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 OF *AMICI CURIAE*
U.S. SENATOR CHARLES E. GRASSLEY
AND U.S. SENATOR RON WYDEN
IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amicus Senator Charles E. Grassley is the Chair of the bipartisan U.S. Senate Whistleblower Protection Caucus. He co-authored the Whistleblower Protection Act of 1989 (WPA), Pub. L. No. 101-12, 103 Stat. 16, codified at 5 U.S.C. § 2302(b)(8). That statute is the source of the burden of proof in the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 (SOX), Pub. L. No. 107-204, 116 Stat. 745, 18 U.S.C. § 1514A, which he co-sponsored, and which is at issue in this case. He also led the inclusion of the burdens of proof for whistleblower protections in the Wendell H. Ford Aviation Security Act, 49 U.S.C. § 42121, which are incorporated into SOX. In more than thirty years legislating for effective whistleblower protection laws and programs, Senator Grassley has cultivated a unique expertise in what makes whistleblowing work and the invaluable role that whistleblowers play in protecting taxpayers and investors in addition to individual whistleblowers. Senator Grassley thus has a strong interest in ensuring that the Court interprets SOX in accordance with the plain text and congressional intent.

Amicus Senator Ron Wyden serves as Vice-Chairman of the bipartisan U.S. Senate Whistleblower Protection Caucus. He was the original sponsor of legislation in the House of Representatives that ultimately became the Energy Reorganization Act whistleblower amendments for protection of

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[1] Pursuant to Supreme Court Rule 37.6, undersigned counsel states that no party's counsel authored this brief in whole or in part and no person or entity other than the amici or their counsel contributed money to its preparation or submission.

nuclear workers, 42 U.S.C. § 5851—the precedential private-sector whistleblower protection statute that first employed the WPA's burden of proof in the private sector and incorporated the two-part test at issue in this proceeding.

Amici submit this brief because they believe that the Second Circuit seriously erred in imposing a burden of proof on petitioner that is nowhere found in SOX. This brief is written from the perspective of Members of Congress who wrote the provisions at issue, which amici believe will assist the Court in properly understanding the applicable burden of proof in the whistleblower provisions of SOX.

INTRODUCTION & SUMMARY OF ARGUMENT

In April 2011, three years after the nationwide collapse of the fraudulent mortgage-backed securities market triggered the greatest stock market crash since 1929, a prominent Wall Street firm, respondent UBS Securities, LLC, hired petitioner Trevor Murray for its mortgage-backed securities department. UBS assigned him to write reports for its clients that UBS promised would be unbiased and, therefore, trustworthy. Although SEC regulations required analysts like Murray to certify that such reports reflected their "independent" judgment, SEC Regulation AC, 17 C.F.R. § 242.501 (2015), UBS' sales team pressured him to "play ball" by bending his reports to boost UBS' sales and bottom line. Murray refused and blew the whistle on these potential SEC violations to UBS' senior leadership in January 2012. UBS terminated him one month later.

Two years later, after presenting his claim to the Department of Labor, which took no action, petitioner filed a civil whistleblower complaint against UBS in the District Court for the Southern District of New York under SOX. As trials in cases like this often proceed, petitioner presented evidence of his efforts to assure that he followed the law in his work and of the rejection of his complaints by respondent's officers. In its defense, respondent offered a number of reasons why his termination was due to financial downturns in its business and was unrelated to petitioner's whistleblowing. It was, in other words, a classic case for the jury.

Fortunately, Congress had expressly provided for this situation in the burden of proof standard that it incorporated in SOX, which required petitioner to prove that his whistleblowing disclosures were a "contributing factor" in UBS' decision to fire him just a month later, *i.e.*, that his whistleblowing tended to affect in any way the decision to take an adverse employment action against him. Once petitioner made that showing by a preponderance of the evidence, those same provisions required respondent to "demonstrate *by clear-and-convincing evidence* that [it] would have taken the same unfavorable personnel action in the absence of that behavior," *i.e.*, that it had a legitimate rather than an impermissible motive for its actions. 18 U.S.C. § 1514A(b)(2)(C), incorporating 49 U.S.C. § 42121(b) (emphasis added).

After a two-week trial, the jury was properly instructed under the law, it believed petitioner, and it awarded him damages of $903,300.

The court of appeals for the Second Circuit overturned the verdict. It held that the district court

should have instructed the jury that SOX whistleblowers have the burden of proving that their employer acted with a specific state of mind, a "retaliatory intent—*i.e.*, an intent to 'discriminate against an employee ... because of' lawful whistleblowing activity.'" Pet. App. 11a.[2]

As respondent stated in its opposition to the petition, the only question presented is whether "liability under SOX requires [the plaintiff to produce] proof of retaliatory intent." Opp. at 1. It does not. Those words do not appear in the text of SOX, nor in the burden of proof provisions that Congress incorporated into SOX. The Second Circuit overcame this obstacle by completely ignoring the specific section in SOX labeled "Burdens of proof" and instead imposing a new burden on SOX whistleblowers that is fundamentally different from the burden that Congress expressly chose to include in SOX. Instead of making it easier for whistleblowers to defend themselves, by requiring the employer to prove non-retaliatory motives with clear and convincing evidence, as Congress provided, the Second Circuit shifted the burden to the whistleblower, who first must prove a retaliatory motive. That was error because the Second Circuit lacked the authority to add the retaliatory intent language and thereby reverse the burden of proof that Congress had chosen.

Moreover, in imposing a heavy burden on whistleblowers like petitioner, the court below failed to recognize that the whistleblower protections in SOX were included not just to protect employees who stood up for the law, but to protect investors and other

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[2] As a result, the court of appeals did not reach the issues presented by petitioner's cross appeal.

employees whose lives and finances were devasted because employees like petitioner were reluctant to call attention to unlawful activities for fear of losing their jobs. It was to guard against future disasters like the collapse of Enron Corporation that Congress included only a modest burden on employees—to show that their disclosures were "a contributing factor"—and why employers like respondent were required to show by "clear and convincing evidence" that they "would have taken the same unfavorable personnel action" even if the employee had not blown the whistle.

Equally important, the Second Circuit overlooked the extensive history of federal whistleblower statutes in general and of SOX in particular. Largely based on the urging of amicus Senator Grassley, Congress recognized that the burden of proof that this Court had placed on employees under other anti-retaliation laws was too great to assure credible protection of whistleblowers and therefore chose to employ a "contributing factor" causation standard that does not require proof of retaliatory intent to satisfy the employee's burden of proof.

The history of the whistleblower provision in SOX confirms that the Second Circuit erroneously concluded that "retaliatory intent" had to be proven by employees to establish a prima facie case. The Senate bill, which became the law, was a compromise that was achieved by specifically incorporating the burden of proof from a whistleblower protection law applicable to the airline industry. That provision was modeled on whistleblower protection laws governing federal employees that did not impose the retaliatory intent standard which the Second Circuit appended

to SOX. This history is not offered to contradict the text, but to reinforce the conclusion that the district court properly instructed the jury and that the court of appeals erred in overturning the verdict in favor of petitioner.

ARGUMENT

THE DECISION BELOW SHOULD BE REVERSED, AND THE CASE REMANDED FOR FURTHER PROCEEDINGS ON THE CROSS-APPEAL BY PETITIONER.

A. The Plain Meaning of the Applicable Statute Does Not Require an Employee to Prove Retaliatory Intent.

Congress enacted SOX "after a series of celebrated accounting debacles." *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010). Those "debacles," which were epitomized by the decade-long shareholder frauds of a FORTUNE "Top 10" company, the Enron Corporation, caused significant "spillover economic effects" throughout the Nation, including massive bankruptcies, widespread job losses, and diminished confidence in the securities markets.

As this Court explained in *Lawson v. FMR LLC,* 571 U.S. 429, 435 n.1 (2014)—quoting S. Rep. 107-146 (2002), which the Court described as the "'official legislative history' of Sarbanes–Oxley"—Congress learned that "Enron had succeeded in perpetuating its massive shareholder fraud in large part due to a 'corporate code of silence,'" an informal but stringently enforced program that effectively "discourage[d] employees from reporting fraudulent

behavior ….” *Id.* at 447 (quoting S. Rep. 107-146, pp. 10, 2).

In 2002, while debating whether to enact SOX, Congress found that, although then-existing statutes protected many federal civil service and private-sector whistleblowers from employer retribution for protected disclosures, “there [was] no similar protection for employees of publicly traded companies.” 148 Cong. Rec. S1787 (daily ed. Mar. 12, 2002) (statement of Sen. Leahy).

Congress “identified the lack of whistleblower protection as ‘a significant deficiency’” in deterring misconduct, alerting Congress about hidden chicanery in the securities industry, and protecting the public. *Lawson*, 571 U.S. at 435, n.1. To alleviate this “deficiency,” Congress “installed whistleblower protection in [SOX] as one means to ward off another Enron debacle.” *Id.* at 447 (citing S. Rep. 107-146 at 2–11). Accordingly, under 18 U.S.C. § 1514A(a), “publicly traded companies” 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 any lawful act done by the employee,” including providing evidence of fraud to their supervisors or others.

Congress chose to protect corporate whistleblowers by creating a private right of action for them in SOX, § 1514A(b)(2)(B). Although Congress determined that those whistleblowers needed protection through a private right of action, Congress realized that it did not need to reinvent the wheel and to create a wholly new scheme of protection, formulate new burdens of proof, or articulate new standards for meeting those burdens. In fact, as

explained below, there were several other models for whistleblower protection, and Congress chose the one used to protect airline industry employees from adverse personnel actions for blowing the whistle found in 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), Pub. L. No. 106-181, 114 Stat 61 (2020), often referred to as AIR-21.

Under that provision, an airline industry employee must first file a claim with the Secretary of Labor, which has the authority to adjudicate the claim. The agency is directed to proceed with its investigation only if the employee has presented evidence that "makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint." § 42121(b)(2)(B)(i). Subpart (ii), "Showing by Employer," instructs the Secretary to dismiss the complaint "if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior." *Id.* Airline employees have no right to file an AIR-21 complaint in court against their employer; their only remedy is with the Secretary of Labor followed by an appeal to the court of appeals where the violation occurred. *Id.* at (b)(4).

S. 2010, which became the whistleblower protection section of SOX, originally provided for a direct action by a covered employee in federal district court, but that option was removed during the markup of the bill in the Senate Judiciary Committee. In its place Senator Grassley offered an amendment

which provided for "an administrative remedy and resort to federal court if the administrative decision is not made within six months" and, among other changes, also removed enhanced penalties in whistleblower matters. "The amendment was adopted by unanimous consent." S. Rep. 107-146, *supra,* at 23.

Under that provision, which became section 1514A(b)(1)(A), the employee must first file a complaint with the Secretary of Labor, and if the Secretary does not act within six months, the employee may file suit in federal district court. § 1514A(b)(1)(B). Under subsection (b)(2)(C), which governs cases like this one that go to district court, Congress stated that "Burdens of Proof … shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code," *i.e.,* those found in the recently enacted AIR-21.

But the Second Circuit nonetheless rejected the district court's instructions, which had used the very terms of the statute. Instead, it decreed that the jury had to be directed to find against petitioner unless he had produced evidence of respondent's "retaliatory intent," a phrase not found in section 1514A or AIR-21.[3] The appeals court focused on the word "discriminate" which is the last term in a longer string of distinct prohibited actions – the employer may not

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[3] The phrase "intend to retaliate" is contained in another part of SOX, the criminal prohibition in 18 U.S.C. § 1513(e), which criminalizes retaliation for reporting the commission or possible commission of fraud or any Federal offense. Adding an element of criminal intent to this civil damages provision is a further reason why the Second Circuit erred here. *See also* Whistleblower Protection Act of 2012, 5 U.S.C. § 2302(f), requiring proof of "reprisal" in order for the employee to prevail.

"discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment." § 1514A(a). It then concluded that discriminate in this context must mean retaliation, and since all retaliation is intentional, petitioner was required to prove the employer's retaliatory intent. Pet App. 14a-15a.[4]

How, one might ask, did the Second Circuit respond to subparagraph (b)(2)(C) on burdens of proof: it simply never mentioned it, let alone explain what other function it might serve beyond that urged by petitioner and amici. Nor did the court of appeals mention this Court's decision in *Lawson,* the Senate Report on the whistleblower provisions in SOX cited in *Lawson,* or AIR-21. To be sure, the words setting forth the actual burden on an employee are not in section 1514A, but the term "Burdens of proof" is, and it directs the reader to the precise place in AIR-21 where the "contributing factor" requirement is found. Perhaps a reader might conclude that "a contributing factor" could include retaliatory intent, but it would be an enormous stretch to mean that it *must always* include retaliatory intent.

If there were any doubt as to the meaning of a contributing factor, it should be dispelled by the burden that AIR-21 (and hence SOX) places on the employer, to prove that it would have, in this case,

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[4] As petitioner pointed out in his reply brief (at 8 & n. 3), some dictionary definitions of discriminate have softer meanings than retaliate, such as to distinguish or provide different treatment, which would produce a different conclusion than that urged by respondent, even without the burdens of proof incorporated from AIR-21.

terminated petitioner even if he had not blown the whistle. § 42121(b)(2)(B)(ii). Even more significant is the further requirement on the employer that it must meet its burden by "clear and convincing evidence," not just the normal preponderance standard that the employee must satisfy.[5]

In *Colorado v. New Mexico,* 467 U.S. 310, 316 (1984), this Court discussed the clear and convincing evidence standard and why it is used, in that case in the context of what proof would be needed to justify Colorado's diversion of water from New Mexico:

> a diversion of interstate water should be allowed only if Colorado could place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are "highly probable." *See* C. McCormick, Law of Evidence § 320, p. 679 (1954). This would be true, of course, only if the material it offered instantly tilted the evidentiary scales in the affirmative when weighed against the evidence New Mexico offered in opposition. *See generally* McBaine, Burden of Proof: Degrees of Belief, 32 Calif. L. Rev. 242, 251-254 (1944).

In the whistleblower context, the court in *Whitmore v. Dep't of Labor,* 680 F.3d 1353,1367 (Fed. Cir. 2012),

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[5] In construing SOX's provisions (and the AIR-21 provisions SOX expressly incorporate), it is crucial to examine how those provisions fit within "the structure and internal logic of the statutory scheme." *Lockhart v. United States*, 577 U.S. 347, 351 (2016). *See McCullen v. Coakley*, 573 U.S. 464, 503 (2014)(Scalia, Kennedy, & Thomas, JJ., concurring). As Justice Scalia explained: "[t]he text must be construed as a whole" and "in view of its structure," with "context [being] the primary determinant of meaning." Antonin Scalia and Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 167 (2012).

explained why the employer should have this heavy burden, quoting from the WPA's legislative history:

> this heightened burden of proof required of the agency also recognizes that when it comes to proving the basis for an agency's decision, the agency controls 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. In these circumstances, it is entirely appropriate that the agency bear a heavy burden to justify its actions.

In other words, imposing the onerous burden of proving retaliatory intent on an employee surely makes no sense in the same statute that requires the employer to justify its adverse personnel action by clear and convincing evidence. That is, unless the reader simply disregards the burdens of proof spelled out in SOX, as the Second Circuit did here.

The Labor Department, which has jurisdiction over complaints under AIR-21 and SOX, has issued regulations that are firmly in petitioner's camp. *See* 29 C.F.R. § 1980.100-115. The regulations describe how the complaining party can meet the contributing factor burden before the Department may investigate a SOX retaliation claim. Section 1980.104(e)(3) gives as an example a situation in which "the complaint shows that the adverse personnel action took place within a temporal proximity after the protected activity, or at the first opportunity available to respondent, giving rise to the inference that it was a contributing factor in the adverse action," which is a far cry from requiring retaliatory intent. Section

1980.109 applies the same burden of proof to final decisions as it does to investigations, and section 1980.114 closes the loop and concludes that these burdens must be followed in district court cases.[6]

Finally, the reasons why Congress in general and why amicus Senator Grassley in particular considered the need to protect whistleblowers to be so important, underscores why the burden assigned to employees like petitioner was not the one that the Second Circuit imposed. As noted above, what made the Enron scandal so painful was that it also brought down tens of thousands of innocent investors, including public and private pension funds, as well as unsuspecting employees.

To avoid another Enron, Congress recognized that employees are in the best position to sound the alarm about unlawful accounting and other practices. In its comments to the Securities & Exchange Commission regarding the agency's proposed whistleblower rules, the Chamber of Commerce agreed that "internal reporting mechanisms are cornerstones of effective compliance processes."[7] But Congress also concluded

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[6] The Labor Department's Administrative Review Board ("ARB") which handles adjudications under the whistleblower statutes, agrees that "proof of actual discriminatory or retaliatory intent [i]s not required." *Petitt v. Delta Airlines, Inc.,* ARB No. 2021-0014, 2022 WL 1091413, *11 (March 29, 2022). This Court agreed in *Lawson, supra,* at 439 n. 6, that the Labor Department, not the SEC, is the lead agency on these provisions. Moreover, most circuits defer to the ARB because "Congress has explicitly delegated to the Secretary of Labor authority to enforce the whistleblower provisions" of AIR-21 statutes. *TransAm Trucking, Inc. v. Admin. Rev. Bd.,* 833 F.3d 1206, 1210 (10th Cir. 2016).

[7] http://www.sec.gov/comments/s7-33-10/s73310-110.pdf.

that, without effective whistleblower protections like those in AIR-21 and SOX, employees would fear for their jobs even if they blew the whistle internally.

Moreover, as this case shows, employers can always find some other reason, with at least surface plausibility, to justify terminating an employee, with the employee having little access to the evidence to overcome that defense. Yet by setting the barrier low for employees and high for the employer, employees are more likely to take the risk of blowing the whistle, especially if they have a reasonable chance of recovering their losses if their employer retaliates. On the other hand, by placing the nearly insurmountable "retaliatory intent" burden on employees, the Second Circuit has seriously undermined Congress' goal in including the whistleblower provisions in SOX at a time when fraud is no less prevalent or pernicious than it was in 2002.

B. Other Federal Whistleblower Statutes and the Specific History of the Whistleblower Provisions of SOX Confirm that the Second Circuit Erred.

As the prior section demonstrates, there is no basis in the text of SOX for the Second Circuit's conclusion that petitioner was required to show that respondent had a retaliatory intent to discharge him. We now show that other whistleblower statutes, including how they have been read by the courts, as well as the specific history of section 1514A, confirm that the Second Circuit should be reversed.

We begin with other anti-discrimination statutes, not involving whistleblowers, and how this Court imposed burdens in those cases when plaintiffs, like

petitioner here, claimed that they had been discriminated against, in those cases, by preferring a person who is not in a protected class over them. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981), is a good illustration. Plaintiff, a female employee, was denied a promotion given to a male, and she sued for sex discrimination. The issue before this Court was whether the plaintiff had met her burden to show that her employer had engaged in unlawful conduct.

On pages 254-56 of his opinion for the Court, Justice Powell explained the various burdens on the parties in detail, relying on the test in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a decision generally considered favorable to plaintiffs who must establish a prima facie violation of the law. The *Burdine* Court then concluded (at 259-60) as follows:

> In summary, the Court of Appeals erred by requiring the defendant to prove by a preponderance of the evidence the existence of nondiscriminatory reasons for terminating the respondent and that the person retained in her stead had superior objective qualifications for the position. When the plaintiff has proved a prima facie case of discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions.

Whether that is a reasonable allocation of the burden of proof in a case in which the harm is limited to one employee is not the question. What is relevant is that the harms to society overall in a case like *Burdine* are orders of magnitude less than they are in a whistleblower case like this. Thus, a very different

balance is required, in situations like Enron, or where the wrongful conduct involves conduct that places members of the public at personal risk of serious physical harm or death.

It was the recognition that employees were in the best position to prevent widespread harm, if they were protected in doing so, that led amicus Senator Grassley to sponsor the Whistleblower Protection Act of 1989 ("WPA"), Pub. L. No. 101-12, 103 Stat. 16, 5 U.S.C. § 2308(b)(8). Before the WPA was enacted, the Civil Service Reform Act of 1978 ("CSRA"), Pub. L. No. 95-454, 92 Stat. 1111, governed whistleblowing claims by federal civil-service workers. The CSRA "defined a prohibited personnel practice as 'tak[ing] or fail[ing] to take a personnel action ... as a reprisal for' a protected disclosure of information." *Marano v. Dept. of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993). By the time the CSRA was a decade old, Congress had concluded that the CSRA's "reprisal for" test imposed an "'excessively heavy burden … on the employee'" and, "in effect, had gutted the CSRA's protection of whistleblowers." *Id.* (citing the "WPA's Explanatory Statement," 135 Cong. Rec. 5033 (1989)).

This is how the Federal Circuit in *Marano* described Congress's response:

> Congress amended the CSRA's statutory scheme with the WPA, thereby substantially reducing a whistleblower's burden to establish his case, and "send[ing] a strong, clear signal to whistleblowers that Congress intends that they be protected from any retaliation related to their whistleblowing." 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20).

Id. The Court then noted that employees would no longer be "required to prove that the whistleblowing disclosure was a 'significant' or 'motivating' factor," but that, under 5 U.S.C. § 1221(e)(1), the evidence must only show that the "protected disclosure played a role in, or was 'a contributing factor' to, the personnel action taken." *Id*. The Federal Circuit further explained that a contributing factor means "*any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.* This test is 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.* (emphasis in original).

Most relevant for this case, and to remove any doubt as to the meaning of a contributing factor, the Federal Circuit also stated that, "though evidence of a retaliatory motive would still suffice to establish a violation of his rights under the WPA, a whistleblower *need not* demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action." *Id.* at 1141 (citations omitted, emphasis in original).[8]

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[8] That understanding of "contributing factor" is supported by the history of the WPA. On the Senate floor, Senator Grassley defined the standard, reaffirmed verbatim by other original sponsors and the Joint Explanatory Report, as "any factor, which alone or in connection with other factors, tends to affect in any way the outcome . . . ." 135 Cong. Rec. 4509 (1989). *See id*. at 4518 (statement of Sen. Grassley); *id*. at 4522 (statement of Sen.

To support its reading of the WPA, *Marano* observed that the "policy goal behind the WPA was to encourage government personnel to blow the whistle on wasteful, corrupt or illegal government practices without fearing retaliatory action by their supervisors or those harmed by the disclosures," which would be "guaranteed by the substantially reduced burden that must be carried by the whistleblower to earn the WPA's protection from adverse action." *Id*. at 1142 (citation omitted). Based on this analysis, the court concluded that the employee there had satisfied the contributing factor requirement and remanded the case to the Merit Systems Protection Board to allow his employer to meet "the burden of proving by clear and convincing evidence that the personnel action would have been taken in the absence of the protected disclosure," *id*. at 1143, which is the same burden imposed by SOX on respondent in this case.[9]

Pryor); *id*. at 5033 (explanatory statement of Senate Bill 20); *id*. at 4522 (statement of Rep. Schroeder). Furthermore, a letter from Attorney General Thornburgh is consistent with that approach: "A 'contributing factor' need not be 'substantial.' The individual's burden is to prove that the whistleblowing contributed in some way to the agency's decision to take the personnel action." 135 Cong. Rec. 5033 (1989).

[9] Other circuits have disagreed with *Marano,* at least as applied to other federal statutes. *See Neylon v. BNSF Railway,* 968 F.3d 724, 728-29 (8th Cir. 2020). The Third Circuit agrees with *Marano*: *Araujo v. New Jersey Transit Rail Ops, Inc.,* 708 F.3d 152, 158 (3d Cir. 2013). For the reasons set forth above and in petitioner's brief, amici support the conclusions in *Marano* regarding the WPA and SOX. The Second Circuit took no position on *Marano*; it simply did not mention it, just as it did not mention AIR-21.

Subsequent to the passage of the WPA, Congress enacted sixteen whistleblower laws applicable to specific industries. Of these, the most relevant is the one in AIR-21, found in 49 U.S.C. § 42121(b). There is not a word of statutory language or legislative history in any of those sixteen statutes that changes or modifies the WPA definition of "contributing factor."

In SOX Congress specifically provided in 18 U.S.C. § 1514A(b)(2)(C) that district court actions brought under SOX "shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code." That incorporation expressly brought in as the "Burdens of proof" the "contributing factor" requirement for employees and, for the employer's defense, that it must introduce "clear and convincing" evidence that it would have taken the adverse personnel action in the absence of whistleblowing by the employee. Although those words do not appear in the text of SOX, they were incorporated in SOX by this provision in section 1514A(b)(2)(C): "An action [in the district court] brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code." In other words, for Members of Congress to determine exactly what those burdens are, they would have had to go to the cited provision or some other source. And in this case, that source would be the Senate Report relied on by the majority in *Lawson, supra.*

That Report is significant for several reasons. First, the discussion of the whistleblower protections, which were in section 6, is entirely consistent with the position urged by petitioner and amici. That is true for what the majority wrote (S. Rep. 107-146 at 18-20)

and what was in the additional views of the minority (*id*. at 26). None of the discussion includes the actual terms used in AIR-21, but the Report confirms (*id*. at 19-20 & 26) that the AIR-21 standards will apply when employees file whistleblower complaints.

As the Report sets forth at 23, section 6 was the subject of a unanimous amendment offered by amicus Senator Grassley and co-sponsored by Senator Leahy. It replaced the option for an immediate suit in federal court with a requirement that the employee first file with the Secretary of Labor, with resort to federal court if an administrative decision is not made within six months. The Additional Views (*id*. at 30) expand on the reasons for the amendment and what it did:

> The amendment offered by Senators Grassley and Leahy revises the original bill to make these protections consistent with the Aviation Safety Protection Act of 2000 in which we provided whistleblower protections to another class of non-government employees. Because we had already extended whistleblower protections to non civil service employees, we thought it best to track those protections as closely as possible.

That tracking was not precise for all procedures because SOX allows employees to bring their own actions if the Secretary does not respond within 180 days, § 1514A(1)(B), but AIR-21 has no such remedy.

Most significantly, there is nothing in the history of section 1514A that supports a requirement that an employee must show retaliatory intent to prevail. The word "retaliation" appears only in the title, "Civil action to protect against retaliation in fraud cases," and neither "retaliate" nor "retaliatory" appears at all in that section. The Senate Report includes a single

use of retaliatory in the Additional Views (S. Rep. 107-146 at 30) stating that the bill protects "corporate whistleblowers, who should be shielded from illegal retaliatory action." The Report does use the term "retaliation" as a general description of what is prohibited, but it never uses "retaliatory intent" or any other term that supports requiring that employees would have to show their whistleblowing action was more than "a contributing factor" to their adverse personnel action.

In short, the plain meaning and history of the whistleblower provisions of SOX confirms what the combination of the texts of AIR-21 and section 1514A establish: that employees such as petitioner must only prove that their whistleblowing activities were a contributing factor to their termination or other adverse action, a standard that imposes no obligation to show that their employer acted with retaliatory intent.

CONCLUSION

For the foregoing reasons and those set forth in the briefs of petitioner, the judgment below should be reversed, and the case remanded to the Second Circuit for consideration of petitioner's cross-appeal.

Respectfully Submitted,

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