

**DEFINING THE WHISTLEBLOWER:
THE DIGITAL REALTY CASE AND PROPOSED LEGISLATION[†]**

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I. INTRODUCTION

[1] Whistleblowers have existed since ancient times, with the first known instance having been recorded in 695 A.D.¹ Early U.S. records indicate that in 1773 Benjamin Franklin provided evidence that the governor of Massachusetts misled Parliament to increase the military in the new world, resulting in the governor being dishonorably discharged and exiled.² In 1777, two U.S. naval officers reported the torture of British prisoners of war.³ More recently, an anonymous internal whistleblower at Apple disclosed privacy issues surrounding its voice assistant Siri, similar to the privacy issues discovered with Amazon's Alexa, when humans listened to recordings from these devices.⁴ Whistleblowers help shape corporate America by raising issues and righting wrongs discovered in the workplace.

[2] Whistleblowing is defined as “the disclosure by organization members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action.”⁵

¹ See *Whistleblowing History Overview*, WHISTLEBLOWERS INT'L (2020), <https://www.whistleblowersinternational.com/what-is-whistleblowing/history/> [<https://perma.cc/AUS8-LB93>] (discussing the beginnings of whistleblowing history).

² See *A Timeline of US Whistleblowers*, GOV'T ACCOUNTABILITY PROJECT, <https://whistleblower.org/timeline-us-whistleblowers/> [<https://perma.cc/56NF-8PG2>].

³ See *id.*

⁴ See Hannah Denham & Jay Greene, *Did You Say, 'Hey Siri'? Apple and Amazon Curtail Human Review of Voice Recordings*, WASH. POST (Aug. 2, 2019), <https://www.washingtonpost.com/technology/2019/08/02/apple-says-its-contractors-will-stop-listening-users-through-siri/?noredirect=on> [<https://perma.cc/2MPS-XS8E>].

⁵ Janet P. Near & Marcia P. Miceli, *Organizational Dissidence: The Case of Whistleblowing*, 4 J. Bus. Ethics 1, 4 (1985).

[3] As evidenced by the passage of many pieces of federal and state legislation regarding whistleblowers, all levels of government policy makers understand the importance of whistleblowing and seek to reap the benefits of whistleblowers.⁶ However, despite the many statutes designed to facilitate and protect whistleblowers, whistleblowers risk both their personal and professional reputations when they report wrongdoing.⁷ Although both federal and state laws may prohibit retaliation, many whistleblowers are later retaliated against by the very employers that they are trying to assist by disclosing wrongdoing.⁸ According to the Ethics & Compliance Initiative's Global Business Ethics Survey, more than one in three employees who reported misconduct experienced retaliation.⁹ The extreme cases of retaliation ruin the careers of the whistleblowers and even jeopardize their safety.¹⁰ Depending on the steps the whistleblower has taken in the process of disclosing the wrongdoing, some statutes may not even protect a whistleblower.¹¹

⁶ See Norman D. Bishara et al., *The Mouth of Truth*, 10 N.Y.U. J. L. & BUS. 37, 44 (2013).

⁷ See *The Whistleblower's Dilemma: Do the Risks Outweigh the Benefits?*, KNOWLEDGE @ WHARTON, (Nov. 5, 2019), <https://knowledge.wharton.upenn.edu/article/whistleblowers-in-business/> [<https://perma.cc/L27S-UG2N>].

⁸ See Bishara et al., *supra* note 6, at 56–57.

⁹ See *Global Business Ethics Survey: Measuring Risk and Promoting Workplace Integrity*, ECI (2016), <https://www.ethics.org/knowledge-center/2016-global-business-ethics-survey/> [<https://perma.cc/7567-5YZZ>].

¹⁰ See Tanya M. Marcum & Jacob Young, *Blowing the Whistle in the Digital Age: Are You Really Anonymous? The Perils and Pitfalls of Anonymity in Whistleblowing Law*, 17 DEPAUL BUS. & COM. L. J. 1, 19 (2019).

¹¹ See Bishara et al., *supra* note 6, at 64.

[4] In this article, we discuss federal legal protection for whistleblowers in Part II, analyze the *Digital Realty Trust, Inc. v. Somers*¹² case in Part III, and clarify the intent of the Dodd-Frank whistleblower legislation relative to the definition of a whistleblower in Part IV.¹³ In Part V, we examine why someone might choose to only report concerns internally, and finally, in Part VI, we suggest language needed to amend the Dodd-Frank Wall Street Reform and Consumer Protection Act to better align with the needs of whistleblowers.¹⁴

II. FEDERAL LEGAL PROTECTION FOR WHISTLEBLOWERS

[5] The statutory landscape that whistleblowers are faced with is piecemeal, without one main statute providing protection to whistleblowers, thus leading to confusion by both whistleblowers, their advisors, and researchers.¹⁵ Many federal and state statutes attempt to provide some protection to whistleblowers regarding anti-retaliation provisions.¹⁶ For example, two recent federal statutes seek to protect whistleblowers from retaliation and encourage employees to provide information regarding fraud and securities violations.¹⁷ The Sarbanes-Oxley Act of 2002 (SOX) provides protection to whistleblowers who report misconduct to the Securities and Exchange Commission or any other federal agency, Congress, or an internal supervisor.¹⁸ SOX was

¹² *Dig. Realty Tr. Inc. v. Somers*, 138 S. Ct. 767 (2018).

¹³ *See infra* Part IV.

¹⁴ *See infra* Part V; *infra* Part VI.

¹⁵ *See* Bishara et al., *supra* note 6, at 43.

¹⁶ *See id.* at 44.

¹⁷ *See* Marcum & Young, *supra* note 10, at 12.

¹⁸ *See* 18 U.S.C. §1514A(a)(1) (2010).

passed by Congress to remedy accounting fraud and other illegal business practices by large corporations in an attempt to reinstate trust in financial markets and to protect investors in public companies.¹⁹ Whistleblowers are protected against retaliation under SOX, which does not require the whistleblower to have disclosed the information about a potential violation to the SEC.²⁰ If the whistleblower experiences retaliation, SOX requires the whistleblower to file a complaint with the Secretary of Labor²¹ within 180 days of the act.²² If the Secretary of Labor does not issue a final decision within 180 days, the whistleblower can file a complaint with the federal district court for *de novo* review.²³ Whistleblowers can sue for “all relief necessary to make the employee whole.”²⁴

[6] The next law affecting corporate whistleblowers is the Dodd-Frank Wall Street Reform and Consumer Protection Act [Dodd-Frank], which did not repeal SOX but expanded its whistleblower protections and bounty program.²⁵ Dodd-Frank defines a whistleblower as “any individual who provides... information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the

¹⁹ See Todd W. Shaw, *Recent Development: When Text and Policy Conflict: Internal Whistleblowing Under the Shadow of Dodd-Frank*, 70 ADMIN. L. REV. 673, 678 (2018).

²⁰ See 18 U.S.C. § 1514A (2010).

²¹ See *id.* § 1514A(b)(1)(A).

²² See *id.* § 1514A(b)(2)(D).

²³ See *id.* § 1514A(b).

²⁴ *Id.* § 1514A(c)(1).

²⁵ See Geoffrey Christopher Rapp, *Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act*, 2012 BYU L. REV. 73, 85 (2012).

Commission.”²⁶ To further complicate matters for whistleblowers, Dodd-Frank provides three situations whereby whistleblowers are protected from retaliation.²⁷ The three situations are as follows: (1) providing information to the SEC in accordance with the whistleblower incentive section;²⁸ (2) “initiating, testifying in, or assisting in any investigation or judicial or administrative action of the [SEC] based upon or related to such information;”²⁹ or (3) making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002, the Securities Exchange Act of 1934, and any other law, rule, or regulation subject to the jurisdiction of the SEC.³⁰ Dodd-Frank provides protection for internal disclosures, disclosures made to a supervisor or a corporate compliance program, if the whistleblower also disclosed the information about the potential violation to the SEC.³¹ This follows the goal of Dodd-Frank to “promote the financial stability of the United States by improving accountability and transparency in the financial system.”³² To recover in a case of retaliation under Dodd-Frank, a whistleblower may sue the employer directly in federal court within six years of the alleged retaliation.³³

²⁶ 15 U.S.C. §78u-6(a)(6).

²⁷ *See id.* § 78u-6(h)(1)(A)(i)-(iii).

²⁸ *See id.* § 78u-6(h)(1)(A)(i).

²⁹ *Id.* § 78u-6(h)(1)(A)(ii).

³⁰ *See id.* § 78u-6(h)(1)(A)(iii).

³¹ *See Dig. Realty Tr. Inc. v. Somers*, 138 S. Ct. 767, 772 (2018).

³² Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010).

³³ *See* 15 U.S.C. §§ 78u-6(h)(1)(B)(i), 78u-6(h)(1)(B)(iii)(I)(aa).

[7] This difference in the definition of a whistleblower related to claims of retaliation has caused a split in the federal circuits.³⁴ The Fifth Circuit ruled that employees must first report to the SEC to sue under Dodd-Frank.³⁵ The Second Circuit reached the decision that employees need not report to the SEC in order for the Dodd-Frank protections to be applicable.³⁶ The Ninth Circuit agreed with the Fifth Circuit in the case of *Digital Realty Trust, Inc. v. Somers*.³⁷

III. ENTER THE U.S. SUPREME COURT AND THE DIGITAL REALTY CASE

[8] On February 21, 2018, the United States Supreme Court reached its final decision in the case of *Digital Realty Trust, Inc. v. Somers*.³⁸ The facts of the case focus on Paul Somers, a vice president of the Digital Realty Trust, who made several complaints to officers, directors, and managing agents of Digital Realty from 2010 to 2014 regarding several potential Securities and Exchange Commission [SEC] violations.³⁹ Somers believed that a senior vice president hid millions of dollars of cost overruns and eliminated internal controls.⁴⁰ These were all internal

³⁴ See *Asadi v. G.E. Energy U.S. LLC*, 720 F.3d 620, 623 (5th Cir. 2013); *Contra Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 147–148, 155 (2d Cir. 2015); and *Dig. Realty Tr.*, 138 S. Ct. at 776.

³⁵ See *Asadi*, 720 F.3d at 623.

³⁶ See *Berman*, 801 F.3d at 155.

³⁷ See *Dig. Realty Tr.*, 138 S. Ct. at 776.

³⁸ See *id.*

³⁹ See *id.* at 776.

⁴⁰ See Susan B. Heyman, *United States Supreme Court Surveys: 2017 Term: Digital Realty Trust v. Somers: Whistleblowers and Corporate Retaliation*, 24 ROGER WILLIAMS UNIV. L. REV. 78 (2019).

complaints, as he never reported to the SEC or any other federal agency.⁴¹ Somers was eventually terminated from employment; he then sued based on a violation of the Dodd-Frank Act, particularly the anti-retaliation provisions of §21F of the Act.⁴² His employer, Digital Realty Trust, Inc., defended their actions based on the fact that Somers had not reported his concerns to the SEC, and thus he was not technically a whistleblower as defined in the Dodd-Frank Act and therefore not entitled to protection from the Act's anti-retaliation provisions.⁴³ The U.S. District Court for the Northern District of California determined that an employee did not have to first report to the SEC to obtain whistleblower status and thus receive protection from retaliation.⁴⁴ It also determined that "the statutory scheme" was ambiguous, so it gave weight to the SEC rules.⁴⁵ On appeal, the Ninth Circuit affirmed the District Court's decision.⁴⁶ It reasoned that applying the statutory definition of a whistleblower to the third clause regarding retaliation would narrow it "to the point of absurdity."⁴⁷ The Ninth Circuit reasoned that the statute should be read in such a way that all whistleblowers who reported and were retaliated against would be protected regardless of a disclosure to the SEC.⁴⁸

⁴¹ *See Dig. Realty Tr.*, 138 S. Ct. at 776.

⁴² *See id.*

⁴³ *See id.* at 775–76.

⁴⁴ *See id.* at 776.

⁴⁵ *See id.*

⁴⁶ *See Somers v. Dig. Realty Tr. Inc.*, 850 F.3d 1045, 1047 (9th Cir. 2017).

⁴⁷ *See id.* at 1049.

⁴⁸ *See id.* at 1050.

[9] The U.S. Supreme Court granted certiorari on June 26, 2017 to resolve the split among the federal circuits.⁴⁹ Oral argument occurred on November 28, 2017.⁵⁰ The Supreme Court published its 9-0 decision on February 21, 2018, when Justice Ginsburg delivered the opinion of the Court, joined by Justices Roberts, Kennedy, Breyer, Sotomayor and Kagan.⁵¹ Justice Sotomayor filed a concurring opinion, in which Justice Breyer joined, and Justice Thomas also filed a concurring opinion, in which Justices Alito and Gorsuch joined.⁵² The final decision in *Digital Realty Trust v. Somers* was to reverse and remand the case back to the Ninth Circuit.⁵³

[10] The Court reasoned that the part of the Dodd-Frank Act that protected whistleblowers from retaliatory actions such as firing, demotion, or harassment only applied to those individuals who reported potential legal violations to the SEC.⁵⁴ Those individuals who used only internal reporting methods were not qualified as whistleblowers under the Dodd-Frank Act, and thus not entitled to protection under its anti-retaliation provisions.⁵⁵

[11] According to the decision, “Dodd-Frank’s text and purpose leave

⁴⁹ See *Digital Realty Trust, Inc. v. Somers*, OYEZ, <https://www.oyez.org/cases/2017/16-1276> [<https://perma.cc/RR5P-6SUJ>].

⁵⁰ See *id.*

⁵¹ See *Dig. Realty Tr., Inc. v. Somers*, 138 S.Ct. 767, 772 (2018).

⁵² See *id.*

⁵³ See *id.* at 782.

⁵⁴ See *id.* at 774.

⁵⁵ See *id.* at 776.

no doubt,” about who the term whistleblower applies to.⁵⁶ Because the employee did not report information to the SEC prior to his termination,⁵⁷ he did not fit into the definition of a whistleblower and thus did not qualify for protection from retaliation from his employer.⁵⁸ The employee was not eligible to seek relief under the statute.⁵⁹ The argument of interested parties and Somers was that this definition of a whistleblower only applied to the financial award program in the Dodd-Frank Act.⁶⁰ However, in the Court’s disagreement with this argument that ignored the statutory definition, Justice Ruth Bader Ginsburg wrote for the majority, “[t]he definition section of the statute supplies an unequivocal answer: A ‘whistleblower’ is ‘any individual who provides ... information relating to a violation of the securities laws to the Commission.’”⁶¹ This treatment of an individual who only internally reports information is “consistent with Congress’ aim to encourage SEC disclosure.”⁶² Since Congress included a reporting requirement in the law to seek protection from retaliation under the same law, courts cannot change those requirements.⁶³ The end result of the U.S. Supreme Court decision in the *Digital Realty Trust v. Somers* case is the shrinking of the number of individuals protected by Dodd

⁵⁶ *See id.* at 778.

⁵⁷ *See* 15 U.S.C. § 78 (2018).

⁵⁸ *See* *Dig. Realty Tr., Inc.*, 138 S. Ct. 767, 774.

⁵⁹ *See id.* at 770–71.

⁶⁰ *See id.* at 778.

⁶¹ *See id.* at 777.

⁶² *See* *Dig. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 780 (2018).

⁶³ *See id.* at 777.

Frank's protections against retaliation.⁶⁴

IV. STATUTORY INTENT

[12] Several *amicus curiae* briefs were filed in the case, some supporting the employer and some supporting the employee.⁶⁵ The National Whistleblower Center,⁶⁶ the United States of America, Ethical Systems, Inc., and the Taxpayers Against Fraud Education Fund filed *amicus* briefs in support of the employee's position that he qualified as a whistleblower within the ordinary meaning, "i.e. without any SEC-reporting requirement."⁶⁷ In addition, on October 17, 2017, Republican Senator Charles Grassley filed an *amicus curiae* brief in the *Digital Realty Trust* case.⁶⁸ Senator Grassley has a long history of supporting whistleblower legislation.⁶⁹ To this end, he "[h]as authored and promoted

⁶⁴ See Skyler Splinter, *Developments in Banking & Financial Law: 2018: X. What is Left of Dodd-Frank?*, 38 REV. BANKING & FIN. L. 117, 127 (2018).

⁶⁵ See, e.g., Brief of Amici Curiae New England Legal Found. & Associated Indus. of Massachusetts in Support of Petitioner, *Dig. Realty Tr., Inc. v. Somers*, 138 S.Ct. 767 (2018) (No. 16-1276) [hereinafter NEIF Brief].

⁶⁶ See Brief for the National Whistleblower Center, et al. as Amici Curiae in Support of Respondent, *Dig. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767 (2018), https://www.scotusblog.com/wp-content/uploads/2017/10/16-1276-bsac-The-National-Whistleblower-Center-et-al_.pdf [<https://perma.cc/VYP9-SHHE>].

⁶⁷ See *Dig. Realty Tr., Inc.*, No. 16-1276, slip op. at 12 (U.S. Feb. 21, 2018).

⁶⁸ See Brief of Senator Charles Grassley as Amicus Curiae in Support of Respondent, *Dig. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767 (2018) (No. 16-1276), <https://www.scotusblog.com/wp-content/uploads/2017/10/16-1276-bsac-Sen.-Grassley.pdf> [<https://perma.cc/J49D-CEJC>].

⁶⁹ See *id.* at 1.

in Congress numerous pivotal statutes that protect whistleblowers and incentivize them to help identify waste, fraud, and abuse in the American government and economy.”⁷⁰ Senator Grassley also co-authored SOX, supported the whistleblower provisions in Dodd-Frank, and worked with the drafters of Dodd-Frank.⁷¹ His position is that “the anti-retaliation provision of the [Dodd-Frank] statute protects those who report internally [and] to the Securities and Exchange Commission.”⁷² Senator Grassley’s brief argued that Digital Realty’s interpretation of Dodd-Frank’s §21F, clause (iii) was incongruously narrow compared to other statutory schemes regarding whistleblowers and severely discourages internal reporting.⁷³ It seems as though Senator Grassley was in a unique position as he was present when this legislation was passed, with an insider view as to Congress’s intent when Dodd-Frank was passed.⁷⁴

[13] The *amicus curiae* brief filed by the New England Legal Foundation and Associated Industries of Massachusetts, as well as the briefs filed by The Center for Workplace Compliance, Cato Institute, Chamber of Commerce of the United States of America, and Lime Energy Services Co. and Prestige Cruises International, all supported Digital Realty’s position that Dodd-Frank did not offer protection to individuals

⁷⁰ *Id.* at 2.

⁷¹ *See id.*

⁷² *Id.*

⁷³ See Theresa Gabaldon, *Argument Preview: Plain Talk About Dodd-Frank Whistleblowing*, SCOTUSBLOG (Nov. 21, 2017, 2:23 PM), <https://www.scotusblog.com/2017/11/argument-preview-plain-talk-dodd-frank-whistleblowing/> [<https://perma.cc/U4FY-E95S>].

⁷⁴ Press Release, Chuck Grassley, Grassley Urges SEC Chairman to Make Sure New Whistleblower Office is Effective (May 10, 2011).

that only internally reported potential wrongdoings and did not report to the SEC.⁷⁵ The above briefs' main argument was that the statutory language regarding the definition of a whistleblower was clear; to be a whistleblower, one must report to the SEC.⁷⁶ The brief argues that "[i]t is not for the courts to pass judgment on congressional line drawing of this sort. Nor is it a court's role to conform an unambiguous statute such as this one to the court's own notion of what Congress may have had in mind."⁷⁷ Others have commented on the need to legislatively correct the omission of protection for internal whistleblowers under Dodd-Frank as a result of the *Digital Realty Trust* Supreme Court decision.⁷⁸

V. INTERNAL WHISTLEBLOWERS

[14] The most important method used to discover internal wrongdoing is employee tips or when an employee engages in whistleblowing.⁷⁹

⁷⁵ See, NEIF Brief, *supra* note 65, at 3; see also *Dig. Realty Tr., Inc. v. Somers*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/digital-realty-trust-inc-v-somers/> [<https://perma.cc/3HEU-FV4C>] (showing similar briefs supporting Digital Realty's position were filed by The Center for Workplace Compliance, Chamber of Commerce of the United States of America, and Lime Energy Services Co. and Prestige Cruises International).

⁷⁶ See, e.g., NEIF Brief, *supra* note 65, at 3.

⁷⁷ *Id.* at 4.

⁷⁸ See generally Todd W. Shaw, *Recent Developments: When Text and Policy Conflict: Internal Whistleblowing Under the Shadow of Dodd-Frank*, 70 Admin. L. Rev. 673 (2018) (discussing the outcome in the *Digital Realty* case and considering a need to protect all internal whistleblowers by a legislative amendment to Dodd-Frank).

⁷⁹ See Marcum & Young, *supra* note 10, at 2.

Whistleblowing encourages corporate transparency.⁸⁰ Some believe that employers should have systems in place to allow for anonymous whistleblowing to encourage transparency and communication that is honest and effective.⁸¹ Internal whistleblowers “are efficient and inexpensive sources of feedback about organizational mistakes.”⁸² Most whistleblowers are motivated to report potential wrongdoings or violations of the law because of intrinsic factors like personal morals or a civic duty to report.⁸³ Some whistleblowers may be seeking self-preservation if they believe reporting will fix something negative that they have experienced.⁸⁴

A. Will Whistleblowers Whistle?

[15] The *Digital Realty Trust* decision creates many issues for internal whistleblowers besides the lack of protection against retaliation if the SEC is not notified of the alleged wrongdoing prior to the retaliation. First, “the *Digital Realty Trust* holding deprives attorney whistleblowers who comply

⁸⁰ See Jennifer M. Pacella, *Silencing Whistleblowers by Contract*, 55 AM. BUS. L.J. 261, 262 (2018).

⁸¹ See Antonio Vaccaro, *Serious About Fighting Corruption? How to Encourage Whistleblowing in Your Business*, FORBES (Dec. 6, 2018), <https://www.forbes.com/sites/iese/2018/12/06/serious-about-fighting-corruption-how-to-encourage-whistleblowing-in-your-business/#1c64bc872b9e> [<https://perma.cc/Y86W-9L6L>].

⁸² See Bishara et al., *supra* note 6, at 40.

⁸³ See Christine A. Ladwig, *A Sarbanes-Oxley and Dodd-Frank Triple Win Scenario: The Joint Benefit of an Internal-External Reporting Alliance for Corporations, Whistleblowers and Government*, 27(1) MIDWEST L. J. 79, 87 (2017).

⁸⁴ See Marlowe Doman, *Why Risk It? The Motivations of a Whistleblower*, THE COMPLIANCE & ETHICS BLOG (Oct. 16, 2014), <http://complianceandethics.org/risk-motivations-whistleblower/> [<https://perma.cc/5JNN-JZQ6>].

with their reporting obligations under the Sarbanes-Oxley Act by reporting up the ladder, but not disclosing confidential information to the SEC, from any recourse for retaliation under the Dodd-Frank Act.”⁸⁵ Although securities attorneys may be ineligible to receive rewards, they are mandated to report violations of securities laws to corporate legal counsel, CEOs, and perhaps the board of directors.⁸⁶ An attorney can use his or her discretion to make an external disclosure of information to the SEC of material violations that could cause investors large losses, to prevent perjury before the SEC, or where the attorney’s services were used to commit a material violation and to rectify such a violation.⁸⁷ The reporting to the SEC will be the exception and the up the ladder reporting will be the norm by attorneys, thus leaving no protection under Dodd-Frank because these attorneys will not meet the whistleblower definition under *Digital Realty Trust*.

[16] Second, the *Digital Realty Trust* decision may encourage employees to bypass corporate internal reporting procedures and go directly to the SEC. This will impact a corporation’s ability to resolve the fraud or potential securities violations without government involvement and may eliminate the ability of management to quickly resolve the problems.⁸⁸ According to the Ethics Resource Center, 92-percent of whistleblowers internally reported their concerns, with 82-percent reporting directly to their supervisor during the process.⁸⁹ Businesses

⁸⁵ See Heyman, *supra* note 40, at 95.

⁸⁶ See Jennifer M. Pacella, *Advocate or Adversary? When Attorneys Act as Whistleblowers*, 28 GEO. J. Legal Ethics 1027, 1030–31 (2015) (discussing the Sarbanes-Oxley Act reporting requirements for security attorneys).

⁸⁷ See 17 C.F.R. § 205.3(d) (2019).

⁸⁸ See Heyman, *supra* note 40, at 96.

⁸⁹ See ETHICS RES. CENTER, NATIONAL BUSINESS ETHICS SURVEY OF THE U.S. WORKFORCE 29 (2014) [hereinafter NBES).

would rather have the whistleblowing occur internally as it might prevent government involvement, bad publicity, potential fines, and other undesirable results.⁹⁰ To that end, some corporations have created sophisticated internal whistleblower systems to protect the identity of the whistleblower to encourage anonymous internal reporting.⁹¹

[17] Third, employees may choose to not come forth with information about observed wrongdoings. Several factors contribute to this: fear of retaliation by employers, long-term damage to their professional reputation, career damage, blacklisting, possibility of prison, harm to themselves or their families, and even death threats.⁹² Without anti-retaliation protections for employees who only use an internal reporting system, these individuals will struggle finding new employment.⁹³

[18] Fourth, some employers require employees to sign confidentiality agreements whereby the employees agree to waive any future whistleblower awards.⁹⁴ These types of agreements, although not

⁹⁰ See Tim Barnett, Daniel S. Cochran, & G. Stephen Taylor, *The Internal Disclosure Policies of Private-Sector Employers: An Initial Look at Their Relationship to Employee Whistleblowing*, 12 J. BUS. ETHICS 127, 128 (1993).

⁹¹ See Marcum & Young, *supra* note 10, at 2, 4–5.

⁹² See Leora F. Eisenstadt & Jennifer M. Pacella, *Whistleblowers Need Not Apply*, 55 AM. BUS. L. J. 665, 666–667 (2018); Marcum, *supra* note 10, at 21–22. See also NBES, *supra* note 89, at 45 (reporting that between 16% and 31% of whistleblowers claim that they experienced physical harm to their person or property in retaliation for reporting wrongdoing); Jean Lennane, *What Happens to Whistleblowers, and Why*, 6 SOC. MED. 249, 252 (2012).

⁹³ See Eisenstadt, *supra* note 92, at 669 (stating that two-thirds of whistleblowers seeking new employment have extreme difficulty finding new positions if their termination was due to blowing the whistle on their previous employer).

⁹⁴ See Pacella, *supra* note 80, at 272.

enforceable, intimidate employees and often dissuade them from contacting the SEC at all.⁹⁵ The *Digital Realty Trust* Supreme Court decision does nothing to assist with this problem.⁹⁶ If employees are intimidated from reporting due to these agreements, they may only report internally to their supervisor.⁹⁷ These employees are not protected from retaliation under Dodd-Frank.

B. Importance of Anonymity

[19] Despite affording the least protection, the first instinct for most whistleblowers is to report their concerns internally.⁹⁸ Given the high likelihood of retaliation against known whistleblowers, it is critical to ensure that all reporting channels have effective anonymity protections.⁹⁹ Although many U.S. laws refer to anonymity and confidentiality, all neglect to define key terms or outline objective measures for assessing a channel's effectiveness.¹⁰⁰

[20] Definitions for both anonymity and confidentiality have recently been proposed specifically for the whistleblowing context.¹⁰¹ A suggested

⁹⁵ *See id.*

⁹⁶ *See* *Dig. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 583 U.S. ____ (2018).

⁹⁷ *See, e.g., SEC: Companies Cannot Stifle Whistleblowers in Confidentiality Agreements*, SEC (Apr. 1, 2015), <https://www.sec.gov/news/pressrelease/2015-54.html> [<https://perma.cc/NE4E-ZCX2>] (discussing use of such agreements by KBR).

⁹⁸ *See* NBES, *supra* note 89, at 29.

⁹⁹ *See id.* at 12.

¹⁰⁰ *See* Marcum & Young, *supra* note 10, at 19.

¹⁰¹ *See id.* at 32.

definition for anonymity is “the state of being not identifiable within a set of potential whistleblowers, known as the anonymity set,”¹⁰² whereas confidentiality is when “the identity of the whistleblower will be known by at least one individual as a result of reporting wrongdoing.”¹⁰³

[21] Since whistleblowers cannot anonymously report to the SEC,¹⁰⁴ requiring whistleblowers to have reported to the SEC before they qualify for legal protection can actually increase the risk of retaliation. If a whistleblower can only report confidentially, the likelihood of identification by those who wish to retaliate increases.¹⁰⁵ For example, one commonly recommended method for external reporting to a government agency involves confidentially submitting claims through an attorney.¹⁰⁶ Unfortunately, there are several opportunities for a whistleblower to be identified when pursuing this method.¹⁰⁷

[22] First, the whistleblower’s interaction with the attorney can be monitored through physical or digital surveillance.¹⁰⁸ For example, if a

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *See id.* at 13–14.

¹⁰⁵ *See* Marcum & Young, *supra* note 10, at 32.

¹⁰⁶ *See id.* at 14.

¹⁰⁷ *See generally* *What is the Difference Between Internal and External Whistleblowing*, BERGER MONTAGUE, <https://bergermontague.com/internal-vs-external-whistleblower/> [<https://perma.cc/NCY3-57AL>] (detailing how the identity of a whistleblower using external reporting methods is usually released at some point throughout the process).

¹⁰⁸ *See generally* TOM DEVINE ET AL., *CAUGHT BETWEEN CONSCIENCE & CAREER: EXPOSE ABUSE WITHOUT EXPOSING YOUR IDENTITY* 42–44, 49 (2019) (describing how a whistleblower’s digital information and physical location can be under surveillance).

whistleblower has already reported concerns internally, he or she might be placed under surveillance by private investigators.¹⁰⁹ If the whistleblower is observed visiting a law firm that specializes in whistleblower law, it provides convincing evidence that the whistleblower is at least considering further action.¹¹⁰

[23] Similarly, a whistleblower can be identified through metadata if the organization can monitor his or her digital behavior, such as email or telephone activity.¹¹¹ Metadata is commonly referred to as “data about data” and can provide significant context to digital events.¹¹² For example, records showing an email sent or a phone number dialed by an employee under surveillance could reveal communication with the law firm. Even if the content of discussions between an attorney and client are not known, simply engaging in such communication can be enough to signal the general nature of the conversations.¹¹³

[24] Second, the rules of professional conduct require attorneys to

¹⁰⁹ See, e.g., Adriane Quinlan, *In Kenner, City Hall Hired Private Investigators to Follow Employees*, NOLA.COM (Oct. 3, 2013, 4:22 AM), https://www.nola.com/news/politics/article_675da18a-eb0b-5dde-abbe-f2d97c197052.html [<https://perma.cc/G6CH-8R7L>]; Kevin Kelleher, *How Whistleblowers Have Taken Down the Titans of American Business*, FORTUNE (Sept. 27, 2019), <https://fortune.com/2019/09/27/what-is-a-whistleblower-famous-examples-business/> [<https://perma.cc/WV3Z-QJ9Q>].

¹¹⁰ See generally BERGER MONTAGUE, *supra* note 107 (describing how whistleblowers will use law firms to consider further actions after their internal reporting methods have not been successful).

¹¹¹ See Marcum & Young, *supra* note 10, at 22.

¹¹² JENN RILEY, NAT'L INFO. STANDARDS ORG., UNDERSTANDING METADATA: WHAT IS METADATA, AND WHAT IS IT FOR? (2017), https://groups.niso.org/apps/group_public/download.php/17446/Understanding%20Metadata.pdf [<https://perma.cc/6VQT-FHQ4>].

¹¹³ See Marcum & Young, *supra* note 10, at 22.

determine whether a conflict of interest exists and to hold information learned from prospective clients in confidence.¹¹⁴ Therefore, these two rules effectively require whistleblowers to disclose their identity to attorneys since it would be impractical and highly irregular for an attorney to represent an unknown client. Furthermore, attorneys are prime targets for cyberattacks that can expose sensitive and privileged information.¹¹⁵ If such information is breached, a whistleblower's identity can be compromised. Therefore, to truly protect a whistleblower from retaliation, anonymity must be maintained throughout the entire whistleblowing process. Confidentiality afforded through an attorney-client relationship simply does not provide sufficient protection.

[25] As demonstrated by the *Digital Realty Trust* case, a failure to properly define or clearly stipulate the true intent of a statute can have disastrous consequences for those seeking protection under the law.¹¹⁶ Therefore, as Dodd-Frank and other whistleblower laws are amended, we encourage legislators to improve the language on anonymity and confidentiality. We also encourage lawmakers to expand the protections afforded to whistleblowers by removing restrictions on reporting channels. We argue that it is against the spirit of whistleblowing to disqualify a whistleblower from legal protections based upon the channel an individual elects to use.

¹¹⁴ MODEL RULES OF PROF'L CONDUCT r. 1.6, 1.18 (AM. BAR ASS'N 1983).

¹¹⁵ See Alan W. Ezekiel, *Hackers, Spies, and Stolen Secrets: Protecting Law Firms from Data Theft*, 26 Harv. J. L. & Tech. 649, 650 (2013).

¹¹⁶ See generally *Dig. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 583 U.S. ____ (2018) (limiting protection for whistleblowers to a narrow definition that only applies to dual reporters).

VI. A SIMPLE SOLUTION

[26] The Supreme Court decision in the *Digital Realty Trust* case will likely affect internal corporate compliance programs. “Employees at publicly traded companies, who inform their managers of potential violations, will be stripped of protection.”¹¹⁷ Employees who internally inform their managers and choose not to inform the SEC will no longer have protection from retaliation under Dodd-Frank.¹¹⁸ There may be a simple solution with legislation to include all whistleblowers.

[27] U.S. Senator Chuck Grassley has been an advocate for whistleblowers throughout his tenure.¹¹⁹ An *amicus curiae* brief was filed on his behalf in the *Digital Realty Trust* case.¹²⁰ Thus, it would be logical for him to propose legislation to overturn the harsh decision in the *Digital Realty Trust* case. The language in such legislation should suggest that employees who only report violations of securities laws and regulations to their supervisor or other person within the company in which they work should receive the same protections as those individuals who report the same violations to the SEC. Should this be proposed and passed by Congress, it would change the current state of the law that resulted from

¹¹⁷ Stephen Kohn, *Digital Trust v. Somers May Kill Corporate Compliance*, LAW360 (Sept. 21, 2017, 1:14 PM EDT), <https://www.law360.com/employment/articles/964208/digital-realty-trust-v-somers-may-kill-corporate-compliance> [<https://perma.cc/6A6W-UPHN>].

¹¹⁸ See *Dig. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 773, 583 U.S. ____ (2018).

¹¹⁹ See *Grassley Urges Esper to Take Action on Whistleblower Retaliation at DoD*, CHUCK GRASSLEY (Aug. 1, 2019), <https://www.grassley.senate.gov/news/news-releases/grassley-urges-esper-take-action-whistleblower-retaliation-dod> [<https://perma.cc/737R-GG47>] (reporting on a recent letter to the Department of Defense urging action on whistleblower retaliation cases).

¹²⁰ See Brief of Senator Charles Grassley as *Amicus Curiae* in Support of Respondent, *Dig. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 583 U.S. ____ (2018) (No. 16-1276).

the Supreme Court decision to now afford the anti-retaliation provisions of Dodd-Frank to all whistleblowers; those who report only internally, those who report only externally to the SEC, and those who report violations both internally and to the SEC. This is a pretty simple solution.

VII. CONCLUSION

[28] If society wishes to encourage whistleblowers to come forward and expose wrongdoing, we must trust whistleblowers' judgment in who they believe can best remedy the wrongdoing. Those who are subjected to retaliation should not be further harmed simply because they were unable to anticipate legal technicalities. Allowing such injustice to continue not only perpetuates their suffering, but discourages future whistleblowers from coming forward and allows wrongdoings to remain undetected, which harms society as a whole. To address the immediate problem, Congress should pass legislation to remedy the *Digital Realty Trust* decision. The suggested language should gain bi-partisan support in Congress. Although the whistleblower laws should all be combined into one statute to best serve the whistleblowers and employers, our proposed change to correct the results from the *Digital Realty Trust* case is a great place to start to protect internal whistleblowers from retaliation.