No. 22-___

IN THE

Supreme Court of the United States

TREVOR MURRAY,

Petitioner,

v.

UBS SECURITIES, LLC AND UBS AG,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Easha Anand
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Robert B. Stulberg
Patrick J. Walsh
STULBERG & WALSH, LLP
14 Wall Street, Suite 5G
New York, NY 10005

Robert L. Herbst
Counsel of Record
Benjamin J. Ashmore, Sr.
HERBST LAW PLLC
420 Lexington Avenue,
Suite 300
New York, NY 10170
(914) 450-8163
rherbst@herbstlawny.com

Scott A. Korenbaum
SCOTT A. KORENBAUM, ESQ.
14 Wall Street, Suite 1603
New York, NY 10005

QUESTION PRESENTED

The Sarbanes-Oxley Act of 2002 protects whistleblowers who report financial wrongdoing at publicly traded companies. 18 U.S.C. § 1514A. When a whistleblower invokes the Act and claims he was fired because of his report, his claim is "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).

Under that incorporated framework, a whistleblowing employee meets his burden by showing that his protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. § 42121(b)(2)(B)(iii). If the employee meets that burden, the employer can prevail only if it "demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior." *Id.* § 42121(b)(2)(B)(iv).

The Question Presented is:

Under the burden-shifting framework that governs Sarbanes-Oxley cases, must a whistleblower prove his employer acted with a "retaliatory intent" as part of his case in chief, or is the lack of "retaliatory intent" part of the affirmative defense on which the employer bears the burden of proof?

RELATED PROCEEDINGS

Trevor Murray v. UBS Securities, LLC, UBS AG, Docket No. 1:14-cv-00927 (S.D.N.Y. 2014).

Trevor Murray v. UBS Securities, LLC, UBS AG, Docket Nos. 20-4202 and 21-56 (2d Cir. 2020).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules and Regulations

Legislative Materials

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Trevor Murray respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a-17a) is reported at 43 F.4th 254. The Court of Appeals' order denying rehearing en banc (Pet. App. 18a) is not reported. The order of the United States District Court for the Southern District of New York denying respondent's motion for judgment as a matter of law or for a new trial (Pet. App. 19a-20a) is unreported but available at 2018 WL 11437630.

JURISDICTION

The Court of Appeals issued its decision on August 5, 2022, and denied the petition for rehearing en banc on September 15, 2022. Pet. App. 18a. On November 16, 2022, Justice Sotomayor extended the time to file a petition for a writ of certiorari from December 14, 2022, to January 13, 2023. No. 22A438. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 806(a) of the Sarbanes-Oxley Act of 2002, codified as amended at 18 U.S.C. § 1514A, is reproduced in the appendix to this petition. Pet. App. 21a-24a.

Section 519(b) of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, codified as amended at 49 U.S.C. § 42121(b), is

reproduced in the appendix to this petition. Pet. App. 25a-32a.

INTRODUCTION

This case concerns the interpretation of 18 U.S.C. § 1514A, a provision of the Sarbanes-Oxley Act of 2002 (SOX) that protects corporate whistleblowers who report financial wrongdoing and experience backlash. In common with many other federal whistleblower laws, SOX's text dictates a specific burden-shifting framework for its cause of action: Once an employee shows that his protected activity was a "contributing factor" in an adverse employment action, the burden shifts to his employer to demonstrate, by clear and convincing evidence, that it would have taken the adverse action absent his protected behavior, 18 U.S.C. § 1514A(b)(2)(C) (cross-referencing 49 U.S.C. § 42121(b)).

In the opinion below, the Second Circuit relieved defendant employers of their burden under SOX's affirmative defense. Instead, the Second Circuit's rule requires a whistleblower to prove in his case in chief that his employer acted with "retaliatory intent," Pet. App. 11a—that is, that the adverse action taken against him was motivated by "discriminatory animus," Pet. App. 13a, "prompted by [his] protected activity." *Id.* 14a. This new requirement contravenes the text of Section 1514A, which considers the employer's motivation within its affirmative defense and not within the employee's case in chief.

The Second Circuit's decision warrants this Court's review. In turning Section 1514A on its head, the Second Circuit conflicts with the approach taken by four other courts of appeals—none of which

requires plaintiffs to prove their employer's animus or motivation. The question presented also has broad practical ramifications and arises in an area of federal law where uniformity is particularly needed. Further, the Second Circuit's holding is wrong. It ignores the section of the statute that governs "burdens of proof." And by requiring that the plaintiff show some form of discriminatory animus in his case in chief, the Second Circuit's decision contravenes Congress's deliberate decision to use the "contributing factor" standard.

STATEMENT OF THE CASE

A. Statutory background

1. Congress enacted the Sarbanes Oxley Act (SOX) "to safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation." *Lawson v. FMR LLC*, 571 U.S. 429, 432 (2014); *see also* S. Rep. No. 107-146, pp. 2-11 (2002). "Enron had succeeded in perpetuating its massive shareholder fraud in large part due to a 'corporate code of silence'" that "discourage[d] employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally." *Lawson*, 571 U.S. at 435 (quoting S. Rep. No. 107-146, pp. 4-5 (2002)). Enron employees who had attempted to report corporate misconduct had faced retaliation.

At the time, federal law protected civil service whistleblowers from such retaliation, but "there [was] no similar protection for employees of publicly traded companies." S. Rep. No. 107-146 at 10. Congress decided the lack of corporate whistleblower protection was "'a significant deficiency' in the law, for in complex securities fraud investigations, employees 'are [often]

the only firsthand witnesses to the fraud.'" *Lawson*, 571 U.S. at 435 (quoting S. Rep. No. 107-146 at 10).

To remedy this significant deficiency, SOX protects "employees of publicly traded companies who provide evidence of fraud" or other corporate misbehavior. Pub. L. No. 107-204, § 806, 116 Stat. 745, 802-03. As codified, those companies are forbidden to "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of" protected whistleblowing activity. 18 U.S.C. § 1514A(a).

2. SOX also provides a private cause of action to employees who claim their rights have been violated. 18 U.S.C. § 1514A. This whistleblower cause of action is "governed by the legal burdens of proof set forth in" the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, a statute commonly referred to as "AIR-21" that bars retaliation against airline workers for protected conduct. 18 U.S.C. § 1514A(b)(2) (cross-referencing 49 U.S.C. § 42121(b)). Section 1514A's drafters explained the cross-reference to AIR-21 this way: "Because we had already extended whistleblower protection to non civil service employees" like airline workers, "we thought it best to track those protections as closely as possible." S. Rep. No. 107-146, at 30.

AIR-21, and thus SOX, specifies a calibrated burden-shifting framework. The plaintiff's initial burden is to show that his whistleblowing "was a contributing factor in the unfavorable personnel action alleged." 49 U.S.C. § 42121(b)(2)(B)(iii). If he does, he prevails unless the employer can "demonstrate[] by clear and convincing evidence that

the employer would have taken the same unfavorable personnel action in the absence of that behavior." *Id.* § 42121(b)(2)(B)(iv). An employer who successfully establishes this affirmative defense has thereby shown that its personnel action was not ultimately motivated by discriminatory animus or an intentional desire to retaliate against by the protected activity; rather, the employer had a legitimate motivation for its decision.

3. The burden-shifting framework that SOX incorporated from AIR-21, and that at least ten other whistleblowing statutes use, originated in their shared ancestor, the Whistleblower Protection Act of 1989 (WPA). Pub. L. No. 101-12 (codified as amended at 5 U.S.C. § 1221(e)). The WPA amended the Civil Service Reform Act of 1978—a statute that originally had prohibited personnel actions taken "as a reprisal for" a protected disclosure of information. Pub. L. No. 95–454, § 101(a), 92 Stat. 1111, 1114. Prior to the WPA, courts had interpreted the Civil Service Reform Act's language to require employees to prove that their disclosure was a significant or motivating factor behind the personnel action, borrowing that requirement from constitutional and Title VII disparate treatment cases. 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20, 101st Cong., 1st Sess. 1989) (WPA Explanatory Statement).

Because this impermissible-purpose requirement imposed an "excessively heavy burden" on employees, Congress replaced the "reprisal" language with a new burden-shifting framework. WPA Explanatory Statement, *supra*, at 5033. Under that framework, employees need show only that their protected activity was a "contributing factor" in the adverse employment

action. *See* 5 U.S.C. § 1221(e)(1); *see also Addis v. Dep't of Lab.*, 575 F.3d 688, 691 (7th Cir. 2009) (noting that the WPA was the first federal whistleblower statute to employ a "contributing factor" standard).

The new contributing-factor standard was "specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a 'significant', 'motivating', 'substantial', or 'predominant' factor in a personnel action in order to overturn that action." WPA Explanatory Statement, *supra*, at 5033. As the bill's sponsor explained: "the word 'contributing' does not place any requirement" on plaintiffs "to produce evidence proving retaliatory motive on the part of" the employer. WPA Explanatory Statement, *supra*, at 5037 (remarks of Rep. Pat Schroeder).

Instead of requiring civil service whistleblowers to prove a retaliatory motive, the WPA "establishes an affirmative defense" for an employer to prove a non-retaliatory motive by clear and convincing evidence. WPA Explanatory Statement, *supra*, at 5035. The employer "bear[s] a heavy burden," Congress explained, because the employer "controls most of the cards—the drafting of the documents supporting the [challenged] decision, the testimony of witnesses who participated in the decision, and the records that could document whether similar personnel actions have been taken in other cases." *Id.* at 5033.

B. Proceedings below

1. Petitioner Trevor Murray is a financial expert who earned a graduate degree from the Massachusetts

Institute of Technology. C.A. J.A. 149-155.[1] In April 2011, UBS hired Murray as its sole research strategist servicing UBS's commercial mortgage-backed securities (CMBS) business. His job was to report on CMBS markets to UBS's current and potential customers. His direct supervisor was Michael Schumacher. Pet. App. 4a.

Given Murray's responsibilities, Securities and Exchange Commission (SEC) regulations required him to certify that his research was independently produced and accurately reflected his own views, rather than those of the company's trading desk. Pet. App. 3a. Certifying a report that was not independently produced would violate those regulations. *Id.* n.1; *see* 17 C.F.R. § 242.501(a). UBS's compliance department took extra steps to physically separate Murray's workspace from the trading desk to ensure independence. C.A. J.A. 206, 1442. That desk was headed by Ken Cohen, who had worked at Lehman Brothers before its collapse during the Great Recession due to its involvement in the subprime mortgage crisis. C.A. J.A. 752.

2. Despite SEC regulations requiring that Murray's reports be independent, Cohen pressured Murray to skew his research in support of UBS business strategies. Pet. App. 3a. In June 2011, Cohen told Murray to produce "a research article" that would "smooth[] over" concerns investors might have about participating in UBS's mortgage-backed securities trades. C.A. J.A. 211-12. In August, Cohen directed Murray, "don't say anything negative" in a client

---

[1] Citations to the Joint Appendix before the Second Circuit are cited C.A. J.A. [xxx], where "xxx" indicates the page number.

meeting. *Id.* 243. In September, Cohen told Murray, "It's important that we maintain consistency of message between originations, trading desk, and research." Pet. App. 3a. For that reason, Cohen instructed Murray to "clear your research articles with the [trading] desk going forward." *Id.* (alteration in original).

Despite the pressure, Murray wrote an independent "Outlook" report forecasting the 2012 CMBS markets as risky (or at least riskier than the CMBS trading desk wanted investors to believe). C.A. J.A. 274-77, 1501. Cohen reacted negatively, telling Murray the report was "too bearish" and had not delivered a "consistent message with what we're trying to do around here." *Id.* 276.

3. In early December 2011, Schumacher drafted a "glowing review" of Murray's performance. C.A. J.A. 3118. He highlighted Murray's reputation as "a great ambassador for the [UBS] franchise." *Id.* 1499.

On December 15, 2011, after Schumacher had prepared the review but before he shared it with Murray, Murray reported the trading desk's improper pressure campaign to Schumacher. Pet. App. 4a; C.A. J.A. 283. Murray told Schumacher the situation "wasn't just unethical, it was illegal." Pet. App. 4a. Schumacher responded that "it is very important you do not alienate [the CMBS trading desk]." *Id.*

4. Shortly thereafter, Schumacher emailed Larry Hatheway (UBS's Global Head of Macro Strategy) requesting to have a private telephone conversation. C.A. J.A. 3117, *id.* 1544-45. When Hatheway declined to speak on the phone, Schumacher emailed back a recommendation. *Id.* 1544-45. Either UBS should

"remove [Murray] from our headcount," Pet. App. 5a—that is, terminate him—or, in the alternative, move him to a trading desk position. C.A. J.A. 1544. There, he would provide marketing material rather than independent analysis and could be required to follow Cohen's directives. *See id.* 206, 502.

Two days after suggesting Murray's termination, Schumacher met with Murray to give him the favorable December performance review. C.A. J.A. 3115-16. Schumacher did not mention that Murray's job was in jeopardy. *Id.* 3116. Murray reiterated his concerns about the trading desk's pressure, saying that "the constant efforts to skew my research" violated "regulations as it pertains to my objectivity and independence as a research analyst" and comprised "an overall mosaic" of "illegality." *Id.* 3115, 294-95. Schumacher told Murray "to write what the business line wanted." Pet. App. 5a.

A few weeks later, Cohen declined to take on Murray as a trading desk analyst, and wrote that if Murray was not going to remain as a research analyst, UBS should "let him go." C.A. J.A. 1557. Schumacher and Hatheway then agreed to terminate Murray. *Id.* 1797.

On February 6, 2012, Schumacher summoned Murray to the 13th floor, where he was fired. C.A. J.A. 304. Although Schumacher suggested that "obviously you know what's going on today," *id.* 305, Murray had had no prior inkling that his job was in jeopardy or that he would be terminated. Schumacher later conceded that "one of the factors that led to the selection of Mr. Murray for termination was the fit or difference in terms of publishing analyst versus desk analyst." *Id.* 549-50.

5. In August 2012, Murray filed a whistleblower complaint with the U.S. Department of Labor alleging that his termination violated the Sarbanes-Oxley Act. Compl. ¶ 31, ECF No. 2. When the Department of Labor had not processed his claim within 180 days, Murray exercised his right under Section 1514A(b)(1)(B) to file a de novo action in federal district court. He filed his complaint in the Southern District of New York in February 2014. Compl. ¶ 31, ECF No. 2.

The district court denied UBS's motion for summary judgment, finding that Murray had established a prima facie case that his protected activity contributed to his termination. The court also found genuine dispute over whether UBS could show that it would have discharged Murray absent his report of improper pressure. Op. and Order, pp. 25, 30-31, ECF No. 147. The case proceeded to trial by jury.

The trial lasted more than two weeks. Murray presented evidence regarding his whistleblowing activity, his interactions with Schumacher and Cohen, and his termination. Pet. App. 3a-4a. UBS's defense was that it had fired Murray for financial reasons unconnected to any protected activity. *Id.* 5a. But evidence showed that UBS's CMBS business was in fact a "core" and "profitable" business for the Bank, C.A. J.A. 930, 508, and continued to grow. For example, UBS did not lay off any other CMBS business-related staff as part of its reduction in force, *id.* 786; to the contrary, the total number of people devoted to the CMBS business grew between 2011 and 2013. *Id.* 910. And Schumacher also conceded that he had anticipated Murray's continued employment at

UBS before Murray's protected disclosure of Cohen's illegal interference. *Id.* 466-67.

The district court instructed the jury that Murray was entitled to compensation only "[i]f you find that defendants improperly retaliated against Plaintiff in terminating him from UBS." C.A. J.A. 3056. Specifically, the court instructed the jury that Murray had the burden of proving that: 1) his activity was protected, 2) his employer knew about the activity, 3) he suffered an adverse action in being fired, and 4) his protected activity contributed to his termination. C.A. J.A. 3050. With respect to the contributing factor element, the court explained that "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." *Id.* 3053. Furthermore, Murray was "not required to prove that his protected activity was the primary motivating factor in his termination, or that UBS's articulated reason for his termination was a pretext, in order to satisfy this element." *Id.* 3053-54.

The court also instructed the jury that if it found that Murray had "proven each of the four elements of his Sarbanes-Oxley Act claim by a preponderance of the evidence," it was then required to consider UBS's "claim that [Murray's] employment was terminated as part of a larger 'reduction in force,' or series of layoffs, at UBS." C.A. J.A. 3054. The court explained to the jury that "[o]n this specific issue, the burden of proof [lay] with" UBS to "demonstrate by 'clear and convincing' evidence that it would have terminated Plaintiff's employment even if he had not engaged in protected activity." *Id.* If UBS "prove[d] this element

by clear and convincing evidence," then it would not be "liable to Plaintiff under the Sarbanes-Oxley Act." *Id.* 3054-55.

The jury returned a verdict for Murray. The jury verdict form required the jury to make separate findings regarding Murray's case in chief and UBS's affirmative defense. C.A. J.A. 3065. The jury found that Murray had "proved, by a preponderance of the evidence, all four elements of his claim." *Id.* It further found that UBS had not "proved, by clear and convincing evidence" its affirmative defense. *Id.* The jury awarded Murray back pay and compensatory damages. *Id.* 3066-67. The district court denied UBS's post-trial motion and upheld the jury verdict. *See* Pet. App. 19a.[2]

6. On appeal, UBS did not challenge the jury's finding that it had failed to prove that it would have fired Murray "even if he had not engaged in protected activity." C.A. J.A. 3065. Instead, its brief focused on whether Murray should have been required to show, as part of his case in chief, that UBS acted with a retaliatory intent.

The Second Circuit reversed. It acknowledged that "the jury found that Murray's whistleblowing was a contributing factor to his termination." Pet. App. 17a. It also rejected UBS's argument that there was insufficient evidence of retaliatory intent to support the verdict, conceding that "there was circumstantial evidence at trial that UBS terminated Murray in retaliation for whistleblowing." *Id.* However, the

---

[2] The order refers to the reasoning set forth during a Sept. 25, 2018, telephonic conference. The oral transcript of that conference is available as ECF 346.

Second Circuit held that this was insufficient to establish liability because the jury had not been instructed that it was required to find that Murray proved UBS had "retaliatory intent" in firing him. *Id.*

The court located this intent requirement, not in the SOX provision that governs adjudication of whistleblower suits, 18 U.S.C. § 1514A(b)(2), but rather in the SOX provision that describes what employers are forbidden from doing, *id.* § 1514A(a). The court focused on the directive that an employer not "'*discriminate* against an employee . . . *because of*' whistleblowing." Pet. App. 9a (quoting 18 U.S.C. § 1514A(a)) (italics and ellipses supplied by the Second Circuit). In the Second Circuit's view, the presence of the word "discriminate" in SOX "requires the employee to prove that [he] was the victim of intentional retaliation." Pet. App. 13a-14a. The Second Circuit variously defined such retaliatory intent as (1) "an intent to 'discriminate against an employee . . . because of' lawful whistleblowing activity," Pet. App. 11a (ellipses in the original); or a situation in which the employer's action (2) was "motivated by the employee's whistleblowing," *id.* 10a; (3) was "based on the employer's conscious disfavor of an employee for whistleblowing," *id.*; or (4) was "at some level, *motivated* by discriminatory animus," *id.* 13a (emphasis in the original).

The court "recognize[d] that [its] conclusion" that plaintiffs in a SOX case must show retaliatory intent "departs from the approach of the Fifth and Ninth Circuits." Pet. App. 14a, n. 7 (citing *Halliburton, Inc. v. Admin. Rev. Bd.*, 771 F.3d 254, 263 (5th Cir. 2014), and *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010)). But it claimed its conclusion was

consistent with two prior decisions of its own involving other statutes: *Vega v. Hempstead Union Free School District*, 801 F.3d 72, 85 (2d Cir. 2015), a Title VII disparate treatment case, and *Tompkins v. Metro-North Commuter Railroad Co.*, 983 F.3d 74 (2d Cir. 2020), a Federal Railroad Safety Act case. *See* Pet. App. 10a-11a.

7. The Second Circuit denied rehearing and rehearing en banc. Pet. App. 18a.

REASONS FOR GRANTING THE WRIT

The Second Circuit's decision here departs from the statutory text of the Sarbanes-Oxley Act (SOX) and the rule applied in four other circuits. Only this Court can resolve the conflict over this important question of law, and this petition provides an ideal opportunity to do so.

I. There is a square conflict as to whether Section 1514A plaintiffs bear the burden of proving that their employer had an improper motive.

In the opinion below, the Second Circuit held that a SOX plaintiff must "prove that the employer took the adverse employment action against [him] with retaliatory intent" as part of his case in chief. Pet. App. 11a. The Second Circuit acknowledged that its decision "departs from the approach of the Fifth and Ninth Circuits as to the elements of a section 1514A claim." Pet. App. 14a, n.7. That understates the conflict: The Second Circuit's decision also conflicts with the Fourth and Tenth Circuits. None of these four circuits requires plaintiffs in Section 1514A cases to prove their employer's improper motive as part of their case in chief.

1. The Second Circuit was correct that its rule conflicts with the Fifth and Ninth Circuits.

In *Halliburton, Inc. v. Administrative Review Board*, 771 F.3d 254 (5th Cir. 2014), the Fifth Circuit rebuffed an employer's argument that "an employee must prove a 'wrongfully-motivated causal connection.'" *Id.* at 263. Quoting the Federal Circuit's analysis in *Marano v. Department of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993), interpreting the identical language in the Whistleblower Protection Act (WPA) on which SOX was based, the Fifth Circuit held that in a SOX case, "a whistleblower *need not* demonstrate the existence of a retaliatory motive on the part of the [employer]" to meet his burden to show that the protected disclosure was a contributing factor in the adverse personnel action. *Halliburton*, 771 F.3d at 263 (alteration in original).

The Fifth Circuit's holding in *Halliburton* also followed from its earlier decision in *Allen v. Administrative Review Board*, 514 F.3d 468 (5th Cir. 2008). There, the court recognized that SOX's "'independent burden-shifting framework' is distinct from the *McDonnell Douglas* burden-shifting framework applicable to Title VII claims." *Id.* At 476 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). The Title VII framework places the burden on the employee ultimately to prove that the employer acted with a discriminatory purpose. But SOX, by contrast, imposes the burden on the employer to prove "by clear and convincing evidence that it would have taken the same personnel action against the whistleblower even in the absence of that protected behavior." *Allen*, 514 F.3d at 476.

When faced with the question whether Section 1514A requires a plaintiff to prove his employer's intent, the Ninth Circuit also held that an employee does not need to "demonstrate the employer's retaliatory motive." *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010). *See also McEuen v. Riverview Bancorp, Inc.*, No. C12-5997, 2013 WL 6729632, at *3 (W.D. Wash. Dec. 19, 2013) (applying *Coppinger-Martin*'s holding to the question whether a SOX plaintiff had established a prima facie case).

2. The Fourth and Tenth Circuits also conflict with the Second Circuit: In SOX cases, they rely on *Marano*'s reasoning to reject a requirement that a whistleblower bear the burden of proving that his employer had an improper motive for taking the challenged personnel action.

In *Feldman v. Law Enforcement Associates Corp.*, 752 F.3d 339 (4th Cir. 2014), the Fourth Circuit explained that a contributing factor is "any factor which alone, or in combination with any other factors, tends to affect in any way the outcome of the decision." *Id.* at 348. Looking to the Fifth Circuit's decision in *Allen* and citing *Marano*, 2 F.3d at 1140, the Fourth Circuit added that SOX's contributing factor "test is specifically intended" to eliminate any requirement that a whistleblower "prove that his protected conduct" was a "motivating" factor in the employer's decision. *Feldman*, 752 F.3d at 348.

In *Lockheed Martin Corp. v. Department of Labor*, 717 F.3d 1121 (10th Cir. 2013), the Tenth Circuit similarly declared that "the required showing to establish causation" under Section 1514A "is less onerous than the showing required under Title VII." *Id.* at 1137. Like the Fourth and Fifth Circuits, the

Tenth Circuit adopted *Marano*'s reading of the contributing factor language common to SOX, AIR-21, and the WPA: That language was "intended to overrule" prior requirements that whistleblowers prove their protected activity was a "motivating" factor. *Id.* at 1136 (quoting *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB No. 04–149, 2006 WL 3246904, at *13 (Admin. Rev. Bd. May 31, 2006) (quoting *Marano*, 2 F.3d at 1140)).

The conflict here is real. And it is not going away given the Second Circuit's denial of rehearing en banc.

II. The question presented is important.

The specific question presented here is important to resolve for at least four reasons.

1. The whistleblower protections of the Sarbanes-Oxley Act (SOX) are critical to the integrity of the national economy. "Congress installed whistleblower protection in the Sarbanes-Oxley Act as one means to ward off another Enron debacle." *Lawson v. FMR LLC*, 571 U.S. 429, 447 (2014).

Any uncertainty in how SOX should be enforced thus raises important questions. "[O]ne in every two Americans invest[s] in public companies" either directly or through pension and retirement plans. S. Rep. No. 107-146, p. 10 (2002). And in the past six years, employees filed more than 850 SOX whistleblower claims with the Department of Labor. *See* OSHA, Whistleblower Investigation Data: Fiscal Years 2016-2021 (n.d.), https://perma.cc/9H3W-8AYL. Such lawsuits cannot serve their intended deterrent purpose if SOX claims are too hard to prove. In fact, a prominent corporate defense firm has already written about the effects the decision here will have: "The

increased burden on whistleblowing plaintiffs may also reduce the cost to settle anti-retaliation claims." Paul Weiss, *Client Memorandum: Second Circuit Rules That Retaliatory Intent Is an Element of a Sarbanes-Oxley Whistleblower Claim* (Aug. 18, 2022), https://perma.cc/747U-L2NT.

2. A central purpose of Sarbanes-Oxley is providing *uniform* protection to corporate whistleblowers. Prior to SOX, "[c]orporate employees who report[ed] fraud [were] subject to the patchwork and vagaries of current state laws, although most publicly traded companies do business nationwide." S. Rep. No. 107-146, at 10. Congress enacted SOX out of concern that otherwise "a whistleblowing employee in one state may be far more vulnerable to retaliation than a fellow employee in another state who takes the same actions." *Id.* Unfortunately, the conflict created by the decision below resurrects that "vulnerability."

Indeed, the conflict between the Second Circuit and four other courts of appeals about the elements of a SOX whistleblower claim is especially consequential. New York City is the heart of the finance industry. It houses 166,000 of the 922,000 securities jobs nationwide. Mario A. González-Corzo & Vassilios N. Gargalas, U.S. Bureau of Labor Statistics, Recent Trends in Employment and Wages in New York City's Finance and Insurance Sector (Apr. 2019), https://perma.cc/7ZXN-XDCL. Not surprisingly, federal courts in the Second Circuit handle 21.5 percent of all SOX whistleblower cases. Br. for the Government Accountability Project as *Amicus Curiae* in Support of Appellee-Cross-Appellant, *Trevor Murray v. UBS Securities LLC, UBS AG* 43 (No. 20-4202) (2nd Cir. Sep. 3, 2021). The three circuits with

the next highest number of SOX whistleblower cases—the Ninth, the Fifth and the Fourth, *Recent Trends*, *supra*—all conflict with the Second.

In the context of an increasingly interconnected corporate universe, the Second Circuit's decision means that a whistleblower claimant's burden of proof turns on where the whistleblower can file suit. Filing against a company's Houston office, for example, would trigger the Fifth Circuit's no-proof-of-intent-required contributing factor standard, whereas suing in New York would require surmounting the more difficult hurdle of proving an employer's motive.

3. The Second Circuit's new rule also merits this Court's review because of its inconsistency with positions the Department of Labor has taken with respect to the contributing factor language SOX incorporates from AIR-21. *See Lawson*, 571 U.S. at 440 (granting certiorari "to resolve the division of opinion" on the interpretation of Section 1514A between the First Circuit and the Administrative Review Board—the Department of Labor's adjudicatory body for worker protection laws).

In contrast to the Second Circuit, the Department of Labor has read AIR-21's contributing factor language to exclude any requirement that whistleblowers prove an impermissible motive. In *Hutton v. Union Pacific Railroad Co.*, ARB No. 11-091, 2013 WL 2450037 (Admin. Rev. Bd. May 31, 2013), the Administrative Review Board held that "neither motive nor animus is a requisite element of causation as long as protected activity contributed in any way." *Id.* at *5. The Labor Department has since reiterated that "the contributing-factor standard contains no requirement that the employee show that the

employer took the adverse action based on animus." Br. for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiff-Appellee and Affirmance 12-13, *Blackorby v. BNSF Railway Co.*, 849 F.3d 716 (8th Cir. 2017) (No. 15-3192), *cert. denied*, 138 S. Ct. 264 (2017).

Resolving this interpretive conflict between courts and the Secretary of Labor is particularly urgent because of the statute's requirements for adjudicating SOX claims. The statute's text explicitly directs federal courts to use the same procedures as the Department of Labor. *Compare* 18 U.S.C. § 1514A(b)(2)(A) *with* 18 U.S.C. § 1514A(b)(2)(C). "Should such a case be brought in federal court, it is intended that the same burdens of proof which would have governed in the Department of Labor will continue to govern the action." S. Rep. No. 107-146 at 19-20 (2002). Such consistency reduces the strain on judicial resources and advances national uniformity.

But courts within the Second Circuit have now been directed to deviate from the burdens of proof that govern within the Department of Labor. This raises a conundrum: Is the Department supposed to adjudicate cases arising within the Second Circuit differently from cases arising everywhere else? That disuniformity is intolerable in a statute enacted to ensure uniform, nationwide protections. On the other hand, if the Department retains its interpretation and preserves administrative uniformity, its failure to require plaintiffs to prove an employer's motive will doom its decisions to reversal on appeal in the Second Circuit. That inefficiency is equally intolerable.

Even worse, the same administrative decision may be subject to review in courts with different interpretations, so the Department of Labor will not

know which circuit will ultimately review its findings. The statute's judicial review provisions permit "any person adversely affected" by a final Department of Labor ARB order—the employee, the employer, or both—to obtain review either where the violation occurred or where the plaintiff resided. 49 U.S.C. § 42121(b)(4). Many Wall Street analysts employed by New York City-based firms may live in New Jersey; others have second homes or work remotely from locations outside the Second Circuit. If, for example, a prospective SOX plaintiff were working remotely from San Francisco or Jackson Hole, outcomes might turn on who wins the race to the courthouse, given that the Ninth and Tenth Circuits have rejected a discriminatory purpose requirement for SOX claims. This risk is not hypothetical. For example, in *Doyle v. Secretary of Labor*, 285 F.3d 243 (3d Cir. 2002) where the whistleblowing statute (like SOX) permitted filing either where the plaintiff resided or where the violation occurred, dueling petitions for review of the Administrative Review Board's decision were filed in the Third and Sixth Circuits one day apart. *Id.* at 248 & n.3.

4. Finally, a decision by this Court to grant the petition and resolve the circuit split here would have beneficial consequences for whistleblower protection statutes beyond SOX itself. At least ten other whistleblower statutes incorporate the WPA framework by either cross-referencing AIR-21 or using identical language. *See* National Transit Systems Security Act, 6 U.S.C. § 1142; Consumer Financial Protection Act, 12 U.S.C. § 5567; Consumer Product Safety Improvement Act, 15 U.S.C. § 2087; FDA Food Safety Modernization Act, 21 U.S.C. § 399d; Patient

Protection and Affordable Care Act, 29 U.S.C. § 218c; Seaman's Protection Act, 46 U.S.C. § 2114; Federal Railroad Safety Act, 49 U.S.C. § 20109; Moving Ahead for Progress in the 21st Century Act, 49 U.S.C. § 30171; Surface Transportation Assistance Act, 49 U.S.C. § 31105; Pipeline Safety Improvement Act, 49 U.S.C. § 60129. These statutes protect whistleblowers in industries like nuclear energy, railways, and aviation, where adherence to laws and regulations is particularly important.

Yet the courts of appeals disagree about whether this language requires that plaintiffs prove their employer acted with an impermissible motive. This disagreement extends beyond the circuit split over SOX discussed in this petition. *Compare Tamosaitis v. URS Inc.*, 781 F.3d 468, 482 (9th Cir. 2015) (holding that, under the Energy Reorganization Act's contributing factor framework, "the presence of an employer's subjective retaliatory animus is irrelevant"), *with Armstrong v. BNSF Ry. Co.*, 880 F.3d 377, 382 (7th Cir. 2018) (holding that a Federal Railroad Safety Act (FRSA) plaintiff must "demonstrate the existence of an improper motive"); *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014) (holding that "the contributing factor that an employee must prove is intentional retaliation" in FRSA cases); *and Tompkins v. Metro-N. Commuter R.R. Co.*, 983 F.3d 74, 82 (2d Cir. 2020) ("some evidence of retaliatory intent is a necessary component of an FRSA claim").

In resolving the question presented, this Court would also provide valuable guidance on how this constellation of statutes should be interpreted. "[W]hen Congress uses the same language in two

statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (plurality opinion) (citation omitted). *See also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012) (discussing the prior-construction canon). Congress enacted SOX two years after AIR-21, so its language should be presumed to have the same meaning in both statutes. A decision from this Court on SOX's language may therefore affect thousands of whistleblower cases brought under AIR-21 and the other statutes that cross-reference it. See OSHA, Whistleblower Investigation Data: Fiscal Years 2016-2021 (n.d.), https://perma.cc/9H3W-8AYL.

III. This case provides the right vehicle for resolving the question presented.

The procedural posture of this case provides an ideal opportunity for this Court to clarify the burdens of proof in Section 1514A claims. Every other issue related to liability—from whether Murray's conduct was protected to whether UBS established its affirmative defense—has been decided in Murray's favor. Pet. App. 17a. As this case comes to this Court, the ultimate outcome turns entirely on whether Murray was also required to prove in his case in chief that his employer acted with culpable intent.

Moreover, the record in this case, developed through eight years of litigation that included a two-week trial, shows that Murray met the standard used in the Fourth, Fifth, Ninth, and Tenth Circuits. The Second Circuit recognized that "the jury found that

Murray's whistleblowing was a contributing factor to his termination." Pet. App. 17a. The Second Circuit had no problem with the quantum of evidence Murray had presented. See *id.* 16a-17a (acknowledging the "circumstantial evidence at trial that UBS terminated Murray in retaliation for whistleblowing") *Id.* 16a. And the jury's finding that UBS had not shown that it would have fired Murray regardless of his protected conduct was unchallenged on appeal. *Id.* 17a. Had the Second Circuit not additionally required that Murray *prove* that UBS acted with retaliatory intent, it would have affirmed the jury verdict.

IV. The Second Circuit's ruling is wrong.

"In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). Both the text and the structure of the Sarbanes-Oxley Act (SOX) make clear that a whistleblower is not required to prove his employer's motive as part of a Section 1514A case. Indeed, Congress chose the relevant language here precisely to overrule prior judicial decisions that demanded whistleblowers prove employer motive.

1. *Text.* The Second Circuit's decision here ignores the subsection of SOX that governs what adjudicators are supposed to do.

Section 1514A(a) is directed to employers and tells them what SOX forbids. Section 1514A(b)(2) is directed to adjudicators and tells them how to assess whistleblower claims. When these claims are adjudicated in federal district court, they "shall be governed by the legal burdens of proof set forth in

section 42121(b) of title 49." 18 U.S.C. § 1514A(b)(2)(C).

As petitioner has explained, that provision of Title 49—passed as part of AIR-21—codifies the Whistleblower Protection Act's burden-shifting framework as applied to private employers. *See supra* pp. 5-6. It declares that a plaintiff meets his burden if he shows that his protected activity "was a contributing factor" in his employer's unfavorable action against him. 49 U.S.C. § 42121(b)(2)(B)(iii). If Congress had wanted to require instead that plaintiffs show that their whistleblowing activity was a "motivating factor" in the challenged employment action, it knew how to do so. In the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), for example, Congress provided that an employer is liable for engaging in a forbidden "act of reprisal" if protected activity was "*a motivating factor* in the employer's action, unless the employer can prove that the action would have been taken in the absence of such" protected activity. 38 U.S.C. § 4311(c)(2) (emphasis added). Congress included no such "motivating factor" language when it enacted SOX in 2002.

AIR-21's contributing factor language, which SOX incorporates, explains how a factfinder will know whether an employer has "discriminate[d] against an employee . . . because of" his whistleblowing. 18 U.S.C § 1514A(a); *see also* Pet. App. 9a, 11a. The Second Circuit apparently stopped reading Section 1514A after the first subsection, never mentioning, let alone grappling with, Section 1514A(b)(2), where SOX incorporates AIR-21.

Instead of attending to SOX's burden-shifting framework, the Second Circuit fixated on the words "discriminate" and "because of." From those words, the court of appeals reasoned that, like a plaintiff in a Title VII disparate treatment case, a SOX plaintiff must show "that the employer's adverse action was *motivated by* the employee's whistleblowing." Pet. App. 10a (emphasis added). To be sure, the Title VII caselaw on disparate treatment offers one version of how "discrimination" may be proven. But that is not the version that Congress adopted in enacting SOX.

The Second Circuit's resort to Title VII and the dictionary, Pet. App. 9a, is unavailing here. As to the former, we explain *supra* pp. 5-6 and *infra* pp. 30-31 that Congress chose the language that SOX incorporates precisely to *reject* Title VII as a model. As to the latter, generic dictionary definitions of the word *discriminate* "cannot resolve the basic question presented in this case." *United States v. Tinklenberg*, 563 U.S. 647, 655 (2011). Instead, the discrimination forbidden in Section 1514A must be understood "in context and in light of the statute's structure and purpose." *Id.* Here, the statutory language requires a contributing factor, not a motivating one.

The Second Circuit went further awry when it insisted that "animus" is the "essence" of all discrimination claims. Pet. App. 14a, 13a. Not so. As this Court has explained, there are a number of "antidiscrimination laws" where liability can stem from "the consequences of an action rather than the actor's intent." *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Comtys. Project, Inc.*, 576 U.S. 519, 533, 534 (2015). The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.*, and the Fair Housing

Act of 1968, 42 U.S.C. §§ 3601 *et seq.*, are two such examples. *See Inclusive Comtys.*, 576 U.S. at 533-34. SOX is another one.

The Second Circuit erred again in repeatedly referring to some form of the word "retaliation" to contend that Section 1514A somehow places the burden on plaintiffs to establish their employer's motive as part of their case in chief. *See* Pet. App. 7a, 8a, 9a, 10a, 11a, 13a, 14a, 15a, 16a, 17a. But "retaliation" appears only in the heading of Section 1514A and not in the text, and this Court has already cautioned lower courts not to fixate on Section 1514A's heading: "[W]here, as here, 'the [statutory] text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner.'" *Lawson v. FMR LLC*, 571 U.S. 429, 446 (2014) (quoting *Brotherhood of R.R. Trainmen v. Balt. & Ohio R.R.*, 331 U.S. 519, 528 (1947)). Thus, headings cannot "take the place of the detailed provisions of the text." *Id.* (quoting *Brotherhood of R.R. Trainmen*, 331 U.S. at 528). Here, the detailed provisions of the text clearly lay out a SOX plaintiff's burden, which does not include proving the employer's motivation.

2. *Structure.* For two separate reasons, SOX's structure also supports the conclusion that plaintiffs do not bear the burden of proving their employer's retaliatory intent under Section 1514A.

First, SOX contains another whistleblower protection provision whose text *does* require proof of retaliatory intent. In addition to creating the Section 1514A cause of action, SOX also amended an existing provision of federal law, 18 U.S.C. § 1513, to prohibit "knowingly, *with the intent to retaliate*, tak[ing] any action harmful to any person, including interference

with the lawful employment or livelihood of any person, for [reporting federal crimes to law enforcement]." 18 U.S.C. § 1513(e) (emphasis added). "[W]here Congress includes particular language in one section of a statute but omits it in another," courts should assume Congress intended the two to be construed differently. *Loughrin v. United States*, 573 U.S. 351, 358 (2014) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). The absence of any such burden to prove retaliatory intent in Section 1514A is telling.

Second, the Second Circuit's decision upends the two-step framework that SOX adopted for assessing burdens of proof in Section 1514A cases. That framework first asks whether the plaintiff has shown his whistleblowing to be a "contributing factor" in the challenged personnel action. 49 U.S.C. § 42121(b)(2)(B)(iii). If he has, the framework then asks whether the defendant can show, by clear and convincing evidence, that it would have taken the same action even absent the whistleblowing. *Id.* § 42121(b)(2)(B)(iv). The Second Circuit's rule renders this affirmative defense superfluous because it requires the plaintiff to preemptively rebut the affirmative defense as part of his case in chief. In doing so, the Second Circuit's rule changes both the location and the weight of the burden of proof—from the defendant to prove a legitimate motive by clear and convincing evidence to the plaintiff to prove an illegitimate motive by a preponderance.

To see why the Second Circuit's approach is wrong, consider the following hypothetical. A jury finds that the plaintiff's activity was a contributing factor in the challenged action but is unsure about

whether the employer had a legitimate motive for firing the whistleblower anyway. Under the statute, the jury should find for the plaintiff because the employer has failed to prove a legitimate motive by clear and convincing evidence. But under the Second Circuit's rule, the jury must return a verdict for the defendant because the plaintiff has not shown a retaliatory motive. SOX commands otherwise.

This case is a variant of that hypothetical. The Second Circuit claimed that "we do not know whose reasons—UBS's or Murray's—the jury credited." Pet. App. 17a. Not so. The panel acknowledged that UBS had not "prove[d] by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of [Murray's] protected behavior." *Id.* (citation omitted; alteration supplied by the Second Circuit). So, under SOX's burden-shifting framework, the Second Circuit was wrong to demand that "Murray prove[] by a preponderance of the evidence that UBS acted with retaliatory intent." *Id.* To the contrary: Murray met his burden. The jury expressly found that his protected conduct in *some* way affected UBS's decision, which was what the "contributing factor" requirement required. *See Feldman v. Law Enf't Assocs. Corp.*, 752 F.3d 339, 348 (4th Cir. 2014); *Lockheed Martin Corp. v. Dep't of Lab.*, 717 F.3d 1121, 1136 (10th Cir. 2013); *Allen v. Admin. Rev. Bd.*, 514 F.3d 468, 476 n.3 (5th Cir. 2008).

3. *History*. When Congress first enacted the "contributing factor" test for whistleblowing statutes as part of the Whistleblower Protection Act of 1989 (WPA), it declared: "This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was

a 'significant', *'motivating'*, 'substantial', or 'predominant' factor in a personnel action in order to overturn that action." 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20, 101st Cong., 1st Sess. 1989) ("WPA Explanatory Statement") (emphasis added). In other words, the WPA abandoned reliance on Title VII's disparate treatment caselaw as the proper standard in whistleblower cases. *See* Explanatory Statement, *supra*, at 5033.

As discussed above, *supra* pp. 5-6, the language in the statute here is drawn directly from the WPA. Accordingly, by ignoring the history of the WPA—SOX's actual antecedent—and instead modeling its interpretation of SOX on the Title VII disparate impact cases, the Second Circuit did more than just take a wrong turn. It did exactly what Congress explicitly rejected in the WPA and in SOX. In Title VII disparate treatment cases, the "burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 252-53 (1981) (explaining the *McDonnell Douglas* "allocation" of burdens of proof for such cases). Even once a Title VII plaintiff establishes a prima facie case, a Title VII defendant need only "produc[e] evidence" of "a legitimate, nondiscriminatory reason." *Id.* at 254. "The defendant need not persuade the court that it was *actually* motivated by the proffered reasons." *Id.* (emphasis added).

The Second Circuit's decision is a textbook example of the perils of "apply[ing] rules applicable under one statute to a different statute without careful and critical examination." *Federal Express Corp. v.*

Holowecki, 552 U.S. 389, 393 (2008). SOX and Title VII are two different statutes with two distinct histories. And imposing Title VII's framework on SOX cases simply cannot be squared with SOX's express demand that the defendant "demonstrate[] by clear and convincing evidence" the legitimacy of the actual basis for the unfavorable personnel action. 49 U.S.C. § 42121(b)(2)(B)(iv).

Put another way, to "engraft" the liability standard from Title VII onto SOX "would thus require more than a little judicial adventurism, and look a good deal more like amending a law than interpreting one," *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1017 (2020). This Court should correct the Second Circuit's mistake.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Easha Anand
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Robert B. Stulberg
Patrick J. Walsh
STULBERG & WALSH, LLP
14 Wall Street, Suite 5G
New York, NY 10005

Robert L. Herbst
Counsel of Record
Benjamin J. Ashmore, Sr.
HERBST LAW PLLC
420 Lexington Avenue,
Suite 300
New York, NY 10170
(914) 450-8163
rherbst@herbstlawny.com

Scott A. Korenbaum
SCOTT A. KORENBAUM, ESQ.
14 Wall Street, Suite 1603
New York, NY 10005

January 13, 2023