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 AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF PETITIONER

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July 2023

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INTEREST OF AMICUS CURIAE[1]

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

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

SUMMARY OF ARGUMENT

SOX's whistleblower protection provision makes it unlawful to "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of" specified protected

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of the brief.

whistleblower activities. 18 U.S.C. § 1514A(a). Congress has provided a private right of action to enforce this provision, to "be governed by the legal burdens of proof set forth in section 42121(b) of title 49." *Id.* § 1514A(b)(2)(C). Section 42121(b), enacted as part of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21), contains a detailed burden-shifting framework. First, an injured employee must "make[] a prima facie showing that any [protected whistleblower activity] was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. § 42121(b)(2)(B)(i). Then, the burden shifts to the employer to demonstrate that it "would have taken the same unfavorable personnel action in the absence of" the protected activity. *Id.* § 42121(b)(2)(B)(ii).

Despite Congress's explicit direction that section 1514A claims be governed by the AIR-21 burden-shifting framework, the Second Circuit below imposed an additional burden on section 1514A plaintiffs—one appearing nowhere in either AIR-21 or SOX. In its view, a whistleblower must prove not just what the statute requires them to prove (that protected activity was a contributing factor in the adverse action alleged), but. *also* that the employer had a retaliatory intent in taking that action. The Second Circuit grounded this holding in the notion that the word "discriminate" inherently incorporates a discriminatory intent requirement, and thus a plaintiff bears the burden of establishing retaliatory intent in bringing a section 1514A claim. This conclusion was wrong because it imbues the word "discriminate" with far too much meaning and because it ignores the detailed burden-shifting

framework that Congress specified should govern section 1514A claims.

In several cases considering various statutes, this Court has held that the words "discriminate" or "discrimination" only refer to differential treatment, without suggesting that motivation or a specific allocation of burden inheres in the definition. Nothing about SOX suggests that Congress meant something different when it used the word "discriminate" at the end of a list of possible ways in which employers could subject employees to differential treatment in section 1514A(a).

Here, there is no question that Petitioner experienced differential treatment. The question is what he must show to establish that the differential treatment was "because of" a protected activity. Congress provided the answer: A plaintiff's "required showing" for a claim that he has been subjected to adverse employment action "because of" lawful whistleblower activity is that his protected activity was "a contributing factor" in an unfavorable personnel action. 49 U.S.C. § 42121(b)(2)(B)(i), *incorporated by* 18 U.S.C. § 1514A(b)(2)(C). Nothing more, and nothing less.

Thus, it is irrelevant what "because of" might mean in a vacuum, or what Congress has said about a plaintiff's burden to show an employment action was "because of" a protected status or activity under *other* statutes. Congress has the prerogative to define the terms of a statute, to set out the requirements for a statutory cause of action, and to prescribe rules of decision for adjudicating such an action. Congress did so here, well aware of how courts had chosen to construe *other* statutory language. And at the time

Congress adopted the AIR-21 standard for section 1514A claims, it was well understood that a contributing factor standard like the one contained in AIR-21 did *not* include a "retaliatory intent" requirement. The court of appeals thus erred in grafting a retaliatory intent requirement onto a plaintiff's required showing under section 1514A.

ARGUMENT

I. The word "discriminate" in section 1514A refers to an employer's differential treatment of an employee.

Below, the Second Circuit's error began with its conclusion that, as a matter of plain language, the word "discriminate" "requires a conscious decision to act based on a protected characteristic or action." Pet. App. 9a. This conclusion incorrectly ascribes to the word "discriminate" a mental state and a causal element. In defining the words "discriminate" and "discrimination" in other contexts, however, this Court has never taken this view. Instead, the Court has consistently defined "discrimination" to mean only differential or less favorable treatment—without limitation to the intent behind it.

For example, in *FTC v. Anheuser-Busch*, 363 U.S. 536 (1960), the Court rejected the notion that, to show "discrimination in price" under the Clayton Act, a plaintiff must show that a price was set low "for the purpose or design to eliminate competition and thereby obtain a monopoly." *Id.* at 546. The Court explained that "there are no overtones of business buccaneering in the § 2(a) phrase 'discriminate in price.'" *Id.* at 549. When the issue "is solely whether there has been a price discrimination," it held, the only question is whether there is "a price difference."

Id. at 549. Similarly, in a case concerning the Public Salary Tax Act of 1939, 4 U.S.C. § 111, the Court held that whether a state tax "discriminate[s] against" a federal officer or employee does not turn on "the intent lurking behind the law," but simply on whether the tax treats federal officers differently from others. *Dawson v. Steager*, 139 S. Ct. 698, 704 (2019).

That the word "discrimination" does not itself concern the *reason* for differential treatment is also reflected in this Court's dormant Commerce Clause jurisprudence. There, in applying a judicially created test, the Court has repeatedly stated that "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter," without inquiry into "the purpose of, or justification for, a law." *Oregon Waste Sys., Inc. v. Dep't of Env't Quality of State of Or.*, 511 U.S. 93, 99 (1994) (citing *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 340 (1992)); *see United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007).

The Court has adopted the same view in interpreting employment discrimination and other civil rights statutes. In *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978), for example, the Court held that a practice "discriminates" on the basis of sex, as that term is used in Title VII, if it treats women differently from men, with no further inquiry. More recently, in *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), the Court concluded that, under Title IX, retaliation "is a form of 'discrimination' because the complainant is being subject to differential treatment." *Id.* at 174. In so doing, it endorsed Justice Kennedy's statement in *Olmstead v. L.C.*, that "the

normal definition of discrimination" is "differential treatment." *Id.* (citing 527 U.S. 581, 614 (1999) (Kennedy, J., concurring)). Likewise, in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), the Court stated that, in Title VII, "the term 'discriminate against' refers to distinctions or differences in treatment that injure protected individuals." *Id.* at 59; *see also Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1740, 1753 (2020) (applying *Burlington Northern* definition); *Babb v. Wilkie*, 140 S. Ct. 1168, 1176 (2020) (equating "discrimination" in 29 U.S.C. § 633a(a) with "differential treatment"). None of these cases have suggested that differential treatment qualifies as "discrimination" only when it includes specific intent.

The word "discriminate" in section 1514A has the same meaning. "Under the familiar interpretive canon *noscitur a sociis*, 'a word is known by the company it keeps.'" *McDonnell v. United States*, 579 U.S. 550, 568–69 (2016) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). In SOX, the word "discriminate" appears at the end of a list of ways an employee can be treated differently. The statute makes it unlawful to:

> discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment …

18 U.S.C. § 1514A(a). The phrase "in any other manner discriminate" does not import a requirement of retaliatory intent any more than do the words "discharge," "demote," "suspend," "threaten," or "harass." The context thus eliminates the ambiguity,

to the extent there was any, as to the meaning of the word "discriminate" in this statute.

II. There is no basis to disturb Congress's specification of the plaintiff's burden under section 1514A.

Not all "discrimination" is unlawful. Defining what constitutes unlawful differential treatment, and a plaintiff's burden in establishing as much, are "decision[s] for Congress to make." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177 n.3 (2009). In enacting SOX, Congress made those decisions, as reflected in the statute's plain text: Differential treatment is unlawful when it is taken "because of" any of the acts specified in section 1514A(a)(1)–(2). And a plaintiff's burden to establish differential treatment "because of" one of those acts is the "burden[] of proof set forth in section 421212(b) of Title 49, United States Code." 18 U.S.C. § 1514A(b)(2)(C). Section 421212(b), in turn, imposes on plaintiffs the burden of showing that their protected activity was a contributing factor in the challenged action—and does not impose a burden to show retaliatory intent. Congress's decisions control; "[w]hen Congress supplies a constitutionally valid rule of decision, federal courts must follow it." *Brown v. Davenport*, 142 S. Ct. 1510, 1520 (2022).

A. In opposing certiorari, respondent UBS cited cases interpreting statutes that require a plaintiff to establish retaliatory intent. *See* Resp. Br. in Opp. 16–17 (citing *Jackson*, 544 U.S. at 173–74 (Title IX); *Staub v. Proctor Hosp.*, 562 U.S. 411, 417 (2011) (USERRA); *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) (Title VII); *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 779 (2018) (Dodd-Frank Act)). Unlike SOX, though, the statutes cited by UBS do not

incorporate the AIR-21 burden-shifting framework. And as this Court has frequently recognized, Congress can assign different burdens to plaintiffs under different discrimination statutes.

For example, in *Babb*, the federal government argued that the federal-sector provision of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 633a(a), should be read to require a plaintiff to show that age was a "but-for cause of an employment decision," which it referred to as the "default rule … recognized in other employment discrimination cases." 140 S. Ct. at 1172. The employee, on the other hand, argued that he needed to show only "any adverse consideration of age in the decision-making *process*." *Id.* In resolving the dispute, the Court did not question that it may have applied a "default rule" in interpreting *other* statutory language, but the language of section 633a(a) was different and clearly required that all personnel actions "be made free from any discrimination based on age." *Id.* at 1172–73. The Court distinguished statutory provisions that prohibited employment actions "based on" or "because of" certain characteristics, which had been construed to require but-for causation of an ultimate personnel action. *Id.* at 1175. And the Court explained that, although Congress *could* have prohibited "personnel actions that are based on age," it did not do so in the federal-sector provision of the ADEA. *Id.* at 1173. "Ascrib[ing] significance" to Congress's decision *not* to use language that had been construed as requiring a plaintiff to show age was the but-for causation of the ultimate employment action, the Court refused to read that requirement into the statute. *Id.* at 1177.

Similarly, in *Gross*, the Court explained that different burdens of persuasion govern claims under

Title VII and the ADEA, both of which prohibit discrimination "because of" protected characteristics, based on additional statutory language in the former. 557 U.S. at 174. Specifically, the Court recognized that Congress had amended Title VII to allow plaintiffs to satisfy their burden to show that discrimination was "because of" a protected characteristic by showing that the characteristic was one "motivating factor," rather than a but-for cause of differential treatment. *Id.* Because, however, Congress, had not similarly amended the ADEA, plaintiffs bringing claims under the ADEA have the burden of showing that age was the but-for causation of the challenged action. *Id.*

B. If, as *Babb* and *Gross* recognize, Congress is free to choose whether a plaintiff's burden is to show that a protected characteristic was the "but-for" cause of an employment action, was a "motivating factor" for such an action, or was merely considered adversely during the decision-making process, there is no reason why Congress cannot require the plaintiff to bear the burden of showing that protected activity was a "contributing factor," without also requiring the plaintiff to bear the burden of showing retaliatory intent. That is what Congress did here: In enacting SOX, Congress made the decision that "the only proof of discriminatory intent that a plaintiff is required to show is that his or her protected activity was a 'contributing factor' in the resulting adverse employment action." *Frost v. BNSF Ry. Co.*, 914 F.3d 1189, 1195 (9th Cir. 2019) (discussing the AIR-21 standard as applied to a Federal Railroad Safety Act (FRSA) retaliation claim). A contributing factor "*is* the required showing of intentional discrimination." *Id.*; *see also Halliburton, Inc. v. Admin. Rev. Bd.*, 771 F.3d

254, 263 (5th Cir. 2014) (under section 1514A, where an employee shows protected activity was a "contributing factor," the employee need not "prove that the employer had a 'wrongful motive' too"); *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 161 (3d Cir. 2013) (similar, under the FRSA).

For one, the text itself is clear. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). Here, Congress specified that the "burdens of proof" for the parties in a section 1514A case are those set out in AIR-21, 18 U.S.C. § 1514A(b)(2)(C), and AIR-21 in turn sets out the "required showing" by an aggrieved employee, before the burden shifts to the employer, 49 U.S.C. § 42121(b)(2)(B)(i). The employee must show that the protected behavior "was a contributing factor in the unfavorable personnel action alleged in the complaint." *Id.* Congress could have included retaliatory intent or motive as part of the required showing. Because it did not, such a showing should not be read into the statute. *See Bates v. United States*, 522 U.S. 23, 29 (1997) ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face.").

The context in which Congress enacted section 1514A and other statutes that adopt the contributing factor burden-shifting regime of AIR-21 and its predecessors make clear that Congress purposely did not impose on plaintiffs the burden of establishing retaliatory intent. *See, e.g.*, *Jones v. Hendrix*, 599 U.S. ___, slip op. at 4–5 (2023) (considering context and purpose of legislation as aid to "understanding [of

relevant] statutory text"); *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 377 (2004) (looking "to the context in which it was enacted and the purposes it was designed to accomplish" to aid in interpreting statutory language). The point of the AIR-21 regime was to eliminate any requirement that a plaintiff bear that burden. The term "contributing factor" first appeared in the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16, *codified at* 5 U.S.C. § 1221(e). At that time, courts had held that "proof of discriminatory motive is critical to establish a prima facie case of discrimination" under discrimination and whistleblower protection statutes. *AFSCME v. Washington*, 770 F.2d 1401, 1405 (9th Cir. 1985) (citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977)) (Title VII case); *see also*, *e.g.*, *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1260 (10th Cir. 1988) (recognizing that a Title VII plaintiff "must produce evidence of discriminatory intent or motive to establish a prima facie case"); *E. Assoc. Coal Corp. v. Fed. Mine Safety & Health Rev. Comm'n*, 813 F.2d 639, 642 (4th Cir. 1987) (noting that it was "well settled" that a whistleblower must show that an adverse action "was motivated" by protected activity as part of the prima facie case under the non-retaliation provision of the Mine Safety and Health Act); *Wilcoxson v. U.S. Postal Service*, 812 F.2d 1409 (table), 1987 WL 36561, at *2 (6th Cir. 1987) (requiring a plaintiff to show a retaliatory motive for a Title VII reprisal claim); *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 868 (7th Cir. 1985) (stating that a prima facie showing of a Title VII claim required "some

indication that the [defendant]'s actions were motivated by discriminatory animus").[2]

In enacting the Whistleblower Protection Act, Congress overrode this interpretation, based on its determination that requiring civil service whistleblowers to show that their protected activity "constituted a 'significant' or 'motivating' factor" imposed an "excessively heavy burden … on the employee." *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (discussing legislative history). Congress used the term "contributing factor" to effect a "substantial reduction of the whistleblower's burden." *Id.* (citations omitted). This deliberate choice reflected the view that, "[r]egardless of the official's motives, personnel actions against employees should quite simply not be based on protected activities such as whistleblowing." S. Rep. No. 413, 100th Cong., 2d Sess. 16 (1988), *quoted in Marano*, 2 F.3d at 1141; *see Feldman v. Law Enforcement Assocs. Corp.*, 752 F.3d 339, 348 (4th Cir. 2014) (applying *Marano* to SOX section 1514A claim); *Lockheed Martin Corp. v. Admin. Rev. Bd., U.S. Dep't of Labor*, 717 F.3d 1121, 1136 (10th Cir. 2013) (same).

Since 1989, Congress has incorporated the contributing factor burden-shifting standard into several other statutes to eliminate judicially imposed intent or motive requirements. For example, in 1992, Congress amended the Energy Reorganization Act "to include a burden-shifting framework distinct from the

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

Title VII employment-discrimination burden-shifting framework first established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800–05 (1973)," in order "to make it easier for whistleblowers to prevail in their discrimination suits." *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999) (citing Energy Policy Act of 1992, Pub. L. No. 102-486, § 2902(d), 106 Stat. 2776, 3123–24, *codified at* 42 U.S.C. § 5851(b)(3)(A)); *see also Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) (citing H. Rep. No. 474 (VIII), 102nd Congress, 2d. Sess. 79 (1992), reprinted in 1992 U.S.C.C.A.N. 1953, 2282, 2297, and observing that the Energy Policy Act imposed "a tough standard" for employers "and not by accident").

Similarly, in 1993, Congress amended the whistleblower protections of the Federal Deposit Insurance Act, which courts had previously interpreted as incorporating the same intent standard as Title VII, to incorporate the contributing factor burden of proof—an amendment that "quite clearly ma[d]e it easier for the plaintiff to make her case under the statute" by requiring only "circumstantial evidence that her disclosure was a contributing (not necessarily a substantial or motivating) factor in the adverse personnel action." *Frobose v. Am. Sav. & Loan Ass'n of Danville*, 152 F.3d 602, 612 (7th Cir. 1998). Again in 2000 when it enacted AIR-21, Congress used the "contributing factor" standard "to protect whistleblowers" in the airline industry by "mak[ing] it difficult for employers to avoid paying damages in 'mixed-motive cases.'" *Ameristar Airways, Inc. v. Admin. Rev. Bd.*, 771 F.3d 268, 273 (5th Cir. 2014). Likewise, in 2007, after incorporating the AIR-21 standard into SOX, Congress incorporated the

standard into the Surface Transportation Assistance Act (STAA). In so doing, it "imposed a lower burden on the employee than existed previously [for retaliation claims under that statute], when the employee was required to show the protected activity had 'motivated' the adverse action." *Maverick Transp., LLC v. U.S. Dep't of Lab., Admin. Rev. Bd.*, 739 F.3d 1149, 1153 (8th Cir. 2014). *See also Araujo*, 708 F.3d at 159–60 (noting legislative history of incorporation of AIR-21 standard into FRSA reflected that "Congress intended to be protective of plaintiff-employees").

The Second Circuit's view, essentially overriding Congress's decision not to require plaintiffs to establish retaliatory intent to prevail under this regime, runs counter to the fundamental principle of statutory interpretation that "Congress remains free to alter what [the courts] have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989); *cf. Pierson v. Ray*, 386 U.S. 547, 561 (1967) (Douglas, J., dissenting) ("Congress enacts a statute to remedy the inadequacies of the pre-existing law, including the common law."). It also contravenes the principle that the courts' job is to apply the law that Congress has written. *Wooden v. United States*, 142 S. Ct. 1063, 1083 (2022) (Gorsuch, J., concurring) (citing *United States v. Wiltberger*, 18 U.S. 76, 95 (1820)). When enacting SOX, as when enacting AIR-21, Congress was aware that, absent specific language as to the burden of proof regarding causation, courts had read whistleblower protection statutes to require plaintiffs to show retaliatory intent as part of their case in chief. Congress's choice to enact a different, specific burden of proof governs over any default judicial interpretation that would otherwise apply.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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July 2023