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 WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether plaintiffs must prove retaliatory intent to prevail on a whistleblower claim under Sarbanes-Oxley.

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Raytheon Co. v. Hernandez,
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TABLE OF AUTHORITIES
(*continued*)

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TABLE OF AUTHORITIES
(*continued*)

Page(s)

S. Rep. No.
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Other Authorities

Cameron Abadi, *Adam Tooze: Why the Economic Gap Between the U.S. and Europe Is Growing*, Foreign Policy (June 23, 2023).....23

Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining 'Discrimination,'* 70 Geo. L.J. 1 (1981).....7

Dick Thornburgh et al., *Free Enterprise, Left Behind after Sarbanes-Oxley*, WLF CONVERSATIONS WITH (Mar. 14, 2008).....1

Donn C. Meindertsma & Ryan T. Scharnell, *High Court Extends Federal Whistleblower Protection to Public Companies' Private Contractors*, WLF LEGAL BACKGROUNDER (May 9, 2014).....1

Judith Welch Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 Cornell L. Rev. 401 (1984).....7, 14

TABLE OF AUTHORITIES
(*continued*)

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U.S. Gov't Accountability Off., GAO-15-191, *FEDERAL WORKFORCE: Improved Supervision and Better Use of Probationary Periods Are Needed to Address Substandard Employee Performance* (Feb. 2015) 21

INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as amicus urging proper interpretation of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745. *See, e.g.*, *Yates v. United States*, 574 U.S. 528 (2015); *Neer v. Perlino*, No. 05-4830 (3d Cir. brief filed May 17, 2006).

WLF's Legal Studies Division publishes papers on the harms of extending SOX liability beyond its statutory text. *See, e.g.*, Donn C. Meindertsma & Ryan T. Scharnell, *High Court Extends Federal Whistleblower Protection to Public Companies' Private Contractors*, WLF LEGAL BACKGROUNDER (May 9, 2014); Dick Thornburgh et al., *Free Enterprise, Left Behind after Sarbanes-Oxley*, WLF CONVERSATIONS WITH (Mar. 14, 2008).

INTRODUCTION

When SOX was passed over twenty years ago, only a small cadre of attorneys focused on whistleblower litigation. That meant that only a few lobbyists were pushing an agenda tied to whistleblowing. Today, however, representing whistleblowers in court is big business. Many attorneys have made a fortune suing companies under SOX. These attorneys have formed a powerful lobby that peddles money, and thus influence, on

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* No person or entity, other than Washington Legal Foundation and its counsel, paid for the brief's preparation or submission.

Capitol Hill. The lobby tries to make it easier to extort money from companies by expanding SOX liability. The unions have happily jumped on board these attempts at expanding the scope of liability, hoping to make it harder for companies to fire underperforming workers.

When the whistleblower lobby fails in the halls of Congress, it shifts its agenda to the courts. That is what has happened here. The top-side briefs try to paint a picture of virtuous employees who are being fired for their good-faith reporting of corporate misconduct. What is happening, however, is that companies are making sound business decisions that do not discriminate based on whether employees report alleged misconduct.

Companies—not courts—make the best staffing decisions. Although there may be a temporal proximity between reported wrongdoing and staff reshuffling, it does not follow that there is discrimination based on whistleblowing activities. Rather, there are many innocent explanations for why reported wrongdoing may lead to staff reductions or realignment.

In other words, businesses are accountable for their conduct. This differs from how the federal government operates. Today's civil-service system is broken. Federal employees enjoy de facto life tenure; it is nearly impossible to be dismissed from a civil-service job. That is why good customer service from the Internal Revenue Service or the Social Security Administration is so rare while it is common to get good customer service at a bed and breakfast.

The top-side briefs, however, try to graft onto SOX the framework for federal employee whistleblowers. This simply makes no sense. At a basic level, the statutes use different language because they have different burden-shifting frameworks. But even overlooking that technicality, it makes no sense to force companies to behave like the federal government. Doing so would harm our nation's economy. This Court should thus reject the top-side's pleas to give companies' employees the same protections that federal workers enjoy.

STATEMENT

I. STATUTORY BACKGROUND

Under SOX, no company may "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any" act protected by SOX. 18 U.S.C. § 1514A(a). SOX does not itself say who bears the burden of proof for a whistleblower claim. *See* 18 U.S.C. § 1514A(b)(2)(C). Rather, it borrows from another statute, under which an employee must prove, among other things, that his protected activity was a "contributing factor" in an adverse employment action. *See* 49 U.S.C. § 42121(b)(2)(B). If an employee meets that burden, the burden shifts to the employer to prove by clear and convincing evidence that it "would have taken the same unfavorable personnel action in the absence of that behavior." *Id.*

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Murray worked as a strategist in UBS's commercial mortgage-backed securities business. In that role, he published market research. Because strategists don't generate revenue, the position is unnecessary to UBS's business. Due to market pressures, UBS decided not to expand its mortgage-backed securities business. That made Murray's position a luxury. As UBS was in financial trouble, it could not afford luxuries.

UBS eventually decided to cut seven positions in Murray's unit. UBS cut Murray's position because it had decided not to expand its commercial mortgage-backed securities business. In other words, UBS made the business judgment to save money by eliminating the research group's sole commercial mortgage-backed securities job. Because it could not transfer Murray to a different position, UBS let him go.

Murray sued, alleging that UBS violated SOX by firing him after pressuring him to skew his public research. At trial, the judge refused to instruct the jury that Murray had to prove that UBS intentionally retaliated against him. Rather, the judge instructed the jury that Murray need show only that his whistleblowing activities tended to affect, in any way, UBS's decision to terminate his employment. *See* J.A. 130. After the jury found for Murray, the district court entered final judgment. The Second Circuit reversed, unanimously holding that "retaliatory intent is an element of a section 1514A claim." Pet. App. 8a. As the court explained, "[t]he unambiguous, ordinary meaning of section 1514A's statutory language

requires retaliatory intent." Pet. App. 9a. After the Second Circuit denied Murray's rehearing petition, this Court granted certiorari to consider the issue.

SUMMARY OF ARGUMENT

I.A. When Congress passes statutes, it chooses its language carefully. If it wants plaintiffs to prove intent when bringing a claim, it uses the unmodified word "discriminate" to express that wish. When it wants to allow plaintiffs to prevail without proving intent, it uses broad language that shows that desire. Both this Court and the courts of appeals have consistently interpreted various statutes in this way. The difference in language shows that plaintiffs must prove intent to prevail under SOX even though federal employees need not prove intent to prevail under the Whistleblower Protection Act.

B. Congress also chooses statutory words for a reason. There are sound public policy reasons for requiring plaintiffs to prove intent under some statutory causes of action but not under others. There are particularly good reasons for not requiring federal employees to show intent under the WPA while requiring private employees to show intent under SOX. Murray and his amici overlook these congressional policies when asking this Court to make a different policy choice.

II.A. Murray's argument that the WPA and SOX should share the same interpretation lacks merit. The two statutes are worded differently for a reason. True, some isolated language is similar. But read in context, SOX's language requires plaintiffs to

prove intent while the WPA's language does not. This Court's analysis should end there.

B. If the Court looks beyond the two statutes' plain language, legislative history shows that Congress wanted different burdens for federal employees and private employees. Before the WPA's enactment, President Reagan vetoed a similar bill because he thought that federal employees should have the same burden as private employees. During debates on the WPA, members of Congress said they wanted to lessen the burden on federal employee whistleblowers. And after the WPA's passage, Congress kept passing statutes that treated federal employees differently from private employees.

C. It is nearly impossible to fire federal employees, no matter how badly they perform. Private companies, meanwhile, often fire underperforming workers. This helps explain why Congress relieved federal employees of the burden to prove intent. If a federal agency takes adverse employment action against a whistleblower, it is almost certainly discrimination. The same is not true in the private sector. This is yet another reason that the WPA and SOX should not be interpreted similarly.

ARGUMENT

I. INTENT IS IMPORTANT IN DISCRIMINATION CASES.

Murray and his amici try to distract this Court from SOX's plain language and the relevant case law. They refuse to admit that SOX bars discrimination

based on protected whistleblower activity. That fact makes SOX an anti-discrimination statute that should be treated as such. Murray and his amici, however, try to run away from this anti-discrimination component of SOX's whistleblower protections. And for good reason—it sinks their case.

A. Congress Uses Distinct Language When Requiring Plaintiffs To Prove Intent.

1. Congress began passing anti-discrimination statutes after the Civil War. At the time, "discrimination was often characterized by overt denials of equal opportunity, which were the product of acknowledged racial animus." Judith Welch Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 Cornell L. Rev. 401, 429 (1984) (citing *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 386-88 (1982)). Thus, "federal civil rights statutes of the period specifically address purposeful discriminatory conduct of this type." *Id.* (citing 42 U.S.C. §§ 1981, 1985(3)).

Over the past few decades, Congress has been sharply divided on whether to keep the intent requirement for anti-discrimination statutes. Often, the debates have been heated. *See* Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining 'Discrimination,'* 70 Geo. L.J. 1, 34-35 (1981). Congress has decided to keep the intent requirement for anti-discrimination statutes. In some other civil-rights and civil-rights-adjacent statutes, however, Congress has chosen to

eliminate the intent requirement. Congress has not eliminated the intent requirement under SOX.

2.i. When Congress uses the term "discrimination" without further qualification, it requires plaintiffs to show intent as part of their case in chief:

- Title VI bars discrimination. *See* 42 U.S.C. § 2000d. This requires that the plaintiff prove intent. *Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001).

- The Age Discrimination Act bars discrimination. *See* 42 U.S.C. § 6102. This too requires plaintiffs to prove intent. *See Kamps v. Baylor Univ.*, 592 F. App'x 282, 285-86 (5th Cir. 2014).

- The Immigration Reform and Control Act of 1986 also bars discrimination. 8 U.S.C. § 1324b. Unsurprisingly, it requires that plaintiffs prove intent. *See Robison Fruit Ranch, Inc. v. United States*, 147 F.3d 798, 801 (9th Cir. 1998).

ii. When Congress does not want to force plaintiffs to prove intent, it says so explicitly. And it has not hesitated to create disparate-impact liability—which does not require proving intent.

- Title VII makes it illegal "to deprive any individual of employment opportunities *or otherwise adversely affect* his status as an employee" for specific reasons. 42 U.S.C. § 2000e-2(a)(2) (emphasis added). The Court

has held that the "otherwise adversely affect" language naturally removes any intent requirement. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 429-31 (1971).

- The Age Discrimination in Employment Act similarly uses the "otherwise adversely affect" language. 29 U.S.C. § 623(a)(2). So plaintiffs can assert disparate-impact claims under the ADEA. *See Smith v. City of Jackson*, 544 U.S. 228, 235-36 (2005).

- States and localities violate Section 2 of the Voting Rights Act when, "*based on the totality of circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision *are not equally open* to participation by members of a class of citizens." 52 U.S.C. § 10301(b) (emphases added). Because Congress told courts to look at the totality of circumstances to decide whether election laws treat groups equally, it meant to relieve plaintiffs of the burden of proving intent. *See Chisom v. Roemer*, 501 U.S. 380, 394 (1991).

- Similarly, States and localities violate Section 5 of the Voting Rights Act when a voting qualification "has the purpose of or *will have the effect of* diminishing the ability [to vote] of any citizens of the United States on account of race or color." 52 U.S.C. § 10304(b) (emphasis added). This too allows plaintiffs to bypass the intent requirement. *Shelby Cnty. v. Holder*, 570 U.S. 529, 539 (2013).

- The Americans with Disabilities Act also employs "the effect of" language. 42 U.S.C. § 12112(b)(3)(A). So it is unsurprising that the Court has held that plaintiffs need not prove intent under the ADA. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003).

B. There Are Good Policy Reasons For Requiring Intent For Some Causes Of Action.

1. Persuasive policy reasons explain why Congress has declined to eliminate the intent requirement from some statutes. For example, plaintiffs can assert a disparate-impact claim under Title VII but not under Title VI. At first glance, this may seem odd. But Title VI addresses discrimination in programs receiving federal funding. The only reason that a program receives federal funding is because the government believes it benefits the community. So it makes sense that Congress does not want to hurt a program benefitting the entire community by permitting plaintiffs to recover for unintentional or incidental disparate treatment. In short, Congress desires to protect federal-funds recipients from baseless lawsuits.

Once the plaintiff proves that a federal-funds recipient has discriminated *because of race*, Congress has decided that pulling the federal funding is warranted. Although this may hurt the community, it is worth it because intentional discrimination based on race is insidious and must be rejected at every opportunity possible. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2161 (2023).

Congress has decided that the same concerns are not present in the Title VII context. There, Congress is regulating conduct irrespective of the receipt of federal funds. Allowing plaintiffs to sue for disparate impact under Title VII does not harm the public as much as it would if those suits were allowed under Title VI. In other words, there is a reasonable policy rationale for Congress's choice to keep the intent requirement for claims under Title VI.

2. The same rationale explains the difference between the Age Discrimination Act and the ADEA. Again, the Age Discrimination Act bars age discrimination in federally funded programs while the ADEA covers contracts between private parties.

As it did with the Title VI/Title VII distinction, Congress decided that it should require plaintiffs to prove intent if they wish to prevail under the Age Discrimination Act. Again, this helps protect federal-funds recipients from baseless lawsuits. If such suits were allowed to proceed to judgment, it is likely that fewer organizations would be willing to accept federal funds. Although the money may be helpful in the short term, it might cost the recipients more in the end if they had to pay to defend against age-discrimination claims. But for claims under the ADEA, which do not hinge on accepting federal funds, Congress allowed for disparate-impact claims. In short, Congress made another reasonable policy decision to keep the intent requirement for Age Discrimination Act claims.

3. Finally, the Immigration Reform and Control Act also requires that plaintiffs prove intent. Again, there are strong policy reasons for requiring

this showing of intent. A key aim of our nation's immigration laws is ensuring that those who work in the United States are legally authorized to do so. For aliens, their ability to work depends on their immigration status and any restrictions that status carries. Employers ensure compliance with these laws by requesting that all workers—citizens and aliens alike—provide documentation showing their ability to legally work in the United States.

Employers would hesitate to request such documentation, or would not examine those documents, if plaintiffs could recover under the Immigration Reform and Control Act without proving intentional discrimination. So Congress decided to amend the Act in 1996 to require that plaintiffs prove an intent to discriminate to prevail in a suit.

Requiring plaintiffs to show intent to prevail in a civil action balances the need to eliminate discrimination based on immigration status while ensuring that workers are eligible to work in the United States. This is a very pragmatic policy choice. And the Courts have enforced that decision. *See Robison Fruit Ranch*, 147 F.3d at 801.

4. As described below, Congress had an equally reasonable policy rationale for requiring plaintiffs in SOX cases to prove discrimination rather than requiring employers to prove that they did not discriminate. True, as shown by a top-side amicus brief, not every member of Congress is happy with that decision; some would have preferred a different law. But what matters is the text of the law that Congress enacted. *See Flores-Figueroa v. United States*, 556 U.S. 646, 658 (2009) (Scalia, J.,

concurring). It retained the discrimination language that courts have long recognized requires the plaintiff to prove intent.

Murray and his amici ask this court to disregard this sound policy decision and eliminate the important protections an intent requirement provides in anti-discrimination statutes. A decision reversing the Second Circuit would jeopardize the intent requirement in all areas of anti-discrimination law. This Court should not go down that path. Rather, it should confirm that when Congress uses unqualified discrimination language, plaintiffs bear the burden of proving intent to prevail in a civil suit.

II. SOX DIFFERS IN SIGNIFICANT WAYS FROM THE WPA.

Murray and his amici spill much ink arguing that this Court should interpret SOX in the same way the Federal Circuit has interpreted the WPA; it does not require plaintiffs prove intent. *See Marano v. Dep't of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993). This argument fails for three reasons.

A. SOX's Text Does Not Resemble The WPA's Text.

The most glaring—and fatal—flaw in Murray's and his amici's arguments is that SOX's text differs materially from the WPA's. This textual difference helps explain why SOX requires plaintiffs to prove intent even though the WPA does not.

1. SOX bars publicly traded companies from "discriminat[ing] against an employee * * * because

of" any lawful whistleblowing act. 18 U.S.C. § 1514A(a). As detailed above, this Court has interpreted this type of language as requiring a plaintiff to prove intent. From after the Civil War until today, the use of the phrase "discriminate because of" without qualification generally requires that plaintiffs prove intent. *See Sandoval*, 532 U.S. at 280-81; *Kamps*, 592 F. App'x at 285-86; *Robison Fruit Ranch*, 147 F.3d at 801; *see also* Wegner, 69 Cornell L. Rev. at 429.

The WPA lacks this language. Rather, it employs language that this Court has consistently found relieves plaintiffs of their obligation to prove intent. The WPA makes it unlawful to "take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of" protected activity. 5 U.S.C. § 2302(b)(8).

If this language sounds familiar, it should. It resembles other statutory language that the Court has found allows plaintiffs to prevail without proving intent. Both Title VII and the ADEA use very broad language that allow disparate-impact claims. *See* 42 U.S.C. § 2000e-2(a)(2); 29 U.S.C. § 623(a)(2). The WPA, Title VII, and the ADEA therefore prevent specified actions based on certain activities or characteristics. Title VII and the ADEA also bar actions that hurt people with certain protected characteristics, even if the actions themselves are nondiscriminatory. That is why, under all three statutes, courts have found that plaintiffs need not prove intent to prevail on some claims.

SOX, however, uses different language. It bars only discrimination. This language choice shows that Congress wanted to keep the rule that requires plaintiffs alleging discrimination to prove intent.

2. Unsurprisingly, Murray and his amici don't focus on this language from the WPA and SOX. They understand that this Court's precedents are clear that when Congress uses the term "discrimination," it intends for the burden to be on plaintiffs to prove intent. Rather, they focus on other portions of the two statutes. *See, e.g.*, Murray Br. 27.

Those portions of the statues, however, cannot be read in isolation. *See Samantar v. Yousuf*, 560 U.S. 305, 319 (2010) (citing *United States v. Morton*, 467 U.S. 822, 828 (1984)). Rather, "statutes must be read as a whole." *Guam v. United States*, 141 S. Ct. 1608, 1613 (2021) (cleaned up). Read as a whole, SOX and the WPA are dissimilar.

Murray cites those parts of the WPA and SOX that allow for a claim when prohibited conduct "was a contributing factor" in the "personnel action." 5 U.S.C. § 1221(e)(1)(B); 49 U.S.C. §§ 42121(b)(2)(B)(i), (iii). He also cites common statutory language that allows an employer to show that it "would have taken the same" "personnel action in the absence of such" protected activity. 5 U.S.C. § 1221(e)(2); 49 U.S.C. §§ 42121(b)(2)(B)(ii), (iv).

This language in SOX and the WPA matters. But it matters only *after* the plaintiff proves what is needed for a violation. Under the WPA, this is a very low bar to clear; plaintiffs need prove only that they were subject to personnel action because of protected

activity. Under SOX, this is a higher bar to clear. Plaintiffs must show that they were discriminated against because of their protected whistleblower activity.

Plaintiffs' burden to prove (or not prove) intent thus arises first. Under the WPA, there is no requirement to prove intent. But that requirement exists under SOX. This shows how the statutory language differentiates SOX from the WPA.

This interpretation does not render the affirmative defense in 49 U.S.C. §§ 42121(b)(2)(B)(ii), (iv) superfluous. Even if a defendant may have discriminated against an individual in part because of their protected whistleblower activity, that does not automatically mean that they would not have taken the same action without the protected activity. For example, imagine an employee of a public company who sets lines for college football games. The employee reveals corruption in which bookies are paying athletes to shave points. The company investigates and considers internal discipline. But the next day, every State bans betting on college sports. The company then lays off the whistleblower as part of a reduction in force. Although the linemaker may be able to prove that the company discriminated against him for his whistleblowing activities, the company could likely prove that it would let him go anyway because there were no more college football games to set lines for. This is just one example of the way the affirmative defense remains relevant under the Second Circuit's correct interpretation of SOX.

In other words, the temporal proximity between an employee's termination and her

whistleblowing activities does not mean that she faced discrimination. Rather, the whistleblowing activities may have just led to industry-wide changes that makes the employee's position unnecessary.

B. SOX's Legislative History Does Not Support Murray's Argument.

SOX's text so obviously compels affirming the Second Circuit's decision that further inquiry is unnecessary. *See Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 254 (2000) ("where the statutory language provides a clear answer," this Court's inquiry "ends there" (quotation omitted)). But even if this Court looks at SOX's legislative history, it will find no support for Murray's position.

Six months before the WPA became law, Congress passed a nearly identical bill. But President Reagan pocket vetoed the legislation. *See generally* Memorandum of Disapproval on a Bill Concerning Whistleblower Protection, 2 Pub. Papers 1391 (Oct. 26, 1988). As he noted, the WPA altered "the factual showings required of employees in making their cases in whistleblower proceedings." *Id.* at 1391. It essentially "rigs the [] process against agency personnel managers in favor of employees." *Id.* There is no similar legislative history showing that SOX changed the factual showing that employees of public companies must make to prevail in a whistleblower claim; it just created the claim. Nor is there any legislative history showing that Congress passed SOX to rig the process in favor of employees and against companies.

When Congress debated the WPA, members said that the statute's purpose was to reduce the burden on a federal employee whistleblower. *See* 135 Cong. Rec. 5,033 (1989) (statement of Rep. Sikorski); *see also id.* at 5,032 (stating that the WPA's sponsors agreed with this assessment). This tracks the Senate report on the prior year's bill that was pocket vetoed by President Reagan. *See* S. Rep. No. 100-413, 33 (1988). There is, of course, no similar statement in the legislative history for SOX. Rather, members of Congress conveyed only that they wanted to provide some level of protection for whistleblowers working for private parties. This differs significantly from the WPA's legislative history.

Then over a decade after the WPA's passage, Congress gave Federal Aviation Administration employees the same protections that the WPA gave most other federal employees. *See* Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, § 307, 114 Stat. 61, 124 (2000). The same statute also gave whistleblower protection to some private aviation employees. But in doing so, Congress required the private employees to prove intent. *See id.* § 519(a), 114 Stat. at 145; *Dakota, Minn. & E. R.R. Corp. v. U.S. Dep't of Lab. Admin. Rev. Bd.*, 948 F.3d 940, 945 (8th Cir. 2020). It did so while not requiring the same showing for FAA employees. *See* AIR-21 § 307, 114 Stat. at 124.

The previous Congress considered similar legislation as AIR-21 but could not pass it. The Senate report on that legislation explains the difference in treatment between FAA employees and those employed by private companies. Congress wanted FAA employees to enjoy the same whistleblower

protections that other federal employees had. *See* S. Rep. No. 105-278, 21 (1998). Notably, the Senate report does not compare the protections private industry employees enjoy to those given to FAA employees. Rather, it compares the protections to those given to other private industry employees. *See id.* at 22. The analogy used by the Senate is instructive. Because FAA employees have a different burden of proof than private aviation employees, Congress did not compare those employees' protections. Even though both categories of protections were included in the same statute, Congress did not conflate oranges with apples. Private employees must prove intent, federal employees do not.

As discussed in the parties' briefs, SOX borrows from AIR-21. Yet even that statute found it necessary to distinguish between the whistleblower protections for government employees and those for private sector employees. That is why even Murray can argue only that "[w]hen Congress enacted SOX, it wanted '*similar* protection' to the WPA for corporate whistleblowers." Murray Br. 7 (quoting S. Rep. No. 107-146, 10 (2002) (emphasis added)). The word similar was used because Congress did not want to provide the *same* protection. As in other contexts, it wanted private employees to have to prove intent while relieving federal employees of that burden.

So legislative history from before and after the WPA's passage shows that Congress wanted to provide federal employees with whistleblower protections stronger than those enjoyed by employees in private industry. Murray and his amici argue, however, that neither the WPA's nor SOX's

whistleblower protections require a showing of intent. If this Court looks past the two statutes' plain language, it should reject this argument because the legislative history shows that Congress did not intend such a result.

C. Private Industry Employees Have Different Needs Than Federal Government Employees.

1.i. One thing that makes our free-enterprise system work is that companies can hire and fire employees quickly, for almost any reason. This ability to quickly change labor inputs—both quantitatively and qualitatively—allows for the most efficient allocation of an expensive resource.

Because they understand that sometimes their labor needs will change, companies need flexibility to hire and fire individuals quickly. For example, in early spring many golf courses begin hiring more people to care for the course, to caddy, and to sell food. Then, as winter approaches, many of those same people are let go because the demand for golf services plummets. If companies had to worry about being sued every time they let go of these seasonal workers, it could cost thousands of dollars to play a round of golf.

The same goes for adjusting staffing depending on how employees perform. It makes no sense to have an individual fill a role if a replacement could do the job more efficiently. In these cases, companies replace the underperforming workers with others, either from inside or outside the organization. Either way, the company's productivity can increase when poorly

performing employees are replaced with better employees. And sometimes, just eliminating an employee—without replacement—is best because of increased morale and other intangibles.

ii. The federal government, however, is different. "The time and resource commitment needed to remove a poor performing permanent employee can be substantial." U.S. Gov't Accountability Off., GAO-15-191, *FEDERAL WORKFORCE: Improved Supervision and Better Use of Probationary Periods Are Needed to Address Substandard Employee Performance* highlights (Feb. 2015). At best, it can take six months to a year to fire a federal employee. *See id.* at 13-14. But often that timeframe is "significantly longer." *Id.* at 13.

The time and effort required to fire a federal employee leads to many poor performers getting to keep their jobs forever. "According to selected experts and GAO's literature review, concerns over internal support, lack of performance management training, and legal issues can also reduce a supervisor's willingness to address poor performance." *FEDERAL WORKFORCE*, *supra* at highlights. Combined with the fact that "[s]ome employees promoted to supervisory positions because of their technical skill are not as inclined towards supervision," *id.* at 8, few federal employees ever face disciplinary proceedings.

2. This difference between how private industry works and how the federal government works is key to understanding the difference between SOX and the WPA. When adverse personnel action is taken against a federal employee, something is grievously wrong. It happens so rarely that it

immediately raises suspicions. Typically, it means that there has been such gross misconduct by an employee that his supervisor is willing to spend years going through the tedious procedures necessary to fire him. This is no simple task and takes away from the supervisor's other responsibilities.

Because the employee likely did something so egregious as to warrant getting fired, it is easy for the agency to prove that is the reason that the employee was dismissed. In other words, all the evidence has been collected to show why that person has been fired. There is no increased burden with gathering that evidence.

When a federal employee is fired (or otherwise retaliated against) for protected whistleblowing activities, bells go off across the system. Because discipline against federal employees is so rare, the fact that a whistleblower faces an adverse personnel action leads to the strong suspicion that it is retaliation.

Because the inference of retaliation is so strong, Congress decided not to require the federal employee to prove intent under the WPA. Rather, it jumped straight to requiring the agency prove that it would have taken the adverse action without the protected whistleblower activity. Again, there should be a comprehensive record already compiled if the action was not retaliatory.

Private industry is very different. Because it is so easy for companies to hire, fire, and otherwise change employee job descriptions, there is no strong inference of discrimination based on whistleblower

activity. Similarly, there is no need for companies to compile mountains of evidence showing that they would have taken the same action but for the plaintiffs' protected whistleblower activities. The combination of these two facts led Congress to decide that plaintiffs should have to prove intent to prevail in a SOX whistleblower case.

In other words, the difference between the WPA and SOX makes sense when examined in the context of how private companies and the federal government treat employees. Under one set of laws, there is no support for a strong presumption of discrimination and no need to keep records to support employment action. Under a different set of laws, any adverse employment action towards a whistleblower has a strong presumption of discrimination and the agency has compiled a heap of evidence showing that the adverse employment action is not retaliation—if that is true.

Murray's and his amici's arguments comparing the WPA to SOX therefore make no sense. The two statutes cover vastly different scenarios that require different burdens of proof for plaintiffs to recover. Murray's proposed rule would cause industry to be less likely to fire unproductive employees. If that happens, America can forget its economic supremacy. *Cf.* Cameron Abadi, *Adam Tooze: Why the Economic Gap Between the U.S. and Europe Is Growing*, Foreign Policy (June 23, 2023), https://tinyurl.com/452dvbj8 (explaining that the U.S. has now surpassed the EU in economic power).

CONCLUSION

This Court should affirm.

Respectfully submitted,

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