



1           IN THE SUPREME COURT OF THE UNITED STATES  
2   - - - - -  
3   DIGITAL REALTY TRUST, INC.,           )  
4                            Petitioner,           )  
5                            v.                            ) No. 16-1276  
6   PAUL SOMERS,                            )  
7                            Respondent.            )  
8   - - - - -

9  
10                            Washington, D.C.  
11                            Tuesday, November 28, 2017

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

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

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P R O C E E D I N G S

(11:11 a.m.)

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

Mr. Shanmugam.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. SHANMUGAM: So, Justice Ginsburg,

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

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

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

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

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

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

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



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

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

13 MR. SHANMUGAM: So --

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

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

1 a couple minutes ago, to replace the broader  
2 term "employees, contractors, or agents" with  
3 the narrower term, "whistleblower."

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

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

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

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

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

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

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

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

22            MR. SHANMUGAM:  They would not be --

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

25            MR. SHANMUGAM:  They would not be so

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

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

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

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

25 JUSTICE KAGAN: But, isn't that

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

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

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

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

1 generally in the Sarbanes-Oxley Act.

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

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

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

25           And, indeed --

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

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

9 Why does he get extra protection?

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

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

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

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

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

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



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

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

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

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

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

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

7 JUSTICE BREYER: Why not?

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

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

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

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

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

25 MR. SHANMUGAM: Justice Breyer, I

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

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

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

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

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

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

25 We have no quibble with that. But

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

6 That is a distinct statutory  
7 requirement, and, again, I don't think that the  
8 Commission really has any leeway in that  
9 regard. And I do think that the way that the  
10 Commission went about the rule-making here is  
11 telling.

12 As the Court will be aware, in the  
13 proposed rule, the SEC issued a rule that  
14 merely tracked the statutory definition, and  
15 the SEC provided no indication in the notice of  
16 proposed rule-making that it was contemplating  
17 the possibility of dispensing with that  
18 requirement.

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

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

25 But I don't think that the mere fact

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

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

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

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

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

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

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

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

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

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

1 question about the ordinary meaning of  
2 whistleblower.

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

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

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

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

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

1 the briefing was ongoing in the Ninth Circuit.

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

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

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

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



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

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

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

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

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

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

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

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

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

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

1 my time for rebuttal if needed. Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 Mr. Geysler.

5 ORAL ARGUMENT OF DANIEL L. GEYSER

6 ON BEHALF OF THE RESPONDENT

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

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

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

25 But I think there's actually an even

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

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

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

17 MR. GEYSER: Yes, Your Honor.

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

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

2 Why is that anomalous?

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

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

11 MR. GEYSER: Well, reports --

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

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

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

25 So it --

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

5 MR. GEYSER: That's exactly right.

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

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

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

21 The use of whistleblower is entirely  
22 indirect. It would be highly unusual for  
23 Congress to think that they were trying to  
24 bolster remedies in Sarbanes-Oxley because they  
25 did realize these were highly ineffective.

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

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

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

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

18           The entire securities framework is --  
19    is hinged on internal whistleblowing.  Everyone  
20    thinks it is better to have people go first --

21           JUSTICE GORSUCH:  Well, I -- I'm just  
22    stuck on the plain language here, and maybe you  
23    can get me unstuck, but --

24           MR. GEYSER:  Sure.

25           JUSTICE GORSUCH:  -- how much clearer

1 could Congress have been than to say in this  
2 section the following definitions shall apply,  
3 and whistleblower is defined as including a  
4 report to the Commission.

5 What else would you have had Congress  
6 do if it had wanted to achieve that which your  
7 opponent says it achieved?

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

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

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

19 JUSTICE GORSUCH: Clearer than in this  
20 section, the following definitions shall apply?

21 MR. GEYSER: Just as --

22 JUSTICE GORSUCH: How much clearer  
23 could they have possibly been?

24 MR. GEYSER: That is the same language  
25 in Utility Air where the definition of "air



1 pollutant" was in this chapter. And in Duke  
2 Energy, it gets even worse. In that case --

3 JUSTICE GORSUCH: So "shall" just  
4 means maybe; sometimes?

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

14 Our contention is that the clear  
15 meaning from the text, the context, the  
16 structure, the purpose, the history of this  
17 provision is tantamount to that kind of  
18 parenthetical.

19 JUSTICE GORSUCH: Well --

20 CHIEF JUSTICE ROBERTS: Counsel, this  
21 case, Utility Air, the difficulty of applying  
22 the defined term in that case strikes me as so  
23 -- so much more insurmountable than in this  
24 case.

25 MR. GEYSER: I think it could be more

1 or less, Your Honor, but I think the important  
2 point here is that having an incentive to skip  
3 over internal reporting would be disastrous to  
4 the modern scheme of securities regulation,  
5 which turns on internal reporting.

6 Under my friend's view --

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

16 Why? Because the ordinary  
17 whistleblower is protected under  
18 Sarbanes-Oxley. He just has to have some  
19 exhaustion. And it's a shorter statute of  
20 limitations.

21 And if you want to make it tougher,  
22 which they do, it makes sense in a statute  
23 that's mostly about awards for reporting to the  
24 SEC to say it's where the SEC is directly  
25 involved that we cut out the need to exhaust,

1 that we cut out the need, while if, in fact,  
2 you read it your way, we -- we've basically  
3 eliminated Sarbanes-Oxley because everybody  
4 would bring it under this provision.

5 Now, that's -- that's why, when you  
6 say, you know, this is totally anomalous, this  
7 is a disaster, et cetera, et cetera, I say:  
8 Well, you haven't shown me that yet. So maybe  
9 you want to spend one minute on doing that.

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

20 Sarbanes-Oxley requires people to --  
21 to disclose internally.

22 What Congress wanted was as -- this is  
23 the ordinary progression of getting information  
24 to the government. You first give the  
25 corporation a chance for self-governance. You

1 give them the chance to swiftly and efficiently  
2 address the problem and to make sure that they  
3 remediate whatever the violation is.

4 If they refuse to do it, then you go  
5 to the government.

6 JUSTICE SOTOMAYOR: Is every employee  
7 obligated by law to report a violation or is it  
8 only certain employees, lawyers and accountants  
9 and others who are affirmatively obligated to  
10 report?

11 MR. GEYSER: It's some employees like  
12 lawyers and auditors do have the affirmative  
13 obligation. Other employees may not have the  
14 legal or regulatory obligation, but they often  
15 do have a corporate obligation under the  
16 corporation's code of conduct.

17 JUSTICE SOTOMAYOR: All right. So why  
18 would Congress want to treat lawyers and  
19 accountants to the generous provisions of the  
20 whistleblower statute when they have an  
21 obligation anyway, they're basically being  
22 incentivized to do what they're already legally  
23 obligated to do.

24 They've got a protection,  
25 Sarbanes-Oxley. Why put them under the

1 whistleblower statute as well?

2 MR. GEYSER: Because Congress saw  
3 examples, and they saw this in Enron, where  
4 people were deterred from fulfilling those  
5 roles and disclosing the information in  
6 whistleblowing because they didn't want to be  
7 terminated. And the threat of termination --

8 JUSTICE SOTOMAYOR: But that was  
9 Sarbanes-Oxley.

10 MR. GEYSER: And Dodd-Frank --

11 JUSTICE SOTOMAYOR: And that's the  
12 statute Congress provided to incentivize them  
13 to do what they were legally obligated to do.

14 MR. GEYSER: Sure. And Congress  
15 specifically singled out the protections in  
16 Sarbanes-Oxley as something that needed to be  
17 bolstered in Dodd-Frank. So I don't think it's  
18 fair to divorce the two from each other.

19 JUSTICE SOTOMAYOR: Well, I see  
20 Dodd-Frank as -- as expanding the category of  
21 people, not limiting or -- or expanding it to  
22 include people who are already included.

23 MR. GEYSER: Well, it does expand  
24 people in some situations like with  
25 self-regulatory organizations who aren't

1 covered under Sarbanes-Oxley. But notably then  
2 that doesn't apply for internal reporters in  
3 those groups under Petitioner's reading.

4 So even though Congress would have  
5 singled out those people and said these people  
6 should be protected from making internal  
7 disclosures, they would actually have no legal  
8 protection at all if they didn't first report  
9 to the SEC, which, again, is contrary to even  
10 the regulated stakeholder's interest in this  
11 very setting.

12 We know from the Chamber of Commerce,  
13 who submitted elaborate comments during the  
14 notice and comment process, that the policy  
15 touchstone of Dodd-Frank -- and I think this  
16 goes a little bit too to Justice Breyer's  
17 question -- should be preserving internal  
18 compliance systems.

19 JUSTICE GORSUCH: I'd like to talk  
20 about that notice and comment period for just a  
21 moment. It seems to me you've got this plain  
22 language problem, so you've got to generate an  
23 ambiguity. That's the first step of your --  
24 your move.

25 Then the second step is that the SEC

1 has reasonably resolved that ambiguity and that  
2 we should defer to it.

3 But here the notice and comment period  
4 provided notice that we're going to issue a  
5 rule-making with respect to whistleblowers who  
6 report to the Commission.

7 Then -- then the rule comes out and  
8 says reporting to the Commission is not  
9 required, in an ipsi dixit unreasoned opinion,  
10 one line, basically, and then we have two  
11 circuits that actually gave deference to that  
12 interpretation.

13 Now, that seems to me to put the whole  
14 administrative process on its head because  
15 you're providing no notice to people, no  
16 reasonable opportunity to comment, maybe a few  
17 people spot the issue, but most people don't.

18 The agency acts without the benefit of  
19 the notice and comment and is unable to issue a  
20 reasoned decision-making, and then we're  
21 supposed to defer to that to resolve this  
22 ambiguity? Help me out with that scheme.

23 MR. GEYSER: Sure.

24 JUSTICE GORSUCH: That just doesn't  
25 quite hold together for me.

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

6 But to -- to go through the steps, on  
7 page 70,511 in the Federal Register, the agency  
8 specifically asked for comments about whether  
9 to broaden or change the definition of  
10 whistleblower for purposes of the  
11 anti-retaliation.

12 JUSTICE GORSUCH: It said to the  
13 Commission, for reports to the Commission, that  
14 language is in there, too, right?

15 MR. GEYSER: Well, that language is in  
16 the initial, in the initial rule.

17 JUSTICE GORSUCH: Yeah.

18 MR. GEYSER: It also suggested,  
19 though, that you could qualify under the  
20 whistleblower protections without satisfying  
21 all the manners of reporting to the Commission.  
22 So I think there actually is some ambiguity  
23 there.

24 And, again, the SEC specifically  
25 requested comments on that exact issue. Three



1 people did comment on it and suggested that it  
2 should make clear, the SEC should make clear  
3 that internal whistleblowers are covered.

4 The Association of Corporate Counsel  
5 implied that they just assumed that -- and this  
6 is a pretty big group -- they -- they assumed  
7 that internal whistleblowers were covered.

8 There's not a single comment out of  
9 the over 250 or so that were submitted that  
10 suggested that internal reporting would not be  
11 protected under Dodd-Frank, and I think that's  
12 telling, because I don't know any corporation,  
13 while they were strongly urging the Commission  
14 --

15 JUSTICE GORSUCH: Well, if it's not --  
16 if it's not -- if it's not fairly put to the  
17 notice, is it any surprise that many people  
18 don't comment on it?

19 MR. GEYSER: Well, Your Honor, we  
20 disagree that it wasn't fairly put to the  
21 notice because they specifically requested  
22 comments on exactly this topic. That's  
23 generally considered enough.

24 And for the reasoned explanation, we  
25 think they did provide a sufficient basis,

1 certainly as strong a basis as the agency  
2 provided in the Long Island case.

3 But I also want to make another point  
4 that I think goes back to the original  
5 definition of whistleblower, and I do think  
6 this is important, and it shows that what  
7 Congress really had in mind with A-6 had  
8 nothing to do with the anti-retaliation  
9 provision.

10 The sentence does not end --

11 JUSTICE GORSUCH: I'm looking at the  
12 notice, though. I'm sorry, I'm just still  
13 stuck there. Paragraph 42 I assume is what  
14 you're referring to, right?

15 MR. GEYSER: And -- and the language  
16 that precedes paragraph 42.

17 JUSTICE GORSUCH: Yeah, should --  
18 should -- should the anti-retaliation  
19 protections, yada, yada, yada, apply broadly to  
20 any person who provides information to the  
21 Commission concerning a potential violation,  
22 right?

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

25 JUSTICE GORSUCH: To the Commission,

1       yeah, but to the Commission, right?

2                   MR. GEYSER:   Your Honor, part -- part  
3       of the logical outgrowth test, which -- which I  
4       think this Court has effectively endorsed, but  
5       I think there's some lack of clarity there,  
6       too, it doesn't require that the exact proposal  
7       be endorsed.

8                   JUSTICE BREYER:   No, but his point  
9       really, I think, is that notice which says we  
10      include -- we're going to include who counts as  
11      providing information to the Commission does  
12      not put people on notice that they are  
13      including -- going to apply it to people who  
14      don't provide information to the Commission.

15                   I mean, that's English, I would think.  
16      Now, that's the question.   That's why I  
17      actually found your argument below, perhaps --  
18      but you've abandoned that, right?

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

22                   MR. GEYSER:   Your Honor, the -- I  
23      think the argument that was accepted by the  
24      Ninth Circuit below didn't suggest that the SEC  
25      was saying that if --

1 JUSTICE BREYER: No, no, but I mean I  
2 asked that -- first, I want you to answer  
3 Justice Gorsuch's question.

4 Second, I just wonder separately  
5 whether I am just bound by what seems to be  
6 your concession, I guess I am, that the  
7 argument below is abandoned.

8 MR. GEYSER: Your Honor, I think that  
9 you can affirm on any ground that's present in  
10 the record. So, if you think that that's the  
11 better reading of it, then -- then we would  
12 warmly embrace it.

13 Justice Gorsuch, I think that -- I  
14 think, again, that the logical outgrowth test  
15 would assume that in a proceeding --

16 JUSTICE GORSUCH: The logical  
17 outgrowth test, is -- is it anticipated that  
18 something is going to follow? Is it reasonable  
19 notice?

20 And, again, what's reasonable about  
21 saying X and then doing not X or the opposite  
22 of X, and then doing it in an ipsi dixit,  
23 one-line sentence, that's unreasoned and  
24 wouldn't normally get much deference from us in  
25 the first place.

1 MR. GEYSER: The --

2 JUSTICE GORSUCH: How does all that  
3 get you Chevron?

4 MR. GEYSER: The key issue in the  
5 proceeding was how do you deal with the  
6 interaction between internal reporting and  
7 preserving internal compliance mechanisms and  
8 -- and the anti-retaliation provision and  
9 making sure that the award program makes sense.

10 So I think the -- the interaction of  
11 those things suggests that, while corporations  
12 thought we need to preserve internal  
13 compliance, so we need to make sure that people  
14 first report internally and give corporations a  
15 chance to fix the problem, that the necessary  
16 counterpart to that is people have to be  
17 protected when they internally report.

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

21 I'd like to get to the (a)(6). Again,  
22 the definition section does not end by saying  
23 the report has to go to the Commission. It  
24 says, "in a manner established by rule or  
25 regulation by the Commission."

1           And I think that's important because  
2 Congress realized that the Commission needed to  
3 -- to prevent the situation where the SEC has a  
4 big enforcement award and -- everyone comes out  
5 of the woodwork and they all claim an  
6 entitlement to part of that award.

7           The manner established by the  
8 Commission ensures that there is a -- a simple,  
9 easy way to track exactly who is eligible for  
10 award and who is not. Congress did not need to  
11 limit the anti-retaliation section to whether a  
12 whistleblower filled out the right form or  
13 faxed a form to the exact right number; even if  
14 they provided information to the SEC,  
15 accomplishing the core objective of the  
16 whistleblower litigation -- legislation in the  
17 very first place.

18           JUSTICE GINSBURG: May I just ask  
19 whether Somers -- was there any reason he  
20 didn't report to the SEC?

21           MR. GEYSER: He -- I think it just  
22 simply did not occur to him at the time. And  
23 so -- and in the same way that he missed the  
24 limitations period for the Sarbanes-Oxley  
25 claim.

1           What he tried to do was do the right  
2 thing, and to honor the corporate Code of  
3 Conduct by calling the -- the misconduct to his  
4 supervisor's attention; which again is exactly  
5 what all the corporate stakeholders, you know,  
6 in this proceeding have said is their goal,  
7 too.

8           No one thinks it's better to have  
9 reports go directly to the SEC, unless the  
10 corporation is entirely unwilling to remediate  
11 and address the problem. So, I -- again, it is  
12 consistent with the -- the natural, regulatory  
13 scheme in Sarbanes-Oxley; and Dodd-Frank is not  
14 passed in a vacuum. Dodd-Frank is part -- and  
15 Sarbanes-Oxley work together. They each amend  
16 provisions of the Exchange Act.

17           So I don't think it -- I think it's  
18 highly odd to say that: in Dodd-Frank,  
19 Congress wanted to create a heavy incentive not  
20 to report internally; but in Sarbanes-Oxley,  
21 Congress was focused intently on internal  
22 reporting, and especially internal reporting of  
23 lawyers and auditors.

24           So under my friend's reading,  
25 Dodd-Frank would leave those critical groups,

1 the groups that this Court in Lawson versus FMR  
2 recognized were best equipped to spot and  
3 detect and prevent fraud, out of these critical  
4 protections; after Congress recognized that  
5 Sarbanes-Oxley had been ineffective in getting  
6 lawyers and auditors and other employees to  
7 report internally.

8 This is critical whistleblower  
9 protections, and we don't see any basis for  
10 carving those groups out of the statute.

11 If the Court has no further questions.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel.

14 Mr. Michel.

15 ORAL ARGUMENT of CHRISTOPHER G. MICHEL

16 ON BEHALF OF THE UNITED STATES, AS

17 AMICUS CURIAE, SUPPORTING THE RESPONDENT

18 MR. MICHEL: Mr. Chief Justice, and  
19 may it please the Court: The statutory  
20 definition of whistleblower is tailor-made for  
21 the awards program, but it does not fit in the  
22 retaliation programs.

23 Giving the term its ordinary meaning  
24 in the retaliation context would harmonize the  
25 statute and avoid the anomalies that would



1 result from woodenly applying the statutory  
2 definition.

3           Some of those anomalies have been  
4 discussed already by the Court. But I do think  
5 the most drastic one is that applying the  
6 statutory definition, which requires reporting  
7 to the Commission, into clause (iii) of the  
8 retaliation provisions, which protects internal  
9 reporting; would decouple retaliation liability  
10 from the Act that causes the retaliation; and  
11 moreover, would make employers liable for  
12 conduct that they don't know about. Now, that  
13 in our view would be a one of a kind  
14 retaliation provision in the U.S. code.

15           JUSTICE KAGAN: So, Mr. Michel, I do  
16 think that that's a real anomaly. And I -- I  
17 -- and I also think if you really look at the  
18 way this statute came to be; it's quite  
19 possible the way this provision gets in very  
20 late in the game, that they didn't know that  
21 they'll -- they forgot about this definitional  
22 provision, and they were meaning it more in the  
23 ordinary-language sense.

24           But there you are, you have this  
25 definitional provision, and it says what it

1 says. And it says that it applies to this  
2 section. And you have to have a really, really  
3 severe anomaly to get over that.

4 So what makes it rise to that level?  
5 It's odd; it's peculiar; it's probably not what  
6 Congress meant. But what makes it the kind of  
7 thing where we can just say we're going to  
8 ignore it?

9 MR. MICHEL: So, I -- Justice Kagan,  
10 I'd direct you to the Lawson versus Suwanee  
11 Fruit case, which I think is often cited as a  
12 canonical case on statutory definitions.

13 That was a worker's compensation case.  
14 And the statute included the term "injury,"  
15 which was defined understandably enough for a  
16 worker's compensation case as injury on the  
17 job.

18 But there was a provision in which the  
19 employer was relieved from liability if the  
20 employee had a preexisting injury. And the  
21 Court said if you apply the statutory  
22 definition to that preexisting injury and  
23 require that injury to be on the job; that  
24 would be anomalous, because it would unfairly  
25 assign liability to the employer, and it would

1 deter the statutory purpose of keeping  
2 employers from retaliating against disabled  
3 employees.

4           So I think that decision is analogous  
5 here. You would deter employers from -- excuse  
6 me -- you would unfairly apportion liability to  
7 employers based on conduct that they don't know  
8 about; and you would take out the premise of  
9 the retaliation provision, because the very  
10 conduct that is an element in the retaliation  
11 claim -- reporting to the Commission -- is  
12 different from the conduct for which they  
13 retaliated against the employee. One --

14           JUSTICE ALITO: Now this sort of thing  
15 will come up in other cases in which the  
16 government is involved. And do you want us to  
17 write an opinion that uses the terminology that  
18 you just used?

19           So, you have a statute with -- a --  
20 that uses a particular term, and there's a  
21 definitional provision in the statute. And  
22 what we write is that the definition in the  
23 statute doesn't apply if it produces an  
24 anomaly.

25           Is that the standard? That's all you

1 need to get out of the definitional provision?

2 MR. MICHEL: I -- I think, you know,  
3 if you look at Suwanee Fruit, for example, the  
4 Court talked about incongruities, it talked  
5 about undermining the purpose of the statute.

6 If you look at the -- the Public  
7 Utilities case, the Court talks about  
8 undermining the purpose of the statute.

9 JUSTICE GINSBURG: I thought -- I  
10 thought the stock phrase was absurd, that you  
11 -- if the statute gives a definition, you  
12 follow the definition in the statute unless it  
13 would lead not merely to an anomaly, but to an  
14 absurd result.

15 MR. MICHEL: Justice Ginsburg, I -- I  
16 don't think that -- with respect, I don't think  
17 that's the standard the -- the Court has  
18 applied. In fact, in all of the cases we cite,  
19 starting with Suwanee Fruit and Public  
20 Utilities --

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

23 I mean, the government concedes that  
24 Subsection (iii) would cover a subset of cases  
25 -- maybe not as much as the government would

1 like, but -- but it's not an absurd reading,  
2 right?

3 MR. MICHEL: We're not arguing that  
4 it's absurd. That -- that's correct, Justice  
5 Gorsuch.

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

9 CHIEF JUSTICE ROBERTS: Well, but I  
10 mean, it's not just that it's not absurd. It  
11 seems to me that if you look at Utility Air, it  
12 has to be -- not absurd or anomalous, whatever  
13 you want to say -- it has to be cut very  
14 broadly.

15 I mean, if you get to a tiny little  
16 thing and you're saying, well, the definition  
17 doesn't work there, it's one thing to say,  
18 well, then we're not going to apply it to that  
19 provision.

20 The cases where you're allowed to move  
21 beyond the defined term are when if you stick  
22 to it, it really makes a mess of the whole  
23 thing.

24 MR. MICHEL: I agree, Mr. Chief  
25 Justice, but I think it's a pretty big mess

1 that -- that the Petitioner's reading is -- is  
2 making here. You know, in addition to the  
3 anomalies we have already discussed, I do think  
4 a very important one is that Petitioner's  
5 reading would eviscerate the incentive for  
6 internal reporting.

7 Keep in mind, Petitioner wants to  
8 import the entire --

9 JUSTICE GORSUCH: Well, counsel, you  
10 might have an argument there if there weren't  
11 Sarbanes-Oxley as the backdrop, but there is.  
12 And so the Chief Justice's point and Justice  
13 Breyer's point is that if it were to make a  
14 hash of the entire statute, and there'd be  
15 meaning -- no meaning at all, maybe, maybe, but  
16 you don't -- you don't have -- you don't even  
17 allege that here.

18 MR. MICHEL: Well -- let me try two  
19 responses, Justice Gorsuch.

20 First of all, I think it's quite clear  
21 that what Congress was trying to do in  
22 Dodd-Frank was bolster the remedies that were  
23 available under Sarbanes-Oxley. That's why it  
24 was --

25 JUSTICE GORSUCH: But -- but we don't

1 follow what they're trying to do. We follow  
2 what they do do, right?

3 MR. MICHEL: So what they did --

4 JUSTICE GORSUCH: You -- you would  
5 agree with me on that?

6 MR. MICHEL: Absolutely.

7 JUSTICE GORSUCH: All right.

8 MR. MICHEL: And what they did do was  
9 change the statute of limitations from six  
10 months to six years. They changed the single  
11 back pay to double back pay.

12 JUSTICE GORSUCH: Do you want to  
13 comment on the notice and -- and rule-making  
14 procedures here and its reference to how much  
15 deference we owe? And I -- I, again, I'm just  
16 stuck with the absence of any fair notice, an  
17 ipse dixit decision, without any reasons that  
18 wouldn't normally pass muster under the APA;  
19 and then we have two circuit courts that  
20 nonetheless thought that it was appropriate to  
21 defer to that, which seems to me allowing an  
22 agency to swallow a large amount of legislative  
23 power and judicial power in the process, giving  
24 up our opportunity to -- to -- to interpret the  
25 law as it is.

1 MR. MICHEL: So just I -- I'll start  
2 with a small correction, which is the Court of  
3 Appeals in this case actually primarily --

4 JUSTICE GORSUCH: Did both --

5 MR. MICHEL: -- interpreted the  
6 statute.

7 JUSTICE GORSUCH: Did both. And the  
8 other -- and the other court relied exclusively  
9 on Chevron --

10 MR. MICHEL: It --

11 JUSTICE GORSUCH: So here we are.

12 MR. MICHEL: That -- that's right. I  
13 think I would also point out that, you know,  
14 this procedural deficiency argument has a  
15 serious procedural deficiency of its own, in  
16 which --

17 JUSTICE GORSUCH: It's not making an  
18 invalidity argument. It's -- it's asking for  
19 deference, as -- as your friend pointed out,  
20 which is a different animal.

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

23 JUSTICE GORSUCH: Good.

24 MR. MICHEL: As --

25 JUSTICE GORSUCH: Please.



1 MR. MICHEL: -- I -- you're, you know,  
2 as you're reading from the notice of proposed  
3 rule-making, I do want to point out that it's  
4 the Supreme Court that is doing this in the  
5 first instance. No court in case or any other  
6 case has -- has consulted this before.

7 But if you want to look at it, I do  
8 think Petitioner pointed to what we think is  
9 the closest statement in the rule, which is at  
10 page 70,511, and lays out, you know, as -- as  
11 my friend read, "the Commission is seeking  
12 comments on whether it should promulgate rules  
13 regarding the implementation of the -- of this  
14 section, should application of the retaliation  
15 provisions be limited or broadened."

16 I -- I think the fact that several  
17 comments --

18 JUSTICE GORSUCH: "Who provides  
19 information to the Commission." Right? That's  
20 kind of an important little phrase there.

21 MR. MICHEL: Right. I -- I agree with  
22 that.

23 JUSTICE GORSUCH: Right.

24 MR. MICHEL: And -- and I'm not saying  
25 that it couldn't have been written more

1 clearly. I do think if you look at --

2 JUSTICE GORSUCH: I think it was  
3 written very clearly.

4 MR. MICHEL: Well, I think if you look  
5 actually, Justice Gorsuch, at the -- at the  
6 Long Island Care case, which I think is -- is  
7 probably this Court's leading case on the  
8 logical outgrowth test, it -- it ultimately  
9 says that, you know, proposing X and getting  
10 not X is enough to satisfy the logical  
11 outgrowth.

12 Now, maybe that's not logical, but  
13 that is the -- you know, the Court's precedent  
14 in this area. And I think we certainly satisfy  
15 that test here.

16 JUSTICE SOTOMAYOR: Bottom line, are  
17 you -- how much are you relying on just Chevron  
18 deference here?

19 MR. MICHEL: That -- that's not even  
20 our principal argument. We're -- we're  
21 certainly happy to have Chevron deference if  
22 you find the statute ambiguous, but we -- we  
23 think you can resolve this without Chevron  
24 deference, simply as the Ninth Circuit did in  
25 its primary holding by saying that we have the

1 best reading of the statute. I think a number  
2 of the lower courts have done that too.  
3 There's a District of Nebraska opinion that we  
4 cite that I think is particularly helpful in --  
5 in evaluating the statute.

6 JUSTICE GORSUCH: Would -- would you  
7 agree, though, that a notice-and-comment  
8 rule-making that didn't provide fair notice  
9 shouldn't be deferred to?

10 MR. MICHEL: I -- this -- I think  
11 Encino is some support for that, although this  
12 Court has never taken the additional step of  
13 saying that the -- failure to meet the logical  
14 outgrowth test as distinguished from the  
15 inadequate explanation --

16 JUSTICE GORSUCH: Well, just  
17 hypothetically, let's say whatever your logical  
18 outgrowth test is fails to meet that, okay? No  
19 notice, no adequate procedures. Should --  
20 should courts defer to that as -- as the law?

21 MR. MICHEL: Again, I think there's a  
22 lot of, you know, preliminary questions you'd  
23 have to answer about timing and -- and  
24 everything else, but in -- in a properly --

25 JUSTICE GORSUCH: Let's get to the

1 merits.

2 MR. MICHEL: I think in a properly  
3 presented challenge, that -- that you wouldn't  
4 be able to defer to that. I'll -- I'll agree  
5 with that, Justice Gorsuch.

6 JUSTICE GORSUCH: You would not -- you  
7 would not be able to defer to that?

8 MR. MICHEL: Correct.

9 JUSTICE GORSUCH: All right.

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

13 JUSTICE BREYER: Are you wary of the  
14 government conceding that point? I would be  
15 wary of that because I don't know what  
16 implications it has for other cases where, in  
17 fact, you start chipping away in an unforeseen  
18 way, I mean maybe -- I can think of a lot of  
19 reasons for not deferring to the rule here.  
20 Among others, it doesn't refer to manner.  
21 There's nothing in there about manner that I  
22 could find.

23 I could think of reasons, but I -- I'm  
24 just saying I -- that is not necessarily what  
25 you just said, a -- a lifetime concession on

1 the part of the government, is it?

2 MR. MICHEL: No, it is not.

3 (Laughter.)

4 MR. MICHEL: I -- I do want to try to  
5 get back to the point about internal  
6 whistleblowing and internal reporting, which I  
7 think is something that there's a unity of  
8 interest from employees, employers, and the  
9 Commission. And -- and my friend --

10 JUSTICE SOTOMAYOR: So why don't you  
11 give an award for that?

12 MR. MICHEL: May I answer, Mr. Chief  
13 Justice?

14 CHIEF JUSTICE ROBERTS: Certainly.

15 MR. MICHEL: We do actually give an  
16 award for people who report internally if the  
17 -- if the company then reports to the  
18 Commission and the person then reports within  
19 120 days. So the rule does reflect that  
20 principle.

21 JUSTICE SOTOMAYOR: You only give it  
22 if they report to the SEC?

23 MR. MICHEL: They have to ultimately  
24 report to the SEC within 120 days.

25 Thank you, Mr. Chief Justice.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Mr. Shanmugam, seven minutes.

4 REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM  
5 ON BEHALF OF THE PETITIONER

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

8 The first, with regard to these cases  
9 concerning statutory definitions, I think if  
10 you look at the cases cited by Respondent and  
11 the government, most of those cases are cases  
12 in which either the terms of the statutory  
13 definition are ambiguous or in which the reach  
14 of the statutory definition is unclear.

15 Whereas here, both the terms and the  
16 reach of the statutory definition are  
17 unambiguous, this Court has refused to give  
18 effect to a statutory definition, only where it  
19 would lead to absurd results. And to be sure,  
20 many of those cases are pre-1986 cases.

21 They do not use the term "absurdity,"  
22 but they sound in absurdity. And the perfect  
23 example of that is Mr. Michel's favorite case,  
24 Lawson versus Suwannee Fruit. That was a case  
25 in which if the statutory definition of

1 disability were given effect, an employer would  
2 be liable for the entirety of an employee's  
3 disability, even if the previous partial  
4 disability occurred when the employee was not  
5 on the job.

6 And the Court said that that would  
7 lead to obvious incongruities in the language  
8 and destroy the very purpose of the statute.  
9 So, again, that's absurdity by any other name.

10 And to the extent that Respondent and  
11 the government seem to suggest that absurdity  
12 is not required here, I would submit that it  
13 would be a very odd regime of statutory  
14 interpretation if this Court were to apply a  
15 different standard to unambiguous language in a  
16 statutory definition from the standard that it  
17 applies where you have unambiguous language  
18 anywhere else. If anything, where Congress  
19 provides a specific statutory definition, that  
20 ought to be given effect and more respect,  
21 rather than less.

22 And to the extent that there may be  
23 some incidental overbreadth with our  
24 interpretation because one could posit a  
25 hypothetical in which there's really not a

1 nexus between the internal report and the  
2 report to the SEC, I would respectfully submit  
3 that this case is a lot like the Court's last  
4 whistleblower case, Lawson versus FMR, where  
5 the Court said that incidental overbreadth, the  
6 mere fact that one could think of hypotheticals  
7 involving gardeners, nannies, and housekeepers  
8 in the words of the Court, is not enough to  
9 invalidate an interpretation, particularly  
10 where the contrary interpretation suffers from  
11 a similar deficiency, the wild overbreadth to  
12 which I referred in my opening.

13 And my second point is just a brief  
14 point on the procedural issue concerning the  
15 rule-making here. I think Justice Gorsuch put  
16 his finger on the exact language in the  
17 proposed rule that makes clear that the SEC was  
18 operating from the premise that reporting to  
19 the Commission was required.

20 And to the extent that the Commission  
21 asked whether the application of the  
22 anti-retaliation provision could be limited or  
23 broadened, it was asking about limiting or  
24 broadening it in other ways, such as by adding  
25 the same requirements, the procedural



1 requirements that apply to eligibility for the  
2 award provisions, to the anti-retaliation  
3 provision as well.

4           And it is certainly true, as  
5 Mr. Geysler said, that this Court and lower  
6 courts have often asked whether the final rule  
7 is somehow the logical outgrowth from the  
8 proposed rule. But in the words of Judge  
9 Randolph from the D.C. Circuit, something  
10 cannot grow out of nothing.

11           And where there is nothing in the  
12 proposed rule to put interested parties on  
13 notice that an agency is considering a  
14 particular interpretation, it would be the  
15 height of inequity to uphold a rule and to  
16 afford deference to the agency in those  
17 circumstances.

18           In our view, the SEC's interpretation  
19 here was procedurally improper, as well as  
20 substantively invalid, and for that reason and  
21 the other reasons set out in the briefs, the  
22 judgment of the Ninth Circuit should be  
23 reversed.

24           Thank you.

25           CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

2 (Whereupon, at 12:07 p.m., the case  
3 was submitted.)

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51:22 52:24 54:5 56:21 58:7 59:4 <b>Air</b> <sup>[4]</sup> 31:25,25 32:21 52:11 <b>aligns</b> <sup>[1]</sup> 26:13 <b>ALITO</b> <sup>[1]</sup> 50:14 <b>all-purpose</b> <sup>[1]</sup> 13:18 <b>allege</b> <sup>[1]</sup> 53:17 <b>allegedly</b> <sup>[1]</sup> 25:19 <b>allowed</b> <sup>[1]</sup> 52:20 <b>allowing</b> <sup>[1]</sup> 54:21 <b>already</b> <sup>[8]</sup> 4:7 8:24 10:6 25:3 35:22 36:22 48:4 53:3 <b>although</b> <sup>[1]</sup> 58:11 <b>ambiguity</b> <sup>[4]</sup> 37:23 38:1,22 39:22 <b>ambiguous</b> <sup>[3]</sup> 4:9 57:22 61:13 <b>amend</b> <sup>[1]</sup> 46:15 <b>amended</b> <sup>[2]</sup> 5:11 13:6 <b>amendment</b> <sup>[1]</sup> 26:13 <b>amicus</b> <sup>[4]</sup> 1:25 2:12 19:2 47:17 <b>Among</b> <sup>[1]</sup> 59:20 <b>amount</b> <sup>[1]</sup> 54:22 <b>analogous</b> <sup>[1]</sup> 50:4 <b>animal</b> <sup>[1]</sup> 55:20 <b>anomalies</b> <sup>[4]</sup> 31:15 47:25 48:3 53:3 <b>anomalous</b> <sup>[5]</sup> 28:2,3 34:6 49:24 52:12 <b>anomaly</b> <sup>[11]</sup> 9:24 10:1 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