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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

JENNIFER DAVIES, an individual, Plaintiff, vs. BROADCOM CORPORATION, a California corporation, Defendant.	Case No. SACV15-928 AG (JCx) **NOTICE OF MOTION AND MOTION BY THE SECURITIES AND EXCHANGE COMMISSION TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF** Judge: Hon. Andrew J. Guilford Date: July 27, 2015 Time: 10 a.m. Crtrm.: 10D

The Securities and Exchange Commission (SEC or Commission), a non-party to this action, respectfully requests permission to file an *amicus curiae* brief in support of plaintiff Jennifer Davies.[1] The brief, a copy of which is attached at Exhibit A, addresses an important question concerning the proper interpretation of Section 21F(h)(1) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u-6. The SEC has consulted with counsel for each party**,** and neither party opposes the SEC's motion.[2]

In its pending motion to dismiss, defendant contends that Davies's Section 21F(h)(1) whistleblower employment retaliation claim fails as a matter of law because, in its view, the provision protects *only* individuals who have reported a potential securities law violation directly to the Commission prior to the alleged retaliation. As explained below, the Commission, through notice-and-comment rulemaking, has adopted a broader reading of the scope of Section 21F(h)(1)'s protections.

I. BACKGROUND

Section 21F, which was added by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), provides a number of measures to encourage individuals to step forward to disclose potential securities law violations. In particular, Section 21F authorizes the Commission to pay monetary awards to individuals who voluntarily provide information that leads

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[1] The federal government can file an *amicus* brief without consent of the parties or leave of the court on appeal (Fed. R. App. Proc. 29(a)). There is no corresponding provision for filing as *amicus* in a district court, but district courts in this Circuit have previously permitted *amicus* participation by non-parties where appropriate. *See, e.g.*, *Bear Valley Mut. Water Co. v. Salazar*, 2012 WL 5353353, at *6, (C.D. Cal. Oct. 17, 2012) (referencing earlier order granting non-party's motion to file *amicus* brief);

[2] Neither the Federal Rules of Civil Procedure nor this Court's Local Rules establish a time period for filing an *amicus* brief. If the Commission were seeking permission to intervene—since one of Broadcom's defenses is based on a statute administered by the SEC and regulations issued under that statute—then its motion would simply have to be "timely." Fed. R. Civ. Proc. 24(b)(2).

to a successful enforcement action, and prohibits employers from retaliating against individuals in the terms and conditions of their employment when the individuals engage in certain specified whistleblowing activities (collectively referred to as the "whistleblower program").

When the Commission issued its rules under Section 21F to implement the whistleblower program, it included a rule clarifying that the employment retaliation protections apply whenever an employee engages in any of the whistleblowing activities specified in Section 21F(h)(1) — including making a report of a potential securities law violation to a supervisor or compliance official at a public company — *irrespective of whether the employee separately reports the information directly to the Commission*. *See* 17 C.F.R. § 240.21F-2(b)(1). The Commission issued the clarifying rule to address a statutory ambiguity that exists as a result of considerable tension within the text of Section 21F.

Since the Commission issued its rule, a majority of the federal courts that have considered the interpretive issue have agreed with the Commission that the statutory language is ambiguous, and have deferred to the Commission's interpretation.[3]

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[3] *See Somers v. Digital Realty Trust, Inc.,* Case No. C-14-5180, 2015 WL 2354807, at *3-13 (N.D. Cal. May 15, 2015*). See also Nollner v. S. Baptist Convention, Inc.*, 852 F.Supp.2d 986, 993-95 (M.D. Tenn. 2012); *Bussing v. COR Clearing, LLC*, 20 F.Supp.3d 719, 728-35 (D. Neb. 2014); *Rosenblum v. Thomson Reuters (Markets) LLC*, 984 F.Supp.2d 141, 146-48 (S.D.N.Y. Oct. 25, 2013); *Ellington v. Giacoumakis*, 977 F.Supp.2d 42, 44-46 (D. Mass. 2013); *Genberg v. Porter*, 935 F.Supp.2d 1094, 1106-07 (D. Colo. 2013), *appeal dismissed in relevant part*, 566 Fed. App'x 719 (10th Cir. 2014); *Yang v. Navigators Grp., Inc.*, 18 F.Supp.3d 519, 531-34 (S.D.N.Y. 2014); *Kramer v. Trans-Lux Corp.*, 2012 WL 4444820, at *3-5 (D. Conn. Sept. 25, 2012); *Connolly v. Remkes*, 2014 WL 5473144, at *4-6 (N.D. Cal. Oct. 28, 2014); *Khazin v. TD Ameritrade Holding Corp.*, 2014 WL 940703, at *3-6 (D.N.J. Mar. 11, 2014), *aff'd on other grounds*, 773 F.3d 488 (3rd Cir. 2014); *Murray v. UBS Sec., LLC*, 2013 WL 2190084, at *2-7 (S.D.N.Y. May 21, 2013); *Egan v. TradingScreen, Inc.*, 2011 WL 1672066, at *3-5 (S.D.N.Y. May 4, 2011); *Peters v. Lifelock Inc.*, CV-14-00576-PHX-ROS (D. Ariz. Sept. 19, 2014), Dkt. # 47, Order, at 6-13 (attached hereto as Ex. C).

II. ARGUMENT

The Commission has a strong programmatic interest in demonstrating that its reasonable interpretation of Section 21F(h)'s ambiguous statutory language was a valid exercise of its broad rulemaking authority.[4] This interest arises for two related reasons. *First*, the rule helps protect individuals who choose to report potential violations internally in the first instance (*i.e.*, before reporting to the Commission), and thus is an important component of the overall design of the Commission's whistleblower program. *Second*, if the rule were invalidated, the Commission's authority to pursue enforcement actions against employers that retaliate against individuals who report internally would be substantially weakened.

The Commission respectfully submits that, as the primary federal securities regulator and the agency charged with administering the Congressionally-mandated whistleblower program, its explanation of the regulatory background and its analysis of the statutory text will aid the Court in ruling on defendant's Motion to Dismiss. Among other things, the brief thoroughly explains: (i) the importance of internal reporting as a means for deterring, detecting, and stopping unlawful conduct that may harm investors; (ii) the context and purposes for which Section 21F was enacted; and (iii) the Commission's reasonable exercise of its authority to issue rules and regulations implementing Section 21F(h) to resolve a statutory ambiguity inherent in that section.

III. REQUEST TO WAIVE FEDERAL AND LOCAL RULES OF CIVIL PROCEDURE REGARDING FORMAT AND LENGTH OF FILINGS

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[4] The Commission does not take a position on any other issues that may be presented in defendant's motion to dismiss or in this action. The motion to file as *amicus* is limited to the issue of whether an employee is required to make a report to the Commission before the alleged retaliation in order to pursue a claim under Section 21F(h)(1) and the regulations thereunder.

The *amicus* brief the Commission proposes to file was initially filed with the Second Circuit in *Berman v. Neo@Ogilvy LLC*, Case No. 14-4626, and conforms to that court's length, spacing, typeface, and other rules.[5] The SEC intends to make the identical legal arguments here as were made in the attached brief. Therefore, to the extent the brief does not conform to this Court's requirements, the SEC respectfully requests that the Court exercise its authority to waive these requirements and permit the brief to be filed in the identical format as attached to this motion. The SEC also asks that, if the Court does not grant this request, it be granted leave to revise the brief to conform to this Court's rules. The Commission also respectfully requests that the Court permit it to file the letter, attached hereto as Exhibit B, that it submitted to the Second Circuit on June 26, 2015, pursuant to Fed. R. App. P. 28(j), regarding the Supreme Court's recent decision in *King v. Burwell*, No. 14-114, 2015 WL 2473448 (S. Ct. June 25, 2015) (holding that challenged statutory language in the Affordable Care Act could not be viewed in isolation but must be read in light of the context and structure of the whole Act).

IV. CONCLUSION

For the foregoing reasons, the SEC respectfully requests that this Court: (1) permit the Commission to file an *amicus curiae* brief in support of the plaintiff; (2) waive the rules regarding format and length of filings; and (3) accept the attached brief (Ex. A) for filing, along with the attached Rule 28(j) letter (Ex. B) to the Second Circuit concerning *King v. Burwell*.

* * *

[5] The Commission was given permission to file a brief that exceeded the standard length of an appellate *amicus* brief. As filed, the brief has 8,660 words excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii)).

July 6, 2015

Respectfully submitted,

/s/ John W. Berry

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PROOF OF SERVICE

I am over the age of 18 years and not a party to this action. My business address is:

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On July 6, 2015, I caused to be served the document entitled **NOTICE OF MOTION AND MOTION BY THE SECURITIES AND EXCHANGE COMMISSION TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF, EXHIBITS A, B and C, and [PROPOSED] ORDER** on all the parties to this action addressed as stated on the attached service list:

☐ **OFFICE MAIL:** By placing in sealed envelope(s), which I placed for collection and mailing today following ordinary business practices. I am readily familiar with this agency's practice for collection and processing of correspondence for mailing; such correspondence would be deposited with the U.S. Postal Service on the same day in the ordinary course of business.

☐ **PERSONAL DEPOSIT IN MAIL:** By placing in sealed envelope(s), which I personally deposited with the U.S. Postal Service. Each such envelope was deposited with the U.S. Postal Service at Los Angeles, California, with first class postage thereon fully prepaid.

☐ **EXPRESS U.S. MAIL:** Each such envelope was deposited in a facility regularly maintained at the U.S. Postal Service for receipt of Express Mail at Los Angeles, California, with Express Mail postage paid.

☐ **HAND DELIVERY:** I caused to be hand delivered each such envelope to the office of the addressee as stated on the attached service list.

☐ **UNITED PARCEL SERVICE:** By placing in sealed envelope(s) designated by United Parcel Service ("UPS") with delivery fees paid or provided for, which I deposited in a facility regularly maintained by UPS or delivered to a UPS courier, at Los Angeles, California.

☐ **ELECTRONIC MAIL:** By transmitting the document by electronic mail to the electronic mail address as stated on the attached service list.

☒ **E-FILING:** By causing the document to be electronically filed via the Court's CM/ECF system, which effects electronic service on counsel who are registered with the CM/ECF system.

☐ **FAX:** By transmitting the document by facsimile transmission. The transmission was reported as complete and without error.

I declare under penalty of perjury that the foregoing is true and correct.

Date: July 6, 2015

/s/ John W. Berry
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Davies vs. Broadcom, et al.
United States District Court—Central District of California
Case No. SACV15-928 AG (JCx)

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EXHIBIT A

14-4626

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DANIEL BERMAN,

Plaintiff-Appellant,

v.

NEO@OGILVY LLC and WPP GROUP USA, INC.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION,
AMICUS CURIAE IN SUPPORT OF THE APPELLANT

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No. 14-4626

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DANIEL BERMAN,

Plaintiff-Appellant,

v.

NEO@OGILVY LLC and WPP GROUP USA, INC.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION,
AMICUS CURIAE IN SUPPORT OF THE APPELLANT

STATEMENT OF THE ISSUE

The Securities and Exchange Commission ("Commission"), after notice-and-comment rulemaking, issued a rule to clarify an ambiguity in the whistleblower employment anti-retaliation provisions in Section 21F(h)(1) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §78u-6(h)(1). The Commission's rule interpreted the anti-retaliation protections to extend to any individual who engages in the whistleblowing activities described in Section 21F(h)(1)(A), irrespective of whether the individual makes a separate report to the

Commission. Is the Commission's rule entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)?

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION AND SUMMARY OF ITS POSITION

The Commission—the agency principally responsible for the administration of the federal securities laws—submits this brief as *amicus curiae* pursuant to Fed. R. App. P. 29(a) to address an important securities law issue presented in this appeal.

Congress, in Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L. No. 111-203, 124 Stat. 1376, 1841-49 (2010), amended the Exchange Act to add Section 21F, entitled "Securities Whistleblower Incentives and Protection" and codified at 15 U.S.C. §78u-6. Section 21F directs the Commission to pay awards to individuals whose reports to the Commission about violations of the securities laws result in successful Commission enforcement actions, and prohibits employers from retaliating against individuals in the terms and conditions of their employment when they engage in certain specified whistleblowing activities. (The award program and anti-retaliation protections are referred to collectively herein as "the whistleblower program.")

In May 2011, at Congress's direction, the Commission issued final rules "implementing the provisions of Section 21F." *See* Dodd-Frank §924(a), 124 Stat.

at 1850. Throughout the rulemaking process, the Commission considered the "significant issue" of how to ensure that the whistleblower program does not undermine the willingness of individuals to make whistleblower reports internally at their companies before they make reports to the Commission. Securities Whistleblower Incentives and Protections ("Adopting Release"), 76 Fed. Reg. 34300, 34300, 34323 (June 13, 2011); Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 ("Proposing Release"), 75 Fed. Reg. 70488, 70488 (Nov. 17, 2010). The Commission's final rules were carefully calibrated to achieve this objective by providing "strong incentives" for individuals in appropriate circumstances to report internally in the first instance. Adopting Release at 34301, 34322.[1]

[1] The Commission recognized that internal reporting is not always appropriate, and the decision whether to do so (either prior to reporting to the Commission or at all) is best left for whistleblowers to determine based on the particular facts and circumstances. *See* Adopting Release at 34327. Among the considerations a whistleblower would likely consider are: (i) whether the employer has an anonymous reporting system; (ii) whether the potential misconduct involves upper-level management; (iii) whether the misconduct is still ongoing and poses a risk of sufficiently significant harm to investors that immediate reporting to the Commission is more appropriate; and (iv) whether the employer may be prone to bad faith conduct such as the destruction of evidence. *Id.* at 34326.

One of those rules—Exchange Act Rule 21F-2(b)(1), 17 C.F.R. §240.21F-2(b)(1)—is at issue in this litigation.[2] The Commission has a strong programmatic interest in demonstrating that the rule's reasonable interpretation of certain ambiguous statutory language was a valid exercise of the Commission's broad rulemaking authority under Section 21F. This interest arises for two related reasons. *First*, the rule helps protect individuals who choose to report potential violations internally in the first instance (*i.e.*, before reporting to the Commission), and thus is an important component of the overall design of the whistleblower program. *Second*, if the rule were invalidated, the Commission's authority to pursue enforcement actions against employers that retaliate against individuals who report internally would be substantially weakened.

STATEMENT OF THE CASE

A. The securities laws recognize that internal company reporting by employees and others is important for deterring, detecting, and stopping unlawful conduct that may harm investors.

Companies' processes for the internal reporting of violations of law and other misconduct "play an important role in achieving compliance with the securities laws." Adopting Release at 34325; *accord id.* at 34324. Among other things, these internal reporting processes can help companies to promptly identify, correct, and self-report unlawful conduct by officers, employees, or others

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[2] Each rule designated in this brief as Exchange Act Rule 21F-___ is codified at 17 C.F.R. §240.21F-___.

connected to the company. *See generally* Proposing Release at 70496. In this way, "reporting through internal compliance procedures can complement or otherwise appreciably enhance [the Commission's] enforcement efforts … ." Adopting Release at 34359 n.450; *see also* Report of Investigation Pursuant to Section 21(A) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, 2001 WL 1301408, at *1 (Oct. 23, 2001) ("When businesses seek out, self-report and rectify illegal conduct, and otherwise cooperate with Commission staff, large expenditures of government and shareholder resources can be avoided and investors can benefit more promptly.").[3]

Recognizing the significant role that internal company reporting can play, Congress for nearly two decades has enacted a series of amendments to the securities laws to encourage, and in some instances to require, internal reporting of potential misconduct. In 1995, Congress amended the Exchange Act to add Section 10A(b), entitled "Required Response to Audit Discoveries." *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, §301, 109 Stat. 737, 762-64. Section 10A(b) imposes a series of internal company disclosure obligations on a registered public accounting firm that, during the course of

[3] To be clear, as the Commission has advised, "while internal compliance programs are valuable, they are *not substitutes* for strong law enforcement." Adopting Release at 34326 (emphasis added).

conducting an audit of a public company required by the Exchange Act, discovers that an illegal act connected to the company has occurred.[4] Section 10A(b) describes a process of disclosure by the auditor to the Commission *after* the auditor's internal disclosures occur and certain other conditions are met, including a failure on the company's part to take an appropriate response.[5]

In 2002, Congress enacted the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"), Pub. L. No. 107-204, 116 Stat. 745, in response to "a series of celebrated accounting debacles"[6] involving companies such as Enron and WorldCom. As part of Sarbanes-Oxley, Congress enacted several additional provisions related to the internal company reporting of wrongdoing.[7] In Section 307, for example,

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4 This brief uses the term "public company" to refer to a company with a class of securities registered under Section 12 of the Exchange Act and those required to file reports under Section 15(d) of that Act.

5 An early version of the legislative proposal that became Section 10A would have required auditors to report immediately to the Commission. SEC Chairman John Shad testified before Congress at the time in opposition to such a reporting requirement. *See SEC and Corporate Audits (Part 6): Hearings on Detecting and Disclosing Financial Fraud Before Subcomm. on Oversight and Investigations of the Comm. on Energy and Commerce*, 99th Cong. 345 (1986) ("[W]hy not give management an opportunity to respond to suspicions and take corrective action?").

6 *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010).

7 A principal aim of Sarbanes-Oxley was to promote the establishment of robust internal corporate governance mechanisms and processes that could promptly identify and remedy violations. *See, e.g.*, Sarbanes-Oxley §404, 15

Congress directed the Commission to issue rules requiring attorneys appearing and practicing before the Commission in the representation of public companies "to report evidence of a material violation" of the securities laws or any "breach of fiduciary duty or similar violation by the company or any agent thereof" to specified company officials. Sarbanes-Oxley §307, 15 U.S.C. §7245. These attorneys are not required to make reports to the Commission and, indeed, may often be precluded from doing so as a result of their ethical obligations to their clients.[8] Similarly, Sarbanes-Oxley added Exchange Act Section 10A(m)(4), which required the Commission, by rule, to direct that national securities exchanges and national securities associations require that audit committees of listed companies establish internal company procedures allowing employees and others to submit complaints "regarding accounting, internal accounting controls, or auditing matters," and to report anonymously "concerns regarding questionable

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U.S.C. §7262 (requiring internal compliance systems and an annual audit by outside auditors).

[8] Only in limited situations—where an attorney reasonably believes it is "necessary" to report to the Commission to prevent a securities law violation that will cause substantial financial injury, or to correct past violations of similar severity where the attorney's services were used—*may* attorneys report evidence of a material violation to the Commission. 17 C.F.R. §205.3(d)(2). But even when such disclosure to the Commission is permitted, an attorney will typically need to report internally *first* in order to satisfy the requirement that disclosure to the Commission may be necessary.

accounting or auditing matters." *See* Sarbanes-Oxley §301, 116 Stat. at 775-77; 17 C.F.R. §240.10A-3(b)(3).

Further, Section 806 of Sarbanes-Oxley (as later amended by Dodd-Frank) prohibited public companies, certain related persons or entities, and nationally recognized statistical rating organizations from engaging in employment retaliation against an employee who makes certain whistleblower disclosures concerning, among other things, securities fraud (18 U.S.C. §1348), bank fraud (*id.* §1344), mail fraud (*id.* §1341), wire fraud (*id.* §1343), or any violation of a Commission rule or regulation. 18 U.S.C. §1514A(a). The whistleblower disclosures are protected if they are made to "a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)," or to Congress or certain governmental agencies (including the Commission). *Id.* §1514A(a)(1)(C).[9]

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9 The Commission has periodically adopted rules and regulations requiring internal reporting in certain circumstances either within or among regulated entities. *See, e.g.*, 17 C.F.R. §270.38a-1(a)(4) (requiring the chief compliance officer of a mutual fund to report the details of any material compliance matters to the fund's board); 17 C.F.R. §240.17a-5(h)(2) (requiring the auditor of a broker-dealer to report material inadequacies to the chief financial officer);17 C.F.R. §275.204A-1(a)(4) (requiring each investment adviser to establish a code of ethics requiring supervised persons to report any violations thereof to the chief compliance officer); 17 C.F.R. §275.206(4)-2(a)(6)(ii) (requiring each investment adviser to obtain an internal control report with respect to custody of client assets maintained by the investment adviser or an affiliate).

B. By providing new incentives and protections for individuals to engage in whistleblowing activity, the Dodd-Frank whistleblower program enhances the existing securities-law enforcement scheme, including internal company reporting.

As noted above, Dodd-Frank established the Commission's new whistleblower program in 2010 by adding Section 21F to the Exchange Act. Section 21F expressly authorized the Commission "to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section." Exchange Act §21F(j). In May 2011, the Commission used that broad authority to adopt final rules implementing both the monetary award and employment anti-retaliation aspects of the whistleblower program.

1. The Commission carefully calibrated the rules implementing the monetary award component of the whistleblower program to ensure that individuals were not disincentivized from first reporting internally.

Section 21F directs the Commission to pay awards, subject to certain limitations and conditions, to individuals who voluntarily provide the Commission with original information about a violation of the securities laws that leads to the successful enforcement of an action brought by the Commission resulting in monetary sanctions exceeding $1,000,000.[10] *See* Exchange Act §21F(a)-(c).

[10] As discussed *infra* Argument Part III, Section 21F also provides for awards where the same original information that led to a successful Commission enforcement action also led to a successful enforcement action by certain other

Further, Section 21F affords the Commission discretion to set the amount of each award within a range of 10 percent to 30 percent of the total monetary sanctions collected. *Id.*

A principal challenge the Commission faced in crafting rules to implement the award program was ensuring that employees and others were not dissuaded from reporting internally due to the possibility of a monetary award. *See* Proposing Release at 70488 (expressing the Commission's desire "not to discourage whistleblowers who work for companies that have robust compliance programs [from] *first* report[ing] the violation to appropriate company personnel") (emphasis added). Were this to happen, the Commission recognized, the result could be a reduction in the "effectiveness of a company's existing compliance, legal, audit and similar internal processes for investigating and responding to potential violations of the Federal securities laws," which in turn could weaken corporate compliance with the securities laws. *Id.* at 70488.[11] The Commission

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statutorily specified law enforcement and regulatory authorities, including the U.S. Department of Justice and the various self-regulatory organizations that are under the Commission's supervision (*e.g.*, FINRA).

[11] *Cf.* Proposing Release at 70516 (explaining that "allow[ing] a company a reasonable period of time to investigate and respond to potential securities laws violations (or at least begin an investigation) prior to [an individual making a report] to the Commission" is "consistent with the Commission's efforts to encourage companies to create and implement strong corporate compliance programs").

also recognized that "reporting through internal compliance procedures can complement or otherwise appreciably enhance [its] enforcement efforts in appropriate circumstances." Adopting Release at 34359 n.450.

> For instance, the subject company may at times be better able to distinguish between meritorious and frivolous claims, and may make such findings available for the Commission. This would be particularly true in instances where the reported matter entails a high level of institutional or company-specific knowledge and/or the company has a well-functioning internal compliance program in place. Screening allegations through internal compliance programs may limit false or frivolous claims, provide the entity an opportunity to resolve the violation and report the result to the Commission, and allow the Commission to use its resources more efficiently.

Id.[12]

Accordingly, the Commission "tailored the final rules to provide whistleblowers who are otherwise pre-disposed to report internally, but who may also be affected by financial incentives, with additional economic incentives to continue to report internally" in the first instance.[13] *Id.* at 34360. The final rules seek to do this in three principal ways:

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12 *See also* Proposing Release at 70516 (explaining that allowing individuals to first report internally "provides a mechanism by which some of th[e] erroneous [tips] may be eliminated before reaching the Commission," and that otherwise "a large number of tips of varying quality [could] caus[e] the Commission to incur costs to process and validate the information").

13 Many commenters during the rulemaking, particularly industry-affiliated commenters, urged the Commission to encourage or require individuals to report internally before reporting to the Commission. *See, e.g.*, Adopting Release at

- An individual "who reports internally can collect a whistleblower award from the Commission if his internal report to the company or entity results in a successful covered action." *Id.* (discussing Exchange Act Rule 21F-4(c)(3)).

- An individual "who *first* reports [pursuant] to an entity's internal whistleblower, legal, or compliance procedures for reporting allegations of possible violations of law and within 120 days reports to the Commission" will be treated for purposes of an award as "if [the submission to the Commission] had been made at the earlier internal reporting date." *Id.* at 34322 (emphasis added) (discussing Exchange Act Rule 21F-4(b)(7)). "This means that even if, in the interim, another whistleblower has made a submission that caused the [Commission's] staff to begin an investigation into the same matter, the [individual] who had first reported internally will be considered the first whistleblower who came to the Commission … ." *Id.*

- "In addition, the final rules provide that when determining the amount of an award, the Commission will consider as a plus-factor the whistleblower's participation in an entity's internal compliance procedures." *Id.* at 34360 (discussing Exchange Act Rule 21F-6(a)(4)).[14] The ability to adjust an award upward based on internal reporting, the Commission explained, would "allow [the Commission] to account for a reduced monetary sanction … where the internal reporting potentially resulted in a lower monetary sanction" because the company responded to the internal report by engaging in remediation, self-reporting and cooperating with the Commission. *Id.* at 34360 n.455.

Beyond the tailored financial incentives that the Commission crafted to encourage individuals to report internally in appropriate situations, the

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34326 n.230 (citing comment letters from, among others, the Business Roundtable and the U.S. Chamber of Commerce).

[14] Relatedly, the Commission's rules also provide that "a whistleblower's interference with internal compliance and reporting is a factor that can decrease the amount of an award." Adopting Release at 34301, 34331 (discussing Exchange Act Rule 21F-6(b)(3)).

final rules also require that officers, directors, trustees, and partners, as well as other specified personnel having internal audit or compliance responsibilities, must in certain instances *first* internally disclose the information about potential securities law violations and then wait 120 days before reporting the information to the Commission. *See* Exchange Act Rule 21F-4(b)(4). The Commission determined that this restriction was necessary to discourage "whistleblower submission[s] [that] might undermine the proper operation of internal compliance systems" that companies have established for responding to violations of law. Adopting Release at 34317.

2. Using its broad rulemaking authority, the Commission adopted a rule clarifying that employment retaliation is prohibited against individuals who engage in any of the whistleblowing activity described in Section 21F(h)(1)(A)(iii)—including making internal reports at public companies of securities fraud violations.

Section 21F(h)(1) is designed to protect employees who engage in certain specified whistleblowing activities. It does this in two significant ways.

First, subparagraph (A) seeks to *prevent* employment retaliation by placing employers on notice that they may not retaliate against employees who engage in certain whistleblowing activity. This is clear from the express terms of the subparagraph, which is drafted as a prohibition directed to employers:

> (A) In General. No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner

> discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—
>
> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 *et seq*.), this chapter [*i.e.*, the Exchange Act], including section 78j-1(m) of this title [*i.e.*, Section 10A(m) of the Exchange Act], section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.[15]

Second, subparagraphs (B) and (C) address the legal remedies that employees can pursue against employers who have failed to heed subparagraph (A)'s prohibition.[16]

The Commission, employing its broad rulemaking authority under Section 21F(j), adopted two clarifying rules related to the prohibition in subparagraph (A).

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[15] As discussed *infra* 19-20, the disclosures listed in clause (iii) include the internal company reporting disclosures described above in Part A.

[16] Subparagraph (B) provides a cause of action in federal district court for any "individual who alleges discharge or other discrimination in violation of subparagraph (A)." Exchange Act §21F(h)(1)(B)(i). Subparagraph (C) provides that relief in a successful action shall include reinstatement, two times back pay, compensation for litigation costs, expert witness fees, and reasonable attorneys' fees. *Id.* §21F(h)(1)(C).

The first rule expressly stated that the Commission possesses authority to bring civil enforcement actions and proceedings against employers who violate the retaliation prohibition. *See* Exchange Act Rule 21F-2(b)(2).

The second rule, Exchange Act Rule 21F-2(b)(1), clarified that the retaliation prohibition in subparagraph (A) protects any employee who engages in any of the whistleblowing activities specified in clauses (i)-(iii) above, irrespective of whether the employee separately reports the information to the Commission. It provides in pertinent part:

> For purposes of the anti-retaliation protections afforded by Section 21F(h)(1) of the Exchange Act (15 U.S.C. 78u-6(h)(1)), you are a whistleblower if:
>
> (ii) You provide that information in a manner described in Section 21F(h)(1)(A) of the Exchange Act (15 U.S.C. 78u-6(h)(1)(A)).

17 C.F.R. §240.21F-2(b)(1)(ii).

As the Commission explained in the adopting release, this rule reflects the fact that clause (iii) prohibits employers from retaliating against "individuals who report to persons or governmental authorities *other than the Commission*." Adopting Release at 34304 (emphasis in original). In particular, clause (iii) prohibits employers from retaliating against employees who make the "disclosures that are required or protected under the Sarbanes-Oxley Act" or the other securities laws, including the internal company disclosures described above in Part A. For example:

- Disclosures that Sarbanes-Oxley Section 307 requires attorneys for the public company to make to the company's general counsel regarding potential evidence of a material violation of the securities laws or a breach of fiduciary duty by a corporate director;

- Disclosures to an audit committee pursuant to Section 10A(m) of the Exchange Act concerning "questionable accounting or auditing matters" at a public company; and

- Disclosures protected under Sarbanes-Oxley Section 806 to a supervisor or compliance official at a public company concerning possible securities fraud, wire fraud, bank fraud, or mail fraud.

Significantly, by clarifying that the prohibition on employment retaliation extends to individuals who report internally in instances such as these (irrespective of whether they have reported to the Commission), Rule 21F-2(b)(1) complements the overall goal of the whistleblower program rulemaking to maintain incentives for individuals to first report internally in appropriate circumstances. In the adopting release, the Commission recognized that the prohibition on employment retaliation would help preserve these incentives for internal reporting, since "[e]mployees who report internally in this manner will have anti-retaliation employment protection to the extent provided for by [Section 21F(h)(1)(A)(iii)], which incorporates the broad anti-retaliation protections of Sarbanes-Oxley Section 806." Adopting Release at 34325 n.223. *See generally* Orly Lobel, *Lawyering Loyalties: Speech Rights and Duties Within Twenty-First-Century New Governance*, 77 FORDHAM L. REV. 1245, 1250 (2009)

("[I]nternal protections are particularly crucial in view of research findings that … employees are more likely to choose internal reporting systems.").

STANDARD OF REVIEW

"The interpretation of a statute by a regulatory agency charged with its administration is entitled to deference if it is a permissible construction of the statute." *Haekal v. Refco, Inc.*, 198 F.3d 37, 41 (2d Cir. 1999). *See also United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) ("administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority"). Consideration of whether an agency interpretation is permissible involves two steps. *First*, this Court considers whether there is an "unambiguously expressed intent of Congress" on "the precise question at issue." *McNamee v. Dep't of the Treasury*, 488 F.3d 100, 105 (2d Cir. 2007) (quoting *Chevron*, 467 U.S. at 842-43) (internal quotation marks omitted). A "fundamental ambiguity" arises where two statutory provisions present "seemingly categorical—and, at first glance, irreconcilable—legislative commands," thereby affording the agency discretion to "harmonize[]" the provisions. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661-73 (2007); *accord N.Y. Pub. Interest Research Group v. Whitman*, 321 F.3d

316, 327-29 (2d Cir. 2003); *Career College Ass'n v. Riley*, 74 F.3d 1265, 1271-72 (D.C. Cir. 1996).

Second, if the statute is silent or ambiguous with respect to the specific issue, this Court determines whether the agency's interpretation is reasonable, which means the interpretation is rational and not inconsistent with the statute. *See, e.g.*, *Sullivan v. Everhart*, 494 U.S. 83, 89 (1990). To find an agency's interpretation rational, this Court "need not conclude that the agency construction was the only one it permissibly could have adopted" or "even the reading [this Court] would have reached if the question initially had arisen in a judicial proceeding." *Mei Juan Zheng v. Holder*, 672 F.3d 178, 183-84 (2d Cir. 2012) (internal quotation omitted).

ARGUMENT

I. Section 21F does not unambiguously demonstrate a Congressional intent to restrict employment anti-retaliation protection to *only* those individuals who provide the Commission with information relating to a violation of the securities laws.

Congress did not unambiguously limit the employment anti-retaliation protections in Section 21F(h)(1) to only those individuals who provide the Commission with information relating to a securities law violation. Rather, there is ambiguity on this issue given the considerable tension between clause (iii) of Section 21F(h)(1)(A), which as discussed above lists a broad array of whistleblowing activity to entities and persons other than just the Commission, and Section 21F(a)(6), which defines "whistleblower."

To appreciate the significant tension between these two provisions, it is useful to first examine the language and structure of Section 21F(h)(1)(A). As quoted in full *supra* 13-14, Section 21F(h)(1)(A) prohibits an employer from retaliating against a whistleblower: (i) for "providing information to the Commission in accordance with this section"; (ii) for assisting in an investigation or action of the Commission "based upon or related to such information"; or (iii) for "making disclosures that are required or protected under" Sarbanes-Oxley, the Exchange Act, 18 U.S.C. §1513(e), "and any other law, rule, or regulation subject to the jurisdiction of the Commission."

As the quoted language makes evident, clauses (i) and (ii), together, protect individuals for whistleblowing to the Commission about securities law violations. But the anti-retaliation protection that clause (iii) affords reaches beyond just disclosures involving securities law violations and disclosures to the Commission. It covers, among other things, an employee's submission to a public company's audit committee about questionable accounting practices (including those questionable practices that do not rise to the level of a securities law violation) under Section 10A(m)(4) of the Exchange Act, or an in-house counsel's disclosure under Section 307 of Sarbanes-Oxley about a potential breach of the CEO's fiduciary duty.[17]

Yet, the interplay of Section 21F(h)(1)(A) with the definition of "whistleblower" in Section 21F(a)(6) may suggest a different result. Section 21F(h)(1)(A) protects "a whistleblower in the terms and conditions of employment," and Section 21F(a)(6) in turn defines a "whistleblower" as "any individual who provides … information relating to a violation of the securities law to the Commission." If Section 21F(a)(6)'s narrow whistleblower definition is read as a limitation on the overall scope of Section 21F(h)(1)(A), the disclosures protected under clause (iii) would be significantly restricted. Specifically, an individual would be protected for making one of the whistleblower disclosures identified in clause (iii) *only if* two preconditions are met:

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[17] The legislative history adds no clarity concerning Congress's intention in adding clause (iii) to Section 21F(h)(1)(A). Indeed, the provision was added relatively late in the Dodd-Frank legislative process; it was not included either in the original version of the bill that passed the House, *see* H.R. 4173, 111th Cong. §7203(a) (as passed Dec. 11, 2009), or in the version that initially passed the Senate, *see* H.R. 4173, 111th Cong. §922(a) (as passed May 20, 2010). The language first appeared in the base conference committee draft that the Senate in May 2010 approved for use in the Dodd-Frank conference committee, *see* H.R. 4173, 111th Cong. §922(a) (conference base text), and it remained in the final version of the committee bill that the House and Senate subsequently approved. Notably, the nearly identical statutory provision of Dodd-Frank that authorized a whistleblower program for the Commodity Futures Trading Commission does not include language comparable to clause (iii). *See* Dodd-Frank §748, 124 Stat. at 1743-44 (enacting employment anti-retaliation protections as new Section 23(h)(1) to the Commodity Exchange Act, codified at 7 U.S.C. §26(h)(1)).

(1) the individual has separately submitted that same information to Commission, and

(2) that information involves a securities law violation.

But this reading raises an immediate question: If Congress had actually intended to protect only those "required or protected" disclosures that satisfy these two conditions, why would Congress craft clause (iii) to unnecessarily suggest that it protects a much broader class of disclosures than it actually does? Surely Congress could have been more explicit and more direct if it in fact intended to protect only those disclosures that involve securities law violations, and only if the employee has made a separate disclosure to the Commission. *See Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014) ("[T]he presumption of consistent usage readily yields to context, and a statutory term—even one defined in the statute—may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.") (quotations omitted). *See also In re Air Cargo Shipping Servs. Antitrust Litig.*, 697 F.3d 154, 163 (2d Cir. 2012) (rejecting "mechanical use of a statutory definition that would destroy one of the major purposes of enacting the provision") (quotation omitted).

That Congress did not unambiguously intend such a result becomes apparent by considering the bizarre consequences that such a narrow reading produces. With one possible exception, clause (iii) becomes superfluous. If an employer knows that an individual has made a disclosure listed in clause (iii), such as an internal report about a potential securities fraud violation, and the employer is also aware that the individual has provided the same information to the Commission, then as a practical matter the individual will be protected from retaliation under clauses (i) and (ii). An employer will not be able to disaggregate the whistleblowing to the Commission from the internal whistleblowing so as persuasively to claim that any retaliation was solely in connection with the latter. Thus, where an employer knows that an individual has reported to the Commission, clauses (i) and (ii) would already sufficiently protect the individual from retaliation should the individual also wish to make the disclosures specified in clause (iii).

That leaves only one situation where clause (iii) might conceivably have independent utility—where the employer, unaware that the individual had already reported to the Commission, takes an adverse employment action against the employee for a disclosure listed in clause (iii). Although the Fifth Circuit has reasoned that this potential scenario saves clause (iii) from being superfluous under the narrow reading of Section 21F(h)(1)'s employment anti-retaliation protection, *Asadi v. G.E. Energy (U.S.A.), L.L.C.*, 720 F.3d 620, 627-28 (5th Cir. 2013), that is far from clear for two reasons. *First*, as discussed above, subparagraph (A) principally operates as a prohibition directed to employers; it seeks to *prevent* retaliation by placing employers on notice that they may not take adverse employment action against employees who engage in certain whistleblowing activity. But under the scenario posited by the *Asadi* court, clause (iii) would be utterly ineffective as a preventive measure. Put simply, because in this scenario employers would not know that a report was made to the Commission, clause (iii) would have no appreciable effect in deterring employers from taking adverse employment action for internal reports or the other disclosures listed in clause (iii).

Second, it is unlikely that an employee who suffers an adverse employment action in this situation could even rely on clause (iii) to successfully pursue a private action against the employer under Section 21F(h)(1)(B). Whether an individual's disclosures constitute a "protected activity" under the Fifth Circuit's narrow reading of clause (iii) would turn on whether the individual has made a separate disclosure to the Commission. But if an employer is genuinely unaware that the employee has separately disclosed to the Commission, any adverse employment action that the employer takes would appear to lack the requisite retaliatory intent—*i.e.*, the intent to punish the employee for engaging in a protected activity.[18] *Cf. Zann Kwan v. Andalex Group* LLC, 737 F.3d 834, 844 (2d

[18] As at least one district court has recognized, the alternative would be to construe the anti-retaliation provision to impose strict liability on an employer (*i.e.*, intent would not be an element of a retaliation claim). *See Liu v. Siemens, A.G.*, 978 F. Supp. 2d 325, 332 (S.D.N.Y. 2013), *aff'd on other grounds*, 763 F.3d 175 (2d Cir. 2014). But we are aware of no precedent for treating an employment anti-retaliation provision as a strict liability scheme.

Cir. 2013) (to establish employment retaliation claim, plaintiff must show "defendant's knowledge of the protected activity" and "a causal connection between the protected activity and the adverse employment action") (internal quotation omitted).[19]

This examination of the relevant statutory language demonstrates, at a minimum, considerable tension and inconsistency within the text, thus revealing that Congress did not unambiguously express an intent to limit the employment anti-retaliation protections under Section 21F(h)(1) to only those individuals who report securities law violations to the Commission.

Although the Fifth Circuit reached a contrary conclusion in *Asadi*, the court's holding that the statutory language compels the narrow reading described above is based on a flawed understanding of the statutory scheme. The court approached Section 21F as though its sole purpose is "to require individuals to report information to the SEC to qualify as a whistleblower." *Asadi*, 720 F.3d at 630. But this fails to consider the role that Section 21F occupies within the broader securities-law framework, particularly the internal reporting processes that

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[19] A further anomaly resulting from this interpretation is that the individual, in order to successfully maintain a retaliation claim, would be required to "out" himself as someone who reported information to the Commission. This conflicts with Congress's strong desire to shield a whistleblower's identity from public disclosure to the fullest extent possible. *See* Exchange Act §21F(h)(2) (confidentiality provisions); *see also id.* §21F(d)(2)(A) (permitting anonymous disclosures to the Commission).

Congress has previously established. As discussed *infra* Part II, the Commission reasonably chose to interpret clause (iii) of Section 21F(h)(1)(A) against that broader framework, construing the statute to afford the same employment anti-retaliation protections for individuals regardless of whether they report to the Commission under the new procedures established by Section 21F or instead make the disclosures "required or protected" under the other provisions of the securities laws.

The Fifth Circuit also erroneously believed that its interpretation was necessary to avoid rendering the private cause of action under Sarbanes-Oxley Section 806, "for practical purposes, moot." *Asadi*, 720 F.3d at 628. The court, after observing that clause (iii) covers the disclosures protected by Section 806, reasoned that "[i]t is unlikely … that an individual would choose to raise a [Sarbanes-Oxley] anti-retaliation claim instead of a Dodd-Frank whistleblower-protection claim" because: (i) Section 21F provides "for greater monetary damages because it allows for recovery of two times back pay, whereas [Section 806] provides for only back pay," and (ii) "the applicable statute of limitations is substantially longer for Dodd-Frank whistleblower-protection claims." *Id.* at 628-29.

But the Fifth Circuit ignored at least two countervailing advantages of a Sarbanes-Oxley Section 806 claim over a Dodd-Frank Section 21F claim:

- For individuals who want to avoid the burdens of pursuing the claim in court, including potential high litigation costs that they might bear if they do not prevail, actions under Section 806 may be attractive because the claims are heard (at least in the first instance) in an administrative forum at the Department of Labor ("DOL"). Moreover, DOL assumes responsibility for investigating the retaliation claim and preparing the evidence for an administrative law judge's review.[20]

- Depending on the nature of the injury, a claim under Section 806 may afford a greater recovery. Unlike Section 21F, Section 806 provides for "all relief necessary to make the employee whole" and for "compensation for any special damages." 18 U.S.C. §1514A(c)(1) & (c)(2)(C). This language has been held to authorize compensation for emotional distress and reputational harm.[21] Thus, individuals who have experienced minimal pay loss, but significant emotional injuries, may find Section 806 actions more attractive.

Finally, the Fifth Circuit expressed concern that any other reading of Section 21F "would read the words 'to the Commission' out of the definition of 'whistleblower' for purposes of the whistleblower-protection provision." *Asadi*, 720 F.3d at 628. But applying the Section 21F(a)(6) definition of whistleblower to Section 21F(h)(1)(A) makes the phrase "to the Commission" in clause (i) and the

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[20] DOL has delegated to its sub-agency the Occupational Safety and Health Administration ("OSHA") responsibility for receiving and investigating claims under Section 806. *See generally* 29 C.F.R. §1980. If OSHA finds the employee suffered retaliation, it may order immediate reinstatement. *Id.* §1980.105. OSHA's findings are subject to a *de novo* hearing before an administrative law judge and review by DOL's Administrative Review Board. *Id.* §§1980.106-110.

[21] *See Jones v. SouthPeak Interactive Corp.*, Nos. 13-2399, 14-1765, 2015 WL 309626, at *1 (4th Cir. Jan. 26, 2015) ("emotional distress damages are available" under Section 806); *Halliburton, Inc. v. Admin. Review Bd.*, No. 13-60323, 2014 WL 5861790, at *10 (5th Cir. Nov. 12, 2014) (per curiam) (Section 806 "affords noneconomic compensatory damages").

similar reference in clause (ii) superfluous. That either of two competing interpretations yields superfluous statutory language confirms that Congress did not speak unambiguously on the issue. *See Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2248 (2011) ("[T]he canon against superfluity assists only where a competing interpretation gives effect to every clause and word of a statute.") (quotation omitted).

II. In light of the ambiguity here, the Commission adopted a reasonable interpretation in Rule 21F-2(b)(1) that warrants judicial deference.

By adopting Exchange Act Rule 21F-2(b)(1) to specify what persons are whistleblowers for purposes of the anti-retaliation provisions, the Commission revealed its view that Section 21F(h)(1)(A) is best read as an implied exception to the definition of whistleblower in Section 21F(a)(6). *See, e.g.*, *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202, 2011 WL 1672066, at *5 (S.D.N.Y. May 4, 2011).[22] *See generally Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S.

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[22] Several other district courts have also shared the Commission's reading of Section 21F(h)(1)(A). *Connolly v. Remkes*, No. 5:14-CV-01344, 2014 WL 5473144, at *4-6 (N.D. Cal. Oct. 28, 2014); *Peters v. LifeLock Inc.*, No. 2:14-cv-00576, Dkt. 47, slip op. 6-13 (D. Ariz. Sept. 19, 2014); *Yang v. Navigators Group, Inc.*, No. 13-cv-2073, 2014 WL 1870802, at *10-13 (S.D.N.Y. May 8, 2014); *Khazin v. TD Ameritrade Holding Corp.*, No. 13-4149, 2014 WL 940703, at *3-6 (D.N.J. Mar. 11, 2014), *aff'd on other grounds*, 773 F.3d 488 (3d Cir. 2014); *Ahmad v. Morgan Stanley & Co.*, 2 F. Supp. 3d 491, 496 n.5 (S.D.N.Y. 2014); *Rosenblum v. Thomson Reuters (Markets) LLC*, 984 F. Supp. 2d 141, 146-48 (S.D.N.Y. 2013); *Ellington v. Giacoumakis*, 977 F. Supp. 2d 42, 44-46 (D. Mass. 2013); *Murray v. UBS Secs., LLC*, No. 12 Civ. 5914, 2013 WL 2190084, at *3-7 (S.D.N.Y. May 21, 2013); *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1106-07 (D.

193, 206-207 (2009) ("'Statutory definitions control the meaning of statutory words, of course, in the usual case. But this is not the usual case.") (quoting *Lawson v. Suwannee First & S.S. Co.*, 336 U.S. 198, 201 (1949)); *Philko Aviation, Inc. v. Shacket*, 462 U.S. 406, 411-12 (1985) (similar). The Commission thus promulgated Exchange Act Rule 21F-2(b)(1) to clarify that, "[f]or purposes of the anti-retaliation protections afforded by Section 21F(h)(1) of the Exchange Act, you are a whistleblower if … [y]ou provide that information in a manner described in Section 21F(h)(1)(A)."

In doing so, the Commission concluded "that the statutory anti-retaliation protections apply to three different categories of whistleblowers, and the third category [*i.e.*, clause (iii)] includes individuals who report to persons or governmental authorities *other than the Commission*." Adopting Release at 34304. The Commission explained that, accordingly, the anti-retaliation protections will

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Colo. 2013), *appeal dismissed in relevant part*, 566 Fed. App'x 719 (10th Cir. 2014); *Kramer v. Trans-Lux Corp.*, No. 11 Civ. 1424, 2012 WL 4444820, at *3-5 (D. Conn. Sept. 25, 2012); *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 993-95 (M.D. Tenn. 2012). *See also Bussing v. COR Clearing, LLC*, No. 8:12-cv-238, 2014 WL 2111207, at *5-13 (D. Neb. May 21, 2014); *Azim v. Tortoise Capital Advisors, LLC*, No. 13-2267, 2014 WL 707235, at *1-3 (D. Kans. Feb. 24, 2014), *objections overruled*, 2014 WL 4352069 (D. Kans. Sept. 2, 2014). *But see Verfuerth v. Orion Energy Sys., Inc.*, No. 14-C-352, 2014 WL 5682514, at *2-4 (E.D. Wisc. Nov. 4, 2014); *Englehart v. Career Educ. Corp.*, No. 8:14-cv-444, 2014 WL 2619501, at *3-9 (M.D. Fla. May 12, 2014); *Banko v. Apple, Inc.*, No. 13-02977, 2013 WL 7394596, at *3-6 (N.D. Cal. Sept. 27, 2013); *Wagner v. Bank of Am. Corp.*, No. 12-cv-00381, 2013 WL 3786643, at *4-6 (D. Colo. July 19, 2013), *aff'd on other grounds*, 571 Fed. App'x 698 (10th Cir. 2014).

extend to, among others, employees of public companies who make certain disclosures internally to "a person with supervisory authority over the employee or such other person working for the employer who has authority to investigate, discover, or terminate misconduct." *Id.*

The Commission's interpretation is reasonable because it resolves the statutory ambiguity in a manner that effectuates the broad employment anti-retaliation protections that clause (iii) contemplates. The Commission's interpretation is also reasonable because, by ensuring that individuals who report internally first will not be potentially disadvantaged by losing employment anti-retaliation protection under Section 21F, it better supports a core overall objective of the whistleblower rulemaking—avoiding disincentivizing individuals from reporting internally first in appropriate circumstances. By establishing parity between individuals who first report to the Commission and those who first report internally, the Commission's rule avoids a two-tiered structure of anti-retaliation protections that might discourage some individuals from first reporting internally in appropriate circumstances and, thus, jeopardize the benefits that can result from internal reporting, *supra* 4-5, 15-17. The Commission's decision to adopt this interpretation was reasonable in light of its view, based on its experience and expertise, that if internal compliance and reporting procedures "are not utilized or working, our system of securities regulation will be less effective." Proposing Release at 70500.[23]

Lastly, the Commission's interpretation was reasonable because it enhances the Commission's ability to bring enforcement actions when employers take adverse employment actions against employees for reporting securities law violations internally. A contrary result that narrowly cabined this enforcement authority to only those situations where the employee has separately reported to the Commission would significantly weaken the deterrence effect on employers who might otherwise consider taking an adverse employment action.[24]

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[23] Rule 21F-2(b)(1) also supports the whistleblower program by extending anti-retaliation protection to individuals who first report to designated authorities *other than the Commission*. Section 21F(b) & (c) authorize awards to such individuals under certain circumstances when their information leads to successful "related actions" by the other designated authorities. To facilitate this reporting, the Commission adopted Rule 21F-4(b)(7), under which individuals who first provide information to a designated authority and then within 120 days submit the same information to the Commission will be treated as though they reported to the Commission as of the date of the original report to the designated authority. Rule 21F-2(b)(1) ensures that individuals who follow this reporting approach will not lose anti-retaliation protection during the period prior to their report to the Commission.

[24] The Commission lacks such authority under Sarbanes-Oxley Section 806.

III. Failure to defer to Rule 21F-2(b)(1) could arbitrarily and irrationally deny the employment retaliation protections afforded by Dodd-Frank to individuals who, before coming to the Commission, *first* report potential securities law violations to the U.S. Department of Justice or Self-Regulatory Organizations such as FINRA.

Important law enforcement interests beyond the considerations connected to internal company reporting counsel in favor of deference to the interpretation in Rule 21F-2(b)(1). Congress in Section 21F sought to encourage individuals to make reports of misconduct not just to the Commission, but also to certain other law enforcement and regulatory authorities. As demonstrated below, this congressional purpose is revealed through both the award program and the employment retaliation protections.

Section 21F directs that, for any individual who is a meritorious whistleblower in a Commission enforcement action, the Commission shall pay a monetary award of 10 percent to 30 percent of the monetary sanctions collected in any "related action" if the same information that led to the successful prosecution of the Commission action also led to the successful prosecution of the related action. *See* Exchange Act §21F(b) & (c). A related action is "any judicial or administrative action brought by," among other entities, the U.S. Department of Justice ("DOJ"), the federal banking regulators (including the Board of Governors of the Federal Reserve System and the Comptroller of the Currency), and the various self-regulatory organizations ("SROs") that are subject to the jurisdiction and oversight of the Commission (such as FINRA and NYSE). Significantly, nothing in the provisions that establish the award program requires that an individual report to the Commission before or at the same time as reporting to any of these other authorities. So, for example, an individual who provides the FBI with original information about a potential securities law violation before reporting that same information to the Commission can recover a monetary award based on resulting successful Commission and related actions no differently than if he or she had reported the information to the Commission before going to the FBI.[25]

The employment retaliation protections afforded by clause (iii) of Section 21F(h)(1)(A), in turn, complement the related action component of the award program. Clause (iii) does this by prohibiting employment retaliation against individuals who make various types of disclosure to either the DOJ or the other federal government agencies that can bring related actions, as well as the SROs.[26]

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25 Under the 120-day look-back established by Exchange Act Rule 21F-4(b)(7), an individual who first makes the disclosure to the FBI or any of the other law enforcement or regulatory authorities that can pursue a related action, and within 120 days submits the same information to the Commission, will be treated for purposes of an award determination as if the submission to the Commission had been made on the date of the submission to the other authority.

26 Clause (iii) provides employment retaliation protection based on disclosures to DOJ and the other federal agencies by expressly incorporating the "disclosures that are required or protected under the Sarbanes-Oxley Act," which includes Sarbanes-Oxley Section 806. Section 806, in turn, prohibits employment retaliation based on certain disclosures of securities law violations to a "Federal regulatory or law enforcement agency." 18 U.S.C. §1514A(a)(1)(A).

In this way, the employment retaliation protections of Section 21F(h)(1)(A) are generally co-extensive with the award program: clauses (i) and (ii) provide employment retaliation protection for providing information to the Commission, which may lead to a successful Commission action for which an award may be paid, while clause (iii) affords employment retaliation protection for providing information to a law enforcement or regulatory authority *other than the Commission*, which may lead to a successful related action for which an award may be paid.[27]

Significantly, under the interpretation provided by the Commission's rule, individuals who report *first* to one of these other authorities before coming to the Commission are protected from employment retaliation under Section 21F(h)(1)(A) to the same degree as an individual who reports first to the Commission. In other words, Rule 21F-2(b)(1) represents a policy judgment that is fully consistent with the policy judgment that Congress established in writing the statutory award provisions. The award provisions express no preference in how individuals sequence their reporting as between the Commission and the other authorities. So too Rule 21F-2(b)(1) ensures that individuals receive the same

[27] We note that there is one exception to the general symmetry that exists within Section 21F between the related-action award provisions and the employment retaliation protections afforded by clause (iii). While the Commission may make an award for a related action that is a criminal matter brought by a state attorney general, clause (iii) does not cover disclosures made directly to state attorney generals.

employment retaliation protections regardless of whether they report to the Commission before or after reporting to the other authorities.

But were this Court to reject the Commission's interpretation and instead follow the Fifth Circuit's *Asadi* decision, an individual who decides to report first to one of the other authorities could be significantly more exposed to the risks of employment retaliation. For example, if an individual makes a report of securities fraud first to the FBI and is promptly fired before making a similar report to the Commission, he will be unable to invoke the enhanced employment retaliation protections of Section 21F and will have only the protections afforded by Sarbanes-Oxley Section 806 (assuming the individual is within the categories of employees covered by that provision).[28] Yet had this individual reported to the Commission first, he would have the protections of both Section 21F and Sarbanes-Oxley Section 806. There is no basis to believe that Congress would have intended this disparate treatment based purely on the happenstance of which agency the individual reported to first given the dual responsibility that the

[28] As noted in footnote 26, *supra*, Sarbanes-Oxley Section 806—in addition to protecting individuals against employment retaliation when they make internal reports of securities fraud and certain other violations—protects against employment retaliation when an individual makes a report to "a Federal regulatory or law enforcement agency." 18 U.S.C. §1514A(a)(1)(A).

Commission and DOJ have for the enforcement of the securities laws.[29] *See generally United States v. Wilson*, 503 U.S. 329, 334 (1992) (an interpretation that produces an "arbitrary" or "absurd" result should be avoided).

And the consequences of the *Asadi* decision are potentially even more severe for an individual who first reports to an SRO and is fired before being able to make a similar report to the Commission. Reports to SROs fall within the scope of clause (iii) of Section 21F(h)(1)(A) to the extent that such disclosures are "required or protected" by a Commission or SRO rule ("covered disclosure").[30] *See Bussing*, 20 F. Supp. 3d at 734-35 (disclosures required or protected by SRO rules are covered by clause (iii)). But Sarbanes-Oxley Section 806, by contrast, does not provide any employment retaliation protection for any disclosures made to SROs. Thus, if an individual makes a covered disclosure to an SRO and is fired before making the same disclosure to the Commission, that individual will not only have no legal recourse under Section 21F, but he will also have no recourse under

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[29] Generally speaking, the Commission has responsibility for pursuing civil actions for violations of the federal securities laws while DOJ possesses criminal enforcement authority.

[30] Section 21F(h)(1)(A)(iii) provides protection for any disclosure "required or protected" by a "rule or regulation *subject to the jurisdiction of the Commission*." Exchange Act §21F(h)(1)(A)(iii) (emphasis added). As explained in *Bussing*, 20 F. Supp. 3d at 732, 734-35, SRO rules are "subject to the jurisdiction of the Commission" for purposes of the employment retaliation protections of Section 21F(h)(1) because the Commission has statutory authority to approve or disapprove such rules. The Commission also possesses jurisdiction to review SRO disciplinary proceedings in which such rules are enforced.

Sarbanes-Oxley Section 806 (unlike the individual who first reports to DOJ). This result is deeply problematic because SROs by congressional design have long been "a vital element in the regulation of the securities industry," helping "enforce compliance by its members, and persons associated with its members, with the federal securities laws." *Request for Comment on NASDAQ Petition*, 68 Fed. Reg. 27722, 27722 (May 20, 2003). Given this vital SRO role, individuals frequently report violations of the securities laws to them in the first instance rather than coming directly to the Commission; so were this Court to adopt the *Asadi* approach, there is a real risk that individuals could expose themselves to retaliation without the benefit of the protections of Section 21F(h)(1)(A).

The interpretation that the Commission has advanced in Rule 21F-2(b)(1) prevents the arbitrary and irrational results identified above by ensuring that individuals experience no diminution in the employment retaliation protections afforded to them as a result of the sequence of their reporting. Accordingly, deference to the Commission's interpretation is warranted for this additional reason.

CONCLUSION

For the foregoing reasons, this Court should defer to the Commission's rule and hold that individuals are entitled to employment anti-retaliation protection if they make any of the disclosures identified in Section 21F(h)(1)(A)(iii) of the Exchange Act, irrespective of whether they separately report the information to the Commission.

Respectfully submitted,

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February 2015

STATUTORY ADDENDUM:

SECTION 21F(a)-(d), (h), (j) OF THE SECURITIES EXCHANGE ACT OF 1934, 15 U.S.C. §78u-6(a)-(d), (h), (j)

(a) Definitions. In this section the following definitions shall apply:

(1) Covered judicial or administrative action. The term “covered judicial or administrative action” means any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding $1,000,000.

(2) Fund. The term “Fund” means the Securities and Exchange Commission Investor Protection Fund.

(3) Original information. The term “original information” means information that--

(A) is derived from the independent knowledge or analysis of a whistleblower;

(B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and

(C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.

(4) Monetary sanctions. The term “monetary sanctions”, when used with respect to any judicial or administrative action, means--

(A) any monies, including penalties, disgorgement, and interest, ordered to be paid; and

(B) any monies deposited into a disgorgement fund or other fund pursuant to section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)), as a result of such action or any settlement of such action.

(5) Related action. The term “related action”, when used with respect to any judicial or administrative action brought by the Commission under the

securities laws, means any judicial or administrative action brought by an entity described in subclauses (I) through (IV) of subsection (h)(2)(D)(i) that is based upon the original information provided by a whistleblower pursuant to subsection (a) that led to the successful enforcement of the Commission action.

(6) Whistleblower. The term "whistleblower" means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.

(b) Awards

(1) In general. In any covered judicial or administrative action, or related action, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to--

(A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and

(B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.

(2) Payment of awards. Any amount paid under paragraph (1) shall be paid from the Fund.

(c) Determination of amount of award; denial of award

(1) Determination of amount of award

(A) Discretion. The determination of the amount of an award made under subsection (b) shall be in the discretion of the Commission.

(B) Criteria. In determining the amount of an award made under subsection (b), the Commission--

(i) shall take into consideration--

(I) the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action;

(II) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action;

(III) the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that lead to the successful enforcement of such laws; and

(IV) such additional relevant factors as the Commission may establish by rule or regulation; and

(ii) shall not take into consideration the balance of the Fund.

(2) Denial of award. No award under subsection (b) shall be made--

(A) to any whistleblower who is, or was at the time the whistleblower acquired the original information submitted to the commission, a member, officer, or employee of--

(i) an appropriate regulatory agency;

(ii) the Department of Justice;

(iii) a self-regulatory organization;

(iv) the Public Company Accounting Oversight Board; or

(v) a law enforcement organization;

(B) to any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under this section;

(C) to any whistleblower who gains the information through the performance of an audit of financial statements required under the securities laws and for whom such submission would be contrary to the requirements of section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1); or

(D) to any whistleblower who fails to submit information to the Commission in such form as the Commission may, by rule, require.

(d) Representation

(1) Permitted representation. Any whistleblower who makes a claim for an award under subsection (b) may be represented by counsel.

(2) Required representation

(A) In general. Any whistleblower who anonymously makes a claim for an award under subsection (b) shall be represented by counsel if the whistleblower anonymously submits the information upon which the claim is based.

(B) Disclosure of identity. Prior to the payment of an award, a whistleblower shall disclose the identity of the whistleblower and provide such other information as the Commission may require, directly or through counsel for the whistleblower.

. . .

(h) Protection of whistleblowers

(1) Prohibition against retaliation

(A) In general. No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower--

(i) in providing information to the Commission in accordance with this section;

(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

(B) Enforcement

(i) Cause of action. An individual who alleges discharge or other discrimination in violation of subparagraph (A) may bring an action under this subsection in the appropriate district court of the United States for the relief provided in subparagraph (C).

(ii) Subpoenas. A subpoena requiring the attendance of a witness at a trial or hearing conducted under this section may be served at any place in the United States.

(iii) Statute of limitations

(I) In general. An action under this subsection may not be brought--

(aa) more than 6 years after the date on which the violation of subparagraph (A) occurred; or

(bb) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the employee alleging a violation of subparagraph (A).

(II) Required action within 10 years. Notwithstanding subclause (I), an action under this subsection may not in any circumstance be brought more than 10 years after the date on which the violation occurs.

(C) Relief. Relief for an individual prevailing in an action brought under subparagraph (B) shall include--

(i) reinstatement with the same seniority status that the individual would have had, but for the discrimination;

(ii) 2 times the amount of back pay otherwise owed to the individual, with interest; and

(iii) compensation for litigation costs, expert witness fees, and reasonable attorneys' fees.

(2) Confidentiality

(A) In general. Except as provided in subparagraphs (B) and (C), the Commission and any officer or employee of the Commission shall not disclose any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower, except in accordance with the provisions of section 552a of Title 5, unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission or any entity described in subparagraph (C). For purposes of section 552 of Title 5, this paragraph shall be considered a statute described in subsection (b)(3)(B) of such section.

(B) Exempted statute. For purposes of section 552 of Title 5, this paragraph shall be considered a statute described in subsection (b)(3)(B) of such section 552.

(C) Rule of construction. Nothing in this section is intended to limit, or shall be construed to limit, the ability of the Attorney General to present such evidence to a grand jury or to share such evidence with potential witnesses or defendants in the course of an ongoing criminal investigation.

(D) Availability to Government agencies

(i) In general. Without the loss of its status as confidential in the hands of the Commission, all information referred to in subparagraph (A) may, in the discretion of the Commission, when determined by the Commission to be necessary to accomplish the purposes of this chapter and to protect investors, be made available to--

(I) the Attorney General of the United States;

(II) an appropriate regulatory authority;

(III) a self-regulatory organization;

(IV) a State attorney general in connection with any criminal investigation;

(V) any appropriate State regulatory authority;

(VI) the Public Company Accounting Oversight Board;

(VII) a foreign securities authority; and

(VIII) a foreign law enforcement authority.

(ii) Confidentiality

(I) In general. Each of the entities described in subclauses (I) through (VI) of clause (i) shall maintain such information as confidential in accordance with the requirements established under subparagraph (A).

(II) Foreign authorities. Each of the entities described in subclauses (VII) and (VIII) of clause (i) shall maintain such information in accordance with such assurances of confidentiality as the Commission determines appropriate.

(3) Rights retained. Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any whistleblower under any Federal or State law, or under any collective bargaining agreement.

. . .

(j) Rulemaking authority. The Commission shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section.

DECISIONAL ADDENDUM:

***Peters v. LifeLock Inc.*,**
No. 2:14-cv-00576, Dkt. 47 (D. Ariz. Sept. 19, 2014)

(unavailable on either Westlaw or LEXIS)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Michael D. Peters, Plaintiff, v. LifeLock Incorporated, et al., Defendants.	No. CV-14-00576-PHX-ROS **ORDER**

Plaintiff Michael D. Peters has sued his former employer, Defendant LifeLock, Inc. ("LifeLock"), for violating the whistleblower provisions of the Sarbanes-Oxley Act and the Dodd-Frank Act. Peters has also sued Cristy Schaan ("Schaan"), a former coworker, for defamation. LifeLock moves to dismiss the claim brought under the Dodd-Frank Act and Schaan moves to dismiss the defamation claim. Peters has also moved for judgment on the pleadings regarding one of the counterclaims brought against him by LifeLock. As set out below, Schaan will be dismissed but the Dodd-Frank Act claim and the counterclaim against Peters will be allowed to proceed.

BACKGROUND

According to his complaint, "Peters is an internationally recognized authority on information technology security." (Doc. 1 at 2). Sometime prior to 2013, Peters worked at a company now known as Vantiv. Peters left that position under disputed circumstances involving Peters and Vantiv entering into a "separation agreement." (Doc. 1 at 6). Peters subsequently obtained a different job in Georgia.

In 2013, Peters was working in Georgia when he was contacted by a recruiter regarding a position at LifeLock. Peters pursued the position by submitting an application. In his application, Peters stated he had resigned from Vantiv. (Doc. 1 at 6). After a lengthy interview process, LifeLock offered Peters the position of Chief Information Security Officer ("CISO"). Peters moved to Arizona and started work at LifeLock on July 1, 2013.

Upon starting work, Peters displaced Schaan who had been serving as the interim CISO. Schaan had applied for the CISO position but she was passed over in favor of Peters. Schaan allegedly was upset about being passed over and, the same day Peters started work, Schaan decided to conduct "her own private investigation of Peters' prior employment." (Doc. 1 at 8). Schaan emailed Kim Jones, an acquaintance who worked at Vantiv, and asked Jones "if he knew anything about Peters." Jones responded via email the next day. In that email, Jones stated:

- "Peters was fired from [Vantiv] and that he was walked out of the building without being allowed to return to his office to retrieve his personal belongings."
- "Peters's relationship building skills [are] virtually non-existent."
- "Peters has a reputation for being disingenuous in his promotional activities by overstating his accomplishments."
- "Peters engaged in inappropriate actions."

Schaan took no action with Jones' email at that time.

Shortly after starting work at LifeLock, Peters "began an initial risk assessment." (Doc. 1 at 3). During that assessment, Peters discovered "many instances of illegal and incompetent practices that constituted fraud against LifeLock's shareholders." Those instances of fraud included evidence that audits were not done, despite LifeLock representing otherwise, as well as LifeLock "manipulat[ing] the customer alerts sent to its elderly customers." (Doc. 1 at 4).

On July 9, 2013, Peters met with LifeLock's CFO Chris Power and discussed the initial assessment findings and the areas Peters found concerning. Power took no action.

A few days later, Peters met with his direct supervisor, LifeLock's chief information officer, Rich Stebbins. Again Peters expressed his concerns yet Stebbins did nothing. After these meetings, LifeLock's "upper management" decided to fire Peters. To do so, the "upper management directed Michelle Deutsch, LifeLock's in-house special counsel for labor and employment, to try and find grounds to terminate Peters's employment." (Doc. 1 at 6). Deutsch contacted Vantiv and "she was incorrectly told that Peters had been fired." Around this same time, Schaan "discovered that LifeLock was about to fire Peters." In an attempt to "seal Peters's fate," Schaan forwarded Stebbins the email she had received from Jones on July 2, 2013.

On July 29, 2013, LifeLock fired Peters. According to LifeLock, Peters was fired because he had "provided false information on his employment application" by claiming he resigned from Vantiv when, in fact, he had been fired. LifeLock also claimed Peters had engaged in inappropriate behavior by "'hit[ting] upon' a female employee." (Doc. 1 at 9). Peters alleges these reasons were false and "the real reason for his termination" was that he had "reported to his supervisors about the illegal, fraudulent, and incompetent business practices relating to fraud against shareholders that were occurring at LifeLock." (Doc. 1 at 9).

A few weeks after he was fired, Peters filed complaints against LifeLock with the Federal Trade Commission and the Securities and Exchange Commission. Peters also filed a "whistleblower complaint with the U.S. Department of Labor under the Sarbanes-Oxley Act." (Doc. 1 at 6). The Sarbanes-Oxley complaint remained pending for 180 days and, in early 2014, Peters filed this suit. The complaint alleges a whistleblower claim under the Sarbanes-Oxley Act as well as a whistleblower claim under the Dodd-Frank Act. The complaint also alleges a defamation claim against Schaan for forwarding the email she received from Jones.

Schaan responded to the complaint by seeking dismissal of the defamation claim. LifeLock answered the whistleblower claim under the Sarbanes-Oxley Act but seeks dismissal of the whistleblower claim under the Dodd-Frank Act. When answering

Peters' complaint, LifeLock asserted five counterclaims, including counterclaims for breach of contract and unjust enrichment. According to LifeLock, Peters made "material misrepresentations and omissions regarding his employment history" when he applied for the position with LifeLock. (Doc. 36 at 4). LifeLock relied on those misstatements and omissions when it made him an offer of employment. That offer included a signing bonus of $15,000 that would have to be repaid if Peters was terminated for cause during his first year. Peters received the signing bonus and has refused to repay it despite being terminated after only one month. LifeLock's breach of contract claim seeks to recover the signing bonus while the unjust enrichment claim "seeks full restitution of all salary and benefits LifeLock paid to Peters prior to the termination of his employment." (Doc. 36 at 3). Peters answered all the counterclaims but now moves for judgment on the pleadings regarding the unjust enrichment claim.

ANALYSIS

I. Standard for Motion to Dismiss and Judgment on the Pleadings

LifeLock and Schaan have filed motions to dismiss and Peters has filed a motion for judgment on the pleadings. The standard for evaluating these motions is the same. *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 n.4 (9th Cir. 2011). Under that standard, a claim must either be dismissed or judgment on the pleadings granted if it is not supported by "sufficient factual matter, accepted as true" to state a "plausible" claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This does not require "detailed factual allegations" but it does require "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. This is not a "probability requirement," but a requirement that the factual allegations show "more than a sheer possibility that a defendant has acted unlawfully." *Id.*

II. Defamation Claim Must be Dismissed

The sole basis for Peters' defamation claim against Schaan is her forwarding of Jones' email. Schaan argues the Communications Decency Act ("CDA"), 47 U.S.C. § 230, prevents her from being held liable for forwarding that email. Schaan is correct.

Passed in 1996, the CDA has "been widely and consistently interpreted to confer broad immunity against defamation liability for those who use the Internet to publish information that originated from another source." *Barrett v. Rosenthal*, 146 P.3d 510, 513 (Cal. 2006). The portion of the CDA conferring that immunity provides "[n]o . . . user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Based on the definition in the CDA, there is no question Jones qualified as an "information content provider." 47 U.S.C. § 23(f)(3) (defining "information content provider" as "any person . . . that is responsible . . . for the creation or development of information"). And while "user" is not defined in the CDA, it "plainly refers to someone who uses something, and the statutory context makes it clear that Congress simply meant someone who uses an interactive computer service." *Barrett*, 146 P.3d at 526. In light of this, Schaan was a "user" of an "interactive computer service" when she forwarded Jones' email. *See* 47 U.S.C. § 230(f)(2) (defining "interactive computer service"). Put together, these definitions mean Schaan cannot "be treated as the publisher or speaker" of the information contained in Jones' email. 47 U.S.C. § 230(c)(1). And that means Schaan cannot be liable for defamation based on forwarding Jones' email. *See Peagler v. Phoenix Newspapers, Inc.*, 560 P.2d 1216, 1222 (Ariz. 1977) (individual liable for defamation if she "*publishes* a false and defamatory communication") (emphasis added); 47 U.S.C. § 230(e)(3) (preempting state law inconsistent with CDA).

Peters attempts to avoid this straightforward conclusion by arguing it would frustrate a central purpose of the CDA to read its immunity provision as protecting individuals. (Doc. 28 at 7). But the CDA's immunity provision explicitly covers any "*user* of an interactive computer system." 47 U.S.C. § 230(c)(1) (emphasis added).

Peters offers no argument that Schaan does not qualify as a "user" as that term is used in the CDA. Therefore, his policy arguments are unconvincing. *See United States v. Aerojet Gen. Corp.*, 606 F.3d 1142, 1151 (9th Cir. 2010) (rejecting policy argument in light of unambiguous statutory language).

Peters also argues the CDA immunity provision should not apply because Schaan "instigat[ed]" the defamation and committed a "targeted move" by forwarding the email "to the one person she thought could cause the most harm to Peters." (Doc. 28 at 9). Peters does not explain how, assuming Schaan's behavior can be described in these terms, that behavior takes her outside the CDA's immunity. The CDA's immunity provision does not carve out exceptions for content "instigat[ed]" by another or content that is forwarded in a "targeted move." To be clear, under the facts alleged in the complaint, Schaan did not generate any defamatory statements herself when she first contacted Jones. Rather, she solicited an email from Jones and then forwarded that email without adding any defamatory statements of her own. If Schaan had added her own defamatory comments, the situation would be different.[1] But she did not. Thus, the CDA immunity provision applies and the defamation claim against Schaan must be dismissed.[2]

III. Dodd-Frank Act Claim is Plausible

LifeLock argues Peters cannot pursue a whistleblower claim under the Dodd-Frank Act because he was fired *before* he made any report to the Securities and Exchange Commission (the "Commission"). LifeLock has Fifth Circuit authority in its favor but many courts have criticized that opinion as adopting an overly restrictive view of the statutory language. Under the reading of the statute adopted by the vast majority of courts, Peters' internal complaints were sufficient to protect him from retaliatory

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[1] As noted in *Barrett*, "[a]t some point, active involvement in the creation of a defamatory Internet posting would expose a defendant to liability as an original source." 146 P.3d at 527 n.19. But Peters has not alleged Schaan had "active involvement" in Jones' email such that she could be deemed the original source of the email.

[2] Peters asks for leave to amend his complaint against Schaan. (Doc. 28 at 12). If Peters wishes to amend, he must file a motion to amend accompanied by his proposed amended pleading establishing a factual basis for avoiding the broad immunity provision.

discharge.

A. *Chevron* Analysis

Peters has asserted a claim under 15 U.S.C. § 78u-6(h), the provision of the Dodd-Frank Act protecting an employee from adverse employment actions when that employee engages in certain activities. Congress granted the Commission "authority to issue such rules and regulations as may be necessary or appropriate to implement" this provision. 15 U.S.C. § 78u-6(j). Pursuant to that authority, the Commission adopted a rule providing broad whistleblower protections to employees. 17 C.F.R. § 240.21F-2(b). Importantly, that rule states an employee may assert a retaliation claim under the Dodd-Frank Act even if the employee did not make a report to the Commission prior to the adverse employment action. LifeLock argues this rule is contrary to the plain language of the Dodd-Frank Act and the Court should not defer to it.

LifeLock's argument requires application of the familiar two-step framework contained in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). That framework requires the Court determine, using "the ordinary tools of statutory construction . . . whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *City of Arlington, Tex. V. FCC*, 133 S. Ct. 1863, 1868 (2013) (quotation omitted). Only when the statute can be deemed ambiguous must the Court proceed to the second step of determining whether the agency's interpretation "is based on a permissible construction of the statute." *Id.*

B. Statute is Ambiguous

Determining whether the statute is ambiguous requires the text of the statute be set out in some detail. The Dodd-Frank Act whistleblower provision begins by defining "whistleblower."

> The term "whistleblower" means any individual who provides . . . information relating to a violation of the securities laws to the Commission, in a manner established, by rule or

> regulation, by the Commission.

15 U.S.C. § 78u-6(a)(6). The scope of protection provided to a "whisteblower" is then set forth in subsection (h):

> (h) Protection of whistleblowers
>
> (1) Prohibition against retaliation
>
> (A) In general
>
> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—
>
> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

Upon first reading, there is an oddity when the statutory definition in subsection (a) is plugged into subsection (h). The statute defines a "whistleblower" as an individual who directly makes a report to the Commission. But subsection (h)(1)(A) then appears to ignore the definition in setting out the types of protected activity. Subsection (h)(1)(A)(i) first protects "providing information to the Commission" even though the very definition of "whistleblower" requires the individual provide information to the Commission. Subsection (h)(1)(A)(ii) then broadly protects "initiating, testifying in, or assisting in" Commission-related actions. Again, however, the definition itself would seem to protect such activities. Finally, subsection (h)(1)(A)(iii) protects a "whistleblower" when that individual makes "disclosures that are required or protected under the Sarbanes-Oxley Act of 2002." This last provision does not duplicate the coverage inherent in the statutory definition, but it raises its own set of problems because the Sarbanes-Oxley Act requires and protects a wide variety of disclosures *other* than reports to the Commission. Thus, an individual can make a disclosure "required or protected under the Sarbanes-Oxley Act" without ever contacting the Commission. The problem, therefore, is how to reconcile the statutory definition of "whistleblower" seemingly requiring a direct report to the Commission with the broader substantive protection set out in (h)(1)(A)(iii).

This problem has generated conflicting views of the statute. The Fifth Circuit is the only court of appeals to address the issue. In *Asadi v. G.E. Engergy (USA), LLC*, 720 F.3d 620, 626 (5th Cir. 2013), the court held the statutory definition of "whistleblower" and the protection provided in (h)(1)(A)(iii) "do not conflict." In the Fifth Circuit's view, the statute's repeated use of the term "whistleblower," instead of "individual" or "employee," is significant. *Id.* That is, by using the term "whistleblower" when describing the substantive protections, Congress was stressing that *only* whistleblowers, as defined by the statute, were protected. And under that definition, a report to the Commission *before* the adverse action is taken is an absolute prerequisite.

The Fifth Circuit acknowledged its reading raised the possibility that (h)(1)(A)(iii) was "superfluous" in that it would seem to duplicate the protection afforded in (h)(1)(A)(i) and (h)(1)(A)(ii). *Id.* at 627. But the Fifth Circuit concluded its reading of the statute did not render (h)(1)(A)(iii) superfluous because that section will provide protection "where the employer, unaware that the individual had already reported to the Commission, takes an adverse employment action against the employee for" a disclosure required or protected under the Sarbanes-Oxley Act. (Doc. 27 at 32) (amicus brief from SEC). In other words, (h)(1)(A)(i) protects an employee who reports to the Commission and the employer knows of that activity; (h)(1)(A)(ii) protects an employee who aids the Commission and the employer knows of that activity; and (h)(1)(A)(iii) protects an employee who makes an internal report and makes a report to the Commission, but the employer is not aware of the report to the Commission. This construction is not convincing for multiple reasons not addressed by the Fifth Circuit.

To start, the Fifth Circuit stressed its reading was necessary to avoid "read[ing] the words 'to the Commission' out of the definition of 'whistleblower' for purposes" of subsection (h). *Id.* at 628. In the Fifth Circuit's view, its reading was the only way to avoid violating the "surplusage canon [requiring] that every word is to be given effect." *Id.* The Fifth Circuit did not explain, however, how its reading does not independently violate the surplusage canon. According to the Fifth Circuit, Congress made it abundantly clear the statutory definition *must* be plugged into subsection (h). But doing so makes (h)(1)(A)(i) meaningless. That is, combining the statutory definition with (h)(1)(A)(i) results in an employee being protected from adverse employment actions when he "provides . . . information relating to a violation of the securities laws to the Commission," provided he then "provid[es] information to the Commission." The Fifth Circuit offered no explanation how this reading was sensible. In fact, the Fifth Circuit simply ignored the surplusage problem its reading created in its attempt to avoid that very problem.

The Fifth Circuit's approach also makes the Dodd-Frank's anti-retaliation provision unique from other anti-retaliation provisions by imposing something approaching strict liability for certain adverse employment actions. Under the Fifth Circuit's approach, an employee engages in "protected activity" under (h)(1)(A)(iii) by doing two things: making a report to the Commission and making another disclosure required or protected by Sarbanes-Oxley. An employee *must* engage in both activities to qualify for protection under (h)(1)(A)(iii). But an employer will not always know an employee has made a report to the Commission. Thus, an employer's retaliation liability under (h)(1)(A)(iii) will not depend on the employer's knowledge of protected activity. Instead, it will depend on whether the employee, unbeknownst to the employer, has made a report to the Commission. This would be contrary to other anti-retaliation provisions that require a causal link between the protected activity and the adverse employment action.[3] *Cf. Thomas v. City of Beaverton*, 379 F.3d 802, 812 n.4 (9th Cir. 2004) ("The employer's awareness of the protected activity is also important in establishing a causal link."). It is not sensible to conclude there would be a causal link between an employee's protected activity and an adverse employment action when the employer is not even aware protected activity occurred. *See Bussing v. COR Clearing*, LLC, 2014 WL 2111207, at *11 (D. Neb. May 21, 2014) (Fifth Circuit's interpretation "creates a peculiar standard of liability, in which liability for retaliation only attaches if certain preconditions—of which they are unaware—are satisfied"). At the very least, lowering the standard for retaliation liability in this way would represent a unique approach by Congress and would be contrary to the generally accepted deterrent purpose of anti-retaliation provisions. *Stiltner v. Beretta U.S.A. Corp.*, 74 F.3d 1473, 1491 (4th Cir. 1996) (Phillips, J., concurring in part and dissenting in part) (noting "fundamental purpose" of anti-retaliation provisions is "to impose a general deterrence upon the impulse of employers to retaliate for the exercise of statutory rights.").

Based on these problems, and others, the majority of district courts to address the issue have rejected the Fifth Circuit's reasoning. For the most part, those courts have not concluded the Dodd-Frank Act is clear. *But see Bussing*, 2014 WL 2111207, at *11 (finding statute unambiguously protects disclosures even absent reporting to the Commission). Rather, they have simply "concluded that the Dodd-Frank Act's

[3] LifeLock attempts to avoid this conclusion by arguing it is a "red herring." (Doc. 29 at 7). According to LifeLock, the "protected conduct" is the employee's internal report, provided he has already made a report to the Commission. But that does not address the issue. The problem remains that, according to the Fifth Circuit, an employer may be held liable under the anti-retaliation provision even though it does not know the employee has engaged in the conduct actually protected by the statute (*i.e.*, reporting to the Commission).

whistleblower provision is ambiguous on its face." *Khazin v. TD Ameritrade Holding Corp.*, 2014 WL 940703, at *5 (D.N.J. March 11, 2014). That facial ambiguity is based on (h)(1)(A)(iii) being "in direct conflict" with the statutory definition because (h)(1)(A)(iii) "provides protection to persons who have not disclosed information to the [Commission]." *Id.* (quotation omitted). The Court concludes this approach is persuasive.

Trying to plug the statutory definition of whistleblower into the substantive provisions creates a conflict. And that conflict creates serious "uncertainty of meaning or intention" regarding the reach of the statute. *Republic of Ecuador v. Mackay*, 742 F.3d 860, 865 (9th Cir. 2014) (quotation omitted). That is enough to deem the statute ambiguous. Therefore, the Court must proceed to the second step of the *Chevron* analysis.

C. The Commission's Interpretation is Permissible

The second step requires the Court determine whether the Commission's interpretation represents "a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Nat. Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). This step requires the Court determine "whether Congress has explicitly instructed the agency to flesh out specific provisions of the general legislation, or has impliedly left to the agency the task of developing standards to carry out the general policy of the statute." *Tovar v. United States Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993). If Congress explicitly instructed the agency to develop regulations, "a reviewing court must find the agency's construction permissible unless it is arbitrary, capricious, or manifestly contrary to the statute." *Id.* If Congress only impliedly deferred to the agency, "a court must uphold the agency's construction if it is reasonable." *Id.* The latter "reasonableness standard affords agencies less latitude than the arbitrary and capricious standard." *McLean v. Crabtree*, 173 F.3d 1176, 1181 (9th Cir. 1999). But even the reasonableness standard does not require the agency's construction be the only possible construction or the one the Court would reach on its own. *Id.*

The Dodd-Frank Act explicitly instructs the Commission "to issue such rules and regulations as may be necessary or appropriate to implement" the whistleblower provisions. 15 U.S.C. § 78u-6(j). This may qualify as an "explicit" statement such that the Commission's rule is subject to review under the arbitrary and capricious standard. But the parties do not discuss the different standards and apparently are content to rely on the reasonableness standard. Under that standard, the Court must defer to the Commission's rule unless the Court is "compell[ed] to reject" its construction of the statute based on it being either irrational or obviously inconsistent with the statute. *Leisnoi, Inc. v. Stratman*, 154 F.3d 1062, 1069 (9th Cir. 1998) (quotation omitted); *Haro v. Sebelius*, 747 F.3d 1099, 1115 (9th Cir. 2014) (quotation omitted).

The Commission's rule reads the statute as providing protection to employees who make only internal reports. Securities Whistleblower Incentives and Protections, 76 Fed Reg. 34300-01 (June 13, 2011) ("[T]he statutory anti-retaliation protections apply to three different categories of whistleblowers, and the third category includes individuals who report to persons or governmental authorities other than the Commission."). The only argument offered by LifeLock that this is not a permissible construction is that, given the plain language of the statute, the Commission's rule impermissibly expands the reach of the statute. As set forth above, the plain language of the statute is not clear. In fact, at least one court read the language of the statute as dictating the completely opposite result as that proposed by LifeLock. *Bussing*, 2014 WL 2111207, at *11 (finding protection for internal reports "flows from the statute itself, and it is not necessary to determine if deference to the SEC's construction of the statute is warranted"). In these circumstances, the Commission's rule seeking to clarify the reach of the statute is neither arbitrary and capricious nor unreasonable.

LifeLock does not contest that if its statutory construction is rejected, Peters has stated a claim under the Dodd-Frank Act. Therefore, LifeLock will be required to answer that claim.

IV. Claim for Unjust Enrichment is Plausible

Peters moves for judgment on the pleadings regarding LifeLock's unjust enrichment counterclaim. That counterclaim seeks to recover the salary and benefits Peters received during his one month of working at LifeLock. Peters' motion seems to invoke two separate arguments.[4] First, that the parties' contract prevents any resort to unjust enrichment. And second, Peters' retention of his "salary and benefits" cannot be "unjust" given that he performed services for the month he was employed. These arguments are addressed in turn.

Peters is correct that LifeLock cannot rely on an unjust enrichment claim if "a specific contract . . . governs the [parties'] relationship." *Brooks v. Valley Nat'l Bank*, 548 P.2d 1166, 1171 (Ariz. 1976). But LifeLock is seeking rescission of the parties' alleged contract. And unjust enrichment is a viable claim when a purported contract is not enforceable. *W. Corrections Group, Inc. v. Tierney*, 96 P.3d 1070, 1077 (Ariz. Ct. App. 2004) ("Quantum meruit damages are available when services are performed under an unenforceable contract . . . ."). Because the parties do not agree a contract governed their relationship, LifeLock can pursue an unjust enrichment claim. Of course, LifeLock cannot prevail on both its breach of contract and unjust enrichment counterclaims. *See Edward Greenbank Enters. Of Ariz. v. Pepper*, 538 P.2d 389, 391 (Ariz. 1975) (party may pursue claims for fraudulent inducement and breach of contract but cannot recover on both). But under the facts alleged in LifeLock's counterclaims, LifeLock can pursue both counterclaims past the pleading stage.

Peters is also correct that retention of his "salary and benefits" does not appear "unjust," a prerequisite to an unjust enrichment claim. *Murdock-Bryant Const. Inc. v. Pearson*, 703 P.2d 1197, 1203 (Ariz. 1985) ("Restitutionary relief is allowable only when

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[4] Peters also claims the unjust enrichment counterclaim should be dismissed because it is duplicative of the breach of contract counterclaim. LifeLock's breach of contract counterclaim seeks to recover the signing bonus provided to Peters while the unjust enrichment counterclaim seeks the "salary and benefits" LifeLock paid to Peters during his employment. Thus, the counterclaims are not duplicative. And even if they were, such duplication would not be a valid basis for dismissal because under Federal Rule of Civil Procedure 8(d), a party may assert claims in the alternative.

it would be inequitable or unjust for defendant to retain the benefit without compensating plaintiff.”). But LifeLock alleges it paid Peters’ salary and benefits based on his concealment of his “true qualifications or, rather, lack thereof.” (Doc. 36 at 6). In other words, LifeLock alleges it did not receive what it bargained for and it paid the salary and benefits under false pretenses. That is enough to proceed past the pleading stage.[5] *Cf. Dilek v. Watson Enters., Inc.*, 885 F. Supp. 2d 632, 649 (S.D.N.Y. 2012) (rejecting unjust enrichment claim brought by employer against employee because employer “had materially full knowledge of the facts it alleges about [Plaintiff’s] job performance”). Peters’ motion for judgment on the pleadings will be denied.

Accordingly,

IT IS ORDERED the Motion to Dismiss (Doc. 15) is **DENIED**.

IT IS FURTHER ORDERED the Motion to Dismiss (Doc. 21) is **GRANTED**. Defendant Cristy Schaan is **DISMISSED**.

IT IS FURTHER ORDERED the Motion for Leave to File Amicus Brief (Doc. 26) is **GRANTED**.

IT IS FURTHER ORDERED the Motion for Judgment on the Pleadings (Doc. 34) is **DENIED**.

IT IS FURTHER ORDERED the Stipulation of Dismissal (Doc. 41) is **GRANTED**. Defendant Kim Jones is **DISMISSED WITH PREJUDICE** with each party to bear his own attorneys’ fees, costs, and expenses.

Dated this 19th day of September, 2014.

Honorable Roslyn O. Silver
Senior United States District Judge

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[5] Whether LifeLock can recover the salary and benefits paid to Peters raises issues under Arizona’s law regarding payment of wages. At present, it is unclear how LifeLock plans on avoiding Arizona law regarding payment and withholding of wages. *See, e.g.*, A.R.S. § 23-352 (setting forth exclusive grounds for withholding wages). But that issue can be addressed through later motion, if appropriate.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count limitation that this Court established in its February 2, 2015 order in this appeal (Dkt. No. 48) because it contains 8,660 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-Point Times New Roman.

/s/ Stephen G. Yoder
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February 6, 2015

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on February 6, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Stephen G. Yoder

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February 6, 2015

EXHIBIT B

UNITED STATES
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June 26, 2015

VIA CM/ECF

Catherine O'Hagan Wolfe
Clerk of Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, New York 10007

Re: Berman v. Neo@Ogilvy LLC, No. 14-4626

Dear Ms. Wolfe,

Pursuant to FRAP 28(j), we write to advise the Court of *King v. Burwell*, No. 14-114, 2015 WL 2473448 (S. Ct. June 25, 2015). In construing a provision of the Affordable Care Act, the Supreme Court held that the challenged statutory language could not be viewed in isolation but must be read in light of the context and structure of the whole Act.

The decision is relevant for several reasons. *First*, the Court considered the fact that the Act's "three reforms [were designed to] *work together* to expand insurance coverage," which would not occur if the statutory phrase was narrowly construed. Slip op. at 16 (emphasis added). A similar structural consideration applies here; in Section 21F of the Exchange Act, three reforms—monetary awards, confidentiality protections, and enhanced employment retaliation protections—were designed to work together to encourage individuals to disclose wrongdoing. But the defendants' reading would produce a contrary result in many instances. For example, auditors who must first report internally before they can report to the Commission to qualify for an award, *see* Section 21F(c)(2)(C), would be left without Section 21F's employment retaliation protections in the interim.

Second, the Court considered the "odd" and "implausible" results that the petitioner's narrow reading would produce. Slip op. at 11 n.1, 17. Here, too, the defendants' reading would produce odd results:

- Section 21F(h)(1)(A)(iii), while written as a broad catchall provision, would be rendered virtually superfluous; and

- The defendants' reading would undermine decades of enactments intended to encourage individuals to report internally first in appropriate circumstances.

Finally, the Court explained that "examples of inartful drafting" in a massive statute weighed against the petitioner's reading of a phrase in isolation. Slip op. at 14. The same principle applies here given Section 21F's origin in the massive Dodd-Frank Act. For example, Section 21F(c)(2)(D) provides that awards cannot be made "to any *whistleblower* who fails to submit information to the Commission in such form as the Commission may" require, but this directly contradicts the definition of "whistleblower" in Section 21F(a)(6), which excludes any individual who fails to provide information in the form the Commission requires.

Respectfully yours,

/s William K. Shirey
William K. Shirey
Assistant General Counsel

Enclosure

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

KING ET AL. *v*. BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 14–114. Argued March 4, 2015—Decided June 25, 2015

The Patient Protection and Affordable Care Act grew out of a long history of failed health insurance reform. In the 1990s, several States sought to expand access to coverage by imposing a pair of insurance market regulations—a "guaranteed issue" requirement, which bars insurers from denying coverage to any person because of his health, and a "community rating" requirement, which bars insurers from charging a person higher premiums for the same reason. The reforms achieved the goal of expanding access to coverage, but they also encouraged people to wait until they got sick to buy insurance. The result was an economic "death spiral": premiums rose, the number of people buying insurance declined, and insurers left the market entirely. In 2006, however, Massachusetts discovered a way to make the guaranteed issue and community rating requirements work—by requiring individuals to buy insurance and by providing tax credits to certain individuals to make insurance more affordable. The combination of these three reforms—insurance market regulations, a coverage mandate, and tax credits—enabled Massachusetts to drastically reduce its uninsured rate.

The Affordable Care Act adopts a version of the three key reforms that made the Massachusetts system successful. First, the Act adopts the guaranteed issue and community rating requirements. 42 U. S. C. §§300gg, 300gg–1. Second, the Act generally requires individuals to maintain health insurance coverage or make a payment to the IRS, unless the cost of buying insurance would exceed eight percent of that individual's income. 26 U. S. C. §5000A. And third, the Act seeks to make insurance more affordable by giving refundable tax credits to individuals with household incomes between 100 percent and 400 percent of the federal poverty line. §36B.

In addition to those three reforms, the Act requires the creation of an "Exchange" in each State—basically, a marketplace that allows people to compare and purchase insurance plans. The Act gives each State the opportunity to establish its own Exchange, but provides that the Federal Government will establish "such Exchange" if the State does not. 42 U. S. C. §§18031, 18041. Relatedly, the Act provides that tax credits "shall be allowed" for any "applicable taxpayer," 26 U. S. C. §36B(a), but only if the taxpayer has enrolled in an insurance plan through "an Exchange established by the State under [42 U. S. C. §18031]," §§36B(b)–(c). An IRS regulation interprets that language as making tax credits available on "an Exchange," 26 CFR §1.36B–2, "regardless of whether the Exchange is established and operated by a State . . . or by HHS," 45 CFR §155.20.

Petitioners are four individuals who live in Virginia, which has a Federal Exchange. They do not wish to purchase health insurance. In their view, Virginia's Exchange does not qualify as "an Exchange established by the State under [42 U. S. C. §18031]," so they should not receive any tax credits. That would make the cost of buying insurance more than eight percent of petitioners' income, exempting them from the Act's coverage requirement. As a result of the IRS Rule, however, petitioners *would* receive tax credits. That would make the cost of buying insurance *less* than eight percent of their income, which would subject them to the Act's coverage requirement.

Petitioners challenged the IRS Rule in Federal District Court. The District Court dismissed the suit, holding that the Act unambiguously made tax credits available to individuals enrolled through a Federal Exchange. The Court of Appeals for the Fourth Circuit affirmed. The Fourth Circuit viewed the Act as ambiguous, and deferred to the IRS's interpretation under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837.

Held: Section 36B's tax credits are available to individuals in States that have a Federal Exchange. Pp. 7–21.

(a) When analyzing an agency's interpretation of a statute, this Court often applies the two-step framework announced in *Chevron*, 467 U. S. 837. But *Chevron* does not provide the appropriate framework here. The tax credits are one of the Act's key reforms and whether they are available on Federal Exchanges is a question of deep "economic and political significance"; had Congress wished to assign that question to an agency, it surely would have done so expressly. And it is especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort.

It is instead the Court's task to determine the correct reading of

Section 36B. If the statutory language is plain, the Court must enforce it according to its terms. But oftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, the Court must read the words "in their context and with a view to their place in the overall statutory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 133. Pp. 7–9.

(b) When read in context, the phrase "an Exchange established by the State under [42 U. S. C. §18031]" is properly viewed as ambiguous. The phrase may be limited in its reach to State Exchanges. But it could also refer to *all* Exchanges—both State and Federal—for purposes of the tax credits. If a State chooses not to follow the directive in Section 18031 to establish an Exchange, the Act tells the Secretary of Health and Human Services to establish "such Exchange." §18041. And by using the words "such Exchange," the Act indicates that State and Federal Exchanges should be the same. But State and Federal Exchanges would differ in a fundamental way if tax credits were available only on State Exchanges—one type of Exchange would help make insurance more affordable by providing billions of dollars to the States' citizens; the other type of Exchange would not. Several other provisions in the Act—*e.g.,* Section 18031(i)(3)(B)'s requirement that all Exchanges create outreach programs to "distribute fair and impartial information concerning . . . the availability of premium tax credits under section 36B"—would make little sense if tax credits were not available on Federal Exchanges.

The argument that the phrase "established by the State" would be superfluous if Congress meant to extend tax credits to both State and Federal Exchanges is unpersuasive. This Court's "preference for avoiding surplusage constructions is not absolute." *Lamie* v. *United States Trustee*, 540 U. S. 526, 536. And rigorous application of that canon does not seem a particularly useful guide to a fair construction of the Affordable Care Act, which contains more than a few examples of inartful drafting. The Court nevertheless must do its best, "bearing in mind the 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Utility Air Regulatory Group* v. *EPA*, 573 U. S. ___, ___. Pp. 9–15.

(c) Given that the text is ambiguous, the Court must look to the broader structure of the Act to determine whether one of Section 36B's "permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371.

Here, the statutory scheme compels the Court to reject petitioners' interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very "death spirals" that Congress designed the Act to avoid. Under petitioners' reading, the Act would not work in a State with a Federal Exchange. As they see it, one of the Act's three major reforms—the tax credits—would not apply. And a second major reform—the coverage requirement—would not apply in a meaningful way, because so many individuals would be exempt from the requirement without the tax credits. If petitioners are right, therefore, only one of the Act's three major reforms would apply in States with a Federal Exchange.

The combination of no tax credits and an ineffective coverage requirement could well push a State's individual insurance market into a death spiral. It is implausible that Congress meant the Act to operate in this manner. Congress made the guaranteed issue and community rating requirements applicable in every State in the Nation, but those requirements only work when combined with the coverage requirement and tax credits. It thus stands to reason that Congress meant for those provisions to apply in every State as well. Pp. 15–19.

(d) The structure of Section 36B itself also suggests that tax credits are not limited to State Exchanges. Together, Section 36B(a), which allows tax credits for any "applicable taxpayer," and Section 36B(c)(1), which defines that term as someone with a household income between 100 percent and 400 percent of the federal poverty line, appear to make anyone in the specified income range eligible for a tax credit. According to petitioners, however, those provisions are an empty promise in States with a Federal Exchange. In their view, an applicable taxpayer in such a State would be *eligible* for a tax credit, but the *amount* of that tax credit would always be zero because of two provisions buried deep within the Tax Code. That argument fails because Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457. Pp. 19–20.

(e) Petitioners' plain-meaning arguments are strong, but the Act's context and structure compel the conclusion that Section 36B allows tax credits for insurance purchased on any Exchange created under the Act. Those credits are necessary for the Federal Exchanges to function like their State Exchange counterparts, and to avoid the type of calamitous result that Congress plainly meant to avoid. Pp. 20–21.

759 F. 3d 358, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which KEN-

NEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 14–114

DAVID KING, ET AL., PETITIONERS *v.* SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

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

[June 25, 2015]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Patient Protection and Affordable Care Act adopts a series of interlocking reforms designed to expand coverage in the individual health insurance market. First, the Act bars insurers from taking a person's health into account when deciding whether to sell health insurance or how much to charge. Second, the Act generally requires each person to maintain insurance coverage or make a payment to the Internal Revenue Service. And third, the Act gives tax credits to certain people to make insurance more affordable.

In addition to those reforms, the Act requires the creation of an "Exchange" in each State—basically, a marketplace that allows people to compare and purchase insurance plans. The Act gives each State the opportunity to establish its own Exchange, but provides that the Federal Government will establish the Exchange if the State does not.

This case is about whether the Act's interlocking reforms apply equally in each State no matter who establishes the State's Exchange. Specifically, the question presented is whether the Act's tax credits are available in States that have a Federal Exchange.

I

A

The Patient Protection and Affordable Care Act, 124 Stat. 119, grew out of a long history of failed health insurance reform. In the 1990s, several States began experimenting with ways to expand people's access to coverage. One common approach was to impose a pair of insurance market regulations—a "guaranteed issue" requirement, which barred insurers from denying coverage to any person because of his health, and a "community rating" requirement, which barred insurers from charging a person higher premiums for the same reason. Together, those requirements were designed to ensure that anyone who wanted to buy health insurance could do so.

The guaranteed issue and community rating requirements achieved that goal, but they had an unintended consequence: They encouraged people to wait until they got sick to buy insurance. Why buy insurance coverage when you are healthy, if you can buy the same coverage for the same price when you become ill? This consequence—known as "adverse selection"—led to a second: Insurers were forced to increase premiums to account for the fact that, more and more, it was the sick rather than the healthy who were buying insurance. And that consequence fed back into the first: As the cost of insurance rose, even more people waited until they became ill to buy it.

This led to an economic "death spiral." As premiums rose higher and higher, and the number of people buying insurance sank lower and lower, insurers began to leave the market entirely. As a result, the number of people without insurance increased dramatically.

This cycle happened repeatedly during the 1990s. For example, in 1993, the State of Washington reformed its individual insurance market by adopting the guaranteed issue and community rating requirements. Over the next three years, premiums rose by 78 percent and the number of people enrolled fell by 25 percent. By 1999, 17 of the State's 19 private insurers had left the market, and the remaining two had announced their intention to do so. Brief for America's Health Insurance Plans as *Amicus Curiae* 10–11.

For another example, also in 1993, New York adopted the guaranteed issue and community rating requirements. Over the next few years, some major insurers in the individual market raised premiums by roughly 40 percent. By 1996, these reforms had "effectively eliminated the commercial individual indemnity market in New York with the largest individual health insurer exiting the market." L. Wachenheim & H. Leida, The Impact of Guaranteed Issue and Community Rating Reforms on States' Individual Insurance Markets 38 (2012).

In 1996, Massachusetts adopted the guaranteed issue and community rating requirements and experienced similar results. But in 2006, Massachusetts added two more reforms: The Commonwealth required individuals to buy insurance or pay a penalty, and it gave tax credits to certain individuals to ensure that they could afford the insurance they were required to buy. Brief for Bipartisan Economic Scholars as *Amici Curiae* 24–25. The combination of these three reforms—insurance market regulations, a coverage mandate, and tax credits—reduced the uninsured rate in Massachusetts to 2.6 percent, by far the lowest in the Nation. Hearing on Examining Individual State Experiences with Health Care Reform Coverage Initiatives in the Context of National Reform before the Senate Committee on Health, Education, Labor, and

Pensions, 111th Cong., 1st Sess., 9 (2009).

B

The Affordable Care Act adopts a version of the three key reforms that made the Massachusetts system successful. First, the Act adopts the guaranteed issue and community rating requirements. The Act provides that "each health insurance issuer that offers health insurance coverage in the individual . . . market in a State must accept every . . . individual in the State that applies for such coverage." 42 U. S. C. §300gg–1(a). The Act also bars insurers from charging higher premiums on the basis of a person's health. §300gg.

Second, the Act generally requires individuals to maintain health insurance coverage or make a payment to the IRS. 26 U. S. C. §5000A. Congress recognized that, without an incentive, "many individuals would wait to purchase health insurance until they needed care." 42 U. S. C. §18091(2)(I). So Congress adopted a coverage requirement to "minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums." *Ibid.* In Congress's view, that coverage requirement was "essential to creating effective health insurance markets." *Ibid.* Congress also provided an exemption from the coverage requirement for anyone who has to spend more than eight percent of his income on health insurance. 26 U. S. C. §§5000A(e)(1)(A), (e)(1)(B)(ii).

Third, the Act seeks to make insurance more affordable by giving refundable tax credits to individuals with household incomes between 100 percent and 400 percent of the federal poverty line. §36B. Individuals who meet the Act's requirements may purchase insurance with the tax credits, which are provided in advance directly to the individual's insurer. 42 U. S. C. §§18081, 18082.

These three reforms are closely intertwined. As noted, Congress found that the guaranteed issue and community rating requirements would not work without the coverage requirement. §18091(2)(I). And the coverage requirement would not work without the tax credits. The reason is that, without the tax credits, the cost of buying insurance would exceed eight percent of income for a large number of individuals, which would exempt them from the coverage requirement. Given the relationship between these three reforms, the Act provided that they should take effect on the same day—January 1, 2014. See Affordable Care Act, §1253, redesignated §1255, 124 Stat. 162, 895; §§1401(e), 1501(d), *id.,* at 220, 249.

C

In addition to those three reforms, the Act requires the creation of an "Exchange" in each State where people can shop for insurance, usually online. 42 U. S. C. §18031(b)(1). An Exchange may be created in one of two ways. First, the Act provides that "[e]ach State shall . . . establish an American Health Benefit Exchange . . . for the State." *Ibid.* Second, if a State nonetheless chooses not to establish its own Exchange, the Act provides that the Secretary of Health and Human Services "shall . . . establish and operate such Exchange within the State." §18041(c)(1).

The issue in this case is whether the Act's tax credits are available in States that have a Federal Exchange rather than a State Exchange. The Act initially provides that tax credits "shall be allowed" for any "applicable taxpayer." 26 U. S. C. §36B(a). The Act then provides that the amount of the tax credit depends in part on whether the taxpayer has enrolled in an insurance plan through "an Exchange *established by the State* under section 1311 of the Patient Protection and Affordable Care Act [hereinafter 42 U. S. C. §18031]." 26 U. S. C. §§36B(b)–(c) (emphasis added).

The IRS addressed the availability of tax credits by promulgating a rule that made them available on both State and Federal Exchanges. 77 Fed. Reg. 30378 (2012). As relevant here, the IRS Rule provides that a taxpayer is eligible for a tax credit if he enrolled in an insurance plan through "an Exchange," 26 CFR §1.36B–2 (2013), which is defined as "an Exchange serving the individual market . . . regardless of whether the Exchange is established and operated by a State . . . or by HHS," 45 CFR §155.20 (2014). At this point, 16 States and the District of Columbia have established their own Exchanges; the other 34 States have elected to have HHS do so.

D

Petitioners are four individuals who live in Virginia, which has a Federal Exchange. They do not wish to purchase health insurance. In their view, Virginia's Exchange does not qualify as "an Exchange established by the State under [42 U. S. C. §18031]," so they should not receive any tax credits. That would make the cost of buying insurance more than eight percent of their income, which would exempt them from the Act's coverage requirement. 26 U. S. C. §5000A(e)(1).

Under the IRS Rule, however, Virginia's Exchange *would* qualify as "an Exchange established by the State under [42 U. S. C. §18031]," so petitioners would receive tax credits. That would make the cost of buying insurance *less* than eight percent of petitioners' income, which would subject them to the Act's coverage requirement. The IRS Rule therefore requires petitioners to either buy health insurance they do not want, or make a payment to the IRS.

Petitioners challenged the IRS Rule in Federal District Court. The District Court dismissed the suit, holding that the Act unambiguously made tax credits available to individuals enrolled through a Federal Exchange. *King* v.

Sebelius, 997 F. Supp. 2d 415 (ED Va. 2014). The Court of Appeals for the Fourth Circuit affirmed. 759 F. 3d 358 (2014). The Fourth Circuit viewed the Act as "ambiguous and subject to at least two different interpretations." *Id.,* at 372. The court therefore deferred to the IRS's interpretation under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). 759 F. 3d, at 376.

The same day that the Fourth Circuit issued its decision, the Court of Appeals for the District of Columbia Circuit vacated the IRS Rule in a different case, holding that the Act "unambiguously restricts" the tax credits to State Exchanges. *Halbig* v. *Burwell*, 758 F. 3d 390, 394 (2014). We granted certiorari in the present case. 574 U. S. ___ (2014).

II

The Affordable Care Act addresses tax credits in what is now Section 36B of the Internal Revenue Code. That section provides: "In the case of an applicable taxpayer, there shall be allowed as a credit against the tax imposed by this subtitle . . . an amount equal to the premium assistance credit amount." 26 U. S. C. §36B(a). Section 36B then defines the term "premium assistance credit amount" as "the sum of the *premium assistance amounts* determined under paragraph (2) with respect to all *coverage months* of the taxpayer occurring during the taxable year." §36B(b)(1) (emphasis added). Section 36B goes on to define the two italicized terms—"premium assistance amount" and "coverage month"—in part by referring to an insurance plan that is enrolled in through "an Exchange established by the State under [42 U. S. C. §18031]." 26 U. S. C. §§36B(b)(2)(A), (c)(2)(A)(i).

The parties dispute whether Section 36B authorizes tax credits for individuals who enroll in an insurance plan through a Federal Exchange. Petitioners argue that a

Federal Exchange is not "an Exchange established by the State under [42 U. S. C. §18031]," and that the IRS Rule therefore contradicts Section 36B. Brief for Petitioners 18–20. The Government responds that the IRS Rule is lawful because the phrase "an Exchange established by the State under [42 U. S. C. §18031]" should be read to include Federal Exchanges. Brief for Respondents 20–25.

When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron*, 467 U. S. 837. Under that framework, we ask whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable. *Id.*, at 842–843. This approach "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 159 (2000). "In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." *Ibid.*

This is one of those cases. The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep "economic and political significance" that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. *Utility Air Regulatory Group* v. *EPA*, 573 U. S. ___, ___ (2014) (slip op., at 19) (quoting *Brown & Williamson*, 529 U. S., at 160). It is especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort. See *Gonzales* v. *Oregon*, 546 U. S. 243, 266–267 (2006). This is not a case for the IRS.

It is instead our task to determine the correct reading of Section 36B. If the statutory language is plain, we must enforce it according to its terms. *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U. S. 242, 251 (2010). But oftentimes the "meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Brown & Williamson*, 529 U. S., at 132. So when deciding whether the language is plain, we must read the words "in their context and with a view to their place in the overall statutory scheme." *Id.,* at 133 (internal quotation marks omitted). Our duty, after all, is "to construe statutes, not isolated provisions." *Graham County Soil and Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U. S. 280, 290 (2010) (internal quotation marks omitted).

A

We begin with the text of Section 36B. As relevant here, Section 36B allows an individual to receive tax credits only if the individual enrolls in an insurance plan through "an Exchange established by the State under [42 U. S. C. §18031]." In other words, three things must be true: First, the individual must enroll in an insurance plan through "an Exchange." Second, that Exchange must be "established by the State." And third, that Exchange must be established "under [42 U. S. C. §18031]." We address each requirement in turn.

First, all parties agree that a Federal Exchange qualifies as "an Exchange" for purposes of Section 36B. See Brief for Petitioners 22; Brief for Respondents 22. Section 18031 provides that "[e]ach State shall . . . establish an American Health Benefit Exchange . . . for the State." §18031(b)(1). Although phrased as a requirement, the Act gives the States "flexibility" by allowing them to "elect" whether they want to establish an Exchange. §18041(b). If the State chooses not to do so, Section 18041 provides that the Secretary "shall . . . establish and operate *such Exchange* within the State." §18041(c)(1) (emphasis added).

By using the phrase "such Exchange," Section 18041 instructs the Secretary to establish and operate the *same* Exchange that the State was directed to establish under Section 18031. See Black's Law Dictionary 1661 (10th ed. 2014) (defining "such" as "That or those; having just been mentioned"). In other words, State Exchanges and Federal Exchanges are equivalent—they must meet the same requirements, perform the same functions, and serve the same purposes. Although State and Federal Exchanges are established by different sovereigns, Sections 18031 and 18041 do not suggest that they differ in any meaningful way. A Federal Exchange therefore counts as "an Exchange" under Section 36B.

Second, we must determine whether a Federal Exchange is "established by the State" for purposes of Section 36B. At the outset, it might seem that a Federal Exchange cannot fulfill this requirement. After all, the Act defines "State" to mean "each of the 50 States and the District of Columbia"—a definition that does not include the Federal Government. 42 U. S. C. §18024(d). But when read in context, "with a view to [its] place in the overall statutory scheme," the meaning of the phrase "established by the State" is not so clear. *Brown & Williamson*, 529 U. S., at 133 (internal quotation marks omitted).

After telling each State to establish an Exchange, Section 18031 provides that all Exchanges "shall make available qualified health plans to qualified individuals." 42 U. S. C. §18031(d)(2)(A). Section 18032 then defines the term "qualified individual" in part as an individual who "resides in the State that established the Exchange." §18032(f)(1)(A). And that's a problem: If we give the phrase "the State that established the Exchange" its most natural meaning, there would be *no* "qualified individuals" on Federal Exchanges. But the Act clearly contemplates that there will be qualified individuals on *every* Exchange.

As we just mentioned, the Act requires all Exchanges to "make available qualified health plans to qualified individuals"—something an Exchange could not do if there were no such individuals. §18031(d)(2)(A). And the Act tells the Exchange, in deciding which health plans to offer, to consider "the interests of qualified individuals . . . in the State or States in which such Exchange operates"—again, something the Exchange could not do if qualified individuals did not exist. §18031(e)(1)(B). This problem arises repeatedly throughout the Act. See, *e.g.*, §18031(b)(2) (allowing a State to create "one Exchange . . . for providing . . . services to both qualified individuals and qualified small employers," rather than creating separate Exchanges for those two groups).[1]

These provisions suggest that the Act may not always use the phrase "established by the State" in its most natural sense. Thus, the meaning of that phrase may not be as clear as it appears when read out of context.

Third, we must determine whether a Federal Exchange is established "under [42 U. S. C. §18031]." This too might seem a requirement that a Federal Exchange cannot fulfill, because it is Section 18041 that tells the Secretary when to "establish and operate such Exchange." But here again, the way different provisions in the statute interact suggests otherwise.

The Act defines the term "Exchange" to mean "an American Health Benefit Exchange established under section 18031." §300gg–91(d)(21). If we import that definition

[1] The dissent argues that one would "naturally read instructions about qualified individuals to be inapplicable to the extent a particular Exchange has no such individuals." *Post*, at 10–11 (SCALIA, J., dissenting). But the fact that the dissent's interpretation would make so many parts of the Act "inapplicable" to Federal Exchanges is precisely what creates the problem. It would be odd indeed for Congress to write such detailed instructions about customers on a State Exchange, while having nothing to say about those on a Federal Exchange.

into Section 18041, the Act tells the Secretary to "establish and operate such 'American Health Benefit Exchange established under section 18031.'" That suggests that Section 18041 authorizes the Secretary to establish an Exchange under Section 18031, not (or not only) under Section 18041. Otherwise, the Federal Exchange, by definition, would not be an "Exchange" at all. See *Halbig*, 758 F. 3d, at 399–400 (acknowledging that the Secretary establishes Federal Exchanges under Section 18031).

This interpretation of "under [42 U. S. C. §18031]" fits best with the statutory context. All of the requirements that an Exchange must meet are in Section 18031, so it is sensible to regard all Exchanges as established under that provision. In addition, every time the Act uses the word "Exchange," the definitional provision requires that we substitute the phrase "Exchange established under section 18031." If Federal Exchanges were not established under Section 18031, therefore, literally none of the Act's requirements would apply to them. Finally, the Act repeatedly uses the phrase "established under [42 U. S. C. §18031]" in situations where it would make no sense to distinguish between State and Federal Exchanges. See, *e.g.*, 26 U. S. C. §125(f)(3)(A) (2012 ed., Supp. I) ("The term 'qualified benefit' shall not include any qualified health plan . . . offered through an Exchange established under [42 U. S. C. §18031]"); 26 U. S. C. §6055(b)(1)(B)(iii)(I) (2012 ed.) (requiring insurers to report whether each insurance plan they provided "is a qualified health plan offered through an Exchange established under [42 U. S. C. §18031]"). A Federal Exchange may therefore be considered one established "under [42 U. S. C. §18031]."

The upshot of all this is that the phrase "an Exchange established by the State under [42 U. S. C. §18031]" is properly viewed as ambiguous. The phrase may be limited in its reach to State Exchanges. But it is also possible that the phrase refers to *all* Exchanges—both State and

Federal—at least for purposes of the tax credits. If a State chooses not to follow the directive in Section 18031 that it establish an Exchange, the Act tells the Secretary to establish "such Exchange." §18041. And by using the words "such Exchange," the Act indicates that State and Federal Exchanges should be the same. But State and Federal Exchanges would differ in a fundamental way if tax credits were available only on State Exchanges—one type of Exchange would help make insurance more affordable by providing billions of dollars to the States' citizens; the other type of Exchange would not.[2]

The conclusion that Section 36B is ambiguous is further supported by several provisions that assume tax credits will be available on both State and Federal Exchanges. For example, the Act requires all Exchanges to create outreach programs that must "distribute fair and impartial information concerning . . . the availability of premium tax credits under section 36B." §18031(i)(3)(B). The Act also requires all Exchanges to "establish and make available by electronic means a calculator to determine the actual cost of coverage after the application of any premium tax credit under section 36B." §18031(d)(4)(G). And the Act requires all Exchanges to report to the Treasury Secretary information about each health plan they sell,

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[2]The dissent argues that the phrase "such Exchange" does not suggest that State and Federal Exchanges "are in all respects equivalent." *Post*, at 8. In support, it quotes the Constitution's Elections Clause, which makes the state legislature primarily responsible for prescribing election regulations, but allows Congress to "make or alter such Regulations." Art. I, §4, cl. 1. No one would say that state and federal election regulations are in all respects equivalent, the dissent contends, so we should not say that State and Federal Exchanges are. But the Elections Clause does not precisely define what an election regulation must look like, so Congress can prescribe regulations that differ from what the State would prescribe. The Affordable Care Act *does* precisely define what an Exchange must look like, however, so a Federal Exchange cannot differ from a State Exchange.

including the "aggregate amount of any advance payment of such credit," "[a]ny information . . . necessary to determine eligibility for, and the amount of, such credit," and any "[i]nformation necessary to determine whether a taxpayer has received excess advance payments." 26 U. S. C. §36B(f)(3). If tax credits were not available on Federal Exchanges, these provisions would make little sense.

Petitioners and the dissent respond that the words "established by the State" would be unnecessary if Congress meant to extend tax credits to both State and Federal Exchanges. Brief for Petitioners 20; *post*, at 4–5. But "our preference for avoiding surplusage constructions is not absolute." *Lamie* v. *United States Trustee*, 540 U. S. 526, 536 (2004); see also *Marx* v. *General Revenue Corp.*, 568 U. S. ___, ___ (2013) (slip op., at 13) ("The canon against surplusage is not an absolute rule"). And specifically with respect to this Act, rigorous application of the canon does not seem a particularly useful guide to a fair construction of the statute.

The Affordable Care Act contains more than a few examples of inartful drafting. (To cite just one, the Act creates three separate Section 1563s. See 124 Stat. 270, 911, 912.) Several features of the Act's passage contributed to that unfortunate reality. Congress wrote key parts of the Act behind closed doors, rather than through "the traditional legislative process." Cannan, A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History, 105 L. Lib. J. 131, 163 (2013). And Congress passed much of the Act using a complicated budgetary procedure known as "reconciliation," which limited opportunities for debate and amendment, and bypassed the Senate's normal 60-vote filibuster requirement. *Id.,* at 159–167. As a result, the Act does not reflect the type of care and deliberation that one might expect of such significant legislation. Cf. Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 545 (1947) (describing a cartoon "in which a senator tells his colleagues 'I admit this new bill is too complicated to understand. We'll just have to pass it to find out what it means.'").

Anyway, we "must do our best, bearing in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Utility Air Regulatory Group*, 573 U. S., at ___ (slip op., at 15) (internal quotation marks omitted). After reading Section 36B along with other related provisions in the Act, we cannot conclude that the phrase "an Exchange established by the State under [Section 18031]" is unambiguous.

B

Given that the text is ambiguous, we must turn to the broader structure of the Act to determine the meaning of Section 36B. "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371 (1988). Here, the statutory scheme compels us to reject petitioners' interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very "death spirals" that Congress designed the Act to avoid. See *New York State Dept. of Social Servs.* v. *Dublino*, 413 U. S. 405, 419–420 (1973) ("We cannot interpret federal statutes to negate their own stated purposes.").[3]

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[3]The dissent notes that several other provisions in the Act use the phrase "established by the State," and argues that our holding applies to each of those provisions. *Post*, at 5–6. But "the presumption of consistent usage readily yields to context," and a statutory term may

As discussed above, Congress based the Affordable Care Act on three major reforms: first, the guaranteed issue and community rating requirements; second, a requirement that individuals maintain health insurance coverage or make a payment to the IRS; and third, the tax credits for individuals with household incomes between 100 percent and 400 percent of the federal poverty line. In a State that establishes its own Exchange, these three reforms work together to expand insurance coverage. The guaranteed issue and community rating requirements ensure that anyone can buy insurance; the coverage requirement creates an incentive for people to do so before they get sick; and the tax credits—it is hoped—make insurance more affordable. Together, those reforms "minimize . . . adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums." 42 U. S. C. §18091(2)(I).

Under petitioners' reading, however, the Act would operate quite differently in a State with a Federal Exchange. As they see it, one of the Act's three major reforms—the tax credits—would not apply. And a second major reform—the coverage requirement—would not apply in a meaningful way. As explained earlier, the coverage requirement applies only when the cost of buying health insurance (minus the amount of the tax credits) is less than eight percent of an individual's income. 26 U. S. C. §§5000A(e)(1)(A), (e)(1)(B)(ii). So without the tax credits, the coverage requirement would apply to fewer individuals. And it would be a *lot* fewer. In 2014, approx-

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mean different things in different places. *Utility Air Regulatory Group* v. *EPA*, 573 U. S. ___, ___ (2014) (slip op., at 15) (internal quotation marks omitted). That is particularly true when, as here, "the Act is far from a *chef d'oeuvre* of legislative draftsmanship." *Ibid.* Because the other provisions cited by the dissent are not at issue here, we do not address them.

imately 87 percent of people who bought insurance on a Federal Exchange did so with tax credits, and virtually all of those people would become exempt. HHS, A. Burke, A. Misra, & S. Sheingold, Premium Affordability, Competition, and Choice in the Health Insurance Marketplace 5 (2014); Brief for Bipartisan Economic Scholars as *Amici Curiae* 19–20. If petitioners are right, therefore, only one of the Act's three major reforms would apply in States with a Federal Exchange.

The combination of no tax credits and an ineffective coverage requirement could well push a State's individual insurance market into a death spiral. One study predicts that premiums would increase by 47 percent and enrollment would decrease by 70 percent. E. Saltzman & C. Eibner, The Effect of Eliminating the Affordable Care Act's Tax Credits in Federally Facilitated Marketplaces (2015). Another study predicts that premiums would increase by 35 percent and enrollment would decrease by 69 percent. L. Blumberg, M. Buettgens, & J. Holahan, The Implications of a Supreme Court Finding for the Plaintiff in King vs. Burwell: 8.2 Million More Uninsured and 35% Higher Premiums (2015). And those effects would not be limited to individuals who purchase insurance on the Exchanges. Because the Act requires insurers to treat the entire individual market as a single risk pool, 42 U. S. C. §18032(c)(1), premiums outside the Exchange would rise along with those inside the Exchange. Brief for Bipartisan Economic Scholars as *Amici Curiae* 11–12.

It is implausible that Congress meant the Act to operate in this manner. See *National Federation of Independent Business* v. *Sebelius*, 567 U. S. ___, ___ (2012) (SCALIA, KENNEDY, THOMAS, and ALITO, JJ., dissenting) (slip op., at 60) ("Without the federal subsidies . . . the exchanges would not operate as Congress intended and may not operate at all."). Congress made the guaranteed issue and community rating requirements applicable in every State in the Nation. But those requirements only work when combined with the coverage requirement and the tax credits. So it stands to reason that Congress meant for those provisions to apply in every State as well.[4]

Petitioners respond that Congress was not worried about the effects of withholding tax credits from States with Federal Exchanges because "Congress evidently believed it was offering states a deal they would not refuse." Brief for Petitioners 36. Congress may have been wrong about the States' willingness to establish their own Exchanges, petitioners continue, but that does not allow this Court to rewrite the Act to fix that problem. That is particularly true, petitioners conclude, because the States likely *would* have created their own Exchanges in the absence of the IRS Rule, which eliminated any incentive that the States had to do so. *Id.,* at 36–38.

Section 18041 refutes the argument that Congress believed it was offering the States a deal they would not

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[4] The dissent argues that our analysis "show[s] only that the statutory scheme contains a flaw," one "that appeared as well in other parts of the Act." *Post*, at 14. For support, the dissent notes that the guaranteed issue and community rating requirements might apply in the federal territories, even though the coverage requirement does not. *Id.,* at 14–15. The confusion arises from the fact that the guaranteed issue and community rating requirements were added as amendments to the Public Health Service Act, which contains a definition of the word "State" that includes the territories, 42 U. S. C. §201(f), while the later-enacted Affordable Care Act contains a definition of the word "State" that excludes the territories, §18024(d). The predicate for the dissent's point is therefore uncertain at best.

The dissent also notes that a different part of the Act "established a long-term-care insurance program with guaranteed-issue and community-rating requirements, but without an individual mandate or subsidies." *Post*, at 14. True enough. But the fact that Congress was willing to accept the risk of adverse selection in a comparatively minor program does not show that Congress was willing to do so in the general health insurance program—the very heart of the Act. Moreover, Congress said expressly that it wanted to avoid adverse selection in the *health* insurance markets. §18091(2)(I).

refuse. That section provides that, if a State elects not to establish an Exchange, the Secretary "shall . . . establish and operate such Exchange within the State." 42 U. S. C. §18041(c)(1)(A). The whole point of that provision is to create a federal fallback in case a State chooses not to establish its own Exchange. Contrary to petitioners' argument, Congress did not believe it was offering States a deal they would not refuse—it expressly addressed what would happen if a State *did* refuse the deal.

C

Finally, the structure of Section 36B itself suggests that tax credits are not limited to State Exchanges. Section 36B(a) initially provides that tax credits "shall be allowed" for any "applicable taxpayer." Section 36B(c)(1) then defines an "applicable taxpayer" as someone who (among other things) has a household income between 100 percent and 400 percent of the federal poverty line. Together, these two provisions appear to make anyone in the specified income range eligible to receive a tax credit.

According to petitioners, however, those provisions are an empty promise in States with a Federal Exchange. In their view, an applicable taxpayer in such a State would be *eligible* for a tax credit—but the *amount* of that tax credit would always be zero. And that is because—diving several layers down into the Tax Code—Section 36B says that the amount of the tax credits shall be "an amount equal to the premium assistance credit amount," §36B(a); and then says that the term "premium assistance credit amount" means "the sum of the premium assistance amounts determined under paragraph (2) with respect to all coverage months of the taxpayer occurring during the taxable year," §36B(b)(1); and then says that the term "premium assistance amount" is tied to the amount of the monthly premium for insurance purchased on "an Exchange established by the State under [42 U. S. C.

§18031]," §36B(b)(2); and then says that the term "coverage month" means any month in which the taxpayer has insurance through "an Exchange established by the State under [42 U. S. C. §18031]," §36B(c)(2)(A)(i).

We have held that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001). But in petitioners' view, Congress made the viability of the entire Affordable Care Act turn on the ultimate ancillary provision: a sub-sub-sub section of the Tax Code. We doubt that is what Congress meant to do. Had Congress meant to limit tax credits to State Exchanges, it likely would have done so in the definition of "applicable taxpayer" or in some other prominent manner. It would not have used such a winding path of connect-the-dots provisions about the amount of the credit.[5]

D

Petitioners' arguments about the plain meaning of Section 36B are strong. But while the meaning of the phrase "an Exchange established by the State under [42 U. S. C. §18031]" may seem plain "when viewed in isolation," such a reading turns out to be "untenable in light of [the statute] as a whole." *Department of Revenue of Ore.* v. *ACF Industries, Inc.*, 510 U. S. 332, 343 (1994). In this instance, the context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase.

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[5] The dissent cites several provisions that "make[] taxpayers of all States eligible for a credit, only to provide later that the amount of the credit may be zero." *Post*, at 11 (citing 26 U. S. C. §§24, 32, 35, 36). None of those provisions, however, is crucial to the viability of a comprehensive program like the Affordable Care Act. No one suggests, for example, that the first-time-homebuyer tax credit, §36, is essential to the viability of federal housing regulation.

Reliance on context and structure in statutory interpretation is a "subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself." *Palmer* v. *Massachusetts*, 308 U. S. 79, 83 (1939). For the reasons we have given, however, such reliance is appropriate in this case, and leads us to conclude that Section 36B allows tax credits for insurance purchased on any Exchange created under the Act. Those credits are necessary for the Federal Exchanges to function like their State Exchange counterparts, and to avoid the type of calamitous result that Congress plainly meant to avoid.

* * *

In a democracy, the power to make the law rests with those chosen by the people. Our role is more confined—"to say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). That is easier in some cases than in others. But in every case we must respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan.

Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter. Section 36B can fairly be read consistent with what we see as Congress's plan, and that is the reading we adopt.

The judgment of the United States Court of Appeals for the Fourth Circuit is

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 14–114

DAVID KING, ET AL., PETITIONERS *v.* SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

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

[June 25, 2015]

JUSTICE SCALIA, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

The Court holds that when the Patient Protection and Affordable Care Act says "Exchange established by the State" it means "Exchange established by the State or the Federal Government." That is of course quite absurd, and the Court's 21 pages of explanation make it no less so.

I

The Patient Protection and Affordable Care Act makes major reforms to the American health-insurance market. It provides, among other things, that every State "shall . . . establish an American Health Benefit Exchange"—a marketplace where people can shop for health-insurance plans. 42 U. S. C. §18031(b)(1). And it provides that if a State does not comply with this instruction, the Secretary of Health and Human Services must "establish and operate such Exchange within the State." §18041(c)(1).

A separate part of the Act—housed in §36B of the Internal Revenue Code—grants "premium tax credits" to subsidize certain purchases of health insurance made on Exchanges. The tax credit consists of "premium assistance amounts" for "coverage months." 26 U. S. C. §36B(b)(1). An individual has a coverage month only when he is covered by an insurance plan "that was enrolled in through an Exchange established by the State under [§18031]." §36B(c)(2)(A). And the law ties the size of the premium assistance amount to the premiums for health plans which cover the individual "and which were enrolled in through an Exchange established by the State under [§18031]." §36B(b)(2)(A). The premium assistance amount further depends on the cost of certain other insurance plans "offered through the same Exchange." §36B(b)(3)(B)(i).

This case requires us to decide whether someone who buys insurance on an Exchange established by the Secretary gets tax credits. You would think the answer would be obvious—so obvious there would hardly be a need for the Supreme Court to hear a case about it. In order to receive any money under §36B, an individual must enroll in an insurance plan through an "Exchange established by the State." The Secretary of Health and Human Services is not a State. So an Exchange established by the Secretary is not an Exchange established by the State—which means people who buy health insurance through such an Exchange get no money under §36B.

Words no longer have meaning if an Exchange that is *not* established by a State is "established by the State." It is hard to come up with a clearer way to limit tax credits to state Exchanges than to use the words "established by the State." And it is hard to come up with a reason to include the words "by the State" other than the purpose of limiting credits to state Exchanges. "[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." *Lynch* v. *Alworth-Stephens Co.,* 267 U. S. 364, 370 (1925) (internal quotation marks omitted). Under all the usual rules of interpretation, in short, the Government should lose this case. But normal rules of interpretation seem always to yield to the overriding principle of the present Court: The Affordable Care Act must be saved.

II

The Court interprets §36B to award tax credits on both federal and state Exchanges. It accepts that the "most natural sense" of the phrase "Exchange established by the State" is an Exchange established by a State. *Ante,* at 11. (Understatement, thy name is an opinion on the Affordable Care Act!) Yet the opinion continues, with no semblance of shame, that "it is also possible that the phrase refers to *all* Exchanges—both State and Federal." *Ante,* at 13. (Impossible possibility, thy name is an opinion on the Affordable Care Act!) The Court claims that "the context and structure of the Act compel [it] to depart from what would otherwise be the most natural reading of the pertinent statutory phrase." *Ante,* at 21.

I wholeheartedly agree with the Court that sound interpretation requires paying attention to the whole law, not homing in on isolated words or even isolated sections. Context always matters. Let us not forget, however, *why* context matters: It is a tool for understanding the terms of the law, not an excuse for rewriting them.

Any effort to understand rather than to rewrite a law must accept and apply the presumption that lawmakers use words in "their natural and ordinary signification." *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, 12 (1878). Ordinary connotation does not always prevail, but the more unnatural the proposed interpretation of a law, the more compelling the contextual evidence must be to show that it is correct. Today's interpretation is not merely unnatural; it is unheard of. Who would ever have dreamt that "Exchange established by the State" means "Exchange established by the State *or the Federal Government*"? Little short of an express statutory definition could justify adopting this singular reading.

Yet the only pertinent definition here provides that "State" means "each of the 50 States and the District of Columbia." 42 U. S. C. §18024(d). Because the Secretary is neither one of the 50 States nor the District of Columbia, that definition positively contradicts the eccentric theory that an Exchange established by the Secretary has been established by the State.

Far from offering the overwhelming evidence of meaning needed to justify the Court's interpretation, other contextual clues undermine it at every turn. To begin with, other parts of the Act sharply distinguish between the establishment of an Exchange by a State and the establishment of an Exchange by the Federal Government. The States' authority to set up Exchanges comes from one provision, §18031(b); the Secretary's authority comes from an entirely different provision, §18041(c). Funding for States to establish Exchanges comes from one part of the law, §18031(a); funding for the Secretary to establish Exchanges comes from an entirely different part of the law, §18121. States generally run state-created Exchanges; the Secretary generally runs federally created Exchanges. §18041(b)–(c). And the Secretary's authority to set up an Exchange in a State depends upon the State's "*[f]ailure* to establish [an] Exchange." §18041(c) (emphasis added). Provisions such as these destroy any pretense that a federal Exchange is in some sense also established by a State.

Reading the rest of the Act also confirms that, as relevant here, there are *only* two ways to set up an Exchange in a State: establishment by a State and establishment by the Secretary. §§18031(b), 18041(c). So saying that an Exchange established by the Federal Government is "established by the State" goes beyond giving words bizarre meanings; it leaves the limiting phrase "by the State" with no operative effect at all. That is a stark violation of the elementary principle that requires an interpreter "to give effect, if possible, to every clause and word of a statute." *Montclair* v. *Ramsdell*, 107 U. S. 147, 152 (1883). In weighing this argument, it is well to remember the difference between giving a term a meaning that duplicates another part of the law, and giving a term no meaning at all. Lawmakers sometimes repeat themselves—whether out of a desire to add emphasis, a sense of belt-and-suspenders caution, or a lawyerly penchant for doublets (aid and abet, cease and desist, null and void). Lawmakers do not, however, tend to use terms that "have no operation at all." *Marbury* v. *Madison*, 1 Cranch 137, 174 (1803). So while the rule against treating a term as a redundancy is far from categorical, the rule against treating it as a nullity is as close to absolute as interpretive principles get. The Court's reading does not merely give "by the State" a duplicative effect; it causes the phrase to have no effect whatever.

Making matters worse, the reader of the whole Act will come across a number of provisions beyond §36B that refer to the establishment of Exchanges by States. Adopting the Court's interpretation means nullifying the term "by the State" not just once, but again and again throughout the Act. Consider for the moment only those parts of the Act that mention an "Exchange established by the State" in connection with tax credits:

- The formula for calculating the amount of the tax credit, as already explained, twice mentions "an Exchange established by the State." 26 U. S. C. §36B(b)(2)(A), (c)(2)(A)(i).

- The Act directs States to screen children for eligibility for "[tax credits] under section 36B" and for "any other assistance or subsidies available for coverage obtained through" an "Exchange established by the State." 42 U. S. C. §1396w–3(b)(1)(B)–(C).

- The Act requires "an Exchange established by the

State" to use a "secure electronic interface" to determine eligibility for (among other things) tax credits. §1396w–3(b)(1)(D).

- The Act authorizes "an Exchange established by the State" to make arrangements under which other state agencies "determine whether a State resident is eligible for [tax credits] under section 36B." §1396w–3(b)(2).

- The Act directs States to operate Web sites that allow anyone "who is eligible to receive [tax credits] under section 36B" to compare insurance plans offered through "an Exchange established by the State." §1396w–3(b)(4).

- One of the Act's provisions addresses the enrollment of certain children in health plans "offered through an Exchange established by the State" and then discusses the eligibility of these children for tax credits. §1397ee(d)(3)(B).

It is bad enough for a court to cross out "by the State" once. But seven times?

Congress did not, by the way, repeat "Exchange established by the State under [§18031]" by rote throughout the Act. Quite the contrary, clause after clause of the law uses a more general term such as "Exchange" or "Exchange established under [§18031]." See, *e.g.,* 42 U. S. C. §§18031(k), 18033; 26 U. S. C. §6055. It is common sense that any speaker who says "Exchange" some of the time, but "Exchange established by the State" the rest of the time, probably means something by the contrast.

Equating establishment "by the State" with establishment by the Federal Government makes nonsense of other parts of the Act. The Act requires States to ensure (on pain of losing Medicaid funding) that any "Exchange established by the State" uses a "secure electronic interface" to determine an individual's eligibility for various benefits (including tax credits). 42 U. S. C. §1396w–3(b)(1)(D). How could a State control the type of electronic interface used by a federal Exchange? The Act allows a State to control contracting decisions made by "an Exchange established by the State." §18031(f)(3). Why would a State get to control the contracting decisions of a federal Exchange? The Act also provides "Assistance to States to establish American Health Benefit Exchanges" and directs the Secretary to renew this funding "if the State . . . is making progress . . . toward . . . establishing an Exchange." §18031(a). Does a State that refuses to set up an Exchange still receive this funding, on the premise that Exchanges established by the Federal Government are really established by States? It is presumably in order to avoid these questions that the Court concludes that federal Exchanges count as state Exchanges only "for purposes of the tax credits." *Ante,* at 13. (Contrivance, thy name is an opinion on the Affordable Care Act!)

It is probably piling on to add that the Congress that wrote the Affordable Care Act knew how to equate two different types of Exchanges when it wanted to do so. The Act includes a clause providing that "[a] *territory* that . . . establishes . . . an Exchange . . . shall be treated as a State" for certain purposes. §18043(a) (emphasis added). Tellingly, it does not include a comparable clause providing that the *Secretary* shall be treated as a State for purposes of §36B when *she* establishes an Exchange.

Faced with overwhelming confirmation that "Exchange established by the State" means what it looks like it means, the Court comes up with argument after feeble argument to support its contrary interpretation. None of its tries comes close to establishing the implausible conclusion that Congress used "by the State" to mean "by the State or not by the State."

The Court emphasizes that if a State does not set up an

Exchange, the Secretary must establish "such Exchange." §18041(c). It claims that the word "such" implies that federal and state Exchanges are "the same." *Ante,* at 13. To see the error in this reasoning, one need only consider a parallel provision from our Constitution: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter *such Regulations*." Art. I, §4, cl. 1 (emphasis added). Just as the Affordable Care Act directs States to establish Exchanges while allowing the Secretary to establish "such Exchange" as a fallback, the Elections Clause directs state legislatures to prescribe election regulations while allowing Congress to make "such Regulations" as a fallback. Would anybody refer to an election regulation made by Congress as a "regulation prescribed by the state legislature"? Would anybody say that a federal election law and a state election law are in all respects equivalent? Of course not. The word "such" does not help the Court one whit. The Court's argument also overlooks the rudimentary principle that a specific provision governs a general one. Even if it were true that the term "such Exchange" in §18041(c) implies that federal and state Exchanges are the same in general, the term "established by the State" in §36B makes plain that they differ when it comes to tax credits in particular.

The Court's next bit of interpretive jiggery-pokery involves other parts of the Act that purportedly presuppose the availability of tax credits on both federal and state Exchanges. *Ante,* at 13–14. It is curious that the Court is willing to subordinate the express words of the section that grants tax credits to the mere implications of other provisions with only tangential connections to tax credits. One would think that interpretation would work the other way around. In any event, each of the provisions mentioned by the Court is perfectly consistent with limiting tax credits to state Exchanges. One of them says that the minimum functions of an Exchange include (alongside several tasks that have nothing to do with tax credits) setting up an electronic calculator that shows "the actual cost of coverage after the application of any premium tax credit." 42 U. S. C. §18031(d)(4)(G). What stops a federal Exchange's electronic calculator from telling a customer that his tax credit is zero? Another provision requires an Exchange's outreach program to educate the public about health plans, to facilitate enrollment, and to "distribute fair and impartial information" about enrollment and "the availability of premium tax credits." §18031(i)(3)(B). What stops a federal Exchange's outreach program from fairly and impartially telling customers that no tax credits are available? A third provision requires an Exchange to report information about each insurance plan sold—including level of coverage, premium, name of the insured, and "amount of any advance payment" of the tax credit. 26 U. S. C. §36B(f)(3). What stops a federal Exchange's report from confirming that no tax credits have been paid out?

The Court persists that these provisions "would make little sense" if no tax credits were available on federal Exchanges. *Ante,* at 14. Even if that observation were true, it would show only oddity, not ambiguity. Laws often include unusual or mismatched provisions. The Affordable Care Act spans 900 pages; it would be amazing if its provisions all lined up perfectly with each other. This Court "does not revise legislation . . . just because the text as written creates an apparent anomaly." *Michigan* v. *Bay Mills Indian Community*, 572 U. S. ___, ___ (2014) (slip op., at 10). At any rate, the provisions cited by the Court are not particularly unusual. Each requires an Exchange to perform a standardized series of tasks, some aspects of which relate in some way to tax credits. It is entirely natural for slight mismatches to occur when, as here, lawmakers draft "a single statutory provision" to cover "different kinds" of situations. *Robers* v. *United States*, 572 U. S. ___, ___ (2014) (slip op., at 4). Lawmakers need not, and often do not, "write extra language specifically exempting, phrase by phrase, applications in respect to which a portion of a phrase is not needed." *Ibid.*

Roaming even farther afield from §36B, the Court turns to the Act's provisions about "qualified individuals." *Ante,* at 10–11. Qualified individuals receive favored treatment on Exchanges, although customers who are not qualified individuals may also shop there. See *Halbig* v. *Burwell*, 758 F. 3d 390, 404–405 (CADC 2014). The Court claims that the Act must equate federal and state establishment of Exchanges when it defines a qualified individual as someone who (among other things) lives in the "State that established the Exchange," 42 U. S. C. §18032(f)(1)(A). Otherwise, the Court says, there would be no qualified individuals on federal Exchanges, contradicting (for example) the provision requiring every Exchange to take the "'interests of qualified individuals'" into account when selecting health plans. *Ante,* at 11 (quoting §18031(e)(1)(b)). Pure applesauce. Imagine that a university sends around a bulletin reminding every professor to take the "interests of graduate students" into account when setting office hours, but that some professors teach only undergraduates. Would anybody reason that the bulletin implicitly presupposes that every professor has "graduate students," so that "graduate students" must really mean "graduate or undergraduate students"? Surely not. Just as one naturally reads instructions about graduate students to be inapplicable to the extent a particular professor has no such students, so too would one naturally read instructions about qualified individuals to be inapplicable to the extent a particular Exchange has no such individuals. There is no need to rewrite the term "State that established the Exchange" in the definition of "qualified individual," much less a need to rewrite the separate term "Exchange established by the State" in a separate part of the Act.

Least convincing of all, however, is the Court's attempt to uncover support for its interpretation in "the structure of Section 36B itself." *Ante,* at 19. The Court finds it strange that Congress limited the tax credit to state Exchanges in the formula for calculating the *amount* of the credit, rather than in the provision defining the range of taxpayers *eligible* for the credit. Had the Court bothered to look at the rest of the Tax Code, it would have seen that the structure it finds strange is in fact quite common. Consider, for example, the many provisions that initially make taxpayers of all incomes eligible for a tax credit, only to provide later that the amount of the credit is zero if the taxpayer's income exceeds a specified threshold. See, *e.g.,* 26 U. S. C. §24 (child tax credit); §32 (earned-income tax credit); §36 (first-time-homebuyer tax credit). Or consider, for an even closer parallel, a neighboring provision that initially makes taxpayers of all States eligible for a credit, only to provide later that the amount of the credit may be zero if the taxpayer's State does not satisfy certain requirements. See §35 (health-insurance-costs tax credit). One begins to get the sense that the Court's insistence on reading things in context applies to "established by the State," but to nothing else.

For what it is worth, lawmakers usually draft tax-credit provisions the way they do—*i.e.*, the way they drafted §36B—because the mechanics of the credit require it. Many Americans move to new States in the middle of the year. Mentioning state Exchanges in the definition of "coverage month"—rather than (as the Court proposes) in the provisions concerning taxpayers' eligibility for the credit—accounts for taxpayers who live in a State with a state Exchange for a part of the year, but a State with a federal Exchange for the rest of the year. In addition,

§36B awards a credit with respect to insurance plans "which cover the taxpayer, *the taxpayer's spouse, or any dependent . . . of the taxpayer* and which were enrolled in through an Exchange established by the State." §36B(b)(2)(A) (emphasis added). If Congress had mentioned state Exchanges in the provisions discussing taxpayers' eligibility for the credit, a taxpayer who buys insurance from a federal Exchange would get no money, even if he has a spouse or dependent who buys insurance from a state Exchange—say a child attending college in a different State. It thus makes perfect sense for "Exchange established by the State" to appear where it does, rather than where the Court suggests. Even if that were not so, of course, its location would not make it any less clear.

The Court has not come close to presenting the compelling contextual case necessary to justify departing from the ordinary meaning of the terms of the law. Quite the contrary, context only underscores the outlandishness of the Court's interpretation. Reading the Act as a whole leaves no doubt about the matter: "Exchange established by the State" means what it looks like it means.

III

For its next defense of the indefensible, the Court turns to the Affordable Care Act's design and purposes. As relevant here, the Act makes three major reforms. The guaranteed-issue and community-rating requirements prohibit insurers from considering a customer's health when deciding whether to sell insurance and how much to charge, 42 U. S. C. §§300gg, 300gg–1; its famous individual mandate requires everyone to maintain insurance coverage or to pay what the Act calls a "penalty," 26 U. S. C. §5000A(b)(1), and what we have nonetheless called a tax, see *National Federation of Independent Business* v. *Sebelius*, 567 U. S. ___, ___ (2012) (slip op., at 39); and its tax credits help make insurance more affordable.

The Court reasons that Congress intended these three reforms to "work together to expand insurance coverage"; and because the first two apply in every State, so must the third. *Ante,* at 16.

This reasoning suffers from no shortage of flaws. To begin with, "even the most formidable argument concerning the statute's purposes could not overcome the clarity [of] the statute's text." *Kloeckner* v. *Solis*, 568 U. S. ___, ___, n. 4 (2012) (slip op., at 14, n. 4). Statutory design and purpose matter only to the extent they help clarify an otherwise ambiguous provision. Could anyone maintain with a straight face that §36B is unclear? To mention just the highlights, the Court's interpretation clashes with a statutory definition, renders words inoperative in at least seven separate provisions of the Act, overlooks the contrast between provisions that say "Exchange" and those that say "Exchange established by the State," gives the same phrase one meaning for purposes of tax credits but an entirely different meaning for other purposes, and (let us not forget) contradicts the ordinary meaning of the words Congress used. On the other side of the ledger, the Court has come up with nothing more than a general provision that turns out to be controlled by a specific one, a handful of clauses that are consistent with either understanding of establishment by the State, and a resemblance between the tax-credit provision and the rest of the Tax Code. If that is all it takes to make something ambiguous, everything is ambiguous.

Having gone wrong in consulting statutory purpose at all, the Court goes wrong again in analyzing it. The purposes of a law must be "collected chiefly from its words," not "from extrinsic circumstances." *Sturges* v. *Crowninshield*, 4 Wheat. 122, 202 (1819) (Marshall, C. J.). Only by concentrating on the law's terms can a judge hope to uncover the scheme *of the statute*, rather than some other scheme that the judge thinks desirable. Like it or not, the express terms of the Affordable Care Act make only two of the three reforms mentioned by the Court applicable in States that do not establish Exchanges. It is perfectly possible for them to operate independently of tax credits. The guaranteed-issue and community-rating requirements continue to ensure that insurance companies treat all customers the same no matter their health, and the individual mandate continues to encourage people to maintain coverage, lest they be "taxed."

The Court protests that without the tax credits, the number of people covered by the individual mandate shrinks, and without a broadly applicable individual mandate the guaranteed-issue and community-rating requirements "would destabilize the individual insurance market." *Ante,* at 15. If true, these projections would show only that the statutory scheme contains a flaw; they would not show that the statute means the opposite of what it says. Moreover, it is a flaw that appeared as well in other parts of the Act. A different title established a long-term-care insurance program with guaranteed-issue and community-rating requirements, but without an individual mandate or subsidies. §§8001–8002, 124 Stat. 828–847 (2010). This program never came into effect "only because Congress, in response to actuarial analyses predicting that the [program] would be fiscally unsustainable, repealed the provision in 2013." *Halbig*, 758 F. 3d, at 410. How could the Court say that Congress would never dream of combining guaranteed-issue and community-rating requirements with a narrow individual mandate, when it combined those requirements with *no* individual mandate in the context of long-term-care insurance?

Similarly, the Department of Health and Human Services originally interpreted the Act to impose guaranteed-issue and community-rating requirements in the Federal Territories, even though the Act plainly does not make the individual mandate applicable there. *Ibid.*; see 26 U. S. C.

§5000A(f)(4); 42 U. S. C. §201(f). "This combination, predictably, [threw] individual insurance markets in the territories into turmoil." *Halbig, supra,* at 410. Responding to complaints from the Territories, the Department at first insisted that it had "no statutory authority" to address the problem and suggested that the Territories "seek legislative relief from Congress" instead. Letter from G. Cohen, Director of the Center for Consumer Information and Insurance Oversight, to S. Igisomar, Secretary of Commerce of the Commonwealth of Northern Mariana Islands (July 12, 2013). The Department changed its mind a year later, after what it described as "a careful review of [the] situation and the relevant statutory language." Letter from M. Tavenner, Administrator of the Centers for Medicare and Medicaid Services, to G. Francis, Insurance Commissioner of the Virgin Islands (July 16, 2014). How could the Court pronounce it "implausible" for Congress to have tolerated instability in insurance markets in States with federal Exchanges, *ante,* at 17, when even the Government maintained until recently that Congress did exactly that in American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands?

Compounding its errors, the Court forgets that it is no more appropriate to consider one of a statute's purposes in isolation than it is to consider one of its words that way. No law pursues just one purpose at all costs, and no statutory scheme encompasses just one element. Most relevant here, the Affordable Care Act displays a congressional preference for state participation in the establishment of Exchanges: Each State gets the first opportunity to set up its Exchange, 42 U. S. C. §18031(b); States that take up the opportunity receive federal funding for "activities . . . related to establishing" an Exchange, §18031(a)(3); and the Secretary may establish an Exchange in a State only as a fallback, §18041(c). But setting up and running an

Exchange involve significant burdens—meeting strict deadlines, §18041(b), implementing requirements related to the offering of insurance plans, §18031(d)(4), setting up outreach programs, §18031(i), and ensuring that the Exchange is self-sustaining by 2015, §18031(d)(5)(A). A State would have much less reason to take on these burdens if its citizens could receive tax credits no matter who establishes its Exchange. (Now that the Internal Revenue Service has interpreted §36B to authorize tax credits everywhere, by the way, 34 States have failed to set up their own Exchanges. *Ante,* at 6.) So even if making credits available on all Exchanges advances the goal of improving healthcare markets, it frustrates the goal of encouraging state involvement in the implementation of the Act. *This* is what justifies going out of our way to read "established by the State" to mean "established by the State or not established by the State"?

Worst of all for the repute of today's decision, the Court's reasoning is largely self-defeating. The Court predicts that making tax credits unavailable in States that do not set up their own Exchanges would cause disastrous economic consequences there. If that is so, however, wouldn't one expect States to react by setting up their own Exchanges? And wouldn't that outcome satisfy two of the Act's goals rather than just one: enabling the Act's reforms to work *and* promoting state involvement in the Act's implementation? The Court protests that the very existence of a federal fallback shows that Congress expected that some States might fail to set up their own Exchanges. *Ante,* at 19. So it does. It does not show, however, that Congress expected the number of recalcitrant States to be particularly large. The more accurate the Court's dire economic predictions, the smaller that number is likely to be. That reality destroys the Court's pretense that applying the law as written would imperil "the viability of the entire Affordable Care Act." *Ante,* at 20. All in all, the

Court's arguments about the law's purpose and design are no more convincing than its arguments about context.

IV

Perhaps sensing the dismal failure of its efforts to show that "established by the State" means "established by the State or the Federal Government," the Court tries to palm off the pertinent statutory phrase as "inartful drafting." *Ante,* at 14. This Court, however, has no free-floating power "to rescue Congress from its drafting errors." *Lamie* v. *United States Trustee*, 540 U. S. 526, 542 (2004) (internal quotation marks omitted). Only when it is patently obvious to a reasonable reader that a drafting mistake has occurred may a court correct the mistake. The occurrence of a misprint may be apparent from the face of the law, as it is where the Affordable Care Act "creates three separate Section 1563s." *Ante,* at 14. But the Court does not pretend that there is any such indication of a drafting error on the face of §36B. The occurrence of a misprint may also be apparent because a provision decrees an absurd result—a consequence "so monstrous, that all mankind would, without hesitation, unite in rejecting the application." *Sturges*, 4 Wheat., at 203. But §36B does not come remotely close to satisfying that demanding standard. It is entirely plausible that tax credits were restricted to state Exchanges deliberately—for example, in order to encourage States to establish their own Exchanges. We therefore have no authority to dismiss the terms of the law as a drafting fumble.

Let us not forget that the term "Exchange established by the State" appears twice in §36B and five more times in other parts of the Act that mention tax credits. What are the odds, do you think, that the same slip of the pen occurred in seven separate places? No provision of the Act—none at all—contradicts the limitation of tax credits to state Exchanges. And as I have already explained, uses of the term "Exchange established by the State" beyond the context of tax credits look anything but accidental. *Supra,* at 6. If there was a mistake here, context suggests it was a substantive mistake in designing this part of the law, not a technical mistake in transcribing it.

V

The Court's decision reflects the philosophy that judges should endure whatever interpretive distortions it takes in order to correct a supposed flaw in the statutory machinery. That philosophy ignores the American people's decision to give *Congress* "[a]ll legislative Powers" enumerated in the Constitution. Art. I, §1. They made Congress, not this Court, responsible for both making laws and mending them. This Court holds only the judicial power—the power to pronounce the law as Congress has enacted it. We lack the prerogative to repair laws that do not work out in practice, just as the people lack the ability to throw us out of office if they dislike the solutions we concoct. We must always remember, therefore, that "[o]ur task is to apply the text, not to improve upon it." *Pavelic & LeFlore* v. *Marvel Entertainment Group, Div. of Cadence Industries Corp.*, 493 U. S. 120, 126 (1989).

Trying to make its judge-empowering approach seem respectful of congressional authority, the Court asserts that its decision merely ensures that the Affordable Care Act operates the way Congress "meant [it] to operate." *Ante,* at 17. First of all, what makes the Court so sure that Congress "meant" tax credits to be available everywhere? Our only evidence of what Congress meant comes from the terms of the law, and those terms show beyond all question that tax credits are available only on state Exchanges. More importantly, the Court forgets that ours is a government of laws and not of men. That means we are governed by the terms of our laws, not by the unenacted will of our lawmakers. "If Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent." *Lamie*, *supra*, at 542. In the meantime, this Court "has no roving license . . . to disregard clear language simply on the view that . . . Congress 'must have intended' something broader." *Bay Mills*, 572 U. S., at ___ (slip op., at 11).

Even less defensible, if possible, is the Court's claim that its interpretive approach is justified because this Act "does not reflect the type of care and deliberation that one might expect of such significant legislation." *Ante,* at 14–15. It is not our place to judge the quality of the care and deliberation that went into this or any other law. A law enacted by voice vote with no deliberation whatever is fully as binding upon us as one enacted after years of study, months of committee hearings, and weeks of debate. Much less is it our place to make everything come out right when Congress does not do its job properly. It is up to Congress to design its laws with care, and it is up to the people to hold them to account if they fail to carry out that responsibility.

Rather than rewriting the law under the pretense of interpreting it, the Court should have left it to Congress to decide what to do about the Act's limitation of tax credits to state Exchanges. If Congress values above everything else the Act's applicability across the country, it could make tax credits available in every Exchange. If it prizes state involvement in the Act's implementation, it could continue to limit tax credits to state Exchanges while taking other steps to mitigate the economic consequences predicted by the Court. If Congress wants to accommodate both goals, it could make tax credits available everywhere while offering new incentives for States to set up their own Exchanges. And if Congress thinks that the present design of the Act works well enough, it could do nothing. Congress could also do something else altogether, entirely abandoning the structure of the Affordable

Care Act. The Court's insistence on making a choice that should be made by Congress both aggrandizes judicial power and encourages congressional lassitude.

Just ponder the significance of the Court's decision to take matters into its own hands. The Court's revision of the law authorizes the Internal Revenue Service to spend tens of billions of dollars every year in tax credits on federal Exchanges. It affects the price of insurance for millions of Americans. It diminishes the participation of the States in the implementation of the Act. It vastly expands the reach of the Act's individual mandate, whose scope depends in part on the availability of credits. What a parody today's decision makes of Hamilton's assurances to the people of New York: "The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over . . . the purse; no direction . . . of the wealth of society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961).

* * *

Today's opinion changes the usual rules of statutory interpretation for the sake of the Affordable Care Act. That, alas, is not a novelty. In *National Federation of Independent Business* v. *Sebelius*, 567 U. S. ___, this Court revised major components of the statute in order to save them from unconstitutionality. The Act that Congress passed provides that every individual "shall" maintain insurance or else pay a "penalty." 26 U. S. C. §5000A. This Court, however, saw that the Commerce Clause does not authorize a federal mandate to buy health insurance. So it rewrote the mandate-cum-penalty as a tax. 567 U. S., at ___–___ (principal opinion) (slip op., at 15–45). The Act that Congress passed also requires every State to accept an expansion of its Medicaid program, or else risk losing *all* Medicaid funding. 42 U. S. C. §1396c. This Court, however, saw that the Spending Clause does not authorize this coercive condition. So it rewrote the law to withhold only the *incremental* funds associated with the Medicaid expansion. 567 U. S., at ___–___ (principal opinion) (slip op., at 45–58). Having transformed two major parts of the law, the Court today has turned its attention to a third. The Act that Congress passed makes tax credits available only on an "Exchange established by the State." This Court, however, concludes that this limitation would prevent the rest of the Act from working as well as hoped. So it rewrites the law to make tax credits available everywhere. We should start calling this law SCOTUScare.

Perhaps the Patient Protection and Affordable Care Act will attain the enduring status of the Social Security Act or the Taft-Hartley Act; perhaps not. But this Court's two decisions on the Act will surely be remembered through the years. The somersaults of statutory interpretation they have performed ("penalty" means tax, "further [Medicaid] payments to the State" means only incremental Medicaid payments to the State, "established by the State" means not established by the State) will be cited by litigants endlessly, to the confusion of honest jurisprudence. And the cases will publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites.

I dissent.

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2015, I electronically filed the foregoing letter with the Clerk of Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that electronic service will be accomplished by the appellate CM/ECF system.

/s/ Stephen G. Yoder

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Dated: June 26, 2015

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Michael D. Peters, Plaintiff, v. LifeLock Incorporated, et al., Defendants.	No. CV-14-00576-PHX-ROS **ORDER**

Plaintiff Michael D. Peters has sued his former employer, Defendant LifeLock, Inc. ("LifeLock"), for violating the whistleblower provisions of the Sarbanes-Oxley Act and the Dodd-Frank Act. Peters has also sued Cristy Schaan ("Schaan"), a former coworker, for defamation. LifeLock moves to dismiss the claim brought under the Dodd-Frank Act and Schaan moves to dismiss the defamation claim. Peters has also moved for judgment on the pleadings regarding one of the counterclaims brought against him by LifeLock. As set out below, Schaan will be dismissed but the Dodd-Frank Act claim and the counterclaim against Peters will be allowed to proceed.

BACKGROUND

According to his complaint, "Peters is an internationally recognized authority on information technology security." (Doc. 1 at 2). Sometime prior to 2013, Peters worked at a company now known as Vantiv. Peters left that position under disputed circumstances involving Peters and Vantiv entering into a "separation agreement." (Doc. 1 at 6). Peters subsequently obtained a different job in Georgia.

In 2013, Peters was working in Georgia when he was contacted by a recruiter regarding a position at LifeLock. Peters pursued the position by submitting an application. In his application, Peters stated he had resigned from Vantiv. (Doc. 1 at 6). After a lengthy interview process, LifeLock offered Peters the position of Chief Information Security Officer ("CISO"). Peters moved to Arizona and started work at LifeLock on July 1, 2013.

Upon starting work, Peters displaced Schaan who had been serving as the interim CISO. Schaan had applied for the CISO position but she was passed over in favor of Peters. Schaan allegedly was upset about being passed over and, the same day Peters started work, Schaan decided to conduct "her own private investigation of Peters' prior employment." (Doc. 1 at 8). Schaan emailed Kim Jones, an acquaintance who worked at Vantiv, and asked Jones "if he knew anything about Peters." Jones responded via email the next day. In that email, Jones stated:

- "Peters was fired from [Vantiv] and that he was walked out of the building without being allowed to return to his office to retrieve his personal belongings."
- "Peters's relationship building skills [are] virtually non-existent."
- "Peters has a reputation for being disingenuous in his promotional activities by overstating his accomplishments."
- "Peters engaged in inappropriate actions."

Schaan took no action with Jones' email at that time.

Shortly after starting work at LifeLock, Peters "began an initial risk assessment." (Doc. 1 at 3). During that assessment, Peters discovered "many instances of illegal and incompetent practices that constituted fraud against LifeLock's shareholders." Those instances of fraud included evidence that audits were not done, despite LifeLock representing otherwise, as well as LifeLock "manipulat[ing] the customer alerts sent to its elderly customers." (Doc. 1 at 4).

On July 9, 2013, Peters met with LifeLock's CFO Chris Power and discussed the initial assessment findings and the areas Peters found concerning. Power took no action.

A few days later, Peters met with his direct supervisor, LifeLock's chief information officer, Rich Stebbins. Again Peters expressed his concerns yet Stebbins did nothing. After these meetings, LifeLock's "upper management" decided to fire Peters. To do so, the "upper management directed Michelle Deutsch, LifeLock's in-house special counsel for labor and employment, to try and find grounds to terminate Peters's employment." (Doc. 1 at 6). Deutsch contacted Vantiv and "she was incorrectly told that Peters had been fired." Around this same time, Schaan "discovered that LifeLock was about to fire Peters." In an attempt to "seal Peters's fate," Schaan forwarded Stebbins the email she had received from Jones on July 2, 2013.

On July 29, 2013, LifeLock fired Peters. According to LifeLock, Peters was fired because he had "provided false information on his employment application" by claiming he resigned from Vantiv when, in fact, he had been fired. LifeLock also claimed Peters had engaged in inappropriate behavior by "'hit[ting] upon' a female employee." (Doc. 1 at 9). Peters alleges these reasons were false and "the real reason for his termination" was that he had "reported to his supervisors about the illegal, fraudulent, and incompetent business practices relating to fraud against shareholders that were occurring at LifeLock." (Doc. 1 at 9).

A few weeks after he was fired, Peters filed complaints against LifeLock with the Federal Trade Commission and the Securities and Exchange Commission. Peters also filed a "whistleblower complaint with the U.S. Department of Labor under the Sarbanes-Oxley Act." (Doc. 1 at 6). The Sarbanes-Oxley complaint remained pending for 180 days and, in early 2014, Peters filed this suit. The complaint alleges a whistleblower claim under the Sarbanes-Oxley Act as well as a whistleblower claim under the Dodd-Frank Act. The complaint also alleges a defamation claim against Schaan for forwarding the email she received from Jones.

Schaan responded to the complaint by seeking dismissal of the defamation claim. LifeLock answered the whistleblower claim under the Sarbanes-Oxley Act but seeks dismissal of the whistleblower claim under the Dodd-Frank Act. When answering

Peters' complaint, LifeLock asserted five counterclaims, including counterclaims for breach of contract and unjust enrichment. According to LifeLock, Peters made "material misrepresentations and omissions regarding his employment history" when he applied for the position with LifeLock. (Doc. 36 at 4). LifeLock relied on those misstatements and omissions when it made him an offer of employment. That offer included a signing bonus of $15,000 that would have to be repaid if Peters was terminated for cause during his first year. Peters received the signing bonus and has refused to repay it despite being terminated after only one month. LifeLock's breach of contract claim seeks to recover the signing bonus while the unjust enrichment claim "seeks full restitution of all salary and benefits LifeLock paid to Peters prior to the termination of his employment." (Doc. 36 at 3). Peters answered all the counterclaims but now moves for judgment on the pleadings regarding the unjust enrichment claim.

ANALYSIS

I. Standard for Motion to Dismiss and Judgment on the Pleadings

LifeLock and Schaan have filed motions to dismiss and Peters has filed a motion for judgment on the pleadings. The standard for evaluating these motions is the same. *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 n.4 (9th Cir. 2011). Under that standard, a claim must either be dismissed or judgment on the pleadings granted if it is not supported by "sufficient factual matter, accepted as true" to state a "plausible" claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This does not require "detailed factual allegations" but it does require "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. This is not a "probability requirement," but a requirement that the factual allegations show "more than a sheer possibility that a defendant has acted unlawfully." *Id.*

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II. Defamation Claim Must be Dismissed

The sole basis for Peters' defamation claim against Schaan is her forwarding of Jones' email. Schaan argues the Communications Decency Act ("CDA"), 47 U.S.C. § 230, prevents her from being held liable for forwarding that email. Schaan is correct.

Passed in 1996, the CDA has "been widely and consistently interpreted to confer broad immunity against defamation liability for those who use the Internet to publish information that originated from another source." *Barrett v. Rosenthal*, 146 P.3d 510, 513 (Cal. 2006). The portion of the CDA conferring that immunity provides "[n]o . . . user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Based on the definition in the CDA, there is no question Jones qualified as an "information content provider." 47 U.S.C. § 23(f)(3) (defining "information content provider" as "any person . . . that is responsible . . . for the creation or development of information"). And while "user" is not defined in the CDA, it "plainly refers to someone who uses something, and the statutory context makes it clear that Congress simply meant someone who uses an interactive computer service." *Barrett*, 146 P.3d at 526. In light of this, Schaan was a "user" of an "interactive computer service" when she forwarded Jones' email. *See* 47 U.S.C. § 230(f)(2) (defining "interactive computer service"). Put together, these definitions mean Schaan cannot "be treated as the publisher or speaker" of the information contained in Jones' email. 47 U.S.C. § 230(c)(1). And that means Schaan cannot be liable for defamation based on forwarding Jones' email. *See Peagler v. Phoenix Newspapers, Inc.*, 560 P.2d 1216, 1222 (Ariz. 1977) (individual liable for defamation if she "*publishes* a false and defamatory communication") (emphasis added); 47 U.S.C. § 230(e)(3) (preempting state law inconsistent with CDA).

Peters attempts to avoid this straightforward conclusion by arguing it would frustrate a central purpose of the CDA to read its immunity provision as protecting individuals. (Doc. 28 at 7). But the CDA's immunity provision explicitly covers any "*user* of an interactive computer system." 47 U.S.C. § 230(c)(1) (emphasis added).

Peters offers no argument that Schaan does not qualify as a "user" as that term is used in the CDA. Therefore, his policy arguments are unconvincing. *See United States v. Aerojet Gen. Corp.*, 606 F.3d 1142, 1151 (9th Cir. 2010) (rejecting policy argument in light of unambiguous statutory language).

Peters also argues the CDA immunity provision should not apply because Schaan "instigat[ed]" the defamation and committed a "targeted move" by forwarding the email "to the one person she thought could cause the most harm to Peters." (Doc. 28 at 9). Peters does not explain how, assuming Schaan's behavior can be described in these terms, that behavior takes her outside the CDA's immunity. The CDA's immunity provision does not carve out exceptions for content "instigat[ed]" by another or content that is forwarded in a "targeted move." To be clear, under the facts alleged in the complaint, Schaan did not generate any defamatory statements herself when she first contacted Jones. Rather, she solicited an email from Jones and then forwarded that email without adding any defamatory statements of her own. If Schaan had added her own defamatory comments, the situation would be different.[1] But she did not. Thus, the CDA immunity provision applies and the defamation claim against Schaan must be dismissed.[2]

III. Dodd-Frank Act Claim is Plausible

LifeLock argues Peters cannot pursue a whistleblower claim under the Dodd-Frank Act because he was fired *before* he made any report to the Securities and Exchange Commission (the "Commission"). LifeLock has Fifth Circuit authority in its favor but many courts have criticized that opinion as adopting an overly restrictive view of the statutory language. Under the reading of the statute adopted by the vast majority of courts, Peters' internal complaints were sufficient to protect him from retaliatory

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[1] As noted in *Barrett*, "[a]t some point, active involvement in the creation of a defamatory Internet posting would expose a defendant to liability as an original source." 146 P.3d at 527 n.19. But Peters has not alleged Schaan had "active involvement" in Jones' email such that she could be deemed the original source of the email.

[2] Peters asks for leave to amend his complaint against Schaan. (Doc. 28 at 12). If Peters wishes to amend, he must file a motion to amend accompanied by his proposed amended pleading establishing a factual basis for avoiding the broad immunity provision.

discharge.

A. *Chevron* Analysis

Peters has asserted a claim under 15 U.S.C. § 78u-6(h), the provision of the Dodd-Frank Act protecting an employee from adverse employment actions when that employee engages in certain activities. Congress granted the Commission "authority to issue such rules and regulations as may be necessary or appropriate to implement" this provision. 15 U.S.C. § 78u-6(j). Pursuant to that authority, the Commission adopted a rule providing broad whistleblower protections to employees. 17 C.F.R. § 240.21F-2(b). Importantly, that rule states an employee may assert a retaliation claim under the Dodd-Frank Act even if the employee did not make a report to the Commission prior to the adverse employment action. LifeLock argues this rule is contrary to the plain language of the Dodd-Frank Act and the Court should not defer to it.

LifeLock's argument requires application of the familiar two-step framework contained in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). That framework requires the Court determine, using "the ordinary tools of statutory construction . . . whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *City of Arlington, Tex. V. FCC*, 133 S. Ct. 1863, 1868 (2013) (quotation omitted). Only when the statute can be deemed ambiguous must the Court proceed to the second step of determining whether the agency's interpretation "is based on a permissible construction of the statute." *Id.*

B. Statute is Ambiguous

Determining whether the statute is ambiguous requires the text of the statute be set out in some detail. The Dodd-Frank Act whistleblower provision begins by defining "whistleblower."

> The term "whistleblower" means any individual who provides . . . information relating to a violation of the securities laws to the Commission, in a manner established, by rule or

regulation, by the Commission.

15 U.S.C. § 78u-6(a)(6). The scope of protection provided to a "whisteblower" is then set forth in subsection (h):

> (h) Protection of whistleblowers
>
> (1) Prohibition against retaliation
>
> (A) In general
>
> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—
>
> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

Upon first reading, there is an oddity when the statutory definition in subsection (a) is plugged into subsection (h). The statute defines a "whistleblower" as an individual who directly makes a report to the Commission. But subsection (h)(1)(A) then appears to ignore the definition in setting out the types of protected activity. Subsection (h)(1)(A)(i) first protects "providing information to the Commission" even though the very definition of "whistleblower" requires the individual provide information to the Commission. Subsection (h)(1)(A)(ii) then broadly protects "initiating, testifying in, or assisting in" Commission-related actions. Again, however, the definition itself would seem to protect such activities. Finally, subsection (h)(1)(A)(iii) protects a "whistleblower" when that individual makes "disclosures that are required or protected under the Sarbanes-Oxley Act of 2002." This last provision does not duplicate the coverage inherent in the statutory definition, but it raises its own set of problems because the Sarbanes-Oxley Act requires and protects a wide variety of disclosures *other* than reports to the Commission. Thus, an individual can make a disclosure "required or protected under the Sarbanes-Oxley Act" without ever contacting the Commission. The problem, therefore, is how to reconcile the statutory definition of "whistleblower" seemingly requiring a direct report to the Commission with the broader substantive protection set out in (h)(1)(A)(iii).

This problem has generated conflicting views of the statute. The Fifth Circuit is the only court of appeals to address the issue. In *Asadi v. G.E. Engergy (USA), LLC*, 720 F.3d 620, 626 (5th Cir. 2013), the court held the statutory definition of "whistleblower" and the protection provided in (h)(1)(A)(iii) "do not conflict." In the Fifth Circuit's view, the statute's repeated use of the term "whistleblower," instead of "individual" or "employee," is significant. *Id.* That is, by using the term "whistleblower" when describing the substantive protections, Congress was stressing that *only* whistleblowers, as defined by the statute, were protected. And under that definition, a report to the Commission *before* the adverse action is taken is an absolute prerequisite.

The Fifth Circuit acknowledged its reading raised the possibility that (h)(1)(A)(iii) was "superfluous" in that it would seem to duplicate the protection afforded in (h)(1)(A)(i) and (h)(1)(A)(ii). *Id.* at 627. But the Fifth Circuit concluded its reading of the statute did not render (h)(1)(A)(iii) superfluous because that section will provide protection "where the employer, unaware that the individual had already reported to the Commission, takes an adverse employment action against the employee for" a disclosure required or protected under the Sarbanes-Oxley Act. (Doc. 27 at 32) (amicus brief from SEC). In other words, (h)(1)(A)(i) protects an employee who reports to the Commission and the employer knows of that activity; (h)(1)(A)(ii) protects an employee who aids the Commission and the employer knows of that activity; and (h)(1)(A)(iii) protects an employee who makes an internal report and makes a report to the Commission, but the employer is not aware of the report to the Commission. This construction is not convincing for multiple reasons not addressed by the Fifth Circuit.

To start, the Fifth Circuit stressed its reading was necessary to avoid "read[ing] the words 'to the Commission' out of the definition of 'whistleblower' for purposes" of subsection (h). *Id.* at 628. In the Fifth Circuit's view, its reading was the only way to avoid violating the "surplusage canon [requiring] that every word is to be given effect." *Id.* The Fifth Circuit did not explain, however, how its reading does not independently violate the surplusage canon. According to the Fifth Circuit, Congress made it abundantly clear the statutory definition *must* be plugged into subsection (h). But doing so makes (h)(1)(A)(i) meaningless. That is, combining the statutory definition with (h)(1)(A)(i) results in an employee being protected from adverse employment actions when he "provides . . . information relating to a violation of the securities laws to the Commission," provided he then "provid[es] information to the Commission." The Fifth Circuit offered no explanation how this reading was sensible. In fact, the Fifth Circuit simply ignored the surplusage problem its reading created in its attempt to avoid that very problem.

The Fifth Circuit's approach also makes the Dodd-Frank's anti-retaliation provision unique from other anti-retaliation provisions by imposing something approaching strict liability for certain adverse employment actions. Under the Fifth Circuit's approach, an employee engages in "protected activity" under (h)(1)(A)(iii) by doing two things: making a report to the Commission and making another disclosure required or protected by Sarbanes-Oxley. An employee *must* engage in both activities to qualify for protection under (h)(1)(A)(iii). But an employer will not always know an employee has made a report to the Commission. Thus, an employer's retaliation liability under (h)(1)(A)(iii) will not depend on the employer's knowledge of protected activity. Instead, it will depend on whether the employee, unbeknownst to the employer, has made a report to the Commission. This would be contrary to other anti-retaliation provisions that require a causal link between the protected activity and the adverse employment action.[3] *Cf. Thomas v. City of Beaverton*, 379 F.3d 802, 812 n.4 (9th Cir. 2004) ("The employer's awareness of the protected activity is also important in establishing a causal link."). It is not sensible to conclude there would be a causal link between an employee's protected activity and an adverse employment action when the employer is not even aware protected activity occurred. *See Bussing v. COR Clearing*, LLC, 2014 WL 2111207, at *11 (D. Neb. May 21, 2014) (Fifth Circuit's interpretation "creates a peculiar standard of liability, in which liability for retaliation only attaches if certain preconditions—of which they are unaware—are satisfied"). At the very least, lowering the standard for retaliation liability in this way would represent a unique approach by Congress and would be contrary to the generally accepted deterrent purpose of anti-retaliation provisions. *Stiltner v. Beretta U.S.A. Corp.*, 74 F.3d 1473, 1491 (4th Cir. 1996) (Phillips, J., concurring in part and dissenting in part) (noting "fundamental purpose" of anti-retaliation provisions is "to impose a general deterrence upon the impulse of employers to retaliate for the exercise of statutory rights.").

Based on these problems, and others, the majority of district courts to address the issue have rejected the Fifth Circuit's reasoning. For the most part, those courts have not concluded the Dodd-Frank Act is clear. *But see Bussing*, 2014 WL 2111207, at *11 (finding statute unambiguously protects disclosures even absent reporting to the Commission). Rather, they have simply "concluded that the Dodd-Frank Act's

[3] LifeLock attempts to avoid this conclusion by arguing it is a "red herring." (Doc. 29 at 7). According to LifeLock, the "protected conduct" is the employee's internal report, provided he has already made a report to the Commission. But that does not address the issue. The problem remains that, according to the Fifth Circuit, an employer may be held liable under the anti-retaliation provision even though it does not know the employee has engaged in the conduct actually protected by the statute (*i.e.*, reporting to the Commission).

whistleblower provision is ambiguous on its face." *Khazin v. TD Ameritrade Holding Corp.*, 2014 WL 940703, at *5 (D.N.J. March 11, 2014). That facial ambiguity is based on (h)(1)(A)(iii) being "in direct conflict" with the statutory definition because (h)(1)(A)(iii) "provides protection to persons who have not disclosed information to the [Commission]." *Id.* (quotation omitted). The Court concludes this approach is persuasive.

Trying to plug the statutory definition of whistleblower into the substantive provisions creates a conflict. And that conflict creates serious "uncertainty of meaning or intention" regarding the reach of the statute. *Republic of Ecuador v. Mackay*, 742 F.3d 860, 865 (9th Cir. 2014) (quotation omitted). That is enough to deem the statute ambiguous. Therefore, the Court must proceed to the second step of the *Chevron* analysis.

C. The Commission's Interpretation is Permissible

The second step requires the Court determine whether the Commission's interpretation represents "a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Nat. Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). This step requires the Court determine "whether Congress has explicitly instructed the agency to flesh out specific provisions of the general legislation, or has impliedly left to the agency the task of developing standards to carry out the general policy of the statute." *Tovar v. United States Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993). If Congress explicitly instructed the agency to develop regulations, "a reviewing court must find the agency's construction permissible unless it is arbitrary, capricious, or manifestly contrary to the statute." *Id.* If Congress only impliedly deferred to the agency, "a court must uphold the agency's construction if it is reasonable." *Id.* The latter "reasonableness standard affords agencies less latitude than the arbitrary and capricious standard." *McLean v. Crabtree*, 173 F.3d 1176, 1181 (9th Cir. 1999). But even the reasonableness standard does not require the agency's construction be the only possible construction or the one the Court would reach on its own. *Id.*

The Dodd-Frank Act explicitly instructs the Commission "to issue such rules and regulations as may be necessary or appropriate to implement" the whistleblower provisions. 15 U.S.C. § 78u-6(j). This may qualify as an "explicit" statement such that the Commission's rule is subject to review under the arbitrary and capricious standard. But the parties do not discuss the different standards and apparently are content to rely on the reasonableness standard. Under that standard, the Court must defer to the Commission's rule unless the Court is "compell[ed] to reject" its construction of the statute based on it being either irrational or obviously inconsistent with the statute. *Leisnoi, Inc. v. Stratman*, 154 F.3d 1062, 1069 (9th Cir. 1998) (quotation omitted); *Haro v. Sebelius*, 747 F.3d 1099, 1115 (9th Cir. 2014) (quotation omitted).

The Commission's rule reads the statute as providing protection to employees who make only internal reports. Securities Whistleblower Incentives and Protections, 76 Fed Reg. 34300-01 (June 13, 2011) ("[T]he statutory anti-retaliation protections apply to three different categories of whistleblowers, and the third category includes individuals who report to persons or governmental authorities other than the Commission."). The only argument offered by LifeLock that this is not a permissible construction is that, given the plain language of the statute, the Commission's rule impermissibly expands the reach of the statute. As set forth above, the plain language of the statute is not clear. In fact, at least one court read the language of the statute as dictating the completely opposite result as that proposed by LifeLock. *Bussing*, 2014 WL 2111207, at *11 (finding protection for internal reports "flows from the statute itself, and it is not necessary to determine if deference to the SEC's construction of the statute is warranted"). In these circumstances, the Commission's rule seeking to clarify the reach of the statute is neither arbitrary and capricious nor unreasonable.

LifeLock does not contest that if its statutory construction is rejected, Peters has stated a claim under the Dodd-Frank Act. Therefore, LifeLock will be required to answer that claim.

IV. Claim for Unjust Enrichment is Plausible

Peters moves for judgment on the pleadings regarding LifeLock's unjust enrichment counterclaim. That counterclaim seeks to recover the salary and benefits Peters received during his one month of working at LifeLock. Peters' motion seems to invoke two separate arguments.[4] First, that the parties' contract prevents any resort to unjust enrichment. And second, Peters' retention of his "salary and benefits" cannot be "unjust" given that he performed services for the month he was employed. These arguments are addressed in turn.

Peters is correct that LifeLock cannot rely on an unjust enrichment claim if "a specific contract . . . governs the [parties'] relationship." *Brooks v. Valley Nat'l Bank*, 548 P.2d 1166, 1171 (Ariz. 1976). But LifeLock is seeking rescission of the parties' alleged contract. And unjust enrichment is a viable claim when a purported contract is not enforceable. *W. Corrections Group, Inc. v. Tierney*, 96 P.3d 1070, 1077 (Ariz. Ct. App. 2004) ("Quantum meruit damages are available when services are performed under an unenforceable contract . . . ."). Because the parties do not agree a contract governed their relationship, LifeLock can pursue an unjust enrichment claim. Of course, LifeLock cannot prevail on both its breach of contract and unjust enrichment counterclaims. *See Edward Greenbank Enters. Of Ariz. v. Pepper*, 538 P.2d 389, 391 (Ariz. 1975) (party may pursue claims for fraudulent inducement and breach of contract but cannot recover on both). But under the facts alleged in LifeLock's counterclaims, LifeLock can pursue both counterclaims past the pleading stage.

Peters is also correct that retention of his "salary and benefits" does not appear "unjust," a prerequisite to an unjust enrichment claim. *Murdock-Bryant Const. Inc. v. Pearson*, 703 P.2d 1197, 1203 (Ariz. 1985) ("Restitutionary relief is allowable only when

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[4] Peters also claims the unjust enrichment counterclaim should be dismissed because it is duplicative of the breach of contract counterclaim. LifeLock's breach of contract counterclaim seeks to recover the signing bonus provided to Peters while the unjust enrichment counterclaim seeks the "salary and benefits" LifeLock paid to Peters during his employment. Thus, the counterclaims are not duplicative. And even if they were, such duplication would not be a valid basis for dismissal because under Federal Rule of Civil Procedure 8(d), a party may assert claims in the alternative.

it would be inequitable or unjust for defendant to retain the benefit without compensating plaintiff."). But LifeLock alleges it paid Peters' salary and benefits based on his concealment of his "true qualifications or, rather, lack thereof." (Doc. 36 at 6). In other words, LifeLock alleges it did not receive what it bargained for and it paid the salary and benefits under false pretenses. That is enough to proceed past the pleading stage.[5] *Cf. Dilek v. Watson Enters., Inc.*, 885 F. Supp. 2d 632, 649 (S.D.N.Y. 2012) (rejecting unjust enrichment claim brought by employer against employee because employer "had materially full knowledge of the facts it alleges about [Plaintiff's] job performance"). Peters' motion for judgment on the pleadings will be denied.

Accordingly,

IT IS ORDERED the Motion to Dismiss (Doc. 15) is **DENIED**.

IT IS FURTHER ORDERED the Motion to Dismiss (Doc. 21) is **GRANTED**. Defendant Cristy Schaan is **DISMISSED**.

IT IS FURTHER ORDERED the Motion for Leave to File Amicus Brief (Doc. 26) is **GRANTED**.

IT IS FURTHER ORDERED the Motion for Judgment on the Pleadings (Doc. 34) is **DENIED**.

IT IS FURTHER ORDERED the Stipulation of Dismissal (Doc. 41) is **GRANTED**. Defendant Kim Jones is **DISMISSED WITH PREJUDICE** with each party to bear his own attorneys' fees, costs, and expenses.

Dated this 19th day of September, 2014.

Honorable Roslyn O. Silver
Senior United States District Judge

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[5] Whether LifeLock can recover the salary and benefits paid to Peters raises issues under Arizona's law regarding payment of wages. At present, it is unclear how LifeLock plans on avoiding Arizona law regarding payment and withholding of wages. *See, e.g.*, A.R.S. § 23-352 (setting forth exclusive grounds for withholding wages). But that issue can be addressed through later motion, if appropriate.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

JENNIFER DAVIES, an individual,

Plaintiff,

vs.

BROADCOM CORPORATION, a California corporation,

Defendant.

Case No. SACV15-928 AG (JCx)

[PROPOSED] ORDER GRANTING MOTION BY THE SECURITIES AND EXCHANGE COMMISSION TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF

Judge: Hon. Andrew J. Guilford
Date: July 27, 2015
Time: 10 a.m.
Crtrm.: 10D

The Court having considered the Securities and Exchange Commission's motion to file i) an *amicus curiae* brief on the sole issue of whether an individual must make a report to the SEC in advance of alleged retaliation to be considered a "whistleblower" within the meaning of the anti-retaliation provisions of 15 U.S.C. § 78u-6, and ii) the letter that the SEC submitted to the Second Circuit on June 26, 2015, pursuant to Fed. R. App. P. 28(j), regarding the Supreme Court's recent decision in *King v. Burwell*, No. 14-114, 2015 WL 2473448 (S. Ct. June 25, 2015), the Court hereby orders that the motion is GRANTED. The Clerk is directed to file the brief and the letter that were attached as exhibits to the SEC's motion.

DATED: July ___, 2015 By: ____________________________________

Andrew J. Guilford
United States District Judge

PROOF OF SERVICE

I am over the age of 18 years and not a party to this action. My business address is:

U.S. SECURITIES AND EXCHANGE COMMISSION,
400 S. Flower Street, Suite 900, Los Angeles, California 90071
Telephone No. (323) 965-3998; Facsimile No. (213) 443-1904.

On July 6, 2015, I caused to be served the document entitled **[PROPOSED] ORDER GRANTING MOTION BY THE SECURITIES AND EXCHANGE COMMISSION TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF** on all the parties to this action addressed as stated on the attached service list:

☐ **OFFICE MAIL:** By placing in sealed envelope(s), which I placed for collection and mailing today following ordinary business practices. I am readily familiar with this agency's practice for collection and processing of correspondence for mailing; such correspondence would be deposited with the U.S. Postal Service on the same day in the ordinary course of business.

☐ **PERSONAL DEPOSIT IN MAIL:** By placing in sealed envelope(s), which I personally deposited with the U.S. Postal Service. Each such envelope was deposited with the U.S. Postal Service at Los Angeles, California, with first class postage thereon fully prepaid.

☐ **EXPRESS U.S. MAIL:** Each such envelope was deposited in a facility regularly maintained at the U.S. Postal Service for receipt of Express Mail at Los Angeles, California, with Express Mail postage paid.

☐ **HAND DELIVERY:** I caused to be hand delivered each such envelope to the office of the addressee as stated on the attached service list.

☐ **UNITED PARCEL SERVICE:** By placing in sealed envelope(s) designated by United Parcel Service ("UPS") with delivery fees paid or provided for, which I deposited in a facility regularly maintained by UPS or delivered to a UPS courier, at Los Angeles, California.

☐ **ELECTRONIC MAIL:** By transmitting the document by electronic mail to the electronic mail address as stated on the attached service list.

☒ **E-FILING:** By causing the document to be electronically filed via the Court's CM/ECF system, which effects electronic service on counsel who are registered with the CM/ECF system.

☐ **FAX:** By transmitting the document by facsimile transmission. The transmission was reported as complete and without error.

I declare under penalty of perjury that the foregoing is true and correct.

Date: July 6, 2015

/s/ John W. Berry
John W. Berry

Davies vs. Broadcom, et al.
United States District Court—Central District of California
Case No. SACV15-928 AG (JCx)

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