No. 22-660

IN THE

Supreme Court of the United States

TREVOR MURRAY,

Petitioner,

v.

UBS SECURITIES LLC, AND UBS AG,

Respondents.

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

BRIEF OF SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

This amicus curiae brief is filed on behalf of the Securities Industry and Financial Markets Association (SIFMA). SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of its industry's one million employees, SIFMA advocates on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. SIFMA serves as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. SIFMA also provides a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). To further SIFMA's mission, SIFMA regularly files amicus curiae briefs in cases that raise issues of vital concern to participants in the securities industry, such as the present one.

SIFMA's members have a direct interest in the proper interpretation of the whistleblower provisions of Section 806 of the Sarbanes-Oxley Act of 2002

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

(SOX) codified as amended at 18 U.S.C. 1514A (section 1514A). As participants in the securities industry, SIFMA's members are subject to a vast and complicated regulatory structure that aims to strengthen corporate governance, improve risk management, and foster trust and confidence in the financial markets. These objectives are shared by SIFMA's members. Achieving these objectives, however, requires a carefully balanced and consistent regulatory landscape.

SIFMA believes that the Second Circuit's opinion below properly interprets the whistleblower provisions of SOX by requiring that a purported whistleblower prove retaliatory intent. This construction aligns with the plain meaning of the statute and respects bedrock historical norms governing intentional torts, such as discrimination. It also honors Congress's goal to create a uniform, balanced means to redress whistleblower concerns. In contrast, petitioner's interpretation of Section 806 deviates from the text and longstanding principles governing intentional torts and would foster inconsistency, uncertainty, and unreasonable results. Overturning the Second Circuit's decision and eliminating a plaintiff's obligation to show discriminatory intent would burden even the most conscientious of companies with the onerous task of navigating an ill-defined and unbalanced standard. Doing so would frustrate Congress's goal of addressing whistleblower concerns in a fair and consistent manner.

SUMMARY OF ARGUMENT

Congress enacted protections for employee-whistleblowers who believe they have been retaliated against for speaking out about corporate fraud or other wrongdoing. 18 U.S.C. 1514A (2002). Specifically, these protections ensure that a covered employer may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because" that employee engaged in protected activity. *Ibid.* To maintain such a claim, a purported whistleblower must show that the protected activity was a "contributing factor" to any adverse employment action taken by the employer. 18 U.S.C. 1514A(b)(2)(C) (incorporating 49 U.S.C. 42121(b)).

The Second Circuit correctly interpreted the whistleblower provision of SOX by requiring that a purported whistleblower prove retaliatory intent. In doing so, the Second Circuit rejected both the district court's determination that the petitioner was not required to prove retaliatory intent and the court's jury instructions, which directed 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* [the] decision to terminate" petitioner's employment. *Murray* v. *UBS Sec., LLC*, 43 F.4th 254, 256-258 (2d Cir. 2022) (emphasis added), cert. granted, 143 S. Ct. 2429 (2023).

The Second Circuit's opinion should be affirmed. First, the plain meaning of the statute clearly dictates the need for a plaintiff to prove retaliatory intent. Second, eliminating the intent requirement from a plaintiff's burden ignores the historical importance of

intent in similar common law torts and other protections against discrimination. Finally, disposing of the need to prove retaliatory intent leaves open the possibility of illogical and inconsistent outcomes. The Second Circuit's interpretation is in line with the plain meaning of the statutory text and honors Congress's intent to create a uniform and predictable means to redress whistleblower concerns. 9 S. Rep. No. 107-146, at 10 (2002). As such, the Second Circuit's opinion correctly calibrated the burden of proof in SOX whistleblower cases, ensuring the degree of fairness and consistency needed to fulfill the law's objectives.

ARGUMENT

I. The Statute's Plain Meaning Dictates the Need for a Plaintiff to Prove Retaliatory Intent.

This case poses an important question that merits careful consideration:[2] should a purported whistleblower bringing a retaliation claim under the protec-

[2] Indicative of the importance of this question is the fact that the U.S. Securities and Exchange Commissioners Mark Uyeda and Hester Peirce recently dissented from the Commission's decision to join an amicus brief in support of the petitioner. Hester M. Peirce & Mark T. Uyeda, U.S. Secs. & Exch. Comm'n, *Statement Regarding Amicus Brief Filed in* Murray *v.* UBS Securities, LLC (July 6, 2023), https://www.sec.gov/news/statement/peirce-uyeda-murray-v-ubs-20230706. Specifically, Commissioners Peirce and Uyeda dissented because, in their opinion, it was unclear that a "robust deliberative process" had occurred with respect to the Commission's decision to join the amicus brief. *Ibid.*

tions of SOX be required to prove that his or her employer acted with "retaliatory intent"? The statute's plain meaning directs that the clear answer is yes.

Petitioner contends (Br. at 17) that a whistleblower need not prove an employer's retaliatory intent. This interpretation, however, overlooks the ordinary meaning of the statutory text. Indeed, "[w]hen a party seeks relief under a statute, [the Court's] task is to apply the law's terms as a reasonable reader would have understood them at the time Congress enacted them. 'After all, only the words on the page constitute the law adopted by Congress and approved by the President.'" *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2208 (2023) (Gorsuch, N., concurring) (citing *Bostock* v. *Clayton County*, 140 S. Ct. 1731, 1738 (2020)).

SOX directs that no covered employer "may discharge, demote, suspend, threaten, harass, or in any other manner ***discriminate*** against an employee * * * ***because of***" whistleblowing. 18 U.S.C. 1514A(a) (emphasis added). Petitioner discounts the importance of the phrase "discriminate," considering it merely a "catchall term." Pet. Br. 19. This is not the case. As the Second Circuit aptly concluded, "discriminate" is a key phrase in the statute. *Murray*, 43 F.4th at 258-260. To interpret otherwise is nonsensical, especially given that the purpose of section 1514A is precisely aligned with the definition of discrimination, *i.e.*, to ensure that an individual is not treated worse than another because he or she engaged in protected activity. *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) ("[Retaliation] is a form of

'discrimination' because the complainant is being subjected to differential treatment."). Indeed, "discharge," "demote," "suspend," "threaten," and "harass" are all properly understood as forms of discrimination. Moreover, as the Second Circuit notes, "[t]o 'discriminate' means [t]o act on the basis of prejudice." *Murray*, 43 F.4th at 259 (citing *Webster's II New Riverside University Dictionary* (1994)). "Prejudice" can be further defined as a "preconceived judgment or opinion." *Merriam-Webster's Collegiate Dictionary* 979 (11th ed. 2003). Thus, given that "prejudice" inherently implicates an actor's *mindset* in his decision to take an action, "intent" is imbedded within the meaning of "discriminate."

Next, "'[b]ecause of' is a familiar phrase in the law." *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2209 (Gorsuch, N., concurring) (citing *Bostock*, 140 S. Ct. at 1739). It is properly understood as "by reason of" or "on account of." *Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 350 (2013). Therefore, as the Second Circuit notes, "because of" implies that there must be a causal connection between the discriminatory action and the whistleblowing activity. *Murray*, 43 F.4th at 259.

Put together, these definitions construct a simple, clear standard. SOX provides that a defendant may not "***discriminate*** against an employee * * * ***because of*** any lawful act done by the employee[.]" 18 U.S.C. 1514A(a) (emphasis added). Therefore, section 1514A prohibits discriminatory actions—*i.e.*, those that implicate *deliberate* prejudice—which are caused by an employee's whistleblowing actions. Such a construction necessarily implicates retaliatory intent.

Thus, to establish a violation, a plaintiff must show both a causal connection between the whistleblowing activity and the adverse employment action *and* that the employer acted with retaliatory intent. See *Nassar*, 570 U.S. at 346-352 (holding that where the antiretaliation provisions of Title VII prohibit an employer from "discriminating" against employees "because of" protected activity, "Title VII retaliation claims require proof that the *desire to retaliate* was the [cause] of the challenged employment action") (emphasis added).

II. Intent Is a Fundamental Component of Causes of Action Rooted in Discrimination and Retaliation.

A historical understanding of the significance of intent in tort law and federal discrimination and retaliation statutes also demonstrates the need for a plaintiff to prove retaliatory intent.

The notion that an actor's state of mind bears on his or her culpability is deeply ingrained in both law and generalized conceptions of fairness. *Romag Fasteners, Inc.* v. *Fossil, Inc.*, 140 S. Ct. 1492, 1494 (2020) ("Without question, a defendant's state of mind may have a bearing on what relief a plaintiff should receive."); Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought to Be*, 78 St. John's L. Rev. 725, 725-726 (2004); Peter Cane, *Mens Rea in Tort Law*, 20 Oxford J. Legal Stud. 533, 533 (2000) ("In ethical terms, intention is widely felt to be the clearest and strongest basis for the attribution of personal responsibility for conduct and outcomes."). Indeed, the concept of a culpable *mens rea* or a "guilty mind" can be traced back as far

as the foundations of Roman law and English Common Law. Francis B. Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 982-983 (1932); Milhizer, 78 St. John's L. Rev. at 756 ("The notion of criminal intent in Roman law has roots as ancient as the founding of the city itself."). Henry de Bracton, whose writings were instrumental in the foundation of English Common Law, opined on the subject: "[W]e must consider with what mind (*animo*) or with what intent (*voluntate*) a thing is done, in fact or in judgment, in order that it may be determined accordingly what action should follow and what punishment." Sayre, 45 Harv. L. Rev. at 985 (quoting Henry de Bracton, *De Legibus et Consuetudinibus Angliæ* 101b (1235)).

The importance of intent in determining one's culpability is similarly imbedded into modern tort law. Mark A. Geistfeld, *Conceptualizing the Intentional Torts*, 10 J. Tort L. 1, 6 (2017). Prior to the modern conception of tort law, most of the classic torts were rooted in strict liability and did not consider an actor's intent. Kenneth J. Vandevelde, *A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort*, 19 Hofstra L. Rev. 447, 450-452 (1990). The modern schema of tort law, advanced largely by Oliver Wendell Holmes in the nineteenth century, recognized fault as a governing principal of tort. *Id.* at 448, 462. Borrowing from criminal law, Holmes organized torts into the classic tripart: causes of action based on strict liability, causes of action based on negligence, and causes of action based on ***intentional*** conduct. *Id.* at 457-462.

In recognizing a unique category of harm resulting from an actor's ***intentional*** conduct, Holmes astutely acknowledged a simple yet fundamental concept: that harm inflicted intentionally is normatively distinct from harm caused by accidental negligence or strict liability. Geistfeld, 10 J. Tort L. at 10. Modern tort law has embraced this maxim. According to the Restatement (Third) of Torts: Liability for Physical and Emotional Harms, "tort law must distinguish between intentional and nonintentional consequences and harms" because "[h]arms that are tortious if caused intentionally may not be tortious if caused unintentionally." Restatement (Third) of Torts: Liability for Physical and Emotional Harms § 1 cmt. a (Am. Law Inst. 2010).

This Court has adopted such principles, including the necessity of demonstrating intent, in its understanding of both constitutional and federal statutory protections against discrimination. W. Kerrel Murray, *Discriminatory Taint*, 135 Harv. L. Rev. 1190, 1196-1197 (2022). In *Staub* v. *Proctor Hospital*, this Court noted that "when Congress creates a federal tort[,] it adopts the background of general tort law." 562 U.S. 411, 417 (2011). In analyzing discrimination under the Uniformed Services Employment and Reemployment Act, the Court adopted tort law's understanding of "intent," noting that "[i]ntentional torts such as this, as distinguished from negligent or reckless torts[,] * * * generally require that the actor intend the *consequences* of an act, not simply the act itself." *Ibid.* (internal quotation marks omitted) (quoting *Kawaauhau* v. *Geiger*, 523 U.S. 57, 61-62 (1998)).

This Court has similarly imbued principles of tort law into the statutory analysis of other federal discrimination statutes, including Title VII. *Nassar*, 570 U.S. at 346; *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009); see generally Sandra F. Sperino, *Let's Pretend Discrimination Is a Tort*, 75 Ohio St. L.J. 1107 (2014). In *Bostock* v. *Clayton County*, this Court again recently acknowledged intent as the cornerstone of a disparate treatment analysis under Title VII, emphasizing that "[i]n so-called 'disparate treatment cases,' this Court has held that the difference in treatment * * * must be ***intentional***." 140 S. Ct. 1731, 1734 (2020) (emphasis added). In fact, as the Court emphasized, "[t]here is simply no escaping the role intent plays" in such an analysis. *Id.* at 1742. Thus, by invoking common law principles in the analysis of federal discrimination statutes, this Court has established that discrimination statutes are torts and should be analyzed in accordance with such. See generally Sperino, 75 Ohio St. L.J. 1107.

Intent has also been interpreted to play a central role in various constitutional protections against discrimination. Aziz Z. Huq, *What is Discriminatory Intent?*, 103 Cornell L. Rev. 1211, 1211-1214 (2018); Murray, 135 Harv. L. Rev. at 1201. In *Washington* v. *Davis*, the Court emphasized the importance of discriminatory intent in the analysis of protections afforded under the Equal Protection Clause, holding that "the basic equal protection principle [is] that the invidious quality of a law claimed to be * * * discriminatory must ultimately be traced to a racially discriminatory ***purpose***." 426 U.S. 229, 240 (1976) (emphasis added). A similar focus on discriminatory purpose is

also apparent in the Court's jurisprudence on protections under the Free Exercise Clause. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 540-541 (1993); Huq, 103 Cornell L. Rev. at 1232; Murray, 135 Harv. L. Rev. at 1201.

Here too, the retaliation provisions of SOX should be examined through the lens of these principles, emphasizing the importance of an actor's intent. Indeed, the cause of action created by section 1514A is one of retaliatory discharge, which is an ***intentional*** tort. See, *e.g.*, *Tompkins* v. *Metro-N. Commuter R.R. Co.*, 983 F.3d 74, 82 (2d Cir. 2020) (discussing unlawful retaliation under the Federal Railroad Safety Act and noting that "the essence of [such a] tort is 'discriminatory animus'") (quoting *Kuduk* v. *BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014)); *Smith* v. *Atlas Off-Shore Boat Serv., Inc.*, 653 F.2d 1057, 1064 (5th Cir. 1981) ("The employer's retaliatory discharge is properly characterized as an intentional tort[.]"); *Travis* v. *Gary Cmty. Mental Health Ctr., Inc.*, 921 F.2d 108, 112 (7th Cir. 1990) (categorizing retaliatory discharge as an intentional tort); *Reich* v. *Cambridgeport Air Sys., Inc.,* 26 F.3d 1187, 1192 (1st Cir. 1994) ("Retaliatory discharge has been treated as an intentional tort[.]"). Moreover, this Court has recognized that retaliation is "always—by definition—intentional." *Jackson*, 544 U.S. at 173-174 ("Retaliation is, by definition, an intentional act"); see also *Gomez-Perez* v. *Potter*, 553 U.S. 474, 480 (2008). Considering the importance of intent in proving similar causes of action, the need to demonstrate retaliatory intent in SOX whistleblower claims cannot—and indeed should not—be disregarded. To find otherwise ignores the historical foundation of such causes of action and is

contrary to traditional notions of fairness that dictate that an actor's state of mind is reflective of culpability.

III. An Interpretation of Section 1514A Without Retaliatory Intent Leads to Inconsistency, Unreasonable Results, and an Unbalanced Burden.

Without retaliatory intent as part of a plaintiff's burden of proof, lower courts are left to navigate an ambiguous standard that leads to inconsistent and unreasonable results. This is especially true because it remains unclear what an employee must do to meet the "contributing factor" standard if he or she does not need to prove retaliatory animus. Valerie Watnick, *Whistleblower Protections Under the Sarbanes-Oxley Act: A Primer and a Critique*, 12 Fordham J. Corp. & Fin. L. 831, 849-851 (2007). Indeed, there is little guidance on how such a standard can be applied in a fair and consistent fashion. See *Murray*, 43 F.4th at 262 n.7.

Removing retaliatory intent from the analysis leads to unpredictable and nonsensical outcomes. Firstly, a standard lacking retaliatory intent will improperly guide juries, leading to absurd results. One need only look as far as the jury instructions from the district court in this case for an example. The district court, refusing to instruct the jury that retaliatory intent was an element of the employee's burden, instead found that the petitioner was only required to show that his whistleblowing activity "tended to affect in any way" the employer's decision to terminate plaintiff's employment. *Id.* at 258.

As the Second Circuit noted, by defining "contributing factor" as anything that "tended to affect in any

way" the employer's decision, the district court's instructions encompass the illogical scenario where, because of an employee's whistleblowing, he is "*insulated* from a termination to which he would otherwise have been subjected sooner." *Id.* at n.4. Additionally, eliminating the requirement that a plaintiff prove retaliatory intent often results in unfair gamesmanship. First, consider the issue of temporal proximity. Temporal proximity should not be enough on its own to satisfy the causation standard. See, *e.g.*, *Riddle* v. *First Tenn. Bank, Nat'l Ass'n*, 497 Fed. Appx. 588, 596 (6th Cir. 2012) ("[T]emporal proximity alone is usually insufficient to constitute evidence that would prove that an employer retaliated against an employee for engaging in alleged protected activity."). However, some courts have suggested—and some plaintiffs contend—that temporal proximity is sufficient to establish that protected activity was a "contributing factor" in the adverse employment action. See, *e.g.*, *Van Asdale* v. *Int'l Game Tech.*, 577 F.3d 989, 1003 (9th Cir. 2009) ("We have previously held that 'causation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity.'") (quoting *Villiarimo* v. *Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002)); *Deltek, Inc.* v. *Dep't of Lab., Admin. Rev. Bd.*, 649 Fed. Appx. 320, 326 (4th Cir. 2016).

Yet, temporal proximity is an ineffective proxy for retaliatory intent. And, when the intent requirement is removed, plaintiffs often lean on the imprecise nature of temporal proximity to maintain their claims, at great expense to employers. Consider the following example:

Employee is hired to work for a small but growing financial services Company as a junior analyst. At first, his performance is acceptable, but he soon begins to miss meetings, and his research is sloppy and incomplete. Company, in a good-faith effort to continue the employment relationship, provides Employee with coaching and training. Employee, however, is unreceptive, and his performance does not improve. At the same time, Employee mistakenly comes to believe that a certain Company practice is in violation of SOX. Employee sends an email to his supervisor reporting this purported violation. Company acts swiftly and appropriately, conducting a thorough investigation that ultimately determines that no violations have, in fact, occurred. Company takes all other appropriate actions, including informing Employee of the outcome of the investigation. Unsatisfied, however, Employee repeatedly raises the same concern to his supervisor. Each time, Company takes similarly appropriate steps to investigate the claim and routinely establishes that it remains unfounded. Meanwhile, Employee continues to underperform and misses several additional deadlines. Typically, Company would terminate an employee after so many months of underperformance. However, amid Company's decision to terminate, Employee once again raises the same, unfounded claim of a SOX violation.

In this not uncommon situation, Company finds itself trapped in an untenable cycle. Despite legitimate, well-documented performance deficiencies, and no indicia of retaliatory intent, Company's counsel is

concerned that the temporal proximity between Employee's protected activity and his employment termination will expose it to liability. Moreover, each time that Employee makes his same, unmeritorious report, the temporal proximity clock restarts.

Without a separate intent requirement as an element of Employee's case, Company faces an unfair burden. Even though Company can put forward robust evidence of its legitimate reasons for termination, plaintiffs and some courts will rely on temporal proximity alone to defeat Company's motion for summary judgment, and worse yet, create a potential trial victory for Employee, leaving Company vulnerable to months of costly litigation and potential reputational harm.

This outcome is even more uncertain given that the range of what can be considered "temporal proximity" is imprecise and ill-defined. Where one jury might find that temporal proximity occurs within a few weeks, another could interpret temporal proximity to mean months or even a year or more between an employee's protected activity and the purported adverse action. See, *e.g.*, *Thomas* v. *Ariz. Pub. Serv. Co.*, 1989-ERA-19 (Sec'y Sept. 17, 1993) (finding temporal proximity where the protected activity and the discriminatory event were separated by one year); *Getman* v. *Sw. Sec., Inc.*, 2003–SOX–8 (Feb. 2, 2004) (sustaining action involving an eight-month gap between protected activity and adverse employment action); *Magnus* v. *St. Mark United Methodist Church*, 688 F.3d 331, 338 (7th Cir. 2012) (finding no temporal proximity where there was a one-day gap between

plaintiff's protected activity and termination); *Richmond* v. *ONEOK, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997) (finding that a three-month gap between protected activity and adverse employment action was insufficient to establish causation).

Another example further illustrates the unreasonable results that can occur when eliminating the requirement of intent. Imagine Company is struggling financially and makes the difficult determination to reduce its workforce. To be as equitable as possible, Company leadership implements a neutral, fair process for evaluating each employee's performance and determining who will be laid off as part of this restructuring. During this process, Employee's performance is evaluated, and it is determined that, as the lowest performer on her team, her position should be eliminated. Completely unbeknownst to those decisionmakers, however, several weeks prior Employee had raised a concern that a particular practice may be a violation of SOX. Similar to the previous scenario, the appropriate department within Company acted diligently, thoroughly investigating the claim and determining that there was no improper or illegal conduct. Upon learning of Employee's report, however, leadership becomes concerned by the temporal proximity between her actions and the scheduled termination.

Once again, when retaliatory intent is disregarded, Company is faced with an unfortunate dilemma. Does it continue with the restructuring, exposing itself to potentially extended, costly litigation that it can ill afford? Does it allow Employee to stay

on and, unfairly, terminate a higher-performing colleague in her place? Or, in an attempt to weaken any temporal connection, does it postpone the restructuring, risking the financial stability of the Company as well as the jobs of its other employees? Surely such situations were not what Congress intended when enacting protections against retaliatory practices.

Moreover, an even more absurd outcome is apparent if the district court's "tended to affect" instruction is applied to this scenario. Because Employee's misguided whistleblowing activity could be said to have impacted *in any way* the Company's decision to terminate, since her termination was delayed during Company's investigation of her mistaken allegation, this would be enough to fulfil the plaintiff's burden on this element.

Petitioner downplays this concern, arguing that in such a scenario an employer would have the ability to prove that it would have taken the same unfavorable personnel action in the absence of whistleblowing, only sooner. 49 U.S.C. 42121(b)(2)(B)(iv); Pet. Br. 19. Yet, this ignores crucial realities. An employer must show by *clear and convincing* evidence that it would have taken the same action in the absence of the protected activity. 49 U.S.C. 42121(b)(2)(B)(iv)). This high burden on employers is entirely unfair if an employee does not have to show retaliatory intent to prove a violation of the statute even occurred.

Indeed, this dilemma is exacerbated by the scale of the employer's business. The larger the employer, the more daunting the prospect of defending itself against a multitude of unmeritorious claims, each im-

pacting the employer's reputation and financial viability. Requiring retaliatory intent at the outset of a plaintiff's claim restores a more fair, balanced burden to the framework.

A final example is instructive of the unique implications that occur in the whistleblowing context when the intent to retaliate is disregarded. Employee is employed by a large, reputable firm in its tax department. Employee comes to believe that the firm is engaged in a practice that constitutes a securities violation. Employee reports his concern and Company diligently responds with a thorough investigation. The conclusion of the investigation reveals that there is no violation, and that Employee is mistaken about how the law functions. Despite this being communicated to Employee, he refuses to accept this outcome. He raises the same concern repeatedly. Each time the Company uses valuable resources to investigate and continuously determines the claim is unfounded. Unrelenting, Employee refuses to perform any of his duties until the Company changes the outcome of its investigation to his satisfaction. To do so would be improper, and so Company rightfully refuses. Employee's refusal to perform his duties compromises the firm's accounts and so it decides to terminate Employee.

In the scenario above, Employee's complaints are technically a contributing factor to his termination, even though Company harbored no retaliatory intent directed at Employee's whistleblowing activity. Indeed, this scenario demonstrates the significant policy concerns implicated by petitioner's interpretation, as

it could incentivize employees hoping to avoid legitimate discipline to make unjustified complaints, thereby diverting crucial investigative and remedial resources away from real issues that need addressing.

Congress correctly enacted the whistleblower protection provisions of SOX to protect employees who engaged in recognized protected activity. However, no evidence exists that Congress intended to shield employees who engage in protected activity from ordinary workplace performance requirements or discipline. *Kahn* v. *U.S. Sec'y of Lab.*, 64 F.3d 271, 279 (7th Cir. 1995) (noting that a plaintiff could not "hide behind his protected activity as a means to evade termination for non-discriminatory reasons," because "Congress did not intend 'to tie the hands of employers in the objective selection and control of personnel' in enacting various laws proscribing employment discrimination") (quoting *Hochstadt* v. *Worcester Found. for Experimental Biology*, 545 F.2d 222, 231 (1st Cir. 1976)). But when retaliatory intent is not considered, SOX becomes just that—a shield that forces even the most conscientious of employers into expensive, protracted litigation based on mere timing and happenstance. See *Deltek, Inc.*, 649 Fed. Appx. at 336-337 (Agee, J., dissenting).

Thus, as the above scenarios demonstrate, without the requirement for a plaintiff to prove intent, section 1514A expands far beyond what Congress intended, creating blanket immunity, not just for protected activity but for a myriad of other ordinary misconduct and performance deficiencies. Such an approach fosters perverse incentives and is inconsistent with the goals of Congress to create a balanced and

uniform means to address concerns of corporate retaliation.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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