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No.

In the Supreme Court of the United States

DIGITAL REALTY TRUST, INC., PETITIONER

v.

PAUL SOMERS

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the anti-retaliation provision for "whistleblowers" in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 extends to individuals who have not reported alleged misconduct to the Securities and Exchange Commission and thus fall outside the Act's definition of a "whistleblower."

CORPORATE DISCLOSURE STATEMENT

Petitioner Digital Realty Trust, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

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Digital Realty Trust, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 850 F.3d 1045. The order of the district court denying petitioner's motion to dismiss (App., *infra*, 12a-47a) is reported at 119 F. Supp. 3d 1088.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act or Act), Pub. L. No. 111-203, 124 Stat. 1376, codified in relevant part at 15 U.S.C. 78u-6(a)(6), provides:

> The term "whistleblower" means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the [Securities and Exchange] Commission, in a manner established, by rule or regulation, by the Commission.

Section 922 of the Dodd-Frank Act, codified in relevant part at 15 U.S.C. 78u-6(h)(1)(A), further 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.

STATEMENT

This case presents a clear and intractable conflict on an important and recurring question of statutory interpretation. The Dodd-Frank Act defines a "whistleblower" as an "individual who provides * * * information relating to a violation of the securities laws to the [Securities and Exchange] Commission." 15 U.S.C. 78u-6(a)(6). The Act proceeds to prohibit retaliation against "whistleblowers" who, *inter alia*, "mak[e] disclosures that are required or protected under the Sarbanes-Oxley Act of 2002" and other securities laws. 15 U.S.C. 78u-6(h)(1)(A). The question presented is whether that anti-retaliation provision extends to individuals who have not reported alleged misconduct to the SEC and thus fall outside the statutory definition of a "whistleblower."

Respondent is a former employee of petitioner. As is relevant here, after being terminated, he sued under the anti-retaliation provision of the Dodd-Frank Act, alleging that he was fired for making internal complaints protected under the Sarbanes-Oxley Act. Respondent did not report the alleged misconduct to the SEC. Petitioner moved to dismiss the Dodd-Frank Act claim, arguing that respondent could not maintain a claim under the anti-retaliation provision because he was not a "whistleblower" within the meaning of the provision. The district court denied the motion.

A divided panel of the Ninth Circuit affirmed. Over a dissent from Judge Owens, the court held that the anti-retaliation provision applies to all individuals who make internal reports under the Sarbanes-Oxley Act and other federal laws, regardless of whether the individual qualifies as a "whistleblower" under the statutory definition. As the Ninth Circuit explicitly recognized, its decision deepened a split of authority in the federal courts of appeals on the question presented. Because this case is an

optimal vehicle for resolving that conflict, the petition for a writ of certiorari should be granted.

1. This case concerns Section 922 of the Dodd-Frank Act, entitled "Securities Whistleblower Incentives and Protection" and codified at 15 U.S.C. 78u-6. That section has three principal parts: it defines key terms, creates an incentive program for "whistleblowers" who report to the SEC, and protects those same "whistleblowers" from retaliation.

The definitional provision starts by specifying that "the following definitions shall apply" "[i]n this section." 15 U.S.C. 78u-6(a). As relevant here, it proceeds to define a "whistleblower" as "any individual who provides * * * information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. 78u-6(a)(6).

Incorporating that definition, the section then creates an incentive program for "whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of [a] covered judicial or administrative action." 15 U.S.C. 78u-6(b)(1). Such whistleblowers are entitled to receive a monetary "award" from a special fund created by the Act. See 15 U.S.C. 78u-6(b), (g).

Finally, in its anti-retaliation provision, the section guarantees "[p]rotection of whistleblowers." 15 U.S.C. 78u-6(h)(1)(A). Specifically, it provides that "[n]o employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower" in specific circumstances set out in three separate clauses. *Ibid.* First, a whistleblower is protected from retaliation for "providing information to the Commission in accordance with this section." 15 U.S.C. 78u-

6(h)(1)(A)(i). Second, a whistleblower is protected for "initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information." 15 U.S.C. 78u-6(h)(1)(A)(ii). Third, a whistleblower is protected for "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." 15 U.S.C. 78u-6(h)(1)(A)(iii) (citation omitted).

In 2011, the SEC issued a rule interpreting Section 78u-6. Consistent with the definition in Section 78u-6(a)(6), the rule first explains: "You are a whistleblower if * * * you provide the Commission with information pursuant to the procedures set forth in § 240.21F-9(a) of this chapter, and the information relates to a possible violation of the Federal securities laws * * * that has occurred, is ongoing, or is about to occur." 17 C.F.R. 240.21F-2(a)(1). Remarkably, however, the rule goes on to provide a different definition of "whistleblower" for purposes of the anti-retaliation provision. The rule states that, "[f]or purposes of the anti-retaliation protections afforded by Section [78u-6(h)(1)] * * * you are a whistleblower if * * * [you provide] information in a manner described in Section [78u-6(h)(1)(A)]." 17 C.F.R. 240.21F-2(b)(1)(ii). In other words, the SEC's rule defines "whistleblower" for purposes of the anti-retaliation provision not by reference to the statutory definition of "whistleblower," but rather by reference to the activity protected by that provision.

2. Petitioner is a real estate investment trust that owns, acquires, and develops data centers. Petitioner

hired respondent as a vice president of portfolio management in 2010, and it fired respondent in April 2014. App., *infra*, 3a, 14a-15a.

In November 2014, respondent filed suit against petitioner and Ellen Jacobs, a senior vice president for human resources, in the United States District Court for the Northern District of California. As relevant here, respondent alleged that, shortly before being fired, he had complained to senior management that his supervisor had eliminated some internal controls over certain corporate actions and had engaged in other misconduct, including hiding substantial cost overruns on a project in Hong Kong. It is undisputed that respondent did not report the alleged misconduct to the SEC. He nevertheless asserted in his complaint that petitioner had retaliated against him in violation of the anti-retaliation provision of the Dodd-Frank Act by firing him for, *inter alia*, making an internal report protected by the Sarbanes-Oxley Act. App., *infra*, 3a, 14a-15a.[1]

3. Petitioner moved to dismiss the Dodd-Frank Act claim. Petitioner argued that respondent was not a "whistleblower" within the meaning of the anti-retaliation provision because he did not report the alleged misconduct to the SEC; as a result, the anti-retaliation provision did not apply. App., *infra*, 13a.

The district court denied the motion. App., *infra*, 12a-47a. At the outset, the court acknowledged that the Dodd-Frank Act "defines a 'whistleblower' as 'any individual who provides * * * information relating to a violation of the securities laws *to the Commission*.'" App., *infra*, 18a-19a (quoting 15 U.S.C. 78u-6(a)(6)). The court never-

[1] Ms. Jacobs was not named as a defendant on the Dodd-Frank Act claim.

theless concluded that the language in the statutory definition was ambiguous in light of Section 78u-6(h)(1)(A)(iii), which "prohibit[s] retaliatory acts against employees who make" internal reports of securities-law violations. *Id.* at 26a. Because the court could not "find a clear and simple way to read the statutory provisions * * * in perfect harmony with one another," it deferred to the SEC's interpretation, under which an individual who makes an internal disclosure under the Sarbanes-Oxley Act is a "whistleblower" for purposes of the anti-retaliation provision. *Id.* at 40a.

Although the district court denied petitioner's motion to dismiss, it certified its order for interlocutory review under 28 U.S.C. 1292(b). App., *infra*, 46a-47a. The court recognized that there was a "serious split in authority" on the issue, with the Fifth Circuit, the only court of appeals to have considered the question at that time, unanimously reaching the opposite conclusion. D. Ct. Dkt. 61, at 4 (July 22, 2015) (citing *Asadi* v. *G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013)).

4. The court of appeals granted interlocutory review. While the appeal was pending, a divided panel of the Second Circuit issued an opinion disagreeing with the Fifth Circuit and holding that an individual who makes an internal disclosure under the Sarbanes-Oxley Act is a "whistleblower" for purposes of the anti-retaliation provision. See *Berman* v. *Neo@Ogilvy LLC*, 801 F.3d 145 (2015). Judge Jacobs dissented. See *id.* at 155.

The SEC filed an amicus brief in the court of appeals supporting respondent and defending its rule interpreting Section 78u-6. See SEC C.A. Br. 19-37. The SEC also participated in oral argument.

5. A divided panel of the court of appeals affirmed. App., *infra*, 1a-11a.

a. The court of appeals began by acknowledging that the question presented "has divided the federal district and circuit courts." App., *infra*, 1a. It recognized that Section 78u-6(a)(6) defines a "whistleblower" as an individual who "provides * * * information relating to a violation of the securities laws to the Commission." *Id.* at 5a. But the court reasoned that the definition of "whistleblower" "should not be dispositive of the scope of [the Dodd-Frank Act's] later anti-retaliation provision," because "[t]erms can have different operative consequences in different contexts." *Id.* at 7a (citing *King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015)). According to the court, "[s]tatutory definitions are * * * just one indication of meaning," and the anti-retaliation provision "unambiguously and expressly protects from retaliation all those who report to the SEC and who report internally." *Id.* at 7a-8a (internal quotation marks, brackets, and citation omitted).

A contrary interpretation, the court of appeals continued, would "make little practical sense and undercut congressional intent." App., *infra*, 8a. In the court's view, applying the statutory definition of "whistleblower" would "narrow[] [clause (iii)] to the point of absurdity," on the ground that only individuals who made both internal reports and reports to the SEC would be covered. *Ibid.* The court, however, believed that a broader interpretation was necessary to "give effect to all statutory language." *Ibid.*

For that reason, the court of appeals concluded that the anti-retaliation provision "should be read to provide protections to those who report internally as well as those who report to the SEC." App., *infra*, 10a. The court added that, "even if the use of the word 'whistleblower' in the anti-retaliation provision creates uncertainty because of the earlier narrow definition of the term," the SEC's

interpretation was entitled to deference. *Ibid.* The court reasoned that the SEC's interpretation "accurately reflects Congress's intent to provide broad whistleblower protections under [the Dodd-Frank Act]." *Ibid.* After reviewing the "intercircuit disagreement" on the question presented, the court of appeals ultimately agreed with the Second Circuit's reasoning in *Berman*. *Id.* at 9a-10a.

b. Judge Owens dissented. App., *infra*, 11a. He indicated he would have held that the anti-retaliation provision reaches only individuals who fall within the Act's definition of "whistleblower," based on the reasoning of the Fifth Circuit in *Asadi* and Judge Jacobs' dissent in *Berman*. *Ibid.* He added that, to the extent the majority relied on this Court's decision in *King*, "we should quarantine *King* * * * to the specific facts of that case." *Ibid.*

REASONS FOR GRANTING THE PETITION

This case presents a straightforward conflict among the courts of appeals on an important and recurring question involving the interpretation of the Dodd-Frank Act. In the decision below, the Ninth Circuit expressly recognized that it was deepening an existing conflict on the question whether the anti-retaliation provision for "whistleblowers" extends to individuals who have not reported alleged misconduct to the SEC and thus fall outside the Act's definition of a "whistleblower." Three courts of appeals and at least two dozen district courts have weighed in on that issue. One court of appeals has held that the anti-retaliation provision reaches only individuals who qualify as "whistleblowers." Two courts of appeals, including the court below, have held (over dissents) that the anti-retaliation provision applies to all individuals, regardless of whether they qualify as "whistleblowers" under the statutory definition.

That conflict cries out for the Court's review, and this case is an optimal vehicle in which to resolve it. The arguments on both sides of the conflict are well developed, having been aired in dozens of opinions. The question presented is one of substantial legal and practical importance, potentially affecting every publicly traded company. And this case presents the question squarely and cleanly. Because this case readily satisfies the criteria for the Court's review, the petition for a writ of certiorari should be granted.

A. The Decision Below Deepens A Conflict Among The Courts Of Appeals

The Ninth Circuit's decision deepens a preexisting conflict among the federal courts of appeals concerning the scope of the Dodd-Frank Act's anti-retaliation provision.

1. a. As the Ninth Circuit noted (App., *infra*, 2a), the first appellate decision addressing the question presented was the Fifth Circuit's unanimous decision in *Asadi* v. *G.E. Energy (USA), LLC*, 720 F.3d 620 (2013). The plaintiff in that case alleged that his former employer had violated the Dodd-Frank Act's anti-retaliation provision by firing him for internally reporting a possible violation of the Foreign Corrupt Practices Act. See *id.* at 621. There, as here, it was undisputed that the plaintiff had not brought those allegations to the SEC's attention. See *id.* at 624.

The Fifth Circuit held that the district court had correctly dismissed the plaintiff's claim under the anti-retaliation provision. See 720 F.3d at 630. The Fifth Circuit's analysis "start[ed] and end[ed] * * * with the text of the relevant statute." *Id.* at 623. The Act, the court explained, defines a "whistleblower" as an "individual who provides * * * information relating to a violation of the

securities laws *to the Commission.*" *Ibid.* (citation omitted). "[S]tanding alone," that definition "expressly and unambiguously requires that an individual provide information to the SEC to qualify as a 'whistleblower.'" *Ibid.*

The Fifth Circuit next turned to the anti-retaliation provision. That provision, the court observed, "clearly answers two questions: (1) who is protected; and (2) what actions by protected individuals constitute protected activity." 720 F.3d at 625. "First, and most critically to this appeal, the answer to the first question is 'a whistleblower.'" *Ibid.* "[T]he answer to the latter question," the court continued, "is 'any lawful act done by the whistleblower' that falls within one of the three categories of action described in the statute." *Ibid.*

The Fifth Circuit rejected the plaintiff's argument that its construction would render clause (iii) of the anti-retaliation provision superfluous. See 720 F.3d at 626-628. To begin with, the court explained, there would be conflict between the definition of a "whistleblower" and clause (iii) only "if [the court] read the three categories of protected activity [in Section 78u-6(h)(1)(A)] as additional definitions of three types of whistleblowers." *Id.* at 626. But the statute explicitly defines a "whistleblower": namely, an individual who reports to the SEC. See *ibid.* And the anti-retaliation provision specifies that no one may retaliate against a "whistleblower." See *ibid.* The Fifth Circuit reasoned that, because Congress used that specific term instead of more general language such as "individual" or "employee," the court "must give that [term] effect." *Id.* at 626-627. The court explained that clause (iii) was not superfluous under its interpretation because it would protect an individual who had reported alleged misconduct both internally and to the SEC but was fired because of the internal report. See *id.* at 627.

To the contrary, the Fifth Circuit observed, a different rule would render the statute's definition of "whistleblower" surplusage, and would also render the anti-retaliation provision of the Sarbanes-Oxley Act, which does not require a report to the SEC, "for practical purposes[] moot." 720 F.3d at 628. Because the Fifth Circuit held that the statute was unambiguous, it concluded that deference to the SEC's interpretation was unwarranted. See *id.* at 629-630.

b. Numerous district courts nationwide have followed the Fifth Circuit, citing *Asadi* and holding that an individual must report alleged misconduct to the SEC to qualify as a "whistleblower" for purposes of Section 78u-6(h)(1)(A). See, *e.g.*, *Deykes* v. *Cooper-Standard Automotive, Inc.*, Civ. No. 16-11828, 2016 WL 6873395, at *2-*4 (E.D. Mich. Nov. 22, 2016); *Lamb* v. *Rockwell Automation Inc.*, Civ. No. 15-1415, 2016 WL 4273210, at *4 (E.D. Wis. Aug. 12, 2016); *Puffenbarger* v. *Engility Corp.*, 151 F. Supp. 3d 651, 663-665 (E.D. Va. 2015); *Verble* v. *Morgan Stanley Smith Barney, LLC*, 148 F. Supp. 3d 644, 656 (E.D. Tenn. 2015), aff'd on other grounds, No. 15-6397, 2017 WL 129040 (6th Cir. Jan. 13, 2017), cert. denied, No. 16-946 (Mar. 20, 2017); *Duke* v. *Prestige Cruises International, Inc.*, Civ. No. 14-23017, 2015 WL 4886088, at *3 (S.D. Fla. Aug. 14, 2015); *Verfuerth* v. *Orion Energy Systems, Inc.*, 65 F. Supp. 3d 640, 643-646 (E.D. Wis. 2014); *Englehart* v. *Career Education Corp.*, Civ. No. 14-444, 2014 WL 2619501, at *9 (M.D. Fla. May 12, 2014); *Wagner* v. *Bank of America Corp.*, Civ. No. 12-381, 2013 WL 3786643, at *6 (D. Colo. July 19, 2013), aff'd on other grounds, 571 Fed. Appx. 698 (10th Cir. 2014).

2. a. A divided panel of the Second Circuit reached the opposite conclusion in *Berman* v. *Neo@Ogilvy LLC*, 801 F.3d 145 (2015). The plaintiff in that case alleged that he was fired for internally reporting accounting fraud.

See *id.* at 149. Again, it was undisputed that the plaintiff did not report the alleged misconduct to the SEC prior to his termination. See *ibid.*

The district court dismissed the plaintiff's claim under the anti-retaliation provision, but the Second Circuit, over a dissent from Judge Jacobs, reversed. See 801 F.3d at 155. The Second Circuit characterized the case as presenting "the recurring issue of statutory interpretation that arises when express terms in one provision of a statute are arguably in tension with language in another provision of the same statute." *Id.* at 146. According to the Second Circuit, this Court "recently encountered a similar issue" in *King*. *Ibid.*

Relying heavily on *King*, the Second Circuit proceeded to consider the scope of the anti-retaliation provision. The court recognized that "there is no absolute conflict between the Commission notification requirement in the definition of 'whistleblower' and the absence of such a requirement" elsewhere in the Dodd-Frank Act. 801 F.3d at 150-151 (citing *Asadi*, 720 F.3d at 627-628). The court contended, however, that there was a "significant tension" between those provisions, and it reasoned that applying the definition of a "whistleblower" to the anti-retaliation provision would leave clause (iii) with an "extremely limited scope." *Id.* at 151. The court suggested that whistleblowers who report alleged misconduct both internally and to the SEC are "likely to be few in number," *ibid.*, and some whistleblowers would not be permitted to report alleged misconduct to the SEC until after they have reported it internally, see *id.* at 151-152.

In light of what it perceived as the "sharply limiting effect of a Commission reporting requirement," the Second Circuit believed that "the question becomes whether Congress intended to add [clause (iii)] * * * only to achieve such a limited result." 801 F.3d at 152. The court

acknowledged that legislative history shed no light on the issue, because clause (iii) was added after the bill passed through committee both in the House and in the Senate. See *id.* at 152-153. The court further acknowledged that "the terms of a definitional subsection are usually to be taken literally * * * [and] applied to all subdivisions literally covered by the definition." *Id.* at 154.

The Second Circuit nevertheless reasoned that "mechanical use of a statutory definition is not always warranted." 801 F.3d at 154 (internal quotation marks and citation omitted). Taking into account the "realities of the legislative process," the court determined that the statute was ambiguous. *Id.* at 154-155. The court "doubt[ed] that the conferees who accepted the last-minute insertion of [clause (iii)] would have expected it to have the extremely limited scope it would have if it were restricted by the Commission reporting requirement in the 'whistleblower' definition in [Section 78u-6(a)(6)]." *Id.* at 155. For that reason, the court concluded that, under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), it was "oblige[d] * * * to give * * * deference to the reasonable interpretation of the agency charged with administering the statute." 801 F.3d at 155.

Judge Jacobs dissented. He contended that "our obligation is to apply congressional statutes as written" and that the majority's "alteration" of the statutory text "creates a circuit split[] and places us firmly on the wrong side of it." 801 F.3d at 155. In Judge Jacobs' view, the majority's approach "looks here, there and everywhere—except to the statutory text." *Id.* at 158. Judge Jacobs rejected the majority's assertion that clause (iii) would have an unduly narrow scope under the statutory definition of "whistleblower." See *ibid.* But even accepting that assertion, Judge Jacobs reasoned that there was "no support" for the proposition that "when a plain reading of a statutory

provision gives it an 'extremely limited' effect, the statutory provision is impaired or ambiguous." *Ibid.* "The thing about a definition is that it is, well, definitional." *Ibid.*

Finally, Judge Jacobs asserted that *King* "does not do the work the majority needs done." 801 F.3d at 159. In his view, *King* did not work a "wholesale revision of the Supreme Court's statutory interpretation jurisprudence." *Ibid.* Instead, to the extent the Court "departed from the plain statutory text" in *King*, it did so under "most unusual circumstances": namely, "to avoid what it considered the upending of a ramified, hugely consequential enactment." *Ibid.* In any event, Judge Jacobs continued, the Court emphasized in *King* that "categorical guidance as to congressional intent should better be looked for in a more predictable location—*like a definitions section.*" *Id.* at 160 (citing *King*, 135 S. Ct. at 2495). "In our case," Judge Jacobs concluded, "the majority follows the sort of 'winding path of connect-the-dots provisions' that the Supreme Court ridiculed." *Ibid.*[2]

b. Numerous district courts nationwide have reached the same conclusion as the Second Circuit, holding that an individual need not report alleged misconduct to the SEC to qualify as a "whistleblower" for purposes of Section 78u-6(h)(1)(A). See, *e.g.*, *Lutzeier* v. *Citigroup Inc.*, Civ. No. 14-183, 2015 WL 7306443, at *2 (E.D. Mo. Nov. 19, 2015); *Dressler* v. *Lime Energy*, Civ. No. 14-7060, 2015 WL 4773326, at *16 (D.N.J. Aug. 13, 2015); *Bussing* v. *COR Clearing, LLC*, 20 F. Supp. 3d 719, 733 (D. Neb. 2014); *Khazin* v. *TD Ameritrade Holding Corp.*, Civ. No. 13-4149, 2014 WL 940703, at *6 (D.N.J. Mar. 11, 2014),

[2] The defendants in *Berman* did not file a petition for a writ of certiorari.

aff'd on other grounds, 773 F.3d 488 (3d Cir. 2014); *Ellington* v. *Giacoumakis*, 977 F. Supp. 2d 42, 45 (D. Mass. 2013); *Genberg* v. *Porter*, 935 F. Supp. 2d 1094, 1107 (D. Colo. 2013), aff'd in part on other grounds and dismissed in part, 566 Fed. Appx. 719 (10th Cir. 2014); *Nollner* v. *Southern Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 994-995 (M.D. Tenn. 2012).[3]

3. In the decision below, the Ninth Circuit expressly recognized the existence of a circuit conflict on the question presented. App., *infra*, 9a. And it ultimately agreed with the Second Circuit's reasoning in *Berman* and rejected the Fifth Circuit's reasoning in *Asadi*. *Id.* at 9a-10a. In his dissent, by contrast, Judge Owens adopted the reasoning of *Asadi* and of Judge Jacobs' dissent in *Berman*. *Id.* at 11a. There can be no serious dispute, therefore, that there is a substantial circuit conflict on the question presented. That conflict is ripe for the Court's resolution, and further review is warranted.

B. The Question Presented Is Exceptionally Important And Warrants Review In This Case

1. This case presents a question with significant practical consequences for employers and employees alike. Employees frequently allege misconduct both to the SEC and internally. In 2016 alone, the SEC received over 4,200 reports of misconduct. See SEC, *2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program* 1

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[3] Notably, before *Berman* and the decision below, district courts in the Second and Ninth Circuits had reached the same conclusion as the Fifth Circuit in *Asadi*, holding that an individual must report alleged misconduct to the SEC to qualify as a "whistleblower." See *Davies* v. *Broadcom Corp.*, 130 F. Supp. 3d 1343, 1349-1350 (C.D. Cal. 2015); *Wiggins* v. *ING U.S., Inc.*, Civ. No. 14-1089, 2015 WL 3771646, at *11 (D. Conn. June 17, 2015); *Sarkisov* v. *Stonemor Partners L.P.*, Civ. No. 13-4834, 2014 WL 12644016, at *4 (N.D. Cal. June 25, 2014); *Banko* v. *Apple Inc.*, 20 F. Supp. 3d 749, 757 (N.D. Cal. 2013).

(Nov. 2016) <tinyurl.com/doddfrankreport>. For their part, in 2015, employers received around 1.3 reports of misconduct per 100 employees. See Navex Global, *2016 Ethics & Compliance Hotline Benchmark Report* 4 (2016) <tinyurl.com/navexreport>.

In light of the frequency with which employees allege misconduct, it is not surprising that the question presented here also arises often. As reflected by the enormous number of conflicting decisions in the seven years since the passage of the Dodd-Frank Act, there is pervasive confusion about the scope of the anti-retaliation provision that the lower courts are unlikely to resolve on their own. Numerous commentators have recognized the deepening conflict and the need for this Court's intervention. See, *e.g.*, Janna Mouret, Comment, *Shelter from the Retaliation Storm*, 52 Hous. L. Rev. 1529, 1549 (2015); Jennifer M. Pacella, *Inside or Out? The Dodd-Frank Whistleblower Program's Antiretaliation Protections for Internal Reporting*, 86 Temp. L Rev. 721, 726 (2014); Joseph C. Toris & Benjamin L. Rouder, *Circuit Split Over Protection Afforded By Dodd-Frank Whistleblower Provision Widens*, Nat'l L. Rev. (Mar. 16, 2017) <tinyurl.com/splitwidens>.

2. If allowed to stand, the decision below, from the Nation's largest circuit, will have pernicious consequences for every publicly traded company. That decision deepens the confusion regarding the relationship between the two primary anti-retaliation protections available to corporate whistleblowers under federal law: the Sarbanes-Oxley Act and the Dodd-Frank Act. As this Court recently observed, those statutes protect different categories of whistleblowers. The Sarbanes-Oxley Act's "protections include employees who provide information to any 'person with supervisory authority over the employee,'" whereas

the anti-retaliation provision of the Dodd-Frank Act "focuses primarily on reporting to federal authorities." *Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1175 (2014) (citation omitted).

The Ninth Circuit's decision in this case threatens to upset that balance, essentially rendering obsolete the Sarbanes-Oxley Act's anti-retaliation scheme. That is because the Dodd-Frank Act affords whistleblowers several distinct advantages that the Sarbanes-Oxley Act does not. For example, the Dodd-Frank Act allows whistleblowers to bring a retaliation claim in district court in the first instance. See 15 U.S.C. 78u-6(h)(1)(B)(i). Under the Sarbanes-Oxley Act, however, whistleblowers must exhaust their administrative remedies by filing a complaint with the Department of Labor; the whistleblower may pursue a retaliation claim in federal court only if the Department of Labor does not issue a final decision within 180 days of the filing of the administrative complaint. See 18 U.S.C. 1514A(b)(1). Whistleblowers can seek double backpay under the Dodd-Frank Act, but not under the Sarbanes-Oxley Act. Compare 15 U.S.C. 78u-6(h)(1)(C) (Dodd-Frank Act) with 18 U.S.C. 1514A(c)(2) (Sarbanes-Oxley Act). And the limitations period for Dodd-Frank Act claims is between six and ten years, see 15 U.S.C. 78u-6(h)(1)(B)(iii), whereas the corresponding period under the Sarbanes-Oxley Act is just six months, see 18 U.S.C. 1514A(b)(2)(D).

This case well illustrates the danger that the anti-retaliation provision of the Dodd-Frank Act will effectively supplant its counterpart in the Sarbanes-Oxley Act. Respondent alleged that he was fired for, *inter alia*, making internal reports under the Sarbanes-Oxley Act. App., *infra*, 3a, 14a-15a. Rather than exhausting his administrative remedies as the Sarbanes-Oxley Act requires, how-

ever, respondent proceeded directly to federal court under the Dodd-Frank Act. Nor is respondent the only plaintiff to have taken that approach: the vast majority of the plaintiffs in the dozens of other cases addressing the question presented did the same. See pp. 10-16, *supra*. Absent this Court's intervention, individuals who have not reported alleged misconduct to the SEC will be able to proceed under the Dodd-Frank Act in some circuits (and districts), but not in others. That will undermine the consistency and clarity critical to both employers and employees.

3. This case is an optimal vehicle for considering and resolving such an important question. As a result of the allegations and posture of this case, the question is presented cleanly and squarely. Respondent alleges that he made an internal disclosure protected by the Sarbanes-Oxley Act. App., *infra*, 3a, 14a-15a. If respondent had reported the alleged misconduct to the SEC, he would have qualified as a "whistleblower" eligible to bring an anti-retaliation claim under the Dodd-Frank Act. It is undisputed, however, that respondent reported the misconduct only internally and not to the SEC. *Id.* at 15a. The question presented is thus dispositive of respondent's claim under the Dodd-Frank Act. That question was exhaustively briefed by the parties and the SEC below, and it was the sole question addressed by the court of appeals in its opinion. And by agreement of the parties, the district court recently stayed any further proceedings in the case pending the Court's disposition of this petition. See D. Ct. Dkt. 210 (Apr. 11, 2017).

Finally, there would be no material benefit to additional percolation in the lower courts. The arguments for both sides have been exhaustively developed in the three court of appeals decisions (two with dissents) and the more than two dozen district-court decisions addressing

the question presented. Even if it were otherwise, the pressing need for consistency and clarity in the law would outweigh any benefit from further percolation.

* * * * *

In sum, the Ninth Circuit's decision deepens a widely recognized conflict on the question whether the anti-retaliation provision for "whistleblowers" in the Dodd-Frank Act extends to individuals who have not reported alleged misconduct to the SEC and thus fall outside the Act's definition of a "whistleblower." That question is an important and recurring one, and this case is the ideal vehicle for resolving it. Further review is undeniably warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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