

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

TREVOR MURRAY,)
)
) Petitioner,)
)
) v.) No. 22-660
)
UBS SECURITIES, LLC, ET AL.,)
)
) Respondents.)

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 22-660, Murray versus UBS Securities.

Ms. Anand.

ORAL ARGUMENT OF EASHA ANAND
ON BEHALF OF THE PETITIONER

MS. ANAND: Thank you, Mr. Chief Justice, and may it please the Court:

Congress passed the Sarbanes-Oxley Act in the wake of the Enron meltdown to encourage whistleblowers to report misconduct that could threaten the finances of millions. The question in this case is how claims that an employer acted with retaliatory intent are to be proven.

The plain text of the statute answers that question. District court actions shall be governed by the burdens of proof in AIR21. AIR21, in turn, places exactly one burden of proof on plaintiff, to show that his protected conduct was a contributing factor in the unfavorable personnel action.

The burden then shifts to the defendant to prove that it would have taken the

1 same unfavorable personnel action in the absence
2 of the protected conduct, in essence, that it
3 did not act with retaliatory intent.

4 The Second Circuit held that the
5 contributing factor element required a showing
6 of retaliatory intent. UBS does not defend that
7 holding, nor could it. UBS instead contends
8 that in addition to showing the contributing
9 factor element, a plaintiff must separately show
10 retaliatory intent.

11 But UBS never grappled with the plain
12 text of the statute, which says that an action
13 shall be governed by the burdens in AIR21. And
14 having now disclaimed any requirement that a
15 plaintiff show animus, UBS never explains what
16 its proposed retaliatory intent element would
17 amount to, other than the second step of the
18 burden-shifting framework, a showing that the
19 employer would not have taken the adverse action
20 in the absence of the protected conduct.

21 I welcome this Court's questions.

22 JUSTICE THOMAS: If you did not have
23 the burden-shifting framework, would there be an
24 intent requirement?

25 MS. ANAND: So, yes, Your Honor. That

1 is, the burden-shifting framework is designed to
2 prove the intent element. Absent the
3 burden-shifting framework, the default rule
4 would apply and plaintiff would just have to
5 show intent.

6 JUSTICE THOMAS: Well, it just seems
7 that the substantive statute provides for
8 but-for -- but-for causation and has an intent
9 requirement. But you're saying the burden of
10 proof requirement seems to -- framework seems to
11 eviscerate that substantive requirement.

12 MS. ANAND: I wouldn't say
13 "eviscerate." I would say it's how you prove
14 that substantive requirement. So, for instance,
15 in Title VII, the same language, "discriminate
16 because of," can either be proven entirely by
17 the plaintiff or, depending on the type of case,
18 Congress has sometimes said there's a
19 burden-shifting framework that comes in. You
20 just have to show a motivating factor and then
21 the burden shifts.

22 In other words, this --

23 JUSTICE SOTOMAYOR: I'm a bit confused
24 by that answer. I understand the meaning of
25 "discriminate" means to treat someone

1 differently. And I don't know how you can prove
2 intent other than to show by action that
3 something has -- someone has discriminated:
4 they fired someone, they demoted someone, they
5 treated them differently in some way. They
6 discriminated against them.

7 So I don't think there's any question
8 that there was an intent to fire this person,
9 correct?

10 MS. ANAND: That's correct, Your
11 Honor.

12 JUSTICE SOTOMAYOR: And so the
13 causation issue is not about intent -- or the
14 issue is not about the intent to fire someone.
15 The issue is what relationship does it have to
16 the act?

17 MS. ANAND: That's exactly right, Your
18 Honor.

19 JUSTICE SOTOMAYOR: So I don't know
20 where your answer to Justice Thomas comes that
21 if there wasn't this burden-shifting, that we
22 would have a different kind of intent. We would
23 still be charging people with did they fire them
24 because of this, correct?

25 MS. ANAND: That's exactly right, Your

1 Honor. The question would just be who has to
2 prove that, that the firing was because of the
3 protected conduct or trait. The default rule is
4 plaintiff. In this case, Congress has chosen to
5 put a burden-shifting framework in the statute
6 that gives the plaintiff an initial burden
7 before the burden shifts to the defendant.

8 JUSTICE SOTOMAYOR: So the question --

9 JUSTICE KAVANAUGH: What --

10 JUSTICE SOTOMAYOR: -- of intent, as
11 you said, might arise in motivating factor cases
12 because then the jury has to find out whether
13 this was more important or not than other
14 reasons, correct --

15 MS. ANAND: So --

16 JUSTICE SOTOMAYOR: -- basically?

17 MS. ANAND: -- that's correct, Your
18 Honor. The analogy to Title VII is just to say
19 that Congress is entitled to come up with
20 different schemes to prove this same thing,
21 namely, that the employer took the adverse
22 employment action because of the protected trait
23 or conduct.

24 JUSTICE KAVANAUGH: What do you think
25 "contributing factor" means? Because I think

1 both sides' positions have difficulty hanging
2 together completely because of the interaction
3 of "contributing factor" and, as you call it,
4 step 2. At least for me, that's the -- I'm
5 trying to figure out how those fit together.

6 So what do you think "contributing
7 factor" means?

8 MS. ANAND: So, Your Honor, I think
9 the -- the simplest answer is that it's a term
10 of art drawn from the Whistleblower Protection
11 Act. And for a generation, the definition
12 adopted by the Federal Circuit has been, alone
13 or in combination with other factors, affects
14 the -- the adverse employment action.

15 JUSTICE KAVANAUGH: And in your brief,
16 I think on 29, you said that knowledge by the
17 employer of the protected activity plus temporal
18 proximity would be good enough in this
19 particular statute to show a contributing
20 factor. Is that correct?

21 MS. ANAND: Yes, Your Honor. So
22 that's actually in the text of the Whistleblower
23 Protection Act. Right. It's the first time
24 Congress uses this "contributing factor"
25 language. So they give an example of what would

1 suffice, and they say knowledge plus temporal
2 proximity.

3 So, again, what you've got at that
4 point is protected conduct, so someone had
5 objectively reasonable evidence of securities
6 fraud and recorded -- and reported it; you've
7 got the fact that they were fired; you've got
8 the employer's knowledge; and they were fired
9 shortly after reporting objectively reasonable
10 evidence of securities fraud.

11 JUSTICE KAVANAUGH: Yeah, that's a
12 sensible scheme, I think. I'm not sure it maps
13 completely onto the term "contributing factor,"
14 but I -- I understand where you're getting that
15 as a term of art.

16 MS. ANAND: That's right, Your Honor.
17 And, again, in the Whistleblower Protection Act,
18 Congress explained what "contributing factor"
19 meant. Subsequently, it didn't put that
20 explanation in the statute, presumably because,
21 in future statutes, it thought that term was
22 adequately defined.

23 JUSTICE BARRETT: But it's tricky,
24 though, because --

25 JUSTICE ALITO: Well, as I

1 understand --

2 CHIEF JUSTICE ROBERTS: Justice Alito.

3 JUSTICE ALITO: As I understand your
4 argument, intent plays no role whatsoever in --
5 discriminatory intent plays no role whatsoever
6 in what the plaintiff must prove.

7 MS. ANAND: So that's right, Your
8 Honor, that the plaintiff can get the burden to
9 shift without showing discriminatory intent,
10 although I think what Congress believed is that
11 at the point where you've shown this protected
12 conduct, temporal proximity, and adverse action,
13 there's something like a presumption, as the SG
14 put it, of intent, and that's why we shift the
15 burden.

16 JUSTICE ALITO: So in -- let's say
17 that an individual engages in protected
18 activity, an employee engages in protected
19 activity, and, as a result of that, the employer
20 investigates the employee's performance and
21 finds that the employee actually has embezzled a
22 hundred thousand dollars.

23 The -- the plaintiff would not have to
24 show that the decision to discharge was based in
25 any way on the -- that the motivation, the

1 thinking of the decisionmaker was based in any
2 way on the protected activity? That would be up
3 to the employer then to show by clear and
4 convincing evidence that person would have been
5 discharged upon the discovery of this even if
6 there had never been protected activity? That's
7 your argument?

8 MS. ANAND: So, yes, Your Honor. That
9 is, obviously, at step 2, the employer wins
10 because they can show anyone who embezzled a
11 hundred thousand dollars would have gotten fired
12 whether or not they'd engaged in protected
13 activity. But that's right. Congress believed
14 that employees shouldn't have to have evidence
15 of what was in the head of the decisionmaker at
16 the moment of the decision before the burden
17 shifted.

18 JUSTICE ALITO: The key language in
19 that part of the statute is that the protected
20 activity was a contributing factor in the
21 unfavorable personnel action alleged in the
22 complaint.

23 So you read "unfavorable personnel
24 action" to mean simply discharge, but can it not
25 also be read to mean discriminatory discharge,

1 the unfavorable personnel action alleged in the
2 complaint is the discriminatory discharge?

3 MS. ANAND: So I -- I don't think so,
4 Your Honor, and that's because that would render
5 the contributing factor language superfluous;
6 that is, if you had to say -- if you had to
7 prove as part of it that there was a
8 discriminatory discharge, what would it -- once
9 you've shown there's a discriminatory discharge,
10 by definition, the protected conduct was a
11 contributing factor, in fact, you've shown a
12 much higher standard.

13 JUSTICE ALITO: No, I don't quite
14 understand your -- I don't understand that
15 answer. Could you explain it to me again?

16 MS. ANAND: Sure. So, if an employee
17 has to show discriminatory discharge --

18 JUSTICE ALITO: Right.

19 MS. ANAND: -- that means they have to
20 show that the -- that the employer was motivated
21 and would not have taken the action --

22 JUSTICE ALITO: No, it doesn't mean
23 but-for. It means that it played some role in
24 the -- in the discharge decision. It was a
25 contributing factor to the discharge decision.

1 MS. ANAND: So, if Your Honor's
2 question is whether the -- the contributing
3 factor has to be to the decision rather than
4 just some part of the causal chain, I'll just
5 say that I don't know that this case is exactly
6 the right case to draw that distinction if
7 there's something below retaliatory intent.

8 Remember, in this case, during the
9 jury deliberations, there's a second instruction
10 given that uses "affects the decision." That's
11 the language. It's at JA 180.

12 And so, if this Court thinks there's
13 some lesser showing than retaliatory intent that
14 has to do with affecting the decision versus
15 just being part of the causal chain, this case
16 wouldn't be the right case to make that
17 determination.

18 JUSTICE BARRETT: But doesn't it --
19 don't you have to do that if you're going to
20 show -- if you're going to rule out the
21 hypotheticals that UBS raises and the ones that
22 the Chamber of Commerce did in its amicus brief,
23 things that happened in the causal chain like
24 the whistle-blowing alienates the customer, the
25 customer takes her business elsewhere, and then

1 the department is eliminated, and so, even
2 though the employer was very supportive of the
3 whistle-blowing, she loses her job because
4 there's no work left.

5 I took your brief, your reply brief,
6 to say no, no, no, no, no, that wouldn't happen.
7 Is it your position that those kinds of
8 hypotheticals only get ruled out at step 2 by
9 the clear and convincing evidence standard or,
10 as Justice Alito is saying, if you have to show
11 some sort of link between the discharge and the
12 decision, it seems like some of them might get
13 ruled out at the first step.

14 MS. ANAND: So I think that's right,
15 Your Honor. So two responses. The first is
16 Marano in the Federal Circuit, right, the case
17 that interprets "contributing factor," seems to
18 say those cases get to the second step, right?

19 So, in that case, the fact pattern is
20 a whistleblower reports. As a result, the
21 employer cleans house, fires everyone related to
22 this unit, and the plaintiff is discharged as
23 part of that.

24 And Marano says, because there's no
25 requirement of retaliatory intent at the first

1 step, that gets to the second stop. If the
2 employer is telling the truth that they were
3 just cleaning house, that --

4 JUSTICE BARRETT: But that's not the
5 hypothetical. Could you address in the
6 hypothetical where the employer is grateful for
7 the information, cleans house, and the customer
8 leaves, so it's not cleaning house within the
9 employer. I might not have been clear.

10 Do you know what example I'm talking
11 about from the brief?

12 MS. ANAND: Yes, the Sara.

13 JUSTICE BARRETT: Okay. Yeah.

14 MS. ANAND: Sara, the Sara example,
15 that's right. So our position is that that is
16 resolved at the second step because the employer
17 at that point can show that they would have
18 fired the plaintiff even if the customer had
19 left for a different reason.

20 JUSTICE BARRETT: But why wouldn't it
21 -- why couldn't it be resolved in part at the
22 first step because you have to show that it's a
23 link in the -- to the decision, a contributing
24 factor, not substantial, you don't have to use
25 motive -- show motivating, but it played a role

1 in the decision --

2 MS. ANAND: Right.

3 JUSTICE BARRETT: -- even if not a
4 determinative one, some role.

5 MS. ANAND: So -- and I don't want to
6 fight you too hard on this because, again, in
7 our case, there's an instruction that says
8 "affected the decision."

9 JUSTICE BARRETT: But the way we write
10 the opinion affects other cases too obviously.

11 MS. ANAND: Sure. So I take it that
12 is not what the Second Circuit meant by
13 "retaliatory intent." So you at least have to
14 reverse the Second Circuit, right, because the
15 Second Circuit required some sort of animus
16 showing. It did not believe that the
17 instruction at JA 180, which says "affected the
18 decision," was sufficient.

19 But, if Your Honors decide to write an
20 opinion that says "affected the decision," I
21 think that's not quite consistent with Marano
22 and the definition there, but it's certainly an
23 interpretation of the statute we'd be
24 comfortable with so long as you don't say
25 there's some higher showing than that.

1 JUSTICE ALITO: What do you mean --

2 JUSTICE GORSUCH: Counsel --

3 JUSTICE ALITO: -- by -- what do you
4 mean by "animus"? I mean, we -- we use that
5 term a lot. We toss it around. What do you --
6 what does it mean here? Does it mean something
7 different than some sort of discriminatory
8 intent?

9 MS. ANAND: So yes, Your Honor. This
10 Court has distinguished between discriminatory
11 intent, which simply means you want to treat
12 someone differently on account of or because of
13 the protected trait or conduct --

14 JUSTICE ALITO: Right, right.

15 MS. ANAND: -- and animus, which is
16 sort of like you have a bad motive in your
17 heart. And so this Court has routinely said
18 that in discrimination statutes, there's no
19 requirement to show animus.

20 JUSTICE GORSUCH: And --

21 MS. ANAND: And, indeed, I think UBS
22 disclaims any animus requirement at Footnote 3.

23 JUSTICE GORSUCH: -- counsel, I --
24 I -- I -- that's where I want to pick up --

25 MS. ANAND: Yeah.

1 JUSTICE GORSUCH: -- and -- and so I'm
2 sorry for interrupting, but --

3 MS. ANAND: Please.

4 JUSTICE GORSUCH: -- I -- I wonder, is
5 that enough for the day?

6 The Second Circuit opinion can be read
7 in various ways, one of which possible reading
8 is, in addition to an intent to discriminate,
9 you have to prove a further intent or a motive
10 to retaliate.

11 And we've rejected that in the Title
12 VII context many times, saying you may have a
13 further intent of trying to equalize men and
14 women as groups, you may have a further intent
15 of wishing to discriminate on the basis of
16 motherhood. Irrelevant. Intent to discriminate
17 is enough for the day.

18 Could we simply say that and not get
19 into how this statute overall works, which seems
20 to me to raise a bunch of other questions that
21 may be more than we need to do for today?

22 React to that.

23 MS. ANAND: So I think that's correct,
24 Your Honor. I think that that would be enough
25 to reverse the Second Circuit. I -- I think you

1 may have to address UBS's position, which is
2 that "contributing factor" means what plaintiff
3 said it means, but there's some sort of separate
4 freestanding retaliatory intent element.

5 JUSTICE GORSUCH: No, that -- that's
6 what I'm saying. We -- we would reject the idea
7 --

8 MS. ANAND: Yes.

9 JUSTICE GORSUCH: -- that there is a
10 freestanding further intention or motivation
11 requirement and say it is simply discrimination,
12 intent to discriminate, that's all that's
13 required, vacate/remand.

14 MS. ANAND: I -- I think that's right,
15 Your Honor. Say a contributing factor doesn't
16 require some sort of animus showing, there's no
17 separate freestanding retaliatory intent
18 element, and whether "contributing factor" means
19 affect --

20 JUSTICE GORSUCH: Period? Period?
21 Would period be okay there?

22 MS. ANAND: Period -- period --

23 JUSTICE GORSUCH: Would that be okay
24 there?

25 MS. ANAND: Yeah. Period would be

1 okay with us there.

2 JUSTICE GORSUCH: Okay. All right.

3 MS. ANAND: Yeah.

4 JUSTICE KAVANAUGH: You probably need
5 a little more, right?

6 (Laughter.)

7 MS. ANAND: All right.

8 JUSTICE JACKSON: Can I ask you -- was
9 someone else?

10 JUSTICE SOTOMAYOR: One follow-up on
11 that.

12 JUSTICE JACKSON: Oh, go ahead.

13 JUSTICE SOTOMAYOR: In your brief, you
14 said that if the Court disagrees with the Second
15 Circuit, which is what my colleague is
16 suggesting, the proper course would be to remand
17 for consideration of whether the jury was
18 adequately instructed.

19 In your reply brief, though, you say
20 that we should reinstate the jury verdict and
21 remand only for proceedings on your
22 cross-appeal.

23 So which is it?

24 MS. ANAND: So we think that it would
25 be proper to reinstate the jury verdict because

1 we think that what you should do is say that
2 "contributing factor" is a term of art that
3 means "tends to affect in any way," which will
4 obviate --

5 JUSTICE SOTOMAYOR: Well, if I have
6 problems with that language, and I think that
7 that's what some of my colleagues are alluding
8 to, which is it's -- I know the Federal Circuit
9 has adopted it, but we haven't.

10 And in your brief, you don't actually
11 use that language. You go around it. And I
12 think there's reasons for that because that's
13 not the definition of "contributing factor."

14 You say -- you say it's something that
15 helps bring about. I think that is a better
16 formulation. So why don't we just remand and
17 let the Second Circuit think about what the
18 proper charge should be?

19 MS. ANAND: So two responses, Your
20 Honor.

21 First, I just want to note that for
22 this to be a term of art, this Court doesn't
23 have to have decide it. So, for instance, in
24 *Helsinn*, similarly, this Court relied on a
25 Federal Circuit case to conclude that something

1 was a term of art. So I just want to make that
2 clear that you can conclude "contributing
3 factor" is a term of art without having a
4 Supreme Court decision on point.

5 JUSTICE SOTOMAYOR: Well, that --
6 that's -- there's -- there were a lot of reasons
7 for that, not the least of which is that
8 Congress did tend to adopt it as a term of art
9 but not in this case. They created this term of
10 art.

11 MS. ANAND: That's -- that's right,
12 Your Honor.

13 JUSTICE SOTOMAYOR: The Congress did.
14 So -- well, putting that aside --

15 MS. ANAND: So -- so -- okay. So
16 that's my first-line answer.

17 JUSTICE SOTOMAYOR: Okay.

18 MS. ANAND: The second-line answer is,
19 even if you conclude that you're not sure about
20 the "tends to affect in any way" jury
21 instruction, remember, there's a second jury
22 instruction in this case that is "affects the
23 decision." Someone with knowledge because of
24 that knowledge affected the decision.

25 And so, if you conclude that's the

1 right formulation --

2 JUSTICE SOTOMAYOR: All right.

3 MS. ANAND: -- then I think you can
4 still --

5 CHIEF JUSTICE ROBERTS: Thank you.
6 Thank you, counsel.

7 Normally, in the law in these types of
8 cases, there is a distinction between liability
9 and causation. In a car accident, you're
10 speeding and you hit a car and injure the person
11 or allegedly injure the person, the speeding is
12 liability, right? Whether that has resulted in
13 an injury, whether it's caused it is -- is a
14 different question.

15 Now your position merges those two,
16 right? You don't separately look for liability
17 and causation?

18 MS. ANAND: So I think there are two
19 different types of causation we're talking about
20 here. So, for liability, yes, you have to show
21 you acted because of the protected activity.
22 There's still the causal connection between what
23 the employer did and your damages, right?

24 There -- that -- there's a separate
25 causation inquiry that looks more like the

1 speeding example you gave, which is, given that
2 the employer suspended or demoted or discharged,
3 what damages is the employer liable for? So
4 causation comes in again at that step.

5 But I think, in every discrimination
6 case, right -- this is EEOC versus
7 Abercrombie -- the core question is, did the
8 employer take the action because of the
9 protected trait or conduct?

10 CHIEF JUSTICE ROBERTS: Well, that's
11 causation. And I think your friend on the other
12 side draws the sharp distinction between
13 liability and causation. And your position is
14 that there is no distinction of that sort?

15 MS. ANAND: So I'm not sure my friend
16 on the other side has an example -- having
17 disclaimed animus, it's not clear what
18 "discriminate" would mean, other than acting on
19 account of or because of.

20 And this is -- again, in EEOC versus
21 Abercrombie, this Court interprets the term
22 "discriminate" and says it's got three parts.
23 You've got to show adverse action, because of,
24 protected trait.

25 Now "because of" in discrimination law

1 is sort of a -- sort of merges causation and
2 intent because the forbidden intent is to act
3 because of the protected trait.

4 CHIEF JUSTICE ROBERTS: Thank you.

5 Justice Thomas?

6 Justice Alito?

7 Justice Sotomayor?

8 Justice Kagan?

9 JUSTICE KAGAN: Ms. Anand, on page 5
10 of your reply brief, you note that the -- this
11 is what you say: The United States offers two
12 additional persuasive observations. And then
13 you describe the United States' position.

14 Two additional persuasive
15 observations, I would have thought that the
16 United States' position is either in conflict or
17 at least in tension with yours, so I was
18 wondering if you could explain to me why you
19 think that's not so or whether you really think
20 it is so.

21 MS. ANAND: So, Your Honor, I think
22 the differences are semantic; that is, both we
23 and the United States agree that all you have to
24 do is run through the burden-shifting framework,
25 step 1; contributing factor, step 2; and then

1 you end up with isolating those employers who
2 engaged in discrimination. Whether it is, as
3 the United States says, because, after step 1,
4 there's a presumption that can be rebutted by
5 the employer or whether it's, as we say,
6 because, after step 2, the employer has not been
7 able to show a lack of retaliatory intent, I'm
8 not sure it matters, right? That's a semantic
9 distinction. The point is you get through both
10 steps and then --

11 JUSTICE KAGAN: So you're saying
12 there's no practical difference, but the sort of
13 analytic way that the argument spools out is
14 different?

15 MS. ANAND: I think that's right, Your
16 Honor, but, again, because the jury's always
17 instructed on both steps and the plaintiff has
18 to win on both steps, I'm not sure it matters.

19 CHIEF JUSTICE ROBERTS: Justice
20 Gorsuch?

21 Justice Kavanaugh?

22 JUSTICE KAVANAUGH: Just on that
23 "tends to affect" language that Justice
24 Sotomayor was asking about, I want to make sure
25 I have your answer. Your answer is that we

1 don't need to address that because the follow-up
2 jury instruction after the question was raised
3 by the jury didn't use "tends to affect," is
4 that --

5 MS. ANAND: That's correct, Your
6 Honor.

7 JUSTICE KAVANAUGH: Okay.

8 MS. ANAND: And, again, the Second
9 Circuit's holding was based on this requirement
10 that there be some retaliatory intent component.
11 So, as long as you don't agree with that, as
12 between the two jury instructions, I'm not sure
13 this Court has to make a -- a decision.

14 JUSTICE KAVANAUGH: And then going
15 back to my original questions about knowledge of
16 the protected activity and temporal proximity,
17 and you said that's basically what it means --
18 that's what you said in your brief -- do jury
19 instructions, however, usually define
20 "contributing factor" in that way?

21 MS. ANAND: So, no, Your Honor, and
22 that's because, in the Whistleblower Protection
23 Act, it's -- it's -- it's illustrative, right?
24 So the "such as," this shall be sufficient.

25 JUSTICE KAVANAUGH: Mm-hmm.

1 MS. ANAND: And so the jury doesn't
2 necessarily need to find those two elements. In
3 virtually every case, that's how it's proven,
4 right? That's the sort of standard way that
5 plaintiffs prove their case. But it's
6 illustrative, not exhaustive.

7 JUSTICE KAVANAUGH: And I think, as
8 the jury here had confusion, lots of juries
9 probably have confusion trying to figure out
10 what "contributing factor" means before they do
11 step 2. Is that not your understanding from
12 reviewing cases of this sort?

13 MS. ANAND: I don't think so, Your
14 Honor; that is, remember, again, you've got to
15 show protected activity, someone reported fraud.
16 You've got to show a retaliatory discharge. In
17 almost every case I've seen, the plaintiff's
18 also showing knowledge by the employer.

19 And so the best way to establish a
20 causal connection between the protected activity
21 and the discharge is to show that it happened
22 pretty close in time; that is, most juries don't
23 believe there's a causal connection if you -- if
24 someone's fired a year or two after they report
25 protected conduct.

1 JUSTICE KAVANAUGH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Barrett?

4 Justice Jackson?

5 JUSTICE JACKSON: Can I just clarify?
6 Way back at the beginning, perhaps in your
7 introduction, you talked about discriminatory
8 intent. And so I'm just trying to understand,
9 do you believe that there is an element of
10 intent at work here and it's being taken care of
11 by the burden-shifting test, or intent is not an
12 element at all in this framework or in this
13 area?

14 MS. ANAND: So we believe that
15 Congress designed the burden-shifting framework
16 to address discriminatory intent. Does that --

17 JUSTICE JACKSON: And so -- but you
18 have to have it in order to be liable for this,
19 but you -- but what -- you've defined it as the
20 employer taking the action because of protected
21 conduct, not some sort of animus or something
22 like that?

23 MS. ANAND: That's exactly right. So,
24 properly understood, discriminatory intent is
25 basically exactly what the second step of the

1 burden-shifting framework shows.

2 JUSTICE JACKSON: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Mr. Yang.

6 ORAL ARGUMENT OF ANTHONY A. YANG
7 FOR THE UNITED STATES, AS AMICUS CURIAE,
8 SUPPORTING THE PETITIONER

9 MR. YANG: Mr. Chief Justice, and may
10 it please the Court:

11 The Second Circuit held that SOX
12 requires retaliatory intent, which the court
13 determined to mean prejudice and conscious
14 disfavor of the employee because of
15 whistleblowing. The court also stated that that
16 interpretation was identical to its
17 interpretation requiring proof of discriminatory
18 animus in the railroad safety whistleblowing
19 context. That holding, which exactly tracked
20 Respondents' arguments, is incorrect.

21 First, the term "discriminate against"
22 means differential treatment that injures a
23 protected individual. That is the same meaning
24 as in Title VII, and this Court's Title VII
25 cases makes clear that discrimination does not

1 turn on such motive or animus. All that's
2 required is that the decision to treat
3 differently be made because of the protected
4 activity.

5 Second, Congress directed that SOX
6 claims be adjudicated using AIR21's burdens of
7 proof, which requires proof that the protected
8 activity, not retaliatory intent, was a
9 contributing factor in the employer's decision.
10 That simply requires that the protected activity
11 played a part in producing the decision.

12 JUSTICE THOMAS: Mr. Yang, is there
13 any difference or daylight between your position
14 and Petitioner's position?

15 MR. YANG: I -- I believe there is,
16 and maybe I can help illustrate this with
17 looking at three different options to look at.

18 One is a pure chain of causation type
19 of an approach, that if you set a domino in
20 effect and it ends up in a retaliatory decision,
21 even if the decision didn't consider the first
22 domino, that is, the retaliatory intent -- or
23 the -- the whistleblowing, that chain of
24 causation is enough.

25 And I think that goes to the

1 hypothetical, Justice Barrett, that you were
2 asking about.

3 That's not our position. In fact, the
4 -- that was a prior problem, chain of causation,
5 that the ARB reversed course in 2019 in the
6 Thorstenson and Yowell cases that we cite late
7 in our brief. What -- now the approach is is
8 the -- which we think is our -- is our position,
9 which we think is right, is that "contributing
10 factor" requires proof that the protected
11 behavior itself was a factor that played a role,
12 not necessarily determinative, but just a role
13 in producing the decision.

14 That can be proven inferentially
15 through causation -- temporal proximity and
16 knowledge. But what -- the ultimate question
17 that the jury has to find or the fact finder has
18 to find is it had some role.

19 JUSTICE ALITO: In the
20 decisionmaking --

21 MR. YANG: In the --

22 JUSTICE ALITO: -- in the adverse
23 decision?

24 MR. YANG: -- in the decision.

25 JUSTICE ALITO: So that --

1 MR. YANG: And that -- so -- so that
2 is not -- does not occur if the decision is
3 based only, for instance, on the employee's
4 misconduct even if the misconduct was revealed
5 by a chain of dominos that started with the
6 whistleblowing.

7 JUSTICE ALITO: No, I understand that,
8 but that reads discriminatory intent of some
9 kind into the final factor that the employee
10 plaintiff must prove.

11 MR. YANG: I -- I think that is right.
12 If we only looked at the prohibition, we would
13 probably agree a lot with Respondent here. But
14 Congress has told us how to adjudicate that
15 question. And let me illustrate --

16 JUSTICE ALITO: Well, I -- I -- I --
17 you're losing me. I -- I understand --

18 MR. YANG: I --

19 JUSTICE ALITO: -- I understand
20 Petitioner's position --

21 MR. YANG: Mm-hmm.

22 JUSTICE ALITO: -- that no
23 discriminatory intent need be proven by the
24 employee plaintiff. But what you just said a
25 minute ago was that some species of

1 discriminatory intent --

2 MR. YANG: Mm-hmm.

3 JUSTICE ALITO: -- is inherent in what
4 the employee plaintiff must prove.

5 MR. YANG: Right.

6 JUSTICE ALITO: Right?

7 MR. YANG: Yes, but --

8 JUSTICE ALITO: Okay.

9 MR. YANG: -- the way you prove it is
10 by proving that the protected activity was a
11 contributing factor; that is, it played a role
12 in the decision. So --

13 JUSTICE ALITO: Yeah. Okay.

14 MR. YANG: -- let me -- let me
15 explain. There's been a debate about causation
16 and intent and how the two are separate. But,
17 in this context --

18 JUSTICE ALITO: Well, I just want to
19 understand, what is the difference between that
20 position and what the -- and the position of UBS
21 in the Second Circuit?

22 MR. YANG: Well, like --

23 JUSTICE ALITO: They said that they
24 wanted an instruction that says there has to be
25 discriminatory intent. And you just admitted

1 that there must be some proof of discriminatory
2 intent.

3 MR. YANG: Their position goes
4 further. They call it retaliatory intent. And
5 retaliatory intent, they mean animus. And
6 animus is some kind of desire to harm because
7 of. That is not required.

8 Secondly, I think their position just
9 doesn't work on the text.

10 JUSTICE ALITO: I mean, if you
11 discriminate against somebody because that
12 person engaged in protected activity, are you
13 not retaliating against that person because the
14 person engaged in protected activity?

15 MR. YANG: I -- I don't think you
16 would say that you're retaliating all the time.
17 For instance, in the employers, there are
18 instances where the employer goes: We've got a
19 whistleblower, I want to protect the
20 whistleblower, I'm going to move the
21 whistleblower to a different shift, different
22 responsibilities because I'm concerned that
23 other people might take action.

24 That good-hearted employer is still
25 discriminating on the basis of the

1 whistle-blowing. So there --

2 JUSTICE JACKSON: Mr. Yang, can I --

3 MR. YANG: And also, there's a
4 distinction --

5 JUSTICE JACKSON: -- can I just -- is
6 the response to Justice Alito -- is the key to
7 it the definition of "retaliatory intent" that
8 Petitioner just put forward?

9 In other words, I understood her
10 presentation and the -- that argument to be that
11 discriminatory intent is taking an action
12 because of the protected conduct.

13 So, if that is the definition, then
14 haven't we solved the problem of there seeming
15 to be discord in the way that Justice Alito
16 points out?

17 MR. YANG: I'm not -- I think that
18 would be discriminatory intent. Retaliatory
19 intent would be --

20 JUSTICE JACKSON: Yes, discriminatory
21 intent.

22 MR. YANG: -- would be some -- yes, we
23 agree -- we definitely agree with that, but
24 let -- let me explain the burden-shifting
25 because I think this is relevant.

1 JUSTICE JACKSON: Okay.

2 MR. YANG: In this context, intent and
3 causation, although they often are different
4 concepts, they merge.

5 The intent underlying the decision,
6 that is, the reasons for the decision and what
7 caused the decision to be made, is effectively
8 the same because the decisionmaker's reasons are
9 the cause for the decision.

10 That's why, when you look at the
11 burden-shifting scheme, it asks did the
12 protected behavior play a role in and produce,
13 which is a contributing factor, the decision.
14 It's a real low bar and you can prove it
15 circumstantially.

16 If so, even if it wasn't the but-for
17 cause of the decision, it is enough intent to be
18 shown here that you're treating them differently
19 that you go to the offending offense --

20 JUSTICE GORSUCH: Counsel?

21 MR. YANG: -- which makes sense
22 because they have -- the employer has more
23 information about the decision.

24 JUSTICE GORSUCH: Counsel?

25 MR. YANG: Yes.

1 JUSTICE GORSUCH: The same question I
2 asked Petitioners.

3 MR. YANG: Mm-hmm.

4 JUSTICE GORSUCH: What if we simply
5 said, you're correct that retaliation as a
6 further motive, we talk about motives, you
7 talked about animus, it really is just a further
8 intention beyond the intention to discriminate
9 is not a thing under this statute. And to the
10 extent the Second Circuit thought it was, it's
11 mistaken. The question is whether there was
12 discrimination, period.

13 MR. YANG: I -- I think the Court
14 could issue that decision. I -- I think it
15 would leave a lot left to be decided.

16 JUSTICE GORSUCH: Oh, my goodness,
17 yes.

18 (Laughter.)

19 MR. YANG: But -- but -- but I -- but
20 I also think it doesn't -- and I --

21 JUSTICE GORSUCH: That's sometimes a
22 bug and sometimes it's a virtue.

23 MR. YANG: Exactly. But, here, I
24 don't think it's that hard, and let me just make
25 another run at the distinction between intent

1 and causation because I --

2 JUSTICE GORSUCH: Before you do,
3 though --

4 MR. YANG: Yeah.

5 JUSTICE GORSUCH: -- you -- you agree
6 that would be an acceptable place to stop?

7 MR. YANG: Oh, I -- I'm certain, if
8 the Court wants to do that, that is an
9 acceptable place. We're not going to fight you
10 on that.

11 JUSTICE GORSUCH: All right. Have at
12 it.

13 MR. YANG: But I -- I think, though,
14 that Respondents' position just doesn't work on
15 the text. Retaliatory intent has to be a
16 response to the whistle-blowing behavior just by
17 nature of the concept of retaliation.

18 So, if the adverse action is taken
19 with retaliatory intent, which they say has to
20 be shown, then the whistle-blowing will always
21 be a contributing factor. And if that's true,
22 you've -- you've made the -- made the
23 contributing factor inquiry superfluous, and
24 that's just not right.

25 Congress sought in the contributing

1 factor standard -- and this goes all the way
2 back to the WPA and Mt. Healthy. If you look at
3 the way that the Court has analyzed these
4 employment decisions, there's been a
5 burden-shifting scheme. Congress tweaked it to
6 lower the standard to a contributing factor, and
7 it did so because intent and causation here are
8 really --

9 JUSTICE BARRETT: Counsel --

10 MR. YANG: -- the same thing.

11 JUSTICE BARRETT: -- counsel, would it
12 be enough at the first stage to show temporal
13 proximity to the adverse employment decision?

14 MR. YANG: It would be enough for a
15 decisionmaker to find -- make a finding.
16 There's a distinction between the proof --

17 JUSTICE BARRETT: Not enough for
18 liability. I just mean, would that be
19 sufficient to carry the employee's burden? That
20 -- that's what Petitioner says.

21 MR. YANG: It -- it -- it might be but
22 not necessarily.

23 JUSTICE KAVANAUGH: Plus -- plus
24 knowledge, right?

25 MR. YANG: Plus knowledge. There's a

1 difference between the evidence that you use to
2 prove the fact that you have to prove, and I
3 think your question goes to the evidence. You
4 could -- you could infer --

5 JUSTICE BARRETT: Sure, because
6 knowledge is a separate element. I'm only
7 talking -- knowledge and the fact that he
8 engaged in public protected activity, all of
9 that is separate.

10 MR. YANG: And --

11 JUSTICE BARRETT: But, once you get to
12 that shifting --

13 MR. YANG: Mm-hmm. What the -- what
14 the government's position is is what you have to
15 -- what the fact finder has to find is that the
16 protected activity played a part in producing
17 the decision, right?

18 JUSTICE BARRETT: Right.

19 MR. YANG: That's what the fact finder
20 has to find.

21 JUSTICE BARRETT: Right.

22 MR. YANG: The way you prove that, you
23 can prove that and allow an inference to be made
24 of the ultimate finding by saying knowledge and
25 temporal proximity. And, frankly, that's no

1 different than when, like, true intent is
2 involved because, if someone's factual theory in
3 a Title VII case is this person hates me because
4 I'm of this protected trait, and you show that
5 you have that protected trait, and you show
6 that, you know, that decision and the adverse --
7 the adverse action, like, are in close temporal
8 proximity, knowledge, and -- that's a way of
9 proving intent. It's not unique to this
10 contributing factor context. This is true
11 generally.

12 JUSTICE BARRETT: So, when you say not
13 necessarily, maybe it could be the difference
14 of, you know, how long the temporal -- or how
15 great the temporal proximity is? Like, hey,
16 listen, if it was within two weeks of
17 discovering about the protected activity versus
18 six months?

19 MR. YANG: And other things. The --
20 the fact finder has to look at all the evidence
21 when making this determination of circumstantial
22 -- contributing factor.

23 So the fact finder may say, oh, you
24 know what, there's really good documentation of
25 your misbehavior and all these other things, and

1 if the fact finder can find that the misbehavior
2 was the only reason and that there was no
3 contributing --

4 JUSTICE BARRETT: And can consider
5 that at step 1?

6 MR. YANG: At step 1. That's, I
7 think, a big difference between our position and
8 Petitioner's.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Thomas?

12 Justice Alito?

13 JUSTICE ALITO: How do you root your
14 interpretation in the language of the statute?

15 So was a contributing factor in the
16 unfavorable personnel action alleged in the
17 complaint? Does unfavorable personnel action
18 alleged in the complaint mean simply in a
19 discharge case discharge, or does it mean
20 discriminatory discharge?

21 MR. YANG: I -- I'm not sure it
22 ultimately makes a difference because the first
23 part of the sentence, that is, the -- the
24 protected activity has to be a contributing
25 factor in the employment decision, is -- is --

1 goes to the question of discriminatory
2 treatment, right?

3 This is the discussion that we've had
4 now about intent and causation. I -- I will say
5 that the "as alleged in the complaint" does,
6 if -- this is on page, I believe, 13A of our
7 brief -- but if you look at what has to be
8 alleged in the complaint, it is discharge or
9 other discrimination by the person in violation
10 of the provision.

11 That -- so you'd also have to show
12 that that person is, for instance, a securities
13 -- a company with securities that are publicly
14 traded. That's part of the -- the retaliatory
15 or the adverse action inquiry. So --

16 JUSTICE ALITO: I -- I -- I -- I don't
17 really understand the answer, but --

18 MR. YANG: Ultimately, it is the --

19 JUSTICE ALITO: The employee plaintiff
20 under this scheme has to show that the protected
21 behavior, any behavior described in paragraphs 1
22 through 4, was a contributing factor in the
23 unfavorable personnel action alleged in the
24 complaint.

25 MR. YANG: Mm-hmm.

1 JUSTICE ALITO: So "unfavorable
2 personnel action alleged in the complaint" could
3 be read to mean the discharge, with no intent
4 requirement, or it could be read to mean
5 discriminatory discharge, because that's what is
6 prohibited by the statute.

7 Doesn't it have to be one or the
8 other? And what is your position on which is --

9 MR. YANG: I think it's more the -- I
10 think it's more the latter.

11 JUSTICE ALITO: It's the latter?

12 MR. YANG: Sorry, the former. It's
13 the discharge, because discriminatory, all that
14 means -- the discriminatory means differential
15 treatment because of the protected activity, and
16 that's what this sentence is getting to.

17 JUSTICE ALITO: Well, if that's how
18 you read it, then I don't understand your answer
19 about how discriminatory intent figures in this
20 at all. It seems to me then you are taking
21 exactly the same petition -- position as the
22 Petitioner. But I must be missing something.

23 MR. YANG: Hmm. I think there's some
24 daylight between us, and I think the reason is
25 is that we think that when you ask whether it

1 was a contributing factor in the unfavorable
2 personnel action, the thing that has to be a
3 contributing factor has to be the protected
4 behavior itself, not some chain of events that
5 gets to the ultimate outcome.

6 JUSTICE ALITO: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Sotomayor?

9 JUSTICE SOTOMAYOR: I may be confused
10 because I don't know that I understood the other
11 side to be saying anything different.

12 MR. YANG: I think that's probably --
13 I think that's --

14 JUSTICE SOTOMAYOR: If that's how you
15 --

16 MR. YANG: -- probably best addressed
17 to the other side then because I --

18 JUSTICE SOTOMAYOR: All right. They
19 can await it.

20 MR. YANG: -- I -- I -- I think this
21 case is a little confusing. I -- I do think
22 that if you take a look at the three options --
23 chain of causation, our position, and then
24 retaliatory intent, which, again, makes the
25 contributing factor inquiry superfluous -- I

1 think that helps to clarify, and you could ask
2 the parties what their views are on those three.

3 CHIEF JUSTICE ROBERTS: Justice Kagan?

4 JUSTICE KAGAN: Okay, Ms. Anand, when
5 you get up, I thought that you were saying the
6 exact same thing, but you'll tell me if that's
7 incorrect.

8 Let me ask you, Mr. -- Mr. Yang, when
9 -- when Justice Gorsuch gave his relatively
10 bare-bones disposition and you said, well, that
11 leaves a lot on the table, you know, I wouldn't
12 say you couldn't do it. Of course, you can do
13 it. Happy if you're overturning the Second
14 Circuit, but it leaves a lot on the table.

15 Could you tell me what it leaves on
16 the table and why you think -- whether you think
17 there are any reasons not to leave those things
18 on the table?

19 MR. YANG: Well, I think maybe my
20 exchange with Justice Alito may reflect that. I
21 mean, it's one thing to say that retaliatory
22 intent's not required because, you know,
23 retaliation is not required, is not the same,
24 you know, you don't have to take this act to
25 injure someone else. That's one thing.

1 And it -- and it solves the way that
2 the Second Circuit decided the case. But it
3 does not answer, well, does -- is discriminatory
4 intent required? And what does that mean? And
5 what -- you know, how do you prove that? What
6 does that -- how does that relate to the
7 contributing factor burden-shifting scheme?

8 And so I think this -- that might
9 forestall another need to address this issue,
10 but it's pretty minimalist. I don't want to
11 fight you if that's where the Court sits. I
12 don't want to fight you on that, but I think
13 what that may mean is, at some point in the
14 future, we have to --

15 JUSTICE KAGAN: Have this conversation
16 all over again?

17 MR. YANG: Maybe.

18 CHIEF JUSTICE ROBERTS: Justice
19 Gorsuch?

20 JUSTICE GORSUCH: I don't think
21 anybody wants to have this conversation all over
22 again.

23 (Laughter.)

24 MR. YANG: I certainly don't.

25 JUSTICE GORSUCH: However, it -- this

1 is our first look at this statute, and that's
2 normally a -- a reason to be careful. And I
3 guess I'm just not sure what exactly you think
4 we would be leaving seriously awry if we were to
5 take this narrow approach that Justice Kagan and
6 I have been asking about. What would be -- what
7 would be the danger of taking that approach?
8 I'd like to understand it if there is one.

9 MR. YANG: Well, the danger, I think,
10 is simply that there's no -- you're not going to
11 err in -- in going that route. The question is
12 what you're leaving --

13 JUSTICE GORSUCH: Well, that's good.
14 That's a good day. That's a good start.

15 MR. YANG: Well, the -- the question
16 is what you're leaving on the table, right?

17 JUSTICE GORSUCH: What -- yeah. What
18 is it that we're leaving on the table that you
19 think we really need to clean up today?

20 MR. YANG: The -- what you propose, I
21 believe, is simply interpreting 1514A(a), right?
22 Let's ignore the burden-shifting and just look
23 at what this prohibition means, right, and it
24 doesn't mean retaliatory intent.

25 JUSTICE GORSUCH: That was the QP on

1 which we granted the case.

2 MR. YANG: Well, that is -- that --

3 JUSTICE GORSUCH: That's true, right?

4 MR. YANG: It is certainly true, but
5 the whole, like the way this -- these cases are
6 adjudicated is through the burden-shifting
7 scheme. That's just as a practical matter how
8 these cases are adjudicated. So -- and, again,
9 I don't want to fight you, Justice Gorsuch, on
10 this. I'm just saying --

11 JUSTICE GORSUCH: Well, what do you
12 want me to say about the burden-shifting regime
13 that's going to be intelligent and useful and
14 surely correct?

15 MR. YANG: Well, I think what you
16 could say is that the contributing factor
17 requires that the protected behavior, not
18 intent, right, because it's a means of inferring
19 intent, the protected behavior was a
20 contributing factor, which means it played a
21 role in -- in -- in producing the decision,
22 right, and that that's all that you need to
23 show, and then you -- the burden shifts to the
24 -- the employer to -- to make out its
25 affirmative defense.

1 I think that would go a long way in
2 solving some of the issues that come up. You
3 could also, if you want to, say that's not a
4 chain-of-causation type of -- of inquiry, but,
5 you know, again, I don't want to step on the --
6 the Court's prerogatives about how a right's
7 explained here.

8 JUSTICE GORSUCH: No, no, I appreciate
9 that. Thank you very much.

10 CHIEF JUSTICE ROBERTS: Justice
11 Kavanaugh?

12 JUSTICE KAVANAUGH: Well, a follow-up
13 on that. The reason you think retaliatory
14 intent is not part of the employee's burden, as
15 I understand it, is in part because, as Justice
16 Gorsuch says, it's not there, but that's
17 confirmed or underscored by the fact that it's
18 step 2 of the burden-shifting framework that
19 gets at retaliatory intent. Is that not --

20 MR. YANG: I think that's true, that
21 the step 2 --

22 JUSTICE KAVANAUGH: Or is that not
23 right?

24 MR. YANG: No, no, no. Step 2 can --
25 can address two types of circumstances. One,

1 the employer can say: Look, taking our decision
2 as a given, like, we would -- like, if you look
3 at the decision, the contributing -- the
4 protected activity was so remote, like, we would
5 have reached the decision the same way.

6 But it also allows employers to do
7 something else, which is the employers can say:
8 Yeah, we had a bad actor supervisor. The guy
9 fired the employee because of the protected
10 activity. He hates whistleblowers. But, by the
11 way, we also had a RIF going on that was
12 completely independent. We would have gotten to
13 the same way -- the same result.

14 So there's two things -- and the
15 employer can prove that too. So there's two --

16 JUSTICE KAVANAUGH: So the usual case
17 -- correct me if I'm wrong -- is going to be
18 where the person made a report of wrongdoing,
19 protected activity, and the employer says -- and
20 the person gets fired, and the employer says:
21 We fired them because they were a poor
22 performer, because we're doing a reduction in
23 force, because they were embezzling, and not
24 because of the protected activity. And then the
25 jury has to weigh is the employer telling the

1 truth or not, which is exactly what the closing
2 arguments in this case were?

3 MR. YANG: I think that's exactly --
4 that, I think, is the typical case.

5 JUSTICE KAVANAUGH: Okay.

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett?

8 JUSTICE BARRETT: How does your
9 articulation of the contributing factor test
10 rule out the chain of causation? You said have
11 some effect in producing the decision.

12 MR. YANG: Yeah. And I think -- I
13 think you actually have to say -- look also at
14 the text and say, when -- when Congress talked
15 about a contributing factor in the personnel
16 action, they're talking about the decision to
17 take that action.

18 JUSTICE BARRETT: Right.

19 MR. YANG: And that requires that they
20 actually consider the protected behavior, not
21 something that was caused by the protected
22 behavior in a long chain that could be quite
23 tenuous.

24 JUSTICE BARRETT: Okay. And just one
25 other question that goes to Justice Gorsuch's

1 point about how much we need to decide.

2 Do you think that there's a risk that
3 if we only say, listen, there's no extra element
4 of retaliatory intent required, and we say
5 nothing more, that it would leave open the
6 possibility that lower courts would say: Oh,
7 okay, I guess that just means, you know, chain
8 of causation? Is that part of your concern,
9 like, that it would send the --

10 MR. YANG: I don't know that the
11 courts are inclined to go that way at this point
12 now that the ARB has -- has corrected its
13 position since 2019. You never know. You know,
14 I think, if you look at the excellent briefing
15 in this case on both sides, including the amici,
16 I think there are a lot of questions to be
17 raised. Some of them are more central than the
18 others.

19 And so I -- you know, again, I would
20 leave the Court to decide what's -- what's best
21 to do in this case.

22 CHIEF JUSTICE ROBERTS: Justice
23 Jackson?

24 JUSTICE JACKSON: So isn't the real
25 risk of not going farther that it leaves open

1 the possibility that courts will think there is
2 still something more to do than the
3 burden-shifting test?

4 And I think the reason why that's kind
5 of happening is because, as I read the
6 Respondents' brief, they have separated
7 causation from intent, and they suggest that the
8 burden-shifting goes to something called
9 causation in this world and that that doesn't
10 cover intent, which is why, whether you have --
11 whether the level of that intent is retaliatory
12 animus or something else, I think, if we just
13 eliminate retaliatory -- retaliatory animus,
14 there's still the question of, is there this
15 intent element outside of the burden-shifting?

16 And my understanding is your argument
17 and Petitioner's argument is no, that the
18 burden-shifting takes care of whatever intent,
19 discriminatory intent, exists in this world, and
20 so it would be a real benefit to make that
21 clear, I think.

22 MR. YANG: I think the Court could
23 definitely conclude that. I think, if the Court
24 doesn't address the role of the burden-shifting
25 scheme, you likely will leave open for

1 litigation a cogent argument made by the other
2 side which ultimately doesn't work because I
3 think --

4 JUSTICE JACKSON: Well, let me -- let
5 me also give you the opportunity to answer that
6 question directly --

7 MR. YANG: Yeah. Yeah.

8 JUSTICE JACKSON: -- because what I'm
9 struggling with is trying to understand how
10 causation and intent are different in this
11 world. When you're talking about the reason, I
12 guess, for the person's having been fired,
13 whether you say it as, you know, employer, what
14 caused you to fire this person, that's
15 causation, or, employer, why did you follow --
16 fire this person, that's intent, it seems to me
17 they both get at the same thing.

18 So can you respond? You -- you've
19 said a couple times they're different, and maybe
20 you can help us understand why that's the case.

21 MR. YANG: Oh, I don't think I said
22 generally these concepts --

23 JUSTICE JACKSON: Oh, they're --
24 they're not different.

25 MR. YANG: They're not different --

1 JUSTICE JACKSON: I'm sorry, they're
2 not different. Yes.

3 MR. YANG: -- and they are the same.

4 JUSTICE JACKSON: Yes.

5 MR. YANG: And, you know, I -- again,
6 it's the intent underlying a decision are the
7 reasons for the decision, and when you ask what
8 caused the decision to be made, it is the same
9 thing because the decision-makers' reasons are
10 what caused the decision to be made.

11 So I think, in this particular
12 context, the -- and I think this is reflected --
13 if you go back to Mt. Healthy, right, it talks
14 about a rule of causation, but it's all talk --
15 it's talking about the decision, right? It's
16 all over -- page 3 of our brief just goes
17 through, and you -- you can see how many times
18 the word "decision" comes in. That was always
19 the case.

20 When the -- the WPA language was
21 adopted, Attorney General Thornburgh said, look,
22 this "contributing factor" language says you
23 have to contribute to the decision. And when
24 the -- the MSPB's regulations were issued, they
25 say it has to affect the decision.

1 So this is an unusual context where
2 intent and causation don't have a meaningful
3 difference. And I think, frankly, the Court's
4 decisions in the Title VII context reflect that
5 too.

6 JUSTICE JACKSON: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Mr. Scalia.

10 ORAL ARGUMENT OF EUGENE SCALIA
11 ON BEHALF OF THE RESPONDENTS

12 MR. SCALIA: Thank you, Mr. Chief
13 Justice, and may it please the Court:

14 In Sarbanes-Oxley, Congress employed a
15 phrase, "discriminate because of," that has long
16 been recognized to require a plaintiff to show
17 discriminatory intent. It is this transplanted
18 phrase with its rich soil that decides this
19 case.

20 Congress also incorporated in
21 Sarbanes-Oxley the contributing factor standard
22 of the AIR-21 statute to address a distinct
23 issue that this Court and Congress occasionally
24 grapple with, and that is the causation standard
25 in a discrimination case.

1 But just as Congress did not eliminate
2 an intent requirement in Title VII when it
3 adopted the reduced motivating factor causation
4 test in Title VII, so in Sarbanes-Oxley it did
5 not eliminate an intent requirement by
6 incorporating the reduced contributing factor
7 causation test of AIR-21.

8 Put differently, the Petitioner errs
9 by overreading the burdens of proof provision of
10 AIR-21. That provision addresses a distinct
11 element, causation. It does not purport to
12 address all the elements a plaintiff must
13 establish, not that she's a covered employee,
14 not that her employer is a covered employer, and
15 not that she was separated with retaliatory
16 intent.

17 Finally, Petitioner and the government
18 err in relying on the Whistleblower Protection
19 Act or the WPA. That law lacks the
20 "discriminate because of" language, which frames
21 this case, and indeed Congress removed the
22 phrase that the action had to be taken as a
23 reprisal for protected activity.

24 For these reasons and others,
25 Petition -- Petitioner cannot overcome the

1 strong presumption that discriminatory intent is
2 plaintiff's burden in a Sarbanes-Oxley
3 retaliation case.

4 I welcome the Court's questions.

5 JUSTICE THOMAS: Mr. Scalia, the
6 Petitioner indicated earlier that you could use
7 a motivating factor to prove -- demonstrate
8 an -- an unlawful employment practice under
9 Title VII.

10 And contributing, I think, to her
11 analogy was that the contributing factor here --
12 the contributing factor test here is similar to
13 the motivating factor under Title VII.

14 How would you respond to that?

15 MR. SCALIA: Justice Thomas, I agree
16 that the Title VII framework is a framework very
17 similar to the framework that we have with
18 Sarbanes-Oxley in AIR-21, a much closer analogy,
19 by the way, than the Whistleblower Protection
20 Act which we heard relatively about today.

21 But as I said, there was an intent
22 requirement to Title VII before motivating
23 factor was added, and there remains one now.
24 And it does not arise from motivating factor.

25 What this Court said in Nassar is that

1 the motivating factor test does not add a
2 substantive bar, rather, it defines the
3 causation standard for a violation defined
4 elsewhere. Same thing here.

5 The violation is described in
6 Sarbanes-Oxley. Sarbanes-Oxley looks over to
7 AIR-21 solely for causation. There's no way
8 that that AIR-21 provision could carry the
9 weight Petitioner wants to give it. As I
10 mentioned in my opening, it leaves out elements
11 of a Sarbanes-Oxley case.

12 JUSTICE JACKSON: Where -- where in
13 the statute does it say causation? I'm sorry,
14 you say it looks over to pick up or reference
15 causation. And I guess I'm trying to understand
16 why you're saying that because it doesn't seem
17 to suggest or say that that's what it's doing.

18 MR. SCALIA: Justice Jackson, I think
19 it's widely recognized by the practicing bar
20 that this is a test of the causal role that's
21 played. I believe that is the Petitioner's
22 position as well, but it's a reduced causal test
23 just as this Court --

24 JUSTICE JACKSON: Understood. But
25 how -- how that different than intent? Tell me

1 -- tell me what is different about a
2 determination that the adverse action was caused
3 by the protected activity and that the employer,
4 you know, the adverse action -- that the
5 protected activity was a contributing factor or
6 was intended because of the -- because of the
7 protected activity?

8 MR. SCALIA: Justice Jackson, this
9 Court's cases recognize that the discriminatory
10 intent required under Title VII and other
11 similar laws and causation are actually
12 importantly distinct.

13 Now, I would concede there are times
14 when the evidence used to establish causation
15 will also be evidence used to show intent as
16 well, but take, for example, this Court's
17 decision in *Babb v. Wilkie* a few terms ago.

18 This Court held that there could be
19 discriminatory intent and liability for it under
20 a special provision of the age discrimination
21 law applicable to federal workers with no
22 causation.

23 The Court gave an example of a manager
24 that has to make a promotion decision rates one
25 worker a 90, rates another worker an 85, and

1 then because he doesn't like older people, rates
2 the younger worker down to an 80.

3 JUSTICE JACKSON: But that's animus.
4 We're not -- I thought -- are you saying that
5 animus has to be a part of this? Is that what
6 you mean by discriminatory intent?

7 MR. SCALIA: No, we are not saying
8 that animus is necessary. But we are saying
9 that differential treatment for intentional
10 reasons. The way this Court defined it in Staub
11 was to intend for discriminatory reasons that
12 the adverse action occurred. This Court called
13 that the scienter that's required.

14 So in the Wilkie -- in the Babb
15 v. Wilkie case, this Court said there was
16 discriminatory intent, even though there wasn't
17 causation because the older worker already had a
18 lower score.

19 JUSTICE BARRETT: So is that what you
20 would contemplate -- I'm just wondering what
21 kind of proof you would use to show intent that
22 would be different than the causation
23 burden-shifting framework.

24 You would say that the employee has to
25 show that the employer harbored some sort of

1 discriminatory intent with what evidence? Like
2 how do you show it?

3 MR. SCALIA: Sometimes it will be the
4 same evidence that's used to show cause, but
5 other times there's evidence such as I made a
6 complaint and my boss had a very angry reaction,
7 or I made a complaint and immediately afterward,
8 there was a lot of hustling about among the
9 managers. And I could tell that they were
10 angry. Or my manager immediately began treating
11 me differently.

12 There often is additional evidence of
13 intent. And let me -- again, a question that's
14 been presented here is how much would we disturb
15 the waters if we were to sort of glom together
16 causation and intent? My answer is immensely.

17 Take this Court's --

18 JUSTICE KAGAN: Well, I -- I -- I
19 don't understand that, Mr. Scalia. Because
20 everything that you just said, that seems to me
21 exactly the question that the burden-shifting
22 mechanism is all about.

23 The employee comes in and says -- and
24 says all of those things, I made a complaint and
25 then terrible things started happening to me.

1 And the employer says: No, not at
2 all. I mean, these terrible things had nothing
3 to do with the complaint. It was because you
4 were a terrible worker or because you embezzled
5 money.

6 So all of that is exactly what the
7 burden-shifting mechanism is designed to suss
8 out. And that's exactly the way you just
9 explained what your intent requirement is, so at
10 that point, I guess I just don't see what one is
11 doing differently from the other.

12 MR. SCALIA: And again, there often
13 can be overlap in the actual evidence required,
14 but in terms of the impact for the case, it's
15 very important.

16 Take, again, the Staub case. That was
17 the "cat's paw" case. You -- you had
18 retaliatory intent on the part of the immediate
19 managers. It had a -- some sort of remote
20 causal role, but this Court very carefully
21 looked both at intent and at causation as each
22 -- as elements that had to be satisfied. That
23 is fundamental to discrimination law.

24 And by the way, I want --

25 JUSTICE KAGAN: That's just saying

1 that even with this intent to discriminate, you
2 might fall below the threshold at which the
3 intent matters, right? And then the question
4 is, you know, how much, what is contributing
5 factor and how is that different from a
6 motivating factor and, you know, are you saying
7 that you took the decision exclusively because
8 of the -- the prohibited reason or partly
9 because of the prohibited reason? And if
10 partly, how much because of the prohibited
11 reason?

12 So those questions would have to be
13 answered, but -- but it's still the exact same
14 question. There's no here's where we have
15 intent and here's where we have causation.

16 MR. SCALIA: Your Honor, where I begin
17 is that the "discriminate because of" language
18 is language that Court has recognized from time
19 immemorial requires discriminatory intent, an
20 intent element. And then causation must be
21 established too.

22 The Petitioner has argued -- she
23 began, Petitioner's counsel, by saying that this
24 was -- how to handle claims that somebody acted
25 with retaliatory intent. Her argument is that

1 gets determined at the second step, but that's
2 simply not true.

3 She has admitted in her brief that
4 retaliatory intent actually doesn't necessarily
5 get discerned at the second step because an
6 employer that did have retaliatory intent but
7 nonetheless would have separated the person
8 anyway, wins. That's the old Price Waterhouse
9 case.

10 On the other hand, an employer that
11 lacked retaliatory intent can still lose at that
12 second step. So Justice Kagan --

13 JUSTICE KAVANAUGH: How?

14 MR. SCALIA: Many, many different
15 ways. First of all, the Halliburton case is a
16 Fifth Circuit case, an old Fifth Circuit case,
17 that Plaintiff cited as establishing the circuit
18 split here. The protected activity there was
19 the employee complained within the company. He
20 then explained to the SEC. The SEC told the
21 general counsel, we're going to be conducting an
22 investigation, at which point the general
23 counsel, as a general counsel does, sent out a
24 notice to employees to retain documents.

25 What he said was the SEC is

1 investigating Mr. Menendez's allegations. This
2 is the employee. Mr. Menendez said: That hold
3 notice was retaliatory action because it made my
4 colleagues angry that I had said they were
5 violating the law. And so that was the
6 protected activity.

7 If that employer is forced to prove,
8 without any prior showing of intent, that it
9 would have let that employ -- that it would have
10 sent out the hold notice anyway, that's
11 impossible. It sent out the hold notice for
12 what were quite possibly very good faith reasons
13 because the complaint was made.

14 Or another example, these things
15 happen: An employee, lawyer at a company,
16 complains to the SEC, and woven throughout his
17 complaint is privileged, confidential
18 information. The employer says: I do not want
19 to be represented by a lawyer who discloses my
20 privileged information to the SEC. I'm going to
21 have to let you go.

22 Those things, that employer is not
23 going to be able to prove that he would have
24 done the same thing absent the complaint to the
25 SEC, because it was the complaint to the SEC

1 that disclosed privileged information, which for
2 innocent, good faith, non-retaliatory reasons
3 led to the separation.

4 And -- then then, finally, because
5 this is important too, there's a long series of
6 cases now under the FRSA, Federal Railroad
7 Safety Act, where plaintiff makes a complaint,
8 there's an investigation, it's found that
9 actually the plaintiff engaged in -- in
10 misconduct at some point, and he's let go.

11 And those cases were being forced to
12 go to the second step. Employers sometimes
13 weren't able to meet it. And the courts
14 eventually realized this doesn't work, this
15 chain of causation, and they introduced an
16 intent element to discipline it.

17 JUSTICE BARRETT: But, Mr. Scalia, why
18 wouldn't the government's test -- in your
19 example about the revealing privilege --
20 privileged information, why wouldn't the
21 government's test take care of that? Because
22 the government said: No, chain of causation
23 isn't enough; it has be a contributing factor to
24 the decision. And there the decision, you know,
25 the contributing factor was the revelation of

1 privileged material, not the complaint itself.

2 MR. SCALIA: Justice Barrett, that
3 sounds like intent to me. That sounds like
4 you're getting inside the heads of the
5 decisionmakers --

6 JUSTICE BARRETT: But at the --

7 MR. SCALIA: -- and asking --

8 JUSTICE BARRETT: But at the
9 burden-shifting -- but at the burden-shifting
10 stage, right, not independently? So is it -- I
11 mean, maybe I'm just confused about your
12 position. I thought your position was that
13 there was an independent element of intent that
14 was separate and apart from the burden-shifting
15 framework? Is that right?

16 MR. SCALIA: I'm saying that one thing
17 that needs to be established in order for the
18 burden to shift is that there was retaliatory
19 intent. The -- and in response to Justice
20 Alito, I believe a question that you were
21 asking, AIR-21 refers to whether the protected
22 activity was a contributing factor to the
23 unfavorable personnel action alleged in the
24 complaint.

25 If you go to Sarbanes-Oxley, the

1 unfavorable personal -- personnel action alleged
2 in the complaint is, under Section 1, taken with
3 discrimination. So the contributing factor has
4 to be contributing to an action that has that
5 discriminatory intent --

6 JUSTICE GORSUCH: Mr. Scalia --

7 MR. SCALIA: -- as part of it.

8 JUSTICE GORSUCH: --if I -- let me --
9 let me see if I understand it. And -- and tell
10 me where I'm going wrong.

11 As you read the statute, there has to
12 be mens rea and causation, causation established
13 through this burden-shifting mechanism only.
14 And you read that because "discriminate because
15 of" has traditionally had a mens rea requirement
16 within it and Title VII and a whole bunch of
17 other statutes.

18 The other side says, in this
19 particular new, novel regime, those two are
20 collapsed into the causation requirement.

21 So far so good?

22 MR. SCALIA: I think that's
23 accurate --

24 JUSTICE GORSUCH: Okay.

25 MR. SCALIA: -- Justice Gorsuch.

1 JUSTICE GORSUCH: The one thing we can
2 maybe all agree on, though, is that whatever
3 mens rea requirement does not -- is an intent to
4 discriminate and not with a further motive or
5 further intention of retaliation. One could
6 intend to discriminate for benign reasons, for
7 example, and -- in the Title VII context, what
8 some people think of as benign reasons. I -- I
9 want to equalize pay for men and women as a
10 whole; one example the Court has used.

11 Can we agree on that much, that the
12 further intent to retaliate or motive is not
13 part of the statute?

14 MR. SCALIA: Unfortunately, no. I
15 think the two --

16 JUSTICE GORSUCH: No? No? Oh, we
17 were so close.

18 (Laughter.)

19 JUSTICE GORSUCH: We had two out of
20 three.

21 MR. SCALIA: Two intents are required,
22 Justice Gorsuch. First to take the action. Now
23 that's -- the base level of intent, that's
24 required even in a disparate impact case, right?
25 Even in disparate impact, which we say doesn't

1 require intent, requires intent not to hire the
2 employee, not to promote the employee.

3 What Staub said is there needs to be
4 intent for discriminatory reasons that the
5 adverse action occurred. So there needs to be
6 intent to take the action but to do it for a
7 reason the law prohibits.

8 And, Justice Gorsuch, I think to
9 substitute the -- the plaintiff needs to show
10 discriminatory intent for a requirement that the
11 plaintiff show retaliatory intent would just
12 engender confusion in a -- what everybody
13 recognizes to be a retaliation case.

14 In -- in Lawson, which was the Court's
15 prior Sarbanes-Oxley whistleblower decision, the
16 word "retaliate" was used 50 times. So --

17 JUSTICE GORSUCH: Yeah, but if I -- if
18 I intend to treat you differently, that's my
19 mens rea, your -- your -- your mens rea, because
20 of a protected trait, why isn't that
21 retaliation?

22 MR. SCALIA: And the best instruction
23 to elicit that is one which refers to
24 retaliatory intent under a statute which is
25 intended to target --

1 JUSTICE GORSUCH: But why wouldn't a
2 statute --

3 MR. SCALIA: -- retaliatory intent.

4 JUSTICE GORSUCH: Why wouldn't -- why
5 wouldn't an instruction saying if you intend to
6 treat somebody differently because of a
7 protected trait, you are liable? What would --
8 what -- what issue would you have with an
9 instruction like that?

10 MR. SCALIA: I think the instruction
11 needs to make clear that it was intended to do
12 it for a reason that the law regards as
13 improper.

14 JUSTICE GORSUCH: Here in -- yeah --

15 MR. SCALIA: Here because an adverse
16 reaction to --

17 JUSTICE GORSUCH: To whistleblowing.

18 MR. SCALIA: -- the whistleblowing.
19 Right.

20 JUSTICE GORSUCH: I intend to treat
21 you differently because of your whistleblowing
22 activity, period. No word -- "retaliate"
23 doesn't appear in that sentence. What's wrong
24 with that -- what's wrong with that instruction?
25 How would you reverse me if I gave that

1 instruction?

2 MR. SCALIA: Obviously, it wasn't an
3 instruction that was given here.

4 JUSTICE GORSUCH: No, I -- I -- right.
5 Right. Right.

6 MR. SCALIA: But we can talk about the
7 other flaws in the instructions that were given
8 here that we think that are independent reasons
9 to affirm the Second Circuit. But, again, if
10 you're instructing a jury about retaliatory
11 intent in a case that's involving Sarbanes-Oxley
12 whistleblower retaliation --

13 JUSTICE GORSUCH: I just don't see
14 those words in this statute.

15 MR. SCALIA: -- I think it becomes a
16 little bit confusing for a jury.

17 JUSTICE GORSUCH: I see discrimination
18 in this statute, and I see whistle-blowing
19 activity, and I know there's a causation
20 requirement, but I don't see the retaliation in
21 this statute.

22 MR. SCALIA: Yeah.

23 JUSTICE GORSUCH: So help me out.
24 You're asking me to read things into a statute
25 that aren't there. Aren't you, counsel?

1 MR. SCALIA: And as I said, the
2 Petitioner's counsel began by describing this as
3 a statute that requires retaliatory intent. The
4 question presented is whether it's established
5 that the --

6 JUSTICE JACKSON: But, counsel, can I
7 just ask you. I agree with Justice Gorsuch in
8 the sense that I don't see certain things in the
9 statute, but I was curious, in your briefing, as
10 to why you left out the other sort of actus reus
11 parts of the statute. You -- you've reduced it
12 all down to "discriminate because of," what you
13 say is the heart of the statute.

14 But before the word "discriminate," we
15 have the company may not or "no company may
16 discharge, demote, suspend, threaten, harass, or
17 in any other manner discriminate."

18 And the reason why I think that might
19 be important is that if you are right that there
20 is some sort of mens rea that relates to
21 retaliation, I guess I at least would have
22 thought that Congress would write this
23 differently, right? That you would have a
24 statute that would say one may not come up --
25 you know, purposefully or with retaliatory

1 intent harass, demote, suspend, et cetera, but
2 that's not the way this is written.

3 So it seems like "discriminate" is not
4 necessarily doing the work that -- in light of
5 the entire sentence, doing the work that you
6 want it to do.

7 MR. SCALIA: Your -- Your Honor, the
8 word "discriminate" does appear. It says "or in
9 any other manner discriminate," which --

10 JUSTICE JACKSON: Yes.

11 MR. SCALIA: -- has been read to mean
12 that the others are forms of discrimination.
13 But this Court, under Title VII, certainly has
14 understood that "discharge" is modified by
15 discriminate; "fail to promote," modified by
16 discriminate. Our position is it modifies all.

17 But if you need more, Justice Jackson,
18 I would point you to subsection (c), which
19 refers to the relief that's available. And that
20 refers specifically to the plaintiff receiving
21 the seniority he would have had in the absence
22 of the discrimination. This statute plainly
23 does contemplate that --

24 JUSTICE JACKSON: But -- but it --

25 MR. SCALIA: -- all those foregoing

1 acts are discriminatory.

2 JUSTICE JACKSON: But you reject the
3 view that when it says "discriminate or in any
4 other manner discriminate," that just means any
5 other manner treat the person differently and is
6 not necessarily carrying with it the kind of
7 separate intent to discriminate, and to the
8 extent it is there, it's in the burden-shifting
9 test as to how you prove that intent?

10 MR. SCALIA: We believe that
11 "discriminate" as used in this context does
12 again modify all the actions that would trigger
13 liability, and that needs to be an intent to
14 discriminate. That is how the word
15 "discriminate" in the statute has been
16 understood.

17 Again, I take you to Nassar. This
18 Court's decision regarding Title VII refers to
19 the motivating factor test as a test of
20 causation. Intent resides elsewhere.

21 Also, remember that the finding after
22 the second step is actually of a violation. The
23 Petitioner's position is that a violation can be
24 found under this statute without ever having
25 established the improper intent.

1 CHIEF JUSTICE ROBERTS: Counsel --

2 JUSTICE ALITO: Could you read --

3 CHIEF JUSTICE ROBERTS: -- both of
4 your -- the counsel on the other side said that
5 discrimination is simply treating people
6 differently.

7 I gather it's the essence of your
8 position that that's not true?

9 MR. SCALIA: It's treating people
10 differently in a way that is harmful to a
11 protected individual and, additionally, under
12 this Court's cases for decades, which, of
13 course, were established law when this law was
14 enacted, it -- it needs to be intentional
15 discrimination.

16 So that's our position, that we don't
17 quarrel generally with their description of
18 discriminate itself, but we add this Court has
19 been crystal-clear that that discrimination
20 needs to be intentional. Otherwise, again,
21 we're back at -- at disparate impact among other
22 things.

23 CHIEF JUSTICE ROBERTS: Well,
24 intentional -- there must be more to that term
25 if you think that those sentences from your

1 adversaries are -- are wrong because you can
2 intentionally treat people differently, but you
3 think that's not necessarily discrimination?

4 MR. SCALIA: It's intentionally for
5 discriminatory reasons treating them
6 differently. So you are intentionally treating
7 them differently but for a reason the law
8 prohibits. That, I believe, is just ingrained
9 --

10 JUSTICE KAGAN: So I -- I -- I --

11 MR. SCALIA: -- in the "discriminate
12 against because of" language. Excuse me.

13 JUSTICE KAGAN: -- I think that
14 basically is ingrained in all of our
15 discrimination statutes. They all have some
16 requirement that a prohibited factor came into a
17 decision and that it was there in your head when
18 you made the decision.

19 But what all of our decisions have
20 recognized is the tent -- intent is a very
21 difficult thing to prove, and, as a result of
22 that, what Congress has done, and sometimes this
23 Court has done it, has set up burden-shifting
24 mechanisms. You do this first. Then we'll give
25 you a chance to do that.

1 They're all -- those burden-shifting
2 mechanisms are geared to trying to figure out
3 what was in his head when he made the decision.
4 Was the prohibited consideration in his head in
5 the requisite way? But, because that's hard to
6 say directly, we'll shift burdens and tell
7 different people to do different things.

8 And that's exactly what this statute
9 does and says that's the way you figure out
10 whether the whistle-blowing activity was in his
11 head in the prohibited way.

12 MR. SCALIA: Your Honor, I agree with
13 much of that, that these burden-shifting schemes
14 have been developed to get at both causation but
15 also intent. But, ultimately, both also are
16 required as part of the plaintiff's case.

17 I'm simply unaware of any decision
18 under Title VII on which this was plainly framed
19 where intent was not also something that the
20 plaintiff had to show.

21 And, remember, under Title VII's
22 motivating factor, again, the plaintiff who
23 shows that wins. Now they may not get
24 reinstatement or back pay, but they've won.
25 They get attorneys' fees and -- and -- and --

1 and they have shown a violation.

2 This statute operates the same way.
3 It's quite unusual to think that those -- that
4 burden-shifting operates to produce that result
5 with causation suddenly just becoming combined
6 with intent and not simply asking the jury to
7 make a separate finding --

8 JUSTICE KAVANAUGH: Could I --

9 MR. SCALIA: -- on that point.

10 JUSTICE KAVANAUGH: -- could I ask a
11 question then about how the case -- this case
12 and usual cases develop? Someone engages in
13 protected activity or a report of misconduct and
14 then a few weeks later, a few months later, is
15 fired.

16 Then the case goes to the litigation
17 and the jury, and the plaintiff says: I was
18 fired because I engaged in the protected
19 activity. The employer, as here, comes in and
20 says: No, we fired you because you were a poor
21 performer or because we had money issues and
22 needed to eliminate the position.

23 Then, at that point and in this case,
24 in the closing arguments, you know, your counsel
25 said you're going to hear two different versions

1 of events. And then Murray's counsel got up and
2 said, you just heard a speech, it was a slick
3 presentation for sure, but it was not the truth.
4 It's a smoke screen.

5 In other words, the jury had to decide
6 between two different versions of events, which
7 the burden was on you to show that your version
8 was correct, but you were able to present to the
9 jury this idea that no, we didn't do it, we
10 didn't intend to do it because of the protected
11 activity. We did it for another reason, right?

12 Didn't that defense get to the jury?

13 MR. SCALIA: Yes, it -- it did, Your
14 Honor, although the way, of course, these
15 instructions functioned, first of all, they got
16 there by just showing that the protected
17 activity tended to affect in any way --

18 JUSTICE KAVANAUGH: Well, there was --

19 MR. SCALIA: -- the decision.

20 JUSTICE KAVANAUGH: -- a follow-up
21 instruction on that. But put that aside. The
22 ultimate question was who's telling the truth
23 about why this person, Murray, was fired.

24 MR. SCALIA: And -- and, Justice
25 Kavanaugh, that's another part of the reason why

1 the innocent employer, if forced to make that
2 defense without a prior intent showing, may lose
3 even though there's no wrongful intent because
4 the -- showing by clear and convincing evidence
5 --

6 JUSTICE KAVANAUGH: But they'll
7 have -- to pick up on Justice Kagan's point, I'm
8 sorry to interrupt, but the -- the employer will
9 have the information that shows, okay, we fired
10 10 other employees as well who hadn't engaged in
11 the protected activity for the same reason.

12 Or here's our list of performance
13 ratings and, see, we fired these other people
14 who had the same performance rating. That's how
15 the employer wins these cases, but they -- the
16 employer has the information.

17 Once you put that in, then the jury,
18 as was went on in the closing arguments here,
19 has to figure out is that enough to show that
20 the protected activity wasn't the -- you know,
21 whatever the -- the reason.

22 MR. SCALIA: Justice Kavanaugh,
23 ideally, you have that evidence and you put it
24 in. But part of the problem is that often you
25 may not. And you may not have it in a way

1 that's clear and convincing.

2 In a reduction-in-force case, for
3 example, by definition, you're letting go people
4 that you thought were doing just fine.
5 Sometimes you're making fine distinctions.
6 That's -- or sometimes you don't have
7 comparators. The person engaged in misconduct
8 that's pretty --

9 JUSTICE KAVANAUGH: Yeah, I agree.

10 MR. SCALIA: -- pretty unusual.

11 JUSTICE KAVANAUGH: You're -- you're
12 stuck there under the -- under plaintiff's
13 version. I agree with that.

14 MR. SCALIA: And -- and, Justice
15 Kavanaugh, that's another reason why the
16 innocent employer loses under the second prong
17 even when there is no retaliatory intent, which
18 is where Petitioner's counsel began.

19 And then, with respect to the
20 instruction, what the judge did was first sent
21 the jury back to her original instruction about
22 "tend to affect in any way." And although she
23 used words that took "tend" out, she still --
24 still said "affect any way." And there was
25 evidence here that the employee's direct

1 manager, who had supposedly received the
2 whistle-blowing complaint, actually tried to
3 find him another position.

4 So the jury could have used that to
5 say, yeah, I guess it kind of had an effect
6 because he heard the whistle-blowing and tried
7 to find another position.

8 If there had been an intent
9 instruction --

10 JUSTICE KAVANAUGH: Well, if the jury
11 believed Schumaker -- I think that's the name --
12 you would have won, right?

13 MR. SCALIA: Well, but if the jury had
14 been told that it had to have been found that
15 Schumaker had an intent to retaliate or an
16 intent to discriminate, although, again, I
17 think, in a retaliation case, using intent to
18 discriminate might be somewhat confusing, would
19 require explanation. We're not saying animus.

20 If the jury had been required to find
21 that too about Mr. Schumaker, not just that it
22 tended to affect or even affected but that there
23 was an intent --

24 JUSTICE KAVANAUGH: You don't think --

25 MR. SCALIA: -- that was a reaction --

1 JUSTICE KAVANAUGH: Sorry to prolong
2 it, but you don't think the jury instructions
3 allowed the jury to get at that by saying is
4 Schumaker telling the truth when he says I'm
5 firing -- or you're being fired for something
6 other than the report, you don't think the jury
7 -- that was before the jury?

8 MR. SCALIA: I think that the jury was
9 given too easy a path to find against UBS in a
10 case that was --

11 JUSTICE KAVANAUGH: Because of the
12 burden flip probably?

13 MR. SCALIA: Because of the burden
14 flip and because a basic element of a
15 discrimination case, intent to discriminate,
16 intent to retaliate, was taken out.

17 And for a jury trying to find
18 agreement four days before Christmas, as was the
19 case here, those things make a difference.

20 JUSTICE JACKSON: Mr. --

21 MR. SCALIA: That element should not
22 have been --

23 JUSTICE ALITO: Suppose you were --
24 suppose you were drafting jury instructions.
25 Part of the instructions presumably wouldn't

1 involve the burden-shifting features of the
2 statute.

3 What, if anything, would you instruct
4 a jury that the plaintiff has to prove before
5 you get to that part of the instructions?

6 MR. SCALIA: I -- I'm sorry, Justice
7 Alito. Before I get to the burden-shift part of
8 the instruction?

9 JUSTICE ALITO: Exactly what do you
10 think should be -- should the jury be
11 instructed?

12 MR. SCALIA: I think the --

13 JUSTICE ALITO: Walk us through that.

14 MR. SCALIA: -- the -- the jury should
15 be instructed --

16 JUSTICE ALITO: What's the first step?

17 MR. SCALIA: The jury should be
18 instructed to find the elements in the
19 Plaintiff's case. Sometimes they're stipulated,
20 but that would include that there was protected
21 activity. That would include the contributing
22 factor. That would also include that there was
23 an intent to take the action for retaliatory
24 reasons. And then it would -- then there are
25 cases that now do this because the --

1 JUSTICE ALITO: Okay. You would --
2 before you get to the anything about the
3 burden-shifting, the jury -- the plaintiff would
4 have to show that the protected activity was,
5 what, a but-for cause, a motivating cause, some
6 cause? What would -- what would you do -- what
7 would you ask the jury to decide before this
8 burden-shifting scheme entered the picture?

9 MR. SCALIA: Justice Alito, the way
10 that is typically done, should be done, is to
11 show that it played some role in furthering, in
12 bringing about the adverse action. That's a
13 proper, I think, description of contributing
14 factor. It's not the one that was given. It's
15 one the government has now begun using but had
16 not been used with the jury. But not
17 motivating. It's recognized that contributing
18 is a lower level than motivating.

19 JUSTICE ALITO: But that sounds like
20 you're -- you're working your argument about
21 discriminatory intent into the burden-shifting
22 framework, not requiring something outside the
23 burden-shifting framework.

24 MR. SCALIA: It is outside. This is a
25 question about the impact of the protected

1 activity. Did it contribute, did it further the
2 decision that was made separately, is the
3 instruction to be given regarding whether there
4 was an intent to take this discriminatory
5 action.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Thomas? Anything further?
9 Justice Sotomayor?

10 JUSTICE SOTOMAYOR: Give me the --

11 CHIEF JUSTICE ROBERTS: Justice Kagan
12 -- oh, I'm sorry.

13 JUSTICE SOTOMAYOR: Give me the
14 instruction. Intent to do what? Intent to have
15 the whistleblowing contribute in some way to the
16 firing? Because I -- but why isn't that the
17 burden shifting already?

18 MR. SCALIA: An intent to --

19 JUSTICE SOTOMAYOR: To do what?

20 MR. SCALIA: -- separate the employee
21 in reaction -- in retaliation for --

22 JUSTICE SOTOMAYOR: But that wasn't
23 the only reason. They have multiple reasons.
24 So don't you have to tell the jury it has to be
25 -- you're right back in the circle. You're

1 right back in the circle because you can't get
2 out of contributing factor because it doesn't
3 have to be the only reason or it only has to be
4 a part of a reason.

5 MR. SCALIA: That -- that's correct,
6 Your Honor. It has to show that there -- that
7 intent played a role, that it played a role in
8 the separation decision, but it does not --

9 JUSTICE SOTOMAYOR: So how is that
10 different than the burden shifting?

11 MR. SCALIA: Because it's a
12 requirement of the intent, the mens rea, what
13 this Court called the scienter, that's basic to
14 discrimination claims.

15 JUSTICE SOTOMAYOR: Okay.

16 CHIEF JUSTICE ROBERTS: Justice Kagan?

17 JUSTICE KAGAN: I mean, Congress could
18 definitely have written a statute like that,
19 that sets up here's the protected activity, it
20 was a contributing factor, and there was -- the
21 employer intended for the protected activity to
22 be a contributing factor.

23 That's a sensible statute. But if
24 that were the statute, you don't need the second
25 step of the burden-shifting analysis. You've

1 already done everything that the second step of
2 the burden-shifting analysis does.

3 The reason why you have the second
4 step of the burden-shifting analysis is
5 precisely to make that determination of whether
6 the employer actually acted in part or in whole
7 for that reason, understanding that the employer
8 has the information. And so it makes sense to
9 put that question on the employer's side of who
10 has the burden to do what.

11 MR. SCALIA: But, respectfully,
12 Justice Kagan, as I've sought to explain, the
13 second step does not discern the employer's
14 retaliatory motive or the absence of it. The
15 Petitioner is saying that's where it's
16 determined. But, remember, the employer that
17 has retaliatory motive can still win there. And
18 as I've explained, the employer that lacks it
19 can still lose.

20 So that's not the step at which it's
21 ascertained whether there is retaliatory intent.
22 What's ascertained there is whether this action
23 would have been taken even in the absence of the
24 protected activity, including that intent.

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch?

2 Justice Kavanaugh?

3 Justice Barrett?

4 JUSTICE BARRETT: One question,
5 Mr. Scalia. I want to pose a variation of the
6 question that Justice Gorsuch asked your friends
7 on the other side. If we disagreed with you
8 that intent was an independent element and we
9 think intent, as Justice Kagan was just
10 suggesting, is wrapped into the burden-shifting
11 framework, would you like us to just stop there,
12 or do you think it would be valuable to say
13 something more about the contributing factor in
14 the burden-shifting test?

15 MR. SCALIA: Certainly, we think the
16 Court should proceed to address the second
17 issue. That has been briefed by the parties.
18 It was integral to the court's decision below.
19 If you read where it said that there had to be
20 retaliatory intent -- by the way, retaliatory
21 intent, it did not say there had to be animus.
22 If you read that, immediately in the same place,
23 it explained the problems with the instruction
24 that was being given. That is a widely used
25 instruction that the government has backed away

1 from here. So has Petitioner.

2 I think you are leaving an enormous
3 amount unsettled in whistleblower law if you do
4 not address that and you do not address also the
5 discriminatory or retaliatory intent that is
6 required to be established.

7 JUSTICE BARRETT: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Jackson.

10 JUSTICE JACKSON: And would we also
11 cover how you would go about proving the
12 retaliatory intent? And I just ask, and this is
13 just a short question, which is ordinarily my
14 understanding is that a burden-shifting test is
15 used precisely because of the reasons that
16 Justice Kagan pointed out, that we don't require
17 sort of direct evidence of what is in -- in the
18 head of an employer.

19 So if this is a separate element, are
20 you suggesting that we have two burden-shifting
21 tests operating in this environment; one that
22 relates to causation and uses the contributing
23 factor and another that relates to intent and I
24 guess uses motivating or but-for or because or
25 something?

1 MR. SCALIA: No. We are suggesting
2 just a single burden shift still, which is, as
3 we've explained, a defense to relief. But the
4 plaintiff's burden, when the plaintiff is done
5 with this case, it's been shown to be a
6 violation. And we submit --

7 JUSTICE JACKSON: No, I understand,
8 but I guess my question is just you would
9 require the plaintiff to bring direct evidence
10 of this intent? It couldn't do it during the --
11 sort of the ordinary way that it's done in
12 discriminatory -- in discrimination cases?

13 MR. SCALIA: It -- not at all, Justice
14 Jackson. There would need to be a finding of
15 intent, but that can be inferred from
16 circumstantial evidence. We would not require
17 direct evidence. We're merely saying that it
18 would be so remarkable under a discrimination
19 statute or a retaliation statute to find a
20 violation, as SOX does, without even finding
21 that there was retaliatory intent.

22 JUSTICE JACKSON: Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 MR. SCALIA: Thank you.

1 CHIEF JUSTICE ROBERTS: Rebuttal,
2 Ms. Anand?

3 REBUTTAL ARGUMENT OF EASHA ANAND
4 ON BEHALF OF THE PETITIONER

5 MS. ANAND: Thank you, Your Honor.

6 I want to start by addressing Justice
7 Kagan's question about the relationship between
8 our position and the SG's position.

9 So we agree on two key things. First,
10 "contributing factor" cannot include an animus
11 requirement, and it cannot include retaliatory
12 intent to the extent that means something more
13 than the JA 180 language of "affects the
14 decision."

15 Second, the burden-shifting framework
16 is how you capture discrimination. And I don't
17 think I heard my friend on the other side give
18 you an example of why Justice Gorsuch's proposed
19 instruction, which is step 2 of the
20 burden-shifting framework, doesn't adequately
21 capture -- doesn't adequately exclude innocent
22 employers, setting aside the clear and
23 convincing evidence standard, which of course
24 was Congress's prerogative.

25 And this Court has already held that's

1 what discrimination means, right? That's --
2 that's Bostock. Discrimination has occurred if
3 changing the employee's sex would have yielded a
4 different choice. That's Abercrombie. Three
5 elements for discriminate, adverse action,
6 because of protected activity. So you're not --
7 you're not breaking any new ground here. And
8 I'm happy to explain Staub and Halliburton that
9 my friend on the other side cited if there are
10 questions about those.

11 To the extent this Court is inclined
12 to decide between the JA 130 formulation, which
13 is "tends to affect in any way," which is our
14 preferred formulation, or the JA 180 "affects
15 the decision in any way," and, again, I don't
16 think you need to do that because both
17 instructions were in this case, but to the
18 extent this Court is inclined to choose between
19 them, I'd like to say a few words on why I think
20 the JA 130 formulation is the preferred one.

21 So, first, the statute notably doesn't
22 say "contributing factor in the decision." And
23 that's notable because as the SG's Office
24 explained, Mt. Healthy does use the "in the
25 decision" formulation, so it's notable that

1 Congress chose not to use that.

2 Second, this would collapse the
3 difference between contributing and motivating
4 factor, right? So motivating factor, Price
5 Waterhouse. If we ask the decisionmaker to list
6 the reasons and they were truthful, the
7 protected trait would be on that list. That's
8 basically saying it's a contributing factor in
9 the decision. And Congress chose to use
10 "contributing factor" and not "motivating
11 factor" in this context.

12 And, third, Marano seems to have
13 defined this authoritatively a generation ago,
14 Congress was well aware of that definition when
15 it incorporated into SOX.

16 So, again, for us to win, you just
17 have to say no animus and contributing factor
18 and no retaliatory intent to the extent it means
19 more than "affects the decision," and
20 burden-shifting framework is all you need to
21 show to get at discrimination.

22 If you want to go further and choose
23 between these two instructions, I've given you
24 my position on why the JA 130 formulation is
25 preferable.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 The case is submitted.

4 (Whereupon, at 11:32 a.m., the case
5 was submitted.)

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