JUDICIAL INTERPRETATIONS OF THE "CONTRIBUTING FACTOR" ELEMENT OF SARBANES-OXLEY RETALIATION CLAIMS

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INTRODUCTION

The Sarbanes-Oxley Act ("SOX") is, essentially, "a securities regulation smorgasbord," enacted in response to a number of very public instances of corporate fraud in the early 2000s.[2]

Congress intended for SOX to help reestablish trust in U.S. financial markets, after seeing it eroded by the bad behavior of some of the nation's largest companies.[3] One key provision of SOX, section 806 (codified as section 1514A), "protect[s] employees … [from] retaliatory action for providing information concerning conduct the employee reasonably believes violates . . . any … provision of federal law relating to fraud against shareholders."[4] The legislative history provides that Congress intended section 1514A to "play a crucial role in restoring trust in the financial markets by ensuring that … corporate fraud and greed [could] be better detected."[5]

The text of section 1514A, however, has caused problems for courts.[6] That said, courts traditionally have uniformly identified the elements of a section 1514A claim.[7] Recently, however, the Second Circuit, in *Murray v. UBS Securities, LLC*, split with the Fifth and Ninth Circuits regarding its interpretation of one of the elements—the "contributing factor" element.[8] The Second Circuit held that the element "requires a

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[2] HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, SARBANES-OXLEY ACT IN PERSPECTIVE ch. 1, pt. 2, § 1:10 (2021–2022 ed. 2021).

[3] U.S. Securities and Exchange Commission, *What Did the Sarbanes-Oxley Act do? | Office Hours with Gary Gensler*, YOUTUBE (Aug. 2, 2022), https://www.youtube.com/watch?v=eJChWPaOMJo [https://perma.cc/2MAE-KPBV].

[4] BLOOMENTHAL & WOLFF, *supra* note 2, at ch. 14, pt.1, § 14:1 (citing 18 U.S.C. § 1514A).

[5] S. REP. NO. 107-146, at 2, 18–19 (2002).

[6] *See generally* BLOOMENTHAL & WOLFF, *supra* note 2, at ch. 14, pt. 1, § 14:1 (discussing Senator discourse and multiple case holdings).

[7] *See, e.g.,* Murray v. UBC Securities L.L.C., 43 F.4th 254, 257-258 (2d Cir. 2022); Coppinger-Martin v. Solis, 627 F.3d 745, 750 (9th Cir. 2010); Halliburton, Inc. v. Admin. Rev. Bd., 771 F.3d 254, 259 (5th Cir. 2014).

[8] Murray v. UBC Securities L.L.C., 43 F.4th 254 (2d Cir. 2022); *see also* Bradley J. Bondi, Cyrus N. Bordbar & Jason M. Ecker, *United States: Second Circuit Requires Proof Of Retaliatory Intent In Sarbanes-Oxley Whistleblower Claim*, MONDAQ (Sept. 13, 2022), https://www.mondaq.com/unitedstates/whistleblowing/1229540/second-circuit-requires-proof-of-retaliatory-intent-in-sarbanes-oxley-whistleblower-claim [https://perma.cc/VS9D-AEMU] (discussing how the Second Circuit in *Murray* created a circuit split).

whistleblower-employee to prove retaliatory intent," a determination flatly rejected by its sister circuits.[9]

This Note explores the conflicting interpretations of the "contributing factor" element of section 1514A and argues that the correct interpretation does not require an employee to prove retaliatory intent. The remainder of this introduction provides (I) necessary background information on SOX and (II) a more detailed analysis of the SOX antiretaliation provision. In addition, the analysis that follows encompasses two parts. Part I examines judicial interpretations of the "contributing factor" element. Part II outlines why the correct reading of the statute does not require a showing of retaliatory intent.

NECESSARY BACKGROUND INFORMATION ON SOX

Context is vital in understanding both the scope and the purpose of SOX. It is only possible to talk about SOX by first discussing Enron. Enron, an energy trading firm, was one of the largest companies in the United States before its collapse in late 2001 and early 2002.[10] Prior to Enron's collapse, the company began experiencing economic difficulties.[11] The company's executives, however, sought to hide the reality of these hardships to avoid a decrease in the value of the company's stock.[12] To that end, "Enron executives used fraudulent accounting practices to inflate the company's revenues and hide debt in its subsidiaries."[13] Of course, this scheme was unsustainable, and in 2001 the company filed for bankruptcy.[14] The estimated total losses from the company's downfall were $74 billion.[15] The firm's lower-level employees experienced detrimental impacts from its collapse, as much of their retirement was invested in the company's stock.[16]

The damaging effect, however, extended far beyond the company and its employees to, ultimately, the entire U.S. financial system—a system built on trust.[17] The collapse of Enron diluted that trust.[18] Within the first three months of 2002, more than 30 "Enron-inspired bills" were introduced in Congress.[19] SOX was the result of the legislative process that followed the company's demise.[20] The goal was clear;

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[9] *See Murray*, 43 F.4th at 258, 261, n.7.
[10] CNN Editorial Research, *Enron Fast Facts*, CNN (Apr. 12, 2023, 2:52 PM), https://www.cnn.com/2013/07/02/us/enron-fast-facts/index.html [https://perma.cc/X3B9-R5Z5].
[11] Adam Hayes, *What Was Enron? What Happened and Who Was Responsible*, INVESTOPEDIA (Mar. 28, 2023), https://www.investopedia.com/terms/e/enron.asp#:~:text=Enron%20was%20an%20energy%20company,and%20bankruptcy%20in%20recen t%20history [https://perma.cc/U3CJ-76UM].
[12] *See id.*
[13] *Id.*
[14] *Enron Fast Facts*, *supra* note 10.
[15] *Id.*
[16] *Id.*
[17] U.S. Securities and Exchange Commission, *supra* note 3.
[18] *Id.*
[19] BLOOMENTHAL & WOLFF, *supra* note 2, at ch. 1, pt. 2, § 1:09.
[20] *See id.*

Congress wanted to restore the diluted trust in the U.S. financial system.[21] The legislation "created strict new rules for accountants, auditors, and corporate officers and imposed more stringent recordkeeping requirements."[22] Moreover, it sought to enhance the quality of inspection and to enforce federal laws governing publicly traded companies rigorously.[23]

A More Detailed Analysis of the SOX Antiretaliation Provision

A key enforcement mechanism in SOX is its codified protection for whistleblowers—18 U.S.C. § 1514A. The statute reads as follows:

> No [publicly traded company] may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee … because of any lawful act done by the employee . . . (1) to … assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of [federal law].[24]

Section 1514A allows employees alleging retaliation to seek relief with the Secretary of Labor or, under certain circumstances, in "the appropriate district court of the United States."[25]

The statute provides that the burdens of proof for a claim of retaliation are "governed by the legal burdens of proof set forth in section 42121(b) of title 49."[26] The referenced provision sets up a burden-shifting framework, which the Ninth Circuit neatly explains in *Coppinger-Martin v. Solis*.[27] To avoid dismissal by either the Secretary or District Judge, the whistle-blowing employee must make a prima facie showing of retaliation.[28] The Ninth Circuit explained:

> To make a prima facie showing …, an employee's complaint must allege that (1) the employee engaged in protected activity; (2) the employer knew, actually or constructively, of the protected activity; (3) the employee suffered an unfavorable personnel action; and (4) the circumstances raise an inference that the protected activity was a contributing factor in the personnel action.[29]

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[21] U.S. Securities and Exchange Commission, *supra* note 3.
[22] Will Kenton, *Sarbanes-Oxley Act: What it Does to Protect Investors*, Investopedia (May 8, 2022), https://www.investopedia.com/terms/s/sarbanesoxleyact.asp [https://perma.cc/9DEY-SWD8].
[23] U.S. Securities and Exchange Commission, *supra* note 3.
[24] 18 U.S.C. § 1514A(a)(1) (2010).
[25] § 1514A(b)(1).
[26] § 1514A(b)(2)(C).
[27] Coppinger-Martin v. Solis, 627 F.3d 745, 750 (9th Cir. 2010).
[28] 49 U.S.C. § 42121(b)(2)(B)(i).
[29] *Coppinger-Martin*, 627 F.3d at 750 (citing 29 C.F.R. § 1980.104(b)(1)).

Once an employee makes a prima facie showing of retaliation, "the burden shifts to the employer to rebut the employee's prima facie case by demonstrating by clear and convincing evidence that the employer would have taken the same personnel action in the absence of the protected activity."[30]

ANALYSIS

A. Judicial Interpretations of the "Contributing Factor" Element

As mentioned previously, in August of 2022, the Second Circuit issued *Murray v. UBS Securities, LLC*.[31] In Murray, the court determined that the "contributing factor" element of section 1514A required a showing of retaliatory intent.[32] In contrast, the Fifth and Ninth Circuits have held that "a whistleblower need not demonstrate the existence of a retaliatory motive on the part of the [employer]" to be successful in a section 1514A claim.[33] The Second Circuit's "narrow interpretation of section 1514A will make it more challenging for plaintiffs [in that jurisdiction] to prove causation."[34]

This section of this Note explores the details of these conflicting approaches. Part A examines the Fifth Circuit's decision in *Halliburton, Inc. v. Administrative Review Bd.*, providing insight into the school of thought against an intent requirement. Part B then examines *Murray*, focusing on the key facts that led the Second Circuit to stray from its sister circuits.

i. The Fifth and Ninth Circuits Approach Illustrated by Halliburton

The Fifth Circuit in *Halliburton* articulated the view that proof of a retaliatory or wrongful motive is unnecessary for a successful section 1514A claim.[35] The facts of the *Halliburton* case are straightforward. The plaintiff, a Haliburton employee, submitted an internal complaint regarding what he felt were "questionable" accounting procedures.[36] At the same time, the plaintiff filed a complaint concerning the same accounting practices with the Securities and Exchange Commission ("SEC"), which led to an SEC investigation.[37] "When Halliburton received the SEC's

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[30] *Id.* (citing 49 U.S.C. § 42121(b)(2)(B)(ii); 18 U.S.C. § 1514A(b)(2)(C)).
[31] 43 F.4th 254 (2d Cir. 2022).
[32] *Id.* at 256.
[33] Halliburton, Inc. v. Admin. Rev. Bd., 771 F.3d 254, 263 (5th Cir. 2014); *see also Coppinger-Martin*, 627 F.3d at 750 ("A prima facie case does not require that the employee conclusively demonstrate the employer's retaliatory motive.").
[34] Pinchos (Pinny) Goldberg & Alisha A. Bruce, *Second Circuit: SOX Whistleblower Claims Require Retaliatory Intent*, NAT'L L. REV. (Sept. 13, 2022), https://www.natlawreview.com/article/second-circuit-sox-whistleblower-claims-require-retaliatory-intent [https://perma.cc/U2MG-DPG2].
[35] *Halliburton*, 771 F.3d at 263.
[36] *Id.* at 255–56.
[37] *Id.* at 255–57.

notice of the investigation, the company inferred" that the plaintiff had, along with his internal complaint, filed a complaint with the SEC.[38]

The SEC instructed Halliburton "to retain certain documents during the pendency of the SEC's investigation."[39] Halliburton heeded the SEC's instructions by emailing several of its employees, including many of the plaintiff's colleagues, advising them of the SEC's retention recommendation.[40] The contents of said email are where this case truly begins. It suggested that document retention was necessary because "the SEC [had] opened an inquiry into the allegations of [the plaintiff]," naming the plaintiff.[41] After the email, the plaintiff was treated differently by his co-workers.[42] He felt isolated and "missed work frequently."[43] Eventually, seeing the situation as untenable, the plaintiff sought and received administrative leave.[44] After the SEC's investigation concluded, in which the SEC determined that "no enforcement action … was recommended," the plaintiff resigned from Halliburton.[45]

Before his resignation, the plaintiff filed a claim under the antiretaliation provision of SOX.[46] He alleged that "Halliburton retaliated against him . . . by disclosing his identity as the whistleblower."[47] The Administrative Law Judge and the Administrative Review Board went back and forth several times, disagreeing on whether the plaintiff had satisfied both the "adverse action" and the "contributing factor" elements.[48] Haliburton finally appealed for review by the Fifth Circuit after the Administrative Review Board held that the plaintiff had established liability.[49] The Fifth Circuit addressed both section 1514A elements.[50]

The Fifth Circuit began its analysis by outlining the elements, as it describes them, of a section 1514A claim.[51]

> To prevail on an antiretaliation claim …, the employee must prove . . . that (1) he engaged in protected whistleblowing activity, (2) the employer knew that he engaged in the protected activity, (3) he suffered an "adverse action," and (4) the protected activity was a "contributing factor" in the "adverse action."[52]

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[38] *Id*. at 255.
[39] *Id.*
[40] *Id.* at 255.
[41] *Id*.
[42] *Id.* at 257.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.* at 258.
[50] *Id*. at 259.
[51] *Id.*
[52] *Id.*

The court briefly acknowledged that the first two elements were not at issue or contested.[53] Moreover, the court agreed with the Administrative Review Board on the "adverse action" element, finding that Halliburton's action met the court's "materially adverse" standard.[54]

Of course, the most critical conversation engaged in by the court, for purposes of this Note, concerned the "contributing factor" element. The court plainly stated its rule, "[A] 'contributing factor' is 'any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.'"[55] The court rejected Halliburton's argument that "an employee must prove a 'wrongfully-motivated causal connection.'"[56]

Consequently, the court determined—relatively easily—that the plaintiff's protected activity, filing the complaints mentioned above, was a "contributing factor" in Halliburton's "adverse action," the decision to disclose the plaintiff's identity.[57] The court, somewhat sarcastically, remarked, "Given the facts of this case, it is difficult to see how a different outcome could have been possible."[58] In other words, the court considered it evident that the plaintiff's protected activity affected Halliburton's decision to disclose the plaintiff's identity, and that was all the plaintiff needed to satisfy the "contributing factor" element.[59]

ii. The Second Circuits Approach Illustrated by Murray.

On the other hand, the Second Circuit in *Murray* determined that proof of a retaliatory or wrongful motive is, in fact, requisite to a successful section 1514A claim.[60] The plaintiff worked for UBS "as a strategist in its commercial mortgage-backed securities ('CMBS') business."[61] In this role, he was "responsible for performing research and creating reports [to be distributed] to [UBS's] current and potential clients . . . ."[62] Given the nature of these reports, the SEC required that the plaintiff "certify [that the reports] were produced independently and that they accurately reflected his own views."[63] To that end, the plaintiff alleged that several UBS employees encouraged and, in some cases, instructed him to violate the SEC's certification requirement.[64]

In response to this perceived pressure to disregard the SEC, the plaintiff contacted his supervisor to report the conduct of his co-workers.[65] His supervisor expressed

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[53] *Id.*
[54] *Id.* at 262.
[55] *Id.* at 263 (quoting *Allen v. Admin Rev. Bd.*, 514 F.3d 468, 476, n. 3 (5th Cir. 2008)).
[56] *Id.*
[57] *Id.* at 262–63.
[58] *Id*. at 263.
[59] *Id*.
[60] Murray v. UBC Securities L.L.C., 43 F.4th 254, 258 (2d Cir. 2022).
[61] *Id*. at 256.
[62] *Id.*
[63] *Id.*
[64] *Id.* at 256–57.
[65] *Id.* at 256.

sympathy and acknowledged that the plaintiff was in "a tough position," but took, essentially, no further action.[66] Later, in another meeting with his supervisor, the plaintiff made a point to discuss the situation further.[67] This time, however, the plaintiff's concerns were not met with sympathy.[68] Instead, his supervisor indicated that he would not intervene and that the plaintiff needed to continue his work accordingly—in other words, how "the business line [his co-workers] wanted" him to operate.[69] Not long after this second conversation, the plaintiff's supervisor suggested that either the plaintiff be terminated or assigned to a different position, one "unregulated by the SEC."[70] Ultimately, UBS terminated the plaintiff's employment.[71]

Subsequently, the plaintiff filed suit alleging that "his termination was retaliation for whistleblowing."[72] UBS rebutted the plaintiff's claim by offering evidence that, at the time of the plaintiff's termination, the company was making strategic layoffs due to financial difficulties, which happened to include the plaintiff's position.[73] The jury sided with the plaintiff, finding UBS liable for retaliation.[74] The appeal to the Second Circuit focused almost entirely on the jury instructions.[75] Specifically, the instruction's explanation of the "contributing factor" element, which "did not [describe] retaliatory intent as [necessary to] a section 1514A claim."[76] UBS argued that the trial court erred by not instructing the jury that a plaintiff must show proof of retaliatory intent.[77]

The Second Circuit agreed with UBS, holding that a showing of retaliatory intent is required to satisfy the "contributing factor" element.[78] The court based its holding "on the plain meaning of the statutory language and [its] interpretation of a nearly identical statute . . . ."[79] The court focused its attention primarily on the word "discriminate" and the phrase "because of" in the statutory text.[80] In doing so, it determined that the statute

> [P]rohibits discriminatory actions caused by—or "because of"—whistleblowing, and [that] actions are "discriminat[ory]" [only]

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[66] *Id.* at 257.
[67] *Id.*
[68] *Id.*
[69] *Id*.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.* at 258.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.* at 258–60.
[79] *Id.* at 258.
[80] *Id* at 259.

> when they are based on the employer's conscious disfavor of an employee for whistleblowing.[81]

Thus, the definition of "discriminatory" ultimately led the court to determine that the statute's plain text indicated "that retaliatory intent is required to sustain a SOX antiretaliation claim."[82]

The Second Circuit, albeit in a footnote, acknowledged that its holding was inconsistent with the view of both the Fifth and Ninth Circuits.[83] Seemingly to address this divide, the court looked to its interpretation of another statute, the Federal Railroad Safety Act ("FRSA"), to bolster its argument and provide evidence of its alignment with other circuits.[84] According to the court, the statute contains a "nearly identical" antiretaliation provision.[85] The relevant statutory text reads as follows:

> A covered railroad carrier "may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due … to the employee's lawful … act done … to provide information … regarding any conduct which the employee reasonably believes constitutes a violation of any [federal law]."[86]

The court noted that in an earlier case, *Tompkins v. Metro N. Commuter R.R. Co.*, 983 F.3d 74 (2d Cir. 2020), the court determined, "point[ing] to the [statutory] language specifically referencing discrimination," that some proof of retaliatory intent is necessary to a successful claim under the FRSA.[87] The court noted that both the Seventh and Eighth Circuits agree with its interpretation of the FRSA.[88] Thus, the statute's plain text and the court's interpretation of the FRSA compelled the Second Circuit to break from the Fifth and Ninth Circuits in interpreting section 1514A.[89]

B. The Correct Reading of the Statute Does Not Require a Showing of Retaliatory Intent

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[81] *Id.*
[82] *Id.*
[83] *Id.* at 261, n.7.
[84] *Id.* at 260, 261, n.7.
[85] *Id.* at 260.
[86] *Id.* at 260 (quoting 29 U.S.C. § 20109(a)).
[87] *Id.* at 261.
[88] *Id.* at 261, n.7.
[89] *Id.* at 262–63.

"Judges [take] a variety of approaches to resolving the meaning of a statute."[90] Judges often look to "the ordinary meaning of the statutory text," the statute's purpose (i.e., "the broader statutory context"), "the legislative history," as well as various canons of construction.[91] This Note will analyze section 1514A utilizing each approach, taken one by one. Part A analyses the ordinary meaning of the statute. Part B examines the broader statutory context. Part C discusses the statute's purpose and legislative history. Part D, then, looks to other employer retaliation provisions for guidance.

i. Analyzing Section 1514A's Ordinary Meaning

Given the ambiguity of the statute, the ordinary meaning of section 1514A does little to resolve the circuit split. In examining the ordinary meaning, it is worth dissecting the Second Circuit's proposition that "the plain meaning of the statutory language makes clear that retaliatory intent is an element of a section 1514A claim."[92] If such a proposition were true, the inquiry into whether the statute requires a showing of intent would end because, as the court states, "[i]f . . . statutory language is unambiguous . . . the inquiry [into its meaning] ceases."[93]

The Second Circuit relied on dictionaries to determine that the statute's use of the word "discriminate" necessitated a showing of retaliatory intent.[94] The court also discussed the definition of the phrase "because of."[95] This phrase and its meaning will be discussed further in section D of this Note. To support its claim, the court cited the definition of "discriminate" in Webster's II New Riverside University Dictionary,[96] which defined the term as "[t]o act on the basis of prejudice."[97] In a parenthetical, the court also cited The New Oxford American Dictionary, which similarly provided that to discriminate is to "make an unjust or prejudicial distinction in the treatment of different categories of people."[98] The Second Circuit's interpretation seemingly turned on the inclusion of the word prejudice in both definitions. The court opined that prejudice "requires a conscious decision to act based on a protected characteristic or action."[99]

Such an interpretation is feasible. Beyond the court's reasoning, it finds support in an excerpt from Black's Law Dictionary ("Black's"), which notes that "the current political use of the term[, discrimination] is . . . non-neutral, [and] pejorative."[100] Thus, it would not be inherently inaccurate to describe the "ordinary meaning" of the

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[90] VALERIE BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 2 (2018).
[91] *Id.* at 2–3.
[92] *Murray*, 43 F.4th at 258–259.
[93] *Id.* at 259.
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Discrimination*, BLACK'S LAW DICTIONARY (11th ed. 2019).

word as requiring a sort of active disfavor. Nevertheless, the Second Circuit's reading of the statute fails to dispense with all ambiguity.

An ambiguity exists when a statute is "capable of being understood in two or more possible senses or ways."[101] To that end, reaching a different conclusion is possible by looking only at different definitions. Black's defines "discrimination" as "a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored."[102] Furthermore, Black's provides an excerpt bolstering its definition, which states that "The dictionary sense of 'discrimination' is neutral . . . ."[103] Thus, the text of section 1514A can also be interpreted to prohibit discriminatory actions—actions that result in the "failure to treat all persons equally"—because of whistleblowing.[104] Under this interpretation, the analysis of whether unequal treatment has occurred is neutral and need not consider disparagement or whether it was belittling.[105] Therefore, because the statutory language of section 1514A is ambiguous, further inquiry into its meaning is necessary.

ii. Examining the Broader Statutory Context

To that end, the specificity by which Congress identified the applicable burdens of proof under a section 1514A claim and an analysis of said burdens strongly support the Fifth and Ninth Circuits' view that a showing of retaliatory intent is not required. When an interpretation of a statute turns on "the meaning of only a few words," courts often look to "the full statutory context" for guidance.[106]

Congress was specific in its formulation of how to appropriately enforce section 1514A. Regardless of where the complaint receives review, Congress intended the "burdens of proof which . . . govern[] in the Department of Labor . . . to govern the action."[107] To that end, the Department of Labor regulations provide precise guidelines. According to the regulations:

> A [section 1514A] complaint will be dismissed unless the complainant has made a prima facie showing that a protected activity was a contributing factor in the adverse action alleged in the complaint . . . . [A complaint makes this prima facie showing if it] alleges the existence of facts and either direct or circumstantial evidence . . . [that] give rise to an inference that the respondent knew or suspected that the employee engaged in

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[101] *Ambiguous*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/ambiguous [https://perma.cc/98MB-6CZ9] (last visited Mar. 14, 2023).
[102] *Discrimination, supra* note 100.
[103] *Id.*
[104] *Id.*; *See supra* text accompanying notes 80–82.
[105] *Discrimination, supra* note 100; *Pejorative*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/pejorative [https://perma.cc/4AHJ-V7GE] (last visited Mar. 14, 2023).
[106] BRANNON, *supra* note 90, at 25.
[107] S. REP. NO. 107-146, at 19–20 (2002).

> protected activity and that the protected activity was a contributing factor in the adverse action. [Allegations of facts and circumstantial evidence, such as] . . . if the complaint shows that the adverse personnel action took place within a temporal proximity after the protected activity, or at the first opportunity available . . ., giv[es] rise to the inference that it was a contributing factor in the adverse action.[108]

The Ninth Circuit's analysis of the "contributing factor" element mirrors the Department of Labor's regulations. The court in *Coppinger-Martin* took a totality of the circumstances approach, looking to the temporal relationship between the "adverse employment action" and the "protected activity," as well as "dramatic change[s]" in the plaintiff's employment evaluations after the plaintiff engaged in "protected activity."[109] Not only does such an approach match the Department of Labor's articulation of the proof necessary to make a prima facie showing, but it also aligns with the Fifth Circuits' articulation that "any factor, which . . . tends to affect in any way" the employer's "adverse action" is a "contributing factor."[110] Thus, an analysis of the burdens, specifically identified by Congress as part of the statutory scheme, relevant to a section 1514A claim strongly supports the view that a showing of retaliatory intent is not required.

iii. The Purpose & Legislative History of Section 1514A

Moreover, the purpose of section 1514A as a mechanism to improve corporate accountability strongly supports the Fifth and Ninth Circuits' interpretation of the statute. The legislative history of section 1514A provides critical insight into its purpose. Senator Leahy, a sponsor of the amendment that, in part, became the whistleblower provision, stated in response to Enron, Congress must "make sure that there are adequate doses of accountability in our legal system to prevent such occurrences in the future, and to offer a constructive remedy . . . should they occur."[111] In that same report, he cleverly remarked that the provision was one of many intended to "ensure that . . . greed does not succeed."[112] In other words, Congress intended section 1514A to act as an important mechanism for accountability and transparency to combat fraud and rebuild trust in the United States economy.

That purported purpose finds additional support in excerpts from the Senate Floor regarding the need for an amendment that included section 1514A. The House passed a version of SOX before the Senate, which failed to include protections for

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[108] 29 C.F.R. § 1980.104(e)(1), (3) (2022).
[109] Coppinger-Martin v. Solis, 627 F.3d 745, 751 (9th Cir. 2010).
[110] Halliburton, Inc. v. Admin. Rev. Bd., 771 F.3d 254, 263 (5th Cir. 2014).
[111] S. REP. NO. 107-146, at 11 (2002).
[112] *Id.* at 2.

whistleblowers.[113] Senator Boxer, echoing the sentiment of many of her Senate colleagues, considered the House bill "weak and . . . [not capable of] get[ting] the job done."[114] Senator Kohl further articulated this view.[115] He noted, "It is not enough to challenge corporate America to do better [and] [w]e must make clear that there is a cost to engaging in accounting and securities fraud."[116] Boxer felt that including section 1514A provided "the necessary teeth to clamp down on corporate irresponsibility."[117]

The Second Circuit's interpretation of section 1514A rids the provision of its "teeth." It is a simple truth that "an employee rarely is able to produce direct evidence of the retaliatory motive behind an employer's adverse actions."[118] Employees often cannot access the information and documentation necessary to show such an intent. Moreover, most employers, aided by their lawyers, are much too sophisticated to allow for the existence of a "smoking gun." It is hard to imagine how section 1514A could lead to greater accountability and transparency if it enables employers to retaliate against whistleblowing employees as long as they never say as much.

These statements are not mere conjecture. Congress considered the relative sophistication of the parties to a retaliation claim in passing section 1514A.[119] In addressing the patchwork of state laws protecting corporate employees that reported fraud before SOX, the Senate, in a Judiciary Committee Report, recognized that the "vagaries" in state law allowed "most . . . employers, with help from their lawyers, [to] know exactly what they [could] do to a whistleblowing employee" without violating the law.[120] Requiring a whistleblowing employee to show proof of a retaliatory motive will allow for the resurgence of Congress's problem with existing state laws. Employers will escape liability simply by carefully drafting their communications with a whistleblowing employee to eliminate evidence of a wrongful motive. In short, the Second Circuit's interpretation will allow for instances where greed will succeed.

On the other hand, the Fifth and Ninth Circuits' approach to section 1514A gives the provision "teeth." Again, Congress considered whistleblowers a crucial part of ensuring accountability for corporate fraud and greed; Senator Cleveland said, "[i]t is the duty of officers and directors … to blow the whistle when they know there is wrongdoing."[121] Accountability, otherwise, is less likely to occur. Senator Leahy clearly expressed this sentiment, stating, "[Congress] can put whatever criminal law [it] wants on the books but unless there are witnesses who are not scared to help

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[113] *See* 148 CONG. REC. S6759 (daily ed. Jul. 15, 2002) (statement of Sen. Barbara Boxer).
[114] *Id.*
[115] *Id.* at S6758 (statement of Sen. Herbert H. Kohl).
[116] *Id.*
[117] *Id*. at S6759 (statement of Sen. Barbara Boxer).
[118] Melanie M. Poturica & Liebert Cassidy Whitmore, *Retaliation: So Many Laws, So Little Time (Speaking of Time, Is Temporal Proximity All a Plaintiff Needs?)*, CASETEXT (Jun. 30, 2011), https://casetext.com/analysis/retaliation-so-many-laws-so-little-time-speaking-of-time-is-temporal-proximity-all-a-plaintiff-needs [https://perma.cc/5Z9G-Z7YJ].
[119] *See* S. REP. NO. 107-146, at 17 (2002).
[120] *Id.* at 19.
[121] 148 CONG. REC. S6754 (daily ed. July 15, 2002) (statement of Sen. Max Cleland).

prosecutors prove what happened no one will be held accountable."[122] Employees can only feel safe blowing the whistle if it is clear they will have protection from retaliation. Thus, for SOX to properly "clamp down on corporate irresponsibility,"[123] Section 1514A must stand for the proposition that "[r]egardless of the official's motives, personnel actions against employees should quite simply not be based on . . . whistleblowing."[124] Thus, the purpose of the provision, to serve as a mechanism to aid in accountability, strongly supports the Fifth and Ninth Circuits' interpretation of the statute.

iv. Looking to Other Employer Retaliation Provisions for Guidance

Finally, it is important to consider other employer retaliation provisions in interpreting section 1514A. Courts interpret similar statutes similarly unless the text, "legislative history[,] or purpose suggests material differences."[125] Here, the Supreme Court's interpretation of Title VII supports a determination that section 1514A does not require a showing of retaliatory intent.

The Supreme Court's interpretation of Title VII strongly supports the Fifth and Ninth Circuits' approach. In *University of Texas Southwestern Medical Center v. Nassar*, the Court determined that "Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the . . . employment action."[126] A showing of but-for causation is, practically speaking, the same as a showing of proof of retaliatory motive. The Court determined that the inclusion of the word "because" in Title VII's retaliation provision "require[d] proof that the desire to retaliate was the but-for cause . . . ."[127] The Second Circuit made a similar argument in *Murray*.[128] Thus, at first blush, the Supreme Court's understanding of Title VII seemingly supports the Second Circuit's view of section 1514A. After considering the Supreme Court's opinion further, however, it is clear that Nassar actually endorses the Fifth and Ninth Circuit's approach.

The *Nassar* Court distinguished Title VII "status-based discrimination claims" from Title VII "unlawful employer retaliation" claims.[129] 42 U.S.C. § 2000e-2 is the relevant statute for status-based claims.[130] On the other hand, 42 U.S.C. § 2000e-3 governs unlawful employer retaliation.[131] Notably, notwithstanding both statutes' inclusion of the word "because," the Court determined that "[a]n employee who alleges status-based discrimination under Title VII need not show" but-for causation.[132] The Court ignored its textualist interpretation of "because" due to

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[122] *Id.* at S6768 (statement of Sen. Patrick Leahy).
[123] *Id.* at S6759 (statement of Sen. Barbara Boxer).
[124] Halliburton, Inc. v. Admin. Rev. Bd., 771 F.3d 254, 263 (5th Cir. 2014).
[125] BRANNON, *supra* note 90, at 58 n.588.
[126] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 352 (2013).
[127] *Id.* at 352.
[128] *See* Murray v. UBS Sec., LLC, 43 F.4th 254, 259 (2nd Cir. 2022).
[129] *Nassar*, 570 U.S. at 343, 351–52.
[130] 42 U.S.C. § 2000e-2 (1991).
[131] 42 U.S.C. § 2000e-3 (1972).
[132] *Nassar*, 570 U.S. at 343.

Congress's codification of a "burden-shifting and lessened causation framework" in section 2000e-2.[133]

The *Nassar* Court created a very workable standard—including the word "because" in discrimination and retaliation provisions requires a showing of retaliatory intent or "but-for" causation unless Congress specified otherwise.[134] In section 1514A, Congress did just that.[135] As discussed in detail above, section 1514A(b)(2)(C) provides that claims under section 1514A will operate under a burden-shifting framework.[136] Moreover, the provision, albeit not as directly as section 2000e-2, calls for lessened causation. Section 1514A(b)(1) requires employees to first file complaints under the provision with the Secretary of Labor, and only "if the Secretary has not issued a final decision within 180 days of the filing of the complaint" may the employee bring an action in federal district court.[137] Regardless, however, of where the section 1514A claim ultimately receives review, Congress intended the burdens of proof established by the Department of Labor to govern.[138] The Department of Labor's requirement for "causation" is merely a showing that "[t]he circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action."[139] This burden can be satisfied by showing evidence as slight as temporal proximity between the protected activity and the adverse personnel action.[140] Therefore, it does not require employees to show "proof that the desire to retaliate was the but-for cause of the challenged employment action."[141] Thus, because Congress specified otherwise, the inclusion of the word "because" in section 1514A does not require a showing of retaliatory intent.

CONCLUSION

SOX, especially section 1514A, embodies Congress's attempt to "clamp down"[142] on securities fraud and corporate greed. The whistle-blower provision provides an effective and consistent mechanism for achieving that purpose and providing accountability. To that end, the "contributing factor" element must be interpreted not to require a showing of retaliatory intent. To interpret the statute otherwise rids the provision of its "teeth"[143] and disregards Congress's explicit designation of the burdens of proof applicable to a section 1514A claim.

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[133] *Id.* at 348–50.
[134] *Id.* at 347–52.
[135] 18 U.S.C § 1514A(b)(2)(C); *see* S. REP. NO. 107-146, at 13 (2002).
[136] *See* § 1514A(b)(2)(C).
[137] *See* § 1514A(b)(1).
[138] S. REP. NO. 107-146, at 19–20 (2002).
[139] 29 C.F.R. § 1980.104(e)(2)(iv) (2022).
[140] *See* 29 C.F.R. § 1980.104(e)(3).
[141] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 352 (2013).
[142] 148 CONG. REC. S6759 (daily ed. July 15, 2002) (statement of Sen. Barbara Boxer).
[143] *Id.*