No. 16-1276

In the Supreme Court of the United States

DIGITAL REALTY TRUST, INC.,

Petitioner,

v.

PAUL SOMERS,

Respondent.

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

BRIEF OF *AMICUS CURIAE* LIME ENERGY SERVICES COMPANY IN SUPPORT OF PETITIONER

Richard J. Cino
Joseph C. Toris
JACKSON LEWIS P.C.
220 Headquarters Plaza
East Tower, 7th Floor
Morristown, NJ 07960
(973) 538-6890
CinoR@jacksonlewis.com

Collin O'Connor Udell
Counsel of Record
JACKSON LEWIS P.C.
90 State House Square
Eighth Floor
Hartford, CT 06103-3708
(860) 522-0404
Collin.udell@
jacksonlewis.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(Continued)

Page(s)

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES
(Continued)

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(Continued)

Page(s)

INTEREST OF THE *AMICI CURIAE*[1]

Lime Energy Services Company ("Lime Energy") respectfully submits this brief as *amicus curiae* in support of Petitioner Digital Realty Trust, Inc. ("Digital").

Lime Energy is a national provider of energy savings to utility clients under Small Business Direct Install (SBDI) programs. It has a 25-year track record in providing energy efficiency projects to thousands of small business customers annually, completing over 100,000 of such projects for small and mid-sized businesses across the nation since 2009, and helping small and mid-sized businesses gain access to over $272 million in utility incentives.

Lime Energy is also an employer and the defendant in a case before the United States

---

[1] No counsel for any party authored this brief in whole or in part, and no person other than *amicus*, its insurance carrier, Chubb, providing defense costs to *amicus* through a policy of insurance, its members, and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have been timely notified of the undersigned's intent to file this brief. Both Petitioner and Respondent have filed a blanket consent with this Court to the filing of all amicus briefs.

District Court for the District of New Jersey which considered the very issue presented by Digital's petition for a writ of certiorari. *See Dressler v. Lime Energy*, No. 3:14-cv-07060, 2015 U.S. Dist. LEXIS 106532, at *13-14 (D.N.J. Aug. 13, 2015). In *Dressler*, plaintiff was a former employee of Lime Energy who alleges she voiced concerns internally about discrepancies in accounts receivable but who did not go to the SEC. After she was terminated, plaintiff filed a complaint, alleging retaliatory termination in violation of the whistleblower-protection provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd Frank Act"), 15 U.S.C. § 78u-6, *et seq.*[2]

Lime Energy moved to dismiss, arguing that plaintiff did not qualify as a "whistleblower" under the Dodd-Frank Act's anti-retaliation provision because she did not make protected disclosures to the SEC. The district court denied the motion to dismiss, holding that the whistle-blower protections of the Dodd-Frank Act are ambiguous under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467

---

[2] The whistleblower-protection provisions of the Dodd-Frank Act, Pub. L. No. 111-203, Title IX, § 922(a), 124 Stat. 1376, 1841 (2010), added section 21F to the Securities Exchange Act of 1934, codified at 15 U.S.C. § 78u-6.

U.S. 837 (1984), and deferred to the rule promulgated by the SEC (Rule 21F-2(b)(1)) as a reasonable and permissible construction of the Dodd-Frank Act. *See* 2015 U.S. Dist. LEXIS 106532, at *37-41. Litigation is proceeding before the district court, and the parties are in the midst of extensive discovery.

Accordingly, resolution of the question presented by Digital's petition will have a direct impact on the outcome of *Dressler v. Lime Energy*, now before the United States District Court for the District of New Jersey. Moreover, this is an issue of vital concern to the country's business community. The Dodd-Frank Act's anti-retaliation provision has a statute of limitations of 6-10 years. Therefore, Lime Energy is still vulnerable to Dodd-Frank whistleblower claims like the one it currently faces that could potentially be brought by former employees long separated from the company. And each time, absent this Court's action, the varying treatment of the Dodd-Frank Act's whistleblower protections by courts in different jurisdictions will burden Lime Energy, as an employer, with unnecessary cost and administrative complexity, requiring it to assess and predict which side of the circuit split a particular court will follow. Clear guidance from this Court is necessary so that Lime Energy, and companies like it, clearly

understand which employees fall within the Dodd-Frank Act's definition of "whistleblower" and what the relationship is between the anti-retaliation provisions of the Sarbanes-Oxley Act and the Dodd-Frank Act, with the assurance that the same standards apply uniformly across the country.

SUMMARY OF ARGUMENT

Lime Energy, as the undersigned *amicus*, urges this Court to grant Digital's petition. Lime Energy has found itself embroiled in litigation based on the question presented by Digital's certiorari petition, and it thus serves as a concrete example of the problems created by the decision below. In *Dressler v. Lime Energy*, as in this case, the plaintiff allegedly raised concerns internally about alleged misconduct but admittedly never reported those concerns to the SEC. Nevertheless, after Dressler was terminated, she sued two years later in federal court under the Dodd-Frank Act. The district court denied Lime Energy's motion to dismiss and held that Dressler qualified as a "whistleblower" under the Dodd-Frank Act, that the retaliation provision of the Dodd-Frank Act is ambiguous, and accorded *Chevron* deference to the SEC's regulation, which took the position that internal complaints are sufficient to qualify a plaintiff as a Dodd-Frank "whistleblower."

Absent the district court's holding, Dressler's lawsuit would have been time-barred due to the differences between the statute of limitations contained in the Dodd-Frank Act (between six and ten years) and the Sarbanes-Oxley Act (six months). Dilatory and opportunistic plaintiffs are incentivized by the decision below and decisions like it. The *Dressler* litigation is ongoing, and the parties are currently engaged in extensive discovery.

The circuit split underlying Digital's petition is well defined. The Fifth Circuit in *Asadi v. G.E. Energy (USA), L.L.C.*, the only circuit court to have ruled at the time of the *Dressler* decision, took a textualist approach, respecting the integrity of the definition of "whistleblower" in the Dodd-Frank Act, which is clear and unambiguous. In contrast, the Second Circuit in *Berman v. Neo@Ogilvy LLC* came to the opposite conclusion, abandoning the clear statutory definition in favor of "the realities of the legislative process," which it stated gave rise to an "arguable tension" between statutory provisions. According to the Second Circuit, this arguable tension constituted sufficient ambiguity to trigger *Chevron* deference to the SEC's regulation. The decision below explicitly followed *Berman*'s application of *Chevron* deference to the regulation. The circuit conflict regarding what consti-

tutes a Dodd-Frank "whistleblower" is pressing, and this Court's intervention is needed.

The petition also presents an opportunity to resolve uncertainty about the future of the doctrine of *Chevron* deference, which seems to have an increasing number of critics, both in the courts and in the academy. This case can and should be decided on the basis of the plain language of the statute, but if the Court disagrees, the case would present an opportunity for the Court to provide guidance on the scope of *Chevron* deference doctrine: *e.g.*, its role with respect to separation of powers, the degree of statutory ambiguity required to trigger its application, and the necessity for institutional expertise outside the context of highly specialized or technical matters. The Court should grant Digital's petition for a writ of certiorari.

ARGUMENT

I. Lime Energy's Predicament Illustrates the Burdens Placed on Employers by Judicial Deference to the SEC Regulation.

Lime Energy provides the Court with a concrete example of the burdens faced by national employers in light of judicial deference to

the SEC's regulation (Rule 21F-2(b)(1)),[3] and how critically important it is that the issue be resolved so that consistency and predictability across jurisdictions become the norm.

Wendy P. Dressler, plaintiff in *Dressler v. Lime Energy*, was initially hired as an administrator of the public sector for New York projects but later held the position of accounting manager of the utilities division. *Dressler v. Lime Energy*, No. 3:14-cv-07060, Dkt. No. 1, Compl. ¶¶ 3-9 (Nov. 10, 2014). She alleges she raised concerns internally about discrepancies in the company's accounts receivable but admittedly did not go to the SEC. *Id.* ¶¶ 15-17, 25, 28, 30, 34, 38, 40. She further alleges she was terminated as a result. *Id.* ¶ 2.

On July 17, 2012, Lime Energy issued a press release advising that it had discovered misreporting that might require restatement of

---

[3] "[B]y providing that an individual is a 'whistleblower if' they 'provide information in a manner described in' Subsection (iii) of Section 78u-6(h)(1)(A) [of the Dodd-Frank Act], Rule 21F-2(b)(1) stipulates that the whistleblowing-protection program of the [Dodd-Frank Act] does *not* require an employee to report violations directly to the SEC." *Dressler v. Lime Energy*, No. 3:14-cv-07060, 2015 U.S. Dist. LEXIS 106532, at *13 (D.N.J. Aug. 13, 2015) (citations omitted).

affected financial statements. *Id.* ¶ 44. On November 5, 2012, Dressler and other employees were terminated as the result of an internal investigation. *Id.* ¶ 47. Dressler's complaint does not allege that at any time she submitted any documents or contacted the SEC regarding her accounting concerns.

The District Court nonetheless found that Dressler qualified as a "whistleblower" under the Dodd-Frank Act, holding that the whistleblower-protection provision of the Dodd-Frank Act is ambiguous under *Chevron* and deferring to the SEC's regulation as "a reasonable and permissible construction of the Dodd-Frank Act's whistleblower protection provision." *Dressler v. Lime Energy*, No. 3:14-cv-07060, 2015 U.S. Dist. LEXIS 106532, at *37-42 (D.N.J. Aug. 13, 2015). After Lime Energy's motion to dismiss was denied, the case entered an extensive discovery phase.

Although Dressler was terminated on November 5, 2012, she did not file her complaint with the District Court until November 10, 2014. Dressler thus is the perfect example of a plaintiff who could not sue under the Sarbanes-Oxley Act, but who *could* sue under the Dodd-Frank Act because the District Court held she was a Dodd-Frank "whistleblower." The statute of limitations for the Sarbanes-Oxley Act is only

six months, *see* 18 U.S.C. § 1514A(b)(2)(D), so under that statute, Dressler's lawsuit would have been time-barred. In marked contrast, the statute of limitations for the Dodd-Frank Act is between *six and ten years*. *See* 15 U.S.C. § 78u-6(h)(1)(B)(iii). Because the District Court held that, despite failing to raise her concerns with the SEC, Dressler was a "whistleblower" under the Dodd-Frank Act, she was able to file her claim in federal court.

Moreover, the Dodd-Frank Act allowed her to bring a retaliation claim in the District Court in the first instance, *see* 15 U.S.C. § 78u-6(h)(1)(B)(i), whereas the Sarbanes-Oxley Act would have required her to first exhaust her administrative remedies by filing a complaint with the Department of Labor, *see* 18 U.S.C. § 1514A(b)(1). The differences between the statutes are no accident; rather, the language in the Dodd-Frank whistleblower provision was the result of a conscious strategy to award financial incentives and additional protections to complainants who adhered to Dodd-Frank procedures, including the requirement to directly re-

port to the SEC, in order to increase the amount and caliber of the complaints made to the SEC.[4]

In sum, Dressler's lawsuit was saved by the District Court's finding that she was a Dodd-Frank Act "whistleblower," placing the viability of her claim squarely within the ambit of the question presented by Digital's petition. Her case illustrates the dramatic expansion accomplished by the SEC's regulation, by the decision below in deferring under *Chevron* to that regulation, and by the Second Circuit's decision

---

[4] Indeed, the principal purpose of the Dodd-Frank whistleblower provision, according to the SEC, was "to promote effective enforcement of the Federal securities laws by providing incentives for persons with knowledge of misconduct to come forward and share their information with the *Commission* . . . providing information to persons conducting an *internal investigation* may not . . . achieve the statutory purpose of getting high-quality, original information about securities violations directly into the hands of Commission staff." 76 Fed. Reg. at 34,308 (emphases added); *see also* 156 Cong. Rec. S5929 (daily ed. July 15, 2010) (statement of Sen. Chris Dodd) ("The Congress intends that the SEC make *awards that are sufficiently robust* to motivate potential whistleblowers to share their information and to overcome the fear of risk of the loss of their positions. Unless the whistleblowers come forward, the Federal Government will not know about the frauds and misconduct.") (emphases added).

in *Berman* which underlies the circuit split in this case.[5] And all in the face of an unambiguous, clear statutory definition.

II. Certiorari Is Warranted To Resolve a Widely Recognized Circuit Split and To Clarify that the SEC's Regulation Does Not Warrant *Chevron* Deference in Light of the Unambiguous Statutory Definition of "Whistleblower."

The lines between the two sides of the circuit split that gave rise to Digital's petition are clearly drawn. As noted by Petitioner, the Fifth Circuit in *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013), took a textualist approach, concluding that the definition of "whistleblower" in the Dodd-Frank Act "expressly and unambiguously requires that an individual provide information to the SEC to qualify as a 'whistleblower.'" *Id.* at 623; *see also* Pet. 10-12. Because it relied on the words of the statute to conclude that the statute was unambiguous, the Fifth Circuit did not consider the issue of deference to the SEC's interpretation—there was

---

[5] Moreover, the Dodd-Frank Act provides that whistleblowers can seek double backpay, *see* 15 U.S.C. § 78u-6(h)(1)(C), but they may not do so under the Sarbanes-Oxley Act, *see* 18 U.S.C. § 1514A(c).

no reason to proceed from Step 1 of *Chevron* (unambiguous statutory language) to Step 2 (deference to the administrative agency due to ambiguous statutory language). *See* 720 F.3d at 630 ("Because Congress has directly addressed the precise question at issue, we must reject the SEC's expansive interpretation of the term 'whistleblower' for purposes of the whistleblower-protection provision.") (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984)). Under the first step of *Chevron*, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.

In contrast, the Second Circuit relied heavily on the doctrine of *Chevron* deference in *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015), which led it to the opposite conclusion and created the circuit split. *See id.* at 154-55. The decision found ambiguity in the "*arguable tension* between the definition subsection [of the Dodd-Frank Act], subsection 21F(a)(6), which defines 'whistleblower' to mean an individual who reports violations to the [SEC], and subdivision (iii) of subsection 21F(h)(1)(A), which, unlike subdivisions (i) and (ii), does not within its own terms limit its protection to those

who report wrongdoing to the SEC." 801 F.3d at 147 (emphasis added); *see also* Pet. 2 (setting out codified versions: 15 U.S.C. § 78u-6(a)(6) and 15 U.S.C. § 78u-6(h)(1)(a)). Specifically, "subdivision (iii) expands the protections of Dodd-Frank to include the whistleblower protection provisions of Sarbanes-Oxley, and those provisions, which contemplate an employee reporting violations internally, do not require reporting violations to the [SEC]." 801 F.3d at 147. The Second Circuit identified "the precise issue . . . [a]s whether [this] arguable tension . . . creates sufficient ambiguity . . . to oblige us to give *Chevron* deference to the SEC's rule." *Id.* at 148. The Second Circuit held that it did. *Id.* at 155.

The rule provides a different definition of "whistleblower," which rests on the *activity* protected by the anti-retaliation provision rather than the statutory definition of "whistleblower." 17 C.F.R. 240.21F-2(b)(1)(ii); Pet. 5. Its effect is to extend protections to those who make disclosures of suspected violations internally as well as to those who make disclosures to the SEC. Despite this aspect of the SEC's regulation, the Second Circuit determined that *Chevron* deference to the SEC's regulation was warranted. 801 F.3d at 155.

The Second Circuit's Step 2 *Chevron* analysis was not appropriate given the unambiguous nature of the Dodd-Frank whistleblower definition. In a portion of its holding, the Ninth Circuit's decision below explicitly followed *Berman*, applying *Chevron* deference to the regulation. Pet. App. 10a-11a ("We also agree with the Second Circuit 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 agency responsible for enforcing the securities laws has resolved any ambiguity and its regulation is entitled to deference.").

But the foundation upon which the Second Circuit's decision rests is faulty. *See* 801 F.3d at 158 (Jacobs, J., dissenting) ("[T]he majority has 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."). The Second Circuit explained its decision by referring to the "realities of the legislative process." 801 F.3d at 154. Setting aside the canon that "terms of a definitional subsection are usually to be taken literally," the Second Circuit focused instead on "whether the [statutory] definition should apply to a late-added subdivision of a subsection that uses the defined term." *Id.* It justified its aban-

donment of the statutory definition by explaining that "[w]hen conferees are hastily trying to reconcile House and Senate bills, each of which number hundreds of pages, and someone succeeds in inserting a new provision like subdivision (iii) into subsection 21F(h)(1)(A), it is not at all surprising that no one noticed that the new subdivision and the definition of 'whistleblower' do not fit together neatly." 801 F.3d at 154.

Noting that "[t]rue ambiguity is almost always the result of carelessness or inattention," *id.* at 154 n.10 (quoting ANTONIN SCALIA AND BRYAN A. GARNER, READING LAW 33 (2012)), the Second Circuit was persuaded that neither the text nor any legislative history resolved whether those "conferees who accepted the last-minute insertion of subdivision (iii) would have expected it to have the extremely limited scope it would have if it were restricted" by the statutory definition. *Id.* at 155. Absent that knowledge, the Second Circuit determined that the tension between the provisions, notwithstanding its prior description of that tension as "arguable," created sufficient ambiguity to trigger the doctrine of *Chevron* deference. From there, it was quick work to conclude that an employee's internal reporting to his employer was sufficient to invoke Dodd-Frank remedies

for alleged retaliation, despite not having reported to the SEC.

The Fifth Circuit's structural analysis makes far more sense and is faithful to the statutory scheme, distinguishing between Dodd-Frank's definition of a "whistleblower" and the three categories of protected activity. *Asadi*, 720 F.3d at 626 ("[T]he definition of 'whistleblower' and the third category of protected activity do not conflict. Conflict would exist between these statutory provisions only if we read the three categories of protected activity as additional definitions of three types of whistleblowers."). Further, although much is made in other opinions of the dearth of legislative history, the Fifth Circuit noted that the "legislative history indicates that Congress specifically rejected a broader description of individuals eligible to raise claims under the whistleblower-protection provision. Specifically, GE Energy explains that the bill initially passed by the House did not use the term 'whistleblower' in describing the individuals protected from employer retaliation; instead, it used the phrase 'employee, contractor, or agent.'" 720 F.3d at 626 n.9 (quoting Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 7203(g)(1)(A) (as passed by House, Dec. 11, 2009)). However, "[t]he Senate's subsequent version of the bill re-

placed the use of the phrase 'employee, contractor, or agent' with 'whistleblower' and restructured the format of the provision to resemble the enacted version." 720 F.3d at 626 n.9 (quoting Restoring American Financial Stability Act of 2010, H.R. 4173, 111th Cong. § 922(h)(1)(A) (as passed by Senate, May 20, 2010)).[6]

The Fifth Circuit's textual analysis was the correct one, but in the event the Court is persuaded that tension exists that rises to the level of ambiguity, the next source to mine for the intent of the legislature should be legislative history rather than judicial conjecture about the "realities of the legislative process." *Berman*, 801 F.3d at 154; *see also id.* at 158 (Jacobs, J., dissenting) ("The U.S. Code is full of statutory provisions with 'extremely limited' effect; there is no canon that counsels reinforcement of any sub-sub-sub-subsection that lacks a paradigm shift. The majority is thrown back on what it calls euphemistically 'the realities of the legisla-

[6] Because the Fifth Circuit in *Asadi* relied on the plain, unambiguous statutory language to reach its conclusion, it did not rely on this legislative history in its analysis, 720 F.3d at 626 n.9, although clearly it was deemed worthy of mention.

tive process.'"). The contrasting language in successive bills noted by the Fifth Circuit in *Asadi* and the substitution of the "whistleblower" term for the language of "employee, contractor, or agent" that came with the enactment of the Senate bill indicates that Congress intended to reject the broader description of those eligible for whistleblower protection under the Dodd-Frank Act. *Id.*

The Second Circuit erred: first, the text is clear, and second, some legislative history does exist that more than hints at the answer. *Compare Berman*, 801 F.3d at 155; *see id.* at 160 (Jacobs, J., dissenting) (noting that plain statutory text should not be "cast aside . . . just because [judges] harbor 'doubt[s]' about what was going on in the heads of individual 'conferees' during the legislative process") (citation omitted). Now that the Ninth Circuit has entered the fray, certiorari is warranted in order to resolve the deep and intractable conflict among the circuits.

III. If the Court Finds the Statutory Language Ambiguous, It Could Grant Certiorari To Clarify the Scope of the Doctrine of *Chevron* Deference.

This case can be, and should be, readily decided, as the Fifth Circuit did in *Asadi*: on

the basis of the plain language of the statute. The Second Circuit's decision in *Berman* found ambiguity where there was none and rested its decision on generalities about the legislative process, doubts, and speculation. However, the petition also presents the Court with an opportunity to refine and limit *Chevron*, should it wish to do so.

Few doctrines have been as controversial in recent years as those applying various degrees of deference to the positions of federal administrative agencies. What was envisioned by supporters of the doctrine in past decades as a sensible delegation to an administrative agency made up of subject-matter experts is increasingly described as a threat to the separation of powers. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1221 (2014) (Thomas, J., concurring) ("When courts refuse even to decide what the best interpretation is under the law, they abandon the judicial check. That abandonment permits precisely the accumulation of governmental powers that the Framers warned against. *See* THE FEDERALIST NO. 47, at 302 (J. Madison).").

Increasingly, members of this Court and others have described some discomfort with the doctrine. *See, e.g., Michigan v. EPA*, 135 S. Ct. 2699, 2712-14 (2015) (Thomas, J., concurring)

(writing separately to note that *Chevron* deference "raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes."); *City of Arlington v. FCC*, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting) ("the danger posed by the growing power of the administrative state cannot be dismissed."); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (describing the *Chevron* doctrine as the "elephant in the room," allowing executive agencies to "swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."); *cf. Perez*, 135 S. Ct. at 1211-12 (Alito, J., concurring in part and concurring in the judgment) ("Heedless of the original design of the APA, we have developed an elaborate law of deference to agencies' interpretations of statutes and regulations. . . . The problem is bad enough, and perhaps insoluble if *Chevron* is not to be uprooted, with respect to interpretive rules setting forth agency interpretation of statutes."); *id.* at 1213-14 (Thomas, J., concurring).[7]

---

[7] Over the years, the academy has not been shy about criticizing the *Chevron* doctrine either. *See, e.g.*, Philip

Others have suggested pruning rather than eliminating the doctrine. *See, e.g., Egan v. Delaware River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring). In *Egan*, for example, Judge Jordan's concurrence gave the following examples of times when agency expertise is valuable: "the Federal Energy Regulatory Commission is well qualified to determine what is the 'just and reasonable' rate that utilities should pay when purchasing energy from other energy-producing facilities. Likewise, the Treasury Department is in a good position to say whether certain revenue qualifies as 'reserve strengthening.' And the Department of Energy can helpfully suggest whether 'oil produced from tar sands' includes oil produced using enhanced extraction techniques." *Id.* at

---

Hamberger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187 (2016); Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM L. REV. 1727 (2010); Jack M. Beerman, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010); Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 678-80 (2007); Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83 (1994).

281 (citations omitted). However, "[h]ighly specialized or technical matters are far different . . . than the legal matters on which federal courts are now routinely told, in the name of *Chevron*, to bow down and obey the executive branch." *Id.* at 281-82 (using as an example the Department of Labor's decision about which provision of the FMLA the court was "supposed to interpret . . . the rules of proof regarding such a claim and the kind of jury instruction that must be given. So much for the job of the judicial branch.").

So, too, here: the SEC in its regulation put aside the clear, unambiguous statutory definition ("whistleblower") that Congress said was to be used throughout the section, instead developing two separate definitions for "whistleblower," depending on which section of the statute contains the word. The SEC has no particular expertise in determining a statute's scope of coverage, and the statute's plain terms leave the SEC no leeway to change the meaning of "whistleblower." Yet the SEC did so, expanding the scope of the definition such that it is at odds with the statute.

The subject matter is important, the circuit split is mature and deep, and as Petitioner has noted, the dockets of the lower courts are filling up with such cases. Pet. 16-17. National

employers are faced with varying treatment of anti-retaliation plaintiffs turning solely on the incident of geography—in some circuits, those who have not reported alleged misconduct to the SEC may proceed under the Dodd-Frank Act, and in other circuits, they may not. In order to resolve the ensuing uncertainty and to assure a uniform approach across the nation, certiorari is warranted.

CONCLUSION

For the foregoing reasons and those stated by Petitioner, this Court should grant Digital's Petition for a Writ of Certiorari.

Respectfully submitted,

Richard J. Cino
Joseph C. Toris
JACKSON LEWIS P.C.
220 Headquarters Plaza
East Tower, 7th Floor
Morristown, NJ 07960
(973) 538-6890
CinoR@jacksonlewis.com

Collin O'Connor Udell
Counsel of Record
JACKSON LEWIS P.C.
90 State House Square
Eighth Floor
Hartford, CT 06103-3708
(860) 522-0404
Collin.udell@
jacksonlewis.com

Counsel for Amicus Curiae
Lime Energy Services Company

May 25, 2017