No. 16-0715

In the
Supreme Court of the United States

SARAH FOSTER,
Petitioner,
v.

SENTINEL MEDIA, INC., *et. al.*,
Respondent.

On Writ of Certiorari To The
United States Court of Appeals
For the Thirteenth Judicial Circuit

BRIEF FOR RESPONDENT

JESSYKA LINTON
ALI MOSSER
Team No. 3

October 10, 2017

QUESTIONS PRESENTED

1. Does an individual classify as a "whistleblower" under 15 U.S.C. § 78u-6 when the individual reports a securities law violation internally and not to the Securities and Exchange Commission?

2. Can a party, pursuant to Federal Rule of Civil Procedure 30(e), change the deposition in form or substance?

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STATEMENT OF THE CASE

Nearly every child has a memory of waking up to their father with a cup of coffee reading the Saturday morning paper. Behind that memory, was Sentinel Media. Though Sentinel got its start in the newspaper publishing industry, Sentinel grew to be a pillar of the Everton community. Sentinel eventually became an owner of local radio outlets and the beloved Everton Cougars. Record at 9. Sentinel grew to employ approximately 18,000 employees and to be valued at over $14 billion, with stock prices consistently averaging $65 per share. R. at 9.[1]

Sarah Foster was one of the many employees to benefit from Sentinel's hard-earned success. From 2002 to 2014, Foster enjoyed working as a financial reporter for *The Everton Sentinel*. R. at 10. Foster was given a number of opportunities for success with Sentinel. Foster covered several high-profile cases, and was given the freedom to express her views, even when they conflicted with the interests of Sentinel (see letter criticizing *Sentinel*'s endorsement of a presidential candidate). R. at 12.

Foster's time with *Sentinel* was not unblemished. Foster struggled both with her work and with those around her. In addition to being accused for fabricating quotes in an article about Ally's Organics IPO, Foster caused tension with her coworkers. R. at 11. Foster's attacks were broad: battering smokers outside *Sentinel*'s main office, badgering emails on her coffee preferences, and belittling a coworker who won the coveted Pulitzer Prize for poetry. R. at 11.

[1] "R. at 10" will from here on refer to Record at 10.

The final straw of a strained employment relationship came when Foster openly bullied Sentinel's Chief Financial Officer, Karen Crowder. R. at 13.

With every action, there is an equal and opposite reaction. The explosion of free news on the internet had a number of magnificent benefits to the public. Unfortunately, the spread of free media took a devastating toll on Sentinel. By 2014, Sentinel reduced its workforce to 10,000 employees, its estimated value was $8 billion, and stock was trading at less than $23 per share. R. at 9.

So, when the shareholders of Sentinel received an offer for a leveraged buyout, from Little Equity Partners, LLC, primarily owned by reputable investor R. Forrest Little, the majority jumped at the chance to have their shares redeemed at $70 per share. R. at 9. Unfortunately, the transaction was devastating to Sentinel and its unsecured creditors, saddling the corporation with $10 billion in debt. R. at 10. Through a reorganization plan, Sentinel has avoided bankruptcy. R. at 10.

In January 2014, Foster, who was covering the Sentinel buyout, received a call from an undisclosed source concerning the buyout. R. at 12. According to the source, Little intended to make an offer so enticing, Sentinel's shareholders would not question his valuations and would be willing to remove any dissenting shareholders or management. R. at 12. Foster approached Karl Woodward, her editor, and informed him that Little used valuations that were too high. R. at 12. Woodward did not allow Foster to write the story for want of information. R. at 12. On March 11, 2014, around the time the shareholders were voting to accept the buyout, Foster met with Crowder. R. at 13. Foster brought accusations about the

buyout and asked Crowder to comment and to facilitate a meeting with Little. R. at 13. After Crowder declined Foster's requests, Foster abruptly left Crowder's office, and in the presence of at least five others, yelled, "Just wait. The truth will come out. It always does. You had your chance." R. at 13. Foster was terminated on March 15, 2014. R. at 13. Foster sued Sentinel in bankruptcy court in 2016 claiming her termination violated federal and Everton state workplace law, and claimed that she was a "whistleblower" as defined by the Dodd-Frank Act. R. at 13.

During discovery, Woodward, along with other witnesses, was deposed. R. at 13. After deposition, pursuant to Rule 30(e), Sentinel requested Woodward be given the opportunity to review the transcript. R. at 14. The next month, the court reporter informed Woodward that a copy of his transcript was available for review. R. at 14. One week later, Woodward submitted a notarized errata sheet in which he indicated revisions to his deposition. R. at 14. The totality of Woodward's statements are contained below with the added revisions in bold:

> "Q: [Foster's counsel:] Do you know why Ms. Foster was fired?
>
> A: [Woodward:] Basically, she was just too hard to get along with. Many of her co-workers were afraid of her and tended to avoid her. Her personality was so abrasive. **And, the Ally Organics' IPO article. I'm not sure what I thought about the whole episode, but we all, in management, took it very seriously. Everyone felt that journalistic integrity was crucial to the Sentinel's reputation. So do I.**
>
> Q: But, you had generally given her positive performance reviews?
>
> A: Yes. Overall, her work was good, she was a good writer – probably even deserved that Pulitzer. **But, again, I was also beginning to wonder whether she had fabricated those quotes. It was definitely an issue.**"

R. at 13 – 14. Woodward, through an affidavit, explained the reasons for his changes: due to his worry over his wife's recovery from knee surgery, he forgot a meeting in which management addressed the fabrication allegations against Foster. R. at 14. Crowder reminded Woodward of the meeting. R. at 14.

In the Eastern District Court of Everton, Foster moved for partial summary judgment, claiming that she is a "whistleblower" Dodd-Frank Act. R. at 2. Foster also moved to strike Woodward's amended deposition. R. at 6. The district court granted Foster's motion for partial summary judgment of the "whistleblower" claim, but denied Foster's motion to strike Woodward's depositional amendments. R. at 15. On appeal, the Thirteenth Circuit held that Foster was not a "whistleblower" under the Dodd-Frank Act, and that Woodward's depositional changes were permissible under Rule 30(e). R. at 22.

SUMMARY OF THE ARGUMENT

The Dodd-Frank Act and Rule 30(e) cover vastly different topics: the former is concerned with the definition of "whistleblower" and the protections granted those who are "whistleblowers," and the latter is concerned with the liberties afforded a deponent after deposition is taken. However, the underlying issue of this case is the same for both issues: Will this Court honor the clear and unambiguous language of the authors, or will it allow appellate courts to change the plain meaning to achieve a different result? The drafters of the respective writings, after considering all relevant policy concerns, have clearly and firmly allocated power within the text of the statute and the rule. For the Dodd-Frank Act, the drafters placed power in the hands of the Securities and Exchange Commission (SEC). For Rule 30(e), the drafters placed power in the hands of the fact finder, or the jury.

First, the Dodd-Frank Act's whistleblower provision in 15 U.S.C. § 78u-6 was written with clear and unambiguous language to show that whistleblower anti-retaliation protection applies only to those who report to the SEC. Because the Court should end its analysis at the clear and unambiguous language of the Dodd-Frank Act, the *Chevron* Doctrine, and thus, the SEC's expanded definition of "whistleblower" do not apply.

Second, Federal Rule of Civil Procedure 30(e) clearly allows a deponent to make changes in form or substance and does not require the judge to determine the validity of the deponent's reasons for making the changes. The Court should end its

analysis with the clear and unambiguous language of Rule 30(e) and follow the approach applied by the Second Circuit Court of Appeals.

The Court should read the Act and the Rule to mean what they say, or require the authors to rewrite these provisions to say what they mean.

ARGUMENT

I. The unambiguous definition of "whistleblower" in 15 U.S.C. § 78u-6 precludes petitioner's claim.

This case presents a simple issue of statutory interpretation that is resolved by a plain reading of the unambiguous text of the statute. The relevant parts of the statute state:

> (a) The term "whistleblower" means any individual who provides…information relating to a violation of the securities laws *to the Commission*…
>
> [***]
>
> (h)(1)(A) 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.

15 U.S.C. § 78u-6(a)(6), (h)(1)(A)(i)-(iii) (emphasis added). Sarah Foster brought notice of a securities law violation internally to Sentinel's General Counsel and Chief Financial Officer, but not to the Securities and Exchange Commission. R. at 13. Under the plain text reading, Foster cannot bring a claim for anti-retaliation because she does not fit the definition of "whistleblower" as set out in the statute.

Interpretation of a statute is a question of law. *In re Southwest Airlines Voucher Litig.*, 799 F.3d 701, 707 (7th Cir. 2015). This court reviews the interpretation of the statute de novo. *Rumsey v. Dep't of Justice*, 866 F.3d 1375, 1379 (Fed. Cir. 2017). Specifically, this court has de novo review of interpretation of terms defined by a statute. *GIC Servs., L.L.C. v. Freightplus USA, Inc.,* 866 F.3d 649, 656 (5th Cir. 2017).

A. The statute unambiguously states that anti-retaliation protection applies only to those who report violations to the SEC.

The statutory text bars Foster's claim. The text of the statute, the structure of the statute, and the purpose behind the statute all cohesively serve the same function. These statutory elements demonstrate that anti-retaliation protection for whistleblowers is provided only for those who report securities law violations to the Securities and Exchange Commission (SEC). Foster did not report a violation to the SEC, and, thus, is not a "whistleblower" as set forth in 15 U.S.C. § 78u-6.

1. The plain language of the statute clearly shows that reporting must be made to the Commission.

Courts read statutes according to their text. *Hui v. Castaneda*, 559 U.S. 799, 812 (2010). Thus, the interpretation of this statute begins with the text that Congress composed. This Court has repeatedly held that analysis begins with the text itself. *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1658 (2017) (in interpreting statutes, the Supreme Court always starts with the statutory language); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1569 (2017) (Court's analysis of a statute begins with the language of the statute); *Ross v. Blake*, 136 S.

Ct. 1850, 1856 (2016) (statutory interpretation begins with the text); *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1165 (2014) (in determining the meaning of a statutory provision, courts look first to its language). Then, when the text of a statute is clear, the inquiry into interpreting the statute ends with the text. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016).

Thus, the analysis here begins with the text of 15 U.S.C. § 78u-6. This issue centers on the way that provisions (a) and (h) work together. The part of the statute that Foster seeks to take advantage of is the anti-retaliation protection in Section (h). This section is entitled "Protection of whistleblowers." 15 U.S.C. § 78u-6(h). Congress defines "whistleblowers" in Section (a) of the statute. This definition clearly states that notice must be made to the Commission. If Congress had not specified where notice must be given, perhaps the argument that notice is sufficient when given to an employer would be viable, but Congress has spoken directly to Foster's argument. In light of Congress's words describing those who are whistleblowers, Foster's argument cannot stand.

The first clause of the anti-retaliation provision protects whistleblowers who, because of their lawful acts, provide "information to the Commission in accordance with this section." 15 U.S.C. § 78u-6(h)(1)(A)(i). This is similar to the definition clause. The phrase "to the Commission" mirrors the identical language found in the definition. Again, this clearly shows that reporting must be made to the Commission itself. This language is exceedingly clear – it leaves no room for any

other interpretation. Courts must give effect to the clear meaning of the statutes as written. *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017).

The second clause extends this protection to whistleblowers who are "initiating, testifying in, or assisting any investigation or judicial or administrative action of the Commission based upon or related to such information." 15 U.S.C. § 78u-6(h)(1)(A)(ii). This clause is not necessarily central to the issue at hand, but it notably describes interactions of the whistleblower with the Commission – just as the first clause does.

The third and final clause protects those whistleblowers who are "making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002…, this chapter…, section 1513(e) of title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission." 15 U.S.C. § 78u-6(h)(1)(A)(iii). Foster claims that this section allows for a broader definition of "whistleblower" to be brought in under the Sarbanes-Oxley Act.

The plain reading of this statute aligns with the conclusions drawn from analyzing the structure of the statute as well as looking at the purpose behind the statute. Together, these conclusions all show that the anti-retaliation provision applies only to those who report to the SEC, which does not include Foster.

As the Fifth Circuit reasoned, when these two parts of the statute are read together, two questions are clearly answered: "(1) who is protected; and (2) what actions by protected individuals constitute protected activity." *Asadi v. G.E. Energy (USA) L.L.C.*, 720 F.3d 620, 625 (5th Cir. 2013). Under the Fifth Circuit's reasoning,

the question to consider is if the individual is a whistleblower. *Id.* Only whistleblowers can take advantage of protection of the anti-retaliation provision. The dissent in *Berman* also acknowledges this as the correct line of reasoning. *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 157 (2d Cir. 2015) (dissent).

2. The statute includes an unambiguous definition of "whistleblower" that applies throughout the statute.

The definition of "whistleblower" included in the statute describes those individuals who report "to the Commission." 15 U.S.C. § 78u-6(a)(6). When a statute includes an explicit definition, the court must follow that definition. *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000). Because this statute includes a definition of "whistleblower," that definition set out by Congress controls throughout the statute. In interpreting a statute, a court presumes that the legislature says what it means and means what it says. *Henson v. Santander*, 137 S. Ct. 1718, 1725 (2017). Additionally, when Congress defines a term, the definition removes ambiguity about the meaning of a term. *Martinez v. Mukasey*, 519 F.3d 532, 544 (5th Cir. 2008). Because Congress purposely defined "whistleblower," that term has a distinct meaning. If Congress did not hold specific views on exactly what the term "whistleblower" meant, it would not have gone to the trouble to define the term in the beginning of the statute.

Additionally, a term that appears in multiple places within the statutory text will be read the same way in each instance it appears. *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). The Court has even taken a step further than this to find that similar language all encompassed in the same section of a statute should be

given a consistent meaning. *Nat'l Credit Union Admin. v. First Nat'l Bank & Tr. Co.*, 522 U.S. 479, 501 (1998). The term "whistleblower" appears multiple times throughout the statute – first in the title of the statute, then in the definitions section, and then is sprinkled throughout the following specific provisions.

"Statutory construction is a 'holistic endeavor,'" and the remainder of the statutory scheme often clarifies a provision that may seem ambiguous in isolation. *Koons Buick Pontiac GMC, Inc. v. High*, 543 U.S. 50, 59 (2004). Statutes should be interpreted as a symmetrical and coherent regulatory scheme. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1989 (2015). Additionally, courts "must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000). Thus, the definition clause set out at the beginning of the statute must be given effect throughout the entirety of the statute, just as Congress intended.

Congress set out a definition for "whistleblower" in Section (a)(6) of the statute. That section states:

> 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.

15 U.S.C. § 78u-6(a)(6) (emphasis added). Because Congress set out a definition in this specific section, this definition controls throughout the entire section. Statutory definitions control the meaning of statutory words. *Burgess v. United States*, 553 U.S. 124, 129 (2008). Additionally, Congress continued to use the term "whistleblower" throughout the remainder of the statute, further showing its intent to carry out its specific definition throughout the entire statute.

Before the definition section, the legislature added the following language: "In this section, the following definitions *shall* apply." 15 U.S.C. § 78u-6(a) (emphasis added). The various definitions, including "whistleblower" then follow. The word "shall" in a statute connotes a requirement. *Kingdomware Tech., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016). As used in statutes, the word "shall" is ordinarily the language of command. *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001). This language then mandates the use of this definition of "whistleblower" throughout the section. The court may not choose to look to other language when it has been mandated by the legislature to use a particular definition. A statute's use of the term "shall" normally imposes an obligation. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998).

The term "whistleblower" is used in the title of Section (h) ("Protection of *whistleblowers*") (emphasis added) and in the general statement in Section (h)(1)(A) that precedes the three actions in (i), (ii), and (iii) that trigger the anti-retaliation protection ("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 or employment because of any lawful act done by the *whistleblower*") 15 U.S.C. § 78u-6(h)(1)(A) (emphasis added).

Statutory titles and section titles are tools available for the resolution of doubt about the meaning of a statute. *Fla. Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008). Therefore, these titles provide further clarity that the "whistleblower" term applies throughout the statute to give it consistent meaning.

It is clear that this anti-retaliation provision applies to whistleblowers as Congress has identified them in its definition set out in the beginning of the statute.

Foster contends that Section (h)(1)(A)(iii) allows the Court to reach beyond this definition set out by the legislature. That section extends the retaliation protection to those whistleblowers "making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.). *Id.* "This Court has no roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that…Congress must have intended something broader." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 (2014). This is precisely what Foster is asking this Court to do – to extend the definition of "whistleblower" to include her internal report, even though that is obviously in contrast with the text of the statute. The legislature's use of "whistleblower" in the language immediately preceding this clause shows precisely that this clause extends only to whistleblowers as Congress has defined them in this statute. Just because the Sarbanes-Oxley Act is introduced does not mean that clear language that immediately precedes – and thus modifies – this clause can be ignored. The term "whistleblowers" as previously defined must still be regarded.

The Fifth Circuit correctly addressed this issue in *Asadi v. G.E. Energy*. The facts of that case mirror those of the case at hand. In *Asadi*, appellant Khaled Asadi filed an internal report of securities law violation after he learned that G.E. Energy had hired an employee with connections that would help the company negotiate a lucrative business deal. *Asadi*, 720 F.3d at 621. Asadi's employment was later

terminated. He then filed a complaint alleging that his employer had violated 15 U.S.C. § 78u-6(h), just as Foster has in the case at hand. *Id.*

When faced with the issue that the definition of "whistleblower" conflicts with the clause in 15 U.S.C. § 78u-6 (h)(1)(A)(iii), the Fifth Circuit found that a plain reading of the statute would not cause these terms to conflict.

> Conflict would exist between these statutory provisions only if we read the three categories of protected activity as additional definitions of three types of whistleblowers.

Asadi, 720 F.3d at 626. These three clauses were placed under a title declaring them to apply to whistleblowers. Thus, the Fifth Circuit found that appellant Asadi did not qualify to take advantage of the statute's anti-retaliation protection. *Id.* at 630.

The court's construction of a statute must, to the extent possible, ensure that statutory scheme is coherent and consistent. *Ali v. Fed. Bureau of Prison*s, 552 U.S. 214 (2008). Congress set out a definition of "whistleblower" in the beginning of the statute. It then uses that term three times in headings. Then, the term appears in language directly preceding the clause relied on by Petitioner. Allowing Petitioner to use a different definition of "whistleblower" endangers the consistency and coherency of this statutory scheme.

Where Congress has made its intent clear, courts must give effect to that intent. *Miller v. French*, 530 U.S. 327, 336 (2000). A construction that creates an inconsistency should be avoided when a reasonable interpretation can be adopted which will not do violence to the plain words of the statute and will carry out the

intention of Congress. *United States. v. Raynor*, 302 U.S. 540, 547 (1938). Allowing Petitioner to bring in this definition of "whistleblower" beyond the scope of 15 U.S.C. § 78u-6 certainly creates an inconsistency with the rest of the statute. Because the statute can be plainly construed without creating this inconsistency, the Court must follow that consistent reading, thus prohibiting Petitioner's claim to be protected under the anti-retaliation provision.

3. The unambiguous definition of whistleblower fits with the purpose of the Dodd Frank Act.

After the Great Depression and the stock market crash of 1929, Congress began to pass legislation to guarantee that "the highest ethical standards prevail in every facet of the securities industry." *Kokesh v. SEC*, 137 S. Ct. 1635, 1640 (2017), quoting *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963). The second piece in this series of legislation enacted the Securities Exchange Commission for the purpose of enforcing the federal securities laws. *Kokesh*, 137 S. Ct. at 1640. Part of the power that Congress bestowed on the Commission included the "broad authority to conduct investigations into possible violations of the federal securities laws." Much later, in 2010, Congress passed – and then-President Obama signed into law – the Dodd-Frank Wall Street Reform and Consumer Protection Act in response to the financial crisis in 2008. Part of the purpose of this Act was to "promote the financial stability of the United States by improving accountability and transparency in the financial system." Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). This is exactly the type of work the whistleblower program sets out to do.

The Senate Report shows the intent of Congress to motivate individuals to report violations to the SEC through the creation of a "new, robust whistleblower program." S. Rep. No. 111-176, at 38 (2010). The report goes on to describe one of the intent of the legislation to be the whistleblower program "to be used actively with ample rewards to promote the integrity of the financial markets." Congress knew that monetary incentives would encourage whistleblowers to report violations to the SEC, and, in turn, the SEC would be able to "promote the integrity of the financial markets" with the information it would receive by offering these incentives. *Id.* This legislative history supports the plain text reading of the statute that whistleblowers are those who report securities violations to the SEC.

The whistleblower program described by Congress in 15 U.S.C. § 78u-6 "aims to motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated securities laws and recover money for victims of financial fraud." S. Rep. No. 111-176, at 110 (2010). Congress intended to incentivize those individuals aware of securities law breaches to come forward to the government – not to their own institutions. The government is the one providing the incentive to come forward: either the monetary reward or the anti-retaliation protection. Just like a parent wants their child to report directly to the parent, and not to an older sibling, Congress has made clear the whistleblower is to report to the government, and not to her employer.

"Whenever a whistleblower or whistleblower's tip leads the SEC to collect sanctions and penalties that are determined to be distributed to the victims of the

fraud, the intent of the Committee is the reward the whistleblower." S. Rep. No. 111-176, at 111-12. "The Committee intends for this program to be used actively with ample rewards to promote the integrity of the financial markets." *Id.* at 112. If the SEC itself is not given the information, it has no means by which it can collect sanctions and penalties, which ultimately lead to the whistleblower's reward – or protection. This is the means by which the SEC will promote the integrity of the financial markets.

The SEC is the only entity with the power to regulate the financial markets. That power rests with the Commission exclusively – not with various employers around the United States. Employees who report securities laws violations are bringing complaints about what is happening inside their places of employment. Reporting to the employer would be as effective as a younger child reporting the wrong of an older sibling to that older sibling himself. Perhaps their employers might turn a blind eye to the reported violation, or – worse – be directly or indirectly involved in the violation. Regardless, it is not the employer's job to police in this situation – that is the exact role of the SEC. Having individuals report these violations to those who are in the position to police these matters is preferable to internal reporting. Reports are only constructive if they lead to action, and an entity in a police-type capacity like the SEC is positioned to take action on these types of reports.

The Supreme Court's task in interpreting separate provisions of a single act is to give the act the most harmonious, comprehensive meaning possible in light of

legislative policy and purpose. *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 616 (1973). The purpose behind Dodd-Frank – and specifically the provision under scrutiny – was to more efficiently police the violations of securities laws. This would be achieved through the SEC, aided by informed individuals providing information to the Commission, who are incentivized by the provisions laid out in 15 U.S.C. § 78u-6. Thus, the purpose of this statute affirms what is gathered from reading the text of the statute and from examining the structure of the statute – those individuals who are afforded anti-retaliation protection are whistleblowers who report securities law violations *to the Commission*. Petitioner does not meet this description and, thus, has no claim.

B. Courts should not give *Chevron* deference to the SEC's interpretation.

The Thirteenth Court of Appeals below was correct in refusing to give *Chevron* deference to the SEC's interpretation of the whistleblower provisions. *Chevron* analysis is a two-step process. First, the court must ask "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If Congress has clearly spoken on the issue, the analysis ends. *Id.* "The agency must give effect to the unambiguously expressed intent of Congress." *Id.* at 843. However, if Congress has not directly addressed the exact issue, the analysis proceeds to the second step, which involves looking at the agency's interpretation. *Id.* The next "question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*

There is no ambiguity in 15 U.S.C. § 78u-6. Thus, the court cannot proceed past the first step of *Chevron* analysis. Even if ambiguity did exist and the court proceeded to the second step of the analysis, the SEC's interpretation is not reasonable and could not be adopted by the court. Additionally, giving deference to the SEC's interpretation has unwanted effects on public policy – this contributes to the rise of the regulatory state. This court should follow the Thirteenth Court of Appeals' reasoning and not give deference to the SEC's interpretation.

1. *Chevron* analysis does not proceed past step one because no ambiguity exists in 15 U.S.C. § 78u-6.

The first step of *Chevron* analysis calls for determining if Congress has spoken to the specific issue at hand. *Chevron*, 467 U.S. at 842. In the Dodd-Frank Act's whistleblower provision, Congress set out a definition of "whistleblower" in the first section of the statute. 15 U.S.C. § 78u-6(a)(6). The SEC's interpretation of the statute also gives a definition of "whistleblower." Congress explicitly laid out a definition in unambiguous terms, and has, thus, spoken precisely on the issue at hand, which is whether or not Foster is a "whistleblower" under 15 U.S.C. § 78u-6.

Furthermore, the language Congress used in speaking on the issue is clear and unambiguous. As shown above, the Dodd-Frank Act's whistleblower provision does not contain ambiguity. The language of the statute itself is clear and unambiguous, and the structure of the statute and the purpose of the statute support the meaning gathered from the plain reading of the statute. This plain language of the statute expresses congressional intent. *Ardestani v. INS*, 502 U.S. 129, 135 (1991).

In *Asadi v. G.E. Energy*, the Fifth Circuit reasoned that "[b]ecause Congress has directly addressed the precise question at issue, we must reject the SEC's expansive interpretation of the term 'whistleblower' for purposes of the whistleblower-protection provision." *Asadi*, 720 F.3d at 620, 630 (5th Cir. 2013). When this Court has found language to be unambiguous, this Court has abandoned *Chevron* analysis at the first step. In *Encino Motorcars*, this Court did not give *Chevron* deference to a Department of Labor regulation that provided a definition for the term "salesman" that was used in the Fair Labor Standards Act. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016).

In his concurrence in *Gutierrez-Brizuela*, then-Circuit Judge Gorsuch wrote: "*Chevron*'s rule of deference isn't about trying to make judges out of agencies or letting them usurp the judicial function. Rather, it's about letting agencies fill legislative voids." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016). There is no legislative void in the statute at hand. Congress has clearly defined "whistleblower" and there is no need to turn to the SEC's interpretation. *Id.*

2. Further, the SEC's interpretation of the whistleblower provision should not be adopted because it is not reasonable.

In the case at hand, the *Chevron* analysis should not proceed past the first step because the legislature has spoken directly to the issue. Additionally, even if the statute was determined to be ambiguous, the SEC's interpretation should not apply because it is not a reasonable interpretation.

An agency cannot add to a definition by pretending to interpret it. It is not reasonable for the SEC to give an alternate definition where Congress has already

plainly given a single definition. Foster is not asking to interpret the whistleblower definition provision; she suggests an additional category of whistleblowers. An expansion is not an interpretation, and is not reasonable where Congress has already plainly set the bounds.

In *Asadi*, the Fifth Circuit recognized that the interpretation set forth by the SEC was "expansive." *Asadi*, 720 F.3d at 620, 630 (5th Cir. 2013). However, in *Berman*, the Second Circuit deferred to the SEC's interpretation after finding the statute to be ambiguous. *Berman*, 801 F.3d at 155. And, in *Somers*, the Ninth Circuit followed the reasoning in *Berman* and held that the ambiguity in the 15 U.S.C. § 78u-6 allowed the court to defer to the SEC's interpretation as well. *Somers v. Digital Realty Trust Inc.*, 850 F.3d 1045, 1047 (9th Cir. 2017). Both *Berman* and *Somers* erred at the first step of *Chevron* analysis by finding the statute to contain ambiguity. The Fifth Circuit's approach is the correct approach.

3. Deference to the SEC's interpretation has unfavorable consequences.

Administrative bodies lack the authority to change the legislation passed by the Congress, the constitutionally-mandated lawmaking body. Congress must be confident that, when it clearly and unambiguously sets forth language in a statute, that language will be the law until properly changed by future legislation. Congress should not have to worry that an agency will be able to produce language outside of the legislative process and then insert that language on top of the words Congress deemed to be law.

This is what the SEC's interpretation attempts to do to the whistleblower provision in the Dodd-Frank Act. Congress has explicitly defined the term "whistleblower" – and it would frustrate public policy to allow the SEC to impose their definition instead. Allowing the SEC to overrule the definition set out by Congress would overrule Congressional intent. Congress is the legislative body elected to articulate the law – not the SEC or any other administrative body.

Because the statute clearly mandates that the individual seeking to be a whistleblower must report violations to the SEC, this Court should affirm the decision of the Thirteenth Circuit precluding Foster's whistleblower claim.

II. Woodward's amendments to the deposition are proper under Federal Rule of Civil Procedure 30(e), which allows a deponent to make changes in form or substance.

Just as the clear and unambiguous language of the Dodd-Frank Act precluded Foster's claim of being a whistleblower, the clear language of Rule 30(e) allows Woodward to make changes in form or substance to his deposition.

A. Rule 30(e)'s text, structure, and background demonstrate that the Legislature intended for a deponent to be able to amend a deposition in form or substance.

The Court reviews an appellate court's interpretation of a Federal Rule of Civil Procedure de novo. *EBC, Inc. v. Clark Bldg. Sys., Inc.*, 618 F.3d 253, 265 (3d Cir. 2010). Because the language of Rule 30(e) permits a deponent to make changes in form or substance to the deposition, Rule 30(e) allows Woodward's deposition changes.

Although the language of Rule 30(e) is clear and unequivocal, district and appellate courts have tried to rewrite Rule 30(e). Sentinel asks that the Court declare Rule 30(e) applies just as the clear and unequivocal language says it applies.

The appellate courts' misinterpretation and misapplication of Rule 30(e) have created two problems. First, some circuits provide deponents with less litigation rights than Rule 30(e) affords. Second, Rule 30(e) has become a symbol of the traditional power-struggle inherent in the structure of American democracy. Will this Court allow appellate and district courts to modify Rule 30(e) to suit their preferred practice, or will this Court honor the intent of the drafters of Rule 30(e)? Applying the Rule in a way that is faithful to the words of the Rule provides this Court an opportunity to encourage uniformity and to reinforce the role of the courts as interpreters of Rules, not ad hoc makers of the rule.

1. The clear and unambiguous text of Rule 30(e) permits a deponent to make changes in form or substance.

As with statutes, the court begins its analysis of a Federal Rule of Civil Procedure with the language of the Rule itself. *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 540. (1991) (reversed on other grounds) ("We give the Federal Rules of Civil Procedure their plain meaning." Citing *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 123 (1989)). If the language is clear and unambiguous, the Court's analysis ends with the language of the Rule. *Id* at 540-41 ("As with a statute, our inquiry is complete if we find the text of the Rule to be clear and unambiguous.").

Federal Rule of Civil Procedure 30(e) states, in its entirety, the following:

> (e) Review by the Witness; Changes.
>
> > (1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:
> >
> > > (A) to review the transcript or recording; and
> > >
> > > (B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.
> >
> > (2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

Fed. R. Civ. P. 30(e).

This Court has applied canons of construction in interpreting Federal Rules of Civil Procedure. *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 376 (2013) (applying canons of construction to a statute and a Federal Rule of Civil Procedure). In interpreting language approved by Congress, the Court has held that the trial court cannot omit or add to the plain meaning of the statute. *Dean v. United States*, 129 S. Ct. 1849, 1854 (2009); *Alabama v. North Carolina*, 130 S. Ct. 2295, 2312-13 (2010). Limiting language is clearly not present in the rule. There are no words qualifying the types of form or substantive changes which may be made. The drafters could have chosen to include limiting language, but they did not. Rule 30(e)'s clear language states that a deponent may make changes in form or substance. *Any* changes. The court may not add limiting language not incorporated by the Rule's drafters.

In fact, the word, "any" is included in Rule 30(e): "The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period." Fed. R. Civ. P. 30(e)(2). The word "any" is given an expansive meaning, one or some indiscriminately of whatever kind. *Freeman v. Quicken Loans Inc.*, 132 S. Ct. 2034, 2042 (2012); *Ali*, 552 U.S. at 219. "Any" is an inclusive and not exclusive term. The intent of the writers of Rule 30(e) can clearly be seen by what the writers chose to exclude (limiting language) and by what they chose to include (expansive language).

Further, the drafters chose a simple, universally understood word to describe what a deponent may do: make *changes* in form or substance. Fed. R. Civ. P. 30(e)(1)(B). If the drafters had intended for Rule 30(e) to include hurdles to the deponent's use of the Rule, the drafters could have included terms with legal significance, such as "modifications," or "amendments." Instead, the court chose to use easy-to-understand terms.

In the case at bar, Foster contends that Rule 30(e) does not permit deponent Karl Woodward's deposition changes. Immediately after deposition, Sentinel requested Woodward be given the opportunity to review the transcript. R. at 14. The next month, the court reporter informed Woodward that a copy of his transcript was available for review. R. at 14. One week later, Woodward submitted a notarized errata sheet in which he indicated revisions to his deposition. R. at 14. The revisions, which are bolded, are as follows:

> [A]: [Woodward]: Basically, she was just too hard to get along with. Many of her co-workers were afraid of her and tended to avoid her. Her

> personality was so abrasive. **And, the Ally Organics' IPO article. I'm not sure what I thought about the whole episode, but we all, in management, took it very seriously. Everyone felt that journalistic integrity was crucial to the Sentinel's reputation. So do I.**
>
> [* * *]
>
> [A]: Yes. Overall, her work was good, she was a good writer – probably deserved that Pulitzer. **But, again, I was also beginning to wonder whether she had fabricated those quotes. It was definitely an issue.**

R. at 14. Pursuant to Rule 30(e), Woodward attached his reasons for the changes. Due to stress associated with his wife's medical procedure, Woodward forgot a conversation with Karen Crowder, Sentinel's CFO. R. at 14. In that conversation, Crowder reminded Woodward of a meeting held by management to address the possibly fabricated quotes contained within the IPO article, and Foster's later bullying outburst. R. at 14.

Foster does not contend that Sentinel and Woodward did not follow Rule 30(e)'s procedural requirements. There is no problem with Sentinel's request on Woodward's behalf; Rule 30(e) clearly states deponent may review the deposition "[o]n request by the deponent *or a party*." Fed. R. Civ. P. 30(e)(1) (emphasis added). Rule 30(e) also clearly states that "the deponent must be allowed 30 days *after being notified* by the officer that the transcript or recording is available." *Id.* (emphasis added). The Rule clearly stipulates that the deponent must have thirty days with the deposition. This thirty-day clock begins running when the deponent is notified. Woodward submitted his changes one week after receiving notice from the court reporter. R. at 14. Woodward timely submitted his changes. Finally, Rule 30(e) states that, "if there are changes in form or substance, [the deponent is] to

sign a statement listing the changes and the reasons for making them." Fed. R. Civ. P. 30(e)(1)(B). Rule 30(e) does not specify that these changes be made in a specific way, nor does it require a measurable justification for the changes. Woodward attached his changes in the form of a notarized errata sheet. Because Rule 30(e) does not specify how the deponent must attach the depositional changes, any method of attachment is permitted. *Id.* ("if there are changes in form or substance, [deponent is] to sign a statement listing the changes and the reasons for making them").

Woodward complied with all of Rule 30(e)'s procedural requirements. Foster's complaint is that the justification for Woodward's changes are not persuasive enough. But, Rule 30(e) is clear and simple. The Rule does not restrict the type of substantive changes, or require that the changes be persuasive to a judge. The intent of the writers – which can be seen through the language of the Rule – is that a deponent have the opportunity to make changes to the deposition. These changes may be in form or in substance. Fed. R. Civ. P. 30(e)(1). Had the writers intended for the judge to weigh the validity of the changes, the text would have included a responsibility for the judge. Instead, the drafters contemplated all relevant policy concerns and determined to leave the question of validity of the deponent's changes in the hands of the jury. Whether the changes are persuasive is left to the trier of fact.

2. The structure of Rule 30(e) enforces the Legislature's clear intent to permit a deponent to make substantial changes to a deposition.

The Court is to read words exactly as they are written on the page. The Court does not look to the language in isolation, but looks to the Rule as a whole, to its object and policy, and to its proper context. *Abramski v. United States*, 134 S. Ct. 2259, 2267 (2014); *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). Just as Rule 30(e)'s language is simple and clear, so is its structure.

Rule 30(e) first states that, should the deponent request, a deponent should be given thirty days after the deponent is given notice from the officer. Fed. R. Civ. P. 30(e)(1). In that thirty days, the deponent may make changes in form or substance. *Id.* If the deponent does make changes in form or substance, the deponent must sign a statement listing the changes and the reasons for making them. Fed. R. Civ. P. 30(e)(1)(B). Once the deponent has complied with Rule 30(e), the officer must note if the review was requested and the officer must attach the changes made by the deponent during the thirty-day period. Fed. R. Civ. P. 30(e)(2). The procedural sequence of Rule 30(e) is as follows:

1. Deponent must request review of the deposition.
2. The deponent must be allowed thirty days to review the transcript (or recording) and make changes after being notified by the officer that the transcript is available.
3. If the deponent makes changes in form or substance, the deponent must sign a statement listing the changes and the reasons for making them.
4. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested. If a review has been requested, the officer must attach changes the deponent made during the thirty-day period.

Fed. R. Civ. P. 30(e). The simplicity in the structure of Rule 30(e) reinforces the clarity contained within Rule 30(e).

Chief Judge Banks attempts to complicate the implications of Rule 30(e) by restructuring the Rule. Chief Judge Banks states, "[c]onverting the rule to a less linguistically obtuse if-then statement, it would read: '*if* there are changes in form or substance, *then* the deponent must be allowed to sign a statement listing the changes and the reasons for making them.'" R. at 26. From these seemingly minor structural changes, the Chief Judge is able to arrive at a surprising conclusion: because reasons for the deponent's changes must be attached, the deponent's reasons must be sufficiently persuasive. R. at 27. In the same paragraph, Chief Judge Banks is able to leap – from conceding that the Rule does not quality-control the deponent's reasons for changes – to concluding that there is no point in adding the reason if the reason does not have to be persuasive. R. at 27.

Chief Judge Banks attempts to bolster his argument by relying on the canon of construction which says that the Court should not read Rules in a way that renders a portion of the text superfluous. R. at 27. Chief Judge Banks argues that, unless the Court reads Rule 30(e) to include a sufficiency requirement, the words stating that a reason must be attached is superfluous.

Rule 30(e)'s requirement that a deponent attach his or her reasons for changing the deposition is not rendered superfluous if the Court interprets the Rule exactly as written. Chief Judge Banks assumes that, unless the *judge* has the final word on the sufficiency of the deponent's reasons, the deponent's changes will not be

analyzed. Chief Judge Banks is mistaken. Rule 30(e) contemplates that the deponent's changes must be made with sufficient reasons, as determined by the *finder of fact*.

Once again, it is important to note what Rule 30(e) does not contain. An interpreter of the law cannot omit or add to the plain meaning of the Rule. *Dean*, 129 S. Ct. at 1854; *Alabama*, 130 S. Ct. at 2312-13. Rule 30(e) does not make the judge the one to decide the validity of the deponent's reason for changing his or her deposition. By leaving the judge out of Rule 30(e), the Court is to infer that the writers of the Rule intended to leave the judge out. The deponent's reasons for amending the deposition, satisfactory or not, is to be left in the hands of the jury. If the writers of Rule 30(e) intended the judge to determine the sufficiency of the deponent's reasons for changes made, the writers would have included "judge" or "court" in the language of Rule 30(e).[2]

3. The history and purpose of Rule 30(e) confirm Legislature's intent to allow changes in substance to a deposition.

While this Court had treated statutes and Federal Rules of Civil Procedure similarly concerning the deference given the words on the page, Federal Rules of Civil Procedure and statues differ in one important way: how they are created.

Originally, Congress delegated rule-making power to the Supreme Court through the Rules Enabling Act of 1934. *See* Rules Enabling Act of 1934, 28

[2] In fact, drafters of Federal Rules of Civil Procedure have included such language in Rules. Rule 56, which is relied on by several circuits and will be discussed further later in the brief (sham affidavit), expressly provides for the judge to take action concerning an affidavit or declaration submitted in bad faith. Fed. R. Civ. P. 56(h).

U.S.C.A. § 2071 (West 2006 and Supp. 2017). The Supreme Court then delegated draft formation to the Advisory Committee.[3] Today, proposed rules have five stops along the route to becoming an enacted rule: the Advisory Committee, the Standing Committee, the Judicial Conference, the Supreme Court, and Congress. *See* 28 U.S.C.A. § 2071(a) (mandating Supreme Court to submit Rules to Congress before enactment); 28 U.S.C.A. § 2073(a)(1)-(2) (noting addition of Standing Committee and Judicial Conference to Advisory Committee in Rulemaking process); Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 Geo. L.J. 887 (1999) 893-97.

The Advisory Committee, typically the drafters of the Rules, are required by the Enabling Act to include Notes. 28 U.S.C.A. § 2073(d) (requiring promulgating body to include proposed Rule, explanatory Note, report, and minority views on Rule); see also *United States v. Orlandez-Gamboa*, 320 F.3d 328, 332 n.2 (2d Cir. 2003) (stating Congress requires explanatory Note to each proposed Rule); cf. *Tome v. United States*, 513 U.S. 150, 168 (1995) (Scalia, J., concurring) (stating Congress requires explanatory Notes for Federal Rules of Evidence).[4]

Where the language of the Rule is unambiguous, the Court's analysis ends with the clear language. *Bus. Guides, Inc.* 111 S. Ct. at 928. However, unlike legislative history, where there is an ambiguity, the Advisory Committee Notes can

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[3] See generally Kirin K. Grill, Comment, *Depose and Expose: The Scope of Authorized Deposition Changes under Rule 30(e)*, 41 U.C. Davis L. Rev. 357 (2007) 362-65.

[4] See Kirin K. Grill, Comment, *Depose and Expose: The Scope of Authorized Deposition Changes under Rule 30(e)*, 41 U.C. Davis L. Rev. 357 (2007) 364 n.42.

be a fairly reliable source of the intent of the drafters. While legislative history, may not be a persuasive indicator of the intent of all of Congress, the Advisory Committee Notes can be a beneficial tool in interpreting the drafters' intent. This difference can largely be attributed to the differences in the writing processes for Statutes and Rules. Advisory Committee Notes are more reliable than legislative history for two reasons: (1) the Rules go through a much more thorough process before they become Rules, and (2) the Notes come directly from the drafters, as opposed to a fraction of the drafters or proponents of a particular reading of a statute.

The language of Rule 30(e) is unambiguous. The Court need not rely wholly on the history of Rule 30(e), nor the Advisory Committee Notes. A deponent is permitted to make changes in form or substance. However, the history of the Rule and the Advisory Committee Notes only serve to reaffirm Rule 30(e)'s clear and unequivocal language.

Rule 30 has been amended eleven times since its enactment. Out of those eleven amendments, provision (e) has been addressed three times. Fed. R. Civ. P. 30(e) advisory committee's note to 1937, 1970, 1993 amendments. Of the three express mentions, two are regarding the procedural requirements of the Rule. Only one, the 1937 amendment, has to do with substantive changes. The 1937 Advisory Notes state that the amendment serves to "permit the deponent to require the officer to make changes in the deposition if the deponent is not satisfied with it." The only time the Advisory Notes expressly mention the substantive allowance of

Rule 30(e), the drafters expand, rather than restrict, the reasoning behind a deponent's changes. The drafters of Rule 30(e) had eleven opportunities to restrict the litigation liberties granted in Rule 30(e), had that been their intent. The drafters chose to restrain the deponent only by placing a thirty-day time limit in the 1970 amendment. The drafters chose not to make such a restriction regarding the type of changes a deponent may make.

Evidence of intent to restrain a deponent cannot be found in the language of the language itself, nor can it be found in the structure of the Rule, nor can it be found in the history of Rule 30(e).

B. Enforcing the clear intent of the Legislature will resolve the inconsistencies in the handling of Rule 30(e) by the Appellate and District Courts.

Every appellate court that has confronted Rule 30(e) has found the rule is unambiguous. *Podell v. Citicorp Diners Club, Inc.*, 112 F.3d 98, 103 (2d Cir. 1997) (applying the words exactly as written without mention of an ambiguity); *Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383, 389 (7th Cir. 2000) (quoting the language of Rule 30(e) without stating an ambiguity); *EBC, Inc.*, 618 F.3d at 265 ("The procedural requirements of Rule 30(e) are clear and mandatory."); *Pina v. Children's Place*, 740 F.3d 785, 792 (1st Cir. 2014) (quoting the language of Rule 30(e) without stating an ambiguity); *Garcia v. Pueblo Country Club*, 299 F.3d 1233, 1242 (10th Cir. 2002) (quoting *Greenway v. Int'l Paper Co.*, 144 F.R.D. 322, 325 (W.D. La. 1992) which stated that, "[t]he purpose of Rule 30(e) is obvious."); *Hambleton Bros. Lumber Co. v. Balkin Enters.*, 397 F.3d 1217, 1224 (9th Cir. 2005)

(quoting the language of Rule 30(e) without stating an ambiguity); *Kampouris v. St. Louis Symphony Soc.*, 210 F.3d 845, 848 (8th Cir. 2000) (abrogated on other grounds) (applying Rule 30(e) without stating an ambiguity); *Trout v. First Energy Generation Corp.*, 339 F. App'x 560, 565 (6th Cir. 2009) (quoting the language of Rule 30(e) without stating an ambiguity). And yet, nearly every circuit has invented a different method of applying Rule 30(e)'s clear and unambiguous language.

The Court has an opportunity to require uniformity in application of Rule 30(e). The Court should tell the lower courts that the clear and unambiguous language of Rule 30(e) is consistent with the intent of Congress, and is therefore mandatory.

1. The approach of the Second Circuit most clearly follows the unambiguous language of Rule 30(e).

In 1997, relatively early in the struggle to apply the language of Rule 30(e), the Second Circuit read Rule 30(e)'s clear language, and applied it exactly as written.

In *Podell v. Citicorp Diners Club, Inc.*, Gary Podell, plaintiff and deponent in the case, made significant errors during deposition.[5] *Podell*, 112 F.3d at 102. While reviewing the transcript for his signature, pursuant to Rule 30(e), Podell lined through his self-defeating responses to deposition questions. *Id* at 103. Pursuant to Rule 30(e), Podell stated his reason for the strikethroughs: "Speculation is

[5] Podell claimed that TRW and Trans Union failed to follow proper investigations procedures of disputed credit entries. *Id.* Unfortunately, during deposition, Podell effectively conceded that TRW followed its investigate procedures by stating that a second report may have been sent. *Podell*, 112 F.3d at 102.

improper. I did not receive a response to my July 2, 1991 letter to TRW," and, "I did not receive anything." *Id.*

The district court found that Podell "undertook to change his deposition on a material matter," and that his "reasons for changing his testimony are unconvincing in the extreme," and that his "subsequent positive assertions that he did not receive a response from TRW cannot be squared with his deposition testimony." *Id* at 103.

Despite a less than favorable fact pattern, the Second Circuit clearly and simply applied Rule 30(e) as it is written. The court followed the pattern of the language of Rule 30(e), methodically stating the rules the deponent must follow in order to make changes in form or substance to the deposition. The court stated that the rule allows a deponent to change his answer in form or substance. *Podell*, 112 F.3d at 103. The court explained that any changes are to be "appended" to the filed transcript.[6] *Id.* Next, the court stated that, to invoke the privilege of Rule 30(e), a deponent must sign a statement the changes and the reasons given for making them. *Id.*

After explaining the requirements of Rule 30(e), the court declared Rule 30(e)'s impact on the procedures and roles of the courtroom. The court stated that, "'[t]he language of the Rule places no limitations on the type of changes that may be made[,] … nor does the Rule require a judge to examine the sufficiency, reasonableness, or legitimacy of reasons for the changes" even if those reasons "are

[6] The court uses the former language of the Rule. The change in language from "append" to "attach" does not change the meaning of the Rule. "Append" means "to attach, affix." *Append*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2017).

unconvincing.'" *Podell*, 112 F.3d at 103 (citing *Lutwig v. Thomas*, 89 F.R.D. 639, 641 (N.D. Ill. 1981)). Concerning the procedural application of the rule, the court stated that the original answer remains a part of the record and can be read at trial. *Id.* The court stated that "'[n]othing in the language of Rule 30(e) requires or implies that the original answers are to be stricken when the changes are made.'" *Id.* (citing *Lutwig*, 89 F.R.D. at 641-42). The court recognized that, "'[a]ny out-of-court statement by a party is an admission," a deponent's "original answer should [be] admitted [into evidence]" even when he amends his deposition testimony—with the deponent "[o]f course ... free to introduce the amended answer and explain the reasons for the change.'" *Id.* (citing *Usiak v. New York Tank Barge Co.*, 299 F.2d 808, 810 (2d Cir. 1962)). Accordingly, the court held that Podell's subsequent answers became a part of the discovery record. *Id.*

The Second Circuit Court of Appeals started and ended its analysis with the plain language of Rule 30(e). The court followed the language of Rule 30(e) in two ways: first, in what the deponent could change (form or substance), and second, in how the court should handle the subsequent changes ("append" them to the original deposition – they all become a part of discovery). The court recognized that Rule 30(e) does not ask, or even permit, a judge to make a decision as to the validity of the deponent's reasons for his changes.

The court used the clear and unequivocal language of Rule 30(e) to be its starting and ending point concerning the privilege of the deponent and the role of

the court. Such should be the decision of this Court. The Second Circuit has done what the court is charged to do: interpret unambiguous words as written.

The Second Circuit has been the only court to submit to the language and implications of Rule 30(e). The many of incorrect applications of Rule 30(e) should not persuade the Court that a wrong way is an acceptable alternative. A step towards wrong is not a compromise, it is a failure.

2. Any method of applying Rule 30(e) that does not follow the clear language of the rule is an inappropriate use of the Court's discretion.

Though nearly all of the Circuits have contributed their interpretation of Rule 30(e)'s clear language, almost no other court has taken the approach of the Second Circuit – applying the words exactly as written on the page without additions and without changes. Because the language of Rule 30(e) is clear and unequivocal, the Court only has one job: to apply that unambiguous language as written. *Bus. Guides, Inc.*, 111 S. Ct. at 928.

All applications of Rule 30(e) are not equal. The Court does not have a multitude of options concerning how to interpret Rule30(e).[7] Instead, the Court should take the differences in the appellate courts' interpretations of Rule 30(e) as an indicator of the need for the Court to rule on the intent of the drafters of Rule 30(e).

[7] This brief will not address in detail every appellate court application of Rule 30(e) for want of space and necessity. This brief will focus on the most prominent, the most flagrant, and those approaches which seem like a "good compromise."

a. Adding requirements to Rule 30(e) does not comply with the clear intent behind Rule 30(e).

A court that recognizes its role is to interpret the language but is not content with the freedoms granted a deponent by Rule 30(e) will be most tempted by the approach taken by the Seventh Circuit. While the approach taken by the Seventh Circuit may seem like a safety net for the court, the Seventh Circuit overstepped its role by adding requirements not contained in the language of Rule 30(e).

Like the Second Circuit, the Seventh Circuit court started its analysis with the plain language of Rule 30(e). However, unlike the Second Circuit, the Seventh was openly critical of Rule's plain language:

> What he tried to do, whether or not honestly, was to change his deposition from what he said to what he meant. Though this strikes us as a questionable basis for altering a deposition, it is permitted by Fed. R. Civ. P. 30(e), which authorizes "changes in form *or substance*," though fortunately the rule requires that the original transcript be retained (this is implicit in the provision of the rule that any changes made by the deponent are to be appended to the transcript) so that the trier of fact can evaluate the honesty of the alteration.

Thorn, 207 F.3d at 389 (emphasis in original).

Instead of applying the language as written, the Seventh Circuit added a restraint to Rule 30(e). The court stated that, "a change of substance which actually contradicts the transcript is impermissible unless it can plausibly be represented as the correction of an error in transcription, such as dropping a 'not.'" *Thorn*, 207 F.3d at 389.

The Seventh Circuit cleverly couches its amendment to Rule 30(e) as a long-standing principle that can easily be applied to Rule 30(e). The court analogized

Rule 30(e) to the "sham affidavit rule"– the finding by case law that a subsequent affidavit may not be used to contradict the witness's deposition. *Thorn*, 207, F.3d at 389.

The court's analogy is problematic for two reasons. First, the court's sole job is to interpret the clear and unequivocal language before it. The plain and unequivocal language of Rule 30(e) does not prohibit the deponent from making contradictory changes to the original deposition. Analogy is not a cannon of construction, nor is it a proper excuse for a court to use their misgivings about a rule to rewrite it. Second, while the language of Rule 30(e) does not mention the court's role in relation to the deponent's changes, Rule 56 does. The language of Rule 56 expressly precludes a party from submitting an affidavit in bad faith or solely for delay:

> If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court – after notice and a reasonable time to respond – may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

Fed. R. Civ. P. 56(h).

b. Rule 56's sham affidavit rule is not comparable to Rule 30(e) clear and unequivocal language.

The Seventh Circuit is not alone in its reliance on Rule 56 and "sham affidavits" to create requirements that are nowhere within the language or structure of Rule 30(e). The Third and Ninth Circuits stretched the analogy of a sham affidavit to their analyses of Rule 30(e).

Despite the court's deference to the "clear and mandatory" procedural requirements, the court proceeded to ignore the language of the Rule for the remainder of the court's analysis. "Upon procedural compliance with Rule 30(e), the court will determine the effect of the errata sheet on the depositional transcript." *EBC, Inc.*, 618 F.3d at 267. The court does not cite to the Rule for this authority. The court then states:

> We believe that a flexible approach – consistent with our prior jurisprudence – is appropriate… As a general proposition, a party may not generate from whole cloth a genuine issue of material fact (or eliminate the same) simply by retailoring sworn deposition testimony to his or her satisfaction.

Id. at 267-68. With this "general proposition," the court deviates from Rule 30(e). Rule 30(e)'s "general proposition" is found in the text: a deponent may make changes in form or substance. Fed. R. Civ. P. 30(e). There is no "flexible approach" to clear words. They should be read to mean what they say.

The Ninth Circuit also used the analogy of the "sham affidavit rule" to come to the same conclusion as the Third Circuit: that regardless of the clear language of Rule 30(e), a deponent may not make changes in substance to their deposition should those changes contradict their original answer. *Hambleton Bros. Lumber Co.*, 397 F.3d at 1224.

Several courts, including the Sixth, Ninth, and Tenth Courts of Appeals, have relied on language from *Greenway v. International Paper Co.*, a case from the Western District Court of Louisiana. In *Greenway*, the court held that if substantive changes are to be made in a deposition, they should only be made to correct

reporter-made errors because "[a] deposition is not a take home examination." *Greenway*, 144 F.R.D. at 325. However, the court need not address this concern. The Rule itself contemplates the issue of a deponent "retailoring" their deposition – the Rule stipulates that one must add the reason for the changes made. Fed. R. Civ. P. 30(e)(1)(B). The trier of fact will be able to evaluate the reason associated with the changes. The jury will be able to take those changes and the alleged reasons for them into consideration in the jury's pursuit of the truth. In fact, the risk of changing an answer in a way that a jury perceives as unfair carries great risk for the deponent. The jury can properly conclude that the change has irreparably damaged the deponent's credibility. Even statements that might otherwise be true can be rejected by a jury that has tired of a deponent's constantly changing story. Thus, even if a deponent does attempt to cheat by making the deposition a "take home exam," Rule 30(e) requires the jury, not the judge, to grade.

c. Not even small deviations from Rule 30(e)'s clear language are tolerable.

While, on its face, the approach of the First Circuit may seem to comply with the intent behind Rule 30(e), it also deviates from the language. Not even a slight deviation from the language of the rule is acceptable because it will produce results contrary to the intent of Rule 30(e).

The First Circuit begins its discussion of Rule 30(e) by stating that the rule permits changes in form and substance. *Pina*, 740 F.3d at 792. The court then states that, "[w]hen witnesses make substantive changes to their deposition testimony, the district court certainly has the discretion to order the depositions reopened so that

the revised answers may be followed up on and the reasons for the corrections explored." *Id.*

The First Circuit suggests that when substantive changes are made, the district court has discretion to order the deposition reopened. *Pina*, 740 F.3d at 792. While this may seem like a small change, the change marks a significant power-shift and creates procedures not included within the rule.

First, the First Circuit's approach adds a procedural hurdle that Rule 30(e) does not permit. Rule 30(e) clearly states that a deponent may make any changes in form or substance. Those changes are then to be attached to the original deposition. The rule does not allow for any other options or further procedures. Second, the First Circuit's approach places the discretion inherent in Rule 30(e) in the hands of the judge as opposed to placing the discretion in the hands of the fact finder. Before the evidence is submitted to the jury, the judge will have the power to grant changes to the evidence. By allowing a judge to reopen a deposition, the judge is given the power to see the deponent re-deposed before the jury sees the original and changed deposition. Instead of allowing the jury to weigh the evidence present in the deposition and subsequent amendments, the judge may see to it that the jury is given new evidence.

Rule 30(e) clearly and equivocally articulates what is required for a deponent to make depositional changes in form or substance. Sentinel and Woodward followed the procedural requirements of Rule 30(e), and thus, this Court should affirm the decision of the Thirteenth Court of Appeals.

CONCLUSION

Mark Twain has been credited with stating, "a person who won't read has no advantage over one who can't read." He's right. A court is charged with interpreting a statute or a rule by reading the words as they are written on the page. If the Court will not read the statutes and rules in the manner in which they have been written, the court does not serve its function.

Sentinel asks the Court to give the Dodd-Frank Wall Street and Consumer Protection Act and the Federal Rule of Civil Procedure 30(e) their respective meanings as defined by their clear and unambiguous language.

For the foregoing reasons, Respondent prays that the Court affirm the decision of the Thirteenth Circuit Court of Appeals on both issues.

CERTIFICATE OF COMPLIANCE

Word Count: 11,622

The undersigned counsel certifies that the Respondent's Brief complies with the word limitation specified in C(3)(d) of the ALA Moot Court Competition Rules.

/s/ Jessyka Linton
/s/ Ali Mosser