BREAKING THE CORPORATE CODE OF SILENCE: WHY SARBANES-OXLEY WHISTLEBLOWERS NEED NOT PROVE AN EMPLOYER'S INTENT TO RECOVER FOR RETALIATION

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ABSTRACT

When whistleblowers exposed the widespread corporate fraud pervading companies like Enron and WorldCom in the early 2000s, Congress responded by enacting the Sarbanes-Oxley Act (SOX) to protect the public from future fraud. Among its provisions, SOX protected whistleblowers from retaliation using an employee-friendly burden of proof—the "contributing factor" standard. Despite Congress's longstanding interpretation of "contributing factor" to mean "any factor, which alone or in connection with other factors, tended to affect in any way the outcome of the decision," the Second Circuit adopted a contrary interpretation in its 2022 decision Murray v. UBS Securities, LLC.

In Murray, the Second Circuit held that a whistleblower must prove an employer's retaliatory intent before the burden shifts to the employer to show that it would have taken the same action regardless of the employee's whistleblowing. This decision created a circuit split with at least two other circuits, and it has revived the inconsistent protection across jurisdictions that SOX intended to remedy. Although the Court initially denied Murray's petition for certiorari, it relisted the case in April 2023. On May 1, 2023, the Court granted certiorari and will resolve the circuit split. The Court should hold that SOX's plain language and statutory structure do not require a whistleblower to prove the employer's retaliatory intent before the whistleblower may recover under SOX's anti-retaliation provision.

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I. INTRODUCTION

In the early 2000s, public scandals revealed that major, well-known corporations had engaged in widespread fraudulent business practices. Outraged, advocates pressured Congress to reform the law and investigate the fraudulent activities.[1] Congressional investigations uncovered a "culture, supported by law" that allowed these practices to thrive.[2] Congress described this culture as the "corporate code of silence" because it isolated and punished employees who challenged fraudulent practices.[3] Thus, the corporate culture kept employees quiet and allowed wrongdoers to defraud stakeholders and public investors without facing repercussions.[4] Wrongful conduct went unreported both internally and

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1 Jarod S. Gonzalez, *SOX, Statutory Interpretation, and the Seventh Amendment: Sarbanes-Oxley Act Whistleblower Claims and Jury Trials*, 9 U. PA. J. BUS. L. 25, 25 (2006).

2 S. REP. NO. 107-146, at 4–5 (2002).

3 *Id.* at 4.

4 Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1119–20 (2006).

externally—i.e., to agencies like the Federal Bureau of Investigation (FBI) or the Securities and Exchange Commission (SEC).[5]

Employees who spoke up played a key role in informing the public when they summoned the courage to blow the whistle on corporate executives' fraudulent practices. Two whistleblowers—Sherron Watkins and Cynthia Cooper—received particular attention.[6] Watkins and Cooper, high-ranking officials at Enron and WorldCom, respectively, identified accounting irregularities and reported them to corporate executives.[7] Watkins described the irregularities at Enron as "fuzzy off-the-books arrangements seemingly backed by nothing more than now deflated Enron stock."[8] Watkins reported these irregularities to her supervisor, but instead of investigating them, he began to inquire whether he could legally fire Watkins under Texas law.[9] However, before he received an answer, both Enron and WorldCom famously collapsed, resulting in two of the largest bankruptcies in United States history.[10]

Because whistleblowers played a key role in exposing widespread corporate fraud, society started to see them in a more positive light; for example, Time Magazine highlighted Cooper and Watkins as "Persons of the Year."[11] Many celebrated the whistleblowers' bravery and appreciated that they protected investors and stakeholders.[12] Nevertheless, whistleblowers continue to face stigmatizing and career-ruining consequences. This suggests that the positive treatment of whistleblowers did not lead to the lasting social impact for which many had hoped.[13]

Although whistleblowers continue to face social consequences for speaking up, they have benefited from strengthened legal protections since the Enron and WorldCom scandals. In 2002, Congress responded to these scandals by enacting the Sarbanes-Oxley Act (SOX), which imposed specific reporting

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5 S. REP. NO. 107-146, at 4 (2002).

6 Gonzalez, *supra* note 1, at 25–26.

7 GOVERNMENT ACCOUNTABILITY PROJECT, SHERRON WATKINS (2020), https://whistleblower.org/whistleblower-profiles/sherron-watkins/.

8 Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CAL. L. REV. 433, 445 (2009).

9 Wade Goodwyn, *Enron Whistleblower Testifies Against Ex-Chairman*, NAT'L PUB. RADIO (Mar. 15, 2006, 4:00 PM), https://www.npr.org/2006/03/15/5282194/enron-whistleblower-testifies-against exchairman#:~:text=Watkins%20said%20that%20Lay%20said%20he%27d%20initiate%20an,consequences%20would%20be%20if%20they%20did%20fire%20her.

10 Kathleen F. Brickey, *From Enron to WorldCom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L.Q. 357, 358 (2003).

11 Richard Lacayo & Amanda Ripley, *Persons of the Year*, TIME, Dec. 22, 2002.

12 Silvia X. Liu, *When Doing the Right Thing Means Losing Your Job: Reforming the New York Whistleblower Statute*, 7 N.Y. CITY L. REV. 61, 61 (2004).

13 Leora F. Eisenstadt & Jennifer M. Pacella, *Whistleblowers Need Not Apply*, 55 AM. BUS. L. J. 665, 669 (2018).

requirements on publicly traded companies.[14] Among other provisions, SOX protects corporate whistleblowers from retaliation.[15] Retaliation includes firing whistleblowers, but it also includes demoting, suspending, threatening, harassing, or discriminating against them.[16] Congress hoped that future employees, inspired by SOX's protections, would come forward with information about corporate fraud.[17] SOX's supporters held high expectations for the act, and they called it a "great leap forward" for corporate whistleblower protection.[18] Corporate whistleblower protection improved both because the act expanded whistleblowers' legal protections and because it inspired legislators to enact or amend subsequent federal and state whistleblower laws.[19]

SOX kicked off twenty years of legal reform that expanded corporate whistleblower protection,[20] but the Second Circuit reversed this progress in August 2022.[21] In *Murray v. UBS Securities, LLC*, the Second Circuit held that a whistleblower who alleges retaliation under SOX must conclusively demonstrate the employer's intent to retaliate.[22] The Second Circuit's decision departed from at least two other circuits' decisions, which only required the employee to show that the whistleblowing was "any factor, which alone or in connection with other factors, tended to affect in any way the outcome of the decision."[23] Even if the whistleblower meets this burden, however, the employer—in any circuit—may escape liability 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."[24]

Since *Murray*, a SOX whistleblower's burden of proof depends on the circuit in which the whistleblower brings a lawsuit. This inconsistency among circuits threatens to revive the "patchwork" of corporate whistleblower protection that SOX intended to cure.[25] On January 18, 2023, the plaintiffs in the circuit-splitting case petitioned for certiorari from the United States Supreme Court.[26] The Court initially declined the petition, but it relisted the case in April 2023 and

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14 15 U.S.C. § 7201.
15 *See* 18 U.S.C. § 1514A.
16 151 Am. Jur. *Trials* 311 § 7 (2017).
17 Richard Moberly, *Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1, 3 (2012).
18 *Id.*
19 *Id.* at 11–14.
20 *Id.* at 4.
21 *See* Murray v. UBS Sec., LLC, 43 F.4th 254, 259 (2d Cir. 2022).
22 *Id.* at 259–60.
23 *Id.* at 263 n.7; Halliburton, Inc. v. Admin. Rev. Bd., 771 F.3d 254, 262–63 (5th Cir. 2014).
24 49 U.S.C. § 42121(b)(1)(B)(ii) (incorporated by 18 U.S.C. § 1514A(b)(2)(C)).
25 Moberly, *supra* note 16, at 7.
26 *See* Murray, 43 F.4th at 254.

granted certiorari.[27] When the Court decides *Murray*, it should adopt the circuit majority's definition of "contributing factor" because it is the only interpretation consistent with SOX's plain language and statutory structure.

II. BACKGROUND

SOX's plain language and statutory structure reflect Congress's intent to destroy the corporate code of silence by ensuring legal protection for employees who come forward with information about fraudulent practices. Before SOX, corporate whistleblowers faced inconsistent protections.[28] SOX, however, streamlined and expanded corporate whistleblower protection. It introduced an employee-friendly procedural scheme and burden of proof distinct from other whistleblower protections that existed before.[29] Nevertheless, *Murray*—and the circuit split it created—calls this burden of proof into question because circuits now disagree on what a SOX claimant must show to prove that their whistleblowing caused their employer to take an adverse employment action.[30] The Court should reverse *Murray* because its holding threatens to revive the "patchwork and vagaries" of corporate whistleblower protection that existed before SOX.[31]

A. *History of Corporate Whistleblower Protection: Patchwork and Vagaries*

Before SOX, the law inconsistently protected whistleblowers.[32] SOX changed this landscape when it provided uniform protection for corporate whistleblowers under federal law.[33] Additionally, since SOX's enactment, federal and state whistleblower protections have shifted and expanded, which reflects how SOX impacted subsequent whistleblower protection statutes.[34]

Historically, corporate whistleblowers primarily relied on state law for retaliation protection. Because state laws vary, employees of the same national or international corporations received different levels of protection, based on their jurisdiction.[35] While the source of state whistleblower protection varies, it

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[27] John Elwood, *The Standard for Bringing a "Whistleblower" Retaliation Claim Under Sarbanes-Oxley*, SCOTUSBLOG (Apr. 26, 2023, 11:29 AM), https://www.scotusblog.com/2023/04/the-standard-for-bringing-a-whistleblower-retaliation-claim-under-sarbanes-oxley/.

[28] *See infra* Section II.A.

[29] *See infra* Section II.B.

[30] *See infra* Section II.C.

[31] S. REP. NO. 107-46, at 10 (2002). ("Corporate employees who report fraud are subject to the patchwork and vagaries of current state laws.").

[32] *Id.*

[33] Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1035 (2004).

[34] Eisenstadt & Pacella, *supra* note 12, at 718.

[35] *Id.*

generally derives from tort law, contract law, or state statutes. Tort law protects whistleblowers in nearly every state because whistleblowers may bring a wrongful discharge claim against their employer for retaliation.[36] Wrongful discharge tort claims originate from common law, and states generally require the plaintiff to prove that their discharge violated public policy.[37] However, these claims do not always protect whistleblowers to the extent that federal statutes do. For example, in Oregon, "a common-law wrongful discharge claim based on retaliation for 'whistleblowing' . . . requires that the complaint be made to a recognized outside authority legally vested with the power to take action on such complaints."[38] Internal complaints, by contrast, do not receive any protection under the common law wrongful discharge claim in Oregon.[39]

Contract law also protects whistleblowers because many states recognize a public policy exception to the employment-at-will doctrine.[40] Under the traditional employment at-will doctrine, an employer may fire an employee at any time for any reason.[41] Courts recognize an exception to this doctrine when an employer discharges an employee for reasons that violate public policy.[42] Many states recognize whistleblowing as a public policy exception.[43] However, because states define whistleblowing differently, whistleblowers do not receive uniform protection across jurisdictions.[44] For example, in Missouri, the whistleblower must report wrongdoing to the employer, an internal supervisor, or a third-party authority, but "a report of wrongdoing to the wrongdoer is insufficient to invoke the whistleblowing public policy exception."[45] By contrast, Ohio only requires a whistleblower plaintiff to prove that the termination violated a statute or a "deeply ingrained public policy" unless the state legislature has enacted a specific statute that encompasses the action.[46] These two examples demonstrate different levels of protection.

Finally, less than half of states statutorily protect corporate whistleblowers.[47] These statutes vary from state to state.[48] For example, in California, the plaintiff must prove that the reported misconduct "would result in a

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36 Moberly, *supra* note 16, at 7.
37 *See, e.g.*, Celeste v. Wiseco Piston, 784 N.E.2d 1198, 1200 (Ohio Ct. App. 2003).
38 De Bay v. Wild Oats Mkt., Inc., 260 P.3d 700, 703–04 (Or. Ct. App. 2011).
39 *Id.*
40 Eisenstadt & Pacella, *supra* note 12, at 718.
41 Cherry, *supra* note 33, at 1042–43.
42 *Id.* at 1043.
43 *Id.*
44 *Id.* at 1045–46.
45 Drummond v. Land Learning Found., 358 S.W.3d 167, 171 (Mo. Ct. App. 2011).
46 Rheinecker v. Forest Lab'y, Inc., 813 F. Supp. 1307, 1312–13 (S.D. Ohio 1993).
47 Cherry, *supra* note 33, at 1045.
48 *Id.* at 1046–47.

violation of a state statute, rule or regulation."[49] Ohio has similar requirements but also adds protection when an employee reports the "misuse of public resources."[50] Also, some states allow whistleblowers to prevail if they prove that they reasonably believed the employer violated a law, rule, or regulation, but New York differs.[51] It instead requires the plaintiff to prove that the employer actually violated the law—"a 'reasonable belief of a possible violation' will not suffice."[52] These examples further demonstrate that because laws varied across jurisdictions, whistleblowers did not receive universal protection.

And federal statutes did not make up for the states' inconsistent protections. Although the United States has maintained anti-retaliation whistleblower statutes since 1863[53], federal law did not provide uniform protection for non-governmental whistleblowers until SOX.[54] Instead, federal whistleblowers received protection only if the statute covering their whistleblowing behavior contained an anti-retaliation provision.[55] For example, the Emergency Medical Treatment and Active Labor Act (EMTALA) protects hospital employee whistleblowers from retaliation.[56] Similarly, the Toxic Substances Control Act "[p]rovides protections for private-sector employees against retaliation for reporting potential violations to industrial chemicals currently produced or imported into the U.S."[57] But these statutes covered whistleblowers in specific industries, thus they did not cover every corporate employee.[58]

Nevertheless, before SOX, federal whistleblower protection had started to expand. When Congress enacted one of the earliest whistleblower protection schemes in the Civil Service Reform Act of 1978 (CSRA),[59] it originally required employees to establish that their whistleblowing activity constituted a "significant" or "motivating" factor in their employer's decision to terminate or otherwise retaliate against them.[60] Congress later recognized this "excessively heavy burden" and amended the CSRA's scheme when it enacted the Whistleblower Protection Act (WPA) in 1989.[61] Under the WPA, a whistleblower need only show that the

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49 Edgerly v. City of Oakland, 211 Cal.App.4th 1191, 1195 (Cal. Ct. App. 2012).

50 Desmond v. Mahoning Cnty., 134 N.E.3d 280, 289 (Ohio Ct. App. 2019).

51 Barker v. Peconic Landing at Southold, Inc., 885 F. Supp. 2d 564, 569–70.

52 *Id.* (quoting Bordell v. Gen. Elec. Co., 667 N.E.2d 922 (1996)).

53 Patricia Meador & Elizabeth S. Warren, *The False Claims Act: A Civil War Relic Evolves Into A Modern Weapon*, 65 TENN. L. REV. 455, 458 (1998).

54 Cherry, *supra* note 33, at 1049–50.

55 *Id.* at 1041–42.

56 42 U.S.C. § 1395dd(i) (2000).

57 *Retaliation Protection by Subject*, U.S. DEP'T OF LAB., https://www.whistleblowers.gov/retaliation_by_subject#environmental-protection; *see also* 15 U.S.C. § 2622.

58 Cherry, *supra* note 33, at 1049–50.

59 Todd W. Shaw, *When Text and Policy Conflict: Internal Whistleblowing Under the Shadow of Dodd-Frank*, 70 ADMIN. L. REV. 673, 705 (2018).

60 Marano v. Dep't of Just., 2 F.3d 1137, 1140 (Fed. Cir. 1993).

61 *Id.*

protected whistleblowing activity was a contributing factor in the employer's adverse employment action.[62] Congress also explained that under the WPA, "contributing factor" meant "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."[63] When it established this burden of proof, Congress hoped to send "a strong, clear signal to whistleblowers that Congress intends that they be protected from any retaliation related to their whistleblowing."[64]

A few years later, Congress similarly amended the whistleblower protection provisions of several environmental acts that Congress passed in the 1970s. The Energy Policy Act of 1992 (EPA) amended the Energy Reorganization Act of 1974 (ERA) by implementing a burden-shifting framework similar to the WPA's scheme.[65] The nuclear industry, which the ERA regulates, carries a long history of whistleblower harassment and retaliation; thus, Congress intended for whistleblowers in the field to face a lighter burden and for corporations to "face a difficult time defending themselves."[66] Notably, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21)—whose burden of proof is referenced in SOX[67]— modeled the EPA.[68]

Since SOX, Congress has passed several federal statutes that protect whistleblowers against retaliation.[69] Many of these statutes include SOX's burdens of proof, and Congress delegated many of the statutes' whistleblower provisions to the Depart of Labor (DOL) to administer, like it did with SOX.[70] Both Republican and Democratic lawmakers joined this trend and expanded federal corporate whistleblower protection.[71] For example, during the Trump Administration, Congress strengthened whistleblower protection when it passed the Veterans Accountability and Whistleblower Protection Act, which safeguards whistleblowers within the Department of Veterans Affairs.[72] More recently, during

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62 5 U.S.C. § 1221(e)(1).

63 135 CONG. REC. 5033 (1989).

64 *Id.*

65 Energy Policy Act of 1992, Pub. L. No. 102–486, 106 Stat. 2776 (1992).

66 Stone & Webster Eng'g Corp. v. Herman, 115 F.3d 1568, 1572 (11th Cir. 1997) (citing H.R. REP. NO. 102-474, pt. 8, at 79 (1992)).

67 18 U.S.C. § 1514A(b)(2)(C).

68 William Dorsey, *An Overview of Whistleblower Protection Claims at the United States Department of Labor*, 26 J. NAT'L ASS'N ADMIN. L. JUDGES 43, 54 (2006).

69 Brief for U.S. Senator Charles E. Grassley, U.S. Senator Ron Wyden, and the Government Accountability Project as Amici Curiae Supporting Petitioner at 15–16, Murray v. UBS Sec., LLC, 43 F.4th 254 (2022) (No. 22-660).

70 S. REP. NO. 107-146, at 11 (2002).

71 Leora F. Eisenstadt & Jennifer M. Pacella, *Whistleblowers Need Not Apply*, 55 AM. BUS. L. J. 665, 718 (2018).

72 *Remarks by President Trump at Signing of the Veterans Accountability and Whistleblower Protection Act*, WHITE HOUSE BLOG (June 23, 2017, 11:57 AM), https://trumpwhitehouse.archives.

the Biden Administration, Congress enacted the Anti-Money Laundering Act (AMLA) and the Criminal Antitrust Anti-Retaliation Act (CAARA), both of which "extend[] whistleblower protections to people who report criminal violations of antitrust laws."[73] Scholars have credited SOX as a model for these whistleblower-friendly anti-retaliation provisions that protect corporate employees.[74]

B. SOX's Expansion of Corporate Whistleblower Protection

SOX aimed to protect public investors by reducing corporate fraud and increasing accountability for corporations.[75] SOX focused on three areas that the Enron and WorldCom scandals exposed as major issues in corporate accounting. [76] First, SOX placed heightened controls and requirements on high-ranking corporate individuals to improve corporate governance and prevent accountability shortcomings. [77] Second, it aimed to prevent fraud and to punish corporate employees who attempt to interfere with an investigation or audit of a corporation's finances. [78] Third, it established the Public Company Accounting Oversight Board to "oversee the auditing of public companies and related matters." [79]

These provisions reflect the issues that the Enron and WorldCom scandals revealed; however, SOX also addresses how the world found out about the corporations' problems: whistleblowers. Section 1514A of SOX provides a "civil action to protect against retaliation in fraud cases."[80] It states that no publicly traded corporation "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 or assist in an investigation into fraudulent activity or to file or assist in a proceeding relating to an allegation of fraud against shareholders.[81] After it defines prohibited retaliation, § 1514A sets out procedural rules and remedies

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gov/briefings-statements/remarks-president-trump-signing-veterans-accountability-whistleblower-protection-act/.

[73] Greg Keating & Daniel J. Green, *Viewpoint: Evolving Challenges in Whistle-Blower Law*, SOC'Y FOR HUM. RES. MGMT. (Feb. 3, 2021), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/2021-trends-for-whistleblowers.aspx.

[74] Richard Moberly, *Whistleblowers and the Obama Presidency: The National Security Dilemma*, 16 EMPL. RTS. & EMPLOY. POL'Y J. 51, 67 (2012).

[75] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

[76] William E. Quick & Toni Ruo, *Sarbanes-Oxley Turns 20: A Look-Back to See Ahead*, POLSINELLI (July 19, 2022), https://www.polsinelli.com/publications/sarbanes-oxley-turns-20-a-look-back-to-see-ahead.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] 18 U.S.C. § 1514A.

[81] *Id.*

under the anti-retaliation action.[82] Two provisions that received particular attention were SOX's employee-friendly procedural scheme and burden-shifting mechanism.

1. Procedural Requirements of SOX Claimants

SOX provided greater protection for whistleblowers through its employee-friendly procedural scheme. SOX creates two paths for a whistleblower's claim to arrive in federal court. Under both paths, a § 1514A claimant must first pursue administrative relief with the Secretary of Labor (SOL).[83] The SOL delegated this administrative process to the Occupational Safety and Health Administration (OSHA), authorizing OSHA to investigate and adjudicate § 1514A claims.[84] SOX is one of fourteen statutes administered by the SOL, eleven of which the SOL delegated to OSHA to adjudicate.[85] After the whistleblower files a complaint with OSHA, OSHA decides whether the claimant met SOX's *prima facie* burden.[86] If the whistleblower does not meet SOX's *prima facie* burden, OSHA will dismiss the claim.[87] Otherwise, OSHA will issue a determination on the merits.[88]

If OSHA dismisses the claim or decides against the employee on the merits, the employee may appeal the adverse decision to the Department of Labor (DOL).[89] If the employee appeals, an Administrative Law Judge (ALJ) will review the claim.[90] If the ALJ also dismisses the claim or rules against the whistleblower, the whistleblower may appeal to the DOL's Administrative Review Board (the Board).[91] If the Board also dismisses the claim or rules against the whistleblower, the employee may appeal to the United States Circuit Court of Appeals.[92] This path to the United States Circuit Court of Appeals commonly appears in employment anti-retaliation statutes.[93]

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82 *Id.*

83 18 U.S.C. § 1514A(b); *see also* James L. Buchwalter, *Construction and Application of Whistleblower Provision of Sarbanes-Oxley Act*, 15 A.L.R. Fed. 2d 315 § 2 (2006).

84 James L. Buchwalter, *Construction and Application of Whistleblower Provision of Sarbanes-Oxley Act*, 15 A.L.R. Fed. 2d 315 § 2 (2006).

85 William Dorsey, *An Overview of Whistleblower Protection Claims at the United States Department of Labor*, 26 J. NAT'L ASS'N ADMIN. L. JUDGES 43, 48 (2006).

86 18 U.S.C. § 1514A(b); Debra S. Katz, *Whistleblower Litigation*, AM. L. INST. CONTINUING LEGAL EDUC., 805 (2016).

87 Debra S. Katz, *Whistleblower Litigation*, AM. L. INST. CONTINUING LEGAL EDUC., 805, 805 (2016).

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.*

SOX's second path to federal court—its "kick-out" provision—is more unique. If the SOL does not issue a final decision within 180 days of the initial claim, the claimant may file a claim in United States District Court, regardless of the amount in controversy.[94] The claimant may not take advantage of this provision if the SOL's delay resulted from the complainant's bad faith.[95] Because this path to federal court is unique for an anti-retaliation provision, it illustrates SOX's noteworthy expansion of whistleblower protection.[96]

2. SOX's Burden of Proof: The Contributing Factor Standard

SOX's burden of proof reflects Congress's intent to protect whistleblowers from retaliation. SOX's whistleblower provision adopts AIR 21's burden of proof instead of restating the burden itself.[97] To show a prima facie claim, a claimant must show that their protected whistleblowing activity was a contributing factor in the employer's adverse action.[98] To prevail in a § 1514A claim, the plaintiff must prove that: (1) they engaged in protected conduct; (2) their employer knew about the conduct; (3) they suffered an adverse personnel action; and (4) their protected conduct was a contributing factor to the adverse action.[99] Once the claimant satisfies their prima facie burden, the employer may escape liability if it demonstrates, by clear and convincing evidence, that it would have taken the same adverse action absent the whistleblower's protected activity.[100]

SOX's contributing factor burden of proof is one of three standards that Congress set forth in the eleven whistleblower protections that OSHA administers.[101] The three standards governing OSHA-administered retaliation claims are: (1) the but-for causation standard; (2) the motivating factor standard; and (3) the contributing factor standard.[102] The but-for causation standard is the most stringent, but even under that standard, a claimant need not show that the protected activity was the employer's sole reason for its retaliation.[103] Instead,

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94 James L. Buchwalter, *Construction and Application of Whistleblower Provision of Sarbanes-Oxley Act*, 15 A.L.R. Fed. 2d 315 § 2 (2006).

95 *Id.*

96 Jarod S. Gonzalez, *Sox, Statutory Interpretation, and the Seventh Amendment: Sarbanes-Oxley Act Whistleblower Claims and Jury Trials*, 9 U. PA. J. LAB. & EMP. L. 25, 27 (2006).

97 *See* Scott A. Baxter, *Reference Statutes: Traps for the Unwary*, 30 MCGEORGE L. REV. 562, 563–64 (1999).

98 18 U.S.C. § 1514A(b)(2)(C) (adopting the burdens of proof set out in 49 U.S.C. § 42121(b)).

99 Coppinger-Martin v. Solis, 627 F.3d 745, 750 (9th Cir. 2010).

100 John F. Fatino, *The Sarbanes-Oxley Act of 2002 and The New Prohibition on Employer Retaliation Against Whistleblowers: For Whom the Bell Tolls or Tooting One's Own Horn?*, 51 S.D. L. REV. 450, 456–457 (2006).

101 U.S. DEP'T OF LAB., WHISTLEBLOWER INVESTIGATIONS MANUAL, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION 30 (2022).

102 *Id.*

103 *Id.*

"but-for causation analysis directs the court to change one thing at a time and see if the outcome changes; if it does, there is but-for causation."[104] This is more stringent than other causation standards because it requires the plaintiff to prove that the whistleblowing necessarily caused the adverse employment action, even if other factors also caused it. The motivating factor standard is easier to satisfy than the but-for standard; it requires the claimant to show that "more likely than not [the employer] would have taken the same action in the absence of the protected activity."[105]

The most employee-friendly standard——the contributing factor burden—still requires the whistleblower to prove causation. However, the claimant's burden is lighter under the contributing factor than the more stringent but-for and motivating factor standards.[106] In administrative proceedings, contributing factor means "any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision."[107] OSHA applies this definition—which originated from Congress's explanatory statement on the WPA—to all statutes that incorporate the contributing factor standard, including SOX.[108]

Marano is the seminal case that explains the "contributing factor" standard under the WPA, and courts often cite it when they interpret SOX and other statutes that use the same language.[109] In *Marano*, the Federal Circuit Court of Appeals thoroughly analyzed the term and its meaning in the WPA context.[110] *Marano* found that Congress adopted the "contributing factor" standard in the WPA to "send a strong, clear signal to whistleblowers" that Congress intends to protect employees against whistleblower retaliation."[111]

When Congress first used the "contributing factor" language in the WPA, it explicitly distinguished "contributing factor" from less employee-friendly burdens that required plaintiffs to prove that their whistleblowing was a "significant" or "motivating" factor in the adverse employment action.[112] *Marano* clarified that "contributing" does not mean "significant," "motivating," "substantial," or "predominant" in this context.[113] *Marano* also defined "because of" in the WPA's context, clarifying that the language merely requires that the whistleblowing was *a* factor of the adverse employment action—not *the only*

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104 *Id.*
105 *Id.* at 31.
106 *Id.* at 30–31.
107 *Id.*
108 *Id.*
109 *See, e.g.*, Araujo v. N.J. Transit Rail Ops., Inc., 708 F.3d 152, 158–59 (3d Cir. 2013) (relying on *Marano* in the FRSA context to interpret "contributing factor.").
110 Marano v. Dep't of Just., 2 F.3d 1137, 1140 (Fed. Cir. 1993).
111 *Id.*
112 *Id.*
113 *Id.*

factor.[114] *Marano* explicitly held that the plaintiff need not show the employer's retaliatory motive under the WPA's "contributing factor" standard.[115] A comment in SOX's record specifically commends the bill's adoption of "the modern burdens of proof in the [WPA.]"[116]

Many courts interpret the contributing factor standard consistent with *Marano* and the WPA. Generally, these courts consider the following factors:

> (1) temporal proximity, (2) indications of pretext, (3) inconsistent application of an employer's policies, (4) an employer's shifting explanations for its actions, (5) antagonism or hostility toward a complainant's protected activity, (6) the falsity of an employer's explanation for the adverse action taken, and (7) a change in the employer's attitude toward [the complainant] after he or she engages in protected activity.[117]

OSHA uses the WPA's interpretation of the contributing factor standard to decide SOX retaliation claims.[118] Thus, whistleblowers need not prove their employer's retaliatory intent or motive if they resolve their claim in the administrative process. In federal courts, however, circuits disagree on what "contributing factor" means for SOX claims and whether this standard requires claimants to show their employers' subjective intent to retaliate.[119]

C. Circuit Split over the Contributing Factor Element

Circuits disagree on the meaning of SOX's contributing factor element. The circuit split emerged on August 5, 2022, when the Second Circuit held that a §1514A claimant must show their employer's retaliatory intent.[120] Only three circuits have explicitly addressed the issue, but additional circuits have at least discussed it in dictum.[121] The Second Circuit is the only circuit that requires that an employee to show that their employer had retaliatory intent.[122] By contrast, the Fifth and Ninth Circuits expressly reject an employee's need to demonstrate their employer's retaliatory intent as part of SOX's contributing factor standard.[123]

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114 *Id.*
115 *Id.* at 1141.
116 *Id.*
117 Sirois v. Long Island R.R. Co., 797 F.App'x 56, 59–60 (2d Cir. 2020).
118 U.S. DEP'T OF LAB., *supra* note 101, at 30.
119 *Id.*
120 *Id.*
121 *See* Murray v. UBS Sec., LLC, 43 F.4th 254, 259 (2d Cir. 2022); Halliburton, Inc. v. Admin. Rev. Bd., 771 F.3d 254, 256 (5th Cir. 2014); Coppinger-Martin v. Solis, 627 F.3d 745, 751 (9th Cir. 2010).
122 *Murray*, 43 F.4th at 259.
123 *Halliburton*, 771 F.3d at 256; *Coppinger-Martin*, 627 F.3d at 751.

1. Majority Approach"Contributing Factor" Does Not Require Retaliatory Intent

Two circuits have expressly held that SOX claimants need not prove their employer's retaliatory intent to prevail in a § 1514A action. In *Halliburton, Inc. v. Administrative Review Board*, the Fifth Circuit held that a SOX claimant need not show their employer's retaliatory intent in response to the employee's protected whistleblowing conduct. Menendez, an employee of Halliburton's Finance Department, noticed improper accounting practices and attempted to resolve them internally.[124] He did not succeed, so he confidentially reported the misconduct to the SEC.[125] After the SEC opened an investigation, Menendez's supervisor told Mendendez's colleagues that Menendez's allegations triggered the SEC's investigation.[126] Menendez's colleagues began to avoid and mistreat him.[127]

Menendez filed a complaint with OSHA and alleged that Halliburton retaliated against him by disclosing his identity as the SEC complainant.[128] The Fifth Circuit determined that Menendez's complaint to the SEC was a contributing factor in his supervisor's decision to reveal his identity.[129] It defined the contributing factor standard in the same way that *Marano* did: "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision."[130]

The Fifth Circuit, when it made this decision, addressed Halliburton's argument that Menendez needed to show a "wrongfully-motivated causal connection."[131] The Fifth Circuit turned to other courts for guidance and found that no circuit had held that an employee must prove retaliatory intent, or "wrongful motive," to meet SOX's burden of proof.[132] It also relied on the language in *Marano* that rejected finding a retaliatory intent standard under the WPA's similar statutory language.[133]

Next, the Ninth Circuit addressed the issue in *Coppinger-Martin v. Solis.* Coppinger-Martin, Chief Technical Architect of Nordstrom's Business Information Systems Strategic Planning Group, reported the company's potential SEC violations to her supervisor.[134] Soon after, Coppinger-Martin received an

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124 *Halliburton*, 771 F.3d at 256.
125 *Id.*
126 *Id.* at 257.
127 *Id.*
128 *Id.*
129 *Id.* at 263 ("Given the facts of this case, it is difficult to see how a different outcome could have been possible.").
130 *Id.*
131 *Id.*
132 *Id.*
133 *Id.* (quoting Marano v. Dep't of Just., 2 F.3d 1137, 1141 (Fed. Cir. 1993)).
134 *Coppinger-Martin*, 627 F.3d at 747–48.

unfavorable work-performance evaluation that contrasted with her previous positive reviews.[135] A few months after she reported the violations, her supervisor informed her that Nordstrom eliminated her job duties and could not offer her a different opportunity.[136] Coppinger-Martin filed a complaint, and the ARB dismissed it because Coppinger-Martin did not timely file it. The Ninth Circuit reviewed the ARB's decision.[137]

In the unique facts of this case, Coppinger-Martin, the employee, argued that an employee must demonstrate an employer's retaliatory motive.[138] Typically, the employer—not the employee—argues for the more stringent burden of proof, but here, Coppinger-Martin advocated for a less employee-friendly burden of proof because she was attempting to invoke the equitable tolling doctrine to assert that she did not know she had a claim until she learned information that suggested her employer's retaliatory intent.[139] The Ninth Circuit rejected her argument, holding that a *prima facie* case does not require an employee to demonstrate her employer's retaliatory intent.[140] The Ninth Circuit suggested that a retaliatory intent requirement contradicts the contributing factor standard.[141] Coppinger-Martin's complaint stated:

> [T]he circumstances surrounding her termination raise the very inference that her protected activity was at the very least a contributing factor in the decision to terminate her – the timing of the notice of her termination after engaging in the protected activity and the dramatic change in her good evaluations before engaging in her protected activity compared to her unfavorable evaluation after engaging in the protected activity followed by her termination of employment from the Company.[142]

This allegation sufficed under the contributing factor element, and she did not need to show Nordstrom's retaliatory intent.[143]

Three additional circuits have discussed the issue without deciding it. In 2013, the Tenth Circuit discussed the contributing factor standard in *Lockheed*

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135 *Id.* at 748.
136 *Id.*
137 *Id.*
138 *Id.* at 749–50.
139 *Id.*
140 *Id.* at 750.
141 *Id.* at 749–50 ("A prima facie case does not require that the employee conclusively demonstrate the employer's retaliatory motive . . . rather, the employee need only make a 'prima facie showing that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint.") (citing 29 C.F.R. § 1980.104(b)).
142 *Id.* at 751.
143 *Id.* at 750.

Martin Corp. v. Admin. Review Board.[144] The Tenth Circuit defined contributing factor using the *Marano* definition: "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision."[145] The court called this element "broad and forgiving," and emphasized that temporal proximity may alone suffice under this test.[146] One year after *Lockheed*, the Fourth Circuit addressed the contributing factor standard in *Feldman v. Law Enforcement Assoc's Corporation.*[147] The court cited *Lockheed's* description of the standard as "broad and forgiving," and it added that the contributing factor standard is a "rather light burden."[148] Despite the agreement among several circuits, the Second Circuit departed from their reasoning, which increased plaintiffs' burden under SOX.

2. Second Circuit ApproachSOX Claimants Must Show Employer's Retaliatory Intent to Prove Contributing Factor Element

On August 5, 2022, the Second Circuit departed from the Fourth and Ninth Circuits' holdings when it concluded that a § 1514 complainant must show their employer's intent to retaliate against them for whistleblowing. UBS strategist Murray researched and reported to clients about UBS's commercial mortgage-backed securities business's products, services, and transactions.[149] The SEC required him to certify that he independently produced the reports and that they accurately reflected his views.[150] Murray reported that two business leaders improperly pressured him to skew his reports.[151] UBS fired Murray a few months later.[152]

On the contributing factor element, the District Court instructed the jury:

> 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 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, to satisfy this element.[153]

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144 717 F.3d 1121, 1125–26 (10th Cir. 2013).
145 *Id.* at 1136.
146 *Id.*
147 752 F.3d 339, 345–46 (4th Cir. 2014).
148 *Id.* at 348.
149 Murray v. UBS Sec., LLC, 43 F.4th 254, 256 (2d Cir. 2022).
150 *Id.*
151 *Id.* at 256–57.
152 *Id.* at 257.
153 *Id.* at 258.

On appeal, the Second Circuit held that the district court erred because it failed to instruct the jury that Murry had to prove UBS's retaliatory intent to prevail on his claim.[154] The court based this decision on two rationales. First, it interpreted SOX's plain language, specifically the phrase stating that no employer "may discharge, demote, suspend, threaten, harass, or in any other manner *discriminate* against an employee . . . *because of*" protected whistleblowing activity.[155] The Second Circuit held that this language unambiguously requires the employee to prove that the employer took the adverse employment action with the intent to retaliate against the employee because of their protected whistleblowing activity.[156] It reasoned that the dictionary definition of "discriminate," which is "[t]o act on the basis of prejudice," requires a "conscious decision to act based on a protected characteristic or action."[157] It also reasoned that "because of," which means "by reason of" or "on account of," necessitates a showing of retaliatory intent.[158]

Second, it compared SOX's language to the nearly identical language in the Federal Railroad Safety Act's (FRSA) anti-retaliation provision and its recent decision requiring FRSA whistleblowers to show "some evidence of retaliatory intent."[159] The Second, Seventh, and Eighth Circuits interpret the FRSA's language similarly.[160] Notably, the Second Circuit holds that retaliatory intent requires the SOX claimant to show that retaliation against an employer's whistleblowing conduct was a *motivating* factor in the employer's adverse employment action.[161] This holding requires the plaintiff, as part of the prima facie burden, to show their employer's subjective intent to retaliate against the plaintiff.[162]

III. ANALYSIS

SOX's plain text and statutory structure demonstrate that a SOX claimant need only show that their whistleblowing activity contributed to an adverse employment action. Contrary to the Second Circuit's holding in *Murray*,[163] a SOX claimant need not prove their employer's retaliatory intent to prove their prima

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154 *Id.*

155 *Id.* at 259 (quoting 18 U.S.C. § 1514A(a)) (emphasis in original).

156 *Id.*

157 *Id.*

158 *Id.*

159 *Id.* at 260–61.

160 *Id.* at 254 n.7. *But see* Frost v. BNSF Ry. Co., 914 F.3d 1189, 1196 (9th Cir. 2019) (holding that an FRSA anti-retaliation claim does not require proof of retaliatory intent); Araujo v. N.J. Transit Rail Ops., 708 F.3d 152, 158 (3d Cir. 2013)).

161 Murray v. UBS Sec., LLC, 43 F.4th 254, 261 (2d Cir. 2022).

162 Gregory Markel, Christopher Robertson & David J. Winkler, *United States: Murray v. UBS: The Second Circuit Creates A Circuit Split on Whistleblower Claim Standards*, MONDAQ, (Aug. 12, 2022),https://www.mondaq.com/unitedstates/whistleblowing/1221058/murray-v-ubs-the-second-circuit-creates-a-circuit-split-on-whistleblower-claim-standards.

163 *Murray*, 43 F.4th at 259–60.

facie case in a § 1514A action. SOX's anti-retaliation provision states that no publicly traded companies 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" whistleblowing activity by the employee.[164] Lawful whistleblowing activity is defined in §§ 1514A(1)–(2).[165] This section also provides SOX's burden of proof when it states that an action alleging "discharge or other discrimination" shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code."[166]

Section 42121(b) forms the whistleblower provision for AIR 21.[167] SOX explicitly incorporates AIR 21's burden of proof, which proves that an employer unlawfully retaliates against a whistleblower "only if the complainant demonstrates that any [protected whistleblowing conduct] was a *contributing factor* in the unfavorable personnel action alleged in the complaint."[168] To ascertain how a SOX claimant proves causation, the Court's analysis will likely hinge on three words or phrases from SOX's test: "because of," "contributing factor," and "discrimination."

SOX whistleblowers need not prove their employers' retaliatory intent because (1) SOX's "because of" language does not unambiguously specify how a SOX claimant must prove causation; (2) "contributing factor" defines how a SOX claimant proves causation as "any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision;"[169] and (3) SOX's list of adverse actions, which includes discrimination, does not imply that a SOX claimant must prove retaliatory intent. Courts, however, should adopt different language to describe the existing circuit split, which most courts describe as whether a SOX whistleblower claimant must show the employer's retaliatory intent to recover for retaliation. Courts should instead describe the issue as what evidence suffices to prove that an employer intentionally retaliated against a SOX whistleblower claimant because of their whistleblowing conduct.[170]

A. *SOX Claimants Need Only Show that Their Whistleblower Conduct Contributed to an Adverse Employment Action*

SOX's text and statutory structure establish that to prove retaliation "because of" whistleblowing, a SOX claimant need only show that their

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164 Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A(a).
165 § 1514A(a)(1)–(2).
166 § 1514A(b)(2)(C).
167 Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121(b).
168 § 42121(b)(B)(iii).
169 *See* 135 CONG. REC. 5033 (1989) (Explanatory Statement on S. 20).
170 *See infra* Section III.B.

whistleblowing activity contributed to an adverse employment action. When courts seek to determine a statute's meaning, they start with the plain text.[171] If the court finds a statute's plain meaning ambiguous, the court need not use additional methods to interpret the text.[172] A word or phrase's "ordinary" or "general dictionary" meaning may suggest its plain meaning.[173] However, sometimes Congress uses language as a "term of art," which means that Congress understood the word or phrase to have a specialized meaning when it incorporated the language into a statute.[174] Nevertheless, language often carries multiple reasonable meanings, so "context must guide choice among them, where possible."[175] Thus, courts will also consider a statute's structure and context when deciding the meaning of a word or phrase.[176] Statutory interpretation trends suggest that "more often than before, statutory text is thought to be the ending point as well as the starting point for interpretation."[177]

Here, the Court's analysis will likely focus primarily, if not exclusively, on the statutory text. As such, this Comment will prioritize the statute's text in its analysis of SOX's causation requirement, using additional interpretations like legislative history only to add context to its textual arguments. To prove causation, SOX's text requires § 1514A claimants to show that their whistleblowing conduct contributed to their employer's adverse action, as demonstrated by the language's ordinary meaning, terms of art, and statutory structure.

1. Standing Alone, "Because of" is Ambiguous

SOX prohibits publicly traded companies from discriminating against an employee *because of* the employee's lawful whistleblowing activity.[178] The dictionary definition of "because of" suggests that SOX whistleblowers must demonstrate causation; however, it does not indicate that this causal link requires a plaintiff to prove their employer's retaliatory intent. Dictionary or ordinary definitions help demonstrate a phrase's plain meaning, as Congress understood it at the time of enactment.[179] Merriam-Webster defines "because of" as "by reason of" or "on account of."[180] Similarly, Merriam-Webster defines both "by reason of"

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171 Jimenez v. Quarterman, 555 U.S. 113, 118 (2009).

172 Sebelius v. Cloer, 569 U.S. 369, 380 (2013).

173 LARRY M. EIG, CONG. RSCH SERV., RL97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 4 (2014).

174 Morissette v. U.S., 342 U.S. 246, 263 (1952).

175 EIG, *supra* note 173, at 8.

176 Nken v. Holder, 556 U.S. 418, 426 (2009).

177 EIG, *supra* note 173, at 4 (2014).

178 18 U.S.C. § 1514A(a).

179 Caminetti v. U.S., 242 U.S. 470, 485 (1917).

180 *Because of*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/because%20of (last visited Jan. 28, 2023).

and "on account of" as "because of."[181] Thus, the dictionary definition of "because of" merely demonstrates that the three terms—"because of," "by reason of," and "on account of"—are synonymous. All three terms suggest that a SOX claimant must demonstrate some link between the employee's whistleblowing activity and the adverse employment action. But the ordinary meaning of "because of," on its own, does not clarify what a claimant must demonstrate to prove that their whistleblowing caused an adverse employment action to occur.

The Supreme Court has previously interpreted "because of" to require causation, but its precedent does not clarify what this showing entails because it interpreted "because of" in different statutes to require different causation standards. The Court has stated at least once that the ordinary meaning of "because of" mandates but-for causation.[182] In *Gross v. FBL Financial Services, Inc.*, Justice Thomas, writing for the majority, explained that "because of" means "the 'reason' that the employer decided to act," and that the protected activity must have "a determinative influence on the outcome to satisfy the "because of" standard."[183] When he implied but-for causation from the "because of" language, he also relied on the common law of torts, explaining that "[a]n act or omission is not regarded as a cause of event if the particular event would have occurred without it."[184]

Thus, in *Gross*, the majority concluded that the ADEA requires plaintiffs to prove but-for causation; however, the plain meaning of "because of" alone did not mandate this result. Because Congress did not expressly incorporate a burden of proof that defined "because of" in the ADEA's plain language, the Court had to rely on the common law to understand the meaning of "because of." Thus, under the ADEA, courts may interpret "because of" consistent with what it meant at common law—the plaintiff must prove that but for the whistleblowing conduct, the employer would not have terminated or otherwise acted adversely toward him or her.

The dissenting opinion in *Gross* illustrates how "because of" carries multiple reasonable meanings. Justice Stevens, writing for the dissent, argued that proscribing the but-for causation standard to the language "because of" based on its dictionary definitions was a "bald assertion."[185] Without definitions such as "*solely* by reason of" or "*exclusively* on account of," he explained, the language

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181 *By reason of*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/by%20reason%20of (last visited Jan. 28, 2023); *On account of*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/on%20account%20of (last visited Jan. 28, 2023).

182 Gross v. FBL Fin. Servs., 557 U.S. 167, 176 (2009).

183 *Id.*

184 *Id.* (quoting W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON, LAW OF TORTS 265 (5th ed. 1984).

185 *Id.* at 192 n.4.

could not reasonably require but-for causation.[186] Nevertheless, *Gross*'s majority held that "because of" invokes the but-for causation standard.

But the Court held otherwise in *Price Waterhouse v. Hopkins*. In *Price Waterhouse*, Justice Brennan wrote for a plurality explaining that the plain text of "because of" requires plaintiffs to show that their protected characteristic was a "motivating" or "substantial" factor in their employer's adverse employment decision.[187] Therefore, between *Gross's* majority, *Gross's* dissent, and *Price Waterhouse's* plurality, the Court's justices have presented three different and reasonable interpretations of "because of." The justices' disagreement illustrates that the plain meaning of "because of," based on its ordinary meaning alone, does not sufficiently inform courts of what exactly a claimant must show to prove that their whistleblowing caused an adverse employment action.

The Court, however, has settled on equating "because of" with but-for causation because it assumes that Congress legislated against the backdrop of common law. Importantly, the Court only relies on common law causation rules when Congress declines to expressly provide a statutory burden of proof.[188] For example, the ADEA provides that "[i]t shall be unlawful for an employer . . . to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[189] When the Supreme Court concluded that the ADEA's "because of" language requires the plaintiff to prove that their age was a but-for cause of the employer's adverse action, it partly relied on the fact that "nothing in the statute's text indicates that Congress has carved out an exception to that rule for a subset of ADEA cases."[190]

But where Congress has "carved out" such an exception, Congress's express causation standard overrides the default but-for causation standard.[191] For example, Title VII also invokes the "because of" language, providing that employers may not "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[192] Although Title VII invokes the "because of" language, the Supreme Court held that "Title VII relaxes [the but-for causation] standard . . . to prohibit even making a protected characteristic a 'motivating factor' in an employment decision."[193] Therefore, if Congress had only assigned the

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186 *Id.*

187 Price Waterhouse v. Hopkins, 490 U.S. 228, 249 (1989).

188 Gross v. FBL Fin. Servs., 557 U.S. 167, 177 (2009).

189 Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a)(1).

190 *Gross*, 557 U.S. at 177.

191 *Id.*

192 Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).

193 E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 773 (2015).

"because of" language to SOX, SOX would likely require plaintiffs to prove but-for causation. However, like Title VII's anti-discrimination provision, Congress expressly provided a statutory burden of proof to SOX whistleblowers: the contributing factor standard. Therefore, to determine a SOX whistleblower plaintiff's burden, the Court must direct its focus to the meaning of contributing factor and not rely on the language "because of" on its own.

2. Contributing Factor is a Term of Art

The Supreme Court should interpret "contributing factor" as a term of art, which Congress understood to mean "any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision."[194] Congress defined SOX's "because of" language when it expressly incorporated the contributing factor burden of proof. Under the "fair reading method," even strict textualists will assume Congress intended to apply a technical meaning to a statute's language when the word or phrase constitutes a term of art.[195] If language has a technical meaning when Congress enacts a statute, courts interpret the language consistent with the technical meaning.[196] The Supreme Court has stated that "[i]f a word in a statute is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it."[197]

Congress itself defined "contributing factor" in the whistleblowing retaliation context in 1989, thirteen years before Congress enacted SOX.[198] It defined "contributing factor" as "any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision."[199] Further, it explained:

> 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.[200]

In 1993, the Federal Circuit quoted Congress's explanatory statement when it explained the contributing factor standard.[201] In *Marano v. Department of Justice*, the Federal Circuit explained that the contributing factor standard does not

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194 *See* 135 CONG. REC. 5033 (1989) (Explanatory Statement on S. 20).

195 Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 76 (2012).

196 Yellen v. Confederated Tribes of Chehalis Rsrv., 141 S. Ct. 2434, 2445 (2021).

197 Sekhar v. U.S., 133 S. Ct. 2720 (2013).

198 135 CONG. REC. 5033 (1989) (Explanatory Statement on S. 20).

199 *Id.*

200 *Id.*

201 Marano v. Dep't of Just., 2 F.3d 1137, 1140 (Fed. Cir. 1993).

require a showing of retaliatory intent.[202] Before SOX's enactment, courts cited *Marano* and Congress's definition of the "contributing factor" standard to define the plaintiff's burden of proof when they interpreted the contributing factor language.[203] Courts rely on *Marano's* explanation, not just in the WPA context, but also when they interpret other statutes that use the contributing factor standard.[204]

Courts have increasingly relied on the WPA definition of "contributing factor" since Congress and the Federal Circuit first explained it. Citing *Marano*, the Third Circuit explicitly described "contributing factor" as a "term of art" when it explained that a plaintiff need not show an employer's retaliatory intent in the FRSA context.[205] Similarly, the Court should hold that Congress intended for "contributing factor" to imply a technical meaning under SOX.

Congress also suggested that it intended for "contributing factor" to reflect its meaning under the WPA when it chose to delegate SOX whistleblower claims to the SOL. The SOL also administers the WPA, the ERA, and AIR 21, all of which Congress enacted before SOX and incorporated the contributing factor burden of proof.[206] The Department of Labor delegates its administrative power to OSHA.[207] OSHA issues a manual instructing administrative courts on how to adjudicate whistleblower claims.[208] Currently, OSHA defines contributing factor and the other causation standards, and it details what a plaintiff must prove to satisfy each causation standard.[209] Although OSHA did not provide as much detail at the time Congress enacted SOX as it does today, it did provide a universal manual for administrative courts adjudicating whistleblower claims, which suggests that OSHA treated whistleblower claims under WPA, the ERA, and AIR 21 identically or at least similarly.[210] Congress chose to delegate administration of SOX claims to the SOL, knowing that the SOL would likely interpret "contributing factor" under SOX similarly or identically to how it interpreted the standard under the other statutes with the same language. And Congress did not choose to delegate SOX claims to the SOL as a last resort—it could have chosen the SEC. When it chose to delegate claims to the SOL, whose expertise is employment, not securities, Congress suggested that it intends for contributing factor under SOX to share its established meaning under other SOL-administered statutes.

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202 *Id.* at 1141.

203 *See, e.g.*, Rouse v. Farmers St. Bank of Jewell, 866 F. Supp. 1191, 1208 (N.D. Iowa 1994) (relying on *Marano* to interpret "contributing factor" under the WPA).

204 *See, e.g.,* Addis v. Dep't of Lab., 575 F.3d 688, 691 (7th Cir. 2009) (relying on *Marano* to interpret "contributing factor" under the ERA).

205 Araujo v. N.J. Transit Rail Operations, Inc., 708 F.3d 152, 158 (3d Cir. 2013)

206 18 U.S.C. § 1514A(b).

207 *Id.*

208 U.S. DEP'T OF LAB., *supra* note 101, at 30.

209 *Id.*

210 *Id.*

Even though courts favor a term of art's technical meaning over its ordinary meaning, the ordinary meaning of contributing factor also supports the conclusion that a SOX claimant need not show their employer's retaliatory intent. Merriam-Webster defines "contributing factor" as "something that helps cause a result."[211] Relevant definitions of "help" include "to be of use to" and "to further the advancement of."[212] Thus, contributing factor means to further the advancement of a cause or to be of use to the cause. The ordinary definition of contributing factor contains no language indicating that the whistleblowing need be a motivating cause or a substantial cause; rather, to "help[] cause a result" indicates that the whistleblowing merely needed to be one thing, perhaps among countless others, that pushed the employer toward the adverse employment action.

Additionally, SOX's statutory structure suggests that Congress intended for "contributing factor" to define how a SOX claimant proves that he or she suffered an adverse action "because of" whistleblowing—not to require two separate showings for "because of" and "contributing factor." SOX's burden of proof, explicitly incorporated from AIR 21, states that a violation will be found "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."[213] Subsection (a) refers to the whistleblower protection provision of AIR 21.[214] In the SOX context, the whistleblower protection provision is also subsection (a), which is where the statute prohibits adverse action because of the employee's whistleblowing.[215] Additionally, paragraphs (1) through (4) describe what activity constitutes whistleblowing.[216] Thus, the burden of proof, reworded by inputting this information, becomes: a violation will be found "only if the complainant demonstrates that any [whistleblowing] was a contributing factor in the unfavorable personnel action." This burden of proof indicates that subsection (a) defines prohibited retaliation by the employer, but it does not define the plaintiff's required showing to prevail in suit. Therefore, the plaintiff's required showing arises only from the contributing factor standard set out in AIR 21, which SOX expressly incorporates.

"Contributing factor" merely defines the standard that a plaintiff must meet to establish that the employer acted adversely "because of" the employee's whistleblowing. Neither of those terms plainly indicate that a plaintiff must prove

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211 *Contributing factor*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/contributing%20factor (last visited Jan. 28, 2023).

212 *Help*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/help (last visited Jan. 28, 2023).

213 49 U.S.C. § 42121(b)(2)(B)(iii).

214 *Id.* at § 42121(a).

215 *See* 18 U.S.C. § 1514A(a).

216 49 U.S.C. § 42121(a)(1)–(4).

the employer's retaliatory intent. Thus, the plain language will only support a retaliatory intent or motivating factor standard if SOX's explanation of prohibited conduct, which is that no employer may "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee . . ."[217] contains the requirement of retaliatory intent. In *Murray*, the Second Circuit concluded that the word "discriminate" indicates a retaliatory intent requirement.[218] However, this requirement would contradict SOX's plain meaning.

3. SOX's List of "Discriminatory" Actions Does Not Encompass a Requirement to Show the Employer's Retaliatory Intent

The word "discrimination" describes adverse employment actions that can trigger SOX liability, but it does not create an additional requirement of retaliatory intent for SOX plaintiffs like the Second Circuit asserts. Merriam-Webster defines "discrimination" as (1) "prejudiced or prejudicial outlook, action, or treatment" or (2) "the act, practice, or an instance of discriminating categorically rather than individually."[219] The first definition uses the word "prejudice[]," which means "an irrational attitude of hostility directed against an individual, a group, a race, or their supposed characteristics."[220] "Prejudice" might suggest a requirement of the "conscious disfavor" that the Second Circuit held SOX claimants must show.[221] Nevertheless, the second definition of "discrimination" merely requires that the employer treats a whistleblowing employee differently than a non-whistleblowing employee. The definition's use of the words "act, practice, or an instance" suggests that even treating the two categories of employees differently one time can trigger liability. Because "discrimination" has multiple reasonable meanings, SOX's statutory structure and context will serve particularly useful in determining a SOX claimant's burden of proof.

SOX's structure suggests that the word "discrimination," as used in § 1514A, imposes no retaliatory intent requirement on SOX claimants. The canon of construction *noscitur a sociis*, which means "it is known from its associates," aids courts in determining the meaning of a word that appears in a list.[222] The canon informs courts that when words with similar meanings appear together in a group,

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[217] 18 U.S.C. § 1514A(a).

[218] Murray v. UBS Sec., LLC, 43 F.4th 254, 259–60 (2d Cir. 2022)

[219] *Discrimination*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/discrimination (last visited Jan. 28, 2023).

[220] *Prejudice*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/prejudice (last visited Jan. 28, 2023).

[221] *See Murray*, 43 F.4th at 254, 259 ("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.").

[222] SHAMBIE SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION § 47:16 (7th ed. 2022).

they "should be understood in the same general sense."[223] The Court previously used the *noscitur a sociis* canon to determine if language imposes an intent requirement.[224] For example, in *Bullock v. BankChampaign, N.A.*, the Court interpreted the term "defalcation" within a bankruptcy statute.[225] The term "defalcation" appeared in a list alongside the words "fraud," "embezzlement," and "larceny."[226] While the plain meaning of "defalcation" did not clearly suggest that the breach of fiduciary duty must be intentional, the Court held that the language imposed a retaliatory intent requirement because "fraud," "embezzlement," and "larceny" unambiguously encompassed state of mind requirements.[227]

By contrast, the words that accompany "discrimination" in SOX's statutory list of adverse actions lack any requirement of conscious disfavor. The words accompanying "discriminate" are "discharge," "demote," "suspend," "threaten," and "harass."[228] Merriam-Webster defines "discharge" as "to dismiss from employment."[229] The definition of "discharge" does not plainly indicate that an employer must intend to dismiss an employee from employment *because* they engaged in whistleblowing conduct. Similarly, "demote" means "to reduce to a lower grade or rank."[230] Not only do these definitions lack indication of an intent element, but it would be unreasonable to inject a requirement of intent into these words. Although "threaten" and "harass" may, at first glance, seem to give the words an intent requirement, neither term requires it. "Threaten" means "to cause to feel insecure or anxious," and "harass" means "to annoy persistently" or "to create an unpleasant or hostile situation for especially by uninvited and unwelcome verbal or physical conduct."[231] All the words accompanying "discriminate" are either (1) actions taken by an employer regardless of the employer's intent or (2) actions by the employer that have a specific effect on the employee. The words in the list do not create an intent requirement; rather, they explain the adverse action element that a plaintiff must prove to impose liability on the employer for retaliation. By contrast, "because of" defines what a plaintiff must show to prove causation, and the contributing factor standard, which is a term of art, clarifies what the "because of" language requires.

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223 *Id.*

224 *See* Bullock v. BankChampaign, N.A., 569 U.S. 267, 273–74 (2013).

225 *Id.*

226 *Id.*

227 *Id.*

228 18 U.S.C. § 1514A(a).

229 *Discharge*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/discharge (last visited Jan. 28, 2023).

230 *Demote*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/demote (last visited Jan. 28, 2023).

231 *Threaten*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/threaten (last visited Jan. 28, 2023); *Harass*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/harass (last visited Jan. 28, 2023).

The ordinary meaning and technical meaning of "because of," "contributing factor," and "discrimination," taken together, suggest that a SOX plaintiff need only show that their whistleblowing *contributed to* their employer's adverse action, not that it *motivated* the employer's action. In *Murray*, the defendants argued that if courts do not require retaliatory intent, they allow plaintiffs to recover for discrimination even though the plaintiff did not prove retaliation.[232] The defendants likely overstated this concern because after the plaintiff shows that their whistleblowing contributed to the employer's adverse action, the employer may still escape liability by showing that it "would have taken the same unfavorable personnel action in the absence of that behavior."[233] But, if the Court adopts different language to explain the contributing factor burden of proof, it would help clarify why the *Murray* defendants overstate the contributing factor standard's impact on retaliation claims.

B. The Contributing Factor Standard Allows Circumstantial Evidence of Retaliatory Intent

Even when they agree, courts and advocates vary when explaining SOX's causation requirement. The circuits involved in the split frame the issue as whether a SOX claimant must show their employer's intent or motive to retaliate against the employee for the employee's whistleblowing activity, resulting in a binary split with some circuits requiring retaliatory intent and some circuits imposing no intent requirement.[234] However, the Ninth Circuit departs from this framing when it explains the contributing factor burden of proof under the FRSA and the ERA.[235] Instead of holding that SOX claimants need not show their employers' retaliatory intent, the Ninth Circuit explains that proving the contributing factor standard *equates* to proving the employer's retaliatory intent.[236] In other words, the contributing factor standard allows plaintiffs to prove their employer's retaliatory intent through circumstantial evidence. The Ninth Circuit emphasizes that a SOX claimant need not show the employer's *subjective* retaliatory intent.[237] Instead, the employee need only prove the employer's *objective* intent to retaliate against an

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232 Brief for Defendant at 2, Murray v. UBS Sec., LLC, 43 F.4th 254 (2d Cir. 2022) (No. 14 Civ. 0927).

233 49 U.S.C. § 42121(b)(2)(B)(ii) (incorporated by 18 U.S.C. § 1514A(b)(2)(B)).

234 *See Murray*, 43 F.4th 254, 258 (2d Cir. 2022) ("[R]etaliatory intent is an element of a section 1514A claim."); *see also* Coppinger-Martin v. Solis, 627 F.3d 745, 750 (9th Cir. 2010) ("A prima facie case does not require that the employee conclusively demonstrate the employer's retaliatory motive.").

235 *See* Frost v. BNSF Ry. Co., 914 F.3d 1189, 1195 (9th Cir. 2019); *see also* Tamosaitis v. URS Inc., 781 F.3d 468, 482 (9th Cir. 2015).

236 Tamosaitis v. URS Inc., 781 F.3d 468, 482 (9th Cir. 2015).

237 *Frost*, 914 F.3d at 1195.

employee for their whistleblowing behavior.[238] By distinguishing these concepts, the Ninth Circuit defeats the argument that without retaliatory intent, SOX claimants can prove retaliation without meeting a causation requirement. Nevertheless, the Second Circuit's decision in *Murray* requires plaintiffs to prove two separate elements: (1) that their whistleblowing activity was objectively a contributing factor in the employer's adverse employment decision and (2) that the employer had a subjective retaliatory intent.[239]

If the Court reframes the issue presented to reflect the Ninth Circuit's explanation, it will show why contributing factor and retaliatory intent cannot reasonably create two separate requirements under SOX. The Third Circuit explained that a reframing could be helpful when it discussed Title VII's causation standard.[240] In *Jensen v. Potter*, the court established that a plaintiff must prove that "she suffered intentional discrimination because of her protected activity."[241] The Third Circuit explicitly clarified that this requirement does not add an additional element beyond satisfying the burden of proof applicable to the plaintiff's retaliation claim, explaining:

> This element differs in wording, but not in substance, from our usual retaliation test's requirement of a "causal connection" between the protected activity and the adverse employment action. By showing a causal link, the plaintiff raises an inference of retaliatory intent and satisfies her initial burden under the *McDonnell Douglas* framework.[242]

The Third Circuit explains that temporal proximity and patterns of hostility support inferring retaliatory intent.[243] The Supreme Court, in deciding *Murray*, should adopt this framing of the SOX retaliatory intent issue. Reframing will not change the outcome explained in Section III.A; the same evidence that currently satisfies the contributing factor standard in the majority of circuits will continue to do so. However, it may relieve concerns that employers could face liability for retaliation when they did not actually intend to retaliate. The reframing proposed will merely change the conclusion of this Comment from "a SOX whistleblower claimant need not show their employer's retaliatory intent" to "a SOX whistleblower claimant shows retaliatory intent by satisfying the contributing factor standard."

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238 *See id.*

239 Murray v. UBS Sec., LLC, 43 F.4th 254, 259–60 (2d Cir. 2022).

240 Jensen v. Potter, 435 F.3d 444, 449 (3d. Cir. 2006).

241 *Id.*

242 *Id.* at 454 n.2.

243 *Id.*

IV. CONCLUSION

SOX's plain text and statutory structure suggest that a plaintiff need only show that their whistleblowing conduct contributed to their employer's decision to act adversely. Before SOX, inconsistency among jurisdictions was the norm.[244] Watkins and Cooper's whistleblowing set SOX's enactment into motion. Before SOX's enactment, Enron could have fired Watkins in retaliation for her whistleblowing because Texas law did not provide her any remedies.[245] By contrast, Mississippi law would have protected Cooper.[246] established uniformity because it provides corporate whistleblowers federal protection, which mitigates the inconsistency among state protections.[247] Because of the Second Circuit's decision in *Murray*, whistleblowers again face different likelihoods of success depending on the jurisdiction in which they bring their claim. This step backward directly contradicts Congress's intent in enacting SOX. The Supreme Court recognized that the inconsistency and confusion created by this circuit split made *Murray* a strong candidate for the Court's review. Upon this review, the Supreme Court should hold that a § 1514A whistleblower claimant need not demonstrate their retaliatory intent, as supported by fundamental statutory interpretation principles.

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244 *Id.* at 1042.

245 Cherry, *supra* note 32, at 1041–42.

246 *Id.*

247 Richard Moberly, *Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1, 10 (2012).