No. 22-660

IN THE

Supreme Court of the United States

TREVOR MURRAY

Petitioner,

v.

UBS SECURITIES LLC, AND UBS AG,

Respondents.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The Sarbanes-Oxley Act of 2002 protects whistleblowers who report financial wrongdoing at publicly traded companies. 18 U.S.C. § 1514A. When a whistleblower invokes the Act and claims he was fired because of his report, his claim is "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)(C).

Under that incorporated framework, a whistleblowing employee meets his burden by showing that his protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. §§ 42121(b)(2)(B)(i), (iii). If the employee meets that burden, the employer can prevail only if it "demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior." *Id.* §§ 42121(b)(2)(B)(ii), (iv).

The Question Presented is:

Under Sarbanes-Oxley's burden-shifting framework, must a whistleblower prove his employer acted with a "retaliatory intent" as part of his case in chief, or does the employer bear the burden of proving a lack of "retaliatory intent"?

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BRIEF FOR PETITIONER

Petitioner Trevor Murray respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a-17a) is published at 43 F.4th 254. The district court's order (Pet. App. 19a-21a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 2022. Pet. App. 1a. A timely petition for rehearing was denied on September 15, 2022. Pet. App. 18a. On November 16, 2022, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including January 13, 2023. The petition for a writ of certiorari was filed on January 13, 2023, and granted on May 1, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 806(a) of the Sarbanes-Oxley Act of 2002, codified as amended at 18 U.S.C. § 1514A, is reproduced in the appendix to the petition for certiorari. Pet. App. 21a-24a.

Section 519(b) of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, codified as amended at 49 U.S.C. § 42121(b), is reproduced in the appendix to the petition for certiorari. Pet. App. 25a-32a.

INTRODUCTION

This case concerns one of the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 (SOX). That provision prohibits publicly traded companies from retaliating against their employees for engaging in protected activity, such as providing information to a supervisor about violations of federal securities statutes and regulations. 18 U.S.C. § 1514A(a). Companies covered by the provision may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of" the employee's protected activity. *Id.*

The statute doesn't just set forth that substantive prohibition. It also mandates precisely how violations of that prohibition must be proven. A civil action to enforce the whistleblower protection provision "shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49." 18 U.S.C. § 1514A(b)(2)(C). Section 42121(b) in turn lays out a burden-shifting framework. First, the plaintiff must show that protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. §§ 42121(b)(2)(B)(i), (iii). If the plaintiff does so, the burden then shifts to the employer to "demonstrate by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior"—that is, in the absence of the employee's protected activity. *Id.* §§ 42121(b)(2)(B)(ii), (iv).

To lay out the statutory scheme is to answer the question presented. The statute requires plaintiffs to show only that their protected conduct was a

"contributing factor in the unfavorable personnel action" 49 U.S.C. §§ 42121(b)(2)(B)(i), (iii)—no mention of "retaliatory intent." And were there any doubt, SOX's burden-shifting framework is borrowed verbatim from a predecessor statute, the Whistleblower Protection Act of 1989, that has, for decades, been interpreted so as to absolve plaintiffs of the requirement to show "retaliatory intent" as part of their case in chief. Instead, an employer who lacks "retaliatory intent" can prove that it would have taken the same unfavorable personnel action even absent the protected conduct.

The Second Circuit did not mention the burden-shifting framework incorporated by the plain text of SOX, let alone explain how requiring plaintiffs to prove "retaliatory intent" as part of their case in chief could be squared with that framework. And that framework makes clear that a plaintiff has no burden to prove "retaliatory intent." This Court should reverse.

STATEMENT OF THE CASE

A. Statutory background.

1. Congress enacted the Sarbanes-Oxley Act (SOX) "to safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation." *Lawson v. FMR LLC*, 571 U.S. 429, 432 (2014); *see also* S. Rep. No. 107-146, at 2-11 (2002) (hereinafter S. Rep.). "Enron had succeeded in perpetuating its massive shareholder fraud in large part due to a 'corporate code of silence'" that "discourage[d] employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even

internally." *Lawson*, 571 U.S. at 435 (quoting S. Rep., at 4-5). Enron employees who had attempted to report corporate misconduct faced retaliation. *Id.*

At the time, no federal law protected corporate whistleblowers. S. Rep. No. 107-146, at 10. Congress decided that this lack of protection was "'a significant deficiency' in the law, for in complex securities fraud investigations, employees 'are [often] the only firsthand witnesses to the fraud.'" *Lawson*, 571 U.S. at 435 (quoting S. Rep., at 10). Without protection for corporate whistleblowers, Congress worried not only about the fate of those individual whistleblowers, but also about the fate of the entire financial system—Enron's collapse made clear that a single corporation's wrongdoing could affect millions of investors if kept hidden. S. Rep., at 11.

To remedy this "significant deficienc[y]," SOX protects "employees of publicly traded companies who provide evidence of fraud" or other corporate misbehavior. Pub. L. No. 107-204, § 806, 116 Stat. 745, 802-03. As codified, SOX makes it unlawful for a covered company to "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of" protected whistleblowing activity. 18 U.S.C. § 1514A(a). SOX provides a private cause of action to employees who claim their rights have been violated. *Id.* § 1514A(b).

2. Congress did not stop there, however. It specified precisely how such cases are to be proven. It drew on a framework for whistleblower protection first set out in the Whistleblower Protection Act of 1989 (WPA). Pub. L. No. 101-12 (codified as amended at 5 U.S.C. § 1221(e)).

The WPA amended the Civil Service Reform Act of 1978, which prohibited personnel actions taken "as a reprisal for" protected conduct but did not explain how such claims were to be proven. Pub. L. No. 95-454, § 101(a), 92 Stat. 1111, 1116. Courts had interpreted the Civil Service Reform Act to require employees to prove that their disclosure was a "significant" or "motivating" factor behind the adverse personnel action. 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20, 101st Cong., 1st Sess. 1989) (hereinafter WPA Explanatory Statement).

Believing that this interpretation imposed an "excessively heavy burden" on whistleblowing employees, Congress inserted into the WPA a new burden-shifting framework to govern how reprisal claims should be proven. WPA Explanatory Statement, at 5033. The new framework was "specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a 'significant', 'motivating', 'substantial', or 'predominant' factor in a personnel action in order to overturn that action." *Id.*

At the first step of the WPA's burden-shifting framework, employees must only show that their protected activity was a "contributing factor" in the adverse employment action. *See* 5 U.S.C. § 1221(e)(1). As the bill's sponsor explained: "the word 'contributing' does not place any requirement" on plaintiffs "to produce evidence proving retaliatory motive on the part of" the employer. WPA Explanatory Statement, at 5037 (statement of Rep. Pat Schroeder).

Once a whistleblower has established that his protected conduct was a "contributing factor" in the unfavorable personnel action, the burden shifts to an employer to prove by clear and convincing evidence that it would have taken the same unfavorable personnel action even absent the protected conduct. WPA Explanatory Statement, at 5035. An employer who lacks "retaliatory intent" thus avoids liability.

Congress explained that it placed the burden on the employer "for two reasons." *Id.* at 5033. "First, this burden of proof comes into play only if the employee has established by a preponderance of the evidence that the whistleblowing was a contributing factor in the action—in other words, that the agency action was 'tainted'" by the protected activity. *Id.* Second, the employer "controls most of the cards—the drafting of the documents supporting the [challenged] decision, the testimony of witnesses who participated in the decision, and the records that could document whether similar personnel actions have been taken in other cases." *Id.*

3. The WPA's burden-shifting framework has been borrowed by more than a dozen other statutes that aim to protect whistleblowers in industries that pose serious dangers to public wellbeing—pipeline safety, national defense, and the like.[1] One such

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[1] *See, e.g.*, 6 U.S.C. § 1142(c)(2)(B) ("Public transportation employee protections" provision of Implementing Recommendations of the 9/11 Commission Act of 2007); 10 U.S.C. § 4701(c)(6) ("Contractor employees: protection from reprisal for disclosure of certain information" provision of National Defense Authorization Act for Fiscal Year 2013); 12 U.S.C. § 5567(c)(3) ("Employee protection" provision of Dodd-

statute is the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, a statute commonly referred to as "AIR-21." 49 U.S.C. § 42121(b).

When Congress enacted SOX, it wanted "similar protection" to the WPA for corporate whistleblowers. S. Rep., at 10. It thus incorporated AIR-21 and the burden-shifting framework it borrowed from the

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Frank Wall Street Reform & Consumer Protection Act); 15 U.S.C. § 7a-3(b)(2)(B) ("Anti-retaliation protection for whistleblowers" provision of Criminal Antitrust Anti-Retaliation Act of 2019); 15 U.S.C. § 2087(b)(2)(B) ("Whistleblower protection" provision of Consumer Product Safety Act); 21 U.S.C. § 399d(b)(2)(C) ("Employee protections" provision of FDA Food Safety Modernization Act); 29 U.S.C. § 218c(b)(1) ("Protections for employees" provision of Patient Protection & Affordable Care Act); 26 U.S.C. § 7623(d)(2)(B)(i) ("Whistleblower protection provision" of Taxpayer First Act); 31 U.S.C. § 5323(g)(3) ("Whistleblower incentives and protections" provision of William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021); 42 U.S.C. § 5851(b)(3) ("Employee protection" provision of Comprehensive National Energy Policy Act); 46 U.S.C. § 2114(b) ("Protection of seamen against discrimination" provision of Coast Guard Authorization Act of 2010); 49 U.S.C. § 20109(d)(2)(A)(i) ("Employee protections" provision of Implementing Recommendations of the 9/11 Commission Act of 2007); 49 U.S.C. § 30171(b)(2)(B) ("Protection of employees providing motor vehicle safety information" provision of Moving Ahead for Progress in the 21st Century Act); 49 U.S.C. § 31105(b)(1) ("Employee protections" provision of Implementing Recommendations of the 9/11 Commission Act of 2007); 49 U.S.C. § 42121(b)(2)(B) ("Protection of employees providing air safety information" provision of Wendell H. Ford Aviation Investment & Reform Act for the 21st Century); 49 U.S.C. § 60129(b)(2)(B) ("Protection of employees providing pipeline safety information" provision of Pipeline Safety Improvement Act of 2002).

WPA by reference: SOX specifies that a whistleblower claim "shall be governed by the legal burdens of proof set forth in" 49 U.S.C. § 42121(b)—that is, AIR-21. 18 U.S.C. § 1514A(b)(2)(C). Congress explained the choice to incorporate the burden-shifting framework that AIR-21 had borrowed from the WPA this way: "Because we had already extended whistleblower protection to non-civil service employees" like airline workers, "we thought it best to track those protections as closely as possible." S. Rep., at 30.

SOX thus adopts the WPA's burden-shifting framework. The plaintiff's initial burden is to show that his whistleblowing "was a contributing factor in the unfavorable personnel action alleged." 49 U.S.C. §§ 42121(b)(2)(B)(i), (iii). If he does, he prevails unless the employer can "demonstrate[] by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior." *Id.* §§ 42121(b)(2)(B)(ii), (iv). Per SOX, those two findings suffice to establish that the employer retaliated by taking adverse action against the plaintiff "because of" the protected activity.

B. Factual background.

Because a jury found for petitioner Trevor Murray, we describe the facts in the light most favorable to him. *See Staub v. Proctor Hosp.*, 562 U.S. 411, 413 (2011).

1. Petitioner Trevor Murray is a financial expert who earned an undergraduate degree from the University of Notre Dame and a graduate degree from the Massachusetts Institute of Technology. C.A.

J.A. 140.[2] Murray worked at UBS from 2007 to 2008, and he was recruited back to UBS in April 2011, three years after the collapse of the mortgage-backed securities business triggered the Great Recession. Pet. App. 2a-3a; C.A. J.A. 167, 184-89. When he returned to UBS in 2011, Murray worked as UBS's sole public research strategist servicing UBS's commercial mortgage-backed securities (CMBS) business. Pet. App. 3a; C.A. J.A. 193. His job was to report on CMBS markets to UBS's current and potential customers. Pet. App. 3a.

Given Murray's responsibilities, Securities and Exchange Commission (SEC) Regulation AC required him to certify that the views expressed in his research reports "accurately reflect[ed]" his "personal views" and "were prepared in an independent manner." 17 C.F.R. § 242.501; Pet. App. 3a. Certifying a report that was not independently produced would violate those regulations and constitute a fraud on shareholders. Pet. App. 3a n.1; C.A. J.A. 1340-41. To ensure Murray's independence, UBS's compliance department thus took extra steps to physically separate his workspace from the trading desk (which bought and sold CMBS and so had an interest in painting a rosy picture of the product and its market). J.A. 143; C.A J.A. 199. The trading desk was headed by Ken Cohen, who had worked at Lehman Brothers before it collapsed during the Great Recession thanks to its involvement in the subprime

[2] Citations to the Joint Appendix before this Court are cited J.A. [xxx], where "xxx" indicates the page number. Citations to the Joint Appendix before the Second Circuit are cited C.A. J.A. [xxx].

mortgage crisis. C.A. J.A. 752. Cohen was recruited to UBS at the same time Murray was. *Id.*

2. Notwithstanding SEC regulations requiring that Murray's research reports be independent, Cohen and his team pressured Murray to skew his research in support of UBS business strategies. Pet. App. 3a. In June 2011, Cohen told Murray to produce "a research article" that would "smooth[] over" concerns investors might have about participating in UBS's mortgage-backed securities trades. C.A. J.A. 211-12. In August, Cohen directed Murray, "Don't say anything negative" in a client meeting. J.A. 24. A month later, Cohen told Murray, "It's important that we maintain consistency of message between originations, trading desk, and research." Pet. App. 3a. For that reason, Cohen instructed Murray to "clear your research articles with the [trading] desk going forward." *Id.* (alteration in original).

Despite this illegal pressure, Murray wrote an independent "Outlook" report forecasting the 2012 CMBS markets as risky (or at least riskier than the CMBS trading desk wanted investors to believe). J.A. 148-50. Cohen reacted negatively, telling Murray the report was "too bearish" and had not delivered a "consistent message with what we're trying to do around here." J.A. 26.

3. Murray's direct supervisor was Michael Schumacher. Pet. App. 4a. In early December 2011, as yet unaware that Murray was facing improper pressure from the trading desk, Schumacher drafted a "glowing review" of Murray's performance. C.A. J.A. 3118; *see* J.A. 145-47. He highlighted Murray's reputation as "a great ambassador for the [UBS] franchise." J.A. 145.

Shortly thereafter, Schumacher sent an email to Larry Hatheway (UBS's Global Head of Macro Strategy) saying that the CMBS business was profitable and that the "revenue per CMBS researcher" (that is, the revenue attributable to Murray, the sole CMBS researcher) "probably is fine." C.A. J.A. 1532. At the time Schumacher sent that email, he anticipated that Murray would be employed at UBS in the coming year, not laid off. J.A. 36. Around the same time, other UBS actors continued to state that the CMBS business was a "core" UBS business and that it was profitable. *See, e.g.*, J.A. 79 (Cohen email characterizing CMBS business as "completely unaffected" by rogue trading scandal); J.A. 163 (UBS CEO rating CMBS business as "attractive"); J.A. 166 (UBS documents deeming CMBS business "great success[]").

4. On December 15, 2011, after Schumacher had prepared Murray's performance review but before he shared it with Murray, Murray reported the trading desk's improper pressure campaign to Schumacher. J.A. 27-28. Murray told Schumacher the situation "wasn't just unethical, it was illegal." Pet. App. 4a; J.A. 28. Schumacher responded that "it is very important that you do not alienate your internal client"—that is, the CMBS trading desk. Pet. App. 4a; J.A. 28.

Less than a month later, Schumacher emailed Hatheway requesting a telephone conversation. J.A. 153. When Hatheway declined to speak on the phone, Schumacher emailed back a proposal regarding Murray's employment. J.A. 151-52. Either UBS should "remove [Murray] from our headcount"—that is, fire him—or, alternatively, move him to a trading

desk position. Pet. App. 5a; J.A. 151-52. There, he would provide marketing material rather than independent research. *See* C.A. J.A. 206, 502. As a result, he would no longer be subject to Regulation AC, and any pressure Cohen exerted would no longer be illegal. *Id.*

Two days after suggesting Murray's firing to Hatheway, Schumacher met with Murray. C.A. J.A. 281. During the meeting, Schumacher gave Murray the favorable December performance review. C.A. J.A. 290. Schumacher did not mention that Murray's job was in jeopardy.[3] Pet. App. 5a. Murray reiterated his concerns about the trading desk's pressure, saying that "the constant efforts to skew my research" violated "regulations as it pertains to my objectivity and independence as a research analyst" and comprised "an overall mosaic" of "illegality." J.A. 29-30. Schumacher told Murray "just to write what the business line wanted." Pet. App. 5a.; J.A. 30.

A few weeks later, Cohen declined to take on Murray as a trading desk analyst and wrote that if Murray was not going to remain as a research

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[3] Schumacher's failure to be honest with Murray stood in stark contrast with his treatment of another UBS employee, Shuman Li. Li was Murray's counterpart in UBS's Residential Mortgage-Backed Securities (RMBS) group, a research strategist who also reported to Schumacher. Because UBS was planning to exit the RMBS business, Li was in danger of being let go. Schumacher told Li to look for another job within UBS, warned him that the RMBS job was in jeopardy, and tried to help Li get a job as a Credit Strategist even though Li, a poorer performer than Murray, would have needed at least six months to get up to speed in that role. C.A. J.A. 518-26, 697-700, 1162-65, 1544-45, 1555-56, 1876-77.

analyst, UBS should "let him go." J.A. 155. Schumacher and Hatheway then agreed to fire Murray. C.A. J.A. 1797.

On February 6, 2012, Schumacher summoned Murray to the bank's 13th floor and fired him. C.A. J.A. 304-05. Schumacher later conceded under oath that "one of the factors that led to the selection of Murray for termination was the fit or difference in terms of publishing analyst versus desk analyst." J.A. 46. UBS did not lay off any other CMBS business-side staff during this time period, and the total number of people devoted to CMBS at UBS increased from 35 in 2011 to 49 in 2013. J.A. 77-83.

C. Procedural background.

1. In August 2012, Murray filed a whistleblower complaint with the U.S. Department of Labor alleging that his termination violated the Sarbanes-Oxley Act. Compl. ¶ 31, ECF No. 2. After the Department of Labor failed to process his claim within 180 days, Murray exercised his right under Section 1514A(b)(1)(B) to file a de novo action in the Southern District of New York. *Id.*

2. The case went to trial in 2017. The trial lasted more than two weeks. The parties presented irreconcilable versions of events. Murray presented evidence that (1) the leaders of UBS's CMBS trading desk unlawfully pressured him to skew his research to conform to the trading desk's business strategies, notwithstanding SEC regulations that forbade them from doing so; (2) that he reported that conduct to his immediate supervisor and was told "not to alienate your internal client"; and (3) that he was fired for making the report. J.A. 28, 125. UBS contended that

Murray simply made up the whole claim—that there had been no skewing, no reports of pressure to Schumacher, and therefore no protected activity—and that Murray was laid off in a reduction in force because of a downturn in UBS's finances. J.A. 125-26.

After hearing the evidence, the jury was instructed that "[f]or plaintiff to prevail on his retaliation claim," he had to prove four elements: "Protected activity, knowledge by his employer, termination of employment and protected activity as a contributing factor in that termination." J.A. 131.

"Contributing factor," in turn, was defined as follows: "For a protected activity to be a contributing factor, it must have either alone or in combination with other factors tended to affect in any way UBS's decision to terminate plaintiff's employment." J.A. 130. The "contributing factor" instruction further specified that "Plaintiff is not required to prove that his protected activity was the primary motivating factor in his termination, or that UBS's articulated reason for his termination was a pretext, in order to satisfy this element." *Id.* A supplemental instruction (which UBS agreed to) during deliberations told the jury that it had to find that "anyone with knowledge of th[e] protected activity, because of the protected activity, affect[ed] in any way the decision to terminate Mr. Murray's employment." J.A. 180.

The jury was instructed that, if it found that Murray had proven those four elements, it should proceed to the second step of the SOX burden-shifting framework: "UBS must demonstrate by clear and convincing evidence that it would have terminated plaintiff's employment even if he had not engaged in

protected activity." J.A. 130-31. This instruction was not challenged by UBS.

Finally, the jury was told that if it found that "defendants improperly retaliated against plaintiff in terminating him from UBS," Murray was entitled to compensation. J.A. 133.

The jury returned a verdict for Murray. It found that Murray had "proved, by a preponderance of the evidence, all four elements of his claim." C.A. J.A. 3065. It further found that UBS had not proven that it would have taken the same action in the absence of Murray's protected conduct. *Id.* The jury awarded Murray almost $1 million in back pay and compensatory damages. *Id.* 3066-67. The district court denied UBS's post-trial motion, upheld the jury verdict on compensatory damages, and adopted as its own the jury's advisory verdict on back pay. *See* Pet. App. 19a.

3. On appeal, UBS did not challenge either the sufficiency of the evidence or the jury instructions underlying the second step of the burden-shifting framework (the finding that it had failed to prove it would have fired Murray "even if he had not engaged in protected activity"). Pet. App. 8a. Instead, it raised two arguments regarding the first step of the framework, Murray's case in chief.

First, it argued that there was insufficient evidence of "retaliatory intent" to support the verdict. Pet. App. 16a. The Second Circuit disagreed, finding that "there was circumstantial evidence at trial that UBS terminated Murray in retaliation for whistleblowing." *Id.*

Second, UBS made the argument underlying this case: that the jury should have been required to find

that Murray proved UBS acted with "retaliatory intent" as part of his case in chief. Pet. App. 17a. The Second Circuit agreed with UBS and remanded for a new trial on liability. *Id.*

The court acknowledged that "the jury found that Murray's whistleblowing was a contributing factor to his termination." Pet. App. 17a. But it held that this was insufficient to establish liability because the jury had not been instructed that it must find that Murray had proved that UBS had "retaliatory intent" in firing him. *Id.* The court focused on the directive that an employer not "'*discriminate against* an employee . . . *because of*' whistleblowing." Pet. App. 9a (quoting 18 U.S.C. § 1514A(a)) (italics and ellipses supplied by the Second Circuit). In the Second Circuit's view, the presence of the word "discriminate" in SOX meant that only an employee who was the "victim of intentional retaliation" could seek relief. Pet. App. 13a-14a. It then assumed that the employee had to be the one to prove intentional retaliation. *Id.* The Second Circuit never mentioned the provision of SOX mandating that whistleblower protection suits "shall be governed" by the burdens of proof in AIR-21.[4]

4. Murray timely petitioned for rehearing en banc. ECF No. 179. The Second Circuit denied rehearing and rehearing en banc. Pet. App. 18a.

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[4] Murray also cross-appealed the district court's findings regarding back pay, reinstatement, and attorneys' fees. Pet. App. 8a. The Second Circuit did not address the cross-appeal.

SUMMARY OF THE ARGUMENT

The Sarbanes-Oxley Act's whistleblower protection provision does not require plaintiffs to prove "retaliatory intent" as part of their case in chief.

I.A. Reading the statute from top to bottom makes that clear. Section 1514A(a) is directed to employers and, as relevant here, prohibits "discharge . . . because of" various types of protected activity. Section 1514A(b)(2)(C) is directed to courts and explains how violations of Section 1514A(a) are proven. It states that a whistleblower retaliation case brought in a federal district court "shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code." The "shall be governed" language means that courts must apply the burdens of proof from Section 42121(b), and no other "creature[s] of judicial cloth," in adjudicating SOX whistleblower protection claims. *See Weinberger v. Cath. Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 141 (1981).

Section 42121(b) contains two burdens of proof, one directed to the plaintiff-employee, the other to the defendant-employer. First, the plaintiff must demonstrate that his protected activity was "a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. §§ 42121(b)(2)(B)(i), (iii). On its face, that provision contains no mention of "retaliatory intent." And were there any doubt, the Congress that wrote SOX had multiple options for making such a showing explicit. For instance, it could have required a showing of "intent to retaliate," as it did in SOX's criminal provision, or it could have required a showing that

protected conduct was a *motivating factor* in the unfavorable personnel action. It did neither.

Instead, any consideration of "retaliatory intent" is left to the second step of the burden-shifting framework. At that step—and only once a plaintiff has met his burden—the employer must show that it "would have taken the same unfavorable personnel action in the absence of" the protected activity. 49 U.S.C. §§ 42121(b)(2)(B)(ii), (iv). This same-action analysis is a familiar way to show that an action was taken (or not taken) "because of" a particular trait or activity. It "directs us to change one thing at a time and see if the outcome changes." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020). An employer who lacks "retaliatory intent" can avail itself of the second step of the burden-shifting framework.

B. Were there any doubt, the prior construction of SOX's burden-shifting framework makes clear the plaintiff need not prove "retaliatory intent" in his case in chief. "Where Congress employs a term of art obviously transplanted from another legal source, it brings the old soil with it." *George v. McDonough*, 142 S. Ct. 1953, 1959, 1963 (2022) (internal quotation marks omitted). SOX's burden-shifting framework is "obviously transplanted from another legal source," the Whistleblower Protection Act of 1989. Congress thus brought "the old soil" of the WPA with that burden-shifting framework.

That "old soil" makes clear that it is not a plaintiff's burden to prove "retaliatory intent." Long before SOX borrowed the WPA framework, the authoritative construction of the "contributing factor" standard from the WPA rejected any notion that it required a showing of "retaliatory intent." *See*

Marano v. Dep't of Justice, 2 F.3d 1137, 1141 (Fed. Cir. 1993). Uniform agency practice in the decades since the WPA reinforces that the plaintiff need not show "retaliatory intent" under the WPA's burden-shifting framework.

II. Because the text of SOX makes clear how retaliation claims are to be proven, that should be the end of the story. Even if the Second Circuit's concerns were valid, they would not be able to overcome the plain text of the statute.

However, the Second Circuit's concerns were misplaced. First, it zoomed in on the word "discriminate" in Section 1514A. Pet. App. 9a. But the word "discriminate" in the statute is simply a catchall term for unenumerated unfavorable personnel actions taken because of protected activity—precisely what the burden-shifting framework is intended to suss out.

Second, the court below worried about a "scenario in which, by virtue of his whistleblowing activity, [plaintiff] was insulated from a termination to which he would otherwise have been subjected sooner." Pet. App. 11a n.4. But the second step of the burden-shifting framework takes care of that scenario: The employer could show that it "would have taken the same unfavorable personnel action in the absence of" the whistleblowing, only sooner. *See* 49 U.S.C. §§ 42121(b)(2)(B)(ii), (iv).

Finally, the Second Circuit raised policy concerns. But Congress was well within its rights to put the burden on employers to prove lack of "retaliatory intent." After all, employers "control[] most of the cards." WPA Explanatory Statement, at 5033. And

even if those policy concerns had force, they could not overcome the plain text of the statute.

ARGUMENT

I. A whistleblower need not prove his employer acted with "retaliatory intent" as part of his case in chief under the Sarbanes-Oxley Act.

The jury in this case was instructed to find whether UBS had retaliated against Trevor Murray. J.A. 126-27. And it was instructed on exactly how to do so: First, it had to consider whether Murray's protected conduct was a "contributing factor" in his termination; then, it had to consider whether UBS had shown that it would have discharged Murray even absent the protected activity. J.A. 130.

The jury found that Murray's protected conduct was a contributing factor in his termination. C.A. J.A. 3065. It also found that UBS had not proven that, because of a reduction in force, it would have taken the same action in the absence of any protected conduct. *Id.* In so doing, the jury found all that the statute requires to establish a retaliation claim under 18 U.S.C. § 1514A.

A. SOX's text makes clear the plaintiff need not prove "retaliatory intent" in his case in chief.

Reading the statute from top to bottom makes clear that a plaintiff is not required to prove "retaliatory intent" as part of his case in chief.

1. Section 1514A(a) is directed to employers. As relevant here, the statute prohibits "discharge . . . because of" various types of protected activity. 18

U.S.C. § 1514A(a). It also prohibits various other adverse employment actions. Employers may not, for example, "suspend" an employee "because of" protected conduct, "threaten" an employee "because of" protected conduct, or "harass" an employee "because of" protected conduct. *Id.*

Section 1514A(a) also contains a catchall provision: An employer may not "in any other manner discriminate against an employee in the terms and conditions of employment because of" protected conduct. 18 U.S.C. § 1514A(a). That provision captures adverse employment actions not specifically listed (i.e. employment actions other than "discharge," "suspen[sion]," "demot[ion]," and so on).

2. Section 1514A(b)(2)(C) is directed to courts and explains how violations of Section 1514A(a) are proven and assessed. Section 1514A(b)(2)(C) states that a whistleblower retaliation case brought in a federal district court "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)(C).

To say that the civil action "shall be governed" by the burdens of proof in Section 42121(b) means that the factfinder must look to those burdens—and only those burdens—in resolving the case. For instance, when this Court says that public disclosure of an environmental impact statement "shall be governed" by FOIA, it means that courts should apply FOIA's written exceptions and no other "creature[s] of judicial cloth." *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 141 (1981). To take another example: Where one statute says an arbitration proceeding "shall be governed" by appellate review procedures from another statute, a

party can't argue that one of those review procedures operates differently in the arbitration context. *Cornelius v. Nutt*, 472 U.S. 648, 660-61 (1985). The "shall be governed" language means that the appellate review procedures are "incorporate[d] by reference." *Id.* at 660. "Shall be governed" thus creates a closed universe of rules that a court must apply.

UBS has never disputed that the "shall be governed" language refers to two "burdens of proof" in Section 42121(b), one placed on the plaintiff-employee and one on the defendant-employer. First, "the complainant" must demonstrate that "any behavior described in paragraphs (1) through (4) of subsection (a)"—that is, any protected conduct—"was a contributing factor in the unfavorable personnel action." 49 U.S.C. §§ 42121(b)(2)(B)(i), (iii). Second, "the employer" must "demonstrate by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior." *Id.* §§ 42121(b)(2)(B)(ii), (iv).

3. As a first step under this burden-shifting framework, the plaintiff must demonstrate that his protected activity was "a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. §§ 42121(b)(2)(B)(i), (iii). This step does not require proof of "retaliatory intent."

a. The ordinary meaning of the terms in Section 42121(b) makes that clear: A "factor" is "any of the circumstances, conditions, etc. that bring about a result," and to "contribute" to is to "be partly responsible" for or to "do a part in bringing about" a result. *Factor*, Webster's New World College

Dictionary (4th ed. 2001); *Contribute*, *id.*; *Contribute*, The Oxford English Dictionary (2d ed. 1989). In legal parlance, "one thing is understood to 'contribute' to a given result when such thing has some share or agency in producing such result." James A. Ballentine, *Contribute*, Ballentine's Law Dictionary (3d ed. 1969); *see also Contributing Cause*, Black's Law Dictionary (6th ed. 1990) ("contributing cause" is a "generic term used to describe any factor which contributes to a result, though its causal nexus may not be immediate"). Putting those pieces together, the plaintiff satisfies his burden where he demonstrates that his protected activity affected—that is, influenced or helped bring about—an adverse personnel action in some way.

b. Lest there be any doubt, Congress could easily have required proof of "retaliatory intent" had it wanted to. To start, Congress could have made "intent to retaliate" one of the elements of a SOX whistleblower claim. Indeed, Congress did just that in another provision of SOX, which amended Section 1514A's criminal counterpart to prohibit "knowingly, *with the intent to retaliate*, tak[ing] any action harmful to any person, including interference with the lawful employment or livelihood of any person, for" reporting federal crimes. *See* 18 U.S.C. § 1513(e) (emphasis added). Neither Section 1514A nor Section 42121(b) contains any such "intent to retaliate" language.

Alternatively, Congress could have required a plaintiff to show that protected conduct was a *motivating factor* in the unfavorable personnel action. The phrase "motivating factor" means that "if we asked the employer at the moment of the decision

what its reasons were and if we received a truthful response, one of those reasons would be" the protected conduct. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 249-50 (1989) (plurality opinion); *see also Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977) ("motivating factor" is one of several "competing considerations" in decision). Other employment statutes, such as the Uniformed Services Employment and Reemployment Rights Act of 1994 and Title VII of the Civil Rights Act, require a showing of "motivating factor," rather than "contributing factor." *See* 38 U.S.C. § 4311(c)(2); 42 U.S.C. § 2000e-2(m). But Congress required no such thing in SOX.

4. Instead, any consideration of what the Second Circuit called "retaliatory intent" is left to the second step of the burden-shifting framework. Finding that the plaintiff proved his protected activity was a "contributing factor" in his termination is a necessary step in finding that he was discharged "because of" protected activity. But it's not the only thing a jury must find. A jury must also find that the employer has not shown, by clear and convincing evidence, that it "would have taken the same unfavorable personnel action in the absence of" the protected activity. 49 U.S.C. §§ 42121(b)(2)(B)(ii), (iv). An employer who did not discharge the plaintiff "because of" protected activity or who had no "retaliatory intent" can thereby avoid liability.

The statute's text calls for running a counterfactual: Assume that the plaintiff did not engage in protected activity and see if the employer "would have taken the same unfavorable personnel action." 49 U.S.C. §§ 42121(b)(2)(B)(ii), (iv). This

same-action analysis is a familiar way to show that an action was taken (or not taken) "because of" a particular trait or activity. It "directs us to change one thing at a time and see if the outcome changes." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020) (interpreting 42 U.S.C. § 2000e-2(a)(1), which bars "discharg[ing] any individual . . . *because of*" various protected traits) (emphasis added); *see also Kentucky Ret. Sys. v. E.E.O.C.*, 554 U.S. 135, 141 (2008) (similar analysis under 29 U.S.C. § 623(a)(1)'s similar language).

To be sure, in other statutes, the plaintiff often bears the burden of proving the "same-action" point. But no one disputes that in SOX, Congress placed the burden on the defendant to prove that it would have taken the same unfavorable personnel action even absent the protected activity. And the key point is that the "same-action" analysis completes the proof that an employer has taken adverse personnel action "because of" some forbidden consideration—here, "because of" protected activity.

The "same-action" analysis also completes the proof that the defendant has acted with "retaliatory intent." This Court has explained that if the employer would have "retain[ed] an otherwise identical employee" who did not have a protected trait, "the employer intentionally penalizes" the employee who does have the protected trait. *Bostock*, 140 S. Ct. at 1741. In SOX, similarly, if an employer would have "retain[ed] an otherwise identical employee" who had not engaged in protected activity, the employer "intentionally penalizes" the employee who has engaged in protected activity when it discharges him. In other words, where a jury finds that an employer

has not shown that it "would have taken the same unfavorable personnel action in the absence of" protected activity, it finds that the employer acted with "retaliatory intent."

B. Prior construction of SOX's burden-shifting framework confirms the plaintiff need not prove "retaliatory intent" in his case in chief.

"Where Congress employs a term of art obviously transplanted from another legal source, it brings the old soil with it." *George v. McDonough*, 142 S. Ct. 1953, 1959 (2022) (internal quotation marks omitted). That is, "when Congress employs a term of art in a statute, that usage itself suffices to adopt the cluster of ideas that were attached to each borrowed word in the absence of indication to the contrary." *Id.* at 1963 (internal quotation marks omitted). That presumption is particularly strong when Congress used "the very same terminology" in "the very same field, such as securities law or civil-rights law." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts § 54 (2012). The "old soil" can include the text of the prior statute; authoritative judicial constructions by a court with "exclusive jurisdiction" over the prior statute, *Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc.*, 139 S. Ct. 628, 633 (2019); and "the mainstream of agency practice," *George*, 142 S. Ct. at 1961.

SOX's burden-shifting framework is "obviously transplanted from another legal source," the Whistleblower Protection Act of 1989, a statute in "the very same field" of whistleblower law. Congress thus intended to "bring[] the old soil" of the WPA with that burden-shifting framework. And that "old

soil" makes clear that it is not a plaintiff's burden to prove "retaliatory intent."

1. SOX incorporates, by way of AIR-21, the burden-shifting structure first set forth in the Whistleblower Protection Act of 1989 and since incorporated into more than a dozen whistleblower statutes. SOX uses almost identical language to the WPA to lay out the burden-shifting framework. At the first step, both statutes require that a plaintiff prove that a protected activity "was a contributing factor" in the "personnel action." 5 U.S.C. § 1221(e)(1)(B); 49 U.S.C. §§ 42121(b)(2)(B)(i), (iii). At the second step, both statutes require that the employer "demonstrate[] by clear and convincing evidence" that it "would have taken the same" "personnel action in the absence of such" protected activity. 5 U.S.C. § 1221(e)(2); 49 U.S.C. §§ 42121(b)(2)(B)(ii), (iv).

Moreover, the two statutes serve the same goal. Like SOX, the WPA provides a remedy where an employer takes adverse personnel action "because of" various kinds of protected activity. 5 U.S.C. § 2302(b)(8); *see* 18 U.S.C. § 1514A(a). And like the whistleblower protection provision of SOX (entitled "Civil action to protect against *retaliation* in fraud cases"), the relevant provision of the WPA is concerned with retaliation against whistleblowers ("Individual right of action in certain *reprisal* cases"). 18 U.S.C. § 1514A (emphasis added); 5 U.S.C. § 1221 (emphasis added).

To top it off, the legislative history of SOX also shows that its goal was to give private-sector whistleblowers the same right of action as the WPA gave their public-sector counterparts. *See* 148 Cong.

Record No. 92, S6541 (2002) (SOX sponsor statement of Sen. Tom Harkin) ("[W]orkers who discover corporate fraud should be protected just as we protect government whistleblowers."); S. Rep., at 30 ("Because we had already extended whistleblower protection to non civil service employees" like airline workers, "we thought it best to track those protections as closely as possible.").

2. Because SOX's burden-shifting framework is "obviously transplanted from" the WPA, we consider the "old soil" that Congress intended to come with it. *See George*, 142 S. Ct. at 1959. Here, the text of the WPA itself, prior judicial constructions by the Federal Circuit (which had exclusive jurisdiction over the WPA during the period prior to SOX's passage), and settled agency practice all show that the burden-shifting framework SOX borrows from the WPA does not require the plaintiff to prove "retaliatory intent."

a. Start with the text of the WPA itself. In 1994, Congress amended the WPA to give an example of how an employee might prove protected conduct was a "contributing factor" to the adverse employment action. *See Kewley v. Dep't of Health & Hum. Servs.*, 153 F.3d 1357, 1361–62 (Fed. Cir. 1998). The text of the WPA itself explains that an employee may prove the "contributing factor" element "through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure or protected activity; and the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action." 5 U.S.C. § 1221(e)(1). In other words, the statute permits a fact finder to find

"contributing factor" simply based on knowledge of the protected activity plus temporal proximity—no showing of "retaliatory intent" required.

b. Next, consider how the WPA's burden-shifting framework has been construed by the Federal Circuit, the court that had "exclusive jurisdiction" over WPA cases in the period before SOX's passage. *See Helsinn*, 139 S. Ct. at 633. The seminal case interpreting the WPA's "contributing factor" standard is *Marano v. Department of Justice*, 2 F.3d 1137 (Fed. Cir. 1993). In *Marano*, the plaintiff's disclosures of mismanagement in the Albany office of the Drug Enforcement Administration resulted in a "major overhaul" of that office, during which he was reassigned. *Id.* at 1138-39. There was evidence that the reassignment was due to the need for a "clean sweep" of the Albany office, and the administrative law judge held that plaintiff had not shown any retaliatory intent as part of his case in chief. *Id.* But the Federal Circuit nonetheless found that plaintiff had still satisfied his burden of showing that his disclosures were a "contributing factor" in his reassignment and remanded for consideration of the second step of the burden-shifting framework. *Id.* at 1143.

The Federal Circuit held that "a whistleblower need not demonstrate the existence of a retaliatory motive on the part of the" employer to meet his burden to show that "his protected disclosure was a contributing factor to the adverse personnel action." *Id.* at 1141 (emphasis in original). And it defined "contributing factor" to make clear that no showing of "retaliatory intent" is required: "[A]ny factor which, alone or in connection with other factors, tends to

affect in any way the outcome of the decision." *Id.* at 1140.[5]

To be sure, as the Federal Circuit explained, "evidence of a retaliatory motive would still *suffice* to establish a violation." *Id.* at 1141 (emphasis added). Indeed, in this case, Murray's proof on the "contributing factor" element consisted of evidence of "retaliatory intent": Before he reported illegal activity to Schumacher, Schumacher had drafted a glowing performance review for Murray and expected him to remain employed. *Supra*, 10. Shortly after Murray made his report, Schumacher recommended to Hatheway that he be fired (and attempted to avoid created a written record of the recommendation) and did so in part because of the "difference in fit" between a publishing analyst (who had to be given independence) and a desk analyst (who did not). *Supra*, 12-13. And UBS's stated reasons for firing Murray were pretextual—aside from Murray, the head count of the CMBS business rose steadily, in keeping with the profitable, "core" line of business it

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[5] *Marano* accords with the WPA's legislative history. The drafters of the WPA defined "contributing factor" just as *Marano* did—that is, "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *See* 135 Cong. Rec. 4509 (1989); *id.* at 4518 (statement of Sen. Chuck Grassley); *id.* at 4522 (statement of Sen. David Pryor); *id.* at 5033 (explanatory statement of Senate Bill 20); *id.* at 4522 (statement of Rep. Pat Schroeder). In choosing the "contributing factor" standard, Congress made clear that "the word 'contributing' does not place any requirement" on plaintiffs "to produce evidence proving retaliatory motive on the part of" the employer. WPA Explanatory Statement, at 5037 (statement of Rep. Pat Schroeder).

was. *Supra*, 11, 13. But the Federal Circuit also made clear that "contributing factor" may also be proven without considering "retaliatory intent." *Marano*, 2 F.3d at 1141.

c. "The mainstream of agency practice" surrounding the WPA also makes clear that the burden-shifting framework adopted by SOX does not require plaintiffs to prove retaliatory intent. *See George*, 142 S. Ct at 1961. The Department of Labor has never required any showing of "retaliatory intent." Rather, the Department of Labor has consistently instructed that "[c]ontributing factor means any disclosure that affects an agency's decision to threaten, propose, take, or not take a personnel action with respect to the individual making the disclosure." 5 C.F.R. § 1209.4(d). In selecting the same burden-shifting framework as the WPA, Congress is thus presumed to have incorporated the "old soil" of that agency practice, too.[6]

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[6] To the extent deference to executive agencies' understanding of the statute is relevant here, it, too, cuts in Murray's favor. Although the statute gives the SEC authority to promulgate regulations regarding SOX as a whole, this Court has explained that there is strong evidence the statute delegated authority to the Department of Labor to interpret the whistleblower provisions. *See Lawson*, 571 U.S. at 439 n.6; *TransAm Trucking, Inc. v. Admin. Rev. Bd.,* 833 F.3d 1206, 1210 (10th Cir. 2016). And the Department of Labor has held in both regulations and adjudications that a plaintiff need not prove that an employer acted with "retaliatory intent" as part of his prima facie case. *See* 29 C.F.R. § 1980.104(e)(3) (plaintiff may satisfy burden to show "contributing factor" by showing "that the adverse personnel action took place within a temporal

3. Lest there be any doubt that the burden-shifting framework has a meaning fixed by the WPA, consider that the same burden-shifting framework has been incorporated into more than a dozen other whistleblower statutes. *Supra*, 6-7 n.1. As to each of those statutes, too, the "mainstream of agency practice," *George*, 142 S. Ct. at 1961, places no burden on the plaintiff to prove "retaliatory intent."[7] Indeed, the "contributing factor" standard has been incorporated into state whistleblower laws in recent years, and in those laws, too, it is a term of art that does not require a showing of "retaliatory intent."[8]

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proximity after the protected activity, or at the first opportunity available to respondent"); *In re Williams v. QVC, Inc.*, ARB Case No. 2020-0019, 2023 WL 1927097 at *7 (ARB Jan. 17, 2023) (defining "contributing factor" as "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision").

[7] *See, e.g.*, 29 C.F.R. § 1978.104(e)(3) (interpreting 49 U.S.C. § 31105(b)(1)); 29 C.F.R. § 1979.104(b)(2) (interpreting 49 U.S.C. § 42121(b)(2)(B)); 29 C.F.R. § 1980.104(e)(3) (interpreting 18 U.S.C. § 1514A(b)(2)(C)); 29 C.F.R. § 1981.104(b)(2) (interpreting 49 U.S.C. § 60129(b)(2)(B)); 29 C.F.R. § 1982.104(e)(3) (interpreting 49 U.S.C. § 20109(d)(2)(A)(i)); 29 C.F.R. § 1983.104(e)(3) (interpreting 15 U.S.C. § 2087(b)(2)(B)); 29 C.F.R. § 1984.104(e)(3) (interpreting 29 U.S.C. § 218c(b)(1)); 29 C.F.R. § 1985.104(e)(3) (interpreting 12 U.S.C. § 5567(c)(3)); 29 C.F.R. § 1986.104(e)(3) (interpreting 46 U.S.C. § 2114(b)(2)(B)); 29 C.F.R. § 1987.104(e)(3) (interpreting 21 U.S.C. § 399d(b)(2)(C)); 29 C.F.R. § 1988.104(e)(3) (interpreting 49 U.S.C. § 30171(b)(2)(B)); *see also* 48 C.F.R. § 3.907-6(a)(1) (defining "contributing factor" for purposes of whistleblower protection under American Recovery and Reinvestment Act of 2009).

[8] *See, e.g.*, Ky. Rev. Stat. § 61.103(1)(b) ("contributing factor" is "any factor which, alone or in connection with other

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SOX thus makes clear that a plaintiff is not required to show "retaliatory intent" as part of his case in chief. Because a SOX civil action "shall be governed" by the burdens of proof in 49 U.S.C. § 42121(b), those burdens—and only those burdens—apply. The only burden that Section 42121(b) places on plaintiffs is the burden of showing that protected conduct was a "contributing factor in the unfavorable personnel action." And neither the plain meaning of "contributing factor" nor its meaning as a term of art with a longstanding and authoritative construction require a showing of "retaliatory intent."

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factors, tends to affect in any way the outcome of a decision" under Kentucky Whistleblower Act); D.C. Code § 1-615.52(a)(2) ("contributing factor" is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of a decision" under D.C. Whistleblower Protection Act); *Williams v. Trans States Airlines, Inc.*, 281 S.W.3d 854, 867 (Mo. App. 2009) ("contributing factor" under Missouri Human Rights Act is any factor "that contributed a share in anything or has a part in producing the effect"); *Lawson v. PPG Architectural Finishes, Inc.*, 12 Cal. 5th 703, 713-14 (2022) ("contributing factor standard" under California whistleblower statute is "any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision"); *Wynn v. Illinois Dep't of Hum. Servs.*, 81 N.E.3d 28, 29 (Ill. App. Ct. 2017) ("contributing factor" under Illinois Ethics Act's whistleblower provision is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision").

II. No legal or practical concerns entitled the Second Circuit to ignore the burden-shifting framework prescribed by SOX.

The Second Circuit entirely ignored the portion of SOX instructing courts on how to evaluate SOX claims. Indeed, based on the Second Circuit's opinion, a reader wouldn't even know that SOX mandates that civil actions "shall be governed" by the burden-shifting framework of 49 U.S.C. § 42121(b). Because the text of SOX makes clear how retaliation claims must be proven, that should be the end of the story—no matter how forceful the Second Circuit's concerns, they would not be able to overcome the plain text of the statute.

In any event, the Second Circuit's concerns have no purchase.

1. *First*, the Second Circuit claimed the presence of the word "discriminate" in 18 U.S.C. § 1514A(a) requires a showing of "animus" or "conscious disfavor" and thus requires placing some burden on plaintiffs to show "retaliatory intent." Pet. App. 9a, 10a, 13a. To start, the word "discriminate" has nothing to do with Murray's claim. And in any event, that word simply means differential treatment—precisely what the second step of the burden-shifting framework is designed to capture.

a. Recall that Section 1514A(a) directs that no covered employer "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee . . . because of" protected activity. Murray alleged here that he was "discharge[d] . . . because of" protected activity, which is one of the employment actions Section 1514A(a) bans. The parallel structure of the sentence makes

clear that a plaintiff can prove a violation of the statute simply by showing he was "discharge[d] . . . because of" protected activity, whether or not he was "in any other manner discriminate[d] against . . . because of" protected activity. The word "discriminate" is not relevant to Murray's claim.

The Second Circuit seemed to believe that the phrase "in any other manner discriminate against" colored all the other terms in Section 1514A ("discharge," "suspend," and so on). *See* Pet. App. 9a. But it cited no authority for that sort of reverse ejusdem generis reasoning. To the contrary, "when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration." *Brogan v. United States*, 522 U.S. 398, 403 n.2 (1998). Here, the general term is "in any other manner discriminate," while the specific terms are "discharge, "suspend," and the rest. 18 U.S.C. § 1514A(a). While the phrase "*discharge* . . . because of" might inform the way we interpret the phrase "*discriminate* . . . because of," the converse isn't true. *Id.* (emphasis added).

b. Even if the word "discriminate" were relevant to this case, the court below was still wrong to require a showing of "animus" or "conscious disfavor." Instead, it's simply a catchall term that refers to any adverse employment action other than the listed terms (for instance, assigning a whistleblower to an undesirable shift, or failing to promote him). To "discharge . . . because of" protected activity is one "manner" of "discriminat[ing] . . . because of" protected activity. "Discriminate" in SOX thus simply means to "make a difference in treatment" or to "make an adverse distinction with regard to."

Discriminate, Merriam-Webster's Dictionary of Law (1996); *Discriminate*, The Oxford English Dictionary (2d ed., 1989).

The burden-shifting framework is designed to suss out just such differential treatment by asking the employer to persuade the factfinder of an alternative explanation for the challenged action that does not have to do with the protected activity. Where an employer fails to prove that it "would have taken the same unfavorable personnel action in the absence of" the protected behavior, a factfinder is entitled to conclude it has engaged in intentional "discrimination"—that is, differential treatment because of the protected activity. *See* 49 U.S.C. §§ 42121(b)(2)(B)(ii), (iv).

The Second Circuit thought that the word "discriminate" required something more—some sort of showing of the employer's hostile feelings about the employee. *See, e.g.*, Pet. App. 10a ("conscious disfavor"), 13a-14a ("animus"). As just explained, however, that accords neither with the structure of Section 1514A nor with basic tenets of statutory interpretation. *Supra*, 34-35. And the word "discriminate" doesn't require this sort of showing in other contexts. A manufacturer who does not hire women "discriminates" even if it acted out of a desire to protect potential offspring from lead exposure, not out of animus; a school district that always fires white teachers over Black ones "discriminates" even if it acted out of a desire to preserve role models for minority schoolchildren, not out of animus; and a power company that requires women to contribute more to a pension fund than men "discriminates" even if it acted based on actuarial calculations about

the life expectancy of each gender, not out of animus. *See Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 197-98 (1991); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-75 (1986); *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707-08 (1978); *see also Bostock*, 140 S. Ct. at 1743 (fact that employer is "not guilty of animosity against women" is "irrelevant" to a claim of "discrimination" under Title VII).

So to require the kind of animus the Second Circuit demanded would leave SOX out of joint with other employment statutes. And it wouldn't make much sense, either: To a fired employee, it matters little whether the employer felt animosity when they made the discharge decision. It matters only whether the employee was fired because he engaged in protected conduct.[9]

2. *Second*, the court below worried about a "scenario in which, by virtue of his whistleblowing activity, [plaintiff] was insulated from a termination

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[9] The Second Circuit considered only whether the jury instructions required Murray to prove animus. If this Court disagrees with the Second Circuit that the plaintiff must show animus, reconsideration of whether the jury was adequately instructed is warranted, even if this Court concludes that the plaintiff must make some other showing of "retaliatory intent." The jury was told, *inter alia,* that (1) a "contributing factor" need not be a "primary motivating factor" (i.e., that the protected activity should be at least *a* motivating factor), (2) the "contributing factor" showing required proof that someone with knowledge of the protected activity "because of" the protected activity affected the decision, and (3) if it found UBS had "improperly retaliated" against Murray, it could award him back pay," which it did. *Supra*, 14-15.

to which he would otherwise have been subjected sooner." Pet. App. 11a n.4. Let's assume (generously) that any plaintiff would bring that suit (which would yield no damages) and that such a plaintiff could show that his protected activity was a "contributing factor in the unfavorable personnel action." *See* 49 U.S.C. §§ 42121(b)(2)(B)(i), (iii). The second step of the burden-shifting framework would produce a verdict for the employer. The employer could show that it "would have taken the same unfavorable personnel action in the absence of" the whistleblowing, only sooner. *See* 49 U.S.C. §§ 42121(b)(2)(B)(ii), (iv). To put it another way: We "change one thing," *supra*, 24-25—that the plaintiff blew the whistle—and see if the "outcome changes." Here, the outcome doesn't change—the plaintiff would still have been fired even if he had not blown the whistle.

A final note: Even if in some hypothetical case, following the statute's explicit directions were to result in liability where this Court thinks there shouldn't be, that would still be no reason to ignore the text of the statute in favor of a court-crafted process. After all, this Court has warned that, in interpreting SOX, hypotheticals that are "likely more theoretical than real" cannot prevail over the statute's plain text. *Lawson*, 571 U.S. at 445. And here, the text of the statute makes clear how SOX claims are to be adjudicated.

3. *Finally*, the Second Circuit fretted that innocent employers may be held liable unless plaintiffs are required to show "retaliatory intent." Pet. App. 14a-15a, 17a. Even if policy considerations were relevant in a case where the statute is crystal

clear, that worry would be misplaced. The Second Circuit hasn't suggested any sort of epidemic of companies being held liable when they did not retaliate against a whistleblower. And this case—where the jury specifically found that UBS would not have fired Murray if he had not engaged in protected conduct—is not such a one.

Moreover, as Congress explained in choosing the "contributing factor" standard for the WPA, in many cases it is "unrealistic to expect the whistleblower . . . to demonstrate improper motive." WPA Explanatory Statement, at 5037. Instead, the burden-shifting framework makes sense because employers "control[] most of the cards—the drafting of the documents supporting the decision, the testimony of witnesses who participated in the decision, and the records that could document whether similar personnel actions have been taken in other cases," and thus are better positioned to make that showing. *Id.* at 5033-35. Congress was deeply concerned about deterring employers from retaliating against whistleblowers: SOX is intended not only to protect individual whistleblowers, but also to safeguard the entire interconnected economy from financial misdeeds. *See* S. Rep. 107-146, at 11. Thus, where the adverse personnel action has been "tainted," *id.*—affected in some way by the protected activity—Congress thought it wise to require employers to come forward with proof in order to avoid liability.

Congress specifically chose a burden-shifting framework that placed the burden of disproving "retaliatory intent" on employers. And even if this Court would have made a different choice, it should not change the plain text of SOX.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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