

No. 22-\_\_

---

---

IN THE  
*Supreme Court of the United States*

TREVOR MURRAY,  
*Petitioner,*

v.

UBS SECURITIES, LLC AND UBS AG,  
*Respondents.*

---

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

---

**PETITION FOR A WRIT OF CERTIORARI**

---

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

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

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

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

---

---

## QUESTION PRESENTED

The Sarbanes-Oxley Act of 2002 protects whistleblowers who report financial wrongdoing at publicly traded companies. 18 U.S.C. § 1514A. When a whistleblower invokes the Act and claims he was fired because of his report, his claim is “governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.” 18 U.S.C. § 1514A(b)(2)(C).

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

### *The Question Presented is:*

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

**RELATED PROCEEDINGS**

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

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

**TABLE OF CONTENTS**

QUESTION PRESENTED ..... i  
RELATED PROCEEDINGS..... ii  
TABLE OF AUTHORITIES ..... iv  
PETITION FOR A WRIT OF CERTIORARI..... 1  
OPINIONS BELOW ..... 1  
JURISDICTION..... 1  
RELEVANT STATUTORY PROVISIONS ..... 1  
INTRODUCTION ..... 2  
STATEMENT OF THE CASE..... 3  
A. Statutory background..... 3  
B. Proceedings below..... 6  
REASONS FOR GRANTING THE WRIT ..... 14  
I. There is a square conflict as to whether  
Section 1514A plaintiffs bear the burden of  
proving that their employer had an  
improper motive..... 14  
II. The question presented is important..... 17  
III. This case provides the right vehicle for  
resolving the question presented ..... 23  
IV. The Second Circuit’s ruling is wrong ..... 24  
CONCLUSION ..... 31  
APPENDIX

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Addis v. Dep't of Labor</i> , 575 F.3d 688 (7th Cir. 2009) .....	6
<i>Allen v. Admin. Rev. Bd.</i> , 514 F.3d 468 (5th Cir. 2008) .....	15, 16, 29
<i>Armstrong v. BNSF Ry. Co.</i> , 880 F.3d 377 (7th Cir. 2018) .....	22
<i>Brotherhood of R.R. Trainmen v. Balt. &amp; Ohio R.R.</i> , 331 U.S. 519 (1947) .....	27
<i>Blackorby v. BNSF Ry. Co.</i> , 849 F.3d 716 (8th Cir. 2017), <i>cert. denied</i> , 138 S. Ct. 264 (2017) .....	20
<i>Comcast Corp. v. Nat'l Ass'n of Afr. Am.- Owned Media</i> , 140 S. Ct. 1009 (2020) .....	31
<i>Coppinger-Martin v. Solis</i> , 627 F.3d 745 (9th Cir. 2010) .....	13, 16
<i>Doyle v. Sec'y of Labor</i> , 285 F.3d 243 (3d Cir. 2002).....	21
<i>Federal Express Corp. v. Holowecki</i> , 552 U.S. 389 (2008) .....	30-31
<i>Feldman v. Law Enf't Assocs. Corp.</i> , 752 F.3d 339 (4th Cir. 2014) .....	16, 29
<i>Halliburton, Inc. v. Admin. Rev. Bd.</i> , 771 F.3d 254 (5th Cir. 2014) .....	13, 15
<i>Hutton v. Union Pac. R.R. Co.</i> , ARB No. 11-091, 2013 WL 2450037 (Admin. Rev. Bd. May 31, 2013) .....	19

<i>K Mart Corp. v. Cartier, Inc.</i> , 486 U.S. 281 (1988) .....	24
<i>Klopfenstein v. PCC Flow Techs. Holdings, Inc.</i> , ARB No. 04-149, 2006 WL 3246904 (Admin. Rev. Bd. May 31, 2006) .....	17
<i>Kuduk v. BNSF Ry. Co.</i> , 768 F.3d 786 (8th Cir. 2014) .....	22
<i>Lawson v. FMR LLC</i> , 571 U.S. 429 (2014) .....	3-4, 17, 19, 27
<i>Lockheed Martin Corp. v. Dep't of Labor</i> , 717 F.3d 1121 (10th Cir. 2013) .....	16, 29
<i>Loughrin v. United States</i> , 573 U.S. 351 (2014) .....	28
<i>Marano v. Dep't of Justice</i> , 2 F.3d 1137 (Fed. Cir. 1993) .....	15, 16, 17
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792 (1973) .....	15, 30
<i>McEuen v. Riverview Bancorp, Inc.</i> , No. C12-5997, 2013 WL 6729632 (W.D. Wash. Dec. 19, 2013) .....	16
<i>Russello v. United States</i> , 464 U.S. 16 (1983) .....	28
<i>Smith v. City of Jackson</i> , 544 U.S. 228 (2005) .....	22-23
<i>Tamosaitis v. URS Inc.</i> , 781 F.3d 468 (9th Cir. 2015) .....	22
<i>Texas Dep't of Hous. &amp; Cmty. Affs. v. Inclusive Cmtys. Project, Inc.</i> , 576 U.S. 519 (2015) .....	26
<i>Texas Dep't of Cmty. Affs. v. Burdine</i> , 450 U.S. 248 (1981) .....	30

<i>Tompkins v. Metro-N. Commuter R.R. Co.</i> , 983 F.3d 74 (2d Cir. 2020).....	14, 22
<i>United States v. Tinklenberg</i> , 563 U.S. 647 (2011) .....	26
<i>Vega v. Hempstead Union Free Sch. Dist.</i> , 801 F.3d 72 (2d Cir. 2015).....	14

### Statutes

Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 <i>et seq.</i> .....	26
Civil Rights Act of 1964, 42 U.S.C. § 2000e <i>et seq.</i> .....	5, 14-16, 26, 30, 31
Civil Service Reform Act of 1978, 5 U.S.C. § 1101 <i>et seq.</i> .....	5
Consumer Financial Protection Act, 12 U.S.C. § 5567 .....	21
Consumer Product Safety Improvement Act, 15 U.S.C. § 2087 .....	21
Fair Housing Act of 1968, 42 U.S.C. § 3601 <i>et seq.</i> .....	26-27
FDA Food Safety Modernization Act, 21 U.S.C. § 399d.....	21
Federal Railroad Safety Act, 49 U.S.C. § 20109.....	14, 22
Moving Ahead for Progress in the 21st Century Act, 49 U.S.C. § 30171.....	22
National Transit Systems Security Act, 6 U.S.C. § 1142 .....	21
Patient Protection and Affordable Care Act, 29 U.S.C. § 218c.....	21-22

Pipeline Safety Improvement Act, 49 U.S.C. § 60129 .....	22
Sarbanes-Oxley Act of 2002, Pub. L. No. 107- 204, 116 Stat. 745 (July 30, 2002) ....	1-5, 10, 11-31
18 U.S.C. § 1513.....	27
18 U.S.C. § 1513(e) .....	27-28
18 U.S.C. § 1514A.....	i, 1, 2, 4, 14-16, 19, 23-28
18 U.S.C. § 1514A(a).....	4, 13, 24, 25
18 U.S.C. § 1514A(b)(1)(B) .....	10
18 U.S.C. § 1514A(b)(2) .....	4, 13, 24, 25
18 U.S.C. § 1514A(b)(2)(A) .....	20
18 U.S.C. § 1514A(b)(2)(C) .....	i, 2, 20, 24-25
Seaman’s Protection Act, 46 U.S.C. § 2114 .....	22
Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105 .....	22
Wendell H. Ford Aviation Investment and Reform Act, Pub. L. 106-181, 114 Stat 61 (April 5, 2000).....	1, 4
49 U.S.C. § 42121(b) .....	i, 1, 2, 4, 24
49 U.S.C. § 42121(b)(2)(B)(iii) .....	i, 4, 25, 28
49 U.S.C. § 42121(b)(2)(B)(iv) .....	i, 4-5, 28, 31
49 U.S.C. § 42121(b)(4).....	21
Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (April 10, 1989) .....	5, 6, 15, 17, 21, 29-30
5 U.S.C. § 1221(e) .....	5
5 U.S.C. § 1221(e)(1) .....	6
28 U.S.C. § 1254(1) .....	1
38 U.S.C. § 4311(c)(2) .....	25

**Rules and Regulations**

17 C.F.R. § 242.501(a) ..... 7

**Legislative Materials**

Explanatory Statement on S. 20 (“WPA  
Explanatory Statement”), 135 Cong. Rec.  
5033 (1989) ..... 5, 6, 29-30

S. Rep. No. 107-146 (2002) ..... 3, 4, 17, 18, 20

**Other Authorities**

González-Corzo, Mario A. & Vassilios N.  
Gargalas, U.S. Bureau of Labor Statistics,  
*Recent Trends in Employment and Wages  
in New York City’s Finance and Insurance  
Sector* (April 2019) ..... 18, 19

Occupational Safety and Health  
Administration, *Whistleblower  
Investigation Data: Fiscal Years 2016-2021*  
(n.d.), <https://perma.cc/9H3W-8AYL>..... 17-18, 23

Paul Weiss, *Client Memorandum: Second  
Circuit Rules That Retaliatory Intent Is an  
Element of a Sarbanes-Oxley  
Whistleblower Claim* (Aug. 18, 2022)..... 18

Scalia, Antonin & Bryan A. Garner, *Reading  
Law: The Interpretation of Legal Texts*  
(2012) ..... 23

## **PETITION FOR A WRIT OF CERTIORARI**

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

### **OPINIONS BELOW**

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

### **JURISDICTION**

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

### **RELEVANT STATUTORY PROVISIONS**

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

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

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

## INTRODUCTION

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

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

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

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

## STATEMENT OF THE CASE

### A. Statutory background

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

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

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

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

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

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

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

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

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

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

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

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

## **B. Proceedings below**

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

### **REASONS FOR GRANTING THE WRIT**

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

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

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

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

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

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

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

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

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

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

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

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

## **II. The question presented is important.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### **IV. The Second Circuit’s ruling is wrong.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### CONCLUSION

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

Respectfully submitted,

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

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

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

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

January 13, 2023

## **APPENDIX**

## TABLE OF CONTENTS

Appendix A, Opinion of the United States Court of Appeals for the Second Circuit, August 5, 2022 .....	1a
Appendix B, Order of the United States Court of Appeals for the Second Circuit (denying rehearing <i>en banc</i> ), September 15, 2022 .....	18a
Appendix C, Order of the United States District Court for the Southern District of New York, September 25, 2018 .....	19a
Appendix D, 18 U.S.C. § 1514A: Civil action to protect against retaliation in fraud cases.....	21a
Appendix E, 49 U.S.C. § 42121: Protection of employees providing air safety information ....	25a

1a

**APPENDIX A**

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

August Term, 2021

(Argued: April 1, 2022      Decided: August 5, 2022)

Docket Nos. 20-4202 (Lead), 21-56 (Con)

---

TREVOR MURRAY,

*Plaintiff-Appellee-Cross-  
Appellant,*

v.

UBS SECURITIES, LLC, UBS AG,

*Defendants-Appellants-  
Cross-Appellees.*

---

Before:

PARK, MENASHI, and PÉREZ, *Circuit Judges.*

Plaintiff Trevor Murray claims that UBS Securities, LLC and UBS AG (together, “UBS”) fired him in retaliation for reporting alleged fraud on shareholders to his supervisor. Murray sued UBS under the whistleblower protection provision of the Sarbanes-Oxley Act (“SOX”), 18 U.S.C. § 1514A, and he ultimately prevailed at trial. The district court (Failla, *J.*), however, did not instruct the jury that a SOX antiretaliation claim requires a showing of the employer’s retaliatory intent. Section 1514A prohibits publicly traded companies from taking adverse employment actions to “discriminate against an employee ... because of” any lawful whistleblowing

act. 18 U.S.C. § 1514A(a). We hold that this provision requires a whistleblower-employee like Murray to prove by a preponderance of the evidence that the employer took the adverse employment action against the whistleblower-employee with retaliatory intent—i.e., an intent to “discriminate against an employee ... because of” lawful whistleblowing activity. The district court’s legal error was not harmless. We thus vacate the jury’s verdict and remand to the district court for a new trial.

THOMAS G. HUNGAR (Christopher Smith, Anna Casey, Gibson, Dunn & Crutcher LLP, Washington, D.C.; Gabrielle Levin, Gibson, Dunn & Crutcher LLP, New York, NY, *on the brief*), Gibson, Dunn & Crutcher LLP, Washington, D.C., *for Defendants-Appellants-Cross-Appellees*.

ROBERT L. HERBST (Robert B. Stulberg, Patrick J. Walsh, Stulberg & Walsh, LLP, New York, NY; Scott A. Korenbaum, New York, NY; Benjamin J. Ashmore, Sr., Herbst Law PLLC, New York, NY, *on the brief*), Herbst Law PLLC, New York, NY, *for Plaintiff-Appellee-Cross-Appellant*.

PARK, *Circuit Judge*:

## I. BACKGROUND

### A. Factual Background

In 2011, UBS hired Murray as a strategist in its commercial mortgage-backed securities (“CMBS”)

business. Murray was “responsible for performing research and creating reports that were distributed to [UBS’s] current and potential clients about CMBS products, services and transactions.” Am. Compl. ¶ 2. As a CMBS strategist, Murray was required by Securities and Exchange Commission (“SEC”) regulations to certify that his reports were produced independently and that they accurately reflected his own views.<sup>1</sup>

According to Murray, two leaders of UBS’s trading desk—Ken Cohen, the head of the CMBS trading desk, and Dave McNamara, the head CMBS trader—improperly pressured him to skew his research and to publish reports to support their business strategies. For example, Murray testified that in September 2011, Cohen told him “if we’re going to accomplish what we want to accomplish as a business, it’s important that we maintain consistency of message between originations, trading desk, and research,” and that “it would be best if you clear your research articles with the [trading] desk going forward,” and McNamara agreed. App’x at 254. This made Murray “very concerned” because he “was faced with the dilemma of how to maintain a relationship

---

<sup>1</sup> Specifically, Murray was required to “include in [his] research report[s] a clear and prominent certification . . . containing . . . [a] statement attesting that all of the views expressed in the research report accurately reflect the research analyst’s personal views about any and all of the subject securities or issuers; and . . . [a] statement attesting that no part of the research analyst’s compensation was, is, or will be, directly or indirectly, related to the specific recommendations or views expressed by the research analyst in the research report.” 17 C.F.R. § 242.501(a).

with [his] client while maintaining integrity as a researcher.” *Id.* at 255.

Murray reported this conduct to his direct supervisor, Michael Schumacher, in December 2011 and again in January 2012. In December, Murray met privately with Schumacher and told him:

[M]y relationship with my client had become untenable, that [Cohen and McNamara] had told me to preclear my articles, which I had been doing; that they wanted me ... to be nothing more than a shill for the market. The only feedback I had gotten [about the articles] for the most part was just negative. ... [I] [t]old [Schumacher] about the reaction I got from both [Cohen] and [McNamara] about [one of my research] article[s] and that I was like I don’t know how [Cohen] got away with this.... But this type of relationship was completely foreign to me; and that it wasn’t just unethical, it was illegal, and I wanted it to stop.

*Id.* at 283. According to Murray, Schumacher responded: “I sympathize with your situation. It is a tough position to be in when you have a dour view of the market that is in conflict [with] ... your internal client but it is very important that you do not alienate your internal client.” *Id.*

The following month, Murray met with Schumacher to go over his performance review. Afterwards, Murray “told [Schumacher] once again that the situation with [his] client,” referring to the UBS trading desk, “was bad and getting worse.” *Id.* at 294. Murray explained that he had been left out of

meetings that “would normally be a normal part of [his] job function” and outlined Cohen and McNamara’s “constant efforts to skew [his] research dating back to the beginning.” *Id.* at 294–95. Schumacher responded that “these were the confines under which [you] should expect [your] job to be, ... [you’re] going to have to operate, and ... just ... write what the business line wanted.” *Id.* at 295.

Shortly after this, Schumacher emailed his supervisor, Larry Hatheway, recommending that UBS “remove [Murray] from our head count.” *Id.* at 539, 1,544. Alternatively, he suggested that “[i]f Ken Cohen and the CMBS team want to keep a presence in analysis, they can move [Murray] onto the desk” as a desk analyst, unregulated by the SEC. *Id.* at 539–40, 1,544. Schumacher continued that “[o]therwise, we will make the tough call,” which Schumacher later explained meant that “[Murray] would be a candidate for termination.” *Id.* at 540, 1,544. The CMBS trading desk declined to take Murray on as a desk analyst, and UBS terminated him in February 2012.

Murray contends that his termination was retaliation for whistleblowing. UBS asserts that it terminated Murray due to a shift in strategy prompted by financial difficulties. Indeed, UBS had implemented a series of reductions in force, including one in February 2012 which resulted in the elimination of Murray’s position.

B. Procedural History

Murray sued UBS in 2014.<sup>2</sup> He alleged that he was terminated by UBS in response to his complaints about fraud on shareholders in violation of the Sarbanes-Oxley Act's antiretaliation provision, 18 U.S.C. § 1514A.<sup>3</sup> The case went to trial before a jury. UBS moved for judgment as a matter of law, which the district court denied. The district court then instructed the jury on the elements of a section 1514A claim:

First, that plaintiff engaged in activity protected by Sarbanes-Oxley;

Second, that UBS knew that plaintiff engaged in the protected activity;

Third, that plaintiff suffered an adverse employment action – here, the termination of his employment at UBS; and

Fourth, that plaintiff's protected activity was a contributing factor in the termination of his employment.

\* \* \*

For a protected activity to be a contributing factor, it must have either alone or in combination with other factors tended to affect in any way UBS's decision to terminate plaintiff's employment. Plaintiff is not

---

<sup>2</sup> Murray first sued UBS in 2012 for violating the Dodd-Frank Act's antiretaliation provision, 15 U.S.C. § 78u-6(h), but the district court granted UBS's motion to compel arbitration.

<sup>3</sup> Murray also sued for violation of 12 U.S.C. § 5567(b), but that cause of action is not at issue in this appeal.

required to prove that his protected activity was the primary motivating factor in his termination, or that UBS's articulated reasons for his termination ... was a pretext, in order to satisfy this element.

App'x at 1,389–90, 1,393. UBS objected to these jury instructions, arguing that they lacked a key element of a section 1514A claim: proof of UBS's retaliatory intent in taking the adverse employment action. The district court overruled UBS's objection and the case went to the jury, which found UBS liable. The jury also returned an advisory damages verdict, determining that Murray should be awarded \$653,300 in back pay, no front pay, and \$250,000 in non-economic damages.

In post-trial briefing, UBS renewed its motion for judgment as a matter of law or, in the alternative, for a new trial, and moved to limit Murray's back-pay award. The district court denied UBS's motions. The district court reasoned that "there is evidence to support the jury's finding as to each of the elements of the Section 1514A offense, principally derived from Mr. Murray's testimony." Sp. App'x at 10. In reaching this conclusion, the district court again did not view retaliatory intent as an element of a section 1514A claim. The district court also adopted the jury's advisory verdict on damages.

Murray then moved for statutory attorney's fees and costs. The district court entered judgment, awarding Murray \$1,769,387.52 in attorney's fees and costs, as well as \$653,300 in back pay, no front pay, and \$250,000 in non-economic damages—identical to the jury's advisory verdict on damages.

UBS appealed the district court's denial of its motion for judgment as a matter of law or, in the alternative, a new trial, while Murray cross-appealed the damages and attorney's fees awards.

## II. DISCUSSION

This appeal presents the question whether the Sarbanes-Oxley Act's antiretaliation provision requires a whistleblower-employee to prove retaliatory intent. We review this legal question *de novo*. See *United States v. Williams*, 733 F.3d 448, 452 (2d Cir. 2013).

UBS argues that the district court erred by failing to instruct the jury that Murray had to prove UBS's retaliatory intent to prevail on his section 1514A claim. Murray responds that there was no such error because retaliatory intent is not an element of a section 1514A claim. We conclude based on the plain meaning of the statutory language and our interpretation of a nearly identical statute that retaliatory intent is an element of a section 1514A claim. The district court committed a non-harmless error by failing to instruct the jury accordingly. We thus vacate the judgment and remand for a new trial on liability and do not reach the cross-appeal.

### A. The Plain Meaning of the Sarbanes-Oxley Act's Antiretaliation Provision

First, the plain meaning of the statutory language makes clear that retaliatory intent is an element of a section 1514A claim. To interpret statutory language, "we begin with the statute's text because 'we assume that the ordinary meaning of the statutory language accurately expresses the

legislative purpose.” *Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 147 (2d Cir. 2016) (quoting *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 376 (2013)). “[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.” *Harris v. Sullivan*, 968 F.2d 263, 265 (2d Cir. 1992) (citation omitted). “If the statutory language is unambiguous and the statutory scheme is coherent and consistent ... the inquiry ceases.” *Friends of the E. Hampton Airport*, 841 F.3d at 147–48 (citation omitted).

The unambiguous, ordinary meaning of section 1514A’s statutory language requires retaliatory intent. Section 1514A directs that no covered employer “may discharge, demote, suspend, threaten, harass, or in any other manner *discriminate* against an employee ... *because of* whistleblowing. 18 U.S.C. § 1514A(a) (emphasis added). To “discriminate” means “[t]o act on the basis of prejudice,” which requires a conscious decision to act based on a protected characteristic or action. *Discriminate*, WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY (1994); *see Discriminate*, THE NEW OXFORD AMERICAN DICTIONARY (2001) (to “make an unjust or prejudicial distinction in the treatment of different categories of people”). And “because of” means “by reason of” or “on account of,” connoting a causal relationship between the parts of the sentence the phrase connects. *See Because of*, THE AMERICAN HERITAGE DICTIONARY (4th ed. 2000); *Because of*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1993).

The statute thus prohibits discriminatory actions caused by—or “because of”—whistleblowing, and actions are “discriminat[ory]” when they are based on the employer’s conscious disfavor of an employee for whistleblowing. *Cf. Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 85 (2d Cir. 2015) (explaining that, in the Title VII context, “an action is ‘because of’ a plaintiff’s [protected characteristic] where it was a ‘substantial’ or ‘motivating’ factor contributing to the employer’s decision to take the action”). A discriminatory action “because of” whistleblowing therefore necessarily requires retaliatory intent—*i.e.*, that the employer’s adverse action was motivated by the employee’s whistleblowing. The plain meaning of section 1514A’s statutory language thus compels our conclusion that retaliatory intent is required to sustain a SOX antiretaliation claim.

We have previously articulated the elements of a SOX antiretaliation claim in *Bechtel v. Admin. Rev. Bd.*, 710 F.3d 443 (2d Cir. 2013). There, we explained that “an employee must prove by a preponderance of the evidence that (1) [he] engaged in protected activity; (2) the employer knew that [he] engaged in the protected activity; (3) [he] suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.” *Id.* at 447 (citation omitted). The district court instructed the jury that “[f]or a protected activity to be a contributing factor, it must have either alone or in combination with other factors tended to affect in any way UBS’s decision to terminate plaintiff’s employment.” App’x at 1,393. But this explanation of the contributing factor element fails to account for the statute’s explicit

requirement that the employer’s conduct be “discriminat[ory].”<sup>4</sup> We therefore hold that to prevail on the “contributing factor” element of a SOX antiretaliation claim, a whistleblower-employee must prove that the employer took the adverse employment action against the whistleblower-employee with retaliatory intent—*i.e.*, an intent to “discriminate against an employee ... because of” lawful whistleblowing activity.

**B. Consistency with Our Interpretation of a Nearly Identical Provision in the Federal Railroad Safety Act**

This reading of the SOX antiretaliation provision is consistent with our interpretation of nearly identical language in the Federal Railroad Safety Act, 49 U.S.C. § 20109(a) (“FRSA”). *See Tompkins v. Metro-N. Commuter R.R. Co.*, 983 F.3d 74 (2d Cir. 2020).<sup>5</sup> We generally interpret identical language in different statutes to have the same meaning. *See,*

---

<sup>4</sup> The inadequacy of the “contributing factor” standard utilized by the district court is illuminated by the fact that “tended to affect in any way UBS’s decision to terminate plaintiff’s employment” could include a scenario in which Murray’s whistleblowing resulted in termination, but also a scenario in which, by virtue of his whistleblowing activity, Murray was *insulated* from a termination to which he would otherwise have been subjected sooner. In addition, “tended to affect” increases the level of abstraction such that a jury might look beyond whether the whistleblowing activity *actually* caused the termination to whether it was *the sort of behavior* that would *tend to affect* a termination decision.

<sup>5</sup> We note that the district court did not have the benefit of our decision in *Tompkins* during the pendency of Murray’s trial; *Tompkins* was decided one day after the district court entered final judgment in this case.

*e.g.*, *Northcross v. Bd. of Educ.*, 412 U.S. 427, 428 (1973) (“The similarity of language in § 718 and § 204(b) is, of course, a strong indication that the two statutes should be interpreted *pari passu*.”); *Wasser v. N.Y. State Off. of Vocational & Educ. Servs. for Individuals with Disabilities*, 602 F.3d 476, 479 (2d Cir. 2010) (“Given the similarity between, and in fact the nearly identical wording of, 29 U.S.C. § 722(c)(5)(J)(ii) and 20 U.S.C. § 1415(i)(2)(C), we see no basis for interpreting the standard of review required by these provisions differently.”).

The relevant statutory language of the SOX and the FRSA is nearly identical. *Compare* 18 U.S.C. § 1514A(a) (No covered employer “may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee ... to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of [federal law].”), *with* 49 U.S.C. § 20109(a) (A covered railroad carrier “may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee’s lawful, good faith act done, or perceived by the employer to have been done or about to be done ... to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any [federal law].”). Accordingly, our

articulations of the elements of these claims must likewise be consistent.<sup>6</sup>

In *Tompkins*, we interpreted the whistleblower antiretaliation provision of the FRSA and held that “some evidence of retaliatory intent is a necessary component of an FRSA claim.” 983 F.3d at 82; *see also Armstrong v. BNSF Ry. Co.*, 880 F.3d 377, 382 (7th Cir. 2018) (“The [FRSA] prohibits intentional discrimination in response to an employee’s performance of a protected activity. That is to say, an employer violates the statute only if the adverse employment action is, at some level, *motivated* by discriminatory animus.” (citation omitted) (emphasis in original)). We pointed to the language specifically referencing discrimination— *i.e.*, “that a rail carrier may not discharge ‘or in any other way *discriminate* against’ an employee for engaging in protected activity”—as requiring evidence of retaliatory intent for an FRSA claim. *Tompkins*, 983 F.3d at 82 (citations omitted) (emphasis in original). We also explained that “the essence of such a tort is

---

<sup>6</sup> Compare *Bechtel*, 710 F.3d at 447 (To prevail on a SOX antiretaliation claim, “an employee must prove by a preponderance of the evidence that (1) [he] engaged in protected activity; (2) the employer knew that [he] engaged in the protected activity; (3) [he] suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.” (citation omitted)), with *Tompkins*, 983 F.3d at 80 (To prevail on an FRSA antiretaliation claim, “a plaintiff must show by a preponderance of the evidence that (1) the plaintiff engaged in protected activity; (2) the employer knew that the plaintiff engaged in the protected activity; (3) the plaintiff suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.” (cleaned up)).

discriminatory animus, which in turn requires the employee to prove that she was the victim of intentional retaliation prompted by her protected activity.” *Id.* (cleaned up).

The unambiguous, ordinary meaning of section 1514A’s statutory language, along with our identical interpretation of the FRSA antiretaliation provision, thus compel the conclusion that a SOX antiretaliation claim requires a showing that the employer took the adverse employment action against the whistleblower-employee with retaliatory intent.<sup>7</sup> As in *Tompkins*, the whistleblower-employee need not show that retaliatory intent “was the sole factor affecting the discipline or that the employer

---

<sup>7</sup> We recognize that our conclusion departs from the approach of the Fifth and Ninth Circuits as to the elements of a section 1514A claim. *See Haliburton, Inc. v. Admin. Rev. Bd.*, 771 F.3d 254, 263 (5th Cir. 2014) (holding that retaliatory intent is not an element of a section 1514A claim); *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010) (same). In our view, those courts overlooked the plain meaning of the text. Moreover, we note that the Second, Seventh, and Eighth Circuits have interpreted the same language in the FRSA to require a showing of retaliatory intent. *See Tompkins*, 983 F.3d at 82; *Armstrong*, 880 F.3d at 382; *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014). *But see Frost v. BNSF Ry. Co.*, 914 F.3d 1189, 1196 (9th Cir. 2019) (holding that an FRSA antiretaliation claim does not require proof of retaliatory intent); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013) (same). We also note that three circuits have declined to decide the issue of whether retaliatory intent is an element of a section 1514A claim. *See Wiest v. Tyco Electronics Corp.*, 812 F.3d 319, 330 (3d Cir. 2016); *Feldman v. Law Enforcement Assoc’s Corp.*, 752 F.3d 339, 348 (4th Cir. 2014); *Lockheed Martin Corp. v. Admin. Rev. Bd.*, 717 F.3d 1121, 1136 (10th Cir. 2013).

acted only with retaliatory motive.” 983 F.3d at 82. There must, however, be “more than a temporal connection between the protected conduct and the adverse employment action.” *Id.* (internal quotation marks omitted); *see also Armstrong*, 880 F.3d at 382 (“[W]hile a FRSA plaintiff need not show that retaliation was the *sole* motivating factor in the adverse decision, the statutory text requires a showing that retaliation was *a* motivating factor.”) (emphasis in original)).<sup>8</sup>

### C. The Jury Instruction Error Was Not Harmless

We must next determine the appropriate remedy for the district court’s jury-instruction error. “We review a claim of error in jury instructions *de novo*, reversing only where appellant can show that, viewing the charge as a whole, there was a prejudicial error.” *Warren v. Pataki*, 823 F.3d 125, 137 (2d Cir. 2016) (cleaned up). “An erroneous instruction requires a new trial unless the error is harmless and an error is harmless only if the court is convinced that the error did not influence the jury’s verdict.” *Id.* (cleaned up).

---

<sup>8</sup> This framework is consistent with the goal of section 1514A to “combat what Congress identified as a corporate culture, supported by law, that discourages employees from reporting fraudulent behavior . . . [by] protect[ing] employees when they take lawful acts to disclose information or otherwise assist . . . in detecting and stopping actions which they reasonably believe to be fraudulent.” *Bechtel*, 710 F.3d at 446 (cleaned up); *see also Guyden v. Aetna, Inc.*, 544 F.3d 376, 383 (2d Cir. 2008) (Section 1514A “protects ‘employees when they take lawful acts to disclose information or otherwise assist . . . in detecting and stopping actions which they reasonably believe to be fraudulent.’”) (quoting S. Rep. No. 107–146, at 19)).

Because we need to be convinced that the error did not influence the jury's verdict, the district court's failure to instruct the jury on Murray's burden to prove UBS's retaliatory intent in terminating him was not harmless. Indeed, the district court itself remarked that this was "one of the closest [cases] [it] has ever observed." Sp. App'x at 55. UBS offered evidence at trial of non-retaliatory reasons for its decision to terminate Murray. For example, UBS witnesses testified that the company was experiencing significant financial difficulties, resulting in company-wide layoffs when Murray reported the alleged misconduct and was ultimately terminated. In response to a question about why UBS imposed layoffs, a UBS witness testified: "[In] 2011 our financial performance or the performance of the firm was not good. We lost billions of dollars that year and, therefore, we had to layoff people." App'x at 573; *see id.* at 575 (citing "a two billion dollar trading loss" as a cause of "more financial hardship to [UBS]"). Cohen, the head of the CMBS trading desk, also testified that Murray's position as a CMBS strategist was "not necessary" to generate revenue, but instead was "nice to have." *Id.* at 867. This evidence supports UBS's position that it terminated Murray without retaliatory intent—specifically, that it did so for the non-retaliatory reason of saving money during a time of financial difficulty. To be sure, there was circumstantial evidence at trial that UBS terminated Murray in retaliation for whistleblowing. *See, e.g.*, App'x at 649 (testimony explaining close temporal proximity between Murray's whistleblowing and termination); *id.* at 447

(testimony of Schumacher stating that he gave Murray a “good” performance evaluation in December 2011, prior to Murray’s purported whistleblowing). But we do not know whose reasons—UBS’s or Murray’s—the jury credited, as the jury instructions did not require the jury to find retaliatory intent. And although the jury did not find that UBS “prove[d] by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of [Murray’s] protected behavior,” *Bechtel*, 710 F.3d at 447 (citation omitted), this does not mean that Murray proved by a preponderance of the evidence that UBS acted with retaliatory intent in terminating Murray. In other words, even though the jury found that Murray’s whistleblowing was a contributing factor to his termination, we cannot know whether it would have found that UBS acted with retaliatory intent. We are thus unconvinced that the erroneous jury instruction did not influence the verdict, and we accordingly remand to the district court for a new trial.

### III. CONCLUSION

Retaliatory intent is an element of a section 1514A claim. This conclusion flows from the plain meaning of the statutory language and is supported by our interpretation of nearly identical language in the FRSA. The district court erred by failing to instruct the jury on Murray’s burden to prove UBS’s retaliatory intent in terminating him. The jury instructions were incorrect as a matter of law, and the error was not harmless. We thus vacate the jury’s verdict and remand to the district court for a new trial.

**APPENDIX B**

UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT

---

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of September, two thousand twenty-two.

---

Trevor Murray,

Plaintiff-Appellee-Cross-  
Appellant,

v.

UBS Securities, LLC, UBS AG,

Defendants-Appellants-  
Cross-Appellees.

---

**ORDER**

Docket Nos:

20-4202 (L)

21-56 (XAP)

Appellee-Cross-Appellant, Trevor Murray, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

[SEAL] /s/ *Catherine O'Hagan Wolf*



20a

The Clerk of Court is directed to terminate the motions at docket entries 243, 280, 282, and 285. In addition, the Clerk of Court is directed to terminate entries for certain previously decided motions, including the motions at docket entries 184, 185, 329, 331, and 334.

Finally, the parties are directed to file a joint letter, on or before October 2, 2018, proposing a schedule for a motion for attorney's fees.

SO ORDERED.

Dated: September 25, 2018  
New York, New York

*Katherine Polk Failla*  
KATHERINE POLK FAILLA  
United States District Judge

**APPENDIX D**

**18 U.S.C. § 1514A**

**§ 1514A. Civil action to protect against retaliation  
in fraud cases**

Effective: July 22, 2010

**(a) Whistleblower Protection for Employees of Publicly Traded Companies.**--No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c), 1 or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee--

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the

information or assistance is provided to or the investigation is conducted by--

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

**(b) Enforcement Action.--**

(1) **In general.**--A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by--

(A) filing a complaint with the Secretary of Labor; or

(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo

review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

**(2) Procedure.--**

**(A) In general.--**An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.

**(B) Exception.--**Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

**(C) Burdens of proof.--**An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.

**(D) Statute of limitations.--**An action under paragraph (1) shall be commenced not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation.

**(E) Jury trial.--**A party to an action brought under paragraph (1)(B) shall be entitled to trial by jury.

**(c) Remedies.--**

**(1) In general.--**An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

**(2) Compensatory damages.--**Relief for any action under paragraph (1) shall include--

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) the amount of back pay, with interest; and

(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

**(d) Rights Retained by Employee.**--Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.

**(e) Nonenforceability of Certain Provisions Waiving Rights and Remedies or Requiring Arbitration of Disputes.**--

**(1) Waiver of rights and remedies.**--The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement.

**(2) Predispute arbitration agreements.**--No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.

**APPENDIX E**

**49 U.S.C. § 42121**

**§ 42121. Protection of employees providing air  
safety information**

Effective: December 27, 2020

**(a) Prohibited discrimination.**--A holder of a certificate under section 44704 or 44705 of this title, or a contractor, subcontractor, or supplier of such holder, may not discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--

(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to aviation safety under this subtitle or any other law of the United States;

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to aviation safety under this subtitle or any other law of the United States;

(3) testified or is about to testify in such a proceeding; or

(4) assisted or participated or is about to assist or participate in such a proceeding.

**(b) Department of Labor complaint procedure.--**

**(1) Filing and notification.--**A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 90 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary of Labor shall notify, in writing, the person named in the complaint and the Administrator of the Federal Aviation Administration of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person under paragraph (2).

**(2) Investigation; preliminary order.--**

**(A) In general.--**Not later than 60 days after the date of receipt of a complaint filed under paragraph (1) and after affording the person named in the complaint an opportunity to submit to the Secretary of Labor a written response to the complaint and an opportunity to meet with a representative of the Secretary to present statements from witnesses, the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the

complainant and the person alleged to have committed a violation of subsection (a) of the Secretary's findings. If the Secretary of Labor concludes that there is a reasonable cause to believe that a violation of subsection (a) has occurred, the Secretary shall accompany the Secretary's findings with a preliminary order providing the relief prescribed by paragraph (3)(B). Not later than 30 days after the date of notification of findings under this paragraph, either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Such hearings shall be conducted expeditiously. If a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review.

**(B) Requirements.--**

**(i) Required showing by complainant.--**The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

**(ii) Showing by employer.--** Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

**(iii) Criteria for determination by Secretary.--** The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

**(iv) Prohibition.--** Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

**(3) Final order.—**

**(A) Deadline for issuance; settlement agreements.--** Not later than 120 days after the date of conclusion of a hearing under paragraph (2), the Secretary of Labor shall issue a final order providing the relief prescribed by this paragraph or denying the complaint. At any time before issuance of a final order, a proceeding under this subsection

may be terminated on the basis of a settlement agreement entered into by the Secretary of Labor, the complainant, and the person alleged to have committed the violation.

**(B) Remedy.**--If, in response to a complaint filed under paragraph (1), the Secretary of Labor determines that a violation of subsection (a) has occurred, the Secretary of Labor shall order the person who committed such violation to--

(i) take affirmative action to abate the violation;

(ii) reinstate the complainant to his or her former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and

(iii) provide compensatory damages to the complainant.

If such an order is issued under this paragraph, the Secretary of Labor, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary of Labor, by the complainant for, or in connection with, the bringing the complaint upon which the order was issued.

**(C) Frivolous complaints.**--If the Secretary of Labor finds that a complaint under paragraph

(1) is frivolous or has been brought in bad faith, the Secretary of Labor may award to the prevailing employer a reasonable attorney's fee not exceeding \$1,000.

**(4) Review.--**

**(A) Appeal to Court of Appeals.--**Any person adversely affected or aggrieved by an order issued under paragraph (3) may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation. The petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary of Labor. Review shall conform to chapter 7 of title 5, United States Code. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the order.

**(B) Limitation on collateral attack.--**An order of the Secretary of Labor with respect to which review could have been obtained under subparagraph (A) shall not be subject to judicial review in any criminal or other civil proceeding.

**(5) Enforcement of order by Secretary of Labor.--**Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to occur to enforce

such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief and compensatory damages.

**(6) Enforcement of order by parties.--**

**(A) Commencement of action.--**A person on whose behalf an order was issued under paragraph (3) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

**(B) Attorney fees.--**The court, in issuing any final order under this paragraph, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

**(c) Mandamus.--**Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of title 28, United States Code.

**(d) Nonapplicability to deliberate violations.--**Subsection (a) shall not apply with respect to an employee of a holder of a certificate issued under section 44704 or 44705, or a contractor or subcontractor thereof, who, acting without direction from such certificate-holder, contractor, or subcontractor (or such person's agent), deliberately

32a

causes a violation of any requirement relating to aviation safety under this subtitle or any other law of the United States.

**(e) Contractor defined.**--In this section, the term “contractor” means--

(1) a person that performs safety-sensitive functions by contract for an air carrier or commercial operator; or

(2) a person that performs safety-sensitive functions related to the design or production of an aircraft, aircraft engine, propeller, appliance, or component thereof by contract for a holder of a certificate issued under section 44704.