No. 22-660

IN THE

Supreme Court of the United States

TREVOR MURRAY,

Petitioner,

v.

UBS SECURITIES, LLC AND UBS AG,

Respondents.

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

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, a consumer-advocacy organization with members and supporters in all fifty states, works before Congress, administrative agencies, and courts for enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen has a longstanding interest in the effective enforcement of laws, such as the Sarbanes-Oxley Act of 2002 (SOX), that aim to ensure corporate accountability and transparency, as well as in ensuring that employees have meaningful access to statutory remedies for unlawful employment actions.

Public Citizen believes that the Second Circuit's decision in this case, which imposes on plaintiffs alleging unlawful whistleblower retaliation the burden of proving retaliatory motive, is contrary to both the text and purpose of SOX and significantly weakens the statute's protections of workers and the public. Given the similarity between the language and structure of SOX and other statutes that protect employees from unlawful retaliation, Public Citizen is concerned that the Second Circuit's flawed reasoning could be expanded to other statutes—contrary to Congress's express direction.

SUMMARY OF ARGUMENT

Many federal statutes make it unlawful for employers to take employment actions "because of" protected statuses and activities. What a plaintiff must prove to establish a violation of each statute

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of the brief. Counsel for all parties received more than ten days' notice of the filing of the brief.

varies, though, based on differences in statutory text and structure. In cases where Congress has not been specific, this Court and other courts have used various interpretative tools to discern the plaintiff's burden of proof. But where Congress has specified the applicable standard, this Court has recognized that it is ultimately Congress's prerogative to do so and the courts' job to apply Congress's decision.

Congress exercised this prerogative in enacting the whistleblower retaliation provisions of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A. In that statute, Congress specified that, to make a case that an employer took action "because of" activity protected by that statute, a plaintiff need only show that the protected activity was a "contributing factor" in the employer's decisionmaking, at which point the burden would shift to the employer. In so doing, Congress incorporated language from other statutes that was expressly designed to eliminate the requirement that plaintiffs prove motive or intent, which courts had read into statutes without this language.

In the decision below, the Second Circuit disregarded the express statutory language and, under the guise of a "plain meaning" analysis that failed even to address the relevant statutory provision, held that a claim under a statute that prohibits employment action "because of" a protected activity *necessarily* imposes a burden on the plaintiff to show that the decision was "motivated" by that protected characteristic or activity. In so doing, the court ignored Congress's deliberate choice to require a lesser standard of causation for SOX claims, as recognized by other courts of appeals.

Because the Second Circuit's decision substantially weakens the protections Congress deemed necessary to ensure that employees freely report violations of the substantive provisions of SOX, and because its reasoning could also make it difficult for whistleblowers to bring successful claims under a variety of statutes where Congress has dictated the same burden of proof, the Court should grant the petition and reverse.

ARGUMENT

I. The court of appeals ignored Congress's decision not to require evidence of impermissible motive.

Section 1514A makes it unlawful to "discriminate against an employee in the terms and conditions of employment because of" various protected activities. 18 U.S.C. § 1514A(a). In concluding that a plaintiff pursuing a claim of unlawful retaliation under SOX must establish "retaliatory intent," the Second Circuit relied solely on what it referred to as the "plain meaning" of the words "discriminate" and "because" in subsection (a), without considering the *other* relevant provisions of section 1514A. Pet. App. 9a–10a.

"[S]tatutes must be read as a whole." *Guam v. United States*, 141 S. Ct. 1608, 1613 (2021) (cleaned up). And whatever the words "discriminate" and "because" would indicate about what a plaintiff must prove if they were the *only* clues in the statute, SOX says more. Indeed, the statute *specifically* addresses the question of what is necessary for an employee bringing a retaliation claim to prove. *Cf. Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 352–45 (2013) (concluding that what plaintiff must prove to show employment action was "because of" protected status

or activity varies under two provisions of Title VII, in light of Congress's specification of a specific standard that governs only one).

Specifically, SOX provides that section 1514A enforcement actions "shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code." 18 U.S.C. § 1514A(b)(2). Section 42121(b), enacted as part of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21), contains a detailed burden-shifting framework for complaints for "discriminat[ion] against an employee … because the employee" engaged in a variety of aviation-related whistleblower activities. It requires the Secretary of Labor, who is charged with adjudicating complaints under that provision, to dismiss complaints "unless the complainant makes a prima facie showing that any [protected whistleblower activity] was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. § 42121(b)(2)(B)(i). If the complainant makes that showing, the burden shifts to the employer to demonstrate that it "would have taken the same unfavorable personnel action in the absence of" the protected activity. *Id.* § 42121(b)(2)(B)(ii). The concept of retaliatory motive or intent does not appear in the AIR-21 standard.

Nowhere in its opinion did the Second Circuit acknowledge section 1514A(b)(2) or the AIR-21 standard that it expressly incorporates, much less explain why an employee must meet a standard that differs from the one the statute provides. Courts, however, are not free to ignore Congress's explicit determination as to who bears what burden of proof. As this Court has recognized, whether or not to require a plaintiff to show that "a forbidden motive

played a role in the employer's decision … is a decision for Congress to make." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177 n.3 (2009).

In enacting SOX, Congress made the decision that "the only proof of discriminatory intent that a plaintiff is required to show is that his or her protected activity was a 'contributing factor' in the resulting adverse employment action." *Frost v. BNSF Ry. Co.,* 914 F.3d 1189, 1195 (9th Cir. 2019) (discussing the AIR-21 standard as applied to Federal Railroad Safety Act (FRSA) retaliation claim). A contributing factor "*is* the required showing of intentional discrimination." *Id.* Thus, as several courts of appeals have recognized, "there is no requirement that [] plaintiffs separately prove discriminatory intent." *Id.*; *see Halliburton, Inc. v. Admin. Rev. Bd.*, 771 F.3d 254, 263 (5th Cir. 2014) (under section 1514A, where an employee shows protected activity was a "contributing factor," the employee need not "prove that the employer had a 'wrongful motive' too"); *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 161 (3d Cir. 2013) (similar, under the FRSA).

This textual analysis is supported by the context in which Congress has enacted contributing-factor burden-shifting schemes. The term "contributing factor" first appeared in the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16, *codified at* 5 U.S.C. § 1221(e). At that time, courts had held that "proof of discriminatory motive is critical to establish a prima facie case of discrimination" under discrimination and whistleblower protection statutes. *AFSCME v. Washington*, 770 F.2d 1401 (9th Cir. 1985) (citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977)) (Title VII case); *see also, e.g. McAlester v. United Air Lines, Inc.*, 851 F.2d

1249, 1260 (10th Cir. 1988) (recognizing that a Title VII plaintiff "must produce evidence of discriminatory intent or motive to establish a prima facie case"); *E. Assoc. Coal Corp. v. Fed. Mine Safety & Health Rev. Comm'n*, 813 F.2d 639, 642 (4th Cir. 1987) (noting that it was "well settled" that a whistleblower must show that an adverse action "was motivated" by protected activity as part of the prima facie case under the non-retaliation provision of Mine Safety and Health Act); *Wilcoxson v. U.S. Postal Service*, 812 F.2d 1409 (table), 1987 WL 36561, at *2 (6th Cir. 1987) (requiring a plaintiff to show retaliatory motive for a Title VII reprisal claim); *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 868 (7th Cir. 1985) (stating that a prima facie showing of a Title VII claim required "some indication that the [defendant]'s actions were motivated by discriminatory animus"); *Grant v. Bethlehem Steel Corp.*, 622 F.2d 43, 46 (2d Cir. 1980) (recognizing that a Title VII retaliation plaintiff must establish "retaliatory motive play[ed] a part in the adverse employment actions").[2]

In enacting the Whistleblower Protection Act, Congress overrode this interpretation, based on its determination that requiring civil service whistle-blowers to show that their protected activity "constituted a 'significant' or 'motivating' factor" imposed an "excessively heavy burden … on the employee." *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (discussing legislative history).

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[2] The Merit Systems Protection Board had also incorporated a motivating factor requirement for cases of reprisal under the Civil Service Reform Act. *See Gerlach v. FTC*, 8 M.S.P.B. 599, 604–05 (1981) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285–86 (1977)).

Congress used the term "contributing factor" to effect a "substantial reduction of the whistleblower's burden." *Id.* (citations omitted). This deliberate choice reflected the view that, "[r]egardless of the official's motives, personnel actions against employees should quite simply not be based on protected activities such as whistleblowing." S. Rep. No. 413, 100th Cong., 2d Sess. 16 (1988), *quoted in Marano*, 2 F.3d at 1141; *see Feldman v. Law Enforcement Assocs. Corp.*, 752 F.3d 339, 348 (4th Cir. 2014) (applying *Marano* to SOX section 1514A claim); *Lockheed Martin Corp. v. Admin. Rev. Bd., U.S. Dep't of Labor*, 717 F.3d 1121, 1136 (10th Cir. 2013) (same).

Since 1989, Congress has incorporated the contributing factor standard into several other statutes to eliminate judicially imposed motive requirements. For example, in 1992, Congress amended the Energy Reorganization Act "to include a burden-shifting framework distinct from the Title VII employment-discrimination burden-shifting framework first established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800–05 (1973)," as it "desired to make it easier for whistleblowers to prevail in their discrimination suits." *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999) (citing Energy Policy Act of 1992, Pub. L. No. 102-486, § 2902(d), 106 Stat. 2776, 3123–24, *codified at* 42 U.S.C. § 5851(b)(3)(A)); *see also Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) (observing that the Energy Policy Act imposed "a tough standard" for employers "and not by accident").

Similarly, in 1993, Congress amended the whistleblower protections of the Federal Deposit Insurance Act, which courts had previously interpreted as incorporating the same intent standard

as Title VII, to incorporate the contributing factor burden of proof—an amendment that "quite clearly ma[d]e it easier for the plaintiff to make her case under the statute" by requiring only "circumstantial evidence that her disclosure was a contributing (not necessarily a substantial or motivating) factor in the adverse personnel action." *Frobose v. Am. Sav. & Loan Ass'n of Danville*, 152 F.3d 602, 612 (7th Cir. 1998). Again in 2000 when it enacted AIR-21, Congress used the "contributing factor" standard "to protect whistleblowers" in the airline industry by "mak[ing] it difficult for employers to avoid paying damages in 'mixed-motive cases.'" *Ameristar Airways, Inc. v. Admin. Rev. Bd.*, 771 F.3d 268, 273 (5th Cir. 2014). Likewise, in 2007, after incorporating the AIR-21 standard into SOX, Congress incorporated the standard into the Surface Transportation Assistance Act (STAA). In so doing, it "imposed a lower burden on the employee than existed previously [for retaliation claims under that statute], when the employee was required to show the protected activity had 'motivated' the adverse action." *Maverick Transp., LLC v. U.S. Dep't of Lab., Admin. Rev. Bd.*, 739 F.3d 1149, 1153 (8th Cir. 2014) (discussing 49 U.S.C. § 31105(b)(1)). *See also Araujo*, 708 F.3d at 159–60 (noting legislative history of incorporation of AIR-21 standard into FRSA reflected that "Congress intended to be protective of plaintiff-employees").

In the Second Circuit's view, though, Congress's decisions as to the standards that govern retaliation claims under these and other statutes are meaningless. Under the decision below, the words "because of" require a plaintiff to prove impermissible intent or motive, even where a statute explicitly sets forth a different standard. The decision runs counter

to the fundamental principle of statutory interpretation that "Congress remains free to alter what [the courts] have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989); *see also Pierson v. Ray*, 386 U.S. 547, 561 (1967) (Douglas, J., dissenting) ("Congress enacts a statute to remedy the inadequacies of the pre-existing law, including the common law."). It also contravenes the principle that it is the courts' job to apply the law that Congress has written. *Wooden v. United States*, 142 S. Ct. 1063, 1083 (2022) (Gorsuch, J., concurring) (citing *United States v. Wiltberger,* 5 Wheat. 76, 95 (1820)); *United States v. LaBonte,* 520 U.S. 751, 757 (1997) ("[W]e assume that in drafting legislation, Congress said what it meant.").

Whereas congressional failure to act in response to a judicial interpretation of a statute may be an "indication that Congress at least acquiesces in, and apparently affirms, that interpretation," *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 338 (1988), Congress's amendment of statutory language in response to judicial interpretation is clear evidence of the opposite. When enacting SOX, and AIR-21, Congress was aware that, absent specific language as to the burden of proof regarding causation, courts had read whistleblower protection statutes as requiring plaintiffs to show retaliatory motive as part of their case in chief. Congress's choice to enact a different, specific burden of proof governs over any default judicial interpretation that would otherwise apply.

II. The Second Circuit's error has the potential to impact a growing set of statutory regimes.

The importance of the question raised by the petition is magnified by the fact that Congress

continues to prescribe the same "contributing factor" burden of proof, without a motive requirement, under newer statutes designed to protect whistleblowers. Congress did so twice in 2020 alone, in the Criminal Antitrust Anti-Retaliation Act, 15 U.S.C. § 7a-3(b)(2) and the Anti-Money Laundering Act, 31 U.S.C. § 5323(g)(3)(A), both of which incorporate the AIR-21 standard. Numerous other statutes take the same approach. *See* Consumer Financial Protection Act, 12 U.S.C. § 5567(c)(3); Consumer Product Safety Improvement Act, 15 U.S.C. § 2087(b)(2); Defense Contractor Whistleblower Protection Act, 41 U.S.C. § 4712(c)(6); Food Safety Modernization Act, 21 U.S.C. § 399d(b)(2)(C); Moving Ahead for Progress in the 21st Century Act, 49 U.S.C. § 30171(b)(2)(B); National Transit Systems Security Act, 6 U.S.C. § 1142(c)(2)(B); Patient Protection and Affordable Care Act, 29 U.S.C. § 218c(b)(1); Pipeline Safety Improvement Act of 2002, 49 U.S.C. § 60129(b)(2)(B); Seaman's Protection Act, 46 U.S.C. § 2114(b); Taxpayer First Act, 26 U.S.C. § 7623(d)(2)(B)).

Congress's repeated enactment of statutes dictating that an employee need only demonstrate that protected activity was a contributing factor in an employment action to make out their case in chief makes review of the decision below important for two reasons. First, it highlights that, by adding a retaliatory intent requirement for SOX whistleblower cases, the Second Circuit's decision threatens to weaken statutory regimes beyond those that govern financial reporting, including those that ensure the safety of vital infrastructure. Second, the ubiquity of statutes setting forth the same standard reflects Congress's determination that the standard means something different than what courts have discerned

from the words "because of" and "discriminate" viewed in isolation. Should this Court disagree that Congress's approach is adequate to effect Congress's desired result, it would be best for Congress to learn sooner, rather than later, so that it can respond in turn.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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