No. 22-660

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Sarbanes-Oxley Act "protect[s] against retaliation in fraud cases" by prohibiting employers from "discharg[ing] . . . or in any other manner discriminat[ing] against an employee" "because of" protected activity. 18 U.S.C. § 1514A(a). To establish a prima facie SOX whistleblower claim, a plaintiff must show that his protected activity was a "contributing factor" to the adverse employment action he suffered. *Id.* § 1514A(b)(2)(C) (incorporating 49 U.S.C. § 42121(b)). The district court in this case refused to instruct the jury that retaliatory intent was an element of plaintiff's prima facie case, and instead instructed the jury that a plaintiff need show only that his protected activity "tended to affect in any way" the employer's decision. The court of appeals held that the absence of a retaliatory intent instruction and the inclusion of the "tended to affect in any way" language constituted legal error.

The only question presented in the petition, however, is whether the court of appeals correctly held that liability for retaliation under SOX requires proof of retaliatory intent.

RULE 29.6 STATEMENT

UBS AG is wholly owned by UBS Group AG, a publicly traded corporation, and no publicly held corporation holds 10% or more of UBS Group AG stock. UBS Group AG is a publicly owned corporation and does not have a parent company.

No publicly held corporation other than UBS AG owns 10 percent or more of the stock of Defendant UBS Securities LLC.

STATEMENT OF RELATED PROCEEDINGS

Trevor Murray v. UBS Securities, LLC, UBS AG, Docket No. 12-cv-5914 (S.D.N.Y.) (case dismissed Dec. 30, 2020).

Trevor Murray v. UBS Securities, LLC, UBS AG, Docket No. 1:14-cv-00927 (S.D.N.Y.) (judgment entered Dec. 16, 2020).

Trevor Murray v. UBS Securities, LLC, UBS AG, Docket Nos. 20-4202 and 21-56 (2d Cir.) (judgment entered Aug. 5, 2022).

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BRIEF IN OPPOSITION

Respondents UBS Securities, LLC and UBS AG respectfully submit that the petition for a writ of certiorari should be denied.

INTRODUCTION

Further review is not warranted in this case. Petitioner has failed to challenge the judgment below, because his question presented addresses only one of the two bases for the Second Circuit's decision. Even if this Court were to rule that retaliatory intent is not required for a Sarbanes-Oxley Act ("SOX") retaliation claim, the judgment below would not be disturbed, and the case would still proceed to a new trial on liability. In any event, Petitioner substantially overstates the alleged circuit conflict. The Fifth Circuit decision cited by Petitioner did not address (much less reject) the textual analysis adopted by the Second Circuit here. Instead, it mistakenly relied on an earlier decision interpreting a different statute containing meaningfully different statutory language. The other cases identified by Petitioner do not conflict at all with the decision below; they either recognize that intent is a critical element of a SOX retaliation claim or do not resolve the question. Regardless, the decision below was correct: the unambiguous, ordinary meaning of section 1514A's statutory text requires proof of retaliatory intent, in keeping with this Court's interpretation of the Dodd-Frank Act's similar anti-retaliation provision. Finally, there are no other reasons to grant review. Certiorari should be denied.

STATEMENT

A. STATUTORY BACKGROUND

SOX prohibits publicly traded companies from retaliating against employees who have reported what they reasonably believe to be instances of criminal fraud or securities law violations. It directs that no 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" that qualifies as protected activity under the statute. 18 U.S.C. § 1514A(a) (emphasis added).

The Dodd-Frank Act similarly provides that "[n]o employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any" act that qualifies as protected activity under the statute. 15 U.S.C. § 78u-6(h)(1)(A). This Court has recognized that a Dodd-Frank retaliation claim requires the plaintiff to demonstrate intent to retaliate. *Digit. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 779 (2018).

The "legal burdens of proof" for a SOX whistleblower claim are borrowed from the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR-21"), 49 U.S.C. § 42121(b). *See* 18 U.S.C. § 1514A(b)(2)(C). Under this standard, an employee has the initial burden of showing, among other things, that his protected activity was a "contributing factor" in the adverse employment action. *See* 49 U.S.C. § 42121(b)(2)(B). If an employee carries that burden, the employer may still prevail if it can demonstrate by clear and convincing evidence that it "would have

taken the same unfavorable personnel action in the absence of that behavior." *Id.*

B. Factual Background

In early 2011, UBS hired Petitioner as a strategist supporting its commercial mortgaged-backed securities business ("CMBS"). Pet. App. 2a. As a strategist, Petitioner did not trade or sell securities; instead, he primarily published research *about* the CMBS market. Pet. App. 3a. Because a CMBS strategist does not directly generate revenue, the position is "by no means necessary" to running a successful CMBS business. C.A. JA-867:5-7. In fact, as a witness at trial explained, "many, many businesses and many, many players in the CMBS space are very successful and they do not have the benefit of research" published by a CMBS strategist. C.A. JA-867:12-14. If a bank chooses to run a modest CMBS business, then having a CMBS strategist becomes merely "nice to have." C.A. JA-867:6-7.

After hiring Petitioner, UBS experienced significant financial difficulties. As UBS's CEO explained to his staff, the financial industry was "in the midst of a massive transformation" caused by "a fundamentally changed market environment," "more cautious clients," "debt reduction by governments and private individuals alike," and "more stringent regulatory rules and extremely high capital requirements." C.A. JA-2048. These market-wide difficulties were compounded by a $2 billion loss on a UBS trading desk in London in 2011. Pet. App. 16a.

Such extraordinary challenges led to significant changes in UBS's CMBS business. UBS decided to invest only a relatively small amount of capital in the business and not to grow it going forward. *See* C.A.

JA-1317:1-7. By the end of 2011, the CMBS strategist position had become "not necessary," but merely "nice to have." Pet. App. 16a.

Because of its financial challenges, UBS could no longer afford "nice to haves." UBS senior management was forced to reduce costs through a series of reductions in force. Pet. App. 16a. One of the reductions occurred around February 2012. Pet. App. 5a. At that time, UBS's senior management determined that 129 positions would be eliminated from UBS's Fixed Income, Currencies, and Commodities division, seven of which would be eliminated from Petitioner's research unit. *Id*.

Lawrence Hatheway, the Global Head of Macro Strategy and Chief Economist for UBS's Investment Bank, was required to select the seven positions to eliminate from Petitioner's group. C.A. JA-1091:12-1092:6. He selected the CMBS strategist position as one of the seven based on his belief that the CMBS business would not be "a focal point for the firm in terms of its strategy as it was then unfolding." *Id.* So Hatheway made the business judgment to reduce the resources allocated to supporting CMBS by eliminating the research group's sole CMBS position. C.A. JA-1092:5-6.

This decision met opposition. Hatheway spoke about his decision with the head of the CMBS business, who was "not happy" about the idea of "eliminating [Petitioner's] position." C.A. JA-1104:6-12.

Similarly, Petitioner's direct supervisor, Michael Schumacher, "opposed" the elimination of Petitioner's position. C.A. JA-1105:8-25. Schumacher actually tried to *keep* Petitioner at UBS by proposing to transfer him from the CMBS research position to a desk

analyst position in the CMBS trading unit. Pet. App. 5a. But Schumacher agreed that if this plan to preserve Petitioner's employment was unsuccessful, Hatheway would need to make the "tough call" to eliminate the CMBS strategist position. *Id.* The CMBS business was unable to take on Petitioner as a desk analyst, so UBS terminated Petitioner's employment in February 2012. *Id.*

C. PROCEEDINGS BELOW

In 2014 Petitioner sued UBS, claiming that his termination violated SOX. Pet. App. 6a. He alleged that he had complained about purported shareholder fraud in December 2011 and January 2012, and that these complaints caused UBS to eliminate the CMBS research position. *Id.* The case eventually went to a trial before a jury. *Id.*

As relevant here, the district court, over UBS's objections, refused to instruct the jury that Petitioner must prove that UBS intentionally retaliated against him. Pet. App. 6a. The jury instructions never mentioned intent at all. *Id.* Moreover, again over UBS's objections, the district court articulated Petitioner's burden to the jury by directing 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." *Id.* (emphasis added).

The jury returned a verdict in Petitioner's favor and rendered an advisory verdict on damages. Pet. App. 7a. After post-trial briefing in which UBS renewed its motion for judgment as a matter of law and

Petitioner sought attorneys' fees, the district court entered final judgment in Petitioner's favor, awarding him damages, fees, and costs. *Id.*

Both sides appealed. UBS argued that the district court erred by not instructing on retaliatory intent and also by instructing the jury that Petitioner needed to prove only that his protected activity "tended to affect in any way UBS's decision to terminate" him. *See, e.g.*, Resp. C.A. Opening Br. 31. Petitioner cross-appealed from the award of damages and attorneys' fees. Pet. App. 8a.

The Second Circuit "vacate[d] the judgment [below] and remand[ed] for a new trial on liability and d[id] not reach [Petitioner's] cross-appeal." Pet. App. 8a. In a unanimous opinion written by Judge Park, the Second Circuit held that "retaliatory intent is an element of a section 1514A claim." *Id.* As the court explained, "[t]he unambiguous, ordinary meaning of section 1514A's statutory language requires retaliatory intent." Pet. App. 9a. Because the statute's text explicitly "prohibits *discriminatory* actions caused by . . . whistleblowing," and because "actions are *discriminatory* when they are based on the employer's conscious disfavor of an employee for whistleblowing," there must be a showing of "retaliatory intent." Pet. App. 10a (emphases added; brackets and quotation marks omitted). The district court's jury instructions were thus legally erroneous because the "explanation of the contributing factor element fail[ed] to account for the statute's explicit requirement that the employer's conduct be 'discriminat[ory].'" Pet. App. 10a–11a.

The Second Circuit further identified two other ways in which the "contributing factor" instruction given to the jury was "inadequa[te]." Pet. App. 11a n.4. First, by defining "contributing factor" as something that tended to affect "in any way" UBS's decision to terminate Petitioner's employment, the instruction improperly permitted the jury to impose liability on UBS even if Petitioner's "whistleblowing activity" caused him to be "*insulated* from a termination to which he would otherwise have been subjected sooner." *Id.* (emphasis in original). Second, by asking whether his alleged whistleblowing "tended to affect" UBS's decision in any way, the instruction erroneously allowed the jury to "look beyond whether the whistleblowing activity *actually* caused the termination" and instead consider "whether it was *the sort of behavior* that would *tend to affect* a termination decision." *Id.* (emphases in original).

The court concluded that the district court's failure to instruct the jury properly was not harmless. The court noted the district court's own comment that this was "one of the closest cases it ha[d] ever observed," and pointed to trial evidence suggesting that UBS had terminated Petitioner's employment "for the non-retaliatory reason of saving money during a time of financial difficulty," including testimony about "company-wide layoffs," the "two billion dollar trading loss," and the perception that Petitioner's position was "not necessary" but merely "nice to have." Pet. App. 15a–16a (brackets omitted). Accordingly, the Second Circuit vacated the judgment and remanded to the district court for a new trial. Pet. App. 17a.

The Second Circuit denied Petitioner's request for rehearing and rehearing en banc without opinion. Pet. App. 18a.

REASONS FOR DENYING THE PETITION

A. PETITIONER HAS NOT CHALLENGED THE JUDGMENT BELOW.

"This Court 'reviews judgments, not statements in opinions.'" *California v. Rooney*, 483 U.S. 307, 311 (1987) (quoting *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956)). The Court is "not permitted to render an advisory opinion, and if the same judgment would be rendered by" the lower court notwithstanding the resolution of the question presented, this Court's "review could amount to nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945). By challenging only *one* of the bases for the judgment below, however, Petitioner asks the Court to issue an advisory opinion.

Petitioner has asked the Court to decide only whether SOX requires proof of retaliatory intent. *See* Pet. i. But the Second Circuit separately held that the district court's jury instructions were also "inadequa[te]" because of the erroneous "tended to affect in any way" language. Pet. App. 11a n.4.

First, that instruction improperly allowed the jury to impose liability even if "by virtue of his whistleblowing activity, [Petitioner] was *insulated* from a termination to which he would otherwise have been subjected sooner." Pet. App. 11a n.4 (emphasis in original). In other words, the instruction's broad and vague "affect in any way" language meant UBS could be liable even if Petitioner's whistleblowing activity

actually benefited him, such as by delaying his eventual termination. *Id.* Indeed, Petitioner's counsel affirmatively argued at trial that liability should be imposed even if UBS personnel were motivated to *preserve* Petitioner's employment because of his alleged whistleblowing activity. *See* Resp. C.A. Reply Br. 33-35. That argument was material to the facts of this case, because the supervisor who supposedly received the whistleblowing reports—Schumacher—is the one who tried to find Petitioner another job at UBS.

Second, the "tended to affect in any way" instruction improperly allowed the jury to impose liability if it concluded that Petitioner's conduct "was *the sort of behavior* that would *tend to affect* a termination decision." Pet. App. 11a n.4 (emphases in original). That language, the Second Circuit explained, erroneously "increase[d] the level of abstraction such that a jury might look beyond whether the whistleblowing activity *actually* caused the termination" and instead consider whether it was the type of action that one might think would often affect a termination decision. *Id.* (emphasis in original).

Petitioner is thus wrong when he asserts that this case "turns entirely" on whether he was "required to prove in his case in chief that his employer acted with culpable intent." Pet. 23. At most, Petitioner seeks review of portions of the Second Circuit's *reasoning* supporting its judgment remanding the case to the district court for a new trial. A decision from this Court holding that a plaintiff need not prove retaliatory intent for a SOX retaliation claim (which is all the petition seeks) would not disturb the Second Circuit's holding that the "tended to affect in any way"

language was "inadequa[te]" for two independent reasons. Accordingly, the case would return to the district court for a new trial in any event. The Court should deny the petition for that reason alone.

B. The Alleged Circuit Conflict Is Substantially Overstated And Not Ripe For Review.

In any event, Petitioner's alleged circuit conflict is considerably exaggerated and not sufficiently crystallized to merit review.

Petitioner claims that there is a "square conflict as to whether Section 1514A plaintiffs bear the burden of proving that their employer had an improper motive," pointing to decisions from the Fifth, Ninth, Fourth, and Tenth Circuits. Pet. 14–17. In reality, the only decision that has taken an inconsistent position is the Fifth Circuit's opinion in *Halliburton, Inc. v. Administrative Review Board*, 771 F.3d 254 (5th Cir. 2014) (per curiam), and that decision is unlikely to be durable and does not squarely conflict with the decision below because it failed to consider the relevant statutory text.

1. The *Halliburton* panel did not address the textual analysis that the Second Circuit found persuasive here. Instead, the Fifth Circuit (and the district court here) mistakenly relied on the Federal Circuit's thirty-year old decision in *Marano v. Department of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993), to conclude that a SOX plaintiff does not have to prove retaliatory intent to establish a retaliation claim. *See Halliburton*, 771 F.3d at 263. *Marano*, however, was not a SOX case at all. Rather, it interpreted the Whistleblower Protection Act of 1989 ("WPA"), and relied on that

statute's legislative history in holding that "a whistleblower *need not* demonstrate the existence of a retaliatory motive." 2 F.3d at 1140–41 (emphasis in original).

In extending *Marano* to SOX, the *Halliburton* panel overlooked the crucial distinction between the two statutes: Unlike SOX, the WPA does not require a showing of discrimination. SOX makes it unlawful for an employer to "*discriminate against* an employee in the terms and conditions of employment because of" the employee's protected activity. 18 U.S.C. § 1514A(a) (emphasis added). By contrast, under the WPA, it is unlawful merely to "take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of" the employee's protected activity; discrimination is not an element. 5 U.S.C. § 2302(b)(8). The Fifth Circuit, therefore, completely failed to consider the relevant statutory text when it appropriated a standard derived from the WPA, which requires only a showing of *causation in fact*, and grafted it onto SOX, which requires a showing of *discrimination*.

The Second Circuit's holding was expressly predicated on the established meaning of the word "discriminate." Pet. App. 9a–10a. That crucial argument was not presented to or resolved by the Fifth Circuit in *Halliburton*. Accordingly, there is no direct conflict between the reasoning employed by the two circuits, and there is every reason to believe that the Fifth Circuit may reconsider its approach once it is given the opportunity to consider for the first time the textual analysis that the Second Circuit found compelling. Granting review now, therefore, would be both premature and unnecessary.

2. Petitioner also claims that the Ninth Circuit has "held that an employee does not need to 'demonstrate the employer's retaliatory motive.'" Pet. 16 (quoting *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010)). But that selective quotation completely misstates the court's opinion. The court actually said the following, in the context of assessing whether plaintiff had sufficient notice of the "possible existence" of her claim to prevent equitable tolling: "A prima facie case does not require that the employee *conclusively* demonstrate the employer's retaliatory motive." *Coppinger-Martin,* 627 F.3d at 750 (emphases added). As support for that proposition, the *Coppinger-Martin* court cited *Gay v. Waiters' & Dairy Lunchmen's Union, Local No. 30*, 694 F.2d 531, 543 n.11 (9th Cir. 1982), which explained that proof of certain factors "is prima facie, but not conclusive, proof of *discriminatory intent*." *Id*. (emphasis added). And *Gay* expressly held that the claim at issue there "requires proof of intentional discrimination." *Id*. at 538. *Coppinger-Martin*'s reliance on *Gay* for the proposition that a plaintiff need not "conclusively demonstrate" retaliatory intent to make out a prima facie case thus confirms that, far from rejecting any intent requirement, the Ninth Circuit in fact *recognized* the plaintiff's obligation to prove retaliatory intent, and was merely making the point that intent need not be shown *conclusively* at the prima facie case stage. Indeed, the *Coppinger-Martin* court elsewhere noted that "retaliatory motive" was "the very conduct upon which [the plaintiff's] claim is founded." 627 F.3d at 752. *Coppinger-Martin* is thus entirely consistent with the decision below.

3. Finally, Petitioner contends that decisions of the Fourth and Tenth Circuits conflict with the decision here. But as the Second Circuit explained below, the Fourth and Tenth Circuit have not expressly "decide[d] the issue of whether retaliatory intent is an element of a section 1514A claim." Pet. 14a n.7.

In *Feldman v. Law Enforcement Associates Corporation*, the Fourth Circuit held that a plaintiff "need not show that [his protected] activities were a primary or even a significant *cause of his termination*." 752 F.3d 339, 348 (4th Cir. 2014) (emphasis added). As that language makes clear, the court was addressing the degree of *causation* required for liability, not the question whether retaliatory intent must be shown. Far from holding that intent is unnecessary, the Fourth Circuit's analysis assumed that intent *is* required. The plaintiff had provided evidence of "animus," but the court held that "he ha[d] not shown that the animus was a retaliatory response to his activities." *Id.* at 349.

Lockheed Martin Corporation v. Department of Labor, 717 F.3d 1121 (10th Cir. 2013), is equally inapposite. As Petitioner admits (Pet. 16), the Tenth Circuit's holding addressed "the required showing to establish causation" under SOX. 717 F.3d at 1137. The fact that the SOX "contributing factor" standard "is less onerous than the showing required under Title VII," *id.*, says nothing about whether retaliatory in-

tent is required for a retaliation claim like Petitioner's, and Petitioner points to nothing in the Tenth Circuit's opinion that even speaks to that question.[1]

In invoking these cases, Petitioner conflates two distinct issues: (1) whether a showing of intent is required, and (2) what degree of causal nexus is required. He assumes (and asks this Court to assume) that because these courts used *Marano*'s "tended to affect in any way" language to describe the requisite causal nexus, those decisions must conflict with the Second Circuit's holding that retaliatory intent is a necessary element of Petitioner's claim. But there is no necessary connection between those two issues, as evidenced by the fact that numerous anti-discrimination statutes require proof of discriminatory intent even while employing differing causal-nexus standards. *See*, *e.g.*, *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 346-51 (2013) (discussing varying causal-nexus standards under different statutes forbidding intentional discrimination).

At most, then, only one decision from the Fifth Circuit is in tension with the decision below on the issue presented by Petitioner, and that decision never considered the textual analysis that was the basis for the ruling here. Until the Fifth Circuit has had an opportunity to reconsider its approach in light of the

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[1] Petitioner also cites *Allen v. Administrative Review Board*, 514 F.3d 468 (5th Cir. 2008), but that case likewise says nothing about whether retaliatory intent is required. And it had no cause to do so, because the court resolved the case on the threshold ground that petitioners "did not engage in protected activity." *Id.* at 471.

statutory text, the conflict alleged by Petitioner is superficial, hypertechnical, and unlikely to survive. Review by this Court is unwarranted.[2]

C. THE DECISION BELOW IS CORRECT.

This Court's role is not to engage in mere error-correction, but in any event, the decision below is well reasoned and correct. Petitioner does not even attempt to challenge the Second Circuit's holding that the "tended to affect in any way" instruction was legally flawed. Pet. App. 11a n.4. And the court's holding that intent is necessary for liability under SOX is clearly correct, because the unambiguous ordinary meaning of section 1514A's statutory text requires proof of retaliatory intent.

SOX prohibits employers from "discharg[ing] . . . or in any other manner *discriminat[ing]* against an employee . . . because of" his protected activity. 18 U.S.C. § 1514A(a) (emphasis added). As the Second Circuit explained, "[t]o 'discriminate' means '[t]o act on the basis of prejudice,' which requires a conscious decision to act based on a protected characteristic or action." Pet. App. 9a (quoting *Discriminate*, WEBSTER'S II NEW RIVERSIDE UNIV. DICTIONARY (1994)). The word "discriminate" incorporates culpable intent.

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[2] *Amici* claim that there is a broader conflict because Federal Railroad Safety Act cases should be included. *Amici* Br. of Senators & Government Accountability Project ("GAP") 13. But Petitioner's question presented is limited to SOX, and in any event, the additional cases cited by *amici* are entirely consistent with the reasoning of the decision below. Accordingly, they cannot change the fact that the only arguably inconsistent precedent is *Halliburton*, which fails to consider the relevant statutory text.

To speak of *retaliation* without *intent* requires active disassociation from common sense and a disregard of precedent. "Retaliation is, by definition, an intentional act." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173–74 (2005). To drive home this point, the Court repeated it: Retaliation is "always—by definition—intentional." *Id.* at 183. Moreover, "[w]hen Congress creates a federal tort[,] it adopts the background of general tort law." *Staub v. Proctor Hosp.*, 562 U.S. 411, 417 (2011). "Intentional torts . . . generally require that the actor *intend the consequences of an act*, not simply the act itself." *Id.* (emphasis altered; quotation marks omitted). By definition, retaliation is disparate treatment on account of protected activity, and it is black-letter law that "[a] disparate-treatment plaintiff must establish 'that the defendant had a discriminatory intent or motive' for taking a job-related action." *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) (quoting *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 986 (1988)).[3]

This Court's interpretation of the Dodd-Frank Act's anti-retaliation provision further supports this conclusion. Like SOX, Dodd-Frank prohibits employ-

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[3] Petitioner notes that some "antidiscrimination laws" permit liability under a disparate-impact theory. But Petitioner did not bring a disparate-impact claim, so this observation is of no help to him. Nor does Petitioner dispute that even those statutes permitting disparate-impact claims require proof of discriminatory intent to prevail on a disparate-*treatment* claim. And there is no reason to believe that SOX or other anti-retaliation provisions permit liability on a disparate-impact theory, since as explained above, retaliation is by its very nature a claim of disparate-treatment.

ers from "discharg[ing] . . . or in any other manner discriminat[ing] against" employees because of protected activity. 15 U.S.C. § 78u-6(h)(1)(A). Section 78u-6(h) of Dodd-Frank identifies different types of protected activity: the first clause protects "providing information to the [SEC]," and the third clause covers "making disclosures" to various persons and entities, including but not limited to the SEC, pursuant to certain laws. *Id.* § 78u-6(h)(1)(A)(i), (iii); *Digit. Realty Tr.*, 138 S. Ct. at 779. In holding that "whistleblower[s]" are protected only if they have reported to the SEC, the Court rejected the plaintiff's argument that this interpretation would "vitiate" the third clause's protections for disclosures to other persons or entities. The Court explained that the third clause retained independent significance because "[t]he employee can recover under the statute without having to demonstrate whether the retaliation was motivated by the internal report (thus yielding protection under clause (iii)) or by the SEC disclosure (thus gaining protection under clause (i))." *Dig. Realty Tr.*, 138 S. Ct. at 779. The Court's analysis makes clear that the employer's retaliatory intent is a required element under either theory; the inclusion of the third clause simply means that a Dodd-Frank claim does not depend on which of the alternative forms of protected activity motivated the employer. *Id.*

Petitioner's contrary interpretation of SOX is rooted in a conflation of intent with causation. Petitioner implies that the Second Circuit's decision elevates the "contributing factor" causation standard to a "motivating factor" standard. *See* Pet. 25. It did no such thing. In fact, the Second Circuit recognized that

proof of the employer's culpable intent remains subject to the contributing-factor standard, not some higher standard of causation. Pet. App. 11a.[4]

Petitioner also errs in contending (Pet. 28) that the decision below renders SOX's affirmative defense superfluous. After a SOX plaintiff proves his prima facie case, the statute provides that an employer may avoid liability if it proves by "clear and convincing evidence" that it "would have taken the same unfavorable personnel action in the absence of" protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv). Petitioner contends that proving this affirmative defense means the employer has "shown that its personnel action was not ultimately motivated by discriminatory animus." Pet. 5. But that is demonstrably incorrect. Even if an employer harbored retaliatory intent and protected activity was a contributing factor in the adverse employment action, it is entirely possible that the employer might be able to prove that it would have taken the same action for other, independent reasons (for example, because of an economic downturn or unrelated serious misconduct by the employee). SOX's affirmative defense is available for employers who can prove the absence of but-for causation, not a lack of intent. The Second Circuit's decision does nothing to disturb this balance.

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[4] For the same reason, it is irrelevant that Congress in SOX and other whistleblower statutes chose a lower causation standard in response to judicial decisions that had interpreted different statutes to require a higher level of causation. *Contra* Pet. 5–6; *Amicus* Br. of Pub. Citizen 5–9; *Amici* Br. of Senators & GAP 9–11.

Elimination of the intent requirement, on the other hand, would lead to absurd consequences. Imagine William whose entire role is providing specialized services exclusively for one customer of his company. William discovers fraud and promptly reports it; corporate management investigates and confirms the truth of his report, rewards him with an immediate bonus for promptly reporting, and discloses the fraud to the major customer that William supports. No longer trusting the company, the major customer terminates its relationship, which leaves William, given his extremely specialized skills, without any work. He is laid off by the company. William's reporting was the but-for cause of his termination, so the company cannot use the affirmative defense, despite the fact that it had no retaliatory animus and even sought to reward him for his protected activity. Absent an intent element, the company would be liable.[5]

Petitioner also argues that Congress's inclusion of a specific, express *mens rea* requirement—"with the intent to retaliate"—in a criminal statute forbidding obstruction of law enforcement investigations, 18 U.S.C. § 1513(e), demonstrates that there is no intent requirement in the statute providing a civil action for retaliation, *id.* § 1514A(a). But federal civil discrimination provisions rarely, if ever, include an explicit *mens rea* element. *See, e.g.*, 42 U.S.C. § 1981; 42 U.S.C. § 2000e-2(a) (Title VII); 29 U.S.C. § 623

[5] Petitioner asserts that SOX retaliation "lawsuits cannot serve their intended deterrent purpose if SOX claims are too hard to prove." Pet. 17. But intent requirements are commonplace in the employment discrimination field, and Petitioner identifies no basis for believing that disparate-treatment laws lack deterrent effect.

(ADEA); 49 U.S.C. § 20109(a) (FRSA); 49 U.S.C. § 42121(a) (AIR-21). Moreover, the criminal statute lacks the words in section 1514A that embody the intent requirement—"discriminate . . . because of" protected activity—so Congress had to include language specifying the requisite *mens rea*.

In any event, the purported connection between these provisions is belied by the fact that they were enacted in different titles of SOX (Title VIII, Section 806 and Title XI, Section 1107, respectively). *See* Pub. L. No. 107-204, 116 Stat. 745, 802-03, 810. Indeed, they were drafted as parts of different bills. *See* Corporate and Criminal Fraud Accountability Act of 2002, S. 2010, § 6 (adding 18 U.S.C. § 1514A); Corporate Fraud Accountability Act of 2002, H.R. 5118, § 11 (adding 18 U.S.C. § 1513(e)). The enactment history thus confirms that comparing these vastly different provisions is a meaningless exercise.[6]

D. THERE IS NO OTHER REASON TO GRANT REVIEW.

Petitioner's other asserted reasons for review are unpersuasive. Two are worth mentioning briefly.

First, Petitioner argues that the Court should grant review because of how the Department of Labor

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[6] *Amici*'s reliance on the remedial-purposes canon demonstrates the weakness of Petitioner's interpretation. *See Amici* Br. of Senators & GAP 24–25. All statutes, including remedial ones, are to be given "a fair reading." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018). "After all, almost every statute might be described as remedial in the sense that all statutes are designed to remedy some problem." *CTS Corp. v. Waldburger*, 573 U.S. 1, 12 (2014).

has interpreted AIR-21's "contributing factor" language. Pet. 19. But as explained above, the Second Circuit's holding that a SOX retaliation claim includes an intent element is a function of SOX's prohibition of discrimination, not its incorporation of AIR-21's causation standard. And Congress in SOX delegated to the SEC, not the Labor Department, the "authority . . . to make rules carrying the force of law." *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); *see* 15 U.S.C. § 7202(a) ("The [SEC] shall promulgate such rules and regulations, as may be necessary or appropriate in the public interest or for the protection of investors, and in furtherance of this Act."); *Lawson v. FMR LLC*, 571 U.S. 429, 477 (2014) (Sotomayor, J., dissenting, joined by Kennedy, J., and Alito, J.) (concluding that the Labor Department's interpretations of SOX are not entitled to *Chevron* deference).

Second, Petitioner and *amici* suggest that the Court should grant review to provide guidance about how other federal whistleblower statutes should be interpreted. *See* Pet. 21–22; *Amicus* Br. of Pub. Citizen 9–11; *Amici* Br. of Senators & GAP 13–16. But resolving this case requires closely examining the text of SOX, which would not necessarily yield a transferable answer for other statutes with different texts. Notably, the alleged conflict Petitioner asserts only involves SOX cases, and as explained above is largely illusory. That Petitioner and *amici* believe granting review would somehow inject numerous additional federal statutes into the question presented is hardly a factor militating in favor of certiorari. If the interpretation of one or more of those separate statutes actually merits this Court's review at some point, the

appropriate course would be to address any such question in a case actually involving the statute at issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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