the remedies that were  
8 available under Sarbanes-Oxley. That's why it  
9 was --

10 JUSTICE GORSUCH: But -- but we don't  
11 follow what they're trying to do. We follow  
12 what they do do, right?

13 MR. MICHEL: Well, they did --

14 JUSTICE GORSUCH: You'd agree with me  
15 on that?

16 MR. MICHEL: Absolutely.

17 JUSTICE GORSUCH: All right.

18 MR. MICHEL: And what they did do was  
19 change the statute of limitations from six  
20 months to six years. They changed the single  
21 back pay to double back pay.

22 JUSTICE GORSUCH: Do you want to  
23 comment on the notice and -- and rule-making  
24 procedures here and its reference to how much  
25 deference we owe? And I -- I, again, I'm just

1       stuck with the absence of any fair notice, an  
2       ipse dixit decision, without any reasons that  
3       wouldn't normally pass muster under the APA;  
4       and then we have two circuit courts that  
5       nonetheless thought that it was appropriate to  
6       defer to that, which seems to me allowing an  
7       agency to swallow a large amount of legislative  
8       power and judicial power in the process, giving  
9       up our opportunity to -- to -- to interpret the  
10      law as it is.

11               MR. MICHEL:  So I just -- I -- I'll  
12      start with a small correction, which is the  
13      court of appeals in this case actually  
14      primarily --

15               JUSTICE GORSUCH:  Did both --

16               MR. MICHEL:  -- interpreted the  
17      statute.

18               JUSTICE GORSUCH:  Did both.  And the  
19      other -- and the other court relied exclusively  
20      on Chevron.

21               MR. MICHEL:  Yes.

22               JUSTICE GORSUCH:  So here we are.

23               MR. MICHEL:  That -- that's right.  I  
24      think I would also point out that, you know,  
25      this procedural deficiency argument has a



1 serious procedural deficiency of its own, in  
2 which --

3 JUSTICE GORSUCH: It's not making an  
4 invalidity argument. It's -- it's asking for  
5 deference, as -- as your friend pointed out,  
6 which is a different animal.

7 MR. MICHEL: It's true. And I do want  
8 to go to the merits of that.

9 JUSTICE GORSUCH: Good.

10 MR. MICHEL: But as -- as -- as --

11 JUSTICE GORSUCH: Please.

12 MR. MICHEL: -- you're -- you know,  
13 reading from the notice of proposed  
14 rule-making, I do want to point out that it's  
15 the Supreme Court that is doing this in the  
16 first instance. No court in case or any other  
17 case has -- has consulted this before.

18 But if you want to look at it, I do  
19 think Petitioner pointed to what we think is  
20 the closest statement in the rule, which is at  
21 page 70,511, and lays out, you know, as -- as  
22 my friend read, "the Commission is seeking  
23 comments on whether it should promulgate rules  
24 regarding the implementation of the -- of this  
25 section, should application of the retaliation

1 provisions be limited or broadened."

2 I -- I think the fact that several  
3 comments --

4 JUSTICE GORSUCH: "Who provides  
5 information to the Commission." Right? That's  
6 kind of an important little phrase there.

7 MR. MICHEL: Right. I -- I agree with  
8 that.

9 JUSTICE GORSUCH: Right.

10 MR. MICHEL: And -- and I'm not saying  
11 that it couldn't have been written more  
12 clearly. I do think if you look at --

13 JUSTICE GORSUCH: I think it was  
14 written very clearly.

15 MR. MICHEL: Well, I think if you look  
16 actually, Justice Gorsuch, at the -- at the  
17 Long Island Care case, which I think is -- is  
18 probably this Court's leading case on the  
19 logical outgrowth test, it -- it ultimately  
20 says that, you know, proposing X and getting  
21 not X is enough to satisfy the logical  
22 outgrowth.

23 Now, maybe that's not logical, but  
24 that is the -- you know, the Court's precedent  
25 in this area. And I think we certainly satisfy

1 that test here.

2 JUSTICE SOTOMAYOR: Bottom line, are  
3 you -- how much are you relying on just Chevron  
4 deference here?

5 MR. MICHEL: That -- that's not even  
6 our principal argument. We're -- we're  
7 certainly happy to have Chevron deference if  
8 you find the statute ambiguous, but we -- we  
9 think you can resolve this without Chevron  
10 deference, simply as the Ninth Circuit did in  
11 its primary holding by saying that we have the  
12 best reading of the statute. I think a number  
13 of the lower courts have done that too.  
14 There's a District of Nebraska opinion that we  
15 cite that I think is particularly helpful in --  
16 in evaluating the statute.

17 JUSTICE GORSUCH: Would -- would you  
18 agree, though, that a notice-and-comment  
19 rule-making that didn't provide fair notice  
20 shouldn't be deferred to?

21 MR. MICHEL: I -- this -- I think  
22 Encino is some support for that, although this  
23 Court has never taken the additional step of  
24 saying that the -- a failure to meet the  
25 logical outgrowth test as distinguished from

1 the inadequate explanation --

2 JUSTICE GORSUCH: Well, just  
3 hypothetically, let's say whatever your logical  
4 outgrowth test is fails to meet that, okay? No  
5 notice, no adequate procedures. Should --  
6 should courts defer to that as -- as the law?

7 MR. MICHEL: Again, I think there's a  
8 lot of, you know, preliminary questions you'd  
9 have to answer about timing and -- and  
10 everything else, but in -- in a properly --

11 JUSTICE GORSUCH: Let's get to the  
12 merits.

13 MR. MICHEL: I think in a properly  
14 presented challenge, that -- that you wouldn't  
15 be able to defer to that. I'll -- I'll agree  
16 with that, Justice Gorsuch.

17 JUSTICE GORSUCH: You would not -- you  
18 would not be able to defer to that?

19 MR. MICHEL: Correct.

20 JUSTICE GORSUCH: All right.

21 MR. MICHEL: But -- but I don't think  
22 this -- that's this case for a lot of the  
23 reasons that we have discussed.

24 JUSTICE BREYER: Are you wary of the  
25 government conceding that point? I would be

1 wary of that because I don't know what  
2 implications it has for other cases where, in  
3 fact, you start chipping away in an unforeseen  
4 way, I mean maybe -- I can think of a lot of  
5 reasons for not deferring to the rule here.  
6 Among others, it doesn't refer to manner.  
7 There's nothing in there about manner that I  
8 could find.

9 I could think of reasons, but I -- I'm  
10 just saying I -- that is not necessarily what  
11 you just said, a -- a lifetime concession on  
12 the part of the government, is it?

13 MR. MICHEL: No, it is not.

14 (Laughter.)

15 MR. MICHEL: I -- I do want to try to  
16 get back to the point about internal  
17 whistleblowing and internal reporting, which I  
18 think is something that there's a unity of  
19 interest from employees, employers, and the  
20 Commission. And -- and my friend --

21 JUSTICE SOTOMAYOR: So why don't you  
22 give an award for that?

23 MR. MICHEL: May I answer, Mr. Chief  
24 Justice?

25 CHIEF JUSTICE ROBERTS: Certainly.

1           MR. MICHEL: We do actually give an  
2           award for people who report internally if the  
3           -- if the company then reports to the  
4           Commission and the person then reports within  
5           120 days. So the rule does reflect that  
6           principle.

7           JUSTICE SOTOMAYOR: You only give it  
8           if they report to the SEC?

9           MR. MICHEL: They have to ultimately  
10          report to the SEC within 120 days.

11          Thank you, Mr. Chief Justice.

12          CHIEF JUSTICE ROBERTS: Thank you,  
13          counsel.

14          Mr. Shanmugam, seven minutes.

15          REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM  
16          ON BEHALF OF THE PETITIONER

17          MR. SHANMUGAM: Just two quick points  
18          on rebuttal. And thank you, Mr. Chief Justice.

19          The first, with regard to these cases  
20          concerning statutory definitions, I think if  
21          you look at the cases cited by Respondent and  
22          the government, most of those cases are cases  
23          in which either the terms of the statutory  
24          definition are ambiguous or in which the reach  
25          of the statutory definition is unclear.

1           Whereas here, both the terms and the  
2 reach of the statutory definition are  
3 unambiguous, this Court has refused to give  
4 effect to a statutory definition, only where it  
5 would lead to absurd results. And to be sure,  
6 many of those cases are pre-1986 cases.

7           They do not use the term "absurdity,"  
8 but they sound in absurdity. And the perfect  
9 example of that is Mr. Michel's favorite case,  
10 Lawson versus Suwannee Fruit. That was a case  
11 in which if the statutory definition of  
12 disability were given effect, an employer would  
13 be liable for the entirety of an employee's  
14 disability, even if the previous partial  
15 disability occurred when the employee was not  
16 on the job.

17           And the Court said that that would  
18 lead to obvious incongruities in the language  
19 and destroy the very purpose of the statute.  
20 So, again, that's absurdity by any other name.

21           And to the extent that Respondent and  
22 the government seem to suggest that absurdity  
23 is not required here, I would submit that it  
24 would be a very odd regime of statutory  
25 interpretation if this Court were to apply a

1 different standard to unambiguous language in a  
2 statutory definition from the standard that it  
3 applies where you have unambiguous language  
4 anywhere else. If anything, where Congress  
5 provides a specific statutory definition, that  
6 ought to be given effect and more respect,  
7 rather than less.

8           And to the extent that there may be  
9 some incidental overbreadth with our  
10 interpretation because one could posit a  
11 hypothetical in which there's really not a  
12 nexus between the internal report and the  
13 report to the SEC, I would respectfully submit  
14 that this case is a lot like the Court's last  
15 whistleblower case, Lawson versus FMR, where  
16 the Court said that incidental overbreadth, the  
17 mere fact that one could think of hypotheticals  
18 involving gardeners, nannies, and housekeepers  
19 in the words of the Court, is not enough to  
20 invalidate an interpretation, particularly  
21 where the contrary interpretation suffers from  
22 a similar deficiency, the wild overbreadth to  
23 which I referred in my opening.

24           And my second point is just a brief  
25 point on the procedural issue concerning the



1 rule-making here. I think Justice Gorsuch put  
2 his finger on the exact language in the  
3 proposed rule that makes clear that the SEC was  
4 operating from the premise that reporting to  
5 the Commission was required.

6 And to the extent that the Commission  
7 asked whether the application of the  
8 anti-retaliation provision could be limited or  
9 broadened, it was asking about limiting or  
10 broadening it in other ways, such as by adding  
11 the same requirements, the procedural  
12 requirements that apply to eligibility for the  
13 award provisions, to the anti-retaliation  
14 provision as well.

15 And it is certainly true, as  
16 Mr. Geysler said, that this Court and lower  
17 courts have often asked whether the final rule  
18 is somehow the logical outgrowth from the  
19 proposed rule. But in the words of Judge  
20 Randolph from the D.C. Circuit, something  
21 cannot grow out of nothing.

22 And where there is nothing in the  
23 proposed rule to put interested parties on  
24 notice that an agency is considering a  
25 particular interpretation, it would be the

1 height of inequity to uphold a rule and to  
2 afford deference to the agency in those  
3 circumstances.

4 In our view, the SEC's interpretation  
5 here was procedurally improper, as well as  
6 substantively invalid, and for that reason and  
7 the other reasons set out in the briefs, the  
8 judgment of the Ninth Circuit should be  
9 reversed.

10 Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel. The case is submitted.

13 (Whereupon, at 12:07 p.m., the case  
14 was submitted.)

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## Official

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