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

## REPLY BRIEF FOR PETITIONER


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## REPLY BRIEF FOR PETITIONER

The Sarbanes-Oxley Act directs that "[a]n action" under the whistleblower protection provision "shall be governed by the legal burdens of proof set forth in section 42121(b)." 18 U.S.C. § 1514A(b)(2)(C). Section 42121(b)'s burden-shifting framework, in turn, requires a plaintiff to prove only that his protected conduct "was a contributing factor in the unfavorable personnel action." *See* 49 U.S.C. §§ 42121(b)(2)(B)(i), (iii). It nowhere requires that the plaintiff prove that his employer acted with "retaliatory intent."

UBS and the Second Circuit both ignore Congress's deliberate decision to adopt that well-established framework. UBS claims that, in addition to proving the "contributing factor" element actually listed in the statute, a plaintiff must *also* prove some sort of freestanding "retaliatory intent" element. But UBS doesn't explain how that claim can be squared with SOX's command that the entire "action" must be "governed by" the burden-shifting framework of Section 42121(b), which does not put any such burden on plaintiffs. The Second Circuit took a different tack, holding that proof of "retaliatory intent" is required as part of the "contributing factor" element. UBS doesn't even try to defend that argument before this Court. Nor could it: Neither the plain meaning of "contributing factor" nor the phrase's use in burden-shifting frameworks dating back to the Whistleblower Protection Act of 1989 provide for any such intent requirement.

Both the Second Circuit's holding and UBS's arguments thus contravene this Court's cardinal principle of statutory interpretation: The statute "must be read as a whole." *Territory of Guam v. United*

*States*, 141 S. Ct. 1608, 1613 (2021) (citation omitted). In determining what plaintiff's burden of proof is, this Court should look in "[t]he most obvious place to look," *id.*: the portion of the statute that specifies the "legal burdens of proof" that "govern" the "action," 18 U.S.C. § 1514A(b)(2)(C).

The Whistleblower Protection Act of 1989 created a burden-shifting framework that was different from other employment statutes to reflect that the harms from retaliating against whistleblowers extend far beyond the injured employee to the public at large. Since then, Congress has adopted that framework in SOX, AIR-21, and dozens of other contexts where those harms involve the health, safety, and savings of the public at large. This Court should honor that decision and reverse the judgment of the court of appeals.

## ARGUMENT

### I. The plain text of the statute decides this case.

UBS and the Second Circuit each advance a different theory for why SOX might require a plaintiff to prove retaliatory intent. But each theory entirely ignores the critical provision of SOX: 18 U.S.C. § 1514A(b)(2)(C), which mandates that "[a]n action brought under" the whistleblower protection provision "shall be governed by the legal burdens of proof set forth in section 42121(b)."

1. Start with UBS's position: That, in addition to the "legal burdens of proof set forth in section 42121(b)," the plaintiff must *also* prove "retaliatory intent." *See* Resp. Br. 21-23. UBS never acknowledges 18 U.S.C. § 1514A(b)(2)(C), let alone explains how its

position could be squared with that provision. Section 1514A(b)(2)(C)'s command that whistleblower retaliation cases "shall be governed by the legal burdens of proof set forth in section 42121(b)" means that a factfinder must look to those burdens—and only those burdens—in resolving the case. Petr. Br. 21-22. UBS's protest that the "legal burdens of proof set forth in section 42121(b)" only *partially* govern SOX actions runs headlong into that plain text, which says that the whole SOX "*action*" is "governed" by those burdens of proof. 18 U.S.C. § 1514A(b)(2)(C) (emphasis added). UBS has no examples of where the phrase "shall be governed by" takes UBS's preferred meaning of "shall be partly governed by" or "shall be governed by, among other things."

Lest there be any doubt: As petitioner's opening brief explained, SOX and Section 42121(b) were clearly modeled on the Whistleblower Protection Act of 1989, which only requires a plaintiff to prove that protected conduct was a "contributing factor" in the unfavorable personnel action. Petr. Br. 26-33; U.S. Br. 2-10, 17-20. UBS argues that rather than considering precedent interpreting the WPA, this Court should consider case law interpreting the Energy Reorganization Act, another statute modeled on the WPA. Resp. Br. 43. But doing so would not help UBS. Case law interpreting the ERA supports petitioner's position, too: An ERA plaintiff need only prove that protected activity was a "contributing factor in the unfavorable personnel action." *See, e.g.*, *Trimmer v. Dep't of Labor*, 174 F.3d 1098, 1101-02 (10th Cir. 1999) (listing elements). UBS points to *no* case holding that an ERA plaintiff must prove retaliatory intent in

addition to satisfying the "contributing factor" test.[1] And the cases it cites (at Resp. Br. 43) all postdate the enactment of SOX, so SOX could not have incorporated UBS's (incorrect) understanding of those cases.

2. The Second Circuit reached the same wrong result by a different path. Rather than manufacturing a freestanding "retaliatory intent" element, as UBS does, the Second Circuit located the requirement that a plaintiff prove "retaliatory intent" within the requirement that a plaintiff show his protected conduct "was a contributing factor in the unfavorable personnel action." Pet. App. 11a. (discussing 49 U.S.C. §§ 42121(b)(2)(B)(i), (iii)). The Second Circuit held 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." Pet. App. 11a.

UBS doesn't defend that holding. Nor could it. The plain meaning of "contributing factor" does not suggest an intent requirement. Petr. Br. 22-24. Consider the way justices of this Court have used the phrase: to describe the "instability of the steering compass" as "a contributing factor to the ship's deviation," *see Libby,*

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[1] *See Addis v. Dep't of Lab.*, 575 F.3d 688, 691 (7th Cir. 2009) ("accept[ing] the petitioner's contention that she can shift the burden" by satisfying the "contributing factor" test); *Hasan v. U.S. Dep't of Lab.*, 400 F.3d 1001, 1004 (7th Cir. 2005) (parties conceded that *McDonnell Douglas* framework applied to ERA claims); *Doyle v. U.S. Sec'y of Lab.*, 285 F.3d 243, 249-50 (3d Cir. 2002) (ERA does not apply because plaintiff "filed his claim well before October 24, 1992"); *Kaufman v. Perez*, 745 F.3d 521, 525-26 (D.C. Cir. 2014) (plaintiff brought claims under six statutes in addition to ERA, none of which were governed by "contributing factor" burden-shifting framework).

*McNeill & Libby v. United States*, 340 U.S. 71, 73-74 (1950) (Frankfurter, J., dissenting) (citation omitted), for instance, or to characterize "alcohol and drug use" as a "contributing factor" to a train accident, *Skinner v. Ry. Lab. Execs. Ass'n*, 489 U.S. 602, 607 (1989) (quoting 48 Fed. Reg. 30726 (1983)). To state the obvious, ships and train accidents aren't the sorts of things that have "intent." That this Court uses the phrase "contributing factor" to refer to inanimate objects and abstract concepts helps make clear that, in choosing the phrase "contributing factor," Congress intended to *eliminate* any intent requirement.

The term "contributing factor" is also a term of art, originating in the WPA. *See* Petr. Br. 26-32. In that context, it means "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision"—no proof of intent required. *Id.* Again, UBS offers no response: It neither disputes that "contributing factor" is a term of art drawn from the WPA nor that the term has no intent requirement.

3. In sum, neither UBS nor the Second Circuit has a reading of the statute that accounts for 18 U.S.C. § 1514A(b)(2)(C). Both thus contravene the most basic rule of statutory interpretation: That statutes "must be read as a whole." *Territory of Guam v. United States*, 141 S. Ct. 1608, 1613 (2021) (citation omitted).

The next section of this brief observes that the second step of the burden-shifting framework allows employers who lack retaliatory intent to avoid liability. The United States offers two additional persuasive observations—that the statute may not require any assessment of retaliatory intent and that the statute may impose a legal presumption of

retaliatory intent whenever the "contributing factor" test is met. *See* U.S. Br. 24-29.

This Court need not resolve the precise relationship between the burden-shifting framework and retaliatory intent to resolve this case. All this Court needs to find in order to reverse the Second Circuit's decision is that "shall be governed by the legal burdens of proof set forth in section 42121(b)" actually governs what each side must prove in a SOX retaliation case; that the only "burden of proof" Section 42121(b) imposes on plaintiffs is to prove that protected conduct "was a contributing factor in the unfavorable personnel action"; and that "contributing factor" requires no proof of intent. UBS does not persuasively take on any of those propositions. That should end this appeal. This Court should reverse the Second Circuit and direct that the jury's verdict be reinstated.

## II. UBS's arguments for ignoring the burden-shifting framework prescribed by SOX are unpersuasive.

1. UBS's primary argument is that the burden-shifting framework does not address "retaliatory intent." Resp. Br. 14-35. For the reasons just explained, it would not matter if that were true: The text of the statute mandates how a SOX whistleblower protection claim is to be proven, even if UBS believes there is a better way to do so. In any case, UBS is wrong.

a. "Retaliatory intent" in a SOX case should simply mean that an employer took an unfavorable personnel action against an employee because the employee engaged in protected activity—that is, the employer

would not have taken such action if the employee had not engaged in protected conduct. As this Court put the point, to suss out such intent, we "change one thing at a time and see if the outcome changes"; if it does, we have found "intentional discrimination." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020); *see also* Petr. Br. 24-25.

Properly understood, then, "retaliatory intent" maps closely onto the second step of the burden-shifting framework. At that step, an employer who has not acted with retaliatory intent can prove that he "would have taken the same unfavorable personnel action in the absence of" the protected activity. 49 U.S.C. §§ 42121(b)(2)(B)(ii), (iv). In other words, the employer has the chance to show that if we "change one thing" (that is, remove the protected activity), the outcome does not change. *See Bostock*, 140 S. Ct. at 1739.

Thus, a jury that finds for the plaintiff at both steps of the burden-shifting framework has effectively found that the employer acted with retaliatory intent.[2]

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[2] UBS apparently understood as much before the district court. True, its proposed instructions state that "Mr. Murray bears the burden of proof to establish that UBS intentionally retaliated against him because" of protected conduct. J.A. 1. But when UBS explained *how* a jury was to evaluate Murray's claim, it listed four elements for Murray to prove (protected activity, knowledge, discharge, and contributing factor) and one for UBS to prove (that it would have taken the same unfavorable personnel action in the absence of the protected conduct). DCt. Dkt. 175 at 13. UBS did not suggest that retaliatory intent was a separate element or that it was part of the "contributing factor" element; instead, it understood that siding with Murray on both steps of the burden-shifting framework *amounted* to a finding of

Indeed, if the plaintiff were required to prove "retaliatory intent," both halves of the burden-shifting framework would be largely superfluous. If an employer acted with "retaliatory intent," the protected conduct would always be, by definition, a "contributing factor in the unfavorable personnel action." *See* 49 U.S.C. §§ 42121(b)(2)(B)(i), (iii). Conversely, an employer who acted without "retaliatory intent" by definition "would have taken the same unfavorable personnel action in the absence of" the protected activity and would automatically avoid liability at the second step of the framework. *See id.* §§ 42121(b)(2)(B)(ii), (iv).[3]

b. UBS argues that the second step of the burden-shifting framework is about "causation," not "intent."

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retaliatory intent. And the jury instructions that the district court gave mirrored that request: The district court told the jury that Murray was entitled to compensation if it found that "defendants improperly retaliated against plaintiff in terminating him from UBS." J.A. 133. The district court instructed the jury on the burden-shifting framework as a way to find that "improper retaliation." *See* J.A. 125-126, 129. If, as UBS claims, retaliation is "by definition, an intentional act" (Resp. Br. 1, 19), then the jury was effectively instructed to find retaliatory intent, the evidence of which the Second Circuit found sufficient. Pet. App. 16a-17a. UBS's argument that there was "no way to determine whether the jury 'would have found that UBS acted with retaliatory intent'" (Resp. Br. 10 (quoting Pet. App. 17a)) is thus meritless.

[3] In fact, even some employers who acted with retaliatory intent may be able to avail themselves of the second step of the burden-shifting framework. For instance, an employer might act with retaliatory intent in discharging an employee but may still be able to win on the second step of the burden-shifting framework if the employee's business unit was being shut down anyway.

But that argument trades on the fact that this Court uses the terms "cause" and "but-for cause" in two different senses.

This Court often labels the "change one thing" analysis "causation" or "but-for causation." *See, e.g.*, *Bostock*, 140 S. Ct. at 1739; *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989) (plurality opinion) ("But-for causation is a hypothetical construct. In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way.").

"Causation" or "but-for causation" is *also* used to refer to a different sort of analysis, where we change not just "one thing" but all the consequences that flow from that "one thing." Think of the facts of *Palsgraf v. Long Island R. Co.*, 162 N.E. 99 (N.Y. 1928), from 1L torts: Everyone in that case agreed that the railroad employee was the "but-for cause" of the plaintiff's injuries because we not only "change one thing" (that the railroad employee dropped a package) but also change all the consequences that flow from it (that the package exploded, that the explosion knocked over a scale, that the scale hit the plaintiff).

But-for causation in the *Palsgraf* sense may be different from "retaliatory intent." The "change one thing" analysis, however—for which this Court often uses the same label of "but-for causation"—is *precisely* what we mean by "retaliatory intent" in the WPA, SOX, AIR-21, and related whistleblower contexts.

c. With that terminology cleared up, UBS's arguments falter. Consider UBS's hypothetical

employee, Sarah, whose specialized skills are useful to just one customer, whose whistleblowing results in the loss of that customer, and who is let go because her specialized skills are no longer useful. Resp. Br. 33-34. Sarah's protected activity certainly caused her termination in the *Palsgraf* sense: Had she not blown the whistle, then the customer would not have left, then Sarah's skills would not be useless, then she would not have been fired. But it did not cause her termination in the "change one thing" sense: We "change one thing" (that Sarah blew the whistle) and keep everything else (that the customer left; that Sarah's skills are no longer useful) the same. Sarah's employer would still have fired her if the customer left for a different reason, so the employer did not act with retaliatory intent.

UBS argues that Sarah's employer would be held liable notwithstanding the second step of the burden-shifting framework because "Sarah's report of the fraud was a but-for cause of her termination, which would not have occurred absent her report." *Id.* But the second step of the burden-shifting framework does not ask for but-for causation in the *Palsgraf* sense. It asks the jury to consider instead what the employer would have done "in the absence of" the protected activity, not "in the absence of" both the protected activity and all the consequences that flow from it. *See* 49 U.S.C. §§ 42121(b)(2)(B)(ii), (iv). Indeed, the second step of the burden-shifting framework even eschews the "but-for" locution, presumably to leave no doubt that the *Palsgraf* sense is not the right one. *Compare* 49 U.S.C. §§ 42121(b)(2)(B)(ii), (iv) *with* 18 U.S.C. § 1514A(c)(2)(A) (different provision of SOX pegs reinstatement to "seniority status that the employee

would have had *but for* the discrimination") (emphasis added).

So the second step of the burden-shifting framework asks the jury to "change one thing" only. "In the absence of" Sarah's whistleblowing—but keeping everything else the same (that is, assuming that the customer still left, just for a different reason)—Sarah's employer would still have fired Sarah, because her skills were no longer useful. An employer who acted without retaliatory intent can thus avoid liability under the second step of the burden-shifting framework.[4]

2. UBS also argues that the WPA's prohibition on "taking or failing to take . . . a personnel action . . . because of" protected activity is somehow

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[4] The same is true for UBS's amici's variations on the hypothetical. One amicus brief posits an "employee who misses an important client meeting to file a protected safety-related complaint." Br. for Amicus Curiae Airlines for Am. in Support of Resp. 18. We "change one thing" (filing the protected complaint) and keep everything else the same (that the employee missed the client meeting). So long as the employer would have fired the employee if she missed the important client meeting for a different reason, it can prevail at the second step of the burden-shifting framework. Another amicus brief describes a railroad worker who fell in the snow, reported the incident, and was then fired because the fall was part of a pattern of carelessness. Br. of the Am. Assoc. of Railroads as Amicus Curiae in Support of Resp. 7-8. Again, we "change one thing" (that the railroad worker reported the incident) and keep everything else the same (that the railroad worker fell; that the employer knew about the incident, perhaps from another employee; that there was a pattern of carelessness). So long as the employer would have fired the worker even if someone else had made the report of the fall, it can avail itself of the second step of the burden-shifting framework.

different from SOX's prohibition on retaliation because the WPA does not use the word "discriminate." Resp. Br. 36. As a reminder, of course, even if the WPA proscribed some different conduct than SOX, it would not matter—the text of SOX mandates that violations of each are *proven* the same way, through the two-part burden-shifting framework. *Supra*, 2-5.

In any event, UBS is wrong. SOX's anti-retaliation provision prohibits precisely what the WPA's does: taking a personnel action *because of* protected activity (again, in the "change one thing" sense). That is all that the words "discriminate . . . because of" in SOX amount to. *See* Petr. Br. 34-37.

Indeed, despite UBS's repeated insistence that "intent" and "causation" are entirely distinct, UBS does not ever say what "retaliatory intent" *could* mean aside from acting because of protected activity (in the "change one thing" sense). UBS disclaims any suggestion that animus is required, *see* Resp. Br. 27 n.3, but it never explains what more would be required *beyond* proof that an employer would have acted differently had the employee not engaged in protected activity.[5]

3. UBS next suggests that other statutes and "background tort principles" require that plaintiffs prove "retaliatory intent" as a separate element from

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[5] UBS's definition of "intent" is so narrow that somehow, even a requirement that plaintiff prove protected conduct was a "motivating factor" in an adverse employment action *still* would be a "causation" requirement and not an "intent" requirement. Resp. Br. 27.

the burden-shifting framework. Resp. Br. 15-20. But none of those other statutes have the same burden-shifting framework that Congress prescribed under SOX, and so-called "background tort principles" are only relevant where the text of the statute is silent. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 59 (2007). Here, Congress has mandated—in the text of SOX—precisely how violations of the statute's anti-retaliation provision are to be proven.

In any event, UBS is wrong about both the other statutes and "background tort principles." Consider Title VII. This Court has consistently held that the only required proof under Title VII is that an employee was fired *because of* her race, religion, or other protected trait (in the "change one thing" sense). *EEOC v. Abercrombie & Fitch*, 575 U.S. 768 (2015), is illustrative: "The disparate treatment provision forbids employers to: (1) 'fail . . . to hire' an applicant (2) 'because of' (3) 'such individual's . . . religion' (which includes his religious practice)." *Id.* at 772. In *Abercrombie*, the parties conceded that the employer "failed to hire" the plaintiff and that she engaged in a "religious practice." *Id.* At that point, "[a]ll that remains is whether she was not hired (2) 'because of' her religious practice"—no separate proof of intent necessary. *See id.*

UBS's "background tort principles" do not fare any better. UBS argues "discrimination is an intentional tort." Resp. Br. 18-20. Sure. But as UBS's preferred treatise (Resp. Br. 19) puts the point, an "intentional tort" is simply one where "[t]he defendant has an intent to achieve a specified result when the defendant either (1) has a purpose to accomplish that result or (2) lacks such purpose but knows to a substantial

degree of certainty that the defendant's actions will bring about the result." Dan B. Dobbs, et. al., *The Law of Torts* § 29 (2d ed. 2011). In this case, Michael Schumacher and Larry Hatheway—Murray's supervisor and UBS's Global Head of Macro Strategy, respectively, who jointly made the decision to fire Murray—clearly "intended" Murray's firing in the tort law sense; no one is claiming that the pair accidentally put Murray's name on a "to-can" list.[6]

UBS is also wrong that the "retaliatory discharge" tort "requires the plaintiff to 'establish wrongful intent to discharge in violation of public policy.'" Resp. Br. 19 (quoting Dobbs, *supra*, § 703 n.21). That line comes from a parenthetical to a Washington Supreme Court case in a footnote. Dobbs, *supra*, § 703 n.21 (quoting *Korslund v. Dyncorp Tri-Cities Servs., Inc.*, 125 P.3d 119, 124-25 (Wash. 2005)). The actual text of the treatise lists four elements to a "retaliatory discharge" tort, intent not among them. *Id.* § 703.

4. UBS argues that the second step of the burden-shifting framework—allowing the employer to prove it "would have taken the same unfavorable personnel action in the absence of" the protected conduct—is only about what relief a plaintiff is entitled to after proving a violation of SOX. Resp. Br. 21-22 (quoting 49 U.S.C. § 42121(b)(2)(B)(iv)). That is, UBS thinks the violation must be proven *before* the second step of the burden-

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[6] UBS suggests "[i]t is undisputed that Hatheway, who had no knowledge of any alleged whistleblowing, made the decision to eliminate petitioner's position." Resp. Br. 6. But in pretrial proceedings, UBS conceded that Schumacher, to whom Murray blew the whistle, made the decision to fire Murray jointly with Hatheway. J.A. 157-58 ("Hatheway and Schumacher agreed to eliminate Murray's CMBS Strategist position.").

shifting framework comes into play, meaning that the burden is entirely on plaintiff to establish a violation. *Id.* Not so.

To start, there's no daylight between proving a violation and ordering relief under SOX. "An employee prevailing in any action under subsection (b)(1)"—that's the provision covering district-court and administrative actions—"*shall* be entitled to all relief necessary to make the employee whole." 18 U.S.C. § 1514A(c)(1) (emphasis added). (The same is true under AIR-21. 49 U.S.C. § 42121(b)(3)(B).) There would be no reason for Congress to create a different rule for proving a violation than for obtaining relief when proving a violation *necessarily* entitles a plaintiff to relief.

Moreover, UBS's argument turns on Section 42121(b)(2)(B)(iv), the provision saying "[r]elief may not be ordered" if the employer wins on the second step of the burden-shifting framework. But the second step of the burden-shifting framework *also* appears in Section 42121(b)(2)(B)(ii), which says that "no investigation . . . shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of" the protected activity. Section 42121(b)(2)(B)(ii) makes no mention of relief. The second step of the burden-shifting framework thus comes into play well before the relief stage.

Finally, a SOX district-court action—like this one—incorporates only the "*burdens of proof* set forth in section 42121(b)." *See* 18 U.S.C. § 1514A(b)(2)(C). (Contrast that with a SOX administrative action, which incorporates *all* the "rules and procedures set

forth in section 42121(b)." *See* 18 U.S.C. § 1514A(b)(2)(A).) In other words, a district-court action incorporates only the requirement that a plaintiff has the burden of "demonstrat[ing] that" protected conduct "was a contributing factor in the unfavorable personnel action," and the requirement that a defendant has the burden of "demonstrat[ing], by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of" the protected conduct. 49 U.S.C. §§ 42121(b)(2)(B)(ii), (iv). It does not incorporate the distinctions between "investigation," "violation," and "relief."

5. Ultimately, UBS's arguments (and the arguments of most of its amici) boil down to policy. UBS thinks that the statute Congress drafted makes things too easy on plaintiffs. But "[t]he role of this Court is to apply the statute as it is written—even if [it] think[s] some other approach might accord with good policy." *Burrage v. United States*, 571 U.S. 204, 218 (2014) (citation omitted).

In any case, UBS and its amici are wrong to suggest that petitioner's interpretation would allow a poorly performing employee to insulate himself from firing by making a stray remark he insists is protected conduct. Proof of protected conduct generally requires both that the employee subjectively believe that the employer is engaged in fraud and that such a belief is objectively reasonable. *See* 18 U.S.C. § 1514A(a)(1). A stray remark with no basis in fact will not clear that hurdle.

Besides, Congress *intended* to tilt the scales in favor of plaintiffs and against employers. Congress was keenly sensitive to how difficult it would be for the

average employee to prove retaliatory intent: "[S]upervisors do not usually write down or tell other employees of their intent to take prohibited reprisal against an employee." S. Rep. No. 413, 100th Cong., 2d Sess. 13 (1988); *see also* Petr. Br. 3-8. And Congress reserved SOX's burden-shifting framework primarily for contexts—financial markets, railroad and aviation safety, nuclear energy, food hygiene, and the like—where misconduct could affect the health, safety, or finances of thousands or millions of people, such that whistleblowing is particularly critical. *See* S. Rep. No. 413, 100th Cong., 2d Sess. 13 (1988); 154 Cong. Rec. S7867-01 (Sen. Levin statement on Consumer Product Safety Improvement Act); 148 Cong. Rec. H5273-02 (Rep. Pascrell statement on Pipeline Safety Improvement Act).[7]

## III. This Court should ignore UBS's request to affirm on alternative grounds.

UBS repeats its arguments from the certiorari stage that there were additional errors with the "contributing factor" instruction, unrelated to "retaliatory intent." That argument is outside the scope of the question presented; was not appropriately pressed to the district court; and is wrong on the merits in any case.

1. To start, Supreme Court Rule 14.1(a) is crystal clear: "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." *See, e.g.*, *14 Penn Plaza LLC v. Pyett*, 556 U.S.

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[7] UBS also contends that the Department of Labor's Administrative Review Board's interpretation of SOX does not merit deference. Resp. Br. 43-47. For the reasons outlined by the United States, UBS is wrong. U.S. Br. 29-35.

247, 273 (2009) (declining to consider an argument raised by respondent that was not encompassed by question presented); *Glover v. United States*, 531 U.S. 198, 205 (2001) (same); *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998) (same).

The question presented in this case is whether "a whistleblower must prove his employer acted with 'retaliatory intent' as part of his case-in-chief." Pet. i. UBS's arguments about *other* supposed flaws in the "contributing factor" instruction (Resp. Br. 47-50) thus form no part of the question presented. Indeed, at the certiorari stage, UBS conceded as much: It argued against certiorari on the ground that those other flaws in the jury instructions were *not* encompassed by the question presented. BIO 8-10.

Moreover, UBS's alternative arguments about the "contributing factor" instruction also were not the basis for the Second Circuit's ruling. The Second Circuit's actual holding dealt only with retaliatory intent: "We therefore *hold* 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 . . . ." Pet. App. 11a (emphasis added). Further proof there was only one holding: The Second Circuit conducted a harmless error analysis with respect to its actual holding but did not do so as to any of UBS's purported "alternative holdings." *See* Cert. Reply 4-6.

2. This Court should ignore UBS's other arguments about the "contributing factor" instruction for another reason: Those arguments were not appropriately pressed to the district court.

Start with UBS's argument that the instructions were flawed because they would allow Murray to satisfy his burden "even if, by virtue of his whistleblowing activity, he was insulated from a termination to which he would otherwise have been subjected sooner." Resp. Br. 47-48 (quoting Pet. App. 11a n.4). The problem is that the jury instruction that *UBS* proposed also would have allowed Murray to satisfy his burden in that circumstance: "For protected activity to be a contributing factor, it must have either alone, or in combination with other factors, affected *in some way* UBS's decision to terminate Mr. Murray's employment." J.A. 4 (emphasis added).

UBS also argues that the "contributing factor" instruction "would permit a plaintiff to satisfy his burden even where the protected activity did not '*actually*' have a causal effect on the termination but instead merely 'was *the sort of behavior* that would *tend to affect* a termination decision.'" Resp. Br. 48 (quoting Pet. App. 11a n.4). It's true that UBS worried that the jury would be "confus[ed] about what 'tended to affect in any way' means." J.A. 139. But UBS said it "would be comfortable" if the judge gave a supplemental instruction during deliberations telling the jury it should only find "contributing factor" if "anyone with knowledge of th[e] protected activity, because of the protected activity, affect[ed] in any way the decision to terminate Mr. Murray's employment." J.A. 140, 180. The judge then gave the supplemental instruction, which did not include the "tended to affect" language. J.A. 180.

3. In any event, the "contributing factor" instruction in this case was correct. UBS does not contest that the term "contributing factor" is a term of

art drawn directly from the WPA. The formulation that the district court used in this case—"For a protected activity to be a contributing factor, it must have either alone or in combination with other factors tended to affect in any way UBS's decision to terminate plaintiff's employment"—is, verbatim, the accepted definition of "contributing factor" under the WPA. Petr. Br. 29-31.

And even if there were some error in that instruction—and even if this Court were to consider an error that, as explained, is outside the scope of the question presented and was not appropriately pressed to the district court—any such error would be harmless. The jury surely did not award Murray nearly $1 million in damages thinking his whistleblowing *insulated* him from termination.[8] Quite the contrary. *See* J.A. 133 (jury instructed that damages should be awarded only if "Defendants improperly retaliated against Plaintiff in terminating him from UBS"); Petr. Br. 37 n.9 (summarizing jury instructions functionally requiring proof of some form of retaliatory intent). And a supplemental instruction made clear that it was the *particular* protected activity in *this* case, not the "sort of behavior" in general, that was the focus of the jury's inquiry. J.A. 180.

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[8] UBS cites testimony suggesting the company would hold off on a termination until an investigation of a whistleblower's report was completed. Resp. Br. 48. But in this case, UBS never offered evidence of any investigation; such an investigation would have been inconsistent with UBS's main factual contention that Murray never in fact made any protected report. J.A. 125-26. That is one of many instances where UBS argues its own version of the facts rather than dealing with the facts in the light most favorable to Murray.

Plus, recall that the jury rejected UBS's evidence and all its arguments at the second step of the burden-shifting framework. If Murray's whistleblowing delayed his firing or otherwise "insulated him from termination," UBS had the chance to show that it "would have taken the same unfavorable personnel action in the absence of" protected activity, only sooner. *See* 49 U.S.C. §§ 42121(b)(2)(B)(ii), (iv). And if Murray's protected conduct had been only the "sort of behavior" that might tend "in the abstract" to affect personnel decisions, the second step of the burden-shifting framework again gave UBS the chance to show that Murray's protected conduct did not in fact affect the decision. But UBS failed to convince the jury of either (implausible) scenario, and UBS has not challenged any part of the second step of the burden-shifting framework—neither the jury instructions nor the jury's verdict—on appeal.

* * *

This case proceeded precisely as the text of SOX dictates. The jury found that Murray's protected activity was a contributing factor in his termination. C.A. J.A. 3065. It found that UBS had not proved that it would have taken the same action regardless of any protected conduct. *Id.* In so doing, it found all that the statute requires to establish a claim for retaliation under 18 U.S.C. § 1514A.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, the jury verdict reinstated, and the case remanded for proceedings on petitioner's cross appeal.

Respectfully submitted,

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