No._____

IN THE

Supreme Court of the United States

ERIN DALY

Petitioner,

– v. –

CITIGROUP INC., CITIGROUP GLOBAL MARKETS, INC., and CITIBANK, N.A.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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December 16, 2019

QUESTIONS PRESENTED

1. Whether the provisions under the Sarbanes-Oxley Act as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 protect whistleblowers from retaliation by former employers where the employer used the FINRA Form U-5 to blacklist and repeatedly interfere with the former employee's business prospects after the employee reported illegal acts and SEC violations to her superiors and Defendants' lawyers.

2. Whether a whistleblower suing under the Sarbanes-Oxley Act can be mandated by courts to arbitrate claims of retaliation against a defendant bank, where Sarbanes-Oxley provides that "[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section"? 18 U.S.C. § 1514A(e)(2).

LIST OF PARTIES TO THE PROCEEDING

Petitioner is an individual and former employee of Citigroup. Petitioner was the Plaintiff in the district court proceedings and the Appellant in the court of appeals proceedings.

Respondent is a multinational investment bank and financial corporation incorporated in Delaware, and headquartered in New York City at 388 Greenwich Street, New York, New York 10013, and publicly traded on the New York Stock Exchange. Citigroup owns Citicorp, the holding company for Citibank and international subsidiaries, ("Citigroup" or the "Bank"). Respondents were Defendants before the district court and Appellees in the Second Circuit Court of Appeals.

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PETITION FOR A WRIT OF *CERTIORARI*

Petitioner, Erin Daly, respectfully petitions this Court for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals, (App., *infra,* 1a-33a), is reported at 939 F.3d 415. The Order and judgment of the District Court granting Citigroup's Motion to Dismiss is reported first on February 6, 2018 at 2018 U.S. Dist. LEXIS 19413 (App., *infra,* 36a-53a) and secondly on February 14, 2018 at 2018 U.S. Dist. LEXIS 26087 (App., *infra*, 34a-35a).

JURISDICTION

The final Order of the Court of Appeals was entered on September 19, 2019. (App., *infra*, 1a-33a). Erin Daly filed this Petition for a Writ of *Certiorari* on December 16, 2019. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and this petition is timely because it was filed within 90 days from the date of entry of the Order.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Sarbanes-Oxley Act, ("SOX" or "Sarbanes-Oxley") Pub. L. No. 107-204, § 806(a), July 30, 2002, 116 Stat. 802, and modified by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, ("Dodd-Frank") Pub. L. No. 111-203, 124 Stat. 1848,

codified in relevant part at 18 U.S.C. § 1514A, provides:

> **"(a) Whistleblower protection for employees of publicly traded companies.** No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 . . . . may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—
>
> **(1)** to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of . . . any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by— . . .
>
> **(C)** 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); . . .
>
> **(b)(2)(E)** Jury trial. A party to an action brought under paragraph (1)(B) shall be entitled to trial by jury. . . .

> **(e) Nonenforceability of certain provisions waiving rights and remedies or requiring arbitration of disputes.**
>
> **(1)** Waiver of rights and remedies. The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement.
>
> **(2)** Predispute arbitration agreements. No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.

INTRODUCTION AND STATEMENT OF THE CASE

A. Statutory Background

There is a clear conflict of statutory interpretation on a nationally important issue concerning the financial stability of the United States. The questions presented are whether claims of post-employment retaliation by whistleblowers are actionable under Sarbanes-Oxley as amended, and whether such claimants can be forced to arbitrate some or all of those claims of retaliation under 18 U.S.C. § 1514A.

In 2002, the Sarbanes-Oxley Act ("SOX") was enacted to respond to ENRON and put whistleblower protections in place to encourage employees among others to come forward with information of any SEC

violations. In 2010, Dodd-Frank was enacted in the wake of huge financial bailouts to Citigroup and others. Dodd-Frank amended SOX to prohibit and render invalid any predispute arbitration agreement, if the agreement would require arbitration of a claim of retaliation against a whistleblower. Now, nine years since Dodd Frank, there is a split among the Circuit Courts as to whether SOX claims, as amended by Dodd Frank, should be forced into arbitration. Given the global significance of the financial laws, and given the purpose of Dodd Frank "[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end "too big to fail", to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, . . ." *certiorari* is necessary to resolve the circuit split. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376.

B. Whistleblower Lawsuit

Erin Daly brought an action against Citigroup pursuant to 18 U.S.C. 1514A for its retaliation against her for blowing the proverbial whistle on its several SEC violations. Among Citigroup's many illegal retaliatory acts, Daly alleged that the most recent and most detrimental was the Bank's deliberate interference and prohibition against her future employment in the industry.

The gravamen of Petitioner's complaint was that each time she complained to her superiors and Citigroup's lawyers of SEC violations, Daly suffered immediate negative retaliation from Citigroup as a

result. When she refused to allow insider trading on a huge Initial Public Offering and that refusal was made known to Citigroup's upper management and inside counsel, Citigroup defamed her on her Form U-5[1], thereafter required every potential employer to obtain Citigroup's *consent* before hiring Daly, and then repeatedly and systematically withheld such consent. On November 28, 2016, Daly brought a Complaint against Citigroup to the Department of Labor ("OSHA"), the Equal Employment Opportunity Commission ("EEOC"), and Financial Industry Regulatory Authority, Inc. ("FINRA")[2], and filed suit in Federal District Court. The Department of Labor represented that the initial complaint was not received and thus, the undersigned filed the Amended Complaint, of which the DOL acknowledged receipt on March 24, 2017. The Second Circuit, the District Court and the Bank conceded that the operative pleading is the Amended Complaint. 180 days from

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[1] "The Form U5 is the Uniform Termination Notice for Securities Industry Registration. Broker-dealers, investment advisers, or issuers of securities must use this form to terminate the registration of an individual in the appropriate *jurisdictions* and/or *self-regulatory organizations ("SROs")"* Form U5 Uniform Termination Notice for Securities Industry Registration, General Instructions, available at https://www.finra.org/sites/default/files/AppSupport Doc/p015113.pdf (*emphasis in original*) (last visited Dec. 9, 2019).

[2] Financial Industry Regulatory Authority, Inc. is a private corporation that acts as a self-regulatory organization. FINRA is the successor to the National Association of Securities Dealers, Inc.

March 24, 2017 is September 20, 2018. At such time, the Secretary of Labor had not issued a final decision. On October 6, 2017, the Petitioner moved to amend the Complaint to remove all Petitioner's claims under the Sarbanes Oxley Act to Federal District Court for *de novo* review pursuant to 18 U.S.C. § 1514A(b)(B) and 18 U.S.C. § 1514A(b)(2)(D). The statute specifically provides that "[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section." 18 U.S.C. § 1514A(e)(2).

C. Citigroup's Motion to Dismiss And Compel Arbitration

Citigroup moved to compel arbitration of the dispute and dismiss the action. Without even denying Citigroup's interference with Daly's future employment, the Bank asked the federal district court to consider Daly's termination as the last retaliatory act (which therefore would be barred as outside the Statute of Limitations period). Citigroup further moved to compel Petitioner to arbitrate all of its alleged unlawful actions through FINRA's arbitration mechanism.

Rather than acknowledge Daly's claim as post-employment blacklisting and interference by Citigroup with future employment, the District Court merely stated that Daly "continues to suffer ongoing consequences" and declined to consider Citigroup's post-employment retaliation as a cause of action as alleged. (App., *infra*, 11a). The District Court then continued its inquiry incorrectly, using the termination date as the last date of retaliation, thus rendering Daly's filing to OSHA and to the District

Court untimely. The District Court dismissed any Sarbanes-Oxley claim, and, freed from the Congressional mandate rendering the "predispute arbitration agreement invalid," held that "[b]ecause all of Petitioner's remaining claims are arbitrable and subject to a valid arbitration agreement, they must be arbitrated." (App., *infra,* 51a).

D. Second Circuit's Decision

The Petitioner timely appealed the District Court's Orders to Dismiss and Compel Arbitration. The Second Circuit affirmed the lower court's ruling. The panel mischaracterized the Complaint as alleged, and likewise disregarded the post-employment retaliation and blacklisting alleged. The Second Circuit decided the case as if the most recent date of retaliation was the date of termination, instead of the post-employment interference with employment and blacklisting as alleged in the Amended Complaint. The panel ruled against Daly with regard to exhaustion of administrative remedies and jurisdiction on that basis. 18 U.S.C. § 1514A(b)(1)(B) required her to submit her claim to the Department of labor within 180 days of her retaliation. Using most recent the post-employment interference with employment, she was well within that time period. The Secretary of Labor had not issued a final decision within 180 days of the filing of the Amended Complaint so using the correct date of retaliation, she satisfied both jurisdictional and administrative exhaustion requirements.

The panel further found no connection between Daly's whistleblowing - her reporting of fraud and SEC violations to her superiors - and the resulting

retaliation in the form of her resulting demotions, termination and blacklisting, and held that all such allegations were subject to FINRA arbitration. The panel found that she "failed to satisfy her burden of establishing that such claims are precluded by statute from arbitration." (App., *infra*, 4a-5a).

REASON FOR GRANTING THE WRIT

I. *CERTIORARI* IS WARRANTED ON THE JURISDICTIONAL QUESTION AS TO WHETHER POST-EMPLOYMENT RETALIATION IS PROTECTED BY SARBANES-OXLEY

A. The Circuits Have Consistently Held that the Sarbanes-Oxley Act as Amended by Dodd-Frank Shields Whistleblowers from Post-Employment Retaliation, and the Second Circuit Sanctioned Such a Departure from that Precedent that *Certiorari* is Required to Inform on this Important Federal Question

The courts have consistently found that post-employment retaliation in the form of blacklisting or active interference with securing future employment is actionable. However, *certiorari* is warranted because of the Second Circuit's deviation from this precedent and the national importance of the issues raised by the decision below, as the most dangerous and regularly used type of retaliation by banks against whistleblowers will go unchecked, in perhaps the most important federal circuit addressing banking and financial issues.

The courts are largely consistent in finding that post-employment interference with employment and

blacklisting constitute retaliation protected by Sarbanes-Oxley (18 U.S.C. § 1514A). However, when considering whether filing a false U-5 constitutes such interference, the courts vary widely as detailed below. The Petitioner here maintains that by filing the false and defamatory U-5, FINRA requires every potential employer to consult with Citigroup to verify such items, constituting a new cause of action for retaliation in the form of interference with future employment and blacklisting from employment in the financial industry.

Sarbanes-Oxley was passed in the wake of the Enron scandal to encourage whistleblowers to come forward with any SEC violations being perpetrated by their employer, or within their companies. Dodd-Frank was passed in the wake of the financial bailouts and gave employees of banks greater protection, ensuring that their cases would be heard in federal district court, not in arbitration run by FINRA, the regulatory organization self-regulated by its member banks. *Certiorari* is imperative to decide whether when a bank uses the FINRA platform to retaliate against a whistleblower to interfere with potential employers and ensure her unemployability in the industry, such retaliation constitutes post-employment blacklisting protected by Sarbanes-Oxley as amended by Dodd-Frank.

The courts deciding on post-employment blacklisting have hinged their arguments on whistleblowing statutes enacted prior to Sarbanes-Oxley and Dodd-Frank and the Congressional record supporting the passage of those laws.

Post-Employment Blacklisting Is Actionable:

In *Kshetrapal v. Dish Network, LLC*, 90 F. Supp. 3d 108 (S.D.N.Y. 2015), the court held "employees" under Sarbanes-Oxley includes former employees, finding that "a contrary holding would discourage employees from exposing fraudulent activities of their former employers for fear of retaliation in the form of blacklisting or interference with subsequent employment. Such a result would contravene the purpose of SOX, to "encourage whistleblowing by . . . employees who suspect fraud involving the public companies with whom they work."" *Kshetrapal v. Dish Network, LLC*, 90 F. Supp. 3d 108, 114 (S.D.N.Y. 2015) citing *Lawson v. FMR LLC*, 134 S. Ct. 1158 at 1170 (2014); *Feldman v. Law Enf't Assocs. Corp.*, 779 F. Supp. 2d 472 (E.D.N.C. 2011) (Sarbanes-Oxley does protect employees from blacklisting or other active interference with subsequent employment); *MiMedx Grp., Inc. v. Fox*, No. 16 CV 11715, 2017 U.S. Dist. LEXIS 121801 (N.D. Ill. Aug. 2, 2017) (former employees are protected from retaliation under Dodd-Frank's whistleblowing statute).

In *Bogenschneider v. Kimberly Clark Glob. Sales, LLC*, No. 14-cv-743-bbc, 2015 U.S. Dist. LEXIS 22377 (W.D. Wis. Feb. 25, 2015), the court held that allegations that the employer made false and defamatory statements about the employee which interfered with subsequent employment were potentially actionable even though the statements were made after employment terminated. The court held that post-employment actions were well within the "terms and conditions of employment" as considered by Sarbanes-Oxley and found that the plaintiff had sufficiently pled pursuant to Sarbanes-

Oxley that the defendant retaliated against him by stopping payment of his attorney fees. *Econn v. Barclays Bank PLC*, 2010 U.S. Dist. LEXIS 143063 (S.D.N.Y. May 10, 2010).

In *Robinson v. Shell Oil Co.,* 519 U.S. 337 (1997), the court reversed the Fourth Circuit precedent, holding that Title VII § 204(a) does include former employers where the individual sued Shell Oil for an employment reference and Shell gave him a negative reference in retaliation for his having filed an EEOC charge against the company. Justice Thomas expressed the opinion of the per curiam court: "We hold that the term "employees," as used in § 704(a) of Title VII, is ambiguous as to whether it includes former employees. It being more consistent with the broader context of Title VII and the primary purpose of § 704(a), we hold that former employees are included within § 704(a)'s coverage. Accordingly, the decision of the Fourth Circuit is reversed." *Robinson v. Shell Oil Co.,* 519 U.S. 337 at 346 (1997). *See also Jordan v. Sprint Nextel Corp.*, 3 F. Supp. 3d 917, 932 n. 46 (D. Kan. 2014) (An employer's blacklisting or other active interference with subsequent employee is protected by Sarbanes Oxley, citing *Harvey v. Home Depot, Inc.,* Case No. 2004-SOX-36, 2004 DOLSOX LEXIS 47, 2004 WL 5840284, at *3 (May 28, 2004)

B. *Certiorari* is Warranted to Decide Whether Filing a False Form U-5, Which Requires Potential Employers to Obtain the Former Employer's Consent Before Hiring the Whistleblower, is Actionable as Post-Employment Retaliation Under Sarbanes-Oxley

Whether Filing a False Form U-5 Constitutes Actionable Retaliation in the Form of Business Interference or Blacklisting

While the weight of precedent supports the notion that Sarbanes-Oxley's whistleblower protections do encompass post-employment retaliation, this position conflicts with the precedent established in New York State Courts and certified by the Second Circuit. The Second Circuit also has found that statements made on Form U5 are protected under absolute privilege. *Rosenberg v. MetLife, Inc.*, 492 F.3d 290, 291 ((2d Cir. 2007) (citing *Rosenberg v. MetLife, Inc.*, 8 N.Y.3d 359, 368, 866 N.E.2d 439, 834 N.Y.S.2d 494 (2007) (finding absolute privilege because of "Form U-5's compulsory nature"; "its role in the [FINRA's] quasi-judicial process"; and "the protection of public interests")). *See also Sullivan v. SII Invs., Inc.*, No. 18-cv-00666-SI, 2018 U.S. Dist. LEXIS 28067 (N.D. Cal. Feb. 20, 2018) (citing the *Rosenberg* cases).

Likewise, in *Bussing v. COR Clearing, LLC*, No. 8:12CV238, 2013 U.S. Dist. LEXIS 187701 (D. Neb. Nov. 27, 2013), the Plaintiff alleged that the statements made on her U-5 were defamatory, and claimed an action of retaliation based on 15 U.S.C. § 78u-6. The Court held that the statements made on the Form U-5 were privileged and dismissed her claim of retaliation under 15 U.S.C. § 78-u-6 for failing to report the defendant's violations to the SEC. In *Brady v. Calyon Sec. (USA)*, 2007 U.S. Dist. LEXIS 92602 (S.D.N.Y. Dec. 17, 2007), the plaintiff brought an action against Calyon Securities (formerly Credit Lyonnais Securities), its parent Credit Agricole and two individual officers and managers for retaliation

under 18 U.S.C. § 1514A, for breach of contract and wrongful discharge, and for tortious interference with ability to secure new employment, among other causes of action. The court held that New York law bars the claim only because plaintiff had failed to state a claim under the New York State tortious interference cause of action but additionally cited *Rosenberg v. Metlife, Inc.*, 8 N.Y.3d 359, 368, 866 N.E.2d 439, 834 N.Y.S.2d 494 (2007) ("Statements made by an employer on a NASD employee termination notice are subject to an absolute privilege in a suit for defamation.").

However, whether statements provided by former employers on the U-5 are subject to absolute privilege is subject to a circuit split. The filing of the Form U-5 is treated with considerable disparity among the courts. In *Kollar v. Allstate Ins. Co.*, No. 3:16-cv-1927 (VAB), 2018 U.S. Dist. LEXIS 167569 (D. Conn. Sep. 28, 2018), the court considered whether filing a U-5 constituted blacklisting, rendering its decision only on the basis that the plaintiff did not allege that the statements contained therein were false. *Kollar v. Allstate Ins. Co.*, No. 3:16-cv-1927 (VAB), 2018 U.S. Dist. LEXIS 167569 (D. Conn. Sep. 28, 2018). There, the statements made on the U-5 were concededly true. *Id.*

The courts above rely on other court precedent for the view that members, as well as the self-regulatory organization, FINRA, enjoy absolute immunity in the exercise of the SRO's delegated regulatory functions. *Standard Inv. Chartered, Inc. v. NASD*, 2010 U.S. Dist. LEXIS 19174 (S.D.N.Y. Mar. 1, 2010). However, unlike private entities, "FINRA has absolute immunity for its Regulatory Actions "[b]ecause they

perform a variety of vital governmental functions, but lack the sovereign immunity that governmental agencies enjoy, SROs are protected by absolute immunity when they perform their statutorily delegated adjudicatory, regulatory, and prosecutorial functions.'" *Empire Fin. Grp. v. Fin. Indus. Regulatory Auth., Inc.*, No. 08-80534-CIV-RYSKAMP/VITUNAC, 2009 U.S. Dist. LEXIS 133643, at 15 (S.D. Fla. Jan. 15, 2009) (citing *Weissman v. Nat'l Ass'n of Secs. Dealers, Inc.*, 500 F.3d 1293, 1296 (11th Cir. 2007)). "It is well settled in the Second Circuit that SROs such as FINRA are absolutely immune with respect to actions taken in furtherance of their regulatory duties." *Lobaito v. Fin. Indus. Regulatory Auth.*, 2014 U.S. Dist. LEXIS 101052, at *20 (S.D.N.Y. July 22, 2014). As a self-regulatory organization registered under the Securities Exchange Act of 1937, FINRA has "absolute immunity when acting in an adjudicatory, prosecutorial, arbitrative or regulatory capacity." *Hurry v. Fin. Indus. Regulatory Auth.*, No. CV-14-02490-PHX-ROS, 2015 U.S. Dist. LEXIS 180020 (D. Ariz. Aug. 5, 2015) citing *Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 159 F.3d 1209, 1210 (9th Cir. 1998). Of note, while the "absolute immunity" of FINRA is well-settled in the Second Circuit and other courts of appeals, the question of whether absolute immunity should protect an employer bank which made false statements merely using the FINRA platform has not been settled by this Court. The Supreme Court denied *certiorari* in *Std. Inv. Chtd. Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 560 F.3d 118, (2d Cir. 2009) *cert. denied,* 565 U.S. 1173 (2012), where the question was only to the absolute immunity of FINRA. But the question in this Petition does not go to the absolute immunity of FINRA.

Instead, the question here is whether a defendant can avoid accountability under SOX merely by publishing a false U-5 form using FINRA's platform.

The Respondent's false statements made on the Form U-5 were not just statements but a tool used on FINRA's platform to require every potential employer to consult with Citigroup and obtain its consent before hiring Daly. Any potential employer who fails to consult with Citigroup would be subject to disciplinary action by FINRA. Potential Employers must "[c]ertify that the member has communicated with all of the applicant's previous employers for the past three years and has taken appropriate steps to verify the items." FINRA Rule 88-67, *available at https://www.finra.org/rules-guidance/notices/88-67* (last visited Dec. 8, 2019).

By filing a false U-5, Citigroup subjected every potential employer to disciplinary action if such potential employer did not contact Citigroup. Citigroup would have had to confirm and explain the statements to Daly's potential employers to satisfy its FINRA obligations and potential employers would have had to act on the false representations made by Citigroup in making their decision not to hire. "The NASD has brought disciplinary actions against member firms who have failed to properly research a potential employee's background prior to hiring such person." FINRA Rule 88-67, *available at* https://www.finra.org/rules-guidance/notices/88-67 (last visited Dec. 8, 2019).

By writing false statement on Daly's U-5, Citigroup had, by FINRA mandate, ***required*** every single potential employer to "communicate[] with

[Citigroup as her only . . . previous employer[] for the past three years." FINRA Rule 88-67, *available at https://www.finra.org/rules-guidance/notices/88-67* (last visited Dec. 8, 2019). If a potential employer did not "communicate[] with [Citigroup]" pursuant to FINRA Rule 88-67, it would face disciplinary action itself. FINRA Rule 8310 provides that sanctions for failure of a potential employer to consult with Citigroup regarding what Citigroup put on the U-5 could include censure, fines, suspension, expulsion, revocation of registration, temporary or permanent cease and desist orders, or "any other fitting sanction." FINRA Rule 8310, *available at* https://www.finra.org/rules-guidance/rulebooks/finra-rules/8310 (last visited Dec. 8, 2019). The import of this cannot be overstated: "Each party to a proceeding resulting in a sanction shall be deemed to have assented to the imposition of the sanction . . . ." FINRA Rule 8310, *available at* https://www.finra.org/rules-guidance/rulebooks/finra-rules/8310 (last visited Dec. 8, 2019).

These rules are only a few select few examples of how Citigroup has used a false U-5 form to blacklist whistleblowers and this was clearly alleged in the Amended Complaint (the operative pleading): "[t]he U-5 is not merely written up once and then forgotten, but a dynamic system used by all parties in finance, and gives interested parties the power to ensure oversight, jurisdiction, and control . . . . In retaliation against Daly's protected actions, Defendant and Defendant's managers continues to violate Plaintiff's rights, in using the U-5 as a tool to ensure that Daly will not only never work for Citi again, but never work in finance again." Complaint at *7-8, Daly v. Citigroup et. al, 2017 U.S. Dist. Ct. Pleadings LEXIS 6383.

The Second Circuit discusses the U-5 only in the context of a continuing violation, not, as alleged, as the most recent and new act of retaliation. The Amended Complaint properly alleged that Citigroup mandated its own interference with Daly's future employment. A future employer's failure to allow Citigroup's interference would have subjected such potential employer to disciplinary action once the false language was put on the U-5. The panel mischaracterizes the allegation of a new act of retaliation and instead states that "[t]he plaintiff argues that because the defendants' filing of a false and defamatory Form U-5 about her on the FINRA database continues to prevent her from obtaining employment, their violation is ongoing and, therefore, her 180-day filing deadline has not elapsed." (App., *infra*, 31a). Instead, the Amended Complaint and subsequent arguments allege that Citigroup engaged in new acts of retaliation and had to have engaged in new acts of retaliation because Citigroup's failure to confirm and explain the language on the U-5 to new employers would have been Citigroup's violation of FINRA rules, and the failure of future employers to consult with Citigroup about the language on the U-5 would have likewise been a violation of FINRA rules by the potential employer. As this issue remains outstanding, and with circuits split on the matter, *certiorari* is warranted and necessary.

The lower courts' failure to address this type of post-employment retaliation necessitates this Court's *certiorari* review because as detailed in the next section, it appears that this type of retaliation has become the industry standard for quieting whistleblowers.

C. *Certiorari* is Warranted to Vindicate the Congressional Mandate that "[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section." 18 U.S.C. § 1514A(e)2)

On November 23, 2008, the Treasury, Federal Reserve and the FDIC issued a Joint Statement declaring that the

> "Treasury and the Federal Deposit Insurance Corporation will provide protection against the possibility of unusually large losses on an asset pool of approximately $306 billion of loans and securities backed by residential and commercial real estate and other such assets, which will remain on Citigroup's balance sheet. . . . In addition, Treasury will invest $20 billion in Citigroup from the Troubled Asset Relief Program in exchange for preferred stock . . . . With these transactions, the U.S. government is taking the actions necessary to strengthen the financial system and protect U.S. taxpayers and the U.S. economy."

U.S. Department of the Treasury, *Joint Statement by Treasury, Federal Reserve and the FDIC on Citigroup* (Nov. 23, 2008) (online at https://www.federalreserve.gov/newsevents/pressreleases/bcreg20081123a.htm) (hereinafter "Joint Statement on Citigroup").

The Dodd-Frank Wall Street Reform and Consumer Protection Act was then passed "[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end "too big to fail", to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes." Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376.

As part of this Act, Congress not only strengthened whistleblower protections, but ensured that whistleblowers would not be forced to arbitrate their dispute in FINRA arbitration. The fairness or unfairness[3] of arbitration or the judicial policy in

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[3] In a motion brought by Wells Fargo to confirm a FINRA arbitration award where the broker who sued Wells Fargo was required by the three-member FINRA panel (which unanimously ruled in Wells Fargo's favor), to pay Wells Fargo $229,060.52 plus interest, plus over $60,000 for Wells Fargo's attorney's fees, the District Court judge candidly stated, "[a]s counsel's open challenge to the court's review authority makes clear, arbitration under the Federal Arbitration Act is a process that, although retaining the appearance of constitutionality by involving the courts in confirming an award, does not even attempt to retain the appearance of fairness. In the hearing before this court on the claimant bank's motion to confirm an arbitration award, counsel for the claimant bank noted that the bank handles hundreds of arbitrations a year and that counsel herself handles 30 to 40 a year and that she, by the

way, has never lost a *single* case. Tr. 52 ("I've never lost one and I've never not gotten attorney's fees. I *always* win these cases.") (emphasis added). Now *there's* a level playing field.

"Because of its constant and prolific participation in FAA arbitration, the claimant bank [Wells Fargo] enjoys a clear advantage over the individual employee or customer. That is, the arbitration company or arbiter knows that the bank will participate in hundreds of arbitrations a year, whereas an individual employee or customer may participate in arbitration only once in their lifetime, if ever. The bank will know from experience, then, which arbiters are the most likely to favor the bank; therefore, the bank will naturally choose that arbiter to arbitrate the bank's case. The individual, on the other hand, has very limited knowledge of the arbiter. Couple that with the proposition that the arbiter's mistakes of facts or law are not reviewable by the courts and the result is a process in which, as in this case, counsel for the bank can remain undefeated 30 or 40 times a year. Tr. 52.

Counsel's argument that the parties voluntarily agreed to arbitration and that the process saves money is also disingenuous. Since financial institutions and large employers have virtually all of the available lending capital and a large number of the jobs, individuals have no recourse but to agree to an arbitration clause. Further, since the individuals seldom win and are forced to reimburse costs and attorney fees, the only ones saving money are large institutions like the claimant." *Wells Fargo Advisors,*

favor of arbitration is not at issue here, only the Congressional intent to override that policy for the protection of whistleblowers and for the financial stability of the country. Congress specifically prohibited exactly what Citigroup has thus far managed to accomplish: retaliation against a whistleblower who informed her superiors of SEC violations and mandatory forced arbitration of her dispute pursuant to a predispute arbitration agreement. Sarbanes-Oxley as amended by Dodd-Frank specifically prohibits this treatment of this exact type of claim. 18 U.S.C. § 1514 provides that:

> **"(a) Whistleblower protection for employees of publicly traded companies.** No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 . . . . may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—
>
> **(1)** to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation . . . any rule or regulation of the Securities and Exchange Commission, or any provision

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LLC v. Watts, 858 F. Supp. 2d 591 (W.D.N.C. 2012) (*rev'd in relevant part and aff'd in part*).

> of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by— . . .
>
> **(C)** 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); . . .
>
> **(b)(2)(E)** Jury trial. A party to an action brought under paragraph (1)(B) shall be entitled to trial by jury. . . .
>
> **(e) Nonenforceability of certain provisions waiving rights and remedies or requiring arbitration of disputes.**
>
> **(1)** Waiver of rights and remedies. The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement.
>
> **(2)** Predispute arbitration agreements. No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.

18 U.S.C. § 1514A.

Dodd-Frank was enacted "to protect consumers from abusive financial services practices." Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376.

Therefore, the use of the Form U-5 to retaliate against whistleblowers must be evaluated in light the "text of § 1514A, [and] the mischief to which Congress was responding . . . ." *Lawson v. FMR LLC*, 571 U.S. 429, 433 (2014) (Ginsburg, J.).

> "[P]ublic reports indicate that Wells Fargo may have filed inaccurate or incomplete Form U5s for fired employees and that the bank may have done so to retaliate against whistleblowers. If this is the case, then it would appear that Wells Fargo concealed key information from regulators that may have revealed the bank's misdeeds long before the September 2016 settlement. . . . Currently available information suggests that the bank may have filed defamatory statements to retaliate against employees . . . and that those negative statements often dealt serious blows to the employees' careers. . . ."

Letter from Senators Elizabeth Warren, Ron Wyden, and Robert Menendez to Timothy J. Sloan, President and Chief Executive Officer, Wells Fargo & Company (Nov. 3, 2016) *available at* https://www.warren.senate.gov/files/documents/2016-11-03_Wells_Fargo_FINRA_Violations_Letter_Final.pdf (last visited Dec. 8, 2019).

Certiorari is warranted because the whistleblower protections passed in the wake of the financial bailouts are only effective insofar as they are enforced. It is abundantly clear to employees in the

financial industry that whistleblowing is synonymous with professional suicide. That will remain the case as long as banks like Citigroup which received the largest bailout from the Troubled Asset Relief Program ("TARP"), like Wells Fargo, are able to use a U-5 Form to blacklist and prevent the employment of every employee who reports SEC violations.

II. *CERTIORARI* IS WARRANTED ON THE QUESTION OF WHETHER BIFURCATING RETALIATION FROM THE WHISTLEBLOWING UNDER SARBANES OXLEY CONTRAVENES THE CONGRESSIONAL MANDATE

A. The Circuit Courts are in Direct Conflict as to Application and Scope of the SOX Anti-Arbitration Congressional Mandate.

The District Court and the Second Circuit separated Citigroup's retaliatory acts from the whistleblowing that inspired them, and thus relieved the bank of any accountability and stripped Petitioner of her whistleblower protections under Sarbanes-Oxley. The courts are split as to the allowable discretion of district judges to make such a determination. The District Court of Puerto Rico and Western District of Arkansas held that Sarbanes-Oxley as amended by Dodd-Frank required that actions of retaliation against a whistleblower not be split off or arbitrated.

Courts Finding That All Claims Arising Under SOX Are No Longer Arbitrable Nor Are They Subject to Bifurcation:

In deciding whether to compel arbitration of breach of contract claims, a district court found an arbitration agreement invalid and unenforceable, as the breach of contract claim "ar[o]se from the same nucleus of operative facts as . . . claims under Sarbanes-Oxley." *Stewart v. Doral Fin. Corp.,* 997 F. Supp. 2d 129, 139 (D.P.R. 2014). As the court further noted, "the arbitration agreement requires arbitration of a dispute arising under Sections 806 and 1514, as . . . [the] main argument on the breach of contract claim is that the Bank retaliated against him as a result of the memorandum he sent to the chair of the Audit Committee expressing his concerns. In other words, . . . [his] employment would not have been terminated had he not voiced his concerns to the Audit committee. Thus, compelling arbitration would require both sides to re-litigate the application of SOX's whistleblower provision." *Id.* at 139. And "[c]ompelling arbitration would not only frustrate the purpose of 18 U.S.C. § 1514A(e)(2) but would also place a substantial financial and temporal burden on all parties involved. *Id.* at 140 (citing *Wong v. CKX, Inc.*, 890F. Supp. 2d 411, 421 (S.D.N.Y. 2012)). The court in *Stewart* held that "any claims arising under Section 806 are no longer arbitrable following the enactment of Dodd-Frank in July 21, 2010." *Id.* at 129.

Where a plaintiff filed against his employer for violation of Sarbanes-Oxley, wrongful termination and retaliation, and claimed that the language of 18 U.S.C. § 1514A(e) rendered the arbitration agreement unenforceable in its entirety, the Western District of Arkansas made a similar ruling. "Adopting . . . [the employer's] preferred interpretation not only would run counter to the canons of construction . . . ; it would

frustrate the statute's purpose of "Whistleblower Protection"—which is the title given to § 922 of the Dodd Frank Act - by forcing SOX whistleblowers with entangled claims to choose between either engaging in duplicative and costly litigation in multiple forums or abandoning potentially meritorious claims." *Laubenstein v. Conair Corp.*, No. 5:14-CV-05227, 2014 U.S. Dist. LEXIS 163410 at *7 (W.D. Ark. Nov. 19, 2014). The court makes reference to *Dean Witter Reynolds, Inc.* and *KPMG LLP* and correctly states that "these cases are inapposite; this Court's present task is not to interpret the FAA, but rather to interpret a different statute that *overrides* the FAA." *Id.* at *7-8 (citing *KPMG LLP v. Cocchi*, 132 S.Ct. 23, 24, 181 L. Ed. 2d 323 (2011) (per curiam); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217, (1985)).

Courts Holding That Some Claims Are Arbitrable Even if They Would Arbitrate the Same Facts As Alleged Under SOX:

The above rationale is in direct conflict with the precedent followed in New York and Wisconsin and specifically criticized by the Connecticut District Court. "The only two decisions of which the court is aware that address the question whether to compel arbitration of otherwise-arbitrable claims arising from the same set of operative facts as a SOX claim, *Stewart v. Doral Fin. Corp.*, 997 F. Supp. 2d 129, 139-40 (D.P.R. 2014), and *Laubenstein v. Conair Corp.*, No. 5:14-cv-5227, 2014 U.S. Dist. LEXIS 163410, 2014 WL 6609164, at *3 (W.D. Ark. Nov. 19, 2014), came to the opposite conclusion from the one this court reaches. Those courts held that, when a non-SOX claim is "entangled with" and "arise[s] from the same nucleus of operative facts" as a SOX claim

(to which section 1514A(e)(2) applies), compelling arbitration is inappropriate because doing so would "frustrate the purpose of 18 U.S.C. § 1514A(e)(2) [and] place a substantial financial and temporal burden on all parties involved.'" *Wiggins v. ING U.S., Inc.*, No. 3:14-CV-1089 (JCH), 2015 U.S. Dist. LEXIS 78129 (D. Conn. June 17, 2015) citing *Stewart*, 997 F. Supp. 2d at 140. The *Wiggins* court declined to follow the rule set forth in *Stewart* and *Laubenstein* and submitted claims which arose "from the same set of operative facts" to arbitration. *Wiggins v. ING U.S., Inc.*, No. 3:14-CV-1089 (JCH), 2015 U.S. Dist. LEXIS 78129 at *21 (D. Conn. June 17, 2015).

Where a whistleblower sued under the Sarbanes-Oxley Act, 18 U.S.C. § 1514A and the Dodd-Frank Act, 15 U.S.C. § 78u-6, the employer moved to compel arbitration of the Dodd-Frank claim and to stay all proceedings in court pending outcome of the arbitration. *Wussow v. Bruker Corp.*, No. 16-cv-444-wmc, 2017 U.S. Dist. LEXIS 99904 (W.D. Wis. June 28, 2017). The district court compelled arbitration of the Dodd-Frank claim, and directed that the Sarbanes-Oxley claim proceed simultaneously in court, despite the fact that "[b]oth claims [we]re based on the same factual allegations and adverse employment actions." *Wussow v. Bruker Corp.*, No. 16-cv-444-wmc, 2017 U.S. Dist. LEXIS 99904 at *8 (W.D. Wis. June 28, 2017).

B. This Court's Review is Needed Because of the Importance of Interpreting the Congressional Anti-Arbitration Mandate

The Supreme Court thus far has not addressed the issue of the application and scope of the anti-

arbitration provisions as they apply to claims of retaliation under Sarbanes-Oxley.

Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1985) was decided before Sarbanes Oxley was passed and well before it was amended by Dodd Frank. There, the court held that the Arbitration Act required arbitration of arbitrable claims even where the result would be an inefficient maintenance of separate proceedings in different forums. This case is relied on by some courts and considered irrelevant by others in determining arbitrability in Sarbanes Oxley whistleblower cases. However, in *Dean Witter Reynolds*, decided in 1985, there were no Congressional mandates in place yet that overrode the Arbitration Act. Therefore, this Court was asked to interpret only the application of the Federal Arbitration Act, not how the Sarbanes-Oxley Act as amended by Dodd-Frank overrides it.

In *KPMG LLP V. Cocchi,* 565 U.S. 18 (2011), this Court decided, consistent with *Dean Witter Reynolds*, that where there was a motion to compel arbitrable claims, even if it would require inefficient maintenance of separate proceedings in different forums, the court should require arbitration of arbitrable claims. Not at issue in that case was whether there was any Congressional Act which overrode the Federal Arbitration Act, because no such Congressional mandate applied to the proceeding. The court decided that because there was an agreement to arbitrate, and because there were no grounds existing "at law or in equity for the revocation of any contract," the courts were required to "compel arbitration of pendent arbitrable claims." *KPMG LLP V. Cocchi,* 565 U.S. 18, 21-22, (2011). However,

it is *KPMG*, decided only on the import of the Federal Arbitration Act, and not on any Act which overrides it, which the Second Circuit relies on in the instant case in deciding to bifurcate and arbitrate as many claims as possible. "We are instead charged with "examin[ing] with care the complaints seeking to invoke [our] jurisdiction in order to separate arbitrable from nonarbitrable claims." (App., *infra*, 23a) (citing *KPMG LLP v. Cocchi,* 565 U.S. 18, 19 (2011) (per curiam)).

The recent case, *Dig. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767 (2018), likewise did not address the application of the anti-arbitration provisions in the Sarbanes-Oxley Act as amended by Dodd-Frank. This Court was asked to decide whether the anti-retaliation provisions and rewards for whistleblowers under 15 U.S.C.S. § 78u-6(h)(1)(A)(iii) applied where an individual did not report to the Securities and Exchange Commission. Arbitration is not mentioned once in this decision because the anti-arbitration provisions are found in 18 U.S.C. § 1514A, a separate provision which would have been irrelevant to *Dig. Realty*.

Sarbanes-Oxley prohibited companies like Citigroup from retaliating against any whistleblower and provided that if a person alleged retaliation as detailed herein, that person could bring "an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy." 18 U.S.C. § 1514(a) and (b). The statute further provides for the "[n]onenforceability of Certain Provisions Waiving

Rights and Remedies or Requiring Arbitration of Disputes –

> (1) Waiver of rights and remedies. – The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement.
>
> (2) Predispute arbitration agreements. – No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section." 18 U.S.C. 1514A(e).

The Causes of Action alleged in the Amended Complaint can be reduced to three dominant acts of unlawful retaliation:

First:

Whistleblowing Cause: Daly demanded fair and legal trading allocation by Citibank.

Retaliation Effect: Citibank stripped her allocation privileges and she was effectively demoted to and treated as a secretary.

Second:

Whistleblowing Cause: Daly demanded that she be returned her allocation privileges.

Retaliation Effect: Citibank's Human Resources forced her to publicly apologize to management and all of her colleagues.

Third:

Whistleblowing Cause: Daly refused to engage in insider trading and reported the pressure from management to do so to her bosses, human resources, and inside counsel.

Retaliation Effect: Citigroup fired her, wrote false statements on her Form U-5, and using FINRA's platform, interfered with every potential employer to ensure that each potential employer would face disciplinary charges or expulsion themselves if they hired her.

Notwithstanding this, the Second Circuit mischaracterizes Petitioner's position, in stating that "the plaintiff asserts that we cannot separate these claims from her SOX claims for purposes of determining their arbitrability because they arise out of the same act of whistleblowing. . . . She therefore argues that each of her federal claims, like her SOX claims, should be precluded from arbitration. We disagree." (App., *infra*, 23a). Petitioner's actual position was that all of Citigroup's acts were done in retaliation for her whistleblowing. Citigroup's unlawful acts were so egregious that they happened to violate many more laws, as detailed in the Amended Complaint, but that should only give a whistleblower greater, not less, protection under Sarbanes-Oxley. The Second Circuit's mischaracterization would use the fact that, because Citigroup's retaliatory acts violated several laws, Citigroup can now avoid its fate under 18 U.S.C. § 1514A(e)(2) ("[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."). The Second Circuit's decision would reward Citigroup for committing many acts of

retaliation instead of few. After separating Citigroup's retaliation acts from Daly's whistleblowing which inspired them, the panel held that "[t]he district court therefore correctly compelled arbitration of all of the plaintiff's claims, with the exception of her SOX claim, which it properly determined to be nonarbitrable," which the panel had already dismissed by using the wrong retaliation date to toll the Statute of Limitations. (App., *infra*, 23a).

Separating a bank's actions from the whistleblowing that inspire those actions frustrates the purpose of 18 U.S.C. § 1514A and effectively renders impotent the statute designed to protect whistleblowers. Without *certiorari* review, whistleblowers bringing their claims within the Second Circuit, seated in one of the major financial capitals of the world, will be forced to arbitrate any claims of retaliation they may have against a member bank, none of which would have occurred but for whistleblowing. As Wells Fargo's recent history has shown, banks' use of the Form U-5 to blacklist whistleblowers, interferes with their potential employment, and renders them permanently unemployed, and thereby enables banks to commit major securities violations. Most importantly, if the Second Circuit's decision is permitted to stand, the message received by Bank employees is exactly what is intended by Citigroup. Practically speaking, Bank employees will know their options: either keep silent and turn a blind eye to unlawful activity, or join in.

CONCLUSION

The Circuit Courts have entered decisions in conflict with one another as to the possible "absolute

immunity" of false language on the Form U-5, and parties who post such language as post-employment retaliation. The Circuit courts are likewise split on the issue of the forced FINRA arbitration of whistleblower claims under 18 U.S.C. § 1514A. This is a matter of national importance because the stability of the financial system requires the protection of whistleblowers who report SEC violations, especially with regard to a major bailout bank. For these reasons and the reasons detailed herein, it is respectfully requested that the petition for a writ of *certiorari* be granted.

Respectfully submitted,

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December 16, 2019