

# A TEXTUAL ANALYSIS OF WHISTLEBLOWER PROTECTIONS UNDER THE DODD-FRANK ACT

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## INTRODUCTION

In the aftermath of the 2008 financial crisis, Congress enacted and President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”).<sup>1</sup> The purpose of Dodd-Frank was “[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system.”<sup>2</sup> One mechanism Dodd-Frank’s drafters crafted for improving accountability in the financial system was a comprehensive whistleblower incentives and protections program.<sup>3</sup> Dodd-Frank’s whistleblower program followed in the footsteps of previous remedial legislation—namely the Sarbanes-Oxley Act (“SOX”)<sup>4</sup>—with

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1 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 5, 7, 12, 15, 22, 26, 28, 31, and 42 U.S.C.); see also Helene Cooper, *Obama Signs Overhaul of Financial System*, N.Y. TIMES (July 21, 2010), [http://www.nytimes.com/2010/07/22/business/22regulate.html?\\_r=0](http://www.nytimes.com/2010/07/22/business/22regulate.html?_r=0). For a discussion of the causes of the financial crisis and a timeline of events, see FIN. CRISIS INQUIRY COMM’N, THE FINANCIAL CRISIS INQUIRY REPORT (2011).

2 124 Stat. at 1376; see also Michael S. Barr, *The Financial Crisis and the Path of Reform*, 29 YALE J. ON REG. 91, 96 (2012) (characterizing Dodd-Frank as “the government’s historic response to the causes of the [2008] economic crisis”).

3 See Dodd-Frank § 922, 124 Stat. at 1841–49 (codified as amended at 15 U.S.C. § 78u–6); see also Peter J. Henning, *The S.E.C., Whistle-Blowers and Sarbanes-Oxley*, N.Y. TIMES (Nov. 9, 2010), <http://dealbook.nytimes.com/2010/11/09/the-s-e-c-whistleblowers-and-sarbanes-oxley/> (noting Dodd-Frank’s requirements that the SEC “pay at least 10 percent, and as much as 30 percent, of any monetary penalties more than \$1 million” to whistleblowers).

4 See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15, 18, 28, and 29 U.S.C.); see also William W. Bratton, *Enron, Sarbanes-Oxley and Accounting: Rules Versus Principles Versus Rents*, 48 VILL. L. REV. 1023, 1024 (2003) (describing Sarbanes-Oxley as a legislative response to the 2002 financial crisis “intended to address the scandals and restore confidence in the securities markets, responds by regulating the accounting profession”). But see Richard E. Moberly,

the intention that Dodd-Frank would “build on existing legislation to remedy the aftermath of the 2008 financial crisis, and provide strong compliance and reporting incentive structures to prevent future market failures.”<sup>5</sup>

Since its enactment, Dodd-Frank has avoided the main difficulties in application that whistleblowers under SOX experienced—i.e., questions of “who” within an organization may be classified as a whistleblower.<sup>6</sup> However, circuits have split on the question of “what” a whistleblower must do in order to receive Dodd-Frank’s antiretaliation protections. The controversy has turned on the interaction between two specific provisions of Dodd-Frank. The first provision is the section that defines the term “whistleblower” for the purposes of the whistleblower provisions—15 U.S.C. § 78u-6(a)(6).<sup>7</sup> The definitional section states: “In this section the following definitions shall apply: . . . The term ‘whistleblower’ means any individual who provides . . . information relating to a violation of the securities laws *to the Commission*.”<sup>8</sup> The second provision is the section that outlines the Act’s antiretaliation protections for whistleblowers—15 U.S.C. § 78u-6(h)(1)(A).<sup>9</sup> It provides:

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, and any other law, rule, or regulation subject to the jurisdiction of the Commission.*<sup>10</sup>

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*Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 65 (2007) (finding that “during its first three years, only 3.6% of Sarbanes-Oxley whistleblowers won relief through the initial administrative process that adjudicates such claims, and only 6.5% of whistleblowers won appeals through the process”).

5 Zizi Petkova, Note, *Interpreting the Anti-Retaliation Provision of the Dodd-Frank Act*, 18 U. PA. J. BUS. L. 573, 574 (2016).

6 See Samuel C. Leifer, Note, *Protecting Whistleblower Protections in the Dodd-Frank Act*, 113 MICH. L. REV. 121, 123 (2014) (noting that “SOX was unclear about which individuals within an organization are entitled to whistleblower protections,” e.g., “direct employees of a company versus employees of a company’s contractors”).

7 15 U.S.C. § 78u-6(a)(6) (2012). This section will be referred to throughout this Note as the definitional section.

8 *Id.* (emphasis added).

9 15 U.S.C. § 78u-6(h)(1)(A). This section will be referred to throughout this Note as the antiretaliation provision or whistleblower protection provision.

10 *Id.* (emphasis added).

In *Asadi v. G.E. Energy (USA), L.L.C.*, the Fifth Circuit held that the plain language of Dodd-Frank’s whistleblower definition and antiretaliation provision restricted the law’s protections “to those individuals who provide ‘information relating to a violation of the securities laws’ to the SEC.”<sup>11</sup> In contrast, the Second Circuit held in *Berman v. Neo@Ogilvy LLC* that the tension between Dodd-Frank’s whistleblower definition and its antiretaliation provision “renders [the whistleblower provisions] as a whole sufficiently ambiguous to oblige us to give *Chevron* deference to” the SEC’s interpretation that internal reporting is sufficient to invoke the statute’s protections.<sup>12</sup>

This Note endorses the reasoning of the Fifth Circuit, and argues that the plain language of Dodd-Frank limits its whistleblower protections to individuals who provide information to the SEC. This Note argues that the reasoning of the Second Circuit relying on the Supreme Court’s decision in *King v. Burwell* is inapposite, and that the Second Circuit introduced ambiguity where no ambiguity previously existed and improperly extended *Chevron* deference to the SEC.<sup>13</sup> Part I briefly describes the interpretive rule adopted by the SEC, as well as the reasoning of the Fifth Circuit in *Asadi* and the Second Circuit in *Berman*. Part II analyzes the plain language of the statute using judicial canons of construction to show that the text of Dodd-Frank is not ambiguous, and is clearly limited to those making external reports to the SEC.

## I. ASADI, BERMAN, AND THE SEC

This Part first explains the SEC regulation interpreting Dodd-Frank’s language, which in the SEC’s opinion is ambiguous. Next, it explains the Fifth Circuit’s decision in *Asadi v. G.E. Energy (USA), L.L.C.*, rejecting the SEC’s interpretation because it did not consider the text to be ambiguous. And finally, it explains the Second Circuit’s subsequent decision in *Berman v. Neo@Ogilvy LLC*, deferring to the SEC and creating a circuit split.

### A. *The SEC’s Interpretation*

The SEC has taken the position that Dodd-Frank’s whistleblower provisions are ambiguous.<sup>14</sup> Namely, the SEC believes that Dodd-Frank’s definition of “whistleblower” creates a tension with the statute’s language defining

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11 *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 630 (5th Cir. 2013) (quoting 15 U.S.C. § 78u-6(a)(6)); *see also infra* Section I.B.

12 *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155 (2d Cir. 2015); *see also infra* Section I.C.

13 *Cf. King v. Burwell*, 135 S. Ct. 2480 (2015); *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

14 *See* Interpretation of the SEC’s Whistleblower Rules Under Section 21F of the Securities Exchange Act of 1934, 80 Fed. Reg. 47,829, 47,829 (Aug. 10, 2015) [hereinafter SEC Interpretive Rule] (“[W]e recognized that Section 21F is ambiguous . . .”).

the scope of the antiretaliation protections.<sup>15</sup> Accordingly, the SEC has promulgated regulations and interpretive rules that seek to reconcile the purported ambiguities. Relevant to the circuit split at hand, the SEC issued Exchange Act Rule 21F-2, pursuant to its rulemaking authority under Dodd-Frank, which states, in relevant part:

(1) For purposes of the anti-retaliation protections afforded by [Dodd-Frank], you are a whistleblower if:

(i) You possess a reasonable belief that the information you are providing relates to a possible securities law violation (or, where applicable, to a possible violation of the provisions set forth in 18 U.S.C. 1514A(a)) that has occurred, is ongoing, or is about to occur, and;

(ii) You provide that information in a manner described in Section 21F(h)(1)(A) of the Exchange Act (15 U.S.C. 78u-6(h)(1)(A)).

(iii) *The anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award.*<sup>16</sup>

In enacting its rule, the SEC stated that it understood its regulations to create two definitions of “whistleblower”: one that mirrored Dodd-Frank’s definition, for the purposes of receiving the whistleblower monetary incentives and heightened confidentiality protections, and a second, broader than the first, for the purposes of receiving antiretaliation protections.<sup>17</sup> Accordingly, under the SEC’s reading of the statute, “the availability of employment retaliation protection is not conditioned on an individual’s adherence to the Rule 21F-9(a) procedures [requiring reporting to the SEC],” and an individual who only made a report internally would receive protections.<sup>18</sup>

### B. *The Fifth Circuit’s Decision in Asadi*

Khaled Asadi served from 2006 until 2011 as G.E. Energy’s Iraq Country Executive.<sup>19</sup> In that position, he worked from Amman, Jordan, to coordinate on behalf of G.E. Energy with Iraq’s governing bodies in order to secure and manage energy service contracts.<sup>20</sup> In 2010, Asadi was informed by Iraqi officials that G.E. Energy had hired a close associate of a senior Iraqi official in order to “curry favor” with that official and receive preferential treatment in contract negotiations.<sup>21</sup> Asadi reported the issue to his supervisors at G.E. Energy due to his concern that G.E. Energy may have violated the Foreign

15 See *id.* at 47,830 (arguing that applying the narrower definition “is not consistent with Rule 21F-2 and would undermine [the SEC’s] overall goals in implementing the whistleblower program”).

16 17 C.F.R. § 240.21F-2(b)(1) (2015) (emphasis added).

17 SEC Interpretive Rule, 80 Fed. Reg. at 47,829–30.

18 *Id.* at 47,830.

19 *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 621 (5th Cir. 2013); see also *Asadi v. G.E. Energy (USA), LLC*, No. 4:12-345, 2012 WL 2522599, at \*1 (S.D. Tex. July 28, 2012).

20 *Asadi*, 2012 WL 2522599, at \*1.

21 *Asadi*, 720 F.3d at 621.

Corrupt Practices Act (FCPA).<sup>22</sup> A year later, Asadi was terminated by G.E. Energy, and he filed his suit alleging that G.E. Energy had violated Dodd-Frank's whistleblower protections by terminating him following his internal report of the possible FCPA violation.<sup>23</sup>

As the first court of appeals to address Dodd-Frank's whistleblower provisions,<sup>24</sup> the Fifth Circuit faced two questions: (1) Was Asadi a whistleblower within the meaning of Dodd-Frank, and (2) if he was a whistleblower, does Dodd-Frank apply extraterritorially? Because the court answered the first question in the negative, it did not reach the second.<sup>25</sup>

The Fifth Circuit set out to “start and end [its] analysis with the text of the relevant statute.”<sup>26</sup> The primary ground for its decision was a point conceded by the plaintiff himself: “[H]e is not a ‘whistleblower’ as that term is defined [in the definitional section] because he did not provide any information to the SEC.”<sup>27</sup> Asadi did not claim that Dodd-Frank's definition of whistleblower was ambiguous; instead, he based his ambiguity argument on the perceived tension between the definition and the scope of the antiretaliation protections.<sup>28</sup> Under Asadi's reading (and the SEC's reading), the antiretaliation provision is ambiguous because an individual could take actions that fall within the third category of activity protected by the antiretaliation provision—activity that does not necessarily require reporting to the SEC—while failing to qualify as a whistleblower, and thus losing out on the Act's antiretaliation protections.<sup>29</sup> To Asadi, the SEC, and others, this outcome would undermine the very purpose for which the antiretaliation provisions were put in place.<sup>30</sup>

The Fifth Circuit rejected these concerns. The court's opinion placed particular emphasis on the fact that “whistleblower” was a defined term. “[T]he placement of the three categories of protected activity in subsection (h) follows the phrase ‘[n]o employer may discharge . . . or in any other manner discriminate against, a *whistleblower* . . . because of any lawful act done by the *whistleblower*.’”<sup>31</sup> The court explained that “[t]he use of the term ‘whistleblower,’ as compared with terms such as ‘individual’ or ‘employee,’ is

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22 *Id.*

23 *Id.*

24 See Jennifer M. Pacella, *Inside or Out? The Dodd-Frank Whistleblower Program's Antiretaliation Protections for Internal Reporting*, 86 TEMP. L. REV. 721, 721 (2014) (noting the Fifth Circuit was the first federal court of appeals to address the whistleblower provisions).

25 *Asadi*, 720 F.3d at 630 n.13.

26 *Id.* at 623.

27 *Id.* at 624.

28 *Id.*

29 *Id.* at 626.

30 See Pacella, *supra* note 24, at 751 (“By stripping aggrieved employee-whistleblowers of the very protections that Dodd-Frank sought to provide, the decision in *Asadi* flies in the face of the purpose of the statute in minimizing the fear of retaliation and motivating whistleblowers to come forward with information pertaining to securities laws violations.”).

31 *Asadi*, 720 F.3d at 626 (quoting 15 U.S.C. § 78u-6(h)(1)(A) (2012)).

significant”<sup>32</sup> because “the text of § 78u–6 clearly and unambiguously provides a single definition of ‘whistleblower.’”<sup>33</sup>

Asadi also argued that under the straightforward application of the whistleblower definition, the third category of activity in the antiretaliation provision was rendered superfluous—an outcome that weighed in favor of the broader interpretation.<sup>34</sup> The court rejected this argument, and in fact argued that it was Asadi’s construction that rendered portions of the statute superfluous by essentially writing the words “to the Commission” out of the definitional section.<sup>35</sup> In addition to violating the surplusage canon, the court argued that Asadi’s construction would render SOX’s antiretaliation provisions moot “because an individual who makes a disclosure that is protected by [SOX] . . . could also bring a Dodd-Frank whistleblower-protection claim on the basis that the disclosure was protected by SOX.”<sup>36</sup> The court argued that no whistleblower would choose to bring a claim under SOX under Asadi’s construction because Dodd-Frank’s regime is so much more attractive.<sup>37</sup>

Asadi’s final argument was based on the SEC regulation interpreting Dodd-Frank to protect internal whistleblowing as well as external whistleblowing.<sup>38</sup> In Asadi’s view, given the ambiguous language of the statute, the Fifth Circuit should defer to the SEC’s reasonable interpretation under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>39</sup> The Fifth Circuit rejected this argument for two reasons. First, because the court found the statute to be unambiguous, it found that this case failed the first step of the *Chevron* test.<sup>40</sup> Second, even assuming the language were ambiguous, the court doubted that the SEC’s interpretation could be considered “reasonable” given that its regulations concerning the whistleblower provision are “inconsistent”—namely, the court took a dim view of the SEC’s decision to adopt two definitions of “whistleblower,” one for the purpose of receiving monetary awards and one for the purpose of antiretaliation protection.<sup>41</sup>

32 *Id.*

33 *Id.* at 627.

34 *Id.* at 628.

35 *Id.*

36 *Id.*

37 *Id.* at 628–29 (noting that, compared to SOX, Dodd-Frank provides greater monetary damages, does not require an administrative claim before bringing suit, and has a substantially longer statute of limitations).

38 *Id.* at 629 (citing 17 C.F.R. § 240.21F–2(b)(1) (2015)).

39 *Id.* at 629–30; *cf.* *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

40 *Asadi*, 720 F.3d at 630; *see also Chevron*, 467 U.S. at 842–43 (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

41 *Asadi*, 720 F.3d at 630; *see* SEC Interpretive Rule, 80 Fed. Reg. 47,829, 47,829–30 (Aug. 10, 2015) (explaining the SEC’s position that there are two definitions of “whistleblower”: one for awards and one for antiretaliation); *see also Chevron*, 467 U.S. at

Thus, the Fifth Circuit held that the narrower interpretation of § 78u-6 was the only reasonable interpretation given the scope of Dodd-Frank's definition of "whistleblower."

### C. *The Second Circuit's Decision in Berman*

Daniel Berman was the finance director of Neo@Ogilvy LLC, a subsidiary of the advertising firm WPP PLC.<sup>42</sup> While employed at Neo@Ogilvy, Berman alleged he discovered various practices that amounted to accounting fraud and violated generally accepted accounting principles, Sarbanes-Oxley, and Dodd-Frank.<sup>43</sup> He reported his discovery internally, and did not make any report to the SEC until after he had been terminated in retaliation for his whistleblowing.<sup>44</sup> Berman, like Asadi, argued that the tension between the definitional section and the antiretaliation protections rendered the statute ambiguous, and that the proper reading was not to require whistleblowers to make external reports before making Dodd-Frank's protections available.<sup>45</sup> The Second Circuit agreed.<sup>46</sup>

At the outset of its discussion, the Second Circuit analogized to *King v. Burwell*.<sup>47</sup> As in *King*, the Second Circuit argued, the court faced the question of determining how—if at all—imperfectly drafted portions of a statute should work together.<sup>48</sup> While the court recognized that "there is no absolute conflict between the Commission notification requirement in the definition [section] and the absence of such requirement in both subdivision (iii) of [the antiretaliation provision of] Dodd-Frank and the Sarbanes-Oxley provisions" incorporated by reference,<sup>49</sup> the court nevertheless found a "significant tension within subsection 21F."<sup>50</sup> In the court's opinion, applying the Commission reporting requirement in the definitional section would leave the antiretaliation protections in subsection (iii) "with an extremely limited scope."<sup>51</sup>

The court outlined several reasons it saw that "extremely limited scope" as problematic. First, it expressed discomfort with the idea that, in order to

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843 ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

42 See *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 148–49 (2d Cir. 2015); Magistrate Judge's Report & Recommendation, No. 14–CV–00523, 2014 WL 6865718, at \*1 (S.D.N.Y. Aug. 15, 2014), *adopted in part* by *Berman v. Neo@Ogilvy LLC*, 72 F. Supp. 3d 404, 410–11 (S.D.N.Y. 2014).

43 *Berman*, 801 F.3d at 149.

44 *Id.*

45 See *Berman*, 72 F. Supp. 3d at 407–08; see also *Asadi*, 720 F.3d at 626; see also *supra* notes 28–30 and accompanying text.

46 *Berman*, 801 F.3d at 146.

47 See *id.* at 150.

48 *Id.*

49 *Id.*

50 *Id.* at 151.

51 *Id.*

receive whistleblower protections under subsection (iii), a whistleblower would need to make simultaneous reports internally and to the Commission—the court thought the number of whistleblowers who would take that route would be “few in number.”<sup>52</sup> It noted that at least some whistleblowers will feel that “reporting only to their employer offers the prospect of having the wrongdoing ended, with little chance of retaliation, whereas reporting to a government agency creates a substantial risk of retaliation.”<sup>53</sup>

Second, the court was uncomfortable with the fact that “there are categories of whistleblowers who cannot report wrongdoing to the Commission until after they have reported the wrongdoing to their employer”—particularly auditors and attorneys.<sup>54</sup> For the court, it was significant that SOX provisions covering auditors and attorneys require internal reporting before external reporting to the Commission is contemplated.<sup>55</sup> The court saw the limited extra protections available under Dodd-Frank’s subsection (iii) compared to SOX as problematic, and as a source of tension.<sup>56</sup>

The court noted the general rule that the definitions provided for terms within a section are to be applied literally throughout the section, but argued that the general rule was not applicable in this context because subsection (iii) was added to the statute late in the legislative process.<sup>57</sup> In the court’s eyes, the question was not whether the definition section should be applied literally, but whether Congress intended the definition of “whistleblower” to be applied to subsection (iii) at all.<sup>58</sup> For the court, a debate about whether a particular construction would render a provision of Dodd-Frank or another statute superfluous was beside the point.<sup>59</sup> Instead, the court was willing to chalk up the confusion to the “realities of the legislative process”:

When conferees are hastily trying to reconcile House and Senate bills, each of which number hundreds of pages, and someone succeeds in inserting a new provision like subdivision (iii) into [the bill], it is not at all

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52 *Id.*

53 *Id.*

54 *Id.*

55 For auditors, Sarbanes-Oxley requires an auditor to first inform the appropriate level of management under certain circumstances, and only permits reporting of illegal activity to the SEC if both the management and board of the company first fail to take remedial action when made aware of illegal acts. *Id.* Likewise, for attorneys under Sarbanes-Oxley, they are expected to first make their reports internally to the company’s chief legal counsel, and only report to the Commission if the company fails to take appropriate action. *Id.* at 151–52.

56 *Id.* at 152 (noting auditors and attorneys “would gain little, if any, Dodd-Frank protection” if subsection (iii) only protects external reporting). *But see infra* text accompanying notes 107–18.

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

58 *Id.* (“The issue here, however, is not whether to read the words of the definitional section literally, but the different issue of whether the definition should apply to a late-added subdivision of a subsection that uses the defined term.”).

59 *Id.*; *see also supra* notes 34–35 and accompanying text.



surprising that no one noticed that the new subdivision and the definition of “whistleblower” do not fit together neatly.<sup>60</sup>

In the court’s opinion, the realities of the legislative process militated in favor of giving the drafters the benefit of the doubt, and arguably supported a broader reading of subsection (iii) rather than a more literal application.<sup>61</sup> Ultimately, the court held that the conflict was sufficient to render the text of the statute ambiguous, and therefore obliged the court to grant *Chevron* deference to the SEC’s interpretation that external reporting was not required.<sup>62</sup>

## II. A TEXTUAL ANALYSIS OF DODD-FRANK

This Part carries out an independent analysis of Dodd-Frank’s text in order to determine the proper scope of the whistleblower antiretaliation protections and conclude whether the Fifth Circuit or Second Circuit reached the correct outcome.

The starting point for the analysis of any statute must be the statutory language itself. As the Supreme Court has said, “In interpreting a statute, ‘[o]ur inquiry must cease if the statutory language is unambiguous,’ . . . and ‘the statutory scheme is coherent and consistent.’”<sup>63</sup> One category of tools for the interpretation of statutes is the semantic canons of construction.<sup>64</sup> The canons are a set of background principles and common sense rules designed to assist the judiciary when interpreting statutes, and to provide a unifying framework for the construction of statutes that allow courts to maintain consistency throughout the law.<sup>65</sup> Though they are not binding law,

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

61 *Id.* at 155 (“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 external reporting requirements].”).

62 *Id.* (“[W]e need not definitively construe the statute, because, at a minimum, the tension between the definition . . . and the limited protection provided by subdivision (iii) . . . if it is subject to that definition renders section 21F as a whole sufficiently ambiguous to oblige us to give *Chevron* deference to the [SEC’s interpretation].”).

63 *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 412 (2011) (some internal quotation marks omitted) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)).

64 The “semantic” or “linguistic” canons are distinguished from the “substantive” canons in that the former are a set of presumptions about how the legislature uses language when it drafts a statute, while the latter are a set of canons that place a “thumb on the scale” in favor of some judicially preferred policy outcome (e.g., the “rule of lenity”). See JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION: CASES AND MATERIALS* 202 (2d ed. 2013) (describing the semantic canons as “simply . . . a form of textual analysis,” while the substantive canons “favor . . . a particular substantive outcome”). This Note relies primarily on the semantic canons of construction.

65 See Adam W. Kiracofe, Note, *The Codified Canons of Statutory Construction: A Response and Proposal to Nicholas Rosenkranz’s Federal Rules of Statutory Interpretation*, 84 B.U. L. REV. 571, 574 (2004).

they have a long history of use in the Anglo-American legal system,<sup>66</sup> and are a tool frequently relied upon by the Supreme Court and lower courts in interpreting statutes.<sup>67</sup>

In this Part, Sections II.A and II.B will use a number of these semantic canons as aids in construing the language of Dodd-Frank. Then, Section II.C discusses the significance of judicial respect for and understanding of the legislative process in relation to the judicial role as the interpreter of statutes. Section II.D critiques the view of the Second Circuit, SEC, and some commentators that subsection (iii) of the whistleblower protection provision was meant to incorporate the bulk of Sarbanes-Oxley's antiretaliation protections. Finally, Section II.E discusses the critique that the courts should account for the remedial purpose of Dodd-Frank in construing the statute's language.

### A. *The Significance of a Definitional Section*

When Congress chooses to supply a definition for use in a statute, it should not come as a surprise that Congress likely intended the supplied definition to govern.<sup>68</sup> "When . . . a definitional section says that a word

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66 See FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 100 (2009) (describing the semantic canons of construction as "almost universally accepted as helpful statutory interpretive devices"); James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 8 (2005) (noting that Anglo-American judges have relied on the canons of construction for at least 400 years).

67 The canons are used quite frequently, and are used by Justices of both liberal and conservative ideological bents. See, e.g., *Yates v. United States*, 135 S. Ct. 1074, 1085–87 (2015) (Ginsburg, J.) (plurality opinion) (using the *ejusdem generis* and *noscitur a sociis* canons); *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (Scalia, J.) (applying the canon that specific terms govern general terms); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (O'Connor, J.) (applying the presumption disfavoring a construction that would render terms as surplusage); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995) (Kennedy, J.) (applying the presumption in favor of consistent meaning). While the canons are frequently used, they have also attracted much modern criticism. See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 309 (1996) (describing the canons of construction as "fig leaves covering decisions reached on other grounds"); Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909 (2016) (performing an empirical analysis of Supreme Court cases in which the majority and dissent rely on the same canon of construction to reach opposite conclusions); Karl N. 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 (1950) (challenging the notion that the canons of construction can provide a neutral method of interpreting statutes and arguing that various canons may be used to cancel each other out).

68 2A NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 47:07, at 227–28 (6th ed. 2000) ("As a rule a definition which declares what a term means is binding upon the court."); see also *Burgess v. United States*, 553 U.S. 124, 129–30 (2008) ("Statutory definitions control the meaning of statutory words . . . in the usual case." (quoting *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949) (internal quotation marks omitted))).

‘means’ something, the clear import is that this is its *only* meaning.”<sup>69</sup> Here, the definition of “whistleblower” and its required application to the entire antiretaliation provision could hardly be more clear, and should therefore bind the courts. The definitional section explicitly provides that: “*In this section* the following definitions *shall* apply: . . . The term ‘whistleblower’ *means* any individual who provides . . . information relating to a violation of the securities laws to the Commission.”<sup>70</sup> First, the explicit application of the definitions to the entire section is particularly important. This creates a strong presumption in favor of a consistent meaning of “whistleblower” throughout all of § 78u–6.<sup>71</sup>

Second, the phrasing of the definition as “‘whistleblower’ *means* . . .” is important because it creates a strong presumption that the definition provided in the statute is the *only* definition of “whistleblower” contemplated.<sup>72</sup> Use of the word “means” implies that the definition is the term’s *only* definition: “A definition which declares what a term *means* . . . excludes any meaning that is not stated.”<sup>73</sup> This is consistent with the well-known *expressio unius* canon of construction. According to this canon, when a statutory provision explicitly includes particular things, other things are implicitly excluded.<sup>74</sup> By contrast, when a definition “declares what it ‘*includes*’ . . . [i]t . . . conveys the conclusion that there are other items includable, though not specifically enumerated.”<sup>75</sup> Ergo, according to the conventional rules of statutory interpretation, the section’s definition is both mandatory and exclusive—only individuals who provide information *to the SEC* are eligible to qualify as whistleblowers, and that definition “*shall apply*” throughout § 78u–6.

The Second Circuit protested in its decision that “‘mechanical use of a statutory definition’ is not always warranted.”<sup>76</sup> It is certainly true that definitions are merely one indication of the meaning of terms—albeit a strong one—and may not necessarily call for literal application in every case.<sup>77</sup> However, the exceptions to the strict application of a defined term are limited and will only apply where, for example, the definition is arbitrary, creates

69 ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 226 (2012).

70 15 U.S.C. § 78u–6(a)(6) (2012) (emphasis added).

71 See *infra* Section II.B.

72 15 U.S.C. § 78u–6(a)(6) (emphasis added).

73 SINGER, *supra* note 68, § 47:07, at 232 (emphasis added).

74 See *Silvers v. Sony Pictures Entm’t, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) (en banc) (“‘[W]hen a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions.’” (quoting *Boudette v. Barnette*, 923 F.2d 754, 757 (9th Cir. 1991))); SINGER, *supra* note 68, § 47:23, at 304–07.

75 SINGER, *supra* note 68, § 47:07, at 231 (emphasis added) (quoting *Argosy Ltd. v. Hennigan*, 404 F.2d 14, 20 (5th Cir. 1968)).

76 *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 154 (2d Cir. 2015) (quoting *In re Air Cargo Shipping Servs. Antitrust Litig.*, 697 F.3d 154, 163 (2d Cir. 2012)).

77 See SCALIA & GARNER, *supra* note 69, at 228.

obvious incongruities in the statute, defeats a major purpose of the legislation, or is so discordant to common usage as to generate confusion.<sup>78</sup>

In the Second Circuit's opinion, *Berman* fell into the category of exceptions where a strict application of the definition would create incongruities in the statute. In support of that proposition, the Second Circuit analogized to *King v. Burwell* as the case "closer to [Berman's] case."<sup>79</sup> The grave statutory conundrum the Supreme Court faced in *King* is a difference in kind, not merely in degree, from the question faced by the Fifth Circuit and the Second Circuit. First, in *King* the Supreme Court was called on to construe genuinely ambiguous language—whether the provision regarding subsidies for insurance purchased on an "[e]xchange established by the State" only contemplated state-run exchanges or also included federally-run exchanges, where there were no relevant defined terms for aiding in answering the question.<sup>80</sup> In contrast, Dodd-Frank's language explicitly provides for the scope of its whistleblower protections by defining its terms.<sup>81</sup> Second, the Supreme Court in *King* faced the prospect of rendering an integral part of the Affordable Care Act ineffective depending on its chosen construction of the statute.<sup>82</sup> In contrast, the straightforward application of Dodd-Frank's definition of "whistleblower" merely leaves subsection (iii) with a narrow scope that could be considered suboptimal by those who favor broader whistleblower protections.<sup>83</sup>

Likewise, the SEC's interpretation, which would create two definitions of "whistleblower" in § 78u-6—one for awards, and one for antiretaliation protections—is clearly not reasonable.<sup>84</sup> The Second Circuit frames the question to be decided as "whether the [definitional section] applies to another provision of the statute."<sup>85</sup> But the statute itself has already provided the answer to that question: "In this section the following definitions *shall apply*."<sup>86</sup> The ordinary rules of statutory construction show that there can be

78 See SINGER, *supra* note 68, § 47:07, at 228–29.

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

80 See *King v. Burwell*, 135 S. Ct. 2480, 2487 (2015).

81 See 15 U.S.C. § 78u-6(a)(6) (2012).

82 See *King*, 135 S. Ct. at 2492–93 ("Here, the statutory scheme compels us to reject petitioners' interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very 'death spirals' that Congress designed the Act to avoid."); see also *N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 419–20 (1973) ("We cannot interpret federal statutes to negate their own stated purposes.").

83 See *Pacella*, *supra* note 24, at 748 ("The court in *Asadi* erred by rendering meaningless the specific reference to SOX in the third prong of subsection (h)(1)(A), providing no supportable explanation for why Congress decided to include this language in Dodd-Frank. Interpreting the third prong . . . as inclusive of internal whistleblowers is consistent with the overall scheme of the Dodd-Frank whistleblower program itself . . .").

84 See *supra* note 17 and accompanying text.

85 *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 150 (2d Cir. 2015).

86 15 U.S.C. § 78u-6(a) (emphasis added).

only one definition of whistleblower in this section, and the provided definition is exclusive.

*B. Presumption in Favor of Consistent Meaning*

The presumption in favor of consistent meaning stands for the proposition that, “[i]n seeking to interpret [a statutory term], we adopt the premise that the term should be construed, if possible, to give it a consistent meaning throughout the Act.”<sup>87</sup> The presumption arises from the common sense premise that when Congress uses a particular word throughout the same statute, it likely intended for that word to mean the same thing in each instance it was used.<sup>88</sup> For example, in *Gustafson v. Alloyd Co.*, the Supreme Court was called on to interpret a statute that defined the term “prospectus” for the purposes of one subsection, but not for the other subsections in which the term was used.<sup>89</sup> The Court ultimately determined that, if the statute were to be interpreted as “symmetrical and coherent,” the term prospectus would have to have a consistent meaning throughout the Act.<sup>90</sup>

However, the presumption may be overcome if it can be shown that Congress clearly intended to use a term differently in different sections of a statute.<sup>91</sup> The interpretation advanced by the SEC is that “whistleblower” has two different meanings in the Dodd-Frank Act.<sup>92</sup> Under the SEC’s reading, Congress intended for the whistleblower definition provided in § 78u-6(a)(6) to apply to subsections (i) and (ii) in § 78u-6(h)(1)(A), but meant for the whistleblowers under subsection (iii) to be a broader category of individuals. This is an entirely unreasonable reading of the statute.

Given that the general formulation of the rule, as discussed in *Gustafson*, would apply a consistent definition across disparate sections of a statute, it seems obvious that the presumption should apply with enhanced force where an explicit definition of “whistleblower” applies to the entirety of the section. As such, any attempt to interpret the provision to include multiple definitions of “whistleblower” should be required to make a very clear showing to overcome the presumption that the provided definition should apply to *all* of

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87 *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995).

88 See MANNING & STEPHENSON, *supra* note 64, at 215–16 (“[J]udges often try to discern the meaning of ambiguous terms by looking to other terms in the statute and making assumptions about how these other terms relate to the ambiguous language at issue. . . . [T]hese so-called canons simply describe intuitive and familiar techniques that we all use, sometimes unconsciously, in understanding language in context.”).

89 *Gustafson*, 513 U.S. at 568–70.

90 *Id.* at 569.

91 See *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595–96 (2004) (“The presumption of uniform usage thus relents when a word used has several commonly understood meanings among which a speaker can alternate in the course of an ordinary conversation, without being confused or getting confusing.”).

92 See SEC Interpretive Rule, 80 Fed. Reg. at 47,829–30; see also *supra* notes 16–18 and accompanying text.

the subsections.<sup>93</sup> The Second Circuit’s argument that subsection (iii) was inserted late in the legislative process, and the drafters would not have intended the whistleblower definition to apply strictly to subsection (iii), is not sufficient to overcome that presumption.<sup>94</sup>

### C. *Respect for the Legislative Process*

Courts interpreting the whistleblower provisions have been faced with the same age-old question that has long divided legal scholars—should a court do what it thinks is best to carry into effect the background purposes of a statute in light of the messy, hasty legislative process where staffers may overlook the fact that a newly added provision does not mesh well with the old language; or should a court strictly apply the language that managed to run the legislative gauntlet of bicameralism and presentment as the best evidence of Congress’s purpose, given the low likelihood that the court will be able to accurately guess how Congress would have preferred the pieces fit together if legislators had thought of it?<sup>95</sup>

The Second Circuit places a great deal of weight on the fact that subsection (iii) was inserted into Dodd-Frank’s whistleblower protections when the conference committee began to reconcile the House and Senate bills. Under the Second Circuit’s reading, the fact that subsection (iii) doesn’t fit “neatly” together with the definitional section or the other subsections in the antiretaliation provisions is merely reflective of the “realities of the legislative process.”<sup>96</sup> The Second Circuit frames the question as whether the drafters, in inserting subsection (iii) with its references to SOX’s protections, would have expected the new subsection to have the “extremely limited scope it would have if it were restricted by the Commission reporting requirement” in the definitional section.<sup>97</sup>

The Second Circuit, however, is asking the wrong question. It is not the role of the court to determine what the drafters would have wanted the statute to accomplish in the abstract; it is the court’s role to apply the statutory language that the drafters *actually drafted*. The court should not attempt to *fix* the statute because it hypothesizes that the drafters must have inserted the

93 See 15 U.S.C. § 78u-6(a)(6) (2012) (“In this section the following definitions shall apply . . .”).

94 See *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 154–55 (2d Cir. 2015).

95 Compare *id.* at 154, and Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848 (1992) (“Should one not look to the background of a statute, the terms of the debate over its enactment, the factual assumptions the legislators made, the conventions they thought applicable, and their expressed objectives in an effort to understand the statute’s relevant context, conventions, and purposes?”), with SCALIA & GARNER, *supra* note 69, at 56–58 (“[T]he purpose must be derived from the text, not from extrinsic sources . . . or an assumption about the legal drafter’s desires.”), and William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 690 (1990) (“[T]extualists remind us that statutory interpretation is, most of all, textual analysis. We start with the text, and most practitioners end with the text . . .”).

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

97 *Id.* at 155.

provision “hastily” at the “last minute” and the straightforward application of the statute must therefore be erroneous and an oversight.<sup>98</sup> Instead, respect for the “realities of the legislative process” would be better served by applying the language as it was enacted.<sup>99</sup> Textualists have long argued that the legislative process is one built on compromise.<sup>100</sup> While, to the Second Circuit, subsection (iii)’s scope may seem like an oversight that Congress would have fixed if the issue had been brought to its attention, many would argue that the exact scope of that provision may have been a necessary byproduct of the legislative process.<sup>101</sup> Who is to say that Congress would have assented to subsection (iii)’s addition to the statute at all if it had explicitly provided for protection for internal whistleblowing?<sup>102</sup> It would be presumptuous of the court to jump to that conclusion. Furthermore, while Congress may have agreed on the *purposes* for the whistleblower protection provisions, that is not to say that Congress would have been in unanimous agreement about the *means* to carry out those purposes. Again, textualists would argue that “the choice of means may be the product of hard-fought legislative compromise” and for the court to abstract out of a statute’s background purposes a mandate to broaden the literal text of a statute would “dishonor[ ] the legislative choice.”<sup>103</sup>

The Fifth Circuit’s approach, then, is far more respectful of the duties of judges to operate subject to the constraints of legislative supremacy in our system of government.<sup>104</sup> Critics of the Fifth Circuit’s approach essentially argue that one may somehow manufacture an ambiguity when viewing two independently unambiguous provisions in combination, even though the two provisions do not produce an outright conflict, but merely produce “tension” in the sense that one portion of one provision is left with a small—though still very real<sup>105</sup>—scope. “Tension” is far too low a bar to possibly serve as the threshold necessary to render a statutory provision ambiguous. The Second Circuit’s understanding of the “realities of the legislative pro-

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98 *Id.* at 154–55.

99 *Id.* at 154.

100 See Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 68 (1994).

101 See John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70, 74–75 (2006).

102 See *id.* at 92.

103 RICHARD H. FALLON, JR. ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 654–55 (7th ed. 2015) (internal quotation marks omitted) (quoting Easterbrook, *supra* note 100, at 68).

104 See Manning, *supra* note 101, at 96.

105 See *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 627–28 (5th Cir. 2013) (noting that the third category of activity would include a scenario in which an individual makes concurrent reports to the SEC and internally, but her employer fires her on the basis of her internal report, unaware that she made a report to the SEC). *But see* Leifer, *supra* note 6, at 139 (arguing that the Fifth Circuit’s hypothetical is an “unlikely scenario” in which it is “hard to imagine what motivations would prompt the employee to make this [form of] disclosure at all”).

cess” draws the improper conclusion—merely because the legislative process is imperfect does not give the court leeway to ignore the clear and unambiguous text of a statute.<sup>106</sup>

*D. Purpose of Subsection (iii)*

For the Second Circuit, the purpose of subsection (iii) is another source of tension within the whistleblower provisions. Subsection (iii) provides that:

No employer may [retaliate] against[ ] a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.<sup>107</sup>

In the Second Circuit’s eyes, subsection (iii) was meant to incorporate the full scope of the whistleblower protections of SOX by reference, including protection of internal reporting.<sup>108</sup> For the Second Circuit and likeminded commentators, if subsection (iii) is limited by the whistleblower definition, the incorporation of SOX’s protection by reference would not be fully accomplished, and only a small sliver of the activities SOX protects would also gain protection under Dodd-Frank.<sup>109</sup> But the Second Circuit and others fail to consider the possibility that subsection (iii) was not in fact intended to incorporate the *entirety* of SOX.

Proponents of broader whistleblower protections fail to take into account the alternative characterization of subsection (iii) as a residual or catchall section. I argue that the language of subsection (iii) is far more susceptible of this interpretation than as a wholesale importation of SOX’s whistleblower protections by reference. The language of subsection (iii) should more properly be read as a laundry list of the many reasons besides those provided in subsections (i) or (ii) that a whistleblower may have been motivated to report illegal activity to the SEC: viz., because of disclosures oth-

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106 Indeed, it is telling that, in reaching the opposite conclusion of this Note, the Second Circuit cited *Church of the Holy Trinity v. United States*—that old chestnut of statutory interpretation and perhaps the *ne plus ultra* of purposivist reasoning divorced from the text. *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 150 (2d Cir. 2015) (citing *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892)); see also MANNING & STEPHENSON, *supra* note 64, at 39–40 (describing *Church of the Holy Trinity* as representative of “strong purposivism” and characterizing the Court’s reasoning as “deciding that its job, as Congress’s faithful agent, was to cut back the statute to give effect to its background purpose or general aim” even though “in no uncertain terms . . . [the case] fell within the prohibition of the [statute]”).

107 15 U.S.C. § 78u-6(h)(1)(A), (A)(iii) (2012).

108 See *Berman*, 801 F.3d at 153–54; see also Pacella, *supra* note 24, at 745 (describing subsection (iii) as an “express incorporation of the SOX antiretaliation provision into Dodd-Frank”).

109 See *Berman*, 801 F.3d at 151–53; Leifer, *supra* note 6, at 139–40, 148–49; Pacella, *supra* note 24, at 745–46.



erwise required or protected by SOX,<sup>110</sup> the securities laws,<sup>111</sup> criminal statutes,<sup>112</sup> or any other law or regulation relevant to the SEC's jurisdiction.<sup>113</sup> The most natural reading of that list is "as a safety net that Congress used to sweep up anything it had forgotten to include."<sup>114</sup> Far from being an incorporation by reference of every whistleblower provision of SOX, subsection (iii) was instead meant to perform the function of the proverbial "belt *and* suspenders."<sup>115</sup>

Furthermore, if subsection (iii) is read to be analogous to a residual or catchall clause, the problems of "surplusage" and "mootness" that so vexed the Second Circuit, Fifth Circuit, and commentators become less important.<sup>116</sup> This is so because catchall provisions are, in some sense, *intended* to include redundancies—for example, the securities laws are replete with definitions that include long lists of terms that appear to have been lifted straight from a thesaurus,<sup>117</sup> and that under one reading could be considered to violate the canon that each term in a statute should be construed to have independent meaning if possible.<sup>118</sup> The better reading of provisions such as subsection (iii) is as an attempt by the legislature to cover all of its bases. Under this reading, the Fifth Circuit was correct not to have been concerned with the relative scope of its hypothetical situation that would satisfy subsection (iii)'s requirements.<sup>119</sup> A small scope for subsection (iii)'s SOX protections is consistent with the subsection's purpose as a gap-filler, and the narrow scope of the protections when the literal definition of whistleblower is applied to subsection (iii) may even suggest that this is the proper construction of the text. The scope of the SOX protections included in the catchall provision need not be large so long as the operation of the subsection will appropriately sweep up any circumstances that Congress may have left out

110 15 U.S.C. § 78u-6(h)(1)(A)(iii) ("required or protected under the Sarbanes-Oxley Act of 2002").

111 *Id.* ("required or protected under . . . this chapter"). Chapter 2B of Title 15 codifies the federal securities laws. *See* 15 U.S.C. § 78a, *Securities Exchanges*.

112 18 U.S.C. § 1513(e) ("required or protected under . . . section 1513(e) of title 18"). 18 U.S.C. § 1513(e) criminalizes retaliation against an informant who provides information relating to the commission of a federal offense to a law enforcement officer.

113 *Id.* ("required or protected under . . . any other law, rule, or regulation subject to the jurisdiction of the Commission").

114 *Gustafson v. Alloyd Co.*, 513 U.S. 561, 587 (1995) (Thomas, J., dissenting).

115 *See, e.g., TMW Enters., Inc. v. Fed. Ins. Co.*, 619 F.3d 574, 577 (6th Cir. 2010) (emphasis added) (quoting *In re SRC Holding Corp.*, 545 F.3d 661, 670 (8th Cir. 2008)).

116 *See Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 151 (2d Cir. 2015); *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 627–28 (5th Cir. 2013); *Leifer, supra* note 6, at 137–39; *Petkova, supra* note 5, at 583–84.

117 *See, e.g., Gustafson*, 513 U.S. at 587 (Thomas, J., dissenting) (listing examples from the securities laws).

118 This is known as the "antisurplusage canon" or the "whole-text canon." *See MANNING & STEPHENSON, supra* note 64, at 228–29 (stating that "judges should construe statutes so that every term and provision is meaningful, if it is possible to do so"); *SCALIA & GARNER, supra* note 69, at 167–69.

119 *See Asadi*, 720 F.3d at 627–28.

through oversight. Critics who argue that Congress could not have intended such a small scope for subsection (iii)'s SOX protections are operating from an incorrect base assumption—they automatically assume that Dodd-Frank's reference to SOX requirements and protections was intended to ensure that Dodd-Frank was at least as broad as SOX. I argue that that reading attributes greater effect to one subsection than is warranted.

However, this is not to say that the antisurplusage canon is not relevant to the discussion of Dodd-Frank's whistleblower protections at all. Indeed, the antisurplusage canon applies with full force to the definitional section of the whistleblower provisions, and the broad SEC and Second Circuit interpretations of subsection (iii) would render the definition's requirement that reports be made "to the Commission" entirely superfluous by permitting an individual to qualify as a whistleblower irrespective of the clear external reporting requirement embedded in those three words.<sup>120</sup>

### E. Remedial Purpose or Public Policy

Finally, one critique of the narrower reading of the antiretaliation provision argues that courts should adopt a broad and flexible reading of securities statutes that have a remedial purpose.<sup>121</sup> Proponents of this argument point to the Court's decision in *Herman & MacLean v. Huddleston*, which held that "securities laws combating fraud should be construed 'not technically and restrictively, but flexibly to effectuate [their] remedial purposes.'"<sup>122</sup> According to this argument, the whistleblower protection provisions of Dodd-Frank were meant to serve a remedial purpose—namely, to "improv[e] accountability and transparency in the financial system" following the 2008 financial crisis<sup>123</sup>—and insofar as the text of the statute is supportive of a broad reading, the statute's provisions should be construed broadly to effectuate that general purpose.<sup>124</sup>

The *Herman* rule, then, operates as a substantive presumption about how to construe ambiguous text. This critique is inapposite: in order to apply the *Herman* rule's substantive presumption, the text must be susceptible to more than one meaning. That is not the case here.<sup>125</sup> As has been already noted, there is no outright ambiguity in the text of Dodd-Frank—instead, the definition of whistleblower is unambiguous, and literally applies to the antiretaliation

120 See *id.* at 628 ("Moreover, it is Asadi's suggested construction of the whistleblower-protection provision that arguably renders statutory text superfluous. Specifically, Asadi's suggested construction would read the words 'to the Commission' out of the definition.")

121 See Leifer, *supra* note 6, at 140–42 (describing "the *Herman* rule" as standing for the proposition that "remedial statutes should be interpreted broadly and flexibly").

122 *Herman & MacLean v. Huddleston*, 459 U.S. 375, 386–87 (1983) (alteration in original) (quoting *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963)).

123 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 5, 7, 12, 15, 22, 26, 28, 31, and 42 U.S.C.); see also *supra* notes 1–2 and accompanying text.

124 See Leifer, *supra* note 6, at 143–45.

125 See *supra* Sections II.A, II.B.

tion provisions. The Supreme Court has previously cautioned that “we would not be inclined to read [a securities statute] more broadly than its language and the statutory scheme reasonably permit.”<sup>126</sup> Consistent with this precedent, it makes little sense to apply a presumption about the remedial nature of the statute in this context given the clear scope of the text. In any event, discussions of the remedial nature of the statute are unpersuasive for an additional reason: if the text were truly ambiguous, the court would be required to defer to the SEC’s interpretation under *Chevron*, making any application of the *Herman* rule moot.<sup>127</sup>

Furthermore, I question the utility of characterizing the background purpose of the statute beyond the words and provisions contained within the text, a position many others have taken before me.<sup>128</sup> Rather, the best evidence of a statute’s meaning or purpose is the objective text enacted in the statute’s operative provisions by Congress and signed into law.<sup>129</sup> The judiciary has at its disposal adequate tools of statutory interpretation, in the form of the semantic and substantive canons of construction, for use in resolving ambiguities *without* using a judge’s subjective understanding of which general background aims and purposes Congress may have had in mind in fashioning a statute. Only where the text of the statute itself is ambiguous in the first place can turning to legislative history as evidence of meaning or purpose be justified—or, to put it plainly, only as a last resort in exceptional cases. The plain meaning of Dodd-Frank makes this unnecessary.

#### CONCLUSION

Ultimately, this Note argues that the most natural reading of Dodd-Frank’s whistleblower provisions is one that focuses primarily on *external* whistleblowing. This textually constrained reading of the statute is more faithful to congressional intent and the judicial role. While courts are quite good at interpreting texts, they are far less ably equipped to divine the spe-

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126 *SEC v. Sloan*, 436 U.S. 103, 116 (1978).

127 Assuming *arguendo* that the SEC’s interpretation could be considered reasonable. *Cf. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

128 See, e.g., *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (“As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material.”); *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) (“The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators.”); Eskridge, *supra* note 95, at 625 (noting textualism’s emphasis that “the Court should devote more of its energy to analyzing statutory *texts*” and that “legislative history is, at best, secondary and supporting evidence of statutory meaning”). But for a defense of the use of legislative history, see Breyer, *supra* note 95, at 847, 874 (arguing that “legislative history helps appellate courts reach interpretations that tend to make the law itself more coherent, workable, or fair” and “[t]he ‘problem’ of legislative history is its ‘abuse,’ not its ‘use’”).

129 See John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1290 (2010) (emphasizing “that judges in our system of government have a duty to enforce *clearly worded* statutes as written, even if there is reason to believe that the text may not perfectly capture the background aims or purposes that inspired their enactment”).

cific purpose or intent of Congress when it structures a statute in one way over another. The fact that Congress provided a definition section in which “whistleblower” was a defined term, and proceeded to use that defined term in a subsequent provision of the same section lends itself to the natural inference that Congress intended that definition to control, notwithstanding the fact that the section may have alluded to other statutes with differing standards. Indeed, it is arguable that the fact that Congress knew of the alternative reporting requirements available in SOX, and yet apparently chose not to utilize those same requirements in Dodd-Frank, would seem to imply the rejection of that alternative remedy.<sup>130</sup> If Congress intended to incorporate the alternative requirements of SOX for the antiretaliation provision, “backdoor” the protections through a subsection seems a peculiar way to do so. The definition section demonstrates that Congress knows perfectly well how to make its intentions clear—which is to say, why would Congress incorporate SOX’s protections through a window rather than through a door?<sup>131</sup>

It may very well be that a statute that protected internal whistleblowing as well as external whistleblowing would better serve the purposes of combating illegal activity and encouraging compliance with financial regulations. I think there are meritorious arguments in favor of protecting internal whistleblowing.<sup>132</sup> The merit of a statute with provisions protecting internal whistleblowing notwithstanding, that is not the statute that Congress enacted. The rule that the Second Circuit has adopted is a perfectly reasonable one, and likely would function quite well—*nonetheless*, it does violence to our constitutional structure to permit the courts to alter the statutes enacted by Congress, merely because the statute’s operation is less than optimal.<sup>133</sup> The desirability of a particular construction of a statute does not give the SEC or the courts the prerogative to adopt a broader interpretation of the statute than the text would permit.<sup>134</sup> This Note argues that the Second Circuit overstepped the bounds of the judicial role. Where the terms of a statute are unambiguous and the operation of the statute is neither impeded by irreconcilable provisions nor ineluctably hobbled by the plain meaning of the words, the courts have an obligation to enforce the statute as written.<sup>135</sup>

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130 See the discussion of the *expressio unius* canon, *supra* notes 73–78 and accompanying text.

131 See *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001) (“Congress . . . does not, one might say, hide elephants in mouseholes.”).

132 See Pacella, *supra* note 24, at 754–60.

133 See Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 292 (1989) (arguing legislative supremacy requires that “[w]hen statutory language and legislative intent are unambiguous, courts may not take action to the contrary”); see also Manning, *supra* note 129, at 1290.

134 Cf. *SEC v. Sloan*, 436 U.S. 103, 117 (1978) (“We do not think [the statute] was meant to be such a cure-all. . . . If extension of the [SEC’s] summary suspension power is desirable, the proper source of that power is Congress.”).

135 However, where a statute contains truly irreconcilable provisions, or where the terms are ambiguous and one interpretation of the ambiguous terms would seriously

Though I conclude that the straightforward application of the whistleblower definition is the proper outcome, it is not lost on me that the Fifth Circuit and I are outliers in our determinations.<sup>136</sup> Nonetheless, the Supreme Court has rejected rules adopted by a majority of the lower courts before, and I argue that is what should occur in this context.<sup>137</sup> Indeed, Justice Ginsburg, speaking for the Court in *Lawson v. FMR LLC*, hinted in passing that she may agree with the narrower interpretation, noting that “Dodd-Frank’s whistleblower provision . . . focuses primarily on reporting to federal authorities.”<sup>138</sup> Whether a decision by the Court adopting the narrower interpretation will come to pass remains an open question, but the confirmation of Justice Neil Gorsuch to succeed Justice Scalia on the Court seems to bode well for an interpretation tethered to the plain meaning of the text.<sup>139</sup>

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undermine the effectiveness of the statute, it is appropriate—operating from the assumption that Congress would not enact a statute it intended to be a failure—for a court to opt for a reasonable interpretation that will ensure the statute is effective. *Cf.* *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) (“Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. *If at all possible*, we must interpret the Act in a way that is consistent with the former, and avoids the latter.” (emphasis added)); *see also supra* notes 79–83 and accompanying text.

136 The Second Circuit’s reasoning has been winning the battle of the string citations: the Ninth Circuit and the majority of district courts deciding the question in the first instance appear to have taken its view. *See, e.g., Somers v. Digital Realty Tr., Inc.*, 850 F.3d 1045 (9th Cir. 2017); *Somers v. Digital Realty Tr., Inc.*, 119 F. Supp. 3d 1088 (N.D. Cal. 2015); *Yang v. Navigators Grp., Inc.*, 18 F. Supp. 3d 519 (S.D.N.Y. 2014); *Khazin v. TD Ameritrade Holding Corp.*, No. 13-4149, 2014 WL 940703 (D.N.J. Mar. 11, 2014); *Ellington v. Giacomakis*, 977 F. Supp. 2d 42 (D. Mass. 2013); *Genberg v. Porter*, 935 F. Supp. 2d 1094 (D. Colo. 2013); *see also Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 153 (2d Cir. 2015) (“[A] far larger number of district courts have deemed the statute ambiguous and deferred to the SEC’s Rule.”). Only a handful of district courts have adopted the Fifth Circuit’s view. *See, e.g., Verfeuth v. Orion Energy Sys., Inc.*, 65 F. Supp. 3d 640 (E.D. Wis. 2014); *Banko v. Apple Inc.*, 20 F. Supp. 3d 749 (N.D. Cal. 2013); *Wagner v. Bank of Am. Corp.*, No. 12-cv-00381, 2013 WL 3786643 (D. Colo. July 19, 2013).

137 *Cf. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 601–02 (2001) (rejecting the “catalyst theory” for award of attorneys’ fees under 42 U.S.C. § 1988 that had previously been accepted by every court of appeals but one).

138 *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1175 (2014).

139 *See* Eric Citron, *Potential Nominee Profile: Neil Gorsuch*, SCOTUSBLOG (Jan. 13, 2017), <http://www.scotusblog.com/2017/01/potential-nominee-profile-neil-gorsuch/> (describing Judge Gorsuch as “an ardent textualist”); Matt Ford, *Trump Nominates Neil Gorsuch for the U.S. Supreme Court*, ATLANTIC (Jan. 31, 2017), <https://www.theatlantic.com/politics/archive/2017/01/gorsuch-trump-supreme-court/515232/>.

