Nos. 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 AMICUS CURIAE THE ANTI-FRAUD COALITION, THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AND BETTER MARKETS, INC. IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Anti-Fraud Coalition (TAF)

Amicus curiae The Anti-Fraud Coalition (TAF Coalition) is a nonprofit public interest organization dedicated to combating fraud in the United States' securities markets and protecting whistleblowers who expose such fraud. TAF Coalition is committed to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to publicize the whistleblower provisions of state and federal statutes, regularly participates in litigation as *amicus curiae*, and has provided testimony to Congress about ways to improve whistleblower protections. TAF Coalition is supported by whistleblowers and their counsel, by membership dues and fees, and by private donations. TAF Coalition is the 501(c)(3) arm of Taxpayers Against Fraud, which was founded in 1986.

TAF Coalition has a strong interest in ensuring proper interpretation and application of the anti-retaliation provisions of the Sarbanes-Oxley Act (SOX), 18 U.S.C. § 1514A. It files this brief to address the law governing the burdens of proof required for whistleblowers to succeed in a claim under SOX.

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[1] No counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief.

The National Employment Lawyers Association (NELA)

Founded in 1985, NELA is the largest bar association in the country focused on empowering workers' rights attorneys. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to protecting the rights of worker, in employment, wage and hour, labor, and civil rights disputes. NELA attorneys litigate daily in every circuit, giving NELA a unique perspective on how principles announced by courts in employment cases actually play out on the ground. Many NELA members represent workers who are whistleblowers experiencing retaliation for exposing workplace abuses and NELA therefore has a strong interest in ensuring proper interpretation and application of the anti-retaliation provisions of SOX.

Better Markets, Inc. (Better Markets)

Better Markets is a nonprofit, nonpartisan organization that promotes the public interest in the financial markets through comment letters on agency rule proposals, *amicus curiae* briefs, independent research, and public advocacy. It fights for reforms that stabilize our financial system, prevent financial crashes, and reduce fraud and abuse. Better Markets has focused not only on the need for strong rules governing the financial markets but also on the need for strong enforcement of those rules. Hand in hand with that advocacy have been numerous comment letters, reports, and other activities highlighting the important—indeed indispensable—role that whistleblowers play in uncovering and prosecuting the illegal conduct that is still prevalent

in today's financial markets. *See generally* www.bettermarkets.org. Better Markets has an interest in this case because unless reversed, the decision below will increase the likelihood of retaliation against whistleblowers, thus inhibiting these uniquely valuable sources of evidence from coming forward, to the detriment of effective enforcement and the integrity of our markets.

SUMMARY OF ARGUMENT

The Second Circuit's opinion below improperly grafts an additional elemental burden of proof onto that which Congress unambiguously imposed on whistleblower plaintiffs under SOX. Congress explicitly and clearly identified the "[b]urdens of proof" that plaintiffs and defendants in SOX cases bear: "An action brought under" the statutory provision allowing filing in 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) (emphasis added). Section 42121 imposes the burden on plaintiffs to establish that their protected activity "was a contributing factor in the unfavorable personnel action alleged." 49 U.S.C. § 42121(b)(2)(B)(iii). If the plaintiff meets this burden, the defendant can avoid liability by "demonstrat[ing] by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior." *Id.* at § 42121(b)(2)(B)(iv). Nowhere in the "legal burdens of proof" articulated in Section 42121(b) did Congress articulate a requirement that the plaintiff also prove the defendant's intent or motive.

Contrary to the Second Circuit's opinion below, the general terms "discriminate" and "because of" in the initial section of SOX do not insert "intentionally" or "motivated by" into the statute's elemental burdens of proof. First, these terms do not provide the unambiguous language that the Second Circuit relies on, nor do they, when read in the context of the statute, "require[] retaliatory intent." *Murray v. UBS Sec., LLC*, 43 F.4th 254, 259 (2d Cir. 2022). Contrary to the Second Circuit's bold declaration that "discriminate" requires "conscious disfavor[ing]," this Court has repeatedly recognized that "discriminate" is not unambiguous and does not inherently require intent or motive. *See*, *e.g.*, *Burlington N. R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 463 (1987) (rejecting the Tenth's Circuit's holding that 49 U.S.C. § 11503(b), precluding states from taking certain "acts" that "unreasonably burden and discriminate against interstate commerce," requires "discriminatory intent," and finding that "nowhere does it refer to the intent of the actor," despite using the word "discriminate"); *see also CSX Transp., Inc. v. Alabama Dep't of Revenue*, 562 U.S. 277, 298–99 (2011) (Thomas, J. dissenting) (joined by Ginsburg, J.) (detailing the ambiguity of the word "discriminate" as evidenced in this Court's prior opinions).

Moreover, the phrase "because of" does not alone require that an actor have a specific intent or motive. In fact, as this Court has acknowledged, the level of causal connection required by the phrase "because of" can be determined by subsequent provisions within the same statute that dictate the burden of proof for the claims. *See Univ. of Tex. Sw.*

Med. Ctr. V. Nassar, 570 U.S. 338, 352-354 (2013) (Congress' choice to insert a less burdensome "motivating factor" standard into 42 U.S.C. § 2000e-2(m) changed the elemental burden of proof for claims of discrimination "*because of* [an] individual's race, color, religion, sex or national origin," but did not change the elemental burden of proof for claims under 42 U.S.C. § 2000e-3(a), which bars discrimination "*because*" the individual engaged in protected conduct (emphasis added)).

Second, the context and structure of SOX establish that the general terms "discriminate" and "because of" must be read in conjunction with, and with deference to, the more specific "burdens of proof" dictated in Section 1514A(b)(2)(C), *i.e.* that a plaintiff need only prove her protected activity was a contributing factor in the unfavorable personnel action. *See id.* Through 18 U.S.C. § 1514A(b)(2)(C), Congress explicitly delineated the applicable elemental burdens of proof, and the Second Circuit's decision is contrary to that delineation and this Court's repeated maxim to apply laws as they are written.

Congress' decision to not require plaintiffs under SOX to bear the burden of proof as to the defendant's intent or motive was deliberate and aimed at fulfilling the remedial purposes of the statute. The lack of such an intent requirement serves the purpose of SOX by more effectively discouraging retaliation against whistleblowers who come forward to report fraud on the financial markets. The whistleblower protections of SOX are broad and forgiving to pierce through the prevalent corporate "code of silence" that has enabled some of

the largest frauds in the past half-century. Whistleblowers have long been recognized as a necessary tool to expose illegal conduct that can, if unchecked, not only victimize countless individual investors but also have broad and negative impacts on the markets and society as a whole. The whistleblower protections under Section 1514A are about more than simply providing a remedy to an individual whistleblower who loses a job; they are intended to encourage employees to come forward and shine a light on their employer's financial frauds. The Second Circuit's requirement that plaintiffs prove the defendant's intent in order to receive these protections would discourage would-be whistleblowers from taking the significant risk of coming forward to report financial frauds. Unless reversed, the decision will insulate financial misconduct from detection and prosecution. Investors, financial markets, and potentially our entire economic system will suffer the negative consequences.

ARGUMENT

I. The Specific "Burdens of Proof" Selected by Congress Control the Elements of a Plaintiff's Case in Chief Under SOX, Not the General Terms on Which the Second Circuit Relied.

The starting point for determining the elemental burden of proof imposed on plaintiffs under SOX is the language of the statute itself. Section 1514A(b)(2)C) explicitly and clearly lays out the "[b]urdens of proof" (as its heading states) that plaintiffs and defendants in SOX cases bear: "An

action … *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) (emphasis added). Section 42121(b), in turn, imposes the burden on plaintiffs to demonstrate that their protected activity "was a contributing factor in the unfavorable personnel action alleged." 49 U.S.C. § 42121(b)(2)(B)(iii). If the plaintiff meets this burden, Section 42121(b)(2)(B)(iv) shifts the burden of proof to defendants to "demonstrate by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior." Neither Section 1514A(b)(2)(C) nor Section 42121(b) mentions or imposes the burden on a plaintiff to establish the defendant's intent or motive. In fact, by using the word "contribut[e]," the statute does the opposite: It imposes a burden on the plaintiff to prove that her protected activity was simply "[a] factor that — though not the primary cause — plays a part in producing" the challenged personnel action. *See Cause*, Black's Law Dictionary (11th ed. 2019) (defining "contributing cause").

By enacting a provision that specifies the burdens of proof to be imposed on the parties under SOX, 18 U.S.C. § 1514A(b)(2)(C), Congress defined the generalized prohibition under 15 U.S.C. § 1514A(a) with a relaxed requirement for the plaintiff. This is not a novel concept. In Title VII, Congress similarly enacted a general provision prohibiting "discriminat[ion] … because of" protected status, *see* 42 U.S.C. § 2000e–2(a)(1), and then later in time and structure enacted a provision that defined and relaxed this broad standard, *see id.* at (m). *See*

E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 772–73 (2015) (discussing how subsection (m) "relaxes" the traditional but-for standard). Just as in Title VII, which requires that a plaintiff "establish" that their protected status was a "motivating factor" in the challenged personnel action, SOX's specification of the burdens of proof, *i.e.* what the parties must each establish and persuade the jury of, "relaxes" and defines what would otherwise be required if the phrase "discriminate … because of" stood alone.

Further, the clear requirements of SOX are evident by what Sections 1514A(b)(2)(C) and 42121(b) lack – neither mentions the defendant's intent or motive as part of the plaintiff's burden of proof at trial. In *E.E.O.C. v. Abercrombie & Fitch Stores*, this Court rejected the argument that a plaintiff must prove that the defendant knew of the need for a religious accommodation, noting that the prohibitions of 42 U.S.C. § 2000e–2(a)(1) and (m) do not mention or impose a knowledge requirement. *See* 575 U.S. at 772–73. Similar to the absence of a knowledge requirement in *Abercrombie & Fitch Stores*, neither Section 1514A(b)(2)(C) nor the burdens of proof specified by Congress in Section 42121(b) mentions or imposes an intentionality requirement.

The entire concept of a contributing factor, in contrast to an intent-based standard or a motivating-factor standard, is that it focuses on the harmful effects of the defendant's conduct, not the defendant's mental state. Congress, in an oft-quoted explanatory statement, characterized a "contributing factor" as:

> 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 [or her] protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action in order to overturn that action.

135 Cong. Rec. 5033 (1989). "Any" weight given to the protected disclosure, either alone or in combination with other factors, can satisfy the "contributing factor" test. *Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993).

Under the specific burdens of proof in SOX, the plaintiff need only establish that her protected conduct played a role in producing the challenged personnel action, without any showing of the defendant's intent or motive. To find otherwise would misread the plain language of the statute. Moreover, it would interpret SOX in a manner contrary to how this Court has interpreted other statutes that use a specific provision to articulate what a party must establish in order to meet a generalized prohibition against "discrimin[ation] … because of" some protected status or act.

II. The Vague and General Phrases "Discriminate" and "Because of" Do Not Require That Plaintiffs Prove the Defendant's Intent in SOX Claims.

Turning to the substantive prohibition against retaliation in SOX, Section 1514A(a) makes it

unlawful to "discriminate against an employee in the terms and conditions of employment because of" the employee's protected activities. This language does not alter the burdens of proof that Congress explicitly established for SOX retaliation claims, as discussed above. Moreover, a close examination of these words and phrases reinforces the point. The statute does not spell out what level of differentiation is required to "discriminate" or what role the protected activity must play in a personnel action to make it "because of" such protected activity. Contrary to the Second Circuit's opinion, the vague and ambiguous phrases "discriminate" and "because of" do not provide clarity on these matters. Rather, one must look to the statute as a whole and read it within the structure and context that Congress chose to derive the contours of this generalized prohibition. Those sources make clear that, in this context at least, the reference to discrimination does not require a showing of intent.

Congress intended to create a statutory scheme that protected whistleblowers from personnel actions that their protected activity played a role in triggering. In furtherance of this goal, it selected "legal burdens of proof" – the contributing factor standard of 49 U.S.C. § 42121(b) – that would provide such protections regardless of the employer's motives or intent. In enacting SOX with explicit burdens of proof incorporated, Congress did exactly what is necessary to provide the clear and specific legislative direction that this Court has previously encouraged. The words "discriminate" and "because of" do not override this plain language and Congressional intent. SOX simply does not impose

on plaintiffs a requirement that they prove the defendant's intent or motive as part of their burden of proof.

A. The Phrases "Discriminate" and "Because of" are Vague and Ambiguous on Their Own, and Do Not Provide the Level of Clarity Required to Override Congress' Clear Directive as to the Burdens of Proof Required Under SOX.

The Second Circuit's novel requirement that plaintiffs bear the burden of proving the defendant's retaliatory intent or motive is based entirely on purported definitions of "discriminate" and "because of" that distort the meaning of these terms and conflict with this Court's precedents. *See Murray,* 43 F.4th at 259-260.

The Second Circuit confidently asserts that the word "discriminate" requires a prejudicial act and "requires a conscious decision to act based on a protected characteristic or action." *Id.* at 259. It also states, based on a Title VII case addressing different burdens of proof than Section 1514A(b)(2)(C) incorporates, that "actions are 'discriminat[ory]' when they are based on the employer's conscious disfavor of an employee for whistleblowing." *Id.* However, this Court has repeatedly held that the "normal definition" of "discrimination" is merely "differential treatment." *Babb v. Wilkie*, 140 S. Ct. 1168, 1173 (2020); *see also Olmstead v. L. C.,* 527 U.S. 581, 614 (1999) (KENNEDY, J., concurring in judgment) (the "normal definition of discrimination" is "differential treatment"); *see also CSX Transp.,*

Inc. v. Alabama Dep't of Revenue, 562 U.S. 277, 286–87 (2011).

This Court has also rejected the argument that a statute requires proof of discriminatory intent merely by using the word "discriminate." In *Burlington N. R. Co. v. Oklahoma Tax Comm'n,* the Court interpreted 49 U.S.C. § 11503(b), which precluded states from taking certain "acts" which "unreasonably burden and discriminate against interstate commerce," and rejected the Tenth's Circuit's holding that this statutory language requires "discriminatory intent." 481 U.S. at 463. The Court found that "nowhere does [the statute at issue] refer to the intent of the actor," despite using the word "discriminate." *Id.*

As Justice Thomas has noted, "'[d]iscriminates,' standing alone, is a flexible word." *CSX Transp., Inc.*, 562 U.S. at 298–99 (Thomas, J. dissenting) (comparing varying applications of the word "discriminate" in the Court's precedent). The word "discriminate" is not so definite as to be clear and unambiguous on its face, and it certainly does not necessarily require proof of intent. *See*, *e.g.*, *Guardians Assn. v. Civil Serv. Comm'n of New York City,* 463 U.S. 582, 592 (1983) (opinion of White, J.) ("The language of Title VI on its face is ambiguous; the word 'discrimination' is inherently so"); *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 284 (1978) (opinion of Powell, J.) ("The concept of 'discrimination' ... is susceptible of varying interpretations").

Similarly, the phrase "because of" does not require motive or intent to be established. As the

Second Circuit noted, "because of" merely means "by reason of" or "on account of," and "connot[es] a causal relationship between the parts of the sentence the phrase connects." *Murray,* 43 F.4th at 259. To reason from this basic definition as a causal connector that "[a] discriminatory action 'because of' whistleblowing therefore necessarily requires retaliatory intent—i.e., that the employer's adverse action was motivated by the employee's whistleblowing," *id.*, is a step too far.

This Court has recently rejected the idea that such generic causal connection phrases impose a discriminatory intent requirement. In *Allen v. Milligan* this Court addressed a claim that Alabama's redistricting plan, *inter alia*, diluted votes in violation of § 2 of the Voting Rights Act (VRA). 599 U.S. ___, ___, 2023 WL 3872517 (U.S. June 8, 2023). Section 2 of the VRA prohibits States from imposing any "standard, practice, or procedure ... in a manner which results in a denial or abridgement of the right of any citizen ... to vote *on account of* race or color." 52 U.S.C. § 10301(a) (emphasis added). The Court noted that, despite the general causal connection phrase "on account of," "§ 2 turns on the presence of discriminatory effects, *not discriminatory intent*," *id.* at *12–13 (emphasis added), for "[i]t is patently clear that Congress has used the words 'on account of race or color' in the Act to mean 'with respect to' race or color, and not to connote any required purpose of racial discrimination." *Thornburg v. Gingles*, 478 U.S. 30, 71 n.34 (1986) (plurality opinion) (some alterations omitted). *Allen* and *Gingles* demonstrate this Court's position that general causal connection phrases such as "because of" and "on account of,"

which are synonymous with each other, do not inherently require proof of intent or motive.

Moreover, as described above, the causal connection connoted by the phrase "because of" is subject to and defined by statutory provisions that impose a more relaxed standard than the "but-for" standard that the phrase generally carries. *See Abercrombie & Fitch Stores, Inc.*, 575 U.S. at 772–73 (noting that Title VII "relaxes" the usual but-for standard imposed by the phrase "because of" in 42 U.S.C. § 2000e-2(a)(1) by specifying a violation is "established when the complaining party demonstrates" that her protected status was a "motivating factor" for the challenged employment practice). Consequently, it is improper to interpret the phrase without reference to later provisions that actually provide the standard by which the causal connection is established.

Thus, the phrases "discriminate" and "because of" are far from clear and unambiguous and do not necessarily impose an intent or motive element on plaintiff's burden of proof. Instead they are general phrases that are subject to varying interpretations based on the other language in, structure of, and context provided by the statute as a whole. The Second Circuit's reliance on them failed to account for these factors and was therefore misplaced. As described above and below, Congress' decision to establish burdens of proof that do not require the plaintiff to prove the defendant's intent or motive provides the appropriate guidance on what Section 1514A(a) means by "discriminate … because of."

B. The Structure of Section 1514A Establishes that the Burdens of Proof Selected by Congress Provide the Contours and Context of the Generalized Phrase "Discriminate … Because of."

Section 1514A's structure precludes the Second Circuit's interpretation requiring a showing of retaliatory intent. By enacting Section 1514A(b)(2)(C), Congress chose to provide precise and explicit burdens of proof that must be met by the plaintiff to establish that she was "discriminated against … because of" her protected activity. Congress' specific pronouncement of the elemental burdens of proof for a SOX claim in (b)(2)(C), which do not contain any requirement that the plaintiff prove the defendant's intent or motive, provide the context that defines the contours of the generalized prohibitions of Section 1514A(a).

As Justice Thomas has stated, "[e]ven though 'discriminate' has a general legal meaning relating to differential treatment, its precise contours still depend on its context." *CSX Transp., Inc.*, 562 U.S. at 298–99 (Thomas, J. dissenting). Similarly, it is apparent that what sort of associational nexus the phrase "because of" requires is also defined by the broader structure of the statute at issue. For instance, this Court determined in *Nassar* that the phrase "because" in Title VII's anti-retaliation provision requires "but for" causation to establish discrimination on the basis of protected conduct. 570 U.S. at 352-354. However, at the same time, the Court noted that Congress' insertion of the motivating factor standard in 42 U.S.C. § 2000e-2(m)

dictated the elemental burden of proof for claims of discrimination "because of [an] individual's" protected status under Title VII's anti-discrimination provisions. *Id.* Thus, the Court acknowledged that the contours of the phrase "because of" depend on the design and structure of a statute, including specific provisions that later define what that phrase means within the context of the relevant statute.

As a general rule, in addition to the actual language used, statutory interpretation focuses on "the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341 (1997). "After all, 'a statute's meaning does not always turn solely on the broadest imaginable definitions of its component words.'" *Id.* Instead, "'[l]inguistic and statutory context also matter.'" *Dubin v. United States*, ___ U.S. ___, ___, 2023 WL 3872518, at *6 (U.S. June 8, 2023) (citations omitted) (*quoting Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1631 (2018)).

In the opinion below, the Second Circuit relied primarily on definitions pulled from a few select dictionaries to find that SOX unambiguously imposed a burden on plaintiffs to prove defendants' intent. However, this Court has cautioned against such an approach in relation to other sections enacted by the same statute. In *Yates v. United States*, 574 U.S. 528, 537–38 (2015), this Court ruled that the phrase "tangible object" under 18 U.S.C. § 1519, which criminalizes "knowingly alter[ing], destroy[ing], mutilate[ing], conceal[ing], cover[ing] up, falsif[ying], or mak[ing] a false entry in any record, document, or tangible object," does not include undersized fish thrown back by fishermen. The Court overruled a

decision that, like the Second Circuit's here, relied primarily on dictionary definitions of individual words within a phrase without consideration of the context in which those words were placed. The Court noted that "[w]hether a statutory term is unambiguous . . . does not turn solely on dictionary definitions of its component words," the words must be read in the context of the provision and the statute as a whole, because "[i]n law as in life . . . the same words, placed in different contexts, sometimes mean different things." *Id.* The Court has often "affirmed that identical language may convey varying content when used in different statutes…" *Id.* Ultimately, the Court found that Section 1519 must be read in the context of the statute in which it was passed, *i.e.* the Sarbanes-Oxley Act. *Id.* at 536. The Court noted that the enactment of the Sarbanes-Oxley Act "was prompted by the exposure of Enron's massive accounting fraud and revelations that the company's outside auditor, Arthur Andersen LLP, had systematically destroyed potentially incriminating documents." *Id.* 535-36. Given this context, as well its textual analysis, the Court ruled that the phrase "tangible object" in Section 1519 does not included undersized fish, as they have no connection to harm that Congress was seeking to prohibit.

Here, starting with Section 1514A's title, "[c]ivil action to protect against retaliation in fraud cases," it is apparent that the statute's intent and structure is to "protect" whistleblowers and encourage them to come forward, not merely preclude *intentional* retaliation. As this Court has held, when key terms are "elastic" in their meaning, they must be construed "'in light of the terms surrounding

[them],' and the title Congress chose is among those terms." *Dubin, 2023 WL 3872518, at *7* (*quoting Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004)). The word "protect" does not require that the action being guarded against must be intentional. *See Protect*, Merriam-Webster online, *available at* https://www.merriam-webster.com/dictionary/protect (last visited July 3, 2023) ("to cover or shield from exposure, injury, damage, or destruction"). In fact, the highest levels of protection are afforded when no intent is required. Congress could have inserted the word "intentional" before retaliation, but it did not.

Next, Congress chose to neither include within Section 1514A(a) any requirement that the defendant's differential treatment, *i.e.* discrimination, be "intentional" nor that the required nexus between the plaintiff's protected activity and the personnel action be that such protected activity was the "motivation" for the defendant's acts. If Congress had intended SOX to require a plaintiff to prove the defendant's intent or motive as part of her case in chief, then it could have so stated. *See United States v. LaBonte*, 520 U.S. 751, 757 (1997) ("[W]e assume that in drafting legislation, Congress said what it meant."). Instead, Congress decided to incorporate and use an established burden of proof that did not consider or mention the defendant's intent or motive.

Finally, Congress' explicit incorporation and use of the "legal burdens of proof" in 49 U.S.C. § 42121(b), *see* 18 U.S.C. § 1514A(b)(2)(C), which require a plaintiff to bear the burden of proving that her protected activity was a "contributing factor" in the personnel action, provides decisive structural and

contextual guidance as to what the otherwise elastic phrase "discriminate … because of" actually contemplates under SOX. A "contributing cause" is defined as "[a] factor that — though not the primary cause — plays a part in producing a result." *Cause*, Black's Law Dictionary (11th ed. 2019). This definition is consistent with how the "contributing factor" burden of proof was understood and used at the time Congress enacted SOX. *See* 135 Cong. Rec. 5033 (1989) (regarding the WPA); *Marano*, 2 F.3d at 1140 (same). The term "contributing factor" first appeared in the Whistleblower Protection Act of 1989 (WPA), 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. In enacting the "contributing factor" standard, Congress determined that requiring civil service whistle-blowers to show that their protected activity "constituted a 'significant' or 'motivating' factor" imposed an "excessively heavy burden … on the employee." *Marano*, 2 F.3d at 1140 (discussing legislative history). Congress used the term "contributing factor" to affect a "substantial reduction of the whistleblower's burden" from the substantial and motivating factor standards that governed other employment retaliation claims. *Id.* (citations omitted). Congress chose to create the "contributing factor" standard because, "*[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) (emphasis added), *quoted in Marano*, 2 F.3d at 1141.

Congress could have indicated its intent to require proof of the defendant's intent or motive in any number of ways: It could have inserted the words intentional or motivating into either Section 1514A(b)(2)(C) or Section 42121(b); it could have incorporated a different burden of proof altogether (such as the motivating factor standard) that explicitly required proof of intent; it could have cited a different statute's burdens of proof; or it could have simply omitted any specific description of the burdens of proof under SOX. However, that is not what Congress did; rather, it chose to explicitly use and incorporate a burden of proof that did not impose on the plaintiff the burden of proving the defendant's intent or motive. The Second Circuit's holding that "to prevail on the 'contributing factor' element of a SOX antiretaliation claim, a whistleblower-employee must prove that the employer took the adverse employment action against the whistleblower-employee with retaliatory intent—*i.e.*, an intent to 'discriminate against an employee ... because of' lawful whistleblowing activity," 43 F.4th at 259–60, turns Congress' chosen language and structure on its head by permitting the generalized phrases in Section 1514A(a) to add nonexistent elements to the specific "burdens of proof" adopted by Section 1514A(b)(2)(C) and articulated in Section 42121(b). Such an interpretation of SOX is erroneous.

III. Requiring Plaintiffs to Prove the Defendant's Retaliatory Intent, in Addition to the Burdens of Proof Explicitly Selected by Congress, Would Undermine the Broad Remedial Purposes of SOX and Discourage Would-be Whistleblowers from Breaking the Corporate "Code of Silence" and Supplying Critical Evidence of Wrongdoing.

Congress enacted SOX following the Enron and WorldCom financial frauds, which each had profound effects on the U.S. economy and the investing public. In *Lawson v. FMR LLC,* 571 U.S. 429 (2014), this Court noted that SOX was passed after Congress learned that "Enron had succeeded in perpetuating its massive shareholder fraud in large part due to a 'corporate code of silence,'" which "discourage[d] employees from reporting fraudulent behavior …." *Id.* at 447 (quoting S.Rep. 107-146, pp. 10, 2 (2002)). During the Congressional hearings that led to SOX's passage, Congress heard from Sherron Watkins, an Enron internal accountant, who described how she had reported to CEO Ken Lay, in an anonymous letter and an in-person meeting, that Enron and its accounting firm were engaging in financial improprieties. *See The Financial Collapse of Enron—Part 3: Hearing Before the Subcomm. On Oversight & Investigations of the H. Comm. On Energy & Commerce*, 107th Cong. 14-66 (2002). When Ms. Watkins' supervisor and Enron's attorneys found out about her reporting, they launched a plan to terminate her, citing the apparent lack of any prohibition on such conduct. *See id.* at 18-19; *see also*

Moberly, Richard, Sarbanes-Oxley Whistleblower Provisions: Ten years Later, 64 South Carolina Law Review 1, at 5 (2012). Combatting such corporate codes of silence through protecting and encouraging whistleblowers is the broad remedial purpose of SOX.

Recent enforcement actions and recoveries made possible by SEC whistleblowers demonstrate the vital need for whistleblowers in the financial markets. For instance, in May of 2023, a whistleblower received a large award under the SEC's whistleblower program which stemmed from a $1.1 billion settlement involving allegations that telecommunications company, Ericsson, had lied to investors and engaged in a massive corruption and bribery scheme.[2] Overall, enforcement actions resulting from whistleblower tips have recovered more than $6 billion in financial remedies. U.S. Securities and Exchange Commission, https://www.sec.gov/page/whistleblower-100million. These actions depend on the willingness of whistleblowers to come forward not only to reveal often hidden acts of wrongdoing but also to help prove them in court. If whistleblower protections under SOX (the primary protection for securities fraud whistleblowers) are weakened by requiring proof of defendants' intent, recoveries such as these will decline as those who commit financial fraud are emboldened to intimidate whistleblowers and thereby suppress vital evidence of their wrongdoing..

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[22] *Record $279 Million Whistleblower Award Went to a Tipster on Ericsson*, WALL ST. J.(May 26, 2023), https://www.wsj.com/articles/record-279-million-whistleblower-award-went-to-a-tipster-on-ericsson-5af40b98.

One study noted that in "circumstances where an organization is dependent upon the continuation of the wrongdoing or when they are not dependent upon the whistleblower . . . the organization is more likely to retaliate against the whistleblower and continue the wrongdoing." Jessica R. Mesmer-Magnus, et al., *Whistleblowing in Organizations: An Examination of Correlates of Whistleblowing Intentions, Actions, & Retaliation*, 62 J. Bus. Ethics 277, 281 (2005). That same study also found that whistleblowers who report significant and/or frequent wrongdoing face greater risks of retaliation. *Id.* at 292. Retaliation against whistleblowers is swift, and often occurs immediately after they report internally. *See* Terry Morehead Dworkin et al., *Internal vs. External Whistleblowers: A Comparison of Whistleblowing Processes*, 17 J. Bus. Ethics 1281, 1296 (1998).

Protection from retaliation is crucial to encouraging whistleblowers to come forward and report financial fraud, and whistleblowers take significant personal and financial risk when they make the brave decision to do so. For example, a 2004 Congressional Research Service report described the difficulties of pointing out suspected wrongdoing in a corporate setting and identified the types of retaliation that whistleblowers suffered. *See* Mark Jickling, Cong. Research Serv., RL32718, *Barriers to Corporate Fraud: How They Work, Why They Fail* 31 (2004):

> Corporate wrongdoers naturally do not wish to have their actions exposed. Individuals in positions of authority can utilize direct threats such as

> termination, denied promotions, salary stagnation, undesirable transfer, etc. More subtle pressure can also be used, such as reminders that performance reviews are imminent or that being a "team player" is an important factor. Compensation packages for many depend on performance measures that would be negatively affected by a revelation of wrongdoing. Finally, regardless of its merit, an organization has a tendency to punish the bearer of bad news. Individuals are thus reluctant to assume this role.

Whistleblowers often suffer negative impacts for the rest of their lives, leading to psychological distress, bankruptcy, divorce, and more. *The False Claims Act Correction Act (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century, Hearing on S. 2041, The False Claims Act Correction Act Before the S. Comm. on the Judiciary*, 110th Cong. 19-21 (2008). Whistleblowers who risk termination and lasting impacts on their personal lives should be afforded the strongest protections possible from retaliation when they make the difficult decision to bring fraud to light, and they should not face additional burdens in proving their case that were not contemplated by Congress in enacting those protections.

It is a general "canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). On the flipside of this canon is the principle that courts must refrain from

construing a remedial statute in ways "incompatible with ... Congress' regulatory scheme" or in ways that would "destroy one of the [statute's] major purposes." *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 778 (2018) (citations omitted). "Congress installed whistleblower protection in the Sarbanes–Oxley Act ['SOX'] as one means to ward off another Enron debacle," *Lawson,* 571 U.S. at 447, and to protect employees—who "are [often] the only firsthand witnesses to the fraud," *id.* at 434 (quoting S.Rep. 107–146, p.2).

An interpretation of SOX that imposes an elemental burden of proof on plaintiffs to establish the defendant's intent or motive would undermine the broad remedial purpose of SOX and Congress' intent to provide substantial protection for and encouragement of whistleblowers. The Second Circuit's opinion below imposes an elevated burden on plaintiffs that Congress did not intend and that would ultimately chill would-be whistleblowers from coming forward with information that could prevent, or at a minimum expose, the next great financial fraud. In the False Claims Act context, witnesses testified that they did not blow the whistle on fraud because of the lack of retaliation protections. *The False Claims Act Correction Act of 2007: Joint Hearing on H.R. 4854 Before the Subcomm. on Courts, the Internet, and Intellectual Prop. and the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary, 110th Cong. 124* (2008). Diluting those protections by increasing a whistleblower's burden of proof to show retaliation would similarly dissuade whistleblowers from coming forward to expose fraud in the financial markets.

A rule requiring a plaintiff to establish the defendant's discriminatory intent, in addition to the burdens of proof chosen by Congress, would perpetuate the corporate codes of silence that today's fraudsters still rely on to conceal their misconduct. On the other hand, requiring plaintiffs simply to prove that their protected activity was a contributing factor in the challenged personnel action, without imposing an additional intent element, will better protect investors, bring more wrongdoing to light, and serve the strong and broad remedial purposes of SOX.

In sum, the Second Circuit's decision below improperly grafts onto SOX a requirement that plaintiffs bear the burden of establishing the defendant's discriminatory intent. This decision elevates general and ambiguous phrases over specific provisions that Congress explicitly implemented to define the burdens of proof that the parties bear under SOX. The language, context, and structure of SOX define the contours of what "discriminate … because of" means under the statute. They establish that neither intent nor motive are an element that the plaintiff bears the burden of proving. Finally, the imposition of a burden of proof on plaintiffs beyond that which Congress chose to incorporate into the statute would undermine and defeat the broad remedial purpose behind SOX. For these reasons, the Second Circuit's opinion below must be reversed to make clear that SOX and the other statutes incorporating or using the contributing factor standard do *not* require the plaintiff to prove that the defendant possessed a discriminatory intent or

motive. Such plaintiffs need only prove that their protected activity was a contributing factor in the challenged personnel action, thus shifting the burden of proof to the defendant as to its affirmative defense.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully Submitted,

/s/

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