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 FOR *AMICUS CURIAE* NATIONAL WHISTLEBLOWER CENTER IN SUPPORT OF PETITIONER

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## TABLE OF CONTENTS

**Page(s)**

TABLE OF AUTHORITIES……..……...ii

INTEREST OF THE *AMICUS CURIAE*……1

SUMMARY OF THE ARGUMENT……2

ARGUMENT……4

I. A BURDEN OF PROOF STANDARD REFLECTS A THOUGHTFUL ALLOCATION OF RISK IN LIGHT OF SOCIETAL INTERESTS……...4

II. CONGRESS CHANGED THE BURDEN OF PROOF BASED ON AN EXTENSIVE FACTUAL RECORD……..9

CONCLUSION……...23

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

*Addington v. Texas*,
441 U.S. 418 (1979).....2, 4, 9

*Colorado v. New Mexico*,
467 U.S. 310 (1984).....4

*Concrete Pipe & Prod. of California, Inc., v. Constr. Laborers Pension Tr. For S. California*,
508 U.S. 602 (1993).....4

*Cooper v. Oklahoma*,
517 U.S. 348 (1996).....4

*Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261 (1990).....4

*Engle v. Isaac,*
456 U.S. 107 (1982).....4

*Francis v. Franklin*,
471 U.S. 307 (1985).....4

*In re Winship,*
397 U.S. 358 (1970).....4, 5, 8

*Jackson v. Virginia*,
443 U.S. 307 (1979).....4

**TABLE OF AUTHORITIES—continued**

*Marano v. Dep't of Justice*,
2 F.3d 1137 (Fed. Cir. 1993).....18

*McDonell Douglas v. Green*,
411 U.S. 792 (1973).....10

*Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*,
429 U.S. 274 (1977).....10

*Mullaney v. Wilbur*,
421 U.S. 684 (1975).....4

*Murray v. UBS Sec., LLC,*
43 F.4th 254 (2d Cir. 2022).....3

*Patterson v. New* York,
432 U.S. 197 (1977).....4

*Rivera v. Minnich*,
483 U.S. 574 (1987).....4

*Rose v. Clark*,
478 U.S. 570 (1986).....4

*Rose v. Mitchell*,
443 U.S. 545 (1979).....4

*Santosky v. Kramer*,
455 U.S. 745 (1982).....4

*Speiser* v. *Randall*,
357 U.S. 513 (1958).....8

**TABLE OF AUTHORITIES—continued**

*Sumner v. Mata*,
449 U.S. 539 (1981).....4

**STATUTES**

18 U.S.C. § 1514(a).....3

18 U.S.C. § 1514A(b)(2)(A).....3

49 U.S.C. § 42121(b)(2)(B)(i)-(iii).....3

**LEGISLATIVE HISTORY**

132 Cong. Rec. 219 (1986).....14

132 Cong. Rec. 319 (1986).....13

134 Cong. Rec. 19981 (1988).....10

135 Cong. Rec. 4518 (1989).....11

135 Cong. Rec. 5032 (1989).....16, 17

135 Cong. Rec. 5037 (1989).....10

135 Cong. Rec. 5039-40 (1989).....15

148 Cong. Rec. S7358 (daily ed. July 25, 2002)..19

H.R. Rep. No. 100-274 (1987)..... 12, 15

**TABLE OF AUTHORITIES—continued**

*NRC Regulation of TVA: Hearings Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Com.*, 99th Cong., 224-25 (1986).....16

*Roll Call Vote 101st Congress – 1st Session,* United States Senate, https://www.senate.gov/legislative/LIS/roll_call_votes/vote1011/vote_101_1_00024.htm.....16

S. Rep. No. 100-413 (1988).....11, 13, 15

S. Rep. No. 107-146 (2002).....18, 19

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George H.W. Bush, *Remarks on Signing the Whistleblower Protection Act of 1989*, The American Presidency Project (April 10, 1989), https://www.presidency.ucsb.edu/documents/remarks-signing-the-whistleblower-protection-act-1989.....17, 18

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## INTEREST OF *AMICUS CURIAE*[1]

The National Whistleblower Center ("NWC") is a nonprofit, non-partisan, tax-exempt, charitable organization dedicated to the protection of whistleblowers. Founded in 1988, the NWC is keenly aware of the issues facing corporate employees who report fraud under the Sarbanes-Oxley Act ("SOX"). *See,* National Whistleblower Center Website at *www.whistleblowers.org*.

Since 1990, NWC has participated before this Court as *amicus curiae* in cases that directly impact whistleblowers, including *Lawson v. FMR LLC,* 571 U.S. 429 (2014) (SOX case); *English v. G.E.,* 496 U.S. 72 (1990); *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000); *Kellogg Brown & Root Servs., Inc. v. U.S. ex rel. Carter*, 575 U.S. 650 (2015); and *Universal Health Servs. v. U.S. ex rel. Escobar*, 579 U.S. 176 (2016).

The National Whistleblower Center is referenced in the legislative history of the Sarbanes-Oxley Act as one of the public interest organizations that supported the legislation. S. Rep. No. 107-146, at 6 (2002).

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[1] No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

## SUMMARY OF THE ARGUMENT

When Congress passed the Sarbanes-Oxley Act of 2002 (SOX), they intended to provide protections for employees of publicly traded companies who blow the whistle on fraud, as they had previously done for federal employees under the Whistleblower Protection Act of 1989 ("WPA"). These protections explicitly incorporated a burden of proof standard for employees that was lower than the burden used by federal courts in typical employment cases.

Congress' decision to lower the burden of proof on corporate whistleblowers is extremely significant in understanding the issue presented in this case. Burdens of proof "serve to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision."[2] Consistent with the purposes behind the development of burdens of proof, Congress looked at the unique problems facing whistleblowers and crafted a special statutory burden of proof applicable to federal employees in the WPA. This burden was incorporated into the SOX whistleblower law.

When Congress first developed this special burden of proof, known as the "contributing factor" test, Congress determined that it was necessary to alter the traditional burdens of proof in employment cases in order to make it easier for whistleblowers to prevail in retaliation cases. In crafting the unique "contributing factor" test for

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[2] *Addington v. Texas*, 441 U.S. 418, 423 (1979).

whistleblowers, Congress left an incredibly straight-forward legislative history documenting the value of whistleblowers' contributions, the risks and retaliation whistleblowers faced, the barriers the previous burden of proof presented for whistleblowers, and Congress' explicit intention to lower that burden of proof for whistleblowers.

The United States Court of Appeals for the Second Circuit looked to the provision generally prohibiting retaliation against whistleblowers[3] and took it upon themselves to raise the "contributing factor" burden of proof to require a whistleblower to "prove that the employer took the adverse employment action against the whistleblower-employee with retaliatory intent."[4] This interpretation completely negates the purpose of Congress crafting the "contributing factor" standard to lower the burden for whistleblowers and the plain meaning of the mandatory "contributing factor" burden of proof.[5]

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[3] *See Murray v. UBS Sec., LLC*, 43 F.4th 254, 259 (2d Cir. 2022) ("The unambiguous, ordinary meaning of section 1514A's statutory language requires retaliatory intent. Section 1514A directs that no covered employer 'may discharge, demote, suspend, threaten, harass, or in any other manner *discriminate* against an employee … *because of*' whistleblowing. 18 U.S.C. § 1514A(a) (emphasis added).").

[4] *Id.* at 260.

[5] 18 U.S.C. § 1514A(b)(2)(A); 49 U.S.C. § 42121(b)(2)(B)(i)-(iii).

## ARGUMENT

### I. A BURDEN OF PROOF STANDARD REFLECTS A THOUGHTFUL ALLOCATION OF RISK IN LIGHT OF SOCIETAL INTERESTS.

The Supreme Court has spoken on the general purpose, functions, and implications of burden of proof standards in several cases throughout the years. Justice Harlan's *In re Winship* concurring opinion most thoroughly addresses this topic and has been cited in subsequent Supreme Court majority opinions.[6]

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[6] *In re Winship*, 397 U.S. 358 (1970) (Harlan, J., *concurring*); cited by Chief Justice Burger in *Addington v. Texas*, 441 U.S. 418, 423 (1979) ("the function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'"); cited by Justice O'Connor in *Colorado v. New Mexico*, 467 U.S. 310, 315 (1984) ("The function of any standard of proof is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'"); *see also Mullaney v. Wilbur*, 421 U.S. 684, 703-04 (1975); *Patterson v. New* York, 432 U.S. 197, 208 (1977); *Jackson v. Virginia*, 443 U.S. 307, 315 (1979); *Rose v. Mitchell*, 443 U.S. 545, 586 (1979); *Sumner v. Mata*, 449 U.S. 539, 551 (1981); *Santosky v. Kramer*, 455 U.S. 745, 755 (1982); *Engle v. Isaac,* 456 U.S. 107, 150 (1982); *Francis v. Franklin*, 471 U.S. 307, 313 (1985); *Rose v. Clark*, 478 U.S. 570, 580 (1986); *Rivera v. Minnich*, 483 U.S. 574, 581 (1987); *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 282 (1990); *Concrete Pipe & Prod. of California, Inc., v.*

Justice Harlan discusses how "the choice of the standard for a particular variety of adjudication does … reflect a very fundamental assessment of the comparative social costs of erroneous factual determinations."[7] Justice Harlan elaborates by making two propositions and comparing the implications for each in the context of civil and criminal cases:

> First, in a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what *probably* happened. The intensity of this belief – the degree to which a factfinder is convinced that a given act actually occurred – can, of course, vary. In this regard, a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. Although the phrases "preponderance of the evidence" and "proof beyond a reasonable doubt" are quantitatively imprecise, they do communicate to the finder of fact

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*Constr. Laborers Pension Tr. For S. California*, 508 U.S. 602, 622 (1993); and *Cooper v. Oklahoma*, 517 U.S. 348, 362 (1996).

[7] *In re Winship*, 397 U.S. at 370 (Harlan, J., *concurring*).

different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions.

A second proposition, which is really nothing more than a corollary of the first, is that the trier of fact will sometimes, despite his best efforts, be wrong in his factual conclusions. In a lawsuit between two parties, a factual error can make a difference in one of two ways. First, it can result in a judgment in favor of the plaintiff when the true facts warrant a judgment for the defendant. The analogue in a criminal case would be the conviction of an innocent man. On the other hand, an erroneous factual determination can result in a judgment for the defendant when the true facts justify a judgment in plaintiff's favor. The criminal analogue would be the acquittal of a guilty man.

The standard of proof influences the relative frequency of these two types of erroneous outcomes. If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of

proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.

When one makes such an assessment, the reason for different standards of proof in civil as opposed to criminal litigation becomes apparent. In a civil suit between two private parties for money damages, for example, we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor. A preponderance of the evidence standard therefore seems peculiarly appropriate for, as explained most sensibly, it simply requires the trier of fact "to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence."

In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty. As [Justice

> Brennan] wrote for the Court in *Speiser* v. *Randall*, 357 U.S. 513, 525-526 (1958):
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> > There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value – as a criminal defendant his liberty – this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.
>
> In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.[8]

Justice Harlan's concurring opinion lays out the traditional approach to understanding burdens of proof, highlighting key factors that must be

[8] *In re Winship*, 397 U.S. at 370-72 (Harlan, J., *concurring*).

considered when developing a burden of proof for a specific kind of action—what society believes is the appropriate degree of certainty required by a factfinder, how society is willing to allocate the risks of an error, and how frequently society is willing to accept an error. Congress crafts burdens of proof by viewing the factual records before them and carefully weighing what is at risk for each party and the good of society.

Many laws do not contain a burden of proof defined in the statute, and a common law standard is presumed. When Congress takes the time to specifically incorporate a standard of proof into a law, it reflects Congress' belief that the standard is needed given society's interest in the allocation of risks. Further, "increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate [judgments] will be ordered."[9] This also holds true where a burden is decreased for one party and necessarily heightens the burden for the other party.

## II. CONGRESS CHANGED THE BURDEN OF PROOF BASED ON AN EXTENSIVE FACTUAL RECORD.

Congress first created the "contributing factor" test (i.e., a unique burden of proof only used in certain whistleblower laws) when it passed the Whistleblower Protection Act of 1989. Congress

[9] *Addington*, 441 U.S. at 427.

explained that this new burden of proof was intended to "ease the current burden to demonstrate improper motive on the part of the acting official . . . because we recognize that it is unrealistic to expect the whistleblower—or the special counsel acting on the whistleblower's behalf—to demonstrate improper motive."[10] The bill aimed to:

> [I]mprove the ability of whistleblowers to prove cases of reprisal . . . [by relaxing] the standard of proof of retaliation established in the case of Mount Healthy City Board of Education versus Doyle. In particular, the bill specifies that a whistleblower may make out a prima facie case of reprisal by showing that the whistleblowing was a factor in the personnel action. The agency can overcome this showing by demonstrating by "clear and convincing evidence" that the whistleblowing was not a "material factor" in the action. A "material factor," as used in the statute, means any factor which, alone or in connection with other factors, tended to affect the outcome of the decision.[11]

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[10] 135 Cong. Rec. 5037 (1989) (statement of Rep. Schroeder).
[11] 134 Cong. Rec. 19981 (1988) (statement of Sen. Levin). The reference to *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) is significant. That case articulated a burden of proof that was more pro-employee than the now well-established *McDonell Douglas v. Green*, 411 U.S. 792 (1973) standard. Thus, for Congress, even the *Mt. Healthy*

Congress recognized that the prior burden of proof used in traditional employment cases was inappropriate in federal employee whistleblower cases. They rejected this traditional burden because they wanted to make it easier for whistleblowers to win their cases, even if that resulted in whistleblowers prevailing in cases where they would have otherwise lost if they had to prove discriminatory motive as was required in other employment laws. The record created by Congress clearly explains this intent and unquestionably justifies the policy decision made by Congress.

Senator Charles Grassley, a principle co-sponsor of the WPA (and the principle co-sponsor of the Sarbanes-Oxley Act's whistleblower law) stated that "[f]or more than 10 years, our bureaucracy has not at all been receptive to whistleblowers."[12] The Senate also reported, "even a sitting Special Counsel [William O'Connor, the Special Counsel from 1982 to 1986] stated publicly that he did not believe the system worked to protect whistleblowers."[13]

The House Subcommittee on Civil Service of the Committee on Post Office and Civil Service heard many advocates for the lower burden of proof in the WPA, which included:

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standard was a bridge too far for whistleblowers to cross when trying to prove retaliation. This is further evidence that Congress wanted to significantly lower the burden on employees when changing the standard to the very low threshold of a "contributing factor."

[12] 135 Cong. Rec. 4518 (1989) (statement of Sen. Grassley).

[13] S. Rep. No. 100-413, at 5 (1988).

> Retaliation for whistleblowing is usually difficult to prove . . . . Whether or not retaliation has occurred is a complex determination that involves matter of judgment and conflicting testimony. Federal officials have an incentive to obscure the role that protected disclosures played in a personnel action. Moreover, the agency rather than the employee is likely to be in possession of the evidence which can establish whether or not retaliation has occurred. Therefore, the justifications for the adoption of the substantial evidence standard in regard to whistleblowers are . . . strong. . . .[14]

The Senate noted a Government Accountability Office ("GAO") report on the Office of the Special Counsel ("OSC")[15] in response to 99% of whistleblower cases being closed by the OSC without initiating disciplinary or corrective action, citing "difficulties of proof of retaliation against

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[14] H.R. Rep. No. 100-274, at 27 (1987) (citing *A Bill to Amend Title 5, United States Code, to Strengthen the Protections available to Federal Employees Against Prohibited Personnel Practices, and for Other Purposes: Hearing on H.R. 25 Before the Subcomm. on Civ. Serv. of the H. Comm. on Post Off. and Civ. Serv.*, 100th Cong. 129-30 (1987) [hereinafter *Hearing*] (statement of Robert Vaughn, Professor of Law, at The American University Washington College of Law)).

[15] Under the original Civil Service Reform Act (that was amended by the Whistleblower Protection Act), the Office of Special Counsel had the authority to bring cases on behalf of a whistleblower before the Merit Systems Protection Board.

whistleblowers" as one of the reasons for the low level of response to complaints to the OSC, further showing retaliation was a substantial obstacle to protecting whistleblowers.[16]

The difficulty of showing a nexus between a protected disclosure and a personnel action was further highlighted in Senate Report No. 100-413 (1988):

> Proving a causal connection between protected conduct and an agency's personnel action is difficult because direct evidence of retaliation is rare; supervisors do not usually write down or tell other employees of their intent to take prohibited reprisal against an employee. Thus, one of the hardest hurdles a whistleblower or the OSC must overcome in making a prima facie case of reprisal is to show the requisite nexus between the whistleblowing and the personnel action.[17]

Additionally, the same report addressed a 1985 GAO report, noting that "two-thirds of the cases closed by the OSC were closed in anticipation that the agency could argue persuasively that there was no causal connection between the complaint's whistleblowing and a personnel action."[18] The OSC's performance history in the years preceding the passage of the Whistleblower

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[16] 132 Cong. Rec. 319 (1986) (statement of Sen. Levin).
[17] S. Rep. No. 100-413, at 13 (1988).
[18] *Id.*

Protection Act provides evidence that whistleblowers were essentially unable to prove their cases under the heavy burden of proof.

> In its study of the Office of Special Counsel (OSC), the General Accounting Office (GAO) determined that only 8 percent of allegations made to the OSC survive the initial screening process to receive an in depth investigation, and only a tiny fraction of these cases have been actively pursued. The special counsel closes more than 99 percent of whistleblower cases without initiating disciplinary or corrective action.[19]

Additionally,

> The OSC's track record through 1985 of helping only 1% of whistleblowers obviously left a great many employees dissatisfied. The OSC appears to now be placing more emphasis on corrective actions, with the result being that OSC now seeks action in about 5% of whistleblower cases. While this five-fold increase in activity is welcome, it still leaves many employees frustrated with the lack of OSC action and the absence in many cases of other possible relief.[20]

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[19] 132 Cong. Rec. 219 (1986) (statement of Rep. Schroeder).
[20] S. Rep. No. 100-413, at 17 (1988).

Representative Schroeder expanded on that fact, saying:

> To date there has not been one case documented by a GAO study which saved or recovered the job of a single whistleblower. That does not give a worker who wishes to expose intentional acts of wrongdoing the incentive to expose the management of a Government agency. The fear of losing their job is exacerbated by the ineffectiveness of the agencies created to represent and protect them.[21]

Not only were whistleblowers not receiving legal relief or protection, but they often suffered for the sacrifices that they made to blow the whistle. Dr. Donald Soeken shared findings from a study that he conducted on whistleblowers in which "most whistleblowers were not protected, and in fact, they suffered cruel and disastrous retaliation for their efforts."[22] Dr. Soeken summed up the findings by stating that "we are not only killing the messenger, but we are ignoring their warnings."[23] Similarly, during oversight hearings into the operation of Tennessee Valley Authority ("TVA") nuclear plants, Representative John D. Dingell

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[21] 135 Cong. Rec. 5039-40 (1989) (statement of Rep. Hoyer).
[22] *See* note 14, *supra* at 151 (statement of Dr. Donald R. Soeken).
[23] *Id.* at 153.

described the treatment of whistleblowers as "bloodying the heads of messengers."[24]

The Senate passed the WPA (Senate Amendment S. 20) 97-0 on March 16, 1989.[25] On March 21, 1989, the House of Representatives entered the "Explanatory Statement on Senate Amendment—S. 20" into the Congressional Record.[26] The Explanatory Statement contained a letter from Attorney General Richard Thornburgh to Senator Carl Levin dated March 3, 1989, expressing support for clarifying the word "factor" by adding the word "contributing."[27] Thornburgh stated, "[a] 'contributing factor' need not be substantial.' The individual's burden is to prove that the whistleblowing contributed in some way to the agency's decision to take the personnel action."[28] Following this portion of Attorney

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[24] *NRC Regulation of TVA: Hearings Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Com.*, 99th Cong., 224-25 (1986) (statement of Rep. John Dingell, Chairman, Subcomm. on Oversight & Investigations).

[25] *Roll Call Vote 101st Congress – 1st Session,* United States Senate, https://www.senate.gov/legislative/LIS/roll_call_votes/vote1011/vote_101_1_00024.htm.

[26] 135 Cong. Rec. 5032 (1989) ("In an effort to complete a rather exhaustive legislative history leading up to enactment of the act, I am entering into the Record at this point a short explanatory statement which has the approval and concurrence of the bill's chief sponsors, Congresswoman Schroeder and Congressman Horton.") (Explanatory Statement submitted by Representative Sikorski).

[27] *Id.* at 5033.

[28] *Id.* at 5033-5034 (letter from Richard Thornburgh, Att'y Gen. of the United States).

General Thornburgh's letter, the Explanatory Statement continues:

> By reducing the excessively heavy burden imposed on the employee under current case law, the legislation will send a strong, clear signal to whistleblowers that Congress intends that they be protected from any retaliation related to their whistleblowing and an equally clear message to those who would discourage whistleblowers from coming forward that reprisals of any kind will not be tolerated. Whistleblowing should never be a factor that contributes in any way to an adverse personnel action.[29]

On the same day, the House voted to pass the Senate bill.[30]

On April 10, 1989, President George H. W. Bush signed the WPA into law, asserting that "a true whistleblower is a public servant of the highest order. And I share the determination of the Congress that we do everything possible to ensure that these dedicated men and women should not be fired or rebuked or suffer financially for their honesty and good judgment."[31] President Bush

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[29] *Id.*

[30] *Id.* at 5040.

[31] George H.W. Bush, *Remarks on Signing the Whistleblower Protection Act of 1989*, The American Presidency Project, https://www.presidency.ucsb.edu/documents/remarks-signing-the-whistleblower-protection-act-1989.

further noted that "[t]his bill will go a long way toward this goal by strengthening the protections and procedural rights available to those Federal employees who report misdeeds and mismanagement," and he specifically commended the Attorney General and members of Congress, who were "successful in clarifying the burden of proof on employees."[32]

Shortly thereafter, the U.S. Court of Appeals for the Federal Circuit issued its first decision[33] discussing the burden of proof, that was widely followed through 2002, when the "contributing factor" test was incorporated into SOX.

The Congressional record surrounding the SOX whistleblower law pointed to many of the same concerns Congress had regarding the ability of whistleblowers to be protected under federal law when the "contributing factor" test was enacted in 1989. It should be of no surprise that Congress decided to use the "contributing factor" test as a statutorily created burden of proof covering cases adjudicated under that law.

The Senate report on the SOX whistleblower law noted that "corporate whistleblowers are left unprotected under current law."[34] Further, "[t]his is a significant deficiency because often . . . these insiders are the only firsthand witnesses to the fraud. They are the only people who can testify as to 'who knew what, and when,' crucial questions not only in the Enron matter but in all complex

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[32] *Id.*

[33] *Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993).

[34] S. Rep. No. 107-146, at 10 (2002).

securities fraud investigations."[35] Like similarly situated federal employees, Congress did not want corporate employees covered under SOX to be "discouraged at nearly every turn"[36] when they attempted to report corporate crimes. Congress was concerned that the lack of protection for corporate whistleblowers created a "corporate code of silence [that] not only hamper[ed] investigations, but also create[d] a climate where ongoing wrongdoing can occur with virtual impunity."[37]

Congress also noted "current law protects many government employees who act in the public interest by reporting wrongdoing, there is no similar protection for employees of publicly traded companies who blow the whistle on fraud and protect investors."[38] Congress pointed directly to the WPA and indicated that they wanted "similar" protections for corporate employees who engaged in protected activities covered under SOX.

Following the precedent set under the WPA, the SOX whistleblower law, by express

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[35] *Id.*

[36] *Id.* at 4-5.

[37] *Id.* *See also* Floor Speech by the principle sponsor of SOX, Senator Patrick Leahy: "[W]e include[d] meaningful protections for corporate Whistleblowers. . . . We learned from Sherron Watkins of Enron that these corporate insiders are the key witnesses that need to be encouraged to report fraud and help prove it in court. Enron wanted to silence her . . . . The [whistleblower] provisions Senator Grassley and I worked out in Judiciary Committee make sure whistleblowers are protected." 148 Cong. Rec. S7358 (daily ed. July 25, 2002) (statement of Sen. Leahy).

[38] S. Rep. No. 107-146, at 10 (2002).

Congressional design, significantly shifts the traditional burden of proof used in employment cases. Although such a significant shift in the burden of proof governing employment cases has been selectively used (it is not applicable in Title VII cases, Age Discrimination cases, or cases filed under the NLRA), the unique nature of the "contributing factor" test must be given its plain meaning. On its face, an employee need not prove discriminatory motive. This was by Congressional design and is consistent with the purposes behind burdens of proof. Congress intended to make it easier for whistleblowers to prevail, and Congress decided to shift the burdens implicated if a court made a mistake and incorrectly ruled in favor of a whistleblower. Congress properly created the burden of proof, and the Courts must follow that burden.

Given Congress' findings as to the importance of incentivizing whistleblowers[39] on the one hand

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[39] Congress bet on increasing the protections for corporate whistleblowers hoping it would give them the courage to step forward, and it has paid off. For example, on September 23, 2020, then-SEC Chairman Jay Clayton explained the benefits obtained over time from the federal laws protecting and incentivizing whistleblowers to report securities violations: "Over the past ten years, the whistleblower program has been a **critical component of the Commission's efforts to detect wrongdoing and protect investors** and the marketplace, particularly where fraud is well-hidden or difficult to detect. Enforcement actions from whistleblower tips have resulted in more than $2.5 billion in ordered financial remedies, including more than $1.4 billion in disgorgement of ill-gotten gains and interest, of which almost **$750 million has been, or is**

and the well documented empirical evidence of the difficulties whistleblowers had in prevailing cases on the other, Congress' allocation of the burden proof under the WPA and SOX is logical, consistent with the underlying purposes of allocating different burdens of proof under different laws, and well documented on the record. Under the "contributing factor" test, no additional evidentiary requirements are permitted, except the burden on an employee to simply demonstrate "a contributing factor." A contributing factor is an extremely low threshold. As Oxford dictionary points out, to "contribute" to something is "to be one of the causes of something."[40] For example, you can "contribute" to the multi-million-dollar Red Cross Guard by simply putting $5 into the donation plate.

Even though the whistleblower's burden of proof is very low, an employer can still prevail in the case if it meets its burden of proof. The employer remains fully protected, as Professor Vaughn illustrated to Congress at the hearings discussing the WPA.[41] An employer has access to witness' documents and is in a strong position to ensure that they have clear and convincing evidence to justify adverse action against a

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**scheduled to be, returned to harmed investors."** Jay Clayton, *Strengthening our Whistleblower Program*, (Sept. 23, 2020), https://www.sec.gov/news/public-statement/clayton-whistleblower-2020-09-23 (emphasis added).

[40] *Contribute*, Oxford Learner's Dictionaries, https://www.oxfordlearnersdictionaries.com/us/definition/american_english/contribute.

[41] *See* note 13, *supra*.

whistleblower. The employer is also on notice that whistleblowing is viewed by Congress as an important social contribution. Consequently, the employer must ensure that their own biases are put aside in order to meet a burden that is well established in law. This was a determination of Congress based on an extremely strong record. The plain meaning of the statue must be strictly enforced.

## CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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