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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

UBS leads off its argument for denial with the suggestion (BIO 8-10) that buried in a footnote midway through the Second Circuit's opinion (Pet. App. 11a n.4) lies an alternative basis for the judgment. That suggestion is entirely specious for the reasons we explain below.

What is more, UBS's decision to lead with its "alternative holding" theory bespeaks the weakness of its other arguments against review. Unable to deny there is a circuit split, UBS claims only that the conflict is shallower than the Second Circuit acknowledged. Pet. App. 14a n.7. But the petition confirms it is, in fact, both mature and even deeper than the Second Circuit realized. Pet. 15-17. UBS also attempts to characterize the Second Circuit's analysis as "textual." BIO 1, 10, 11, 14. But the most striking thing about the Second Circuit's opinion is that it ignored—to the tune of literally never mentioning—the relevant text. The Sarbanes Oxley Act's (SOX) whistleblower provision directs that in deciding whether discrimination has occurred, courts must use the "govern[ing]" framework set out in 49 U.S.C. § 42121(b). *See* 18 U.S.C. § 1514A(b)(2)(C); Pet. 24-25. The failure to grapple with the text of Section 42121(b) explains not only why the Second Circuit reached a result that conflicts with the approach of four other courts of appeals (and the Department of Labor to boot), but also why UBS's construction of SOX is wrong.

This Court should grant the petition for certiorari.

1. *Split*. The court below "recognize[d] that [its] conclusion depart[ed] from the approach of the Fifth

and Ninth Circuits as to the elements of a section 1514A claim." Pet. App. 14a n.7. The petition for certiorari shows that the Fourth and Tenth Circuits similarly disagree with the decision below, amounting to a 4-1 split. Pet. 16-17.

UBS doesn't deny that there is a split between the court below and the Fifth Circuit. That alone is enough to grant certiorari. Even if the split were only 1-1, this Court routinely grants certiorari to resolve that sort of conflict.[1] UBS asserts that "there is every reason to believe that the Fifth Circuit may reconsider its approach once it is given the opportunity to consider for the first time the textual analysis that the Second Circuit found compelling." BIO 11. But this Court would *never* grant review if the possibility that a circuit "may reconsider its approach" were enough to deny certiorari in the face of a square split. And in any event, the Fifth Circuit already *did* consider, and reject, the "textual analysis that the Second Circuit found compelling." *See* Reply Br. of Pet'r Halliburton, Inc., at *19, *Halliburton, Inc. v. Admin. Review Bd.*, 2013 WL 6837502 (5th Cir. Dec. 19, 2013) (arguing that employee must show "retaliatory motive," unlike in the WPA context, because "the text of the WPA differs significantly from that of SOX").

UBS next argues that both the Second Circuit and Murray are wrong that the Ninth Circuit is on the other side of the split. BIO 12; *see* Pet. App. 14a n.7.

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[1] *See, e.g.*, Pet. 15-17, *Nance v. Ward*, 142 S. Ct. 858 (2022) (No. 21-439); Pet. 20-23, *Babb v. Wilkie*, 140 S. Ct. 1168 (2020) (No. 18-882); Pet. 12-15, *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768 (2020) (No. 18-1116); Pet. 11, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 615 (2015) (No. 15-290).

But as UBS admits, the Ninth Circuit has squarely held that a petitioner need not make a conclusive showing of retaliatory intent at the prima facie stage. BIO 12. As the Ninth Circuit explained, "the employee need only make a prima facie showing that the protected behavior or conduct was a contributing factor in the unfavorable personnel action"—no "additional proof of [the employer's] motivation" is needed. *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010). The Second Circuit, by contrast, held that Murray *did* need to prove something more than that his protected conduct was a contributing factor as part of his prima facie case. Pet. App. 11a; *see* BIO 6 (describing Second Circuit's holding).

Finally, the petition explained that the Fourth and Tenth Circuits have rejected the idea that a plaintiff must make some showing of intent separate and apart from his burden to show that protected conduct was a contributing factor in the wrongful conduct. Pet. 16-17. UBS accuses the petition of "conflat[ing]" intent and "causal nexus." BIO 13-14. But UBS does not deny that the Fourth and Tenth circuits, unlike the Second, would have upheld the verdict in Murray's favor.

2. *Importance*. UBS doesn't deny that the SOX whistleblower provision is important, governing adjudication of some 850 claims per year and protecting countless whistleblowers in thousands of public companies. *See* Pet. 17-18. Nor does it deny that the Second Circuit's approach conflicts with that of the Department of Labor. *See id.* at 19-21. And it cannot deny that at least ten other statutes incorporate the same governing framework. *See id.* at 21-22.

UBS instead raises two arguments. First, it argues that the Department of Labor's interpretation of the

whistleblower statute does not matter because the SEC, not the Department of Labor, is responsible for promulgating rules regarding SOX. BIO 20-21. But it is the Department of Labor, and not the SEC, that *adjudicates* whistleblower claims in the first instance. *See* 18 U.S.C. § 1514A(b)(1)(A). Accordingly, this Court should be concerned that the Labor Department and the Second Circuit read the SOX "govern[ing]" framework differently. 18 U.S.C. § 1514A(b)(2)(A).

Second, UBS argues that this Court should ignore all the other statutes that incorporate 49 U.S.C. § 42121(b)(2) by reference—the so-called AIR-21 statutes—because an answer to the question presented in this case "would not necessarily yield a transferable answer for other statutes with different texts." BIO 21. To be sure, there might be reasons why some AIR-21 statutes should be construed differently, although the court below relied for its construction of SOX on a decision construing the Federal Railroad Safety Act, Pet. App. 11a. In any case, surely a decision from this Court would provide some guidance. For instance, a decision by this Court might make clear that judges shouldn't substitute their own procedures for finding "discrimination" and "retaliation" for those prescribed by Congress in AIR-21.

3. *Vehicle.* As the petition explains, this case is a clean vehicle for addressing the question presented. Pet. 23-24. Every other issue related to liability has been decided in Murray's favor. Pet. App. 16a-17a. The Second Circuit's opinion starts by asking "whether the Sarbanes-Oxley Act's antiretaliation provision requires a whistleblower-employee to prove retaliatory intent," *id.* 8a; it ends by vacating the

verdict because the district court "fail[ed] to instruct the jury on Murray's burden to prove UBS's retaliatory intent," *id.* 17a; and in between, it discusses only that single issue.

UBS nevertheless insists that the Second Circuit issued a "separate[]" holding—actually, two "separate[]" holdings—buried in a footnote ten pages into the opinion. BIO 8-10. In the footnote, the Second Circuit discussed two hypothetical "scenario[s]," Pet. App. 11a n.4, but neither was at issue in *this* case.

First, the footnote suggests that in some case, a jury might impose liability even if a plaintiff's whistleblowing activity "insulated [him] from a termination to which he would otherwise have been subjected sooner." Pet. App. 11a n.4. But in this case, the jury surely did not award Murray nearly *$1 million* in damages because his whistleblowing *insulated* him from termination. *See* C.A. J.A. 3056 (damages should be awarded only if "Defendants improperly retaliated against Plaintiff for terminating him from UBS").[2]

Second, the footnote noted that in some cases, a jury might impose liability if a whistleblower's activity was "*the sort of behavior* that would *tend to affect* a termination decision," even if it did not "*actually* cause[] the termination." Pet. App. 11a n.4. But again, that didn't happen here: A supplemental instruction made clear that it was the *particular* activity in *this*

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[2] UBS is mistaken when it claims that "Petitioner's counsel affirmatively argued at trial" that liability could be imposed even if Murray's whistleblowing insulated him from termination. BIO 9. UBS's citation to that effect is to its own reply brief below, which in turn discusses a colloquy before the judge, not an argument to the jury. *Id.* (citing Resp. C.A. Reply Br. 33-35).

case, not UBS's general "*sort of behavior*," that had to be the basis for liability. *See* C.A. J.A. 1415 (supplemental instruction told the jury to consider whether knowledge of the protected activity "affect[ed] in any way the decision to terminate *Mr. Murray's* employment?" (emphasis added)).

Lest there be any doubt, if UBS's "alternative holdings" really were holdings, one might expect to see some assessment of whether the district court's errors were harmless. After all, the Second Circuit spent pages of its opinion assessing whether its actual holding regarding "retaliatory intent" amounted to harmless error. Pet. App. 15a-17a. But it never once considered whether the two points in footnote four were prejudicial, making clear that its discussion of the hypothetical "scenario[s]" is nothing more than dicta.

4. *Merits*. The statute explains precisely how to determine in a SOX case whether unlawful discrimination has occurred. Under the "govern[ing]" framework, a plaintiff must show that protected conduct "was a contributing factor in the unfavorable personnel action"—a phrase that has a well-established meaning. 18 U.S.C. § 1514A(b)(2)(C) (incorporating 49 U.S.C. § 42121(b)(2) by reference); *see also* Pet. 6, 16, 29-30. If he does so, then the employer can prevail only if it shows, "by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior"—that is, that the employer acted without retaliatory intent. 18 U.S.C. § 1514A(b)(2)(C) (incorporating 49 U.S.C. § 42121(b)(2) by reference).

The court below did not even acknowledge this text. UBS makes two arguments to excuse this failure, but neither is availing.

a. UBS claims that Murray's reliance on the incorporated AIR-21 framework "is rooted in a conflation of intent with causation." BIO 17. But many—perhaps most—antidiscrimination statutes allow intent to be proven by showing causation. Under Title VII, for instance, proving discriminatory intent simply requires proving that a decision was made *because* of a protected characteristic. *See Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1742 (2020) ("There is simply no escaping the role intent plays here . . . . [S]ex is necessarily a but-for cause when an employer discriminates against homosexual or transgender employees."). Proving discrimination under the Age Discrimination in Employment Act similarly requires only proof that the plaintiff's age was the but-for cause of the adverse employment action (no need for any more "direct evidence"). *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177-78 (2009). And to find a retaliatory motive in the First Amendment context, courts apply a "test of causation," looking to whether a plaintiff can show that his constitutionally protected conduct "was a substantial factor in the decision" and to whether a defendant can show "that it would have reached the same decision . . . . even in the absence of protected conduct." *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286-87 (1977). In short, causal nexus is used to prove discriminatory motive all the time.

Indeed, the word "discriminate" itself—on which UBS hangs much of its argument—often means

nothing *more* than that there is a "causal nexus" between the protected characteristics of the plaintiff and the defendant's decisions. SOX itself defines discrimination—including discharges like Murray's—in terms of causation: To "discharge" an employee "because of" a protected act is one "manner" in which a company "discriminate[s] against an employee." 18 U.S.C. § 1514A(a). And dictionaries confirm as much. *See, e.g.*, *Discrimination*, Bryan A. Garner, Black's Law Dictionary 479 (7th ed. 1999) (to "discriminate" is to "confer[] privileges on a certain class" or "den[y] privileges to a certain class *because of*" a protected characteristic (emphasis added)).[3]

And because intent and causation are often inextricably intertwined, UBS's argument that retaliation and discrimination require intent is beside the point. The question in this case is how to allocate the burden of proof among plaintiffs and defendants. Most circuits to have considered the question conclude that the text of 49 U.S.C. § 42121(b)(2) answers the question: A plaintiff must show only that protected conduct contributes to the challenged employment action (call it causation or intent), and then the burden

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[3] *See also Discriminate*, The American Heritage Dictionary of the English Language 517 (4th ed. 2000) ("[T]o make distinctions *on the basis of* class or category without regard to individual merit." (emphasis added)); *Discriminate*, Merriam-Webster's Collegiate Dictionary 332 (10th ed. 1993) ("[T]o make a difference in treatment or favor *on a basis* other than individual merit." (emphasis added)).

shifts to the employer to show a nondiscriminatory reason for its action.[4]

In short, the text of SOX lays out how a discrimination claim—including a finding of any requisite intent—is to be proven. There is no reason to deviate from the text of the statute.

b. UBS also posits a series of edge cases where, it claims, following the procedure laid out in the statute would mean finding retaliation without bad intent. BIO 19-20. For starters, UBS provides no evidence that such cases have ever been brought or that Congress was concerned about such cases. This Court "need not dwell on the situation hypothesized," for it "veers far from the case before us." *Digit. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 781 (2018).

Regardless, the framework laid out by the text of SOX is more than capable of handling such edge cases.

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[4] UBS claims that *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767 (2018), "makes clear that the employer's retaliatory intent is a required element." BIO 17. *Digital Realty* interpreted the 2010 Dodd-Frank Act, which provides less "far-reaching" protection for whistleblowers than SOX. *Id.* at 778. Indeed, the Court recognized that Dodd-Frank and SOX "differ in important respects." *Id.* at 772. One of the most important ones is that SOX, but *not* Dodd-Frank, uses the AIR-21 framework to govern retaliation claims.

In the portion of the analysis that UBS seizes upon, the Court actually takes the *opposite* view from UBS: It makes clear that retaliation may be proven by showing a causal connection between an internal report and the retaliatory act. *See Digital Realty*, 138 S. Ct. at 779. In any event, *Digital Realty* reiterated that "[w]hen a statute includes an explicit definition, we must follow that definition, even if it varies from a term's ordinary meaning." *Id.* at 776-77. Here, SOX makes explicit how retaliation is to be shown. *See* 49 U.S.C. § 42121(b)(2)(B)(i)-(ii).

Take UBS's hypothetical employee, "William," whose specialized skills are useful to just one customer, whose whistleblowing results in the loss of that customer, and who is let go because his specialized skills are no longer useful (but not because the company was upset that he blew the whistle). BIO 19. UBS claims that interpreting the statute Murray's way would lead to liability for the company, even though the company didn't act with a retaliatory motive. *Id.* But that's not right. In UBS's hypothetical, if the company can show it "would have taken the same unfavorable personnel action in the absence of" William's protected behavior—that is, that it would have fired William even if the customer was lost for reasons that had nothing to do with William—it would win. *See* 49 U.S.C. § 42121(b)(2)(B)(ii).

And even if UBS *did* identify a case where the statute's explicit directions about proving retaliation did not perfectly proxy retaliatory intent, that would still be no reason to ignore the text of the statute in favor of a court-crafted process for ascertaining intent. After all, it is not this Court's role "to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2381 (2020) (citation omitted).

CONCLUSION

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

Respectfully submitted,

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